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No. ICC-01/05-01/13 A A2 A3 A4 A5
Date: 8 March 2018

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

Judgment
on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Mr Aimé Kilolo Musamba
Mr Michael G. Karnavas

Counsel for Mr Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Mr Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Narcisse Arido
Mr Charles Achaleke Taku
Ms Beth Lyons

Registrar
Mr Herman von Hebel

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The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" of 19 October 2016 (ICC-01/05-01/13-1989-Red),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1) The convictions entered by Trial Chamber VII in respect of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo for the offence under article 70 (1) (b) of the Statute are reversed and the accused are acquitted of this charge.

2) The remaining convictions entered by Trial Chamber VII in respect of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, as well as the convictions entered by Trial Chamber VII in respect of Mr Fidèle Babala Wandu and Mr Narcisse Arido are confirmed.

3) All remaining procedural requests are rejected.

REASONS

I. KEY FINDINGS

1. Immunities from legal proceedings of defence counsel practicing before the Court apply exclusively with respect to the exercise of jurisdiction by national courts. They do not constitute a bar to the operation of the Court's own process.

2. Article 69 (8) of the Statute does not *per se* preclude that, in certain circumstances, the Court may take into account, for its determination on the

admissibility of evidence on the grounds of article 69 (7) of the Statute, issues of compliance with national law in the collection of evidence as a factual matter potentially relevant to the understanding of the relevant factual background. However, there exists no legal basis under the Statute allowing a chamber to review the application of national law, including with a view to determining whether a "manifest" violation of national law occurred, as part of an assessment of whether evidence is inadmissible under article 69 (7) of the Statute.

3. A State's collection and transmission of evidence to the Court is presumed to constitute sufficient indication that the domestic authorities complied with the applicable procedures under their national law in the collection of such evidence. In any case, a violation of national law in the collection of evidence does not constitute *per se* a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute. Likewise, compliance with national law is not *per se* a guarantee that the concerned evidence was not obtained by means of any such violation.

4. Breaches of Part 9 of the Statute do not constitute *per se* violations of the Statute for the purpose of exclusion of evidence under article 69 (7) of the Statute.

5. States may go beyond the explicit duties and conditions contained in Part 9 of the Statute and offer additional cooperation, unilaterally in their implementing laws or through agreements and informal *ad hoc* arrangements with the Court. The Court may request, and the requested State may provide, forms or modalities of cooperation in addition to those foreseen in Part 9 of the Statute, provided that they are not contrary to the Statute, including internationally recognised human rights, in accordance with article 21 (3) of the Statute.

6. In the exercise of its functions under article 57 (3) (a) of the Statute, a pre-trial chamber has the power to authorise the transmission to the Prosecutor of recordings of telephone communications from the detention centre kept by the Registry, as may be required for the purposes of her investigation.

7. In accordance with rule 73 (1) of the Rules, communications between lawyer and client that do not take place in the context of such professional relationship are not covered by privilege as defined before this Court. This includes communications

that, rather than being made within the context of defence activities, are instead made in the context of the implementation of criminal activity. Such communications, even if they occur between a person and his or her legal counsel, are *ab initio* non-privileged as they fall outside the recognised professional scope of legal work protected by rule 73 (1) of the Rules.

8. Upon the submission of an item of evidence by a party, a trial chamber has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused. Under the latter approach, no separate ruling on the admissibility of all evidence is required.

9. Evidence is properly before a trial chamber for the purpose of its decision on the guilt or innocence of the accused when it has been "submitted" in accordance with the procedure set out by the trial chamber and "discussed" at trial, unless it is ruled as irrelevant or inadmissible. Any item of submitted evidence that is not excluded at trial must therefore be presumed to be considered by a trial chamber not to be inadmissible under any applicable exclusionary rule. For this reason, both the procedure for the submission of evidence at trial and the status of each piece of evidence as "submitted" within the meaning of article 74 (2) of the Statute must be clear.

10. The legal framework of the Court does not contain any provision stipulating that requests for assistance must be disclosed to the accused person. Rather, such material *may* fall within the Prosecutor's residual obligation under rule 77 of the Rules to disclose any document and other objects in her possession or control "which are material to the preparation of the defence". Whether this is the case necessarily depends on the content, context and purpose of any individual request for assistance in the specific circumstances of each case, and no general and abstract definition can be given as to the type of requests for assistance which may fall within rule 77 of the Rules.

11. In accordance with the principles of treaty interpretation set out in article 31 of the Vienna Convention on the Law of Treaties the provisions of the Statute are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty. However, this method of interpretation needs to be applied taking into account the nature of the Statute, in particular, with respect to its incriminating provisions. Its interpretation must be guided by the principle of legality. Notably, any interpretation of such provisions shall comply with the principle of strict construction under article 22 (2) of the Statute.

12. Offences pursuant to article 70 (1) of the Statute do not require the showing of any special intent to undermine the administration of justice.

13. A witness gives false testimony in terms of article 70 (1) (a) of the Statute when he or she intentionally provides incomplete responses to the questions by omitting facts that he or she is specifically asked about or by omitting facts that are necessarily encompassed within, or inseparably linked to, the information sought during the testimony.

14. Calling a witness in the hope or anticipation that the witness will testify falsely before a trial chamber does not amount to the offence of "presenting evidence that the party knows is false or forged" under article 70 (1) (b) of the Statute.

15. For the purpose of criminal responsibility for co-perpetration under article 25 (3) (a) of the Statute, acts that do not, as such, form the *actus reus* of the crime or offence in question may nevertheless be taken into account when determining whether the accused has made an essential contribution. The essential contribution may take many forms and need not be "criminal" in nature.

16. Depending on the circumstances, co-perpetration may cover situations in which, at the time the common plan is conceived, the exact contours of all the crimes or offences that will be committed as part of the plan's implementation are not yet known; in addition, actions of an accused person not made at the execution stage may nevertheless be a basis for finding that he or she made an essential contribution. Requiring that each co-perpetrator make an intentional contribution to each of the specific crimes or offences that were committed on the basis of the common plan would be clearly incompatible with the above.

17. Under article 25 (3) (b) of the Statute what matters is that there is a causal relationship between the act of instigation and the commission of the crime, in the sense that the accused person's actions prompted the principal perpetrator to commit the crime or offence. Such an act of instigation does not need to be performed directly on the principal perpetrator, but may be committed through intermediaries.

18. The *actus reus* under article 25 (3) (c) of the Statute is certainly fulfilled when the person's assistance in the commission of the crime facilitates or furthers the commission of the crime, as the showing of such an effect indicates that the person indeed assisted in its commission. Whether a certain conduct amounts to "assistance in the commission of the crime" within the meaning of article 25 (3) (c) of the Statute even without the showing of such an effect can only be determined in light of the facts of each case.

19. Nothing in article 25 (3) (c) of the Statute requires that an accessory aid, abet or otherwise assist a specific person, whether considered a "principal perpetrator", "intermediary perpetrator", or otherwise; rather, individual criminal liability under article 25 (3) (c) of the Statute is established in reference to the assistance provided in the commission or attempted commission of a *crime*.

20. Assistance offered after the commission of the crime or offence may give rise to liability under article 25 (3) (c) of the Statute. Indeed, if there was a prior offer of assistance or an agreement between the principal perpetrator and the accessory that the latter would lend assistance after the commission of the crime or offence, that conduct can be said to have amounted to assistance in the commission of the crime because the principal perpetrator committed it, knowing that he or she would receive assistance in the aftermath. At least in such circumstances, the Appeals Chamber does not see any incompatibility between assistance that is provided after the commission of the crime or offence and the requirement under article 25 (3) (c) of the Statute that the accessory act "[f]or the purpose of facilitating the commission of such a crime".

21. Article 25 (3) (c) of the Statute requires that the aider and abettor act "[f]or the purpose of facilitating the commission of […] a crime". However, this does not mean that the aider and abettor must know all the details of the crime in which he or she assists. A person may be said to be acting for the purpose of facilitating the

commission of a crime, even if he or she does not know all the factual circumstances in which it is committed.

II. INTRODUCTION

22. On 19 October 2016, Trial Chamber VII ("Trial Chamber") convicted Mr Jean-Pierre Bemba Gombo ("Mr Bemba"), Mr Aimé Kilolo Musamba ("Mr Kilolo"), Mr Jean-Jacques Mangenda Kabongo ("Mr Mangenda"), Mr Fidèle Babala Wandu ("Mr Babala") and Mr Narcisse Arido ("Mr Arido") for offences against the administration of justice pursuant to article 70 of the Statute committed in connection with the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*[1] ("Main Case").[2] It acquitted Mr Mangenda, Mr Babala and Mr Arido on some counts.[3]

23. All five accused filed appeals against their convictions, followed by appeal briefs, to which the Prosecutor filed a consolidated response. The comprehensive procedural history of the proceedings is set out in Annex A to this judgment. Annex B contains a list of the materials cited and designations used in this judgment.[4]

A. Background

1. The appellants

24. Mr Bemba was born on 4 November 1962 in the Democratic Republic of the Congo.[5] He is the President of the *Mouvement de Libération du Congo* ("MLC").[6] He was arrested on the basis of a warrant of arrest issued by Pre-Trial Chamber III in the Main Case and surrendered to the Court on 3 June 2008.[7] The trial in the Main Case, in the context of which Mr Bemba was charged with crimes against humanity and war crimes, was held before Trial Chamber III and commenced on 22 November 2010. Mr Bemba was convicted in the Main Case on 21 March 2016[8] and subsequently

[1] ICC-01/05-01/08.
[2] Conviction Decision, pp. 455-457.
[3] Conviction Decision, pp. 456-457.
[4] *See* Annex A - Procedural History; and Annex B - Cited Materials and Defined Terms.
[5] Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT).
[6] *See* Conviction Decision, para. 8; *Bemba* Conviction Decision, para. 1.
[7] *See Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of 4 July 2008, ICC-01/05-01/08-T-3-ENG (ET WT).
[8] *Bemba* Conviction Decision.

sentenced to 18 years of imprisonment.[9] At the time relevant to the charges in the present case, he was in detention at the Court detention centre pending trial in the Main Case.

25. Mr Kilolo was born on 1 January 1972 in Kinshasa, Democratic Republic of the Congo and is a lawyer by profession.[10] He was Mr Bemba's lead counsel in the Main Case at the time relevant to the charges in the present case.

26. Mr Mangenda was born on 1 October 1979 in Kinshasa, Democratic Republic of the Congo.[11] At the time relevant to the charges in the present case, he was the case manager in Mr Bemba's defence team in the Main Case.

27. Mr Babala was born in 1956 in Kinshasa, Democratic Republic of the Congo, where he is a parliamentarian of the National Assembly.[12] He is a close political associate of Mr Bemba.[13]

28. Mr Arido was born on 15 May 1978 in Bangui, Central African Republic.[14] He was listed as a defence witness in the Main Case but did not testify.[15]

2. Convictions and acquittals entered by the Trial Chamber

(a) Mr Bemba

29. The Trial Chamber convicted Mr Bemba for the offences of having corruptly influenced witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, and having presented their false evidence as co-perpetrator pursuant to article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute.[16] The Trial Chamber also convicted him of having solicited the giving of false evidence by these 14 witnesses under article 70 (1) (a), in conjunction with article 25 (3) (b) of the Statute.[17]

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[9] *Bemba* Sentencing Decision.
[10] Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 5, lines 1-3.
[11] Transcript of 5 December 2013, ICC-01/05-01/13-T-3-Red2-ENG (WT), pp. 17-19.
[12] Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG CT WT, p. 5, lines 9-11.
[13] *See* Conviction Decision, para. 12.
[14] Transcript of 20 March 2014, ICC-01/05-01/13-T-4-Red2-ENG CT WT, p. 4, lines 11-12.
[15] *See* Conviction Decision, para. 12.
[16] Conviction Decision, p. 455.
[17] Conviction Decision, p. 455.

(b) Mr Kilolo

30. The Trial Chamber convicted Mr Kilolo as co-perpetrator for the offences of having corruptly influenced witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, and having presented their false evidence, pursuant to article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute.[18] The Trial Chamber also convicted him of having induced the giving of false testimony by these 14 witnesses under article 70 (1) (a), in conjunction with article 25 (3) (b) of the Statute.[19]

(c) Mr Mangenda

31. The Trial Chamber convicted Mr Mangenda as co-perpetrator for the offences of having corruptly influenced witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64 and having presented their false evidence, pursuant to article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute.[20] The Trial Chamber also convicted him of having aided in the giving of false testimony by witnesses D-15 and D-54, and having abetted in the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29 under article 70 (1) (a), in conjunction with article 25 (3) (c) of the Statute.[21]

32. The Trial Chamber acquitted Mr Mangenda of the charges of having aided, abetted or otherwise assisted in the giving of false testimony by witnesses D-23, D-26, D-55, D-57 or D-64 under article 70 (1) (a), in conjunction with article 25 (3) (c) of the Statute.[22]

(d) Mr Babala

33. The Trial Chamber convicted Mr Babala for the offence of having aided in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of corruptly influencing witnesses D-57 and D-64 pursuant to article 70 (1) (c), in conjunction with article 25 (3) (c) of the Statute.[23]

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[18] Conviction Decision, p. 455.
[19] Conviction Decision, p. 455.
[20] Conviction Decision, pp. 455-456.
[21] Conviction Decision, p. 456.
[22] Conviction Decision, p. 456.
[23] Conviction Decision, p. 456.

34. The Trial Chamber acquitted Mr Babala of the charges of having aided, abetted or otherwise assisted in the commission of the offences of giving false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64; and in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of presenting false evidence by these 14 witnesses pursuant to article 70 (1) (a) and (b) in conjunction with article 25 (3) (c) of the Statute.[24] The Trial Chamber also acquitted Mr Babala of the charge of having aided, abetted or otherwise assisted in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda, of the offences of corruptly influencing witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54 and D-55 under article 70 (1) (c), in conjunction with article 25 (3) (c) of the Statute.[25]

(e) Mr Arido

35. The Trial Chamber convicted Mr Arido for the offence of having corruptly influenced witnesses D-2, D-3, D-4 and D-6 pursuant to article 70 (1) (c) in conjunction with article 25 (3) (a) of the Statute.[26]

36. The Trial Chamber acquitted Mr Arido of the charges of having aided, abetted or otherwise assisted the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of presenting false evidence of witnesses D-2, D-3, D-4 and D-6, and of having aided, abetted or otherwise assisted the commission of D-2, D-3, D-4 and D-6 of the offence of giving false testimony pursuant to article 70 (1) (a) and (b) in conjunction with article 25 (3) (c) of the Statute.[27]

B. General overview of the appeals

37. Mr Bemba, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido filed appeals against the Conviction Decision.

[24] Conviction Decision, p. 456.
[25] Conviction Decision, pp. 456-457.
[26] Conviction Decision, p. 457.
[27] Conviction Decision, p. 457.

1. Mr Bemba

38. Mr Bemba advances four grounds of appeal against his convictions, which raise issues about: (i) the interpretation of the legal elements of article 70 offences;[28] (ii) the charges;[29] (iii) the admissibility of documentary evidence;[30] (iv) the interpretation of the modes of liability under article 25 (3) (a) and (b) of the Statute;[31] and (v) the Trial Chamber's assessment of the evidence.[32] He requests that the Appeals Chamber set aside his convictions, acquit him of all counts and immediately release him.

2. Mr Kilolo

39. Mr Kilolo presents three grounds of appeal against his convictions, which concern: (i) the admissibility of documentary evidence given alleged violations in the collection of materials from the Western Union company;[33] (ii) the admissibility of certain documentary evidence given an alleged violation of legal professional privilege;[34] and (iii) the Trial Chamber's assessment of the evidence.[35] Mr Kilolo requests that the Appeals Chamber reverse all findings of guilt and convictions against him and vacate the Conviction Decision.[36]

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[28] Ground one: "The Trial Chamber Interpreted the Article 70 Provisions Incorrectly". Mr Bemba's Appeal Brief, paras 8-56.
[29] Ground two: "Mr. Bemba was Convicted on the Basis of an Improperly Pleaded and Defined Common Plan". Mr Bemba's Appeal Brief, paras 57-92, 123-129, 138-140.
[30] Ground three: "The Chamber Based the Conviction, to a Decisive Level, on Privileged and Illegally Collected Evidence". Mr Bemba's Appeal Brief, paras 141-187.
[31] Ground two in part (sub-grounds 2.3.1 to 2.3.4, 2.4, 2.5, 2.6). Mr Bemba's Appeal Brief, paras 94-140.
[32] Ground four: "Errors concerning the Admission and Assessment of Evidence", ground two in part (sub-grounds 2.3 and 2.5). Mr Bemba's Appeal Brief, paras 93-122, 130-137, 188-331.
[33] Ground One: "The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute and that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met, and by admitting and relying on evidence obtained because of or resulting from the Western Union materials". Mr Kilolo's Appeal Brief, paras 15-16, 20-106.
[34] Ground two: "The Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege". Mr Kilolo's Appeal Brief, paras 15-16, 107-124.
[35] Ground three: "The Trial Chamber erred in law, fact and abused its discretion in finding that the evidence presented by the Prosecution in support of the charges against Mr. Kilolo was sufficient to find the allegations proved beyond a reasonable doubt". Mr Kilolo's Appeal Brief, paras 17, 125-171.
[36] Mr Kilolo's Appeal Brief, p. 6.

3. Mr Mangenda

40. Mr Mangenda advances six grounds of appeal against his convictions, which concern: (i) the admissibility of certain documentary evidence;[37] (ii) the charges;[38] (iii) the interpretation of the legal elements of article 70 offences;[39] and (iv) the Trial Chamber's assessment of the evidence.[40] He requests that the Appeals Chamber reverse the findings and convictions on all counts.[41]

4. Mr Babala

41. Mr Babala presents several grounds of appeal, which concern: (i) the admissibility of documentary evidence; (ii) violation of the principle of legality under article 22 (2) of the Statute (in relation to the Trial Chamber's interpretation of article 25 (3) (c) of the Statute and the Trial Chamber's reasoning based on analogy and induction); and (iii) the Trial Chamber's assessment of the evidence. He requests that the Appeals Chamber reverse the Conviction Decision and acquit him.[42]

5. Mr Arido

42. Mr Arido advances several grounds of appeal against his conviction raising issues about: (i) the charges; (ii) the admissibility of documentary evidence; (iii) other

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[37] Ground one: "The Trial Chamber improperly admitted audio-surveillance evidence". Mr Mangenda's Appeal Brief, paras 16-126.
[38] Ground two: "The Trial Chamber erred in finding that Mangenda was part of a common criminal plan based on the intercepted conversations concerning D-25, D-29, D-15, D-54 and D-13 (the 'intercepted witnesses')" - Sub-Ground 2(A): "The Chamber erred in law by relying on matters beyond the scope of the charges, and an undefined common plan, to infer Mangenda's *mens rea* in respect of the intercepted witnesses". Mr Mangenda's Appeal Brief, paras 127-145.
[39] Ground two - Sub-Ground 2(B): "The Chamber erred in defining the offence of 'corruptly influencing' as not requiring an intent to induce a falsehood". Mr Mangenda's Appeal Brief, paras 146-165.
[40] Ground two - Sub-Ground 2(C): "The Chamber erred in fact in concluding that Mangenda knew that Kilolo was inducing the intercept witnesses to lie". Mr Mangenda's Appeal Brief, paras 166-253. Sub-Ground 2 (D): "The Chamber erred in fact and law in finding that Mangenda made an essential contribution to the common criminal plan". Mr Mangenda's Appeal Brief, paras 254-262.
Ground Three: "The Trial Chamber erred in finding that Mangenda was involved in contemporaneous or post facto measures to conceal the common plan". Mr Mangenda's Appeal Brief, paras 263-289.
Ground four: "The Trial Chamber erred in fact and in law in finding that Mangenda 'surmised' that Kilolo was corruptly influencing the Yaoundé witnesses based on the distribution of mobile telephones", Mr Mangenda's Appeal Brief, paras 290-307.
Ground five: "The Trial Chamber erred in law and in fact when it found that the evidence showed that Mangenda contributed, with the necessary *mens rea*, to the illicit coaching of: D-23, D-26, D-55, D-57, or D-64; the Yaoundé witnesses; or D-13". Mr Mangenda's Appeal Brief, paras 308-316.
Ground six: "The Trial Chamber erred in law and in fact in finding Mangenda abetted D-2, D-3, D-4, D-6, D-13, D-25 and D-29 to give false testimony, or that he aided D-15 and D-54, to give false testimony". Mr Mangenda's Appeal Brief, paras 317-323.
[41] Mr Mangenda's Appeal Brief, para. 325.
[42] Mr Babala's Appeal Brief, para. 307, p. 122.

alleged procedural errors; (iv) the interpretation of the legal elements of article 70 offences; and (v) the Trial Chamber's assessment of the evidence. Mr Arido requests that the Appeals Chamber reverse his conviction and acquit him.[43]

III. PRELIMINARY MATTERS

43. Prior to addressing the appellants' grounds of appeal, the Appeals Chamber will dispose of outstanding procedural requests that have been made in the course of these appeal proceedings, with the exception of the outstanding requests for admission of additional evidence on appeal, which are addressed jointly with the disposal of the grounds of appeal they purportedly relate to.[44]

A. Mr Arido, Mr Babala and Mr Mangenda's requests for a hearing

44. Mr Arido and Mr Babala filed motions on 11 and 12 September 2017, respectively,[45] in which they request that the Appeals Chamber convene an appeal hearing for their appeals against the Conviction Decision and the Sentencing Decision. On 22 September 2017, Mr Mangenda filed a response, expressing support for Mr Arido's and Mr Babala's requests "to the extent they request hearings in the appeals from the Conviction Decision".[46] The Prosecutor did not file a response to the requests.

1. Submissions of Mr Arido, Mr Babala and Mr Mangenda

45. Mr Arido, Mr Babala and Mr Mangenda, relying on rule 156 (3) of the Rules, request the Appeals Chamber to exercise its discretion to convene a hearing.[47] Mr Arido and Mr Babala argue that such hearing would ensure the fairness of the proceedings.[48] Mr Arido, Mr Babala and Mr Mangenda contend that as the present appeals are "complex and voluminous" and involve novel or unsettled issues, a

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[43] Mr Arido's Appeal Brief, para. 474.
[44] *See infra* paras 389, 500-515, 626 (addressing two requests for admission of additional of evidence made by Mr Bemba) and paras 1624-1629 (addressing, *inter alia*, on a request for admission of additional evidence by Mr Arido).
[45] Mr Arido's Request for Hearing; Mr Babala's Request for Hearing.
[46] Mr Mangenda's Response to Requests for a Hearing, paras 1, 16.
[47] Mr Arido's Request for Hearing, para. 1; Mr Babala's Request for Hearing, para 19; Mr Mangenda's Response to Requests for a Hearing, para. 1.
[48] Mr Arido's Request for Hearing, paras 2, 14, 19; Mr Babala's Request for Hearing, paras 23, 24, 30.

hearing would help the parties refine their arguments and assist the Appeals Chamber in defining, clarifying the issues raised in the appeals and deciding "the points of contention".[49] Mr Arido and Mr Mangenda argue that an oral hearing would not unduly delay the proceedings and would ensure that they are expeditious and fair.[50]

2. Determination by the Appeals Chamber

46. The Appeals Chamber notes that Mr Arido, Mr Babala and Mr Mangenda refer to rule 156 (3) of the Rules as the legal basis for their request that the Appeals Chamber convene a hearing on their appeals. This provision, however, is found in Section III of Chapter 8 of the Rules, which regulates appeals against decisions other than convictions, acquittals, sentences and reparation orders and is, therefore, not applicable to the proceedings at hand.

47. Indeed, there is no provision in the Statute, Rules or Regulations of the Court that would regulate the circumstances under which an appeal hearing is held in appeals against convictions, acquittals, sentences and reparation orders. The Appeals Chamber recalls, however, that it has previously held that "the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis".[51] In that regard, "[s]uch decisions should be based primarily on the potential utility of an oral hearing, namely whether it would assist the Appeals Chamber in clarifying and resolving the issues raised in the appeal".[52]

48. In the present case, the Appeals Chamber is not convinced by Mr Arido's, Mr Babala's and Mr Mangenda's submissions that a hearing would be useful in assisting the Appeals Chamber in its determination of the appeals. The Appeals Chamber observes that the three appellants have had the opportunity to submit detailed written submissions in which they have raised numerous grounds of appeal against the Conviction Decision, and in the case of Mr Arido and Mr Babala, against the Sentencing Decision. The Prosecutor has responses to these submissions. In the

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[49] Mr Arido's Request for Hearing, paras 15-17; Mr Babala's Request for Hearing, paras 29-30; Mr Mangenda's Response to a Request a Hearing, paras 7-13.
[50] Mr Arido's Request for Hearing, paras 20-21; Mr Mangenda's Response to Requests for a Hearing, paras 2, 14-15.
[51] *Ngudjolo* Scheduling Order, para. 13.
[52] *Ngudjolo* Scheduling Order, para. 13.

circumstances of this case, the Appeals Chamber does not consider it useful to receive additional submissions orally.

49. Accordingly, Mr Arido's, Mr Babala's and Mr Mangenda's requests for an appeal hearing are rejected.

B. Mr Bemba's request for disclosure and judicial assistance

50. On 18 September 2017, Mr Bemba filed a request seeking an order from the Appeals Chamber to the Prosecutor for the disclosure of certain material and to the Registry for the transmission of certain information.[53] The Prosecutor responded to this request on 2 October 2017.[54]

51. On 6 October 2017, Mr Bemba filed a request for leave to reply to the Prosecutor's response,[55] to which the Prosecutor responded on 11 October 2017.[56]

1. Submissions of the parties

(a) Mr Bemba

52. Mr Bemba, arguing that the Prosecutor's disclosure obligations continue throughout the proceedings, including at the appeal stage,[57] requests the Appeals Chamber to order the Prosecutor to disclose to him call data records ("CDR") of certain telephone numbers that she obtained from the Dutch authorities as part of her investigations in the present case, and, more generally, "any records concerning Mr. Bemba, his former Defence, or Defence witnesses, that have not yet been disclosed, and a schedule concerning the date of the collection of this information".[58] Mr Bemba also requests, as a measure of judicial assistance, that the Appeals Chamber order the Registry to: (i) inform him on the actions that it took in response to the Prosecutor's allegation that Mr Bemba had violated the regime at the Court's detention centre and what it, formally or informally, communicated to the Prosecutor

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[53] Request for Disclosure and Judicial Assistance.
[54] Prosecutor's Response to the Request for Disclosure and Judicial Assistance.
[55] "Defence Request for Leave to Reply to the Prosecution's Response to Bemba's 'Consolidated Request for Disclosure and Judicial Assistance'", ICC-01/05-01/13-2236-Conf-Corr.
[56] "Prosecution's Response to Mr Bemba's 'Defence Request for Leave to Reply to the Prosecution's Response to Bemba's "Consolidated Request for Disclosure and Judicial Assistance"'", ICC-01/05-01/13-2238-Conf.
[57] Request for Disclosure and Judicial Assistance, paras 4, 5.
[58] Request for Disclosure and Judicial Assistance, paras 1, 6-26.

in response to this allegation;[59] and (ii) transmit to him the dossier – or a redacted version thereof – of the internal investigations conducted by the Registry concerning the staff member who leaked to Mr Mangenda information on investigations prior to their public disclosure.[60]

(b) The Prosecutor

53. The Prosecutor responds that the Request for Disclosure and Judicial Assistance should be rejected in its entirety as it "does not meet the requirements of *prima facie* materiality and specificity", "is overly broad and vague", "misunderstands the record" and "relied on unfounded speculative theories that are divorced from reality".[61]

2. Determination by the Appeals Chamber

54. As a preliminary matter, the Appeals Chamber recalls that, in accordance with regulation 24 (5) of the Regulations of the Court, participants may reply to a response only with the leave of the relevant chamber. A decision in this respect is discretionary in nature. Having regard to the issues on which Mr Bemba seeks leave to reply to the Prosecutor's response, the Appeals Chamber is of the view that it would not benefit from further submissions for its disposal of Mr Bemba's Request for Disclosure and Judicial Assistance. Accordingly, the Appeals Chamber rejects Mr Bemba's request for leave to reply.

55. Turning to the merits of the Request for Disclosure and Judicial Assistance, the Appeals Chamber recalls that Mr Bemba seeks, first, an order to the Prosecutor for the disclosure of certain identified materials. The Appeals Chamber observes that Mr Bemba gives his account of the relevant background and advances arguments allegedly indicating the illegality of the collection of certain evidence on the part of the Prosecutor, but he does not explain how disclosure to him of the requested material would advance any of his arguments on appeal. More generally, Mr Bemba, while referring in passing to rule 77 of the Rules, does not indicate how the disclosure of the material concerned would fall within the scope of that provision. The Appeals Chamber recalls that it has previously explained that "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will

[59] Request for Disclosure and Judicial Assistance, paras 27-50.
[60] Request for Disclosure and Judicial Assistance, paras 51-60.
[61] Prosecutor's Response to the Request for Disclosure and Judicial Assistance, paras 2, 46.

depend upon the specific circumstances of the case", but that such an assessment must be made on a *prima facie* basis placing on an accused only a low burden.[62] The Appeals Chamber will at this point address each of the materials of which Mr Bemba requests disclosure.

56. The first item is a document containing certain call data records of one of the telephone numbers relevant to the present case that the Prosecutor received from the Dutch authorities as part of her investigations. The Appeals Chamber notes at the outset that Mr Bemba has been aware since at least 13 February 2014, when the present case was still at its pre-trial stage, that the Prosecutor, on 13 September 2013, had obtained these particular data from the Dutch authorities.[63] It appears, however, that Mr Bemba at no point indicated that their disclosure could be material to the preparation of his defence. Rather, he waited until the appeal stage of the case – and even after the filing of his appeal brief – to request the disclosure of this material, the existence of which was known to him for more than three years. The Appeals Chamber further notes that the document at issue contains call data within a certain time period.[64] However, on 20 December 2013, Mr Bemba obtained disclosure from the Prosecutor of another document that she had received from the same provider and that contains the call data of the same telephone number for a broader period of time.[65] The data the disclosure of which Mr Bemba now seeks are contained within this more comprehensive document disclosed at trial and are therefore already available to him. The Appeals Chamber agrees with Mr Bemba that duplication of information is not in and of itself a reason to withhold its disclosure. Nonetheless, the Appeals Chamber considers that the fact that Mr Bemba has already access – and has had it since 20 December 2013 – to the actual information which he now seeks is relevant to the disposal of the present request. This is particularly so, given that Mr

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[62] *Banda and Jerbo* OA4 Judgment, paras 39, 42.
[63] This information is in fact contained at paragraphs 10 and 11 in both the public and the confidential redacted version of the "Third Request for Judicial Order to Obtain Evidence for Investigation under Article 70" which was made available to the accused persons on 13 February 2014 (ICC-01/05-60-Red and ICC-01/05-60-Conf-Red2).
[64] Mr Bemba seeks disclosure of the other documents in possession of the Prosecutor which contain call data records covering the periods between 20 and 24 August 2013, and between 30 July and 30 August 2013 (*see* Request for Disclosure and Judicial Assistance, para. 16; and its Annex G, (ICC-01/05-01/13-2227-Conf-AnxG)).
[65] CAR-OTP-0072-0082, including call data covering the period between 24 September 2012 to 13 September 2013.

Bemba could have raised the issue of disclosure of the other records containing the call data at issue already in February 2014.

57. In addition, he does not explain how disclosure of the actual content of these records would relate to any of his grounds of appeal against the Conviction Decision. In particular, the Appeals Chamber notes that, to the extent that Mr Bemba argues that records of call data were obtained by the Prosecutor directly from the Dutch authorities in violation of an order of the Pre-Trial Chamber,[66] Mr Bemba can raise this issue on appeal, as indeed he does,[67] without the need to have access to the actual data contained in the concerned records. Mr Bemba's arguments in this respect – which are not contingent on the data themselves – as made in his appeal brief are in fact considered on their merits below as part of the Appeals Chamber's disposal of his appeal against the Conviction Decision.[68] For all these reasons, the Appeals Chamber rejects this part of Mr Bemba's request.

58. Mr Bemba also requests an order to the Prosecutor for the disclosure of CDRs of some other telephone numbers which the Prosecutor also obtained from the Dutch authorities as part of her investigations, but which were eventually found to be unrelated to the present case. The Appeals Chamber observes that, also in this instance, Mr Bemba fails to explain why he requests disclosure of this material only during the present appeal proceedings, considering that he has been aware since at least 28 August 2015 that the Prosecutor had requested these data as part of her investigations.[69] In particular, Mr Bemba does not indicate any information which he may recently have discovered and which would justify the sudden need for disclosure of the data. In any case, and more importantly, the Appeals Chamber observes that Mr Bemba does not dispute that the call data of these telephone numbers are indeed irrelevant to the present case. Whilst seeking an order from the Appeals Chamber for disclosure of materials the existence of which had been known to him for more than two years, Mr Bemba does not explain how access to the call data of these irrelevant telephone numbers could be of any relevance to the grounds of appeal he raised against the Conviction Decision, or more generally how disclosure of this material

[66] Request for Disclosure and Judicial Assistance, paras 8, 9.
[67] *See e.g.* Mr Bemba's Appeal Brief, para. 173.
[68] *See infra* paras 487-491.
[69] *See* CAR-OTP-0090-1930, which was disclosed on 28 August 2015.

could be now (or could have been) material to the preparation of his defence within the meaning of rule 77 of the Rules.[70] The fact that the Prosecutor's investigations led to the present case does not mean that all material collected as part of these investigations, including items found to have no connection with the case, must be disclosed to the accused. The request for disclosure of this material is therefore rejected.

59. In light of the above, the Appeals Chamber also finds no basis in Mr Bemba's general request to issue an order to the Prosecutor for the disclosure of "any records concerning Mr. Bemba, his former Defence, or Defence witnesses, that have not yet been disclosed, and a schedule concerning the date of the collection of this information".[71] Irrespective of any other consideration in this respect, the Appeals Chamber finds it sufficient to note that the only basis in support of Mr Bemba's broad request is the fact that the Prosecutor had violated her disclosure obligations by failing to provide him with the material addressed above.[72] In light of the conclusions above, this additional request is likewise rejected.

60. For these reasons, the Appeals Chamber rejects Mr Bemba's request for an order for disclosure from the Prosecutor.

61. The Appeals Chamber recalls that Mr Bemba also requests, as a measure of judicial assistance, that the Appeals Chamber order the Registrar to provide him with certain information. Mr Bemba essentially requests the Appeals Chamber's assistance in pursuing new lines of defence investigation with respect to two issues. In this regard, the Appeals Chamber emphasises that, given the corrective nature of appeal proceedings at this Court, its powers to provide judicial assistance shall be exercised restrictively. The Appeals Chamber observes that Mr Bemba provides no explanation as to why he waited until after the commencement of appellate proceedings – even after the filing of his appeal brief – to inquire with the Registry as to what steps it had taken in response to the allegation that he had violated detention regulations and/or

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[70] The Appeals Chamber notes Mr Bemba's submission that "the[] *collection* and *transmission* [of these data] is […] highly relevant" (Request for Disclosure and Judicial Assistance, para. 21, emphasis added). Mr Bemba's arguments to this effect are thus wholly independent from the actual call data, access to which would not advance any of Mr Bemba's arguments.
[71] Request for Disclosure and Judicial Assistance, para. 1.
[72] *See* Request for Disclosure and Judicial Assistance, para. 26.

provided any response to the Prosecutor in this regard,[73] nor does he indicate that newly obtained information has triggered the need to pursue this investigative line.[74] In any case, to the extent that Mr Bemba appears to seek an order from the Appeals Chamber to direct the Registry to provide him with this information, the Appeals Chamber observes that this information has been communicated to him in the meantime.[75]

62. With respect to Mr Bemba's request to disclose the dossier of the Registry's internal investigation on the leakage of information during the investigation leading to the present case – or a redacted version thereof – the Appeals Chamber notes that, in this instance, Mr Bemba refers to the fact that he discovered only recently that the staff member who leaked the information was [redacted].[76] Nevertheless, he does not explain why, in his view, the need to pursue this line of investigation for which he now seeks assistance from the Appeals Chamber – *i.e.* to verify what information the staff member concerned had access to – arises only now and could not have been reasonably pursued before. In any case, the Appeals Chamber is unpersuaded by Mr Bemba's submission that access to the information now sought would be of any relevance to any of his grounds of appeal raised against the Conviction Decision.

63. Accordingly, the Appeals Chamber rejects Mr Bemba's Request for Disclosure and Judicial Assistance in its entirety.

C. Mr Bemba's first request for a remedy

64. On 13 November 2017, Mr Bemba filed a "Request for a Remedy for Disclosure and Article 54(1) violations".[77] Mr Arido and the Prosecutor responded to this request on 22 and 24 November 2017, respectively.[78]

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[73] The Appeals Chamber notes that Mr Bemba requested this information for the first time on 24 July 2017 (*see* Request for Disclosure and Judicial Assistance, para. 34, and its Annex H, ICC-01/05-01/13-2227-Conf-AnxH).
[74] *See* Annex H to the Request for Disclosure and Judicial Assistance, ICC-01/05-01/13-2227-Conf-AnxH, which includes the email from Mr Bemba's counsel requesting the concerned information on the basis of information that had been communicated to Mr Bemba on 21 March 2014.
[75] *See* ICC-01/05-01/13-2233-Conf-Exp-AnxA and ICC-01/05-01/13-2244-Conf-AnxD.
[76] Request for Disclosure and Judicial Assistance, paras 53, 54, 56.
[77] First Request for a Remedy.

65. On 30 November 2017, Mr Bemba filed a request for leave to reply to the Prosecutor's response to the First Request for a Remedy.[79]

1. Submissions of the parties

(a) Mr Bemba

66. Mr Bemba requests the Appeals Chamber to make a favourable inference on Joachim Kokaté's and his associates' roles *vis-à-vis* the common plan as a remedy for purported violations of the Prosecutor of her disclosure obligations and of article 54 (1) of the Statute.[80] He alleges that the information contained in records that the Prosecutor disclosed on 27 October 2017 is exculpatory.[81] He submits that the disclosed records "serve to demonstrate […] that as a result of the Prosecution's muddled and distorted common plan and case theory, the Chamber committed a reversible error of fact and law by ignoring the role of Mr. Kokaté in the chain of causation, and wrongly attributing acts and intent to Mr. Bemba, that were squarely attributable to Mr. Kokaté".[82]

67. In Mr Bemba's view, when "read in conjunction with the Chamber's findings that the Defence did not know that D-23 was lying about his military background and was not involved in the promise of relocation, it is clear that D-23's decision to testify falsely had no causal nexus to the actions of Mr. Bemba".[83] As regards the Prosecutor's disclosure obligations, Mr Bemba alleges that in "their drive to link all five defendants to an amorphous common plan, the Prosecution failed to recognise that information that might be incriminating vis-à-vis Kokaté and his associates, could be exculpatory as concerns Mr. Bemba".[84] Mr Bemba submits that, in this case, the Prosecutor redacted information concerning contacts between third persons and witnesses, "which could have suggested the existence of different motives and thus an independent common plan to adduce false testimony in the Main Case".[85] In

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[78] Mr Arido's Response to the First Request for a Remedy; Prosecutor's Response to First Request for a Remedy.
[79] "Request for Leave to Reply to the 'Prosecution's Response to Bemba's "Request for a Remedy for Disclosure and Article 54(1) violations"'", ICC-01/05-01/13-2245-Conf.
[80] First Request for a Remedy, paras 1, 59.
[81] First Request for a Remedy, p. 6.
[82] First Request for a Remedy, para. 23.
[83] First Request for a Remedy, para. 25.
[84] First Request for a Remedy, para. 42.
[85] First Request for a Remedy, para. 42.

Mr Bemba's view, the verdict would have been different had the Prosecutor disclosed evidence concerning actions by Mr Kokaté and his associates[86] and given the advanced stage of the proceedings, "the most appropriate remedy would be to draw a reasonable inference in favour of Mr. Bemba in relation to the assertions of fact that formed the basis of the Trial Chamber's findings".[87]

(b) Mr Arido

68. Mr Arido submits that he supports "in principle" the First Request for a Remedy, while emphasising that he "is not in a position to make any further representations on the specific arguments advanced by the Bemba Defence".[88]

(c) The Prosecutor

69. The Prosecutor submits that the First Request for a Remedy is undermined by "a series of misconceptions and errors".[89] She submits that Mr Bemba misread witness D-23's records, Mr Kokaté's role, the nature of the common plan, and the trial Chamber's findings underpinning Mr Bemba's guilt.[90] She also alleges that Mr Bemba misinterprets *inter partes* communications on disclosure and the Prosecutor's article 54 (1) obligations.[91] In the Prosecutor's view, the requested remedy is unwarranted and procedurally improper.[92]

2. Determination by the Appeals Chamber

70. As a preliminary matter, regarding Mr Bemba's request for leave to reply, the Appeals Chamber recalls, as explained above, that whether to grant leave to reply to a response under regulation 24 (5) of the Regulations of the Court is a discretionary decision. The Appeals Chamber considers that a reply from Mr Bemba to the Prosecutor's response to his First Request for a Remedy will not assist in its disposal of the matter at hand. Accordingly, the Appeals Chamber rejects this request.

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[86] First Request for a Remedy, para. 46.
[87] First Request for a Remedy, paras 51, 59.
[88] Mr Arido's Response to the First Request for a Remedy, para. 1.
[89] Prosecutor's Response to First Request for a Remedy, para. 7.
[90] Prosecutor's Response to First Request for a Remedy, para. 7.
[90] Prosecutor's Response to First Request for a Remedy, para. 7.
[90] Prosecutor's Response to First Request for a Remedy, paras 8-11.
[91] Prosecutor's Response to First Request for a Remedy, paras 12-17.
[92] Prosecutor's Response to First Request for a Remedy, paras 18-23.

71. Turning to the merits of the First Request for a Remedy, the Appeals Chamber notes that Mr Bemba requests that the Appeals Chamber draw a "reasonable inference that the actions of Kokaté and his associates cannot be attributed to the common plan of Mr. Bemba".[93] He argues that the admission of the recently disclosed records into evidence would "not be an effective and appropriate remedy", *inter alia*, because the requirements of rule 68 of the Rules would need to be complied with, which would lead to delays.[94] He also refers to decisions of trial chambers of this Court as well as of the ICTY and ICTR that, according to him, have adopted such an approach.[95]

72. The Appeals Chamber notes that an appellant is required to set out the grounds of appeal in the appeal brief.[96] A variation of these grounds may be sought under regulation 61 of the Regulations of the Court, while regulation 62 of the Regulations of the Court sets out the procedure for requesting the admission of additional evidence on appeal. The Appeals Chamber notes that Mr Bemba has not availed himself of these procedural avenues. Instead, he requests the Appeals Chamber, as a remedy for alleged late disclosure, to draw a factual conclusion. He argues, in general terms, that this would be relevant to some of his grounds of appeal,[97] without, however, specifying how the proposed factual conclusion would impact on the Appeals Chamber's determination of these grounds of appeal. Accordingly, the Appeals Chamber dismisses *in limine* the First Request for a Remedy.

D. Mr Bemba's second request for a remedy

73. On 4 January 2018, Mr Bemba filed a second request seeking a remedy for the alleged violations on the part of the Prosecutor of her disclosure obligations with respect to some materials which, in his view, are relevant to the admissibility of certain documentary evidence relied upon by the Trial Chamber in the Conviction

[93] First Request for a Remedy, para. 59.
[94] First Request for a Remedy, para. 50.
[95] First Request for a Remedy, paras 51-52.
[96] Regulation 58 (2) of the Regulations of the Court; the Appeals Chamber notes that the amendment to this regulation, which entered into force on 20 July 2017, did not affect the substance of this provision.
[97] First Request for a Remedy, para. 13.

Decision.[98] Mr Arido and the Prosecutor responded to this request on 15 January 2018.[99]

74. On 19 January 2018, Mr Bemba requested leave to reply to the Prosecutor's response.[100] The Prosecutor responded to the request for leave to reply on 24 January 2018.[101]

1. Submissions of the parties

(a) Mr Bemba

75. Mr Bemba argues that the Prosecutor failed to comply with her disclosure obligations in that "[she] failed to disclose at trial, and has refused to disclose on appeal" certain call data records obtained from the Dutch authorities during her investigations in the present case, and her correspondence with the Belgian authorities concerning the execution of a request for assistance that had been transmitted to them during her investigations.[102] Mr Bemba also submits that the Prosecutor violated her disclosure obligations as she had not disclosed to him an email in which certain records from the Western Union company had been transmitted to an investigator of her office.[103] On the basis of these alleged disclosure violations, Mr Bemba requests that the concerned evidence be excluded or, at least, be treated "with extreme caution".[104]

(b) Mr Arido

76. Mr Arido supports the relief sought in Mr Bemba's request, "shar[ing] the same legal and procedural concerns regarding Prosecution's violations of its obligations under the Statute and the disclosure regime".[105] He also submits that he "has consistently pointed out throughout the trial and in [his] Appeal Brief the human

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[98] Second Request for a Remedy.
[99] Mr Arido's Response to Second Request for a Remedy; Prosecutor's Response to Second Request for a Remedy.
[100] "Request for Leave to Reply to the 'Prosecution's response to Bemba's "Second Request for an Effective Remedy for Disclosure Violations"'", ICC-01/05-01/13-2255-Conf.
[101] "Request for an Order to Mr Bemba's Counsel."Prosecution's response to Bemba's 19 January 2018 request for leave to reply, and request for orders to Defence Counsel for Mr Bemba", ICC-01/05-01/13-2261.
[102] Second Request for a Remedy.
[103] Second Request for a Remedy, paras 9, 12-18.
[104] Second Request for a Remedy, paras 56-58.
[105] Mr Arido's Response to Second Request for a Remedy, para. 1.

rights and fair trial violations associated with, and resulting from the Western Union records".[106]

(c) The Prosecutor

77. The Prosecutor submits that in the Second Request for a Remedy, Mr Bemba "fails to establish a disclosure violation, or that his defence was 'obstructed' in any manner", and that, therefore, "[h]e deserves no remedy".[107] Moreover, she argues that Mr Bemba "seeks to improperly expand his appeal".[108] On this basis, she requests the Appeals Chamber to summarily dismiss the Second Request for a Remedy.[109]

2. Determination by the Appeals Chamber

78. As a preliminary matter, the Appeals Chamber considers that the further submissions which Mr Bemba seeks to make in reply to the Prosecutor's response would be of no assistance to the disposal of the Second Request for a Remedy. The Appeals Chamber therefore rejects his request for leave to reply.

79. Turning to the merits of the Second Request for a Remedy, the Appeals Chamber notes that Mr Bemba requests it to exclude as inadmissible certain documentary evidence that the Prosecutor had submitted during trial and upon which the Trial Chamber relied in the Conviction Decision, or, at least, to treat this evidence "with extreme caution". This is meant to be a remedy allegedly warranted by purported disclosure violations on the part of the Prosecutor. The Appeals Chamber considers, therefore, that, with his request, Mr Bemba effectively attempts to complement his appeal against the Conviction Decision with further submissions in support of his arguments that his conviction must be set aside. The Appeals Chamber finds Mr Bemba's presentation of these new submissions, irrespective of whether they are justified by any newly discovered information, to be in any case procedurally improper and contrary to the regime governing appellate proceedings before this Court. In accordance with regulation 58 (2) of the Regulations of the Court, an appellant is required to set out the grounds of appeal in the appeal brief. While a variation of the grounds of appeal might have been sought under regulation 61 of the

[106] Mr Arido's Response to Second Request for a Remedy, para. 3.
[107] Prosecutor's Response to Second Request for a Remedy, para. 27.
[108] Prosecutor's Response to Second Request for a Remedy, para. 27.
[109] Prosecutor's Response to Second Request for a Remedy, para. 27.

Regulations of the Court, Mr Bemba has not availed himself of this procedural avenue. Nor did he otherwise request an authorisation to provide further arguments after expiration of the relevant time limit on the ground that, for reasons outside his control, new information had only been obtained after the filing of his appeal brief.

80. While the above provides a sufficient basis to dismiss Mr Bemba's request, the Appeals Chamber considers that this request must also fail on its merits. In particular, the Appeals Chamber finds it appropriate, given the nature of Mr Bemba's allegations, to address each of the material the non-disclosure of which justifies, in Mr Bemba's view, exclusion of evidence in the present case.

81. First, Mr Bemba argues that exclusion of certain records of financial transactions which the Prosecutor, through the competent authorities of Austria, from the Western Union company is warranted by the non-disclosure by the Prosecutor of a prior email transmitting to an investigator of the Office of the Prosecutor certain information from the database of the Western Union. The Prosecutor explains that she could not locate this particular email from the server.[110] In any case, and irrespective of whether this email would have fallen within rule 77 of the Rules, the Appeals Chamber notes that the fact that the Prosecutor directly accessed certain information in the Western Union database, including as transmitted to investigators of the Office of the Prosecutor by email, can in no way be considered a new piece of information that had not been previously disclosed. This fact was known at trial. It indeed triggered requests by Mr Arido, Mr Mangenda, Mr Kilolo and Mr Babala for the exclusion of the records subsequently received that were specifically addressed by the Trial Chamber.[111] Several grounds of appeal have been presented by all appellants – with the exception of Mr Bemba – in their appeal briefs on this precise point, seeking essentially the same "remedy" sought only now by Mr Bemba – that is, that the Appeals Chamber reverses the Trial Chamber's finding that the concerned evidence was not inadmissible under article 69 (7) of the Statute.[112] These grounds of appeal are addressed below in the present judgment where a detailed account of the relevant

[110] Prosecutor's Response to Second Request for a Remedy, para. 11.
[111] *See* First Western Union Decision.
[112] *See* Mr Mangenda's Appeal Brief, paras 16-126; Mr Kilolo's Appeal Brief, paras 20-106; Mr Arido's Appeal Brief, paras 123-153; Mr Babala's Appeal Brief, paras 21-33.

background is also provided.[113] Mr Bemba's only explanation as to why the non-disclosure of this particular email would justify exclusion of the concerned evidence is that the email was "likely" to contain information "that would have shed light" on whether the Prosecutor knew about the compatibility of her investigations with Austrian law, and/or could be used to challenge the credibility of the testimony of Herbert Smetana at trial.[114] As explained in detail below in the disposal of the other appellants' grounds of appeal, the Appeals Chamber considers that neither of these two aspects is of any significance as concerns the admissibility under article 69 (7) of the evidence in question.[115]

82. Second, Mr Bemba alleges that the Prosecutor violated her disclosure obligation with respect to certain undisclosed communications between her and the Belgian authorities in connection with a request for assistance she transmitted in the present case. The Appeals Chamber considers Mr Bemba's arguments in this regard to be baseless. Contrary to Mr Bemba's suggestion,[116] the Appeals Chamber does not see how access to the reasons and the legal basis why the Belgian authorities – in application of their own national law – did not execute the Prosecutor's request for assistance in the present case could be of any relevance to the issue of the legality of the materials that were collected by the Dutch authorities. There is thus no support for Mr Bemba's submission that the Prosecutor violated her disclosure obligations in this respect.

83. Third, Mr Bemba complains about the non-disclosure of the CDRs, the disclosure of which he had sought before the Appeals Chamber in his request for disclosure and judicial assistance of 18 September 2018.[117] With regard to this argument, the Appeals Chamber finds it sufficient to refer to its considerations above for its rejection of Mr Bemba's request for disclosure of this same material.[118] For the same reasons, and *a fortiori*, the Appeals Chamber sees no merit in Mr Bemba's request to obtain a remedy because of "disclosure violations" in this respect.

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[113] *See infra* Section VI.B.
[114] Second Request for a Remedy, para. 17.
[115] *See infra* paras 280-352.
[116] Second Request for a Remedy, para. 39.
[117] Second Request for a Remedy, para. 8.
[118] *See supra* paras 56-60.

84. Accordingly, the Appeals Chamber rejects Mr Bemba's Second Request for a Remedy.

E. Prosecutor's request for an order to Mr Bemba's counsel

85. On 24 January 2018, the Prosecutor, in her response to Mr Bemba's second request for a remedy, also requested the Appeals Chamber "to order Counsel for Bemba to withdraw [some] baseless offending allegations and to adhere to the expected standards of professional conduct required of Counsel under the Code of Professional Conduct for counsel"[119] ("Request for an Order to Mr Bemba's Counsel"). Mr Bemba responded to this request on 29 January 2018.[120] On 10 February 2018, Mr Babala filed an "*adjonction*" to Mr Bemba's response.[121]

1. Submissions of the parties

(a) The Prosecutor

86. The Prosecutor argues that Mr Bemba's counsel "make baseless, serious and untrue allegations about the Prosecution's conduct during trial and appeal, contrary to their obligations under the Code [of Professional Conduct for counsel]", and that this "demeans the Court's integrity", "bring[s] the Court as a whole into disrepute", and "has reached the point where the Appeals Chamber must intervene to preserve the Court's integrity".[122] The Prosecutor refers to two allegations in particular which, in her view, "have 'crossed the line' of professionally acceptable conduct required of Counsel", are "groundless" and "Counsel had no good faith basis to make them".[123] The Prosecutor submits that these allegations breach the Code of Professional Conduct for counsel, in particular its articles 7 and 24 (2).[124] On this basis, the Prosecutor requests the Appeals Chamber to order Mr Bemba's counsel "to withdraw these baseless offending allegations and to adhere to the expected standards of

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[119] "Prosecution's response to Bemba's 19 January 2018 request for leave to reply, and request for orders to Defence Counsel for Mr Bemba", ICC-01/05-01/13-2261-Conf.
[120] Response to the Request for an Order to Mr Bemba's Counsel.
[121] "Adjonction de la Défense de Monsieur Fidèle Babala Wandu à 'Response to Prosecution's request for orders to Defence Counsel for Mr Bemba' (ICC-01/05-01/13-2264-Conf)", ICC-01/05-01/13-2266-Conf.
[122] Request for an Order to Mr Bemba's Counsel, paras 1, 6.
[123] Request for an Order to Mr Bemba's Counsel, paras 1, 6. *See also* para. 5.
[124] Request for an Order to Mr Bemba's Counsel, paras 5-7, fn. 16.

professional conduct required of Counsel under the Code of Professional Conduct for counsel".[125]

(b) Mr Bemba

87. Mr Bemba submits that the Prosecutor's "current attempt to have adverse allegations withdrawn only serves to reinforce Defence arguments that there are reasonable grounds to conclude that key elements of this case were not investigated and prosecuted in a manner which was consistent with the Prosecution's duties under Article 54(1)".[126] He submits that "it would be contrary to basic human rights principles regarding the right of access to a Court to require Counsel to withdraw submissions which seeks to obtain a remedy for the defendant in criminal proceedings".[127]

2. Determination by the Appeals Chamber

88. At the outset, the Appeals Chamber regrets that the litigation in the present case has reached this point of discordance. It expects that all parties and participants appearing before the Court adhere to the most rigorous standard of professionalism which also requires that their mutual interactions be at all times courteous and respectful. That said, the Appeals Chamber considers that there is no legal basis in the framework of the Court to order a party to "withdraw" allegations made on the record. It also notes that, while it is indeed within its responsibility to take the necessary measures to ensure the integrity of the proceedings before it, the responsibility for any purported breach of the Code of Professional Conduct for counsel is vested in the organs in charge of disciplinary proceedings for counsel,[128] and that the Prosecutor has the independent power to file a complaint of misconduct if she considers it warranted.[129] In this context, and considering that Mr Bemba's allegations as to purported acts of prosecutorial misconduct are addressed on their merits in the present judgment, the Appeals Chamber considers that no further action on its part is warranted. Accordingly, the Prosecutor's request is rejected.

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[125] Request for an Order to Mr Bemba's Counsel, para. 8.
[126] Response to the Request for an Order to Mr Bemba's Counsel, para. 8.
[127] Response to the Request for an Order to Mr Bemba's Counsel, para. 12.
[128] *See* articles 30-44 of the Code of Professional Conduct for counsel.
[129] *See* article 34 of the Code of Professional Conduct for counsel.

IV. STANDARD OF REVIEW

89. Article 81 (1) (b) of the Statute provides that the convicted person may appeal on grounds of a procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. According to article 83 (2) of the Statute, the Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error". The Appeals Chamber has previously held that its jurisprudence regarding the standard of review in appeals arising under article 82 (1) of the Statute is "in essence, also applicable in relation to legal, factual and procedural errors raised in appeals pursuant to article 81 (1) of the Statute".[130]

A. Errors of law

90. Regarding errors of law, the Appeals Chamber has held that

> [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.
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> A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'.[131] [Footnotes omitted.]

B. Errors of fact

91. With respect to alleged factual errors, the Appeals Chamber's task is to "determine whether a reasonable Trial Chamber could have been satisfied […] as to the finding in question",[132] thereby applying a margin of deference to the factual findings of the trial chamber. In this regard, the Appeals Chamber has previously held that:

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[130] *Lubanga* Appeal Judgment, para. 17.
[131] *Lubanga* Appeal Judgment, paras 18-19; *Ngudjolo* Appeal Judgment, para. 20.
[132] *Lubanga* Appeal Judgment, para. 27.

> [I]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[133] [Footnotes omitted.]

92. The Appeals Chamber has noted that in assessing alleged errors of fact, the *ad hoc* tribunals also apply a standard of reasonableness, which accord a similar margin of deference to the Trial Chamber's findings as that applied by the Appeals Chamber pursuant to articles 81 and 82 of the Statute.[134]

93. The rationale for this deferential approach to factual findings has been described by the *ad hoc* tribunals in the following terms:

> [T]he Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion.[135]

94. The outcome of this is, as the Appeals Chamber has previously found, that the Appeals Chamber "must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial".[136]

95. Furthermore, the Appeals Chamber recalls that the Appeals Chambers of the *ad hoc* tribunals have held that:

> [I]t is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable

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[133] *Lubanga* Appeal Judgment, para. 21. *See* also *Ngudjolo* Appeal Judgment, para. 22.
[134] *Lubanga* Appeal Judgment, para. 24.
[135] *Lubanga* Appeal Judgment, para. 24, quoting *Kupreškić et al.* Appeal Judgment, para. 32.
[136] *Lubanga* Appeal Judgment, para. 25 referring to *Gotovina and Markač* Appeal Judgment, para. 50 quoting *Kayishema and Ruzindana* Appeal Judgment, para. 119; *Ngudjolo* Appeal Judgment, para. 24.

> and credible and to accept or reject the 'fundamental features' of the evidence.[137]

96. As such, the Appeals Chamber has previously stated that, when a factual error is alleged, it will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber; rather, it will "determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question", based on the evidence that was before it.[138] In this regard, it must be borne in mind that the Trial Chamber is required to make findings of fact to the standard of proof of "beyond reasonable doubt" only in relation to those facts that correspond to "the elements of the crime and mode of liability of the accused as charged".[139]

97. In determining whether a given factual finding was reasonable, the Trial Chamber's reasoning in support thereof is of great significance. Whilst the sufficiency of reasoning will be discussed further below, the Appeals Chamber notes that as put by the Supreme Court Chamber of the ECCC:

> [T]he starting point for the Supreme Court Chamber's assessment of the reasonableness of the Trial Chamber's factual findings is the reasoning provided for the factual analysis, as related to the items of evidence in question. In particular when faced with conflicting evidence or evidence of inherently low probative value (such as out-of-court statements or hearsay evidence), it is likely that the Trial Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis. At the same time, arguments limited to disagreeing with the conclusions of the Trial Chamber and submissions based on unsubstantiated alternative interpretations of the same evidence are not sufficient to overturn factual findings of the trier of fact.[140]

98. The Appeals Chamber finds this approach persuasive. Thus, when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the relevant evidence, but also to the Trial Chamber's reasoning in analysing it. In particular if the supporting evidence is, on its face, weak, or if there is significant

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[137] *Lubanga* Appeal Judgment, para. 23, quoting *Kupreškić et al.* Appeal Judgment, para. 31.
[138] *Lubanga* Appeal Judgment, para. 27.
[139] *Lubanga* Appeal Judgment, para. 22.
[140] *Nuon Chea and Khieu Samphân* Appeal Judgment, para. 90 (footnote omitted).

contradicting evidence, deficiencies in the Trial Chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached. Nevertheless, the emphasis of the Appeals Chamber's assessment is on the substance: whether the evidence was such as to allow a reasonable Trial Chamber to reach the finding it did.

C. Procedural errors

99. Regarding procedural errors, the Appeals Chamber has found that:

> [A]n allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a […] decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered.[141]

100. Having previously found that "procedural errors often relate to alleged errors in a Trial Chamber's exercise of its discretion",[142] the Appeals Chamber has established that:

> [I]t will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[143] [Footnotes omitted.]

101. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of

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[141] *Lubanga* Appeal Judgment, para 20. *See also* *Ngudjolo* Appeal Judgment, para. 21.
[142] *Ngudjolo* Appeal Judgment, para. 21.
[143] *Kenyatta* OA5 Judgment, para. 22. *See also* *Kony et al.* OA3 Judgment, paras 79-80; *Ruto et al.* OA Judgment, paras 89-90; *Lubanga* Sentencing Appeal Judgment, para. 41.

fact as set out above.[144] Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

> Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[145] [Footnotes omitted.]

102. The Appeals Chamber recalls that article 74 (5) of the Statute requires the Trial Chamber to provide "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". If a decision under article 74 (5) of the Statute does not, or not completely, comply with this requirement, this amounts to a procedural error. In the view of the Appeals Chamber, this provision recognises the importance of reasoning in allowing the accused person to usefully exercise available rights of appeal. The Appeals Chamber has already recalled that it requires to "indicate with sufficient clarity the grounds on which they based their decision".[146] The provision of reasons also enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision has been taken and thereby properly exercise its appellate functions.

103. The Appeals Chamber has previously outlined its considerations regarding the requirement of a reasoned decision in the following terms:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[147]

104. The Appeals Chamber considers that these considerations apply, in principle, also to decisions on the guilt or innocence of the accused under article 74 of the Statute. It must be clear from the Trial Chamber's decision which facts it found to

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[144] *Kenyatta* OA5 Judgment, paras 23-24.
[145] *Kenyatta* OA5 Judgment, para. 25
[146] *Lubanga* OA5 Judgment, para. 20, quoting *Hadjianastassiou v. Greece*, para. 33.
[147] *Lubanga* OA5 Judgment, para. 20.

have been established beyond reasonable doubt and how it assessed the evidence to reach these factual findings.

105. As already held by this Appeals Chamber and the Appeals Chamber of the ICTY, to fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision.[148] The Appeals Chamber also finds that, as enunciated by other international courts, it is to be presumed that the Trial Chamber evaluated all the evidence before it, "as long as there is no indication that [it] completely disregarded any particular piece of evidence".[149] This presumption may be rebutted "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[150] As explained in detail below,[151] in the legal framework of the Court, evidence is properly before a trial chamber when it has been "submitted" and "discussed" at trial and has not been otherwise excluded by the trial chamber as irrelevant or inadmissible.

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[148] *See*, with respect to appeals filed under rules 154 and 155 of the Rules, *Lubanga* OA5 Judgment, para. 20; *Bemba et al.* OA4 Judgment, para. 116.

[149] *Halilović* Appeal Judgment, paras 121, 188. *See Delalić et al.* Appeal Judgment, para. 498; *Kvočka et al.* Appeal Judgment, para. 23; *Kalimanzira* Appeal Judgment, para. 195; *Simba* Appeal Judgment, para. 152; *Nuon Chea and Khieu Samphân* Appeal Judgment, para. 304.

[150] *Kvočka et al.* Appeal Judgment, para. 23, which states with regard to the acused's right to a reasoned opinion that "the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. If 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. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement" (footnotes omitted). *See also Kalimanzira* Appeal Judgment, para. 195.

[151] *See infra* paras 572-601.

106. The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74 (5) of the Statute. When determining whether there was a breach of article 74 (5) of the Statute, the Appeals Chamber will assess whether there was reasoning in support of a given factual finding. If particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed. It is important to underline that whether the Trial Chamber's reasoning was *convincing* or whether a reasonable Trial Chamber could have reached the factual finding in question is *not* relevant to the determination of whether there was a breach of article 74 (5) of the Statute.

107. If the Trial Chamber's reasoning in relation to a given factual finding does not conform with the principles set out in the preceding paragraphs, this may amount to a procedural error, as the Trial Chamber's conviction would, in respect of that particular finding, not comply with the requirement in article 74 (5) of the Statute. Such an error has a material effect in terms of article 83 (2) of the Statute because it inhibits the parties from properly mounting an appeal in relation to the factual finding in question and the Appeals Chamber from exercising its appellate review of it.

108. The appropriate remedy in such a case will depend on the circumstances, in particular the extent of insufficient or lacking reasoning. In particular in cases where the lack of reasoning is extensive, the Appeals Chamber may decide to order a new trial before a different Trial Chamber.[152] Alternatively, it may be appropriate to remand the factual finding to the original Trial Chamber with the instruction to properly set out its reasoning in support of it and report back to the Appeals Chamber.[153] Particularly if the original Trial Chamber is no longer available, the Appeals Chamber may also decide to determine *de novo* the factual question at hand, analysing the relevant evidence that was before the Trial Chamber.[154] If the Appeals Chamber's assessment of this evidence leads it to adopt the same factual finding as

[152] *See* article 83 (2) (b) of the Statute.
[153] *See* article 83 (2), second sentence, of the Statute.
[154] *See e.g. Perišić* Appeal Judgment, para. 96; *Kordić and Čerkez* Appeal Judgment, paras 386-387; *Gotovina and Markač* Appeal Judgment, para. 64.

that adopted by the Trial Chamber, the Appeals Chamber will confirm the impugned decision in relation to the factual finding despite the insufficient or lacking reasoning. If, however, the Appeals Chamber, based on its own assessment of the evidence, reaches a factual finding that is different from the one of the Trial Chamber, the Appeals Chamber will consider the impact, if any, of this new factual finding on the finding as to the guilt or innocence of the accused person.

D. Substantiation of arguments

109. Regulation 58 (3) of the Regulations of the Court requires the appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue. It also stipulates that the appellant must identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number. Failure to observe these formal requirements may result in an argument being dismissed *in limine*.

110. The Appeals Chamber has previously held that, in order to substantiate an argument, "the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance".[155] The Appeals Chamber has found:

> Whether an error or the material effect of that error has been sufficiently substantiated will depend on the specific argument raised, including the type of error alleged. With respect to legal errors, the Appeals Chamber, as set out above, 'will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law'. Accordingly, the appellant has to substantiate that the Trial Chamber's interpretation of the law was incorrect; […] this may be done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error.[156] [Footnotes omitted.]

111. In alleging factual errors, the appellant must "set out in particular why the Trial Chamber's findings were unreasonable. In that respect, repetitions of submissions

[155] *Lubanga* Appeal Judgment, para. 30 (footnotes omitted).
[156] *Lubanga* Appeal Judgment, para. 31.

made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence".[157]

V. GROUNDS OF APPEAL ON THE CHARGES

112. Mr Bemba submits that the Trial Chamber erred in relying on a vague and improperly pleaded common plan.[158] Mr Bemba and Mr Mangenda argue that the Trial Chamber's reformulation of the common plan exceeded the scope of the confirmed charges and that the Trial Chamber erred by relying on matters related to the merits of the Main Case.[159] Mr Bemba avers further that the Trial Chamber erred in applying a "standard of knowledge" not set out in the charges and in relying on Mr Bemba's conduct in connection with witness D-19 and potential witness Bravo, even though he was not charged with offences in respect of these witnesses.[160]

113. Mr Arido submits that the Pre-Trial Chamber acted *ultra vires* with respect to the mode of liability of direct perpetration under article 25 (3) (a) of the Statute by confirming a mode of liability that had not been part of the charges on which the Prosecutor had sought a trial against him.[161] Mr Arido avers further that the Trial Chamber erred by not ordering an updated document containing the charges, and that this would have been necessary because the Confirmation Decision confirmed charges on the basis of a mode of liability not identified in the Document Containing the Charges.[162] He also argues that the Trial Chamber erred by misrepresenting his objections to lack of notice.[163]

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[157] *Lubanga* Appeal Judgment, para. 33. *See also* *Ngudjolo* Appeal Judgment, para. 205 ("The Appeals Chamber finds that, at best, the Prosecutor is putting forward a possible alternative interpretation of the evidence, but she has failed to establish any error on the part of the Trial Chamber that would render the Chamber's approach unreasonable. Accordingly, the Prosecutor's arguments are rejected."). *Lubanga* Appeal Judgment, para. 30, fn. 27, referring to *Kony et al.* OA3 Judgment, para. 48, which reads, in relevant part: "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".
[158] Mr Bemba's Appeal Brief, paras 57-73.
[159] Mr Bemba's Appeal Brief, paras 74-88; Mr Mangenda's Appeal Brief, paras 127, 130, 135-145.
[160] Mr Bemba's Appeal Brief, paras 74, 89-92.
[161] Mr Arido's Appeal Brief, paras 7-23, 60-69.
[162] Mr Arido's Appeal Brief, paras 31, 44.
[163] Mr Arido's Appeal Brief, paras 51-58.

114. The Appeals Chamber will address the issues raised by Mr Bemba, Mr Mangenda and Mr Arido in turn.

A. Alleged error in relying on a vague common plan and by reformulating the common plan

1. Relevant background and part of the Conviction Decision

115. In the Document Containing the Charges, the Prosecutor alleged that Mr Kilolo, Mr Mangenda, Mr Babala, and Mr Arido committed the charged offences pursuant to a common plan to "defend [Mr Bemba] against charges of crimes against humanity and war crimes in the *Bemba* case by means which included the commission of offences against the administration of justice in violation of Article 70 of the Statute".[164] The Prosecutor alleged a series of actions performed by the suspects that demonstrated their essential contribution to the commission of the article 70 offences pursuant to the common plan.[165]

116. In the Confirmation Decision, the Pre-Trial Chamber considered that the suspects' role in the "purported overall strategy" was that "of defending Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice", which differed for each suspect.[166] It found that "while Mr Bemba, Mr Kilolo and Mr Mangenda played an essential role in the design and implementation of the overall strategy […], the involvement of Mr Babala and Mr Arido [was] more limited".[167] The Pre-Trial Chamber confirmed the relevant charges against Mr Bemba for the commission, as a co-perpetrator under article 25 (3) (a) of the Statute, "together with Mr Kilolo and Mr Mangenda", of the offence, pursuant to article 70 (1) (c) of the Statute, of "corruptly influencing witnesses […]", and the offence, pursuant to article 70 (1) (b) of the Statute, of "presenting false evidence with regard to witnesses […] by way of planning and coordinating with the other suspects the perpetration of th[ese] offence[s]".[168]

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[164] Document Containing the Charges, paras 20, 110-111.
[165] Document Containing the Charges, paras 112-117.
[166] Confirmation Decision, para. 52.
[167] Confirmation Decision, para. 52.
[168] Confirmation Decision, para. 106, pp. 47, 48,

117. In the Trial Brief, the Prosecutor described the plan pursuant to which the five accused acted in concert with each other and other persons between the end of 2011 and 14 November 2013, as that of "defend[ing] [Mr Bemba] against charges of crimes against humanity and war crimes in the Main Case by means which included the commission of offences against the administration of justice in violation of article 70 of the Statute".[169] The Prosecutor referred to this plan as the "overall strategy".[170] She described the roles of the accused in the implementation of the "overall strategy" as follows:

> **BEMBA** directed the implementation of the Overall Strategy from the ICC Detention Centre, circumventing the Registry's monitoring system to issue instructions to **KILOLO**, **MANGENDA**, and **BABALA** necessary to carry it out. **KILOLO** bribed witnesses, scripted their evidence and presented their false evidence in court. **MANGENDA** planned these offences with **KILOLO** and assisted in their execution. He relayed necessary instructions and information between **BEMBA** and **KILOLO**. **BABALA, BEMBA**'s long-time confidant, ensured that the money necessary for the overall strategy was made available. On **BEMBA**'s authorisation and instruction, **BABALA** bribed witnesses, and provided the funds for **KILOLO** and others to do so. **ARIDO** recruited false witnesses to testify and corruptly influenced witnesses.[171]
>
> **BEMBA**, **KILOLO**, and **MANGENDA** played an essential role in the design and implementation of the Overall Strategy. **BABALA,** in furtherance of the Overall Strategy, assisted in handling the financial aspects of corruptly influencing witnesses in the Main Case. **ARIDO**'s involvement in the Overall Strategy consisted in his personal recruitment and corrupt influencing of witnesses, who subsequently falsely testified in the Main Case.[172]

118. In the Conviction Decision, the Trial Chamber noted that the Prosecutor, in her closing statements at trial, had failed to clearly describe what she considered to be the common plan between Mr Bemba, Mr Kilolo, and Mr Mangenda, "for the purposes of assessing their responsibility under Article 25(3)(a) of the Statute".[173] However, it was satisfied that, based on the evidence, "Mr Bemba, Mr Kilolo and Mr Mangenda jointly committed the offences of corruptly influencing the 14 witnesses and presenting false evidence as part of an agreement or common plan".[174] The Trial

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[169] Trial Brief, para. 17. *See also* para. 1.
[170] Trial Brief, para. 17. *See also* para. 1.
[171] Trial Brief, para. 2.
[172] Trial Brief, para. 18.
[173] Conviction Decision, para. 681.
[174] Conviction Decision, para. 681.

Chamber was convinced that Mr Bemba, Mr Kilolo, and Mr Mangenda "agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour" and, "[m]ore precisely", that they "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".[175]

119. The Trial Chamber inferred the existence of the common plan between the co-perpetrators from the concerted actions of Mr Bemba, Mr Kilolo and Mr Mangenda, which also involved Mr Babala and Mr Arido, "and other third persons".[176] The Trial Chamber indicated that the actions performed by Mr Babala and Mr Arido were taken into account only to allow a full and comprehensive assessment of the actions of the three co-perpetrators.[177] In order to establish "the existence of an agreement among the three co-perpetrators", the Trial Chamber relied on evidence that demonstrated Mr Bemba's and his co-perpetrators' conduct as follows:

> (i) planning of acts; (ii) payments and non-monetary promises to witnesses; (iii) illicitly coaching witnesses either over the telephone or in person, including to testify falsely; (iv) taking (other) measures to conceal the implementation of the plan, such as the use of coded language, destruction of evidence, concealing of illicit coaching activities from other members of the Main Case Defence and circumvention of the Registry's monitoring system at the Detention Centre, through the abuse of the Registry's privileged line; and finally, (v) the co-perpetrators' remedial measures after learning that they were being investigated.[178] [Footnote omitted.]

120. In the view of the Trial Chamber, the "acts of corruptly influencing the 14 witnesses in the Main Case were […] the result of a carefully planned and deliberate strategy".[179] The Trial Chamber considered Mr Bemba's position as the "ultimate and main beneficiary" of the implementation of the common plan[180] and based his conviction on his contributions to the common plan by way of "planning, authorising and instructing the activities relating to the corrupt influencing of

[175] Conviction Decision, para. 681.
[176] Conviction Decision, para. 682.
[177] Conviction Decision, para. 682.
[178] Conviction Decision, para. 683.
[179] Conviction Decision, para. 684.
[180] Conviction Decision, paras 106, 727, 805.

witnesses and their resulting false testimonies",[181] including his contribution to the measures taken to conceal the implementation of the common plan[182] and the remedial measures taken after learning about the initiation of an investigation.[183]

121. The Appeals Chamber recalls that Mr Bemba was convicted: (i) for the offences of having corruptly influenced defence witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, and having presented their false evidence as co-perpetrator pursuant to article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute;[184] and (ii) of having solicited the giving of false evidence by these 14 witnesses under article 70 (1) (a), in conjunction with article 25 (3) (b) of the Statute.[185] Mr Mangenda was convicted: (i) as co-perpetrator for the offences of having corruptly influenced 14 witnesses and having presented their false evidence, pursuant to article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute;[186] and (ii) of having aided in the giving of false testimony by witnesses D-15 and D-54, and having abetted in the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29 under article 70 (1) (a), in conjunction with article 25 (3) (c) of the Statute.[187]

2. Submissions of the parties

(a) Mr Bemba

122. Mr Bemba argues that the Trial Chamber erred in "[c]onvicting [him] on unacceptably vague charges that did not specify the common plan's element of criminality, and [his] contributions with sufficient precision".[188] More specifically, Mr Bemba submits that the description, at paragraph 20 of the Document Containing the Charges,[189] of the common plan as only "includ[ing]" the commission of offences pursuant to article 70 of the Statute fails to make a "distinction between licit and illicit conduct, as required by the 'element of criminality requirement'".[190] Referring to the

[181] Conviction Decision, para. 806. *See also* paras 808-813, 816-818.
[182] Conviction Decision, paras 814-815, 819.
[183] Conviction Decision, para. 820.
[184] Conviction Decision, p. 455.
[185] Conviction Decision, p. 455.
[186] Conviction Decision, pp. 455-456.
[187] Conviction Decision, p. 456.
[188] Mr Bemba's Appeal Brief, para. 58. *See also* para. 66.
[189] Mr Bemba's Appeal Brief, para. 60.
[190] Mr Bemba's Appeal Brief, para. 61.

Ruto and Sang and the *Katanga and Ngudjolo* cases, Mr Bemba avers that the term "included" does not define the charges with sufficient precision because it fails to indicate how the "act of defending Mr. Bemba related to the charged offences", in particular whether the commission of offences was a necessary element of Mr Bemba's defence or was merely "one of a plethora of strategies that was adopted".[191] He claims that as a result of this ambiguous wording he could not ascertain whether his contributions to the common plan "amounted to intentional contributions to the realisation of illicit conduct".[192] Mr Bemba maintains that the "charges" failed to "identify and demarcate the facts and circumstances underlying Mr. Bemba's individual responsibility for each of the charged offences".[193]

123. Mr Bemba asserts that his contributions to particular offences "were never pleaded" and the charges did not include "key information concerning dates".[194] He alleges that the Prosecutor's Trial Brief did not remedy the defects in the charges as the common plan was formulated in the same vague manner and it contained no information either as to the date on which the common plan was formulated or when Mr Bemba became part of it.[195] Mr Bemba further alleges that the Trial Brief did not specify his contributions to the critical elements of the plan and the dates of such contributions with respect to each witness.[196] He argues that the "ambiguities concerning the nature and scope of the common plan were never resolved at trial".[197] Mr Bemba avers that by conceding, in the Conviction Decision, that the Prosecutor had not provided a clear definition of the alleged common plan, the Trial Chamber "affirmed that the common plan was never clearly pleaded before, or during trial".[198]

124. Mr Bemba avers that, in addressing this defect by reformulating the common plan to the effect that he agreed to "illicitly interfere with defence witnesses in order

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[191] Mr Bemba's Appeal Brief, paras 64-65, referring to Trial Chamber V, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Decision on the content of the updated document containing the charges", 28 December 2012, ICC-01/09-01/11-522, paras 32-33; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document", 25 June 2008, ICC-01/04-01/07-648, paras 33-34.
[192] Mr Bemba's Appeal Brief, para. 64.
[193] Mr Bemba's Appeal Brief, para. 61. *See also* para. 60, referring to Document Containing the Charges, para. 20.
[194] Mr Bemba's Appeal Brief, para. 61.
[195] Mr Bemba's Appeal Brief, para. 70.
[196] Mr Bemba's Appeal Brief, para. 70.
[197] Mr Bemba's Appeal Brief, para. 72.
[198] Mr Bemba's Appeal Brief, paras 72-73, referring to Conviction Decision, para. 681.

to ensure that these witnesses would provide evidence in favour of Mr Bemba",[199] the Trial Chamber exceeded the facts and circumstances described in the charges and violated article 74 (2) of the Statute.[200] In his view, this reformulation changed the focus of the "agreement from defending Mr. Bemba, to agreeing jointly to 'illicitly interfere' with Defence witnesses".[201] Mr Bemba avers that the Trial Chamber materially changed the scope and basis of the charges to convict him in connection with the offence of illicitly interfering with the collection of evidence, which is a different and separate offence under article 70 (1) (c) of the Statute that was not charged and, even more, had been "deliberately excluded by the Pre-Trial Chamber" from the charges.[202] He avers that, as the charges are crystallised by the Pre-Trial Chamber, the Trial Chamber erred in law in convicting him "on the basis of a common plan, predicated on an excluded offence".[203]

125. Mr Bemba argues further that the Trial Chamber failed to "delimit the scope of 'illicit interference'" – as a means to obtain "evidence in favour of Mr Bemba" – which "included a range of licit conduct"[204] "directed to the lawful objective of being defended".[205] According to Mr Bemba, he was convicted "for conduct directed to securing evidence in [his] favour" – based, *inter alia*, on payments made to witnesses to ensure that they will testify in his favour which, he submits, is not illicit *per se* – rather than for the charges as confirmed which concerned conduct directed at securing false testimony in his support.[206] He claims that because the Trial Chamber did not "differentiate between Defence efforts that were directed towards obtaining false, as opposed to truthful evidence in favour of Mr. Bemba", the common plan as reformulated by the Trial Chamber has the same defect as the plan pleaded by the Prosecutor, that is, it has "an insufficient element of criminality".[207] Mr Bemba maintains that this error affects the Trial Chamber's findings on his criminal

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[199] Mr Bemba's Appeal Brief, para. 75, quoting Conviction Decision, para. 103.
[200] Mr Bemba's Appeal Brief, paras 74-76, 88.
[201] Mr Bemba's Appeal Brief, para. 76.
[202] Mr Bemba's Appeal Brief, para. 77, referring to Confirmation Decision, paras 17-18.
[203] Mr Bemba's Appeal Brief, para. 78.
[204] Mr Bemba's Appeal Brief, para. 79.
[205] Mr Bemba's Appeal Brief, para. 80. *See also* para. 79.
[206] Mr Bemba's Appeal Brief, para. 81, referring to Conviction Decision, paras 253-254, 280-281, 293, 298, 305, 439, 444, 453, 526, 535, 543, 651, 700, 816.
[207] Mr Bemba's Appeal Brief, para. 82.

responsibility as they rest "on contributions directed towards obtaining favourable evidence".[208]

(b) Mr Mangenda

126. Mr Mangenda contends that "the purpose of the criminal plan through which a person is alleged to commit a crime falls within the scope of the 'nature, cause and content of the charge[s]'" of which an accused person must be informed in detail in accordance with article 67 (1) (a) of the Statute, and that failure to articulate "this purpose" at the commencement of the trial amounts to "a defect in the indictment".[209] Arguing that the Trial Chamber suggested, during the closing arguments, that the "articulation of the common criminal plan had, up to that point, been deficient", and that, in the Conviction Decision, it "propounded, for the first time, its own definition of the common criminal plan", Mr Mangenda submits that his right under article 67 (1) of the Statute had been violated.[210] According to Mr Mangenda, the appropriate remedy is to quash his convictions for presenting false testimony and corruptly influencing witnesses on the basis of participating in any common plan.[211]

(c) The Prosecutor

127. The Prosecutor responds that Mr Bemba's and Mr Mangenda's submissions that they were not properly informed of the nature and content of the charges in violation of article 67 (1) (a) should be dismissed as the Confirmation Decision and the Trial Brief, as an auxiliary document, provided them with detailed information on the nature, cause and content of the charges that both of them with Mr Kilolo shared an overall strategy of "defending Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice".[212] She argues that the Confirmation Decision found that Mr Bemba was the "ultimate beneficiary" of this strategy and provided details as to his contributions to

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[208] Mr Bemba's Appeal Brief, para. 82, referring to Conviction Decision, paras 123, 293, 305.
[209] Mr Mangenda's Appeal Brief, para. 144.
[210] Mr Mangenda's Appeal Brief, paras 143-145, referring to Conviction Decision, para. 681; Transcript of 31 May 2016, ICC-01/05-01/13-T-48-CONF-ENG (ET), p. 4, line 16 to p. 6, line 10.
[211] Mr Mangenda's Appeal Brief, paras 144-145.
[212] Response, paras 309, 311-312 quoting Confirmation Decision, paras 52, 419-422. The Prosecutor argues that the terms "overall strategy" and "common plan" were considered as synonymous for the purposes of the present case. *See* Response, fn. 1482.

the implementation of the strategy which resulted in the commission of the offences enumerated at paragraphs (b) and (c) of article 70 (1) of the Statute.[213]

128. The Prosecutor submits that 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", rather than alleging that "all of the co-perpetrators' activities to defend Bemba were illegitimate".[214] The Prosecutor avers that the formulation of the common plan where the "co-perpetrators agreed that they would, among other things, resort to committing offences against the administration of justice" when defending Mr Bemba against the charges in the Main Case "specifies how the criminal element of the Common Plan relates to the objective of defending Bemba".[215] According to the Prosecutor, the common plan was formulated in a clear and precise manner.[216] She argues that Mr Bemba's references to the Court's jurisprudence is inapposite because, while the Chambers, in the referred cases, held that the Prosecutor should provide a clear statement of the facts "including the time and place of the alleged crimes", these holdings do not mean that the use of "inclusionary language" to describe the charges is always inappropriate or that it "cannot be used to distinguish the criminal component of a Common Plan from its non-criminal components".[217]

129. The Prosecutor argues further that the Confirmation Decision and the Trial Brief properly informed Mr Bemba that the common plan existed and was implemented between the end of 2011 and 14 November 2013, and "specified the nature of Bemba's contributions to the Common Plan and the fact that they occurred on precise dates within that time frame".[218]

130. With respect to Mr Bemba's and Mr Mangenda's submissions regarding the reformulation of the common plan, the Prosecutor argues that they should be

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[213] Response, para. 421.
[214] Response, para. 424 (emphasis in original omitted).
[215] Response, para. 425.
[216] Response, para. 425.
[217] Response, para. 426.
[218] Response, paras 427-428.

rejected.[219] She maintains that the common plan for which Mr Bemba and Mr Mangenda were convicted "is in substance identical" to the charged common plan confirmed by the Pre-Trial Chamber and described in the Trial Brief.[220] She argues that the Trial Chamber did not "reformulate" the common plan "but merely articulated it in slightly different words" without changing its focus on its criminal element, and therefore remained within the scope of the confirmed charges.[221] The Prosecutor avers that when articulating the common plan, the Trial Chamber made clear that its reference to 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".[222] The Prosecutor adds that the Trial Chamber's formulation of the common plan did not refer to a different offence for which Mr Bemba was not charged or convicted.[223] The Prosecutor avers further that the Trial Chamber's finding on Mr Bemba's approval of illicit payments to witnesses with the knowledge that "the purpose of such payments was to ensure the witness' testimony in his favour" does not show that the Trial Chamber "confused the criminal element of the Common Plan with potentially legitimate defence strategies".[224]

3. Determination by the Appeals Chamber

131. The Appeals Chamber recalls that the Court's statutory regime provides for the accused's right to be informed of the charges against him or her.[225] Article 67 (1) (a) and (b) of the Statute states that an accused is entitled to be "informed promptly and in detail of the nature, cause and content of the charge" and "to have adequate time and facilities for the preparation of the defence".

132. The Appeals Chamber notes that in order to determine if an accused person committed a crime under the jurisdiction of the Court "jointly with another […] person", the following elements of this mode of liability must be established:

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[219] Response, paras 309, 429.
[220] Response, paras 313-314, 429 (emphasis in original omitted).
[221] Response, paras 429-430. *See also* para. 314.
[222] Response, para. 431.
[223] Response, para. 431.
[224] Response, para. 432.
[225] *See* *Lubanga* Appeal Judgment, para. 118; article 61 (3) (a) of the Statute; rule 121 (3) of the Rules; regulation 52 (b) of the Regulations.

> [T]wo or more individuals worked together in the commission of the crime. This requires an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court. It is this very agreement – express or implied, previously arranged or materialising extemporaneously – that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts. This agreement may take the form of a 'common plan'.[226] [Footnotes omitted.]

133. With regard to the furtherance of the common plan, the Appeals Chamber has held that the common plan need not be "specifically directed at the commission of a crime" as it is "sufficient for the common plan to involve 'a critical element of criminality'".[227] The Appeals Chamber has also held that, in order to provide notice to the accused to allow the preparation of an effective defence, where the accused is charged of committing offences under article 25 (3) (a) of the Statute "jointly with another […] person", the accused must be provided with the following factual allegations: "(i) […] the contours of the common plan and its implementation as well as the accused's contribution[;] (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators".[228]

134. The Appeals Chamber is not persuaded by Mr Bemba's and Mr Mangenda's arguments that the purpose of the common plan in the present case, as pleaded by the Prosecutor in the Document Containing the Charges and confirmed by the Pre-Trial Chamber in the Confirmation Decision, was vague and failed to distinguish between licit and illicit conduct, thereby violating their right to be informed of the charges against them. The Appeals Chamber finds that the Prosecutor's use of the term "included" when describing the common plan is consistent with the finding of the Appeals Chamber that recognises that it is "sufficient for the common plan to involve 'a critical element of criminality'".[229] The Appeals Chamber emphasises that it is this critical element of criminality in the common plan that matters for the purpose of ascertaining co-perpetration of the offence and that must therefore be properly articulated by the Prosecutor.

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[226] *Lubanga* Appeal Judgment, para. 445.
[227] *Lubanga* Appeal Judgment, para. 446.
[228] *Lubanga* Appeal Judgment, para. 123.
[229] *Lubanga* Appeal Judgment, para. 446, quoting with approval *Lubanga* Conviction Decision, para. 984.

135. In the present case, the Appeals Chamber considers that the Document Containing the Charges provided Mr Bemba and Mr Mangenda with sufficiently detailed information regarding the allegation that there was an agreement between Mr Bemba, Mr Mangenda and Mr Kilolo to commit offences under article 70 (1) (b) and (c) of the Statute – the critical element of criminality of the common plan. Indeed, they were informed of the alleged conduct that led to the implementation of the common plan[230] and the acts performed by Mr Bemba and Mr Mangenda that allegedly amounted to their essential contributions.[231] The Appeals Chamber observes that the Document Containing the Charges alleged that Mr Bemba led the implementation of the common plan by orchestrating and directing his co-perpetrators' activities and instructing and/or authorising actions carried out by them;[232] Mr Mangenda furthered the common plan by relaying "instructions, directions, and other information" to Mr Bemba and Mr Kilolo that was necessary for its implementation; he planned the illicit coaching of witnesses, assisted and advised Mr Kilolo in such activities, and provided logistical support to Mr Kilolo for more effective illicit coaching of witnesses.[233]

136. The Pre-Trial Chamber confirmed these allegations in the Confirmation Decision and referred to an "overall strategy" rather than a "common plan".[234] The Appeals Chamber observes that the use of the term "overall strategy" may appear ambiguous since "common plan" has become a term of art in relation to the mode of liability of co-perpetration. In this respect, the Appeals Chamber notes that the term "common plan" is used to refer to the agreement among the co-perpetrators that "justifies reciprocal imputation of their respective acts".[235] However, the Appeals Chamber considers that the term "overall strategy" used by the Pre-Trial Chamber had a similar meaning to the term "common plan", which the Pre-Trial Chamber found to exist between the co-perpetrators. The Pre-Trial Chamber clarified that the means of participation in the "purported overall strategy" differed for each suspect.[236] It found

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[230] Document Containing the Charges, paras 23, 25.
[231] Document Containing the Charges, paras 111, 113, 115.
[232] Document Containing the Charges, para. 23.
[233] Document Containing the Charges, para. 25.
[234] Confirmation Decision, para. 52.
[235] *Lubanga* Appeal Judgment, para. 445.
[236] Confirmation Decision, para. 52.

that "Mr Bemba, Mr Kilolo and Mr Mangenda played an essential role in the design and implementation of the overall strategy", where Mr Bemba was "the ultimate beneficiary of the overall strategy to defend him in the Main Case" and his role was to plan and coordinate "all the activities" that concerned "the corruption of the Witnesses and their ensuing false testimonies".[237] This included discussing the content of the witnesses' testimony with Mr Kilolo, giving specific instructions regarding the content of the testimony to be presented, instructing Mr Babala on the money transfers to be made, including to other suspects, directing Mr Kilolo to liaise with Mr Babala regarding the money transfers and raising the issue of the warrant of arrest against Walter Barasa in a conversation with Mr Mangenda.[238] With respect to Mr Mangenda, the Pre-Trial Chamber found that, as the liaison person between Mr Bemba and Mr Kilolo, he coordinated with them the transfers of money that were made or needed to be made to the witnesses and discussed with both of them the instructions to witnesses before their testimony.[239] It therefore considered that there were substantial grounds to believe that he was criminally liable as a co-perpetrator for intentionally corruptly influencing the witnesses and presenting false evidence.[240] In light of these findings, the Appeals Chamber considers that Mr Bemba and Mr Mangenda were sufficiently put on notice as to the conduct that demonstrated their essential contributions to the implementation of the common plan to commit offences against the administration of justice.

137. Moreover, the Appeals Chamber finds no merit in Mr Bemba's submission that he was convicted on the basis of licit conduct – payments made to witnesses – in order to obtain evidence in his favour. The Trial Chamber did not convict Mr Bemba for licit conduct in the preparation of his defence. The Trial Chamber specifically found that certain payments made to witnesses, such as reimbursement for travel cost, were considered legitimate payments.[241] It convicted Mr Bemba for offences under article 70 of the Statute,[242] based on the repeated pattern of witness payments forming

[237] Confirmation Decision, paras 52, 97, 105.
[238] *See* Confirmation Decision, para. 102.
[239] Confirmation Decision, paras 73, 75.
[240] Confirmation Decision, para. 76.
[241] *See e.g.* Conviction Decision, para. 288.
[242] Conviction Decision, paras 684-688.

a deliberate approach on his part to influence the testimony of the witnesses,[243] the illicit coaching of witnesses contrary to the administration of justice,[244] the measures taken to conceal the implementation of the common plan,[245] and the remedial measures taken after learning about the initiation of an investigation against him and his co-perpetrators.[246] The Trial Chamber found that these acts corruptly influenced the 14 witnesses in the Main Case and "were […] the result of a carefully planned and deliberate strategy" to obstruct the good administration of justice.[247]

138. With respect to Mr Bemba's contention that key information concerning the dates of his contributions were not pleaded in the charges, the Appeals Chamber notes that the Confirmation Decision indicates that the charged offences were all committed between the "end of 2011 and 14 November 2013".[248] The Pre-Trial Chamber confirmed factual findings in relation to Mr Bemba's actual conduct amounting to contribution to the common plan, *inter alia*, that Mr Bemba discussed with Mr Kilolo the content of the testimonies by giving specific instructions as to their content;[249] that he further instructed Mr Babala to transfer money to witnesses and suspects, including directing Mr Kilolo to liaise with Mr Babala in respect of transfers of money;[250] and that he raised the issue of the warrant of arrest against Walter Barasa with Mr Mangenda.[251] The Appeals Chamber notes that dates relevant to the specific charged instances involving the conduct of the co-perpetrators pursuant to the common plan concerning the 14 witnesses were included in the the Confirmation Decision[252] – as well as in the Trial Brief[253] – and provided Mr Bemba with sufficient information concerning the dates of his contributions to the offences for which he was charged.

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[243] Conviction Decision, para. 702. *See also* para. 700 where the Trial Chamber concluded on the basis of an overall assessment of the evidence that "Mr Bemba knew that at least some of the payments he discussed and authorised over the phone served also illegitimate purposes". *See further* paras 689-703.
[244] Conviction Decision, paras 704, 727-734.
[245] Conviction Decision, paras 735-769.
[246] Conviction Decision, paras 770, 773, 787, 801.
[247] Conviction Decision, paras 684, 802-803.
[248] Confirmation Decision, p. 47.
[249] Confirmation Decision, paras 102, 104.
[250] Confirmation Decision, paras 102-104.
[251] Confirmation Decision, para. 102.
[252] *See e.g.* Confirmation Decision, paras 53-57, 74 (witnesses D-2, D-3, D-4, D-6), 58 (witnesses D-55, D-57, D-64), 63 (witnesses D-15, D-26, D-54, D-55), 68 (witness D-54), 99 (witness D-55), 100 (witnesses D-51, D-19), 101 (witness D-19), 102, 104.
[253] *See e.g.* Trial Brief, paras 67, 69, 75, 77-81 (witness D-15), 83-106 (witness D-54), 107-116 (witness D-26), 138, 142 (witness D-3), 148-154 (witness D-2), 156-163 (witness D-6), 166 (witness

139. Having found that Mr Bemba and Mr Mangenda were provided with sufficiently detailed information regarding the common plan to commit offences under article 70 of the Statute and their essential contributions to the implementation of the common plan, the Appeals Chamber now turns to the issue of whether the Trial Chamber's purported reformulation of the common plan exceeded the scope of the facts and circumstances described in the confirmed charges, in violation of article 74 (2) of the Statute.

140. The Appeals Chamber finds no merit in Mr Bemba's assertion that the Trial Chamber shifted the focus of the agreement from defending Mr Bemba to an agreement to illicitly interfere with defence witnesses. The Appeals Chamber recalls that the Trial Chamber convicted him for having corruptly influenced 14 defence witnesses, and having presented their false evidence under article 70 (1) (b) and (c) of the Statute.[254] The Appeals Chamber notes that, while article 70 (1) (c) contains the term "interfering" in relation to the attendance or testimony of a witness, there is no offence of "illicitly interfering with a witness" under this provision.[255] The Trial Chamber stated that Mr Bemba, Mr Kilolo and Mr Mangenda "agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour".[256] This statement merely summarised the Trial Chamber's findings on the agreement between Mr Bemba, Mr Kilolo and Mr Mangenda "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".[257] The Trial Chamber relied on acts that were described in the Confirmation Decision and included in the Trial Brief to establish the existence of an agreement among Mr Bemba, Mr Kilolo and Mr Mangenda to commit offences under article 70.[258] Accordingly, the Appeals Chamber finds that the Trial Chamber's reformulation of the common plan

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D-4), 172, 174-176 (witness D-57), 178, 182-183 (witness D-64), 186-190, 192 (witness D-55), 196, 198-199 (witness D-29), 205, 207-211 (witness D-13), 213-218 (witness D-25).

[254] Conviction Decision, p. 455.

[255] Article 70 (1) (c) reads as follow: "Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving or destroying, tampering with or interfering with the collection of evidence".

[256] Conviction Decision, para. 681.

[257] Conviction Decision, para. 681.

[258] Conviction Decision, para. 683, referring to Trial Brief, para. 238. *See also* Confirmation Decision, paras 73, 75, 97-98, 102-105.

did not exceed the facts and circumstances described in the charges and therefore did not violate article 74 (2) of the Statute.

141. Based on the foregoing, the Appeals Chamber rejects Mr Bemba's arguments under sub-grounds 2.1 and 2.2 and Mr Mangenda's arguments related to the common plan under his sub-ground 2 (A).[259]

B. Alleged error regarding "standard of knowledge" not pleaded in the charges

1. Relevant background and part of the Conviction Decision

142. With respect to Mr Bemba's specific instructions regarding witness testimony on the merits of the Main Case, the Trial Chamber found that Mr Bemba intended "to motivate the witnesses to testify to certain information regardless of the truth or falsity of this information or whether or not it accorded with the witness's personal knowledge".[260] The Trial Chamber noted the lack of direct evidence that Mr Bemba had given directions and instructions regarding false testimony concerning "(i) the nature and number of prior contacts of the witnesses with the Main Case Defence, (ii) payments and material or non-monetary benefits received from or promised by the Main Case Defence, and/or (iii) acquaintances with other individuals".[261] However, it inferred, "on the basis of an overall assessment of the evidence", that "Mr Bemba at least implicitly knew about these instructions to the witnesses and expected Mr Kilolo to give them".[262]

2. Submissions of the parties

(a) Mr Bemba

143. Mr Bemba submits that the Trial Chamber convicted him on the basis of "[a] standard of knowledge […] which was never pleaded, or set out in the charges".[263] In particular, he alleges that the Trial Chamber "exceeded the scope of the charges by convicting [him] on the basis of 'implicit' rather than actual knowledge of illicit

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[259] Mr Mangenda's Appeal Brief, paras 143-145.
[260] Conviction Decision, para. 818.
[261] Conviction Decision, para. 818.
[262] Conviction Decision, para. 818.
[263] Mr Bemba's Appeal Brief, para. 74.

conduct".[264] He argues that, in the Document Containing the Charges presented by the Prosecutor to the Pre-Trial Chamber, "[t]he charges alleged that Mr. Bemba possessed actual knowledge",[265] while "the notion of implicit knowledge was never pleaded in the charges, nor referred to in the Confirmation Decision".[266] Mr Bemba avers that, therefore, it was impermissible for the Trial Chamber to "lower the threshold for intent" without giving him prior notice.[267]

(b) The Prosecutor

144. The Prosecutor responds that Mr Bemba's submissions misinterpret the Conviction Decision as he "knew and intended Kilolo to instruct witnesses to testify about certain information regardless of the truth or falsity of this information".[268]

3. Determination by the Appeals Chamber

145. The Appeals Chamber finds no merit in Mr Bemba's contention that "implicit knowledge" had to be pleaded in order for him to be properly informed of the charges against him. The Appeals Chamber notes that the Trial Chamber's use of the term "implicit" relates to its assessment of the evidence. As explained below, the Trial Chamber inferred Mr Bemba's knowledge from the evidence, but it did not refer to a different standard or lesser threshold of *mens rea* than that required by the Statute.[269] Therefore, the fact that the Trial Chamber qualified Mr Bemba's knowledge as "implicit" knowledge has no bearing on the issue of whether he was properly informed of the charges against him.

146. Accordingly, the Appeals Chamber rejects Mr Bemba's submissions in that regard.

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[264] Mr Bemba's Appeal Brief, para. 88, referring to Conviction Decision, para. 818.
[265] Mr Bemba's Appeal Brief, para. 88 (emphasis in original omitted), referring to Document Containing the Charges, paras 22, 118-120, 134-135, 146-147.
[266] Mr Bemba's Appeal Brief, para. 88.
[267] Mr Bemba's Appeal Brief, para. 88.
[268] Response, para. 436.
[269] *See infra* paras 834 *et seq.*

C. Alleged error regarding Mr Bemba's conduct in connection with witness D-19 and potential witness Bravo was not pleaded in the charges

1. Relevant background and part of the Conviction Decision

147. In the Document Containing the Charges, the Prosecutor cited, *inter alia*, to evidence concerning witness D-19 to support the allegation that Mr Bemba and Mr Kilolo "conspired to circumvent, and circumvented, the Detention Centre's monitoring system" in order for Mr Bemba to communicate with "witnesses", amongst other people.[270] These allegations appear in the context of demonstrating that the co-perpetrators communicated during the implementation of the Common Plan.[271] The accused were not charged with offences against the administration of justice in relation to witness D-19.[272]

148. In the Confirmation Decision, the Pre-Trial Chamber, under its section "[f]actual findings with regard to Mr Bemba",[273] considered three instances where "Mr Bemba, through Mr Kilolo, used the privileged line set up at the Court's detention centre to communicate with three of the Witnesses (D-55, D-51 and D-19)."[274] The Pre-Trial Chamber considered the evidence in relation to all three witnesses,[275] but only confirmed the charges in respect of witness D-55.[276] In relation to witness D-19, in particular, it considered evidence regarding calls on 13 January 2013 between Mr Bemba and Mr Kilolo, where the latter called witness D-19.[277] The Pre-Trial Chamber observed that:

> There is abundant evidence showing that, whilst by virtue of his detention Mr Bemba did not directly pay or coach the witnesses, he was at the origin of many

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[270] Document Containing the Charges, para. 30.
[271] Document Containing the Charges, paras 30-31.
[272] *See* Document Containing the Charges, paras 46-51 (witness D-15), paras 52-59 (witness D-54), paras 60-64 (witness D-26), paras 65-72 (witness D-3), paras 73-78 (witness D-2), paras 79-81 (witness D-4), paras 82-85 (witness D-29), paras 86-89 (witness D-25), paras 90-92 (witness D-57), paras 93-96 (witness D-64), paras 97-100 (witness D-55), paras 101-104 (witness D-23), paras 105-106 (witness D-6), paras 107-109 (witness D-13).
[273] Confirmation Decision, p. 43.
[274] Confirmation Decision, para. 98. *See also* paras 99-101.
[275] Confirmation Decision, paras 99-101.
[276] Document Containing the Charges, paras 97-100.
[277] Confirmation Decision, para. 101.

> of the acts committed by the other suspects and was systematically informed of the status of those acts and of their results.[278]

149. In the Conviction Decision, in explaining its factual findings relevant to co-perpetration, the Trial Chamber found, *inter alia*, that Mr Kilolo had "enable[d] a multi-party call between D-19 and Mr Bemba".[279] The Trial Chamber considered these factual findings to conclude that Mr Bemba abused the Registry's privileged line from the Detention Centre "allowing him (and his co-perpetrators) to communicate improperly for the purpose of implementing the common plan to corruptly influence witnesses" in the context of measures implemented to conceal the common plan.[280] On this basis, taken together with the remainder of the findings as to Mr Bemba's participation,[281] the Trial Chamber concluded that his contributions were "essential to the implementation of the common plan".[282] Thereafter, having examined his contributions as a whole, the Trial Chamber relied, *inter alia*, on his "deliberate and knowing abuse of his privileged line at the ICC Detention Centre" to "indicate his *mens rea* […] to bring about the material elements of the offences".[283]

150. Furtheremore, when determining Mr Kilolo's contribution to the "illicit coaching of witnesses contrary to the administration of justice",[284] the Trial Chamber considered evidence relating to the same conversation that concerned a potential witness named Bravo that showed Mr Kilolo's "reluctance to call witnesses unless he had briefed them extensively" showing close collaboration between the three co-perpetrators.[285] The Trial Chamber found that this "exchange between the co-perpetrators highlights the illicit coaching strategy",[286] demonstrating, *inter alia*, Mr Bemba's "knowledge and approval of the illicit coaching" and Mr Bemba's "ultimate control over who would be called to testify".[287]

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[278] Confirmation Decision, para. 102.
[279] Conviction Decision, para. 741.
[280] Conviction Decision, para. 814.
[281] *See* Conviction Decision, paras 808-815. *See also* paras 816-818.
[282] Conviction Decision, para. 816.
[283] Conviction Decision, para. 817.
[284] *See* Conviction Decision, paras 705-716, p. 336.
[285] Conviction Decision, para. 715.
[286] Conviction Decision, para. 715.
[287] Conviction Decision, para. 715.

151. In relation to solicitation, the Trial Chamber found that Mr Bemba had "exerted direct influence on D-19 and D-55".[288] The Trial Chamber noted that, whilst "no direct evidence" existed that Mr Bemba had "urged or asked these witnesses about the specifics of their testimony" it was convinced, based on an "assess[ment] [of] the evidence as a whole", that he had urged witnesses D-19 and D-55 to "cooperate and follow the instructions given by Mr Kilolo".[289] In its legal characterisation of its findings in relation to solicitation of offences under article 70 (1) (a) of the Statute, the Trial Chamber recalled that Mr Bemba had "asked for or urged conduct with the […] consequence of prompting each of the 14 Main Case defence witnesses to provide false testimony" "through Mr Kilolo and Mr Mangenda".[290]

2. Submissions of the parties

(a) Mr Bemba

152. Mr Bemba submits that the Trial Chamber erred in convicting him "in connection with conduct directed towards D-19",[291] who was not called as a witness in this case and was not "designated as falling within the scope of the charges".[292] Mr Bemba avers that the parameters of the charges concerned 14 specific witnesses, whereas no allegations were made regarding the content of alleged calls between Mr Bemba and witness D-19 or the fact that witness D-19 testified falsely.[293] Mr Bemba claims further that the Trial Chamber, by finding that he exercised direct and personal influence on the testimony of witness D-19, impermissibly expanded the charges as it contradicted the Pre-Trial Chamber's finding that he "did not directly pay or coach witnesses".[294] Mr Bemba argues that the Trial Chamber's findings on his knowledge and approval of illicit coaching rested on a conversation between Mr

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[288] Conviction Decision, para. 856.
[289] Conviction Decision, para. 856.
[290] Conviction Decision, para. 932.
[291] The Appeals Chamber notes that Mr Bemba argues generally that the Trial Chamber erred in convicting him for "[k]ey incidents concerning witnesses (D-19, Bravo), which were not charged" (Mr Bemba's Appeal Brief, para. 74). However, Mr Bemba presents arguments only in relation to witness D-19. See Mr Bemba's Appeal Brief, paras 89-91.
[292] Mr Bemba's Appeal Brief, paras 89-91. In paragraph 90 of his appeal brief, Mr Bemba refers to the Sentencing Decision, paras 220, 222, 236 to argue that the citation of "the D-19 incident" in its finding on gravity of the offences confirms that the Trial Chamber's findings concerning Mr Bemba's interactions with witness D-19 was a "stand-alone basis for imputing responsibility to Mr Bemba".
[293] Mr Bemba's Appeal Brief, paras 89-91, referring, *inter alia*, to Decision Concerning Independent Counsel Reports, para. 19; Conviction Decision, paras 741, 816, 856.
[294] Mr Bemba's Appeal Brief, para. 91, referring to Conviction Decision, para. 856; Confirmation Decision, para. 102.

Mangenda and Mr Kilolo regarding a witness named Bravo, which was not pleaded in the Document Containing the Charges.[295]

(b) The Prosecutor

153. The Prosecutor responds that Mr Bemba's submissions misrepresent the Conviction Decision.[296] She argues that witness D-19 was not "one of the 14 Defence witnesses whose illicit coaching constitutes the basis of Bemba's conviction".[297] She adds that the Trial Chamber was correct in relying on evidence showing that Mr Bemba "abused the privileged line and spoke to D-19" as part of its analysis based on all the evidence on the record.[298] The Prosecutor argues that this evidence "helped establish", *inter alia*, "the fact of illicit coaching, and the co-perpetrators' collaboration" in its execution.[299]

3. Determination by the Appeals Chamber

154. The Appeals Chamber considers that, contrary to Mr Bemba's argument,[300] the Trial Chamber did not rely on his conduct in connection with witness D-19 as a stand-alone basis for imputing responsibility on Mr Bemba. The Appeals Chamber recalls that witness D-19 was not among the 14 witnesses in relation to which Mr Bemba was charged, nor did the Trial Chamber convict him for offences against the administration of justice by or in respect of witness D-19. Rather, the Trial Chamber relied on the multi-party phone call between Mr Bemba, Mr Kilolo and witness D-19 to substantiate its finding that the co-perpetrators abused the "privileged line" at the detention centre by including unauthorised persons in conference calls.[301] In the opinion of the Appeals Chamber, despite the fact that witness D-19 was not one of the 14 witnesses, the Trial Chamber was at liberty to consider, examine and rely on the evidence concerning Mr Bemba's conduct in connection with with witness D-19 in determining the factual findings against Mr Bemba.

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[295] Mr Bemba's Appeal Brief, para. 113.
[296] Response, paras 436-437.
[297] Response, paras 437, 460. *See also* para. 489.
[298] Response, para. 437.
[299] Response, para. 437.
[300] Mr Bemba's Appeal Brief, para. 90.
[301] *See* Conviction Decision, paras 109, 816.

155. To the extent that the Trial Chamber referred to this phone call in the context of its findings regarding solicitation of false testimony, the Appeals Chamber notes that the Trial Chamber only found that Mr Bemba had urged, *inter alia*, witness D-19 "to cooperate and follow the instructions given by Mr Kilolo".[302] In the section of the Conviction Decision on the legal characterisation of the conduct of the accused, the Trial Chamber, when addressing solicitation of false testimony, did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses "through Mr Kilolo and Mr Mangenda".[303] Thus, it is clear that the Trial Chamber did not find that Mr Bemba had solicited witness D-19 to testify falsely. The Appeals Chamber therefore sees no merit in Mr Bemba's argument that, becuae "[i]t was also not alleged that D-19 testified falsely", he "could not prepare a case in relation to the Chamber's eventual finding that [he] directly and personally influenced D-19 as to the content of his testimony".[304] In this respect, the Appeals Chamber further notes that Mr Bemba's conduct in connection with witness D-19 was actually described already in the Confirmation Decision. In particular, the Pre-Trial Chamber considered that Mr Bemba, through Mr Kilolo, used the Registry's "privileged line" at the detention centre to communicate with witnesses D-55, D-51, and D-19.[305] Facts relating to the phone call between Mr Bemba, Mr Kilolo and witness D-19 on 13 January 2013 and the related evidence were also specifically referred to in the Confirmation Decision.[306]

156. Similarly, the Appeals Chamber considers that the Trial Chamber did not rely on the incident regarding potential witness Bravo as a stand-alone basis for Mr Bemba's responsibility. The Appeals Chamber recalls that witness Bravo was not among the 14 witnesses in relation to which Mr Bemba was charged, nor did the Trial Chamber convict Mr Bemba for offences against the administration of justice by or in respect of this potential witness. Rather, the Trial Chamber relied on a telephone conversation between Mr Kilolo and Mr Mangenda on 29 August 2013 about a potential witness referred to as Bravo when finding that this evidence demonstrated Mr Kilolo's "reluctance to call witnesses unless he had briefed them extensively"

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[302] Conviction Decision, para. 856.
[303] Conviction Decision, para. 932.
[304] Mr Bemba's Appeal Brief, para. 91.
[305] Confirmation Decision, paras 98, 100-101.
[306] Confirmation Decision, para. 101.

showing close collaboration between the three co-perpetrators.[307] The Trial Chamber found further that this "exchange between the co-perpetrators highlights the illicit coaching strategy"[308] demonstrating, *inter alia*, Mr Bemba's "knowledge and approval of the illicit coaching" and Mr Bemba's "ultimate control over who would be called to testify".[309] Therefore, the Appeals Chamber finds that, although potential witness Bravo was not one of the 14 witnesses, the Trial Chamber was at liberty to consider, examine, and rely on this evidence in determining the factual findings against Mr Bemba.

157. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments that the Trial Chamber erred in relying on his conduct in connection to witness D-19 and potential witness Bravo.

D. Alleged error in relying on matters related to the "merits" of the Main Case

1. Relevant procedural background and part of the Conviction Decision

158. In the Confirmation Decision, the Pre-Trial Chamber confirmed the charges against Mr Bemba for, *inter alia*, the offences under article 70 (1) (b) and (c), in conjunction with article 25 (3) (a) of the Statute for the commission as a co-perpetrator, "together with Mr Kilolo and Mr Mangenda", of "presenting false evidence with regard to witnesses […]" and of "corruptly influencing witnesses […], by way of planning and coordinating with the other suspects the perpetration of the offences".[310] It further confirmed the charge for the offence under article 70 (1) (a), in conjunction with article 25 (3) (b) of the Statute for soliciting witnesses to give false testimony when under an obligation to tell the truth, by way of directing and coordinating with the other suspects the perpetration of this offence.[311]

159. Regarding Mr Mangenda, the Pre-Trial Chamber confirmed the charges for, *inter alia*, the commission under article 25 (3) (a) of the Statute, "together with Mr

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[307] Conviction Decision, para. 715.
[308] Conviction Decision, para. 715. The Trial Chamber also considered evidence relating to another telephone conversation between Mr Mangenda and Mr Kilolo on potential witness Bravo in relation to its finding on Mr Manganda's advising "Mr Kilolo on approaching the potential witness and illicitly coaching him on the content of his testimony." *See* Conviction Decision, para. 720.
[309] Conviction Decision, para. 715.
[310] Confirmation Decision, pp. 47-48.
[311] Confirmation Decision, p. 48.

Bemba and Mr Kilolo", (i) of "corruptly influencing witnesses […]" pursuant to article 70 (1) (c) of the Statute, "by way of liaising between Mr Bemba and Mr Kilolo as well as discussing, coordinating with and advising Mr Kilolo both on money transfers to [these] witnesses and on the content of their testimony, by providing cell phones to witnesses and by actively participating in meetings where witnesses were illicitly coached";[312] and (ii) of "presenting false oral evidence in the knowledge that it was false" under article 70 (1) (b) of the Statute, "by way of introducing the testimony of witnesses […] in the proceedings before [Trial Chamber III]".[313] The Pre-Trial Chamber further confirmed the charge pursuant to article 25 (3) (c) of having "aided, abetted or otherwise assisted […] witnesses […]" to give "false testimony [under article 70 (1) (a)] when under an obligation […] to tell the truth, by way of actively participating in meetings where witnesses were illicitly coached, by providing cell phones to witnesses and by regularly discussing with Mr Kilolo and Mr Bemba, advising and reporting to them about the false testimonies rendered by [these] witnesses before [Trial Chamber III]".[314]

160. On 29 September 2015, at the opening of the trial, the Presiding Judge of the Trial Chamber, with respect to matters related to the merits of the Main Case, stated the following:

> The evidence on the merits of the main case was presented before Trial Chamber III, not before this Chamber […] [as] 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 […] That said, and in these particular circumstances, the 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 […] Moreover, broadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of the proceedings and the right of the accused to be tried without undue delay.[315]

161. However, the Trial Chamber clarified that "[s]tatements pertaining to the merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during

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[312] Confirmation Decision, pp. 49-50.
[313] Confirmation Decision, pp. 50-51.
[314] Confirmation Decision, pp. 51-52.
[315] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 19 to p. 5, line 13.

testimony".[316] Nevertheless, it indicated that such statements would "not be considered for their truth or falsity, and evidence submitted solely for the purpose of proving the truth or falsity of such statements at trial will not be considered by the Chamber in its judgment".[317]

2. Submissions of the parties

(a) Mr Bemba

162. Mr Bemba avers that the Trial Chamber convicted him on the basis of "[i]ssues concerning the merits of the Main Case, in connection with conduct that falls outside the scope of the confirmed case".[318] In particular, he asserts that the Trial Chamber relied on "contributions that are directed towards procuring false testimony concerning the merits of the Main Case", despite the fact that both the Pre-Trial Chamber and Trial Chamber affirmed that these matters "fell outside the scope of the case".[319] He avers that the Trial Chamber failed to describe the context in which statements by the witnesses on the merits of the Main Case could have some relevance in this case, and that "[t]his omission was problematic given that a general allegation of 'pre-testimony witness coaching' did not feature in the charges, and the Chamber did not define what it meant by 'coaching'".[320] He further claims that, by "incorporating the merits of the Main Case through the back door, whilst eliminating the key criterion of falsity", the Trial Chamber convicted him on the basis of "modified material facts" which violated article 74 (2) and the *mens rea* requirement under article 30 of the Statute.[321]

(b) Mr Mangenda

163. Mr Mangenda submits that the Trial Chamber erred in law by "assuring [him] […] that he was not on trial for lies about the *merits of the Main Case*, then using those purported lies to establish the *mens rea* necessary to convict him".[322] Mr

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[316] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, line 24 to p. 6, line 1.
[317] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 6, lines 1-4.
[318] Mr Bemba's Appeal Brief, para. 74.
[319] Mr Bemba's Appeal Brief, para. 83, referring to Confirmation Decision, para. 64; Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, lines 18-23.
[320] Mr Bemba's Appeal Brief, paras 85-86, referring to Document Containing the Charges, paras 22, 40, fn. 40.
[321] Mr Bemba's Appeal Brief, para. 87, referring to Conviction Decision, paras 704, 729.
[322] Mr Mangenda's Appeal Brief, para. 130 (emphasis in original).

Mangenda argues that by doing so, the Trial Chamber violated his right to be informed of the charges against him as he had been prevented during the trial from litigating the truth or falsity of testimony concerning the merits of the Main Case.[323] In addition, in Mr Mangenda's view, the Trial Chamber violated article 74 (2) of the Statute, "since the Chamber's instructions [at the commencement of the trial] were expressly based on its understanding of the charges".[324] Mr Mangenda avers that the Trial Chamber failed to "abide by the framework established at the beginning of the trial".[325] In support of his submission, he refers to the testimony of witnesses D-13, D-25, D-29 and D-54 and argues that instead of relying on their "objective lies" – that the witnesses testified incorrectly about prior and number of contacts with the defence team in the Main Case – the Trial Chamber based its findings on Mr Mangenda's knowledge about instructions, Mr Kilolo's overall "illicit coaching activities" and conversations between the two on witness's performance on the stand that concerned "exclusively" the merits of the Main Case.[326] Similarly, he asserts that, with respect to witness D-15, the Trial Chamber, in the absence of evidence on his knowledge about the witness' "objective lies", inferred his guilt by relying "overwhelmingly, if not exclusively" on his discussions with Mr Kilolo about the testimony of witnesses concerning the merits of the Main Case.[327]

(c) The Prosecutor

164. The Prosecutor responds that the Trial Chamber "did not make findings on issues falling outside the scope of the charges, and […] on the merits of the Main Case".[328] She avers that the Trial Chamber's finding about Mr Bemba's instructions on the illicit coaching of witnesses "does not imply that the Chamber made findings on the merits of the Main Case and in particular whether the witnesses testified

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[323] Mr Mangenda's Appeal Brief, paras 135, 136, 141, referring to Confirmation Decision, para. 28; Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 16 to p. 6, line 4; Transcript of 5 October 2015, ICC-01/05-01/13-T-13-CONF-ENG (ET), p. 18, lines 5-16; Transcript of 8 October 2015, ICC-01/05-01/13-T-16-Red2-ENG (WT), p. 39, lines 17-25.
[324] Mr Mangenda's Appeal Brief, para. 141, referring to Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, lines 15-19.
[325] Mr Mangenda's Appeal Brief, para. 141.
[326] Mr Mangenda's Appeal Brief, para. 138, referring to Conviction Decision, paras 504-505, 534, 538-539, 541-542, 597,606, 609, 611-612, 651-652, 659, 666-667.
[327] Mr Mangenda's Appeal Brief, paras 139-140.
[328] Response, para. 433.

'falsely' on the merits of the Main Case".[329] The Prosecutor maintains that illicit coaching was defined 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'".[330] According to the Prosecutor, this practice included "the rehearsing, instructing, correcting and scripting of expected answers on issues pertaining to the Main Case".[331] She avers that Mr Bemba was convicted for offences that resulted from the common plan that included influencing the witnesses' testimony in a manner that affected the way they testified on certain issues.[332]

165. The Prosecutor submits that pursuant to rule 63 (2) of the Rules, the Trial Chamber can freely "rely on all evidence before it", that included "conversation […] and intercepts in which the co-accused discussed the merits of the Main Case" when establishing that Mr Bemba, Mr Mangenda and their co-perpetrators "engaged in the practice of illicit coaching".[333] The Prosecutor argues that the Trial Chamber did not make any findings on whether the witnesses' testimony on the merits of the Main Case was true or false nor on the merits of the Main Case.[334] She avers that the Trial Chamber inferred Mr Mangenda's *mens rea* on his knowledge of Mr Kilolo's illicit coaching activities regardless of whether the information contained in a particular script was true of false, and that this finding is based on Mr Kilolo's instructions to "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 acquaintance with certain persons".[335] The Prosecutor argues that contrary to Mr Mangenda's submissions regarding witnesses D-13, D-15, D-25, D-29 and D-54, the Trial Chamber did not rely on his knowledge that the witnesses testified falsely on the merits of the Main Case or made findings on the veracity of the evidence on the merits of the Main Case to infer his *mens rea*.[336]

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[329] Response, para. 433.
[330] Response, para. 433 (emphasis in original omitted).
[331] Response, para. 433.
[332] Response, para. 433.
[333] Response, paras 303, 434.
[334] Response, paras 303, 434-435.
[335] Response, paras 304-305.
[336] Response, paras 306-307.

166. The Prosecutor avers that in any event, it was open for the Trial Chamber 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".[337] She adds that the Trial Chamber would not have erred if it had relied on evidence "demonstrating Mangenda's belief that the witnesses' testimonies were false on the merits" to conclude on Mr Mangenda's knowledge of Mr Kilolo's illicit coaching of witnesses and his knowledge and intention that the "14 Defence witnesses would provide false testimony about their contacts with the Defence, payments and benefits and their acquaintances with certain person".[338] According to the Prosecutor, this "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".[339]

3. Determination by the Appeals Chamber

167. The Appeals Chamber observes that Mr Bemba and Mr Mangenda challenge the Trial Chamber's reliance on issues concerning the "merits" of the Main Case from two different viewpoints. Mr Bemba primarily argues that these issues fall "outside the scope of the case" confirmed by the Pre-Trial Chamber,[340] while Mr Mangenda avers that the Trial Chamber's reliance on these issues in the Conviction Decision was incongruous with its statement at the opening of the trial.[341] The Appeals Chamber will address these two aspects in turn.

168. The Appeals Chamber is not persuaded by Mr Bemba's argument that the Trial Chamber, by relying on his contributions that were directed towards procuring false testimony concerning the "merits" of the Main Case, relied on matters falling outside the scope of the case.[342] The facts and circumstanes described in the charges contained the allegation that the co-perpetrators' common plan, and their contribution thereto, concerned "presenting false evidence" under article 70 (1) (b) and "corruptly

[337] Response, para. 434.
[338] Response, para. 307 (emphasis in original omitted).
[339] Response, para. 307.
[340] Mr Bemba's Appeal Brief, para. 83.
[341] Mr Mangenda's Appeal Brief, paras 138, 140-141.
[342] Mr Bemba's Appeal Brief, paras 83-84.

influencing witnesses" under article 70 (1) (c) of the Statute.[343] They were not limited to the allegation that the false evidence concerned matters other than those related to the "merits" of the Main Case, or that witnesses were corruptly influenced only on "non-merit" issues. In addition, the Appeals Chamber notes that, while the Pre-Trial Chamber stated that it was "not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case", it found that there was "evidence that the Witnesses falsely testified before [Trial Chamber III] in respect of the following issues: […] (vi) other substantive issues related to the charges against Mr Bemba in the Main Case, such as the witnesses' membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials".[344] Therefore, the Appeals Chamber is of the view that matters pertaining to the "merits" of the Main Case were part of the confirmed charges.

169. Turning to the issue of whether, and to what extent, matters related to the "merits" of the Main Case were excluded from the scope of the case as a result of the Trial Chamber's statement at the opening on the trial, the Appeals Chamber recalls that the Trial Chamber stated 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", but that "[s]tatements pertaining to merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony".[345] The Trial Chamber then clarified that "these statements will not be considered for their truth or falsity".[346]

170. In the Appeals Chamber's view, the Trial Chamber's statement cannot be understood as excluding as irrelevant *any* matter that somehow touched upon the "merits" of the Main Case. The Trial Chamber only decided that it would not make findings on whether the testimony of the witnesses before Trial Chamber III was true or false on matters pertaining to the "merits" of the Main Case. It is here that the Trial Chamber drew the line.

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[343] *See* Confirmation Decision, pp. 47-51.
[344] Confirmation Decision, para. 64.
[345] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 9 to p. 5, line 15.
[346] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 6, lines 2-4.

171. The Appeals Chamber is not persuaded by Mr Bemba's argument that it is "problematic" that, in its statement at the commencement of the trial, the Trial Chamber did not describe the contexts in which statements before Trial Chamber III by the witnesses concerned pertaining to the "merits" of the Main Case could have some relevance.[347] The Appeals Chamber notes that the Trial Chamber described the framework by focusing on what it would *not* do (namely, assess the truth or falsity of the witnesses' testimony before Trial Chamber III)[348] and explained that statements pertaining to the "merits" of the Main case could be considered in relation to whether "alleged pre-testimony witness coaching was in fact repeated during testimony".[349] The Appeals Chamber sees no error in the fact that the Trial Chamber did not indicate how issues concerning the "merits" of the Main Case could be relied upon for the purpose of the eventual decision under article 74 of the Statute.

172. The Appeals Chamber notes that the Trial Chamber, in the Conviction Decision, explained that the "truth or falsity of the testimonies concerning the merits of Main Case has not been assessed by this Chamber".[350] The Appeals Chamber is not persuaded by Mr Mangenda's argument that the Trial Chamber eventually failed to respect its own guidance. The Appeals Chamber notes that Mr Mangenda refers to factual findings made in the Conviction Decision – from which the Trial Chamber inferred his *mens rea* – which concern conversations between him and Mr Kilolo.[351] While these conversations did concern the testimony of witnesses D-13,[352] D-54,[353] D-29,[354] D-25[355] and D-15,[356] including on matters pertaining to the substance of the Main Case, the Trial Chamber made no finding on the truth or falsity of these witnesses' testimony before Trial Chamber III.

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[347] Mr Bemba's Appeal Brief, para. 85.
[348] *See* Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 9 to p. 5, line 23.
[349] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, line 24 to p. 6, line 1.
[350] Conviction Decision, para. 194.
[351] Mr Mangenda's Appeal Brief, para. 138.
[352] Conviction Decision, paras 659-660, 666-667.
[353] Conviction Decision, paras 605-612, 651-652.
[354] Conviction Decision, paras 534-542.
[355] Conviction Decision, paras 504-505.
[356] Conviction Decision, paras 575-577.

173. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in the way it considered the "merits" of the Main Case in the Conviction Decision. Therefore, the Appeals Chamber rejects Mr Bemba's and Mr Mangenda's arguments on this point.

E. Alleged errors concerning the mode of liability of direct perpetration

1. Alleged lack of notice of the mode of liability of direct perpetration

(a) Relevant background and part of the Conviction Decision

174. In the Document Containing the Charges, the Prosecutor alleged that Mr Arido, along with the other co-perpetrators, executed and implemented a plan to defend Mr Bemba "against charges of crimes against humanity and war crimes in [the Main Case] by means which included the commission of offences against the administration of justice in violation of Article 70 of the Statute".[357] The Prosecutor alleged that Mr Arido implemented the common plan in Cameroon by identifying and procuring false testimony from witnesses to be called in the Main Case, facilitating and paying for their participation, and illicitly coaching them.[358] The Prosecutor charged Mr Arido with the offence of corruptly influencing, *inter alia*, witnesses D-2, D-3, D-4 and D-6 as a direct and/or indirect co-perpetrator under article 25 (3) (a) of the Statute under counts 12, 15, 18 and 42.[359]

175. In the Confirmation Decision, the Pre-Trial Chamber noted that the Prosecutor had charged the suspects as direct and/or indirect co-perpetrators under article 25 (3) (a) of the Statute.[360] The Pre-Trial Chamber recalled that, pursuant to article 25 (3) (a) of the Statute, co-perpetration "requires two or more persons to agree to contribute to the commission of the offence and to act accordingly".[361] It was of the view that "[p]erpetration [was] subsumed under the mode of liability of co-perpetration".[362] The Pre-Trial Chamber reasoned that, given the "specific nature of the offences in the present case, where some of the Suspects are directly involved in the commission of

[357] Document Containing the Charges, paras 2, 20.
[358] Document Containing the Charges, para. 27, referring, *inter alia*, to paras 65-81, 105-106.
[359] Document Containing the Charges, paras 110, 117, pp. 77, 80.
[360] Confirmation Decision, para. 31.
[361] Confirmation Decision, para. 33.
[362] Confirmation Decision, para. 33.

such offences, […] the mode of liability of co-perpetration, rather than *indirect* co-perpetration, captures their conduct more appropriately".[363]

176. On the basis of witnesses D-2's and D-3's statements the Pre-Trial Chamber considered that the involvement of Mr Arido in the "overall strategy to defend Mr Bemba in the Main Case was confined to recruiting and corruptly influencing witnesses D-2, D-3, D-4 and D-6, all of whom subsequently falsely testified in the Main Case".[364] It further considered that Mr Arido "liaised between the abovementioned witnesses and Mr Kilolo and exploited the precarious personal situations of these witnesses" with the aim of bringing them to falsely testify under the "illusion that this would result in a better future for them".[365] The Pre-Trial Chamber, *inter alia*, confirmed the charges against Mr Arido for the commission, as a perpetrator under article 25 (3) (a) of the Statute, of 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".[366]

177. In the Conviction Decision, the Trial Chamber considered Mr Arido's claim that he had not been provided with adequate notice because the Prosecutor had failed to allege direct perpetration in the Document Containing the Charges and only charged him as a "direct and/or indirect 'co-perpetrator'".[367] The Trial Chamber found no merit in Mr Arido's claim on the ground that the "factual allegations underpinning the Pre-Trial Chamber's conclusions were all clearly specified in the Confirmation Decision, the document containing the charges and the Prosecution Pre-Trial Brief".[368] It was of the view that the work of Mr Arido's defence team "during the entire trial phase has been conducted in the knowledge that Mr Arido had charges confirmed against him as a direct perpetrator".[369] The Trial Chamber further noted

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[363] Confirmation Decision, para. 51.
[364] Confirmation Decision, para. 95 (footnotes ommited).
[365] Confirmation Decision, para. 95.
[366] Confirmation Decision, p. 53, referring to counts 12, 15, 18, and 42 of the Document Containing the Charges.
[367] Conviction Decision, para. 59, referring to Confirmation Decision, para. 33.
[368] Conviction Decision, para. 60.
[369] Conviction Decision, para. 60.

that when calling for objections regarding the conduct of the proceedings since the confirmation hearing, Mr Arido "raised no notice objections as to the modes of liability confirmed".[370] The Trial Chamber convicted Mr Arido for the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6 under article 70 (1) (c) of the Statute as a direct perpetrator.[371]

(b) Submissions of the parties

(i) Mr Arido

178. Mr Arido submits that the Pre-Trial Chamber acted *ultra vires* because it rejected the modes of liability of direct and indirect co-perpetration while confirming the mode of direct perpetration that was not "included"[372] in the Document Containing the Charges.[373] Mr Arido argues that, rather than using the "procedural option" of "ordering an amendment of the [Document Containing the Charges]", the Pre-Trial Chamber "effectively re-characterized the legal framework of the mode of liability charged *sua sponte*", and that the Trial Chamber erred by hearing the present case based on a "defective [Confirmation Decision]".[374] He claims that the Pre-Trial and the Trial Chambers did not cite any authority in support of their assertion that direct perpetration is subsumed under co-perpetration, and the Trial Chamber acted in violation of article 74 (5) of the Statute by failing to provide any reason for its conclusion in this regard considering that "the mode of liability is a key legal finding in [Mr Arido's] conviction for Article 70(1)(c)".[375] He adds that article 25 (3) (a) "includes the language 'commits […] individually' which is basically synonymous with perpetration" and argues that "[i]t is unclear why the [Pre-Trial and Trial Chambers] did not adopt the language already in the Statute".[376]

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[370] Conviction Decision, para. 60, referring to Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 11, line 24 to p. 13, line 15.
[371] Conviction Decision, para. 945. *See also* p. 457.
[372] Mr Arido's Appeal Brief, para. 68.
[373] Mr Arido's Appeal Brief, paras 13, 19, 37-38, 62-64, 66-70, referring to article 61 (4), (9) of the Statute and regulations 52-53 of the Regulations of the Court.
[374] Mr Arido's Appeal Brief, paras 24, 26, 68, referring to regulation 55 of the Regulations; Confirmation Decision, p. 53; Conviction Decision, fn. 101, referring to Confirmation Decision, para. 33.
[375] Mr Arido's Appeal Brief, paras 71-75.
[376] Mr Arido's Appeal Brief, para. 74.

179. Mr Arido contends that the Document Containing the Charges and the Confirmation Decision did not identify the legal elements of direct perpetration and the former only identified the relevant mode of liability as "direct and/or indirect co-perpetrat[ion]".[377] According to Mr Arido, the Prosecutor never charged the mode of liability of direct perpetration and therefore there was no factual allegation in that regard in the Confirmation Decision.[378] He avers that direct perpetration appeared in the Prosecutor's Trial Brief only two months before the trial and that this document did not elaborate on the "specific *mens rea*" of the mode of liability of direct perpetration and on the "specific factual allegations" for the *actus reus* of this particular mode of liability.[379] Mr Arido argues that his request for leave to appeal the Trial Chamber's decision not to order an updated document containing the charges was rejected and requests the Appeals Chamber to rule on the "issues in [his] leave to appeal".[380]

180. Mr Arido submits further that the Trial Chamber shifted the burden on him by finding that it was not necessary to address his argument "whether direct perpetration is subsumed under co-perpetration" and that he was able to prepare his defence knowing that he was charged for direct perpetration.[381] He argues that it was for the Prosecutor to discharge her obligation to provide notice of the factual allegations underlying the "mode of liability charged".[382] Mr Arido claims that the Trial Chamber erred in implying that at trial he had not raised notice objections to the modes of liability confirmed, including direct perpetration, whereas he alleges that he had actually done so since the confirmation hearing.[383] Mr Arido argues that these errors

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[377] Mr Arido's Appeal Brief, paras 12, 18, 25, 33, 59, 65.
[378] Mr Arido's Appeal Brief, paras 23, referring to Document Containing the Charges, paras 76-81. *See also* para. 32.
[379] Mr Arido's Appeal Brief, paras 12, 18, 22, 25, fn. 21, referring, *inter alia*, to Trial Brief, paras 255-256. *See also* para. 365.
[380] Mr Arido's Appeal Brief, paras 41-45, referring to Auxiliary Documents Decision, paras 14, 19; "Decision on Narcisse Arido's Request for Leave to Appeal the 'Decision on the Submission of Auxiliary Documents'", 16 July 2015, ICC-01/05-01/13-1089; "Narcisse Arido's Request for Leave to Appeal the 'Decision on the Submission of Auxiliary Documents' (ICC-01/05-01/13-922)", 22 June 2015, ICC-01/05-01/13-1026, paras 16-21.
[381] Mr Arido's Appeal Brief, paras 51-53, referring to Conviction Decision, para. 60.
[382] Mr Arido's Appeal Brief, paras 53-54.
[383] Mr Arido's Appeal Brief, paras 55-58, referring to Conviction Decision, para. 60; Transcript of 1 March 2016, ICC-01/05-01/13-T-39-Red-ENG (WT), p. 7, referring to Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 49, lines 1-7; Mr Arido's Submissions in Advance of First Trial Status Conference, paras 60-62.

violated his right to a fair trial as he lacked notice and could not investigate the allegations related to the alleged mode of liability of "direct perpetration" and requests that his conviction be reversed.[384]

(ii) The Prosecutor

181. The Prosecutor submits that Mr Arido had "ample and timely notice of the material facts" underlying the charges on his liability as a direct perpetrator.[385] The Prosecutor maintains that the Confirmation Decision, the Document Containing the Charges and the Prosecutor's Trial Brief contained the necessary "factual detail" required for him to prepare his defence on these charges.[386] The Prosecutor argues that the manner in which Mr Arido conducted his defence following the Confirmation Decision, including his post-confirmation submissions, exemplify the absence of a "genuine notice issue".[387] She adds that Mr Arido's arguments arise from a misunderstanding of the "scope and purpose" of article 67 (1) (a) of the Statute and the nature and type of notice information that he is entitled to under that provision.[388]

182. The Prosecutor argues further that the Pre-Trial Chamber did not exceed its authority or impair Mr Arido's right to notice of the case against him when it confirmed the charges against him on the basis of direct perpetration.[389] She argues that, given the nature of the allegations in this case, "direct perpetration was subsumed under the Prosecution's co-perpetration theory", especially in the case of Mr Arido whose conduct largely involved "physically perpetrating the offence of corruptly influencing witnesses".[390] According to the Prosecutor, the Pre-Trial Chamber "simplified" the case against Mr Arido and therefore it was "inconceivable" that Mr Arido could have been deprived of adequate notice.[391] She adds that Mr Arido could not have suffered harm on this account because Mr Arido, in his submissions on the elements of article 70 offences made before the commencement of the trial,

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[384] Mr Arido's Appeal Brief, paras 13, 35-36, 47-48, 50, 59, 76, referring to articles 67 (1) (a) and 83 (2) of the Statute.
[385] Response, para. 653.
[386] Response, para. 650.
[387] Response, paras 651-652.
[388] Response, paras 650, 653.
[389] Response, para. 654.
[390] Response, para. 654.
[391] Response, para. 655.

"acknowledge[ed]" that he would be tried as a direct perpetrator and failed to raise any timely objections to the Pre-Trial Chamber's approach in this regard.[392]

(c) Determination by the Appeals Chamber

183. The Appeals Chamber notes that Mr Arido's main argument is that he was not properly informed of the mode of liability of direct perpetration and that the Trial Chamber erred in rejecting his claim of lack of notice.[393] The Appeals Chamber recalls that, when rejecting Mr Arido's claim, the Trial Chamber considered that the "factual allegations underpinning the Pre-Trial Chamber's conclusions were all clearly specified in the Confirmation Decision, the document containing the charges and the Prosecution Pre-Trial Brief".[394] It was also of the view that the work of Mr Arido's defence team "during the entire trial phase has been conducted in the knowledge that Mr Arido had charges confirmed against him as a direct perpetrator".[395] The Appeals Chamber finds no error in the Trial Chamber's finding. Contrary to Mr Arido's contention, the Appeals Chamber notes that the Document Containing the Charges, the Confirmation Decision and the Trial Brief provided Mr Arido with sufficient information as to the details of his conduct, including the underlying facts and circumstances forming the basis of his liability under article 25 (3) (a) of the Statute for direct perpetration.[396]

184. The Appeals Chamber observes that the Document Containing the Charges contained details of instances where Mr Arido acted individually in bribing witnesses[397] and making promises to witnesses in exchange for false testimony[398] as part of his overall contribution to the implementation of the common plan. The Prosecutor alleged that Mr Arido, *inter alia*, "improperly induc[ed] individuals to falsely testify as witnesses" in the Main Case[399] and pleaded material information on his intent and knowledge that his contributions would bring about the objective

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[392] Response, para. 655.
[393] Mr Arido's Appeal Brief, paras 14, 75.
[394] Conviction Decision, para. 60.
[395] Conviction Decision, para. 60.
[396] Confirmation Decision, pp. 53-55. *See also* paras 95-96.
[397] *See* Document Containing the Charges, para. 33.
[398] Document Containing the Charges, para. 35.
[399] Document Containing the Charges, para. 117.

elements of article 70 (1) (c) of the Statute.[400] In that regard, the Prosecutor alleged that Mr Arido was aware of "his direct participation in recruiting witnesses to testify falsely in exchange for payment or other benefit [… and] in illicit[ly] coaching and bribing […] witnesses".[401] Further, the Pre-Trial Chamber found, based on the evidence before it, that Mr Arido's involvement in the "overall strategy to defend Mr Bemba in the Main Case was confined to recruiting and corruptly influencing witnesses D-2, D-3, D-4 and D-6, all of whom subsequently falsely testified in the Main Case".[402] In the Trial Brief, the Prosecutor contended that Mr Arido implemented the "Overall Strategy" by "identifying and recruiting false witnesses to be called in the Main Case, facilitating their participation as such, and illicitly coaching them".[403] The Trial Brief further identified specific conduct, attributable to Mr Arido alone, that the Prosecutor alleged to be relevant to one or more substantive elements of the acts described in article 70 (1) (c) of the Statute, such as making monetary and non-monetary promises to witnesses D-2, D-3, D-4 and D-6 in exchange for their testimony,[404] and providing instruction on their testimony.[405] Accordingly, the Appeals Chamber finds that Mr Arido was on notice of the material allegations pertaining to direct perpetration.

185. In these circumstances, the Appeals Chamber is also unconvinced by the argument that the Pre-Trial Chamber acted *ultra vires* because it confirmed the charges against Mr Arido based on direct perpetration, even though the Prosecutor had not characterised the mode of liability as direct perpetration in the Document Containing the Charges, and that the trial, therefore, proceeded on the basis of a defective Confirmation Decision. The Appeals Chamber notes that the accused has the right to be duly informed of the "nature, cause and content" of each "charge" of the case, pursuant to article 67 (1) (a) of the Statute. This includes information about the legal characterisation of the charges. The Appeals Chamber recalls that the Prosecutor, in the Document Containing the Charges, characterised Mr Arido's role as

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[400] Document Containing the Charges, paras 130-131, 139.
[401] Document Containing the Charges, para. 139.
[402] Confirmation Decision, para. 95.
[403] Trial Brief, para. 25.
[404] Trial Brief, paras 32, 35, 133-134, 145, 156.
[405] Trial Brief, paras 135, 144, 156, 165.

that of a co-perpetrator, rather than that of a direct perpetrator.[406] The Pre-Trial Chamber, in contrast, characterised Mr Arido's role as that of a (direct) perpetrator.[407] As noted above, however, this was based on the factual allegations that had been put forward by the Prosecutor in the Document Containing the Charges. In this context, and considering that Mr Arido's alleged criminal responsibility for the charged offence remained within the mode of liability of commission under article 25 (3) (a) of the Statute, it was not necessary to adjourn the confirmation hearing and request the Prosecutor to consider amending the charge pursuant to article 61 (7) (c) (ii) of the Statute. Therefore, the Appeals Chamber does not consider that the Pre-Trial Chamber acted *ultra vires*. The Appeals Chamber also recalls that neither Mr Arido nor the Prosecutor sought any appellate intervention in relation to the confirmation of the charges against Mr Arido for direct perpetration of the offence under article 70 (1) (c) of the Statute.

186. Turning to Mr Arido's claim that the Trial Chamber erred in finding that he did not raise notice objections to the confirmed modes of liability, Mr Arido refers to examples which, he alleges, demonstrate that he objected to the lack of notice regarding the modes of liability. However, the Appeals Chamber is of the view that these examples do not support his submission in this respect.[408] On the contrary, Mr Arido's submissions in these examples pertain to, *inter alia*, obtaining clarity as to the constitutive elements of the said mode of liability rather than the absence of notice as to the factual allegations underpinning the charges.[409] The Appeals Chamber further notes that during the hearing where the Trial Chamber requested the parties to raise "any remaining objections or observations concerning the conduct of proceedings which have arisen since the confirmation hearing", Mr Arido did not raise any objections as to the charges, but rather confirmed that he understood the "nature of the

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[406] Document Containing the Charges, paras 130 *et seq*.
[407] Confirmation Decision, para. 96.
[408] *See e.g.* Transcript of 1 March 2016, ICC-01/05-01/13-T-39-Red-ENG (WT), p. 7 lines 4-12; Mr Arido's Submissions in Advance of First Trial Status Conference, paras 53, 60-62; "Status Conference", Transcript of 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG (WT), p. 66, lines 5-10.
[409] *See* Mr Arido's Submissions in Advance of First Trial Status Conference, para. 60. *See also* Arido Article 70 Submissions, para. 43 where Mr Arido submitted that "the Pre-Trial Chamber confirmed the charges against Mr Arido for Article 70 (1) (c) as direct perpetration" but "did not provide a definition of the constitutive elements of direct perpetration in the Confirmation of Charges Decision".

charges against him".[410] Accordingly, the Appeals Chamber rejects Mr Arido's arguments that the Trial Chamber erred in finding that he did not raise notice objections as to the modes of liability confirmed.

187. In light of the above, the Appeals Chamber finds no error in the Pre-Trial Chamber's confirmation of the charges against Mr Arido, as a perpetrator under article 25 (3) (a) of the Statute, and therefore rejects Mr Arido's arguments in that regard and that he lacked notice for this mode of liability.

2. Alleged error in not ordering an updated document containing the charges

(a) Relevant background and part of the Conviction Decision

188. On 13 April 2015, Mr Arido requested to be provided with an updated document containing the charges.[411] He reiterated his request during the status conference on 24 April 2015[412] and through joint submissions with the other defendants following the status conference.[413] On 10 June 2015, the Trial Chamber, by majority, rejected the request for an updated document containing the charges on the ground that it was "neither appropriate nor compatible with the procedural regime set out in the Statute".[414]

189. The Trial Chamber reasoned that, since the Pre-Trial Chamber has the responsibility to confirm or decline to confirm the charges as presented by the Prosecutor in the Document Containing the Charges, if the Pre-Trial Chamber confirms the charges,

> its determination not only extends to *whether* the person is committed to a Trial Chamber but also *for what* the person is put on trial. Therefore, the confirmation of a 'charge' implies a judicial decision both in relation to the facts set out in the

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[410] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 12, lines 5-7, p. 20, lines 22-24.
[411] Mr Arido's Submissions in Advance of First Trial Status Conference, paras 53-54.
[412] "Status Conference", Transcript of 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG (WT), p. 66, lines 16-18.
[413] "Observations conjointes des équipes de défense suite à la Première conférence de mise en état et requête afin de fixer certains délais (ICC-01/05-01/13-T-8-Conf-FRA)", 11 May 2015, ICC-01/05-01/13-940, with one public annex, paras 20-24, p. 12. The English version was registered on 19 May 2015, ICC-01/05-01/13-940-Conf-tENG. This document and its annex were originally filed confidentially but were reclassified as public pursuant to the Trial Chamber VII's instruction, 4 August 2016.
[414] Auxiliary Documents Decision, para. 8, p. 11.

> [Document Containing the Charges] and their legal characterization.[415] [Emphasis in original.]

190. The Trial Chamber held that the Confirmation Decision "constitute[d] the authoritative document informing the accused of the charges 'as confirmed'" and the "submission of a new charging document by the Prosecution post-confirmation" was not foreseen by the Statute.[416] The Trial Chamber explained that "at the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the [Confirmation Decision] sets out the charges, which, as such, also binds the Trial Chamber".[417]

191. The Trial Chamber found that based on a combined reading of articles 61 (7) (a), 64 (8) (a) and 74 (2) of the Statute and regulation 55 of the Regulations, it was "bound by the factual description of the charges, as determined by the Pre-Trial Chamber in the confirmation decision".[418] It was of the view that the "content and tenor [of the Confirmation Decision] is authoritative and cannot be 'updated' by any of the parties".[419] The Trial Chamber considered that an updated document containing the charges "is an updated version of a document given a specific purpose in the statutory scheme – and this purpose has been served when the confirmation decision is rendered".[420]

192. The Trial Chamber noted that in the present case, the "Confirmation Decision sets out clearly the 'facts and circumstances' of the case for the accused, presenting a description of the factual allegations and their legal characterization, thus satisfying the minimum requirements of Article 67(1)(a) of the Statute".[421] In the Trial Chamber's view, ordering an updated document containing the charges would be repetitive of the allegations set out in the Confirmation Decision.[422] Nevertheless, the Trial Chamber was of the view that a "pre-trial brief", in which the Prosecutor would set out her "case theory with reference to the evidence [she] intends to rely on", could

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[415] Auxiliary Documents Decision, para. 10.
[416] Auxiliary Documents Decision, para. 11.
[417] Auxiliary Documents Decision, para. 12.
[418] Auxiliary Documents Decision, para. 15.
[419] Auxiliary Documents Decision, para. 16.
[420] Auxiliary Documents Decision, para. 16.
[421] Auxiliary Documents Decision, para. 19.
[422] Auxiliary Documents Decision, para. 19.

be beneficial to the accused "in the preparation for trial", and, on this basis, invited the Prosecutor to prepare such document.[423]

(b) Submissions of the parties

(i) Mr Arido

193. Mr Arido submits that the Trial Chamber erred by convicting him as a direct perpetrator, a "mode of liability which was not requested" by the Prosecutor and that does not "appear[] in the Rome Statute".[424] Mr Arido submits that the Trial Chamber had the "option of requesting the Prosecutor to amend the [Document Containing the Charges]", but failed to do so.[425] According to Mr Arido, the Trial Chamber, by failing to order an updated document containing the charges – or otherwise take any step to remedy the alleged lack of notice in regard to the mode of liability of "direct perpetration" – failed to exercise its function under article 64 (2) of the Statute.[426] Mr Arido argues that "[t]he providing of [an updated document containing the charges] is a relevant option for the lack of notice, and was permissible under the Statute".[427] He claims that this document was necessary because the Document Containing the Charges "was based on a different theory than that which was confirmed".[428]

(ii) The Prosecutor

194. The Prosecutor responds that, contrary to Mr Arido's submission about his right to be informed of the legal elements of the mode of liability for which he is charged, article 67 (1) (a) does not entitle an accused person to notice of the "Court's or the Prosecution's interpretation of the interpretation of the legal elements of the charged modes of liability".[429] For this reason, she argues that it would have been "unnecessary" for the Trial Chamber to order the Prosecutor to file an updated document containing the charges.[430]

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[423] Auxiliary Documents Decision, para. 21.
[424] Mr Arido's Appeal Brief, paras 13, 19, 36, 70.
[425] Mr Arido's Appeal Brief, paras 13, 19.
[426] Mr Arido's Appeal Brief, paras 40, 49.
[427] Mr Arido's Appeal Brief, para. 49.
[428] Mr Arido's Appeal Brief, para. 31.
[429] Response, para. 653 (footnote omitted).
[430] Response, para. 655.

(c) Determination by the Appeals Chamber

195. The Appeals Chamber recalls that it has found that the Pre-Trial Chamber did not err in confirming the charges against Mr Arido under the mode of liability of direct perpetration and that Mr Arido was sufficiently put on notice in that regard. Therefore, it will now only address Mr Arido's claim that the Trial Chamber should have ordered the Prosecutor to produce an "updated" document containing the charges.[431]

196. The Appeals Chamber recalls that the Prosecutor, being the "charging entity" under the Court's legal framework, has the responsibility to clearly formulate the charges for which confirmation for trial is sought in the document containing the charges.[432] Until confirmation, it is therefore this document containing the charges that serves as the authoritative statement of the charges and serves as a basis for the confirmation process. Upon confirmation, however, this authority transposes to the confirmation decision issued by the pre-trial chamber. As already concluded by the Appeals Chamber in the *Lubanga* Appeal Judgment, it is the confirmation decision issued by the pre-trial chamber that "defines the parameters of the charges at trial".[433] In other words, it is the decision on the confirmation of charges under article 61 (7) of the Statute, as opposed to the document containing the charges, which constitutes the authoritative statement of the charges. Thus, while the confirmation decision must necessarily be understood in the context of the confirmation proceedings as a whole, including the document containing the charges, it is the confirmation decision that serves as a basis for the trial. This was rightly recalled by the Trial Chamber in the present case when it found that it was "bound by the factual description of the charges, as determined by the Pre-Trial Chamber in the confirmation decision".[434]

197. The Appeals Chamber is therefore of the view that, contrary to Mr Arido's submission,[435] the Trial Chamber did not have the "option" to request the Prosecutor to "update" the charges as confirmed by the Pre-Trial Chamber. While the trial chamber may exercise pre-trial functions that are "capable of application" in trial

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[431] Mr Arido's Appeal Brief, paras 26-30, 34-37.
[432] *See* article 61 of the Statute and rule 121 (3) of the Rules.
[433] *Lubanga* Appeal Judgment, para. 124.
[434] Auxiliary Documents Decision, para. 15.
[435] Mr Arido's Appeal Brief, para. 19.

proceedings,[436] this power does not encompass functions that are exclusively assigned to the pre-trial chamber. Under the procedural architecture of the Court, only a pre-trial chamber decides which cases may go to trial. As rightly pointed out by the Trial Chamber, this "determination not only extends to *whether* the person is committed to a Trial Chamber but also *for what* the person is put on trial".[437] Article 61 (9) of the Statute explicitly indicates that after confirmation, the Prosecutor can only amend the charges with the permission of the Pre-Trial Chamber. Pursuant to the same provision, after the commencement of the trial, the Trial Chamber can only authorise a withdrawal of the charges – not its amendment or "update" – or a change in the legal characterisation of facts, under regulation 55 of the Regulations. Therefore, the Appeals Chamber shares the view of the Trial Chamber that an "updated" document containing the charges is "neither appropriate nor compatible with the procedural regime set out in the Statute"[438] as it undermines the authority of the decision on confirmation of charges to serve as the operative document for the trial. As explained above, the Trial Chamber does not have the power to "update" the facts and circumstances described in the charges.

198. The Appeals Chamber notes Mr Arido's reference to the fact that Trial Chamber VI in the *Ntaganda* case ordered such an "updated" document containing the charges at the accused person's request.[439] The Appeals Chamber further notes that, in the past, other trial chambers of the Court have also ordered the filing of an "updated" document containing the charges, seeking to remedy the uncertainties in the confirmation decision and/or to assist in the preparation of the trial.[440] While this practice may have been justified in the past, the Appeals Chamber in any case notes recent efforts to enhance the format and clarity of decisions on the confirmation of

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[436] *See* article 64 (6) (a) read with article 61 (11) of the Statute.
[437] Auxiliary Documents Decision, para. 10 (emphasis in original).
[438] Auxiliary Documents Decision, para. 8. *See also* para. 11.
[439] Mr Arido's Appeal Brief, para. 29, referring to *Prosecutor v. Bosco Ntaganda*, "Decision on the updated document containing the charges", 6 February 2015, ICC-01/04-02/06-450, para. 18.
[440] *See Prosecutor v. Thomas Lubanga Dyilo*, "Order for the prosecution to file an amended document containing the charges", 9 December 2008, ICC-01/04-01/06-1548, paras 9-10, 15; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Filing of a Summary of the Charges by the Prosecutor", registered on 29 October 2009, ICC-01/04-01/07-1547-tENG; original French version, dated 21 October 2009 (ICC-01/04-01/07-1547), paras 29-31; *Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Order for the prosecution to file an updated document containing the charges", 5 July 2012, ICC-01/09-02/11-450, paras 8-10.

charges – as well as, more generally, improve the confirmation proceedings – in order to reduce uncertainties and streamline and expedite the criminal process as a whole.[441]

199. The Appeals Chamber also notes that the Trial Chamber, while rejecting the request to order an "updated" document containing the charges, considered that a "pre-trial brief", in which the Prosecutor would set out her "case theory with reference to the evidence [she] intends to rely on", could be beneficial to the accused "in the preparation for trial", and, on this basis, it invited the Prosecutor to provide the accused persons with such a document.[442] The Appeals Chamber shares the Trial Chamber's view that the preparation of a brief of this kind could indeed be of assistance to the accused and serve as an effective trial management tool without undermining the authority of the confirmation decision as setting out the facts and circumstances described in the charges on which the trial proceeds.

200. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in refusing to order an "updated" document containing the charges. Accordingly, it rejects Mr Arido's arguments in this regard.

VI. GROUNDS OF APPEAL ON THE ADMISSIBILITY OF DOCUMENTARY EVIDENCE

201. All appellants raise, as grounds of appeal, errors that the Trial Chamber allegedly made in its decisions not to exclude, as inadmissible evidence, certain documentary evidence submitted by the Prosecutor.

202. In particular, Mr Mangenda, Mr Kilolo, Mr Arido and Mr Babala raise grounds of appeal concerning the inadmissibility, within the meaning of article 69 (7) of the Statute, of records of financial transactions conducted through the Western Union company that had been obtained by the Prosecutor through the competent authorities of Austria in execution of requests of assistance under Part 9 of the Statute ("Western Union Records").[443] Mr Bemba also makes arguments concerning the purported

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[441] *See* Chambers Practice Manual, 3rd edition, May 2017, pp. 16-19. *See also* pp. 11-15 concerning the formulation of the charges and any challenge thereto.
[442] Auxiliary Documents Decision, para. 21.
[443] Mr Mangenda's Appeal Brief, paras 16-29, 36-94; Mr Kilolo's Appeal Brief, paras 20-93; Mr Arido's Appeal Brief, paras 123-153; Mr Babala's Appeal Brief, paras 21-33.

inadmissibility of audio recordings, and related logs, of his non-privileged telephone communications from the Court's detention centre that had been transmitted to the Prosecutor by the Registry upon authorisation of the Pre-Trial Chamber ("Detention Centre Materials").[444] Mr Bemba and Mr Kilolo also argue that the materials connected to the interception of Mr Kilolo's telephone communications with Mr Bemba conducted by the competent authorities of The Netherlands in execution of requests of assistance under Part 9 of the Statute ("Dutch Intercept Materials") should have been excluded as they had been purportedly obtained in violation of Mr Bemba's legal professional privilege.[445] Mr Mangenda maintains that the exclusion of the same Dutch Intercept Materials was warranted because they had derived from the Western Union Records (an argument which Mr Kilolo and Mr Babala also raise[446]) and that, taking into account all relevant circumstances, their admission was antithetical to and seriously damaged the integrity of the proceedings.[447]

203. Moreover, Mr Arido argues that the two statements that he gave to the French police prior to his surrender to the Court should also have been excluded as inadmissible evidence as they were not signed by the counsel that assisted him during his interviews by the French police.[448] In addition, a certain number of arguments in respect of inadmissibility of documentary evidence are made by Mr Kilolo – and, in part, by Mr Babala – on the ground of the purported immunities from legal process enjoyed by Mr Kilolo and Mr Mangenda as members of Mr Bemba's defence team in the Main Case.[449]

204. The Appeals Chamber will begin its analysis with this latter set of arguments as they are brought – in general terms – as affecting, *inter alia*, the admissibility of all evidence obtained by the Prosecutor as part of her investigation.[450] Thereafter, the Appeals Chamber will address, in turn, the grounds of appeal concerning the alleged

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[444] Mr Bemba's Appeal Brief, paras 141-154, 180-187.
[445] Mr Bemba's Appeal Brief, paras 155-187; Mr Kilolo's Appeal Brief, paras 107-123.
[446] Mr Kilolo's Appeal Brief, paras 94-100; Mr Babala's Appeal Brief, para. 26.
[447] Mr Mangenda's Appeal Brief, paras 30-35, 95-126.
[448] Mr Arido's Appeal Brief, paras 373-382.
[449] Mr Kilolo's Appeal Brief, paras 29-36, 70-74, 86, 101-102, 104; Mr Babala's Appeal Brief, para. 19.
[450] Section VI.A.

inadmissibility of the Western Union Records,[451] of the Detention Centre Materials,[452] of the Dutch Intercept Materials,[453] and of Mr Arido's statements to the French police.[454]

A. Arguments concerning the purported violation of Mr Kilolo's and Mr Mangenda's immunities

205. As noted above, several arguments made by Mr Kilolo with respect to the inadmissibility of certain documentary evidence are predicated on his purported immunities from legal process as Mr Bemba's defence counsel in the Main Case.[455] Albeit in a different context, Mr Babala also argues that the investigation and prosecution in the present case are vitiated by the violation of Mr Kilolo's and Mr Mangenda's immunities as members of Mr Bemba's defence team in the Main Case.[456]

1. Relevant procedural background

206. On 19 November 2013, the Prosecutor requested the Pre-Trial Single Judge exercising the functions of the Pre-Trial Chamber within the meaning of article 57 (2) (b) of the Statute ("Pre-Trial Single Judge) to issue warrants for the arrest of Mr Bemba, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido.[457] At that time, Mr Kilolo and Mr Mangenda were part of Mr Bemba's defence team in the Main Case, as lead counsel and case manager, respectively. In the application seeking a warrant for their arrests, the Prosecutor submitted that the privileges and immunities of Mr Kilolo and Mr Mangenda as members of Mr Bemba's defence team "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".[458] On this basis, the Prosecutor requested the Pre-Trial Single Judge to "specify to the relevant State(s) [in the requests for arrest and surrender concerning Mr Kilolo and Mr Mangenda] that such persons are not entitled

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[451] Section VI.B.
[452] Section VI.C.
[453] Section VI.D.
[454] Section VI.E.
[455] Mr Kilolo's Appeal Brief, paras 29-36, 70-74, 86, 101-102, 104.
[456] Mr Babala's Appeal Brief, para. 19.
[457] Application for Warrant of Arrest
[458] Application for Warrant of Arrest, para. 125.

to invoke such privileges and immunities as a bar to their arrest and surrender to the Court".[459]

207. On the same day, the Pre-Trial Single Judge, noting the "delicate issue" and the Prosecutor's proposed interpretation on the nature and extent of Mr Kilolo's and Mr Mangenda's privileges and immunities, seized the Presidency with this matter, "formally requesting the Presidency, whether to waive the privileges and immunities of [Mr Kilolo] and [Mr Mangenda], or to follow the interpretation given by the Prosecution".[460]

208. On 20 November 2013, the Presidency issued its decision on the matter.[461] The Presidency found that "[t]he legitimate functions to be performed by counsel and persons assisting them do not extend to the types of conduct depicted in articles 70(1)(b) and article 70(1)(c) of the Rome Statute, which the persons concerned are alleged to have undertaken", and that, therefore, "there is no immunity attaching to the acts allegedly committed by the persons concerned which presents a bar to their arrest and potential detention on remand for alleged article 70 offences in the instant case and […] no waiver need be granted".[462] At the same time, the Presidency, "to the extent that it might be argued that counsel and the case manager may nevertheless enjoy such immunities",[463] decided to waive Mr Kilolo's and Mr Mangenda's immunities "to the extent necessary for the issuance and execution of the arrest warrant against them for alleged crimes committed against the administration of justice and for their potential detention on remand pending investigation or prosecution of those offences".[464]

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[459] Application for Warrant of Arrest, para. 125.
[460] "Request to waive immunities of counsel and to be excused from the Presidency in such decision", Annex I to "Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of The Prosecutor v Jean-Pierre Bemba Gombo", 19 November 2013, ICC-01/05-68-AnxI, p. 2.
[461] Presidency Decision.
[462] Presidency Decision, para. 10.
[463] Presidency Decision, para. 11.
[464] Presidency Decision, para. 13.

2. Submissions of the parties

(a) Mr Kilolo

209. Mr Kilolo argues that the issue of immunity of counsel for the defence under article 48 (4) of the Statute must be decided as a "threshold issue" before the commencement of any legal case, and that the Trial Chamber's failure to consider the issue of immunity in its analysis on inadmissibility of evidence under article 69 (7) of the Statute constitutes an abuse of discretion "because the Trial Chamber misdirected itself on the applicable law".[465] In particular, Mr Kilolo avers that the Trial Chamber failed to consider that "the scope of Defence Counsel's immunity is such treatment as is necessary for the independent performance of Defence functions".[466] In this regard, he argues that the Trial Chamber erred in not considering article 48 (4) of the Statute, article 18 of the Agreement on Privileges and Immunities of the International Criminal Court and article 25 of the Headquarters Agreement between the International Criminal Court and the host State.[467] Mr Kilolo also submits that the Trial Chamber failed to consider that "the purpose of immunity is to facilitate the independent performance of Defence duties" and that counsel for the defence benefit from functional immunity even in the absence of any agreement conferring such immunity.[468] Finally, he argues that the Trial Chamber failed to consider that "the waiver of Defence Counsel's immunity belongs exclusively to the Presidency".[469]

210. According to Mr Kilolo, "[h]ad the Trial Chamber properly considered the applicable law, it would have found that the OTP should have sought to lift Mr Kilolo's immunity before proceeding to investigate him during trial".[470] On this basis, Mr Kilolo lists the investigative activities that were conducted before 20 November 2013 (*i.e.* the date when the Presidency issued its decision addressing the issue of his and Mr Mangenda's immunities),[471] and argues that the evidence

[465] Mr Kilolo's Appeal Brief, para. 30.
[466] Mr Kilolo's Appeal Brief, para. 31.
[467] Mr Kilolo's Appeal Brief, para. 31.
[468] Mr Kilolo's Appeal Brief, para. 32.
[469] Mr Kilolo's Appeal Brief, para. 33.
[470] Mr Kilolo's Appeal Brief, para. 36.
[471] Mr Kilolo's Appeal Brief, paras 71-72.

obtained as a result of these activities should have been excluded by the Trial Chamber as inadmissible evidence.[472]

(b) Mr Babala

211. Mr Babala also makes arguments to the effect that proceedings have been vitiated by the violation of the immunities belonging to members of Mr Bemba's defence team in the Main Case.[473] While, Mr Babala's arguments do not appear to concern the (in)admissibility of evidence, the Appeals Chamber finds it appropriate to address them at this juncture as they are equally predicated on the existence of such immunities in the present proceedings. In particular, Mr Babala submits that "[he] has suffered [from] the prosecutions unlawfully brought against the Lead Counsel and Case Manager of the Defence team in the Main Case".[474] According to Mr Babala, "[t]hose prosecutions infringed their immunity from legal process as provided in article 48(4) of the Statute, article 23 of the Headquarters Agreement between the International Criminal Court and the Host State and article 18 of the Agreement on the Privileges and Immunities of the International Criminal Court".[475] Mr Babala argues that "[t]he Presidency decision to waive the[se] immunities was issued on 20 November 2013, after all the procedural steps – each as unlawful as the last – had been taken, and it dealt merely with the issuance and execution of a warrant for arrest for the two Defence members and their placement in detention".[476] Mr Babala concludes on this point by stating that the "waiving of immunities cannot authorize prior investigations and prosecutions".[477]

(c) The Prosecutor

212. The Prosecutor argues that "Kilolo and Mangenda never enjoyed immunity in the course of the investigation, neither before nor after the arrest warrant against them was issued" and, thus, "[b]y extension, no waiver would be needed for investigative

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[472] Mr Kilolo's Appeal Brief, paras 73-74, 86, 102.
[473] Mr Babala's Appeal Brief, paras 19-20.
[474] Mr Babala's Appeal Brief, para 19.
[475] Mr Babala's Appeal Brief, para 19.
[476] Mr Babala's Appeal Brief, para. 19.
[477] Mr Babala's Appeal Brief, para. 19. Mr Babala also attaches to his Appeal Brief a table from which, in his submission, "[t]he infringement emerges quite clearly" ("Tableau synoptique relatif aux irrégularités liées aux écoutes téléphoniques de la Défense Bemba", Annex D to Mr Babala's Appeal Brief, ICC-01/05-01/13-2147-Conf-AnxD-Corr (a public redacted version was registered on 30 May 2017 (ICC-01/05-01/13-2147-AnxD-Corr-Red)).

steps preceding [their] arrest and detention for those offences".[478] According to the Prosecutor, the Presidency's decision of 20 November 2013 indicates 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".[479] The Prosecutor also argues that Mr Kilolo's argument conflates the legal professional privilege under rule 73 (1) of the Rules and the immunities afforded to counsel under article 48 (4) of the Statute, which are "two distinct principles".[480] In the Prosecutor's submission, "[c]ounsel immunities […] 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", but are "obviously not intended to protect and immunise [defence counsel] from being investigated for the commission of crimes".[481]

3. Determination by the Appeals Chamber

213. At the outset, the Appeals Chamber recalls that the Presidency: (i) found that because of the "types of conduct depicted in [the alleged offences]", Mr Kilolo and Mr Mangenda did not benefit from immunities from arrest and detention on remand, but nonetheless (ii) proceeded to waive such immunity "to the extent that it might be argued that counsel and the case may […] enjoy [it]".[482] Mr Kilolo and Mr Babala argue that, because of the time and scope of the Presidency Decision, members of Mr Bemba's defence team still enjoyed immunities from investigation and prosecution in the present proceedings.

214. The Appeals Chamber is not persuaded by the appellants' arguments concerning a purported immunity of members of Mr Bemba's defence team from proceedings by this Court. Contrary to Mr Kilolo's and Mr Babala's arguments, the Appeals Chamber considers that there is no legal basis for any such immunity. The legal instruments to which Mr Kilolo and Mr Babala refer (*i.e.* article 48 (4) of the Statute, the Agreement on Privileges and Immunities of the International Criminal Court and the Headquarters Agreement between the International Criminal Court and the Host

[478] Response, para. 88.
[479] Response, para. 89, referring to Presidency Decision, para. 10.
[480] Response, para. 93.
[481] Response, para. 94.
[482] Presidency Decision, paras 10-13.

State)[483] provide for immunities that are applicable externally, *i.e. vis-à-vis* those States that are bound by these legal texts, rather than, internally, between the Court and defence counsel.

215. Article 48 of the Statute, indeed, makes it clear that the immunities accorded therein are provided to ensure the effective and independent functioning of the Court. This is the case also with respect to defence counsel. Article 48 (4) in fact specifies that "[c]ounsel […] shall be accorded such treatment as is necessary for the proper functioning of the Court". That these immunities are owed to the Court, in protection of its own interests *vis-à-vis* external actors, is further confirmed by the fact that the power to waive such immunities is left with the Court itself, specifically, as concerns defence counsel, with the Presidency.

216. Furthermore, article 48 (4) of the Statute makes explicit reference to the Agreement on the Privileges and Immunities of the Court, which is an international legal instrument between States.[484] The Preamble of this agreement specifies that "article 48 of the Rome Statute provides that the International Criminal Court shall enjoy in the territory of each State Party to the Rome Statute such privileges and immunities as are necessary for the fulfilment of its purposes". In addition, article 18 (1) of the agreement stipulates, *inter alia*, the immunities that a counsel practicing before the Court "shall enjoy […] to the extent necessary for the independent performance of his or her functions", while article 26 emphasises that such immunities "are granted in the interest of the good administration of justice and not for the personal benefit of the individuals themselves". These immunities – which are indeed founded on an international agreement – therefore protect the functioning of the Court from possible external interferences. The same considerations equally apply with respect to the "Headquarters Agreement" – a bilateral agreement between the

[483] Mr Kilolo's Appeal Brief, para. 31; Mr Babala's Appeal Brief, para. 19.
[484] "Agreement on the Privileges and Immunities of the International Criminal Court", adopted by the Assembly of States Parties to the Rome Statute at its first session on 3-10 September 2002, ICC-ASP/1-3.

Court and The Netherlands – which contains, *mutatis mutandis*, corresponding provisions.[485]

217. In light of the above, the Appeals Chamber concludes that immunities from legal proceedings of defence counsel practicing before the Court apply exclusively with respect to the exercise of jurisdiction by national courts. They do not constitute a bar to the operation of the Court's own process. In other words, Mr Kilolo and Mr Mangenda did not enjoy any immunity vis-à-vis the Court, and therefore, there was none that needed to be "waived". Accordingly, the Appeals Chamber rejects Mr Kilolo's and Mr Babala's arguments that, in the absence of any such waiver, the immunities of members of Mr Bemba's defence team in the Main Case prevented their investigation and prosecution by the Court.[486]

B. Alleged errors concerning the admissibility of the Western Union Records

1. Overview of the appellants' grounds of appeal

218. Mr Kilolo, Mr Mangenda, Mr Arido and Mr Babala argue that the Trial Chamber erred by not excluding, as inadmissible evidence pursuant to article 69 (7) of the Statute, the Western Union Records. These are records of money transfers conducted through the Western Union company listing, *inter alia*, the sender's name, the amount, the date and time of the transfer and the sender's telephone number, as well as the name and telephone number of the recipient and the date and time on which the money was collected.[487] These records had been transmitted to the Prosecutor by the Austrian authorities in execution of three requests for assistance to

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[485] "Headquarters Agreement between the International Criminal Court and the Host State", concluded on 7 June 2007 and entered into force on 1 March 2008, ICC-BD/04-01-08, articles 25, 30. *See also* the Preamble to this agreement, which, *inter alia*, specify that "the Court and the host State wish to conclude an agreement to facilitate the smooth and efficient functioning of the Court in the host State".

[486] Notably, Mr Kilolo's sub-ground 1.A., section 3 ("The Trial Chamber abused its discretion in failing to consider whether the OTP violated Defence Counsel's immunity under Article 48 (4) of the Statute"), and sub-ground 1.B., section 1 in the part entitled "The Trial Chamber erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of Defence Counsel's immunity" (Mr Kilolo's Appeal Brief, paras 29-36 and paras 70-74, respectively); Mr Babala's section entitled "Violation of the privileged and immunities of members of the defence team in the Main Case" (Mr Babala's Appeal Brief, paras 19-20).

[487] The Western Union Records are registered in the record of the present case with the following reference numbers: CAR-OTP-0070-0004; CAR-OTP-0070-0005; CAR-OTP-0070-0006; CAR-OTP-0070-0007; CAR-OTP-0073-0273; CAR-OTP-0073-0274; CAR-OTP-0073-0275; CAR-OTP-0074-0854; CAR-OTP-0074-0855; CAR-OTP-0074-0856; and CAR-OTP-0085-0856.

Austria made by the Prosecutor on 2 November 2012,[488] 18 October 2013[489] and 10 October 2014,[490] respectively, and were subsequently submitted by the Prosecutor as evidence under article 69 (3) of the Statute.[491]

219. The dispute arose at trial – and equally in the present appeals – as to whether the Western Union Records received by the Austrian authorities should be excluded as inadmissible evidence within the meaning of article 69 (7) of the Statute because of the circumstances surrounding their collection. The errors raised by the appellants concern two decisions which the Trial Chamber, upon motion by the accused, rendered on 29 April 2016 and 14 July 2016, on the issue of the alleged inadmissibility of this evidence.[492]

220. Mr Kilolo's first ground of appeal reads: "The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute and that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met, and by admitting and relying on evidence obtained because of or resulting from the Western Union materials". Sub-grounds 1.A.[493] and 1.B.[494] relate to the purported inadmissibility of the Western Union Records, and are thus addressed in the present section.[495] Sub-ground 1.C.,[496] in contrast, concerns the inadmissibility of the Dutch Intercept Materials – it is therefore analysed in the next section addressing such material. With respect to the alleged inadmissibility of the

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[488] CAR-OTP-0091-0351.
[489] CAR-OTP-0091-0360.
[490] CAR-OTP-0091-0371.
[491] Prosecutor's First Submission of Documentary Evidence. The Western Union Records are listed in the confidential Annex A (ICC-01/05-01/13-1013-Conf-AnxA) under "C. Category III – Money Transfer Records". The Trial Chamber recognised the submission of this material in the First Decision on Submission of Documentary Evidence.
[492] First Western Union Decision.
[493] "The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute", Mr Kilolo's Appeal Brief, paras 20-36.
[494] "The Trial Chamber erred in law, fact, and procedure in finding that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met", Mr Kilolo's Appeal Brief, paras 37-93.
[495] The Appeals Chamber recalls that section 3 of Mr Kilolo's sub-ground 1.A. ("The Trial Chamber abused its discretion in failing to consider whether the OTP violated Defence Counsel's immunity under Article 48(4) of the Statute", Mr Kilolo's Appeal Brief, paras 29-36) and the part, under sub-ground 1.B., entitled "The Trial Chamber erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of Defence Counsel's immunity" (paras 70-74 of Mr Kilolo's Appeal Brief) have been addressed at section VI.A above.
[496] "The Trial Chamber erred in law, fact, and procedure in admitting and relying on evidence obtained because of and resulting from the Western Union materials", Mr Kilolo's Appeal Brief, paras 94-102.

Western Union Records, Mr Kilolo makes two sets of arguments, namely that: (i) "[t]he Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute";[497] and (ii) "[t]he Trial Chamber erred in law, fact, and procedure in finding that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met".[498]

221. Mr Mangenda's first ground of appeal reads: "The Trial Chamber improperly admitted audio-surveillance evidence". Sub-ground 1.1. ("[t]he Chamber erred in law when finding that Article 69(8) applied to the Prosecution's collection of Western Union information and in crafting a 'manifestly unlawful' standard under Article 69(8)")[499] relates entirely to the Western Union Records. Conversely, under sub-grounds 1.2., Mr Mangenda avers that "[t]he Chamber erred in law in concluding that admission of the intercepted conversations would not be antithetical to, or seriously damage the integrity of the proceedings".[500] Certain arguments under this sub-ground relate to purported violations in the collections of the Western Union Records,[501] while others concern the admissibility of the Dutch Intercept Materials.[502] The arguments made by Mr Mangenda in relation to the latter category of material will thus be addressed in the section concerning the alleged inadmissibility of the intercept materials. In this section, the Appeals Chamber will instead address the arguments made by Mr Mangenda specifically with respect to the alleged violations in the collection of the Western Union Records and the related errors allegedly made by the Trial Chamber in its two decisions on the admissibility of the Western Union Records under article 69 (7) of the Statute.

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[497] Mr Kilolo's Appeal Brief, paras 20-36.
[498] Mr Kilolo's Appeal Brief, paras 37-93.
[499] Mr Mangenda's Appeal Brief, paras 44-64.
[500] Mr Mangenda's Appeal Brief, paras 65-122.
[501] This is the case for the sections, in Mr Mangenda's Appeal Brief, entitled "The Chamber undervalued the violations" (paras 70-73), "The Chamber erred in relying upon unverified information" (paras 74-78); "The Chamber erred in shifting responsibility for the violations onto the State" (paras 79-94).
[502] This is the case for the sections, in Mr Mangenda's Appeal Brief, entitled "The Chamber erred in failing to exclude the intercepts as derivative evidence of the Western Union misconduct" (paras 95-102); "The Prosecution failed to provide concrete facts to the Dutch authorities" (paras 103-106); "The Prosecution misrepresented the evidence to the Pre-Trial Chamber and Dutch authorities" (paras 107-111); "The facts in possession of the Prosecution at the time did not provide probable cause to intercept Mangenda's calls" (paras 112-115); "Other misconduct" (para. 116).

222. Mr Arido alleges, among the purported "other fair trial violations", a number of errors made by the Trial Chamber "in respect to Western Union [Records]", namely that "[t]he Trial Chamber erred by factually misrepresenting the Defence position regarding the Western Union [Records]",[503] that "[t]he Trial Chamber erred by not addressing Defence issues raised at trial […]",[504] and that "[t]he Trial Chamber's decision to admit the Western Union [Records] is […] legally inconsistent with Article 69(7)(b) and Article 21(3) and violates [Mr Arido's] right to a fair trial".[505]

223. Finally, Mr Babala raises the "unlawful acquisition of the Western Union records" and the Trial Chamber's refusal to exclude this evidence under article 69 (7) of the Statute as one of several alleged procedural errors affecting the Conviction Decision.[506]

2. The circumstances surrounding the collection of the Western Union Records and their submission at trial

224. In light of the arguments raised by the appellants and for the sake of clarity, the Appeals Chamber considers it appropriate to provide, first, a chronology of the events related to the collection of the Western Union Records as it emerges from the record of the case, as well as an overview of the main findings of the Trial Chamber in its two decisions on the motions by the accused for the exclusion of this evidence.

225. On 28 September and 4 October 2012, [redacted], an investigator of the Office of the Prosecutor, contacted by email Mr Herbert Smetana,[507] director of global investigations and security at Western Union based in Vienna, Austria.[508] [redacted] requested a "check" on the Western Union database in relation to certain individuals based on information that "they have been involved in suspect transactions via WU and MoneyGram over the past 12 months".[509] The individuals referred to were

[503] Mr Arido's Appeal Brief, paras 123-124.
[504] Mr Arido's Appeal Brief, paras 125-130
[505] Mr Arido's Appeal Brief, paras 131-153.
[506] Mr Babala's Appeal Brief, paras 9, 21-33.
[507] The Appeals Chamber notes that Mr Smetana later testified at trial as witness P-267.
[508] *See* Mr Smetana's testimony before the Court in the transcript of 2 November 2015, ICC-01/05-01/13-T-33-ENG (ET WT), p. 15, lines 18-19.
[509] CAR-OTP-0092-0021; CAR-OTP-0092-0022.

Joachim Kokaté, Narcisse Arido and [redacted] in the first email,[510] and Joachim Kokaté, Narcisse Arido and [redacted] in the second email.[511]

226. On 11 October 2012, Mr Smetana responded to the second email and transmitted to [redacted] an Excel spreadsheet containing information on the financial transactions – as either sender or receiver – of Joachim Kokaté, Narcisse Arido and [redacted].[512]

227. On 15 October 2012, the Prosecutor transmitted a communication to the Austrian Ministry of Justice announcing that a meeting was scheduled to take place between [redacted] (another investigator of her Office) and "Western Union representatives" at the office of the Western Union in Vienna on 18 and 19 October 2012 "to identify and if applicable screen relevant information that may be in possession of Western Union and which can be relevant to our ongoing investigations".[513] On 1 November 2012, the Prosecutor notified the competent Austrian authorities of a second visit to Western Union by [redacted], scheduled for 4 and 5 November 2012, for the same purpose as the previous one, and informed them that the day after the communication, 2 November 2012, the Prosecutor would transmit an urgent request for assistance to the Austrian authorities "requesting the transmission of copies of relevant records held by the Western Union".[514] The Prosecutor held that the mission scheduled to take place on 4 and 5 November 2012 would "facilitate the expedited execution of the forthcoming request [for assistance]".[515]

228. On 2 November 2012, as announced, the Prosecutor transmitted a request for assistance to the Austrian authorities requesting the "[t]ransmission of copies of

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[510] CAR-OTP-0092-0021.
[511] CAR-OTP-0092-0022.
[512] Mr Smetana's email is registered as document CAR-OTP-0092-0023, and the Excel spreadsheet that was transmitted as attachment to the email as document CAR-OTP-0092-0024.
[513] CAR-OTP-0092-0892. As indicated in the first request for assistance to Austria transmitted by the Prosecutor on 2 November 2012 (CAR-OTP-0091-0351), this meeting took place on 19 October 2012 ("On 19 October 2012, a meeting was facilitated by Mr Herbert Smetana, Director of International Security of Western Union […] at [redacted] Vienna").
[514] CAR-OTP-0092-0890.
[515] CAR-OTP-0092-0890.

records held by Western Union regarding all monies transacted, sent or received by or from the [67] individuals listed in 'Annexure A' of [the request]".[516]

229. On 7 November 2012, [redacted] sent an email to Mr Smetana asking whether Western Union had information concerning payments sent or received by Mr Mangenda using his full name.[517] In response to [redacted]'s request, Mr Smetana sent an email attaching an Excel spreadsheet containing the requested information.[518]

230. In execution of the request for assistance of 2 November 2012, the Austrian authorities transmitted to the Prosecutor of the Court part of the Western Union Records on 10 January[519] and on 21 May 2013.[520]

231. On 18 October 2013, the Prosecutor submitted a second request for assistance to the Austrian authorities requesting the transmission of records from the Western Union. By this request the Prosecution sought the "[t]ransmission of copies of records held by Western Union regarding monies transacted, sent or received by or from the [68] individuals listed in 'Annex A' of [the request] for the period from 1st of February 2013 until 31 October 2013".[521] In execution of this request, the Austrian authorities transmitted to the Prosecutor another part of the Western Union Records on 2 January 2014.[522]

232. On 10 October 2014, the Prosecutor submitted a third request for assistance to the Austrian authorities, reminding the Austrian authorities of her two previous requests and further requesting "[t]ransmission of copies of records held by Western Union regarding monies transacted, sent or received by or from the [68] individuals listed in 'Annex A' […] for the period from 1 to 23 November 2013".[523] The last part

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[516] CAR-OTP-0091-0351 at 0354.
[517] CAR-OTP-0092-0033.
[518] Mr Smetana's email is registered as document CAR-OTP-0092-0033 and the attached Excel spreadsheet as document CAR-OTP-0092-0034.
[519] CAR-OTP-0070-0001-0001, transmitting documents CAR-OTP-0070-0004, CAR-OTP-0070-0005, CAR-OTP-0070-0006; CAR-OTP-0070-0007.
[520] CAR-OTP-0073-0278, transmitting the records registered as documents CAR-OTP-0073-0273, CAR-OTP-0073-0274; CAR-OTP-0073-0275.
[521] CAR-OTP-0091-0360.
[522] CAR-OTP-0074-0826, transmitting the records registered as documents CAR-OTP-0074-0854, CAR-OTP-0074-0855; CAR-OTP-0074-0856.
[523] CAR-OTP-0091-0371 at 0374.

of the Western Union Records was transmitted by the Austrian authorities, in execution of this third request for assistance, on 6 February 2015.[524]

233. On 16 June 2015, the Prosecutor submitted into the record of the case the Western Union Records transmitted by the Austrian authorities in execution of her three requests for assistance.[525] The Chamber recognised the submission of this evidence on 24 September 2015.[526]

234. On 29 April 2016, upon requests made on 8 April 2016 by Mr Babala,[527] Mr Mangenda,[528] Mr Arido[529] and Mr Kilolo[530] to declare the Western Union Records inadmissible under article 69 (7) of the Statute, the Trial Chamber issued the First Western Union Decision. In its decision, the Trial Chamber, after setting out its understanding of the applicable law,[531] considered the allegations by the accused that: (i) the Austrian authorities were misled by false statements made by the Prosecutor in the requests for assistance submitted to Austria;[532] (ii) Austrian law does not provide for judicial assistance in investigations into offences under article 70 of the Statute;[533] (iii) the request for financial data was overly broad;[534] and (iv) the collection of the Western Union Records was vitiated by the direct contact between the Prosecutor and Western Union and by the receipt of information on financial transactions prior to the issuance of the first request for assistance and any order from the Austrian

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[524] CAR-OTP-0085-0843, transmitting the records registered as document CAR-OTP-0085-0856.
[525] *See* Prosecutor's First Submission of Documentary Evidence. The Western Union Records are listed in the confidential Annex A (ICC-01/05-01/13-1013-Conf-AnxA) under "C. Category III – Money Transfer Records".
[526] First Decision on Submission of Documentary Evidence.
[527] "Requête de la Défense de M. Fidèle Babala Wandu afin d'obtenir l'inadmissibilité des registres Western Union", ICC-01/05-01/13-1785-Conf; a public redacted version was registered on 27 May 2016 (ICC-01/05-01/13-1785-Red).
[528] "Request to Exclude Evidence Pursuant to Article 69(7)", corrigendum registered on 11 April 2016, ICC-01/05-01/13-1791-Conf-Corr; a public redacted version was registered on 10 May 2016 (ICC-01/05-01/13-1791-Corr-Red).
[529] "Narcisse Arido's motion on inadmissibility and exclusion of evidences", ICC-01/05-01/13-1795-Conf; a public redacted version was registered on 9 July 2016 (ICC-01/05-01/13-1795-Red).
[530] "Motion on behalf of Aime Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights", ICC-01/05-01/13-1796-Conf; a public redacted version was registered on 3 May 2016 (ICC-01/05-01/13-1796-Red).
[531] First Western Union Decision, paras 28-40.
[532] First Western Union Decision, para. 52.
[533] First Western Union Decision, para. 53.
[534] First Western Union Decision, para. 53.

authorities.[535] Upon consideration, the Trial Chamber concluded that the Western Union Records had not been collected by means of a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute.[536] Notwithstanding this conclusion, the Trial Chamber, "due to the importance of the issue", decided to consider also whether, "in case the alleged violation had occurred", the criteria of article 69 (7) (a) or (b) of the Statute would have been fulfilled, assuming, as a "hypothetical" violation, the violation of the internationally recognised human right to privacy stemming from the prior contact between the investigators of the Office of the Prosecutor and Mr Smetana and the provision of financial data "before the approval of the first order by an Austrian judge".[537] The Trial Chamber however considered that "even if" a violation of the Statute or internationally recognised human rights "would be assumed", "the criteria of Articles 69(7)(a) and (b) of the Statute are not fulfilled".[538]

235. On 9 June 2016, Mr Arido disclosed to the other parties two domestic rulings that had been rendered on 22 April and 24 May 2016, by which the Higher Regional Court of Vienna (*Oberlandesgericht Wien*) had repealed two decisions by a lower court (*Landesgericht für Strafsachen Wien*) which had authorised the execution of the Prosecutor's first and second requests for assistance for the collection of relevant records in possession of the Western Union.[539] On the basis of these two domestic rulings, Mr Arido requested the Trial Chamber to consider again the purported inadmissibility of the Western Union Records under article 69 (7) of the Statute,[540] which the Trial Chamber agreed to do.

236. In its Second Western Union Decision, issued on 14 July 2016, the Trial Chamber stated that "[i]n view of" the decisions of the Higher Regional Court of

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[535] First Western Union Decision, paras 54-59.
[536] First Western Union Decision, para. 60.
[537] First Western Union Decision, paras 61, 64.
[538] First Western Union Decision, para. 70.
[539] The two rulings were disclosed by Mr Arido to the other parties and made available to the Trial Chamber on 9 June 2016 through e-Court. They were registered (in the original German language) as documents CAR-D24-0005-0001 and CAR-D24-0005-0013, respectively. The official French translations were registered as CAR-D24-0005-0045 and CAR-D24-0005-0033, respectively, and made available by Mr Arido through e-Court on 28 June 2016.
[540] "Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions", original version registered on 9 June 2016 and corrigendum registered on 13 June 2016, ICC-01/05-01/13-1928-Corr. This document was originally filed confidentially and reclassified as public pursuant to Trial Chamber VII's instruction, 4 August 2016.

Vienna, "the internationally recognised right to privacy has been violated".[541] Nevertheless, the Trial Chamber determined that, despite this violation, "the admission of the Western Union [Records] would not be antithetical to and would [not] seriously damage the integrity of the proceedings" within the meaning of article 69 (7) (b) of the Statute.[542]

237. In the Conviction Decision, the Trial Chamber relied on the Western Union Records for its factual findings, stating that it used them "primarily to corroborate other evidence concerning payments, in particular witness testimonies".[543]

3. Alleged "preliminary errors"

238. Mr Arido argues that the Trial Chamber made two "preliminary errors" in relation to the matter of the admissibility of the Western Union Records. Both of these errors were allegedly made in the Conviction Decision, rather than in its interlocutory decisions on the admissibility of the Western Union Records.

(a) Relevant part of the Conviction Decision

239. In the Conviction Decision, under the heading "Admissibility of Western Union Records",[544] the Trial Chamber stated that, while "[t]he reliability and accuracy of the information contained in these records was actually never challenged by the Defence", the accused had sought their exclusion under article 69 (7) of the Statute "on the grounds that the records had been obtained in breach of national laws, several Chapter IX provisions and the accuseds' right to privacy as an internationally recognised human right".[545] The Trial Chamber then recalled that it had rejected these motions for the exclusion of the Western Union Records in its two interlocutory decisions on the issue, *i.e.* the First Western Union Decision and Second Western Union Decision.[546]

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[541] Second Western Union Decision, para. 28.
[542] Second Western Union Decision, para. 40.
[543] Conviction Decision, para. 210.
[544] Conviction Decision, paras 210-212.
[545] Conviction Decision, para. 211.
[546] Conviction Decision, paras 211-212.

(b) Submissions of the parties

(i) Mr Arido

240. First, Mr Arido argues that in the Conviction Decision the Trial Chamber did not address his arguments against the legality of the "Western Union RFAs [(requests for assistance)] producing the records", on the basis of which, he had requested exclusion of the Western Union Records and argued that their "admission into the record" was in violation of article 69 (7) of the Statute".[547] According to him, "[t]his silence in the Trial Judgment makes the TC's legal holdings unreviewable, in violation of Appellant's right to a fair trial".[548]

241. Second, Mr Arido submits that the Trial Chamber's statement in the Conviction Decision that the Defence did not challenge the reliability and accuracy of the information in the Western Union Records is factually incorrect.[549] In this regard, Mr Arido recalls that he had actually challenged the reliability and accuracy of this material "both in [his] cross-examination of [Mr Smetana] […] and in [his] Motion on Inadmissibility and Exclusion of Evidence".[550]

(ii) The Prosecutor

242. The Prosecutor contends that Mr Arido's arguments should be summarily dismissed. She states that: (i) "all of [Mr Arido's] challenges were addressed in interlocutory procedural decisions relating specifically to those challenges" and that the Trial Chamber "was not required to recapitulate those holdings again in its [Conviction Decision]";[551] and (ii) Mr Arido "fails to mention" that in the First Western Union Decision the Trial Chamber noted, considered and ultimately dismissed his argument as to the reliability of the Western Union Records.[552]

(c) Determination by the Appeals Chamber

243. The Appeals Chamber is not persuaded by Mr Arido's assertion that he is prejudiced in his right to appeal because of the "silence" of the Trial Chamber in the Conviction Decision on his arguments regarding the inadmissibility of the Western

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[547] Mr Arido's Appeal Brief, paras 126, 128.
[548] Mr Arido's Appeal Brief, para. 130.
[549] Mr Arido's Appeal Brief, para. 123, referring to Conviction Decision, para. 211.
[550] Mr Arido's Appeal Brief, para. 124.
[551] Response, para. 86.
[552] Response, para. 85.

Union Records. The Appeals Chamber notes that the arguments concerning the alleged inadmissibility of the Western Union Records made by the accused – including by Mr Arido – were disposed of in interlocutory decisions rendered before the Conviction Decision.[553] As correctly pointed out by the Prosecutor, there was no need for the Trial Chamber to include these considerations again in the Conviction Decision. No prejudice ensues from this "silence" in the Conviction Decision, including to Mr Arido's right to appeal. Indeed, Mr Arido himself – as well as Mr Mangenda, Mr Kilolo and Mr Babala – raise, as grounds of appeal against the Conviction Decision, errors allegedly made by the Trial Chamber precisely in those interlocutory decisions which disposed of the parties' arguments concerning the admissibility of the Western Union Records.

244. The Appeals Chamber is also not persuaded by Mr Arido's argument concerning the Trial Chamber's statement in the Conviction Decision that there had been no actual challenge to the reliability and accuracy of the information contained in the Western Union Records. Given the context in which this statement was made (notably, under the heading "Admissibility of Western Union Records"), the Appeals Chamber understands that the Trial Chamber meant to indicate that no such challenge had been made within the meaning of article 69 (7) (a) of the Statute. The "challenges" to the reliability of the Western Union Records, that Mr Arido claims to have made "during [his] cross-examination" of Mr Smetana, were in fact *questions* to the witness and, in any case, were unrelated to the reliability of this material within the meaning of article 69 (7) (a) of the Statute. Notwithstanding the above, the Appeals Chamber recognises that the Trial Chamber's statement was not entirely accurate as Mr Arido had indeed argued at one point that the alleged violations of the internationally recognised human right to privacy in the collection of the Western Union Records casted substantial doubt on their reliability within the meaning of article 69 (7) (a) of the Statute.[554] However, the Appeals Chamber notes that such arguments were considered and ultimately dismissed by the Trial Chamber in the First

[553] First Western Union Decision; Second Western Union Decision.
[554] *See e.g.* "Narcisse Arido's motion on inadmissibility and exclusion of evidences", 8 April 2016, ICC-01/05-01/13-1795-Red, para. 49; a public redacted version dated 9 July 2016 was registered on 11 July 2016 (ICC-01/05-01/13-1795-Red).

Western Union Decision.[555] The absence in the Conviction Decision of a reference to these arguments and their prior disposal by the Trial Chamber is therefore inconsequential.

245. For these reasons, the Appeals Chamber rejects Mr Arido's arguments concerning the Trial Chamber's "preliminary errors".

4. Challenges to the determination on whether the Western Union Records were obtained "by means of a violation" under article 69 (7) of the Statute

246. The appellants argue that errors were committed by the Trial Chamber in its inquiries into whether violations of the Statute or internationally recognised human rights had occurred in the collection of the Western Union within the meaning of the *chapeau* of article 69 (7) of the Statute. They also refer to a number of circumstances that, rather than constituting violations as such, would provide indications that the admission of the Western Union Records was antithetical to and seriously damaged the integrity of the proceedings within the meaning of article 69 (7) (b) of the Statute. For the reasons explained below, the Appeals Chamber summarises here only the Trial Chamber's determinations under the *chapeau* of article 69 (7) of the Statute and the appellants' challenges thereto.

(a) Relevant parts of the Trial Chamber's decisions

247. In the First Western Union Decision, which was rendered on 29 April 2016, the Trial Chamber noted that arguments were raised concerning "the application of national law and the Chamber's power and limits to decide if evidence was obtained in accordance with national law".[556] In this regard, the Trial Chamber, noting the provisions of article 69 (8) of the Statute and rule 63 (5) of the Rules, stated that "it is clear that the Chamber cannot analyse whether or not the Austrian authorities correctly applied domestic laws as such".[557] At the same time, according to the Trial Chamber, some statutory provisions – such as articles 55 (2) and 59 of the Statute – "apply directly to national authorities acting on request of the Court […] making the way in which national procedures were implemented relevant in an Article 69 (7)

[555] First Western Union Decision, paras 14, 62.
[556] First Western Union Decision, para. 31.
[557] First Western Union Decision, para. 32.

analysis".[558] In addition, in the view of the Trial Chamber, as any interference with the internationally recognised right to privacy must be done in accordance with the law, "a Chamber's analysis of this right may also have some element of reviewing national law when national authorities act pursuant to Court cooperation requests".[559] On the understanding that a tension existed between articles 69 (7) and 69 (8) of the Statute,[560] the Trial Chamber attempted to reconcile this tension as follows:

> The Chamber will review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute. In other words, the Chamber in these situations engages 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. If the Chamber cannot conclude that such manifestly unlawful conduct occurred at the national level, the Chamber is not permitted to further examine whether a mere infringement of domestic rules of procedure transpired.[561]

248. The Trial Chamber also clarified 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 [9] of the Statute".[562] It reasoned that the provisions of Part 9 of the Statute, including article 99 (1), address the relationship between requested States and the Court and "are not generally apt to protect the interests of the individual", and that "[o]nce the State has complied with the Court's cooperation request, even if national laws were not correctly applied, the State is considered to have nevertheless complied with its obligations under Part [9]".[563] In addition, the Trial Chamber considered that the terms and purpose of article 69 (7) of the Statute also "militate[] against conflating Part [9] considerations with those under Article 69(7) of the Statute".[564] It therefore concluded that "[a] State's failure to respect its own national procedures does not automatically result in a 'violation of this Statute' for Article 69(7) purposes".[565] On this basis, the Chamber rejected all arguments on the inadmissibility of the Western

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[558] First Western Union Decision, para. 33.
[559] First Western Union Decision, para. 33.
[560] First Western Union Decision, paras 33, 34.
[561] First Western Union Decision, para. 34.
[562] First Western Union Decision, para. 40.
[563] First Western Union Decision, para. 36. *See also* para. 40.
[564] First Western Union Decision, para. 37. *See also* paras 39-40.
[565] First Western Union Decision, para. 40.

Union Records resulting from an alleged breach of article 99 (1) of the Statute in their collection.[566]

249. The Trial Chamber clarified that the Western Union Records, of which exclusion under article 69 (7) of the Statute was sought by the accused, had been "provided by the Austrian authorities in response to Prosecution's RFAs".[567] It therefore held that article 99 (4) of the Statute was not applicable to the issue under consideration.[568]

250. The Trial Chamber further stated that, as interferences with the right to privacy on financial information must be "in accordance with an applicable law", "[it] ha[d] to determine if the provision of the Western Union [Records] was executed in accordance with the law".[569] In this regard, and noting that the materials at issue were provided pursuant to authorisations of an Austrian court, it nonetheless recalled that it would "only assess whether there are grounds which render this authorisation manifestly unlawful so as to void it, and not if the authorisation itself was lawfully provided under Austrian law as such".[570]

251. On this basis, the Trial Chamber addressed the argument made by Mr Arido that the request for financial data was "overly broad", but, determined that, as "it is barred from assessing the concrete application of national law", it "[would] not assess if the national authorities should not have granted the RFA due to the alleged overly broad character of the request".[571]

252. The Trial Chamber also considered the issue of whether the contacts between the investigators of the Office of the Prosecutor and the representative of the Western Union as well as the receipt of financial information prior to the transmission of the first request for assistance and the issuance of any order from the Austrian authorities "vitiate the judicially approved orders" rendered in accordance with article 116 of the

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[566] First Western Union Decision, para. 44, referring to paras 35-40.
[567] First Western Union Decision, para. 45, referring to para. 42 (vii).
[568] First Western Union Decision, para. 45.
[569] First Western Union Decision, para. 46.
[570] First Western Union Decision, para. 51.
[571] First Western Union Decision, para. 53.

Austrian Code of Criminal Procedure.[572] The Trial Chamber observed that in an "investigation report" prepared by the Office of the Prosecutor (document CAR-OTP-0092-0018) "it is stated that a senior public prosecutor of the Austrian Ministry of Justice advised that the Prosecution was allowed to screen material from Western Union unless it was required for evidentiary purposes, in which case a RFA was needed in order to obtain a court order".[573] In addition, the Trial Chamber found of significance that the Prosecutor "at no point in time tried to conceal the fact that it had prior contacts with Western Union and access to financial information", as this information had been provided to the Austrian authorities on several occasions, including in the Prosecutor's request for assistance transmitted on 18 October 2013.[574] Therefore, according to the Trial Chamber, "the Austrian public prosecutor was aware of the prior contacts between the Prosecution and Western Union and that the Prosecution had access to financial data beforehand when requesting that the orders be approved by an Austrian judge".[575] The Trial Chamber concluded, "upon the facts and submissions presented", that it was "not proven that the Prosecution's contacts with Western Union and the reception of financial data prior to the first order of the Austrian Authorities vitiate judicially approved orders and, in consequence, led to a manifest violation of Article 38 of the Austrian Banking Act".[576]

253. The Trial Chamber thus determined that "[the] manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be 'in accordance with the law' for purposes of the right to privacy as reviewed under Article 69(7) of the Statute" and clarified that "[a]ny further inquiry would involve applying Austrian law to determine a mere infringement of national procedure, which this Chamber is expressly precluded from doing by the terms of Article 69(8) of the Statute and Rule 63(5) of the Rules".[577]

254. The Trial Chamber therefore concluded that "with regard to the Austrian law, there was no manifestly unlawful conduct" and that "it [was] not convinced that the

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[572] First Western Union Decision, paras 54-55.
[573] First Western Union Decision, para. 56, referring to document CAR-OTP-0092-0018.
[574] First Western Union Decision, paras 57-58.
[575] First Western Union Decision, para. 58, referring to documents CAR-OTP-0092-0892, CAR-OTP-0092-0890; CAR-OTP-0091-0360.
[576] First Western Union Decision, para. 59.
[577] First Western Union Decision, para. 60.

Western Union [Records] were not obtained 'in accordance with law'".[578] It thus found that the material at issue was not obtained by means of a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute.[579]

255. In the Second Western Union Decision – in which the Trial Chamber agreed to consider again the purported inadmissibility of the Western Union Records under article 69 (7) of the Statute, on the ground that new information had been brought to its attention by Mr Arido – the Trial Chamber stated that, "[i]n view of" the two domestic decisions of the Higher Regional Court repealing two rulings by the lower courts authorising the collection of the Western Union Records, "any further assessment whether there was manifestly unlawful conduct [was] not necessary" and concluded that "the internationally recognised right to privacy ha[d] been violated".[580]

(b) Submissions of the parties

(i) Mr Mangenda

256. Mr Mangenda argues that the Trial Chamber erred in law in finding that article 69 (8) of the Statute applied to the collection of the Western Union Records,[581] and in creating, and applying in its analysis, a "'manifestly unlawful' standard".[582]

257. At first, Mr Mangenda argues that the Trial Chamber erred in applying article 69 (8) of the Statute to evidence collected by or on behalf of the Prosecutor, as "[t]he deference to State sovereignty sought to be achieved by Article 69 (8) is not applicable when the evidence is obtained directly by the Prosecution, or at the Prosecution's direct behest".[583] He submits that, to the contrary, article 69 (8) of the Statute concerns situations in which State officials conduct their own investigations.[584] In Mr Mangenda's view, "[a]pplying Article 69 (8) to any situation where there is any element of State involvement would inappropriately exempt the

[578] First Western Union Decision, para. 70.
[579] First Western Union Decision, para. 70.
[580] Second Western Union Decision, para. 28.
[581] Mr Mangenda's Appeal Brief, paras 44-49.
[582] Mr Mangenda's Appeal Brief, paras 50-63.
[583] Mr Mangenda's Appeal Brief, para. 49.
[584] Mr Mangenda's Appeal Brief, paras 45, 47.

Prosecution from well-accepted international human rights norms".[585] On this basis, Mr Mangenda avers that the Trial Chamber erred in applying article 69 (8) of the Statute to the collection of the Western Union Records given that information from the Western Union had first been collected by investigators of the Office of the Prosecutor who, at the time, "were not even acting under the colour of authority of an Austrian court order".[586] He submits that "[e]ven if the Western Union information is considered to have been 'collected' only at the time the Austrian authorities provided it to the Prosecution, Article 69(8) would still not apply" since "[t]he entire context can leave no doubt that Austria was acting as nothing more than the ICC Prosecutor's agent".[587]

258. Mr Mangenda also submits that, even if article 69 (8) of the Statute were found to apply with respect to the Western Union Records, "the Chamber erred in creating a 'manifestly unlawful' test that allowed it to derogate from its duty to determine if evidence was collected in violation of international human rights law".[588] He avers that the Trial Chamber created a rule "heretofore unknown in international criminal jurisprudence" to reconcile the purported tension created by article 69 (8) when applying article 69 (7) of the Statute.[589] In Mr Mangenda's submission, the Trial Chamber erred in applying "this rule of its own creation" to exclude assessing certain circumstances concerning the collection of the Western Union Records.[590] He avers that "[a]n individual's protection from violations of privacy is not reduced to only manifestly unlawful acts simply because domestic – in this case, Austrian – law regulates the privacy of financial records".[591] Specifically, according to Mr Mangenda, "the 'manifestly' unlawful standard is inherently inconsistent, in particular, with the need to prevent disproportionate infringements of privacy and other rights".[592]

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[585] Mr Mangenda's Appeal Brief, para. 48.
[586] Mr Mangenda's Appeal Brief, para. 45.
[587] Mr Mangenda's Appeal Brief, para. 47.
[588] Mr Mangenda's Appeal Brief, para. 50.
[589] Mr Mangenda's Appeal Brief, para. 51.
[590] Mr Mangenda's Appeal Brief, paras 52-53.
[591] Mr Mangenda's Appeal Brief, para. 53.
[592] Mr Mangenda's Appeal Brief, para. 54.

259. Mr Mangenda argues that the "manifestly unlawful" test adopted by the Trial Chamber is also "contrary to the legislative intent of Article 69(8)" as well as "unnecessary and unjustified".[593] In his view, "[c]ompliance or lack of compliance with national law was a relevant part of the factual context, but was not dispositive whether the interference with the right to privacy was according to law" given that "[i]nvestigative activities are measured not against domestic law, but by whether they conform to internationally recognised human rights".[594] In this respect, Mr Mangenda submits that "[t]he violation of national law is neither a necessary nor sufficient condition of exclusion under Article 69 (7)".[595]

260. Mr Mangenda therefore states that "[t]he Chamber erred in applying Article 69(8) to evidence collected by the Prosecution" and that "[a]lternatively, if Article 69(8) applied, it did not operate to insulate all but 'manifestly unlawful' violations of the right to privacy".[596] On this basis, he argues that the Trial Chamber "erred in the first step under Article 69(7)", and that this, in turn, "precluded, or relegated to hypotheticals, the second step – considering the impact of these violations under Article 69(7)(b)".[597]

261. In particular, Mr Mangenda submits that, because of the application of its erroneous "manifestly unlawful standard", the Trial Chamber failed to consider that, by receiving financial information before obtaining authorisation from an Austrian court, the Prosecutor was in breach of Austrian law, and her interference with Mr Mangenda's right to privacy of financial records – which was thus "not according to law" – therefore amounted to a violation of his internationally recognised human right within the meaning of article 69 (7) of the Statute.[598] According to Mr Mangenda, the Trial Chamber also erred in relying, for its analysis on this particular issue, on document CAR-OTP-0092-0018, as this document was not signed, contains "no attestation of truth or accuracy", is "self-serving in the extreme, given that the author is the very person whose conduct was unlawful", is "not even

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[593] Mr Mangenda's Appeal Brief, paras 60-61.
[594] Mr Mangenda's Appeal Brief, para. 61.
[595] Mr Mangenda's Appeal Brief, para. 61.
[596] Mr Mangenda's Appeal Brief, para. 64.
[597] Mr Mangenda's Appeal Brief, para. 64.
[598] Mr Mangenda's Appeal Brief, paras 22-25, 64, 72.

close to contemporaneous" and was prepared for the purposes of litigation "only after, and for the purpose of trying to dispel, the cloud of impropriety that emerged [during the examination of Mr Smetana at trial]".[599]

262. Similarly, Mr Mangenda argues that the Trial Chamber erred when, in another application of its "manifestly unlawful" standard, it "refused to look at the proportionality issue, concluding that failing to provide time parameters for the records obtained was not 'manifestly unlawful'", and that, in doing so, the Trial Chamber failed to consider that by obtaining financial records disproportionate to the time period she was investigating, the Prosecutor violated his internationally recognised human right to privacy of financial records.[600] Indeed, in Mr Mangenda's submission, "the Chamber's 'manifestly' unlawful standard ratified the Prosecution's unlawful acquisition of 922 Western Union transactions dating back to 2005" and "[t]his directly contravenes the principle of proportionality which is at heart of preserving and protecting the right to privacy.[601]

263. Finally, Mr Mangenda argues that while the Trial Chamber, "in the wake of" the two subsequent domestic rulings by the Higher Regional Court of Vienna, accepted that there had been a violation of the right to privacy in the collection of the Western Union Records, it erred in "analys[ing] the impact of that violation in a vacuum failing to also consider the screening and disproportionality issues".[602]

(ii) Mr Kilolo

264. Under sub-ground 1.A., Mr Kilolo avers that "[t]he Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute".[603] In particular, Mr Kilolo submits that the Trial Chamber erred in law in concluding that article 99 (1) of the Statute was not relevant in determining whether to exclude the Western Union Records under article 69 (7) of the Statute, and that article 99 (4) of the Statute was not applicable.

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[599] Mr Mangenda's Appeal Brief, paras 74-78.
[600] Mr Mangenda's Appeal Brief, para. 72. *See also* para. 26.
[601] Mr Mangenda's Appeal Brief, para. 55.
[602] Mr Mangenda's Appeal Brief, para. 72.
[603] Mr Kilolo's Appeal Brief, paras 20-36.

265. At first, Mr Kilolo argues that the Trial Chamber, in its First Western Union Decision, erred in considering that violations of national law in the collection of evidence do not constitute violations of the Statute within the meaning of article 69 (7) of the Statute.[604] Recalling that article 99 (1) of the Statute provides that requests for assistance shall be executed in accordance with the procedure under the law of the requested State, Mr Kilolo avers that violations of this provision amount to violations of the Statute for the purposes of article 69 (7) of the Statute.[605] In Mr Kilolo's submission, the Trial Chamber rendered the *chapeau* of article 69 (7) of the Statute superfluous in considering Part 9 of the Statute as strictly limited to obligations between the Court and States Parties.[606]

266. Mr Kilolo further argues that violations of article 99 (4) of the Statute, requiring the Prosecutor to consult with the State before directly executing on its territory a request that does not involve compulsory measures, also constitute violations of the Statute within the meaning of article 69 (7) of the Statute.[607] Mr Kilolo observes that the Trial Chamber found that article 99 (4) of the Statute did not apply, as a matter of fact, to the situation at hand, but did not conduct an analysis of the interplay between Part 9 of the Statute and article 69 (7) with respect specifically to article 99 (4).[608] Nonetheless, in Mr Kilolo's view, the Trial Chamber's legal reasoning concerning the relationship between Part 9 of the Statute and article 69 (7) of the Statute made with respect to article 99 (1) constitutes an error of law also for article 99 (4) as they are both included in Part 9 of the Statute.[609]

267. Mr Kilolo concludes that "[h]ad the Trial Chamber correctly analyzed the *chapeau* element of Article 69(7), it would have correctly concluded that violations of Part [9] of the Statute can constitute 'violation[s] of this Statute' for the purposes of Article 69(7)" and, therefore "it would have correctly concluded that both Article 99(1) and Article 99(4) are applicable".[610]

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[604] Mr Kilolo's Appeal Brief, para. 20.
[605] Mr Kilolo's Appeal Brief, paras 21-23.
[606] Mr Kilolo's Appeal Brief, para. 23.
[607] Mr Kilolo's Appeal Brief, paras 25-27.
[608] Mr Kilolo's Appeal Brief, paras 26-27, referring to First Western Union Decision, para. 45.
[609] Mr Kilolo's Appeal Brief, para. 27.
[610] Mr Kilolo's Appeal Brief, para. 27.

268. According to Mr Kilolo, the Trial Chamber failed to consider that the Prosecutor's requests to Mr Smetana required compulsory measures under Austrian law, and that, therefore, by seeking information protected under the Austrian Banking Act, the Prosecutor failed to comply with Austrian law and thus violated article 99 (1) of the Statute.[611] In addition, according to Mr Kilolo, "the OTP's emails also constituted a direct request on the territory of a State Party pursuant to Article 99(4) of the Statute and […] the OTP failed to notify the Austrian authorities".[612]

269. Mr Kilolo also submits that the Trial Chamber failed to consider that, while the Prosecutor's request for assistance to Austria dated 2 November 2012 was pending, the Office of the Prosecutor "continued to circumvent Austrian law by communicating with and receiving confidential financial information from Western Union".[613] Similarly, in Mr Kilolo's view, the Trial Chamber failed to consider "that the OTP's notification email to the Austrian Ministry of Justice of 15 October 2012 did not disclose that it had already obtained confidential banking records from [Mr Smetana] or that the notification contained a material misstatement" in that it "falsely and deliberately represent[ed] that the notification was made in the context of the situation in Côte d'Ivoire".[614] According to Mr Kilolo, "[a]lthough the notification stated that the OTP would not interview witnesses or collect documents or copies, what was discussed, what materials were requested, and what was provided to Western Union during this meeting was never disclosed".[615] In this regard, Mr Kilolo submits that "the Trial Chamber failed to exercise its discretionary authority under Articles 64(6)(d) and 69(3) of the Statute and Rule 140(2) to inquire into this information, which would have been essential in determining whether the OTP's conduct in gathering the evidence made its admission antithetical to and seriously damaging to the integrity of the proceedings".[616]

270. Finally, Mr Kilolo argues that the Trial Chamber also erred in relying for its analysis on document CAR-OTP-0092-0018. According to Mr Kilolo, this document

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[611] Mr Kilolo's Appeal Brief, para. 59.
[612] Mr Kilolo's Appeal Brief, para. 59.
[613] Mr Kilolo's Appeal Brief, para. 65.
[614] Mr Kilolo's Appeal Brief, para. 63.
[615] Mr Kilolo's Appeal Brief, para. 64.
[616] Mr Kilolo's Appeal Brief, para. 64.

is unverifiable and vague, is "hearsay within hearsay", was prepared and disclosed in an untimely manner, and, in any case, refers to a purported advice that investigators of the Office of the Prosecutor received in an unrelated situation.[617] Mr Kilolo observes that neither the Austrian senior public prosecutor who gave the alleged advice discussed in the document, nor the investigators who attended the meeting with him testified at trial, and that no contemporaneous notes or other reports documenting the meeting were produced.[618] Mr Kilolo submits that, while Mr Bemba's counsel used document CAR-OTP-0092-0018 to "refresh" Mr Smetana's memory during his testimony and "the Defence failed to timely object to the use of the report", the Trial Chamber failed to exercise its obligations under articles 64 (2), 64 (6) (d) and 69 (3) of the Statute and rule 140 (2) of the Rules as it did not "request the OTP to lay a foundation", "inquire into the provenance of this report before it was shown to [Mr Smetana]" or "compel[] the OTP investigators' testimony".[619] According to Mr Kilolo, "[t]he Trial Chamber's failure to inquire into the provenance of [document CAR-OTP-0092-0018] was so unreasonable and prejudicial as to constitute an abuse of discretion".[620]

(iii) Mr Arido and Mr Babala

271. Mr Arido and Mr Babala focus their respective appeals in connection with the admissibility of the Western Union Records on the second part of the Court's inquiry under article 69 (7) of the Statute, arguing that the admission of the Western Union Records would be "antithetical to and would seriously damage the integrity of the proceedings" within the meaning of article 69 (7) (b) of the Statute.[621] In doing so, neither Mr Arido nor Mr Babala elaborates in detail on the violations by means of which the Western Union Records were allegedly obtained,[622] although they include,

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[617] Mr Kilolo's Appeal Brief, paras 60, 66-67.
[618] Mr Kilolo's Appeal Brief, para. 61.
[619] Mr Kilolo's Appeal Brief, paras 79-81. More specifically, Mr Kilolo submits that the investigators of the Office of the Prosecutor should have been compelled to testify at trial to determine: (i) who was the target of investigations from the moment the OTP received the anonymous tip; (ii) whether the OTP knew that Mr Kilolo's immunity should have been lifted at this point; (iii) what advice the OTP allegedly received from the Austrian public prosecutor in 2011; (iv) whether the OTP's actions complied with that alleged advice; and (iv) what was discussed, what materials were requested, and what was provided during the meetings with Western Union on 19-20 October and 5 November 2012.
[620] Mr Kilolo's Appeal Brief, para. 82.
[621] Mr Arido's Appeal Brief, paras 131-149; Mr Babala's Appeal Brief, paras 21-33.
[622] Mr Arido merely states that "[his] position is that the evidence obtained in violation of an internationally recognised human right can only damage the proceedings because it renders the trial

as part of their respective Appeal Briefs, charts, in tabular form, detailing the circumstances surrounding the collection of the Western Union Records and, next to each of those, a column entitled "Error/Violation" (in Mr Arido's Appeal Brief[623]) or "Évènement / commentaires" (in Annex C to Mr Babala's Appeal Brief[624]).

272. While, in the absence of any elaboration on their part, it remains difficult to ascertain Mr Babala's and Mr Arido's respective positions as to the actual violations that they consider having been the means by which the Western Union Records were obtained, the Appeals Chamber understands their position to be that the relevant violations in the collection of the Western Union Records consist in the Office of the Prosecutor having obtained certain financial data directly from Mr Smetana.[625] Mr Arido also maintains that the financial information requested and obtained by the Prosecutor was "[o]verly broad […] in terms of time period, and persons in violation of right to privacy".[626]

(iv) The Prosecutor

273. The Prosecutor argues that, because of the provision of article 69 (8) of the Statute, a chamber, when deciding whether to exclude evidence under article 69 (7), "cannot rule on the validity of a decision of a national court", "[n]or can it make a decision as to whether or how a national law might apply", as these are matters which fall within the sovereignty of the particular State.[627] Therefore, according to the

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unfair" (Mr Arido's Appeal Brief, para. 137) and assumes, on the basis of the Second Western Union Decision, that the Western Union Records were in fact obtained in violation of an internationally recognised human rights (*see more generally* Mr Arido's Appeal Brief, paras 131-153); Mr Babala only submits that "[t]he Western Union records were obtained by means of fraud under Austrian law and a breach of internationally recognised human rights orchestrated by the Office of the Prosecutor without prior judicial authorization" and that the Prosecutor's conduct of "bypassing normal legal channels is far from upstanding conduct and verges on a lack of integrity [which] infringes human rights" (Mr Babala's Appeal Brief, paras 22, 24).

[623] "Chart A – Chronology of Events Related to the Unlawful Collection of Western Union Documents", Mr Arido's Appeal Brief, pp. 101-104.

[624] "Tableau synoptique relatif aux irrégularités entachant l'obtention des registres Western Union", Annex C to Mr Babala's Appeal Brief, ICC-01/05-01/13-2147-Conf-AnxC-Corr ("Annex C to Mr Babala's Appeal Brief.

[625] *See* Mr Arido's Appeal Brief, pp. 101-102; Mr Babala's Appeal Brief, paras 22, 24.

[626] Mr Arido's Appeal Brief, p. 101. *See also* pp. 102-104.

[627] Response, para. 20.

Prosecutor, "neither national law nor domestic court rulings applying that law determine a Chamber's article 69(7) analysis".[628]

274. The Prosecutor submits that in arguing that article 69 (8) of the Statute does not apply as concerns the Western Union Records, Mr Mangenda makes a series of factual and legal errors.[629] In particular, in the Prosecutor's view, Mr Mangenda "misreads the plain text and purpose of article 69(8)" as well as the drafting history of this provision which reveals that "the phrase 'evidence collected by a State' […] 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 [9] of the Statute".[630] In addition, the Prosecutor argues that Mr Mangenda's submissions on the relevant facts are unfounded and unsubstantiated.[631] With respect to Mr Mangenda's challenge to the "manifestly unlawful" standard, the Prosecutor argues that such challenge "ignores the drafting history of article 69(8), and its plain text".[632] In addition, she avers that Mr Mangenda, in arguing that the "manifestly unlawful standard" introduces a "seriousness requirement" which does not appear in the Statute, "conflates two different concepts", namely "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)".[633]

275. As concerns Mr Kilolo's claim that the Trial Chamber erred by not applying articles 99 (1) and 99 (4) of the Statute in its analysis under article 69 (7), the Prosecutor argues that this argument "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".[634] She contends that "[a] failure to comply with national procedures in executing a request under Part [9] does not necessarily mean that the Statute has been violated in accordance with article 69(7)" and that, while the Trial Chamber found several reasons "militating against interpreting Part [9] in a sweeping

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[628] Response, para. 20.
[629] Response, paras 28-30.
[630] Response, para. 29 (emphasis in original omitted).
[631] Response, para. 30.
[632] Response, para. 33.
[633] Response, para. 35.
[634] Response, para. 43.

manner for article 69(7) purposes", Mr Kilolo "fails to engage with the Chamber's comprehensive reasoning".[635] The Prosecutor also avers that in claiming that the Trial Chamber erred in finding that article 99 (4) of the Statute did not apply to the collection of the Western Union Records, "Kilolo misreads article 99(4)'s statutory purpose, and the import of the Chamber's findings".[636] In this respect, she argues that none of the conditions of article 99 (4) of the Statute "were present in [her] cooperation request to the Austrian authorities and its liaising with the Western Union officials to obtain the Western Union material", and, "[s]ignificantly", that the emails to Mr Smetana by the investigator of her Office, did not constitute a "direct request on the territory of a State Party" under article 99 (4) of the Statute.[637]

276. That said in terms of Mr Mangenda's and Mr Kilolo's arguments concerning the Trial Chamber's alleged legal errors, the Prosecutor also argues that, contrary to Mr Mangenda's and Mr Kilolo's claims, "[her] 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", and that "[t]he Chamber underscored this fact, along with the Prosecut[or]'s good faith displayed throughout the investigation".[638]

277. In particular, the Prosecutor argues that the prior screening of Western Union data by members of her office was lawful.[639] She argues that the appellants do not provide any evidence to support their argument that the screening of these data violated Austrian law,[640] and emphasises that, in addition, "[n]one 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".[641]

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[635] Response, paras 44-45. *See also* para. 46.
[636] Response, para. 47.
[637] Response, para. 48, referring to Mr Kilolo's Appeal Brief, para. 59.
[638] Response, para. 59. *See also* paras 61-63.
[639] Response, paras 69-78.
[640] Response, para. 72.
[641] Response, para. 69. *See also* para. 75.

278. The Prosecutor also argues that Mr Mangenda's argument that investigators of the Office of the Prosecutor took "possession" of Western Union documents during their on-site screening in October and November 2012 is unfounded, and that, in compliance with the "mission notification" to the Austrian authorities, "[n]o documents were collected while Prosecution investigators were in Austria during that mission".[642] Rather, the Prosecutor explains, the four spreadsheets referred to by Mr Mangenda were emailed to an investigator of the Office of the Prosecutor by Mr Smetana "following a request by Prosecution investigators that the [Western Union] simply run 'checks' and to inform the Prosecution as to whether Western Union had information concerning transfers between certain individuals".[643]

279. Finally, with respect to Mr Kilolo's and Mr Mangenda's challenge to the Trial Chamber's reliance on document CAR-OTP-0092-0018, the Prosecutor avers that the content of this document is corroborated by other facts on the record of the case, and that the accused had the opportunity to call witnesses and submit evidence to challenge its veracity.[644] In addition, in the Prosecutor's view, "[t]o the extent the Appellants had any objections or questions relating to [document CAR-OTP-0092-0018]'s presentation to [Mr Smetana], it was for them to do so in a timely manner".[645]

(c) Determination by the Appeals Chamber

(i) The two-step analysis under article 69 (7) of the Statute

280. Article 69 (7) of the Statute envisages two consecutive inquiries. First, in accordance with the *chapeau* of this provision, it must be determined whether the evidence at issue was "obtained by means of a violation of th[e] Statute or internationally recognized human rights". An affirmative answer to this question is, however, not sufficient for the concerned evidence to be inadmissible. When the conditions of the *chapeau* of article 69 (7) of the Statute are met, the second step is to consider whether "[t]he violation casts substantial doubt on the reliability of the evidence" (article 69 (7) (a) of the Statute) or "[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings" (article

[642] Response, para. 73.
[643] Response, para. 73.
[644] Response, paras 65, 67-68.
[645] Response, para. 68.

69 (7) (b) of the Statute). The evidence concerned is inadmissible in case of an affirmative answer to either of these two questions.

281. As recalled above, the Trial Chamber, in its First Western Union Decision, determined that there had been no violation within the meaning of the *chapeau* of article 69 (7) of the Statute in the collection of the Western Union Records, while in the Second Western Union Decision it found a violation of the internationally recognised human right to privacy, but concluded that neither of the two conditions for exclusion of evidence under article 69 (7) (a) or (b) of the Statute were met. The appellants argue that errors were committed by the Trial Chamber both in its inquiries into whether violations of the Statute or internationally recognised human rights had occurred in the collection of the Western Union Records and in its determinations under article 69 (7) (a) and (b) of the Statute.

282. The Appeals Chamber considers it appropriate to analyse, first, the grounds of appeal concerning alleged errors by the Trial Chamber in its determination under the *chapeau* of article 69 (7) of the Statute, namely on whether the Western Union Records had been obtained by means of a violation of the Statute or an internationally recognised human right. These arguments – which are brought primarily by Mr Mangenda and Mr Kilolo, and, in part, also by Mr Babala and Mr Arido – relate to the legal interpretation of the *chapeau* of article 69 (7) of the Statute and its application to the facts of the case. Bearing in mind the two-step analysis required under article 69 (7) of the Statute, the Appeals Chamber will address the remaining arguments by Mr Mangenda, Mr Kilolo, Mr Arido and Mr Babala related to the requirement for exclusion of evidence under article 69 (7) (b) of the Statute only if any such violation is found.

(ii) The bar on ruling on the application of national law

283. The Appeals Chamber observes that an issue that underlies the vast majority of the arguments which are advanced by the appellants, and informed the Trial Chamber's decisions on the requests to exclude the Western Union Records, is whether, and, if so, to what extent, purported violations of national law in the collection of evidence are relevant to a determination on the inadmissibility of

evidence under article 69 (7) of the Statute.[646] As this is a question of law, the Appeals Chamber will not defer to the Trial Chamber's interpretation and will arrive at its own conclusions as to the appropriate law.

284. The Appeals Chamber recalls that the issue at hand concerns the purported inadmissibility of the records of certain financial transactions, which are, in principle, protected by a general right to privacy, as an internationally recognised human right within the meaning of article 69 (7) of the Statute.[647] In this regard, the Appeals Chamber is of the view that information on money transfers conducted through the Western Union company, while arguably more limited than information relating to bank accounts in general,[648] is, in principle, protected by the human right to privacy as internationally recognised.

285. In this regard, the Appeals Chamber also notes that the internationally recognised right to privacy is not absolute, but may be subject to legitimate interference in accordance with the law and as necessary for the protection of important public interests, such as national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.[649] The ECtHR has also clarified that the condition that the interference with the right to privacy take place "in accordance with the law" must be understood not only to "require[] that the

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[646] The Appeals Chamber notes that while, as explained, Mr Mangenda and Mr Kilolo raise this issue as a specific ground of appeal, Mr Babala assumes the relevance of domestic law in a determination under article 69 (7) of the Statute and, on this basis, merely avers that the Western Union Records were obtained, *inter alia*, "by means of fraud under Austrian law" (Mr Babala's Appeal Brief, para. 22).

[647] *See e.g.* Council of Europe, *European Convention on Human Rights*, 4 November 1950, article 8.1 ("Everyone has the right to respect for his private and family life, his home and his correspondence"); ACHR, article 11.2 ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence […]"); and United Nations, General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series 14668, article 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence […]"). The Appeals Chamber considers that the understanding that the right to privacy is an internationally recognised human right is not called into question by the absence of any reference to this right in the African Charter on Human and Peoples' Rights.

[648] The Appeals Chamber notes that according to the ECtHR, information relating to bank accounts are to be considered data which are protected by article 8 of the European Convention on Human Rights (*see e.g.* ECtHR, *G.S.B. v. Switzerland*, para. 51).

[649] *See* for instance, Council of Europe, *European Convention on Human Rights*, 4 November 1950, article 8.2 which provides the interference by a public authority with the exercise of the right to privacy are allowed if "in accordance with the law" and as "necessary in a democratic society".

impugned measure should have some basis in domestic law", but also to refer to "the quality of the law in question".[650]

286. The Appeals Chamber observes that the requirement that any interference with an individual's right to privacy be made "in accordance with the law" raises the question of the scope of the inquiry into the compliance with national law that could or should be conducted by the Court for the purposes of a determination under article 69 (7) of the Statute. The Appeals Chamber notes that article 69 (8) of the Statute explicitly addresses this issue in that it mandates that "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".[651]

287. The Appeals Chamber observes that this unequivocal bar in article 69 (8) of the Statute resulted from discussions, during the drafting of the Statute, on precisely the issue of whether violations of domestic law in the collection of evidence could trigger the exclusionary rule under current article 69 (7) of the Statute.[652] The Appeals

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[650] *See e.g.* ECtHR, *M.N. and others v. San Marino*, para. 72.

[651] *See also* D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds),*Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), pp. 1749-1750 explaining that the provision of article 69 (8) of the Statute "precludes the Court 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" as well as from "rul[ing] on the validity of a decision of a national court [and] mak[ing] a decision as to whether or how a national law might apply", as these are matters within the sovereignty of the relevant State.

[652] United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, 13 September 1996, A/51/22[VOL-I], para. 289 ("Another issue related to the means of obtaining evidence and the exclusion of evidence (of article 44, para. 5). This raised, *inter alia*, the important question of judicial cooperation between the Court and national jurisdictions since very often evidence presented to the Court would have been obtained in the States concerned, in accordance with their national rules. Consideration was given to the possibility for the Court to inquire whether such evidence had been obtained in accordance with national rules. It was suggested that a mechanism should be created whereby the Court, in cases of allegations of evidence obtained by national authorities by illegal means, could decide on the credibility of the allegations and the seriousness of 'violations'. According to another view, the Court should not get involved in intricate inquiries about domestic laws and procedures and it should rather rely on ordinary principles of judicial cooperation. It should apply international law and should exclude, for example, evidence obtained in violation of fundamental human rights, or minimum internationally acceptable standards (such as the Guidelines of the United Nations Congress on Prevention of Crime and Treatment of Offenders), or by methods casting substantive doubts on its reliability"). *See also* United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume II (Compilation of proposals)*, 13 September 1996, A/51/22[VOL-II], p. 208; D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1721 ("Several concerns were expressed about the inter-relation between the Court's adjudication and national law; in particular, whether the Court could or should consider national law in

Chamber notes that, as part of this debate, it was argued that "the Court should not get involved in intricate inquiries about domestic laws and procedures and should rather rely on ordinary principles of judicial cooperation".[653] In support of this view, it was argued, *inter alia*, that such an involvement would imply an undue interference by the Court with the sovereignty of a State.[654] Accordingly, the draft text that emerged confirmed that the Court was precluded from ruling on the application of the State's national law in the collection of evidence. This draft, however, left undecided, whether the Court could, nonetheless, "have regard" to the application of national law.[655] At the Rome Conference, this possibility was also rejected, thus confirming the categorical nature of the prohibition stipulated in article 69 (8) of the Statute.[656]

288. Taking into account the text of the provision, also in the context of its drafting history, the Appeals Chamber considers that article 69 (8) of the Statute establishes an unequivocal separation between the national and international spheres in the respective competences of the Court and the States, which is also more generally reflected in the principles of judicial cooperation underlying Part 9 of the Statute. In light of this separation, the execution by a State of a request for cooperation and the transmission to the Court of the requested evidence by the competent authorities of the requested State indicate that the collection of the evidence has taken place in

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determining relevance or admissibility of evidence collected in a state. The ensuring debate resulted in a separate paragraph being proposed to address this particular concern (*i.e.* paragraph 8)".

[653] United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, 13 September 1996, A/51/22[VOL-I], para. 289.

[654] D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1722.

[655] The draft version of current 69 (8) of the Statute that was formulated in the session of the Preparatory Committee of March-April 1998 and presented at the Rome Conference indeed read "the Court shall not rule on [, but may have regard to,] the application of the State's national law" (*See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Draft Statute for the International Criminal Court", Addendum to *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 14 April 1998, A/CONF-183/2/Add-1, p. 110).

[656] Commentators explain that the deletion, at the Rome Conference, of the "bracketed reference to having regard to national law" was done also because "[c]oncerns were […] expressed that any explicit reference to, or applications of, national law should be governed only by the process outlined in article 21 para. 1 (c)" and because "[a] reference to national law in article 69 could lead to specialized interpretation of applicable law in the evidentiary context, a result that was not desired by the drafters of the Statute" (D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1722).

accordance with national law and pursuant to the relevant domestic procedures of the concerned State.

289. It is indeed for the relevant State, and not for this Court, to ensure that the collection of evidence on its territory takes place in accordance with the relevant procedures of national law, as foreseen in article 93 of the Statute. In any event, a breach of national law in the collection of evidence does not *per se* indicate that such evidence was obtained by means of a violation within the meaning of the *chapeau* of article 69 (7) of the Statute. In this regard, the Appeals Chamber notes that Trial Chamber I, in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, similarly held that, given the provision of article 69 (8) of the Statute and considering that the Court shall only apply the sources of law set out in article 21 of the Statute, "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) of the Statute".[657]

290. The Appeals Chamber is not persuaded by Mr Mangenda's argument that article 69 (8) of the Statute only applies to situations in which the evidence is collected independently by State officials conducting their own investigations and not when the evidence is obtained upon request by the Court.[658] First, the text of article 69 (8) of the Statute makes no distinction between evidence "collected by the State" on its own initiative or upon request by the Court. Second, the Appeals Chamber sees no merit in Mr Mangenda's arguments that "[t]he deference to State sovereignty sought to be achieved by Article 69(8) is not applicable when the evidence is obtained […] at the Prosecut[or]'s direct behest".[659] Irrespective of whether a State collects evidence on its own initiative or upon request by the Court, the gathering of the evidence by the competent national authorities takes place in accordance with the applicable national procedure. Thus, there exists no basis to treat differently situations which, from this viewpoint, are equal. The Appeals Chamber also recalls, as observed above, that the provision under article 69 (8) was included in the Statute precisely because of issues arising in a context of judicial assistance in which the evidence requested by the Court

[657] "Decision on the admission of material from the 'bar table'", 24 June 2009, ICC-01/04-01/06-1981, para. 36.
[658] Mr Mangenda's Appeal Brief, paras 47, 49.
[659] Mr Mangenda's Appeal Brief, para. 49.

is to be collected by States under national law procedures.[660] Thus, the Appeals Chamber shares the Trial Chamber's view that article 69 (8) of the Statute also applies when evidence is collected by the State upon the request of the Court.[661]

291. The Appeals Chamber notes that Mr Mangenda also maintains that article 69 (8) of the Statute does not apply when evidence is collected directly by the Prosecutor, rather than by the State.[662] The Appeals Chamber recognises that the bar on rulings by the Court on the application of national law contained therein only makes reference to evidence that is "collected by a State". However, this does not mean that the Court is permitted to make rulings on the interpretation and application of the national law of the State in whose territory the Prosecutor, when allowed to do so, directly collects the evidence concerned. In this regard, the Appeals Chamber emphasises that the Court may only base its determinations on its own sources of law under article 21 of the Statute, which do not include national laws. In particular, the Appeals Chamber notes that, while, the Court, in accordance with article 21 (1) (c) of the Statute, can apply (exclusively as a subsidiary source of law) "general principles derived by the Court from national laws of legal systems of the world", no particular national law constitutes part of the applicable law under article 21 of the Statute.

292. In light of the above, the Appeals Chamber rejects Mr Mangenda's argument that the bar on the Court ruling on the application of national law does not apply when evidence is collected by a State in execution of a request for assistance by the Court and/or when evidence is directly obtained by the Prosecutor. In addition, on the basis of the categorical prohibition on ruling on the application of national law and underlying principles of judicial cooperation contained in Part 9 of the Statute, the Appeals Chamber also dismisses Mr Kilolo's argument to the effect that the Court should inquire into the application of national law in the collection of evidence by a State because a failure by the State to respect its own law in the collection of the evidence amounts to a "violation of th[e] Statute", most notably article 99 (1), within the meaning of article 69 (7) of the Statute.

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[660] *See* United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, 13 September 1996, A/51/22[VOL-I], para. 289.
[661] First Western Union Decision, para. 38.
[662] Mr Mangenda's Appeal Brief, paras 47, 49.

293. At this juncture, the Appeals Chamber notes that the Trial Chamber, in response to the Prosecutor's argument that "determinations of national law are expressly and categorically prohibited" stated that it "[was] not persuaded that the role of national law in the present inquiry is as categorically clear as the Prosecut[or] suggests".[663] The Trial Chamber found that, in determining whether a violation occurred under article 69 (7) of the Statute, it would still "review the application of national law", but 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 recognized human rights" (emphasis added).[664] The Trial Chamber considered that the introduction of this "manifestly unlawful" standard to justify a certain level of review of national law in the collection of evidence by a State was warranted by the need to reconcile a purported tension between article 69 (7) and article 69 (8) of the Statute as concerns interferences with the right to privacy, as well as by the fact that certain statutory provisions "apply directly to national authorities acting on request of the Court […] making the way in which national procedures were implemented relevant in an Article 69(7) analysis".[665]

294. Based on this understanding, the Trial Chamber made, *inter alia*, the following conclusions: (i) that it was "not proven that the Prosecution's contacts with Western Union and the reception of financial data prior to the first order of the Austrian Authorities vitiate judicially approved orders and, in consequence, led to a manifest violation of Article 38 of the Austrian Banking Act";[666] and (ii) that "[i]n view of" the two decisions of the Higher Regional Court repealing two rulings by the lower courts authorising the collection of the Western Union Records, "any further assessment

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[663] First Western Union Decision, paras 31-32, referring to "Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute", 22 April 2016, ICC-01/05-01/13-1833-Conf, paras 7-13; a public redacted version was registered on 1 June 2016 (ICC-01/05-01/13-1833-Red). The Appeals Chamber notes that the argument that has been made by the Prosecutor to the Trial Chamber was that "when determining whether evidence collected by a State is relevant or admissible (*i.e.* that acquired through State cooperation), the Court may not make determinations on whether the State or the Prosecution investigators complied with domestic substantive or procedural law" (*see* para. 8).
[664] First Western Union Decision, para. 34.
[665] First Western Union Decision, para. 33.
[666] First Western Union Decision, para. 59.

whether there was manifestly unlawful conduct [was] not necessary" and that "the internationally recognised right to privacy ha[d] been violated".[667]

295. The Appeals Chamber notes at the outset that the meaning of the term "manifest" is unclear in the circumstances at hand. While this term is normally associated with a character of being "obvious",[668] the Trial Chamber, in its application of the standard it introduced in this regard, contrasted these "manifest violations" of domestic law with "mere infringements" of domestic law.[669] This suggests that the standard introduced by the Trial Chamber is somehow based on the seriousness or gravity of the concerned violation of national law. It is also unclear how, and under which criteria, a distinction could be made between these two categories of violations of national law, and against which body of law.

296. The Appeals Chamber considers that this distinction between "manifest" violations of national law and "mere infringements" of national law, and the Trial Chamber's introduction of a "manifestly unlawful" standard to justify an inquiry into the application of national law have no statutory foundation. Any such inquiry is incompatible with the unequivocal prohibition contained in article 69 (8) of the Statute. This provision does not *per se* preclude the Court from taking into account, in certain circumstances, issues of compliance with national law in the collection of evidence as a factual matter potentially relevant to the understanding of the relevant factual background.[670] However, there is no legal basis under the Statute for a chamber to "review the application of national law",[671] including with a view to determining whether a "manifest" violation of national law occurred.

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[667] Second Western Union Decision, para. 28.
[668] The term "manifest" is defined as "clear or obvious to the eye or mind" in the Oxford Dictionary (https://en.oxforddictionaries.com/definition/manifest), and as "easily noticed or obvious" in the Cambridge Dictionary (http://dictionary.cambridge.org/dictionary/english/manifest).
[669] *See* First Western Union Decision, paras 34, 37, 60.
[670] *See* D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1750 ("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 factual matter if relevant to the admissibility or weight of the evidence. Compliance or non-compliance with national law gives some additional factual context. However, it will be difficult for the Court to consider the issue of compliance or non-compliance if this matter is contested, as this would necessitate an adjudication by the Court which is specifically prohibited by paragraph 8").
[671] *See* First Western Union Decision, para. 34.

297. The Appeals Chamber is also not persuaded by the Trial Chamber's argument that "[s]ome specific provisions of the Statute apply directly to national authorities acting on request of the Court – such as Articles 55(2) and 59 of the Statute – making the way in which national procedures were implemented relevant in an Article 69 (7) analysis".[672] The Appeals Chamber agrees that the application by national authorities of the requirements provided in these two statutory provisions may be assessed by the Court. However, both such requirements have a foundation in the Statute, and not in the national law of the State acting upon request of the Court.[673] Therefore, regardless of what is provided for in the national law of the concerned State, failure to comply with these statutory requirements would constitute a breach of the Statute, which is indeed for the Court to interpret and apply.

298. For these reasons, the Appeals Chamber concludes that the Trial Chamber erred in law in finding that its scope of inquiry under article 69 (7) would include an assessment on whether there had been violations (whether "manifest" or otherwise) of Austrian law in the collection of the Western Union Records.

299. The Appeals Chamber will at this point turn to the application of the correct law to the relevant facts. As this is a legal evaluation, the Appeals Chamber, in accordance with the applicable standard of review, does not defer to the findings of the Trial Chamber. In this regard, the Appeals Chamber observes that the relevant facts surrounding the collection of the Western Union Records are, to a large extent, undisputed and are readily apparent from the information in the record of the case.[674] One exception concerns the reliance by the Trial Chamber, in the First Western Union Decision, on document CAR-OTP-0092-0018, and on certain disputed facts referred to therein. As this reliance is contested by Mr Kilolo and Mr Mangenda, the Appeals Chamber will dispose of these arguments prior to addressing the issue of whether the

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[672] First Western Union Decision, para. 33.
[673] The Appeals Chamber observes that article 55 (2) of the Statute provides that when there are grounds to believe that a person has committed a crime within the jurisdiction of the Court, that person, when questioned, *inter alia*, by national authorities acting at the behest of the Court, must be accorded (and duly informed of) certain enumerated rights. Article 59 (2) of the Statute requires that the competent authorities of the custodial State make the determination, in accordance with that State's law, that the warrant of arrest applies to the person who has been arrested, that the person has been arrested in accordance with the proper process and that the person's rights have been respected.
[674] For the relevant background, *see supra* section VI.B.2.

Western Union Records were obtained by means of a violation within article 69 (7) of the Statute.

(iii) The Trial Chamber's reliance on document CAR-OTP-0092-0018

300. Document CAR-OTP-0092-0018 is an "investigation report" that was prepared by [redacted] and [redacted] at a point in time when Mr Smetana was giving testimony before the Trial Chamber.[675] The Trial Chamber referred to this document in its First Western Union Decision, noting that, according to the information provided therein, "a senior public prosecutor of the Austrian Ministry of Justice advised that the Prosecution was allowed to screen material from Western Union unless it was required for evidentiary purposes, in which case a [request for assistance] was needed in order to obtain a court order".[676] The Trial Chamber relied on this portion of document CAR-OTP-0092-0018 as part of its determination on whether the Prosecutor's access to financial information through direct contact with Mr Smetana vitiated "judicially approved orders and, in consequence, led to a manifest violation of Article 38 of the Austrian Banking Act".[677]

301. Mr Kilolo and Mr Mangenda argue that the Trial Chamber's reliance on document CAR-OTP-0092-0018 was erroneous, including on the grounds that this document contains "no attestation of truth or accuracy" and was prepared for the purposes of litigation,[678] and that the Trial Chamber should have "compelled the OTP investigators' testimony".[679] In response to these arguments, the Prosecutor emphasises the "Defence's failure to concretely object to the introduction of [document CAR-OTP-0092-0018]", and avers that "[t]o the extent the Appellants had

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[675] The Appeals Chamber notes that the same document is also identified with the reference number CAR-D20-0003-0013 (*see* the relevant metadata of document CAR-OTP-0092-0018 and ICC-01/05-01/13-1523-Conf-Anx10, p. 4, item 32).
[676] First Western Union Decision, para. 56.
[677] First Western Union Decision, paras 54-59.
[678] Mr Mangenda's Appeal Brief, paras 74-78.
[679] Mr Kilolo's Appeal Brief, paras 79-81. More specifically, Mr Kilolo submits that the investigators of the Office of the Prosecutor should have been compelled to testify at trial to determine: (i) who was the target of investigations from the moment the OTP received the anonymous tip; (ii) whether the OTP knew that Mr Kilolo's immunity should have been lifted at that point; (iii) what advice the OTP allegedly received from the Austrian public prosecutor in 2011; (iv) whether the OTP's actions complied with that alleged advice; and (iv) what was discussed, what materials were requested, and what was provided during the meetings with Western Union on 19-20 October and 5 November 2013 (Mr Kilolo's Appeal Brief, para. 81).

any objections or questions relating to [this document]'s presentation to [Mr Smetana], it was for them to do so in a timely manner".[680]

302. The Appeals Chamber notes that the document at issue is dated 3 November 2015, was disclosed by the Prosecutor to the accused through e-Court on 4 November 2015 and used, on the same day, by Mr Bemba's counsel as part of her questioning of Mr Smetana at trial as well as by the representative of the Office of the Prosecutor at the hearing.[681] On 5 November 2015, the Prosecutor submitted this document into evidence within the meaning of articles 64 (9), 69 (3) and 74 (2) of the Statute[682] – which the Trial Chamber recognised by way of email on 12 November 2015.[683]

303. The Appeals Chamber notes that Mr Smetana testified before the Trial Chamber from 2 until 4 November 2015.[684] Document CAR-OTP-0092-0018, which, as noted, is dated 3 November 2015, was thus prepared, in the midst of Mr Smetana's testimony at trial. As also noted, this document was prepared by [redacted] and [redacted], the two investigators of the Office of the Prosecutor who directly accessed information in the Western Union database in October and November 2012. It provides an account of certain facts, primarily on a meeting between them a senior public prosecutor from the Austrian Ministry of Justice allegedly held on 16 March 2011, during which access to Western Union financial information was discussed "in general terms". It was about these same circumstances – in particular, on the direct access to Western Union financial information by the two investigators concerned – that Mr Smetana was testifying before the Trial Chamber when the document at issue was prepared and disclosed.

304. The Appeals Chamber considers that document CAR-OTP-0092-0018 cannot be considered to be a mere internal document of the Office of the Prosecutor, or a

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[680] Response, para. 68.
[681] *See* Transcript of 4 November 2015, ICC-01/05-01/13-T-35-Red-ENG (WT), p. 52, line 17, to p. 54, line 7, to p. 72, line 16, to p. 74, line 21, where the same document is referred to as CAR-D20-0003-0013.
[682] ICC-01/05-01/13-1523-Conf-Anx10, pp. 12-13. Also in these communications by email, the document at issue is identified with the reference number CAR-D20-0003-0013.
[683] ICC-01/05-01/13-1523-Conf-Anx10, p. 6. *See also* item 32 in the list of material formally submitted and related to witness P-267, at p. 4 of the same document.
[684] *See* the transcripts of the relevant hearings: Transcript of 2 November 2015, ICC-01/05-01/13-T-33-ENG (ET WT); Transcript of 3 November 2015, ICC-01/05-01/13-T-34-Red-ENG (CT WT); Transcript of 4 November 2015, ICC-01/05-01/13-T-35-Red-ENG (WT).

document prepared for purposes other than being relied upon in the context of the legal proceedings before the Trial Chamber. Rather, it was written, at that particular point in time (on the second day of Mr Smetana's testimony at trial) for the purpose of being submitted in the present proceedings, that is, to be presented with a view to proving or disproving the facts in issue before the Trial Chamber.[685] Indeed, the Appeals Chamber considers that the content of the document, as well as the timing and context of its preparation and submission in the proceedings, reveal that its exclusive purpose was to provide the Trial Chamber with the account of [redacted] and [redacted] of certain relevant facts on which the Prosecutor, in turn, intended to rely. In the view of the Appeals Chambers, these circumstances indicate that document CAR-OTP-0092-0018 is testimonial in nature.

305. The Appeals Chamber observes that, in accordance with article 69 (2) of the Statute, testimonial evidence may be elicited orally, through examination of the person at trial, or, when previously recorded, "subject to" the Statute and "in accordance with" the Rules.[686] As already explained by the Appeals Chamber, the most notable exceptions to the principle of orality for testimonial evidence are those provided for in rule 68 of the Rules.[687] This provision allows a chamber to introduce prior recorded testimony under certain enumerated conditions and taking into account certain factors. While the situations under rule 68 (2) (a),[688] (c)[689] and (d)[690] of the

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[685] *See* *Bemba* OA5 OA6 Judgment, para. 43.
[686] The second sentence of article 69 (2) of the Statute indeed reads: "The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence".
[687] *Bemba* OA5 OA6 Judgment, para. 77 ("under the second sentence of article 69 (2) of the Statute, a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence. The most relevant provision in the Rules of Procedure and Evidence is rule 68 which provides that the 'Trial Chamber may [...] allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony'. However, the introduction of such evidence is subject to strict conditions set out in the provision […]"). *See also*, in the present case, "Decision on Mr Arido's request to respond to evidence adduced by the Prosecutor", 2 October 2017, ICC-01/05-01/13-2198, para. 11. This document was originally filed confidentially and later reclassified as public pursuant to the "Order on reclassification of decision ICC-01/05-01/13-2198-Conf", 2 October 2017, ICC-01/05-01/13-2232.
[688] Rule 68 (2) (a) of the Rules allows the introduction of prior recorded testimony when "[b]oth the Prosecutor and the defence had the opportunity to examine the witness during the recording [of the prior testimony]".
[689] Rule 68 (2) (c) of the Rules allows the introduction of prior recorded testimony when the testimony "comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally".

Rules are ostensibly not applicable to the introduction of document CAR-OTP-0092-0018, rule 68 (2) (b) and 68 (3) of the Rules could, in principle, be. However, both provisions provide certain mandatory requirements.

306. Rule 68 (2) (b) of the Rules requires, *inter alia*, that the prior recorded testimony be accompanied by "a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief" to be made, *inter alia*, after being informed that "if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony".[691] Rule 68 (3) of the Rules requires that the witness concerned is available for examination at trial and does not object to the submission of his or her prior recorded testimony. None of these mandatory requirements was met for the introduction of document CAR-OTP-0092-0018. In addition, while rule 68 (1) of the Rules provides that introduction of prior recorded testimony may be allowed "after hearing the parties", the Trial Chamber did not seek submissions on the possible introduction of document CAR-OTP-0092-0018 under rule 68 of the Rules. Rather, the Trial Chamber allowed the submission into evidence of document CAR-OTP-0092-0018[692] without indicating under which legal basis a document which is testimonial in nature could be introduced in writing in the applicable circumstances.[693] The matter is further complicated by the fact that [redacted] and [redacted] are the co-authors of the document, making it even more difficult to ascertain whether the events referred to therein would be described in the same way by each of them. This is particularly the case given that some

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[690] Rule 68 (2) (d) of the Rules allows the introduction of prior recorded testimony when the testimony "comes from a person who has been subjected to interference".
[691] Rule 68 (2) (b) (ii) and (iii) of the Rules. In addition, in accordance with rule 68 (2) (b) (iii), the witness' declaration must, in turn, be witnessed by a person authorised to do so.
[692] *See* ICC-01/05-01/13-1523-Conf-Anx10, pp. 12-13.
[693] The Appeals Chamber notes that, in the Conviction Decision, the Trial Chamber stated that it "[had] decided that Rule 68 of the Rules only applies when a [witness's] statement is submitted for the truth of its content" rather than, for instance, "to challenge the credibility of a witness" (*see* Conviction Decision, fn. 201). While it is unclear, given the absence of any explanation on the part of the Trial Chamber, whether this consideration could have been the basis on which the Trial Chamber allowed the introduction of document CAR-OTP-0092-0018, the Appeals Chamber clarifies that the distinction introduced by the Trial Chamber has no statutory foundation. Indeed, neither rule 68 of the Rules nor any other provision in the legal framework of the Court supports any such distinction. The dispositive consideration is rather that the item of evidence in question is presented with a view to proving or disproving *any* fact in issue before a chamber (*see* *Bemba* OA5 OA6 Judgment, para. 43), including facts related to the credibility of witnesses and irrespective of whether, when testimonial in nature, such evidence is submitted "for the truth of its content" or otherwise.

portions of this document concern the missions to Vienna on 19-20 October and 4-5 October 2012 that [redacted] conducted alone, without [redacted]'s presence.

307. The Appeals Chamber notes the Prosecutor's argument that, "to the extent the Appellants had any objections or questions relating to the [document]'s presentation to [Mr Smetana], it was for them to do so in a timely manner".[694] The Appeals Chamber is not persuaded by this argument. First, the Appeals Chamber notes that Mr Mangenda's counsel did object to the use by the Prosecutor of document CAR-OTP-0092-0018 during the testimony of Mr Smetana, and that this objection was overruled on the ground that the document had already been used earlier that day by Mr Bemba's counsel.[695] In any case, and importantly, the Appeals Chamber emphasises the significant difference between the use of a document during the questioning of a witness and the submission of such document as evidence. Indeed, in the first scenario a document is "part of" the question, while "evidence" is only any response that a witness may give as prompted by the reference to such document during his or her examination. Conversely, in the second scenario, it is (also) the document itself which, as submitted, qualifies as "evidence" that can be relied upon by the chamber in its determination of the facts at issue. In this particular case, document CAR-OTP-0092-0018, rather than only being used during the examination at trial of Mr Smetana to assist in eliciting *his* evidence, was also introduced as evidence itself. Given the testimonial nature of this document, the Appeals Chamber is of the view that the Trial Chamber erred in doing so. In this sense, it is of no significance that the accused did not object on the record to the submission into evidence of document CAR-OTP-0092-0018.

308. Thus, the Trial Chamber's reliance on document CAR-OTP-0092-0018 as evidence – as opposed to the mere reliance on Mr Smetana's testimony as prompted by confrontation with the content of such document – was erroneous. To this extent,

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[694] Response, para. 68.
[695] Transcript of 4 November 2015, ICC-01/05-01/13-T-35-Red-ENG (WT), p. 73, line 1, to, line 7. Specifically, with respect to the document at issue that was referred to at that hearing as document CAR-D20-0003-0013, Mr Mangenda's counsel stated: "It's a statement that was prepared yesterday. It's not the practice, to my knowledge, to be showing statements from other witnesses to a witness on the stand. I think it's even more far-fetched to be showing a statement from somebody who is not a witness to a witness who is on the stand. We're here to listen to Mr Smetana's memories. And if there are documents that he can be oriented to that's fine, but this is a statement. If the Prosecution wishes to call this person as a witness then they can do that."

the Appeals Chamber agrees with the arguments made in this regard by Mr Mangenda and Mr Kilolo. The Appeals Chamber will therefore not consider document CAR-OTP-0092-0018 for its determination on whether the circumstances surrounding the collection of the Western Union Records indicate that this material was obtained by means of a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute.

(iv) Reasons for the rejection of Mr Mangenda's "Motion for Request for Cooperation"

309. Prior to turning to this analysis, the Appeals Chamber recalls that, on 13 September 2017, Mr Mangenda filed a motion requesting the Appeals Chamber to order the Registrar to transmit a request for cooperation to Austria to facilitate the participation of Austrian prosecutor [redacted] in an interview by Mr Mangenda's defence team.[696] The Prosecutor opposed the request, *inter alia*, on the grounds that it was untimely, irrelevant, unnecessary, and had no forensic purpose.[697] The Appeals Chamber rejected the request on 24 January 2018 and announced that reasons would be provided in its judgment disposing of the present appeals.[698] The Appeals Chamber finds it appropriate to do so at this juncture.

310. The Appeals Chamber notes that Mr Mangenda sought to interview [redacted] in order to question him on whether it would be possible that an Austrian prosecutor would have advised investigators of the Office of the Prosecutor of the Court that in accordance with Austrian law the Western Union Records could be lawfully "screened" without a court order unless and until needed for evidential purposes.[699] This is because, in Mr Mangenda's view, "[c]redulity is strained by th[is] proposition".[700] The Appeals Chamber observes that the relevance of the information sought by Mr Mangenda is predicated on the view that this Court may base its determination as to the admissibility of the Western Union Records on the interpretation and application of Austrian national law. As found above, this is not the case. In addition, the Appeals Chamber considers that the issue of the reliability of the

[696] Motion for Request for Cooperation, para. 40.
[697] "Prosecutor's response to Mangenda's request for cooperation", 25 September 2017, ICC-01/05-01/13-2230-Conf).
[698] "Decision on the Motion for Request for Cooperation", ICC-01/05-01/13-2258.
[699] Motion for Request for Cooperation, paras 25-26.
[700] Motion for Request for Cooperation, para. 26.

information reported by [redacted] and [redacted] in document CAR-OTP-0092-0018 is also irrelevant in light of the Appeals Chamber's finding that the Trial Chamber erred in allowing the introduction of and in relying on this document. Therefore, the investigative act sought by Mr Mangenda was aimed at obtaining evidence of no relevance to the present appeal proceedings. It is for these reasons that the Appeals Chamber rejected Mr Mangenda's request in this regard.

(v) The collection of the Western Union Records

311. In light of the arguments brought by the appellants, the Appeals Chamber will address, in turn, three circumstances of relevance to the determination of whether the Western Union Records were obtained in violation of the Statute or internationally recognised human rights, namely: (i) the Prosecutor's direct access to some information in the Western Union database prior to the receipt of the Western Union Records from the Austrian authorities; (ii) the allegedly overly broad character of the information contained in the Western Union Records; and (iii) the issuance of two rulings by the Higher Regional Court of Vienna in connection with the execution by Austria of the Prosecutor's requests for assistance for the collection of the Western Union Records.

(a) The Prosecutor's prior direct access to information in the Western Union database

312. The Appeals Chamber recalls that the Prosecutor, prior to the receipt of the Western Union Records from the Austrian authorities, had already obtained directly from Mr Smetana some information in possession of the Western Union company on certain money transfers conducted through that company – a circumstance which is referred to in the Trial Chamber's decisions and in the submissions of the parties as "(pre)-screening".[701] In particular, on 11 October 2012, [redacted] received by email certain information on financial transactions conducted through Western Union in which Mr Arido (who had been scheduled to testify in the Main Case as defence witness D-11), Mr Kokaté ([redacted]) and [redacted]

[701] *See e.g.* First Western Union Decision, paras 56, 68; Mr Mangenda's Appeal Brief, paras 72, 79; Mr Kilolo's Appeal Brief, para. 62 (arguing, however, that the Prosecutor's actions "constituted more than a mere screening of names"); Mr Arido's Appeal Brief, para. 129; Response, paras 69-78.

[redacted] (defence witness [redacted] in the Main Case) figured as sender or receiver.[702] Subsequently, on 7 November 2012, [redacted] received from Mr Smetana information concerning money transfers through Western Union sent or received by Mr Mangenda (who, at that time, was the case manager in Mr Bemba's defence team in the Main Case).[703] In addition, [redacted] conducted two visits to the Western Union offices – on 19 October and 5 November 2012 – when records on money transfers in possession of Western Union, and made available to him by Mr Smetana, were identified and "screened".[704]

313. The Appeals Chamber observes that the Trial Chamber conducted its analysis on whether the Prosecutor's direct access to Western Union financial information constituted a violation within the meaning of article 69 (7) of the Statute in accordance with its understanding of the applicable law. Indeed, upon assessment of the relevant facts, the Trial Chamber concluded that it had not been demonstrated that the Prosecutor's direct reception of financial data "led to a manifest violation of Article 38 of the Austrian Banking Act".[705]

314. The Appeals Chamber recalls that it has concluded that the Trial Chamber erred in law in seeking to determine whether the collection of evidence by the State occurred by means of a ("manifest") violation of national law.[706] In addition, the Appeals Chamber considers that, by focusing its analysis on the potential violation of the Austrian Banking Act, the Trial Chamber failed to consider whether the Prosecutor's direct access to financial information in the Western Union database constituted instead a violation of the Statute or of the internationally recognised human right to privacy in the collection of the Western Union Records.

315. The Appeals Chamber shall therefore assess the relevant facts in light of what it considers to be the correct legal standard. In doing so, the Appeals Chamber will

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[702] Mr Smetana's email is registered as document CAR-OTP-0092-0023, and the Excel spreadsheet that was transmitted as attachment to the email as document CAR-OTP-0092-0024.
[703] Mr Smetana's email is registered as document CAR-OTP-0092-0033-R02 and the attached Excel spreadsheet containing the information on money transfers as document CAR-OTP-0092-0034.
[704] *See* the references to the mission of October 2012 in documents CAR-OTP-0092-0892 and CAR-OTP-0091-0351, and the reference to the mission of November 2012 in document CAR-OTP-0092-0890.
[705] First Western Union Decision, para. 59.
[706] *See supra* paras 293-298.

disregard document CAR-OTP-0092-0018, given that it has found that this document should not have been introduced into evidence. The Appeals Chamber shall determine whether the Western Union Records – which the Austrian authorities provided in response to the three requests for assistance transmitted by the Prosecutor – are to be deemed "obtained by means of a violation of th[e] Statute or internationally recognized human rights" on the ground that the Prosecutor, prior to the receipt of the records from the Austrian authorities, had already had access to information on certain financial transactions conducted through Western Union.

(i) Alleged violation of the Statute

316. Mr Kilolo submits that the Prosecutor's access to Western Union financial information prior to Austria's execution of a request for assistance under Part 9 was in violation of the Statute and that, for this reason, also the subsequent collection of the Western Union Records must be deemed to have occurred in violation of the Statute within the meaning of article 69 (7) of the Statute. The Appeals Chamber recalls that the database of the Western Union money transfers is located on the territory of Austria. The Prosecutor obtained direct access to information contained in this database, and later requested, and obtained, the transmission of the Western Union Records from the competent authorities of Austria, which ordered Western Union to produce them.

317. The Appeals Chamber recalls that the cooperation regime of the Court is governed by Part 9 of the Statute. Within that Part, the general cooperation regime for collection of evidence is based on requests for assistance made by the Court – including the Prosecutor – in accordance with article 87 of the Statute. Pursuant to rule 176 (2) of the Rules, the Prosecutor is entitled to transmit requests for cooperation and receive responses from requested States. Article 99 (4) of the Statute also enables the Prosecutor, under certain conditions, to collect evidence directly on the territory of a State "where it is necessary for the successful execution of a request which can be executed without compulsory measures", provided that the Prosecutor, depending on the circumstances, consult with, or consider "any reasonable conditions on concerns" by the requested State.

318. The Appeals Chamber is not persuaded by Mr Kilolo's arguments that the Western Union Records were obtained by means of a violation of the Statute within

the meaning of article 69 (7) of the Statute because the Prosecutor's previous direct access to materials located in the territory of Austria outside the conditions of article 99 (4) of the Statute was in violation of Part 9 of the Statute. First, in the view of the Appeals Chamber, breaches of Part 9 of the Statute do not constitute *per se* violations of the Statute for the purpose of exclusion of evidence under article 69 (7) of the Statute. Second, the Appeals Chamber considers that, in the circumstances of the present case, the Prosecutor's conduct did not amount to a violation of Part 9 of the Statute.

319. The Appeals Chamber notes that Part 9 of the Statute regulates the interactions between the Court and States. As correctly observed by the Trial Chamber, the "[s]afeguard clauses embedded in the various provisions of Part [9] address sovereignty concerns of States and are not generally apt to protect the interests of the individual".[707] Indeed, the Appeals Chamber considers that Part 9 protects the sovereign competences of States within their territories while ensuring, at the same time, certain mandatory forms of cooperation, which the Court is entitled to request. As indicated by commentators involved in its drafting, this system reflects in many respects the "lowest common denominator" with which all States Parties are obliged to comply.[708] States may go beyond the explicit duties and conditions contained therein and offer additional cooperation unilaterally in their implementing laws or through agreements and informal *ad hoc* arrangements with the Court. Through voluntary cooperation, States may provide additional forms of cooperation with the Court or facilitate autonomous and direct activities by the Prosecutor on their territory, beyond that which is already required of them under Part 9 of the Statute. In this regard, while Part 9 of the Statute safeguards the competences of States, the Court may request, and the requested States may provide, forms or modalities of cooperation in addition to those foreseen in Part 9 of the Statute provided that they are not contrary to the Statute, including internationally recognised human rights, in accordance with article 21 (3) of the Statute.

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[707] First Western Union Decision, para. 36.
[708] C. Kress, *et al*., "Part 9. International Cooperation and Judicial Assistance – Preliminary Remarks", in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 2013.

320. Taking into account the facts and circumstances of the case, the Appeals Chamber considers that the Austrian authorities were sufficiently informed of – and accepted – the investigative activities conducted by the Prosecutor to access information on money transfers in the Western Union database on their territory before the transmission of the requests for assistance under Part 9 of the Statute for the collection of the related records.

321. The Appeals Chamber notes, in particular, the Prosecutor's notification sent to the Austrian authorities on 15 October 2012 informing them in advance of the planned mission to the Western Union Offices in Vienna for 18 and 19 October 2012, explicitly stating that the purpose of this mission was "to identify and if applicable screen relevant information that may be in possession of Western Union and which can be relevant to our ongoing investigations".[709] The same notification also specified that, "[s]hould relevant information be identified, a formal request for judicial cooperation requesting for the transmission of relevant information/documents would be addressed to the competent Austrian authorities".[710] A similar notification was also transmitted a few days later, on 1 November 2012, announcing a second mission by staff of the Office of the Prosecutor to the Western Union offices in Vienna.[711] In this second notification, the Prosecutor also announced that, as "[she] ha[d] become aware of money transfers that ha[d] taken place, among others via Western Union, and which could involve funds under the control of our suspect [*i.e.* Mr Bemba] or persons associated with him", she would address a request for assistance to the Austrian authorities the day after (*i.e.* 2 November 2012) requesting the transmission of copies of relevant records held by Western Union.[712] The Prosecutor specified that the meeting scheduled for 5 November 2012 – the purpose of which was again to

[709] CAR-OTP-0092-0892. The Appeals Chamber notes in this context that Mr Mangenda and Mr Kilolo draw its attention to the fact that this first mission notification to the Austrian authorities contains the erroneous reference that the Prosecutor's mission to Vienna scheduled would be conducted in the context of the situation in Côte d'Ivoire (Mr Mangenda's Appeal Brief, para. 24; Mr Kilolo's Appeal Brief, para. 63). Nonetheless, in the absence of any explanation on the part of the appellants as to the significance of this error and given that no such significance is otherwise apparent to the Appeals Chamber, the Appeals Chamber is unable to draw any conclusion from the Prosecutor's incorrect reference in this particular communication to the Austrian authorities the situation in Côte d'Ivoire rather than to the case of the *Prosecutor v. Jean-Pierre Bemba Gombo* in the situation in Central African Republic.
[710] CAR-OTP-0092-0892.
[711] CAR-OTP-0092-0890.
[712] CAR-OTP-0092-0890.

"identify and if applicable screen relevant information that may be in possession of Western Union" – would "facilitate the expedited execution of the forthcoming request [for assistance]".[713]

322. In addition, the Appeals Chamber observes that in the first request for assistance under Part 9 of the Statute – which, as announced the day before, was transmitted on 2 November 2012 – the Prosecutor, *inter alia*, informed the Austrian authorities that there had been a meeting in Vienna with Mr Smetana (referred to as the "Director of International Security of Western Union"), and that a "screening of documents ha[d] identified a number of transactions and movements of large sums of money in connection with a number of individuals which appear to be of relevance to the ongoing investigation".[714] The same information was repeated in the Prosecutor's second request for assistance to the Austrian authorities dated 18 October 2013.[715]

323. Therefore, by the time the Austrian authorities received the Prosecutor's requests for assistance, they had been abundantly apprised of the fact that the Prosecutor had already accessed certain information on financial transactions – whether by e-mail or through the live "screening" at the Western Union offices in Vienna is immaterial in this regard. The Appeals Chamber notes that at no point did the Austrian authorities raise any concerns with regard to the autonomous activities conducted by the Prosecutor. Ultimately, they further confirmed this process by executing the three requests for assistance transmitted by the Prosecutor under Part 9 of the Statute.

324. In this regard, the Appeals Chamber recalls that the Western Union Records submitted into the record of the present case were formally transmitted by the Austrian authorities and were thus obtained by means of the execution by the State of the three requests for assistance made by the Prosecutor under Part 9 of the Statute. As explained, the execution of the requests by the competent authorities of the requested State and transmission of the relevant materials constitute a sufficient

[713] CAR-OTP-0092-0890.
[714] CAR-OTP-0091-0351.
[715] CAR-OTP-0091-0360.

indication that, as far as that State is concerned, such material was collected in compliance with national law and pursuant to the relevant domestic procedures.

325. In light of the relevant circumstances, the Appeals Chamber concludes that the Prosecutor's direct access to financial information prior to the receipt of the Western Union Records was consistent with Part 9 of the Statute. Accordingly, the Appeals Chamber rejects Mr Kilolo's argument that the Western Union Records were obtained by means of a violation of the Statute within the meaning of article 69 (7) of the Statute.

(ii) Alleged violation of internationally recognised human rights

326. Mr Mangenda argues that the Prosecutor's access to Western Union financial information prior to the execution by the Austrian authorities of the Prosecutor's requests for assistance was in violation of Austrian law.[716] He submits that, as a consequence of this violation of national law, the Western Union Records that were subsequently collected by the Austrian authorities must be deemed to have been obtained by means of a violation of the internationally recognised human right to privacy within the meaning of article 69 (7) of the Statute.[717] Mr Arido and Mr Babala make essentially the same argument.[718] The Appeals Chamber observes that the appellants' arguments in this respect are predicated on the assertion that Austrian law, save for a number of enumerated exceptions, does not permit access to financial information without a prior court order.

327. The Appeals Chamber is unpersuaded by this argument, which essentially rests on an interpretation of Austrian law, which, as explained, the Court, in accordance with article 69 (8) of the Statute, cannot assess. While this provision is not directly concerned with situations in which investigative activities are directly performed by the Prosecutor rather than by a State, this does not mean that in these situations the Court may make rulings on the interpretation of the national law of any State, and its application to the particular facts of the case. In particular, the Appeals Chamber is of the view that the Court is precluded from ruling on whether, and under which

[716] Mr Mangenda's Appeal Brief, paras 22-25, 64, 72.
[717] Mr Mangenda's Appeal Brief, paras 22-25, 64, 72.
[718] Mr Arido's Appeal Brief, pp. 101-102; Mr Babala's Appeal Brief, paras 22, 24.

particular requirements, the performance of a particular investigative activity is allowed by the national law of the relevant State.[719] Rather, the Court can only apply its own sources of law, as set out in article 21 of the Statute. Therefore, the Court is not permitted – and, in any case, is not in a position – to determine whether, in the factual circumstances of the present case, Austrian law did or did not allow the Prosecutor to access information on financial transactions conducted through the Western Union company without a prior court order.

328. Accordingly, the Appeals Chamber rejects the appellants' arguments in this regard.

(b) The allegedly disproportionate interference with the right to privacy in the collection of the Western Union Records

329. As recalled above, in the First Western Union Decision, the Trial Chamber was confronted with arguments by the accused that the Prosecutor's requests for assistance to Austria were "overly broad" and, as such disproportionate. The Trial Chamber stated that "[as] it [was] barred from assessing the concrete application of national law […] [it] w[ould] not assess if the national authorities should not have granted the RFA due to the alleged overly broad character of the request".[720] Mr Mangenda submits that this conclusion – stemming from "the Chamber's 'manifestly' unlawful standard" – "ratified the Prosecution's unlawful acquisition of 922 Western Union transactions dating back to 2005", notwithstanding that Mr Bemba "was not arrested until 2008 and his trial did not start until 2010".[721] According to Mr Mangenda, "[t]his directly contravenes the principle of proportionality which is at heart of preserving and protecting the right to privacy".[722]

330. The Appeals Chamber recalls that a State's collection and transmission of evidence to the Court is presumed to constitute sufficient indication that the domestic

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[719] *See also* D. Piragoff, "Article 69, Evidence" in in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1749-1750, explaining that article 69 (8) of the Statute also "precludes the Court 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" and "mak[ing] a decision as to whether or how a national law might apply", as these are matters of exclusive competence of the relevant State.
[720] First Western Union Decision, para. 53.
[721] Mr Mangenda's Appeal Brief, para. 55. *See also* para. 26.
[722] Mr Mangenda's Appeal Brief, para. 55.

authorities complied with the applicable procedures under their national law in the collection of such evidence. At the same time, in the view of the Appeals Chamber, compliance with domestic law in the collection of evidence is not *per se* proof that the evidence was not obtained by means of a violation of the Statute or internationally recognised human rights and may be thus excluded on this ground by the Court. As observed above, the Court is not precluded *per se* from taking into account, as part of the relevant factual background, the fact of (non-)compliance with national law. However, its determination under article 69 (7) must be made in accordance with international standards and bearing in mind the prohibition to adjudicate matters concerning the interpretation and application of national law. In this regard, the Appeals Chamber agrees with Mr Mangenda that "[i]nvestigative activities are measured not against domestic law, but by whether they conform to internationally recognised human rights" and that a violation of national law "is neither a necessary nor sufficient condition of exclusion under Article 69 (7)".[723]

331. The Appeals Chamber also agrees with Mr Mangenda that by not addressing the issue of the proportionality of the collection of the Western Union Records on the grounds that this fell outside its permitted scope of inquiry, the Trial Chamber failed to consider that the requirement that any interference with the right to privacy be proportionate to the legitimate investigative needs at issue is a necessary component of the safeguard of the right to privacy as an internationally recognised human right. The Appeals Chamber notes that the ECtHR has repeatedly explained that an interference with the right to privacy may only be legitimate if "proportionate to the legitimate aims pursued".[724] In addition, the Appeals Chamber understands the requirement of proportionality to be an integral part of the condition that any interference with the right to privacy not be "arbitrary" within the meaning of article 17 of the International Covenant on Civil and Political Rights, nor, similarly, "abusive or arbitrary" within the meaning of article 11 (2) of the American Convention on Human Rights.

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[723] Mr Mangenda's Appeal Brief, para. 61.
[724] *See e.g.* ECtHR, Grand Chamber, *Khoroshenko v. Russia*, "Judgment", 30 June 2015, application no. 41418/04, para. 118 (with further references therein).

332. The Appeals Chamber is thus of the view that the requirement of proportionality is of relevance in the present case because of the applicable standard under international law for legitimate inferences with the right to privacy, regardless of whether it is contemplated by the domestic law of the State concerned, or has been already considered by domestic courts. The Appeals Chamber therefore considers that the Trial Chamber erred in law in finding that it was precluded from addressing the issue of the proportionality in the collection of the Western Union Records because "it [was] barred from assessing the concrete application of national law" and could not determine "if the national authorities should not have granted the RFA due to the alleged overly broad character of the request". [725] As explained, a violation of national law in the collection of evidence does not constitute *per se* a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute. Likewise, compliance with national law is not *per se* a guarantee that the evidence concerned was not obtained by means of any such violation.

333. In these circumstances, the Appeals Chamber considers it necessary to determine whether the Western Union Records were obtained in violation of the internationally recognised human right to privacy in that their collection entailed a disproportionate interference with the right to privacy of the individuals concerned. In this regard, the Appeals Chamber emphasises that the proportionality of the interference with the right to privacy must be determined taking into the nature of the information concerned weighed against the pursued investigative need warranting such access.

334. The Appeals Chamber recalls that the Western Union Records are Excel spreadsheets itemising money transfers through Western Union. The dates of the transactions and their amounts, as well as the names, dates of birth, identification numbers and addresses of both senders and receivers of these transactions are indicated in these spreadsheets. The Appeals Chamber observes, in this regard, that in a determination of whether a violation of article 8 of the European Convention on Human Rights had occurred, the ECtHR in the case of *G.S.B. v. Switzerland* considered it of relevance that "the impugned disclosure only concerned [the

[725] First Western Union Decision, para. 53.

applicant's] bank data, that is to say purely financial information; it therefore in no way involved the transmission of intimate details or data closely linked to his identity, which would have merited enhanced protection".[726] In this case, it was "particularly in the light of the non-personal nature of the data disclosed" that the ECtHR concluded that it was not unreasonable to prioritise, over the applicant's private interests, "the country's economic well-being" to which a settlement of a conflict between a private bank and the tax authorities of the United States of America was considered conducive.[727]

335. The Appeals Chamber also observes that the money transfers listed in the Western Union Records are those in which at least one of the 68 individuals identified in the Prosecutor's three requests for assistance to Austria figured as sender or receiver.[728] At that time, Mr Bemba had called – or intended to call – most of these individuals as witnesses in the Main Case. In addition to these witnesses, the list includes Mr Kilolo and Mr Mangenda (who, at that time, were part of Mr Bemba's defence team in the Main Case), Mr Liriss Nkwebe (who had previously been Mr Bemba's defence counsel in the Main Case), Mr Babala, Mr Robert Nginamau and [redacted] (the former two being considered by the Prosecutor to be Mr Bemba's political associates, while the latter was considered to be Mr Bemba's

[726] ECtHR, Chamber, *G.S.B. v. Switzerland*, "Judgment", 22 December 2015, application no. 28601/11, para. 93.
[727] Paras 83, 97.
[728] The Appeals Chamber observes that, by the first request for assistance, the Prosecutor requested information on Western Union financial transactions concerning 67 individuals (*see* CAR-OTP-0091-0351). An additional name was then added, for a narrower time period, in the second and third requests for assistance (*see* CAR-OTP-0091-0360; CAR-OTP-0091-0371, respectively). The Western Union Records finally transmitted by Austria in execution of the three requests concern money transfers of which the sender or receiver is at least one of 62 of these individuals.

[redacted][729]) and, as concerns the time period between 1 February and 23 November 2013, Ms Caroline Wale Bamanisa (Mr Bemba's sister).[730]

336. The Appeals Chamber observes that the information available to the Prosecutor (while limited and yet to be verified as part of a proper investigation) which prompted the investigation and led to the present case, included that four individuals scheduled to be called by Mr Bemba as witnesses in the Main Case would provide false testimony after being paid money through Western Union, and that Mr Bemba's "Congolese" lawyer and Mr Kokaté were behind these payments.[731] In light of this and taking into account the nature of the information concerned, the Appeals Chamber is of the view that the Western Union Records requested and obtained in relation to the financial transactions of these 68 individuals, as identified in the Prosecutor's requests for assistance, was proportionate to the investigative needs on the part of the Prosecutor.

337. The Appeals Chamber notes Mr Mangenda's argument that the Western Union Records obtained by the Prosecutor were disproportionate to the time period she was investigating as they "dat[e] back to 2005 – even though Bemba was not arrested until 2008 and his trial did not start until 2010".[732] The Appeals Chamber notes that some of the Western Union Records obtained in execution of the Prosecutor's first request

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[729] *See, e.g.* "Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70", 3 May 2013, a confidential redacted on 12 February 2014, Conf-Red2) and a public redacted version was registered on 12 February 2014 (ICC-01/05-44-Red2), para. 15. The Appeals Chamber notes, in particular, that in this filing of 3 May 2013, Mr Robert Nginamau is identified by the Prosecutor as a "DRC parliamentarian", and in the Application for Warrants of Arrest, as "allegedly Democratic Republic of Congo […] parliamentarian", para. 4. However, Mr Nginamau, called at trial by the Prosecutor as prosecution Witness P-272, testified that his profession since 11 years was to "errands" for Mr Babala (Transcript of 21 October 2015, ICC-01/05-01/13-T-25-Red-ENG (WT), p. 9, lines 17-23, p. 23, line 6).

[730] The Appeals Chamber has been, however, unable to determine the connection to the Prosecutor's investigations at the relevant time of two individuals ([redacted] and [redacted]) out of the 68 ones for whom information on Western Union money transfer was requested, and obtained, by the Prosecutor.

[731] For an overview by the Prosecutor of the relevant background, *see* "Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70", 3 May 2013, ICC-01/05-44-Conf-Exp, paras 9-12, wherein the Prosecutor also explained that, in addition to information obtained from an anonymous source and from a named witness, she, at the relevant time, had also noted: (i) "evidence of false documents included on the exhibit list of the Defence [in the Main Case]"; (ii) "that the witness who may have played a role in forging those documents [Mr Arido] failed to travel to The Hague"; and (iii) "that witness [redacted] […] disappeared from The Hague in the middle of his testimony". A confidential redacted version (ICC-01/05-44-Conf-Red2) and a public redacted version of this filing were registered on 12 February 2014 (ICC-01/05-44-Red2).

[732] Mr Mangenda's Appeal Brief, para. 55.

for assistance to Austria[733] indeed include entries within the time period between June 2005 and 23 May 2008 (the date of the issuance of Mr Bemba's warrant of arrest in the Main Case), and between 24 May 2008 and 22 November 2010 (*i.e.* between Mr Bemba's arrest and the commencement of the trial in the Main Case). While the transmission of information on financial transactions conducted after the commencement of the Main Case appears justified (given the nature of the offences under investigation), it is more difficult for the Appeals Chamber to discern the reasons why the Prosecutor received, from the Western Union and through the Austrian authorities, information concerning money transfers conducted before the issuance of the warrant of arrest against Mr Bemba in the Main Case.[734]

338. The Appeals Chamber notes, however, that the information on financial transactions between the individuals concerned at a time prior to the commencement of the Main Case is in any case of relatively limited extent. In addition, the Appeals Chamber understands that this limited information was introduced into evidence only because it is itemised in the same documents containing information concerning money transfers conducted at a later date. Indeed, neither the Prosecutor nor the Trial Chamber relied on any information of financial transactions carried out between 2005 and 2008. The Appeals Chamber also recalls that, in any case, the information at issue does not concern details of a particularly intimate or sensitive nature. In these circumstances, the Appeals Chamber is not persuaded that, because of the portion of information concerning these earlier money transfers, the Western Union Records could be considered as having been obtained by means of a disproportionate interference with the concerned individuals' internationally recognised human right to privacy.

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[733] Notably the records registered as documents CAR-OTP-0070-0004, CAR-OTP-0070-0005, CAR-OTP-0070-0006, CAR-OTP-0070-0007, CAR-OTP-0073-0273, CAR-OTP-0073-0274 and CAR-OTP-0073-0275.

[734] At the same time, the Appeals Chamber notes that, in her request to the Pre-Trial Single Judge for authorisation to access the Detention Centre Materials, the Prosecutor, with reference to the part of the Western Union Records that had already been transmitted to her by the Austrian authorities, stated that "[a]t this stage, there is no evidence that any of the financiers named above had pre-existing financial or other relationships with witnesses prior to the commencement of the trial" ("Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70", 3 May 2013, ICC-01/05-44-Conf-Exp para. 19; a confidential redacted version (ICC-01/05-44-Conf-Red2) and a public redacted version were registered on 12 February 2014, (ICC-01/05-44-Red2)).

339. In light of the above, the Appeals Chamber considers that the legal error identified above does not affect the Trial Chamber's conclusion in the First Western Union Decision that the alleged "overly broad" nature of the Western Union Records did not amount to a violation of an internationally recognised human right in their collection.[735]

(c) The effect of subsequent domestic rulings on the admissibility of the Western Union Records

340. In its Second Western Union Decision, the Trial Chamber took note of two domestic rulings, issued by the Higher Regional Court of Vienna (*Oberlandesgericht Wien*) on 22 April and 24 May 2016, made available by Mr Arido to the other parties and the Trial Chamber on 9 June 2016.[736] These two rulings repealed two of the three authorisations that had been granted, on 15 November 2012 and 5 November 2013, by the competent lower court (*Landesgericht für Strafsachen Wien*) for the execution by Austria of the Prosecutor's requests for assistance concerning the collection of the Western Union Records.

341. The Trial Chamber found that, because of these domestic rulings, the internationally recognised human right to privacy had been violated in obtaining the Western Union Records.[737] While the Trial Chamber did not explain how it reached this conclusion, this finding appears to have been made as a result of the application of the "'manifestly unlawful' standard" with reference to Austrian law. The Trial Chamber indeed found that, "in view of" the two rulings by the Austrian court, "any further assessment whether there was manifestly unlawful conduct [was] not necessary".[738] The Appeals Chamber however recalls, as found above, that the "manifestly unlawful standard" has no statutory foundation and that an assessment on the interpretation and application of national law falls outside the Court's permitted scope of inquiry under article 69 (7) of the Statute. The Appeals Chamber notes that this finding by the Trial Chamber is not challenged as such in the present appeals. It

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[735] First Western Union Decision, para. 53.
[736] The two rulings were registered (in the original German language) as documents CAR-D24-0005-0001 and CAR-D24-0005-0013, respectively. The official French translations were registered as CAR-D24-0005-0045 and CAR-D24-0005-0033, respectively, and made available by Mr Arido on 28 June 2016.
[737] Second Western Union Decision, para. 28.
[738] Second Western Union Decision, para. 28.

however notes that, in their appeal briefs, Mr Mangenda, Mr Kilolo, Mr Arido and Mr Babala make several arguments to the effect that the Trial Chamber failed to draw the appropriate conclusions from its finding that the Western Union Records had been obtained by means of a violation within the meaning of the *chapeau* of article 69 (7) of the Statute. Therefore, considering that the Trial Chamber's error is a legal one and has implications on the rest of the arguments brought by the appellants, the Appeals Chamber finds it necessary to assess, applying the applicable law to the relevant facts, whether the Trial Chamber's conclusion as to the effects of the domestic rulings by the Higher Regional Court of Vienna is vitiated by this legal error.

342. The Appeals Chamber concurs that, for the purpose of a determination of whether evidence was obtained in violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute, the Court is not precluded *per se* from taking into account, as relevant factual matters, decisions of national courts rendered within the context of the execution by the State of a request for cooperation by the Court. Depending on the circumstances, such rulings may be part of the relevant factual background for a determination on whether certain evidence is inadmissible on the grounds of article 69 (7) of the Statute. Nonetheless, the Appeals Chamber emphasises that the Court must ultimately decide on the basis of the applicable law under article 21 of the Statute and not on the basis of national laws or domestic rulings interpreting and applying such national laws.

343. The Appeals Chamber notes that the Trial Chamber's finding that, "in view of" the two rulings by the Austrian court, the internationally recognised right to privacy has been violated rests, in essence, on the attribution of direct effects on this Court of judicial determinations by national courts. As indicated above, domestic jurisprudence is not part of the Court's applicable law. In addition, the Appeals Chamber observes that the cooperation regime under Part 9 the Statute does not foresee direct effects of domestic decisions related to the execution of requests for assistance by the Court. On the contrary, legal impediments to the execution of requests for assistance cannot be unilaterally invoked by the requested State in order to avoid compliance. Article 93 (3) of the Statute explicitly indicates that, where execution of a particular measure of assistance is prohibited on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to

resolve the matter.[739] Similarly, article 97 of the Statute provides for the possibility of consultations between the Court and the requested State in case of any problem that may impede or prevent the execution of the request. Any such problems may also include issues concerning compliance with national law as identified by the relevant national courts of the requested State. In fact, determinations by national courts may be brought to the attention of the Court by the competent authorities of the requested State as part of the consultations envisaged under Part 9 of the Statute.

344. The Appeals Chamber notes in this regard that Austria did not raise at any point the matter of the subsequent rulings issued by its national court, which were instead filed in the record of the case by Mr Arido. As repeatedly stressed above, issues regarding compliance with national law in the execution of a request for cooperation by the Court fall within the competence of the requested State. It was thus for the competent authorities of Austria to communicate to the Court whether, following the domestic rulings at issue, there existed any problem with the collection and transmission of the Western Union Records, and, if so, consult with the Court as appropriate to resolve the matter.

345. In sum, for the reasons given, it must be stressed that any domestic decision is not, as such, directed at the Court nor is it otherwise binding on the Court, which must apply its own sources of law and cannot simply "import" findings made by national courts, including for determination of admissibility of evidence under article 69 (7) of the Statute. In this regard, the Appeals Chamber observes that Pre-Trial Chamber I, confronted with an issue of a similar nature, stated that "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 [as] [t]his is clear from article 69(8)".[740]

346. The Appeals Chamber is therefore of the view that the issuance of the two rulings by the Higher Regional Court of Vienna does not indicate that a violation of the Statute or internationally recognised human rights occurred in the collection of the

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[739] The Appeals Chamber also notes that article 93 (1) (l) of the Statute mandates States Parties to comply with requests by the Court to provide "any other type of assistance which is not prohibited by the law of the requested State".
[740] *Lubanga* Confirmation Decision, para. 69.

Western Union Records. Accordingly, the Appeals Chamber concludes that the Trial Chamber erred in finding that "in view of" these two domestic rulings, the Western Union Records had been obtained by means of a violation of an internationally recognised human right within the meaning of article 69 (7) of the Statute.

(vi) Conclusion

347. In light of the above, the Appeals Chamber concludes that the Trial Chamber, in the First Western Union Decision, committed a series of errors. In particular, the Trial Chamber erred in law: (i) in stating that its inquiry under article 69 (7) of the Statute could extend to a determination of whether there had been "manifest" violations of national law in the collection of the Western Union Records; and (ii) in failing to make a determination on whether the collection of the Western Union Records was a disproportionate interference with the individually recognised human right to privacy. In addition, the Trial Chamber committed a procedural error in allowing the submission into evidence of document CAR-OTP-0092-0018 outside the requirements of rule 68 of the Rules, despite this document being testimonial in nature, and in relying on it in the First Western Union Decision. Nonetheless, as explained above, the Appeals Chamber considers that none of these errors, whether on their own or in combination, affects the validity of the Trial Chamber's conclusion in the First Western Union Decision that no violation of the Statute or of internationally recognised human rights within the meaning of article 69 (7) of the Statute had occurred in the collection of the Western Union Records.

348. As concerns the Second Western Union Decision, the Appeals Chamber finds that the Trial Chamber erred in law in, once more, making a determination on whether there had been "manifest" violations of national law in the collection of the Western Union Records and in its conclusion that "in view of" the two subsequent domestic rulings of the Higher Regional Court of Vienna, the Western Union Records had been obtained by means of a violation of the internationally recognised human right to privacy. Rather, upon application of the law to the relevant facts, the Appeals Chamber concludes that the Western Union Records were not obtained by means of a violation of internationally recognised human rights within the meaning of article 69 (7) of the Statute, irrespective of the two domestic rulings in question.

349. For these reasons, and to the extent specified above, the Appeals Chamber rejects: (i) Mr Kilolo's sub-ground 1.A.[741] and, in part, sub-ground 1.B.;[742] (ii) Mr Mangenda's Ground 1, section 1[743] and, in part, Ground 1, section 2;[744] and (iii) Mr Arido's and Mr Babala's allegations that the Western Union Records were obtained by means of violations within the meaning of article 69 (7) of the Statute.[745]

5. *Effects of the Appeals Chamber's conclusion on the appellants' remaining arguments concerning the Western Union Records*

350. The Appeals Chamber recalls that Mr Kilolo, Mr Mangenda, Mr Arido and Mr Babala bring, as part of their respective appeals in connection with the admissibility of the Western Union Records, also arguments concerning the requirement under article 69 (7) (b) of the Statute by which they challenge the "*arguendo* section" of the First Western Union Decision[746] and the second part of the Second Western Union Decision.[747]

351. The Appeals Chamber recalls that, pursuant to article 69 (7) of the Statute, the fact that evidence was obtained by means of a violation of the Statute or internationally recognised human rights is a necessary pre-condition for the exclusion of such evidence under this legal basis. In light of the Appeals Chamber's conclusion above, the question of whether the admission of the Western Union Records would be antithetical to and would seriously damage the integrity of the proceedings within the meaning of article 69 (7) (b) of the Statute does not arise. Therefore, the appellants' arguments concerning article 69 (7) (b) of the Statute are dismissed. In particular, the Appeals Chamber dismisses, on this basis:

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[741] "The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute", Mr Kilolo's Appeal Brief, paras 20-28.
[742] Notably, the section "The Trial Chamber erred in law and abused its discretion by failing to seek evidence that would have led it to the truth", Mr Kilolo's Appeal Brief, paras 75-82.
[743] "The Trial Chamber erred in law when finding that Article 69(8) applied to the Prosecution's collection of Western Union information and in crafting a 'manifestly unlawful standard under Article 69(8)", Mr Mangenda's Appeal Brief paras 44-64. *See also* paras 22-29.
[744] Notably, the section "The Chamber erred in relying upon unverified information", Mr Mangenda's Appeal Brief, paras 74-78.
[745] Mr Arido's Appeal Brief, pp. 101-102; Mr Babala's Appeal Brief, paras 22, 24.
[746] First Western Union Decision, paras 63-71.
[747] Second Western Union Decision, paras 32-40.

(i) Mr Kilolo's sub-ground 1.B.,[748] in the parts in which he argues that the Trial Chamber, in its determination under article 69 (7) (b) of the Statute, failed to consider the totality of the circumstances of the Prosecutor's bad faith in the conduct of the investigations[749] and the "chilling effect of its decisions on Counsel practicing before the [Court]";[750]

(ii) Mr Mangenda's Ground 1, section 2, in the parts in which he argues that the Trial Chamber erred in failing to consider all relevant factors and circumstances in its determination under article 69 (7) (b) of the Statute that the admission of the Western Union Records was not antithetical to and seriously damaging the integrity of the proceedings;[751]

(iii) Mr Arido's arguments to the effect that the Trial Chamber erred by "set[ting] up a 'severity scale' for human rights violations [as] [t]his implies that some internationally recognised human rights are more serious (and, hence, deserving) of legal remedies, such as the exclusion of illegally obtained evidence",[752] and that, even accepting, *arguendo*, the "severity standard" introduced by the Trial Chamber for a determination under article 69 (7) (b) of the Statute, "the facts in this case meet [this] standard";[753] and

(iv) Mr Babala's arguments that "[h]aving found that the Western Union records had been obtained in breach of internationally recognized human

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[748] This sub-ground is entitled "The Trial Chamber erred in law, fact, and procedure in finding that the criteria to exclude evidence under Article 69(7)(b) were not met" (Mr Kilolo's Appeal Brief, paras 37-93).
[749] Mr Kilolo's Appeal Brief, paras 48-69. The Appeals Chamber recalls that the rest of this section (notably, the part under sub-ground 1.B., entitled "The Trial Chamber erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of Defence Counsel's immunity", paras 70-74 of Mr Kilolo's Appeal Brief,) has been addressed at section VI.A above.
[750] Mr Kilolo's Appeal Brief, paras 83-89.
[751] This includes, in particular, the sections "[t]he Chamber undervalued the violations" and "[t]he Chamber erred in shifting responsibility for the violations onto the State" at paras 70-73 and 79-94, respectively, of Mr Mangenda's Appeal Brief.
[752] Mr Arido's Appeal Brief, para. 141. *See also* paras 131-153.
[753] Mr Arido's Appeal Brief, para. 143.

rights, the Chamber should have excluded them […] so as to safeguard the fairness of the proceedings".[754]

352. In conclusion, the grounds of appeal concerning the purported inadmissibility of the Western Union Records are rejected in their entirety. The Trial Chamber did not err in its conclusion, in the First Western Union Decision and Second Western Union Decision, that the Western Union Records were not inadmissible under article 69 (7) of the Statute, and in relying on this material for its factual findings in the Conviction Decision.

C. Alleged errors concerning the admissibility of the Detention Centre Materials

353. Under sub-ground 3.1 of his appeal,[755] Mr Bemba argues that the Detention Centre Materials, *i.e.* selected recordings and logs of his non-privileged telephone communications at the Court's detention centre, were obtained in violation of his right to privacy. Therefore, he alleges that the Trial Chamber erred in not excluding them as inadmissible evidence under article 69 (7) of the Statute.[756] These materials – which were in the Registrar's possession as part of the regular management of telephone communications of detainees at the detention centre – were transmitted to the Prosecutor upon authorisation of the Pre-Trial Single Judge,[757] granting a Prosecutor's request to this effect.[758] The Prosecutor subsequently submitted them into evidence at trial.[759]

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[754] Mr Babala's Appeal Brief, para. 26. *See also* paras 21-33.
[755] Mr Bemba's Appeal Brief, paras 141-154 ("Mr Bemba's right to privacy and confidentiality was violated through the collection of detention unit materials").
[756] The Appeals Chamber notes that consideration of sub-ground 3.4 of Mr Bemba's appeal (which reads, in relevant part: "If the Chamber had considered the second limb of Article 69(7), it would have excluded the detention unit records") is predicated on the existence of violation in the collection of the Detention Centre Materials within the meaning of the *chapeau* of article 69 (7) of the Statute.
[757] Decision Authorising Access to Detention Centre Materials.
[758] Request for Access to Detention Centre Materials.
[759] "Prosecution's Second Request for the Admission of Evidence from the Bar Table", 31 July 2015, ICC-01/05-01/13-1113-Conf; a public redacted version was registered on 6 August 2015 (ICC-01/05-01/13-1113-Red); *see also* "Prosecution's Third Request for the Admission of Evidence from the Bar Table", 21 August 2015, ICC-01/05-01/13-1170-Conf; a public redacted version was registered on 18 September 2015 (ICC-01/05-01/13-1199-Red); The Detention Centre Materials are listed in the confidential Annex A (ICC-01/05-01/13-1113-Conf-AnxA); a public redacted version was registered on 6 August 2015 (ICC-01/05-01/13-1113-Red); and (ICC-01/05-01/13-1170-Conf-AnxA) a public redacted version was registered on 18 September 2015 (ICC-01/05-01/13-1170-Red) under "F.

1. Relevant procedural background

354. As recalled above, the Detention Centre Materials were transmitted to the Prosecutor – together with other logs and recordings of Mr Bemba's non-privileged telephone communications at the detention centre – upon authorisation of the Pre-Trial Single Judge. In his decision to this effect, the Pre-Trial Single Judge, noting the Prosecutor's investigations into possible offences under article 70 of the Statute, found, on the basis of the information submitted to him by the Prosecutor, that access to this material "may be of essence for the Prosecutor to be able to shed further light on the relevant facts".[760] In addition, the Pre-Trial Single Judge considered that, "[a]s long as such calls are not directed to counsel for [Mr Bemba] […] they can be legitimately directly accessed by the Prosecutor for the purposes of her investigation" without the need to appoint any "independent counsel".[761]

355. In a decision issued on 30 October 2015, the Trial Chamber rejected Mr Bemba's request to exclude the Detention Centre Materials as inadmissible evidence under article 69 (7) of the Statute.[762] In this decision, the Trial Chamber found that the materials at issue had not been obtained by means of a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute. With respect to the conclusion that the Detention Centre Materials had not been obtained by means of a violation of Mr Bemba's right to privacy, the Trial Chamber found that the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone calls at the detention centre had a basis in law and was necessary and proportionate to the aim pursued.[763] This is the part of the Trial Chamber's determination that Mr Bemba challenges in his appeal.[764]

356. In particular, the Trial Chamber considered that articles 57 (3) (a) and 70 of the Statute, when read in conjunction with regulation 100 (3) of the Regulations of the Court and regulations 174 and 175 of the Regulations of the Registry, "are accessible,

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Category VI – Detention Centre Materials". The Trial Chamber recognised the submission of this material in its First Decision on Submission of Documentary Evidence.

[760] Decision Authorising Access to Detention Centre Materials, para. 4.

[761] Decision Authorising Access to Detention Centre Materials, para. 4.

[762] Decision on Admissibility of Detention Centre Materials, disposing of, *inter alia*, Mr Bemba's Response to Prosecutor's Submission of Documentary Evidence.

[763] Decision on Admissibility of Detention Centre Materials, paras 14-19.

[764] Mr Bemba's Appeal Brief, paras 141-154.

foreseeable as to their effects and sufficiently precise in order to enable Mr Bemba to regulate his conduct".[765] In this regard, the Trial Chamber considered it to be of particular significance that "Mr Bemba was on notice that his non-privileged communications were passively monitored and could be disclosed and/or reviewed if there were reasonable grounds to believe that the detained person or interlocutor may be attempting to, *inter alia*, interfere with a witness or the administration of justice".[766]

357. The Trial Chamber was also of the view that the Prosecutor's access to the Detention Centre Materials was necessary. It noted in this regard that the Pre-Trial Single Judge, acting under article 57 (3) (a) of the Statute and "apparently applying a standard of 'reasonable suspicion' and on the basis of the information available", was satisfied that access to the logs and recording of Mr Bemba's non-privileged telephone calls at the detention centre might be "of essence" for the Prosecutor "to shed further light on the relevant facts" for the purposes of her investigation.[767] In this context, the Trial Chamber also added that "[t]he Bemba Defence does not claim that any other reasonable measure was available in order to obtain such information for that purpose".[768]

358. Finally, the Trial Chamber considered that "access to the Detention Centre Materials was proportionate to its objective".[769] It noted that the Prosecutor had been provided with access only to recordings of non-privileged calls and "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".[770]

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[765] Decision on Admissibility of Detention Centre Materials, para. 15.
[766] Decision on Admissibility of Detention Centre Materials, para. 15 (footnotes omitted).
[767] Decision on Admissibility of Detention Centre Materials, para. 16, referring to Decision Authorising Access to Detention Centre Materials, para. 4.
[768] Decision on Admissibility of Detention Centre Materials, para. 16.
[769] Decision on Admissibility of Detention Centre Materials, para. 17.
[770] Decision on Admissibility of Detention Centre Materials, para. 17.

2. Submissions of the parties

(a) Mr Bemba

359. As noted, Mr Bemba maintains that the materials should have been excluded under article 69 (7) of the Statute on the ground that they had been collected in violation of his internationally recognised human right to privacy.[771] Mr Bemba avers that the Trial Chamber's determination is invalidated by its erroneous reliance on its "flawed conclusions" that the law applied by the Pre-Trial Single Judge was sufficiently foreseeable, that the Pre-Trial Single Judge had applied a "reasonable suspicion threshold" and that his defence had failed to establish that the Prosecutor could have obtained the recordings through other reasonable measures.[772]

360. More specifically, Mr Bemba submits that, while the Trial Chamber found that article 57 (3) (a) of the Statute in conjunction with regulation 100 (3) of the Regulations of the Court and regulations 174 and 175 of the Regulations of the Registry constituted a sufficient legal basis for the measures taken, these were not the provision relied upon by the Pre-Trial Single Judge in the Decision Authorising Access to Detention Centre Materials.[773] Rather, according to Mr Bemba "the [Pre-Trial] Single Judge jettisoned the specific regime for detention monitoring set out in these regulations, and relied only upon Article 57(3)(a)".[774] Mr Bemba argues that the Trial Chamber's finding that the law was sufficient by virtue of the details in regulations 174 and 175 of the Regulations of the Registry confirms that article 57 (3) (a) of the Statute alone "did not offer sufficient detail and protections", in that this provision "sets out no criteria concerning its evidential threshold, the triggering criteria, and the scope of surveillance that can be ordered".[775]

361. Mr Bemba further argues that the Trial Chamber misconstrued the decision of the Pre-Trial Single Judge also with respect to the evidential threshold applied therein for the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged

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[771] Mr Bemba's Appeal Brief, paras 141-154.
[772] Mr Bemba's Appeal Brief, para. 141, referring to Decision on Admissibility of Detention Centre Materials, paras 13, 16.
[773] Mr Bemba's Appeal Brief, para. 142, referring to Decision on Admissibility of Detention Centre Materials, para. 15.
[774] Mr Bemba's Appeal Brief, para. 142, referring to Decision Authorising Access to Detention Centre Materials, p. 3.
[775] Mr Bemba's Appeal Brief, para. 143.

telephone calls at the detention centre.[776] He submits that the Pre-Trial Single Judge relied on "vague, unsubstantiated allegations [which] fail to meet the requirement that covert surveillance must be based on evidence supporting the existence of a reasonable suspicion that the target is involved in serious criminal activity".[777] In particular, Mr Bemba argues that the fact that Pre-Trial Single Judge did not apply the "correct standard" is evidenced also by, *inter alia*: (i) his reliance on information "collected illegally" from Western Union relating to payment that did not originate from Mr Bemba; and (ii) on a "bald assertion" by the Prosecutor that she had information that Mr Bemba may be using the detention centre telephone system to contact supporters, "that fell under Article 54(3)(e)".[778] In addition, according to Mr Bemba, the Trial Chamber's finding that the Pre-Trial Single Judge applied and adhered to the appropriate standard is "unsustainable". He argues that the Pre-Trial Single Judge himself observed that the Prosecutor had not yet made a determination as to whether there were reasonable grounds to believe that an offence under article 70 of the Statute had been committed – a threshold which, in Mr Bemba's submission, is equivalent to the "reasonable suspicion".[779]

362. Mr Bemba also argues that the Trial Chamber erred in finding that he had failed to establish whether "any other reasonable measure was available in order to obtain such information".[780] He submits that, first, this finding was factually incorrect as he had "cited precedent" in this regard and, second, it is "the entity that implement[s] the surveillance [that bears] the burden of proving that it [is] necessary and proportionate".[781] In this case, according to Mr Bemba, "the [Pre-Trial] Single Judge's decision was invalidated through his failure to consider and apply less instructive measures that were available, such as the transmission of transcripts after

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[776] Mr Bemba's Appeal Brief, para. 144.
[777] Mr Bemba's Appeal Brief, para. 147.
[778] Mr Bemba's Appeal Brief, para. 146.
[779] Mr Bemba's Appeal Brief, paras 144-145, referring to "Decision on the 'Registry Observations pursuant to regulation 24 *bis* of the Regulations of the Regulations of the Court on the implementation of the "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'"", 27 May 2013, ICC-01/05-50, para. 9. This document was originally filed confidentially but was reclassified as public pursuant to Pre-Trial Chamber II's decision ICC-01/05-01/13-147, 3 February 2014.
[780] Mr Bemba's Appeal Brief, para. 148, referring to Decision on Admissibility of Detention Centre Materials, para. 16.
[781] Mr Bemba's Appeal Brief, para. 148.

prior judicial vetting as to relevance and redactions".[782] In particular, Mr Bemba submits that the approach of the Pre-Trial Single "failed to satisfy the legal requirement[s] [for] covert surveillance" in that he did not exercise "judicial oversight as concerns the specific information transmitted to the Prosecut[or]" and did not put in place "safeguards as concerns the redaction of private or confidential information".[783]

363. Mr Bemba also submits that the Prosecutor "called no witnesses and tendered no evidence to attest to the selection process or the procedures adopted at this juncture to guard against conflicts or improper access" nor did she call any witness "from the detention unit, or persons engaged in the recording of communications, to testify in relation to the procedures that were employed to log and record conversations".[784]

364. Finally, Mr Bemba submits that "individuals affected by covert surveillance must be afforded an effective opportunity to challenge the measures, and obtain a remedy as soon as it is possible to do so, without compromising the investigations".[785] He argues that, notwithstanding this principle, the Trial Chamber "declined to meaningfully address arguments that this right had been withheld from [him]".[786]

365. Mr Bemba concludes by maintaining that "[t]he above series of errors, individually or cumulatively, invalidated the Chamber's finding that the first limb of Article 69(7) was not fulfilled".[787]

(b) The Prosecutor

366. The Prosecutor submits that the collection of logs and recordings of Mr Bemba's non-privileged calls at the detention centre was "lawful and reasonable" and that "the Chamber correctly concluded that the [Pre-Trial] Single Judge had acted according to the Statute and that access to the Detention Centre materials was necessary and proportionate to its objective".[788] She asserts that Mr Bemba "now repeats many of his trial challenges, but without showing that the [Pre-Trial] Single

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[782] Mr Bemba's Appeal Brief, para. 148 (footnotes omitted).
[783] Mr Bemba's Appeal Brief, para. 150.
[784] Mr Bemba's Appeal Brief, para. 151.
[785] Mr Bemba's Appeal Brief, para. 153.
[786] Mr Bemba's Appeal Brief, para. 153.
[787] Mr Bemba's Appeal Brief, para. 154.
[788] Response, para. 98 (footnotes omitted).

Judge or the Chamber erred" and "also misreads the Chambers' respective decisions".[789]

367. With respect to Mr Bemba's argument that the Pre-Trial Single Judge erred in relying only on article 57 (3) (a) for his authorisation to transmit the Detention Centre Materials to the Prosecutor, the Prosecutor argues that Mr Bemba "misreads" the decision concerned and that his suggestion is "unsupported".[790] Rather, according to the Prosecutor, "[m]erely 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 reference to these sets of provisions in the Decision Authorising Access to the Detention Centre Materials, as well as in the Prosecutor's request.[791] In addition, the Prosecutor argues that, "even if the [Pre-Trial] 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".[792] She observes that, while article 57 of the Statute is "the overarching provision regulating the functions of the Pre-Trial Chamber, including during investigations",[793] "[n]one of the specific Regulation provisions cited, contrary to Bemba's assertion, impose duties or restrictions on judges with respect to *the collection of evidence*".[794] In particular, according to the Prosecutor, the regulations at issue do not "govern[] the Chamber's power to order the production of evidence they deem necessary".[795]

368. The Prosecutor also submits that "the Chamber correctly understood that the [Pre-Trial] Single Judge applied a 'reasonable suspicion' standard when granting the request regarding the Detention Centre material",[796] as indicated in the relevant decisions by the Pre-Trial Single Judge.[797] The Prosecutor asserts that, in the Decision

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[789] Response, para. 98 (footnotes omitted).
[790] Response, para. 99.
[791] Response, para. 99.
[792] Response, para. 100.
[793] Response, para. 100.
[794] Response, para. 100 (emphasis in original).
[795] Response, para. 100.
[796] Response, para. 101 (footnotes omitted).
[797] Response, para. 101 referring to Decision Authorising Access to Detention Centre Materials, para. 9 and to "Decision on the 'Registry Observations pursuant to regulation 24 *bis* of the Regulations of the Regulations of the Court on the implementation of the "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'"'", 27 May 2013, ICC-01/05-

on Admissibility of Detention Centre Materials, the Trial Chamber referred to specific portions of the Pre-Trial Single Judge's decisions, but that "Bemba neither acknowledges this, nor shows error".[798] In this regard, the Prosecutor states that the Decision Authorising Access to the Detention Centre Materials "was a reasoned judicial determination based on evidence implicating Bemba and others in allegedly corrupting witnesses in the Main Case", and that her request was based on "numerous and varied sources".[799] The Prosecutor argues in this respect that "Bemba disregards the totality of the Prosecut[or]'s analysis on the basis of which the [Pre-Trial] Single Judge issued his decision and upon which that decision was confirmed by the Chamber".[800]

369. Further, the Prosecutor argues that Mr Bemba is "factually incorrect" as to his submissions at trial in that, contrary to his suggestion, he never advanced arguments before the Trial Chamber "for access to the Detention Centre records through less intrusive means".[801] In addition, the Prosecutor submits that Mr Bemba "cites no evidence supporting [his] allegations" that the Pre-Trial Single Judge failed to balance Mr Bemba's rights or that the Trial Chamber erred in determining that access to the Detention Centre Materials by the Prosecutor was necessary.[802] According to the Prosecutor, Mr Bemba also "fails to substantiate at all" his suggestion that the recordings of Mr Bemba's telephone calls "that were not privileged and relevant to the Prosecut[or]'s investigations" ought to have been redacted.[803]

370. Finally, the Prosecutor submits that Mr Bemba's remaining challenges "should be summarily dismissed".[804] In particular, according to the Prosecutor, this is the case for: (i) Mr Bemba's argument concerning her failure to call witness or tender evidence to attest to the selection process or procedures adopted to collect the Detention Centre Materials – in support of which, in her view, Mr Bemba cites no

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50, para. 10; this document was originally filed confidentially but was reclassified as public pursuant to Pre-Trial Chamber II's decision ICC-01/05-01/13-147, 3 February 2014.
[798] Response, para. 101, referring to Decision on Admissibility of Detention Centre Materials, para. 16.
[799] Response, para. 104.
[800] Response, para. 104.
[801] Response, para. 102.
[802] Response, para. 103.
[803] Response, para. 105.
[804] Response, para. 106.

legal basis;[805] and (ii) for Mr Bemba's suggestion that he was denied the right to challenge the Detention Centre Materials – which, according to the Prosecutor, "discounts the Chamber's full consideration of this issue".[806]

3. Determination by the Appeals Chamber

(a) The nature of the measure ordered by the Pre-Trial Single Judge

371. The Appeals Chamber recalls that Mr Bemba challenges the Trial Chamber's reliance on the Detention Centre Materials in the Conviction Decision on the grounds that this material is inadmissible under article 69 (7) of the Statute and that the Trial Chamber therefore erred in failing to exclude it in its interlocutory ruling on the matter. In particular, Mr Bemba argues that the Detention Centre Materials had been obtained by means of a violation of his internationally recognised human right to privacy at the detention centre within the meaning of article 69 (7) of the Statute, in that the Pre-Trial Single Judge's order to transmit the Detention Centre Materials to the Prosecutor entailed an unlawful interference with such right to privacy. In this context, the Appeals Chamber understands Mr Bemba's arguments to concern primarily the legality of the order of the Pre-Trial Single Judge in this respect, rather than the Trial Chamber's disposal at trial of his challenges in this regard. The Appeals Chamber will address Mr Bemba's arguments in line with this understanding.

372. At the outset, the Appeals Chamber underlines that detained persons also benefit from the internationally recognised human right to privacy. At the same time, the Appeals Chamber recognises that certain limitations necessarily result from the fact that the person concerned is in detention.[807] The legal instruments of the Court indeed regulate a number of limitations to a detainee's right to privacy at the detention

[805] Response, para. 106.
[806] Response, para. 106.
[807] *See e.g.* United Nations Office of the High Commissioner for Human Rights, "Basic Principles for the Treatment of Prisoners", adopted and proclaimed by UNGA resolution 45/111 of 14 December 1990, A/45/756, article 5, providing that detained persons retain human rights and fundamental freedoms "[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration".

centre with a view to securing the interests of the administration of justice, as well as security and good order at the detention centre.[808]

373. In this regard, the Appeals Chamber considers that Mr Bemba's arguments are predicated on a misrepresentation of the Decision Authorising Access to Detention Centre Materials rendered by the Pre-Trial Single Judge. Indeed, Mr Bemba's submissions rest on the repeated assertion that the Pre-Trial Single Judge ordered that he be placed under "covert surveillance", upon request by the Prosecutor.[809] This was, however, not the case. Contrary to Mr Bemba's argument, the surveillance of his non-privileged telephone communications at the detention centre was not ordered by the Pre-Trial Single Judge, but is specifically provided for by the ordinary detention regime applicable at the detention centre of this Court.

374. Indeed, regulation 174 (1) of the Regulations of the Registry specifically provides that "[a]ll telephone conversations of detained persons shall be passively monitored, other than those with counsel, assistants to counsel entitled to legal privilege, diplomatic or consular representatives, representatives of the independent inspecting authority, or representatives of the Registry, a Chamber or the Presidency". In accordance with sub-regulation (2), "passive monitoring entails the recording of telephone calls but without simultaneous listening". This provision also specifies that "[t]he detained person shall be informed of the monitoring of telephone calls" (sub-regulation (3)) and that "[r]ecords of telephone conversations shall be erased after the completion of the proceedings" (sub-regulation (4)). In addition, regulation 174 (2) provides that "[t]hese recordings could be listened to subsequently in cases listed

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[808] In addition to the provisions of regulations 174 and 175 of the Regulations of the Registry which are specifically addressed in this section, the Appeals Chamber notes, for example, regulations 168, 169, 183, 184, 194, 195 and 196 of the Regulations of the Registry. *See also*, in general, regulations 99 (2) and 100 (3) of the Regulations of the Court.

[809] *See e.g.* Mr Bemba's Appeal Brief, paras 147 ("[the] vague, unsubstantiated allegations [relied upon by the Pre-Trial Single Judge] fail to meet the requirement that covert surveillance must be based on evidence supporting the existence of a reasonable suspicion that the target is involved in serious criminal activity"), 148 ("the entity that implemented the surveillance bore the burden of proving that it was necessary and proportionate), 150 ("[the Pre-Trial Single Judge's] approach failed to satisfy the legal requirement that covert surveillance should be restricted to situations of 'strict necessity', and accompanied by effective and rigorous scrutiny over the duration, scope and necessity of such measures"), 153 ("individuals affected by covert surveillance must be afforded an effective opportunity to challenge the measures, and obtain a remedy, as soon as it is possible to do so without compromising the investigations"). *See also* para. 143 ("Article 57(3)(a) sets out no criteria concerning […] the scope of surveillance that can be ordered").

under regulation 175, sub-regulation 1", namely when "the Chief Custody Officer has reasonable grounds to believe that the detained person may be attempting to", *inter alia*, "[i]nterfere with […] a witness"[810] or "[i]nterfere with the administration of justice".[811]

375. The Appeals Chamber notes that these provisions are communicated to detained persons upon arrival at the detention centre,[812] enabling them to adjust their conduct accordingly. Indeed, as observed, these provisions explicitly stipulate that all phone calls, other than those specifically excluded, are recorded and that these recordings, which are kept until "the completion of the proceedings", can be listened to, including "at random".[813] In other words, the monitoring regime at the detention centre cannot in any way be qualified as an act of "covert surveillance" as this regime is explicitly spelled out and the detained persons duly informed of its existence.

376. The Appeals Chamber observes that the Pre-Trial Single Judge did not order any change to the regular monitoring system already in place for all detainees, but only authorised the transmission to the Prosecutor, for the purposes of her investigation into possible offences under article 70 of the Statute, of the pre-existing logs and recordings of Mr Bemba's telephone communications at the detention centre. The Appeals Chamber considers that Mr Bemba's mischaracterisation of the measure ordered by the Pre-Trial Single Judge undermines his arguments that this measure constituted an unlawful interference with his right to privacy because the legal, factual and procedural conditions justifying acts of "covert surveillance" had not been met.

377. At the same time, the Appeals Chamber recognises that the transmission of the recordings to the Prosecutor for the purposes of her investigation did entail an additional intrusion into Mr Bemba's privacy as it expanded the scope of individuals with access to this material, beyond what is provided for in the regular detention

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[810] Regulation 175 (1) (b) of the Regulations of the Registry.
[811] Regulation 175 (1) (c) of the Regulations of the Registry.
[812] *See* regulation 93 (1) of the Regulations of the Court ("[w]hen a detained person arrives at the detention centre, he or she shall be provided with a copy of these Regulations and the Regulations of the Registry relevant to detention matters in a language which he or she fully understands and speaks"), regulation 174 (3) of the Regulations of the Registry ("[t]he detained person shall be informed of the monitoring of telephone calls"), as well as the procedure upon arrival of the detained person at the detention centre under regulation 186 of the Regulations of the Registry.
[813] *See* regulation 175 (1) of the Regulations of the Registry.

regime. It is on this understanding that the Appeals Chamber will address Mr Bemba's arguments in support of his allegation that the Detention Centre Materials should have been excluded as inadmissible evidence as they had been obtained in violation of his right to privacy.

(b) Alleged errors concerning the legal basis of the measure

378. As observed, the Pre-Trial Single Judge ordered the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone calls acting under article 57 (3) (a) of the Statute. Mr Bemba does not appear to contest that the legal instruments of the Court allow, in principle, the transmission to the Prosecutor of logs and recordings of telephone communications at the detention centre. Rather, he argues that the Pre-Trial Single Judge, in authorising this measure, incorrectly relied only on article 57 (3) (a) of the Statute which, in his view "[does] not offer sufficient detail and protections".[814] According to Mr Bemba, the Pre-Trial Single Judge's reliance only on article 57 (3) (a) of the Statute, in turn, invalidates the Trial Chamber's finding that the measure ordered by the Pre-Trial Single Judge had a sufficient legal basis by virtue of the details in regulations 174 and 175 of the Regulations of the Registry.[815]

379. The Appeals Chamber recalls that the Pre-Trial Single Judge provided the judicial authorisation necessary for the Prosecutor to obtain the recordings of Mr Bemba's non-privileged phone calls from the detention centre which had been collected by the Registry in accordance with the applicable detention regime. As noted, by so doing, the Pre-Trial Single Judge enlarged the circle of officials with access to the material beyond those regularly allowed under the ordinary detention regime.

380. In this regard, the Appeals Chamber recalls that it has previously found that a chamber is vested with the discretion to transmit to the Prosecutor an accused's monitored conversations at the detention centre, including for the purposes of the Prosecutor's exercise of her authority to "establish the truth" within the meaning of article 54 (1) of the Statute and with a view to potentially introducing such recordings

[814] Mr Bemba's Appeal Brief, para. 143.
[815] Mr Bemba's Appeal Brief, para. 142.

as evidence in an ongoing trial.[816] The Appeals Chamber considers that the same considerations apply in the circumstances at hand, in which judicial authorisation was given by the Pre-Trial Chamber in the exercise of its statutory functions in connection with the Prosecutor's investigations into possible offences under article 70 of the Statute. Indeed, in accordance with article 57 (3) (a) of the Statute, a pre-trial chamber, at the request of the Prosecutor, may "issue such orders and warrants as may be required for the purposes of an investigation". In the Appeals Chamber's view, in the exercise of its functions under this provision, a pre-trial chamber has the power to authorise the transmission to the Prosecutor of recordings of telephone communications from the detention centre kept by the Registry, as may be required for the purposes of her investigation.

381. The Appeals Chamber therefore sees no error in the fact that the Pre-Trial Single Judge relied on article 57 (3) (a) of the Statute as the legal basis for the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone calls at the detention centre. In the view of the Appeals Chamber, it was correct for the Pre-Trial Single Judge not to rely on regulation 100 (3) of the Regulations of the Court or regulations 174 and 175 (1) of the Regulations of the Registry. As explained, these regulations, plainly, do not address the types of situations concerned with the judicial authorisation requested by the Prosecutor, but have a different scope of application.[817] In particular, contrary to Mr Bemba's suggestion,[818] these regulations do not set out any "specific regime" or "legal safeguards" that the Pre-Trial Single Judge "jettisoned" in authorising the transmission of this material to the Prosecutor for the purposes of her investigation.

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[816] *See* *Katanga* OA9 Judgment, paras 40, 41, 49, 50. *See also* *Ngudjolo* Appeal Judgment, para. 267. In these judgments, which concern the authority on the part of a trial chamber to authorise the transmission to the Prosecutor, for the purpose of their potential use at trial, of an accused person's telephone communications at the detention centre that have been monitored upon an order of the Registrar, the Appeals Chamber considered that the relevant discretion of the Trial Chamber is founded on regulation 92 (3) of the Regulations of the Court which provides that a "[a] Chamber may, *proprio motu* or at the request of any interested person, order that the detention record or part thereof be withheld or disclosed".

[817] The Appeals Chamber recalls that regulations 174 and 175 (1) of the Regulations of the Registry are not concerned with the transmission of recordings of passively monitored telephone calls to the Prosecutor for the purposes of investigation, and thus they do not constitute an appropriate legal basis for any such a measure. Even more misplaced is the reference to regulation 100 (3) of the Regulations of the Court which, as pointed out by the Prosecutor (*see* Response, para. 100) regulates visits to the detainees at the detention centre and is therefore of no relevance to the matter at issue.

[818] Mr Bemba's Appeal Brief, paras 142-143.

382. The Appeals Chamber is thus of the view that the Pre-Trial Single Judge's decision to authorise the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone communications at the detention centre had a sufficient basis in law, and, consequently, that the Trial Chamber did not err in this regard.

(c) Alleged errors concerning the factual basis of the measure

383. At this juncture, the Appeals Chamber turns to Mr Bemba's argument concerning the alleged absence of a sufficient factual basis for the Pre-Trial Single Judge's decision to transmit to the Prosecutor the recordings of Mr Bemba's telephone communications from the detention centre.

384. Mr Bemba's basic premise is that the measure at issue must have been based on "evidence supporting the existence of a reasonable suspicion that the target is involved in serious criminal activity", a standard which he considers to be a requirement for measures of "covert surveillance".[819] As explained, however, the measure at issue is not one of "covert surveillance", but an order that a Pre-Trial Chamber has the authority to make as part of the exercise of its functions under article 57 (3) (a) of the Statute. On this basis, the Appeals Chamber sees no merit in Mr Bemba's submissions that the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone communications was unlawful on the mere ground that the Pre-Trial Single Judge authorised such measure without applying the "reasonable suspicion" standard required for measures of "covert surveillance".[820]

385. At the same time, the Appeals Chamber recalls that the measure ordered by the Pre-Trial Single Judge constituted an additional interference into the Mr Bemba's right to privacy at the detention centre in that it entailed an expansion of the circle of individuals granted access to the recordings of the detainee's non-privileged telephone communications beyond those who are authorised to access these recordings as part of

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[819] *See* Mr Bemba's Appeal Brief, para. 147.

[820] This applies to Mr Bemba's argument that the Pre-Trial Single Judge's finding that the Prosecutor had not yet made a determination as to whether there were reasonable grounds to believe that an offence under article 70 of the Statute had been committed is, in and of itself, incompatible with the application of the "reasonable suspicion" standard (Mr Bemba's Appeal Brief, paras 144, 145), as well as to Mr Bemba's submission that the Pre-Trial Single Judge erred because he relied on allegations which, in and of themselves, fail to meet the evidential threshold required for measures of "covert surveillance" (Mr Bemba's Appeal Brief, para. 147).

the ordinary detention regime. Accordingly, in the consideration of whether this measure is "required for the purposes of an investigation" within the meaning of article 57 (3) (a) of the Statute, a chamber must be satisfied that the Prosecutor's request for any such measure has a sufficient factual basis justifying this additional intrusion into the detainee's privacy.

386. The Appeals Chamber observes that the Pre-Trial Single Judge, in the Decision Authorising Access to Detention Centre Materials, stated that "[w]henever 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".[821] The Appeals Chamber also notes that the authorisation to transmit to the Prosecutor the recordings of Mr Bemba non-privileged telephone calls at the detention centre was granted on the basis of a number of indicia brought by the Prosecutor to the attention of the Pre-Trial Single Judge as "leading to a legitimate suspicion that [Mr Bemba] himself may be directing the payments to the witnesses".[822] This information included:

(i) Information, obtained in October 2012 from a person whom the Prosecutor had previously interviewed during her investigation for the purpose of the Main Case, that an individual to be called as a defence witness in the Main Case had been promised by a person in The Hague – in a contact facilitated by Mr Kokaté – relocation to Europe in exchange of his testimony;[823]

(ii) Information indicating that money transfers had been made, through Western Union, to defence witnesses D-11 (Mr Arido), [redacted] ([redacted]), D-64 ([redacted]), D-57 ([redacted]), D-59 ([redacted]), D-38 ([redacted]), D-55 ([redacted]), and D-45 ([redacted]), as well to [redacted] (Mr Kokaté) by individuals close to Mr Bemba, including Mr Kilolo, Mr Babala, Mr Nginamau, [redacted] and [redacted];[824]

[821] Decision Authorising Access to Detention Centre Materials, para. 9.
[822] Request for Access to Detention Centre Materials, para. 28.
[823] Request for Access to Detention Centre Materials, para. 14,
[824] Request for Access to Detention Centre Materials, paras 15, 16, and Annex A.

(iii) Information indicating that Mr Kilolo was also receiving funds from Mr Babala, [redacted] and [redacted];[825]

(iv) Information indicating that the individuals making the payments to defence witnesses have "strong and close personal ties" with Mr Bemba, and, in particular, that Mr Babala and Caroline Bemba were among the few individuals authorized by Mr Bemba to handle his finances;[826]

(v) Reference to the fact that, at least, witness D-57 ([redacted]), D-64 ([redacted]), [redacted] ([redacted]) and D-55 ([redacted]), while asked during their respective testimony in the Main Case before Trial Chamber III, did not admit to having received any payment by Mr Bemba or his defence team, despite acceptance of a Western Union payment requires, *inter alia*, physical presence at a Western Union location;[827]

(vi) Information indicating that Mr Kilolo was releasing confidential information related to the Main Case to Mr Babala;[828] and

(vii) Information indicating that Mr Bemba spoke to unapproved interlocutors by forwarded or three-way conference calls, evading the regime applicable at the detention centre.[829]

387. In the view of the Appeals Chamber, the information made available to the Pre-Trial Single Judge provided a sufficient factual basis for him to reasonably conclude that an additional intrusion into Mr Bemba's right to privacy concerning his recorded non-privileged telephone conversations at the detention access was "of essence for the Prosecutor to be able to shed further light on the relevant facts", and thus justified within the meaning of article 57 (3) (a) of the Statute.[830]

388. The Appeals Chamber considers that this conclusion is not called into question by Mr Bemba's arguments concerning certain information that the Prosecutor brought

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[825] Request for Access to Detention Centre Materials, para. 21.
[826] Request for Access to Detention Centre Materials, para. 22.
[827] Request for Access to Detention Centre Materials, paras 17, 19, fn. 18.
[828] Request for Access to Detention Centre Materials, para. 26.
[829] Request for Access to Detention Centre Materials, para. 27.
[830] Decision Authorising Access to Detention Centre Materials, para. 4.

to the attention of the Pre-Trial Single Judge. Indeed, in the view of the Appeals Chamber, these arguments – in addition to being raised in support of his submission that the Pre-Trial Single Judge did not apply the standard required for measures of "covert surveillance" – are also factually incorrect. More specifically, contrary to Mr Bemba's suggestion,[831] the "judicially approved" records concerning money transfers conducted through Western Union were not only transmitted "in June 2013", but had already been transmitted by the Austrian authorities in execution of the first request for assistance under Part 9 of the Statute in January 2013.[832] In addition, the Appeals Chamber notes that the "bald assertion" that Mr Bemba attributes to the Prosecutor (*i.e.* that Mr Bemba "may be using the Detention Centre telephone system to contact supporters") was not an "assertion […] that fell under Article 54(3)(e)".[833] Rather, the Prosecutor, in support of her allegation in this respect, relied on various sources, including information provided by an individual under the condition that his *identity* would remain confidential under article 54 (3) (e) of the Statute, as well as open-source video material in which Mr Bemba's supporters reported having had telephone conversations with him.[834]

389. Finally, the Appeals Chamber notes at this juncture that Mr Bemba requests the admission as additional evidence on appeal of a series of emails that he considers relevant to his ground of appeal and, in particular, relating to the Prosecutor's communication to the Registry, on 11 February 2013, of the open-source video as indicating that Mr Bemba could have been violating the applicable regulations at the detention centre.[835] The Appeals Chamber finds Mr Bemba's request to be meritless. Contrary to Mr Bemba's suggestion, the Appeals Chamber considers that whether the Registry considered that any measure was warranted due to the video at issue[836] is

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[831] Mr Bemba's Appeal Brief, para. 146, fn. 248.
[832] *See* CAR-OTP-0070-0001-0001.
[833] Mr Bemba's Appeal Brief, para. 146.
[834] Request for Access to Detention Centre Materials, paras 23-25, 27.
[835] "Second Request to Admit Additional Evidence on Appeal", 29 November 2017, ICC-01/05-01/13-2244-Conf-Exp, paras 32-46. The emails that Mr Bemba seeks to admit as additional evidence on appeal have been filed in the record as ICC-01/05-01/13-2227-Conf-AnxA, ICC-01/05-01/13-2233-Conf-Exp-AnxA and ICC-01/05-01/13-2244-Conf-AnxD. The Appeals Chamber notes that the Prosecutor responded to Mr Bemba's request on 11 December 2017 ("Prosecution's response to Bemba's Second Request to Admit Additional Evidence on Appeal", ICC-01/05-01/13-2247-Conf-Exp).
[836] *See* "Second Request for Admission of Additional Evidence", 29 November 2017, ICC-01/05-01/13-2244-Conf-Exp, para. 41.

irrelevant to the matter on whether the information brought to the attention of the Pre-Trial Single Judge was sufficient for him to authorise the measure requested by the Prosecutor under article 57 (1) (a) of the Statute. Emails indicating that the Registry "evidently did not consider this video to be sufficiently serious to warrant active monitoring of Mr. Bemba's communications"[837] are therefore of no relevance to the Appeals Chamber's disposal of Mr Bemba's ground of appeal concerning the admissibility of the Detention Centre Materials. Equally irrelevant to the ground of appeal at issue is the claim that the Prosecutor did not consider the video itself to be probative to the alleged offences under article 70 of the Statute as allegedly indicated in the Registry's recent confirmation that the Prosecutor did not seek access to the recordings of Mr Bemba's telephone calls which overlapped with the meeting or by a chain of emails exchanged between the Prosecutor and the Registry at the relevant time.[838] In these circumstances, the Appeals Chamber dismisses Mr Bemba's request to admit this material as additional evidence on appeal without further consideration, including on whether the emails at issue can in fact be considered "evidence".

390. The Appeals Chamber therefore concludes that the judicial order authorising the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone communications at the detention centre for the purposes of her investigation into possible offences under article 70 of the Statute was grounded on a sufficient factual basis, and accordingly, the Trial Chamber did not err in finding so.[839]

(d) Alleged errors concerning the implementation of the measure

391. In a further application of his understanding that the Pre-Trial Single Judge ordered a measure of "covert surveillance", Mr Bemba asserts that the approach of the Pre-Trial Single Judge, as validated by the Trial Chamber, was incorrect in that there had been "no judicial oversight as concerns the specific information transmitted to the

[837] "Second Request for Admission of Additional Evidence", 29 November 2017, ICC-01/05-01/13-2244-Conf-Exp, para. 41.
[838] *See* Second Request for Admission of Additional Evidence, paras 34, 38-40.
[839] Decision on Admissibility of Detention Centre Materials, paras 16-17.

Prosecution" and "no safeguards as concerns the redaction of private or confidential information".[840]

392. Prior to addressing the merits of these arguments, the Appeals Chamber notes, as a preliminary point, that as part of his submissions Mr Bemba misrepresents the Trial Chamber's statement, in the Decision on Admissibility of Detention Centre Materials, that "[t]he Bemba Defence does not claim that any other reasonable measure was available in order to obtain such information for that purpose".[841] Contrary to Mr Bemba's suggestion, the Appeals Chamber considers that this statement by the Trial Chamber, when put in context, does not entail a shifting of "the burden of proving that [the measure authorised by the Pre-Trial Single Judge] was necessary and proportionate"[842] or "put the cart before the horse".[843] Rather, in the Appeals Chamber's view, the Trial Chamber merely indicated that, as a matter of fact, Mr Bemba himself had not argued that there existed other reasonable measures to obtain the information that was considered "of essence" to the Prosecutor's investigation into possible offences under article 70 of the Statute alternative to the transmission to her of the recordings of Mr Bemba's non-privileged telephone calls at the detention centre. Contrary to Mr Bemba's assertion, this was factually correct on the part of the Trial Chamber.[844]

393. That said, and turning to the merits of Mr Bemba's arguments under consideration, the Appeals Chamber notes, first, that, beyond an unspecific claim that his right to privacy should be protected against measures of "covert surveillance", he does not provide any argument in support of his submission that the transmission to the Prosecutor of the recordings of his telephone calls at the detention centre must

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[840] Mr Bemba's Appeal Brief, para 150.
[841] Decision on Admissibility of Detention Centre Materials, para. 16.
[842] Mr Bemba's Appeal Brief, para. 148.
[843] Mr Bemba's Appeal Brief, para. 149.
[844] The Appeals Chamber notes that Mr Bemba, at paragraph 148 and corresponding footnote of his appeal brief, refers, in support of his claim that the Trial Chamber's statement was factually incorrect, to paragraphs 62-67, 74, 80-82 of his Response to Prosecutor's Submission of Documentary Evidence. However, as correctly pointed out by the Prosecutor, those arguments by Mr Bemba concerned the evidential threshold that he claimed should have been required for the authorisation of the Detention Centre Materials to the Prosecutor and not the issue of whether there were other reasonable measures for the Prosecutor to obtain the information required for the purposes of her investigation (Response, para. 102).

have only occurred "after prior judicial vetting as to relevance and redactions".[845] In this respect, the Appeals Chamber reiterates that the Pre-Trial Single Judge: (i) did not order a measure of "covert surveillance", but issued a judicial order merely authorising the transmission to the Prosecutor of recordings collected through the ordinary regime of passive monitoring of telephone communications at the detention centre of which Mr Bemba was aware; (ii) ordered the transmission to the Prosecutor exclusively of recordings and logs of Mr Bemba's non-privileged telephone communications at the detention centre; and (iii) satisfied himself that there was a sufficient legal and factual basis for the transmission of these recordings and considered that such measure was "of essence" for the purposes of the Prosecutor's ongoing investigation, within the meaning of article 57 (3) (a) of the Statute, into possible offences under article 70 of the Statute. In these circumstances, the Pre-Trial Single Judge having determined, on the basis of the information brought to his attention, that access to the pre-existing recordings of Mr Bemba's telephone calls was required for the purpose of the Prosecutor's investigation within the meaning of article 57 (3) (a) of the Statute, a further judicial control on the recordings actually transmitted to the Prosecutor was unwarranted.

394. The Appeals Chamber therefore dismisses Mr Bemba's submission that the transmission of the recordings at issue, which had been obtained through the ordinary regime of passive monitoring (a legitimate administrative function transparently conducted) and transmitted to the Prosecutor pursuant to a judicial authorisation by the Pre-Trial Single Judge, should have only occurred "after prior judicial vetting as to relevance and redactions".[846]

395. Finally, the Appeals Chamber notes Mr Bemba's reference to the fact that the Prosecutor "called no witnesses and tendered no evidence to attest to the selection process or the procedures adopted at this juncture to guard against conflicts or improper access" and that she "called no one from the detention unit, or persons engaged in the recording of communications, to testify in relation to the procedures that were employed to log and record conversations".[847] In the absence of any

[845] Mr Bemba's Appeal Brief, paras 148, 150.
[846] Mr Bemba's Appeal Brief, para. 148.
[847] Mr Bemba's Appeal Brief, para. 151.

elaboration in this regard on the part of Mr Bemba, it appears that his arguments are predicated on the existence of a legal requirement obliging that witnesses be called or documentary evidence tendered for these purposes. However, no such legal requirement exists in the legal framework of the Court.

396. In light of the above, the Appeals Chamber is of the view that the Trial Chamber did not err in finding that the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone calls at the detention centre constituted an unlawful violation of his right to privacy because of the way it was implemented.

(e) Alleged denial of Mr Bemba's right to challenge the measure and obtain a remedy

397. The Appeals Chamber turns now to Mr Bemba's argument that, as an individual "affected by covert surveillance", he should have been afforded "an effective opportunity to challenge the measures, and obtain a remedy as soon as it [was] possible to do so without compromising the investigations", and that the Trial Chamber erred by "declin[ing] to meaningfully address arguments that this right had been withheld from [him]".[848]

398. The Appeals Chamber is not persuaded by these arguments. First, as concerns his right to challenge "covert surveillance", the Appeals Chamber reiterates that there has been no such measure with respect to Mr Bemba's telephone communications at the detention centre. Second, the Appeals Chamber reiterates that the passive monitoring of Mr Bemba's telephone communications at the detention centre – of which he was aware since his arrival at the detention centre – is part of the ordinary detention regime at the Court as provided by its legal framework. Third, as correctly pointed out by the Trial Chamber, "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 [and] [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".[849] Fourth, as concerns, more

[848] Mr Bemba's Appeal Brief, para. 153 (footnotes omitted).
[849] Decision on Admissibility of Detention Centre Materials, para. 12 (footnotes omitted).

specifically, Mr Bemba's right to challenge the legality of the transmission to the Prosecutor of the recordings of his non-privileged phone calls as an unlawful violation of his right to privacy and the purported ensuing inadmissibility as evidence in the present case of the Detention Centre Materials, the Appeals Chamber notes that Mr Bemba did make such a challenge and that the Trial Chamber considered it on its merits in the Decision on Admissibility of Detention Centre Materials. The fact that Mr Bemba disagrees with the merits of the Trial Chamber disposal of his argument – which he challenges in the present appeal – does not indicate that he was denied the right to present his arguments in this regard and have the Trial Chamber address them.

(f) Conclusion

399. In light of the above, the Appeals Chamber is of the view that the Pre-Trial Single Judge's order authorising the transmission to the Prosecutor of the recordings of Mr Bemba's non-privileged telephone calls from the detention centre for the purposes of her investigations into possible offences under article 70 of the Statute was lawful. Accordingly, the Appeals Chamber considers that the Trial Chamber did not err in its determination that the Detention Centre Materials had not been obtained by means of a violation of Mr Bemba's right to privacy at the detention centre within the meaning of article 69 (7) of the Statute, and in its reliance on this material for its factual findings in the Conviction Decision.

400. Mr Bemba's sub-ground 3.1 of appeal – and the related part of sub-grounds 3.4 and 3.5[850] – are therefore rejected.

D. Alleged errors concerning the admissibility of the Dutch Intercept Materials

401. Mr Bemba, Mr Kilolo, Mr Mangenda and Mr Babala argue that the Trial Chamber erred by not excluding, and by relying in the Conviction Decision on logs and recordings of Mr Kilolo's and Mr Mangenda's telephone conversations which had been collected by the Dutch authorities and transmitted to the Prosecutor, in execution of requests for assistance ("Dutch Intercept Materials").

[850] Mr Bemba's Appeal Brief, paras 180-187. Sub-ground 3.4 of Mr Bemba's appeal reads, in relevant part: "If the Chamber had considered the second limb of Article 69(7), it would have excluded the detention unit records". Sub-ground 3.5. reads: "The Chamber erred in law by not qualifying the extent to which it relied on these materials in its judgment".

402. In particular, Mr Mangenda, Mr Kilolo and Mr Babala argue that the Dutch Intercept Materials should have been excluded in their entirety as they derived from the "illegally obtained" Western Union Records.[851] Mr Kilolo and Mr Bemba also argue the inadmissibility of the Dutch Intercept Materials due to an alleged violation of Mr Bemba's legal professional privilege in his telephone communications with Mr Kilolo.[852] Finally, Mr Mangenda also argues that the Prosecutor's conduct in obtaining the Dutch Intercept Materials related to his telephone communications vitiates the authorisation(s) for their collection and warrants their exclusion as inadmissible evidence under article 69 (7) of the Statute.[853]

1. Procedural background

403. On 19 July 2013, in the course of her investigations into possible offences against the administration under article 70 of the Statute, the Prosecutor requested authorisation from the Pre-Trial Single Judge to transmit a request for assistance to the competent authorities of, *inter alia*, The Netherlands to intercept calls on the telephones used by Mr Kilolo and Mr Mangenda.[854] While submitting that, according to the Statute, she would normally not need a judicial approval for this measure, the Prosecutor explained that she considered it appropriate, in the "exceptional circumstances" of the present case, to seek "independent judicial approval within the Court for the intended evidence collection plan" given that the intended collection of evidence implicated the "likely collateral collection of privileged communications between lawyer and client".[855]

404. The authorisation to "seize the relevant authorities of […] the Netherlands with a view to collecting logs and recordings of telephone calls placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda" was granted by the Pre-Trial Single Judge on 29 July 2013.[856] The Pre-Trial Single Judge, however, considered that, because of the potential privilege attaching to communications between a counsel and his client, it was necessary to appoint an "independent counsel" tasked with filtering

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[851] Mr Mangenda's Appeal Brief, paras 95-102; Mr Kilolo's Appeal Brief, paras 94-100; Mr Babala's Appeal Brief, para. 26.
[852] Mr Bemba's Appeal Brief, paras 155-187; Mr Kilolo's Appeal Brief, paras 107-123.
[853] Mr Mangenda's Appeal Brief, paras 30-35, 103-126.
[854] Request to Seize National Authorities.
[855] Request to Seize National Authorities, para. 3.
[856] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, p. 7.

the recordings collected by the Dutch authorities to be transmitted to the Prosecutor.[857]

405. Some of the materials so obtained by the Prosecutor were submitted into evidence by the Prosecutor in the trial pursuant to article 69 (3) of the Statute[858] – submission which the Trial Chamber recognised on 24 September 2015.[859] After the submission by the Prosecutor, the Trial Chamber, upon several motions by the accused requesting exclusion this evidence (in part or in its entirety), issued several decisions addressing the purported inadmissibility of this material. These interlocutory decisions are now challenged in the present appeals by one or more appellants. The Appeals Chamber notes that, on this matter, the Trial Chamber, issued the following decisions:

(i) On 16 September 2015, the Trial Chamber rendered a decision – challenged on appeal by Mr Bemba and Mr Kilolo – in which it: (a) decided not to exclude (part of) the Dutch Intercept Materials on the ground of the alleged violation of Mr Bemba's legal professional privilege in their acquisition by the Prosecutor; and (b) found that the collection of the Dutch Intercept Materials in connection with Mr Kilolo's telephone communications was an interference with the right to privacy (including from the viewpoint of the privilege) that had taken place "in accordance with the law";[860]

(ii) On 24 September 2015, the Trial Chamber rendered a decision – challenged by Mr Mangenda in his appeal – in which it rejected Mr Mangenda's arguments that these materials should have been excluded as inadmissible evidence under article 69 (7) of the Statute on the grounds that the Prosecutor made some material misstatements to both the Pre-Trial Single Judge and the Dutch authorities when requesting the collection these materials;[861]

(iii) On 29 April 2016, the Trial Chamber issued the First Western Union Decision, in which it rejected the arguments concerning the purported inadmissibility of

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[857] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, pp. 7, 8.
[858] *See* Prosecutor's First Submission of Documentary Evidence.
[859] First Decision on Submission of Documentary Evidence.
[860] First Decision on Dutch Intercepts.
[861] Second Decision on Dutch Intercepts.

the (entirety) of the Dutch Intercept Materials on the ground that they derived from the Western Union Records[862] – Mr Mangenda, Mr Kilolo and Mr Babala challenge this decision in their respective appeal against the Conviction Decision; and

(iv) Also on 29 April 2016, the Trial Chamber rendered a further decision – challenged on appeal by Mr Bemba – in which it rejected certain arguments by Mr Bemba that the materials collected by the Dutch authorities in connection with one of the telephone numbers used by Mr Kilolo should be excluded as inadmissible evidence under article 69 (7) of the Statute because of the modality of its collection by the Dutch authorities and transmission to the Prosecutor.[863]

406. These decisions address the matter at issue on different grounds and concern different items of the Dutch Intercept Materials. The Appeals Chamber will first consider the challenges to the First Western Union Decision in connection with the entirety of the Dutch Intercept Materials. After that, the Appeals Chamber will address the arguments related to Mr Bemba's alleged legal professional privilege, namely the challenges brought by Mr Bemba and Mr Kilolo against, in particular, the First and the Third Decision on Dutch Intercepts. Finally, the Appeals Chamber will entertain Mr Mangenda's challenge to the Second Decision on Dutch Intercepts.

2. Alleged inadmissibility of the entirety of the Dutch Intercept Materials as derivative evidence of the Western Union Records

407. Mr Kilolo and Mr Mangenda both argue that the Trial Chamber erred in failing to exclude the Dutch Intercept Materials as they derived from the Western Union Records.[864] Mr Babala, in passing, makes the same argument.[865] These arguments challenge the Trial Chamber's determination in the relevant part of the First Western Union Decision.

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[862] First Western Union Decision.
[863] Third Decision on Dutch Intercepts.
[864] Mr Mangenda's Appeal Brief, paras 95-102; Mr Kilolo's Appeal Brief, paras 94-100.
[865] Mr Babala's Appeal Brief, para. 26.

(a) Relevant part of the Trial Chamber's First Western Union Decision

408. In the First Western Union Decision, the Trial Chamber addressed the alleged inadmissibility of the Dutch Intercept Materials on the grounds of their link with the Western Union Records, as follows:

> The main argument of the Kilolo and Mangenda Defence is that the Western Union [Records] were the basis for obtaining the [Dutch Intercept Materials] and that the illegality of the Western Union [Records] renders the [Dutch Intercept Materials] consequently also unlawful. Since the Chamber has found that the Western Union [Records] were obtained lawfully, it considers this argument to be void. Accordingly, the Chamber rejects the Mangenda and Kilolo Request in respect of its request to declare the [Dutch Intercept Materials] inadmissible.[866]

(b) Submissions of the parties

(i) Mr Kilolo

409. Mr Kilolo argues that the Dutch Intercept Materials are inadmissible under article 69 (7) of the Statute on the grounds that they are the "fruits of the poisonous tree", and the Trial Chamber erred in law and fact by failing to consider the link between these materials and the Western Union Records.[867] In Mr Kilolo's submission, the Western Union Records – which in his view were illegally obtained – were then "the basis for further intrusion into Mr Kilolo's privacy and legal professional privilege".[868] Mr Kilolo argues that "the Trial Chamber failed to consider whether the fruit of the poisonous tree doctrine applies at the ICC".[869] He adds that "[t]he doctrine of the fruit of the poisonous tree applies to bar admission into evidence of the direct or indirect products of illegally obtained evidence".[870] Mr Kilolo submits that "[n]othing bars the Court from applying the doctrine of the fruit of the poisonous tree since it is an accepted legal principle, albeit not universally employed".[871]

(ii) Mr Mangenda

410. Mr Mangenda observes that the Trial Chamber, because it found that the Western Union Records had not been illegally obtained, concluded that there was no

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[866] First Western Union Decision, paras 73-74.
[867] Mr Kilolo's Appeal Brief, para. 95.
[868] Mr Kilolo's Appeal Brief, para. 95.
[869] Mr Kilolo's Appeal Brief, para. 96.
[870] Mr Kilolo's Appeal Brief, para. 96.
[871] Mr Kilolo's Appeal Brief, para. 100 (footnotes omitted).

basis to exclude the Dutch Intercept Materials.[872] He submits that the Dutch Intercept Materials derived directly from the "illegally obtained Western Union information" given that "the only evidence of the offence of interfering with the administration of justice referred to in the Prosecution's Request for Assistance to The Netherlands requesting the interceptions derived directly from the Western Union information".[873] Mr Mangenda avers that "[t]he issue of exclusion of derivative evidence under Article 69(7) has not previously arisen at the Court".[874] Making reference to a number of national jurisdictions,[875] Mr Mangenda argues that the intercept material should have been excluded on account of the direct line of causation between the "illegally obtained" Western Union Records and the Dutch Intercept Materials as the Prosecutor used the former to obtain the latter.[876]

(iii) Mr Babala

411. Mr Babala argues that because the Western Union Records had been obtained by means of a violation within the meaning of article 69 (7) of the Statute, the Trial Chamber should have also "refused to rely on the fruit of the poisonous tree when establishing the facts in respect of Mr Babala so as to safeguard the fairness of the proceedings".[877] According to Mr Babala, the Dutch Intercept Materials are some of these "fruits" which should have been excluded on this basis.[878]

(iv) The Prosecutor

412. The Prosecutor argues that "[a]rticle 69(7), read with article 69(8), is the unique standard at this Court governing the exclusion of unlawfully obtained evidence" and that, therefore, since "there is no *lacuna* in the statutory framework", there was no error on the part of the Trial Chamber in not addressing the "fruit of the poisonous tree doctrine".[879] In addition, the Prosecutor submits that, in any case, this doctrine is a "controversial rule" that the appellants "seek to import by citing select common law

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[872] Mr Mangenda's Appeal Brief, para. 95, referring to First Western Union Decision, para. 73.
[873] Mr Mangenda's Appeal Brief, para. 96.
[874] Mr Mangenda's Appeal Brief, para. 97.
[875] Mr Mangenda's Appeal Brief, para. 100, fn. 151, referring to South Africa, Australia, Brazil, Canada, Colombia, The Netherlands, Philippines, Taiwan and United States.
[876] Mr Mangenda's Appeal Brief, paras 98, 101.
[877] Mr Babala's Appeal Brief, para. 26.
[878] Mr Babala's Appeal Brief, para. 26. The Appeals Chamber notes that Mr Babala argues that, on the same basis, the Detention Centre Materials should have equally excluded by the Trial Chamber.
[879] Response, para. 51.

jurisdictions", which is indeed not universally employed in that while some domestic jurisdictions have upheld "a form of" it, others have declined to endorse it.[880] She further argues that the ECtHR "has rejected [the] use [of an exclusionary rule for derivative evidence] as an absolute bar on its admission".[881] Finally, the Prosecutor argues that – "[e]ven if the Appeals Chamber were to accept the 'fruit of the poisonous tree' doctrine" – the Dutch Intercept Material would still not be excluded under this exclusionary rule, since: (i) "[such a doctrine] would only operate if the primary evidence is actually excluded";[882] and, in any case, (ii) the interception activities of Mr Kilolo's and Mr Mangenda's telephone calls were authorised on the basis of several evidentiary sources, and not only of the Western Union Records.[883]

(c) Determination by the Appeals Chamber

413. The Appeals Chamber notes that the accused argued at trial (as well as in the present appeals) that the Dutch Intercept Materials should have been excluded because they had "derived" from the Western Union Records, which, in their view, had been illegally collected. The Trial Chamber, in light of the standard for exclusion of evidence under article 69 (7) of the Statute, considered that, as the Western Union Records had not been obtained unlawfully – a conclusion that the Appeals Chamber upholds in the present judgment[884] – those arguments were "void".[885] The Appeals Chamber sees no error in this determination. Mr Kilolo's, Mr Mangenda's and Mr Babala's arguments that the Trial Chamber erred in not excluding the Dutch Intercept Materials because of the link with the Western Union Records are thus rejected.

3. Alleged inadmissibility of the Dutch Intercept Materials related to Mr Kilolo's telephone communications

414. Mr Bemba and Mr Kilolo argue that the Trial Chamber erred in failing to exclude and relying on the Dutch Intercept Materials in connection with Mr Kilolo's telephone communications which, in their submission, had been obtained in violation of legal professional privilege.

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[880] Response, paras 53, 141.
[881] Response, para. 53.
[882] Response, para. 141 (footnotes omitted).
[883] Response, para. 142.
[884] *See supra* Section VI.C.
[885] First Western Union Decision, para. 73.

415. Mr Kilolo's second ground of appeal is "[t]he Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege".[886] Mr Bemba, as part of ground 3 of his appeal ("The Chamber based the conviction, to a decisive level, on privileged and illegally collected evidence"),[887] raises two sub-grounds related to the legality of the collection of the Dutch Intercept Materials in light of the privilege to which he is entitled. These are sub-ground 3.2. ("The Chamber applied an erroneous definition of privilege, and its exception")[888] and sub-ground 3.3. of Mr Bemba's appeal ("The Chamber failed to rule on, or remedy the ineffective system for vetting privilege, established by the Single Judge").[889]

416. The Appeals Chamber notes that essentially two sets of arguments are brought by Mr Kilolo and Bemba. On the one hand, they argue that, because of an erroneous definition of "privilege" adopted by the Trial Chamber, materials connected to privileged communications were erroneously transmitted to the Prosecutor, introduced into evidence and relied upon by the Trial Chamber. On the other hand, they both submit – while challenging different aspects – that the modalities of the collection and transmission of the Dutch Intercept Materials did not duly take into account their privileged nature. In particular, Mr Kilolo challenges the legal and factual basis for the Pre-Trial Single Judge's decision authorising the Prosecutor to seize the Dutch authorities with a request for cooperation. Mr Bemba argues that there were several irregularities in the interception activities and transmission of related materials to the Prosecutor.

417. The Appeals Chamber considers it appropriate to address these arguments in turn, as follows: (i) alleged errors in the definition of "legal privilege" (raised by both Mr Kilolo and Mr Bemba); (ii) alleged errors concerning the Pre-Trial Single Judge's authorisation to seize the Dutch authorities (raised by Mr Kilolo); and (iii) alleged errors concerning the collection of the Dutch Intercept Materials and their acquisition by the Prosecutor (raised by Mr Bemba).

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[886] Mr Kilolo's Appeal Brief, paras 107-124.
[887] Mr Bemba's Appeal Brief, paras 141-187.
[888] Mr Bemba's Appeal Brief, paras 155-163.
[889] Mr Bemba's Appeal Brief, paras 164-179.

(a) Alleged errors in the definition of the scope of the legal professional privilege before the Court

(i) Relevant procedural background

418. With regard to the extent of the privilege envisaged in the legal instruments of the Court related to communications between a person and his or her legal counsel, the Pre-Trial Single Judge held:

> [A]t least some of the communications between [Mr Bemba] and his counsel, overlapping as they are with calls made to individuals the Prosecutor has grounds to suspect involved in a bribery scheme aimed at perturbing the course of justice, might indeed not qualify as being "made in the context of the professional relationship between a person and his or her legal counsel" within the meaning and for the purposes of Rule 73 of the Rules of Procedure and Evidence. The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(1)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when – as in the present case – the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.[890]

419. The Pre-Trial Single Judge also considered that "[a]lthough not explicitly stated in the Statute or the Rules, the fact that communications effected in furtherance of crime or fraud provide an exception to the principle of professional privilege is broadly accepted both at the national and the international level",[891] and that "[w]henever an exception to the general principle of the privileged nature of the communications between an accused and her or her counsel is made, the scope of such exception must be determined in light of, and limited by, the specific reasons warranting such exception."[892]

420. In the course of the trial, the Trial Chamber was confronted with the issue of whether the Dutch Intercept Materials in connection with Mr Kilolo's telephone number ought to be excluded as inadmissible evidence under article 69 (7) of the Statute on the grounds that they had been obtained in violation of the Statute due to their allegedly privileged nature. Mr Kilolo indeed requested the Trial Chamber to

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[890] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, para. 3.
[891] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, para. 4.
[892] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, para. 6.

exclude as inadmissible evidence all the recorded communications between Mr Kilolo and Mr Bemba subject to any waiver by Mr Bemba.[893]

421. This request was rejected in the First Dutch Intercepts Decision. In this decision, the Trial Chamber recalled that the Pre-Trial Single Judge, when authorising the collection of the Dutch Intercept Materials, had determined that "communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege".[894] The Trial Chamber expressed its agreement "with this interpretation of the law",[895] and, in that context, it recalled that in a prior determination on a related matter, it had also determined that "there is a crime/fraud exception to legal professional privilege".[896] The Trial Chamber also added that it had "also adopted the same safeguards developed by the [Pre-Trial] Single Judge to make sure no otherwise privileged communications [were] provided to the Prosecut[or]", and that Mr Kilolo had failed to establish that these safeguards "ha[d] been inadequate in isolating privileged materials which are not affected by crime/fraud exception" and any of the materials was privileged.[897] On this basis, the Trial Chamber concluded that "no violation of the Statute ha[d] occurred within the meaning of Article 69(7) of the Statute".[898]

(ii) Submissions of the parties

(a) Mr Kilolo

422. Mr Kilolo submits that "[w]hile technically, the text of Rule 73 implies that the legal professional privilege belongs to the client, and not Counsel, the Trial Chamber's errors inhibit Defence Counsel from zealously representing their clients and have a chilling effect on their professional responsibility to provide legal representation".[899] In particular, Mr Kilolo argues that "[t]he Trial Chamber erred in failing to consider that the purpose of legal professional privilege is to protect the fair

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[893] Mr Kilolo's Request to Exclude Dutch Intercepts Materials, para. 62.
[894] First Decision on Dutch Intercepts, para. 12, referring to Decision Authorising to Seize National Authorities and Appointing Independent Counsel, paras 3-5.
[895] First Dutch Intercepts Decision, para. 13.
[896] First Decision on Dutch Intercepts, para. 13, referring to Decision Concerning Independent Counsel Reports, paras 14-15.
[897] First Decision on Dutch Intercepts, paras 13-14.
[898] First Decision on Dutch Intercepts, para. 14.
[899] Mr Kilolo's Appeal Brief, para. 107 (footnotes omitted).

trial rights of the accused; specifically, the right to communicate freely with counsel and freedom from self-incrimination".[900] He submits that essential to the right to effective legal representation protected under article 67 of the Statute is the right to communicate freely with counsel.[901] In Mr Kilolo's submission, the Trial Chamber "ignored the purpose of this fundamental legal protection when it upheld the [Pre-Trial] Single Judge's grant of authorization to the OTP to collect intercepts without any independent analysis of the crime-fraud exception".[902]

423. Mr Kilolo submits that both the Pre-Trial Single Judge and the Trial Chamber erred in failing to articulate a "clear standard" in the application of the "crime-fraud exception to legal professional privilege", and that "[t]his creates ambiguity as to the proper burden of proof required to pierce legal professional privilege".[903] In particular, Mr Kilolo maintains that the plain text of rule 73 (1) of the Rules does not include any explicit "crime-fraud exception".[904] He submits that rule 73 of the Rules "appears to apply the common-law tradition of legal professional privilege […] rather than the civil law tradition of 'professional secrecy'" because it "implies that the privilege belongs to the client and not Counsel".[905] According to Mr Kilolo, since "common-law cases are more helpful in defining the applicable standards", "the Trial Chamber should have applied the 'clear and compelling evidence' standard in the U.K. Code of Practice, or at least the probable cause standard elaborated by the U.S. Court of Appeal for the Second Circuit".[906]

(b) Mr Bemba

424. Under sub-ground 3.2. of his appeal, Mr Bemba argues that the Pre-Trial Single Judge and the Trial Chamber both erred in the "definition of privilege and its exception".[907] Mr Bemba argues that, unlike other courts, the Statute and the Rules do not provide for an explicit exception to privilege,[908] and that, "even if an exception

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[900] Mr Kilolo's Appeal Brief, para. 108 (footnotes omitted).
[901] Mr Kilolo's Appeal Brief, para. 109.
[902] Mr Kilolo's Appeal Brief, para. 110, referring to First Decision on Dutch Intercepts, paras 12, 13.
[903] Mr Kilolo's Appeal Brief, paras 111, 115.
[904] Mr Kilolo's Appeal Brief, para. 112.
[905] Mr Kilolo's Appeal Brief, para. 112.
[906] Mr Kilolo's Appeal Brief, paras 112, 115.
[907] Mr Bemba's Appeal Brief, paras 155-163.
[908] Mr Bemba's Appeal Brief, para. 157. Mr Bemba argues that, although other international courts and domestic jurisdictions do not consider legal privilege to be absolute, they have articulated limitations as

were to be read by implication to cover communications that do not fall within 'the context of a professional relationship' between counsel and client, such an implied exception should have been construed narrowly, so as not to swallow the rule".[909]

425. Mr Bemba argues that both the Trial Chamber and the Pre-Trial Single Judge found that any material that is relevant to allegations – and then the charges – under article 70 of the Statute falls outside the scope of privilege.[910] According to Mr Bemba, this approach "was also inconsistent with the Statute, Rules and international legal precedents, and allowed the Prosecution to access and rely on information that should have been excluded pursuant to Article 69(5)".[911]

426. In particular, Mr Bemba avers that "the test of 'relevance to the Prosecution' created a presumption of access, which undermined the very purpose of Article 67(1)(b)".[912] In this regard, Mr Bemba submits that it is impossible to read a "test of relevance" into the text of rule 73 (1) of the Rules.[913] In his view, information concerning the defendant's responsibility and the credibility of defence witnesses "is likely to be 'relevant' to the Prosecution's Article 70 investigations", but this type of information also falls within the scope of professional relationship between counsel and client.[914] On this basis, Mr Bemba submits that the "relevance test" prioritises the Prosecutor's truth-seeking function over the defendant's right to seek legal advice in confidence, "whereas the opposite should hold true".[915]

427. Mr Bemba argues that the impact of this error is reflected by the "broad range of information" transmitted to the Prosecutor and relied upon in the Conviction Decision, including conversations – "touching directly on internal work product and Defence strategy" – that "[were] not directed to the commission of criminal acts, and [in which] Mr Bemba was not abusing privilege in order to seek advice as to how to

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concerns the circumstances in which privilege can be lifted and to what extent (Mr Bemba's Appeal Brief, para. 160. *See also* paras 161, 162.)

[909] Mr Bemba's Appeal Brief, para. 157

[910] Mr Bemba's Appeal Brief, para. 155, referring to Decision Concerning Independent Counsel Reports, paras 17-18; and "Decision on the filing in the record of items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo", 19 May 2014, ICC-01/05-01/13-408, pp. 3-6.

[911] Mr Bemba's Appeal Brief, para. 156.

[912] Mr Bemba's Appeal Brief, para. 157.

[913] Mr Bemba's Appeal Brief, para. 159.

[914] Mr Bemba's Appeal Brief, para. 159.

[915] Mr Bemba's Appeal Brief, para. 159.

avoid the law, or to otherwise engage in illicit activity".[916] In particular, Mr Bemba refers to discrete lines in six identified conversations over which "[t]he Main-Case Defence [had] asserted privilege" before the Trial Chamber.[917]

(c) The Prosecutor

428. The Prosecutor submits that the Pre-Trial Single Judge and the Trial Chamber were correct in recognising that communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege.[918]

429. The Prosecutor argues that, contrary to Mr Kilolo's argument, the Trial Chamber was keenly aware that the purpose of the legal professional privilege is to facilitate free communication between counsel and the accused.[919] In this regard, she submits that Mr 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".[920] In addition, according to the Prosecutor, "Kilolo's contention that the Court should adopt a 'clear and compelling evidence' to invoke the crime-fraud exception – a test he imports from domestic common law systems – […] shows no error".[921]

430. With respect to Mr Bemba's argument that the Trial Chamber applied an erroneous definition of privilege, the Prosecutor argues that Mr Bemba "conflates two distinct concepts" in asserting that a "test of relevance" cannot be read in rule 73 (1) of the Rules.[922] Indeed, in the Prosecutor's submission, rule 73 of the Rules "simply establishes the existence of privileges for certain communications and information", but "it does not relate to the scope of the Prosecut[or]'s investigative powers if such privileges are abused to commit article 70 offences".[923] According to the Prosecutor,

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[916] Mr Bemba's Appeal Brief, para. 163.
[917] Mr Bemba's Appeal Brief, fn. 281, referring to Annexes A and B to Mr Bemba's Application for Exclusion of Dutch Intercept Materials and listing the following conversations: CAR-OTP-0079-0102, lines 96-121, 170-179; CAR-OTP-0079-1732, lines 87-94; CAR-OTP-0079-1744, lines 67-68; CAR-OTP-0082-1309, lines 22-26, 473-488; CAR-OTP-0082-0618, lines 25-37, 38-67; CAR-OTP-0079-0191, lines 7-76. *See also* fns 282, 283.
[918] Response, para. 109.
[919] Response, para. 121.
[920] Response, para. 121.
[921] Response, para. 110.
[922] Response, paras 111, 113.
[923] Response, para. 113.

the Pre-Trial Single Judge and the Trial Chamber – in addition to articulating and applying a "clear and concise standard for identifying the information covered by the exception [to privilege]" – were also "careful to identify those communications which they deemed 'relevant' to the crime-fraud exception".[924] In response to Mr Bemba's argument that the Trial Chamber relied on conversations covered by privilege, the Prosecutor submits that the fact that "these conversations are relied upon in the [Conviction Decision] demonstrates that the Independent Counsel's and the Chamber's assessments that they were relevant and fell within the crime-fraud exception were correct".[925]

(iii) Determination by the Appeals Chamber

431. The Appeals Chamber notes that Mr Kilolo's and Mr Bemba's respective arguments revolve around the scope of "legal professional privilege" as applicable before this Court. Their common starting point is that the legal instruments of the Court do not provide for an explicit exception to the privileged nature of communications between lawyer and client,[926] and therefore any "crime/fraud exception" – given that, at most, it can only be considered an "implied exception" – should be construed narrowly "so as not to swallow the rule"[927] when the appropriate "burden of proof" to "pierce" the privilege is met.[928] The Appeals Chamber is of the view that Mr Kilolo and Mr Bemba misconstrue the scope and extent of legal professional privilege as protected in the legal framework of the Court.

432. The Appeals Chamber observes that rule 73 (1) of the Rules – which is the part of this provision of relevance to the present determination[929] – defines privileged communications as those "communications made in the context of the professional relationship between a person and his or her legal counsel". Communications between lawyer and client that do not take place in the context of such professional relationship are therefore not covered by privilege as defined before this Court. This includes communications that, rather than being made within the context of defence

[924] Response, para. 119.
[925] Response, para. 119.
[926] Mr Bemba's Appeal Brief, para. 157. Mr Kilolo's Appeal Brief, para. 112.
[927] Mr Bemba's Appeal Brief, para. 157.
[928] Mr Kilolo's Appeal Brief, paras 112-115.
[929] The Appeals Chamber notes that rule 73 (2) to (6) of the Rules concerns other forms of privileged communications and information which are not relevant to the present case.

activities, are instead made in the context of the implementation of a criminal activity, including, like in the present case, as means to further offences against the administration of justice under article 70 of the Statute. Such communications, even if they occur between a person and his or her legal counsel, are *ab initio* non-privileged as they fall outside the recognised professional scope of legal work protected by rule 73 (1) of the Rules.

433. The Appeals Chamber observes that the drafting history of rule 73 of the Rules confirms the conclusion that activities that fall outside the recognised professional scope of legal work are not afforded the protection under rule 73 (1) of the Rules. Indeed, the Appeals Chamber notes that the point of departure of current rule 73 (1), as originally proposed, reproduced the text of the rule 97 of the ICTY Rules of Procedure and Evidence and provided that, in principle, all communications between a lawyer and client would be regarded as privileged save for two enumerated exceptions (*i.e.* that the client consents or the client voluntarily discloses the contents of the communication to a third person and that person gives evidence of the disclosure).[930] However, there were concerns that the proposal was too broad in stating that all communications between a lawyer and client shall be regarded as privileged, and that privilege should not attach to communications that are made as part of a criminal scheme or, more generally, that are not made in the context of a professional relationship.[931] Several proposals were considered to reflect this idea, including a proposal to provide as an express exception to the privilege that the communication was not made for the purpose of giving or receiving legal advice.[932] It

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[930] *See* D. Piragoff, "Evidence", in Roy S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, 2001), p. 359, referring to rule 102 proposed by Australia in the First Session of the Preparatory Commission, "Proposal submitted by Austria: Draft Rules of Procedure and Evidence of the International Criminal Court" (PCNICC/1999/DP.1). The Appeals Chamber notes that rule 97 of the ICTY Rules of Procedure and Evidence indeed provides that "[a]ll communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless i) the client consents to such disclosure; or ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure".

[931] *See* D. Piragoff, "Evidence", in Roy S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, 2001), p. 359.

[932] *See* Preparatory Commission for the International Criminal Court, the Working Group on Rules of Procedure and Evidence, *Discussion Paper proposed by the Coordinator on Part 6 of the Rome Statute: The Trial*, 1 July 1999, (PCNICC/1999/WGRPE/RT.5), Rule 6.4(a) wherein the proposed third exception to the principle that "[c]ommuncations between a person and his or her legal counsel shall be regarded as privileged", read: "(iii) The Chamber is satisfied that the communication was not for the purpose of giving or receiving legal advice".

was finally decided to add the sentence "made in the context of the professional relationship between a person and his or her legal counsel" as a condition for a communication to attract privilege under rule 73 (1) of the Rules. The Appeals Chamber observes that commentators explain that this formulation was accepted on the basis that it would "enable the Court not to recognize a privilege if the communication was outside the bounds of a professional relationship",[933] and it would "prevent[] an accused from using the privilege to cloak communications that were made for purposes other than the giving or receiving of legal advice".[934]

434. Therefore, the Appeals Chamber considers that, in accordance with rule 73 (1) of the Rules, communications between a person and his or her legal counsel are privileged when: (i) such communications were made in the context of their professional relationship; and (ii) the client has neither voluntarily consented to the disclosure of the communication nor has already disclosed its content to a third party who gives evidence of that disclosure.[935] Thus, the Appeals Chamber is of the view that it is the definition of "privilege", as provided for in rule 73 (1) of the Rules itself, that excludes therefrom communications made in furtherance of criminal activities, rather than the application of an "exception" to a presumption of privilege attached to all lawyer-client communications. On this basis, and also recalling that the Court can only apply the sources of law enumerated in article 21 of the Statute, the Appeals Chamber sees no merit in Mr Kilolo's attempt to import certain domestic principles providing for a "crime-fraud exception" to privilege.

435. In light of the above, the Appeals Chamber is of the view that the Pre-Trial Single Judge and the Trial Chamber did not err in finding that communications between a person and his or her legal counsel that are made in furtherance of criminal activities are not privileged in the legal framework of the Court.

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[933] D. Piragoff, "Evidence", in Roy S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, 2001), p. 360.
[934] D. Piragoff and P. Clarke, "Article 69, Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1742.
[935] *See also* D. Piragoff and P. Clarke, "Article 69, Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), pp. 1718-1719.

436. Mr Bemba submits that the Pre-Trial Single Judge and the Trial Chamber erroneously adopted a test of "relevance" in the determination of the scope of privilege, and that this standard "prioritises the Prosecution's truth-seeking functions over the defendant's right to seek legal advice in confidence" as its effect is that "an accused could never seek advice on issues concerning the credibility of witnesses, or matters that might incriminate him without forfeiting both privilege, and the protection against self-incrimination".[936] According to Mr Bemba, this error in the definition of the scope of privilege is demonstrated by the Trial Chamber's reliance in the Conviction Decision, in particular, on six telephone conversations.[937] Mr Bemba submits that these conversations – which, he argues, included discrete portions "touching directly on internal work product and Defence strategy"[938] – were not "directed to the commission of criminal acts" or "engage[ment] in illicit activity" and therefore should be considered privileged.[939]

437. At the outset, the Appeals Chamber observes that, in the finding challenged by Mr Bemba,[940] the Trial Chamber held that a determination on whether individual communications are protected by privilege before the Court or not "will depend on a proper appreciation of the broader context of the given communication" and must be made "in the context of the charges as a whole".[941] The finding by the Pre-Trial Single Judge which Mr Bemba challenges[942] was instead that "the right to professional privilege is instrumental to the need to obtain legitimate legal advice on a confidential basis" and that "no privilege can be claimed for the purposes of obstructing the investigation and prosecution of allegations of offences against the

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[936] Mr Bemba's Appeal Brief, para. 159. *See also* paras 155-158.
[937] Mr Bemba's Appeal Brief, para. 163, fn. 281, listing the conversations registered as CAR-OTP-0079-0102, (referred to in the Conviction Decision at paras 752, 753); CAR-OTP-0079-1732 (referred to in the Conviction Decision at paras 479, 480); CAR-OTP-0079-1744, (referred to in the Conviction Decision at paras 567-568, 810); CAR-OTP-0082-1309, (referred to in the Conviction Decision at paras 781, 784, 792, 812, 819, 820, 836, 855); CAR-OTP-0082-0618 (referred to in the Conviction Decision at paras 615, 616); CAR-OTP-0079-0191, (referred to in the Conviction Decision at paras 820, 836).
[938] Mr Bemba's Appeal Brief, para. 163 and fn. 281. Mr Bemba refers to: CAR-OTP-0079-0102, lines 96-121, 170-179; CAR-OTP-0079-1732, lines 87-94; CAR-OTP-0079-1744, lines 67-68; CAR-OTP-0082-1309, lines 22-26, 473-488; CAR-OTP-0082-0618, lines 25-37, 38-67; CAR-OTP-0079-0191, lines 7-76.
[939] Mr Bemba's Appeal Brief, para. 163.
[940] Mr Bemba's Appeal Brief, para. 155.
[941] Decision Concerning Independent Counsel Reports, para. 18.
[942] Mr Bemba's Appeal Brief, para. 155.

administration of justice, all the more so where a Chamber is satisfied that there are reasonable grounds to believe that such offences have been committed".[943] Contrary to Mr Bemba's suggestion, neither the Pre-Trial Single Judge nor the Trial Chamber at any point stipulated or implied that communications in which a person confides in his or her counsel to obtain *legitimate* legal advice would fall outside the scope of privilege on the grounds that they may be of interest to the Prosecutor. The conversations referred to by Mr Bemba were relied upon in the Conviction Decision not because they were considered "relevant" to the Prosecutor's "truth-seeking functions", but because they were considered by the Trial Chamber to have been made in the context of the implementation of the alleged illicit activities.[944]

438. The Appeals Chamber notes that Mr Bemba's argument in this regard is that it was a "clear error" by the Trial Chamber to rely on these communications "whilst recognising that [Mr Bemba's] communications did not directly evidence criminal activity".[945] The Appeals Chamber is not persuaded by this argument. Contrary to Mr Bemba's suggestion, the fact that a particular communication between a lawyer and his or her client does not contain "direct" evidence of a suspected criminal activity or is not "directed to the commission of criminal acts"[946] does not automatically mean that it is protected by legal professional privilege under rule 73 (1) of the Rules.

439. First, as observed above, in accordance with that rule, in order to be protected by privilege, it is required that communications take place "in the context of the professional relationship between a person and his or her legal counsel". Thus, communications that take place outside that context are not privileged even if they do

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[943] "Decision on the filing in the record of items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo", 19 May 2014, ICC-01/05-01/13-408, p. 5.
[944] *See* Conviction Decision: paras 567-568, 810, where the Trial Chamber found that, in the conversation registered as CAR-OTP-0079-1744, Mr Bemba and Mr Kilolo discussed Mr Kilolo's illicit coaching activities concerning witness D-15; para. 753, where the Trial Chamber found that the conversation registered as CAR-OTP-0079-0102 related to the use of coded language between the co-perpetrators to cover-up their activities; paras 479, 480, where the Trial Chamber found that the conversation registered as CAR-OTP-0079-1732 related to a defence witness who had been paid an unknown amount of money by Mr Kilolo; paras 784, 792, 812, 819, 820, 836, 855, where the Trial Chamber considered that, in the conversation registered as CAR-OTP-0082-1309, Mr Bemba and Mr Kilolo discussed attempts to cover-up their illicit conducts; and paras 820, 836, where the Trial Chamber found that in the conversation registered as CAR-OTP-0079-0191, Mr Bemba and Mr Kilolo discussed the possible consequences of proceedings for offences under article 70 of the Statute before the Court with reference to the existence of similar proceedings in the *Barasa* case.
[945] Mr Bemba's Appeal Brief, 163.
[946] Mr Bemba's Appeal Brief, 163.

not provide direct evidence of the commission of a criminal act, or are not directed at the commission of a crime. Second, in cases in which a suspected criminal activity is allegedly furthered by communications between a person and his or her legal counsel, not only communications explicitly and directly concerned with the commission of a particular crime can be considered as having been made in the context of the furtherance of the criminal activity at issue. Rather, as correctly found by the Trial Chamber,[947] the Appeals Chamber considers that, in these situations, the question of whether a particular communication is made "in the context of the professional relationship between a person and his or her legal counsel" cannot be answered in isolation. Indeed, while an individual communication, viewed in isolation, may appear to be unrelated to the suspected criminal activity, it may, in fact, be a relevant element of a broader criminal scheme when evaluated in light of other conversations and all available information on the suspected criminal scheme. Similarly, it is evident that, by its nature, a telephone conversation is likely to be of a "mixed" nature as containing different kinds of "communications", not all of them necessarily related to the alleged criminal activity. However, communications which are considered to have been made in the context of a suspected criminal scheme (rather than in the context of the professional relationship) do not gain privileged status simply because they also contain portions which are unrelated to the criminal activity at issue.

440. In light of the above, the Appeals Chamber rejects Mr Bemba's and Mr Kilolo's arguments concerning the allegedly erroneous definition of privilege by the Pre-Trial Single Judge and the Trial Chamber. The Appeals Chamber considers that, in the circumstances of the present case, the transmission to the Prosecutor of the intercepted conversations between Mr Kilolo and Mr Bemba, and the Trial Chamber's reliance thereon in the Conviction Decision, did not take place in violation of Mr Bemba's legal professional privilege.

[947] Decision Concerning Independent Counsel Reports, para. 18.

(b) Alleged errors concerning the Pre-Trial Single Judge's authorisation to seize the Dutch authorities

(i) Relevant procedural background

441. As recalled above, the Pre-Trial Single Judge, on 29 July 2013, granted the Prosecutor authorisation to "seize the relevant authorities of […] the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received by Mr Aimé Kilolo and Mr Jean-Jacques Mangenda" and appointed an independent counsel to review and filter these logs and recordings that would be made available by the national authorities prior to their transmission to the Prosecutor.[948]

442. In the First Dutch Intercepts Decision, the Trial Chamber rejected Mr Kilolo's argument that the acquisition of the Dutch Intercept Materials constituted an interference with the right to privacy that had not taken place "in accordance with the law".[949] In particular, the Trial Chamber found that this measure "had a basis in law", in that article 70 of the Statute and rule 165 of the Rules as well as article 54 of the Statute, "give the Prosecut[or] a wide mandate to collect evidence relevant to [her] investigations".[950] In addition, the Trial Chamber noted that the Prosecutor "did not exercise this mandate in the absence of judicial authority, but duly applied to the [Pre-Trial] Single Judge for authorisation to obtain the [Dutch Intercept Materials] under Article 57(3)(a) of the Statute".[951] In this regard, the Trial Chamber also stated that it "fails to see why these powers of the Prosecut[or] and Pre-Trial Chamber, contained in publicly available statutory provisions, did not provide a sufficiently accessible and foreseeable legal basis for obtaining the [Dutch Intercept] Materials", and that "the legal provisions utilised in obtaining the [Dutch Intercept] Materials, though broad, were sufficiently precise that Mr Kilolo was able to regulate his conduct".[952] In addition, the Trial Chamber considered that "[i]t would be patently unreasonable for someone to conclude that judges of this Court could never authorise the monitoring of lawyer-client communications falling under the crime/fraud privilege exception".[953] On this basis, the Trial Chamber concluded that "any interference with Mr Kilolo's

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[948] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, pp. 7, 8.
[949] First Decision on Dutch Intercepts, paras 15-20, disposing Mr Kilolo's Request to Exclude Dutch Intercepts Materials.
[950] First Decision on Dutch Intercepts, para. 18.
[951] First Decision on Dutch Intercepts, para. 18.
[952] First Decision on Dutch Intercepts, paras 19-20.
[953] First Decision on Dutch Intercepts, para. 20.

right to privacy was 'in accordance with the law'", and that the Dutch Intercept Materials was thus not inadmissible under article 69 (7) of the Statute.[954]

(ii) Submissions of the parties

(a) Mr Kilolo

443. Mr Kilolo argues that the Trial Chamber, in the First Dutch Intercepts Decision, erred in law and fact in rejecting the objections to the admissibility of the Dutch Intercept Materials on the grounds of the Pre-Trial Single Judge's errors in his decision authorising the Prosecutor to seize the Dutch authorities.[955]

444. First, Mr Kilolo submits that the Trial Chamber "erred in law in holding that Article 54 of the Statute provides a sufficient 'basis in law' to collect interceptions of legally privileged conversations so as to be 'in accordance with the law'",[956] a requirement that is not met if "there is no pre-existing framework regulating the infringement or if the framework that exists has not been complied with".[957] Mr Kilolo avers that article 54 of the Statute "says nothing about whether, when or how [the Prosecutor's] power [to collect evidence] may be exercised when investigating Counsel, particularly one engaged in ongoing proceedings against the OTP at the ICC".[958] Accordingly, he submits, the Trial Chamber erred by failing to consider that the lack of a pre-existing framework rendered the admission of the intercepts of his privileged communications antithetical to or seriously damaging the integrity of the proceedings within the meaning of article 69 (7) (b) of the Statute.[959]

445. Second, Mr Kilolo maintains that the Trial Chamber failed to "properly analy[se] the sufficiency of the [Prosecutor]'s evidence at the point it made the request [for authorisation to seize the Dutch authorities]".[960] In Mr Kilolo's submission, had the Trial Chamber made this analysis, it would have concluded that the Prosecutor's request "should not have been granted", as the Prosecutor had only provided "circumstantial evidence that Mr Kilolo was involved in a scheme to bribe

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[954] First Decision on Dutch Intercepts, para. 21.
[955] Mr Kilolo's Appeal Brief, paras 116-121.
[956] Mr Kilolo's Appeal Brief, para. 118, referring to First Decision on Dutch Intercepts, para. 18.
[957] Mr Kilolo's Appeal Brief, para. 119.
[958] Mr Kilolo's Appeal Brief, para. 118.
[959] Mr Kilolo's Appeal Brief, para. 121, referring to First Decision on Dutch Intercepts, para. 22.
[960] Mr Kilolo's Appeal Brief, para. 117.

witnesses", which, in his view, "was not sufficient to trigger the crime-fraud exception under the clear and convincing standard, the probable cause standard, or even the reasonable suspicion standard".[961]

(b) The Prosecutor

446. The Prosecutor argues that, contrary to Mr Kilolo's argument, article 54 of the Statute, "by its clear terms", is a "sufficient basis to authorise the collection of the intercepts".[962] According to the Prosecutor, the Trial Chamber correctly found that this provision, in conjunction with article 70 of the Statute and rule 165 (1) of the Rules, "give the Prosecut[or] a wide mandate to collect evidence relevant to [the] investigations".[963]

447. The Prosecutor also submits that the Pre-Trial Single Judge and the Trial Chamber "correctly found that there was sufficient evidence justifying the interception of Kilolo's and Mangenda's telephone communications".[964] In particular, the Prosecutor avers that she had relied on "numerous and varied sources, including direct evidence of the Appellants' telephone logs and conversations and their payments to Defence witnesses" and that "[t]hat 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 [Conviction Decision]".[965] In this regard, the Prosecutor further argues that Mr Kilolo "fails to explain why the Chamber had to [conduct its own 'independent analysis' of the evidence that the Pre-Trial Single Judge relied upon to authorise the intercepts] when it was in the [Pre-Trial] Single Judge's province to do so as the Pre-Trial Chamber was the proper Chamber then seised of the matter".[966]

448. The Prosecutor also considers that Mr Kilolo "merely speculates" that the Trial Chamber would have reached a different conclusion from the Pre-Trial Single Judge

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[961] Mr Kilolo's Appeal Brief, paras 116-117.
[962] Response, para. 114.
[963] Response, para. 114, referring to First Decision on Dutch Intercepts, para. 18.
[964] Response, para. 117.
[965] Response, para. 117.
[966] Response, para. 117.

if it had itself evaluated the evidence that had been made available to him.[967] In particular, in the Prosecutor's view, "the Chamber's consistent endorsement of the intercept process's legality and the [Pre-Trial] Single Judge's authorisation, despite multiple challenges by the Defence, all demonstrate that the Chamber endorsed the [Pre-Trial] Single Judge's decisions".[968]

449. Finally, the Prosecutor submits that Mr Kilolo "incorrectly assumes the 'lack of any pre-existing framework' to determine the use of potentially privileged communications at this Court" and that "[i]n 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".[969] Rather, according to the Prosecutor, "the legal regime protecting attorney-client communications is set forth in rule 73" and "article 69(7) enables the Court to exclude evidence which violates the right to privacy".[970]

(iii) Determination by the Appeals Chamber

450. The Appeals Chamber recalls that the Pre-Trial Single Judge did not order the interception of Mr Kilolo's and Mr Mangenda's telephone calls. Rather, he authorised the Prosecutor to transmit to the competent national authorities (including those of The Netherlands) requests for assistance under Part 9 of the Statute "with a view to collecting logs and recordings of telephone calls placed or received by Mr Aimé Kilolo and Mr Jean-Jacques Mangenda".[971] The activities of interception – following which the Dutch Intercept Materials were collected and transmitted to the Court – were subsequently authorised and conducted by the competent authorities of The Netherlands in execution of the Prosecutor's requests for assistance.

451. As recalled above, the Prosecutor, in her request to the Pre-Trial Single Judge, had in fact submitted that, in principle, she would not need judicial approval to transmit a request for assistance given her powers under article 54 (3) of the Statute and considering that a judicial overview would be part of the domestic process of execution of such request in the requested State.[972] The Appeals Chamber observes in

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[967] Response, para. 118.
[968] Response, para. 118 (footnotes omitted).
[969] Response, para. 121.
[970] Response, para. 121.
[971] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, p. 7.
[972] Request to Seize National Authorities, para. 3.

this respect that the Prosecutor indeed had the authority, under article 54 (3) and Part 9 of the Statute, as well as under rule 176 of the Rules, to transmit on her own the requests for cooperation to the national authorities and did not need an authorisation by the Pre-Trial Single Judge to that effect. The Appeals Chamber notes that the Prosecutor chose to seize the Pre-Trial Single Judge of the matter because the intended collection of evidence could result in the "likely collateral collection of privileged communications between lawyer and client", which constituted "exceptional circumstances".[973] The Pre-Trial Single Judge was thus never requested to order the interception of Mr Kilolo's and Mr Mangenda's telephone calls, nor did he make any such order. The purpose of the Pre-Trial Single Judge's decision was to ensure that among the materials that would be collected by the national authorities, only those not covered by privilege as recognised in the legal instruments of the Court would be transmitted to the Prosecutor.

452. That said, the Appeals Chamber is of the view that Mr Kilolo mistakenly conflates the two distinct legal acts at issue, namely: (i) the Pre-Trial Single Judge's authorisation to transmit a request for cooperation to the relevant national authorities, on the one hand; and (ii) the national authorities' subsequent authorisation to carry out the interception requested by the Prosecutor, on the other hand. Mr Kilolo indeed argues that the Dutch Intercept Materials should have been excluded as inadmissible evidence because article 54 of the Statute did not provide a sufficient basis in law to collect interceptions of legally privileged conversations and "subvert the requirement of a clearly articulated pre-existing framework".[974] However, as explained and contrary to Mr Kilolo's suggestion, the activities of interception of his telephone calls were not ordered by the Pre-Trial Single Judge under article 54 of the Statute, but by the Dutch judicial authorities in execution of requests for assistance by the Prosecutor under Part 9 of the Statute. The measure authorised by the Pre-Trial Single Judge was exclusively for the Prosecutor to seize the Dutch authorities with such requests for assistance.

453. The Appeals Chamber considers that article 54 of the Statute constitutes the appropriate legal basis for the Prosecutor's transmission of the requests for assistance

[973] Request to Seize National Authorities, para. 3.
[974] Mr Kilolo's Appeal Brief, paras 118, 120.

to the Dutch authorities. This provision indeed specifies the duties and powers of the Prosecutor with respect to investigations, including the power to conduct investigation, collect and examine evidence and seek the cooperation of any State in accordance with Part 9 of the Statute. Considering the nature of the measure authorised by the Pre-Trial Single Judge, it is of no relevance that article 54 of the Statute does not contain a "pre-existing framework to monitor communications at the ICC".[975] As observed, this provision enables the Prosecutor to seek cooperation by States for the collection of evidence as part of her investigation. In accordance with article 93 of the Statute, the execution by the requested State of requests for assistance by the Court is then regulated by the procedures of national law of that State. Thus, when evidence is collected by a State upon request by the Prosecutor – as in the circumstances at hand – the "pre-existing framework" for the collection of evidence by a State is the one provided by the national law of the requested State.

454. Conversely, as concerns the protection of legal privilege as applicable before the Court (that is, beyond any particular process or requirement that a State may envisage in this regard), the relevant "framework" is the one provided in rule 73 (1) of the Rules. As explained, this provision sets forth the scope and limits of the legal privilege attached to attorney-client communications at this Court, which the Court shall respect and observe.[976] The Independent Counsel was indeed entrusted with the responsibility to verify that only recordings not covered by privilege as defined in the legal framework of the Court would be transmitted to the Prosecutor. These provisions are, however, not concerned with the process of collection of evidence by States in execution of requests for assistance under Part 9 of the Statute – which remains that provided by the domestic law of the requested State.

455. The Appeals Chamber also sees no merit in Mr Kilolo's additional argument that the information that the Prosecutor brought to the attention of the Pre-Trial Single Judge "was not sufficient to trigger the crime-fraud exception under the clear and convincing standard, the probable cause standard, or even the reasonable suspicion standard".[977] In his decision, the Pre-Trial Single Judge did not "trigger the crime-

[975] Mr Kilolo's Appeal Brief, sub-ground 2.D., p. 76.
[976] *See also* article 69 (5) of the Statute.
[977] Mr Kilolo's Appeal Brief, paras 116, 117.

fraud exception". Rather, after authorising the Prosecutor to address requests for assistance to the relevant national authorities, he explained the scope and limits of the "privilege", as defined before this Court in rule 73 of the Rules, and appointed the Independent Counsel to filter the materials collected by the Dutch authorities as part of their interception activities prior to their transmission to the Prosecutor. As noted, these measures were taken with a view to ensuring that recordings of communications protected by privilege as envisaged in the Court's legal framework would not be accessed by the Prosecutor. In doing so, the Pre-Trial Single Judge, rather than "trigger[ing] the crime-fraud exception", established a system for the protection of the privilege as defined in the Court's own applicable law. The Appeals Chamber sees no error in this course of action.

456. In light of the above, the Appeals Chamber considers that Mr Kilolo has not demonstrated any error on the part of the Pre-Trial Single Judge in his decision to authorise the Prosecutor to seize the Dutch authorities with a request for assistance. Mr Kilolo's arguments that the Trial Chamber erred in not excluding the Dutch Intercept Materials due to errors made by the Pre-Trial Single Judge are therefore rejected.

(c) Alleged errors concerning the collection of the Dutch Intercept Materials and their acquisition by the Prosecutor

(i) Relevant procedural background

457. The Pre-Trial Single Judge, while authorising the Prosecutor to seize the Dutch authorities with a request for assistance for the collection of the intercepts of, *inter alia*, Mr Kilolo's telephone communications, also considered it necessary to appoint an independent counsel to "review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation and delivering them to the Prosecutor" so that "privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor's investigation".[978] Accordingly, the Pre-Trial Single Judge appointed an independent counsel tasked with: "(i) reviewing the logs of telephone calls either placed or received by Mr Aimé

[978] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, para. 7.

Kilolo and Mr Jean-Jacques Mangenda made available by the […] Dutch authorities, with a view to identifying any calls received from or placed to parties connected with the investigation; (ii) listening to the recordings of any and all such calls; (iii) transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation".[979]

458. On 29 April 2015, the Trial Chamber issued the Third Dutch Intercepts Decision, whereby it rejected Mr Bemba's arguments with respect to the purported inadmissibility of the intercept materials collected by the Dutch authorities in connection with one of the telephone numbers used by Mr Kilolo.[980] After setting out its understanding of the applicable law[981] – repeating the same legal analysis contained in the First Western Union, which was issued on the same day – the Trial Chamber proceeded to address Mr Bemba's arguments in light of this understanding.

459. The Trial Chamber addressed, first, Mr Bemba's arguments concerning the alleged "[a]bsence of a legal basis for the interception of the Kilolo Number between August and September 2013".[982] In particular, the Trial Chamber identified the "most relevant parts of th[e] timeline in relation to the interception of the Kilolo Number between August and September 2013" in consideration of Mr Bemba's submission that "the[se] facts are unlawful under Dutch national procedure".[983] Upon considerations of the relevant facts, the Trial Chamber concluded that "the actions of the Dutch Prosecution in requesting interception of the Kilolo Number and the Dutch Investigative Judge in authorising the interception do not appear to be so manifestly unlawful that they amount to a failure to act 'in accordance with the law' for purposes of Mr Kilolo's right to privacy", while "any further inquiry would involve applying Dutch law to determine a mere infringement of national procedure, which this

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[979] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, p. 7.
[980] Third Dutch Intercepts Decision, disposing of Mr Bemba's Application for Exclusion of Dutch Intercept Materials, and, in part, of "Motion on behalf of Aimé Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights", 8 April 2016, ICC-01/05-01/13-1796-Conf (a public redacted version was registered on 3 May 2016, ICC-01/05-01/13-1796-Red).
[981] Third Dutch Intercepts Decision, paras 9-20.
[982] Third Dutch Intercepts Decision, paras 22-27.
[983] Third Dutch Intercepts Decision, paras 23, 24.

Chamber is expressly precluded from doing by the terms of Article 69(8) of the Statute and Rule 63(5) of the Rules".[984]

460. The Trial Chamber then proceeded to the disposal of Mr Bemba's discrete arguments as concerns the "[a]bsence of adequate safeguards", which it summarised as follows: "(i) the Dean of The Hague Bar Association played no role in reviewing the [Dutch Intercept Materials]; (ii) the Independent Counsel cannot qualify as a substitute for the Dean under Dutch law; (iii) neither the Dutch Investigative Judge or Pre-Trial Chamber Single Judge were able to verify the Independent Counsel's recommendations and (iv) [Mr Bemba] had no ability to obtain a remedy concerning these violations before the Dutch courts or Pre-Trial Chamber".[985] In particular, with respect to "the role of the Dean and the Independent Counsel's role under Dutch law as his substitute", the Trial Chamber considered that "the procedure adopted by the Dutch Investigating Judge does not appear to be so manifestly unlawful that it amounts to a failure to act 'in accordance with the law' for purposes of the internationally recognised right to privacy".[986] With regard to "the inability for the [Dutch] Investigating Judge and the Pre-Trial Chamber Single Judge to review the work of the Independent Counsel", the Trial Chamber stated that the matter had already been addressed in its First Dutch Intercepts Decision, and there was no need to revisit its determinations.[987] Finally, as concerns Mr Bemba's "inability to obtain an effective remedy for any violation", the Trial Camber considered that it was "not able to pronounce itself as to how any remedy may be sought before a Dutch Court" and, with respect to possible remedies before the Trial Chamber, recalled that "both the Pre-Trial and this Chamber have made multiple rulings on defence challenges to the legality and propriety of using the Dutch [Intercept] Materials".[988]

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[984] Third Dutch Intercepts Decision, para. 26.
[985] Third Dutch Intercepts Decision, para. 28, referring to Mr Bemba's Application for Exclusion of Dutch Intercept Materials paras 41-84.
[986] Third Dutch Intercepts Decision, para. 30.
[987] Third Dutch Intercepts Decision, para. 31, referring to First Decision on Dutch Intercepts.
[988] Third Dutch Intercepts Decision, para. 32, referring to First Decision on Dutch Intercepts, Second Dutch Intercepts Decision and Confirmation Decision, para. 14.

461. On this basis, the Trial Chamber concluded that "no violation of the Statute or internationally recognised human rights [was] established within the meaning of Article 69(7) of the Statute".[989]

(ii) Submissions of the parites

(a) Mr Bemba

462. Mr Bemba submits that "the pre-confirmation review procedure violated internationally recognised human rights", and that the Trial Chamber erred in dismissing *in limine* his challenges in this respect.[990] According to Mr Bemba, "[i]f the Trial Chamber had considered this issue on the merits, then it would have found that the pre-confirmation review procedure violated internationally recognised human rights".[991]

463. Mr Bemba argues that "[f]rom the outset, given the existence of potential conflict of interest, it was incompatible with human rights standards to vest the Prosecution, rather than the Registry, with the responsibility for overseeing the execution of the interception process with the national authorities".[992] In his view, while the duty to ensure "appropriate internal walls" was, in first instance, a duty of the Prosecutor, "the [Pre-Trial] Single Judge had a complimentary duty to take steps to ensure the overall fairness and integrity of the proceedings".[993] Nonetheless, Mr Bemba argues, the Pre-Trial Single Judge "gave the Prosecution *carte blanche* to frame the terms and nature of the interception process with the Dutch authorities".[994]

464. Mr Bemba also argues that the Prosecutor "availed [herself] of [her] Article 70 powers to obtain privileged access to information that it then employed to the detriment of the Main Case Defence".[995] He submits that after sending the first request for assistance requesting the Dutch authorities to complete its execution by 15 August 2013, members of the Office of the Prosecutor met the Dutch authorities at

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[989] Third Dutch Intercepts Decision, para. 35.
[990] Mr Bemba's Appeal Brief, paras 164, 165.
[991] Mr Bemba's Appeal Brief, para. 165.
[992] Mr Bemba's Appeal Brief, para. 166.
[993] Mr Bemba's Appeal Brief, para. 168.
[994] Mr Bemba's Appeal Brief, para. 168.
[995] Mr Bemba's Appeal Brief, para. 170.

least three times in August 2013,[996] and that these discussions "included substantive issues".[997]

465. According to Mr Bemba, "[t]his interaction [between members of the Office of the Prosecutor and the Dutch authorities] appears to have triggered a dilution of domestic protections".[998] In particular, according to Mr Bemba, the Dutch Investigating Judge, after having initially decided that the Dean should be involved in the review process, subsequently excluded him from following the Prosecutor's proposal to rely exclusively on the review conducted by the Independent Counsel.[999]

466. In addition, Mr Bemba submits that the Prosecutor received directly from the Dutch authorities "some substantive information", in particular "[redacted]" and the fact that there seemed to be "a lot of activity" around two of the targeted number.[1000] Mr Bemba also argues that the Prosecutor obtained CDRs directly from the Dutch authorities "in violation of the Single Judge's order that they should be vetted first by the Independent Counsel", and that this fact corroborates "[t]he inference that the Dutch authorities conveyed substantive information directly to the Prosecut[or]".[1001] Mr Bemba submits that after receiving these CDRs, the Prosecutor "claimed to the [Pre-Trial] Single Judge that receipt was pending, and made the disingenuous request to receive the CDRs directly" and "even went so far as to insert the later date into the CDRs' metadata on ringtail".[1002]

467. According to Mr Bemba, "[a]fter the Prosecution-Dutch interactions commenced, the Prosecution began to question Defence witnesses whether they had contacted the Defence after the cut-off date, or during their testimony", whilst prior to

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[996] Mr Bemba's Appeal Brief, para. 170, referring to CAR-OTP-0090-1922; CAR-OTP-0090-1927; and Annex F to Mr Bemba's Application for Exclusion of Dutch Intercept Materials, p. 6.
[997] Mr Bemba's Appeal Brief, para. 170, Mr Bemba's Appeal Brief, paras 170, referring to Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 9, line 21 to p. 10, line 6, and p. 11, line 19 to p. 12, line 9.
[998] Mr Bemba's Appeal Brief, para. 171.
[999] Mr Bemba's Appeal Brief, para. 171, referring to Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, pp. 11, 12.
[1000] Mr Bemba's Appeal Brief, para. 172, referring to Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 10, lines 20-24, and p. 11, lines 6-7.
[1001] Mr Bemba's Appeal Brief, para. 173.
[1002] Mr Bemba's Appeal Brief, para. 173.

August 2013 "the OTP only asked general questions re contacts between the Defence and witnesses".[1003]

468. Moreover, Mr Bemba submits that the Trial Chamber, "[a]t the post-confirmation phase", granted Mr Bemba, as the privilege holder, the opportunity to make observations on potentially privileged material prior to its transmission to the Prosecutor, and clarified that the Independent Counsel would exercise his functions under the supervision of the Trial Chamber.[1004] According to Mr Bemba, "[h]aving recognised these legal requirements, the Trial Chamber erred by excluding violations of these requirements at the pre-confirmation phase, from its determination as to whether the first limb of Article 69(7) was fulfilled".[1005]

469. Finally, the Appeals Chamber observes that Mr Bemba, in support of certain arguments under sub-ground 3.3. of his appeal, also relies on two decisions issued by a Dutch District Court,[1006] of which he requests admission as additional evidence on appeal.[1007] The Appeals Chamber will address this issue in a separate section, below.

(b) The Prosecutor

470. The Prosecutor submits that the collection and transmission of the intercepted materials was lawful and that Mr Bemba's challenges in this regard "distort the process by which those records were authorised, reviewed, transmitted and subsequently submitted to the Chamber".[1008] In particular, according to the Prosecutor, "Bemba's portrayal of the process of collecting the intercepted communications is inaccurate" and that his allegation that the Prosecutor was "disingenuous" is "without foundation".[1009]

471. First, the Prosecutor argues that Mr Bemba's "principal challenge" concerning the role of the Prosecutor in the intercept process, "effectively amounts to a request to disqualify the Prosecution from its evidence-gathering function".[1010] In this regard,

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[1003] Mr Bemba's Appeal Brief, para. 174, fn. 321.
[1004] Mr Bemba's Appeal Brief, para. 179.
[1005] Mr Bemba's Appeal Brief, para. 179.
[1006] Mr Bemba's Appeal Brief, paras 176-178.
[1007] Mr Bemba's Request for Additional Evidence on Appeal.
[1008] Response, para. 122. *See generally* paras 122-140.
[1009] Response, para. 126.
[1010] Response, para. 127.

the Prosecutor submits that she is vested with the authority to investigate offences under article 70 of the Statute, and that, in any case, the matter of her disqualification from investigating the present case was "extensively litigated before the Appeals Chamber".[1011]

472. Second, the Prosecutor submits that, as the authority responsible for investigating a prosecuting article 70 offences, she "correctly framed [her] RFAs to the Dutch authorities" and that, "[i]n any event, […] measures were put in place to ensure that the wiretaps were done according to Dutch law".[1012]

473. Third, the Prosecutor argues that "there is no evidence supporting Bemba's contention that domestic protections under Dutch law were 'dilute[d]'".[1013] In this regard, she submits that the Dean of The Hague Bar was personally consulted by the Dutch Investigative Judge, and that the Dean himself gave a statement to the effect that it is not mandatory under Dutch law to give lawyers or the Dean an opportunity to review intercepts and that, in any case, his advice is not legally binding on the Judge.[1014]

474. Fourth, the Prosecutor argues that she "[is] not precluded from corresponding with national counterparts when undertaking investigative steps", but that, to the contrary, this is normal for her, and the Court in general, "to ensure that investigative steps comply with national laws and with the Court's statutory framework".[1015] According to the Prosecutor, "Bemba fails to show that such contact is unlawful or that those discussions affected the original legal justifications given for the intercepts".[1016] Rather, in the Prosecutor's view, Mr Bemba's suggestion that the Dutch authorities may have circumvented Dutch legal safeguards based on communications with the Prosecutor or the Court is "simply unfounded".[1017]

[1011] Response, para. 127.
[1012] Response, para. 128.
[1013] Response, para. 129.
[1014] Response, para. 129, referring to CAR-OTP-0094-0359, at 0364-0366.
[1015] Response, para. 130.
[1016] Response, para. 130.
[1017] Response, para. 130.

475. In this regard, the Prosecutor also submits that Mr Bemba's arguments "misread or distort the facts and should be summarily dismissed".[1018] In particular, according to the Prosecutor: (i) Mr Bemba's allegation that she asked the Dutch Investigative Judge to rely only on the Independent Counsel instead of the Dean is "speculative, incorrect and unsupported"; (ii) the fact that the Dutch authorities updated her on their progress in executing the requests for assistance that she had transmitted to them "is distinct from Bemba's speculation that [she] was actually sent intercepts prior to their vetting or receive 'substantive information'"; (iii) the fact that the Dutch authorities transmitted the CDRs directly to her "did not violate either the lawyer-client communication privilege or the [Pre-Trial] Single Judge's prior orders"; (iv) Mr Bemba's "unsupported claim" that she inserted a later date into the metadata on e-Court of one CDR is "misleading, incorrect and demonstrates unfamiliarity with how the Ringtail system operates"; and (v) if Mr Bemba wishes to argue that she obtained a "litigation advantage" in the Main Case proceedings due to her investigations into article 70 offences, "he can, as he has, litigate it in the Main Case, not in this one".[1019]

476. Finally, the Prosecutor asserts that the fact that the Trial Chamber, following the confirmation of the charges, employed additional processes to vet the privileged communications "did not make the Pre-Trial Chamber's vetting process pre-confirmation unlawful".[1020] She submits in this respect that the circumstances were different, and that authorising Mr Bemba to review to seized material when he was "under investigation (pre-confirmation)" would have made "no sense" as it would have defeated the purpose of monitoring him and "ceded Bemba, an interested party, the power to stop relevant evidence from being available for trial".[1021]

(iii) Determination by the Appeals Chamber

477. The Appeals Chamber observes that Mr Bemba advances various arguments aimed at demonstrating improprieties in the collection and transmission of the Dutch Intercept Materials resulting, in his view, in the inadmissibility of this material within the meaning of article 69 (7) of the Statute. On the one hand, he alleges several irregularities with respect to this process on the part of the Court. On the other hand,

[1018] Response, para. 131.
[1019] Response, para. 131.
[1020] Response, para. 140.
[1021] Response, para. 140.

he submits that there was also a "dilution of domestic protections" in the collection of the Dutch Intercept Materials by the Dutch authorities.

478. The Appeals Chamber will address these two sets of arguments in turn. In addition, the Appeals Chamber recalls that a discrete part of Mr Bemba's arguments rests on certain material which he requests to be admitted as additional evidence on appeal – this request will be analysed separately, below.

(a) Alleged irregularities on the part of the Court in the process of acquisition of the Dutch Intercept Materials

479. As observed, the first set of arguments by Mr Bemba concerns irregularities that he alleges to have been made in the process of collection of the Dutch Intercept Materials. In his view, due to these irregularities, these materials were obtained by means of a violation within the meaning of article 69 (7) of the Statute. Mr Bemba's arguments focus primarily on the fact that the Prosecutor should not have been authorised to interact with the Dutch authorities. More specifically, Mr Bemba's first argument in this respect is that, "given the existence of potential conflict of interest", the Prosecutor should not have been vested "with the responsibility for overseeing the execution of the interception process with the national authorities".[1022]

480. At the outset, the Appeals Chamber notes that Mr Bemba's reference to the ECtHR jurisprudence in the case of *Zakharov v. Russia* does not advance his argument that it was "incompatible with human rights standards" to vest the Prosecutor with the responsibility to interact with the Dutch authorities for the execution of the interception process.[1023] This decision concerns a situation in which a "blending of functions within one prosecutor's office, with the same office giving approval to requests for interceptions [lodged by investigators in the framework of criminal proceedings] and then supervising their implementation [in the framework of prosecuting functions] may […] raise doubts as to the prosecutors' independence".[1024] The Appeals Chamber considers that no such "blending of functions" has occurred in the present case. As explained, it was not the Prosecutor who approved the

[1022] Mr Bemba's Appeal Brief, para. 166.
[1023] Mr Bemba's Appeal Brief, para. 167.
[1024] ECtHR, Grand Chamber, *Zakharov v. Russia*, "Judgement", 4 December 2015, application no. 47143/06, para 280.

interception of Mr Kilolo's and Mr Mangenda's telephone calls, but the competent domestic authorities seized with a request for assistance by the Court.

481. That said, the Appeals Chamber observes that, in the legal framework of the Court, the responsibility to investigate and prosecute offences against the administration of justice under article 70 of the Statute is vested with the Prosecutor. Rule 165 (1) of the Rules explicitly states in this regard that "[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative". Article 54 (3) of the Statute stipulates that, as part of her powers in relation to the investigation, the Prosecutor may seek the cooperation of States. Such cooperation is requested in accordance with Part 9 of the Statute which explicitly stipulates, in article 87 of the Statute, that the Court shall have the authority to make requests to State Parties. As already indicated above, the reference to the "Court" encompasses the Prosecutor, who may transmit requests and receive responses under Part 9 of the Statute. In this regard, rule 176 of the Rules provides that it is the Office of the Prosecutor that "transmit[s] the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from the requested States". Therefore, as observed above, the Prosecutor had the authority to transmit on her own the requests of assistance to the Dutch authorities, although she chose to seek authorisation from the Pre-Trial Single Judge in light of the sensitivity of the activities involved.

482. The Appeals Chamber is not persuaded that the Prosecutor should not have exercised her statutory functions in respect of the investigation into possible offences against the administration of justice arising in the context of the Main Case due to a "potential conflict of interest". The Appeals Chamber observes that the choice specifically made in rule 165 (1) of Rules, namely to attribute to the Prosecutor the responsibility in connection with possible offences under article 70 of the Statute, was made notwithstanding the availability of other models offered by the precedents of other international jurisdictions providing for the possibility of entrusting other entities with the responsibility to conduct investigations of these types of offences. The applicable provisions at the ICTY, for example, provide for the possibility of a trial chamber to appoint an *amicus curiae* to investigate – and potentially prosecute –

matters of possible contempt of that tribunal.[1025] A different choice was made for this Court, where the Prosecutor is responsible for the investigation and prosecution of offences against the administration of justice, unless she recuses herself or is otherwise disqualified under article 42 of the Statute. In particular, the Appeals Chamber observes that the Prosecutor may be disqualified when her impartiality might reasonably be doubted[1026] or on the grounds enumerated in rule 34 of the Rules, and that any question as to such disqualification shall be decided by the Appeals Chamber.[1027] A motion for disqualification of the Prosecutor in the present case was made by Mr Kilolo and Mr Mangenda and was rejected by the Appeals Chamber.[1028]

483. In this regard, as previously held,[1029] the Appeals Chamber considers that, if a "potential conflict of interest" warranting disqualification of the Prosecutor were to be understood as existing merely because of her role in the prosecution of cases before the Court, any such potential conflict would be inherent to almost all investigations and prosecutions into offences against the administration of justice under articles 70 (1) (a), (b) or (c) of the Statute, as they invariably arise in the context of cases that are being – or have been – investigated or prosecuted by the Prosecutor him- or herself. The Appeals Chamber is of the view that there is nothing particular in the circumstances of the present case which would justify that the Prosecutor be precluded from exercising the ordinary functions of investigation and prosecution of offences against the administration of justice attributed to her under the Statute and the Rules. In this regard, the Appeals Chamber also observes that the legal framework of the Court explicitly foresees the possibility that charges under article 70 of the

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[1025] Rule 77 (C) of the ICTY Rules of Procedure and Evidence, as amended on 13 December 2001, provides that "[w]hen a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may: (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt; (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or (iii) initiate proceedings itself". Rule 77 (D) of the ICTY Rules of Procedure and Evidence further stipulates that that Chamber, if it considers that there are sufficient grounds to proceed against a person for contempt, may, in the circumstances under rule 77 (C) (ii) or (iii), "issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself".
[1026] Article 42 (7) of the Statute.
[1027] Article 42 (7) of the Statute.
[1028] Decision on the Requests for Disqualifications.
[1029] Decision on the Requests for Disqualifications, para. 35.

Statute be joined with charges under articles 5 to 8.[1030] While no such joinder was ordered in the present case, its possibility indicates that, in principle, there exists no legal impediment for these matters to be dealt with by the same judges and the same Prosecutor.[1031]

484. In light of this, the Appeals Chamber considers Mr Bemba's suggestion that the Registry, rather than the Prosecutor, should have been vested with the responsibility for "overseeing the execution of the interception process with the national authorities" to be unreasonable and without basis.[1032] As explained, it is the Prosecutor who, unless disqualified in accordance with the Statute, is responsible for investigations under article 54 of the Statute. Pursuant to this provision, read in conjunction with Part 9 of the Statute and rule 176 of the Rules, it was thus within her powers to transmit a request for assistance to the Dutch authorities as part of her investigation.

485. On the same basis, the Appeals Chamber is also not persuaded by Mr Bemba's argument that the Prosecutor – or, alternatively, the Pre-Trial Single Judge – should have "ensure[d] appropriate internal walls" within the Office of the Prosecutor.[1033] The Appeals Chamber observes that in the legal framework of the Court, the Prosecutor is the one vested with the responsibility for investigations and prosecutions, irrespective of the fact that in the exercise of her statutory functions, and for the purposes of an efficient management of her office, she avails herself of the assistance of staff members.[1034] In accordance with article 42 of the Statute, the Office of the Prosecutor is a hierarchical structure with the Prosecutor at its head, with full authority over the management and administration of the office and all the duties and powers with respect to investigations and prosecutions at the Court. Staff members – or "teams" – within the Office of the Prosecutor do not have independent powers under the Statute, but perform their activities under the supervision and responsibility of the Prosecutor. Correspondingly, no "excusal" or "disqualification" of staff members or "teams" within the Office of the Prosecutor is indeed envisaged under the

[1030] Rule 165 (4) of the Rules.
[1031] *See also* Decision on the Requests for Disqualifications, para. 35.
[1032] Mr Bemba's Appeal Brief, para. 166.
[1033] Mr Bemba's Appeal Brief, para. 168.
[1034] *See* article 44 of the Statute.

Statute.[1035] Within the Office of the Prosecutor, only deputy prosecutors, who are elected officials of the Court, are entitled to carry out the acts required of the Prosecutor under the Statute.[1036]

486. As explained, in the present case, no basis existed for the disqualification of the Prosecutor from the exercise of her statutory functions in connection to the investigation into and prosecution of offences against the administration of justice arising in the context of the Main Case. Accordingly, and considering that the Prosecutor was in any event personally responsible for the investigations into the alleged offences under article 70 as well as the prosecution of Mr Bemba in the Main Case, the Appeals Chamber sees no merit in the argument that it was erroneous for the Prosecutor to be assisted in both by the same staff members within her Office without ensuring "appropriate internal walls".[1037]

487. The Appeals Chamber turns now to Mr Bemba's argument that the Prosecutor violated an order by the Pre-Trial Single Judge because she obtained directly from the Dutch authorities information which had to be filtered by the Independent Counsel. In this regard, the Appeals Chamber recalls that the Independent Counsel was appointed by the Pre-Trial Single Judge to identify (through a first screening of logs) and subsequently review recordings of telephone calls placed or received by Mr Kilolo and Mr Mangenda that would have been made available by the national authorities in response to requests to this effect that the Prosecutor was authorised by the Pre-Trial Single Judge to transmit.[1038]

488. Mr Bemba's primary argument is that the Prosecutor, on 13 September 2013, directly obtained from the Dutch authorities some Call Data Records (CDRs) "in violation of the [Pre-Trial] Single Judge's order that they should be vetted first by the Independent Counsel".[1039] The Prosecutor indeed acknowledges having received the

[1035] The Appeals Chamber notes that excusal and disqualification, in accordance with article 42 (6), (7) and (8) of the Statute, apply only with respect to the Prosecutor and the Deputy Prosecutor(s).
[1036] *See* article 42 (2) of the Statute.
[1037] Mr Bemba's Appeal Brief, para. 168.
[1038] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, pp. 7, 8.
[1039] Mr Bemba's Appeal Brief, para. 173.

CDRs directly.[1040] In the Appeals Chamber's view, however, this did not constitute a violation of the Pre-Trial Single Judge's order.

489. The Appeals Chamber notes that the CDRs at issue are materials that, while provided to the Court through the Dutch authorities, originate from private telecommunication companies and are not connected with the interception activities conducted by the Dutch authorities upon request of the Prosecutor. Importantly, they contain no information about the content of any telephone call listed therein. The Appeals Chamber observes that the Prosecutor herself, in a filing before the Pre-Trial Single Judge, informed him that she had received some CDRs of Mr Kilolo's and Mr Mangenda's phone calls directly from the Dutch authorities, and requested a judicial order to receive certain further information on the basis of information obtained through her ongoing analysis of the CDRs.[1041] At no point did the Pre-Trial Single Judge indicate that the Prosecutor's receipt of the CDRs directly from the Dutch authorities violated any of his previous orders. To the contrary, when the matter was raised again at a status conference a few days later, the Pre-Trial Single Judge, upon request by the Prosecutor, clarified that the CDRs were in fact not privileged and that, therefore, the Prosecutor could "just get them from the Dutch authorities as soon as they are ready".[1042] In these circumstances, and considering that Mr Bemba does not claim that the Prosecutor's access to the CDRs was otherwise unlawful, the Appeals Chamber sees no merit in Mr Bemba's argument that the Prosecutor acted in violation of the Pre-Trial Single Judge's orders.

490. The Appeals Chamber is also unpersuaded by Mr Bemba's argument that the Prosecutor was "disingenuous" in that, at the status conference of 10 October 2013, she claimed before the Pre-Trial Single Judge that receipt of the CDRs directly was pending when instead she had already received them.[1043] The Appeals Chamber finds it sufficient to recall, as observed above, that before this status conference, the Prosecutor had submitted to the Pre-Trial Single Judge in unequivocal terms that, on 13 September 2013, she had received the CDRs and was already analysing their

[1040] Response, para. 131.
[1041] Request for Information from the VWU, paras 2, 10-12.
[1042] Transcript of status conference of 10 October 2013, ICC-01/05-T-4-CONF, p. 29, lines 3-5.
[1043] Mr Bemba's Appeal Brief, para. 173.

contents.[1044] The Appeals Chamber also sees no basis in Mr Bemba's submission that the Prosecutor "even went so far as to" manipulate on e-court the date field(s) of the CDR registered as CAR-OTP-0072-0079.[1045] As explained by the Prosecutor,[1046] and eventually accepted by Mr Bemba[1047] in the course of the present appeal proceedings, this particular CDR is not one of those obtained by the Prosecutor on 13 September 2013, but was received from the Dutch authorities on 10 October 2013, as accurately reflected in the e-Court metadata.

491. The Appeals Chamber also considers that the fact that the Prosecutor reported to the Pre-Trial Single Judge that the Dutch police had accidentally intercepted all calls to the Court's building for about 25 minutes[1048] and that there seemed to be "a lot of activity" around two of the targeted numbers[1049] – or more generally, that members of the Office of the Prosecutor met with the Dutch authorities to discuss the execution of the Prosecutor's requests for assistance[1050] – does not indicate that the Prosecutor "clearly received some substantive information" in breach of the Pre-Trial Single Judge's order. The system established by the Pre-Trial Single Judge for the filtering of intercepts to be transmitted to the Prosecutor concerned exclusively the recordings of intercepted telephone conversations with a view to isolating privileged communications.[1051] Other than this specific aspect as to the material to be actually accessed by the Prosecutor, the execution by the Dutch authorities of the Prosecutor's requests for assistance was part of the ordinary cooperation regime under Part 9 of the Statute. In the view of the Appeals Chamber, there exists no basis to sustain that the

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[1044] Request for Information from the VWU, paras 2, 10-12.
[1045] Mr Bemba's Appeal Brief, para. 173, and Annex K (ICC-01/05-01/13-2144-Conf-AnxK).
[1046] Response, para. 131. *See also* Annex G to Mr Bemba's Request for Disclosure and Judicial Assistance, 18 September 2017, ICC-01/05-01/13-2227-Conf-AnxG.
[1047] *See e.g.* Mr Bemba's Request for Disclosure and Judicial Assistance, paras 6-26, wherein Mr Bemba requests that the Prosecutor be ordered to disclose to him, *inter alia*, the version of the concerned CDR that had been received on 13 September 2013 on the grounds that he had only be disclosed the version obtained by the Prosecutor in October 2013. *See also* Annex G, ICC-01/05-01/13-2227-Conf-AnxG.
[1048] *See* Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 10, lines 20-24, referred to in Mr Bemba's Appeal Brief, para. 172.
[1049] *See* Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 11, lines 6-7, referred to in Mr Bemba's Appeal Brief, para 172.
[1050] *See* Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 9, line 21 to p. 10, line 6, and p. 11, line 19 to p. 12, line 9 (in which members of the Office of the Prosecutor updated the Pre-Trial Single Judge on their interactions with the Dutch authorities and status of execution of the Prosecutor's request for assistance) referred to in Mr Bemba's Appeal Brief, para. 170.
[1051] Decision Authorising to Seize National Authorities and Appointing Independent Counsel, para. 7.

Prosecutor should be precluded from corresponding with the competent authorities entrusted with the execution of investigative activities upon request by the Prosecutor. On this basis, and contrary to Mr Bemba's suggestion,[1052] the Appeals Chamber also sees no impropriety in the fact that the Dutch authorities updated the Office of the Prosecutor on their progress in executing the Prosecutor's requests for assistance, and discussed the process required under Dutch law for the collection of the requested evidence, insofar as no intercept materials were directly transmitted to the Prosecutor in violation of the Pre-Trial Single Judge's orders. As explained, there is no indication that any such violation of the Pre-Trial Single Judge's orders occurred.

492. The Appeals Chamber is also not persuaded by Mr Bemba's submission that the Prosecutor "availed [herself] of [her] Article 70 powers to obtain privileged access to information that it then employed to the detriment of the Main Case Defence".[1053] Mr Bemba fails to elaborate on what information (which, in his view, the Prosecutor was illegitimately privy to as covered by privilege) was unfairly employed "to the detriment of the Main Case Defence", and how.[1054] In this regard, he merely argues that the Prosecutor, in August 2013, started asking defence witnesses in the Main Case whether they had contacted the defence after the cut-off date or during their testimony.[1055] The Appeals Chamber sees no impropriety on the part of the Prosecutor in pursuing this course of action, and no apparent connection with any allegedly irregular interaction between the Prosecutor and the Dutch authorities. Indeed, at that time, it had already been almost one year since the Prosecutor, in the exercise of her duties and powers under the Statute, had started her investigations into the possible commission of offences under article 70 of the Statute arising within the context of the Main Case and, as part of these investigations, had already obtained supporting evidence in this regard.

493. In light of the above, the Appeals Chamber rejects Mr Bemba's arguments that the Dutch Intercept Materials must be deemed to have been unlawfully collected due to the Prosecutor's interactions with the Dutch authorities in their collection. The Appeals Chamber therefore concludes that the Trial Chamber did not err in not

[1052] Mr Bemba's Appeal Brief, paras 170, 172.
[1053] Mr Bemba's Appeal Brief, para. 170.
[1054] Mr Bemba's Appeal Brief, para. 170.
[1055] Mr Bemba's Appeal Brief, para. 174, fn. 321.

finding, on the ground of these interactions, a violation within the meaning of article 69 (7) of the Statute.

494. Finally, the Appeals Chamber notes that Mr Bemba recalls that the Trial Chamber, when seized of the case after the confirmation of charges, gave him the opportunity to make observations on potentially privileged materials prior to its transmission to the Prosecutor.[1056] Mr Bemba argues that, having done so, the Trial Chamber erred in disregarding violations of such a "requirement" at the pre-trial confirmation phase when determining the admissibility of the Dutch Intercept Materials under article 69 (7) of the Statute.[1057] In the view of the Appeals Chamber, Mr Bemba fails to show any error on the part of the Trial Chamber in this respect. First, the Appeals Chamber notes that Mr Bemba does not claim that it was unlawful for the Pre-Trial Single Judge to transmit to the Prosecutor the Dutch Intercept Materials as filtered by the Independent Counsel without giving Mr Bemba the opportunity to make submissions. His arguments are rather based on an alleged "inconsistency" of the Trial Chamber. However, the fact that the Trial Chamber decided on a certain procedure prior to the transmission to the Prosecutor of some potentially privileged materials does not *per se* imply that a different procedure applied before the confirmation of charges amounted to a violation of the Statute or of an internationally recognised human right in the Prosecutor's acquisition of the Dutch Intercept Materials. Accordingly, the Appeals Chamber rejects Mr Bemba's argument on the alleged "inconsistency" of the Trial Chamber in its determination on whether to exclude the Dutch Intercepts Materials under article 69 (7) of the Statute.

(b) Alleged "dilution of domestic protections" by the Dutch authorities in the collection of the Dutch Intercept Materials

495. At the outs[1058]et, the Appeals Chamber observes that the Third Dutch Intercepts Decision contains the same analysis of the applicable law as the First Western Union Decision which was issued on the same day. The sections on the "Applicable Law" in

[1056] Mr Bemba's Appeal Brief, para. 179 referring to "Decision on 'Request concerning the review of seized material' and related matters", 9 April 2015, ICC-01/05-01/13-893-Red.
[1057] Mr Bemba's Appeal Brief, para. 179.
[1058] *See supra* paras 295-298.

these two decisions are almost identical.[1059] The Appeals Chamber recalls its conclusion above that, in the First Western Union Decision, the Trial Chamber erred in law in extending its scope of inquiry under article 69 (7) of the Statute to considerations concerning compliance with national law in the collection of evidence by a State. The same considerations equally apply to the, effectively identical, Third Dutch Intercepts Decision, in which the Trial Chamber focused its analysis on whether, in collecting the relevant materials, the Dutch authorities ("manifestly") violated Dutch national law.[1060]

496. In this respect, the Appeals Chamber notes that the Trial Chamber considered that "the procedure adopted by the Dutch Investigating Judge" with respect to "the role of the Dean and the Independent Counsel's role under Dutch law as his substitute" did not appear to be "manifestly unlawful".[1061] The Appeals Chamber is unable to share this conclusion. Indeed, whether, and to what extent, the Dean of the Hague Bar must be involved in the review of potentially privileged communications under Dutch law, is a determination that the Court is unable to make and, importantly, is expressly precluded from making by article 69 (8) of the Statute.[1062]

497. The Appeals Chamber notes that the Prosecutor transmitted to the Dutch authorities requests for assistance under Part 9 of the Statute with a view to obtaining logs and recordings of Mr Kilolo's and Mr Mangenda's telephone calls. The Dutch authorities executed these requests and transmitted to the Court the relevant materials obtained as part of their interception activities requested by the Court. Accordingly, as provided by article 69 (8) of the Statute, the Court, when deciding on the relevance or admissibility of the Dutch Intercept Materials collected by the Netherlands, shall not rule on the application of Dutch national law.

498. The Appeals Chamber considers that Mr Bemba's suggestion that the Prosecutor exercised undue influence on the Dutch judicial authorities in order for them to exclude the Dean from the domestic review process[1063] is speculative and

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[1059] Third Dutch Intercepts Decision, paras 9-20; First Western Union Decision, paras 28-40.
[1060] *See e.g.* Third Dutch Intercepts Decision, paras 29, 30.
[1061] Third Dutch Intercepts Decision, para. 30.
[1062] *See supra* paras 283-298.
[1063] Mr Bemba's Appeal Brief, para. 171.

unsupported. The only basis for Mr Bemba's submission in this respect is that the Dutch Investigating Judge having initially decided to involve the Dean, eventually "excluded" him, purportedly after the Prosecutor made a "proposal" to this effect.[1064] The Appeals Chamber observes that the transcript of the status conference of 30 August 2013 – on which Mr Bemba relies in support of his argument[1065] – does not sustain his proposition that it was the Prosecutor who proposed to the Dutch authorities that the Independent Counsel be involved instead of the Dean.[1066] In any case, the Appeals Chamber considers that, even if the Prosecutor had indeed made this proposal to the Dutch authorities, it was still for them to identify and apply the appropriate procedures required at the domestic level.

499. In light of the above, the Appeals Chamber finds that the Trial Chamber erred in law in analysing whether the Dutch Intercept Materials had been obtained by means of a "manifest" violation of Dutch law. However, the Appeals Chamber is of the view that this error has no impact on the Trial Chamber's conclusion that the actions of the Dutch authorities do not render the collection of the Dutch Intercept Materials to be in violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute.

(c) Mr Bemba's request for admission of additional evidence on appeal

500. The Appeals Chamber observes that in support of sub-ground 3.3. of his appeal, Mr Bemba relies on – and attaches as annexes to his Appeal Brief[1067] – two domestic decisions that were issued by a Dutch District Court, respectively, on 9 and 25

[1064] Mr Bemba's Appeal Brief, para. 171.
[1065] Mr Bemba's Appeal Brief, para. 171, fn. 310.
[1066] Transcript of status conference of 30 August 2013, ICC-01/05-T-2-CONF-ENG, p. 11, lines 13-23, in which the representative of the Office of the Prosecutor updated the Pre-Trial Single Judge on the matter at issue as follows: "When we met the Dutch authorities, they stressed the fact that it was essential to comply with Dutch legislation, in order to follow the Dutch regulations, which seems of course entirely logical. Dutch legislation demands that, when dealing with counsel, one has to be a member of a designated Bar and there has to be some form of check to ensure that no confidential information is implicated. The Dutch authorities examined the possibility, and given the challenges thrown up by this case, [redacted] and principally for this reason they came back to us and said there is no counsel at the Bar of the Hague meeting the necessary profile, so they asked whether they could have advantage of the fact that [the Court] had nominated a counsel to request support."
[1067] ICC-01/05-01/13-2144-Conf-AnxI.

October 2013.[1068] As these two domestic rulings were not available to the Trial Chamber, Mr Bemba, on 12 July 2017, requested the Appeals Chamber to admit them as additional evidence on appeal, together with "related correspondence", *i.e.* a letter from a Dutch Public Prosecutor, dated 19 February 2014, to Mr Kilolo's counsel in the Dutch proceedings.[1069] On 18 July 2017, the Appeals Chamber, acting pursuant to regulation 62 of the Regulations of the Court, decided that it would rule on the admissibility of this material as additional evidence on appeal, jointly with the other issues raised in Mr Bemba's appeal.[1070] The Appeals Chamber will do so at this juncture.

(i) Submissions of the parties

(a) Mr Bemba

501. In his Appeal Brief, Mr Bemba argues that, in the decision issued on 9 October 2013, the Dutch District Court "refused to authorise" the transmission of the intercepts of one of Mr Kilolo's telephone numbers due to the absence of a written request from the Court.[1071] He argues that in its subsequent decision, issued on 25 October 2013, the same Dutch District Court "reversed its [previous] decision, citing the fact that the Investigating Judge had informed the Court that adequate safeguards would be applied by the ICC upon receipt".[1072] According to Mr Bemba, "th[is] reversal reflects the absence of an independent and effective verification process at the domestic level".[1073] In addition, Mr Bemba argues that the Dutch decisions "were predicated on assurances that the ICC would erect appropriate safeguards", while "this was not the case".[1074]

502. When requesting the admission of this material as additional evidence on appeal, Mr Bemba more specifically explained that, in his view, the decisions of the

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[1068] Mr Bemba's Appeal Brief, paras 176-178.
[1069] Mr Bemba's Request for Additional Evidence on Appeal.
[1070] "Directions regarding Mr Bemba's application for additional evidence filed pursuant to regulation 62 of the Regulations of the Court", 18 July 2017, ICC-01/05-01/13-2176.
[1071] Mr Bemba's Appeal Brief, para.176.
[1072] Mr Bemba's Appeal Brief, para. 176.
[1073] Mr Bemba's Appeal Brief, para. 177.
[1074] Mr Bemba's Appeal Brief, para. 178. In this regard, Mr Bemba submits that "this was not the case" given the "celerity" with which the Pre-Trial Single Judge approved the transmission of audio recordings to the Prosecutor, the lack of any redactions, and the absence of any judicial reasoning for the transmission to the Prosecutor of the first two reports of the Independent Counsel.

Dutch District Court, and some "related correspondence",[1075] are relevant to demonstrate "the absence of evidential review and effective safeguards at the domestic level".[1076] According to Mr Bemba this, in turn, triggered an obligation on the part of the Court "to ensure that the evidential threshold for interception was met, and secondly to implement appropriate safeguards to protect Mr Bemba's right to privilege and confidentiality".[1077] Specifically, Mr Bemba submits that "it is […] clear" from the decisions of the Dutch District Court that: (i) "[t]here was never an effective review of the reasonable suspicion threshold at the domestic level"; and (ii) "[t]he District Court did not verify whether the standard safeguards for interception (i.e. the involvement of the Independent Counsel) were complied with, and the District Court did not conduct any review of the legality of the process or the rights of the targeted persons, on the understanding that this would be addressed by the ICC".[1078] On this latter point, Mr Bemba submits that the Dutch District Court "appears to have been unaware" that the Dutch Investigating Judge had decided to "replac[e] the Dean with the Independent Counsel", and "did not assess the rights of Mr. Bemba or exhaust his right to an effective remedy".[1079]

503. On this basis, Mr Bemba argues that "[t]hese two decisions and related correspondence are probative of the issue before the Appeals Chamber as to whether the Trial Chamber erred by failing to exclude these intercepts, or lessen their weight".[1080]

504. Mr Bemba also submits that the two decisions by the Dutch District Court "were also not 'available' to the Defence at trial for reasons unrelated to the diligence of the Defence".[1081] He argues that, because of the Prosecutor's position at trial that the legality of the Dutch process was irrelevant, he "experienced profound difficulties in ascertaining what happened during the domestic processes".[1082] Mr Bemba

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[1075] The "related correspondence" referred to by Mr Bemba is a letter, dated 19 February 2014, from a Dutch prosecutor to Mr Kilolo's counsel in the Dutch proceedings is attached as Annex C to Mr Bemba's Request for Additional Evidence on Appeal (ICC-01/05-01/13-2172-Conf-AnxC).
[1076] Mr Bemba's Request for Additional Evidence on Appeal, para. 18.
[1077] Mr Bemba's Request for Additional Evidence on Appeal, para. 18.
[1078] Mr Bemba's Request for Additional Evidence on Appeal, para. 19.
[1079] Mr Bemba's Request for Additional Evidence on Appeal, paras 40, 41, 43.
[1080] Mr Bemba's Request for Additional Evidence on Appeal, para. 2 (footnote omitted).
[1081] Mr Bemba's Request for Additional Evidence on Appeal, para. 4.
[1082] Mr Bemba's Request for Additional Evidence on Appeal, para. 5. *See also* paras 6-8.

concedes that the two decisions of the Dutch District Court were included in the "Dutch dossier" that he had received from Mr Kilolo on 4 April 2016.[1083] However, he argues that "the file was approximately 1142 pages, primarily in Dutch, and the index provided by the Kilolo team did not refer to these decisions".[1084]

(b) The Prosecutor

505. The Prosecutor opposes Mr Bemba's request for admission on appeal of additional evidence, on the grounds that he "did not act with the required diligence and the admission of the [additional evidence] could not and would not alter the Trial Chamber's sound conclusions and decisions".[1085]

506. In particular, according to the Prosecutor, Mr Bemba "relies on fragmented and unsupported (mis)representations of the case record" and that "even if [he] seeks to demonstrate that the proceedings were unfair on some other unspecified grounds, the [additional evidence] and the remaining record do not support that claim".[1086] Indeed, according to the Prosecutor, "had the [additional evidence] been admitted at trial, they would have supported the Chamber's conclusions, further demonstrating the fairness of the proceedings", as "[t]he record of this case simply does not support Bemba's conclusions".[1087] More specifically, the Prosecutor argues that the proposed additional evidence "could not and would not have affected the Chamber's conclusion that the interception of the Kilolo Number was not manifestly unlawful"[1088] and "could not and would not alter the Chamber's conclusion that there were adequate safeguards to vet the intercepted materials".[1089]

507. In addition, the Prosecutor submits that Mr Bemba's request "fails because of his lack of diligence in presenting the [additional evidence] at trial, or earlier on

[1083] Mr Bemba's Request for Additional Evidence on Appeal, para. 10.
[1084] Mr Bemba's Request for Additional Evidence on Appeal, para. 10.
[1085] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, para. 42.
[1086] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, para. 27.
[1087] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, para. 28.
[1088] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, paras 29-34.
[1089] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, paras 35-41.

appeal", and that "[h]is attempt to shift the blame for his lack of diligence to the Prosecut[or] is unjustified and transparent".[1090]

(ii) Determination by the Appeals Chamber

508. Regulation 62 of the Regulations provides in relevant part:

> 1. A participant seeking to present additional evidence shall file an application setting out:
>
> (a) The evidence to be presented;
>
> (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

509. The Appeals Chamber recalls that it has previously found that in a decision on whether to admit additional evidence on appeal, due consideration shall be given to the distinct features of the appellate stage of proceedings, in particular as concerns the corrective nature of appeal proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence.[1091] In this respect, the Appeals Chamber has held that additional evidence would be admissible on appeal if: (i) the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence; and (ii) it is demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part.[1092] In addition, noting regulation 62 (1) (a) of the Regulations of the Court, the Appeals Chamber considered that "the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81 (1) and (2) of the Statute".[1093]

510. The Appeals Chamber recalls that Mr Bemba requests the admission as additional evidence on appeal of two decisions issued by a Dutch District Court on 9

[1090] Prosecutor's Response to Mr Bemba's Request for Additional Evidence on Appeal, para. 12. *See also* paras 13-26.
[1091] *Lubanga* Appeal Judgment, para. 55-57.
[1092] *Lubanga* Appeal Judgment, para. 58-59.
[1093] *Lubanga* Appeal Judgment, para. 54.

and 25 October 2013[1094] and of a letter by a Dutch prosecutor to Mr Kilolo's counsel in the Dutch proceedings.[1095] Mr Bemba requests the admission of this additional evidence on appeal with a view to demonstrating, as part of sub-ground 3.3. of his appeal, alleged irregularities in the Dutch domestic process in the collection by the Dutch authorities of intercepts of one of Mr Kilolo's telephone numbers. For the reasons elaborated below, the Appeals Chamber considers that the material proposed as additional evidence on appeal does not support Mr Bemba's arguments for its admission or is otherwise irrelevant to a determination under article 69 (7) of the Statute with respect to the Dutch Intercept Materials.

511. The Appeals Chamber notes that the two decisions referred to Mr Bemba do not support his argument that the decisions of the Dutch District Court demonstrate that the Dutch judicial authorities authorised the interception of Mr Kilolo's telephone number without verifying whether the appropriate evidential threshold had been met. These two decisions concern (and authorise) exclusively the transmission to the Court of certain traffic data and intercepted conversations collected by the Dutch authorities and not the prior authorisation for such authorities to carry out the intercepts. They are therefore of no relevance to the issue of the application of any standard by the Dutch authorities for the authorisation to intercept Mr Kilolo's telephone communications.

512. The Appeals Chamber is also not persuaded by Mr Bemba's argument that the decisions demonstrate that the Dutch District Court did not verify the legality of the process as they appear to have been unaware about the replacement of the Dean with the Independent Counsel by the Dutch Investigating Judge. The Appeals Chamber considers that this argument rests on speculation which is not supported by a plain reading of the proposed additional evidence.[1096] Furthermore, it is based on the incorrect assumption that the Court may determine whether the Dutch law was

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[1094] Available in the record of the present case as Annex I to Mr Bemba's Appeal Brief, (ICC-01/05-01/13-2144-Conf-AnxI).
[1095] Available in the record of the present case as Annex C to Mr Bemba's Request for Additional Evidence on Appeal (ICC-01/05-01/13-2172-Conf-AnxC).
[1096] The Appeals Chamber notes that Mr Bemba merely speculates that because the Dutch District Court referred to the first decision by the Dutch Investigating Judge issued prior to the involvement of the Independent Counsel and did not address the role of the Independent Counsel in the vetting process, it must have been unaware that the Dutch Investigating Judge had replaced the Dean with the Independent Counsel (Mr Bemba's Request for Additional Evidence on Appeal, para. 40). In addition, the Appeals Chamber observes that in both decisions, the Dutch District Court states explicitly that it had "taken due note" of the relevant case file.

applied correctly by the Dutch judicial authorities. Finally, contrary to Mr Bemba's suggestion, nowhere in either of the two decisions it is stated that the Dutch District Court did not review the legality of the interception process at the domestic level "on the understanding that this would be addressed by the ICC".

513. The Appeals Chamber is also not persuaded by Mr Bemba's argument that the two decisions are relevant in that they demonstrate that the Dutch District Court did not "assess [his] rights" or "exhaust his right to an effective remedy" but "tossed the ball to the ICC".[1097] At the outset, the Appeals Chamber considers that this argument is also based on a misrepresentation of the material at issue.[1098] In any case, the Appeals Chamber observes that the Trial Chamber, in addressing Mr Bemba's arguments at trial, held that: (i) it "[was] not able to pronounce itself as to how any remedy may be sought before a Dutch court"; and (ii) as concerns a remedy before the Court, "both the Pre-Trial Chamber and this Chamber have made multiple rulings on defence challenges to the legality and propriety of using the Dutch [Intercept] Materials" and therefore "it cannot be said [Mr Bemba and Mr Kilolo] did not have any opportunity to obtain a remedy for alleged violations".[1099] Mr Bemba does not explain how the Trial Chamber could have reached a different conclusion in this respect had the two decisions of the Dutch District Court been available to it.

514. The Appeals Chamber considers that also the letter of the Dutch Prosecutor to Mr Kilolo's counsel in the Dutch domestic process[1100] – whether on its own or read together with the decisions of the Dutch District Court – could not have led the Trial Chamber to reach a different verdict, had the letter been made available to it. Mr Bemba refers to the portion of this letter in which the Dutch Prosecutor informs Mr Kilolo's counsel in the Dutch proceedings that "there has been no investigation with regard to your client in the Netherlands. The Public Prosecutor Service had merely and solely complied with requests for judicial assistance".[1101] In the absence of any

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[1097] Mr Bemba's Request for Additional Evidence on Appeal, paras 40, 41, 43.
[1098] The Appeals Chamber finds it sufficient to recall in this respect that in neither of the two decisions Dutch District Court stated, or implied, that it left matters concerning the legality of the Dutch processes unaddressed "tossing the ball" to the Court.
[1099] Third Dutch Intercepts Decision, para. 32.
[1100] ICC-01/05-01/13-2172-Conf-AnxC.
[1101] Mr Bemba's Request for Additional Evidence on Appeal para. 29, referring to ICC-01/05-01/13-2172-Conf-AnxC.

explanation as to how this statement would support Mr Bemba's grounds of appeal as elaborated in his Appeal Brief, the Appeals Chamber is unable to draw any conclusion therefrom.

515. In these circumstances, the Appeals Chamber considers that this material, even if it had been presented at trial, would not have had an impact on the Trial Chamber's determination that the Dutch Intercept Materials were not obtained by means of a violation within the meaning of article 69 (7) of the Statute and, therefore, on the verdict entered by the Trial Chamber. It is thus unnecessary for the Appeals Chamber to determine whether Mr Bemba, with the exercise of due diligence, could have presented this material at trial, as well as whether, in principle, domestic decisions rendered by national judicial authorities as part of the domestic process of execution of requests for assistance by the Court can be considered admissible evidence in the proceedings before the Court. Mr Bemba's request for additional evidence is therefore rejected.

4. Alleged inadmissibility of the Dutch Intercept Materials related to Mr Mangenda's telephone communications

(a) Relevant procedural background

516. In the Second Dutch Intercepts Decision, the Trial Chamber rejected Mr Mangenda's argument that the Prosecutor, in her requests for assistance to the Dutch authorities, had given them the impression that a judicial decision on the legality of the collection of the intercepts of telephone communications had already been taken and that this had led to a reduced judicial control by the Dutch Authorities.[1102]

517. The Trial Chamber found that, contrary to Mr Mangenda's suggestion, "the Request for Assistance can only be read as the Prosecution seeking judicial authorisation from the Dutch Authorities to collect the recordings, not merely informing them that such authorisation had been granted by the Single Judge".[1103] In

[1102] Second Dutch Intercepts Decision, para. 25, disposing of "Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution", 13 August 2015, ICC-01/05-01/13-1136-Conf-Corr (a public redacted version was registered on 15 July 2016, ICC-01/05-01/13-1136-Red).
[1103] Second Dutch Intercepts Decision, para. 25.

addition, the Trial Chamber considered that "the Dutch Authorities responded in a manner consistent with the assumption that the Request for Assistance was a request for judicial authorisation".[1104] In support of this consideration, the Trial Chamber specifically referred to the fact that "a Dutch examining magistrate granted authorisation with regard to Mr Mangenda's telephone numbers mentioned in the Request for Assistance" and that "the Dutch district court issued several decisions affirming the legality of the authorisation […] for telephone interception and the deliverance of the selected taped conversations to this Court".[1105]

518. The Trial Chamber also addressed Mr Mangenda's arguments that the Prosecutor had made a number of "misrepresentations" in her request to the Pre-Trial Single Judge for authorisation to seize the national authorities with requests for assistance to collect intercepts of Mr Mangenda's telephone communications.[1106] The Trial Chamber analysed each of these alleged "misrepresentations" individually, and, upon consideration, found that the corresponding assertions by the Prosecutor either had not been made in the way alleged by Mr Mangenda[1107] or were presented as "intermediate results in an on-going investigation" – which, in the Trial Chamber's view, were "reasonably brought forward" at that point in time – rather than established facts.[1108] The Trial Chamber rejected Mr Mangenda's argument accordingly.

(b) Submissions of the parties

(i) Mr Mangenda

519. Mr Mangenda submits that "[t]he manner in which the intercepted conversations were obtained, apart from the Western Union illegality, supports the argument that their admission would be antithetical and seriously damaging to the

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[1104] Second Dutch Intercepts Decision, para. 25.
[1105] Second Dutch Intercepts Decision, para. 25, referring to Annex to "Second Registry submissions related to the implementation of Decision ICC-01/05-01/13-403", 23 May 2014, ICC-01/05-01/13-424-Anx1, para. 1.
[1106] Second Dutch Intercepts Decision, paras 19-26.
[1107] Second Dutch Intercepts Decision, paras 19-20, addressing Mr Mangenda's allegation that the Prosecutor, in the request to the Pre-Trial Single Judge, asserted that "phone records from Mr Babala showed communication between Mr Mangenda and defence witnesses".
[1108] Second Dutch Intercepts Decision, paras 21-24, addressing Mr Mangenda's allegation that the Prosecutor, in the request to the Pre-Trial Single Judge, asserted that "Mr Mangenda was paying witnesses through Western Union".

integrity of the proceedings in this case".[1109] In this regard, Mr Mangenda makes essentially two sets of arguments, namely that: (i) the Prosecutor failed to provide the Dutch authorities with "concrete facts";[1110] and (ii) the Prosecutor misrepresented the evidence to the Pre-Trial Single Judge and the Dutch authorities.[1111] In addition, Mr Mangenda argues that there had also been "other misconducts".[1112]

520. Mr Mangenda argues that the Prosecutor "treated the Dutch authorities as a rubber-stamp" in that her request for assistance to the Netherlands only contained "conclusory information" and did not "allow Dutch authorities to make their own determination that intercepting the telephone calls was warranted".[1113] According to Mr Mangenda, "the Prosecut[or] was allowed to intercept the conversations by merely telling the Dutch authorities that [she] wanted to do so", and this "vitiates the requirement of judicial, not prosecutorial, approval for court orders".[1114] On this basis, Mr Mangenda submits that "[i]t would be antithetical and seriously damaging to the proceedings if this Court were to condone this abuse of judicial oversight and State sovereignty".[1115]

521. Mr Mangenda also submits that the Prosecutor misrepresented two relevant facts when seeking authorisation from the Pre-Trial Single Judge to apply to the Dutch authorities to intercept his telephone conversations, namely that Mr Mangenda had "sent Western Union payments to Defence witnesses" and that "the times and dates of transfers of exact sums of money suggest that Kilolo and Mangenda may be paying witnesses while they are at the seat of the Court".[1116] Mr Mangenda submits that these were misrepresentations which also misled the Dutch authorities as the Prosecutor's request was then forwarded to the Dutch authorities.[1117] He argues that "[t]he [Pre-Trial] Single Judge and, in turn, the Dutch authorities, relied upon these

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[1109] Mr Mangenda's Appeal Brief, para. 103.
[1110] Mr Mangenda's Appeal Brief, paras 103-106.
[1111] Mr Mangenda's Appeal Brief, paras 107-111. *See also* paras 30-35.
[1112] Mr Mangenda's Appeal Brief, para. 116.
[1113] Mr Mangenda's Appeal Brief, paras 104, 105.
[1114] Mr Mangenda's Appeal Brief, para. 106.
[1115] Mr Mangenda's Appeal Brief, para. 106.
[1116] Mr Mangenda's Appeal Brief, paras 107-109, referring to Request to Seize National Authorities, para. 21.
[1117] Mr Mangenda's Appeal Brief, para. 107.

misrepresentations when finding that there were grounds to authorise intercepting Mangenda's telephone conversations".[1118]

522. Mr Mangenda argues that the Trial Chamber erred by "excus[ing] these misrepresentations", characterising them as "an intermediate result of an on-going investigation".[1119] According to Mr Mangenda, failing to exclude evidence when applications are based on misrepresentation "would be to encourage law enforcement to make misstatements to obtain incriminating evidence and would be antithetical and seriously damaging to the proceedings".[1120]

523. Mr Mangenda concludes on this point by stating that, because of these misrepresentations – compounded by "[t]he absence of information provided to the Dutch authorities" – his telephone conversations were intercepted "at a time when [the Prosecutor] lacked probable cause to believe that [Mr Mangenda] was part of the scheme to bribe witnesses or that evidence of that scheme would be obtained by intercepting his calls".[1121] Accordingly, Mr Mangenda maintains, "[t]o admit those conversations was antithetical and seriously damaging to the integrity of the proceedings".[1122]

524. Finally, Mr Mangenda submits that an "[e]valuati[on] [of] the Prosecut[or]'s conduct" to determine whether admission of the Dutch Intercept Materials would be antithetical and seriously damaging to the proceedings "would not be complete without considering how the Prosecut[or] used the Article 70 investigation, and the intercepted conversations, to obtain a tactical advantage in [the] main case against Bemba".[1123] Mr Mangenda submits that "[t]hose facts are extensively set forth in the *Bemba* appeal brief in the main case, and are incorporated by reference herein".[1124]

[1118] Mr Mangenda's Appeal Brief, para. 110.
[1119] Mr Mangenda's Appeal Brief, para. 111, referring to Second Dutch Intercepts Decision, para. 22.
[1120] Mr Mangenda's Appeal Brief, para. 111.
[1121] Mr Mangenda's Appeal Brief, para. 112.
[1122] Mr Mangenda's Appeal Brief, para. 115.
[1123] Mr Mangenda's Appeal Brief, para. 116.
[1124] Mr Mangenda's Appeal Brief, para. 116, referring to the *Prosecutor v. Jean-Pierre Bemba Gombo*, "Appellant's document in support of the appeal", 19 September 2016, ICC-01/05-01/08-3434-Conf; a public redacted version was registered on 28 September 2016 (ICC-01/05-01/08-3434-Red), paras 13-114.

(ii) The Prosecutor

525. The Prosecutor submits that Mr Mangenda's suggestion that the Dutch authorities were not provided with sufficient information for them to execute a wiretap is "unfounded".[1125] According to the Prosecutor, "Mangenda's contention is belied by the fact that the Prosecution's request was judicially authorised by this Court and on the national level".[1126] On this basis, the Prosecutor argues that, contrary to Mr Mangenda's suggestion, the Dutch authorities did not "merely" do what the Prosecutor told them, but specifically analysed the propriety of the intercepts under Dutch law.[1127]

526. The Prosecutor also argues that "the Chamber correctly found that the Prosecution did not 'misrepresent' matters either to Pre-Trial Chamber II or the Dutch authorities" and that Mr Mangenda "repeats his rejected trial arguments, without showing that the Chamber erred by doing so".[1128] In addition, the Prosecutor states that Mr Mangenda's arguments in this respect "relies upon a narrow reading of [her] filing – one part of one sentence of a 15 page filing".[1129] She submits that her representations to the Pre-Trial Single Judge were based on a reasonable suspicion supported by the evidence that had been collected by that time.[1130] With reference to a number of portions of her request, the Prosecutor also argues that "[her] request was carefully worded to ensure that the [Pre-Trial] Single Judge understood that [her] conclusions were based on information she [had] reviewed *to date* and that [her] conclusions were not definitive".[1131]

527. Finally, the Prosecutor submits that Mr Mangenda's submissions as concerns the alleged "other misconducts" should be summarily dismissed.[1132] She argues that "[a]n appellant is obliged to substantiate his or her position in writing" and "cannot incorporate by reference arguments from another brief, much less from another case", including because "[s]uch an approach would also circumvent the page limits

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[1125] Response, para. 143.
[1126] Response, para. 143.
[1127] Response, para. 143.
[1128] Response, para. 145 (footnotes omitted).
[1129] Response, para. 145 (footnote omitted).
[1130] Response, para. 146.
[1131] Response, para. 147 (footnote omitted).
[1132] Response, para. 150.

imposed for appeal briefs".[1133] However, the Prosecutor submits that "if the Appeals Chamber were minded to consider Bemba's Main Case appellate arguments referred to by Mangenda, then [she] equally incorporates by reference [her] response to those arguments as set out in [her] response brief in the Main Case".[1134]

(c) Determination by the Appeals Chamber

528. The Appeals Chamber observes that Mr Mangenda's first argument is, in essence, that the Dutch authorities were not provided by the Prosecutor with sufficient information "to make their own determination" in support of her requests for assistance for the interception of Mr Mangenda's telephone communications.[1135] Effectively, Mr Mangenda argues that the Dutch authorities should not have executed the Prosecutor's request for assistance due to the lack of sufficient substantiating information. The Appeals Chamber is unpersuaded by this argument.

529. The Appeals Chamber recalls that, in the framework of Part 9 of the Statute, it is for the requested State to comply with a request for assistance in accordance with the procedures of national law,[1136] or consult with the Court in case it identifies any problem which may impede or prevent the execution of the request. In this respect, article 97 of the Statute specifically includes "[i]nsufficient information to execute the request" as one of the possible issues that may be addressed as part of the consultations between the Court and the requested State. In the present case, the Dutch authorities executed the Prosecutor's request for assistance and transmitted to the Court the requested material collected as part of this execution. It is evident, therefore, that the Dutch authorities considered that sufficient information, as required by Dutch law, had been provided by the Prosecutor. Thus, contrary to Mr Mangenda's suggestion,[1137] there is no basis to conclude the Prosecutor "treated the Dutch authorities as a rubber-stamp" and "abuse[d] […] State sovereignty", or that there was any "unchecked power in the hands of a prosecutor vitiat[ing] the requirement of judicial […] approval of court orders". The Appeals Chamber therefore rejects Mr Mangenda's arguments in this respect.

[1133] Response, para. 150 (footnotes omitted).
[1134] Response, para. 150.
[1135] Mr Mangenda's Appeal Brief, para. 105.
[1136] *See* article 93 (1) of the Statute.
[1137] Mr Mangenda's Appeal Brief, paras 104-106.

530. Turning to Mr Mangenda's second argument that the Prosecutor misrepresented certain facts to the Pre-Trial Single Judge, the Appeals Chamber recalls that the Trial Chamber, on the basis of a reading of the Prosecutor's request to the Pre-Trial Chamber "as a whole",[1138] found that it contained no such "misrepresentations".[1139] The Appeals Chamber observes that Mr Mangenda merely repeats the arguments he had made before the Trial Chamber, but does not identify any error by the Trial Chamber. Mr Mangenda's submissions as to alleged errors by the Trial Chamber are entirely based on the assertion that "misrepresentations" were made, in that they are limited to the argument that the Trial Chamber erred in "excus[ing] these misrepresentations" and that, "when applications [for evidence-gathering orders] are based upon misrepresentations", admission of the collected evidence "would be to encourage law enforcement to make misstatements to obtain incriminating evidence and would be antithetical and seriously damaging to the proceedings".[1140] Thus, Mr Mangenda alleges that the Trial Chamber erroneously "excused" the Prosecutor's "misrepresentations" and failed to exclude the Dutch Intercept Materials notwithstanding these "misrepresentations". The Appeals Chamber considers that this issue, however, does not arise in the circumstances at hand. As recalled, the Trial Chamber did not decide not to exclude the Dutch Intercept Materials as inadmissible evidence *despite* the "misrepresentations" at issue. Rather, it found that there existed no such "misrepresentations". As explained, Mr Mangenda, beyond the mere repetition of those arguments that were rejected by the Trial Chamber, does not claim – or, even less, substantiate – that the Trial Chamber made a factual error in finding so. In these circumstances, and recalling that proceedings before the Appeals Chamber are corrective in nature, the Appeals Chamber dismisses *in limine* Mr Mangenda's arguments in this respect.

531. In light of the above, the Appeals Chamber also rejects Mr Mangenda's argument that his telephone conversations were intercepted at a time when the Prosecutor lacked "probable cause to believe that [Mr Mangenda] was part of the scheme to bribe witnesses",[1141] as this argument is, in turn, contingent on his

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[1138] Second Dutch Intercepts Decision, para. 22.
[1139] Second Dutch Intercepts Decision, paras 19- 24.
[1140] Mr Mangenda's Appeal Brief, para. 111.
[1141] Mr Mangenda's Appeal Brief, para. 112.

assertions – rejected above – that the Dutch authorities were not provided with sufficient information and that the Prosecutor made misrepresentations to the Pre-Trial Single Judge.

532. Finally, the Appeals Chamber dismisses *in limine* Mr Mangenda's argument as to the "other misconducts" allegedly demonstrated by the facts "extensively set forth in the *Bemba* appeal brief in the main case".[1142] As previously held by the Appeals Chamber, appellants cannot make submissions on appeal by incorporation of arguments advanced in other filings.[1143] The attempt by Mr Mangenda to incorporate into his appeal against the Conviction Decision submissions made in another appeal by another appellant in another case is not acceptable.

5. Conclusion

533. In light of the above, the Appeals Chamber therefore concludes that the Trial Chamber did not err in its determination that the Dutch Intercept Materials had not been obtained in violation by means of a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute, and in its reliance on this material for its factual findings in the Conviction Decision.

534. Thus, the Appeals Chamber rejects:

(i) Mr Bemba's sub-ground 3.2. ("The Chamber applied an erroneous definition of privilege, and its exception"),[1144] sub-ground 3.3. ("The Chamber failed to rule on, or remedy the ineffective system for vetting privilege, established by the [Pre-Trial] Single Judge")[1145] and sub-ground 3.4. in the part related to the Dutch Intercepts ("If the Chamber had considered the second limb of Article 69(7), it would have excluded the […] Dutch materials reviewed by the [Pre-Trial] Single Judge");[1146]

[1142] Mr Mangenda's Appeal Brief, para. 116, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, "Appellant's document in support of the appeal", 19 September 2016, ICC-01/05-01/08-3434-Conf (a public redacted version was registered on 28 September 2016, ICC-01/05-01/08-3434-Red), paras 13-114.
[1143] *See e.g.* *Lubanga* OA6 Judgment, para. 29.
[1144] Mr Bemba's Appeal Brief, paras 155-163.
[1145] Mr Bemba's Appeal Brief, paras 164-179.
[1146] Mr Bemba's Appeal Brief, paras 180-185.

(ii) Mr Kilolo's Ground 2 ("The Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege"[1147]); and

(iii) Mr Mangenda, Ground 1, section 2, in the part concerning the alleged violations in the collection of the Dutch Intercept Materials.[1148]

E. Alleged errors concerning the admissibility of Mr Arido's statements to the French police

535. As part of his appeal on the assessment of the evidence, Mr Arido argues that the Trial Chamber erred in relying on two statements of interviews that Mr Arido gave to the French police on 23 November 2013, shortly after his arrest (CAR-OTP-0074-1065), and on 17 January 2014 (CAR-OTP-0077-0169[1149]).[1150] Mr Arido's argument is that these two statements should have been excluded because they had been collected in violation of rule 111 (1) of the Rules.[1151] As these arguments concern the admissibility of the materials at issue, the Appeals Chamber will address them at this juncture.

1. Relevant procedural background

536. On 21 August 2015, the Prosecutor submitted into evidence the two statements of interviews that Mr Arido gave to the French police.[1152]

537. On 14 September 2015, Mr Arido requested the exclusion of these two statements on the grounds that: (i) they were not "audio or video recorded, contrary to the requirements of Rule 112" of the Rules; (ii) he was not properly informed of the

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[1147] Mr Kilolo's Appeal Brief, paras 107-124.
[1148] This includes, in particular, the sections "[t]he Chamber erred in failing to exclude the intercepts as derivative evidence of the Western Union misconduct", "[t]he Prosecution failed to provide concrete facts to the Dutch authorities", "[t]he Prosecution misrepresented the evidence to the Pre-Trial Chamber and Dutch authorities", "[t]he facts in possession of the Prosecution at the time did not provide probable cause to intercept Mangenda's calls" and "[o]ther misconducts". Mr Mangenda's Appeal Brief, paras 95-116.
[1149] The Appeals Chamber notes that another copy of the same document provided to the Prosecutor by the French authorities is registered with the reference number CAR-OTP-0078-0117.
[1150] Mr Arido's Appeal Brief, paras 373-382.
[1151] Mr Arido's Appeal Brief, para. 375.
[1152] "Prosecution's Third Request for the Admission of Evidence form the Bar Table", 21 August 2015, ICC-01/05-01/13-1170-Conf; a public redacted version was registered on 18 September 2015 (ICC-01/05-01/13-1170-Red), paras 2, 24-27; Annex A to the "Prosecution's Third Request for the Admission of Evidence form the Bar Table" (ICC-01/05-01/13-1170-Conf-AnxA), pp. 15-16.

offences charges against him which violated article 55 (2) of the Statute; and (iii) the statements were taken in violation of his right to obtain effective legal assistance and therefore violated his right to remain silent.[1153]

538. The Trial Chamber rejected Mr Arido's request on 30 October 2015.[1154] It found that the procedural requirements under article 55 (2) of the Statute had been respected,[1155] and, with reference to the requirements under rule 112 of the Rules and article 91 (1) of the Statute, considered that the French authorities had taken the statements made by Mr Arido on French territory in compliance with French law, and that, therefore, the Trial Chamber "[was] precluded from ruling on whether French law was correctly applied in this context".[1156]

539. On 8 April 2016, Mr Arido requested again that the two statements be excluded.[1157] While he reiterated some of his previous arguments,[1158] he also submitted that because the statements were signed only by Mr Arido and the police officer and not by the counsel, "[a]s a matter of law, both interviews should be excluded, based on a violation of Rule 111".[1159]

540. The Trial Chamber disposed of this second request by Mr Arido on 29 April 2016.[1160] It held that Mr Arido had already challenged the admissibility of the two statements and "simply ignore[d]" the fact that the Trial Chamber has rejected his request to declare them inadmissible and "fail[ed] to address any of the necessary criteria for reconsideration".[1161] The Trial Chamber further held that it did not find "any apparent reasons which demonstrate[d] a 'clear error of reasoning' or the

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[1153] "Narcisse Arido's Response to the Prosecution's Third Bar Table Motion (ICC-01/05-01/13-1170-Conf) of 21 August 2015", 14 September 2015; a public redacted version was registered on 8 October 2015 (ICC-01/08-01/13-1241-Red), paras 33-56.
"Narcisse Arido's Response to the Prosecution's Third Bar Table Motion" (ICC-01/05-01/13-1170-Conf) of 21 August 2015
[1154] Decision on Admissibility of Detention Centre Intercept Materials.
[1155] Decision on Admissibility of Detention Centre Intercept Materials, para. 22.
[1156] Decision on Admissibility of Detention Centre Intercept Materials, para. 24, referring to CAR-OTP-0089-0007 where the French authorities confirmed that the two statements complied with French law.
[1157] Mr Arido's Second Request for Exclusion of Statements.
[1158] Mr Arido's Second Request for Exclusion of Statements, *e.g.*, paras 12-17.
[1159] Mr Arido's Second Request for Exclusion of Statements, para. 20. *See also* paras 18, 19.
[1160] First Western Union Decision, para. 76, p. 25.
[1161] First Western Union Decision, para. 75.

necessity to 'reconsider the prior decision in order to prevent an injustice'".[1162] Mr Arido's request for leave to appeal the dismissal *in limine* of his argument concerning the alleged violation of rule 111 (1) of the Rules[1163] was subsequently rejected by the Trial Chamber.[1164]

541. In the Conviction Decision, the Trial Chamber relied on the statement given by Mr Arido to the French police on 23 November 2013 for its factual findings on Mr Arido's *mens rea* for his commission of the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6 under article 70 of the Statute.[1165] More specifically, that Trial Chamber considered that in his statement to the French police, "Mr Arido [had] stated his belief that D-2, D-3, D-4 and D-6 had not been military persons".[1166]

2. Submissions of the parties

(a) Mr Arido

542. Mr Arido submits that the Trial Chamber erred in relying, in support of its factual findings in the Conviction Decision, on the two statements he gave to the French police.[1167] He argues that these two statements should have been excluded "as a matter of law, based on the violation of Rule 111", given that, in violation of the procedural requirements under that provision, they are not signed by the counsel assisting Mr Arido and present during the interviews, nor is any reason provided.[1168] Mr Arido argues that he had made this argument at trial, but that the Trial Chamber never addressed his challenge in this regard limiting its assessment to matters concerning the requirements under rule 112 of the Rule.[1169] He submits in this regard

[1162] First Western Union Decision, para. 76.
[1163] Mr Arido's Request for Leave to Appeal the First Western Union Decision.
[1164] "Decision on Babala, Arido and Mangenda Defence Requests to Appeal 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)'", 23 May 2016, ICC-01/05-01/13-1898.
[1165] Conviction Decision, para. 671.
[1166] Conviction Decision, para. 671, referring to CAR-OTP-0074-1065-R02 at 1066-R02 and 1068-R02.
[1167] Mr Arido's Appeal Brief, para. 382.
[1168] Mr Arido's Appeal Brief, paras 373-375.
[1169] Mr Arido's Appeal Brief, paras 375-379, referring to First Western Union Decision, paras 75-76 and Decision on Admissibility of Detention Centre Intercept Materials, paras 23-24.

that the Trial Chamber's reliance on the two statements in the Conviction Decision "implicitly means that [it] did not find any violation of Rule 111".[1170]

(b) The Prosecutor

543. The Prosecutor argues that Mr Arido "repeatedly challenged" the admissibility of his statements to the French police, and that the Trial Chamber "properly rejected" Mr Arido's arguments in that regard.[1171] The Prosecutor submits that "the sole part of rule 111 that applies when the person is questioned by national authorities" is that of sub-rule (2),[1172] which provides that the person who is questioned must be informed of his or her rights under article 55 (2) of the Statute and that the fact that this information has been provided shall be noted in the record. In this regard, the Prosecutor argues that 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".[1173] On this basis, the Prosecutor argues that "Arido's submission regarding rule 111(1) and the lack of his counsel's signature should be dismissed".[1174]

3. Determination by the Appeals Chamber

544. The Appeals Chamber agrees with Mr Arido that the Trial Chamber did not address his arguments as to the alleged procedural violations of rule 111 (1) of the Rules. As recalled above, the Trial Chamber, on 30 October 2015, only addressed Mr Arido's arguments as concerns the alleged violations of article 55 (2) of the Statute and rule 112 of the Rules,[1175] and was thus incorrect in subsequently dismissing Mr Arido's arguments on the alleged violations of rule 111 of the Rules on the ground that he had "fail[ed] to address any of the necessary criteria for reconsideration".[1176] As correctly submitted by Mr Arido, "the [alleged] Rule 111 violation […] was and still remains undecided".[1177] The Appeals Chamber also recalls that the Trial Chamber

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[1170] Mr Arido's Appeal Brief, para. 381.
[1171] Response, para. 759.
[1172] Response, para. 759.
[1173] Response, fn. 2808, referring to Håkan Friman, "Investigation and Prosecution", in Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 536.
[1174] Response, para. 759.
[1175] Decision on Admissibility of Detention Centre Intercept Materials, paras 23-26.
[1176] First Western Union Decision, para. 75.
[1177] Mr Arido's Appeal Brief, para. 180.

relied on Mr Arido's statement to the French police of 23 November 2013 for its factual findings in the Conviction Decision that Mr Arido had the required *mens rea* for the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6 under article 70 (1) (c) of the Statute.[1178] In these circumstances, the Appeals Chamber considers it necessary to address the matter of whether this statement (as well as the second statement of 17 January 2014) should have been excluded as inadmissible evidence under article 69 (7) of the Statute.

545. Mr Arido was questioned by the French national authorities, for the first time, on 23 November 2013. He was then questioned again by the French authorities on 17 January 2014 in the presence of representatives of the Office of the Prosecutor of the Court. On both occasions, Mr Arido was questioned by the French police while under arrest in France in execution of the warrant for his arrest issued by the Pre-Trial Single Judge on 22 November 2013,[1179] and pending his surrender to the Court.[1180] Therefore, when Mr Arido was questioned by the French police, there were already reasonable grounds to believe that he had committed an offence within the jurisdiction of the Court. Therefore, the requirements under article 55 (2) of the Statute applied to his interviews. No argument is brought by Mr Arido as concerns any alleged violation of these procedural requirements. The Appeals Chamber also observes that rule 112 of the Rules, while concerning questioning of persons against whom a warrant of arrest has been issued, is however not applicable to the circumstances at hand because it only applies when the person is questioned by the Prosecutor, and not when he or she is questioned by national authorities, as is the case regarding Mr Arido's interviews by the French police. Also this aspect is not disputed in the present appeal.

546. What is, however, disputed in the appeal is whether rule 111 (1) of the Rules applies also when the person is questioned by the national authorities. Mr Arido's arguments are dependent on an affirmative answer to this question, while the Prosecutor explicitly asserts that this is not the case and that the "sole part" of rule

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[1178] Conviction Decision, para. 671.
[1179] "Warrant of arrest for Jean-Pierre BEMBA GMOBO, Aimé KILOLO MUSAMBA KABONGO, Fidéle BABALA WUNDU and Narcisse ARIDO", ICC-01/05-01/13-1-tENG.
[1180] The Appeals Chamber observes that Mr Arido was arrested by the French authorities on 23 November 2013 and surrendered to the Court on 18 March 2014. *See* "Decision convening a hearing for the first appearance of Narcisse Arido", 18 March 2018, ICC-01/05-01/13-265.

111 of the Rules that applies when the person is questioned by national authorities is sub-rule (2).[1181] Rule 111 (1) of the Rules stipulates:

> A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.

547. The Appeals Chamber observes that this provision does not specify whether the procedure contained therein shall be observed only by the Prosecutor or also by the national authorities, contrary to rule 111 (2) which indicates that it also applies when national authorities question a person in connection with proceedings before the Court.[1182] This explicit reference contained in the second paragraph of rule 111, and the absence of such a reference in the first paragraph of the same provision, already tend to indicate that the procedure contained in rule 111 (1) only applies to the Prosecutor and not to the national authorities. This interpretation finds support in other statutory provisions and principles.

548. Indeed, as already indicated above,[1183] the legal framework of the Court reflects a clear separation between the national and international spheres in the exercise of the respective competences of the Court and the States. The Court applies its own applicable law under article 21 of the Statute, and States, on their territory, apply their own domestic systems, including when they act upon a request of assistance by the Court. Article 93 (1) of the Statute explicitly stipulates that States Parties comply with requests by the Court "under procedures of national law". Impositions of particular procedures to States are exceptions to this statutory provision and its underlying principles and, as such, must be narrowly construed. The Rules of Procedure and Evidence cannot deviate from them either, as they are "in all cases" [1184] a subordinate

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[1181] Response, para. 759.
[1182] Rule 111 (2) of the Rules reads: "When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record".
[1183] *See supra* para. 288.
[1184] *See* Explanatory note to the Rules of Procedure and Evidence.

instrument to the Statute. The Appeals Chamber further notes in this regard that also rule 111 (2) of the Rules cannot be interpreted as imposing an additional duty on States Parties beyond those provided in the Statute, and, in particular, those under article 55 of the Statute. Indeed, rule 111 (2) of the Rules only mandates that "due regard shall be given to article 55"and that the fact that a person has been informed of his or her rights under article 55 (2) of the Statute "shall be noted in the record".

549. For these reasons, the Appeals Chamber is not persuaded by the argument that the procedure set forth in rule 111 (1) of the Statute shall be followed also by national authorities when questioning a person in their own territory upon a request of assistance by the Court. Such interpretation of this rule would impose on States a duty to replace the procedures under their national law and would, thus, deviate from the principle of separation between the national and international spheres and constitute an exception to article 93 (1) of the Statute. In the absence of an explicit indication to that effect in rule 111 (1) of the Rules, such statutory provision and underlying principles must prevail.

550. The Appeals Chamber therefore concludes that rule 111 (1) of the Rules is not applicable when the person is questioned by national authorities. Accordingly, since Mr Arido's statements were produced as part of his questioning by the French police, the fact that they do not contain the signatures of Mr Arido's counsel is inconsequential. Given that all procedural requirements applicable to Mr Arido's questioning by the French authorities (*i.e.*, those set out in article 55 (2) of the Statute and rule 111 (2) of the Rules) were complied with, the statements at issue are not inadmissible evidence. Mr Arido's arguments are therefore rejected.

F. Overall conclusion

551. In light of the above, the Appeals Chamber concludes that the Trial Chamber did not err in not excluding, as inadmissible evidence, the Western Union Records, the Detention Centre Materials, the Dutch Intercept Materials and Mr Arido's statements to the French police, and in relying on this evidence for its factual findings

in the Conviction Decision. Mr Kilolo's Grounds 1[1185] and 2,[1186] Mr Mangenda's Ground 1[1187] and Mr Bemba's Ground 3[1188] are therefore dismissed. Likewise dismissed are Mr Babala's[1189] and Mr Arido's[1190] discrete arguments concerning the alleged inadmissibility of documentary evidence relied upon by the Trial Chamber in the Conviction Decision.

VII. GROUNDS OF APPEAL ALLEGING OTHER PROCEDURAL ERRORS

A. Alleged errors concerning the absence of rulings on the relevance or admissibility of all evidence submitted

552. Mr Babala, Mr Arido and Mr Bemba argue that the Conviction Decision is vitiated by errors concerning the procedure in which documentary evidence has been introduced in the course of the trial.[1191]

1. Relevant procedural background

553. On 24 September 2015, at the beginning of the trial, the Trial Chamber issued a decision laying out its general approach to the consideration of relevance and/or admissibility of documentary evidence submitted by the parties.[1192] In this decision, the Trial Chamber determined that, "as a general rule", it would "defer[] its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2) of the Statute", and would "consider the relevance, probative value and

[1185] "The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute and that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met, and by admitting and relying on evidence obtained because of or resulting from the Western Union materials" (Mr Kilolo's Appeal Brief, paras 20-106).
[1186] The Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege. (Mr Kilolo's Appeal Brief, paras 107-124).
[1187] "The Trial Chamber improperly admitted audio-surveillance evidence" (Mr Mangenda's Appeal Brief, paras 16-126).
[1188] "The Chamber Based the Conviction, to a Decisive Level, on Privileged and Illegally Collected Evidence" (Mr Bemba's Appeal Brief, paras 141-187).
[1189] Mr Babala's Appeal Brief, paras 19-33.
[1190] Mr Arido's Appeal Brief, paras 123-153, 373-382.
[1191] Mr Babala's Appeal Brief, paras 49-72; Mr Arido's Appeal Brief, paras 241-246; Mr Bemba's Appeal Brief, paras 188-201.
[1192] First Decision on Submission of Documentary Evidence.

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".[1193]

554. The Trial Chamber based this decision on the provisions of articles 64 (9) (a), 69 (4) and 74 (2) of the Statute and rule 63 (2) of the Rules, and the Appeals Chamber's holding in the *Bemba* OA5 OA6 Judgment.[1194] It explained that this approach was justified by the fact that: (i) "the Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial";[1195] (ii) "[t]he relevance of a particular piece of evidence may not be possible to determine without consideration of other items of evidence, or even the totality of the evidence";[1196] (iii) "[d]eferring these assessments is also more consonant with" the right and duty to assess freely, according to Rule 63(2) of the Rules, all evidence submitted;[1197] (iv) "a significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings [as] [r]elevance and probative value, which are closely related in any event, will only require one Chamber assessment if they are deferred to the final judgment";[1198] (v) "there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately";[1199] (vi) "[t]he notion of a fair trial does not require that the Chamber rule on the admissibility of each piece of evidence upon submission – Article 69(4) of the Statute clearly gives the Chamber discretion in this respect";[1200] and (vii) "[u]nlike situations where submitting marginally relevant or prejudicial material may unduly compromise the proceedings, such as when these materials are introduced in trials where fact-finding is done by a jury, these issues do not apply when professional judges are evaluating the evidence presented".[1201]

[1193] First Decision on Submission of Documentary Evidence, para. 9.
[1194] First Decision on Submission of Documentary Evidence, paras 7-10, referring to *Bemba* OA5 OA6 Judgment, para. 37.
[1195] First Decision on Submission of Documentary Evidence, para. 10.
[1196] First Decision on Submission of Documentary Evidence, para. 10.
[1197] First Decision on Submission of Documentary Evidence, para. 10.
[1198] First Decision on Submission of Documentary Evidence, para. 11.
[1199] First Decision on Submission of Documentary Evidence, para. 12.
[1200] First Decision on Submission of Documentary Evidence, para. 12.
[1201] First Decision on Submission of Documentary Evidence, para. 12.

555. Accordingly, the Trial Chamber decided not to make a ruling on the relevance and/or admissibility of the items of documentary evidence that had been presented by the Prosecutor and to which the accused persons had already responded, and "consider[ed] these items to be submitted and discussed within the meaning of Article 74(2) of the Statute".[1202] Subsequently, the Trial Chamber rendered further decisions recognising as "submitted" additional items of documentary evidence presented by the parties.[1203]

556. Conversely, in the course of the trial, the Trial Chamber issued several decisions addressing requests to declare items of documentary evidence inadmissible under article 69 (7) of the Statute,[1204] and to introduce certain prior recorded testimony under rule 68 of the Rules.[1205] In this respect, the Trial Chamber had indeed clarified that it was not "stop[ped] […] from giving earlier consideration to admissibility objections related to, as examples, certain motions made under Article 69(7) of the Statute (where it is noted that the Chamber has an obligation to rule on the admissibility of evidence), or whether certain statutory pre-requisites are met for admitting prior recorded testimony under Rule 68 of the Rules".[1206]

557. In the Conviction Decision, the Trial Chamber explained that:

> it considered all 'recognised' submitted evidence and all corresponding objections in its deliberations. However, the Chamber's admissibility approach does not mean that all such items have been discussed in the present judgment. Article 74(5) of the Statute merely requires the Chamber to provide a 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'. Regardless of a Chamber's admissibility approach, as long as the

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[1202] First Decision on Submission of Documentary Evidence, para. 16.
[1203] Second Decision on Submission of Documentary Evidence; Third Decision on Submission of Documentary Evidence; Fourth Decision on Submission of Documentary Evidence; Fifth Decision on Submission of Documentary Evidence.
[1204] *See e.g.* First Western Union Decision; Second Western Union Decision; First Decision on Dutch Intercepts; Second Dutch Intercepts Decision; Third Decision on Dutch Intercepts; Decision on Admissibility of Detention Centre Materials.
[1205] *See e.g.* "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules", 29 October 2015, ICC-01/05-01/13-1430; "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; "Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence'", 12 November 2015, ICC-01/05-01/13-1481-Red; "Decision on the 'Motion on behalf of Mr Aimé Kilolo for the Admission of the Previously Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence'", 29 April 2016, ICC-01/05-01/13-1857.
[1206] First Decision on Submission of Documentary Evidence, para. 13.

judgment remains 'full and reasoned' it need not discuss therein every item of evidence submitted during trial [footnote omitted].[1207]

2. Submissions of the parties

(a) Mr Babala

558. Mr Babala's argues that the Trial Chamber erred in its "approach to evidence", which, in his view, was contrary to article 74 (5) of the Statute, rule 64 (2) of the Rules and the *Bemba* OA5 OA6 Judgment, and caused prejudice to the rights of the defence.[1208] He argues that the Trial Chamber erred in (i) failing to issue "at any stage of the proceedings" any ruling on the admissibility of each item of evidence "on an case-by-case basis";[1209] and (ii) "deferring any decisions on the admissibility of evidence until the judgment".[1210]

559. First, Mr Babala observes that "no decision on the admissibility of evidence was issued at any stage of proceedings",[1211] and argues that this was contrary to the Trial Chamber's "duty of ruling on the admissibility of every item of evidence on a case-by-case basis".[1212] Mr Babala states in this respect that this duty has been clearly established by the Appeals Chamber in the *Bemba* OA5 OA6 Judgment.[1213]

560. In addition, according to Mr Babala, "[t]he Chamber's refusal to rule on the admissibility of evidence is plainly contrary to its duty of giving reasons for any rulings it makes on evidentiary matters [under rule 64 (2) of the Rules] and of providing a full and reasoned statement of its findings on the evidence [under article 74 (5) of the Statute]."[1214] Mr Babala submits in this regard that "[e]ven a close examination of the [Conviction Decision], however, fails to reveal what evidence was admitted or not".[1215] In particular, according to Mr Babala, "the fact that no findings were issued on the Defence arguments concerning the prejudice caused by particular items prevents the Defence from raising substantive objections on appeal" and

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[1207] Conviction Decision, para. 193.
[1208] Mr Babala's Appeal Brief, paras 49-72.
[1209] Mr Babala's Appeal Brief, paras 52, 61-69.
[1210] Mr Babala's Appeal Brief, paras 53-60.
[1211] Mr Babala's Appeal Brief, para. 52.
[1212] Mr Babala's Appeal Brief, para. 62.
[1213] Mr Babala's Appeal Brief, paras 62, 67, 72.
[1214] Mr Babala's Appeal Brief, para. 67. *See also* paras 66, 267.
[1215] Mr Babala's Appeal Brief, para. 66.

"impedes th[e] [Appeals] Chamber's proper review of the [Conviction Decision]".[1216] He states in this regard: "[w]ithout knowing what evidence was admitted and for what reasons the Trial Chamber considered that the prejudice caused by using certain items of evidence was outweighed by their probative value, how can the Appeals Chamber assess whether the Trial Chamber's finding was reasonable?".[1217] Further, Mr Babala argues that the Trial Chamber erred in establishing the authenticity of a number of logs of Mr Bemba's telephone calls at the detention centre.[1218]

561. Second, Mr Babala submits that the Trial Chamber's "approach of deferring any decisions on the admissibility of evidence until the judgment" "caused prejudice to the rights of the defence, in particular the right to be tried fairly and impartially and to be able to prepare a defence" under article 67 of the Statute.[1219] In this respect, according to Mr Babala, "[t]he Trial Chamber's approach made it impossible for the parties to know what evidence had and had not been admitted" and he was therefore "forced to invest time and resources in responding to all the evidence submitted".[1220] In this respect, Mr Babala argues that, given the "remarkable amount of documentary evidence" in this case, he had to "analyse, investigate and respond […] to items of evidence that would be ultimately excluded by the Chamber".[1221]

(b) Mr Arido

562. Mr Arido argues that "[t]he Trial Chamber erred in its approach to evidence, particularly in respect to the Bar Table Motions, which violated Appellant's right to a fair trial".[1222] He argues that the "evidentiary regime" put in place by the Trial Chamber "poses fundamental fair trial violations for the Appellant".[1223] In particular, according to Mr Arido, he "[was] deprived of his right to confront all the evidence against him, and to litigate relevance or admissibility, based on the criteria of reliability, authenticity or probative vs. prejudicial value", because his defence "ha[d]

[1216] Mr Babala's Appeal Brief, para. 69.
[1217] Mr Babala's Appeal Brief, para. 69.
[1218] Mr Babala's Appeal Brief, para. 64.
[1219] Mr Babala's Appeal Brief, para. 53.
[1220] Mr Babala's Appeal Brief, para. 53.
[1221] Mr Babala's Appeal Brief, paras 58, 59.
[1222] Mr Arido's Appeal Brief, pp. 53-55.
[1223] Mr Arido's Appeal Brief, para. 242.

no way to know during the course of the trial […] what evidence […] [would] be admitted and on what evidentiary criteria".[1224]

563. Mr Arido also argues that he is deprived of his right "to argue any violations based on the 1205 items [of documentary evidence submitted in the present case], because [he] has no idea on what documentary evidence the conviction is based, but for the few references mentioned in the [Conviction Decision]".[1225] According to Mr Arido, the "hidden danger" is "what about the evidence which is not mentioned in the [Conviction Decision], but relied upon, nevertheless, by the [Trial Chamber]?".[1226] Mr Arido avers that while the "'safeguard' is supposed to be the full and reasoned statement on findings on evidence and conclusions, as per Article 74(5)", in this particular case, "this, clearly doesn't work, given the [Conviction Decision]'s multiple failures to provide a full and reasoned statement as to its evidentiary findings and conclusions".[1227]

(c) Mr Bemba

564. Mr Bemba's sub-ground 4.1. of appeal is that "[t]he Chamber committed reversible errors of law and procedure by failing to issue a reasoned determination concerning the admissibility of individual items of evidence".[1228]

565. Mr Bemba argues, first, that "having deferred its admissibility decision to the Judgment, the Chamber was then required to issue item-by-item admissibility determinations, which comported with the Appeals Chamber's requirements".[1229] According to Mr Bemba, the Appeals Chamber, in the *Bemba* OA5 OA6 Judgment, had indeed indicated that "at some point in the proceedings, the Chamber must decide on the admissibility of each item of evidence".[1230] Mr Bemba submits that the fact that, in the Conviction Decision, the Trial Chamber did not "discuss[] the criteria

[1224] Mr Arido's Appeal Brief, para. 242 (emphasis omitted).
[1225] Mr Arido's Appeal Brief, para. 245.
[1226] Mr Arido's Appeal Brief, para. 245.
[1227] Mr Arido's Appeal Brief, para. 246.
[1228] Mr Bemba's Appeal Brief, paras 188-202.
[1229] Mr Bemba's Appeal Brief, para. 193.
[1230] Mr Bemba's Appeal Brief, para. 193.

under Article 69(2) and (4) for individual items of evidence" was contrary to the "Appeals Chamber's directive" in the *Bemba* OA5 OA6 Judgment.[1231]

566. Mr Bemba submits that he was prejudiced in several respects by the Trial Chamber's approach. In particular, he argues that: (i) "[t]he Prosecution's extensive reliance on the admission of hearsay evidence through [submission of documentary evidence] was prejudicial and, due to the Prosecution's failure to include sufficient information concerning the admissibility criteria, did not satisfy the burden of proof";[1232] (ii) he had to respond to the Prosecutor's first submission of documentary evidence "without the benefit of an updated DCC, Pre-Trial Brief, or disclosure of the Prosecution expert report on intercept evidence";[1233] (iii) he was "ambushed" at the end of the trial with "Prosecution theories concerning the relevance and precise meaning of intercepts that were never clearly pleaded in a timely manner" and the Trial Chamber's "own interpretations or relevance and reliability", as the Prosecutor had failed to explain the relevance of each item of documentary evidence at the point of its submission;[1234] (iv) "[t]he absence of an item-by-item consideration as to whether the Prosecution fulfilled the criteria for admission, also resulted in broad categories of evidence being admitted", in particular inadmissible documentary digital evidence that had not been "authenticated" through testimonial evidence;[1235] and (iv) the Trial Chamber's "flawed approach to the admissibility of evidence" undermined his right to present evidence under article 67 (1) (e) of the Statute.[1236]

(d) The Prosecutor

567. The Prosecutor argues that "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 [and] also misinterpret[] the statutory provisions governing the submission of evidence".[1237] In particular, according to her, "[g]eneric challenges to the principles governing the evidence submission regime and its suitability must fail [as] Babala, Arido and Bemba cannot rewrite the Statute or

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[1231] Mr Bemba's Appeal Brief, paras 192, 193.
[1232] Mr Bemba's Appeal Brief, para. 190.
[1233] Mr Bemba's Appeal Brief, para. 190.
[1234] Mr Bemba's Appeal Brief, paras 190-191.
[1235] Mr Bemba's Appeal Brief, paras 191, 196.
[1236] Mr Bemba's Appeal Brief, paras 199-201.
[1237] Response, para. 152.

supplant the drafters' intention merely because they prefer a different system for the admission of evidence".[1238] The Prosecutor argues that, in the legal framework of this Court, a trial chamber is not required to render decisions on admissibility of evidence.[1239] She submits that the Trial Chamber did not "admit" any evidence when it was presented, permitted the parties to challenge the submitted evidence ("and the Defence did so extensively") and then properly limited its consideration to the evidence "submitted" according to article 74 (2) of the Statute.[1240]

568. According to the Prosecutor, several national systems, based on the continental legal system, such as those of France, Germany, Belgium, Portugal and Finland, follow procedures similar to that implemented by the Trial Chamber.[1241] In addition, she argues that the Trial Chamber "followed the Appeals Chamber's guidance in deciding to use the submission of evidence regime", in that the Appeals Chamber has endorsed the legality of this particular regime.[1242]

569. The Prosecutor also submits that the appellants fail to show any prejudice, and that their unsupported arguments in this regard should be dismissed, most notably because they are vague, speculative and unspecified,[1243] are based on a misconception of the Trial Chamber's general regime or of the Trial Chamber's specific findings,[1244] or are unrelated to their grounds of appeal concerning the "submission regime" but rather express mere dissatisfaction with the Trial Chamber's assessment of the evidence.[1245]

3. Determination by the Appeals Chamber

570. In light of the arguments raised by Mr Babala, Mr Arido and Mr Bemba, the Appeals Chamber addresses below two issues in turn: (i) whether, in the legal system of the Court, a trial chamber is required to "admit" the items of evidence submitted during the trial and render rulings on the relevance and admissibility of each item of

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[1238] Response, para. 153.
[1239] Response, para. 160.
[1240] Response, para. 165.
[1241] Response, para. 159.
[1242] Response, paras 156-158, referring to *Bemba* OA5 OA6 Judgment. *See also* paras 160, 161, 172, 173, 182 where the Prosecutor argues that the appellants misrepresent the Appeals Chamber's *Bemba* OA5 OA6 Judgment.
[1243] *See e.g.* Response, paras 179, 185, 191.
[1244] *See e.g.* Response, paras 174-176, 179, 181.
[1245] Response, paras 187-190.

evidence, in accordance with a general "admissibility test"; and (ii) whether, in the circumstances of the present case, the Trial Chamber's decision not to exercise its discretion to rule on the relevance and admissibility of evidence caused undue prejudice to the rights of the accused persons.

571. The Appeals Chamber clarifies that this analysis deals with issues raised with respect to the procedure implemented by the Trial Chamber. Alleged factual errors by the Trial Chamber in its evaluation of the guilt or innocence of the accused are addressed by the Appeals Chamber in the section of the present judgment disposing of the grounds of appeal alleging errors by the Trial Chamber in the assessment of evidence.[1246]

(a) Whether the Court's legal framework mandates rulings on the relevance and admissibility of each item of evidence on the basis of a general admissibility test

572. The Appeals Chamber recalls that, in the present case, the Trial Chamber did not make individual rulings on the relevance or admissibility of items of documentary evidence submitted by the parties. In particular, the Trial Chamber did not conduct a process of "admission" of evidence – neither in the course of the trial nor as part of the Conviction Decision. Rather, it ensured that the items of evidence submitted by the parties were not inadmissible by virtue of the operation of an exclusionary rule in the legal instruments of the Court, *i.e.*, in the language of the Trial Chamber, that they were not affected by a "procedural bar".[1247] In particular, the Trial Chamber disposed of requests for the exclusion of evidence under article 69 (7) of the Statute – such as, as seen above, the Western Union Records, the Detention Centre Materials and the Dutch Intercept Materials – and verified, prior to the introduction of prior recorded testimony, that the relevant requirements under rule 68 of the Rules had been met. When no such "procedural bars" were found to exist or none were raised, the Trial Chamber "recognised" the "submission" of the concerned evidence by the relevant party. Subsequently, in the Conviction Decision, the Trial Chamber assessed the oral evidence elicited at trial as well the documentary evidence submitted in the

[1246] *See infra* Section X.
[1247] *See* Conviction Decision, para. 191.

proceedings as part of its determination of the guilt or innocence of the accused persons.

573. Mr Babala, Mr Arido and Mr Bemba argue that this approach by the Trial Chamber is erroneous as a matter of law. The Appeals Chamber observes that the appellants' arguments in this respect are entirely based on the underlying premise that, in the legal framework of this Court, a trial chamber, for the purpose of its decision under article 74 of the Statute, can only rely on evidence that it had individually "admitted" after satisfying itself, on an item-by-item basis, that certain "admissibility criteria" are met. The Prosecutor challenges this premise arguing that "Babala, Arido and Bemba cannot rewrite the Statute or supplant the drafters' intention merely because they prefer a different system", and that "the Statute, the Appeals Chamber, other Trial Chambers of this Court, and several national legal systems have all endorsed the […] regime" implemented by the Trial Chamber.[1248]

574. At the outset, the Appeals Chamber observes that in support of their respective positions, the parties refer, *inter alia*, to domestic procedural systems[1249] and to the practice of international(ised) tribunals.[1250] The Appeals Chamber notes, first, that domestic systems differ greatly with respect to the matter at issue,[1251] and are influenced by their own underlying legal culture.[1252] Similarly, and as explained in

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[1248] Response, paras 153, 159.
[1249] *See e.g.* Response, para. 158, fn. 537.
[1250] *See e.g.* Response, fn. 516; Mr Babala's Appeal Brief, fn. 87.
[1251] For a comparison between the different approaches in, for instance, German law and United States law on this matter, *see* C. Schuon, "International Criminal Procedure - A Clash of Legal Cultures" (TMC Asser Press, The Hague, 2010), p. 51, observing that: "[i]n U.S. law, evidence is given careful attention at the admissibility stage. German law allows evidence much more readily into trial. In fact, a German lawyer would not even consider the court deciding on the evidence's suitability for trial to be a distinct stage. In German law, evidence is scrutinised most closely when a judge evaluates its weight after it has been submitted to trial, or in common law terms, after it has been 'admitted'. This in fact denotes a typically civil law style of handling evidence, whereas the isolated evaluation of a single item of evidence at the early admissibility stage is characteristic of common law systems. Utilizing these different stages of the proceedings for the court to examine the evidence thoroughly is not merely a technical difference. It also materially affects the evidence evaluation. In common law systems, a judge assesses each item of evidence in isolation from the other submitted evidence. In civil law systems, in contrast, a judge is able to evaluate an item of evidence that was readily allowed into trial in conjunction with the entirety of the case material in order to assess its weight."
[1252] For a brief analysis on how different legal cultures influence different procedural models on the matter at issue, *see,* for instance, M. Damaška, "Atomistic and Holistic Evaluation of Evidence: A Comparative View", in D. S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker and Humblot, Berlin, 1990). Damaška argues that, with respect to "admissibility rules" and, in general, issues concerning the admission of evidence in judicial proceedings, domestic procedural systems are underpinned by one or another

more detail below, substantial differences exist between the relevant provisions applicable before this Court, and those applicable, for instance, in the proceedings before the ICTY, the ICTR, the SCSL and the STL. In these circumstances, the Appeals Chamber considers that little assistance, if any, may be derived from the practices of national, international and internationalised criminal jurisdictions in the interpretation of the legal framework of this Court. In any case, the Appeals Chamber emphasises that, in accordance with article 21 of the Statute, the Court shall apply, in the first place, its Statute and Rules. Indeed, as explained below, the procedural regime envisaged in the legal framework of the Court is comprehensive and unique, and, as a whole, it has been designed by the Court's legislator as a distinctive workable balance of different procedural models.

575. The Appeals Chamber observes that Mr Babala and Mr Arido, first, argue that the Trial Chamber erred by basing its decision on the guilt or innocence of the accused on evidence which the Trial Chamber had not explicitly "admitted" in the course of the trial or within the Conviction Decision.[1253] Neither Mr Babala nor Mr Arido however indicates any legal basis requiring such a step of "admission" of evidence.

576. The Appeals Chamber notes that article 74 (2) of the Statute expressly provides that the decision on the guilt or innocence of the accused may only be based on evidence which has been "submitted" and "discussed" at trial. Importantly, this provision does not stipulate that the evidence upon which a trial chamber may rely in its final decision under that provision is evidence which has been *admitted*. Rather, the focus of this provision is on the fact that the evidence was *submitted*. The Appeals Chamber notes that article 69 (3) of the Statute, in turn, provides that "[t]he parties may submit evidence relevant to the case", and that chambers have the authority to

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model of ascertaining facts in adjudication, one "holistic" and another "atomistic". Under the "holistic" view, "the probative force of any item of information arises from interaction among elements of the total informational input" and "separate weights of individual items of evidence cannot be disentangled from global judgments". Conversely, under the "atomistic" view, "mental processes employed in 'finding' facts can be decomposed into independent parts" and "probative force is attributed to distinct items of evidence and discrete inferential sequences, and the final determination is made by aggregating these separate probative values through some sort of additive process". In this regard, Damaška observes that in Anglo-American procedural systems the tendency is more affine to atomistic conceptions, while continental systems – despite more varied among them – are, in general terms, underpinned by holistic conceptions.

[1253] Mr Babala's Appeal Brief, paras 53, 66, 69; Mr Arido's Appeal Brief, paras 242, 245.

"request the submission of all evidence that it considers necessary for the determination of the truth". Similarly, article 64 (8) (b) of the Statute stipulates that "[s]ubject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute". These provisions – as well as others in the legal framework of the Court[1254] – clearly indicate that the act of "submission" of evidence is a procedural act performed by the parties. Indeed, as previously found by the Appeals Chamber, "evidence is 'submitted' [within the meaning of article 74 (2) of the Statute] if it is *presented to the Trial Chamber by the parties* on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber".[1255] Therefore, it is the evidence that is presented ("submitted") by the parties that – insofar as "discussed"[1256] – constitutes the basis of the eventual decision under article 74 (2) of the Statute, rather than evidence "admitted" by the trial chamber.[1257]

577. At this juncture, the Appeals Chamber considers it important to emphasise the difference between the relevant provisions in the legal instruments of the Court and those applicable in the proceedings before other international(ised) tribunals on this particular matter. Indeed, in contrast to the provisions applicable before this Court, the provisions applicable at the ICTY/ICTR and STL stipulate that "[a] Chamber may *admit* any relevant evidence which it deems to have probative value",[1258] and the corresponding provision at the SCSL states that "[a] Chamber may *admit* any relevant

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[1254] *See e.g.* rules 63, 64, 140 and 141 of the Rules.
[1255] *Bemba* OA5 OA6 Judgment, para. 43 (emphasis added).
[1256] It is understood that what is required is that there has been the opportunity at trial to make arguments on the evidence concerned, irrespective of whether any such arguments are actually made. *See also* O. Triffterer and A. Kiss, "Requirements for the decision", in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1847.
[1257] The Appeals Chamber clarifies in this regard that this conclusion only concerns the submission of evidence at trial, where the parties, in accordance with article 69 (3) of the Statute, have a right to submit evidence. No such right exist as far as proceedings on appeal are concerned. Appellate proceedings indeed differ significantly in that their corrective nature demands that additional evidence be presented on appeal only if certain specific conditions are met, most notably that such evidence could not have been submitted at trial and would have an impact on the verdict (*see* *Lubanga* Appeal Judgment, para. 56-59). Regulation 62 of the Regulations of the Court ("Additional evidence presented before the Appeals Chamber") provides however the Appeals Chamber with the discretion to rule on the admissibility of the additional evidence either separately (when the application for the presentation of the additional evidence is made) or jointly with the other issues raised in the appeal.
[1258] Rule 89 (C) of the ICTY Rules of Procedure and Evidence; rule 89 (C) of the ICTR Rules of Procedure and Evidence; rule 149 (C) of the STL Rules of Procedure and Evidence (emphasis added).

evidence".[1259] Similarly, the procedural act by which prior recorded testimony can enter the record of the case and, thus, form part of the evidentiary basis for a decision on the guilt or innocence of the accused requires, in the proceedings before these other international(ised) tribunals, that the trial chamber *admits* such prior recorded testimony,[1260] while, in the proceedings before the Court, that the trial chamber *allows* the *introduction* or the *submission* of this material.[1261] In the view of the Appeals Chamber, the use of this different terminology is significant in that it reflects the difference in the general procedural construction between this Court and the other international(ised) tribunals.

578. In this context, contrary to Mr Babala's and Mr Arido's suggestion,[1262] the Appeals Chamber sees no error in the fact that the Trial Chamber did not "admit" items of evidence, but its formal act was instead that of "recognising" the "submission" of this evidence by the parties. On the contrary, by doing so, and basing its decision on the guilt or innocence of the accused on the evidence which had been so submitted, the Trial Chamber acted in line with the procedure provided in the Statute.

579. At the same time, the Appeals Chamber observes that rule 64 (3) of the Rules complements the provision of article 74 (2) of the Statute in that it stipulates that a chamber shall not consider "[e]vidence ruled irrelevant or inadmissible". It may be noted, first, that this provision confirms that no process of "admission" of evidence is envisaged in the legal framework of the Court, in that its formulation indicates that evidence can be considered as long as it has not been "ruled irrelevant or inadmissible" – rather than as long as it has been "admitted" by the trial chamber. Second, and more importantly, rule 64 (3) of the Rules indicates that items of evidence that have been submitted by the parties may be ruled irrelevant or

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[1259] Rule 89 (C) of the SCSL Rules of Procedure and Evidence (emphasis added).
[1260] *See e.g.* rules 92 *bis*, 92 *ter*, 92 *quater* and 92 *quinquies* of the ICTY Rules of Procedure and Evidence; rule 92 *bis* of the ICTR Rules of Procedure and Evidence; rules 155, 156 and 158 of the STL Rules of Procedure and Evidence; rules 92 *bis*, 92 *ter* and 92 *quater* of the SCSL Rules of Procedure and Evidence.
[1261] Rule 68 of the Rules. *See also* article 69 (2) of the Statute.
[1262] Mr Babala's Appeal Brief, paras 53 ("The Trial Chamber's approach made it impossible for the parties to know what evidence had and had not been admitted"), 66 ("Even a close examination of the [Conviction Decision], however, fails to reveal what evidence was admitted or not"); Mr Arido's Appeal Brief, para. 245 ("The Defence cannot identify the harm and prejudice of an admitted document, without knowing that it has been admitted").

inadmissible, and excluded on this basis. Indeed, the legal framework of the Court provides that a trial chamber may – and in certain circumstances shall – render rulings on the relevance or admissibility of individual items of evidence, separately from, and preliminarily to, its assessment of the evidence for the purpose of its decision on the guilt or innocence of the accused under article 74 of the Statute.

580. The Appeals Chamber observes that the legal framework of the Court indeed contains a number of exclusionary rules, providing that certain evidence may be inadmissible in the proceedings before the Court and, as such, unsuitable to be considered by a trial chamber for the purpose of its decision under article 74 of the Statute. In the context of the potential operation of any such exclusionary rule, a distinct determination on the admissibility of certain items of evidence must be conducted – whether in the course of the trial or at the end of the proceedings – separately from the assessment of the evidence for the purpose of establishing the guilt or innocence of the accused.

581. The Appeals Chamber recalls that article 69 (7) of the Statute is one such exclusionary rule because it provides that, under certain circumstances, evidence obtained by means of a violation of the Statute or internationally human rights shall not be admissible. Correspondingly, rule 63 (3) of the Rules mandates that the Court "shall" rule on the admissibility of evidence "when it is based on the grounds set out in article 69, paragraph 7", and it may do so upon application by a party or on its own motion. A further exclusionary rule in the legal system of the Court concerns evidence of the prior or subsequent sexual conduct of a victim or a witness which, in accordance with rule 71 of the Rules, is always inadmissible. Rule 72 of the Rules also provides for a specific procedural mechanism aimed at determining whether, and under what conditions, certain evidence (that is, "evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness" in cases of sexual violence) may be admissible in the proceedings before the Court and, if so, for what specific purpose. In addition, the legal instruments of the Court provide that testimonial evidence may only be relied upon by the parties when the person appears to testify at trial or, when previously recorded, under certain conditions, such as those under rule 68 of the Rules or when measures under article 56 of the Statute have been taken. Evidence which is

testimonial in nature is thus inadmissible – irrespective of the "purpose" for which it would be relied upon by a party – when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met.

582. The Appeals Chamber considers that a trial chamber is thus required to ensure that evidence which is affected by an exclusionary rule is ruled inadmissible under the applicable ground and is, therefore, disregarded in the decision on the guilt or innocence of the accused. This consideration is mandatory in nature.

583. The Appeals Chamber notes that in the present case the Trial Chamber, with respect to rulings on the relevance or admissibility of evidence, distinguished between, on the one hand, the mandatory determination on the existence of any "procedural bar" to the reliance on a particular item of evidence and, on the other hand, the assessment of – what it described as – "standard evidentiary criteria" which it deferred to the end of the trial.[1263] The first category ("procedural bars") refers to the potential operation of an exclusionary rule within the legal framework of the Court, while the second ("standard evidentiary criteria") to the relevance, probative value and potential prejudice of an item of evidence referred to in article 69 (4) of the Statute. The appellants' arguments under consideration are premised on the understanding that the Trial Chamber was required to render rulings on the admissibility of each item of evidence on the basis of these "standard evidentiary criteria", which, in their view, are mandatory requirements for the admissibility of evidence in the proceedings before the Court.[1264] For the reasons provided below, the Appeals Chamber is not persuaded that article 69 (4) of the Statute sets out an additional "test" for evidence to be admissible in the proceedings before the Court (beyond that of not being inadmissible under an exclusionary rule), and that Trial Chambers have therefore the duty to render rulings on the relevance and admissibility of each item of evidence submitted by the parties to determine whether each item meets this general "test".

[1263] *See* Conviction Decision, paras 190-192. *See also* First Decision on Submission of Documentary Evidence, paras 7-14.
[1264] Mr Babala's Appeal Brief, paras 52, 61-63; Mr Bemba's Appeal Brief, paras 192, 193. *See also* Mr Arido's Appeal Brief, para. 242.

584. Article 69 (4) of the Statute stipulates:

> 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 a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

585. The Appeals Chamber observes that this provision – rather than obliging a trial chamber to rule on the relevance or admissibility of each item of evidence submitted by the parties – is permissive in nature in that it allows a trial chamber to do so. Consistent with the absence of an obligation to rule on the relevance or admissibility of evidence, other provisions in the legal framework of the Court provide a chamber with the general "power",[1265] "discretion"[1266] or "authority"[1267] to rule on the relevance or admissibility of evidence, rather than with a duty to do so.

586. The Appeals Chamber considers that the fact that, according to article 69 (4) of the Statute, the Court *may* make rulings on the relevance or admissibility of evidence is incompatible with the proposition that this provision establishes a mandatory test for an item of evidence to be admissible at trial. In this regard, and as observed above, the Appeals Chamber recalls that when the legal framework of the Court provides for mandatory exclusionary rules – such as in the case of inadmissibility of evidence under article 69 (7) of the Statute – a chamber is explicitly required to make rulings in this respect. A comparison between the provision of article 69 (4) of the Statute ("[t]he Court *may* rule […]") with, for instance, rule 63 (3) of the Rules concerning issues related to potential inadmissibility under article 69 (7) of the Statute, ("[a] Chamber *shall* rule […]") confirms that a determination of the relevance or admissibility of all evidence submitted is not mandatory as such.[1268]

587. In the Appeals Chamber's view, article 69 (4) of the Statute – by providing a chamber with the discretion to rule on the relevance or admissibility of any evidence

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[1265] *See* article 64 (9) (a) of the Statute: "The Trial Chamber shall have, *inter alia*, the *power* on application of a party or on its own motion to [r]ule on the admissibility or relevance of evidence" (emphasis added).
[1266] Rule 63 (2) of the Rules specifically speaks of "the *discretion* described in article 64, paragraph 9" (emphasis added).
[1267] *See* rule 63 (2) of the Rules: "A Chamber shall have the *authority* […] to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69" (emphasis added).
[1268] Emphasis added.

"*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"[1269] – stipulates certain factors, rather than a list of mandatory requirements, that a trial chamber may indeed "take into account" when choosing to exercise its discretion to rule on the relevance or admissibility of an individual item of evidence. Again, the Appeals Chamber notes the significant difference between the formulation of article 69 (4) of the Statute and the formulations of the exclusionary rules recalled above, such as article 69 (7) of the Statute[1270] or rule 71 of the Rules.[1271]

588. The Appeals Chamber also notes in this regard that commentators involved in the drafting of these provisions explain that "no explicit test or standard is incorporated in paragraph 4 [of article 69]" because the drafters preferred "a statement of principle and a listing of some of the factors that may be taken into account", and, subsequently, also avoided the elaboration of any "specific test" in the Rules.[1272] The Appeals Chamber observes that an exception to this principle is contained in rule 72 of the Rules which provides that a certain type of evidence[1273] is admissible only when the trial chamber, after hearing the parties, considers that it has "sufficient degree of probative value to an issue in the case" also taking into account the prejudice that it may cause. The specific regulation of the exception is, in the view of the Appeals Chamber, further indication of the absence of an equivalent general statutory rule that would be applicable to all evidence without distinction.

589. The Appeals Chamber is of the view that this interpretation of article 69 (4) of the Statute as not containing a mandatory test for an item of evidence to be admissible at trial is also confirmed by its drafting history. The Appeals Chamber notes that the

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[1269] Emphasis added.
[1270] "Evidence obtained by means of a violation of this Statute or internationally recognised human rights *shall not be admissible if* […]" (emphasis added).
[1271] "[…] [A] Chamber *shall not admit* evidence of the prior or subsequent sexual conduct of a victim or witness" (emphasis added).
[1272] D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1741. *See also* D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 351.
[1273] Notably, evidence that a victim consented to an alleged crime of sexual violence or evidence of the words, conduct, silence or lack of resistance of a victim or witness in cases of sexual violence.

version of (current) article 69 (4) of the Statute that was included in the Report of the Preparatory Committee of 14 April 1998 (providing that "[t]he Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence"[1274]) contained a footnote explaining that a proposal had been made to add that "[t]he Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias".[1275] The Appeals Chamber observes that this proposal, had it been accepted, would have made the procedural regime of the Court on this issue similar to that applicable before other international(ised) tribunals.[1276] This proposal was, however, rejected in an attempt to achieve a "delicate balance" between different domestic models in different national procedural systems.[1277]

590. In this regard, the Appeals Chamber observes that, with reference to the discussions held as part of the drafting process of the Statute, commentators explain that the final formulation of article 69 of the Statute was indeed the result of a compromise between common law systems (which "tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility") and civil law systems (in which "all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence").[1278] This final compromise 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

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[1274] *See* Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, p. 58.
[1275] Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, p. 58, fn. 192.
[1276] *See e.g.* rule 89 (D) of the ICTY Rules of Procedure and Evidence, which indeed stipulates that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial". This provision, in turn, complements that of rule 89 (C) of the ICTY Rules of Procedure and Evidence providing that "[a] Chamber may *admit* any relevant evidence which it deems to have probative value" (emphasis added). *See also* rule 149 (D) of the STL Rules of Procedure and Evidence.
[1277] *See* D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1741.
[1278] D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 351.

the relevance or admissibility of any evidence'".[1279] In particular, it has been explained in this regard that article 69 of the Statute, "while [it] adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence", also incorporates "some common law concepts" in that it "permits the Court 'to rule on the relevance or admissibility of any evidence' before considering the question of weight".[1280]

591. Similarly, the related provisions of the Rules were also the result of "significant debate and reformulation" aimed at ensuring that "the delicate compromise achieved in Rome was not upset by the articulation of specific rules of evidence in the Rules".[1281] In this regard, the Appeals Chamber notes that the original proposal of (current) rule 63 of the Rules that was presented by France stipulated that "[a]ll evidence submitted by the parties shall, in principle, be admissible before the chambers of the Court, which shall freely assess its probative value".[1282] However, as "[c]ommon law lawyers objected on the basis that it declared that all evidence submitted *shall* be admissible by a Chamber, and its probative value would subsequently be assessed freely […] undo[ing] the compromise of article 69, paragraph 4", the French proposal was reformulated in the terms of (current) rule 63 (2) of the Rules, confirming the principle of free assessment of the evidence when a chamber exercises its discretion under article 69 (4) of the Statute.[1283] This provision indeed stipulates that "[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". It has been explained that this formulation was adopted "so as not to presuppose when

[1279] D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 351.
[1280] D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1735.
[1281] D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 351.
[1282] Rule 37.1. in PCNICC/1999/DP.10, 22 February 1999, referred to in D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 352.
[1283] D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 352.

or how evidence would be admissible, but instead to reflect the delicate balance of article 69, paragraph 4".[1284]

592. The Appeals Chamber is thus of the view that, had the legal texts intended that individual rulings on the relevance or admissibility of each item of evidence in accordance with any particular test be mandatory, they would have said so, rather than making this process a discretionary one on the part of the chamber. This is particularly so in light of the drafting history of the relevant provisions, which, as indicated above, indeed confirms that the formulation of article 69 (4) of the Statute – as well as the related provisions in the Rules – was the result of a compromise which creates a hybrid system, wherein consideration by a trial chamber of the relevance and/or probative value of an item of evidence within the context of a possible ruling on its relevance or admissibility rendered separately from its assessment as part of the eventual evaluation of the guilt or innocence of the accused is, in principle, permitted, but is not mandatory.

593. The Appeals Chamber observes that Mr Babala argues that the Trial Chamber, by not rendering rulings on the admissibility of evidence, acted contrary to the Appeals Chamber's previous determination in the *Bemba* OA5 OA6 Judgment.[1285] According to Mr Babala, in that judgment the Appeals Chamber "clear[ly]" determined that "sooner or later" a trial chamber must issue rulings on the relevance and admissibility of each piece of evidence on an item-by-item basis.[1286] Similarly, Mr Bemba submits that the Trial Chamber did not follow the Appeals Chamber's "directive" in *Bemba* OA5 OA6 that "at some point in the proceedings" a trial chamber "must decide on the admissibility of each item of evidence" and "issue item-by-item admissibility determinations".[1287]

594. The Appeals Chamber is of the view that Mr Babala and Mr Bemba misrepresent its *Bemba* OA5 OA6 Judgment. In that judgment, the Appeals Chamber, recognising the discretion envisaged in article 69 (4) of the Statute, found that while a

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[1284] D. Piragoff, "Evidence", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 352.
[1285] Mr Babala's Appeal Brief, paras 62, 67, referring to *Bemba* OA5 OA6 Judgment, para. 37.
[1286] Mr Babala's Appeal Brief, para. 62.
[1287] Mr Bemba's Appeal Brief, para. 193.

chamber "*may* rule on the relevance and/or admissibility when evidence is submitted […] and then determine the weight to be attached to the evidence at the end of the trial", a chamber may also "defer its *consideration* of [the relevance, probative value and potential prejudice] 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*".[1288] The Appeals Chamber also clarified in this regard that "[i]rrespective of the approach the Trial Chamber chooses, it will have to *consider* the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings".[1289] Thus, contrary to Mr Babala's and Mr Bemba's suggestion, the Appeals Chamber did not indicate that a trial chamber must render rulings on the relevance or admissibility of each item of evidence. Rather, what a trial chamber must do in any case is to consider the relevance, probative value and potential prejudice of the evidence submitted and the issues raised by the parties in this respect,[1290] and may do so as "part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person".[1291] The Appeals Chamber therefore considers without basis the appellants' arguments that, in the *Bemba* OA5 OA6 Judgment, the Appeals Chamber indicated that, in the legal framework of the Court, relevance, probative value and potential prejudice are mandatory requirements for an item of evidence to be *admissible* at trial and that, therefore, a trial chamber is obliged to render rulings on the relevance and admissibility of each submitted item of evidence to determine whether these "requirements" are met.

595. The Appeals Chamber observes that Mr Babala also argues that the Trial Chamber's "refusal to rule on the admissibility of evidence" – whether in the Conviction Decision or at any point during the trial – amounts to an infringement of article 74 (5) of the Statute and rule 64 (2) of the Rules, and this, in turn, impedes proper appellate review of his conviction.[1292]

596. At the outset, the Appeals Chamber is not persuaded by the suggestion that the provision of rule 64 (2) of the Rules must be understood as curtailing a trial

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[1288] *Bemba* OA5 OA6 Judgment, para. 37 (emphasis added).
[1289] *Bemba* OA5 OA6 Judgment, para. 37 (emphasis added).
[1290] *Bemba* OA5 OA6 Judgment, para. 37
[1291] *Bemba* OA5 OA6 Judgment, para. 37.
[1292] Mr Babala's Appeal Brief, paras 66-69.

chamber's discretion under article 69 (4) of the Statute. Rule 64 (2) of the Rules only stipulates that "[a] Chamber shall give reasons for any rulings it makes on evidentiary matters", but does not concern when and under what circumstances any such ruling may or shall be rendered by a trial chamber.[1293] The Appeals Chamber is equally not persuaded by the argument that an accused's right to a reasoned determination on the charges against him or her, as enshrined in article 74 (5) of the Statute, is violated as such when a trial chamber decides not to exercise its discretion to render rulings on the relevance and/or admissibility of evidence.

597. As explained, consideration by the trial chamber of the relevance, probative value and potential prejudice of the evidence submitted – and any issues raised by the parties in this regard – may be made part of its assessment of evidence for the determination of the guilt or innocence of the accused. The Appeals Chamber agrees that, in that context, a trial chamber must indeed explain with sufficient clarity the basis for its determination.[1294] However, when a trial chamber, in its decision under article 74 of the Statute, fails to explain sufficiently why it considers an item of evidence – whether documentary or testimonial – to be relevant and with sufficient probative value to be relied upon for its factual analysis (or *vice versa*) despite issues raised at trial in that regard, what is at issue is the trial chamber's compliance with its duty under article 74 (5) of the Statute to provide "a full and reasoned statement of [its] findings on the evidence and conclusion" in support of its decision on the guilt or innocence of the accused. In other words, the safeguard of an accused's right to a reasoned determination on the charges against him or her does not lie in the fact that a trial chamber exercises its discretion to rule on the relevance or admissibility of documentary evidence or rather considers its relevance and probative value as part of the evaluation of the guilt or innocence of the accused. The appellants may raise on appeal – as they indeed extensively do in the present appeals – errors by the Trial Chamber in its assessment of the evidence, including with respect to insufficient reasoning on its evaluation of the evidence and factual findings, in the same way as they could have done had the Trial Chamber decided to exercise its discretion to rule

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[1293] *See also* *Bemba* OA5 OA6 Judgment, paras 59, 60, finding that the Trial Chamber acted in breach of rule 64 (2) of the Rules because, while electing to rule on the admissibility of evidence, it did not reason such rulings.
[1294] *See supra* paras 102-107.

separately on the relevance and/or admissibility of the evidence. The Appeals Chamber is therefore unconvinced that article 74 (5) of the Statute or rule 64 (2) of the Rules indicate that rulings on the relevance and/or admissibility of evidence of each item of documentary evidence are mandatory in the legal framework of the Court.

598. In conclusion, the Appeals Chamber considers that a trial chamber, upon the submission of an item of evidence by a party, has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.[1295]

599. The Appeals Chamber emphasises that evidence is properly before a trial chamber for the purpose of its decision on the guilt or innocence of the accused when it has been "submitted" in accordance with the procedure adopted by the trial chamber and discussed at trial, unless it is ruled as irrelevant or inadmissible. Any item of submitted evidence that is not excluded at trial must therefore be presumed to be considered by a trial chamber not to be inadmissible under any applicable exclusionary rule. For this reason, both the procedure for the submission of evidence at trial and the status of each piece of evidence as "submitted" within the meaning of article 74 (2) of the Statute must be clear.[1296] This is a fundamental guarantee for the rights of the parties at trial as well as for the purpose of any subsequent appellate review.[1297]

600. The Appeals Chamber recalls that, in the present case, the Trial Chamber, before the commencement of the trial, set out the procedure for the submission of documentary evidence.[1298] It explained that, in general, it would not to render rulings

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[1295] *See* *Bemba* OA5 OA6 Judgment, para. 37.
[1296] *See* *Bemba* OA5 OA6 Judgment, para. 43.
[1297] *See supra* paras 105-107.
[1298] First Decision on Submission of Documentary Evidence.

on the relevance or admissibility of individual items of evidence, in particular because it considered itself to be "able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial",[1299] and because "[r]elevance and probative value, which are closely related in any event, will only require one Chamber assessment if they are deferred to the final judgment".[1300] In addition, the Trial Chamber explained that "there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately" and that "[u]nlike situations where submitting marginally relevant or prejudicial material may unduly compromise the proceedings, such as when these materials are introduced in trials where fact-finding is done by a jury, these issues do not apply when professional judges are evaluating the evidence presented".[1301] Consistent with this approach, the Trial Chamber did not rule separately, as a preliminary step, on the relevance and probative value of individual pieces of evidence on an item-by-item basis, but merged its consideration of these aspects to its final assessment of the evidence in the Conviction Decision. The Appeals Chamber also observes that the status of each item of evidence submitted at trial in accordance with the procedure set out by the Trial Chamber was clear. In particular, the Appeals Chamber notes that the fact that an item of evidence had been "submitted", within the meaning of article 74 (2) of the Statute, was placed on the record following each batch of submission of documentary evidence by the parties in the course of the trial, and such status accordingly reflected in the e-Court metadata of each item of such evidence.[1302]

601. For the reasons above, the Appeals Chamber considers that the procedure set out and implemented by the Trial Chamber for the submission of evidence at trial was consistent with the legal framework of this Court.

[1299] First Decision on Submission of Documentary Evidence, para. 10.
[1300] First Decision on Submission of Documentary Evidence, para. 11.
[1301] First Decision on Submission of Documentary Evidence, para. 12.
[1302] *See* First Decision on Submission of Documentary Evidence, para.17 ("the Registry is to ensure that the e-court metadata clearly reflects which items have been formally submitted to the Chamber as the trial advances") and p. 11, ordering the Registry to ensure that the e-court metadata reflected the submission of the items of evidence recognised in that decision; Second Decision on Submission of Documentary Evidence, p. 4; Third Decision on Submission of Documentary Evidence, p. 7; Fourth Decision on Submission of Documentary Evidence, p. 5; Fifth Decision on Submission of Documentary Evidence, p. 17.

(b) Whether the Trial Chamber's decision not to rule on the relevance and/or admissibility of all items of evidence prejudiced the rights of the accused

602. Mr Babala, Mr Bemba and Mr Arido raise several arguments alleging prejudice resulting from the Trial Chamber's "approach" in the present case with respect to rulings on the relevance or admissibility of evidence.

603. Prior to addressing the appellants' arguments in this regard, the Appeals Chamber recalls that the challenges that had been raised at trial to the admissibility of documentary evidence on the basis of article 69 (7) of the Statute were all disposed of by the Trial Chamber in interlocutory decisions rendered before the issuance of the Conviction Decision.[1303] Similarly, the Trial Chamber verified that the procedural requirements under rule 68 of the Rules were met before allowing the introduction of any prior recorded testimony.[1304] In this context, the Appeals Chamber understands the appellants' arguments as to the alleged prejudice to be related to the Trial Chamber's decision not to exercise its discretion under article 69 (4) of the Statute to issue rulings on the relevance or admissibility of each item of 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 this regard, and as recognised in the *Bemba* OA5 OA6 Judgment, the Appeals Chamber recalls that while rulings on the relevance and/or admissibility of evidence are indeed discretionary, a trial chamber shall balance this discretion with, *inter alia*, its duty, under article 64 (2) of the Statute, to ensure that the trial is fair and expeditious and is conducted with full respect of the rights of the accused.[1305] In

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[1303] *See e.g.* First Western Union Decision, Second Western Union Decision, First Decision on Dutch Intercepts, SeSecond Decision on Dutch Intercepts, Third Decision on Dutch Intercepts, Decision on Admissibility of Detention Centre Materials.

[1304] *See e.g.* "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2) (b) of the Rules", 29 October 2015, ICC-01/05-01/13-1430; "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; "Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2) (c) of the Rules of Procedure and Evidence'", 12 November 2015, ICC-01/05-01/13-1481-Red; "Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67", 19 February 2016, ICC-01/05-01/13-1641; "Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules", 29 March 2016, ICC-01/05-01/13-1753; "Decision on the Motion on behalf of Mr Aimé Kilolo for the Admission of the Previously Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 29 April 2016, ICC-01/05-01/13-1857.

[1305] *Bemba* OA5 OA6 Judgment, para. 37.

particular, this duty, in certain specific circumstances of each individual case, may warrant that a trial chamber, consistently with the boundaries of its statutory competence and, in the final instance, the object and purpose of the trial, exercise its discretion under article 69 (4) of the Statute, and render separate rulings on the relevance and/or admissibility of individual items of evidence.

604. Against this backdrop, the Appeals Chamber will at this juncture address the appellants' arguments as to the prejudice they allegedly suffered due to the Trial Chamber's decision not to exercise its discretion under article 69 (4) of the Statute.

(i) Alleged prejudice raised by Mr Babala

605. With respect to the prejudice allegedly arising from the Trial Chamber's "practice", Mr Babala makes, in essence, three sets of arguments. In particular, he asserts that: (i) he was prejudiced by the fact that the Trial Chamber did not issue rulings on the relevance or admissibility of documentary evidence in the course of the trial;[1306] (ii) some of his arguments relating to the admissibility of evidence were eventually disregarded by the Trial Chamber;[1307] and (iii) the Trial Chamber erred in establishing the authenticity of a number of logs of Mr Bemba's telephone communications at the detention centre.[1308] The Appeals Chamber will address these three sets of arguments in turn.

606. First, Mr Babala argues that "[t]he practice followed during the trial caused prejudice to the rights of the defence, in particular the right to be tried fairly and impartially and to be able to prepare a defence".[1309] In particular, he avers that "[s]ince [he] did not know what evidence had been admitted, [his] Defence was forced to invest time and resources in responding to all the evidence submitted".[1310] The Appeals Chamber observes that this argument does not concern, in general, the absence of rulings on the relevance or admissibility of each item of evidence submitted in the present case, but, more specifically, the fact that no such rulings were rendered by the Trial Chamber *during* the trial.

[1306] Mr Babala's Appeal Brief, paras 53-60.
[1307] Mr Babala's Appeal Brief, para. 69.
[1308] Mr Babala's Appeal Brief, para. 64.
[1309] Mr Babala's Appeal Brief, para. 53.
[1310] Mr Babala's Appeal Brief, para. 53.

607. The Appeals Chamber agrees with the Trial Chamber's position that "[t]he notion of a fair trial does not require that the Chamber rule on the admissibility of each piece of evidence upon submission – Article 69(4) of the Statute clearly gives the Chamber discretion in this respect".[1311] Indeed, the Appeals Chamber is not persuaded by Mr Babala's generic proposition that his fair trial rights were violated because he had to conduct his defence in the expectation that all evidence submitted in the proceedings could constitute the basis for the Trial Chamber's eventual decision on his guilt or innocence. As explained above, article 74 (2) of the Statute and related provisions indicate that it is the evidence "submitted" (and discussed) at trial that, unless excluded by virtue of the operation of an exclusionary rule in the applicable law, constitutes the evidentiary basis for the final decision on the guilt or innocence of the accused. Thus, the "expectation" that all evidence submitted could be considered for the purpose of the Trial Chamber's decision under article 74 (2) arises directly from the Court's own legal instruments – which, by providing so, accept that there is no inherent incompatibility between fair trial rights and an assessment of the relevance and probative value of the evidence at the end of the proceedings in light of all evidence submitted. As pointed out by the Prosecutor, this is also the case in several domestic systems which adopt similar procedures as a matter of course.[1312]

608. The Appeals Chamber also recalls that in the *Bemba* OA5 OA6 Judgment, it already found that consideration of the relevance and probative value of the evidence submitted may be deferred to the end of the proceedings,[1313] and that, in that context, it also rejected similar arguments to those raised now by Mr Babala.[1314] In that appeal, Mr Bemba had maintained that he was prejudiced by the "admission into evidence of all items on [the Prosecutor's list of evidence]" because he "ha[d] to investigate and seek to defend against large swathes of 'evidence' which may ultimately [be]

[1311] First Decision on Submission of Documentary Evidence, para. 12.
[1312] *See* Response, para. 159, referring to several national systems, based on the continental legal system, which follow a procedure similar to that implemented by the Trial Chamber in the present case, and differ in this respect from a number of common law jurisdictions adopting an "admission regime" (fn. 537).
[1313] *Bemba* OA5 OA6 Judgment, paras 36, 37. *See also Gbagbo and Blé Goudé* OA11 OA12 Judgment, paras 45, 46, where the Appeals Chamber reiterated that the decision on whether to rule on the relevance or admissibility of an item of evidence in the course of the trial is discretionary in nature.
[1314] *Bemba* OA5 OA6 Judgment, paras 66-68.

disregarded by the Chamber".[1315] The Appeals Chamber rejected this argument, *inter alia*, on the ground that "irrespective of the approach the Trial Chamber takes to the admission of evidence, [an accused person] must, at this stage of the proceedings, expect that all the evidence listed on the [Prosecutor's list of evidence] might be used against him and prepare his defence accordingly".[1316] While this holding concerned more specifically the beginning of the trial, the Appeals Chamber is of the view that the same considerations apply in the course of the trial. As noted, Article 74 (2) of the Statute states precisely so.

609. Moreover, the Appeals Chamber observes that even when a trial chamber decides to exercise its discretion to render a ruling on the relevance or admissibility of an item of evidence in the course of the trial, it will need to consider again the relevance, reliability and weight of all submitted evidence that it has not excluded as irrelevant or inadmissible, when assessing, in light of all evidence before it, the guilt or innocence of the accused. In other words, the accused person may, in any case be "forced to invest time and resources in responding to"[1317] items of evidence that may end up being disregarded by the trial chamber.

610. Furthermore, the Appeals Chamber recalls that, in the present case, the Trial Chamber clearly indicated at the commencement of the trial proceedings that, in principle, no ruling on the relevance or admissibility of the submitted evidence would be rendered other than in the context of the potential applicability of an exclusionary rule.[1318] In addition, as already observed, the fact that an item of evidence had been properly submitted within the meaning of article 74 (2) of the Statute was reflected in the e-Court metadata of each such item. Therefore, the Appeals Chamber considers that the procedure set out by the Trial Chamber did not lead to any uncertainty in the course of the trial as to the status of the evidence submitted by the parties.

611. That said, the Appeals Chamber reiterates that there may be certain circumstances in which respect for the rights of the accused may warrant that a trial chamber exercises its discretion and makes a ruling on the relevance or admissibility

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[1315] *Bemba* OA5 OA6 Judgment, para. 66.
[1316] *Bemba* OA5 OA6 Judgment, para. 67.
[1317] *See* Mr Babala's Appeal Brief, para. 53.
[1318] First Decision on Submission of Documentary Evidence, para. 9.

of an individual item of evidence in the course of the trial. However, the Appeals Chamber is of the view that Mr Babala does not demonstrate that the Trial Chamber erred in not doing so in relation to any particular item of evidence. Importantly, the Appeals Chamber notes that, ultimately, the Trial Chamber did not find *any* item of documentary evidence submitted by the parties to be inadmissible. It is thus unclear how Mr Babala's right to prepare his defence was prejudiced. For these reasons, the Appeals Chamber rejects Mr Babala's arguments that his right to be tried fairly and impartially and to be able to prepare a defence were violated by the fact that during the trial the Trial Chamber did not render rulings on the relevance or admissibility of each item of documentary evidence.

612. Turning to Mr Babala's second argument, the Appeals Chamber notes his assertion that "no findings were issued on the Defence arguments concerning the prejudice caused by particular items [of evidence]" and that this "prevents [him] from raising substantive objections on appeal".[1319] However, Mr Babala does not identify which arguments were allegedly disregarded by the Trial Chamber and to which items of evidence they related. Given this lack of substantiation, the Appeals Chamber is also unable to determine whether the error alleged by Mr Babala relates to the grounds of appeal under consideration or rather concerns the Trial Chamber's assessment of evidence for its determination of Mr Babala's guilt or innocence. Mr Babala's argument in this regard is thus dismissed.

613. Finally, Mr Babala submits that the Trial Chamber erred in finding that certain logs of Mr Bemba's telephone calls from the detention centre were authentic.[1320] The Appeals Chamber notes that this alleged error has no apparent connection with Mr Babala's ground of appeal under consideration and with his argument that the Trial Chamber erred "by refusing to issue rulings on the admissibility of all items of evidence on a case-by-case basis".[1321] In any case, the Appeals Chamber observes that Mr Babala also appears to misrepresent the Trial Chamber's determination with regard to the authenticity of the detention centre call logs when he states that the Trial Chamber reached its conclusion on the basis of arguments inapplicable to this

[1319] Mr Babala's Appeal Brief, para. 69.
[1320] Mr Babala's Appeal Brief, para. 64, fn. 110.
[1321] Mr Babala's Appeal Brief, Section C. III. under which this argument is placed.

material.[1322] In support of his argument, Mr Babala selectively quotes only the indicia of authenticity found by the Trial Chamber with respect to *other* materials,[1323] but disregards those considerations by the Trial Chamber that were relevant specifically to all the detention centre call logs. Most notably, the Appeals Chamber observes that the Trial Chamber found that: (i) "the content of every communication in evidence matches the allegedly corresponding logs and attributed numbers",[1324] and it "ha[d] not been able to find a single communication in evidence where the communication itself was demonstrably inconsistent with the corresponding log";[1325] (ii) this material was generated by the Registry, *i.e.* the Court's neutral organ tasked with non-judicial aspects of the Court's administration;[1326] and (iii) "[t]he Defence ha[d] […] been unable to present a single substantiated challenge to the authenticity of any of this information".[1327] Therefore, the Appeals Chamber sees no merit in Mr Babala's submissions concerning alleged errors in establishing the authenticity of the detention centre call logs.

614. In light of the above, the Appeals Chamber rejects Mr Babala's arguments that he was prejudiced by the Trial Chamber's decision not to render rulings on the relevance and/or admissibility of evidence.

(ii) Alleged prejudice raised by Mr Arido

615. Mr Arido argues that the Trial Chamber's "approach to evidence" violated his right to a fair trial.[1328] He makes essentially two arguments in this respect.

616. First, Mr Arido asserts that the Trial Chamber's "evidentiary regime" causes "fundamental fair trial violations for [him]" because he "ha[d] no way to know during the course of the trial […] what evidence […] will be admitted and on what evidentiary criteria".[1329] The Appeals Chamber has already addressed and rejected a similar argument made by Mr Babala with regard to the absence of rulings on the

[1322] Mr Babala's Appeal Brief, para. 64.
[1323] Mr Babala's Appeal Brief, para. 64.
[1324] Conviction Decision, para. 220.
[1325] Conviction Decision, para. 224.
[1326] Conviction Decision, para. 223.
[1327] Conviction Decision, para. 224.
[1328] Mr Arido's Appeal Brief, paras 241-246.
[1329] Mr Arido's Appeal Brief, para. 242 (emphasis omitted).

relevance or admissibility of evidence during the trial. For the same reasons, Mr Arido's argument is equally rejected.

617. Second, Mr Arido argues that, "[g]iven the plethora of documentary evidence in this case […], the potential violations of fair trial are infinite", and that he is "deprived of his right to argue any violations […] because [he] has no idea on what documentary evidence the conviction is based, but for the few references mentioned in the [Conviction Decision]". In particular, according to Mr Arido, there exists a "hidden danger" as concerning "evidence which is not mentioned in the [Conviction Decision], but relied upon, nevertheless, by the [Trial Chamber]".[1330] In the Appeals Chamber's view, this argument is baseless. The Trial Chamber indicates in the Conviction Decision the documentary and testimonial evidence that serves as basis for Mr Arido's conviction. Mr Arido may argue errors in the Trial Chamber's factual findings, but, given the reasoning provided in the Conviction Decision, there is no uncertainty as to the documentary evidence on which his conviction rests, nor any foundation for an alleged category of evidence "not mentioned", but nevertheless "relied upon" by the Trial Chamber.

618. Accordingly, the Appeals Chamber rejects Mr Arido's arguments that his fair trial rights were violated by the fact that the Trial Chamber elected not to exercise its discretion to rule on the relevance and/or admissibility of evidence.

(iii) Alleged prejudice raised by Mr Bemba

619. Mr Bemba submits that he was prejudiced in several respects by the Trial Chamber's "flawed approach to the admissibility of evidence".[1331]

620. First, Mr Bemba states that "[t]he Prosecution's extensive reliance on the admission of hearsay evidence through [the submission of documentary evidence] was prejudicial and, due to the Prosecution's failure to include sufficient information concerning the admissibility criteria, did not satisfy the burden of proof".[1332] The Appeals Chamber observes that Mr Bemba does not develop this argument

[1330] Mr Arido's Appeal Brief, paras 244, 245.
[1331] Mr Bemba's Appeal Brief, para. 199. *See also* paras 188-191, 196-201.
[1332] Mr Bemba's Appeal Brief, para. 190. *See also* para. 194, arguing that it is "impossible" to determine from the Conviction Decision "how the Chamber addressed the issue of remote hearsay in specific intercepts".

concerning the Prosecutor's "extensive reliance on the admission of hearsay evidence" any further, nor does he identify which items of evidence are allegedly affected by the error he raises.[1333] What is more, Mr Bemba does not elaborate on how the fact that documentary evidence submitted at trial contained hearsay information relates to his ground of appeal that the Trial Chamber "fail[ed] to issue a reasoned determination concerning the admissibility of individual items of evidence".[1334] In any event, the Appeals Chamber clarifies that the fact that an item of evidence is, in whole or in part, hearsay in nature may be a relevant consideration when assessing its weight or probative value, but does not render it inadmissible (or otherwise admissible only under certain conditions as suggested by Mr Bemba) in the proceedings before this Court.[1335]

621. Second, Mr Bemba argues that the Trial Chamber erred by not excluding, as inadmissible evidence, "digital evidence" (in particular, intercepted communications and CDRs) that had not been "authenticated" through testimonial evidence.[1336] The Appeals Chamber observes that, in the Conviction Decision, the Trial Chamber addressed this specific aspect and considered that any such "authentication" was not necessary.[1337] In particular, the Trial Chamber emphasised "the array of mutually reinforcing information confirming the accuracy of the intercepted communications and their corresponding logs".[1338] The Appeals Camber notes that Mr Bemba states, without further elaboration, that "this approach reversed the burden of proof and contravened a well-established line of jurisprudence regarding the need for testimonial authentication".[1339] However, he does not demonstrate any error on the part of the Trial Chamber in this respect, nor does he indicate any basis in the legal framework of this Court in support of his submission that, as a matter of law, "digital

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[1333] Mr Bemba's Appeal Brief, para. 190. *See also* para. 194, referring to "remote hearsay in specific intercepts" without even identifying the intercepts at issue.
[1334] Mr Bemba's sub-ground 4.1. of his appeal is entitled: "The Chamber committed reversible errors of law and procedure by failing to issue a reasoned determination concerning the admissibility of individual items of evidence" (Mr Bemba's Appeal Brief, paras 188-202).
[1335] *See also* *Ngudjolo* Appeal Judgment, para. 226.
[1336] Mr Bemba's Appeal Brief, paras 191, 196, 197.
[1337] Conviction Decision, para. 225.
[1338] Conviction Decision, para. 218.
[1339] Mr Bemba's Appeal Brief, para. 196, referring to "Defence Response to Prosecution's First Request for the Admission of Evidence from the Bar Table (ICC-01/05-01/13-1013-Conf)", ICC-01/05-01/13-1074-Conf, 9 July 2015, paras 60-62; a public redacted version was registered on 9 October 2015 (ICC-01/05-01/13-1074-Red.)

evidence" is inadmissible when not accompanied by some form of "testimonial authentication".

622. Third, Mr Bemba argues that the Prosecutor, when submitting intercepted communications, "fail[ed] to explain the relevance of each item", and, as a result, he was "ambushed" at the end of the trial with "Prosecution theories concerning the relevance and precise meaning of intercepts that were never clearly pleaded in a timely manner" as well as the Trial Chamber's "own interpretations of relevance and reliability".[1340]

623. The Appeals Chamber agrees with the Prosecutor that these arguments are "irrelevant to the submission regime and the grounds of appeal",[1341] as Mr Bemba indeed does not explain how they could relate to his assertion that the Trial Chamber erred "by failing to issue a reasoned determination concerning the admissibility of individual items of evidence".[1342] In any case, the Appeals Chamber observes that the Trial Chamber explained that it "set no limitations in the course of the trial on how it would consider any submitted evidence in its [final decision under article 74 of the Statute]".[1343] The Appeals Chamber sees no error in this determination. In its view, an item of evidence that is submitted in the proceedings is not limited to go to proof of one or more pre-determined issue(s), nor can its reliance on the part of a trial chamber be otherwise constrained. In this context, the Appeals Chamber recalls that article 69 (3) of the Statute refers to the submission by the parties of evidence that is "relevant *to the case*".[1344] As explained by commentators, the use of this expression clarifies that a particular item of evidence, even when "subsequently […] held not to be relevant in connection with the particular fact which it was meant to prove, […] may still be relevant to the case as a whole", and that "[i]n such a situation, evidence, though irrelevant for the purpose for which it was originally submitted, has still been submitted in accordance with paragraph 3 [of article 69] if relevant to other issues in

[1340] Mr Bemba's Appeal Brief, paras 190-191.
[1341] Response, para. 187.
[1342] Mr Bemba's Appeal Brief, sub-ground 4.1. of Mr Bemba's appeal.
[1343] Conviction Decision, para. 192.
[1344] Emphasis added.

the case".[1345] The Appeals Chamber also notes that an explicit exception to this general principle is provided for in rule 72 of the Rules, according to which a trial chamber must determine the admissibility of certain type of evidence[1346] and, if it finds it admissible in the proceedings, "shall state on the record the specific purpose for which the evidence is admissible". No such requirement exists with respect to any evidence other than that under rule 72 of the Rules, which, because of its nature, warrants this particular screening mechanism. In the Appeals Chamber's view, this specific regulation is a further indication of the absence of an equivalent statutory rule of general applicability. For these reasons, the Appeals Chamber is thus unpersuaded by Mr Bemba's submission concerning the Prosecutor's alleged failure to explain the relevance of each item of intercepted communications and the resulting "own interpretations" of this material on the part of the Trial Chamber.[1347]

624. Fourth, Mr Bemba asserts that he was prejudiced by the fact that he was "compelled" to respond to the Prosecutor's first request for introduction of documentary evidence "without the benefit of an updated DCC, Pre-Trial Brief, or disclosure of the Prosecution expert report on intercept evidence".[1348] The Appeals Chamber is equally unconvinced by this argument. It considers it sufficient to observe in this respect that there exists no indication that, in the course of the trial, Mr Bemba was precluded from making any submission on any item of evidence on the ground that any such submission ought to have been made earlier in the proceedings. In addition, the Appeals Chamber considers that this matter is also unrelated to Mr Bemba's ground of appeal concerning the Trial Chamber's alleged errors in choosing not to render rulings on the admissibility of each item of evidence.

625. Fifth, Mr Bemba argues that the Trial Chamber's "flawed approach to the admissibility of evidence also significantly undermined [his] right to present

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[1345] *See* D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 3rd ed., 2016), p. 1733.
[1346] That is evidence that the victim consented to an alleged crime of sexual violence in cases of sexual violence or evidence of the words, conduct, silence or lack of resistance of a victim or witness in cases of sexual violence.
[1347] Mr Bemba's Appeal Brief, para. 191.
[1348] Mr Bemba's Appeal Brief, para. 190.

evidence" under article 67 (1) (e) of the Statute.[1349] In this regard, he avers that "[a]part from the report of Dr. Harrison and related testimony, the [Conviction Decision] does not cite to a single item of evidence submitted by the Bemba Defence",[1350] and the Trial Chamber overlooked evidence that was relevant to its determination on Mr Bemba's guilt or innocence, in particular as concerns "[his] state of mind and knowledge as to whether individual payments were illicit".[1351] In the absence of any explanation on the part of Mr Bemba as to how these claims relate to the Trial Chamber's "flawed approach to the admissibility of evidence",[1352] the Appeals Chamber agrees with the Prosecutor that they are "unrelated to challenges to the evidence submission regime",[1353] but appear to concern alleged errors in the assessment of the evidence. In any event, the Appeals Chamber observes that Mr Bemba exclusively refers to some arguments that he had made at trial[1354] without identifying the evidence that, in his view, was overlooked, the findings that he alleges to be unreasonable because of allegedly disregarded evidence or how any error in this respect would materially affect his conviction. Thus, the Appeals Chamber sees no merit in Mr Bemba's submissions concerning an alleged violation of his right to present evidence under article 67 (1) (e) of the Statute.

626. Finally, the Appeals Chamber finds it appropriate to address at this juncture Mr Bemba's request for admission as additional evidence on appeal, in support of this ground of appeal, of two emails in which, in his view, the Prosecutor "has cited the appellate phase of the proceedings in order to resist Defence requests for disclosure on issues that relate to [the admissibility of the Detention Centre Materials]".[1355]

[1349] Mr Bemba's Appeal Brief, para. 199.
[1350] Mr Bemba's Appeal Brief, para. 199 (emphasis omitted).
[1351] Mr Bemba's Appeal Brief, paras 199-201.
[1352] Mr Bemba's Appeal Brief, para. 199.
[1353] Response, para. 190.
[1354] Mr Bemba's Appeal Brief, para. 200, referring to his arguments concerning "[t]he attribution and usage of the '[redacted]' number", "[t]he opaque nature of the shared burden between the Defence and the Registry concerning the responsibility for paying witnesses expenses", "[t]he amounts reimbursed by the Registry as being necessary and reasonable", "[t]he broad types of payments to witnesses that are allowed at other international courts and tribunals" and "Mr. Bemba's unawareness as to the purpose of certain payments to the Defence, and Defence witnesses".
[1355] "Second Request to Admit Additional Evidence on Appeal", 29 November 2017, ICC-01/05-01/13-2244-Conf-Exp, para. 26. While unclear in Mr Bemba's request, the Appeals Chamber understands that the emails that he seeks to admit as additional evidence on appeal are the ones that have been filled by Mr Bemba as ICC-01/05-01/13-2227-Conf-AnxD and ICC-01/05-01/13-2244-Conf-AnxB. The Appeals Chamber notes that the Prosecutor responded to Mr Bemba's request on 11 December 2017. *See* Prosecution's response to Bemba's Second Request to Admit Additional Evidence on Appeal.

Irrespective of whether these emails can be regarded "evidence", the Appeals Chamber considers that Mr Bemba's arguments in support of his request rest on a fundamental misconception of the trial record. Mr Bemba argues that these emails are relevant to demonstrate the prejudice he suffered due to the Trial Chamber's decision to defer the issue concerning the admissibility of the Detention Centre Materials to the appeal proceedings.[1356] The Appeals Chamber observes that the Trial Chamber never stated so. What the Trial Chamber held in the decision referred to by Mr Bemba[1357] was that an *interlocutory appeal* on its decision not to exclude the Detention Centre Materials was not warranted, as a challenge to that decision could be more aptly raised as part of any final appeal.[1358] At no point did the Trial Chamber state that Mr Bemba could not have challenged again the admissibility of the concerned evidence on the basis of any new information or that his right to obtain disclosure of materials under rule 77 relevant to any challenge on his part to the admissibility of this evidence was "suspended" until the appeal stage of proceedings. In these circumstances, Mr Bemba's argument that "[a]s a result, it would have been futile for the Defence to investigate, and adduce evidence on this point during the trial phase"[1359] is meritless. Accordingly, contrary to Mr Bemba's arguments, the concerned emails cannot demonstrate any error on the part of the Trial Chamber with respect to the procedure for submission of documentary evidence at trial. Mr Bemba's request to admit these emails as additional evidence on appeal is therefore dismissed.

627. In light of the above, the Appeals Chamber rejects Mr Bemba's arguments that he was unduly prejudiced by the Trial Chamber's decision not to render rulings on the relevance and/or admissibility of evidence.

(c) Conclusion

628. In conclusion, the Appeals Chamber is not persuaded by the appellants' arguments that the Trial Chamber acted inconsistently with the legal framework of the Court and/or caused undue prejudice to the rights of the accused persons in deciding not to rule on the relevance and/or admissibility of evidence and in relying for the

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[1356] Second Request to Admit Additional Evidence on Appeal, paras 26-31. *See also* para. 23.
[1357] Second Request to Admit Additional Evidence on Appeal, para. 23, fn. 36.
[1358] "Decision on Request for Leave to Appeal 'Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible'", 20 November 2015, ICC-01/05-01/13-1489, para. 10.
[1359] Second Request to Admit Additional Evidence on Appeal, para. 23.

purpose of the Conviction Decision on the evidence which it had recognised as "submitted". Accordingly, Mr Babala's,[1360] Mr Arido's[1361] and Mr Bemba's[1362] grounds of appeal in this regard are rejected.

B. Other procedural errors alleged by Mr Arido

629. Mr Arido argues that, in the course of the proceedings, there had been "other fair trial violations".[1363] Some of his arguments placed under that section of his Appeal Brief are addressed elsewhere in the present judgment, namely the arguments that: (i) Mr Kokaté's role "exculpates" Mr Arido, or at least, raises reasonable doubts on his guilt;[1364] (ii) the Trial Chamber erred in the assessment of certain CDRs;[1365] and (iii) the Western Union Records should have been excluded as inadmissible evidence under article 69 (7) of the Statute.[1366] The Appeals Chamber addresses below the remaining arguments raised by Mr Arido under the section "other fair trial violations".[1367]

1. Challenge to the decision of the Trial Single Judge on the Prosecutor's interview with witness D-4

(a) Relevant procedural background

630. In the present case, the Trial Chamber regulated the regime for contacts between a party and witnesses of another party by way of a protocol adopted on 20 July 2015.[1368] Under this regime it is required, *inter alia*, that the witness, upon request through the calling party, consents to be contacted or interviewed by the non-calling party.[1369]

631. During the trial, the Prosecutor expressed her intention to interview, *inter alia*, witness D-4 who, at that time, was included in Mr Arido's list of witnesses

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[1360] Mr Babala's Appeal Brief, paras 49-72.
[1361] Mr Arido's Appeal Brief, paras 241-246.
[1362] Mr Bemba's Appeal Brief, paras 188-201.
[1363] Mr Arido's Appeal Brief, paras 77-160.
[1364] Mr Arido's Appeal Brief, paras 82-87. These arguments are addressed below at para. 1549.
[1365] Mr Arido's Appeal Brief, paras 103-112. These arguments are addressed below at paras 1597-1599 and 1607-1609.
[1366] Mr Arido's Appeal Brief, paras 123-153. These arguments are addressed above in Section VI.B.
[1367] Mr Arido's Appeal Brief, paras 88-102, 116-122, 154-160.
[1368] Protocol on Witnesses.
[1369] Protocol on Witnesses, paras 34-37.

(identified, in the present case, as witness D24-2).[1370] While the witness consented to be interviewed by the Prosecutor, Mr Arido refused to communicate to her the witness's contact details referring, as the reason for the refusal, to the Prosecutor's intention to interview the witness "as a suspect pursuant to Article 55 (2) of the Statute".[1371]

632. When seized of the matter, the Trial Single Judge held that the applicability of article 55 (2) of the Statute to interviews conducted by the Prosecutor depended on the existence of an objective criterion, and that "the Prosecution would violate its obligations if it questioned a person for whom it had grounds to believe committed a crime within the jurisdiction of the Court without applying the safeguards in Article 55(2)".[1372] On this ground, the Trial Single Judge found no merit in Mr Arido's refusal to provide the Prosecutor with the contact details of witness D-4, and ordered Mr Arido to communicate this information to the Prosecutor forthwith.[1373]

633. The audio recordings of witness D-4's interview were disclosed by the Prosecutor on 4 March 2016.[1374] On 7 March 2016, "[u]pon review of the recent disclosure, communicated on 4 March 2016, which included the audio recordings", Mr Arido formally notified the Trial Chamber that he no longer intended to call witness D-4 to testify at trial.[1375]

(b) Submissions of the parties

(i) Mr Arido

634. Mr Arido argues that the Trial Single Judge's decision permitting the Prosecutor to interview witness D-4 under article 55 (2) of the Statute "resulted in a violation of

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[1370] *See* "Prosecution Motion to Obtain the Contact Information of Witnesses D24-P-0002, D24-P-0003, D24-P-0009, D24-P-0011, and D24-P-0012", 10 February 2016, ICC-01/05-01/13-1619; this document was reclassified as public pursuant to the Trial Chamber VII's instruction dated 4 August 2016.
[1371] *See* "Narcisse Arido's Response to the 'Prosecution Motion to Obtain the Contact Information of Witnesses D24-P-0002, D24-P-0003, D24-P-0009, D24-P-0011, and D24-P-0012' (ICC-01/05-01/13-1619-Conf)", 15 February 2016, ICC-01/05-01/13-1630-Conf, paras 15-17. A public redacted version was registered on 6 July 2016 (ICC-01/05-01/13-1630-Red).
[1372] Decision on Prosecutor's Request for Contact Information, para. 9.
[1373] Decision on Prosecutor's Request for Contact Information, p. 7.
[1374] *See* "Prosecution's Communication of Rule 77 Material Disclosed to the Defence on 4 March 2016", ICC-01/05-01/13-1700 with one confidential annex.
[1375] "Narcisse Arido's Notification of its Revised List of Witnesses and Supplementary Submissions", ICC-01/05-01/13-1705-Red, paras 1, 6.

[Mr Arido's] fair trial rights, under Article 67(1)(e)".[1376] In particular, in Mr Arido's view, "[t]he Prosecution's questioning of D-4 as a suspect created an untenable situation for the Defence because it meant that if D-4 were to be called as a Defence witness, he could incriminate himself, would need counsel, etc".[1377] According to Mr Arido, "[a]s a result" of this, he was "forced to drop D-4 as a witness", given that "[o]nce the Prosecution attached 'suspect status' to D-4, his fate had been sealed".[1378] Mr Arido submits that "[t]his presented a conflict of interest for the Defence" because, after dropping witness D-4 as a witness in the present case, his defence "could no longer approach [the witness] without the permission of the Prosecution or risking an Article 70 investigation".[1379] On this basis, Mr Arido concludes that his right to present witnesses on his behalf was violated.[1380]

(ii) The Prosecutor

635. The Prosecutor argues that Mr Arido misunderstands the purpose and scope of the application of the safeguards under article 55 (2) of the Statute.[1381] She submits that "[she] would violate [her] own obligations if [she] questioned a person whom [she] had grounds to believe committed a crime within the Court's jurisdiction without applying the article 55(2) safeguards".[1382] According to the Prosecutor, "[t]he decision to drop D-4 as a Defence witness just three days after [she] disclosed the content of its interview was exclusively Arido's strategic choice, and not a violation of his fair trial rights".[1383]

(c) Determination by the Appeals Chamber

636. The Appeals Chamber is not persuaded that the fact that the Prosecutor interviewed witness D-4 (who, at that time, was listed as one of Mr Arido's witnesses), according him the guarantees of article 55 (2) of the Statute, resulted in a violation of Mr Arido's fair trial rights because it "forced" him to drop witness D-4 from his list of witnesses. Mr Arido does not substantiate this allegation. In addition,

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[1376] Mr Arido's Appeal Brief, para. 94.
[1377] Mr Arido's Appeal Brief, para. 92.
[1378] Mr Arido's Appeal Brief, paras 92, 93.
[1379] Mr Arido's Appeal Brief, para. 92.
[1380] Mr Arido's Appeal Brief, para. 93.
[1381] Response, para. 670.
[1382] Response, para. 670.
[1383] Response, para. 671 (footnotes omitted).

even assuming that the Prosecutor's interview of witness D-4 conducted with the safeguards of article 55 (2) of the Statute could have adversely affected Mr Arido's defence strategy, the Appeals Chamber is of the view that Mr Arido does not demonstrate any error on the part of the Trial Single Judge. Indeed, the Appeals Chamber agrees with the Trial Single Judge that the safeguards under article 55 (2) of the Statute apply whenever there are grounds to believe that the person being interviewed by the Prosecutor has committed a crime within the jurisdiction of the Court.[1384] These safeguards are set forth in the Statute to protect the person against self-incrimination, and they cannot be denied for the sake of the defence strategy of another person. In the circumstances at hand, and as correctly held by the Trial Single Judge, the Prosecutor had no choice but to question witness D-4 under article 55 (2) of the Statute.

637. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

2. Alleged late disclosure by the Prosecutor

(a) Submissions of the parties

(i) Mr Arido

638. Mr Arido argues that the "[t]he failure of the Prosecution to fulfil its disclosure obligations in a non-selective and timely manner renders the proceedings unfair and adversely affected the Defence".[1385] In particular, Mr Arido submits that the Prosecutor violated her disclosure obligations as she disclosed certain materials under rule 77 of the Rules untimely, in particular seven requests for assistance by the Prosecutor to the Cameroonian authorities,[1386] four official responses from the Cameroonian authorities,[1387] two official agreements between the Prosecutor and Cameroon[1388] and three emails between investigators of the Office of the Prosecutor

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[1384] "Decision on Prosecution Request to Obtain Contact Information of Defence Witnesses", 19 February 2016, ICC-01/05-01/13-1638, para. 9.
[1385] Mr Arido's Appeal Brief, para. 122.
[1386] Mr Arido's Appeal Brief, paras 117, 119, referring to CAR-OTP-0091-0317, CAR-OTP-0091-0333, CAR-OTP-0091-0320, CAR-OTP-0091-0326, CAR-OTP-0091-0331, CAR-OTP-0091-0307 and CAR-OTP-0091-0312.
[1387] Mr Arido's Appeal Brief, para. 121, fn. 124, referring to CAR-OTP-0073-0007, CAR-OTP-0073-0008, CAR-OTP-0073-0009 and CAR-OTP-0073-0010.
[1388] Mr Arido's Appeal Brief, para. 121, fn. 125, referring to CAR-OTP-0092-5497 and CAR-OTP-0092-5498.

and the Cameroonian authorities.[1389] Mr Arido submits that the Prosecutor's failure to comply with her disclosure obligations "made it impossible for the Defence to confront all of the evidence against [him] which accurately reflected the 'whole picture' of the investigations".[1390] As a result, according to Mr Arido, he "was placed in a position where [he] could not fully challenge the legality of the evidence against [him]".[1391]

(ii) The Prosecutor

639. The Prosecutor responds that she fulfilled her disclosure obligations in a timely manner.[1392] She submits that at trial she had opposed Mr Arido's unsubstantiated requests for disclosure of her requests for assistance to national authorities, and that she subsequently disclosed the materials referred to by Mr Arido in compliance with the Trial Single Judge's order to that effect.[1393] The Prosecutor also argues that Mr Arido does not explain how the timing of the disclosure of the material concerned prejudiced him in any way and adversely affected his fair trial rights.[1394]

(b) Determination by the Appeals Chamber

640. The Appeals Chamber observes that Mr Arido, while arguing that the Prosecutor violated her disclosure obligations under rule 77 of the Rules, does not explain how the particular documents he refers to[1395] were material for the preparation of his defence within the meaning of that provision and, on that basis, had to be disclosed to him sooner. Rather, his argument appears to be that the Prosecutor's requests for assistance to States, and any related communications, received and transmitted for the purposes of the conduct of the relevant investigative activities had to be disclosed to the defence as a matter of law.[1396] However, other than an unsubstantiated reference to the fact that disclosure of this material is necessary in order to have "the 'whole picture' of the investigations" and "fully challenge the

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[1389] Mr Arido's Appeal Brief, para. 121, fn. 126, referring to CAR-OTP-0093-0004, CAR-OTP-0093-0011 and CAR-OTP-0093-0053.
[1390] Mr Arido's Appeal Brief, para. 122.
[1391] Mr Arido's Appeal Brief, para. 122.
[1392] Response, para. 684.
[1393] Response, para. 685.
[1394] Response, paras 685, 686.
[1395] Mr Arido's Appeal Brief, paras 117, 119-121.
[1396] Mr Arido's Appeal Brief, para. 122.

legality of the evidence",[1397] Mr Arido does not provide any legal basis in support of this proposition.

641. The Appeals Chamber observes that the legal framework of the Court does not contain any provision stipulating that requests for assistance must be disclosed to the accused person. Rather, such material *may* fall within the Prosecutor's residual obligation under rule 77 of the Rules to disclose any document and other objects in her possession or control "which are material to the preparation of the defence". With respect to the interpretation of this provision, the Appeals Chamber reiterates its previous holding that "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case".[1398] Thus, while this assessment should be made on a *prima facie* basis,[1399] rule 77 of the Rules does not mandate the automatic disclosure of *any* particular class of documents in the abstract[1400] – contrary, for example, to the provision of rule 76 of the Rules.[1401] Against this backdrop, the Appeals Chamber considers untenable Mr Arido's suggestion that requests for assistance transmitted by the Prosecutor within the context of the relevant investigation and related communications with States must as such be considered material under rule 77 of the Rules. Whether this is the case necessarily depends on the content, context and purpose of any individual request for assistance in the specific circumstances of each case,[1402] and no general and abstract definition can be given as to the type of requests for assistance which may fall within rule 77 of the Rules.

642. In the Appeals Chamber's view, the fact that at least some of the Prosecutor's requests for assistance led to the collection of evidence on which the Prosecutor relied

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[1397] Mr Arido's Appeal Brief, para. 122.
[1398] *Banda and Jerbo* OA4 Judgment, para. 39.
[1399] *Banda and Jerbo* OA4 Judgment, para. 42.
[1400] This is with the exception to the last part of rule 77 of the Rules which mandates the disclosure of material which "were obtained from or belonged to the person".
[1401] Rule 76 of the Rules, indeed, mandates the Prosecutor to disclose to the defence, *inter alia*, the copies of any prior statements made by the witnesses whom the Prosecutor intends to call to testify.
[1402] *See also* *Lubanga* OA5 OA6 Judgment, para. 11, where the Appeals Chamber found that a particular request for assistance from the Prosecutor to the Democratic Republic of the Congo authorities was material to the preparation of the defence, and thus subject to disclosure under rule 77 of the Rules, on the ground that it related to a specified key issue that was in dispute between the parties in the pending appeal.

at trial[1403] is manifestly insufficient for their disclosure to the defence to be considered mandatory under rule 77 of the Rules. Mr Arido's suggestion to this effect has no basis in law and ostensibly falls short of meeting even the low burden placed on him to demonstrate the actual or potential "materiality" to the preparation of his defence of these communications which occurred between the Prosecutor and the Cameroonian authorities within the context of the Prosecutor's investigations. Indeed, as observed above, Mr Arido does not explain how the seven Prosecutor's requests for assistance to the Cameroonian authorities, the four responses from the Cameroonian authorities and the two official agreements between the Prosecutor and Cameroon were material for the preparation of his defence within the meaning of rule 77 of the Rules, nor does he explain how his rights were impaired by the timing of disclosure of this particular material or, in general, by the Prosecutor's alleged failure to properly fulfil her disclosure obligations.[1404]

643. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

3. Alleged errors regarding the reference to [redacted] in an Austrian document

(a) Relevant procedural background

644. In his closing submissions at the end of the trial, Mr Arido observed that the subject field of one of the Austrian judicial orders to the Western Union company reads: "Criminal matter of the International Criminal Court – Against: Narcisse Arido – Subject/Because of: [redacted]".[1405] Mr Arido requested the Trial Chamber to "[d]eclare that the characterization of Mr. Arido as a [redacted] in the Austrian request defamed his character and reputation, and caused irreparable harm and prejudice to him within his community, and the international community".[1406] On the basis of this (and other alleged "human rights violations identified in this case"), Mr Arido also requested that the Trial Chamber "determine a process within the ICC structure for re-dress, including the awarding of reparations".[1407]

[1403] *See* Mr Arido's Appeal Brief, para. 118.
[1404] Mr Arido's Appeal Brief, para. 122.
[1405] Mr Arido's Closing Submissions, para. 140, referring to CAR-D24-0002-1363.
[1406] Mr Arido's Closing Submissions, para. 410 b.
[1407] Mr Arido's Closing Submissions, para. 411.

645. On 29 June 2016, the Trial Chamber issued a decision on these requests by Mr Arido.[1408] It found that the particular Austrian document containing the reference to [redacted] was a confidential document not accessible to the public at large, and that the error could not be imputed to the Prosecutor.[1409] The Trial Chamber emphasised that it "fail[ed] to see how under these circumstances Mr Arido's character was defamed and prejudice was caused to him within any community, may it be personal or international".[1410] The Trial Chamber also rejected Mr Arido's request for redress and reparation, observing: (i) Mr Arido's failure to indicate any legal basis in support of the request; and (ii) that there had been no violation of Mr Arido's rights.[1411]

(b) Submissions of the parties

(i) Mr Arido

646. Mr Arido submits that the Trial Chamber failed to rule in the Conviction Decision on his "objections to [his] characterisation as a [redacted]"[1412] According to Mr Arido, the Trial Chamber's failure to do so "removes the error, and insulates it, from appellate review".[1413] He states in this regard that the "erroneous [redacted] label is a serious human right violation with on-going adverse consequences [and] is the kind of error that cannot be easily rectified, if at all, especially [redacted]".[1414]

647. Mr Arido states that the Trial Chamber erred when, before the issuance of the Conviction Decision, it rejected his arguments that this erroneous label violated his human rights.[1415] In particular, according to Mr Arido, the Trial Chamber's conclusion that there had been no harm to Mr Arido's human rights did not take into account of the fact that: (i) the confidentiality of the document concerned and its public inaccessibility "must reasonably be viewed as a limited protection in the

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[1408] Decision on Mr Arido's Requested Remedies.
[1409] Decision on Mr Arido's Requested Remedies, para. 20.
[1410] Decision on Mr Arido's Requested Remedies, para. 20.
[1411] Decision on Mr Arido's Requested Remedies, para. 21.
[1412] Mr Arido's Appeal Brief, para. 95.
[1413] Mr Arido's Appeal Brief, para. 96.
[1414] Mr Arido's Appeal Brief, para. 96.
[1415] Mr Arido's Appeal Brief, para. 97.

current electronic age";[1416] and (ii) "there was obviously correspondence between the Prosecution and the Austrian authorities on multiple occasions" and therefore the Prosecutor cannot be absolved for her responsibility and shall be held accountable.[1417]

(ii) The Prosecutor

648. The Prosecutor submits that the issued raised by Mr Arido on the use of the term [redacted] by the Austrian authorities was adequately addressed by the Trial Chamber in an interlocutory decision rendered before the Conviction Decision.[1418] According to the Prosecutor, Mr Arido's arguments should be summarily dismissed as he has "not even attempted" to show how such interlocutory decision addressing his additional requests distinct from – and unrelated to – the merits of the case against him materially affected his conviction.[1419]

649. The Prosecutor submits that, in any case: (i) [redacted] was never mentioned in any documents emanating from her, including in any request for assistance to Austria, which "made clear that the suspected crime was an article 70 offence";[1420] and (ii) there has been no prejudice or harm to Mr Arido as the relevant Austrian document is confidential and unavailable to the public and "[t]he 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".[1421]

(c) Determination by the Appeals Chamber

650. Mr Arido argues that the Trial Chamber erred[1422] in rejecting his request that the Trial Chamber "[d]eclare that the characterization of Mr. Arido as a [redacted] in the Austrian request defamed his character and reputation, and caused irreparable harm and prejudice to him within his community, and the international community".[1423] The Appeals Chamber observes that Mr Arido does not explain how the Trial Chamber's rejection of this request – which was unrelated to the consideration of his guilt or innocence for the offences with which he was charged in

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[1416] Mr Arido's Appeal Brief, para. 98 (emphasis omitted).
[1417] Mr Arido's Appeal Brief, paras 99-101.
[1418] Response, para. 672.
[1419] Response, paras 673-674.
[1420] Response, para. 674.
[1421] Response, para. 675.
[1422] Mr Arido's Appeal Brief, paras 97-101.
[1423] Mr Arido's Closing Submissions, para. 410 b.

the present proceedings –impacts on his conviction. Mr Arido does not even claim that the reference to [redacted] in the Austrian judicial order rendered the proceedings before the Court unfair. Rather, he alleges (and had alleged before the Trial Chamber[1424]) a violation of his right "not to be subject to unlawful attack on [his] honour and reputation".[1425] However, he does not substantiate how any error that the Trial Chamber may have committed in its determination that there has been no violation of his right to honour and reputation resulting from the use of the term [redacted] may affect his conviction.

651. Accordingly, the Appeals Chamber dismisses *in limine* Mr Arido's arguments.

4. Alleged unfairness from the Conviction Decision's "silence" on the rejection of remedies requested by Mr Arido

(a) Relevant procedural background

652. In his closing submissions at the end of the trial, Mr Arido advanced a number of requests for "remedies" beyond that of acquittal for the charges levied against him.[1426] These requests were all addressed – and rejected – by the Trial Chamber in a decision rendered on 29 June 2016.[1427]

(b) Submissions of the parties

(i) Mr Arido

653. Mr Arido submits that the Conviction Decision "is silent in respect to all of the remedies [which he had requested in his closing submissions at trial], but for the remedy of acquittal".[1428] He observes that the Trial Chamber had rejected all these other requested remedies in a separate decision,[1429] but argues that, in the Conviction Decision, it "did not even address [his] remedies request and explain how it was dealing with, or had dealt with, the remedies requested".[1430] According to Mr Arido, "[b]y excluding the legal content of its decision on remedies from the [Conviction

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[1424] Mr Arido's Closing Submissions, para. 141.
[1425] Mr Arido's Appeal Brief, para. 101, referring to article 17 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668; article 12 of the *Universal Declaration of Human Right*, 10 December 1948.
[1426] Mr Arido's Closing Submissions, paras 408-411.
[1427] Decision on Mr Arido's Requested Remedies.
[1428] Mr Arido's Appeal Brief, paras 157, referring to Mr Arido's Closing Submissions, paras 407-411.
[1429] Mr Arido's Appeal Brief, para. 158, referring to Decision on Mr Arido's Requested Remedies.
[1430] Mr Arido's Appeal Brief, para. 159.

Decision], the [Trial Chamber] violated [his] fair trial right to a full and reasoned opinion, which would be subject to appellate review".[1431]

(ii) The Prosecutor

654. The Prosecutor recalls that the Trial Chamber, four months before rendering the Conviction Decision, issued a decision disposing of the requests that had been made by Mr Arido and were unrelated to the merits of the case against him.[1432] According to her, "[a]ddressing 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".[1433] The Prosecutor submits that "Arido is entitled to challenge the Chamber's Decision in his appeal against the [Conviction Decision], and does so", but that "he must show that the Chamber erred in this Decision and that such error materially affected the [Conviction Decision]".[1434] According to her, "[s]ince Arido fails to do so, his arguments should be summarily dismissed".[1435]

(c) Determination by the Appeals Chamber

655. The Appeals Chamber observes that Mr Arido's argument is that the Trial Chamber, by addressing his requests for remedies in a decision other than the Conviction Decision, "violated [his] fair trial right to a full and reasoned opinion, which would be subject to appellate review".[1436] The Appeals Chamber is unpersuaded by this argument. The fact that certain requests, additional to the request for acquittal, have been addressed by the Trial Chamber in a separate decision, and that the Conviction Decision is "silent" in this respect has no consequence on Mr Arido's right to appeal his conviction under article 81 of the Statute. Indeed, this right extends to the right to challenge on appeal interlocutory decisions rendered in the course of the proceedings leading up to his conviction provided that they do indeed have a material effect on such conviction. That the Trial Chamber disposed of Mr Arido's request for additional remedies separately from the evaluation of his guilt or innocence is of no significance as far as Mr Arido's right to appeal under article 81 of

[1431] Mr Arido's Appeal Brief, para. 160.
[1432] Response, para. 688.
[1433] Response, para. 688.
[1434] Response, para. 689.
[1435] Response, para. 689 (footnote omitted).
[1436] Mr Arido's Appeal Brief, para. 160 (footnote omitted).

the Statute is concerned. Rather, the dispositive consideration is whether (and, if so, how) the Trial Chamber's disposal of these request impacts on the verdict rendered by the Trial Chamber, which is subject to the present appeal. Mr Arido, however, advances no submissions in this respect.

656. Accordingly, the Appeals Chamber rejects Mr Arido's arguments that his right to appeal is prejudiced by the "Trial Chamber's failure to respond in the [Conviction Decision] to [his] remedies".[1437]

5. Arguments concerning the rejection of requests for leave to appeal

(a) Submissions of the parties

(i) Mr Arido

657. Under the heading "Article 81(1)(b)(iv) – Leaves to Appeal" in his appeal brief, Mr Arido argues that "[t]he Appeals Chamber is the 'final arbiter of the law' and may hear arguments which are significant to the Court's jurisprudence and has *proprio motu* powers to rule on legal issues".[1438] On this basis, and referring to his eleven requests for leave to appeal decisions by the Pre-Trial Chamber or by the Trial Chamber that were rejected in the course of the proceedings,[1439] Mr Arido "requests that the Appeals Chamber review the denials of appeal discussed, and deliberate and rule on the legal issues presented".[1440] In his view, [t]he issues raised impact directly on [him], but are also of significance to the interpretation of the Rome Statute, particularly Article 70 and Article 25, and the processes and functioning of the Court's Prosecutorial and Judicial organs".[1441]

(ii) The Prosecutor

658. The Prosecutor argues that Mr Arido's submission that the Appeals Chamber should review the eleven decisions by the Pre-Trial Chamber and Trial Chamber rejecting his requests for leave to appeal and rule on the merits of each legal issue therein is "unsubstantiated" and "should be summarily dismissed".[1442] The Prosecutor

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[1437] Mr Arido's Appeal Brief, para. 157-160.
[1438] Mr Arido's Appeal Brief, para. 154.
[1439] Mr Arido's Appeal Brief, para. 155.
[1440] Mr Arido's Appeal Brief, para. 156.
[1441] Mr Arido's Appeal Brief, para. 156.
[1442] Response, para. 687.

submits in this regard that "Arido does not explain why these 11 decisions were erroneous nor how they materially affected the [Conviction Decision]".[1443]

(b) Determination by the Appeals Chamber

659. The Appeals Chamber is of the view that the fact that the Pre-Trial Chamber or the Trial Chamber considered that interlocutory appeals against certain procedural decisions were not warranted does not, in and of itself, indicate any error – even less does it substantiate a "fair trial violation". While Pre-Trial and Trial Chambers shall indeed grant leave to appeal when the requirements under article 82 (1) (d) of the Statute are met, the Appeals Chamber observes that Mr Arido does not explain why the rejections of his requests for leave to appeal were erroneous, and how the absence of interlocutory determinations by the Appeals Chamber on the issues addressed therein materially affected his final conviction. Mr Arido's request that the Appeals Chamber "review the denials of appeal" is thus dismissed.

660. In terms of his other request that the Appeals Chamber "deliberate and rule on the legal issues" on which he had sought interlocutory appeals in the course of the proceedings, the Appeals Chamber considers that this request is without basis and is contrary to the provisions regulating appellate proceedings. The present appeal is an appeal under article 81 of the Statute, and is thus concerned with a review of the Trial Chamber's decision on Mr Arido's conviction. To the extent that the disposal of any particular issue in a procedural decision issued by the Pre-Trial Chamber or Trial Chamber may materially affect his conviction, Mr Arido is entitled to raise any such error within the context of his final appeal against the Conviction Decision (as indeed he does in several instances[1444]). Outside that context, the Appeals Chamber sees no merit in Mr Arido's request that the Appeals Chamber "rule" on the legal issues addressed in a number of interlocutory decisions merely on the ground that he had unsuccessfully sought leave to appeal them in the course of the proceedings. Accordingly, the Appeals Chamber rejects this request.

[1443] Response, para. 687.

[1444] *See e.g.* Mr Arido's Appeal Brief, paras 123-153, arguing errors in the First Western Union Decision and Second Western Union Decision, which he had unsuccessfully sought to appeal under article 82 (1) (d) of the Statute in the course of the trial (*see* Mr Arido's Request for Leave to Appeal the First Western Union Decision; "Narcisse Arido's Request for Leave to Appeal 'Decision on Request in Response to Two Austrian Decisions' (ICC-01/05-01/13-1948)", dated 18 July 2016 and made public on 4 August 2016, ICC-01/05-01/13-1950).

C. Other procedural errors alleged by Mr Babala

661. Under the section "procedural errors affecting the [Conviction Decision]" in his appeal brief, Mr Babala raises several arguments, namely: (i) "[the] appointment of [the] Independent Counsel";[1445] (ii) "[the] violation of the privileges and immunities of members of the defence team in the Main Case";[1446] (iii) "[the] unlawful acquisition of the Western Union Records";[1447] (iv) "[the] underestimation of technical errors and faults in the recordings of conversations at the detention centre and the unacceptable attempt by the Chamber to correct them by itself";[1448] and (v) "[the] consideration given by the Chamber to the subjective translations and transcriptions of recordings of conversations from the detention centre provided by the Office of the Prosecutor".[1449]

662. The Appeals Chamber recalls that Mr Babala's arguments under points (ii) and (iii) have been addressed above in the section disposing of the grounds of appeal on the admissibility of documentary evidence.[1450] The arguments under points (iv) and (v), while presented as procedural errors, are instead related to the Trial Chamber's assessment of the Detention Centre Materials for its factual findings in the Conviction Decision, and are thus addressed below in the section of the present judgment concerning the grounds of appeal on the Trial Chamber's assessment of evidence.[1451] The Appeals Chamber will address at this juncture the remaining "procedural error" raised by Mr Babala, which is the alleged error concerning the role of the Independent Counsel.[1452]

1. Submissions of the parties

(a) Mr Babala

663. Mr Babala argues that "the institution, mandate and actions of [the] Independent Counsel are procedurally flawed".[1453] In particular, Mr Babala asserts that the

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[1445] Mr Babala's Appeal Brief, paras 13-18.
[1446] Mr Babala's Appeal Brief, paras 19-20.
[1447] Mr Babala's Appeal Brief, paras 21-33.
[1448] Mr Babala's Appeal Brief, paras 34-42.
[1449] Mr Babala's Appeal Brief, paras 43-48.
[1450] *See supra* sections VI.A and VI.B, respectively.
[1451] *See infra* Section X.D.
[1452] Mr Babala's Appeal Brief, paras 13-17.
[1453] Mr Babala's Appeal Brief, para. 16.

Independent Counsel "did not carry out his mandate in a neutral fashion" and "[h]is improperly broad interpretation and his misplaced observations on each conversation led the Prosecution to believe it could identify knowledge and intent on the part of Mr Babala".[1454] According to Mr Babala, the Independent Counsel, despite not having access to confidential information in the Main Case and first-hand knowledge of events, "considered himself in a position to evaluate the so-called 'instructions' given by Mr Kilolo to his interlocutors (that is, witnesses), which 'were not necessarily consistent with the true facts' and deduce on that basis that Mr Kilolo was corruptly influencing them".[1455] In sum, according to Mr Babala, "[g]iven the Prosecution and Trial Chamber's slavish adherence to the Independent Counsel's interpretations and their consideration of those interpretations are *res judicata*, that institution has had an overwhelmingly negative impact on Mr Babala's interest".[1456]

(b) The Prosecutor

664. The Prosecutor submits that Mr Babala's arguments should be summarily dismissed, as they are "barely argued" and "unclear".[1457]

2. Determination by the Appeals Chamber

665. In the view of the Appeals Chamber, Mr Babala's argument that his conviction is vitiated by the Prosecutor's and/or Trial Chamber's purportedy "slavish adherence" to the Independent Counsel's interpretations of the concerned communications does not withstand scrutiny. The Independent Counsel was not appointed to assist in the substantive analysis of the material or evidence relevant to the case, but to ensure respect for privileged communication between Mr Bemba and Mr Kilolo by filtering the recordings of intercepted communications collected by the Dutch authorities prior to their transmission to the Prosecutor.[1458] Furthermore, the Trial Chamber explicitly stated that for the purpose of its assessment on the guilt or innocence of the accused, it did not rely on any evaluation given by the Independent Counsel,[1459] but arrived to its

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[1454] Mr Babala's Appeal Brief, para. 16.b-c.
[1455] Mr Babala's Appeal Brief, para. 16.d.
[1456] Mr Babala's Appeal Brief, para. 17.
[1457] Response, para. 140.
[1458] *See* Decision Authorising to Seize National Authorities and Appointing Independent Counsel, pp. 7, 8.
[1459] *See* Conviction Decision, para. 216 (iii), on the matter of the attribution of telephone numbers in the logs to the speakers.

own conclusions in light of its own assessment of the communications at issue. The Appeals Chamber notes in this regard that Mr Babala does not refer to any finding in which the Trial Chamber simply adopted the interpretation of the Independent Counsel. Similarly, the Appeals Chamber sees no merit in Mr Babala's obscure suggestion that it was the Independent Counsel to have "led the Prosecution to believe it could identify knowledge and intent on the part of Mr Babala".[1460]

666. Accordingly, the Appeals Chamber rejects Mr Babala's argument.

VIII. GROUNDS OF APPEAL ON THE INTERPRETATION OF THE LEGAL ELEMENTS OF THE OFFENCES UNDER ARTICLE 70 OF THE STATUTE

667. Mr Bemba, Mr Mangenda and Mr Arido challenge the Trial Chamber's interpretation of the offences under article 70 (1) (a) to (c) of the Statute. Mr Bemba submits that the Trial Chamber erred because it found that these offences did not require a showing of special intent.[1461] Regarding the offence of giving false testimony under article 70 (1) (a) of the Statute, Mr Bemba argues that the Trial Chamber erred by adopting a definition that encompasses the conduct of concealing information not asked of the witness.[1462] He also argues that the Trial Chamber erred in finding that the accused may be "party" who can present false evidence within the meaning of article 70 (1) (b) of the Statute.[1463] As for the offence of corruptly influencing witnesses under article 70 (1) (c) of the Statute, Mr Arido challenges the Trial Chamber's interpretation of the term "witness", which in its view includes "potential witness", as well as the Trial Chamber's alleged interpretation of this provision which, he submits, was inconsistent with the intent requirement.[1464] Mr Bemba and Mr Mangenda allege that the Trial Chamber erred by including non-criminal practices within the definition of the offence of corruptly influencing a

[1460] Mr Babala's Appeal Brief, para. 16.c.
[1461] Mr Bemba's Appeal Brief, paras 10-18; Mr Babala's Appeal Brief, paras 171-173.
[1462] Mr Bemba's Appeal Brief, paras 23-31.
[1463] Mr Bemba's Appeal Brief, paras 32-42.
[1464] Mr Arido's Appeal Brief, paras 162-212.

witness.[1465] Finally, Mr Bemba argues that the Trial Chamber erred in entering cumulative convictions under articles 70 (1) (a) to (c) of the Statute.[1466]

668. The Appeals Chamber will address these arguments in turn.

A. *Chapeau* of article 70 (1) of the Statute

1. *Relevant part of the Conviction Decision*

669. The Trial Chamber held that contrary to Mr Kilolo's, Mr Arido's and Mr Mangenda's submissions that offences under article 70 (1) of the Statute require special intent to interfere with or harm the administration of justice, no "additional evidential requirement that the administration of justice be 'harmed' or that the offence be committed to interfere with the administration of justice" was needed.[1467] In the Trial Chamber's view, interfering with the administration of justice was an obvious consequence of the acts committed under articles 70 (1) (a) to (c) of the Statute.[1468]

670. When addressing the applicable law to article 70 (1) (a) of the Statute, the Trial Chamber noted that "[t]he *chapeau* of Article 70(1) of the Statute prescribes that all offences under its sub-paragraphs must be committed 'intentionally'".[1469] It observed that article 30 of the Statute, which is applicable in the present case pursuant to rule 163 (1) of the Rules, sets out the requisite *mens rea*.[1470]

2. *Submissions of the parties*

(a) Mr Bemba

671. Mr Bemba submits that the Trial Chamber erred in finding that article 70 (1) of the Statute does not require special intent while "determin[ing] that the *chapeau* intent requirement only applies to physical perpetrators, not necessarily the defendant".[1471] He avers that the Trial Chamber should have determined whether the accused

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[1465] Mr Bemba's Appeal Brief, paras 43-56; Mr Mangenda's Appeal Brief, paras 146-165.
[1466] Mr Bemba's Appeal Brief, paras 19-22.
[1467] Conviction Decision, paras 30-31.
[1468] Conviction Decision, para. 31.
[1469] Conviction Decision, para. 26.
[1470] Conviction Decision, para. 26.
[1471] Mr Bemba's Appeal Brief, para. 10, referring to Conviction Decision, paras 26, 31.

intended to engage in a conduct that undermined the administration of justice.[1472] Mr Bemba submits further that the Trial Chamber disregarded the drafting history of article 70 of the Statute, particularly, the proposals made by Japan and the United States "which set out an intent requirement for each of the sub-offences".[1473] Mr Bemba avers that the Trial Chamber restricted its analysis to two domestic jurisdictions when declining to apply the special intent requirement and that it failed to consider several domestic jurisdictions in support of this requirement.[1474]

672. Mr Bemba argues further that the requirement that the offences under article 70 of the Statute be committed "intentionally" has the effect of excluding accessorial modes of liability for these offences.[1475] He avers that this is in keeping with the "limited nature of contempt, as defined and applied" by international courts and domestic jurisdictions.[1476]

(b) The Prosecutor

673. The Prosecutor responds that, consistent with the principles of treaty interpretation, the phrase "offences against [the] administration of justice" in article 70 (1) of the Statute is not a constitutive element of the offences enumerated in the article, but rather represents a reference to the general category of these offences.[1477] In the Prosecutor's view, the word "intentionally" in this provision refers to the standard mental element required by article 30 of the Statute, which is applicable to offences against the administration of justice pursuant to rule 163 (1) of the Rules.[1478] She considers that equating the word "intentionally" to special intent, as Mr Bemba does, goes against the principle of effective interpretation as it would make redundant the language used by other provisions that clearly require special intent, such as articles 6, 7 (1) (g) and 7 (2) (f) of the Statute relating to the crime of genocide and the crime against humanity of forced pregnancy.[1479] The Prosecutor notes that Mr Bemba concedes that other tribunals do not require a special intent for equivalent offences

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[1472] Mr Bemba's Appeal Brief, para. 10.
[1473] Mr Bemba's Appeal Brief, para. 14.
[1474] Mr Bemba's Appeal Brief, para. 17.
[1475] Mr Bemba's Appeal Brief, paras 15-16.
[1476] Mr Bemba's Appeal Brief, para. 16.
[1477] Response, para. 196.
[1478] Response, para. 196.
[1479] Response, para. 197.

against the administration of justice.[1480] As for Mr Bemba's references to the proposal presented by the United States during the drafting of what would become article 70 of the Statute, the Prosecutor avers, this proposal simply requires intention for the commission of the offences.[1481]

674. Finally, the Prosecutor asserts that Mr Bemba did not show an error in the Trial Chamber's finding that article 70 (1) of the Statute allows accessorial liability.[1482] In the Prosecutor's view, article 25 (3) applies to article 70 of the Statute by virtue of rule 163 of the Rules.[1483] She avers that Mr Bemba conflates the objective and subjective elements of article 70 of the Statute with the elements of accessorial liability, and that his submissions simply show that intent is required, but not that accessorial modes of liability are excluded.[1484] The Prosecutor disputes that other tribunals exclude accessorial liability for similar offences against the administration of justice.[1485]

3. Determination by the Appeals Chamber

675. The Appeals Chamber notes that the arguments raised by Mr Bemba focus on the interpretation of the *chapeau* of article 70 (1) of the Statute. The Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of the Vienna Convention also apply to the interpretation of the Statute.[1486] Therefore, its provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty. However, this method of interpretation needs to be applied taking into account the nature of the Statute, in particular, as in the present instance, with respect to its incriminating provisions. The Appeals Chamber emphasises that its interpretation in this regard must be guided by the principle of legality as reflected, *inter alia*, in article 22 of the Statute. Notably, any interpretation of such provisions shall comply with the principle of strict construction under article 22 (2) of the Statute.

[1480] Response, para. 200, referring to Mr Bemba's Appeal Brief, para. 16. *See also* Response, para. 200.
[1481] Response, para. 201.
[1482] Response, para. 203.
[1483] Response, para. 204.
[1484] Response, paras 205-206.
[1485] Response, para. 207.
[1486] *Lubanga* Appeal Judgment, para. 277.

676. The *chapeau* of article 70 (1) of the Statute stipulates that "[t]he Court shall have jurisdiction over the following offences against the administration of justice when committed intentionally". The different offences are listed in subparagraphs (a) to (f). Contrary to Mr Bemba, the Appeals Chamber is of the view that, rather than stipulating an additional mental element, the phrase "offences against the administration of justice" is conditioned by the clause "when committed intentionally", which defines the requisite *mens rea*. Importantly, the phrase is qualified by the word "following". The effect of this term is to make the phrase "when committed intentionally" applicable to each of the offences listed in the subparagraphs of article 70 (1) of the Statute.

677. Moreover, when read in context with other provisions, it is clear that the word "intentionally" in article 70 of the Statute refers to the basic intent required by article 30 of the Statute. As correctly found by the Trial Chamber, the basic intent under article 30 of the Statute applies to the offences against the administration of justice pursuant to rule 163 (1) of the Rules.[1487] Article 30 (1), in turn, provides that "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". In the Appeals Chamber's view, the explicit reference to "intentionally" in article 70 does not depart from the standard set out in article 30 of the Statute, but simply clarifies that the same standard applies to offences listed therein.

678. Indeed, the Appeals Chamber notes that "special intent" refers to an additional mental element that has to be established beyond the basic *mens rea* in relation to the material elements of the crime or offence – conduct, consequence and circumstance, as applicable – in the terms provided for in article 30 of the Statute. Any such additional element must therefore be set out in the incriminating provision concerned. However, the *chapeau* of article 70 (1) of the Statute does not specify any additional element that would be subject to any special intent. The Appeals Chamber is, therefore, not persuaded that article 70 (1) of the Statute requires any special intent to undermine the administration of justice.

[1487] Conviction Decision, para. 26.

679. The Appeals Chamber considers that this conclusion is not called into question by the argument of Mr Bemba that the Trial Chamber "disregarded the drafting history" of article 70 of the Statute, particularly, the proposals made by the United States and Japan. The Appeals Chamber recalls that the *travaux préparatoires* of a treaty are only supplementary means of interpretation, to which recourse may only be had to confirm an interpretation or if the interpretation leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.[1488] The Appeals Chamber considers that the formulation of article 70 is sufficiently clear and that recourse to the *travaux préparatoires* is thus unnecessary. In any event, the Appeals Chamber notes that the proposals made in the course of the drafting of the provision to which Mr Bemba refers are not relevant for the issue at hand.[1489]

680. Turning to Mr Bemba's argument that the inclusion of the phrase "when committed intentionally" results in accessorial modes of liability becoming inapplicable, the Appeals Chamber notes that all modes of liability set forth in article 25 (3) of the Statute are applicable, in principle, pursuant to rule 163 (1) of the Rules, as correctly submitted by the Prosecutor.[1490] In the view of the Appeals Chamber, nothing in rule 163 (1) of the Rules restricts the application of article 30 of the Statute to the offences against the administration of justice, and the reference to "intent" in the *chapeau* of article 70 (1) of the Statute must not be understood narrowly as referring to only article 30 (2) of the Statute, but to the provision as a whole.

[1488] *See* article 32 of the Vienna Convention.
[1489] Mr Bemba's Appeal Brief, para. 14. The Appeals Chamber notes that Mr Bemba makes reference to the Japanese proposal. This however seems to be based on a misreading of that proposal as it does not make any statement regarding the *mens rea* of perjury. *See* for example Preparatory Committee of the Establishment of an International Criminal Court, "Tentative Draft on Procedure: Working Paper submitted by Japan", 13 August 1996, A/AC.249/L.7, accessed at http://www.legal-tools.org/doc/a96376/; Preparatory Committee of the Establishment of an International Criminal Court, "Report of the Preparatory Committee of the Establishment of an International Criminal Court. Volume II (Compilation of proposals)", 13 September 1996, A/51/22, accessed at https://www.legal-tools.org/doc/03b284/, p. 211 ("The detailed regulations of procedure concerning trial and judgement including perjury shall be provided in the rules of the Court."). The US Proposal does not include a special intent. While that proposal is drafted differently than article 70 (1) of the Statute – separately defining the requisite *mens rea* for each of the proposed offences against the integrity of the Court – it did not require a special intent to undermine the administration of justice. Preparatory Committee of the Establishment of an International Criminal Court, "Proposal submitted by the United States of America: Offences against the integrity of the Court", 23 August 1996, A/AC.249/WP.41, accessed at https://www.legal-tools.org/doc/d17942/.
[1490] Response, para. 204.

681. In sum, the Appeals Chamber rejects Mr Bemba's arguments that the Trial Chamber erred by not requiring the showing of a special intent or by not excluding accessorial modes of liability on the basis of the intent requirement set out in the *chapeau* of article 70 (1) of the Statute.

B. Article 70 (1) (a) of the Statute

1. Relevant part of the Conviction Decision

682. With regard to the offence of giving false testimony under article 70 (1) (a) of the Statute, the Trial Chamber found that withholding information may amount to giving false testimony, as this offence not only criminalises affirming a false fact or negating a true one, but also covers situations where a "witness is not directly asked but intentionally withholds information that is true and that is inseparably linked to the issues explored during questioning".[1491] The Trial Chamber held that finding otherwise would be inconsistent with the witness's duty to tell the "whole truth" and that judges could be misled by incomplete or partly untrue evidence.[1492]

683. Applying this interpretation to the facts of the case, the Trial Chamber specifically found that witness D-55 "untruthfully mentioned only three contacts and concealed, despite being asked, his meeting with Mr Kilolo in Amsterdam and [a] telephone call with Mr Bemba".[1493] The Trial Chamber found Mr Bemba guilty, *inter alia*, of having solicited the giving of false testimony by witness D-55, which included the concealing of this information.[1494]

2. Submissions of the parties

(a) Mr Bemba

684. Mr Bemba submits that the Trial Chamber erred when finding that the offence of giving false testimony can be committed by withholding information on matters that were not directly asked of the witness and that this definition "expands the confirmed parameters" of his culpability.[1495] Mr Bemba claims that the domestic authorities and the domestic legal provisions cited by the Trial Chamber are

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[1491] Conviction Decision, para. 21, referring to para. 28.
[1492] Conviction Decision, para. 21.
[1493] Conviction Decision, para. 301 (footnote omitted).
[1494] *See* Conviction Decision, paras 933, 931, 905, fn. 2005.
[1495] Mr Bemba's Appeal Brief, para. 23, referring to Confirmation Decision, para. 28.

insufficient to support its finding.[1496] He avers that the jurisprudence of the ICTR and domestic jurisdictions confine false testimony to affirming a false fact or negating a true fact and do not penalise withholding information on issues outside the lines of questioning.[1497]

685. Mr Bemba argues that witness D-55 "was never questioned as to whether he had spoken to Mr. Bemba after Mr. Bemba's arrest", but that he was rather "asked how far his contact with Mr. Bemba went back, and the details of his first contact with the Defence team for Mr. Bemba".[1498] Mr Bemba submits that the Trial Chamber's legal error also invalidates the Trial Chamber's finding regarding Mr Bemba's *mens rea*, given the nexus between the finding on witness D-55 and the finding that Mr Bemba knew that the witness was providing false testimony.[1499]

(b) The Prosecutor

686. The Prosecutor responds that the Trial Chamber's interpretation is "common-sensical" and consistent with the wording of article 70 (1) (a) of the Statute, noting the provision's broad formulation, a witness's obligation to speak "the whole truth", and the need to capture situations in which a witness provides partially true information to mislead the judges.[1500] The Prosecutor submits further that, contrary to Mr Bemba's submission, witness D-55 was actually asked about all his contacts with Mr Bemba's defence team in the Main Case and failed to talk about his meeting with Mr Kilolo in Amsterdam and his telephone call with Mr Bemba.[1501] Regarding Mr Bemba's submission that witness D-55 was the sole basis for the Trial Chamber's finding on Mr Bemba's knowledge of the witnesses' false testimony, the Prosecutor contends that Mr Bemba's knowledge was substantiated by other findings of the Trial Chamber regarding his essential contributions to the common plan and his directions to ask 14 witnesses to provide false testimony.[1502]

[1496] Mr Bemba's Appeal Brief, paras 25-26.
[1497] Mr Bemba's Appeal Brief, paras 27-28.
[1498] Mr Bemba's Appeal Brief, para. 30, referring to Conviction Decision, para.819 (emphasis in original omitted).
[1499] Mr Bemba's Appeal Brief, para. 31.
[1500] Response, para. 217.
[1501] Response, para. 219.
[1502] Response, para. 223, referring to Conviction Decision, paras 817-820, 930-933.

3. Determination by the Appeals Chamber

687. The Appeals Chamber notes Mr Bemba's contention that the Trial Chamber erred in finding that the offence of giving false testimony can be committed by withholding information on matters that were not directly asked of the witness.[1503] The Trial Chamber considered that the offence of article 70 (1) (a) of the Statute covers, *inter alia*, situations where "the witness is not directly asked but intentionally withholds information that is true and that is inseparably linked to the issues explored during questioning".[1504]

688. The offence of giving false testimony is defined in article 70 (1) (a) as follows:

> The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
>
> (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth.

689. The Appeals Chamber notes that the phrase "[g]iving false testimony" does not, on its face, suggest that it may also be fulfilled by a witness not providing particular information, unless specifically asked. However, article 70 (1) (a) of the Statute also refers to a witness's "obligation to tell the truth". As per article 69 (1) of the Statute and rule 66 of the Rules, every witness of legal age and capacity shall "solemnly declare that [he/she] will speak the truth, the whole truth and nothing but the truth".

690. In the view of the Appeals Chamber, the phrase "giving false testimony" must therefore be understood in the context of the witness's obligation to speak "the whole truth" under article 69 (1) of the Statute and rule 66 of the Rules. Thus, distorting the truth by intentionally withholding part of the information amounts to "giving false testimony" in terms of article 70 (1) (a) of the Statute.

691. Mr Bemba also challenges the Trial Chamber's reference to domestic jurisdictions, which, according to the Trial Chamber, also penalise the withholding of information, claiming that the Trial Chamber misstated the domestic law.[1505] The Appeals Chamber shall not assess the domestic laws referred to by the Trial

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[1503] Mr Bemba's Appeal Brief, para. 23, referring to Confirmation Decision, para. 28.
[1504] Conviction Decision, para. 21.
[1505] Mr Bemba's Appeal Brief, paras 25-26, referring to Conviction Decision, fn. 30.

Chamber,[1506] as it considers that recourse to other sources was in any event unnecessary, taking into account that article 69 (1), explicitly referred to by article 70 (1) (a) of the Statute, read in conjunction with rule 66 of the Rules, are sufficient for the interpretation of the question at hand.[1507]

692. In light of these provisions, it is clear that intentionally providing an incomplete response is contrary to the obligation to tell the "whole" truth. The Appeals Chamber considers that this does not impose a duty on the witness to volunteer to provide all information that she or he may have on the case but is not asked to provide. In the view of the Appeals Chamber, a witness gives false testimony when he or she intentionally provides incomplete responses to the questions by omitting facts that he or she is specifically asked about or by omitting facts that are necessarily encompassed within, or inseparably linked to, the information sought during the testimony. In this sense, the Appeals Chamber considers that the Trial Chamber did not err in finding that intentionally withholding information inseparably linked to the questions asked of a witness amounts to giving false testimony.

693. Turning to Mr Bemba's contention that witness D-55 was only questioned about how far back his contact with Mr Bemba went and the details of his first contact with Mr Bemba's defence team,[1508] the Appeals Chamber notes that the Trial Chamber found that pursuant to Mr Kilolo's instructions, the witness "untruthfully mentioned only three contacts and concealed, despite being asked, […] the telephone call with Mr Bemba".[1509] The Appeals Chamber notes that the Prosecutor in the Main Case questioned witness D-55 about his first contact with Mr Bemba and his defence team,[1510] his second contact with Mr Bemba's defence team[1511] and whether there were "*other contacts thereafter*" with Mr Bemba's defence team to which witness D-55 testified that he had no other contact with Mr Bemba's defence team and

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[1506] Conviction Decision, fn. 30.
[1507] As far as the decisions issued by the ICTR referred to by Mr Bemba, the Appeals Chamber observes that none of them state that withholding information is not false testimony. *See* *Rutaganda* Decision on false testimony, p. 3; *Akayesu* Decision on false testimony, p. 2.
[1508] Mr Bemba's Appeal Brief, para. 30.
[1509] Conviction Decision, para. 301.
[1510] Transcript of 29 October 2012, ICC-01/05-01/08-T-264-Red2-ENG (WT), p. 55, line 11 to p. 63, line 20.
[1511] Transcript of 29 October 2012, ICC-01/05-01/08-T-264-Red2-ENG (WT), p. 63, line 21 to p. 66, line 14.

confirmed that he had only three contacts in total.[1512] In the Appeals Chamber's view, the questioning of the witness, which focussed on his contacts with Mr Bemba and his defence team, necessarily included Mr Kilolo having facilitated the telephone call between the witness and Mr Bemba. In that regard, the Appeals Chamber observes that the Trial Chamber noted that "Kilolo Defence admitted in its written submissions to the Pre-Trial Chamber that Mr Kilolo facilitated contact between Mr Bemba and D-55",[1513] which was corroborated by the call data records.[1514] In these circumstances, the information about this call with Mr Bemba, which the witness concealed, was necessarily encompassed within the information sought by the Prosecutor during her examination. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in finding that witness D-55 gave false testimony by concealing this information.

694. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments.

C. Article 70 (1) (b) of the Statute

1. Relevant part of the Conviction Decision

695. The Trial Chamber noted that the purpose of article 70 (1) (b) of the Statute is to ensure that the "parties introducing evidence may not present evidence knowing it to be false or forged", as this would affect the integrity of the proceedings and the reliability of the evidence.[1515] The Trial Chamber was of the view that the "physical perpetrator of this offence" must be "someone who is considered a 'party' to the proceedings".[1516] It observed that, while only the English and Arabic versions of the Statute refer to the term "party", this provision, "in all authentic versions", is "addressed to those who have the right to present evidence" in proceedings before the Court.[1517]

696. With regard to the defence specifically, the Trial Chamber found that the term "party" encompasses everyone in the team who, individually or jointly, is in charge of the accused's representation, including the presentation of evidence, regardless of his

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[1512] Transcript of 29 October 2012, ICC-01/05-01/08-T-264-Red2-ENG (WT), p. 66, lines 15-23 (emphasis added).
[1513] Conviction Decision, para. 295.
[1514] Conviction Decision, para. 296.
[1515] Conviction Decision, para. 32.
[1516] Conviction Decision, para. 32. *See also* para. 37.
[1517] Conviction Decision, para. 33.

or her formal title.[1518] In this regard, the Trial Chamber held that a party should be understood as "any member of the Defence team who is either formally authorised to present evidence or who, *de facto*, plays a significant role in the Defence team's decision on the strategy of the accused's representation, including the presentation of evidence".[1519] On the basis of articles 61 (6) (c), 67 (1) (e) of the Statute and rule 149 of the Rules, the Trial Chamber concluded that the Statute permitted the accused person to present evidence.[1520] The Trial Chamber found further that the accused is permitted to present evidence him – or herself, regardless of whether counsel has the obligation to consult with his or her client before posing a legal act in court.[1521]

697. Regarding the type of evidence encompassed by article 70 (1) (b) of the Statute, the Trial Chamber found that this provision "encompassed all type of evidence, including oral testimony, which seeks to prove a particular factual allegation".[1522] The Trial Chamber reviewed several provisions of the Statute where the term "evidence" is used "in a generic fashion without differentiating further between types of evidence" and where other provisions of the Statute either place this type of evidence "on a par with other evidence" or placed "testimonial evidence and documentary evidence […] on an equal footing with other type of evidence".[1523] The Trial Chamber therefore concluded that based on the Statute, the use of the term "evidence", "if not further specified, in the most generic fashion, embrac[es] all types of evidence".[1524] The Trial Chamber held further that in accordance with the Statute, the party is not required "itself [to be] responsible for the production of the 'false' or 'forged' evidence" as long as "[t]he party […] present the evidence".[1525] It also found that the presentation of evidence, "[i]n the case of oral testimony, this takes place at least when a witness appears before the Court and testifies".[1526]

[1518] Conviction Decision, para. 34.
[1519] Conviction Decision, para. 34.
[1520] Conviction Decision, para. 35.
[1521] Conviction Decision, para. 36.
[1522] Conviction Decision, para. 38.
[1523] Conviction Decision, para. 38.
[1524] Conviction Decision, para. 38.
[1525] Conviction Decision, para. 40.
[1526] Conviction Decision, para. 40.

2. Submissions of the parties

(a) Mr Bemba

698. Mr Bemba submits that the Trial Chamber erred in finding that article 70 (1) (b) of the Statute covers any member of the defence team, including an accused who *de facto* plays a significant role in the defence strategy.[1527] Mr Bemba argues that the Trial Chamber noted discrepancies between the versions of article 70 (1) (b) in English and Arabic, on the one hand, and Chinese, French, Spanish and Russian, on the other, but failed to address the point that all versions "focus on the act of presenting evidence"; in his view, the Trial Chamber erred in including the "notion of persons who merely contribute to the act of tendering evidence".[1528] Mr Bemba further submits that the Trial Chamber's interpretation of article 70 (1) (b) of the Statute is inconsistent with counsel's responsibilities for effective representation of the accused and handling of the case, which, according to Mr Bemba, protect his right to be defended and the prohibition against self-incrimination.[1529]

699. Mr Bemba avers further that counsel has the primary responsibility to examine witnesses and, as a result, any input provided by the accused cannot be considered as an "essential contribution" as the accused does not "control[] the execution of the act in question".[1530] He asserts that the Trial Chamber erred in implicitly finding that, if false testimony is elicited in "cross-examination", the accused can "control" the evidence at that point and has a duty to correct the record.[1531]

(b) The Prosecutor

700. The Prosecutor responds that a party can present evidence during the confirmation of charges, under article 61 (6) (c) of the Statute, and that this prerogative is applicable to other stages in the proceedings by virtue of rule 149 of the Rules.[1532] In the Prosecutor's view, even if the accused are represented, they play an essential role in their defence, as article 14 (2) (a) of the Code of Professional

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[1527] Mr Bemba's Appeal Brief, para. 32, referring to Conviction Decision, paras 32-37.
[1528] Mr Bemba's Appeal Brief, para. 34.
[1529] Mr Bemba's Appeal Brief, paras 35-36, referring to Code of Professional Conduct for Counsel, articles 14 (2), 24 (2), 25 (2).
[1530] Mr Bemba's Appeal Brief, paras 39-40.
[1531] Mr Bemba's Appeal Brief, para. 41, referring to Conviction Decision, para. 928.
[1532] Response, para. 227.

Conduct requires counsel to consult with their clients.[1533] The Prosecutor refers in this regard to the notion of "unity of identity between counsel and client", as developed by the ICTY.[1534] The Prosecutor is of the view that the offences in this case would have been committed differently without Mr Bemba's intervention.[1535]

3. Determination by the Appeals Chamber

701. Pursuant to article 70 (1) (b) of the Statute, the Court has jurisdiction over the offence of "presenting evidence that the party knows is false or forged".

702. The Appeals Chamber agrees with Mr Bemba[1536] – and the Trial Chamber[1537] – that the focus of article 70 (1) (b) of the Statute is on the incriminated conduct (*presenting* false evidence) rather than on the quality of the perpetrator as a "party". Indeed, as noted by the Trial Chamber,[1538] the requirement that those presenting the false or forged evidence must be "parties" appears in the English and Arabic versions[1539] of the Statute, but not in the other four equally authentic versions of the Statute.[1540]

703. In relation to the definition of the incriminated conduct of this offence – that is, the act of presentation of evidence – the Trial Chamber stated that "evidence is deemed 'presented' when it is introduced in the proceedings".[1541] In this regard, the Trial Chamber noted that a synonym to "present" is "submit", a term which is used throughout the Statute and the Rules.[1542] The Appeals Chamber agrees with the Trial Chamber that the term "presenting evidence" denotes the formal submission of

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[1533] Response, para. 230.
[1534] Response, para. 230.
[1535] Response, para. 232.
[1536] Mr Bemba's Appeal Brief, para. 34.
[1537] Conviction Decision, para. 33.
[1538] Conviction Decision, para. 33.
[1539] The Arabic version of article 70 (1) (b) reads: "قدأ عي ف ر طلا ف ر هنأ ا ةقف نازوأ ؛ةروزم م يدق ت (ب)".
[1540] The French version of article 70 (1) (b) reads: "*Production d'éléments de preuve faux ou falsifiés en connaissance de cause*"; the Spanish version of Article 70(1)(b) of the Statute reads: "*Presentar pruebas a sabiendas de que son falsas o han sido falsificadas*"; the Russian version of Article 70(1)(b) of the Statute reads: "представление заведомо ложных или сфальсифицированных доказательств"; the Chinese version of Article 70(1)(b) of the Statute reads: "提出自己明知是不实的或伪造的证据".
[1541] Conviction Decision, para. 40.
[1542] *See* Conviction Decision, para. 40.

evidence in proceedings.[1543] The Appeals Chamber further notes that the French and Russian texts of article 70 (1) (b) of the Statute use the equivalent of the term "produce",[1544] which also denotes the formal submission of evidence in proceedings.

704. The Trial Chamber noted that, in the context of proceedings before this Court, not anyone may submit evidence in the proceedings and that the provision of article of 70 (1) (b) of the Statute is "addressed to those who have the right to present evidence to a chamber in the course of proceedings before the Court".[1545] Given the overall purpose of the provision to prevent the presentation of false or forged evidence, the Appeals Chamber is of the view that the offence under article 70 (1) (b) of the Statute may be perpetrated by all those who – irrespective of their formal status as a "party" – have, in fact, the ability to present evidence, whether as matter of statutory rights or because authorised to do so by the Chamber in the concrete circumstances of the case.

705. The Appeals Chamber notes that the Trial Chamber further explained that it understood the term "party" within the meaning of article 70 (1) (b) of the Statute to encompass not only members of a defence team who are formally authorised to present evidence in the proceedings, but also any other member "who, *de facto*, plays a significant role in the Defence team's decisions on the strategy of the accused's representation, including the presentation of evidence".[1546] The Appeals Chamber notes that this reference to the "Defence team's decisions on the strategy of the accused's representation" could be understood as suggesting that such acts actually amount to "presenting" evidence. This would be incorrect. The incriminated conduct of the offence under article 70 (1) (b) of the Statute is the actual presentation of evidence in the proceedings, while the decision-making as to which evidence should be presented is merely a preparatory act. While participation in preparatory acts within a defence team may be an indication that an individual is a "party" in the sense of that provision or may amount to an essential contribution giving rise to liability as a co-perpetrator pursuant to article 25 (3) (a) of the Statute, it does not amount to the presentation of evidence. The Appeals Chamber understands that the Trial Chamber

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[1543] Conviction Decision, para. 40.
[1544] *See also* articles 64 (6) (b), (d), articles 93 (1) (b), (4), article 99 (2) of the Statute; rule 68 (2) (b) (ii) of the Rules (in French), rule 82 (2), rule 84, rule 91 (3) (b) of the Rules.
[1545] Conviction Decision, paras 32-33.
[1546] Conviction Decision, para. 34.

considered that, in the case at hand, it was Mr Kilolo who had carried out the actual act of presenting false evidence and was therefore the "physical perpetrator" of the offence.[1547] Mr Kilolo's conduct was then imputed to Mr Bemba and Mr Mangenda by virtue of all three being co-perpetrators.

706. In the Appeals Chamber's view, the Trial Chamber's attribution to Mr Kilolo of the physical act of "presenting" the false oral evidence raise the issue of the scope of the actual conduct incriminated by article 70 (1) (b) of the Statute and, in particular, its applicability in connection with oral evidence. In that regard, the Appeals Chamber notes that Mr Bemba argues that he did not "control[] the execution of the act in question".[1548]

707. The Appeals Chamber recalls that the Trial Chamber stated that the generic term "'evidence', absent any further specification, encompasses all types of evidence, including oral testimony which seeks to prove a particular factual allegation".[1549] In particular, the Trial Chamber stated that "[i]n the case of oral testimony, [the 'presentation' of evidence] takes place at least when a witness appears before the Court and testifies".[1550] As noted above, the Trial Chamber considered that, in the present case, Mr Kilolo was the physical perpetrator[1551] of the offence under article 70 (1) (b) of the Statute because "[a]s lead counsel for the defence of Mr Bemba in the Main Case, [he] called the defence witnesses […] and presented their evidence knowing that they would testify falsely".[1552] However, the Appeals Chamber notes that the Trial Chamber did not clarify what it meant by "calling" the witnesses *and* "presenting" their evidence, also considering that Mr Kilolo was not the person actually introducing all witnesses in the courtroom.[1553]

[1547] *See*, in particular, Conviction Decision, paras 821, 830.
[1548] Mr Bemba's Appeal Brief, paras 40-41.
[1549] Conviction Decision, para. 38.
[1550] Conviction Decision, para. 40.
[1551] Conviction Decision, paras 31, 34.
[1552] Conviction Decision, para. 830.
[1553] This is the case for witnesses D-2, D-3, D-4, D-6 and D-29. *See* Transcript of 12 June 2013, ICC-01/05-01/08-T-321-RED-ENG (WT), p. 8, line 10 (Mr Peter Haynes starts questioning witness D-2); Transcript of 18 June 2013, ICC-01/05-01/08-T-325-RED-ENG (WT), p. 8, line 16 (Mr Peter Haynes starts questioning witness D-3); Transcript of 18 June 2013, ICC-01/05-01/08-T-325bis-RED-ENG (WT), p. 7, line 5 (Mr Peter Haynes starts questioning witness D-4); Transcript of 21 June 2013, ICC-01/05-01/08-T-328-RED-ENG (WT), p. 7, line 19 (Mr Peter Haynes starts questioning witness D-6);

708. The Appeals Chamber agrees with the Trial Chamber that the term "evidence" in article 70 (1) (b) of the Statute does not distinguish between different forms of evidence for the purpose of the applicability of this provision. However, this offence is committed when evidence is "presented" – that is, as explained above, formally submitted in the proceedings – knowing that it *is* false or forged. Since the *giving* of false oral evidence by a witness (who in any case is not a "party") is incriminated under article 70 (1) (a) of the Statute, this raises the question of whether it is conceivable that a party knowingly "presents" false oral evidence, and, if so, what act would amount to the incriminated conduct.

709. In the view of the Appeals Chamber, the mere inclusion of a person in the list of witnesses cannot be assimilated to presentation of evidence as the list itself is not "evidence" and is not submitted "for the purpose of proving or disproving the facts in issue before the Chamber".[1554] Similarly, the act of "calling" a witness in court proceedings cannot be equated to "presenting" evidence knowing that *is* false or forged". Indeed, oral testimonial evidence is given *by* the witness, rather than being "produced" or "presented" by a party, as it is orally elicited through questioning in the courtroom and is only "formed" when the witness testifies in response to the questions posed. The parties may "present" a witness to the Court, but the concerned "evidence" is not the witness him- or herself but his or her live testimony, which, at the time a party "calls" a witness, does not yet exist and the party cannot control. Indeed, when calling a witness, it is beyond the party's control whether the witness will actually testify falsely. While the calling party may hope or anticipate that the witness will lie before the chamber, it remains the independent decision of the witness to do so when he or she gives evidence in court. The actual "presentation" of testimonial evidence is therefore not an act of the party, but an autonomous act that can only be made and controlled by the witness him- or herself. In this sense, a party calling a witness can hope for a certain result but cannot "know" that the evidence, which does not yet exist, *is* false or forged within the terms of article 70 (1) (b) of the Statute. The party introducing a witness who then testifies falsely may be liable pursuant to other provisions of article 70 of the Statute when the relevant constitutive

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Transcript of 28 August 2013, ICC-01/05-01/08-T-338-RED-ENG (CT WT), p. 3, line 6 (Mr Peter Haynes starts questioning witness D-29).

[1554] *See* *Bemba* OA5 OA6 Judgment, para. 43.

elements of any such other offence are met, but cannot be, in the view of the Appeals Chamber, criminally responsible under article 70 1 (b) of the Statute.

710. In light of the foregoing reasons and of the applicable criterion of interpretation of incriminating provisions under article 22 (2) of the Statute,[1555] the Appeals Chamber is of the view that the wording of article 70 (1) (b) of the Statute cannot be reconciled with the nature of oral testimony and it is therefore meant to encompass only the presentation of false or forged documentary evidence. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that this provision encompassed oral evidence. As Mr Bemba, Mr Kilolo and Mr Mangenda were convicted of the offence under article 70 (1) (b) of the Statute for the "presentation" of false oral evidence, the Appeals Chamber considers that these convictions were wrongly entered and reverses the convictions in that regard.

D. Article 70 (1) (c) of the Statute

1. Whether the Trial Chamber erred in interpreting the term "witness" to include "potential witness"

(a) Relevant part of the Conviction Decision

711. The Trial Chamber found that a "witness" in terms of article 70 (1) (a) of the Statute is "a person appearing before the Court, either in person or by means of audio or video technology, who attests to factual allegations according to his or her personal knowledge".[1556] In the context of article 70 (1) (c) of the Statute, however, the Trial Chamber held that this "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".[1557] According to the Trial Chamber, this "broad conception" is in line with the purpose of the provision, which is 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".[1558] The Trial Chamber also referred to the term "witness" in its Protocol on Witnesses at trial as "a person whom a party

[1555] Article 22 (2) of the Statute provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy" and "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".
[1556] Conviction Decision, para. 20 (footnotes omitted).
[1557] Conviction Decision, para. 44.
[1558] Conviction Decision, para. 44.

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".[1559]

712. Applying this understanding of the word "witness" to the facts of the case, the Trial Chamber found that Mr Arido had recruited witnesses D-2, D-3, D-4 and D-6 and that "[he] promised the payment of money and relocation to Europe in exchange for testifying as witnesses for the Main Case Defence".[1560] The Trial Chamber found that Mr Arido had briefed or facilitated briefings to these witnesses, instructed them to say that they had specific military ranks as soldiers of Armed forced of the Central African Republic ("FACA") and the MLC as well as detailed military background, experience and training.[1561] Mr Arido then introduced these witnesses to Mr Kilolo to be interviewed and afterwards met them again to debrief and give them further guidance and instructions.[1562] In the view of the Trial Chamber, this amounted to the offence of corruptly influencing witnesses under article 70 (1) (c) of the Statute.[1563]

(b) Submissions of the parties

(i) Mr Arido

713. Mr Arido submits that the Trial Chamber's interpretation of the word "witness" under article 70 (1) (c) of the Statute, which encompasses "potential witness", is *ultra vires* and contradicts its own definition of "witness" under article 70 (1) (a) of the Statute.[1564] Mr Arido avers that all offences listed in article 70 (1) of the Statute refer to witnesses – not potential witnesses.[1565] In Mr Arido's view, nothing can be found in the drafting history and commentaries of the Statute that would support an interpretation of article 70 (1) (c) of the Statute that includes "potential witnesses".[1566] He avers further that the Trial Chamber's reliance on the Court and ICTY

[1559] Protocol on Witnesses, para. 4 (e).
[1560] Conviction Decision, para. 420.
[1561] Conviction Decision, para. 420.
[1562] Conviction Decision, para. 420.
[1563] Conviction Decision, p. 457.
[1564] Mr Arido's Appeal Brief, paras 163-165, referring to Conviction Decision, paras 20, 44. *See also* Mr Arido's Appeal Brief, paras 188, 195.
[1565] Mr Arido's Appeal Brief, paras 175-176.
[1566] Mr Arido's Appeal Brief, paras 180-183.

jurisprudence is misplaced as article 70 (1) (c) clearly does not refer to a "potential" witness.[1567]

714. Mr Arido argues further that the Trial Chamber lacked the inherent power or inherent jurisdiction to alter the wording to the Statute when interpreting this provision and violated the principle of strict construction enshrined in article 22 (2) of the Statute.[1568] He submits that the Trial Chamber's interpretation of the term "witness" under article 70 (1) (c) of the Statute is inconsistent with the definition provided in the Protocol on Witnesses, which accords with its own definition of witness under article 70 (1) (a) of the Statute.[1569] Mr Arido claims that the Trial Chamber failed to provide reasons for this inconsistency.[1570]

715. Finally, Mr Arido contends that the Trial Chamber erred in not addressing his point that witnesses D-2, D-3, D-4 and D-6 did not fall within the definition of "witness" provided in the Protocol on Witnesses, and that the Prosecutor did not prove this element beyond a reasonable doubt.[1571] He adds that in accordance with the definition of "witness" provided in the Protocol on Witnesses, he could not be convicted for recruiting and instructing individuals whom Mr Kilolo had not yet met because these individuals were not, at that time, witnesses.[1572]

(ii) The Prosecutor

716. The Prosecutor responds that excluding potential witnesses from the definition of "witness" would leave unpunished situations where individuals are offered a payment but are later not selected to testify because of their inability to learn the script or because they rejected the corrupting offer.[1573] This, in the Prosecutor's view, would make the offence of corruptly influencing witnesses a result offence as oppose to a conduct-based offence.[1574] A broad understanding of the term "witness" that

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[1567] Mr Arido's Appeal Brief, paras 167-174. *See also* paras 178-179.
[1568] Mr Arido's Appeal Brief, paras 165, 184-187.
[1569] Mr Arido's Appeal Brief, paras 189-191, 197, referring to Protocol on Witnesses.
[1570] Mr Arido's Appeal Brief, para. 190.
[1571] Mr Arido's Appeal Brief, para. 196.
[1572] Mr Arido's Appeal Brief, para. 198.
[1573] Response, para. 252.
[1574] Response, para. 252.

includes individuals who potentially testify accords, in the Prosecutor's view, with the Court's jurisprudence regarding witness interference.[1575]

717. Regarding Mr Arido's argument on the Trial Chamber's alleged contradictory definitions of the term "witness", the Prosecutor submits that the Trial Chamber did not depart from the definition given in the Confirmation Decision; nor did it contradict the definition set out in the Protocol on Witnesses.[1576] The Prosecutor argues that, in any event, the definition provided in this protocol is not the controlling definition for the offences defined in article 70 of the Statute.[1577] The Prosecutor avers further that, due to the different purposes of the offences under article 70 of the Statute, the definition of witness under article 70 (1) (c) of the Statute may cover conduct before testifying in Court, while a more limited definition may apply to article 70 (1) (a) of the Statute.[1578] Lastly, the Prosecutor challenges Mr Arido's submission that the purportedly overly broad definition of "witness" breaches article 22 (2) of the Statute, as, in the Prosecutor's view, the principle of strict construction only applies if the text of the offence reveals ambiguity after applying the statutory rules of interpretation, which she argues is not the case here.[1579]

(c) Determination by the Appeals Chamber

718. The Court has jurisdiction over the offence of corruptly influencing witnesses, which is defined in article 70 (1) (c) of the Statute as follows:

> The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
>
> […]
>
> (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.

719. At issue is whether the Trial Chamber correctly found that the term "witness" under article 70 (1) (c) of the Statute includes "'potential witnesses', namely persons

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[1575] Response, para. 253.
[1576] Response, para. 255, referring to Protocol on Witnesses.
[1577] Response, para. 255.
[1578] Response, para. 256.
[1579] Response, para. 257.

who have been interviewed by either party but have not yet been called to testify before the Court".[1580] The Appeals Chamber recalls that the Trial Chamber convicted Mr Arido for having corruptly influenced witnesses D-2, D-3, D-4 and D-6 based on the finding that he had "promised the payment of money and relocation to Europe in exchange for testifying as witnesses for the Main Case Defence"[1581] and had instructed these witnesses to say that they had specific military background.[1582] However, Mr Arido had interacted with the witnesses mainly before they were introduced to Mr Kilolo; the decision that they be called to testify was made only at a later stage.[1583]

720. In the Appeals Chamber's view, the term "witness", which is not defined in the Statute, can have different meanings, depending on the context and purpose of the relevant provision. It can, for instance, refer to "[a] person giving sworn testimony to a court of law"[1584], which is in keeping with the Trial Chamber's interpretation of the term for the purposes of article 70 (1) (a) of the Statute.[1585] Depending on the context, it can also be understood more broadly to include anyone who knows, or is believed to know something of relevance to the judicial proceedings, even if he or she has not appeared before the Court. The Appeals Chamber understands this to be the meaning of the term "witness" in article 54 (3) (b) and article 68 (1) of the Statute, which impose duties on the Prosecutor *vis-à-vis* witnesses during the investigation, and of article 57 (3) (c) of the Statute, which grants pre-trial chambers discretion to "provide for the protection and privacy" of witnesses.[1586]

[1580] Conviction Decision, para. 44.
[1581] Conviction Decision, p. 457, para. 420.
[1582] Conviction Decision, para. 420.
[1583] *See* Conviction Decision, paras 410, 672.
[1584] Oxford Dictionary (Oxford 2017), accessed at https://en.oxforddictionaries.com/definition/witness This use is also included in the definition provided by the Cambridge Dictionary: "a person in a law court who says what they know about a legal case or a particular person". *See* Cambridge Dictionary (Cambridge 2017), accessed at http://dictionary.cambridge.org/dictionary/english/witness. Other meanings include "a person who sees an event, typically a crime or accident, take place". *See* Oxford Dictionary (Oxford 2017), accessed at https://en.oxforddictionaries.com/definition/witness. Similarly the Cambridge Dictionary defines a "witness" as a "person who sees an event happen, especially a crime or an accident". *See* Cambridge Dictionary (Cambridge 2017), accessed at http://dictionary.cambridge.org/dictionary/english/witness.
[1585] Conviction Decision, para. 20 (footnotes omitted).
[1586] *See also* article 56 (1) (a) of the Statute; rules 104 (2), 107 (3) of the Rules.

721. The Appeals Chamber considers that for the purposes of article 70 (1) (c) of the Statute, the term "witness" must also be understood broadly, taking into account the context and purpose of the provision. The Appeals Chamber shares the view of the Trial Chamber that the term "witness" in article 70 (1) (c) requires a broader understanding of the concept than the one used in article 70 (1) (a) or the Protocol on Witnesses, which has different purposes. It encompasses persons who have not yet been called to testify before the Court, as rightly found by the Trial Chamber.[1587] However, contrary to the Trial Chamber, the Appeals Chamber considers that the term witness within this provision does not need to be qualified further by requiring that the individuals must have been interviewed by either party.[1588] In the view of the Appeals Chamber, the offence under article 70 (1) (c) of the Statute is committed when the perpetrator corruptly influences a person who knows or is believed to know information that may be relevant to the proceedings before the Court, regardless of whether or not such person has been previously contacted by either party.

722. Contrary to Mr Arido's submission, the Appeals Chamber is of the view that this interpretation of the term "witness" does not violate the principle of strict construction under article 22 (2) of the Statute. As indicated above, there is no *one* controlling definition of the term "witness" under the Statute. This term it has to be read and understood in context and taking into account the purpose of the provision in question. This does not represent an illegitimate expansion of an accepted definition contrary to the principle of legality but, rather, the necessary selection of the most appropriate ordinary meaning of the term in its context and in light of the object of the relevant provision.

723. In sum, the Appeals Chamber finds that the Trial Chamber did not err when it found that the term "witness" in article 70 (1) (c) of the Statute also covered "potential" witnesses. Accordingly, Mr Arido's arguments are rejected.

[1587] Conviction Decision, para. 44.
[1588] Conviction Decision, para. 44.

2. *Whether the Trial Chamber defined "corruptly influencing witnesses" too broadly*

(a) Relevant part of the Conviction Decision

724. The Trial Chamber noted that the *actus reus* of article 70 (1) (c) of the Statute of "influencing a witness" is an open-ended provision, capturing "many different modes of commission […] that are capable of influencing the nature of the witness's evidence".[1589] The Trial Chamber found that, in addition to activities such as bribing witnesses, "'[i]nfluencing' may also be assumed if the perpetrator modifies the witness's testimony by instructing, correcting or scripting the answers to be given in court, or providing concrete instructions to the witness to dissemble when giving evidence, such as to act with indecision or show equivocation", all of which were activities "specifically aimed at compromising the reliability of the evidence".[1590] The Trial Chamber stated, however, that "[t]he rehearsal of testimony only then rises to the threshold of article 70(1) [(c)] of the Statute if the physical perpetrator contaminated the witness's evidence".[1591] The Trial Chamber defined the term "corrupt" to mean "that the relevant conduct is aimed at contaminating the witness's testimony".[1592] It distinguished "between permissible conduct and conduct considered to fall under the purview of article 70 (1) (c)", and stressed the need to consider "the legal framework which contextualises the conduct of the perpetrator".[1593] It also noted that the assessment of the nature of contacts with the witnesses required taking into account the "regime regulating those contacts with witnesses, such as decisions on witness preparation and / or witness familiarisation".[1594] The Trial Chamber held that the payments to witnesses should have regard to "their purpose and whether the perpetrator has adhered to the Court's applicable directions and guidelines".[1595]

[1589] Conviction Decision, para. 45.
[1590] Conviction Decision, para. 46.
[1591] Conviction Decision, para. 46. The Appeals Chamber notes that the Trial Chamber, in the cited passage, refers to article 70 (1) (a) of the Statute. The Appeals Chamber understands this to be a typographical error.
[1592] Conviction Decision, para. 47.
[1593] Conviction Decision, para. 47.
[1594] Conviction Decision, para. 47.
[1595] Conviction Decision, para. 47.

(b) Submissions of the parties

(i) Mr Bemba

725. Mr Bemba submits that the Trial Chamber defined the conduct of "corruptly influencing witnesses" in such a broad manner that it encompasses licit conduct not directed at obtaining false testimony.[1596] Mr Bemba avers that, as a result, the Trial Chamber convicted him for "licit investigative interactions", which took place before the cut-off point established by the Victims and Witnesses Unit ("VWU") and which were not addressed by the familiarisation decision in the Main Case.[1597] According to Mr Bemba, a previous decision of this Court confirms that influence is not corrupt unless witnesses are "encouraged to provide accounts of events different from what, to their knowledge, actually happened".[1598] Mr Bemba maintains that the Trial Chamber erred by relying on the fact that witnesses were influenced to testify or thanked for testifying in Mr Bemba's favour, because, in his view, such behaviour did "not contain a sufficient element of corruption".[1599]

726. Mr Bemba argues further that the Trial Chamber failed to apply "clear and consistent thresholds" when assessing the amounts and timing of payments made to witnesses.[1600] Mr Bemba avers that the Trial Chamber failed to consider as exculpatory the timing of payments or promises made after the witnesses had given their testimony.[1601] Mr Bemba argues that the Trial Chamber incorrectly found that the payment made to witness D-6 after his testimony in the Main Case was illicit, although Mr Kilolo had discussed this payment "in the context of hotel costs pending the completion of the VWU assessment".[1602] He also argues that he was convicted for interactions between Mr Kilolo and the witnesses from Cameroon, Brazzaville and the Democratic Republic of the Congo despite the absence of evidence of Mr Bemba's

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[1596] Mr Bemba's Appeal Brief, paras 43, 52.
[1597] Mr Bemba's Appeal Brief, para. 53, referring to *Bemba* Familiarisation Protocol.
[1598] Mr Bemba's Appeal Brief, para. 53, referring to Trial Chamber V(B), *Prosecutor v. Uhuru Muigai Kenyatta*, "Decision on Defence application for a permanent stay of the proceedings due to abuse of process", 5 December 2013, ICC-01/09-02/11-868-Red, para. 37.
[1599] Mr Bemba's Appeal Brief, paras 54-55.
[1600] Mr Bemba's Appeal Brief, para. 46.
[1601] Mr Bemba's Appeal Brief, para. 47.
[1602] Mr Bemba's Appeal Brief, para. 47.

"expectation" in this regard, that he "was privy to these interactions" and that the "details were reported to him".[1603]

(ii) Mr Mangenda

727. Mr Mangenda submits that the Trial Chamber erred by applying a *mens rea* standard "that did not include the intent to induce a witness to lie".[1604] He avers that the Trial Chamber's definition of the *actus reus* of the offence was vague, and that the reference to the legal regime regulating contact with witnesses replaced "the intent to induce falsehoods with the intent to violate the preparation or contact protocols".[1605] He notes that, throughout the Conviction Decision, the Trial Chamber referred to "illicit coaching", which it defined *inter alia* as giving instructions to "testify according to a particular script concerning the merits of the Main Case, regardless of the truth or falsity of the information therein".[1606] Mr Mangenda maintains that the concept of corruptly influencing witnesses "entails inducing either non-appearance of a witness or having a witness tell falsehoods"; that is, conduct to induce false testimony or to prevent or interfere with the giving of testimony.[1607]

728. Mr Mangenda submits that, while witness preparation practices can influence the witness' testimony, they are accepted techniques that serve goals deemed legitimate by the Prosecutor and other international courts.[1608] Mr Mangenda also submits that the Prosecutor has paid large sums of money to witnesses for lost income and in some cases the Prosecutor has argued that these payments were immaterial and should not be disclosed.[1609] He argues further that the Protocol on Witnesses were silent with regards to the "scope of pre-cut witness preparation" and that this practice was allowed "until shortly before testimony in the Main Case".[1610] In support of his submissions, Mr Mangenda refers to the Trial Chamber's findings where, according

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[1603] Mr Bemba's Appeal Brief, paras 48-49.
[1604] Mr Mangenda's Appeal Brief, para. 146.
[1605] Mr Mangenda's Appeal Brief, para. 148.
[1606] Mr Mangenda's Appeal Brief, para. 150, referring to Conviction Decision, paras 704, 733.
[1607] Mr Mangenda's Appeal Brief, paras 152-155, referring, *inter alia*, to penal codes from Senegal, Gabon, Madagascar, Algeria, Belgium, France; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13 September 1996, A/51/22, pp. 212-213.
[1608] Mr Mangenda's Appeal Brief, para. 162.
[1609] Mr Mangenda's Appeal Brief, para. 158.
[1610] Mr Mangenda's Appeal Brief, para. 162.

to him, it applied a lower standard of intent to induce a falsehood by relying on telephone conversations about witnesses.[1611] He argues that the conversations are rather exculpatory as "they show that Mangenda's understanding was that Kilolo was conducting himself within the limits of lawful witness preparation".[1612]

(iii) The Prosecutor

729. The Prosecutor submits that Mr Bemba's and Mr Mangenda's submissions are "legally and factually incorrect".[1613] The Prosecutor recalls that the Trial Chamber's definition excluded recapitulating information that the witness knows or rehearsing testimony as long as it does not contaminate the evidence and submits that the conduct of the accused in the present case did not amount to legitimate interactions with witnesses.[1614] In the Prosecutor's view, "[t]he element of corruption lay with the criminal means employed by the co-perpetrators".[1615] Finally, the Prosecutor submits that the Trial Chamber's definition of "corruptly influencing" is also consistent with the purpose of the offence, which criminalises "any conduct that is intended to disturb the administration of justice by deterring the witness from testifying according to his or her recollection".[1616]

(c) Determination by the Appeals Chamber

730. The Trial Chamber defined the concept "influencing a witness" as conduct "capable of influencing the nature of the witness's evidence",[1617] aimed at procuring certain testimony by the witness or modifying the witness's testimony,[1618] thereby "compromising the reliability of the evidence".[1619] Such conduct was found to include bribing, intimidating, pressuring or threatening witnesses or causing injuries, correcting, instructing or scripting the answers, or providing concrete instructions to the witness in order to mislead when giving evidence.[1620] The Appeals Chamber notes that the Trial Chamber acknowledged that there are lawful ways in which forthcoming

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[1611] Mr Mangenda's Appeal Brief, para. 163.
[1612] Mr Mangenda's Appeal Brief, paras 163-164.
[1613] Response, para. 238.
[1614] Response, paras 239-240
[1615] Response, para. 243.
[1616] Response, para. 245 (emphasis omitted).
[1617] Conviction Decision, para. 45.
[1618] Conviction Decision, paras 45-46.
[1619] Conviction Decision, para. 46.
[1620] Conviction Decision, paras 45-46.

testimony may be discussed with a witness,[1621] but drew a distinction between such permissible conduct and conduct that would fall under the offence listed in article 70 (1) (c) of the Statute by clarifying that "[t]he use of the word 'corruptly' signifies that the relevant conduct is aimed at contaminating the witness's testimony".[1622]

731. To the extent that the Trial Chamber considered that "scripting" of testimony could amount to "corruptly influencing a witness" regardless of the truth or falsity of the information in question,[1623] the Appeals Chamber considers, contrary to the submissions of Mr Bemba and Mr Mangenda, that it is clear from the context in which the Trial Chamber made this statement, that it did not have in mind behaviour that could be considered legitimate interactions with witnesses. Instead, the Trial Chamber referred to situations in which Mr Kilolo had instructed witnesses to testify about events and facts relating to the Main Case although they had no knowledge thereof.[1624] In such a situation, a witness is influenced to give false testimony since truthfulness of testimony requires that he or she had actual experience of the events and facts in question and can recall them. The Appeals Chamber therefore considers that the Trial Chamber did not define the term "corruptly influencing" too broadly. The examples of conduct provided by Mr Bemba[1625] and Mr Mangenda[1626] do not fall under the concept of "corruptly influencing" a witness, as defined by the Trial Chamber. Accordingly, their arguments are rejected.

732. The Appeals Chamber also rejects the arguments that the Trial Chamber erroneously lowered the applicable mental element. The Appeals Chamber recalls that the Trial Chamber defined the *mens rea* of the offence as requiring the physical perpetrator to have intentionally corruptly influenced the witness.[1627] Based on the Trial Chamber's definition of "corruptly influencing witnesses", there is no suggestion that recklessness would be sufficient or that the mental element was otherwise unduly lowered.

[1621] Conviction Decision, para. 46.
[1622] Conviction Decision, para. 47; Mr Mangenda's Appeal Brief, paras 156-162, 165.
[1623] Conviction Decision, paras 704, 733.
[1624] Conviction Decision, para. 897.
[1625] *See* Mr Bemba's Appeal Brief, paras 52-53.
[1626] *See* Mr Mangenda's Appeal Brief, paras 156-162, 165.
[1627] *See* Conviction Decision, paras 45-46, 50.

733. In light of the reasons above, the Appeals Chamber finds that the Trial Chamber did not define the offence of corruptly influencing witnesses too broadly, and therefore, Mr Bemba's and Mr Mangenda's arguments are rejected.

3. Whether the Trial Chamber's interpretation of article 70 (1) (c) of the Statute is inconsistent with the intent requirement

(a) Relevant part of the Conviction Decision

734. The Trial Chamber found that article 70 (1) (c) of the Statute "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 impact on the witness".[1628] The Trial Chamber also found that the "physical perpetrator must have 'intentionally corruptly influenced the witness", further specifying that what is required is that "the perpetrator knows that his or her action will bring about the material elements of the offence, […] with the purposeful will (intent) or desire to bring about the those material elements of the offence".[1629]

(b) Submissions of the parties

(i) Mr Arido

735. Mr Arido submits that the Trial Chamber erred when it found that the conduct of corruptly influencing a witness does not require a result because this is "legally inconsistent with the statutory requirement of intent" and leads to strict liability.[1630] Mr Arido maintains that, under the Trial Chamber's approach, promising money and relocation to witnesses would on its own be considered a criminal act, although these payments could have been merely financial promises "to help fellow country persons out of difficult economic situation".[1631] He refers to witnesses D-2 and D-3 as, in his view, there is evidence supporting his "intent to help or assist someone".[1632]

[1628] Conviction Decision, para. 48.
[1629] Conviction Decision, para. 50.
[1630] Mr Arido's Appeal Brief, paras 204, 212.
[1631] Mr Arido's Appeal Brief, para. 208.
[1632] Mr Arido's Appeal Brief, para. 210.

(ii) The Prosecutor

736. The Prosecutor submits that Mr Arido "fundamentally misunderstands" the Trial Chamber's finding.[1633] The Prosecutor argues that the Conviction Decision did not encourage the imposition of strict liability, but actually required the conduct of corruptly influencing a witness to be intentional under article 30 (2) of the Statute.[1634] In the Prosecutor's view, "the perpetrator's intent to influence the witness testimony is encompassed within the general article 30 intent to bring about the material elements of the offence".[1635] This, in the Prosecutor's view, accords with the Trial Chamber's finding that the *chapeau* of article 70 (1) of the Statute does not require special intent.[1636] The Prosecutor avers that, regardless of the result, the offence focuses on the conduct of the perpetrator, as correctly found by the Trial Chamber.[1637]

(c) Determination by the Appeals Chamber

737. The Appeals Chamber recalls that the Trial Chamber found that the offence of corruptly influencing a witness under article 70 (1) (c) of the Statute "does not require proof that the conduct had an actual effect on the witness".[1638] The Appeals Chamber agrees with this finding, which is supported by the wording of the provision: by stipulating that "corruptly influencing" a witness amounts to an offence, without mentioning any result of this conduct, article 70 (1) (c) of the Statute places the emphasis on the criminal conduct. In the view of the Appeals Chamber, this is an appropriate interpretation also in light of the purpose of the provision, which seeks to avoid improper influence on witnesses, including in relation to witnesses who, in fact, never testify before the Court. Accordingly, the Appeals Chamber rejects Mr Arido's argument that the Trial Chamber's interpretation is "legally incorrect".[1639]

738. The Appeals Chamber also rejects Mr Arido's argument that the Trial Chamber interpreted article 70 (1) (c) of the Statute to be an offence of strict liability or otherwise not requiring intent. The Appeals Chamber notes in this regard that the Trial Chamber expressly found that intent was required under the Statute and found

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[1633] Response, para. 247.
[1634] Response, para. 247.
[1635] Response, para. 248, referring to Conviction Decision, para. 50.
[1636] Response, para. 248.
[1637] Response, para. 250.
[1638] Conviction Decision, para. 48.
[1639] *See* Mr Arido's Appeal Brief, para. 204.

that it was established. Notably, it indicated that it must be demonstrated that "the perpetrator knows that his or her action will bring about the material elements of the offence, *viz.* corruptly influencing the witnesses, with the purposeful will (intent) or desire to bring about those material elements of the offence".[1640] In respect of Mr Arido, the Trial Chamber found that his "*mens rea* [was] demonstrated by his conduct and interaction with the witnesses" and that "he meant to engage in the conduct of corruptly influencing the witnesses".[1641] The Appeals Chamber also rejects the argument that the Trial Chamber considered promises of money and relocation, on their own, to be criminal. The Trial Chamber found that the "promise of money and relocation was unduly given by Mr Arido as an inducement to procure the testimony of the witnesses in favour of Mr Bemba".[1642]

739. Accordingly, the Appeals Chamber rejects Mr Arido's arguments

E. Alleged error regarding cumulative convictions

1. Relevant part of the Conviction Decision

740. The Trial Chamber found that cumulative convictions are permissible under the Court's statutory regime[1643] when the conduct in question clearly violates two distinct provisions of the Statute, each demanding proof of a materially distinct element not required by the other.[1644] The Trial Chamber held that it is the legal elements of each statutory provision and not the specific facts of the case that must be considered when applying the test for cumulative convictions.[1645]

741. The Trial Chamber found that each provision under article 70 of the Statute required a materially distinct element not required by the other.[1646] It held that article 70 (1) (a) of the Statute required false testimony; article 70 (1) (b) required false or forged evidence presented by a party; and article 70 (1) (c) did not require that the conduct of the perpetrator actually influence the witness in question.[1647] The Trial

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[1640] Conviction Decision, para. 50.
[1641] Conviction Decision, para. 670.
[1642] Conviction Decision, para. 944.
[1643] Conviction Decision, paras 950-951.
[1644] Conviction Decision, para. 951.
[1645] Conviction Decision, para. 951.
[1646] Conviction Decision, paras 952, 955.
[1647] Conviction Decision, para. 953.

Chamber concluded that "convictions for the same conduct may be entered under Article 70(1)(a) to (c) of the Statute if all legal elements are met".[1648]

742. On this basis, the Trial Chamber found that Mr Bemba was guilty, as a co-perpetrator, for the offences of corruptly influencing witnesses and presenting their false testimony, under articles 70 (1) (b) and (c) of the Statute.[1649] The Trial Chamber also found Mr Bemba guilty for having solicited the giving of false testimony by witnesses under article 70 (1) (a) of the Statute.[1650]

2. Submissions of the parties

(a) Mr Bemba

743. Mr Bemba submits that article 20 (1) of the Statute prohibits multiple convictions being entered in relation to the same underlying conduct, and, as the focus of this provision is on conduct rather than the legal elements of the crime, the approach taken at this Court should differ from the approach taken at the *ad hoc* tribunals.[1651] Mr Bemba asserts that since the legal qualification of crimes is irrelevant to the assessment of the notion of conduct under article 17 of the Statute, then, by analogy the same must be true with respect to the definition of conduct under article 20 (1) of the Statute.[1652]

744. Mr Bemba argues that with respect to offences under article 70 of the Statute, the Trial Chamber failed to take into account the broad definitions it had given to these crimes, which obliterated any distinction between the offences.[1653] Mr Bemba contends that the only notional difference materialises through the mode of liability applied, but this contributes little to the fair labelling of the responsibility of the accused.[1654] Mr Bemba argues that there is no difference between a conviction for co-perpetrating the presentation of false testimony under article 70 (1) (b) of the Statute and soliciting false testimony pursuant to article 70 (1) (a) of the Statute.[1655] Mr

[1648] Conviction Decision, para. 954.
[1649] Conviction Decision, p. 455.
[1650] Conviction Decision, p. 455.
[1651] Mr Bemba's Appeal Brief, para. 19.
[1652] Mr Bemba's Appeal Brief, para. 20.
[1653] Mr Bemba's Appeal Brief, para. 21.
[1654] Mr Bemba's Appeal Brief, para. 21.
[1655] Mr Bemba's Appeal Brief, para. 21.

Bemba further submits that corruptly influencing pursuant to article 70 (1) (c) is "a lesser included version of the solicitation of actual false testimony" pursuant to article 70 (1) (a) of the Statute.[1656]

(b) The Prosecutor

745. The Prosecutor responds that the Trial Chamber correctly entered cumulative convictions for Mr Bemba, Mr Kilolo, and Mr Mangenda since the distinct legal requirements of article 70 (1) (a), (b) and (c) of the Statute were fulfilled.[1657] The Prosecutor argues that Mr Bemba repeats arguments made at trial, which the Trial Chamber duly noted and dismissed, and on this basis alone his challenges should be summarily dismissed.[1658] She argues that, in any event, Mr Bemba's arguments lack merit as articles 17 and 20 (1) of the Statute do not apply to cumulative convictions.[1659] She argues that the *ne bis in idem* principle enshrined in article 20 (1) of the Statute does not apply to cumulative convictions, since it prohibits a second trial for conduct which formed the basis of crimes for which a person has already been convicted or acquitted.[1660] She further argues that article 17 of the Statute relates to admissibility determinations and is therefore similarly irrelevant.[1661]

746. The Prosecutor argues that Mr Bemba disregards the "materially different legal elements" test consistently applied at this Court and other international criminal tribunals[1662] and that the Trial Chamber correctly found that articles 70 (1) (a), (b) and (c) of the Statute criminalise entirely different forms of conduct and contain materially distinct elements.[1663] She asserts that Mr Bemba's arguments misunderstand the elements of the offences and conflates these elements with the modes of liability under article 25 (3) of the Statute.[1664] She further argues that the same evidence can be used to fulfil the requirements of the elements of the offences

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[1656] Mr Bemba's Appeal Brief, para. 22.
[1657] Response, paras 209, 214.
[1658] Response, para. 210.
[1659] Response, para. 211.
[1660] Response, para. 211.
[1661] Response, para. 211.
[1662] Response, para. 212.
[1663] Response, para. 213.
[1664] Response, para. 214.

or crimes and the modes of liability[1665] and therefore Mr Bemba's arguments should be dismissed.[1666]

3. Determination by the Appeals Chamber

747. The Appeals Chamber recalls that it has found that article 70 (1) (b) of the Statute only criminalises the presentation of false or forged documentary evidence and has therefore overturned convictions entered under this provision.[1667] As a result of having overturned the Trial Chamber's convictions under article 70 (1) (b) of the Statute, the Appeals Chamber need not consider this offence when assessing Mr Bemba's challenges concerning the permissibility of entering multiple convictions under articles 70 (1) (a) to (c) of the Statute.

748. The Appeals Chamber considers Mr Bemba's arguments relating to article 20 (1) of the Statute to be misplaced. That provision concerns the question of whether a person may be tried more than once for the same conduct. At issue here, however, is the question of whether a trial chamber, at the end of a trial, may enter multiple convictions if the same conduct fulfils the legal elements of more than one offence.

749. Mr Bemba was convicted under article 70 (1) (c) of the Statute as a co-perpetrator for having, *inter alia*, planned, authorised, approved, and given precise instructions as to the illicit coaching of witnesses.[1668] The Trial Chamber explained that the illicit coaching "encompassed instructions on information regarding the merits of the Main Case, irrespective of its truth or falsity," as well as instructions to testify falsely with regards to contacts, payments and acquaintances.[1669] In relation to article 70 (1) (a) of the Statute, the Trial Chamber found that Mr Bemba "asked for or urged conduct with the explicit and/or implicit consequence of prompting each of the Main Case defence witnesses to provide false testimony" on contacts, payments and acquaintances and that, "without Mr Bemba's directives, the witness would not have testified untruthfully before Trial Chamber III".[1670]

[1665] Response, para. 214.
[1666] Response, para. 215.
[1667] *See supra* para. 710.
[1668] Conviction Decision, para. 924.
[1669] Conviction Decision, para. 808.
[1670] Conviction Decision, para. 932.

750. The Trial Chamber correctly understood that the same acts underlie Mr Bemba's conviction as a co-perpetrator for corruptly influencing 14 witnesses, pursuant to article 70 (1) (c) of the Statute, and his conviction for soliciting the giving of false testimony by these witnesses on issues unrelated to the merits of the Main Case such as prior contacts, payments and acquaintances with third persons.[1671] The Trial Chamber thereafter sought to determine whether multiple convictions based on the same conduct were permissible. In so doing, the Trial Chamber applied the same test used by the *ad hoc* tribunals, namely the test articulated in the *Delalić et al.* case.[1672] The Appeals Chamber finds no error in the Trial Chamber's reliance on this test. The Appeals Chamber, however, is mindful that the *Delalić et al*. test only addresses the principle of speciality, namely a situation where one offence falls entirely within the ambit of another, and therefore only a *conviction* for the more specific crime is ultimately entered.

751. The Appeals Chamber notes that it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it. However, the Appeals Chamber will not dwell on this question any further in the context of the present case. It suffices here to note that, in the circumstances of this case, there is no indication that the conviction under article 70 (1) (a) and that under article 70 (1) (c) of the Statute should be understood as mutually exclusive. The Appeals Chamber notes that Mr Bemba's conviction under article 70 (1) (c) of the Statute overlaps with his conviction under article 70 (1) (a) of the Statute with respect to issues unrelated to the merits of the Main Case, such as contacts, payments, and acquaintances. The witnesses eventual giving of false testimony on these non-merits issues were simply the intended result of Mr Bemba's acts of corrupt influence. However, there are aspect of Mr Bemba's activities in relation to the corruptly influence of witnesses, namely those activities related to the merits of the Main Case, which did not result in convictions under article 70 (1) (a) of the Statute because the Trial Chamber refrained from assessing the truth or falsity of the witnesses' testimony

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[1671] *See* Conviction Decision, para. para. 954.
[1672] *Delalić et al*. Appeal Judgment, paras 409, 412-413.

as it related to the merits of the Main Case.[1673] Thus, on the facts of this case, the Appeals Chamber sees no reason why it would have been incorrect to enter convictions both under article 70 (1) (a) and 70 (1) (c) of the Statute. For these reasons, the Appeals Chamber rejects Mr Bemba's arguments in this respect.

IX. MR BEMBA'S GROUNDS OF APPEAL ON THE MODES OF LIABILITY

752. Mr Bemba challenges the Trial Chamber's legal and factual findings concerning his liability as a co-perpetrator of offences under articles 70 (1) (b)[1674] and (c) of the Statute.[1675] He also challenges the Trial Chamber's findings concerning his liability for having solicited the offence under article 70 (1) (a) of the Statute.[1676]

A. Mr Bemba's grounds of appeal regarding co-perpetration

753. Mr Bemba alleges that the Trial Chamber's findings regarding co-perpetration do "not fulfil the legal requirements" of this mode of liability.[1677] He submits that the Trial Chamber erred in relying on: (i) the conduct of persons who were not members of the common plan;[1678] (ii) conduct that post-dates the commission of the charged offence;[1679] (iii) bad character evidence;[1680] and (iv) "uncorroborated neutral contributions".[1681] Mr Bemba further submits that the Trial Chamber relied on an erroneous legal standard on knowledge,[1682] and that it failed to make evidential findings with respect to his *mens rea* and *actus reus* for each charged offences.[1683] The Appeals Chamber shall address these arguments in turn.

[1673] Conviction Decision, para. 194.
[1674] The Appeals Chamber recalls that it has found that the Trial Chamber erred in its interpretation of article 70 (1) (b) of the Statute and overturned the convictions, *inter alia*, of Mr Bemba entered under that provision.
[1675] Mr Bemba's Appeal Brief, paras 93-137.
[1676] Mr Bemba's Appeal Brief, paras 138-140.
[1677] Mr Bemba's Appeal Brief, para. 93.
[1678] Mr Bemba's Appeal Brief, paras 94-99.
[1679] Mr Bemba's Appeal Brief, paras 100-106.
[1680] Mr Bemba's Appeal Brief, paras 107-115.
[1681] Mr Bemba's Appeal Brief, paras 116-122.
[1682] Mr Bemba's Appeal Brief, paras 123-129.
[1683] Mr Bemba's Appeal Brief, paras 130-137.

1. Alleged error regarding the existence of the common plan

(a) Relevant part of the Conviction Decision

754. In the Conviction Decision, the Trial Chamber held that, in order "[t]o establish the existence of the common plan between the co-perpetrators",

> [it] inferred its existence from Mr Bemba's, Mr Kilolo's and Mr Mangenda's concerted actions, also involving the two co-accused, Mr Babala and Mr Arido, and other third persons. The fact that actions performed by Mr Babala and Mr Arido are taken into account in the context of the present assessment does not render Mr Babala and Mr Arido co-perpetrators. Rather, it allows the Chamber to fully and comprehensively assess the actions of the three co-perpetrators.[1684]

755. In particular, the Trial Chamber noted that "a significant body of evidence [proved] that Mr Babala […] would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons. This included funds that Mr Babala or Mr Kilolo illicitly transferred to the witnesses".[1685]

756. To demonstrate Mr Bemba's direct involvement and knowledge of the payments effected, including illicit payment to witnesses, the Trial Chamber noted, *inter alia*, Mr Babala's statements asking Mr Bemba for authorisation to proceed with the transfer or payment of money to Mr Kilolo.[1686] The Trial Chamber further noted that Mr Babala had also informed Mr Bemba about the status of money transactions, *inter alia*, to Mr Kilolo[1687] and that Mr Bemba had authorised Mr Babala to proceed with the payments of money.[1688]

757. Finally, the Trial Chamber considered that, "[r]eading the evidence in context",[1689] payments could not be effected without prior authorisation of Mr Bemba and that, "on the basis of an overall assessment of the evidence",[1690] it was convinced that "Mr Bemba knew that at least some of the payments he discussed and authorised over the phone served also illegitimate purposes".[1691] When reaching this conclusion,

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[1684] Conviction Decision, para. 682.
[1685] Conviction Decision, para. 693.
[1686] Conviction Decision, para. 695.
[1687] Conviction Decision, para. 696.
[1688] Conviction Decision, para. 697.
[1689] Conviction Decision, para. 699.
[1690] Conviction Decision, para. 700.
[1691] Conviction Decision, paras 699-700.

the Trial Chamber referred, "as a prominent example",[1692] to its findings in relation to witnesses D-57 and D-64.

(b) Submissions of the parties

(i) Mr Bemba

758. Mr Bemba submits that the Trial Chamber erred by relying "on the individual actions of Mr Babala, and concerted action between Mr Bemba and Mr Babala in order to infer the existence of a common plan to corruptly influence witnesses through payments".[1693] In Mr Bemba's view, inferring the existence of the common plan "from concerted action with persons who were not members of the common plan"[1694] contradicts the legal framework applied by the Trial Chamber[1695], which had stated that "participation in the commission of the offence(s) without coordination with one's co-perpetrator(s) falls outside the scope of co-perpetration".[1696] Mr Bemba argues that this framework contained a "restriction"[1697] that the Trial Chamber failed to apply when assessing the evidence.

759. Mr Bemba submits further that the Trial Chamber relied on communications between Mr Babala and Mr Bemba to infer Mr Bemba's participation in a common plan to corruptly influence all 14 witnesses through payment,[1698] stating at the same time that these communications did not disclose a link between Mr Babala and the corrupt influencing of witnesses, except for witnesses D-57 and D-64.[1699] In Mr Bemba's view, "if the Chamber was unable to conclude, from these communications, that Mr. Babala was involved in the corrupt influencing of 12 of the 14 witnesses, then it defies logic that the Chamber could rely on the same communications as the exclusive basis for inferring Mr. Bemba's agreement to be part of a common plan to corruptly influence all 14 witnesses".[1700]

[1692] Conviction Decision, para. 700.
[1693] Mr Bemba's Appeal Brief, para. 96, referring to Conviction Decision, para. 693.
[1694] Mr Bemba's Appeal Brief, para. 95.
[1695] Mr Bemba's Appeal Brief, para. 94, referring to Conviction Decision, paras 65-66.
[1696] Mr Bemba's Appeal Brief, para. 94, referring to Conviction Decision, paras 65-66.
[1697] Mr Bemba's Appeal Brief, para. 94.
[1698] Mr Bemba's Appeal Brief, para. 96.
[1699] Mr Bemba's Appeal Brief, para. 96.
[1700] Mr Bemba's Appeal Brief, para. 97, referring to Conviction Decision, paras 693-700.

760. With regard to Mr Babala's involvement with witnesses D-64 and D-57, Mr Bemba recalls that, according to the Trial Chamber, Mr Babala was not a member of the common plan.[1701] In Mr Bemba's view, if Mr Babala did not execute the payments pursuant to the common plan, "then there is no basis for relaying [*sic*] on this conduct in order to infer the existence of the common plan in general or as concerns these witnesses".[1702] Mr Bemba submits that this error "impacted on the Chamber's reliance on Mr. Bemba's communications with Mr. Babala in order to infer the existence of a common plan to conceal the existence of the plan through codes, or through the alleged misuse of the privileged line of Mr. Kilolo".[1703]

(ii) The Prosecutor

761. The Prosecutor responds that Mr Bemba misinterprets the Conviction Decision and "mistakes the law".[1704] First, the Prosecutor avers that the existence of a common plan and its membership are "simply questions of fact" and it would be "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'".[1705] Second, the Prosecutor argues that Mr Bemba's "selective criticisms" only focuses on certain evidence, considered in isolation.[1706] The Prosecutor maintains that the common plan was not established solely on the basis of Mr Babala's individual actions and concerted actions between Mr Bemba and Mr Babala.[1707] She avers that these interactions were relevant to only two of the five factors upon which the Trial Chamber primarily relied, that is, the monetary payments to witnesses and the concealment of the common plan. [1708] The Prosecutor adds that this evidence was not decisive in either respect.[1709] Finally, the Prosecutor argues that "[i]t 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,

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[1701] Mr Bemba's Appeal Brief, para. 98.
[1702] Mr Bemba's Appeal Brief, para. 98.
[1703] Mr Bemba's Appeal Brief, para. 99, referring to Conviction Decision, paras 737-739.
[1704] Response, para. 440.
[1705] Response, para. 441 (emphasis in original).
[1706] Response, para. 442.
[1707] Response, para. 442.
[1708] Response, para. 442.
[1709] Response, para. 442.

in the context of all the other evidence, to demonstrate that Bemba is a co-perpetrator".[1710]

(c) Determination by the Appeals Chamber

762. The Appeals Chamber understands Mr Bemba to raise two distinct errors. The first one relates to how the Trial Chamber established the existence of the common plan. The second one pertains to an alleged "logical dissonance"[1711] stemming from the Trial Chamber's reliance on the communications between Mr Babala and Mr Bemba to demonstrate Mr Bemba's involvement in the corrupt influencing of all 14 witnesses.

763. Concerning the first alleged error, Mr Bemba seems to argue that, when assessing the evidence on the existence of the common plan, the Trial Chamber failed to apply the "restriction" it set out in the section on the applicable law on the mode of liability of co-perpetration.[1712] The Appeals Chamber recalls that the Trial Chamber stated in that section that "participation in the commission of the offence(s) without coordination with one's co-perpetrator(s) falls outside the scope of co-perpetration".[1713] However, as the Trial Chamber also recognised, this does not mean that the agreement or the common plan, which ties the co-perpetrators together, cannot be inferred from circumstantial evidence.[1714]

764. The Appeals Chamber observes that the Trial Chamber focused on whether there existed a common plan between the three co-perpetrators, Mr Bemba, Mr Mangenda and Mr Kilolo.[1715] The Conviction Decision made clear that the common plan was inferred from their concerted actions.[1716] Nevertheless, the Trial Chamber also took into account actions of third persons, including of the other two co-accused, Mr Babala and Mr Arido, who were nevertheless not found to have been co-perpetrators.[1717] Thus, the existence of a common plan between Mr Bemba, Mr Kilolo and Mr Mangenda was inferred from their concerted actions, including those taken *in*

[1710] Response, para. 443 (emphasis in original).
[1711] Mr Bemba's Appeal Brief, para. 97.
[1712] Mr Bemba's Appeal Brief, paras 94-95.
[1713] Conviction Decision, para. 65.
[1714] Conviction Decision, para. 66.
[1715] Conviction Decision, paras 682-683, 802-803.
[1716] Conviction Decision, para. 682.
[1717] Conviction Decision, para. 682.

connection with other persons, including other co-accused.[1718] In the Conviction Decision, these interactions were indeed taken into account by the Trial Chamber in order to determine the existence of the common plan and to show that Mr Bemba was involved extensively in the payment scheme[1719] and that, *inter alia*, he had "directed the commission of the offences from the ICC Detention Centre".[1720] The Appeals Chamber agrees with the Prosecutor[1721] that the relations of the three co-perpetrators with third persons may be relevant to proving, by inference, the existence of the common plan and the Trial Chamber, therefore, did not err.

765. Moreover, the Appeals Chamber notes that the common plan between the three co-perpetrators was not proved solely on the basis of inferences drawn from the actions taken in connection with the other two co-accused. Among the five factors relied upon by the Trial Chamber to establish the existence of an agreement,[1722] the interactions between Mr Bemba and Mr Babala were taken into account only for the payments and non-monetary promises to witnesses and for the measures taken to conceal the implementation of the plan.

766. Concerning the second alleged error, Mr Bemba argues that, the communications between him and Mr Babala could not be used by the Trial Chamber to infer Mr Bemba's participation in the common plan to corruptly influence all 14 Main Case witnesses.[1723]

767. The Appeals Chamber is not persuaded by Mr Bemba's argument that the Trial Chamber's approach in this regard was erroneous. Although the Trial Chamber considered that Mr Babala's assistance related only to witnesses D-57 and D-64 in the context of the analysis of his criminal responsibility, this did not prevent the Trial Chamber from taking into account the communications between Mr Babala and Mr Bemba, together with all the other relevant evidence, to assess the role of Mr Bemba as a co-perpetrator in the common plan.

[1718] Conviction Decision, para. 803.
[1719] Conviction Decision, para. 693.
[1720] Conviction Decision, para. 737.
[1721] Response, para. 441.
[1722] Conviction Decision, para. 683.
[1723] Mr Bemba's Appeal Brief, para. 97.

768. In light of the foregoing, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal relating to the existence of the common plan.

2. Alleged error regarding the conduct that post-dates the commission of charged offences

(a) Relevant part of the Conviction Decision

769. When addressing the mental element of co-perpetration as a mode of liability, the Trial Chamber held that

> [t]he Chamber must be satisfied of the co-perpetrators' mutual awareness that implementing the common plan would result in the fulfilment of the material elements of the crimes; and they nevertheless perform their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that, 'in the ordinary course of events', the fulfilment of the material elements will be a virtually certain consequence of their actions.[1724] [Footnote omitted.]

(b) Submissions of the parties

(i) Mr Bemba

770. Mr Bemba submits that the Trial Chamber's reliance, "to a decisive extent",[1725] on "*ex-post facto* contributions was incompatible with legal principles concerning co-perpetration, and international and domestic case law".[1726] He alleges that a contribution by a co-perpetrator to the crimes cannot be qualified as essential "if the crime has already been realised".[1727] Mr Bemba argues that the terms "would" and "bring", which the Trial Chamber used in the passage quoted above, refer to future acts.[1728] Mr Bemba argues that "mutual awareness must, of necessity, exist before, or at the time that the crime was committed" and the required *mens rea* cannot be evidenced by *ex-post facto* knowledge.[1729]

771. Mr Bemba avers that the Trial Chamber did not "acknowledge these limitations" and erred in relying on his alleged involvement in obstructing the Prosecutor's investigation on article 70 offences in order to establish "his association

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[1724] Conviction Decision, para. 70.
[1725] Mr Bemba's Appeal Brief, para. 100.
[1726] Mr Bemba's Appeal Brief, para. 100.
[1727] Mr Bemba's Appeal Brief, para. 101.
[1728] Mr Bemba's Appeal Brief, paras 103-104.
[1729] Mr Bemba's Appeal Brief, para. 104.

and intent concerning the initial common plan".[1730] He asserts that this error vitiated the Trial Chamber's findings regarding Mr Bemba's intent regarding the common plan.[1731] He adds that the alleged obstruction was never charged as a separate offence under article 70 (1) (c) of the Statute and that the conduct and knowledge regarding these remedial measures fall outside of the scope of the confirmed common plan.[1732]

(ii) The Prosecutor

772. The Prosecutor responds that Mr Bemba arguments are based on "unsupported assumptions"[1733] and fail for three reasons.[1734] First, the Prosecutor notes that Mr Bemba does not identify the "*ex post facto* contributions"; she assumes that he must be referring to the remedial measures to counter the Article 70 investigation.[1735] The Prosecutor avers that these remedial measures "did not occur *after* all the offences falling within the Common Plan were completed but *while they were ongoing*".[1736]

773. Second, the Prosecutor argues that the Trial Chamber's reasoning concerning the existence of the common plan, Mr Bemba's essential contribution and his *mens rea* was "carefully distinguished, and fully reasoned".[1737] According to the Prosecutor, Mr 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*), such a limitation would apply equally to the entirety of the Chamber's analysis".[1738] The Prosecutor avers that, while the Trial Chamber considered the remedial measures when establishing the existence of the common plan, "this was still just *part* of the evidence underlying the five factors upon which the Chamber relied".[1739] She adds that, even without considering the remedial measures, the existence of the common plan still remains the only reasonable inference from the evidence.[1740]

[1730] Mr Bemba's Appeal Brief, para. 105.
[1731] Mr Bemba's Appeal Brief, para. 106.
[1732] Mr Bemba's Appeal Brief, para. 105.
[1733] Response, para. 444.
[1734] Response, para. 444.
[1735] Response, para. 445.
[1736] Response, para. 445 (emphasis in original).
[1737] Response, para. 447.
[1738] Response, para. 447 (footnotes omitted).
[1739] Response, para. 448 (emphasis in original).
[1740] Response, para. 448.

774. The Prosecutor submits further that, although the Trial Chamber referred to Mr Bemba's role in ordering the remedial measures when finding that he made an essential contribution, this was not the heart of its reasoning.[1741] According to the Prosecutor, Mr Bemba was 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 its execution".[1742] Regarding the *ex-post facto* contributions, the Prosecutor submits that, even if this type of 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".[1743]

775. The Prosecutor further argues that the Trial Chamber's conclusion that Mr Bemba had the necessary *mens rea* was the only reasonable inference from the evidence of his "continuous and substantive knowledge",[1744] considered together with all the other relevant evidence.[1745] The Prosecutor also avers that the Trial Chamber did not rely "heavily"[1746] on remedial actions, which were "but one factor in the Chamber's analysis".[1747]

776. Third, the Prosecutor argues that, "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".[1748] She submits that, "provided an alleged co-perpetrator's conduct genuinely amounts to an essential contribution to the common plan, its precise timing is irrelevant".[1749]

(c) Determination by the Appeals Chamber

777. As a preliminary matter, the Appeals Chamber notes that, in support of his arguments under this sub-ground of appeal, Mr Bemba refers to Annex F of his

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[1741] Response, para. 449.
[1742] Response, para. 450.
[1743] Response, para. 451.
[1744] Response, para. 453, referring to Conviction Decision, para. 817.
[1745] Response, para. 453.
[1746] Response, para. 453.
[1747] Response, para. 453.
[1748] Response, para. 454.
[1749] Response, para. 454.

Appeal Brief, which is a 42-page-long document, reproducing some of the Trial Chamber's findings, together with Mr Bemba's comments thereto.[1750]

778. The Appeals Chamber recalls that the submissions of an appellant in an appeal brief are subject to a page limit, stipulated in regulation 58 (5) of the Regulations of the Court, which the Appeals Chamber extended for all appellants in the present case. The Appeals Chamber considers that the comments included in Annex F amount to submissions, which supplement those in Mr Bemba's Appeal Brief. This circumvents the page limit and contravenes regulation 36 (2) (b) of the Regulations of the Court, which provides that "[a]n appendix shall not contain submissions". Accordingly, the submissions included in Annex F will not be considered.

779. Turning to the substance of Mr Bemba's submissions under this sub-ground of appeal, the Appeals Chamber understands Mr Bemba to challenge the Trial Chamber's reliance on "*ex-post facto* contributions",[1751] which he defines as contributions occurring after the execution of the offences,[1752] to establish that he made an essential contribution to the commission of the offences for which he was convicted. In particular, he takes issue with the Trial Chamber's findings included in the Conviction Decision under the heading "Remedial measures after knowledge of initiation of investigation".[1753] In Mr Bemba's view, these measures fall outside the scope of the confirmed common plan[1754] and the Trial Chamber therefore "erred in law by relying on conduct that post-dates the commission of the charged offence".[1755]

780. Regarding the time-frame of the common plan, the Appeals Chamber recalls, first, that the Confirmation Decision indicated that the charged offences against the administration of justice were committed between the "end of 2011 and 14 November 2013".[1756] The Appeals Chamber notes that the Trial Chamber found that the agreement between Mr Bemba, Mr Kilolo and Mr Mangenda "was made in the course of the Main Case among the three accused at the latest when the Main Case Defence

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[1750] Mr Bemba's Appeal Brief, para. 106, fn. 177.
[1751] Mr Bemba's Appeal Brief, para. 100.
[1752] Mr Bemba's Appeal Brief, para. 101.
[1753] Mr Bemba's Appeal Brief, para. 105, fn. 175.
[1754] Mr Bemba's Appeal Brief, para. 105.
[1755] Mr Bemba's Appeal Brief, sub-ground of appeal 2.3.2.
[1756] Confirmation Decision, p. 47.

arranged for the testimony of D-57, and involved the corrupt influencing of, at least, 14 defence witnesses, together with the presentation of their evidence".[1757] The Trial Chamber also found that the co-perpetrators were alerted to the article 70 investigation on 11 October 2013, "one month before D-13 was called to testify as the last defence witness in the Main Case".[1758] The "remedial measures" took place over the following two weeks, until 22 October 2013.[1759] Witness D-13 completed his testimony before 15 November 2013.[1760] Thus, the commission of the offences pursuant to the common plan continued until at least 13 or 14 November 2013, one month after the co-perpetrators started conceiving and implementing "remedial measures". This is the reason why the "deliberate strategy on the part of the three accused to influence the testimony of the witnesses and secure their testimony in the Main Case in Mr Bemba's favour"[1761] included, according to the Trial Chamber, a "number of remedial countermeasures",[1762] adopted "with a view to frustrating the Prosecution's Article 70 investigation and to offer[ing] […] [the relevant witnesses] incentives and money to terminate their collaboration with the Prosecution".[1763] Thus, the "remedial measures" were conceived and implemented[1764] while the execution of the common plan was still ongoing.

781. The Appeals Chamber agrees with the Prosecutor's view that these remedial measures "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 not different from other measures to conceal the Common Plan, which had been carried out as required since the plan's inception".[1765] In the Appeals Chamber's view, it is obvious from the Conviction Decision that the remedial measures were merely factors among others, which, taken together, proved the existence of the common plan. Given that all references to the remedial measures were essentially linked to proof of the

[1757] Conviction Decision, para. 103. *See also* para. 802.
[1758] Conviction Decision, paras 110, 770.
[1759] Conviction Decision, para. 886.
[1760] Conviction Decision, para. 655.
[1761] Conviction Decision, para. 104.
[1762] Conviction Decision, para. 803.
[1763] Conviction Decision, para. 803.
[1764] Conviction Decision, paras 110, 803
[1765] Response, para. 446.

agreement,[1766] the Appeals Chamber finds that Mr Bemba shows no error in the Trial Chamber's approach.

782. As to Mr Bemba's essential contribution to the commission of crimes and his role in relation to the common plan,[1767] as well as his intent and knowledge, the Trial Chamber analysed the actions taken by Mr Bemba in order to authorise, ensure and/or implement measures to conceal the common plan.[1768] The Trial Chamber stated that, "[w]hen Mr Bemba was informed that the Prosecution had initiated an Article 70 investigation, [he] ordered that all Main Case Defence witnesses be contacted with a view to interfering with the witnesses and thereby frustrating the Prosecution's investigation".[1769] According to the Trial Chamber, Mr Bemba "also approved Mr Kilolo's suggestion to take remedial measures".[1770]

783. The Appeals Chamber observes that Mr Bemba's ordering of the remedial measures was merely one of several contributions that he made to the execution of the offences. The Trial Chamber enumerated, in its overall findings concerning Mr Bemba, the different types of contributions which, taken together, amounted to an essential contribution to the commission of the offences encompassed by the common plan.[1771]

784. The Appeals Chamber concludes that, in light of the above, the Trial Chamber did not err in taking into account, *inter alia*, his ordering of remedial measures when determining that he had made an essential contribution to the offences.

785. Turning to the remainder of Mr Bemba's arguments, the Appeals Chamber recalls that the Trial Chamber found that Mr Bemba's essential contributions to the implementation of the common plan were indicative of his *mens rea*.[1772] In Mr Bemba's view, "[r]emedial action does not in itself reflect a guilty mind since it cannot be excluded that an accused associated himself with such actions because of information (or misinformation) that was discovered after the commission of the

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[1766] *See e.g.* Conviction Decision, paras 683, 687, 701.
[1767] Conviction Decision, para. 804.
[1768] Conviction Decision, paras 814-815.
[1769] Conviction Decision, para. 815.
[1770] Conviction Decision, para. 815.
[1771] Conviction Decision, para. 816.
[1772] Conviction Decision, para. 817.

initial offences".[1773] In the Appeals Chamber's view, the Conviction Decision does not indicate that the Trial Chamber considered that the remedial measures proved, as such, Mr Bemba's *mens rea*. In addition to the remedial measures, the Trial Chamber took into account a series of factors, namely: (i) the planning and organising of activities relating to the common plan;[1774] (ii) the deliberate abuse of Mr Bemba's communication privileges at the detention centre;[1775] (iii) Mr Bemba's specific directions and instructions concerning testimony relating to the merits of the Main Case;[1776] (iv) information about the coaching activity and the contacts, as well as payments to the witnesses;[1777] and (v) Mr Bemba's personal observation of the witnesses in the proceedings.[1778] The Appeals Chamber finds that Mr Bemba shows no error in this respect.

786. For the above-mentioned reasons, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

3. Alleged error regarding "bad character" evidence

(a) Relevant part of the Conviction Decision

787. The Trial Chamber relied on five factors[1779] to infer the existence of the common plan between the three co-perpetrators.[1780]

788. As one of the factors, it considered that witnesses had been illicitly coached, either over the telephone or in person.[1781] It found, *inter alia*, that Mr Kilolo had decided whether witnesses should come to testify based on whether they were willing to follow the specific narrative dictated by him.[1782] The Trial Chamber cited as an

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[1773] Mr Bemba's Appeal Brief, para. 104.
[1774] Conviction Decision, para. 817.
[1775] Conviction Decision, para. 817.
[1776] Conviction Decision, para. 818.
[1777] Conviction Decision, para. 819.
[1778] Conviction Decision, para. 819.
[1779] These factors were: (i) planning of acts; (ii) payments and non-monetary promises to witnesses; (iii) illicitly coaching witnesses either over the telephone or in person, including to testify falsely; (iv) taking (other) measures to conceal the implementation of the plan, such as the use of coded language, destruction of evidence, concealing of illicit coaching activities from other members of the defence team in the Main Case and circumvention of the Registry's monitoring system at the Detention Centre, through the abuse of the Registry's privileged line; and finally, (v) the co-perpetrators' remedial measures after learning that they were being investigated. *See* Conviction Decision, para. 683.
[1780] Conviction Decision, paras 682-683.
[1781] Conviction Decision, paras 704-734.
[1782] Conviction Decision, para. 713.

example a telephone conversation concerning Bravo, a potential witness.[1783] Having quoted the relevant extracts of the conversation, the Trial Chamber concluded that the exchanges between the co-perpetrators highlighted the illicit coaching strategy and Mr Kilolo's reluctance to call witnesses unless he had briefed them extensively.[1784] The Trial Chamber also concluded that this showed the close collaboration and interplay between the co-perpetrators.[1785] According to the Trial Chamber, this demonstrated Mr Mangenda's and Mr Bemba's knowledge and approval of the illicit coaching strategy and, furthermore, Mr Bemba's ultimate control over who would be called to testify.[1786]

789. When analysing the measures taken to conceal the implementation of the common plan, which was one of the relevant factors,[1787] the Trial Chamber considered a multi-party call between Mr Bemba and witness D-19.[1788] The Trial Chamber gave weight to the fact that it was established, in relation to witness D-55, that Mr Kilolo did enable such a multi-party call.[1789] It considered it established that, as early as 4 October 2012, Mr Kilolo had the technical abilities as well as the idea for such a multi-party call.[1790] The Trial Chamber found that the only reasonable conclusion was that Mr Kilolo connected the telephone lines to enable a multi-party call between witness D-19 and Mr Bemba on 4 October 2012.[1791]

790. Regarding the remedial measures taken after knowledge of the initiation of the article 70 investigation,[1792] as the fifth of the relevant factors,[1793] the Trial Chamber stated that is was overall satisfied that the co-perpetrators "discussed and were persuaded to take a series of measures to prevent and frustrate the Prosecution's Article 70 investigation".[1794] The Trial Chamber concluded that they had agreed to contact witnesses, in particular, the Cameroonian witnesses whom they suspected of

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[1783] Conviction Decision, para. 714.
[1784] Conviction Decision, para. 715.
[1785] Conviction Decision, para. 715.
[1786] Conviction Decision, para. 715.
[1787] Conviction Decision, para. 683.
[1788] Conviction Decision, para. 741.
[1789] Conviction Decision, para. 741.
[1790] Conviction Decision, para. 741.
[1791] Conviction Decision, para. 741.
[1792] Conviction Decision, paras 770-801.
[1793] Conviction Decision, para. 683.
[1794] Conviction Decision, para. 801.

having spoken to the Prosecutor, and convince them to terminate their cooperation with her.[1795]

(b) Submissions of the parties

(i) Mr Bemba

791. Mr Bemba submits that the Trial Chamber erred in relying on "bad character" evidence, which undermines the "Chamber's reliance on allegations concerning D-19, Bravo, and the 'remedial measures' in order to infer intent, and conduct on the part of Mr. Bemba".[1796] In his view, this "bad character" evidence concerned uncharged incidents which "[p]osted-dated the charges or were not established to the threshold of beyond reasonable doubt; or [w]ere triggered by a fundamental mistake of fact, and based on an entirely fictitious scenario".[1797]

792. In Mr Bemba's view, even if the Court were to accept such a category of evidence, it could only be employed to show "a *propensity* to commit a crime of a similar nature".[1798] It would also have "no relevance as concerns crimes that have already been committed".[1799] Mr Bemba submits that "bad character" evidence also requires the Trial Chamber to establish the overall illicit nature of the relevant behaviour to the standard of beyond reasonable doubt.[1800]

793. Mr Bemba argues further that the Trial Chamber used the alleged multi-party call with witness D-19 on 4 October 2012[1801] to "ascribe illicit intention to Mr. Bemba" when describing his subsequent communication with witness D-55.[1802] In Mr Bemba's view, there were "no overlapping contacts with D-19" on this date and, as for the alleged telephone call in January 2013, this post-dates the communication with D-55 and is irrelevant to his state of mind at the time of the call with witness D-55.[1803]

[1795] Conviction Decision, para. 801.
[1796] Mr Bemba's Appeal Brief, paras 107-108.
[1797] Mr Bemba's Appeal Brief, para. 107.
[1798] Mr Bemba's Appeal Brief, para. 110 (emphasis in original).
[1799] Mr Bemba's Appeal Brief, para. 110.
[1800] Mr Bemba's Appeal Brief, para. 111.
[1801] Mr Bemba's Appeal Brief, para. 112, referring to Conviction Decision, para. 741.
[1802] Mr Bemba's Appeal Brief, para. 112.
[1803] Mr Bemba's Appeal Brief, para. 112, referring to Annex G.

794. Mr Bemba also alleges that the Trial Chamber relied on untested hearsay to conclude that Mr Bemba "knew and approved of illicit coaching, and controlled the presentation of evidence".[1804] In Mr Bemba's view, in addition to the fact that his conduct is not mentioned in the Document Containing the Charges, it is "entirely unreasonable to rely on a hypothetical response in a hypothetical conversation as concerns an uncharged incident, as evidence of individual responsibility".[1805]

795. Mr Bemba finally recalls that the Trial Chamber accepted that the Prosecutor had not actually spoken to the defence witnesses that Mr Bemba, Mr Kilolo and Mr Mangenda agreed to contact in order to convince them to terminate their cooperation with the Prosecution, in the context of the remedial measures.[1806] He submits that there was no evidence that attempts were made to convince defence witnesses not to cooperate with the Prosecutor[1807] and that the Trial Chamber should not have considered as irrelevant the question as to whether "this plan" was fictitious.[1808] In Mr Bemba's view, it is not "permissible to rely on a person's awareness as to a specific circumstance or consequence, if this awareness was generated through false information".[1809]

(ii) The Prosecutor

796. In the Prosecutor's view, Mr Bemba's criticism both misapplies the concept of "bad character" evidence and "mistakes" the Trial Chamber's approach.[1810] The Prosecutor submits, first, that Mr Bemba's complaints must be closely examined on their substance because when looking at the relevant legal systems and case-law,[1811] a characterisation of evidence as going to "bad character" is insufficient to dismiss it generally.[1812] The Prosecutor argues that "[e]ven in the modern law of England and Wales, […] two important considerations apply"[1813] in that bad character evidence does not encompass evidence which "has to do with the alleged facts of the offence

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[1804] Mr Bemba's Appeal Brief, para. 113.
[1805] Mr Bemba's Appeal Brief, para. 113.
[1806] Mr Bemba's Appeal Brief, para. 114, referring to Conviction Decision, para. 801.
[1807] Mr Bemba's Appeal Brief, para. 114.
[1808] Mr Bemba's Appeal Brief, para. 115, referring to Conviction Decision, para. 800.
[1809] Mr Bemba's Appeal Brief, para. 115.
[1810] Response, para. 456.
[1811] Response, paras 457-458.
[1812] Response, para. 459.
[1813] Response, para. 458.

with which the defendant is charged" or "evidence of misconduct in connection with the investigation or prosecution of that offence".[1814] She maintains, in addition, that even genuine bad character evidence may still be admissible if it is "important explanatory evidence"[1815] or "relevant to an important matter in issue between the defendant and the prosecution".[1816] According to the Prosecutor, such evidence is also "subject to certain procedural safeguards".[1817]

797. The Prosecutor submits that a "specific assessment in the concrete circumstances must be made of the probative value weighed against any prejudicial effect".[1818] She alleges that Mr 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'".[1819]

798. In any case, in the Prosecutor's view, neither the multi-party telephone call with witness D-19,[1820] nor Mr Kilolo's and Mr Mangenda's discussion of potential witness Bravo[1821] or the co-perpetrators' remedial measures[1822] constitute examples of "bad character" evidence, as alleged by Mr Bemba.

(c) Determination by the Appeals Chamber

799. The Appeals Chamber understands Mr Bemba to argue that the Trial Chamber erroneously inferred from other instances of wrongdoing – indicating his "bad character" – that he would be prone to commit offences again. In the Appeals Chamber's view, however, the Trial Chamber did not base its findings on Mr Bemba's purported "bad character". The examples cited by Mr Bemba show instead that the Trial Chamber analysed the evidence of related acts and incidents together, following a logical approach.

[1814] Response, para. 458.
[1815] Response, para. 458.
[1816] Response, para. 458.
[1817] Response, fn. 1652.
[1818] Response, para. 459.
[1819] Response, para. 459.
[1820] Response, paras 460-462.
[1821] Response, paras 463-465.
[1822] Response, paras 466-467.

800. Regarding, first, the contested multi-party call with witness D-19, which took place on 13 January 2013,[1823] the Appeals Chamber notes that the Trial Chamber mentions this call as one of the examples[1824] of the types of measures taken to conceal the common plan.[1825] Mr Bemba's calls with witness D-55, witness D-19 and Mr Babala were considered as examples of his abuse of his communication privileges.[1826] The Trial Chamber used the evidence cited by Mr Bemba solely to describe his contributions to the implementation of the common plan, not to "ascribe [the] illicit intention to Mr Bemba" of subsequently communicating with witness D-55.[1827] Thus, Mr Bemba does not identify any error stemming from the use of what he characterises as "bad character" evidence.

801. Secondly, the conversation between Mr Mangenda and Mr Kilolo, the Appeals Chamber notes that it was mentioned by the Trial Chamber when analysing the activities of the three perpetrators in relation to illicit coaching.[1828] The Trial Chamber did not rely upon the conversation as direct evidence of Mr Bemba's knowledge, but rather as evidence which, together with all other evidence, allowed the inference of his knowledge.[1829] In the Appeals Chamber's view, Mr Bemba does not show any error on this point.

802. Turning to the third example cited by Mr Bemba regarding the measures taken by the co-perpetrators to prevent and frustrate the Prosecution's article 70 investigation,[1830] the Appeals Chamber considers that Mr Bemba's argument is unclear. Notably, he does not explain to what extent he considers the evidence used by the Trial Chamber to be "bad character" evidence. In any event, the Appeals Chamber finds that the conduct of the co-perpetrators (responding to the suspicion that they were under investigation for article 70 offences) was relevant to the Trial

[1823] Conviction Decision, para. 741. Regarding the actual date of this telephone call, *see infra* paras 1040-1041.
[1824] Conviction Decision, para. 741.
[1825] Conviction Decision, paras 735-768.
[1826] Conviction Decision, para. 816.
[1827] Mr Bemba's Appeal Brief, para. 112.
[1828] Conviction Decision, paras 704-734.
[1829] Conviction Decision, paras 714-715.
[1830] Conviction Decision, paras 800-801.

Chamber's determination that there existed a common plan, a finding which was also based on other factors.[1831]

803. For these reasons, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal relating to "bad character" evidence.

4. Alleged errors regarding Mr Bemba's essential contribution

804. Mr Bemba raises two sub-grounds of appeal concerning the Trial Chamber's findings regarding his essential contributions to the offences. In the first sub-ground, Mr Bemba submits that the Trial Chamber's findings regarding "Mr Bemba's 'essential contributions' are invalidated by its reliance on neutral contributions".[1832] In his second sub-ground, Mr Bemba argues that the Trial Chamber "erred in law by failing to enter specific evidential findings as concerns Mr Bemba's *mens rea* and *actus reus* for each charged offences [*sic*]".[1833] The Appeals Chamber will address these two sub-grounds in turn.

(a) Mr Bemba's "neutral" contributions

(i) Relevant part of the Conviction Decision

805. Regarding Mr Bemba's essential contribution as an element of co-perpetration liability and his mental element, the Trial Chamber concluded that

> Mr Bemba's contribution to the commission of the offences materialised in various ways. The Chamber relied on a number of actions that persuaded it to conclude that Mr Bemba's contributions were essential. Furthermore, the Chamber finds that Mr Bemba fulfilled the subjective elements as (i) he 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, and (ii) he carried out his own contributions nonetheless.[1834]

(ii) Submissions of the parties

(a) Mr Bemba

806. Mr Bemba alleges that the Trial Chamber erred in law by failing to indicate that he knew that his own conduct, as opposed to that of his co-perpetrators, constituted an

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[1831] Conviction Decision, para. 683.
[1832] Mr Bemba's Appeal Brief, sub-ground of appeal 2.3.4, paras 116-122.
[1833] Mr Bemba's Appeal Brief, sub-ground of appeal 2.5, paras 130-137.
[1834] Conviction Decision, para. 807.

essential contribution to the material elements of the offences.[1835] In Mr Bemba's view, he was, as a result, erroneously[1836] convicted for neutral contributions, "that is, conduct, which was not *per se* illicit, and which was not corroborated by independent evidence that the accused engaged in this conduct with the intent to fulfil the material elements of the offences".[1837]

807. Mr Bemba submits that the required causal link between the contribution and the crime "is cut in circumstances in which the Chamber has relied on non-licit [*sic*] conduct in order to establish both the *actus reus* and *mens rea* of the accused".[1838] He adds that the Trial Chamber's conclusions regarding his essential contribution were premised on conduct that "was not only not prohibited, but either protected by Article 67(1) of the Statute, or encouraged by the Trial Chamber and VWU (thanking witnesses)".[1839] Concerning his *mens rea*, Mr Bemba argues that the Trial Chamber also erroneously relied on conduct that had no intentional impact on the realisation of the specific charged offences.[1840]

(b) The Prosecutor

808. The Prosecutor submits that it is well established that contributions to a common plan, itself containing the critical element of criminality, need not be criminal in nature.[1841] She argues that Mr Bemba's general assertion that neutral acts generally cannot constitute co-perpetration is inconsistent with the logic of the Statute and should be rejected,[1842] and is also beset by two significant flaws.[1843] The Prosecutor submits, first, that Mr Bemba is not correct when he asserts that the Trial Chamber failed to find that he had the necessary subjective awareness concerning his own conduct,[1844] because the Trial Chamber's conclusion that Mr Bemba knew of his "co-perpetrators' concerted actions", in execution of the common plan necessarily

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[1835] Mr Bemba's Appeal Brief, para. 117.
[1836] Mr Bemba's Appeal Brief, para. 117.
[1837] Mr Bemba's Appeal Brief, para. 117.
[1838] Mr Bemba's Appeal Brief, para. 118.
[1839] Mr Bemba's Appeal Brief, para. 121.
[1840] Mr Bemba's Appeal Brief, para. 122.
[1841] Response, para. 469.
[1842] Response, para. 469.
[1843] Response, para. 469.
[1844] Response, para. 470.

includes the requisite subjective awareness of his *own* actions.[1845] Second, in the Prosecutor's view, it is not impermissible to rely on the same evidence to satisfy the requirements of article 30 of the Statute (*mens rea*) and the requirements under article 25 (3) (a) of the Statute for a co-perpetrator's contribution to the common plan (*actus reus*).[1846]

809. In any event, the Prosecutor considers that Mr Bemba is wrong when he alleges that the Trial Chamber relied solely on "neutral contributions" both to find that he contributed to the common purpose in an essential way and to infer his *mens rea*.[1847] The Prosecutor submits that Mr Bemba's account of the conduct relevant to his essential contribution is selective.[1848] She submits that, 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 Trial Chamber did not need to parse the circumstances of each individual event. In the Prosecutor's view, this follows not only from the principle that a contribution need not be criminal *per se*, but also from the requirement that contributions be made within the framework of the common plan and from the recognition that co-perpetration may be proven circumstantially.[1849]

(iii) Determination by the Appeals Chamber

810. With respect to Mr Bemba's argument that the Trial Chamber convicted him as a co-perpetrator based on "neutral" contributions, the Appeals Chamber recalls that it has previously found that, to hold an accused liable as a co-perpetrator in terms of article 25 (3) (a) of the Statute, it has to be established, *inter alia*, that he or she had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage of the crime.[1850] Given that the essential contribution does not have to be made at the execution stage, it is clear that acts that do not, as such, form the *actus reus* of the crime or offence in question may nevertheless be taken into

[1845] Response, para. 470.
[1846] Response, para. 471.
[1847] Response, para. 473.
[1848] Response, paras 473-474.
[1849] Response, para. 475.
[1850] *Lubanga* Appeal Judgment, para. 473.

account when determining whether the accused has made an essential contribution to that crime or offence. The Appeals Chamber considers, therefore, that the essential contribution may take many forms and need not be "criminal" in nature.

811. Mr Bemba submits further that the Trial Chamber erred when analysing: (i) Mr Bemba's interaction with Mr Kilolo in the context of the testimony of witness D-15;[1851] (ii) the type of instructions that Mr Bemba conveyed to Mr Kilolo through Mr Mangenda concerning witness D-54;[1852] (iii) the role of Mr Bemba regarding the authorisation of payment to D-57;[1853] and (iv) the communications between Mr Bemba and witness D-55.[1854] The Appeals Chamber is not persuaded by Mr Bemba's contention. Mr Bemba does not explain why these acts were, in his view, "protected by Article 67(1) of the Statute",[1855] and his account of the Trial Chamber's findings with regard to his essential contribution is selective.

812. The Appeals Chamber recalls that the Trial Chamber concluded that, "[f]rom his detailed knowledge of and role"[1856] in a series of activities, including, but not limited to, those mentioned above, "Mr Bemba was in a position to frustrate the illicit coaching and paying of witnesses, as well as the presentation of the witnesses in the Main Case, by issuing other directions or otherwise refusing his approval".[1857] The Appeals Chamber observes that the Trial Chamber not only carefully analysed each contribution or activity personally undertaken by Mr Bemba,[1858] in conjunction with the other co-perpetrators,[1859] but also explained why the activities, *taken as a whole*, amounted to an essential contribution to the offences covered by the common plan. In the view of the Trial Chamber, "these contributions of Mr Bemba, taken together, were essential to the implementation of the common plan to illicitly interfere with defence witnesses in order to ensure that these witnesses would testify in favour of Mr Bemba".[1860] The Appeals Chamber is of the view that, provided that the incidents

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[1851] Mr Bemba's Appeal Brief, para. 120, referring to Conviction Decision, paras 809-810.
[1852] Mr Bemba's Appeal Brief, para. 120, referring to Conviction Decision, para. 811.
[1853] Mr Bemba's Appeal Brief, para. 120, referring to Conviction Decision, para. 813.
[1854] Mr Bemba's Appeal Brief, para. 120, referring to Conviction Decision, para. 814.
[1855] Mr Bemba's Appeal Brief, para. 121.
[1856] Conviction Decision, para. 816.
[1857] Conviction Decision, para. 816.
[1858] Conviction Decision, paras 809, 810, 811, 814.
[1859] Conviction Decision, para. 813
[1860] Conviction Decision, para. 816.

occur within the framework of a criminal common plan, to which the co-perpetrator made an essential contribution with intent and knowledge, it is not necessary for the co-perpetrator to make an essential contribution to each criminal incident. The Appeals Chamber considers that, on this specific point, Mr Bemba does not show an error in the Trial Chamber's approach.

813. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal relating to the nature and extent of his contribution.

(b) Mr Bemba's contributions to "each charged offence"

(i) Relevant part of the Conviction Decision

814. The Trial Chamber found that "Mr Bemba, Mr Kilolo and Mr Mangenda jointly agreed to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba"[1861] and concluded that this amounted to a common plan involving, "at least, the corrupt influencing of 14 Main Case defence witnesses, together with the presentation of their evidence".[1862] The Trial Chamber also found that Mr Bemba made several contributions that "were essential to the implementation of the common plan to illicitly interfere with defence witnesses in order to ensure that these witnesses would testify in favour of Mr Bemba".[1863] The Trial Chamber stated that it was "satisfied that Mr Bemba's essential contributions to the common plan taken as a whole […] indicate[d] his *mens rea*."[1864]

(ii) Submissions of the parties

(a) Mr Bemba

815. Mr Bemba submits that the Trial Chamber erred in law because it failed "to enter findings concerning [his] intentional contribution to the realisation of each charged offence".[1865] He alleges that the joint control theory presupposes that the accused exercised control over specific crimes, and not merely the common plan generally.[1866] He submits that the Trial Chamber erroneously inferred from "limited

[1861] Conviction Decision, para. 103.
[1862] Conviction Decision, para. 802.
[1863] Conviction Decision, para. 816.
[1864] Conviction Decision, para. 817.
[1865] Mr Bemba's Appeal Brief, para. 130.
[1866] Mr Bemba's Appeal Brief, para. 131.

findings in relation to a handful of witnesses"[1867] that Mr Bemba was "a member of the common plan, and on that basis, imputed responsibility to [him] for each charged offence".[1868] According to Mr Bemba, the Trial Chamber's error is also reflected in the fact that it "clearly extrapolated intent concerning specific offences, from his general involvement in a broadly defined, non-criminal common plan".[1869]

(b) The Prosecutor

816. The Prosecutor argues that "[t]he Chamber's reasoning was not based upon a vague inference from the general to the particular, but a coherent and logical analysis".[1870] According to the Prosecutor, Mr Bemba "misapprehends the distinction between the Common Plan (of which the offences were a virtually certain consequence) and the offences themselves".[1871]

(iii) Determination by the Appeals Chamber

817. The Appeals Chamber understands Mr Bemba to argue that, in order to impute liability on the basis of co-perpetration under article 25 (3) (a) of the Statute in relation to a specific crime or offence committed pursuant to a common plan, it has to be established that the accused made an intentional contribution to that specific crime or offence.

818. The Appeals Chamber is not persuaded by this argument. The Appeals Chamber recalls that, in the *Lubanga* Appeal Judgment, it found, with regard to co-perpetration, that,

> [I]t has to be established that two or more individuals worked together in the commission of the crime. This requires an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court. It is this very agreement – express or implied, previously arranged or materialising extemporaneously – that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts".[1872]

[1867] Mr Bemba's Appeal Brief, para. 134.
[1868] Mr Bemba's Appeal Brief, para. 135.
[1869] Mr Bemba's Appeal Brief, para. 136.
[1870] Response, para. 486.
[1871] Response, para. 486.
[1872] *Lubanga* Appeal Judgment, para. 445.

819. The Appeals Chamber also found that, where several individuals are involved in the commission of a crime, a person is a co-perpetrator of this crime if he or she makes "within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime", and that the "essential contribution can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived".[1873]

820. What is required is a "normative assessment of the role of the accused person", with a view to determining "whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage".[1874] The decisive consideration for determining whether an accused person must be qualified as a co-perpetrator is whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime could not have been committed or would have been committed in a significantly different way.

821. Depending on the circumstances, co-perpetration may cover situations in which, at the time the common plan is conceived, the exact contours of all the crimes or offences that will be committed as part of the plan's implementation are not yet known; in addition, actions of an accused person not made at the execution stage may nevertheless be a basis for finding that he or she made an essential contribution. Requiring that each co-perpetrator make an intentional contribution to each of the specific crimes or offences that were committed on the basis of the common plan would be clearly incompatible with the above.

822. Regarding the case at hand, the Appeals Chamber recalls that the Trial Chamber, following the Confirmation Decision, had to analyse Mr Bemba's responsibility in relation of the three offences of: (i) corruptly influencing witnesses, (ii) presenting false evidence; and (iii) giving false testimony when under an obligation to tell the truth, within the meaning of article 70 (1) (a) to (c) of the

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[1873] *Lubanga* Appeal Judgment, para. 469.
[1874] *Lubanga* Appeal Judgment, para. 473.

Statute.[1875] Two of these three offences – namely the charges of corruptly influencing witnesses and presenting false evidence – were allegedly perpetrated by committing, in the context of an agreement concluded between different co-perpetrators (co-perpetration).[1876]

823. After assessing the evidence, the Trial Chamber considered it established that Mr Bemba, Mr Kilolo and Mr Mangenda had "agreed to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba".[1877] The Trial Chamber then assessed whether Mr Bemba had made an essential contribution "to the implementation of the common plan to illicitly interfere with defence witnesses", noting, *inter alia*, Mr Bemba's overall coordinating role, his involvement in the planning of the illicit coaching, his giving of instructions and involvement in decision-making, his conversations with two witnesses, his approvals of money to be paid to witnesses and his involvement in the planning and taking of "remedial measures" once he learned about the Article 70 investigation.[1878] The Trial Chamber concluded on this basis that Mr Bemba was "in a position to frustrate the illicit coaching and paying of witnesses, as well as the presentation of the witnesses in the Main Case, by issuing other directions or otherwise refusing his approval".[1879] Regarding the charge of corruptly influencing witnesses, the Trial Chamber considered that Mr Bemba's "contribution to the illicit coaching activities was essential, without which the influencing of the witnesses would not have occurred in the same way".[1880]

824. Mr Bemba alleges that, although the law "required the Chamber to establish Mr Bemba's intent and contribution as concerns each charged offence",[1881] the Conviction Decision "included limited findings in relation to a handful of witnesses".[1882] The Appeals Chamber notes that, whilst the Trial Chamber concluded that the agreement "involved the corrupt influencing of, at least, 14 defence witnesses,

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[1875] Conviction Decision, para. 13.
[1876] Conviction Decision, para. 13.
[1877] Conviction Decision, para. 103.
[1878] Conviction Decision, para. 816.
[1879] Conviction Decision, para. 816.
[1880] Conviction Decision, para. 924.
[1881] Mr Bemba's Appeal Brief, para. 134.
[1882] Mr Bemba's Appeal Brief, para. 134.

together with the presentation of their evidence",[1883] the plan of the three co-perpetrators was broadly defined. In the Trial Chamber's view, Mr Bemba, Mr Kilolo and Mr Mangenda agreed to "illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba".[1884] In these circumstances, the Appeals Chamber considers that the Trial Chamber was not required to establish that Mr Bemba had made intentional contributions to the corrupt influencing of each of the witnesses, as long as it established that he had made an essential contribution to the implementation of the common plan.

825. The Appeals Chamber notes that Mr Bemba also recalls that the "references to 'the crime', and 'the offence' in the Court's interpretation of co-perpetration express the notion that control is linked to the *crime* specifically, not [to] the *common plan* generally".[1885] The Appeals Chamber considers that this is not an issue in the case at hand, taking into account the nature of the common plan and the findings of the Trial Chamber. Indeed, as noted above, the Trial Chamber, after assessing the evidence, established Mr Bemba's essential contributions to the *implementation* of the common plan – that is to the offences – and not simply to the plan generally, and concluded that without his essential contributions these offences would not have been committed or would not have been committed in the same way.

826. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal relating to the nature of his contribution.

5. Alleged error regarding Mr Bemba's knowledge

(a) Relevant part of the Conviction Decision

827. In relation to Mr Bemba's intent to bring about the material elements of the offences,[1886] the Trial Chamber indicated that "no direct evidence exists that Mr Bemba […] directed or instructed false testimony regarding (i) the nature and number of prior contacts of the witnesses with the Main Case Defence, (ii) payments and material or non-monetary benefits received from or promises by the Main Case

[1883] Conviction Decision, paras 103, 113.
[1884] Conviction Decision, para. 103.
[1885] Mr Bemba's Appeal Brief, para. 131 (emphasis in original). *See also* para. 136.
[1886] Conviction Decision, para. 817.

Defence, and/or (iii) acquaintances with other individuals".[1887] The Trial Chamber added, however, that "on the basis of an overall assessment of the evidence, [it made] the inference that Mr Bemba at least implicitly knew about these instructions to the witnesses and expected Mr Kilolo to give them".[1888]

828. The Trial Chamber further explained that this inference was based on several considerations,[1889] namely: (i) the common plan itself and the fact that the co-perpetrators had concealed it;[1890] (ii) the reporting to Mr Bemba concerning "the coaching activity and the contacts, as well as payments to the witnesses"; [1891] (iii) Mr Bemba's personal observation in the proceedings of witnesses "consistently [giving] testimony" on incorrect issues;[1892] (iv) Mr Bemba's expression of satisfaction with such testimony;[1893] and (v) Mr Bemba's reaction to the article 70 investigation. [1894]

(b) Submissions of the parties

(i) Mr Bemba

829. Mr Bemba submits that "implicit knowledge" is not a legal concept and that the Trial Chamber used this term improperly.[1895] In his view, the notion of implicit knowledge implies that "the accused is unable to ascertain and appreciate the full context of the situation".[1896] In his view, this notion is "therefore akin to an innate presentiment, which stands in stark contrast to the requirement that an accused must be 'virtually certain' as concerns the illicit consequences of his conduct".[1897] Mr Bemba avers that as a result, the "use of this threshold creates the inevitable impression that the Chamber's finding was based on [the] Chamber's own suspicion, rather than an objective appreciation of the facts".[1898]

[1887] Conviction Decision, para. 818.
[1888] Conviction Decision, para. 818.
[1889] Conviction Decision, para. 818.
[1890] Conviction Decision, para. 819.
[1891] Conviction Decision, para. 819.
[1892] Conviction Decision, para. 819.
[1893] Conviction Decision, para. 819.
[1894] Conviction Decision, para. 819.
[1895] Mr Bemba's Appeal Brief, para. 123.
[1896] Mr Bemba's Appeal Brief, para. 124.
[1897] Mr Bemba's Appeal Brief, para. 124.
[1898] Mr Bemba's Appeal Brief, para. 124.

830. Mr Bemba also argues that the elements relied on by the Trial Chamber to infer his knowledge are "tangential and speculative".[1899] He submits that the first element – the "concealment of contacts and payments" – which was critical to the success of the plan, "rests on speculation concerning assumed, rather than actual knowledge".[1900] He argues that the second element – the presence of Mr Bemba in court when the witnesses testified and the satisfaction expressed after the testimony – is not based on evidence.[1901] The third element – Mr Bemba's attitude with regard to the article 70 investigation – does not reflect, in Mr Bemba's view, his state of mind "at the time that the charged offences occurred".[1902] Mr Bemba also alleges that the Trial Chamber's consideration of his approval of instructions regarding false testimony, "at least tacitly",[1903] is based on an impermissibly circular inference.[1904] Finally, Mr Bemba submits that the above elements "do not establish actual knowledge, but give expression to a broad 'might have known' standard, which is less than negligence".[1905]

(ii) The Prosecutor

831. The Prosecutor responds that Mr Bemba misreads the Conviction Decision,[1906] which cannot be understood as making a factual finding that Mr Bemba only possessed "implicit knowledge" in the sense of "tacit knowledge" or "innate presentiment".[1907] The Prosecutor argues that this would be contrary to article 30 of the Statute, as the Trial Chamber plainly recognised in the Conviction Decision.[1908]

832. The Prosecutor submits that the Conviction Decision can only be properly understood as establishing that "Bemba had actual knowledge, proven inferentially".[1909] The Prosecutor considers that, "notwithstanding any infelicity in the

[1899] Mr Bemba's Appeal Brief, para. 125.
[1900] Mr Bemba's Appeal Brief, para. 126.
[1901] Mr Bemba's Appeal Brief, para. 127.
[1902] Mr Bemba's Appeal Brief, para. 128.
[1903] Mr Bemba's Appeal Brief, para. 125.
[1904] Mr Bemba's Appeal Brief, para. 128.
[1905] Mr Bemba's Appeal Brief, para. 129.
[1906] Response, para. 483.
[1907] Response, para. 483.
[1908] Response, para. 483.
[1909] Response, para. 484 (emphasis in original omitted).

particular wording used",[1910] this is supported by the logic inherent in the Trial Chamber's language and reasoning.[1911]

833. With respect to the "elements" mentioned by Mr Bemba, the Prosecutor maintains that the Trial Chamber's findings are logical, adequately based on the evidence and reasonable.[1912]

(c) Determination by the Appeals Chamber

834. Mr Bemba's principal argument under this sub-ground of appeal is that the Trial Chamber relied on an erroneous standard in respect of the requisite mental element because it found that "Mr Bemba *at least implicitly* knew about [Mr Kilolo's] instructions to the witnesses and expected Mr Kilolo to give them",[1913] which fell short of establishing actual knowledge on the part of Mr Bemba. The Appeals Chamber considers that the legal standard used by the Trial Chamber in the Conviction Decision in order to establish the *mens rea* of the co-perpetrators and the facts found to establish the standard need to be distinguished.

835. In relation to the former, the Appeals Chamber notes that the Trial Chamber explained extensively the legal standard it would apply. Nothing in the Conviction Decision suggests that "implicit knowledge" would be sufficient to establish the *mens rea* of the co-perpetrators. To the contrary, the Trial Chamber expressly underlined that "any lower *mens rea* threshold, such as *dolus eventualis*, recklessness and negligence, [was] insufficient to establish the offence under Article 70(1)(a) of the Statute"[1914]

836. Turning to the factual findings relied upon by the Trial Chamber to establish Mr Bemba's knowledge, the finding that Mr Bemba "at least implicitly knew about" the illicit coaching activities is further explained in the next paragraph of the Conviction Decision, which ends as follows:

[1910] Response, para. 484.
[1911] Response, para. 484.
[1912] Response, para. 485.
[1913] Conviction Decision, para. 818 (emphasis added).
[1914] Conviction Decision, para. 29. *See also* paras 41 (regarding article 70 (1) (b) of the Statute), 50 (regarding article 70 (1) (c) of the Statute).

> 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. He therefore also knew and intended that the Main Case Defence would present false evidence to the Court.[1915]

837. Although the Trial Chamber's reference to "implicit knowledge" may, on its face, be misleading, it should not be read in isolation, but put in its proper context, which demonstrates that the Trial Chamber saw actual knowledge as being established. The Trial Chamber stated that it reached its conclusion "on the basis of an overall assessment of the evidence".[1916] The Trial Chamber also explained how the inference was actually founded and the different "considerations"[1917] taken into account when reaching its conclusion.[1918]

838. The Appeals Chamber recalls that the Trial Chamber explained the reasons for its findings as follows:

> Mr Bemba, Mr Kilolo and Mr Mangenda agreed to illicitly interfere with witnesses in the context of defending Mr Bemba against the charges in the Main Case in order to ensure that these witnesses would provide evidence in favour of Mr Bemba. 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. The Chamber found that Mr Bemba was kept abreast of the coaching activity and the contacts, as well as payments to the witnesses. Yet, he also saw in the proceedings before this Chamber that the witnesses consistently gave testimony on these issues that was incorrect. Thereafter, there is evidence that he nevertheless expressed his satisfaction with the witnesses' testimony overall, including those who testified falsely on the above topics. Furthermore, as elaborated, the evidence on his reaction to the ongoing Article 70 investigation shows that his intention was to cover and conceal the coaching activity. In particular, he suggested that, in the worst case scenario, Mr Kilolo simply deny everything with regard to the allegations.[1919] [Footnotes omitted.]

839. The Trial Chamber inferred Mr Bemba's knowledge of Mr Kilolo's conduct implementing an essential aspect of the common plan from the fact that the three co-perpetrators, including Mr Bemba, had agreed to illicitly interfere with witnesses and had formed a common plan. In the Trial Chamber's view, the acts of corruptly

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[1915] Conviction Decision, para. 819.
[1916] Conviction Decision, para. 818.
[1917] Conviction Decision, para. 818.
[1918] Conviction Decision, paras 819-820.
[1919] Conviction Decision, para. 819.

influencing the 14 defence witnesses in the Main Case "were not spontaneous or coincidental, but the result of a carefully planned and deliberate strategy".[1920] As the Trial Chamber concluded, the existence of the common plan was proved by the concerted actions of Mr Bemba, Mr Kilolo and Mr Mangenda who all participated, at their respective level and following a pre-defined repartition of tasks,[1921] notably in the planning of acts, in the payments and non-monetary promises to witnesses, in the illicit coaching of witnesses and in the taking of measures to conceal the implementation of the plan.[1922] The Trial Chamber also found that Mr Bemba was extensively involved in the payment scheme[1923] and that he knew that "at least some of the payments he discussed and authorised over the phone served also illegitimate purposes".[1924] Thus, contrary to Mr Bemba's assertion, the Appeals Chamber does not consider that the Trial Chamber's finding was based on suspicion, rather than an objective assessment of the facts.

840. As to the Trial Chamber's finding that Mr Bemba personally observed witnesses giving evidence that he knew to be incorrect, Mr Bemba submits that this finding was unsupported by evidence. However, the Appeals Chamber recalls that the Trial Chamber referred to Mr Bemba's satisfaction after reviewing the evidence concerning witness D-25.[1925] That Mr Bemba may appear "unfocussed or tired" on the video recordings of the proceedings,[1926] and that he may, as he alleges, not have "followed these specific aspects of the witnesses' testimonies",[1927] does not show, in itself, that the Trial Chamber was unreasonable in its appreciation of the facts of the case.

841. Moreover, in the view of the Appeals Chamber, Mr Bemba does not show any specific error in the Trial Chamber's interpretation of his actions when learning of the Article 70 investigation. Mr Bemba mainly submits that the Trial Chamber "misconstrued [his] comment concerning denial of the allegations".[1928] The Appeals Chamber will analyse this particular submission in the section of the present judgment

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[1920] Conviction Decision, para. 684.
[1921] Conviction Decision, para. 688.
[1922] Conviction Decision, para. 682-683.
[1923] Conviction Decision, para. 693.
[1924] Conviction Decision, para. 700.
[1925] Conviction Decision, paras 495, 732.
[1926] Mr Bemba's Appeal Brief, fn. 210.
[1927] Mr Bemba's Appeal Brief, para. 127.
[1928] Mr Bemba's Appeal Brief, para. 128, referring to paras 285, 287.

concerning the grounds of appeal raised by Mr Bemba in relation to the assessment of evidence.[1929]

842. In light of the above, the Appeals Chamber rejects Mr Bemba's ground of appeal relating to his knowledge.

B. Alleged error regarding 'solicitation'

1. Relevant part of the Conviction Decision

843. The Trial Chamber convicted Mr Bemba of "having solicited the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64".[1930] It found that Mr Bemba "solicited" the commission of these offences personally or through Mr Kilolo and Mr Mangenda.[1931] The Trial Chamber stated that "'soliciting' and 'inducing' fall into a broader category of 'instigating' or 'prompting another person to commit a crime' in the sense that they refer to a form of conduct by which a person exerts psychological influence on another person as a results of which the criminal act is committed".[1932] The Trial Chamber stated that the act of soliciting or inducing has to have "a direct effect on the commission or attempted commission of the offence" and that this "means that the conduct of the accessory needs to have a causal effect on the offence".[1933]

844. According to the Trial Chamber, Mr Bemba solicited "the 14 witnesses' false and intentional testimonies regarding the: (i) nature and number of prior contacts with the Main Case Defence; (ii) payments and material or non-monetary benefits received from or promises by the Main Case Defence; and/or (iii) acquaintances with other individuals".[1934] The Trial Chamber indicated that it reached this conclusion drawing inferences from Mr Bemba's various actions, which, taken together, warranted such a conclusion. Notably, the Trial Chamber relied on the following considerations: (i) Mr Bemba agreed with Mr Kilolo and Mr Mangenda to illicitly interfere with witnesses in order to ensure that they would provide favourable evidence;[1935] (ii) Mr

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[1929] *See infra* paras 1056 *et seq.*
[1930] Conviction Decision, p. 455.
[1931] Conviction Decision, paras 852, 932.
[1932] Conviction Decision, para. 73.
[1933] Conviction Decision, para. 81.
[1934] Conviction Decision, para. 852.
[1935] Conviction Decision, para. 853.

Bemba knew of the false testimony as he personally observed witnesses giving testimony that he knew to be incorrect;[1936] (iii) Mr Bemba urged or knew and tacitly approved of Mr Kilolo's instructions to the witnesses to lie about information relating to the contacts, payments and associations linked to the illicit activities of the defence team in the Main Case;[1937] and (iv) in addition to Mr Bemba's indirect influence on the witnesses through Mr Kilolo, whom he entrusted to pass on his influence to the witnesses, Mr Bemba also exerted direct influence on witnesses D-19 and D-55.[1938]

2. Submissions of the parties

(a) Mr Bemba

845. Mr Bemba submits that the Trial Chamber did not address the Prosecutor's failure to delineate in the charges Mr Bemba's conduct to solicit the false testimony of witnesses as opposed to co-perpetration.[1939] Mr Bemba claims that by not acknowledging that "solicitation requires direct influence", the Trial Chamber contradicted the Pre-Trial Chamber's finding that he did not directly pay or coach witnesses and that "the material facts did not support a finding that [he] acted through another person".[1940] He argues that "[s]olicitation requires a direct causal nexus between the defendant's conduct, and the specific crimes in question" but as he only "'implicitly knew' that his 'tacit approval' of the actions of other persons would lead to 'implicit consequences'" this nexus could not be fulfilled.[1941] Mr Bemba argues that as the Trial Chamber relied on its findings on "his membership of, and contribution to the common plan", the errors relating to the common plan affect the findings on solicitation.[1942] Moreover, Mr Bemba avers that, by relying on the findings regarding the common plan "to substantiate the elements of solicitation", the Trial Chamber appears to have convicted Mr Bemba either for "soliciting a common plan, or a common plan to solicit, neither of which are permissible".[1943]

[1936] Conviction Decision, para. 854.
[1937] Conviction Decision, para. 855.
[1938] Conviction Decision, para. 856.
[1939] Mr Bemba's Appeal Brief, para. 138.
[1940] Mr Bemba's Appeal Brief, para. 139.
[1941] Mr Bemba's Appeal Brief, para. 139.
[1942] Mr Bemba's Appeal Brief, para. 140.
[1943] Mr Bemba's Appeal Brief, para. 140.

(b) The Prosecutor

846. The Prosecutor responds that Mr Bemba shows no error in the Conviction Decision and merely repeats an unsuccessful argument presented at trial, and rejected by the Trial Chamber.[1944] In addition, she submits that, contrary to Mr Bemba's claim, the Trial Chamber made no finding of "implicit consequences", but rather determined beyond reasonable doubt that Mr Bemba exercised influence over the witnesses not only by his own interactions with them but by Mr Kilolo's and Mr Mangenda's interactions with said witnesses carried out at his direction and on his behalf.[1945] Finally, in the Prosecutor's view, there is no confusion in the Conviction Decision between liability under articles 25 (3) (a) and (b) of the Statute. In the Prosecutor's view, that the evidence is relevant to multiple offences, or multiple modes of liability, does not necessarily imply any legal confusion between them.[1946]

3. Determination by the Appeals Chamber

847. At the outset, the Appeals Chamber considers that the notion of "solicitation", within the meaning of article 25 (3) (b) of the Statute, characterises a criminal conduct falling within the category of instigation. Mr Bemba essentially submits that the Trial Chamber erred when convicting him for having solicited the commission of offences under article 70 (1) (a) of the Statute because he did not directly influence any of the witnesses to testify falsely in court. The Appeals Chamber is not persuaded by this argument. The Appeals Chamber agrees with the Prosecutor that the means by which Mr Bemba's influence was communicated did not itself need to be direct, provided that it had the requisite effect on the principal[1947] – *i.e.*, in the case at hand, on the witnesses testifying falsely in the proceedings before Trial Chamber III.

848. In the view of the Appeals Chamber, what matters is that there is a causal relationship between the act of instigation and the commission of the crime, in the sense that the accused person's actions prompted the principal perpetrator to commit the crime or offence.[1948] The Appeals Chamber considers that such an act of

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[1944] Response, para. 491.
[1945] Response, para. 492.
[1946] Response, para. 493.
[1947] Response, para. 492.
[1948] *See* *Kordić and Čerkez* Appeal Judgment, para. 27; *Nahimana et al.* Appeal Judgement, para. 480; *Karera* Appeal Judgment, para. 317; *Nyiramasuhuko et al.* Appeal Judgment, para. 3327.

instigation does not need to be performed directly on the principal perpetrator, but may be committed through intermediaries.[1949] In addition, as stated by the Trial Chamber, the act of instigation the commission of a crime can be performed by any means, either by implied or express conduct.[1950] The Appeals Chamber therefore sees no error in the Trial Chamber's approach. It notes in this regard that the Trial Chamber indeed concluded that Mr Bemba's conduct had an effect on the commission of the offence of giving false testimony by the 14 witnesses in the Main Case, and that, without Mr Bemba's authoritative influence, the untruthful testimony would not have occurred in the same manner before Trial Chamber III.[1951]

849. The Appeals Chamber is also unpersuaded by Mr Bemba's submission that his conviction for "solicitation" is based on the "same errors that apply to its definition and application of common plan precepts";[1952] the Appeals Chamber has already assessed – and rejected – these arguments. Mr Bemba's argument that the Trial Chamber convicted Mr Bemba "for either soliciting a common plan, or a common plan to solicit" is obscure, given that the Trial Chamber made specific findings as to the basis upon which it concluded that he had solicited the false testimonies of the 14 witnesses.[1953]

850. The Appeals Chamber also rejects Mr Bemba's argument that the Trial Chamber failed to address his arguments regarding the purportedly incorrectly pleaded charges in relation to solicitation; these arguments are based on an incorrect understanding of the law, as set out above. Therefore, there was no reason for the Trial Chamber to address his submissions.

851. In light of the above, the Appeals Chamber rejects Mr Bemba's arguments under this sub-ground of appeal.

[1949] *See* *Akayesu* Appeal Judgment, para. 478.
[1950] Conviction Decision, para. 78.
[1951] Conviction Decision, para. 857.
[1952] Mr Bemba's Appeal Brief, para. 140.
[1953] *See* Conviction Decision, paras 852 *et seq.*

X. GROUNDS OF APPEAL REGARDING THE ASSESSMENT OF THE EVIDENCE

852. Before addressing the appellants' challenges to the Trial Chamber's assessment of the evidence, the Appeals Chamber notes the Trial Chamber's explanation regarding its use of pseudonyms of witnesses in the present case and the Main Case. In that regard, it stated that:

> When the Chamber uses the pseudonym assigned in the Main Case [for instance D-2], it makes reference to the witness's testimony before Trial Chamber III in the Main Case or events that took place in the context of the Main Case. On the other hand, when the Chamber makes reference to the witness's testimony before this Chamber and events that took place in the context of this case, it makes reference to the pseudonym assigned in this case, together with the former pseudonym in parentheses [for instance P-260 (D-2)]. In case the witness only testified in the Main Case, the Chamber makes reference to the pseudonym as assigned in the Main Case. Witnesses who have only testified in the context on this case and not in the Main Case are referred to by their pseudonyms as assigned in this case.[1954]

853. The Appeals Chamber will follow the Trial Chamber's approach when referring to the pseudonyms of witnesses in the present case and Main Case.

A. Mr Bemba's grounds of appeal

854. Mr Bemba challenges the Trial Chamber's assessment of the evidence, arguing that unreasonable inferences as to his culpability were drawn from items of evidence that were open to alternative interpretations consistent with his innocence. He also contends that his conviction was based on indirect and hearsay evidence to a decisive and impermissible extent.

855. Mr Bemba elaborates these arguments in separate sections of his appeal brief, raising general issues with inferential reasoning and hearsay evidence, as well as specific arguments focused on individual items of evidence. The Appeals Chamber notes that there is considerable overlap in the specific items of evidence that Mr Bemba challenges in each section. In the analysis which follows, the Appeals Chamber considers first his general arguments regarding: (i) the standards applicable to inferential reasoning; and (ii) the evidential weight of hearsay evidence. In light of

[1954] Conviction Decision, fn. 248.

the general principles set out in these sections, challenges to the Trial Chamber's analysis of individual items of evidence are thereafter evaluated, considering Mr Bemba's arguments regarding the inferences drawn and the allegedly hearsay nature of the evidence in a holistic manner.

1. Preliminary issue - arguments dismissed in limine

856. The Appeals Chamber will not consider arguments that Mr Bemba makes without reference to the relevant sections of the Conviction Section. In this regard, the Appeals Chamber notes that Mr Bemba refers to evidentiary challenges set out in his closing submissions.[1955] On appeal, Mr Bemba submits that the Trial Chamber failed to address his arguments relating to particular items of evidence, but does not identify or demonstrate any error in findings of the Trial Chamber that may have been based on such evidence. Accordingly, these arguments are dismissed *in limine*.

857. The Appeals Chamber notes that Mr Bemba contends that paragraphs 818 and 819 of the Conviction Decision are based on unauthenticated intercepts of conversations in coded language between co-accused who did not testify.[1956] The Appeals Chamber notes that the two paragraphs in question contain the overall conclusions of the Trial Chamber regarding Mr Bemba's essential contribution to the common plan and his *mens rea*, based on the entirety of its evidentiary analysis. As Mr Bemba does not further explain his assertion, his argument is dismissed *in limine*.

858. The Appeals Chamber further considers that references to arguments elaborated in other documents represent an impermissible attempt to circumvent the applicable page limits and such arguments will not be considered on their merits. Accordingly, the Appeals Chamber dismisses *in limine* the arguments advanced by reference to Mr Bemba's Filing of Errors Identified in the Conviction Decision and Mr Bemba's Closing Submissions.[1957]

[1955] Mr Bemba's Appeal Brief, para. 310, referring to Mr Bemba's Closing Submissions, paras 234-237, 253-256.
[1956] Mr Bemba's Appeal Brief, para. 308, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 48.
[1957] Mr Bemba's Appeal Brief, para. 300, referring to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 15; Mr Bemba's Appeal Brief, para. 296, referring to Mr Bemba's Closing Submissions, paras 204, 238, 269.

2. The standards of inferential reasoning

859. Several of the Trial Chamber's findings in relation to Mr Bemba are based on inferences drawn from the evidence that was before it. On appeal, Mr Bemba makes submissions as to the applicable legal standards for such inferential reasoning, which, in his view, the Trial Chamber did not respect.[1958] While Mr Bemba's submissions in this regard do not identify any specific error regarding the way the Trial Chamber defined the evidentiary threshold in the Conviction Decision, the Appeals Chamber nevertheless considers it appropriate to address them, given their relevance for the remainder of Mr Bemba's arguments.

(a) Relevant part of the Conviction Decision

860. The Trial Chamber endorsed the findings of previous Chambers of this Court that the evidentiary standard of beyond reasonable doubt should be applied to establish all the facts underpinning the elements of the particular offence and the mode of liability alleged against the accused.[1959] The Trial Chamber further stated that, in assessing the evidence, it carried out "a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue".[1960] The Trial Chamber underlined that, "when [it] conclude[d] that, based on the evidence, there [was] only one reasonable conclusion to be drawn from the facts *sub judice*, the conclusion [was] that they have been established beyond reasonable doubt".[1961]

861. The Trial Chamber also stated that there was no need to discuss every incriminating piece of evidence submitted by the Prosecutor, but only those evidentiary items upon which it relied for conviction.[1962] Regarding, in particular, the common plan between the co-perpetrators, the Trial Chamber indicated that its existence may be inferred from subsequent concerted actions of the co-perpetrators, and proven by direct evidence or inferred from circumstantial evidence.[1963]

[1958] Mr Bemba's Appeal Brief, para. 208.
[1959] Conviction Decision, para. 186.
[1960] Conviction Decision, para. 188.
[1961] Conviction Decision, para. 188.
[1962] Conviction Decision, para. 196.
[1963] Conviction Decision, paras 66, 803.

(b) Submissions of the parties

(i) Mr Bemba

862. Mr Bemba submits that a trial chamber "may establish material facts on the basis of circumstantial evidence and inferences, but it should be cautious in doing so, paying heed to the reliability of the evidence on which the inference is based".[1964] Any inference so drawn must also be the "only reasonable one that could be drawn from the evidence".[1965] In his view, if another reasonable inference can be drawn, which is consistent with the accused's innocence, he must be acquitted.[1966] Mr Bemba avers that, to be deemed reasonable, an inference must follow "logically from evidence, which is reliable, and specific and clear", take "into account all relevant facts and evidence, including alternative exculpatory inferences", and not be too remote.[1967]

863. Mr Bemba asserts that "[a]n inference based on 'a consistent pattern of conduct by the Accused' […] cannot be based upon broad generalisations".[1968] In Mr Bemba's view, whilst nothing prevents a court from relying upon "stacked inferences", it is necessary to: (i) exercise caution in so doing to ensure that the ultimate conclusion, "so far removed from the source on which it is originally based", does not lack a sufficient basis; and (ii) identify any intermediate inferences on which the chamber's ultimate inferred conclusion is based.[1969] In Mr Bemba's view, "the longer the chain of inferences (the higher the stack), the more unreliable the ultimate inference will be".[1970] In addition, Mr Bemba submits that, "[i]n order to demonstrate that an inference is the *only* reasonable one on the evidence, a Chamber must articulate *why* that is the case".[1971]

(ii) The Prosecutor

864. The Prosecutor responds that the "Chamber's approach to circumstantial evidence and the use of inferences was correct, both in principle and in

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[1964] Mr Bemba's Appeal Brief, para. 204 (footnote omitted).
[1965] Mr Bemba's Appeal Brief, para. 204.
[1966] Mr Bemba's Appeal Brief, para. 204.
[1967] Mr Bemba's Appeal Brief, para. 204.
[1968] Mr Bemba's Appeal Brief, para. 205.
[1969] Mr Bemba's Appeal Brief, para. 206.
[1970] Mr Bemba's Appeal Brief, para. 206.
[1971] Mr Bemba's Appeal Brief, para. 207 (emphasis in original).

application".[1972] She alleges that the Trial Chamber "properly directed itself on the burden and standard of proof, its application to 'all the facts underpinning the elements of the particular offence and the mode of liability', and the approach to circumstantial evidence".[1973]

865. The Prosecutor submits that "only essential findings (usually, those necessary to establish the elements of charged crimes and modes of liability) need to be made beyond reasonable doubt".[1974] She underlines that "[o]therwise, a chamber is free to interpret each piece of evidence – or even any intermediate inference – in the way it considers to be most reas868onable, having regard to all the other evidence".[1975]

866. The Prosecutor argues that, "[a]lthough it is true that a judgment must be adequately reasoned, this does not require exhaustive reference 'to the testimony of every witness or every piece of evidence'".[1976] She concludes that "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".[1977]

(c) Determination by the Appeals Chamber

867. Mr Bemba's and the Prosecutor's submissions raise the following two issues: (i) the conditions under which a trial chamber may establish facts on the basis of circumstantial evidence and inferences; and (ii) whether a trial chamber is required to identify all "intermediate inferences" on which its ultimate conclusion is based.

868. Regarding the first issue, the Appeals Chamber concurs with Mr Bemba that "nothing prevents a court from relying upon 'stacked inferences' to establish a material fact or ultimate conclusion".[1978] It also agrees with the Prosecutor that "each piece of circumstantial evidence need not be, nor rarely is, proved beyond reasonable doubt".[1979] As previously found by the Appeals Chamber, a "clear distinction must be

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[1972] Response, para. 495.
[1973] Response, para. 495 (footnotes omitted).
[1974] Response, para. 496, referring to *Lubanga* Appeal Judgment, para. 22.
[1975] Response, para. 496 (footnote omitted).
[1976] Response, para. 497 (footnote omitted).
[1977] Response, para. 497.
[1978] Mr Bemba's Appeal Brief, para. 206.
[1979] Response, para. 496.

made between facts constituting the elements of the crime and mode of liability […] and any other set of facts introduced by the different types of evidence"; only the former need to be established beyond reasonable doubt.[1980] Where a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence.[1981] It is indeed well established that it is not sufficient that a conclusion reached by a trial chamber is merely *a* reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the *only* reasonable conclusion available.[1982] If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he or she must be acquitted. For alleged errors of fact in relation to factual findings that were based on inferences drawn from circumstantial evidence, the Appeals Chamber will therefore, in keeping with the standard of review for factual errors, consider whether no reasonable trier of fact could have concluded that the inference drawn was the only reasonable conclusion that could be drawn from the evidence.

869. In the Appeals Chamber's view, the Trial Chamber adopted, in the present case, the correct legal standard. Regarding its reasoning by inference, the Trial Chamber specified whether it reached the "only reasonable conclusion available on the evidence" or whether the inference was based on evidence that "warrant[ed] such a conclusion".[1983] Where it deemed it necessary, the Trial Chamber also explained in detail the reasons for its conclusion, based on its own evaluation of the relevant facts and evidence.[1984] It also indicated when it could not exclude a "reasonable possibility",[1985] which made a conclusion beyond reasonable doubt impossible to reach.

870. As regards the second issue, namely whether a trial chamber is required to identify all "intermediate inferences" that led it to its final conclusion, the Appeals

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[1980] *Lubanga* Appeal Judgment, para. 22
[1981] Mr Bemba's Appeal Brief, para. 204.
[1982] *Delalić et al.* Appeal Judgment, para. 458.
[1983] Conviction Decision, paras 251, 277, 278, 302, 366, 371, 401, 663, 664, 852, 859, 865, 867, 880.
[1984] Conviction Decision, paras 251, 371, 496-497, 664, 818-819, 853.
[1985] Conviction Decision, para. 532.

Chamber considers that, when drawing an inference, a trial chamber is not required to articulate every step of its reasoning. The Appeals Chamber finds, however, that a trial chamber should always indicate the basis for its inference. When an inference is made to reach an essential finding, for example, in relation to the elements of charged crimes / offences and modes of liability, the trial chamber has to explain in more detail how it reached the factual conclusion in question.

871. The Appeals Chamber will assess the alleged error raised by Mr Bemba against these principles.

3. Overall challenge to the evidential weight of hearsay evidence

(a) Submissions of the parties

(i) Mr Bemba

872. Mr Bemba alleges that the Trial Chamber based his conviction, "to a decisive extent, on remote hearsay and untested evidence", did not consider such evidence with the appropriate level of caution and failed to issue a reasoned determination on the prejudicial effect of individual items of evidence "or the cumulative impact of its reliance on such evidence" for conviction.[1986] Referring to the prior jurisprudence of the Court and of the *ad hoc* tribunals, he submits that the remoteness of hearsay evidence and the accused's inability to confront it militates against its admission, and that, if admitted, it should be accorded low probative value and considered with great circumspection, especially if the source has particular motives or the evidence is not corroborated.[1987]

(ii) The Prosecutor

873. The Prosecutor submits that the Trial Chamber "relied on a wealth of reliable and mutually compatible evidence, including Bemba's own words captured in recorded telephone conversations".[1988] The Prosecutor argues that, in the conversations between Mr Kilolo and Mr Mangenda whose use in evidence is challenged by Mr Bemba, the interlocutors discuss "efforts to update Bemba about the illicit coaching operation" and the investigation thereof and catalogue Mr Bemba's

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[1986] Mr Bemba's Appeal Brief, paras 290, 296.
[1987] Mr Bemba's Appeal Brief, paras 291, 292.
[1988] Response, para. 545.

instructions.[1989] She contends that to eliminate such evidence because it was not given under oath "would effectively deprive the Court of an important type of evidence", seen as crucial in many domestic jurisdictions in fighting serious crime.[1990] The Prosecutor highlights that the intercepted communications were compatible with other evidence relied upon by the Trial Chamber, including intercepted conversations involving Mr Bemba himself.[1991]

(b) Determination by the Appeals Chamber

874. Mr Bemba appears to argue that the Trial Chamber generally attached too much weight to what was, in his submission, hearsay evidence. The Appeals Chamber notes that there is no procedural bar to the introduction or reliance on hearsay evidence in the legal framework of the Court. Although Mr Bemba seems to suggest that hearsay evidence should always be accorded low weight, the Appeals Chamber considers that while the fact that evidence is hearsay may result in such evidence being afforded less weight, this ultimately "depend[s] upon the infinitely variable circumstances which surround hearsay evidence".[1992]

875. The Appeals Chamber notes that a large part of the evidence in the present case that Mr Bemba considers to be hearsay in nature consists of intercepted communications in which the co-perpetrators discuss, plan and coordinate the coaching of witnesses. In the context of the criminal activity at issue in the present case, this intercept evidence was an important source of direct, circumstantial and hearsay evidence of the commission of the offences and the involvement of the various accused persons. The evidentiary weight of this evidence and the reasonableness of specific inferences that were drawn from it are matters that must necessarily be determined in light of the evidentiary record as a whole.

876. Mr Bemba also suggests that the intercepted communications between the co-accused should have been treated with "caution" because the interlocutors "had motives to provide inaccurate or exaggerated information".[1993] Given the nature of

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[1989] Response, para. 547.
[1990] Response, paras 547, 550.
[1991] Response, para. 548.
[1992] *Ngudjolo* Appeal Judgment, para. 226, referring to *Aleksovski* Appeal on Admissibility of Evidence, para. 15.
[1993] Mr Bemba's Appeal Brief, paras 295-296.

these discussions and the fact that the interlocutors incriminated themselves, in addition to Mr Bemba, the Appeals Chamber does not find any merit to Mr Bemba's suggestion that this factor should be considered in assessing the weight of the intercept evidence.

877. In sum, the Appeals Chamber considers that Mr Bemba has not established that the Trial Chamber's generally attached too much weight to "hearsay evidence" or that its overall approach in that regard was flawed.

878. Before turning to an assessment of the specific arguments directed against individual items of evidence or findings of the Trial Chamber, the Appeals Chamber notes that Mr Bemba tends to challenge the Trial Chamber's assessment of specific items of evidence in a piecemeal manner, without demonstrating how the purported error would impact on the Trial Chamber's factual findings or overall conclusions in light of the totality of the evidence. While this could warrant dismissal *in limine* of the arguments, the Appeals Chamber has nevertheless decided to consider them, given the importance of the challenged evidence for Mr Bemba's conviction.

879. Finally, the Appeals Chamber notes that Mr Bemba also refers to a table filed as an annex to Mr Bemba's Filing of Errors Identified in the Conviction Decision, which presents, *inter alia*, a list of references to findings of the Trial Chamber that rely upon the challenged evidence.[1994] Although it would have been preferable to include such references in the appeal brief itself, the Appeals Chamber considers that the page limit of Mr Bemba's Appeal Brief would not in that case have been exceeded. Accordingly, these arguments will be considered below.

4. Alleged error regarding Mr Bemba as the main beneficiary of the common plan

(a) Relevant part of the Conviction Decision

880. The Trial Chamber considered that Mr Bemba was the "ultimate and main beneficiary of the implementation of the common plan, as the offences were committed in the context of his defence against the charges of crimes against

[1994] Mr Bemba's Appeal Brief, para. 308, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision.

humanity and war crimes in the Main Case".[1995] The Trial Chamber found that, on the evidence, "Mr Bemba's role was that of planning, authorising and instructing the activities relating to the corrupt influencing of witnesses and their resulting false testimonies".[1996] It concluded that "[a]s the ultimate beneficiary of illicit coaching, whom both Mr Kilolo and Mr Mangenda intended to keep satisfied, his role consisted in approving the coaching strategy and giving directions".[1997]

(b) Submissions of the parties

(i) Mr Bemba

881. Mr Bemba submits that his conviction rests on a series of inferences, conditioned by the underlying premise that, as the defendant in the Main Case, he was the ultimate and main beneficiary of the common plan.[1998] He alleges that there was no evidence that the illicit conduct was done for his benefit as the Trial Chamber "glossed over this aspect, and instead, applied its assumption that Mr Bemba [was] the ultimate beneficiary of common plan to support its finding that Mr Bemba was engaged in the illicit coaching of witnesses and possessed knowledge and intent".[1999]

882. Mr Bemba alleges that the Trial Chamber's assumption that he was the main beneficiary of the common plan was not the only reasonable conclusion available on the evidence.[2000] Referring to his closing submissions before the Trial Chamber,[2001] he claims that, to the contrary, the evidence confirmed that Mr Bemba had instructed his defence team in the Main Case to identify and call credible witnesses, with real experience.[2002] He adds that his defence was "irreparably harmed"[2003] by witnesses who lied for personal or professional benefit, "unconnected to Mr Bemba's best interests".[2004] In his view, the evidence shows that the proposal to conceal knowledge

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[1995] Conviction Decision, para. 805. *See also*, para. 106.
[1996] Conviction Decision, para. 806.
[1997] Conviction Decision, para. 727.
[1998] Mr Bemba's Appeal Brief, para. 209, referring to Annex C to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 3.
[1999] Mr Bemba's Appeal Brief, para. 209, referring to Conviction Decision, paras 805-806; Annex B to Mr Bemba's Filing of Errors Identified in the Conviction Decision, pp. 5, 1.
[2000] Mr Bemba's Appeal Brief, para. 212.
[2001] Mr Bemba's Closing Submissions, paras 71-72, 91-93, 97.
[2002] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, para. 324.
[2003] Mr Bemba's Appeal Brief, para. 211.
[2004] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, para. 323.

of acquaintances was initiated by persons outside his defence team[2005] and that, in testifying falsely about certain contacts, the witnesses contradicted his submissions in the record.[2006] Finally, Mr Bemba recalls that he decided at the end of the trial not to rely on any of the 14 witnesses and that "there was no ratification of or attempt to benefit from illicit conduct".[2007] In Mr Bemba's view, therefore, another reasonable inference available to the Trial Chamber was that he had not been the beneficiary of the illicit conduct[2008] and, in any case, that it was a false syllogism to find that, because he benefitted from conduct, he must have made intentional contributions to the conduct in question.[2009]

(ii) The Prosecutor

883. The Prosecutor responds that the Trial Chamber's conclusion regarding Mr Bemba as the ultimate and main beneficiary of the implementation of the common plan 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'".[2010] She submits that, since no essential finding rests upon the Trial Chamber's inference, it did not need to be made beyond reasonable doubt.[2011] In her view, Mr Bemba's identification of what he considers other reasonable conclusions is immaterial and shows no error in the Conviction Decision.[2012]

(c) Determination by the Appeals Chamber

884. Mr Bemba argues that the Trial Chamber's conclusion that he was the "ultimate and main beneficiary of the implementation of the common plan"[2013] was not the only reasonable conclusion available on the evidence. The Appeals Chamber is not persuaded by this argument, for the reasons that follow.

[2005] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, paras 149, 434.
[2006] Mr Bemba's Appeal Brief, para. 211, referring to CAR-OTP-0079-0114 at 0119, lines.134-160; CAR-OTP-0090-0831 at 0832, fn.1; ICC-01/05-01/08-T-352-Red-ENG, pp. 35-36.
[2007] Mr Bemba's Appeal Brief, para. 212, referring to Mr Bemba's Closing Submissions, para. 123.
[2008] Mr Bemba's Appeal Brief, para. 212.
[2009] Mr Bemba's Appeal Brief, para. 213, referring to Mr Bemba's Closing Submissions, para. 70-71.
[2010] Response, para. 498.
[2011] Response, para. 499.
[2012] Response, para. 499.
[2013] Conviction Decision, para. 805.

885. First, the Trial Chamber's statement that he was the "ultimate and main beneficiary of the implementation of the common plan" must be understood in the context in which it was made. It related to the analysis of Mr Bemba's position and role in the framework of the common plan,[2014] as well as his contribution to the offences.[2015] Contrary to what Mr Bemba suggests,[2016] it was not a key factual finding that underpinned generally the Trial Chamber's findings as to his contribution to the commission of the offences. Rather, it was a conclusion that the Trial Chamber drew from Mr Bemba's overall role in the context of the common plan and in light of its content.

886. In this regard, the Appeals Chamber observes that the Trial Chamber's finding as to his essential contribution was based on numerous items of evidence, which were related to different "actions" that were taken into account by the Trial Chamber.[2017] The Trial Chamber made findings about him directing and approving illicit coaching and illicit payments of witnesses and their presentation to the Court[2018] and authorising, ensuring and/or implementing measures to conceal the common plan.[2019] None of these findings included, or referred to, the statement that Mr Bemba was the ultimate and main beneficiary of the implementation of the common plan. Mr Bemba's contention that this statement was the underlying premise for all other findings[2020] is therefore purely speculative.

887. Importantly, the Trial Chamber concluded that Mr Bemba "exercised an overall coordinating role over the illicit activities of the co-perpetrators" and that "from his detailed knowledge of and role" in the relevant activities pointed out by the Trial Chamber, "Mr Bemba was in the position to frustrate the illicit coaching and paying of witnesses as well as the presentation of witnesses in the Main Case".[2021] This key finding was based on several items of evidence, which the Trial Chamber assessed as a whole.

[2014] Conviction Decision, paras 106, 678, 727.
[2015] Conviction Decision, para. 805.
[2016] Mr Bemba's Appeal Brief, para. 209.
[2017] Conviction Decision, para. 807.
[2018] Conviction Decision, paras 808-813.
[2019] Conviction Decision, paras 814-815.
[2020] Mr Bemba's Appeal Brief, para. 209.
[2021] Conviction Decision, para. 816.

888. Second, with regard to the reasonableness of the Trial Chamber's statement itself, the Appeals Chamber has already clarified that it did not amount to a separate factual finding but was a conclusion based on other findings. His argument that "there is no evidence that the illicit conduct was done for the benefit of Mr Bemba"[2022] is therefore unconvincing. His arguments that the evidence available to the Trial Chamber showed that: (i) Mr Bemba instructed his defence team to identify and call credible witnesses;[2023] (ii) witnesses lied for personal or professional interests;[2024] (iii) "the proposal to conceal knowledge of acquaintances was initiated by persons outside the Defence";[2025] (iv) "in testifying falsely about certain contacts, the witnesses contradicted Defence submissions in the record";[2026] and (v) Mr Bemba renounced his reliance on all 14 witnesses[2027] do not engage with the basis of the Trial Chamber's conclusion and therefore do not demonstrate that the Trial Chamber's statement that he was the main beneficiary of the illicit conduct was unreasonable.

889. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

5. Alleged errors regarding witness coaching

890. Mr Bemba challenges several of the Trial Chamber's findings that he was involved in illicit witness coaching, raising arguments that often overlap. Below, the Appeals Chamber shall address these arguments grouped according to the specific issues to which they pertain.

(a) Witness D-54

(i) Relevant part of the Conviction Decision

891. The Trial Chamber found "that D-54 untruthfully testified in the Main Case regarding prior contacts with the Main Case Defence".[2028] The Trial Chamber found "that Mr Kilolo had extensive telephone conversations with D-54 prior to and during

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[2022] Mr Bemba's Appeal Brief, para. 209.
[2023] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, para. 324; Mr Bemba's Closing Submissions, paras 71-72.
[2024] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, para. 323; Mr Bemba's Closing Submissions, paras 91-93, 97.
[2025] Mr Bemba's Appeal Brief, para. 211, referring to Conviction Decision, paras 149, 434.
[2026] Mr Bemba's Appeal Brief, para. 211, referring to CAR-OTP-0079-0114 at 0119, lines 134-160; CAR-OTP-0090-0831 at 0832, fn.1; ICC-01/05-01/08-T-352-Red-ENG, pp. 35-36.
[2027] Mr Bemba's Appeal Brief, para.212, referring to Mr Bemba's Closing Submissions, para. 123.
[2028] Conviction Decision, para. 650.

the witness's testimony in the Main Case".[2029] It concluded, *inter alia*, that "Mr Kilolo instructed D-54 to testify incorrectly about his prior contacts with the Main Case Defence" and that the witness had "abided by these instructions".[2030]

892. The Trial Chamber also found "that Mr Mangenda knew that Mr Kilolo intended to and did illicitly coach D-54".[2031] Concerning Mr Bemba, it concluded that he "knew about, approved and directed (through Mr Mangenda) Mr Kilolo's illicit coaching activities in relation to D-54".[2032]

893. The Trial Chamber analysed the contents of a series of conversations which it found demonstrated that, "between 29 August and 1 November 2013, before, during and after D-54's testimony in the Main Case, Mr Bemba, Mr Kilolo, Mr Mangenda and/or D-54 were in regular contact concerning the latter's testimony".[2033] In this context, the Trial Chamber evaluated 14 intercepted communications (six involving Mr Kilolo and Mr Mangenda, two involving Mr Bemba and Mr Kilolo, and six involving Mr Kilolo and D-15), call records data showing contact between Mr Kilolo and witness D-54, including after the cut-off date for contact between a witness and the calling party, and the testimony of P-201 (D-54) in the present case.[2034]

894. Mr Bemba alleges that "[t]here is no direct evidence that [he] provided instructions that witness D-54 should testify falsely or that he knew that D-54 would testify falsely".[2035] He primarily challenges the Trial Chamber's reliance on: (i) an intercepted communication between Mr Bemba and Mr Mangenda on 30 August 2013;[2036] and (ii) two intercepted calls between Mr Bemba and Mr Kilolo of 17 October 2013 and of 1 November 2013.[2037] The Appeals Chamber shall address these arguments in turn.

[2029] Conviction Decision, para. 651.
[2030] Conviction Decision, para. 651.
[2031] Conviction Decision, para. 652.
[2032] Conviction Decision, para. 653.
[2033] Conviction Decision, para. 597.
[2034] Conviction Decision, paras 598-649.
[2035] Mr Bemba's Appeal Brief, para. 215.
[2036] Mr Bemba's Appeal Brief, paras 221-230, referring to Conviction Decision, paras 601, 604, 606, 652-653, which in turn refers to audio recording, CAR-OTP-0074-0995; translated transcript of audio recording, CAR-OTP-0079-0131.
[2037] Mr Bemba's Appeal Brief, paras 216-220, referring to Conviction Decision, paras 616, 648-649, which in turn refers to audio recording, CAR-OTP-0080-1323; translated transcript of audio recording,

(ii) Conversation between Mr Mangenda and Mr Kilolo on 30 August 2013

895. In relation to the intercepted communication of 30 August 2013, the Trial Chamber found that Mr Mangenda, during this conversation, relayed instructions to Mr Kilolo from Mr Bemba, to whom he referred as "*notre frère*" ("our brother"), regarding witness D-54, referred to as "[redacted]".[2038]

(a) Submissions of the parties

(i) Mr Bemba

896. Mr Bemba submits that, in the 30 August 2013 conversation, "Mr Mangenda appears to have obtained information for the purpose of facilitating Mr Kilolo's ability to conduct" an interview with witness D-54.[2039] In Mr Bemba's view, the Trial Chamber's inference that the two interlocutors were speaking about Mr Bemba "completely lacks an evidentiary foundation".[2040]

897. Mr Bemba raises, in particular, the following arguments: (i) he alleges that "[g]iven the lapse in time between this conversation and D-54's in-court testimony, the conversation is too remote to be linked to illicit coaching during D-54's testimony, or D-54's testimony on the stand",[2041] that it was also "not possible to identify, with certitude, the […] person/s referred as '*notre frère*'" ("our brother") and that the Trial "Chamber failed to address contextual elements which suggest that '*notre frère*' could not be Mr. Bemba";[2042] (ii) the Trial Chamber assumed that "*notre frère*" referred to Mr Bemba "on the basis of a factor (Mr Mangenda's request that Mr Kilolo take notes) that was never pleaded by the Prosecution or otherwise 'discussed' at trial";[2043] (iii) the Trial Chamber "erred by failing to consider aspects of the conversation which suggested that on the one hand, '*notre frère*' could not be Mr. Bemba, and on the other, that '*notre frère*' was more likely to be a Defence witness, who had personally

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CAR-OTP-0082-0618; audio recording, CAR-OTP-0080-1372; translated transcript of audio recording, CAR-OTP-0082-0669.

[2038] Conviction Decision, para. 601, referring to audio recording, CAR-OTP-0074-0995; translated transcript of audio recording, CAR-OTP-0079-0131 at 0133.

[2039] Mr Bemba's Appeal Brief, para. 222.

[2040] Mr Bemba's Appeal Brief, para. 223.

[2041] Mr Bemba's Appeal Brief, para. 222.

[2042] Mr Bemba's Appeal Brief, para. 223.

[2043] Mr Bemba's Appeal Brief, para. 224 (footnote omitted).

supervised witness D-54 during the 2002 events"; [2044] and (iv) the Trial Chamber relied on remote and untested hearsay evidence.[2045] Mr Bemba alleges that the Trial Chamber failed to address the defence argument that the reference to "*il*" ("he") in the conversation "appears to be someone who is not detained, i.e. someone in the field who needed advance notice to complete something".[2046] He considers that two other conversations concerning witness D-54 should have been taken into account by the Trial Chamber in interpreting the 30 August 2013 conversation.[2047]

(ii) The Prosecutor

898. The Prosecutor submits that Mr "Bemba shows no error in the Chamber's interpretation of the intercepted conversation".[2048] She argues that the intercepted communication of 30 August 2013 "directly shows that Bemba issued specific instructions concerning D-54's testimony".[2049] In addition, the Prosecutor submits that Mr Bemba shows no error in the Trial Chamber's conclusion that the person referred to as "*notre frère*" was Mr Bemba.[2050] In her view, Mr Bemba's "arguments address only peripheral issues, and merely disagree with the Chamber's evaluation".[2051]

(b) Determination by the Appeals Chamber

899. The Appeals Chamber notes that the Trial Chamber discussed the conversation that took place on 30 August 2013 extensively.[2052] The two contested findings of the Trial Chamber read as follows:

> 604. In the same vein, neither of the two interlocutors used Mr Bemba's name. Instead, they refer to him as '*il*' or '*notre frère'*. The Bemba Defence maintained that the Prosecution merely conjectured that the reference to '*notre frère*' is directed at Mr Bemba. Yet, the Chamber is satisfied that, taking into account the context of the conversation, the person referred to as '*il*' or '*notre frère*' was Mr Bemba. Two elements, in particular, support this conclusion.

[2044] Mr Bemba's Appeal Brief, paras 225-226, referring to audio recording, CAR-OTP-0074-0995; translated transcript of audio recording, CAR-OTP-0079-0131 at 0134.
[2045] Mr Bemba's Appeal Brief, para. 290, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision.
[2046] Mr Bemba's Appeal Brief, para. 226.
[2047] Mr Bemba's Appeal Brief, paras 228-229, referring to CAR-OTP-0082-1109, lines 143-147, 263-266, 272-275, 279-280, 314-334; CAR-OTP-0082-0663, lines 25-34, 39-42.
[2048] Response, para. 505.
[2049] Response, para. 505.
[2050] Response, para. 506.
[2051] Response, para. 506.
[2052] Conviction Decision, paras 600-605.

> First, at the beginning of their conversation, Mr Mangenda insists that Mr Kilolo take notes, underlining the importance of the information to be given. Second, Mr Kilolo was instructed by '*notre frère'* to finish all business with D-54 before '*notre blanc'*, Mr Haynes, spoke with the witness. The Chamber considers that such instructions to lead counsel, in particular, on important matters concerning the conduct of the defence team, likely emanate from the client. No other person would normally be in a position to instruct lead counsel in this manner.
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> 605. The Chamber considers that the information communicated to Mr Kilolo through Mr Mangenda was not merely proposed by Mr Bemba. Rather, the suggestions advanced by Mr Bemba are concrete instructions, both as regards the topics to be addressed and the manner in which D-54 was expected to testify. This is evidenced by the language Mr Mangenda used throughout the conversation, when he specifies that the witness '*should clearly state*', '*has to say*', or '*[i]s going to say'*. Mr Bemba's instructions also pertain to D-54's behaviour when testifying. As Mr Mangenda told Mr Kilolo,
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> > *et puis, il [Bemba] a dit lorsqu'il [D-54] va commencer à répondre aux questions, que ce ne soit pas un système … du tic au tac. Parce que ce n'est pas tout à fait agréable. Donc c'est-à-dire à un certain moment, il pose même une petite question… (…) c'est comme ça que lui-même a demandé car il [Bemba] insistait là-dessus, ç'est* [sic] *pour cela que je t'en parle.* [Footnotes omitted, Emphasis in original.]
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> This direction demonstrates Mr Bemba's interest in concretely predicting D-54's testimony.[2053]

900. The Appeals Chamber observes that Mr Bemba's arguments on appeal in relation to these findings simply reproduce those made before the Trial Chamber in his closing submissions.[2054] The Appeals Chamber finds that the Trial Chamber's reasoning, which also refers to the accused's submissions at trial regarding the possible interpretation of the evidence, is detailed and not unreasonable. As the Trial Chamber explicitly stated, the notes taken by Mr Kilolo were not the only consideration which led it to reach its conclusion that the person referred to as "*il*" ("he") or "*notre frère*" ("our brother") was Mr Bemba". Mr Bemba's arguments on appeal essentially put forward an alternative and speculative interpretation of the evidence without revealing any error in the Trial Chamber's broader reasoning. Mr Bemba argues that other extracts of the conversation also make reference to "*il*" or "*notre frère*" in contexts that suggest that these terms did not refer to Mr Bemba.

[2053] Conviction Decision, paras 604-605.
[2054] Mr Bemba's Closing Submissions, paras 298-299.

However, in the view of the Appeals Chamber, these extracts do not demonstrate that Mr Bemba was not the subject referred to in these contexts, nor do they reveal any error in the Trial Chamber's finding that "*notre frère*" was a reference to Mr Bemba in the relevant extract of the conversation upon which it relied.

901. In addition, the two other conversations,[2055] which he argues should have been taken into account by the Trial Chamber, and which took place in October 2013, do not demonstrate that the Trial Chamber's interpretation of the conversation on 30 August 2013 was unreasonable. Based on these conversations, Mr Bemba alleges that "*notre frère*" could designate "other superior officers of D-54",[2056] which are referred to either by Mr Kilolo or witness D-54 in the relevant conversations. In the Appeals Chamber's view, the relevance of the extracts highlighted by Mr Bemba to an understanding of the 30 August 2013 conversation is difficult to evaluate. Moreover, nothing suggests that Mr Mangenda was referring to the same persons or one of these persons in the 30 August 2013 conversation.

902. Regarding Mr Bemba's argument that the Trial Chamber impermissibly relied on remote and untested hearsay evidence in the conversation of 30 August 2013, the Appeals Chamber is not persuaded that the Trial Chamber erred in relying on this evidence to support its overall conclusion that Mr Bemba "provided specific instructions to Mr Kilolo and Mr Mangenda on what and how the witnesses were expected to testify".[2057] Mr Kilolo's and Mr Mangenda's interaction in the intercepted communication of 30 August 2013 shows that Mr Bemba's co-perpetrators acted under the common understanding that Mr Bemba was involved in the scheme of illicit witness coaching and gave instructions regarding the expected testimony.

903. Moreover, the Appeals Chamber notes that the Trial Chamber did not base its conclusion that Mr Bemba gave instructions regarding the testimony of the illegally coached witnesses solely on the intercepted communication of 30 August 2013. The Trial Chamber also referred to evidence of an intercepted communication between Mr

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[2055] Mr Bemba's Appeal Brief, paras 228-229, referring to CAR-OTP-0082-1109, lines 143-147, 263-266, 272-275, 279-280, 314-334; CAR-OTP-0082-0663, lines 25-34, 39-42.
[2056] Mr Bemba's Appeal Brief, para. 228.
[2057] Conviction Decision, para. 808. *See also* paras 606, 729, 811.

Kilolo and Mr Bemba regarding witness D-15's testimony and other intercepted communications between Mr Kilolo and Mr Mangenda.[2058]

904. The Appeals Chamber considers that Mr Bemba has not demonstrated any error in the Trial Chamber's reliance on the contents of the intercepted communication of 30 August 2013 or in the Trial Chamber's overall conclusion. Accordingly, his arguments are rejected.

(iii) Conversation between Mr Kilolo and Mr Bemba on 17 October 2013

905. In relation to the intercepted conversation between Mr Bemba and Mr Kilolo of 17 October 2013, the Trial Chamber noted that Mr Kilolo reminded Mr Bemba that they had arranged a lot and had taken hours with "[redacted]".[2059]

(a) Submissions of the parties

(i) Mr Bemba

906. Mr Bemba alleges that the Trial "Chamber was unable to conclude […] that the speakers were discussing the coaching of D-54" and therefore erred in finding that Mr Kilolo's comments about the time spent on "[redacted]" "corroborat[ed] or support[ed] any further inferences on this point".[2060]

(ii) The Prosecutor

907. The Prosecutor responds that the Trial Chamber did not err in relation to witness D-54.[2061] She submits that Mr "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".[2062] The Prosecutor adds that evidence of Mr Kilolo's extensive coaching of witness D-54 formed a reasonable context in which to interpret his comment that they had arranged a lot and had taken hours with the witness, and that chambers of the Court "do not require 'certainty' on *all* factual

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[2058] Conviction Decision, paras 729-732, 808-813.
[2059] Conviction Decision, para. 616, referring to audio recording, CAR-OTP-0080-1323; translated transcript of audio recording, CAR-OTP-0082-0618 at 0623.
[2060] Mr Bemba's Appeal Brief, para. 216.
[2061] Response, paras 501-502.
[2062] Response, para. 503.

determinations, nor […] are they required to apply the criminal standard of proof to assessing individual pieces of evidence".[2063]

(b) Determination by the Appeals Chamber

908. The Appeals Chamber finds that Mr Bemba's allegation concerning the Trial Chamber's interpretation of the 17 October 2013 conversation is unfounded. Although the Trial Chamber observed that the relevant part of it, "as such, [did] not indicate with certainty that Mr Kilolo was speaking about his illicit coaching activities regarding D-54", it went on to note that "the assessment of this statement [was] context-dependent and [would] therefore be considered in the light of [subsequent] events".[2064] In the following paragraphs of the Conviction Decision, the Trial Chamber assessed other items of evidence that showed that Mr Kilolo had coached witness D-54 extensively. The Appeals Chamber also notes that the Trial Chamber did not rely upon the 17 October 2013 conversation directly for its analysis concerning Mr Bemba's instructions regarding witness D-54. Mr Bemba therefore overstates the significance of the Trial Chamber's reasoning in this respect; he also fails to appreciate that the Trial Chamber did not consider the contested call in isolation, but in the context of other evidence concerning the coaching of witness D-54. Mr Bemba shows no error in this respect and his arguments are rejected.

(iv) Conversation between Mr Kilolo and Mr Bemba on 1 November 2013

909. In the intercepted communication between Mr Bemba and Mr Kilolo on 1 November 2013, which took place on the morning of the last day of D-54's testimony, Mr Kilolo indicated that he was worn out from "*la personne que vous connaissez*" ("that person you know").[2065] The Trial Chamber interpreted this to be a reference to his dealings with witness D-54, given the calls he had made to the witness the night before.[2066]

[2063] Response, para. 503.
[2064] Conviction Decision, para. 616.
[2065] Conviction Decision, paras 648-649, referring to audio recording, CAR-OTP-0080-1372; translated transcript of audio recording, CAR-OTP-0082-0669.
[2066] Conviction Decision, para. 649.

(a) Submissions of the parties

(i) Mr Bemba

910. Mr Bemba submits that the Trial Chamber erroneously concluded from Mr Kilolo's comment that he was referring to illicit conversations with, rather than preparation for the examination of, witness D-54, that Mr Bemba understood this to be the case and that "Mr. Bemba had previously endorsed this approach, with a view to eliciting false testimony from D-54".[2067] Mr Bemba alleges that the Trial Chamber "did not acknowledge the multiple levels of inferences involved in its conclusion, nor does it provide a reasoned opinion as to why each inference was the only reasonable inference".[2068] He alleges that the Trial Chamber failed to provide a "reasoned opinion concerning reasonable exculpatory explanations" and argues that "Mr Bemba expressed clear impatience to move to pending political developments, which suggests that he was not attentive to the earlier interventions from Mr Kilolo".[2069] In Mr Bemba's view, the Trial Chamber failed to explain how its conclusion supported the only reasonable inference that Mr Bemba possessed prior knowledge and intent as "this is a hidden inference which results in a conclusion which is unacceptably remote from the evidence itself".[2070]

(ii) The Prosecutor

911. The Prosecutor contends that Mr Bemba shows no error in the Trial Chamber's approach to the intercepted conversations between Mr Bemba and Mr Kilolo of 17 October 2013 and of 1 November 2013.[2071] As to the 1 November 2013 conversation, the Prosecutor alleges that the Trial "Chamber was not obliged to exclude alternative reasonable inferences" "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)".[2072] In addition, the interpretation that Mr Kilolo was referring

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[2067] Mr Bemba's Appeal Brief, para. 217, referring to CAR-OTP-0082-0669; Conviction Decision, paras 648-649; Annex B to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 4.
[2068] Mr Bemba's Appeal Brief, para. 217.
[2069] Mr Bemba's Appeal Brief, para. 219 (footnotes omitted).
[2070] Mr Bemba's Appeal Brief, para. 220.
[2071] Response, para. 502.
[2072] Response, para. 504.

to witness D-54 as the person who had "worn him out" was, according to the Prosecutor, reasonable, while alternative interpretations were speculative.[2073]

(b) Determination by the Appeals Chamber

912. The Appeals Chamber is not persuaded by Mr Bemba's arguments. Mr Bemba's argument merely expresses disagreement with the Trial Chamber's interpretation of the conversation on 1 November 2013, without demonstrating that, in light of all the other items of evidence, the Trial Chamber's conclusions were unreasonable.[2074] The Appeals Chamber recalls that, while individual items of evidence, when seen in isolation, may be reasonably open to different interpretations, including interpretations favourable to the accused, this does not necessarily mean that a trial chamber's interpretation of an item of evidence that is unfavourable to the accused is unreasonable in light of all the relevant evidence.

913. As the Trial Chamber explained, it was in light of the other items of evidence, and in particular the fact that Mr Kilolo was twice on the telephone with witness D-54 the night before, that it understood that "Mr Kilolo's tiredness stem[ed] from his dealings with D-54, whom he had to prepare for his last day of testimony"[2075] before the Trial Chamber. The Appeals Chamber does not find unreasonable this conclusion, which took into account the context of the conversation. The Appeals Chamber therefore considers that Mr Bemba has failed to show any error on this point.

914. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

(b) Witness D-15

(i) Relevant part of the Conviction Decision

915. The Trial Chamber concluded that Mr Bemba was deeply involved in the coaching of witnesses, noting that this was exemplified, *inter alia*, by his interactions regarding witness D-15.[2076] In relation to that witness, the Trial Chamber found that he had been "coached illicitly and extensively by Mr Kilolo" and that "Mr Bemba

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[2073] Response, para. 504.
[2074] *See* *Lubanga* Appeal Judgment, para. 33.
[2075] Conviction Decision, para. 649.
[2076] Conviction Decision, paras 808-810.

knew precisely about Mr Kilolo's instructions to D-15 over the telephone".[2077] The Trial Chamber also found that Mr Bemba had "provided feedback on how specific issues [in relation to witness D-15] should be handled when he felt they were handled wrongly by Mr Kilolo".[2078]

916. The latter finding was based notably on the Trial Chamber's assessment of a telephone conversation between Mr Bemba and Mr Kilolo on 12 September 2013, in which Mr Kilolo and Mr Bemba talked about three points to be raised with witness D-15.[2079] The Trial Chamber also referred to an intercepted call on 12 September 2013, between Mr Kilolo and witness D-15, in which Mr Kilolo conveyed Mr Bemba's satisfaction with the witness's performance,[2080] and a conversation, following the conclusion of witness D-15's testimony, on 13 September 2013, when Mr Kilolo called the witness and thanked him personally and on Mr Bemba's behalf.[2081]

(ii) Intercept of 12 September 2013 between Mr Bemba and Mr Kilolo

(a) Submissions of the parties

(i) Mr Bemba

917. Mr Bemba submits that the Trial Chamber's conclusion that he was involved in coaching witness D-15 is unsustainable.[2082] He argues that, "to be 'involved' in coaching, [he] would need to have influenced the content of D-15's responses"[2083] and that Mr Kilolo did "not solicit Mr Bemba's input concerning the answers which could or should be given by the witness in response to these questions".[2084] In Mr Bemba's view, his passive "interventions also reflect[ed] his belief that the Defence

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[2077] Conviction Decision, para. 809.
[2078] Conviction Decision, para. 592. *See also* para. 810.
[2079] *See* Conviction Decision, paras 809-810, referring to audio recording, CAR-OTP-0074-1006; translated transcript of audio recording, CAR-OTP-0079-1744 at 1747-1748.
[2080] Conviction Decision, para. 569, referring to audio recording, CAR-OTP-0074-1008; translated transcript of audio recording, CAR-OTP-0091-0186.
[2081] Conviction Decision, paras 585-586, referring to audio recording, CAR-OTP-0074-1012; transcript of audio recording, CAR-OTP-0077-1414 at 1415.
[2082] Mr Bemba's Appeal Brief, para. 232.
[2083] Mr Bemba's Appeal Brief, para. 233 (emphasis in original).
[2084] Mr Bemba's Appeal Brief, para. 234, referring to CAR-OTP-0079-1744 at 1746; Mr Bemba's Closing Submissions, para. 279.

[was] putting forward a truthful case in relation to these issues, and the Chamber [did] not cite evidence that would indicate otherwise".[2085]

918. Mr Bemba alleges that "[t]here is no objective foundation for the Chamber's assumption that Mr. Kilolo was reporting on his illegal coaching activities, as opposed to abiding by his ethical duty to notify the client of the questions to be put to the witness".[2086] He submits that "the Chamber failed to consider that the phrase *'je reviens à la question d'hier'* ["going back to yesterday's question"], supports the more reasonable conclusion that the two speakers were discussing the content of in-court questioning, and not external, illicit coaching".[2087] Mr Bemba submits that, "[i]n any case, the fact that [he] interacted with Mr. Kilolo after the coaching severs any causal nexus between [his] conversation with Mr. Kilolo and the alleged coaching the night before".[2088]

919. Mr Bemba highlights that the night before his conversation with Mr Kilolo, the latter informed Mr Mangenda that an agreement had been concluded concerning the content of witness D-15's questions, and that Mr Bemba had been trying to reach him but he had been avoiding his calls.[2089] Mr Bemba argues that this "proves that [he] was not part of, or aware of this agreement" and that the "subsequent conversation with [him] was clearly just a formality".[2090] Mr Bemba further submits that Mr Kilolo used less explicit language with him that with Mr Mangenda, suggesting that he "was not privy to the illicit coaching activities".[2091] Mr Bemba also argues that the Trial Chamber failed to construe the 12 September 2013 conversation "in light of its finding concerning 'Mr Kilolo's reluctance to call witnesses unless he had briefed them extensively'" and its reliance on evidence indicating that Mr Kilolo ultimately decided whether a witness should be called.[2092]

[2085] Mr Bemba's Appeal Brief, para. 234, referring to CAR-OTP-0091-0127 at 0131, line 71.
[2086] Mr Bemba's Appeal Brief, para. 235.
[2087] Mr Bemba's Appeal Brief, para. 235, referring to Mr Bemba's Closing Submissions, para. 280.
[2088] Mr Bemba's Appeal Brief, para. 236 (emphasis in original).
[2089] Mr Bemba's Appeal Brief, para. 237, referring to CAR-OTP-0080-0604 at 0606, lines 10-15.
[2090] Mr Bemba's Appeal Brief, para. 237.
[2091] Mr Bemba's Appeal Brief, para. 238.
[2092] Mr Bemba's Appeal Brief, para. 240, referring to Conviction Decision, paras 599, 714-715.

(ii) The Prosecutor

920. The Prosecutor responds that the Trial Chamber did not err in its reliance on witness D-15 as an "example" of Mr Bemba's "deep involvement" in the illicit coaching activities and that Mr "Bemba overlooks the purpose for which the Chamber considered the evidence, as well as its context".[2093] The Prosecutor considers that whether Mr Bemba influenced the content of witness D-15's responses 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".[2094] The Prosecutor recalls that, in any event, "the conversation between Bemba and Kilolo concerning D-15 was not the only evidence upon which the Chamber relied to determine that Bemba controlled the presentation of the evidence and issued instructions to Kilolo".[2095]

(b) Determination by the Appeals Chamber

921. The Appeals Chamber notes that the Trial Chamber mentioned the conversation of 12 September 2013 between Mr Bemba and Mr Kilolo regarding witness D-15 as one of several examples of Mr Bemba's "deep involvement" in the illicit coaching activities.[2096] Based on this conversation, the Trial Chamber concluded that "Mr Bemba knew precisely about Mr Kilolo's instructions to D-15"[2097] and that he "also provided feedback on how specific issues should be handled by Mr Kilolo".[2098] The Trial Chamber further found that Mr Bemba exercised "control over the presentation of the evidence" and that "he was in a position to, and did indeed, instruct Mr Kilolo".[2099]

922. Concerning the impact of the coaching activities and the question of whether Mr Bemba would need to have influenced the content of witness D-15's responses in order to be deemed to have been involved in coaching activities,[2100] the Appeals Chamber considers that the contested paragraphs of the Conviction Decision must be

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[2093] Response, paras 508-509, referring to Conviction Decision, paras 808-809.
[2094] Response, para. 509.
[2095] Response, para. 514, referring to Conviction Decision, 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.
[2096] Conviction Decision, para. 808, referring to "examples already discussed by the Chamber", notably in paras 727-732.
[2097] Conviction Decision, para. 809.
[2098] Conviction Decision, para. 810.
[2099] Conviction Decision, para. 810.
[2100] Mr Bemba's Appeal Brief, para. 233.

understood in their context. The conversation of 12 September 2013 between Mr Kilolo and Mr Bemba is quoted in the part of the Conviction Decision relating to the roles and contributions of the co-perpetrators in relation to the common plan as well as to their intent and knowledge.[2101] Clearly, the question of whether the content of witness D-15's answers was, in fact, influenced by Mr Bemba was not essential to the Trial Chamber's analysis in this part of the Conviction Decision. Thus, Mr Bemba misunderstands the purpose for which the Trial Chamber considered the evidence in question, which was to ascertain Mr Bemba's role in the presentation of evidence, exercised with and through Mr Kilolo.

923. The Appeals Chamber is not persuaded by Mr Bemba's argument that an exculpatory interpretation of this conversation was possible. The conversation shows that Mr Kilolo sought the approval of Mr Bemba on certain issues, which apparently were immediately understood by Mr Bemba despite relatively cursory explanation. Although the conversation, read in isolation, may indeed be interpreted differently, its context, including the previous conversations between Mr Kilolo and Mr Mangenda, and between Mr Kilolo and witness D-15, supports the Trial Chamber's conclusion that Mr Bemba expressed approval, gave feedback and provided directions to Mr Kilolo on matters that he felt had been handled wrongly and that concern illicit coaching. Thus, Mr Bemba merely puts forward an alternative interpretation of the passage in question, without demonstrating that the Trial Chamber's reading, put in context, was unreasonable.

924. The Appeals Chamber is similarly unconvinced by Mr Bemba's arguments that: (i) an agreement regarding the questions to be put to witness D-15 had already been concluded the night before he spoke to Mr Kilolo; and (ii) this undermines the Trial Chamber's inference that "the purpose of the conversation of 12 September 2013 was to report on illicit coaching activities".[2102] In this regard, the Appeals Chamber notes that the Trial Chamber's evaluation of the conversation of 11 September 2013 between Mr Kilolo and Mr Mangenda reads as follows:

[2101] Conviction Decision, paras 804, 809.
[2102] Mr Bemba's Appeal Brief, para. 237.

> Mr Kilolo updated Mr Mangenda about his earlier telephone conversation with D-15. Mr Kilolo recapitulated at least two of the three questions that he would pose to D-15 the following day. Mr Mangenda signalled his agreement. Contrary to the allegations of the Mangenda Defence, the Chamber concludes from this conversation that Mr Kilolo updated Mr Mangenda on the details of his illicit coaching activities.[2103]

925. The Appeals Chamber considers that the Trial Chamber's full analysis of the sequence of events shows that witness D-15's coaching started prior to the conversation on 11 September 2013, in the course of which Mr Kilolo reported on his activities to Mr Mangenda.[2104] Mr Bemba has not demonstrated that the Trial Chamber's conclusions regarding the chronology of witness D-15's coaching, whereby Mr Kilolo coached the witness, notified "the details of his illicit coaching activities" to Mr Mangenda, and finally reported to Mr Bemba, who endorsed the strategy and provided feedback, are inconsistent with its conclusions regarding Mr Bemba's involvement. Mr Kilolo still deemed it necessary to call Mr Bemba the day after his conversation with Mr Mangenda in order to report on his activities. The Trial Chamber's analysis of the conversation of 12 September 2013 and its conclusions as to Mr Bemba's involvement are not undermined by its conclusions regarding the 11 September 2013 call.[2105] The Appeals Chamber, therefore, rejects Mr Bemba's arguments.

(iii) Intercepts of 12 and 13 September 2013 between Mr Kilolo and witness D-15

(a) Mr Bemba's submissions

926. Mr Bemba challenges the Trial Chamber's reliance on an intercepted call of 12 September 2013, between Mr Kilolo and witness D-15, in which Mr Kilolo conveyed Mr Bemba's satisfaction with the witness's performance.[2106] Furthermore, Mr Bemba challenges the Trial Chamber's reliance on a conversation on 13 September 2013, when Mr Kilolo thanked witness D-15 personally and on behalf of

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[2103] Conviction Decision, para. 566, referring to audio recording, CAR-OTP-0074-1005; translated transcript of audio recording, CAR-OTP-0080-0604.
[2104] Conviction Decision, paras 551-566.
[2105] Conviction Decision, paras 566, 568.
[2106] Mr Bemba's Appeal Brief, para. 308, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 2, referring in turn to Conviction Decision, para. 569; audio recording, CAR-OTP-0074-1008; translated transcript of audio recording, CAR-OTP-0091-0186.

Mr Bemba.[2107] He argues that the relevant extracts are hearsay evidence and that "it was highly unreliable and prejudicial to use such extracts to divine [his] actual state of mind".[2108]

(b) Determination by the Appeals Chamber

927. The Appeals Chamber considers that the Trial Chamber did not base its conclusions that Mr Bemba knew about, approved and provided feedback on Mr Kilolo's illicit coaching activities in relation to witness D-15 solely on the aforementioned intercepts of 12 and 13 September 2013 between Mr Kilolo and witness D-15.[2109] The Trial Chamber's conclusions seem to have been primarily based on the intercepted communication on 12 September 2013 between Mr Bemba and Mr Kilolo, in which they discussed the questions that had been rehearsed with D-15 and Mr Bemba provided feedback on how certain issues should be handled.[2110] Indeed, the content of this intercepted communication between Mr Bemba and Mr Kilolo closely reflects and supports the ultimate conclusion drawn by the Trial Chamber. Viewed in the context of this evidence regarding Mr Bemba's involvement, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to give weight to indirect evidence that Mr Bemba thanked or was satisfied with the witness.

928. The Appeals Chamber finds that the Trial Chamber did not err in relying on the intercepted communications of 12 and 13 September 2013 between Mr Kilolo and D-15. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

(c) Witnesses D-19 and D-55

(i) Relevant part of the Conviction Decision

929. The Trial Chamber considered that, in addition to the indirect influence he exerted on the witnesses through Mr Kilolo, "Mr Bemba also exerted direct influence

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[2107] Mr Bemba's Appeal Brief, para. 290, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 30, referring in turn to Conviction Decision, para. 586; audio recording, CAR-OTP-0074-1012; transcript of audio recording, CAR-OTP-0077-1414 at 1415.
[2108] Mr Bemba's Appeal Brief, para. 308.
[2109] *See* Conviction Decision, para. 592.
[2110] Conviction Decision, para. 568.

on D-19 and D-55".[2111] The Trial Chamber found that "Mr Bemba had direct telephone conversations with these witnesses from the ICC Detention Centre".[2112]

930. The Trial Chamber added:

> Although no direct evidence proves that in these telephone conversations Mr Bemba urged or asked these witnesses about the specifics of their testimony, the Chamber is convinced, assessing the evidence as a whole, that the fact that he illicitly spoke to them on his privileged line in the ICC Detention Centre indicates that he urged them to cooperate and follow the instructions given by Mr Kilolo.[2113]

931. Concerning witness D-55 in particular, the Trial Chamber was "convinced that Mr Bemba, with the intention of motivating D-55 to give specific testimony, agreed to and did speak to D-55 personally on 5 October 2012 and thanked him for agreeing to testify in his favour".[2114]

(ii) Submissions of the parties

(a) Mr Bemba

932. Mr Bemba submits that, while "the Chamber acknowledged that there [was] no evidence that Mr. Bemba provided such instructions", it "nonetheless conjured their existence from the fact that Mr Bemba spoke to [these two witnesses] on his privileged line, and the context of '*the evidence as a whole*'".[2115] Mr Bemba alleges that the Trial Chamber's finding that Mr Bemba agreed to speak with witness D-55 with the intention of motivating this witness to give specific testimony is based on speculation.[2116]

933. Recalling a point of law he had made in his closing submissions,[2117] Mr Bemba submits that "in the absence of evidence concerning the content of communications, collusion cannot be assumed".[2118] He adds that "it does not logically follow that Mr.

[2111] Conviction Decision, para. 856.
[2112] Conviction Decision, para. 856.
[2113] Conviction Decision, para. 856.
[2114] Conviction Decision, para. 298.
[2115] Mr Bemba's Appeal Brief, para. 242 (emphasis in original), referring to Conviction Decision, para. 856.
[2116] Mr Bemba's Appeal Brief, para. 242.
[2117] Mr Bemba's Closing Submissions, para. 151.
[2118] Mr Bemba's Appeal Brief, para. 243.

Bemba *must* have urged [the witnesses] to cooperate and follow Mr. Kilolo's instructions".[2119] Mr Bemba argues that the Trial Chamber's inference is "too remote to satisfy the standard for inferential reasoning".[2120] In addition, he contends that, in establishing whether the inference was the only reasonable one, the Trial Chamber had a duty to consider witness D-55's direct evidence "that the conversation was extremely brief,[2121] and that they did not discuss the content of [his] upcoming testimony".[2122] Mr Bemba submits that the Trial "Chamber did not explain why this specific aspect of D-55's testimony was discarded".[2123] Mr Bemba also argues that the Trial "Chamber's inference that Mr. Bemba spoke to D-55 in order to motivate him to provide specific testimony is controverted by its findings that D-55 demanded to speak to Mr. Bemba, not *vice versa*, and then did not discuss his testimony with him".[2124]

(b) The Prosecutor

934. The Prosecutor responds that the "Chamber did not err in recognising the significance of the covert nature of Bemba's communications with D-19 and D-55, abusing the Registry facilities for privileged communications and avoiding passive monitoring".[2125] In the Prosecutor's view, the Trial Chamber's inference "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 Mr Bemba to avoid detection".[2126] According to the Prosecutor, "[t]his 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".[2127]

[2119] Mr Bemba's Appeal Brief, para. 243 (emphasis in original).
[2120] Mr Bemba's Appeal Brief, para. 243.
[2121] Mr Bemba's Appeal Brief, para. 244, referring to Conviction Decision, para. 740, fn. 1694; Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 37, lines 10-11.
[2122] Mr Bemba's Appeal Brief, para. 244, referring to Conviction Decision, para. 293.
[2123] Mr Bemba's Appeal Brief, para. 244, referring to Conviction Decision, paras 293, 295.
[2124] Mr Bemba's Appeal Brief, para. 245, referring to Conviction Decision, para. 856.
[2125] Response, para. 515, referring to Conviction Decision, paras 736-737, 740-741, 769.
[2126] Response, para. 515, referring to Conviction Decision, paras 298, 814, 816, 856.
[2127] Response, para. 515.

(iii) Determination by the Appeals Chamber

935. The Appeals Chamber notes that Mr Bemba's arguments focus on the Trial Chamber's conclusion[2128] that he, "with the intention of motivating D-55 to give specific testimony, agreed to and did speak to D-55 personally on 5 October 2012 and thanked him for agreeing to testify in his favour".[2129] As he does not articulate specific challenges to the Trial Chamber's finding that he exerted direct influence on witness D-19, the Appeals Chamber will focus its analysis on the alleged error in the finding related to witness D-55.

936. The contested finding is part of the Trial Chamber's reasoning concerning soliciting as a mode of liability and reads as follows:

> In addition to Mr Bemba's indirect influence on the witnesses through Mr Kilolo, who he entrusted to pass on his influence to the witnesses, Mr Bemba also exerted direct influence on D-19 and D-55. As has been elaborated above, Mr Bemba had direct telephone conversations with these witnesses from the ICC Detention Centre. Although no direct evidence proves that in these telephone conversations Mr Bemba urged or asked these witnesses about the specifics of their testimony, the Chamber is convinced, assessing the evidence as a whole, that the fact that he illicitly spoke to them on his privileged line in the ICC Detention Centre indicates that he urged them to cooperate and follow the instructions given by Mr Kilolo.[2130]

937. The Appeals Chamber notes that this paragraph must be read in conjunction with other paragraphs of the Conviction Decision, to which the Trial Chamber explicitly referred.[2131] In particular, the Trial Chamber referred to witness P-214 (D-55)'s testimony that Mr Kilolo facilitated a telephone conversation with Mr Bemba and "that he had insisted on speaking to Mr Bemba, as he had lost confidence in Mr Kilolo".[2132] Although the Trial Chamber noted that witness D-55 consistently stated that they did not discuss the content of his upcoming Main Case testimony, it observed that his "description of the events was diffident and cautious and he seemed hesitant to deliberately implicate Mr. Bemba".[2133] The Trial Chamber also noted the

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[2128] Mr Bemba's Appeal Brief, paras 242, 244-245.
[2129] Conviction Decision, para. 298. *See also* Conviction Decision, paras 293-297.
[2130] Conviction Decision, para. 856 (footnote omitted).
[2131] Conviction Decision, paras 293-298, 741.
[2132] Conviction Decision, para. 293.
[2133] Conviction Decision, para. 293.

witness's testimony that Mr Bemba thanked him for agreeing to testify in his favour.[2134]

938. The Trial Chamber also referred to its findings regarding Mr Bemba's abuse of the Registry's privileged line from the detention centre in order to circumvent monitoring and improperly communicate regarding the implementation of the common plan.[2135] In the Appeals Chamber's view, the Trial Chamber did not err in recognising the significance of the use of privileged line and the measures taken by Mr Bemba to avoid detection. As the Trial Chamber concluded, Mr Bemba intentionally circumvented the Registry's monitoring system, thus allowing him and his co-perpetrators to communicate improperly for the purpose of implementing the common plan to corruptly influence witnesses.[2136]

939. The Appeals Chamber finds that the Trial Chamber did not err in its overall assessment of the evidence. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

(d) General conversations between Mr Kilolo and Mr Mangenda

(i) Relevant part of the Conviction Decision

940. The Trial Chamber concluded that "Mr Bemba was kept updated about the illicit coaching activities at all times".[2137] In support of this finding, the Trial Chamber relied, *inter alia*, on three intercepted conversations between Mr Kilolo and Mr Mangenda.

941. In the first intercepted communication between Mr Kilolo and Mr Mangenda of 29 August 2013,[2138] Mr Mangenda expressed concerns about the poor quality of witness D-29's testimony, and, in response, Mr Kilolo indicated that "*j'ai toujours dit au Client, de faire encore la couleur*" ("I've always told the client to redo the colour") "*[u]n ou deux jours avant que la personne passe*" ("a day or two before the person

[2134] Conviction Decision, para. 293.
[2135] Conviction Decision, para. 856.
[2136] Conviction Decision, para. 814.
[2137] Conviction Decision, para. 728.
[2138] Conviction Decision, paras 534-535, referring to audio recording, CAR-OTP-0074-0997; translated transcript of audio recording, CAR-OTP-0080-0245 at 0248.

appears").[2139] The Trial Chamber found, based on its analysis of the use of coded language in a number of intercepted communications, that references to "colour" were used by the co-perpetrators to denote the illicit coaching or bribing of witnesses.[2140]

942. The second intercepted communication of 27 August 2013 concerned witness D-25's testimony.[2141] During this conversation, Mr Mangenda reported that "*[le client] a vu vraiment que (…) un véritable travail de couleurs a été effectivement fait*" (["the client] really saw that (…) thorough colour work was effectively carried out") and Mr Kilolo commented that "*ça il a dû se rendre compte, parce que comment quelqu'un peut lui sortir des vérités*" ("he must have noticed that, because how can someone tell him those facts").[2142]

943. The Trial Chamber also attached significant weight to an intercepted call of 17 October 2013, in which Mr Kilolo and Mr Mangenda discussed certain occasions when Mr Bemba had given instructions regarding testimony in front of other members of the defence team.[2143]

(ii) Submissions of the parties

(a) Mr Bemba

944. Mr Bemba avers that the Trial Chamber cited no evidence to substantiate the inference that Mr Kilolo's advice about the need to "redo the colour" mentioned during the 29 August 2013 conversation was actually communicated to Mr Bemba.[2144] Mr Bemba also submits that "there is no evidence concerning the terms used to describe" the illicit coaching activity, nor any response from Mr Bemba.[2145] Concerning the conversation related to how Mr Bemba must have noticed aspects of witness D-25's testimony, Mr Bemba alleges that this would apply to everyone who was present in the courtroom; therefore, the Trial Chamber's analysis is

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[2139] Conviction Decision, paras 534-535, referring to audio recording, CAR-OTP-0074-0997; translated transcript of audio recording, CAR-OTP-0080-0245 at 0248.
[2140] Conviction Decision, paras 756-761.
[2141] Conviction Decision, para. 495, referring to audio recording, CAR-OTP-0074-0992; transcript of audio recording, CAR-OTP-0079-0114 at 0118.
[2142] Conviction Decision, para. 495.
[2143] Conviction Decision, para. 731, referring to audio recording, CAR-OTP-0080-1317; translated transcript of audio recording, CAR-OTP-0082-1293 at 1301.
[2144] Mr Bemba's Appeal Brief, para. 247.
[2145] Mr Bemba's Appeal Brief, para. 247.

misconceived.[2146] Regarding the conversation on 17 October 2013 regarding instructions given by Mr Bemba in the presence of other members of the defence team, Mr Bemba submits there was no basis to support the Trial Chamber's inference that these instructions concerned illicit coaching.[2147] Mr Bemba alleges that he was providing instructions to other members of his defence team (including Mr Haynes) to elicit focused testimony from witnesses,[2148] and that it was "unreasonable to infer that the instructions in question were evidence of a pattern of conduct concerning the illicit preparation of witnesses".[2149] Mr Bemba also complains that the content of all of the intercepted communications between Mr Kilolo and Mr Mangenda was hearsay and objects to the Trial Chamber's reliance on these communications for the truth of their contents regarding his state of mind.[2150]

(b) The Prosecutor

945. The Prosecutor submits that Mr "Bemba's criticism of the Trial Chamber's reliance on the intercepted 29 August 2013 conversation between Kilolo and Mangenda […] merely disagrees with the weight given to this evidence".[2151] She alleges that "this intercept *itself* is some evidence that 'this advice was actually communicated to Mr Bemba', even if its probative value may be qualified partially by its nature".[2152] The Prosecutor argues that the expression "*faire la couleur*" ("redo the colour") was "a code understood by all three co-perpetrators 'to refer to the illicit coaching or bribing of defence witnesses'".[2153] She submits that the evidence showed that, "[a]lthough primarily used in conversations between Kilolo and Mangenda, the evidence shows that it was understood by Bemba".[2154] As regards the two other conversations referred to by Mr Bemba, the Prosecutor argues that Mr Bemba "partly

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[2146] Mr Bemba's Appeal Brief, para. 248, referring to Conviction Decision, para. 495.
[2147] Mr Bemba's Appeal Brief, para. 249.
[2148] Mr Bemba's Appeal Brief, para. 249.
[2149] Mr Bemba's Appeal Brief, para. 249 (emphasis in original).
[2150] Mr Bemba's Appeal Brief, paras 290, 308-309, 311, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 7, 8, 9; Conviction Decision, para. 731; audio recording, CAR-OTP-0080-1317; translated transcript of audio recording, CAR-OTP-0082-1293 at 1301; Conviction Decision, para. 495; audio recording, CAR-OTP-0074-0992; translated transcript of audio recording, CAR-OTP-0079-0114 at 0118; Conviction Decision, para. 535; audio recording, CAR-OTP-0074-0997; translated transcript of audio recording, CAR-OTP-0080-0245 at 0248.
[2151] Response, para. 518.
[2152] Response, para. 518 (emphasis in original).
[2153] Response, para. 519, referring to Conviction Decision, para. 756.
[2154] Response, para. 519, referring to CAR-OTP-0082-1065 at 1074, lines 270-274; Conviction Decision, paras 782, 792-795, 819-820, 660.

misunderstands the significance"[2155] of the evidence or merely "speculates"[2156] as to other interpretations which could have been given by the Trial Chamber.

(iii) Determination by the Appeals Chamber

946. The Appeals Chamber observes that Mr Bemba mainly challenges the Trial Chamber's interpretation of three conversations, which formed part of the basis for the Trial Chamber's conclusions about the level of implication of Mr Bemba in the illicit coaching of witnesses.

(a) Intercept of 29 August 2013

947. Regarding the first conversation, which took place on 29 August 2013,[2157] Mr Bemba challenges the Trial Chamber's conclusions in paragraph 728 of the Conviction Decision, itself referring to paragraph 535, in which the content of the conversation was summarised and analysed as follows:

> Mr Kilolo reacted to this news by recalling what he purportedly always told '*le client*', namely Mr Bemba: *'Tu vois maintenant, 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]. The accused used coded language throughout the conversation, as demonstrated by the use of the terms *'faire encore la couleur'* [redo the colour] or *'Bravo'*. The Chamber understands that Mr Kilolo referred to prior conversations with Mr Bemba where he clarified the need to properly instruct witnesses concerning their testimonies. The instructive character of Mr Kilolo's intervention with witnesses is further exemplified by his remark to Mr Mangenda that, if D-29 did not conclude his testimony that day, he would contact the witness to ensure that he rectified two or three points. The Chamber considers that the above excerpt, read also in the light of another telephone conversation the following morning, demonstrates that Mr Kilolo illicitly coached witnesses, preferably shortly before their testimony, as a strategy intended to instruct them and ensure their favourable testimony on issues important to the Main Case Defence.[2158] [Footnotes omitted.]

[2155] Response, para. 520, referring to Conviction Decision, para. 495.
[2156] Response, para. 521, referring to Conviction Decision, para. 731.
[2157] Conviction Decision, para. 533.
[2158] Conviction Decision, para. 535, referring to audio recording, CAR-OTP-0074-0997; translated transcript of audio recording, CAR-OTP-0080-0245 at 0248.

948. In paragraph 728 of the Conviction Decision, the Trial Chamber referred to this evidence in order to highlight Mr Bemba's role within the common plan.

949. The Appeals Chamber considers that, by simply asserting that the Trial Chamber was wrong to rely on this evidence, Mr Bemba does not demonstrate that its reasoning was erroneous in reaching its overall conclusion that "Mr Bemba was kept updated about the illicit coaching activities at all times".[2159] The Appeals Chamber observes that Mr Kilolo referred in the conversation at issue to repeated conversations with Mr Bemba, which seemed to concern several witnesses, during which he advised Mr Bemba about the need to "redo the colour" ("*faire encore la couleur*") one or two days before the witness testified. In light of the other evidence upon which the Trial Chamber relied, including intercepted conversations involving Mr Bemba himself, intercepted conversations showing that Mr Bemba was updated on the illicit coaching activities, coordinated with his co-perpetrators, and gave instructions regarding the testimony of the witnesses,[2160] the Appeals Chamber is satisfied that it was not unreasonable for the Trial Chamber to rely on this intercepted communication to support its conclusion that "Mr Bemba was kept updated about the illicit coaching activities at all times".[2161]

(b) Intercept of 27 August 2013

950. Mr Bemba challenges the Trial Chamber's reliance on the second contested conversation for the truth of its contents regarding his state of mind (satisfaction with witness D-25's testimony).[2162] In this regard, the Appeals Chamber notes that the Trial Chamber found, solely on the basis of this intercept, that "Mr Bemba knew about and approved the illicit coaching of D-25 prior to his testimony".[2163] Mr Bemba argues that suspicion regarding his satisfaction with the witness's testimony does not establish his culpability.[2164]

951. The Appeals Chamber notes that the content of the relevant excerpt of the intercepted communication does not make clear whether Mr Mangenda had directly

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[2159] Conviction Decision, para. 728.
[2160] Conviction Decision, paras 727, 729-731, 806, 808-813.
[2161] Conviction Decision, para. 728.
[2162] Mr Bemba's Appeal Brief, para. 309.
[2163] Conviction Decision, para. 506.
[2164] Mr Bemba's Appeal Brief, para. 248.

received Mr Bemba's feedback in relation to witness D-25's testimony or was merely speculating as to his assessment of the testimony and their work.[2165] Nevertheless, the Appeals Chamber understands this intercepted communication to demonstrate the co-perpetrators' mutual investment in the illicit activities that were part of the common plan, as both Mr Mangenda and Mr Kilolo expected Mr Bemba to notice the signs of, and to be pleased with, its execution. The Appeals Chamber observes that the Trial Chamber's reasoning is clear and coherent and that, it focused on the logical link between the facts that: (i) according to Mr Mangenda, Mr Bemba was pleased with witness D-25's testimony; (ii) the expression "*travail de couleur*" ("colour work") was used in the conversation to refer to illicit coaching; and (iii) Mr Kilolo assumed that Mr Bemba realised that the level of precision with which the witness had testified was the result of this coaching.

952. The Appeals Chamber considers that the Trial Chamber was not unreasonable to rely on this intercept in support of its ultimate conclusions. In light of the statements and reactions of the two interlocutors, the Appeals Chamber considers that it is clear that their interaction was based on the common understanding that Mr Bemba was aware and approved of the illicit coaching of this witness. Even if it were accepted that Mr Mangenda falsely assumed or inaccurately represented Mr Bemba's satisfaction with the work carried out, the interlocutors' exchange is indicative of their shared assumptions regarding Mr Bemba's knowledge of and level of involvement in the common plan.

953. Moreover, the Appeals Chamber notes that the Trial Chamber did not rely on this evidence in isolation to support its ultimate conclusions regarding Mr Bemba's involvement in the illicit coaching activities. The Trial Chamber based its findings on its analysis of other evidence, including intercepted communications between Mr Kilolo and Mr Bemba himself, which showed that Mr Bemba was kept updated, discussed and gave instructions on the illicit coaching of the witnesses.[2166]

[2165] Conviction Decision, para. 495, referring to audio recording, CAR-OTP-0074-0992; translated transcript of audio recording, CAR-OTP-0079-0114 at 0118.
[2166] Conviction Decision, paras 727, 729-731, 806, 808-813.

954. Finally, Mr Bemba submits that the independent counsel's report used the expression "corridor work" rather than "colour work" and that this discrepancy could only be resolved by calling Mr Mangenda to testify.[2167] Having examined the transcript of the intercept in question, the Appeals Chamber considers it to be immaterial whether the words "corridor work" or "colour work" was used, as both expressions would signify the illicit coaching of witnesses in the context in which they were used. In this regard, the Appeals Chamber notes that, while the independent counsel referred to "corridor work" rather than "colour work", he considered, based, *inter alia*, on the use of this expression that the conversation indicated that instructions were given to witnesses on the content of their testimony.[2168] Therefore, the Appeals Chamber considers that Mr Bemba's arguments regarding the independent counsel's interpretation of the word used are unpersuasive and do not cast doubt on the Trial Chamber's findings on the significance of the contested utterance.

955. Accordingly, the Appeals Chamber finds that the Trial Chamber's overall conclusions regarding his contribution to and knowledge of the common plan were not unreasonable. Therefore, Mr Bemba's arguments are rejected.

(c) Intercept of 17 October 2013

956. Regarding the third conversation of 17 October 2013, the contested paragraph reads as follows:

> During that telephone conversation, Mr Kilolo recalled a meeting with Mr Bemba (*'notre frère-là'* [our brother]). Mr Mangenda responded that he had witnessed a similar situation in which Mr Bemba gave instructions concerning the witness and his testimony. The Chamber concludes from this evidence that Mr Bemba gave instructions on the expected contents and topics of the witnesses' testimonies.[2169]

957. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to draw this conclusion on the basis of the communication between Mr Kilolo and Mr Mangenda. Contrary to Mr Bemba's submission that this constituted

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[2167] Mr Bemba's Appeal Brief, para. 309, referring to CAR-OTP-0074-0897.
[2168] CAR-OTP-0079-0114 at 0118.
[2169] Conviction Decision, para. 731, referring to audio recording, CAR-OTP-0080-1317; translated transcript of audio recording, CAR-OTP-0082-1293.

"uncorroborated third-hand hearsay",[2170] the Appeals Chamber notes that Mr Mangenda gave an account of his personal experience, using unequivocal language. In the context of expressing their concerns that the other members of the defence team already "[knew] too much" about their activities and discussing how they could best manage the situation, the interlocutors recalled instances when Mr Bemba had issued instructions regarding how a witness should testify in the presence of these others.[2171] By merely offering an alternative speculative interpretation of this evidence, Mr Bemba shows no error in the Trial Chamber's finding.

958. Moreover, the Trial Chamber did not rely upon this communication alone to reach its overall conclusion that Mr Bemba had given instructions regarding witnesses' testimony. The Trial Chamber based its finding also on its analysis of other evidence, including intercepted communications between Mr Kilolo and Mr Bemba himself, which showed that Mr Bemba had discussed and given instructions on the illicit coaching of the witnesses.[2172] The Appeals Chamber considers that Mr Bemba has not demonstrated any error in the Trial Chamber's reliance on the contents of the intercepted communication of 17 October 2013 or its overall conclusions. Accordingly his arguments are rejected.

(d) Overall conclusion

959. The Appeals Chamber finds that the Trial Chamber's overall conclusion that Mr Bemba was kept updated on the illicit coaching activities was not unreasonable. Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

(e) Expressing satisfaction with and thanking witnesses

(i) Relevant part of the Conviction Decision

960. The Trial Chamber noted that Mr Bemba had expressed satisfaction with the testimony of the illicitly coached witnesses.[2173] In particular, the Trial Chamber mentioned that Mr Kilolo had spoken with witness D-15 to express his and Mr

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[2170] Mr Bemba's Appeal Brief, para. 249.
[2171] Audio recording, CAR-OTP-0080-1317; translated transcript of audio recording, CAR-OTP-0082-1293 at 1300-1301.
[2172] Conviction Decision, paras 729, 808-811.
[2173] Conviction Decision, paras 106, 161, 169, 406, 495, 505, 692.

Bemba's satisfaction with his testimony,[2174] that Mr Kilolo, in a telephone conversation that had been recorded, had reassured witness D-6 that Mr Bemba ("*le sénateur*") had been "very pleased with the witnesses' performance in court and that Mr Bemba would meet every witness individually once released",[2175] and that "Mr Mangenda also reported that Mr Bemba was very pleased with D-25's testimony".[2176]

(ii) Submissions of the parties

(a) Mr Bemba

961. Mr Bemba alleges that the Trial "Chamber erred by inferring that Mr. Bemba knew of and was '*fully involved*' in illicit coaching,[2177] from its factual finding that Mr Bemba expressed satisfaction with witness testimony and thanked witnesses for testifying, either directly or through Mr. Kilolo".[2178] Mr Bemba submits that it is not illicit to thank witnesses for their testimony[2179] and that "it is impossible to reliably infer [his] state of mind from expressions of gratitude or satisfaction that were conveyed by Mr. Kilolo[2180] or Mr. Mangenda,"[2181] as the dynamics of the conversation, including politeness, made it likely that they had an incentive to fabricate or exaggerate Mr Bemba's satisfaction.[2182]

(b) The Prosecutor

962. The Prosecutor submits that the considerations linked to the expression of satisfaction and gratitude "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".[2183] The Prosecutor argues that, "[i]n

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[2174] Conviction Decision, para. 169.
[2175] Conviction Decision, paras 406, 692.
[2176] Conviction Decision, paras 161, 495, 505
[2177] Mr Bemba's Appeal Brief, para. 250, referring to Conviction Decision, paras 732, 123, 293, 298, 305, 506, 569; Annex B to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 8(c),(d).
[2178] Mr Bemba's Appeal Brief, para. 250, referring to Conviction Decision, paras 106, 161, 169, 406, 495, 505, 692.
[2179] Mr Bemba's Appeal Brief, para. 251.
[2180] Mr Bemba's Appeal Brief, para. 251, referring to Conviction Decision, paras 406, 586.
[2181] Mr Bemba's Appeal Brief, para. 251, referring to Conviction Decision, para. 161.
[2182] Mr Bemba's Appeal Brief, para. 252, referring to Mr Bemba's Closing Submissions, para. 288
[2183] Response, para. 522, referring to Conviction Decision, para. 732.

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".[2184]

(iii) Determination by the Appeals Chamber

963. The Appeals Chamber understands Mr Bemba to challenge the Trial Chamber's finding that he expressed satisfaction with the witnesses' testimony on the basis of Mr Kilolo and Mr Mangenda's hearsay statements, and the logical link between Mr Bemba's expression of satisfaction with witness testimony and his knowledge and involvement in illicit coaching.[2185]

964. The Appeals Chamber observes that several of the paragraphs of the Conviction Decision that Mr Bemba contests[2186] refer to conclusions of the Trial Chamber merely describing the circumstances in which Mr Bemba expressed satisfaction with witnesses' testimony. As to the link between this and Mr Bemba's role in illicit coaching, the Trial Chamber explained:

> Mr Bemba would also express satisfaction or dissatisfaction with the testimony of the coached witnesses and Mr Kilolo's illicit coaching activities which further underscores that he was fully involved. For example, in the intercepted telephone call on 27 August 2013, Mr Mangenda stated that Mr Bemba was satisfied with Mr Kilolo's pre-testimony coaching activities involving D-25.[2187]

965. However, the Trial Chamber took into account several factors in order to assess Mr Bemba's role in the illicit coaching, namely: (i) that he "was kept updated about the illicit coaching activities at all times";[2188] (ii) that he "personally planned, directed and authorised the illicit coaching activities" and that he expected his directions to be implemented;[2189] (iii) his close collaboration and interplay with the other two co-perpetrators and the instructions given on the expected contents and topics of the witnesses' testimonies;[2190] and (iv) his expression of satisfaction or dissatisfaction

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[2184] Response, para. 522.
[2185] Mr Bemba's Appeal Brief, paras 250, 252.
[2186] Conviction Decision, paras 732, 123, 293, 298, 305, 506, 569. *See also* Annex B to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 8 (c), (d), referring to paras 123, 298, 305, 161, 406, 495, 692.
[2187] Conviction Decision, para. 732.
[2188] Conviction Decision, para. 728.
[2189] Conviction Decision, para. 729.
[2190] Conviction Decision, paras 730-731.

with the testimony of the coached witnesses.[2191] This last consideration was explicitly mentioned by the Trial Chamber as one factor which "further underscore[ed]"[2192] that he was involved in the illicit coaching activities.[2193]

966. Thus, Mr Bemba's involvement in the illicit coaching activity was not established only on the basis of the fact that he had expressed satisfaction and gratitude to witnesses. Apart from asserting that the Trial Chamber should not have concluded that Mr Bemba was fully involved in the illicit coaching, Mr Bemba alleges no specific error in the Trial Chamber's analysis. Accordingly, the Appeals Chamber rejects this sub-ground of appeal.

(f) Coaching on concealment of contacts and payments

(i) Relevant part of the Conviction Decision

967. The Trial Chamber made, "on the basis of an overall assessment of the evidence", the inference that Mr Bemba "at least implicitly knew" about Mr Kilolo's instructions to witnesses that they deny contacts by, and payments from, the defence and expected Mr Kilolo to give such instructions.[2194] The Trial Chamber further explained on which considerations it based this conclusion.[2195] The Trial Chamber concluded that Mr Bemba, "along with his instructions on testimony regarding the merits on the Main Case, also authorised and thereby approved, at least tacitly, instructions regarding false testimony".[2196] The Trial Chamber added that "he therefore also knew and intended that the Main Case Defence would present false evidence to the Court".[2197]

[2191] Conviction Decision, para. 732.
[2192] Conviction Decision, para. 732.
[2193] Conviction Decision, para. 732.
[2194] Conviction Decision, para. 818.
[2195] Conviction Decision, para. 819.
[2196] Conviction Decision, para. 819.
[2197] Conviction Decision, para. 819.

(ii) Submissions of the parties

(a) Mr Bemba

968. In Mr Bemba's view, the Trial Chamber's finding is derived from a larger pattern of flawed circular inferences.[2198] He submits that the Trial Chamber erroneously inferred that Mr Bemba tacitly approved of Mr Kilolo's conduct because he apparently knew of it, and did not intervene or object.[2199] Mr Bemba also argues that there is no evidence in support of the Trial Chamber's finding that he was kept abreast of the coaching activity, nor any evidence that he was aware of the illicit nature, and specific breakdown of payment of witnesses.[2200]

(b) The Prosecutor

969. The Prosecutor submits that the Trial Chamber did not simply infer that Mr Bemba approved Mr Kilolo's instructions regarding false testimony from Mr Bemba's knowledge of those instructions, nor did it err in concluding that Mr Bemba had that knowledge.[2201] Rather, in the Prosecutor's view, the Trial Chamber inferred from all the evidence that Mr Bemba had actual knowledge of Mr Kilolo's instructions to witnesses to testify falsely.[2202] The Prosecutor avers that the Trial Chamber determined, "given broader circumstances", that Mr Bemba had authorised and approved instructing witnesses to testify falsely not only on the merits of the Main Case, but also other matters necessary to preserve the secrecy of the common plan.[2203]

(iii) Determination by the Appeals Chamber

970. The Appeals Chamber understands Mr Bemba to challenge two aspects of the Trial Chamber's conclusions in paragraphs 818 and 819 of the Conviction Decision. The first one is the connection that the Trial Chamber made between the "implicit knowledge" of Mr Bemba about the instructions to the witnesses regarding false

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[2198] Mr Bemba's Appeal Brief, paras 253-254, referring to Annex B to Mr Bemba's Filing of Errors Identified in the Conviction Decision, p. 9(e).
[2199] Mr Bemba's Appeal Brief, para. 254.
[2200] Mr Bemba's Appeal Brief, para. 255.
[2201] Response, para. 523.
[2202] Response, para. 523.
[2203] Response, para. 523.

testimony and his tacit approval thereof.[2204] The second one is the evidential basis of the Trial Chamber's conclusion that Mr Bemba knew about the illicit instructions.[2205]

971. Regarding the first argument, the Appeals Chamber has already concluded[2206] that, although the Trial Chamber's reference to "implicit knowledge" may, on its face, be misleading, it must not be read in isolation, but put in its proper context. It is then clear that the Trial Chamber found that actual knowledge was established.[2207]

972. In order to properly address Mr Bemba's argument, the Appeals Chamber finds it necessary to recall the main steps of the Trial Chamber's reasoning. In paragraph 818 of the Conviction Decision, the Trial Chamber inferred from Mr Bemba's specific directions and instructions concerning testimony relating to the merits of the Main Case that his intent was to motivate the witnesses to testify to certain information, regardless of its truth or falsity or whether it accorded with the witness's personal knowledge. The Trial Chamber then noted that no direct evidence existed that Mr Bemba also directed or instructed false testimony regarding (a) the nature and number of prior contacts of the witnesses with members of his defence team in the Main Case; (b) the payments and material or non-monetary benefits that members of the defence team made, or promised to the witnesses; and/or (c) acquaintances with other individuals. The Trial Chamber concluded, nevertheless, on the basis of an overall assessment of the evidence, that it could infer that Mr Bemba at least "implicitly knew" about such instructions to the witnesses and expected Mr Kilolo to give them.[2208]

973. In paragraph 119 of the Conviction Decision, the Trial Chamber explained the basis for its inference and concluded that, along with his instructions on testimony regarding the merits of the Main Case, Mr Bemba also authorised and thereby approved, at least tacitly, instructions regarding false testimony on the three above-mentioned points (prior contacts, payments and non-monetary benefits, and

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[2204] Mr Bemba's Appeal Brief, para. 254.
[2205] Mr Bemba's Appeal Brief, para. 255.
[2206] *See supra* paras 834 *et seq.*
[2207] *See* Mr Bemba's Appeal Brief, paras 123, 254.
[2208] Conviction Decision, para. 818.

acquaintances with other individuals).[2209] It reiterated at the end of this paragraph that the Trial Chamber found that Mr Bemba knew and intended that his defence team would present false evidence to the Court.

974. Thus, contrary to what Mr Bemba seems to allege,[2210] his knowledge of these instructions was not the basis of the Trial Chamber's conclusion that he had authorised and thereby approved, at least tacitly, instructions regarding false testimony on the three aspects referred to above, regarding prior contacts of the witnesses with the Main Case defence, benefits received by or promised to them and acquaintances with other individuals. Rather, the Trial Chamber based its finding on all the considerations detailed in paragraph 819 of the Conviction Decision, which, *inter alia*, recalled the existence of the common plan, Mr Bemba's role within it and the critical importance for the success of such a plan that the influence on the witnesses be concealed. The Appeals Chamber does not identify a "pattern of flawed circular inference",[2211] as alleged by Mr Bemba, nor does it identify any other error in the Trial Chamber's reasoning.

975. Concerning the second aspect of this sub-ground of appeal, the Appeals Chamber observes that Mr Bemba merely alleges that the Trial Chamber made an error without substantiating this allegation.[2212] Accordingly, the Appeals Chamber rejects Mr Bemba's sub-ground of appeal.

(g) Other arguments related to reliance on hearsay evidence

976. Mr Bemba challenges several other findings of the Trial Chamber on the basis that they were erroneously based on hearsay evidence. The Appeals Chamber will address these arguments in turn below.

(i) Testimony of witnesses D-2, D-3 and D-6 relating to promises

977. In the context of its findings regarding each witnesses who was illicitly coached and the events leading up to their testimony, the Trial Chamber noted: (i) witness P-260 (D-2)'s testimony that Mr Kilolo gave him money and said that it "was a small

[2209] Conviction Decision, para. 819.
[2210] Mr Bemba's Appeal Brief, para. 254.
[2211] Mr Bemba's Appeal Brief, para. 254.
[2212] Mr Bemba's Appeal Brief, para. 255.

gift from Mr Bemba"; (ii) witness P-245 (D-3)'s testimony that Mr Kilolo promised that, once released from detention, Mr Bemba would meet the witnesses in Kinshasa; and (iii) an intercepted communication, in which Mr Kilolo made the same promise of a meeting with Mr Bemba to witness D-6.[2213]

978. Although Mr Bemba suggests that the Trial Chamber relied on these statements for the truth of their contents in order to assess Mr Bemba's state of mind,[2214] the Appeals Chamber finds that this argument is not made out on the facts. Based on witness P-260 (D-2)'s testimony, in conjunction with other evidence and reasoned conclusions regarding a group of witnesses, the Trial Chamber found that Mr Kilolo made payments to witnesses D-2, D-3, D-4 and D-6 to bribe them "to testify according to the instructions provided and in favour of the Main Case Defence".[2215] Based on witness P-245 (D-3)'s testimony, and intercept evidence of similar promises made to witnesses D-6 and D-55, the Trial Chamber found that "[s]ome of the witnesses were given non-monetary promises with the aim of ensuring that their testimonies were favourable to Mr Bemba".[2216] The Trial Chamber did not make findings with respect to Mr Bemba's state of mind, based on the above-mentioned testimony of witnesses P-260 (D-2) and P-245 (D-3) and the intercepted communication between Mr Kilolo and witness D-6. In particular, the Trial Chamber did not conclude, based on that evidence, that Mr Bemba had promised the witnesses money or other incentives in exchange for their testimony. Rather, the Trial Chamber's conclusions relied exclusively on the statements made by Mr Kilolo for the purpose of establishing the motivation for and context of the payments made and assurances given by the latter to the witness. Accordingly, Mr Bemba's arguments are rejected.

(ii) Intercept regarding witness Bravo

979. Mr Bemba challenges the Trial Chamber's reliance on an intercepted communication between Mr Kilolo and Mr Mangenda dated 29 August 2013, in

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[2213] Conviction Decision, paras 373-374, 406.
[2214] Mr Bemba's Appeal Brief, para. 308, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 12, 28, 29; Conviction Decision, paras 138, 139, 146, 373, 374, 380, 406, 419, 586, 692; and audio recording, CAR-OTP-0080-1332, and transcript of audio recording, CAR-OTP-0082-0562 at 0568.
[2215] Conviction Decision, para. 380.
[2216] Conviction Decision, para. 692.

which Mr Kilolo expressed concerns about the ability of a potential witness named Bravo to testify without damaging the case if he was unable to brief him every day, and Mr Mangenda indicated that he would have to inform the client, who would have to weigh up the "pros and cons" of relying on this evidence.[2217] The Trial Chamber considered that this communication, *inter alia*, showed Mr Bemba's ultimate control over who would be called to testify.[2218]

980. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to draw this conclusion on the basis of the communication between Mr Kilolo and Mr Mangenda. Their discussion demonstrates their understanding that Mr Bemba would ultimately decide whether the witness should testify and they posture themselves as advisors in this process.

981. Moreover, the Trial Chamber did not rely upon this communication alone to ultimately establish Mr Bemba's knowledge of, and involvement in, the common plan. Rather, this item of evidence was one element in the body of evidence, which also included conversations between Mr Bemba and his co-perpetrators, for the purposes of supporting the Trial Chamber's conclusions regarding his involvement and knowledge. The Appeals Chamber considers that Mr Bemba has not demonstrated any error in the Trial Chamber's reliance on the contents of the intercepted communication of 29 August 2013 or its overall conclusions. Accordingly, his arguments are rejected.

(iii) Intercept of 16 October 2013

982. Mr Bemba challenges the Trial Chamber's reliance on an intercepted communication between Mr Kilolo and Mr Mangenda that took place on 16 October 2013.[2219] In that conversation Mr Mangenda said he would explain to Mr Bemba that

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[2217] Mr Bemba's Appeal Brief, para. 290, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 3; Conviction Decision, paras 714-715, 812, 816; audio recording, CAR-OTP-0074-0997; translated transcript of audio recording, CAR-OTP-0080-0245 at 0251.
[2218] Conviction Decision, para. 715.
[2219] Mr Bemba's Appeal Brief, para. 290, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 42, referring to Conviction Decision, para. 766; audio recording, CAR-OTP-0080-1362; translated transcript of audio recording, CAR-OTP-0082-0649 at 0651.

they destroyed or did not keep evidence of payments of "the colour".[2220] Based on this evidence, the Trial Chamber was satisfied that "the co-perpetrators agreed to destroy any physical evidence of their money transactions connected with illicit coaching/bribing of witnesses in order to minimise the traceability of the illicit transactions".[2221]

983. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to conclude that there was an agreement between the co-perpetrators to destroy evidence of payments on the basis of evidence of a conversation to this effect. In the evidence in question, the two interlocutors spoke about their own actions and intentions in destroying and discarding evidence of payments. Moreover, the conduct thereby established by the Trial Chamber was consistent with its other findings regarding the criminal scheme in which the co-perpetrators were engaged. Accordingly, Mr Bemba's arguments are rejected.

(iv) Intercepted communications regarding remedial measures

984. Mr Bemba argues that the Trial Chamber relied on untested evidence and remote hearsay in its analysis of a number of intercepted communications between Mr Kilolo and Mr Mangenda, between Mr Kilolo and Mr Babala, and between Mr Kilolo and Mr Bemba concerning the article 70 investigation into their activities.[2222] The Trial Chamber, in its assessment of these intercepts, concluded "that the co-perpetrators discussed and were persuaded to take a series of measures to prevent and frustrate the Prosecution's Article 70 investigation" and that certain measures to this

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[2220] Conviction Decision, para. 767; audio recording, CAR-OTP-0080-1362; translated transcript of audio recording, CAR-OTP-0082-0649 at 0652.
[2221] Conviction Decision, para. 768.
[2222] Mr Bemba's Appeal Brief, para. 290, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision, 35, 36, 38, 40, 45, 46, referring to Conviction Decision, paras 110, 755, 774, 776, 785-788, 790, 796, 798; audio recording, CAR-OTP-0074-1031 and translated transcript of audio recording, CAR-OTP-0080-0322 at 0325 and 0327; audio recording, CAR-OTP-0074-1032 and translated transcript of audio recording, CAR-OTP-0079-1762 at 1766; audio recording, CAR-OTP-0074-1032 and translated transcript of audio recording, CAR-OTP-0079-1762 at 1764; audio recording, CAR-OTP-0080-1324 and translated transcript of audio recording, CAR-OTP-0082-1326 at 1332; audio recording, CAR-OTP-0080-1324 and translated transcript of audio recording, CAR-OTP-0082-1326 at 1336; audio recording, CAR-OTP-0080-1326 and translated transcript of audio recording, CAR-OTP-0082-0626 at 0628; audio recording, CAR-OTP-0080-1330 and translated transcript of audio recording, CAR-OTP-0082-0547 at 0548.

effect were agreed.[2223] Regarding Mr Bemba, the Trial Chamber concluded that "Mr Kilolo and Mr Mangenda updated Mr Bemba, who coordinated, gave instructions and authorised the measures implemented by his co-perpetrators".[2224]

985. The Appeals Chamber notes that the Trial Chamber based these conclusions on its analysis of call logs and intercepted communications, involving, at various times, Mr Mangenda and Mr Kilolo, and Mr Kilolo and Mr Babala, but also including conversations between Mr Kilolo and Mr Bemba himself.[2225] The Trial Chamber's analysis traced the co-perpetrators' sequential and coordinated reaction to the revelation that an article 70 investigation was underway. The Appeals Chamber notes that the communications between the different interlocutors were consistent with each other in terms of the events and reactions described. Accordingly, the Appeals Chamber finds no merit in Mr Bemba's argument that his conviction rests, to this extent, on remote hearsay and untested evidence.[2226] Therefore, his arguments are rejected.

6. Alleged error regarding payments to witnesses

(a) Relevant part of the Conviction Decision

986. The Trial Chamber was convinced that Mr Bemba was, at all times, aware of the payments, including illicit payments, effected to witnesses or other persons and of

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[2223] Conviction Decision, para. 801.
[2224] Conviction Decision, para. 801.
[2225] Conviction Decision, paras 770-772, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Mangenda of 11 October 2013, CAR-OTP-0074-1029 and CAR-OTP-0079-0198; Conviction Decision, paras 773-778, referring, *inter alia*, to audio recordings and transcripts of two conversations between Mr Kilolo and Mr Mangenda of 16 October 2013, CAR-OTP-0074-1031, CAR-OTP-0080-0322, CAR-OTP-0074-1032, and CAR-OTP-0079-1762; Conviction Decision, paras 779-781, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Babala of 17 October 2013, CAR-OTP-0080-1319 and CAR-OTP-0091-0023; Conviction Decision, paras 782-786, 792-795, referring, *inter alia*, to audio recordings and transcripts of three conversations between Mr Kilolo and Mr Bemba on 17 October 2013, CAR-OTP-0080-1320, CAR-OTP-0082-1309, CAR-OTP-0080-1321, CAR-OTP-0082-0614, CAR-OTP-0080-1325, and CAR-OTP-0082-1065; Conviction Decision, paras 787-790, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Mangenda of 17 October 2013, CAR-OTP-0080-1324 and CAR-OTP-0082-1326; Conviction Decision, para. 796, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Mangenda of 18 October 2013, CAR-OTP-0080-1326 and CAR-OTP-0082-0626; Conviction Decision, paras 797-798, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Babala of 21 October 2013, CAR-OTP-0080-1330 and CAR-OTP-0082-0547; Conviction Decision, para. 799, referring, *inter alia*, to an audio recording and transcript of a conversation between Mr Kilolo and Mr Babala of 22 October 2013, CAR-OTP-0080-1360 and CAR-OTP-0082-0596.
[2226] Mr Bemba's Appeal Brief, para. 290.

the purposes of those payments.[2227] The Trial Chamber explained that a significant body of evidence proved that Mr Kilolo, Mr Mangenda and Mr Babala would seek authorisation from, or inform, Mr Bemba before making any payment.[2228] The Trial Chamber found that "Mr Bemba was involved in this payment scheme extensively", as demonstrated by a significant body of evidence, which proved that Mr Babala, who was Mr Bemba's financier, would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons.[2229]

987. In particular, the Trial Chamber found that, on 16 October 2012, Mr Babala and Mr Bemba used coded language in their communication.[2230] The Trial Chamber considered, for example, that when saying "*la même chose comme pour aujourd'hui*" ("the same thing as for today") and "*donner du sucre aux gens*" ("to give people sugar"), Mr Babala referred to the payment of money to witness D-57's wife.[2231] The Trial Chamber found that Mr Bemba knew about money transfers to witnesses.[2232]

988. The Trial Chamber also concluded from a conversation on 21 October 2013 between Mr Kilolo and Mr Babala that the payments could not have been effected without prior authorisation of Mr Bemba.[2233]

(b) Submissions of the parties

(i) Mr Bemba

989. Mr Bemba submits that the Trial Chamber erroneously extrapolated from a "technically flawed conversation with Mr Babala"[2234] that Mr Bemba was involved in an illicit payment scheme.[2235] He challenges in particular the conclusions drawn by the Trial Chamber when it considered that the conversation of 16 October 2012 between him and Mr Babala proved his knowledge about money transfers to

[2227] Conviction Decision, para. 813.
[2228] Conviction Decision, para. 813.
[2229] Conviction Decision, para. 693.
[2230] Conviction Decision, para. 267.
[2231] Conviction Decision, paras 117, 267.
[2232] Conviction Decision, para. 267.
[2233] Conviction Decision, para. 699.
[2234] Mr Bemba's Appeal Brief, para. 256, referring to Conviction Decision, paras 693-698.
[2235] Mr Bemba's Appeal Brief, para. 256.

witnesses.[2236] Mr Bemba alleges that the "degree of inference stacking" resulted in an "unacceptably remote and unreliable conclusion".[2237] Referring to his closing submissions before the Trial Chamber,[2238] he also submits that, absent a reliable record, it was impossible to conclude that Mr Bemba knew and understood the code in the same manner as the Trial Chamber understood it.[2239]

990. Mr Bemba asserts in particular that the Trial Chamber construed the conversation exclusively in an incriminating light.[2240] He adds that the Trial Chamber erred when it found that, because Mr Bemba and Mr Babala used code language, they must have intended to conceal illicit activities regarding payments to witnesses, and that consequently, Mr Bemba must have known the illicit nature of the payments.[2241] Mr Bemba also alleges that the Trial Chamber made an error of reasoning when it inferred illicit conduct from evidence of licit conduct, *i.e.* communications that concerned general payments.[2242] Referring to his closing submissions before the Trial Chamber, Mr Bemba argues that the Trial Chamber should have considered the evidence which reflected Mr Bemba's understanding that the payments were licit or that he was side-lined on issues concerning illicit payment.[2243]

991. Regarding the alleged technical flaws of the intercepted conversations, Mr Bemba submits that the Trial Chamber erred by relying on unauthenticated, coded and de-synchronised recordings.[2244] Mr Bemba argues that the Trial Chamber did not correctly consider the issues identified in the testimony of witness D20-1 regarding discrepancies and misalignment, and that it relied on extracts of the conversation of 16 October 2012, which witness D20-1 "identified as being flawed by significant discrepancies".[2245] Mr Bemba submits that the Trial Chamber contradicted itself by interpreting the phrase "*donner du sucre*" (to give sugar) through unconnected words used elsewhere in the conversation and that it disregarded technical flaws in the

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[2236] Mr Bemba's Appeal Brief, paras 257-259, referring to Annex A to Mr Bemba's Filing of Errors Identified in the Conviction Decision and Conviction Decision, para. 267.
[2237] Mr Bemba's Appeal Brief, para. 259, referring to section 4.3.3 of his Appeal Brief.
[2238] Mr Bemba's Closing Submissions, para. 203.
[2239] Mr Bemba's Appeal Brief, para. 260.
[2240] Mr Bemba's Appeal Brief, para. 261.
[2241] Mr Bemba's Appeal Brief, para. 262.
[2242] Mr Bemba's Appeal Brief, para. 263.
[2243] Mr Bemba's Appeal Brief, para. 264.
[2244] Mr Bemba's Appeal Brief, para. 312.
[2245] Mr Bemba's Appeal Brief, paras 314-315.

recording.[2246] Mr Bemba contends that no reasonable trier of fact could have relied on Mr Babala's decontextualized and stand-alone utterances to impute knowledge to Mr Bemba or to infer his authorisation of witness payments.[2247] Mr Bemba submits that the Trial Chamber relied on select excerpts without corroboration to make key findings concerning his acts and conduct.[2248]

992. Mr Bemba also challenges the Trial Chamber's conclusions about the intercepted conversation of 21 October 2013,[2249] "during which Mr Babala asked whether Mr Kilolo, who requested the transfer of money, had 'talked' with the client".[2250] Mr Bemba submits that the vagueness of the language does not support the specific conclusions drawn by the Trial Chamber.[2251] He adds that there is evidence reflecting his opposition to the idea of payments to the witnesses.[2252]

(ii) The Prosecutor

993. Concerning the 16 October 2012 call, the Prosecutor responds that it was a natural conclusion that Mr Babala and Mr Bemba understood the expression "*donner du sucre*" ("to give sugar") to mean making payments.[2253] In addition, the Prosecutor submits that the only reasonable inference that could be drawn from the use of coded language between Mr Bemba and Mr Babala when discussing matters arising from the proceedings before the Court – which were almost invariably financial – was that those matters were illicit.[2254] Further, the Prosecutor submits that, other than the 16 October 2012 call, there is evidence showing that Mr Babala repeatedly and consistently requested Mr Bemba's authorisation for payments.[2255]

994. On the issue of technical flaws, the Prosecutor submits that the Trial Chamber was mindful of misalignment problems and relied on selected remarks by Mr Bemba and Mr Babala where they were capable of being understood on their own.[2256] The

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[2246] Mr Bemba's Appeal Brief, paras 316-318.
[2247] Mr Bemba's Appeal Brief, paras 319-324.
[2248] Mr Bemba's Appeal Brief, para. 325.
[2249] Mr Bemba's Appeal Brief, para. 265.
[2250] Conviction Decision, para. 699.
[2251] Mr Bemba's Appeal Brief, para. 265.
[2252] Mr Bemba's Appeal Brief, para. 266.
[2253] Response, para. 527.
[2254] Response, paras 527, 528, 529.
[2255] Response, para. 527.
[2256] Response, para. 551.

Prosecutor argues that the Trial Chamber did not consider Mr Babala's comments in isolation, or improperly reconstruct Mr Bemba's conversations with Mr Babala.[2257] The Prosecutor contends that, when interpreting the phrase "*donner du sucre*" ("to give sugar"), the Trial Chamber appropriately relied on the surrounding circumstances, including the evidence of payments made to D-57's wife and to D-64 on the same day when the remark was made and on the following day.[2258] The Prosecutor argues that the Trial Chamber did not improperly assume that Mr Babala uttered that remark in one continuous sequence.[2259]

995. Regarding the 21 October 2013 call between Mr Kilolo and Mr Babala, the Prosecutor submits that the Trial Chamber did not err in being "attentive"[2260] to this conversation in which Mr Babala responded to a query about the "budget" by verifying that Mr Kilolo had first spoken to "the client".[2261] The Prosecutor alleges that such evidence was not unreliable, nor was reliance upon it conditional upon calling Mr Kilolo and Mr Babala to testify.[2262]

(c) Determination by the Appeals Chamber

996. The Appeals Chamber understands Mr Bemba to challenge the reasonableness of the Trial Chamber's inference that he knew of, and was involved in, money transfers to witnesses, based on the two conversations of 16 October 2012 and 21 October 2013.[2263] He also alleges that the Trial Chamber erred in "relying on ten unauthenticated, coded and de-synchronised recordings between Mr. Bemba and Mr. Babala" to establish his involvement in the payment scheme.[2264] These arguments will be addressed in turn below.

997. Regarding the Trial Chamber's allegedly flawed inferential reasoning based on the conversations of 16 October 2012 and 21 October 2013, the Appeals Chamber notes that the conclusions that Mr Bemba seeks to challenge – namely that he was

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[2257] Response, para. 552.
[2258] Response, para. 553.
[2259] Response, para. 553.
[2260] Conviction Decision, para. 699.
[2261] Response, para. 531.
[2262] Response, para. 531.
[2263] Mr Bemba's Appeal Brief, paras 257-266, referring to Conviction Decision, paras 267, 699.
[2264] Mr Bemba's Appeal Brief, paras 312-325, referring to Conviction Decision, paras 117, 227, 267, 693, 694-698.

involved in an illicit payment scheme[2265] and that he knew about the illicit payments – were not based on these particular items of evidence alone, but on the Trial Chamber's assessment of the evidence as a whole. In the Conviction Decision, the conclusions related to payments of money and non-monetary promises to witnesses are based on the evidence of payments to a "significant number of witnesses"[2266] and "a significant body of evidence" proving that "Mr Babala […] would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons",[2267] which allowed the Trial Chamber to identify a "recurring pattern".[2268]

998. Regarding Mr Bemba's role in the payment scheme, the Trial Chamber relied "on extracts from several intercepts",[2269] on the basis of which it reached "clear"[2270] conclusions about Mr Bemba's role and relations with the other co-perpetrators. The Trial Chamber concluded that: (i) Mr Babala, who was Mr Bemba's financier, would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons;[2271] (ii) the "statements clearly demonstrate[ed] Mr Bemba's direct involvement and knowledge of the payments effected, including illicit payments to witnesses";[2272] (iii) Mr Babala also informed Mr Bemba about the status of money transactions, *inter alia*, to Mr Kilolo;[2273] (iv) Mr Bemba authorised Mr Babala to proceed with the payments of money;[2274] (v) the accused were speaking in coded languages;[2275] and (vi) the payments could not have been effected without authorisation of Mr Bemba.[2276]

999. The Trial Chamber indicated that "on the basis of an overall assessment of the evidence", it was "convinced that Mr Bemba knew that at least some of the payments

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[2265] Mr Bemba's Appeal Brief, para. 256.
[2266] Conviction Decision, para. 689.
[2267] Conviction Decision, para. 693.
[2268] Conviction Decision, para. 691.
[2269] Conviction Decision, para. 693.
[2270] Conviction Decision, para. 695.
[2271] Conviction Decision, para. 693.
[2272] Conviction Decision, para. 695.
[2273] Conviction Decision, para. 696.
[2274] Conviction Decision, para. 697.
[2275] Conviction Decision, para. 698.
[2276] Conviction Decision, para. 699.

he discussed and authorised over the phone served also illegitimate purposes".[2277] The "overall" assessment of the evidence included, but was not limited to, the 16 October 2012 conversation, which was nevertheless considered as "a prominent example".[2278]

1000. As to the conversation itself, the Appeals Chamber is not convinced by Mr Bemba's arguments and does not find the Trial Chamber's conclusion unreasonable. In this conversation, which involves Mr Bemba's "financier", and which occurred shortly before the oral testimony of the witnesses, the meaning of the coded language is clear, taking into account the context and different payments made the same day and the day after.[2279] Moreover, as the Trial Chamber explained, referring to the relevant findings elsewhere in the Conviction Decision:

> Furthermore, this finding is corroborated by the fact that Mr Bemba circumvented the ICC Detention Centre's monitoring system with regard to his telephone calls with Mr Babala by falsely listing Mr Babala's telephone number as a privileged line with Mr Kilolo. Similarly, the Chamber is convinced that Mr Bemba and Mr Babala discussed payments in coded language, as elaborated above, to conceal discussions on illegitimate payments. Mr Bemba's knowledge of illegitimate payments is further corroborated by his reaction to learning of the Article 70 investigations, for example, his suggestion to Mr Kilolo that, in the worst case scenario, he deny everything with regard to the allegations.[2280] [Footnote omitted.]

1001. As to the conversation of 21 October 2013, the Trial Chamber described it as follows:

> The 21 October 2013 conversation includes an exchange between Mr Babala and Mr Kilolo that exemplifies Mr Babala's assistance as financier and demonstrates that the accused would only make payments with Mr Bemba's approval.[2281]

1002. By alleging that the vagueness of the language used in the conversation does not support the specific conclusions drawn by the Trial Chamber,[2282] Mr Bemba states his disagreement with the conclusions of the Trial Chamber but does not show any error, nor does he explain how this part of the conversation should have been interpreted

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[2277] Conviction Decision, para. 700.
[2278] Conviction Decision, para. 700.
[2279] Conviction Decision, paras 243, 268-269.
[2280] Conviction Decision, para. 701.
[2281] Conviction Decision, para. 798.
[2282] Mr Bemba's Appeal Brief, para. 265.

differently. In addition, it is clear from the conversation that what had been decided between "the client" and Mr Kilolo is the content of the "*SMS avec un budget*" ("SMS with a budget").[2283] Mr Bemba refers to another conversation, which, in his view, reflects that he "was opposed to the idea of payments to the witnesses".[2284] The Appeals Chamber notes, however, that he does not explain how this specific extract of another conversation would demonstrate that the Trial Chamber made an error about the 21 October 2013 conversation.

1003. Turning to the alleged technical flaws in the conversations upon which the Trial Chamber relied, the Appeals Chamber notes that Mr Bemba's argument concerning witness D20-1's testimony that "it would be virtually impossible to identify discrepancies in a reliable manner"[2285] misconstrues the Trial Chamber's findings. The Trial Chamber considered the evidence of expert witness D20-1 and acknowledged on that basis that the technical irregularities in recording conversations from and to the Detention Centre were significant.[2286] However, the Trial Chamber did not consider these irregularities to be of "such a scale as to exclude the evidence from the outset" and adopted a case-by-case approach.[2287] In particular, based on the evidence of witness D20-1, the Trial Chamber noted that, although the sequence of utterances by two interlocutors is affected, nothing is missing and the sequence of utterances relating to each speaker is correct.[2288] In addition, the Trial Chamber indicated that "where discrepancies appear plausible, [it] refrained from relying on the recordings" and that "[o]therwise, […] it relied on such items only if corroborated by other evidence".[2289] Mr Bemba fails to identify an error in this case-by-case approach.

1004. Regarding Mr Bemba's argument that the Trial Chamber did not address the issues identified by expert witness D20-1 in the recording of the conversation dated 16 October 2012,[2290] the Appeals Chamber notes that expert witness D20-1 identified

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[2283] CAR-OTP-0082-0547 at 0548, lines 11-26.
[2284] Mr Bemba's Appeal Brief, para. 266.
[2285] Mr Bemba's Appeal Brief, para. 314.
[2286] Conviction Decision, para. 227.
[2287] Conviction Decision, para. 227.
[2288] Conviction Decision, para. 227, citing Transcript of 10 March 2016, ICC-01/05-01/13-T-43-Red-ENG (WT), p. 21, lines 21-23; p. 67, lines 17-22; p. 68, lines 1-4.
[2289] Conviction Decision, para. 227.
[2290] Mr Bemba's Appeal Brief, paras 315, 324.

misalignment problems in the recording[2291] and suspected that the connection was lost from the party in the right channel of the call.[2292] D20-1 testified that it was not possible to objectively determine the precise degree of misalignment.[2293] The Trial Chamber acknowledged that "[b]ecause of the problems pointed out by the expert witness D20-1, [it could not], with certainty, establish the reference point for the first part of Mr Babala's statement: *'Non, non ce n'est pas ça, il faut que cela se fasse quand même parce que c'est très important'*" ("No, it's not that, it needs to be done though because it's very important").[2294] However, the Trial Chamber found that the part of the statement containing the phrase "*donner du sucre*" ("to give sugar") "[stood] on its own and [could] be relied upon".[2295] The Appeals Chamber notes that D20-1 did not suggest that the recording was so flawed that the Trial Chamber should not rely on it at all. Furthermore, the conclusion that the statement in question, the meaning of which is quite clear and independent of preceding statements, stood alone, is consistent with the Trial Chamber's findings, based on D20-1's evidence, that nothing was missing from the recordings and that the sequence of utterances relating to individual speakers was correct.[2296]

1005. The Appeals Chamber is not persuaded by Mr Bemba's argument that it is impossible to ascertain whether Mr Babala uttered the words "[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") "as one continuous sequence, or whether the second part was uttered in response to a separate topic".[2297] Although it was aware of the technical problems with the recordings, the Trial Chamber was satisfied that this utterance was continuous and could be logically interpreted as referring to the context of payments made at the time. The Appeals

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[2291] Transcript of 10 March 2016, ICC-01/05-01/13-T-43-Conf-ENG (ET), p. 37, lines 9-10, referring to audio recording, CAR-OTP-0074-0610.
[2292] Transcript of 10 March 2016, ICC-01/05-01/13-T-43-Conf-ENG (ET), p. 38, lines 16-18, referring to audio recording, CAR-OTP-0074-0610.
[2293] Transcript of 10 March 2016, ICC-01/05-01/13-T-43-Conf-ENG (ET), p. 39, lines 18-21, referring to audio recording, CAR-OTP-0074-0610.
[2294] Conviction Decision, para. 267, referring to audio recording, CAR-OTP-0074-0610; translated transcript of audio recording, CAR-OTP-0077-1299.
[2295] Conviction Decision, para. 267, referring to audio recording, CAR-OTP-0074-0610; translated transcript of audio recording, CAR-OTP-0077-1299.
[2296] Conviction Decision, para. 227, citing Transcript of 10 March 2016, ICC-01/05-01/13-T-43-Red-ENG (WT), p. 21, lines 21-23; p. 67, lines 17-22; p. 68, lines 1-4.
[2297] Mr Bemba's Appeal Brief, para. 317.

Chamber finds that Mr Bemba does not demonstrate any error in the Trial Chamber's interpretation of or reliance on this excerpt of the conversation between Mr Babala and him. In particular, Mr Bemba does not show how the statement in question should be read other than in the sequence in which it appears in the transcript of the recording, nor does he show to which other topic it may refer.

1006. The Appeals Chamber further notes that, contrary to Mr Bemba's argument,[2298] the Trial Chamber relied also on corroborating evidence to determine the meaning of the phrase "*donner du sucre*" ("to give sugar"), consistent with its approach to the recordings, based on the recommendations of expert witness D20-1. It found that, on the day when the phrase was uttered, Mr Babala had transferred USD 665 to the bank account of D-57's wife[2299] and that "on 17 October 2012, one day after Mr Babala's *'donner du sucre'* remark and the day D-64 travelled to The Hague, Mr Babala's employee, P-272, transferred USD 700 in two transactions, at 11:48 and 12:41 (local time) to D-64's daughter on Mr Babala's behalf".[2300]

1007. In view of the foregoing, the Appeals Chamber finds that Mr Bemba has not demonstrated that the Trial Chamber erred in relying on conversations from and to the Detention Centre, despite technical irregularities in the recordings. Furthermore, Mr Bemba has not demonstrated that the Trial Chamber erred in relying on the recording of the conversation dated 16 October 2012 to conclude that Mr Babala uttered the phrase "*donner du sucre*" ("to give sugar") and in its interpretation of that phrase. In light of this finding, the Appeals Chamber does not find it necessary to address Mr Bemba's arguments regarding the alleged prejudice caused by reliance on the recorded conversations from and to the detention centre.[2301]

1008. Accordingly, the Appeals Chamber rejects this sub-ground of appeal.

[2298] Mr Bemba's Appeal Brief, para. 325.
[2299] Conviction Decision, para. 243.
[2300] Conviction Decision, para. 268.
[2301] Mr Bemba's Appeal Brief, paras 318-322.

7. Alleged error regarding remote evidence from perjured witnesses

(a) Relevant part of the Conviction Decision

1009. The Trial Chamber found that, "upon Mr Kilolo's request, Mr Arido, together with Mr Kokaté, recruited D-2 [and] D-3 […] as witnesses for the Main Case Defence".[2302] Based on its assessment of the evidence, the Trial Chamber was satisfied that Mr Kilolo had instructed and illicitly coached witnesses D-2 and D-3 on aspects of their testimony before Trial Chamber III, and that these witnesses had subsequently provided false testimony in relation to certain issues.[2303] It found that Mr Kilolo had promised the witnesses a sum of money and paid most of this shortly before their testimony "as an encouragement to testify in Mr Bemba's favour", and had promised D-3 that Mr Bemba would meet him in Kinshasa once released, in order to express his gratitude.[2304]

(b) Submissions of the parties

(i) Mr Bemba

1010. Mr Bemba contends that the Trial Chamber abused its discretion by accepting P-260 (D-2) and P-245 (D-3)'s testimony at "face value", given that both had lied under oath in the Main Case and agreed to testify in favour of the Prosecutor under threat of prosecution.[2305] He also submits that the witnesses contradicted each other in relation to the promise of relocation.[2306]

1011. Mr Bemba argues that the Trial Chamber's own findings undercut the notion that money was paid to D-2 and D-3 with the knowledge of, or pursuant to a common plan with, Mr Bemba.[2307] He refers, in particular, to the Trial Chamber's findings that Mr Arido promised D-2 money in exchange for his testimony, and that Mr Kilolo agreed to pay the money promised after Mr Arido had absconded, but was not aware that the witnesses were lying during the February 2012 meeting.[2308] He argues that there was no evidence to corroborate P-260 (D-2)'s testimony that Mr Kilolo gave

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[2302] Conviction Decision, para. 420.
[2303] Conviction Decision, paras 412-413, 416-417
[2304] Conviction Decision, para. 419.
[2305] Mr Bemba's Appeal Brief, paras 298-299, 306.
[2306] Mr Bemba's Appeal Brief, para. 300.
[2307] Mr Bemba's Appeal Brief, paras 301-302.
[2308] Mr Bemba's Appeal Brief, paras 301-302.

him money and informed him that it was a gift from Mr Bemba.[2309] He submits that P-245 (D-3) had testified to the contrary that witnesses had been told that they would not receive money from Mr Bemba as his assets had been frozen.[2310]

1012. Mr Bemba asserts that the Trial Chamber relied on "speculative remote hearsay" that Mr Bemba must have discussed this payment with Mr Kilolo before the latter spoke to D-2.[2311] Regarding the Trial Chamber's finding that Mr Kilolo informed the witness D-3 that he would meet Mr Bemba in Kinshasa once the latter was released from detention, Mr Bemba argues that this was based on remote hearsay evidence that was not corroborated.[2312] He further submits that there is nothing illicit in meeting a witness after their testimony.[2313]

(ii) The Prosecutor

1013. The Prosecutor responds that the Trial "Chamber did not err in relying on the evidence of D-2 and D-3 merely because they testified falsely" in the Main Case.[2314] She contends that the testimony of these witnesses constitutes "accomplice evidence" and that "a chamber may rely on such evidence even in the absence of corroboration".[2315] She contends that the Trial Chamber carried out its credibility assessment appropriately, taking into account the fact that the witnesses had previously lied, but observing also that they "did not distance themselves from these lies", and assessing also "a variety of other factors", none of which are addressed by Mr Bemba.[2316]

1014. The Prosecutor submits that Mr Bemba "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".[2317] She contends that his arguments that the witnesses contradicted each other are unsupported.[2318]

[2309] Mr Bemba's Appeal Brief, para. 303.
[2310] Mr Bemba's Appeal Brief, para. 303.
[2311] Mr Bemba's Appeal Brief, para. 304.
[2312] Mr Bemba's Appeal Brief, para. 305.
[2313] Mr Bemba's Appeal Brief, para. 305.
[2314] Response, para. 554.
[2315] Response, para. 554.
[2316] Response, para. 554.
[2317] Response, para. 555.
[2318] Response, para. 555.

1015. The Prosecutor contends that Mr Bemba's arguments that the Trial Chamber erred in relying on the witnesses' testimony regarding inducements to testify that allegedly emanated from him should be dismissed because they were not "central to the Chamber's determination concerning Bemba's criminal responsibility".[2319]

(c) Determination by the Appeals Chamber

1016. The Appeals Chamber understands Mr Bemba to be raising errors regarding: (i) the Trial Chamber's credibility assessment of witnesses P-260 (D-2) and P-245 (D-3); (ii) allegedly contradictory aspects of the witnesses' testimony that were relied upon by the Trial Chamber to establish their credibility; (iii) discrete aspects of the Trial Chamber's findings regarding the coaching of the two witnesses that were purportedly contradictory; and (iv) the Trial Chamber's inferences regarding Mr Bemba's responsibility for the illicit coaching of the two witnesses, which were purportedly based on "speculative remote hearsay" or the implication that Mr Kilolo must have discussed the promises he made to the witnesses with Mr Bemba in advance. These arguments will be addressed in turn below.

(i) Credibility assessments of witnesses P-260 (D-2) and P-245 (D-3)

1017. Mr Bemba's first argument is that the Trial Chamber erred in taking the testimony of witnesses P-260 (D-2) and P-245 (D-3) "at face value" without giving "due weight" to the fact that D-2 and D-3 had lied under oath.[2320]

1018. The Appeals Chamber notes that the Trial Chamber, when addressing the accused's challenges at trial that the concerned witnesses were not credible as they had previously lied under oath and that corroboration was therefore required, stated that "the question to what extent corroboration is needed is a matter of assessing the evidence and cannot be ruled upon in the abstract".[2321] Elsewhere in the Conviction Decision, the Trial Chamber further held that "no witness is *per se* unreliable, including a witness that has previously given false testimony before a court".[2322]

[2319] Response, para. 557.
[2320] Mr Bemba's Appeal Brief, para. 306.
[2321] Conviction Decision, para. 25.
[2322] Conviction Decision, para. 202.

1019. The Appeals Chamber sees no error in these holdings of the Trial Chamber. The Appeals Chamber considers that trial chambers have a significant degree of discretion in considering all types of evidence.[2323] Nothing in the Statute, the Rules, or the Regulations prohibits a trial chamber from relying on the testimony of certain categories of witnesses. In the Appeals Chamber's view, whether a particular witness is considered credible will depend on a case-by-case assessment of the evidence, in light of all relevant circumstances. While the fact that a witness is known to have previously given false testimony before a court is one of such relevant circumstances that a trial chamber shall duly consider when assessing the reliability of the concerned witness's testimony, this fact does not necessarily mean that his or her testimony should be automatically excluded,[2324] or that the witness's evidence is *per se* unreliable.

1020. In the present case, the Trial Chamber set out its approach to the assessment of the reliability of testimonial evidence as follows:

> [T]he Chamber bore in mind the individual circumstances of the witness, including his or her relationship to the accused, age, the provision of assurances against self-incrimination, bias against the accused, and/or motives for telling the truth. At the outset, the Chamber emphasises that no witness is *per se* unreliable, including a witness that has previously given false testimony before a court. Instead, each statement made by a witness must be assessed individually. The testimony of one and the same witness may therefore be reliable in one part, but not reliable in another.[2325] [Footnote omitted.]

1021. A review of the Trial Chamber's individual credibility analysis for witnesses P-260 (D-2) and P-245 (D-3) also shows that the evidence given by each of these witnesses was indeed examined by the Trial Chamber with due attention to the particular circumstances involved. The Trial Chamber considered, *inter alia*: (i) the fact that witnesses P-260 (D-2) and P-245 (D-3) testified after having been given assurances under rule 74 of the Rules;[2326] (ii) witnesses P-260 (D-2)'s and P-245 (D-3)'s admissions regarding their conduct in the Main Case that would cast them in a

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[2323] *See* article 69 of the Statute. *See also e.g.* *Lubanga* Decision on admissibility of four documents, para. 24 (emphasis added).
[2324] Mr Bemba's Appeal Brief, paras 298 *et seq*.
[2325] Conviction Decision, para. 202.
[2326] Conviction Decision, paras 307, 312.

disadvantageous light;[2327] and (iii) the extent to which inconsistencies or discrepancies in their testimonies were explained.[2328] This detailed and frank account of the challenges to witnesses P-260 (D-2)'s and P-245 (D-3)'s credibility indicates that the Trial Chamber considered carefully all necessary factors, including the witnesses' admission that they gave false testimony in the Main Case, and the potential risks generally associated with their testimony.

1022. The same considerations apply with respect to Mr Bemba's second argument that the Trial Chamber failed to take into account information that of witnesses P-260 (D-2)'s and P-245 (D-3) "[had] received a promise from the Prosecution that they would not be prosecuted if they agreed to testify against Mr. Bemba et al".[2329] As noted above, among the factors considered by the Trial Chamber in its assessment of the credibility of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence, the Trial Chamber duly considered the fact that the witnesses testified under assurances against self-incrimination provided by this Court. Whether such assurances had already been provided by the Prosecutor in terms of "promises" or were only given by the Trial Chamber under rule 74 of the Rules when the witnesses appeared to testify in court in the present case is immaterial in this context. The fact remains that the Trial Chamber in its assessment of the credibility of witnesses P-260 (D-2)'s and P-245 (D-3) took into account that the two witnesses testified in the present case under the assurance that their testimony would not be used to prosecute them for any offence they might have committed in the Main Case.

1023. The Appeals Chamber recalls that the Trial Chamber has the primary role in assessing the credibility of witnesses and the reliability of their evidence. In carrying out this assessment, the Trial Chamber has the advantage of having observed the witnesses in person and so is better positioned than the Appeals Chamber to evaluate their testimony. Thus, when reviewing the Trial Chamber's credibility assessments, the Appeals Chamber will not easily disturb the Trial Chamber's findings unless it is demonstrated that no reasonable trier of fact could have reach this factual finding.[2330] The Appeals Chamber is of the view that Mr Bemba's arguments do not demonstrate

[2327] Conviction Decision, paras 308, 313.
[2328] Conviction Decision, para. 308. *See also* para. 315.
[2329] Mr Bemba's Appeal Brief, paras 299-300.
[2330] *See supra* para. 98.

that the the Trial Chamber's assessment of the credibility of witnesses P-260 (D-2) and P-245 (D-3) was unreasonable. Mr Bemba's arguments in this regard are thus rejected.

(ii) Purportedly contradictory aspects of the witnesses' testimony or the Trial Chamber's findings

1024. Mr Bemba also points to a purported contradiction in the Trial Chamber's credibility assessment of witnesses P-260 (D-2)'s and P-245 (D-3).[2331] He argues that the Trial Chamber found P-245 (D-3)'s description of Mr Kilolo's promises of relocation to be credible because it was detailed and corroborated by P-260 (D-2), while, in apparent contradiction, it found witness P-260 (D-2) to be credible because he acknowledged that Mr Kilolo had *not* promised relocation.[2332]

1025. Having considered the relevant aspects of the Trial Chamber's analysis, the Appeals Chamber finds that Mr Bemba's arguments misrepresent the Conviction Decision. In particular, it notes that, in the cited portions of the Conviction Decision, the Trial Chamber did not indicate that Mr Kilolo had promised relocation. Rather, the Trial Chamber found that both witness P-260 (D-2) and witness P-245 (D-3) provided a consistent description of a meeting in the course of which a group of witnesses had expressed their dissatisfaction with Mr Kilolo for having failed to accede to previous promises of payments and relocation.[2333] From the subsequent analysis of the chronology of events involving these two witnesses, it is clear that the witnesses testified that the promises of relocation had emanated from Mr Arido rather than Mr Kilolo.[2334] The Appeals Chamber can find no contradiction in the Trial Chamber's analysis. Accordingly, Mr Bemba's arguments are rejected.

(iii) Purportedly contradictory aspects of the Trial Chamber's findings

1026. Mr Bemba also argues that the witnesses were originally promised money by Mr Arido in exchange for their testimony, that this initial agreement excluded the defence, and that, "after Mr Arido absconded, Mr Kilolo agreed to pay it on the spot

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[2331] Mr Bemba's Appeal Brief, para. 300, fn. 619.
[2332] Mr Bemba's Appeal Brief, para. 300, fn. 619.
[2333] Conviction Decision, para. 314.
[2334] Conviction Decision, paras 344, 349, 372.

to calm the witnesses down".[2335] The Appeals Chamber considers Mr Bemba's argument in this respect to be based on a selective reading of the Conviction Decision and, therefore, misleading. Trial Chamber provided a detailed chronology of events leading to the testimony of witnesses D-2 and D-3 in the Main Case, which included their initial contact and interaction with Mr Arido,[2336] their initial meeting with Mr Kilolo, during which, according to the Trial Chamber, he had not given instructions to the witnesses, or promised payments or relocation,[2337] and their subsequent interactions, in the course of which Mr Kilolo had given instructions regarding the witnesses' testimony, and made payments and distributed telephones to allow contact with the witnesses to continue after the VWU took away their personal telephones.[2338] Mr Bemba's arguments ignore much of this evidentiary analysis and do not demonstrate any error in the Trial Chamber's overall conclusions regarding Mr Kilolo's involvement. Accordingly, his arguments are dismissed.

(iv) Inferences regarding Mr Bemba's responsibility

1027. Mr Bemba seems to suggest that the Trial Chamber found that he knew about or discussed Mr Kilolo's promises to the witnesses in advance on the basis of witnesses P-260 (D-2) and P-245 (D-3)'s testimony relaying what Mr Kilolo had purportedly told them on behalf of Mr Bemba.[2339] He also suggests that, from the perspective of his responsibility, "the point was not whether Mr. Kilolo said this […], but rather whether he did so because Mr. Bemba was aware of the payment, and intended for Mr. Kilolo to say this".[2340]

1028. The Appeals Chamber considers that Mr Bemba's arguments misconceive the Trial Chamber's findings in relation to the various co-perpetrators' involvement with witnesses D-2 and D-3. The Appeals Chamber notes that the Trial Chamber did not expressly allude to MR Bemba's involvement in its overall conclusions regarding the illicit coaching of these two witnesses.[2341] It noted only that Mr Kilolo had promised money "as an encouragement to testify in Mr Bemba's favour" and that he had

[2335] Conviction Decision, paras 301-302.
[2336] Conviction Decision, paras 320-352.
[2337] Conviction Decision, paras 348-350.
[2338] Conviction Decision, paras 353-411.
[2339] Conviction Decision, paras 302, 304-305.
[2340] Conviction Decision, para. 304.
[2341] Conviction Decision, paras 412-421.

promised D-3 that Mr Bemba would meet him in Kinshasa once released "to express his gratitude".[2342] The Trial Chamber does not appear to have inferred that Mr Bemba knew or was involved with the illicit coaching of the two witnesses on the basis of these statements.

1029. The Appeals Chamber considers that Mr Bemba also misconceives the Trial Chamber's findings regarding his criminal responsibility as a co-perpetrator and the relationship between his responsibility and the conduct of his co-perpetrators in relation to the two witnesses. The Trial Chamber considered the "concerted actions" of Mr Bemba, Mr Kilolo, and Mr Mangenda to infer the existence of a common plan pursuant to which they "jointly committed the offences of corruptly influencing the 14 witnesses".[2343] It did not carry out an individual assessment of whether each of the co-perpetrators played a role in the illicit coaching of each individual witness. Rather, it inferred the co-perpetrators' involvement in the common plan regarding the 14 witnesses from its evidentiary assessment of their individual contributions to the commission of offences and the execution of the plan. Mr Bemba has not demonstrated any error in this approach. Accordingly, his arguments are rejected.

8. Errors in findings on concealing illicit activities

(a) Errors concerning the use of coded language

(i) Relevant part of the Conviction Decision

1030. The Trial Chamber found that the co-perpetrators "adopted a series of measures with a view to ensuring that their illicit activities took place undisturbed and undetected, such as […] the use of coded language".[2344] The Trial Chamber further found that "the measures taken throughout the Main Case proceedings, as well as the remedial measures taken to counter the Article 70 investigations into the co-perpetrators […] demonstrate that Mr Bemba knew that the coaching activity and the payments to witnesses were illicit".[2345]

[2342] Conviction Decision, para. 419.
[2343] Conviction Decision, paras 681-682.
[2344] Conviction Decision, para. 803.
[2345] Conviction Decision, para. 820.

(ii) Submissions of the parties

(a) Mr Bemba

1031. Mr Bemba submits that it is "question-begging to infer that Mr. Bemba knew that he was engaged in illicit activity because he used codes, and that he used codes because he knew that he was engaged in illicit activity".[2346] Mr Bemba further argues that the Trial Chamber "failed to accord due weight to Defence arguments concerning prior use of coded language" to achieve privacy.[2347] He submits that the Trial Chamber failed to provide a reasoned opinion with respect to his arguments and evidence regarding the meaning of the codes.[2348]

(b) The Prosecutor

1032. The Prosecutor submits that Mr Bemba shows no error in the Trial Chamber's reasoning and that his disagreement is inconsistent with that reasoning.[2349] The Prosecutor argues that Mr Bemba's position regarding the use of codes does not engage with the substance.[2350] The Prosecutor submits that, contrary to Mr Bemba's submission, the Conviction Decision expressly considered and rejected his claim that he had had a pattern of using codes to discuss non-illicit activity.[2351]

(iii) Determination by the Appeals Chamber

1033. Mr Bemba's argument that the Trial Chamber's inferences are "question-begging"[2352] is unclear. He fails to explain why those inferences are "question-begging" and how the Trial Chamber erred in relying on its finding that Mr Bemba engaged in concealing the illicit activities to establish that he knew that they were illicit. This argument is dismissed for failing to identify an error.

1034. Mr Bemba further argues that the Trial Chamber failed to accord due weight to his arguments concerning prior use of coded language.[2353] The Trial Chamber,

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[2346] Mr Bemba's Appeal Brief, para. 269 (emphasis in original).
[2347] Mr Bemba's Appeal Brief, para. 270.
[2348] Mr Bemba's Appeal Brief, para. 271.
[2349] Response, paras 533-534.
[2350] Response, para. 534.
[2351] Response, para. 534.
[2352] Mr Bemba's Appeal Brief, para. 269.
[2353] Mr Bemba's Appeal Brief, para. 270.

however, considered those arguments and found that they could not be sustained.[2354] Mr Bemba does not explain why this was an erroneous conclusion. He merely repeats what he argued at trial regarding conclusions to be drawn from the evidence he had presented. The Appeals Chamber reiterates that "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 of the evidence".[2355] This argument of Mr Bemba is therefore dismissed.

1035. Regarding Mr Bemba's argument that the Trial Chamber failed to provide a reasoned opinion with respect to his arguments regarding the meaning of the codes,[2356] the Appeals Chamber notes that Mr Bemba does not identify any findings of the Trial Chamber that are impacted by this alleged failure, nor does he explain why the alleged failure to provide a reasoned opinion would invalidate any such findings. This argument is dismissed.

1036. Accordingly, Mr Bemba's arguments regarding the use of coded language are dismissed.

(b) Errors regarding findings on the use of the privileged line at the detention centre

(i) Relevant part of the Conviction Decision

1037. The Trial Chamber found that, "in order to cover up the witness interference, the co-perpetrators took precautionary measures when illicitly coaching the witnesses".[2357] The measures included "the circumvention of the Registry's monitoring system at the Detention Centre through the abuse of the Registry's privileged line".[2358] The Trial Chamber found that Mr Bemba "directed the commission of the offences […] using his privileged line with his counsel to talk unmonitored" with Mr Kilolo, Mr Mangenda and Mr Babala, as well as with witnesses.[2359]

[2354] Conviction Decision, paras 748-749.
[2355] *Lubanga* Appeal Judgment, para. 33.
[2356] Mr Bemba's Appeal Brief, para. 271.
[2357] Conviction Decision, para. 735.
[2358] Conviction Decision, para. 735.
[2359] Conviction Decision, para. 737.

(ii) Submissions of the parties

(a) Mr Bemba

1038. Mr Bemba submits that the Trial Chamber's findings regarding two multi-party calls with witness D-19 are based on "a clear error of evidence" and an arbitrary inference.[2360] He argues that the Trial Chamber relied on a non-existent telephone call and failed to give due weight to the testimony of witness P-361 regarding the impossibility of determining "whether a particular overlapping contact is a conference call".[2361] Mr Bemba submits that the Trial Chamber's reliance on the length of the overlap was arbitrary.[2362] He argues that the Trial Chamber failed to consider "evidence concerning the special circumstances in which [he] was in contact with his legal team from the Detention Unit, the related difficulty of reinitiating a call if cut off" and examples of Mr Bemba "being placed on hold, and occupying himself with other activities".[2363] Mr Bemba contends that the Trial Chamber's inference that he contacted Mr Babala through Mr Kilolo's number is speculative.[2364] Mr Bemba argues that the Trial Chamber failed to provide a reasoned opinion in relation to alternative inferences with respect to the finding that a number registered to Mr Kilolo was actually Mr Babala's number.[2365] Regarding the finding that Mr Babala was the exclusive user of that number, Mr Bemba submits that the Trial Chamber failed to address his "arguments that the label of a number did not necessarily designate the user".[2366]

(b) The Prosecutor

1039. The Prosecutor argues that the Trial Chamber made a harmless error regarding the date of the multi-party telephone call between Mr Bemba and witness D-19.[2367] With respect to the finding that Mr Bemba would not be on hold for 17 minutes, the Prosecutor submits that the Trial Chamber might reasonably draw the distinction

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[2360] Mr Bemba's Appeal Brief, para. 273.
[2361] Mr Bemba's Appeal Brief, paras 274-275.
[2362] Mr Bemba's Appeal Brief, para. 276.
[2363] Mr Bemba's Appeal Brief, para. 277.
[2364] Mr Bemba's Appeal Brief, para. 278.
[2365] Mr Bemba's Appeal Brief, para. 279.
[2366] Mr Bemba's Appeal Brief, para. 280.
[2367] Response, para. 536, referring to paras 461-462, 517.

between that telephone call and other calls.[2368] The Prosecutor contends that the argument that the Trial Chamber disregarded witness P-361's testimony is manifestly incorrect.[2369] Regarding the argument that the Trial Chamber failed to consider certain evidence, the Prosecutor submits that the Trial Chamber is not under the obligation to justify its findings in relation to every submission.[2370] The Prosecutor contends that Mr Bemba does not show any error in the Trial Chamber's finding that he used the privileged line to talk to Mr Babala.[2371]

(iii) Determination by the Appeals Chamber

1040. Regarding Mr Bemba's argument that the Trial Chamber relied on a non-existent multi-party telephone call involving Mr Bemba, Mr Kilolo and witness D-19 on 4 October 2012,[2372] the Appeals Chamber notes that, in the paragraph discussing this multi-party telephone call, the Trial Chamber was indeed mistaken as to the date on which this call took place.[2373] In the opening sentence of this paragraph, the Trial Chamber referred to a telephone call on 4 October 2012; reference to that date is made three more times in this paragraph.[2374] However, the second sentence of this paragraph and the supporting footnotes refer to 13 January 2013 as the date of the telephone call.[2375] Furthermore, the references to "the above-cited call" and the discussion in the preceding paragraph suggest that some of the references to the call on 4 October 2012 are in fact to a call made on 5 October 2012.[2376] Having reviewed the underlying evidence cited by the Trial Chamber, the Appeals Chamber concludes that the multi-party telephone call between Mr Bemba, Mr Kilolo and witness D-19 took place on 13 January 2013 and not on 4 October 2012. The first and the fourth of the references to the call on 4 October 2012 appearing in that paragraph of the Conviction Decision should therefore read "13 January 2013", whereas the second

[2368] Response, para. 536.
[2369] Response, para. 537.
[2370] Response, para. 538, citing *Kvočka et al.* Appeal Judgment, para. 23.
[2371] Response, para. 539.
[2372] Mr Bemba's Appeal Brief, para. 274.
[2373] Conviction Decision, para. 741.
[2374] Conviction Decision, para. 741.
[2375] Conviction Decision, para. 741, fns 1697, 1698, referring to CAR-OTP-0072-0391.
[2376] Conviction Decision, para. 740.

and the third reference should read "5 October 2012". The two latter references are to a telephone call involving witness D-55.[2377]

1041. However, the Appeals Chamber is of the view that the Trial Chamber's mistake does not have any impact on its findings, as the exact dates on which the telephone call took place were irrelevant in this context. The Trial Chamber invoked the evidence of this and another multi-party call to assess Mr Bemba's ability to communicate directly with third parties while in contact with Mr Kilolo. To the extent that the Trial Chamber found, seemingly based on the telephone call between Mr Bemba, Mr Kilolo and witness D-19, that Mr Kilolo had, "the technical abilities as well as the idea for such a multi-party call in mind as early as 4 October 2012",[2378] the Trial Chamber's error is also inconsequential. As discussed above, this sentence in fact refers to the multi-party telephone call between Mr Bemba, Mr Kilolo and witness D-55 on 5 October 2012.[2379] The difference of one day is clearly insignificant as regards the Trial Chamber's finding in respect of Mr Kilolo's ability and idea to carry out multi-party telephone calls between him, Mr Bemba and witnesses in early October 2012. The Appeals Chamber therefore rejects the argument of Mr Bemba regarding the Trial Chamber's reliance on the allegedly non-existent telephone call.

1042. As regards the Trial Chamber's alleged failure to give due weight to the testimony of witness P-361,[2380] the Appeals Chamber notes that the portions of that testimony relied upon by Mr Bemba concern a distinction between a multi-party call and call waiting. The witness testified that when call data records disclose overlapping time frames, it cannot be derived from those records whether it was a multi-party call or one of the parties was placed on hold.[2381] The Trial Chamber considered the evidence of witness P-361. It indicated that the witness "gave evidence on how to read and understand [the call] logs".[2382]

[2377] *See* Conviction Decision, para. 740.
[2378] Conviction Decision, para. 741.
[2379] Conviction Decision, para. 740.
[2380] Mr Bemba's Appeal Brief, para. 274.
[2381] Transcript of 9 October 2015, ICC-01/05-01/13-T-17-Red2 (WT), p. 24, lines 6-9; p. 26, lines 15-18; p. 42, line 25 to p. 43, line 3.
[2382] Conviction Decision, para. 216, fn. 227.

1043. The reasoning of the Trial Chamber regarding multi-party calls is consistent with witness P-361's testimony, which further confirms that the Trial Chamber attached weight to that testimony. In particular, the Trial Chamber analysed the length of overlapping time frames and distinguished overlaps of three, nine and ten minutes[2383] from an overlap of seventeen minutes.[2384] With respect to the shorter overlaps, the Trial Chamber found, consistent with the evidence of witness P-361, that they were not long enough to exclude the possibility that one of the speakers was put on hold.[2385] The longest overlap led the Trial Chamber to conclude, on the basis of the substantial length of that overlap, that it was a multi-party call.[2386] This is also consistent with the evidence of witness P-361, who testified that "[t]here's no way other than examining overlapping time frames to determine whether […] the first person was put on hold".[2387] Furthermore and in view of the foregoing, Mr Bemba does not substantiate his claim that the Trial Chamber's reliance on the length of overlapping time frames was arbitrary.[2388]

1044. Mr Bemba's reliance on the evidence of witness P-361 to argue that "Mr. Bemba was willing to endure call waiting and disrupted phone activity for a total duration of over 15 minutes"[2389] is misplaced. The witness gave expert testimony "on how to read and understand [the call] logs",[2390] rather than on whether Mr Bemba was willing to endure call waiting for a given amount of time. Furthermore, Mr Bemba does not provide any basis for his claim that, during the telephone call to which he refers in support of his argument, he was put on hold for 15 minutes. It is thus unclear how the evidence of this particular call contradicts or undermines the Trial Chamber's findings with respect to other calls.

1045. Contrary to Mr Bemba's argument,[2391] the Trial Chamber did consider the existence of other reasonable inferences, which the evidence of P-361 supported. It is

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[2383] Conviction Decision, paras 742-745.
[2384] Conviction Decision, para. 741.
[2385] Conviction Decision, paras 742-475.
[2386] Conviction Decision, para. 741.
[2387] Transcript of 9 October 2015, ICC-01/05-01/13-T-17-Red2 (WT), p. 25, lines 6-7.
[2388] Mr Bemba's Appeal Brief, para. 276.
[2389] Mr Bemba's Appeal Brief, para. 276.
[2390] Conviction Decision, para. 216, fn. 227. *See* Transcript of 9 October 2015, ICC-01/05-01/13-T-17-Red2 (WT), p. 26, lines 15-18.
[2391] Mr Bemba's Appeal Brief, para. 275.

for that reason that the Trial Chamber found itself unable to conclude that the shorter overlapping time frames were indicative of a multi-party call. It entered such a finding only with respect to a shorter overlapping time frame where evidence other than call data records supported the conclusion that it was a multi-party call.[2392]

1046. As regards Mr Bemba's argument that the Trial Chamber failed to consider evidence of the special circumstances in which he was in contact with his legal team, the difficulty in reinitiating a call if cut off and examples of Mr Bemba being put on hold,[2393] the Appeals Chamber notes that he does not explain why this evidence should have been considered. The relevance of this evidence is not apparent.

1047. The Appeals Chamber therefore rejects Mr Bemba's argument that the Trial Chamber failed to give due weight to the testimony of witness P-361 and distinguished longer overlapping time frames from shorter ones in an arbitrary manner. He has not demonstrated that the Trial Chamber made a finding which no reasonable trier of fact would have made.

1048. Mr Bemba further argues that the Trial Chamber failed to provide a reasoned opinion in relation to evidence which, in his view, is relevant to the Trial Chamber's finding that Mr Bemba used the privileged line to talk to Mr Babala on a telephone number indicated as belonging to Mr Kilolo.[2394] The Appeals Chamber notes that to make the finding in issue the Trial Chamber relied on the contact list forensically extracted from the cell phone of Mr Kilolo,[2395] where Mr Babala's name appears and is linked to the disputed number.[2396] The Trial Chamber specifically addressed arguments made by Mr Babala regarding the ownership of the SIM card from which that contact list was extracted, to conclude that the evidence was sufficient to establish Mr Kilolo's ownership.[2397] It also addressed the argument of Mr Babala that calls were forwarded between the disputed number and another number of Mr Kilolo.[2398]

[2392] Conviction Decision, para. 740.
[2393] Mr Bemba's Appeal Brief, para. 277.
[2394] Mr Bemba's Appeal Brief, para. 279.
[2395] Conviction Decision, para. 738.
[2396] CAR-OTP-0090-1872, at 1873.
[2397] Conviction Decision, para. 739.
[2398] Conviction Decision, para. 739.

1049. The Appeals Chamber notes that the relevance of the evidence cited by Mr Bemba in support of his present argument is not apparent. He only lists a number of pieces of evidence and briefly summarises their content to argue that "alternative inferences" derive from them and the Trial Chamber should have provided a reasoned opinion in relation to them. The Appeals Chamber notes that, although the Trial Chamber has an obligation to provide a reasoned opinion,[2399] it is not required to individually set out each and every factor that was before it provided that it indicates with sufficient clarity the basis of the decision.[2400] As discussed above, the Trial Chamber did indicate with clarity the basis of its finding, including by addressing contrary arguments of Mr Babala. Mr Bemba has not demonstrated that the evidence cited by him was so significant to the Trial Chamber's findings that the Trial Chamber's failure to address it amounts to an error.

1050. Mr Bemba further argues that "no reasonable Chamber could infer [from an undated contact] list, that this established that Mr. Babala was the exclusive user of the number on the relevant dates in 2012".[2401] In support of his submission, he refers to another entry on this undated list which pairs the name "'Bemba kokate Ukraine Peter' […] with the number of a person who is not 'Bemba', 'Kokate' or 'Peter'".[2402] However, the Appeals Chamber considers this entry to be ambiguous, unlike the entry concerning Mr Babala. The Appeals Chamber is therefore not persuaded that the inclusion on the contact list of that number undermines the Trial Chamber's finding regarding the attribution of a number to Mr Babala so as to render that finding unreasonable.

1051. Accordingly, the Appeals Chamber rejects all Mr Bemba's arguments regarding the Trial Chamber's finding that he exploited his privileged line at the ICC Detention Centre.

[2399] *Lubanga* Appeal Judgment, para. 24, quoting *Kupreškić et al.* Appeal Judgment, para. 32.
[2400] *See*, with respect to appeals filed under rules 154 and 155 of the Rules, *Lubanga* OA5 Judgment, para. 20; *Bemba et al.* OA4 Judgment, para. 116.
[2401] Mr Bemba's Appeal Brief, para. 280.
[2402] Mr Bemba's Appeal Brief, para. 280.

9. Errors regarding findings on remedial measures

(a) Relevant part of the Conviction Decision

1052. The Trial Chamber found that

> 110. On 11 October 2013, […] Mr Mangenda informed Mr Kilolo on a '*top secret*' basis that he had received information from a source whose wife worked at the Court that they were being investigated in connection with the alleged bribing of witnesses. From such time as the three accused learnt that they were being investigated, a number of remedial measures were conceived and implemented with a view to frustrating the Prosecution's investigation. Mr Bemba instructed Mr Kilolo to contact all defence witnesses in a '*tour d'horizon*' to ascertain whether any of them had leaked information to the Prosecution. Mr Kilolo complied with this instruction. All three accused agreed to offer defence witnesses incentives and money to terminate their collaboration with the Prosecution, and to obtain declarations from the defence witnesses attesting that they had lied to the Prosecution. Mr Mangenda advised Mr Bemba to act swiftly. Certain witnesses, suspected by the co-perpetrators of having leaked information to the Prosecution, were indeed approached.
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> 111. Mr Bemba, Mr Kilolo and Mr Mangenda were fully aware of the serious and grave nature of the allegations against them. In particular, Mr Kilolo was concerned about 'losing' all the work done so far, and that Mr Bemba could face another five-year prison sentence. Mr Mangenda believed that the results of the investigation would negatively impact on the reliability of *all* defence witnesses in the Main Case. The three accused discussed similar allegations of witness interference in the case of the *Prosecutor v. Walter Osapiri Barasa* case [*sic*] ('*Barasa* Case').[2403]

1053. The Trial Chamber found that Mr Bemba "also planned and directed the taking of remedial measures upon learning of the Article 70 investigation".[2404] In addition, the Trial Chamber found that "Mr Bemba's intent to bring about the material elements of the offences is evidenced by […] the various measures he ordered when the co-perpetrators became aware that an Article 70 investigation was underway".[2405] The Trial Chamber concluded that Mr Bemba "discussed with the co-perpetrators the existence of similar proceedings in the *Barasa* Case and the penalisation of their conduct under Article 70 of the Statute, which indicates that Mr Bemba was aware of the illegality of their actions".[2406]

[2403] Conviction Decision, paras 110-111.
[2404] Conviction Decision, para. 816.
[2405] Conviction Decision, para. 817.
[2406] Conviction Decision, para. 820 (footnote omitted).

(b) Submissions of the parties

(i) Mr Bemba

1054. Mr Bemba submits that the Trial Chamber failed to provide a reasoned opinion in relation to evidence regarding the context of his discussion of the *Barasa* Case.[2407] He argues that the Trial Chamber's inferences concerning his reactions to the Prosecutor's investigations are invalidated by reliance on hearsay.[2408] Mr Bemba contends that the Trial Chamber's findings are invalidated by its "failure to account for the impact of the *faux scenario* on Mr Bemba's knowledge and reactions".[2409] He argues that the Trial Chamber erred by failing to consider alternative interpretations when finding that Mr Bemba had instructed Mr Kilolo to deny everything.[2410] Mr Bemba further submits that the Trial Chamber failed to provide a reasoned opinion with respect to evidence concerning his state of mind.[2411] He argues that the Trial Chamber failed to consider the role of Mr Mangenda and Mr Kilolo.[2412]

(ii) The Prosecutor

1055. The Prosecutor argues that the Trial Chamber reasonably found, in the context of the co-perpetrators' discussions about the *Barasa* Case, that Mr Bemba understood that similar actions could have consequences for him personally.[2413] The Prosecutor submits that Mr Bemba's claim that the Trial Chamber's findings on his role in the remedial measures is invalidated by reliance on hearsay, should be summarily dismissed for his failure to explain his claim.[2414] The Prosecutor argues that Mr Bemba fails to show that the Trial Chamber was unreasonable in establishing his *mens rea* in relation to the remedial measures.[2415] In particular, the Prosecutor submits that the Trial Chamber found that Mr Kilolo had informed Mr Bemba about the essential points of the article 70 investigation and that it also relied on other evidence of Mr Bemba's involvement in the Common Plan.[2416] Regarding the role of Mr

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[2407] Mr Bemba's Appeal Brief, para. 282.
[2408] Mr Bemba's Appeal Brief, para. 283.
[2409] Mr Bemba's Appeal Brief, paras 283-286.
[2410] Mr Bemba's Appeal Brief, para. 287.
[2411] Mr Bemba's Appeal Brief, para. 288.
[2412] Mr Bemba's Appeal Brief, para. 289.
[2413] Response, para. 542.
[2414] Response, para. 543.
[2415] Response, para. 543.
[2416] Response, para. 543.

Mangenda and Mr Kilolo, the Prosecutor argues that Mr Bemba repeats his arguments from trial and does not show that the Trial Chamber's findings were unreasonable.[2417]

(c) Determination by the Appeals Chamber

1056. Regarding the discussions on the *Barasa* Case, the Appeals Chamber notes that the Trial Chamber relied on the evidence of those discussions to conclude that "Mr Bemba, Mr Kilolo and Mr Mangenda were fully aware of the serious and grave nature of the allegations against them"[2418] and that Mr Bemba "was aware of the illegality of their actions".[2419] Mr Bemba does not demonstrate that the evidence showing his "tendency to discuss topical issues in other ICC cases"[2420] and the evidence regarding the timing of those discussions[2421] were relevant and should have been considered by the Trial Chamber. The impugned finding concerned Mr Bemba's awareness of the illegality of the co-perpetrators' actions. Whether he would have been interested in the *Barasa* Case irrespective of his involvement in the illicit activities does not affect the finding of his awareness, especially in view of the evidence, to which the Trial Chamber cited, that Mr Kilolo presented the *Barasa* Case to Mr Bemba as "*une histoire similaire*" ("similar thing").[2422] The Appeals Chamber therefore rejects Mr Bemba's argument that the Trial Chamber ought to have considered the evidence to which he refers and that the conversations upon which the Trial Chamber relied had no probative value. Regarding the privilege allegedly attaching to the conversations upon which the Trial Chamber relied, the Appeals Chamber refers to its findings regarding Mr Bemba's arguments on this issue.[2423]

1057. The Appeals Chamber dismisses Mr Bemba's argument regarding the alleged hearsay nature of the communications upon which the Trial Chamber relied, as he has failed to set out the alleged error.

[2417] Response, para. 544.
[2418] Conviction Decision, para. 111.
[2419] Conviction Decision, para. 820.
[2420] Mr Bemba's Appeal Brief, para. 282.
[2421] Mr Bemba's Appeal Brief, para. 282.
[2422] Conviction Decision, para. 784.
[2423] *See supra* paras 371-400.

1058. Mr Bemba argues that the Trial Chamber failed to consider the impact of the false information that he received from Mr Kilolo and Mr Mangenda.[2424] However, the Appeals Chamber notes that the alternative interpretations he suggests are untenable in view of the Trial Chamber's other findings. In particular, the proposition that Mr Bemba believed that the witnesses in question "felt aggrieved for not having been called",[2425] and that the Prosecutor took advantage of that to "put […] words in their mouths",[2426] is undermined by the Trial Chamber's findings that Mr Bemba had learned of the article 70 investigations before the conversations cited by Mr Bemba took place[2427] and that he "was aware of the illegality of their actions".[2428] In view of these findings, it was not unreasonable for the Trial Chamber to disregard this alternative interpretation of the witnesses' motivations and the Prosecutor's conduct.

1059. Furthermore, the Trial Chamber did expressly consider aspects of the interpretation which Mr Bemba puts forward on appeal. It found that Mr Kilolo "agreed to falsely represent to Mr Bemba that the leak originated from three Cameroonian witnesses".[2429] However, the Trial Chamber did not find, as Mr Bemba suggests it should have, that he genuinely believed that what those witnesses had told the Prosecutor were "tall tales and lies".[2430] Rather, the Trial Chamber found that Mr Bemba gave instructions to approach the Cameroonian witnesses and, *inter alia*, make them sign a document stating that whatever they had said to the Prosecution was untrue.[2431] Furthermore, the Trial Chamber found irrelevant Mr Mangenda's argument that the discussions about a cover-up were fictitious, as it considered that "the three co-perpetrators clearly intended to take measures to conceal their prior activities".[2432] In light of these findings, it was not unreasonable for the Trial Chamber not to consider the above alternative interpretation. It is also in this light that the Trial Chamber interpreted Mr Bemba's response to Mr Kilolo that he would have to deny

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[2424] Mr Bemba's Appeal Brief, paras 283-284.
[2425] Mr Bemba's Appeal Brief, para. 285; CAR-OTP-0082-1065 at 1068, lines 49-56.
[2426] Mr Bemba's Appeal Brief, para. 285; CAR-OTP-0082-1309 at 1317, lines 244-246.
[2427] Conviction Decision, paras 773-778.
[2428] Conviction Decision, para. 820.
[2429] Conviction Decision, para. 778.
[2430] Mr Bemba's Appeal Brief, para. 285. *See* CAR-OTP-0082-1309, at 1325, line 538 ("JPB: […] *dans le pire pour toi c'est … nier tout cela c'est du mensonge*").
[2431] Conviction Decision, para. 787.
[2432] Conviction Decision, para. 800.

everything.[2433] Mr Bemba has not demonstrated that the Trial Chamber erred by not interpreting these words the way he suggests.[2434]

1060. Mr Bemba's further argues that the Trial Chamber failed to provide a reasoned opinion regarding his belief that at the time his defence team should have filed an abuse of process motion to reveal the matters to the Trial Chamber, which, he submits, is "the opposite of a cover-up".[2435] However, his arguments are limited to a mere repetition of the arguments he made at trial and a general claim that the Trial Chamber failed to provide a reasoned opinion.[2436] The Appeals Chamber dismisses these arguments for Mr Bemba's failure to set out the alleged error.[2437]

1061. As regards Mr Bemba's arguments concerning the Trial Chamber's alleged failure to consider the role of Mr Mangenda and Mr Kilolo,[2438] Mr Bemba only describes their role briefly and refers to Annex C to his appeal brief. The Annex is a compilation of excerpts of conversations between Mr Mangenda and Mr Kilolo. No dates of the conversations are provided. While some portions of those conversations appear to support the proposition that Mr Mangenda and Mr Kilolo contemplated concealing some of their actions from Mr Bemba and that they planned to derive a personal gain,[2439] the significance of other excerpts is not apparent and not explained by Mr Bemba, apart from his brief description of Mr Mangenda's and Mr Kilolo's role as "the *deus ex machina*".[2440] In light of this and taking into account the above-mentioned findings of the Trial Chamber,[2441] the Appeals Chamber finds that Mr Bemba has not demonstrated that the Trial Chamber erred by failing to consider his interpretation of the role of Mr Mangenda and Mr Kilolo.

[2433] Conviction Decision, para. 783.
[2434] Mr Bemba's Appeal Brief, para. 287.
[2435] Mr Bemba's Appeal Brief, para. 288.
[2436] Mr Bemba's Appeal Brief, para. 288.
[2437] *See* *Lubanga* Appeal Judgment, para. 33.
[2438] Mr Bemba's Appeal Brief, para. 289.
[2439] CAR-OTP-0080-0322, at 0326, lines 74-76 ("*Je vais trouver même deux ou trois personnes qui sont proches… c'est possible qu'ils vont demander même quinze mille… je vais récupérer mes dix, tu prends même cinq pour toi.*"); CAR-OTP-0079-1762, at 1764, line 18 ("*Comme ça il se rendra vraiment compte de la façon dont nous envisagerons les choses …*"); CAR-OTP-0079-1762, at 1768, lines 147-148 ("*Si c'est de notre côté, mais, n'est-ce pas qu'il a beaucoup de connexions là bas. Il va appeler pour demander, vérifier ça, dites ceci, dites cela.*").
[2440] Mr Bemba's Appeal Brief, para. 289.
[2441] Conviction Decision, paras 778, 787, 800, 820.

1062. In view of the foregoing, the Appeals Chamber rejects Mr Bemba's arguments regarding his awareness of the illegality of the co-perpetrators' actions and Mr Kilolo's and Mr Mangenda's roles.

10. Findings that are allegedly not based on evidence

(a) Submissions of the parties

(i) Mr Bemba

1063. Mr Bemba submits that several key findings are not supported by evidence or that the Trial Chamber misstated the evidence for those findings.[2442] He argues that these evidential omissions and errors were crucial to adverse findings and that they invalidate his conviction.[2443]

(ii) The Prosecutor

1064. The Prosecutor argues that some of the arguments of Mr Bemba are unsubstantiated, as they are only supported by unexplained reference to a table.[2444] The Prosecutor contends that other arguments are not well-founded, as they read passages of the Conviction Decision in isolation or are based on incorrect legal interpretations.[2445] The Prosecutor submits that the Trial Chamber did make two harmless errors.[2446]

(b) Determination by the Appeals Chamber

1065. As indicated above, Mr Bemba submits that a number of findings of the Trial Chamber were not supported by evidence.[2447] However, contrary to Mr Bemba's argument, these findings were supported by evidence, either directly or based on other findings of the Trial Chamber.[2448] The Appeals Chamber notes that Mr Bemba does

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[2442] Mr Bemba's Appeal Brief, paras 326-330.
[2443] Mr Bemba's Appeal Brief, para. 331.
[2444] Response, para. 558.
[2445] Response, para. 558.
[2446] Response, para. 559.
[2447] Mr Bemba's Appeal Brief, para. 329.
[2448] Regarding the finding on Mr Bemba's participation in an agreement to interfere with witnesses (Conviction Decision, paras 103, 802), *see* Conviction Decision, paras 360, 434, 436, 535, 600-606, 609, 637-638. Regarding the finding on Mr Bemba's intent to corruptly influence witnesses (Conviction Decision, para. 700), *see* the evidence relied upon to make findings regarding "his planning and organising activities relating to the common plan, the various measures he ordered when the co-perpetrators became aware that an Article 70 investigation was underway, and his deliberate and knowing abuse of his privileged line at the ICC Detention Centre" (Conviction Decision, para. 817). Regarding the causation between Mr Bemba's conduct and the charged offence, as well as the

not set out any specific error and merely alleges abuse of discretion and a lack of evidence. The Appeals Chamber therefore rejects Mr Bemba's arguments in this respect.

1066. Mr Bemba further alleges that the Trial Chamber relied on "a misleading and incorrect citation",[2449] without specifying the alleged error or its impact on the relevant finding. Therefore, the Appeals Chamber dismisses this argument.

1067. Similarly, the Appeals Chamber dismisses the arguments concerning the abuse of the privileged line in contacts with the witnesses.[2450] Again, Mr Bemba does not identify an error and only cross-references another sub-ground of his appeal, which the Appeals Chamber has already rejected.[2451] Regarding an alleged error relating to "the October 2013 call", Mr Bemba's argument is developed in an annex to his appeal brief, in contravention of regulation 36 (2) (b) of the Regulations of the Court. The content of that annex will therefore not be considered. In addition, the Appeals Chamber refers to its conclusion in respect of Mr Babala's arguments regarding the Trial Chamber's characterisation of the same telephone call as having been made on Mr Bemba's "privileged line".[2452]

1068. Finally, contrary to Mr Bemba's submission, the Trial Chamber did not characterise Mr Bemba's use of his privileged telephone line as "a premeditated abuse of privilege" and it is therefore irrelevant whether such a characterisation was "legally misconceived".[2453]

1069. In view of the foregoing, the Appeals Chamber rejects this sub-ground of Mr Bemba's appeal related to lack of evidence for certain findings.

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conclusion that his contribution to the illicit coaching was essential, *see* Conviction Decision, paras 857, 924, 927. Regarding the finding that Mr Bemba asked, either personally or through Mr Kilolo, the 14 witnesses to give false testimony on certain issues, the Trial Chamber indicated that it arrived at that conclusion based on a number of considerations (Conviction Decision, para. 853) and "assessing the evidence as a whole" (Conviction Decision, para. 856).

[2449] Mr Bemba's Appeal Brief, para. 330.
[2450] Mr Bemba's Appeal Brief, para. 330.
[2451] *See supra* paras 935-939.
[2452] *See infra* paras 1362-1365.
[2453] Mr Bemba's Appeal Brief, para. 330.

B. Mr Kilolo's grounds of appeal

1070. Under his third ground of appeal, Mr Kilolo argues that the Trial Chamber incorrectly assessed the credibility of witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23), and thus erroneously relied on their evidence to enter certain factual findings.[2454] Furthermore, Mr Kilolo argues that the Trial Chamber erroneously concluded that he had induced the false testimony of 14 witnesses.[2455] Lastly, he contends that the Trial Chamber erred in finding that he together with Mr Bemba and Mr Mangenda, made an essential contribution to the common plan in the Main Case.[2456] These arguments will be addressed in turn below.

1. Alleged errors regarding the assessment of witnesses P-260 (D-2)'s, P-245 (D-3)'s and P-261 (D-23)'s evidence

(a) Relevant part of the Conviction Decision

1071. Following the Trial Chamber's stated approach to the assessment of oral testimony,[2457] when assessing the credibility of witness P-260 (D-2), the Trial Chamber noted, *inter alia*, that the witness testified after having been given the assurances provided under rule 74 of the Rules.[2458] The Trial Chamber noted that, from the outset, witness P-260 (D-2) admitted "he had lied on specific points in the Main Case for his own benefit".[2459] The Trial Chamber further explained that, when challenged by the Defence regarding perceived inconsistencies in his evidence, witness P-260 (D-2) "responded spontaneously and provided reasonable clarifications without diffidence" such as when "he reported outright the various sums of money he had received from Mr Kilolo and Mr Arido".[2460] The Trial Chamber found witness P-260 (D-2) to be articulate and precise in his descriptions and careful in "limit[ing] himself to his personal experiences".[2461] The Trial Chamber also noted witness "P-260 (D-2)'s various attempts to differentiate facts within his testimony", which indicated that the witness "recounted events as he personally experienced them".[2462]

[2454] *See* Mr Kilolo's Appeal Brief, paras 126, 169.
[2455] Mr Kilolo's Appeal Brief, paras 125-126.
[2456] Mr Kilolo's Appeal Brief, para. 169.
[2457] Conviction Decision, para. 202. *See also infra* para. 285.
[2458] Conviction Decision, para. 307.
[2459] Conviction Decision, para. 308.
[2460] Conviction Decision, para. 308.
[2461] Conviction Decision, para. 309.
[2462] Conviction Decision, para. 310.

The Trial Chamber noted that witness P-245 (D-3) corroborated many aspects of witness P-260 (D-2)'s evidence regarding the meetings in Douala and Yaoundé.[2463]

1072. With respect to witness P-245 (D-3), the Trial Chamber noted that he testified after having been given assurances under rule 74 of the Rules.[2464] The Trial Chamber found witness P-245 (D-3) to be "frank and forthcoming throughout his testimony", and noted that "[h]e provided explanations voluntarily and did not evade questions, even if they could potentially cast him in a disadvantageous light".[2465] The Trial Chamber noted, in particular, witness P-245 (D-3)'s forthright testimony regarding his contacts with witness D-2 and other defence witnesses after their Main Case testimony as well as his threat at the Douala meeting not to testify unless he was paid.[2466] The Trial Chamber stated that witness P-245 (D-3) provided a level of detail consistent with someone who has experienced the events in question personally.[2467]

1073. The Trial Chamber further found that witness P-245 (D-3) did not revise or retract his statements when challenged by the Defence and "provided a firm and consistent account of Mr Kilolo's role and instructions".[2468] With respect to reimbursement of costs and payments to witness P-245 (D-3) by the Prosecutor, the Trial Chamber found "no indication that the witness benefited from extraordinary reimbursements that prompted the witness to strategically direct his evidence".[2469]

1074. With respect to witness P-261 (D-23), the Trial Chamber noted, *inter alia*, that he testified after being given assurances under rule 74 of the Rules.[2470] The Trial Chamber found witness P-261 (D-23) to be "natural and coherent" when answering questions and his answers to be "direct and forthcoming", even during the examination by the defence.[2471] The Trial Chamber observed that the witness "admitted outright that he received money on two occasions, as well as a new laptop from Mr Kilolo", and demonstrated an understanding of how costs incurred by

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[2463] Conviction Decision, para. 310.
[2464] Conviction Decision, para. 312.
[2465] Conviction Decision, para. 313.
[2466] Conviction Decision, para. 313.
[2467] Conviction Decision, para. 314.
[2468] Conviction Decision, para. 315.
[2469] Conviction Decision, para. 316.
[2470] Conviction Decision, para. 423.
[2471] Conviction Decision, para. 424.

witnesses are typically reimbursed by the Court.[2472] The Trial Chamber also noted that the witness "unhesitatingly confirmed, on several occasions, that he had lied before Trial Chamber III".[2473] In addition, the Trial Chamber noted that the witness became "evasive or even defensive" when questioned about his motivation for accepting money offered by Mr Kilolo or about Mr Kokaté's precise instructions.[2474] The Trial Chamber accordingly stated that it would "treat those aspects of his testimony with caution".[2475]

1075. Accordingly, the Trial Chamber concluded that witnesses P-260 (D-2) and P-245 (D-3) were generally credible and that it would rely on their testimony, in particular, with respect to the meetings with Mr Arido and Mr Kilolo, Mr Mangenda's intervention, and the payments of money.[2476] Likewise, with respect to witness P-261 (D-23) the Trial Chamber found him to be generally credible and largely relied on his testimony except for some discrete aspects it expressly identified.[2477]

(b) Submissions of the parties

(i) Mr Kilolo

1076. Mr Kilolo submits that the Trial Chamber failed to properly assess the credibility of witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23).[2478] He argues that, by failing to assess the extent of their dishonesty, the Trial Chamber ignored indicia of "inherent unreliability" in relation to all three witnesses.[2479] Furthermore, he avers that the Trial Chamber failed to apply "additional caution" in its assessment, although "these witnesses [had] lied under oath about the very same incidents that were at issue in the present case".[2480]

1077. Mr Kilolo argues further that the Trial Chamber abused its discretion in not requiring independent corroboration of witnesses P-260 (D-2)'s, P-245 (D-3)'s and P-

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[2472] Conviction Decision, para. 425.
[2473] Conviction Decision, para. 425.
[2474] Conviction Decision, para. 426.
[2475] Conviction Decision, para. 426.
[2476] Conviction Decision, para. 319.
[2477] Conviction Decision, para. 427.
[2478] Mr Kilolo's Appeal Brief, paras 126, 135.
[2479] Mr Kilolo's Appeal Brief, paras 128-132, 134, and fns 250, 269, referring to *Muvunyi* Appeal Judgment, para. 147 and *Taylor* Contempt Appeal Judgment, para. 38.
[2480] Mr Kilolo's Appeal Brief, para. 131.

261 (D-23)'s testimony.[2481] In his view, as both witnesses P-260 (D-2) and P-245 (D-3) were inherently unreliable and self-confessed perjurers, the Trial Chamber erred in using their evidence to corroborate several aspects of each other's testimony.[2482] As a consequence, Mr Kilolo avers that the Trial Chamber made several erroneous factual findings, which were "inextricably linked" to its ultimate conclusion that Mr Kilolo induced false testimony from these witnesses.[2483]

1078. As to witness P-261 (D-23)'s testimony, Mr Kilolo submits that because the witness was a "self-confessed perjurer", the Trial Chamber should not have relied on any portion of his testimony.[2484] Mr Kilolo argues that, therefore, the Trial Chamber erred in finding that he had induced this witness to give false testimony.[2485]

(ii) The Prosecutor

1079. The Prosecutor responds that, having found witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23) to be credible, it was reasonable for the Trial Chamber to rely on their evidence to find that Mr Kilolo had "paid witnesses, illicitly coached them and instructed them to give false testimony".[2486] The Prosecutor submits that the fact that they testified falsely in the Main Case, as argued by Mr Kilolo, did not prevent the Trial Chamber from relying on their evidence.[2487] The Prosecutor avers that the Trial Chamber approached these witnesses' evidence with caution, as set out in detail in the Conviction Decision, and that Mr Kilolo ignores other factors considered by the Trial Chamber when assessing these witnesses' credibility.[2488]

1080. The Prosecutor argues further that the Trial Chamber did not abuse its discretion when relying on "mutually corroborative features" of witnesses P-260 (D-2) and P-245 (D-3)'s evidence as an additional factor showing "the reliability of their evidence".[2489] With respect to witness P-261 (D-23), the Prosecutor avers that the

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[2481] Mr Kilolo's Appeal Brief, para. 132.
[2482] Mr Kilolo's Appeal Brief, para. 132.
[2483] Mr Kilolo's Appeal Brief, para. 135.
[2484] Mr Kilolo's Appeal Brief, para. 134.
[2485] Mr Kilolo's Appeal Brief, para. 135.
[2486] Response, para. 291.
[2487] Response, para. 291.
[2488] Response, paras 291-292, referring to Conviction Decision, paras 308-310, 313-315, 424.
[2489] Response, para. 293.

Trial Chamber reasonably relied on the call data records "which confirmed the timing and frequency" of Mr Kilolo's and the witness's conversations.[2490]

(c) Determination by the Appeals Chamber

1081. Mr Kilolo challenges the Trial Chamber's findings concerning the credibility of witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23) on the basis that they had previously "lied under oath about the very same incidents that were at issue in the present case" and thus could not be relied upon.[2491] The Appeals Chamber has addressed above similar arguments in the context of Mr Bemba's challenges regarding the credibility of witnesses P-260 (D-2) and P-245 (D-3). In that context, it has indicated that there is no category of witness that is *per se* unreliable, and that the fact that a witness has previously lied under oath, (that is, in Mr Kilolo's submission, that the witness is a "self-confessed perjurer"[2492]) shall be taken into account by a trial chamber when assessing the witness' credibility, but does not necessarily make his or her testimony unreliable.[2493]

1082. With respect to witness P-261 (D-23), the Trial Chamber found this witness to be "generally credible", as opposed to being so impugned that this witness's evidence was inherently unreliable.[2494] In this regard, the Trial Chamber specifically noted with respect to witness P-261 (D-23) that he had admitted to testifying falsely in the Main Case[2495]. Thus, far from ignoring the fact that this witness had previously falsely testified and did so for monetary gain, the Trial Chamber took this into account in its assessment of the witness's credibility.[2496] Furthermore, the Trial Chamber stated that it would treat certain parts of witness P-261 (D-23)'s testimony with caution.[2497] In the view of the Appeals Chamber, Mr Kilolo does not show any error in the Trial Chamber's assessment of the credibility of witness P-261 (D-23). His arguments in this regard are thus rejected.

[2490] Response, para. 294.
[2491] Mr Kilolo's Appeal Brief, para. 131.
[2492] Mr Kilolo's Appeal Brief, paras 127-135.
[2493] *See supra* paras 1018-1019.
[2494] *See* *Ngudjolo* Appeal Judgment, para. 169.
[2495] *See* Conviction Decision, paras 308, 313, 425.
[2496] *See* Conviction Decision, paras 319, 427.
[2497] Conviction Decision, para. 426.

1083. In addition, Mr Kilolo argues that, since witnesses P-260 (D-2) and P-245 (D-3) were not credible, the Trial Chamber could not have relied on their evidence as corroborative of each other's testimony and should have required "independent corroboration" instead.[2498] As discussed above, the Trial Chamber found these witnesses to be "generally credible".[2499] The Appeals Chamber has discerned no error in this finding.

1084. As to the argument that "independent corroboration" should have been required, the Appeals Chamber notes that the Trial Chamber, with reference to the challenges at trial to the credibility of witnesses who had previously lied under oath, stated that "the question to what extent corroboration is needed is a matter of assessing the evidence and cannot be ruled upon in the abstract".[2500] The Appeals Chamber finds no error in this. Pursuant to rule 63 (4) of the Rules there is no legal requirement of corroboration irrespective of the type of evidence or the fact to be established on its basis. This is not to say that corroboration will never have a role to play when assessing a witness's credibility and the reliability of his or her testimony.[2501] It is one of many potential factors relevant to a trial chamber's assessment. A trial chamber may find, in the specific circumstances of the case, that corroboration of a particular witness's testimony – or part thereof – is needed for it to be convinced of its reliability and credibility;[2502] however, this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness. The Appeals Chamber, therefore, finds that the Trial Chamber was not prevented from relying on aspects of witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony that were "mutually corroborative" since other types of corroboration were not required.

1085. Having rejected Mr Kilolo's arguments that the Trial Chamber erred in assessing the credibility of witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23) the Appeals Chamber will not address his final argument that, but for these errors, the

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[2498] Mr Kilolo's Appeal Brief, para. 132.
[2499] Conviction Decision, para. 319.
[2500] Conviction Decision, para. 25.
[2501] *See* *Ngudjolo* Appeal Judgment, para. 168; *Lubanga* Appeal Judgment, para. 218. *See also* *Nchaminhigo* Appeal Judgment, para. 47.
[2502] *See* *Ngudjolo* Appeal Judgment, para. 168; *Lubanga* Appeal Judgment, para. 218. *See also* *Nchaminhigo* Appeal Judgment, para. 47.

Trial Chamber would not have determined that he had induced these witnesses to give false testimony.[2503]

1086. In relation to the sub-grounds of appeal that follow, the Appeals Chamber observes that most of Mr Kilolo's arguments are, to a large extent, based on his contention that witnesses P-260 (D-2) and P-245 (D-3) and, to a certain extent witness P-261 (D-23), lacked credibility to the extent of rendering them "inherently unreliable" as witnesses.[2504] As the Appeals Chamber has rejected this argument it will not address it further when considering these sub-grounds of appeal.

1087. Accordingly, the Appeals Chamber rejects Mr Kilolo's argument that the Trial Chamber should not have relied on the testimonies of witnesses P-260 (D-2), P-245 (D-3) and P-261 (D-23) because the witnesses were not credible, and that as a result it erred when it found that Mr Kilolo illicitly coached and instructed them to testify falsely.

2. Alleged errors in the Trial Chamber's findings that Mr Kilolo corruptly influenced witness and induced their false testimony

(a) Alleged errors regarding witnesses D-4 and D-6

(i) Relevant part of the Conviction Decision

1088. The Trial Chamber found that Mr Kilolo had illicitly instructed witnesses D-2, D-3, D-4 and D-6, in particular, on their prior recorded statements,[2505] payments and monetary benefits received,[2506] contacts with and knowledge of members of the Mr Bemba's defence team in the Main Case and other individuals.[2507] The Trial Chamber based its findings in relation to witnesses D-4 and D-6 (who did not testify in the case at hand) primarily on the testimony of witnesses P-260 (D-2) and P-245 (D-3),[2508] the personal notes of witness P-260 (D-2), to which the Trial Chamber referred to as Annex 3,[2509] and a clear pattern in the instructions, evinced from the evidence on record, that Mr Kilolo gave to other witnesses (D-15, D-23, D-26, D-54 and D-55) "to

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[2503] Mr Kilolo's Appeal Brief, para. 135.
[2504] *See* Mr Kilolo's Appeal Brief, paras 140, 159, 166-167, 169.
[2505] Conviction Decision, para. 365.
[2506] Conviction Decision, para. 366.
[2507] Conviction Decision, para. 366.
[2508] Conviction Decision, paras 365-366.
[2509] Conviction Decision, paras 357-360.

conceal the real number of contacts with the Main Case Defence or deny knowledge of certain individuals".[2510]

(ii) Submissions of the parties

(a) Mr Kilolo

1089. Mr Kilolo asserts that witnesses P-260 (D-2) and P-245 (D-3) were inherently unreliable and, as such, the Trial Chamber should not have relied on them for its factual findings against him.[2511] He argues further that, given witness P-260 (D-2)'s "propensity to forge documents", the Trial Chamber should have ignored Annex 3, the authenticity of which was uncorroborated.[2512] Mr Kilolo avers that the "remaining evidence on the record was circumstantial and insufficient to support the Trial Chamber's conclusions beyond a reasonable doubt".[2513]

1090. Mr Kilolo avers that there is no evidence supporting the Trial Chamber findings that: (i) he instructed witness D-4 to testify untruthfully about whether he knew Mr Arido, Mr Kokaté and witness D-7; and (ii) he instructed witness D-6 to testify falsely about "the number of contacts he had with the Main Case Defence".[2514]

(b) The Prosecutor

1091. The Prosecutor responds that Mr Kilolo's contention that there is no evidence to support the Trial Chamber's conclusion regarding witnesses D-4 and D-6 is "entirely undeveloped and should be summarily dismissed".[2515]

(iii) Determination by the Appeals Chamber

1092. The Appeals Chamber notes that, for its finding that Mr Kilolo had instructed and illicitly coached witnesses P-260 (D-2), P-245 (D-3), D-4 and D-6 on their expected testimony in the Main Case, the Trial Chamber relied on the testimony of witnesses P-260 (D-2) and P-245 (D-3) concerning their meeting in Yaoundé with

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[2510] Conviction Decision, para. 366.
[2511] Mr Kilolo's Appeal Brief, para. 140.
[2512] Mr Kilolo's Appeal Brief, para. 140.
[2513] Mr Kilolo's Appeal Brief, para. 141.
[2514] Mr Kilolo's Appeal Brief, para. 142.
[2515] Response, para. 271. *See also* fn. 924.

Mr Kilolo, and witnesses D-4 and D-6,[2516] as well as the personal notes of witness P-260 (D-2) referred to as Annex 3.[2517] In this respect, Mr Kilolo reiterates his contention that the Trial Chamber should not have relied on the testimony of these witnesses on account of their "inherent unreliability".[2518] However, for the reasons discussed above, the Appeals Chamber rejects this argument.[2519] The Appeals Chamber notes that, in accordance with witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony, the Trial Chamber found that at this meeting, Mr Kilolo "provided or read out a document to each witness, namely, D-2, D-3, D-4 and D-6, which reflected their statements at the February 2012 interview in Douala".[2520] This finding of the Trial Chamber was unchallenged.[2521] Based on witnesses P-260 (D-2)'s and P-245 (D-3)'s further testimony, the Trial Chamber went on to find that their prior statements contained certain amendments, and that Mr Kilolo had "individually instructed them on specific points […] with a view to ensuring that their evidence was consistent with other defence evidence and favourable to the Main Case Defence position".[2522]

1093. With respect to the Trial Chamber's reliance on Annex 3, the Appeals Chamber notes that witness P-260 (D-2) testified in detail as to the evolution of the document for his personal preparation to testify in the Main Case.[2523] He stated that Annex 3 included points that Mr Kilolo had impressed upon him.[2524] As to Mr Kilolo's argument that, because witness P-260 (D-2) had a propensity to forge documents, referring to the witness's admission that he had fabricated a document to mislead Mr Kilolo and that he had forged another person's signature on another

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[2516] Conviction Decision, paras 355-356, 360, referring to Transcript of 12 October 2015 ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 52, lines 3-6; p. 53, lines 1, 5-6; Transcript of 13 October 2015 ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 9, lines 7-9 and 19-25; p. 11, lines 11-13; p. 12, lines 7-21; p. 68, lines 14-15; p. 69, lines 3-10 and 17-21; p. 76, lines 13-18; Transcript of 14 October 2015 ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 29, line 17; Transcript of 15 October 2015 ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 79, lines 4-8; Transcript of 20 October 2015 ICC-01/05-01/13-T-23-Red2-ENG (WT), p. 11, lines 20-22; Transcript of 23 October 2015 ICC-01/05-01/13-T-27-Red-ENG (WT), p. 17, lines 8-15; p. 74, lines 8-15; Prior Recorded testimony, CAR-OTP-0078-0248-R01 at 0255-R01, lines 236-238 and 244-245.
[2517] Conviction Decision, paras 136, 336, 357, 388.
[2518] *See* Mr Kilolo's Appeal Brief, para. 140.
[2519] *See supra* paras 1081-1087.
[2520] Conviction Decision, para. 355.
[2521] Conviction Decision, para. 355.
[2522] Conviction Decision, paras 355-356, 360, 365.
[2523] Conviction Decision, para. 357.
[2524] Conviction Decision, para. 357.

document,[2525] the Appeals Chamber notes that, notwithstanding these two instances of fabrication, the Trial Chamber rejected Mr Kilolo's allegation that Annex 3 could have been fabricated, given the lack of evidence in the record to that effect.[2526] As noted by the Trial Chamber, when the witness was confronted as to the authenticity of the document, he stated that "he considered Annex 3 to be a '*fabrication, but of all of us*', produced upon Mr Kilolo's advice and directions".[2527] In addition, the Appeals Chamber finds that, as corroboration is not a legal requirement,[2528] it was not unreasonable for the Trial Chamber to have relied on witness P-260 (D-2)'s testimony alone to authenticate Annex 3.

1094. Accordingly, the Appeals Chamber rejects the arguments in relation to Annex 3 and finds that it was not unreasonable for the Trial Chamber to have relied on the direct evidence of witnesses P-260 (D-2) and P-245 (D-3), and Annex 3 for its conclusion that Mr Kilolo had instructed and illicitly coached witnesses P-260 (D-2), P-245 (D-3), D-4 and D-6 on their expected testimony in the Main Case.

1095. In addition, Mr Kilolo challenges the Trial Chamber's reliance on circumstantial evidence to support its conclusions beyond a reasonable doubt concerning witnesses D-4 and D-6. As already indicated, the Appeals Chamber considers that the legal framework of the Court does not preclude a Chamber from relying on circumstantial evidence to support its conclusions beyond a reasonable doubt. What is important is that based on the evidence, the conclusion reached must be the only reasonable conclusion.[2529]

1096. The Appeals Chamber notes that, in the case at hand, the Trial Chamber arrived at the following conclusions on the basis of circumstantial evidence: (i) Mr Kilolo had similarly instructed witnesses D-4 and D-6 to deny any receipt of money or non-monetary benefits;[2530] in reaching this conclusion the Trial Chamber drew inferences

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[2525] *See* Mr Kilolo's Appeal Brief, para. 128, fn. 255, referring to Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 66, lines 13-22, and fn. 256, referring to CAR-OTP-0084-0472, p. 0482, lines 341-367.
[2526] Conviction Decision, para. 358.
[2527] Conviction Decision, para. 357 (emphasis in the original, footnotes omitted).
[2528] *See supra*, para. 1084.
[2529] *See infra* para 868. *See also Delalić et al.* Appeal Judgment, para. 458.
[2530] Conviction Decision, para. 366.

from the testimony of witnesses P-260 (D-2) and P-245 (D-3)[2531] and a clear pattern of explicit instructions, as recorded in the evidence, whereby Mr Kilolo instructed other witnesses, such as witnesses D-57 and D-64, not to reveal that they had received any money, including legitimate reimbursements and non-monetary promises, from members of the defence team in the Main Case;[2532] and (ii) Mr Kilolo had instructed witnesses D-4 and D-6 to limit the number of prior contacts with the defence team in the Main Case or deny knowledge of certain individuals.[2533] In reaching these conclusions, the Trial Chamber drew inferences from witness P-260 (D-2)'s evidence regarding the instruction from Mr Kilolo on prior contacts,[2534] witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence on the instruction on acquaintances[2535] and a clear pattern of explicit instructions, as recorded in the evidence, whereby Mr Kilolo instructed other witnesses to conceal the real number of contacts with the defence team in the Main Case or deny knowledge of certain individuals.[2536] In light of the above, the Appeals Chamber finds that Mr Kilolo fails to demonstrate that it was unreasonable for the Trial Chamber to reach these findings based on circumstantial evidence and other direct evidence as discussed above.

1097. Furthermore, Mr Kilolo disputes the Trial Chamber's findings concerning his instructions to witnesses D-4 to falsely testify that he did not know Mr Arido, Mr Kokaté or witness D-7 and his instruction to witness D-6 to falsely testify about the number of contacts with the defence team in the Main Case, on the mere assertion that there is no evidence to support these findings.[2537] The Appeals Chamber rejects these arguments since, as demonstrated above the Trial Chamber drew inferences from the evidence on record to support both these findings and Mr Kilolo fails to show that no reasonable trier of fact could have concluded that the inference drawn was the only reasonable conclusion that could be drawn from the evidence. Mr Kilolo's arguments are thus rejected.

[2531] Conviction Decision, para. 366.
[2532] Conviction Decision, para. 366.
[2533] Conviction Decision, para. 366.
[2534] Conviction Decision, paras 360, 366.
[2535] Conviction Decision, paras 363, 366.
[2536] Conviction Decision, para. 366.
[2537] Mr Kilolo's Appeal Brief, para. 142.

1098. Finally, as to Mr Kilolo's argument that there was no indication in witness P-433's report that Mr Kilolo was in contact with witness D-6 either before the cut-off period or during witnesses D-6's testimony,[2538] the Appeals Chamber finds the argument to be irrelevant, given that the Trial Chamber's conclusions were based on a holistic evaluation of the evidence which, as discussed above, included both direct and circumstantial evidence. The Appeals Chamber thus rejects Mr Kilolo's argument and finds that it was not unreasonable for the Trial Chamber on that evidentiary basis to find that Mr Kilolo had illicitly coached and instructed witnesses D-4 and D-6 to give false testimony.

(b) Alleged errors regarding witness D-13

(i) Relevant part of the Conviction Decision

1099. In relation to witness D-13, the Trial Chamber found that the witness had given false testimony in the Main Case regarding his prior contacts with the Main Case Defence.[2539] In addition, the Trial Chamber found that Mr Kilolo had illicitly coached witness D-13 as to his expected testimony and instructed him to give an inaccurate account of the number of contacts he had with the Main Case Defence.[2540] The Trial Chamber also found that "Mr Kilolo discussed his illicit coaching activities with Mr Mangenda over the telephone" using coded language.[2541]

(ii) Submissions of the parties

(a) Mr Kilolo

1100. Mr Kilolo submits that witness D-13 did not testify in the present case and that, without hearing this witness, "the Trial Chamber's conclusion that Mr. Kilolo instructed him to lie [before Trial Chamber III] was not the only reasonable conclusion available to it".[2542] Mr Kilolo argues that the witness testified falsely before Trial Chamber III about his contacts with the Main Case Defence "on his own volition because of his security concerns".[2543] Mr Kilolo submits further that the Trial Chamber "misconstrued" the intercepted telephone conversation of 10 November

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[2538] Mr Kilolo's Appeal Brief, para. 142.
[2539] Conviction Decision, para. 665.
[2540] Conviction Decision, para. 666.
[2541] Conviction Decision, para. 667.
[2542] Mr Kilolo's Appeal Brief, para. 145.
[2543] Mr Kilolo's Appeal Brief, para. 145.

2013 between him and Mr Mangenda because the language used in the conversation was ambiguous and the witness's name was never mentioned.[2544] In his view, the Trial Chamber therefore made an error in finding that this witness was the subject of the telephone conversation.[2545] Lastly, Mr Kilolo submits that there is no evidence that he instructed the witness to give false testimony on the number of contacts he had with the Main Case Defence.[2546]

(b) The Prosecutor

1101. The Prosecutor submits that the Trial Chamber reasonably concluded that "Kilolo instructed D-13 to testify falsely regarding his contacts with the Main Case Defence".[2547] The Prosecutor argues that the Trial Chamber did not need to hear the witness to draw its conclusions given: (i) the evidence that established that the witness had "four lengthy conversations with Kilolo on 8 November 2013", four days before his testimony in the Main Case, while he falsely claimed to have had contact with Mr Kilolo several weeks before his testimony;[2548] and (ii) that this evidence "followed a pattern of similar false evidence which Kilolo instructed other Defence witnesses to give".[2549] The Prosecutor adds that the Trial Chamber did not err in concluding that witness D-13 was the subject of the conversation between Mr Kilolo and Mr Mangenda on 10 November 2013[2550] as Mr Kilolo "referred in code to his illicit coaching of D-13 when he said that he was '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'".[2551] In the Prosecutor's view, Mr Kilolo "fails to confront [the Trial Chamber's] reasoning" in this regard.[2552]

(iii) Determination by the Appeals Chamber

1102. The Appeals Chamber considers that the absence of testimonial evidence from witness D-13 in the proceedings at hand did not preclude the Trial Chamber from inferring, on the basis of other evidence on the record, that the only reasonable

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[2544] Mr Kilolo's Appeal Brief, para. 146.
[2545] Mr Kilolo's Appeal Brief, para. 146.
[2546] Mr Kilolo's Appeal Brief, para. 147.
[2547] Response, para. 287, referring to Conviction Decision, paras 663-664, 666.
[2548] Response, para. 287, referring to Conviction Decision, paras 656-657, 662.
[2549] Response, para. 287, referring to Conviction Decision, paras 663-664.
[2550] Response, para. 289.
[2551] Response, para. 288, referring to Conviction Decision, paras 659-660.
[2552] Response, para. 289, referring to Conviction Decision, paras 660, 665.

conclusion to be drawn was that Mr Kilolo illicitly coached the witness during their telephone contacts and that he instructed the witness to testify falsely about the number of contacts he had with the Main Case Defence. In reaching these findings, the Trial Chamber relied, *inter alia*, on the call sequence tables and corresponding call data records which indicated "the frequency and duration of contacts prior to the testimony on 8 November 2013, Mr Kilolo's reference to his occupation with *'les couleurs*' ("the colours") in his conversation with Mr Mangenda on 10 November 2013, and the fact that the same pattern was employed in relation to other witnesses, such as D-2, D-3, D-23, D-15 and D-54".[2553] Mr Kilolo fails to show that the Trial Chamber's conclusions were conclusions that no reasonable trier of fact could have reached and that the inference drawn was not the only reasonable conclusion that could be drawn from the evidence relied upon by the Trial Chamber, despite the absence of testimony from witness D-13.

1103. Regarding Mr Kilolo's argument that witness D-13 lied about his contacts with the Main Case Defence because of his "security concerns",[2554] the Appeals Chamber notes that in support of this argument Mr Kilolo refers in footnotes to paragraph 95 of Mr Kilolo's Closing Submissions before the Trial Chamber, where he made assertions as to the failure of the Prosecutor to adduce any evidence to prove the allegations against him in relation to witness D-13.[2555] Mr Kilolo also refers to an email of 19 May 2013 in which Mr Bemba's defence team in the Main Case informed Trial Chamber III that witness D-13 [redacted].[2556] The Appeals Chamber notes that in Mr Kilolo's Closing Submissions before Trial Chamber VII, Mr Kilolo neither made this submission nor referred to the email correspondence regarding the witness's possible motivation for testifying falsely.[2557] In the Appeals Chamber's view, Mr. Kilolo merely proposes an alternative interpretation of the evidence in question, which falls short of demonstrating that the Trial Chamber's

[2553] Conviction Decision, paras 656, 663-664 (emphasis in original).
[2554] Mr Kilolo's Appeal Brief, para. 145.
[2555] *See* Mr Kilolo's Appeal Brief, para. 145, referring to Mr Kilolo's Closing Submissions, para. 95.
[2556] *See* Mr Kilolo's Appeal Brief, para. 145, referring to CAR-D21-0013-0177.
[2557] *See generally* Mr Kilolo's Closing Submissions.

finding was unreasonable in the context of the other evidence on which the Trial Chamber also reasonably relied The argument is thus rejected.

1104. Mr Kilolo's argues that the Trial Chamber erred in finding that witness D-13 was the subject of the conversation of 10 November 2013 between himself and Mr Mangenda because the language used in the passage of the conversation was allegedly ambiguous and the witness's name was never mentioned.[2558] The Appeals Chamber recalls that the Trial Chamber assessed the conversation in light of all the relevant evidence. In particular, the Trial Chamber explained, when interpreting the relevant passage of the 10 November 2013 conversation, that:

> The Chamber understands from the above that Mr Kilolo referred to D-13 as '*cette personne*', since he (i) was only recently, namely on 7 November 2013, re-scheduled to testify and (ii) due to the time lapse, in Mr Kilolo's view, would no longer remember 'things'. The Chamber also notes the use of coded language: Mr Kilolo uses the expression '*les couleurs*' to describe what has been occupying him in relation to D-13. That expression is used repeatedly and in varied forms ('*faire* […] *la couleur*' or '*couleur*') by the accused, mainly Mr Kilolo and Mr Mangenda, throughout their conversations in relation to (potential) defence witnesses. In the present context, the Chamber understands that Mr Kilolo refers to the illicit coaching of D-13 before his testimony, as was the case with other witnesses such as D-54.[2559] [Emphasis in original, footnotes omitted.]

1105. In the Appeals Chamber's view, it is clear that the basis for the Trial Chamber's conclusion that witness D-13 was the subject of the conversation was not only the content of the particular passage of the 10 November 2013 conversation. As the Trial Chamber noted, the four telephone contacts between Mr Kilolo and the witness on 8 November 2013, before his Main Case testimony on 12 November 2013, were "critical in understanding the backdrop" against which the conversation of 10 November 2013 took place.[2560] These contacts involved telephone numbers that the Chamber found could be attributed to Mr Kilolo and witness D-13, who indicated that one of the telephone numbers belonged to him.[2561] This, coupled with the content of the conversation, the frequency and duration of the contacts prior to the testimony and the fact that the same pattern was employed in relation to other witnesses,

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[2558] Mr Kilolo's Appeal Brief, para. 146.
[2559] Conviction Decision, para. 660.
[2560] Conviction Decision, para. 658.
[2561] Conviction Decision, paras 656-657.

supported the Trial Chamber's conclusion that Mr Kilolo illicitly prepared and coached witness D-13.[2562] In the Appeals Chamber's view, Mr Kilolo has not shown that the Trial Chamber's conclusion that witness D-13 was the subject of the 10 November 2013 conversation was one that no reasonable trier of fact could have reached. The argument is thus rejected.

1106. Furthermore, the Appeals Chamber rejects Mr Kilolo's argument that there is no evidence that he instructed the witness to give false testimony on the number of contacts he had with the Main Case Defence. The Appeals Chamber notes that in reaching this finding, the Trial Chamber: (i) inferred on the basis of intercepts of the telephone conversations between Mr Kilolo and other defence witnesses, that he instructed them to deny contacts; (ii) found that witness D-13 did testify falsely in this regard; and (iii) that, because Mr Kilolo had "expended great effort and time on illicit witness coaching activities", had the witness testified honestly as to the number of his contacts with the Main Case Defence, this effort would have been "futile" and "might have entailed criminal prosecution".[2563] Consequently, the Appeals Chamber finds that Mr Kilolo fails to show that the Trial Chamber's conclusions were conclusions that no reasonable trier of fact could have reached based evidence on record. The argument is thus rejected.

1107. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments that the Trial Chamber erred when it found that he had illicitly coached witness D-13 on his expected testimony and instructed him to testify falsely about the number of contacts he had with the Main Case Defence.

(c) Alleged errors regarding witness D-25

(i) Relevant part of the Conviction Decision

1108. In relation to witness D-25 the Trial Chamber noted that he testified in the Main Case but was not called in the present case.[2564] The Trial Chamber found, in relevant part, that following Mr Kilolo's instructions, witness D-25 falsely testified in the Main Case regarding any payment of money, including legitimate reimbursement of

[2562] Conviction Decision, paras 661-663.
[2563] Conviction Decision, para. 664.
[2564] Conviction Decision, para. 477.

travel or other expenses.[2565] In addition, the Trial Chamber found that Mr Kilolo illicitly coached witness D-25 prior to and during the witness's testimony including in relation to payments of money from the Mr Bemba's defence in the Main Case.[2566]

(ii) Submissions of the parties

(a) Mr Kilolo

1109. Mr Kilolo argues that the Trial Chamber erred in concluding that he illicitly coached and instructed witness D-25 to "falsely deny that he had received any payments".[2567] In support of this argument Mr Kilolo submits that witness D-25 did not falsely testify about the payments he received, as the witness "may have understood, for example, that money he received via Western Union had originated from the VWU to cover his travel expenses".[2568] Thus, in his view, based on the witness's testimony before Trial Chamber III it would be reasonable to conclude that the witness did not intentionally testify falsely.[2569]

1110. Furthermore, Mr Kilolo avers that, since he had no reason to instruct witness D-25 to lie about the transfer of USD 132.61, this being a "legitimate and transparent" payment, there is "no direct evidence to support the conclusion that Mr. Kilolo instructed him to lie or illicitly coached him".[2570]

1111. In relation to the intercepted conversations on 26 and 27 August 2013 between himself and Mr Mangenda, Mr Kilolo avers that the language used in the conversations is "ambiguous and does not relate to any instructions given to D-25".[2571] Moreover, he contends that without hearing witness D-25 on the issue, the Trial Chamber could not have reasonably reached its conclusions.[2572]

1112. Lastly, with respect to the Trial Chamber's reliance on its findings regarding witnesses P-242 (D-57) and P-243 (D-64) to support its findings in relation to witness D-25, Mr Kilolo submits that the "circumstances in which D-57 and D-64 received

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[2565] Conviction Decision, para. 503.
[2566] Conviction Decision, para. 504.
[2567] Mr Kilolo's Appeal Brief, para. 148.
[2568] Mr Kilolo's Appeal Brief, para. 149.
[2569] Mr Kilolo's Appeal Brief, para. 149.
[2570] Mr Kilolo's Appeal Brief, para. 150.
[2571] Mr Kilolo's Appeal Brief, para. 151.
[2572] Mr Kilolo's Appeal Brief, para. 151.

money were different" since it involved reimbursement of their expenses.[2573] In his view, the evidence does not support the conclusion that witnesses D-57 and D-64 "were instructed to conceal payments", and as such the Trial Chamber should not have relied on these witnesses to support its finding that witness D-25 was instructed to falsely testify.[2574]

(b) The Prosecutor

1113. The Prosecutor responds that "[t]he Chamber reasonably concluded that Kilolo instructed D-25 to falsely deny being paid by the Main Case Defence".[2575] The Prosecutor argues that it was reasonable for the Trial Chamber to rely on the comments made by Mr Kilolo and Mr Mangenda in their telephone conversations during and immediately after witness D-25's testimony.[2576] These comments, in the Prosecutor's view, showed Mr Kilolo's illicit coaching of witness D-25 and 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".[2577] The Prosecutor argues that the telephone conversations between Mr Kilolo and Mr Mangenda were "neither 'ambiguous' nor [did] they constitute innocuous discussions concerning D-25's ongoing testimony".[2578] The Prosecutor bases this contention on the grounds that: (i) Mr Kilolo and Mr Mangenda discussed, during these conversations, the instructions given to witness D-25; (ii) Mr Mangenda expressed his concern that Trial Chamber III had suspicions about this illicit coaching; and (iii) Mr Mangenda said that Mr Bemba "really saw that […] thorough colour work was effectively carried out".[2579] The Prosecutor adds that, given the evidence of Mr Kilolo's role in the transfer of money to witness D-25 through Western Union and the nature of the question asked to the witness as to whether he had receive any payment, the Trial Chamber reasonably concluded that this witness

[2573] Mr Kilolo's Appeal Brief, para. 152.
[2574] Mr Kilolo's Appeal Brief, para. 152.
[2575] Response, para. 280, referring to Conviction Decision, paras 499-504.
[2576] Response, para. 280, referring to Conviction Decision, paras 496-502.
[2577] Response, para. 280, referring to Conviction Decision, paras 496-502.
[2578] Response, para. 281, referring to Conviction Decision, paras 488-490, 493-495.
[2579] Response, para. 281, referring to Conviction Decision, paras 488-490, 493-495.

testified falsely when he denied having received any payment from the Main Case Defence.[2580]

(iii) Determination by the Appeals Chamber

1114. Mr Kilolo challenges the Trial Chamber's conclusion that witness D-25 testified falsely in the Main Case about receiving any payment of money including legitimate reimbursement of travel and other expenses from Mr Bemba's defence team in the Main Case. The Appeals Chamber recalls in this regard that the Trial Chamber noted, with respect to the Western Union transfer of USD 132.61 to the witness that it could not establish that the payment was illegitimate, as it could have been legitimately transferred by the defence in connection with the Brazzaville mission.[2581] Nevertheless, as the witness denied before Trial Chamber III that he had received any payments from the Mr Bemba's defence team in the Main Case, the Trial Chamber concluded that the witness was untruthful on this point. This conduct of the witness was deemed, by the Trial Chamber, to be consistent with a pattern of conduct on the part of Mr Kilolo, whereby he would give instructions to witnesses to conceal any payments received from the defence.[2582] Moreover, the Trial Chamber noted that Mr Kilolo's "illicit coaching activities resulted in scripting the entirety of the witnesses' testimonies".[2583] In the Trial Chamber's view, the witnesses' "consistent denial of all Main Case Defence payments, including legitimate ones", was a "regular feature of the script Mr Kilolo illicitly rehearsed with the witnesses".[2584] In this regard, the Appeals Chamber notes that Mr Kilolo proposes an alternative reading of the witness's testimony, namely, that the witness did not intentionally testify falsely because he may have understood that the Western Union transfer in question originated from the VWU and not the Mr Bemba's defence team.[2585]

1115. The Appeals Chamber finds that the alternative reading of the witness's testimony proposed by Mr Kilolo falls short of demonstrating that the inferences drawn by the Trial Chamber, on the basis of the evidence, were not the only

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[2580] Response, para. 282, referring to Conviction Decision, para. 500.
[2581] Conviction Decision, para. 483.
[2582] Conviction Decision, para. 501.
[2583] Conviction Decision, para. 501.
[2584] Conviction Decision, para. 501.
[2585] Mr Kilolo's Appeal Brief, paras 148-149.

reasonable conclusion that could be reached. The Appeals Chamber notes in particular, that the Trial Chamber did not consider the witness's testimony in isolation, but in the context of the pattern of instructions issued by Mr Kilolo with respect to other witnesses concerning payments. The Appeals Chamber also finds that, contrary to Mr Kilolo's further argument, despite the absence of direct evidence the Trial Chamber was not precluded from drawing conclusions based on other evidence in the record to show that he had instructed witness D-25 to lie about the transfer of the USD 132.61. These arguments are thus rejected.

1116. With respect to the Trial Chamber's reliance on findings about witnesses P-242 (D-57) and P-243 (D-64) to support its findings concerning witness D-25, Mr Kilolo argues that there is no evidence that demonstrates the existence of a pattern in his instruction to the witnesses to deny any payments received, including those for legitimate purposes.[2586] Consequently, the question arising is whether the Trial Chamber's conclusion concerning a pattern discernible from instructions that he gave to witnesses not to reveal that they had received any payments was reasonable in the circumstances.

1117. The Appeals Chamber notes that the Trial Chamber found, *inter alia*, that witness P-242 (D-57) had received an illegitimate transfer of money shortly before his testimony in the Main Case.[2587] In support of this finding, the Trial Chamber drew conclusions from the record that witness P-242 (D-57) was instructed, like other defence witnesses, not to reveal that he had received any payments.[2588] Similarly, in relation to witness P-243 (D-64) the Trial Chamber found, *inter alia*, that the witness had testified untruthfully when he denied having received any money from the Main Case Defence, including for "legitimate reimbursement of costs and the amount of USD 700 *via* his daughter".[2589] In support of this finding, the Trial Chamber noted that there was a pattern of Mr Kilolo instructing defence witnesses not to reveal that they had received any payments.[2590] The Appeals Chamber recalls that the Trial Chamber drew this conclusion in relation to witnesses P-260 (D-2), P-245 (D-3), D-6,

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[2586] Conviction Decision, para. 501. *See also* paras 250, 278.
[2587] Conviction Decision, paras 240-250.
[2588] Conviction Decision, para. 250.
[2589] Conviction Decision, para. 279.
[2590] Conviction Decision, para. 278.

P-198 (D-15) and P-261 (D-23) as well.[2591] Based on the direct evidence of witnesses P-260 (D-2) and P-245 (D-3), the fact that each witness denied receiving any payments in their Main Case testimony and did so using the same language in their testimony,[2592] the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to discern a pattern in the instructions issued by Mr Kilolo to these witnesses. Moreover, the Appeals Chamber observes that, as found by the Trial Chamber in relation to Mr Kilolo's instructions to witnesses to conceal their prior contacts with Mr Bemba's defence team in the Main Case,[2593] had the witness testified honestly as to receiving payments from defence, Mr Kilolo's efforts to secure testimony favourable to the defence would have been futile and may have resulted in criminal prosecution.

1118. Finally, the Appeals Chamber finds no merit in Mr Kilolo's contention that the Trial Chamber should not have relied upon the intercepted telephone conversations of 26 and 27 August 2013 between him and Mr Mangenda because the language used was ambiguous and does not relate to any instructions given to witness D-25.[2594] In relation to the conversation of 26 August 2013, which took place on the first day of witness D-25's testimony,[2595] the Appeals Chamber understands Mr Kilolo to be referring to an apparent discrepancy in the translation of a word in the original language of Lingala into the word "*enseignements*" in French, as discerned from footnote 333 of his appeal brief. In this regard, the Appeals Chamber notes that, when asked by Mr Kilolo whether the witness had followed his instructions ("*enseignements*"), Mr Mangenda replied affirmatively, "*oui, oui il a bien suivi*", ("yes, he did indeed follow [the instructions]") referring, in the Trial Chamber's view, to "*les enseignements*".[2596] Mr Kilolo challenged the accuracy of the translation, claiming that neither he nor Mr Mangenda used the word "*enseignement*", but "*renseignement*".[2597] The Trial Chamber, declining to enter a finding on the accuracy of the translation, nevertheless observed that, while Mr Kilolo alleged that another

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[2591] *See* Conviction Decision, paras 412-415, 440, 452-453.
[2592] Conviction Decision, para. 250.
[2593] Conviction Decision, para. 664.
[2594] Mr Kilolo's Appeal Brief, para. 151.
[2595] Conviction Decision, para. 487.
[2596] Conviction Decision, para. 488, referring to Audio recording, CAR-OTP-0074-0091; translated transcript of audio recording, CAR-OTP-0080-0228 at 0231, line 60.
[2597] Conviction Decision, para. 488.

word was used altogether, Mr Mangenda, on the other hand, appeared to accept the translation.[2598] In this context, the Appeals Chamber observes that the Trial Chamber concluded that "both accused refer[ed] to the instructions which Mr Kilolo gave the witness as part of the illicit coaching".[2599] The Trial Chamber based its conclusion on the fact that "when asked whether the witness had followed the *'enseignement'*, Mr Mangenda affirmed and answered by explaining the substance of the witness's testimony".[2600] In addition, other excerpts from the conversation, such as Mr Kilolo's disagreement with Mr Mangenda's assessment of discrete aspects of the witness's testimony, which in Mr Kilolo's view did not comply with his instructions,[2601] support the Trial Chamber's conclusion. On the basis of the above, the Appeals Chamber considers that the Trial Chamber's conclusion regarding the meaning of the term "*enseignements*" was not unreasonable, when understood against the full backdrop of the conversation in question.

1119. In relation to the intercepted conversation of 27 August 2013 and by reference to footnote 333 of Mr Kilolo's Appeal Brief, the Appeals Chamber discerns that the following excerpt from this conversation is in issue. The excerpt in its translated form reads:

> 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.[2602]

[2598] Conviction Decision, para. 488.
[2599] Conviction Decision, para. 488.
[2600] Conviction Decision, para. 488.
[2601] Conviction Decision, para. 489.
[2602] *See* 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.

1120. With respect to the above excerpt, the Trial Chamber noted that Mr Kilolo "emphasised that he had given D-25 clear instructions to stay on script".[2603] The Trial Chamber attached "great weight" to Mr Kilolo's admission "that the reason D-25 had testified to his satisfaction was due to his 'clear instructions'".[2604] The Appeals Chamber finds that Mr Kilolo fails to demonstrate any ambiguity in this excerpt or why the Trial Chamber's finding in this regard was unreasonable. Accordingly, the Appeals Chamber finds that the Trial Chamber's conclusions, based on the telephone intercepts of 26 and 27 August 2013, were not unreasonable. Mr Kilolo's arguments are thus rejected.

1121. Lastly, the Appeals Chamber rejects Mr Kilolo's further argument that, not having heard from witness D-25 on the issue, the Trial Chamber could not have reasonably reached its conclusions. The Appeals Chamber recalls that the absence of testimonial evidence does not preclude the Trial Chamber from inferring, on the basis of other evidence on the record, that the only reasonable conclusion to be drawn was that Mr Kilolo illicitly instructed the witness to testify falsely.

1122. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments that the Trial Chamber erred when it found that he had illicitly coached and instructed witness D-25 to give false testimony.

(d) Alleged errors regarding witness D21-3 (D-29)

(i) Relevant part of the Conviction Decision

1123. After testifying for the Main Case under the pseudonym D-29, the witness testified in the present case as a defence witness for Mr Kilolo under the pseudonym D21-3.[2605] In assessing the witness's credibility and the reliability of his evidence, the Trial Chamber found him to be generally "self-confident" and able to "express[] himself with ease".[2606] In particular, the Trial Chamber found the witness's testimony to be reliable concerning "his account of Mr Kokaté's involvement, a series of contacts with the Main Case Defence, and the payment of money *via* Western

[2603] Conviction Decision, para. 493.
[2604] Conviction Decision, para. 494.
[2605] Conviction Decision, paras 507-508.
[2606] Conviction Decision, para. 509.

Union".[2607] However, the Trial Chamber also noted that, when questioned by the Prosecutor in court, the witness's demeanour was "defensive and often evasive,"[2608] this, coupled with other observations about the witness's behaviour,[2609] led the Trial Chamber to conclude that witness D21-3 (D-29)'s "version of events was intended to protect his own interests and remain consistent with his evidence in the Main Case".[2610] In addition, the Trial Chamber found that the witness sought "to impress a particular narrative on the Chamber" when he testified as to payments from Mr Kilolo.[2611] On the basis of these findings, the Trial Chamber found the witness's credibility to be "partially affected" and determined that it would not rely on all of witness D21-3 (D-29)'s testimony.[2612]

1124. The Trial Chamber found that witness D-29 had "dishonestly testified in the Main Case regarding his prior contacts with the Main Case Defence".[2613] In addition, the Trial Chamber found that Mr Kilolo had instructed witness D-29 to falsely testify about his prior contacts with the Mr Bemba's defence team in the Main Case and to deny any payments of money he had received.[2614] For this finding, the Trial Chamber relied, *inter alia*, on the pattern of instructions that Mr Kilolo had given to other witnesses not to reveal their prior contacts with and receipt of money from Mr Bemba's defence team in the Main Case.[2615] In particular, the Trial Chamber found that the transfer of USD 649.43 to witness D-29, shortly before the witness's testimony in the Main Case, was an illegitimate payment which Mr Kilolo made in circumvention of proper VWU channels in order to secure the witness's Main Case testimony in favour of Mr Bemba.[2616] In this regard, the Trial Chamber was convinced that Mr Kilolo had also instructed witness D-29 to deny receiving the

[2607] Conviction Decision, paras 509, 512.
[2608] Conviction Decision, para. 510.
[2609] Conviction Decision, paras 510-511.
[2610] Conviction Decision, para. 511.
[2611] Conviction Decision, para. 511.
[2612] Conviction Decision, para. 511.
[2613] Conviction Decision, para. 540.
[2614] Conviction Decision, para. 541.
[2615] Conviction Decision, paras 527, 531.
[2616] Conviction Decision, paras 526, 541.

payment of USD 649.43 even though it could not be established that the witness himself was aware that the payment was illicit.[2617]

1125. Furthermore, the Trial Chamber found that it could not conclude that witness D-29 gave false testimony in the Main Case with regard to these payments because it could not "exclude the possibility that the witness in fact believed the payment to be legitimate and not in exchange for his testimony".[2618]

(ii) Submissions of the parties

(a) Mr Kilolo

1126. Mr Kilolo submits that the Trial Chamber erred in finding that he instructed witness D-29 to lie about receiving money from and having contacts with Mr Bemba's defence team in the Main Case.[2619] In support of this argument, Mr Kilolo challenges the Trial Chamber's credibility assessment of witness D21-3 (D-29). In particular, Mr Kilolo avers that the Trial Chamber based its credibility assessment on the witness's "defensive demeanour" when answering questions put by the Prosecutor, but "failed to consider other relevant factors as to why the witness's demeanour […] was defensive", notably the witness's "difficulty in dealing with a personal matter".[2620]

1127. Additionally, Mr Kilolo argues that, given the Trial Chamber's finding that witness D-29 did not give false testimony regarding the receipt of USD 649.43 from the defence to cover his son's travel and relocation, there was no need for the witness to lie about receiving the money or for Mr Kilolo to instruct him to lie about it.[2621]

1128. With respect to the Trial Chamber's finding that witness D-29 deliberately concealed two instances of contact with Mr Bemba's defence team during his testimony before Trial Chamber III, namely: (i) his contact with Mr Kilolo and Mr Mangenda when they escorted him and his wife D-30 to a meeting with the VWU; and (ii) his telephone call to Mr Kilolo during which he requested assistance in

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[2617] Conviction Decision, para. 527.
[2618] Conviction Decision, para. 530.
[2619] Mr Kilolo's Appeal Brief, para. 154.
[2620] Mr Kilolo's Appeal Brief, para. 155.
[2621] Mr Kilolo's Appeal Brief, para. 156.

relocating his son,[2622] Mr Kilolo argues that the Trial Chamber failed to provide any reference for its finding regarding these two contacts.[2623] Moreover, he submits that, as the meeting with the VWU was not an illicit meeting, there was no need for the witness to conceal it.[2624] Furthermore, Mr Kilolo maintains that there is no evidence that he had "a separate and discrete contact with D-29 about the relocation of his son".[2625]

1129. In addition, he submits that the intercepted conversation between him and Mr Mangenda is not indicative of Mr Kilolo instructing witness D-29 to lie.[2626] Mr Kilolo asserts that the Trial Chamber's finding that Mr Kilolo instructed the witness to lie about payments and meetings with the defence is based on circumstantial evidence which is insufficient to support a finding of beyond a reasonable doubt.[2627] Mr Kilolo takes issue with the fact that the Trial Chamber relied on its conclusions regarding other witnesses to support its finding that he had instructed witness D-29 to lie about payments he received and his contacts with Mr Bemba's defence team.[2628] He contends that witnesses D-2, D-3 and D-23 "were inherently unreliable" and there is "no evidence in the record supporting the Trial Chamber's findings regarding D-55, D-15, D-26, or D-54".[2629]

(b) The Prosecutor

1130. The Prosecutor responds that the Trial Chamber reasonably found that, based on Mr Kilolo's instruction, witness D-29 lied about his contacts with and the money received from the Mr Bemba's defence team.[2630] The Prosecutor argues that Mr Kilolo "misconstrues" the Trial Chamber's analysis when claiming that his conversations with Mr Mangenda did not demonstrate that he instructed witness D-29 to lie.[2631] She avers that it was reasonable for the Trial Chamber to rely on these

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[2622] Mr Kilolo's Appeal Brief, para. 157, referring to Conviction Decision, para. 528.
[2623] Mr Kilolo's Appeal Brief, para. 157.
[2624] Mr Kilolo's Appeal Brief, para. 157.
[2625] Mr Kilolo's Appeal Brief, para. 157.
[2626] Mr Kilolo's Appeal Brief, para. 158.
[2627] Mr Kilolo's Appeal Brief, para. 159.
[2628] Mr Kilolo's Appeal Brief, para. 159, referring to Conviction Decision, paras 527, 531.
[2629] Mr Kilolo's Appeal Brief, para. 159, referring to sub-grounds 3 (A), 3 (B) (2) (b), 3 (B) (3).
[2630] Response, para. 283, referring to Conviction Decision, paras 527, 531, 540-541.
[2631] Response, para. 284, referring to Conviction Decision, paras 534-539.

conversations for its inferences, as this was "consistent with Kilolo's *modus operandi*".[2632]

1131. The Prosecutor submits that the Trial Chamber "clearly identified the physical, telephone, and SMS contacts which D-29 failed to disclose during his testimony in the Main Case".[2633] The Prosecutor maintains that Mr Kilolo ignores the Trial Chamber's conclusion that he made arrangements for the witness to be paid in order for him to testify in Mr Bemba's favour.[2634] The Prosecutor argues that when arriving at this conclusion, the Trial Chamber considered the testimony of the former head of VWU, witness D21-9 that "in principle, a calling party is not prohibited from funding witness requests" and accepted that witness D-29 did not realise that the payment he received was made in exchange for his testimony in the Main Case.[2635] The Prosecutor avers that it was nevertheless reasonable for the Trial Chamber to conclude that the payment was illicit in nature given the timing and size of the payments which corresponded to other illicit payments made to defence witnesses.[2636]

(iii) Determination by the Appeals Chamber

1132. Mr Kilolo challenges the Trial Chamber's credibility assessment of witness D21-3 (D-29) on the basis that the Trial Chamber failed to consider other relevant factors, notably the witness's difficulty in dealing with a "personal matter", which would have explained why his demeanour was so defensive when being questioned by the Prosecutor.[2637] Based on the excerpts from the transcripts of the witness's testimony to which Mr Kilolo refers, the Appeals Chamber understands the "personal matter" to be that [redacted][2638] In Mr Kilolo's view, "[f]or the OTP to suggest that he was lying was an affront considering this private matter in

[2632] Response, para. 284 (emphasis in original), referring to Conviction Decision, para. 501.
[2633] Response, para. 285, referring to Conviction Decision, paras 514-517, 519, 528.
[2634] Response, para. 286, referring to Conviction Decision, paras 522-527.
[2635] Response, para. 286, referring to Conviction Decision, paras 525, 530.
[2636] Response, para. 286, referring to Conviction Decision, paras 522-526.
[2637] Mr Kilolo's Appeal Brief, para. 155.
[2638] Mr Kilolo's Appeal Brief, para. 155, referring to Transcript of 2 March 2016, ICC-01/05-01/13-T-40-Red2-ENG (WT), p. 13, lines 18-21.

the context of the witness's culture".[2639] For the reasons explained below, the Appeals Chamber is not persuaded by this argument.

1133. First, the Appeals Chamber observes that the transcripts relied upon by Mr Kilolo in support of his argument do not give any indication that the witness became defensive and evasive because he was struggling with the abovementioned "personal matter". Second, the Trial Chamber found the witness to be generally "self-confident", articulate and able to "express[] himself with ease",[2640] a finding that Mr Kilolo does not challenge and that is difficult to reconcile with the assumption that the witness was struggling with a personal matter when testifying. Third, by merely proposing an alternative explanation for the witness's demeanour Mr Kilolo fails to demonstrate any unreasonableness in the Trial Chamber's conclusion that the witness's credibility was "partially affected" because of, *inter alia*, his demeanour. Mr Kilolo's argument is therefore rejected.[2641]

1134. Mr Kilolo also challenges the Trial Chamber's finding that witness D-29 had "dishonestly testified" before Trial Chamber III concerning the number of his prior contacts with the defence.[2642] The Trial Chamber found that witness D-29 mentioned only five pre-testimony contacts with Mr Kilolo and "deliberately withheld": (i) his encounter with Mr Kilolo and Mr Mangenda "when they escorted D-29 and D-30 to their meeting with the VWU"; and (ii) "his telephone call to Mr Kilolo during which he requested assistance in relocating his son".[2643] The Appeals Chamber finds that, contrary to Mr Kilolo's argument, the Trial Chamber did provide references for its finding regarding these two contacts. First, the Trial Chamber relied, as evidenced in its footnotes, on the VWU records to confirm the meeting of 13 August 2013 between Mr Kilolo, Mr Mangenda, the witness, his wife and the VWU.[2644] Second, witness

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[2639] Mr Kilolo's Appeal Brief, para. 155, referring to Transcript of 3 March 2016, ICC-01/05-01/13-T-41-Red2-ENG (WT), p. 19, lines 24-25 to p. 20, lines 1-2; p. 22, lines 2-22; p. 56, lines 14-15.
[2640] Conviction Decision, para. 509.
[2641] Conviction Decision, paras 510-511.
[2642] Mr Kilolo's Appeal Brief, para. 157, referring to Conviction Decision, para. 528.
[2643] Conviction Decision, para. 528.
[2644] Conviction Decision, para. 515, fns 1048-1050, referring to VWU Table, CAR-OTP-0078-0290 at 0296 (ICC-01/05-01/13-207-Conf-Anx, p.7) and Transcript of 2 March 2016, ICC-01/05-01/13-T-40-Red2-ENG (WT), p. 27, lines 8-10; p. 74, lines 11 to p. 75, line 6; Transcript of 3 March 2016, ICC-01/05-01/13-T-41-Red2-ENG (WT), p. 46, lines 16-17.

D21-3 (D-29) testified in the proceedings at hand that he had called Mr Kilolo requesting assistance in relocating his son.[2645]

1135. As said, Mr Kilolo also argues that, as the meeting with the VWU was not an illicit meeting, there was no need for the witness to conceal it.[2646] The Appeals Chamber rejects this argument as it indicates no error in the Trial Chamber's finding. Regardless of whether the meeting was illicit or not, the Trial Chamber correctly held, based on the evidence, that the witness failed to mention the meeting during his testimony. Furthermore, Mr Kilolo argues that there is no evidence that he had "a separate and discrete contact with D-29 about the relocation of his son".[2647] However, as discussed above, witness D21-3 (D-29) himself testified that he had called Mr Kilolo requesting assistance in relocating his son.[2648] Therefore, the Appeals Chamber finds no merit in Mr Kilolo's argument.

1136. Mr Kilolo's further argument relates to the Trial Chamber's finding that he had instructed witness D-29 to deny receiving a payment of USD 649.43 (*via* Western Union) which he had arranged in order to "ensure certain testimony" and "in full awareness of the illegitimacy of the payment".[2649] The Appeals Chamber notes that the Trial Chamber found that Mr Kilolo "deliberately circumvented the proper channels through the VWU in order to satisfy D-29's conditions".[2650] The Trial Chamber held further that in arranging the payment, Mr Kilolo intended to "ensure certain testimony, in full awareness of the illegitimacy of the payment".[2651] However, when assessing whether witness D-29 testified falsely in the Main Case, the Trial Chamber found that it could not "exclude the possibility that the witness in fact believed the payment to be legitimate and not in exchange for his testimony" and thus could not find that witness D-29 gave false testimony with regard to this payment.[2652] Mr Kilolo argues that, since the witness believed that the payment was legitimate and not in exchange for his testimony, there was no need for him to instruct the witness to

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[2645] Conviction Decision, para. 519.
[2646] Mr Kilolo's Appeal Brief, para. 157.
[2647] Mr Kilolo's Appeal Brief, para. 157.
[2648] Conviction Decision, para. 519.
[2649] Conviction Decision, para. 527.
[2650] Conviction Decision, para. 526.
[2651] Conviction Decision, para. 527.
[2652] Conviction Decision, para. 530.

lie about it.[2653] The Appeals Chamber is not persuaded by this argument. While the Trial Chamber could not conclude, based on the evidence before it, that witness D-29 was aware that the payment was not legitimate, this does not mean that there was no reason for Mr Kilolo to instruct the witness not to reveal the payment if asked about it. This is because, according to the Trial Chamber's findings, Mr Kilolo knew that the payment was illegitimate and he nevertheless made it to ensure witness D-29's testimony.

1137. Regarding Mr Kilolo's argument that there was insufficient evidence for the finding that he gave instructions to witness D-29 to lie, the Appeals Chamber notes that the Trial Chamber drew an inference based on: (i) Mr Kilolo's interest to ensure that the payment was kept secret because of its illicit nature; and (ii) as was the case with other witnesses (D-2, D-3, D-23 and D-54), the instructions issued by Mr Kilolo when making illicit payments to witnesses consistently included the instruction not to reveal such payments.[2654] The Trial Chamber drew similar inferences in relation to Mr Kilolo's instruction to witness D-29 to testify falsely about the number of contacts with members of Mr Bemba's defence team.[2655] Mr Kilolo has not shown that no reasonable trier of fact could have concluded that the inferences drawn were the only reasonable conclusions that could be drawn from the evidence. Mr Kilolo's argument that the intercepted conversations between him and Mr Mangenda are not indicative of Mr Kilolo instructing witness D-29[2656] to lie is unpersuasive. The Trial Chamber found these conversations to "demonstrate[] that Mr Kilolo illicitly coached witnesses, preferably shortly before their testimony, as a strategy intended to instruct them and ensure their favourable testimony on issues important to the Main Case Defence".[2657] In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to infer, on the basis of the aforementioned finding, that Mr Kilolo instructed witness D-29 to lie. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments that the Trial Chamber erred when it found, beyond reasonable doubt, that he had instructed witness D-29 to deny receipt of any

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[2653] Mr Kilolo's Appeal Brief, para. 156.
[2654] Conviction Decision, para. 527.
[2655] Conviction Decision, para. 531.
[2656] Mr Kilolo's Appeal Brief, para. 158.
[2657] Conviction Decision, para. 535.

payments of money[2658] and to falsely testify about his prior contacts with Mr Bemba's defence team in the Main Case.[2659]

(e) Alleged errors regarding witness P-214 (D-55)

(i) Relevant part of the Conviction Decision

1138. After testifying for the Main Case under the pseudonym D-55, the witness testified in the present case for the Prosecution under the pseudonym P-214.[2660] On 22 January 2014, witness P-214 (D-55) provided a statement to the Prosecutor[2661] ("P-214 (D-55)'s January 2014 Statement"), which was recognised as submitted under rule 68 of the Rules.[2662] For its evidentiary assessment, the Trial Chamber relied on both the witness's testimony as well as P-214 (D-55)'s January 2014 statement.[2663]

1139. In relation to D-55's testimony before Trial Chamber III, the Trial Chamber found that the witness had "incorrectly testified about his prior contacts with the Main Case Defence and payment of money, including reimbursement of expenses".[2664] In addition, the Trial Chamber found that he had lied about promises made to him concerning benefits that he would receive from Mr Bemba's good graces.[2665]

1140. The Trial Chamber also found that Mr Kilolo had instructed witness D-55 to testify that a document dating from November 2009[2666] ("November 2009 Document"), of which witness D-55 was a co-author, had been prepared solely for the purpose of the other co-author's [redacted], which Mr Kilolo knew to be incorrect.[2667]

1141. In addition, the Trial Chamber found that Mr Kilolo had instructed witness D-55 "to lie about his contacts with the Main Case Defence and to conceal, for example, their meeting in Amsterdam and the telephone call [that] Mr Kilolo [had] facilitated

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[2658] Conviction Decision, paras 527, 541.
[2659] Conviction Decision, paras 531, 541.
[2660] Conviction Decision, para. 282.
[2661] *See* CAR-OTP-0074-0860-R03 (Portuguese original); CAR-OTP-0074-0872-R03 (French Translation).
[2662] Conviction Decision, para. 283.
[2663] Conviction Decision, paras 284, 286.
[2664] Conviction Decision, paras 301, 303.
[2665] Conviction Decision, para. 301.
[2666] CAR-OTP-0062-0094-R02.
[2667] Conviction Decision, para. 290.

between D-55 and Mr Bemba".[2668] Furthermore, the Trial Chamber found that Mr Kilolo had instructed witness D-55 to deny that he "received money, including legitimate reimbursement, and any non-monetary promises from the Main Case Defence".[2669] Lastly, the Trial Chamber found that, in an effort to "motivate" witness D-55 to give "specific testimony", Mr Bemba spoke with the witness by "telephone shortly before his testimony and thanked him for agreeing to testify in his favour".[2670]

(ii) Submissions of the parties

(a) Mr Kilolo

1142. Mr Kilolo submits that the Trial Chamber erred in finding that he "instructed D-55 to give false testimony with respect to: (i) the November 2009 Document; (ii) the payment of money; (iii) his prior contacts with the Bemba Main Case Defence; and (iv) his conversation with Mr Bemba".[2671]

1143. Mr Kilolo takes issue with the Trial Chamber's finding that he had instructed witness D-55 to testify that the November 2009 Document had been prepared to bolster its co-author's [redacted].[2672] He submits that the witness testified that Mr Kilolo had not instructed him to testify that the document was fabricated.[2673]

1144. Mr Kilolo asserts that there is no evidence that he instructed the witness to lie about the money he received.[2674] In particular, Mr Kilolo avers that there was no need "to instruct D-55 to lie about receiving EUR 100 and the costs associated with the Amsterdam meeting" since these were legitimate costs as confirmed by the Trial Chamber.[2675] In addition, Mr Kilolo submits that the Trial Chamber erred in inferring that he instructed the witness to lie about the payment from its conclusions regarding witnesses D-57 and D-64 because its findings were not based on evidence.[2676]

[2668] Conviction Decision, para. 304.
[2669] Conviction Decision, para. 304.
[2670] Conviction Decision, para. 305.
[2671] Mr Kilolo's Appeal Brief, para. 160, referring to Conviction Decision, paras 303-305. *See also* paras 153, 165.
[2672] Mr Kilolo's Appeal Brief, para. 161.
[2673] Mr Kilolo's Appeal Brief, para. 161, referring to Conviction Decision, paras 289-290; Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 29, lines 10-18.
[2674] Mr Kilolo's Appeal Brief, para. 162.
[2675] Mr Kilolo's Appeal Brief, para. 162, referring to Conviction Decision, para. 288.
[2676] Mr Kilolo's Appeal Brief, para. 162.

1145. Mr Kilolo disputes the Trial Chamber's finding that he had instructed witness D-55 to testify falsely about his contacts with the Mr Bemba's defence team in the Main Case.[2677] In particular, he submits that he did not instruct the witness to conceal the Amsterdam meeting. He argues that he only instructed the witness not to reveal this information to the public as the meeting was private.[2678] In any event, Mr Kilolo submits that, since part of the substance of the meeting required him to contact the VWU to arrange protective measures for the witness, he could not have instructed the witness to lie about the meeting.[2679]

1146. Regarding the Trial Chamber's finding on witness D-55's conversation with Mr Bemba, Mr Kilolo argues that the Trial Chamber erred in finding that Mr Bemba had spoken to the witness and had "thanked him for agreeing to testify in his favour".[2680] Mr Kilolo asserts, in this regard, that the witness merely stated that Mr Bemba "thanked him for 'having accepted to testify in this case'".[2681] He asserts further that the witness did not know for sure that the person he spoke with was Mr Bemba and, when testifying in the Main Case, the witness was not "expressly asked" if "he had spoken with Mr. Bemba".[2682] Thus, Mr Kilolo avers, the witness did not testify falsely.[2683]

(b) The Prosecutor

1147. The Prosecutor responds that the Trial Chamber reasonably found that Mr Kilolo had instructed witness D-55 to deny receiving money and non-monetary promises from the Mr Bemba's defence team, to lie about his prior contacts and on testifying that the November 2009 Document had been prepared to bolster the [redacted].[2684] The Prosecutor argues that Mr Kilolo

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[2677] Mr Kilolo's Appeal Brief, para. 163.
[2678] Mr Kilolo's Appeal Brief, para. 163, referring to Conviction Decision, para. 299; CAR-OTP-0074-0872-R03, p. 0880.
[2679] Mr Kilolo's Appeal Brief, para. 163, referring, *inter alia*, to Transcript of 30 October 2012, ICC-01/05-01/08-T-265-Red2-ENG (WT), p. 14, lines 18-25, p. 15, lines 1-6; Prior Recorded Testimony of witness D-55, CAR-OTP-0074-0872, p. 0878; Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 16, lines 23-24, p. 17, lines 4-24.
[2680] Mr Kilolo's Appeal Brief, para. 164, referring to Conviction Decision, para. 305.
[2681] Mr Kilolo's Appeal Brief, para. 164, referring to Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 66, lines 1-3.
[2682] Mr Kilolo's Appeal Brief, para. 165, referring to Conviction Decision, para. 294.
[2683] Mr Kilolo's Appeal Brief, para. 165.
[2684] Response, para. 290, referring to Conviction Decision, paras 290, 299-302, 304.

misinterprets and ignores relevant evidence relied upon by the Trial Chamber when making this finding, notably the witness's testimony in the present case and in the Main Case, and P-214 (D-55)'s January 2014 Statement.[2685] In particular, the Prosecutor submits that Mr Kilolo fails to acknowledge witness D-55's testimony in the present case stating that he had received instructions not to talk about certain things and that there was coaching.[2686]

(iii) Determination by the Appeals Chamber

1148. The Appeals Chamber observes that, when Mr Kilolo argues that the Trial Chamber erred when it "found" that the November 2009 Document was prepared solely to bolster [redacted][2687] he misconstrues the Trial Chamber's finding in this regard. The Trial Chamber did not find that the November 2009 Document was prepared solely for that purpose – it found that Mr Kilolo instructed witness D-55 to say so.[2688]

1149. Mr Kilolo's argument that witness D-55 "agreed" that Mr Kilolo had not instructed him to say that the November 2009 Document was a fabrication is also not persuasive.[2689] Mr Kilolo refers to an excerpt of witness D-55's testimony before the Trial Chamber, which arguably could be understood as suggesting that Mr Kilolo indeed did not give such instructions to the witness.[2690] However, the Trial Chamber's finding was based on several items of evidence, which Mr Kilolo does not challenge or address and which potentially shed a different light on the passage upon which he relies.[2691] He therefore has failed to demonstrate that the Trial Chamber's finding was unreasonable. Accordingly, the Appeals Chamber rejects Mr Kilolo's argument and finds that the Trial Chamber's conclusion that Mr Kilolo had instructed witness D-55 to testify to circumstances that Mr Kilolo knew to be incorrect was not unreasonable.

[2685] Response, para. 290, referring to Transcript of 29 October 2012, ICC-01/05-01/18-T-264-Red2-ENG (WT), p. 62, line 22 to p. 66, line 23; Prior Recorded Testimony of witness D-55, CAR-OTP-0074-0872-R03, pp. 0878-0880; Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 29, line 17.
[2686] Response, para. 290, referring to Transcript 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 33, line 24, p. 34, line 2.
[2687] *See* Mr Kilolo's Appeal Brief, para. 161.
[2688] Conviction Decision, para. 290.
[2689] *See* Mr Kilolo's Appeal Brief, para. 161.
[2690] Mr Kilolo's Appeal Brief, para. 161.
[2691] Conviction Decision, para. 290.

1150. The Appeals Chamber also rejects Mr Kilolo's further argument that there is no evidence that he instructed the witness to lie about the EUR 100 or the money he received for the costs associated with the Amsterdam meeting.[2692] The Appeals Chamber notes that the Trial Chamber inferred that Mr Kilolo had instructed witness D-55 to deny having received money, including legitimate reimbursement, and any non-monetary promises on the basis of "a clear pattern discernible from explicit instructions, as recorded in the evidence, that Mr Kilolo gave to other witnesses not to reveal that they had received any money from the Main Case Defence", and of the fact that witness D-55 had denied receiving these payments during his Main Case testimony.[2693] The Appeals Chamber finds that, as these payments were found to be the result of "legitimate investigative activities",[2694] which the witness nevertheless denied receiving, it was not unreasonable for the Trial Chamber to conclude that Mr Kilolo had instructed the witness to deny receipt of the money as he had with respect to other witnesses.

1151. In addition, Mr Kilolo challenges the Trial Chamber's finding that he had instructed witness D-55 to conceal the Amsterdam meeting. As said, Mr Kilolo argues that he had only instructed the witness not to reveal this information to the public, as the meeting was private and that, in any event, the witness had not denied the meeting during his Main Case testimony.[2695] As to his first contention, the Appeals Chamber notes that Mr Kilolo refers to a passage of the P-214 (D-55)'s January 2014 Statement, which is somewhat ambiguous as to whether Mr Kilolo gave instructions not to disclose the meeting to the public or generally.[2696] However, the Trial Chamber relied on another passage in P-214 (D-55)'s January 2014 Statement and the witness's testimony before it, which indicated that Mr Kilolo had instructed the witness "not to talk about certain things" and to deny the Amsterdam meeting.[2697] The Trial Chamber found the witness's testimony particularly persuasive in this regard due to his demeanour, which the Trial Chamber described as "adamant on this point".[2698] The

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[2692] Mr Kilolo's Appeal Brief, para. 162.
[2693] Conviction Decision, paras 301-302.
[2694] Conviction Decision, para. 288.
[2695] Mr Kilolo's Appeal Brief, para. 163, referring to Conviction Decision, para. 299; CAR-OTP-0074-0872-R03, p. 0880.
[2696] Mr Kilolo's Appeal Brief, para. 163, referring to CAR-OTP-0074-0872-R03, p. 0880.
[2697] Conviction Decision, paras 299-300.
[2698] Conviction Decision, para. 300.

Trial Chamber also noted that the witness "did not waiver when questioned by the Kilolo Defence" and admitted to abiding by Mr Kilolo's instructions.[2699] In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude, based on the witness's evidence, that Mr Kilolo had instructed him to conceal the meeting. Furthermore, the Appeals Chamber finds that the fact that Mr Kilolo may have informed the VWU about the witness's security concerns following the Amsterdam meeting and therefore had no reason to conceal the meeting,[2700] does not change this conclusion as the evidence demonstrates that Mr Kilolo instructed the witness to "deny that any meeting was held in Amsterdam, even if he was asked before the Court",[2701] an instruction which the witness adhered to. Mr Kilolo's arguments are therefore rejected.

1152. As to his second contention, namely that the witness did not deny the meeting, the Appeals Chamber observes that the Trial Chamber found that "despite being asked" the witness only mentioned three contacts and, *inter alia*, concealed his meeting with Mr Kilolo in Amsterdam.[2702] The Appeals Chamber considers that this was a reasonable finding to make, based on the testimony on which the Trial Chamber relied: witness D-55 was specifically asked about contacts with Mr Bemba's defence team and, while he mentioned three other interactions, he failed to mention the meeting in Amsterdam.[2703] The passage of witness D-55's testimony before Trial Chamber III on which Mr Kilolo relies,[2704] does not call this finding into question.

1153. In addition, Mr Kilolo disputes the Trial Chamber's finding that he instructed witness D-55 to conceal his telephone call with Mr Bemba on the basis that: (i) the witness did not know for certain that the person he had spoken to was Mr Bemba; and

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[2699] Conviction Decision, para. 300.
[2700] Mr Kilolo's Appeal Brief, para. 163, referring, *inter alia*, to Transcript of 30 October 2012, ICC-01/05-01/08-T-265-Red2-ENG (WT), p. 14, lines 18-25, p. 15, lines 1-6; Prior Recorded Testimony of witness D-55, CAR-OTP-0074-0872, p. 0878; Transcript of 5 November 2015, ICC-01/05-01/13-T-36-Red-ENG (WT), p. 16, lines 23-24, p. 17, lines 4-24.
[2701] Prior Recorded Testimony of witness D-55, CAR-OTP-0074-0872 at p. 0881.
[2702] Conviction Decision, para. 301.
[2703] *See* Transcript of 29 October 2012, ICC-01/05-01/08-T-264-Red2-ENG (WT), p. 66, 15-23. *See also* p. 55, lines 19-22, p. 57, lines 17-25, to p. 58, lines 1-17, p. 63, lines 13-25, to p. 64, lines 1-7, p. 65, lines 19-25, to p. 66, line 23.
[2704] Mr Kilolo's Appeal Brief, para. 163, referring to Transcript of 30 October 2012, ICC-01/05-01/08-T-265-Red2-ENG (WT), p. 14, lines 18-25, p. 15, lines 1-6.

(ii) the witness had not expressly been asked in the Main Case about whether he had spoken to Mr Bemba.[2705]

1154. With respect to whether the witness knew that the person he had spoken to was Mr Bemba, the Appeals Chamber notes that the Trial Chamber confirmed, based on witness P-214 (D-55)'s testimony, that the witness "never positively stated that he actually spoke with Mr Bemba" but rather "assumed that the person on the other end of the line was Mr Bemba".[2706] However, in finding that the witness did indeed speak to Mr Bemba on 5 October 2012, the Trial Chamber relied on witness P-214 (D-55)'s testimony that the "conversation was conducted in Lingala, which Mr Bemba speaks", and that Mr Bemba was a "powerful man with many friends outside detention", a description which the Chamber considered matched Mr Bemba.[2707] The Trial Chamber also surmised that "in light of D-55's loss of trust in Mr Kilolo and his request to speak to Mr Bemba personally", it was unlikely that "Mr Kilolo would pass the call through to a person other than Mr Bemba" and that the "Kilolo Defence admitted in its written submissions to the Pre-Trial Chamber that Mr Kilolo facilitated contact between Mr Bemba and D-55".[2708] Moreover, the Trial Chamber relied on relevant call data records which corroborated the fact that witness P-214 (D-55) spoke to Mr Bemba.[2709] In light of the foregoing, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude on the basis of a holistic analysis of all the evidence before it, that the person witness P-214 (D-55) had spoken to was Mr Bemba. This argument is therefore rejected.

1155. As to the argument that the witness had never expressly been asked whether he had spoken to Mr Bemba and therefore did not conceal his conversation with him, the Appeals Chamber recalls that, elsewhere in this judgment, it has found that the Trial Chamber did not err in finding that witness D-55 gave false testimony by concealing this information.[2710] Lastly, Mr Kilolo disputes the Trial Chamber's finding that Mr Bemba spoke to witness D-55 and "thanked him for agreeing to testify in his

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[2705] Mr Kilolo's Appeal Brief, para. 165.
[2706] Conviction Decision, para. 294.
[2707] Conviction Decision, para. 295.
[2708] Conviction Decision, para. 295.
[2709] Conviction Decision, para. 296.
[2710] *See supra* para. 693.

favour", as opposed to having thanked the witness for "having accepted to testify in this case".[2711] The Appeals Chamber notes that, in P-214 (D-55)'s January 2014 Statement, the witness indeed stated that the person whom he assumed to be Mr Bemba "thanked him for agreeing to testify in his favour", whilst in his testimony before the Trial Chamber the witness stated that he was thanked for "having accepted to testify in this case".[2712] Mr Kilolo's argument merely focuses on the latter evidence, while he ignores the testimony in P-214 (D-55)'s January 2014 Statement, which is more specific and provides a reasonable basis for the Trial Chamber's finding. The argument is therefore rejected.

1156. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments and finds that the Trial Chamber did not err when it found, beyond reasonable doubt, that he had instructed witness D-55 to give false testimony with respect to: (i) the November 2009 document;[2713] (ii) the payment of money;[2714] (iii) his prior contacts with Mr Bemba's defence team in the Main Case;[2715] and (iv) his conversation with Mr Bemba.[2716]

(f) Alleged errors regarding witnesses D-57 and D-64

(i) Relevant part of the Conviction Decision

1157. After having testified in the Main Case under the pseudonym D-57, the witness testified in the present case for the Prosecutor under the pseudonym P-20 and his wife testified under the pseudonym P-242.[2717] In January 2014, witness P-20 (D-57) provided a statement to the Prosecutor[2718] ("P-20 (D-57)'s January 2014 statement") which was recognised as submitted under rule 68 of the Rules.[2719] For its evidentiary

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[2711] Mr Kilolo's Appeal Brief, para. 164.
[2712] Prior Recorded Testimony of witness D-55, CAR-OTP-0074-0872, pp. 0878-0879 to 0880.
[2713] Conviction Decision, para. 304.
[2714] Conviction Decision, para. 304.
[2715] Conviction Decision, para. 304.
[2716] Conviction Decision, para. 304.
[2717] Conviction Decision, para. 229.
[2718] Conviction Decision, fn. 249, referring to "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; Prior recorded testimony, CAR-OTP-0074-0712; CAR-OTP-0077-0045; CAR-OTP-0077-0052; CAR-OTP-0077-0074; CAR-OTP-0077-0088; CAR-OTP-0077-0121; CAR-OTP-0077-0149; CAR-OTP-0077-0160; CAR-OTP-0074-0713; CAR-OTP-0077-0003; CAR-OTP-0077-0026.
[2719] Conviction Decision, para. 230.

assessment, the Trial Chamber relied on both the witness's testimony as well as P-20 (D-57)'s January 2014 statement.[2720]

1158. The Trial Chamber found that witness D-57's testimony in the Main Case was untruthful "as regards the payments of USD 106 as reimbursement and USD 665 shortly before his testimony in the Main Case as well as the number of his prior contacts with the Main Case Defence".[2721] The Trial Chamber found that Mr Kilolo had "arranged the transfer of USD 665 to D-57 through Mr Babala […] so as to secure his testimony in Mr Bemba's favour".[2722] The Trial Chamber found that Mr Kilolo ensured that the transfer was made to witness D-57's wife so as to "conceal any links between the witness and the Main Case Defence".[2723] More specifically, the Trial Chamber found that, as with many other witnesses, Mr Kilolo also "instructed D-57 to lie about the existence of payments and the extent of his contacts with the Main Case Defence".[2724]

1159. With respect to witness D-64, the Trial Chamber noted that, after having testified in the Main Case under the pseudonym D-64, the witness testified in the present case for the Prosecutor under the pseudonym P-243.[2725] On 22 and 23 January 2014, witness P-243 (D-64) provided a statement to the Prosecutor[2726] ("P-243 (D-64)'s January 2014 statement") which was recognised as submitted under rule 68 (3) of the Rules.[2727] For its evidentiary assessment, the Trial Chamber relied on both the witness's testimony as well as P-20 (D-57)'s January 2014 statement.[2728]

[2720] Conviction Decision, paras 231-232.
[2721] Conviction Decision, paras 246, 249, 252.
[2722] Conviction Decision, para. 253.
[2723] Conviction Decision, para. 253.
[2724] Conviction Decision, para. 253.
[2725] Conviction Decision, para. 255.
[2726] Conviction Decision, fn. 319, referring to Audio recording, CAR-OTP-0074-0707-R01 Track 1-7; Transcripts of audio recordings, CAR-OTP-0074-1091; CAR-OTP-0074-1112-R01; CAR-OTP-0074-1124-R01; CAR-OTP-0074-1155; CAR-OTP-0074-1169; CAROTP-0074-1189-R02; CAR-OTP-0074-1201; Audio recording, CAR-OTP-0074-0708-R01 Track 1-3; Transcripts of audio recordings, CAR-OTP-0074-1206-R01; CAR-OTP-0074-1229-R01; CAR-OTP-0074-1259.
[2727] Conviction Decision, para. 256, fn. 319, referring to transcript of 30 September 2015, ICC-01/05-01/13-T-32-Red2-ENG (WT), p. 32, lines 12-20, p. 41, line 23 to p. 42, line 3; "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red-Corr.
[2728] Conviction Decision, paras 257-258.

1160. The Trial Chamber found that witness D-64 "incorrectly testified when he denied having received any money from the Main Case Defence, including for legitimate reimbursement of costs and the amount of USD 700 *via* his daughter".[2729] The Trial Chamber found further that the witness also "lied about the number of contacts [he had] with the Main Case Defence, in particular Mr Kilolo".[2730] In addition, the Trial Chamber held that Mr Kilolo, through Mr Babala, arranged the transfer of USD 700 shortly before the witness's testimony in the Main Case so as to secure testimony that was favourable to Mr Bemba.[2731] It found further that Mr Kilolo ensured that the money was transferred to witness D-64's daughter so as to "conceal any links between the witness and the Main Case Defence".[2732] Furthermore, the Trial Chamber found that Mr Kilolo "instructed D-64 to lie about payments received from and the number of prior contacts with the Main Case Defence".[2733]

(ii) Submissions of the parties

(a) Mr Kilolo

1161. Mr Kilolo submits that the Trial Chamber erred in finding that he instructed witnesses D-57 and D-64 to lie about payments received from and their contacts with the defence team in the Main Case as neither witness had testified that Mr Kilolo had done so.[2734] He contends that witness D-57 did not testify that he received any payments "because he thought that it was not worth mentioning" and that both witnesses testified that he had never asked them to "modify their testimony".[2735]

1162. Furthermore, Mr Kilolo argues that the Trial Chamber erred in relying on its findings regarding witnesses D-2, D-15, D-26, D-54 and D-55 to support its conclusions that Mr Kilolo instructed witnesses D-57 and D-64 to lie about their contacts with the defence team in the Main Case and on its findings regarding witnesses D-2, D-3, D-15, D-23, D-54, and D-55 for its conclusions on the receipt of monetary and other benefits by witnesses D-57 and D-64.[2736] In his view, witness D-

[2729] Conviction Decision, para. 279.
[2730] Conviction Decision, para. 279.
[2731] Conviction Decision, para. 280.
[2732] Conviction Decision, para. 280.
[2733] Conviction Decision, para. 280.
[2734] Mr Kilolo's Appeal Brief, para. 166.
[2735] Mr Kilolo's Appeal Brief, para. 167.
[2736] Mr Kilolo's Appeal Brief, para. 166.

2, D-3 and D-23 were "inherently unreliable", there is no evidence that witness D-55 was instructed by him to lie about the money he received or his contacts, witness D-26 did not testify in the present case and witnesses D-15 and D-54 never testified that Mr Kilolo instructed them to lie.[2737]

(b) The Prosecutor

1163. The Prosecutor responds that the Trial Chamber reasonably found that Mr Kilolo transferred money to witnesses D-57 and D-64 through Mr Babala in order to have them testify in favour of Mr Bemba and he instructed them to lie about these payments and contacts with the defence team in the Main Case.[2738] The Prosecutor argues that Mr Kilolo ignored the detailed reasons that the Trial Chamber provided in support of its findings.[2739] The Prosecutor avers that the Trial Chamber considered and rejected Mr Kilolo's argument that the payments were meant to reimburse expenses incurred by the witnesses.[2740] The Prosecutor maintains that the lies told by witnesses D-57 and D-64 during their testimony in the Main Case "followed a pattern of similar lies that Kilolo instructed other witnesses to tell".[2741] According to the Prosecutor, it was reasonable for the Trial Chamber to favour "this pattern over the witnesses' denials that they were illicitly coached" and adds that Mr Kilolo, when claiming that the Trial Chamber erred in doing so, fails to appreciate the Trial Chamber's detailed credibility assessment of both witnesses' evidence.[2742] The Prosecutor argues further that the Trial Chamber relied on witnesses D-57's and D-64's evidence on the appellants' "behaviour and conduct" only if the evidence was sufficiently corroborated.[2743] As the witnesses' denial of having been illicitly coached was not corroborated, the Prosecutor avers that it was reasonable for the Trial Chamber to rely "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".[2744]

[2737] Mr Kilolo's Appeal Brief, para. 167.
[2738] Response, para. 295.
[2739] Response, para. 296.
[2740] Response, para. 296, referring to Conviction Decision, paras 239-240, 271-273.
[2741] Response, para. 296, referring to Conviction Decision, paras 250-251, 277-278.
[2742] Response, para. 296, referring to Conviction Decision, paras 231, 257.
[2743] Response, para. 297, referring to Conviction Decision, paras 231, 257.
[2744] Response, para. 297.

(iii) Determination by the Appeals Chamber

1164. The Appeals Chamber notes that Mr Kilolo challenges the Trial Chamber's finding that he instructed witnesses D-57 and D-64 to lie about payments received and their contacts with Mr Bemba's defence team in the Main Case. In his view, as neither witness had testified that he had done so and since both witnesses testified that he had never asked them to "modify their testimony" the Trial Chamber's finding is in error.[2745]

1165. At the outset, the Appeals Chamber notes that Mr Kilolo does not challenge the Trial Chamber's findings on the various money transfers received by the two witnesses or the actual extent of the witnesses' contacts with the defence in the Main Case. He only disputes that he *instructed* the witnesses to lie about receiving these payments and the number of contacts they had with the defence. The Appeals Chamber will thus focus its review on the findings of the Trial Chamber underpinning this overall conclusion regarding Mr Kilolo.

1166. For its conclusions that Mr Kilolo had instructed witness D-57 and D-64 to lie about the receipt of money transfers and the number of contacts that they had with the the defence in the Main Case, the Trial Chamber relied, for the most part, on circumstantial evidence such as its conclusions in relation to other defence witnesses, a discernible pattern in the explicit instructions given by Mr Kilolo regarding contacts and payments to other witnesses and other relevant inferences to support its finding that Mr Kilolo instructed witnesses D-57 and D-64 to lie about receiving payments from and the number of contacts they had with the defence.[2746] The Appeals Chamber recalls that a trial chamber is not precluded from relying on circumstantial evidence to establish its conclusions beyond a reasonable doubt as long as the conclusion reached is the only reasonable conclusion.[2747] In this regard, the Appeals Chamber finds that Mr Kilolo has not established that, on the basis of the evidence before the Trial Chamber, no reasonable trier of fact could have concluded that the inference drawn was the only reasonable conclusion that could be drawn from the evidence.

[2745] Mr Kilolo's Appeal Brief, paras 166-167.
[2746] *See* Conviction Decision, paras 250-251, 277-278 and evidence cited therein.
[2747] *See supra* paras 1018-1019.

1167. To the extent that Mr Kilolo reiterates his arguments concerning the "inherent unreliability" of witnesses D-2, D-3 and D-23,[2748] the Appeals Chamber for the reasons discussed elsewhere in this judgment rejects the argument.[2749] The Appeals Chamber also finds unpersuasive the argument that the Trial Chamber should not have relied on its conclusions regarding witness D-55 for its conclusions regarding witnesses D-57 and D-64.[2750] As discussed above, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that Mr Kilolo had instructed witness D-55 to deny receipt of money and contacts as he had with respect to other witnesses. In addition, as to Mr Kilolo's argument that the Trial Chamber erroneously relied on its findings regarding witness D-26 for its conclusions on witnesses D-57 and D-64, the Appeals Chamber notes that the fact that witness D-26 did not testify in the present case did not preclude the Trial Chamber from concluding, on the basis of other evidence on the record, that Mr Kilolo instructed the witness not to reveal the "nature and number of his contacts with the Main Case Defence".[2751]

1168. Finally, the fact that witnesses D-57 and D-64 testified before the Trial Chamber that Mr Kilolo had not instructed them to lie or to modify their testimony does not call into question the Trial Chamber's finding. Mr Kilolo's reliance on witnesses D-57's and D-64's testimony in support of this argument is misleading. When the witnesses stated that Mr Kilolo had never instructed them to lie or modify their testimony, the witnesses were actually testifying about what they personally experienced and saw during the conflict in Central African Republic and not whether Mr Kilolo had asked them to lie about receiving payments from and having contacts with the defence team in the Main Case.[2752] The Appeals Chamber therefore rejects this argument.

1169. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments and finds that the Trial Chamber did not err in finding, beyond reasonable doubt, that he had

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[2748] Mr Kilolo's Appeal Brief, para. 167.
[2749] *See supra* paras 1081 *et seq.*
[2750] Mr Kilolo's Appeal Brief, paras 166-167.
[2751] Conviction Decision, para. 476.
[2752] Mr Kilolo's Appeal Brief, para. 167, fn. 381, referring to Transcript of 29 October 2015, ICC-01/05-01/13-T-31-Red2-ENG (WT), p. 49, lines 16-25 to p. 50, line 1; Transcript of 30 October 2015, ICC-01/05-01/13-T-32-Red2-ENG (WT), p. 66, lines 23-25.

instructed witnesses D-57 and D-64 to lie about payments received from and the number of their prior contacts with Mr Bemba's defence team in the Main Case.[2753]

(g) Alleged errors regarding witnesses D-15, D-26, and D-54

(i) Relevant part of the Conviction Decision

1170. The Trial Chamber found that witness D-15, as instructed by Mr Kilolo, untruthfully testified in the Main Case regarding the "timing and number" of prior contacts with Mr Bemba's defence team in the Main Case.[2754] The Trial Chamber further found that Mr Kilolo had extensive telephone contacts with the witness "despite the contact prohibition order imposed by Trial Chamber III" where Mr Kilolo made sure that the witness "followed a narrative favourable to the Main Case Defence position".[2755] The Trial Chamber noted that Mr Kilolo had "disclosed the questions he would ask in court" and those from the victims' legal representatives available to the parties in the Main Case on a confidential basis.[2756] The Trial Chamber found further that "Mr Kilolo [had] extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case", which the witness followed.[2757]

1171. With respect to witness D-26, the Trial Chamber found that he had testified in the Main Case untruthfully about certain issues that "had been dictated to him by Mr Kilolo, in particular concerning the movements and composition of Bozize's troops".[2758] According to the Trial Chamber, the witness also "untruthfully testified about his contacts with the Main Case Defence".[2759] The Trial Chamber found further that Mr Kilolo had instructed the witness on "specific topics pertaining to the subject-matter of the Main Case" and "scripted the course of D-26's testimony".[2760] In addition, the Trial Chamber found that Mr Kilolo had instructed the witness to testify falsely about the "nature and number of his contacts with the Main Case Defence".[2761]

[2753] Conviction Decision, paras 253, 280.
[2754] Conviction Decision, para. 589-590. *See also* paras 166-170.
[2755] Conviction Decision, para. 590.
[2756] Conviction Decision, para. 590.
[2757] Conviction Decision, para. 590.
[2758] Conviction Decision, para. 475.
[2759] Conviction Decision, para. 475.
[2760] Conviction Decision, para. 476.
[2761] Conviction Decision, para. 476.

1172. Regarding witness D-54, the Trial Chamber found that the witness had been in regular contact with Mr Kilolo prior to and after the VWU cut-off date and that the witness's testimony in the Main Case had followed Mr Kilolo's instructions "on a series of issues relating to the merits of the Main Case".[2762] The Trial Chamber found that, Mr Kilolo had also instructed the witness to testify incorrectly about his contacts with the defence team in the Main Case.[2763] The Trial Chamber found that the witness had denied knowing Mr Kilolo and receiving money from the defence.[2764]

(ii) Submissions of the parties

(a) Mr Kilolo

1173. Mr Kilolo submits that the Trial Chamber erred in finding that he instructed witnesses D-15, D-26, and D-54 to give false testimony as witness D-26 did not testify in the present case and witnesses D-15 and D-54 did not testify that they were instructed by Mr Kilolo to lie.[2765]

(b) The Prosecutor

1174. The Prosecutor responds that the Trial Chamber reasonably found that Mr Kilolo illicitly coached witnesses D-15, D-26, and D-54 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".[2766] The Prosecutor argues that these findings were supported by Mr Kilolo's own words recorded in the telephone conversations he had with each witness before and during their testimony.[2767] The Prosecutor avers that Mr Kilolo fails to address the evidence supporting the Trial Chamber's finding and its related findings.[2768]

[2762] Conviction Decision, paras 175, 180, 646. *See also* para. 177.
[2763] Conviction Decision, paras 178, 180, 651.
[2764] Conviction Decision, paras 180, 651.
[2765] Mr Kilolo's Appeal Brief, paras 167-168, referring to Conviction Decision, paras 454, 475-476, 589-590, 650-651; Transcript of 28 October 2015, ICC-01/05-01/13-T-30-Red2-ENG (CT WT), p. 74, lines 21-25, p. 75, lines 1; Transcript of 26 October 2015, ICC-01/05-01/13-T-28-Red2-ENG (WT), p. 32, lines 21-23, p. 33, lines 3-11.
[2766] Response, para. 272, referring to Conviction Decision, paras 475-476, 589-590, 651.
[2767] Response, paras 272-273, referring to Conviction Decision, paras 463, 562, 631, 634-635, 642, fns 944, 1185, 1190, 1445.
[2768] Response, para. 272. *See also* para. 271.

1175. The Prosecutor argues further that Mr Kilolo "dominated his conversations" with the three witnesses, while they "largely remained silent or passively confirmed their agreement with a 'oui' or similar utterance" and when any suggestions of deviation was suggested from his instructions, Mr Kilolo clearly indicated that he "expected blind obedience".[2769] The Prosecutor submits further that Mr Kilolo: (i) "used his telephone contacts with the witnesses to address deficiencies in the evidence they had already given"; (ii) insured harmonisation between the witnesses' evidence with the evidence of other Defence witnesses; (iii) provided instructions to the witnesses on answers to questions in order to ensure that the illicit coaching went undetected; and (iv) told the witnesses to testify falsely on the contacts they had with him.[2770] In the view of the Prosecutor, the fact that witness D-26 did not testify makes no difference because there is "ample evidence supporting" the Trial Chamber's finding that Mr Kilolo illicitly coached that witness and the Trial Chamber carefully assessed the credibility of witnesses D-15 and D-54 and "reasonably favoured Kilolo's unambiguous words instructing" these witnesses.[2771]

(iii) Determination by the Appeals Chamber

1176. The Appeals Chamber notes that Mr Kilolo disputes the Trial Chamber's conclusion that he instructed witnesses D-26, D-15 and D-54 to give false testimony.[2772]

1177. With respect to witness D-26, Mr Kilolo reiterates his argument that the witness did not testify in the present case and by implication the Trial Chamber could not have entered findings concerning this witness against Mr Kilolo in the absence of the witness's testimony.[2773] The Appeals Chamber rejects this argument. As discussed above, the absence of testimonial evidence does not preclude the Trial Chamber from inferring, on the basis of other evidence on the record, that the only reasonable

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[2769] Response, para. 274, referring to Conviction Decision, paras 461, 465, 555-556, 564, 569, 578-579, 641, 645.
[2770] Response, paras 275-278, referring to Conviction Decision, paras 464, 466, 468-471, 555, 557-558, 561, 570-571, 637, 642-643, 709, fn. 1443.
[2771] Response, para. 279, referring to Conviction Decision, paras 545-548, 553, 572, 577, 580, 582, 595-596, 633, 643, 645.
[2772] Mr Kilolo's Appeal Brief, para. 168.
[2773] Mr Kilolo's Appeal Brief, paras 167-168.

conclusion to be drawn was that Mr Kilolo instructed the witness not to reveal the "nature and number of his contacts with the Main Case Defence".[2774]

1178. With respect to witness D-15, Mr Kilolo references an excerpt of the witness's testimony before the Trial Chamber to demonstrate that he had not instructed the witness to lie.[2775] The Appeals Chamber notes in this regard that the Trial Chamber assessed this portion of the witness's testimony as follows:

> […] P-198 (D-15) insisted that Mr Kilolo '*did not have anything to teach'* him, as he was the expert in military-related affairs and his account was based on his personal experiences. The Chamber attaches no weight to such generic assertions and considers them to be nothing more than an attempt to downplay the illicit nature of Mr Kilolo's conduct. The Chamber is of the view that the relevant intercepted conversations form a coherent whole that disproves P-198 (D-15)'s contention that he was not influenced by Mr Kilolo. The attitude and remarks of both Mr Kilolo and D-15, as reflected in the intercepted conversations, speak for themselves.[2776] [Emphasis in the original, footnotes omitted.]

1179. The Appeals Chamber finds the Trial Chamber's decision not to attach any weight to the witness's testimony on this point was not unreasonable. Given the available evidence in the form of intercepted conversations, it was not unreasonable for the Trial Chamber to conclude that the witness was influenced by Mr Kilolo. Consequently, Mr Kilolo's argument is rejected.

1180. In relation to witness D-54, Mr Kilolo similarly references an excerpt of the witness's testimony before the Trial Chamber to demonstrate that he had not instructed the witness to lie.[2777] In this regard the Trial Chamber observed that:

> […] when asked about the content of his conversations with Mr Kilolo at the time of his testimony before Trial Chamber III – P-201 (D-54) avoided the question, instead elaborating on peripheral or even irrelevant points. […] For example, he stated, '*Mr Kilolo is a lawyer. He can call me just to remind me*'. This gives the impression that such an explanation was P-201 (D-54)'s last resort.[2778] [Footnote omitted.]

[2774] Conviction Decision, para. 476. *See also supra* paras 1164-1169.
[2775] Mr Kilolo's Appeal Brief, para. 168.
[2776] Conviction Decision, para. 580.
[2777] Mr Kilolo's Appeal Brief, para. 168, referring to Transcript of 26 September 2015, ICC-01/05-01/13-T-28-Red2-ENG (WT), p. 32, lines 21-23, p. 33, lines 3-11.
[2778] Conviction Decision, para. 595.

1181. The Trial Chamber concluded with respect to the reliability of the witness's evidence, that it would treat aspects of his evidence which relate to the accused's behaviour with caution.[2779] In the Appeals Chamber's view, with reference to this particular portion of the witness's testimony, the Trial Chamber's conclusion that Mr Kilolo influenced the witness to give false testimony was not unreasonable. The Trial Chamber found, based on all the available evidence, such as telephone intercepts and audio recordings, that Mr Kilolo "extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case".[2780] In addition, the Trial Chamber found that Mr Kilolo had instructed witness D-54 to testify incorrectly about his prior contacts with the defence and to deny any payments he received.[2781] In the circumstances, Mr Kilolo's argument is rejected.

1182. Accordingly, the Appeals Chamber rejects Mr Kilolo's arguments and finds that the Trial Chamber did not err in finding, beyond reasonable doubt, that he had instructed witnesses D-15, D-26, and D-54 to give false testimony.[2782]

3. Alleged errors regarding Mr Kilolo's essential contribution to a common plan with Mr Bemba and Mr Mangenda to corruptly influence witnesses and present false testimony

(a) Relevant part of the Conviction Decision

1183. The Trial Chamber convicted, *inter alia*, Mr Kilolo as co-perpetrator for the offences of having corruptly influenced witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, pursuant to article 70 (1) (c), in conjunction with article 25 (3) (a) of the Statute.[2783]

(b) Submissions of the parties

(i) Mr Kilolo

1184. Mr Kilolo submits that the Trial Chamber's errors regarding its assessment of the witnesses' credibility and of the facts affect its finding that Mr Kilolo "made an 'essential contribution' to the common plan".[2784] He argues that: (i) he did not

[2779] Conviction Decision, para. 596.
[2780] Conviction Decision, para. 651.
[2781] Conviction Decision, para. 651.
[2782] Conviction Decision, paras 476, 590, 651.
[2783] Conviction Decision, p. 455.
[2784] Mr Kilolo's Appeal Brief, para. 169.

personally pay money to witnesses. The Trial Chamber's finding in this regard is primarily based on the unreliable evidence of witnesses D-2, D-3, and D-23 and on its conclusions regarding witnesses D-29, D-57, and D-64;[2785] (ii) he did not plan and execute the illicit coaching of witnesses. In his view this finding is based on the Trial Chamber's erroneous conclusions regarding witnesses D-2, D-3, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-57, and D-64;[2786] (iii) he did not collaborate with Mr Mangenda to instruct witnesses to give false testimony. This finding he argues is based on the Trial Chamber's erroneous conclusions regarding witnesses D-15, D-26, D-29, and D-54;[2787] (iv) he did not report to Mr Bemba for the purpose of illicitly coaching witnesses to provide testimony in Mr Bemba's favour. This finding he contends is based on the Trial Chamber's erroneous conclusions regarding witnesses D-15 and D-54;[2788] and (v) he did not present evidence known to be false. A finding which is based on the Trial Chamber's erroneous conclusion that Mr Kilolo induced the 14 witnesses to provide false testimony.[2789]

(ii) The Prosecutor

1185. The Prosecutor responds that Mr Kilolo's submission regarding the Trial Chamber's error in concluding that his contribution to the common plan was essential is undeveloped and should be summarily dismissed.[2790]

(c) Determination by the Appeals Chamber

1186. The Appeals Chamber observes that Mr Kilolo's arguments under this sub-ground of appeal are contingent on the Appeals Chamber finding errors in the Trial Chamber's assessment of the credibility and reliability of the 14 witnesses and their evidence as well as the Trial Chamber's factual conclusions stemming from the witness's evidence. As the Appeals Chamber has found no errors in the Trial Chamber's assessment of the evidence, his challenge to the Trial Chamber's findings on his contribution to the common plan is dismissed.

[2785] Mr Kilolo's Appeal Brief, para. 169, referring to sub-ground 3 (B) (2), paras 153-167.
[2786] Mr Kilolo's Appeal Brief, para. 169, referring to sub-grounds 3 (B) (1) to (3), paras 136-168.
[2787] Mr Kilolo's Appeal Brief, para. 169, referring to sub-grounds 3 (B) (2)-(3), paras 153-168.
[2788] Mr Kilolo's Appeal Brief, para. 169, referring to sub-ground 3 (B) (3), para. 168.
[2789] Mr Kilolo's Appeal Brief, para. 169, referring to sub-grounds 3 (A) and 3 (B), paras 127-168.
[2790] Response, para. 271, fn. 924.

1187. Accordingly, the Appeals Chamber dismissed Mr Kilolo's arguments under his third ground of appeal.

C. Mr Mangenda's grounds of appeal

1. Alleged factual errors concerning Mr Mangenda's knowledge about Mr Kilolo inducing the intercept witnesses to lie

1188. Under his ground of appeal 2.C, Mr Mangenda submits that the Trial Chamber erred when it found that he knew that Mr Kilolo had been inducing witnesses to lie or had been engaged in "illicit coaching".[2791]

(a) Relevant part of the Conviction Decision

1189. The Trial Chamber concluded, with respect to the offence under article 70 (1) (c) of the Statute, that Mr Mangenda, jointly with the two co-perpetrators, "intentionally contributed to the planning and execution of the illicit coaching activities of Mr Kilolo" in relation to the 14 witnesses.[2792] This conclusion was based on the Trial Chamber's earlier finding that "[o]n the basis of an overall assessment of the evidence, […] [Mr Mangenda's contributions to the commission of the offences], taken as a whole, also demonstrate his *mens rea*"[2793] and on a number of particular findings:

> 848. The Chamber is further satisfied that Mr Mangenda's essential contributions to the common plan indicate his *mens rea*. In particular, Mr Mangenda's intent to bring about the material elements of the offences is confirmed by his discussions and planning of the illicit coaching activities, under Mr Bemba's authority and in consultation with Mr Kilolo, and his involvement in measures taken to counter the Article 70 investigation. The same activities and the continuous and substantive knowledge derived therefrom also demonstrate that Mr Mangenda intended to engage in the relevant conduct and was aware that implementing the common plan in concert with Mr Bemba and Mr Kilolo will, in the ordinary course of events, result in the fulfilment of the material elements of the offences, in particular, the illicit interference with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba, and the presentation of false evidence.
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> 849. The Chamber is also satisfied that Mr Mangenda knew and intended that the 14 witnesses presented by the Main Case Defence would provide false testimony on contacts, payments and association related to the Main Case

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[2791] Mr Mangenda's Appeal Brief, paras 132, 166-253.
[2792] Conviction Decision, para. 910 (footnote omitted).
[2793] Conviction Decision, para. 838. *See also* para. 848.

> Defence. 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. His involvement in the illicit coaching activities thus self-evidently demonstrates his knowledge and intention that the witnesses would testify falsely concerning these topics. He either heard this false testimony in court or received updates about it. Yet, he expressed his approval and relayed Mr Bemba's approval of such false testimony. He also continued to collaborate in the illicit coaching activities, during which witnesses were instructed to lie, despite knowing the obvious result.
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> 850. Lastly, Mr Mangenda's actions and initiatives to conceal the illicit witness coaching and bribery and then to counter the Article 70 investigation also convince the Chamber that Mr Mangenda – a lawyer on notice of, *inter alia*, the Court's statutory and disciplinary regime – knew about the illicit nature of both the coaching activity and the payments to witnesses. This is further demonstrated by his discussions with the co-perpetrators about the existence of similar proceedings in the *Barasa* Case and the penalisation of their conduct under Article 70 of the Statute. In this context, the Chamber also notes Mr Mangenda's professional background and the fact that he had knowledge of the Court's statutory and disciplinary regime.[2794]

1190. The Trial Chamber also found that "Mr Mangenda was informed on a substantive and continuous basis of Mr Kilolo's activities and accompanied him to the field knowing that Mr Kilolo illicitly coached witnesses".[2795] In the preceding sections of the Conviction Decision, the Trial Chamber set out its findings, *inter alia*, relevant to Mr Mangenda's essential contribution to the common plan and his mental element,[2796] including a section entitled "*Participation in Planning and Execution of Illicit Coaching*", where the Trial Chamber referred to, *inter alia*, intercepted telephone conversations between Mr Kilolo and Mr Mangenda in relation to D-15, D-25, D-29, D-30, D-54 and potential witness Bravo, field missions on which Mr Mangenda had accompanied Mr Kilolo, the provision of cell phones to witnesses, as well as the sharing of questions that were to be posed by the legal representatives of victims.[2797] In making these findings, the Trial Chamber referred to its analysis of the evidence set out elsewhere in the Conviction Decision.

[2794] Conviction Decision, paras 848-850.
[2795] Conviction Decision, para 847.
[2796] Conviction Decision, paras 837-845.
[2797] Conviction Decision, paras 839-841.

(b) Submissions of the parties

(i) Mr Mangenda

1191. Mr Mangenda submits that "[t]he key factual issue in this case was whether Mangenda's conversations with Kilolo reflected his intent that Kilolo should resort to criminal influencing or whether, rather, it is reasonably possible that Mangenda should have understood those conversations as not requiring criminal means".[2798] He avers that he knew "little to nothing about the scale or content of Kilolo's preparation of witnesses" and that the Trial Chamber's conclusion to the contrary is based on a series of errors in the assessment of the evidence.[2799]

1192. Notably, Mr Mangenda alleges errors in the Trial Chamber's assessment of the evidence in relation to D-25,[2800] D-29,[2801] D-15,[2802] D-54,[2803] D-13,[2804] as well as errors in the Trial Chamber's interpretation of references to the expression "*faire la couleur*" as meaning corruptly influencing witnesses[2805] and its analysis of evidence in relation to potential witness Bravo.[2806] He also argues that the Trial Chamber failed to take into account or misstated some of its own findings.[2807] Overall, Mr Mangenda submits that "[n]o reasonable Chamber could have found that the only reasonably possible interpretation of the intercepted conversations is that Mangenda intended and knew that Kilolo should and would corruptly influence witnesses", an error which, in his view, materially affected his conviction.[2808] The details of Mr Mangenda's arguments are set out below, in the context of the Appeals Chamber's assessment of these arguments.

(ii) The Prosecutor

1193. The Prosecutor responds that the Trial Chamber's finding as to Mr Mangenda's knowledge of Mr Kilolo's illicit coaching of witnesses was based on the overall

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[2798] Mr Mangenda's Appeal Brief, para. 132.
[2799] Mr Mangenda's Appeal Brief, para. 167.
[2800] Mr Mangenda's Appeal Brief, paras 169-180.
[2801] Mr Mangenda's Appeal Brief, paras 181-203.
[2802] Mr Mangenda's Appeal Brief, paras 204-218.
[2803] Mr Mangenda's Appeal Brief, paras 219-234.
[2804] Mr Mangenda's Appeal Brief, paras 235-239.
[2805] Mr Mangenda's Appeal Brief, paras 240-243.
[2806] Mr Mangenda's Appeal Brief, paras 244-246.
[2807] Mr Mangenda's Appeal Brief, paras 247-251.
[2808] Mr Mangenda's Appeal Brief, para. 253.

assessment of all the evidence, not only the individual conversations in the intercepted communications.[2809] She submits that the Trial Chamber, as a matter of law and in order to establish Mr Mangenda's liability as a co-perpetrator under articles 25 (3) (a) and 70 (1) (b) and (c) of the Statute, was not required to establish that he knew 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",[2810] given that the "Common Plan encompassed the illicit coaching of Defence witnesses in general".[2811]

1194. The Prosecutor argues that Mr Mangenda fails to take into account that the Trial Chamber's findings were "based on a broader platform of evidence"[2812] and that the intercepted conversations must be assessed in light of the evidence as a whole, rather than by way of a piecemeal approach in relation to individual items of evidence, also recalling the deferential appellate standard of review for factual findings.[2813] She submits that, rather than rehearsing arguments already brought at trial, Mr Mangenda "must present clearly and in detail an alternative inference he wants the Appeals Chamber to consider", and that "it is not enough for him to present alternative inferences with respect to isolated pieces of evidence".[2814] The Prosecutor also disputes the individual arguments of Mr Mangenda in relation to the Trial Chamber's assessment of witnesses D-25,[2815] D-29,[2816] D-15,[2817] D-54[2818] and D-13[2819] as well as its understanding of the term "*faire de couleur*",[2820] its assessment of the conversation regarding potential witness Bravo[2821] and its own findings.[2822]

[2809] Response, para. 317.
[2810] Response, para. 324.
[2811] Response, para. 382.
[2812] Response, para. 325.
[2813] Response, paras 325-328.
[2814] Response, para. 329.
[2815] Response, paras 331-332.
[2816] Response, paras 333-337.
[2817] Response, paras 338-341.
[2818] Response, paras 342-345.
[2819] Response, paras 346-347.
[2820] Response, para. 348.
[2821] Response, para. 349.
[2822] Response, paras 350-352.

(c) Determination by the Appeals Chamber

1195. The Appeals Chamber notes that Mr Mangenda's arguments under this sub-ground of appeal largely consist of challenges to the Trial Chamber's interpretation of individual conversations between Mr Mangenda and Mr Kilolo regarding witnesses D-25, D-29, D-15, D-54 and D-13 as well as potential witness Bravo. However, the finding that he seeks to challenge – namely that he was aware of Mr Kilolo's illicit witness coaching activities – was based not only on these particular items of evidence, but on the Trial Chamber's assessment of the evidence as a whole, including inferences drawn from his essential contributions to the common plan.[2823] Importantly, the Trial Chamber did not consider the individual conversations in isolation, but in the context of the other evidence relevant to the question of Mr Mangenda's knowledge.[2824] This is indeed what was required of the Trial Chamber, as part of its holistic analysis of the evidence.[2825] Therefore, it is not sufficient for Mr Mangenda to simply point to potential alternative interpretations of individual conversations without having regard to *all* the relevant evidence before the Trial Chamber. The Appeals Chamber will assess Mr Mangenda's arguments with this in mind.

(i) Witness D-25

1196. In relation to witness D-25, the Trial Chamber found that Mr Mangenda "knew about, approved and partook in Mr Kilolo's overall illicit coaching activities by updating Mr Kilolo on the details elicited from D-25".[2826] It also found that Mr Mangenda had "discussed whether D-25 had followed Mr Kilolo's instructions during his testimony and relayed Mr Bemba's satisfaction with D-25's testimony" and that he had "alerted Mr Kilolo that, at one point, he suspected that the Trial Chamber III Judges had surmised that D-25 had been illicitly coached".[2827] These findings were based primarily on the Trial Chamber's analysis of two intercepted telephone conversations between Mr Kilolo and Mr Mangenda on 26 and 27 August 2013,

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[2823] Conviction Decision, para. 848.
[2824] *See* Conviction Decision, para. 188, where the Trial Chamber explained, generally, "[w]hen 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'" (footnote omitted).
[2825] *Lubanga* Appeal Judgment, para. 22.
[2826] Conviction Decision, para. 505.
[2827] Conviction Decision, para. 505.

during which they discussed witness D-25's testimony before Trial Chamber III, which was ongoing at that time.[2828]

1197. Mr Mangenda challenges the Trial Chamber's assessment of the telephone conversations, submitting that the Trial Chamber's finding as to his knowledge of Mr Kilolo's illicit coaching of witness D-25 was based on the Trial Chamber's interpretation of several passages within these conversations, all of which he disputes.[2829] First, the Trial Chamber noted that Mr Kilolo had asked whether witness D-25 had followed his instructions ("*enseignements*") and rejected the arguments of, *inter alia*, Mr Mangenda that this did not necessarily refer to illicit coaching, noting that, in response to Mr Kilolo's question, Mr Mangenda had reported on the substance of the witness's answers.[2830] The Appeals Chamber is not persuaded by Mr Mangenda's arguments that: (i) his discussion of the substance of witness D-25's testimony does not support a finding of illicit coaching, particularly as there is no finding that witness D-25's testimony had been untruthful;[2831] and (ii) the Trial Chamber failed to mention that in the telephone calls between Mr Mangenda and Mr Kilolo, Mr Kilolo had not referred to, even implicitly, conversations he had had with witness D-25 after the cut-off date for such communications.[2832] Neither argument is capable of demonstrating that the Trial Chamber's analysis of this passage was unreasonable: the Trial Chamber reached its conclusion not only on the basis of the particular passage of the telephone interpretation, but analysed it in light of the "overall context" of the conversation and the answers that Mr Mangenda gave in response to Mr Kilolo's questions.[2833] Mr Mangenda has not shown that the Trial Chamber's interpretation was one that no reasonable trier of fact could have reached.

1198. The same is true for Mr Mangenda's further argument that an unduly literal interpretation of a conversation could distort its actual meaning.[2834] Mr Mangenda cites as an example a conversation between him and Mr Kilolo in which they discuss

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[2828] Conviction Decision, paras 487-495.
[2829] Mr Mangenda's Appeal Brief, para. 170.
[2830] Conviction Decision, para. 488.
[2831] Mr Mangenda's Appeal Brief, para. 171.
[2832] Mr Mangenda's Appeal Brief, para. 172.
[2833] Conviction Decision, para. 488.
[2834] Mr Mangenda's Appeal Brief, para. 173.

the skill with which Mr Haynes conducted a re-direct examination.[2835] However, the passage to which Mr Mangenda refers, which is taken from the conversation between Mr Kilolo and Mr Mangenda on the following day, is unrelated to the passage at issue here and does not demonstrate that the Trial Chamber's interpretation of the references to instructions ("*enseignements*") and the ensuing discussion of the substance of witness D-25's testimony was unreasonable.

1199. Second, Mr Mangenda challenges the Trial Chamber's analysis of a passage of the conversation on 26 August 2013, which the Trial Chamber understood as Mr Kilolo expressing concern that witness D-25, contrary to his instructions, had not mentioned certain information in his in-court testimony, while Mr Mangenda expressed the view that, had the witness mentioned this information, this would have been suspicious, as Mr Haynes, the counsel conducting the examination, had not been asked questions in this regard.[2836] Mr Mangenda argues that his comment was related to appearances rather than to whether the suspicions were well-founded, and that his concern reasonably may have been that, had the witness provided unsolicited information, the testimony may be perceived to be "excessively prepared rather than spontaneous".[2837] The Appeals Chamber is not persuaded by this argument which proposes an alternative interpretation of the passage in question, but without demonstrating that the Trial Chamber's reading, which it analysed in the context of the other passages and evidence, was unreasonable.

1200. Third, Mr Mangenda argues, with respect to the Trial Chamber's finding that Mr Mangenda surmised that the Judges of Trial Chamber III suspected that witness D-25 might have been illicitly coached,[2838] that he did indeed surmise that the Judges might have perceived witness D-25's testimony to be excessively and suspiciously corroborative of other evidence.[2839] However, he notes that the Trial Chamber did not enter a finding that witness D-25 had lied before Trial Chamber III in relation to this testimony or that Mr Mangenda knew that it was a lie and that its finding that the "accused were keen on making sure that the witness stayed on script, but also were

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[2835] Mr Mangenda's Appeal Brief, para. 173.
[2836] Mr Mangenda's Appeal Brief, para. 174.
[2837] Mr Mangenda's Appeal Brief, para. 174 (footnote omitted).
[2838] Conviction Decision, para. 490.
[2839] Mr Mangenda's Appeal Brief, para. 175.

concerned that their illicit activities may be suspected" was speculative.[2840] The Appeals Chamber finds, once again, that Mr Mangenda's argument does not demonstrate that the Trial Chamber's finding was unreasonable, in particular since the Trial Chamber considered the passage upon which it relied not in isolation, but in the context of the other evidence. The Appeals Chamber also notes that the Trial Chamber was not required to enter a finding that witness D-25 had lied about his military status to conclude that he had been illicitly coached; accordingly, it was also not necessary to enter a finding that Mr Mangenda knew of such lies.

1201. Fourth, Mr Mangenda submits that the Trial Chamber's finding that, during the conversation between Mr Mangenda and Mr Kilolo on 27 August 2017, the latter "had expressed satisfaction that D-25 had not revealed an illicit coaching meeting"[2841] was manifestly incorrect because the meeting in question had been disclosed to the Prosecutor.[2842] He also argues that Mr Kilolo's satisfaction that the witness had not mentioned this meeting was misplaced and did, in any event, not demonstrate concern about concealment of falsehoods.[2843] The Appeals Chamber notes, first, that the emphasis of the Trial Chamber's finding was not on whether this specific meeting amounted to illicit coaching, but rather on Mr Kilolo's satisfaction that the witness had not disclosed what Mr Kilolo had *believed* to have been illicit coaching. This becomes clear when the impugned statement is read in the context of the following paragraph of the Conviction Decision, which focuses on Mr Kilolo's admission of illicit coaching.[2844] The Appeals Chamber also notes that the fact that the meeting between [redacted] and witness D-25 had taken place was disclosed to the Prosecutor does not mean that Mr Kilolo did not want to hide the fact that he had participated in the meeting – indeed, the excerpt cited by the Trial Chamber indicates

[2840] Mr Mangenda's Appeal Brief, para. 175, referring to Conviction Decision, para. 490.
[2841] Conviction Decision, para. 493.
[2842] Mr Mangenda's Appeal Brief, para. 176. The Appeals Chamber notes that Mr Mangenda also refers to witness D-29 in this paragraph, but from the context, the Appeals Chamber understands this to be a typographical error and that Mr Mangenda is, in fact, referring solely to witness D-25.
[2843] Mr Mangenda's Appeal Brief, para. 177.
[2844] Conviction Decision, para. 494.

that Mr Kilolo was content that witness D-25 had not mentioned that there were three participants at the meeting.[2845]

1202. While Mr Mangenda also challenges, as his fifth argument, the Trial Chamber's finding that Mr Kilolo admitted to having illicitly coached witnesses when noting the witness had followed his "clear instructions",[2846] this challenge merely proposes an alternative reading of the testimony, falling short of demonstrating unreasonableness.

1203. The same is true for Mr Mangenda's sixth argument,[2847] which challenges the Trial Chamber's interpretation of Mr Mangenda's statement to Mr Kilolo that Mr Bemba had been pleased by witness D-25's testimony, as it disclosed that a true "*travail de couleur*" ("colour work") had been done.[2848] By arguing that Mr Bemba might simply have been satisfied by the results of licit witness preparation, Mr Mangenda does not demonstrate that the Trial Chamber's reading was unreasonable, in particular in the context of the other evidence.

1204. As to Mr Mangenda's overall argument that none of the passages relied upon, either individually or as a whole, "show that Mangenda knew that Kilolo had induced D-25 to lie on any subject",[2849] the Appeals Chamber notes, that the Trial Chamber's conclusion is not only based on the specific passages of the two telephone conversations that Mr Mangenda has challenged on appeal, but the Trial Chamber's assessment of all relevant evidence together, which Mr Mangenda does not challenge.[2850] In sum, the Appeals Chamber concludes that Mr Mangenda has not demonstrated that the Trial Chamber's findings in relation to witness D-25 were unreasonable.

(ii) Witness D-29

1205. In relation to witness D-29, the Trial Chamber found that:

[2845] Conviction Decision, para. 493: "*tu t'imagines s'il avait accepté et puis qu'il dise qu'on était trois*" ("just imagine if he had agreed and then had said that there were three of us").
[2846] Mr Mangenda's Appeal Brief, para. 178.
[2847] Mr Mangenda's Appeal Brief, para. 179.
[2848] Conviction Decision, para. 495.
[2849] Mr Mangenda's Appeal Brief, para. 180.
[2850] Conviction Decision, paras 496-502.

> Mr Mangenda approved of and partook in Mr Kilolo's overall illicit coaching strategy. In this particular instance, he assisted by updating Mr Kilolo on the details elicited from witness D-29 so that the latter, *inter alia*, could prepare D-30, D-29's wife, accordingly.[2851]

1206. Mr Mangenda notes that the Trial Chamber found that witness D-29 had lied about the number of contacts with members of the defence team in the Main Case when testifying before Trial Chamber III and did not mention, *inter alia*, an encounter with Mr Mangenda and Mr Kilolo, when the two accompanied the witness to a meeting with VWU.[2852] Mr Mangenda argues that the Trial Chamber's finding is a clear error because, during his testimony before Trial Chamber III, the witness actually mentioned this encounter.[2853] The Appeals Chamber notes that the Trial Chamber's finding that the witness had failed to disclose this encounter in his testimony before Trial Chamber III is indeed in error, as the witness mentioned this meeting in the passage of the transcript cited by Mr Mangenda. Nevertheless, the Appeals Chamber considers that this error is inconsequential because the more important contact with the defence, which the witness, according to the Trial Chamber, failed to mention, was the telephone call requesting assistance from Mr Kilolo in the relocation of his son – which Mr Mangenda concedes the witness did not disclose in his testimony before Trial Chamber III.[2854]

1207. As to the argument that the Trial Chamber erred in fact when it found that the witness D-29 had deliberately failed to mention his additional contacts with Mr Kilolo,[2855] the Appeals Chamber notes that the Trial Chamber did not directly reference any evidence to support this finding. Nevertheless, the Trial Chamber, in the paragraphs immediately preceding the paragraph where this finding was made, found that Mr Kilolo had "instructed D-29 not to reveal the payment [of USD 649.43] when questioned before Trial Chamber III".[2856] The payment in question was purportedly

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[2851] Conviction Decision, para. 542.
[2852] Mr Mangenda's Appeal Brief, para. 181, referring to Conviction Decision, para. 528.
[2853] Mr Mangenda's Appeal Brief, para. 182, referring to Transcript of 29 August 2013, ICC-01/05-01/08-T-339-Red-ENG (WT), p. 36, lines 2-4. *See also* paras 183-184.
[2854] Mr Mangenda's Appeal Brief, para. 185. *See also* Response, para. 333. The Appeals Chamber notes that at para. 185 of the Mr Mangenda's Appeal Brief, the date of the telephone conversation is indicated as 10 August 2013, while the Trial Chamber, at para. 519 of the Conviction Decision, found that the call took place on or after 13 August 2013. The Appeals Chamber nevertheless considers it clear from the context that Mr Mangenda is referring to the same telephone conversation.
[2855] Mr Mangenda's Appeal Brief, para. 185, referring to Conviction Decision, para. 528.
[2856] Conviction Decision, para. 527.

for the relocation of the witness's son, which, in turn, had been the subject of one of the contacts the Trial Chamber found the witness had failed to disclose.[2857] In these circumstances, the Appeals Chamber considers Mr Mangenda's argument that the witness may simply have forgotten about this conversation insufficient to establish unreasonableness on the part of the Trial Chamber, although it would have been preferable for the Trial Chamber to explain its finding in more detail.

1208. The Trial Chamber also relied on excerpts of two conversations between Mr Kilolo and Mr Mangenda to find that there was "the emergence of suspicion within the defence team in the Main Case about the two co-perpetrators", noting that in the first conversation, "Mr Kilolo expressed his concern that Mr Haynes may have understood the co-perpetrators' illicit coaching strategy", while during the second conversation "the two co-perpetrators' intention comes to the fore, namely, to keep their illicit coaching activities secret from other members of the defence team in the Main Case".[2858] Mr Mangenda challenges these findings on appeal, referring to a passage of the second conversation and arguing that this passage demonstrates that, rather than referring to illicit coaching which might have been discovered, Mr Kilolo and Mr Mangenda were talking about Mr Haynes' frustration that he had not been properly briefed about what witness D-29 would testify to.[2859]

1209. Having considered the passages relied upon by the Trial Chamber and the passage referred to by Mr Mangenda, the Appeals Chamber is not persuaded that the Trial Chamber's reading was unreasonable; in particular, while it is perceivable that in the passage to which Mr Mangenda refers he and Mr Kilolo were discussing frustrations of Mr Haynes regarding procedures within the defence team, this does not, in itself, render unreasonable the Trial Chamber's reading of the other passages upon which it ultimately relied. The same applies to the argument that the interpretation of the conversation proposed by Mr Mangenda finds corroboration in witness D-29's testimony regarding contact he had with the defence team before the cut-off date, when witness preparation purportedly was still permitted, which, it is argued, demonstrates that there had been an opportunity for Mr Kilolo to engage in

[2857] Conviction Decision, para. 528.
[2858] Conviction Decision, para. 726.
[2859] Mr Mangenda's Appeal Brief, paras 188-190.

licit witness preparation, the results of which may not have been properly communicated to Mr Haynes.[2860] First, this testimony is not incompatible with the Trial Chamber's interpretation and does not call into question the reasonableness of its finding because in the passage relied upon by the Trial Chamber, Mr Mangenda and Mr Kilolo appear to talk about when members of the defence team first met with the witness, while in the passage cited by Mr Mangenda, the conversation appears to have moved on to Mr Haynes' reliance on interview notes. Second, the Trial Chamber had categorically prohibited any form of witness preparation.[2861] There was therefore no reason for Mr Mangenda to believe that Mr Kilolo may simply be referring to licit witness preparation practices.

1210. Mr Mangenda also challenges the Trial Chamber's interpretation of a passage of the second conversation as an indication that he and Mr Kilolo had sought to keep illicit coaching activities secret from other members of the defence team[2862] on the ground that there was no evidence that what Mr Mangenda had told Mr Haynes in relation to witness D-29 was untruthful.[2863] With respect to this challenge, the Appeals Chamber considers that the argument disregards the fact that in the passage at issue, Mr Mangenda and Mr Kilolo were discussing not only that witness, but witnesses more generally. Thus, the Trial Chamber's finding was not unreasonable, irrespective of whether there was other evidence relating specifically to witness D-29.

1211. Furthermore, Mr Mangenda challenges the Trial Chamber's interpretation of a subsequent telephone conversation between him and Mr Kilolo in the early afternoon of 29 August 2013, the second day of witness D-29's testimony before Trial Chamber III, during which Mr Mangenda reported on the witness's purportedly bad performance in the courtroom.[2864] Mr Mangenda argues that the Trial Chamber should not have relied upon Mr Mangenda's "salty description" of the witness's performance, as this was not unusual in internal discussions of adversarial lawyers, and that the interpretation of the term "*couleur*" ("colour") as referring to illicit witness coaching was unwarranted because it might as well refer to "witness

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[2860] Mr Mangenda's Appeal Brief, para. 191.
[2861] *Bemba* Witness Preparation Decision, para. 34.
[2862] Conviction Decision, para. 725.
[2863] Mr Mangenda's Appeal Brief, paras 192-193.
[2864] Conviction Decision, paras 534-537.

preparation within the wide latitude permitted at the ICC".[2865] The Appeals Chamber is not persuaded by this argument as it merely proposes an alternative interpretation of the passage of the telephone conversation, without demonstrating that the Trial Chamber's interpretation was unreasonable in light of the evidence as a whole; further, as noted above, Trial Chamber III had disallowed any form of witness preparation or proofing, and there was therefore no reason for Mr Mangenda to believe that Mr Kilolo may simply be referring to licit witness preparation practices.[2866] Similarly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to find, based on the telephone conversation, that witness D-29 had "performed badly in Court because Mr Kilolo had not illicitly coached him the night before" or that the witnesses "were meant to be *'prepared*' on the substance of their testimony"[2867] – again, Mr Mangenda is merely proposing an alternative reading of the evidence.[2868]

1212. As to the Trial Chamber's finding that an excerpt of the telephone conversation on 29 August 2013 "demonstrate[s] that Mr Mangenda not only knew of, but also approved the strategy of illicitly coaching witnesses, as executed by Mr Kilolo",[2869] Mr Mangenda argues that the Trial Chamber's finding is unreasoned and "conclusory" and proposes an alternative interpretation thereof.[2870] The Appeals Chamber is unpersuaded by this argument because it fails to acknowledge that the Trial Chamber interpreted this passage in the context of the conversation as a whole and, in particular, Mr Mangenda's opinion that witness D-29 had "performed badly in Court because Mr Kilolo had not illicitly coached him the night before"[2871] – an interpretation that Mr Mangenda has not successfully challenged.[2872]

1213. The Appeals Chamber also can see no unreasonableness in the Trial Chamber's interpretation of Mr Kilolo's use of the code "[redacted]" as referring to witness D-

[2865] Mr Mangenda's Appeal Brief, paras 194-195.
[2866] *Bemba* Witness Preparation Decision, para. 34.
[2867] Conviction Decision, para. 536 (footnote omitted, emphasis in original).
[2868] Mr Mangenda's Appeal Brief, paras 196-197.
[2869] Conviction Decision, para. 537.
[2870] Mr Mangenda's Appeal Brief, para. 198.
[2871] Conviction Decision, para. 536 (footnote omitted).
[2872] *See supra* para. 1210.

29,[2873] given the context of the telephone conversation, which took place in the morning of the second day of the witness's testimony and the content of it, which appears to relate to ongoing testimony.[2874] Mr Mangenda's mere reiteration of a prior submission of Mr Bemba that in a conversation between Mr Kilolo and Mr Bemba an individual other than witness D-29 had been referred to as "[redacted]",[2875] is insufficient to establish unreasonableness on the part of the Trial Chamber.

1214. Mr Mangenda also challenges the Trial Chamber's reliance on a passage of the second conversation on 29 August 2013 as further exemplifying that Mr Kilolo's intervention with witnesses amounted to instructions;[2876] the Trial Chamber stated that, in that passage, Mr Kilolo had remarked to Mr Mangenda that "if D-29 did not conclude his testimony that day, he would contact the witness to ensure that he rectified two or three points".[2877] Mr Mangenda notes that, according to the transcript of the conversation, Mr Kilolo stated that such intervention could take place if the witness *finished* his testimony on that day – which would mean that there would be no further opportunity to correct his testimony.[2878] Mr Mangenda also notes that his response to Mr Kilolo's comment – namely that the witness would be taken as a liar – was ambiguous and that, in any event, Mr Mangenda knew that the witness finished his testimony on that day, therefore leaving no room for Mr Kilolo to contact him.[2879]

1215. The Appeals Chamber is not persuaded that Mr Mangenda's arguments disclose unreasonableness on the part of the Trial Chamber. While it is true that, according to the transcript, Mr Kilolo referred to the witness *concluding* his testimony on that day, it is clear from the context that he was referring to a possibility of correcting the testimony the following day. The argument that Mr Mangenda's response was ambiguous is unpersuasive as well because it presents merely an alternative interpretation of the evidence. Finally, it is irrelevant that witness D-29 actually concluded his testimony on that day – therefore leaving no room for Mr Kilolo to give

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[2873] Conviction Decision, para. 725.
[2874] CAR-OTP-0080-0238, at 0240, lines 28 *et seq*.
[2875] Mr Mangenda's Appeal Brief, para. 199.
[2876] Mr Mangenda's Appeal Brief, para. 200.
[2877] Conviction Decision, para. 535 (footnote omitted), referring to CAR-OTP-0080-0245 at 0252, lines 212-214.
[2878] Mr Mangenda's Appeal Brief, para. 200.
[2879] Mr Mangenda's Appeal Brief, para. 200.

him instructions in the evening – because the Trial Chamber used this passage as further confirmation of Mr Kilolo generally giving instructions to witnesses; his stated intention to do so with regard to witness D-29 supports this point.

1216. Further, Mr Mangenda challenges the Trial Chamber's finding based on a passage in the second conversation between him and Mr Kilolo on 29 August 2013, regarding witness D-30, the wife of witness D-29, that Mr Kilolo had a "strategy to intervene and design the testimonial evidence of the Main Case Defence witnesses, while also violating the VWU cut-off date"[2880] as well as the Trial Chamber's corresponding finding that he provided Mr Kilolo with the information requested and participated in developing the strategy for the illicit coaching of D-29 and D-30.[2881] Mr Mangenda argues that, even assuming that Mr Kilolo was implying that he had illicit contact with witness D-30, there was no indication that Mr Mangenda was aware of this, and that Mr Mangenda might not have realised that the cut-off date had already passed.[2882] The Appeals Chamber is not persuaded by these arguments because the presentation of alternative hypotheses does not demonstrate that the Trial Chamber's finding was unreasonable. To the extent that Mr Mangenda argues that conduct relating to witness D-30 was outside the scope of the charges,[2883] the Appeals Chamber notes that Mr Mangeda does not develop this argument and that Mr Mangenda was not convicted for any offences against the administration of justice in relation to witness D-30.

1217. Accordingly, the Appeals Chamber rejects the arguments raised by Mr Mangenda against the Trial Chamber's evaluation of the evidence in relation to witness D-29.

(iii) Witness D-15

1218. Mr Mangenda argues that the Trial Chamber made a factual error when it found that he was "firmly involved in and approved of Mr Kilolo's illicit coaching involving D-15".[2884] In making this finding, the Trial Chamber relied, in particular, on an

[2880] Conviction Decision, para. 538.
[2881] Conviction Decision, para. 539.
[2882] Mr Mangenda's Appeal Brief, para. 201.
[2883] Mr Mangenda's Appeal Brief, para. 202.
[2884] Mr Mangenda's Appeal Brief, para. 218, referring to Conviction Decision, para. 591

intercepted telephone conversation between Mr Mangenda and Mr Kilolo in the evening of 11 September 2013, the first day of witness D-15's testimony before Trial Chamber III, and on a telephone conversation in the evening of the following day, 12 September 2013.[2885] The witness concluded his testimony before Trial Chamber III on 13 September 2013.[2886]

1219. In relation to the first telephone conversation, Mr Mangenda argues, first, that there was no basis for the Trial Chamber's characterisation of it as an "update" by Mr Kilolo on his earlier conversations with witness D-15, because there was no indication that Mr Kilolo had previously provided information on the witness to Mr Mangenda.[2887] The Appeals Chamber rejects this argument: the term "update" in this context does not necessarily imply that there had been earlier communication in this regard – a fact Mr Mangenda acknowledges[2888]– and the Appeals Chamber finds that there is no indication that the Trial Chamber intended such a meaning. As to the argument that the Trial Chamber failed to address that there was no evidence that Mr Mangenda had understood Mr Kilolo to refer to witness D-15, as opposed to witness D-54, who would testify to similar subjects,[2889] the Appeals Chamber finds that such a theoretical possibility does not give rise to a reasonable doubt that the Trial Chamber should have entertained, in particular in view of the timing of the call on the evening of the first day of witness D-15's testimony before the Trial Chamber. Finally, as to the argument that there was no evidence that Mr Mangenda knew that Mr Kilolo's "recitation of questions and answer included inducement to lie",[2890] the Appeals Chamber recalls that the Trial Chamber assessed the conversation in light of all relevant evidence. Therefore, the Appeals Chamber considers that the Trial Chamber's interpretation of the conversation, in the context of the other evidence as

[2885] Conviction Decision, paras 565-566, 574-576.
[2886] Conviction Decision, para. 584.
[2887] Mr Mangenda's Appeal Brief, para. 207, referring to Conviction Decision, para. 566.
[2888] Mr Mangenda's Appeal Brief, para. 207 ("to the extent that ['update'] implies").
[2889] Mr Mangenda's Appeal Brief, para. 208.
[2890] Mr Mangenda's Appeal Brief, para. 209.

to the involvement of Mr Mangenda in illicit coaching activities,[2891] was not one that no reasonable trier of fact could have made.

1220. In the course of the second conversation, which took place in the evening of 12 September 2013, Mr Kilolo asked Mr Mangenda to send him the – at that time, confidential – questions that the legal representatives of victims were going to ask of witness D-15 in court the next morning.[2892] The Trial Chamber found that, during this conversation, Mr Kilolo mentioned twice to Mr Mangenda that the witness was tired and was waiting for the questions.[2893] The Trial Chamber also found that Mr Mangenda subsequently sent the questions by email to Mr Kilolo and concluded that "Mr Mangenda had broad and detailed knowledge concerning the purpose and the content of Mr Kilolo's contacts with D-15".[2894] The Appeals Chamber is not persuaded that the Trial Chamber's conclusion was a "clear error".[2895] Contrary to Mr Mangenda's submission, the Trial Chamber did not find that he had had detailed knowledge of the "detailed scripting" that Mr Kilolo had been engaged in with the witness in an earlier telephone conversation, but only that Mr Mangenda knew the purpose and content of Mr Kilolo's interactions with witness D-15, a finding that the Appeals Chamber considers, based on the evidence that was before the Trial Chamber,[2896] not to have been unreasonable.

1221. To the extent that Mr Mangenda submits that there was insufficient evidence to demonstrate that he had known that witness D-15 had lied about his contacts with the defence team in the Main Case and that this lie had been induced by Mr Kilolo,[2897] the Appeals Chamber notes that the Trial Chamber did not make a finding that Mr Mangenda had knowledge in this regard. Accordingly, his arguments are without any basis and must be rejected.

[2891] *See* Conviction Decision, paras 837-850, where the Trial Chamber summarised its findings regarding Mr Mangenda's essential contribution and his *mens rea*, which is, in turn, based on the Trial Chamber's assessment of the evidence.
[2892] Conviction Decision, para. 575.
[2893] Conviction Decision, para. 575.
[2894] Conviction Decision, para. 576.
[2895] Mr Mangenda's Appeal Brief, para. 212.
[2896] *See* Conviction Decision, paras 566, 576, 591
[2897] Mr Mangenda's Appeal Brief, paras 213-217.

(iv) Witness D-54

1222. Mr Mangenda argues that the Trial Chamber erred when it found that he had known that Mr Kilolo had intended to, and actually did, coach witness D-54 and had conveyed Mr Bemba's instructions that the witness should testify to certain, specific matters.[2898] He argues that the Trial Chamber relied on four telephone conversations between him and Mr Kilolo, all of which took place long before the cut-off date for substantive communications with the witness and therefore at a time when witness preparation was still permissible.[2899] As to the argument that the first telephone conversation, which took place on 29 August 2013, does not reflect any "impropriety",[2900] the Appeals Chamber notes that the Trial Chamber did not find that it did; it only found that the "conversation must be assessed in the light of subsequent events".[2901] The argument is therefore rejected.

1223. As to the argument that Trial Chamber's assessment of the second telephone conversation, which took place on 30 August 2013, was flawed,[2902] the Appeals Chamber notes that Mr Mangenda for the most part presents alternative interpretations of the conversation, without demonstrating that the Trial Chamber's analysis, which was taken in view of the evidence as a whole, was unreasonable. To the extent, however, that the Trial Chamber found that Mr Bemba had, as relayed by Mr Mangenda, directed that witness D-54 "pretend that he went to visit family members at a certain location",[2903] the Appeals Chamber considers that, as argued by Mr Mangenda,[2904] it is clear that the passage of the transcript on which the Trial Chamber based its finding related to a person referred to as Bravo, and not witness D-54. Nevertheless, given that this was but one of several matters in relation to which, according to the Trial Chamber, Mr Bemba had given instructions,[2905] the Appeals Chamber considers that the Trial Chamber's error in this regard is inconsequential.

[2898] Mr Mangenda's Appeal Brief, paras 219-220, referring to Conviction Decision, para. 652.
[2899] Mr Mangenda's Appeal Brief, para. 222.
[2900] Mr Mangenda's Appeal Brief, para. 223.
[2901] Conviction Decision, para. 599.
[2902] Mr Mangenda's Appeal Brief, paras 224-227.
[2903] Conviction Decision, para. 606.
[2904] Mr Mangenda's Appeal Brief, para. 227.
[2905] *See* Conviction Decision, para. 606. The Trial Chamber found that "Mr Bemba directed that D-54 be influenced to: (i) deny any knowledge of events in Mongoumba; (ii) deny having any power, despite being a member of the '*organe qui dirigeait la guerre*' ["the body conducting the war"]; (iii) testify

1224. Turning to the Trial Chamber's analysis of the third telephone conversation, which took place on 1 September 2013, the Appeals Chamber notes that Mr Mangenda's argument that Mr Kilolo was expressing the view that witness D-54 might be reluctant to accept that he had been a member of the CCOP for fear of prosecution for his such involvement[2906] is merely proposing an alternative interpretation of the conversation, without, however, demonstrating that the Trial Chamber's interpretation was unreasonable. The argument is therefore rejected.

1225. The Appeals Chamber also does not consider that the Trial Chamber's interpretation of the fourth conversation, which took place on 9 September 2013, was unreasonable. First, the Appeals Chamber notes that, contrary to Mr Mangenda submission,[2907] there is no indication that the Trial Chamber relied on this conversation to find that "Mr Mangenda conveyed Mr Bemba's instructions to Mr Kilolo to influence D-54 to testify to certain, specific matters".[2908] Rather, the Trial Chamber appears to have relied primarily on the conversation on 30 August 2013, during which Mr Mangenda conveyed such instructions.[2909] There is also no indication that the Trial Chamber interpreted the reference to "*la lettre de la personne que tu connais*" ("The letter from the person that you know") as a reference "to Bemba's instructions about the content of D-54's testimony".[2910] Mr Mangenda appears to be challenging the Trial Chamber's finding that the conversation regarding the *"lettre"* "implies that D-54 should be instructed according to the pre-determined narrative".[2911] In the view of the Appeals Chamber, however, it is clear that the Trial Chamber was referring to a letter authored by Mr Bemba that had been tendered into evidence – and that Mr Kilolo and Mr Mangenda discussed that the testimony of witness D-54 must align with the content of the letter. Mr Mangenda proposes an

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that '*on avait mélangé les troupes*' ["the troops had been intermingled"]; (iv) testify about when the troops arrived at PK12; (v) testify that he was a member of '*le truc de ce gens-là, qui commandaient toute la guerre*' ["those people who were in charge of the whole war"] until December 2012, when he was replaced; (vi) pretend that he went to visit family members at a certain location; (vii) explain the size of the soldiers crossing '*into a war zone*', namely the Central African Republic; and (viii) not forget to mention '*les évènements qu'ils filmaient*' ["the events that they were filming"], as well as the '*deux grands véhicules qu'ils avaient vus*' ["the two large vehicles that they had seen"] (footnotes omitted).

[2906] Mr Mangenda's Appeal Brief, para. 228, referring to Conviction Decision, paras 609, 686, 839.
[2907] Mr Mangenda's Appeal Brief, para. 229.
[2908] Conviction Decision, para. 652.
[2909] Conviction Decision, paras 600-606.
[2910] Mr Mangenda's Appeal Brief, para. 229.
[2911] Conviction Decision, para. 757.

alternative reading of the evidence to the extent that he avers that, when referring to this letter in the "*cadre de la Couleur*" ("as part of the colours"), he might simply have wished to ensure that the witness's testimony would fit the logic of the defence case without inducing the witness to lie.[2912] The Appeals Chamber finds that alternative reading implausible in the context of the conversation as a whole.

1226. Furthermore, the Appeals Chamber is unpersuaded by the argument that the Trial Chamber had no basis for finding that "Mr Bemba, Mr Kilolo, Mr Mangenda and/or D-54 were in regular contact concerning the latter's testimony",[2913] given that Mr Mangenda had spoken to Mr Kilolo only four times, and that the last conversation took place long before the witness testified in court.[2914] The impugned finding is at the beginning of the section of the Conviction Decision, where the Trial Chamber discussed the various telephone conversations regarding witness D-54,[2915] and it is clear that the Trial Chamber was aware of the extent and timing of Mr Mangenda's interactions with Mr Kilolo regarding that witness. Nor is the Appeals Chamber persuaded by the argument that the Trial Chamber failed to consider that there was no evidence that Mr Mangenda knew that witness D-54 testified falsely about his last contact with the defence[2916] – the Trial Chamber did not find that he had such knowledge and there was, therefore, no reason for it to consider the absence of evidence in this regard.

1227. In sum, the Appeals Chamber rejects Mr Mangenda's arguments in relation to witness D-54 as no errors have been demonstrated or, to the extent that the Trial Chamber did err, the error was inconsequential.

(v) Witness D-13

1228. In relation to witness D-13, the Trial Chamber found, *inter alia*, that "Mr Kilolo discussed his illicit coaching activities with Mr Mangenda over the telephone",[2917] based on an intercepted telephone conversation between the two that had taken place on 10 November 2013 and during which Mr Kilolo had stated that he was occupied

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[2912] Mr Mangenda's Appeal Brief, para. 231.
[2913] Conviction Decision, para. 597.
[2914] Mr Mangenda's Appeal Brief, para. 232.
[2915] *See* Conviction Decision, paras 597-653.
[2916] Mr Mangenda's Appeal Brief, para. 233.
[2917] Conviction Decision, para. 667.

with "*les couleurs*" ("the colours") of a person the Trial Chamber identified as witness D-13.[2918] The Trial Chamber explained that the expression "*les couleurs*" had also been used in other conversations, such as in relation to witness D-54, and interpreted it as referring to illicit coaching activities.[2919]

1229. The Appeals Chamber is unpersuaded by Mr Mangenda's argument[2920] that the Trial Chamber's interpretation of the expression "*les couleurs*" ("the colours") was unreasonable, given that the Trial Chamber analysed the term in light of the evidence as a whole, noting in particular that the expression was used repeatedly in varied forms by Mr Kilolo and Mr Mangenda in their discussions regarding potential defence witnesses.[2921] Nor is the Appeals Chamber persuaded by the argument[2922] that the Trial Chamber failed to distinguish between Mr Kilolo's extensive telephone contact with witness D-13 and Mr Mangenda's "limited" knowledge thereof: the Trial Chamber clearly made a distinction in this regard, finding that Mr Kilolo had been in extensive contact with the witness, while making a more confined finding in respect of Mr Mangenda.[2923] There is also no basis for the arguments that there was no evidence that would support a finding that Mr Mangenda "had advance notice that the witness would tell this lie [regarding his contacts with the defence]" or that Mr Mangenda "knew for a fact when the witness had last spoken to Kilolo":[2924] contrary to what Mr Mangenda suggests, the Trial Chamber did not make a finding that he "had knowledge of, or intended, that Kilolo induce D-13 to lie";[2925] the Trial Chamber merely concluded that "Mr Kilolo discussed his illicit coaching activities with Mr Mangenda over the telephone. They both used coded language during their conversation".[2926] Advance knowledge that the witness would lie or knowledge of the exact last contact was not required to reach this conclusion.

1230. Accordingly, the Appeals Chamber rejects Mr Mangenda's arguments in relation to witness D-13.

[2918] Conviction Decision, paras 659-660.
[2919] Conviction Decision, para. 660.
[2920] Mr Mangenda's Appeal Brief, para. 236.
[2921] Conviction Decision, para. 660.
[2922] Mr Mangenda's Appeal Brief, para. 238.
[2923] Conviction Decision, paras 666-667.
[2924] Mr Mangenda's Appeal Brief, para. 238.
[2925] Mr Mangenda's Appeal Brief, para. 239.
[2926] Conviction Decision, para. 667.

(vi) Alleged factual errors regarding other references to "couleur"

1231. In a section of the Conviction Decision discussing the use of coded language[2927] by the co-perpetrators, the Trial Chamber analysed, *inter alia*, the use of the term "*faire la couleur"* ("doing the colour") in a telephone conversation between Mr Kilolo and Mr Mangenda on 7 November 2013 in relation to a potential witness, during which Mr Mangenda stated that it would be good if that witness accepted "*la couleur*" ("the colour").[2928] The Appeals Chamber is not persuaded by Mr Mangenda's argument on appeal that, "in the context of a lawyer-to-lawyer conversation, [this] cannot reasonably be interpreted as implying forcing a story down a witness's throat in a manner that would imply corruptly influencing" and that the passage generally does not imply that impermissible techniques were to be used.[2929] In the view of the Appeals Chamber, the Trial Chamber's assessment of the passage – which it assessed not in isolation but in light of all the relevant evidence, including other telephone conversations during which the term "*faire la couleur*" ("do the colour") or variants thereof had been used – was not one that no reasonable trier of fact could have made.

1232. The Trial Chamber also referred to a telephone conversation between Mr Mangenda and Mr Kilolo on 30 August 2013, during which, according to the Trial Chamber, "Mr Kilolo admit[ed] to Mr Mangenda that if his activities involving '*faire les couleurs*' ("doing the colours") were to be discovered, he would be the first person targeted",[2930] and which implied that "the '*faire les couleurs*' ("doing the colours") activities are illicit in nature and that [Mr Kilolo] knows about the consequences for the co-perpetrators".[2931] Mr Mangenda challenges this finding, arguing that it could be interpreted differently and that the Trial Chamber failed to address his submissions on this point.[2932] The Appeals Chamber rejects this argument as Mr Mangenda is merely proposing an alternative interpretation of the evidence, without demonstrating unreasonableness on the part of the Trial Chamber; in this regard, the Appeals

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[2927] Conviction Decision, paras 748-761.
[2928] Conviction Decision, paras 758-759.
[2929] Mr Mangenda's Appeal Brief, para. 241.
[2930] Conviction Decision, para. 760.
[2931] Conviction Decision, para. 761.
[2932] Mr Mangenda's Appeal Brief, para. 242.

Chamber also notes that it is not incumbent on a trial chamber to address each argument raised by the parties – what is required is that it is clear from the reasoning why the Trial Chamber reached the finding it did.[2933]

1233. Mr Mangenda also challenges[2934] the Trial Chamber's assessment of the term "*la couleur*" ("the colours") in another section of the Conviction Decision, dealing with the destruction of physical evidence, where the Trial Chamber noted that, during a telephone conversation on 26 Octo1233ber 2013, Mr Mangenda had stated that it could be explained to Mr Bemba that "he did not keep evidence of the transfers in connection with *'la couleur'*".[2935] Mr Mangenda's argument that he "immediately abandon[ed] this suggestion", which the Trial Chamber failed to consider,[2936] is unpersuasive because the Trial Chamber did not find that the particular suggestion was actually carried out, but relied on it to show that there was an agreement to destroy evidence of money transactions connected to illicit coaching or bribing of witnesses.[2937] In the view of the Appeals Chamber, this was not an unreasonable reading of the passage upon which the Trial Chamber relied.

(vii) Alleged factual errors regarding potential witness Bravo

1234. The Trial Chamber also made findings based on passages of telephone conversations between Mr Mangenda and Mr Kilolo relating to Bravo, a potential witness, which Mr Mangenda challenges on appeal.[2938] The first conversation, which took place on 29 August 2013, was, according to the Trial Chamber, another example of illicit witness coaching by Mr Kilolo, "highlight[ing] the illicit coaching strategy and Mr Kilolo's reluctance to call witnesses unless he had briefed them extensively".[2939] Mr Mangenda argues on appeal that the passage upon which the Trial Chamber relied – namely Mr Kilolo's statement that Bravo needed to be reframed and that it could be bad if he testified unless he had been briefed "all day and every night"[2940] – does not necessarily suggest that Mr Kilolo sought to corrupt

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[2933] *See supra* paras 102 *et seq.*
[2934] Mr Mangenda's Appeal Brief, para. 243.
[2935] Conviction Decision, para. 767.
[2936] Mr Mangenda's Appeal Brief, para. 243.
[2937] Conviction Decision, para. 768.
[2938] Mr Mangenda's Appeal Brief, paras 244-246.
[2939] Conviction Decision, paras 714-715.
[2940] Conviction Decision, paras 714-715.

the witness and that Mr Mangenda understood it "in jest".[2941] The Appeals Chamber does not find this argument persuasive as the Trial Chamber's interpretation of the passage was not, in light of the other evidence upon which the Trial Chamber relied, including another passage of the same conversation, where Mr Mangenda had reported on the, in his view, unsatisfactory performance of witness D-29,[2942] unreasonable.

1235. The Trial Chamber also analysed another telephone conversation regarding Bravo, which took place on 24 October 2013,[2943] and found on that basis that "[i]t is clear from the evidence that Mr Mangenda advised Mr Kilolo on approaching the potential witness and illicitly coaching him on the content of his testimony".[2944] The Appeals Chamber considers that Mr Mangenda is correct when he notes that, when viewed in light of the text immediately preceding the passage quoted by the Trial Chamber, this passage indicates that Mr Mangenda advised Mr Kilolo that he should contact the potential witness to tell him that he should indicate to the Registry that he would be willing to testify by video-conference, which would, as such, not amount to illicit coaching.[2945] However, the Appeals Chamber considers that this error of the Trial Chamber is inconsequential, given that it was but one of several examples of illicit coaching activities in which Mr Mangenda was involved.[2946] Thus, it does not call into question the reasonableness of the Trial Chamber's conclusion that "Mr Mangenda advised and assisted Mr Kilolo in the execution of the illicit coaching activities and briefed Mr Kilolo on the witnesses' testimonies whenever he was not in the court".[2947]

(viii) Alleged failure to take account of all evidence and misstatement of its own findings

1236. Mr Mangenda alleges that the Trial Chamber failed to take into account its own findings as well as all the evidence when entering findings as to his *mens rea*, raising several arguments in this regard. First, he submits that the Trial Chamber found that

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[2941] Mr Mangenda's Appeal Brief, para. 245.
[2942] *See supra* para. 1211.
[2943] *See* Conviction Decision, paras 718-719.
[2944] Conviction Decision, para. 720.
[2945] Mr Mangenda's Appeal Brief, para. 246.
[2946] *See* Conviction Decision, paras 717-726.
[2947] Conviction Decision, para. 734.

he had discussed with Mr Kilolo the witnesses' "lies about 'payments and contacts, as well as association with other persons'",[2948] even though the only lie the Trial Chamber identified as having been discussed between Mr Mangenda and Mr Kilolo was the denial of contacts with the Defence by witness D-29.[2949] The Appeals Chamber rejects this argument. First, it is correct that the Trial Chamber did not find that witness D-29 gave false testimony regarding the payments that he had received because it could not exclude that the witness may have believed that the payments he had received were legitimate, which, given the way counsel for the Prosecutor had asked the witness about payments, would have meant that the witness did not lie.[2950] Nevertheless, the Trial Chamber found that the payments were illicit, that Mr Kilolo had instructed the witness to deny them, and that Mr Kilolo and Mr Mangenda had discussed the witness's testimony about payments.[2951] The Trial Chamber also found that Mr Kilolo and Mr Mangenda discussed the witness's testimony about contacts with the Defence.[2952] Second, based on telephone conversations between Mr Kilolo and Mr Mangenda on 19 October 2013, the Trial Chamber also found that the two co-accused had discussed the provision of money to witnesses,[2953] a finding that Mr Mangenda does not challenge on appeal. Third, the Trial Chamber found that, in a telephone conversation with Mr Mangenda on 27 August 2013, Mr Kilolo had "expressed satisfaction that D-25 had not revealed an illicit coaching meeting".[2954] There was, therefore, a sufficient basis for the Trial Chamber's finding that Mr Kilolo and Mr Mangenda discussed payments to witnesses and contacts with the Defence.

1237. Second, Mr Mangenda challenges the Trial Chamber's finding that he "was informed on a continuous and substantive basis of Mr Kilolo's activities" and that he had "continuous and substantive knowledge" of his illicit coaching.[2955] He argues that the Trial Chamber made a clear error in so finding because it disregarded the "sharp contrast between the extensive and intensive witness preparation conducted by Kilolo

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[2948] Mr Mangenda's Appeal Brief, para. 247, referring to Conviction Decision, para. 849.
[2949] Mr Mangenda's Appeal Brief, para. 248.
[2950] Conviction Decision, paras 529-530.
[2951] Conviction Decision, paras 522-527, 538.
[2952] Conviction Decision, para. 538.
[2953] Conviction Decision, paras 619-620.
[2954] Conviction Decision, para. 493.
[2955] Mr Mangenda's Appeal Brief, para. 247, referring to Conviction Decision, paras 847-848.

as compared with Mangenda's limited knowledge thereof".[2956] The Appeals Chamber rejects this argument. The impugned finding is made at the end of a section setting out the Trial Chamber's conclusions regarding Mr Mangenda's essential contribution to the implementation of the common plan and the mental elements.[2957] This section, in turn, is based on more detailed findings contained elsewhere in the Conviction Decision. Mr Mangenda's general arguments are incapable of demonstrating unreasonableness on the part of the Trial Chamber and are therefore rejected.

1238. Third, Mr Mangenda challenges the Trial Chamber's finding that he had extensive knowledge of "scripting" that had been carried out by Mr Kilolo.[2958] The Appeals Chamber notes that, in the paragraphs of the Conviction Decision to which Mr Kilolo refers, the Trial Chamber did not find that Mr Mangenda had knowledge of "scripting". To the extent that Mr Mangenda's argument may be understood as referring to Mr Mangenda's knowledge of illicit coaching activities by Mr Kilolo, the Appeals Chamber notes that Mr Mangenda simply refers to two witnesses – D-25 and D-29 – and presents arguments as to how the telephone conversations between Mr Kilolo and Mr Mangenda in this regard could be interpreted.[2959] This is insufficient to establish that the Trial Chamber's findings on Mr Mangenda's knowledge of Mr Kilolo's coaching activities, which were based on numerous items of evidence and testimony discussed in detail in the Conviction Decision, were unreasonable.

1239. Fourth, Mr Mangenda argues that the Trial Chamber erroneously found that he had "advance knowledge" that witnesses would provide false testimony.[2960] The Appeals Chamber notes in this regard that the Trial Chamber did not find that Mr Mangenda had "advance knowledge" of the witnesses' false testimony, but that he *intended* that they provide false testimony as part of its legal findings. Mr Mangenda's argument is therefore without basis and must therefore be rejected.

[2956] Mr Mangenda's Appeal Brief, para. 249.
[2957] *See* Conviction Decision, paras 837-850.
[2958] Mr Mangenda's Appeal Brief, para. 250, referring to Conviction Decision, paras 835, 848.
[2959] Mr Mangenda's Appeal Brief, para. 250.
[2960] Mr Mangenda's Appeal Brief, paras 247, 251, referring to Conviction Decision, para. 849.

(ix) Conclusion

1240. In light of the reasons above, and having rejected Mr Mangenda's arguments challenging the Trial Chamber's finding that he knew that Mr Kilolo had been inducing witnesses to lie or had been engaged in "illicit coaching", the Appeals Chamber finds that the Trial Chamber did not err in this respect. Accordingly, Mr Mangenda's ground of appeal 2.C is rejected.

2. The Trial Chamber's legal and factual errors regarding essential contribution to the common plan

1241. Under his ground of appeal 2.D, Mr Mangenda argues that the Trial Chamber erred when it found that he had played a "critical role" in the common plan.[2961]

(a) Relevant part of the Conviction Decision

1242. The Trial Chamber found that there was "a common plan between Mr Bemba, Mr Kilolo and Mr Mangenda, in the context of defending Mr Bemba from the charges in the Main Case, to illicitly interfere with defence witnesses in order to ensure that these witnesses would testify in favour of Mr Bemba".[2962] Elsewhere in the Conviction Decision, the Trial Chamber explained, in relation to the content of the common plan, that "[m]ore 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".[2963]

1243. The Trial Chamber also found that Mr Mangenda made an essential contribution to the implementation of the common plan, noting that, while Mr Mangenda "did not physically perform the act of illicit coaching, he nevertheless played a critical role in keeping Mr Kilolo updated whenever Mr Kilolo was not in court, and advising him on the points to be rehearsed with witnesses".[2964] The Trial Chamber also noted that Mr Mangenda had "participated fully in the planning and execution of Mr Kilolo's illicit coaching activities and the presentation of false evidence" and had provided "essential logistical support to Mr Kilolo for the purpose of illicit coaching, such as

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[2961] Mr Mangenda's Appeal Brief, para. 254, referring to Conviction Decision, para. 847.
[2962] Conviction Decision, para. 802.
[2963] Conviction Decision, para. 681.
[2964] Conviction Decision, para. 847.

providing the questions that the victims' legal representatives were to put to the witnesses".[2965]

(b) Submissions of the parties

(i) Mr Mangenda

1244. Mr Mangenda submits that the Trial Chamber erred when it found that he had played a "critical role" in the common plan.[2966] He argues that the common plan, as defined by the Trial Chamber, was instructing or motivating defence witnesses testimony, "knowing the testimony to be false", and that, therefore, any provision of advice in relation to testimony not known to be false could not qualify as a contribution to the common plan.[2967] On this basis, Mr Mangenda claims that the Trial Chamber erred when relying on his involvement in the preparation of witnesses "concerning elements that are not false", recalling that the Trial Chamber did not enter findings as to the falsity of witness testimony not relating to the substance of the case; for the same reason, the Trial Chamber should not have relied on his description to Mr Kilolo of witness testimony that was not found to be false.[2968]

1245. Mr Mangenda argues that the Trial Chamber also erred by not assessing whether his reports to Mr Kilolo about testimony actually had any impact on the subsequent illicit coaching of witnesses, noting that the only witness who might have been coached based on information that he had provided was witness D-30, though illicit coaching of this witness was not encompassed by the charges.[2969] Thus, in Mr Mangenda's submission, he only relayed information *ex post facto* about previously coached witnesses, which would, in any event, have been available to Mr Kilolo through the transcripts of the hearing.[2970] He argues further that the provision of the questions that the legal representative of victims would ask of witness D-15 had no causal impact, as the Trial Chamber did not enter a finding that the witness's eventual response to these questions were false or even that Mr Kilolo had asked the witness to

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[2965] Conviction Decision, para. 847.
[2966] Mr Mangenda's Appeal Brief, para. 254, referring to Conviction Decision, para. 847.
[2967] Mr Mangenda's Appeal Brief, para. 255, referring to Conviction Decision, para. 681.
[2968] Mr Mangenda's Appeal Brief, paras 256-257.
[2969] Mr Mangenda's Appeal Brief, para. 258.
[2970] Mr Mangenda's Appeal Brief, para. 258.

lie.[2971] In any event, Mr Mangenda argues that his contribution to the preparation of the testimony of witness D-15 was minimal, amounting merely to a few utterances of sounds.[2972] He also notes that the Trial Chamber failed to find that any of his acts were connected to the "objective lies", such as the denial of payments by the Defence to witnesses.[2973]

(ii) The Prosecutor

1246. The Prosecutor refutes Mr Mangenda's arguments, submitting, first, that he mischaracterises the Trial Chamber's finding about the common plan, which was not limited to instructing witnesses to give evidence that the co-perpetrators knew was false, and that, therefore, Mr Mangenda's arguments on that basis should be rejected.[2974] She submits further that there was no need for the Trial Chamber to enter findings as to the impact of Mr Mangenda's reports about witness testimony on future illicit coaching because, in keeping with the approach taken by the *Lubanga* Trial Chamber, his contributions had to be assessed against the role that was assigned to him under the common plan, noting that the Trial Chamber found that, without the assistance of Mr Mangenda, Mr Kilolo would not have been able to carry out the coaching activities in the way he did.[2975] The Prosecutor argues also that the description of Mr Mangeda's contribution as being *ex post facto* "does not adequately represent his role in implementing the Common Plan", and that he specifically contributed to the common plan in relation to witness D-29 and by providing the questions that the legal representatives of victims would ask of witness D-15.[2976] She also challenges the argument that Mr Mangenda's contribution to the coaching of witness D-15 was not essential, arguing that his acts must not be looked at in isolation, but based on his overall role in the common plan.[2977]

(c) Determination by the Appeals Chamber

1247. The Appeals Chamber is not persuaded by Mr Mangenda's arguments. As to the argument that the Trial Chamber could not rely on contributions that were not related

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[2971] Mr Mangenda's Appeal Brief, para. 259.
[2972] Mr Mangenda's Appeal Brief, para. 260.
[2973] Mr Mangenda's Appeal Brief, para. 261.
[2974] Response, paras 354-355.
[2975] Response, para. 356.
[2976] Response, para. 357.
[2977] Response, para. 358.

to obtaining false testimony,[2978] the Appeals Chamber notes that Mr Mangenda distorts the Trial Chamber's description of the content of the common plan. As indicated by the Prosecutor,[2979] the Trial Chamber found that the common plan consisted of an agreement "to instruct or motivate defence witnesses to give 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".[2980] Mr Mangenda fails to acknowledge the second part of this description of the common plan.

1248. Further, the Appeals Chamber notes that Mr Mangenda argues that the contributions that the Trial Chamber took into account were not shown to have caused illicit coaching, were minimal, or occurred after the illicit coaching of individual witnesses had taken place.[2981] The Appeals Chamber considers that, as noted by the Prosecutor,[2982] when assessing whether Mr Mangenda made an essential contribution to the implementation of the common plan, the Trial Chamber was required to consider the actions of Mr Mangenda together, and against the role he had been assigned under the common plan. Indeed, the notion of co-perpetration is based on the assumption that there may be a division of tasks among the co-perpetrators; whether individual contributions were causal to the commission of crimes or offences, were minimal, or occurred after a particular witness had been illicitly coached is as such irrelevant. Rather, what is of the essence is that the contributions of an individual as a whole amounted to an essential contribution with the resulting power to frustrate the commission of the crimes or offences.[2983]

1249. Accordingly, Mr Mangenda's arguments under his ground of appeal 2.D. are rejected.

[2978] Mr Mangenda's Appeal Brief, paras 255-257.
[2979] Response, paras 354-355.
[2980] Conviction Decision, para. 681 (emphasis added).
[2981] Mr Mangenda's Appeal Brief, paras 258-261.
[2982] Response, para. 356.
[2983] *See* *Lubanga* Appeal Judgment, para. 469.

3. Alleged errors regarding Mr Mangenda's involvement in contemporaneous or post-facto measures to conceal the common plan

1250. With his third ground of appeal, Mr Mangenda raises arguments relating to his involvement in contemporaneous or post-facto measures to conceal the common plan. The Appeals Chamber shall address these arguments in turn.

(a) Contemporaneous concealment

(i) Relevant part of the Conviction Decision

1251. The Trial Chamber found that, during a telephone conversation on 30 August 2013 with Mr Kilolo, Mr Mangenda had "relayed Mr Bemba's precise instructions regarding D-54's testimony to Mr Kilolo", including Mr Bemba's instruction that "Mr Kilolo should finish his business with D-54 before co-counsel, Mr Haynes, spoke to the witness".[2984]

1252. In relation to Mr Mangenda's participation in the planning and execution of illicit coaching, the Trial Chamber noted, *inter alia*, that he had accompanied Mr Kilolo on field missions and "[i]n a conversation on 2 October 2013 […] admitted that Mr Haynes could not join them as the purpose of the field missions was to illicitly coach witnesses".[2985] This finding was based on the Trial Chamber's analysis of two conversations between Mr Kilolo and Mr Mangenda on 2 October 2013, during which, according to the Trial Chamber, Mr Mangenda had informed Mr Kilolo that Mr Haynes had complained that he had not been asked to join field missions, and, based on an excerpt of the second conversation, concluded that "the co-perpetrators purposefully excluded other members of the defence team from their mission plans so that they could engage in illicit coaching".[2986]

(ii) Submissions of the parties

(a) Mr Mangenda

1253. Mr Mangenda raises six arguments under the heading of "contemporaneous concealment", three of which are merely repetitions of arguments raised also under

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[2984] Conviction Decision, para. 686, referring to paras 600-606.
[2985] Conviction Decision, para. 840 (footnote omitted).
[2986] Conviction Decision, paras 763-764.

other grounds of appeal. These three arguments are not addressed any further here, as they are analysed – and dismissed – elsewhere in this judgment.[2987]

1254. As to the remaining three arguments, Mr Mangenda refers to the finding that he had conveyed Mr Bemba's instructions to Mr Kilolo that he should speak to witness D-54 before Mr Haynes.[2988] Mr Mangenda claims that the Trial Chamber erred in that this "demonstrates his awareness and concealment of a criminal plan to corruptly influence witnesses".[2989] He argues that the purpose of Mr Kilolo meeting the witness before Mr Haynes was merely to ensure that the witness made a good impression on Mr Haynes, and that Mr Kilolo was better placed to reassure the witness and review his potential testimony, given that he spoke the same mother-tongue as the witness.[2990] Mr Mangenda argues further that the instructions as to the content of the witness's testimony did not provide him with an indication that they related to the giving of false testimony; therefore, they cannot be considered evidence that he was aware that any corrupt influence was being executed by Mr Kilolo or that Mr Bemba intended that the witness be corruptly influenced.[2991] Mr Mangenda asserts that any inference to the contrary runs counter to the benefit of the doubt to which he was entitled when the Trial Chamber declined to adjudicate the merits of the Main Case.[2992]

1255. Mr Mangenda also challenges the Trial Chamber's findings that members of the defence team in the Main Case were purposefully excluded from field missions.[2993] He challenges the Trial Chamber's interpretation of the telephone conversations between him and Mr Kilolo on 2 October 2013, arguing that, according to the Trial

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[2987] Mr Mangenda's argument that the Trial Chamber's finding that he knew of the illicit purpose of the distribution of telephones to witnesses in Yaoundé (Mr Mangenda's Appeal Brief, paras 263-264) is addressed below, *see infra* paras 1280-1288. Mr Mangenda's argument that the Trial Chamber erred when it found that he expressed concerns about Mr Haynes' alleged suspicions of coaching, in particular in relation to witness D-29 (Mr Mangenda's Appeal Brief, paras 263, 268) is addressedabove, *see supra* para. 1209. Mr Mangenda's argument that the Trial Chamber erred when it found that there was an agreement to destroy evidence of payments to witnesses (Mr Mangenda's Appeal Brief, paras 263, 276) is addressed above, *see supra* para. 1233.
[2988] Mr Mangenda's Appeal Brief, paras 263, 265.
[2989] Mr Mangenda's Appeal Brief, paras 263, 265.
[2990] Mr Mangenda's Appeal Brief, para. 266.
[2991] Mr Mangenda's Appeal Brief, para. 267.
[2992] Mr Mangenda's Appeal Brief, para. 267.
[2993] Mr Mangenda's Appeal Brief, paras 263, 269-271, referring to Conviction Decision, paras 763-764, 840.

Chamber's interpretation, he had said that "Haynes could be invited to participate in the witness coaching *but for* a perceived danger that he would reveal this illicit coaching while drunk", bringing him into the criminal conspiracy, which was, however an unlikely interpretation.[2994] In Mr Mangenda's submission, the passage is better understood as him expressing concern that Mr Haynes could criticise Mr Kilolo's abilities.[2995] He also argues that the formulation that he had used – "*peut-être il ne pouvait pas venir*" ("maybe he couldn't come") "is not the language that would have been used if the activity in question was criminal", but made sense if understood as referring to the fact that Mr Haynes and the witness did not speak a common language.[2996] Mr Mangenda notes that, although he had presented this interpretation to the Trial Chamber, it had not addressed it.[2997] In his, view, the Trial Chamber's interpretation was a clear error.[2998]

1256. Furthermore, Mr Mangenda recalls his arguments as to the purported erroneous interpretation by the Trial Chamber of the term "*couleur*" and submits that the Trial Chamber also made a clear error in relation to its interpretation of other codes that were used in the conversations (notably, "*le client*", "*le blanc*", "*le collègue en haut*") ("the client", "the white", "the colleague above"), stating that the use of coded language is commonplace because of the widespread use of telephone surveillance and the resulting need to keep confidential matters pertaining to the defence.[2999] He thus challenges the Trial Chamber's rejection of his arguments.[3000]

(b) The Prosecutor

1257. The Prosecutor responds that Mr Mangenda's challenge to the Trial Chamber's finding as to Mr Bemba's instructions that Mr Kilolo meet witness D-54 before Mr Haynes is unfounded and that he merely offers an alternative interpretation of the evidence without showing that the Trial Chamber's analysis was in error.[3001] She further argues that the Trial Chamber was entitled to consider telephone conversations

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[2994] Mr Mangenda's Appeal Brief, para. 272.
[2995] Mr Mangenda's Appeal Brief, para. 272.
[2996] Mr Mangenda's Appeal Brief, para. 273.
[2997] Mr Mangenda's Appeal Brief, para. 273.
[2998] Mr Mangenda's Appeal Brief, para. 274.
[2999] Mr Mangenda's Appeal Brief, para. 275.
[3000] Mr Mangenda's Appeal Brief, para. 275, referring to Conviction Decision, para. 750.
[3001] Response, para. 363.

between Mr Kilolo and Mr Mangenda on matters pertaining to the merits of the Main Case to establish the offence of illicit coaching of witnesses and Mr Mangenda's knowledge thereof.[3002] She similarly contends that Mr Mangenda's challenges to the finding that members of the defence team in the Main Case were excluded from field missions are unfounded and merely offer an alternative interpretation of the evidence.[3003] The Prosecutors argues that the alleged error regarding the use of coded language should be rejected summarily as Mr Mangenda merely states that the Trial Chamber made a clear error, without providing arguments in support, and, in any event, only offers an alternative interpretation of the evidence.[3004]

(iii) Determination by the Appeals Chamber

1258. Mr Mangenda's argument that the Trial Chamber committed a clear error when it found that his conveying of instructions from Mr Bemba to Mr Kilolo regarding witness D-54 "demonstrates his awareness and concealment of a criminal plan to corruptly influence witnesses"[3005] is dismissed *in limine.* The Trial Chamber did not make such a finding on the basis of the conversation of 30 August 2013 that Mr Mangenda challenges. Rather, the Trial Chamber relied upon the conversation of 30 August 2013 to establish the "planned nature" of the offences.[3006]

1259. As to Mr Mangenda's challenge to the Trial Chamber's interpretation of the two conversations on 2 October 2013,[3007] the Appeals Chamber considers that his arguments do not show that the Trial Chamber's conclusion was unreasonable. First, the Appeals Chamber notes that the Trial Chamber, when finding that other members of the defence team in the Main Case were excluded from missions, did not determine that Mr Mangenda went on mission more often than Mr Haynes or Ms Gibson;[3008] rather, the Trial Chamber considered it established that Mr Mangenda had indicated that Mr Haynes could not be allowed to go on a particular mission because, during this mission, witnesses would be illicitly coached.

[3002] Response, para. 364.
[3003] Response, para. 365.
[3004] Response, para. 366.
[3005] Mr Mangenda's Appeal Brief, para. 265.
[3006] *See* Conviction Decision, para. 686, referring to paras 603-604.
[3007] Mr Mangenda's Appeal Brief, paras 270-274.
[3008] *See* Mr Mangenda's Appeal Brief, para. 269.

1260. The Appeals Chamber sees no unreasonableness in the Trial Chamber's assessment of the two conversations on 2 October 2013. As noted by the Trial Chamber,[3009] during these conversations Mr Kilolo and Mr Mangenda discussed Mr Haynes' complaint that he was not going on field missions and reasonably interpreted this conversation as indicating that the reason for this was that the purpose of these field missions was to corruptly influence witnesses. As noted by the Prosecutor,[3010] Mr Mangenda is merely proposing an alternative interpretation of the conversation, without demonstrating that the Trial Chamber's was unreasonable. The arguments are therefore rejected.

1261. Finally, the Appeals Chamber rejects Mr Mangenda's argument regarding the use of coded language.[3011] In the section in which the impugned finding is contained, the Trial Chamber discussed at length how it interpreted the coded language and assessed the various arguments that had been raised by the Accused.[3012] Mr Mangenda fails to explain why the Trial Chamber's analysis would be erroneous.

(b) Post-facto concealment ("fictitious scenario")

(i) Relevant part of the Conviction Decision

1262. In determining that Mr Mangenda's *mens rea* had been established, the Trial Chamber relied, *inter alia*, on "his involvement in measures taken to counter the Article 70 investigation".[3013] In this regard, and with reference to other findings, the Trial Chamber noted that Mr Mangenda had been informed by a source within the Court of the investigations against him and Mr Kilolo and that he had immediately taken steps for remedial measures, notably advising Mr Bemba of the potential consequences and that witnesses should be offered incentives to cease their cooperation with the Prosecutor.[3014] More generally, the Trial Chamber recounted its analysis of the evidence relating to "remedial measures" that had been undertaken once Mr Mangenda, Mr Kilolo and Mr Bemba heard of the potential existence of

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[3009] Conviction Decision, paras 762-764.
[3010] Response, para. 365.
[3011] Mr Mangenda's Appeal Brief, para. 275.
[3012] Conviction Decision, paras 748-761.
[3013] Conviction Decision, para. 848.
[3014] Conviction Decision, para. 845, referring to paras 787-791.

investigations under article 70 of the Statute against them.[3015] The Trial Chamber noted the submissions of Mr Mangenda that discussions about a cover-up were fictitious, but found that this was irrelevant "since the above-mentioned intercepts prove that the three co-perpetrators clearly intended measures to conceal their prior activities".[3016]

(ii) Submissions of the parties

(a) Mr Mangenda

1263. Mr Mangenda submits that the Trial Chamber's finding that he had participated in a post-facto cover-up was "clearly wrong".[3017] He notes that the Prosecutor submitted at the beginning of the trial that he and Mr Kilolo had, in October 2013, made up stories about informers among defence witnesses, in order to persuade Mr Bemba that money should be paid, which Mr Mangenda and Mr Kilolo would then keep for themselves; an allegation that corresponded with the interpretation of the Independent Counsel and of the Pre-Trial Chamber in the Confirmation Decision.[3018] He argues that, contrary to these submissions and findings, the Trial Chamber found that he and Mr Kilolo believed that witnesses D-2, D-3, D-4 and D-6 were the source of the Prosecutor's investigation, genuinely agreed that these witnesses be briefed, and genuinely tried to conceal any such bribes.[3019]

1264. Mr Mangenda raises five sets of arguments to support his contention that the Trial Chamber's findings were unreasonable. First, he notes that there was no evidence that Mr Kilolo, who spoke with witnesses D-2 and D-3 shortly after he and Mr Kilolo had discussed the cover-up, raised the matter with the two witnesses, as one would have expected had the cover-up been genuine.[3020] Instead, he submits, the Trial Chamber relied on a conversation between Mr Kilolo and Mr Bemba, which disregards, however, the possibility that Mr Kilolo may have been deceiving Mr Bemba.[3021] Second, he notes that the sums Mr Kilolo paid to witnesses D-2 and D-3

[3015] Conviction Decision, paras 770-801.
[3016] Conviction Decision, para. 800.
[3017] Mr Mangenda's Appeal Brief, para. 278.
[3018] Mr Mangenda's Appeal Brief, paras 278-280.
[3019] Mr Mangenda's Appeal Brief, para. 281.
[3020] Mr Mangenda's Appeal Brief, para. 283.
[3021] Mr Mangenda's Appeal Brief, para. 284.

were small – much smaller than the sums discussed with Mr Bemba – and corresponded roughly to amounts that had been promised previously.[3022] Third, Mr Mangenda refers to a conversation between Mr Kilolo and him, which in his view does not express a guilty consciousness regarding the Yaoundé witnesses.[3023] Fourth, he submits that the discussions between him and Mr Kilolo about avoiding a paper trail were about how to keep Mr Bemba from discovering that in reality no cover-up payments were made to witnesses and therefore the Trial Chamber's finding that payments were never documented was unreasonable because those payments were in fact fictitious.[3024] Fifth, he argues that the Trial Chamber failed to interpret his statement that the investigation could destroy all witnesses in light of the potential fictitious scenario.[3025] Sixth, he challenges the Trial Chamber's finding that the "fictitious scenario" in light of the intercepts was irrelevant, noting that the Trial Chamber's interpretation of the intercepts depended upon the existence of that scenario.[3026]

(b) The Prosecutor

1265. The Prosecutor responds that the Trial Chamber correctly found that Mr Bemba, Mr Kilolo and Mr Mangenda had discussed measures to frustrate the Prosecutor's investigation under article 70 of the Statute, notably to contact witnesses D-2, D-3, D-4 and D-6 and pay them money.[3027] She submits that it is irrelevant whether Mr Kilolo and Mr Mangenda sought to extort money from Mr Bemba because, irrespective of this, Mr Kilolo and Mr Mangenda acknowledged their previous criminal activities, thus proving the existence of a common plan and their involvement therein.[3028] She submits that, therefore, Mr Mangenda's arguments regarding the fictitious cover-up scenario to extort money from Mr Bemba should be dismissed.[3029] She also notes that the Trial Chamber specifically addressed Mr Mangenda's arguments regarding the fictitious scenario, which Mr Mangenda challenges only by repeating arguments.[3030]

[3022] Mr Mangenda's Appeal Brief, para. 285.
[3023] Mr Mangenda's Appeal Brief, para. 286.
[3024] Mr Mangenda's Appeal Brief, para. 287.
[3025] Mr Mangenda's Appeal Brief, para. 288.
[3026] Mr Mangenda's Appeal Brief, para. 289.
[3027] Response, para. 368.
[3028] Response, para. 369.
[3029] Response, para. 370.
[3030] Response, para. 371.

The Prosecutor also submits that Mr Mangenda's arguments merely provide an alternative interpretation of the evidence, without demonstrating that the Trial Chamber's findings were unreasonable.[3031]

(iii) Determination by the Appeals Chamber

1266. The Appeals Chamber notes that the Trial Chamber relied on the "remedial measures" that Mr Kilolo, Mr Mangenda and Mr Bemba discussed once there were suspicions of investigations by the Prosecutor as indications of the existence of a pre-existing common plan among the co-perpetrators and, in relation to Mr Mangenda, of his *mens rea*.[3032] The Trial Chamber did not find that these remedial measures themselves amounted to offences under article 70 (1) of the Statute. For that reason, and as noted by the Prosecutor,[3033] it is irrelevant whether or not Mr Kilolo and Mr Mangenda were of the view that witnesses D-2, D-3, D-4 and D-6 might be the sources of the Prosecutor's investigations and whether the measures that they discussed with Mr Bemba in this regard were genuine. This is because, even if they had talked about a "fictitious scenario", the conversations would still be an indication of the existence of a common plan, prior criminal behaviour and Mr Mangenda's awareness thereof.

1267. For that reason, there is no reason to assess Mr Mangenda's five arguments any further, which, in any event, largely amount to proposing an alternative interpretation of the evidence without demonstrating that the Trial Chamber's analysis of the remedial measures that had been taken, which the Trial Chamber set out over several pages, was unreasonable.

1268. Accordingly, Mr Mangenda's arguments under his third ground are rejected.

[3031] Response, para. 372.
[3032] Conviction Decision, paras 803, 848.
[3033] Response, para. 369.

4. Alleged error in finding that Mr Mangenda "surmised" that Mr Kilolo was corruptly influencing the Yaoundé witnesses (D-2, D-3, D-4, and D-6) based on the distribution of mobile telephones

(a) Relevant part of the Conviction Decision

1269. The Trial Chamber found that Mr Kilolo distributed new telephones to witness D-3 on 25 May 2013 and witnesses D-2, D-4 and D-6 on 26 May 2013, in order to stay in touch with them.[3034] The Trial Chamber noted witness P-245 (D-3)'s testimony that the distribution of telephones "occurred when the witnesses were entrusted to the care of VWU, which would take away the witnesses' personal telephones".[3035] The Trial Chamber further noted that witnesses P-260 (D-2) and P-245 (D-3) confirmed unequivocally that Mr Mangenda was present when witnesses D-2, D-3, D-4, and D-6 received the telephones.[3036]

1270. The Trial Chamber found that, when Mr Kilolo gave the telephones to the witnesses, he explained that they were necessary to stay in contact with them, as the VWU would take away their personal telephones.[3037] The Trial Chamber further found that "[t]he witnesses understood that they were not supposed to stay in contact with Mr Kilolo during their testimony".[3038] The Trial Chamber noted that witness P-245 (D-3) confirmed that Mr Mangenda was present at the meeting on 25 May 2013 at which Mr Kilolo explained the purpose of the new telephones, although the witness did not specifically testify that Mr Mangenda was "physically present" when Mr Kilolo explained their purpose.[3039]

1271. Nevertheless, the Trial Chamber inferred, "as the only conclusion, that Mr Mangenda was aware that the telephones were handed out to the witnesses in order to enable Mr Kilolo to illicitly contact them after the VWU cut-off date and approved thereof".[3040] In reaching this conclusion, the Trial Chamber noted that Mr Mangenda was present when the telephones were distributed.[3041] The Trial Chamber found that the witnesses did not expressly assert that Mr Mangenda handed

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[3034] Conviction Decision, para. 367.
[3035] Conviction Decision, para. 367.
[3036] Conviction Decision, para. 367.
[3037] Conviction Decision, para. 368.
[3038] Conviction Decision, para. 368.
[3039] Conviction Decision, para. 369.
[3040] Conviction Decision, para. 371.
[3041] Conviction Decision, para. 371.

out the telephones or advised on their illicit purpose; "[h]owever, 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, […] Mr Mangenda could not have surmised any legitimate purpose for the telephones".[3042] The Trial Chamber further found that any legitimate purpose to stay in contact with the witnesses was contradicted by the fact that: (i) Mr Kilolo explained that these telephones were needed as the VWU would take away the witnesses' personal telephones and therefore the distributed telephones were meant for the witnesses to circumvent VWU measures; (ii) the defence kept these telephones secret from VWU; and (iii) there was no need for the telephones after the VWU handover as any contact before the cut-off date could have been facilitated by the VWU.[3043]

(b) Submissions of the parties

(i) Mr Mangenda

1272. Under his fourth ground of appeal, Mr Mangenda submits that the Trial Chamber misstated the evidence regarding the VWU cut-off date and thereby erred in stating, at least twice in its decision, that there was a distribution of new telephones after the VWU cut-off date.[3044] Mr Mangenda argues that this error warrants reversal of the Trial Chamber's inference that he could not have surmised any legitimate purpose for the distribution of telephones to the witnesses, or alternatively, that no deference should be accorded to the Trial Chamber's reasoning as to what he could or could not have reasonably inferred from the circumstances.[3045]

1273. Mr Mangenda additionally submits that the court-imposed cut-off dates were not so imminent as to exclude the possibility that he genuinely believed that the distribution of telephones had a non-illicit purpose particularly as contact with the witnesses were not prohibited in the interval between the distribution of telephones and the court-imposed cut-off date.[3046] Mr Mangenda further argues that witness P-

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[3042] Conviction Decision, para. 371.
[3043] Conviction Decision, para. 371.
[3044] Mr Mangenda's Appeal Brief, para. 292, referring to Conviction Decision, paras 735, 747.
[3045] Mr Mangenda's Appeal Brief, para. 292.
[3046] Mr Mangenda's Appeal Brief, para. 293.

260 (D-2)'s prior inconsistent statement supports the possibility of a non-illicit purpose for the distribution of telephones.[3047]

1274. Mr Mangenda further submits that the Trial Chamber, when assessing the possibility that he could have genuinely believed that the telephones had a non-illicit purpose, failed to consider or address his submissions that: (i) the Prosecutor has provided witnesses with telephones within a similarly short period before cut-off dates;[3048] (ii) witnesses P-260 (D-2) and P-245 (D-3) testified that they had lied to Mr Kilolo regarding the fact that they did not possess mobile telephones;[3049] and (iii) mobile telephones would have been the only means to get into contact with the witnesses prior to the handover to VWU.[3050]

1275. Mr Mangenda submits that the three reasons cited by the Trial Chamber in support of its inference that he could not have surmised any legitimate purpose for the telephones "are internally contradictory, unsupported by any evidence, or based on a mis-appreciation of the evidence."[3051] Mr Mangenda argues that the Trial Chamber's reliance on Mr Kilolo's explanation that the telephones were needed because the VWU would take away the witnesses' personal telephones to substantiate his knowledge is inconsistent with the Trial Chamber's statement that it could not find that he heard this illicit explanation.[3052] With regard to the issue of whether the telephones were disclosed to the VWU, Mr Mangenda argues that: (i) there is no evidential basis that the Main Case Defence did not make the disclosure; (ii) there is no substantiation that there was a requirement that the telephones be disclosed to the VWU; and (iii) there is no evidential basis for the Trial Chamber to assume that he was aware that Mr Kilolo had not disclosed the existence of the telephones to the VWU.[3053] Mr Mangenda also argues that the Trial Chamber's assumption that contacts with prospective witnesses had to be facilitated by VWU after a witness's

[3047] Mr Mangenda's Appeal Brief, para. 293, referring to CAR-OTP-0080-0100-R01 at 0120-R01, lines 729-732.
[3048] Mr Mangenda's Appeal Brief, para. 294, referring to CAR-OTP-0065-0918.
[3049] Mr Mangenda's Appeal Brief, para. 294.
[3050] Mr Mangenda's Appeal Brief, paras 294, 303.
[3051] Mr Mangenda's Appeal Brief, para. 295. *See also* para. 304.
[3052] Mr Mangenda's Appeal Brief, para. 296.
[3053] Mr Mangenda's Appeal Brief, para. 297.

first meeting with the unit is unsubstantiated.[3054] In this regard, Mr Mangenda argues that the *Bemba* Familiarisation Protocol does not support this conclusion.[3055] Mr Mangenda also argues that the Trial Chamber improperly relied on witness D-2's testimony in the Main Case as it held that it would not assess the truth or falsity of such testimony and his defence was instructed not to cross-examine the witness on his Main Case testimony; in addition, witness P-260 (D-2) has "limited or no knowledge of the Court's procedures and protocols" and therefore is not a reliable source for determining when contact with the defence was prohibited.[3056]

1276. Mr Mangenda also submits that the Trial Chamber erred in law by failing to articulate or apply "the proper standard for making findings based on circumstantial evidence" and relying on non-evidence to substantiate its findings.[3057] Mr Mangenda submits that the only appropriate remedy "is to quash his conviction for corruptly influencing witnesses D-2, D-3, D-4, and D-6".[3058]

(ii) The Prosecutor

1277. The Prosecutor responds that Mr Mangenda "mischaracterises and merely disagrees" with the Trial Chamber's findings and therefore his challenges should be summarily dismissed.[3059] She asserts that the Trial Chamber did not misstate the evidence as to the VWU cut-off date and consistently made a distinction between this date and the VWU handover date.[3060] With respect to paragraph 747 of the Conviction Decision, the Prosecutor argues that, "in the context of the surrounding sentences and the corresponding parts of the [Conviction Decision]", the Trial Chamber's finding is understandable and not inconsistent with its other findings.[3061] With respect to paragraph 735 of the Conviction Decision, the Prosecutor concedes that the Trial Chamber erroneously found that new telephones were distributed "after the VWU cut-

[3054] Mr Mangenda's Appeal Brief, paras 298-301.
[3055] Mr Mangenda's Appeal Brief, paras 299-301.
[3056] Mr Mangenda's Appeal Brief, para. 302.
[3057] Mr Mangenda's Appeal Brief, para. 306.
[3058] Mr Mangenda's Appeal Brief, para. 307.
[3059] Response, para. 374.
[3060] Response, paras 375-376, referring to Conviction Decision, paras 370-371, 383, 390.
[3061] Response, para. 376.

off date", but in light of the Trial Chamber's other findings there is no material impact on the Conviction Decision.[3062]

1278. The Prosecutor further argues that Mr Mangenda merely provides an alternative interpretation of the evidence and views the evidence in isolation when he contends that the interval between the distribution of telephones and the court-imposed cut-off date for contact with the defence was long enough to introduce doubt as to whether the telephones were given for illicit purposes.[3063] She argues that the one piece of evidence that Mr Mangenda does refer to, an excerpt of witness P-260 (D-2)'s prior statement, "is ambiguous, rather than dispositive".[3064] The Prosecutor also argues that the Trial Chamber did not ignore any salient considerations and the considerations that Mr Mangenda puts forward should be dismissed summarily or, in the alternative, should be dismissed as irrelevant or unpersuasive.[3065] She asserts that Mr Mangenda's reference to the issuance of telephones to witnesses by her office is unrelated and occurs in a different context.[3066] The Prosecutor argues that the Trial Chamber's three additional considerations, found at paragraph 371 of the Conviction Decision, for concluding that Mr Mangenda could not have surmised any legitimate purpose for the telephones are logically consistent.[3067] She asserts that Mr Mangenda merely disagrees with the Trial Chamber's reasoning without showing an error.[3068]

1279. The Prosecutor asserts that, with respect to the alleged legal error, Mr Mangenda's challenge should be summarily dismissed.[3069] In the alternative, she argues that the Trial Chamber clearly stated and consistently applied the beyond reasonable doubt standard under article 66 (3) of the Statute and assessed, whether, based on all the evidence, "there is only one reasonable conclusion to be drawn".[3070]

[3062] Response, para. 376.
[3063] Response, para. 377.
[3064] Response, para. 377.
[3065] Response, para. 378.
[3066] Response, para. 378.
[3067] Response, para. 379.
[3068] Response, para. 379.
[3069] Response, para. 380.
[3070] Response, para. 380, referring to Conviction Decision, paras 185, 188, 215, 221, 250, 277-278, 302, 366, 401, 409, 502.

(c) Determination by the Appeals Chamber

1280. Mr Mangenda argues that the Trial Chamber erred in law by failing to articulate or apply the proper standard for making findings based on circumstantial evidence.[3071] As the Appeals Chamber has already concluded, the Trial Chamber adopted the correct legal approach with respect to circumstantial evidence and inferences drawn therefrom.[3072] With respect to the distribution of new telephones, the Trial Chamber clearly stated that it "infers, as the only conclusion, that Mr Mangenda was aware that the telephones were handed out to the witnesses in order to enable Mr Kilolo to illicitly contact them after the VWU cut-off date and approved thereof".[3073] Thus, contrary to Mr Mangenda's assertion, the Trial Chamber applied the proper standard in relation to its finding regarding his awareness of the illicit purpose of the distributed telephones.

1281. Mr Mangenda also asserts that the Conviction Decision incorrectly states that new telephones were distributed to witnesses after the VWU cut-off date.[3074] The Appeals Chamber finds that Mr Mangeda is correct in this assertion. These two instances include an introductory paragraph that sets out what will be discussed in a section entitled "*Measures to Conceal the Implementation of the Plan*"[3075] and a sub-heading in this section which discusses the distribution of telephones to witnesses.[3076] The Appeals Chamber notes, however, that the content of the paragraph under the subheading refers to telephones being distributed "around the time the witnesses were entrusted to the care of the VWU".[3077] The Appeals Chamber further notes that the Trial Chamber clearly established that the date of distribution of telephones occurred on 25 and 26 May 2013[3078] and the VWU cut-off date for contacts between witnesses D-) and D-3 was on 10 and 13 June 2013, respectively.[3079] The Trial Chamber further established that the date of distribution of telephones occurred "a few days before the

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[3071] Mr Mangenda's Appeal Brief, para. 306.
[3072] *See supra* paras 868-869.
[3073] Conviction Decision, para. 371.
[3074] Conviction Decision, paras 735, 747.
[3075] Conviction Decision, para. 735.
[3076] Conviction Decision, p. 359.
[3077] Conviction Decision, para. 747.
[3078] Conviction Decision, para. 367.
[3079] Conviction Decision, paras 383, 390.

handover to the VWU and less than three weeks before the VWU cut-off date".[3080] In this context, the Appeals Chamber understands the Trial Chamber's reference to "around the time the witnesses were entrusted to the care of the VWU" to refer to what the Trial Chamber has described as the VWU handover date, and not the VWU cut-off date. In light of these findings, the Appeals Chamber does not consider the error in the introductory paragraph, which was repeated in the corresponding sub-heading, to be material to the Trial Chamber's findings with respect to the distribution of telephones. It also does not warrant lack of deference to the Trial Chamber's reasoning.

1282. Mr Mangenda puts forth a number of considerations, including: (i) the 15 and 19 day interval between the distribution of telephones and the cut-off date for witnesses D-2 and D-3, respectively;[3081] (ii) the three or four day interval between the distribution of telephones and witnesses D-2's and D-3's handover to VWU;[3082] (iii) witness P-260 (D-2)'s prior statement in which he states that the distributed telephones were necessary to remain in contact with Mr Kilolo so Mr Kilolo could put him and other witnesses at the disposal of the Court;[3083] (iv) the Prosecutor's provision of telephones to witnesses before the imposed cut-off date; (v) witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony that they lied to Mr Kilolo when they told him they did not have mobile telephones; and (vi) the fact that mobile telephones are often the only means in which to remain in contact with witnesses, which he contends the Trial Chamber ignored and further asserts that these considerations show that the possibility cannot be excluded that he genuinely believed that the distribution of telephones had a licit purpose.[3084] The Appeals Chamber notes that Mr Mangenda raised these considerations at trial[3085] and the Trial Chamber rejected them.[3086] On

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[3080] Conviction Decision, para. 371.
[3081] Mr Mangenda's Appeal Brief, para. 292.
[3082] Mr Mangenda's Appeal Brief, para. 303.
[3083] Mr Mangenda's Appeal Brief, para. 293, referring to CAR-OTP-0080-0100-R01, at 0120-R01, lines 729-732 (« *Kilolo, étant parti, il nous a laissé ce téléphone-là, avec qui, on communiquait avec lui. Parce qu'il fallait absolument avoir ça pour communiquer avec lui. Puisque nous devions aller à la maison et revenir, afin qu'il puisse nous remettre à la disposition de … la Cour*. ») ("Kilolo, having left, left us that telephone with which to communicate with him. Because we absolutely needed that to be in touch with him. Since we had to go to the house and come back, so that he could put us at the disposal of the Court.")
[3084] Mr Mangenda's Appeal Brief, para. 294.
[3085] Mr Mangenda's Closing Submissions, paras 43-46.
[3086] Conviction Decision, para. 371.

appeal, Mr Mangenda is merely proposing an alternative reading of the evidence, without, however, demonstrating that the Trial Chamber's interpretation was one that no reasonable trier of fact could have reached. The Appeals Chamber accordingly rejects these arguments.

1283. Mr Mangenda also contests the three additional considerations the Trial Chamber relied on to support its conclusion that "Mr Mangenda could not have surmised any legitimate purpose for the telephones".[3087] With respect to the first consideration, Mr Mangenda fails to show any error on the part of the Trial Chamber. The Trial Chamber's core considerations were the timing of the distribution of mobile telephones and Mr Mangenda's knowledge and role in the Main Case.[3088] The Trial Chamber, in addressing Mr Mangenda's arguments that there were possible legitimate purposes for the distribution of telephones, enumerated the following additional considerations: (i) Mr Kilolo's explanation that the telephones were needed as the VWU would take away the witnesses' personal telephones; (ii) the fact that the telephones were kept secret from VWU; and (iii) the fact that contact with the witnesses until the cut-off date could have been facilitated by the VWU.[3089] The Appeals Chamber notes that Mr Kilolo's explanation is but one consideration that the Trial Chamber took into account and serves to counter arguments concerning "any legitimate purpose to stay in contact with the witnesses as proposed by the Mangenda Defence".[3090] In this context, the Appeals Chamber considers that the Trial Chamber's reliance on Mr Kilolo's explanation for the distribution of telephones is not inconsistent with the Trial Chamber's acknowledgement that Mr Mangenda was not physically present for Mr Kilolo's explanation of the illicit purpose of the telephones.[3091] Mr Mangenda's arguments in this regard are therefore rejected.

1284. Mr Mangenda asserts that there is no evidential basis for the Trial Chamber's finding that the defence team in the Main Case kept the distribution of telephones secret from the VWU. The Appeals Chamber notes, however, that this statement of the Trial Chamber is an inference derived from its other findings, namely that: (i)

[3087] Mr Mangenda's Appeal Brief, paras 295-304.
[3088] Conviction Decision, para. 371.
[3089] Conviction Decision, para. 371.
[3090] Conviction Decision, para. 371.
[3091] Conviction Decision, paras 367-369, 371.

Trial Chamber III had imposed a cut-off date for contact with the witnesses;[3092] (ii) Mr Kilolo explained to the witnesses that the telephones were necessary to remain in contact as VWU would take away their personal telephones;[3093] (iii) "the witnesses understood that they were not supposed to stay in contact with Mr Kilolo during their testimony";[3094] and (iv) the telephones were distributed without the VWU's knowledge.[3095] Against this backdrop, and contrary to Mr Mangenda's submissions, the Trial Chamber did not have to find that there was an obligation on the part of the defence to disclose the telephones to the VWU in order to determine that the distribution was clandestine in nature and ultimately kept from the VWU. In light of these findings, the Appeals Chamber rejects Mr Mangenda's arguments.

1285. Mr Mangenda asserts that the Trial Chamber erred in assuming that any contact with witnesses after hand-over had to be effected through the VWU and that this error resulted from an ambiguity in the term "handover".[3096] The Appeals Chamber finds, first, that there is no ambiguity in the Trial Chamber's references to "handover" or "cut-off" dates. As noted above, the Trial Chamber clearly established that the date of distribution of telephones occurred on 25 and 26 May 2013[3097] and the VWU cut-off date for contacts between witnesses D-2 and D-3 was 10 and 13 June 2013, respectively.[3098] While not specifically providing a "handover" date with respect to witnesses D-2 and D-3, the Trial Chamber clearly established that the distribution of telephones took place "a few days before the handover to the VWU and less than three weeks before the VWU cut-off date" thereby making a clear distinction between the handover of the witnesses and the court-imposed cut-off date for contact with the witnesses.[3099] The Appeals Chamber accordingly rejects the Mr Mangenda's argument that the Trial Chamber was ambiguous in the use of the term "handover".

1286. The Appeals Chamber additionally notes that the Trial Chamber stated that there was no need for telephones "after the VWU handover, since any contact until

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[3092] Conviction Decision, para 370.
[3093] Conviction Decision, para. 368.
[3094] Conviction Decision, para. 368.
[3095] Conviction Decision, para. 370.
[3096] Mr Mangenda's Appeal Brief, para. 298.
[3097] Conviction Decision, para. 367.
[3098] Conviction Decision, paras 383, 390.
[3099] Conviction Decision, paras 367, 371.

the cut-off date *could have been* facilitated by the VWU".[3100] Mr Mangenda misunderstands the Trial Chamber's reasoning when he asserts that the Trial Chamber assumed that contact with witnesses "*had to be effected* through the VWU" after handover.[3101] The Trial Chamber did not find that, as a matter of law, once a witness had been handed over to the VWU, members of the defence team could no longer contact the witness directly. Rather, the Trial Chamber found that, from a practical perspective, the VWU would have been in a position to facilitate contact between the defence team and the witness, until the cut-off date. This finding is indeed supported by paragraph 31 of the *Bemba* Familiarisation Protocol, which is based on the understanding that the VWU is facilitating access to witnesses before the cut-off point. The Trial Chamber's finding must also be seen in light of the Trial Chamber's earlier finding that Mr Kilolo had explained to the witnesses when handing out the telephones that the VWU would take away the witnesses' personal telephones.[3102] While the Trial Chamber did not establish at which exact point in time Mr Kilolo believed the witnesses' telephones would be taken away, it is clear that this would occur at some point between the hand-over of the witnesses to the VWU and the cut-off date. The Appeals Chamber accordingly rejects the Mr Mangenda's argument that the Trial Chamber's conclusion is unsupported by the *Bemba* Familiarisation Protocol.

1287. The Appeals Chamber recalls that the Trial Chamber, in support of its statement that contacts with the witnesses could have been facilitated by the VWU after handover relied not only on the *Bemba* Familiarisation Protocol,[3103] but referred also to a passage of witness D-2's testimony in the Main Case. Mr Mangenda challenges the Trial Chamber's reliance on this reference on the grounds that it was improper to rely on this testimony and that, in any event, it does not support the Trial Chamber's finding.[3104] The Appeals Chamber sees no need to consider these arguments any further because the *Bemba* Familiarisation Protocol provides a sufficient basis for the Trial Chamber's finding and the Trial Chamber referred to the witness's testimony

[3100] Conviction Decision, para. 371 (emphasis added).
[3101] Mr Mangenda's Appeal Brief, para. 298 (emphasis added).
[3102] Conviction Decision, para. 368.
[3103] *Bemba* Familiarisation Protocol.
[3104] Mr Mangenda's Appeal Brief, para. 302.

only as an additional reference, to provide further context, as is evidenced by it use of the term "*see also*".[3105]

1288. In light of the foregoing, the Appeals Chamber finds that Mr Mangenda has not shown that it was unreasonable for the Trial Chamber to conclude that he could not have surmised any legitimate purpose for the distribution of telephones.

1289. Accordingly, Mr Mangenda's arguments under his fourth ground of appeal are rejected.

5. Alleged error in finding that the evidence showed that Mr Mangenda contributed, with the necessary mens rea, to the illicit coaching of witnesses D-23, D-26, D-55, D-57 or D-64, the Yaoundé witnesses, or witness D-13

(a) Relevant part of the Conviction Decision

1290. With respect to article 70 (1) (c) of the Statute, the Trial Chamber found that Mr Mangenda, jointly with Mr Bemba and Mr Kilolo, "intentionally contributed to the planning and execution of the illicit coaching activities of Mr Kilolo involving witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57, and D-64"[3106] and "shared the aim of manipulating the witnesses testimonies and contaminating the evidence presented by Trial Chamber III".[3107] The Trial Chamber found that "Mr Mangenda's contributions to the illicit coaching activities were essential, without which the influencing of the 14 witnesses would not have occurred in the same way".[3108]

1291. The Trial Chamber found that Mr Mangenda's contribution consisted of the following: (i) "[h]e liaised between Mr Bemba and Mr Kilolo and relayed Mr Bemba's instruction to Mr Kilolo, in particular as regards witness testimonies"; (ii) [h]e kept Mr Kilolo updated on the testimony of the defence witnesses whenever Mr Kilolo was not in the courtroom"; (iii) he "advised Mr Kilolo on specific points to rehearse with the witnesses"; (iv) he "advised Mr Bemba and Mr Kilolo on legal and other matters, including the calling of witnesses and the content of their testimony; (v)

[3105] Conviction Decision, para. 371, fn. 666.
[3106] Conviction Decision, para. 910 (footnotes omitted).
[3107] Conviction Decision, para. 911.
[3108] Conviction Decision, paras 847, 911.

he "accompanied Mr Kilolo on field missions in the knowledge that Mr Kilolo would illicitly coach the witnesses"; (vi) he "provided Mr Kilolo with the questions of the victims' legal representatives that had been shared […] on a confidential basis, knowing that Mr Kilolo would use them to illicitly coach witnesses"; (vii) he "participated in the distribution of telephones to the defence witnesses, without the knowledge of the Registry, knowing that Mr Kilolo would use them to stay in contact with the witnesses during their testimony"; and (viii) he took measures "to conceal the common plan, including remedial measures once informed of the Article 70 investigation".[3109] The Trial Chamber concluded that it was satisfied beyond reasonable doubt that Mr Mangenda, jointly with Mr Bemba and Mr Kilolo committed the offence of corruptly influencing the 14 witnesses within the meaning of article 70 (1) (c) of the Statute.[3110]

1292. In relation to article 70 (1) (b) of the Statute, the Trial Chamber found that Mr Mangenda, "[h]aving participated in the illicit coaching activities together with Mr Kilolo, […] intentionally presented evidence in the knowledge that the evidence of the witnesses concerned was false".[3111] The Trial Chamber referenced Mr Mangenda's activities as set out in relation to article 70 (1) (c) of the Statute and determined that, for the same reasons, Mr Mangenda's contributions to the presentation of false evidence were essential.[3112] The Trial Chamber concluded that it was satisfied beyond reasonable doubt that Mr Mangenda, jointly with Mr Bemba and Mr Kilolo, committed the offence of presenting false evidence through the 14 witnesses with the meaning of article 70 (1) (b) of the Statute.[3113]

1293. In relation to article 70 (1) (a) of the Statute, the Trial Chamber recalled that the 14 witnesses "gave false testimony on three issues before Trial Chamber III when under an obligation to tell the truth".[3114] With respect to Mr Mangenda's criminal responsibility, it noted that it could not establish any link between Mr Mangenda's

[3109] Conviction Decision, para. 910 (footnotes omitted).
[3110] Conviction Decision, para. 912.
[3111] Conviction Decision, para. 914 (footnote omitted).
[3112] Conviction Decision, para. 916.
[3113] Conviction Decision, para. 917.
[3114] Conviction Decision, para. 919.

activities and the false testimony of witnesses D-23, D-26, D-55, D-57, or D-64.[3115] The Trial Chamber was therefore unable to conclude beyond reasonable doubt that Mr Mangenda aided, abetted or otherwise assisted in the giving of false testimony by D-23, D-26, D-55, D-57, or D-64.[3116]

(b) Submissions of the parties

(i) Mr Mangenda

1294. Under his fifth ground of appeal, Mr Mangenda submits that the Trial Chamber erred in law and fact when it found that he was part of the common plan concerning witnesses (i) D-23, D-26, D-55, D-57, or D-64; (ii) D-2, D-3, D-4, D-6; or (iii) D-13.[3117]

1295. Mr Mangenda argues that the Trial Chamber "erred in law or fact in projecting backward in time, or outwards in scope, the common plan" based solely on conjecture and inference and that such convictions for co-perpetration have been reversed at the ICTY.[3118] Mr Mangenda argues that witnesses D-55, D-57, and D-64 were all allegedly "tampered with and testified before the first evidence of [him] having any knowledge of [the common plan]".[3119] Mr Mangenda argues that the Trial Chamber determined that his first awareness of the common criminal plan was on 25 or 26 May 2013 when he was found by the Trial Chamber to have witnessed and assisted in the distribution of telephones to witnesses D-2, D-3, D-4, and D-6; however, witnesses D-55, D-57 and D-64 testified in October 2012.[3120]

1296. Mr Mangenda additionally argues that the Trial Chamber made no finding and cited no evidence in support of its finding that he knew that Mr Kilolo was coaching witnesses D-23, D-26, D-55, D-57, and D-64 and in fact found that "there is no direct or indirect link between Mr Mangenda's activities and the false testimony given by D-

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[3115] Conviction Decision, paras 865, 920. The Appeals Chamber notes that paragraph 865 of the Conviction Decision refers to "any direct link" while paragraph 920 refers to "no direct or indirect link" between Mr Mangenda's activities and the false testimony given by witnesses D-23, D-26, D-55, D-57, or D-64.
[3116] Conviction Decision, para. 920.
[3117] Mr Mangenda's Appeal Brief, paras 308, 316.
[3118] Mr Mangenda's Appeal Brief, paras 310-311.
[3119] Mr Mangenda's Appeal Brief, para. 310.
[3120] Mr Mangenda's Appeal Brief, para. 310.

23, D-26, D-55, D-57 or D-64".[3121] Mr Mangenda argues that there is "no evidence and no finding that the *post facto* cover-up efforts concerned anyone other than the Yaoundé witnesses".[3122] Mr Mangenda further argues that the Trial Chamber contradictorily held that he "presented evidence in the knowledge that the evidence of the witnesses concerned was false". [3123] Mr Mangenda submits that the Trial Chamber had no basis to conclude that the common plan in which Mr Mangenda was found to have participated encompassed these five witnesses.[3124]

1297. Mr Mangenda argues further that, while witness P-261 (D-23) denied having received payments from Mr Kilolo and knowing Mr Kokaté and witness D-26 denied having contacts with the defence in the Main Case after the VWU cut-off date and during his testimony, the Trial Chamber does not cite any evidence that he knew this testimony to be false.[3125] Mr Mangenda asserts that this error requires reversal of his convictions under article 70 (1) (b) and (c) of the Statute in respect of these two witnesses.[3126]

1298. Mr Mangenda submits that his conviction concerning the four Yaoundé witnesses is materially affected by the clear error in respect on witnesses D-23, D-29, D-55, D-57, and D-64, and therefore must be reversed.[3127] Mr Mangenda asserts that, even assuming there is no clear error with respect to the Trial Chamber's inferences concerning the distribution of telephones (Ground 4), its error with respect to witnesses D-23, D-29, D-55, D-57, and D-64 materially affects the Trial Chamber's findings with respect to the distribution of telephones.[3128] Mr Mangenda argues that the Trial Chamber's inferences about his apprehension of the purpose of the telephones was fortified and corroborated by the Trial Chamber's erroneous finding in respect of witnesses D-23, D-29, D-55, D-57 and D-64.[3129] Mr Mangenda submits that the Trial Chamber's findings with respect to witnesses D-23, D-29, D-55, D-57 and D-64 constitute more than one third of the common plan and the removal of one third

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[3121] Mr Mangenda's Appeal Brief, paras 310, 312, referring to Conviction Decision, para. 920.
[3122] Mr Mangenda's Appeal Brief, para. 309, referring to Conviction Decision, para. 778.
[3123] Mr Mangenda's Appeal Brief, para. 312, referring to Conviction Decision, para. 914.
[3124] Mr Mangenda's Appeal Brief, para. 309.
[3125] Mr Mangenda's Appeal Brief, para. 312.
[3126] Mr Mangenda's Appeal Brief, para. 313.
[3127] Mr Mangenda's Appeal Brief, para. 314.
[3128] Mr Mangenda's Appeal Brief, para. 314.
[3129] Mr Mangenda's Appeal Brief, para. 314.

of the basis of the common plan materially affects the Trial Chamber's conclusions as a whole.[3130]

1299. Mr Mangenda additionally submits that the Trial Chamber's finding that the evidence showed that he contributed, or was part of a criminal plan, to coach witness D-13 is also in clear error.[3131] Mr Mangenda argues that the extent of his involvement with the witness was listening, without responding to, Mr Kilolo complaint about having to remind the witness of what the witness said during his interview.[3132]

(ii) The Prosecutor

1300. The Prosecutor responds that Mr Mangenda misunderstands the applicable law and relevant findings as the common plan encompassed the illicit coaching of defence witnesses in general and should be rejected on that basis alone.[3133] She further argues that an individual co-perpetrator who provides an essential contribution to the common plan can be held responsible for crimes to which he did not contribute as long as these crimes were committed by his co-perpetrators in the implementation of their common plan.[3134] The Prosecutor asserts that the Court's jurisprudence holds that none of the participants in a common plan exercises individually control over the crime as a whole; rather control over the crime falls in the hands of a collective as such.[3135] The Prosecutor further argues that, as a matter of law, a chamber is entitled to use subsequent evidence to infer that Mr Mangenda had been a member of the common plan from the outset.[3136]

1301. The Prosecutor argues that, although the Trial Chamber made no findings that Mr Mangenda was directly involved in the illicit coaching of witnesses D-57, D-64 or D-55, none were required.[3137] The Prosecutor argues that the Trial Chamber drew a reasonable inference that Mr Mangenda had agreed to the common plan at least by the

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[3130] Mr Mangenda's Appeal Brief, para. 314.
[3131] Mr Mangenda's Appeal Brief, para. 315.
[3132] Mr Mangenda's Appeal Brief, para. 315.
[3133] Response, paras 382, 385.
[3134] Response, paras 383, 396, referring to Conviction Decision, para. 69; *Lubanga* Conviction Decision, paras 1000, 1004; *Lubanga* Appeal Judgment, paras 488, 491.
[3135] Response, para. 384.
[3136] Response, para. 392, referring to *Stakić* Appeal Judgment, para. 128.
[3137] Response, para. 386.

time that witness D-57's testimony was arranged.[3138] The Prosecutor asserts that, while the earliest point in which the Trial Chamber found direct evidence of Mr Mangenda's involvement in the common plan was his presence for the distribution of telephones to the Yaoundé witnesses during a field mission in May 2013, it was reasonable for the Trial Chamber to infer that Mr Mangenda shared the common plan before May 2013[3139] because: (i) he expressed no opposition to Mr Kilolo's illicit conduct during the Yaoundé meeting and those outside the common plan, such as Mr Haynes, were not asked to join any field missions;[3140] (ii) Mr Kilolo's illicit coaching of D-57, D-64 and D-55 followed a similar pattern to that of later witnesses[3141] and this pattern links Mr Mangenda's conduct in respect to witnesses who testified after May 2013 with those that testified before;[3142] and (iii) throughout the period covered by the common plan Mr Mangenda fulfilled the role of Mr Kilolo's "assisting hand and confidant" and "was informed on a substantive and continuous basis of Mr Kilolo's activities".[3143]

1302. The Prosecutor argues that, with respect to witnesses D-23 and D-26, the Trial Chamber correctly inferred Mr Mangenda's knowledge of the illicit coaching of witnesses D-23 and D-26 from the fact that Mr Kilolo illicitly coached them in August 2013, after Mr Mangenda was found to have been involved in the illicit coaching of the Yaoundé witnesses in May 2013.[3144] She argues that the "patterns of payments to witnesses for the purpose of influencing their testimony and of telephone contacts with witnesses" before and during their testimony is highly probative evidence of Mr Mangenda's knowledge of the illicit coaching of witnesses D-23 and D-26.[3145] The Prosecutor further argues that, in any event, as a matter of law, it was not necessary for the Trial Chamber to enter specific findings on Mr Mangenda's knowledge with respect to each individual witness as a result of his liability as a co-perpetrator.[3146] The Prosecutor further submits that, in light of her arguments in

[3138] Response, para. 386, referring to Conviction Decision, para. 802.
[3139] Response, para. 387, referring to Conviction Decision, paras 367-370.
[3140] Response, para. 387, referring to Conviction Decision, paras 763-764.
[3141] Response, paras 388-389.
[3142] Response, para. 390.
[3143] Response, para. 391.
[3144] Response, para. 395.
[3145] Response, para. 395.
[3146] Response, para. 396.

relation to witnesses D-23, D-26, D-55, D-57, and D-64, Mr Mangenda's argument that an error in relation to these five witnesses affects his conviction in relation to witnesses D-2, D-3, D-4, D-6 should be dismissed as moot.[3147]

1303. With respect to witness D-13, the Prosecutor argues that Mr Mangenda misunderstands the Trial Chamber's findings when he states that he was not involved in a common plan to illicitly coach witness D-13, as the common plan was found to be illicit interference with defence witnesses in general and not with specific witnesses.[3148] The Prosecutor argues, that in any event, Mr Kilolo discussed his illicit coaching of witness D-13 with Mr Mangenda over the telephone, and although Mr Mangenda initially only listened to Mr Kilolo complain about his illicit coaching, he later in the conversation actively participated in the discussion.[3149]

(c) Determination by the Appeals Chamber

1304. The Appeals Chamber considers that Mr Mangenda's submissions do not accurately reflect the applicable law in relation to co-perpetration and the conclusions of the Trial Chamber, which considered whether his role and activities amounted cumulatively to an essential contribution and demonstrated the requisite intent.[3150] The Appeals Chamber recalls that, in the context of co-perpetration, it is not required that a person actually carry out directly and personally the incriminated conduct in order to incur criminal liability as a co-perpetrator.[3151]

1305. Rather than viewing the evidence in its totality, Mr Mangenda isolates one of the Trial Chamber's findings, namely his presence during the Yaoundé field mission where cell phones were distributed to witnesses D-2, D-3, D-4, and D-6 to facilitate future illicit coaching by Mr Kilolo,[3152] and contends that he should not be held liable for any criminal conduct in relation to witnesses P-20 (D-57), P-243 (D-64) and P-214 (D-55), as these witnesses testified before the meeting in Yaoundé.[3153] The Appeals Chamber considers that Mr Mangenda ignores the Trial Chamber's findings regarding

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[3147] Response, para. 397.
[3148] Response, para. 398, referring to Conviction Decision, paras 103, 681, 802, 847.
[3149] Response, para. 399, referring to Conviction Decision, paras 658-661, 667.
[3150] Conviction Decision, paras 838, 847.
[3151] *Lubanga* Appeal Judgment, para. 466.
[3152] Conviction Decision, paras 140, 367-371, 747.
[3153] Conviction Decision, para. 310.

the nature of his essential contribution to the common plan.[3154] The Trial Chamber found that, "[a]s a result of Mr Mangenda's distinguished position within the defence team, [he] participated fully in the planning and execution of Mr Kilolo's illicit coaching activities and the presentation of false evidence".[3155] Mr Mangenda was found not merely to have assisted Mr Kilolo, but to "have acted as an equal in the implementation of the plan".[3156] The Trial Chamber further found that "Mr Mangenda was informed on a substantive and continuous basis of Mr Kilolo's activities".[3157] The Trial Chamber additionally found that Mr Mangenda's essential contribution to the common plan indicated his intent to engage in the illicit interference with defence witnesses and that he knew and intended that the 14 witnesses would provide false testimony.[3158] The Trial Chamber assessed the totality of the evidence to determine that he agreed, at the latest when the defence arranged for the testimony of D-57 in the Main Case, jointly with Mr Kilolo and Mr Bemba, to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba.[3159] The agreement between co-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".[3160] With respect to witnesses D-57, D-64 and D-55, the Trial Chamber found that Mr Kilolo's illicit coaching followed a pattern similar to later witnesses;[3161] consequently it was not unreasonable for the Trial Chamber to conclude that these witnesses were encompassed in the common plan and Mr Kilolo's conduct in relation to these witnesses could be imputed to Mr Mangenda by virtue of their participation in that plan.

1306. The Appeals Chamber recalls that there is no bar to a trial chamber using evidence to infer, either backwards of forward in time, an accused's involvement in a common plan.[3162] The appropriateness of doing so must be determined on a case-by-case basis. Mr Mangenda's references to ICTY jurisprudence are factually specific to

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[3154] Conviction Decision, para. 847.
[3155] Conviction Decision, para. 847.
[3156] Conviction Decision, para. 847.
[3157] Conviction Decision, para. 847.
[3158] Conviction Decision, paras 848-850.
[3159] Conviction Decision, paras 103, 802.
[3160] *Lubanga* Appeal Judgment, para. 445 (footnote omitted).
[3161] *See* Conviction Decision, paras 250-251, 272-274, 277-278, 302.
[3162] *See* *Lubanga* Confirmation Decision, para. 345; *Stakić* Appeal Judgment, para. 128; *Milošević Rejoinder Appeal*, para. 31.

the circumstances of the cited cases and do not support any contention that there is an overarching rule prohibiting the use of subsequent evidence to infer that an accused is involved in a common plan at an earlier point in time.[3163]

1307. The Appeals Chamber notes that the Trial Chamber found, in the context of Mr Mangenda's liability for aiding, abetting, or otherwise assisting, within the meaning of article 25 (3) (c) of the Statute, in the giving of false testimony, that there was no link between Mr Mangenda's activities and the false testimony given by witnesses D-23, D-26, D-57, D-64 and D-55.[3164] However, contrary to Mr Mangenda's submissions, the Appeals Chamber does not consider that this finding indicates that the Trial Chamber had no basis upon which to conclude that the common plan, to the implementation of which Mr Mangenda was found to have made an essential contribution, encompassed the illicit coaching of these five witnesses. This finding was made specifically with reference to the Trial Chamber's understanding of the legal requirements of the mode of liability under article 25 (3) (c) of the Statute,[3165] not co-perpetration under article 25 (3) (a) of the Statute. The Appeals Chamber recalls that, in the present case, the Trial Chamber found that the three co-perpetrators had "jointly agreed to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba" and that this "involved the corrupt influencing of, at least, 14 defence witnesses, together with the presentation of their evidence".[3166] The common plan was broadly conceived. Having made an essential contribution to its implementation, Mr Mangenda was therefore

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[3163] *Šainović et al*. Appeal Judgment, paras 1667, 1709 (concluding that Lazarević's awareness of the use of excessive and indiscriminate force, killings of civilians, and destruction of property by VJ forces in 1998 at most made him aware of the probability that VJ forces would use excessive and indiscriminate force to commit those crimes, not forcible displacement, if ordered to operate in Kosovo in 1999); *Blagojević and Jokić* Appeal Judgment, paras 296-298 (rejecting, on the basis that the evidence cited by the Trial Chamber did not clearly establish who knew what at what moment in time, the Prosecution's contention that the Trial Chamber's finding that many people knew what happened at the Kravica Warehouse within 24 hours of the mass executions meant that the only reasonable inference was that Bratunac Brigade members knew that detainees would be channelled into a murder operation); *Krajišnik* Appeal Judgment, paras 173-175 (finding that, in light of the scarce or entirely absent findings of the Trial Chamber, the Appeals Chamber was not able to conclude with the necessary preciseness how and at which point in time the common objective of the JCE expanded to include other crimes that originally were not included in it, and, consequently on what basis the Trial Chamber imputed those expanded crimes to Krajišnik).
[3164] Conviction Decision, paras 865, 920.
[3165] Conviction Decision, para. 865. The alleged errors raised with respect to the Trial Chamber's interpretation of the mode of liability under article 25 (3) (c) are discussed in greater detail in relation to Mr Mangenda's Ground 6, in Section X.C.6, below.
[3166] Conviction Decision, para. 103.

liable for the corrupt influencing of all 14 witnesses as a joint perpetrator, based on article 25 (3) (a) of the Statute.

1308. With respect to witnesses D-23 and D-26, the Appeals Chamber reiterates that it was not necessary for the Trial Chamber to enter specific findings on Mr Mangenda's knowledge with respect to each witness's false testimony in order to incur criminal liability as a co-perpetrator.[3167] As noted above, the Trial Chamber found that Mr Mangenda's essential contribution to the common plan indicated his intent to engage in the illicit interference with defence witnesses and that he knew and intended that the 14 witnesses would provide false testimony.[3168] The Appeals Chamber considers such finding sufficient for the purposes of liability as a co-perpetrator. Mr Mangenda fails to demonstrate any error in the Trial Chamber's reasoning.

1309. Having failed to demonstrate an error with respect to the Trial Chamber's findings concerning witnesses D-23, D-26, D-57, D-64 and D-55, the Appeals Chamber does not have to address Mr Mangenda's argument that an error in relation to these five witnesses affects his conviction, as a co-perpetrator, for offences under article 70 (1) (b) and (c) of the Statute in relation to witnesses D-2, D-3, D-4, and D-6.

1310. With respect to witness D-13, Mr Mangenda argues that the Trial Chamber did not have a sufficient basis from which to infer that he "was involved in a common plan to illicitly coach D-13".[3169] The Appeals Chamber notes that Mr Mangenda misunderstands the common plan as defined by the Trial Chamber. The Trial Chamber found that the agreement amongst the co-perpetrators involved the corrupt influencing of, at least, 14 defence witnesses, together with the presentation of their evidence.[3170] The Appeals Chamber reiterates that Mr Mangenda did not have to contribute specifically to the illicit coaching of each individual witness in order to be found criminally responsible as a co-perpetrator in relation to all of them.[3171] As noted above, the Trial Chamber made numerous findings concerning Mr Mangenda's

[3167] *Lubanga* Appeal Judgment, para. 466.
[3168] Conviction Decision, paras 848-850.
[3169] Mr Mangenda's Appeal Brief, para. 315.
[3170] Conviction Decision, paras 103, 802.
[3171] *Lubanga* Appeal Judgment, para. 466.

essential contribution to the common plan.[3172] Concerning witness D-13, the Trial Chamber found that Mr Kilolo discussed his illicit coaching activities with Mr Mangenda over the telephone and they both used coded language during their conversation.[3173] Mr Mangenda isolates this finding from its larger context to argue that it did not constitute an essential contribution or participation in the common plan. The Appeals Chamber considers that Mr Mangenda does not demonstrate any error in the Trial Chamber's findings.

1311. In light of the foregoing, the Appeals Chamber finds no error in the Trial Chamber's findings that Mr Mangenda contributed, with the requisite *mens rea*, to the illicit coaching of the 14 witnesses. Accordingly, Mr Mangenda's arguments under his fifth ground of appeal are rejected.

6. Alleged errors in finding Mr Mangenda abetted witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29 to give false testimony, or that he aided witnesses D-15 and D-54 to give false testimony

(a) Relevant part of the Conviction Decision

1312. The Trial Chamber found, with respect to Mr Mangenda's responsibility pursuant to article 25 (3) (c) of the Statute, that he "provided physical assistance and/or encouraged, directly and indirectly through Mr Kilolo, the giving of false testimony by D-2, D-3, D-4, D-6, D-13, D-15, D-25, D-29, and D-54".[3174]

1313. The Trial Chamber recalled that Mr Mangenda was deeply involved in the planning of Mr Kilolo's illicit coaching activities as was the case with witnesses D-29 and D-54, and accompanied Mr Kilolo on field missions.[3175] The Trial Chamber found that Mr Mangenda "provided practical assistance to Mr Kilolo by relaying Mr Bemba's directives (as was the case with D-54) which Mr Kilolo, in turn, impressed upon the witnesses. […] Mr Mangenda also reported back to Mr Bemba and kept him abreast of Mr Kilolo's coaching activities".[3176]

[3172] Conviction Decision, paras 839-847, 910-911.
[3173] Conviction Decision, paras 658-661, 667.
[3174] Conviction Decision, para. 865.
[3175] Conviction Decision, para. 866.
[3176] Conviction Decision, para. 866.

1314. The Trial Chamber further found that, when Mr Kilolo was not present in the courtroom, Mr Mangenda: (i) reported to Mr Kilolo on the testimony of witnesses such as D-25 and D-29; (ii) advised on points on which the witnesses performed badly or required instruction; and (iii) proposed how best to carry out illicit coaching.[3177] Mr Kilolo was found to have "consulted Mr Mangenda in detail and had exchanges with him about the on-going testimony of the witnesses, particularly D-13 and D-15".[3178] The Trial Chamber found that this assistance was indispensable to Mr Kilolo who was then able to illicitly coach the witnesses in a focused manner.[3179]

1315. The Trial Chamber found that Mr Mangenda aided logistically in the illicit coaching by being present for the distribution of telephones to witnesses D-2, D-3, D-4 and D-6.[3180] The Trial Chamber found that Mr Mangenda gave moral support and encouragement to Mr Kilolo through his presence at meetings.[3181] The Trial Chamber considered that "it would be unreasonable to imagine that Mr Mangenda played a minor and merely logistical role" in these meetings when the evidence proves that "he advised Mr Kilolo on an equal footing on details of the coaching activity".[3182] The Trial Chamber concluded that Mr Mangenda's presence during meetings where corrupt influencing occurred facilitated subsequent article 70 (1) (a) offences and therefore this moral support had an effect on the false testimony of the witnesses.[3183]

1316. With respect to witness D-13, the Trial Chamber found that Mr Mangenda's actions had an effect on the eventual false testimony given by this witness as he had provided moral support to Mr Kilolo by listening to Mr Kilolo's updates and complaints about illicit coaching and by tacitly approving them.[3184] In relation to witness D-15, the Trial Chamber found that Mr Mangenda advised Mr Kilolo on the content of the illicit coaching and provided the confidential victims' legal representative's questions to Mr Kilolo for use during illicit coaching.[3185] In relation to witness D-54, "Mr Mangenda conveyed Mr Bemba's instructions concerning the

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[3177] Conviction Decision, paras 866, 921.
[3178] Conviction Decision, para. 866 (footnote omitted).
[3179] Conviction Decision, para. 866.
[3180] Conviction Decision, paras 867, 921.
[3181] Conviction Decision, para. 867.
[3182] Conviction Decision, para. 867.
[3183] Conviction Decision, para. 867.
[3184] Conviction Decision, paras 868, 921.
[3185] Conviction Decision, paras 868, 921.

illicit coaching of [this witness] and advised Mr Kilolo concerning these activities".[3186] The Trial Chamber concluded that these actions "ultimately assisted these witnesses in giving the evidence that Mr Kilolo had dictated to them".[3187]

1317. The Trial Chamber concluded that it was satisfied beyond reasonable doubt that Mr Mangenda committed the offence of aiding the giving of false testimony by witnesses D-15 and D-54 and abetted the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25, and D-29 within the meaning of article 70 (1) (a) of the Statute.[3188]

(b) Submissions of the parties

(i) Mr Mangenda

1318. Under his sixth ground of appeal, Mr Mangenda submits that the Trial Chamber erred in law in finding that liability for aiding and abetting does not require that the accessory's conduct had a substantial effect on the commission of the crime or offence.[3189] Mr Mangenda argues that the Trial Chamber failed to address the prevailing jurisprudence of the *ad hoc* tribunals, which stipulates that the contribution must be substantial, as a matter of customary international law, as well as the jurisprudence of the Court.[3190]

1319. Mr Mangenda submits further that encouragement and moral support can only form a substantial contribution to a crime when the perpetrators are aware of the accessory's encouraging conduct.[3191] Mr Mangenda argues that the Trial Chamber had no evidence before it and made no findings that his actions had an encouraging psychological effect on witnesses D-2, D-3, D-4, D-6, D-13, D-25, or D-29 to give false testimony.[3192] Mr Mangenda avers that, while the Trial Chamber found that he gave moral support and encouragement to Mr Kilolo, this was irrelevant to abetting the offence of giving false testimony under article 70 (1) (a) of the Statute, which can

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[3186] Conviction Decision, paras 868, 921.
[3187] Conviction Decision, para. 868.
[3188] Conviction Decision, para. 922.
[3189] Mr Mangenda's Appeal Brief, para. 320.
[3190] Mr Mangenda's Appeal Brief, para. 320.
[3191] Mr Mangenda's Appeal Brief, para. 318, referring to *Nyiramasuhuko et al.* Appeal Judgment, para. 2088; *Brđanin* Appeal Judgment, para. 277; *Ntagerura et al.* Appeal Judgment, para. 374.
[3192] Mr Mangenda's Appeal Brief, para. 319.

only be committed by a witness.[3193] Mr Mangenda further argues that there was no evidence to conclude that witnesses D-13, D-25, or D-29 "were even aware of Mr Mangenda's existence".[3194] With respect to witnesses D-2, D-3, D-4 and D-6, while the witnesses were aware of his existence, there is no finding by the Trial Chamber, or evidence on the record, that these witnesses were psychologically encouraged by his actions.[3195]

1320. Mr Mangenda also argues that the Trial Chamber erred in finding that he aided witnesses D-15 and D-54 in giving false testimony.[3196] With respect to witness D-15, Mr Mangenda asserts that the Trial Chamber made no finding, nor could it have made such a finding on the evidence before it, that he advised Mr Kilolo on the content of witness D-15's testimony.[3197] Mr Mangenda argues that, while he did forward the victims' legal representatives questions to Mr Kilolo, the Trial Chamber failed to explain how this impacted on witness D-15's lies regarding the date of his last contact with Mr Kilolo.[3198] With regard to witness D-54, Mr Mangenda argues that the Trial Chamber did not explain how the information he had provided to Mr Kilolo had aided the witness's lies concerning contacts with the defence in the Main Case.[3199]

(ii) The Prosecutor

1321. The Prosecutor responds that the Trial Chamber's approach to the contribution threshold for article 25 (3) (c) of the Statute was correct.[3200] She argues that "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" as neutral contributions do not give rise to criminal responsibility under article (25) (3) (c) of the Statute.[3201]

1322. The Prosecutor asserts that Mr Mangenda misstates the law as set out by the Trial Chamber, which held that an accessory may provide assistance to the principal

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[3193] Mr Mangenda's Appeal Brief, para. 319.
[3194] Mr Mangenda's Appeal Brief, para. 319.
[3195] Mr Mangenda's Appeal Brief, para. 319.
[3196] Mr Mangenda's Appeal Brief, paras 321-322.
[3197] Mr Mangenda's Appeal Brief, para. 321.
[3198] Mr Mangenda's Appeal Brief, para. 321.
[3199] Mr Mangenda's Appeal Brief, para. 322.
[3200] Response, paras 407-408, referring to Conviction Decision, paras 91-95.
[3201] Response, para. 408, referring to *Mbarushimana* Appeal Judgment, Separate Opinion of Judge Fernández de Gurmendi, para. 12.

perpetrator or an intermediary perpetrator.[3202] She argues that the Trial Chamber's approach to assistance to "intermediate perpetrators" accords with the approach of the SCSL Appeals Chamber and various chambers at the ICTY.[3203] She further argues that the proposition that encouragement and moral support can only form the requisite contribution to a crime when the principal perpetrators are aware of it relates to the "silent spectator" scenario which does not apply in this case.[3204] The Prosecutor argues that, contrary to Mr Mangenda's submissions, it is not a requirement of aiding and abetting liability that the "principal perpetrators know of the aider and abettor's existence or of his assistance to them".[3205] The Prosecutor submits that, in light of the ample factual findings concerning Mr Mangenda's provision of support to Mr Kilolo, the Trial Chamber correctly found that Mr Mangenda abetted witnesses D-2, D-3, D-4, D-6, D-13, D-25, and D-29.[3206]

1323. The Prosecutor argues that Mr Mangenda's remaining arguments divorce the Trial Chamber's findings from their context.[3207] She argues that, with respect to witness D-15, Mr Mangenda simply disagrees with the Trial Chamber's characterisation of his activities as "advising" and that, in any case, there is no legal requirement for him to have "advised" Mr Kilolo on the content of D-15's testimony for there to be liability under article 25 (3) (c) of the Statute.[3208] She also argues that, while Mr Mangenda disputes that there was a causal link between his forwarding of the victims' legal representative's questions and witness D-15's false testimony, the Trial Chamber was not required to find such a direct causal link.[3209] With respect to witness D-54, the Prosecutor asserts that Mr Mangenda merely presents alternative inferences with respect to isolated pieces of evidence.[3210] She argues that the Trial Chamber reasonably relied on Mr Mangenda's participation in multiple telephone calls with Mr Kilolo about the illicit coaching of witness D-54 to infer his intent and

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[3202] Response, para. 401, referring to Conviction Decision, para. 96.
[3203] Response, paras 402-404.
[3204] Response, para. 405, referring to *Brđanin* Appeal Judgment, para. 277.
[3205] Response, para. 405, referring to *Brđanin* Appeal Judgment, para. 349.
[3206] Response, para. 406, referring to Conviction Decision, paras 867, 921-922 (in relation to witnesses D-2, D-3, D-4, and D-6), 568-660, 868, 921-922 (in relation to witness D-13), 487-495, 866, 921-922 (in relation to witness D-25), 533-539, 866, 921-922 (in relation to witness D-29).
[3207] Response, para. 409.
[3208] Response, para. 410.
[3209] Response, para. 411.
[3210] Response, para. 412.

knowledge with respect to witness D-54's false testimony about prior contacts with the defence in the Main Case.[3211]

(c) Determination by the Appeals Chamber

1324. At the outset, the Appeals Chamber notes that, while the Trial Chamber stated that the terms "aided", "abetted" and "otherwise assisted" have their respective meanings, it observed that "they nevertheless belong to the broader category of assisting in the (attempted) commission of an offence".[3212] The Appeals Chamber therefore understands that the Trial Chamber did not consider that "aiding", "abetting" and "otherwise assisting" are each separate forms of responsibility, but considered that the acts constituting aiding or abetting or otherwise assisting, on their own, suffice for liability under the article 25 (3) (c) of the Statute, should the other requisite elements of this mode of liability be met.[3213] The Appeals Chamber further notes that the understanding of article 25 (3) (c) of the Statute as containing a single mode of liability is also consistent with the way in which the charges were confirmed against Mr Mangenda.[3214]

1325. The Appeals Chamber notes that, despite the Trial Chamber's apparent understanding of article 25 (3) (c) of Statute as a single mode of liability, it nevertheless categorised certain acts of Mr Mangenda as "aiding" and others as "abetting".[3215] The Appeals Chamber considers that this adds confusion rather than clarity. For example, it is not apparent to the Appeals Chamber why the Trial Chamber found that "providing updates on how the illicit coaching was reflected in the courtroom" with respect to witnesses D-25 and D-29 constituted "abetting", but did not amount to "aiding" or "otherwise assisting".[3216] In the Appeals Chamber's view, conceptualising the terms "aided", "abetted" and "otherwise assisted" together

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[3211] Response, para. 413, referring to Conviction Decision, paras 172-174, 598-621, 652.
[3212] Conviction Decision, para. 87.
[3213] *See* Conviction Decision, para. 89.
[3214] *See* Confirmation Decision, pp. 50-51.
[3215] *See* Conviction Decision, p. 456 (convicting Mr Mangenda for "having aided in the giving of false testimony by witnesses D-15 and D-54, and having abetted in the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25, D-29."). The Appeals Chamber observes that the Trial Chamber similarly distinguished between "aiding", "abetting" and "otherwise assisting" for the purpose of the individual criminal responsibility under article 25 (3) (c) of Mr Babala, whom it convicted for "having aided in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of corruptly influencing witnesses D-57 and D-64" (Conviction Decision, p. 456).
[3216] Conviction Decision, paras 866, 921-922.

as a *single* mode of liability is the correct approach. There is therefore no reason to distinguish between acts that are considered as "aiding" and others as "abetting". Nevertheless, the Trial Chamber's attempt to distinguish between "aiding", "abetting" and "otherwise assisting" was inconsequential for the correctness of its conclusions.

1326. Turning to Mr Mangenda's argument that the Trial Chamber erred in law in failing to require a "substantial contribution" for the mode of liability under article 25 (3) (c) of the Statute,[3217] the Appeals Chamber notes that, as submitted by Mr Mangenda, the jurisprudence of the ICTY, ICTR and SCSL, indeed requires that the aider and abettor provide a "substantial contribution".[3218] The Appeals Chamber notes that, while this jurisprudence may inform this Court's understanding of liability for aiding and abetting, it is not binding on this Court. In accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules.

1327. The Appeals Chamber notes that the Trial Chamber stated that for the purpose of article 25 (3) (c) of the Statute, the "assistance" must have been "causal", in the sense of having had an effect on the commission of the offence.[3219] The Appeals Chamber recalls that article 25 (3) (c) of the Statute provides for individual criminal responsibility of a person who "[f]or the purpose of facilitating the commission of […] a crime, aids, abets or otherwise assists in its commission or attempted commission". The text of this provision therefore only requires that the assistance in the commission (or attempted commission) of the crime be provided for the purposes of facilitating such commission without indicating whether the conduct must have also had an effect on the commission of the offence. The Appeals Chamber considers that the *actus reus* under article 25 (3) (c) of the Statute is certainly fulfilled when the person's assistance in the commission of the crime facilitates or furthers the commission of the crime, as the showing of such an effect indicates that the person indeed assisted in its commission. Whether a certain conduct amounts to "assistance

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[3217] Mr Mangenda's Appeal Brief, para. 320.
[3218] *See*, *e.g.* *Tadić* Appeal Judgment, para. 229; *Blaškić* Appeal Judgement, para. 46; *Šainović et al.* Appeal Judgment, para. 1649; *Brđanin* Appeal Judgment, paras 151, 277; *Mrkšić and Šljivančanin*, Appeal Judgment, para. 49; *Orić* Appeal Judgment, para. 43; *Rukundo* Appeal Judgment, para. 52; *Nahimana et al.* Appeal Judgment, para. 482; *Kalimanzira* Appeal Judgment, para. 74; *Taylor* Appeal Judgment, paras 436, 475. *See* also *Tadić* Trial Judgment, para. 688; *Furundžija* Trial Judgment, para. 233.
[3219] Conviction Decision, paras 90, 94.

in the commission of the crime" within the meaning of article 25 (3) (c) of the Statute even without the showing of such an effect can only be determined in light of the facts of each case. In any event, the Appeals Chamber considers it unnecessary to dwell into this issue any further in the context of the present case, given that, as discussed below, the Trial Chamber found that Mr Mangenda's conduct had an effect on the commission of the offences.

1328. The Appeals Chamber now turns to Mr Mangenda's argument that the Trial Chamber erred in failing to consider whether his actions had an encouraging psychological effect on witnesses D-2, D-3, D-4, D-6, D-13, D-25 or D-29 (as opposed to Mr Kilolo), as the offence of giving false testimony under article 70 (1) (a) of the Statute can only be committed by a witness.[3220] The Appeals Chamber notes that the Trial Chamber found that Mr Mangenda gave moral support and encouragement to Mr Kilolo: (i) through his physical presence at meetings;[3221] and (ii) by "listening to Mr Kilolo's updates and complaints about [his illicit coaching] activities and tacitly approving them".[3222] The Trial Chamber concluded that this encouragement and moral support had an effect on the false testimony.[3223] When setting out the law in relation to aiding and abetting, the Trial Chamber stated in one instance that the notion of abetting refers to "the moral or psychological assistance of the accessory *to the principal perpetrator*"[3224] and in another instance stated that an "accessory may provide assistance *to the principal perpetrator or intermediary perpetrator*".[3225] The Appeals Chamber notes that, with respect to the offence of giving false testimony under article 70 (1) (a) of the Statute, the principal perpetrator is, as Mr Mangenda correctly contends, the witness. In finding that Mr Mangenda gave moral support and encouragement to Mr Kilolo, the Appeals Chamber considers that the Trial Chamber found that an accessory can give moral support and encouragement to an "intermediary perpetrator" (*i.e.* someone who is not the direct perpetrator of a given offence).

[3220] Mr Mangenda's Appeal Brief, para. 318.
[3221] Conviction Decision, paras 867, 921.
[3222] Conviction Decision, paras 868, 921.
[3223] Conviction Decision, paras 867, 868.
[3224] Conviction Decision, para. 89 (emphasis added).
[3225] Conviction Decision, para. 96 (emphasis added).

1329. The Appeals Chamber finds that this did not amount to an error of law. Article 25 (3) (c) of the Statute provides that a person shall be criminally responsible for a crime if he or she "aids, abets or otherwise assists *in its commission or its attempted commission*". Nothing in this provision requires that an accessory aid, abet or otherwise assist a specific person, whether considered a "principal perpetrator", "intermediary perpetrator", or otherwise; rather, individual criminal liability under article 25 (3) (c) of the Statute is established in reference to the assistance in the commission or attempted commission of a *crime*.

1330. Pointing to various cases at the *ad hoc* tribunals, Mr Mangenda asserts that encouragement and moral support can only lead to liability under article 25 (3) (c) of the Statute when the principal perpetrator is aware of it.[3226] He further asserts that when encouragement or moral support is rendered through presence alone that presence must be found to have had an "encouraging effect" on the principal perpetrators.[3227] In the Appeals Chamber's view, Mr Mangenda conflates the legal requirements of aiding and abetting with the factual characterisation of the conduct potentially amounting to the *actus reus* of aiding and abetting.[3228] While, in the individual circumstances of a case, it may have been necessary to establish that the principal perpetrator was aware of the encouragement and moral support rendered by the accused, the jurisprudence of the *ad hoc* tribunals does not establish that it is required *as a matter of law* that the principal perpetrators know of the aider or abettor's existence or his or her assistance to them,[3229] even if the assistance takes the form of encouragement or moral support. Importantly, the cases on which Mr Mangenda relies do not concern a scenario where encouragement and moral support were lent to an intermediary and the findings in the cases must be understood in their factual context.[3230] The Appeals Chamber also sees no reason of principle why

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[3226] Mr Mangenda's Appeal Brief, para. 318.
[3227] Mr Mangenda's Appeal Brief, para. 319.
[3228] *See* *Taylor* Appeal Judgment, para. 370; *Brđanin* Appeal Judgment, para. 277.
[3229] *Taylor* Appeal Judgment, para. 370, citing, *inter alia*, STL Appeal on Applicable Law, para. 227; *Kalimanzira* Appeal Judgement, para. 87; *Brđanin* Appeal Judgment, para. 349; *Tadić* Appeal Judgment, para. 229 (ii).
[3230] *See* *Brđanin* Appeal Judgment, paras 277 (stating that "the Appeals Chamber finds that, *in this case*, encouragement and moral support could only have had a substantial effect if the camp personnel committing torture were aware that Brđanin made encouraging and supporting statements or encouraged and supported through his inaction." (emphasis added)), 281 ("[Brđanin's] first statement – that '[i]f Hitler, Stalin, and Churchill could have working camps so can we' could have alerted

psychological assistance rendered to an intermediary rather than directly to the perpetrator should not give rise to liability under article 25 (3) (c) of the Statute, as long as it can be established, as a factual matter, that this assisted the commission or attempted commission of a crime or offence.[3231] The Appeals Chamber therefore finds that the Trial Chamber did not err in law when considering Mr Mangenda's moral support and encouragement to Mr Kilolo in relation to the *actus reus* of aiding and abetting, even though Mr Kilolo was not the perpetrator in terms of article 25 (3) (a) of the Statute of the offences in question. The Appeals Chamber accordingly rejects Mr Mangenda's argument that the Trial Chamber erred in failing to find that he rendered moral encouragement to witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29 in their commission of false testimony.

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personnel running the camps to Brđanin's support for the camps, assuming the statement was actually heard by camp personnel. Yet, even under this assumption, it does not necessarily follow that such a statement would have been interpreted as a signal of acquiescence to the torture of detainees. It might alternatively have been taken as a signal of acquiescence to the maintenance of the camps and detention facilities."), 282 ("The second statement relates to Brđanin's visit to Prijedor Municipality, which included a visit to Omarska camp on 17 July 1992. On that day, Brđanin was reported to have publicly stated that 'what we have seen in Prijedor is an example of a job well done' and 'it is a pity that many in Banja Luka, are not aware of it yet, just as they are not aware of what might happen in Banja Luka in the very near future.' This statement could be sufficient to show that Brđanin's support for the camps and detention facilities, but it is insufficient to show that camp personnel were aware of Brđanin's visit to Omarska, or that he supported the fact that torture was being committed in camps or detention facilities. The statement never mentions camps or detention facilities, or any acts of torture and mistreatment committed there. Hence, even if it can be shown that personnel running the camps had heard the statement, it does not necessarily follow that they understood it to express support or encouragement for the camps, much less for the commission of torture within them."), 284 ("There is also the issue of Brđanin's failure to speak out against the camps. Again, there is no evidence that the personnel running the camps and detention facilities were aware that Brđanin had failed to condemn the conditions in the camps, either in the Trial Judgement, or in the Prosecution's submissions."); *Nyiramasuhuko et al.* Appeal Judgment, para. 2088 ("The Appeals Chamber observes that in reaching this finding, the Trial Chamber did not make a determination that the principal perpetrators of the crimes witnessed or knew of Ntahobali's prior criminal conduct at the Hotel Ihuliro roadblock or the prefectoral office. A contextual reading of the Trial Chamber's factual findings similarly does not reveal any evidence to allow for such conclusion to be drawn. Absent such evidence, the Appeals Chamber considers that no reasonable trier of fact could have relied on Ntahobali's prior criminal conduct in support of its finding that Ntahobali's presence at the EER alongside the *Interahamwe* and soldiers substantially contributed to the commission of the crimes at the EER. In these circumstances, the Appeals Chamber finds it unnecessary to assess Ntahobali's remaining arguments regarding the Trial Chamber's reliance on his prior conduct."); *Ntagerura et al.* Appeal Judgment, para. 374 ("Although the Trial Chamber finds that Imanishimwe 'acquiesced in' the participation of his soldiers in the massacre, it does not establish that such acquiescence was a substantial contribution to the perpetration of the crime. A reasonable trier of fact could not have concluded from the evidence that the soldiers implicated in the massacre were aware of the acquiescence in question, nor have determined the extent to which it might have influenced the said soldiers. In these circumstances, the Trial Chamber cannot be taken to task for not finding Imanishimwe responsible for aiding and abetting the perpetrators of the massacre.").

[3231] *See* *Milutinović et al.* Trial Judgment, fn. 107; *Orić* Trial Judgment, paras 282, 285.

1331. As regards Mr Mangenda's argument that the Trial Chamber provided no support for its finding that he had advised Mr Kilolo on the illicit coaching of witness D-15 and that it did not find his assistance had any effect on the witness's false testimony,[3232] the Appeals Chamber finds no error in the Trial Chamber's findings. The Appeals Chamber is not persuaded by Mr Mangenda's argument that the Trial Chamber "did not cross reference to its own factual findings"[3233] as the Trial Chamber made reference to its finding that Mr Mangenda, when speaking on the telephone to Mr Kilolo, signalled his agreement with regards to the content of the illicit coaching of the witness.[3234] Mr Mangenda correctly asserts that the Trial Chamber did not find that he "advised" Mr Kilolo on the content of the illicit coaching of witness D-15.[3235] Instead, the Trial Chamber found that Mr Kilolo updated Mr Mangenda on the details of his illicit coaching[3236] and 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 victim's legal representatives".[3237] In addition, the Trial Chamber also found that Mr Mangenda sent Mr Kilolo the confidential questionnaire of the legal representatives of victims after Mr Kilolo asked for it and told him that the witness was waiting for it.[3238] Here, Mr Mangenda's conduct assisted the illicit coaching activities of Mr Kilolo with respect to witness D-15. While this illicit coaching primarily centred on the merits of the Main Case, such coaching would only have an impact on the Main Case if the witness also testified falsely on contacts with the defence. The Appeals Chamber therefore considers that it has not been established that no reasonable trier of fact could have found that Mr Mangenda's assistance to Mr Kilolo in relation to witness D-15 had an effect on the witness's false testimony regarding contacts with Mr Kilolo.

[3232] Mr Mangenda's Appeal Brief, para. 321.
[3233] Mr Mangenda's Appeal Brief, para. 321.
[3234] Conviction Decision, paras 565-566. Mr Mangenda's challenges to this finding of the Trial Chamber have been addressed and dismissed elsewhere (*see supra* paras 1218-1221).
[3235] Mr Mangenda's Appeal Brief, para. 321.
[3236] Conviction Decision, para. 566. Mr Mangenda's challenges to this finding of the Trial Chamber have been addressed and dismissed elsewhere (*see supra* paras 1218-1221).
[3237] Conviction Decision, para. 591.
[3238] Conviction Decision, paras 575-576.

1332. Finally, the Appeals Chamber is unpersuaded by Mr Mangenda's argument that the Trial Chamber made no finding explaining how the fact that he conveyed Mr Bemba's instructions concerning the illicit coaching of witness D-54 and the fact that he advised Mr Kilolo concerning these activities assisted the witness's giving of false testimony regarding prior contacts with the defence.[3239] The Trial Chamber found that "these actions on the part of Mr Mangenda ultimately assisted [witness D-54] in giving the evidence that Mr Kilolo had previously dictated to [him]".[3240] As noted with respect to witness D-15, the illicit coaching activities on the merits of the Main Case go hand in hand with the giving of false testimony on contacts with the defence. While the illicit coaching primarily centred on the merits of the Main Case, such coaching would only have the desired impact on the Main Case if the witnesses also testified falsely regarding contacts with the defence. The Appeals Chamber therefore considers that it has not been established that no reasonable trier of fact could have found that Mr Mangenda's assistance to Mr Kilolo in relation to the illicit coaching of witness D-54 had an effect on the witness's false testimony regarding contacts with the defence.

1333. In light of the foregoing, the Appeals Chamber finds that Mr Mangenda fails to demonstrate that the Trial Chamber erred in law and in fact in finding that he aided the false testimony of witnesses D-15 and D-54 and abetted the false testimony of witnesses D-2, D-3, D-4, D-6, D-13, D-25, and D-29. Accordingly, Mr Mangenda's arguments under his sixth ground of appeal are rejected.

D. Mr Babala's grounds of appeal

1. Alleged errors regarding the transcripts and translations of the Court's detention centre recordings

(a) Relevant background and part of the Conviction Decision

1334. In a decision issued on 24 September 2015, the Trial Chamber recognised as submitted the documentary materials that the Prosecutor sought to be admitted from the "bar table", including the Court's detention centre's recordings of Mr Bemba's

[3239] Mr Mangenda's Appeal Brief, para. 322.
[3240] Conviction Decision, para. 868.

non-privileged telephone conversations.[3241] This material comprised transcripts of these recordings and, to the extent that the conversations were not conducted in French but in Lingala, translations of the transcripts from Lingala to French.[3242] These transcriptions and translations had been produced by the Prosecutor's Language Services Unit. The Registry subsequently translated the French relevant parts of the transcripts into English, which are reproduced in the Conviction Decision.

1335. In the Conviction Decision, the Trial Chamber determined, with regard to the technical anomalies in recording of telephone conversations to and from the Court's detention centre, that the said conversations warranted a case-by case approach.[3243] The Trial Chamber indicated that it would review all corresponding material together; that is, it did not rely only on the audio recordings or their transcriptions/translations in isolation.[3244] Where relevant, the Trial Chamber relied on official translations into English of the transcripts originally in French.[3245] The Trial Chamber stated 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".[3246] This included listening to the audio recordings.[3247]

(b) Submissions of the parties

(i) Mr Babala

1336. Mr Babala submits that, whilst the Trial Chamber agreed with expert witness D20-1 that, as a result of the misalignment of the Court's detention centre recordings, the derivative transcriptions and translations of the audio material are also unreliable, it nevertheless decided that it would rule on the reliability of the conversations on a case-by-case basis.[3248] Mr Babala submits further that the Trial Chamber erroneously

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[3241] Decision on Submission of Documentary Evidence, paras 1-2, p. 11.
[3242] "Prosecution's Second Request for the Admission of Evidence form the Bar Table", 31 July 2015, ICC-01/05-01/13-1113-Conf, para. 15.
[3243] Conviction Decision, para. 227.
[3244] Conviction Decision, para. 227.
[3245] Conviction Decision, fn. 361.
[3246] Conviction Decision, para. 216.
[3247] Conviction Decision, para. 220.
[3248] Mr Babala's Appeal Brief, para. 44, referring to Conviction Decision, para. 226. *See also* Mr Babala's Appeal Brief, para. 45. Mr Babala's contention that the Trial Chamber did not make an admissibility determination on each item of evidence (*see* Mr Babala's Appeal Brief, para. 44) is addressed above in Section VII.A.

relied on the English versions of the French translations provided by the Prosecutor, "a biased party" to the proceedings, affecting its assessment of the recordings of the Court's detention centre in its entirety.[3249] Specifically, Mr Babala avers that the Trial Chamber disregarded the irregularities in the Prosecutor's transcriptions and translations.[3250] Mr Babala adds that, whilst the Trial Chamber decided that the sequence of utterances in the transcripts was unreliable, the Trial Chamber nonetheless "relied on words removed from their context and a speaker's isolated utterances".[3251] In his view, "[i]t is not a question of the order but the distortion of words".[3252] In support of his submission, Mr Babala argues that "the Prosecution had transcribed '[redacted]' instead of '[redacted]', and translated '[redacted]' when Mr Babala can be heard very clearly saying '[redacted] in the recording".[3253] He avers that, out of 12 conversations in French between him and Mr Kilolo, "only four transcripts seem to be error-free".[3254] Citing a decision by the ICTY, Mr Babala asserts, by analogy, that transcriptions of audio material should instead be done by a neutral body like the Registry.[3255]

(ii) The Prosecutor

1337. The Prosecutor responds that the transcriptions and translations were accurate and reliable and that Mr Babala fails to show that the Prosecutor lacked objectivity in preparing them.[3256] The Prosecutor argues that in alleging minor errors in the transcriptions and translations, Mr Babala overlooks the fact that the Trial Chamber listened to the audio recordings.[3257] According to the Prosecutor, the passage of the Conviction Decision to which Mr Babala refers is a summary of arguments by

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[3249] Mr Babala's Appeal Brief, para. 44, referring to Conviction Decision, fn. 361. *See also* Mr Babala's Appeal Brief, paras 36, 48.
[3250] Mr Babala's Appeal Brief, para. 46, referring to Conviction Decision, fn. 361.
[3251] Mr Babala's Appeal Brief, para. 45.
[3252] Mr Babala's Appeal Brief, para. 45.
[3253] Mr Babala's Appeal Brief, para. 45 (footnotes omitted), referring to CAR-OTP-0080-1336; CAR-OTP-0082-0576, p. 0576_01; CAR-OTP-0082-0596, p. 0598_01; CAR-OTP-0080-1360; Mr Babala's Closing Submissions, paras 126-127.
[3254] Mr Babala's Appeal Brief, para. 45, referring to "Réponse de la Défense de M. Fidèle Babala à « Prosecution's First Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1013-Conf)", 9 July 2015, ICC-01/05-01/13-1073-Conf, para. 36.
[3255] Mr Babala's Appeal Brief, paras 43, 47, referring to *Tolimir* Decision on Access, paras 14, 16.
[3256] Response, para. 637.
[3257] Response, para. 637, referring to Conviction Decision, paras 216, 220.

Mr Bemba and expert witness D20-1's view, not its actual finding.[3258] In that regard, the Prosecutor avers, the Trial Chamber determined that it could only rely on the transcriptions and translations when they were corroborated.[3259] Further, the Prosecutor submits, Mr Babala does not identify an error that materially affects the Conviction Decision and fails to mention that the Prosecutor corrected in May 2015 both errors identified by Mr Babala, and that neither of these "typographical errors" formed the basis of any finding in the Conviction Decision.[3260] The Prosecutor also argues that Mr Babala fails to provide information with regard to his claim that only four transcripts of 12 conversations between him and Mr Kilolo appear not to contain errors.[3261] Finally, in her view, the ICTY decision on which Mr Babala relies does not support his submission as it relates to the defence's access to confidential court records in other cases and should be rejected.[3262]

(c) Determination by the Appeals Chamber

1338. The Appeals Chamber is not persuaded that the Trial Chamber should not have relied upon the transcripts and translations of Mr Bemba's telephone conversations from the Court's detention centre. Mr Babala's argument in respect of the expert witness D20-1 and the Trial Chamber's purported agreement with his assessment overlooks the fact that the Trial Chamber determined that it could rely on the audio recordings' transcripts and translations despite the technical issues surrounding them, provided that these transcripts and translations were corroborated by other evidence.[3263] In addition, the Appeals Chamber notes that the Trial Chamber, when determining the relevant details of the telephone communications, including the speakers, "conducted its own independent assessment of the evidence".[3264] In so doing, the Trial Chamber, *inter alia*, listened to the audio recordings and reviewed the

[3258] Response, para. 638, referring to Conviction Decision, para. 227.
[3259] Response, para. 638, referring to Conviction Decision, para. 227.
[3260] Response, para. 639, referring to CAR-OTP-0082-0576, p. 0577_01 (corrected on 14 May 2015); CAR-OTP-0082-0596, p. 0598_01 (corrected on 28 May 2015).
[3261] Response, para. 640.
[3262] Response, para. 641.
[3263] Conviction Decision, para. 227.
[3264] Conviction Decision, para. 216.

corresponding material together, including the transcriptions and translations of those audio recordings.[3265]

1339. Furthermore, the Appeals Chamber finds that the fact that the transcriptions and translations of the conversations had been carried out by the Office of the Prosecutor and not by the Registry was not in itself a reason not to take them into account. This fact was well known and the parties could – and did – challenge the accuracy of transcription or translation. In that regard, the Appeals Chamber considers that it is incumbent upon the party that disputes a transcription or translation to specify the mistakes. The Appeals Chamber further considers that, as not all mistakes are material or affect the substance or understanding of a document, the party should also indicate how the mistakes materially affect the content of the document in question. The Appeals Chamber observes that Mr Babala did not do so, either at trial or on appeal; he did not point to mistakes in any detail other than the three identified above, none of which formed the basis of any finding by the Trial Chamber. The Appeals Chamber further observes that Mr Babala raises the same arguments on appeal as he had at trial.[3266] Indeed, as the Prosecutor rightly points out she had corrected two of the irregularities identified by Mr Babala.[3267]

1340. For these reasons, the Appeals Chamber rejects Mr Babala's arguments.

[3265] Conviction Decision, paras 216, 227.
[3266] The Appeals Chamber notes that at trial, Mr Babala raised the matter of apparent irregularities in the French versions of the Prosecutor's transcriptions and translations of 12 audio recordings between him and Mr Kilolo, and in the Lingala transcripts and French translations thereof. The Appeals Chamber further notes that Mr Babala identified one error in each of the French transcriptions and translations, respectively, and one translation error of a transcript that was originally in Lingala and had been translated by the Prosecution into French. *See* Mr Babala's Appeal Brief, para. 45, referring to Réponse de la Défense de M. Fidèle Babala à « Prosecution's First Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1013-Conf)", 9 July 2015, ICC-01/05-01/13-1073-Conf; a public redacted version was registered on 9 October 2015(ICC-01/05-01/13-1073-Red), para. 37; Mr Babala's Closing Submissions, paras 126-127.
[3267] *See* Response, para. 639.

2. Alleged errors by not taking into account relevant facts

(a) Alleged error regarding Mr Bemba's legal aid status and the sui generis character of the financing of Mr Bemba's Defence

(i) Relevant part of the Conviction Decision

1341. The Trial Chamber determined that Mr Babala transferred money to witness D-57's wife and through witness P-272, money to witness D-64's daughter, shortly before the testimony of witnesses D-57 and D-64 in the Main Case.[3268] The Trial Chamber also determined that Mr Babala arranged the payments knowing that the money was meant to ensure that these witnesses would testify in Mr Bemba's favour.[3269] These findings were based, *inter alia*, on the Trial Chamber's identification of "a recurring pattern: the money was typically given or transferred shortly before the witnesses' testimonies [*sic*] in the Main Case and nearly the same amount of money was involved, irrespective of the individual needs of the witnesses".[3270] The Trial Chamber noted that Mr Babala did not contest having made the payment to witness D-57 and admitted to have facilitated the one to witness D-64.[3271] The Trial Chamber found the stated motivation behind the assistance to Mr Bemba (that the money transfers were made "out of solidarity with Mr Bemba"), was "irrelevant to its criminality".[3272] The Trial Chamber also found that the advice Mr Babala gave to Mr Bemba during a telephone conversation on 16 October 2012, in coded language, on the latter's privileged telephone line at the Court's detention centre, demonstrates, *inter alia*, that Mr Babala was aware of the status of D-57 and D-64 as witnesses in the Main Case, as well as of the importance of paying the witnesses shortly before their testimony.[3273] The Trial Chamber concluded:

> Considering his regular exchanges with Mr Bemba and Mr Kilolo, in particular his role as financier, viewed in the light of the evidence as a whole, the Chamber is satisfied that Mr Babala was aware that the payments were

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[3268] Conviction Decision, paras 253-254, 268, 280-281. *See also* para. 690.
[3269] Conviction Decision, paras 253-254, 268, 280-281.
[3270] Conviction Decision, para. 691.
[3271] Conviction Decision, paras 243, 269.
[3272] Conviction Decision, paras 880-881.
[3273] Conviction Decision, para. 267. *See also* paras 700, 890.

illegitimate and aimed at altering and contaminating the witnesses' testimony.[3274]

(ii) Submissions of the parties

(a) Mr Babala

1342. Mr Babala avers that he was the "focal point" of a *sui generis* financing system, who simply "ma[de] the money collected from Mr Bemba's friends and families available to the Defence team in the Main Case" which, according to Mr Babala, was "the natural duty of solidarity".[3275] This system existed, he submits, because Mr Bemba was never declared indigent.[3276] Mr Babala argues that, had the Trial Chamber taken these circumstances into account, and thereby understood the context in which his actions took place, it would not have found that his conversations with Mr Bemba concerning the money transfers were indicative of a plan to corruptly influence witnesses.[3277]

(b) The Prosecutor

1343. The Prosecutor responds that Mr Babala's submissions regarding Mr Bemba's legal aid status do not impact on the Trial Chamber's findings regarding Mr Babala's convictions.[3278] The Prosecutor argues that: (i) the illicit payments (to witnesses D-57's wife and D-64's daughter, through a third person) for which Mr Babala was found liable were made to the said witnesses for illicit purposes; and (ii) Mr Babala fails to acknowledge the Trial Chamber's finding that his motivation to assist Mr Bemba is irrelevant, as Mr Babala's conduct in illicitly paying the two witnesses remained criminal.[3279]

(iii) Determination by the Appeals Chamber

1344. The Appeals Chamber is not persuaded by Mr Babala's assertion that the Trial Chamber erred in its consideration of his explanation of the money transfers. Mr Babala's argument concerning the *sui generis* character of the financing system

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[3274] Conviction Decision, para. 893.
[3275] Mr Babala's Appeal Brief, paras 76-77. *See also* paras 35, 92, 273.
[3276] Mr Babala's Appeal Brief, paras 74-77. *See also* para. 92.
[3277] Mr Babala's Appeal Brief, paras 77-79, referring to Conviction Decision, para. 691; Mr Babala's Appeal Brief, paras 89 *et seq*.
[3278] Response, paras 576, 578.
[3279] Response, paras 577-578, referring to Conviction Decision, paras 239-248, 254, 265-275, 281, 881.

was correctly disposed of by the Trial Chamber, in that it found that the motivation behind Mr Babala's assistance to Mr Bemba was inconsequential to its criminality.[3280] Mr Babala merely disagrees with the Trial Chamber's conclusion, but does not identify any error on the part of the Trial Chamber.

1345. Accordingly, the Appeals Chamber rejects Mr Babala's argument concerning Mr Bemba's legal aid status and the *sui generis* character of the financing of Mr Bemba's Defence.

(b) Alleged error regarding the "fictitious scenario" identified by the Independent Counsel

(i) Submissions of the parties

(a) Mr Babala

1346. Mr Babala avers that what the Trial Chamber determined to be the "illicit coaching of witnesses" was actually brought to light by the Independent Counsel, who the Pre-Trial Single Judge tasked with filtering the telephone conversations between members of the defence team in the Main Case.[3281] Mr Babala submits that the Trial Chamber erred by not taking into account the "false scenario" identified by the Independent Counsel – a scheme devised by Mr Kilolo and Mr Mangenda, without the knowledge of Mr Bemba, to have their "fees" paid by him – and their intentions to conceal its details from Mr Babala.[3282] According to Mr Babala, the Trial Chamber identified a "conversation between the creators of the scenario and Mr Babala"[3283] as an indication of his knowledge and intent of the corrupt influencing of witnesses, even though he was excluded from the "false scenario".[3284] Mr Babala avers that the Independent Counsel also considered that the "false scenario pointed to previous inciden[ts] of the corrupt influencing of witnesses, of which Mr Babala was probably aware", and that the Prosecutor and the Trial Chamber "regrettably follow[ed] his

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[3280] Conviction Decision, paras 880-881.
[3281] Mr Babala's Appeal Brief, para. 80, referring, *inter alia*, to Decision Authorising to Seize National Authorities and Appointing Independent Counsel.
[3282] Mr Babala's Appeal Brief, paras 80-81, referring to "Troisième rapport du Conseil indépendant (période du 16 octobre au 23 novembre)", 22 May 2014, ICC-01/05-01/13-421-Conf, annex to the report (ICC-01/05-01/13-421-Conf-Anx), pp. 22-31, 34-45, 47-50, 75-77, 84-86; CAR-OTP-0082-1324; CAR-OTP-0074-1032. *See also* Mr Babala's Appeal Brief, para. 74.
[3283] Mr Babala's Appeal Brief, para, 80.
[3284] Mr Babala's Appeal Brief, paras 80-81.

lead" in this regard.[3285] Mr Babala further submits that neither the testimony of witnesses P-20 (D-57) nor that of P-243 (D-64) "revealed [his] slightest involvement" in their corrupt influencing, yet the Trial Chamber failed to take into account this evidence "in a manner favourable" to him.[3286]

(b) The Prosecutor

1347. The Prosecutor responds that, even if the "*faux scénario*" put forward by the Independent Counsel[3287] were a factor in the Trial Chamber's assessment, it would not have lessened Mr Babala's culpability or altered the Trial Chamber's findings.[3288] In the Prosecutor's view, the Trial Chamber, which was not bound by the Independent Counsel's observations, reached its own finding based on a review of the evidence before it, that did not include the existence of a "*faux scénario*".[3289] In that regard, the Prosecutor avers that the Trial Chamber referred to the evidence of intercepted telephone conversations, SMS and emails reviewed by the Independent Counsel, but "it [did] not refer to his characterisations of that evidence in his reports".[3290] The Prosecutor avers that the Trial Chamber considered that, after the co-perpetrator's corrupt influencing of witnesses became known, Mr Kilolo and Mr Mangenda discussed with Mr Bemba and Mr Babala their intention, *inter alia*, to bribe witnesses in order to discourage them from cooperating with the Office of the Prosecutor.[3291]

1348. In addition, the Prosecutor submits that irrespective of the said representations to Mr Bemba in the context of the remedial measures after the initiation of an investigation became known, "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".[3292] As to Mr Babala's submission that the evidence does not implicate him in the corrupt influencing of witnesses D-57 and D-64, the Prosecutor submits that he ignores the "wealth of other evidence" that supported the Trial Chamber's

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[3285] Mr Babala's Appeal Brief, para. 81.
[3286] Mr Babala's Appeal Brief, para. 82, referring to Mr Babala's Closing Submissions, paras 96-97, 193-194.
[3287] According to the Prosecutor, under this "*faux scénario*", Mr Kilolo and Mr Mangenda "sought to appropriate more money from Mr Bemba to purportedly pay off witnesses". *See* Response, para. 579.
[3288] Response, para. 579.
[3289] Response, para. 580.
[3290] Response, para. 580, fn. 2207.
[3291] Response, para. 580, referring to Conviction Decision, paras 778, 780, 790, 793-794.
[3292] Response, para. 581, referring to Conviction Decision, paras 781, 889, 892, fn. 1950.

conclusions regarding his liability, including his telephone calls with Mr Bemba and Mr Kilolo, his role as a financier, his knowledge of the Main Case and his use of coded language regarding the Main Case matters.[3293] The Prosecutor submits that Mr Babala's arguments to this effect are unsupported and thus should be summarily dismissed.[3294]

(ii) Determination by the Appeals Chamber

1349. The Appeals Chamber notes that the Independent Counsel was tasked, in 2013, with filtering the recordings of Mr Bemba's privileged line at the Court's detention centre collected by the Dutch authorities to be transmitted to the Prosecutor.[3295] Any characterisation by the Independent Counsel of the recordings so filtered – including in relation to the so-called "false scenario" – was limited to that purpose. It did not constitute evidence in itself, nor is there any indication that the Trial Chamber relied on the Independent Counsel's characterisation. Therefore, Mr Babala's argument regarding the Independent Counsel's characterisation of the "false scenario" is rejected.

1350. With respect to Mr Babala's argument that the Trial Chamber erred in its assessment of witnesses P-20 (D-57)'s and P-243 (D-64)'s evidence, and, in particular, that nothing therein revealed his involvement in the corrupt influencing of these witnesses, the Appeals Chamber notes that Mr Babala simply refers to arguments that he made at trial and does not provide any further substantiation as to why the Trial Chamber erred. His arguments are therefore rejected. The Appeals Chamber equally finds no merit in Mr Babala's claim that the Trial Chamber failed to take into account the testimony of both witnesses "in a manner favourable to [him]";[3296] he fails to substantiate how the Trial Chamber erred in its assessment of this evidence.

1351. Accordingly, the Appeals Chamber dismisses Mr Babala's arguments.

[3293] Response, para. 582, referring to Conviction Decision, paras 879-892.
[3294] Response, para. 582, referring to Conviction Decision, paras 879-892.
[3295] *See* Decision Authorising to Seize National Authorities and Appointing Independent Counsel, pp. 7, 8.
[3296] Mr Babala's Appeal Brief, para. 82.

(c) Alleged error regarding the assessment of witness P-272's evidence

(i) Relevant part of the Conviction Decision

1352. The Trial Chamber found witness P-272 "credible, […] straightforward and candid in answering questions" and thus considered that it could rely on his evidence regarding payments that he had effected on Mr Babala's behalf.[3297] In the Trial Chamber's view, Mr Kilolo and Mr Babala arranged the money transfer to witnesses P-20 (D-57) and P-243 (D-64) in a manner intended to conceal any links between the witness and the defence in the Main Case, including by Mr Kilolo effecting payments through a third person and Mr Babala transferring, through witness P-272, money to P-243 (D-64)'s daughter.[3298] The Trial Chamber determined that Mr Babala transferred the money, shortly before the testimony of witnesses D-57 and D-64, and arranged the payments knowing that the money was meant to ensure they would testify in Mr Bemba's favour.[3299]

(ii) Submissions of the parties

(a) Mr Babala

1353. Mr Babala submits that his requests to witness P-272 to transfer money on his behalf are not indicative of his participation in a criminal scheme seeking to influence witnesses D-57 and D-64, or to conceal the transfers, contrary to the Trial Chamber's conclusion.[3300] In Mr Babala's view, the Trial Chamber failed to take into account the facts described by witness P-272.[3301]

(b) The Prosecutor

1354. The Prosecutor responds that Mr Babala's argument about witness P-272's testimony does not "specify which facts were purportedly overlooked" by the Trial Chamber and it should therefore be summarily rejected.[3302] The Prosecutor avers that,

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[3297] Conviction Decision, para. 260.
[3298] Conviction Decision, paras 272, 280-281. *See also* paras 267-271. On the Trial Chamber's findings regarding P-20 (D-57) *see* paras 242-245, 253-254.
[3299] Conviction Decision, paras 254, 281.
[3300] Mr Babala's Appeal Brief, para. 83, referring to Conviction Decision, para. 272; Mr Babala's Closing Submissions, para. 94.
[3301] Mr Babala's Appeal Brief, para. 83.
[3302] Response, para. 583.

in any event, the Trial Chamber found that witness P-272 was credible, and that his testimony was compatible, and therefore corroborated, by other evidence.[3303]

(iii) Determination by the Appeals Chamber

1355. In respect of Mr Babala's argument regarding the Trial Chamber's conclusion that his requests to witness P-272 to transfer money on his behalf was indicative of his own participation in a criminal scheme seeking to influence witnesses D-57 and D-64, and to conceal the transfers, the Appeals Chamber notes that Mr Babala simply refers to arguments that he already made at trial.[3304] He does not provide any further substantiation thereof, nor does he set out how the Trial Chamber erred in coming to its finding.

1356. In respect of Mr Babala's argument that the Trial Chamber failed to take into account witness P-272's evidence, the Appeals Chamber notes that the Trial Chamber did rely on this evidence.[3305] Mr Babala does not identify which facts the Trial Chamber omitted to take into account in its assessment of this evidence and how this impacted on the correctness of the Trial Chamber's findings.

1357. In these circumstances, the Appeals Chamber dismisses *in limine* Mr Babala's arguments.

(d) Alleged error regarding the way in which the telephone communication system operated at the Court's detention centre

(i) Relevant part of the Conviction Decision

1358. In its discussion on the measures to conceal the implementation of the common plan, and the abuse of the Registry's "privileged line" in particular, the Trial Chamber determined that Mr Bemba used the said line to speak "unmonitored", *inter alia*, with Mr Babala.[3306] The Trial Chamber noted that the Court's detention centre's documentation for 2012 and 2013 reveal that the privileged telephone numbers for Mr Bemba included a telephone number that was indicated as belonging to Mr Kilolo,

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[3303] Response, para. 583, referring to para. 563; Prosecution's Closing Submissions, para. 35.
[3304] Mr Babala's Appeal Brief, para. 83, referring to Mr Babala's Closing Submissions, para. 94.
[3305] *See* Conviction Decision, para. 260, referring to Transcript of 21 October 2015, ICC-01/05-01/13-T-25-RED-ENG (WT), p. 36, line 14.
[3306] Conviction Decision, para. 737. *See also* paras 109, 736, 738, 884.

but actually belonged to Mr Babala, who was not entitled to privileged, and thus unmonitored, telephone conversations with Mr Bemba.[3307] The Trial Chamber disposed of Mr Babala's argument that the telephone calls were forwarded between the said number and another telephone number, also belonging to Mr Kilolo as being "purely speculative" and lacking any evidence corroborating this claim.[3308] In the Trial Chamber's analysis of the evidence relating to witness P-243 (D-64), the Trial Chamber considered, *inter alia*, a conversation between Mr Babala and Mr Bemba on 16 October 2012, using the latter's "privileged line at the ICC Detention Centre".[3309] In determining that "Mr Babala lent his assistance with the aim of facilitating the offences of corruptly influencing witnesses D-57 and D-64",[3310] the Trial Chamber noted, *inter alia*, that "Mr Babala was in regular contact with Mr Bemba, including by abusing the privileged line at the ICC Detention Centre".[3311]

(ii) Submissions of the parties

(a) Mr Babala

1359. Mr Babala submits that the Trial Chamber misunderstood how the telephone system at the Court's detention centre worked and the difference between privileged and non-privileged lines.[3312] In that regard, Mr Babala submits that the Trial Chamber erred in finding that, on 16 October 2012, he and Mr Bemba had a conversation with respect to witness D-64 on Mr Bemba's privileged, rather than on his non-privileged line, noting that, as found by the Trial Chamber, conversations on the privileged line were never recorded.[3313] In further support of his submission, Mr Babala avers that no one could directly call Mr Bemba's extension, while the Trial Chamber referred to "incoming and outgoing communications between Mr Bemba […] and other persons".[3314] In his view, the distinction between the privileged and non-privileged conversations is important because the Trial Chamber found that he and Mr Bemba

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[3307] Conviction Decision, para. 738.
[3308] Conviction Decision, para. 739.
[3309] Conviction Decision, para. 265.
[3310] Conviction Decision, para. 893.
[3311] Conviction Decision, para. 884.
[3312] Mr Babala's Appeal Brief, para. 84.
[3313] Mr Babala's Appeal Brief, para. 85, referring, *inter alia*, to Conviction Decision, paras 265, 736. He argues that the Trial Chamber incorrectly found that the telephone number "[redacted]" was Mr Bemba's privileged number. Mr Babala's Appeal Brief, para. 85, referring to Conviction Decision, para. 265.
[3314] Mr Babala's Appeal Brief, para. 86, referring to Conviction Decision, para. 215.

avoided the Court's detention centre's monitoring system "by talking on a privileged line under the cover of using a telephone number registered to Mr Kilolo"[3315] and that it saw this (i) as an attempt to conceal the corrupt influencing of witnesses; and (ii) as an indication that Mr Babala knew of this.[3316]

(b) The Prosecutor

1360. The Prosecutor responds that the Trial Chamber's finding that Mr Babala conversed with Mr Bemba on the Court's detention centre's privileged, rather than non-privileged line, does not impact the Trial Chamber's findings against Mr Babala and the Conviction Decision as a whole.[3317] The Prosecutor avers that the Trial Chamber correctly found that the 16 October 2012 conversation took place between Mr Bemba and Mr Babala concerning witness D-64 and that the telephone number used belonged to Mr Bemba, irrespective of whether it characterised it as being privileged or not.[3318] The Prosecutor maintains that "[w]hat was important and relied upon [by the Trial Chamber] was the *content* of their communications".[3319] In addition, the Prosecutor avers that the Trial Chamber's findings that Mr Bemba abused the privileged line included evidence other than that related to the telephone number indicated as belonging to Mr Kilolo, and that this finding is not germane to Mr Babala's convictions.[3320]

(iii) Determination by the Appeals Chamber

1361. The Appeals Chamber observes that the Trial Chamber, at various places, refers to Mr Bemba's "privileged line" at the Court's detention centre.[3321] The Appeals Chamber notes that this terminology is somewhat misleading because, in the Court's detention centre, Mr Bemba did not have two telephone lines, one privileged and the other one not. Rather, depending on Mr Bemba's interlocutor, his telephone calls would either be monitored or not.[3322] To this end, two lists of numbers were maintained, one containing the names of persons entitled to privileged conversations,

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[3315] Mr Babala's Appeal Brief, para. 87 (footnote omitted).
[3316] Mr Babala's Appeal Brief, para. 87, referring to Conviction Decision, paras 736-739. *See also* Mr Babala's Appeal Brief, para. 238.
[3317] Response, para. 584.
[3318] Response, para. 585, referring to Conviction Decision, para. 265, fns 352-354.
[3319] Response, para. 585, referring to Conviction Decision, paras 265, 267 (emphasis in the original).
[3320] Response, para. 586, referring to Conviction Decision, paras 736-745, 884.
[3321] *See e.g.* Conviction Decision, paras 265, 297, 567, 817, 856, 885, 897, 924.
[3322] *See* Conviction Decision, para. 736.

and the other one containing the names of other persons who Mr Bemba could call, or receive calls from, though such calls would be monitored.[3323]

1362. As to Mr Babala's challenge to the Trial Chamber's characterisation of the 16 October 2012 telephone call between Mr Bemba and him in respect of witness D-64 as having been made on Mr Bemba's "privileged line", the Appeals Chamber notes that the Trial Chamber indeed erred in this regard.[3324] Had this call been qualified as privileged, it would not have been monitored by the Court's detention centre and there would be no transcript of it.[3325] In addition, the number from which Mr Babala connected was listed on the list of non-privileged telephone numbers. The Appeals Chamber considers, however, that this error of the Trial Chamber is inconsequential to the overall finding challenged by Mr Babala because the Trial Chamber drew no further conclusion from its finding that, for the 16 October 2012 call, the purportedly "privileged line" was used.

1363. In contrast, the Appeals Chamber sees no error in the Trial Chamber's finding that Mr Babala, in addition to the telephone call that the Trial Chamber erroneously determined to be "privileged", also communicated with Mr Bemba using a number that was listed under Mr Kilolo's name and thus designated as privileged.[3326] In fact, Mr Babala does not raise any argument that would impugn this finding.

1364. Turning to the question of whether Mr Babala knew that he was communicating with Mr Bemba using a privileged line, the Appeals Chamber notes that the Trial Chamber did not expressly find that Mr Babala had such knowledge. Rather, in the section addressing Mr Babala's awareness that he was lending assistance with the aim of facilitating the corrupt influencing of witnesses, it referred to the abusive use of the privileged line together with the use of coded language in the (monitored) conversations between Mr Babala and Mr Bemba.[3327] The Trial Chamber relied on

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[3323] *See* Conviction Decision, para. 736; CAR-OTP-0074-0067; CAR-OTP-0074-0075. *See also* CAR-OTP-0074-0069.
[3324] *See* Conviction Decision, para. 265.
[3325] *See* CAR-OTP-0074-0610; CAR-OTP-0077-1141 (in Lingala); CAR-OTP-0077-1299 (French translation). *See also* Conviction Decision, para. 736.
[3326] *See* Conviction Decision, paras 738, 739.
[3327] Conviction Decision, para. 884.

several other facts to conclude that Mr Babala had such awareness.[3328] In these circumstances, the Appeals Chamber does not consider that the Trial Chamber erred when it referred to the use of a privileged telephone number, in particular because it did not enter a finding that Mr Babala was aware that the number that he was using was privileged.

1365. In light of the above, the Appeals Chamber rejects Mr Babala's arguments.

3. Alleged errors regarding the characterisation of Mr Babala's role as "financier" as criminal

(a) Relevant part of the Conviction Decision

1366. When determining Mr Babala's role as that of "financier" to Mr Bemba, a fact that Mr Babala does not deny, the Trial Chamber noted that he provided support to Mr Kilolo, Mr Bemba and Mr Mangenda, and facilitated money transfers.[3329] The Trial Chamber noted that Mr Babala's role as financier, in itself, "does not automatically imply his criminal responsibility with regard to payments, but only where it can be established that he assisted in the knowledge that they were illegitimate".[3330] After having analysed the evidence as a whole, the Trial Chamber was satisfied of Mr Babala's accessorial assistance with regard to witnesses D-57 and D-64, "to whom Mr Babala transferred an illegitimate payment himself or through a third person".[3331]

1367. In making these conclusions, the Trial Chamber found that Mr Babala himself transferred an illegitimate payment to witness D-57 and to witness D-64, through a third person, and that he was aware of the illegitimate character of the payments and that they were "aimed at altering and contaminating the witnesses' testimony".[3332] It

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[3328] *See* Conviction Decision, paras 880-893.
[3329] Conviction Decision, para. 887, fn. 1947, referring to the telephone call of 17 October 2013 between Mr Kilolo and Mr Babala. *See also* paras 779-781, 888-889, 892-893.
[3330] Conviction Decision, para. 878. The Trial Chamber considered that after having analysed the evidence as a whole, "Mr Babala's accessorial assistance can only be linked to D-57 and D-64, to whom Mr Babala transferred an illegitimate payment himself or through a third person." However, with respect to witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54 or D-55, there was no evidence supporting "any direct or indirect link" between Mr Babala and these witnesses. The Trial Chamber was of the view that "Mr Babala's general assistance in effecting payments or facilitating payments by third persons cannot be considered to be indicative that Mr Babala indeed assisted the co-accused in their commission of the offences involving the remaining witnesses"). *See* para. 878. *See also* paras 887, 892-893.
[3331] Conviction Decision, para. 878.
[3332] Conviction Decision, para. 893. *See also* paras 873-892.

also found that Mr Bemba was in control of the illicit payment scheme to witnesses, as he was aware of and authorised the money transfers that his financier, Mr Babala, would effect.[3333] In reaching this conclusion, the Trial Chamber relied, *inter alia*, on intercepted telephone communications between Mr Bemba and Mr Babala, during which the latter would seek authorisation or inform Mr Bemba prior to making payments to Mr Kilolo or to others, including about funds that Mr Babala illicitly transferred to the witnesses.[3334] The Trial Chamber, mindful of the irregularities affecting the recordings of non-privileged communications from the Court's detention centre,[3335] relied only on selected utterances of Mr Babala and Mr Bemba in those conversations, "and only to the extent that they stand alone".[3336] With respect to the other 12 defence witnesses, it held that there was no evidence supporting "any direct or indirect link" between Mr Babala and these witnesses.[3337]

(b) Submissions of the parties

(i) Mr Babala

1368. Mr Babala avers that the Trial Chamber appears to have regarded his role of financier "as an automatic indication that a crime was committed" without seeing the "real situation".[3338] According to Mr Babala, the Trial Chamber did not take into account the *sui generis* character of the financing system on which the Bemba Defence depended and the reasons why Mr Babala collected money to then transfer to Mr Kilolo "for purposes that – to his understanding and knowledge – were legal".[3339] Mr Babala further submits that the Trial Chamber relied on Mr Bemba's words, which

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[3333] Conviction Decision, para. 703.
[3334] Conviction Decision, paras 689-703. To this end, the Trial Chamber "relie[d] on extracts from several intercepts provided by the ICC Detention Centre, as submitted by the Prosecution, such as the following conversations": 2 March 2012; 25 May 2012; 28 September 2012; 13 November 2012; 22 November 2012; 30 November 2012; 26 April 2013; 6 May 2013. Conviction Decision, para. 693 (footnotes omitted).
[3335] Conviction Decision, para. 695. The Trial Chamber noted the following: "[T]hat at the end of all recordings concerned clearly the two channels of the speakers are not aligned. It can therefore not be ruled out that the questions and responses recorded have been spoken in a different sequence than they have been recorded, any by extension, transcribed. However, despite the irregularities, the Chamber relies on those recordings for the reason that, as confirmed by the Bemba Defence expert, the recordings nevertheless accurately reflect the utterances by the individual speakers". Conviction Decision, fn. 1589.
[3336] Conviction Decision, para. 695.
[3337] Conviction Decision, para. 878.
[3338] Mr Babala's Appeal Brief, paras 89-94. *See also* paras 76-77, 296.
[3339] Mr Babala's Appeal Brief, para. 92, referring, *inter alia*, to paras 76 *et seq*; Mr Babala's Closing Submissions, paras 16017, 110-114. *See also* Mr Babala's Appeal Brief, para. 94.

concerned legal actions, rather than applying the principle *in dubio pro reo* in respect of the irregularities in the Court's detention centre recordings, where doubt existed about the meaning of the words so spoken, especially in the absence of evidence corroborating the allegation of corruptly influencing witnesses.[3340] Mr Babala avers that the Trial Chamber drew "erroneous conclusions from the facts in an attempt to resolve the lingering doubts over the meaning of those words *against* [him]".[3341]

1369. In Mr Babala's view, the Trial Chamber also erred in law by not explaining its reasons for distinguishing between the transfers to Mr Bemba's defence team that were illicit and those that were not.[3342] Mr Babala avers that Mr Bemba and Mr Mangenda "explained that the money transferred between the two men was meant to cover the expenses that Mr Bemba understandably incurred at the detention centre".[3343] Finally, Mr Babala submits that, in support of its finding that the transfers for which he sought Mr Bemba's authorisation concerned the Main Case witnesses, the Trial Chamber "relie[d] on extracts of conversations that had been found unreliable and which the Defence had claimed were irrelevant to the Main Case".[3344]

(ii) The Prosecutor

1370. The Prosecutor responds that Mr Babala misreads the Conviction Decision by claiming that the transfers that he made on behalf of Mr Bemba were automatically given a criminal character.[3345] Instead, the Prosecutor submits, the Trial Chamber found that his role as a financier implied his criminal responsibility "[…] only where it can be established that he assisted in the knowledge that [the money transfers] were illegitimate".[3346] She further submits that Mr Babala fails to show any error, as the Trial Chamber established the requisite *mens rea* for his payments to witnesses D-57 and D-64, and used the said money transfers to establish Mr Bemba's direct involvement and knowledge of the payment scheme and relied on this, together with

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[3340] Mr Babala's Appeal Brief, para. 92, referring to Conviction Decision, para. 695.
[3341] Mr Babala's Appeal Brief, para. 92, referring to Conviction Decision, para. 695.
[3342] Mr Babala's Appeal Brief, paras 93, 94.
[3343] Mr Babala's Appeal Brief, para. 93, referring to Mr Babala's Closing Submissions, paras 195-198.
[3344] Mr Babala's Appeal Brief, para. 91, referring to Conviction Decision, para. 693; Mr Babala's Appeal Brief, paras 34 *et seq*.
[3345] Response, para. 587.
[3346] Response, para. 587, referring to Conviction Decision, para. 878.

other evidence, to establish his essential contribution to and knowledge of the common plan.[3347]

(c) Determination by the Appeals Chamber

1371. The Appeals Chamber considers that Mr Babala misapprehends the Trial Chamber's finding regarding his role as a financier.[3348] The Trial Chamber determined that, by effecting the payments or facilitating them through a third person, Mr Babala provided material assistance to Mr Bemba, Mr Kilolo and Mr Mangenda in their commission of the offence of corruptly influencing witnesses D-57 and D-64.[3349] The Trial Chamber found that the evidence did not support any direct or indirect link between Mr Babala and the remaining witnesses.[3350] As to Mr Babala's argument concerning the *sui generis* character of the financing of Mr Bemba's defence,[3351] the Appeals Chamber refers to its earlier findings on the matter, where it concluded that the Trial Chamber did not err in its consideration of Mr Babala's explanation of the money transfers.[3352] In the view of the Appeals Chamber, the Trial Chamber sufficiently explained its reasons for distinguishing between the money transfers to Mr Bemba's defence team that were lawful and those that were not.

1372. The Appeals Chamber further finds no merit in Mr Babala's argument on the Trial Chamber's purported failure to apply the principle of *in dubio pro reo* when making its finding at paragraph 695 of the Conviction Decision, based on words uttered in telephone conversations between him and Mr Bemba.[3353] Mr Babala misapprehends the Trial Chamber's determination with regard to the misalignment problems affecting the recordings from the Court's detention centre; he also misapplies the principle in question. The Trial Chamber, because of these irregularities,[3354] stated that it had not relied on the intercepted conversations in their entirety, "but only on selected utterances of Mr Babala and Mr Bemba, and only to

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[3347] Response, paras 587-588, referring to Conviction Decision, paras 689-703, 805-820, 878, 880-893.
[3348] *See* Conviction Decision, para. 878.
[3349] Conviction Decision, para. 878.
[3350] Conviction Decision, para. 878
[3351] Mr Babala's Appeal Brief, para. 92, referring to paras 76 *et seq*. *See also* Mr Babala's Appeal Brief, para. 94.
[3352] *See supra* paras 1344-1345.
[3353] Mr Babala's Appeal Brief, para. 92.
[3354] Conviction Decision, para. 695.

the extent that they st[ood] alone".[3355] On that basis, the Trial Chamber "noted the discrete statements of Mr Babala asking Mr Bemba for authorisation to proceed with the transfer or payment of money to Mr Kilolo".[3356] It determined, on the basis of examples of discrete statements by Mr Babala, that these statements "clearly demonstrate Mr Bemba's direct involvement and knowledge of the payments effected, including illicit payments to witnesses".[3357] Apart from disagreeing with the Trial Chamber's conclusion and maintaining, without further explanation that the statements in question related to "legal" actions,[3358] Mr Babala does not engage with the evidence relied upon by the Trial Chamber and does not show that the Trial Chamber's conclusion was unreasonable.

1373. In light of the foregoing, the Appeals Chamber rejects Mr Babala's submissions that the Trial Chamber erred in its reasoning and failed to apply the principle of *in dubio pro reo*.

4. Alleged error regarding the distortion of P-20 (D-57's) testimony

(a) Relevant part of the Conviction Decision

1374. The Trial Chamber found that witness P-20 (D-57) received a telephone call from Mr Babala in Kinshasa on the morning of 16 October 2012, shortly before he left for The Hague.[3359] In reaching this conclusion, the Trial Chamber relied on witness P-20 (D-57)'s testimony that Mr Babala, whom he did not know at the time, confirmed his name and the transfer of money to be made, and recalled that, during his testimony, witness P-20 (D-57) had "unequivocally admitted" numerous times that he noted the name of the transferor and transfer number on paper, which he gave to his wife, witness P-242.[3360] The Trial Chamber noted that witness P-20 (D-57), like his wife, first emphasised that he did not know the sender and confirmed that it was Mr Babala only after having had his memory refreshed.[3361] The Trial Chamber further relied on the fact that witness P-20 (D-57)'s evidence regarding the payment is "mutually corroborated" by other evidence, such as: (i) Mr Babala not contesting the

[3355] Conviction Decision, para. 695.
[3356] Conviction Decision, para. 695.
[3357] Conviction Decision, para. 695.
[3358] Mr Babala's Appeal Brief, para. 92.
[3359] Conviction Decision, para. 242.
[3360] Conviction Decision, para. 242.
[3361] Conviction Decision, para. 244.

16 October 2012 transfer by him, at the request of Mr Kilolo, who also admitted that the transfer occurred, from Kinshasa to the bank account of witness P-242; (ii) the relevant Western Union records; and (iii) witness P-242's testimony.[3362] It further noted that witness P-242 also testified that Mr Babala called her after she collected the money, enquiring whether she had received it.[3363]

(b) Submissions of the parties

(i) Mr Babala

1375. Mr Babala submits that, contrary to the Trial Chamber's finding that witness P-20 (D-57) "testified before this Chamber that Mr Babala, whom he did not know of at the time, confirmed his name and the transfer to be made", this witness's references to Mr Babala's telephone call on 16 October 2012 must instead be analysed taking into account the following: his testimony that he did not know who had telephoned him; that the caller had not introduced himself; that he did not know whether it was the same person that made the transfer on 16 October 2012; and that the witness recalled Mr Babala's name only once the Prosecutor showed him the name on a list, and that it was the only name on that list.[3364]

(ii) The Prosecutor

1376. The Prosecutor submits that the Trial Chamber correctly relied on the witness's identification of Mr Babala as the person to whom he spoke on 16 October 2012.[3365] In the Prosecutor's view, Mr Babala overlooks the corroborated evidence that established his role in paying witness D-57 and that he previously admitted to transferring the money to witness D-57.[3366] She also submits that Mr Babala fails to show an error in the Prosecution's questioning of the witness P-20 (D-57), as the Presiding Judge closely managed this questioning, including the process of refreshing his memory on the identity of the person who telephoned him.[3367] In her view, P-20 (D-57)'s answer established that, even if the witness did not know Mr Babala at the

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[3362] Conviction Decision, para. 243.
[3363] Conviction Decision, para. 244.
[3364] Mr Babala's Appeal Brief, para. 106, referring to Conviction Decision, para. 242 *See also* Mr Babala's Appeal Brief, paras 102-105.
[3365] Response, para. 596.
[3366] Response, para. 596, referring to Conviction Decision, paras 223, 243, 236-237.
[3367] Response, para. 597.

time of the telephone call, he was aware that the person who contacted him was, in fact, Mr Babala.[3368]

(c) Determination by the Appeals Chamber

1377. The Appeals Chamber is not convinced by Mr Babala's arguments. The Appeals Chamber observes that the Trial Chamber noted that witness P-20 (D-57) had testified that he did not know Mr Babala when he called him on 16 October 2012 and it was mindful of this fact.[3369] The Trial Chamber also explicitly referred to the fact that witness P-20 (D-57) first emphasised that "she did not know the sender [of the money] and only confirmed that it was Mr Babala after having [had] her memory refreshed".[3370] The Trial Chamber recalled that witness P-20 (D-57) "unequivocally admitted many times during his in-court testimony that he noted down the name of the transferor and transfer number on a piece of paper, which he gave to his wife, P-242".[3371] Furthermore, the Trial Chamber determined that witness P-20 (D-57)'s testimonial evidence concerning this payment is "mutually corroborated" by other evidence.[3372] In that regard, the Trial Chamber noted that Mr Babala did not contest that he had made this transfer on behalf of Mr Kilolo, and Mr Kilolo admits to it; also, the transfer was further corroborated, the Trial Chamber reasoned, by the relevant Western Union records and witness P-242's testimony.[3373]

1378. The Appeals Chamber finds that Mr Babala has not shown that the Trial Chamber's analysis of the testimony of P-20 (D-57) was unreasonable, but merely disagrees with the Trial Chamber's interpretation of the evidence. Accordingly, his arguments are rejected.

5. Alleged error concerning the principle of legality (article 22 (2) of the Statute)

(a) Relevant part of the Conviction Decision

1379. The Trial Chamber noted that the evidentiary standard of proof of beyond reasonable doubt "must be applied to establish all the facts underpinning the elements

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[3368] Response, para. 597.
[3369] Conviction Decision, para. 242.
[3370] Conviction Decision, para. 244.
[3371] Conviction Decision, para. 242.
[3372] Conviction Decision, para. 243.
[3373] Conviction Decision, para. 243.

of the particular offence and the mode of liability alleged against the accused".[3374] It noted that this evidentiary threshold under article 66 (3) is the highest in the Statute,[3375] and followed the Appeals Chamber's endorsement of the ICTR Appeals Chamber's finding that:

> The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.[3376]

1380. With regard to its methodology, the Trial Chamber specified that it holistically evaluated and weighed all evidence taken together in respect to the fact in question, and that "when [it] 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".[3377]

(b) Submissions of the parties

(i) Mr Babala

1381. Mr Babala submits that the Trial Chamber improperly reasoned by analogy[3378] and inductive reasoning,[3379] in breach of the principle of legality, which requires that criminal law provisions must be strictly construed per, *inter alia*, article 22 (2) of the Statute.[3380] He avers that this led the Trial Chamber to convict Mr Kilolo for corruptly influencing witnesses D-57 and D-64 and "remedy the absence of a fundamental constitutive element in the charges against Mr Babala, namely the element of knowledge and intent required under article 30 of the Statute".[3381] In Mr Babala's view, this was "the only way in which [the Trial Chamber] could render [his] participation in the offences against the administration of justice plausible despite his

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[3374] Conviction Decision, para. 186, referring to *Lubanga* Appeal Judgment, para. 22; Bemba Conviction Decision, para. 215; *Lubanga* Conviction Decision, para. 92. *See also* Conviction Decision, para. 185.
[3375] Conviction Decision, para. 187, referring, *inter alia*, to *Al-Senussi* OA Judgment, paras 30, 33.
[3376] Conviction Decision, para. 187, referring, *inter alia*, to *Ngudjolo* Appeal Judgment, para. 109; *Rutaganda* Appeal Judgment, para. 488.
[3377] Conviction Decision, para. 188, referring to *Bemba* Conviction Decision, para. 216; *Lubanga* Conviction Decision, para. 111.
[3378] Mr Babala's Appeal Brief, paras 127-139.
[3379] Mr Babala's Appeal Brief, paras 112-126.
[3380] Mr Babala's Appeal Brief, paras 110-111. *See also* paras 112-115, 120, 124, 139.
[3381] Mr Babala's Appeal Brief, para. 115.

exclusion from the common plan".[3382] In support of his submissions, Mr Babala argues that the Trial Chamber erred by drawing inferences based on patterns concerning Mr Kilolo's conduct in respect of witnesses other than witnesses D-57[3383] and D-64.[3384]

1382. Concerning the Trial Chamber's reasoning by analogy, Mr Babala submits that the Trial Chamber erroneously relied on the 20 October 2013 telephone conversation between him and Mr Kilolo that occurred after the testimony of witnesses P-20 (D-57) and P-243 (D-64), to infer that he was aware of the illicitness of the money transfers subsequently effected.[3385] Mr Babala contends that the Trial Chamber erroneously reasoned by inference in its analysis of the coded language used by him and Mr Bemba during their conversations.[3386] Mr Babala submits that, in light of the foregoing deficiencies, the Trial Chamber's conclusion in respect of his knowledge and intent to contribute to the corrupt influencing of witnesses is unreasonable.[3387]

(ii) The Prosecutor

1383. The Prosecutor responds that Mr Babala misunderstands the purpose of article 22 (2) of the Statute and the principle of legality, and disregards the Trial Chamber's ability to draw inferences from circumstantial evidence.[3388] She avers that article 22 (2) of the Statute does not regulate the type of evidence, direct or circumstantial, that the Trial Chamber needs to support its findings or the way in which it has to reach its findings[3389] The Prosecutor maintains that whilst this "provision sets out the parameters or statutory limits of crimes and offences, it does not govern how a Chamber must assess the evidence before it".[3390]

[3382] Mr Babala's Appeal Brief, para. 115.
[3383] Mr Babala's Appeal Brief, paras 116-119, 133, referring to Conviction Decision, paras 239, 250, 251.
[3384] Mr Babala's Appeal Brief, paras 121, 122, 135, referring to Conviction Decision, paras 272, 277, 278. Mr Babala's submission that there is no evidence in support of the Trial Chamber's finding that he was aware of the internal details of the Main Case (Mr Babala's Appeal Brief, para. 126) is addressed in section. *See supra* paras 1427 *et seq*.
[3385] Mr Babala's Appeal Brief, para. 136, referring to Conviction Decision, paras 890-893.
[3386] Mr Babala's Appeal Brief, para. 126, referring to paras 95 *et seq*.
[3387] Mr Babala's Appeal Brief, para. 139.
[3388] Response, paras 599-600.
[3389] Response, para. 600.
[3390] Response, para. 600.

1384. Further, the Prosecutor avers that the Trial Chamber is permitted to make findings based on circumstantial evidence, provided that there is "only one reasonable conclusion to be drawn".[3391] She submits that the Conviction Decision is consistent with the case law to this effect and that the Trial Chamber correctly applied the standard of proof beyond reasonable doubt provided under article 66 (3) of the Statute, including in its assessment of patterns of evidence in relation to witnesses P-20 (D-57) and P-243 (D-64).[3392] In her view, Mr Babala simply disagrees with the Trial Chamber's approach and fails to show any error.[3393] The Prosecutor adds that the Trial Chamber's inferences that are based on patterns of evidence in relation to witnesses P-20 (D-57) and P-243 (D-64) challenged by Mr Babala are "well supported by the facts".[3394]

(c) Determination by the Appeals Chamber

1385. The Appeals Chamber considers that Mr Babala misapprehends the principle of legality and the manner it has been incorporated in article 22 (2) of the Statute. As the Prosecutor correctly points out,[3395] this principle relates to the interpretation of elements of the crimes and offences under the Court's jurisdiction.[3396] Thus, the principle of strict construction is unrelated to the issues raised by Mr Babala under this ground of appeal, as they relate to the Trial Chamber's assessment of the evidence.

1386. To the extent that Mr Babala appears to argue that, in making factual findings, a trial chamber may not rely on circumstantial evidence,[3397] the Appeals Chamber finds this argument to be unpersuasive. As already indicated above, nothing in the statutory framework prevents a trial chamber from drawing inferences based on circumstantial evidence;[3398] nor does the standard of proof beyond reasonable doubt or the principle *in dubio pro reo* require that such evidence be excluded. The Appeals Chamber notes

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[3391] Response, para. 601, referring to Conviction Decision, para. 188.
[3392] Response, paras 601-602, referring to Conviction Decision, paras 185, 188, 221, 250, 251, 277, 278, 302, 366, 401, 409, 502.
[3393] Response, para. 602.
[3394] Response, para. 603, referring to paras 562-573.
[3395] Response, paras 599-600.
[3396] Article 22 (2) of the Statute provides as follows: "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".
[3397] Mr Babala's Appeal Brief, paras 112-139.
[3398] *See supra* para. 868.

that the Trial Chamber was well aware of this standard,[3399] and thus dismisses Mr Babala's argument.

1387. As to Mr Babala's contention that the coded language used by him and Mr Bemba in their telephone conversations was to ensure the confidentiality of political discussions,[3400] the Appeals Chamber notes he fails to identify and substantiate any error by the Trial Chamber.

1388. Accordingly, the Appeals Chamber rejects Mr Babala's arguments.

6. Alleged violation of the principle of legality resulting from an extensive interpretation of article 25 (3) (c) of the Statute

(a) Relevant part of the Conviction Decision

1389. As to the objective elements of the mode of liability of aiding, abetting or otherwise assisting the commission of a crime (article 25 (3) (c) of the Statute), the Trial Chamber found, *inter alia*, that the "assistance may be given before, during or after the offence has been perpetrated", citing jurisprudence from the ICTY and ICTR in support.[3401]

1390. In relation to the subjective elements of article 25 (3) (c) of the Statute, the Trial Chamber noted that the phrase "[f]or the purpose of facilitating the commission of such crime" in that provision "introduces a higher subjective mental element and means that the accessory must have lent his or her assistance with the aim of facilitating the offence", and that it "is not sufficient that the accessory merely knows that his or her conduct will assist the principal perpetrator in the commission of the offence".[3402]

1391. The Trial Chamber found further:

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

[3399] Conviction Decision, paras 185-188.
[3400] Mr Babala's Appeal Brief, paras 95, 126, 308.
[3401] Conviction Decision, para. 96.
[3402] Conviction Decision, para. 97.

> the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements.[3403]

1392. In support of the last finding, the Trial Chamber referred to jurisprudence of the ICTY, ICTR and SCSL.

(b) Submissions of the parties

(i) Mr Babala

1393. Mr Babala submits that the Trial Chamber's interpretation of article 25 (3) (c) of the Statute was erroneous. He argues that the Trial Chamber erred when it found that assistance may be given before, during or after the offence has been committed, questioning that this finding can be reconciled with the requirement that the aider or abettor acted "[f]or the purpose of facilitating the commission of such a crime".[3404] In his view, this means that the assistance must occur before the offence or crime is committed.[3405] He notes that the statutes of other international tribunals do not contain provisions comparable to article 25 (3) (c) of the Statute and argues that, therefore, the Trial Chamber's reliance on their jurisprudence was erroneous.[3406]

1394. Mr Babala also challenges the Trial Chamber's finding that it was not necessary that the aider or abettor knew the "precise offence which was intended and which in the specific circumstances was committed", as long as he or she was aware of the essential elements,[3407] arguing that article 25 (3) (c) of the Statute refers to specific offences or crimes and not to "essential elements of criminality in general".[3408] He argues that article 30 of the Statute does not standardise the mental element for all crimes and offences under the Statute and that intent is not the same for all crimes, separated only into *dolus directus* in the first and second degrees, which, he submits, are "in fact the variants of general intent".[3409] With reference to academic writings, he submits that the mental element is specific to each crime.[3410] He submits that:

[3403] Conviction Decision, para. 98 (footnote omitted).
[3404] Mr Babala's Appeal Brief, para. 168.
[3405] Mr Babala's Appeal Brief, para. 168.
[3406] Mr Babala's Appeal Brief, para. 169.
[3407] Conviction Decision, para. 98.
[3408] Mr Babala's Appeal Brief, para. 148.
[3409] Mr Babala's Appeal Brief, para. 151.
[3410] Mr Babala's Appeal Brief, paras 152-156.

> [t]he offence of corruptly influencing a witness requires specific intent to the extent that the purpose of the material act […] is to persuade others either to provide false oral evidence under oath, false statements or false written attestations, or to refrain from providing oral evidence under oath, statements or written attestations.[3411]

1395. Thus, he argues, the Trial Chamber was required to establish that:

> Mr Babala was aware of (1) the transfer beneficiaries' status as witnesses; (2) the subjects of their testimony before the Court; (3) the timing of their testimony; and (4) the false oral evidence under oath, false statements or false written attestations that the witnesses were going to provide.[3412]

(ii) The Prosecutor

1396. The Prosecutor responds that Mr Babala's argument that the Trial Chamber erred in its interpretation of article 25 (3) (c) of the Statute, requiring the accessory to know the "essential elements" of the offence, instead of the specific offence that was intended and that in the specific circumstances was committed, misstates the law.[3413] In her view,

> [a]iding 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.[3414]

1397. The Prosecutor recalls that the Trial Chamber found this to be the case: "that Babala lent his assistance with the aim of facilitating the offences of corruptly influencing [witnesses D-57 and D-64]", and that "[he] was aware that the payments were illegitimate and aimed at altering and contaminating the witnesses' testimony", "based on his regular exchanges with Bemba and Kilolo, in particular his role as financier".[3415] In her view, article 70 (1) (c) of the Statute does not require that false testimony or a false declaration be obtained.[3416] Further in her view, on the facts, by

[3411] Mr Babala's Appeal Brief, para. 157 (emphasis in original).
[3412] Mr Babala's Appeal Brief, para. 163.
[3413] Response, para. 605, referring to Conviction Decision, para. 98.
[3414] Response, para. 605, referring to Conviction Decision, paras 97-98.
[3415] Response, para. 605, referring, *inter alia*, to Conviction Decision, para. 893.
[3416] Response, para. 605, referring to Conviction Decision, para. 48.

making concealed payments through third parties, "Babala participated in concealing the witnesses' links with the Main Case Defence.[3417]

1398. The Prosecutor further submits that Mr Babala's argument that it is not sufficient if the accessory is aware of only the "essential elements of the principal perpetrator's offence" is contrary to established criminal jurisprudence, and that his reliance on academic treaties is inapposite.[3418] She avers that article 25 (3) (c) does not contain "*dolus specialis*".[3419] She contends that the Trial Chamber "was not obliged to make the detailed findings that Babala suggests".[3420] Finally, the Prosecutor submits that this analysis was also consistent with the Trial Chamber's findings that the assistance pursuant to article 25 (3) (c) may be given before or during the commission of the crime or offence in question, and thereafter, which is also "well supported by international criminal jurisprudence".[3421]

(c) Determination by the Appeals Chamber

1399. The first issue raised by Mr Babala is whether the Trial Chamber erred when it found that the assistance by the aider or abettor may not only be given before or during the commission of the crime or offence in question, but also thereafter.[3422] The Appeals Chamber agrees that assistance offered after the commission of the crime or offence may give rise to liability under article 25 (3) (c) of the Statute. Indeed, and as reflected in some of the jurisprudence upon which the Trial Chamber relied, if there was a prior offer of assistance or an agreement between the principal perpetrator and the accessory that the latter would lend assistance after the commission of the crime or offence, that conduct can be said to have amounted to assistance in the commission of the crime because the principal perpetrator committed it, knowing that he or she would receive assistance in the aftermath.[3423] At least in such circumstances, the Appeals Chamber does not see any incompatibility between assistance that is provided after the commission of the crime or offence and the requirement under

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[3417] Response, para. 605, referring to Conviction Decision, paras 245, 272.
[3418] Response, para. 606, referring to Conviction Decision, para. 98
[3419] Response, para. 606.
[3420] Response, para. 607.
[3421] Response, para. 608, referring to Conviction Decision, para. 96.
[3422] Conviction Decision, para. 96.
[3423] *See* *Sesay* Trial Chamber Judgment, para. 278; *Nuon Chea Khieu Samphân* Trial Judgment, paras 712, 713, referring to *Blaškić* Appeal Judgment, para. 48; *Taylor* Trial Judgment, para. 484.

article 25 (3) (c) of the Statute that the accessory act "[f]or the purpose of facilitating the commission of such a crime". Thus, the Trial Chamber did not err and the Appeals Chamber rejects Mr Babala's argument.

1400. The Appeals Chamber notes that Mr Babala also argues that the Trial Chamber erred when it found that it was not necessary for the accessory to "know the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements".[3424] The Appeals Chamber recalls that article 25 (3) (c) of the Statute requires that the aider and abettor act "[f]or the purpose of facilitating the commission of […] a crime". However, this does not mean that the aider and abettor must know all the details of the crime in which he or she assists. A person may be said to be acting for the purpose of facilitating the commission of a crime, even if he or she does not know all the factual circumstances in which it is committed. Thus, Mr Babala's argument is rejected.

1401. Accordingly, the Appeals Chamber rejects Mr Babala's arguments relating to the Trial Chamber's interpretation of article 25 (3) (c) of the Statute.

7. Alleged reversal of burden of proof regarding the use of a "privileged line"

(a) Relevant part of the Conviction Decision

1402. When considering the abuse of the "privileged line" at the Court's detention centre, the Trial Chamber found, *inter alia*, that Mr Bemba communicated with Mr Babala using a Congolese telephone number ending with [redacted], which the Court's detention centre listed as belonging to Mr Kilolo (and therefore entitled to privilege).[3425] The Trial Chamber found that "this telephone number actually belonged to Mr Babala, who was not entitled to a privileged – and thus unmonitored – line with Mr Bemba".[3426] To make this finding, the Trial Chamber relied on the contact list extracted from a SIM card that the Trial Chamber found belonged to Mr Kilolo.[3427] The Trial Chamber rejected Mr Babala's argument that calls from the telephone number ending with [redacted] may have been forwarded to another telephone

[3424] Conviction Decision, para. 98.
[3425] Conviction Decision, para. 738.
[3426] Conviction Decision, para. 738.
[3427] Conviction Decision, paras 738, 739.

number used by Mr Kilolo, noting that this was "purely speculative" and that the "Babala Defence does not present any evidence to corroborate this claim".[3428] The Trial Chamber also rejected Mr Babala's argument that the SIM card cannot be attributed to Mr Kilolo, noting that the Independent Counsel had indicated that the SIM card had been obtained from the Belgian authorities in a sealed manner and that they had indicated that Mr Kilolo was its owner; the Trial Chamber also recalled that members of the Registry were present when the SIM card was unsealed.[3429]

(b) Submissions of the parties

(i) Mr Babala

1403. Mr Babala submits that the Trial Chamber's finding reverses the burden of proof.[3430] He recalls his submissions and evidence before the Trial Chamber as well as those of Mr Bemba, and the testimony of an expert called by the Prosecutor, and avers that the Trial Chamber ignored these submissions and evidence in favour of the Prosecutor's claims that the telephone number ending with [redacted] belonged to him.[3431] He submits that there is no evidence that he used this telephone number to talk to Mr Bemba; nor is the content of any such conversations known.[3432] In his view, the Trial Chamber reversed the burden of proof and forced him to demonstrate how the number was used, therefore violating his rights.[3433]

(ii) The Prosecutor

1404. The Prosecutor responds that Mr Babala's argument that the Trial Chamber reversed the burden of proof concerning the telephone number ending with [redacted] does not impact on the Conviction Decision.[3434] She avers that the Trial Chamber "expressly addressed and rejected" his arguments that it was not possible to attribute the SIM card to Mr Kilolo from which the [redacted] number was extracted, and that the telephone calls to this number were forwarded to Mr Kilolo.[3435] In her view, Mr Babala disregards the Trial Chamber's findings that the authenticity of the SIM

[3428] Conviction Decision, para. 739.
[3429] Conviction Decision, para. 739.
[3430] Mr Babala's Appeal Brief, paras 209 *et seq*.
[3431] Mr Babala's Appeal Brief, paras 210-211.
[3432] Mr Babala's Appeal Brief, para. 215.
[3433] Mr Babala's Appeal Brief, paras 217-218.
[3434] Response, para. 618, referring to Conviction Decision, para. 884.
[3435] Response, para. 618, referring to Conviction Decision, para. 739.

card, and Mr Kilolo's ownership thereof, was established.[3436] Finally, the Prosecutor submits that as the Trial Chamber's finding on the use of the telephone number ending with [redacted] did not affect the factual basis of his convictions, it was therefore not decisive for his convictions.[3437]

(c) Determination by the Appeals Chamber

1405. The Appeals Chamber refers to its discussion of arguments presented by Mr Bemba in respect of the finding regarding the [redacted] number.[3438] The Appeals Chamber recalls that, contrary to Mr Babala's assertion, there was evidence on the record that connected him to the telephone number ending with [redacted]. Notably, the SIM card, which the Trial Chamber found belonged to Mr Kilolo, listed this number under his family name.[3439] As summarised above, the Trial Chamber explained how it reached its finding as to the ownership of the SIM card and attribution of the number to Mr Babala. The arguments Mr Babala raises on appeal merely repeat submissions that he had made before the Trial Chamber, but fail to engage with the Trial Chamber's findings and do not demonstrate that they were unreasonable.

1406. The Appeals Chamber is not persuaded that the Trial Chamber reversed the burden of proof and required Mr Babala to establish the facts; rather, the Trial Chamber analysed the evidence and arguments put before it and reached a decision on that basis. In particular, the Appeals Chamber does not consider that it was inappropriate that the Trial Chamber rejected as speculative Mr Babala's claim that calls may have been forwarded between the number ending with [redacted] and another number belonging to Mr Kilolo, noting that he had not presented any argument in support of this claim.[3440] While the burden to prove the guilt of an accused person is on the Prosecutor,[3441] this does not mean that a trial chamber is required to give credence to any argument that is advanced by an accused without any substantiation

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[3436] Response, para. 618, referring to Conviction Decision, para. 739. *See also* Response, para. 618, referring to Conviction Decision, paras 738, 744-745, 885.
[3437] Response, para. 619, referring to Conviction Decision, paras 882, 884, 885, 887, 892.
[3438] *See supra* paras 1048-1051.
[3439] The Appeals Chamber notes that in the contact list relied upon by the Trial Chamber, the number ending in [redacted] is listed as belonging to "*Babala bis*", while another Congolese number is listed as "*Babala*" and two French numbers are listed as "*Babala paris*". *See* CAR-OTP-0090-1872, pp. 1873-1874. *See also* Conviction Decision, para. 738.
[3440] Conviction Decision, para. 739.
[3441] *See* article 66 (2) of the Statute.

to support it, unless the Prosecutor presents evidence that contradicts the argument advanced.

1407. Accordingly, the Appeals Chamber rejects Mr Babala's arguments

8. Arguments challenging the Trial Chamber's finding that the requisite mental element was established

1408. Mr Babala raises several arguments that challenge in one way or another the Trial Chamber's finding that the requisite mental element was established beyond reasonable doubt. The Appeals Chamber shall address these arguments together, given that they are connected and often repetitive.

(a) Relevant part of the Conviction Decision

1409. The Trial Chamber concluded that "Mr Babala, by effecting money transfers to [witnesses D-57 and D-64], knew they were aimed at contaminating these witnesses' testimony and intentionally aided Mr Kilolo in corruptly influencing the two witnesses".[3442] It found that Mr Babala made money transfers to witness D-57's wife and witness D-64's daughter "knowing that the payments were made for illegitimate purposes".[3443] This conclusion was based on earlier findings that Mr Babala knew "that the money was used as an incentive to make the witnesses testify in favour of Mr Bemba".[3444] Specifically in relation to witness D-57, the Trial Chamber found that Mr Babala was "[a]ware of the exact circumstances and Mr Kilolo's motivation for the money transfer".[3445] In this regard, the Trial Chamber also found that there had been a telephone call between Mr Kilolo and the witness, during which the former had informed the latter that he would send him some money,[3446] that this money was "to motivate [the witness] to testify to particular matters in favour of Mr Bemba before Trial Chamber III",[3447] and that, on 16 October 2012, Mr Babala had called the witness to give him the information necessary to collect the money through Western Union.[3448] The Trial Chamber found that "this course of events demonstrates the close

[3442] Conviction Decision, para. 936.
[3443] Conviction Decision, para. 936.
[3444] Conviction Decision, para. 879.
[3445] Conviction Decision, para. 115. *See also* para. 254.
[3446] Conviction Decision, para. 238.
[3447] Conviction Decision, para. 240.
[3448] Conviction Decision, para. 242.

coordination between Mr Kilolo and Mr Babala in relation to witness contact and payments".[3449]

1410. In relation to witness D-64, the Trial Chamber noted that, also on 16 October 2016, in the course of a telephone conversation between Mr Babala and Mr Bemba, the two co-accused,

> discussed […] the importance of payments to witnesses shortly before their testimony at the Court alluding to the fact that these payments were aimed at securing certain testimony. Mr Babala told Mr Bemba, *'C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien'*. With this, Mr Babala referred to the payment of USD 665 made earlier that day to D-57's wife, suggesting that the payment [to witness D-64] should be the same amount.[3450]

1411. The Trial Chamber also found that an employee of Mr Babala had transferred a total of USD 700 the following day to witness P-243 (D-64)'s daughter, and that "Mr Babala had instructed him to do so in consultation with Mr Kilolo, knowing that the money was being paid to motivate the witness to give certain testimony".[3451] The Trial Chamber also analysed the transcript of the conversation between Mr Bemba and Mr Babala on 16 October 2012, including the Trial Chamber's understanding of the phrase "*la même chose comme aujourd'hui*" ("it's the same thing as for today") and "*donner du sucre*" ("give sugar") as referring to Mr Babala's payment of money to witness P-20 (D-57)'s wife on the same day.[3452]

1412. The Trial Chamber found that Mr Babala "lent his assistance with the aim of facilitating the offences of corruptly influencing witnesses D-57 and D-64" and that he was "aware that the payments were illegitimate and aimed at altering and contaminating the witnesses' testimony".[3453] This finding was based, first, on Mr Babala's "*donner du sucre aux gens*" ("give people sugar") statement during the telephone conversation between Mr Bemba and Mr Babala on 16 October 2012.[3454]

[3449] Conviction Decision, para. 242.
[3450] Conviction Decision, para. 117.
[3451] Conviction Decision, para. 118. *See also* para. 281.
[3452] Conviction Decision, para. 267.
[3453] Conviction Decision, para. 893.
[3454] Conviction Decision, para. 882. The Appeals Chamber notes that the date of the conversation given at this paragraph (17 October 2012) is incorrect. However, it is of the view that this typographical error is without consequence.

Second, the Trial Chamber relied upon Mr Babala's regular contact with Mr Bemba, including by abusing the "privileged line" at the Court's detention centre, during which codes were used and during which "Mr Babala actually underlined to Mr Bemba the importance of paying certain witnesses (in this case, D-57 and D-64) in connection with their testimonies in court".[3455] Third, the Trial Chamber found that the evidence must be "viewed in the light of the fact that Mr Babala was aware – to some extent – of internal details of the Main Case, including the identity of witnesses, and arranged or effected money transfers to the co-accused and other persons".[3456] Fourth, the Trial Chamber "found revealing Mr Babala's interactions with the co-perpetrators on 17 and 22 October 2013, when they became aware that they were the subject of investigation".[3457]

1413. The Trial Chamber noted in this regard Mr Babala's statements regarding the need for "*après-vente*" service ("after sale service"), (according to the Trial Chamber, further contact with, and, if necessary, payments to defence witnesses).[3458] The Trial Chamber found that these interactions "show that Mr Babala was aware of the purpose of the payments in October 201[2] to Mr Kilolo and, in turn, the purpose of the payments to D-57 and D-64", and that he was also "aware of the status of D-57 and D-64 as Main Case Defence witnesses" and "well acquainted with the use of code for internal communications among the accused concerning Main Case matters".[3459] Fifth, the Trial Chamber noted Mr Babala's statement during a conversation on 22 October 2013 that, as financier, he had taken risks, which "further highlights his awareness" and "indicates that he was aware of his involvement in illicit witness payments of D-57 and D-64 and feared negative repercussions".[3460]

[3455] Conviction Decision, para. 884.
[3456] Conviction Decision, para. 885.
[3457] Conviction Decision, para. 886.
[3458] Conviction Decision, paras 887-891.
[3459] Conviction Decision, para. 890.
[3460] Conviction Decision, para. 892.

(b) Submissions of the parties

(i) Lack of evidence for findings on knowledge

(a) Mr Babala

1414. Mr Babala repeatedly argues that there was no evidence that, when he effected the money transfers to witnesses D-57 and D-64, he knew that Mr Kilolo intended to corruptly influence these witnesses and that the payments were for that purpose.[3461] At times he makes this argument in support of a broader point, such as the alleged violation of the principle of legality,[3462] of the burden of proof,[3463] of the "'beyond reasonable doubt' standard",[3464] or of "hermeneutic errors" on the part of the Trial Chamber.[3465]

1415. Mr Babala submits that the Trial Chamber's finding at paragraph 115 of the Conviction Decision, that he was "[a]ware of the exact circumstances and Mr Kilolo's motivation for the money transfer" was not justified and notes that the Trial Chamber did not cite evidence in support of it; he also recalls that the Trial Chamber acknowledged that it did not have "intercepts of the communications between Mr Babala and Mr Kilolo".[3466] He argues that it was insufficient for the Trial Chamber to merely assert, at paragraph 254 of the Conviction Decision, that he knew that witness D-57 was a witness, had been called to testify, of the untruthful testimony the witness would give before Trial Chamber III, and that he had acted to assist Mr Kilolo.[3467] He makes a similar argument in relation to the Trial Chamber's finding at paragraph 272 of the Conviction Decision that, regarding witness D-64, Mr Kilolo and Mr Babala "arranged the money transfer in a manner intended to conceal any link between the witness and the Main Case Defence" [3468]

1416. Mr Babala argues further that he had made several payments on behalf of Mr Kilolo and that the Trial Chamber erroneously placed the burden on him to prove

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[3461] Mr Babala's Appeal Brief, paras 164-167, 174-177, 178-182, 200-204, 230-232, 245, 272, 286-291, 297. *See also* para. 247.
[3462] *See* Mr Babala's Appeal Brief, paras 174 *et seq*.
[3463] *See* Mr Babala's Appeal Brief, paras 200 *et seq*.
[3464] *See* Mr Babala's Appeal Brief, p. 88, paras 220 *et seq*.
[3465] *See* Mr Babala's Appeal Brief, p. 110, paras 271, 272.
[3466] Mr Babala's Appeal Brief, paras 165-166.
[3467] Mr Babala's Appeal Brief, para. 178.
[3468] Mr Babala's Appeal Brief, paras 180-182.

the lawfulness of the payments.[3469] He avers that there was no evidence that he knew the status of witnesses D-57 and D-64, the dates they would testify before Trial Chamber III, or the subjects of their testimony.[3470] He recalls the finding of the Trial Chamber that he was not part of the common plan, which, in his view, was in any event only putative, and argues that, therefore, "he could not have been fully aware that he was in any way aiding a fraudulent process whose existence details he knew nothing about".[3471] He submits that none of the witnesses before the Trial Chamber stated that he had talked to them about the purpose of the payments, and that the conversations between witnesses D-57 and D-64 and Mr Kilolo do not demonstrate that the witnesses intended to give false evidence once the money had been transferred to them.[3472]

1417. Furthermore, Mr Babala avers that there was no evidence that he knew of Trial Chamber III's prohibition of witness coaching and the Trial Chamber's decision to that effect.[3473] In addition, Mr Babala argues that the Trial Chamber's findings regarding his knowledge "that the transfer he made was intended to facilitate Mr Kilolo's commission of the offence of corruptly influencing witnesses [D-57 and D-64]" were insufficiently reasoned.[3474]

(b) The Prosecutor

1418. The Prosecutor responds that the Trial Chamber "correctly assessed the evidence with respect to Babala's *mens rea*", and that it "drew the only reasonable conclusion".[3475] In particular, she submits that the Trial Chamber established his *mens rea* on the basis, *inter alia*, of: "his advising Bemba to make payments to witnesses, for which Mr Bemba would see the benefit";[3476] his "resort to using coded language to communicate this message to Bemba", which further underscored the illicit nature of these payments and Mr Babala's knowledge thereof; his admission to transferring the money to witnesses D-57 and D-64 shortly before their testimony and his awareness

[3469] Mr Babala's Appeal Brief, para. 200.
[3470] Mr Babala's Appeal Brief, para. 230.
[3471] Mr Babala's Appeal Brief, para. 243.
[3472] Mr Babala's Appeal Brief, para. 245.
[3473] Mr Babala's Appeal Brief, para. 272, referring to Conviction Decision, paras 84, 86; *Bemba* Witness Preparation Decision; *Bemba* Familiarisation Protocol.
[3474] Mr Babala's Appeal Brief, para. 263.
[3475] Response, para. 611, referring to Conviction Decision, paras 882-893.
[3476] Response, para. 611, referring to Conviction Decision, para. 882.

at that time of their status as witnesses;[3477] and his interaction with the co-perpetrators on 17 and 22 October 2013, which provided further support for the Trial Chamber's finding that he "agreed to ensure that any prior illicit payment to D-57 and D-64 would not be detected" (his understanding of his role as financier to Mr Bemba and his advice to provide "after-sales service" to the witnesses who had testified).[3478] The Prosecutor further submits that Mr Babala's assertion in respect of the absence of evidence between him and Mr Kilolo at the time of the money transfers is immaterial, as their close interaction is established by "the timing of the telephone calls and Babala's payments" to the witnesses in question, and "the communication between Babala and Kilolo in October 2013 after they became aware that they were the subject of an investigation".[3479]

1419. In respect of Mr Babala's knowledge, the Prosecutor argues that he "provides alternative interpretations of the evidence or simply disagrees with the Chamber's findings", are unsupported claims, and do not demonstrate that the Trial Chamber materially erred.[3480] In her view, as an accessory to an offence under article 70 (1) (c) of the Statute, Mr Babala need not have known the details of witness D-57's false testimony or the level of detailed knowledge of the testimony of witnesses D-57 or D-64 that he otherwise suggests.[3481] In her view, that the Trial Chamber found that he was aware, to some extent, of internal details of the Main Case, including the identities of witnesses in particular, sufficed.[3482] She avers that "[t]he 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", assessed on the basis of the evidence in its entirety.[3483]

[3477] Response, para. 611, referring to Conviction Decision, para. 885.
[3478] Response, para. 611, referring to Conviction Decision, paras 886-889, 891.
[3479] Response, para. 612, referring to Mr Babala's Appeal Brief, paras 178-182; Conviction Decision, paras 235-244, 262-271, 888.
[3480] Response, para. 613.
[3481] Response, para. 614.
[3482] Response, para. 614.
[3483] Response, para. 614, referring to paras 604-608; Conviction Decision, paras 885-886.

(ii) Arguments related to findings on coded language

(a) Mr Babala

1420. At various points in Mr Babala's Appeal Brief, he argues that the Trial Chamber erred in respect of the coded language that was used in conversations between him and Mr Bemba.[3484] Notably, he submits that the Trial Chamber erred when it rejected as irrelevant decisions of Pre-Trial Chambers II and III that had found that Mr Babala and Mr Bemba had used coded language since the beginning of the latter's detention.[3485] He argues that this constituted evidence that the use of coded language was not, *per se*, an indication of "an attempt to conceal the corrupt influencing of witnesses".[3486] According to Mr Babala, the Trial Chamber violated rule 136 of the Rules because it "refuted the submissions on the basis of arguments that were relevant solely to Mr Kilolo and Mr Mangenda".[3487] He further challenges whether the Trial Chamber had identified any conversation between Mr Bemba and him in which they had used coded language, noting that the Trial Chamber had found that conversations recorded at the Court's detention centre were unreliable.[3488] In his submission, even if he had used coded language, this would not establish intent to hide illegal activities.[3489]

1421. Mr Babala maintains further that the Trial Chamber did not establish that the phrase "*C'est la même chose comme pour aujourd'hui. Faire du sucre aux gens, vous verrez que c'est bien*" related to witnesses D-57 and D-64.[3490] He argues that the Trial Chamber failed to analyse this phrase properly.[3491] He recalls that the Trial Chamber did not know the content of the conversations between him and Mr Kilolo or between him and Mr Bemba regarding the two witnesses and that the Trial Chamber failed to establish that its conclusion based on the phrase was the only reasonable one.[3492] He also submits that "no logical connection can be drawn between D-57's and D-64's testimonies and the '*sucre* [sugar]'" and "no possible link between these two

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[3484] *See* Mr Babala's Appeal Brief, paras 95-99, 205-208, 227, 229, 237-242, 249-250, 264-266, 293.
[3485] Mr Babala's Appeal Brief, paras 95-96.
[3486] Mr Babala's Appeal Brief, para. 96.
[3487] Mr Babala's Appeal Brief, para. 97.
[3488] Mr Babala's Appeal Brief, para. 98.
[3489] Mr Babala's Appeal Brief, para. 99.
[3490] Mr Babala's Appeal Brief, paras 206-208.
[3491] Mr Babala's Appeal Brief, para. 227.
[3492] Mr Babala's Appeal Brief, para. 229.

witnesses and the '*service-après-vente* [after-sales service']".[3493] He notes that there were also other witnesses whom he had paid at Mr Kilolo's request, and that the Trial Chamber's reasoning would also apply to those, which, however, would be unreasonable.[3494] As to the phrase "*service après-vente*", he argues that it concerned the so-called "false scenario", and not the concealment of illegal activities.[3495]

1422. Mr Babala argues further that the phrase "*C'est la même chose comme pour aujourd'hui. Faire du sucre aux gens, vous verrez que c'est bien*", ("It's the same as for today. You'll see that it's good to give people sugar") could relate to "Whisky" or [redacted], who were also mentioned in the conversation, instead of to witnesses D-57 and D-64, and that the Trial Chamber failed to analyse properly another phrase in that conversation.[3496] Mr Babala avers that the Trial Chamber's interpretation of the coded language was insufficiently reasoned.[3497] Finally, Mr Babala submits that the Trial Chamber did not apply caution when interpreting the conversation between him and Mr Bemba on 16 October 2012 and drew unjustifiable inferences.[3498]

(b) The Prosecutor

1423. The Prosecutor responds that Mr Babala's argument that his use of coded language is not criminal disregards the Trial Chamber's basic findings.[3499] The Prosecutor submits that, the Trial Chamber, after having explicitly rejected the suggestion that Mr Bemba and Mr Babala used coded language to discuss political matters in the DRC, correctly inferred Mr Babala's *mens rea* from, *inter alia*, his use of coded language, including about Main Case issues.[3500] With regard to Mr Babala's submission regarding rule 136, the Prosecutor avers that the Trial Chamber properly found that Mr Babala used coded language regarding an illicit payment to P-20 (D-57)'s wife, as well as in discussions with Mr Kilolo, during the remedial measures, after having become aware of an initiation of an investigation.[3501] In the Prosecutor's view, to establish the common plan, "[t]he Trial Chamber was thus allowed to fully

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[3493] Mr Babala's Appeal Brief, para. 236.
[3494] Mr Babala's Appeal Brief, para. 237.
[3495] Mr Babala's Appeal Brief, para. 240.
[3496] Mr Babala's Appeal Brief, para. 250.
[3497] Mr Babala's Appeal Brief, paras 264-266.
[3498] Mr Babala's Appeal Brief, paras 293.
[3499] Response, para. 589.
[3500] Response, para. 589.
[3501] Response, para. 590.

and comprehensively assess the actions of [Mr Bemba, Mr Kilolo, and Mr Mangenda] in light of Mr Babala's conduct, and *vice-versa*".[3502]

1424. With respect to Mr Babala's argument that the Trial Chamber erred in disregarding the decisions of the Pre-Trial Chamber, the Prosecutor notes that Mr Babala only references his closing submissions and that, in any event, the Trial Chamber correctly found that the Registry and Pre-Trial Chambers decisions from 2008 and 2009 were inapposite.[3503]

(iii) Arguments related to finding on knowledge of internal details of the Main Case

(a) Mr Babala

1425. Mr Babala submits that the Trial Chamber erred when it found that he had knowledge, to some extent, of details of the defence in the Main Case, because there was no evidence to support this finding.[3504] Mr Babala avers that the Trial Chamber's references in support of its finding relate to Mr Bemba's involvement in the common plan and concern Mr Babala requesting Mr Bemba's permission to perform money transfers, which, however, does not indicate that Mr Babala knew any internal details of the Main Case.[3505] Therefore, in his view, there was no evidential basis for the Trial Chamber's finding.[3506] He further submits that the Trial Chamber erred in law by failing to provide reasons for its finding that he knew about the identity or status of witnesses D-57 and D-64, to whom he transferred money.[3507] He maintains that, in so finding, the Trial Chamber violated the presumption of innocence and the principle of *in dubio pro reo*.[3508]

(b) The Prosecutor

1426. The Prosecutor responds that Mr Babala simply disagrees with the Trial Chamber's findings that he had knowledge of internal details of the Main Case, including witnesses' names, and that his argument that it erred in fact should be

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[3502] Response, para. 591.
[3503] Response, para. 592, referring to Conviction Decision, para. 749.
[3504] Mr Babala's Appeal Brief,, paras 100-101, referring, *inter alia*, to Conviction Decision, para. 885.
[3505] Mr Babala's Appeal Brief, para. 100, referring to Conviction Decision, paras 695-697, 885.
[3506] Mr Babala's Appeal Brief, para. 101.
[3507] Mr Babala's Appeal Brief, para. 101.
[3508] Mr Babala's Appeal Brief, para. 101. *See also* para. 105.

dismissed.[3509] In that regard, the Prosecutor states that Mr Babala admitted that he had contact with witnesses D-57 and D-64 and that the evidence that he was transferring money in witness D-57's wife's name and his instructions to witness P-272 to send money to witness D-64's daughter necessarily implies that he knew the identities of witnesses D-57 and D-64, and was thus aware of their status as witnesses in the Main Case.[3510] In the Prosecutor's view, the Trial Chamber correctly inferred Mr Babala's knowledge of D-57's and D-64's status as witnesses in the Main Case from his telephone conversation with Mr Bemba on 16 October 2012, where Mr Babala referred, in coded language, to the illicit payment that he had made to witness D-57's wife earlier that day.[3511]

(c) Determination by the Appeals Chamber

1427. The Appeals Chamber notes that Mr Babala essentially challenges the Trial Chamber's findings relating to the requisite mental element. His arguments in that regard, however, are often convoluted and repetitive. The Appeals Chamber addresses below the complaints that it understands Mr Babala to raise in relation to these findings.

(i) Purported absence of evidence for finding on knowledge

1428. As summarised above, Mr Babala argues that the Trial Chamber's finding about his knowledge of the money he paid to witness D-57's wife and to witness D-64's daughter was aimed at contaminating these witnesses' testimony was not based on any evidence. The Appeals Chamber is not persuaded by his arguments. The Trial Chamber based its finding as to his knowledge on several facts and items of evidence,[3512] notably the undisputed money transfers that Mr Babala had effected, the telephone conversations between him and Mr Kilolo and between him and witness D-57 and between him and Mr Bemba, all of which occurred within a short time period. The Trial Chamber's finding that Mr Babala "lent his assistance with the aim of facilitating the offences of corruptly influencing witnesses D-57 and D-64" and that he was "aware that the payments were illegitimate and aimed at altering and

[3509] Response, para. 593.
[3510] Response, para. 594.
[3511] Response, para. 595, referring to Conviction Decision, paras 267, 885.
[3512] Conviction Decision, paras 115, 117-118, 238, 240, 242, 254, 267, 281, 879, 936.

contaminating the witnesses' testimony"[3513] was equally based on several items of evidence, as summarised above.[3514]

1429. Thus, while there was no direct evidence of Mr Babala's knowledge and intent, the Trial Chamber assessed the relevant evidence as a whole and drew inferences on the basis of this evidence. Mr Babala's arguments fail to appreciate this fact and instead point to specific paragraphs or sentences in the Conviction Decision, without reading them in context. This is insufficient to establish that the Trial Chamber's finding was unreasonable.

1430. As to Mr Babala's argument that there was no evidence that he knew of the Trial Chamber's decision prohibiting witness coaching,[3515] the Appeals Chamber considers that is was not necessary for the Trial Chamber to establish that he had such knowledge. Nor was it necessary for the Trial Chamber to establish that the payment of money actually had an impact on witnesses D-57's and D-64's testimonies before the Trial Chamber in the Main Case:[3516] as explained elsewhere in this judgment,[3517] the offence of article 70 (1) (c) of the Statute does not require a showing of result. Thus, the Trial Chamber was not required to enter a finding in this regard.

1431. In light of the above, the Appeals Chamber rejects Mr Babala's arguments as to the purported lack of evidence for the Trial Chamber's finding as to his knowledge.

(ii) The Trial Chamber's reliance on and interpretation of coded language

1432. Turning to the use and interpretation of coded language, the Appeals Chamber understands Mr Babala to raise three broad issues.

1433. First, he submits that the Trial Chamber failed to consider that the use of coded language was not, as such, a sign of criminal behaviour, that he had used coded language in conversations about political issues with Mr Bemba long before the offences for which he was convicted were committed and that Pre-Trial Chambers II and III had found that the use of coded language was not indicative of witness

[3513] Conviction Decision, para. 893.
[3514] Conviction Decision, paras 882, 884-893.
[3515] Mr Babala's Appeal Brief, para. 272.
[3516] *See* Mr Babala's Appeal Brief, para. 245.
[3517] *See supra* para. 737.

interference. The Appeals Chamber is not persuaded by these arguments. The Trial Chamber considered the submissions of the parties on the question of coded language, including the decisions of the Pre-Trial Chambers, and rejected them.[3518]

1434. There is no indication that the Trial Chamber relied generally on the use of coded language as proof of criminal behaviour, but rather analysed specific passages in which codes were used. Mr Babala has not pointed to any passages of conversations relied upon by the Trial Chamber in which coded language was used, for instance, to talk about political issues. His argument that the Trial Chamber's approach violates rule 136 of the Rules because the Trial Chamber refuted submissions based on considerations relevant only to Mr Kilolo and Mr Mangenda,[3519] is equally unpersuasive because he fails to indicate which other considerations would have applied to him. In this regard, the Appeals Chamber notes that, in his closing submissions, he specifically agreed with Mr Bemba's submissions,[3520] which the Trial Chamber analysed and rejected in the Conviction Decision.[3521]

1435. Second, Mr Babala submits that the Trial Chamber erred in its approach to, and interpretation of, the phrase "*C'est la même chose comme pour aujourd'hui. Faire du sucre aux gens, vous verrez que c'est bien*"[3522] ("It's the same as for today. You'll see that it's good to give people sugar"). Mr Babala uttered this phrase in a conversation with Mr Bemba on 16 October 2012, which was recorded by the Court's detention centre.[3523] As to his argument that the Trial Chamber had stated that the recordings made by the Court's detention centre were unreliable and that, therefore, the Trial Chamber should not have relied on this conversation,[3524] the Appeals Chamber reiterates its findings, made in relation to a similar argument by Mr Bemba.[3525] The Appeals Chamber considers that Mr Babala generally disagrees with the Trial Chamber's approach and has not demonstrated that this approach was erroneous.

[3518] *See* Conviction Decision, paras 748 *et seq*.
[3519] Mr Babala's Appeal Brief, para. 97.
[3520] *See* Mr Babala's Closing Submissions, para. 41.
[3521] *See* Conviction Decision, para. 748.
[3522] Mr Babala's Appeal Brief, para. 250.
[3523] *See* CAR-OTP-0077-1299.
[3524] Mr Babala's Appeal Brief, para. 98.
[3525] *See supra* paras 1003-1007.

1436. Mr Babala also challenges the Trial Chamber's interpretation of this phrase, notably the Trial Chamber's conclusion that Mr Babala was referring to the payment that he had made on the same day to the wife of witness D-57 and was suggesting that a payment of the same amount of money should also be made in relation to witness D-64. As discussed earlier in relation to a similar argument made by Mr Bemba,[3526] the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to interpret this phrase of the conversation of 16 October 2012 as a reference to payments to witnesses D-57 and D-64. To the extent that Mr Babala argues that the phrase could have related to other individuals mentioned in the conversation,[3527] the Appeals Chamber considers that this argument amounts to a mere disagreement with the Trial Chamber, without showing any clear error. Finally the Appeals Chamber is not convinced by the argument that the Trial Chamber did not apply sufficient caution when interpreting the passage or that its reasoning was insufficient – as explained above, the Trial Chamber's approach and interpretation were not unreasonable.

1437. Third, Mr Babala challenges the Trial Chamber's reliance on the passage in a conversation on 17 October 2013, in which, according to the Trial Chamber, Mr Babala encouraged Mr Kilolo to ensure a "*service après-vente*" ("after sale service"), namely to contact defence witnesses again and, if necessary, give them money.[3528] The Appeals Chamber is not persuaded by Mr Babala's argument that, rather than being a measure to cover-up previous witness coaching, the passage related rather to the "false scenario", which was a purported scheme of Mr Kilolo and Mr Mangenda to fraudulently receive money from Mr Bemba and Mr Babala.[3529] The Appeals Chamber also refers to its above findings with respect to similar arguments by Mr Bemba.[3530] In addition, the Appeals Chamber notes that Mr Babala raised this argument before the Trial Chamber, which rejected it as irrelevant, given that the passage in question, as well as other conversations during the same time, prove "that

[3526] *See supra* paras 1004-1007.
[3527] Mr Babala's Appeal Brief, para. 250.
[3528] Conviction Decision, para. 887.
[3529] Mr Babala's Appeal Brief, para. 240.
[3530] *See supra* paras 1058-1059.

the three co-perpetrators clearly intended to take measures to conceal their prior activities".[3531] Mr Babala does not demonstrate that this finding was unreasonable.[3532]

1438. The Appeals Chamber is equally not convinced by the argument that there was no link between the payments to witnesses D-57 and D-64 and Mr Babala's knowledge of the purpose thereof and his suggestion one year later to ensure the "*service après-vente*".[3533] First, the Appeals Chamber notes that the Trial Chamber took the interactions between Mr Babala and the co-accused in October 2013 into account when determining that Mr Babala had the requisite knowledge and intent when effecting payments to witnesses D-57 and D-64 one year earlier. This, however, was not the only evidence upon which the Trial Chamber relied. In the view of the Appeals Chamber, it was not unreasonable for the Trial Chamber to consider all the evidence together, including that from October 2013, to determine whether Mr Babala's knowledge has been established. The Appeals Chamber notes further that the Trial Chamber did not accord significant weight to the October 2013 evidence. Indeed, it specifically rejected the Prosecutor's proposition that the October 2013 statement about the "*service après-vente*" would be enough to establish an evidentiary link between Mr Babala and the illicit coaching of the other 12 witnesses.[3534] Similarly, the Appeals Chamber does not find any inconsistency in the Trial Chamber's approach. This is because the Trial Chamber was satisfied that there was sufficient evidence as to his knowledge in relation to witnesses D-57 and D-64, while no such evidence had been put before the Trial Chamber in relation to the other 12 witnesses.

1439. Accordingly, the Appeals Chamber rejects Mr Babala's arguments relating to the use of coded language.

(iii) Knowledge of internal details of the Main Case

1440. The Appeals Chamber is not persuaded by Mr Babala's argument that the Trial Chamber erred when it found that he had some knowledge of internal details of the

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[3531] Conviction Decision, para. 800.
[3532] *See also supra* paras 1349 *et seq*.
[3533] Mr Babala's Appeal Brief, para. 236.
[3534] *See* Conviction Decision, para. 878. *See also* para 781, referring, *inter alia*, to CAR-OTP-0080-1319 and CAR-OTP-0082-0542 at 0545, lines 79-87.

Main Case.[3535] First, contrary to Mr Babala's submission, the Trial Chamber did rely on evidence when making this finding, namely the transcripts of audio recordings of telephone conversations between Mr Bemba and Mr Babala.[3536] However, and as noted above, because of the irregularities affecting the intercepted recordings from the Court's detention centre, the Trial Chamber relied only on selected utterances of Mr Babala and Mr Bemba in those conversations, and only to the extent that they stood alone.[3537] The Appeals Chamber further recalls that the Trial Chamber relied on those recordings for the reason that they "accurately reflect the utterances by the individual speakers".[3538] Thus, in reaching the conclusion that Mr Babala was "aware – to some extent – of internal details of the Main Case, including the identity of witnesses", the Trial Chamber relied on: Mr Babala asking Mr Bemba for authorisation to proceed with the transfer or payment of money to Mr Kilolo; Mr Babala informing Mr Bemba about the status of money transfers, including to Mr Kilolo; and Mr Bemba authorising Mr Babala to proceed with the payments of money.[3539] The Trial Chamber also assessed the use of coded language in these excerpts.[3540] While the paragraph in which this assessment is made is not specifically referenced by the Trial Chamber when it found that Mr Babala had some knowledge of internal details of the Main Case, it is nevertheless relevant to understanding how the Trial Chamber interpreted the excerpts of the conversations. In addition, the Appeals Chamber notes that the finding that Mr Babala impugns finds further support in the remainder of the paragraph, where it is made, which cites further examples of Mr Babala's interaction with the defence team[3541] that Mr Babala does not address.

1441. Notably, the Trial Chamber determined that "Mr Babala admitted that he transferred money to D-57 and D-64 shortly before the commencement of their

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[3535] Mr Babala's Appeal Brief, paras 100-101, referring to Conviction Decision, paras 695-697, 885.
[3536] Conviction Decision, paras 695-697, to which para. 885 refers.
[3537] Conviction Decision, para. 695.
[3538] Conviction Decision, para. 695. The Trial Chamber noted the following: "[T]hat at the end of all recordings concerned clearly the two channels of the speakers are not aligned. It can therefore not be ruled out that the questions and responses recorded have been spoken in a different sequence than they have been recorded any by extension, transcribed. However, despite the irregularities, the Chamber lies on those recordings for the reason that, as confirmed by the Bemba Defence expert, the recordings nevertheless accurately reflect the utterances by the individual speakers".
[3539] Conviction Decision, paras 695-697, 885.
[3540] Conviction Decision, para. 698.
[3541] Conviction Decision, para. 885.

testimony in the Main Case".[3542] In reaching this conclusion, the Trial Chamber relied on the recordings of monitored communications from the Court's detention centre, in particular the conversation on 16 October 2012.[3543] The Trial Chamber understood from that conversation that Mr Babala's usage of coded language "*la même chose comme pour aujourd'hui*" ("it's the same thing as for today") and "*donner du sucre aux gens*" ("give people sugar"), he was referring to the payment of money to D-57's wife earlier that same day.[3544] The Trial Chamber was convinced that the advice Mr Babala gave to Mr Bemba in this conversation demonstrated that the former was aware of witness D-57's and P-D-64's status as witnesses in the Main Case and the importance of paying witnesses shortly before their testimony at the Court.[3545] The Appeals Chamber has confirmed that the Trial Chamber's interpretation of these passages was not unreasonable.[3546]

1442. Mr Babala also admitted that he transferred money to witnesses D-57 and D-64, which necessarily implies that he knew the identity of these witnesses. Furthermore, in light of Mr Babala's comments on the impact of these payments and the temporal vicinity of their testimony, it was not unreasonable for the Trial Chamber to conclude that Mr Babala knew that witnesses D-57 and D-64 were witnesses in the Main Case.

1443. In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that Mr Babala had knowledge of internal details of the Main Case, including the identity of witnesses. The Appeals Chamber also rejects the argument that the Conviction Decision was insufficiently reasoned in this regard; as just demonstrated, it is clear how the Trial Chamber reached its finding.

1444. Accordingly, Mr Babala's arguments are rejected.

9. Alleged illogical findings

(a) Relevant part of the Conviction Decision

1445. The Trial Chamber convicted Mr Babala of having aided Mr Bemba, Mr Kilolo and Mr Mangenda in the commission of the offence of corruptly influencing

[3542] Conviction Decision, para. 885.
[3543] Conviction Decision, para. 267.
[3544] Conviction Decision, para. 267.
[3545] Conviction Decision, para. 267.
[3546] *See supra* para. 1432 *et seq*.

witnesses D-57 and D-64 pursuant to article 70 (1) (c) of the Statute.[3547] The Trial Chamber acquitted Mr Babala of "having aided, abetted or otherwise assisted in the commission of the offences of giving false testimony" by the 14 witnesses under article 70 (1) (a) of the Statute, and "in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of presenting false evidence" by the 14 witnesses pursuant to article 70 (1) (b) of the Statute.[3548]

(b) Submissions of the parties

(i) Mr Babala

1446. Mr Babala submits that, since the Trial Chamber found that he was not part of the common plan involving Mr Bemba, Mr Kilolo and Mr Mangenda, this raises the question how he could nevertheless "take part in it by means of one of the modes [of liability] provided for by law".[3549] He also recalls that, at paragraph 877 of the Conviction Decision, the Trial Chamber found that "no evidence sufficiently establishes that Mr Babala assisted in the presentation of the untruthful accounts of witnesses with regard to payments", even though witnesses D-57 and D-64, in relation to whom he was convicted, where among the 14 witnesses found to have given such untruthful accounts.[3550] According to him, the Trial Chamber's finding at paragraph 878 of the Impugned Decision that he assisted Mr Bemba, Mr Kilolo and Mr Mangenda in corruptly influencing witness D-57 and D-64 was thus unreasonable.[3551]

1447. Mr Babala argues that the Trial Chamber's finding that he did not provide assistance to the three co-perpetrators, Mr Bemba, Mr Kilolo and Mr Mangenda, and the giving of false evidence by the 14 witnesses under article 70 (1) (a) contradicts its finding that he, however, provided material assistance to the three co-perpetrators in their corrupt influencing of witnesses D-57 and D-64 pursuant to article 70 (1) (c) of the Statute.[3552] He argues that the offence of corruptly influencing of witnesses "refers […] to incitement to give false testimony.[3553] In Mr Babala's view this offence can only be established when the intention "to obtain false oral evidence under oath, false

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[3547] Conviction Decision, p. 456. *See also* paras 936-937.
[3548] Conviction Decision, p. 456. *See also* paras 878, 938-942.
[3549] Mr Babala's Appeal Brief, para. 295.
[3550] Mr Babala's Appeal Brief, para. 247.
[3551] Mr Babala's Appeal Brief, para. 248.
[3552] Mr Babala's Appeal Brief, para. 252, referring to Conviction Decision, paras 878, 942.
[3553] Mr Babala's Appeal Brief, para. 252, referring to Conviction Decision, para. 45.

statements or false written attestations […] and in this case, false testimony" has been demonstrated.[3554]

1448. Mr Babala submits further, and with reference to paragraph 818 of the Conviction Decision, since the Trial Chamber found that there was no direct evidence that Mr Bemba had directed or given instructions in relation to the witnesses' false testimony on prior contacts with the defence team in the Main Case, payments received or acquaintances with other individuals, it is "difficult to see […] how Mr Babala could have advised Mr Bemba to corruptly influence the witnesses by assisting him in this regard".[3555]

(ii) The Prosecutor

1449. The Prosecutor responds that Mr Babala's argument that because he was acquitted of the offence under article 70 (1) (a) he could not be held liable under article 70 (1) (c) "disregards the difference between the two offences and their legal requirements, and misunderstands the [Conviction Decision]".[3556] The Prosecutor argues that the offence of corruptly influencing a witness "criminalises conduct which may have an impact or influence on the testimony to be given by a witness".[3557] She adds that since this "is a conduct-based offence […], it is completed even if the witness refuses to be influenced by the conduct in question", for instance, effecting a payment to the witness.[3558]

(c) Determination by the Appeals Chamber

1450. The Appeals Chamber is not persuaded by Mr Babala's argument that, since the Trial Chamber found that he was not "part of the common plan", it is questionable whether he could take part in it based on other modes of liability.[3559] The Trial Chamber considered the conduct of Mr Bemba, Mr Kilolo and Mr Mangenda, and concluded that they were liable, as co-perpetrators, for offences under article 70 (1) (b) and (c) of the Statute, it having been established that there was an agreement among the co-perpetrators to commit such offences and that each of the

[3554] Mr Babala's Appeal Brief, para. 252, referring to Conviction Decision, para. 45.
[3555] Mr Babala's Appeal Brief, para. 246.
[3556] Response, para. 625.
[3557] Response, para. 625.
[3558] Response, para. 625.
[3559] Mr Babala's Appeal Brief, para. 295.

three had made an essential contribution.[3560] In addition, the Trial Chamber found it established that Mr Babala lent his assistance to the commission of offences under article 70 (1) (c) of the Statute in relation to witnesses D-57 and D-64.[3561] This was based on the Trial Chamber's evaluation of the facts against the elements of article 25 (3) (c) of the Statute. The two findings are not incompatible: in cases where several individuals are involved in the commission of offences, it will often be the case that some will be classified as (co-)perpetrators, while others will be classified as accessories, based on each individual's precise conduct, knowledge and intent.

1451. To the extent that Mr Babala complains of a purported contradiction in paragraph 877 of the Conviction Decision,[3562] the Appeals Chamber rejects the argument. At paragraph 877 of the Conviction Decision, the Trial Chamber explained why it was not convinced that Mr Babala had aided, abetted or otherwise assisted the commission of offences under article 70 (1) (a) or 70 (1) (b) of the Statute. These offences have different elements than the offence of corruptly influencing witnesses under article 70 (1) (c) of the Statute. It is, therefore, not contradictory that the Trial Chamber acquitted him in relation to article 70 (1) (a) and 70 (1) (b) of the Statute, but found that he was liable under article 70 (1) (c) of the Statute.

1452. The Appeals Chamber recalls that it has confirmed the Trial Chamber's finding that the offence of corruptly influencing a witness under article 70 (1) (c) of the Statute "does not require proof that the conduct had an actual effect on the witness".[3563] Mr Babala misunderstands the Trial Chamber's finding in that regard. Moreover, Mr Babala merely refers to the Trial Chamber's definition of the *actus reus* of "influencing a witness"[3564] to support his contention that the intention "to obtain false oral evidence under oath, false statements or false written attestations"[3565] must first be demonstrated to establish the offence of corruptly influencing a witness, without pointing to any specific error from the Trial Chamber in that regard. Consequently, the Appeals Chamber dismisses his arguments.

[3560] *See* Conviction Decision, paras 802 (existence of common plan), 816 (Mr Bemba's essential contribution), 833 (Mr Kilolo's essential contribution), 847 (Mr Mangenda's essential contribution).
[3561] Conviction Decision, para. 893.
[3562] Mr Babala's Appeal Brief, para. 247.
[3563] *See supra* para. 737.
[3564] Mr Babala's Appeal Brief, para. 252, referring to Conviction Decision, para. 45.
[3565] Mr Babala's Appeal Brief, para. 252, referring to Conviction Decision, para. 45.

1453. Regarding Mr Babala's argument that, in light of the Trial Chamber's finding at paragraph 818 of the Conviction Decision, it was difficult to see how he could have provided advice to Mr Bemba, the Appeals Chamber rejects this argument because Mr Babala fails to cite the Trial Chamber's finding completely: while the Trial Chamber stated that there was no direct evidence of Mr Bemba's involvement, it found that "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 [to testify falsely] and expected Mr Kilolo to give them".[3566] Mr Babala's argument is therefore baseless and is rejected.

1454. In light of the above, the Appeals Chamber rejects Mr Babala's arguments in their entirety.

10. Arguments not alleging errors, obscure or otherwise unsubstantiated

1455. The Appeals Chamber notes that Mr Babala's submissions are often unclear or repetitive. To the extent that his arguments are obscure or amount merely to general expositions of the law or fail to identify specific errors in the Conviction Decision, the Appeals Chamber will not consider them any further.[3567]

1456. The Appeals Chamber also recalls that appellants are required to substantiate the error they allege, as well as the material impact on the decision under review.[3568] Several of Mr Babala's arguments to not meet this threshold.

1457. Notably, he submits that the Prosecutor was unable to prove the allegations against him, which "resulted in a dearth or complete lack of reasoning" in the Conviction Decision.[3569] In support of his contention, he argues that the Trial Chamber, "uncritically seconding the Prosecution's baseless allegations, churned out a series of reasons that were ambiguous, unreal, incomplete or totally non-existent".[3570] However, Mr Babala merely lists several paragraphs of the Conviction

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[3566] Conviction Decision, para. 818.
[3567] *See*, in particular, Mr Babala's Appeal Brief, paras 171-173, 183-196, 197-199, 220-226, 228, 244, 254, 255-257, 258, 271, 284, 285, 297.
[3568] *Lubanga* Appeal Judgment, para. 30. *See also* paras 31-33.
[3569] Mr Babala's Appeal Brief, para. 253.
[3570] Mr Babala's Appeal Brief, para. 253, referring to Conviction Decision, paras 115, 118, 254, 281, 879-880, 936.

Decision to support his broad contention that the Trial Chamber's reasoning was either lacking or "ambiguous, unreal, incomplete or totally non-existent" because it "seconded" the Prosecutor's allegations. The Appeals Chamber considers that Mr Babala's unsubstantiated argument fails to demonstrate any error on the part of the Trial Chamber and consequently dismisses *in limine* his argument in that regard.

1458. Similarly, Mr Babala submits that the Trial Chamber's finding at paragraph 115 of the Conviction Decision that, with the payment to witness P-20 (D-57)'s wife, "Mr Kilolo hoped to motivate the witness to testify in favour of Mr Bemba" "belongs to the realm of beliefs" as there was no basis on which the Trial Chamber could discern his hopes.[3571] The Appeals Chamber rejects this argument *in limine* because it is based on a misunderstanding of the Conviction Decision. As explained by the Trial Chamber, it first set out the facts and circumstances that it found to have been established and which formed the basis of its decision as to the accused persons' guilt;[3572] the impugned finding is part of this section. The Trial Chamber's reasoning underpinning its findings – including in relation to the finding in paragraph 115 – is contained in subsequent sections of the Conviction Decision, in which the Trial Chamber explained in detail how it assessed the relevant evidence.[3573] Mr Babala does not engage with this reasoning.

1459. Mr Babala also challenges several findings of the Trial Chamber contained in paragraphs 103, 107, 108, 109, 112, 115, 117, 118 of the Conviction Decision, arguing that there was no evidence in support of them.[3574] The Appeals Chamber rejects these arguments *in limine* as they are based on the same misunderstanding of the structure of the Conviction Decision.[3575]

1460. Mr Babala raises several arguments in relation to the Trial Chamber's findings on witness P-20 (D-57) and his assistance in the corrupt influencing of this witness.[3576] However, his arguments merely challenge individual items of evidence, indicate general disagreement with the Trial Chamber's finding or raise questions,

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[3571] Mr Babala's Appeal Brief, para. 261.
[3572] Conviction Decision, para. 101.
[3573] *See* Conviction Decision, Sections IV.B and IV.C.
[3574] Mr Babala's Appeal Brief, paras 274-282.
[3575] *See supra* para. 1458.
[3576] Mr Babala's Appeal Brief, paras 286-291.

without, however, demonstrating that the Trial Chamber's findings, which were based on its analysis of all the relevant evidence as a whole, were unreasonable. For that reason, the Appeals Chamber rejects these arguments *in limine*.

1461. The Appeals Chamber also rejects *in limine* Mr Babala's argument that the Trial Chamber failed to provide a reasoned opinion in relation of the evidence on which it based its decision as this argument is entirely unsubstantiated.[3577]

E. Mr Arido's grounds of appeal

1462. Mr Arido alleges that the Trial Chamber erred: (i) in making inconsistent findings in relation to the verdict;[3578] (ii) in connecting Mr Arido to the common plan and finding that he acted "in concert" with Mr Kokaté;[3579] (iii) in taking judicial notice of contested issues related to the testimony of witnesses D-2, D-3, D-4, and D-6 in the Main Case;[3580] (iv) in its findings on Mr Arido's *mens rea*;[3581] (v) in its assessment of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence;[3582] (vi) in its findings on Mr Arido's monetary promises and Mr Kokaté's leading role in criminal conduct that exculpates Mr Arido or raises doubt about his conviction;[3583] and (vii) regarding witnesses D-4 and D-6.[3584]

1. Alleged inconsistent findings made in relation to the verdict

(a) Relevant part of the Conviction Decision

1463. The Trial Chamber found that Mr Arido recruited witnesses D-2, D-3, D-4, and D-6 for Mr Bemba's defence and intentionally promised them money and relocation in Europe in exchange for their testimony in the Main Case.[3585] Mr Arido was also found to have intentionally briefed and instructed the witnesses as to the contents of their testimony, more specifically, to present themselves as military men to Mr Kilolo and the Court even when he believed they had no military background.[3586] The Trial

[3577] Mr Babala's Appeal Brief, paras 267-270.
[3578] Mr Arido's Appeal Brief, paras 221-231.
[3579] Mr Arido's Appeal Brief, paras 213-220.
[3580] Mr Arido's Appeal Brief, paras 247-269, 322.
[3581] Mr Arido's Appeal Brief, paras 367-372, 383-398, 454-460.
[3582] Mr Arido's Appeal Brief, paras 103-112, 270-310, 314, 322, 342, 345-354, 358, 399-407, 420.
[3583] Mr Arido's Appeal Brief, paras 85-86, 355-360, 424-453.
[3584] Mr Arido's Appeal Brief, paras 311-344, 408-423.
[3585] Conviction Decision, paras 669, 944.
[3586] Conviction Decision, paras 671, 944.

Chamber further found that the "promise of money and relocation was unduly given by Mr Arido as an inducement to procure the testimony of the witnesses in favour of Mr Bemba" and that Mr Arido "constructed and adjusted the witnesses' testimonies according to a specific narrative favourable to Mr Bemba during the instruction and briefing sessions, knowing that the witnesses had only agreed to testify […] as a result of the promises he had made to them, thus contaminating the evidence presented before Trial Chamber III".[3587] The Trial Chamber found that Mr Arido intended to and did manipulate the testimonial evidence, and concluded that it was satisfied beyond reasonable doubt that Mr Arido corruptly influenced witnesses D-2, D-3, D-4, and D-6 within the meaning of article 70 (1) (c) of the Statute.[3588] The Trial Chamber noted that Mr Arido was charged in the alternative for having aided, abetted or otherwise assisted in the commission of the offence of corruptly influencing witnesses D-2, D-3, D-4, and D-6, but since it was convinced that Mr Arido had committed the offence as a principal perpetrator, it did not enter findings on the alternative modes of criminal responsibility.[3589]

1464. With respect to the offences under article 70 (1) (a) and (b) of the Statute, the Trial Chamber recalled that, in the specific circumstances of the case, the falsity of the evidence of witnesses D-2, D-3, D-4, and D-6 "can relate only to (i) prior contacts with the defence in the Main Case, (ii) the receipt of money, material benefits, and non-monetary promises, and (iii) the witnesses' acquaintance with third persons".[3590] The Trial Chamber found that Mr Arido did not instruct the witnesses on any of these points.[3591] The Trial Chamber further found that Mr Arido had cut ties with the defence in the Main Case and was no longer in contact with the witnesses by the time the witnesses were called to testify in the Main Case.[3592] The Trial Chamber concluded that it was not convinced beyond a reasonable doubt that Mr Arido aided, abetted or otherwise assisted the offences of: (i) giving false testimony under article

[3587] Conviction Decision, para. 944.
[3588] Conviction Decision, paras 944-945.
[3589] Conviction Decision, para. 945.
[3590] Conviction Decision, para. 947.
[3591] Conviction Decision, para. 947. *See also* para. 872.
[3592] Conviction Decision, para. 947.

70 (1) (a) of the Statute;[3593] or (ii) presenting false oral evidence under article 70 (1) (b) of the Statute.[3594]

(b) Submissions of the parties

(i) Mr Arido

1465. Mr Arido submits that the Trial Chamber erred in convicting him as a principal perpetrator under article 70 (1) (c) of the Statute on the one hand, while on the other hand finding that it was not convinced beyond a reasonable doubt that he aided, abetted or otherwise assisted the offence of giving false testimony, under article 70 (1) (a) of the Statute, or presenting false testimonial evidence under article 70 (1) (b) of the Statute.[3595] Mr Arido submits that these legal findings are inconsistent as they are based on the same evidence that he recruited and instructed witnesses D-2, D-3, D-4, and D-6.[3596] Mr Arido avers that if such evidence does not support a conviction for aiding, abetting, or otherwise assisting the "conduct of instruction" then such evidence should not support his conviction as a principal perpetrator.[3597] Mr Arido asserts such inconsistencies are further exemplified by the fact that the Trial Chamber made a finding that he contaminated the evidence presented in the Main Case when discussing his liability under article 70 (1) (c) of the Statute, but did not make the same finding in relation to his liability under article 70 (1) (b) of the Statute.[3598] Mr Arido submits further that the Trial Chamber was inconsistent in describing his role as a "leader or go-between" and that the finding that he was a "go-between" does not support his conviction as a direct perpetrator under article 25 (3) (a) of the Statute.[3599] Mr Arido requests that, as a matter of law, the Appeals Chamber reverse his conviction under article 70 (1) (c) of the Statute.[3600]

[3593] Conviction Decision, paras 948-949.
[3594] Conviction Decision, paras 946-947.
[3595] Mr Arido's Appeal Brief, paras 221-223, 225, 227.
[3596] Mr Arido's Appeal Brief, paras 224-229.
[3597] Mr Arido's Appeal Brief, para. 227.
[3598] Mr Arido's Appeal Brief, para. 230, referring to Conviction Decision, para. 947.
[3599] Mr Arido's Appeal Brief, para. 230, referring to Conviction Decision, paras 131, 341, 344, 349, 399, 420, 672.
[3600] Mr Arido's Appeal Brief, paras 229, 231.

(ii) The Prosecutor

1466. The Prosecutor responds that the Trial Chamber's findings were not inconsistent.[3601] She submits that Mr Arido was acquitted of offences under article 70 (1) (a) and (b) of the Statute because the Trial Chamber did not assess the truth or falsity of the witnesses' testimonies on the merits of the Main Case, but limited its findings with respect to these offences to the witnesses' contacts with members of the defence team, payments and benefits, and their contacts with certain third persons.[3602] The Prosecutor avers that, having found that Mr Arido's meetings with witnesses only concerned matters closely related to the merits of the Main Case, it was consistent for the Trial Chamber to find him liable solely under article 70 (1) (c) of the Statute.[3603] The Prosecutor argues that Mr Arido misrepresents the Trial Chamber's reasoning and findings and that other alleged inconsistencies are similarly undeveloped and should be dismissed.[3604]

(c) Determination by the Appeals Chamber

1467. The Appeals Chamber considers that Mr Arido misapprehends the Trial Chamber's assessment of the acts underlying the charged offences. The Trial Chamber found that offences under article 70 (1) (a) and (b) of the Statute could only relate, in the specific circumstances of the case, to the following acts: "(i) prior contacts with the defence in the Main Case, (ii) the receipt of money, material benefits, and non-monetary promises, and (iii) the witnesses' acquaintance with third persons".[3605] As there was no evidence of any link between Mr Arido's conduct and the false testimony of the witnesses on such acts, Mr Arido was acquitted of the charges under article 70 (1) (a) and (b) of the Statute.[3606]

1468. With respect to article 70 (1) (c) of the Statute, however, the Trial Chamber did not place similar restrictions on the acts that could underlie the offence, based on its understanding of this offence as not requiring proof that the conduct of "corruptly influencing a witness" actually had an effect on the witness, as long as the perpetrator

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[3601] Response, para. 695.
[3602] Response, paras 695-698.
[3603] Response, para. 698.
[3604] Response, para. 699.
[3605] *See* Conviction Decision, para. 947.
[3606] Conviction Decision, paras 872, 946-949, p. 457.

"from his or her vantage point, seeks to manipulate the evidence given by the witness".[3607] As noted above, the Appeals Chamber considers that the Trial Chamber's approach in this regard was correct.[3608] The Appeals Chamber considers that, for that reason, it was not inconsistent for the Trial Chamber to acquit him of offences under article 70 (1) (a) and (b) of the Statute and convict him under article 70 (1) (c) as the acts underlying each offence differed. In assessing his liability under article 70 (1) (c) of the Statute, the Trial Chamber found that Mr Arido's instructions and briefing of the witnesses "to present themselves as military men to Mr Kilolo and the Court even while believing that they did not have such a background", and his promise of money and relocation was an inducement to procure testimony in favour of Mr Bemba, thereby corruptly influencing said witnesses.[3609] As the Trial Chamber's discussion of contaminated evidence resulting from Mr Arido's instructions and briefing of witnesses to present themselves as military men related to the evidence in the Main Case, it therefore follows that it could only be considered under article 70 (1) (c) of the Statute.

1469. Similarly, the Appeals Chamber considers that Mr Arido misapprehends the Trial Chamber's findings when he argues that the Trial Chamber was inconsistent in describing his role as a "leader or go-between" and that its findings characterising him as a "go-between" do not support his conviction as a direct perpetrator under article 25 (3) (a) of the Statute.[3610] The Appeals Chamber notes that the descriptor "go-between" or "leader" was used by the Trial Chamber when referencing the testimony of witnesses P-260 (D-2) and P-245 (D-3)[3611] and describes Mr Arido's role *vis-à-vis*

[3607] *See* Conviction Decision, para. 48.
[3608] *See supra* para. 737.
[3609] Conviction Decision, para. 944.
[3610] Mr Arido's Appeal Brief, para. 230, referring to Conviction Decision, paras 131, 341, 344, 349, 399, 420, 672.
[3611] *See* Conviction Decision, paras 131 ("Mr Arido acted as the *'go-between'* for the conditions negotiated with the witnesses, which he promised to relay to Mr Kilolo."), 341 ("Mr Arido's function as a 'go-between' is demonstrated by the mutually corroborative evidence given by P-245 (D-3) and P-260 (D-2)."), 344 ("The Chamber finds P-260 (D-2)'s and P-245 (D-3)'s evidence reliable as they describe in a convincingly detailed and articulate manner Mr Arido's direct involvement with the witnesses, his 'go-between' role and Mr Kokaté's intervention."), 349 ("P-245 (D-3) explained that Mr Arido – the '*leader*' of the group or '*go-between*' – was expected to speak to Mr Kilolo on the witnesses' behalf.") (emphasis in original, footnotes omitted), 399 ("The Chamber is convinced that the above-mentioned parts of D-6's testimony were untruthful, considering that he belonged to the group of witnesses in Douala gathered for a *'briefing'* by their *'leader'* and *'go-between'* Mr Arido.") (emphasis in original), 420 ("The Chamber further finds that, upon Mr Kilolo's request, Mr Arido, together with Mr Kokaté, recruited D-2, D-3, D-4, and D-6 as witnesses for the Main Case Defence. He

the relevant witnesses and Mr Kilolo as articulated by these witnesses. The Appeals Chamber notes that, whether Mr Arido's relationship with the relevant witnesses is characterised as "leader" or "go-between", such a finding does not describe the mode of liability by which he committed the offence of corruptly influencing witnesses D-2, D-3, D-4, and D-6 under article 70 (1) (c) of the Statute. Rather, when making its finding on Mr Arido's liability as a direct perpetrator, the Trial Chamber considered Mr Arido's recruitment of witnesses D-2, D-3, D-4, and D-6, his promise of money and relocation to the witnesses in exchange for testifying in the Main Case, his intentional instructions and briefing of the witnesses to present themselves to Mr Kilolo and the Court as soldiers, his construction and adjustment of the witnesses' testimonies, and his intent to manipulate their evidence.[3612]

1470. Moreover, in discussing Mr Arido's *mens rea*, the Trial Chamber relied, *inter alia*, on Mr Arido's promise to the witnesses of a significant financial reward and relocation to Europe as encouragement to give certain evidence as exemplified by the fact that he not only made the promises to the witnesses, but that "he also specifically instructed them to write their conditions (both payment of money and relocation destination) on a piece of paper which he would personally convey to Mr Kilolo".[3613] In the Appeals Chamber's view, the central aspects of this finding are Mr Arido's instructions and promise to convey the witnesses' conditions to Mr Kilolo, rather than the description of Mr Arido's role as "leader" or "go-between".

1471. Accordingly, the Appeals Chamber finds that Mr Arido has failed to show that the Trial Chamber erred and therefore, rejects Mr Arido's arguments in that regard.

2. Alleged error regarding Mr Arido's connection to the common plan and that he acted "in concert with" Kokaté

(a) Relevant part of the Conviction Decision

1472. The Trial Chamber found that "Mr Bemba, Mr Kilolo and Mr Mangenda jointly agreed to illicitly interfere with defence witnesses in order to ensure that these

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acted as a 'go-between' and relayed the witnesses' concerns to Mr Kilolo."), 672 ("Not only did Mr Arido formulate those promises to the witnesses, he also specifically instructed them to write their conditions (both payment of money and relocation destination) on a piece of paper which he would personally convey to Mr Kilolo as their 'leader' or 'go-between'.").

[3612] Conviction Decision, paras 669-672, 944-945.

[3613] Conviction Decision, para. 672.

witnesses would provide evidence in favour of Mr Bemba".[3614] The Trial Chamber held that the agreement between the three co-perpetrators was made during the course of the Main Case and "manifest[ed] itself in their concerted actions with each other and with others, including Mr Babala and Mr Arido".[3615] The Trial Chamber found that, in order to "achiev[e] their goal", the three co-perpetrators "also relied on others, including the co-accused Mr Babala and Mr Arido, who, though not part of the common plan, also made efforts to further this goal".[3616] According to the Trial Chamber, this was done to allow it "to fully and comprehensively assess the actions of the three co-perpetrators".[3617] It explained however that "[t]he fact that actions performed by Mr Babala and Mr Arido are taken into account in the context of the present assessment does not render Mr Babala and Mr Arido co-perpetrators".[3618]

1473. With respect to Mr Arido's personal conduct, the Trial Chamber held that based on its assessment of the evidence, he recruited witnesses D-2, D-3, D-4 and D-6 for Mr Bemba's defence team upon Mr Kilolo's instructions, he briefed these witnesses on their purported military status and promised them "[monetary] compensation and relocation in Europe" in exchange of their testimony in the Main Case.[3619] The Trial Chamber also found that Mr Arido had acted "in concert" with Mr Kokaté "to identify potential witnesses for the Main Case".[3620]

(b) Submissions of the parties

(i) Mr Arido

1474. Mr Arido submits that the Trial Chamber erred in law in finding that he was connected to a common plan involving Mr Bemba, Mr Kilolo and Mr Mangenda because the Pre-Trial Chamber, in the Confirmation Decision, had rejected the mode of liability of co-perpetration in relation to him, thereby "implicitly" rejecting also the "notions of 'acting in concert' or 'acting jointly'".[3621] Mr Arido avers that the Trial Chamber's finding is inconsistent with its holding that he was not part of the common

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[3614] Conviction Decision, para. 103.
[3615] Conviction Decision, para. 103.
[3616] Conviction Decision, para. 112. *See also* paras 682, 803, 878.
[3617] Conviction Decision, para. 682.
[3618] Conviction Decision, para. 682.
[3619] Conviction Decision, paras 112, 420.
[3620] Conviction Decision, para. 327.
[3621] Mr Arido's Appeal Brief, paras 213-214, referring to Conviction Decision, paras 103, 112, 682, 803, 878.

plan and its rejection of the Prosecutor's request to re-characterise as co-perpetration his participation in the offences of article 70 (1) (b) and (c) of the Statute.[3622] In Mr Arido's view, the Trial Chamber assessed the evidence against him "through the lens of the common plan", although "the only reasonable conclusion based on the evidence" was that his "connection to the Main Case was […] simply as an expert who was recruited to prepare a report, and who intended to give testimony (until the security situation forced his withdrawal from the case)".[3623] Mr Arido argues that he suffered "harm and prejudice" because, while "he was not convicted as a co-perpetrator in the common plan, he was found guilty as a direct perpetrator for conduct which furthered the common plan".[3624]

1475. Mr Arido submits further that the Trial Chamber erred "as a matter of law" in finding that he "acted in concert with others", namely with Mr Kokaté, since this "form of liability" was not charged and he was not informed of it in the Confirmation Decision.[3625]

(ii) The Prosecutor

1476. The Prosecutor responds that Mr Arido misunderstands the Conviction Decision and conflates factual findings with their legal characterisation.[3626] The Prosecutor argues that Mr Arido was convicted for the offence under article 70 (1) (c) of the Statute and not for the offences imputed to the co-perpetrators on the basis of the common plan.[3627] The Prosecutor avers that 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".[3628] In the Prosecutor's view, the Trial Chamber's factual findings are not inconsistent with its legal characterisation of Mr Arido's liability as he did not act in isolation but rather in coordination with

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[3622] Mr Arido's Appeal Brief, para. 215, referring, *inter alia*, to Conviction Decision, paras 112, 682, 878; "Decision on Prosecution Application to Provide Notice pursuant to Regulations 55", 15 September 2015, ICC-01/05-01/13-1250; "Decision on Prosecution's Re-application for Regulation 55(2) Notice", 15 January 2016, ICC-01/05-01/13-1553.
[3623] Mr Arido's Appeal Brief, paras 216-217.
[3624] Mr Arido's Appeal Brief, para. 216.
[3625] Mr Arido's Appeal Brief, paras 218-220, referring to Conviction Decision, para. 327.
[3626] Response, paras 690, 692.
[3627] Response, para. 691.
[3628] Response, para. 692.

others, including the co-perpetrators.[3629] The Prosecutor submits that Mr Arido's argument that the Trial Chamber assessed the evidence against him "through the lens of the common plan" is "speculative and unsupported".[3630] The Prosecutor argues that there is ample, reliable and corroborated direct evidence that demonstrates his liability as a direct perpetrator.[3631]

1477. With respect to Mr Arido's argument that the Trial Chamber erred in finding that he had acted in concert with Mr Kokaté, the Prosecutor submits that this shows his misunderstanding of the Conviction Decision because he conflates the Trial Chamber's legal characterisation of his conduct with the factual findings on the context and the "broader criminal scheme in which Arido operated".[3632]

(c) Determination by the Appeals Chamber

1478. The Appeals Chamber observes that, while Mr Arido acknowledges that he was not convicted as a co-perpetrator in the common plan, he takes issue with the fact that he was convicted as a direct perpetrator "for conduct which furthered the common plan".[3633] In the Appeals Chamber's view, the non-confirmation of co-perpetration as mode of liability was no impediment for the Trial Chamber to consider – as a factual matter – his interaction with Mr Bemba, Mr Mangenda and Mr Kilolo in order to determine the existence of a common plan for the other co-accused.

1479. Turning to Mr Arido's contention that the Trial Chamber erred when it assessed the evidence against him "through the lens of the common plan", the Appeals Chamber is not persuaded by this argument. The Appeals Chamber shares the Prosecutor's view that Mr Arido misunderstands the Conviction Decision and conflates the Trial Chamber's factual findings with their legal characterisation. While the Trial Chamber, in its evidentiary discussion on the common plan, stated that it had inferred the existence of a common plan between Mr Bemba, Mr Kilolo and Mr Mangenda from their "concerted actions", which also involved, *inter alia*, Mr Arido, this did not influence its assessment of the evidence when determining Mr

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[3629] Response, para. 692.
[3630] Response, para. 693.
[3631] Response, para. 693.
[3632] Response, para. 694.
[3633] Mr Arido's Appeal Brief, para. 216.

Arido's own criminal liability. Rather, when determining his criminal liability for the offence under article 70 (1) (c) of the Statute that he committed, as a direct perpetrator, the Trial Chamber's assessment of the evidence of witnesses P-260 (D-2) and P-245 (D-3) focused on Mr Arido's personal conduct of corruptly influencing witnesses D-2, D-3, D-4, and D-6. On the basis of that evidence, the Trial Chamber found that Mr Arido recruited the four witnesses, instructed them to present themselves as soldiers to Mr Kilolo and to the Court and promised them money and relocation to Europe in exchange for their testimony for Mr Bemba's Defence in the Main Case.[3634]

1480. With respect to Mr Arido's argument that the Trial Chamber erred in finding that he "acted in concert with others" – namely Mr Kokaté – since this "form of liability" was not charged and he lacked proper notice of it,[3635] the Appeals Chamber finds no merit in this submission. The fact that Mr Arido was charged as a direct perpetrator does not mean that any interaction with other individuals was outside the factual scope of the case. In any event, Mr Arido's argument is also factually inaccurate. Mr Arido challenges the Trial Chamber's finding that "upon Mr Kilolo's instruction, Mr Kokaté and Mr Arido acted in concert to identify potential witnesses for the Main Case Defence".[3636] In the Appeals Chamber's view, Mr Arido takes this finding out of its limited context. The finding only addressed the discrete event of the first contact between witnesses D-2, D-3 and Mr Arido. As explained above, the Trial Chamber's determination of Mr Arido's guilt was based on his personal conduct which amounted to corruptly influencing the witnesses D-2, D-3, D-4, and D-6.[3637] Therefore, the Appeals Chamber rejects Mr Arido's argument in that regard.

1481. In light of the above, the Appeals Chamber rejects Mr Arido's arguments that the Trial Chamber erred in finding that he acted in concert with others and in assessing his conduct "through the lens of the common plan".[3638]

[3634] *See* Conviction Decision, paras 320-340, 351-352, 420, 669.
[3635] Mr Arido's Appeal Brief, paras 218-220, referring to Conviction Decision, para. 327.
[3636] Conviction Decision, para. 327.
[3637] Conviction Decision, paras 944-945, p. 457.
[3638] Mr Arido's Appeal Brief, para. 216.

3. Alleged error regarding judicial notice of contested issues related to the testimony of witnesses D-2, D-3, D-4, and D-6 in the Main Case

(a) Relevant background and part of the Conviction Decision

1482. In its Decision on the Prosecution Motion for Clarification, the Trial Chamber found that it could take judicial notice of transcripts of witness testimony during the Main Case, as they "are capable of ready determination by resort to sources whose accuracy cannot be reasonably questioned".[3639] It observed that this "would be limited to taking judicial notice of the dates and contents of the relevant witnesses' Main Case testimony, and not the truth or falsity of the testimony itself".[3640]

1483. In a subsequent decision, the Trial Chamber took judicial notice of the dates and contents of 260 items, including the transcripts and audio-visual recordings of testimonies in the Main Case trial.[3641] It further noted, however, that the testimony would "not be considered for their truth or falsity".[3642]

1484. In the Conviction Decision, the Trial Chamber recalled that it had taken "judicial notice of trial transcripts in respect of the dates and content of the testimonies, and not the truth or falsity of the testimony itself, and decisions emanating from the Main Case".[3643] It observed further that:

> the Chamber does not render judgment on substantive issues pertaining to the merits of the Main Case. […] The testimonial evidence concerning the merits of the Main Case has only been considered in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before Trial Chamber III. However, the truth or falsity of the testimonies concerning the merits of Main Case has not been assessed by this Chamber.[3644]

1485. In assessing Mr Arido's liability under article 70 (1) (a) and (b) of the Statute, the Trial Chamber stated that it was unable to conclude that he had aided, abetted or assisted these offences because "Mr Arido's meetings with the witnesses [D-2, D-3, D-4 and D-6] concerned only their membership of the military and other matters

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[3639] Decision on Prosecution Motion for Clarification, para. 6.
[3640] Decision on Prosecution Motion for Clarification, para. 6.
[3641] Judicial Notice Decision, paras 1, 4, referring to Annex A of "Prosecution Request for a Judicial Notice, Pursuant to Article 69(6) of the Rome Statute", 5 October 2015, ICC-01/05-01/13-1339-AnxA, pp. 1-4. This annex lists 260 items including 25 transcripts of testimony given by witnesses D-2, D-3, D-4 and D-6 in the Main Case.
[3642] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 6, lines 2-4.
[3643] Conviction Decision, para. 201 (footnote omitted).
[3644] Conviction Decision, para. 194 (footnotes omitted).

closely related to the merits of the Main Case".[3645] When assessing Mr Arido's liability for the offence of corruptly influencing these four witnesses under article 70 (1) (c) of the Statute, the Trial Chamber relied on the testimony of witnesses P-260 (D-2) and P-245 (D-3) in this case to determine that "Mr Arido purposefully and deliberately instructed the witnesses to provide certain information about their professional background, without concern for its truth, during their testimonies before Trial Chamber III".[3646]

1486. In making this finding, the Trial Chamber relied on witness P-260 (D-2)'s testimony in the present case, stating that Mr Arido had directed him and other witnesses at the Douala meeting to give false information to Mr Kilolo and the Court, including that witness D-2 himself was a sub-lieutenant.[3647] It also relied on witness P-245 (D-3)'s testimony in the present case where the witness testified that he as well as witnesses D-4 and D-6 did not have any military background, and that Mr Arido nevertheless gave each of them a military rank and insignia.[3648] The Trial Chamber also referred to "D-2's alleged military background" and found that witness P-245 (D-3) told Mr Arido that he was not a soldier.[3649] The Trial Chamber found further that "Mr Arido admitted that he instructed D-2, D-3, D-4 and D-6 to present themselves to Mr Kilolo and to the Court as FACA soldiers, even though he believed that they had no military background".[3650]

(b) Submissions of the parties

(i) Mr Arido

1487. Mr Arido submits that the Trial Chamber used the testimony of witnesses D-2, D-3, D-4 and D-6 in the Main Case to make adverse conclusions against him on issues under dispute, specifically on witnesses "D-2's and D-3's claim that they (and [witnesses D-4 and D-6]) […] had no military status".[3651] He contends that this was done in violation of the Trial Chamber's own statement that it would take judicial

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[3645] Conviction Decision, para. 872.
[3646] *See* Conviction Decision, para. 671, referring to paras 321-323, 328, 334, 338.
[3647] Conviction Decision, para. 334.
[3648] Conviction Decision, paras 328, 338, 391.
[3649] Conviction Decision, paras 126-127.
[3650] Conviction Decision, para. 128.
[3651] Mr Arido's Appeal Brief, para. 249. *See also* para. 322.

notice only of the dates and content of this testimony but would not consider their truth.[3652]

1488. Mr Arido maintains that the Trial Chamber relied on witnesses D-2's and D-3's testimony in the Main Case "for its truth" in finding that he instructed the witnesses to provide false testimony on their military status.[3653] He contends that the Trial Chamber: (i) compared their testimonies provided in the Main Case and in the present case on the issue of their military status; (ii) noted contradictions in the testimonies; (iii) found that the testimonies in the Main Case were false, and those in the present case were true; and (iv) inferred that the differences in the testimonies were the result of Mr Arido's instructions to these witnesses to state that they were soldiers.[3654]

1489. Mr Arido contends further that the Trial Chamber factually misinterpreted witnesses D-2's and D-3's testimony in the Main Case by suggesting that the witnesses had testified before Trial Chamber III that they had received instructions from Mr Arido as to what to say, even though this was not the case.[3655] Mr Arido also argues that the Trial Chamber made findings as to the untruthfulness of the testimonies of D-4 and D-6 in the Main Case, again contrary to the Trial Chamber's guidelines and adversely affecting Mr Arido.[3656]

(ii) The Prosecutor

1490. The Prosecutor responds that even if Mr Arido was challenging the civilian status of the witnesses, the Trial Chamber was entitled to take judicial notice of the date and content of witnesses D-2's, D-3's, D-4's, and D-6's testimony in the Main Case.[3657] She avers that the issue of their 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".[3658] The Prosecutor asserts that,

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[3652] Mr Arido's Appeal Brief, paras 248-249, 261, 266, referring to Judicial Notice Decision, para. 3, p. 6.
[3653] Mr Arido's Appeal Brief, para. 254.
[3654] Mr Arido's Appeal Brief, para. 259.
[3655] Mr Arido's Appeal Brief, paras 254-258, referring to Conviction Decision, paras 388-389, 391, fns 733, 738.
[3656] Mr Arido's Appeal Brief, paras 262-269, referring to Conviction Decision, paras 393-404.
[3657] Response, para. 702.
[3658] Response, para. 703.

rather than using the testimony in the Main Case "for the truth", the Trial Chamber's findings on Mr Arido's and Mr Kilolo's instructions to witnesses D-2 and D-3 "solely demonstrated that their coaching was reflected in the witnesses' testimony, regardless of the truth or falsity of their testimony".[3659]

1491. The Prosecutor avers further that Mr Arido "conflate[s] and misrepresent[s]" the findings made in the Main Case with those made in the present case.[3660] She argues that the findings that witnesses D-2 and D-3 were briefed or instructed were findings made based on their testimony in the present case.[3661] Moreover, the Prosecutor argues that Mr Arido's arguments regarding witnesses D-4 and D-6 should be summarily dismissed because the Trial Chamber "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)", which concerned offences under article 70 (1) (a) and (b) for which Mr Arido was acquitted.[3662]

(c) Determination by the Appeals Chamber

1492. The Appeals Chamber observes that Mr Arido's overarching submission is that the Trial Chamber made findings on the truthfulness of the testimony given by witnesses D-2, D-3, D-4, and D-6 in the Main Case, particularly on their military status, despite having stated during the proceedings that it would take judicial notice only of the dates and contents of such testimony, without assessing its truthfulness.[3663] The Appeals Chamber is not persuaded by this argument. In the Conviction Decision, the Trial Chamber stated that witnesses D-2 and D-3 had testified before Trial Chamber III that they were members of the FACA, and that this was consistent with Mr Arido's instructions.[3664] However, the Trial Chamber did not make a finding as to the truthfulness of witnesses D-2's or D-3's testimony on their association with the FACA. Indeed, the Trial Chamber's view that it could not make such a finding was

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[3659] Response, para. 703.
[3660] Response, para. 704.
[3661] Response, para. 704, referring to Conviction Decision, paras 321-323, 327-330, 334, 338, 339, 391, fn. 733.
[3662] Response, para. 705, referring to Conviction Decision, paras 48, 262-269, 394, 399, 401.
[3663] Mr Arido's Appeal Brief, para. 249.
[3664] *See* Conviction Decision, paras 338-340, 388, 391.

the reason why it acquitted him of the charges of having aided, abetted or otherwise assisted the offences under article 70 (1) (a) and (b) of the Statute.[3665]

1493. The Appeals Chamber notes in this regard that the Trial Chamber determined that "Mr Arido [had] purposefully and deliberately instructed the witnesses to provide certain information about their professional background, without concern for its truth, during their testimonies before Trial Chamber III".[3666] The Trial Chamber referred, *inter alia*, to parts of the Conviction Decision where it observed that, in his testimony before the Trial Chamber, witness P-260 (D-2) had "responded unequivocally and repeatedly that the information given [in the briefings] was not true"[3667] and that he had "testified that Mr Arido directed him to state that he was a sub-lieutenant".[3668] It also referred to parts where the Trial Chamber noted that witness P-245 (D-3) had "testified that Mr Arido induced him to give false testimony in the Main Case"[3669] and that this witness had "unequivocally stated that, when meeting the entire group of potential witnesses, including D-2, D-4, and D-6, Mr Arido assigned each witness a military rank and handed out military '*insignia*' to each of them".[3670] The Trial Chamber noted further that witness "P-245 (D-3) testified that D-4 and D-6 told the other witnesses in the group that they had no military background".[3671]

1494. The Appeals Chamber considers that, although the Trial Chamber made reference to the testimony relating to the military status of the witnesses, it did so in the context of determining whether illicit pre-testimony coaching had occurred.[3672] For that determination, however, it was irrelevant whether these witnesses had, in fact, been members of the FACA. For that reason, it is also irrelevant whether there was any corroboration as to the lack of military status of witnesses P-260 (D-2) and P-245 (D-3) at trial, or whether now new information has come to light as to whether

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[3665] Conviction Decision, paras 872, 946-949.
[3666] *See* Conviction Decision, para. 671, referring to paras 321-323, 328, 334, 338.
[3667] Conviction Decision, para. 334.
[3668] Conviction Decision, para. 334.
[3669] Conviction Decision, para. 328
[3670] Conviction Decision, para. 338 (footnotes omitted, emphasis in original).
[3671] Conviction Decision, para. 338 (footnote omitted).
[3672] Conviction Decision, para. 194. *See also* Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, line 24 to p. 6, line 1 ("[s]tatements pertaining to the merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony").

witness D-6 had been a soldier.[3673] Accordingly, Mr Arido's arguments in this regard will not be considered any further.

1495. Furthermore, the Appeals Chamber finds no merit in Mr Arido's claim that the Trial Chamber misrepresented the testimony of witnesses D-2 and D-3 in the Main Case by suggesting that they had testified before Trial Chamber III about receiving instructions from Mr Arido as to what to say, even though this was not the case. When reading the passages to which Mr Arido refers in their context, it is clear that the Trial Chamber did not find or even suggest that either witness D-2 or D-3 testified about Mr Arido's instructions in the Main Case.[3674] Mr Arido's argument is therefore baseless.

1496. Finally, with respect to Mr Arido's argument that the testimony of D-2 and D-3 was used to assess the truthfulness of the testimony of witnesses D-4 and D-6 in the Main Case, the Appeals Chamber notes that the Trial Chamber stated that it had only considered "[t]he testimonial evidence concerning the merits of the Main Case […] in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before Trial Chamber III".[3675] The Appeals Chamber observes that none of the Trial Chamber's findings challenged by Mr Arido with regard to the Main Case testimony of witnesses D-4 and D-6 addresses these witnesses' testimony on the merits of the Main Case; rather these findings relate to matters such as the witnesses' contacts with the defence and acquaintances with certain persons for which he was acquitted.[3676] The Appeals Chamber thus rejects Mr Arido's submissions in that regard.

1497. In light of the above, the Appeals Chamber finds that Mr Arido's fails to demonstrate that the Trial Chamber erred, and therefore rejects Mr Arido's arguments under this sub-ground of appeal.

[3673] *See* Mr Arido's Appeal Brief, para. 253.
[3674] *See* Conviction Decision, paras 338-340, 388, 391.
[3675] Conviction Decision, para. 194. *See also* Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, line 24 to p. 6, line 1.
[3676] Conviction Decision, paras 394, 399, 401.

4. Alleged errors regarding the Trial Chamber's findings on mens rea

(a) Alleged failure to provide a reasoned opinion regarding knowledge

(i) Relevant part of the Conviction Decision

1498. When discussing the applicable law for the offences under article 70 of the Statute, the Trial Chamber held with regard to the offence under article 70 (1) (c) of the Statute, that "the physical perpetrator must have 'intentionally' corruptly influenced the witness" and that "Article 70(1)(c) of the Statute 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".[3677]

1499. Elsewhere in the Conviction Decision, the Trial Chamber found that Mr Arido had the requisite *mens rea* under article 70 (1) (c) of the Statute as "he meant to engage in the conduct of corruptly influencing the witnesses".[3678]

1500. Moreover, the Trial Chamber stated that it did not rely on additional factors presented by the Prosecutor to establish Mr Arido's intent.[3679] It found that there was no evidence supporting the Prosecutor's allegation that "Mr Arido knew, at the time of the 2012 meeting in Douala, that Mr Kilolo would illicitly coach the witnesses on what to say in court at the May 2013 meeting in Yaoundé".[3680] The Trial Chamber further rejected the Prosecutor's argument that "Mr Arido cautioned witnesses 'about how they communicated with him, advising against using social media because it would be viewable by others'".[3681] It noted the email dated 11 February 2013 referred to by the Prosecutor in which Mr Arido told witness D-2 "to communicate with him outside '*facebook*'" and held that from the "context of Mr Arido's recurring submission that he had security concerns as a result of his involvement in the Main Case at the time relevant to the charges", the Trial Chamber could not conclude that the cautioning expressed in the email was connected to Mr Arido's illicit instructions

[3677] Conviction Decision, para. 50.
[3678] Conviction Decision, para. 670.
[3679] Conviction Decision, para. 673.
[3680] Conviction Decision, para. 674.
[3681] Conviction Decision, para. 675.

to witness D-2.[3682] The Trial Chamber also noted the Prosecutor's submission on Mr Arido's knowledge of Mr Kilolo's role as Mr Bemba's counsel in the Main Case and that his military background "enabled him 'to appreciate the importance of the information given as false testimony by the witnesses'".[3683] The Trial Chamber recalled in that regard that it would not make any findings on the truth or falsity of testimonial evidence regarding the merits of the Main Case.[3684] It further found that the Prosecutor's submission on Mr Arido's ability to appreciate the importance of the testimonies for the defence in the Main Case was insufficient to further show Mr Arido's intent to corruptly influence the witnesses.[3685]

(ii) Submissions of the parties

(a) Mr Arido

1501. Mr Arido submits that while the Trial Chamber found that article 70 (1) (c) of the Statute required proof that the perpetrator knew that his or her actions would "bring about the material elements of the offence […] with the purposeful will (intent) or desire to bring about those material elements of the offense", the Trial Chamber pointed to no evidence that would demonstrate that Mr Arido had such knowledge.[3686] Mr Arido avers that, to the contrary, the Trial Chamber rejected the Prosecutor's arguments as to his purported knowledge.[3687] Mr Arido alleges that the Trial Chamber did not explain this inconsistency.[3688] He adds that the Trial Chamber's finding that he instructed the witnesses to give specific information "without concern for its truth" "is not evidence that [he] knew that the testimonies were untrue" as, in Mr Arido's view, this finding is "purely subjective and not based on any evidence in the record".[3689]

1502. Mr Arido argues further that, in violation of article 66 of the Statute, the Trial Chamber assisted the Prosecution in satisfying its burden of proof by "filling in" the gaps in the Prosecutor's evidence.[3690] Mr Arido asserts that this is exemplified in the

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[3682] Conviction Decision, para. 675 (emphasis in original).
[3683] Conviction Decision, para. 676.
[3684] Conviction Decision, para. 676.
[3685] Conviction Decision, para. 676.
[3686] Mr Arido's Appeal Brief, paras 455-457, referring to Conviction Decision, para. 50.
[3687] Mr Arido's Appeal Brief, para. 458, referring to Conviction Decision, paras 674, 676.
[3688] Mr Arido's Appeal Brief, para, 459.
[3689] Mr Arido's Appeal Brief, para. 460.
[3690] Mr Arido's Appeal Brief, paras 235-236. *See also* para. 346.

Trial Chamber's approach to *mens rea*: although the Trial Chamber rejected a number of the Prosecutor's arguments, it concluded that he had the requisite *mens rea*.[3691] Mr Arido adds that the Trial Chamber offered "no reasoned opinion as to why it chose essentially to assist the Prosecution in satisfying its burden".[3692]

(b) The Prosecutor

1503. The Prosecutor responds that the "the Chamber expressly found that Arido had the requisite *mens rea* for corruptly influencing the four Cameroon witnesses" and that it clearly set out the evidence and subsidiary findings on which it based this conclusion.[3693] The Prosecutor argues that the fact that the Trial Chamber rejected certain of her arguments is "inapposite and distinct from the ample evidence which the Chamber found supported Arido's conviction".[3694] The Prosecutor adds that the Trial 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".[3695]

1504. The Prosecutor submits further that the Trial Chamber did not "fill in" the gaps in her evidence, but properly carried out a "holistic evaluation and weighing of all the evidence taken together".[3696] The Prosecutor argues that the Trial Chamber's rejection of some of the prosecution's evidence shows that it critically reviewed all the evidence before convicting Mr Arido and did not shift the burden of proof.[3697] She avers that Mr Arido's submissions should be summarily dismissed as they are unsubstantiated and merely express his disagreement with the Trial Chamber's assessment of the evidence.[3698]

(iii) Determination by the Appeals Chamber

1505. The Appeals Chamber recalls the Trial Chamber's finding that article 70 (1) (c) of the Statute "penalises the improper conduct of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct

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[3691] Mr Arido's Appeal Brief, para. 237, referring to Conviction Decision, paras 198-199, 671-677.
[3692] Mr Arido's Appeal Brief, para. 240.
[3693] Response, para. 785, referring to Conviction Decision, paras 670-672.
[3694] Response, para. 785.
[3695] Response, para. 785, referring to Conviction Decision, paras 128, 671.
[3696] Response, para. 700.
[3697] Response, para. 701, referring to Conviction Decision, paras 668-672.
[3698] Response, para. 700.

had an actual effect on the witness".[3699] The Trial Chamber correctly held that this offence does not require that the "criminal conduct actually influences the witness in question" because this "provision penalises the conduct of the physical perpetrator who, from his or her vantage point, seeks to manipulate the evidence given by the witness".[3700] Therefore, there was no reason for the Trial Chamber to establish that Mr Arido knew that his conduct would result in untrue testimony and Mr Arido's argument to that effect[3701] is dismissed.

1506. To the extent that Mr Arido could be understood as arguing that there was no evidence supporting the Trial Chamber's finding that "he meant to engage in the conduct of corruptly influencing the witnesses",[3702] the Appeals Chamber notes that this finding was based on two other findings.[3703] First, the Trial Chamber considered that Mr Arido "purposefully and deliberately instructed the witnesses to provide certain information about their professional background, without concern for its truth, during their testimonies before Trial Chamber III".[3704] Second, it was also satisfied that Mr Arido had made promises to the witnesses of "significant financial reward and relocation to Europe as an encouragement to give certain evidence".[3705] These findings were based on the testimonial evidence of witnesses P-260 (D-2) and P-245 (D-3) as well as documentary evidence.[3706] Mr Arido has not demonstrated that the Trial Chamber's finding on the basis of this evidence was unreasonable.

1507. Turning to Mr Arido's arguments that the Trial Chamber shifted the burden of proof and failed to provide a reasoned opinion as to "why it chose essentially to assist the Prosecution in satisfying its burden",[3707] the Appeals Chamber finds that he fails to identify the specific issues or factual findings in relation to which the Trial Chamber is alleged to have erred, or how any such error would materially affect the

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[3699] Conviction Decision, para. 48.
[3700] Conviction Decision, para. 48. *See also supra* para. 737.
[3701] Mr Arido's Appeal Brief, para. 457.
[3702] Conviction Decision, para. 670.
[3703] Conviction Decision, paras 670-672.
[3704] Conviction Decision, para. 671.
[3705] Conviction Decision, para. 672.
[3706] *See* Conviction Decision, paras 670-672, referring to paras 320-323, 328, 334, 338, 342; CAR-OTP-0074-1065-R02, pp. 1066-R02, 1068-R02.
[3707] Mr Arido's Appeal Brief, para. 240.

Conviction Decision. Therefore, the Appeals Chamber dismisses *in limine* Mr Arido's unsubstantiated assertions.

1508. In light of the above, the Appeals Chamber rejects Mr Arido's arguments.

(b) Alleged error regarding Mr Arido's statements made to the French police

(i) Relevant part of the Conviction Decision

1509. The Trial Chamber found that Mr Arido had "admitted that he instructed D-2, D-3, D-4 and D-6 to present themselves to Mr Kilolo and to the Court as FACA soldiers, even though he believed they had no military background".[3708] This finding was based on Mr Arido's statement to the French police in November 2013 ("November 2013 Statement"),[3709] in which, according to the Trial Chamber, Mr Arido had "stated his belief that D-2, D-3, D-4 and D-6 had not been military persons".[3710]

(ii) Submissions of the parties

(a) Mr Arido

1510. Mr Arido submits that the Trial Chamber's finding that he had the requisite *mens rea* for the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6 was flawed by procedural errors and errors in the assessment of evidence.[3711]

1511. First, Mr Arido argues that the Trial Chamber's findings on his *mens rea* on the basis of his November 2013 Statement were contradicted by a finding the Trial Chamber made in the Sentencing Decision on aggravating circumstances.[3712] He notes that in that decision, the Trial Chamber had expressed "doubts as to the Prosecution's selective interpretation of Mr Arido's statements", and held that the aggravating

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[3708] Conviction Decision, para. 128.
[3709] *See supra* para. 535.
[3710] Conviction Decision, para. 671, referring to CAR-OTP-0074-1065-R02, pp. 1066-R02, 1068-R02.
[3711] Mr Arido's Appeal Brief, paras 362-398. Mr Arido's argument on his alleged lack of notice of the factual allegations regarding the elements of the *mens rea* for direct perpetration is addressed under Section V above. His arguments regarding the purported inadmissibility of his two statements to the French police are addressed at paras 544-550.
[3712] Mr Arido's Appeal Brief, paras 368-371.

circumstances alleged by the Prosecutor on that basis had not been established beyond reasonable doubt.[3713]

1512. Second, Mr Arido submits that the Trial Chamber misinterpreted his November 2013 Statement because, according to Mr Arido, he never admitted that he believed that witnesses D-2, D-3, D-4 and D-6 were not military persons.[3714] Mr Arido argues that his November 2013 Statement clearly indicates that he never physically met any witnesses, but only listened to their testimonies recorded on a Dictaphone, referring to a particular passage of the statement.[3715] Mr Arido adds that, while the statement indicates that he "knew there were six witnesses" from Central African Republic, there was "no indication as to the identity of those six persons"; thus, in his view, the Trial Chamber's conclusion that the recorded testimonies concerned witnesses D-2, D-3, D-4 and D-6 was erroneous.[3716] Mr Arido argues further that in his November 2013 Statement, he only identified witness D-4 as not being a member of the FACA, but did not mention witnesses D-2, D-3 or D-6.[3717]

1513. Third, Mr Arido argues that, in relation to witness D-4, the Trial Chamber erred because it only considered what he stated in the November 2013 Statement, but not his subsequent assertion, in his January 2014 statement, that he knew witness D-4 "as a former military, but he did not know him personally".[3718] In Mr Arido's view, "[i]f the [Trial Chamber] had given weight to this, the allegations in respect to [his] instructing D-4 would evaporate".[3719]

(b) The Prosecutor

1514. The Prosecutor responds that it was reasonable for the Trial Chamber to rely on the November 2013 Statement when finding that he "believed that D-2, D-3, D-4 and D-6 had not been military persons".[3720] The Prosecutor argues that this finding is not contradicted by the Trial Chamber's finding in the Sentencing Decision that the

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[3713] Mr Arido's Appeal Brief, para. 371, referring to Sentencing Decision, para. 85.
[3714] Mr Arido's Appeal Brief, paras 383-384, referring to Conviction Decision, paras 128, 671-672. *See also* Mr Arido's Appeal Brief, para. 238.
[3715] Mr Arido's Appeal Brief, paras 386-387, referring to CAR-OTP-0074-1059, p. 1066.
[3716] Mr Arido's Appeal Brief, para. 388. *See also* paras 390-391.
[3717] Mr Arido's Appeal Brief, para. 391.
[3718] Mr Arido's Appeal Brief, paras 393-394.
[3719] Mr Arido's Appeal Brief, para. 396.
[3720] Response, para. 757, referring to Conviction Decision, para. 671.

Prosecutor failed to prove that Mr Arido had provided false information in his two statements to the French police.[3721] The Prosecutor maintains that, contrary to Mr Arido's submission, the Trial Chamber did not express "doubts" as to the reliability of Mr Arido's statements but rather "questioned the Prosecution's reading of them".[3722]

1515. The Prosecutor submits further that Mr Arido's argument regarding the Trial Chamber's reliance on his November 2013 Statement should be summarily dismissed because it amounts to a mere disagreement with the Trial Chamber's reading of this statement "without articulating an error in the Chamber's reasoning".[3723] The Prosecutor avers that Mr Arido's alternative interpretation that he did not meet the witnesses in person, but rather listened to recordings of anonymous witnesses, is "illogical and has no connection with the evidence".[3724]

1516. Finally, with respect to Mr Arido's argument regarding witness D-4, the Prosecutor avers that the Trial Chamber "reasonably chose" to disbelieve Mr Arido's self-serving version in the January 2014 statement and to rely on his November 2013 Statement instead.[3725] The Prosecutor adds that the Trial Chamber's findings on Mr Arido's *mens rea* are also based on witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence that they were civilians but were nevertheless instructed by Mr Arido together with witnesses D-4 and D-6 to falsely state that they were members of the military.[3726]

(iii) Determination by the Appeals Chamber

1517. With respect to Mr Arido's argument that the Trial Chamber made contradictory findings on his November 2013 Statement in the Conviction and the Sentencing Decisions,[3727] the Appeals Chamber notes that Mr Arido's submission is based on a misunderstanding of the findings in the Sentencing Decision. In that decision, the Trial Chamber did not assess the content of Mr Arido's statements. Rather, it

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[3721] Response, para. 757.
[3722] Response, para. 758.
[3723] Response, para. 760.
[3724] Response, para. 761.
[3725] Response, para. 763.
[3726] Response, para. 764.
[3727] Mr Arido's Appeal Brief, paras 368-371.

considered – and rejected – the Prosecutor's argument that the Trial Chamber should take into account as an aggravating circumstance Mr Arido's purported attempt to obstruct justice in the present case by providing the French authorities with two statements containing false information on issues such as the number of payments received from Mr Kilolo, the purpose of payments to specific witnesses in the Main Case or Mr Arido's acquaintance with defence witnesses in the Main Case.[3728] In this context, the Trial Chamber questioned the "Prosecution's selective interpretation of Mr Arido's statements"[3729] and found that, in his statements, Mr Arido had in fact confirmed that he knew some of the witnesses in the Main Case.[3730] The Appeals Chamber therefore finds that the Trial Chamber's finding in the Sentencing Decision does not contradict its finding in the Conviction Decision on the *mens rea* of Mr Arido, as the findings pertain to different issues.

1518. Turning to Mr Arido's argument that the Trial Chamber misread and misrepresented his November 2013 Statement when finding that he did not believe witnesses D-2, D-3, D-4, and D-6 to be military persons, the Appeals Chamber notes that the Trial Chamber's finding is based on two passages of the November 2013 Statement.[3731] Mr Arido claims that the Trial Chamber misinterpreted the first passage and incorrectly found that Mr Arido had stated that he had met the witnesses in person. The Appeals Chamber considers that he merely proposes an alternative interpretation of the evidence, which falls short of showing that the Trial Chamber's interpretation of that passage was unreasonable. Similarly, the Appeals Chamber considers that he has not shown that it was unreasonable for the Trial Chamber to conclude that the six witnesses referred to in his November 2013 Statement included witnesses D-2, D-3, D-4 and D-6 and that he was referring to them as not being military persons.

1519. With respect to Mr Arido's argument that the Trial Chamber failed to consider his January 2014 statement on witness D-4's military status,[3732] the Appeals Chamber

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[3728] Sentencing Decision, para. 84.
[3729] Sentencing Decision, para. 85.
[3730] *See* Sentencing Decision, para. 85, referring to Conviction Decision, para. 677.
[3731] *See* Conviction Decision, para. 671, referring to CAR-OTP-0074-1065-R02, pp. 1066-R02, 1068-R02.
[3732] *See supra* para. 535.

notes that there is indeed no reference to this statement in the Conviction Decision in relation to this matter. However, the Appeals Chamber recalls that the Trial Chamber correctly interpreted that the offence of corruptly influencing a witness under article 70 (1) (c) of the Statute does not require proof that the conduct had an actual effect on the witness.[3733] Therefore, for the purpose of establishing Mr Arido's criminal responsibility for the commission of this offence it is irrelevant whether witness D-4 had been a member of the FACA, or whether Mr Arido believed that the witness had been a member of the military. Moreover, the Trial Chamber's findings on Mr Arido's *mens rea* rest primarily on the direct evidence of witnesses P-260 (D-2) and P-245 (D-3) that they were instructed by Mr Arido together with witnesses D-4 and D-6 to falsely testify that they were members of the military.[3734] In that regard, witness P-260 (D-2) testified that during the Douala meeting, Mr Arido gave specific directions as to what the witnesses were expected to say to Mr Kilolo and before Trial Chamber III, and that Mr Arido had directed him to state that he was a sub-lieutenant.[3735] Witness P-245 (D-3) "testified repeatedly" that he had disclosed to Mr Arido that he was not a soldier but that was not a problem according to Mr Arido as he would brief the witness on military matters.[3736] Therefore, when considering the strong and direct evidence on Mr Arido's instructions to the witnesses, the Appeals Chamber does not find that it was erroneous for the Trial Chamber not to specifically refer to the January 2014 statement.

1520. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

(c) Alleged error in relying on the testimony of witnesses P-260 and P-245 (D-3) that is contradicted by witness D-4

(i) Submissions of Mr Arido

1521. Mr Arido argues that the Trial Chamber's conclusions as to his *mens rea* are, to the extent that they are based on the testimony of witnesses P-260 (D-2) and P-245

[3733] *See supra* para. 737.
[3734] *See* Conviction Decision, paras 671-672, referring to paras 320-323, 328, 334, 338, 342.
[3735] *See* Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 75, line 22 to p. 76, line 1; Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 64, lines 1-16. *See also* Conviction Decision, para. 334.
[3736] *See* Transcript of 19 October 2017, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 37, lines 10-22, p. 39, lines 10-12; Transcript of 22 October 2017, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 17, lines 12-13, p. 37, lines 10-14, p. 38, lines 4-6, 11-15, p. 46, lines 21-22, p. 48, lines 2-5. *See also* Conviction Decision, para. 328.

(D-3), contradicted by the testimony of witness D-4 during the sentencing hearing that took place after the Conviction Decision was issued.[3737]

(ii) Determination by the Appeals Chamber

1522. The Appeals Chamber recalls that in the "Decision on Mr Arido's application for admission of two hearing transcripts as additional evidence", the Appeals Chamber decided to reject, *inter alia*, the testimony of witness D-4 at the sentencing hearing as additional evidence on appeal, for the reasons set out therein.[3738] Accordingly, since witness D-4's testimony at the sentencing hearing is not properly before the Appeals Chamber, Mr Arido's arguments in this regard are rejected.

5. Alleged errors regarding the assessment of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence

(a) Alleged error regarding P-260 (D-2)'s and P-245 (D-3)'s status as "accomplice witnesses"

(i) Relevant part of the Conviction Decision

1523. The Trial Chamber stated that, in evaluating the oral testimony of a witness, it "bore in mind the individual circumstances of the witness, including his or her relationship to the accused, age, the provision of assurances against self-incrimination, bias against the accused, and/or motives for telling the truth."[3739] The Trial Chamber emphasised that "no witness is *per se* unreliable, including a witness that has previously given false testimony before a court" and that each statement given by a witness must be assessed individually as the "testimony of one and the same witness may therefore be reliable in one part, but not reliable in another."[3740]

1524. When assessing the credibility of witness P-260 (D-2), the Trial Chamber noted that the witness testified after having been given the assurances provided under rule 74 of the Rules.[3741] The Trial Chamber noted that, from the outset, witness P-260 (D-2) admitted "he had lied on specific points in the Main Case for his own benefit".[3742] The Trial Chamber further explained that, when challenged by the Defence regarding

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[3737] Mr Arido's Appeal Brief, paras 408-423.
[3738] Decision on Admission of Two Hearing Transcripts, paras 15-17.
[3739] Conviction Decision, para. 202.
[3740] Conviction Decision, para. 202.
[3741] Conviction Decision, para. 307.
[3742] Conviction Decision, para. 308.

perceived inconsistencies in his evidence, witness P-260 (D-2) "responded spontaneously and provided reasonable clarifications without diffidence" such as when "he reported outright the various sums of money he had received from Mr Kilolo and Mr Arido."[3743] The Trial Chamber found witness P-260 (D-2) to be articulate and precise in his descriptions and careful in limiting himself to his personal experiences.[3744] The Trial Chamber also noted witness P-260 (D-2)'s various attempts to differentiate facts within his testimony which showed that the witness "recounted events as he personally experienced them".[3745] The Trial Chamber noted that witness P-245 (D-3) corroborated many aspects of witness P-260 (D-2)'s evidence regarding the meetings in Douala and Yaoundé.[3746]

1525. With respect to witness P-245 (D-3), the Trial Chamber noted that he testified after being given rule 74 assurances.[3747] The Trial Chamber found witness P-245 (D-3) to be "frank and forthcoming throughout his testimony", and noted that "he provided explanations voluntarily and did not evade questions, even if they could potentially cast him in a disadvantageous light".[3748] The Chamber noted, in particular, witness P-245 (D-3)'s forthright testimony regarding his contacts with witness D-2 and other defence witnesses after their Main Case testimony as well as his threat at the Douala meeting not to testify unless he was paid.[3749] The Trial Chamber stated that witness P-245 (D-3) provided a level of detail consistent with someone who has experienced the events in question personally.[3750]

1526. The Trial Chamber further found that witness P-245 (D-3) did not revise or retract his statements when challenged by the Defence and provided a firm and consistent account of Mr Kilolo's role and instructions.[3751] With respect to reimbursement of costs and payments to witness P-245 (D-3) by the Prosecutor, the Trial Chamber found "no indication that the witness benefited from extraordinary

[3743] Conviction Decision, para. 308.
[3744] Conviction Decision, para. 309.
[3745] Conviction Decision, para. 310.
[3746] Conviction Decision, para. 310.
[3747] Conviction Decision, para. 312.
[3748] Conviction Decision, para. 313.
[3749] Conviction Decision, para. 313.
[3750] Conviction Decision, para. 314.
[3751] Conviction Decision, para. 315.

reimbursements that prompted the witness to strategically direct his evidence".[3752] With respect to Mr Arido's contention that the Prosecutor intervened in witness P-245 (D-3)'s [redacted], the Trial Chamber found that the witness coherently explained that his [redacted] was already underway before he made himself available to the Prosecution as a witness.[3753]

1527. The Trial Chamber concluded that witnesses P-260 (D-2) and P-245 (D-3) were generally credible and that it would rely on "their testimony, in particular, regarding meetings with Mr Arido and Mr Kilolo, Mr Mangenda's intervention, and the payments of money".[3754]

(ii) Submissions of the parties

(a) Mr Arido

1528. Mr Arido submits that the evidence of witnesses P-260 (D-2) and P-245 (D-3) was compromised and unreliable because they were "accomplice/perpetrators" who had to protect their own legal interests[3755] and testified under article 74 assurances.[3756] Mr Arido argues that, as P-260 (D-2) and P-245 (D-3) were the sole witnesses who provided direct testimony in relation to his conviction under article 70 (1) (c) of the Statute, his conviction should be reversed as a matter of law.[3757] He avers that the Trial Chamber should have responded to Defence arguments concerning the accomplice status of the two witnesses and explained the effect of this status on their motivation and incentive to testify.[3758] Mr Arido submits that the Trial Chamber erred in holding that a witness who has previously given false testimony should not be viewed as inherently unreliable as such a holding creates a "presumption of

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[3752] Conviction Decision, para. 316.
[3753] Conviction Decision, para. 316.
[3754] Conviction Decision, para. 319.
[3755] Mr Arido's Appeal Brief, paras 238, 271, 273-274, 314, 322, 351. *See also* paras 345, 353, 358, 405. Mr Arido's argument that witnesses D-2 and D-3 did not consistently maintain their statements as exemplified by the fact that witness D-3 changed his story in relation to the role of Mr Kokaté is addressed above. *See supra* paras 1597-1598.
[3756] Mr Arido's Appeal Brief, paras 271, 273, 275, 280-282, 289-290.
[3757] Mr Arido's Appeal Brief, paras 270-272, 314. *See also* 112.
[3758] Mr Arido's Appeal Brief, paras 273-274. *See also* paras 301-302, referring to *Muvunyi* Appeal Judgment, paras 144, 147. The Appeals Chamber finds the *Muvunyi* Case distinguishable from the case at hand. *See infra* fn. 3840.

reliability" and implies that giving false testimony in another case is a neutral factor.[3759]

1529. Mr Arido further submits that the Trial Chamber erred in not applying caution to or requiring additional corroboration of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence in light of their accomplice status and in light of the fact that they testified pursuant to an "immunity agreement" with the Prosecutor.[3760] Mr Arido argues that common law jurisdictions and other "international courts and tribunals" have treated such evidence with caution, if not great caution, and may require corroboration.[3761] Mr Arido argues that the evidence of witnesses P-260 (D-2) and P-245 (D-3) cannot be used to corroborate each other as both are suspects and accomplices with respect to the article 70 offences.[3762] Mr Arido submits that the Trial Chamber's failure to articulate any caution undertaken when assessing the evidence of witnesses P-260 (D-2) and P-245 (D-3) amounts to a failure to provide a reasoned opinion and impairs the Appeals Chamber's review of the Trial Chamber's credibility findings.[3763] Mr Arido submits that these errors prejudiced him and affected the outcome of the Conviction Decision.[3764]

(b) The Prosecutor

1530. The Prosecutor submits that the Trial Chamber considered witnesses P-260 (D-2)'s and P-245 (D-3)'s accomplice status, exhaustively reasoned why it found these witnesses credible, and reasonably concluded that they were credible and provided reliable evidence.[3765] The Prosecutor argues that Mr Arido's "mere allegations regarding the 'doubtful credibility' of accomplice witnesses" is insufficient to substantiate an error on the part of the Trial Chamber.[3766] The Prosecutor argues that the law does not support Mr Arido's contention that accomplice testimony is *per se* compromised and inherently unreliable as a trial chamber has a significant degree of discretion in considering the relevance and probative value of all types of

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[3759] Mr Arido's Appeal Brief, paras 276-278, referring to Conviction Decision, para. 202.
[3760] Mr Arido's Appeal Brief, paras 273, 278, 280-290. *See also* para. 405.
[3761] Mr Arido's Appeal Brief, paras 282-285.
[3762] Mr Arido's Appeal Brief, para. 288.
[3763] Mr Arido's Appeal Brief, paras 278, 292-293.
[3764] Mr Arido's Appeal Brief, para. 279.
[3765] Response, paras 707. 712.
[3766] Response, paras 707, 714.

evidence.[3767] The Prosecutor asserts that a trial chamber is not prohibited from relying on accomplice testimony,[3768] especially when the witness has been thoroughly cross-examined[3769] and the evidence has been treated with caution.[3770] The Prosecutor asserts that corroboration for accomplice witnesses is not required and a chamber may convict on the basis of the evidence of a single witness, even an accomplice witness.[3771] The Prosecutor further argues that the Trial Chamber did not err in finding witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence to be mutually corroborative, despite the accomplice status of each witness, because corroboration "is premised on similar testimonies and not the status of the witnesses".[3772] The Prosecutor finally argues that there was no "immunity agreement" as asserted by Mr Arido and that, in any event, even if a witness's testimony is given after receiving an assurance against self-incrimination, a chamber can still consider the acceptance of wrongdoing when assessing the witness's credibility.[3773]

(iii) Determination by the Appeals Chamber

1531. The Appeals Chamber understands Mr Arido's primary argument to be that, as a matter of law, his conviction could not be based solely on the evidence of two witnesses who were suspected of providing false testimony in the Main Case and whose testimony in the present case was subject to assurances against self-incrimination under rule 74 of the Rules. The Appeals Chamber has previously considered and rejected similar arguments made by Mr Bemba regarding the Trial Chamber's assessment of the credibility of witnesses P-260 (D-2) and P-245 (D-3).[3774] Given the overlap in substance, the Appeals Chamber considers its reasoning in rejecting Mr Bemba's arguments to be applicable to Mr Arido's arguments regarding the credibility of witnesses P-260 (D-2) and P-245 (D-3) as "accomplice".[3775] As

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[3767] Response, para. 708, referring to rule 63 (2) of the Rules; *Lubanga* Decision on admissibility of four documents, para. 24.
[3768] Response, para. 708.
[3769] Response, para. 708.
[3770] Response, paras 708-709, referring to Conviction Decision, paras 202, 307-319.
[3771] Response, paras 708, 710, referring, *inter alia*, to rule 63 (4) of the Rules.
[3772] Response, para. 710.
[3773] Response, para. 713.
[3774] *See supra* paras 1018-1023.
[3775] The Appeals Chamber understands Mr Arido's reference to "accomplice" to mean a person who helps another person commit a crime. The Appeals Chamber notes that as witnesses P-260 (D-2) and P-245 (D-3) admitted to testifying falsely in the Main Case in exchange for money at the instruction of

explained in that context, the Appeals Chamber considers that whether a particular witness is considered reliable will depend on the circumstances of the case.[3776] The condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence, but, contrary to Mr Arido's suggestion, does not make this evidence unreliable *per se* or in need of corroboration as a matter of law.

1532. As found for Mr Bemba's challenges, the Appeals Chamber considers that from the manner in which the Trial Chamber carried out its assessment of witnesses P-260 (D-2)'s and P-245 (D-3)'s credibility, it is clear that it duly took the individual circumstances of the witness into account.[3777] The Appeals Chamber finds that the Trial Chamber did not overlook the accomplice status of witnesses P-260 (D-2) and P-245 (D-3) and provided sufficient reasons regarding their credibility to enable Mr Arido to exercise his right of appeal.

1533. Turning to Mr Arido's assertion that witnesses P-260 (D-2) and P-245 (D-3) were not credible because they testified pursuant to an "immunity agreement",[3778] the Appeals Chamber finds this argument unpersuasive. First, contrary to Mr Arido's submission, the assurances the witnesses received pursuant to rule 74 (2) and (3) (c) of the Rules do not amount to an immunity agreement against prosecution. Second and most importantly, such assurances do not provide any protection against prosecutions for offences under article 70 of the Statute, or sanctions for misconduct under article 71 of the Statute, should the witness's testimony be false.[3779] Having found that witnesses P-260 (D-2) and P-245 (D-3) did not testify pursuant to an immunity agreement, the Appeals Chamber need not consider what bearing such an agreement would have on a witness's credibility.

Mr Arido (*see* Conviction Decision, paras 308, 313, 334, 338, 420), these witnesses can be considered "accomplices" under this meaning of the term.

[3776] *See supra* para. 1019.

[3777] *See supra* para. 1021.

[3778] Mr Arido's Appeal Brief, paras 273, 280-282.

[3779] In particular, rule 74 (3) (c) (ii) of the Rules provides that: "In the case of other witnesses, the Chamber may require the witness to answer the question or questions, after assuring the witness that the evidence provided in response to the questions: […] Will not be used either directly or indirectly against that person in any subsequent prosecution by the Court, *except under articles 70 and 71*" (emphasis added).

1534. Furthermore, Mr Arido argues that the Trial Chamber erred in not requiring additional corroboration of witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony.[3780] Although, the "accomplice/perpetrator" status of witnesses is a circumstance that needs to be carefully weighed when their testimony is assessed, the Appeals Chamber recalls its finding that corroboration is not required as a matter of law when evaluating the testimony of any witness.[3781] The Appeals Chamber therefore finds that a trial chamber may rely on uncorroborated, but otherwise credible, testimony of accomplice witnesses.

1535. In this regard, the Appeals Chamber recalls that the Trial Chamber, when assessing the credibility of witnesses P-260 (D-2) and P-245 (D-3), noted that their testimonies were mutually corroborative.[3782] Contrary to Mr Arido's assertion,[3783] the Appeals Chamber does not find that the Trial Chamber erred in using the testimony of two "accomplices" to corroborate one another when assessing their credibility.

1536. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber did not err and rejects Mr Arido's arguments regarding the "accomplice" status of witnesses P-260 (D-2) and P-245 (D-3).

(b) Alleged failure to consider witness D-24-1's evidence and a certain email of P-260 (D-2) and to provide a reasoned opinion on the credibility and reliability of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence

(i) Submissions of the parties

(a) Mr Arido

1537. Mr Arido argues that the Trial Chamber failed to provide a reasoned opinion by not considering and discussing evidence that was directly relevant to the credibility of witness P-260 (D-2), specifically the evidence of Defence witness D-24-1 and witness D-2's email to Mr Kilolo.[3784] Mr Arido asserts that witness D-24-1's evidence and witness D-2's email of 21 June 2013 to Mr Kilolo show that D-2 was jealous of and had a "deep-seated animosity toward" Mr Arido and provide unchallenged evidence

[3780] Mr Arido's Appeal Brief, paras 278, 283-285, 288.
[3781] *See supra* para. 1083.
[3782] Conviction Decision, paras 310, 314.
[3783] Mr Arido's Appeal Brief, para. 288.
[3784] Mr Arido's Appeal Brief, paras 295-299. *See also* paras 294, 297, 303-304, 309, 345.

of P-260 (D-2)'s motivation to lie and to "testify unreliably and incredibly" about him and the alleged Douala briefing.[3785] Mr Arido further argues that this evidence contests witness P-260 (D-2)'s credibility and evidence that Mr Arido briefed him, and undermines the Trial Chamber's conclusion that Mr Arido instructed witness D-2.[3786] Mr Arido asserts that the Trial Chamber's "lack of discussion of 'motivational' factors", in light of the evidence of witnesses D-24-1 and P-260 (D-2)'s email, rendered the Trial Chamber's assessment of P-260 (D-2)'s reliability erroneous and incomplete.[3787] Mr Arido submits that the Trial Chamber's failure to provide a reasoned opinion on these points amounts to an error of law and violated his right under article 67 (1) (e) of the Statute.[3788]

(b) The Prosecutor

1538. The Prosecutor submits that the Trial Chamber provided a full and reasoned statement of its findings regarding witnesses P-260 (D-2)'s and P-245 (D-3)'s credibility.[3789] She submits further that the Appeals Chamber should dismiss Mr Arido's submission that the Trial Chamber erred in not addressing the evidence of witness D-24-1 and one email from D-2 to Mr Kilolo.[3790] The Prosecutor argues that it is to be presumed that the Trial Chamber assessed and weighed the evidence, and while this presumption may be rebutted, Mr Arido's argument fails to do so because the evidence to which he refers is not "clearly relevant to the findings" and would not have affected the Conviction Decision.[3791] The Prosecutor argues further that, though not expressly mentioned, the Trial Chamber did not disregard the evidence of witness D-24-1 and the related D-2's email, but concluded that based on other evidence it was not precluded from finding witness P-260 (D-2) to be credible.[3792] The Prosecutor asserts that Mr Arido's argument that D-2 had a deep-seated animosity towards him is "wholly speculative and does not undermine the credibility of D-2's corroborated evidence".[3793] The Prosecutor asserts that Mr Arido fails to point to any

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[3785] Mr Arido's Appeal Brief, paras 296-298. *See also* Mr Arido's Closing Submissions, para. 184.
[3786] Mr Arido's Appeal Brief, paras 296, 299.
[3787] Mr Arido's Appeal Brief, para. 300.
[3788] Mr Arido's Appeal Brief, paras 300, 304.
[3789] Response, para. 715.
[3790] Response, para. 715.
[3791] Response, paras 716, 717.
[3792] Response, para. 717, referring to Conviction Decision, paras 202, 307-319.
[3793] Response, para. 717.

inconsistencies in witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony about the relevant events,[3794] and Mr Arido's unsupported submissions do not show a lacuna in the Trial Chamber's reasoning or that the evidence allegedly disregarded would have affected the Conviction Decision.[3795]

(ii) Determination by the Appeals Chamber

1539. The Appeals Chamber notes that the Trial Chamber did not refer to Mr Arido's Defence witness D-24-1's evidence provided in the present case,[3796] nor did it refer to witness D-2's email of 21 June 2013 to Mr Kilolo.[3797]

1540. The Appeals Chamber recalls that a trial chamber is obliged to carry out a "holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue".[3798] The Appeals Chamber recalls further that every accused has the right to a reasoned opinion.[3799] The Appeals Chamber recalls that it is not necessary for a trial chamber to refer in its reasons to the testimony of every witness or every piece of evidence on the trial record.[3800] Nevertheless, a trial chamber's reasoning may be considered defective if it completely disregarded evidence which is clearly relevant to its findings.

1541. Mr Arido asserts that witness D-24-1's testimony and D-2's email to Mr Kilolo evinces witness D-2's "deep-seated animosity" towards him and contradicts P-260 (D-2)'s evidence that he briefed him.[3801] The Appeals Chamber first notes that D-24-1's testimony and D-2's email to Mr Kilolo do not support these conclusions, particularly as D-2 stated in the email, in reference to Mr Arido, that "he had nothing against him".[3802] Likewise, neither the statement in witness D-2's email, to which Mr

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[3794] Response, para. 720.
[3795] Response, para. 721.
[3796] *See* Transcript of 21 March 2016, ICC-01/05-01/13-T-46-Red-ENG (WT); Transcript of 22 March 2016, ICC-01/05-01/13-T-47-Red-ENG (WT).
[3797] This email is contained in annex C of the "Rapport du Conseil indépendant suivant la Décision ICC-01/05-01/13-366-Conf (Analyse d'un premiers lot d'emails)", 11 September 2014, ICC-01/05-01/13-670-Conf-Exp-AnxC; a confidential redacted version was registered on 20 May 2015 (ICC-01/05-01/13-670-Conf-AnxC-Red). The Appeals Chamber notes that Mr Arido submitted this same annex on 22 March 2016, which was registered as CAR-OTP-0088-0504.
[3798] *Lubanga* Appeal Judgment, para. 22 (emphasis in original).
[3799] *See* article 74 (5) of the Statute.
[3800] *See supra* paras 102-107.
[3801] Mr Arido's Appeal Brief, para. 296.
[3802] *See* CAR-OTP-0088-0504, p. 0509 ("*Je n'ai rien contre lui"*).

Arido refers,[3803] that Mr Arido "had wanted that […] I was removed of the testimony" nor the testimony of witness D-24-1 call into question the Trial Chamber's finding that Mr Arido had briefed and instructed witness D-2. Furthermore, the Appeals Chamber considers that Mr Arido's submissions are based solely on his own assumptions regarding D-2's motivations and fail to show that this evidence was relevant to the Trial Chamber's credibility findings regarding witness P-260 (D-2).

1542. Accordingly, the Appeals Chamber finds that Mr Arido does not demonstrate that the Trial Chamber erred. His arguments are therefore rejected.

(c) Alleged error in assessing the absence of relevant call data records when evaluating witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence

(i) Relevant part of the Conviction Decision

1543. The Trial Chamber noted witness P-260 (D-2)'s testimony that, once he accepted Mr Arido's proposal to testify in the Main Case and to present himself as a sub-lieutenant, "Mr Arido called Mr Kilolo *'on the spot'* and handed the telephone to [him] so that he could introduce himself to Mr Kilolo".[3804] The Trial Chamber found witness P-260 (D-2)'s account to be "organised, chronological and clear" as well as "firm and honest".[3805] With regard to Mr Arido's argument at trial that "no call data records have been produced in support of the alleged telephone call between Mr Arido and Mr Kilolo during Mr Arido's meeting with D-2", the Trial Chamber found that the absence of call data records did not diminish the reliability of witness P-260 (D-2)'s evidence.[3806] The Trial Chamber noted, in this regard, witness P-433's evidence that the call data records did not necessarily comprise all contacts between Mr Arido and Mr Kilolo, as a telephone number unknown to the prosecuting authorities may have been used.[3807] The Trial Chamber further noted that witness P-245 (D-3) "recalled a similar pattern on the part of Mr Arido, insofar as he called Mr Kilolo during his meeting with D-3".[3808] The Trial Chamber concluded that it was

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[3803] Mr Arido's Appeal Brief, para. 296 ("*Et il avait voulu […] que je sois éliminé de la d[é]position*") (emphasis in original).
[3804] Conviction Decision, paras 323-324.
[3805] Conviction Decision, para. 325.
[3806] Conviction Decision, para. 325.
[3807] Conviction Decision, para. 325.
[3808] Conviction Decision, para. 325.

satisfied that witness P-260 (D-2)'s evidence was sufficiently reliable and did not necessitate further corroboration.[3809]

1544. With respect to witness P-245 (D-3), the Trial Chamber noted that, during the witness's first encounter with Mr Arido, Mr Arido received a telephone call which he said was from Mr Kilolo.[3810] The Trial Chamber then recalled that witness P-260 (D-2) "also testified that, when he first met with Mr Arido, Mr Kilolo and Mr Arido communicated by telephone".[3811] The Trial Chamber observed that witness P-245 (D-3)'s "account of his first encounter with Mr Arido was clear and consistent throughout his testimony, including when questioned by the Defence".[3812] The Trial Chamber further noted that, in light of witness P-260 (D-2)'s evidence, witness P-245 (D-3)'s "account of how he was approached by Mr Arido manifests a similar, yet subtly nuanced, pattern".[3813] The Trial Chamber concluded that P-245 (D-3)'s evidence on his encounter with Mr Arido was "honest and reliable".[3814]

(ii) Submissions of the parties

(a) Mr Arido

1545. Mr Arido submits that the Trial Chamber erred in law by not applying the principle *in dubio pro reo* to the absence of call data records corroborating witness P-260 (D-2)'s testimony regarding a telephone call between Mr Kilolo and himself.[3815] He argues that the principle *in dubio pro reo*, as a corollary to the presumption of innocence and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged.[3816] Mr Arido asserts that the Trial Chamber failed to mention that there were no call data records for "the critical January-February 2012 period".[3817] Mr Arido argues that the Trial Chamber used witness P-433's testimony to support its finding

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[3809] Conviction Decision, para. 325.
[3810] Conviction Decision, para. 329.
[3811] Conviction Decision, para. 329.
[3812] Conviction Decision, para. 330.
[3813] Conviction Decision, para. 330.
[3814] Conviction Decision, para. 330.
[3815] Mr Arido's Appeal Brief, paras 103-111.
[3816] Mr Arido's Appeal Brief, para. 103, referring to article 22 (2) of the Statute; *Bemba* Conviction Decision, para. 218; *Renzaho* Appeal Judgment, para. 474; *Akayesu* Trial Judgment, para. 501.
[3817] Mr Arido's Appeal Brief, paras 105-106, referring, *inter alia*, to Mr Arido's Closing Submissions, paras 133-134.

that he had recruited witnesses, "a fundamental element of the offence for which [he] was convicted".[3818] Mr Arido avers that, had the Trial Chamber applied the principle *in dubio pro reo*, "it would have concluded that P-433's testimony did not support proof beyond a reasonable doubt that P-260 (D-2)'s evidence of [an alleged telephone call between Mr Kilolo and himself] was reliable"[3819] or that the witness was credible, and the Trial Chamber would therefore have reached a different verdict.[3820]

1546. Mr Arido argues further that the Trial Chamber presumed that the call between Mr Arido and Mr Kilolo occurred, when in fact there was "missing evidence" important and relevant to the offence charged and the credibility of witness P-260 (D-2).[3821] He adds that the Trial Chamber failed to provide a reasoned opinion making it impossible to assess whether the corroborative evidence of witness P-245 (D-3) was in fact similar to the evidence of witness P-260 (D-2).[3822]

(b) The Prosecutor

1547. The Prosecutor responds that Mr Arido's argument that the Trial Chamber erred in not applying the *in dubio pro reo* principle when finding that Mr Arido called Mr Kilolo, notwithstanding the absence of corroborating call data records, misunderstands the law and misrepresents the evidence and the Trial Chamber's findings.[3823] The Prosecutor submits that the Trial Chamber did not presume that the telephone call between Mr Arido and Mr Kilolo occurred, but rather positively found that Mr Arido called Mr Kilolo based on witness P-260 (D-2)'s direct evidence and the corroborating testimony of witness P-245 (D-3).[3824] With respect to witness P-433's testimony, the Prosecutor argues that the Trial Chamber reasonably found that the absence of evidence in the call data records of a telephone call between Mr Arido and Mr Kilolo did not undermine P-260 (D-2)'s corroborated evidence that the telephone call occurred.[3825] The Prosecutor further argues that witness P-433's

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[3818] Mr Arido's Appeal Brief, paras 108-109.
[3819] Mr Arido's Appeal Brief, paras 108, referring to Conviction Decision, paras 324-326.
[3820] Mr Arido's Appeal Brief, para. 111.
[3821] Mr Arido's Appeal Brief, para. 110.
[3822] Mr Arido's Appeal Brief, para. 112, referring to Conviction Decision, para. 325; *Muvunyi* Appeal Judgment, para. 144.
[3823] Response, para. 676.
[3824] Response, paras 677-678, referring to Conviction Decision, paras 324-325, 329.
[3825] Response, paras 679, 681, referring to Conviction Decision, para. 325.

evidence did not show that witness P-260 (D-2) was unreliable.[3826] The Prosecutor asserts that Mr Arido misunderstands the presumption of innocence principle, the beyond a reasonable doubt standard, and the *in dubio pro reo* principle as only material facts underlying the guilt of the accused, as opposed to individual evidence or predicate circumstantial facts, must be proved beyond a reasonable doubt.[3827] She asserts further that evidence must not always be interpreted in favour of the accused.[3828]

1548. Furthermore, the Prosecutor argues that the Trial Chamber sufficiently explained why it considered witness P-260 (D-2)'s testimony to be corroborated by witness P-245 (D-3)'s evidence and that the Trial Chamber's assessment of the evidence was meticulous and reasonable,[3829] and therefore does not amount to a situation where a trial chamber failed to address inconsistencies in the testimony of witnesses.[3830] The Prosecutor submits that Mr Arido's arguments should be dismissed as he expresses disagreement with the Trial Chamber's "evidentiary assessments and factual determinations, but fails to show that no reasonable Trial Chamber could have reached the same conclusion".[3831]

(iii) Determination by the Appeals Chamber

1549. The Appeals Chamber understands Mr Arido to argue that, because there was no call data records of the telephone call between him and Mr Kilolo to which witness P-260 (D-2) referred in his testimony, the Trial Chamber should have concluded, *in dubio pro reo*, that there had been no such telephone call. This argument is wholly unpersuasive. The Appeals Chamber notes that the Trial Chamber's finding was based on the unequivocal testimony of witness P-260 (D-2), which was corroborated by witness P-245 (D-3)'s testimony, who had stated that Mr Arido had called Mr Kilolo during D-3's and Mr Arido's meeting.[3832] While the existence of documentary proof of the telephone call between Mr Arido and Mr Kilolo by way of a call data record would have provided additional evidence, there is no apparent reason why the Trial

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[3826] Response, para. 680.
[3827] Response, para. 681, referring to *Lubanga* Appeal Judgment, para. 22.
[3828] Response, para. 681, referring to *Katanga* Conviction Decision, para. 53.
[3829] Response, para. 682, referring to Conviction Decision, paras 307-319, 324-325, 328-330.
[3830] Response, para. 682, referring to *Muvunyi* Appeal Judgment, para. 144.
[3831] Response, para. 683.
[3832] Conviction Decision, para. 325.

Chamber could not have found this call to be established on the basis of the testimonial evidence. There was no suggestion in the evidence that the call data records which the Prosecutor had tendered into evidence were exhaustive – as confirmed by witness P-433, upon which the Trial Chamber relied.[3833] The Trial Chamber addressed this issue directly by noting Mr Arido's argument concerning the absence of call data records as well as noting witness P-433's evidence that the call data records did not necessarily comprise all contacts between the accused and Mr Kilolo, as a telephone number unknown to the prosecuting authorities may have been used.[3834] Thus, neither witness P-433's testimony nor the absence of corroborating call data records created any doubt as to the correctness of the testimony of witnesses P-260 (D-2) and P-245 (D-3) upon which the Trial Chamber relied.

1550. Furthermore, Mr Arido's contention that the Trial Chamber failed to provide a full and reasoned opinion with respect to witness P-245 (D-3)'s corroborative evidence also fails. The Trial Chamber explained that it found witness P-245 (D-3)'s evidence corroborative of witness P-260 (D-2)'s evidence because P-245 (D-3) "recalled a similar pattern on the part of Mr Arido, insofar as he called Mr Kilolo during his meeting with D-3".[3835] The Trial Chamber also referenced its summary of witness P-245 (D-3)'s evidence,[3836] where it set out in greater detail the witness "statement that, during D-3's first encounter with Mr Arido, Mr Arido received a telephone call, which he said was from Mr Kilolo" and recalled that witness P-260 (D-2) had "also testified that, when he first met with Mr Arido, Mr Kilolo and Mr Arido communicated by telephone".[3837] The Trial Chamber further explained why it found each witness reliable[3838] and why the absence of corroborating call data records did not undermine this assessment.[3839] Mr Arido does not point to any inconsistencies in witnesses P-260 (D-2)'s and P-245 (D-3)'s accounts of telephone communications between Mr Arido and Mr Kilolo that would have warranted further

[3833] Conviction Decision, para. 325.
[3834] Conviction Decision, para. 325.
[3835] Conviction Decision, para. 325.
[3836] Conviction Decision, para. 325.
[3837] Conviction Decision, para. 329.
[3838] Conviction Decision, paras 324-325, 327-330.
[3839] Conviction Decision, para. 325.

discussion on the part of the Trial Chamber.[3840] The Appeals Chamber accordingly finds that the Trial Chamber provided a reasoned opinion with respect to witness P-245 (D-3)'s corroborative evidence regarding communications between Mr Arido and Mr Kilolo.

1551. In light of the foregoing, the Appeals Chamber finds that Mr Arido has failed to show that the Trial Chamber erred in properly considering the call data records when assessing the evidence of witnesses P-260 (D-2) and P-245 (D-3), and accordingly, his arguments are rejected.

(d) Alleged error in finding that witnesses D-2, D-3, D-4, and D-6 followed Mr Arido's instructions and that he readjusted their scripted testimonies

(i) Relevant part of the Conviction Decision

1552. The Trial Chamber found that, on the morning following witnesses P-260 (D-2)'s and P-245 (D-3)'s arrival in Douala, they, along with others, including witnesses D-4 and D-6, met with Mr Arido and Mr Kokaté at their hotel.[3841] The Trial Chamber further found that, during this preparatory meeting before the witnesses' interviews with Mr Kilolo, Mr Arido gave specific directions as to what the witnesses were expected to say to Mr Kilolo and the Court.[3842]

1553. The Trial Chamber found that Mr Kilolo, together with his legal assistant, interviewed witnesses D-2, D-3, D-4, and D-6 on 21 February 2012 at his hotel in Douala.[3843] The Trial Chamber noted that, "[w]hen played the recordings of the Douala interview with Mr Kilolo, P-260 (D-2) candidly admitted that his statements,

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[3840] The Appeals Chamber notes Mr Arido's reference to the *Muvunyi* Appeal Judgment (Mr Arido's Appeal Brief, para. 112, fn. 109) and finds that this case-law is distinguishable from the present case. In that case, Mr Muvunyi had pointed to numerous inconsistencies between the accounts of two witnesses regarding a meeting. The ICTR Appeals Chamber confirmed that the accounts of the two witnesses conflicted and stated that it was "particularly troubled by the numerous inconsistencies in [the witnesses'] testimonies as to the core details relating to Muvunyi's alleged speech and by the utter lack of any discussion of these inconsistencies in the Trial Judgement". It is in this context that the Appeals Chamber found it "impossible to assess the finding that the testimony of Witnesses YAI and CCP about the meeting was 'strikingly similar' or consistent with respect to the material facts relating to this charge." *Muvunyi* Appeal Judgment, paras 143-144. In the present case, Mr Arido does not point to any inconsistencies and the Appeals Chamber does not find in the Trial Chamber's findings any inconsistencies in witnesses P-260 (D-2)'s and P-245 (D-3)'s accounts as to essential details regarding communications between Mr Arido and Mr Kilolo. *See* Conviction Decision, paras 324-325, 329.
[3841] Conviction Decision, para. 334.
[3842] Conviction Decision, para. 334.
[3843] Conviction Decision, para. 348.

which had been '*arranged*', were influenced by Mr Arido's instructions".[3844] The Trial Chamber also noted that witness P-245 (D-3) similarly testified that he gave Mr Kilolo information as instructed by Mr Arido.[3845] The Trial Chamber concluded, on the basis of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence, "that, at the Douala meeting, D-2, D-3, D-4 and D-6 followed Mr Arido's instructions and Mr Kilolo did not instruct the witnesses on their testimony".[3846]

1554. The Trial Chamber further found that, after the interview with Mr Kilolo, witnesses D-2, D-3, D-4, and D-6 "de-briefed Mr Arido on the substance of their interviews with Mr Kilolo".[3847] The Trial Chamber found that the witnesses, with Mr Arido, "revisited and adjusted some aspects of their scripted testimonies" in light of the issues that arose during their interviews with Mr Kilolo.[3848] The Trial Chamber noted witness P-260 (D-2)'s testimony that he updated his personal notes upon his return home to reflect the new information that had been exchanged among the meeting participants.[3849] The Trial Chamber concluded that, based on witness P-260 (D-2)'s consistent testimony, "Mr Arido readjusted the scripted testimonies of D-2, D-3, D-4, and D-6" during this second de-briefing.[3850]

1555. Witness P-260 (D-2) testified that, in order to prepare properly for the interview with Mr Kilolo and for his Main Case testimony, he created briefing notes.[3851] The witness explained that the first version of his notes contained information upon which Mr Arido had briefed him.[3852] Following his meeting with Mr Kilolo in Douala, the witness stated that he produced a revised version of his original notes.[3853] Witness P-260 (D-2) testified that "he later corrected and amended his revised notes […] to include Mr Kilolo's instructions".[3854] The Trial Chamber found that there was "no

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[3844] Conviction Decision, para. 348 (emphasis in original, footnotes omitted).
[3845] Conviction Decision, para. 348.
[3846] Conviction Decision, para. 348.
[3847] Conviction Decision, para. 351 (footnote omitted).
[3848] Conviction Decision, para. 351.
[3849] Conviction Decision, para. 351.
[3850] Conviction Decision, para. 351. *See also* Conviction Decision, para. 944.
[3851] Conviction Decision, para. 335.
[3852] Conviction Decision, para. 336.
[3853] Conviction Decision, para. 336.
[3854] Conviction Decision, para. 336.

indication in the evidence that these documents were forged or produced *post factum*".[3855]

(ii) Submissions of the parties

(a) Mr Arido

1556. Mr Arido submits that the Trial Chamber erred in finding that: (i) witnesses P-260 (D-2), P-245 (D-3), D-4, and D-6 had followed his instruction regarding their testimonies in the Main Case;[3856] and (ii) he readjusted their scripted testimonies.[3857] He argues that the Trial Chamber's finding concerning the witnesses having followed his instructions was based solely on "the hearsay evidence of D-2 and D-3 about D-4 and D-6", which amounts to an error.[3858] Mr Arido argues that the Trial Chamber erred in finding that he readjusted the scripted testimonies of the witnesses as a result of (i) relying on witness P-260 (D-2)'s unreliable and uncorroborated testimony as an accomplice;[3859] (ii) finding that the witness took part in a debriefing session when he, in fact, had left Douala after meeting Mr Kilolo;[3860] and (iii) relying on witness P-260 (D-2)'s account that he had dipped his notes in tea to make them look old even though the witness had not, in fact, shown the notes to Mr Kilolo.[3861]

(b) The Prosecutor

1557. The Prosecutor submits that, based on the totality of the evidence, including witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony in the present case and the Main Case,[3862] the "Trial Chamber reasonably found that witnesses D-2, D-3, D-4, and D-6 followed Arido's instructions during the Douala meeting with Kilolo in February 2012".[3863] The Prosecutor argues that, although witnesses D-2 and D-3 were not present during D-4's and D-6's individual interviews with Mr Kilolo, the four witnesses "compared their accounts and revisited their scripts under Arido's

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[3855] Conviction Decision, para. 337.
[3856] Mr Arido's Appeal Brief, paras 399-402, referring to Conviction Decision, paras 348, 944.
[3857] Mr Arido's Appeal Brief, paras 403-406, referring to Conviction Decision, paras 351, 944, fn. 2089.
[3858] Mr Arido's Appeal Brief, paras 401-402.
[3859] Mr Arido's Appeal Brief, paras 403-405.
[3860] Mr Arido's Appeal Brief, para. 406.
[3861] Mr Arido's Appeal Brief, para. 407.
[3862] Response, para. 765, referring to Conviction Decision, paras 348, 388, 391.
[3863] Response, para. 765.

guidance" as a group after their interviews.[3864] The Prosecutor avers that, in any event, article 70 (1) (c) of the Statute "does not require proof that the conduct had an actual effect on the witness" and, therefore, Mr Arido's conviction does not depend on the Trial Chamber's finding that witnesses D-2, D-3, D-4, and D-6 followed his instructions at the Douala meeting.[3865]

1558. With respect to the Trial Chamber's finding that the Mr Arido debriefed witnesses D-2, D-3, D-4, and D-6 and readjusted their scripted testimonies, the Prosecutor argues that: (i) corroboration is not required for accomplice witnesses;[3866] (ii) Mr Arido selectively cites witness P-260 (D-2)'s testimony to argue that he did not take part in any debriefing after he met with Mr Kilolo and the witness's testimony on this topic is not inconsistent with his overall testimony or the Trial Chamber's findings;[3867] and (iii) the Trial Chamber reasonably found that witness D-2's contemporary personal notes were reliable as P-260 (D-2) testified that he made his notes look older in case Mr Kilolo asked for them.[3868]

(iii) Determination by the Appeals Chamber

1559. In the view of the Appeals Chamber, while witnesses D-2 and D-3 were not present during D-4's and D-6's individual interviews with Mr Kilolo, it was not unreasonable for the Trial Chamber to infer, based on P-260 (D-2)'s and P-245 (D-3)'s evidence regarding the briefing sessions prior to and after the interviews with Mr Kilolo in which all four witnesses took part, that witnesses D-4 and D-6 also gave information to Mr Kilolo based on Mr Arido's instructions. The Appeals Chamber rejects the contention that the testimony of witness P-260 (D-2) in this regard amounted to hearsay – the witness related what he had directly seen and heard, and the Trial Chamber based its findings thereon. The Appeals Chamber therefore finds no error in the Trial Chamber's conclusion that witnesses D-4 and D-6 in addition to D-2 and D-3 followed Mr Arido's instructions.

[3864] Response, para. 765, referring, *inter alia*, to Conviction Decision, para. 351.
[3865] Response, para. 766, referring to Conviction Decision, para. 45.
[3866] Response, para. 768, referring, *inter alia*, to paras 707-714; rule 63 (4) of the Rules.
[3867] Response, para. 768, referring to Transcript of 13 October 2015, ICC-01/05-01/13-T-19-CONF-ENG (ET), p. 8, lines 13-23.
[3868] Response, para. 769, referring to CAR-OTP-0080-0494-R01 at 0506-R01, lines 442-443.

1560. The Appeals Chamber notes Mr Arido's submission that the Trial Chamber erred when it relied on witness P-260 (D-2)'s "accomplice" evidence to find that he had readjusted the scripted testimonies of D-2, D-3, D-4, and D-6 without requiring corroboration. The Appeals Chamber recalls its finding that a trial chamber may rely on uncorroborated accomplice witness testimony and that the Trial Chamber's treatment of the testimony of, *inter alia*, witness P-260 (D-2) was not erroneous.[3869] The Trial Chamber accordingly did not err.

1561. Mr Arido also asserts that witness P-260 (D-2)'s testimony that he left Douala after the February 2012 meeting with Mr Kilolo undermines the Trial Chamber's finding that a debriefing session occurred after the witnesses were interviewed by Mr Kilolo.[3870] The Appeals Chamber notes that, at the transcript pages cited by Mr Arido, the witness was asked whether he had attended a subsequent meeting with Mr Kilolo.[3871] The witness responded that "[a]fter the meeting that was held in Douala we went our separate ways"[3872] until Mr Kilolo came back a second time to make him and the others available to the Court.[3873] The Appeals Chamber does not consider this testimony to be inconsistent with witness P-260 (D-2)'s testimony cited in the Conviction Decision that he and the other witnesses debriefed Mr Arido in Douala after their interviews with Mr Kilolo.[3874] Mr Arido misconstrues witness P-260 (D-2)'s specific statement regarding his contacts with Mr Kilolo by viewing it in isolation of the rest of the witness's evidence. The Appeals Chamber, accordingly, finds that it was not unreasonable for the Trial Chamber to conclude, based on witness P-260 (D-2)'s testimony, that Mr Arido revisited and adjusted some aspects of the witnesses scripted testimonies.

1562. Furthermore, the Appeals Chamber finds no merit in Mr Arido's argument that witness P-260 (D-2)'s account of aging his briefing notes "makes no sense" in light of the fact that the witness never showed the notes to Mr Kilolo, and consequently

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[3869] *See supra* paras 1531-1536.
[3870] Mr Arido's Appeal Brief, para. 406, referring to Transcript of 13 October 2015, ICC-01/05-01/13-T-19-CONF-ENG (ET), p. 8, lines 17-23.
[3871] Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 8, lines 14-16.
[3872] Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 8, line 17.
[3873] Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 8, lines 21-23.
[3874] Conviction Decision, para. 351, referring to Transcript of 15 October 2015, ICC-01/05-01/13-T-21-CONF-ENG (ET), p. 26, lines 5-6, 11-12, p. 27, line 24 to p. 28, line 3, p. 28, lines 6-7, p. 32, lines 13-16.

undermines the Trial Chamber's finding that this account was credible.[3875] The Appeals Chamber notes that, when asked whether Mr Kilolo had seen the briefing notes, witness P-260 (D-2) answered that Mr Kilolo had not and added that he prepared his notes *in case* Mr Kilolo asked for them, thereby explaining why the briefing notes were never shown to Mr Kilolo.[3876] Mr Arido does not demonstrate that the Trial Chamber erred in its assessment of witness P-260 (D-2)'s evidence on that specific matter.[3877]

1563. In light of the foregoing, the Appeals Chamber finds that Mr Arido has not shown that it was unreasonable for the Trial Chamber to conclude that Mr Arido readjusted the scripted testimonies of the four witnesses, and accordingly his arguments are rejected.

(e) Alleged error in finding that Mr Arido took away the Cameroonian witnesses' (D-2, D-3, D-4, and D-6) telephones

(i) Relevant part of the Conviction Decision

1564. The Trial Chamber noted witness P-245 (D-3)'s testimony that, before their meeting with Mr Kilolo, Mr Arido had taken away the telephones of all the witnesses present, explaining that he had told Mr Kilolo that the witnesses were in the bush and therefore had no telephones.[3878] The Trial Chamber found that witnesses D-2 and D-3, complying with Mr Arido's instructions, told Mr Kilolo that they did not have telephones and asked Mr Kilolo to provide them with new ones.[3879] The Trial Chamber noted the "clear and consistent, indeed, nearly identical, evidence" of witnesses P-260 (D-2) and P-245 (D-3) on this matter.[3880] In light of the mutually corroborative evidence, the Trial Chamber found that Mr Arido had taken away the

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[3875] Mr Arido's Appeal Brief, para. 407.
[3876] *See* Witness P-260 (D-2)'s prior recorded testimony, CAR-OTP-0080-0494, p. 0506, lines 442-443 where the witness stated that "*Mais les informations, je les ai préparées au cas où peut-être il me demanderait des pièces, je lui présente. C'était dans cet esprit-là*" ("But the information, I prepared them in case. He would ask me documents, I present them, it was in that frame of mind"). *See also* Transcript of 14 October 2015, ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 32, line 18 to p. 33, line 5; Transcript of 15 October 2015, ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 67, line 20, to p. 68, line 24.
[3877] *See* *Lubanga* Appeal Judgment, para. 33.
[3878] Conviction Decision, para. 345.
[3879] Conviction Decision, para. 345.
[3880] Conviction Decision, para. 346.

telephones of D-2, D-3, D-4, and D-6 and had instructed them to lie to Mr Kilolo about not having telephones and to ask for new ones.[3881]

(ii) Submissions of the parties

(a) Mr Arido

1565. Mr Arido submits that the Trial Chamber erred in relying on witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence for its finding that he took away witnesses D-2's, D-3's, D-4's, and D-6's telephones and instructed them to tell Mr Kilolo that they did not have telephones and to request new ones.[3882] Mr Arido asserts that witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence "was not credible and not based on proof beyond a reasonable doubt".[3883] Mr Arido argues that witness P-245 (D-3) did not mention D-4 and D-6 when testifying about his telephone being taken,[3884] and the transcripts cited by the Trial Chamber regarding witness P-260 (D-2) did not identify the persons involved by name.[3885] Mr Arido argues that these findings "are harmful" to him as they support the Trial Chamber's conclusion that he had instructed these witnesses to lie about their military background.[3886]

(b) The Prosecutor

1566. The Prosecutor submits that the Trial Chamber reasonably found, on the basis of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence, that Mr Arido took away the telephones of witnesses D-2, D-3, D-4, and D-6 and instructed them to lie to Mr Kilolo that they had no telephones.[3887] The Prosecutor argues that Mr Arido's submissions do not accurately reflect the record and "selectively quotes the evidence".[3888] The Prosecutor asserts that witness P-245 (D-3) testified that Mr Arido had taken their telephones "before they entered the compound to meet Kilolo"[3889] and

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[3881] Conviction Decision, para. 346.
[3882] Mr Arido's Appeal Brief, para. 462, referring to Conviction Decision, para. 346.
[3883] Mr Arido's Appeal Brief, para. 463.
[3884] Mr Arido's Appeal Brief, para. 464, referring to Conviction Decision, fn. 578.
[3885] Mr Arido's Appeal Brief, para. 464, referring to Conviction Decision, para. 345, fn. 582.
[3886] Mr Arido's Appeal Brief, para. 465, referring to Conviction Decision, para. 944, fn. 2089.
[3887] Response, para. 787, referring to Conviction Decision, paras 345-346.
[3888] Response, para. 788, referring to Conviction Decision, para. 345, fns 580-581, 583.
[3889] Response, para. 788, referring to Transcript of 19 October 2015, ICC-01-/05-01/13-l (ET), p. 40, line 10.

went on to specifically enumerate whose telephones were taken.[3890] The Prosecutor argues that witness P-260 (D-2) consistently testified that the group of witnesses lied to Mr Kilolo that they did not have telephones.[3891] She adds that the fact that witness P-260 (D-2) did not identify individuals by name is irrelevant since he clearly spoke of the Cameroonian witnesses being recruited and coached as a group by Mr Arido.[3892]

(iii) Determination by the Appeals Chamber

1567. The Appeals Chamber notes that at the transcript cited by the Trial Chamber to support its finding that "Mr Arido took away the telephones of all witnesses present", witness P 245 (D 3) stated that "[b]efore we entered the compound, [Mr Arido] took all our telephones away from us".[3893] The witness then enumerated the names of two individuals, one of them being witness D-2, who in addition to himself, had their telephones taken away;[3894] he did not however mention the names of witnesses D-4 and D-6. The Appeals Chamber notes that both witnesses P-260 (D-2) and P-245 (D-3) when discussing the issue of telephones at the meeting in Douala consistently use the words "we", "us", or "all".[3895] From the context of the discussion regarding the meeting in Douala, these terms may be reasonably understood as referring to all

[3890] Response, para. 788, referring to Transcript of 19 October 2015, ICC-01-/05-01/13-T-22-CONF-ENG (ET), p. 40, lines 10-12.
[3891] Response, para. 788, referring to Conviction Decision, para. 345, fn. 582.
[3892] Response, para. 788, referring to paras 724-727.
[3893] Conviction Decision, fn. 582, referring to Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 40, line 10.
[3894] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 40, lines 11-12.
[3895] For witness P-245 (D-3): Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 62, lines 17-20 ("Arido took away our phones and told us that he had told Mr Kilolo that we were his people and we were in the bush, and that in the bush we did not have telephones, we only had Thurayas, and that when we meet him, if he asks us a question, we should tell him that we did not have any phones."); Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 56, lines 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."); Transcript of 23 October 2015, ICC-01/05-01/13-T-27-Red-ENG (WT), p. 33, lines 23-25, to p. 34, lines 1-9 ("He said that once we met with him, we should not tell him that we had any phones, that we had been using Thurayas, and that is what I said before the Court."). For witness P-260 (D-2): Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 17, line 25, to p. 18, line 3, ("When Maître Kilolo arrived on the first occasion we told him that we did not have any telephone at our disposal because when 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."); Transcript of 14 October 2015, ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 76, lines 19-20 ("[W]hen we arrived we told [Mr Kilolo] that we did not have telephones, that was a way of not getting in touch with him.").

meeting participants, which included witnesses D-2, D-3, D-4, and D-6.[3896] The Appeals Chamber therefore finds that it was not unreasonable for the Trial Chamber to conclude that Mr Arido took away the telephones of all the witnesses present, which included D-4 and D-6. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

1568. The Appeals Chamber notes the remaining arguments raised by Mr Arido that the evidence from witnesses P-260 (D-2) and P-245 (D-3) "was not credible and not based on proof beyond a reasonable doubt".[3897] To the extent they have not already been addressed, the Appeals Chamber dismisses these arguments *in limine* because Mr Arido simply references arguments made at trial without any further elaboration or substantiation.

(f) Alleged error in rejecting a report issued by the Cameroonian police

(i) Relevant part of the Conviction Decision

1569. The Trial Chamber found that "in February 2012, D-2, D-3, D-4 and D-6 were introduced to Mr Kilolo in a meeting that took place in a hotel in Douala".[3898] Mr Arido presented a report, allegedly authored by the Cameroonian police, in which it is alleged that witness D-2's stay at a certain hotel in Douala could not be confirmed.[3899] The Trial Chamber considered that the report could not impact the reliability of witness P-260 (D-2)'s evidence on his stay in Douala because: (i) the report, dated 23 June 2015, was issued more than two years after the relevant events;[3900] (ii) Mr Kilolo's Defence relied on interviews recorded during the Douala meeting, thereby "implicitly acknowledging that this meeting with D-2 took place"; and (iii) witness P-245 (D-3) testified that he resided with witness D-2 in the hotel concerned.[3901] The Trial Chamber was thus convinced that witness D-2 stayed in a

[3896] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 38, line 9, to p. 39, line 8.
[3897] Mr Arido's Appeal Brief, para. 463, referring to Mr Arido's Closing Submissions, paras 237-291.
[3898] Conviction Decision, para. 331 (footnotes omitted).
[3899] Conviction Decision, para. 333, referring to CAR-D24-0002-0001.
[3900] Conviction Decision, para. 333, referring to CAR-D24-0002-0001.
[3901] Conviction Decision, para. 333.

particular hotel along with Mr Arido, witness D-3 and other individuals in Douala in February 2012, as identified by witnesses P-260 (D-2) and P-245 (D-3).[3902]

(ii) Submissions of the parties

(a) Mr Arido

1570. Mr Arido submits that the Cameroonian police report challenges "the veracity and credibility of D-2's and D-3's evidence" with regard to the briefing in Douala.[3903] Mr Arido avers that the report shows that there is no record that he and witness D-2 stayed at a certain hotel in Douala in February 2012 thereby contradicting witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence on this point.[3904]

1571. Mr Arido argues further that the Trial Chamber erred in rejecting the report.[3905] He avers that the fact that the report was produced more than two years after the relevant events does not explain why the report would not be reliable, as hotel records are maintained over a long period of time and can be retrieved at later dates.[3906] Mr Arido adds that, at trial, neither the Trial Chamber nor the Prosecutor challenged the reliability or accuracy of the report's content or its author.[3907] Mr Arido avers further that the Trial Chamber's reliance on evidence proffered by Mr Kilolo's Defence to reject the Cameroonian police report violated rule 136 (2) of the Rules as evidence of one co-accused cannot be used against another co-accused.[3908]

1572. Additionally, Mr Arido asserts that there is no evidence supporting the Trial Chamber's finding that other people stayed in the concerned hotel; the only evidence referred to by the Trial Chamber concerns "hotel accommodations for D-2, D-3, [Mr Arido]" and another person.[3909] Mr Arido further submits that "the evidence of

[3902] Conviction Decision, para. 333.
[3903] Mr Arido's Appeal Brief, para. 347.
[3904] Mr Arido's Appeal Brief, paras 347-348.
[3905] Mr Arido's Appeal Brief, para. 350.
[3906] Mr Arido's Appeal Brief, para. 350.
[3907] Mr Arido's Appeal Brief, para. 350.
[3908] Mr Arido's Appeal Brief, para. 350.
[3909] Mr Arido's Appeal Brief, para. 352.

[witnesses P-260 (D-2) and P-245 (D-3)] was not credible or reliable based on their legal status as accomplice/perpetrators".[3910]

(b) The Prosecutor

1573. The Prosecutor responds that it was reasonable for the Trial Chamber to find that the report did not impact the reliability of witness P-260 (D-2)'s corroborated evidence regarding his stay in the relevant hotel the night before he and the other witnesses met Mr Arido and Mr Kilolo. In the Prosecutor's view, Mr Arido merely disagrees with the Trial Chamber's assessment of the evidence and its reasoning.[3911] She argues that the report "is not incompatible" with witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence since "it does not provide positive evidence to the contrary" regarding the hotel stay.[3912] In her view, the report simply states that the Cameroonian police were unable to find any trace of witness P-260 (D-2)'s and Mr Arido's stay at the relevant hotel on the specified date.[3913] The Prosecutor avers that Mr Arido fails to demonstrate that no reasonable trial chamber could have reached the same conclusion.[3914]

(iii) Determination by the Appeals Chamber

1574. The Appeals Chamber is not persuaded by Mr Arido's contention that the Trial Chamber erred in finding that the Cameroonian police report did not affect the reliability of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence regarding their stay at the relevant hotel with Mr Arido in February 2012. The police report proffered by Mr Arido is but one piece of evidence which the Trial Chamber had before it in order to assess whether the relevant witnesses stayed with Mr Arido at a particular hotel in Douala in February 2012. Witness P-260 (D-2) testified that, while in Douala to meet Mr Kilolo, he stayed in the same hotel as Mr Arido, witness P-245 (D-3), and another individual.[3915] Witness P-245 (D-3) similarly testified that he was staying in the same hotel as Mr Arido, witness D-2, and another individual in Douala before their meeting

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[3910] Mr Arido's Appeal Brief, para. 351. On this point, the Appeals Chamber recalls its conclusion that the Trial Chamber did not err in relying on the mutually corroborative testimony of witnesses P-260 (D-2) and P-245 (D-3) as a result of their accomplice witness status (*see supra* paras 1531-1536).
[3911] Response, paras 749, 751.
[3912] Response, para. 750.
[3913] Response, para. 750.
[3914] Response, para. 751.
[3915] Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 6, lines 8-19; Transcript of 15 October 2015, ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 7, line 17, to p. 8, line 1.

with Mr Kilolo.[3916] The Trial Chamber additionally considered Mr Kilolo's implicit acknowledgement of the gathering in Douala as a result of his proffering of interviews recorded during that meeting.[3917] Against this evidence, Mr Arido refers to a police report that simply states that it was not possible for authorities in Cameroon to "detect traces" of witness P-260 (D-2)'s and Mr Arido's stay at the relevant hotel in Douala in February 2012.[3918] It was not unreasonable for the Trial Chamber to find that the Cameroonian police report did not affect the reliability of witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence regarding their stay at the relevant hotel with Mr Arido in February 2012.

1575. The Appeals Chamber is not persuaded by Mr Arido's argument that the Trial Chamber violated rule 136 (2) of the Rules by taking into account Mr Kilolo's reliance at trial on a series of interviews recorded during the Douala meeting,[3919] The Appeals Chamber notes that rule 136 (2) of the Rules provides that, in the context of joint trials, "each accused shall be accorded the same rights as if such accused were being tried separately". Nothing in this provision prevents a trial chamber from referring to material mentioned by another defence team in the context of the same case. Therefore, the Trial Chamber did not err.

1576. The Appeals Chamber additionally finds no error with respect to the Trial Chamber's finding that individuals other than Mr Arido and witnesses P-260 (D-2) and P-245 (D-3) stayed at the hotel in Douala. Witnesses P-260 (D-2) and P-245 (D-3) testified that certain other individuals also stayed at the relevant hotel.[3920] Mr Arido's arguments are thus rejected

(g) Alleged error regarding other "adverse" findings and conclusions

(i) Relevant part of the Conviction Decision

1577. In relation to the meeting in Douala, the Trial Chamber noted witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony that all the witnesses present at the meeting were

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[3916] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 38, lines 18-21.
[3917] Conviction Decision, para. 333.
[3918] CAR-D24-0002-0001.
[3919] Mr Arido's Appeal Brief, para. 350. *See also* Conviction Decision, para. 333.
[3920] Transcript of 15 October 2015, ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 7, line 17, to p. 8, line 1; Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 38, lines 18-21.

given 10,000 CFA francs at Mr Kilolo's behest for a meal that evening.[3921] The Trial Chamber concluded that Mr Arido's distribution of this money was for the purpose of buying food and not to influence the witnesses.[3922] The Trial Chamber also noted witnesses P-260 (D-2)'s and P-245 (D-3)'s testimony that they received 10,000 CFA francs from Mr Arido after the Douala meeting for travel costs.[3923] The Trial Chamber concluded that Mr Arido gave the money to cover travel costs and that the money was not meant to influence their testimony.[3924]

(ii) Submissions of the parties

(a) Mr Arido

1578. Mr Arido submits that, while the Trial Chamber found that the money that he distributed was not aimed at influencing the witnesses, these findings were nonetheless "harmful" because they link him to the alleged briefing.[3925] Mr Arido also argues that the Trial Chamber made a number of adverse findings at paragraph 420 of the Conviction Decision, presumably based solely on the testimony of witnesses P-260 (D-2) and P-245 (D-3), regarding his corruption of witnesses without any reference to the evidence.[3926] Mr Arido avers that the Trial Chamber's conclusion regarding Mr Kokaté "important, initial role of recruitment" is not based on any evidence because Mr Kokaté was an "unindicted perpetrator" who was never produced as a witness.[3927]

(b) The Prosecutor

1579. The Prosecutor submits that Mr Arido repeats the Trial Chamber findings without pointing to any particular error.[3928]

(iii) Determination by the Appeals Chamber

1580. The Appeals Chamber notes that Mr Arido's conviction does not depend on the findings of the Trial Chamber, which indicated that the distribution of money was not

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[3921] Conviction Decision, para. 347.
[3922] Conviction Decision, para. 347.
[3923] Conviction Decision, para. 352.
[3924] Conviction Decision, para. 352.
[3925] Mr Arido's Appeal Brief, para. 466.
[3926] Mr Arido's Appeal Brief, paras 470-471, referring to Conviction Decision, paras 420, 944.
[3927] Mr Arido's Appeal Brief, para. 472, referring to Mr Arido's Closing Submissions, paras 292-299. *See also* Mr Arido's Appeal Brief, para. 359.
[3928] Response, para. 788.

illicit.[3929] Therefore, the Appeals Chamber need not address their reasonableness and dismisses Mr Arido's challenges to these findings *in limine.*

1581. Moreover, the Appeals Chamber finds no merit in Mr Arido's contention that the findings at paragraph 420 of the Conviction Decision lack references to the evidence. The Appeals Chamber notes that this paragraph falls under a section entitled "[o]verall conclusions regarding D-2, D-3, D-4, and D-6"[3930] that relates to the evidence assessed and findings made in the immediately preceding sections of the Conviction Decision devoted to witnesses D-2, D-3, D-4 and D-6.[3931] Mr Arido fails to set out in particular why the Trial Chamber's findings in paragraph 420 of the Conviction Decision are unreasonable. Therefore his arguments are dismissed *in limine*.

(h) Alleged error regarding exculpatory evidence from witnesses P-260 (D-2) and P-245 (D-3)

(i) Submissions of the parties

(a) Mr Arido

1582. Mr Arido submits that the Trial Chamber "failed to give credit to evidence that undermined the credibility and reliability of the testimonies of D-2 and P-245 (D-3) relating to [his] alleged promise of relocation to Europe in exchange for their false testimony about their military status in favour of Mr Bemba".[3932] Mr Arido also submits that the Trial Chamber "failed to assess potentially exculpatory evidence which was not produced by D-2 and D-3 in relation to their military status".[3933] Mr Arido avers that witnesses P-260 (D-2)'s and P-245 (D-3)'s ultimate withdrawal of permission for his Defence to review certain material shows their unwillingness to provide information that could corroborate or contradict their statements regarding their military status and provides grounds for a finding of reasonable doubt.[3934]

[3929] *See* Conviction Decision, para. 944.
[3930] Conviction Decision, p. 193.
[3931] *See* Conviction Decision, paras 306-411.
[3932] Mr Arido's Appeal Brief, para. 305, referring to Mr Arido's Closing Submissions, paras 276-277.
[3933] Mr Arido's Appeal Brief, para. 306.
[3934] Mr Arido's Appeal Brief, para. 306.

(b) The Prosecutor

1583. The Prosecutor submits that Mr Arido's assertions that the Trial Chamber failed to consider and rely on P-260 (D-2)'s and P-245 (D-3)'s allegedly exculpatory evidence and failed to assess potentially exculpatory evidence that ultimately were not produced, should be summarily dismissed.[3935]

(ii) Determination by the Appeals Chamber

1584. With respect to Mr Arido's first argument that the Trial Chamber failed to give credit to evidence that undermines the credibility of witnesses P-260 (D-2) and P-245 (D-3), the Appeals Chamber notes that Mr Arido simply refers to arguments he made at trial without any further substantiation.

1585. With respect to Mr Arido's second argument, the Appeals Chamber notes that the alleged material relating to witnesses P-260 (D-2) and P-245 (D-3) was never brought before the Trial Chamber because these witnesses withdrew permission for the Defence to access this material.[3936] In these circumstances, the Trial Chamber could not have been expected to assess evidence that was never brought before it. Mr Arido's argument that witnesses P-260 (D-2)'s and P-245 (D-3)'s unwillingness to provide this material "is a ground for a finding of reasonable doubt",[3937] is unsubstantiated as not even the finding that he challenges is identified.

1586. Accordingly, the Appeals Chamber dismisses *in limine* Mr Arido's arguments.

[3935] Response, para. 722.
[3936] Transcript of 15 October 2015, ICC-01/05-01/13-T-21-Red3-ENG (ET), p. 34, lines 4-12; CAR-D24-0004-0101, p. 1. *See also* CAR-D24-0004-0314, p. 1. Witnesses P-260 (D-2) and P-245 (D-3) originally gave consent to access their [redacted] on 14 and 22 October 2015, respectively. Transcript of 14 October 2015, ICC-01/05-01/13-T-20-RED2-ENG (WT), p. 50, lines 10-16; Transcript of 22 October 2015, ICC-01/05-01/13-T-26-red-ENG (WT), p. 60, lines 17-20.
[3937] Mr Arido's Appeal Brief, para. 306.

6. Alleged errors regarding monetary and relocation promises and leading role of Mr Kokaté

(a) Alleged error regarding Mr Arido's promises of money and relocation to witnesses P-260 (D-2), P-245 (D-3), D-4 and D-6

(i) Relevant part of the Conviction Decision

1587. The Trial Chamber found that, when meeting witnesses D-2 and D-3, Mr Arido made promises of monetary payments in exchange for testimony in Mr Bemba's favour in the Main Case.[3938] The Trial Chamber further found that the conditions of their testimonies were addressed again at the Douala meeting, and that Mr Arido promised to relay the witnesses D-2's, D-3's, D-4's and D-6's conditions to Mr Kilolo.[3939] The Trial Chamber additionally found that Mr Arido's function as a "go-between" was supported by the mutually corroborative evidence given by witnesses P-260 (D-2) and P-245 (D-3).[3940] The Trial Chamber noted witness P-245 (D-3)'s comprehensive testimony that, prior to Mr Kokaté's arrival at the meeting, Mr Arido had asked each witness to note his conditions on a piece of paper, which he would transmit to Mr Kilolo.[3941] The Trial Chamber noted that witness P-245 (D-3) confirmed that Mr Arido then collected the pieces of paper.[3942] The Trial Chamber also noted that witness P-260 (D-2) testified that Mr Arido acted as an intermediary, who conveyed the witnesses' conditions to Mr Kilolo.[3943] The Trial Chamber further noted that witness P-245 (D-3) was unable to specify the amount of money requested or the desired place of relocation.[3944] The Trial Chamber also considered that, while witness P-245 (D-3) did not attest to the other witnesses' specific conditions, both witnesses P-260 (D-2) and P-245 (D-3) confirmed that the promise was addressed to all four witnesses in Douala.[3945]

1588. The Trial Chamber further found that, after Mr Kokaté joined the meeting in Douala, the witnesses raised the issue of payment and possible relocation to Europe

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[3938] Conviction Decision, para. 341.
[3939] Conviction Decision, para. 341.
[3940] Conviction Decision, para. 341.
[3941] Conviction Decision, para. 341.
[3942] Conviction Decision, para. 341.
[3943] Conviction Decision, para. 341.
[3944] Conviction Decision, para. 341.
[3945] Conviction Decision, para. 341.

and Mr Kokaté repeated Mr Arido's promise that each witness would receive money shortly before they testified and that they would be able to go to Europe in exchange for their Main Case testimony.[3946] The Trial Chamber noted witness P-245 (D-3)'s testimony that he became overwhelmed by the anticipated risk and threatened to withdraw unless the witnesses were paid.[3947] The Trial Chamber noted that witness D-3's intervention provoked a swift and angry reaction from Mr Kokaté, who then threatened to recruit other witnesses to do the job.[3948]

1589. The Trial Chamber found witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence to be reliable as they described in a "convincingly detailed and articulate manner Mr Arido's direct involvement with the witnesses, his 'go-between' role and Mr Kokaté's intervention".[3949] In particular, the Trial Chamber found P-245 (D-3)'s "description of the intermezzo with Mr Kokaté and Mr Kokaté's ensuing threat to recruit other witnesses" to be a complicating element that demonstrated "truthfulness and attempts at accuracy".[3950] The Trial Chamber stated that it was not persuaded by Mr Arido's arguments that witness P-245 (D-3) "blurred Mr Arido's and Mr Kokaté's respective roles" as witness P-245 (D-3) "consistently described their distinct roles".[3951] The Trial Chamber concluded that it was satisfied that Mr Arido asked witnesses "D-2, D-3, D-4, and D-6 to note down their conditions, which he promised to relay to Mr Kilolo", and that he "promised the witnesses money and relocation in exchange for testifying in the Main Case".[3952]

1590. In discussing his role as a direct perpetrator, the Trial Chamber recalled that "Mr Arido promised the witnesses a significant financial reward and relocation to Europe as an encouragement to give certain evidence".[3953] The Trial Chamber found that "Mr Arido made them believe that this arrangement would lead to a better life for them. Not only did Mr Arido formulate those promises to the witnesses, he also

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[3946] Conviction Decision, para. 342.
[3947] Conviction Decision, para. 342.
[3948] Conviction Decision, para. 342.
[3949] Conviction Decision, para. 344.
[3950] Conviction Decision, para. 344.
[3951] Conviction Decision, para. 344.
[3952] Conviction Decision, para. 344.
[3953] Conviction Decision, para. 672.

specifically instructed them to write their conditions […] on a piece of paper which he would personally convey to Mr Kilolo as their 'leader' or 'go-between'".[3954]

(ii) Submissions of the parties

(a) Mr Arido

1591. Mr Arido submits that the Trial Chamber erred in concluding that he recruited and made promises of money and relocation when the evidence supports the conclusion that it was in fact Mr Kokaté who was the "decision maker, the initiator and source of the promises".[3955] Mr Arido argues that his role and the role of Mr Kokaté were blurred by witness D-3.[3956] Mr Arido asserts that, once the Prosecutor reminded witness P-245 (D-3) of his suspect status, "the identity of the 'deal maker changed'", shifting away from Mr Kokaté and implicating him.[3957] Mr Arido avers that this is highly relevant to the credibility of witnesses P-260 (D-2) and P-245 (D-3) and his conviction for corrupting witnesses.[3958] Mr Arido argues that this shift in witness P-245 (D-3)'s evidence is one of the ramifications of the Trial Chamber disregarding the "accomplice/perpetrator" status of witnesses P-260 (D-2) and P-245 (D-3).[3959] Mr Arido further asserts that the Trial Chamber "misappreciated and misunderstood" his argument at trial on these points.[3960] Mr Arido argues that the Trial Chamber's findings support the conclusion that Mr Kokaté played a leading role in a "plethora of criminal conduct" which exculpates Mr Arido or, "[a]t the very least", raises reasonable doubt as to the Trial Chamber's finding that Mr Arido recruited and made promises to witnesses D-2, D-3, D-4 and D-6.[3961]

1592. Mr Arido also submits that the Trial Chamber erred in failing to consider relevant evidence that Mr Kokaté made promises of money and relocation.[3962] Mr Arido argues that witness P-260 (D-2) in fact testified that Mr Kokaté was the one

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[3954] Conviction Decision, para. 672.
[3955] Mr Arido's Appeal Brief, paras 86, 425, 446, 453. *See also* paras 429-430.
[3956] Mr Arido's Appeal Brief, para. 355. *See also* para. 291.
[3957] Mr Arido's Appeal Brief, para. 358.
[3958] Mr Arido's Appeal Brief, para. 357, referring to Conviction Decision, para. 48.
[3959] Mr Arido's Appeal Brief, para. 358.
[3960] Mr Arido's Appeal Brief, paras 355, 358, referring to Mr Arido's Closing Submissions, paras 268-271.
[3961] Mr Arido's Appeal Brief, paras 85, 359. referring to Conviction Decision, paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, 716.
[3962] Mr Arido's Appeal Brief, paras 356, 446.

who promised 10 million CFA francs and re-location in Europe[3963] and that witnesses P-260 (D-2) and P-245 (D-3) testified that Mr Kokaté was the one who "hatched" the deal and set its terms and conditions.[3964] Mr Arido further asserts that, contrary to the Trial Chamber's finding concerning promises of money and relocation, and the evidence cited in support of that finding,[3965] it was Mr Kokaté who asked the witnesses how much money they wanted and to where they wanted to be relocated.[3966]

1593. Mr Arido further submits that witness P-245 (D-3)'s evidence regarding promises and relocation was contradictory and raises reasonable doubt.[3967] Mr Arido asserts that witness P-245 (D-3)'s contradictory evidence is exemplified by the fact that he testified that requests had to be submitted to Mr Kokaté,[3968] yet he also testified that Mr Arido was the one who was responsible for presenting all requests to Mr Kilolo.[3969] Mr Arido also argues that reasonable doubt is raised by the fact that witness P-245 (D-3) failed to remember the amount of money or location that he requested and could not attest to what the other witnesses requested, whereas witness P-260 (D-2) stated that 10 million CFA francs was promised.[3970]

1594. Furthermore, Mr Arido submits that the Trial Chamber "failed to provide a full and reasoned opinion on the contradictory evidence" of witnesses P-260 (D-2) and P-245 (D-3) regarding the promises of money and relocation.[3971] Mr Arido argues that, as these two witnesses provided the principal evidence upon which he was convicted, it was incumbent on the Trial Chamber to discuss the inconsistencies in their

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[3963] Mr Arido's Appeal Brief, para. 425, referring to Transcript of 12 October 2015, ICC-01/05-01/13-T-18-CONF-ENG (ET), pp. 71 -72; Transcript of 13 October 2015, ICC-01/05-01/13-T-19-CONF-ENG, pp. 5-6. *See also* Mr Arido's Appeal Brief, para. 445.
[3964] Mr Arido's Appeal Brief, para. 425, referring to Transcript of 13 October 2015, ICC-01/05-01/13-T-19-CONF-ENG, p. 64, lines 1-7; Transcript of 14 October 2015, ICC-01/05-01/13-T-20-CONF-ENG, p. 36, line 18; Transcript of 19 October 2015, ICC-01/05-01/13-T-22-CONF-ENG, p. 39. *See also* Mr Arido's Appeal Brief, para. 86.
[3965] Mr Arido's Appeal Brief, para. 426, referring to Conviction Decision, para. 341, fn. 562.
[3966] Mr Arido's Appeal Brief, para. 426, referring to Transcript of 19 October 2015, ICC-01/05-01/13-T-22-CONF-ENG, p. 39, lines 13-17. *See also* Mr Arido's Appeal Brief, para.472.
[3967] Mr Arido's Appeal Brief, paras 427-428.
[3968] Mr Arido's Appeal Brief, paras 427, referring to Transcript of 22 October 2015, ICC-01/05-01/13-T-26-CONF-ENG, p. 48, lines 23-24.
[3969] Mr Arido's Appeal Brief, para. 427, referring to Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 49, lines 2-5.
[3970] Mr Arido's Appeal Brief, para. 428, referring to Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 49, lines 1-5, 22-24. *See also* Mr Arido's Appeal Brief, paras 448 (referring to Mr Arido's Closing Submissions, paras 338-343), 450, 452.
[3971] Mr Arido's Appeal Brief, paras 356, 430.

testimony.[3972] Mr Arido also asserts that there is no discussion by the Trial Chamber of his challenges regarding the credibility of witnesses P-260 (D-2)'s and P-245 (D-3)'s motivations.[3973] He adds that a reasonable trier of fact could not have concluded that he made promises of money and relocation.[3974]

(b) The Prosecutor

1595. The Prosecutor responds that Mr Arido's arguments should be dismissed because he simply disagrees with the Trial Chamber's assessment of the evidence and fails to articulate an error.[3975] The Prosecutor submits that the Trial Chamber understood and addressed Mr Arido's arguments regarding the blurred roles of Mr Kokaté and Mr Arido and reasonably found that witness P-245 (D-3) consistently described their distinct roles.[3976] She argues that the Trial Chamber was not required to address Mr Arido's speculations as to the reasons behind witness P-245 (D-3)'s alleged inconsistencies.[3977] The Prosecutor argues that, regardless of Mr Kokaté's role in the events, the evidence shows that Mr Arido corruptly influenced witnesses P-260 (D-2), P-245 (D-3), D-4, and D-6.[3978] The Prosecutor avers that Mr Arido's argument that the Trial Chamber failed to consider relevant evidence that Mr Kokaté made promises should be summarily dismissed.[3979] The Prosecutor further submits that Mr Arido's criticism that Mr Kokaté was left "untouched and objectively protected" should be summarily dismissed because it fails to articulate an appealable error.[3980]

1596. In addition, the Prosecutor maintains that the Trial Chamber reasonably found that Mr Arido promised money and relocation to the witnesses in exchange for their testimony.[3981] She argues that there is no contradiction between the Trial Chamber's findings regarding Mr Arido's promises of money and relocation and the portions of their testimony implicating Mr Kokaté.[3982] She further argues that witnesses P-260

[3972] Mr Arido's Appeal Brief, para. 447-450, referring to Mr Arido's Closing Submissions, paras 338-350.
[3973] Mr Arido's Appeal Brief, para. 450.
[3974] Mr Arido's Appeal Brief, para. 360.
[3975] Response, para. 752.
[3976] Response, paras 666, 752.
[3977] Response, para. 753.
[3978] Response, para. 752. *See also* para. 713.
[3979] Response, para. 753.
[3980] Response, para. 753.
[3981] Response, para. 774, referring to Conviction Decision, paras 320, 328, 342, 343.
[3982] Response, paras 666, 775. *See also* paras 667, 694.

(D-2)'s and P-245 (D-3)'s testimony does not exonerate Mr Arido and is consistent with the Trial Chamber's finding that Mr Kokaté was involved in the process and repeated Mr Arido's offers.[3983] The Prosecutor asserts that Mr Arido selectively cites from witness P-245 (D-3)'s testimony which clearly shows that Mr Arido, not Mr Kokaté, asked the witnesses to write down their conditions on a piece of paper which Mr Arido then collected.[3984] The Prosecutor argues that the fact that Mr Arido asked the witnesses to write down their conditions before Mr Kokaté arrived so that those conditions could be discussed with Mr Kokaté does not contradict the fact that Mr Arido would transmit the requests to Mr Kilolo.[3985] The Prosecutor further argues that the fact that witness P-245 (D-3) could not remember the amount of money he had requested or what the other witnesses had requested does not make witness P-245 (D-3)'s testimony regarding the offer of money and relocation less credible.[3986] The Prosecutor submits that witnesses P-260 (D-2) and P-245 (D-3) had unequivocally testified that Mr Arido promised money and relocation and it is irrelevant that Mr Kokaté reiterated the promises made by Mr Arido.[3987] The Prosecutor adds that the Trial Chamber provided a reasoned opinion and was not obliged to expressly address all of Mr Arido's unsupported arguments.[3988]

(iii) Determination by the Appeals Chamber

1597. With respect to Mr Arido's argument concerning the blurring of lines between his role and Mr Kokaté's role, the Appeals Chamber notes that the Trial Chamber directly addressed Mr Arido's arguments at trial on this point and concluded that witness P-245 (D-3) consistently described their distinct roles.[3989] The Appeals Chamber considers that Mr Arido simply repeats arguments made at trial, merely

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[3983] Response, paras 667, 775, referring to Conviction Decision, paras 341-342.
[3984] Response, paras 667, 776, referring to Conviction Decision, fns 562-563.
[3985] Response, para. 777, referring to Transcript of 22 October 2015, ICC-01/05-01/13-T-26-CONF-ENG (ET), p. 48, lines 22-25, p. 50, lines 2-5, p. 50, line 10 to p. 51, line 8.
[3986] Response, para. 778.
[3987] Response, para. 779, referring to Transcript of 14 October 2015, ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 3, line 25 to p. 4, line 2, p. 72, lines 4-5; Transcript of 19 October 2015, ICC-01/05-01/13-T-22-CONF-ENG (ET), pp. 37, line to p. 38, line 1, p. 55, lines 17-18; Transcript of 20 October 2015, ICC-01/05-01/13-T-23-Red2-ENG (WT), p. 15, lines 14-15; Transcript of 23 October 2015, ICC-01/05-01/13-T-27-Red-ENG (WT), p. 48, lines 5-8.
[3988] Response, para. 779, referring to Conviction Decision, paras 320-352.
[3989] Conviction Decision, para. 344.

referring to his closing submissions[3990] and fails to show that the Trial Chamber misunderstood Mr Arido arguments on these points.

1598. The Appeals Chamber further finds that Mr Arido misconstrues the evidence when he asserts that witness P-245 (D-3)'s sought to implicate Mr Arido "once the Prosecution reminded him of his suspect status".[3991] The questioning of witness P-245 (D-3) regarding the context of his interviews with the Office of the Prosecutor in [redacted] and [redacted], is unconnected to later questioning by the Prosecution on the topic of Mr Arido's role in making promises of money and relocation.[3992] Furthermore, witness P-245 (D-3) refers to Mr Arido in the context of his deal regarding testimony in the Main Case both before[3993] and after[3994] his testimony regarding his interviews in [redacted] and [redacted] with the Office of Prosecutor. Therefore, contrary to Mr Arido's assertion, witness P-245 (D-3)'s did not shift the identity of the "deal maker" from Mr Kokaté to him.

1599. Mr Arido argues further that witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence supports the contention that it was Mr Kokaté and not Mr Arido who made promises of money and relocation and the Trial Chamber failed to consider this relevant evidence.[3995] The Appeals Chamber notes that the Trial Chamber acknowledged Mr Kokaté's role.[3996] Mr Arido fails to show how the evidence to which he refers contradicts or negates Mr Arido's role in making promises of money and relocation. Witnesses P-260 (D-2) and P-245 (D-3) consistently testified that Mr Arido made promises of money and relocation and asked the witnesses to note their conditions for testifying which he would then transmit to Mr Kilolo.[3997] The fact that such conditions for testifying were discussed with Mr Kokaté and that he echoed Mr Arido's promises does not undermine the Trial Chamber's finding with respect to Mr Arido.

[3990] Mr Arido's Appeal Brief, paras 355, 358, referring to Mr Arido's Closing Submissions, paras 268-271.
[3991] Mr Arido's Appeal Brief, para. 358.
[3992] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 55, lines 5-18.
[3993] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 37, lines 10-17.
[3994] Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 55, lines 5-18.
[3995] Mr Arido's Appeal Brief, paras 356, 446.
[3996] *See* Conviction Decision, para. 342.
[3997] *See e.g.* Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 71, lines 16-20, p. 72, lines 15-21; Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, lines 14-16, p. 49, lines 22-24, p. 50, lines 2-5, p. 52, lines 10-16.

1600. Mr Arido contends that the Trial Chamber misrepresented witness P-245 (D-3)'s evidence[3998] when making the finding that, *prior* to Mr Kokaté's arrival at the meeting in Douala, Mr Arido asked each of the witnesses to note his conditions on a piece of paper, which he would then transmit to Mr Kilolo.[3999] The Trial Chamber relied, in part, on a portion of witness P-245 (D-3)'s testimony that enumerates events that occurred *after* Mr Kokaté's arrival at the meeting in Douala.[4000] The Appeals Chamber notes that, while this reference to witness P-245 (D-3)'s testimony does not support the Trial Chamber's finding, the remainder of the citation clearly supports the contention that, before Mr Kokaté's arrival, Mr Arido had told the witnesses to write down their conditions for testifying on a piece of paper.[4001] Mr Arido accordingly does not show that the Trial Chamber's finding is unsupported by witness P-245 (D-3)'s evidence.

1601. Furthermore, Mr Arido fails to show how witness P-245 (D-3)'s inability to recall precisely: (i) the amount of money he had requested; (ii) his desired country of relocation; or (iii) the requests of the other witnesses during the Douala meeting[4002] undermines the Trial Chamber's finding that Mr Arido made promises of money and relocation. As noted above, witness P-245 (D-3) provided many details regarding the promises of money and relocation made by Mr Arido.[4003] Witness P-245 (D-3) also explained that at the meeting in Douala the witnesses were invited to write down their requests on pieces of paper and in this way their requests were individualised and not discussed among the group and therefore he was not privy to what the other witnesses had requested.[4004] In light of these explanations and the otherwise detailed nature of witness P-245 (D-3)'s testimony regarding promises of money and relocation, it was not unreasonable for the Trial Chamber to find witness P-245 (D-3)'s corroborated

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[3998] Mr Arido's Appeal Brief, para. 426. The Appeals Chamber notes that Mr Arido refers to witness "D-2" instead of witness P-245 (D-3).
[3999] Conviction Decision, para. 341.
[4000] Conviction Decision, para. 341, fn. 562, referring, *inter alia*, to Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 39, lines 14-15.
[4001] Conviction Decision, para. 341, fns 562-563, referring, *inter alia*, to Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, line 14 to p. 49, line 24, p. 48, lines 14-16, p. 50, lines 2-5, p. 52, lines 15-16.
[4002] Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 49, lines 1-5, 18-25, p. 50 lines 1-5.
[4003] Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, lines 14-16, 49, lines 22-24, p. 50, lines 2-5, p. 52, lines 1-16.
[4004] Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 49, line 18 to p. 50, line 4.

testimony credible and reliable[4005] and to conclude that Mr Arido promised the witnesses money and relocation in exchange for testifying in the Main Case.[4006]

1602. Similarly, the Appeals Chamber finds no merit in Mr Arido's contention that the Trial Chamber failed to provide a reasoned opinion on these issues relating to promises of money and relocation. The Trial Chamber, having explicitly acknowledged that Mr Kokaté had a role in the making of promises of money and relocation,[4007] and having similarly acknowledged the fact that witness P-245 (D-3) did not remember some specifics of his request with respect to money and relocation at the Douala meeting,[4008] did not ignore or fail to address these purported "inconsistencies" as Mr Arido contends. The Appeals Chamber finds that the Trial Chamber provided sufficient reasoning for its conclusion that Mr Arido made promises of money and relocation in exchange for testifying in the Main Case.

1603. In light of the foregoing, the Appeals Chamber finds that Mr Arido has not shown that the Trial Chamber's finding was unreasonable, and accordingly his arguments are rejected.

(b) Alleged error regarding Mr Arido conveying witnesses D-2's, D-3's, D-4's and D-6's conditions to Mr Kilolo

(i) Relevant part of the Conviction Decision

1604. The Trial Chamber recalled that Mr Arido promised the witnesses D-2, D-3, D-4, and D-6 a significant financial reward and relocation to Europe as an encouragement to give certain evidence.[4009] The Trial Chamber found that Mr Arido made them believe that this arrangement would lead to a better life for them, and Mr Arido not only formulated those promises to the witnesses, he also specifically instructed them to write their conditions concerning money and relocation "on a piece of paper which he would personally convey to Mr Kilolo as their 'leader' or 'go-between'".[4010] The Trial Chamber found further that Mr Arido "indeed knew that Mr Kilolo would pay the witnesses for their services as witnesses for the Main Case

[4005] Conviction Decision, paras 312-319, 341, 344.
[4006] Conviction Decision, para. 344.
[4007] Conviction Decision, paras 342, 344.
[4008] Conviction Decision, para. 341.
[4009] Conviction Decision, para. 672, referring to Conviction Decision, paras 320, 328, 342.
[4010] Conviction Decision, para. 672, referring to Conviction Decision, para. 341.

Defence since he conveyed their conditions to Mr Kilolo and assured them that they would be paid".[4011]

(ii) Submissions of the parties

(a) Mr Arido

1605. Mr Arido submits that the Trial Chamber erred in finding that he conveyed the conditions of witnesses D-2, D-3, D-4 and D-6 to Mr Kilolo.[4012] Mr Arido argues that the evidence cited by the Trial Chamber does not support a finding that he conveyed anything to Mr Kilolo.[4013] Mr Arido further argues that evidence that (i) the search for witnesses had been initiated by Mr Kokaté,[4014] (ii) problems in payments were not raised until Mr Kokaté was present, and (iii) Mr Kokaté got angry and threatened to recruit other people when witness P-245 (D-3) threatened to withdraw[4015] shows that Mr Arido did not have any power to make or execute any decisions with respect to the witnesses' conditions.[4016] Mr Arido submits that the Trial Chamber's finding that he conveyed the witnesses' conditions to Mr Kilolo is central to its conclusion that he made promises of money and relocation to the witnesses and therefore also central to his conviction for corruptly influencing witnesses.[4017] Mr Arido argues that these inconsistencies in assessing his role raise reasonable doubt that he was in charge of anything[4018] and show that it was unreasonable for the Trial Chamber to conclude that he played a principal role in making promises of money and relocation.[4019] Mr Arido submits that the Trial Chamber's characterisation of him as a 'go-between' contradicts its finding that he played a principal role, acting as "deal-maker" or "king-pin" by making promises of money and relocation.[4020]

[4011] Conviction Decision, para. 674.
[4012] Mr Arido's Appeal Brief, para. 431.
[4013] Mr Arido's Appeal Brief, paras 432-433, referring to Conviction Decision, fn. 564.
[4014] Mr Arido's Appeal Brief, para. 437, referring Conviction Decision, paras 320, 328; Transcript of 15 October 2016, ICC-01/05-01/13-T-21-CONF-ENG (ET), p. 14, lines 6-8. *See also* Mr Arido's Appeal Brief, para. 86.
[4015] Mr Arido's Appeal Brief, para. 437, referring to Conviction Decision, para. 342; Mr Arido's Closing Submissions, paras 349-356.
[4016] Mr Arido's Appeal Brief, paras 437-438.
[4017] Mr Arido's Appeal Brief, paras 434-435, 441.
[4018] Mr Arido's Appeal Brief, para. 440.
[4019] Mr Arido's Appeal Brief, para. 437.
[4020] Mr Arido's Appeal Brief, paras 436-437, 439.

(b) The Prosecutor

1606. The Prosecutor submits that the Trial Chamber properly found that Mr Arido acted as "go-between" and relayed the witnesses' concerns and conditions to Mr Kilolo.[4021] The Prosecutor argues that, contrary to Mr Arido's assertion, witnesses P-260 (D-2) and P-245 (D-3) stated that Mr Arido acted as an intermediary and that he collected the witnesses' requests and said that he would be reporting them to Mr Kilolo.[4022] The Prosecutor further argues that there is no contradiction between the Trial Chamber's finding that he acted as a "go-between" and the Trial Chamber's premise that Mr Arido had some power to promise money and relocation as Mr Arido ignores the fact that he and Mr Kokaté recruited potential defence witnesses upon Mr Kilolo's request.[4023] The Prosecutor also argues that Mr Arido conflates factual findings with their legal characterisation when he asserts that the Trial Chamber's finding that he was a "go-between" bars the Trial Chamber from finding that he was a direct perpetrator of an offence.[4024]

(iii) Determination by the Appeals Chamber

1607. The Trial Chamber, in discussing the witnesses' conditions for testifying in the Main Case, stated that witness P-260 (D-2)'s testified that "Mr Arido acted as an intermediary, who conveyed the witnesses' conditions to Mr Kilolo".[4025] Mr Arido correctly points out that, at the cited transcript page by the Trial Chamber, the witness does not mention that his conditions for testifying, which included 10 000 CFA francs 000 and relocation to Europe,[4026] were conveyed to Mr Kilolo (although the witness testified that Mr Arido was the "go-between").[4027] The Appeals Chamber notes, however, that the Trial Chamber in the same paragraph of the Conviction Decision also refers to witness P-245 (D-3)'s testimony in support of its finding that Mr Arido

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[4021] Response, para. 781, referring to Conviction Decision, paras 131, 341, 344, 349, 420, 674.
[4022] Response, para. 782.
[4023] Response, para. 783, referring to Conviction Decision, para. 327.
[4024] Response, para. 784. The Appeals Chamber notes that the Prosecutor reiterates arguments made in response to Mr Arido's challenges regarding his liability as a direct perpetrator and the finding that his crimes were connected to the common plan. *See* Response, fn. 2887, referring to Response, paras 690-694. These challenges by Mr Arido and the Prosecutor's corresponding response have been addressed above. *See supra* paras 1478-1481.
[4025] Conviction Decision, para. 341.
[4026] Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 71, lines 14-25.
[4027] Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 72, lines 15-17.

stated he would transmit the witnesses' conditions to Mr Kilolo.[4028] Witness P-245 (D-3) explicitly testified that Mr Arido indicated to the witnesses that their conditions would be transmitted to Mr Kilolo and that Mr Arido's "go-between" status was *vis-à-vis* the witnesses and Mr Kilolo.[4029] Furthermore, when witness P-260 (D-2) was asked whether the conditions he had discussed with Mr Arido were met, in particular whether he received the money he had requested, he stated that Mr Kilolo had given him 550 000 CFA francs, but not the 10 000 000 CFA francs he had requested.[4030] Based on the testimonies of witnesses P-260 (D-2) and P-245 (D-3), it therefore was not unreasonable for the Trial Chamber to have concluded that, when witness P-260 (D-2) referred to Mr Arido's "go-between" status, such status was *vis-à-vis* the witnesses and Mr Kilolo with the understanding that Mr Arido conveyed the witnesses' conditions to Mr Kilolo.

1608. Concerning Mr Arido's submission that the Trial Chamber's characterisation of him as a "go-between" contradicts its findings that he played a principal role,[4031] the Appeals Chamber notes that the Trial Chamber found that, upon Mr Kilolo's request, Mr Arido, together with Mr Kokaté, recruited witnesses D-2, D-3, D-4, and D-6.[4032] The Trial Chamber further found that Mr Arido acted as a "go-between" and relayed the witnesses' concerns to Mr Kilolo and when recruiting potential witnesses Mr Arido made promises of money and relocation in exchange for testifying in the Main Case.[4033] Nothing in these findings suggest that Mr Arido was a "king-pin"[4034] or principal, as Mr Arido's actions were undertaken upon Mr Kilolo's request. In addition, the Appeals Chamber finds no inconsistencies in the Trial Chamber's finding that Mr Arido acted as a "go-between" *vis-à-vis* the witnesses and Mr Kilolo and the fact that he made promises of money and relocation to induce the witnesses to testify.[4035] Contrary to Mr Arido's assertion, these two roles are not contradictory, but rather go hand-in-hand as Mr Arido sought to recruit witnesses at the behest of Mr

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[4028] Conviction Decision, para. 341.
[4029] Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, lines 14-16, p. 50, lines 2-5, p. 52, lines 10-16. *See also* Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 65, lines 5-16, p. 66, lines 19-23.
[4030] Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 73, lines 1-5.
[4031] Mr Arido's Appeal Brief, paras 436-437, 439.
[4032] Conviction Decision, paras 420, 944.
[4033] Conviction Decision, paras 320, 328, 420, 672, 944.
[4034] Mr Arido's Appeal Brief, para. 439.
[4035] *See supra* para. 1469.

Kilolo and the promises he made to the witnesses were an inducement to procure their testimony and fulfil Mr Kilolo's request.

1609. The Appeals Chamber further notes that the Trial Chamber indeed stated that Mr Kokaté had initiated the search for witnesses.[4036] The Trial Chamber also noted witness P-260 (D-2)'s testimony that Mr Kokaté repeated Mr Arido's promises of money and relocation as well as witness P-245 (D-3)'s testimony that, after Mr Kokaté joined the meeting in Douala, the witnesses raised the issue of payment and possible relocation to Europe.[4037] The Trial Chamber additionally noted witness P-245 (D-3)'s testimony that, when he became overwhelmed by the anticipated risk of testifying in the Main Case and consequently threatened to withdraw unless he and the other witnesses were paid, Mr Kokaté became angry and threatened to recruit other witnesses.[4038] Mr Arido asserts that these findings show that he did not have any power to make or execute any decisions with respect to these issues.[4039] However, as the Appeals Chamber has noted above,[4040] witnesses P-260 (D-2) and P-245 (D-3) consistently testified that Mr Arido made promises of money and relocation and asked the witnesses to note their conditions for testifying which he would then transmit to Mr Kilolo.[4041] The fact that Mr Kokaté also played a role in recruiting witnesses or the making of promises, even if such role were to be considered as a primary one, does not undermine the Trial Chamber's findings with respect to Mr Arido. Mr Arido's conduct and Mr Kokaté's conduct are not mutually exclusive.

1610. In light of the foregoing, the Appeals Chamber finds that Mr Arido has not shown that it was unreasonable for the Trial Chamber to conclude that he conveyed the witnesses' conditions for testifying to Mr Kilolo. Mr Arido's arguments are accordingly rejected.

[4036] Conviction Decision, para. 320.
[4037] Conviction Decision, para. 342. The Appeals Chamber notes that the Trial Chamber's reference to P-260 (D-2) should instead be to witness P-245 (D-3) as this section of the witness's testimony concerns the Transcript of 22 October 2015, ICC-01/05-01/13-T-26-CONF-ENG (ET), p. 50, lines 12-13. *See* Conviction Decision, fn. 568.
[4038] Conviction Decision, para. 342.
[4039] Mr Arido's Appeal Brief, paras 437-438, referring to Conviction Decision, para. 342.
[4040] *See supra* para. 1599.
[4041] *See e.g.* Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 71, lines 16-20, p. 72, lines 15-21; Transcript of 22 October 2015, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, lines 14-16, p. 49, lines 22-24, p. 50, lines 2-5, p. 52, lines 10-16.

7. Alleged errors regarding witnesses D-4 and D-6

(a) Alleged error regarding the "missing witnesses" D-4 and D-6

(i) Relevant part of the Conviction Decision

1611. The Trial Chamber found on the basis of the evidence of witnesses P-260 (D-2) and P-245 (D-3) that "Mr Arido unduly influenced D-2, D-3, D-4 and D-6 through his directives concerning the content of their imminent statements to Mr Kilolo and subsequent testimony before Trial Chamber III".[4042] The Trial Chamber concluded that Mr Arido recruited witnesses D-2, D-3, D-4 and D-6 and that "[he] promised the payment of money and relocation to Europe in exchange for testifying as witnesses for the Main Case Defence".[4043] The Trial Chamber noted that witnesses D4 and D-6 were not called to testify in the present case; only witnesses P-260 (D-2) and P-245 (D-3) gave evidence in the present case.[4044]

(ii) Submissions of the parties

(a) Mr Arido

1612. Mr Arido submits that the Trial Chamber erred in not obtaining the evidence of "missing witnesses" D-4 and D-6 and relying solely on the evidence of "accomplice/perpetrator" witnesses P-260 (D-2) and P-245 (D-3), in violation of article 66 (3) of the Statute.[4045] Mr Arido argues that, since the Prosecutor did not submit any direct evidence from witnesses D-4 and D-6, he was denied his right to cross-examine these two witnesses and to confront their evidence against him.[4046] According to Mr Arido, witnesses D-4 and D-6 had material information and were known and available to the Prosecutor as she interviewed witness D-4 in February 2016 and disclosed on 25 July 2016 potentially exculpatory material regarding

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[4042] Conviction Decision, paras 338, 340.
[4043] Conviction Decision, paras 348-349, 420.
[4044] Conviction Decision, para. 306.
[4045] Mr Arido's Appeal Brief, paras 311-312, 314-316, 319-321. Mr Arido's argument about witnesses P-260 (D-2) and P-245 (D-3) "being given immunity" (Mr Arido's Appeal Brief, paras 312, 314) is addressed above. *See supra* para. 1533.
Mr Arido's argument regarding witness D-4's testimony at the sentencing hearing in the present case Mr Arido's Appeal Brief, paras 318, 321, 341, fn. 356) is addressed above. *See supra* para. 1522.
Mr Arido's argument regarding witness D-6's [redacted] as exculpatory information about his military status (Mr Arido's Appeal Brief, paras 321, 340-341) is addressed below. *See infra* para. 1628-1629.
[4046] Mr Arido's Appeal Brief, paras 313, 334, 338-339.

witness D-6.[4047] Mr Arido argues that had both witnesses testified in the present case that they had in fact been members of the military, this would have cast doubt on his conviction, which rests on witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence that witnesses D-4 and D-6 were civilians to whom he assigned military ranks at the Douala briefing.[4048] According to Mr Arido, the Trial Chamber could have ordered the Prosecutor to call witnesses D-4 and D-6 or call them on its own motion.[4049] Mr Arido avers that, as the Trial Chamber failed to do so, its conclusions are solely based on witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence, which, in his view, is unreliable because of the accomplice status of these witnesses.[4050] Mr Arido submits that the Trial Chamber failed to provide a reasoned opinion on the "missing witness problem".[4051]

1613. Mr Arido avers further that the Trial Chamber erred in relying on untested hearsay evidence regarding witnesses D-4 and D-6.[4052] In support of his submission, he argues that, while witnesses P-260 (D-2) and P-245 (D-3) testified as to their direct observations, the content and subject matter of the observations regarding witnesses D-4 and D-6 were accepted by the Trial Chamber for its truth without having had the benefit of hearing witnesses D-4's and D-6's testimony, which could either have supported or contradicted witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence.[4053] Mr Arido maintains that the Trial Chamber relied on this evidence in finding that: (i) he had instructed the four witnesses to present themselves as soldiers, regardless of the truth or falsity of the information; and (ii) he had "giv[en] them 'precise directions as to the account the witnesses should provide to Mr Kilolo'".[4054] Mr Arido requests that, in light of the Trial Chamber's error, his conviction with respect to witnesses D-4 and D-6 be reversed.[4055]

[4047] Mr Arido's Appeal Brief, paras 317, 334.
[4048] Mr Arido's Appeal Brief, para. 321.
[4049] Mr Arido's Appeal Brief, para. 322.
[4050] Mr Arido's Appeal Brief, paras 322, 338. Mr Arido's argument regarding "judicially noticed transcripts imported from the *Bemba* Main Case" is addressed above. *See supra* paras 1492-1497.
[4051] Mr Arido's Appeal Brief, paras 324-325.
[4052] Mr Arido's Appeal Brief, paras 333, 335, 340.
[4053] Mr Arido's Appeal Brief, para. 335.
[4054] Mr Arido's Appeal Brief, para. 336, referring to Conviction Decision, paras 129, 339-340.
[4055] Mr Arido's Appeal Brief, para. 344.

(b) The Prosecutor

1614. The Prosecutor responds that "the absence of relevant testimony 'central to the events'" in an international case, where not all witnesses can be called to testify, "does not *per se* raise reasonable doubt as to the Prosecution's case or the Chamber's findings".[4056] The Prosecutor argues that in the present case the Trial Chamber relied on credible, corroborated and first-hand evidence given by witnesses P-260 (D-2) and P-245 (D-3).[4057] She avers that the absence at trial of the testimony by witnesses D-4 and D-6 does not call into question the Trial Chamber's conclusions.[4058] The Prosecutor asserts that Mr Arido's submissions are "misleading, speculative and fail to show that no reasonable trial chamber could have made findings beyond reasonable doubt without having heard D-4['s] and D-6's testimony".[4059]

1615. The Prosecutor argues further that Mr Arido's contention that, by not calling witnesses D-4 and D-6, the Trial Chamber violated his fair trial rights, his right to confront the evidence against him, and the principle of orality are without merit and should be dismissed.[4060] According to the Prosecutor, Mr Arido had the right to cross-examine witnesses P-260 (D-2) and P-245 (D-3) and to test their evidence which he did.[4061] She adds that Mr Arido's argument that either the Prosecutor or the Trial Chamber should have called these witnesses should be dismissed as she had no obligation to call these witnesses.[4062] The Prosecutor maintains that both witnesses were originally included on Mr Arido's witness list and that it was only after failing to oppose the Prosecutor's initial attempts to contact them and reviewing the notes of witness D-4's interview with the Prosecutor that he decided not to call both witnesses.[4063] The Prosecutor adds that it was for Mr Arido to call them to testify if he was of the view that their testimony would have assisted his defence.[4064] The

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[4056] Response, para. 728.
[4057] Response, para. 730.
[4058] Response, para. 730.
[4059] Response, para. 730.
[4060] Response, para. 727.
[4061] Response, para. 727.
[4062] Response, para. 731.
[4063] Response, para. 731. *See also* para. 727.
[4064] Response, para. 731.

Prosecutor notes that, in any event, the Trial Chamber's decision not to call these witnesses to testify did not prejudice Mr Arido.[4065]

1616. In addition, the Prosecutor asserts that Mr Arido's contentions regarding the "missing" testimony of witnesses D-4 and D-6 is "factually inaccurate, legally unsound and logically flawed".[4066] The Prosecutor argues that Mr Arido's argument about the impact that such evidence could have had on the Trial Chamber's findings is speculative.[4067] She asserts that witnesses P-260 (D-2) and P-245 (D-3) "provided *direct* and not *hearsay* evidence about Arido influencing D-4 and D-6".[4068] She avers that: (i) the four witnesses were together in Douala for the preparatory meeting; (ii) Mr Arido "coached the four witnesses in a group"; (iii) they were together when Mr Arido asked them about their conditions for testifying in the Main Case; (iv) they were together when Mr Arido took away their telephones; and (v) when they debriefed him on their meeting with Mr Kilolo.[4069] The Prosecutor asserts that "whether the witnesses actually had a military background is immaterial for Arido's conviction under article 70(1)(c)".[4070]

1617. Finally, the Prosecutor avers that, contrary to Mr Arido's claim, witnesses P-260 (D-2) and P-245 (D-3) "did not testify about what they heard from others, but about what they *personally directly* witnessed".[4071] The Prosecutor argues that the Trial Chamber correctly accepted the direct evidence of witnesses P-260 (D-2) and P-245 (D-3) on the events that pertained to the group of prospective witnesses that attended the Douala meeting, including witnesses D-4 and D-6.[4072] The Prosecutor additionally argues that the reliability of witnesses P-260 (D-2)'s and P-245 (D-3)'s corroborated evidence is not affected by their accomplice status.[4073]

[4065] Response, para. 731.
[4066] Response, para. 723.
[4067] Response, para. 723.
[4068] Response, para. 724 (emphasis in original).
[4069] Response, para. 724, referring to Conviction Decision, paras 331, 334, 338, 341, 345, 351.
[4070] Response, fn. 2707, referring, *inter alia*, to Conviction Decision, paras 704, 733, 872.
[4071] Response, para. 725 (emphasis in original).
[4072] Response, para. 726.
[4073] Response, para. 726.

(iii) Determination by the Appeals Chamber

1618. The Appeals Chamber notes Mr Arido's claim that his right to examine witnesses D-4 and D-6 and to test their evidence was violated because they did not testify in the present case. In support of this contention, he argues that the Trial Chamber should have ordered the Prosecutor to call these witnesses or call them on its own motion to give effect to his allegedly violated right. The Appeals Chamber finds no merit in these contentions. First, the Appeals Chamber notes that both witnesses were originally included on Mr Arido's list of witnesses[4074] and that, on 7 March 2016, Mr Arido decided to withdraw them.[4075] The Appeals Chamber shares the Prosecutor's view that it was for Mr Arido to call these witnesses if he thought they were material to the preparation of his defence and could raise reasonable doubt with respect to the charges against him. In this context, Mr Arido's claim that the Trial Chamber erred in not providing a reasoned opinion on the issue of the "missing witnesses" is baseless as the Trial Chamber noted that the witnesses did not testify and there was no reason for it to dwell on this matter any further. Furthermore, Mr Arido does not provide any legal basis to support his contention that the Trial Chamber had a duty to call these witnesses or order the Prosecutor to do so. The Appeals Chamber observes that pursuant to article 69 (3) of the Statute a trial chamber has "the authority to request the submission of all evidence that it considers necessary for the determination of the truth", but is not obliged to do so.

1619. The Appeals Chamber also considers that Mr Arido merely speculates that the witnesses' potential evidence could have cast doubt on the evidence of witnesses P-260 (D-2) and P-245 (D-3). The Appeals Chamber notes that Mr Arido extensively examined them on their evidence concerning witnesses D-4 and D-6 and therefore had an opportunity to test the evidence against him.[4076] As for the fact that the Trial

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[4074] Annex A (ICC-01/05-01/13-1557-Conf-AnxA) to "Narcisse Arido's List of Witnesses and Evidence", 21 January 2015, ICC-01/05-01/13-1557; Annex A (ICC-01/05-01/13-1521-Conf-AnxA) to "Narcisse Arido's Updated Provisional List of Witnesses", 11 December 2015, ICC-01/05-01/13-1521.
[4075] "Narcisse Arido's Notification of its Revised List of Witnesses and Supplementary Submissions", ICC-01/05-01/13-1705-Conf; a public redacted version dated 14 July 2016 was registered on 15 July 2016 (ICC-01/0501/13-1705-Red), paras 1, 2, 6-9.
[4076] *See* Transcript of 14 October 2015, ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 38, line 21 to p. 91, line 11; Transcript of 15 October 2017, ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 20, line 8 to p. 75, line 17; Transcript of 20 October 2017, ICC-01/05-01/13-T-23-Red2-ENG (WT), p. 30, line 4 to p. 47, line 14; Transcript of 22 October 2017, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 4, line 17 to p. 69, line 9.

Chamber relied solely on the evidence of witnesses P-260 (D-2) and P-245 (D-3), the Appeals Chamber recalls its finding that a trial chamber may rely on uncorroborated accomplice witness testimony and that the Trial Chamber's treatment of their testimony was therefore not erroneous.[4077]

1620. Turning to Mr Arido's contention that witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence concerning witnesses D-4 and D-6 constituted hearsay, the Appeals Chamber considers that Mr Arido misunderstands the concept of hearsay. Hearsay evidence is defined as the testimony of a witness that "relates not what he or she knows personally, but what others have said".[4078] In contrast, witnesses P-260 (D-2) and P-245 (D-3) testified about what they personally saw and heard, rather than reporting on what they heard from other persons. For instance, they saw among the group of persons present at the meeting in Douala witnesses D-4 and D-6, heard Mr Arido's instructions given to the witnesses on what to say to Mr Kilolo, spoke to the other witnesses, including D-4 and D-6, about their forthcoming testimony,[4079] and saw and heard Mr Arido make promises to the group of witnesses.[4080]

1621. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

[4077] *See supra* para. 1434.
[4078] *See* B, Garner *et al*., *Black's Law Dictionary*, (West Group, 7th ed., 1999), p. 726.
[4079] *See* Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 71, lines 1-5, p. 75, lines 4-10, p. 75, line 22 to p. 76, line 1; Transcript of 13 October 2015, ICC-01/05-01/13-T-19-Red2-ENG (WT), p. 4, lines 16-24, p. 8, lines 17-23, p. 9, lines 17-22, p. 64, lines 1-8; Transcript of 15 October 2017, ICC-01/05-01/13-T-21-Red3-ENG (WT), p. 27, lines 4-12, p. 27, line 24 to p. 28, line 13; Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 38, line 24 to p. 39, line 12, p. 40, lines 13-20; Transcript of 22 October 2017, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 18, lines 18-21, p. 36, lines 16-18, p. 37, line 18 to p. 38, line 1, p. 38, lines 6-7, p. 39, line 20 to p. 40, line 5, p. 45, lines 1-10. *See also* Conviction Decision, paras 331, 334, 338.
[4080] *See* Transcript of 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG (WT), p. 71, lines 6-20, p. 72, lines 15-19; Transcript of 15 October 2017, ICC-01/05-01/13-T-20-Red2-ENG (WT), p. 3, line 25 to p. 4, line 5; Transcript of 19 October 2015, ICC-01/05-01/13-T-22-Red2-ENG (WT), p. 65, lines 11-15; Transcript of 22 October 2017, ICC-01/05-01/13-T-26-Red-ENG (WT), p. 48, lines 14-21, p. 49, line 18 to p. 50, line 5.

(b) Alleged error in not admitting exculpatory material and request to admit this material as additional evidence on appeal

(i) Relevant background

1622. On 15 August 2016, Mr Arido requested the Trial Chamber to admit an interview by a national authority with witness D-6[4081] and its English translation[4082] ("Interview") into evidence.[4083] This request was made after the expiration of the time limit set by the Trial Chamber for all evidentiary submissions.[4084] Mr Arido argued that this material was relevant to the issue of the witness's military status.[4085] The Trial Chamber rejected this on the ground that: (i) Mr Arido knew of the existence of this material and had knowledge of its contents; (ii) Mr Arido failed to explain why he did not himself tried to obtain this evidence; and (iii) there were no "exceptional circumstances warranting a belated admission" of this material.[4086]

1623. In the present appeal, Mr Arido requests that the same Interview be admitted as additional evidence on appeal.[4087] On 18 May 2017, the Appeals Chamber, acting pursuant to regulation 62 of the Regulations of the Court, decided that it would rule on whether the Interview was admissible as additional evidence on appeal, jointly with other issues raised in Mr Arido's appeal.[4088]

(ii) Submissions of the parties

(a) Mr Arido

1624. Mr Arido submits that the Trial Chamber erred in rejecting his request to admit as exculpatory evidence material related to witness D-6 on the issue of his military background because there were no "'exceptional circumstances' to warrant 'a belated admission' of evidence" and because Mr Arido had known of the existence and

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[4081] CAR-OTP-0094-1580-R01.
[4082] CAR-D24-0005-0056.
[4083] Mr Arido's Request for Submission of Further Evidence, para. 18.
[4084] "Decision Closing the Submission of Evidence and Further Directions", 29 April 2016, ICC-01/05-01/13-1859, p. 5.
[4085] Mr Arido's Request, paras 2, 15.
[4086] "Decision on Arido Defence Request to Admit an Item into Evidence", 1 September 2016, ICC-01/05-01/13-1978, paras 8-10, p. 6.
[4087] Mr Arido's Request for Additional Evidence, para. 1.
[4088] Directions on Mr Arido's Request for Additional Evidence, p. 3. *See also* paras 9-12.

content of this material as this witness had been on his witness list.[4089] Mr Arido argues further that he could not adduce this material before the close of the evidentiary submissions on 8 April 2016 because the Prosecutor only disclosed this material to him on 25 July 2016.[4090] He maintains that he was prejudiced by the Trial Chamber's decision not to admit this material as it would have called into question witnesses P-260 (D-2)'s and P-245 (D-3)'s evidence that witness D-6 was recruited and instructed by Mr Arido to testify falsely in the Main Case about his military status, which in his view was fundamental to render a conviction under article 70 (1) (c) of the Statute.[4091]

1625. With respect to his request to admit the Interview as additional evidence on appeal, Mr Arido submits that this material is relevant to his conviction for having corruptly influenced, *inter alia*, witness D-6 pursuant to article 70 (1) (c) of the Statute.[4092] He argues that this material relates to the Trial Chamber's findings that he instructed witnesses D-2, D-3, D-4, and D-6 to "present themselves as soldiers, assigned the witnesses various military ranks, and handed out military insignia to each of them" and that Mr Arido "intentionally instructed and briefed the four witnesses (or facilitated their briefing by others) to present themselves as military men".[4093] Mr Arido asserts that the Interview was not adduced at trial because it was not in his possession until after closing statements.[4094]

(b) The Prosecutor

1626. The Prosecutor responds that the Trial Chamber reasonably found that Mr Arido had a duty to acquire all the relevant documents for the preparation of his defence and that no exceptional circumstances warranted this belated admission of evidence.[4095] She argues that Mr Arido fails to show an error in the Trial Chamber's conclusion to reject his request.[4096] The Prosecutor argues further that the Trial Chamber correctly found that Mr Arido was aware of the existence of this evidence and probably knew

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[4089] Mr Arido's Appeal Brief, para. 329.
[4090] Mr Arido's Appeal Brief, paras 326, 328.
[4091] Mr Arido's Appeal Brief, para. 332.
[4092] Mr Arido's Request for Additional Evidence, paras 14-16.
[4093] Mr Arido's Request for Additional Evidence, para. 14 (emphasis in original omitted).
[4094] Mr Arido's Request for Additional Evidence, para. 14.
[4095] Response, paras 746-747.
[4096] Response, para. 744.

about its content but did not provide an explanation as to why he did not obtain this evidence "at an earlier point in time".[4097] She adds that Mr Arido's "inaccurate and unsubstantiated submission that it was 'factually impossible' for him to adduce the [evidence]" does not demonstrate any error of the part of the Trial Chamber.[4098]

1627. With respect to the request for the admission of the Interview as additional evidence on appeal, the Prosecutor submits that this material could have been presented with the exercise of due diligence[4099] and that even if this material had been presented at trial, it could not have led the Trial Chamber to enter a different verdict.[4100] In the event that the Appeals Chamber admits the Interview, the Prosecutor requests admission of a decree of the Central African Republic Ministry of Defence as evidence in response thereto,[4101] as well as the prior recorded testimony of two witnesses under rule 68 (2) (b) of the Rules.[4102]

(iii) Determination by the Appeals Chamber

1628. The Appeals Chamber considers that, irrespective of whether the Trial Chamber erred in its decision to reject the admission of the Interview regarding the military status of witness D-6, any such error could not have any material effect on Mr Arido's conviction. As noted above, the Appeals Chamber has confirmed the Trial Chamber's interpretation that the offence of corruptly influencing a witness under article 70 (1) (c) of the Statute "does not require proof that the conduct had an actual effect on the witness".[4103] The Appeals Chamber has further found that, in light of this interpretation, it is irrelevant whether witnesses D-2, D-3, D-4 or D-6 had, in fact, been members of the FACA. Accordingly, the Appeals Chamber rejects Mr Arido's arguments on the alleged error by the Trial Chamber in not admitting the Interview at trial.

[4097] Response, para. 745.
[4098] Response, para. 747.
[4099] Response, paras 733-736.
[4100] Response, paras 733, 737-740, 743.
[4101] Response, paras 741-743.
[4102] "Prosecution's Request to Admit Prior Recorded Testimonies and to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)", ICC-01/05-01/13-2205-Conf; a public redacted version was registered on 14 February 2018 (ICC-01/05-01/13-2205-Red). *See also* "Prosecution's Renewed Request to Admit Prior Recorded Testimonies under Rule 68(2)(b)", 23 January 2018, ICC-01/05-01/13-2256-Conf, paras 12-15.
[4103] *See supra* para. 737.

1629. For the same reasons, the Appeals Chamber rejects Mr Arido's request to have the same Interview admitted as additional evidence on appeal. Consequently, the Prosecutor's requests to adduce evidence in response is dismissed.

XI. APPROPRIATE RELIEF

1630. In an appeal pursuant to article 81 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed or order a new trial before a different trial chamber (article 83 (2) of the Statute).

1631. In the present case it is appropriate to reverse the convictions of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo for the charged offence under to article 70 (1) (b) of the Statute and to confirm the remaining convictions entered by the Trial Chamber regarding the charged offences under article 70 (1) (a) and (c) in respect of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo as well as the convictions entered by the Trial Chamber in respect of Mr Fidèle Babala Wandu and Mr Narcisse Arido for the charged offence under article 70 (1) (c) of the Statute.

Judge Geoffrey A. Henderson appends a separate opinion to this judgment.

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

Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 8th day of March 2018
At The Hague, The Netherlands