1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08
5 Presiding Judge Christine Van den Wyngaert, Judge Sanji Mmasenono Monageng,
6 Judge Howard Morrison, Judge Chile Eboe-Osuji and Judge Piotr Hofmanski
7 Appeals Hearing - Courtroom 1
8 Tuesday, 9 January 2018
9 (The hearing starts in open session at 10.04 a.m.)
10 THE COURT USHER: [10:04:10] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE VAN DEN WYNGAERT: [10:04:49] Good morning to
14 everybody.
15 Could the court officer please call the case.
16 THE COURT OFFICER: [10:04:58] Good morning, your Honours.
17 The situation in the Central African Republic, in the case of the Prosecutor versus
18 Jean-Pierre Bemba Gombo, case reference ICC-01/05-01/08.
19 And for the record, we are in open session.
20 PRESIDING JUDGE VAN DEN WYNGAERT: [10:05:19] My name is Christine Van
21 den Wyngaert, and I am presiding in this appeal of Mr Bemba against the Judgment
22 of Trial Chamber III of 21 March 2016 and on the appeal of the Prosecutor and
23 Mr Bemba against Decision on Sentence rendered by the Trial Chamber on
24 21 June 2016.
25 Judge Sanji Monageng, Judge Morrison, Judge Eboe-Osuji and Judge Hofmanski are

1 my fellow judges in these appeals.
2 May I ask the parties and participants to introduce themselves for the record, starting
3 with the Defence.
4 I note the presence of Mr Bemba. Good morning, Mr Bemba.
5 MR HAYNES: [10:06:14] Good morning, your Honour. Next to me is my case
6 manager, Cécile Lecolle. On the far right of the front bench is Leigh Lawrie, and in
7 the bench behind me is Professor Kai Ambos, Professor Mike Newton and
8 Kate Gibson. My name is Peter Haynes and I am Mr Bemba's lead counsel.
9 PRESIDING JUDGE VAN DEN WYNGAERT: [10:06:40] Thank you very much.
10 Prosecution.
11 MS BRADY: [10:06:42] Good morning, your Honours. Allow me to introduce
12 the Prosecution team. Next to me is Meritxell Regue, appeals counsel. To her left is
13 Matthew Cross, appeals counsel. Directly behind me is Mr Reinhold Gallmetzer,
14 appeals counsel, and next to him is Mr Matteo Costi, also an appeals counsel. And
15 then in the back row we have Ms Horejah Bala-Gaye, who is a trial lawyer; she was
16 a trial lawyer in the Bemba case. And next to her is Carmen García Ramos, who is
17 our case manager. Thank you very much. And I am Helen Brady, the senior
18 Appeals counsel. Thank you.
19 PRESIDING JUDGE VAN DEN WYNGAERT: [10:07:25] Thank you. The legal
20 representatives, please.
21 MS BRADY: [10:07:38] Thank you, your Honour, your Honours. My name is
22 Marie-Edith Douzima Lawson and I am the counsel representing victims in this case.
23 I have Célestin N'Zala, one of my legal assistants, with me today, and we have two
24 case managers, Evelyn Ombeni and Prisque Dipanga. Thank you.
25 PRESIDING JUDGE VAN DEN WYNGAERT: [10:08:10] Thank you very much.

1 This appeal concerns a number of important issues that have not yet been addressed
2 at appellate level. For this reason, the Appeals Chamber has issued an order on 27
3 November of last year setting out these issues and requesting the parties and
4 participants for their oral submissions and observations.
5 In today's hearing and the further hearings in the course of the week, the Chamber
6 will hear the views of the parties and participants on these issues.
7 The Chamber will hear these submissions in the following order: First, counsel for
8 Mr Bemba, then the Prosecutor, then the Legal Representative for the Victims, then
9 the Prosecution in response to the Legal Representative of the Victims, and, finally,
10 counsel for Mr Bemba in reply to the Prosecutor and the Legal Representative of the
11 Victims.
12 As we indicated in the scheduling order, the Appeals Chamber may pose questions to
13 the parties and the participants. And as we also said in the order, at the end of the
14 hearing, Mr Bemba will have the opportunity to personally address the Chamber if he
15 wishes to do so.
16 May I also remind the parties or ask the parties that they are requested not merely to
17 repeat the arguments that they already made in their filings but to respond to the
18 questions as we have listed them in the order of last year.
19 May I also remind you that we have set a time limit and that you are expected to
20 complete your submissions within the time frame that we have set in the order, and
21 the court officer will be monitoring the time and he will indicate to the party and
22 participants when the time is about to expire.
23 I understand that he is going to get up two minutes before the end of time to allow
24 you to finish what you are saying. And then of course we also must respect the
25 five-second rule to allow the court reporters and the interpreters to catch up with

1 what we are saying here in the courtroom.
2 The issues that we are going to address were divided into five groups, and before
3 asking the submissions of the parties, I will read these questions into the transcript
4 which will make them better understandable for the public.
5 So let me start now with the first group of questions, which were under group A,
6 listed as preliminary issues.
7 And so for this first group of questions on the time that was allotted, I will briefly
8 remind, is that counsel for Mr Bemba has 15 minutes, counsel for the Prosecution has
9 15 minutes, the legal representative has 10 minutes, the Prosecution in response to
10 Bemba and the legal representative has five minutes, and then Mr Bemba, counsel for
11 Mr Bemba, in reply to the Prosecution and the legal representatives will have
12 maximum of 10 minutes.
13 So let me read out what these preliminary issues are. The first one is about
14 deference. The question is: What level of deference should the Appeals Chamber
15 accord to the Trial Chamber's factual findings?
16 The second one is about Article 81(1)(b)(iv), which is one of the grounds of appeal
17 that is, I think, tested for the first time in this case because it is about the fairness of
18 proceedings. It is a ground of appeal that is not included in the Statute of the
19 ad hocs. So we are asking you to give us your observations.
20 Let me read the article. The article says in its relevant part, quote, "The convicted
21 person, or the Prosecutor on that person's behalf, may make an appeal on any of the
22 following grounds", and then sub-ground or sub-article (iv), on "Any other ground
23 that affects the fairness or reliability of the proceedings or decision".
24 So here the question is the following: Can the convicted person appeal on a ground
25 that affects the fairness of the proceedings but that does not affect the reliability of

1 that decision? So it is basically about the "or".
2 So can I ask now counsel for Mr Bemba to address the Court in reply to these
3 questions.
4 MR HAYNES: [10:13:23] The degree of deference to which any judgment is entitled
5 depends on a variety of circumstances including the degree of reasoning provided by
6 the Trial Chamber, the extent to which issues of fact are mixed with issues of law and
7 procedure, and the presence of manifest indications of a lack of attention to or
8 properly appreciation of the trial record. The factual findings of the Trial Chamber
9 in the instant case bear close scrutiny rather than deference for at least six reasons.
10 First, there is an overall absence of thorough reasoning in the judgment. Deference
11 depends on expression of reasons, and if there is an overall noticeable absence of
12 thorough reasoning, then that should likewise affect the degree of deference accorded
13 to the trial judgment. A trial judgment may provide some reasons but do so in such
14 a cursory or manifestly inadequate way as to demonstrate the need for heightened
15 scrutiny by the Appeals Chamber. There is throughout the judgment a systematic
16 absence of reasoning, but perhaps no more obviously than in relation to
17 the Chamber's credibility assessments. Whole swaths of Defence evidence are
18 dismissed on the basis that the witness was evasive or defensive or a combination of
19 the two. In some cases the Trial Chamber articulates no reason at all for rejecting
20 Defence witnesses and in others rejects them because they tend to support other
21 witnesses or evidence which it has rejected.
22 The rejection of Defence evidence is moreover total. There is in reality no difference
23 between a Defence witness treated with caution and one completely rejected. Both
24 are dismissed entirely.
25 No attempt is made to weigh the content of the evidence. Many of the MLC soldiers,

1 for example, had demonstrably taken part in the events. Their testimony receives
2 support from Prosecution witnesses, Chamber's witnesses, and documents, but the
3 Trial Chamber simply airbrushes them out of history.
4 Neither is there any consistency in the Chamber's resolution to treat witnesses with
5 caution. In the case of Defence witnesses, this means them being completely erased
6 as though they never existed. In the case of Prosecution witnesses, the caution is
7 lightly applied before full credence is duly awarded. These were not reasoned
8 assessments of credibility. A hatchet was simply taken to the Defence case.
9 Second, the citations to evidence are erroneous and in many respects unsupportable
10 and wrong. The extent of erroneous citation to the trial record in the trial judgment
11 should raise further doubts about whether it should be accorded the usual standard
12 of deference. Citations concerning important issues are manifestly erroneous,
13 making it impossible in some cases for the appellant to know on what piece of
14 evidence or testimony the Trial Chamber even intended to rely. For example, as
15 noted in the recent submissions concerning crimes against humanity, the
16 Trial Chamber's findings that MLC soldiers had committed murder, rape and pillage
17 in a catalogue of areas is unsupported by the cited evidence. Assertions such as that
18 the MLC fought independently of the FACA, as discussed in the brief, are said to be
19 supported by press reports which show precisely the opposite.
20 Findings that are unsupported by accurate citation of evidence should be entitled to
21 no deference. More broadly, the degree of erroneous citation in this judgment
22 suggests that the Trial Chamber judgment as a whole should not be entitled to the
23 usual degree of deference.
24 Third, the Trial Chamber's findings do not depend exclusively or even substantially
25 upon the oral testimony of witnesses but rather upon documents.

1 The commonly-expressed source of the so-called margin of deference accorded to the
2 trier of facts, evidential findings, is that it has the unique opportunity to hear and
3 observe witnesses testifying and assess their credibility and reliability. In this case,
4 however, very many of the Trial Chamber's central and critical findings were built
5 upon snippets of tangential hearsay oral testimony augmented by long lists of
6 documentary evidence. The bulk of this evidence was simply dumped wholesale
7 from the bar table into the case record. Even its provenance and authenticity is open
8 to serious question. Copies of snippets of newspapers articles that nobody ever
9 remembered reading contemporaneously. Accordingly, this evidence is not based
10 on any intangible appreciation of witness credibility or an intimate familiarity with
11 matters of particular complexity.
12 Forth, the Trial Chamber's approach to evidence was unbalanced. For no articulated
13 reason the Trial Chamber ignored important evidence on central issues. Also in the
14 submission of the appellant, viewed in its totality, the Trial Chamber's approach to
15 evidence was inconsistent as between the Defence and the Prosecution and
16 incompatible with the proper application of the burden and standard of proof. As
17 set out in the document in support of appeal, the Chamber refused to accept virtually
18 all exculpatory evidence called by the Defence.
19 The totemic example of this was perhaps the evidence of the Defence military expert
20 General Jacques Séara, a professional witness and a French military officer with years
21 of experience of combat, peacekeeping and joint operations. His evidence was
22 dismissed in toto because some of the documentation he had considered may have
23 been inauthentic, notwithstanding his wealth of experience which entitled him to give
24 evidence as he did on, for example, the principle of singularity of command and the
25 need for real-time information to have effective control, or the fact that he had

1 considered much of the evidence in the case and other material that was beyond
2 question.
3 By contrast, the evidence of P-169 and P-178 was beset with difficulties both as to
4 content and to context such that the Trial Chamber acknowledged that it had to
5 approach their evidence with caution. The Trial Chamber nevertheless relied on
6 their uncorroborated, inculpatory evidence unreservedly.
7 Indeed, the Trial Chamber's understanding of the rules of evidence is suggestive of
8 a lack of comprehension of the basic tenets for evaluating evidential weight. The
9 Trial Chamber's management of the trial occasionally revealed that it had a limited
10 grasp of concepts such as provenance, probity, admissibility, relevance and weight of
11 evidence. Prior to the start of the trial, for example, a majority of the Trial Chamber
12 proprio motu admitted the whole case file into evidence without more. Both parties
13 appealed and the Appeals Chamber's judgment is instructive in its criticism of the
14 majority's lack of comprehension of the rules. The Trial Chamber's loose
15 understanding of the rules of evidence extended to the rules for adducing testimonial
16 evidence. The Prosecution was allowed to examine witnesses on unattributed pages
17 from the internet, including social media and Wikipedia. Indeed the Trial Chamber
18 explicitly regarded the fact that something existed on the internet as a form of
19 self-certifying provenance.
20 On 23 October 2012 in perhaps the most striking example of disregard for the most
21 basic precepts of evidence, Judge Steiner, the Presiding Judge, sought to pose
22 questions to a Defence witness on the basis of what she believed was the witness's
23 Facebook page and what it showed about his connections. The Facebook page was
24 not in evidence and no notice had been given of the intent to use this document. The
25 investigative foray was apparently conducted upon her own initiative.

1 Fifth, there is a reasonable basis to apprehend the lack of impartiality on the part of
2 the Trial Chamber.
3 For a five-month period during the Defence case the Trial Chamber engaged in
4 ex parte correspondence with the Prosecution. That correspondence involved the
5 receipt of private written submissions and substantive and substantial hearings
6 behind closed doors. In that correspondence the Prosecution made repeated
7 assertions about the accused, some of his legal team and the credibility of defence
8 evidence.
9 The Prosecution should not have made those submissions and the Trial Chamber
10 should not have entertained them. Indeed the Trial Chamber did more than just
11 entertain these submissions. The Presiding Judge offered suggestions during the
12 ex parte hearings as to how to improve the investigations. A number of the
13 submissions made to the Trial Chamber during that process were inaccurate and
14 those inaccuracies went uncorrected.
15 To compound the error this was not the first or the only example of the Trial Chamber
16 conducting important hearings in the absence of the accused or his lawyers. On
17 7 September 2011 the Trial Chamber took the extraordinary step of hearing from
18 P-178 ex parte the Defence whilst he was subject to his solemn declaration.
19 According to the transcript, even the Legal Representative of Victims were admitted
20 to the courtroom but not Mr Bemba or his advisers.
21 During the course of that hearing P-178, a central Prosecution witness, made a series
22 of defamatory, prejudicial and inculpatory remarks about the accused. Subsequent
23 events, the disclosure of certain telephone records, for example, would suggest that
24 those assertions were demonstrably untrue. They should have been subject to
25 cross-examination. They were not. It was years before the Defence knew what had

1 been said behind closed doors and the Trial Chamber of course declined to have P-178
2 recalled so that the record might be put straight.
3 No reasonable assessment of those events, even allowing all possible latitude for the
4 professionalism of the judiciary, could fail to conclude that there was a serious
5 question mark over the impartiality of the triers of fact in this case. These
6 procedural errors require at the very least a full de novo review of the evidence heard.
7 Sixth, this Appeals Chamber has a great deal of experience as trial Judges. An
8 intangible aspect of the deference to which trial Judges in national systems are given
9 is their long experience and workaday familiarity with criminal trials. Even at the
10 ICTY trial judges' knowledge and expertise in the historical, cultural and social
11 context necessary for assessing witness credibility was deferred to.
12 The situation in this trial, however, is different. None of the trial Judges had any
13 previous trial experience at the ICC, none had previously adjudicated in the case
14 involving the Congo or the Central African Republic. The normal foundations of
15 deference that apply in national systems or even at the ICTY cannot be presumed to
16 apply in this case, particularly given the substantial trial experience in international
17 cases amongst the five Judges of this appeals bench.
18 As a fallback position, the appellant asserts that no reasonable Trial Chamber could
19 have made many of the Trial Chamber's factual findings in this case.
20 Question 2: Can the convicted person appeal on the ground that affects the fairness
21 of the proceedings that does not affect the reliability of the decision? The simple
22 answer is yes.
23 THE COURT OFFICER: [10:26:37] I am sorry to interrupt. Counsel has two
24 minutes to go. And for the record, please slow down.
25 MR HAYNES: [10:26:42] The plain language of Article 81(b) is disjunctive. A

1 separate question is whether a remedy may be granted. This addressed in Article
2 83(2).
3 Although the corresponding provisions of the ICTY statute is expressed in different
4 terms, the jurisprudence of the ad hoc tribunals is clear in two respects: Firstly, that
5 breaches of fair trial rights can equally be termed errors of law; and secondly, that
6 some such errors are prejudicial per se or are presumed to be prejudicial even in the
7 absence of any showing that the appellant -- that they invalidate the decision. These
8 include violations of the accused's right to be tried without undue delay and lack of
9 notice, the locus classicus in that case is Kupreškic.
10 Other violations of the right to a fair trial would also, without doubt, lead to
11 a presumption of prejudice. For example, if a Judge were to participate in a trial
12 judgment who was later found to have been biased, there can be no doubt but that
13 regardless of whether the judgment was in fact even discernibly affected by the bias,
14 the judgment would nevertheless have to be quashed.
15 The Defence submits that receipt by a Trial Chamber of substantial ex parte
16 submissions falls into the same category of serious error that constitutes prejudice per
17 se or presumed prejudice. The potential impact of such impropriety cannot be easily
18 identified and yet goes straight to the heart of actual and perceived trial fairness. At
19 the very least it should fall to the Prosecution, which was actively involved in the ex
20 parte submissions, to disprove the prejudicial impact on the minds of the Judges.
21 The Prosecution would be unable to make such a showing. On the contrary, the
22 Trial judgment is replete with examples of Defence witnesses being categorically
23 deemed unreliable while Prosecution witnesses were salvaged to the extent that they
24 incriminated the accused. The confidentiality of judicial deliberations is a
25 further reason why the prejudice should be presumed. The Defence has no way of

1 inquiring what impact the ex parte submissions may or may not have had on the
2 minds of the Judges. Such impact will never be found in a written judgment.
3 Saying that the Judges are professionals is not enough because even professionals
4 need to hear both sides of the story in order to have a chance of coming to a balanced
5 view of the evidence.
6 THE COURT OFFICER: [10:29:16] May I inform the Defence that the time
7 (Overlapping speakers)
8 MR HAYNES: [10:29:19] I've got two paragraphs.
9 The negative impact on the fairness arising from these ex parte submissions is
10 reinforced by other deviations from the basic components of a fair trial.
11 First, the communications with his lawyers were intercepted during the course of the
12 case.
13 Second, the Legal Representatives were granted unprecedented participation in the
14 trial process.
15 Third, the Chamber, having been presented with cogent evidence that 22 of
16 the Prosecution's witnesses were involved in a concerted attempt to extort money
17 from the ICC in return for their testimony, and having been told by Witness P-169
18 that the ringmaster of this scheme was P-178, who was ready and willing and
19 available to testify, declined further to re-open the evidence to hear P-178.
20 Simply put, the Trial Chamber deviated so substantially from the essential conditions
21 of a fair trial that prejudice must be presumed. No trial judgment can be allowed to
22 stand in such circumstances because the appellant is unable to find evidence of this
23 unfairness in the text of the trial judgment.
24 PRESIDING JUDGE VAN DEN WYNGAERT: [10:30:24] Thank you, Mr Haynes.
25 The word is now to the Prosecution.

1 MS BRADY: [10:30:59] Good morning again, your Honours. I will be addressing
2 you on both elements of the questions in Group A, that is the question on deference to
3 factual findings, as well as the question relating to Article 81(1)(b)(iv) and the impact
4 of the Trial Chamber's decision.
5 During the course of my submissions I will be referring to the authorities which are
6 listed in our reference list which we filed yesterday, this is filing number 3593, and we
7 have done so for ease of reference and in light of the short time frame for the
8 questions because what we have done is I have grouped the authorities in terms of
9 the proposition that I am making as well as in the order of my submissions. We
10 think this might help the Bench and the parties and participants to follow.
11 So turning to the first question, you have asked: What level of deference should the
12 Appeals Chamber accord to the Trial Chamber's factual findings?
13 The Appeals Chamber should accord significant deference to the Trial Chamber's
14 factual findings, only disturbing them if it finds that no reasonable Trial Chamber
15 could have made them or where they are wholly erroneous. The question is not
16 whether another trier of fact theoretically could come to a different factual conclusion
17 or even whether you would find differently. Instead, and I will paraphrase from
18 Judge Shahabuddeen in his separate opinion in the Strugar appeals judgment, that
19 can be found at reference list note A.1, the question is: Can the Appeals Chamber
20 say that the findings made by this Trial Chamber, the Chamber which heard the
21 evidence and indeed lived with it for some four years, were ones no reasonable
22 Trial Chamber could have made? In our submission, and we've shown this
23 exhaustively in our brief, including on all the points that Mr Haynes has raised this
24 morning, the answer is no.
25 The Appeals Chamber has applied this standard in interlocutory appeals and more

1 recently in its final appeal judgments in Lubanga and Ngudjolo. Indeed, for the past
2 20 years all the ad hoc tribunals, the ICTY, ICTR, Sierra Leone court, Extraordinary
3 Chambers, STL, without exception have applied this standard when reviewing factual
4 findings. Those authorities can be found in reference list note A.2. And the
5 Appeals Chambers of these courts have highlighted the corrective nature of appeals,
6 they are not trials de novo, and have confirmed that they will not lightly disturb
7 findings of fact by a Trial Chamber. For that proposition we have a number of
8 authorities in our reference list at note A.3.
9 And we submit that you take this same approach here. And why is that? Years ago
10 the Kupreškic Appeals Chamber gave this classic rationale, which has been repeated
11 many times since:
12 "... the task of hearing, assessing and weighing the evidence presented at trial is left
13 primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of
14 deference to a finding of fact by a Trial Chamber. Only where evidence relied on by
15 the Trial Chamber could not have been accepted by any reasonable tribunal of fact or
16 where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber
17 substitute its finding for that of the Trial Chamber."
18 That can be found, the reference to Kupreškic is in our reference list at note A.4.
19 And this has been developed in many cases. The Appeals Chamber of the ICTY and
20 ICTR has developed this in a number of cases, Krnojelac, many others set out at
21 reference note, in our reference list note A.5. And I note too that many of the cases
22 listed in the Defence authorities stand for this same basic proposition.
23 The Appeals Chamber of the ICC has also confirmed this standard. In the Lubanga
24 and Ngudjolo appeal judgments the Appeals Chamber observed that it must "a priori
25 lend some credibility to the Trial Chamber's assessment of the evidence proffered at

1 trial" and only intervenes if there is, quote, "an unreasonable assessment of the facts of
2 the case carried out by the Trial Chamber which may have occasioned a miscarriage
3 of justice which constitutes a factual error." That citation is at reference list note A.6.
4 And it concluded that when -- at paragraph 27 of that same judgment in Lubanga
5 appeals judgment, it concluded, quote:
6 "When a factual error is alleged the Appeals Chamber will determine whether
7 a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to
8 the finding in question. The Appeals Chamber will not assess the evidence de novo
9 with a view to determining whether it would have reached the same factual
10 conclusion as the Trial Chamber."
11 It's been repeated as well by the Appeals Chamber in its most recent interlocutory
12 appeals decision in Ntaganda, in the no case to appeals -- no case to answer appeals
13 decision at paragraph 11. And I'll leave you with that. It's in our reference list at
14 note A.8.
15 What is the effect of all this? Well, barring a material error or a lack of reasoning,
16 neither of which, and despite the Defence's arguments both in their brief and this
17 morning, despite their arguments and claims that there was a lack of reasoned
18 opinion, this cannot be -- this does not come out from the judgment.
19 We have exhaustively dealt with this in our response brief, so I won't go into the
20 details on each point that he has raised. But essentially the Appeals Chamber should
21 defer to the Trial Chamber's assessments on the credibility and reliability of evidence.
22 This goes for testimonial evidence. It also goes for the non-testimonial, for the
23 documents. He has pointed out that you are in basically the same position to look at
24 the documents. Well, that is not quite right, because you have to look at documents
25 together with the witness testimony, the witness who has spoken, and in light of the

1 entire trial record. That gives the Trial Chamber a box seat on both testimonial and
2 non-testimonial evidence. It also applies to direct and circumstantial.
3 It applies to its -- you should apply deference to its findings on fact, both subsidiary
4 facts and material facts, unless you are satisfied that no reasonable trier of fact could
5 have made those findings or that they are wholly erroneous; that is, you cannot work
6 out -- you cannot discern how the Trial Chamber's conclusion could have been
7 reasonably reached from the evidence before it.
8 I'll rely on the brief in terms of responding to his arguments this morning about the
9 paucity of reasoning that the Trial Chamber has given on identification, on effective
10 control, on the Defence witnesses. We have shown clearly in our response brief why
11 the findings are reasonable. You can see the reasonableness of it in the judgment
12 itself. It is quite exhaustive.
13 In essence, the high threshold for overturning factual findings is not met here.
14 Although the Defence claims for many findings there is a lack of reasoned opinion or,
15 for others, that they are unreasonable, in actuality what he is doing is merely asking
16 you to substitute different factual findings he would have preferred the
17 Trial Chamber to have made, but without showing that they were unreasonable, most
18 importantly, on the material facts relied on to convict Mr Bemba. This should lead
19 you to dismiss his claims and find that the Trial Chamber's factual findings were
20 reasonable.
21 I will turn now directly to question B, and the essence of it is, you have asked whether
22 a convicted person can appeal on a ground that affects the fairness of the proceedings
23 but does not affect the reliability of the decision.
24 A convicted person may raise the unfairness of the proceedings as a ground of appeal.
25 This comes clearly from Article 81(1)(b)(iv). But to succeed in such an appeal, they

1 have to show that any such unfairness affected the reliability of the decision. And
2 this derives from the clear terms of Article 83(2) of the Statute, read together with
3 Article 81(1)(b)(iv).
4 So in effect, while Article 81(1)(b) lists the errors which may be advanced on appeal,
5 Article 83(2) requires that for the alleged error to succeed, it has to have an impact on
6 the appealed decision. This comes from the clear language of Article 83(2), which
7 says in the relevant part, quote:
8 "If the Appeals Chamber finds that the proceedings appealed from were unfair" - here
9 is the important bit - "in a way that affected the reliability of the decision", et cetera,
10 then it may reverse, amend, order a new trial, et cetera.
11 I should add here that in this case, where you have a situation that the Trial Chamber
12 has already ruled on the same challenges to fairness, the appellant has to first show
13 that the Trial Chamber's decision, the below decision, was in error. And this comes
14 directly from the Lubanga appeals judgment at paragraph 155, which says that:
15 "Where a Trial Chamber has already addressed and disposed of the substance of
16 allegations that a trial should have been stayed owing to violations of fair trial rights,
17 the Appeal Chamber's role is not to address these allegations de novo. Rather the
18 Appeals Chamber must review ... the relevant decision."
19 And that citation is in reference list note A.9.
20 Now, again, time is very limited so I will have to rely on our response brief. But we
21 have shown in our response brief that the three matters that Bemba is now raising on
22 appeal as alleged fair trial violations, the ex parte submissions, the delayed disclosure
23 and the alleged access to privileged communications, they were all dealt with at the
24 Trial Chamber stage, in many decisions, several, and they are listed in our response
25 brief. I think there were some seven or eight, but most notably in the

1 Trial Chamber's Abuse of Process Decision and the Stay of Proceedings Decision.
2 They are in reference list note A.10. And the Defence hasn't met the first hurdle
3 because they haven't shown why those decisions must be overturned.
4 But if you are nevertheless minded to address these three alleged fair trial violations
5 de novo, substantively they fail for their lack of impact on the Trial Chamber's final
6 decision. And this has again been settled by the Lubanga Appeals Chamber
7 judgment. The reference is in reference list note A.11. The Chamber there found
8 that in keeping with Article 81(1)(b)(iv) and Article 83(2), it would consider the
9 allegations of fair trial violations "in relation to whether his rights have been
10 violated" - here is the important bit - "and, if so, whether such violations affected the
11 reliability of the Conviction Decision". That's at paragraph 28.
12 And there is another relevant quote - I won't read it to you, but it is at
13 paragraph 56 - which is basically again showing that the scope of appellate
14 proceedings requires that the error has the -- the error, if it is unfairness, has to have
15 the potential to make these decisions unreliable. That is at paragraph 56 of Lubanga.
16 And this approach, it makes good sense because it accords with the confined purpose
17 and the corrective nature of appeal proceedings, even it finds favour with legal
18 commentators. I point your Honours to those cited in our own reference list at note
19 A.12, and also I note that there are a number of academic articles, and indeed cases, in
20 the Defence list of authorities which generally take the same view.
21 The ad hoc tribunals take the same approach. At the ICTY, to succeed on grounds of
22 appeal alleging fair trial violations, an appeal had to show that the violation
23 invalidated the decision. There are a number --
24 THE COURT OFFICER: [10:44:29] Counsel has two minutes.
25 MS BRADY: [10:44:33] Thank you. There are a number of decisions supporting

1 that proposition, decisions such as the Galic Appeals Chamber judgment,
2 paragraph 21; the Kordic appeals judgment, paragraph 119; and other ones listed in
3 our reference list at note A.13.
4 The same approach as well at the Sierra Leone court. In order to show -- well, then it
5 was -- unfairness was dealt through as a procedural error. You had to show the
6 impact on the decision. Those references can be found in A.14 of our reference list.
7 This also accords with how Trial Chambers at this Court have addressed violations of
8 an accused's fair trial rights in the context of abuse of process or stay of proceedings
9 motions. Generally, any violations which are raised won't result in an acquittal of an
10 accused, but they will be addressed in other ways, such as a stay of proceedings in
11 an extreme case where fair trials have just become impossible or a breach of
12 fundamental rights of the accused. Or we acknowledge there are some cases which
13 show that for more narrowly defined violations, then maybe by not relying on the
14 evidence or by mitigating or reducing the sentence. Those can be found, all of the
15 authorities, in reference list note A.15 and A.16.
16 So to conclude, your Honours, in summary, not every violation of a convicted
17 person's fair trial rights, even if established, will affect the reliability of the
18 Trial Chamber's final decision. The violation has to be something so as to either
19 render the whole trial unfair or make it impossible to safely rely on the body of
20 evidence or somehow constitute a miscarriage of justice.
21 We have set this out very exhaustively in our brief in ground one. The Defence has
22 firstly not shown that the Trial Chamber erred in dismissing --
23 THE COURT OFFICER: [10:46:40] It's up.
24 MS BRADY: [10:46:40] If I could just finish this thought, given that the Defence went
25 on for a couple of minutes.

1 Firstly, the Defence has not shown how the Trial Chamber erred in dismissing these
2 same challenges at trial. These submissions should be dismissed in limine.
3 Secondly, he has not established, he has not shown that the three violations he has
4 alleged, either individually or cumulatively, caused Mr Bemba prejudice or
5 unfairness, and, third, let alone that they rendered the Trial Chamber's decision to
6 convict Mr Bemba for these offences unreliable.
7 In short, Mr Bemba had a fair trial and his first ground of appeal should be dismissed.
8 Thank you very much.
9 PRESIDING JUDGE VAN DEN WYNGAERT: [10:47:23] Thank you, Ms Brady.
10 (Microphone not activated)
11 THE INTERPRETER: [10:47:37] Microphone, please.
12 MS DOUZIMA-LAWSON: [10:47:41] (Interpretation) I would like first of all to recall
13 what the role of the judge is, namely to apply the law in relation to the facts.
14 I would like to start by recalling some of the provisions of the Rome Statute, Article
15 81(1)(b), which provides as follows: The person found guilty can appeal on the
16 following grounds: Procedural error, error of fact, error of law and any other error
17 that may compromise the fairness and equity of the proceedings or decision.
18 Let me also refer to article 83(1), which provides as follows: For the purpose of
19 proceedings under Article 81 and this Article, the Appeals Chamber shall have all the
20 powers of the Trial Chamber.
21 And then let me refer also to Article 83(2), which provides as follows: If the
22 Appeals Chamber -- which provides that the Appeals Chamber cannot overturn
23 a decision of the Trial Chamber or reverse such a decision or sentence if there are any
24 shortcomings in the appeals proceedings that might affect the probity of the decision
25 or judgment on which the appeal is based or where there are substantive legal errors

1 of law or fact involved.
2 Now, let me further recall that the Trial Chamber in the Lubanga case considered
3 appeals procedures to be significantly different in their nature and purpose from a
4 trial in the preliminary phases of the case, as well as a trial in the Trial Chamber. It
5 further established that appeals trials are of a corrective nature through a controlled
6 mechanism, as established above.
7 The Appeals Chamber, when dealing with errors of fact, the mandate to control also
8 requires that the decisions of the Trial Chamber be respected and that review be
9 subject simply to whether the decisions of the Trial Chamber are unreasonable, rather
10 than any other consideration.
11 Under 83(2) of the Statute, the scope of appeals is to ensure that errors in law or fact
12 relate to the judgment strictly and that such cases -- in such cases, if the trial is found
13 to be unfair, there must be a finding that such decisions were based on incorrect
14 assessments.
15 The appeals process does not seek to correct all mistakes that may have been made at
16 trial level. It seeks only to address errors which have been established to have had a
17 significant impact on the relevant decision.
18 Now, when it comes to errors of fact, the Appeals Chamber decided that it will not
19 intervene in the fact-finding mission of the Trial Chamber, except it is established that
20 the Trial Chamber had committed a manifest error, such as incorrect assessment of
21 the facts.
22 Finally, the Appeals Chamber is also of the view that it will not perturb the
23 assessment of facts by the Trial Chamber or the Pre-Trial Chamber simply on the
24 grounds that the Appeals Chamber itself may have come to a different finding. It
25 will only intervene where it cannot determine how the Trial Chamber reasonably

1 came to its decision based on the evidence before it.
2 During the trial, when the accused continues to deny that which is obvious, would
3 such an attitude lead to the conclusion that there was an error of fact? The
4 Trial Chamber must rely on the appeals lodged under Article 92 of the Statute and
5 therefore proceed to some measure of deference based on the factual findings of the
6 Trial Chamber. Clearly, therefore, the standard of evidence is that of beyond
7 a reasonable doubt which must exclusively apply only to the elements of the crime
8 and the mode of liability relating to the accused person.
9 The Chamber therefore will not have to review all the facts leading up to the
10 judgment of the Trial Chamber and seek that such facts be proven beyond any
11 reasonable doubt. It must rely only on the facts that speak to the judgment. That in
12 substance is the position of the law and the jurisprudence of the Appeals Chamber,
13 particularly in the Lubanga case.
14 Against this backdrop and these legal provisions and jurisprudence, the
15 Appeals Chamber must therefore grant the necessary deference to the factual material
16 or evidence tendered before the Trial Chamber, given that the Appeals Chamber's
17 duty is not to correct the errors that may have been made at trial level but to deal with
18 errors that are relevant to their judgment.
19 Now, when the other side refers to a Defence witness, namely, General Séara, who is
20 said to -- whose testimony is said to not have been taken into account by the
21 Trial Chamber, the other side forgets to mention that General Séara recognised during
22 his testimony -- and you can find this in the testimony -- he recognised that he had
23 made a number of mistakes on a number of points, particularly relating to his report
24 and even during his testimony.
25 Now, let me address the second question, namely, to determine whether there might

1 be a problem -- what I was saying, in order to answer the question quickly, is that
2 the Defence has a right to appeal. This is a recognised right. But the appeal must
3 be relevant.
4 What is the interest at play when an accused person appeals in an area which might
5 affect the fairness of the trial but not the reliability of the decision? It is therefore our
6 position in answer to this question that -- is that we -- one does not appeal for the
7 pleasure of appealing, but simply to determine that such an appeal can lead to
8 a correction or an amendment of the decision.
9 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you, Madam
10 Douzima-Lawson.
11 I now give the floor to the Prosecution.
12 MS BRADY: [10:56:58] Your Honour, the Prosecution has no need to make
13 a response to the submissions by the Legal Representative of Victims to the extent
14 that we agree with the submissions that she has made, so we won't be making any
15 submissions. Thank you.
16 PRESIDING JUDGE VAN DEN WYNGAERT: Mr Haynes.
17 MR HAYNES: [10:57:16] Just one or two very brief points. And I will take the
18 second question first, if I may.
19 The purpose of Article 83(2) is to outline the bases upon which an Appeals Chamber
20 may grant a remedy. And I will take the time just to read it. If the
21 Appeals Chamber finds that the proceedings appealed from were unfair in a way that
22 affected the reliability of the decision or sentence, or that the decision or sentence
23 appealed from was materially affected by error of fact or law, it may reverse the
24 decision or order a new trial. It has no impact, as it were, on the basis or the way in
25 which the appellant pleads his case upon appeal.

1 There are a number of possibilities. The appellant may allege that there has been
2 unfairness at his trial in a solitary ground, and the Appeals Chamber may find that
3 that is the case. It may allege, or he may allege, in multiple grounds that there is
4 unfairness in a number of ways, and the Appeals Chamber may find that the
5 cumulative effect of those things upon the proceedings were to lead to an unreliability
6 in the decision. But it may equally arise from no ground that is pleaded as
7 unfairness because, as in this case, the appellant says that the decision to allow
8 the Prosecution to address its ex parte on these matters was both a legal and
9 procedural error. It was also very unfair. They say that the latitude given to the
10 Legal Representative of Victims to participate in these proceedings was procedurally
11 and legally erroneous. It was also very unfair. And that the decision not to open
12 the proceedings or re-open the proceedings to allow the recall of P-178 was a legal
13 and a procedural error that was also very unfair.
14 And so the route is therefore open to the Appellate Chamber to grant a remedy upon
15 a finding that the proceedings appealed from were unfair in a way that affected the
16 reliability of the decision. So it is a permissive ground, or it is a permissive provision,
17 to you. What, therefore, is the link between your finding of unfairness and finding
18 that they affected the reliability of the decision?
19 Well, in the submission of the appellant it's an objective one. It has to be. You have
20 to look objectively at whether those grounds that allege legal and procedural errors
21 that were unfair objectively leads to a conclusion that the reliability of the decision is
22 affected. It cannot be a subjective one, as is effectively submitted; in other words,
23 that the Trial Chamber says it is okay and that these matters did not impact upon its
24 decision.
25 If that were the case, there would be no ground of appeal that could arise from the

1 unfairness of the decision providing that the Trial Chamber always says, don't worry,
2 it didn't affect our decision or in any way make it unreliable. That is why we say
3 you will find some comfort in the decisions of the ad hoc tribunals where they have
4 dealt with breeches of fair trial rights which lead effectively to a presumption that
5 there has been prejudice which has invalidated the decision, not just made it
6 unreliable, but invalidated it.
7 But the primary submission we make is that you are permitted to look at whether
8 objectively these matters make the decision of the Trial Chamber unreliable, and we
9 say in the circumstances that is an almost inevitable conclusion.
10 Turning to question one, whether there is an absence of reasoning in this judgment is
11 going to be something you will have to examine. We say there is throughout;
12 the Prosecution say there is not.
13 The matters which appear not to have been addressed are the impact of the ex parte
14 proceedings upon the evaluation you have to have of the evidence. And we say that
15 there is there a reasonable basis to apprehend bias or a lack of impartiality on the part
16 of the Trial Chamber and that necessarily reduces the deference that would you have
17 to their findings and invites closer scrutiny of them by you. Whether their findings
18 were reasonable is, again, litigated at length in the written pleadings. But I simply
19 invite you to this on the question of the exercise of effective control by the appellant
20 in this case, was it reasonable for the Trial Chamber to ignore all the expert military
21 evidence it was offered in the first case of command responsibility before the
22 International Criminal Court? Was it reasonable for the Trial Chamber to ignore the
23 evidence of both of the (Redacted) of the relevant military forces in relation to
24 effective control? In our submission it was not.
25 As to whether the witnesses in this case had a box seat or the Trial Chamber had a box

1 seat to examine the credibility of documents so copiously relied upon in the
2 judgment -- I beg your forgiveness for repeating submissions we have made before,
3 but there was no original newspaper report available in this case. There was no
4 whole newspaper report. Nobody spoke to any of these newspaper reports.
5 Nobody could remember whether they had even been published at the time and
6 nobody could remember reading them. So it is a very curious box seat that the
7 Trial Chamber had indeed in determining that these were documents upon which
8 you could place such wholesale reliance.
9 That is all I propose to say in reply.
10 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you, Mr Haynes.
11 So we now have heard all your submissions. We are going to withdraw for half an
12 hour to deliberate on possible follow-up questions from the Judges, and after that
13 then we will start with the second theme that we have decided to ask submissions on.
14 So now we will withdraw for half an hour.
15 THE COURT USHER: [11:05:36] All rise.
16 (Recess taken at 11.05 a.m.)
17 (Upon resuming in open session at 11.35 a.m.)
18 THE COURT USHER: [11:35:10] All rise.
19 Please be seated.
20 PRESIDING JUDGE VAN DEN WYNGAERT: [11:35:49] So we have a number of
21 questions for the parties and participants, so the party to whom the question is
22 addressed answers first and then the other participants can reply and respond if they
23 so wish.
24 So the first question is a question for Mr Haynes.
25 Mr Haynes, you have mentioned two ex parte meetings of P-178 with the presence of

1 the Prosecution and the victims but not of your client. There was one meeting where
2 Judge Steiner asked questions based on the Facebook page of P-178 and then there
3 was this other meeting where you say that the answers that P-178 gave to
4 the Chamber were wrong or false.
5 So I have two questions: First, can you give us the reference of where that -- when
6 that happened and where that is in the transcript. And, more importantly, can you
7 tell us what these problematic answers were that you are thinking of.
8 If this should be a confidential point, we can go into closed session if you so wish.
9 We are in your hands on that one.
10 MR HAYNES: [11:37:21] Just to be absolutely clear, there are two in-court episodes,
11 not three.
12 The first is the appearance of P-178 before the Trial Chamber, which was on
13 7 September 2011. I'm pretty confident that the transcript is in our list, so it's
14 available to you, but the reference is T-155-CONF-Red2 in English.
15 The examination upon a Facebook page, the reference is T-260-CONF English, and
16 that's 23 October 2012.
17 During the course of the hearing on 7 September, P-178 made a number of assertions
18 about his connection, not just with Mr Bemba but also with one of his legal team,
19 which were when we discovered them quite extraordinary, because what you may or
20 may not know is that Mr Bemba was brought up in Belgium. So having any
21 connection with somebody who lived in Gombe was fairly unusual as a child. But
22 he also made a number of allegations about being contacted by telephone. And over
23 the course of the next two or three years - and this is set out in great detail in I think
24 all the filings - the P-169, P-178 story developed and one of the aspects of that was that
25 VWU investigated the phones of both of those individuals and several of the people

1 whom they said had contacted them. And by the time P-169 gave evidence before
2 the Chamber, many of the allegations about being contacted were abandoned by him
3 because he was confronted by the telephone records. That's as far as I can properly
4 take it. But I believe P-178's telephone records were available as well and
5 undoubtedly would have been put to him.
6 So I hope that -- does that deal with what you are asking me?
7 PRESIDING JUDGE VAN DEN WYNGAERT: [11:40:28] We are just trying to
8 understand what the difference would have been if Mr Bemba could have
9 cross-examined P-178 on that point in time because I thought that that was the point
10 you wanted to make.
11 MR HAYNES: Yes. I mean he could have been contradicted on the central
12 assertions he made in the ex parte proceedings, not least his alleged connection with
13 Mr Bemba.
14 PRESIDING JUDGE VAN DEN WYNGAERT: [11:40:54] Okay. Thank you very
15 much.
16 Does anyone want to respond? Yes, Mrs Brady.
17 MS BRADY: [11:40:57] I will be quite short on this. The ex parte hearing relating to
18 P-178 on September 7, 2011 at transcript page T-155 was concerning a security matter,
19 so that's why I'll be a bit -- not very effusive in my response. But firstly, your
20 Honours, the LRV was not there, contrary to what the Defence said. This was before
21 the Judges, the OTP was there, the VWU. The purpose was to hear P-178's concerns
22 about his security and well-being. It was limited to that. Now, of course the VWU
23 had to be there. They have a responsibility to protect trial witnesses.
24 The Prosecution had to be there because they as well have a responsibility for the
25 protection of their Prosecution witnesses. I want to stress, and again I'm not going to

1 go into the detail of what was discussed, but substantive matters about the case were
2 not discussed. You can see that when you read the transcript.
3 So I don't see the point that's being made that somehow it would have assisted had
4 Bemba been there to cross-examine. And I think this is an unrelated to point to what
5 later evolved or could be said to have evolved in relation to P-178 and 179. We're
6 exhaustive in our response brief in the treatment of 178 and 179. I don't think this
7 really makes a difference to be colloquial.
8 PRESIDING JUDGE VAN DEN WYNGAERT: [11:42:36] Thank you, Mrs Brady.
9 The victims? Okay, then I will give the floor to Judge Morrison who also is going to
10 ask a question.
11 JUDGE MORRISON: [11:42:42] Again this is a question for Mr Haynes. I think you
12 would probably agree that ex parte hearings are not unfair per se, and I take as an
13 example public interest immunity hearings such as are held in the UK which are
14 necessarily ex parte.
15 As to your submissions on ex parte hearings becoming unfair, the question really falls
16 into two parts. Where do you say the line is or ought to be drawn? And secondly,
17 more definitively in this case, where do you say it was crossed to the extent that it
18 ought to cause us significant disquiet?
19 I may be inviting some repetition from you, but it's not always a bad thing.
20 MR HAYNES: [11:43:41] Well, of course the essential difference between a public
21 interest immunity hearing in the United Kingdom and what transpired here is that a
22 public interest immunity hearing would be held by the trial judge prior to a trial
23 where the triers of fact were a jury, and that in a nutshell is the crossing of the line.
24 We say ex parte hearings before the trier of fact should never ever, ever take place.
25 And they were particularly pernicious in this case for a number of reasons that are

1 well rehearsed. One because the submissions made and the material placed before
2 the Trial Chamber was directly relevant to the issues in the case; was critical of the
3 Defence, the accused, the Defence lawyers and all the Defence witnesses; and thirdly,
4 were materially inaccurate, things were said to the Trial Chamber which subsequently
5 in another tribunal were proven to be wrong, but they were never corrected in front
6 of the Chamber who tried this case.
7 So the simple answer to your question, Judge Morrison, is the line was crossed when
8 the ex parte proceedings took place in front of the trier of fact and these things were
9 said.
10 I don't think there is anything usefully I can add.
11 JUDGE MORRISON: [11:45:17] Thank you.
12 MS BRADY: [11:45:20] Yes, I will add a few things.
13 Judge Morrison is completely correct, ex parte submissions are allowed. Of course
14 they shouldn't be excessive and they should be only allowed to the extent that they
15 were absolutely necessary and limited.
16 In this case there was no crossing of the line on ex parte submissions.
17 The Prosecution's ex parte submissions to the trial -- before the Trial Chamber were
18 limited to what was necessary and proportionate. You have to ask yourself what
19 was the Prosecution to do in this situation? They were confronted where they were
20 discovering and it was evolving over the course of time that there appeared to have
21 been payments made to the Defence and there appeared to have been an interference
22 with the course of justice. Clearly revealing the sensitive information to the accused
23 would have compromised the Prosecution's ongoing Article 70 investigation into this
24 complex matter, and it was complex because it involved, and I won't go into the
25 Article 70 trial judgment, it had been shown to have involved beyond reasonable

1 doubt that Mr Kilolo and Mr Mangenda, the lead counsel and the case manager
2 involved, this was quite a sensitive, tricky position the Prosecution found itself in.
3 It's important to note that the ex parte submissions of the Prosecution were limited to
4 what was strictly necessary for the legitimate purpose being pursued. He talks
5 about extensive submissions that went on for five months, et cetera, but actually if
6 you look at the record, what you see is ex parte submissions on 15 November 2012 in
7 a written form asking for some assistance from the Registry; on 20 March 2011, again
8 in written form, asking for investigative assistance; and then at a status conference
9 following that up on 9 April, again related to investigative assistance. At that point
10 the Prosecution is told go to the Pre-Trial Chamber. So the Trial Chamber is acting
11 completely in a way that was preserving the fair trial rights of the accused.
12 The line was also not crossed because the Trial Chamber several times in their
13 decisions, we can see it clearly in the judgment, paragraph 259 to 263, said several
14 times, firstly, we are not going to make any determination on the merits of the
15 allegations. They didn't make decisions on the investigative requests being asked.
16 That was sent to the Pre-Trial Chamber. But most importantly they said in a number
17 of decisions they would base themselves solely on evidence admitted at trial. The
18 Trial Chamber -- and this is not just some subjective "Oh, trust us, this is okay". If
19 you look objectively at the trial judgment you can see very clearly that this is the case.
20 Their analysis of Defence witnesses, for example, they give reasons based on the
21 evidence that the Defence witness gave, the evidence on the record, not evidence
22 about perhaps some allegations in the Article 70 case. And it reached its -- the
23 Trial Chamber reached its view on the merits of the Bemba -- the case against Bemba
24 on the evidence alone and not on any submissions that it had heard about or read
25 about relating to the Article 70 allegations.

1 In summary, your Honours, there is no prejudice. The Trial Chamber wasn't
2 affected. They are professional Judges. They made no determination on the merits.
3 They made no decisions on the Prosecution's investigative requests.
4 Even though the Defence asked the Trial Chamber in their final trial brief to ignore
5 the 14 Defence witnesses who were potentially affected, the Trial Chamber actually
6 goes ahead and assesses their evidence on the record, the evidence on the record, not
7 the evidence in the Article 70 allegations.
8 So the problem as it were with his submissions on the ex parte is that they are
9 completely speculative that the Trial Chamber was effected by what it heard in the
10 ex parte, and we say how could it? There were three discrete sets of submissions
11 and there is no -- we can see no impact on their reasoning process.
12 That's what I will say to your question.
13 PRESIDING JUDGE VAN DEN WYNGAERT: [11:49:57] Thank you, Ms Brady.
14 The victims?
15 (Microphone not activated)
16 JUDGE EBOE-OSUJI: [11:50:07] Thank you very much.
17 Mr Haynes, I was not going to ask you a question, but in light of something you said I
18 thought I would return to it.
19 You said that ex parte hearing before a trier of fact must never ever, ever be allowed.
20 Now, one can see that argument in the context of a trial where the jury is the trier of
21 fact, but are you overstating your proposition if we are talking about a bench-alone
22 trial, that a judge who is both the trier of fact and the trier of law must never ever
23 have ex parte hearings? Is that what you're saying?
24 Now, that's my question to you. It came as a result of your last response. My last
25 question, main question will be to Ms Brady, but after I hear from you.

1 MR HAYNES: [11:51:28] Yes, I do say that.
2 And to sweep up a couple of little matters that perhaps derive from that, P-178, whilst
3 subject to his solemn declaration, should not have appeared before the Trial Chamber
4 ex parte for any reason. I don't think, and I respect the experience of this Bench,
5 I don't think I have ever come across protection issues being dealt with ex parte.
6 When witnesses seek protective measures, they are inter partes litigation.
7 So the fact that this was something where he wanted to complain about his situation
8 still should not have been dealt with ex parte. And the matters he referred to there
9 were truly prejudicial.
10 And lastly this, Ms Brady invites me to say what should the Prosecution have done?
11 Go to the Pre-Trial Chamber, that's what they should have done. That's what the
12 rules say and that's what ultimately Trial Chamber III conceded they should have
13 done. But by then the damage had been done and the damage is evident in the text
14 of this judgment, we say.
15 JUDGE EBOE-OSUJI: [11:53:09] My question -- Mrs Brady, you don't need to
16 respond to that. I think you already spoke to it.
17 But let me ask you my own question to you, my initial question. The first segment of
18 our hearing today is on appellate deference. And when you spoke to it, you said
19 deference is avoided only when no reasonable trier of fact could have made the
20 decision or the finding that was made.
21 Now my question to you is this: That same proposition would also have been made
22 in a civil trial, isn't that the case? If that is the case then, what is the difference in that
23 proposition between a criminal trial and a civil trial? The concept of reasonableness
24 or the finding, the factual finding, is there a difference? If so, what is that
25 difference? Is it the same standard of deference for both? Perhaps another way of

1 asking the question is this: I believe there is an authority somewhere in the -- there is
2 a case from, the 1911 case from the High Court of Australia, a case called Peacock, and
3 the case, it's posed Peacock and R, 1911 case, the quote is this, quote, "It is the practice
4 of judges, whether they are bound to give such a direction or not, to tell the jury that
5 if there is any reasonably hypothesis consistent with the innocence of the prisoner, it
6 is their duty to acquit," unquote
7 Does that kind of principle have any place in international criminal justice? That is
8 another way of asking you the same question. Is there a differential between a civil
9 trial and a criminal trial from the point of view of deference to a finding that is
10 reasonable?
11 MS BRADY: [11:56:32] Your Honour, your question is quite -- I haven't thought
12 about your question in these terms before, so I'm taking it at sort of first blush.
13 I don't think there is a particular difference between deference in a civil
14 proceeding -- if I could clarify, you mean a civil proceeding on, say, a tort matter or a
15 family law matter or something like that. I don't believe that there would be
16 a difference on deference applied between a civil, a finding in a civil case -- it's been
17 a long time since I worked in civil proceedings to recall exactly the case law in
18 deference that is required to those sorts of findings, but I believe it would be the same.
19 There I do recall a decision Re W, which actually Judge Shahabuddeen helpfully
20 refers to in his separate decision. It is an old decision, it is about child custody. It is
21 a matrimonial dispute matter. And there Lord Hailsham makes a very interesting
22 comment about deference in the context of a civil proceedings and basically says, you
23 know, what it means and says, well, reasonable minds can differ and it doesn't mean
24 that a judge is unreasonable to overturn a finding. Reasonable minds, two
25 reasonable people can both come to opposite conclusions and yet they can both be

1 reasonable.

2 I am not summarising or doing justice at all to Lord Hailsham by my summary of it,

3 but you'll be able to look it up yourself.

4 JUDGE EBOE-OSUJI: Maybe I can help you --

5 MS BRADY: You might know.

6 JUDGE EBOE-OSUJI: -- clarify perhaps the point. You say you hadn't thought

7 about it. In your submission you said something to the effect at some point, your

8 earlier submission, that the Defence once asked to substitute the Trial Chamber's

9 factual findings with the one that he, the Defence counsel prefers without showing

10 that the Trial Chamber's finding was unreasonable.

11 The question then is this, if you have a finding -- let's say there is a piece of evidence

12 upon a certain interpretation will lead to a conclusion of guilt, but then there is

13 another reasonable interpretation to that evidence which will lead to innocence. See

14 what I mean? In that case would you say that in a criminal case a finding of guilt is

15 reasonable in that sense?

16 MS BRADY: [11:59:17] Well, of course, in a circumstantial case, the Prosecution must

17 eliminate all reasonable doubt about the accused's innocence. So the finding that

18 somebody is guilty must be the only reasonable conclusion. So if there was

19 a conclusion, another conclusion that was reasonably open, then one could say it was

20 unreasonable not to have taken that if, but I'm saying if that's the case.

21 And on the facts of this case, the findings by the Trial Chamber do not lead to that

22 outcome. I mean, theoretically, the standard of review for the circumstantial

23 findings is the same as for you might call a more direct finding, a finding based on

24 direct evidence. There is no difference. So we can see that from the case law,

25 the Defence has cited as well some authorities for that proposition. However, if

1 there are two reasonable interpretations open, and we are talking about material facts
2 here, ultimate facts, you would have to be convinced that it was unreasonable that
3 there were two reasonable conclusions and it was actually unreasonable not to have
4 taken one of them. But this is not the case here because the Defence hasn't shown
5 that his preferred facts are reasonable. They were not. They were not another
6 reasonable conclusion which the trial should have taken, must have taken.
7 Yes, thank you.
8 PRESIDING JUDGE VAN DEN WYNGAERT: [12:00:51] Thank you, Ms Brady.
9 I have a last question now for the Legal Representative. Sorry, sorry, no.
10 Mr Haynes, I should have.
11 MR HAYNES: [12:01:07] No, please no. You prevented me from observing that I
12 think Judge Chile might well have answered his own question, that the authorities in
13 civil cases on deference are actually quite useful, because of course those are the sorts
14 of cases prior to the history of international criminal law where appellate courts were
15 able to look at judicial factual findings.
16 Most criminal cases, of course, would have been the findings of juries and so
17 appellate courts were tending to look more at the directions given to them by judges
18 as to the law. But, of course, the distinction between civil cases and criminal cases is
19 the burden of proof. And even at the appellate phase, the burden of proof remains
20 on the Prosecution to show that the findings are justifiable beyond a reasonable doubt,
21 not just that two people might come to slightly different conclusions where one is
22 50 per cent right and the other is 49 per cent wrong. There is a different standard
23 here in terms of the Prosecution seeking to uphold those findings on appeal.
24 So with respect, I didn't really need to observe this because I thought you seemed to
25 have answered your own question in the course of your discussion with Ms Brady,

1 but that would be my observation.

2 JUDGE EBOE-OSUJI: [12:02:42] But my point was actually whether that has a value

3 or something that should be received as part of the jurisprudence on international

4 criminal law. Do you have any authority in international criminal law that says

5 that?

6 *MR HAYNES: [12:03:04] Forgive me, I took my headphones off. I had better read

7 what you just said.

8 Not immediately, I suppose, is the answer to that.

9 PRESIDING JUDGE VAN DEN WYNGAERT: [12:03:33] Okay, thank you. Let me

10 proceed to the last question, and that's a question for the Legal Representative. You

11 have mentioned in relation to the testimony of General Séara that there were

12 a number of points that he made that were false or incorrect. Can you expand a little

13 bit on that, please.

14 MS DOUZIMA-LAWSON: [12:04:06] (Interpretation) Thank you, your Honour.

15 There were several points. I will give a number of examples in relation to the

16 document that he based himself upon to draft his report.

17 During the proceedings we realised that he used documents that were not correct.

18 And then he made a number of statements in his report that were not correct either.

19 One example was that he thought that a minister of defence of the CAR had died

20 during the events, whereas even now today this former minister is alive.

21 In relation to a military authority from the CAR he said -- because, you see,

22 the Defence spent their time saying that the MLC troops received operational orders

23 from the military authorities of the CAR and General Séara repeated that in his report.

24 And we saw that actually he was mistaken. For example, he explained that (Redacted)

25 was Mr So-and-so, and yet this gentleman was not the minister of -- correction,

1 not general of staff. He was a general at the time, he had that rank but, well, he
2 became a general later on in the events.
3 So these are just a few examples to show you that, well, once I had finished
4 questioning him, I said to him, "General, throughout all your testimony you have said,
5 'Perhaps I believe I erred. What do you think of your own report?'" And he said to
6 me that all human beings are imperfect and he said he knew he had made some
7 mistakes.
8 So this is my response to your question, and I thank you.
9 PRESIDING JUDGE VAN DEN WYNGAERT: [12:06:45] I seem to remember that
10 General Séara also said that he was speaking on the basis of these documents and
11 taking the content of these documents for the truth. So would you consider that
12 those are then the lies by General Séara when he was basing himself on documents of
13 which he did not know whether they were false or true?
14 MS DOUZIMA-LAWSON: [12:07:17] (Interpretation) I am not saying that he lied.
15 I am merely saying that the observations that were made or the findings were such
16 that he based his report on documents that were not correct. I do not have the right
17 to say that Mr Séara was lying. I gave you an example, namely, he thought one
18 particular authority in the Central African Republic was dead, and in actual fact this
19 gentleman was not dead; whereas the witness wrote on black and white in his report
20 that the gentleman was dead.
21 Then I asked him where these documents came from and how did you draft such an
22 erroneous report, and he said that the Defence had provided -- (Overlapping
23 speakers).
24 PRESIDING JUDGE VAN DEN WYNGAERT: [12:08:17] Thank you. Anybody
25 wants to respond to this? Yes, Ms Brady.

1 MS BRADY: [12:08:22] Yes. Your question goes to the heart of the Trial Chamber's
2 reasoning in not giving any weight to expert witness Séara's evidence. And I think
3 that if you look at the Trial Chamber's reasoning, it is unassailable in terms of why
4 they did not rely on his evidence.
5 Firstly, they took into account the fact that D-53 had relied very much for his evidence
6 on documents that the Chamber deemed unreliable. These were especially the 13 or
7 so FACA documents to which the Chamber gave no weight given the serious doubts
8 about their authenticity.
9 D-53 actually testified that he hadn't assessed the documents' authenticity himself, he
10 just relied on them, and he agreed that had they been false, this is coming from his
11 own testimony, he would have then been following a false line of reasoning. This is
12 at Trial Chamber Judgment paragraph 368.
13 Another problem with D-53's evidence is that he relied on many of the statements
14 made by D-19, which D-19 - I won't go into his name, obviously he is a protected
15 witness - he subsequently contradicted in court and most importantly on operational
16 control. One of the key questions in this case is effective control and dependent on
17 operational control.
18 The Chamber also found that D-19's testimony wasn't credible with respect to
19 Bemba's involvement in the CAR operation and his operational control and other
20 matters. That's at Trial Chamber paragraph 359.
21 Also important, some of the conclusions that expert Séara came to were actually
22 contradicted by evidence at trial. He omitted completely that the MLC hierarchy
23 provided logistics. He omitted that Bemba was using a Thuraya, or satellite phone,
24 throughout the operation. He omitted that P-36 -- I won't say again what his role is;
25 he is another important witness -- was the only channel of communication between

1 Bemba and Colonel Moustapha, or that he also admitted that there was or said that
2 there was no evidence of orders from President Patassé to -- sorry, I won't go into
3 that.
4 Also of relevance is that not a single line in Witness Séara's report was sourced and
5 this also prevented the Chamber from examining the bases for his opinion. So if you
6 look at their reasoning on why they don't rely on him, it is reasonable.
7 PRESIDING JUDGE VAN DEN WYNGAERT: [12:11:30] Mr Haynes?
8 MR HAYNES: Paragraphs 368 and 369 of the judgment are the most simplistic
9 analyses of a professional expert witness's evidence I think I have ever seen, and I
10 suspect it may well be the most simplistic and inadequate analysis of an expert
11 evidence witness that anybody on this bench has ever seen. It is of note that in
12 determining this, the first case on command responsibility before the International
13 Criminal Court three Judges who had never previously tried a case involving
14 command responsibility jettisoned all of the expert evidence in this case, not just that
15 of General Séara, but also the expert called by the Prosecution, General Apandé.
16 They also jettisoned the evidence of CHM-1, the (Redacted) at the
17 relevant time, and the evidence of P-0036, his counterpart.
18 General Séara's report listed all the sources of information he had read before
19 considering his opinion. He also interviewed a vast number of dramatis personae
20 before giving evidence. And the sources of his opinions were, in our submission,
21 perfectly clear. The principle source of his submission on central issues such as
22 singularity of command, the need for realtime information, the impossibility of
23 duality of command, the umbilical cord link to the, as it were, mother authority were
24 his years and years and years of experience, none of which finds any reference in the
25 assessment of his evidence.

1 It is a shockingly dismissive piece of evidential assessment of a very important
2 witness or somebody who one would have thought would be important to a Bench
3 for the first time determining command responsibility.
4 PRESIDING JUDGE VAN DEN WYNGAERT: [12:14:11] (Microphone not activated)
5 Okay. Then we finish with group A questions and I will now proceed to reading
6 group B questions. Sorry.
7 MS BRADY: [12:14:32] If you don't mind, your Honour, we will just change places
8 for the Prosecution team. We didn't want to be rude about that.
9 PRESIDING JUDGE VAN DEN WYNGAERT: [12:14:48] So the second ground of
10 appeal is touching upon a crucial issue that has not been determined yet by this Court
11 on appellate level, and that is the scope of Article 74(2) of the Statute.
12 We have five sub questions under this issue. The first question is about the meaning
13 of Article 74(2). I read the question: What are the facts and circumstances
14 described in the charges within the meaning of Article 74(2) of the Statute? In
15 particular, which of the following examples is a fact? One, the rape of P-0022 in
16 PK12 on or around 6 or 7 November 2002, or rape committed by MLC soldiers in the
17 Central African Republic between, on or about 26 October 2002 and 15 March 2003?
18 Second question. It is about the detail required for the charges as spelled out in
19 Regulation 52(b) of the Regulations.
20 So the question goes as follows: What is the minimum level of detail required for,
21 quote, "a statement of the facts", end quote, to be included in the document containing
22 the charges pursuant to Regulation 52(b) of the Regulations of the Court?
23 And this especially regarding the time and place of the alleged crimes. Very
24 importantly, does the required detail depend on the form of individual criminal
25 responsibility charged in the case? In particular, would the required detail in a case

1 of criminal responsibility as a co-perpetrator under Article 25(3)(a), would that differ
2 from the required detail in the case of command responsibility under Article 28(a)
3 of the Statute?
4 The third question is about the DCC. The question is, must acts underlying the
5 crimes charged be exhaustively listed in the document containing the charges?
6 The forth question is about the confirmation decision. The question is, must the
7 Pre-Trial Chamber determine whether there is sufficient evidence to support to the
8 requisite standard each underlying act included in the document containing the
9 charges and enter a finding on such acts in the confirmation decision?
10 I must here clarify that the term underlying act throughout the judgment is defined as
11 a criminal act underlying one of the crimes charged. It is a term of art that is not
12 used in all decisions of the Court, so it is important to have in mind that this is the
13 meaning of this term: An underlying act is a criminal act underlying one of the
14 crimes charged.
15 Then I come to my last question, which is about the potential amendment of charges
16 in Article 61(9) of the Statute. The question is: Can the Prosecutor notify the
17 accused person of other and underlying acts in axillary documents provided after the
18 confirmation decision was rendered? Can he do so without seeking to add
19 additional charges under Article 61(9) of the Statute? Can the accused person be
20 notified of other underlying acts through the provision of statements of victims? If
21 the Prosecutor or the Legal Representative of Victims notifies the accused person of
22 other underlying acts after the confirmation decision, do they exceed "the facts and
23 circumstances described in the charges in the sense of Article 74(2)"?
24 So this is the list of questions that we want to raise under group B, and I am looking at
25 the hour, and I was wondering whether we could start with the submissions of the

1 Defence. For this group of questions, the parties have 30 minutes each. So would
2 you like then to start with your submissions on this point. Thank you.
3 MS LAWRIE: Good afternoon, Madam President, your Honours.
4 A total of 31 incidents or underlying criminal acts were used by the Trial Chamber to
5 support Mr Bemba's conviction for rape, murder and pillage. Of these 31, two
6 incidents of murder, six incidents of rape, and 12 incidents of pillage were not
7 included in the amended DCC at all or were improperly included. We say that the
8 Trial Chamber's reliance on these 20 incidents means they exceeded the facts and
9 circumstances described in the charges.
10 This then begs the first question posed in section 4: What are the facts and
11 circumstances described in the charges for the purposes of Article 74(2) of the Statute?
12 The short answer in the context of this appeal is that underlying criminal acts form
13 part of the facts and circumstances and must be described in the charges. This
14 conforms with an accused's statutory fair trial right to be informed promptly and in
15 detail of the nature, cause and content of the charge.
16 Having started with the most contentious point, I will now make three I hope less
17 controversial statements to provide a basis for the rest of my submissions.
18 First, the term "charges" used in Article 74(2) must refer to the charges as confirmed.
19 Second, the confirmed charges comprise of a factual and a legal element. This
20 conclusion is based on a combined reading of Article 74(2) of the Statute and
21 Regulation 52 of the Regulations of the Court.
22 Third, the confirmation process defines the legal and factual parameters of the
23 charges for the subsequent trial proceedings.
24 As the Appeals Chamber has observed, if it were otherwise, a person could be tried
25 on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to

1 which confirmation was even declined.
2 Given these statements and looking at the Chamber's first question, the issue at core is
3 what level of factual detail is required when considering a charge, or, put another
4 way, what are the factual building blocks necessary to construct a properly pleaded
5 charge?
6 To answer this question, the starting point is the guidance provided by the
7 Appeals Chamber in two judgments issued in the Lubanga case. In the first
8 judgment, dealing with the triggering of Regulation 55, which is judgment number
9 2205, the Appeals Chamber stated in relevant part at footnote 163 that, and I quote:
10 "The term 'facts' refers to the factual allegations which support each of the legal
11 elements of the crime charged. The Appeals Chamber emphasises that in the
12 confirmation process the facts as defined above must be identified with sufficient
13 clarity and detail meeting the standard in Article 67(1)(a) of the Statute." End of
14 quote.
15 Further clarification regarding the factual detail which requires to be given was
16 provided in Mr Lubanga's conviction appeal judgment number 3121. At paragraph
17 123, the Appeals Chamber held that, and I quote: "The underlying criminal acts
18 form an integral part of the charges against the accused, and sufficiently detailed
19 information must be provided in order for the accused person to effectively defend
20 himself or herself against them."
21 This second statement is a clear and logical focusing of the first. Underlying
22 criminal acts are factual allegations which will be used by the Prosecution to prove
23 the legal elements of the crimes charged. This was expressly acknowledged by
24 Pre-Trial Chamber I in the Gbagbo case. In the decision adjourning the hearing on
25 the confirmation of charges, decision number 432, the Pre-Trial Chamber stated at

1 paragraph 21 in relevant part that, and I quote: "The individual incidents alleged by
2 the Prosecutor in support of her allegation that there was an 'attack directed against
3 any civilian population' are part of the facts and circumstances for the purposes of
4 Article 74(2) of the Statute ... In other words, the incidents are 'facts' which 'support
5 the [contextual] legal elements of the crime charged.'"
6 In the present case brought against Mr Bemba when the Pre-Trial Chamber concluded
7 at confirmation that acts of rape directed against CAR civilians from committed by
8 MLC soldiers as part of a widespread attack against the CAR civilian population from
9 on or about 26 October 2002 to 15 March 2003, it did so not in the abstract but because
10 specific incidents of rape, specific factual allegations had been brought forward by
11 the Prosecution. Looking more widely that the factual element of the charges must
12 be pleaded in some detail and extend to the underlying criminal acts is borne out by
13 the approach taken by all Pre-Trial Chambers during the confirmation process.
14 We are all familiar with the painstaking process employed by Pre-Trial Chambers
15 whereby they assess in detail the factual allegations which are set out in the document
16 containing the charges, accepting certain facts and rejecting others so as to ultimately
17 confirm only those charges for which they consider that there is sufficient evidence to
18 establish substantial grounds to believe that the relevant person committed each of
19 the crimes charged.
20 This process which involved assessing individual incidents of underlying acts, as well
21 as other facts necessary to support each of the legal elements of the crime charged is
22 the process by which the factual parameters of the charges are set and fixed for trial.
23 The specificity with which the factual parameters of the charges are drawn in cases
24 before the ICC is further demonstrated by looking at the type of factual allegation
25 which has necessitated the triggering of the amendment process under Article 61(9) in

1 order for it to be properly included as part of the charges.
2 In Kenyatta in the period between confirmation and the start of trial, Trial Chamber V
3 rejected the Prosecution's attempt to add the factual allegation that victims were also
4 killed by gunshot in Naivasha to the charging document on the basis that the
5 Pre-Trial Chamber had rejected that particular allegation.
6 As a result the Prosecutor filed a request to amend the charges pursuant to Article
7 61(9). This was granted by the Single Judge of the Pre-Trial Chamber following a
8 review of the new evidence provided by the Prosecution to substantiate the allegation
9 and a consideration of the reasons as to why it had not been put forward at
10 confirmation.
11 The Single Judge's approach in Kenyatta is a concrete example of the application of
12 the Appeals Chamber's guidance of what constitutes a fact which forms part of the
13 charges. This was a factual allegation which was to be used to prove the nature of
14 the attack in or around Naivasha. Therefore, if this factual allegation was to be
15 relied upon by the Prosecution, Article 61(9) had to be invoked in order for it to be
16 properly added back into the charges.
17 Based on my submissions so far and turning to the specific query raised by
18 the Chamber asking which of the two examples provided is a fact, my response is that
19 both are. But if a charge of rape is to be pleaded with the requisite position and
20 detail required by the Court's legal texts and jurisprudence, both would require to be
21 described in the charges as confirmed.
22 The second question posed by the Chamber concerns the minimum level of detail
23 required for a statement of facts. In short, we agree with the statements at page 13 of
24 the Chamber's practice manual that the required specificity of the charges depends on
25 the nature of the case and that no threshold of specificity of the charges can be

1 established in abstracto.
2 Nevertheless, certain overarching principles apply: First is the accused's statutory
3 right to be informed promptly and in detail of the nature, cause and content of the
4 charge. Second is the principle that the charges should always be pleaded to the
5 greatest degree of specificity possible. This is underlined by Rule 121(3) which
6 requires the Prosecution to provide the person with a detailed description of the
7 charges. Third, and linked to the second, is that it is incumbent on the Prosecutor to
8 present during the pretrial phase all of the facts and circumstances relating to the case.
9 This is in line with the Appeals Chamber's repeated statements that the Prosecution's
10 investigation should largely be completed by the confirmation of charges hearing.
11 Using the example provided by the Chamber in the previous question and applying
12 the overarching principles I have just identified, a baldly stated fact that rape was
13 committed by MLC soldiers in the Central African Republic between on or about
14 26 October 2002 and 15 March 2003 would not be sufficient for purposes of
15 Regulation 52(b). Without the inclusion of any other factual details, it would be a
16 rape charge with 141-day time frame covering a geographic area of approximately
17 623,000 square kilometres. This clearly does not provide the requisite detail for an
18 accused to be able to mount an efficient and effective defence, bearing in mind that
19 defence resources are not unlimited. Yet according to the Prosecution and accepted
20 by the Trial Chamber this would be a properly pleaded charge with the detail to be
21 filled in during the period prior to trial. This can't be correct.
22 Based on the Appeals Chamber's guidance in the two Lubanga judgments I have
23 already referred to, the minimum level of detail for a statement of facts must include
24 all the factual allegations the Prosecution intends to rely on to support each of the
25 legal elements of the crimes charged and so extends to the individual underlying

1 criminal acts.
2 In terms of the time and place, including the times and places of the underlying
3 criminal acts, these should be pleaded with the greatest degree of specificity possible.
4 Given that by confirmation the Prosecution should be trial ready, pleading in this
5 manner is a fair and reasonable position for all parties. What should not be
6 permitted is wording which permits the Prosecution to expand the factual parameters
7 of the trial after confirmation. For example, in the Kenya and Mbarushimana cases
8 the Pre-Trial Chambers held that phrases such as "in locations including" and "include
9 but not limited to" did not provide the proper degree of specificity and that the
10 charges were limited to the locations expressly pleaded.
11 Not all Chambers have followed this approach to the use of inclusive language in
12 charging documents, including the Pre-Trial Chamber in this case, but that was an
13 error and it was an error that was unsuccessfully challenged by the Defence in this
14 case.
15 Language which permits factual allegations to be used as exemplary and not
16 exhaustive drives a coach and horses through the confirmation process and
17 circumvents the statutory procedure for fairly amending charges under Article 61(9).
18 It also breaches the accused's right to be informed in detail of the charges.
19 Looking at the different modes of liability which may be charged, it's recognised that
20 different levels of specificity are required depending on the form of liability. The
21 jurisprudence of the ad hoc tribunals in this point was endorsed in the Lubanga
22 conviction appeal judgment at paragraph 122. In the Lubanga judgment the
23 Appeals Chamber sets out the detailed, and I stress detailed, information with which
24 an accused charged with liability as a co-perpetrator must be provided.
25 At paragraph 123 the Chamber states that the accused must be informed of "(i) his or

1 her alleged conduct that gives rise to criminal responsibility, including the contours of
2 the common plan and its implementation as well as the accused's contribution (ii) the
3 related mental element; and (iii) the identities of any alleged co-perpetrators."
4 But it also addresses the underlying criminal acts and states that with respect to these
5 acts and the victims thereof, the Prosecutor must provide details as to the date and
6 location of the underlying acts and identify the alleged victims to the greatest degree
7 of specificity possible.
8 Now applying this approach to command responsibility it is clear that an accused
9 must be provided with detailed information regarding the facts which will be used to
10 establish each of the elements of that mode of liability that the accused is a military
11 commander of sufficiently identified subordinates over whom he had effective
12 control and for whose acts he is alleged to be responsible. The accused will also
13 require detailed information regarding his conduct by which he may be found to have
14 known that the crimes were about to be or had been committed by his subordinates
15 and the related conduct of those others for whom he is alleged to be responsible.
16 The underlying subordinates' crimes should be pleaded with as much precision as
17 possible, date, location, identity of the victim. When pleading command
18 responsibility an accused should also be informed of the specific acts that he did or
19 didn't do to prevent the commission of the underlying crimes and/or to punish the
20 perpetrators thereof.
21 The superior responsibility is the mode at issue in the present case. Our primary
22 argument is not about the position with which the underlying acts were pleaded, but
23 that they were not included in the confirmed charges at all.
24 Given my submissions so far it will come as no surprise that the answer to the third
25 question posed by the Chamber is in the affirmative. Acts underlying the crimes

1 charged must be exhaustively listed in the Document Containing the Charges if they
2 are to form part of the charges confirmed for trial. This answer is firmly rooted in
3 the Appeals Chamber's statement that underlying acts form an integral part of the
4 charges.
5 The Prosecution's assertion that underlying acts can be added via disclosure before
6 trial in auxiliary documents is based on a misinterpretation of the Lubanga conviction
7 appeal judgment. At paragraph 124 the Appeals Chamber states that "... further
8 details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on
9 the circumstances, also be contained in auxiliary documents." But underlining acts
10 are not further details. They are an integral part of the charges. It is also to be
11 queried why the Prosecution cannot plead these factual allegations at confirmation
12 and want to keep the formulation of the charges so open-ended.
13 The Prosecution is supposed to have largely completed its investigation by
14 confirmation. It should be able to plead all the factual allegations it intends to rely
15 on at that point. Therefore we are not proposing that a straitjacket be placed on
16 the Prosecution. The Appeals Chamber has acknowledged that investigations can
17 continue post-confirmation. If further evidence emerges prior to the start of trial
18 which has an impact on the scope of the charges, then, as in Kenyatta, an amendment
19 can be sought via Article 61(9). This mechanism protects the rights of all parties and
20 respects the role of the Pre-Trial Chambers during the pretrial process.
21 Pre-Trial Chamber I's observation in the Mbarushimana confirmation decision at
22 paragraph 112 is also relevant. Quote: "The suspect cannot be expected to go
23 through the voluminous evidence disclosed by the Prosecution in order to identify for
24 himself the factual basis of the charges against him." Closed quotes.
25 Turning to question 4, it is not the appellant's position that the Pre-Trial Chamber

1 must determine whether there is sufficient evidence to support to the requisite
2 standard each underlying act included in the DCC and enter a finding on each such
3 act in the confirmation decision. Now, obviously it would make life a whole lot
4 easier for all of us if it did. But there is nothing in the statute or other legal text
5 which imposes this requirement on the Pre-Trial Chambers.
6 Ideally the Pre-Trial Chambers should examine each underlying act and make
7 a determination in relation to each. This would reduce the amount of litigation on
8 this topic. It would also assist in ensuring that the charges are accessible and that
9 their content is sufficiently specific.
10 In relation to the final question, based on my submissions so far I think I can address
11 them in relatively short compass. Three questions are posed by the Chamber: First,
12 in response to the first, we say that the Prosecutor cannot notify an accused of other
13 underlying acts in auxiliary documents provided after the charges are confirmed
14 without invoking Article 61(9).
15 Now, underlying acts are specific incidents of criminal conduct, therefore, it is very
16 hard to think of a scenario where the inclusion of additional underlying acts would
17 not amount to an amendment to the charges, particularly an increase in the
18 seriousness of the charges.
19 Also as shown by the amendment to the charges made in the Kenyatta case, the
20 Article 61(9) procedure permits amendments to be made which don't amount to the
21 addition of new charges or the substitution of more serious charges.
22 Turning to the second question, an accused person cannot be notified of other
23 underlying acts through the provision of statements of victims. The addition of
24 underlying acts is in most scenarios going to amount to an amendment of the charges,
25 and victims do not have this power under Article 61(9), therefore, disclosure cannot

1 be used as a back-door amendment procedure.
2 Finally, if the Prosecutor or the victims' legal representatives notify an accused of
3 other underlying acts after the confirmation decision and Article 61(9) is not followed,
4 they will exceed the facts and circumstances described in the charges.
5 Your Honours, those are my submissions, unless I can be of any further assistance.
6 PRESIDING JUDGE VAN DEN WYNGAERT: [12:42:36] Thank you very much.
7 I am looking at the time, and I think it is best to have our lunch break at this point in
8 time and then for Mr Gallmetzer to take over after the lunch break. We will have
9 a break of one hour and a half. So that means that we will resume at quarter past 2.
10 THE COURT USHER: [12:43:04] All rise.
11 (Recess taken at 12.43 p.m.)
12 (Upon resuming in open session at 2.19 p.m.)
13 THE COURT USHER: [14:19:39] All rise.
14 Please be seated.
15 PRESIDING JUDGE VAN DEN WYNGAERT: [14:20:03] Good afternoon to
16 everyone. We will now proceed with the Prosecution's submissions on group 2 of
17 the issues -- group B of the issues that were defined by the Chamber.
18 Mr Gallmetzer.
19 MR GALLMETZER: [14:20:26] Thank you, your Honour.
20 In your first question, your Honour asked the parties to identify the relevant facts and
21 circumstances described in the charges. Based on the two examples listed under this
22 question, the Prosecution understands this query to focus on the specificity of the
23 alleged crimes.
24 Your Honours, Bemba was charged with, and convicted of, crimes of murder, rape
25 and pillaging committed by MLC soldiers on the territory of the CAR from 26 October

1 2002 to 15 March 2003.
2 Accordingly, the relevant facts and circumstances in this case are those identified
3 under example (ii) of the scheduling order, which broadly set out the material facts of
4 the charges.
5 As a matter of evidence, these convictions are based on three killings; the rape of 28
6 persons and the pillaging of 25 individual victims and six groups or institutions.
7 Example (i) of the scheduling order, namely the rape of P-22 at PK12 on or around 6
8 November 2002 is therefore not a material fact, but a subsidiary fact or evidence,
9 which was used in this case to establish the material fact.
10 Our response brief at paragraphs 78 to 88 explains this position in some detail.
11 Today I would like to highlight some findings from the confirmation decision and
12 from the trial judgment that supports our position.
13 In its confirmation decision, the Pre-Trial Chamber correctly followed the three-step
14 approach to judicial decision making. First, it assessed the credibility and reliability
15 of the evidence. In this context, the Chamber noted some evidence that referred to
16 specific acts of murder, rape and pillaging.
17 Second, based on the totality of the evidence, the Chamber entered findings with
18 respect to the material facts. It held that there are substantial grounds to believe that
19 MLC soldiers committed murder, rape and pillaging in the CAR between 26 October
20 2002 and 15 March 2003. The relevant findings can be found at paragraphs 129, 160,
21 272, 282 and 315.
22 As the third and final step, the Pre-Trial Chamber at pages 184 to 185 confirmed the
23 charges against Mr Bemba for being criminally responsible under Article 28(a) for five
24 counts, namely murder and rape both as war crimes and crimes against humanity
25 and pillaging as a war crime.

1 The Trial Chamber correctly understood the scope of the charges. It noted that the
2 confirmation decision broadly defined the temporal and geographic scope of the
3 charges. It also held that the charges of murder, rape and pillaging were not limited
4 to specific events or evidence examined in the confirmation decision. The most
5 relevant findings can be found at paragraphs 2 and 42 of the trial judgment, as well as
6 in decision 836 at paragraphs 257 to 279.
7 Accordingly, the Trial Chamber has understood that Mr Bemba was charged with the
8 crimes of murder, rape and pillaging committed by MLC soldiers in the CAR during
9 a particular time frame. And this becomes most evident at paragraphs 622, 631
10 and 639.
11 As a next step, the Chamber distinguished the scope of the charges from the question
12 whether the accused received adequate notice of the charges to prepare an effective
13 Defence at paragraph 33. It specified a number of acts of murder, rape and pillaging
14 that fell within the scope of the charges and that had been sufficiently identified either
15 in the confirmation decision or in other auxiliary documents, such as the
16 post-confirmation DCC, the evidence summary, the in-depth analysis chart, the list of
17 evidence or witness statements, at paragraphs 43 to 50.
18 The Chamber clarified that its convictions were limited to evidence regarding these
19 specific acts of murder, rape and pillaging. And I refer you to the last sentences of
20 paragraphs 622, 631 and 639.
21 Looking at these acts, the Chamber found that there was credible and reliable
22 evidence in relation to three acts of murder, 28 acts of rape and the pillaging of 25
23 individual victims and six groups or institutions, at paragraphs 624, 633 and 640.
24 Based on this evidence, the Chamber concluded beyond reasonable doubt that the
25 relevant material facts have been established, namely that MLC soldiers committed

1 crimes of murder, rape and pillaging in the CAR between 26 October 2002 and 15
2 March 2003, at paragraphs 630, 638, 648 and 694.
3 The Trial Chamber correctly applied the beyond reasonable doubt standard to these
4 material facts. The individual acts of murder, rape and pillaging were subsidiary
5 facts or evidence - and the Trial Chamber did not need to enter findings beyond
6 reasonable doubt in relation to each of them. But in this case, your Honours, the
7 Chamber went beyond the minimum required and it nevertheless held that these
8 individual acts of murder, rape and pillaging were established beyond a reasonable
9 doubt, at paragraph 629, 637 and 647.
10 So I'll now turn to question B regarding the minimum degree of detail required for a
11 statement of fact under Regulation 52(b), specifically on the time and place of the
12 alleged crimes.
13 Your Honours, following your guidance from the Lubanga appeal judgment at
14 paragraphs 118 to 137, it may be sufficient for a statement of fact under Regulation
15 52(b) to merely set out the temporal and geographic scope of the crimes, without
16 specifying any underlying acts that are used as evidence to establish the material
17 facts.
18 There are no convincing reasons for the Appeals Chamber in this case to depart from
19 the manner in which it adjudicated this same matter in the Lubanga appeal. As
20 stated in the OA6 appeal in the Gbagbo and Blé Goudé case at paragraph 14,
21 consistency in the application of the law ensures predictability of the law and the
22 fairness of adjudication.
23 Regulation 52(b) requires that a document containing the charges shall contain a
24 statement of fact, "including the time and place of the alleged crimes, which provides
25 a sufficient legal and factual basis to bring the person [...] to trial". Consistent with

1 the Lubanga appeals judgment at paragraph 124, the Prosecution's DCC, as confirmed
2 in the confirmation decision, defines the parameters of the charges.
3 As mentioned earlier, in the Bemba case the Pre-Trial Chamber confirmed charges for
4 the crimes of murder, rape and pillaging committed by MLC soldiers in the CAR
5 from 26 October 2002 to 15 March 2003. These material facts sufficiently set out the
6 temporal and geographic scope of the charges.
7 Your Honour, framing the charges in this particular way was consistent with the
8 Lubanga case, where the accused was charged as a co-perpetrator for conscripting
9 and enlisting boys and girls under the age of 15 into the UPC/FPLC and for using
10 these children to actively participate in hostilities between 1 September 2002 and
11 13 August 2003. I refer you to the Lubanga pre-confirmation DCC at paragraphs 20
12 to 40.
13 Mr Lubanga was not charged with or convicted for committing offences against
14 specific identified children, as shown in the Lubanga confirmation decision at
15 paragraphs 249 to 267 and 410. In fact, the Trial Chamber in its judgment rejected all
16 evidence presented by individual victims who were identified in the pre-confirmation
17 DCC. Instead it convicted Mr Lubanga on the basis of other evidence that
18 established a pattern of child soldier offences, which can be seen in the trial judgment
19 at paragraphs 480 and 1351 to 1356.
20 In his appeal against the conviction, Mr Lubanga argued that the charges were not
21 sufficiently detailed with respect to the dates and places of the individual offences
22 and the identities of the victims, especially since the evidence of all named victims
23 was rejected. In the judgment referred to before, the Appeals Chamber rejected
24 Lubanga's appeal. It held that under certain circumstances, framing the material
25 facts broadly as a pattern of child soldier offences, as opposed to charging individual

1 acts of child soldier offences, is permissible and consistent with Regulation 52(b). I
2 refer you in particular to the appeals judgment at paragraphs 131 to 132 and 135.
3 In the same judgment at paragraph 126, the Appeals Chamber referred with approval
4 to the Katanga and Ngudjolo case. In that case the accused sought an amendment to
5 the DCC because it did not identify the victims of the charged Bogoro attack. In
6 rejecting this request, the Single Judge held that the information provided in the DCC,
7 along with the related evidence contained in the list of evidence, was sufficient to
8 satisfy the requirements of Article 67(1) and Regulation 52(b).
9 Accordingly, the material facts in the Bemba case properly defined the temporal and
10 geographic scope of the charges as required by Regulation 52(b). There was no need
11 to plead specific individual criminal acts as material facts.
12 In any event, the precise level of detail required under Regulation 52(b) is case
13 specific. Question B inquires whether the necessary degree of detail is different
14 between a case of co-perpetration under Article 25(3)(a) and a case of command
15 responsibility under Article 28. This, your Honours, will depend on the proximity of
16 the accused to the events, according to the Appeals Chamber judgment in Lubanga at
17 paragraph 123. If a co-perpetrator is alleged to have physically committed the
18 crimes or to have been present where the crimes were committed, then more detail as
19 to the time and place of the alleged crimes will be required. If, on the other hand, a
20 co-perpetrator's conduct is geographically and temporally remote from the crimes,
21 then the statement of fact under Regulation 52(b) will be less detailed with respect to
22 the underlying crimes.
23 This scenario usually applies to command responsibility cases, like the Bemba case,
24 according to the Appeals Chamber judgment in Lubanga at paragraph 122.
25 Moreover, in some cases, the sheer scale of the alleged crimes makes it impracticable

1 for a high degree of specificity of the individual criminal acts, regardless of the
2 applicable mode of liability. The Appeals Chamber of the ICTY and the ICTR has
3 repeatedly affirmed these principles. I refer you to the authorities that are included
4 in our response brief at paragraphs 210 to 212.
5 A related but a clearly separate question, your Honour, is the detail required to fully
6 protect the accused's rights under Article 67(1)(a) and (b) to be informed of the
7 charges and to prepare a Defence. The Lubanga Appeals Chamber held that "further
8 details about the charges as confirmed by the Pre-Trial Chamber may [...] be
9 contained in auxiliary documents", at paragraph 124. In fact, all documents
10 designed to inform the accused of the charges must be considered to determine
11 whether he or she has been sufficiently informed, according to the Appeals Chamber
12 in Lubanga at paragraphs 128 and 132.
13 To protect the accused's rights under Article 67(1), the Prosecution must provide
14 details as to the date and location of the underlying criminal acts and the identity of
15 the victims "to the greatest degree of specificity possible in the circumstances". But
16 again, the precise degree of specificity is case specific. It will depend on the
17 circumstances, as the language says of the appeals judgment, and this includes,
18 among others, the proximity of the accused to the charged events, the scale of the
19 crimes or the applicable mode of liability, according to the Lubanga appeals judgment
20 at paragraph 123.
21 When ensuring that Mr Bemba's rights under Article 67(1)(a) and (b) were fully
22 protected, the Trial Chamber again went beyond the minimum required in this case.
23 As noted before, the Trial Chamber limited Bemba's conviction for the crimes of
24 murder, rape and pillaging to evidence about specific acts of murder, rape and
25 pillaging for which Mr Bemba was given detailed notice. This was not necessary.

1 The example of the Lubanga case has shown that it may be fair to hold a person
2 responsible for a pattern of crimes committed on a large scale, even as a
3 co-perpetrator, without basing the conviction on specific acts against identified
4 individuals.
5 Bemba was remote from the crimes, and he was charged under Article 28 for a large
6 pattern of crimes committed by his subordinates in a neighbouring country.
7 Accordingly, the Trial Chamber, without violating Bemba's rights under Article 67(1),
8 could have convicted Mr Bemba also on the basis of other acts of rape, murder and
9 pillaging. It found to have credible and reliable evidence of such other acts, but
10 considered them only for the purpose of its finding that there was a widespread
11 attack against the civilian population, at paragraph 563 of the trial judgment.
12 I will now turn to question C, whether acts underlying the charges must be
13 exhaustively listed in the DCC.
14 Your Honours, according to the consistent jurisprudence of this Court and the
15 Chambers Practice Manual at page 12, a pre-confirmation DCC must spell out clearly
16 and exhaustively all material facts. These are the facts that are indispensable for a
17 conviction, namely those facts that are necessary to establish the constitutive elements
18 of the crimes and modes of liability. The Chambers Practice Manual further clarifies
19 that the material facts must be distinguished from subsidiary facts, which are those
20 facts that the Prosecution relies upon in its argumentation in support of the charges.
21 As such, the pre-trial manual states they are functionally evidence.
22 Whether acts underlying the charges, such as individual acts of murder, rape and
23 pillaging, qualify as material evidence -- sorry, as material facts and must therefore be
24 laid out in the DCC will depend on the nature of the charges. For instance, in a case
25 where the accused is charged as a direct perpetrator to have destroyed a handful of

1 particular objects, the Prosecution will most likely choose to charge the individual
2 acts of destruction as material facts. The Al Mahdi case is an example of such a
3 charge.
4 However, where the accused, like Mr Bemba, is alleged to be responsible under the
5 theory of command responsibility for a large pattern of crimes committed by his
6 troops over an extended period of time while Bemba was in a different country, then
7 the Prosecution will usually not charge the individual acts of murder, rape and
8 pillaging as material facts in a DCC. In the Bemba case, the relevant material facts
9 were correctly limited to identifying the temporal and geographic parameters of the
10 alleged crimes of murder, rape and pillaging, consistent with Regulation 52(b). This
11 is also how the Prosecution presented the charge in other comparable cases that have
12 been adjudicated before this Court.
13 As mentioned before, in the Lubanga case the pre-confirmation DCC generally
14 alleged, without referring to individual victims or specific criminal acts, that Mr
15 Lubanga was responsible as a co-perpetrator for conscripting and enlisting boys and
16 girls under the age of 15 and for using them to actively participate in hostilities
17 during a particular time frame. The Appeals Chamber confirmed that a conviction
18 based on this type of charge referring to a criminal pattern, as opposed to specific
19 criminal acts or identified victims, did not violate Regulation 52 or Article 67(1).
20 Similarly, in the Katanga case, the Prosecution alleged in the pre confirmation DCC
21 that Mr Katanga was responsible as a co-perpetrator for various crimes, including
22 murder, sexual violence and others, without exhaustively listing the underlying
23 individual acts or the identity of the victims. As noted before, the Lubanga
24 Appeals Chamber endorsed the charging practice in the Katanga case.
25 Your Honours, even if a DCC broadly defines the relevant material facts, it may

1 include subsidiary facts and describe a sample of the evidence, including on the
2 individual acts, to establish the material facts. The pre-confirmation DCC in the
3 Bemba case did exactly that. These samples, however, do not have to be exhaustive
4 because the individual underlying acts are not material facts. As put in the
5 Chambers Practice Manual, they are functionally evidence.
6 This directly takes me to question D, namely whether the Pre-Trial Chamber must
7 enter findings to the requisite standard on each criminal act underlying one of the
8 crimes charged. This question is related to the previous one and the answer is the
9 same. According to the jurisprudence as well as the Chamber's practice manual, the
10 material facts are the only facts that are subject to a judicial determination to the
11 applicable standard of proof. They must be distinguished from subsidiary facts or
12 evidence.
13 What constitutes a material fact will depend on the circumstances of each case. As
14 we have seen in the Bemba case, the relevant material facts confirmed by the Pre-Trial
15 Chamber are that MLC soldiers committed crimes of murder, rape and pillaging in
16 the CAR between 26 October 2002 and 15 March 2003. These are the only facts that
17 need to be established to the requisite threshold.
18 The Chamber correctly assessed whether all the evidence taken together established
19 these material facts. Some of this evidence referred to specific acts of murder, rape
20 and pillaging. However, there was no need for the Pre-Trial Chamber to apply the
21 standard under Article 61(7) to its findings in relation to these individual acts. It was
22 sufficient for the Pre-Trial Chamber to determine that the evidence on these
23 individual acts was credible and reliable.
24 Next question, E, has several aspects. First, the Appeals Chamber inquires whether
25 the Prosecution can notify the accused person of other underlying acts in

1 post-confirmation auxiliary documents without seeking to add charges under Article
2 61(9). The answer to this question is affirmative. As long as these additional
3 underlying acts are not material facts and they fall within the scope of the charges as
4 confirmed, additional notice can and should to the extent possible in the
5 circumstances be given.
6 Notice of these additional underlying acts does not constitute an amendment of the
7 charges. In this case, the underlying individual acts of murder, rape and pillaging
8 were considered as subsidiary facts. Accordingly, the Trial Chamber could rely on
9 them as evidence to support the existence of the material facts.
10 Related to this question is the Appeals Chamber's query whether the
11 post-confirmation notice by the Prosecutor or the LRV of other underlying acts would
12 exceed the facts and circumstances described in the charges. Your Honour, again, as
13 long as these other underlying acts fall within the scope of the confirmed charges,
14 they do not exceed the facts and circumstances described in the charges. In this case,
15 the Prosecutor and the LRV were allowed to provide further notice of any acts of
16 murder, rape and pillaging committed by MLC soldiers in the CAR during the
17 defined time frame.
18 Finally, the Appeals Chamber asks whether the accused person can be notified of
19 other underlying acts through the provision of a statement of victims. Again, this
20 question is in the affirmative. As held by the Lubanga Appeals Chamber at
21 paragraph 128, all documents designed to inform an accused of the charges, including
22 auxiliary documents, must be considered to determine whether he or she was
23 sufficiently informed of the charges.
24 To give more detailed notice of the charges is exactly the reason why the Prosecution
25 in this case was required to provide the accused with an IDAC, a list of evidence and

1 an evidence summary.
2 These documents essentially are a summarised version of witness statements and
3 other evidence that the Prosecution relied on at trial. If these documents can
4 legitimately be relied upon to provide the accused with additional notice, there is no
5 reason why the underlying witness statements themselves should not serve that
6 purpose.
7 In fact, in this very case, the Appeals Chamber in the OA5 OA6 appeal at paragraph
8 63 expressly held that providing the evidence supporting the charges serves the
9 purpose of giving notice of the charges under Article 67(1)(a). In fact, in this
10 judgment at paragraph 63, the Appeals Chamber already held that Bemba was given
11 sufficient notice of the charges. So this fact has already been adjudicated.
12 Similarly, the Lubanga Appeals Chamber at paragraph 126 referred to with approval
13 to the Katanga case, where the Pre-Trial Chamber held that information provided in
14 the DCC along with the related evidence contained in the list of evidence was
15 sufficient to satisfy the requirements of Article 67(1) and Regulation 52(b).
16 Your Honours, notice to the accused can also be given through witness statements
17 provided by the LRV. As long as the facts referred to in the witness statements fall
18 within the scope of the charges, it does not matter that a witness is called to testify by
19 the Prosecution or by the Defence or by the victims. All witnesses are witnesses of
20 the Court and should be treated equally.
21 The Trial Chamber ordered the LRV to disclose the witness statements of V1 and V2
22 almost two months prior to their testimony, and they included sufficient detail on the
23 time and location of the relevant underlying criminal acts as well as the identities of
24 the victims. This shows that the witness statements were clearly designed to inform
25 Mr Bemba of the detail, further detail, of the charges.

1 In addition, even if Mr Bemba was given notice of additional underlying acts through
2 some witness statements after the commencement of the trial, this is nevertheless
3 relevant to assess whether prejudice caused by lack of detail of the charges may have
4 been cured, according to the Lubanga appeals judgment at paragraph 129.
5 As shown in paragraphs 96 to 102 of the Prosecution's response, any potential
6 prejudice from the late notice of the statements of V1 and V2 was effectively cured in
7 this case. Accordingly, the Trial Chamber correctly relied on the testimonies of
8 witnesses V1 and V2 as evidence to support its findings on the material facts that the
9 crimes of murder, rape and pillaging have been established.
10 THE COURT OFFICER: [14:49:19] Counsel has 1 minute and 48 seconds.
11 MR GALLMETZER: [14:49:23] In any event, because this was a case of command
12 responsibility where the accused was remote from the crimes and where MLC
13 soldiers committed a very high number of criminal acts, prior notice of each and
14 every individual act was not strictly required to ensure compliance with Regulation
15 52(b) and Article 67(1). The Appeals Chamber in the Lubanga case did not require
16 such detail, and it would not have been necessary in this case either.
17 Your Honour, I use my last minute, or 30 seconds, to respond to a particular point
18 raised by the Defence, if I may, and that is the reference that the Defence makes to the
19 Kenyatta case. The Defence argues that the decision number 700 is evidence that
20 specific criminal underlying acts need to be construed narrowly, necessarily, and they
21 constitute material facts that need to be established beyond a reasonable doubt.
22 Your Honour, that does not properly consider the context of that case.
23 And before going to read the relevant provisions of the decision referred to by the
24 Defence, I would like to refer you to the confirmation decision in the Katanga case
25 that sets out the scope of the charges. I appreciate that you may not have it in front

1 of you, and that is why I am going to read out one paragraph, if I may.
2 This is the confirmation decision number 382 in that case, and I'm reading from the
3 bottom of page 152, that is part of the overall conclusion that defines the material facts
4 for the crime of murder.
5 And it defines it as such: Murder constituting a crime against humanity within the
6 meaning of Article 7(1)(a) of the Statute, i.e., killings of perceived ODM supporters in
7 or around Nakuru between 24 and 27 January 2008 and in or around Naivasha
8 between 27 and 28 January 2008.
9 So in this particular case, the murder charge was narrowly defined. It defines the
10 temporal and geographic scope of the count of murder.
11 What the Prosecutor then later sought is to add a detail that was not expressly
12 referred to in this aspect of the confirmation decision. And the Chamber said,
13 because this particular count has been already defined in this way, there is no need
14 for the Prosecutor to seek an amendment of the charges. The Prosecutor was
15 allowed to refer to factual detail even if at that time it had been rejected because of
16 lack of evidence. Because it falls within the temporal and geographic scope of the
17 killing in the town of Naivasha, the Prosecutor could rely on it.
18 And I refer you in particular to paragraph 29 of decision 700 relied upon by the
19 Defence.
20 Thus, it reached the decision: It is apparent that the nature of the requested
21 amendment does not aim at adding an additional charge or substituting an existing
22 charge --
23 THE COURT OFFICER: [14:52:52] Counsel has exceeded his time allocation.
24 MR GALLMETZER: [14:52:56] May I proceed to read out this one sentence. Thank
25 you. Or substituting an existing charge with a more serious charge. Rather, it is a

1 reinsertion on the basis of the new evidence presented of an already known specific
2 factual allegation for an existing charge of murder in Naivasha, a location that has
3 already been referred to in the confirmation of charges decision. It follows that the
4 Single Judge does not need to hold a hearing for the purpose of deciding on the
5 Prosecutor's request.
6 Thank you, your Honour. This concludes my submissions.
7 PRESIDING JUDGE VAN DEN WYNGAERT: [14:53:30] Thank you, Mr Gallmetzer.
8 The Bemba team. No. We have the victims first. I'm sorry.
9 The legal representatives is now asked to make her submissions.
10 MR N'ZALA: [14:53:52] (Interpretation) Thank you for the floor, Madam President.
11 I will answer the group of questions B on behalf of LRV, starting with points A to D,
12 and Maître Douzima will answer question E.
13 The Chamber asked questions relating to the second grounds of appeal under Article
14 74 of the Statute. At point A the question is what are the facts and circumstances
15 described in the charges within the meaning of Article 74(2) of the Statute, in
16 particular, which of the following examples is a fact.
17 Roman I, the rape of P-0022 in PK12 on or around 6 or 7 November 2002, or rape
18 committed by MLC soldiers in Central African Republic between, on or about 26
19 October 2002 and 15 March 2003. First of all, I would like to recall the provisions of
20 74(2) which states that the Trial Chamber's decision shall be based on its evaluation of
21 the evidence and the entire proceedings. The decision shall not exceed the facts and
22 circumstances described in the charges and any amendments to the charges. The
23 Court may base its decision only on evidence submitted and discussed before it at
24 the trial.
25 We shall also refer to Regulation 52(b), (b) and (c) of the Regulations of the Court,

1 which states:
2 "A statement of the facts, including the time and place of the alleged crimes, which
3 provides a sufficient legal and factual basis to bring the person or persons to trial,
4 including relevant facts for the exercise of jurisdiction by the Court."
5 And 52(c) stipulates as follows:
6 "A legal characterisation of the facts to accord both with the crimes under articles 6, 7
7 or 8 and the precise form of participation under articles 25 and 28."
8 It therefore -- the consequence is that the rapes committed by the soldiers of the MLC
9 in the CAR between 26 October 2002 and 15 March 2003 constitute a contextual fact
10 while the rape of Witness P-22 at PK11 is a specific incident that justifies the existence
11 of the contextual facts in the charges. In fact the facts contained in the confirmed
12 charges happened within a determined geographical area and a period, particularly
13 between 26 October and 15 March 2003 in many localities. So the Chamber did not
14 go beyond the requirements of this provision.
15 Question B: What is the minimum level of detail required for a statement of the facts
16 to be included in the Document Containing the Charges pursuant to Regulation 52(b)
17 of the Regulations of the Court, especially regarding "the time and place of the alleged
18 crimes". Does the required detail depend on the form of individual criminal
19 responsibility charged in the case? In particular, would the required detail in a case
20 of criminal responsibility as a co-perpetrator under Article 25(3)(a) differ from the
21 required detail in the case of command responsibility under Article 28 of the Statute?
22 Under 52(b), the form and the details of informations must be given to the accused
23 and depends on the nature of the charges, including the characterisation of the
24 alleged criminal conduct, the proximity of the accused relatively to the facts for which
25 his liability is alleged. Therefore, the determining factor with which the Prosecution

1 should specify the facts of its case in its indictment is determined by the facts of the
2 conduct of the accused.
3 When it is alleged that the accused personally committed underlying crimes, the
4 Prosecution should indicate the identity of the victim, the place and approximate date
5 of the criminal acts alleged and the means by which they were committed; however,
6 when it is alleged that the accused planned, incited, aided and abetted, prepared or
7 executed the alleged crimes, the Prosecution is bound to identify the specific acts or
8 the specific pattern of conduct.
9 Regarding the level of detail with regard to the dates and place of alleged crimes, the
10 Chamber -- the Appeals Chamber specified that these two details are required only in
11 the hypothesis where the liability of the accused is engaged as a direct perpetrator of
12 underlying acts of crimes for which he is being prosecuted given his proximity to the
13 facts.
14 Regarding the responsibility of the commander under Article 28 of the Statute, such a
15 requirement is not required because of the fact that the accused person is not -- is
16 geographically far away from the place of the crime so he cannot put forward the
17 detailed evidence.
18 Now, regarding the underlying crimes, they must be listed in an exhaustive manner
19 in the Document Containing the Charges. We say that the list must not be
20 exhaustive because it will not be necessary.
21 Point (d): Must the Pre-Trial Chamber determine whether there is sufficient
22 evidence to support, to the requisite standard, each underlying act (a criminal act
23 underlying one of the crimes charged) included in the Document Containing the
24 Charges and enter a finding on each such act in the confirmation decision?
25 In answer, the standard of evidence at the pre-trial level does not impose to the

1 Prosecutor to provide all the evidence but only enough evidence to show that there
2 are reasonable grounds for the Chamber to conclude that there are reasons to believe
3 that crimes may have been committed.
4 The trial will be carried out by the Trial Chamber, and this is indicated in the
5 confirmation of charges decision.
6 Regarding question (e), I will hand over the floor to my learned colleague, Maître
7 Douzima. Thank you.
8 MS DOUZIMA LAWSON: [15:03:35] (Interpretation) Regarding point (e) I would
9 like to point out that the Appeals Chamber in the Lubanga case specified that the
10 decision of confirmation of charges defines the scope of the charges for the trial, but
11 not the charges themselves.
12 The Trial Chamber concluded correctly that Pre-Trial Chamber II formulated a
13 broad-based definition of the temporal scope of the charges. It concluded that
14 attacks directed against the population of the CAR were widespread and targeted
15 many localities such as Bangui, PK12, Bossangoa, Bossembélé and others. In our
16 opinion, your Honours, it is sufficient for other underlying acts to be integrated into
17 the charges after the confirmation of charges insofar as they had not been excluded by
18 the preliminary Chamber. In that case, such evidence should be accepted.
19 The witnesses who were interviewed by both the OTP and the LRV were
20 cross-examined by the Defence, which had the opportunity to cross-check the veracity
21 or validity of the testimony of those witnesses. According to the Appeals Chamber,
22 insofar as the trial must begin on the basis of clearly defined charges, this information
23 provided before the commencement of trial are important to determine whether the
24 accused was correctly informed of the charges against him.
25 However, the prejudice caused to the Defence may be cured before the

1 commencement of trial using information provided during the trial. The procedure
2 of confirmation of charges is limited and sometimes there are no witnesses and it is
3 necessary to determine whether there is sufficient evidence to refer the suspect to the
4 Trial Chamber. It is not a mini trial that precedes the trial. It is simply to determine
5 whether there are sufficient grounds to refer the matter to the Trial Chamber.
6 So if incriminating and exculpatory evidence had to be produced at this stage, then
7 the usefulness of the trial will be called into question, just as the provisions of Article
8 69(3) requiring the Chamber to present relevant evidence during the trial itself.
9 Thank you.
10 PRESIDING JUDGE VAN DEN WYNGAERT: [15:07:21] Thank you very much.
11 Now the Prosecutor can respond to the arguments of the victims.
12 MR GALLMETZER: [15:07:28] Your Honour, we do not intend to respond to the
13 victims.
14 PRESIDING JUDGE VAN DEN WYNGAERT: [15:07:31] Thank you, Mr Gallmetzer.
15 The floor is to the Defence.
16 MS LAWRIE: [15:07:51] I'm grateful, your Honours.
17 I just intend to respond on five discrete points raised by the Prosecution.
18 The first is that it's the Prosecution's position that it only had to plead material facts
19 and that these were that murders, rapes and pillage were committed in the CAR
20 between on or about 26 October 2002 and 15 March 2003.
21 According to the Prosecution, this provides the mandated detail and the mandated
22 position. Your Honours, clearly, it has no detail, it has no position. I've already
23 stated that this covers 141 days. It covers 623,000 square kilometres. The position
24 is untenable.
25 The position of the Prosecution seems to be infected by their misinterpretation of

1 what amounts to fact and what amounts to evidence, which brings me to my second
2 point: The Prosecution say that fact one identified in question (a) of the Chamber's
3 questions, the Prosecution say that fact, that point one is evidence. The rape of P-22
4 in PK12 on or around 6 or 7 November 2002, they say that's evidence. Your Honours,
5 that's clearly a factual allegation.
6 Now, if it requires some authority, I can look at Triffterer's commentary on Article 61
7 at page 1501, which it states, and I'm looking at the first complete paragraph, quote,
8 "The statement of the facts must be distinguished from the evidence, Article 69, which
9 the Prosecutor adduces to prove the facts against the applicable law. The evidence is
10 the means to prove the existence or nonexistence of a particular fact" end of quote.
11 Clearly fact one is a factual allegation which will require to be proven at trial. A
12 witness will require to come and say that rape, there was a rape of P-22 in a particular
13 location on a particular date. That fact just doesn't stand alone, it's not just evidence
14 in and of itself. It requires to be proved. How? By evidence. It's also a fact
15 which will require to be proven beyond reasonable doubt.
16 The Prosecution also talks about material facts and subsidiary facts. I would submit
17 that this is not a helpful distinction and indeed it's a distinction which has not been
18 accepted by the Appeals Chamber.
19 Now, it doesn't feature as part of our list of authorities, but it's the Gbagbo appeal
20 judgment number 572, and I'm sure my learned friends opposite are familiar with the
21 statement. It's at paragraph 37, where it's noted that there is a distinction made by
22 the Prosecution between material and subsidiary facts, but they do not accept this.
23 Your Honours, it's very simple. The Appeals Chamber has set out what a fact is.
24 It's the definition that was given in the Lubanga conviction appeals judgment. A
25 factual allegation is any fact which supports each of the legal elements of the crimes

1 charged.
2 Now, I am focusing on underlying acts, but it clearly can be broader than that. And
3 that brings me to my fourth point, which is the Kenyatta example. The example
4 shows the type of factual allegation, not necessarily an underlying act, which if it is to
5 be used to prove the crime must have been a fact confirmed by the Pre-Trial Chamber.
6 In the Kenyatta case the factual allegation was rejected by the Pre-Trial Chamber, and
7 this is set out at paragraph 2 of the decision. It's decision 700 in the Kenyatta case.
8 The Single Judge notes that, and I'm quoting - it's at the beginning of page 4, so it's
9 not actually at the beginning of paragraph 2, but it's in paragraph 2. The relevant
10 part says:
11 "In this decision Trial Chamber V" --
12 MR GALLMETZER: [15:12:21] I apologise.
13 MS LAWRIE: [15:12:26] -- "inter alia rejected" --
14 MR GALLMETZER: [15:12:27] I apologise. This part of the decision 700 is not on
15 the list of authorities. The Defence limited its submission to paragraphs 26, 29, 36 to
16 37 of this decision.
17 MS LAWRIE: [15:12:42] Your Honours, I accept that. But this is, I would hope, not
18 a contentious point. All I'm trying to do is identify what the reasoning of the Trial
19 Chamber was, so why it had to pass back to the Pre-Trial Chamber.
20 PRESIDING JUDGE VAN DEN WYNGAERT: [15:12:53] You can proceed, counsel.
21 MS LAWRIE: [15:12:55] I'm grateful.
22 So the factual position, it should be uncontentious, is that the Trial Chamber, Trial
23 Chamber V said it had rejected a factual allegation put forward by the Prosecutor in
24 her updated document containing the charges on the ground that the Pre-Trial
25 Chamber's conclusion, quotes, "should [...] be viewed as a rejection of that particular

1 allegation [...] and thus, the Prosecution should not include the allegation that
2 gunshots were the cause of some of the alleged killings in Naivasha." Close quotes.
3 So there has been a rejection of the factual allegation, not an underlying act, but a
4 factual allegation which, it transpires, pursuant to further investigations conducted by
5 the Prosecution that's subsequent to the confirmation they want to rely on. So they
6 say, they go to the Trial Chamber and they say, "We want to rely on this." The Trial
7 Chamber says no, that factual allegation, not an underlying act, but one that you want
8 to use to prove the means of the attack at Naivasha, you will have to go back to the
9 Pre-Trial Chamber to have that factual allegation reinserted into the charges if you
10 want to rely on it. And that's what they did.
11 This brings me to my final point, which is Lubanga. At the core of the Defence
12 challenge in Lubanga, as I understand it, is that the charge had not been pleaded with
13 sufficient specificity. The Defence argued that there was insufficient identity of the
14 victims. Now, that's not the case here. We're not talking about specificity. We're
15 talking about inclusion at all.
16 Look at the amended DCC, there is no reference to the underlying acts, 20 underlying
17 acts that we've identified in our Defence brief. They're not there. So it doesn't
18 depend on the level of specificity of these underlying acts, it's just that they're not
19 there at all. But in my submission this is what's the focus of the Lubanga defence.
20 They were looking at the specificity of the facts that were being used to prove the
21 crime of conscripting, enlisting and using child soldiers.
22 It also concerned, that is Lubanga, a type of crime quite different to the ones that we
23 are talking about here. We're talking about the conscription, enlistment and use of
24 child soldiers. Now, that is an ongoing crime in many respects. And also, it can
25 often take place over a huge geographic area over a long period of time. Now,

1 contrast that with the crimes that we're talking about. We're talking about murder,
2 rape and pillage. Those are very specific, discrete events, not similar at all.
3 Now, I understand I've been relying a lot on Lubanga, the conviction appeals
4 judgment, because I say that there is certain very simple and very persuasive
5 principles and binding principles that are there which allow us then to understand
6 the situation that's before us now, that you can take those principles and apply them
7 to the Bemba case. But the facts are different, and that's the distinction I would seek
8 to make.
9 Now, my final point is, basically, what's the problem here? What is the problem?
10 Why can't the Prosecution specify with precision, with detail the factual allegations
11 that they intend to use to prove the crimes of murder, pillage and rape? By the time
12 of confirmation they are supposed to be trial ready. They are making these
13 broad -- murder was committed in the CAR over this period of time until this period
14 of time, because they've collected evidence which shows that. They have witnesses.
15 They have incidents. So plead them.
16 And that would be my final point.
17 THE COURT OFFICER: [15:17:00] It's two minutes.
18 PRESIDING JUDGE VAN DEN WYNGAERT: [15:17:03] Thank you, counsel.
19 We will have another break of half an hour and then we will come back with
20 questions from the Bench.
21 THE COURT USHER: [15:17:13] All rise.
22 (Recess taken at 3.17 p.m.)
23 (Upon resuming in open session at 3.50 p.m.)
24 THE COURT USHER: [15:50:13] All rise.
25 Please be seated.

1 PRESIDING JUDGE VAN DEN WYNGAERT: [15:50:34] This issue obviously raises
2 lots of fascinating questions. And at this stage of the life of the Court we are still
3 discussing our basic vocabulary. So, well, let's try to clarify some of the points that
4 were made here, and I think all of us will have questions.
5 So let me start with a question to Mr Gallmetzer. Your distinction between material
6 facts and subsidiary facts, when you define your material facts as being the temporal
7 and the geographical scope of the charges, how does that differ from the notion of
8 situation? And how does an accused have to, at the time of confirmation, to know
9 how to defend himself if the Prosecution is allowed as the trial goes on to bring
10 underlying acts as many as he or she wishes to bring, provided that there has been
11 notification? How does the Defence at the time of confirmation know what the
12 factual scope of the charges is and the potential factual scope of the conviction that
13 goes with that?
14 MR GALLMETZER: [15:52:10] Thank you, your Honour. There obviously is -- now
15 turning to the first aspect of your question, what is the difference between a situation
16 and what is the difference between a charge. Obviously, that will depend on how
17 the Prosecutor presents the charge in the pre-confirmation DCC. The charge, the
18 temporal and geographic scope of a charge, clearly has to fall within the scope of a
19 situation. It can be narrower. Most of the situations, it will be much narrower than
20 the situation as a whole. It will also be often limited in terms of what kind of crimes
21 are alleged.
22 Now, a separate question is how does the accused know how to defend himself?
23 And we, I think, to some extent, we agree with the Defence. The accused needs
24 adequate notice to the extent possible in the circumstances, and this is the language
25 used by the Appeals Chamber in the Lubanga case, to know of --

1 PRESIDING JUDGE VAN DEN WYNGAERT: [15:53:14] Can that go along as the
2 trial proceeds? So is it sufficient for the Prosecutor to take new underlying acts as he
3 goes on and provided that there is notice, he does not exceed the scope of the charges?
4 MR GALLMETZER: [15:53:27] The Appeals Chamber says that additional notice of
5 the details of the charges can be given in auxiliary document. It also says that in
6 principle this should be done prior to the start of the trial.
7 Now, in this particular case, the overwhelming majority of underlying acts that were
8 used as a basis for a conviction, notice was given prior to the commencement of the
9 start of the trial in various documents, the confirmation decision, but also others, like
10 the post-confirmation DCC, the IDAC, or other auxiliary documents that were
11 designed to inform the accused of additional details.
12 With the exception -- there is an exception. Some limited underlying acts, and I'm
13 speaking, in particular, the acts referred to by victims V1 and V2 were given notice
14 after the commencement of the trial.
15 Now, if we follow the language of the Appeals Chamber in the Lubanga case, at this
16 juncture, a Trial Chamber needs to make an assessment whether the prejudice caused
17 by a lack of detailed notice at the beginning of the trial was cured by the manner in
18 which notice was given, by the manner in which the Defence was allowed to defend
19 itself. And we have argued in detail in our response that in this particular instance,
20 prejudice that obviously went against the principle of timely notice was cured. So
21 no, the Defence has not incurred any prejudice.
22 But turning back to your question, the Defence's right to defend itself and to be fully
23 informed of the content of the charges is respected in this case by the Defence, or was
24 respected by the Defence, receiving notice of all the underlying acts that informed the
25 basis of the conviction.

1 The Trial Chamber at the beginning of the judgment stated the broad scope of the
2 charge, but then analysed which are the acts that fall within the scope of these charges
3 of which sufficient notice was given in order to protect the rights of the Defence.
4 And this was permissible because it is fully consistent with the law as set out in the
5 Lubanga appeals judgment.
6 PRESIDING JUDGE VAN DEN WYNGAERT: [15:56:08] But I suppose that that is
7 based on your premise that the underlying act is a subsidiary fact that can be brought
8 along when the trial goes on.
9 MR GALLMETZER: [15:56:23] Your Honours, it wasn't the Prosecution's assessment
10 only. It was how the Pre-Trial Chamber in its confirmation decision defined the
11 charges. As we have argued before, it was the Pre-Trial Chamber that determined
12 that the scope of the charges in this particular case is to be defined broadly. And
13 then later the Trial Chamber affirmed that yes, that is how the charges were framed.
14 And that's why the scope of the charges included underlying acts that fell within the
15 geographic and temporal scope, but they could only be used, according to the Trial
16 Chamber, to the extent that sufficient notice had been given.
17 JUDGE EBOE-OSUJI: [15:57:08] You are now before the Appeals Chamber. Are
18 you saying that's correct? I think that's what Judge van den Wyngaert is asking you.
19 MR GALLMETZER: [15:57:17] We say it is correct, and we say it is fully consistent
20 with the approach of the Appeals Chamber in the Lubanga case. In the
21 Lubanga -- sorry, your Honour.
22 PRESIDING JUDGE VAN DEN WYNGAERT: [15:57:28] What does that mean for
23 the scope of the conviction then? Is the conviction only for those identified
24 underlying acts or is it still broader, meaning the whole temporal and geographical
25 scope of, well, your -- (Overlapping speakers)

1 MR GALLMETZER: [15:57:49] No, your Honour, the conviction -- the conviction is
2 more limited. The Trial Chamber in the paragraphs that I read out before expressly
3 said that convictions is strictly limited to the underlying acts of which sufficient notice
4 had been given. We say that strictly it was not necessary. But the Trial Chamber
5 decided it, to limit it in this particular case in order to guarantee the rights of the
6 accused.
7 PRESIDING JUDGE VAN DEN WYNGAERT: [15:58:13] But if you say that strictly
8 speaking it is not limited to that, what does that mean in terms of, for example, ne bis
9 in idem, if other underlying acts would appear in the next few years that were not
10 part of the explicitly mentioned underlying acts in the conviction decision, which
11 according to your view the conviction extends to this broader scope?
12 MR GALLMETZER: [15:58:43] No. In this particular case, your Honour, the
13 conviction does not extend to other acts that may fall within the temporal and
14 geographic scope of the charges. It doesn't. And the trial judgment is very clear
15 about that.
16 PRESIDING JUDGE VAN DEN WYNGAERT: [15:58:59] Thank you. I won't keep
17 the floor, because I know my colleagues also have urgent questions.
18 Judge Eboe-Osuji.
19 JUDGE EBOE-OSUJI: [15:59:10] Thank you. I have questions for both counsel. I'll
20 begin with Ms Lawrie.
21 Ms Lawrie, now my questions will come after a series of propositions. And if you
22 think I have answered my own question in asking those, you get then the opportunity
23 to tell what's wrong in any of those positions, so I know you're not afraid to say that.
24 Now, here you suggest that though post-confirmation investigation may take place,
25 and if new facts are discovered, *these maybe the possibility to amend by virtue of

1 going to the Pre-Trial Chamber pursuant to Article 61(9), was that your submission?
2 All right.
3 The question is this: By the time the case goes to court, to the Trial Chamber, the
4 Pre-Trial Chamber would have confirmed the charges; and if the idea of confirmation
5 is to ensure that people are not sent to trial on flimsy cases, what would be the point
6 of then sending a case back to the Pre-Trial Chamber after the indictment had already
7 been confirmed and the case is before the Trial Chamber? What value is added to
8 the process of justice by sending the case back to the Pre-Trial Chamber to confirm a
9 case that is already before the Trial Chamber?
10 Is it possible that given that the evidence you need for confirmation before the
11 Pre-Trial Chamber is necessarily weaker, possibly? By the time the case comes to the
12 Trial Chamber the evidence might have been stronger. And by the time the
13 Prosecution may be applying for amendment before a Trial Chamber, they would
14 have stronger evidence. Do we then need to go back to the Pre-Trial Chamber in
15 order to amend an indictment in those circumstances?
16 MS LAWRIE: [16:02:17] Your Honour, no one is denying that the Court has a
17 truth-finding function, and we're not trying to shut down that truth-finding function.
18 What we're trying to do is say that that truth-finding function is done in a fair manner
19 in accordance with the Statute and the jurisprudence.
20 Now, the Appeals Chamber has said that the Prosecution can continue on
21 investigations post-confirmation, and there might be valid reasons why they have to
22 do that. I can give the example of the Kenya case where, and it was the example I
23 was trying to give with the Kenyatta case, which is that a particular allegation at the
24 pre-trial level was found to not have sufficient evidence and it wasn't confirmed.
25 The Trial Chamber determined that that couldn't be added in because of that, but it

1 would appear that during the period from post-confirmation until the start of trial,
2 the Prosecution were undertaking further investigations, and they discovered new
3 evidence which supported the factual allegation which had been rejected.
4 Now, what happened was is that they wanted to rely on that. They said that that
5 was necessary for their case, so they took the decision to go back to the Pre-Trial
6 Chamber. And why they did that, my understanding is, obviously I'm speaking for
7 the Prosecution and it might be out of turn, but from the papers it appears that they
8 discovered new evidence and that they had a reason, a valid reason why they say
9 they couldn't have obtained that evidence beforehand.
10 And that was the value of going back to provide a full case, because evidence for
11 various - what was determined by the Single Judge to be valid reasons couldn't have
12 been brought forward at confirmation.
13 Now, of course, there might be various reasons why the Single Judge determines for
14 reasons that you have just put forward, which is that, well, there is a case before the
15 Court, it might not be as strong as it could be, but it can go forward. Let's not delay
16 any further. That's one of the reasons why we say, or why the Single Judge might
17 say there is evidence before me which now supports the factual allegation, but I'm not
18 going to give permission for that factual allegation to be added back in, because of
19 various reasons, one of which is that I think the case can proceed as is. It will reduce
20 delay, reduce impact on perhaps further Defence investigations which might be costly,
21 dangerous, there might be security reasons why they can't be undertaken, for a
22 myriad of those types of reasons.
23 But at the end of the day there should be a process, and that's what we're saying, that
24 it's got to be fair. We're not trying to shut down the Prosecution.
25 JUDGE EBOE-OSUJI: [16:05:00] Yes, I hear you. You're saying there needs to be a

1 process and the process needs to be fair. Now, is there not a process before the Trial
2 Chamber, or is the process before the Trial Chamber necessarily less fair for purposes
3 of amending an indictment?
4 MS LAWRIE: [16:05:36] My understanding is that the Trial Chamber has no power
5 to amend the indictment. The charges are as confirmed by the - apologies, I'll
6 backtrack on that. Factually they have no power to amend the indictment or the
7 document containing the charges. They do have a power under Regulation 55 to
8 change the legal characterisation.
9 JUDGE EBOE-OSUJI: [16:06:00] Do you base yourself on any specific provision?
10 MS LAWRIE: [16:06:03] Pardon?
11 JUDGE EBOE-OSUJI: [16:06:06] Maybe I'll leave it at that. It's okay. Thank you
12 very much.
13 And my question for Mr Gallmetzer, please also feel free to respond to Ms Lawrie's
14 submissions on the earlier point, but my question to you would be this: You say,
15 you said repeatedly, that the level of detail required to be pleaded depends on the
16 proximity of the accused person to the facts so that where you have an accused
17 person who was closer to the facts, specific pleading is needed more so than when
18 you have an accused person who is remotely located to the facts, such as a
19 commander.
20 If we look at Article 67(1), which says -- do you have it?
21 "In the determination of any charge, the accused shall be entitled to" -- we can skip to
22 (a) -- "to be informed promptly and in detail of the nature, cause and content of the
23 charge" against him.
24 What is then the rationale or the authority for the proposition that an accused person
25 who is more remotely located to the fact deserves to be given a lesser notice of the

1 facts or details of the fact than the one who was closer to it?
2 MR GALLMETZER: [16:08:27] Thank you for your question.
3 Let me just specify, it is not our position that generally a lesser notice of the facts in
4 the sense of 67(a) is permissible if the accused is remote from the facts. The question
5 is what are the most relevant facts? What are the facts in a case where an accused is
6 alleged to be a hands-on perpetrator? And what, on the contrary, are the facts of
7 which the accused has to have notice in order to have all his rights under Article 67(1)
8 protected when he's alleged to be remote, when he's a commander perhaps in an
9 Article 28 case? In that case, the facts and circumstances that the accused needs to
10 know is what is the factual basis for him to have effective control over the troops?
11 What are the facts or circumstances relevant to Article 28?
12 Obviously, one of the elements is that his subordinates committed crimes. But the
13 details of these crimes, the identity of individual victims, the location of soldier X
14 raping victim Y at a particular place in a particular date is less relevant for the
15 accused to defend himself, and this is --
16 JUDGE EBOE-OSUJI: [16:10:11] Why is that? Isn't the idea of pleadings was to give
17 an accused full, the opportunity to make a full answer and defence of the charges
18 against him? If an accused person is a commander of subordinates in the field, is he
19 not entitled to say, "No, Prosecutor, you said lieutenant Z was at location 1 when the
20 thing, the crime was committed; sorry, you're wrong because I have conducted my
21 investigation, that's not the case." Is he not entitled to that?
22 MR GALLMETZER: [16:10:59] Your Honour, the question is what is the degree of
23 detail that is required in order to guarantee fairness? And it is the consistent
24 jurisprudence of the ad hoc tribunals that have adjudicated similar types of cases as
25 adopted by the Appeals Chamber in the Lubanga cases.

1 Also, for example, if I may refer to the Kupreškic appeals judgment that we find in
2 the list of authorities of the Defence, all these authorities, they support the proposition
3 that it is not unfair in these cases to focus on the conduct, and act and omission of the
4 accused while providing less detail in relation to the underlying acts of the crimes. It
5 is not the proposition - our position is not that less detail in general is permissible. It
6 is just that the focus shifts in these type of cases from the underlying act of which the
7 accused is remote to the accused, to his or her conduct, to his or her position in that --
8 PRESIDING JUDGE VAN DEN WYNGAERT: [16:12:10] Why is it so in this case?
9 MR GALLMETZER: [16:12:13] Your Honour, can you please repeat.
10 PRESIDING JUDGE VAN DEN WYNGAERT: [16:12:15] Why is it so in this case?
11 Because you make a general proposition. But in concrete terms to the case that we
12 are talking of now.
13 MR GALLMETZER: [16:12:23] Okay. In this case it is exactly because it falls within
14 the parameters of cases that have been adjudicated previously to allow for this
15 principle. It is a command responsibility case. Mr Bemba was physically remote.
16 He was in a neighbouring country. And it is a case where the accused was alleged to
17 be responsible for a large amount of underlying acts that were grouped together in
18 the charges of rape, murder and pillaging. And this is consistent, your Honour.
19 This is consistent with how these cases were adjudicated in this Court but also by the
20 sister courts of the ad hoc tribunals.
21 JUDGE EBOE-OSUJI: [16:13:21] Thank you.
22 PRESIDING JUDGE VAN DEN WYNGAERT: [16:13:25] Judge Hofmanski, Judge
23 Morrison?
24 JUDGE HOFMANSKI: [16:13:30] Thank you, Madam President.
25 I think Mr Gallmetzer partly answered the question I wanted to ask, but maybe a

1 short follow-up question. You said in your presentation that the conviction has been
2 limited to the facts on which Mr Bemba received appropriate notice. And what
3 about the operative part of the judgment according to which Mr Bemba has been
4 convicted for crimes committed on the territory of the Central African Republic
5 between October 2002 and March 2003, what is the relation to this?
6 MR GALLMETZER: [16:14:19] In its operative part, of course, the Trial Chamber
7 correctly makes a finding beyond a reasonable doubt in relation to the charge itself.
8 The charge has been defined broadly. But the trial judgment leaves absolutely no
9 doubt that the factual basis and the evidentiary basis for its conviction is limited to
10 three acts of murder, 28 acts of rape and 20 -- the pillaging of 25 individual victims in
11 six groups of institutions.
12 Now the operative part that correctly replicates the finding in relation to the charge
13 needs to be read together with the factual analysis that sets out the evidentiary and
14 factual basis for the conviction.
15 PRESIDING JUDGE VAN DEN WYNGAERT: [16:15:14] If you allow me, I may
16 have another follow-up question. I'm thinking a bit ahead about the implications of
17 what we now define as underlying acts for which the conviction has been pronounced
18 or the broader scope of the charges as they were before the Chamber as you were
19 indicating. What are the implications for reparations? Will the reparations be
20 attached to those specific underlying acts for which a conviction has been pronounced?
21 Or is it the broader scope? It's something that really depends on how one interprets
22 these terms that we are discussing about now. And it's very difficult because we
23 have totally different judicial universe or terminological universe on both sides of this
24 Court. So maybe both parties could respond to this. Do you want to go first, Mr
25 Gallmetzer?

1 MR GALLMETZER: [16:16:20] Yes, of course. Now obviously the Prosecution is
2 not a party in reparation proceedings, so we have limited involvement. But to the
3 extent that the reparation is aimed at addressing the crimes of which the accused was
4 convicted, then, yes, it is limited to those particular acts.
5 We understand, however, that it is the practice to address reparation in a broader, in a
6 context, in any event. So it will be for a Trial Chamber in those reparation
7 proceedings to determine exactly the relation between the crimes of which the
8 accused was convicted and any entitlements to reparation.
9 PRESIDING JUDGE VAN DEN WYNGAERT: [16:17:24] (Microphone not activated)
10 THE INTERPRETER: [16:17:28] Microphone, please. Microphone, Presiding Judge.
11 PRESIDING JUDGE VAN DEN WYNGAERT: [16:17:38] So first, Mrs Lawrie.
12 MS LAWRIE: [16:17:41] In relation to reparations, I would just say that they're
13 intrinsically linked to the crimes that Mr Bemba is convicted of, and we would say
14 that those should be narrowly construed in terms of the underlying acts.
15 (Appeals Chamber confers)
16 MS DOUZIMA LAWSON: [16:18:43] (Interpretation) I am not in a position to
17 answer this question now. Thank you.
18 PRESIDING JUDGE VAN DEN WYNGAERT: [16:18:49] So I will give the floor to
19 Judge Monageng now who wants to ask a question.
20 JUDGE MONAGENG: Yes, thank you, Presiding Judge.
21 I would like to take you back a little bit, all of you. I would want to know, in this
22 case, notice was given to Mr Bemba after confirmation and prior to the
23 commencement of the trial. And I want to know why that scenario, why that notice,
24 would prove to be prejudicial to Mr Bemba. The Defence says it was prejudicial.
25 The Prosecution says no, it wasn't. And I guess the legal representatives are also

1 saying it wasn't. I just want clarity on that. I am aware that the Defence is saying
2 these should have gone back to PTC. And I think we have passed that stage. But
3 I'm now concentrating on why the issue of notice is said or it can be said to have been
4 prejudicial to Mr Bemba. Thank you.
5 MS LAWRIE: [16:20:27] Basically, two-thirds of Mr Bemba's conviction relies on
6 underlying acts which were not subject to any confirmation process. That is the
7 prejudice.
8 Notice is a remedy, in quotation marks, which is being grafted from the ad hocs into
9 this system. Now, accepting a system whereby underlying acts or any fact -- and I'm
10 using the definition of the Lubanga Appeals Chamber -- can be added provided
11 sufficient notice is given completely undermines the whole architecture of the ICC.
12 Why go through confirmation if you can expand the parameters of the trial simply as
13 you go along? That is fundamental. That would be my submission.
14 PRESIDING JUDGE VAN DEN WYNGAERT: [16:21:30] Thank you, Ms Lawrie. I
15 think Judge Morrison wants to ask a question.
16 Mr Gallmetzer.
17 MR GALLMETZER: [16:21:36] Your Honour, can I also answer. Thank you very
18 much. I would also like to answer to Judge Monageng's question, if I may.
19 (Appeals Chamber confers)
20 MR GALLMETZER: [16:22:11] Thank you. It is our position that in this case no
21 prejudice has occurred to the rights of the Defence under Article 67(1)(a) and (b).
22 What the Defence's position implicates is that notice is entirely limited to subsidiary
23 facts included in the confirmation decision. And we know from the Lubanga
24 appeals judgment that this is not the case.
25 But let me be more specific. In the OA5 0A6 appeal in this very case this issue has

1 already been discussed and decided. Please allow me to read out a couple of
2 sentences that go to the heart of the Judge's question.
3 At paragraph 63 of this judgment that has filing number 1386, the Appeals Chamber
4 finds as follows: "The accused person enjoys the right to be informed of the nature,
5 cause and content of the charges against him. This information has already been
6 provided to Mr Bemba. Bemba was at the pre-trial stage served with the document
7 containing the charges, the evidence supporting those charges and the confirmation
8 decision.
9 The evidence upon which the Prosecutor intends to rely at trial has also been
10 disclosed to him. In addition, the Trial Chamber ordered the Prosecutor to submit
11 an updated, in-depth analysis chart setting out in detail how the documentary
12 evidence and the witness statements related to the Prosecutor's factual allegation.
13 Thus, the Appeal Chamber concludes, Mr Bemba has been made fully aware of the
14 factual and legal allegations against him."
15 So the Appeals Chamber itself already viewed that all the right to notice has been
16 fully served on the accused and his rights were fully protected, no prejudice therefore
17 occurred.
18 PRESIDING JUDGE VAN DEN WYNGAERT: [16:24:21] Thank you.
19 Judge Morrison.
20 JUDGE MORRISON: [16:24:23] Ms Lawrie, referring to Regulation 55, which in my
21 view the wording of Regulation 55 could usefully be perhaps a little less convoluted.
22 But if we just read what it says, 55(1) is, "decision under Article 74, the Chamber may
23 change the legal characterisation of facts to accord with the crimes under Article 6, 7
24 or 8 or to accord with the form of participation of the accused under Articles 25 and
25 28 without exceeding the facts and circumstances described in the charges and in the

1 amendments to the charges."
2 Would you be advocating the proposition that the phrase "without exceeding the facts
3 and circumstances" means in principle that after such modification, the defendant
4 should not meet a more serious case in consequence of conviction than the one that he
5 or she originally faced?
6 MS LAWRIE: [16:25:30] In simple terms, I think the answer would be yes.
7 JUDGE MORRISON: [16:25:35] I assumed it was going to be, but I was just
8 wondering if you were going to expand on "yes", but you needn't.
9 MS LAWRIE: [16:25:41] I'm glad I didn't surprise you, and I don't intend to. Thank
10 you.
11 JUDGE MORRISON: In other words, that proposition in principle should be as it
12 were read into the language of the article even -- of the Regulation even though it's
13 not there specifically.
14 MS LAWRIE: [16:25:52] Yes, it should.
15 JUDGE MORRISON: [16:25:55] Thank you.
16 PRESIDING JUDGE VAN DEN WYNGAERT: [16:25:59] Any more questions?
17 JUDGE EBOE-OSUJI: [16:26:04] This question again back to Ms Lawrie. You seem
18 to be the favourite of the Judges to ask questions.
19 Now, the question here is this -- any of counsel on the Defence side can answer it.
20 It's a matter of perhaps policy. Is it necessarily in the interest of an accused person to
21 make amendments of indictment difficult when -- I mean, post-confirmation? And
22 the reason I ask is this. There may be the possibility that the Prosecution can come
23 back with trial on facts subsequently discovered which could have been added to an
24 ongoing trial but weren't. So at the end of a trial, a second trial, or even more, are
25 commenced against the same accused person, is it to the advantage of an accused,

1 given that sort of scenario, to see a difficult regime for amendment of the indictment
2 post-confirmation, or is it more advantageous for the accused to say, "Bring it on as
3 early as possible. We can take out these charges and get on with it"?
4 MS LAWRIE: [16:27:58] Your Honour, it will be fact dependent. I mean, that's the
5 reality. It's very difficult to answer that question in the abstract. I apologise.
6 But I would like to pick up on a couple of points that the Prosecution raised from a
7 question that was triggered by your Honour, if I may. If I understand the
8 Prosecution correctly, they're saying that a commander, no matter how
9 remote -- sorry, let me back up.
10 Basically, a commander has command responsibility. Now, no matter how remote
11 you are from the crimes, in order to be found guilty of murder, at the end of the day
12 there has to have been an act of murder, no matter how remote you are.
13 Now, it seems to be the position, the Prosecution's position, that they don't have to
14 provide notice of any of those underlying acts of murder. Now, underlying acts are
15 the bedrock of the case. If there is none, there is no case. So you have to have been
16 given some notice.
17 Now, what Kupreškic talks about, and other ad hoc jurisprudence which was
18 accepted by Lubanga, is about the specificity with which these underlying acts have
19 to be pleaded. And I'm repeating myself, but they have to be included in order for
20 the specificity then to be either provided or not provided. But we cannot have a
21 situation where there is no underlying act pled, and that is a properly pleaded charge.
22 It just doesn't stand to reason.
23 Now, in command responsibility, it's especially important that you do plead precise
24 facts, because it's necessary to understand which battalion is where, under whose
25 command, because this then dictates the responsibilities, the duties, of the

1 commander.

2 Now, as I understand the Prosecution's position, they're effectively suggesting that

3 the only people in the CAR in terms of troops were the MLC troops. Now, that's not

4 the case. And there has been issues about identity of troops, identities of the

5 perpetrators. So there has to be precision with pleading because the MLC were not

6 the only party in town. There was a series of other battalions, a series of other

7 different armed forces. So precision is key in a command responsibility case.

8 JUDGE EBOE-OSUJI: [16:30:29] But would you -- could you accept a scenario where,

9 for purposes of scope, the overarching facts or fact is pleaded, but in a separate -- or

10 through a separate mechanism, be it a separate bill of particulars or even statements

11 or IDAC, as the case may be, those specific details are supplied? So you would have

12 had both the bare fact pleading that pleads scope, but another document that gives

13 details of all the specificities of the acts pleaded in another document, as long as

14 they're given ahead of time to enable the Defence to investigate and make their

15 answer in defence.

16 MS LAWRIE: [16:31:34] Firstly, we don't accept that underlying acts are details.

17 They're integral to the charges. For a charge to be properly constituted, it has to

18 contain a sufficient level of detail, not just the scope.

19 In the answer that I gave in my first submissions to question one, where we looked at

20 the two different facts, my position is that you need both, because that provides the

21 precision and detail necessary in the charging. So therefore an underlying act is not

22 a mere detail.

23 And I don't -- it's our position that the Lubanga appeals judgment doesn't say that an

24 underlying act is a detail. It says additional details about the charges. The charges

25 are the legal characterisation plus the facts. Those facts include the underlying acts.

1 So that's what I would say on that point.
2 So therefore you cannot have, you cannot have auxiliary documents providing notice
3 of underlying acts. That's not how you properly plead a charge. So I wouldn't
4 accept that you have the scope in the proper charging document, the one that's gone
5 through the confirmation process and therefore you add in all the detail later in
6 IDACs, whatever auxiliary documents there are.
7 Looking at this scope point about geographic scope and temporal scope, you can
8 actually trace that back to Regulation 52(1)(b), because it does request -- and I think
9 I've lost it now. But effectively, looking at Regulation 52(1)(b), it does require the
10 Prosecution to plead facts relevant to jurisdiction. So you could view the temporal
11 scope, this broad area of the CAR -- sorry, the temporal scope being time frame
12 October to March, and the geographic scope the whole of the CAR. Those facts are
13 being put forward on one level to substantiate a jurisdictional aspect. But that still
14 requires additional detail for a properly pleaded statement of facts to provide the
15 underlying acts as well.
16 PRESIDING JUDGE VAN DEN WYNGAERT: [16:34:03] Are there any more
17 questions by the Judges?
18 I'm sorry, the Legal Representative.
19 MS DOUZIMA LAWSON: [16:34:14] (Interpretation) I would like to take the floor
20 because I did not have the opportunity to answer the question put by
21 Judge Sanji - and I hope I pronounced her name correctly - concerning the prejudice
22 that the Defence allegedly suffered in relation to underlying acts. At the risk of
23 repeating myself, I would once again insist on the text, the documents which the
24 Trial Chamber simply implemented. I had not quoted Article 61(7) of the Statute.
25 Now, that Statute states that the Pre-Trial Chamber determines whether there is

1 sufficient evidence to indicate that there are grounds indicating that the suspect
2 perpetrated those alleged crimes. In that case, that person is referred to the
3 Trial Chamber for trial.
4 So the confirmation decision, when you look at the confirmation decision, you see
5 that the preliminary Chamber refused to confirm certain charges, for example the
6 charge related to torture or abuse of dignity, and you would see that at no time in the
7 decision of the Trial Chamber did that Chamber convict Bemba of charges that had
8 not been confirmed by the Pre-Trial Chamber.
9 I was also going to add that the Appeals Chamber added that in accordance with its
10 jurisdiction, underlying acts are part and parcel of charges, but they are not limited to
11 the underlying acts confirmed by the Pre-Trial Chamber. And they concluded that if
12 the Pre-Trial Chamber defines the scope, there can also be additional details on the
13 charges.
14 And where do you find the additional information? In the course of the trial itself.
15 So the witnesses will provide the details. And the Defence had the opportunity to
16 cross-examine or examine all the witnesses. And I will say that fairness, the
17 principle of fairness, was respected and even in favour of the Defence. There is also
18 Article 69 of the Statute, which states that the parties may provide information that is
19 relevant under Article 64. So there is the right to provide all evidence deemed
20 necessary for the ascertainment of the truth.
21 Now, regarding the participation of victims, the decision relating to the modalities of
22 the participation of victims intervenes only after the confirmation of charges, because
23 during the confirmation of charges, the proceedings involve the Defence and the
24 Prosecution. The LRV become involved only during the trial process.
25 PRESIDING JUDGE VAN DEN WYNGAERT: [16:39:03] Merci beaucoup, Maître.

1 This brings us to the end of our discussion of Group B of the questions. I'm looking
2 at the time. And so we could either break here or I could start reading into the
3 transcript the questions for tomorrow.
4 I think, in order to make a maximum use of the time that we have in the courtroom,
5 that I shall proceed with the reading of the questions and then tomorrow morning we
6 shall start immediately with the submissions of the parties.
7 Is that to everybody's agreement?
8 Yes, and tomorrow morning our proposal is also to start a little earlier, at 9.30,
9 because in the ideal scenario, we would finish tomorrow morning the third group of
10 questions in relation to command responsibility; in the afternoon we would finish the
11 fourth group of questions also in relation to command responsibility. We will see
12 where we get. Maybe we can already start the last group of questions in relation to
13 crimes against humanity or the contextual elements. We will see how we go.
14 So now let me start by, for the sake of the transparency of the proceedings, read out
15 the questions that we have submitted to the parties for their observations. So here
16 we are dealing with questions -- issues relating to the third ground of Mr Bemba's
17 appeal against the conviction decision.
18 And here we are -- we have two groups of questions. The first group of questions is
19 the one that I'm addressing now. The second group of questions will be addressed
20 tomorrow, both in relation to the third ground of appeal.
21 The first sub-question here is the following. It's about the distinction between actual
22 knowledge and constructive knowledge in Article 28(a)(i). Question: Would a
23 change from the "new standard" to the "should have known" standard in Article
24 28(a)(i) of the Statute amount to a modification of the legal characterisation of the
25 facts which would need to comply with the requirements of Regulation 55 of the

1 Regulations of the Court, including, as a requirement, that it not exceed the facts and
2 circumstances of the charges?
3 So that's the first very question.
4 Second question also in relation to the interplay with Regulation 55 of the Regulations
5 of the Court: Does the Appeals Chamber have the power to change the legal
6 characterisation of the facts itself? So does the Appeals Chamber have that power?
7 First sub-question: If it does not have such power, why is this the case?
8 Second sub-question: If it does have the power to re-characterise, on what legal
9 basis may it do so?
10 Third sub-question: To what extent is it relevant that the Trial Chamber gave notice
11 under Regulation 55(2) in the course of the trial?
12 The next question is about the interpretation of the standard of knew, the word
13 "knew," actual knowledge: How must the "knew" standard be interpreted? To
14 what extent is the definition of "knowledge" in Article 30, paragraph 3 of the Statute
15 relevant to Article 28(a)(i) of the Statute?
16 The next question is about the "should have known" standard. Question: How
17 must the "should have known" standard be interpreted? Does the "should have
18 known" standard differ materially from the "had reason to know" standard in Article
19 7(3) of the ICC Statute and its jurisprudence?
20 How does this standard relate to the "consciously disregarded" standard in Article 28
21 (b)(i) of the Statute.
22 So these are the questions that we will ask submissions on tomorrow morning at 9.30.
23 So this is the end of today's hearing. I thank the parties and participants, the court
24 reporters, the interpreters. I wish you a nice evening and see you tomorrow.
25 THE COURT USHER: [16:44:26] All rise.

1 (The hearing ends in open session at 4.44 p.m.)