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THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

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

Public Redacted with Public Annexes A, B, E, F and Confidential Annexes C, D, G, H, I, J, K, L, M

Defence Document in Support of the Appeal

Source: **Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo**

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

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INTRODUCTION

1. The Article 70 contempt provisions safeguard the right to a fair and impartial trial before the International Criminal Court. Conduct that intentionally subverts the administration of justice should be deprecated, punished appropriately, and remedied, irrespective as to whether it is committed by the Defence, Prosecution, or third parties. Nothing in this brief should be construed to suggest otherwise.

2. It is, equally, a hallmark of fair and impartial proceedings that conduct should only be sanctioned if the boundaries between licit and illicit conduct are drawn clearly, foreseeably, and fairly. Article 70 aims to protect the Court's integrity, and it must be construed and interpreted in this light. Since "a fair trial is the only means to do justice",[1] the Court's integrity depends first and foremost on its ability to ensure that an accused can exercise his rights under the Statute, without adverse consequences.

3. For this reason, conduct, which is protected under Article 67(1) of the Statute should never be used to construct a contempt conviction. By the same token, the presumption of innocence prevents the Court from drawing adverse inferences concerning the character and motive of an accused, from the sole fact that he is appearing as a defendant in another case before the ICC.

4. These principles did not inform the Trial Chamber's adjudication of Mr. Bemba; he was convicted for providing licit instructions and input to his Defence team, and for knowledge of legitimate Defence activities. The Chamber indeed recognised that:[2]

> *no direct evidence exists that Mr Bemba also directed or instructed false testimony regarding (i)the nature and number of prior contacts of the witnesses with the Main Case Defence, (ii) payments and*

[1] ICC-01/04-01/06-772,para.37.
[2] Trial Judgment(TJ),para.818.

material or non-monetary benefits received from or promised by the Main Case Defence, and/or (iii) acquaintances with other individuals.

5. This lacuna was filled with a series of flawed inferences, which derive from the underlying assumption that because acts were purportedly done for Mr. Bemba's "benefit", he *must* have requested such illicit activity. This is a false and unfair premise that flies in the face of clear evidence that Mr. Bemba instructed his Defence to find truthful witnesses, who were testifying from experience.[3]

6. Illicit conduct **never** benefits the Defence or the defendant: false witnesses only serve to undermine the credibility of the case, and the defendant himself. The principle of individual culpability also should have prevented the Chamber from judging Mr. Bemba on the basis of misconceived and illicit actions perpetrated by other individuals, rather than evidence concerning his own intent and conduct.

7. The legally and factually correct and fair outcome would now be for the Appeals Chamber to overturn Mr. Bemba's conviction due to the Trial Chamber's reliance on:

- Flawed legal interpretations of the charged Article 70 offences (Ground 1);
- An improperly pleaded and defined common plan (Ground 2);
- Illegally collected evidence (Ground 3);
- Evidential conclusions, which rest on speculation, uncorroborated remote-hearsay, or thin air (Ground 4).

GROUND ONE

The Chamber Interpreted the Article 70 Provisions Incorrectly

8. Although this was the first Article 70 trial, the Chamber adopted very broad interpretations of its provisions, exceeding the clear wording of the provisions, their drafting history, and the scope of applicable law. Mr. Bemba was consequently convicted for conduct that was not prohibited by law, or at least,

[3]Defence Final Trial Brief (FTB),paras.91-92.

law which was clear and foreseeable at the time of the events.[4] These legal errors concern the Chamber's findings that:

- It is not necessary to demonstrate that the accused intended to engage in conduct that was contrary to the administration of justice;
- Cumulative convictions could be entered for the same underlying conduct;
- False testimony encompasses issues not put to the witness;
- A 'party' includes a defendant who has not represented himself, or otherwise exercised the prerogatives of a Counsel/Party/Witness; and
- "Corruptly influencing" extends to payments and actions not prohibited by law, order or regulation, or linked to a *qui pro quo* directed to false testimony.

9. Bad facts make bad law; overly broad definitions could have significant implications on lawful investigative activities, as conducted by both parties at this Court. No discretion was afforded to the Trial Chamber as concerns questions of law. These findings should thus be reversed, and Mr. Bemba acquitted.

1.1 The Chamber erred in finding that it was not necessary to establish intent to engage in conduct that violated the administration of justice

10. The Chamber found on the one hand, that Article 70(1) does not encompass a requirement of special intent to interfere with the administration of justice,[5] and on the other, determined that the *chapeau* intent requirement only applies to physical perpetrators, not necessarily the defendant.[6] These twin findings dilute the drafter's intention to limit the Court's Article 70 jurisdiction to cases, in which the defendant intended to engage in conduct that undermined the administration of justice. Whether defined as intent, or special intent, there is a clear obligation to ascertain whether the defendant appearing before the Court intended to engage in conduct that was proscribed by Article 70.

[4]Cf Art.22(2) Statute; *Vasiljević* TJ,para.193.
[5]TJ,para.31.
[6]TJ,para.26.

11. The Chamber averred that where the Statute envisages a form of special intent, such a requirement is set out in the chapeau.[7] But this is exactly the point: the chapeau to Article 70(1) does set out an intent requirement by stating that the Court shall have jurisdiction over the "following offences against its administration of justice when committed intentionally".

12. The Chamber recognised that this wording equates to an intent requirement.[8] But rather than using this *chapeau* element to frame its interpretation of Article 70, the Chamber effectively rendered the wording superfluous, by finding that "it is an obvious consequence of the acts committed under Articles70(1)(a) to (c) of the Statute that the administration of justice is interfered with and thereby harmed".[9]

13. This "obvious consequence" will only result if the elements of Article 70(1) are defined such that they only penalise conduct that is intended to interfere with the administration of justice. The chapeau intent requirement, if applied, ensures that there is an effective threshold for excluding conduct that in the absence of such intent, should be regulated through other tools at the Court's disposal (such as the Code of Conduct, and Article 71 measures).[10]

14. The Chamber also disregarded the drafting history, which elucidates the basis for this wording. The final chapeau wording coalesced proposed wording from Japan and the United States, which set out an intent requirement for each of the sub-offences.[11] The proposals further clarified that the intent element applied to the defendant appearing before the Court.[12] This is consistent with the fact that in the United States, the intent requirement is an essential jurisdictional precondition as it frames the difference between criminal contempt, and misconduct, which does not warrant a punitive sanction.[13]

[7]TJ,para.30.
[8]TJ,para.26.
[9]TJ,para.31.
[10]FTB,para.122.
[11]ICC-01/05-01/13-977,paras.19-25.
[12]ICC-01/05-01/13-977,para.2; Preparatory Committee(1997),p.45, which by virtue of the juxtaposition of "person" and "shall be punished", clarifies that the intent element refers to the defendant not only the physical perpetrator.
[13]ICC-01/05-01/13-977,para.22.

15. The placement of the wording in the chapeau, and its linkage to jurisdiction, not only impacted on the definition of the offences, but also restricted the ability of the Court to prosecute defendants who did not commit the offences with intent. In accordance with its plain meaning, by stating that the ICC can exercise jurisdiction over the following offences, when committed intentionally, the *chapeau* wording precludes the ICC from prosecuting offences when they have not been committed intentionally.

16. The operative effect of this provision, in excluding accessory modes of liability, is further reflected in national legislation implementing article 70 into domestic law.[14] It is also consistent with the limited nature of contempt, as defined and applied at other international courts, and domestic practice. Hence, even if later ICTY case law has not applied the 'special intent' requirement, the *ad hocs* have consistently restricted the prosecution of contempt to situations in which the defendant intended to engage in the proscribed conduct.[15]

17. The Chamber supported its rejection of the special intent requirement with reference to two domestic jurisdictions (Italy and Slovak Republic),[16] but failed to consider that the countervailing weight of authorities support the existence of an intent[17]/special intent[18] requirement. Given that the Chamber was seeking to broaden the parameters of Article 70 by confining the intent requirement to a limited class of perpetrators, the Chamber's reliance on such a limited selection is clearly insufficient to establish a general principle of law.[19]

18. When given full effect, the *chapeau* intent requirement excludes the application of accessory forms of liability, set out in Article 25(3) (including solicitation).[20] Accordingly, as a result of its legal error, the Chamber erroneously convicted Mr. Bemba for charges concerning the solicitation of false testimony from witnesses.

[14]ICC-01/05-01/13-949,paras.14-18; ICC-01/05-01/13-977,fn.19.
[15]ICC-01/05-01/13-949,fn.14.
[16]TJ,para.31, fn.56.
[17]ICC-01/05-01/13-977,fn.20.
[18]Canada,China,Trinidad and Tobago, St.Lucia in ICC-01/05-01/13-977-AnxA.
[19]ICC-01/04-168,para.23 *et seq.*
[20]FTB,para.53;ICC-01/05-01/13-977,paras.15-16(re interpretation of "*mutatis mutandis*"); ICC-01/05-01/13-949,paras.13-21.

1.2 The Chamber erred by entering cumulative convictions on the basis of the same underlying conduct

19. The Chamber determined that due to the existence of a different legal element in each offence, it was not prevented from entering cumulative convictions. This finding failed to address the specific wording of Article 20(1), which prohibits multiple convictions being rendered by the ICC in relation to the same underlying conduct. It thus differs from its *ad hoc* counterparts by focusing on conduct rather than crimes or legal elements.

20. The ICC has affirmed, in the context of admissibility proceedings, that the legal qualification of crimes is irrelevant to its assessment of the notion of conduct under Article 17.[21] This finding must, by extension, apply to the definition of conduct in Article 20(1).[22] The existence of a notionally different legal element is an irrelevant consideration if the conduct is the same.

21. In finding that the provisions had different legal elements, the Chamber also failed to account for the fact that in adopting broad definitions of such elements, the Chamber obliterated any distinction between them. For example, the Chamber found that the key difference between Article 70(1)(a) and (b) is that in the latter, the evidence needs to be submitted by a party.[23] The Chamber then defined a party under Article 70(1)(b) to include a defendant, who exerts a direct influence on strategic decisions concerning evidence, in order for false testimony to be produced.[24] As a result, there is no difference between this Article 70(1)(b) definition, and the notion of a defendant exerting influence through his Defence to solicit false testimony from witnesses, for the purposes of Article 70(1)(a). The only notional difference concerns the mode of liability, but as found in the *Al Mahdi* case:[25]

> *The Accused can be convicted of only one form of Article 25(3)(a) commission for each incident or discrete type of criminal conduct, as to conclude otherwise not only contributes little to the fair labelling of*

[21]ICC-01/11-01/11-565,para.129.
[22]See case law/commentary regarding the emphasis on conduct for *ne bis in idem*: ICC-01/11-01/11-321-Red,paras.60-65.
[23]TJ,para.953.
[24]TJ,para.35.
[25]ICC-01/12-01/15-171,para.60.

> *the responsibility of the accused but it also punishes them twice for the commission of the same crime.*

22. Similarly, the Chamber found as concerns Article 70(1)(c) that the materially distinct element was that it was unnecessary to establish that the witness was actually influenced.[26] By this definition, it is a lesser included version of the solicitation of actual false testimony. It was thus contrary to Article 20(1) to convict Mr. Bemba for the attempt, and the result.

1.3 The Chamber erred in law by finding that false testimony can encompass issues that are not put to the witness

23. The Chamber found that false testimony can encompass the withholding of truthful information, even if "not directly asked";[27] a witness can thus be prosecuted for concealing information in relation to matters that are not put directly to the witness. This definition expands the confirmed parameters of the Mr. Bemba's culpability,[28] the notion of sworn testimony set out in the Statute and Rules, and the definition of false testimony at international and national levels.

24. The offence of false testimony derives from the witness's duty to adhere to the solemn undertaking set out in Rule 66(1).[29] It would therefore be unfair and *ultra vires* to interpret Article 70(1)(a) in a manner that layperson witnesses could not reasonably have foreseen, particularly since the Presiding Judge of Trial Chamber III explained the oath in terms which emphasised the witnesses' duty to answer questions that had actually been put to them.[30]

25. The handful of domestic cases cited by the Chamber is an insufficient basis to expand culpability, and they do not support its position. Regarding the German case, the Federal Court of Justice found that "in withholding a fact, a witness violates the duty to tell the truth when the fact is inseparably linked to the interrogatory (*Beweisfrage)* or the witness has been questioned about it,":[31] the

[26]TJ,para.953.
[27]TJ,para.21.
[28]ICC-01/05-01/13-749,para.28.
[29]TJ,para.19.
[30]D-55,ICC-01/05-01/08-T-264-CONF-ENG,p.5,lns.24-25-p.6,lns.1-11.
[31]Anx.E.

term *Beweisfrage* refers to the brief sent to the witness prior to interrogation, which outlines the object of the interrogation and evidentiary questions, and thus determines the scope of the witness's obligation to provide evidence.[32] Information falling outside the scope of the *Beweisfrage* does not need to be answered voluntarily by the witness, as stated in the case.[33] The case thus affirms that a question must be put to the witness for the answer/omission to constitute false testimony.

26. The 1951 French case does not support the conclusion that false testimony includes omissions on issues not put to the witness: the witness was not convicted, but only requested to clarify an imprecise response.[34] Similarly, none of the cited legal provisions support the Chamber's position:[35] the Italian provision in fact contradicts it, by stipulating that a witness must not conceal knowledge of facts on which he has been questioned;[36] Article 307 of the Swiss Criminal Code also does not specify whether omissions can extend to matters not put to the witness.[37]

27. ICTY/ICTR jurisprudence also confines the scope of the offence to the *affirmation of a false fact* and the *negation of a true fact*,[38] and domestic case law underscores the absence of a general principle of law penalising witnesses for withholding information on matters falling outside the scope of questioning. For example, the San Miguel Court of Appeal from Chile has ruled that *'the absence of questions in this regard implies that such omission cannot be constitutive of falsehood'*.[39]

28. Several courts have also affirmed that regardless of how clear the question is, an evasive or ambiguous answer, could not *per se* constitute a false testimony because it is the questioner's burden to accurately phrase the question or "probe

[32]Sect.377, German Civil Procedure Code (the witness was questioned in civil proceedings).
[33]Anx.E
[34]TJ,fn.30. Cf Anx.E.
[35]Art.247bis, Mexican Federal Penal Code; Sec.346, Slovak Criminal Code, Anx.E.
[36]Art.372, Italian Penal Code, Anx.E.
[37]Art.307, Swiss Criminal Code, Anx.E.
[38]*Akayesu* TC Decision 09/03/1998,p.2; *Rutaganda* TC Decision 10/03/1998.
[39]Corte de Apelaciones, San Miguel, 1284-2008, Anx.E.

deep enough to recognise any potential evasion".[40] According to the U.S Supreme Court,*"a perjury prosecution is not, in our adversary system, the primary safeguard against errant testimony; given the incongruity of an unresponsive answer, it is the questioner's burden to frame his interrogation acutely to elicit the precise information he seeks"*.[41]

29. In terms of the impact of this error, the Chamber found that D55 "concealed, despite being asked, his meeting with Mr Kilolo in Amsterdam and the telephone call with Mr Bemba".[42] This finding was a key plank of the ultimate conclusion that Mr. Bemba must have known that witnesses were lying on the stand in relation to issues of contacts.[43]

30. D-55 was never questioned as to whether he had spoken to Mr. Bemba after Mr. Bemba's arrest.[44] D-55 was asked how far his contact with Mr. Bemba went back,[45] and the details of his first contact with the Defence team for Mr. Bemba. D-55 was not questioned about his last or most recent contacts with Mr. Bemba, nor was he asked to divulge the number of contacts he had with him, or to provide a detailed chronology of events. In line with his duty under the solemn oath, and the above case law, in the absence of relevant questions, D-55 had no duty to volunteer the details of his recent communication with Mr. Bemba. There is thus no foundation to conclude that D-55 lied on a matter that was known by Mr. Bemba to be false.

31. Given the nexus between the Chamber's findings on D-55 and Mr. Bemba's knowledge of false testimony, this legal error also invalidates the Chamber's findings concerning Mr. Bemba culpable *mens rea.*

1.4 The Chamber erred in law by finding that Mr. Bemba could be considered as a party, under Article 70(1)(b)

[40]*US v. Earp*; *Bronston v. US*; Supreme Court of ACT (5/10/1994),para.24; *see* French *Sénat*, Commission of Inquiry (26/05/2016): "*si les propos en cause ont pu comporter une part d'ambiguïté, ils n'étaient pas susceptibles d'être qualifiés de faux témoignage au sens du droit pénal, une telle incrimination étant d'interprétation stricte*."
[41]*Bronston*.
[42]TJ,para.301.
[43]TJ,para.819.
[44]ICC-01/05-01/08-T-264-CONF-ENG,p.55,lns.11-12,19-20.
[45]ICC-01/05-01/08-T-264-CONF-ENG,p.55,lns.11-22.

32. The Chamber recognised that Article 70(1)(b), when construed in its context, was "addressed to those who have the right to present evidence to a chamber'.[46] The Chamber then contradicted itself by extending this definition to any member of the Defence (including the accused), who "de facto, plays a significant role in the Defence team's decisions on the strategy of the accused's representation, including the presentation of evidence." [47]

33. This extension to persons, who do not have rights of audience before the Chamber (and related duties to the Court), is inconsistent with the text of the provision, and undermines the defendant's right to receive effective legal assistance.

34. Although the Chamber noted the discrepancy between the English and Arabic versions on one side and the French, Spanish, Russian and Chinese versions on the other,[48] it failed to focus on the more pertinent point that all versions of Article 70(1)(b) focus on the act of presenting evidence, as reflected by the verbs '*presenting'* in English, *'production'* in French, *'presentar'* in Spanish, تقديم in Arabic. The consistent emphasis on the act of tendering evidence underscores that the prohibited conduct concerns 'presenting' evidence to the Chamber (whilst knowing that it is false).[49] By extending the notion to persons who merely contribute to the act of tendering evidence, the Chamber incorrectly imported uncharged accessory liability norms into the definition of the offence itself.

35. Moreover, whereas the Chamber acknowledged that the scope of Article 70(1)(b) should be determined by reference to the solemn undertaking, the Chamber failed to interpret Article 70(1)(b) in a manner that is consistent with related duties in the Code of Conduct, in particular: Article 25(2), which imposes a duty on Counsel not to submit evidence that he or she knows to be incorrect; Article 14(2), which clarifies that Counsel is ultimately responsible for determining the means by which the accused should be

[46]TJ,para.33.
[47]TJ,paras.32-37.
[48]TJ,para.33.
[49]FTB,fn.102 regarding ICTY interpretation of the verb "present".

represented; and Article 24(2), which confirms that Counsel is personally responsible for the conduct of the case.

36. These provisions protect the defendant's right to be defended, and to freely seek legal advice,[50] whilst maintaining his privilege against self-incrimination vis-à-vis the Court. The notion of effective representation requires that the accused must be able to put his case to his Counsel, without adverse consequences, with the expectation that it is then the role of Counsel to put that case forward in a manner that is consistent with Counsel's duties.[51] If this demarcation between the role of Counsel and Client is eliminated, the right to legal assistance is rendered inutile. Indeed, the logical corollary of the Chamber's finding that Mr. Bemba, as the client, controlled the presentation of evidence is that Mr. Bemba was not represented by an effective Defence Counsel during his trial.[52]

37. Domestic practice affirms that a defendant cannot be prosecuted separately for contempt for instructing the Defence to pursue a positive case, in circumstances in which the accused was found to be guilty,[53] or the evidence was found to be false.[54] The civil law notion concerning the right of an unsworn defendant to put his case to the Court,[55] is also enshrined in Article 67(1)(h).[56] If an accused can put his case to the Chamber without adverse consequences, then he must surely be able to put the same case to his Counsel to advance in accordance with Counsel's ethical duties.

38. Common law countries provide that if an accused acknowledges certain facts, and then instructs counsel to put forward evidence that is incompatible with this acknowledgment, Counsel must decline to do so.[57] Counsel may also withdraw, but under no circumstances can Counsel report the client to the Court.[58] In all jurisdictions, the responsibility falls to Counsel, rather than the client, to

[50]FTB,fn.73.
[51]*Nyiramasuhuko & Ntahobali* TC Decision 22/06/2001; ICC-01/05-01/13-2089-Conf, fn.82.
[52]*Nyiramasuhuko & Ntahobali* TC Decision 22/06/2001, concerning the Chamber's duty to assure itself that Counsel is properly defending the case, and protecting the lawful interests of the accused.
[53]Mr. Bemba would like to clarify that he continues to assert his innocence in the Main Case, on the basis of evidence considered by his current Defence to be intrinsically reliable.
[54]ICC-01/05-01/13-977,fn.27; ICC-01/05-01/13-2089-Conf,fn.77.
[55]Zappala,p.26; Art.153, Code de procédure pénale (France).
[56]ICC-01/05-01/08-2860,para.8.
[57]Rules 3.3(a)(3),3.4(b) ABA Model Rules; See also Restatement (Third) of the Law Governing Lawyers § 120(1) (2000) (lawyer may not knowingly counsel or assist a witness to testify falsely).
[58]Rule gC9(1), UK BSB Code of Conduct*;* Rule 1.6, ABA Model Rules.

ensure that the means by which an accused is defended are compatible with Counsel's ethical duties.[59]

39. It is, moreover, telling that the *ad hocs* have never prosecuted a defendant for the submission of false evidence, tendered through Counsel; prosecutions have been confined to circumstances where the accused directly engaged in the corruption of evidence (i.e. cases which are analogous to Article 70(1)(c)).[60] In *Kupreškić*, the ICTY affirmed that the:[61]

> *examination of witnesses is the primary responsibility of counsel, who must exercise all due diligence in carrying out this responsibility, regardless of whether he or his assistant have held the preparatory interviews with the witnesses.*

40. In a system in which Counsel exercises primary/overall responsibility, the input provided by a represented accused cannot be characterised as an 'essential contribution', since it is Counsel and not the accused who controls the execution of the act in question.[62]

41. The Chamber further erred in law by implicitly finding that an accused has the duty to correct the record, if false testimony has been elicited in cross-examination. In addressing Mr. Bemba's *mens rea*, the Chamber found that Mr. Bemba must have realised that the witnesses were providing false evidence in relation to questions put to them regarding payments and contact (concealment).[63] However, in order to "control" the evidence at this point, Mr. Bemba must have had a positive duty to correct the record. This duty simply does not exist for a defendant;[64] as noted by the Chamber, an accused cannot be punished for failing to incriminate himself.[65] Given that Mr. Bemba did not rely

[59]*Nshogoza* AC Decision 26/06/2009,para.68; ICC-01/05-01/13-977,fn.24.
[60]ICC-01/05-01/13-977,para.36, fn.27.
[61]*Kupreškić* TC Decision 25/06/1999.
[62]"Overall, counsel is considered *dominus litis* in the proceedings of the *ad hoc* Tribunals. He should identify his client's wishes concerning the objectives of representation and keep his client up to date of his decisions. Ultimately, in order to guarantee the independence of the defence, counsel takes the final decisions regarding his client's representation". Tuinstra,p.203.
[63]TJ,para.928.
[64]FTB,para.112.
[65]TJ,para.822; ICC-01/05-01/08-2860,fn.24.

on the evidence of these witnesses (although the Prosecution did),[66] no more could have been expected from him, as a defendant.

42. It was therefore a manifest legal error to conclude that Mr. Bemba fell within the scope of Article 70(1)(b).

1.5 The Chamber adopted an arbitrary and overly broad definition of "corrupt influencing"

43. Linked to the Chamber's failure to apply the *chapeau* intent element, the Chamber defined Article 70(1)(c) in such a broad manner that it encompasses licit conduct, and conduct that is protected by the Statute, and which was not directed to the production of false evidence. This is reflected by the Chamber's findings concerning payments made to witnesses, and pre-testimonial witness preparation. The Chamber also watered down the requirement of 'corruption' by focusing on whether witnesses had been influenced to testify "in favour of Mr. Bemba",[67] rather than whether they were induced to testify falsely in connection with the specific topics encompassed by the charges.

44. In Judgment's opening section, the Chamber found that in determining whether conduct is illicit, "it is essential to pay heed to the legal framework which contextualises the conduct of the perpetrator."[68] If this had been applied, Mr. Bemba would have been acquitted. But instead of adhering to an objective assessment as to whether Mr. Bemba's conduct violated the legal framework governing payments to witnesses, the Chamber based its findings on the "context" of payments: the timing of the payments, Mr. Kilolo's contemporaneous remarks, and the amounts of the payments.[69]

45. Although the Chamber has the right to adopt a method for evaluating evidence, its approach should not be arbitrary, and any criteria should be derived from the evidence placed before it.[70] The Chamber did not, however, justify the nexus between the above criteria and the notion of

[66]FTB,para.78.
[67]TJ,paras.103,115,240,541,702.
[68]TJ,para.47.
[69]TJ,para.702.
[70]*Gotovina* AJ,para.61.

corruption, with reference to established jurisprudence or practice. As a result, the criteria failed to encompass a sufficient degree of corruption, and the defendants were unfairly convicted for payments that other international courts and tribunals either do not catagorise as disclosable witness payments,[71] or treat as a matter of witness credibility rather than corruption (for example, payments to family members).[72]

46. Moreover, rather than applying clear and consistent thresholds for amounts or timing,[73] the Chamber varied its conclusions based on its subjective assessment of the witnesses' testimony. Thus, although different witnesses were paid the same amount, the Chamber found that the purpose for some (and not others) was illicit because it disbelieved the witnesses' or Mr. Kilolo's explanation that they were not.[74] This is an inappropriate evidentiary foundation for a positive finding of fact.[75]

47. With respect to timing, having found that proximity to the date of testimony was a relevant factor, it was arbitrary and unfair not to address the timing from an exculpatory perspective, for example, as concerns payments or promises that were made after a witness had completed their testimony. For example, the Chamber found that post-testimony payments to D-6 were illicit,[76] even though D-6 did not testify in the Article 70 trial, the amount[77] was not *per se* corrupting, the payment occurred after his testimony, and Mr. Kilolo discussed the amount in the context of hotel costs pending the completion of the VWU assessment.[78] If the more pertinent factor is the timing of the agreement to receive payments, then the Chamber erred by failing to give due consideration to evidence that the Cameroonian witnesses' expectations concerning benefits were created by third parties, before the witnesses met with the Defence.[79]

[71]FTB,fn.118.
[72]*Karemera* TC Decision 29/05/2008.
[73]For arbitrary distinctions, see ICC-01/05-01/13-2102-AnxD.
[74] TJ,para.150.
[75]*Nobilo* AJ, para.47; *Steinberg v. Com'r of Taxation*,p.695; *R. v. Tessier*,p.553.
[76]TJ,para.406.
[77]TJ,para.146.
[78]CAR-OTP-0082-0562, at 0563,lns.25-33; ICC-01/05-01/13-1903-Conf-Corr2,para.94.
[79]TJ,paras.125-128.

48. Although the Chamber stated that the emphasis of Article 70(1)(c) is on the "perpetrator's expectation",[80] as a result of its context, witness-driven approach, the Chamber erroneously convicted Mr. Bemba on the basis of findings, which had no nexus to Mr. Bemba's 'expectation'.

49. For the Cameroonian, Brazzaville and DRC witnesses, the Chamber cited no evidence concerning Mr. Bemba's 'expectation', but instead, focussed on the specific interactions between Mr. Kilolo and the witnesses, even though Mr. Bemba was not privy to these interactions, and there is no evidence that the details were reported to him. The amount of the payments would not have alerted Mr. Bemba to any impropriety given the correlation between such amounts, and the expenses incurred by the Defence.[81]

50. For the [Redacted] witnesses, the Chamber based Mr. Bemba's knowledge and intent exclusively on a conversation with Mr. Babala. This conversation did not mention the content of testimony, nor did Mr. Babala suggest that the payments would be concealed or effected through third persons, rather than paid to the witnesses. Mr. Bemba's input (which focused on compensation for debts),[82] did not suggest that he was aware, and intended for the discussed payments to result in false testimony/testimony that was not reflective of the witnesses' knowledge.

51. There is also no linkage between the timing of the payments, and the knowledge and conduct of Mr. Bemba. Regarding D-57, the money was transferred to D-57 before this conversation occurred;[83] knowledge after the fact does not establish knowledge beforehand. In any case, the mention of "aujourd'hui" is not anchored to a specific event, and there is nothing in the text of the conversation that establishes that Mr. Bemba must have known that this referred to testimony that took place that day. As regards D-64, Mr. Babala also does not employ language that suggests that the payment was for a witness who was scheduled to testify the next

[80]TJ,para.44.
[81]FTB,paras.178-181.
[82] *Infra*,Paras.258-263.
[83]TJ,paras.239,244,265.

day: there is just a reference to 'le collègue d'en haut'. Given the absence of evidence that Mr. Bemba expected these payments to result in false testimony, it is clear that the Chamber failed to consistently apply its own test for ascertaining corruption. As a result, the conviction rests on findings concerning payments, rather than corrupt payments.

52. As concerns witness coaching, the Chamber failed to define the term, or distinguish between licit investigative interviews, witness preparation, witness coaching which might be an ethical violation[84] but falls short of Article 70 misconduct,[85] and illicit coaching intended to elicit false testimony. As a result of these blurred lines, the Chamber convicted Mr. Bemba for conduct that was not prohibited, and which was not directed towards offending the administration of justice by procuring false testimony.

53. The Chamber's amorphous notion of "illicit coaching" failed to include a specific element of corruption, and as a result, lead to convictions based on licit investigative interactions, which preceded the VWU cut-off point, and which were not regulated or prescribed by the Main Case familiarisation decision.[86] There is a substantive difference between the purpose and content of investigative interactions, and contacts occurring in the proximity of testimony.[87] During the time-period in question, the Court had yet to establish the point at which suggestive investigative questioning transgressed ethical boundaries.[88] Recent jurisprudence confirms that for influence to be considered corrupt, there must be proof that witnesses were "encouraged to provide accounts of evidence different from what, to their knowledge, actually happened".[89] The Chamber did not cite any legal authorities that would suggest otherwise,

[84]*Perry v. Leeke*; *Geders v. US*; *Odone v. Croda International PLC.*
[85]*Minebea Co., Ltd. v. Papsti; Kobre v. Sun Life Assurance Co. of Canada*; *State v. Mccormick.*
[86]The Chamber assumed that discussing topics and the demeanour of a witness, before the cut-off point, equates to corrupt influencing: TJ,para.686.
[87]ICC-01/09-01/11-524,para.41. The Lubanga proofing ban was influenced by the UK(ICC-01/04-01/06-1049,para.42)which affords substantive leeway for solicitors to interact with witnesses during investigations:ICC-01/09-01/11-524, (Separate Opinion,para.29).
[88]ICC-01/04-01/10-480,paras.30-35.
[89]ICC-01/09-02/11-868-Red,para.37. ICC-01/09-01/11-524,(Separate Opinion,para.27).

but nonetheless extended Article 70(1)(c) to issues that impacted on reliability rather than veracity.[90]

54. The Chamber also wrongly conflated evidence that was favourable to the Defence, with corrupt evidence. The ICC is modeled on an adversarial system,[91] which is predicated on the need for persons to agree to testify for the defence.[92] This system is constructed such that the reliability of evidence can be confronted in court.[93] In such a system, the line in the sand is not whether the defendant requested evidence that was favourable to him, but rather, whether the defendant requested the Defence to employ corrupt means, with a view to influencing witnesses to provide false testimony.[94] The Chamber's findings that witnesses were influenced to testify in favour of the Defence,[95] do not contain a sufficient element of corruption.

55. The Chamber similarly erred by conflating influence, with corrupt influence. Mere influence might be disapproved[96] or deprecated, but it is not proscribed under Article 70. Thanking a witness for testifying,[97] a practice endorsed by both Trial Chamber III and VWU,[98] should not have been designated as a form of corrupt influence.

56. As result of the above legal errors, Mr. Bemba was wrongly convicted without proof that his conduct was directed towards corruptly influencing witnesses to provide false testimony.

GROUND 2

Mr. Bemba was Convicted on the Basis of an Improperly Pleaded and Defined Common Plan

[90] TJ,para.46.
[91] ICC-02/11-01/15-355-Anx1,para.4.
[92] ICC-02/11-01/15-355-Anx1,para.5.
[93] *Karemera* AC Decision 11/05/2007,paras.12-13.
[94] *Haradinaj* TC Decision 12/10/2011,paras.60-61.
[95] TJ,paras.103,115,240,541,702.
[96] ICC-01/04-01/10-480,paras.30-35.
[97] TJ,paras.123,170,298.
[98] FTB,paras.146-7.

57. Mr. Bemba suffered a significant miscarriage of justice: although he had a right to know the case that he would face at trial, the carpet was pulled out from underneath his feet at the very end, by virtue of a fundamentally transformed case,[99] based upon facts which cannot support his individual penal responsibility.

58. Concretely, the Chamber erred in law and fact by:

- Convicting Mr. Bemba on unacceptably vague charges that did not specify the common plan's element of criminality, and Mr. Bemba's contributions with sufficient precision;
- Convicting Mr. Bemba on the basis of an uncharged common plan to "interfere" with witnesses;
- Relying on material facts and circumstances, outside the scope of the charges;
- Convicting Mr. Bemba for co-perpetration, even though his *mens rea* and *actus reus* did not meet the requisite threshold; and
- Convicting Mr. Bemba for each charged offence, even though his *mens rea* and *actus reus* were not established for each offence.

59. These errors, individually and cumulatively, render the conviction of Mr. Bemba manifestly unfair and unsafe.

2.1 The Chamber's flawed reliance on a vague, improperly pleaded common plan

60. The Prosecution charges asserted that:[100]

> *From January 2012 to November 2013, BEMBA, KILOLO, MANGENDA, BABALA, and ARIDO committed the charged offences, in concert with each other and with other persons, pursuant to a common plan to defend BEMBA against charges of crimes against humanity and war crimes in Bemba case by means which included the commission of offences against the administration of justice in violation of Article 70 of the Statute ("Common Plan").*

61. The notion that the common plan "included" the commission of Article 70 crimes failed to articulate a clear distinction between licit and illicit conduct, as required by the "element of criminality requirement". The charges also did not identify and demarcate the facts and circumstances underlying Mr. Bemba's

[99] Anx.B highlights elements not in DCC, and fundamental shift of focus from witness corruption to secure false evidence, to plan focussing on concealing efforts to obtain favourable testimony.
[100] ICC-01/05-01/13-526-AnxB1-Red2,para.20.

individual responsibility for each of the charged offences. His contributions to particular offences were never pleaded, whilst the charges omitted key information concerning dates.

62. The right to be informed promptly of the nature, cause and content of the charges is a fundamental element of the right to a fair trial,[101] which applies equally to contempt cases.[102]

63. For co-perpetration cases, the common plan is the central element, which "ties the co-perpetrators together and (…) justifies the reciprocal imputation of their respective acts".[103] Due to the importance of this element:[104]

> *[t]he accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, (…) the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.*

64. In contrast, the charges indicated in vague and imprecise terms that the common plan to defend Mr. Bemba *included* the commission of Article 70 crimes. The term "included" does not specify how the act of defending Mr. Bemba related to the charged offences: was the commission of offences a necessary element of Mr. Bemba's defence, or merely one of a plethora of strategies that was adopted? Without such clarity, it was impossible to ascertain whether Mr. Bemba's ratification of the common plan, and his contributions to this plan, amounted to intentional contributions to the realisation of illicit conduct. The Prosecution's charges obliterated the distinction between conduct directed towards lawful as opposed to unlawful purposes, in order to cast the net of culpability as widely as possible.

[101] ICC-01/04-01/06-2205,fn.163; ICC-01/04-01/06-3121-Red,para.121.
[102] *Aleksovski* AJ,para.56; *Nyiramasuhuko* TC Decision 30/11/2001,para.8.
[103] ICC-01/04-01/06-3121-Red,para.445.
[104] ICC-01/04-01/06-3121-Red,para.123.

65. The term "include" is overly ambiguous, and did not define the charges with sufficient precision. In *Ruto and Sang*, the Trial Chamber established that the term "including", wrongfully implied that the specific locations mentioned in the charges were exemplary, rather than exhaustive.[105] Similarly, in *Katanga and Ngudjolo*, the Single Judge held that the terms "in at least the following ways" were impermissibly vague and did not describe the accused's alleged conduct with sufficient precision.[106]

66. As result of this vagueness, it was impossible to discern whether the common plan had the "critical element of criminality".[107] This standard will only be fulfilled if the commission of the charged crimes were "a virtually certain" consequence of the alleged common plan, i.e. that crimes/offences *will* be committed in the ordinary course of events.[108] If the common plan requirement is expanded and delinked from the crimes charged, the basis upon which the accused is convicted becomes unacceptably tenuous.[109]

67. The critical element of criminality could not, however, be discerned, considering that the ultimate objective of the common plan (defending Mr. Bemba) was lawful, and, in addition to an unspecified proportion of alleged illegal means, was also implemented through an unspecified proportion of lawful means.

68. The Defence argued repeatedly that the charges failed to comply with the requirements of Article 67(1)(a), and sought timeous remedies, but none were provided. The Single Judge rejected a request for in-depth evidence chart, in order to better understand the nexus between the voluminous disclosure and Mr. Bemba's individual responsibility.[110] The Single Judge also rejected a Defence challenge to the form (and vagueness) of the charges,[111] responding that the procedural framework of the court did not permit such objections outside of the context of confirmation submissions.[112] When the Defence repeated such

[105]ICC-01/09-01/11-522,para.32-33.
[106]ICC-01/04-01/07-648,paras.33-34.
[107]ICC-01/04-01/06-3121-Red,paras.984,1012.
[108]ICC-01/04-01/06-3121-Red,paras.447,451.
[109]Ambos,p.140.
[110]ICC-01/05-01/13-134,para.6.
[111]ICC-01/05-01/13-530-Conf-Corr.
[112]ICC-01/05-01/13-561,p.3.

objections in its confirmation brief,[113] the Pre-Trial Chamber found that it had no competence to review the Single Judge's previous ruling on this point,[114] thus denying the Defence an effective right to be heard as concerns the vague and ambiguous manner in which the charges were pleaded.

69. During pre-trial, the Defence requested the Chamber to order the Prosecution to file an updated charging document, and to provide an evidence chart or metadata to accompany disclosure. The Chamber declined these requests.[115] The Majority further averred that the confirmation decision "satisfied the minimum requirements of Article 67(1)(a)", since it set out the legal characterisation of the charges, and facts and circumstances.[116] The Majority did not, however, consider whether compliance with such minimum guarantees sufficed to ensure the defendants' overarching right to a fair trial, given the particular complexities of this case, including its document intensive nature.

70. The Prosecution's Pre-Trial Brief (PTB) did not remedy the above defects, nor eliminate the prejudice, since the common plan was formulated in the same vague manner,[117] and again, contained no information concerning:

- The (actual or approximate) date on which the common plan was formulated, or the date (actual or approximate) on which Mr. Bemba became part of the plan;[118] and
- Mr. Bemba's specific contribution to the criminal elements of the plan, and the dates (actual or approximate) of such contributions as concerns each witness.

71. In the absence of such particulars, the scope for presenting a meaningful Defence at trial was drastically reduced.[119] The Defence was materially impaired in its preparation, as it was compelled to sift through voluminous post-

[113]ICC-01/05-01/13-599-Conf,paras.59,62,73.
[114]ICC-01/05-01/13-749,paras.9-10.
[115]ICC-01/05-01/13-959,para.33.
[116]ICC-01/05-01/13-992,para.19.
[117]PTB,para.237.
[118]The PTB wording (para.237) omits the crucial detail as to when it was agreed that the "overall strategy" should encompass means that included the commission of Art.70 offences. The Pre-Trial Chamber also did not provide a specific date or time period in its confirmation decision as concerns the common plan itself, or Mr. Bemba's membership of it.
[119] *Krnojelac* TC Decision, 24/02/1999,para.40; *Niyitegeka* AJ,para.194.

confirmation disclosure,[120] with no clear reference point as to the facts that could form the basis of the accused's alleged responsibility, a result that is akin to swimming in quicksand.[121]

72. The ambiguities concerning the nature and scope of the common plan were never resolved at trial. During closing arguments, the Chamber acknowledged that it was unable to understand the nature of the Prosecution's common plan, and the link between this plan and the evidence and arguments set out in the Prosecution's Final Trial Brief.[122] In the Judgment, the Chamber even went so far as to concede that the Prosecution had failed to "clearly articulate a definition of what it considered to be the common plan between Mr. Bemba, Mr. Kilolo and Mr. Mangenda, for the purposes of assessing their responsibility under Article 25(3)(a) of the Statute".[123]

73. By finding that it was impossible to identify the common plan at the end of the trial, the Chamber affirmed that the common plan was never clearly pleaded before, or during the trial. Rather than acquitting the accused, the Chamber addressed this deficiency by reformulating the common plan. This was a manifest legal error. Whilst, in exceptional circumstances, it might be possible to take measures to remedy the prejudice arising from insufficiently detailed charges, it is never possible to do so *after* the close of evidence and argumentation,[124] and it is certainly not possible to do so in the context of the Judgment itself. The prejudice resulting from this violation of Article 67(1)(a) can now only be cured through the reversal of Mr. Bemba's conviction.

2.2 The Chamber's improper formulation of new charges, and reliance on new or altered material facts that exceeded the scope of the confirmed charges

74. Not only were the charges impermissibly vague, the nature and scope of the charges mutated throughout the procedure, and led to the conviction of Mr. Bemba on the basis of facts that were not pleaded, and offences that were not charged. By exceeding the facts and circumstances described in the charges, the Trial Chamber violated Article 74(2) of the Rome Statute. This fundamental

[120] ICC-01/05-01/13-1228-Red,paras.26-27.
[121] *Ntagerura* TJ,para.66.
[122] ICC-01/05-01/13-T-48-Red-ENG,pp.4-6; TJ,para.681.
[123] TJ,para.681.
[124] ICC-01/04-01/06-3121-Red,para.129. *Pélissier and Sassi v France*; *Nahimana et al*. AJ,para.322; *Simić* AJ,para.20; *Ntagerura et al*. AJ,para.22; *Kupreškić* AJ,para.88; *Ntawukulilyayo*, AJ,para.202.

error, which vitiates the conviction, encompasses the Chamber's decision to convict Mr. Bemba on the basis of:

- A common plan to illicitly interfere with witnesses, which rests on a previously excluded charge;
- A reformulated common plan that has an insufficient element of criminality;
- Issues concerning the merits of the Main Case, in connection with conduct that falls outside the scope of the confirmed case;
- A standard of knowledge ("implicit knowledge") which was never pleaded, or set out in the charges; and
- Key incidents concerning witnesses (D-19, Bravo), which were not charged.

75. As concerns the first aspect, having recognised that the Prosecution common plan was defective, the Chamber formulated the following new common plan:[125]

> *Mr Bemba, Mr Kilolo and Mr Mangenda jointly agreed to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba.*

76. In changing the focus of the agreement from defending Mr. Bemba, to agreeing jointly to "illicitly interfere" with Defence witnesses, the Chamber omitted to address:

- The fact that an agreement to illicitly interfere with the collection of evidence is a separate offence under Article 70(1)(c); and
- The Pre-Trial Chamber expressly excluded this offence from the charges.

77. Interfering with evidence, and corrupt influencing are different offences under Article 70(1)(c): whilst corrupt influencing concerns offering something of value to induce a witness to provide false testimony, interfering with witnesses is focused on impeding the witness's attendance or testimony by means of threats, physical force, or intimidation.[126] By defining the common plan as one which was directed towards illicit interfering, the Chamber changed the scope and basis of the charges in a material way, and convicted Mr. Bemba in connection with an offence that was not only uncharged, but one which had

[125] TJ,para.103.
[126] Triffterer,p.1340. Triffterer refers to Preparatory Committee(1996).

been deliberately excluded by the Pre-Trial Chamber, as a result of the Prosecution's omission to plead it in the DCC.[127]

78. The charges are crystallised by the Pre-Trial Chamber.[128] Although the Chamber can, if notice is given, requalify the charges, there is no power to add charges after the trial has commenced.[129] It was therefore a reversible error of law to convict Mr. Bemba on the basis of a common plan, predicated on an excluded offence.

79. The Chamber further erred by relying on an unacceptably ambiguous new common plan concerning efforts to obtain "evidence in favour of Mr Bemba". Although the Chamber found that this objective was pursued through illicit interference with witnesses, the Chamber failed to clarify or appropriately delimit the scope of "illicit interference" and, consequently, included a range of licit conduct within its embrace.

80. It is also plainly wrong to assume illicit conduct from the fact that it was tied to the common plan: it is not illegal to endeavour – even zealously – to obtain evidence that favoured Mr. Bemba.[130] In order to fall within the four corners of Article 70, the efforts would need to be directed towards securing false evidence.[131] Nonetheless, as a result of the Chamber's failure to construe "illicit interference" within the parameters of the elements of Article 70(1), or specify what was implied by the phrase "in favour of Mr. Bemba", there is an ineluctable appearance that Mr. Bemba was convicted on the basis of licit conduct directed to the lawful objective of being defended.

81. This is highlighted by the fact that whereas the confirmed charges concerned alleged conduct that was directed towards securing "false testimony in support of BEMBA",[132] the Chamber convicted Mr. Bemba for conduct directed to securing evidence in favour of Mr. Bemba.[133] Similarly, the Chamber found that Mr. Bemba "approved the payment of money, including illicit payments, to

[127]ICC-01/05-01/13-749,paras.17-18.
[128]ICC-01/05-01/13-992,paras.9-18.
[129]Art.61(9).
[130]Art.5, Code of Conduct.
[131] See,section 1.5.
[132]PTB,para.27.
[133]TJ,paras.293,298,305,253-254,280,281,439,444,453,526,535,543,651.

witnesses and was aware that the purpose of such payments was to ensure that witnesses testified in his favour." [134] It is not illicit, *per se*, to pay money to a witness to ensure that the witness can testify in favour of a party.[135] As noted above, the word "including" is vague and does not exclude the possibility that the essential component of Mr. Bemba's conduct was directed to licit payments.

82. As a result of the Chamber's failure to differentiate between Defence efforts that were directed towards obtaining false, as opposed to truthful evidence in favour of Mr. Bemba, the reformulated common plan suffers from the same defect as the initial plan; there is an insufficient element of criminality. This error taints the Chamber's findings concerning Mr. Bemba's responsibility, which rest on contributions directed towards obtaining favourable evidence.[136]

83. The unfair ambiguity of the phrase "evidence in favour of Mr. Bemba" is aggravated by the Trial Chamber's repeated reliance on contributions that are directed towards procuring false testimony concerning the merits of the Main case, even though both the Pre-Trial Chamber and Trial Chamber affirmed that such matters fell outside the scope of the case.[137] Both Chambers affirmed that the case was delimited to false testimony concerning contacts with the Defence and third persons (including the accused), promises made in exchange for testimony, and the receipt of money intended to corruptly influence the witness.[138]

84. It is apparent, nonetheless, that the Trial Chamber found it impossible to place Mr. Bemba's contributions within the parameters of the above issues. When describing the basis for Mr. Bemba's culpability, the Chamber concluded that Mr. Bemba "gave direct instructions to the two co-perpetrators on what and how witnesses were expected to testify, at least implicitly also regarding the false testimony".[139] The Chamber did not specify that these 'implicit' instructions encompassed the above issues, and further relied on evidence that

[134]TJ,para.816. See also the vague language used at para.700.
[135] D21-9,ICC-01/05-01/13-T-42-CONF-ENG,p.20,lns.5-10; FTB,para.166.
[136]TJ,paras.123,293,305.
[137] ICC-01/05-01/13-749,para.64; ICC-01/05-01/13-T-10-CONF-ENG,p.5,lns.18-23.
[138]ICC-01/05-01/13-T-10-CONF-ENG,p.5,lns.18-23.
[139]TJ,para.734.

was directed to issues concerning the merits of the Main Case.[140] As a result, Mr. Bemba was convicted for contributions that were directed towards an uncharged objective of obtaining evidence on the merits of the Main case.

85. Before the trial commenced, the Chamber stated that "statements pertaining to the merits of the Main Case could perhaps have some relevance *in some contexts*, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony."[141] It did not, however, describe these contexts, or specify the link between them and the charges. This omission was problematic given that a general allegation of "pre-testimony witness coaching" did not feature in the charges, and the Chamber did not define what it meant by "coaching".

86. The Prosecution charges described "illicit coaching" as coaching that occurred "shortly before or after witnesses had been administered the solemn undertaking under Article 69(1) of the Statute and Rule 66 of the Rules" (i.e. after the cut-off point, and during testimony).[142] In turn, "coaching" was pleaded as a series of acts directed towards the procurement of false evidence.[143]

87. Mr. Bemba was nonetheless convicted in connection with instructions, which firstly, did not occur in close proximity to the witness's testimony,[144] and secondly, were to "testify according to a particular script concerning the merits of the Main Case, regardless of the truth or falsity of the information therein".[145] The term 'regardless' does not fulfil the requirement that it must have been "virtually certain" that Mr. Bemba's conduct would result in prohibited conduct in the charges (i.e. instructing witnesses to testify falsely). By incorporating the merits of the Main Case through the back door, whilst

[140] TJ,paras.506,568,592,604-606,652,653,686,688, 729,731,811,812,818,819,829,910, 928
[141] ICC-01/05-01/13-T-10-CONF-ENG,p.5,ln.24-p.6,ln.1.
[142] ICC-01/05-01/13-526-AnxB1-Red,para.22.
[143] At fn.40 of the DCC, the Prosecution relied upon a definition of coaching provided in (ICC-01/09-01/11-524,para.27), as "preparing the witness in a manner that involves improper influence upon the witness, intentionally exerted by counsel, with the view to rendering false evidence into testimony. See also para.40.
[144] TJ,para.729.
[145] TJ,para.704.

eliminating the key criterion of falsity (as set out in the charges, and confirmed by the Pre-Trial Chamber), the Chamber convicted Mr. Bemba on the basis of modified material facts, violating both Article 74(2), and the *mens rea* requirements of Article 30.

88. The Chamber further exceeded the scope of the charges by convicting Mr. Bemba on the basis of "implicit" rather than actual knowledge of illicit conduct.[146] The charges alleged that Mr. Bemba possessed *actual* knowledge as concerns both the pleaded Article 70 offences, and the alleged falsity of the evidence;[147] the notion of implicit knowledge was never pleaded in the charges, nor referred to in the Confirmation Decision. In the same manner that it is impossible to convict a defendant on the basis of constructive knowledge rather than actual knowledge without prior notice,[148] it was impermissible for the Chamber to lower the threshold for intent without (at the very least) putting the Defence on formal notice of such a possibility.[149]

89. Finally, the Chamber improperly convicted Mr. Bemba on the basis of incidents concerning witnesses, who were not designated as falling within the scope of the charges. Mr. Bemba was charged in connection with conduct directed towards 14 specific witnesses. Throughout the pre-trial phase, the Chamber described the parameters of the charges by reference to the 14 witnesses.[150] In line with these parameters, the Defence confined its submissions to allegations concerning these 14 witnesses.[151]

90. The Chamber nonetheless convicted Mr. Bemba in connection with conduct directed towards D-19,[152] and a person who never testified. From the context in which the Chamber relied on these findings (as evidence of intent, and as essential contributions to the common plan),[153] it is clear that the Chamber did not rely on these incidents to corroborate evidence concerning the 14 witnesses,

[146] TJ,para.818.
[147] ICC-01/05-01/13-526-AnxB1-Red2,paras.22,118-120,134-135,146-147.
[148] ICC-01/05-01/08-2324,paras.4-5; ICC-01/05-01/08-3343,para.57. Fry,pp.108-109.
[149] *Simba* AJ,para.77.
[150] ICC-01/05-01/13-947,para.19.
[151] ICC-01/05-01/13-1902-Corr2-Red2,para.143.
[152] TJ,para.741.
[153] TJ,paras.816,856.

but as a stand-alone basis for imputing responsibility to Mr. Bemba. This is further reflected by the Chamber's citation of the D-19 incident in its findings concerning the gravity of the offences in the Sentencing Judgment.[154]

91. D-19 was never called as a witness in this case. The Prosecution did not plead allegations concerning the content of the alleged calls with Mr. Bemba, or submit evidence concerning their content and context. It was also not alleged that D-19 testified falsely. In the absence of particulars in the charges, the Defence could not prepare a case in relation to the Chamber's eventual finding that Mr. Bemba directly and personally influenced D-19 as to the content of his testimony.[155] The finding that Mr. Bemba exercised direct and personal influence on witness testimony is also incompatible with the Pre-Trial Chamber's finding that "Mr. Bemba did not directly pay or coach the witnesses".[156] This is not just an *ultra vires* expansion of the charges, but a fundamental mutation, to the detriment of Mr. Bemba.

92. The above modifications, when considered in isolation or together, had the effect of radically transforming the nature of the case against Mr. Bemba. The Prosecution initiated a poorly pleaded, and evidentially unsubstantiated case as concerns Mr. Bemba. If the evidence in support of these allegations fell short at trial (which it clearly did), the Chamber should have acquitted Mr. Bemba.

2.3 Mr. Bemba's mens rea and actus reus do not meet the requisite threshold to convict him as a co-perpetrator

93. Even if the Appeals Chamber were to accept the Chamber's flawed evidential findings, these findings would not fulfil the legal requirements for co-perpetration, as a result of the Chamber's improper reliance on:

- The conduct of persons who were not members of the common plan;
- Contributions after the fact;
- Bad character evidence pertaining to a fictional scenario; and
- Uncorroborated neutral contributions.

[154] ICC-01/05-01/13-2137,paras.220,222,236.
[155] TJ,para.856
[156] ICC-01/05-01/13-749,para.102.

2.3.1 The Chamber erroneously inferred the existence of a common plan from the conduct of non-members

94. In determining that it could infer the existence of a common plan "from subsequent concerted action of co-perpetrators", the Chamber noted that "participation in the commission of the offence(s) without coordination with one's co-perpetrator(s) falls outside the scope of co-perpetration".[157] The Chamber nonetheless failed to apply this restriction to its evidential findings concerning the existence of the common plan.

95. Although the Chamber restricted the membership of the 'common plan' to Mr. Bemba, Mr. Kilolo and Mr. Mangenda, it inferred the existence of this plan from concerted action with persons who were not members of the common plan.[158] This was a reversible error of law. Whilst affirming that it is possible to infer the existence of a common plan from the conduct of co-perpetrators,[159] ICC jurisprudence has not extended this principle to the actions of non-members. Within the framework of joint criminal enterprise (JCE) liability, the ICTY has underlined that although it is possible to impute crimes that were committed by non-members to a JCE member, it must first be established that the crime was committed pursuant to the common criminal purpose.[160] The relevance of the conduct of non-JCE members is determined by reference to the common plan. Given this restriction, it would be impermissibly question-begging to infer the existence of the common purpose from the conduct of non-JCE members. It follows that concerted action with individuals who are neither co-perpetrators, nor agents controlled by one of the co-perpetrators, has no probative value concerning the common plan at stake, although it could establish the existence of a separate plan between the defendant and third party in question.[161]

[157] TJ,paras.65,66.
[158] TJ,para.682.
[159] ICC-01/04-01/07-717,paras.548,552; ICC-01/04-01/06-2842,paras.1043,1045,1131; ICC-01/09-01/11-373,paras.302–3; ICC-01/09-02/11-382-Red,paras.311,314, and 400. See also Cupido,pp.88-89.
[160] *Đorđević* AJ,para.70.
[161] ICC-01/04-01/07-3436-tENG,para.1630.

96. The impact of this error is illustrated by the Chamber's reliance on the individual actions of Mr. Babala, and concerted action between Mr. Bemba and Mr. Babala in order to infer the existence of a common plan to corruptly influence witnesses through payments.[162] Apart from D-57 and D-64, the Chamber found that communications between Mr. Babala and Mr. Bemba did not disclose a link between Mr. Babala and the corrupt influencing of a witnesses.[163] The Chamber nonetheless relied on the same communications to infer Mr. Bemba's participation in a common plan to corruptly influence all 14 witnesses through payments.[164] Apart from irrelevant evidence post-dating the offences, no other evidence is cited for this conclusion.

97. If the Chamber was unable to conclude, from these communications, that Mr. Babala was involved in the corrupt influencing of 12 of the 14 witnesses, then it defies logic that the Chamber could rely on the same communications as the exclusive basis for inferring Mr. Bemba's agreement to be part of a common plan to corruptly influence all 14 witnesses.[165] This logical dissonance leads to the inevitable conclusion that Mr. Bemba's agreement was confined to the licit aspects of the common plan.

98. In terms of Mr. Babala's involvement with D-64 and D-57, Mr. Babala was charged under Article 25(3)(c) not 3(d);[166] his conduct was directed to crimes not the execution of a common plan. If Mr. Babala was not a member of the common plan, and did not execute these payments pursuant to a common plan, then there is no basis for relaying on this conduct in order to infer the existence of the common plan in general or as concerns these witnesses.

99. This error further impacted on the Chamber's reliance on Mr. Bemba's communications with Mr. Babala in order to infer the existence of a common plan to conceal the existence of the plan through codes, or through the alleged misuse of the privileged line of Mr. Kilolo.[167] Mr. Kilolo was a member of the common plan, whereas Mr. Babala was not a member, or a person acting

[162] TJ,para.693.
[163] TJ,para.883-884.
[164]TJ,paras.693-698.
[165] TJ,paras.693-700.
[166] ICC-01/05-01/13-749,paras.36,51.
[167] TJ,paras.737-9

pursuant to the common plan. Mr. Bemba's communications with Mr. Babala – whether coded or concealed – thus have no relevance to the existence of a so-called common plan to conceal the common plan, or the charged offences themselves.

2.3.2 The Chamber erred in law by relying on conduct that post-dates the commission of the charged offences.

100. The Chamber's reliance, to a decisive extent, on *ex-post facto* contributions was incompatible with legal principles concerning co-perpetration, and international and domestic case law.

101. The notion of co-perpetration is based on the principle that each co-perpetrator must make an essential contribution to the realisation of the charged crime.[168] This contribution can be made "not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived."[169] It can be extrapolated from this that the contribution cannot occur after the crime was executed. It is also notionally impossible to characterise a contribution as being 'essential' to the realisation of the crime, if the crime has already been realised, without it.

102. In terms of non-essential contributions, the jurisprudence of the ICC and other international courts confirms that *ex post facto* contributions only provide a basis for establishing criminal responsibility when based on a *prior agreement* between the defendant and the principal perpetrator.[170] This aligns with domestic jurisdictions, which generally criminalise contributions after the fact as separate crimes, due to the absence of a causal link between the conduct and the realisation of the crime:[171] '[a]ccessories after the fact do not help or influence the principal in his commission of wrongdoing—they make no contribution to the wrong itself'.[172]

[168]ICC-01/04-01/06-3121-Red,para.7.
[169] *Ibid.*
[170]ICC-01/04-01/10-465-Red,para.287; *Blagojević & Jokić* TJ; *Limaj* TJ,para.662.
[171] Van Sliedregt,pp.119-120,126-127.
[172] Jackson,p.11.

103. The Chamber found that it was necessary to establish that the co-perpetrators possessed mutual awareness that the common plan "would result" in the charged offences, and "perform[ed] their actions with the purposeful will (intent) to bring about the material elements of the crimes (…)".[173]

104. The terms 'would' and 'bring' refer to future acts. In line with this, mutual awareness must, of necessity, exist before, or at the time that the crime was committed. Evidence of post-facto knowledge does not satisfy the requirement of knowing and intentional association with the common plan. Remedial action does not in itself reflect a guilty mind since it cannot be excluded that an accused associated himself with such actions because of information (or misinformation) that was discovered after the commission of the initial offences.[174]

105. The Chamber failed to acknowledge these limitations, and instead, relied heavily on Mr. Bemba alleged involvement in obstructing the Prosecution's Article 70 investigation in order to prove his association and intent concerning the initial common plan.[175] This alleged obstruction was never charged as a separate Article 70(1)(c) offence, nor was it confirmed to be part of the initial common plan. The case was rather that this was a *faux scenario* that only came into play after Mr. Mangenda allegedly learned of the existence of an Article 70 investigation.[176] Knowledge and conduct concerning these remedial actions therefore falls outside the scope of the confirmed common plan.

106. This error vitiated the Chamber's findings regarding Mr. Bemba.[177] Mr. Bemba's participation on the concealment of crimes is relied upon by the Chamber to support its findings that Mr. Bemba possessed intent (as opposed to knowledge) regarding the common plan, and charged Article 70 offences.[178] Since the findings concerning Mr. Bemba's interactions with Mr. Babala are also irrelevant, it follows that Mr. Bemba's conviction as a co-perpetrator cannot stand.

[173] TJ,para.70.
[174] *Infra*,Paras.283-289.
[175] TJ,paras.773-774,776,783-787,794-796,801,803,812-813,815-817,819-820.
[176] ICC-01/05-01/13-749,para.69.
[177] Anx.F, *faux scenario* evidence is highlighted in yellow.
[178] TJ,paras.699,818-819,928.

2.3.3 The Chamber's erroneous reliance on bad character evidence

107. The Chamber committed a manifest error of law by relying on "bad character evidence" as concerns uncharged incidents which:

- Posted-dated the charges or were not established to the threshold of beyond reasonable doubt; or
- Were triggered by a fundamental mistake of fact, and based on an entirely fictitious scenario.

108. These errors undermined the Chamber's reliance on allegations concerning D-19, Bravo, and the "remedial measures" in order to infer intent, and conduct on the part of Mr. Bemba.

109. Although the allegations in question, if accepted, might reflect poorly on the character of the defendants, "bad character evidence" should be treated with caution. The ICTR and ICTY have found that the prejudicial value of such evidence outweighs its probative value.[179] Although similar fact evidence has been allowed, it has been restricted to contextual elements rather than matters pertaining to the accused's personal conduct,[180] the exception being if it has been led to rebut a positive Defence (i.e. that the accused is of good character).

110. Even if the ICC were to accept such a category of evidence, it can only be employed to show a *propensity* to commit a crime of a similar nature. It has no relevance as concerns crimes that have already been committed.[181] Although theoretically possible that post-offence conduct could be relevant to an innate psychological condition, to otherwise apply such evidence to crimes that have already occurred suggests that the individuals are inherently bad: that is, if they are amenable to committing crimes now, it is because they have always been of a criminal mind. This is a proposition that falls far outside the notions of a humane justice system.

[179] *Bagosora* TC Decision 18/09/2003,paras.12,17,35; *Kupreškić* TC Decision 17/02/1999.
[180] Rule 93(A),ICTY RPE.
[181] *Strugar* TC Decision 22/01/2004,pp.2,4 (evidence of events outside the indictment was admissible to show the *mens rea* of the Accused, based upon prior conduct in similar circumstances); See *R v Mitchell* references to 'previous bad character'(para.7), 'previous misconduct'(para.16), 'previous convictions'(para.45), 'previous allegations'(para.53).

111. Bad character evidence also requires the Chamber to establish the overall illicit nature of such behaviour, to the standard of beyond reasonable doubt.[182] This is simply not possible as concerns a scenario in which the 'bad' facts never eventuated, or there is no evidence that they did. This is consistent with domestic case law that affirms that a defendant cannot be held to account for engaging in fantasies regarding criminal conduct.[183]

112. In relation to the alleged multi-party call with D-19 in October 2012, the Chamber clearly uses this incident to ascribe illicit intention to Mr. Bemba as concerns what the Chamber describes as Mr. Bemba's subsequent communication with D-55.[184] There were, however, no overlapping contacts with D-19 on this date.[185] As concerns the alleged January 2013 call, this post-dates the communication with D-55, and has no relevance as concerns Mr. Bemba's state of mind at the time of the call with D-55.

113. Regarding *Bravo* (a potential witness), the Chamber relied on untested hearsay deriving from a conversation between Mr. Mangenda and Mr. Kilolo, to conclude that Mr. Bemba knew and approved of illicit coaching, and controlled the presentation of evidence.[186] This allegation was not set out in the DCC, which is grounds for reversal of this finding, and related conclusions. The conversation also has no probative value as concerns Mr. Bemba. Mr. Mangenda comments that Mr. Bemba should be informed that it might not be helpful to call Bravo as a witness, not that he had, or would inform Mr. Bemba. It is entirely unreasonable to rely on a hypothetical response in a hypothetical conversation as concerns an uncharged incident, as evidence of individual responsibility.

114. The Chamber also found that Mr. Bemba, Mr. Kilolo and Mr. Mangenda agreed to contact Defence witnesses, who had spoken with the Prosecution, in order to convince them "to terminate their cooperation with the Prosecution".[187]

[182] *R v Mitchell*,paras.43-44.
[183] FTB,fn.279.
[184] TJ,para.741.
[185] Anx.G.
[186] TJ,paras.714-715.
[187] TJ,para.801.

The Chamber accepted that the Prosecution had not actually spoken to the witnesses,[188] and that as such, there was nothing to terminate. There was also no evidence that attempts were made to convince Defence witnesses not to cooperate with the Prosecution.[189]

115. Notwithstanding the above, the Chamber averred that the question as to whether this 'plan' was fictitious was irrelevant, "since the above-mentioned intercepts prove that the three co-perpetrators clearly intended to take measures to conceal their prior activities."[190] This was a reversible error of law. As argued by the Defence, pursuant to Article 30 in conjunction with Article 32, it is not permissible to rely on a person's awareness as to a specific circumstance or consequence, if this awareness was generated through false information.[191] A state of mind that has been spawned through the efforts of other individuals also has no probative value as concerns the accused's state of mind before it was contaminated by such efforts.[192]

2.3.4 The Chamber's findings concerning Mr. Bemba "essential contributions" are invalidated by its reliance on neutral contributions

116. The Chamber ultimately found that Mr. Bemba:[193]

> (*i)(..)knew that it was virtually certain that the implementation of the common plan through the co-perpetrators' concerted actions would bring about the material elements of the offences, and (ii)he carried out his own contributions nonetheless.*

117. The Chamber erred in law by failing to proceed to the necessary third step: that Mr. Bemba knew that <u>his</u> (as opposed to his co-perpetrators') conduct constituted an essential contribution to the material elements of the offences. As a result, Mr. Bemba was erroneously convicted for neutral contributions; that is, conduct, which was not *per se* illicit, and which was not corroborated by

[188]TJ,fn.1829.
[189]ICC-01/05-01/13-T-21-CONF-ENG,p.49,lns.22-25; T-23-Conf,p.18.
[190]TJ,para.800.
[191]FTB,para.88; *R v GH*.
[192]Anx.C; *Shannon v UK*,p.11; *Nottingham City Council v. Amin*; *Council for the Regulation of Healthcare Professionals v. GMC*.
[193] TJ,para.807.

independent evidence that the accused engaged in this conduct with the intent to fulfil the material elements of the offences.[194]

118. As elaborated by Judge Gurmendi, it is necessary to establish sufficient "normative and causal links between the contribution and the crime", in order to exclude "neutral contributions".[195] This normative and causal link is cut in circumstances in which the Chamber has relied on non-licit conduct in order to establish both the *actus reus* and *mens rea* of the accused.

119. Even in jurisdictions where criminal responsibility for neutral acts is not excluded, criminal responsibility is restricted by the following caveats:

- It is generally limited to aiding, i.e. neutral acts generally can not constitute co-perpetration, which requires a closer connection to the crimes charged;[196]
- There are objective and subjective limitations:
    a. The neutral acts must be causally connected to the crimes charged; and
    b. It must be established that the accused engaged in this conduct with a criminal mind.[197]

120. The Chamber failed to adhere to these restrictions, as reflected by the fact that the Chamber's conclusions regarding Mr. Bemba's 'essential contribution' were premised on the following 'contributions':

- His approval of three questions that Mr. Kilolo proposed to put to D-15 during his re-examination, and suggestion that an issue be addressed in the closing brief ;[198]
- Providing information concerning the 'Defence case' to be put to potential witnesses during investigations;[199]

[194] ICC-01/04-01/10-465-Red,para.132; ICC-01/09-01/11-2027-Red-Corr (Judge Fremr),paras.135-136.
[195] ICC-01/04-01/10-514,(Separate Opinion,para.12).
[196] BGH 20/09/1999; The Hague, Appeals, 09/05/2007,para.7 and 10/03/2008,para.9.3; *Stanišić and Simatović* AJ,paras.94-109.
[197] BGH 20/09/1999; BGH 01/08/2000. **Croatia**, AIDP(2017), Anx.M,pp.11-12; **Italy**, AIDP(2017), Anx.M,p.48; **Russia**, AIDP(2017), Anx.M,pp.94-95; **Slovenia**, AIDP(2017), Anx.M, p.126-127.
[198] TJ,paras.809-810. Infra, paras.232-241.
[199] TJ,para.811.

- Authorisation of payments, which apart from those concerning D-57 and D-64, were not found to have an illicit purpose;[200] and
- Thanking a witness for testifying.[201]

121. Viewed through the lens of the above international and domestic restrictions, it was unacceptable to penalise Mr. Bemba for conduct that was not only not prohibited, but either protected by Article 67(1) of the Statute, or encouraged by the Trial Chamber and VWU (thanking witnesses).[202]

122. The Chamber also erroneously relied on conduct that had no intentional impact on the realisation of the specific charged offences. For example, the Chamber established no intended link between Mr. Bemba thanking D-55 for testifying, and D-55 providing false testimony about contacts or payments. The Chamber also established no nexus between Mr. Kilolo's alleged coaching of D-15 and D-54, and conversations between Mr. Bemba and Mr. Kilolo that occurred subsequently, and which did not address issues relating to the alleged false testimony. There was also no nexus between Mr. Bemba's alleged communication with Mr. Babala on Mr. Kilolo's phone, and any of the charged incidents.[203] The impact of Mr. Bemba's contributions to the realisation of the offences must also be considered in light of his geographic remoteness from the witnesses, and the *in situ* activities of his Defence.[204] Given that the Chamber's conviction of Mr. Bemba as a co-perpetrator rests on the Chamber's erroneous reliance on these contributions, the conviction itself should be overturned.

2.4 The Chamber relied on an erroneous legal standard concerning Mr. Bemba's knowledge

123. The Chamber acknowledged that there was no direct evidence that Mr. Bemba directed or instructed the Defence to call or elicit false testimony regarding the number of contacts with the Defence, receipt of payments, or the

[200]TJ,para.813.
[201]TJ,para.814.
[202]ICC-01/05-01/13-1902-Corr2-Red2,paras.146-147.
[203]Solid inferences cannot be drawn from the existence of contacts between JCE members, unless there is evidence concerning the content of contacts: *Krstić* AJ,paras.84-98.
[204]*Perišić* AJ,para.40.

witness's acquaintance with certain persons.[205] The Chamber nonetheless inferred that "Mr Bemba at least *implicitly* knew about these instructions to witnesses and expected Mr Kilolo to give them".[206] "Implicit knowledge" is not a term of legal art or recognised legal standard, and it is an improper and insufficient basis on which to build a conviction.

124. The notion of "implicit knowledge" as concerns both its plain meaning and the usage in cognitive sciences concerns not only how a person becomes aware of certain issues, but also the quality of this knowledge. Implicit knowledge is also described as tacit knowledge, according to which "a subject is usually unaware of his or her own states of tacit knowledge and, indeed, unable to become aware of them".[207] In contrast to wilful blindness, according to which the accused can, but chooses not to know, implicit knowledge assumes that the accused is unable to ascertain and appreciate the full context of the situation. It is therefore akin to an innate presentiment, which stands in stark contrast to the requirement that an accused must be "virtually certain" as concerns the illicit consequences of his conduct. It is also highly prejudicial, and legally incorrect to employ a mental standard that derives from the Chamber's assessment of the accused's hidden mental processes, rather than objective evidence and criteria.[208] The use of this threshold creates the inevitable impression that the Chamber's finding was based on Chamber's own suspicion, rather than an objective appreciation of the facts.

125. The fact that the Chamber was relying on a standard that fell short of actual knowledge is also apparent from the Chamber's reliance on the following, tangential and speculative elements:[209]

- The concealment of contacts and payments was critical to the success of the plan to illicitly interfere with witnesses;
- Mr. Bemba was in court when the witnesses testified, and afterwards, apparently expressed his satisfaction with their overall testimony;
- When informed of an Article 70 investigation, Mr. Bemba observed that Mr. Kilolo could deny the allegations;

[205] TJ,para.818.
[206] TJ,para.818.
[207] Davies,p.9.
[208] *Vasiljević* AJ,para.131; *Krstić* AJ,para.119; *Blaškić* AJ,para.521,568.
[209] TJ,para.819.

- Mr. Bemba approved "at least tacitly" instructions on these topics.

126. The first aspect is an illogical, non-sequitur. It is impossible to conclude that Mr. Bemba must have known that there was a criminal plan to conceal contacts and payments, because otherwise the common plan to conceal contacts and payments would not succeed. It is, in any case, a proposition that rests on speculation concerning assumed, rather than actual knowledge.

127. The second aspect is again predicated on an evidentially unfounded assumption that because Mr. Bemba was in court, he must have heard witnesses testify on such matters, and realised their testimony was false. Apart from the fact that the videos reflect the contrary,[210] the Chamber does not cite any evidence that establishes that Mr. Bemba actually followed these specific aspects of the witnesses' testimonies (and was aware that the witnesses had provided intentionally false, as opposed to mistaken testimony). By the same token, in the absence of evidence that Mr. Bemba was aware that the witnesses lied in relation to these specific issues or had provided substantially untruthful testimony,[211] his satisfaction with their overall testimony is irrelevant.

128. Regarding the third aspect, the Chamber misconstrued Mr. Bemba's comment concerning denial of the allegations.[212] It does not, in any case, reflect his state of mind at the time that the charged offences occurred. Finally, the fourth aspect is based on an impermissibly circular inference.[213] Of further note, whereas tacit approval might be relevant to a charge of aiding and abetting, it is an insufficient evidential standard for the purpose of co-perpetration, particularly if the defendant is not present at *locus* of the offence (when the witnesses were paid or coached).

[210] In Main case videos, Mr. Bemba often appears unfocussed or tired at the point where these peripheral issues were discussed:CAR-D04-PPPP-0003,at 10:55:15-10:55:17; CAR-D04-PPPP-0013, at 12:01:20-12:01:23; CAR-D04-PPPP-0023,at 16:05:01-16:05:07; CAR-D04-PPPP-0026,at 10:10:22-10:10:24; CAR-D04-PPPP-0057, 10:17:04-10:17:08; CAR-D04-PPPP-0057, at 10:09:05-10:09:12; CAR-D04-PPPP-0064, at 09:22:08-09:22:12; CAR-D04-PPPP-0064, at 09:27:31-09:27:50; CAR-D04-PPPP-0055, at 12:39:10-12:39:25.
[210] CAR-D04-PPPP-0055, at 12:39:10-12:39:25.
[211] FTB,para.118.
[212] *Infra*,Paras.285,287.
[213] *Infra*,Para.254.

129. In sum, the above elements do not establish actual knowledge, but give expression to a broad "might have known" standard, which is less than negligence. The key findings concerning Mr. Bemba's knowledge of false testimony and corrupt influence as concerns each witness falls far short of the threshold required by Article 30 of the Statute, and must therefore be overturned.

2.5 The Chamber erred in law by failing to enter specific evidential findings as concerns Mr. Bemba's mens rea and actus reus for each charged offences

130. Whereas the Chamber found that Mr. Bemba was a member of the common plan and made contributions to this plan, [214] the Chamber erred in law by failing to enter findings concerning Mr. Bemba's intentional contribution to the realisation of each charged offence.

131. Liability theories, such as the "joint control of the crime theory", must be applied and interpreted within the framework of Articles 25(3) and 30 of the Statute:[215] a theory cannot lessen the evidential burden of the Prosecution,[216] or eliminate the need to establish that the accused intended to commit specific crimes, and made culpable contributions to these crimes.[217] For these reasons, the joint control of the crime theory presupposes that the accused exercised control over specific crimes: "the perpetrators of a *crime* are those who control *its* commission and who are aware of the factual circumstances allowing them to exert such control."[218] The references to "the crime", and "the offence" in the Court's interpretation of co-perpetration express the notion that control is linked to the *crime* specifically, not the *common plan* generally. An accused cannot be convicted for mere membership of an organisation, or his association with a general criminal plan.[219]

132. As stressed by Trial Chamber II in relation to Article 25(3)(d):[220]

[214] TJ,para.804.
[215] ICC-01/04-01/06-3121-Red,para.470.
[216] *Kordić* TJ,para.218.
[217] As reflected by Art.25's repetition of the phrase "such a crime"(English), "tel crime"(French).
[218] ICC-01/04-01/07-3436-tENG,para.1396.
[219] *Ojdanić* AC Decision,para.25; ICC-01/04-02/12-4,paras.34-35.
[220] ICC-01/04-01/07-3436-tENG,para.1632.

> *it is paramount that the accused's contribution be connected to the commission of the crime and not solely to the activities of the group in a general sense. Indeed, a significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt.*

133. The Chamber further held that:[221]

> *the accused will not be considered responsible for all of the crimes which form part of the common purpose, but only for those to whose commission he or she contributed.*

134. Although these principles required the Chamber to establish Mr. Bemba's intent and contribution as concerns each charged offence, the Judgment only included limited findings in relation to a handful of witnesses. As concerns illicit coaching, the Chamber's findings are limited to findings that Mr. Bemba knew (or must have known) that Mr. Kilolo was engaged in such coaching as concerns D-25, D-54, and D-15.[222] Regarding "illicit payments", the Chamber found (incorrectly) that Mr. Bemba knew that illicit payments had, or would be made to D-64 and D-57 (but make no findings for the other witnesses). In terms of the introduction of false evidence, apart from the conclusions pertaining to D-55, the Judgment cites no specific evidential findings that Mr. Bemba had actual knowledge that specific witnesses would provide false evidence, if called to testify.

135. In lieu of evidence of involvement in specific offences, the Chamber inferred from the above that Mr. Bemba must have been a member of the common plan, and on that basis, imputed responsibility to Mr. Bemba for each charged offence.

136. This error is reflected by the finding that "Mr. Bemba's intent to bring about the material elements of the *offences* is evidenced by his planning and organizing activities relating to the *common plan*".[223] The Chamber clearly extrapolated intent concerning specific offences, from his general involvement in a broadly defined, non-criminal common plan.

[221] ICC-01/04-01/07-3436-tENG,para.1619.
[222]D-15:paras.168-169,568,592,729,809-810,829,866; D-25:495,843; D-54:171-172,601,604-606,653,686-687,729.
[223]TJ,para.817.

137. Given this clear legal error, the Judgment should be reversed as concerns each offence, for which the Chamber failed to substantiate Mr. Bemba's individual responsibility.

2.6 The Chamber's errors concerning the 'common plan' vitiate its findings regarding solicitation

138. The Chamber failed to address the inadequate manner in which the Prosecution pleaded its charge that Mr. Bemba solicited the false testimony of witnesses, in particular, as concerns the Prosecutor's failure to delineate the conduct pertaining to solicitation, as opposed to co-perpetration.[224]

139. The Chamber also failed to acknowledge the fundamental contradiction that whereas solicitation requires direct influence, the Pre-Trial Chamber found on the one hand, that "by virtue of his detention Mr. Bemba did not directly pay or coach the witnesses",[225] and on the other, that the material facts did not support a finding that Mr. Bemba acted through another person.[226] This contradiction is, rather, replicated in the nonsensical finding that Mr. Bemba directly influenced the witnesses, by acting through other persons to achieve explicit and "implicit consequences".[227] Solicitation requires a direct causal nexus between the defendant's conduct, and the specific crimes in question.[228] This nexus is clearly not fulfilled through findings that the accused 'implicitly knew'[229] that his 'tacit approval'[230] of the actions of other persons, would lead to 'implicit consequences'.[231]

140. The Chamber's conviction of Mr. Bemba for solicitation also derived from its factual findings regarding his membership of, and contribution to the common plan.[232] It is therefore contaminated by the same errors that apply to its

[224] FTB,paras.17-23,43-45. Cf *Blaškić* AJ,para.213.
[225] ICC-01/05-01/13-749,para.102.
[226] ICC-01/05-01/13-749,paras.36,51.
[227] TJ,para.932.
[228] Again reflected by phrase "such a crime",Art.25(3)(b); *Ndindabahizi* AJ,paras.116-117.
[229] TJ,para.818.
[230] TJ,para.819.
[231] TJ,para.932.
[232] TJ,para.853.

definition and application of common plan precepts.[233] The Chamber's exclusive reliance on common plan findings to substantiate the elements of solicitation also gives rise to the appearance that Mr. Bemba has been convicted for either soliciting a common plan, or a common plan to solicit, neither of which are permissible.[234]

GROUND THREE

The Chamber Based the Conviction, to a Decisive Level, on Privileged and Illegally Collected Evidence

3.1 Mr. Bemba's right to privacy and confidentiality was violated through the collection of detention unit materials

141. The Trial Chamber's conclusion that Mr. Bemba's rights were not violated through the collection of detention unit recordings and logs is invalidated as a result of its reliance on the following flawed conclusions:

- The law applied by the Single Judge was sufficiently foreseeable and accessible; [235]
- The Single Judge applied a reasonable suspicion threshold; and
- The Defence failed to establish that the Prosecution could have obtained the recordings through other reasonable measures.[236]

142. Regarding the first issue, the Trial Chamber found that Article 57(3)(a) in combination with Regulation 100(3) of the Regulations of the Court (RoC) and Regulations 174 and 175 of the Regulations of the Registry (RoR), constituted a sufficiently clear and detailed legal basis for the measures taken.[237] These were not, however, the legal provisions relied upon by the Single Judge. Rather, the Single Judge jettisoned the specific regime for detention monitoring set out in these regulations, and relied only upon Article 57(3)(a).[238]

[233] See Ground 2.
[234] *Kvočka* AJ,para.91; *Mpambara* TJ,para.37.
[235] ICC-01/05-01/13-1432,para.13.
[236] ICC-01/05-01/13-1432,para.16.
[237] ICC-01/05-01/13-1432,para.15.
[238] ICC-01/05-46,p.3 (citing legal basis of request),paras.8-9. The Registry (and implicitly the Presidency) affirmed that the recordings were provided pursuant to Art.57(3)(a), not Regulation 175: ICC-RoR221-03/14-3,para.12.

143. Apart from the fact that the Trial Chamber's finding is invalidated by its mistake, its finding that the quality of the law was sufficient by virtue of the detail in Regulations 174 and 175 confirmed that the Article 57(3)(a) alone did not offer sufficient detail and protections. Article 57(3)(a) sets out no criteria concerning its evidential threshold, the triggering criteria, and the scope of surveillance that can be ordered.[239] Moreover, when abandoning the legal safeguards set out in the RoC and RoR, the Single Judge failed to fill this lacuna with specific guidelines or balancing criteria.[240] The need for such detail and protections was of heightened importance given that the Single Judge had, by way of an *ex parte* decision, adopted a course of action that departed from precedents, which addressed comparable scenarios through the monitoring provisions in the RoC and RoR.[241]

144. Regarding the evidential threshold applied by the Single Judge, the Trial Chamber once again misconstrued the Single Judge's decision. Far from applying the reasonable suspicion standard, the Single Judge conceded that the Prosecution had yet to meet this threshold, as reflected in his observation that:[242]

> *The very premise of the Prosecutor's Request–i.e., the fact that the Prosecutor needed the assistance of the Chamber in accessing information–shows that the [OTP], whilst working on an investigative scenario, has not yet come to a determination as to whether there are reasonable grounds to believe that an offence within the context of article 70 has indeed been committed.*

145. Given that the 'reasonable suspicion' standard is equivalent to the reasonable grounds to believe threshold,[243] the Trial Chamber's finding that the Single Judge applied, and adhered to the appropriate standard is unsustainable.

146. The Trial Chamber's conclusion that the Single Judge had "apparently"[244] applied the correct standard also suggests that the Chamber did not actually verify whether the Single Judge had correctly applied this standard to the

[239] Cf *Šantare and Labaznikovs v. Latvia*,para.53; *Kruslin v. France*; *Wisse v. France*.
[240] *Dragojević v. Croatia*,paras.94-102.
[241] ICC-01/04-01/07-1243Conf-Exp-tENG; ICC-01/05-01/08-310.
[242] ICC-01/05-50,para.9.
[243] ICC-02/05-01/09-73,para.31; ICC-01/05-01/08-14-tENG,para.24.
[244] ICC-01/05-01/13-1432,paras.16.

information placed before him. The Single Judge clearly did not, as evidenced by his reliance on:[245]

- Information from an anonymous informant that did not concern Mr. Bemba himself;[246]
- Privileged information[247] collected illegally from Western Union,[248] relating to payments that did not originate from Mr. Bemba, or otherwise concern Mr. Bemba himself; and
- A bald assertion that the Prosecution had "reliable information that the Accused may be using the Detention Centre telephone system to contact supporters, providing him with another means to further the bribery scheme," that fell under Article 54(3)(e).[249]

147. Such vague, unsubstantiated allegations fail to meet the requirement that covert surveillance must be based on evidence supporting the existence of a reasonable suspicion that the target is involved in serious criminal activity.[250] The Single Judge was also required to make his own assessment as to whether the evidential threshold was met, rather than relying on assertions from the Prosecution (particularly those falling under Article 54(3)(e)).[251] Indicia that the defendant misused the privileged telephone at the detention unit are also not sufficient to assume that the accused also offended the administration of justice.[252]

148. The Trial Chamber's finding that the Defence had failed to establish whether "any other reasonable measure was available in order to obtain such information", [253] was also factually incorrect. The Defence had cited precedent, which addressed similar situations through less intrusive means. [254] In any case,

[245] ICC-01/05-44-Conf-Red2,para.3
[246] Cf ICC-01/04-02/06-1817-Red,para.46.
[247] Financial records are protected by legal privilege, and privileges and immunities, *Villa-Nova v. Portugal*; ICC-01/05-01/13-1941,para.50-58.
[248] CAR-OTP-0084-0039 at 0042,para.19, CAR-OTP-0082-1950, which affirms that the Austrian authorities did not transmit the judicially approved records to the Prosecution until June 2013 (i.e. after the submission of ICC-01/05-44-Conf-Red2).
[249]ICC-01/05-44-Conf-Red2,fn.20
[250] *Iordachi v Moldova*,para.51; CoE, Res.2045,paras.19-19.1-19.2.
[251] *Šešelj* President's Decision 19/10/2006; *Kolesnichenko v. Russia*,para.32, *Nagla v. Latvia*,para.94; *Misan v. Russia*,paras.56-57; *Smirnov v. Russia*,para.44.
[252] *Chahal v. UK*,p.4; FTB,paras.160-161.
[253] ICC-01/05-01/13-1432,para.16.
[254] ICC-01/05-01/13-1199-Conf,paras.62-67,74,80-82.

since the entity that implemented the surveillance bore the burden of proving that it was necessary and proportionate,[255] the Single Judge's decision was invalidated through his failure to consider and apply less instructive measures that were available, such as the transmission of transcripts after prior judicial vetting as to relevance and redactions. [256]

149. The Trial Chamber's finding also put the cart before the horse: rather than faulting the Defence for failing to establish alternative measures, the Chamber should have first considered whether it was necessary to grant such broad and unfettered access to the recordings. This clearly was not the case, as reflected by the fact that the Prosecution was authorised to access items, which the Prosecution had not requested access to, or otherwise argued, were necessary for its investigations. The Single Judge also did not justify why it was necessary to exceed the terms of the Prosecutor's request, nor did he describe the nexus between such broad categories of information, and the exigencies of the Prosecutor's investigation.

150. Apart from a vague benediction that the Prosecution could access recordings that were relevant to its investigation, the Single Judge provided no clarification as to which criteria should determine 'relevance', and later confirmed that the right to determine relevance had been arrogated to the Prosecution.[257] This approach failed to satisfy the legal requirement that covert surveillance should be restricted to situations of "strict necessity", and accompanied by effective and rigorous scrutiny over the duration, scope and necessity of such measures.[258] Moreover, whereas precautions should be taken when communicating data to other parties,[259] and mechanisms should be established to exclude irrelevant communications,[260] the Single Judge engaged in no balancing exercise between the interests of the Prosecution as opposed to the rights of Mr. Bemba, exercised no judicial oversight as concerns the specific information transmitted to the Prosecution, and applied no safeguards as concerns the redaction of private or confidential information.

[255] *Chahal v. UK*,para.136; *Džinić v. Croatia*.
[256] *Kopp v. Switzerland*,paras.74-75; ICC-01/04-169,para.2; ICC-01/04-01/06-1444-Anx,para.6 concerning limits to discretionary powers.
[257] ICC-01/05-50,para.8.
[258] *Dragojević v. Croatia*,paras.83-84,94. See also ICC-01/04-01/07-2187-tENG-Red,para.59.
[259] *Weber v Germany*,para.95.
[260] CoE(96/C 329/01).

151. The Prosecution also called no witnesses and tendered no evidence to attest to the selection process or the procedures adopted at this juncture to guard against conflicts or improper access. Moreover, whereas the ECHR has found that the specific procedures used by the authorities to collect, examine and store data (including technical requirements) should be set out in a transparent manner that is publicly accessible,[261] this information has never been disclosed to the Defence. The Prosecution also called no one from the detention unit, or persons engaged in the recording of communications, to testify in relation to the procedures that were employed to log and record conversations.

152. Given the importance of effective safeguards in light of the scope of information disclosed to the Prosecution, it was also a reversible legal error for Trial Chamber VII to simply accept the Prosecution's unsworn assertion that its Main Case team had not accessed detention recordings from Mr. Mangenda, particularly since this assumption was demonstrably incorrect.[262]

153. Although individuals affected by covert surveillance must be afforded an effective opportunity to challenge the measures, and obtain a remedy, as soon as it is possible to do so without compromising the investigations,[263] the Trial Chamber declined to meaningfully address arguments that this right had been withheld from Mr. Bemba.[264] At the same time, rather than considering the impact on the integrity of the proceedings, the Chamber applied, without further analysis, Trial Chamber III decisions, in which Trial Chamber III stated that it had no jurisdiction to adjudicate the legality of the Single Judge's actions.[265] There has thus been a circular pattern of denial, with each Chamber tossing the issue to the other, to the complete detriment of Mr. Bemba's right to an effective remedy.

154. The above series of errors, individually or cumulatively, invalidated the Chamber's finding that the first limb of Article 69(7) was not fulfilled.

[261] *Zakharov v. Russia*,paras.231,241.
[262] ICC-01/05-01/13-1472,fn.16, ICC-01/05-01/13-1472-AnxA
[263] *Zakharov*,para.234.
[264] ICC-01/05-01/13-1199-Conf,paras.93-95.
[265] ICC-01/05-01/08-3059,paras.15-16,19.

3.2 The Chamber applied an erroneous definition of privilege, and its exception

155. Both the Trial Chamber, and the Single Judge found that any materials that were relevant to the Article 70 allegations, and then charges, would fall outside the scope of privilege.[266] The fact that both Single Judge and the Trial Chamber were compelled to weed out irrelevant materials proves that the national authorities must have seized and transmitted materials that exceeded the scope of the Prosecution's lawful investigative needs.[267] Further indicia that the national procedures were an empty formality will be elaborated in the next section.

156. The adopted test of relevance was also inconsistent with the Statute, Rules, and international legal precedents, and allowed the Prosecution to access, and rely on information that should have been excluded pursuant to Article 69(5).

157. Unlike other courts, the ICC Statute and Rules do not provide for an explicit exception to privilege. This lacuna militated against granting the Prosecution request on an *ex parte* basis. But, even if an exception were to be read by implication to cover communications that do not fall within "the context of a professional relationship" between counsel and client, such an implied exception should have been construed narrowly, so as not to swallow the rule. In contrast, the test of 'relevance to the Prosecution" created a presumption of access, which undermined the very purpose of of Article 67(1)(b). The broadness of this exception was reflected by the Single Judge's decision to transmit privileged materials seized from Mr. Bemba's cell, including draft witness questionnaires, simply because they "might assist" the Prosecution.[268]

158. Linking the exception to the Prosecution's unknown, and evolving investigative activities, created an unacceptable level of unpredictability, and uncertainty. Privilege should have an innate quality, as its purpose is to encourage defendants to seek free and unfettered legal advice in confidence.[269] In the same manner that individuals have the right to know the type of circumstances in which certain communications could be surveilled, counsel

[266]ICC-01/05-01/13-947,paras.17-18; ICC-01/05-01/13-408,pp.3-6.
[267] ICC-01/05-01/13-908,paras.21-24.
[268] ICC-01/05-01/13-408,pp.3-6.
[269] *R. v. Derby Magistrates' Court*,para.58.

and defendants must be able to reliably predict whether their communications will be protected.

159. It is also impossible to read a test of relevance into the text of Rule 73(1). Information concerning the defendant's responsibility and the credibility of Defence witnesses is likely to be 'relevant' to the Prosecution's Article 70 investigations. But the same type of information also falls within the scope of the professional Defence relationship. Accordingly, if 'relevance' to the Prosecution is used as the litmus test for excluding privilege, it would mean that an accused could never seek advice on issues concerning the credibility of witnesses, or matters that might incriminate him without forfeiting both privilege, and the protection against self-incrimination. The 'relevance' standard prioritises the Prosecution's truth-finding functions over the defendant's right to seek legal advice in confidence, whereas the opposite should hold true, since "the doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure".[270]

160. Although other international courts and domestic jurisdictions do not consider privilege absolute, they have nonetheless imposed stringent limitations as concerns both the circumstances in which privilege can be lifted, and the extent to which it can be lifted. The SCSL, for example, has affirmed that privilege can be lifted in connection with communications that were in furtherance of a crime, or if there was prima facie evidence that the communications were intended to promote fraudulent activity.[271]

161. At the STL, the President underlined that legal privilege was an essential component of the right to a fair trial, and that as such, restrictions should only be imposed when strictly necessary to do so, and in a proportionate manner.[272] The President also cited with approval *Lanz v. Austria*,[273] an ECHR case which found that the surveillance of contacts between a detained suspect and his Counsel had fundamentally compromised the detainee's right to a fair trial, and his related right to effective legal representation.[274] The ECHR underscored in this case that such communications should only be monitored if there are "very

[270] *A. v. B.*,para.33, cited in *Bangura* Amicus Brief 28/06/2012,para.9.
[271] *Bangura* TC Decision 28/06/2012.
[272] STL President's Order 21/04/2009,paras.16-20.
[273] STL President's Order 21/04/2009,fn.13.
[274] *Lanz v. Austria*,para.50.

weighty grounds" to do so;[275] the risk that a detainee might contact Defence witnesses or collude with them, would not satisfy this threshold.[276] The ECHR further explained that if the suspect was held in pre-trial detention due to the risk of collusion or witness interference (as with the case for Mr. Bemba),[277] reasons other than collusion/interference with witnesses would be required to justify the surveillance of privileged communications.[278]

162. There is no uniform domestic practice concerning the exceptions to privilege, but it is pertinent that in The Netherlands, privilege can only be lifted in "very exceptional" circumstances, and only to the extent to which is "strictly necessary in the pursuit of truth.[279] The Dean of the Dutch Bar Association explained that in practice, privilege would not be lifted unless "the document/communication in question is directed to the commission of criminal acts'; in case only a section of the document is relevant, the rest is censored."[280]

163. The impact of this error is reflected by the broad range of information transmitted to the Prosecution, and relied upon in the Judgment, including conversations touching directly on internal work product and Defence strategy,[281] a conversation regarding questions to be put to a witness in re-examination, and the contents of the Final Trial Brief,[282] and a conversation in which Mr. Mangenda provides a legal opinion concerning the general notion of Article 70 of the Statute.[283] These conversations are not directed to the commission of criminal acts, and Mr. Bemba was not abusing privilege in order to seek advice as to how to avoid the law, or to otherwise engage in illicit activity.[284] This is further corroborated by the fact that the Trial Chamber ultimately concluded that that none of Mr. Bemba's intercepted communications reflected direct evidence that Mr. Bemba was engaged in the

[275] Para.52.
[276] Paras.51-52.
[277] ICC-01/05-01/08-1565-Red.
[278] *Lanz v. Austria*,para.52.
[279] ICC-01/05-01/13-1799-Red,para.59.
[280] CAR-D20-0006-1316 at 1320,ICC-01/05-01/13-1799-Red,para.60.
[281]The Main-Case Defence asserted privilege over the following conversations (ICC-01/05-01/13-1799-Conf-AnxA,ICC-01/05-01/13-1799-Conf-AnxB) which were relied upon in the Judgment: CAR-OTP-0079-0102,lns.96-121,170-179(TJ,paras.752,753);CAR-OTP-0079-1732,lns.87-94(TJ,paras.479,480); CAR-OTP-0079-1744,lns.67-68(TJ,paras.567-568,810);CAR-OTP-0082-1309,lns.22-26,473-488(TJ,paras.781784,792,812,819,820,836,855);CAR-OTP-0082-0618,lns.25-37,38-67(TJ,paras.615-616);CAR-OTP-0079-0191,lns.7-76(TJ,paras.820,836).
[282] CAR-OTP-0079-1744
[283] CAR-OTP-0079-0191(relied on TJ,para.820).
[284] ICC-01/05-01/13-1902-Corr2-Red2,fn.73 concerning the applicability of privilege to this scenario.

charged illicit conduct.[285] It was therefore a clear error to rely on communications that arose in a professional legal relationship, whilst recognising that the communications did not directly evidence criminal activity. Article 69(5) affords no discretion; even if the evidence was collected in a lawful manner, if the content is privileged, the wording ("shall") clearly required the Court to respect such privilege.[286]

3.3 The Chamber failed to rule on, or remedy the ineffective system for vetting privilege, established by the Single Judge

164. The Chamber rejected Defence arguments concerning the review procedure implemented by the Single Judge on the basis that they were "tantamount to challenging the propriety of this Court's procedure in appointing and using the Independent Counsel."[287] This was an error of law. As an affected individual, Mr. Bemba had an absolute right to make this challenge.[288] And, if the Defence can cite the involvement of Court officials in human rights violations to support an abuse of process claim,[289] then they certainly can do so to obtain the lesser remedy of exclusion of evidence.

165. The Chamber's averral that it had already considered, and rejected Defence arguments concerning the Independent Counsel also mischaracterises its earlier decisions. When the question of the review procedure before the Trial Chamber for the first time, the Chamber described Defence arguments concerning the mandate of the Independent Counsel as "repetitive", and decided that since the Single Judge had ruled on this question the Chamber would "not engage with these repetitive submissions."[290] A rejection *in limine* does not equate to judicial consideration. The Kilolo application concerned different issues,[291] and was submitted prior to the disclosure of key information concerning the interaction between the Prosecution and Dutch authorities, and as noted above, Trial Chamber III's tangential scrutiny of these issues did not touch on the

[285] TJ,para.818.
[286] ICC-01/05-01/13-1799-Red,paras.87-88. ICC-01/05-01/13-1179-Conf,fn.4; See also ICC-01/04-01/10-237.
[287] ICC-01/05-01/13-1855,para.30.
[288] *Lambert v. France*; *Matheron v. France*.
[289] ICC-01/04-01/06-772,paras.36-37.
[290] ICC-01/05-01/13-893-Conf,para.14.
[291] ICC-01/05-01/13-1257.

legality of the Single Judge's decisions.[292] If the Chamber had considered this issue on the merits, then it would have found that the pre-confirmation review procedure violated internationally recognised human rights.

166. From the outset, given the existence of potential conflict of interest, it was incompatible with human rights standards to vest the Prosecution, rather than the Registry, with the responsibility for overseeing the execution of the interception process with the national authorities.[293]

167. The Senior Trial Attorney from the Main Case attended the Article 70 Status Conferences,[294] and the Prosecution acknowledged in its initial Article 70 filings that it was using the fruits of its investigation to ambush Defence witnesses in the Main Case.[295] The potential for a conflict to arise was immediately apparent, and never remedied. As found by the Appeals Chamber, potential conflicts of interest impact on the integrity and fairness of the proceedings, and potentially accord one party an unfair advantage over the other.[296] The ECHR has also emphasised that "it is essential that any role prosecutors have in the general protection of human rights does not give rise to any conflict of interest".[297] In the specific area of interception, such a conflict has been found to exist if the same Prosecutor's office exercised different and conflicting responsibilities in connection with the interception process: i.e. on the one hand, requesting them to advance a criminal investigation, whilst on the other, supervising their execution.[298] The ECHR has also concluded that the right to a fair trial would be violated in circumstances in which the Prosecution's position gave them greater rights and privileges than their opponent.[299]

168. Although the duty to ensure appropriate internal walls fell in the first place to the Prosecution, the Single Judge had a complementary duty to take steps to

[292] ICC-01/05-01/08-3255,para.17.
[293] Cf ICC-02/04-01/15-5,ICC-01/04-01/06-8-Corr,paras.106-122.
[294] ICC-01/05-T-2-Conf-Eng.
[295] ICC-01/05-44-Conf-Red2,para.17.
[296] ICC-01/09-02/11-365,para.51.
[297] *Zakharov*,para.280.
[298] *Zakharov*,para.280.
[299] *Menchinskaya v. Russia*,paras.19,30-38.

ensure the overall fairness and integrity of the proceedings.[300] The Single Judge nonetheless gave the Prosecution *carte blanche* to frame the terms and nature of the interception process with the Dutch authorities.

169. The Dutch implemented the intercepts on the basis of the information provided in the OTP Requests for Assistance(RFAs), and "verbal requests" for which there is no independent record.[301] In the absence of such records, and since no-one was called to testify in relation to the interception process, it is impossible to glean what happened when, why and how, which is of particular concern given that the Prosecution implied at a Status Conference that some taps had been put in place prior to 29 July decision.[302]

170. As was the case with Western Union, the Prosecution also availed itself of its Article 70 powers to obtain privileged access to information that it then employed to the detriment of the Main Case Defence. The original RFA requested the Dutch authorities to complete the execution of the request for information by 15 August 2013.[303] The Prosecution then met with the Dutch authorities (including Judges and Prosecutors) on at least 12, 15,[304] and 28 August 2013.[305] These discussions included substantive issues, such as whether the Dutch authorities should approve the transmission of the intercepts to the ICC,[306] and the mechanism and checks that should be put in place as concerns the review of the intercepts.[307]

171. This interaction appears to have triggered a dilution of domestic protections. Whereas the Investigating Judge's initial decision stipulated that the Dean, who plays an essential role in safeguarding the rights of the Defence under Dutch and human rights law,[308] should be involved in the review process,[309] he was then excluded, after the ICC Prosecution proposed that rather than appointing a

[300] ICC-01/09-02/11-365,para.46.
[301] ICC-01/05-01/13-1799-Red,paras.30-35; ICC-01/05-01/13-1799-Conf-AnxF,p.6.
[302] ICC-01/05-T-2-CONF-ENG,p.10,lns.16-19.
[303] CAR-OTP-0090-1922, at 1925.
[304] CAR-OTP-0090-1927.
[305] ICC-01/05-01/13-1799-Conf-AnxF,p.6.
[306] ICC-01/05-T-2-CONF-ENG,pp.9,lns.21-25,p.10,lns.1-6.
[307] ICC-01/05-T-2-CONF-ENG,pp.11,ln.19-p.12,ln.9.
[308] ICC-01/05-01/13-1799-Red,paras.41-50; *Villa-Nova v. Portugal*, concerning the fact that the involvement of the Dean/Batonnier is an essential safeguard even if their advice is not binding on the judge.
[309] ICC-01/05-01/13-1799-Conf-AnxF,pp.3-4.

Dutch Lingala speaker, or involving the Dean, the Judge should rely exclusively on the review conducted by "our Independent Counsel".[310]

172. The Prosecution claimed that they did not receive "detailed" information,[311] but, they clearly received some substantive information. They were informed in real time when [Redacted] (including as concerns the specific number of calls),[312] and of particular import, were aware that there seemed to be "a lot of activity" around two of the targeted numbers.[313] The Prosecution also appeared to have been apprised that the activity involved improper contacts.[314]

173. The inference that the Dutch authorities conveyed substantive information directly to the Prosecution, is also corroborated by the Prosecution's acknowledgement that it obtained CDRs directly on 13 September 2013,[315] in violation of the Single Judge's order that they should be vetted first by the Independent Counsel.[316]After receiving the CDRs, the Prosecution then claimed to the Single Judge that receipt was pending, and made the disingenuous request for authorisation to receive the CDRs directly (even though the matter was a *fait accompli*).[317] The Prosecution even went so far as to insert the later date into the CDRs' metadata on ringtail.[318]

174. The Prosecution appears to have taken advantage of its direct access to information and CDRs (which are privileged)[319] to obtain a litigation advantage. After the Prosecution-Dutch interactions commenced, the Prosecution began to question Defence witnesses about whether they had contacted the Defence after the cut-off date, or during their testimony.[320] This

[310] ICC-01/05-T-2-CONF-ENG,pp.11-12.
[311] ICC-01/05-T-2-CONF-ENG,p.12,ln.18.
[312] ICC-01/05-T-2-CONF-ENG,p.10,lns.20-24.
[313] ICC-01/05-T-2-CONF-ENG,p.11,lns.6-7.
[314] ICC-01/05-T-2-CONF-ENG,p.20,ln.19-23: See,CAR-OTP-0092-0807 at 0808 in which a member of the Main Case Prosecution team asked the Dutch Prosecutor (on 2 September) to inform him as to whether, based on the call histories, "the facts of the case so far warrant further interception". This email was accompanied by contemporaneous telephone conversations (referred to in CAR-OTP-0092-0807) for which there are no records.
[315] ICC-01/05-60-Red,para.10. Emails confirm this date of receipt. CAR-OTP-0093-0019 at 0019, CAR-OTP-0093-0023-R01 at 0023 (in which the Dutch Prosecutor confirms that the ICC prosecutor (Main Case team) had physical receipt of the CDRs).
[316] ICC-01/05-52-Conf.
[317] ICC-01/05-T-4-CONF-ENG,p.28,lns.17-24.
[318] Anx.K.
[319] ICC-01/05-01/13-1799-Red,fn.44; *Malone v. UK*,para.84.
[320] ICC-01/05-01/08-T-333-CONF-ENG,p.69,lns.6-8.

line of questioning had not been put to Defence witnesses previously,[321] and the only source of such information would have been CDRs or intercept content.

175. This was a manifest conflict of interest, as was the Prosecution's extensive interaction with the Dutch in relation to the question of domestic safeguards. [Redacted].[322]

176. Throughout this case, the Defence repeatedly sought access to Dutch decisions connected to the interception of Mr. Kilolo's [Redacted] number, but despite a direct request for cooperation authorised by the Chamber,[323] the Dutch authorities failed to transmit any decisions from the District Court concerning this number, implying that the matter had been addressed exclusively by the Investigating Judge.[324] The Defence has since located two District Court decisions: in the first, dated 9 October 2013, the District Court refused to authorise the transmission of the intercepts of the [Redacted] number (from 15 August until 30 September) due to the absence of a written request from the ICC.[325] In the second, dated 25 October 2013, the District Court reversed its decision, citing the fact that the Investigating Judge had informed the Court that adequate safeguards would be applied by the ICC upon receipt.[326]

177. A key intervening factor is that on 10 October 2013, the Single Judge met with the Dutch investigating judge in order to exchange "views".[327] No record exists of this meeting. In any case, the reversal reflects the absence of an independent and effective verification process at the domestic level, as further evidenced by the District Court's later recitation of the principle of "non-inquiry", which the Court claimed prevented them from reviewing the

[321] Prior to august 2013, the OTP only asked general questions re contacts between the Defence and witnesses (*see*ICC-01/05-01/08-T-321bis-CONF-ENG,p.39,lns.5-8; ICC-01/05-01/08-T-322-CONF-ENG,p.26,lns.6-11;ICC-01/05-01/08-T-323bis-Red2-ENG,p.14,lns.8-17; ICC-01/05-01/08-T-329-CONF-ENG,p.21,lns.13-14; ICC-01/05-01/08-T-330-CONF-ENG,p.20,lns.13-14) after 21 August the OTP started asking witnesses specific questions about contacts with the Defence after the cut-off point or during the testimony (*see* ICC-01/05-01/08-T-333-CONF-ENG,p.68,lns.17-25 and p.69,lns.3-14; ICC-01/05-01/08-T-334-CONF-ENG,p.62,lns.1-13; ICC-01/05-01/08-T-345-CONF-ENG,p.7,lns.14-24; ICC-01/05-01/08-T-345-CONF-ENG,p.9,lns.2-6; ICC-01/05-01/08-T-345-CONF-ENG,p.10,lns.1-4).
[322] ICC-01/05-T-4-CONF-ENG,p.12,lns.12-17.
[323] ICC-01/05-01/13-1861-Conf-Anx1,p.4.
[324] ICC-01/05-01/13-1861-Conf-Anx3.
[325] Anx.I. The Defence will file a request for judicial notice concerning these decisions.
[326] Anx.I.
[327] ICC-01/05-T-4-CONF-ENG,p.2,lns.11-13.

underlying legality of the ICC Prosecution requests.[328] Since Mr. Bemba was not the targeted number, he was in any case, precluded from challenging the procedures after the matter became public.[329]

178. Although the Dutch decisions to transmit the materials were predicated on assurances that the ICC would erect appropriate safeguards, this was not the case, as reflected by the celerity with which the Single Judge approved the transmission of untranslated Lingala/French audio recordings to the Prosecution, the lack of any redactions, and the absence of any judicial reasoning as concerns the basis for transmitting the first two reports to the Prosecution.[330] After the accused were arrested, the Single Judge also refused to allow the Defence to submit observations on any materials other than the materials seized from Mr. Bemba's cell.[331]

179. At the post-confirmation phase, the Chamber affirmed that as the privilege holder, the Bemba Defence should be granted an opportunity to submit observations on materials, prior to their transmission to the Prosecution.[332] The Chamber further underscored that the Independent Counsel should have no delegated judicial powers, but was required to exercise his functions under the supervision of the Chamber.[333] Having recognised these legal requirements, the Trial Chamber erred by excluding violations of these requirements at the pre-confirmation phase, from its determination as to whether the first limb of Article 69(7) was fulfilled.

3.4 If the Chamber had considered the second limb of Article 69(7), it would have excluded the detention unit records, and Dutch materials reviewed by the Single Judge

180. The only reasonable conclusion is that the admission of the fruits of the above violations seriously damages the integrity of the proceedings.

181. The assessment as to the impact on the "integrity of the proceedings" should be tailored to the proceedings in question, in particular, the gravity and

[328] ICC-01/05-01/13-1799-Red,para.77; Cf CC-01/05-01/13-1799-Conf-AnxF.
[329] ICC-01/05-01/13-1799-Red,para.74.
[330] ICC-01/05-01/13-1799-Red,fn.69,para.78.
[331] ICC-01/05-01/13-1799-Red,para.82.
[332] ICC-01/05-01/13-893-Conf,para.12; ICC-01/05-01/13-822.
[333] ICC-01/05-01/13-947,para.16; ICC-01/05-01/13-822.

objective of Article 70 proceedings.[334] These proceedings aim to protect the integrity of the Court by reinforcing the importance of ethical conduct, and sanctioning illicit conduct by the parties and participants. This aim would be undermined through the Court's reliance on evidence that was obtained in violation of the Statute, or human rights standards. There would also be an appearance of double standards if the Court were to apply, in practice, a more rigorous threshold as concerns whether evidence should be excluded, as compared to its determination as to whether the defendants in the case should be convicted.

182. As reflected by the Statute's drafting history, and international case law, exclusion is the most appropriate remedy where the defendant's due process rights, or privilege against self-incrimination have been violated.[335] Many domestic jurisdictions presume, in particular, that if covert surveillance has been used in connection with client-counsel communications, without complying with the requisite safeguards, the integrity of the proceedings will be undermined irrespective of whether the defendant can demonstrate that they suffered specific prejudice.[336]The question is also not whether the content of the material was privileged, but whether the manner in which it was collected and processed complied with relevant legal safeguards.[337]

183. The fact the damage has been done also does not mitigate the duty of the Court to afford a remedy to Mr. Bemba, and impose an appropriate sanction on the Prosecution in order to protect the Court's integrity. Both international and domestic case law affirm that abuse of Prosecutorial powers can seriously undermine the integrity of the proceedings;[338] it is, therefore, considered as either an independent basis for exclusion, or an aggravating factor.[339]

184. The current case can therefore be distinguished from precedents concerning privacy violations in Article 5 cases by virtue of the following factors:

[334] ICC-01/05-01/13-1179-Conf,paras.74-89.
[335] ICC-01/05-01/13-1799-Conf,paras.86-93; ICC-01/05-01/13-1179-Conf,paras.23-44.
[336] *R v. Grant*,para.52. ICC-01/05-01/13-1799-Conf,fns.87,88.
[337] ICC-01/05-01/13-1799-Red,paras.88-89.
[338] ICC-01/05-01/13-1179-Conf,paras.54-74.
[339] ICC-01/05-01/13-1179-Conf,paras.56-73.

- The Prosecution's application to access Mr. Bemba's detention unit recordings was predicated on illegally obtained financial records concerning Caroline Bemba,[340] and information obtained in violation of Defence confidentiality.[341] This illegal genesis tainted the procedure as a whole, and should have triggered the exclusion of evidence obtained as a result;[342]
- No measures were taken to vet, and redact information touching on Mr. Bemba's Defence or confidentiality from the detention unit recordings, and Dutch CDRs notwithstanding the conflict of interest deriving from the direct involvement of the Main Case Prosecution;[343]
- The Prosecution's disclosure violations and failure to call witnesses to elucidate the legality and modalities of the processes used to collect the materials.[344]

185. There is also a logical and legal dissonance as concerns the Prosecution being allowed to use recordings that they would never have obtained, if the Single Judge had applied the law properly in the first place. Since the Defence was never granted audience or opportunity to challenge these measures in a timeous manner, exclusion is the only mechanism available at this point to remedy the violation of Mr. Bemba's rights. It would also be antithetical to the rule of law, and a separate violation to not provide any remedy as concerns violations occasioned by the actions of ICC itself,[345] even if no bad faith was involved.[346]

3.5 The Chamber erred in law by not qualifying the extent to which it relied on these materials in its judgment

186. Since the Chamber found that Mr. Bemba's rights had not been violated, it qualified the issue as to the extent to which the Chamber could base its

[340] ICC-01/05-01/13-1952,paras.19-24; ICC-01/05-01/13-T-35-CONF-ENG,p.54 ln.23 – p.59,ln.13; CAR-D20-0003-0016; CAR-D20-0003-008; CAR-D20-0003-0004. As a result of the Prosecution's failure to include Ms. Bemba-an acting DRC Senator-in its official requests for assistance, the Austrian court did not include her in their 2013 decisions. The Prosecution's reliance on the information was therefore completely illegal.
[341] *Villa-Nova v. Portugal*.
[342] *K.S. and M.S v. Germany*,para.53; *G***afgen v. Germany**,para.167; *Jalloh v. Germany*; *Harutyunyan v. Armenia*,para.63; **El Haski v. Belgium**,para.85;
[343] Cf Zakharov *supra.*
[344] ICC-01/05-01/13-1799-Red,para.94; See *Khan v. UK*; and *Bykov v. Russia*.
[345] HRC, G.C. 31,para.15.
[346] *Barayagwiza* AC Decision 03/11/1999,para.73; *STL President's Order* 15/04/2010,paras.26 and 35.

Judgment on such materials, as a matter pertaining to Article 69(4) rather than Article 69(7).[347] Although the Chamber also averred that it would address this issue in the Judgment, it did not.

187. This omission at both levels contravened the Chamber's overarching duty to ensure that the use of covert intercept evidence or detention recordings does not undermine the overall fairness of the proceedings.[348] The extent to which the evidence is corroborated by independent evidence, and the question as to whether it plays a decisive role in the conviction, is of key importance to this assessment.[349] Given that the conviction of Mr. Bemba is based decisively on the Dutch and detention unit recordings, the Chamber committed a reversible error of law by not considering the impact of such extensive reliance on Mr. Bemba's right to a fair trial. This error is compounded by the remote hearsay-content of the recordings (Ground Four).

GROUND FOUR

Errors concerning the Admission and Assessment of Evidence

4.1 The Chamber committed reversible errors of law and procedure by failing to issue a reasoned determination concerning the admissibility of individual items of evidence

188. After the Defence had expended considerable time and resources responding to multiple Prosecution Bar Table Motions (BTMs), the Chamber notified the parties that all evidence appended to these BTMs was "formally submitted"; the Chamber would defer its consideration as to the admissibility of these items until the Judgment itself.[350]

189. Although it was theoretically permissible for the Chamber to adopt this approach, the Chamber committed reversible error of law and procedure by failing to apply the strict caveats which the Appeals Chamber has attached to such an approach, namely:

- If a "party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its

[347] ICC-01/05-01/13-1855,para.33; ICC-01/05-01/13-1799-Red,para.101.
[348] ICC-01/04-02/12-271-Corr,para.263.
[349] *Khan v. UK*,paras.35-39; *Baldeón García v. Perú*,para.2; cf *Schenk v. Switzerland*,para.48; *Brđanin* TJ,para.34; Viebig, citing *Jalloh v. Germany*,para.121.
[350] ICC-01/05-01/13-1285,para.9.

discretion to defer consideration of this issue with its obligations under that provision";[351] and

- Irrespective as to whether the Chamber decides admissibility at the time of submission, or at the end of the Judgment, the Chamber must consider the "probative value and the potential prejudice of each item of evidence at some point in the proceedings".[352]

190. Regarding the first condition, the Defence addressed the following issues of prejudice to the Chamber. The Prosecution's extensive reliance on the admission of hearsay evidence through BTMs was prejudicial, and, due to the Prosecution's failure to include sufficient information concerning the admissibility criteria, did not satisfy the burden of proof.[353] The Defence was also compelled to respond to, and articulate its case on the first BTM without the benefit of an updated DCC, Pre-Trial Brief, or disclosure of the Prosecution expert report on intercept evidence.[354] The prejudice was heightened by the Prosecution's failure to explain the relevance of each item, and the ambiguity triggered by the Prosecution's incorporation, by reference, of the analysis of the Independent Counsel,[355] without specifying the extent to which it adopted, or diverged from this analysis.

191. As a result, the Defence was ambushed at the end of trial with Prosecution theories concerning the relevance and precise meaning of intercepts that were never clearly pleaded in a timely manner.[356] The Chamber did not remedy these issues of prejudice,[357] but instead, filled in the Prosecution's argumentative lacunae with the Chamber's own interpretations of relevance and reliability. This resulted in the Chamber placing specific inflections on intercepts, that were never pleaded or discussed at trial, and which were only

[351]ICC-01/05-01/08-1386,para.37,53.
[352]ICC-01/05-01/08-1386,para.37.
[353]ICC-01/05-01/13-1074-Conf,paras.20-89.
[354]ICC-01/05-01/13-1074-Conf,paras.8-19. Despite Defence objections, the Prosecution was authorised to disclose it several weeks after disclosure deadline: ICC-01/05-01/13-1027.
[355] ICC-01/05-01/13-1013-Conf,para.15.
[356]DCC:"remedial measures" and the words "cover-up" are not mentioned, whereas OTP-FTB,paras.283-287 present allegations of "cover-up scheme" as if it was a charged offence.
[357] The Chamber did not rule on the Arido request for the Prosecution to refile the BTM (ICC-01/05-01/13-1013-Conf).

notified to the Defence in the Judgment itself.[358] As concerns digital evidence, as a result of the Prosecution failure to call testimonial evidence to authenticate the intercepts and attribute the speakers, it would appear that the Chamber conducted its own *in camera* form of voice identification.[359] Both approaches were contrary to the right to an adversarial process, and the requirements of Article 74(2).

192. As concerns the second condition, instead of discussing the criteria under Article 69(2) and (4) for individual items of evidence, the Chamber merely issued a blanket statement that it had: [360]

> *carefully assessed the probative value, including indicia of reliability and, where applicable, potential prejudice of the evidence upon which it relies.*

193. Although it is nominally correct that a Chamber is not, in general, required to refer to each item of evidence considered during the deliberation process in the judgment, this principle is expressly qualified by the Appeals Chamber's directive that at some point in the proceedings, the Chamber must decide on the admissibility of each item of evidence, and "it must be clear from the reasons of the decision that the Chamber carried out the required item-by-item analysis, and how it was carried out."[361] If the Chamber had issued such a decision at an earlier juncture, then it would not have been necessary to refer to individual items of evidence in the Judgment itself. But, having deferred its admissibility decision to the Judgment, the Chamber was then required to issue item-by-item admissibility determinations, which comported with the Appeals Chamber's requirements.

194. In the absence of detail as to "how" it assessed each items, it is impossible to verify whether the Chamber accurately assessed and applied the expert

[358] TJ,paras.604 (reasons for attribution of notre frère to Mr. Bemba), 567-9 (Chamber interprets communication as a report of past coaching activities, and relies on it to show Mr. Bemba controlled evidence whereas the PTB **only asserted** that Mr. Kilolo reported on the subjects of D-15's testimony that day: PTB,para.75. OTP FTB,para.102. The OTP **only alleged** that Mr. Bemba "must have known" known that D-15 was coached, not that Mr. Kilolo did in fact report this to him: OTP-FTB para.102); TJ,para.757, Chamber wrongly assumed Main-Case exhibit(ICC-01/05-01/08-3121-Red, para.706) was a contemporaneous letter from Mr. Bemba.
[359] TJ,para.216.
[360] TJ,para.195.
[361] ICC-01/05-01/08-1386,para.59.

testimony of Dr. Harrison to the individual detention unit recordings.[362] Similarly, the vagueness of the phrase "where applicable" which was used by the Chamber in connection with potential prejudice, renders it impossible to determine how the Chamber addressed the issue of remote hearsay evidence in specific intercepts, and the prejudice which resulted from the inability of Mr. Bemba to confront specific persons in relation to particularly vague and ambiguous phrases.[363]

195. The presumption that the Chamber carefully considered all relevant arguments concerning the admissibility criteria is also rebutted by the fact that there are clear indicia that the Chamber overlooked testimony and key Defence arguments concerning the reliability of individual evidential items. The Chamber claimed that the Defence did not contest the reliability of the Western Union spreadsheets,[364] or provide examples of inaccurate digital evidence,[365] even though the Bemba Defence provided argument and examples as to the latter,[366] and P-267 and P-433 acknowledged that human error concerning the processing of data has resulted in mistakes in both categories.[367] Despite claiming that the Chamber had not identified any errors itself, the Judgment refers to several in passing, without further consideration as to whether the errors impacted on the reliability of the evidence relied upon.[368]

196. The absence of an item-by-item consideration as to whether the Prosecution fulfilled the criteria for admission, also resulted in broad categories of evidence being admitted. For different sub-categories of digital evidence, it appears that the Chamber applied a presumption of authenticity and reliability,[369] which meant that the Prosecution could rely on intercept evidence and CDRs without calling witnesses to attest to the specific procedures used to collect this evidence. Apart from the fact that this approach reversed the burden of proof, and contravened a well-established line of jurisprudence regarding the need for

[362] *Infra*,Paras.314-315.
[363] See Section 3.4.
[364] TJ,para.211.
[365] TJ,para.224.
[366] ICC-01/05-01/13-1074-Conf,para.80
[367] ICC-01/05-01/13-T-34-CONF-ENG,p.19,ln.10-p.21,ln.3; ICC-01/05-01/13-T-12-CONF-ENG,p.34,ln.17-p.35,ln.11. NB, although P-433 claimed that this error was a typo, the error exists in the original CDR.
[368] TJ,para.236,fn.270; para.263,fn.343.
[369] ICC-01/05-01/13-2102-Conf,p.8, TJ,para.224.

testimonial authentication,[370] it also deprived the Defence of an essential protection as concerns the collection of confidential information obtained through covert surveillance.[371]

197. The Chamber found on this point that if it had adopted other courts' approaches, it would have been necessary to call the Single Judge and Registry staff.[372] Yet, this only serves to underline why such testimonial evidence was necessary. Contrary to the Chamber's assumption that authenticity can be equated to provenance alone,[373] other courts have affirmed that the purpose of authenticating witnesses is to testify in relation to the "gathering, retrieval and storage" of such data.[374] The importance of such testimony was heightened by the fact that most of this evidence was collected and processed on an *ex parte* basis; consequently, there are substantial gaps as concerns Defence knowledge regarding legal and practical aspects of the intercept and recording collection process. It has been difficult, if not possible to fill in these gaps through the disclosure process, as the Defence simply does not know, what it does not know. If not for the fortuitous production of documents by P-267 during his testimony, the Defence would not have discovered key illegalities concerning the collection of Western Union documents.[375] By the same token, although the Dutch records indicated that some CDRs were edited by a third party prior to the transmission to the Court,[376] there is no documentation as to the changes or impact on the integrity of content, [377] and it was impossible to explore this issue with P-361 who conceded he had no knowledge or expertise of this process.[378] P-361 was also only able to attest that it was likely or highly like that the CDRs were produced by the telecom service providers in question,[379] which is a civil rather than criminal standard of beyond reasonable doubt.

[370] ICC-01/05-01/13-1074-Conf,paras.60-62.
[371] See,Paras.151,169,184.
[372] TJ,para.222.
[373] TJ,para.222.
[374] *Ayyash et al.,* F2797,paras.78-84 and 102; *Ayyash et al.,* F2750,para.2; *Ayyash et al.,* F2767,para.2. See also *Lorraine v Markel Insurance Co.,* at 545.
[375] ICC-01/05-01/13-T-35-CONF-ENG,p.54,ln23–p.59,ln.13; CAR-D20-0003-0016; CAR-D20-0003-008; CAR-D20-0003-0004.
[376] ICC-01/05-01/13-T-12-Red-ENG,p.39.
[377] ICC-01/05-01/13-T-12-Red-ENG,p.39. Cf. STL, *Ayyash et al.,* F2797,paras.74-75 and 90-92.
[378] ICC-01/05-01/13-T-16-CONF-ENG,pp.61-62.
[379] ICC-01/05-01/13-T-17-CONF-ENG,p.14.

198. Given these factors, it was prejudicial and contrary to Article 67(1)(i) to adopt a presumption of authenticity, reliability and legality, which the Defence were required to rebut.[380] The Chamber's reliance on judicial economy for its circumscribed approach was similarly erroneous; "while expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements".[381]

199. The Chamber's flawed approach to the admissibility of evidence also significantly undermined the Defence right to present evidence on behalf of Mr. Bemba (as enshrined by Article 67(1)(e)). Apart from the report of Dr. Harrison and related testimony, the Judgment does not cite to a single item of evidence submitted by the Bemba Defence. Although the Chamber professed to have considered all relevant evidence[382], this presumption is once again rebutted by the Chamber's omission to refer to specific items of evidence that were relevant to its determination.[383] A glaring example is the Chamber's claim that the Defence submitted no evidence concerning the call patterns of the [Redacted] number,[384] even though the Chamber recognised evidence on this topic had been formally submitted.[385]

200. Further examples concern evidence tendered to demonstrate:

- The attribution and usage of the [Redacted] number during the specific dates relied upon by the Trial Chamber;[386]
- The opaque nature of the shared burden between the Defence and the Registry concerning the responsibility for paying witness expenses, the absence of any guidelines or rates concerning what and how much should be paid during different points of the proceedings;[387] difficulties concerning availabilities of

[380] Cf TJ,para.224.
[381] ICC-01/05-01/08-1386,para.55.
[382] TJ,paras.189-194
[383] *Halilović* AJ,paras.121-124; *Zigiranirazo* AJ,para.45; *Krajišnik* AJ,para.19; *Popović* AJ,paras.1136,1213,1257; *Limaj* AJ,para.86; *Perišić* AJ,para.92
[384] TJ,para.739.
[385] ICC-01/05-01/13-1858.
[386] ICC-01/05-01/13-1902-Conf-Corr2,paras.128-131, fns.125-130; ICC-01/05-01/13-1794-Conf-Corr,paras.10,36,37, fn.11,51-55
[387] ICC-01/05-01/13-1902-Conf,para.171,fn.181; ICC-01/05-01/13-1794-Conf-Corr,para.34,fn.37; ICC-01/05-01/13-1902-Conf,para.171,fn.182.

funds for investigations,[388]and the necessity for the Defence to pay such costs in advance;[389]

- The amounts reimbursed by the Registry as being necessary and reasonable for hotel, food and transport, at the same locations as the 14 witnesses, and the rates proposed by the Registry in 2016 for general expenses incurred in the collection of evidence *via* third parties and intermediaries;[390]
- The broad types of payments to witnesses that are allowed at other international courts and tribunals both before, and after the completion of their testimony[391]; and
- Mr. Bemba's unawareness as to the purpose of certain payments to the Defence, and Defence witnesses.[392]

201. These evidential items were clearly relevant to Mr. Bemba's state of mind and knowledge as to whether individual payments were illicit. Although the Chamber found in connection with Mr. Kilolo, that he must have known that certain payments exceeded the specific needs of witnesses from the context,[393] his knowledge cannot be imputed to Mr. Bemba, particularly since as a detained person, Mr. Bemba had impeded access to, and a different level of appreciation of contextualising factors. The Chamber therefore committed a manifest error by failing to consider issues of evidential relevance in relation to the circumstances of individual defendants.

202. The impact of this specific error is further demonstrated by the next appellate ground; as a result of the Chamber's failure to consider Defence evidence, it failed to consider reasonable inferences generated through such evidence.

4.2 Mr. Bemba's conviction rests on flawed inferences derived from wholly unreliable circumstantial evidence

[388]ICC-01/05-01/13-1902-Conf,para.172,fn.183; ICC-01/05-01/13-1794-Conf-Corr,para.34, fn.34 ;CAR-D20-005-0212;CAR-D20-005-0214.
[389]ICC-01/05-01/13-1902-Conf,para.172, fn.185; ICC-01/05-01/13-1794-Conf-Corr,para.34, fns.34-36.
[390] ICC-01/05-01/13-1902-Conf,para.178, fns.191-19; ICC-01/05-01/13-1794-Conf-Corr,para.34, fn.38,41.
[391] ICC-01/05-01/13-1794-Conf-Corr,para.53(v),fn.72; ICC-01/05-01/13-1902-Conf,para.213, fn.244; ICC-01/05-01/13-1902-Conf,para.224-210, fn.261 ; ICC-01/05-01/13-1794-Conf-Corr,paras.23-24, fns.23-25 ; CAR-D20-006-0555 ; ICC-01/05-01/13-1902-Conf,para.169, fn.180.
[392] ICC-01/05-01/13-1902-Conf,para.181, fns.197-198
[393] TJ,paras.104,240,689-691,854.

203. As noted *supra,* the Chamber acknowledged that there was no direct evidence concerning Mr. Bemba's involvement in securing false testimony on the issues encompassed by this case.[394] The Chamber's reliance on indirect evidence to address this evidential gap was, moreover, fundamentally flawed due to the Chamber's:

- Failure to provide reasons as to the adoption of the inference in question, and related failure to consider alternative, reasonable inferences;[395]
- Reliance on circular and "stacked" inferences, and non-sequential reasoning;[396]
- Reliance on unreliable and uncorroborated evidence as the foundation for the inference in question.

204. A Chamber may establish material facts on the basis of circumstantial evidence and inferences,[397] but it should be cautious in doing so, paying heed to the reliability of the evidence on which the inference is based.[398] Any inference so drawn must also be the "only reasonable one that could be drawn from the evidence".[399] If another reasonable inference can be drawn, which is consistent with an accused's innocence, he must be acquitted.[400] To be deemed 'reasonable', and not mere speculation,[401] an inference must be one which:

- Follows logically from evidence, which is reliable,[402] and specific and clear;[403]
- Takes into account all relevant facts and evidence,[404] including alternative exculpatory inferences;[405] and
- Is not too remote.[406]

[394] TJ,para.818.

[395] ICC-01/05-01/13-2102-AnxB-Conf, columns 3 and 5.
[396] ICC-01/05-01/13-2102-AnxB-Conf, column 4.
[397] *Orić* TC Order 21/10/2014,para.ix, *Bagosora* AJ,para.515, *Ntagerura* AJ,para.306
[398] *Hategekimana* TJ,para.97; *Muvunyi* AJ,para.70.
[399] ICC-02/05-01/09-73,paras.32-33; *Stakić* AJ,para.219; *Brđanin* TJ,paras.353,970; *Krnojelac* TJ,para.67; *Bagosora* AJ,para.515; *Ntagerura* AJ,para.306; *Karadžić* TJ,para.14.
[400] *Čelebići* AJ,para.458; ICC-01/04-01/06-2842,para.111. See also ICC-02/05-01/09-73,para.33.
[401] *Mugenzi and Mugiraneza* AJ,para.92; *Blaškić* AJ,para.659.
[402] *Ndahimana* AJ,para.186
[403] *Vasiljević* AJ,para.131; *Krstić* AJ,para.119 (in which the AC found that an intercept was too oblique to support a particular inference).
[404] ICC-02/11-01/15-744,para.23
[405] As Windridge argues: "it is the Trial Chamber's duty to consider alternative inferences", Windridge,p.417
[406] *Nchamihigo* AJ,para.82.

205. In terms of similar fact patterns, "the use of context to determine the intent of an Accused must be counterbalanced with the actual conduct of the Accused."[407] An inference based on "a consistent pattern of conduct by the Accused" also cannot be based upon broad generalisations.[408]

206. Whilst nothing prevents a court from relying upon 'stacked inferences' to establish a material fact or ultimate conclusion, it is prudent to exercise caution, the concern being that the ultimate conclusion will lack a sufficient eventual basis, it being so far removed from the source on which it is originally based. The longer the chain of inferences (the higher the stack), the more unreliable the ultimate inference will be.[409] The Chamber must also identify any intermediate inferences on which its ultimate inferred conclusion is based.[410]

207. In order to demonstrate that an inference is the *only* reasonable one on the evidence, a Chamber must articulate *why* that is the case.[411] A failure to give reasons casts doubt upon the reliability of an inferred factual finding, which can ultimately lead to the factual finding being overturned on appeal.[412]

208. The Chamber failed to comply with these legal standards as concerns the adoption of key inferential findings concerning Mr. Bemba's responsibility.

4.2.1 The Erroneous Underlying Premise: Mr. Bemba as the beneficiary

209. Mr. Bemba's conviction rests on a series of inferences, which is conditioned by the underlying premise that Mr. Bemba is '*the ultimate and main beneficiary of the common plan*',[413] because he is the defendant in the Main Case.[414] This is pure assumption: there is no evidence that the illicit conduct was done for the benefit of Mr. Bemba. The Chamber glossed over this aspect, and instead, applied its assumption that Mr. Bemba is the ultimate beneficiary of common

[407] *Bagilishema* TJ,para.63.
[408] *Blaškić* AJ,paras.521 and 568.
[409] Windridge,pp.416,418.
[410] Windridge,p.417-418
[411] *Bagosora* AJ,para.572,604; *Blaškić* AJ,para.519; *Kunarac* AJ,para.41
[412] *Bagosora* AJ,paras.572,604; *Blaškić* AJ,para.519.
[413] TJ,paras.805,727.
[414] ICC-01/05-01/13-2102-AnxC,p.3.

plan to support its finding that Mr. Bemba was engaged in the illicit coaching of witnesses and possessed knowledge and intent.[415] The inferred conclusion does not logically follow from the underlying premise; rather it requires a substantial leap. As affirmed by the Appeals Chamber, the acts of third parties cannot be imputed to the defendant in the absence of an evidential link.[416]

210. This underlying premise also caused the Chamber to view neutral and innocent acts by Mr. Bemba as evidence of illicit activity, which it then used to implicate Mr. Bemba in the concerted action and, ultimately, the common plan.[417] This underlying premise therefore infects, and invalidates the entirety of the Judgment.

211. This underlying premise is not the *only* reasonable conclusion available on the evidence. The evidence confirmed that Mr. Bemba instructed his Defence to identify and call credible witnesses, with real experience.[418] His Defence was then irreparably harmed by witnesses who lied for personal or professional benefit, unconnected to Mr. Bemba's best interests.[419] The notion that Mr. Bemba instigated or approved a common plan to lie about contacts is also undercut by evidence that firstly, the proposal to conceal knowledge of acquaintances was initiated by persons outside the Defence,[420] and secondly, in testifying falsely about certain contacts, the witnesses contradicted Defence submissions in the record.[421]

212. Of particular import, Mr. Bemba renounced his reliance on all fourteen witnesses;[422] there was no ratification of or attempt to benefit from illicit conduct. The Prosecution also acknowledged that the *faux scenario* was engineered by Mr. Kilolo and Mr. Mangenda in order to justify the use of funds for their own financial gain.[423] Quite clearly, another reasonable inference

[415]TJ,paras.805-806; ICC-01/05-01/13-2102-AnxB-Conf,p.5,1.
[416] ICC-01/05-01/08-1937-Red2, para.67; ICC-01/04-01/07-475,para.71; *Milošević* TC Protective Measures Decision 19/02/2002,para.29.
[417] See section 2.3.4 above.
[418]TJ,para.324; FTB,paras.71-72.
[419]TJ,para.323; FTB,paras.91-93,97.
[420] TJ,paras.149,434.
[421]CAR-OTP-0079-0114 at 0119,lns.134-160; CAR-OTP-0090-0831 at 0832 fn.1; ICC-01/05-01/08-T-352-Red-ENG,pp. 35-36,
[422]FTB,para.123.
[423]PTB,para.63; FTB,para.87.

available to the Chamber was that Mr. Bemba was not the beneficiary of the illicit conduct.

213. In any case, it is a false syllogism to infer that because Mr. Bemba benefitted from conduct, he must have made intentional contributions to the conduct in question. Such flawed logic would mean that the Prosecution would bear strict responsibility for any illegal acts committed by intermediaries or State Parties – a premise, which is not supported by either ICC jurisprudence or practice.[424]

4.2.2 Witness Coaching

214. The conclusion that Mr Bemba was involved in illicit coaching is drawn from the evidence relating only to five witnesses: D-54, D-15, D-19, D-25 and D-55.[425] When assessed neutrally, rather than through the lens of the false premise that Mr. Bemba was the beneficiary of the common plan, the evidence can not support the conclusion that Mr. Bemba knew of, or was involved in illicit witness coaching. The Chamber's conclusions concerning each of these witnesses is further undermined by its flawed approach to inference evidence.

4.2.2.1 Witness D-54

215. There is no direct evidence that Mr. Bemba provided instructions that D-54 should testify falsely or that he knew that D-54 would testify falsely. Instead, the Chamber inferred findings to this effect from intercepted conversations between Mr. Bemba and Mr. Kilolo,[426] Mr. Kilolo and Mr. Mangenda,[427] and Mr. Kilolo and D-54.[428]

Conversations between Mr. Kilolo and Mr. Bemba

216. The Chamber's inferences are derived from two conversations, dated 17 October 2013 and 1 November 2013 respectively. Regarding the October

[424]FTB,paras.70-71.
[425] ICC-01/05-01/13-2102-AnxA,pp.3-12.
[426]TJ paras.615-616 (CAR-OTP-0080-1323), 648-649 (CAR-OTP-0080-1372).
[427] CAR-OTP-0082-0107; CAR-OTP-0079-0131; CAR-OTP-0091-0084; CAR-OTP-0079-1737; CAR-OTP-0082-1349; CAR-OTP-0082-0814. TJ,paras.598-614,617-621.
[428] CAR-OTP-0082-0877; CAR-OTP-0082-1109; TJ,paras.622-645.

conversation, the Chamber was unable to conclude with certainty that the speakers were discussing the coaching of D-54.[429] It was therefore an error to find that it corroborate or support any further inferences on this point.

217. In terms of the November conversation, the Chamber erroneously concluded from Mr. Kilolo's comment that he was fatigued by something concerning someone the night before, that:

(a)Mr. Kilolo was referring to conversations with D-54 as opposed to exhausting preparations for examining D-54;
(b)Mr. Bemba knew that Mr. Kilolo was referring to conversations with D-54 as opposed to licit Defence preparation,
(c)Mr. Bemba had previously endorsed this approach, with a view to eliciting false testimony from D-54.[430]

The Chamber did not acknowledge the multiple levels of inferences involved in its conclusion, nor does it provide a reasoned opinion as to why each inference was the only reasonable inference on the vague evidence.

218. In terms of this vagueness, no reasonable Chamber could have found that the passing comment–"*c'est qui ça qui m'a beaucoup épuisé, la personne que vous connaissez*"–was sufficiently specific to support an exclusive evidential conclusion that Mr. Bemba knew that Mr. Kilolo was referring to illicit coaching. The identity of the person referred to and the activity that fatigued Mr. Kilolo are unknown,[431] and the Chamber had already acknowledged that an oblique reference by one person does not constitute a sufficiently specific basis for inferring knowledge on the part of the other party.[432] The Chamber thus erred by failing to explain the basis for its inconsistent conclusions.

219. The Chamber also failed to provide a reasoned opinion concerning reasonable exculpatory explanations:[433] Mr. Bemba expressed clear impatience

[429] TJ para.616.
[430] CAR-OTP-0082-0669.TJ,paras.648-649. ICC-01/05-01/13-2102-AnxB,p.4.
[431] FTB,pp.310-311
[432] TJ,para.616; *Krstić* AJ,para.119.
[433]FTB,para.310; ICC-01/05-01/13-T-48-CONF-ENG,pp.62-63.

to move to pending political developments,[434] which suggests that he was not attentive to the earlier interventions from Mr. Kilolo.[435] Given the number of different persons and topics referred to in the conversation, the Chamber erred by concluding that Mr. Bemba could only have understood "that person" D-54.[436] Mr Bemba also gives a non-committal response,[437] which does not support an exclusive inference of approval or comprehension concerning Mr. Kilolo's veiled references to obscure activities.

220. Post-facto knowledge is an insufficient basis for culpability but the Chamber in any case failed to explain how its conclusion as to derivative knowledge supports the only reasonable inference that Mr. Bemba possessed prior knowledge and intent; this is a hidden inference which results in a conclusion which is unacceptably remote from the evidence itself. The evidence is, moreover, unequivocally exculpatory: Mr. Bemba starts the conversation by inquiring as to why he was unable to reach Mr. Kilolo the night before.[438] If Mr. Bemba knew that Mr. Kilolo was coaching D-54 the night before, he would have known the answer to his question.

Conversations between Mr Mangenda and Mr. Kilolo[439]

221. The Chamber relied upon six intercepts between Mr. Kilolo and Mr. Mangenda[440] to establish that Mr Bemba knew of, approved and directed (through Mr. Mangenda) the illicit coaching of D-54.[441]

222. The Chamber's approach to these conversations is contaminated by its erroneous conflation of interview preparation, with illicit coaching. In the first conversation, Mr. Kilolo informed Mr. Mangenda that he could not decide whether to call D-54, without having first thoroughly interviewed him. He could not, in turn, conduct such an interview, without a clear idea of the

[434]FTB,para.309.
[435]ICC-01/05-01/13-T-48-CONF-ENG,pp.62-63.
[436]TJ,para.649, Cf FTB,pp.310-311.
[437]CAR-OTP-0082-0669 at 0671,ln.17 ("Mm")
[438]FTB,para.307-308.
[439] ICC-01/05-01/13-2102-AnxB,p.3.
[440]CAR-OTP-0082-0107;CAR-OTP-0079-0131;CAR-OTP-0091-0084,CAR-OTP-0079-1737,CAR-OTP-0082-1349,CAR-OTP-0082-0814.TJ,paras.598-614,617-621.
[441]TJ,paras.601,606,652-653. See ICC-01/05-01/13-2102-AnxA-Conf, findings 4(p.5), 5(pp.6-9), 6(p.9).

relevant information that the witness could provide.[442] In the subsequent conversation, Mr. Mangenda appears to have obtained information for the purpose of facilitating Mr. Kilolo's ability to conduct such an interview. Although the issues are framed in a certain manner by Mr. Mangenda (a case manager, with no prior investigative or litigation experience), there is no evidence that Mr. Kilolo then used this information in an inappropriate investigative context. Given the lapse in time between this conversation and D-54's in-court testimony, the conversation is too remote to be linked to illicit coaching during D-54's testimony, or D-54's testimony on the stand.

223. The Chamber's inference that the two interlocutors are speaking about Mr. Bemba also completely lacks an evidentiary foundation because:

- It is not possible to identify, with certitude, the identity of the person/s referred to as '*notre frère*'; and
- The Chamber failed to address contextual elements which suggest that '*notre frère*' could not be Mr. Bemba.

224. The term "notre frère" was not used exclusively by Mr. Kilolo and Mr. Mangenda to designate one particular person.[443] The Chamber nonetheless attributed it to Mr. Bemba on the basis of a factor (Mr. Mangenda's request that Mr. Kilolo take notes)[444] that was never pleaded by the Prosecution or otherwise "discussed" at trial. It was an untested theory which should not have been used as the basis to enter a conviction.[445] The 'logic' employed by the Chamber is also undermined by the more illogical aspect of Mr. Bemba relaying such information through Mr. Mangenda, given that Mr. Kilolo spoke to Mr. Bemba twice on this day.[446]

225. The Chamber also erred by failing to consider aspects of the conversation which suggested that on the one hand, "notre frère" could not be Mr. Bemba,

[442] TJ,para.599, citing CAR-OTP-0082-0107 at 0110_01,lns.70-75.
[443] CAR-OTP-0079-0191 at 0193 ln.30, at 0194 lns.44-45,53; CAR-OTP-0082-1065 at 1072 ln.186; CAR-OTP-0080-0288 at 0290 ln.24; CAR-OTP-0079-0172 at 0174 ln.12; CAR-OTP-0088-1029 at 1034 ln.112
[444]TJ,para.604
[445] *Krstić* AJ,para.76.
[446] CAR-OTP-0074-0078, rows 47-48.

and on the other, that "notre frère" was more likely to be a Defence witness, who had personally supervised D-54 during the 2002 events.

226. As concerns the first aspect, Mr. Mangenda stated : "*Il a dit, bon pour que lui même soit fin prêt**, il lui faut au moins déjà 2 heures à l'avance**, avant que notre blanc n'arrive, il faut déjà l'informer.*"[447] The Chamber nonetheless failed to address the Defence argument that "il" appears to be someone who is not detained, i.e. someone in the field who needed advance notice to complete something.[448]

227. Moreover, although the Chamber placed significant weight on the "tic au tac" reference, it failed to reason why this instruction could only have come from Mr. Bemba, as opposed to someone who had actual experience of being questioned.[449] The latter conclusion is more reasonable given that the person suggesting the approach appears to be speaking from experience: i.e. someone who has been questioned by Mr. Kilolo and found a certain manner to be disagreeable.[450] Mr. Bemba would not be in a position to identify with the impact of Mr. Kilolo's questioning style on a witness, and it is not logical that Mr. Bemba would wait until the Defence case had almost finished to raise such a point.

228. Having concluded that [Redacted] was D-54, it was also a reversible error for the Chamber to read the August intercept in isolation from other intercepts concerning D-54.[451] As a result, the Chamber disregarded key references regarding communications between Mr. Kilolo and other superior officers of D-54 in the context of D-54's testimony. Concretely,

- D-54 indicated that he would call [Redacted], a potential witness, to ask him questions on a specific subject;[452]
- Mr. Kilolo confirmed that [Redacted] has important information, real details, that he will explain the entire story to D-54;[453]

[447] CAR-OTP-0079-0131, at 0134,lns.46-47
[448] FTB,para.299, fn.346.
[449] FTB,fn.346.
[450]In contrast, D-19 was questioned by Mr. Kilolo during his testimony:ICC-01/05-01/08-T-284-Red2-ENG,p.9.
[451] CAR-OTP-0079-0131.
[452]CAR-OTP-0082-1109,lns.143-147,263,264.

- Mr. Kilolo indicated that he met [Redacted] 2-3 times'[454]
- D-54 confirmed that he had conversations with another potential witness named [Redacted];[455]
- Kilolo suggested that D-54 should have a conversation with [Redacted] in order for [Redacted] to explain subjects of his testimony;[456]
- Kilolo admits to D-54 *"…indépendamment de ça, en tout cas … euh … lui [Redacted] … euh … les histoires que je …en tout cas la plupart de ce que je t'ai dit, c'était effectivement les déclarations de [Redacted]. La majorité des choses sur lesquelles je me base proviennent de [Redacted] ou bien de [Redacted]. Dans la plupart des cas*".[457]

229. The last extract demonstrates that "certain, specific matters[458]" addressed by Mr. Kilolo with D-54 emanated from [Redacted] (as opposed to Mr. Bemba). The reasonable and possible inference that "notre frère" is a witness is further bolstered by the fact that when Mr. Mangenda conveys the information to Mr. Kilolo in the August conversation, he constantly refers to [Redacted] (who could reasonably be assumed to be [Redacted]): "*il faut que tu prennes note. Là c'est pas rapport à [Redacted]." "[Redacted] aille à l'endroit que tu connais pour qu'il l'écoute…*[459]" The Chamber also found elsewhere that Mr. Kilolo had attempted to harmonise D-19's testimony with that of other DRC soldiers testifying for the Defence.[460]

230. But, although the Chamber provides reasons as to why it concluded that the reference to [Redacted] in this conversation is not D-19, it did not consider the more plausible possibility that [Redacted] is not [Redacted], and [Redacted] and "notre frère" are one and the same, an inference supported by the following:

[453]CAR-OTP-0082-1109,lns.265,266
[454]CAR-OTP-0082-1109,lns.272-275,279-280
[455]CAR-OTP-0082-1109,lns.314-334.
[456]CAR-OTP-0082-0663,lns.25-34.
[457]CAR-OTP-0082-0663,lns.39-42.
[458]TJ,para.652.
[459]CAR-OTP-0079-0131,lns.17,30.
[460]TJ,para.709.

- The issues described by Mr. Mangenda were referred to by D-19 during his testimony;[461]
- The wording used by Mr. Mangenda suggests that "notre frère" had experienced the events in question,[462] whereas Mr. Bemba was not in the CAR at the time of the described incidents;
- D-19 was D-54's superior in the DRC military in 2012-13,[463] and, unlike Mr. Bemba, had a plausible motive to suggest that D-54 should not mention [Redacted];[464] and
- Since the Bemba Defence acknowledged interacting with D-54,[465] and submitted a pre-testimony summary of D-54,[466] it would be illogical for Mr. Bemba to propose that D-54 should deny having had any meetings with the Defence.

231. As a result of the Chamber's erroneous assumption that this illicit conduct was being performed for Mr. Bemba's benefit, it failed to consider the reasonable alternative inference that other persons had an incentive not to be denounced or contradicted by their subordinates on topics that could have engaged the superior's criminal responsibility. Since neither Mr. Kilolo nor Mr. Mangenda testified, the Defence had no means to clarify this issue. The ensuing prejudice, in turn, undermined the evidential foundation for the Chamber's inferences.

4.2.2.2 Witness D-15[467]

232. The Chamber concluded that Mr. Bemba was involved in coaching D-15,[468] from its flawed inferences that '*Mr Bemba was updated by Mr Kilolo on the questions rehearsed with D-15*' and also '*provided feedback on how specific*

[461]Anx.J.
[462]TJ,para.811, citing the following extract "he particularly shouldn't forget…(…) the events they used to film when they were working for the people …(…) he really emphasises that he mustn't forget that (…) and he also shouldn't forget to mention the two large vehicles they saw (…). FTB,para.299, fn.346.
[463]ICC-01/05-01/08-T-284-Red2-ENG,p.10,lns.11-25,p.16,lns.12-20.
[464]CAR-OTP-0079-0131 at 0137,lns.167-173;FTB,paras.123(e),297.
[465]ICC-01/05-01/08-2852-Conf-Red,para.5.
[466]CAR-D04-0004-0079.
[467]ICC-01/05-01/13-2102-AnxB,p.2.
[468]TJ,para.808.

issues should be handled when he felt they were handled wrongly by Mr Kilolo'.[469] This finding is wholly unsustainable.

233. Firstly, to be "involved" in coaching, Mr. Bemba would need to have influenced the content of D-15's responses. The Chamber does not, however, address the complete lack of causation between this conversation, and the activities that took place the night before.

234. Moreover, Mr. Kilolo does not solicit Mr. Bemba's input concerning the answers which could or should be given by the witness in response to these questions.[470] Mr. Bemba's interventions also reflect his belief that the Defence is putting forward a truthful case in relation to these issues,[471] and the Chamber does not cite evidence that would indicate otherwise. The specific issues relied upon by the Chamber to highlight Mr. Kilolo's control over D-15's testimony, are also not mentioned during Mr. Kilolo's conversation with Mr. Bemba.[472]

235. There is no objective foundation for the Chamber's assumption that Mr. Kilolo was reporting on his illegal coaching activities, as opposed to abiding by his ethical duty to notify the client of the questions to be put to the witness. There is no suggestion in the intercept that these questions were rehearsed with D-15. The Chamber failed to consider that the phrase *'je reviens à la question d'hier',* supports the more reasonable conclusion that the two speakers were discussing the content of in-court questioning, and not external, illicit coaching.[473] The Chamber's orientation towards an incriminating rather than an exculpatory outcome cannot be reconciled with jurisprudence that in assessing recorded phrases that are ambiguous, it would "infringe the principle *in dubio pro reo"* to adopt the meaning which is incriminating.[474]

[469]TJ,paras.592,728,810.
[470]FTB,para.279;CAR-OTP-0079-1744 at 1746, Mr. Bemba's participation is very passive: '*ok., d'accord'*(ln.24), '*trés bien, oui, exact'*(ln.26), '*oui*'(line.28), '*oui*'(ln.31).
[471]CAR-OTP-0091-0127 at 0131,ln.71:"any way you look at it, what they're saying isn't possible, is it?"
[472]TJ,paras.561-562.
[473]FTB,para.280.
[474] *Kordić* AJ,para.691.

236. In any case, the fact that Mr. Bemba interacted with Mr. Kilolo after the coaching severs any causal nexus between Mr. Bemba's conversation with Mr. Kilolo and the alleged coaching the night before.

237. The Chamber's inference that the purpose of the conversation was to report on illicit coaching activities also cannot be reconciled with the Chamber's findings concerning a communication between Mr. Kilolo and Mr. Mangenda, which occurred the night before.[475] Mr. Kilolo informed Mr. Mangenda that an agreement had been reached as concerns putting three questions to D-15. Mr. Kilolo further complained that Mr. Bemba had been attempting to reach him that evening, but Mr. Kilolo did not want to speak to him.[476] Mr. Kilolo's statement that the agreement concerning the content of the questions had already been concluded, at a time when Mr. Kilolo was avoiding Mr. Bemba's calls, proves that Mr. Bemba was not part of, or aware of this agreement. Mr. Kilolo's subsequent conversation with Mr. Bemba was clearly just a formality.

238. Mr. Kilolo also employed explicit language in his conversation with Mr. Mangenda, as compared to the later conversation with Mr. Bemba, which, when read in conjunction with his unwillingness to speak to Mr. Bemba, leads to the more reasonable inference that Mr. Bemba was not privy to the illicit coaching activities.

239. The Chamber also applied its erroneous primary inference concerning one specific discussion and one specific witness (D-15), to support a more general inference that Mr. Bemba had authoritative control over the presentation of evidence.[477] It is a clear error to extrapolate from Mr. Bemba's passive responses that he controlled the presentation of all Defence evidence, particularly as his input is conveyed as comments rather than directions and demands.[478]

240. The Chamber further erred by failing to construe this conversation in light of its finding concerning "Mr Kilolo's reluctance to call witnesses unless he had

[475] TJ,paras.565-566.
[476] CAR-OTP-0080-0604 at 0606,lns.10-15.
[477]TJ,para.568,729.
[478] CAR-OTP-0079-1744 at 1747,lns.47,lns.63-65, at 1748,ln. 68,lns.73-74.

briefed them extensively",[479] and its reliance on another intercept in which Mr. Kilolo refers to the fact that it was for Mr. Kilolo to ultimately decide whether to call a witness.[480] Both confirm that as required by Article 14 of the Code of Conduct, Mr. Kilolo exercised ultimate responsibility for determining the means through which Mr. Bemba would be defended.

241. It is also flawed to assume that because Mr. Bemba provided input on issues that he believed to be true in one conversation, he must have controlled the presentation of all Defence evidence, and due to this control, must have authorised the presentation of false evidence. These are several bridges too far.

4.2.2.3 Witnesses D-19 and D-55

242. The Chamber found that '*Mr Bemba exerted direct influence on D-19 and D-55*' in that he '*urged them to cooperate and follow the instructions given by Mr Kilolo.*'[481] The Chamber acknowledged that there is no evidence that Mr. Bemba provided such instructions,[482] but nonetheless conjured their existence from the fact that Mr. Bemba spoke to them on his privileged line, and the context of '*the evidence as a whole*'.[483] The Chamber also found, on the basis of nothing more than speculation, that Mr. Bemba agreed to speak with D-55 '*with the intention of motivating D-55 to give specific testimony'*.[484]

243. These conclusions fall foul of established case law that in the absence of evidence concerning the content of communications, collusion cannot be assumed.[485] As noted *infra*, intent to engage in serious acts of contempt also cannot be inferred from detention unit infractions.[486] Thus, aside from the fact that the finding that Mr. Bemba spoke to D-19 is based on an erroneous inference concerning the CDRs,[487] it does not logically follow that Mr. Bemba

[479]TJ,paras.714-715.
[480]TJ,para.599.
[481]T,para.856,861,298,305.
[482]TJ,para.856.
[483]TJ,para.856.
[484]TJ,para.298.
[485]FTB,para.151.
[486] *Taylor* TC Decision 22/01/2010,p.4.
[487]TJ,para.741

must have urged them to cooperate and follow Mr. Kilolo's instructions. This inference is clearly too remote to satisfy the standard for inferential reasoning.

244. In considering whether this was the only reasonable inference, the Chamber also had a duty to consider the direct evidence of D-55 that the conversation was extremely brief,[488] and they did not discuss the content of D-55's upcoming testimony.[489] The Chamber did not explain why this specific aspect of D-55's testimony was discarded, given that they found him to be a reliable witness.[490] In any case, the fact that a Chamber finds a witness to be discredited as concerns a specific fact "does not by itself logically permit a tribunal of fact to accept beyond reasonable doubt the truth of fact which he denied."[491]

245. Finally, the Chamber's inference that Mr. Bemba spoke to D-55 in order to motivate him to provide specific testimony is controverted by its findings that D-55 demanded to speak to Mr. Bemba, not *vice versa*,[492] and then did not discuss his testimony with him.[493] This call was thus not part of a pre-arranged plan to elicit false testimony.

4.2.2.4 General conversations between Mr. Kilolo and Mr. Mangenda

246. The Chamber concluded that '*Mr Bemba was kept updated about the illicit coaching activities at all times*' partly on the basis of an intercept dated 29 August 2013, during which Mr. Kilolo informed Mr. Mangenda *that he told Mr Bemba about the need to 'faire encore la couleur*'.[494]

247. The Chamber cited no evidence to substantiate the inference that this advice was actually communicated to Mr. Bemba. Even if such a conversation took place, there is no evidence concerning the terms used to describe this activity (which is necessary to ascertain whether Mr. Bemba knew it entailed illicit conduct) or, most importantly, Mr. Bemba's response. No safe conclusion can be drawn from such vague, uncorroborated and untested hearsay that Mr.

[488] TJ,para.740, fn.1694; ICC-01/05-01/13-T-36-CONF-ENG,p.37,lns.10-11.
[489] TJ,para.293
[490] TJ,paras.284,285,294
[491] *Nobilo* AJ,para.47.
[492] TJ,paras.293,295
[493] *fn.489.*
[494] TJ,para.728,165,535,685.

Bemba was aware of ongoing illicit coaching activities or more remotely, that he approved of them.

248. The Chamber's reliance on an extract where Mr. Mangenda claimed that Mr. Bemba must have seen and noticed certain aspects of the witness's testimony because of the precision with which the witness testified,[495] is also misconceived. This finding would apply to everyone who was present in the courtroom; a suspicion or presentiment cannot equate to culpability.

249. The Chamber also relied on a conversation during which Mr. Mangenda explained that '*he had witnessed a similar situation in which Mr Bemba gave instructions concerning the witness and his testimony*.'[496] In addition to the fact that it is uncorroborated third-hand hearsay, there is no basis to support the inference that this throw-away comment concerned illicit coaching. If Mr. Mangenda had only witnessed it, and Mr. Kilolo was not present (as suggested by the fact that Mr. Mangenda is recounting it to him), that would mean that Mr. Bemba was providing such instructions to other members of his Defence. As the Chamber found that Mr. Haynes QC and Ms. Gibson were not involved in illicit activity,[497] the more reasonable inference would have been that the described scenario (if it did in fact occur) concerned Mr. Bemba instructing the Defence (Mr. Haynes QC) to elicit focused testimony from witnesses *"qui parlent trop-là".*[498] Mr. Mangenda's reference to another situation where Mr. Bemba requested the '*Blancs'* to give their opinion as to whether witnesses should be called also exemplifies Mr. Bemba's reliance on his lawyers' advice as concerns the presentation of evidence. At the same time, Mr. Mangenda's concern that Mr. Bemba was putting Mr. Mangenda and Mr. Kilolo at risk by involving the "*Blancs*" in witness issues,[499] suggests, contrary to the Chamber's position, that Mr. Bemba was not aware that there was anything illicit that needed to be concealed from the "*Blancs*". It is therefore wholly unreasonable to infer that the instructions in question were evidence of a pattern of conduct concerning the illicit preparation of witnesses.

[495] TJ,para.495.
[496] TJ,para.731.
[497] TJ,paras.762-764.
[498] CAR-OTP-0082-1293 at 1308,lns.228-229.
[499] CAR-OTP-0082-1293 at 1308,lns.239-247.

4.2.2.5 'Satisfaction' and 'Thanking' Witnesses

250. The Chamber erred by inferring that Mr. Bemba knew of and was '*fully involved*' in illicit coaching,[500] from its factual finding that Mr Bemba expressed satisfaction with witness testimony,[501] and thanked witnesses for testifying, either directly or through Mr. Kilolo.

251. Firstly, it is not illicit to thank witnesses for their testimony.[502] An illicit connotation cannot be inferred from the fact that the thank-you emanates from the defendant, and not the Prosecution or Chamber.

252. Secondly, it is impossible to reliably infer Mr. Bemba's state of mind from expressions of gratitude or satisfaction that were conveyed by Mr. Kilolo, [503] or Mr. Mangenda. [504] Apart from the fact that this is untested hearsay, the intercepts concern specific dynamics (including general politeness) in which it was likely that the speaker had an incentive to fabricate or exaggerate the 'satisfaction' of Mr. Bemba.[505] It is therefore wholly unreasonable to infer that Mr. Bemba's expression of gratitude and satisfaction evidenced his involvement in the illicit coaching of all 14 witnesses.

4.2.2.6 Coaching on Concealment of Contacts and Payments[506]

253. The Chamber found that Mr. Bemba '*authorised and thereby approved, at least tacitly, instructions regarding false testimony*,[507] from the erroneous inference that Mr. Bemba '*implicitly knew about*' instructions given by Mr. Kilolo to witnesses regarding prior contacts with the Defence, and payments and non-monetary material benefits.[508]

[500]TJ,paras.732,123,293,298,305,506,569; ICC-01/05-01/13-2102-AnxB-Conf,p.8(c),(d).
[501]TJ,paras.106,161,169,406,495,505,692.
[502] *Supra*,Para.121.
[503]TJ,para.586,406.
[504]TJ,para.161.
[505] FTB,para.288.
[506]TJ,paras.107,687,808,818.
[507]TJ.para.819.
[508]TJ,paras.818-819 ; ICC-01/05-01/13-2102-AnxB-Conf,p.9(e).

254. As noted *supra,* 'implicit knowledge' is an insufficient basis on which to establish a defendant's liability.[509] This finding is also generated from a larger pattern of flawed circular inferences. The Chamber inferred that Mr. Bemba tacitly approved of this conduct because he apparently knew of it, and did not intervene or object. The Chamber then cited such tacit approval in support of its inference that he "implicitly knew" of the conduct in question.

255. There is, moreover, no direct evidence that Mr. Bemba knew of illicit instructions on these topics, and certainly no evidence that Mr. Bemba approved illicit activities. There is no direct or indirect evidence in support of the Chamber's finding that Mr. Bemba was "kept abreast of the coaching activity",[510] nor is there any evidence that Mr. Bemba was aware of the illicit nature, and specific breakdown of payments to witnesses.[511] Although Mr. Bemba was aware of some investigative contacts, there is no evidence that he knew the precise number. There is no foundation from which to infer that Mr. Bemba could know, and did in fact know that the specific number of contacts provided by the witnesses was incorrect.

4.2.3 Payments to Witnesses

256. The Chamber extrapolation, from one technically flawed conversation with Mr. Babala,[512] that Mr. Bemba was involved in an illicit payment scheme, falls chasms short of the necessary standard of proof.

257. The technical aspects of the recording will be addressed below. Of graver concern, although the Chamber found that it could infer Mr. Bemba's knowledge of illicit payments from this conversation but not intent,[513] at some point,[514] the Chamber transformed mere knowledge to intent, and relied on the same to establish conduct (authorisation), without explaining the evidential basis for these leaps in logic.[515]

[509] See section 2.4
[510] Cf, TJ,para.819.
[511] TJ,para.819.
[512] TJ,paras.693-698.
[513] TJ,para.267.
[514] TJ,paras.700,813.
[515] ICC-01/05-01/13-2102-AnxA,p.21.

258. The initial inference concerning Mr. Bemba's knowledge is flawed by the Chamber's failure to address the stacked nature of inferences involved in its conclusion: first, it made a significant inference concerning the meaning of the phrase '*donner du sucre aux gens*',[516] second, it inferred that this phrase concerned two specific Defence witnesses, third, it inferred that it concerned illicit payments to these witnesses concerning specific aspects of their testimony, fourth, it inferred that Mr. Bemba understood Mr. Babala's '*sucre*' phrase and was aware that it concerned two Defence witnesse, fifth, it inferred that Mr. Bemba knew that the payment had no legitimate purpose, and sixth, the Chamber inferred that Mr. Bemba "authorised" this most nebulous of payments.

259. Apart from the fact that this degree of inference stacking results in an unacceptably remote and unreliable conclusion, the inferences are context dependent, and as will be addressed in section 4.3.3, it is not possible to ascertain this context due to the technical flaws.

260. Regarding the question as to what Mr. Bemba knew and understood, the Chamber did not address concrete examples cited by the Defence of conversations in which Mr. Bemba and Mr. Babala did not understand the codes that the other person was using.[517] There are clear indicia that this conversation suffered the same issue, as reflected by Mr. Bemba's repetitive queries, and clear confusion (*Comment? Comment?…Encore....C'est ça la récupération, n'est-ce pas? Ce n'est pas ça*?). In the absence of a reliable record, it is impossible to conclude that Mr. Bemba knew and understood the code in the same manner as the Chamber understood it.

261. Indeed, if the Chamber had consistently implemented its stated approach of only relying on what was said by one speaker,[518] it should have examined Mr. Bemba's input in isolation. If the Chamber had done so, the only reasonable conclusion (or at least, one reasonable conclusion) would have been that Mr. Bemba understood Mr. Babala to be referring to on the one hand, the need to

[516]TJ,para.267.
[517]FTB,para.203.
[518]TJ,paras.227,266,267.

compensate people who had incurred a debt,[519] and on the other, the need to effect payments for the "enfant" for "Bravo Golf" . The Prosecution accepted that "enfant" could be Mr. Mangenda, and "Bravo Golf", Mr. Bemba.[520] Whereas the sums mentioned do not correspond to the amounts paid to D-67 and D-64, the "enfant" had deposited money at the detention unit on 16 and 17 October 2012,[521] which would plausibly explain the reference to payments, and Mr. Babala's clarification that the payments related to "*la meme chose comme aujourd'hui*".[522] It was therefore a clear error for the Chamber to construe the conversation exclusively in an incriminating light.[523] The particular weight the Chamber placed on this conversation also heightened their obligation to give due consideration to such alternative inferences.

262. Related to this error, the Chamber found that because Mr. Bemba and Mr. Babala used coded language, they must have intended to conceal illicit activity regarding payments to witnesses; consequently, Mr. Bemba must have known of the illicit nature of the payments. [524] This is circular, and an unacceptable generalisation: apart from the above conversation, the Chamber did not cite any evidence that the communications between Mr. Bemba and Mr. Babala concerned illicit payments, or were otherwise related to the charged offences in this case.

263. The Chamber also inferred from communications that concerned general payments that Mr. Bemba controlled and authorised illicit payments to the witnesses in this case. This was a non-sequitur that lacks evidential foundation. It is a clear error of reasoning to infer illicit conduct from evidence of licit conduct. In any case, this inference is once again drawn from the flawed

[519]CAR-OTP-0077-1299 (lns.9-41) JPB: pour qui…euh…les trois-la…alors que 07, qui…que…07 récupère et puis le reste qu'il envoie chez l'enfant que tu connais pour l'aider à faire, ce que tu sais la…euh…les…les de ces dix-là, de BRAVO GOLF. Tu comprends?….Tu comprends?....Non, non, non, non, non, elle est à la messe pour le moment. Jusqu'à 20 heures 30. Mm-mm….mais...Demain donc trois. Euh ... que 07 récupère... euh ... cette partie-là, et le reste chez l'enfant…. pour ah…pour BRAVO GOLF, quoi….Comment? Comment?…Encore....C'est ça la récupération, n'est-ce pas? Ce n'est pas ça?…Ah ça je ne sais pas ; enfin je vais d'abord demander comme ça demain, mais OK ça va. Bon ça va. Mais, donc….euh…D'accord. OK. Mais… ça va.…Mais…Non, ça va. Donc alors, voies d'abord...fais ces histoires-là...euh...les trois là comme vous avez payé la dette et puis…on enlève 1 kg là et puis le reste à l'enfant. Tu comprends?
[520]ICC-01/05-01/13-1110-Conf-AnxA,p.4,11.
[521] ICC-01/05-01/13-599-Conf,para.122 ;ICC-01/05-01/13-198-Conf-AnxA,p.6.
[522]CAR-OTP-0077-1299 at 1301,lns.29-30.
[523]*Kordić* AJ,para.691.
[524]TJ,para.701.

detention unit recordings, and therefore does not have a reliable evidential foundation.[525]

264. In considering whether this inference was also the only reasonable inference, the Chamber was obligated to consider specific Prosecution evidence, which reflected Mr. Bemba's understanding that the payments were licit, or which demonstrated that Mr. Bemba was side-lined on issues concerning illicit payments.[526] The Chamber even acknowledged that "for small amounts of money", it was possible for payments to be effected without Mr. Bemba's knowledge or authorisation.[527] The Chamber failed to provide any reasons as to why it could discount the inference that illicit payments were effected without his knowledge, given that the 'illicit' payments were also generally low.[528] This error is aggravated by the Chamber's failure to give due weight to specific examples where Mr. Bemba's proposal to pursue licit strategies,[529] resulted in him being bypassed.[530]

Conversation between Mr Babala and Mr. Kilolo

265. The Chamber's inference concerning Mr. Bemba's involvement in illicit payments is further flawed through its reliance on an intercepted conversation '*during which Mr Babala asked whether Mr Kilolo, who requested the transfer of money, had 'talked' with the client*'.[531] This is a wholly unreliable evidential foundation given that it is uncorroborated third-hand hearsay. The vagueness of the language also does not support the specific conclusions drawn by the Chamber. Mr. Kilolo does not describe the particular manner in which the matter was discussed, or Mr. Bemba's understanding of the purpose of such payments.

[525] See section 4.3.3
[526] FTB,paras.247-248,253,255; CAR-OTP-0082-0596,lns.63-64,76-85.
[527] TJ,para.816.
[528]ICC-01/05-01/13-2102-AnxD.
[529] FTB,para.89.
[530] FTB,para.240; Anx.D.
[531] TJ,para.699.

266. The absence of the ability to examine the interlocutors is of particular importance given the existence of evidence which reflects that Mr. Bemba was opposed to the idea of payments to the witnesses: [532]

> *AK: Alors par contre, les trois-là, bon, le client m'a dit qu'on puisse attendre, comme eux ne posent pas de problèmes, qu'on puisse attendre calmement comment ça va évoluer, et puis …*
> *FB: Non, non, non je ne suis pas d'accord avec lui, là. Il faut y aller, faire le service après vente, hein.*
> *AK: Ben, c'est ça, c'est ça.*
> *FB: Il faut le faire.*
> *AK: **Il m'a dit non**, comme…*

267. The Chamber's failure to address Defence arguments[533] concerning this overall context renders its inference patently unsafe.

4.2.4 Concealing Illicit Activities

268. The Chamber found that Mr. Bemba participated in concealing the illicit activities of the co-perpetrators, which included circumventing the Registry's monitoring system by abusing the privileged line and using coded language.[534] From these, the Chamber inferred Mr. Bemba's knowledge and intent concerning the illicit nature of common plan.[535] The finding is based on flawed inferences and conjectured conclusions, and fails to consider reasonable alternative inferences.

4.2.4.1 Use of Coded Language

269. The Chamber's finding on this point is underpinned by the assumption that Mr. Bemba would not have sought to conceal something that he did not know to be illicit. It is, however, question-begging to infer that Mr. Bemba knew that he was engaged in illicit activity because he used codes, and that he used codes because he knew that he was engaged in illicit activity.

[532] CAR-OTP-0082-0596,lns.41-46.
[533] FTB,para.240.
[534] TJ,paras.669,735,803.
[535] TJ,para.817; ICC-01/05-01/13-2102-AnxB,pp.7-8.

270. Moreover, the Chamber mischaracterised, and thus failed to accord due weight to Defence arguments concerning prior use of coded language.[536] The point advanced by the Defence was that it could not be inferred from that mere usage of codes that Mr. Bemba was engaged in illicit activity, since he had a consistent pattern of using codes (including some of the same codes in the case) to discuss non-illicit activity.[537] Codes were a mechanism used to achieve privacy. Both Mr. Bemba and Mr. Babala were members of a political opposition party, and Mr. Babala was based in a country that had the means and motive to monitor any communications concerning the MLC, Mr. Babala, or Mr. Bemba.[538] The use of codes between the defendants appears to have become a general practice, as reflected by the extent to which the defendants use codes in connection with routine matters.[539] The use of codes can not, therefore, in itself constitute evidence of illicit intent.

271. The Chamber's related inferences concerning the illicit nature of certain codes are also invalidated by the Chamber's failure to provide a reasoned opinion in relation to Defence arguments and evidence that it cannot be assumed that codes and phrases had a unitary meaning, rather than one that was speaker and context specific.[540]

4.2.4.2 Improper Use of the Detention Unit Privileged Line

272. The Chamber's errors concerning D-55 are set out in section 4.2.2.3.

273. The Chamber's findings concerning the existence of two multi-party calls with D-19 is based on a clear error of evidence as concerns the 4 October 2012 call, and a flawed, and arbitrary inference concerning the January 2013 call, namely, that although it is reasonable to conclude that a party could be put on hold for 10 minutes,[541] a period of 17 minutes[542] must equate to a multi-party call.[543]

[536]TJ,para.749.
[537]ICC-01/05-01/13-1794-Conf-Corr,paras.64-65.
[538]ICC-01/05-01/13-T-48-Red-ENG,p.64,lns.1-4.
[539]CAR-OTP-0079-0141 at 0146,lns105-112;CAR-OTP-0079-0191 at 0193,lns.29-30,0194,lns.38-54.
[540] ICC-01/05-01/13-1794-Conf-Corr,paras.44-46; ICC-01/05-01/13-1844-Conf,paras.4-6.
[541]TJ,paras.742-745.
[542]TJ,para.741.
[543]ICC-01/05-01/13-2102-AnxB-Conf,p.8.

274. These errors stem from the Chamber's attempt to analyse CDRs without relying on the analysis or opinion of a forensic expert.[544] The room for error is self-evident given the Chamber's reliance on an call with D-19 that does not exist,[545] and which was never pleaded by the Prosecution. As concerns the January contact pattern, the Chamber failed to give due weight to the testimony of P-361 that is impossible to determine, on the basis of CDRs alone, whether a particular overlapping contact is a conference call, as opposed to other equally plausible possibilities.[546] P-361 further confirmed that the ambiguity could not be cured by other call records that corroborate the time and duration of the contacts;[547] the ambiguity remains the same.

275. In order to rely on an inference, the Chamber must be satisfied that it is the only reasonable inference available on the evidence. The evidence of P-361 supported the existence of other reasonable inferences, as did the Chamber acknowledgment that overlapping contacts could also reflect the existence of simultaneous conversations (rather than a conference call).[548] The latter finding proves that the Chamber was not ultimately convinced that the existence of a conference call was the only reasonable inference available on the evidence.

276. The Chamber's reliance on the length of the overlap was arbitrary, and relied on a particular threshold that was never discussed at trial (as required by Article 74(2)).[549] P-361's maintained his position that it was not possible to verify the existence of a conference call (as opposed to call holding) after being shown a 28 minute call pattern.[550] In the course of this 28-minute call, Mr. Kilolo's number engaged in 6 other telephonic activities, including an outgoing call, which lasted for 7minutes 35 seconds.[551] The total amount of overlapping contacts is 15 minutes, 11 seconds. If, on the basis of a call pattern discussed at trial, it appears likely that Mr. Bemba was willing to endure call waiting and disrupted phone activity for a total duration of over 15 minutes, then it is

[544] *Supra*,Para.190.
[545] Anx.G.
[546] T-17,pp.24-26,42-43.
[547] T-17,pp.42-43.
[548] TJ,para.109.
[549] *Gotovina* AJ,para.58.
[550] CAR-OTP-0072-0391, row 9614.
[551] T-17,pp.25-26.

entirely arbitrary to conclude that Mr. Bemba would not do the same for 17 minutes.

277. Although the Chamber had the right to disregard P-361's expert testimony, its decision to reach a contrary conclusion was flawed by its failure to do so on the basis of rational evidence discussed at trial,[552] rather than opinion.[553] The Chamber also failed to consider, or provide a reasoned decision in relation to Defence evidence concerning the special circumstances in which Mr. Bemba was in contact with his legal team from the Detention Unit,[554] the related difficulty of reinitiating a call if cut off,[555] and Prosecution intercepts which reflected concrete examples of Mr. Bemba being placed on hold, and occupying himself with other activities (i.e eating).[556]

278. The Chamber's inference that Mr. Bemba contacted Mr. Babala through Mr. Kilolo's number in order to further the common plan is also based on an impermissible degree of speculation, and fails to take into consideration key dis-attribution evidence.

279. The Chamber inferred, on the basis of an undated contacts list from Mr. Kilolo, that the [Redacted] number registered to Mr. Kilolo for discrete pockets of time, was actually the number of Mr. Babala. In adopting this inference, the Chamber failed provide a reasoned opinion in relation to alternative inferences deriving from:

- Prosecution evidence,[557] and Defence arguments concerning the distinction between attribution of ownership, and attribution of usage as concerns specific contacts;[558]
- Detention unit documents that established that the number was registered by Vodacom to Mr. Kilolo at the time of the relevant contacts (from April 2012);[559]

[552] Bell,pp.56-60,93,95.
[553] *Gotovina* AJ,para.58.
[554] CAR-D20-0006-1337 at 1338; FTB,paras.139-140.
[555] The call occurred from 15:22-16:50:52; Mr. Bemba would not have been able to ask the guards to call Mr. Kilolo back after 5pm (until 6pm) CAR-D20-0006-1337 at 1340:ICC-01/05-01/13-T-48-Red-ENG,p.63,lns.22-25; FTB,para.140.
[556]CAR-OTP-0072-0391, rows 916-920; FTB,paras.139-140, fn.144.
[557]T-12,p.17,ln.11-p.18,ln.1.
[558]ICC-01/05-01/13-1402-Conf,paras.51-52; Greener.

- Detention unit correspondence and logs that established that the 2012 registration as a privileged number was confined to discrete time periods, which corresponded with the duration of Defence missions in the DRC;[560]
- Defence evidence, which established that the date of the contacts between Mr. Bemba and the [Redacted] number corresponded to the dates on which Mr. Kilolo was in the DRC;[561]
- Registry submissions that the detention guards are responsible for establishing contacts,[562] and are able to recognise the voice of persons who frequently call Mr. Bemba; [563] and
- Detention logs, which show that Mr. Babala was contacted by the guards on his registered number, on the same dates that the guards contacted the [Redacted] number.[564]

280. Rather than basing its decision on the above evidence, the Chamber concluded, from an undated contacts list, that Mr. Babala was the exclusive user of the number at all relevant times. Regarding the contacts list, the Chamber further failed to address Defence arguments that the label of a number did not necessarily designate the user. On the same list, "Bemba kokate Ukraine peter" is paired with the number of a person who is not "Bemba", "Kokate" or "Peter".[565] In absence of evidence as to the date of entry,[566] or circumstances under which the entry was created, no reasonable Chamber could infer that the list established that Mr. Babala was the exclusive user of the number on the relevant dates in 2012.

4.2.5 Remedial Measures

281. The Chamber inferred that there was a common plan to interfere with witnesses,[567] from its finding that the co-perpetrators '*discussed and were*

[559] CAR-D20-0006-0478
[560]FTB,paras.128-134;CAR-D20-0006-2009, CAR-D20-0006-2010, CAR-D20-0006-2011, CAR-D20-0006-2012, CAR-D20-0006-2013.
[561] FTB,paras.128-134, Anx.H,p.4.
[562]CAR-D20-0006-1337 at 1338.
[563]FTB,para.131; ICC-01/05-01/08-T-303-Red3-ENG,p.17,lns.1-9.
[564]Anx.H.
[565]CAR-OTP-0090-1872 at 1873; ICC-01/05-01/13-1086-Red,paras.9-10; ICC-01/05-01/13-1402-Conf,para.56.
[566]TJ,para.740. Cf ICC-01/05-01/13-1402-Conf,paras.55-56;ICC-01/05-01/13-1086-Red,paras.7-10.
[567]TJ,para.683.

persuaded to take a series of measures to prevent and frustrate the Prosecution's Article 70 investigation.'[568] The Chamber further inferred that Mr. Bemba agreed to the common plan, in light of his reactions to the information provided to him,[569] and inferred his knowledge of the illegality of this plan from a discussion concerning the *Barasa Case*.[570]

282. This uncharged plan had no relevance to earlier knowledge, intent and conduct. In terms of the Barasa case, apart from the fact that it was a privileged discussion,[571] the Chamber failed to provide a reasoned opinion in relation to evidence concerning Mr. Bemba's tendency to discuss topical issues in other ICC cases.[572] Nor did the Chamber consider that Mr. Bemba's interest would have been piqued by the unsealing of the arrest warrant that day (as reported in the news),[573] coupled with Mr. Barasa's representation by a member of his Defence (Mr. Kaufman).[574] Given that the conversation occurred within the context of the professional Defence relationship, and did not concern the Bemba case or Defence witnesses, the prejudicial value of relying on it outweighs the non-existent probative value. Inferences drawn from such material are unreliable and prejudicial.

283. The Chamber's inferences concerning reactions to the existence of a genuine investigation are also invalidated by the Chamber's reliance on hearsay communications to which Mr. Bemba was not a party, and related failure to account for the impact of the *faux scenario* on Mr. Bemba's knowledge and reactions.

284. In terms of the latter, although Prosecution were not in fact engaged in improper conduct, Mr. Bemba believed that they were, due to false information that had been fed to him. It was therefore a manifest error for the Chamber to find that Mr. Bemba was involved in a cover-up plan concerning a genuine Article 70 investigation, when everything that Mr. Bemba knew, and was reacting to, concerned a completely alternative universe, in which the

[568] TJ,para.801.
[569] ICC-01/05-01/13-2102-AnxB-Conf,p.6.
[570] TJ,para.820
[571] See section 3.2.
[572] FTB,para.84.CAR-OTP-0080-0304 at 0307,lns.51-59, CAR-OTP-0090-1256, at 2161,lns.127-137.
[573] ICC-01/05-01/13-1110-Conf,fn.765.
[574] FTB,para.83; ICC-01/09-01/13-18.

Prosecution investigation was described to him as being completely unlawful. It is simply wrong to make inferences concerning Mr. Bemba's state of mind, on the basis of a complete sub-set of facts that were unknown to him, whilst at the same time, ignoring the actual context of his state of mind, and related reactions.

285. If the communications in which Mr. Bemba was a party are viewed in isolation, it is apparent that Mr. Bemba believed that:

- The witnesses the Defence had relied upon were actual soldiers;[575]
- The Prosecution had, without obtaining the consent of the Chamber,[576] approached Defence witnesses (who had been abandoned by the Defence because their evidence was incoherent); [577]
- The Prosecution were taking advantage of the fact that these witnesses felt aggrieved for not having been called, and were offering them benefits and asylum to change their testimony,[578] and were putting words in their mouths;[579]
- It would be useful for Mr. Kilolo to contact the witnesses, and collect evidence concerning the Prosecution's illegal conduct in order to put it before the Chamber;[580]
- In so doing, the Defence should make clear to its witnesses that even if they felt aggrieved, the Defence could not ethically meet their demands,[581] also, if the witnesses were to lie to the Prosecution to obtain such benefits, the witnesses could be prosecuted for perjury;[582]
- If the witnesses did give statements to the Prosecution, no-one would believe the witnesses' stories;[583]
- For these reasons, if the Prosecution tried to rely on these tall tales and lies to make any claims,[584] Mr. Kilolo could (not should) just deny them.[585]

[575]Anx.D.
[576] TJ,para.490('Les dames'=Judges).
[577]Anx.D.
[578]Anx.D.
[579]Anx.D.
[580]Anx.D.
[581]Anx.D.
[582]Anx.D.
[583]Anx.D.
[584]Anx.D.
[585]Anx.D.

- The Defence could also use the correspondence from the witnesses with their demands and grievances, as it would demonstrate that the Defence had not entertained such demands.[586]

286. There is absolutely no basis from which to infer that Mr. Bemba had a "guilty mind" or knowledge of past illicit conduct on the part of the Defence.

287. The Chamber also erred by interpreting Mr. Bemba's words in the manner that was most favourable to the Prosecution, rather than considering alternative or exculpatory interpretations. For example, the Chamber found that Mr. Bemba had instructed Mr. Kilolo to deny everything. It then relied on this to infer Mr. Bemba's association with an actual cover-up plan. In reaching this conclusion, the Chamber failed to provide a reasoned opinion in relation to the Defence argument that this phrase demonstrated the contrary: by stating that Mr. Kilolo could (not should) deny these "lies" in the worst case scenario, it is more reasonable to infer that firstly, Mr. Bemba believed that any evidence obtained from the Prosecution would be false (and thus could easily be denied), and secondly, in the worst case scenario, Mr. Kilolo should adopt a lawful course of action (to deny allegations– which is a legal right)[587] rather than engage in unlawful remedial measures.[588]

288. In drawing inferences, the Chamber also failed to provide a reasoned opinion in relation to Defence evidence which corroborated Mr. Bemba's state of mind: i.e. his belief that the Defence should draft an abuse of process motion in order to reveal this matters to the Chamber (the opposite of a cover-up).[589] The Chamber also failed to construe Mr. Bemba's state of mind with reference to other Main Case contextual information that explained why Mr. Bemba would have believed this false information.[590]

289. Finally, by characterising the question as to whether this scenario was real or false as irrelevant, the Chamber erred by failing to consider the role of Mr.

[586]Anx.D.
[587]ICC-01/04-01/10-465-Red,para.314 concerning the fact that the denial of "lies" does not equate to a cover-up.
[588]FTB,fn.274.
[589]FTB,para.227,fn.263,264,265
[590] FTB,paras.190-200,fn.210-226

Mangenda and Mr. Kilolo as the *deus ex machina*. Mr. Mangenda and Mr. Kilolo fed Mr. Bemba snippets of false information, in order to trigger specific reactions, and shepherd him away from an approach (which was lawful), to one that could have allowed Mr. Kilolo and Mr. Mangenda to derive a personal gain.[591] Their role is an intervening event as concerns Mr. Bemba's state of mind before October, as compared to his state of mind afterwards. Mr. Bemba's reactions thus have absolutely no probative value as concerns his knowledge, intent, and pattern of conduct regarding the charged Article 70 offences.[592]

4.3 The Chamber erred by basing Mr. Bemba's conviction, to a decisive extent, on uncorroborated remote hearsay evidence

290. Although the Chamber acknowledged that a conviction "may not be based solely and mainly on untested evidence, such as a mere allegation by a witness whom the accused has not been able to question at any stage of the proceedings",[593] Mr. Bemba's conviction rests, to a decisive extent, on remote hearsay and untested evidence.[594] The Chamber's error derived on the one hand, from its failure to qualify particular evidence as remote hearsay, and on the other, its omission to issue an item-by-item determination as to the prejudicial value of particular hearsay statements, and the resultant impact on admissibility and weight.

291. Although hearsay evidence is not *per se* inadmissible, its remoteness,[595] and the inability of the Defence to test or confront the evidence will militate against admission, or allocating the evidence decisive weight.[596] What a witness has heard from someone else will have low probative value,[597] and "evidence, which is based on hearsay, must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution's case".[598] The weight of hearsay will also be greatly lowered if the source has particular motives.[599]

[591] Anx.C.
[592] See section 2.3.3.
[593] TJ,para.25.
[594] ICC-01/05-01/13-2102-AnxA-Conf.
[595] ICC-01/04-01/07-2635,paras.27-30. *Karadžić* TJ,fn.23.
[596] ICC-01/04-01/06-1399-Corr,para.28.
[597] ICC-01/04-01/06-T-276-Red-ENG,p.76,lns.14-19.
[598] ICC-01/04-02/12-3-tENG,para.496.
[599] ICC-01/04-01/07-T-332-Red-ENG,pp.71-73;ICC-01/04-01/07-T-187-Red-ENG,pp.28-38.

292. According to the *ad hocs*, the Chamber's discretion to rely on hearsay evidence is fettered by two important caveats: firstly, the Chamber must assess such evidence with caution, and secondly, significant caution will apply if the hearsay evidence is not corroborated.[600] Even if the hearsay is nominally 'corroborated':[601]

> *where one piece of untested evidence is being used to corroborate another piece of untested evidence, a trial chamber must exercise caution to ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence.*

293. The ICTR Appeals Chamber has also underscored that:[602]

> *The Chamber has a discretion to admit relevant evidence which it deems to have probative value, and conversely, an obligation to refuse evidence which is not relevant, or does not have probative value. Evidence whose reliability cannot adequately be tested by the Defence cannot have probative value.*

294. Convictions have been reversed due to the Chamber's failure to apply caution to the evidence,[603]or acceptance of a witness's uncorroborated hearsay testimony.[604] Pursuant to Article 21(3) of the Statute, the ICC Appeals Chamber must take into consideration ECHR case law that the right to a fair trial would be violated through exclusive or decisive reliance on untested evidence.[605]

295. In contradistinction to the above principles, apart from the testimony from D-55 (which is not incriminating), all of the Chamber's findings concerning Mr. Bemba rest on untested or remote hearsay evidence, comprised of:

- Hearsay testimony from perjured witnesses, who signed an immunity deal (D-2, and D-3); [606]
- Coded and vague references contained within intercepted recordings between co-accused, who did not testify, and had motives to provide inaccurate or exaggerated information;[607] and

[600] *Lukić* AJ,para.14.
[601] *Popović* AJ,para.1226.
[602] *Bagosora* TC Decision 18/11/2003,para.8.
[603] *Muvunyi* AJ,para.70.
[604] *Karera* AJ,para.204; *Ndindabahizi* AJ,para.115.
[605] *Luca v. Italy*,para.41.
[606] ICC-01/05-01/13-2102-AnxA,pp.14,24 (findings 12,13,28).
[607] ICC-01/05-01/13-2102-AnxA(findings 1-11,14-23,29-30,34-36,38-46,48).

- Recorded utterances from a co-accused (Mr. Babala) who did not testify, and which are completely devoid of context.[608]

296. The Chamber issued a generic statement that in assessing weight, it would take into account if "the parties have not had an opportunity to test the author of the non-oral evidentiary item submitted".[609] But, apart from the detention unit recordings, the Chamber did not exercise caution, as reflected by its reliance on uncorroborated items to sustain key findings against Mr. Bemba.[610] The Chamber also did not issue a reasoned determination in relation to the prejudice stemming from individual evidential items, or the cumulative impact of its reliance on such evidence to convict Mr. Bemba.[611] It is telling that whereas the Chamber's reliance on intercepts between Mr. Mangenda and Mr. Kilolo will clearly be more prejudicial vis-à-vis Mr. Bemba then the persons who participated in the communication, the Judgment included no analysis as to the impact of intercept evidence on the position of individual defendants.[612]

297. Although a Chamber is afforded deference as concerns factual conclusions, this deference does not apply to the Chamber's obligation to assess evidence in a manner that comports with the above-mentioned legal principles.[613] The Chamber's failure to apply, rather than simply cite the above legal principles, invalidates Mr. Bemba's conviction.

4.3.1 Remote hearsay from perjured witnesses

298. Both D2 and D-3 acknowledged that they had lied under oath in the Main case in relation to almost every aspect of their testimony. D-2 explained that:[614]

> *I cannot just get up one morning for nothing and desire to testify. If I agreed to testify, it was because I realized that at the end of it all I stood to gain something.*

[608]ICC-01/05-01/13-2102-AnxA(findings 14-23).
[609]TJ,para.207.
[610]ICC-01/05-01/13-2102-AnxA-Conf.
[611]FTB,paras.204,238,269.
[612]Cf ICC-01/04-01/07-2635,paras.53-54.
[613] *Kalimanzira* AJ,paras.99-100
[614]ICC-01/05-01/13-T-19-CONF-ENG,p.37,lns.10-12.

299. They did not experience a subsequent epiphany concerning the need to tell truth under oath; rather, after having been dragged into a police station (where, [Redacted],[615] [Redacted]), they agreed to testify in favour of the Prosecution. This agreement was only reached after–having been advised that they were suspects who could be prosecuted by national authorities – they received a promise from the Prosecution that they would not be prosecuted if they agreed to testify against Mr. Bemba et al.[616]

300. During investigations and in Court, the Prosecution advised them that if they testified in a manner that the Prosecution considered to be untruthful, the Prosecution could revoke the agreement,[617] which acted as a clear constraining factor as concerns the willingness of the witnesses to resile from the account they had provided to the Prosecution, during cross-examination. Both witnesses also provided testimony that was demonstrably false, while under oath in the Article 70 case,[618] and which contradicted each other on material aspects.[619]

301. D-2 testified that Mr. Kilolo gave him money and informed him it was a gift from Mr. Bemba, but did not testify that any *quid pro quo* was involved. Although the Chamber relied on the "context" of the payment in order to infer that it was illicit, the Chamber also found that the money had been promised to the witnesses by Mr. Arido (who was not part of the common plan);[620] the Chamber found that after Mr. Arido absconded, Mr. Kilolo agreed to pay it on the spot to calm the witnesses down.[621]

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[615]ICC-01/05-01/13-T-20-CONF-ENG,p.42,lns.12-13.

[616] *D-3*:CAR-OTP-0078-0155, at 0163,lns.280-306, at 0164,lns.307-322,lns.333-342, at 0165,lns.344-346; CAR-OTP-0078-0171-R01 at 0173, 68-71, at 0175,lns.139-149, at 0176,lns.159-161; CAR-OTP-0077-1095 *D2*:CAR-OTP-0080-0007 at 0010,lns.120-125, at 0011,lns.134-160, at 0014,lns.286-288, at 0017,lns.382-419;CAR-OTP-0078-0303.

[617] D3: CAR-OTP-0078-0171-R01, at 0174,lns.104-111, at 0175,lns.122-134, CAR-OTP-0077-1095;ICC-01/05-01/13-T-22-CONF-ENG,p.42,lns.10-25,p.43,lns.1-20. **D-2:** CAR-OTP-0080-0007, at 00018,lns.445-462, at 0019,lns.463-473; CAR-OTP-0078-0303; ICC-01/05-01/13-T-18-Red2-ENG,p.43,lns.18-25,p.45,lns.1-20.

[618]ICC-01/05-01/13-2102-Conf,p.15.

[619]The Chamber emphasised that D2 was credible because he acknowledged that Mr. Kilolo had not promised relocation to the Douala witnesses (TJ,para.310; ICC-01/05-01/13-T-19-CONF-ENG,p.78) but for D3, found that his description of promises from Mr. Kilolo of relocation were credible because they were detailed and corroborated by D2 (TJ,para.314).

[620]TJ,paras.343,349,372-6.

[621]TJ,para.374. D-2 testified that he threatened not to testify unless he received some money (T-20,p.82,lns.16-18).The Chamber's observation that Mr. Kilolo "was not at all surprised by the witness's complaints" (TJ,para.379) is completely speculative.

302. The initial agreement was based on the witnesses' willingness to lie to both the Court and the Defence; it was a common plan that excluded the Defence. The Chamber recognised as such by finding that Mr. Kilolo was not aware that the witnesses were lying during the February 2012 meeting, and was not involved in the discussions regarding payments and relocation.[622] The Chamber's own findings thus undercut the notion either that the money was paid pursuant to a pre-meditated common plan with Mr. Bemba, or that Mr. Bemba would have know that money provided to Mr. Kilolo for Defence missions would be used for this specific purpose.

303. No independent evidence corroborates D-2's remote hearsay testimony concerning this alleged gift from Mr. Bemba. D-3 also testified that the witnesses had been told by Mr. Kokate that they would not receive money from Mr. Bemba as his assets were frozen; instead, they would have the possibility to receive the money as they came to the courtroom (i.e. in the form of daily subsistence allowance from the Court).[623]

304. In any case, in assessing Mr. Bemba's responsibility, the point was not whether Mr. Kilolo said this to D2, but rather whether he did so because Mr. Bemba was aware of the payment, and intended for Mr. Kilolo to say this. No evidence was led on this, which means that in relying on this extract for the purposing of assessing Mr. Bemba's responsibility, the Chamber relied on speculative remote hearsay, that is, that Mr. Bemba must have discussed this issue with Mr. Kilolo, before Mr Kilolo spoke to D-2. Since Mr. Kilolo did not testify, the Defence had no means to explore this issue, and it was impossible to do so through D-2, since he was not privy to hypothetical communications between Mr. Kilolo and Mr. Bemba on this issue. By virtue of the very nature of such speculation, it was impossible for the Defence to shadow-box thin air.[624]

[622]TJ,paras.348-9.
[623]ICC-01/05-01/13-T-21-CONF-ENG,p.25,lns.11-18.
[624]The ability to cross-examine the person who heard the hearsay evidence does not obviate the prejudice in not being able to confront the original source: *Milošević* AC Decision 30/09/2002,para.22.

305. The same prejudice applied to the Chamber's finding, based on D-3's remote hearsay evidence, that Mr. Kilolo informed the witnesses that they would meet Mr. Bemba in Kinshasa, once he was released from detention.[625] Apart from the fact that there is nothing illicit as concerns meeting a witness after the completion of testimony, D-3's testimony is not corroborated by independent evidence. Although D-2 was supposedly present, he did not mention this detail. D-3's earlier statements fail to mention this promise; his memory appears to have been recovered after the public confirmation decision was issued, which referred to Mr. Kilolo mentioning to D-6 (after he testified) that Mr. Bemba could eventually meet him in Kinshasa.[626]

306. By accepting this testimony at face value (and relying on it to convict Mr. Bemba), the Chamber failed to give due weight to the fact that D-2 and D-3 had lied under oath, which at the very least, impacted on their credibility as witnesses of truth. The Chamber had the discretion to reject such testimony in its entirety, but having decided to rely upon it, was required to approach it with caution, and/or require corroboration.[627] The Chamber also failed to apply additional caution or require corroboration in light of the remoteness of the hearsay, and related inability of the Bemba Defence to test the evidence. Its failure to do so was a clear and reversible abuse of discretion.

4.3.2 Coded and Vague Hearsay Evidence from Mr. Bemba's Co-Accused

307. The Chamber did not address the issue as to the weight of unauthenticated intercept communications, but it would appear from the manner in which the Chamber relied on them, that the Chamber considered the contents to be akin to sworn testimony on matters of first-hand experience, rather than remote, untested hearsay. This was a reversible legal error. Intercept evidence has none of the features of sworn testimony. The speakers are not under oath. Although the intercepts might constitute a reliable record of what was said, they are not a reliable record as to whether what is being described is truthful, as opposed to opinion, conjecture or fantasy.[628] For this reason, in common law jurisdictions,

[625] TJ,para.373.
[626] ICC-01/05-01/13-749,para.57.
[627] *Prince Taylor* AJ,para.38.
[628] Wigmore on Evidence, §1420; FTB,fn.279.

if the content of electronic communications are not repeated by the speaker under oath, they are inadmissible as proof of the truth of their contents,[629] due to the inability to test whether the speaker knew of the truth or accuracy of what he said or wrote.[630] These principles are line with the stance adopted by international courts regarding reliance on speeches,[631] and the particular need for caution as concerns remote, untested hearsay.

308. As a result of this error, the Chamber relied repeatedly on intercepts, in which Mr. Kilolo or Mr. Mangenda refer to Mr. Bemba's sentiments as concerns certain testimony,[632] for the truth of their contents. Even if the recording reflects what the two speakers said, it was highly unreliable and prejudicial to use such extracts in order to divine Mr. Bemba's actual state of mind. Such a conclusion is contingent on firstly, a judicial interpretation of the codes used by the interlocutors, secondly, whether Mr. Mangenda was conveying information to Mr. Kilolo that Mr. Mangenda believed to be true (or *vice-versa*), thirdly, whether the person who spoke to Mr. Bemba was in a position to accurately assess Mr. Bemba's sentiments, and fourthly, whether the context in which these sentiments were expressed made it more likely than not that Mr. Bemba was conveying his real sentiments. None of these issues can be ascertained on the basis of a fleeting, remote hearsay reference, couched in vague and coded language.[633]

309. As an example of such prejudice, the Chamber concluded that Mr. Bemba closely followed the illicit coaching activities of Mr. Kilolo,[634] based on a conversation between Mr. Mangenda and Mr. Kilolo where the former stated that *"[le client] a vu vraiment que (...) un veritable travail de couleur a été effectivement fait (...) lui-même a vraiment senti cela*." The Independent Counsel translated the same phrase as "'*non non le client est satisfait parce qu'il a vu qu'un véritable travail de couloir a été réalisé"*'.[635] These discrepancies (*couleur/couloir*) could only be resolved if Mr. Mangenda had

[629] *Ratten v. The Queen*; *Walton v. R*,para.9; *R v. Smith*,p.916, e-f and p.924, d-f; *R v. Leonard*,paras.32-36; *R v. Chrysostomou*,para.28.
[630] *Lejzor Teper v The Queen*.
[631] ICC-01/04-01/07-2635,paras.32-33; FTB,para.237.
[632] ICC-01/05-01/13-2102-AnxA, findings 2,8,9,12,28-30,48.
[633] Paras.203-207,290-294.
[634] TJ,para.495.
[635] CAR-OTP-0074-0897 at 0914.

testified (which he did not), and yet the Chamber adopted the Prosecution interpretation without justifying why and how it was able to do so.[636]

310. Moreover, although the Defence pointed out several examples where the two speakers conveyed unreliable or false information to each other,[637] the Chamber did not address this issue. Where the Chamber applied caution to specific evidence, it expressly noted this in Judgment.[638] In the absence of such language or reference to Defence arguments, the only reasonable conclusion is that the Chamber did not approach these particular aspects of the intercepts with caution. The Chamber's reliance on these intercepts in connection with Mr. Bemba falls within the four corners of the Appeals Chamber reversal of the *Muvenyi* conviction due to the Chamber's reliance on vague hearsay evidence, which did not contain sufficiently reliable information concerning the details of the accused's involvement in the crimes.[639]

311. The Chamber also erred by inferring that Mr. Bemba was part of a common plan, on the basis of conversations between Mr. Kilolo and Mr. Mangenda,[640] in contravention of ICC precedents, which declined to rely on remote, untested hearsay evidence to establish the defendant's participation in a common plan.[641]

4.3.3 Reliance on the utterances of a co-accused in technically flawed conversations

312. The Chamber erred in fact and law by relying on ten unauthenticated, coded and de-synchronised recordings between Mr. Bemba and Mr. Babala.[642] Concretely, the Chamber:

- Relied on fundamentally unreliable Detention Centre recordings, including the 16 October 2012 conversation; and
- Contradicting its own findings by implicitly reconstructing the interactions.

[636]Cf *Krstić* AJ,para.119.
[637] FTB,paras.234-.237,253-256.
[638]TJ,para.548.
[639]*Muvunyi* AJ,para.70.
[640]TJ,para.535
[641]ICC-02/05-02/09-243-Red,paras.177-178,207; ICC-01/04-02/12-3-tENG,para.423 (upheld on appeal,ICC-01/04-02/12-271,paras.204-205.
[642]TJ,paras.117,693,695-7,fn.362,fns1590-41597-8

313. These errors, viewed individually or cumulatively with other errors, invalidate Mr. Bemba's conviction for corruptly influencing witnesses, and the Chamber's findings concerning Mr. Bemba's membership of the common plan.[643]

314. As concerns the first error, in light of the de-synchronisation issue,[644] the Chamber decided to approach the recordings with caution, and "where discrepancies appear plausible",[645] averred that it would not rely on them. The Chamber did not explain its methodology for identifying discrepancies, nor did it address Dr. Harrison's unequivocal testimony that it would be virtually impossible to identify discrepancies in a reliable manner, since the start, and degree of misalignment cannot be determined by objective means.[646] Dr. Harrison further cautioned in relation to the problem of plausible misalignment, in which particular components might appear to reflect a real-time conversation, whilst being anything but.[647]

315. The Chamber did not provide any elaboration as to what constitutes "plausible discrepancies" or examples where it found such discrepancies to exist. It is nonetheless clear that the Chamber did not correctly apply the issues identified by Dr. Harrison by virtue of its reliance on the specific extracts of a conversation (dated 16 October 2012),[648] which Dr. Harrison identified as being flawed by significant discrepancies.[649]

316. The Chamber acknowledged that it is impossible to identify how the phrase– *C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien*–relates to either earlier references from Mr. Babala, or Mr. Bemba's questions and responses, but nonetheless found that it could rely on this discrete extract because it "stands alone".[650] The Chamber then contradicted itself by interpreting this phrase with the benefit of words used elsewhere in the conversation (Whisky, Le Collègue d'en haut', and 'Bravo

[643]ICC-01/05-01/13-2102-Conf-AnxA, items 14-23.
[644]ICC-01/05-01/13-1199-Conf,paras.37-42.
[645]ICC-01/05-01/13-1989-Conf,para.227.
[646]ICC-01/05-01/13-T-43-Red-ENG,pp.65-66,68.
[647] CAR-D20-0006-1244 at 1255-7;T-43-Red,p.76,ln.5-p.77,ln.14.
[648]TJ,para.117,fn.362.
[649]T-43-Red,pp.35-39.
[650]TJ,para.267.

Golf'), even though it recognised that it could not establish the nexus between this phrase, and other sections of the conversation.[651]

317. In assuming that the above phrase is one continuous utterance, the Chamber misunderstood the source of the problem: it fixated on one symptom (misalignment of speakers) and not the cause (the flaw in metering silence),[652] and therefore ignored the existence of other symptoms caused by this flaw. In particular, in this conversation, certain pockets of words from one channel (Mr. Babala's) are compressed together, such that they do not correspond to the real time sequence; as confirmed by Dr. Harrison, it is impossible to ascertain when this "squashing" commenced, and the exact level of compression at specific parts of the recording, which can increase or decrease at various junctures.[653] It is therefore impossible to reliably ascertain whether, in real time, Mr. Babala uttered these words as one continuous sequence, or whether the second part was uttered in response to a separate topic raised by Mr. Bemba. The fact that the Chamber did not refer to, or take account of this issue, highlights the danger of relying on such technically flawed evidence.

318. The Chamber's adoption of a 'cautious' approach, rather than exclusion, failed to adequately mitigate the prejudice caused by these flaws, in particular, as concerns the recordings for which the Chamber decided to rely on the utterances of Mr. Babala in isolation.[654] In so doing, the Chamber failed to issue a reasoned determination as to whether the technically flawed recordings had sufficient probative value to outweigh the prejudicial impact of admitting de-contextualised, coded, hearsay utterances of a co-accused through the bar, for the purpose of establishing Mr. Bemba's knowledge and intent.

319. No reasonable trier of fact could have found that it was possible to rely on decontextualised, standalone phrases from Mr. Babala in order to impute knowledge to Mr. Bemba, or to infer authorisation. *Gaining* knowledge of and *giving* authorisation to witness payments are dynamic processes implying interactions between two parties. The speech of one party, however accurate,[655]

[651]TJ,para.267.
[652]T-43-Red,pp.30-34.
[653]T-43-Red,p.38,ln.19-p.39.ln.25.
[654]TJ,paras.695-696,117,267.
[655]TJ,para.227;T43,pp 67-69.

is static and inherently incapable of demonstrating whether a message was heard and understood by the listener in the manner intended by the speaker.[656] This cannot be assumed, given:

- The poor quality of connections from DRC to the Detention Unit;[657]
- The existence of examples of conversations in which Mr. Bemba cannot hear or understand what Mr. Babala was saying;[658] and
- Clear indicia that the 'sucre' conversation suffered the same issue.[659]

320. As noted in Ground One, in determining whether payments were illicit, the Chamber placed heavy importance on the context, and the specific wording used when the payments were discussed. However, by virtue of the synchronisation problem, this context is completely absent from these recordings. Even if it is possible to establish that Mr. Bemba said "ok", without the context, it is not possible to establish what Mr. Bemba is saying "ok" to,[660] and the purpose of the payments.[661] The vagueness of this hearsay evidence warrants exclusion on that basis alone.[662]

321. The Chamber's reliance on Mr. Babala's utterances in isolation also caused palpable prejudice, by effacing exculpatory information that was relevant to Mr. Bemba's understanding of the nature of the payments.[663] The Appeals Chamber has recognised that where the Defence do not have the means to rely on exculpatory elements of items of evidence, the Chamber has a positive duty to implement counter-balancing measures,[664] which can include withdrawal of the impacted charges.[665] Similarly, the Court has underlined in connection with summarised exculpatory evidence that it must be able to view the original evidence in its entirety in order to safeguard the rights of the accused.[666] As

[656]FTB,para.313.
[657]CAR-D20-0006-1337at 1341.
[658]FTB,para.203.
[659] *See*,Para.260.
[660] T-43-Red,p.76.
[661]TJ.para,697-8, relies on recordings in which Mr. Bemba mentions payments, whilst at the same time, failing to address the implication of Defence evidence that such conversations concerned legitimate Defence missions (TJ,fn.1600).
[662]*Muvunyi* AJ,para.70.
[663]ICC-01/05-01/13-T-48-Red-ENG,pp.52-53,57-58.
[664]ICC-01/04-01/06-1486,paras.28,44.
[665]ICC-02/05-03/09-442-Red2,para.12.
[666]ICC-01/04-01/07-475,para.65;ICC-01/04-01/06-1401,paras.86,89.

confirmed by Dr. Harrison, that is exactly what the Chamber is unable to do in the present case.[667]

322. Domestic courts have found that the probative failure of digital hearsay is outweighed by prejudice in circumstances in which audio recordings exhibit significant quality flaws, particularly if the content is not corroborated by eye-witnesses or the speakers themselves.[668]

323. In light of the above, no reasonable trier of fact could have found that the minimal probative value of Mr. Babala's vague utterances was not outweighed by the cumulative prejudice resulting from coded, decontextualized, untested hearsay of a co-accused.

324. The Chamber's reliance on such evidence is further undermined by its failure to adhere to its own safeguards. Notwithstanding the caveat that it would only rely on stand-alone utterances for certain conversations, it is apparent that the Chamber's findings are based on implicit reconstructions, that occurred behind closed doors. For example, the Chamber listed the selected utterances spoken by Mr. Babala, and relied on them as evidence of Mr. Bemba's direct involvement and authorisation of the payments mentioned by Mr. Babala.[669] The Chamber failed to articulate the basis for its assumption that Mr. Bemba must have approved or authorised these payments,[670] but such a conclusion could only have been reached if the Chamber relied on the Prosecution's flawed transcripts,[671] or reconstructed the conversation in order to guess Mr. Bemba's potential responses. Mr. Bemba could only authorise a payment if the Chamber assumed that a yes, or okay on his part was responding to a question of money raised by Mr. Babala. The Chamber's conclusion is therefore predicated on flawed reconstructions of specific sequences of conversation, which falls foul of Dr. Harrison's professional opinion that it would be objectively difficult, if not impossible, to reconstruct interactions and reliably

[667]CAR-D20-0006-1244 at 1255-7;T-43-Red,p.76,ln.5-p.77,ln.14.
[668]*Ram Singh & Ors v. Col Ram Singh*; *Penny v. Com*, concerning a recording device that malfunctioned; *R v. Penney*, in which the Court refused to admit a discontinuously filmed video for the purposes of establishing the manner and length of killing.
[669]TJ,paras.695-696.
[670]TJ,paras.695-696.
[671]The Chamber's reliance on the transcripts is corroborated by its statement that it "reviewed all corresponding material together". TJ,para.227.

locate the response to a specific question or remark (and *vice-versa*) in the transcript.[672] Such a reconstruction would be subjective,[673] and highly unreliable, particularly if performed by persons who have no experience in acoustics and linguistics.[674]

325. Finally, although the Chamber stated that it would only rely on select excerpts if corroborated by other evidence, the Chamber relied on them to make key findings concerning Mr. Bemba's acts and conduct without independent corroboration. The Chamber relied on the "sucre" conversation to infer Mr. Bemba's knowledge as concerns illicit payments to D-64 and D-57, and by extension, all of the 14 witnesses. There is, however, no evidence which corroborates Mr. Bemba's knowledge of illicit payments to D-64 and D-57 and the Chamber cites no other evidence concerning Mr. Bemba's knowledge and authorisation of illicit payments to witnesses, in exchange for their testimony. Having recognised that it would be unfair and unsafe to render a finding without corroboration, it was a clear and reversible error to do exactly that as concerns a finding that was of decisive importance to Mr. Bemba's conviction.

4.4 The Chamber manifestly abused its discretion by making findings of fact that were not based on evidence

326. Mr. Bemba's conviction rests on several key findings, which are not supported by evidence, or for which the Chamber has misstated the evidence.

327. The Appeals Chamber has affirmed that,[675]

> Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.

328. The Chamber also had a related duty to reason its findings, which entails setting out the facts and grounds on which it based its decision, with sufficient clarity.[676]

[672]T-43-Red,pp.26,33-34,76-77,69.
[673]T-43-Red,pp.26,33-34,69,76-77.
[674]T-43-Red,pp.76-7.
[675]ICC-02/04-179,para.36.
[676]ICC-01/04-01/06-773,para.20.

329. Notwithstanding these legal requirements, there are at least 14 key findings concerning Mr. Bemba's responsibility, which are not supported by evidence,[677] including essential elements, such as:

- Mr. Bemba's participation in an agreement to interfere with witnesses, which was entered into from an unspecified date on which the Defence started to arrange for the testimony of D-57;[678]
- Mr. Bemba's intent to corruptly influence witnesses through monetary payments;[679]
- The causation between Mr. Bemba's conduct and the charged offences,[680] and the evidential basis for characterising it as "essential";[681] and
- Mr. Bemba's conduct in allegedly asking the 14 witnesses, either in person,[682] or through Mr. Kilolo and Mr. Mangenda, to lie in relation to the issues of payments and contacts.[683]

330. The Chamber's finding concerning Mr. Bemba's involvement in non-monetary promises was also based on a misleading and incorrect citation in the Prosecution Pre-Trial Brief.[684] Moreover, although the Chamber placed significant weight on Mr. Bemba's violation of the privileged line in order to conclude that he was part of the common plan,[685] this finding can be distilled to one contact with one witness, that was instigated by the witness, overseen by Counsel, and which did not touch on issues concerning the witness's testimony.[686] Far from being an evidentially established scheme, the finding concerning the October 2013 call was based on a clear error,[687] the Chamber wrongly characterised a communication between Mr. Bemba and Mr. Babala's approved telephone number as occurring on Mr. Bemba's privileged line,[688] and

[677] ICC-01/05-01/13-2102-AnxA-Red.
[678] TJ paras.103,802.
[679] TJ,para.700 only concerns knowledge.
[680] TJ,paras.857,924,927.
[681] TJ,para.924.
[682] TJ,para.856.
[683] TJ,para.853
[684] TJ,para.301 uses identical language to PTB,paras.191,88, which cites a summary of an interview, in which D-55 expressed his belief that if he testified, he would stop fearing Mr. Bemba.
[685] TJ,para.737.
[686] See section 4.2.2.3
[687] Anx.G.
[688] Anx.L. The Chamber's refusal to issue a corrigendum confirms it was a finding and not a typographical error.

it is legally misconceived to characterise contacts between Mr. Bemba and a member of his Defence team as a premeditated abuse of privilege,[689] or at least one that is sufficiently grave to be relevant to Article 70.[690]

331. The above evidential omissions and errors were crucial to adverse findings concerning both the existence of Mr. Bemba intentional involvement in illicit conduct, and the extent to which his involvement satisfied the threshold of co-perpetration and solicitation; they therefore invalidate Mr. Bemba's conviction.[691]

CONCLUSION

332. When the Chamber ascertained that there no direct evidence of Mr. Bemba's knowledge and involvement in the charged crimes, they should have acquitted him. Instead, the law and evidence were contorted beyond all natural meaning to produce a conviction based on novel standards ("implicit knowledge", "implicit consequences") that do not amount to guilt, and pure speculation. The legal and evidential findings concerning Mr. Bemba fit neither the parameters of the charges, the evidence, nor the legal framework of the Rome Statute. The conviction is invalidated in its entirety, and he should be acquitted and released immediately.

[689] TJ,para.737; Cf. ICC-01/05-01/13-1199-Conf,para.90; ICC-01/05-01/13-1472,paras.28-30.
[690] The Registry rules concerning the use of privileged numbers apply to members of the Defence, and not the defendant:CAR-D20-0006-0466 at 0467(Section 2). Violations are categorised as infractions, addressed through the Regulations or Code of Conduct (Section 11).
[691] *Nikolić* AJ,paras.68-73.

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