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Informe jurídico sobre la Sentencia de Apelación ICC-01/05-01/08 A – El Fiscal v. J.P.B.G.

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RESUMEN

El presente informe jurídico realiza un análisis de la sentencia emitida por la Sala de Apelaciones de la Corte Penal Internacional en el caso Jean-Pierre Bemba Gombo, con el objetivo de determinar si dicha Sala aplicó correctamente los estándares jurídicos de la responsabilidad penal del superior jerárquico reconocidos en el artículo 28(a) del Estatuto de Roma. Al respecto, se sostiene que la interpretación del artículo 28(a) debe realizarse conforme a los métodos de interpretación jurídica previstos en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969, siempre y cuando se armonicen con el principio de legalidad, y recurriendo a la jurisprudencia internacional relevante.

Se concluye que la Sala de Apelaciones cometió varios errores metodológicos. En primer lugar, adoptó una interpretación formal del artículo 74(2) del Estatuto de Roma, al anular cargos confirmados sin valorar si Bemba tuvo conocimiento suficiente de los hechos y la capacidad de ejercer su derecho de defensa. En segundo lugar, se advierte que la Sala de Apelaciones omitió analizar de manera autónoma el requisito de control efectivo y el grado de conocimiento de Bemba, a pesar de ser condiciones previas para evaluar las medidas adoptadas por el superior. En tercer lugar, la Sala de Apelaciones abre la posibilidad de que los comandantes realicen un análisis costo-beneficio antes de tomar medidas frente a crímenes, lo cual desnaturaliza el sentido del artículo 28(a). Finalmente, se reconoce que, si bien los móviles personales del superior no son determinantes, sí pueden servir como indicios para valorar la necesidad de las medidas adoptadas.

Palabras clave

Derecho Penal Internacional, Corte Penal Internacional, Responsabilidad del superior, interpretación jurídica.

ABSTRACT

This legal report analyzes the judgment issued by the Appeals Chamber of the International Criminal Court in the case of Jean-Pierre Bemba Gombo, with the aim of determining whether the Chamber correctly applied the legal standards of superior responsibility as recognized in Article 28(a) of the Rome Statute. In this regard, it is argued that the interpretation of Article 28(a) must follow the methods of legal interpretation set out in Article 31 of the 1969 Vienna Convention on the Law of Treaties, provided that these are harmonized with the principle of legality and supported by relevant international jurisprudence.

The report concludes that the Appeals Chamber committed several methodological errors. First, it adopted a formal interpretation of Article 74(2) of the Rome Statute by annulling confirmed charges without assessing whether Bemba had sufficient knowledge of the facts and the ability to exercise his right to defense. Second, the Appeals Chamber failed to independently examine the requirements of effective control and Bemba's degree of knowledge, despite these being necessary conditions for evaluating the measures taken by the superior. Third, the Chamber opened the door for commanders to conduct a cost-benefit analysis before taking action in response to crimes, which distorts the purpose of Article 28(a). Finally, it is recognized that while a superior's personal motives are not determinative, they may serve as indicators for assessing the necessity of the measures taken.

Keywords

International Criminal Law, International Criminal Court, Superior Responsibility, Legal Interpretation.

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PRINCIPALES DATOS DEL CASO

N° EXPEDIENTE	ICC-01/05-01/08 A
ÁREA(S) DEL DERECHO SOBRE LAS CUALES VERSA EL CONTENIDO DEL PRESENTE CASO	Derecho Penal Internacional, Derecho Internacional Público.
IDENTIFICACIÓN DE LAS RESOLUCIONES Y SENTENCIAS MÁS IMPORTANTES	• ICC-01/05-01/08 – El Fiscal v. Jean-Pierre Bemba Gombo (Sentencia de primera instancia: "Judgment pursuant to Article 74 of the Statute", 21 de marzo de 2016). • Opiniones disidentes de los jueces Mmsenono Monageng y Hofmański
DEMANDANTE/DENUNCIANTE	La Fiscalía de la Corte Penal Internacional
DEMANDADO/DENUNCIADO	Jean-Pierre Bemba Gombo
INSTANCIA ADMINISTRATIVA O JURISDICCIONAL	Sala de Apelaciones de la Corte Penal Internacional
TERCEROS	
OTROS	

I. INTRODUCCIÓN

1.1 Justificación de la elección de la resolución

La elección de la sentencia de apelación en el caso de Jean-Pierre Bemba Gombo ante la Corte Penal Internacional (CPI) responde a la relevancia jurídica y académica que representa esta decisión en el desarrollo del Derecho Penal Internacional contemporáneo, específicamente, con relación a la figura de la responsabilidad del superior jerárquico prevista en el artículo 28 del Estatuto de Roma. Esta sentencia resulta relevante porque revocó la condena dictada por la Sala de Primera Instancia, la cual marcó un cambio importante respecto a la interpretación de los requisitos de la responsabilidad penal del superior jerárquico y del estándar probatorio requerido para atribuir dicha responsabilidad.

Resulta importante analizar la sentencia de Apelación en este caso, dado que evidencia las tensiones y discrepancias que existen dentro del Derecho Penal Internacional cuando se trata de atribuir responsabilidad penal a jefes militares en contextos de conflictos armados con estructuras de mando complejas. En particular, el caso permite analizar aspectos clave de esta figura jurídica como el concepto de control efectivo sobre tropas militares, el grado de conocimiento exigido para atribuir responsabilidad, y el tipo de medidas necesarias y razonables que deben ser adoptadas por el superior jerárquico al conocer los crímenes cometidos.

Además, no solo se aborda estos temas desde un plano teórico, sino que los discute a partir de una situación concreta y compleja, en un contexto de conflicto armado no internacional con diversos actores, lo que hace que este caso sea idóneo para un análisis crítico de la interpretación de los elementos jurídicos de la responsabilidad de superior jerárquico. Dado que, el Estatuto de Roma no ha delimitado el alcance de cada uno de los elementos que deben concurrir a fin de atribuir responsabilidad a un jefe militar.

Otro aspecto fundamental es que existe una divergencia entre la Sala de Primera Instancia y la Sala de Apelaciones respecto a los factores que se deben considerar a fin de determinar si concurren los requisitos de la figura de responsabilidad del superior jerárquico. Así, se consideraron factores como la distancia geográfica, las limitaciones logísticas, análisis costo - beneficio y los móviles personales del superior jerárquico, respecto de los cuales hubo posiciones diferentes. Esto genera una complicación en la aplicación de la responsabilidad del superior jerárquico que genera un precedente

problemático, en tanto no se tiene certeza sobre qué aspectos deben considerarse y cuál es el contenido de cada uno de ellos.

El caso de Jean Pierre Bemba Gombo ante la CPI, constituía la primera vez que la Sala de Primera Instancia condenaba a un líder militar por crímenes internacionales exclusivamente en virtud de su posición de superior jerárquico, y también era la primera vez que la CPI reconocía formalmente a los delitos de violencia sexual como crímenes de guerra y de lesa humanidad. Sin embargo, la Sala de Apelaciones determinó que muchos de los crímenes imputados a Bemba, incluidas las violaciones sexuales, no encajaban en los hechos y circunstancias descritos en el Documento de Confirmación de Cargos (2018, párr. 116).

Esta divergencia entre ambas Salas permite no solo analizar la figura de la responsabilidad del superior desde los dispuesto expresamente en el artículo 28(a) del Estatuto de Roma, sino también reflexionar sobre el rol que tienen los jueces en la construcción del Derecho Penal Internacional al interpretar artículos, así como su impacto en la lucha contra la impunidad y en la protección de las víctimas. Los votos disidentes de los jueces Monageng y Hofmański refuerzan esta posibilidad, ya que ofrecen unos argumentos sólidos en defensa de una interpretación más amplia y no estrictamente literal de los artículos bajo análisis, lo que permite comparar distintas visiones sobre la interpretación que se puede hacer del Estatuto de Roma y, en particular, de los elementos de la responsabilidad del superior jerárquico,

Finalmente, el enfoque adoptado por la mayoría en la Sala de Apelaciones resulta cuestionable porque reduce el ámbito de aplicación del artículo 28 al introducir nuevos factores que restringen su interpretación. Ello genera un precedente problemático que podría debilitar la posibilidad de responsabilizar penalmente a superiores jerárquicos en conflictos armados actuales, donde la cadena de mando puede ser menos visible en virtud de la distancia geográfica pero el control efectivo persiste por otros medios. Este caso constituye un ejemplo de cómo las decisiones judiciales pueden redefinir y, a veces limitar, las herramientas del Derecho Penal Internacional para combatir la impunidad.

1.2 Presentación del caso y del análisis

El presente informe analiza la sentencia dictada por la Sala de Apelaciones de la CPI en el caso Jean-Pierre Bemba Gombo, ex vicepresidente de la República Democrática del Congo y comandante en jefe del Movimiento para la Liberación del Congo (MLC). Esta sentencia revocó la condena emitida por la Sala de Primera Instancia, que hallaba

a Bemba penalmente responsable por crímenes de guerra y crímenes de lesa humanidad cometidos por sus tropas durante la intervención del MLC en la República Centroafricana (en adelante, RCA) entre los años 2002 y 2003, en virtud de la figura de responsabilidad del superior jerárquico contemplada en el artículo 28(a) del Estatuto de Roma (2019, párr. 194).

El problema principal que se aborda radica en determinar cuál debió ser la correcta interpretación de los elementos requeridos para atribuir responsabilidad penal al superior jerárquico, a partir de lo dispuesto en el artículo 28(a) del Estatuto de Roma. De este problema central, se desarrollan una serie de problemas secundarios, tanto de carácter procesal como material, que permiten abordar la complejidad de la interpretación del referido artículo en virtud de las circunstancias concretas del caso.

Desde el plano procesal, se analiza en qué medida una Sala de Juicio puede modificar, ampliar o interpretar de manera flexible los hechos y circunstancias descritos en la Decisión de Confirmación de Cargos sin vulnerar el principio de congruencia procesal consagrado en el artículo 74(2) del Estatuto de Roma (1998). En el plano sustantivo, se aborda cómo debe interpretarse el requisito de “control efectivo” sobre un grupo armado en contextos de mando compartido y distancia geográfica, como ocurrió en el caso Bemba; segundo, cuál es el grado de conocimiento exigido al superior para que se le pueda atribuir responsabilidad penal; y tercero, qué factores se deben considerar a fin de determinar si las medidas adoptadas por el superior para prevenir o sancionar los crímenes fueron realmente necesarias y razonables.

La respuesta a dichas interrogantes permite, finalmente, abordar cómo se debieron interpretar los elementos del artículo 28(a) y, de esa manera, evidenciar cómo la interpretación realizada por la Sala de Apelaciones en el caso de Bemba impacta en la posibilidad de atribuir de responsabilidad penal al superior jerárquico. La posición que se evidenciará en el presente informe es crítica frente a la sentencia de la Sala de Apelaciones, en tanto que la interpretación del artículo 28(a) realizada por la mayoría debilita la eficacia del régimen de responsabilidad de mando, al introducir exigencias que dificultan la imputación penal. En particular, se cuestiona la relevancia otorgada por la Sala a factores como la distancia geográfica del acusado; así como la exclusión de ciertos hechos de la condena con base en argumentos formales que restringen innecesariamente el alcance del juicio.

Entre los instrumentos normativos utilizados destacan el Estatuto de Roma y el Reglamento de Procedimiento y Prueba de la CPI. Asimismo, se examinan en detalle

las sentencias de primera y segunda instancia del caso Bemba, así como los votos disidentes de los jueces Monageng y Hofmański, que ofrecen una interpretación alternativa del alcance del artículo 28(a). El análisis se complementa con doctrina especializada en Derecho Penal Internacional, con énfasis en los elementos constitutivos de la responsabilidad del superior jerárquico, en la interpretación de tratados internacionales. Asimismo, se tomará en cuenta jurisprudencia no solo de la CPI, sino también de los Tribunales Penales Internacionales *ad hoc* que abordaron casos similares.

Las conclusiones más relevantes del informe apuntan a que la revocación de la condena contra Bemba no solo representa un retroceso en la lucha contra la impunidad de los jefes militares, sino que también evidencia las distintas interpretaciones sobre los elementos que configuran la responsabilidad del superior jerárquico de acuerdo con el artículo 28(a) del Estatuto de Roma. En ese sentido, el caso constituye una oportunidad para reflexionar críticamente sobre el alcance, los límites y los desafíos que enfrenta la responsabilidad del superior jerárquico en el Derecho Penal Internacional contemporáneo.

II. IDENTIFICACIÓN DE LOS HECHOS RELEVANTES

2.1 Antecedentes

Jean-Pierre Bemba Gombo, ciudadano de la República Democrática del Congo (RDC), fue presidente del Movimiento de Liberación del Congo (MLC), un movimiento político-militar fundado por él en 1998 (2016, párr. 675). Asimismo, era el líder político y comandante en jefe del ala armada del MLC denominada el Ejército de Liberación del Congo (ALC, por sus siglas en francés) (CPI, 2016, párr. 384). La estructura del MLC estaba dividida entre el ala política y armada, siendo que ambas divisiones no intervenían en las decisiones de la otra. Sin embargo, Bemba se había asegurado de mantener el control sobre ambas (CPI, 2016, párr. 385).

En ese sentido, durante el periodo relevante para el caso (2002-2003), Bemba ejercía una autoridad decisiva sobre las decisiones y operaciones del MLC, tanto en su ala política como militar (CPI, 2018, párr. 13). Por lo que, cualquier decisión del MLC tenía que contar con la aprobación previa de Bemba.

En octubre de 2002, el presidente de la República Centroafricana (RCA), Ange-Félix Patassé, enfrentó un intento de golpe de Estado por parte de las fuerzas rebeldes lideradas por el general François Bozizé, quien había sido destituido por Patassé como

jefe del Estado Mayor de las Fuerzas Armadas Centroafricanas (FACA) en octubre de 2001. Tras su salida del cargo se refugió en la frontera con Chad junto con soldados que habían decidido desertar de las FACA para seguirlo. En octubre de 2002, Bozizé comienza su operación para destituir a Patassé tomando el control de varias ciudades, siendo que ingresó a la localidad de Bangui el 25 de octubre de 2002. Ello generó que Patassé respondiera con bombardeos (CPI, 2016, párr. 379).

Ante el avance de las fuerzas rebeldes lideradas por el general Bozizé, Ange-Félix Patassé solicitó a Bemba el apoyo militar del MLC, específicamente del ALC. En respuesta, Bemba ordenó la intervención del ALC en territorio de la RCA. Las tropas fueron movilizadas desde la RDC hacia la RCA entre el 25 y el 27 de octubre de 2002, e iniciaron operaciones de combate junto a las fuerzas de Patassé (CPI, 2016, párr. 380).

Durante esta intervención, miembros del MLC perpetraron múltiples crímenes como violaciones, asesinatos y saqueos en diversas localidades de la RCA. El conflicto concluyó en marzo de 2003, cuando las fuerzas de Bozizé derrocaron a Patassé y tomaron el control del gobierno. El MLC se retiró progresivamente del territorio centroafricano tras la caída del régimen.

El conflicto armado que ocurrió en la RCA fue calificado como uno de naturaleza no internacional por Sala de Primera Instancia, en virtud de lo dispuesto en el artículo 8(2)(f) del Estatuto de Roma. Dado que, si bien las fuerzas enfrentadas contaban con el apoyo de tropas extranjeras, siguiendo el test de control general establecido por Tribunal Penal Internacional para la Ex Yugoslavia en el caso de *Duško Tadić*, la CPI determinó que en este caso no existía control general por parte de otro Estado sobre las fuerzas enfrentadas. Por tanto, conforme a la definición de conflicto armado internacional al no configurarse una confrontación entre dos Estados ni una ocupación militar, el conflicto se mantuvo dentro de los márgenes de una confrontación interna prolongada entre fuerzas armadas organizadas en el territorio de la RCA (CPI, 2016, párrs. 649–656).

Se ha de tomar en cuenta que el 3 de octubre de 2001, la RCA ratificó el Estatuto de Roma y el 21 de diciembre de 2004 remitió formalmente a la CPI la situación relativa a los crímenes cometidos en su territorio a partir del 1 de julio de 2002. En junio de 2005, el gobierno centroafricano proporcionó al Fiscal de la CPI documentación sobre los crímenes ocurridos entre 2002 y 2003, incluyendo expedientes judiciales locales (CPI, 2008, párr. 1). Tras un análisis de la información recibida, el Fiscal de la CPI determinó que se cumplían los requisitos del Estatuto de Roma para iniciar una investigación (CPI, 2005, p. 2).

2.2 Hechos relevantes del caso

En fecha 26 de octubre de 2002, en virtud de la solicitud realizada por el presidente de la RCA, Ange-Félix Patassé, Bemba como líder del MLC autorizó el despliegue de sus tropas en territorio de la RCA a fin de combatir a las fuerzas rebeldes del general Bozizé que buscaban derrocar al presidente Patassé. Las tropas del MLC enviadas al territorio de la RCA estaban conformadas por aproximadamente 1500 soldados. En fecha 30 de octubre de 2002, se realizó la primera ofensiva del MLC contra las fuerzas del general Bozizé, la cual tuvo como resultado la expulsión de los rebeldes de la localidad de Bangui (CPI, 2016, párr. 650)

En noviembre de 2002, las tropas del MLC junto con un pequeño grupo de las fuerzas armadas de la RCA que siempre los acompañaban se establecieron en la zona de PK12, donde continuaron los enfrentamientos con las fuerzas del general Bozizé de manera sostenida (CPI, 2016, párr. 651). En los meses de noviembre a diciembre, se produjeron diversos enfrentamientos entre ambos mandos en las zonas aledañas a la carrera PK22, en los alrededores de Damara, en el eje Bossembélé-Bozoum, en la carretera hacia Sibut y en el eje Bossembélé-Bossangoa (CPI, 2016, párr. 660).

En enero de 2003, las tropas rebeldes del general Bozizé lograron recuperar el control sobre diversas zonas del RCA, por lo que se solicitó a Bemba que enviará más refuerzos. Sin embargo, el 15 de marzo de 2003, el general Bozizé logró retomar el control sobre Bangui, y ello significó la retirada del MLC de la RCA (CPI, 2016, párr. 562).

Existen pruebas de que durante la presencia de las tropas del MLC en la RCA, estas cometieron diversos crímenes, específicamente, asesinatos, violaciones sexuales sistemáticas y actos de saqueo contra civiles, sin importar su edad o sexo, en las zonas de “Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, Yaloke y Mongoumba” (CPI, 2016, párr. 563, traducción propia). Durante el desarrollo del conflicto, la prensa internacional hizo público estos hechos, ante lo cual Bemba reaccionó con algunas acciones públicas como (i) reunirse con el representante de las Naciones Unidas, el general Cissé, y con el presidente Patassé; (ii) dar un discurso público ante tropas del MLC en PK12, en el cual reconoció comportamientos indebidos de sus fuerzas; (iii) la creación de una

comisión de investigación encabezada por el coronel Mondonga, la cual fue enviada a Bangui para investigar los crímenes cometidos por el MCL (CPI, 2016, párr. 574).

El 21 de diciembre de 2004, tras recibir la remisión del gobierno de la RCA, la Fiscalía de la CPI inició un análisis preliminar conforme al artículo 15 del Estatuto de Roma de los hechos ocurridos en la RCA. Concluido dicho análisis, y tras encontrar fundamentos razonables para creer que se habían cometido crímenes bajo la jurisdicción de la CPI, el Fiscal anunció la apertura oficial de la investigación en mayo de 2007 (CPI, 2008, párr. 1).

El 23 de mayo de 2008, la Fiscalía solicitó a la Sala de Cuestiones Preliminares la emisión de una orden de detención contra Jean-Pierre Bemba, en aplicación del artículo 58 del Estatuto. Ese mismo día, la Sala expidió la orden, señalando que existían motivos razonables para considerar que Bemba era responsable, bajo el artículo 25(3) del Estatuto de Roma por violación como crimen de guerra y de lesa humanidad, tortura, ultrajes contra la dignidad personal y saqueo (CPI, 2008, párrs. 6-7).

El 27 de mayo de 2008, la Fiscalía presentó información adicional sobre el caso, por lo que el 10 de junio de 2008, tras analizar nueva evidencia, la Sala emitió una nueva orden de detención sustitutoria que incluyó que Bemba era responsable bajo el artículo 25(3) del Estatuto de Roma, además de los crímenes listados en la orden previa, por asesinato como crimen de guerra y de lesa humanidad (CPI, 2008, párrs. 8-9).

El 24 de mayo de 2008, las autoridades del Reino de Bélgica arrestaron a Bemba, quien fue entregado a la Corte el 3 de julio de ese mismo año, siendo que finalmente compareció por primera vez ante la CPI el 4 de julio de 2008 (CPI, 2016, párr. 5). El 1 de octubre de ese mismo año, la Fiscalía presentó el primer Documento que Contiene los Cargos, sin embargo, en fecha 17 de octubre, el referido Documento fue enmendado, señalando a Bemba como coautor de crímenes de lesa humanidad y crímenes de guerra, en virtud del artículo 25(3)(a) del Estatuto de Roma. (CPI, 2008, párr. 10).

La Audiencia de Confirmación de Cargos se llevó a cabo entre el 12 y el 15 de enero de 2009. El 3 de marzo de 2009, la Sala de Cuestiones Preliminares, al considerar que la evidencia era más consistente con una modalidad de responsabilidad de mando, consagrada en el artículo 28 del Estatuto de Roma, decidió suspender el procedimiento

y solicitó a la Fiscalía reformular los cargos, en virtud del artículo 61(7)(c)(ii) del mencionado Estatuto (CPI, 2016, párr. 6).

El 30 de marzo de 2009, la Fiscalía presentó un Documento de Confirmación de Cargos modificado, mediante el cual se le imputan a Bemba los crímenes cometidos por las tropas del MLC, de manera alternativa, como coautor o como superior jerárquico, bajo el artículo 28(a) o (b). El 15 de junio de 2009, la Sala de Cuestiones Preliminares confirmó los cargos bajo la figura de responsabilidad del superior jerárquico conforme al artículo 28(a), por asesinato y violación como crímenes de lesa humanidad; y por asesinato, violación y saqueo como crímenes de guerra (CPI, 2016, párr. 7).

El juicio ante la Sala de Juicio III comenzó el 22 de noviembre de 2010. Siendo que, el 21 de marzo de 2016, la Sala dictó sentencia, declarando a Jean-Pierre Bemba culpable como comandante militar con control efectivo de los crímenes cometidos por el MLC en la RCA. La Sala concluyó que Bemba tenía conocimiento de las conductas criminales y no adoptó todas las medidas necesarias y razonables para prevenir, reprimir o sancionar a los responsables (CPI, 2016)

El 4 de abril de 2016, la defensa notificó su intención de apelar, y el 19 de septiembre presentó su escrito de apelación, en el que planteó seis motivos: (i) vicios procesales graves; (ii) exceso respecto de los cargos confirmados; (iii) interpretación incorrecta del artículo 28(a); (iv) ausencia de prueba sobre los elementos contextuales; (v) errores en la valoración de pruebas; y (vi) otras irregularidades. Uno de los ejes centrales fue la alegación de que la Sala de Juicio había excedido el marco fáctico establecido en la Decisión de Confirmación de Cargos, en contravención del artículo 74(2) (CPI, 2018, párr. 30).

El 21 de noviembre de 2016, la Fiscalía respondió a la apelación de Bemba y sostuvo que la condena se basaba en un patrón de criminalidad ya incluido en los cargos confirmados, que Bemba había sido debidamente informado y que no hubo vulneración del derecho de defensa. Asimismo, sostuvo que Bemba reunía los tres requisitos del artículo 28(a) del Estatuto de Roma, por lo que era responsable penalmente como superior (CPI, 2018, párr. 141).

El 8 de junio de 2018, la Sala de Apelaciones, por mayoría, revocó la condena y absolvió a Bemba. Este fallo se fundamentó en el hecho de que la Sala de Juicio excedió los

hechos y circunstancias confirmados en el Documento de Confirmación de Cargos, y que no se probó con el estándar requerido que Bemba no hubiera adoptado todas las medidas necesarias y razonables. La mayoría también concluyó que la Sala no valoró adecuadamente las circunstancias particulares del caso, como la distancia geográfica y las limitaciones operativas (2018, párrs. 196-197).

Los jueces Monageng y Hofmański emitieron votos disidentes, en los que defendieron que la Sala de Juicio actuó razonablemente al establecer la responsabilidad de Bemba y que la interpretación adoptada por la mayoría restringía injustificadamente el alcance del artículo 28(a) del Estatuto (Voto disidente, 2018, párr. 1).

III. IDENTIFICACIÓN DE LOS PRINCIPALES PROBLEMAS JURÍDICOS

3.1 Problema principal

¿Cuál debió ser la correcta aplicación de los estándares jurídicos sobre responsabilidad penal del superior jerárquico en el caso Jean-Pierre Bemba Gombo ante la Corte Penal Internacional en virtud del artículo 28(a) del Estatuto de Roma?

3.2 Problemas secundarios

- ¿Qué métodos de interpretación jurídica son adecuados para interpretar el artículo 28 del Estatuto de Roma?

- ¿La Sala de Primera Instancia puede modificar, ampliar o interpretar de forma flexible los “hechos y circunstancias descritos” en la Decisión de Confirmación de Cargos” dictada por la Sala de Cuestiones Preliminares, sin vulnerar el artículo 74(2) del Estatuto de Roma?

- ¿Cómo debe interpretarse el requisito de “control efectivo” del artículo 28(a) del Estatuto de Roma para atribuir responsabilidad penal al superior jerárquico?

- ¿Qué grado de conocimiento debe tener un superior jerárquico para que se le pueda atribuir responsabilidad conforme el artículo 28(a) del Estatuto de Roma?

- ¿Qué elementos se deben tomar en consideración para determinar si el superior jerárquico adoptó las medidas necesarias y razonables para prevenir o sancionar los crímenes, conforme al artículo 28(a) del Estatuto de Roma?

IV. POSICIÓN DEL CANDIDATO/A

4.1 Respuestas preliminares a los problemas principal y secundarios

Respecto al problema principal, se sostendrá que la correcta aplicación del artículo 28(a) del Estatuto de Roma en el caso Jean-Pierre Bemba Gombo debió mantenerse en la línea con lo establecido por la Sala de Primera Instancia. En tanto, esta última adoptó una interpretación de la figura de la responsabilidad del superior jerárquico en coherencia con los fines del Estatuto de Roma, pero sin excederse de los límites impuestos en sus disposiciones. Se evidencia que la revocación de la condena por parte de la Sala de Apelaciones impuso exigencias demasiado estrictas que desnaturalizan el sentido del artículo 28(a) y dificultan su aplicación en contextos de conflictos armados con estructuras de mando complejas y donde existe una distancia geográfica entre el superior y el lugar de los hechos.

En primer lugar, desde la perspectiva procesal, se explicará que la Sala de Primera Instancia sí podía desarrollar los hechos señalados en el Documento de Confirmación de Cargos (DCC), siempre que no se excedieran los límites fácticos y temporales establecidos y se respetarán las garantías de defensa del acusado. Dicho análisis permitirá concluir que la Sala de Primera Instancia no vulneró el artículo 74(2) del Estatuto de Roma, en tanto en tanto no se introdujeron hechos nuevos sustanciales que afectaran el ejercicio del derecho de defensa del acusado.

A fin de evidenciar que la Sala de Apelaciones no realizó una interpretación adecuada del artículo 28(a) del Estatuto de Roma, se parte del análisis relativo a las fuentes jurídicas que los jueces de la CPI pueden aplicar a fin de resolver un caso, en específico, a los métodos de interpretación jurídica aplicables al Estatuto de Roma y cuáles son sus límites. Así, se evidenciará que, de conformidad con el artículo 21 del Estatuto de Roma, los métodos de interpretación recogidos en los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados de 1969 pueden ser utilizados por los jueces de la CPI, siempre que se respete el principio de legalidad y las garantías procesales del acusado.

Los métodos de interpretación aplicables descritos permitirán analizar el contenido de los tres elementos necesarios para que se pueda atribuir responsabilidad penal al superior jerárquico conforme a lo dispuesto en el artículo 28(a) del Estatuto de Roma y cómo, en el caso concreto de Bemba, concurrieron los tres elementos. Así, se concluye que el "control efectivo" exigido por el artículo 28(a) debe interpretarse en función a los hechos concretos del caso, atendiendo a las capacidades reales de mando del superior, incluso en contextos de mando compartido o de distancia geográfica. Atendiendo a dichos criterios, se evidenciará que, dada la posición de Bemba y el poder real que ostentaba sobre las tropas del MLC, era quien tenía el control sobre las actividades realizadas por sus tropas en la RCA.

Respecto al grado de conocimiento exigido al superior, se analiza qué elementos se pueden tomar en consideración para atribuir responsabilidad penal al superior y se evidencia que lo que pretende el artículo es castigar la falta de actuación del superior que teniendo los medios debió haber conocido de los crímenes. Finalmente, se evidencia que el análisis de si se adoptaron de las medidas necesarias y razonables por parte del superior depende del caso concreto y del análisis realizado respecto de los otros dos elementos previos. Se sustenta que la Sala de Apelaciones cometió un error metodológico al no analizar independientemente cada elemento de la responsabilidad de Bemba como superior, lo que termina impactando negativamente en el análisis efectuado respecto de las medidas adoptadas en el caso concreto.

4.2 Posición individual sobre el fallo de la resolución

El fallo adoptado por la mayoría de la Sala de Apelaciones en el caso de Jean-Pierre Bemba Gombo redujo de forma significativa el alcance de la figura de responsabilidad del superior jerárquico, al realizar una interpretación de sus elementos que no se condice con el desarrollo normativo y jurisprudencial al respecto. La Sala de Apelaciones no valoró adecuadamente la autoridad que ejercía Bemba sobre las tropas del MLC y su grado de conocimiento respecto de los crímenes a partir del conjunto de pruebas que se presentaron durante el juicio que evidenciaban que tenía la autoridad y los medios materiales y jurídicos para impedir y sancionar los crímenes cometidos por sus tropas.

A ello se suma la exclusión de ciertos hechos relevantes por motivos procesales, en aplicación estricta del artículo 74(2) del Estatuto de Roma, sin tomar en cuenta que los cargos se formularon de manera amplia debido a la naturaleza propia del conflicto y de

los crímenes cometidos por las tropas del MLC, así como de la información que se disponía en el momento. De manera tal, que se excluyeron ciertos crímenes que habían sido cometidos por las tropas del MLC, pero que no habían sido precisados en el Documento de Confirmación de Cargos (CPI, 2018, párr. 116).

Otro de los aspectos que se aborda desde una perspectiva crítica es que, a pesar de que los elementos de la responsabilidad del superior jerárquico fueron motivo de apelación por parte de la defensa (CPI, 2018, párr. 30), la Sala de Apelaciones no realiza un análisis completo de dichos elementos. Lo que representa un error metodológico que termina afectando la solidez y coherencia del fallo. Este análisis de la Sala de Apelaciones debilita la posibilidad de atribuir responsabilidad y sancionar a jefes militares por la comisión de delitos por parte de sus tropas. Desde esta perspectiva, sostenemos que el fallo evidencia un análisis anacrónico del desarrollo de los conflictos y representa un retroceso en la sanción de jefes militares en contextos de conflictos armados con diferentes actores intervinientes y que no se desarrollan en el mismo espacio geográfico.

V. ANÁLISIS DE LOS PROBLEMAS JURÍDICOS

V.1. ¿La Sala de Primera Instancia puede modificar, ampliar o interpretar de forma flexible los "hechos y circunstancias" que el artículo 74(2) del Estatuto de Roma exige que se describan en la Decisión de Confirmación de Cargos dictada por la Sala de Cuestiones Preliminares, sin vulnerar el referido artículo?

El artículo 74(2) del Estatuto de Roma establece que el fallo de la Sala de Primera Instancia "no podrá exceder los hechos y circunstancias descritos en los cargos y en cualquier modificación de los cargos" y que solo se podrá basar "en las pruebas presentadas y discutidas ante la Corte en el juicio" (Estatuto de Roma, 1998, art. 74[2]). De acuerdo con el voto disidente de los jueces Mmasenono y Hofmański, esta disposición consagra el principio de congruencia procesal, dado que asegura que el acusado solo pueda ser condenado por hechos sobre los cuales fue debidamente informado y sobre los que tuvo la oportunidad de controvertir (Voto Disidente, 2018, párr. 25).

El principio de congruencia procesal, como explica Rincón, exige que exista una correspondencia entre la acusación formulada por el Fiscal y la sentencia, esta

correspondencia debe ser fáctica, personal y jurídica. Así, la congruencia fáctica hace referencia a que el acusado tenga conocimiento de los hechos que motivaron su acusación y que los mismos no sufran variaciones a lo largo del proceso, mientras que la congruencia jurídica hace referencia a que debe existir consonancia entre los delitos por los que se acusa al imputado y los delitos por los que es condenado (2017, p. 54). En el marco del proceso penal ante la CPI, esta exigencia se traduce en que los hechos respecto de los que se pronuncien los jueces y los crímenes que se le imputen eventualmente deben ser aquellos que se detallaron por el Fiscal en el DCC.

En ese sentido, la norma 52(b) del Reglamento de la CPI exige que el documento que contiene los cargos incluya "una relación de los hechos (…) que proporcione una base jurídica y fáctica suficiente", que justifique la apertura del juicio (CPI, 2004, norma 52[b]). Dada su importancia para el desarrollo del juicio en igualdad de condiciones entre la Fiscalía y el acusado, el Estatuto de Roma regula con detalle el proceso de formulación, confirmación y, eventualmente, modificación de los cargos. En este marco, resulta fundamental comprender el procedimiento de confirmación de cargos, regulado en el artículo 61 del Estatuto.

De acuerdo con el artículo 61(7) del Estatuto de Roma, en la Audiencia de Confirmación de Cargos, la Sala de Cuestiones Preliminares podrá confirmar, rechazar o solicitar al Fiscal que modifique los cargos (Estatuto de Roma, 1998, art. 61[7]). Asimismo, el artículo 61(9) faculta al Fiscal a modificar los cargos entre la confirmación y el inicio del juicio, con autorización de la Sala, y establece que, si la modificación introduce hechos sustancialmente nuevos o una modalidad de responsabilidad distinta, deberá celebrarse una nueva audiencia de confirmación (Estatuto de Roma, 1998, art. 61[9]). Estas disposiciones aseguran que toda modificación sustancial de los hechos sea conocida por el acusado antes del juicio, de manera que pueda preparar su defensa adecuadamente y que se desarrolle un juicio justo.

Esto último es de suma relevancia por lo que se busca garantizar el derecho de defensa del acusado. Este derecho otorga a las partes en un proceso la capacidad de alegar y demostrar su inocencia frente a los hechos que se le imputan, y a partir del cual se desprenden una serie de derechos instrumentales (Beltrán, 2008, 78). En ese sentido, la CPI se ha comprometido en garantizar que los procedimientos que se desarrollen ante ella se ajusten a los más altos estándares legales y al debido proceso de los sospechosos, lo cual ha derivado en que el Estatuto de Roma reconoce diversas garantías para el acusado como ser informado a detalle de los cargos que se imputan y contar con el tiempo suficiente para preparar su defensa. En específico, de acuerdo con

Beltrán, en el Estatuto de Roma, podemos encontrar manifestaciones del derecho de defensa en los artículos 48.4, 55.2.c, 56.2.d, 61.2, 65.1 y 65.5 (Beltrán, 2008, 71).

Del análisis de los artículos citados previamente se puede advertir que en el Estatuto de Roma no se ha contemplado la posibilidad de modificar los cargos una vez iniciado el juicio. No obstante, la norma 55 del Reglamento de la CPI autoriza a la Sala de Juicio a modificar la calificación jurídica de los hechos durante el juicio siempre que se mantenga dentro de los límites del marco fáctico descrito en los cargos confirmados (CPI, 2004, norma 55[2]). Esta disposición recoge el principio iura novit curia que permite al Tribunal aplicar la norma jurídica adecuada con independencia de la calificación propuesta por el Fiscal, pero no lo autoriza a modificar los hechos sustantivos sin seguir los procedimientos establecidos. (CPI, 2018, párr. 25).

En virtud del marco normativo descrito, corresponde analizar si en el caso de Bemba, se realizó una modificación de los cargos sustancial y si ello vulnero el derecho de defensa de Bemba. Dado que Bemba, en su escrito de apelación, sostuvo que la Sala de Primera Instancia vulneró el artículo 74(2) del Estatuto de Roma al basar su decisión en elementos fácticos que no habían sido incluidos o lo fueron de manera ambigua en el DCC. Según la defensa de Bemba, en la sentencia se incluyeron hechos que habían sido expresamente rechazados por la Sala de Cuestiones Preliminares o que fueron introducidos exclusivamente a través de documentos auxiliares, sin que se siguiera el procedimiento para su incorporación formal al juicio. Ello generó que Bemba no preparara su defensa adecuadamente, lo que supuestamente puso en riesgo la igualdad en el proceso (CPI, 2018, párrs. 74-77).

Por su parte, la Fiscalía defendió la validez de la condena, afirmando que los cargos confirmados abarcaban los crímenes de asesinato, violación y saqueo cometidos por las tropas del MLC en territorio centroafricano entre el 26 de octubre de 2002 y el 15 de marzo de 2003. Se alegó que la formulación de los cargos fue suficientemente amplia en virtud de las circunstancias del caso, sin embargo, se fue precisando mediante documentos auxiliares que le permitieron a Bemba tener conocimiento efectivo de las acusaciones, contando así con plena oportunidad para ejercer su derecho de defensa (CPI, 2018, párr. 91).

En el caso de Bemba, la discrepancia entre la Sala de Primera Instancia y la Sala de Apelaciones radica en si los delitos por los que Bemba fue condenado se encontraban dentro del alcance de la DCC o no. La Sala de Apelaciones, en su evaluación, consideró que algunos de los actos sobre los cuales se fundó la condena excedían el marco fáctico

confirmado, y que la Fiscalía no había activado el mecanismo previsto en el artículo 61(9) para modificar formalmente los cargos (CPI, 2018, párr. 115).

Asimismo, advirtió que el DCC era excesivamente general, sin precisar con claridad suficiente los hechos que conformaban la base de la acusación, lo cual atenta contra los dispuesto en la norma 52(b) del Reglamento de la CPI (CPI, 2018, párr. 110). En consecuencia, anuló parcialmente la condena, manteniendo únicamente aquellos actos que sí estaban comprendidos dentro del marco fáctico previamente confirmado (CPI, 2018, párr. 116).

A continuación, se presenta una comparación sobre los crímenes imputados a Bemba en la sentencia de primera instancia y los crímenes que, de acuerdo con la Sala de Apelaciones, eran los únicos que le podrían ser imputados.

TABLA 1

N°	Cargos imputados por la Sala de Primera Instancia	Cargos imputados por la Sala de Apelaciones
1	"Violación de P68 y su cuñada" (CPI, 2016, párr. 49[a]).	"Violación de P87" (CPI, 2018, párr. 118[i]).
2	"Pillaje de pertenencias de P68 y su cuñada" (CPI, 2016, párr. 49[a]).	"Pillaje de pertenencias de P87 y su familia" (CPI, 2018, párr. 118[ii]).
3	"Violación de P22" (CPI, 2016, párr. 49[b]).	"Asesinato del hermano de P87" (CPI, 2018, párr. 118[iii]).
4	"Pillaje de la casa del tío de P22" (CPI, 2016, párr. 49[b]).	"Violación de P68 y su cuñada" (CPI, 2018, párr. 118[iv]).
5	"Asesinato del primo de P22" (CPI, 2016, párr. 49[c]).	"Violación de P23, P80, P81, P82 y otras hijas de P23" (CPI, 2018, párr. 118[v]).
6	"Violación de P87" (CPI, 2016, párr. 49[d]).	"Pillaje de pertenencias de P23, P80, P81, P82" (CPI, 2018, párr. 118[vi]).
7	"Asesinato del hermano de P87" (CPI, 2016, párr. 49[d]).	"Violación de P22" (CPI, 2018, párr. 118[vii]).
8	"Pillaje de la casa de P87" (CPI, 2016, párr. 49[d]).	"Pillaje de la casa de P22 y su tío" (CPI, 2018, párr. 118[viii]).
9	"Violación de P23, P80, P81, P82 y tres hijas de P23" (CPI, 2016, párr. 49[e]).	"Violación de la hija de P42" CPI, 2018, párr. 118[ix]).
10	"Pillaje del hogar de P23 y sus hijas" (CPI, 2016, párr. 49[e]).	"Pillaje del hogar de P42 y su familia" (CPI, 2018, párr. 118[x]).

11	“Violación de la hija de P42” (CPI, 2016, párr. 49[f]).	“Violación de P29 en Mongoumba” (CPI, 2018, párr. 118[xi]).
12	“Pillaje del hogar de P42” (CPI, 2016, párr. 49[f]).	
13	“Violación de 8 mujeres no identificadas de la RCA en un ferry cerca a Bangui” (CPI, 2016, párr. 49[g]).	
14	“Violación de 22 mujeres no identificadas de la RCA en PK12, PK22, PK26” (CPI, 2016, párr. 49[h]).	
15	“Violación de 5 mujeres no identificadas de la RCA cerca a Bangui” (CPI, 2016, párr. 49[l]).	
16	“Violación de P29 en Mongoumba” (CPI, 2016, párr. 49[j]).	
17	“Asesinato del tío de P68” (CPI, 2016, párr. 49[k]).	
18	“Asesinato del primo de P42” (CPI, 2016, párr. 49[l]).	
19	“Violación y pillaje a una mujer en PK12” (CPI, 2016, párr. 49[m]).	
20	“Violación de P69, su esposa, asesinato de su hermana y pillaje de su hogar” (CPI, 2016, párr. 49[n]).	
21	“Violación de P79 y su hija” (CPI, 2016, párr. 49[o]).	
22	“Pillaje de las casas de P108, P110, P112” (CPI, 2016, párr. 49[p]).	
23	“Asesinato de mujer no identificada en PK12” (CPI, 2016, párr. 49[q]).	
24	“Pillaje de pertenencias de P73” (CPI, 2016, párr. 49[r]).	
25	“Violación de dos niñas presenciada por P119 y pillaje de su casa” (CPI, 2016, párr. 49[s]).	
26	“Asesinato de un niño” (CPI, 2016, párr. 49[t).	

Nota. Elaborado a partir de la Sentencia de primera Instancia (CPI, 2016) y la Sentencia de la Sala de Apelaciones en el caso de Jean-Pierre Bemba Gombo (CPI, 2018) [traducción propia].

De esta manera, se evidencia que más de la mitad de los crímenes que se le imputaban a Bemba fueron descartados por la Sala de Apelaciones. Ante ello, cabe preguntarse si la interpretación realizada por la Sala de Apelaciones responde a una adecuada ponderación entre, por un lado, el principio de legalidad y la especificidad fáctica requerida en los cargos y, por el otro lado, las particularidades propias de los casos de

responsabilidad del superior jerárquico, en particular, las circunstancias del conflicto en la RCA.

El principio de legalidad, como explica Estupiñan, es uno de los principios rectores del Derecho Penal Internacional contemporáneo, dado que, hasta principios del siglo XX, en el Derecho Penal Internacional primaba el principio de justicia sustantiva, el cual priorizaba el interés general sobre el interés individual (2012, p. 148). Recién a partir de finales del siglo XX, se reconoce el principio de legalidad en instrumentos internacionales como la Declaración Universal de Derechos Humanos (art. 11.2), el Pacto Internacional de Derechos Civiles y Políticos (art. 15) (Estupiñan, 2012, p. 149). En ese marco, siguiendo la explicación de Estupiñan, el Estatuto de Roma supuso la codificación más acabada de este principio, en tanto, en su artículo 22 se incorporaron exigencias como la tipificación clara de los crímenes, la prohibición de retroactividad y la garantía de *lex certa.* (2012, p. 151).

En esa misma línea, Escobar, sostiene que la consolidación del corpus iuris penal internacional tiene su máxima expresión en el Estatuto Roma que; en sus artículos 5,6, 7 y 8; tipifica los crímenes internacionales sobre los que hay consenso en la comunidad internacional y que constituyen un auténtico Código Penal Internacional. Esto es manifestación del principio de legalidad en tanto, permite conocer qué conductas son consideradas como crímenes internacionales y sus consecuencias (2012, p. 200).

Sin embargo, el respeto a la legalidad no excluye el uso de otras fuentes del derecho internacional general, conforme a lo dispuesto en el artículo 21 del Estatuto de Roma. En ese sentido, siguiendo la explicación propuesta por Estupiñan, la especificidad de la norma penal internacional no excluye en su interpretación el uso de otras fuentes complementarias, lo que incluso se evidencia en diversa práctica jurisprudencial. Por lo que los jueces pueden dinamizar la ley formal a fin de adaptarla a los diferentes contextos (2012, p. 148).

Una interpretación estrictamente literal del artículo 74(2), como la sostenida por la mayoría de la Sala de Apelaciones, no se ajusta a los objetivos que se buscaban conseguir con el referido artículo. Lo que dispone es que la Sentencia de Primera Instancia “se referirá únicamente a los hechos y las circunstancias descritos en los cargos o las modificaciones a los cargos” (Estatuto de Roma, 1998, art. 74[2]). De la lectura del artículo, se desprende que establece la obligación del juez de solo considerar los hechos y circunstancias que se han señalado expresamente en la DCC, pero no detalla el nivel de especificidad de los hechos descritos.

Sobre el particular, en el voto disidente los jueces, señalan que la interpretación del artículo 74(2) requiere de una lectura holística de todo el Estatuto, de lo cual se desprende que el referido artículo pretende una adecuada división de funciones entre la Fiscalía y la Sala de Cuestiones Preliminares, lo que es un reflejo del principio acusatorio (Voto Disidente, 2018, párr. 26). Este principio se evidencia en diversos artículos del Estatuto de Roma que definen claramente las funciones de cada uno de los órganos que intervienen en el enjuiciamiento. Así los artículos 58 y 61 del Estatuto confieren al Fiscal la autoridad exclusiva para formular los cargos, mientras que la función de la Sala de Cuestiones Preliminares queda limitada, conforme al artículo 61(7) del Estatuto, a confirmar los cargos, negarse a confirmarlos o aplazar la audiencia y solicitar al Fiscal que considere modificar un cargo, aportar pruebas adicionales o realizar más investigaciones respecto de un cargo específico (Estatuto de Roma, 1998, art. 61[7]).

Asimismo, al recoger el principio de congruencia procesal, lo que se exige es que el DCC señale un marco fáctico lo suficientemente claro y delimitado para que el acusado pueda preparar su defensa y no sea sorprendido con acusaciones nuevas en el juicio. En ese sentido, la norma 52(b) del Reglamento de la CPI exige que en los documentos en los que se formulen los cargos se incluya “una relación de los hechos (…) que proporcione una base jurídica y fáctica suficiente para hacer que el acusado comparezca ante la CPI” (CPI, 2004, norma 52[b]). Como se puede advertir, el nivel de detalle exigido, a diferencia de lo sostenido por Bemba en su apelación (CPI, 2018, párr. 90), no es el estándar de precisión probatoria requerido para una sentencia condenatoria: “más allá de toda duda razonable”, sino un umbral intermedio, en el que los hechos descritos pueden demostrar la existencia de motivos fundados para creer que el acusado ha cometido esos crímenes (Beltrán 2008, p. 70).

En esa línea, Gauthier de Beco sostiene que la finalidad de la audiencia de confirmación de cargos no es establecer una verdad probatoria definitiva, sino determinar si existen motivos fundados para abrir el juicio. Exigir que el documento de cargos contenga una descripción exhaustiva de cada hecho específico socavaría la función de la Fiscalía, imponiéndole una carga probatoria excesiva (2007, p. 473). Ello encuentra sustento en el artículo 61(5) del Estatuto de Roma, que dispone que en la Audiencia de confirmación cargos se exige que el Fiscal presente “pruebas suficientes de que hay motivos fundados para creer que el imputado cometió el crimen que se le imputa” (Estatuto de Roma, 1998, art. 61[5]). Este artículo recoge un estándar probatorio intermedio, en tanto no se exige la certeza, la cual sí es requerida en el juicio.

Desde esta perspectiva, el principio de congruencia procesal no debe interpretarse como una exigencia de correspondencia absoluta y literal entre los hechos descritos en la decisión de confirmación y aquellos considerados en la sentencia. Lo relevante es que los hechos por los que se condenan al imputado respondan a un mismo patrón, es decir, formen parte de un mismo conjunto de circunstancias acontecidas en un mismo espacio temporal y geográfico. En el caso de Bemba, el patrón estaba claramente delimitado porque se trataba de crímenes de asesinato, saqueo y violación sexual cometidos por las tropas del MLC en el territorio de la RCA entre octubre de 2002 y marzo de 2003, en el contexto de una operación militar bajo su mando.

Además, la defensa de Bemba tuvo acceso a las pruebas, por lo que pudo contradecirlas durante el proceso y no se vio sorprendida por hechos sustancialmente nuevos, lo cual permitió a Bemba ejercer adecuadamente su derecho de defensa conforme al artículo 67 del Estatuto de Roma.

Esto último es relevante, dado que la posibilidad de modificar los cargos durante el proceso ha sido admitida siempre que se garantice el derecho de defensa del acusado. Así, en el caso del *Fiscal c. Renzaho Tharcisse,* el TPIR anuló varias condenas que se le imputaban al superior al advertir que la acusación no se había formulada de manera clara y que el acusado no pudo conocer los hechos en los que se basaba su supuesta responsabilidad como superior. La vaguedad de la acusación y la falta de subsanación durante el proceso generó que el acusado no pueda reorganizar su defensa (TPIR, 2011, párrs. 126–129).

Lo rescatable de este caso es que la Sala de Apelaciones subraya que un defecto de vaguedad en la acusación puede ser subsanado durante el juicio siempre y cuando se otorgue al acusado la oportunidad de ejercer su derecho de defensa. En ese sentido, es posible reformular o precisar cargos durante el proceso penal siempre que se respete el principio del debido proceso y se garantice la oportunidad real del acusado de ejercer su derecho de defensa.

A diferencia del caso *Renzaho* ante el TPIR, en el cual el acusado no recibió una notificación clara y delimitada de los hechos, en el caso de Bemba, este fue informado adecuadamente de “la naturaleza, la causa y el contenido de los cargos”, conforme lo dispone el artículo 67(1)(a) del Estatuto de Roma (Estatuto de Roma, 1998, art. 67[1][a]). Este conocimiento fue proporcionado no solo por el DCC, sino también por otros documentos auxiliares como el Resumen de Evidencia (“Summary of Evidence”), el Cuadro de Análisis de la Información Detallada (IDAC, por sus siglas en inglés), la Lista

de Evidencia y los resúmenes de testigos, todos entregados antes del inicio del juicio (Fiscalía de la CPI, 2017, párr. 77).

Específicamente, en la Lista de Evidencia, se identificó claramente las pruebas de la Fiscalía, brindando una notificación adicional a Bemba sobre los detalles de los cargos que se le imputan. En el IDAC, por su parte, se detalló con precisión los elementos probatorios relevantes, de manera tal que se informó a la Defensa el caso exacto en su contra y el detalle los hechos lo que garantizó que hubiera ambigüedad respecto de los mismos. En el Resumen de evidencia, se explicó cómo las pruebas se vinculaban con los cargos (Fiscalía de la CPI, 2017, párrs. 78-83). Estos documentos evidencian que la Defensa tuvo pleno conocimiento de los hechos que se la imputaban, por lo que no se materializó una afectación al derecho de defensa de Bemba que justificara la anulación de los cargos imputados.

Asimismo, se ha de considerar las circunstancias del caso concreto y el tipo de responsabilidad que se le atribuía a Bemba. Los crímenes cometidos por el MLC en la RCA se cometieron en el marco de un conflicto armado no internacional, en un territorio extranjero, con diversos actores y desarrollado en distintos espacios geográficos alejados de donde se encontraba Bemba. En este contexto, a Bemba no se le acusaba de cometer dichos crímenes directamente, sino como jefe militar que habría incumplido su deber de adoptar las medidas necesarias para impedir o castigar los crímenes cometidos por sus tropas al tomar conocimiento o al menos tener motivos para conocer que sus subordinados estaban cometiendo dichos crímenes. Por lo que, resulta desproporcionado y contrario a la lógica del tipo de responsabilidad que se atribuía a Bemba exigir que cada acto específico esté detallado con precisión en la fase de confirmación de cargos.

Sobre esto último, en el caso *Blaškic*, la Sala de Apelaciones determinó que el grado de especificidad de los cargos dependerá “de la proximidad alegada del acusado a dichos hechos, es decir, del tipo de responsabilidad que le atribuye la Fiscalía” (TPIY, 2004, párr. 210, traducción propia). En ese sentido, la inclusión de actos específicos de violación o asesinato dentro de ese período y ámbito geográfico, aun cuando no estuvieran detalladamente descritos en el documento de cargos, no alteraba sustancialmente la imputación. Más aún cuando la defensa tuvo acceso a las pruebas en cuestión, contó con la oportunidad de contradecirlas y pudo reorganizar su estrategia conforme al desarrollo del juicio. Estas condiciones permitieron que Bemba pueda ejercer adecuadamente su derecho de defensa, conforme al artículo 67 del Estatuto.

Del mismo modo, la Sala de Apelaciones de la CPI en el caso del *Fiscal c. Thomas Lubanga Dyilo* reconoció que el Fiscal debe proporcionar detalles sobre la fecha y el lugar de los hechos que se le imputan al acusado, así como identificar a las presuntas víctimas; sin embargo, el grado de especificidad dependerá de las circunstancias (CPI, 2014, párr. 123). En el caso de Bemba, dadas las particularidades mencionadas, era complicado identificar a cada una de las víctimas con precisión absoluta.

Por lo expuesto, se evidencia que la Sala de Primera Instancia no vulneró el artículo 74(2) al valorar hechos complementarios que se encontraban dentro del marco fáctico confirmado y que fueron debidamente notificados a la defensa. Por el contrario, fue la Sala de Apelaciones la que incurrió en una lectura excesivamente formalista del principio de congruencia procesal que terminó obstaculizando la persecución efectiva de los crímenes internacionales cometidos en la RCA.

Lo relevante al momento de atribuir este tipo de responsabilidad, en la etapa de confirmación de cargos, no consiste en enumerar a cada una de las víctimas, sino si el acusado conocía la naturaleza de la acusación, es decir, los crímenes que se le imputaron, en qué espacio temporal y geográfico ocurrieron. Ello con el objetivo de que tenga la oportunidad de ejercer su defensa. Como se ha podido evidenciar, esta posición es congruente con una interpretación adecuada del artículo 74(2) del Estatuto.

V.2. ¿Qué métodos de interpretación jurídica son adecuados para interpretar el artículo 28 del Estatuto de Roma?

El artículo 28(a) del Estatuto de Roma recoge la figura de la responsabilidad penal del superior jerárquico, tambié conocida como “responsabilidad de mando”, cuyo primer antecedente se sitúa comúnmente en el caso del general japonés Tomoyuki Yamashita, quien fue condenado por la Corte Suprema de Estados Unidos por los crímenes cometidos por sus soldados en Filipinas en el marco de la Segunda Guerra Mundial (Martinez, 2007, p. 648). Aunque ya se habían llevado a cabo varios juicios importantes por crímenes de guerra antes de la Segunda Guerra Mundial, este conflicto armado internacional marcó, de acuerdo con Mettraux, el nacimiento de la justicia penal internacional moderna, en la cual es posible atribuir responsabilidad penal a los líderes militares y civiles no solo cuando participaron directamente en la comisión de un delito, sino también cuando han omitido prevenir o sancionar los crímenes cometidos por sus subordinados (2009, p. 4).

Si bien esta figura ya había sido reconocida en los códigos militares nacionales y en el derecho internacional consuetudinario, fue recién después de la Segunda Guerra Mundial cuando se comenzó a desarrollar progresivamente por los Tribunales Penales Internacionales, los cuales se encargaron de delimitar sus alcances (Huertas, Morales y Archila, 2023, p. 36). De la revisión realizada, se advierte que la primera codificación en un instrumento internacional se dio en el marco del Derecho Internacional Humanitario, específicamente, en el artículo 86(2) del Protocolo I Adicional a los Convenios de Ginebra de 1949 relativo a la protección de las víctimas de los conflictos armados internacionales de 1977 (en adelante, Protocolo Adicional I). En dicho artículo, se dispone que los superiores jerárquicos no quedan exentos de responsabilidad si "sabían o poseían información que les permitiera concluir" que su subordinado estaba cometiendo una infracción grave y no adoptó medidas para prevenirla (Protocolo Adicional I, 1977, art. 86[2]).

Aunque esta última disposición se aplica a conflictos armados internacionales, se ha reconocido su carácter consuetudinario también en conflictos armados no internacionales en la Norma 152 y la Norma 153 de la Lista de las Normas Consuetudinarias del Derecho Internacional Humanitario. La Norma 152 atribuye responsabilidad penal internacional al superior por los crímenes que se cometieron en cumplimiento de sus órdenes (Henckaerts y Doswald-Beck, 2005, Norma 152), lo cual configura responsabilidad directa. Mientras que la Norma 153 es la que reconoce propiamente la responsabilidad de mando o, de acuerdo con Peréz-León (2007, p. 161), responsabilidad indirecta al atribuir responsabilidad penal a los superiores que "sabían, o deberían haber sabido" que sus tropas estaban cometiendo crímenes o los iban a cometer y no adoptaron las medidas necesarias para prevenirlos o sancionarlos (Henckaerts y Doswald-Beck, 2005, Norma 153).

Posteriormente, la responsabilidad de mando fue reconocida en los artículos 7(3) y 6(3) de los Estatutos del Tribunal Penal Internacional para la ex Yugoslavia de 1993 (TPIY) y del Tribunal Penal Internacional para Ruanda de 1994 (TPIR) respectivamente. Estos artículos disponían que el superior sería responsable si "sabía o tenía razones para saber que el subordinado iba a cometer tales actos o los había cometido y no adoptó las medidas necesarias y razonables para impedir que se cometieran o para castigar a quienes los perpetraron" (TPIY, 1993; TPIR, 1994). En estos Estatutos, se comenzaron a delinear los requisitos para atribuir responsabilidad penal al superior, siendo los primeros en hacer referencia de manera expresa al elemento de medidas necesarias y razonables que el superior debía adoptar.

En 1998, el Estatuto de Roma recoge la figura de la responsabilidad del superior jerárquico en su artículo 28(a), el cual dispone que un “jefe militar será penalmente responsable por los crímenes cometidos por las fuerzas bajo su mando y control efectivo” cuando concurran dos requisitos. Primero, el jefe militar "hubiera sabido” o “hubiera debido saber”, en virtud de las circunstancias, que sus subordinados habían cometido o estaban por cometer crímenes bajo la competencia de la Corte. Segundo, el jefe militar no hubiera adoptado “todas las medidas necesarias y razonables a su alcance para prevenir o reprimir” la comisión de los crímenes o, si ya se habían cometido, para poner los mismos “en conocimiento de las autoridades competentes” (CPI, 1998, art. 28[a]).

Del citado artículo, se desprenden tres interrogantes que deben ser atendidas, a fin de atribuir responsabilidad penal al superior jerárquico. Además, dichas preguntas siguen un orden de prelación, conforme el siguiente detalle:

i. ¿Las fuerzas armadas que cometieron los crímenes se encontraban bajo el mando y control efectivo del jefe militar?

ii. ¿El jefe militar sabía o hubiera debido saber que sus subordinados cometieron o iban a cometer los crímenes bajo competencia de la Corte?

iii. ¿El jefe militar adoptó todas las medidas necesarias y razonables que tenía a su disposición para prevenir o castigar la comisión de los crímenes?

De dichas interrogantes se desprende que hay tres elementos clave que deben concurrir para atribuir responsabilidad penal al superior: el control efectivo sobre las fuerzas que cometieron los crímenes, el grado de conocimiento que tenía el superior sobre dichos crímenes, y las medidas necesarias y razonables que adoptó para prevenirlos, reprimirlos o denunciarlos. La verificación de estos elementos requiere determinar su contenido; sin embargo, el propio artículo 28(a) no delimita el alcance de cada uno de estos elementos.

A pesar de ello, la interpretación que se pretenda hacer de estos elementos no puede realizarse de manera discrecional o arbitraria por parte de los jueces. Al respecto, la Convención de Viena sobre el Derecho de los Tratados de 1969 (en adelante, la Convención de Viena), específicamente, en su artículo 31 recoge la regla general de interpretación jurídica aplicable a los tratados, estableciendo que estos deben de “interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los téminos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin” (Organización de las Naciones Unidas, 1969).

Si bien el Estatuto de Roma es un tratado internacional que formalmente se encuentra bajo el ámbito de aplicación de la Convención de Viena, al cumplir con los requisitos previstos en los artículos 1 y artículo 2.1. de la referida Convención, resulta pertinente analizar si la CPI puede aplicar los métodos de interpretación reconocidos en ella al momento de resolver un caso. Esta cuestión es relevante, dado que, en el Derecho Internacional contemporáneo coexisten múltiples regímenes jurídicos especializados, cada uno con principios e instituciones propios, lo que ha dado lugar al fenómeno conocido como fragmentación del Derecho Internacional (CDI, 2006, p.13). La Comisión de Derecho Internacional de las Naciones Unidas (en adelante, CDI), en su informe sobre esta temática, ha descrito esta situación como la proliferación de cuerpos normativos especializados, como el Derecho Penal Internacional, que emergen en respuesta a necesidades concretas de la comunidad internacional y que desarrollan sus propias normas, las cuales no siempre coinciden con las normas del Derecho Internacional General (CDI, 2006, p. 15).

En tal sentido, aunque el Estatuto de Roma es un tratado regido por el Derecho Internacional General, su interpretación debe armonizarse con su carácter especial al ser una fuente jurídica de un régimen especializado: el Derecho Penal Internacional. Por lo que debe analizarse, en primer lugar, qué dispone el referido Estatuto sobre la aplicación de otras fuentes normativas.

El artículo 21 del Estatuto de Roma establece, en orden jerárquico, las fuentes del Derecho Internacional que pueden aplicar los jueces de la CPI al momento de resolver un caso. En ese sentido, lo primero que se debe aplicar es el propio Estatuto, “los elementos de los crímenes y, las reglas de procedimiento y prueba”. Ante una laguna normativa, se puede recurrir a “los tratados aplicables, los principios y normas del Derecho Internacional”. Solo en caso las fuentes anteriores no hayan sido suficientes, la Corte podrá aplicar los principios generales del derecho que se deriven de los derechos internos de los distintos sistemas jurídicos del mundo. Finalmente, se ha de tener en cuenta que, conforme al artículo 21(3), cualquier aplicación e interpretación del Estatuto de Roma “deberá ser compatible con los derechos humanos internacionalmente reconocidos” (Estatuto de Roma, 1998, art.21).

Siguiendo dicho esquema, para determinar qué métodos de interpretación resultan aplicables al Estatuto, es necesario evaluar qué dispone el propio Estatuto al respecto. Se ha de tomar en cuenta que el Estatuto de Roma ha puesto un énfasis mayor en el principio de legalidad al momento de interpretar sus disposiciones, en comparación a los estatutos de los Tribunales Penales Internacionales *ad hoc*, y ello se ve reflejado en

las definiciones de crímenes y los principios generales recogidos en los artículos 22, 23 y 24 (Manley, Tehrani y Rasiah, 2023, p.9).

En efecto, el artículo 22(2) del Estatuto de Roma hace referencia a la interpretación de los crímenes reconocidos en é y dispone que su definición "será interpretada estrictamente y no se hará extensiva por analogía. En caso de ambigüedad, será interpretada en favor de la persona objeto de investigación, enjuiciamiento o condena" (Estatuto de Roma, 1998, art. 22[2]). Este artículo, recoge dos manifestaciones del principio de legalidad que deben observarse al interpretar el Estatuto de Roma: i) la interpretación estricta y ii) el principio de *indubio pro reo* (Gardiner, 2014, p. 33).

Sin embargo, en la doctrina ha surgido un debate respecto a si el principio de legalidad se aplica únicamente a las definiciones de los crímenes y sus respectivas penas, o si también alcanza a los modos de responsabilidad penal, como el artículo 28(a) bajo análisis. Un sector de la doctrina sostiene que la aplicación del artículo 22(2) se limita a la interpretación de las definiciones de los crímenes internacionales de la competencia de la Corte, sin extenderse a las demás disposiciones (Bradley y Beer, 2020, p. 170). Mientras que otro sector de la doctrina considera que las reglas de interpretación que se derivan del artículo 22(2) también aplican a los modos de responsabilidad (Manley, Tehrani y Rasiah, 2023, p.10).

Este debate también ha estado presente en la jurisprudencia de la CPI. En el caso del *Fiscal c. Germain Katanga*, la Sala de Primera Instancia reconoció que la interpretación del Estatuto de Roma debe realizarse conforme al principio de legalidad reconocido en el artículo 22(2), pero ello no impide recurrir a los otros métodos reconocidos en la Convención de Viena, dado que son métodos rigurosos, siempre que ello no implique forzar el sentido de los términos para crear una interpretación contraria al texto de tratado. Asimismo, concluye que el objeto y fin del Estatuto deben ser siempre considerados durante la interpretación de sus disposiciones (CPI, 2014, párr. 54-57).

El principio de legalidad, entonces, no excluye el uso de los métodos de interpretación reconocidos en la Convención de Viena. La aplicación de los referidos métodos resulta válida en aquellos supuestos en los que el contenido o alcance de una disposición del Estatuto de Roma no sea claro o presente ambigüedades. Sin embargo, la remisión a estas fuentes debe realizarse respetando los límites establecidos en el propio Estatuto, en particular, lo dispuesto en los artículos 21(3) y 22(2), los cuales garantizan que toda interpretación que se haga por los jueces sea compatible con los derechos humanos

reconocidos internacionalmente y con el principio de legalidad penal, que prohíbe ampliar por analogía la definición de los crímenes o de las penas.

Asimismo, se ha de tomar en cuenta que, en diferentes casos, tanto la CPI como los Tribunales Penales Internacionales *ad hoc* han recurrido a los métodos de interpretación de la Convención de Viena para determinar el alcance de sus disposiciones. La aplicación de dichos métodos de interpretación ha servido como una guía que permite que las decisiones de los Tribunales Internacionales gocen de mayor credibilidad, han permite estructurar el razonamiento jurídico y han ayudado a que las decisiones sean más comprensibles (Manley, Tehrani y Rasiah, 2023, p.9).

Habiendo determinado las fuentes normativas aplicables, corresponde explicar los métodos de interpretación de tratados reconocidos en la Convención de Viena sobre el Derecho de los Tratados. Así, el artículo 31 recoge cuatros criterios de interpretación: la buena fe, el sentido corriente de los términos, el contexto y, el objeto y fin del tratado (Organización de las Naciones Unidas, 1969). Los cuales deben ser interpretados de manera integral, es decir en su conjunto, dado que no hay una jerarquía entre los cuatro elementos.

La doctrina y la jurisprudencia han desarrollado el contenido de cada uno de estos elementos de manera basta. Sin perjuicio de su complejidad, en el presente informe, se adoptarán las definiciones generalmente aceptadas por la doctrina especializada y la jurisprudencia de los Tribunales Internacionales, con el objetivo de aplicar dichos criterios en análisis del artículo 28(a) del Estatuto de Roma, especialmente en relación con los hechos del caso Bemba.

El concepto de “buena fe” es uno de los más complejos de interpretar, ya que sus propios términos no permiten delimitar con precisión su contenido. A pesar de ello, es un concepto ampliamente reconocido en el Derecho Internacional. Aunque existen diferentes interpretaciones, nos adherimos a la explicación propuesta por Richard Gardiner, quien sostiene que la buena fe está relacionada con el principio de “eficacia”, el cual se manifiesta en dos vertientes: por un lado, debe preferirse la interpretación que otorgue significado o efectos a la disposición en lugar de preferir una interpretación que la prive de eficacia; por otro lado, debe preferirse una interpretación que cumpla los fines del tratado (2018, p.12). Asimismo, en el caso *Katanga*, la CPI concluye que la buena fe implica evitar cualquier interpretación que suponga la violación alguna de las otras disposiciones del tratado (2014, párr. 46).

Así, la interpretación de buena fe resulta un criterio de interpretación bastante amplio y, puede parecer subjetivo. Sin embargo, en virtud del mismo se ha de considerar que cualquier ejercicio interpretativo que se haga sobre la disposición de un tratado debe guardar coherencia con las demás disposiciones y no debe impedir que el tratado produzca los efectos jurídicos que se pretendían al momento de su entrada en vigor. Por ello, cualquier interpretación que anule, contradiga o vacíe de contenido las disposiciones del tratado resultaría contraria al principio de buena fe.

La interpretación conforme al sentido corriente de los términos evidencia un enfoque lingüístico y gramatical que permita identificar el significado habitual o corriente del texto, de manera tal que la interpretación del texto del tratado debe partir del significado común o regular de las palabras utilizadas (Hernández, 2013, p. 115). En otras palabras, debe buscarse el significado ordinario del lenguaje acordado por los Estados parte. En ese sentido, de acuerdo con el artículo 31(4) de la Convención de Viena, solo se dará un significado diferente a un término si se tiene constancia que así lo quisieron las partes (Organización de las Naciones Unidas, 1969, art. 31[4]).

Sin embargo, se ha de considerar que el sentido corriente de un término, en un ámbito jurídico y especializado, no hace referencia al significado vulgar del término sino a su significado técnico y especializado (Remiro, 2010, p. 310). En virtud de este criterio, se debe tomar en cuenta lo que expresamente ha sido acordado por los Estados parte en el texto de tratado, en concordancia con el significado ordinario de los términos en el ámbito jurídico específico del tratado. No se puede atribuir un significado diferente a lo que expresamente han acordado las partes a menos que las mismas hayan acordado un significado diferente. Ello se debe a que lo que está escrito otorga mayor seguridad jurídica y debe prevalecer sobre aquello que no ha sido exteriorizado.

Respecto a la interpretación tomando en cuenta el contexto, está explicada en el mismo artículo 31 de la Convención de Viena, en el cual se establece que el contexto abarca el texto del tratado, “su preámbulo y anexos”, “todo acuerdo que se refiera al tratado concertado entre todas las partes con motivo de la celebración del tratado” y “todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado” (Organización de las Naciones Unidas, 1969, art. 31).

Finalmente, la interpretación del tratado debe realizarse tomando en consideración su objeto y fin. Este criterio hace referencia a la interpretación teleológica del tratado y guarda relación con el principio de efectividad, en tanto, se busca una interpretación que

no convierta las disposiciones del tratado en superfluas y que promueva el cumplimiento de las finalidades del mismo (Hernández, 2013, p. 119).

Algún sector de la doctrina ha intentado diferenciar entre el objeto y el fin, así, Remiro Brotons señala que el objeto desempeña un papel de realismo; ya que, parte de lo establecido en el tratado, mientras que el fin desempeña el papel de idealismo al estar referido a lo que las partes buscaba alcanzar con la celebración del tratado (2010, p. 312). Lo cierto es que, en la práctica, ambos conceptos se han fusionado y se suelen considerar como la finalidad del tratado (Hernández, 2013, p. 120).

Es decir, la interpretación del tratado debe tomar en cuenta cuál fue el propósito que las partes buscaban alcanzar al celebrarlo. No obstante, este criterio debe ser armonizado con los demás recogidos en el artículo 31 de la Convención de Viena, que le sirven como contrapeso. Dado que, como explica Remiro Brotons, se debe alcanzar una interpretación que satisfaga el fin querido por las partes, pero respetando las disposiciones que expresamente han convenido (2010, p. 313).

Cabe precisar que, si bien la buena fe y el objeto y fin del tratado pueden parecer criterios de interpretación similares no deben confundirse. La buena fe actúa como un límite no permitiendo una interpretación que vacíen de contenido el tratado; mientras que el objeto y fin busca orientar el sentido de las disposiciones hacia el cumplimiento de los propósitos del tratado.

En caso de que la aplicación de los métodos de interpretación del artículo 31 no esclarezca el significado de una disposición o conduzca a un resultado absurdo o irrazonable, se podrá recurrir a métodos complementarios de interpretación como “a los trabajos preparatorios del tratado y a las circunstancias de su celebración”, conforme al artículo 32 de la Convención de Viena (Organización de las Naciones Unidas, 1969, art. 32).

En el presente informe, además de recurrir a los métodos de interpretación explicados, se tomará en cuenta la jurisprudencia de otros Tribunales Penales Internacionales. Ello no implica la aplicación directa de los artículos contenidos en sus respectivos Estatutos, sino que sus pronunciamientos servirán como una guía que permita esclarecer cómo se ha entendido, en contextos similares, el contenido y alcances de los elementos de la responsabilidad penal del superior. Si bien el artículo 21 del Estatuto de Roma no hace referencia a la jurisprudencia internacional, los jueces de la CPI, conforme a su propia jurisprudencia, pueden recurrir a ella para verificar la existencia de principios o normas del derecho internacional o para interpretar su propio derecho aplicable, conforme a la

metodología general que se desprende del artículo 38.1.d del Estatuto de la Corte Internacional de Justicia (Gonzales, 2016, p. 213).

En ese sentido, a continuación, se presenta un resumen de las sentencias sobre responsabilidad del superior jerárquico emitidas por Tribunales Penales Internacionales, que se utilizarán en el presente informe a modo de referencia. Con el objetivo de evidenciar cómo se ha interpretado el contenido y alcance de cada uno de los elementos de la responsabilidad del superior.

TABLA 2

Tribunal / Caso	Imputado(s)	Crímenes imputados	Definición de control efectivo	Definición del grado de conocimiento exigido	Definición de medidas necesarias y razonables	Fallo
TPIY – Čelebići (Primera Instancia)	Zdravko Mucić, Hazim Delić, Esad Landžo, Zejnil Delalić	Tortura, homicidio, trato inhumano, violación.	La Sala entendió por control efectivo la capacidad material del superior para prevenir y sancionar crímenes cometidos por sus subordinados, independientemente de si ostenta una autoridad formal (de jure) o solo fáctica (de facto) (TPIY, 1998, párr. 354).	**"conocimiento real":** no se puede presumir, pero puede establecerse en virtud de evidencia circunstancial como el número de actos ilegales cometidos, el tipo de actos cometidos, las tropas involucradas, etc. **"tenía razones para saber":** conforme a su significado ordinario, un superior solo puede ser considerado responsable si tuvo acceso a información específica que le advirtiera sobre los delitos cometidos (TPIY, 1998, párrs. 384-390).	La evaluación de las medidas depende de cada situación particular. Formular un estándar en abstracto carecería de sentido. Sin embargo, las medidas exigidas deben ser aquellas que están dentro de las capacidades, materiales del superior, no se le puede exigir lo imposible (TPIY, 1998, párrs. 394-395).	Zdravko Mucić fue declarado CULPABLE en virtud de la responsabilidad del superior por los crímenes de asesinato, tortura, causar grandes sufrimientos y actos inhumanos. Delalić fue declarado NO CULPABLE dado que no tenía control sobre el campo de prisioneros de Čelebići ni sobre los guardias que trabajaban allí, por lo que no se le podía atribuir responsabilidad penal por sus acciones.
TPIY – Čelebići (Apelación)	Zdravko Mucić, Hazim Delić	Tortura, homicidio, trato inhumano, violación.	Confirmación del requisito: se reafirma que Mucić tenía control de facto a pesar de que pudieran existir otros superiores (TPIY, 2001, párr. 212).	Reafirma la posición de la Sala de Primera Instancia, por lo que el superior será penalmente responsable solo si disponía de información que le hubiera advertido sobre la	No lo aborda de manera directa.	La Sala de Apelaciones confirmó la condena de Mucić por su responsabilidad como superior, al

				comisión de los crímenes (TPIY, 2001, párr. 241).		tener autoridad de facto sobre el campo de detención de Čelebići y sobre los guardias que cometieron crímenes graves y no haber actuado cuando sabía de los crímenes.
TPIY – Blaškić	Tihomir Blaškić	Crímenes de guerra y lesa humanidad durante el conflicto en Bosnia	La Sala de Primera Instancia sostuvo que el control efectivo se basa en la capacidad material del superior y se puede atribuir responsabilidad penal incluso por crímenes cometidos por subordinados no directos, y que varias personas pueden ser responsables por un mismo crimen si comparten ese control (TPIY, 2000, párrs. 300-302).	La Sala de Primera Instancia construye su propia interpretación de este requisito a partir de la costumbre internacional y la jurisprudencia. Llega a la conclusión de que después de la Segunda Guerra Mundial un comandante puede ser responsable por los crímenes cometidos por sus subordinados si no utilizó los medios a su disposición para enterarse del delito y, dadas las circunstancias, debió haberlo sabido Esa falta de conocimiento constituye un incumplimiento de sus deberes (TPIY, 2000, párrs. 322-332). Asimismo, considera que resulta improbable que Blaškić no conociera de los crímenes si los mismos fueron ordenados desde la más alta jerarquía militar de las fuerzas armadas del Consejo de Defensa Croata (TPIY, 2000, párr. 484).	Para la Sala de Primera Instancia la obligación de adoptar las medidas necesarias y razonables para "prevenir o castigar" no otorga dos opciones. Sino que, cuando el acusado sabía o tenía razones para saber que sus subordinados estaban a punto de cometer crímenes no puede compensar su omisión de actuar mediante el castigo a los subordinados (TPIY, 2000, párr. 336).	Blaškić fue declarado culpable
TPIY – Halilović (Apelación)	Sefer Halilović	Asesinato como crimen de guerra durante la Operación Neretva '9	Reconoce que control efectivo sobre un subordinado constituye el umbral que debe alcanzarse para establecer una relación de subordinación a efectos del artículo 7(3)	No se abordó este elemento.	El deber general de los comandantes de adoptar las medidas necesarias y razonables deriva de su posición de autoridad. Las medidas necesarias	Se desestimó la apelación de la Fiscalía; y se confirmó la absolución de Halilović, dado que no tenía control efectivo sobre las

			del Estatuto que no hace referencia al control efectivo (TPIY, 2007, párr. 59).		son aquellas que el superior debe adoptar para cumplir con su obligación demostrando que intentó genuinamente prevenir o castigar, y las medidas razonables son aquellas que se encuentran dentro de las facultades materiales del superior (TPIY, 2007, párr. 63).	tropas que cometieron los crímenes.
TESL – Brima, Kamara y Kanu	Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu	Crímenes de guerra y lesa humanidad cometidos durante la guerra civil en Sierra Leona como asesinatos y violación.	La existencia de una relación de subordinación es una cuestión de hecho, que debe determinarse a la luz de todas las pruebas disponibles. Los indicios de control efectivo incluyen "la formalidad del procedimiento utilizado para el nombramiento del superior; el poder del para emitir órdenes o tomar medidas disciplinarias; que los subordinados muestren disciplina ante su presencia; el nivel de visibilidad; capacidad de transmitir informes a las autoridades competentes" (TESL, 2007, párr. 785, traducción propia).	El conocimiento efectivo puede definirse como la conciencia de que los crímenes se cometieron o estaban por cometerse. No se puede presumir el conocimiento, pero, puede establecerse mediante pruebas circunstanciales. La evidencia requerida puede variar dependiendo de la posición del superior y del nivel de responsabilidad en la cadena de mando competentes (TESL, 2007, párrs. 792-794).	Este elemento recoge dos deberes distintos dependiendo de que cuando el superior adquiere conocimiento: el deber principal del superior es intervenir apenas tenga conocimiento de que están por cometerse crímenes, mientras que adoptar medidas para castigar solo aplicará si el superior tuvo conocimiento de los crímenes después de que se cometieron (TESL, 2007, párrs. 797-799).	Se declara culpable como superior a Brima y a Kamara por el crimen de violación sexual.
TPIR – Renzaho	Tharcisse Renzaho	Crímenes de genocidio, exterminio, asesinato, violación	El superior debe tener control efectivo sobre los subordinados al momento en que se cometió el delito. Este requisito no se cumple si solo se puede evidenciar cierta influencia del acusado (TPIR, 2009, párr. 745).	El conocimiento efectivo se puede probar tanto con evidencia directa o mediante pruebas circunstanciales. Sin embargo, hay indicios para determinar el conocimiento real del superior como "el número, tipo y alcance de los actos ilegales cometidos. el	No se abordó este elemento.	Se declara culpable a Renzaho por genocidio, violación y asesinato como crímenes contra la humanidad.

				período durante el cual ocurrieron. el número y tipo de tropas y logística involucradas, la ubicación geográfica, si los actos fueron generalizados, el ritmo táctico de las operaciones, el modus operandi de actos ilegales similares, la ubicación del superior en el momento de los hechos" (TPIR, 2002, párrs. 746-747, traducción propia).		

Nota. Elaboración y traducción propias a partir de las sentencias que figuran en la lista (traducción propia).

En suma, en el presente informe, se adoptará un enfoque interpretativo que respete la jerarquía normativa establecida en el artículo 21 del Estatuto de Roma. En primer lugar, se atenderá al propio texto del artículo 28(a). En segundo lugar, se aplicarán los métodos de interpretación contenidos en el artículo 31 de la Convención de Viena, especialmente el análisis del objeto y fin del tratado, que, en el caso del Estatuto de Roma, de acuerdo a su Preámbulo, es que los crímenes más graves para la comunidad internacional no queden impunes y sean sometidos a la justicia internacional (Estatuto de Roma, 1998). En tercer lugar, se utilizará la jurisprudencia de Tribunales Penales Internacionales como una herramienta auxiliar que permite delimitar el contenido de los elementos analizados, sin que ello implique adoptar automáticamente sus estándares. Este ejercicio interpretativo, será realizado en armonía con el principio de legalidad, que impide extender por analogía las disposiciones del Estatuto, y con respeto a los derechos del acusado.

V.3. ¿Cómo debe interpretarse el requisito de "control efectivo" del artículo 28(a) del Estatuto de Roma para atribuir responsabilidad penal al superior jerárquico?

Se ha establecido que, de conformidad con los dispuesto en el artículo 28(a) del Estatuto de Roma, el primer requisito para atribuir responsabilidad penal al superior jerárquico por los crímenes cometidos por sus tropas es que haya tenido el control efectivo sobre las mismas. El Estatuto de Roma fue el primer instrumento internacional en codificar el control efectivo como requisito de la responsabilidad de mando, pero no definió su contenido. Por ello, para determinar el alcance de este concepto, es necesario recurrir

a los métodos de interpretación jurídica previstos en el artículo 31 de la Convención de Viena.

Asimismo, resulta necesario acudir al corpus iuris del Derecho Internacional Penal y al diálogo jurisprudencial entre tribunales penales internacionales. En tanto, uno de los rasgos distintivos del Derecho Penal Internacional contemporáneo es el desarrollo de un Sistema de Justicia Penal Internacional, cuyo uno de sus pilares básicos es la consolidación y desarrollo de un cuerpo de jurisprudencia internacional que se ha encargado de establecer reglas interpretativas que se "extienden horizontalmente a través de los distintos tribunales penales internacionales que participan en el sistema" (Escobar, 2012, p. 28).

Se ha de considerar que el Estatuto de Roma recién entró en vigor en 2002; por lo cual, si bien fue el primer instrumento en recoger explícitamente el control efectivo, su contenido fue desarrollado primero por los Tribunales *ad hoc*, que en virtud de sus propios estatutos consideraron el control efectivo como un elemento para determinar la existencia de la relación jerárquica entre el superior y sus subordinados. Esas interpretaciones contribuirían a determinar el alcance y requisitos del control efectivo, dado que, en el marco de la CPI, el primer caso donde se condenó a un jefe militar por los crímenes de sus subordinados fue precisamente en la Sentencia de Primera Instancia en el caso de Bemba.

En virtud de lo dispuesto en el artículo 31 de la Convención de Viena, la interpretación del concepto "control efectivo" recogido en el artículo 28(a) del Estatuto de Roma debe realizarse atendiendo al sentido corriente de sus términos, su contexto normativo, al objeto y fin del Estatuto de Roma, y de buena fe. Este método sistemático asegura que la interpretación sea coherente con el propósito del Estatuto, pero respetando el principio de legalidad que rige dicho Estatuto y evitando interpretaciones que vacíen de contenido sus demás disposiciones.

El sentido corriente de los téminos "control efectivo" alude a la capacidad que un superior tiene para ordenar, mandar, dirigir y supervisar las acciones que deben realizar sus subordinados. En esa línea, en el caso *Čelebići*, el TPIY, en la Sentencia de Primera Instancia, determinó que el control efectivo se entiende como "la capacidad material para prevenir y castigar la comisión de delitos" (1998, párr. 378, traducción propia).

El objeto y fin del Estatuto de Roma, expresado en su preámbulo y en el artículo 1, es que los responsables de los crímenes más graves que afectan a la comunidad internacional no queden impunes (Estatuto de Roma, 1998). Este fin refuerza que la

interpretación que se realice del concepto de “control efectivo” no debe ser tan estricta que impida sancionar a los superiores jerárquicos. En esa línea, en el caso *Čelebići*, se establece que, para atribuir responsabilidad penal al superior, el control se puede ejercer de iure o de facto (TPIY, 1998, párr. 378). Es decir, lo determinante no es el título que ostenta el superior, sino que se debe analizar si efectivamente tenía la capacidad para dar órdenes o para castigar a sus subordinados.

No obstante, determinar la existencia del “control efectivo” por parte del superior se vuelve complejo cuando las operaciones militares se desarrollan fuera del territorio bajo jurisdicción del jefe militar o dentro de estructuras de mando fragmentadas o compartidas. Este fue el desafío en el caso de Bemba Gombo, dado que, la CPI se enfrentó a un contexto en el que las tropas del MLC, bajo el mando político y militar de Bemba, fueron desplegadas en territorio de la RCA para apoyar al entonces presidente Patassé frente a una rebelión armada. Durante el conflicto armado de naturaleza no internacional, miembros del MLC cometieron múltiples crímenes internacionales; incluidos asesinatos, violaciones y saqueos; contra la población civil.

En este contexto, corresponde analizar cuál fue la posición de la Sala de Primera Instancia sobre la existencia del control efectivo por parte de Bemba sobre las tropas del MLC, así como los argumentos esgrimidos por la defensa Bemba en su escrito de apelación y la valoración final de la Sala de Apelaciones sobre el control efectivo.

La Sala de Primera Instancia consideró que para determinar el control efectivo del superior se debe evaluar su “poder material para prevenir o reprimir la comisión de crímenes o para someter el asunto ante la autoridad competente” (CPI, 2016, p. 183, traducción propia). En virtud de los testimonios y pruebas actuadas en el juicio, la CPI concluyó que, más allá de toda duda razonable, Bemba ejercía el control efectivo sobre las tropas del MLC en la RCA, en tanto ostenta el cargo de Presidente del MLC y comandante en jefe del ALC, pero, además, tenía la facultad material de designar y destituir miembros, de enviar y retirar tropas, recibía reportes de sus comandantes y contaba con líneas de comunicación operativas (CPI, 2016, párr. 697).

En su escrito de Apelación, Bemba planteó seis motivos que sustentaban la misma, siendo el tercero de ellos que no era responsable como superior jerárquico. Al respecto, su defensa sostuvo que la Sala de Primera Instancia se equivocó al considerar que él tenía control efectivo sobre las tropas del MLC en la RCA e ignorar pruebas relevantes al respecto (CPI, 2018, párr. 29).

A pesar de que la falta control efectivo fue uno de los argumentos de apelación presentados por la defensa (CPI, 2018, párr. 30), la Sala de Apelaciones no centró su análisis en este elemento de manera directa. En cambio, centró su análisis en si Bemba adoptó las medidas necesarias y razonables para prevenir o reprimir la comisión de crímenes por parte de sus tropas o para someter el asunto ante la autoridad competente. Si bien ambos conceptos están relacionados; en tanto el primero condiciona la posibilidad de ejercer el segundo; la Sala de Apelaciones no evaluó de manera autónoma si Bemba ejerció o no el control efectivo sobre las tropas del MLC, lo que constituye un error metodológico que afectará el razonamiento jurídico que realice la Sala respecto de las medidas adoptadas por Bemba. Esta omisión adquiere mayor relevancia si se toma en cuenta que Bemba objetó expresamente la existencia del control efectivo señalado por la Sala de Primera Instancia (CPI, 2018, párrs. 29-30).

Por lo que, corresponde evaluar, a partir de los estándares internacionales, si dadas las circunstancias y hechos del caso, Bemba ejercía el control efectivo sobre las tropas del MLC desplegadas en el RCA. El Tribunal Especial para Sierra Leona estableció que los indicios del control efectivo incluyen "la formalidad del procedimiento utilizado para el nombramiento del superior, el poder del superior para emitir órdenes o tomar medidas disciplinarias, el hecho de que los subordinados muestren mayor disciplina en presencia del superior, el nivel de exposición pública" (2007, párr. 785, traducción propia). Asimismo, otros criterios a considerar son "su capacidad para asegurar el cumplimiento de sus órdenes, la autoridad para enviar a sus tropas a lugares donde se desarrollan hostilidades y retirarlas en cualquier momento; su acceso independiente a, y control sobre, los medios para hacer la guerra (equipos de comunicación y armamento); control sobre las finanzas; su capacidad para representar a las fuerzas en negociaciones o interactuar con entidades o personas externas en nombre del grupo; posee cierto nivel de visibilidad pública, manifestado a través de apariciones o declaraciones" (CPI, 2016, párr. 188, traducción propia).

No todos los indicios mencionados, tienen que concurrir para determinar la existencia de un control efectivo por parte del superior, sino que sirven de guía para identificar la existencia de una relación jerárquica entre el superior y las tropas que cometieron los crímenes. El análisis dependerá de los hechos y particularidades del caso concreto. En ese sentido, corresponde analizar cuáles de estos elementos se pueden evidenciar en el caso de Bemba, a partir de la evidencia aportada en el juicio.

En primer lugar, respecto a la formalidad del procedimiento utilizado para el nombramiento de Bemba y su poder para emitir órdenes, se debe considerar que Bemba

fue fundador del MLC y presidente durante el período de los cargos. Como se explicó en los antecedentes del caso, Bemba fue la figura principal del MLC porque él mismo se había asegurado de que cualquier decisión del grupo, sea militar o política, pase primero por su aprobación. Ello encuentra sustento en el artículo 12 del Estatuto del MLC, el cual le otorgaba a Bemba amplias funciones y poderes (CPI, 2016, párr. 384). Ello evidencia, que Bemba tenía un rol central dentro del MLC y ese cargo era público y conforme a los estatutos que regían el MLC.

En segundo lugar, respecto a su poder para emitir órdenes, diversos testimonios; como el de los testigos P15, P36, P32, P33, P45, D49 (CPI, 2016); permiten concluir que Bemba ejercía un control directo sobre las fuerzas del MLC desplegadas en la RCA. Según estos testimonios, Bemba no solo participaba en la planificación estratégica de las operaciones militares, sino que tomaba decisiones sobre el inicio de las operaciones, cómo estas debían conducirse en el terreno, ordenaba cambios de ubicación o nuevas ofensivas conforme al desarrollo del conflicto.

Este nivel de involucramiento en la estrategia militar del MLC evidencia que Bemba no solo era una autoridad formal, sino que tenía una participación activa en la toma de decisiones. A pesar de que había una jerarquía en el ala militar del MLC, Bemba muchas veces se comunicaba y daba órdenes directamente a los comandantes en el campo sin pasar por toda la estructura jerárquica. De acuerdo con la evidencia recogida en el juicio, dichos comandantes implementaban las “órdenes”, “iniciativas”, “instrucciones”, “directivas” y/o “intenciones” de Bemba sin cuestionamiento alguno. (CPI, 2016, párr. 402-403).

En tercer lugar, sobre la capacidad de Bemba para asegurar el cumplimiento de sus órdenes y tomar medidas disciplinarias en caso de incumplimiento, se debe considerar que tenía el poder de sancionar, destituir e incluso arrestar a líderes políticos y oficiales militares dentro del MLC y del ALC. Asimismo, de acuerdo a testimonios como el de P33, Bemba tenía la facultad de establecer tribunales militares y otros órganos judiciales dentro del MLC para sancionar las infracciones al Código de Conducta. Incluso, en la misma época del despliegue de las topas del MLC en la RCA, Bemba, ante denuncias de violación y asesinato en Mambasa, dispuso el inicio de una investigación de los hechos que genero el juicio de varios soldados del ALC ante el tribunal militar del MLC e incluso se impusieron penas. Sin embargo, después los soldados fueron liberados y volvieron a las filas del ALC (CPI, 2016, párr. 403). En virtud de estos hechos, es posible concluir que Bemba tenía la capacidad real de sancionar a sus tropas.

A partir del análisis realizado, se concluye que la interpretación del requisito de control efectivo del artículo 28(a) del Estatuto de Roma no puede restringirse a identificar el título que ostente el superior jerárquico. Por el contrario, debe evaluarse si dicho superior tenía, en la práctica, la capacidad material de dirigir, supervisar y sancionar a las fuerzas bajo su mando, independientemente de si se trataba de un control de iure o de facto. En el caso de Bemba existe suficiente evidencia fáctica que demuestra que Bemba no solo ostentaba el título de presidente del MLC, sino que en la práctica ejercía todos los poderes que esta posición le otorgaba.

Por ello, no solo se acredita el cumplimiento del primer requisito del artículo 28(a), sino que este elevado nivel de control impone un estándar más riguroso respecto a las medidas que debió adoptar para prevenir o reprimir los crímenes cometidos por sus subordinados. La omisión de la Sala de Apelaciones de evaluar de forma autónoma este requisito constituye un defecto metodológico que, como se evidenciará en los siguientes apartados, debilita la solidez de su razonamiento jurídico.

V.4. ¿Qué grado de conocimiento debe tener un superior jerárquico para que se le pueda atribuir responsabilidad conforme al artículo 28(a) del Estatuto de Roma?

De acuerdo con el artículo 28(a) del Estatuto de Roma, se puede atribuir responsabilidad al superior cuando este “hubiera sabido” o “hubiera debido saber” que las fuerzas bajo su mando y control efectivo habían cometido o iban a cometer crímenes de competencia de la CPI (CPI, 1998). Este requisito alude al elemento subjetivo o “mens rea”, cuya definición y aplicación ha generado controversias por su complejidad (Martínez, 207, p. 639). La cual radica no solo en determinar cuál es el grado de conocimiento exigido, sino también en probar si el superior adquiere o no el grado de conocimiento requerido para atribuirle responsabilidad penal.

En ese sentido, de acuerdo con Martínez, el “mens rea” es el elemento de la responsabilidad de mando más controvertido no solo por las dificultades que se presentan al momento de intentar definirlo, sino también en su aplicación. En distintos momentos, diferentes tribunales han condenado a superiores utilizando diversos criterios para atribuir conocimiento, recurriendo a estándares que van desde el conocimiento efectivo, hasta la imprudencia, negligencia e incluso, recurriendo a factores objetivos (207, p. 640).

Se ha de tomar en cuenta que, como se mencionó previamente, la figura de la responsabilidad de mando comienza su desarrollo en los juicios post Segunda Guerra

Mundial, momento en el que aún no existía un instrumento internacional que codificara esta regla. Así, como explica Martínez, “ninguno de los textos legales que crearon los Tribunales de la posguerra; la Carta de Núremberg, la Ley N° 10 del Consejo de Control que regulaba los juicios subsiguientes de criminales de guerra nazis de menor rango en Europa, la Carta del Tribunal Militar Internacional para el Lejano Oriente”; regulaba la responsabilidad de los jefes militares por los crímenes cometidos por las tropas bajo su mando. A pesar de ello, en diversos juicios como en el ya mencionado caso del General Yamashita, se comenzó a desarrollar el contenido y alcance de la responsabilidad del superior (2007, p. 647, traducción propia).

El problema no se solucionó con la codificación de la responsabilidad de mando; dado que de la revisión de los diferentes instrumentos internacionales que la reconocieron, se advierte que adoptaron una redacción diferente en cuanto al nivel de conocimiento exigido. Ello ha generado cuestionamientos e interpretaciones diferentes sobre qué estándar es más exigente o cuando se configura cada uno de ellos. Por ejemplo, el artículo 7(3) del Estatuto del TPIY y el artículo 6(3) del TPIR, en su redacción, recurren a la fórmula “sabía” o “tenía razones para saber” (TPIY, 1993, art. 7[3]; TPIR, 1994, art. 6[3]). El artículo 86(2) del Protocolo I, por su parte, establece el requisito que el superior sepa o posea información que le permitiera concluir que su subordinado iba a cometer una infracción (Protocolo I, 1977, art. 86[2]). Mientras que la Norma 153 de la Lista de Normas Consuetudinarias del DIDH, recurre a las fórmulas “sabía” o “tenía razones para saber” (Henckaerts y Doswald-Beck, 2005, Norma 153).

En ese sentido, cabe cuestionarnos cuál es el estándar exigido por el artículo 28(a) y si puede asimilarse al estándar exigido por otros instrumentos jurídicos internacionales a fin de poder recurrir a las interpretaciones realizadas por otros Tribunales Penales Internacionales. En la sentencia de apelación del caso *Čelebići*, el TPIY señaló que entre los conceptos de “hubiera debido saber”, “tenía razones para saber,” o “tenía información que le permitiera concluir”, en realidad no existía diferencia sustantiva (TPIY, 2001, párr. 233-234, traducción propia).

Ese razonamiento se adoptó siguiendo la interpretación de la Comisión de Derecho Internacional de las Naciones Unidas, según la cual la expresión “tenía razones para saber” codificada en los Estatutos de los Tribunales Penales Internacionales *ad hoc* establece el mismo estándar de conocimiento que la expresión “tenía información que permitía concluir” recogida en el Protocolo Adicional I (TPIY, 2001 párr. 234). Además, la Sala concluye que la expresión “tenía razones para saber”, entendida en el sentido de que el comandante tiene el deber de investigar las conductas de sus subordinados

en virtud de la información a su alcance, entonces no existe una diferencia con el estándar de conocimiento: “hubiera debido saber”. (TPIY, 2001 párr. 235).

En consecuencia, para interpretar el estándar de conocimiento exigido por el artículo 28(a) del Estatuto de Roma, se puede recurrir al mismo estándar de “tenía razones para saber” interpretado por los Tribunales *ad hoc* en función de sus propios Estatutos. Lo cual resulta necesario, en tanto, el caso de Bemba es el primer caso ante la CPI donde se discute la responsabilidad del superior jerárquico y el conocimiento exigido, y existen diferentes posiciones entre la Sala de Primera Instancia y la Sala de Apelaciones.

La Sala de Primera Instancia concluyó, más allá de toda duda razonable, que Bemba tenía conocimiento de los crímenes cometidos o que estaban por cometer las tropas del MLC en la RCA entre 2002 y 2003. La Sala llegó a esta conclusión en virtud de la notoriedad de los crímenes cometidos por las tropas del MLC, la posición de Bemba dentro de la estructura jerárquica del MLC, los canales de comunicación disponibles con las tropas que estaban en el campo, el contacto regular que mantenían, la información disponible en los medios de comunicación y los informes de inteligencia del MLC dirigidos a Bemba (CPI, 2016, párr. 717).

En su escrito de apelación, Bemba sostuvo como tercer motivo que no era responsable como superior jerárquico; argumentando que la Sala de Primera Instancia se equivocó al considerar que él tenía conocimiento real de los crímenes cometidos por las tropas del MLC en la RCA (CPI, 2018, párr. 10). Al respecto, la Sala de Apelaciones, consideró que el conocimiento de Bemba debía ser evaluado con relación a si tomó las medidas necesarias y razonables para prevenir o sancionar los crímenes, por lo que, no hay referencia independiente a este elemento en la sentencia de Apelación (CPI, 2018, párr. 32). Lo cual resulta criticable dado que, el grado de conocimiento condiciona el tipo de medidas exigibles al superior: a mayor certeza sobre los crímenes, mayor rigor en el deber de actuar. Sobre todo, considerando que, como se ha explicado en los párrafos precedentes, el artículo 28(a) del Estatuto de Roma establece dos niveles distintos de conocimiento.

El artículo bajo análisis adopta una formulación dual alternativa: por un lado, contempla la posibilidad de que el superior tenga conocimiento real o efectivo y por otro, contempla la posibilidad de que el superior tenga en su poder información que, al menos, lo hubiera puesto en conocimiento del riesgo de que tales delitos se cometieron o se iban a cometer (Mettraux, 2006, p. 301). La primera alternativa no genera mayores problemas sobre su interpretación, los propios términos del texto son claros al recoger el estándar de conocimiento efectivo, el superior sabía o no. De acuerdo con Mettraux, este

conocimiento efectivo, puede acreditarse ya sea mediante prueba directa, por ejemplo, que el superior reciba un informe en el cual se señale la comisión de crímenes por parte de las tropas; o de forma circunstancial, a través de pruebas que permitan inferir que el superior efectivamente adquirió conocimiento de los crímenes cometidos (2006, p. 301).

La segunda alternativa de conocimiento resulta más complicada de probar y su interpretación debe hacerse tomando en cuenta las circunstancias particulares del caso. Este nivel de conocimiento exige que el superior tuviese en su poder información que le advirtiera sobre la probabilidad de que sus tropas cometieron actos ilícitos, así la Fiscalía debe demostrar que el superior era consciente de la alta probabilidad de que se cometiera un crimen como resultado de su omisión, y que, siendo consciente de ello, decidió no actuar al respecto (Mettraux, 2006, p. 302).

Una interpretación de acuerdo con los propios términos de esta segunda alternativa de conocimiento permite concluir que un superior sólo será responsable si tenía información que le evidenciara la posibilidad de que estos crímenes se estaban cometiendo. Sin embargo, surge la interrogante de qué tipo de información o qué calidad debe tener está a fin de considerar que el superior hubiere debido saber de los crímenes. De acuerdo con el TPIY, en el caso *Čelebići*, dicha información no necesita ser, por sí sola, suficiente para determinar que los crímenes se cometieron, sino que basta que la información genere alarmas en el superior, lo cual activa la obligación de investigar los hechos (2001, párr. 236).

En ese sentido, existe un deber del superior de informarse respecto de las acciones de sus subordinados, sobre todo, en casos donde tenga la sospecha de que se están cometiendo crímenes internacionales. En el caso *Blaškić*, se concluye que, desde los juicios posteriores a la Segunda Guerra Mundial, se consolidó la idea de que un comandante puede ser penalmente responsable si no utilizó los medios disponibles para informarse sobre los delitos cometidos por sus subordinados, y que, dadas las circunstancias, debió haberlo sabido (TPIY, 2000, párr. 322). Bajo esta lógica, lo que se pretende sancionar es la inacción del superior que, teniendo acceso a información, no adoptó las medidas necesarias y razonables.

Si se demuestra que el superior tenía conocimiento efectivo de los crímenes, el umbral para determinar si las medidas adoptadas fueron las adecuadas es más exigente debido a su certeza sobre los hechos. Por el contrario, si solo se acredita que el superior “debió saber”, se entiende que el superior tenía indicios o señales de alerta, por lo cual el nivel

de exigencia respecto a las medidas adoptadas para prevenir los crímenes o sancionarlos no es igual de exigente.

Como se explicó previamente y como consta señalado en la Tabla N° 2, el conocimiento del superior no puede ser presumido, pero se puede probar a través de evidencias o indicios. En ese sentido, el TPIY, en la Sentencia de Primera Instancia del caso *Čelebići*, estableció indicios como el número y tipo de actos ilícitos que se cometieron, el alcance de los mismos, "el periodo en el que se cometieron", "el número y tipo de tropas involucradas", "los oficiales y personal involucrado", "la ubicación del comandante cuando ocurrieron los hechos", entre otros (1998, párr. 386, traducción propia).

En contextos donde las tropas realizan las operaciones militares en un territorio distinto al del superior, sin una supervisión directa, como ocurrió en el caso de Bemba, resulta complejo determinar si el superior tenía conocimiento o no de los crímenes cometidos. Sin embargo, en el presente caso, había suficiente evidencia para demostrar que Bemba tenía conocimiento efectivo de los crímenes que estaban cometiendo las tropas del MLC en la RCA.

En primer lugar, existían canales de comunicación disponibles para que Bemba se comunicará con sus tropas. La Sala de Primera Instancia, en virtud de las pruebas presentadas en el juicio, concluyó que las tropas del MLC desplegadas en la RCA llevaban consigo radios de alta frecuencia, teléfonos satelitales Thuraya y otros equipos que permitían una comunicación constante con la sede del MLC en la RDC (CPI, 2016, párr. 397). La existencia de estos canales de comunicación evidencia que Bemba tenía los medios para obtener información y por, tanto que hubiera debido saber de los hechos que se estaban cometiendo. No informarse, teniendo los medios, evidencia una falta de cumplimiento de su deber como superior, que es lo que se sanciona en este tipo de responsabilidad.

Por tanto, aún si no se probara un conocimiento efectivo, como mínimo, se debía concluir que Bemba hubiera debido saber lo que estaba ocurriendo, en los términos exigidos por el artículo 28(a) del Estatuto de Roma.

Pero ello no quedó en una mera presunción, sino que se probó que Bemba mantuvo comunicaciones constantes con el Coronel Moustapha, jefe de las operaciones del MLC en la RCA. En ese sentido, se registraron 126 llamadas en un periodo de cuarenta días entre el 4 de febrero de 2003 y el 15 de marzo de 2003 con el objetivo de que el coronel le informará la situación de las operaciones realizadas por los soldados del MLC (CPI, 2016, párr. 420). Incluso el día del ataque a Mongoumba, Bemba se comunicó con Moustapha 16 veces (CPI, 2016, párr. 541). Lo que evidencia no solo la existencia de

medios de comunicación, sino también el uso constante que hacía Bemba de los mismos para seguir el curso de los acontecimientos.

A pesar de toda la evidencia, la Sala de Apelaciones no se pronunció de manera independiente sobre el grado de conocimiento de Bemba. Sin embargo, cuando evaluó las medidas adoptadas por Bemba, le otorgó un peso significativo a la distancia geográfica entre Bemba y el lugar de comisión de los crímenes (CPI, 2018, párr. 82). Esta línea argumentativa resulta problemática, ya que el artículo 28(a) si bien hace referencia a las circunstancias del caso no considera la proximidad física como un criterio relevante para determinar el grado de conocimiento.

De hecho, considerar la distancia geográfica como un criterio relevante sin tomar en cuenta los medios tecnológicos que Bemba tenía a su disposición como los sistemas de radio y telefonía satelital constituye un enfoque anacrónico, contrario al contexto fáctico de los hechos. Los hechos bajo análisis ocurrieron en el año 2002-2003, cuando ya existían tecnologías que permiten la comunicación a distancia en contextos de conflictos armados. Se ha de tener en cuenta que los progresos tecnológicos en materia de comunicaciones redefinieron la guerra desde inicios del siglo XX, provocando un cambio en cuanto a la organización y estrategia de los ejércitos (Pinto, 2017, p. 265).

Además, esta postura sienta un precedente problemático, dado que aceptar la distancia geográfica como una circunstancia atenuante podría generar la impunidad de superiores en operaciones transnacionales, precisamente aquellas que requieren con mayor razón una estructura de mando y control basada en medios tecnológicos de comunicación remota. Por tanto, este razonamiento contradice no solo el sentido del artículo 28(a), sino también el objeto y fin del Estatuto de Roma que, de acuerdo a lo expresado en su Preámbulo, es prevenir que los crímenes más graves queden impunes (Estatuto de Roma, 1998). Atendiendo al fin del segundo estándar de conocimiento del artículo 28(a) que pretende sancionar la falta de actuación del superior, no resulta acorde considerar que el simple hecho de que las tropas del MLC estuvieran desplegadas en otro Estados exime a Bemba del deber de investigar e informarse sobre los hechos que estaban ocurriendo.

Se comprobó que Bemba “recibía información sobre la situación de combate, las posiciones de las tropas, la situación política y las denuncias de crímenes a través de los servicios de inteligencia militares y civiles” (CPI, 2016, párr. 425, traducción propia). En específico, Bemba recibía informes de inteligencia en los que se informaba sobre los actos realizados por las tropas del MLC como “robos, saqueos, violaciones, asesinatos

de civiles, hostigamiento a personas y el transporte de bienes saqueados" (CPI, 2016, párr. 425, traducción propia).

Otro factor que sirve como indicio del conocimiento de Bemba es la posición que ostentaba dentro de la estructura del MLC. Como se explicó previamente, era su fundador y presidente, y ningún asunto político o militar se resolvía sin su aprobación directa. Su nivel de centralidad en la toma de decisiones era tal que todos los elementos relevantes de la cadena de mando dependían de su consentimiento. En ese contexto, resulta poco probable que Bemba no haya tenido conocimiento de lo que estaba ocurriendo en la RCA. Sobre todo, considerando que los hechos ocurridos en la RCA fueron difundidos en medios de comunicación internacional. Por tanto, no resulta razonable que la comunidad internacional tuviera conocimiento de los hechos y, en cambio, quien estaba al mando militar y político del MLC afirmara desconocerlos.

Como se mencionó previamente, otro de los indicios que pueden ayudar a determinar el conocimiento del superior es el tipo de crímenes cometidos, dado que ciertos crímenes por su gravedad o su carácter generalizado son más probables de ser conocidos por el superior. En el caso de Bemba, los cargos que se le atribuían incluían crímenes de asesinato, saqueo y violación sexual, siendo este último de especial relevancia no solo por su gravedad, sino también porque se trató del primer caso ante la CPI en el que se condenó a un superior jerárquico por violencia sexual como crimen de guerra. Lo cual significaba una oportunidad para fijar estándares interpretativos respecto a cuándo se puede considerar que el superior tiene conocimiento o debió haberlo tenido respecto de estos crímenes para futuros casos. Ello a fin de evitar que sesgos de género presentes en la cultura militar sirvan como excusa para afirmar desconocimiento y evadir responsabilidad.

Esto último es importante, dado que la violencia sexual ha sido un crimen de guerra históricamente invisibilizado en el Derecho Internacional (Gutiérrez-Solana y Zirion, 2020, p. 53). A pesar de que ha sido una estrategia de guerra ampliamente utilizada cuyo objetivo es humillar a la comunidad del enemigo y hacer público el control y poder que se tiene sobre ella (Ínigo, 2023, p. 11). En ese marco, este caso representaba una oportunidad para hacer referencia a estos crímenes y cómo la existencia de estereotipos de género no puede impactar en la determinación del conocimiento que tuvo respecto de los crímenes cometidos o restarles importancia a los daños causados a las víctimas.

Debido a que, como advierte el CICR, el cumplimiento del Derecho Internacional Humanitario durante un conflicto armado depende de lo que el comandante sabía o

debía haber sabido en el momento de los hechos en función de la información razonablemente disponible. Sin embargo, el estándar de comandante militar razonable puede variar por estereotipos de género, dado que, en virtud de estos, el comandante puede asignar diferente gravedad a los actos cometidos por sus tropas (2022, p. 20).

En el caso concreto, Bemba tenía conocimiento de los crímenes de violencia sexual cometidos por sus tropas o al menos debió haberlo sospechado. Dado que, durante el desarrollo del conflicto y ante las denuncias mediáticas sobre crímenes cometidos por el MLC en la RCA, Bemba estableció la "Investigación de Mondonga", que tiene ese nombre dado que el Coronel Mondonga fue el enviado a Bangui (RCA) para investigar las denuncias de asesinato y violación sexual que se habían realizado en el marco del conflicto (CPI, 2016, párr. 582-584). Sin embargo, esta Investigación no abordó la responsabilidad de los comandantes por las denuncias de violación, sino que simplemente condenó a 7 soldados de bajo rango del MLC por cargos de saqueo (CPI, 2017, párr.584). El hecho de que Bemba ordenara el inicio de la referida Investigación, en virtud de denuncias públicas, evidencia que conocía los hechos.

Por lo que, no resulta jurídicamente admisible aceptar la alegación de Bemba de que desconocía los crímenes sexuales cometidos por sus tropas. Aun si se argumentara que existía una práctica militar que toleraba tales crímenes, ello no anula la responsabilidad de mando. Por ello, una interpretación adecuada del artículo 28(a) del Estatuto de Roma exige que se evalúe el conocimiento del superior sin reproducir sesgos de género, y se valore el contexto del caso, la naturaleza de los crímenes como el de violencia sexual y los medios disponibles para informarse, especialmente cuando, como en este caso, existían múltiples denuncias, reportes públicos y canales de comunicación activos.

En conclusión, la interpretación del grado de conocimiento del artículo 28(a) debe armonizarse con el objetivo del Estatuto de Roma de impedir la impunidad, debe considerar el desarrollo jurisprudencial previo, y no puede fundarse en argumentos que desconozcan las herramientas tecnológicas disponibles, así como la naturaleza de los crímenes. Asimismo, el razonamiento de la Sala de Apelaciones, al omitir una evaluación autónoma del conocimiento, compromete la solidez de su análisis posterior sobre las medidas necesarias y razonables, lo cual se analizará a continuación.

V.5. ¿Qué elementos se deben tomar en consideración para determinar si el superior jerárquico adoptó las medidas necesarias y razonables para prevenir o sancionar los crímenes, conforme al artículo 28(a) del Estatuto de Roma?

Finalmente, el tercer elemento, conforme al artículo 28(a) del Estatuto de Roma, para atribuir responsabilidad penal al superior militar consiste en que este no haya "adoptado todas las medidas necesarias y razonables a su alcance para prevenir o impedir la comisión de crímenes por parte de sus subordinados"; o, en caso ya se hayan cometido los crímenes, "para poner el asunto en conocimiento de las autoridades competentes" (Estatuto de Roma 1998, art. 28[a]). Sin embargo, el artículo 28(a) no establece qué se entiende por medidas necesarias y razonables.

Al respecto, la jurisprudencia internacional ha enfatizado que la evaluación de las medidas adoptadas por el superior se realizará en base a los hechos y circunstancias concretas de cada caso en particular, siendo que intentar establecer un estándar general carecería de sentido (TPIY, 1998, párr. 394). En ese sentido, como se ha advertido previamente, el análisis de las medidas deberá tomar en cuenta el grado de conocimiento que tenía el superior. Dado que, cuanto mayor sea el nivel de conocimiento del superior, mayor será también la exigencia sobre las medidas que debió adoptar. De manera tal, que el análisis de este elemento debe realizarse no solo en función del contexto específico del caso, sino también considerando las capacidades reales del superior, la estructura de mando, los medios que tenía a su alcance y el grado de conocimiento.

En el caso bajo análisis, existe una discrepancia entre la posición de la Sala de Primera Instancia y la Sala de Apelaciones respecto a si Bemba cumplió con adoptar las medidas necesarias y razonables dadas las circunstancias del caso. La Sala de Primera Instancia consideró que, durante el periodo de 2002-2003, Bemba tomó algunas medidas frente a los crímenes cometidos por sus subordinados en la RCA, sin embargo, "estas fueron limitadas en ejecución y resultados" (CPI, 2016, párr. 720, traducción propia). Para la Sala, tomando en consideración que Bemba tenía conocimiento de los crímenes cometidos, las medidas adoptadas fueron inadecuadas frente a la gravedad de los hechos. Además, la Sala consideró que las medidas no fueron genuinas, dado que tenían como finalidad contrarrestar las denuncias públicas y mejorar la imagen pública del MLC ante la comunidad internacional (CPI, 2016, párr. 728).

Frente a ello, la Sala de Apelaciones criticó que al momento de evaluar las medidas adoptadas por Bemba la Sala de Primera Instancia no hubiese considerado que las tropas del MLC se encontraban operando en otro país, así como la cadena de mando compartida con las autoridades del RCA, y las dificultades logísticas y operativas que limitaban su capacidad de mando (CPI, 2018, párr. 172-174). Asimismo, consideró que la Sala de Primera Instancia adoptó un enfoque incorrecto al centrar su análisis en las motivaciones personales de Bemba y tratarlas como un elemento para invalidar las medidas adoptadas. A juicio de la Sala de Apelaciones, tales motivaciones no eran intrínsecamente negativas ni incompatibles con el cumplimiento del deber de mando. Incluso si existían fines paralelos ello no excluía que las medidas pudieran ser efectivas y razonables. Por ello, consideran que la Sala de Primera Instancia no realizó una evaluación sobre cómo, en concreto, los supuestos motivos personales de Bemba impactaron en la idoneidad de las medidas adoptadas (CPI, 2018, párr. 176-178).

No obstante, al revisar la sentencia de la Sala de Primera Instancia, se advierte que las motivaciones personales de Bemba no fueron tratadas como un criterio autónomo para atribuir responsabilidad penal ni como un factor determinante en el análisis de la necesidad o razonabilidad de las medidas adoptadas. Más bien, fueron consideradas como un indicio adicional de que dichas medidas resultaban insuficientes, al no reflejar una intención genuina de prevenir o reprimir los crímenes cometidos por las tropas del MLC. Es decir, lo relevante para la Sala de Primera Instancia no fueron los móviles de Bemba en sí, sino el hecho de que tales medidas no estuvieron orientadas a prevenir o reprimir los crímenes, como lo exige el artículo 28(a) del Estatuto de Roma, sino a proteger la imagen del MLC y responder a la presión internacional.

De acuerdo con el voto disidente de los jueces Monageng y Hofmańsk, es la Sala de Apelaciones la que parece haber exagerado la importancia otorgada a las motivaciones de Bemba, utilizando ello para invalidar la evaluación fáctica de la Sala de Primera Instancia que, en realidad, se apoyaba en la gravedad de los crímenes, el conocimiento demostrado de Bemba y la ineficacia manifiesta de las medidas. (Voto Disidente, 2018, párr. 78).

Desde una interpretación conforme a los términos del texto del artículo 28(a), los móviles personales del superior jerárquico no deben ser determinantes al valorar si las medidas adoptadas fueron necesarias y razonables. Lo que exige el Estatuto es una evaluación de eficacia de las medidas, no de buena fe ni de motivaciones subjetivas. En ese sentido, el análisis debe centrarse en si las medidas adoptadas fueron objetivamente

adecuadas y necesarias, sin que las intenciones personales del superior puedan reducir el estándar exigido.

Sin embargo, dado que la finalidad del artículo 28(a) es evitar la impunidad de los superiores jerárquicos por su inacción. Los móviles pueden ser considerados como un indicio que permita determinar si las medidas fueron adecuadas. Debido a que, si una medida se toma con la única finalidad de limpiar la imagen pública del superior, existen altas probabilidades que dicha medida en realidad no castigue a quienes cometieron los delitos. En esa línea, la Sala de Apelaciones del TPIY, en el caso del *Fiscal c. Serfer Halilović*, considero que las medidas necesarias son aquellas que evidencian que genuinamente buscan reprimir o sancionar los crímenes (TPIY, 2007, párr. 63).

En ese sentido, las medidas necesarias, desde una interpretación literal del artículo, se entiende que son aquellas que el superior debe tomar para cumplir con su deber de reprimir o sancionar los crímenes. Son aquellas medidas que le permitan al superior lograr el objetivo específico que establece el artículo 28(a), que es prevenir, reprimir, sancionar o informar de los crímenes cometidos por sus subordinados.

Mientras que las medidas razonables son aquellas que, dado el contexto, se puede esperar que el superior adopte. En tal sentido, no se puede exigir al superior adoptar medidas que escapen de sus facultades o que resulten imposibles de cumplir dado el contexto del caso. La sala de Apelaciones del TPIY, en el caso del *Fiscal c. Popović y otros,* considero que la obligación del superior jerárquico de adoptar medidas razonables está limitada a aquellas que sean material y prácticamente viables según las circunstancias concretas del caso. Es decir, no se puede atribuir responsabilidad penal cuando el cumplimiento del deber de sancionar era imposible en el contexto específico. Esta viabilidad debe evaluarse en función del control efectivo que el superior tenía sobre sus subordinados (TPIY, 2015, párr. 1928).

Por tanto, evaluar la suficiencia de las medidas exige una valoración integral de los hechos, las capacidades reales del superior, el contexto de mando y la eficacia objetiva de las acciones adoptadas. Sin embargo, no basta con acciones simbólicas o formales, lo que exige el artículo 28(a) es que el superior adopte todas las medidas posibles para prevenir, reprimir o denunciar los crímenes cometidos por sus subordinados (Estatuto de Roma, 1998, art. 28[a]). Solo así se evita que la figura de la responsabilidad de mando quede vaciada de contenido y se refuerza su función como herramienta efectiva contra la impunidad.

En virtud de las pruebas del caso y del análisis normativo realizado, las medidas adoptadas por Jean-Pierre Bemba no fueron ni necesarias ni razonables en los términos

exigidos por el artículo 28(a) del Estatuto de Roma. Si bien es cierto que desplegó ciertas acciones como comisiones investigadoras, comunicaciones con autoridades y juicios internos, estas acciones fueron limitadas en alcance y carecieron de eficacia real dado que no lograron reprimir la comisión de crímenes por parte de las tropas del MLC. Incluso si Bemba hubiese tomado conocimiento de los crímenes después de perpetrados, tampoco logró castigar adecuadamente su comisión.

Como se ha evidenciado en los apartados precedentes, Bemba tenía control efectivo sobre las tropas del MLC y tenía conocimiento de los hechos, por lo que tenía la capacidad material y el deber de adoptar medidas idóneas para reprimir y castigar los crímenes cometidos. Esto exigía que Bemba adopte medidas más contundentes para reprimir y castigar los crímenes. A pesar de ello, optó por medidas simbólicas que no tenían como finalidad sancionar o impedir los crímenes, sino que estaban orientadas principalmente a limpiar la imagen internacional del MLC. Su omisión en adoptar medidas, pese a tener la capacidad para hacerlo y el conocimiento de lo sucedido, configura una falta de diligencia incompatible con los estándares exigidos en el artículo 28(a). Por lo que Bemba, al concurrir los tres elementos de la responsabilidad del superior, era culpa como jefe militar.

Finalmente, se ha de mencionar que la Sala de Apelaciones realizó una afirmación extraordinariamente problemática, cuando señala que los comandantes pueden hacer “un análisis costo/beneficio al decidir qué medidas tomar” (CPI, 2018, párr. 170, traducción propia). Ello puede generar interpretaciones que permitan que el superior no investigue, prevenga o castigue las denuncias de crímenes de guerra cometidos por sus subordinados si considera que tiene otras prioridades (Crawford & Fellmeth 2022, p. 175).

La introducción de este análisis resulta problemática porque de una interpretación literal del artículo 28(a) y una interpretación de acuerdo con el objeto y fin del Estatuto de Roma, no es posible que el superior no adopte una medida necesaria y razonable solo por no resultar conveniente. Bajo esta lógica, un superior podría justificar su inacción o pasividad alegando razones de estrategia militar, lo que socavaría el objetivo del artículo 28(a) del Estatuto de Roma que es combatir la impunidad de quienes, teniendo el poder y el deber de prevenir o castigar crímenes atroces, optan por no hacerlo.

En conclusión, en el caso concreto Bemba no cumplió con adoptar las medidas necesarias y razonables para evitar o castigar que se cometieron los crímenes imputados. Tomando en consideración el control efectivo y el grado de conocimiento que tenía Bemba respecto de los crímenes cometidos era exigible la adopción de

medidas más eficaces para reprimir y/o castigar los crímenes, No obstante, la Sala de Apelaciones no realizó este análisis previo, por lo que los criterios empleados para determinar si las medidas adoptadas fueron necesaria u racionales no resulta lógico y, por el contrario, sienta un precedente problemático respecto a la interpretación futura que se pueda hacer respecto de este elemento.

VI. CONCLUSIONES Y/O RECOMENDACIONES

- En virtud del análisis realizado, lo que se ha pretendido evidenciar es cómo se debe interpretar el Estatuto de Roma a la luz de las fuentes jurídicas aplicables y las circunstancias concretas del caso. En ese sentido, un primer aspecto relevante que se propone es que el artículo 74(2) del Estatuto de Roma, que recoge el principio de congruencia procesal, no puede ser interpretado de manera excesivamente formalista. Sino que se debe tomar en cuenta que su finalidad es garantizar que el acusado conozca con suficiente claridad la naturaleza de los hechos que se le imputan y pueda ejercer su defensa adecuadamente. La especificidad de los cargos debe evaluarse en función del tipo de responsabilidad atribuida y el contexto del caso. En ese sentido, se sostiene que la congruencia procesal no exige una identidad literal entre los cargos confirmados y los hechos contenidos en la sentencia, sino coherencia sustancial y posibilidad real del acusado de defenderse.

- El análisis realizado evidencia que el artículo 28(a) del Estatuto de Roma debe ser interpretado conforme a los métodos de interpretación jurídica previstos en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969. No obstante, esta aplicación debe hacerse respetando el principio de legalidad penal reconocido en el artículo 22(2) del mismo Estatuto. Ello implica que, si bien es posible recurrir a métodos como el sentido corriente de los términos, el contexto, y el objeto y fin del tratado, toda interpretación debe realizarse sin ampliar las disposiciones por analogía y siempre a favor del acusado en caso de ambigüedad. Asimismo, es posible acudir a la jurisprudencia de tribunales penales internacionales a fin de delimitar el alcance de los elementos de la responsabilidad penal del superior jerárquico.

- Respecto al control efectivo, como primer elemento de la responsabilidad del superior jerárquico, se sostiene que, en virtud de los métodos de interpretación aplicables al Estatuto de Roma y la jurisprudencia revisa, debe entenderse como

la capacidad real y material del superior para ordenar, supervisar y sancionar a sus subordinados. Asimismo, su determinación no depende del cargo formal que ostente el superior, sino de su posibilidad concreta de actuar. En el caso de Bemba, existían suficientes elementos para afirmar que tenía control efectivo sobre las tropas del MLC desplegadas en la RCA, incluyendo su posición jerárquica dentro del MLC, su contacto directo y constante con los comandantes en el campo, su capacidad para castigar a sus subordinados y la notoriedad de su cargo (CPI, 2016). Asimismo, se sostiene que el hecho de que la Sala de Apelaciones no analizara este requisito de forma autónoma en el caso particular de Bemba constituye un error metodológico, pues condiciona la evaluación del resto de elementos de la responsabilidad de mando.

- En cuanto al grado de conocimiento exigido para atribuir responsabilidad penal al superior, se advierte que al artículo 28(a) establece una cláusula dual de conocimiento (Mettraux, 2006, p. 301), lo que genera que el juez tenga la obligación de identificar claramente cuál de los dos niveles se configura. Dado que ello incide directamente en la evaluación de las medidas necesarias y razonables esperadas del superior. En el caso, se concluye que Bemba tenía conocimiento real de los crímenes cometidos por las tropas del MLC, a través de diversos medios de información, canales de comunicación activos, e informes de inteligencia. Por lo que, la omisión de la Sala de Apelaciones de analizar este elemento de forma independiente constituye un defecto metodológico grave que debilita el análisis posterior realizado respecto de las medidas adoptadas por Bemba.

- Respecto al tercer elemento, se sostiene que las medidas necesarias, en virtud de lo dispuesto en el artículo 28(a) del Estatuto de Roma y de la jurisprudencia penal internacional, son aquellas que permiten al superior cumplir con su obligación de prevenir, reprimir o denunciar los crímenes cometidos por sus subordinados, mientras que las medidas razonables son aquellas que pueden ser adoptadas según las facultades materiales del superior y el contexto concreto. En el caso Bemba, las acciones adoptadas fueron, en su mayoría, formales, tardías y orientadas a proteger su imagen, más que a sancionar efectivamente a los responsables. Si bien los móviles personales no deben ser determinantes para atribuir responsabilidad penal, pueden funcionar como un indicio relevante para evaluar la finalidad y suficiencia de las medidas. Además, aceptar que un comandante pueda hacer un análisis costo-beneficio para decidir

si sanciona o no, es incompatible con la finalidad del artículo 28(a), pues vaciaría de contenido la responsabilidad de mando.

- El análisis realizado sobre el alcance y contenido de los elementos requeridos por el artículo 28(a) para atribuir responsabilidad penal al superior jerárquico evidencia que, en el caso concreto, Bemba cumplía con todos. Por lo cual, se sostiene que la sentencia de la Sala de Apelaciones es errónea, no solo porque no tomó en consideración los hechos del caso, sino porque realizó una interpretación errónea e incompleta del artículo 28(a) del Estatuto de Roma. Lo que puede generar un criterio interpretativo perjudicial para el desarrollo de la responsabilidad del superior jerárquico en el seno de la CPI.

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International
Criminal
Court

Original: English

No. ICC-01/05-01/08 A
Date: 8 June 2018

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public document

Judgment
on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"

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

The Office of the Prosecutor
Ms Fatou Bensouda
Ms Helen Brady

Counsel for the Defence
Mr Peter Haynes
Ms Kate Gibson

Legal Representative of Victims
Ms Marie-Edith Douzima-Lawson

REGISTRY

Registrar
Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled "Judgment pursuant to Article 74 of the Statute" of 21 March 2016 (ICC-01/05-01/08-3343),

After deliberation,

By majority, Judge Monageng and Judge Hofmański dissenting,

Delivers the following

JUDGMENT

1) The "Judgment pursuant to Article 74 of the Statute" is reversed.

2) The Appeals Chamber declares that the crimes listed in paragraph 116 of this judgment were not within the facts and circumstances described in the charges and that the Trial Chamber, therefore, could not enter a verdict thereon. The proceedings with respect to these criminal acts are discontinued.

3) Mr Bemba is acquitted of all remaining charges brought against him in the present case.

4) The Appeals Chamber declares that there is no reason to continue Mr Bemba's detention for the purposes of the present case.

5) The "Defence application to present additional evidence in the appeal against the *Judgment pursuant to Article 74 of the Statute,* ICC-01/05-01/08-3343" is dismissed.

6) The "Prosecution's Request for Leave to Present Additional Authority" is rejected.

REASONS

1. These are the dispositive reasons of the Appeals Chamber, by majority. Judge Eboe-Osuji concurs, as part of the majority, with the essence of these dispositive reasons and the outcome. Judge Monageng and Judge Hofmański disagree with the reasons and the outcome.

I. KEY FINDINGS

2. It is the responsibility of the Appeals Chamber to assess whether or not the trial chamber applied the standard of proof correctly. The accused does not have to prove that the trial chamber made a factual error. It suffices for him or her to identify sources of doubt about the accuracy of the trial chamber's findings to oblige the Appeals Chamber to independently review the trial chamber's reasoning on the basis of the evidence that was available to it.

3. The Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale. Accordingly, when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them.

4. Simply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute.

5. The scope of the duty to take "all necessary and reasonable measures" is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.

6. An assessment of whether a commander took all "necessary and reasonable measures" must be based on considerations of what crimes the commander knew or should have known about and at what point in time.

7. Juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time. The Trial Chamber must specifically identify what a commander should have done *in concreto.*

8. It is not the case that a commander is required to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility. Article 28 only requires commanders to do what is necessary and *reasonable* under the circumstances.

9. Whilst a commander is required to act in good faith in adopting "necessary and reasonable measures", the fact that a commander was motivated by a desire to preserve the reputation of his or her troops does not intrinsically render the measures he or she adopted any less necessary or reasonable.

10. A finding that the measures deployed by a commander were insufficient to prevent or repress an extended crime wave does not mean that these measures were also insufficient to prevent or repress the limited number of specific crimes for which the commander is ultimately convicted.

11. The accused person must be informed of the factual allegations on the basis of which the Prosecutor seeks to establish that he or she failed as a commander to take "all necessary and reasonable measures" within his or her power to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.

II. PROCEDURAL HISTORY

12. On 21 March 2016, Trial Chamber convicted Mr Jean-Pierre Bemba Gombo ("Mr Bemba"), pursuant to article 28 (a) of the Statute, of the crimes against humanity of murder and rape and of the war crimes of murder, rape and pillaging committed by troops of the MLC in the CAR in the course of the 2002-2003 CAR Operation.[1]

[1] Conviction Decision, paras 741-742, 752.

13. Mr Bemba was President of the MLC, a political party founded by him and based in the northwest of the DRC, and Commander-in-Chief of its military branch, the ALC.[2] The events giving rise to his conviction and this appeal took place on the territory of the CAR from on or about 26 October 2002 to 15 March 2003,[3] during an MLC intervention to support Mr Ange-Félix Patassé, the then President of the CAR, in suppressing a rebellion led by General François Bozizé.[4]

14. On 4 April 2016, Mr Bemba filed his notice of an appeal against the Conviction Decision,[5] and, on 19 September 2016, he filed his appeal brief.[6]

15. On 19 September 2016, Mr Bemba requested the Appeals Chamber to admit 23 documents as additional evidence in the appeal.[7]

16. On 21 November 2016, the Prosecutor filed her responses to the Appeal Brief[8] and to the Additional Evidence Application.[9]

17. On 9 December 2016, Mr Bemba filed his reply to the Prosecutor's Response to the Additional Evidence Application.[10]

18. On 20 December 2016, Mr Bemba filed his reply to the Response to the Appeal Brief.[11]

19. On 21 December 2016, the Victims filed their observations on the Additional Evidence Application.[12]

20. On 9 January 2017, the Victims filed their observations on the Appeal Brief.[13]

21. On 9 February 2017, Mr Bemba filed his reply to the Victims' Observations.[14]

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[2] Conviction Decision, para. 1.
[3] Conviction Decision, para. 2.
[4] Conviction Decision, para. 380.
[5] "Defence Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343", ICC-01/05-01/08-3348.
[6] Appeal Brief.
[7] Additional Evidence Application.
[8] Response to the Appeal Brief.
[9] Prosecutor's Response to the Additional Evidence Application.
[10] Reply to the Prosecutor's Response to the Additional Evidence Application.
[11] Reply to the Response to the Appeal Brief.
[12] Victims' Observations on the Additional Evidence Application.
[13] Victims' Observations.

22. On 30 October 2017, the Appeals Chamber issued an order for submissions on the contextual elements of crimes against humanity.[15]

23. On 7 November 2017, the Appeals Chamber issued a scheduling order for an appeal hearing.[16]

24. On 13 November 2017, Mr Bemba filed his submissions on the contextual elements of crimes against humanity[17] and, on 27 November 2017, the Prosecutor filed her response to Mr Bemba's submissions.[18]

25. On 27 November 2017, the Appeals Chamber issued an order in relation to the conduct of the hearing which it had scheduled, and invited the parties and participants to address the Appeals Chamber during that hearing on issues regarding the standard of review and Mr Bemba's second, third and fourth grounds of appeal.[19]

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[14] Reply to the Victims' Observations.
[15] Order for Submissions on Contextual Elements.
[16] Scheduling Order.
[17] Contextual Elements Submissions.
[18] Response to Contextual Elements Submissions.
[19] Order on the Conduct of the Hearing. The following questions were put to the parties and participants: ***Group A - Preliminary issues*** (a. What level of deference should the Appeals Chamber accord to the Trial Chamber's factual findings?; b. Article 81 (1) (b) of the Statute reads in its relevant part: "The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds: […] (iv) Any other ground that affects the fairness or reliability of the proceedings or decision". Can the convicted person appeal on a ground that affects the fairness of the proceedings, but does not affect the reliability of the decision?); ***Group B - Issues relating to the Second Ground of Appeal*** (a. What are "the facts and circumstances described in the charges", within the meaning of article 74 (2) of the Statute? In particular, which of the following examples is a "fact": (i) the rape of P22 in PK12 on or around 6 or 7 November 2002, or (ii) rape committed by the MLC soldiers in the Central African Republic between on or about 26 October 2002 and 15 March 2003?; b. What is the minimum level of detail required for "[a] statement of the facts" to be included in the document containing the charges pursuant to regulation 52 (b) of the Regulations of the Court, especially regarding "the time and place of the alleged crimes"? Does the required detail depend on the form of individual criminal responsibility charged in the case? In particular, would the required detail in a case of criminal responsibility as a co-perpetrator under article 25 (3) (a) differ from the required detail in a case of command responsibility under article 28 (a) of the Statute?; c. Must acts underlying the crimes charged be exhaustively listed in the document containing the charges?; d. Must the Pre-Trial Chamber determine whether there is sufficient evidence to support, to the requisite standard, each underlying act (a criminal act underlying one of the crimes charged) included in the document containing the charges and enter a finding on each such act in the confirmation decision?; e. Can the Prosecutor notify the accused person of other underlying acts in auxiliary documents provided after the confirmation decision was rendered, without seeking to add additional charges under article 61 (9) of the Statute? Can the accused person be notified of other underlying acts through the provision of statements of victims? If the Prosecutor or the legal representative of victims notifies the accused person of other underlying acts after the confirmation decision, do they exceed "the facts and circumstances described in the charges"?); ***Group C - Issues relating to the Third Ground of Appeal*** (a. Would a change from the "knew" standard to the "should have known" standard in article 28 (a) (i)

26. On 4 December 2017, the Victims' Representatives filed their observations on the contextual elements of crimes against humanity[20] and, on 11 December 2017, Mr Bemba filed his response to those observations.[21]

27. From 9 to 11 January 2018, the Appeals Chamber held a hearing during which the parties and participants made submissions and observations.[22] During the hearing, the Appeals Chamber invited the parties and participants to submit further written submissions[23] which they did on 19 January 2018.[24] During the hearing, Mr Bemba was represented by Mr Peter Haynes, Ms Kate Gibson, Mr Kai Ambos, Mr Michael A. Newton and Ms Leigh Lawrie. The Prosecutor was represented by Ms Helen

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of the Statute amount to a modification of the legal characterisation of the facts, which would need to comply with the requirements of regulation 55 of the Regulations of the Court (including that it not exceed the facts and circumstances of the charges)?; b. Does the Appeals Chamber have the power to change the legal characterisation of the facts itself? (i) If it does not have such power, why is this the case?; (ii) If it does have the power to re-characterise, on what legal basis may it do so?; (iii) To what extent is it relevant that the Trial Chamber gave notice under regulation 55 (2) in the course of the trial?; c. How must the "knew" standard be interpreted? To what extent is the definition of knowledge in article 30 (3) of the Statute relevant to article 28 (a) (i) of the Statute?; d. How must the "should have known" standard be interpreted? Does the "should have known" standard differ materially from the "had reason to know" standard in article 7 (3) of the ICTY Statute and in its jurisprudence? How does this standard relate to the "consciously disregarded" standard in article 28 (b) (i) of the Statute?); ***Group D - Further issues relating to the Third Ground of Appeal*** (a. To what extent is a commander's motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy?; b. Must the accused be given notice of the measures which the Trial Chamber finds he could have taken as a commander? If so, how must such notice be given – must it be given specifically with respect to measures or may it be given in the course of pleadings on the commander's material ability?; c. Mr Bemba argues that causation is required in the context of article 28 (a) of the Statute, whilst the Prosecutor argues that causation is not required. If causation is required pursuant to article 28 (a) of the Statute, what degree of nexus is required - "but-for", "high probability", "reasonable foreseeability" or other?; d. Does an assessment of causation overlap with an assessment of whether a commander has taken necessary and reasonable measures or is an additional element required?; e. Is a commander under a legal duty to withdraw his troops in the event that he becomes aware that they are committing crimes? If so: (i) What is the legal basis for this duty?; (ii) When does this duty arise?; (iii) Would it extend to all troops or only to those alleged to have committed crimes?; (iv) Is it of any import that withdrawal, either full or partial, would, in all likelihood, lead to military defeat?); ***Group E - Issues relating to the Fourth Ground of Appeal*** (a. The elements of crimes against humanity include the requirement that "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population". In cases of individual criminal responsibility under article 28 of the Statute, does this requirement apply to the direct perpetrator of the crime or to the accused person or both?; b. Can a Trial Chamber rely on the war crime of pillaging to establish that there was an organizational policy?; c. Responses to and/or replies to responses to the questions listed in the Appeals Chamber's Order for Submissions on Contextual Elements).

[20] Victims' Observations on Contextual Elements.

[21] Mr Bemba's Response to Victims' Observations on Contextual Elements.

[22] Appeals Hearing Transcript 9 January 2018; Appeals Hearing Transcript 10 January 2018; Appeals Hearing Transcript 11 January 2018.

[23] Appeals Hearing Transcript 11 January 2018, p. 88, lines 18-25.

[24] Mr Bemba's Submissions further to the Hearing; Prosecutor's Submissions further to the Hearing; Victims' Submissions further to the Hearing.

Brady, Mr Reinhold Gallmetzer, Mr Matthew Cross, Mr Matteo Costi, and Ms Meritxell Regue. The Victims were represented by Ms Marie-Edith Douzima Lawson and Mr Célestin N'Zala.[25]

28. On 13 April 2018, the Prosecutor sought leave to present an additional authority[26] and, on 20 April 2018, Mr Bemba responded to this request.[27]

III. INTRODUCTION

29. Mr Bemba raises six grounds of appeal, each divided into several sub-grounds. They are the following: (i) that this was a mistrial (Ground 1);[28] (ii) that the conviction exceeded the charges (Ground 2);[29] (iii) that Mr Bemba is not liable as a superior (Ground 3);[30] (iv) that the contextual elements were not established (Ground 4);[31] (v) that the Trial Chamber erred in its approach to identification evidence (Ground 5);[32] and (vi) that other procedural errors invalidated the conviction (Ground 6).[33]

30. More specifically in relation to the third ground of appeal, Mr Bemba argues that the Trial Chamber erred when it found that he was responsible as a commander pursuant to article 28 (a) of the Statute for crimes MLC troops had committed during the 2002-2003 CAR Operation. Notably, Mr Bemba submits that the Trial Chamber erred in: (i) finding that he had effective control over the MLC troops in the CAR;[34] (ii) dismissing and ignoring evidence relevant to that question;[35] (iii) finding that he had actual knowledge of MLC crimes;[36] (iv) finding that he did not take all necessary

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[25] Appeals Hearing Transcript 9 January 2018, p. 2, lines 5-22; Appeals Hearing Transcript 10 January 2018, p. 25 line 23.
[26] Request to File an Additional Authority, paras 2-3.
[27] Response to Request to File an Additional Authority, para. 7.
[28] Appeal Brief, paras 13-114.
[29] Appeal Brief, paras 115-128.
[30] Appeal Brief, paras 129-413.
[31] Appeal Brief, paras 414-461.
[32] Appeal Brief, paras 462-493.
[33] Appeal Brief, paras 494-546.
[34] Appeal Brief, paras 129-226.
[35] Appeal Brief, paras 227-286.
[36] Appeal Brief, paras 287-324.

and reasonable measures;[37] and, further, (v) finding that the causation requirement had been established.[38]

31. The Appeals Chamber has held extensive deliberations on each of these grounds and in January 2018 called a hearing to clarify some of the issues with the parties and participants.

32. Judge Van den Wyngaert, Judge Eboe-Osuji and Judge Morrison are of the view that the second ground of appeal and part of the third ground of appeal, namely Mr Bemba's argument that the Trial Chamber erred when it found that he did not take all necessary and reasonable measures to prevent or repress the commission of crimes, are determinative of the outcome of the appeal. As to the remainder of the third ground of appeal, whereas the majority of the Appeals Chamber also has concerns regarding the Trial Chamber's findings relevant to Mr Bemba's effective control and his actual knowledge of crimes committed by MLC troops in the CAR, it has limited its assessment to the Trial Chamber's finding regarding Mr Bemba's purported failure to take all necessary and reasonable measures, given the clear error therein. For the same reasons, the first, fourth, fifth and sixth grounds of appeal are not addressed herein.

33. The reasons of Judge Van den Wyngaert and Judge Morrison as to the conclusion concerning the second ground of appeal and part of the third ground of appeal are set out below. Judge Eboe-Osuji, whilst agreeing in essence with the reasons of Judge Van den Wyngaert and Judge Morrison and with the outcome of the appeal, also sets out his views in respect of those issues in a separate opinion. Judge Van den Wyngaert, Judge Eboe-Osuji and Judge Morrison address aspects of the remaining grounds of appeal in their separate opinions.

34. Judge Monageng and Judge Hofmański disagree with the standard of review for factual errors and aspects of the substantiation requirement,[39] and dissent from the majority's determination on the second ground of appeal and on the third ground of appeal, concerning necessary and reasonable measures, for the reasons set out in their

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[37] Appeal Brief, paras 325-380.
[38] Appeal Brief, paras 381-413.
[39] *See infra*, paras 38 *et seq*, para. 66.

dissenting opinion. The views of the minority on the first, remainder of the third, fourth, fifth and sixth grounds of appeal are also set out in their dissenting opinion.

IV. STANDARD OF REVIEW

35. Article 81 (1) (b) of the Statute provides that the convicted person, or the Prosecutor on his or her behalf, may appeal on grounds of a procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. According to article 83 (2) of the Statute, the Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error". In the view of the Appeals Chamber, this results in the following standard of review for legal, factual and procedural errors, as well as for other grounds affecting the fairness or reliability of the decision.

A. **Errors of law**

36. Regarding errors of law, the Appeals Chamber has previously found that it:

> […] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.
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> […] A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'. [Footnotes omitted].[40]

37. The Appeals Chamber sees no reason to diverge from this standard, nor has any of the parties or participants invited the Appeals Chamber to do so. Accordingly, it will apply this standard to the present case.

[40] *Lubanga* Appeal Judgment, paras 18-19; *Ngudjolo* Appeal Judgment, para. 20.

B. Factual errors

38. It has previously been stated that when a factual error is alleged, the Appeals Chamber's task is to determine whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question,[41] thereby applying a margin of deference to the factual findings of the trial chamber. However, the Appeals Chamber considers that the idea of a margin of deference to the factual findings of the trial chamber must be approached with extreme caution.

39. With respect to the application of this margin of deference, the Appeals Chamber has previously held that:

> [I]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', the Appeals Chamber has also stated that it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'.[42]

40. The Appeals Chamber is of the opinion that it may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice, and not "only in the case where [the Appeals Chamber] cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it". The Appeals Chamber must be careful not to constrain the exercise of its appellate discretion in such a way that it ties its own hands against the interest of justice, particularly in circumstances where the Rome Statute does not provide for the notion of appellate deference or require the Appeals Chamber to apply that particular notion.

41. As previously noted, in assessing alleged errors of fact, the *ad hoc* tribunals have also applied a standard of reasonableness.[43] This Appeals Chamber has done the same. However, this standard is not without qualification. This Appeals Chamber

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[41] *Lubanga* Appeal Judgment, para. 27.
[42] *Lubanga* Appeal Judgment, para. 21 (footnotes omitted). *See* also *Ngudjolo* Appeal Judgment, para. 22.
[43] *Lubanga* Appeal Judgment, para. 24.

must ensure that the trial chamber reasonably reached a conviction as to guilt beyond reasonable doubt in accordance with article 66(3) of the Statute.

42. When a factual error is alleged, the Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the trial chamber; in this connection, the Appeals Chamber deems it necessary to clarify that it will determine whether a reasonable trial chamber properly directing itself could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it.[44] In this regard, it must be borne in mind that the trial chamber is required to make findings of fact to the standard of proof of "beyond reasonable doubt" only in relation to those facts that correspond to the elements of the crime and mode of liability of the accused as charged.[45] It must be stressed in this regard that the trial chamber must have properly directed itself to the applicable standard of proof. In this regard, the Appeals Chamber recalls its finding in the *Bemba et al.* Appeal Judgment on conviction as to the conditions under which a trial chamber may establish facts on the basis of circumstantial evidence and inferences:

> Where a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence. It is indeed well established that it is not sufficient that a conclusion reached by a trial chamber is merely *a* reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the *only* reasonable conclusion available. If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he or she must be acquitted. For alleged errors of fact in relation to factual findings that were based on inferences drawn from circumstantial evidence, the Appeals Chamber will therefore, in keeping with the standard of review for factual errors, consider whether no reasonable trier of fact could have concluded that the inference drawn was the only reasonable conclusion that could be drawn from the evidence. [Footnotes omitted.][46]

43. In determining whether a given factual finding was reasonable, a trial chamber's reasoning in support thereof is of great significance. The Appeals Chamber notes that as put by the Supreme Court Chamber of the ECCC:

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[44] *See* *Lubanga* Appeal Judgment, para. 27.
[45] *Lubanga* Appeal Judgment, para. 22.
[46] *Bemba et al.* Appeal Judgment, para. 868.

> [T]he starting point for the Supreme Court Chamber's assessment of the reasonableness of the Trial Chamber's factual findings is the reasoning provided for the factual analysis, as related to the items of evidence in question. In particular when faced with conflicting evidence or evidence of inherently low probative value (such as out-of-court statements or hearsay evidence), it is likely that the Trial Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis.[47]

44. The Appeals Chamber finds this approach persuasive. Thus, when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the evidence relied upon, but also to the trial chamber's reasoning in analysing it. In particular if the supporting evidence is, on its face, weak, or if there is significant contradictory evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached. Nevertheless, the emphasis of the Appeals Chamber's assessment is on the substance: whether the evidence was such as to allow a reasonable trial chamber to reach the finding it did beyond reasonable doubt.

45. Ultimately, the Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale. Mere preferences or personal impressions of the appellate judges are insufficient to upset the findings of a trial chamber. However, when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the trial chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made.

46. When the trial chamber is not convinced of guilt beyond reasonable doubt it must refrain from entering a finding. Accordingly, when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them. This is not a matter of the Appeals Chamber substituting its own factual findings for those of the trial chamber. It is merely an application of the standard of proof.

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[47] *Nuon Chea and Khieu Samphân* Appeal Judgment, para. 90.

C. Procedural errors

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

> [A]n allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision […] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered.[48]

48. Having previously found that "procedural errors often relate to alleged errors in a Trial Chamber's exercise of its discretion",[49] the Appeals Chamber has established that:

> […] it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision. [Footnotes omitted].[50]

49. The Appeals Chamber notes that Mr Bemba raises several arguments that allege a lack of or insufficient reasoning in support of factual findings contained in the Conviction Decision; he argues that these deficiencies amount to errors of law and/or fact on the part of the trial chamber.[51] The Appeals Chamber recalls that article 74 (5) of the Statute requires the trial chamber to provide "a full and reasoned statement of [its] findings on the evidence and conclusions". If a decision under article 74 of the Statute does not completely comply with this requirement, this amounts to a procedural error.

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[48] *Lubanga* Appeal Judgment, para 20; *Ngudjolo* Appeal Judgment, para. 21.
[49] *Ngudjolo* Appeal Judgment, para. 21.
[50] *Kenyatta* OA5 Judgment, para. 22. *See* also *Kony et al.* OA3 Judgment, paras 79-80; *Ruto et al.* OA Judgment, paras 89-90; *Lubanga* Sentencing Appeal Judgment, para. 41.
[51] *See* for example, Appeal Brief, paras 162, 167, 170, 206, 228, 427, 431, 432, 442, 468, 509.

50. In the view of the Appeals Chamber, in interpreting article 74 (5) of the Statute, it is appropriate to have regard to the jurisprudence of the ECtHR, which has underlined the importance of reasoning in allowing the accused person to usefully exercise available rights of appeal; it requires that courts "indicate with sufficient clarity the grounds on which they based their decision".[52] The provision of reasons also enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions.

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

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[53]

52. The Appeals Chamber finds that these considerations also apply, in principle, to decisions on the guilt or innocence of the accused under article 74 of the Statute. It must be clear from the trial chamber's decision which facts it found to have been established beyond reasonable doubt and how it assessed the evidence to reach these factual findings.

53. To fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision.[54]

54. The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74 (5) of the Statute. It is also of note that, when determining whether there was a breach of article

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[52] *Lubanga* OA5 Judgment, para. 20, referring to *Hadjianastassiou v. Greece*, para. 32.
[53] *Lubanga* OA5 Judgment, para. 20.
[54] *See*, with respect to appeals filed under rules 154 and 155 of the Rules, *Lubanga* OA5 Judgment, para. 20; *Bemba et al*. OA4 Judgment, para. 116.

74 (5) of the Statute, the Appeals Chamber will assess whether there was reasoning in support of a given factual finding; if particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed, lest it becomes impossible to determine – based on the reasoning provided and the evidence in question – how the trial chamber reached the conclusion it did.

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

56. The appropriate remedy in such a case will depend on the circumstances, in particular the extent of insufficient or lacking reasoning. In particular, in cases where the lack of reasoning is extensive, the Appeals Chamber may decide to order a new trial before a different trial chamber.[55] Alternatively, it may be appropriate to remand the factual finding to the original trial chamber with the instruction to properly set out its reasoning in support of it and report back to the Appeals Chamber.[56] Particularly if the original trial chamber is no longer available, the Appeals Chamber may also decide to determine *de novo* the factual question at hand, analysing the relevant evidence that was before the trial chamber.[57] If the Appeals Chamber's assessment of this evidence leads it to adopt the same factual finding as that adopted by the trial chamber, the Appeals Chamber will confirm the impugned decision in relation to the factual finding despite the insufficient or lacking reasoning. If, however, the Appeals Chamber, based on its own assessment of the evidence, adopts a factual finding that is different from the one adopted by the trial chamber, the Appeals Chamber will then

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[55] *See* article 83 (2) (b) of the Statute.
[56] *See* article 83 (2), second sentence, of the Statute.
[57] The Appeals Chamber notes that the Appeals Chamber of the ICTY has adopted the same approach. *See* *Perišić* Appeal Judgment, para. 96; *Gotovina and Markač* Appeal Judgment, para. 64.

need to consider the impact, if any, of this new factual finding on the finding as to the guilt or innocence of the accused person.

D. Other grounds alleging unfairness

57. The parties to the proceedings have made submissions on the appropriate standard of review and, in particular, the interplay between article 81 (1) (b) (iv) and article 83 (2) of the Statute.[58] The Appeals Chamber shall now address these issues.

58. Article 81 (1) (b) of the Statute reads in its relevant part:

> The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
>
> […]
>
> (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

59. Pursuant to article 83 (2) of the Statute, the Appeals Chamber may reverse or amend the impugned decision, or order a new trial, if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence".[59]

60. Article 81 (1) (b) (iv) of the Statute provides that an appellant may, under this ground, question, on the one hand the *fairness* of the proceedings *or* decision or, on the other hand, the *reliability* of the proceedings *or* decision. Read on its own, this would suggest, for instance, that an appellant may succeed in an appeal against his or her conviction by demonstrating that there was unfairness, without it having been established that this had any impact on the reliability of the trial chamber's decision under article 74 of the Statute. Yet article 81 (1) (b) (iv) of the Statute must be read in

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[58] Mr Bemba: Appeals Hearing Transcript 9 January 2018, p. 10, line 20 to p. 12, line 5; p. 12, lines 9-23; p. 24, lines 17-24.
The Prosecutor: Appeals Hearing Transcript 9 January 2018, p. 17, lines 11-18; p. 19, lines 4-20, referring to *Lubanga* Apeal Judgment, paras 56, 155. Also referring to *CDF* Appeal Judgment, para. 35; *RUF* Appeal Judgment, para. 34, stating that "Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice."; Appeals Hearing Transcript 9 January 2018, p. 19, lines 9-20.
[59] The French version of the same passage reads: "la procédure faisant l'objet de l'appel est viciée au point de porter atteinte à la régularité de la décision ou de la condamnation".

conjunction with article 83 (2) of the Statute, which clarifies that, for the Appeals Chamber to intervene, it must be demonstrated that the *proceedings* were unfair in such a way as to affect the reliability of the decision or sentence.

61. This interpretation was adopted in the *Lubanga* Appeal Judgment, wherein the Appeals Chamber set out a two-limb enquiry into the allegations of unfairness in the following manner:

> In keeping with articles 81 (1) (b) (iv) and 83 (2) of the Statute, these allegations are considered […] in relation to whether [the convicted person's] rights have been violated and, if so, whether such violations affected the reliability of the Conviction Decision.[60]

62. Seeing no reason to depart from that holding, the Appeals Chamber concludes that a convicted person seeking to appeal his or her conviction on grounds of unfairness is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision. Whether any unfairness that is established affects the reliability of the decision is not a question that can be decided *in abstracto*; it is dependent on the nature of the particular case that is before the Appeals Chamber and must be determined as such. In some cases, a particular breach might be decisive and lead to a reversal of a conviction, whilst in other cases it might be determined that the unfairness can be cured or that the breach does not have an impact on the reliability of the conviction.

E. Substantiation of arguments

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

64. The Appeals Chamber has previously held that, in order to substantiate an argument, "the appellant is required to set out the alleged error and how the alleged

[60] *Lubanga* Appeal Judgment, para. 28.

error materially affected the impugned decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance".[61] The Appeals Chamber has found:

> Whether an error or the material effect of that error has been sufficiently substantiated will depend on the specific argument raised, including the type of error alleged. With respect to legal errors, the Appeals Chamber, as set out above, 'will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law'. Accordingly, the appellant has to substantiate that the Trial Chamber's interpretation of the law was incorrect; […] this may be done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error.[62] [Footnotes omitted.]

65. In alleging factual errors, the appellant must "set out in particular why the Trial Chamber's findings were unreasonable. In that respect, repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence".[63]

66. However, assessing whether or not the trial chamber applied the standard of proof correctly is the responsibility of the Appeals Chamber. The accused does not have to prove that the trial chamber made a factual error. It suffices for him or her to identify sources of doubt about the accuracy of the trial chamber's findings to oblige the Appeals Chamber to independently review the trial chamber's reasoning on the basis of the evidence that was available to it. If the trial chamber fails to accompany its finding with reasoning of sufficient clarity, which unambiguously demonstrates both the evidentiary basis upon which the finding is based as well as the trial chamber's analysis of it, the Appeals Chamber has no choice but to set aside the

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[61] *Lubanga* Appeal Judgment, para. 30 (footnotes omitted).
[62] *Lubanga* Appeal Judgment, para. 31.
[63] *Lubanga* Appeal Judgment, paras 30, 33, referring to *Kony et al.* OA3 Judgment, para. 48, which reads, in relevant part: "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision". *See also* *Ngudjolo* Appeal Judgment, para. 205 ("The Appeals Chamber finds that, at best, the Prosecutor is putting forward a possible alternative interpretation of the evidence, but she has failed to establish any error on the part of the Trial Chamber that would render the Chamber's approach unreasonable. Accordingly, the Prosecutor's arguments are rejected").

affected finding, since the lack of adequate reasoning renders the finding unreviewable, thereby constituting a serious procedural error. It is also important that, in all cases before the Court, the duty to substantiate errors in the conviction decision should not lead to a reversal of the burden of proof.

F. Degree of appellate deference to be accorded to the factual findings of the Trial Chamber in the present case

67. The degree of appellate deference was raised in Mr Bemba's Appeal Brief and, subsequent to the Appeal's Chamber's question - "What level of deference should the Appeals Chamber accord to the Trial Chamber's factual findings" - also discussed during the hearing in January 2018.[64]

68. Mr Bemba's argument is that the absence of thorough reasoning in the Conviction Decision, upon which deference depends, and certain alleged flaws in the manner in which the Trial Chamber appreciated the evidence, treated witnesses or approached procedure, are so egregious as to displace the customary standard of deference and entail the application of a much higher level of appellate scrutiny to the factual findings in the instant case.[65] The Appeals Chamber sees no reason as to why the appellate standard for factual errors set out above, which is designed to identify an unreasonable assessment of the facts of the case, including in the appraisal of evidence and in the espousal of rationale, would be insufficient to attend to such alleged deficiencies in a trial judgment.

69. To the extent that it is argued that the judicial decision-making process of the triers of fact was unfair and did not allow for effective intervention of the parties or that specific allegations about improper procedure, flawed evidential assessments, lack of reasoning and bias are made, they will in any case be encompassed within the Appeals Chamber's examination of what was reasonable for the Trial Chamber to have established beyond reasonable doubt in the circumstances of the specific case and, if established, discernible from that enquiry.

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[64] Mr Bemba: Appeal Brief, paras 7-10; Appeals Hearing Transcript 9 January 2018, p. 4, line 13-15; p. 5, line 4 to p. 10, line 19; Mr Bemba's Submissions further to the Hearing, paras 3, 7-8.
The Prosecutor: Appeals Hearing Transcript 9 January 2018, p. 13, line 11 to p. 16, line 20; Response to the Appeal Brief, para. 4.
Victims: Appeals Hearing Transcript 9 January 2018, p. 21, line 22 to p. 22 line 24.
[65] Mr Bemba: Appeal Brief, paras 7-10; Appeals Hearing Transcript 9 January 2018, p. 4, line 13-15; p. 5, line 4 to p. 10, line 19; Mr Bemba's Submissions further to the Hearing, paras 3, 7-8.

70. The Appeals Chamber thus finds it unnecessary to modify the standard of review, as set out above, for its assessment of the Trial Chamber's factual findings.

V. MERITS

A. Preliminary issues: Additional Evidence Application and Prosecutor's Request to File an Additional Authority

71. Before addressing the second ground of appeal and part of the third ground of appeal, the Appeals Chamber shall dispose of two outstanding procedural applications: Mr Bemba's Additional Evidence Application and the Prosecutor's Request to File an Additional Authority.

72. On 19 September 2016, Mr Bemba filed the Additional Evidence Application, requesting the admission of 23 documents into evidence on appeal.[66] As Mr Bemba submits that these documents relate to the first ground of appeal,[67] which will not be addressed in this judgment, the majority of the Appeals Chamber considers it unnecessary to address the merits of the Additional Evidence Application. Accordingly, Mr Bemba's Additional Evidence Application is dismissed.

73. On 13 April 2018, the Prosecutor sought leave to file details of a paper on superior responsibility under article 28 published online in April 2018 in a "respected academic journal".[68] Mr Bemba responded to this request on 20 April 2018, submitting that it should be dismissed.[69] The Appeals Chamber considers that it has sufficient information for the purposes of determining the issues arising in the present appeal and that it is unnecessary for it to receive details of the paper proposed by the Prosecutor. Accordingly, the Prosecutor's Request to File an Additional Authority is rejected.

B. Second ground of appeal: "The conviction exceeded the charges"

74. Mr Bemba alleges that "[n]early two thirds of the underlying acts for which [he] was convicted were not included or improperly included in the Amended DCC and fall outside the scope of the charges".[70] He asserts that the Trial Chamber erred in law

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[66] Additional Evidence Application, para. 12.
[67] Additional Evidence Application, para. 14.
[68] Request to File an Additional Authority, paras 2-3.
[69] Response to Request to File an Additional Authority, para. 7.
[70] Appeal Brief, para. 115.

in relying on these acts for the conviction.[71] Mr Bemba also contends that the Trial Chamber should not have relied on "incidents" or "underlying acts" described by victims V1 and V2 to convict him, as their statements were provided after the start of the trial.[72] The Appeals Chamber notes that Mr Bemba, the Prosecutor as well as the Trial Chamber use the term "underlying acts". It refers to specific criminal acts, such as the murder or rape of a particular victim. The Appeals Chamber shall refer to these acts in what follows as "criminal acts", which it considers to be a more descriptive term.

1. Relevant procedural background

75. During the confirmation process, in the Amended Document Containing the Charges, the Prosecutor listed a number of alleged criminal acts of murder, rape and pillaging, but, through the use of expressions such as "include" or "include but are not limited to", indicated that this list was not complete or exhaustive.[73]

76. The Pre-Trial Chamber confirmed in broad terms charges of murder as a war crime and as a crime against humanity,[74] rape as a war crime and as a crime against humanity,[75] and pillaging as a war crime,[76] finding substantial grounds to believe that these crimes had been perpetrated against civilians by MLC soldiers in the CAR from

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[71] Appeal Brief, para. 115.
[72] Appeal Brief, paras 122-123.
[73] Amended Document Containing the Charges, pp. 33-37.
[74] Confirmation Decision, para. 140: "Having reviewed the Disclosed Evidence as a whole, the Chamber finds that MLC soldiers killed civilians during the attack directed against the CAR civilian population carried out from on or about 26 October 2002 until 15 March 2003, thus committing crimes against humanity within the meaning of article 7(1)(a) of the Statute". Confirmation Decision, para. 277: "Having reviewed the Disclosed Evidence as a whole, the Chamber finds that, as MLC soldiers moved in battle throughout the CAR, they killed civilians thus committing war crimes according to article 8(2)(c)(i) of the Statute".
[75] Confirmation Decision, para. 160: "The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity directed against CAR civilians were committed by MLC soldiers as part of the widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with the knowledge of the attack by MLC soldiers". Confirmation Decision, para. 282: "Having reviewed the Disclosed Evidence as a whole, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that in the context of and in association with the armed conflict not of an international character on the territory of the CAR, acts of rape constituting war crimes pursuant to article 8(2)(e)(vi) of the Statute were committed on civilians by MLC soldiers from on or about 26 October 2002 to 15 March 2003".
[76] Confirmation Decision, para. 322: "Having reviewed the Disclosed Evidence as a whole, the Chamber finds that the evidence shows that, as MLC soldiers moved in battle from on or about 26 October 2002 to 15 March 2003 throughout the CAR territory, they appropriated for their own private or personal use belongings of civilians, such as their livestock, vehicles, televisions, radios, clothing, furniture and money, without the consent of the rightful owners".

on or about 26 October 2002 to 15 March 2003. The Pre-Trial Chamber did not enter findings that there were substantial grounds to believe that specific acts of murder, rape and pillaging had been committed, but rather "relied on" or "dr[ew] attention, in particular" to certain events and evidence to support its overall conclusions.[77]

77. Following the confirmation of charges, the Trial Chamber requested the Prosecutor to provide a second amended document containing the charges,[78] which was submitted on 4 November 2009.[79] Mr Bemba challenged the Second Amended Document Containing the Charges on 12 February 2010, complaining *inter alia* that the Prosecutor had reinterpreted the conclusions of the Pre-Trial Chamber by adding new allegations that were not confirmed, reformulating the Pre-Trial Chamber's conclusions and adding words and expressions such as "on or about" or "including but not limited to" with the aim of broadening the charges.[80]

78. In its Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, the Trial Chamber considered that "the Confirmation Decision is the authoritative document for all trial proceedings".[81] It found that the charging document "must describe the charges by reference to the 'statement of facts' underlying the charges confirmed by the Pre-Trial Chamber – its precise factual findings".[82] With respect to Mr Bemba's proposal to limit the charge of pillaging to those locations that were specifically listed by removing the word "include", the Trial Chamber noted that the Pre-Trial Chamber had not intended to limit acts of pillaging to the four locations cited in the Second Amended Document Containing the Charges.[83] It thereby allowed for the subsequent addition of new locations where pillaging had allegedly taken place. The Trial Chamber also permitted the inclusion of allegations on which the Pre-Trial Chamber had not made any express findings if the

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[77] Confirmation Decision, paras 140, 170, 277, 323.
[78] Transcript of 7 October 2009, ICC-01/05-01/08-T-14-Eng, p. 13, lines 5-10.
[79] Second Amended Document Containing the Charges.
[80] Mr Bemba's Challenge to the Second Amended Document Containing the Charges, para. 36. In the confidential *ex parte* annex to this submission, Mr Bemba appears to have limited his argument regarding the use of the words "including but not limited to" to the introduction of additional underlying acts of pillaging (*see* ICC-01/05-01/08-694-Conf-Exp-AnxA, pp. 38-40).
[81] Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, para. 37.
[82] Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, para. 35.
[83] Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, para. 279.

allegations "merely describe[d] the facts and circumstances upon which the charges have been confirmed" or "d[id] not exceed the scope of the charges".[84] A corrected revised version of the Second Amended Document Containing the Charges[85] was filed on 14 October 2010 and the trial proceeded on that basis.

79. On 4 November 2009 and 15 January 2010, the Prosecutor filed the Prosecutor's Summary Presentation of Evidence and the Prosecutor's Updated Summary Presentation of Evidence, respectively, in which information on further individual acts was provided. On 6 November 2009, the Prosecutor indicated her intention to rely on a few more criminal acts, when disclosing evidence.[86]

80. In the Conviction Decision, the Trial Chamber reiterated that the Confirmation Decision "defines the scope of the charges".[87] It found:

> The provision of additional information by the Prosecution relating to the charges should not exceed the scope of, and thereby result in any amendment to, the facts and circumstances described in the charges as confirmed. In determining whether various facts exceeded that scope, the Chamber adopted the following approach:
>
> a. When the Pre-Trial Chamber excluded any facts, circumstances, or their legal characterisation, the Chamber found that they exceeded the scope of the confirmed charges; and
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> b. In relation to factual, evidential details, when the Pre-Trial Chamber excluded or did not pronounce upon them, the Chamber did not rule out the possibility that, at trial, the information could qualify as evidential detail supporting the facts and circumstances described in the charges.[88][Footnotes omitted]

81. Regarding the Confirmation Decision in the present case, the Trial Chamber noted that:

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[84] *See* Second Amended Document Containing the Charges, paras 50, 53-57: rape of unidentified victims 1-8 (para. 55), rape of unidentified victims 9-30 (para. 56), rape of unidentified victims 31-35 (para. 57)); rape of P68 and pillaging of P68's belongings (para. 50, pp. 36, 38). Decision on Mr Bemba's Challenge to the Second Amended Document Containing the Charges, paras 107, 110, 113.
[85] Corrected Revised Second Amended Document Containing the Charges.
[86] Conviction Decision, para. 48, referring to Prosecutor's Closing Brief, paras 310-314, 380-385, 436-442, 494-497.
[87] Conviction Decision, para. 32.
[88] Conviction Decision, para. 32.

> [T]he Pre-Trial Chamber "in particular, [drew] attention to" certain events and evidence, but did not limit the charges to those particular events or that particular evidence. Rather, the Pre-Trial Chamber broadly defined the temporal and geographical scope of the alleged attack on the civilian population and the alleged armed conflict on CAR territory from on or about 26 October 2002 to 15 March 2003. In Decision 836, the Chamber affirmed that the charges as drafted in the Second Amended DCC conformed to the Confirmation Decision, insofar as they used inclusive language, for example, the phrases "include" and "include, but are not limited to". Further, the Chamber affirmed that the confirmed charges included acts of murder, rape, and pillaging committed on CAR territory, including in Bangui, PK12, Mongoumba, Bossangoa, Damara, Sibut, and PK22, from on or about 26 October 2002 to 15 March 2003.[89] [Footnotes omitted]

82. Having thus defined the scope of the confirmed charges, the Trial Chamber noted that it must "assess whether the Accused received adequate notice" thereof, taking into account "all documents designed to provide information about the charges, including the Confirmation Decision and 'auxiliary documents'".[90] It further noted that, in cases where the accused was geographically remote from the scene of the crimes, "it may not be possible to plead evidential details concerning the identity or number of victims, precise dates, or specific locations" and that, "in cases of mass crimes, it may also be impracticable to provide a high degree of specificity in relation to those matters".[91]

83. Following these principles, the Trial Chamber determined that Mr Bemba had been provided with "adequate notice" regarding criminal acts that were: (i) "relied on" by the Pre-Trial Chamber for the purposes of the confirmation of charges;[92] (ii) included in the Second Amended Document Containing the Charges, filed before the evidentiary hearings commenced, although the Pre-Trial Chamber had declined to rely on these criminal acts for the purposes of the Confirmation Decision;[93] (iii) included in the Prosecutor's Summary Presentation of Evidence and the Prosecutor's Updated Summary Presentation of Evidence, filed before the evidentiary hearings commenced;[94] (iv) relied on in the Prosecutor's Closing Brief and "upon which [she] originally indicated her intention to rely on 6 November 2009" in the disclosure

[89] Conviction Decision, para. 42.
[90] Conviction Decision, para. 33.
[91] Conviction Decision, para. 43.
[92] Conviction Decision, paras 44, 49 (a), (b), (c), (d), (e), (f), (j).
[93] Conviction Decision, paras 45-46, 49 (a), (g), (h), (i).
[94] Conviction Decision, paras 47, 49 (e), (k), (l), (m), (n), (o), (p), (q).

process and in the Prosecutor's Updated In-Depth Analysis Chart of Incriminatory Evidence filed before the evidentiary hearings commenced.[95] As all of these criminal acts "were allegedly committed in the CAR between 26 October 2002 and 15 March 2003", it further found "that they fall within the scope of the charges".[96]

84. In addition, the Trial Chamber noted that the witness statements of V1 and V2 detailing alleged acts of murder, rape and pillaging had been provided to the parties on 1 February 2012, after the evidentiary hearings had commenced.[97] The Trial Chamber noted that Mr Bemba had not challenged the proposed testimony on the basis that the acts described exceeded the scope of the charges, but only because the "evidence was 'cumulative' of the prosecution evidence of 'crimes relevant to the DCC'".[98] It found that it could "rely on the[se] [criminal] acts […] as they provide evidential detail as to the facts set out in the charges".[99]

2. Submissions of the parties and participants

85. Mr Bemba submits that he was convicted of criminal acts that fall outside the scope of the charges. He advances three arguments in support of this submission: (i) the conviction was partly based on unconfirmed criminal acts;[100] (ii) V1 and V2's evidence cannot form the basis of a conviction;[101] and (iii) the conviction was partly based on criminal acts improperly included in the Corrected Revised Second Amended Document Containing the Charges.[102]

86. In relation to the first argument, Mr Bemba submits that "the decision on the confirmation of the charges defines the parameters of the charges at trial" and criminal acts "form an integral part of the charges".[103] He contends that, "[i]f [a criminal] act was not confirmed by the Pre-Trial Chamber, absent a successful […] application [to amend the charges], it does not form part of the charges and cannot be

[95] Conviction Decision, paras 48, 49 (r), (s), (t).
[96] Conviction Decision, para. 49.
[97] Conviction Decision, para. 50.
[98] Conviction Decision, para. 50.
[99] Conviction Decision, para. 50.
[100] Appeal Brief, paras 116-121.
[101] Appeal Brief, paras 122-123.
[102] Appeal Brief, paras 124-128.
[103] Appeal Brief, paras 116-117.

used to found a conviction".[104] He acknowledges that in certain circumstances, auxiliary documents may contain further details about the charges confirmed, but submits that "'[f]urther details' are necessarily those which elaborate or clarify the existing charges such as, for example, the identity of a previously unidentified victim, or corroborative evidence as to the identity of the perpetrator".[105] He contends that to allow a "Trial Chamber to add new [criminal] acts, which are themselves individual crimes, capable of amounting to charges, as 'further details' would be to amend the charges" without following the procedure envisaged under the Statute.[106] He further argues that adding criminal acts through auxiliary documents "would render redundant a central part of the confirmation process, namely the Pre-Trial Chamber's analysis of individual incidents" and "would also allow the Prosecution to seek to rehabilitate acts, expressly rejected by the Pre-Trial Chamber, via additional disclosure in auxiliary documents".[107] Finally, Mr Bemba contends that, "[g]iven the 'strong link' between notice of the charges and the right of an accused to prepare his defence, the fairness of the proceedings is also jeopardised".[108]

87. In relation to the second argument and without prejudice to the first, Mr Bemba contends that the Trial Chamber should not have relied on "incidents" or criminal acts described by V1 and V2 to convict him.[109] He highlights that V1's and V2's statements were provided on 1 February 2012, after the start of the trial, and describe additional [criminal] acts and not just "'evidential detail as to the facts set out in the charges'".[110]

88. With regard to the third argument, Mr Bemba argues that the Trial Chamber erred in convicting him on the basis of two criminal acts upon which the Pre-Trial Chamber declined to rely in confirming the charges: the rape of unidentified victims 1 to 35 and the pillaging of the belongings of P68 and her sister-in-law.[111] Regarding the rape of unidentified victims 1 to 35, he submits that the Pre-Trial Chamber

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[104] Appeal Brief, para. 117.
[105] Appeal Brief, para. 118.
[106] Appeal Brief, para. 118.
[107] Appeal Brief, para. 119.
[108] Appeal Brief, para. 121 (footnote omitted).
[109] Appeal Brief, para. 122.
[110] Appeal Brief, para. 123.
[111] Appeal Brief, para. 124.

attached low probative value to P47's evidence and did not confirm this incident.[112] Regarding the pillaging of the belongings of P68 and her sister-in-law, he argues that the Pre-Trial Chamber "only took note of the corroborative value of [P68's] statement in relation to 'accounts of large-scale pillaging'".[113] He contends that the Pre-Trial Chamber's reference "was not intended to support the inclusion of [a criminal] act in the charges" and that this "is underlined by its recognition of the generality of the witness' evidence".[114] He argues that the pillaging of the belongings of P68's sister-in-law was not included in the Amended Document Containing the Charges, but appeared for the first time in auxiliary documents.[115] He submits that, as this criminal act was not confirmed, it falls outside the scope of the charges.[116]

89. Mr Bemba argues that "the incidents are 'facts' which 'support the [contextual] legal elements of the crime charged'".[117] In response to the question of whether a broadly described crime or an individual act are "facts" within the meaning of article 74 (2) of the Statute, Mr Bemba submits that they both are.[118] Relying on the Chambers Practice Manual, he argues that "no threshold of specificity of the charges can be established in abstracto" and that it "depends on the nature of the case".[119]

90. Referring to regulation 52 (b) of the Regulations of the Court and rule 121 (3) of the Rules, Mr Bemba argues that the allegation of rape by MLC soldiers in the CAR between on or about 26 October 2002 and 15 March 2003 would not be sufficiently specific and that "[w]ithout the inclusion of any other factual details, it would be a rape charge with [a] 141-day time frame covering a geographic area of approximately 623,000 square [kilometers]".[120] Mr Bemba submits that wording permitting the Prosecutor to expand the factual parameters of the trial after confirmation should not be allowed.[121] He argues that in order to form part of the confirmed charges, criminal

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[112] Appeal Brief, para. 125.
[113] Appeal Brief, para. 126.
[114] Appeal Brief, para. 126.
[115] Appeal Brief, para. 127.
[116] Appeal Brief, para. 127.
[117] Appeals Hearing Transcript 9 January 2018, p. 45, lines 1-2. *See also* p. 44, line 23 to p. 45, line 4, referring to *Gbagbo* Adjournment Decision, para. 21.
[118] Appeals Hearing Transcript 9 January 2018, p. 46, lines 17-21.
[119] Appeals Hearing Transcript 9 January 2018, p. 46, line 22 to p. 47, line 1.
[120] Appeals Hearing Transcript 9 January 2018, p. 47, lines 5-17.
[121] Appeals Hearing Transcript 9 January 2018, p. 48, lines 5-7.

acts must be exhaustively listed in the document containing the charges.[122] Mr Bemba clarifies that although it is not his position that "the Pre-Trial Chamber must determine whether there is sufficient evidence to support to the requisite standard each [criminal] act included in the DCC and enter a finding on each such act in the confirmation decision", "[i]deally" the Pre-Trial Chamber should do so.[123] Mr Bemba submits that the "Trial Chamber has no power to amend the factual allegations comprising the charges confirmed by the Pre-Trial Chamber".[124] He contends that criminal acts are facts indispensable for entering a conviction and "must be proved beyond reasonable doubt".[125]

91. The Prosecutor contends that Mr Bemba's conviction did not exceed the charges.[126] She submits that the Pre-Trial Chamber and the Trial Chamber clarified that "the scope of the charges was not limited to the individual incidents of killings, rapes and pillaging discussed in the Confirmation Decision, but extended to all such acts committed by MLC soldiers against CAR civilians on CAR territory from on or about 26 October 2002 to 15 March 2003, as long as [Mr] Bemba received adequate notice of their details".[127] The Prosecutor argues that the details of the charges were "broadly set out" in the confirmed charges, but that additional notice was provided in, *inter alia*, auxiliary documents, including the Corrected Revised Second Amended Document Containing the Charges, the Prosecutor's Updated Summary Presentation of Evidence and the Second Updated In-Depth Analysis Chart of Incriminatory Evidence .[128] She submits that Mr Bemba did not incur unfair prejudice on account of the manner in which notice was given, as he was able to prepare his defence.[129] The Prosecutor argues that the sufficiency of notice is not impacted by some victims not being identified by name and some dates differing by a few days.[130]

92. With respect to the allegedly unconfirmed criminal acts, the Prosecutor submits that the "Pre-Trial Chamber acknowledged that the Confirmation Decision need not

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[122] Appeals Hearing Transcript 9 January 2018, p. 49, line 25 to p. 50, line 2.
[123] Appeals Hearing Transcript 9 January 2018, p. 50, line 25 to p. 51, line 7.
[124] Mr Bemba's Submissions further to the Hearing, para. 23. *See also* para. 24.
[125] Mr Bemba's Submissions further to the Hearing, paras 19-20.
[126] Response to the Appeal Brief, paras 78, 84.
[127] Response to the Appeal Brief, para. 83. *See also* para. 91.
[128] Response to the Appeal Brief, paras 78, 84-87.
[129] Response to the Appeal Brief, para. 84.
[130] Response to the Appeal Brief, para. 88.

expressly set out all [criminal acts] of murder, rape and pillaging" and that "expressions such as '[including] but […] not limited to'" are permissible.[131] She argues that specific criminal acts are not excluded from the scope of the charges because she had not provided evidence on all criminal acts at the confirmation stage or because the Pre-Trial Chamber had not relied on certain evidence before it.[132] The Prosecutor submits that she was required to provide details of the charges "to the greatest degree of specificity possible" and that "the Pre-Trial Chamber did not need to set out every underlying act in the Confirmation Decision".[133] She contends that she was entitled to provide further details in auxiliary documents, "including dates and locations of certain acts, and victims' identities".[134] Regarding the criminal acts to which V1 and V2 referred in their testimony, the Prosecutor submits that they fell within the scope of the confirmed charges and that, because Mr Bemba was notified of these incidents after the trial had commenced, "any potential prejudice" was "effectively cured".[135] She contends that the late notice did not affect Mr Bemba's rights and that at trial he never claimed that the proposed evidence of V1 and V2 would affect his rights.[136] As regards the criminal acts which the Pre-Trial Chamber allegedly declined to confirm, the Prosecutor submits that that Chamber simply did not rely on the evidence of P47 and P68 to confirm the charges of rape and pillaging, respectively, which does not mean that these criminal acts were not confirmed.[137] The Prosecutor contends that Mr Bemba received timely notification of the details of these charges.[138]

93. The Prosecutor clarifies that Mr "Bemba was charged with, and convicted of crimes of murder, rape and pillaging committed by MLC soldiers on the territory of the CAR from 26 October 2002 to 15 March 2003" and that such are "the facts and circumstances" in the present case.[139] The Prosecutor submits that the specific acts underlying these crimes are not material facts, but subsidiary facts or evidence, "used

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[131] Response to the Appeal Brief, para. 91.
[132] Response to the Appeal Brief, para. 92.
[133] Response to the Appeal Brief, para. 93.
[134] Response to the Appeal Brief, para. 93.
[135] Response to the Appeal Brief, para. 96. *See also* paras 95-97, 99.
[136] Response to the Appeal Brief, para. 100.
[137] Response to the Appeal Brief, paras 104-106.
[138] Response to the Appeal Brief, paras 105-106.
[139] Appeals Hearing Transcript 9 January 2018, p. 52, line 24 to p. 53, line 4.

in this case to establish the material fact".[140] The Prosecutor argues that the Trial Chamber's "convictions were limited to evidence regarding these specific acts of murder, rape and pillaging"[141] or to those acts of which sufficient notice had been given.[142] The Prosecutor submits that since the "individual acts of murder, rape and pillaging were subsidiary facts or evidence[,] […] the Trial Chamber did not need to enter findings beyond reasonable doubt in relation to each of them".[143]

94. The Prosecutor argues that since Mr Bemba was remote from the crimes and he was charged under article 28 of the Statute with "a large pattern of crimes committed by his subordinates in a neighbouring country", the Trial Chamber could have convicted Mr Bemba also on the basis of other acts of rape, murder and pillaging, the evidence of which it considered in relation to its finding of a widespread attack against the civilian population.[144]

95. Mr Bemba replies that "[t]he Prosecutor misstates the law in claiming" that the prejudice caused by late notice of charges or criminal acts can be cured.[145] He claims that material received after the trial has commenced is only "relevant to 'whether prejudice caused by lack of detail in the charges may have been cured'", but that notice of the charges by V1 and V2 should have been given to him before trial.[146]

96. The Victims submit that the decision on the confirmation of charges only defines "the parameters of the charges" and not the charges themselves, and that, therefore, the charges are not limited to the criminal acts confirmed by the Pre-Trial Chamber.[147] The Victims contend that the Pre-Trial Chamber defined the scope of the charges broadly and that other criminal acts could be included, "as long as they fell within the scope of the charges and were not excluded by the Pre-Trial Chamber".[148] The Victims argue that in view of the nature of the crimes and the mode of responsibility, with which Mr Bemba was charged, the Prosecutor "[could not] be

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[140] Appeals Hearing Transcript 9 January 2018, p. 53, lines 7-9.
[141] Appeals Hearing Transcript 9 January 2018, p. 54, lines 18-20, referring to Conviction Decision, paras 622, 632, 639. *See also* Appeals Hearing Transcript 9 January 2018, p. 84, lines 8-11.
[142] Appeals Hearing Transcript 9 January 2018, p. 78, lines 2-4.
[143] Appeals Hearing Transcript 9 January 2018, p. 55, lines 4-6.
[144] Appeals Hearing Transcript 9 January 2018, p. 59, lines 1-11.
[145] Reply to the Response to the Appeal Brief, para. 24.
[146] Reply to the Response to the Appeal Brief, para. 24.
[147] Victims' Observations, para. 36.
[148] Victims' Observations, paras 37-38.

expected to prove every crime committed by MLC troops in the CAR during the 2002-2003 operation".[149] The Victims submit that Mr Bemba was informed of the charges in sufficient detail before the start of the trial.[150] As regards the testimony of V1 and V2, the Victims argue that they were not authorised to submit evidence at the pre-trial stage and, as a result, the acts to which V1 and V2 testified could not be notified to Mr Bemba before the commencement of the trial.[151] The Victims submit that the notice which Mr Bemba received was "sufficiently prompt and detailed" and that he was given "adequate time to prepare his defence".[152]

97. In reply to the Victims' Observations, Mr Bemba submits that if the reasoning of the Victims were accepted, any evidence that was not authorised or unavailable at the confirmation stage could be relied upon to convict him.[153] He further argues that the Victims and the Prosecutor "enjoyed close cooperation" and it would have therefore been obvious to the Victims during the pre-confirmation phase of the case that "the Prosecutor had scant evidence of underlying acts of murder".[154] Mr Bemba contends that "[he] could not have anticipated that he was being required to defend against, for example, a charge of murder in Mongoumba, which fell outside the scope of the Second Revised Amended DCC".[155]

3. Determination by the Appeals Chamber

98. The Appeals Chamber notes that the present ground of appeal concerns the scope of the charges (article 74 (2) of the Statute) and not whether Mr Bemba was informed in detail and sufficiently in advance of the charges on the basis of which he was convicted. Indeed, Mr Bemba does not argue on appeal that he did not receive sufficient notice of the allegations against him, including in respect of the criminal acts in question. Nonetheless, the Prosecutor's arguments in response are, to a large extent, based on the assumption that notice to the accused person is relevant to the

[149] Victims' Observations, para. 40.
[150] Victims' Observations, para. 42.
[151] Victims' Observations, para. 47.
[152] Victims' Observations, para. 48.
[153] Reply to the Victims' Observations, para. 31.
[154] Reply to the Victims' Observations, para. 32.
[155] Reply to the Victims' Observations, para. 33.

determination of whether a criminal act falls within the scope of the charges.[156] In its discussion of the present ground of appeal, the Appeals Chamber will focus on the scope of the charges.

99. Mr Bemba's central argument is that the Conviction Decision exceeded the "facts and circumstances described in the charges" in violation of article 74 (2) of the Statute because he was convicted partly based on individual acts of murder, rape and pillaging committed against particular victims at specific times and places that had not been confirmed in the Confirmation Decision. In his view, the scope of the trial against him was limited to the criminal acts that were specifically confirmed by the Pre-Trial Chamber in the Confirmation Decision, arguing that "[i]f [a criminal] act was not confirmed by the Pre-Trial Chamber, […] it does not form part of the charges and cannot be used to found a conviction".[157]

100. The Appeals Chamber will therefore address two main issues, namely, (i) the scope of the Conviction Decision; and (ii) whether the Conviction Decision exceeded the scope of the charges.

(a) Scope of the Conviction Decision

101. Before assessing Mr Bemba's argument, the Appeals Chamber considers it necessary to clarify what Mr Bemba was convicted of. In the disposition of the Conviction Decision, the Trial Chamber stated that Mr Bemba was:

> **GUILTY,** under Article 28(a) of the Statute, as a person effectively acting as a military commander, of the crimes of: -
>
> (a) Murder as a crime against humanity under Article 7(1)(a) of the Statute;
>
> (b) Murder as a war crime under Article 8(2)(c)(i) of the Statute;
>
> (c) Rape as a crime against humanity under Article 7(1)(g) of the Statute;
>
> (d) Rape as a war crime under Article 8(2)(e)(vi) of the Statute; and

[156] It is noted that both Mr Bemba and the Prosecutor misrepresent the Trial Chamber's findings in this regard. Contrary to what Mr Bemba (Appeal Brief, para. 118) and the Prosecutor (Response to the Appeal Brief, paras 83, 91) assert, in its determination of the scope of the charges, the Trial Chamber did not examine whether sufficient notice was given with respect to specific criminal acts. Rather, it first examined whether the specific criminal acts fell within the parameters of the charges set out in the Confirmation Decision and only when satisfied that they did, the Trial Chamber proceeded to examine whether Mr Bemba had received sufficient notice (Conviction Decision, paras 32, 49).
[157] Appeal Brief, para. 117.

(e) Pillaging as a war crime under Article 8(2)(e)(v) of the Statute.[158]

102. This disposition, however, which is formulated in the most general terms, must be understood in the context of the other findings in the Conviction Decision, which further explain what Mr Bemba was convicted of. Notably, in the Conviction Decision, the Trial Chamber found

> beyond reasonable doubt that MLC soldiers committed the war crime of murder and the crime against humanity of murder in the CAR between on or about 26 October 2002 and 15 March 2003.[159]

103. Similar findings were entered in relation to rape as a war crime and crime against humanity and pillage as a war crime.[160] While these findings provide more detail than the disposition, notably by defining, in broad terms, the time period and area of the crimes, as well as the affiliation of the direct perpetrators, important information is still missing. Notably, there is no reference to even an approximate number of the individual criminal acts of murder, rape and pillage that the Trial Chamber found established, or any further demarcation of the scope of the conviction, which would appear to cover, potentially, *all* such crimes committed by MLC soldiers in a territory of more than 600,000 square kilometers and over a period of more than four and a half months.

104. Therefore, the Appeals Chamber considers, by majority, Judge Monageng and Judge Hofmański dissenting, that the Conviction Decision must be understood as convicting Mr Bemba of the specific criminal acts of murder, rape and pillage that the Trial Chamber found to be established beyond a reasonable doubt and which were indeed recalled in the concluding sections of the Conviction Decision in relation to each crime.[161] Thus, in the circumstances of the present case, the broad disposition in the Conviction Decision and the only slightly less broad conclusions of the Trial Chamber in relation to the crimes against humanity and war crimes of murder and rape and the war crime of pillage[162] do not, in reality, reflect what Mr Bemba was convicted of. Rather, they are *summaries* of the Trial Chamber's findings in relation

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[158] Conviction Decision, para. 752
[159] Conviction Decision, para. 630.
[160] Conviction Decision, paras 638, 648.
[161] Conviction Decision, paras 624 (acts of murder); 633 (acts of rape); 640 (acts of pillaging).
[162] *See supra* paras 102-103.

to the criminal acts of murder, rape and pillage that had been established beyond reasonable doubt; the conviction of Mr Bemba, however, was entered in relation to these specific criminal acts. The Appeals Chamber therefore rejects, by majority, Judge Monageng and Judge Hofmański dissenting, the Prosecutor's submission, at the appeal hearing, that Mr Bemba was charged with, and convicted of, generally crimes of murder, rape and pillaging committed by MLC soldiers on the territory of the CAR from 26 October 2002 to 15 March 2003, which constituted the "the facts and circumstances" in the present case, [163] and that the criminal acts were merely "subsidiary facts" or "evidence", "used in this case to establish the material fact".[164]

(b) Whether the Conviction Decision exceeded the scope of the charges

105. Having thus clarified what Mr Bemba was convicted of, the Appeals Chamber shall now turn to the central question raised by Mr Bemba under this ground of appeal, namely whether his conviction exceeded the charges against him. The controlling provision in this regard is article 74 (2) of the Statute, which provides in relevant part:

> The decision [of the Trial Chamber at the end of the trial] shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

106. Thus, to answer the question raised by Mr Bemba, it is necessary to determine which "facts and circumstances" have been described in the charges, and whether they correspond to, or encompass, the criminal acts which Mr Bemba was convicted of.

107. The Appeals Chamber recalls that the Confirmation Decision in its operative part was equally broad as the disposition of the Conviction Decision: the charges against Mr Bemba were "confirmed" in relation to categories of crimes, without any further qualification. [165] Clearly this broad formulation would have been an insufficient basis to bring Mr Bemba to trial and cannot be said to amount to a description of "facts and circumstances" in terms of article 74 (2) of the Statute.

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[163] Appeals Hearing Transcript 9 January 2018, p. 52, line 24 to p. 53, line 4.
[164] Appeals Hearing Transcript 9 January 2018, p. 53, lines 7-9.
[165] *See* Confirmation Decision, pp. 184-185, para. d).

108. The pre-confirmation Amended Document Containing the Charges, on the other hand, provided more detail in its operative part. For instance, in relation to rape as a crime against humanity, the Amended Document Containing the Charges contained the following formulation:

> From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Félix Patassé, crimes against humanity through acts of rape upon civilian men, woman [*sic*] and children in the Central African Republic, in violation of Articles 7(1)(g) and 25(3)(a) or 28(a) or 28(b) of the Rome Statute.
>
> Civilian men, women and children in the Central African Republic include, but are not limited to REDACTED, 26 or 27 October 2002, Fou; REDACTED, 26 or 27 October 2002, Fou; REDACTED, 26 October 2002, PK 12; REDACTED, 30 October 2002, Boy-Rabé; REDACTED, 8 November 2002, PK 12; REDACTED, 8 November 2002, PK 12; REDACTED, 8 November 2002, PK 12; REDACTED, 8 November 2002, PK 12; REDACTED, on or about 8 November 2002, PK 12; REDACTED, 8 November 2002, PK 12; REDACTED, on or about 5 March 2003, Mongoumba; Unidentified Victims 1 to 8, 26 October and 31 December 2002, Bangui; Unidentified Victims 9 to 30, October 2002 and 31 December 2002, Bangui; Unidentified Victims 31 to 35, October 2002 to 31 December 2002, Bangui.[166]

109. The passages in relation to the other crimes followed the same structure: the first paragraph outlined in very general terms the temporal and geographical frame during which crimes were allegedly committed, while the second paragraph listed individual criminal acts of murder, rape or pillage.[167] The use of the words "include, but are not limited to" indicated that, according to the Prosecutor, these lists of criminal acts were not exhaustive.

110. The Appeals Chamber considers that the formulation in the operative part of the Confirmation Decision as well as that in the first paragraphs of the passages in relation to each category of crimes in the Amended Document Containing the Charges are too broad to amount to a meaningful "description" of the charges against Mr Bemba in terms of article 74 (2) of the Statute. The Appeals Chamber recalls that regulation 52 (b) of the Regulations of the Court stipulates that documents containing the charges must set out a "[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the

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[166] Amended Document Containing the Charges, pp. 33-34.
[167] *See* Amended Document Containing the Charges, pp. 34, 36-37.

person or persons to trial". Simply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute.

111. That said, the Appeals Chamber notes that, in the present case, both the Amended Document Containing the Charges and the Confirmation Decision contained more specific factual allegations as to the crimes for which Mr Bemba was to be tried – namely in the form of the identified criminal acts, which were prominently mentioned in the operative part of the Amended Document Containing the Charges and also taken up as part of the evidential analysis in the Confirmation Decision.[168] Thus, in the present case, the "facts and circumstances" were described, in relation to the crimes, at the level of individual criminal acts.

112. Turning to Mr Bemba's allegation that he was convicted of criminal acts that were outside the scope of the charges, the Appeals Chamber considers that, in light of what has been said above, it is clear that the criminal acts that were mentioned in the Amended Document Containing the Charges and mentioned with approval in the Confirmation Decision were within the scope of this case – a fact that Mr Bemba does not dispute. This concerns the following criminal acts which Mr Bemba was convicted of:

i. the pillaging of P22's uncle's house by MLC soldiers near PK12;

ii. the rapes of P68 and her sister-in-law by MLC soldiers on 27 October 2002 near Miskine High School in Fouh;

iii. the murder of P87's "brother" by MLC soldiers in Boy-Rabé on 30 October 2002;

iv. the rape of P87 by MLC soldiers in Boy-Rabé on 30 October 2002;

v. the pillaging of P87's house by MLC soldiers in Boy-Rabé on or around 30 October 2002

[168] Amended Document Containing the Charges, pp. 33-34, 36-37; Confirmation Decision, paras 140, 144, 146-150, 152-158, 165, 169, 171-185, 277-279, 286-288, 322, 324-329, 337-338.

vi. the rape of P22 by MLC soldiers at her uncle's house in PK12 at the end of October 2002;

vii. the pillaging of P42's house by MLC soldiers in PK12 in November 2002;

viii. the rape of P23, his wife (P80), his daughter (P81), and at least one other of his daughters by MLC soldiers at P23's compound in PK12 on 8 November 2002;

ix. the pillaging of P23's compound (including the belongings of P80 and P81) by MLC soldiers in PK12 on 8 November 2002;

x. the rape of P42's daughter by MLC soldiers at the end of November 2002 in PK12; and

xi. the rape of P29 by MLC soldiers on 5 March 2003 in Mongoumba.[169]

113. As to the criminal acts that were mentioned in the Amended Document Containing the Charges, but on which the Pre-Trial Chamber decided not to rely to confirm the charges, the Appeals Chamber notes that Mr Bemba argues that their confirmation was rejected by the Pre-Trial Chamber and that they are, therefore, outside the scope of the present case.[170] This argument disregards, however, that the Pre-Trial Chamber seemingly did not consider that it had to "confirm" all (or indeed any) individual criminal acts.[171] The Appeals Chamber considers that, at this stage of the proceedings – where an appeal is brought against the final decision of the Trial Chamber – it is immaterial whether the approach of the Pre-Trial Chamber was correct or not. It was clear to all parties and participants, including to Mr Bemba, that the Pre-Trial Chamber did not intend to exclude the criminal acts in question from the case against Mr Bemba. Rather, because of evidential shortcomings it had identified, it decided not to rely on them for the purpose of confirmation.[172] For that reason, the Appeals Chamber considers that the criminal acts in question form part of the "facts and circumstances described in the charges" and were therefore within the scope of this trial. This concerns the following criminal acts which Mr Bemba was convicted of:

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[169] Conviction Decision, para. 44.
[170] Appeal Brief, paras 124-128.
[171] *See* Confirmation Decision, paras 65-66.
[172] Confirmation Decision, paras 169, 338.

i. the pillaging of the belongings of P68 and her sister-in-law in Bangui at the end of October 2002; and

ii. the rape of eight unidentified victims at the Port Beach naval base in Bangui at the end of October or beginning of November 2002.[173]

114. The Appeals Chamber recalls that, once the charges against Mr Bemba were confirmed and the Trial Chamber was seized of the case against him, the Prosecutor added, by means of disclosure and inclusion in auxiliary documents, criminal acts of murder, rape and pillage.[174] This appears to have been consistent with the Trial Chamber's understanding that the Pre-Trial Chamber had not meant to limit the criminal acts covered by this case to those mentioned in the Amended Document Containing the Charges.

115. While the Appeals Chamber notes that the Trial Chamber's understanding of the relevance of the specific criminal acts of murder, rape and pillage that were charged corresponded to the Pre-Trial Chamber's approach thereto, the Appeals Chamber nevertheless considers that the criminal acts that the Prosecutor added after the Confirmation Decision was issued cannot be said to have been part of the "facts and circumstances described in the charges" in terms of article 74 (2) of the Statute. This is because, as set out above, in the present case the Prosecutor had formulated the charges at a level of detail sufficient for the purposes of that provision only in respect of the criminal acts. For that reason, adding any additional criminal acts of murder, rape and pillage would have required an amendment to the charges, which, however, did not occur in the case at hand. In this regard, the Appeals Chamber wishes to underline that this is not to say that adding specific criminal acts after confirmation would in all circumstances require an amendment to the charges – this is a question that may be left open for the purposes of disposing of the present ground of appeal; nevertheless, given the way in which the Prosecutor has pleaded the charges in the case at hand, this was the only course of action that would have allowed additional criminal acts to enter the scope of the trial. As that did not occur in the case at hand, the Appeals Chamber finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the criminal acts that were added after the Confirmation Decision had

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[173] Conviction Decision, paras 45-46, referring to, *inter alia*, Confirmation Decision, para. 338.
[174] *See supra* para. 79.

been issued did not form part of the "facts and circumstances described in the charges" – to the extent that the document containing the charges was not amended to reflect them – and Mr Bemba could therefore not be convicted of them. The same applies to the criminal acts put forward by the Victims.

(c) Conclusion

116. In view of the foregoing considerations, the Appeals Chamber grants this ground of appeal and finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber erred when it convicted Mr Bemba of the following acts, which did not fall within the "facts and circumstances described in the charges" in terms of article 74 (2) of the Statute:

i. The murder of P69's sister in PK12 the day after the MLC's arrival in PK12;

ii. Pillaging of the belongings of P69's sister in PK12 the day after the MLC arrived;

iii. Pillaging of the belongings of P69 in PK12 the day after the MLC arrived;

iv. Pillaging of the belongings of P110 in PK12 the day after the MLC arrived;

v. Pillaging of the belongings of P79 and her brother in PK12 several days after the MLC's arrival;

vi. The rape of P79 and her daughter in PK12 several days after the MLC arrived in PK12;

vii. Pillaging of the property of V2 in Sibut in the days after the MLC's arrival.

viii. Pillaging of the belongings of P108 in PK12 during the MLC's presence;

ix. The rape of two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002;

x. Pillaging of the belongings of P119 in Bangui after 30 October 2002;

xi. Pillaging of the belongings of P112 in PK12 in November 2002;

xii. The rape of a woman in the bush outside of PK22 in November 2002;

xiii. Pillaging of the belongings of a woman in the bush outside PK22 in November 2002;

xiv. The rape of P69 and his wife in PK12 at the end of November 2002;

xv. Pillaging of the belongings of P73 in PK12 at the end of November 2002;

xvi. The rape of V1 in Mongoumba on 5 March 2003;

xvii. Pillaging of the property of V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, the gendarmerie, and mayor in Mongoumba on 5 March 2003; and

xviii. The murder of an unidentified "Muslim" man on 5 March 2003 in Mongoumba witnessed by V1.

117. The Appeals Chamber notes that the Trial Chamber relied on the criminal acts that it found had been established beyond reasonable doubt, including those listed in the preceding paragraph, also for its finding regarding the contextual element of crimes against humanity. In the view of the Appeals Chamber, this did not amount to an error. While the Trial Chamber could not convict Mr Bemba of these criminal acts, they could nevertheless be taken into account for the finding regarding the contextual element of crimes against humanity, which operates at a higher level of abstraction. The Appeals Chamber also notes in this regard that Mr Bemba has not argued that he has not received sufficient notice of the allegations regarding these criminal acts and there is no unfairness arising from the Trial Chamber having relied on these criminal acts for the purpose of the contextual element of crimes against humanity.

118. Nevertheless, as regards Mr Bemba's conviction, the only criminal acts that the Trial Chamber found to be established beyond reasonable doubt that were within the scope of the charges were thus:

i. The rape of P87 in Bangui on or around 30 October 2002;

ii. Pillaging of the property of P87 and her family in Bangui on or around 30 October 2002;

iii. The murder of P87's "brother" in Bangui at the end of October 2002;

iv. The rape of P68 and P68's sister-in-law in Bangui at the end of October 2002;

v. The rape of P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002;

vi. Pillaging of the property of P23, P80, P81, and P82 in Bangui in early November 2002;

vii. The rape of P22 in PK12 on or around 6 or 7 November 2002;

viii. Pillaging of the property of P22 and her uncle in PK12 on or around 6 or 7 November 2002;

ix. The rape of P42's daughter in PK12 around the end of November 2002;

x. Pillaging of the property of P42 and his family in PK12 at the end of November 2002; and

xi. The rape of P29 in Mongoumba on 5 March 2003.

119. This means that Mr Bemba was convicted of one murder, the rape of 20 persons and five acts of pillaging.

C. Third ground of appeal: Command Responsibility: Mr Bemba took all necessary and reasonable measures

120. For the reasons set out above,[175] the Appeals Chamber shall only address in this section Mr Bemba's argument that the Trial Chamber erred when it found that he was responsible as a commander pursuant to article 28 (a) of the Statute for crimes that MLC troops had committed during the 2002-2003 CAR Operation.

1. Relevant Part of the Impugned Decision

121. The Trial Chamber found that what constitutes "all necessary and reasonable measures" is to be established on a "case-by-case basis", focusing on the "material power" of the commander.[176]

122. The Trial Chamber found that Mr Bemba took "a few measures" in response to allegations of crimes committed by MLC troops in the CAR which included the following.[177] First, the Mondonga Inquiry,[178] established in the "initial days of the 2002-2003 CAR Operation", which led to Colonel Mondonga, on 27 November 2002, forwarding the case file containing information on the proceedings against Lieutenant Willy Bomengo and other soldiers of the 28th Battalion arrested in Bangui on 30 October 2002 on charges of pillaging ("Bomengo case file"),[179] to the MLC Chief of

[175] *See supra* paras 29-34.
[176] Conviction Decision, paras 197-198.
[177] Conviction Decision, para. 719.
[178] *See* Conviction Decision, para. 582.
[179] *See* Conviction Decision, paras 268, 586.

Staff, copying Mr Bemba.[180] Second, the visit to the CAR "on or around 2 November 2002", during which Mr Bemba met with the UN representative in the CAR (General Cissé) and President Patassé.[181] Third, a speech Mr Bemba gave at PK12 "sometime" in November 2002.[182] Fourth, the trial of Lieutenant Bomengo and others at the Gbadolite court-martial which commenced on 5 December 2002 with the report of conviction transmitted to Mr Bemba on 12 December 2002.[183] Fifth, the Zongo Commission which, between 25 and 28 December 2002, questioned witnesses in Zongo, with the head of the commission sending a report on 17 January 2003 to the MLC Secretary General, copied to Mr Bemba.[184] Sixth, a letter written by Mr Bemba to General Cissé dated 4 January 2003.[185] Seventh, correspondence in response to the FIDH Report, namely Mr Bemba's letter to the President of the FIDH of 20 February 2003 and the latter's reply on 26 February 2003.[186] Eighth, the establishment of the Sibut Mission at the "end of February" 2003.[187]

123. The Trial Chamber concluded that these measures were all "limited in mandate, execution, and/or results".[188] The Trial Chamber made the observations detailed below.

124. The Trial Chamber noted that in a letter dated 27 January 2003, General Cissé responded to Mr Bemba, copying President Patassé, stating that he would bring the contents of Mr Bemba's letter of 4 January 2003[189] to the attention of the UN Secretary-General, offering to participate in any initiative relating to an investigation, and recalling that the CAR and Chad had agreed to create a commission of inquiry.[190]

125. The Trial Chamber found that, "[o]n 13 February 2003, the FIDH issued a report on its investigative mission in Bangui between 25 November and 1 December

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[180] Conviction Decision, paras 711-712.
[181] Conviction Decision, paras 590-591.
[182] Conviction Decision, para. 594.
[183] Conviction Decision, paras 600, 712.
[184] Conviction Decision, paras 602-603.
[185] Conviction Decision, para. 723.
[186] Conviction Decision, paras 600, 610-611.
[187] Conviction Decision, para. 715, 725.
[188] Conviction Decision, para. 720.
[189] As to the contents of the letter to General Cissé, *see* Conviction Decision, para. 605 (footnotes omitted).
[190] Conviction Decision, para. 606.

2002 entitled *Crimes de guerre en République Centrafricaine 'Quand les éléphants se battent, c'est l'herbe qui souffre'*, […] based on interviews with various individuals, including CAR authorities, representatives of international organizations and NGOs, medical personnel, and numerous victims".[191]

126. The Trial Chamber noted that on 17 February 2003, *Le Citoyen* newspaper reported that in the context of the FIDH allegations, Mr Bemba had referred "to the fact that he had arrested eight soldiers for crimes committed in the CAR and that 'he expected an investigation to be initiated between Chad and the CAR'".[192]

127. The Trial Chamber found that Mr Bemba wrote a letter, dated 20 February 2003, to the FIDH President, Mr Sidiki Kaba, in which he: (i) referred to a previous telephone conversation; (ii) stated that he had ordered the establishment of a commission of inquiry charged with verifying allegations, identifying those implicated, and had put them at the disposal of the MLC's military justice system; (iii) referred to his correspondence with General Cissé and the MLC's intention to work with an international commission of inquiry; (iv) complained that the FIDH had not contacted the MLC in order to obtain information; and (v) offered to work with the FIDH.[193] The Trial Chamber found that in his letter of response, dated 26 February 2003, the President of the FIDH, Mr Kaba, noted that the MLC had prosecuted some individuals accused of pillaging but "expressed serious reservations as to the legitimacy, impartiality, and independence of those proceedings"; informed Mr Bemba that, in light of its mandate, the FIDH had formally seized this Court with the matter on 13 February 2003; and "encouraged Mr Bemba to transmit the information at his disposal to the ICC".[194]

128. The Trial Chamber found that the Mondonga Inquiry did not address the responsibility of commanders, did not question suspects about murder, did not pursue reports of rape, gave special treatment to Colonel Moustapha's battalion, contained irregularities such as questioning witnesses in the middle of the night, and resulted in

[191] Conviction Decision, para. 607.
[192] Conviction Decision, para. 609, referring to EVD-T-OTP-00832/CAR-OTP-0013-0106 at 0109.
[193] Conviction Decision, para. 610.
[194] Conviction Decision, para. 611.

only seven soldiers ever being arrested and tried, and only in relation to pillaging minor items and small sums of money.[195]

129. With respect to the Zongo Commission established following the trial of Lieutenant Bomengo, the Trial Chamber found that it was geographically limited to Zongo, only involved allegations of pillaging, all its members were MLC officials, it used a limited definition of pillaging, and appeared not to have interviewed any soldiers, despite the ability to do so.[196]

130. Finally, the Trial Chamber was critical of the Sibut Mission, noting that "[t]he reporters only spoke to a narrow selection of interviewees, a number of whom exercised public functions and were linked to President Patassé's regime. The interviews were conducted in a coercive atmosphere with armed MLC soldiers moving among the interviewees and nearby population."[197]

131. The Trial Chamber, having found that the measures taken by Mr Bemba were inadequate in the circumstances, noted that their inadequacy was "aggravated" by indications that they were not "genuine".[198] The Trial Chamber noted "corroborated evidence" that the "measures were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC".[199] It found that the "minimal and inadequate measures", when taken with evidence as to his motives for ordering such measures, "illustrate[d] that a key intention behind the measures Mr Bemba took was to protect the image of the MLC", concluding that "[h]is primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty".[200]

132. In relation to the motives behind specific measures taken, the Trial Chamber noted that the Mondonga Inquiry was "allegedly" established to: (i) counter media allegations by showing that only minor items had been looted from the CAR; (ii)

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[195] Conviction Decision, paras 589, 720.
[196] Conviction Decision, paras 601-602, 722.
[197] Conviction Decision, para. 725.
[198] Conviction Decision, para. 727.
[199] Conviction Decision, para. 728.
[200] Conviction Decision, para. 728.

demonstrate that action was taken to address allegations of crimes; (iii) vindicate the MLC leadership of responsibility for alleged acts of violence; and (iv) generally rehabilitate the MLC's image.[201] It noted further that the letter that Mr Bemba sent to General Cissé, the UN Representative in the CAR, was, according to witness testimony, intended to "demonstrate good faith and maintain the image of the MLC, particularly, against a backdrop of negotiations in the DRC as to, *inter alia*, the role of the MLC in the transitional institutions".[202] With respect to the withdrawal from the CAR, the Trial Chamber noted that this action was motivated, *inter alia*, by "pressure from the international community", "directly related to the negotiation of the Sun City agreements".[203]

133. The Trial Chamber noted that "[i]n addition to or instead of the insufficient measures" that Mr Bemba took and "in light of his extensive material ability to prevent and repress the crimes, he "could have, *inter alia*" taken the following measures:

> (i) ensured that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervised during the 2002-2003 CAR Operation; (ii) initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes; (iii) issued further and clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altered the deployment of troops, for example, to minimise contact with civilian populations; (v) removed, replaced, or dismissed officers and soldiers found to have committed or condoned any crimes in the CAR; and/or (vi) shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.[204]

134. The Trial Chamber further emphasised that whilst "one key measure at Mr Bemba's disposal was withdrawal of the MLC troops from the CAR", that measure was executed for political reasons and only in March 2003 whereas it found that Mr Bemba had first contemplated withdrawing in November 2002.[205]

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[201] Conviction Decision, para. 582.
[202] Conviction Decision, para. 604.
[203] Conviction Decision, paras 555, 730.
[204] Conviction Decision, para. 729.
[205] Conviction Decision, para. 730.

135. The Trial Chamber noted Mr Bemba's argument that the Prosecutor's assertions "that [he] could have conducted investigations must be viewed against the difficulties encountered by the CAR authorities in subsequent investigations when General Bozizé took power".[206] However, it deemed the "difficulties faced by members of the CAR national justice system in conducting a criminal investigation in the CAR shortly after an armed conflict" to be irrelevant.[207] Furthermore, the Trial Chamber deemed Mr Bemba's "purported comparison" between the Prosecutor's difficulties in conducting investigations in 2006 compared to Mr Bemba's abilities at the time of the 2002-2003 CAR Operation to be unpersuasive, emphasising that Mr Bemba "could and did create commissions and missions in reaction to allegations of crimes, two of which operated on CAR territory at the height of the 2002-2003 CAR Operation".[208]

136. The Trial Chamber ultimately found that Mr Bemba failed to take "all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities."[209] The Appeals Chamber notes that the Trial Chamber did not link Mr Bemba's putative failure to take adequate measures to any of the specific criminal acts – listed above at paragraph 118 – which he was ultimately convicted of.

2. Submissions of the parties and participants

137. Mr Bemba asserts that the Trial Chamber erred in finding that he failed to take all measures that were necessary and reasonable to prevent or repress the crimes committed by MLC forces, or to submit the matter to the competent authorities. Mr Bemba makes five submissions: (i) that the Trial Chamber failed to apply the correct legal standard; (ii) that it misappreciated the limitations of the MLC's jurisdiction and competence to investigate; (iii) that it ignored that Mr Bemba had asked the CAR Prime Minister to investigate the allegations; (iv) that it erred by taking into account irrelevant considerations; and (v) that the Trial Chamber's findings on the measures taken were unreasonable, misstated the evidence and

[206] Conviction Decision, para. 732.
[207] Conviction Decision, para. 732.
[208] Conviction Decision, para. 732.
[209] Conviction Decision, para. 734. *See also* para. 733.

ignored relevant evidence. Each submission and the Prosecutor's response thereto will be summarised in turn.

(a) The Trial Chamber failed to assess Mr Bemba's conduct against the correct legal standard

138. Mr Bemba argues that the Trial Chamber failed to address his conduct against the correct legal standard. First, Mr Bemba submits that a commander need only take such measures that are "within his material possibility".[210] Mr Bemba argues that the Trial Chamber failed to consider the "limitations arising from the unique conditions of [the] case" or assess what measures were feasible judged against his "objectively exceptional circumstances".[211] Mr Bemba asserts that the Trial Chamber erroneously compared his conduct to "a list of hypothetical measures" compiled with the "benefit of hindsight from its *post hoc* position of superior information rather than that which was available to [him] at the time".[212] He contends that he is not required to take "every possible measure" conceived in hindsight by jurists, and that it is not the Trial Chamber's role to speculate as to what measures might have "stemmed or mitigated the commission of the crimes"; he argues that its focus should have been on what was feasible and practicable at that time.[213] Mr Bemba further notes that the vast majority of international command cases that entailed a finding of guilt, arose where the commander in question either took no measures or was participating or present when the crimes were committed.[214]

139. Second, Mr Bemba submits that in compiling a list of theoretical measures, the Trial Chamber deprived him of the opportunity to present evidence as to why these measures were "not practicable, appropriate, possible (or even legal) in the circumstances".[215] He states that an accused must be given notice of the measures which the Trial Chamber found he could have taken as a commander and that it would be unfair to convict him without giving him the opportunity to defend himself,[216]

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[210] Appeal Brief, para. 338.
[211] Appeal Brief, para. 339.
[212] Appeal Brief, para. 340.
[213] Appeal Brief, para. 341.
[214] Appeal Brief, para. 328.
[215] Appeal Brief, para. 342.
[216] Appeals Hearing Transcript 10 January 2018, p. 58, lines 11-15; p. 121, line 18 to p. 122, line 3.

given that the jurisprudence does not provide a checklist of specific measures that a commander can take to shield himself from criminal liability.[217]

140. Mr Bemba cites, as examples, the Trial Chamber's reliance on his failure to share relevant information with the CAR authorities[218] and his failure to alter troop deployment to minimise contact with the civilian population, to demonstrate that, had he known of the "allegation that his duty to take necessary and reasonable measures encompassed altering the deployment of troops", he could have led evidence to show that such measures were "impossible" in the circumstances.[219] Mr Bemba argues that he was thus unable to challenge the Trial Chamber's finding that "he could have unilaterally redesigned the deployment of the MLC troops who were acting as part of a larger contingent", without putting lives at risk from "friendly fire".[220] He adds that the Prosecutor also accepts that he was entitled to notice, as she listed the measures that she alleged he could have taken in the document containing the charges and, in the Response to the Appeal Brief, argues that he received sufficient notice of those measures,[221] thereby "rightly acknowledging that Mr Bemba needed notice of them in order to be able to properly prepare his defence […] and confront these allegations".[222]

141. The Prosecutor maintains that Mr Bemba was "required to take *all* necessary and reasonable measures within his power to prevent or repress MLC crimes or to refer the matter to the competent authorities for investigation and prosecution".[223] The Prosecutor argues that the Trial Chamber did not err in assessing the measures which Mr Bemba could take in the CAR.[224] She argues that, even if the Trial Chamber had erred regarding some measures, this would not materially affect the Conviction Decision.[225] Moreover, in the view of the Prosecutor, there is no support for the claim that necessary and reasonable measures are separately subject to feasibility

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[217] Appeals Hearing Transcript 10 January 2018, p. 121, lines 8-16.
[218] Appeals Hearing Transcript 10 January 2018, p. 76, lines 12-14.
[219] Appeal Brief, paras 343-344; Appeals Hearing Transcript 10 January 2018, p. 59, lines 4-15.
[220] Appeal Brief, para. 343.
[221] Appeals Hearing Transcript 10 January 2018, p. 59, lines 16-24.
[222] Appeals Hearing Transcript 10 January 2018, p. 58 line 16 to p. 59 line 3.
[223] Response to the Appeal Brief, para. 197 (emphasis in original).
[224] Response to the Appeal Brief, para. 203.
[225] Response to the Appeal Brief, para. 197.

requirements (in the sense of not being detrimental to military advantage), provided they are necessary and reasonable.[226]

142. The Prosecutor further submits that "an accused need not be notified in the charges of the specific measures that the Trial Chamber finds he could have taken".[227] She asserts that, instead, an accused has to be notified of "the conduct by which he may be found to have failed to take the necessary and reasonable measures to prevent such crimes or punish his subordinates. […] So what must be pleaded are the superior's culpable omissions, or […] his insufficient actions".[228] She argues that the *ad hoc* tribunals have not required that the charges list each potential measure and have generally been satisfied with the charges pleading that the accused did not take the necessary and reasonable measures to prevent or punish criminal acts of subordinates.[229] Accepting Mr Bemba's proposition that certain measures may be required in one case but not in another, the Prosecutor argues that from the impugned list of measures set out by the Trial Chamber in this case, four are inherent in the duties of a commander and would apply in every case (namely: (i) ensuring proper international humanitarian law training and adequate supervision; (ii) conducting investigations and prosecutions and punishments as necessary; (iii) issuing proper orders; and (iv) replacing, dismissing and removing subordinates).[230] Whilst conceding that the failure to share information with the CAR authorities or other authorities might be regarded as specific to this case, the Prosecutor argues that it could be regarded as a "subset" of a commander's more general duty to take measures to submit a matter to a competent authority.[231]

143. The Prosecutor maintains that, in any event, Mr Bemba received "sufficient notice" of the measures from the Confirmation Decision and auxiliary documents, citing the Corrected Revised Second Amended Document Containing the Charges, the Prosecutor's Updated Summary Presentation of Evidence and the In-Depth Analysis Chart of Incriminatory Evidence; and argues that while these documents may have

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[226] Prosecutor's Submissions further to the Hearing, para. 9
[227] Appeals Hearing Transcript 10 January 2018, p. 73, lines 12-15
[228] Appeals Hearing Transcript 10 January 2018, p. 73, lines 21-23; p. 74, lines 12-14.
[229] Appeals Hearing Transcript 10 January 2018, p. 73, line 15 to p. 74, line 6.
[230] Appeals Hearing Transcript 10 January 2018, p. 122, lines 6-19.
[231] Appeals Hearing Transcript 10 January 2018, p. 122, lines 18-23.

used wording different to the Conviction Decision, all the measures that the Trial Chamber found Mr Bemba could have taken "fell within the scope of the notice provided to Bemba".[232] The Prosecutor references parts of the Confirmation Decision concerning Mr Bemba's control over the MLC troops, such as: his power to appoint, promote, and dismiss MLC commanders; his power to initiate investigations and prosecutions; his power to arrest; his power to deploy selected battalions to the CAR; the maintenance of contact with the MLC Commander of Operations in the CAR; and the order given by him to withdraw.[233] The Prosecutor references parts of the Corrected Revised Second Amended Document Containing the Charges that addressed Mr Bemba's control over the MLC troops, including that he controlled recruitment and redistribution of troops; gave instructions for the troops to progress in the field; received daily reports on operations and all matters related to MLC troops; and that he "retained control of MLC forces through his direct involvement in strategic planning and tactical support of field operations".[234] The Prosecutor notes in particular that Mr Bemba "was given notice of the fact that he had the power to 'alter the deployment of troops to minimise contact with civilian populations' […] through the factual allegation that Bemba deployed the MLC troops in the CAR and that they remained under his effective command and control and that he had the power to withdraw them".[235]

144. Mr Bemba in his reply reiterates that "a trier of fact must have regard to what was feasible in the circumstances prevailing at the time".[236] As to whether he had notice of the Trial Chamber's characterisation of altering the deployment of troops as a "necessary and reasonable measure", Mr Bemba maintains that "minimising contact with the civilian population" is a "specific idea", one not encompassed by his alleged control over the troops, and a finding against which he could not reasonably have known to defend.[237] Mr Bemba further argues that the Prosecutor is wrong that at the

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[232] Response to the Appeal Brief, para. 202; Appeals Hearing Transcript 10 January 2018, p. 123, line 3.
[233] Response to the Appeal Brief, fn. 743, referring to Confirmation Decision, paras 457, 460-464, 474, 477.
[234] Response to the Appeal Brief, fn. 744, referring to Corrected Revised Second Amended Document Containing the Charges, paras 22-31, 58-71.
[235] Response to the Appeal Brief, fn. 745.
[236] Reply to the Response to the Appeal Brief, para. 38.
[237] Reply to the Response to the Appeal Brief, para. 39, referring to Appeal Brief, paras 343-344.

ad hoc tribunals there was no requirement to list the measures that a commander should have taken.[238] He states that indictments from the ICTY including the cases of *Boškoski and Tarčulovski, Mladić, Halilović,* and *Hadžihasanović and Kubura* listed measures that a commander should have taken because it was part of giving an accused the opportunity to defend himself.[239] He argues that the level of detail in the indictments of the ICTR cases are lower as the commanders were often taking no measures or were the perpetrators of the crimes themselves.[240] Nonetheless, he notes that the judgments did not provide for a list of measures that the accused should have taken, as the Trial Chamber did in this case.[241] He further argues that the fact that the Prosecutor listed specific measures in the indictment in this case as well as the *Ntaganda case* and the *Gbagbo case* is a strong indicator that specific measures should be listed in the indictment.[242]

(b) The Trial Chamber misappreciated the limitations on the MLC's jurisdiction and competence to investigate

145. Mr Bemba argues that, having failed to assess his conduct in light of established legal principles, the Trial Chamber was "[u]nbridled by considerations of what was feasible in the circumstances, [and] viewed Mr. Bemba's ability to investigate in the CAR as being limitless".[243] Mr Bemba argues that the Trial Chamber thus erred in not taking into account the limitations on his ability to conduct investigations in the CAR.[244]

146. Mr Bemba maintains that submissions on the obstacles faced by MLC investigations at the time, arising from territorial (i.e. state sovereignty) and jurisdictional limitations, and the difficulties in conducting investigations in a foreign warzone, were unreasonably dismissed or ignored by the Trial Chamber.[245] Mr Bemba argues that an investigative mission by the MLC in the CAR would have

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[238] Appeals Hearing Transcript 10 January 2018, p. 94, lines 21-23.
[239] Appeals Hearing Transcript 10 January 2018, p. 94, line 21 to p. 95, line 5, referring to *Halilović* Indictment; *Hadžihasanović and Kubura* Third Amended Indictment; *Boškoski and Johan Tarčulovski* Amended Indictment, paras 15-17; *Mladić* Fourth Amended Indictment.
[240] Appeals Hearing Transcript 10 January 2018, p. 95, lines 11-15.
[241] Appeals Hearing Transcript 10 January 2018, p. 95, lines 16-20.
[242] Appeals Hearing Transcript 10 January 2018, p. 95, line 22 to p. 96, line 2.
[243] Appeal Brief, paras 345, 355.
[244] Appeal Brief, paras 345-354.
[245] Appeal Brief, paras 346, 353.

required assistance from the CAR authorities.[246] He submits that such difficulties were also corroborated by witness testimony (from P36 and D48), the Zongo Commission Report and General Seara's Report, all of which indicated that any investigation carried out in the CAR was limited and depended on the cooperation of the CAR authorities.[247] "The failure to address this evidence and consider the realities on the ground", Mr Bemba argues, affects "the entirety of the Trial Chamber's findings on measures", bearing on its findings that he "failed to initiate genuine and full investigations into the commission of crimes, failed to share relevant information and support investigative efforts, and made no effort to refer the matter to the CAR authorities, or cooperate with international efforts to investigate".[248]

147. In response, the Prosecutor argues that the Trial Chamber analysed Mr Bemba's investigative powers reasonably.[249] She submits that the Trial Chamber "carefully analysed the breadth of [Mr Bemba's] concrete powers to discipline his forces, including any relevant limitations", in arriving at its conclusion that he had "ultimate disciplinary authority over MLC troops in the CAR", and was thus "the competent authority to investigate the crimes and to establish courts-martials".[250] The Prosecutor avers that this conclusion was bolstered by evidence of the instances in which Mr Bemba exercised disciplinary powers at various times in the CAR: in establishing the Mondonga Inquiry; in dispatching an MLC delegation to Sibut; in court-martialling seven soldiers who were detained in Bangui under Mr Bemba's authority; and broader findings on Mr Bemba's authority over MLC military operations in the CAR.[251] Furthermore, the Prosecutor argues that the Trial Chamber did not err by not expressly referring to the evidence that Mr Bemba relies upon to establish that MLC activity in the CAR was limited and reliant on CAR cooperation.[252] In that regard, the Prosecutor submits that: (i) witness P36's evidence "was immaterial to assessing Mr Bemba's authority over the Mondonga Inquiry in particular or over MLC

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[246] Appeal Brief, paras 347-348.
[247] Appeal Brief, paras 348-353.
[248] Appeal Brief, para. 354 (footnotes omitted).
[249] Response to the Appeal Brief, para. 204.
[250] Response to the Appeal Brief, para. 204 (footnotes omitted).
[251] Response to the Appeal Brief, para. 205. The Prosecutor argues that the Trial Chamber's specific finding on Mr Bemba's disciplinary power is based on the Trial Chamber's "broader findings". *See* Response to the Appeal Brief, para. 205, referring to Conviction Decision at paras 382-403, 427-447, 449.
[252] Response to the Appeal Brief, para. 206.

discipline in the CAR generally";[253] (ii) the reference in the Zongo Commission Report to "one interviewee's suggestions that the Mondonga Inquiry included FACA elements […] had no impact on Mr Bemba's authority" over that Inquiry and need not have been addressed;[254] (iii) the "Trial Chamber expressly relied on D48 to find that Mr Bemba set up the Zongo Commission" and "thus did not fail to consider this evidence", and nor did such evidence establish, in any event, that Mr Bemba lacked the power to investigate MLC crimes in the CAR;[255] and (iv) the "Trial Chamber reasonably gave no weight to General Seara's evidence and did not err by its approach to his report."[256]

(c) The Trial Chamber ignored that Mr Bemba asked the CAR Prime Minister to investigate the allegation

148. Mr Bemba argues that the Trial Chamber ignored "directly relevant evidence" from D48 that Mr Bemba wrote to the Prime Minister of the CAR, specifically notifying the latter of the allegations of crimes committed by MLC troops.[257] In this regard, Mr Bemba argues that D48 is a credible witness with direct knowledge of the events,[258] who testified that Mr Bemba had written to the CAR Prime Minister "asking for an international commission of inquiry to be established to look into these particular events", a course of action that was taken, in the opinion of witness D48, "given that there was an impossible situation to verify what had actually happened in the Central African Republic territory, and they themselves, they had to show diligence in this regard and possibly investigate and pass on the results of the investigation to us".[259] Moreover, Mr Bemba asserts that D48 recalls the CAR Prime Minister responding, but noted that despite the provision of information, the [redacted] "did not receive any correspondence or complaints from the CAR authorities".[260] Mr Bemba argues that this testimony, from a witness whom the Trial Chamber relied on unreservedly throughout the judgment to support findings adverse to Mr Bemba, is clearly relevant to refute the finding that Mr Bemba made

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[253] Response to the Appeal Brief, para. 206.
[254] Response to the Appeal Brief, para. 206.
[255] Response to the Appeal Brief, para. 206 (emphasis in original omitted).
[256] Response to the Appeal Brief, para. 206 (footnotes omitted).
[257] Appeal Brief, paras 357, 360.
[258] Appeal Brief, paras 356, 359.
[259] Appeal Brief, para. 357, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 55, lines 7-10.
[260] Appeal Brief, para. 358.

"no effort to refer the matter to CAR authorities".[261] Mr Bemba argues that D48's evidence is corroborated by the fact that Mr Bemba corresponded with the UN representative in the CAR and the President of the FIDH, deemed by Mr Bemba to be "better placed to investigate";[262] as well as Mr Bemba's contact with the CAR authorities and their involvement in investigating the allegations, referring *inter alia* to Mr Bemba's meetings with President Patassé.[263]

149. The Prosecutor responds that the "Trial Chamber did not err by not expressly referring to witness D48's evidence" regarding the letter to the CAR Prime Minister given the Trial Chamber's finding that Mr Bemba retained primary authority to sanction MLC troops for their conduct in the CAR and that the CAR authorities "could not have successfully investigated alleged MLC crimes".[264] The Prosecutor further argues that there is no evidence that the letter to the CAR Prime Minister contained any "concrete information about the MLC crimes of which Mr Bemba knew", thereby not affecting the conclusion of the Trial Chamber that he "failed to share relevant information with the CAR authorities, or to refer the matter to the CAR authorities".[265] The Prosecutor avers that, in any event, a request by Mr Bemba to the CAR authorities to set up an international commission of inquiry, as relayed by D48, is similar to the requests he made to the UN and to the FIDH, which did not amount to adequate or genuine measures to address allegations of MLC crimes, especially as there was no evidence that Mr Bemba followed up on these requests, including that to the CAR Prime Minister.[266] Given that the Trial Chamber found that Mr Bemba had failed to empower MLC officials to "fully and adequately investigate and prosecute allegations of crimes" and could not therefore be said to have submitted the matter to the competent authorities for investigation and prosecution, the Prosecutor argues that the letter to the CAR Prime Minister, which "referred to a potential measure other than empowering the MLC officials", was thus irrelevant.[267]

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[261] Appeal Brief, para. 359-360.
[262] Appeal Brief, para. 359, referring to Conviction Decision, paras 604-606, 610-611.
[263] Appeal Brief, para. 359, referring to Conviction Decision, paras 582-591, 604-606, 610-611.
[264] Response to the Appeal Brief, paras 207-208.
[265] Response to the Appeal Brief, para. 210.
[266] Response to the Appeal Brief, para. 211, referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 51, lines 2-8.
[267] Response to the Appeal Brief, para. 209.

150. In reply, Mr Bemba contests the Prosecutor's argument that the letter was irrelevant on the ground that it was not the role of the CAR authorities to investigate acts allegedly committed by the MLC, given that the Trial Chamber impugns his failure to refer the matter to the CAR authorities, against which he reiterates his objections.[268]

(d) The Trial Chamber erred in taking into account irrelevant considerations

151. Mr Bemba argues that "the motivation of a commander in taking measures is irrelevant to the question of whether they were necessary and reasonable".[269] As such, Mr Bemba argues that the Trial Chamber had regard to irrelevant considerations, in finding that the measures he took were borne out of the "primary motivation" of "a desire to counter public allegations".[270] Claiming similarity between the measures taken in the CAR and those taken by the President of France at a time when "[t]he reputation of the French Army [wa]s undeniably at stake",[271] Mr Bemba asserts that it is undoubtable that the commander-in-chief would seek to preserve the reputation of his army, his troops, and the "Republic as a whole" and argues that, should the measures taken in this respect be motivated by the aforementioned desire, "this renders them no less reasonable, and no less necessary".[272] Moreover, he argues that there are no examples of command cases from the ICTY where the motives for taking measures were ground for liability.[273] He maintains that, in fact, the ICTY Appeals Chamber reiterated "the irrelevance and inscrutability of motives in criminal law".[274] Thus, in Mr Bemba's view, the Trial Chamber's finding that measures taken by a commander are entitled to evidentiary weight only when supported by evidence that "he or she acted with […] commendable motives is unwarranted by state practice and unsupportable in practice".[275] He argues that, nonetheless, the Trial Chamber viewed

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[268] Reply to the Response to the Appeal Brief, para. 40.
[269] Appeal Brief, para. 361.
[270] Appeal Brief, para. 361.
[271] Appeal Brief, para. 363.
[272] Appeal Brief, paras 362-363.
[273] Appeals Hearing Transcript 10 January 2018, p. 57, lines 13-20.
[274] Appeals Hearing Transcript 10 January 2018, p. 57, lines 17-20.
[275] Mr Bemba's Submissions further to the Hearing, para. 28.

the measures in light of his motivation and discredited all of the measures that he took.[276]

152. In any event, Mr Bemba avers that such findings of the Trial Chamber of an ulterior motive on his part are unfounded, since, having been based on circumstantial rather than direct evidence, they were not the only reasonable inferences available, as there was evidence showing that "Mr Bemba was motivated by a desire for a disciplined army, and that within the MLC discipline was prioritised".[277]

153. As evidence of his desire for a disciplined army, Mr Bemba cites the testimony of witness P15, who testified that MLC was structured in the same way as a regular army,[278] and that Mr Bemba "did not tolerate" offences such as rape or murder.[279] As for evidence of discipline being a priority in the MLC, Mr Bemba cites P15 who stated that, "[g]enerally speaking, as it has been mentioned, discipline was crucial and there were no excesses or aggravated criminal behaviour in the territories controlled by the MLC."[280] He also cites D21 who stated that the attitude of the "political leaders" was that any act that "alienated [the MLC] from the population and its support was to be punished or sanctioned absolutely," and that given the importance of discipline, the MLC had a Code of Conduct[281] and that "there were mechanisms […] to inform [the soldiers of] the content of the Code of Conduct."[282] Mr Bemba refers to P36, who stated that "a great deal" of emphasis was put on military discipline

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[276] Appeals Hearing Transcript 10 January 2018, p. 57, line 11 to p. 58, line 3, referring to Conviction Decision, para. 728.
[277] Appeal Brief, para. 364, referring to Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 39, lines 14-18; Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Red2-Eng, p. 48, lines 5-6; Transcript of 10 February 2012, ICC-01/05-01/08-T-210-Red2-Eng, p. 43, lines 21-25; p. 44, lines 7-8; Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 51, lines 8-20; Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 43, lines 1-7; Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 21, lines 16-22; Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 36, line 9 to p. 37, line 3; p. 43, lines 9-19; Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Red2-Eng, p. 50, line 5 to p. 51, line 4.
[278] Appeal Brief, para. 364, referring to Transcript of 7 February 2012, ICC-01/05-01/08-T-207-Red2-Eng, p. 48, lines 5-6.
[279] Appeal Brief, para. 364, referring to Transcript of 10 February 2012, ICC-01/05-01/08-T-210-Red2-Eng, p. 43, lines 21-25.
[280] Appeal Brief, para. 364, referring to Transcript of 10 February 2012, ICC-01/05-01/08-T-210-Red2-Eng, p. 44, lines 7-8.
[281] Appeal Brief, para. 364, referring to Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 36, line 9 to p. 37, line 3.
[282] Appeal Brief, para. 364, referring to Transcript of 8 April 2013, ICC-01/05-01/08-T-301-Red2-Eng, p. 43, lines 9-19.

and that the soldiers where trained in their duties according to the Code of Conduct.[283] He cites D39, who testified that there was no policy to attack the civilian population, as they needed to maintain good relations with them and that, with respect to the MLC authorities' attitude towards troops' "misdeeds," "the policy was to punish the soldiers severely."[284] Mr Bemba also cites D16, who testified that each unit had its own disciplinary council responsible for ensuring that the population was not maltreated,[285] D49 who testified about the existence of political commissioners who would disseminate knowledge about the content of the Code of Conduct,[286] and finally P45 who testified that the duty of the political instructor included teaching the troops about how to treat the civilian population.[287]

154. The Prosecutor responds that the Trial Chamber committed no error as it was apparent from the corroborated evidence that Mr Bemba was motivated to "counter public allegations and [to] rehabilitate the public image of the MLC", and not to genuinely take all necessary and reasonable measures.[288] The Prosecutor submits that, "having analysed the scope, execution and effect of the measures taken by Bemba, the [Trial] Chamber reasonably concluded that they were 'a grossly inadequate response', were 'not properly and sincerely executed', and were 'not genuine'".[289] Finally, the Prosecutor submits that comparisons made by Mr Bemba to, *inter alia*, actions of the French President are inapposite and unsupported.[290]

155. The Prosecutor argues that the motives of the superior to take necessary and reasonable measures is not something that must be established in all cases, and can be relevant when assessing the adequacy of the measures taken;[291] for instance, an

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[283] Appeal Brief, para. 364, referring to Transcript of 13 March 2012, ICC-01/05-01/08-T-213-Red2-Eng, p. 51, lines 8-20.
[284] Appeal Brief, para. 364, referring to Transcript of 22 April 2013, ICC-01/05-01/08-T-308-Red2-Eng, p. 50, line 5 to p. 51, line 4.
[285] Appeal Brief, para. 364, referring to Transcript of 26 November 2012, ICC-01/05-01/08-T-275-Red2-Eng, p. 21, lines 16-22.
[286] Appeal Brief, para. 364, referring to, Transcript of 19 November 2012, ICC-01/05-01/08-T-270-Red2-Eng, p. 43, lines 1-7.
[287] Appeal Brief, para. 364, referring to, Transcript of 31 January 2012, ICC-01/05-01/08-T-202-Red2-Eng, p. 39, lines 14-18.
[288] Response to the Appeal Brief, para. 212, referring to Conviction Decision, para. 728.
[289] Response to the Appeal Brief, para. 212 (footnotes omitted), referring to Conviction Decision, paras 574-620, 720-727.
[290] Response to the Appeal Brief, para. 213.
[291] Appeals Hearing Transcript 10 January 2018, p. 70, line 21 to p. 71, line 4.

enquiry into motives may not be relevant for a commander who has taken all the measures that were necessary and reasonable.[292] The Prosecutor submits that in the present case, however, Mr Bemba took "minimal, limited and insufficient measures" which thus require an investigation into his motives to "illuminate the genuineness" of the measures taken, and to determine whether the commander took all necessary and reasonable measures within his material possibility.[293] The Prosecutor states that in the *Boškoski and Tarčulovski* case, motivations to do more than what was required were deemed irrelevant as the accused had taken necessary and reasonable measures,[294] whereas in the *Strugar* case, motivations were found to be relevant in finding that the accused did not take necessary and reasonable measures because he knew that the investigation into his subordinates' crimes was a sham and that it was done as damage control.[295] The Prosecutor disagrees with Mr Bemba's assertion that he was found liable based on his motivations alone.[296] She avers that the Trial Chamber first reviewed the measures taken by Mr Bemba before reviewing his motivations and concluding that he used minimal and inadequate measures to address the MLC crimes.[297] Therefore, in her view, the Trial Chamber was reasonable to consider Mr Bemba's motivations together with the evidence of the measures taken to reach its conclusion that he had not taken all necessary and reasonable measures.[298]

156. In reply, Mr Bemba submits that the Prosecutor misinterpreted his argument; he did not argue that the Trial Chamber relied on his motivations alone when finding that he failed to take measures.[299] He argues that even though his motivation was only one of the factors relied upon, it remains problematic.[300] Mr Bemba challenges the Prosecutor's reference to the *Strugar* case, on the ground that the trial chamber in that case did not use the motivation of the accused to undermine the measures taken, which is the key difference.[301] Mr Bemba further argues that General Strugar was

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[292] Appeals Hearing Transcript 10 January 2018, p. 71, lines 6-8.
[293] Appeals Hearing Transcript 10 January 2018, p. 71, lines 14-19.
[294] Appeals Hearing Transcript 10 January 2018, p. 71, line 24 to p. 72, line 3.
[295] Appeals Hearing Transcript 10 January 2018, p. 72, lines 4-9.
[296] Appeals Hearing Transcript 10 January 2018, p. 72, lines 11-14.
[297] Appeals Hearing Transcript 10 January 2018, p. 72, line 15 to p. 73, line 9.
[298] Appeals Hearing Transcript 10 January 2018, p. 73, lines 6-9.
[299] Appeals Hearing Transcript 10 January 2018, p. 93, line 23 to p. 94, line 1.
[300] Appeals Hearing Transcript 10 January 2018, p. 94, lines 1-3.
[301] Appeals Hearing Transcript 10 January 2018, p. 94, lines 4-10.

found liable on the basis that he did not take any necessary and reasonable measures and not because of his motivations.[302]

157. The Victims argue that the motivation of the commander must be taken into consideration together with the circumstances of the case.[303] They submit that in the present case, Mr Bemba took a number of steps that were in his own personal interest and the interest of the MLC, rather than to keep crimes from being committed.[304]

(e) The findings on measures taken are unreasonable, misstate the evidence and ignore relevant evidence

158. Mr Bemba makes a number of submissions on various aspects of the Trial Chamber's findings on the evidence, arguing that the Trial Chamber "disregarded or failed to give a reasoned opinion as to corroborated evidence which cast doubt on its findings, and took into account irrelevant or unreasonable considerations to distort otherwise exculpatory acts and events".[305]

159. First, Mr Bemba contends that in its findings on the adequacy of measures he took, the Trial Chamber failed to refer to the agreement between Chad and the CAR to create an international commission of inquiry to investigate allegations of crimes during the 2002-2003 intervention,[306] whereas it had acknowledged that General Cissé had referred to such an agreement in his response to Mr Bemba's letter requesting UN assistance in conducting an investigation.[307] Mr Bemba argues that, since the letter was copied to President Patassé, the latter would have been in a position to have corrected any false impression as to the commission's existence.[308] Mr Bemba maintains that the existence of the commission was contextually corroborated by his request to the CAR Prime Minister to establish an international commission of inquiry as relayed by D48, and a February 2003 radio interview during which President Patassé stated that a commission had been sent to investigate

[302] Appeals Hearing Transcript 10 January 2018, p. 94, lines 10-20.
[303] Appeals Hearing Transcript 10 January 2018, p. 88, lines 12-14.
[304] Appeals Hearing Transcript 10 January 2018, p. 88, lines 19-21.
[305] Appeal Brief, para. 380.
[306] Appeal Brief, para. 365.
[307] Appeal Brief, para. 366.
[308] Appeal Brief, para. 366.

allegations of crimes.[309] He argues that these factors were not addressed by the Trial Chamber.[310] "Having been told that two states would initiate an investigation", Mr Bemba argues that "a reasonable commander acting in good faith could justifiably have decided to wait for the outcome of that investigation".[311] Furthermore, he submits that given General Cissé's assurance that he would "seise the UN Secretary General", a reasonable commander could also expect the UN to provide the MLC with "actionable information upon which further punitive measures could be based".[312]

160. Second, Mr Bemba contends that he "did not sit and wait"' and that the Trial Chamber erred in holding that he took no concrete measures, given that he initiated the Sibut Mission and wrote to, and telephoned, the FIDH President.[313] He argues that the Trial Chamber's criticism that he took no further concrete measures is "wholly unreasonable, and misstates the evidence".[314] He contests the Trial Chamber's findings that he should have taken concrete measures in light of his correspondence with the President of the FIDH, arguing that the 2003 FIDH report was founded on anonymous hearsay, with the names of all witnesses and sources withheld, no identification of MLC troops, and that no good faith commander could have started arresting people without a reasonable basis.[315] Furthermore, Mr Bemba states that, since the President of the FIDH provided information to the ICC, not the MLC, he did not have the information needed to take the steps that the Trial Chamber criticised him of not taking.[316]

161. Third, Mr Bemba contends that the Trial Chamber misstated the evidence in finding that the Mondonga Inquiry and Zongo Commission were limited in scope and duration, an inaccurate and unreasonable finding, in that "[a] commander who reacts immediately to crimes cannot then be impugned for the investigation not

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[309] Appeal Brief, para. 367, referring, *inter alia*, to referring to Transcript of 6 November 2012, ICC-01/05-01/08-T-267-Red2-Eng, p. 51, lines 5-8.
[310] Appeal Brief, para. 367.
[311] Appeal Brief, para. 368.
[312] Appeal Brief, para. 368.
[313] Appeal Brief, para. 369.
[314] Appeal Brief, para. 369.
[315] Appeal Brief, para. 370.
[316] Appeal Brief, para. 371.

encompassing future allegations".[317] As support for the argument that the Mondonga Inquiry continued throughout the 2002-2003 CAR Operation, he cites the testimony of witness P36 (a witness he maintains the Trial Chamber had deemed credible on the Mondonga Inquiry) who stated that the committee set up by Mr Bemba "did work in Bangui right up until the end, almost to the end of operations".[318] Mr Bemba argues that the Trial Chamber's failure to refer to P36's evidence on this point is "particularly egregious", given that his evidence was corroborated by the cover report of the Bomengo case file, which stated that "the operation continues to arrest those who may be involved directly or indirectly".[319] In relation to the scope of the Mondonga Inquiry, Mr Bemba challenges as "inaccurate and unreasonable" the Trial Chamber's conclusion that the Mondonga Inquiry was limited to allegations of pillaging, contending that the Trial Chamber ignored directly relevant evidence from D19 who testified that Colonel Moustapha was questioned as to rape and killing during the course of the inquiry.[320]

162. Fourth, Mr Bemba contends that the Trial Chamber distorted the evidence of the Sibut Mission.[321] He submits that, contrary to the Trial Chamber's findings that the interviewers spoke to a narrow selection of people some of whom were public officials, there was no evidence that MLC officials chose the people to whom they spoke, and that, in any case, speaking with local authorities to get an overview of the situation would be normal (considering that prosecution witnesses who were public officials under General Bozizé, and members of the government of President Kabila were deemed credible).[322] Mr Bemba avers that it was "an abuse of the Trial Chamber's discretion" to find that the armed MLC troops created a "coercive atmosphere" during the interviews, given that it was a warzone.[323]

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[317] Appeal Brief, para. 372.
[318] Appeal Brief, paras 372-373, referring to Transcript of 15 March 2012, ICC-01/05-01/08-T-215-Red2-Eng, p. 6, lines 21-24 (Q. How long did this fact-finding committee conduct its investigation? A. I couldn't tell you exactly how long it was. One or two weeks, perhaps a month, but I do know that the committee that was set up by Jean-Pierre Bemba did work in Bangui right up until the end, almost to the end of operations.)
[319] Appeal Brief, para. 373, referring to EVD-T-OTP-00393/CAR-DEF-0002-0001.
[320] Appeal Brief, paras 374, referring to Transcript of 26 February 2013, ICC-01/05-01/08-T-285-Red2-Eng, p. 42, lines 6-11.
[321] Appeal Brief, para. 376.
[322] Appeal Brief, paras 377-378.
[323] Appeal Brief, para. 379. *See also* Appeal Brief, para. 377.

163. The Prosecutor responds that Mr Bemba is simply re-litigating trial arguments and "fails to demonstrate that the Chamber failed to consider relevant evidence or was otherwise unreasonable".[324] She argues that the Trial Chamber acted reasonably in giving limited weight to evidence that the CAR and Chad had agreed to create an international commission of inquiry (acknowledging that General Cissé had referred to such an agreement in correspondence with Mr Bemba), but "did not find that Bemba was simply allowed to wait for the outcome of a foreign investigation".[325] The Prosecutor avers that the Trial Chamber found that there was no evidence of any concrete measures taken as a result of their correspondence.[326] The Prosecutor argues that "[t]his finding must be viewed together with the Chamber's finding that Bemba – and not the CAR authorities – held and exercised primary disciplinary authority over the MLC contingent in the CAR".[327]

164. The Prosecutor submits that Mr Bemba's reactions to the FIDH Report and the Sibut Mission were grossly inadequate responses to the allegations of MLC crimes[328] and "[a]ccordingly, the Chamber was accurate when it found that these initiatives did not amount to concrete measures".[329] Further, the Prosecutor maintains that the Trial Chamber reasonably found the Mondonga Inquiry to be "a grossly inadequate response to the allegations of MLC crimes", arguing that the fact that it "continued until the end of the 2002-2003 CAR Operation demonstrates no error, because there was no evidence that, even at a later stage, it was conducted differently or produced different outcomes".[330] She asserts that there was similarly no error in the Trial Chamber's finding that the Mondonga Inquiry did not question suspects about murder and did not pursue reports of rape, given that the evidence relied upon by Mr Bemba was found to be unreliable.[331] The Prosecutor argues that Mr Bemba simply disagrees

[324] Response to the Appeal Brief, para. 214.
[325] Response to the Appeal Brief, para. 215.
[326] Response to the Appeal Brief, para. 215.
[327] Response to the Appeal Brief, para. 215.
[328] Response to the Appeal Brief, paras 216, 218.
[329] Response to the Appeal Brief, para. 216 (emphasis in original omitted).
[330] Response to the Appeal Brief, para. 217 (footnote omitted).
[331] Response to the Appeal Brief, para. 217.

with the Trial Chamber's evaluation of the evidence without showing that the Trial Chamber's findings were unreasonable.[332]

165. In reply, Mr Bemba reiterates that there is no requirement under international law to follow-up on measures taken.[333] He argues that the "genuineness of a commander's measures cannot be dependent on the reaction of those whom he asks for help".[334]

3. Determination by the Appeals Chamber

166. As set out above, Mr Bemba raises several arguments against the Trial Chamber's finding that he "failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities".[335] His overall contention is that no reasonable trial chamber could have reached this conclusion. For the reasons that follow, the Appeals Chamber finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber's finding was indeed unreasonable because it was tainted by serious errors.

167. The scope of the duty to take "all necessary and reasonable measures" is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.[336] Indeed, a commander cannot be blamed for not having done something he or she had no power to do.

168. It follows that an assessment of whether a commander took all "necessary and reasonable measures" will require consideration of what measures were at his or her disposal in the circumstances at the time. This is consistent with international jurisprudence.[337] An assessment of whether a commander took all "necessary and

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[332] Response to the Appeal Brief, para. 219.
[333] Reply to the Response to the Appeal Brief, para. 41.
[334] Reply to the Response to the Appeal Brief, para. 41.
[335] Conviction Decision, para. 734.
[336] *See* *Čelebići* Trial Judgment, paras 394-395; *Aleksovski* Trial Judgment, para. 78; *Blaškić* Trial Judgment, para. 302; *Halilović* Trial Judgment, para. 73; *Karadžić* Trial Judgment, para. 587.
[337] *See e.g.* the measures at the disposal of commanders in *Strugar* Trial Judgment, para. 374-378; *Halilović* Trial Judgment, para. 74; *Renzaho* Trial Judgment, para. 755; *Karadžić* Trial Judgment, para. 588.

reasonable measures" must be based on considerations of what crimes the commander knew or should have known about and at what point in time.

169. However, it is not the case that a commander must take each and every possible measure at his or her disposal. Despite the link between the material ability of a commander to take measures (which is directly connected to his or her level of authority) and what he or she might reasonably have been expected to do, it is not the case that a commander is required to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility. Article 28 only requires commanders to do what is necessary and *reasonable* under the circumstances.

170. In assessing reasonableness, the Court is required to consider other parameters, such as the operational realities on the ground at the time faced by the commander. Article 28 of the Statute is not a form of strict liability. Commanders are allowed to make a cost/benefit analysis when deciding which measures to take, bearing in mind their overall responsibility to prevent and repress crimes committed by their subordinates. This means that a commander may take into consideration the impact of measures to prevent or repress criminal behaviour on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes. There is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight. Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time. The trial chamber must specifically identify what a commander should have done *in concreto*. Abstract findings about what a commander might theoretically have done are unhelpful and problematic, not least because they are very difficult to disprove. Indeed, it is for the trial chamber to demonstrate in its reasoning that the commander did not take specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken. It is not the responsibility of the accused to show that the measures he or she did take were sufficient.

171. Turning to the case at hand, Mr Bemba submits that the Trial Chamber did not take into account what was feasible and possible for him in the circumstances, given the "unique conditions of this case".[338] In other parts of his appeal he argues that his case was one of non-linear command, for which there is one sole precedent in the jurisprudence of the *ad hoc* tribunals.[339] The Appeals Chamber notes that the Trial Chamber had some regard to Mr Bemba's submissions as to the difficulties he faced in implementing relevant investigatory measures, but found these reasons to be unpersuasive.[340] In particular, the Trial Chamber noted that Mr Bemba "could and did create commissions and missions in reaction to allegations of crimes, two of which operated on CAR territory at the height of the 2002-2003 CAR Operation".[341] In finding that Mr Bemba did not adopt all "necessary and reasonable measures" it arrived at this conclusion "in light of his extensive material ability to prevent and repress the crimes".[342] Nevertheless, while the Trial Chamber's finding in this respect has to be read alongside its earlier findings as to the extensiveness of Mr Bemba's control over the MLC forces in the CAR,[343] the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability, as a remote commander, to take measures.

172. In this regard, the Appeals Chamber also notes Mr Bemba's argument that the Trial Chamber ignored the testimony of witness P36 demonstrating that the "MLC's investigative efforts were dependent on the Central African authorities for access, movement, and contact with civilians", resulting in the "mixed" composition of the

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[338] Appeal Brief, para. 339.
[339] In challenging the Trial Chamber's finding on effective control, Mr Bemba argues, *inter alia*, that "[b]y ignoring the realities of command in multinational contingents", the Trial Chamber erred (Appeal Brief, para 185). Referring to the *AFRC* Trial Judgment, he further submits that "[i]n a case involving the temporary transfer of a contingent to assist a loyalist coalition across national boundaries, […] the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful" (Appeal Brief, para 180, referring to *AFRC* Trial Judgment, para. 787). *See also* Appeal Brief, paras 130, 175-184.
[340] Conviction Decision, para. 732.
[341] Conviction Decision, para. 732.
[342] Conviction Decision, para. 729.
[343] The Trial Chamber found, *inter alia*, that Mr Bemba had exercised "primary disciplinary authority" (Conviction Decision, para. 703. *See also* paras 447-449); "ultimate decision-making authority" (Conviction Decision, para. 697); "controlled the MLC's funding" (Conviction Decision, para. 697); retained "disciplinary powers over MLC members, including the power to initiate inquiries and establish courts-martial" (Conviction Decision, para. 697); and "issue[d] the order for the MLC troops to withdraw from the CAR" Conviction Decision, para. 555).

Mondonga Inquiry (i.e. composed of "both people from the Central African Republic and people from the Congo"),[344] and thus indicative of the fact that Mr Bemba's power to investigate crimes committed in the CAR was limited. Whilst P36's testimony does not support the broad proposition that Mr Bemba's material ability to initiate investigations in the CAR was wholly impeded, it demonstrates that the MLC did face logistical difficulties in conducting investigations which had to be overcome (by having a mixed national composition for example). Notably, witness P36 stated that a commission would be comprised of personnel from the CAR as they "would have easier contact with people and they could provide guidance, or they could guide the Congolese persons within the commission with regard to addresses, the language as well, with regards to relations with the other Central Africans, their compatriots".[345] P36's testimony is supported by the statement found within the Zongo Commission Report, to the effect that the Mondonga Inquiry was mixed in composition. The Appeals Chamber notes that the Trial Chamber did not expressly refer to this aspect of P36's testimony, despite its significance and direct relevance to the issues at hand.

173. Thus, although the limitations alluded to by Mr Bemba did not completely curtail his ability to investigate crimes committed by MLC troops in the CAR, the Trial Chamber did not conduct a proper assessment as to whether, in the particular circumstances that existed at the time, the range of measures taken by Mr Bemba could be regarded as the extent of the necessary and reasonable measures that he could have taken, given the limitations upon his material abilities. The Trial Chamber accepted that the MLC contingent had cooperated with the CAR authorities throughout the 2002-2003 CAR Operation and that such cooperation was both "logical in a situation where a contingent of foreign forces is unfamiliar with the terrain and enemy" and a "regular feature of the operations".[346] However, in the assessment of the measures that Mr Bemba took, this aspect was disregarded, resulting in an unrealistic assessment of the "wide range of available measures at his

[344] Appeal Brief, para. 349, fn. 687, referring to Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Red2-Eng, p. 39, lines 15-19.
[345] Transcript of 20 March 2012, ICC-01/05-01/08-T-218-Red2-Eng, p. 39, lines 15-19.
[346] Conviction Decision, para. 699.

disposal".[347] The Trial Chamber even acknowledged that, in so far as the evidence of witnesses supported the proposition that the CAR authorities had retained "some, but not primary or exclusive," disciplinary or investigative authority over the MLC forces, this was not "inconsistent with the corroborated and reliable evidence that Mr Bemba and the MLC had ultimate disciplinary authority" over the MLC contingent in the CAR.[348] Moreover, even if Mr Bemba had ultimate disciplinary authority in the CAR, this does not mean that this disciplinary authority was not in any way subject to limitations or impeded to a degree – a reality which the Trial Chamber ought to have given weight in its assessment of the measures that Mr Bemba took.

174. The Appeals Chamber also notes that the Trial Chamber did not address Mr Bemba's statement that he wrote to the CAR Prime Minister requesting an international commission of inquiry to be set up,[349] nor the testimony of D48 which attested to the existence and content of the letter.

175. The Prosecutor did not contest at trial that Mr Bemba had transmitted a letter to the CAR Prime Minister, nor does she do so on appeal. Instead, the Prosecutor contests the relevance of any such letter, given that the purported measure which Mr Bemba was said to have proposed in that letter was the same as those measures that were discounted by the Trial Chamber, i.e. a commission of inquiry.[350] In the view of the Appeals Chamber, the Prosecutor's argument as to the eventual outcome of the Trial Chamber's hypothetical consideration of any such letter is clearly speculative. Moreover, in its consideration of the correspondence between Mr Bemba and General Cissé (the UN Representative in the CAR), the Trial Chamber expressly noted that in his response to Mr Bemba's letter, General Cissé had, *inter alia*, "recalled that the CAR and Chad had agreed to create an international commission of inquiry".[351] Given that Mr Bemba had expressly raised before the Trial Chamber the matter of having written to the CAR authorities and the Trial Chamber's eventual finding that Mr Bemba "made no effort to refer the matter to the CAR authorities, or

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[347] Conviction Decision, para. 731.
[348] Conviction Decision, para. 448.
[349] Appeal Brief, paras 357, 360. *See also* Mr Bemba's Closing Brief, para. 869.
[350] Response to the Appeal Brief, para. 211.
[351] Conviction Decision, para. 606, referring to EVD-T-OTP-00584/CAR-OTP-0033-0209 at 0209.

cooperate with international efforts to investigate the crimes",[352] it was imperative that the Trial Chamber address this argument. Furthermore, the possibility that the Trial Chamber may have harboured some doubts as to whether Mr Bemba actually sent the letter was not a sufficient ground for it to disregard an uncontested factual allegation. Indeed, if the accused makes a factual claim that was not challenged by the Prosecutor in the course of the trial, the Trial Chamber must give clear and convincing reasons as to why it nevertheless regards the allegation to be untrue. In the absence of such reasoning, the Trial Chamber was not at liberty to simply ignore Mr Bemba's claim. The Trial Chamber thus erred by failing to take into account relevant considerations.

176. The Appeals Chamber also considers that the Trial Chamber inappropriately took Mr Bemba's motives into consideration when determining whether the measures he had taken were necessary and reasonable. While the Appeals Chamber rejects Mr Bemba's submission that the motives of an accused commander are always irrelevant to the assessment of "necessary and reasonable measures" because a commander is required to act in good faith in adopting such measures and must show that he "genuinely" tried to prevent or repress the crimes in question or submit the matter to the competent authorities,[353] it finds that the Trial Chamber took an unreasonably strict approach.

177. The Trial Chamber found that the measures Mr Bemba took "were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC".[354] It further found "that a key intention behind the measures Mr Bemba took was to protect the image of the MLC".[355] The Appeals Chamber accepts Mr Bemba's submission that measures taken by a commander

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[352] Conviction Decision, para. 733.
[353] *Halilović* Appeal Judgment, para. 63; *Orić* Appeal Judgment, para. 177; *Strugar* Appeal Judgment, paras 232, 236-238, Separate Opinion of Judge Shahabuddeen, para. 7, Joint Dissenting Opinion of Judge Meron and Judge Kwon, para. 11; *RUF* Trial Judgment, para. 313; *Boškoski and Tarčulovski* Appeal Judgment, Separate Opinion of Judge Liu Daqun, para. 2; *Kaing Guek Eav* Trial Judgment, para. 545; *Đorđević* Trial Judgment, para. 1887; *Nuon Chea and Khieu Samphan* Trial Judgment, para. 716. *See also* G. Mettraux, "Breach of a Duty and Consequential Failure to Prevent or to Punish Crimes of Subordinates", *The Law of Command Responsibility* (Oxford University Press, 2009), p. 229, at p. 255; W.J. Fenrick, "Article 28", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*: *Observers' Notes, Article by Article* (Nomos Verlagsgesellscaft Baden-Baden, 1st ed., 1999), p. 520.
[354] Conviction Decision, para. 728.
[355] Conviction Decision, para. 728.

motivated by preserving the reputation of his or her troops do not intrinsically render them any less necessary or reasonable in preventing or repressing the commission of crimes, and ensuring their prosecution after proper investigation.[356]

178. The Appeals Chamber notes that the Trial Chamber's preoccupation with Mr Bemba's motivations appears to have coloured its entire assessment of the measures that he took. Indeed, in assessing the Mondonga Inquiry, the Trial Chamber appears to have considered what it perceived to be Mr Bemba's adverse motivations in establishing the inquiry as a key factor in assessing the genuineness of that measure (namely, countering media allegations, demonstrating the taking of action, vindicating MLC leadership and generally rehabilitating its image).[357] The Trial Chamber's consideration of Mr Bemba's motivations also significantly affected its finding regarding his correspondence with the UN Representative in the CAR (which was said to have been driven by the desire to demonstrate good faith and maintain the image of the MLC)[358] and his withdrawal from the CAR (which was said to have been motivated by external pressure directly related to the negotiation of the Sun City agreements).[359] Ultimately, the Trial Chamber concluded that in fact *all* of the measures that Mr Bemba had taken in response to allegations of crimes were driven by a motivation to counter public allegations and rehabilitate the public image of the MLC.[360] Whereas the Trial Chamber stated that these motivations were a factor "aggravating" the failure to exercise his duties, in effect the Trial Chamber appears to have treated the motives as determinative, in and of themselves, of the adequacy or otherwise of the measures. From the ambiguous concept of an "aggravated omission" arises the impression that the Trial Chamber's evaluation of the adequacy of the measures taken by Mr Bemba was tainted by what it considered Mr Bemba's motivations to be.

179. Moreover, the motivations that the Trial Chamber found established, namely, the broad desire to maintain the image of the MLC and counter public allegations are not in fact intrinsically "negative" motivations, as the Trial Chamber appears to have

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[356] Appeal Brief, para. 363.
[357] Conviction Decision, para. 582.
[358] Conviction Decision, para. 604.
[359] Conviction Decision, para. 555.
[360] Conviction Decision, para. 728.

considered them. Nor do they necessarily conflict with the taking of genuine and effective measures. There may be multiple motives behind the measures taken by a commander. In this respect it is conceivable that a commander may discharge his duty to take "necessary and reasonable measures" and in doing so accomplish multiple, additional or extraneous purposes, such as protecting the public image of his forces. Therefore, in considering Mr Bemba's motivation to protect the image of the MLC, the Trial Chamber erred because it took into consideration an irrelevant factor. In any event, the Trial Chamber failed to make an assessment as to how *in concreto* such alleged motive ultimately affected the necessity or reasonableness of the measures taken by Mr Bemba.

180. Turning to the remainder of Mr Bemba's arguments, the Appeals Chamber recalls that the Trial Chamber faulted the measures Mr Bemba took because they were limited in "mandate, execution, and/or results".[361] The Trial Chamber appears to have lost sight of the fact that the measures taken by a commander cannot be faulted merely because of shortfalls in their execution. When a commander establishes an independent commission, inquiry or judicial process – of which he or she is not part – it must be left to freely fulfill its mandate. Whilst limitations in the results of an inquiry might be attributable to the manner of its establishment (for example, through deliberate exclusion or limitation of mandate), this is not necessarily so. It is important to establish, in this regard: (i) that the shortcomings of the inquiry were sufficiently serious; (ii) that the commander was aware of the shortcomings; (iii) that it was materially possible to correct the shortcomings; and (iv) that the shortcomings fell within his or her authority to remedy. The Trial Chamber did not make this assessment in the present case.

181. In finding that there were "indications that all [the] measures were limited in mandate, execution, and/or results", the Trial Chamber implies that this was attributed to Mr Bemba.[362] However, without undertaking the necessary assessment set out in the preceding paragraph, this could not be made out without a finding that Mr Bemba purposively limited the mandates of the commissions and inquiries. Yet, the Trial Chamber made no such finding as to the sham nature of the measures.

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[361] Conviction Decision, para. 720.
[362] Conviction Decision, para. 720.

182. The Trial Chamber also faulted Mr Bemba for having failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes as a result of which he could not be said to have submitted the matter to the competent authorities for investigation and prosecution.[363] However, the Trial Chamber cited no evidence in support of this finding. In addition, this finding appears to be in contradiction with the Trial Chamber's finding that "Colonel Moustapha and the other MLC Commanders also had some disciplinary authority in the field".[364] The Trial Chamber failed to explain this apparent contradiction and its finding as to the lack of empowerment of other MLC officials, hence it appears unreasonable. Moreover, given that finding, the Trial Chamber failed to explain what more Mr Bemba should have done to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes and how he fell short in that regard.

183. Furthermore, it is evident that the assessment of a trial chamber of the measures taken by a commander also depends on the number of crimes that were committed. The Appeals Chamber recalls that the actual number of crimes established beyond reasonable doubt in the instant case was comparatively low.[365] While the Trial Chamber noted, in relation to the specific locations where crimes had been committed, that there was "reliable evidence" more generally that the MLC committed crimes at these locations,[366] the evidence in question, on its face, appears for the most part very weak, often consisting of media reports including anonymous hearsay.[367] Importantly, the Trial Chamber failed to properly analyse this evidence and address its potentially extremely low probative value. The Trial Chamber also failed to give even an indication of the approximate number of crimes that were committed at these locations. Thus, beyond the low number of individual instances of crimes found to have been established beyond reasonable doubt, it is unclear how

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[363] Conviction Decision, para. 733.
[364] Conviction Decision, para. 449.
[365] *See supra* paras 116-119.
[366] *See* Conviction Decision, para. 461, fn. 1304 regarding Bangui; para. 486, fn. 1408 regarding Bangui; para. 520, fn. 1567 in relation to PK22; para. 525, fn. 1585 regarding Damara; para. 527, fn. 1591 regarding the Bossembélé-Bozoum axis; para. 531, fn. 1607 regarding Sibut; para. 534, fn. 1619 regarding the Bossembélé-Bossangoa axis.
[367] *See e.g.* Conviction Decision, para. 461, fn. 1304 regarding Bangui (EVD-T-OTP-00395/CAR-OTP-0001-0034 at 0048-0053; EVD-T-OTP-00411/CAR-OTP-0004-1096 at 1102-1103, 1109, 1121, 1124; EVD-T-OTP-00399/CAR-OTP-0004-0343 at 0344; EVD-T-OTP-00401/CAR-OTP-0004-0409 at 0415, 0419-0423, 0425; EVD-T-OTP-00407/CAR-OTP-0004-0667 at 0667, 0669-0670, 0672-0674, 0678, 0681-0684, 0690).

widespread the criminal behaviour of the MLC troops in the 2002-2003 CAR Operation was; and, as a corollary, it is difficult to assess the proportionality of the measures taken. Furthermore, the Appeals Chamber notes the apparent discrepancy between the limited number of crimes for which Mr Bemba was held responsible under article 28 and the Trial Chamber's assessment of the measures Mr Bemba should have taken, which appears to have been based on the much broader and more general 'finding' by the Trial Chamber concerning widespread MLC criminality in the CAR. Indeed, a finding that the measures deployed by a commander were insufficient to prevent or repress an extended crime wave, for example five hundred crimes, does not mean that these measures were also insufficient to prevent or repress the limited number of specific crimes, for example 20 crimes, for which the commander is ultimately convicted.

184. The Appeals Chamber also notes that the majority of the criminal incidents in relation to which the Prosecutor presented evidence occurred at the beginning of the 2002-2003 CAR Operation, whereas little evidence was presented regarding specific criminal acts towards the end of the operation; a factor which must be taken into account when assessing whether Mr Bemba took all necessary and reasonable measures. Whereas it may have been difficult to make a determination as to the actual extent of criminal behaviour, both in terms of number of crimes and duration, the Trial Chamber should at least have acknowledged this challenge and determined its impact on the assessment of the question of whether Mr Bemba took all necessary and reasonable measures. By failing to do so, the Trial Chamber erred.

185. Finally, the Appeals Chamber recalls that the Trial Chamber found that Mr Bemba had failed to take all necessary and reasonable measures, noting *inter alia* that Mr Bemba should have modified MLC troop deployment so as to, for example, minimise contact with the civilian population, whereas Mr Bemba argues that he did not have sufficient notice of this potential measure.

186. The Appeals Chamber considers it axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge.[368] In principle, notice containing the details of the charges must be given prior to the start

[368] *See* article 67 (1) (a) of the Statute; *Lubanga* Appeal Judgment, paras 118-130.

of the trial.[369] One of the elements of command responsibility under article 28 (a) of the Statute is that the commander must have failed to take "all necessary and reasonable measures within his or her power to prevent or repress [the crimes'] commission or to submit the matter to the competent authorities for investigation and prosecution". It follows that the accused person must be informed of the factual allegations on the basis of which the Prosecutor seeks to establish this element.

187. The Appeals Chamber notes that the Corrected Revised Second Amended Document Containing the Charges did not specifically identify the redeployment of troops as a necessary and reasonable measure that Mr Bemba should have taken. Nor was redeployment of the MLC troops, for example, to minimise contact with the civilian population mentioned in any other document designed to give Mr Bemba notice of the charges as a measure that he should have taken. The deployment of troops to the CAR from the DRC was mentioned in the above document only in the context of establishing Mr Bemba's effective control over the MLC forces,[370] and therefore did not provide adequate notice of redeployment within the CAR and within the particular context of the necessary and reasonable measures taken. Thus, he was not sufficiently notified of this factual allegation as a necessary and reasonable measure.

188. The Appeals Chamber is of the view that Mr Bemba suffered prejudice as a result of the lack of proper notice. The Appeals Chamber notes in this regard Mr Bemba's submission on appeal that, had he known that troop redeployment was considered a necessary and reasonable measure that he should have taken, he would have argued that this would not have been feasible or would have put lives at risk from "friendly fire".[371] Thus, the Trial Chamber should not have relied on this measure when finding that Mr Bemba had failed to take all necessary and reasonable measures and by doing so the Trial Chamber erred.

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[369] *Lubanga* Appeal Judgment, para. 129. The Appeals Chamber also found that: "[t]o the extent that further information [about the charges] is provided in the course of the trial, this can only go towards assessing whether prejudice caused by the lack of detail of the charges may have been cured".
[370] Second Amended Document Containing the Charges, para. 27 (2).
[371] Appeal Brief, para. 343.

189. In sum, the Appeals Chamber has identified the following serious errors in the Trial Chamber's assessment of whether Mr Bemba took all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution: (i) the Trial Chamber erred by failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country;[372] (ii) the Trial Chamber erred by failing to address Mr Bemba's argument that he sent a letter to the CAR authorities before concluding that Mr Bemba had not referred allegations of crimes to the CAR authorities for investigation;[373] (iii) the Trial Chamber erred in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes;[374] (iv) the Trial Chamber erred in attributing to Mr Bemba any limitations it found in the mandate, execution and/or results of the measures taken;[375] (v) the Trial Chamber erred in finding that Mr Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes;[376] (vi) the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures;[377] and (vii) the Trial Chamber erred by taking into account the redeployment of MLC troops, for example to avoid contact with the civilian population as a measure available to Mr Bemba.[378] The Appeals Chamber shall now assess the cumulative material impact of these errors.

190. In assessing the measures that Mr Bemba took, the Trial Chamber focused on the Mondonga Inquiry (which resulted in the Bomengo case file), the meeting with General Cissé, the UN representative in the CAR, and President Patassé in November 2002, the speech he gave to his troops in November 2002, the Gbadolite court-martial,

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[372] *See supra* paras 171-173.
[373] *See supra* paras 174-175.
[374] *See supra* paras 176-179.
[375] *See supra* paras 180-181.
[376] *See supra* para. 182.
[377] *See supra* paras 183-184.
[378] *See supra* paras 185-188.

the Zongo Commission, correspondence with General Cissé, correspondence with the President of the FIDH, and the Sibut Mission.[379]

191. The Appeals Chamber finds that the errors that it has identified have a material impact on the Trial Chamber's finding that Mr Bemba failed to take all necessary and reasonable measures. In particular, it is apparent that the Trial Chamber's error in considering Mr Bemba's motivation had a material impact on the *entirety* of its findings on necessary and reasonable measures because it permeated the Trial Chamber's assessment of the measures that Mr Bemba had taken. Furthermore, the Trial Chamber's failure to fully appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country had an important impact on the overall assessment of the measures taken by Mr Bemba.

192. Indeed, in faulting the results of measures taken by Mr Bemba, the Trial Chamber failed to appreciate that, as a remote commander, Mr Bemba was not part of the investigations and was not responsible for the results generated. Had it done so, the Trial Chamber's assessment of the measures Mr Bemba had taken would have been necessarily different. It must also be noted that the 2002-2003 CAR Operation was conducted within the short space of a few months, which notwithstanding, Mr Bemba took numerous measures in response to crimes committed by MLC troops. In this regard, the Appeals Chamber recalls that the Trial Chamber failed to properly establish how many crimes had been committed.

193. Had the Trial Chamber properly assessed the measures that Mr Bemba took and had the Trial Chamber properly considered the list of measures that it stated that Mr Bemba could have taken in light of the limitations that he faced in the specific circumstances in which he was operating, it would not have been open to it to reach the same conclusion. The errors the Trial Chamber made resulted in an unreasonable assessment of whether Mr Bemba failed to take all necessary and reasonable measures in the circumstances existing at the time.

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[379] Conviction Decision, para. 719.

194. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Monageng and Judge Hofmański dissenting, that the Trial Chamber's conclusion that Mr Bemba failed to take all necessary and reasonable measures in response to MLC crimes in the CAR, was materially affected by the errors identified above. Thus, one of the elements of command responsibility under article 28 (a) of the Statute was not properly established and Mr Bemba cannot be held criminally liable under that provision for the crimes committed by MLC troops during the 2002-2003 CAR Operation.

VI. APPROPRIATE RELIEF

195. In an appeal pursuant to article 81 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed or order a new trial before a different trial chamber (article 83 (2) of the Statute).

196. In the present case, the Appeals Chamber has found, by majority, that the Trial Chamber erred when convicting Mr Bemba for the criminal acts listed above at paragraph 116, as these criminal acts did not fall within the "facts and circumstances described in the charges" in terms of article 74 (2) of the Statute; further, in relation to the remaining criminal acts, the Trial Chamber erred when it found that Mr Bemba had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes committed by MLC troops during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities for investigation and prosecution.

197. In these circumstances, the Appeals Chamber considers it appropriate to reverse the conviction of Mr Bemba and to declare that the criminal acts listed above at paragraph 116 are outside the scope of this case and that the proceedings in that regard are discontinued.

198. In relation to the remainder of the criminal acts of which Mr Bemba was convicted (see above, paragraph 118), it is appropriate to reverse Mr Bemba's conviction and enter an acquittal as the error identified in the Trial Chamber's finding on necessary and reasonable measures extinguishes in full his criminal liability for these crimes.

199. The Appeals Chamber notes that in the case of an acquittal, the acquitted person is to be released from detention immediately.[380] However, the Appeals Chamber is cognisant of the fact that Mr Bemba was convicted of offences against the administration of justice under article 70 (1) (a) and (c) of the Statute[381] by this Court in another case. His sentence in relation to that conviction is currently before Trial Chamber VII for a new determination, following the reversal of the original sentence imposed, upon the Prosecutor's successful appeal.[382]

200. Thus, while the Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on the basis of the present case, it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted.[383]

Judge Monageng and Judge Hofmański append a dissenting opinion to this judgment as to the outcome and the reasons therefor. Judge Van den Wyngaert and Judge Morrison append a joint separate opinion to this judgment. Judge Eboe-Osuji will append a separate opinion to this judgment, which will be filed in due course.

Done in both English and French, the English version being authoritative.

Judge Christine Van den Wyngaert
Presiding Judge

Dated this 8th day of June 2018
At The Hague, The Netherlands

[380] This is reflected, *inter alia*, in article 81 (3) (c) of the Statute.
[381] *Bemba et al.* Conviction Decision, p. 455; *Bemba et al.* Appeal Judgment, para. 1631.
[382] *Bemba et al.* Sentencing Appeal Judgment, paras 359, 361-362.
[383] Trial Chamber VII, in the *Bemba et al.* Sentencing Decision, found that the maximum sentence of imprisonment that it could impose in relation to the offences under article 70 (1) of the Statute of which *inter alia* Mr Bemba was convicted was five years. The sentence of imprisonment initially imposed by Trial Chamber VII – though reversed by the Appeals Chamber – was one year of imprisonment (*Bemba et al.* Sentencing Decision, paras 30, p. 99).