International Criminal Court

Appeals Chamber

Situation: Central African Republic

In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08

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

Appeals Hearing - Courtroom 1

Thursday, 11 January 2018

(The hearing starts in open session at 9.31 a.m.)

THE COURT USHER: [9:31:00] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:31:36] Good morning to everybody.

Today we are continuing our session on submissions that we ask from the parties.

We are now turning to group D, which are questions relating to -- group E, I'm sorry, issues relating to the fourth ground of appeal of Mr Bemba against the conviction decision, the fourth ground of appeal being the ground in relation to contextual elements.

Ms Brady.

MS BRADY: [9:32:14] Your Honour, before we move to group E, and I know everyone is anxious to move on, but I would like to raise just one brief matter relating to yesterday's discussion on group D on causation. Overnight I had a chance to re-read the transcript, especially on the question and answer session we had on group D, and especially in relation to the first set of questions, the very interesting

questions that your Honours, Judge Eboe-Osuji and Judge Van den Wyngaert, yourself, asked.

Perhaps I wasn't as clear as I could have been, and I thought it would be useful to respectfully remind your Honours that the Prosecution's full position on why a textual interpretation of Article 28 does not require a causation element, and the nature of the mode of liability of Article 28, is fully set out in our response brief at paragraphs 224 to 234 and 243 to 253. And I just thought I would take the opportunity to say that this might assist your Honours, to re-read those paragraphs to allay any concerns or further concerns you may have regarding the textual interpretation of Article 28, if I was not clear enough yesterday. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [9:33:31] Thank you, Ms Brady.

Okay, so let me now proceed to the reading of the questions. Here we have a limited list because, as you will remember, you have made written submissions on this issue. So much of the territory has already been covered in those submissions.

So let me read to you the first question. And this is about the element knowledge, the mental element, under Article 7 of the Statute for crimes against humanity. The question is as follows: The elements of crimes against humanity include the requirement that, quote, "the 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", unquote. 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 to both? That's the first question.

The second question is a question on which the parties, the Prosecution has already made submissions in the written submissions: Can a Trial Chamber rely on the war crime of pillaging to establish that there was an organised policy?

Third question, and this relates to the submissions that you have already made. You have not made written responses or replies to these questions, so here you have the opportunity to turn to that if you so wish.

So here we have the same timing as we had for the group C and D questions. So 30 minutes for the parties and five minutes for the Legal Representative, and then reply and response.

So the floor is to Mr Haynes.

MR HAYNES: [9:35:56] Well, good morning, your Honour, and good morning to my colleagues in the courtroom.

And to start with a word of comfort, we have had the opportunity to review the written filings in this regard, and I don't believe for one minute that this is going to take 30 minutes. But lawyers always say that and are very often unfortunately wrong.

For what it is worth, our position is that both the direct perpetrator and the accused require the same mens rea.

In support of that contention, the appellant points firstly to the Elements of Crimes introduction, paragraph 8 of which provides:

"... the term 'perpetrator' is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, mutatis mutandis, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute."

Moreover, paragraph 1 of the Elements of Crimes provides that the terms of Article 7 are "to be construed strictly".

Remarkably, the trial judgment refers to neither of those paragraphs of the Elements of Crimes. What it does refer to in concluding that "knowledge of the contextual elements on the part of the commander is not a requirement", at paragraph 168, is two

paragraphs from the trial judgment in the ICTY case it cites as Sainovic, although strictly it should be Milutinovic, I think.

Quite what the authoritative status of two paragraphs of an ICTY trial judgment is at the ICC on the issue of a commander's mens rea for crimes against humanity may be open to legitimate question before the Appeals Chamber here. There are, of course, significant structural differences between the constructive literature of both crimes against humanity and command responsibility as between the ICC and the ad hoc tribunals, and I'll simply list them briefly. They are, of course, the existence of the Elements of Crimes document, the organisational policy requirement for crimes against humanity, and the disputed causation requirement under Article 28.

And without re-opening yesterday's debate too greatly, or even inviting at this stage Professor Ambos to the microphone, it is our contention that the same mens rea is applicable both within the structure of command responsibility under Article 28 of the Rome Statute and to, as it were, build the bridge of culpability between the commander and the underlying crimes.

It is particularly pertinent that the knowledge requirement is set at that level in this case because of, as it were, the other findings which the Trial Chamber had to, and did in fact, make in order to convict Mr Bemba of crimes against humanity.

According to Article 7(2):

"[An a]ttack directed against a civilian population" means "a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack."

Now, it may seem at this point apposite to flip to question 3 briefly and deal with one submission made by the Prosecution in this regard in its response to the appellant's

filings on your questions on crimes against humanity.

The suggestion that the organisational policy requirement for crimes against humanity under the Statute of Rome was a diplomatic compromise betrays a fundamental misconception of the status of primary legislation such as the Statute. The Statute contains a requirement of an organisational policy. Accordingly, that is the law. Even if it is accepted that the inclusion of the requirement was the subject of some debate in the Prep Comm, that's irrelevant. All legislation, both domestic and international, goes through a process of debate. However, once it has been passed or signed, it becomes law in the terms as signed.

Going back to the requirement, the organisational policy in this case must necessarily be that of the MLC. The Trial Chamber agreed with that, we submit correctly. It analysed, as it were, the requirement that the organisation was State-like and that the only relevant organisation in this case was the MLC. We could not be talking about, for example, the policy of the third battalion of the MLC or the policy of that group of soldiers that came under the control of Mustapha Mukiza. The requirement to find an organisational policy was a requirement to find that the MLC had one.

Now, the Chamber made multiple findings about Mr Bemba's control of the MLC. And for these purposes, I'm not going to quibble with them. But he was, of course, its political leader and commander-in-chief. The Chamber went rather further than that in emphasising his control of it, but any organisational policy of the MLC would inevitably bear his authorship.

Accordingly, the Trial Chamber's findings as recorded, namely that the MLC, the organisation of which Mr Bemba was the executive controller, had a policy to attack a civilian population and that he knew crimes were being committed by MLC soldiers, goes at least as far as, and arguably way beyond, the mental element required under

the Elements of Crimes for crimes against humanity. And we submit, notwithstanding any other submissions, that any lesser finding as to the requisite mental element is inconsistent with the other necessary findings required under a charge of crimes against humanity.

The trouble is that the organisational policy described by the Trial Chamber is nonsensical and unsustainable. What are the composite elements of an organisational policy? And it may be appropriate at this stage to highlight that we are moving into question B: Can a Trial Chamber rely on the war crime of pillaging to establish that there was an organisational policy?

According to the Elements of Crimes:

"'[An a]ttack directed against a civilian population' ... is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

Accordingly, the attack needs to involve the multiple commission of acts referred to in Article 7(1) and therefore not multiple acts of pillage. Further, since the requisite organisational policy is one "to commit such attack", an organisational policy to commit pillage would not be sufficient to satisfy the terms of Article 7.

Accordingly, neither a written or explicit policy to pillage, nor evidence of widespread or systematic pillage would be sufficient to establish an organisational policy to commit such attack since such attack would involve the multiple commission of Article 7(1) acts which does not include pillage.

I just step aside for a little bit and say that the essential quality of the acts listed under Article 7(1) is that they are all offences against the person or violent offences, or both. Pillage is an acquisitive offence, which although it can involve some violence, often

does not. It is not generically of the same family as any offence listed under Article 7(1) and does not qualify by reason of the catch-all provision of Article 7(1)(k). At the risk of stating the obvious, if the States parties had wanted to make pillage a crime under Article 7(1) it would have been included. If the Prosecution by the same route had wanted to allege that in the circumstances of this case pillaging reached the heights of another inhumane act under Article 7(1)(k), it should have sought confirmation of a charge in those terms. It did not. And its belated attempt to argue that pillaging should be considered in the assessment of the attack against the civilian population and by necessary inference the organisational policy was rightly rejected by the Trial Chamber.

Crimes against humanity are the post serious crimes of concern to the international community. Without seeking to trivialise the loss of personal belongings, pillage would generally be classified as theft in most domestic jurisdictions and be subject to a maximum sentence well below the life sentence generally reserved for the sort of crimes set out in Article 7(1). To permit a plan to commit pillage or the multiple commission of acts of pillage to form the basis of an organisational policy under Article 7 would be to dilute the gravity of crimes against humanity in international criminal law.

Now, the appellant is not going to be unrealistic here. Acquisitive offending can often accompany inhumane treatment. For example, Boko Haram probably stole the odd thing whilst pursuing a policy of kidnapping, raping, torturing and sexually enslaving Christian women, but the acquisitive offences do not define the policy. On the other hand, a policy to self-compensate in war may involve ancillary violent criminal behaviour, but the latter would lack the essential quality of a qualifying policy under Article 7.

The problem is that the Trial Chamber rather lost sight of that obvious requirement when it looked for evidence of an organisational policy in this case. The findings that there was such a policy don't just confuse acts under Article 7(1) with other acts, they absolutely focus on pillage. Moreover, they are completely unsustainable evidentially.

In its findings that there was an organisational policy the Trial Chamber pointed to six features in the evidence, and I hope it's possible now that we turn to the relevant paragraphs of the judgment which begin at paragraph 676.

THE COURT OFFICER: [9:50:43] The document will be displayed on the evidence 1 channel.

MR HAYNES: [9:51:00] You will see in paragraph 676 the first feature of the evidence which the Chamber found supported the existence of an organisational policy was the alleged modus operandi. It's worthy of note that the modus operandi was the organisational policy described by the Pre-Trial Chamber in the confirmation decision.

But by the time that we came to the judgment in this case it had been abandoned as the organisational policy and was not followed by the Trial Chamber itself.

Nonetheless, the Trial Chamber copy/pasted, as it were, the Pre-Trial Chamber's organisational policy and modus operandi directly into this paragraph.

But by then the modus operandi was a busted flush. Virtually none of the underlying acts were committed in house-to-house searches. Attacks took place on boats, in ditches, on roads outside of towns and in fields and there really was no continuing evidential basis for continuing to assert that there was a modus operandi in the same terms as found by the Pre-Trial Chamber at confirmation.

The second assertion or second feature of the evidence that the Trial Chamber relied

on is at paragraph 678, which is the assertion that MLC soldiers committed the underlying acts repeatedly during a four and a half month period.

Now this is just factually incorrect. The underlying acts, as your Honour observed yesterday, were committed at the end of October and towards the middle of November and then on 5 March. They were not committed over a four and a half month period.

The third assertion said to support the organisational policy relates to self-compensation by MLC soldiers through pillage.

And the fourth relates to the widespread occurrence of pillage.

The seventh relates to the inadequacy of the code of conduct, which is more better particularised at paragraph 392 and this does really bear looking at.

The Trial Chamber relied on the apparent inadequacies of the code of conduct as supportive of the existence of an organisational policy. What it observed about the code of conduct was that it outlawed murder, that it outlawed rape and that it prescribed the death personality for both of those offences, but it did not outlaw pillage. In point of fact it prohibited theft, which we say is precisely the same thing. But its emphasis on the apparent shortcomings of the code of conduct in failing to outlaw pillage really give the lie to the policy that the Trial Chamber was describing. It was describing a policy to pillage as the organisational policy of the MLC.

And again we say it's not one which satisfies the requirements of Article 7(1). All the ex-ante indicators relied upon by the Trial Chamber relate to pillage. The ex post facto indicators, namely the occurrence of some offences, though not many which qualify as underlying offences, under Article 7(1) do not give rise to an inference of a policy to commit such offences. And we submit that the Trial Chamber fell seriously into error in describing a policy to attack the civilian

population which depended substantially, almost exclusively on the commission of offences of pillage. And on that basis alone the convictions for crimes against humanity must fail.

Worse than that, the contra-indicators of a policy were simply ignored by the Trial Chamber.

The cursory dismissal of the appellant's submissions concerning the evidence erroneously ignored by the Trial Chamber when considering whether the MLC had an illicit organisational policy merits a little further consideration. In 1998 when the appellant formed the MLC he could have had no reason to anticipate that he would one day find himself here in The Hague. Indeed at that time no international tribunal had jurisdiction over the DRC or the Central African Republic. The ICC didn't exist. Notwithstanding that, the MLC established a military arm, a necessary prerequisite to political credibility in the Congo at the time which was trained and subject to a code of conduct which, as you've seen, outlawed crimes against the civilian population. There were courts martial, soldiers were imprisoned, some were put to death.

The Trial Chamber made no findings that the MLC were generally lawless or had a culture of impunity or had acted in any way prior to October 2002 which gave rise to an inference of any policy of that sort.

Its criticism of the code of conduct related almost exclusively to the absence of the word "pillage" in which sense it's wholly semantic and can be regarded as irrelevant for the purposes of determining whether a policy could be inferred.

In response to rumours emanating from the Central African Republic the appellant took a number of investigative steps. They were highlighted to you ad nauseam yesterday. I am not going to go through all of them. I'll highlight only two.

He wrote to the secretary-general of the United Nations and he wrote to the prime minister of the Central African Republic. He had absolutely no control over what response he might receive to those letters. He might well have been furnished with information which would have obliged him to take further action. He could not have accepted that the United Nations would simply do nothing in relation to his request that matters be looked into in that territory.

Now, the International Criminal Court doesn't exist to prosecute bad battalion commanders. It has to trust national jurisdictions to deal with them. The organisational policy requirement does set a threshold. It ensures that only the most culpable offenders are tried for the most serious crimes here. Accordingly, the Trial Chamber had to be satisfied that the MLC had a policy pursuant to which an attack against a civilian population was carried out. Leaving aside the relevance of these matters referred to as measures generally to causation and measures to prevent and punish, how, the appellant asks rhetorically, could the Trial Chamber have ignored this evidence in determining what the organisational policy of the MLC in truth was?

Next, the nexus finding was one which no reasonable Trial Chamber could have made.

The nexus finding is made at paragraph 686 of the trial judgment and it depends upon two strands of evidence. First, the so-called modus operandi. I don't need to say any more about that. It's been rehearsed ad nauseam in all of our filings and I have reminded you today of the weaknesses of that. And the second, the fact that MLC soldiers committed offences.

The second suggestion, namely the fact that soldiers from a particular army commit offences indicates a policy to do such things on behalf of, as it were, the strategic

commander executive on the part of their organisation or state simply beggars belief. It comes nowhere close to being the sort of evidence from which any Trial Chamber could infer an organisational or State policy.

Next, the Trial Chamber's findings as to a widespread attack were invalid. Firstly, the Trial Chamber relied on pillage. The Prosecution's submissions in filing 3578 at paragraphs 21 to 29 survive no close scrutiny. They amount in terms to the classic example of the lawyer's device of confession and avoidance. It goes something like this: My client wasn't there; but if my client was there, he didn't do it. If he was there and he did do it, he didn't have the necessary intention to commit the criminal act.

Or rather in this case the Prosecution asserts the Trial Chamber didn't really rely on acts of pillage in determining that there was a widespread attack, but if it did, it was entitled to. The problems with the submissions are multiple but really begin with its ignorance of both what the Trial Chamber actually said in the judgment and any analysis of the cited evidence. Indeed, it can only survive if one liberally uses the delete button or a bottle of typing correction fluid on both the judgment and the evidence.

Firstly, as to the judgment, the very paragraph reciting the Chamber's critical findings that the attack was widespread notes that the MLC soldiers committed many acts of rape, murder and pillaging. The paragraphs dealing with the existence of an organisational policy to commit such an attack are replete with references to pillaging, referring to the alleged modus operandi of the MLC soldiers who searched house to house, raping civilians, pillaging their belongings, and occasionally killing those who resisted, as well as the alleged general motives of the soldiers who self-compensated through acts of pillaging.

It is plain that the Chamber's concept of the attack, like its concept of the organisational policy, had pillaging at its core, and its finding that the attack was widespread explicitly includes pillaging. The syntactic difference in paragraph 563 is inconsequential and forms no basis for the Appeals Chamber to reinterpret the explicit language of the crucial findings in the section on crimes against humanity. In any event, paragraph 563 does refer to pillaging, as does the majority of the cited evidence.

The secondary citation within footnote 1736 to the factual findings, section V(C)(3) to (7) and V(C)(9) to (10), if anything only clarifies the fact that the Trial Chamber took account of pillaging when determining whether there was a widespread attack. Those chapters include multiple references to offences of pillage over 40 pages of the judgment. Had the Trial Chamber wished to make it clear that it was only having regard to offences under Article 7(1), it would have been perfectly simple to cite to individual paragraph numbers within the factual finding section, rather than the totality of the behaviour.

THE COURT OFFICER: [10:04:43] Mr Haynes, you have two minutes left.

MR HAYNES: [10:04:47] The citation leads to a secondary difficulty with the finding of a widespread attack, namely that the specific underlying acts cited by the Trial Chamber in support of its finding are neither remarkably numerous nor geographically dispersed.

That the Prosecution should seek to have recourse to the victims' application forms in the case is both surprising and revealing. One can only hope that the reference is not intended to introduce some emotive element into the debate. The Prosecution is well aware that they are not in evidence in the case. More to the point, the reference only serves to enhance the impression of the Prosecution's acknowledgment of the

need for some further and better evidence on these two central issues.
The reason for this is that the evidence relied upon is not sufficiently cogent to support the Trial Chamber's finding, firstly because it is of insufficient quality to establish any material fact, and secondly because its content is irrelevant.
The premium item cited in paragraph 563 are the press articles. There were no originals of any of these. There were no complete newspapers, no author or journalist to attest to the truth of their contents. Nobody produced them in evidence. Nobody confirmed that they had been contemporaneously published. Nobody even testified to having read any one of them. Whether they are actually genuine has to be the subject of some serious question. Nonetheless, they are relied upon by the Trial Chamber as evidence of the actual commission of rapes and murders.
The NGO reports contain anonymous complaints. They were not available until very late in the conflict. They do not in any event assist beyond the initial phase of the engagement in Bangui and PK12.
The Trial Chamber made no attempt in relation to all this evidence to weed out what related to offences under Article 7(1) or what related to pillage. As a matter of obvious comment, no sensible inference of any knowledge on the part of Mr Bemba could be drawn from any of this material. Most of it was not available until years after the events, and there is no evidence that anyone saw any of the newspaper reports, let alone him hundreds of miles away in another country.
THE COURT OFFICER: [10:07:15] I'm afraid --
MR HAYNES: [10:07:17] The Prosecution rightly concedes there are different kinds of evidence. There are. There is good evidence and there is bad evidence. There is direct evidence and there is hearsay, rumour and conjecture. There are public documents which prove themselves and there are unattributed, authorless, untested

reports with anonymous sources.

The Prosecution explicitly asserts in paragraph 31 of its filing --

PRESIDING JUDGE VAN DEN WYNGAERT: [10:07:45] Can you please conclude, Mr Haynes, because your time is up.

MR HAYNES: [10:07:48] Yes, I am doing that now -- that contextual elements of crimes against humanity require proof to a low standard or a lower standard. It amounts in terms to a submission that they do not require to be proven to the criminal standard. That must be wrong in law.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:08:10] Thank you, Mr Haynes. The floor is now to the Prosecution.

MS BRADY: [10:08:17] Your Honours, Mr Costi will be addressing this group of questions.

MR COSTI: [10:08:25] Good morning, Madam President, your Honours. I will now address group E, and I will start with the first of your questions, and here and there I will try to address also Mr Haynes's comments this morning.

Your Honours, the short answer to your first question is that in order to enter a conviction under Article 28 for crimes against humanity, both the perpetrator and the accused person need to have the required mens rea for the crime, including the contextual element of being part of the attack, but to a different degree.

For the perpetrator, it is necessary to prove that they knew or intended their conduct to be part of the attack. For the accused person charged under Article 28, it is sufficient to prove that they knew or should have known that their subordinates' conduct was part of the attack.

Now, just to clarify, from now on I will refer to "28" and "should have known" standard, but my submission, mutatis mutandis, would apply to Article 28(b) and its

relevant standard.

Now, I will divide my submission and discussion to this question in two logical steps. First, I will discuss a Chamber's determination as whether a crime against humanity has been committed under Article 7; and, second, I will deal with a Chamber's assessment of the accused's criminal responsibility under Article 28 for that crime. These are two separate queries and should not be blurred, and the Defence in their written and oral submission today appears to do so. For each of them, I will show you how the Trial Chamber was legally and factually correct.

Let me start with the first point then. When assessing whether a certain conduct constitutes a crime against humanity, the only mens rea that needs to be proved is that of the perpetrator, and this includes his knowledge or intent that his conduct or her conduct was part of a widespread attack.

The mental state of a superior who did not intend a crime but failed to prevent, repress or report the crime under Article 28 is not determinative of the question of whether the offence constitutes a crime against humanity. And this is consistent with the Elements of Crime and the Rome Statute.

First, the Elements of crimes against humanity, as your Honour read this morning, and I quote again, read, "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack." End of quote. So to establish whether a murder or a rape constitute a crime against humanity then, it is the perpetrator, and not his superior charged under Article 28, that must at least know that his or her conduct was part of the attack.

Second, under the Statute the superior's failure doesn't need to be part of the attack in the first place. Article 7 requires one of the listed acts - murder, rape, extermination - to be part of an attack. And a superior's failure to prevent, repress or

punish is not one of those and it is not per se a crime against humanity. And obviously Article 28 itself doesn't talk about the superior omission to be part of any attack.

Now, as the ICTY Trial Chamber noted in the Milutinovic case at paragraph 157, volume 1, the superior charged under command responsibility is, and I quote, "too far removed from the commission of the offence", end of quote, for his mens rea to be determinative of the existence of a crime, and also found that the knowledge of the superior is not sufficient alone to find a crime against humanity beyond reasonable doubt; in again Milutinovic, trial judgment volume 1, 153 to 159.

So to determine whether a crime against humanity has been committed, the mens rea of the accused under Article 28 is irrelevant. But different would be the situation whether the accused was charged under Article 25(3)(a), but if your Honour wish, we can expand on this in the next session.

Now, what did the Trial Chamber did in this case? At paragraph 168, when discussing the law on crime against humanity, I had the feeling that the Defence keep reading 168 as defining the law on command responsibility. At paragraph 168, when discussing the law on crimes against humanity, the Chamber found, and I quote:

"... knowledge of the contextual elements on the part of the commander is not a requirement to determine whether or not the alleged underlying crimes against humanity were committed. What is relevant for this purpose is to analyse the mens rea of the perpetrators of the crime." End of quote.

At paragraph 691 the Trial Chamber properly applied this law to the facts and found beyond reasonable doubt, and I quote again:

"... the perpetrators had knowledge of the attack, and knew that their conduct was or

intended their conduct to be part of the widespread attack against the civilian population." End of quote.

So the Chamber properly found, irrespective of Bemba's knowledge of the contextual element, that crimes against humanity were committed. And as the Trial Chamber recalled at paragraph 169, this analysis should not be confused with the question of whether the accused bear responsibility for this crime against humanity.

And this brings me to the second step of my response. Now we are dealing with the second query, whether the accused is responsible under Article 28 for a crime against humanity, then the focus becomes the accused's mens rea. It must be then proved that they knew or should have known that their subordinates' crimes were part of the attack. It is not necessary, like for the perpetrator who actually committed the crime, that they knew or intended their own conduct to be part of the attack.

First, Article 28 is the governing rule and it only requires that an accused knew or should have known that their subordinates were committing crimes, and need not to have detailed knowledge of these crimes.

Second, and we go to paragraph 8 of the Elements' general introductions, paragraph 8 state that the mental element for the crimes applies mutatis mutandis to all those whose criminal responsibility might fall under 25 or 28. So the element in question applies to a different degree not only to the perpetrator in order to establish whether a crime took place, but also to the accused under Article 28 mutatis mutandis to establish whether he should held criminally responsible.

To use the ICTY language, again of the Trial Chamber in Milutinovic, again paragraph 119, it is inherent in the notion of mens rea that a superior of superior responsibility that the accused knew or should have known all the elements of the charged crime had been fulfilled.

Now, let me go back to the judgment again and see whether the law was applied properly.

At paragraph 195, when defining the applicable law on command responsibility, now not on crimes against humanity, on command responsibility, the Chamber found that the requirement of, and I quote, "knowledge on the part of the accused of the commission of the crimes within the jurisdiction of the Court necessarily implies knowledge of the requisite contextual element, which qualifies the conduct as a war crime or crime against humanity." End of quote. In other words, at paragraph 195 the Chamber first recognised that the required knowledge for the crime necessarily implies, thus requires, that the superiors knew or should have known of the contextual element, and, two, it signaled that every time the Chamber refers to crime against humanity or war crimes necessarily refers to each of their elements, including the contextual element.

Now, let me now move to paragraph 717. At paragraph 717 the Trial Chamber properly applied this law to the facts and found beyond reasonable doubt, quote again, "that Bemba knew that the MLC forces under his effective authority and control were committing or about to commit crimes against humanity of murder and rape and war crimes of murder, rape and pillaging."

End of quote.

The Chamber distinction at paragraph 717 between murder and rape as crime against humanity and murder and rape as war crimes clearly shows that the Trial Chamber made a finding as to Bemba's knowledge of the contextual element, which is the only element that distinguishes murder and rape as crime against humanity from murder and rape as war crimes. Now we read and heard the Defence arguing that the Trial Chamber didn't make such finding. In their view, at 717 the Chamber found

that Bemba was aware -- well, the disputed finding. But they admit that the Chamber found that Bemba knew of the crime but not of the context or the attack in which they took place. Now, admittedly, the Trial Chamber couldn't spell out its conclusion more clearly. However, its reasoning is adequate and its ultimate finding as to Bemba's knowledge of the contextual element are perfectly reasonable. And these are for two reasons: One, related to the mens rea in Article 28, and the other, the required knowledge of the attack under crimes against humanity. The first: There is no need under Article 28 for the accused person to have knowledge of the specific details of the crime and the attack. For superior responsibility to arise, it is not required that the superior masters the details of each and every crime committed, or that he knew the particular subordinate who committed each crime. As the Trial Judgment Chamber observed in its judgment at paragraph 194, and I quote, "this is an issue that becomes increasingly difficult as one goes up the military hierarchy." End of quote. Citing the Galić Trial Judgment at paragraph 700 and the Galić appeal judgment at paragraph 377, where it was also said, and I quote the Galić Trial Judgment, "It was physically impossible for the commander the Koševo brigade to literally know about every single incident." End of quote.

Now, consistently, and we go back to the paragraph 8 of the general introduction of the element, required the mental element for the crimes to be applied mutatis mutandis to those charged under Article 28. Now, according to the Oxford dictionary, mutatis mutandis means and, I quote, "when comparing two or more cases or situations making the necessary alterations while not affecting the main point at issue." End of quote.

Now, here, the main point at issue is that the mental element apply not only to the perpetrator but also to the accused, having made the necessary alteration required by

the different situation. And here the different situation is that Article 28, whether standard is applied, does not require knowledge of the specific details of the subordinate crimes.

Second, contextual element of crime against humanity. Knowledge of the attack does not entail knowledge of the details of the attack. The elements of crime, Article 7, introduction, paragraph 2 states that it is unnecessary to have, and I quote, "knowledge of all the characteristics of the attack or the precise details of the plan or policy or the State or organisation." End of quote.

This is consistent with the ICTY case law. And I refer you to the Kunarac Appeals Judgment at paragraph 102 and also other trial cases where the ICTY explains that it is sufficient to know -- sufficient, the knowledge -- of the, and I quote, "overall context", end of quote, in which the crime took place. And I refer you to the Limaj Trial Judgment at paragraph 190. For these reasons, in the context of Article 28 case, it would be contradictory to require the Chambers to find that a commander knew or should have known particular details of the attack and/or how each specific crime is connected or whether it is part of that attack.

Another more prosaic reason as to why the Trial Chamber was not required to further spell out its reasoning at paragraph 717 in relation to Bemba's knowledge of the contextual element is rooted in the facts of this case. Bemba's leadership position surely providing with a better overview of the overall context in which his troops operated. Certainly, a better overview of them -- of his subordinates on the ground. It is not then surprising that the Chamber, having found that his subordinates knew of the contextual element, did not spell out its consistent conclusion that their superiors had the same knowledge.

In its most recent and last Appeals Judgment in the Prlić case at the ICTY, the

Appeals Chamber confirmed this approach. Facing a similar argument by the Defence in the context of JC, joint criminal enterprise, the Appeals Chamber observed that the Trial Chamber, and I quote, "did not make express findings that the appellants fulfilled this requirement." End of quote. The requirement being the knowledge of the contextual element. And I refer you to Prlić Appeals Judgment volume 1, paragraph 390, but more in general, 385 to 392.

However, the Appeals Chamber in that case, based on the Trial Chamber findings that the crimes followed a clear pattern, that the accused shared a common plan, that the accused controlled the soldiers who committed the crime, that the accused was aware of the widespread nature of the crime, the Appeals Chamber rejected the Defence argument and found that the Trial Chamber had made the necessary findings that the accused knew of the contextual element.

Now, the situation faced by the Appeals Chamber in the Prlić case in the context of a joint criminal enterprise is comparable to the one at hand. In this case, the Trial Chamber findings regarding Bemba's effective control of the MLC, paragraphs 696 to 705, Bemba's direct lines of communication with the ground, paragraph 697, 706-708, Bemba's knowledge of the crimes and the behaviour in general, paragraph 709, 716, lead to the inevitable conclusion that the Trial Chamber also found that Bemba knew of the existence of a widespread and systematic attack.

There is nothing in the judgment to suggest that the Chamber did not make the necessary finding.

The Chamber clearly thought that Bemba's knowledge of the attack against the civilian population was as obvious as his knowledge of the existence of an armed conflict, paragraph 147, 195, 717, a parallel finding that the Defence doesn't challenge neither in law nor fact, at least on this basis.

Now, this brings me to a few conclusive remarks on the facts of this case.
The findings and evidence the Trial Chamber relied upon to establish Bemba's mens rea are not about isolated random acts but about the multiple and widespread commission of it across the Central African Republic.
Let me give you a few examples of the findings the Chamber relied upon. Bemba was in regular direct communication with the MLC groups on the ground, Trial Judgment 707; Bemba received military and civilian intelligence reports about the MLC pillaging, raping and killing civilians, Trial Chamber Judgment 708 to 425; Bemba received and discussed media reports including from the BBC, Associated Press, Radio France, consistently reporting that MLC soldiers were raping and killing civilians. And again I refer you to paragraph 709 referring to section V(D)(1).
In response to this information, Mr Bemba felt the need to travel to the Central African Republic where first he met the UN representative and then he addressed his group in PK12, asking them not to brutalise the civilian population, Trial Judgment 594 and Trial Judgment 711, referring back to that self section.
After receiving the February 2003 FIDH report including detailed accounts of rape and murders, Bemba called and wrote a letter to the president of FIDH, Sidiki Kaba, in which he acknowledged that he had read the grave accusations advanced by the FIDH. He confirmed that he had heard on the radio allegations of human rights violations. In response, Mr Kaba expressed serious reservations regarding the measures taken to repress and informed Bemba that FIDH had seized the ICC.
Paragraph 714 referring back to section V(D)8.
These are just some of the findings the Trial Chamber relied upon to conclude that Bemba knew that his subordinates committed crimes. And based on these findings,

the Chamber could only have concluded that Bemba also knew that the crimes were a part of a widespread attack.

Now, I will now move to the second question about policy. But before that, just let me make one comment. Mr Haynes this morning addressed several factual issues surrounding the evidence. And for that, we fully addressed them in our response brief filing 3472, 296 to 328. We addressed them in our response on the contextual element at paragraph -- filing 3578 at paragraph 17 and others, particularly on the code of conduct. And as far as the criticism of the media report was also addressed in our brief, the Chamber approached it with caution is in the Trial Judgment in the paragraph -- that I will give you but I can't find it right now. In any event, it is in our response.

Now, let me move to the second question, whether one can consider pillaging in assessing whether a policy has established. The answer, your Honours, is yes. To establish an organised policy, a Chamber may rely on any factual circumstance, depending on the fact at hand, including the factual circumstance that there was an organised appropriation of property, whether or not legally characterised as pillaging.

This is a purely evidentiary matter, and proof of the state or organisational policy is no different from proof of any other element of the crime.

So we should not confuse the legal element of an attack, which is the conduct under -- on the multiple commission of conduct referred to in Article 7(1) with the evidence revealing that such attack was part of a policy.

And again, the attack has to be part of the policy but is not an intrinsic quality of the attack itself. If I have time, I will discuss later for widespread -- for finding that attack was widespread. We do agree that only conducts under Article 7(1) can be

considered, but here we are talking about whether there was a policy to conduct this attack. In this assessment the Chamber is not limited to look at the multiple commission of listed act under Article 7(1) so it was legally correct in its conclusion at paragraph 679 and 680 when it considered, among many other factors, the organisation and nature of the pillaging.

Now, was the Chamber also reasonable with the facts at hand to do so? Not surprising our position is that yes, it was reasonable. The Chamber found that many acts of rape and murder were committed during the course of the MLC pillaging.

The MLC acted following a consistent modus operandi: They searched house to house, pillaging goods, raping civilian, intimidating and killing those who resisted.

Take for example the stories of P-119, P-87, P-23, P-69, P-79, P-42, the MLC stormed into their houses, pillaged their properties and raped or killed whoever tried to oppose or happened to be there at the time. Wrong time, wrong place.

Based on its finding in section VC the Trial Chamber properly concluded they raped and murdered civilians in conjunction with pillaging. And I refer you to paragraph 563, 564, 767, 769, 780 and sentencing judgment 28, 32, 47, 54.

Now, in turn, pillaging was carried out in an organised manner. It benefited and was condoned by senior MLC commanders. Goods were stored in MLC bases and regularly transported back to DRC to be sold. Paragraph 697 of the judgment.

Having noted, quote, "similar indication in relation to acts of murder and rape", end of quote, at trial judgment 680 the Chamber was reasonable to consider, among several other factors, the scale and degree of organisation of the act of pillaging and the MLC level of involvement.

Now, I think I have very limited time and I am not quite sure what to address among the other topic left in light of this morning's submission of my learned colleague, but I

will try to address the widespread issue.

The Defence in particular argued that the Chamber made an error because it relied on pillaging in establishing whether the attack was widespread.

And I am probably going to adopt Mr Haynes' defence technique: "I wasn't there" or "I'd leave" or "If I was there, I did not commit the crime", that's a legitimate submission.

So our first submission, and we believe that we weren't there, is that the Chamber made that finding.

We recognise that reading paragraph 688 in isolation it appears to rely on pillaging particularly in the passage that Mr Haynes quoted before. However that finding has to be read in the context of the legal determination and the legal determination in this case is crystal clear. The Chamber at paragraph 151, I believe, I have now lost it, they found that should we consider -- sorry, I lost my point. Yes, it first properly defined what attack means, only the multiple commission acts referred to in Article, 7 and then it reiterated that from an evidentiary point of view only acts under Article 7(1), quote "may be relied upon to demonstrate", end of quote, the existence of an attack.

Now, the Chamber in our submission was fully aware that those conduct, pillaging per se, could not be considered. And we submit that the reference at paragraph 688 is either a drafting inaccuracy or an indication, a reference to the general context in which murders and rape took place.

In any event, your Honour, that error will be harmless for two reasons. First of all, because findings on murder and rape are sufficient to show the attack was widespread. And second, because the appropriation of property was so serious that in this case would amount to other inhumane acts under Article 7(1)(k). So they

were similar in character and intentionally caused great suffering or serious injury to body or mental and physical health.

Now, we know the serious violation of human right cannot be limited to physically violence against person and in this case pillaging was the of exceptional nature.

Now, we heard the Defence, rightly so, referring over and over to theft, although we make a big deal here trying to distinguish domestic crimes from international crimes and here we are not talking about theft, we are talking about pillaging, victims who were left with nothing, with no money, no saving, no clothing, no food, and no place to sleep. The MLC act with no concern with the victims' livelihood and well-being. Victims were humiliated, robbed with violence and cruelty.

Now, I know that it's not easy to fully appreciate standing here the difference between a theft and a pillaging.

THE COURT OFFICER: [10:36:47] You have two minutes left.

MR COSTI: [10:36:51] Thank you.

And a pillaging. But we need to understand what it means to be left with nothing in a socio-economic context where things cannot be replaced. If they slaughter your livestock, your goats, your animals, you are probably left with no food for you and your kids. If they steal your mattress, you have no place to sleep with you or your family. If they take your shutters, windows and doors, you and your family will be living in a house with no shutters, no windows and no doors.

Persons were deprived of their essential means for sustaining their life and livelihood. So the appropriation of property in this case amounts to inhumane act. So although Bemba was not charged or convicted of crimes against humanity on the basis of appropriation of property, the Appeals Chamber nonetheless should not disturb the Chamber's finding of widespread attack on the basis of any reliance upon the

evidence on property appropriation. It can simply substitute the proper legal reasoning to a wrong legal reasoning, if this is the case.

I will be happy to address any discussion on policy during the question and answer session, unless you want me to continue.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:38:03] Thank you, Mr Costi. (Interpretation) Maître Douzima now has the floor, but I must correct myself because I said that you had five minutes whereas you are entitled to 15 minutes.

MS DOUZIMA-LAWSON: [10:38:18] (Interpretation) Thank you, Madam President. I would like to address the first question by referring to the individual opinion of Judge Ozaki in the judgment under Article 74 of the Statute. I will simply focus on the accused, mindful of the time constraints.

Judge Ozaki pointed out specifically that Article 28(a) provides for liability for crimes committed by subordinates of the military commander. She went on to say that it also applied to all persons performing the duty of military commander under 28(a). That responsibility is sui generis in nature. Responsibility for crimes therefore is attributed to a military commander in case of failure to discharge their duties under international law.

This is of exceptional consideration within the Statute when we compare this provision with other bases of responsibility or liability under 25(3).

Judge Ozaki, as I pointed out yesterday already, also relied on the preamble of the Statute, Article 1, which provides that the jurisdiction of the Court is complementary to that of the States, meaning that jurisdiction lies first of all with the national courts. For that reason the Court therefore must only pay attention to the most serious crimes affecting the international community and proceed to prosecute only the main perpetrators of such crimes rather than focusing on the charges proper.

Therefore, the accused can never be perceived to be a scapegoat because the Court is governed by the Rome Statute.

Article 28 of the Statute targets military commanders and other superior officials or any other persons holding the position of military chief who are therefore criminally liable for matters within the jurisdiction of the Court, even for crimes which are not committed by the commander personally, but by the forces under his or her command or his authority or effective control.

This is a very clear provision which can only be interpreted as is. The military commander or the person occupying that position of a military commander or leader is in a good position to know what is happening to his subordinates, their state of mind, the risks to which they are exposed, particularly when they are dispatched to the ground.

Particularly if we are dealing with people who are not properly trained, who are poorly trained or who are not trained at all, people who have previously demonstrated what they are able to do, particularly when it comes to rape and pillaging, and people who are trigger-happy, people who do not receive any salaries, it is the superior who is in a better position to know all these people.

Now, let me turn my attention to the second question. Can the Trial Chamber rely on the war crime of pillage to establish policy, organisational policy? Of course pillage is not a crime against humanity and we need to break down things to specifics.

When it comes to the case before us, let me recall my filings on the contextual elements of crimes against humanity and say that the modus operandi of the MLC troops was obvious from the very first day of the operations in 2002-2003 in the Central African Republic and it remained in place throughout the entire operation.

The Trial Chamber referred to this in its judgment at paragraph 676. Mindful of the evidence before it, the Chamber came to the finding that when General Bozizé troops had left a particular sector, the MLC soldiers would come into the sector and mop up the area house after house looking for rebels, as they claimed to be doing. But when they didn't find rebels they would rape civilians, pillage their property and in some cases kill those who opposed them.

In such cases several individuals were involved in these acts of rape, pillaging and murder. In some cases the victims actually were affected on all three scores.

Several crimes were reported to have been committed repeatedly through the same modus operandi over a period of more than four months over an extended geographical area covering some eight towns and surrounding villages involved in this case. These are regions that were under the control of the MLC and, therefore, the general motivation of the MLC can be established through hierarchy's tolerance of such crimes, namely punishment meted out to civilians who seemed to support the rebels and the scale of pillaging, murder and rape, as well as the level of organisation and knowledge and participation of the hierarchy of the MLC in relation to these acts.

One must also add that these crimes were committed in sectors where MLC commanders and their troops were based throughout the operations from 2002 to 2003. That is for a period of about five months when they were settled as the masters of that area.

Civilians were victims repeatedly of pillaging, collective rape in all places at all times. Pillaging was of all items and of items that did not matter. Even food, they would empty out houses, destroy window frames and doors and take them away and simply just tear down the entire structure. Now when you look at or you read statements from various victims they indicated that they were left with nothing. So what was

the method used by the MLC? They would come in as a small group and when the rebels have fled they would settle and then go from house to house to pillage, to rape and to kill anyone who opposed them. Let me recall that the Chamber accepted the applications of 5,219 victims in various surroundings, including 4,284 victims of pillaging.

Let me give a simple example, 1,523 victims from Bangui, Sibut 1,000 victims, Bozoum, 1,282 victims, and so on and so forth. So when it is argued that pillaging may be assimilated to theft I disagree, because theft and pillaging are distinct crimes and pillaging can be perpetrated in the presence of the victims, because when the troops come into a house they do not ask for permission from the occupants to take away their property, they use force and their weapons to be able to pillage. So this is different from theft when material is simply stolen or taken away probably in the absence of the occupants, and this is to be distinguished from what may have obtained in relation to the court martial that was allegedly commissioned.

This therefore is the method which the MLC used to -- rather, the Trial Chamber was right to rely on pillaging to determine that there was indeed an organisational policy for the same reason that the same methodology was used by the MLC in all the cities.

In this regard, when it comes to the 4,284 victims of pillaging out of the 5,229 victims in this case, one must say that these victims complained about the fact that the property which they had acquired over extended periods were lost overnight.

And for this reason I thank you, but my conclusion would be that the Trial Chamber in the context of this case was therefore right to rely on pillaging to determine organisational policy.

Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: (Microphone not activated)

MR COSTI: [10:51:38] Thank you, your Honour. We don't have anything to comment on.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:51:41] Thank you. Mr Haynes.

MR HAYNES: [10:51:43] Very, very briefly.

I will turn just briefly to Ms Douzima-Lawson's submissions.

At the end of the day we are in a court of law and one which applies rules of evidence and one which has a principle of orality. It's a remarkable feature of this case that notwithstanding the fact that Ms Douzima-Lawson and those who are in her office have collected 5,200 victims' application forms, but between the victims and the Prosecution no single witness could be produced to the Trial Chamber between about mid-November and March, that of the eight towns she refers to we heard from not one person, and that we are still at this stage with the Prosecution submitting -- and I note the absence of response on this -- that the contextual elements of war crimes only need to be proved to a low threshold. We are still here referring to newspaper articles. We are still here referring to the victims' application forms which the Trial Chamber specifically rejected as a form of evidence.

Your Honour, we invite you to say that the proof of the contextual elements of these crimes, whether it be their widespread nature or the organisational policy, is fatally flawed in this case.

There is no evidence, if I understood the submission correctly, that the MLC had previously demonstrated any propensity to rape or that they were trigger-happy. And I simply place that on the record. I know that this bench of professional judges will treat that submission for what it was.

The phrase "pillages" is in Article 8 of the Statute of Rome because it comes from international humanitarian law. It's just a term of art but it does describe an

acquisitive offence. It occurs in many, many ways. Forgive me for descending to the evidence, but there was in this case a videotape of pillage or theft occurring, and it's CAR-OTP-0039-0058, it was taken in PK4 just outside Bangui. And what it showed was people pushing carts with other people's belongings on them; refrigerators, the sort of things you have heard great complaint of being stolen. The difficulty was they were Central African civilians stealing from one another, and so I think that the great drama and hoo-ha that's being made about what went on in this war needs to be placed into some sort of context.

Mr Costi says that the Trial Chamber's reference to pillaging in paragraph 688 must have been a mistake in drafting. Well, if it was it was one the Trial Chamber made a number of times. They made it in paragraph 676, paragraph 678, paragraph 679, and in the multiple reference to the evidence sections in paragraph 563 which are replete with references to pillage.

They also made the same errors in citation, particularly in footnote 1763, which, as we pointed out in our filing, references multiple occasions of pillaging simpliciter.

Actually, in relation to the first question I don't think we are that far apart. But we do say that knowledge of the contextual elements includes knowledge of the organisational plan. Professor Ambos wants to say something.

MR AMBOS: [10:56:24] Just with your permission, two very brief comments on the legal issues in question one and two.

As to question one, I think it's a very, very important issue because it deals with the relationship between a general rule in a general part that is a mode of liability in our case and on offence. Yes. And Mr Costi's position is basically, and I quote him, "Article 28 is a governing rule." That's what he said.

So as a consequence we have to think this through; if this is correct a commander can

be responsible for crimes against humanity without having knowledge of the attack. He only needs the lower standard "should have known". Now, this discussion behind is a very, very, very deep discussion we have the national jurisdictions in Holland, in Italy, in Spain, in Germany. In England we talk of transferred intent in these cases.

So which intent rules here, which mental element? Is it the knowledge requirement of crimes against humanity, specific knowledge of the attack and displaces this element, the lower mental element of 28? Or is it, as Mr Costi says, the 28 mental standard? And this is a very, very difficult and important decision and we should really, really think about the consequence of the OTP position. Because in the end we are saying a commander is a criminal against humanity. I mean that is a communication we are making here. If we convict someone on the basis of 28 for crimes against humanity we are not convicting him for, for multiple murders but for crimes against humanity. And how can we convict someone for crimes against humanity, being the perpetrator under 25 or commander under 28, without having the knowledge of the text? That's the first point.

The second point refers to the second question, also a legal point. So the contention here is the following: The OTP basically says as a trial judgment you can infer organisational policy within the meaning of Article 7(2)(a) looking at underlying acts which are not in Article 7. We have to make this very clear. But which could be taken from Article 8, pillage. And this is the position the Chamber has to take a view on this. I mean, that means that what sense does organisational policy in crimes against humanity -- not in war crimes, not in context element -- make if we take this from underlying acts which are not even in Article 7? I just wanted to highlight this because it is so important not only for this case.

Thank you very much.

PRESIDING JUDGE VAN DEN WYNGAERT: [10:59:30] Thank you.

Do you want a short?

MR COSTI: [10:59:35] Well, if your Honour will allow me, yes.

PRESIDING JUDGE VAN DEN WYNGAERT: Very briefly, Mr Costi.

MR COSTI: Thirty seconds. I will respond only to the last two legal observation of Mr Ambos.

First of all, we never argued that there is no need for knowledge. We argued that there is a standard for knowledge under Article 28, as discussed yesterday in detail in the morning, and the same applies to the contextual element like any other element of the crime.

The second point, I am not quite sure about the second point that Mr Ambos is making. I will take a minute to think about it because I am really puzzled by his submission, because of course, of course what we are talking about is the mental element in general and its application in these cases. And of course we are charging under crimes against humanity but we are not suggesting any objective responsibility with no knowledge or no intent.

Anyway, I will get back to it later. I am sure we will have questions. So thank you for --

PRESIDING JUDGE VAN DEN WYNGAERT: [11:00:37] Thank you, Mr Costi.

The Chamber is very well aware of the importance of this discussion because, as for Article 28, also crimes against humanity are now going to be determined for the first time on appellate level, so we take all these arguments very seriously and we will take them into consideration.

So now we are going to break for half an hour and we will come back with questions.

THE COURT USHER: [11:01:02] All rise.

(Recess taken at 11.01 a.m.)

(Upon resuming in open session at 11.33 a.m.)

THE COURT USHER: [11:33:08] All rise.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:33:42] So let me start -- just hold on.

Let me start with the first question. And I think it's a fundamental question. The question is: What was the policy and how is the policy defined or identified? Is it sufficient to prove that there have been attacks against civilians, massive attacks perhaps, is that sufficient to establish a policy or is more required? Does the policy need to be criminal or identifiable?

If we think of the crimes against humanity in Nuremberg, there it was very clear that there was an identified policy. If we look at the ICTR, the ICTY, ethnic cleansing, there was a clear policy.

If we don't have a policy that is clear, more clearly defined, don't we risk to water down the very concept of crimes against humanity? And if we deduce the policy in Article 7 from basically Article 8 crimes, aren't we then just, well, watering down the crimes against humanity notion?

So I think it's a question to all parties and participants.

MR COSTI: [11:35:19] I stood up, but I'm not sure if you want me to start or the Defence.

I see, Madam President, your concern. We don't want to water down the concept of crimes against humanity and transform this Court to a court that prosecute domestic crimes.

But the meaning of the concept of policy has to be read for what it actually, what is the goal of the introduction of the concept of policy.

First of all, let me start by saying that the concept of policy in itself evokes concept that we think are not necessarily the one that many people would think when they think about policy, because policy, as you suggested, suggest the idea of a common plan, of an agreement, of an intent, of a mission to accomplish something.

If we look at what Professor Robinson said in his submission in the Bemba case -- sorry, in the Gbagbo case, filing 534 in this proceeding which both parties refer to, he explains that at the Rome Conference, where I wasn't, the concern of many States was that unconnected crime, yet widespread, could come before the Court.

Let's imagine a city with a high level of criminality, you know, there's a high level or widespread, a widespread commission of murders that are completely unconnected from each other and, yet, we all agree that don't constitute a crime against humanity.

So if the attack is just a widespread commission of this conduct that could amount to involve crimes that are actually, we all agree, should be considered domestic crimes and not crimes against humanity.

So to reflect this idea and prevent that unconnected crime would come before the Court, the Canadian proposal as we discussed in our brief was eventually accepted to introduce the term's policy.

So when we talk about policy, to again borrow Professor Robinson's language, as a modest purpose, the purpose of not -- or eliminate or screen off crimes that are not connected with each other, particularly in the situation where you don't ever see systematic, but you have a widespread commission of it and yet they are not connected with each other, for this reason and the modest purpose of policy, we should not think that it's necessary to prove an ideology, motive, another objective or

a common plan echoing co-perpetratorship or the joint criminal enterprise at the ICTY.

For this reason, when we define what a policy is is just a policy to attack the civilian population, meaning those acts, widespread, were connected with each other.

So there is nothing more than this that in our submission would be proved and I hope I answer your question.

JUDGE EBOE-OSUJI: [11:38:33] Is it your position that policies merely - is it your position that the introduction of the word "policy" is merely out of an abundance of caution to ensure that sporadic attacks and not treat it as crimes against humanity? Is that what you are saying?

MR COSTI: [11:38:53] Yes, although I'm not sure it's out of an abundance of caution, because if we only had widespread and systematic you could have unconnected crimes that are still connected widespreadly.

But to go back even to -- but it is, indeed, the idea to prevent these unconnected crimes to come before the Court.

Now, what is the threshold that is the key threshold to distinguish a crime against humanity? And the real focus that distinguishes crimes against humanity from a domestic crime is the widespread or systematic commission.

So the threshold under Article 7 to prevent the domestic crimes that characterise a crime against humanity is that they are committed in the context of a system -- of an attack against a civilian population in a widespread, systematic way. That's really the key that should answer your Honour's concern.

The policy, in our submission, is as a more modest role to avoid situation where the crimes are committed widespreadly but in an unconnected way. There is nothing behind them. There is just spontaneous action of the people.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:40:05] Now what do you do with the watering down argument?

MR COSTI: [11:40:09] Well, your Honour, we don't think it would water down because the core, as I was trying to say, for crimes against humanity is that they are committed in the context of a widespread systematic attack, not in the context of a policy.

So once you are satisfied there is a widespread systematic attack, then you don't water down the concept of crime against humanity, you don't compare it to war crimes, is another context.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:40:34] Thank you.

MR HAYNES: [11:40:36] I don't want to start with a history lesson, but, of course, this Court is unique because it's looking to try crimes in the future. As your Honour has already observed, the distinction between this institution and Nuremberg and the ICTY and the ICTR is that those were tribunals that were said up to try events that had already occurred and in which the organisational policy of the wrongdoers was a mass of historical record, almost a matter of agreed fact. Nobody doubted but that each side in the war in Yugoslavia had a policy to clear everybody out of areas they wanted to be in by whatever means.

And I read the requirement forum, we keep losing words in this debate. We've lost the word "state" or "organisational". It's not just a policy, it's a state or organisational policy.

The purpose of this institution setting the barrier at crimes against humanity being committed pursuant to a state or organisational policy is to set the bar at the same sort of level as the ICTY, the ICTR or Nuremberg, and not merely to have this Court, which frankly hasn't got the resources, to try gang leaders and people who are in

charge of small militia.

That there needs to be a state or organisational policy is a legal requirement. That the organisation behind that policy needs to be a de facto state, I submit, is similarly a legal requirement. That the policy needs to be criminal is self-evident from the terms of Article 7, because the policy needs to be one pursuant to which acts under Article 7(1) are committed and they are crimes. So --

JUDGE EBOE-OSUJI: [11:42:52] Mr Haynes, gang leaders, can they not commit crimes against humanity? Is the problem whether you characterise them as gang leaders or is it a matter of what they do?

MR HAYNES: [11:43:14] I wouldn't say they can't, but the Court trying them would have to consider whether the organisation qualified under Article 7 as a State or organisation. That would be one of the considerations. The Trial Chamber here turned to that quite deliberately to look at the MLC, and they were, you know, they don't say it explicitly, but they were clear that this could not come down to, as it were, a brigade level or battalion level. There had to be an organisational policy. And the organisation had to be the MLC. You can't lose the word "State" there because it's a State or organisation. And in our submission, it's -- that's how you don't water it down. You require that entry level, as it were.

I'm going to continue to deal with Madam Presiding Judge's questions, as I saw them. This yet has to be defined, I think, as a matter of notice. The Pre-Trial Chamber in this case did define the organisational policy, and they defined it in terms which the Trial Chamber copy pasted for its modus operandi. And that, I say, is essential so that an accused can know what he's charged with and what the organisational policy alleged is. And it's significant in this case that the Trial Chamber changed it. And you may have to consider under the area of crimes against humanity whether that

was permissible, whether Mr Bemba, having been committed for trial on the basis that the organisational policy involved house-to-house searches and crimes being committed in that context, effectively, I submit, disproved that at trial. And then a separate organisational policy, a very simple one, simply within the terms of Article 7 and no more, was that which was found by the Trial Chamber.

I don't think there is anything else there.

JUDGE EBOE-OSUJI: [11:45:32] While you're at it, while you are scouting for something else to say, the concern about watering down of the crimes against humanity law, is that the only concern? Or is there also a concern about ensuring that the premium of protection that the Rome Statute was intended to put in place is also not watered down?

MR HAYNES: [11:46:15] I'm always willing to answer any questions that I'm asked, but you have to bear in mind that I come from a particular perspective here. I do have the interests of a man sitting over there at heart.

JUDGE EBOE-OSUJI: [11:46:36] You also are an officer of the Court to assist us in making sense of the Rome Statute.

MR HAYNES: [11:46:40] Absolutely. But I do submit that allowing crimes under Article 8 to be used as proof of the organisational policy under Article 7 would be a watering down of crimes against humanity, which this Appeals Chamber should be slow to permit.

MR AMBOS: [11:47:05] Can I just add two points on this very important question.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:47:09] Mr Ambos.

MR AMBOS: [11:47:11] The first is the blueprint of crimes against humanity, yes, has been the Nuremberg precedent. I mean, when we discussed, if you read Philippe Sands 'East West Street' book, which explains it very nicely, Lauterpacht vs Lemkin,

when crimes against humanity have been first drafted, of course, the Nazi criminality, a State criminality, in a very organised fashion with a final solution plan, was a blueprint. That doesn't mean, of course, that we cannot have a more loose concept of policy. But the whole policy concept comes from the State and has to do with the development of human rights law, international criminal law, IHL since '45 of the last century. So that means that the organisational policy, which is relevant in this case, must be interpreted restrictively.

The second point is that, what is the basis of information? Take for example the discussion what is the rationale of crimes against humanity. David Luban's piece in the Yale Law Journal. We say that something has horribly gone wrong. It's not just 7.1, contrary to what Mr Costi says. It's not just widespread or systematic; it's 7(1) plus 7(2)(A). And the policy informs the attack. That's why it's not comparable to organised crime and gang leaders, poor gang leaders. You need to have a policy and, in particular, a policy of prosecution, which is also an underlying crime, of course, of Article 7(1), and that was, let's say, why we should not go into history lessons. We should not forget history here. It's very important, and a philosophical discussion informed by Luban and other writers. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:49:03] Judge Monageng.

JUDGE MONAGENG: Counsel, you have just said that organisational policy should not be defined restrictively. My question is -- this is something I have wanted to be clarified. TC inferred the policy from surrounding circumstances. And I would like you to enlighten us in terms of the statement that you have made in terms of the restrictiveness and, of course, the inference that was drawn by TC. Thank you.

MR AMBOS: [11:49:46] Well, thank you very much. Two points. I said that it has to be interpreted restrictively. My position is that we have to have restrictive

interpretation of organisational non-State actor policy because the policy element comes from the State.

The idea was a terrorist State, a national socialist State as a kind of blueprint. In the Kenya discussion, Judge Carl Clausewitz's position, the majority in the Kenya Pre-Trial Chamber, exactly is about this. Now, what does this mean in terms of the inference issue, which comes back to the question I made and Mr Costi wanted to answer but was not able to answer. Maybe I can clarify my argument. It was not clear enough.

You are very sophisticated to make a legal and evidentiary distinction. So you say we are mixing up the legal elements with the evidentiary issues. But what we are saying is, if you talk about organisational policy within the framework of Article 7 Statute, crimes against humanity, you cannot infer from the underlying acts not being in Article 7, and you cannot therefore separate. You cannot say it doesn't import me, it doesn't matter to me; I just take pillage, which is a war crime, and use this, if there is, let's assume for the sake of argument, there is an organised pillage and therefore there has been an organisational policy. We are not talking about the organisational policy of pillaging. We are talking about the organisational policy under crimes against humanity. This is the organisational policy in line with the underlying acts including inhuman acts in Article 7. Thank you.

JUDGE EBOE-OSUJI: [11:51:32] Mr Ambos, he has an alternative argument that you have not responded to it or perhaps I didn't hear you respond, your side. And the alternative argument is that under the catch-all provision of other inhumane acts that property crimes of that nature can come in, what do you say?

MR AMBOS: [11:52:01] Mr Haynes has made this point very clearly. That is not possible because I think it was very convincing, and that is the structure of -- if you

read Article 7(1), all the acts are crimes against a person, against a liberty, enforced disappearances. While pillaging is clearly a property crime and therefore it would never fall under inhumane acts I think, so.

MR HAYNES: [11:52:29] Can I just say, I also think the pleading issue is important. It's far too late to be raising that argument here and now. If it had been the Prosecution's case or even the victims had wanted to make the submission that the pillaging in this case reached the level of an inhumane act, that they should have sought confirmation of a charge in that form.

PRESIDING JUDGE VAN DEN WYNGAERT: [11:52:53] My next question is about -- sorry. I'm sorry.

(Appeals Chamber confers)

JUDGE EBOE-OSUJI: [11:53:13] Prosecutor, I have a number of questions concerning the modus operandi, which is incomplete in the arguments written. Sir Haynes mentioned it also this morning.

Now, as a matter of evidence, I begin with that, as a matter of evidence, is the finding of modus operandi based on any evidence beyond the testimony of the CAR investigation magistrate? Is there more to the evidence than that?

MR COSTI: [11:54:05] I believe, your Honour. I'm sorry. So the modus operandi finding at paragraph 564 is based on the general discussion of the general conduct of MLC troops, and is based, yes, on that evidence that your Honour referred to, but we submit also on the other section in the judgment where underlying incidents were discussed.

So it is a combination of what the Defence rightly defined, hearsay, although corroborated evidence from media report, NGO report, et cetera, procès verbal, but also direct evidence of these other incidents. And I can refer you to the precise part

of our written submission, but we address this to quite a large extent. So, yes, it is more than that.

JUDGE EBOE-OSUJI: [11:55:00] Then I move on to the matter of the concept of it. The notion of modus operandi, does it import some sort of uniqueness of conduct, handprint, if you like, that separates a course of conduct transaction, makes it unique unto itself, so you can say, well, other people doing the same thing, their duty is a different question for them. Here, there is a modus operandi. You follow that formula, you'll get what people are doing and who is doing it. Does the modus operandi connote that sense of things?

MR COSTI: [11:56:02] Well --

JUDGE EBOE-OSUJI: [11:56:05] Let me tell you before you answer. Let me perhaps give you the fuller concern that I need to have clarified.

Here, we have some awful crimes that have been committed, rapes of people, murders, pillaging. But these are crimes that do get committed in a lot of armed conflict by, hopefully, rogue soldiers.

What is it about the facts, factual matter of this case, that makes it unique to MLC, as opposed to in other instances, other wars where rogue soldiers would do the same thing? What is the modus operandi? What makes it so?

(OTP counsel confer)

MR COSTI: [11:57:25] Your Honour, I'll try to address your question. First of all, the modus operandi, the way we understand it, is not the policy, just to begin with. It is one of the factors that the Chamber considered to find that there was a policy.

Now, moving on to modus operandi itself, it is unique in this context, on the basis of the evidence brought, in the sense that unified the conduct of the MLCs.

Now, your Honour rightly said that probably in other conflicts, and also in this

conflict, other crimes were committed by other people. How do we distinguish those from the other?

Well, this is an assessment that the Chamber made in all the discussion of the identification of the perpetrators, which the Defence challenges. We responded to it. It's all in the briefs.

So as far as the underlying incident is concerned, there is no doubt that those were committed by MLC soldiers.

The pattern evidence, let me use this language, which is obviously not legal and not accurate, on other crimes, NGOs, media, et cetera, were scrutinised carefully by the Chamber, who was aware of the limitation of this evidence. And I would refer you to trial judgment, by the way, in response to what Mr Haynes said before, 269 to 271. And they were clearly distilled to make sure that they were evidence of the MLC's behaviour.

So as far as this case is concerned, that modus operandi was of the MLC.

Now, I wouldn't forget that this is one of the elements that the Chamber considered to conclude that it was a policy, so is not the modus operandi per se.

JUDGE EBOE-OSUJI: [11:59:31] Is it enough to -- I'm asking so as it know what to think -- is it enough then that where crimes are identified and attributed to other membership or certain troops that belong to a broader organisation, then we kick it up and say that's evidence of modus operandi of the bigger organisation itself? I guess that's the big question that's been troubling this case, isn't it? In which case the conduct of rogue soldiers would very easily become modus operandi or pattern evidence, if you like, of a larger army involved in warfare somewhere.

MR COSTI: [12:00:34] Your Honour, I hope I respond to your question by saying that the evidence at hand suggests, and show actually beyond reasonable doubt, that

these crimes were committed by MLC soldiers and follow a similar pattern. So is this enough to say that there was a MLC modus operandi? I'm not sure whether this is a relevant question in the sense that the policy has to be the MLC policy.

There was a modus operandi of the troops on the ground that was so constant that would exclude behaviour of a random soldier that act on their own will. Then there were other five, four, six factor discussed by the Chamber. Read together, there was a reasonable conclusion that the MLC had a policy to attack the civilian.

I don't know if I answered your question. I think I probably raised more doubt, looking at your ...

JUDGE MORRISON: [12:01:40] Sorry. Mr Costi, isn't it all boiled down to a matter of evidence at the end of the day?

MR COSTI: [12:01:48] Yes, your Honour. And on this point I would like to respond to Mr Ambos that there is a fundamental difference between legal issues and evidence, and we shouldn't forget it and mix it up.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:02:00] Yes, but the question remains what do you have to establish? And that's precisely what we are discussing here now.

MR COSTI: [12:02:06] Sure. And, your Honour, in our view, the Chamber finding that there was a policy to attack the civilians is the only and necessary finding that should have been found beyond reasonable doubt, and the Chamber did it.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:02:25] Thank you.

May I now turn to my next question -- sorry, I'm sorry.

MR HAYNES: [12:02:31] This may have been obvious from what Mr Costi just said, but the modus operandi is completely pernicious in this case because it's used by the Trial Chamber to identify the perpetrators. And sometimes exclusively to identify

the perpetrators.

If you read the words of the identification sections, they list a number of factors and then they say "and/or because they committed offences pursuant to a modus operandi".

So as your Honour would say, it's a Catch-22 situation. The modus operandi is used to identify you, and then having been identified by that modus operandi, it's then turned around again to show you've got a policy.

Now, Judge Morrison is right, it's a matter of evidence. But what sort of evidence is that? The idea that house to house searching in any urban combat is unique, it's got any fingerprints about it is very far-fetched.

So I thought I just ought to say that, that the use of the modus operandi by the Chamber in this case is a Catch-22.

MR COSTI: [12:03:58] And I'm sure you don't want to hear me probably, but I will just.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:04:03] Very briefly.

MR COSTI: [12:04:04] Very briefly. Precisely because it's a matter of evidence is about the totality of the evidence, it is not about picking and choosing one and trying to turn it down. And of course, if we say the perpetrators were identified only through the modus operandi and the modus operandi decided on the basis of the perpetration, yes, that would be a catch, I'm not sure which number.

MS BRADY: [12:04:29] 22.

MR COSTI: [12:04:30] 22. But that's not the case here.

MR HAYNES: [12:04:33] And I just forgot to say that if you look at the three murders none of them comport to the modus operandi, and quite a lot of the rapes don't either.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:04:41] Thank you.
Madam représent légal.
MS DOUZIMA LAWSON: [12:04:53] (Interpretation) Thank you, Madam President. The first question which was raised a short while ago was for all parties and participants, and I would like to answer quickly by first of all referring to why the troops, why Mr Jean-Pierre Bemba had to send his troops to the CAR. It was at the request for the purpose of warding off rebels who were marching on the capital of the Central African Republic.
He promptly sent them and, yet, at that time there was no fighting as such. We know that his troops were troops that were quite serious and therefore they were no nonsense troops, and that is why the rebels had to withdrew even before they arrived.
Now, what happened when they arrived? When they arrived the rebels fled and they settled. You have the case file with you. For a period of about five months - and this can be seen in the documents which I intended to use in my submissions to your Chamber, I have the references in those documents.
What happened then is that they started to rape, to pillage, and to kill anyone who resisted them whenever they tried to pillage or to rape, and this happened repeatedly with the absolute tolerance of their hierarchy.
At paragraph 160 of the judgment the TC highlighted this point and stated that policy must not be established formally, but that it can be inferred from various factors which put together can determine that there was indeed a policy.
Now, when you don't take reasonable, reliable measures before, during and after the commission of crimes for which you have knowledge, this means that you tolerate and accept what has transpired.
You have the case file before you, as I mentioned a short while ago, murder, pillaging

and rape were committed in all the towns to which those troops went. Could it therefore not be said that there was a policy, a policy of tolerance as I mentioned before?

Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:08:07] Merci, Maître Douzima. My next question is a question to the Prosecution and it's based on their submissions. And I've asked the Registry to pull up paragraph 24 of the submissions of the Prosecution. So this is document 3578, paragraph 24. So evidence 1?

THE COURT OFFICER: [12:08:54] I'm sorry, your Honour, yes, evidence 1 channel.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:09:12] We don't have it.

THE COURT OFFICER: [12:09:16] It's being published.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:09:39] So I want paragraph 24. Do we have it? Yes? Everybody has it?

So here in paragraph 24, I read it here, you say:

"Notably, it is these material facts (multiple acts, widespread attack) which must be proven beyond reasonable doubt ..."

And so it's a question which reminds me of something that we discussed yesterday or the day before with Mr Gallmetzer, the question of the distinction between material facts and subsidiary facts.

So is it then your position that multiple acts and widespread attack are material facts and that the individual acts that you put in evidence is a subsidiary fact? Or is it the case, I think it's also another way to read Article 7, to say that multiple acts and a widespread attack are the elements that need to be sustained by material facts, so are not material facts in and of themselves but are elements that need to be proven by material facts that then have to be notified to the accused, because that's in the notice

part of the interpretation of Article 7?

MR COSTI: [12:11:14] So I will answer very briefly your question. If Mr Gallmetzer wants to add something, I think he will be allowed to step in, if necessary.

The material facts, as we said here, we maintain is the first thing, is the first of your interpretation of this article, of this submission. Material facts is that a widespread - the attack is widespread and systematic. And the underlying acts are going to prove these as material acts are not material facts but intermediary facts. Now, they are not just the incidents, underlying incidents, but a totality of the evidence that eventually has to be looked at when we try to find, when we find beyond reasonable doubt the material fact of the widespread and systematic nature of the attack. So not just the specific incidents, but a totality of the evidence including hearsay evidence and pattern evidence.

Having said that, those are not the material fact. These are the material fact because they are the elements of the crime.

I believe Mr Gallmetzer would like to answer.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:12:24] Mr Gallmetzer.

MR GALLMETZER: [12:12:26] Thank you for this opportunity.

I also would like to remind you how the attack was actually defined in the confirmation decision, which should be the one that actually defines the basis upon which the person is brought to trial.

I'm referring you to paragraphs 91, 108 and 116 of the decision that clearly indicate that the attack as a legal element that needs to be proven is defined in the broad terms, while then the underlying acts, if it were, were used as evidence by the Pre-Trial Chamber to establish the existence of the attack. In order, your Honour, to really appreciate this --

PRESIDING JUDGE VAN DEN WYNGAERT: [12:13:21] (Microphone not activated)
THE INTERPRETER: [12:13:23] Microphone, your Honour.
MR GALLMETZER: [12:13:27] Your Honour, an element is a legal notion, right? The attack is factually defined. It is in this particular case, if I may read it out to you at paragraph 91, there was an attack carried out on the CAR territory by MLC soldiers from 26 October to 15 March 2006. Then paragraph 108 defines it further.
And the Chamber clearly distinguishes between evidence and the factual finding which is the finding that determines the fact. It says, "Having reviewed the ... evidence as a whole, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that a large number of CAR civilians were victims of crimes specified in the Amended DCC, including murder and that a majority were victims of rapes over a five-month period."
So clearly, that identifies the attack and it does not go into the minute detail of which of the underlying acts of murder, rape constitute the factual basis.
The Chamber looked at that as evidence. It looked at it as a whole. Now, to illustrate this, please allow me to refer to something that Professor Robinson writes in the amicus curiae submissions in the Gbagbo case. What the Chamber needs to be satisfied here is that there is the existence of a forest. In order to be satisfied that there is a forest, you don't need to zoom in and make individual findings in relation to every single tree.
In other words, you can look at it from a bird's eye perspective as it were and find that based on all the evidence that you find to be credible and reliable, there is an attack, like there is a forest, without slicing it up and looking at every single tree individually before you come to the conclusion.
PRESIDING JUDGE VAN DEN WYNGAERT: [12:16:05] Thank you, Mr Gallmetzer.

JUDGE EBOE-OSUJI: [12:16:07] But that would be so for purposes of confirmation, is it?

MR GALLMETZER: [12:16:11] Well, the only difference between confirmation and trial is the standard of proof that you apply. There should be no difference as to, you know, how you applied the law.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:16:23] Well, thank you for raising this because I was going to ask a question about precisely this, because that's something you also argue in your submissions, the forest/tree argument. But I agree with that. You have to prove a forest, not the trees. But how can you prove a forest without proving trees? You don't need to prove all the trees in the forest, but at least a substantial amount of trees. And so that brings me to the question: What really needs to be established? We are all I think in agreement that the contextual elements need to be proven beyond a reasonable doubt. So it's the same evidentiary standard.

MR GALLMETZER: [12:17:05] Yes.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:17:05] So if you have to prove your forest, I think that you at least have to prove a substantial amount of trees beyond a reasonable doubt.

MR GALLMETZER: [12:17:16] Our position is that the legal element, if we keep talking in this context, the legal element is: Was there a forest? Right? So the Chamber's application of the standard beyond a reasonable doubt applies to was there a forest?

How do you find it? Well, it is a question of evidence. But in terms of methodology, the existence of individual trees in that particular context to the threshold of beyond a reasonable doubt is not a prerequisite as to the existence of the forest. The element to which you apply the beyond reasonable doubt standard, the

element or the core fact that needs to be established is whether there is a forest and that is a question of evidence.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:18:08] Thank you. I am sure my colleagues will want to --

JUDGE EBOE-OSUJI: [12:18:13] I do. I return to the matter of the trees and the forest that you say was the analogy used. Don't we see that -- tell me now if this understanding or this way of looking at it is incorrect, please feel free to say so -- that at the confirmation stage, where somebody may take the view the primary purpose is to have a vetting system that ensures that people are not sent to trial on flimsy grounds, if that is a primary purpose, then one could see possibly that the Pre-Trial Chamber might confine themselves to taking a credible yet not in-depth look at things and say, yes, this is not a frivolous case, we are satisfied that there is enough in this case to merit further inquiry, so we can get up to the second stage where that detailed inquiry is made. Does that then mean that there is no obligation at the second stage to really dig down to the nitty-gritty of things in terms of the details of the elements that need to be established for purposes of criminal responsibility?

MR GALLMETZER: [12:19:59] Your Honour, the purpose of a confirmation process and confirmation decision indeed, as you say, is to make sure that only those cases go to trial that are supported by solid evidence. And we have abundant jurisprudence, including from the Appeals Chamber, that defines the purpose of the confirmation hearing, the confirmation decision and also the standards that need to be applied to assess the evidence and to determine facts.

Now --

JUDGE EBOE-OSUJI: [12:20:33] Once you get to trial, you now have the full case.

MR GALLMETZER: [12:20:37] And that is why the clear difference between the

confirmation and the trial is, well, first the Prosecution, yes, will present all its evidence, but most importantly the Chamber at that stage will have to enter findings at the higher evidentiary threshold, that is have the material facts and in this case the existence of an attack, have they been established beyond reasonable doubt?

So in terms of methodology, how to go about establishing the material fact as defined by the Pre-Trial Chamber remains the same.

The main difference is, well, the quantity and quality of the evidence that will then be before the Trial Chamber, but most decisively the standard of proof that the Trial Chamber will apply to establish the relevant material fact.

And let me just now go back and talk for a second about what evidence did the Trial Chamber have and how did the Trial Chamber come to this conclusion.

As we have extensively argued in those submissions that your Honour, the presiding Judge, referred to, the finding that there was an attack is not -- is based on a large pool of evidence. In the first place, it is based on evidence that the Chamber also used to establish that the individual acts of murder, rape and, well, pillaging, we'll see, have been established beyond reasonable doubt. The Chamber already established those that were established beyond a reasonable doubt.

And then we have a very large pool of --

PRESIDING JUDGE VAN DEN WYNGAERT: [12:22:31] May I interrupt you? So these are the 28 crimes for which Mr Bemba has been convicted. So that's the basis --

MR GALLMETZER: Right.

PRESIDING JUDGE VAN DEN WYNGAERT: -- and you go beyond that?

MR GALLMETZER: [12:22:41] Absolutely, absolutely. We went beyond that. But what we have is other evidence that where the Chamber then followed what we describe in our briefs and what I alluded to in my submissions, the three-step

approach to decision-making. The Chamber assessed whether that other evidence was credible and reliable. And these are the findings to be found in paragraph 563 of the judgment. It assessed independently whether that evidence was credible and reliable in relation to a broader pool of acts, right? And then taking all that additional evidence together with the evidence that relates to the acts that have separately been found to be established beyond a reasonable doubt, evidence that corroborates each other, evidence that shows the same pattern of conduct on that entire pool of evidence, the Chamber then found beyond a reasonable doubt that there was an attack.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:23:49] Do we then have to base our finding on that footnote or that paragraph 563 with the long footnote? And so my question then is, in that footnote, the quality of the evidence, not only the quantity, but quality, to what extent in making a finding beyond reasonable doubt on crimes against humanity can the Trial Chamber rely on NGO reports, press articles, possibly anonymous hearsay, I don't know.

MR GALLMETZER: [12:24:23] Yes.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:24:24] Is this something that we can rely on to make that or to confirm that finding?

MR GALLMETZER: Now, the Trial Chamber in that one paragraph that you have just indicate, there is a very important footnote, and that footnote refers -- first of all, it includes some evidence, yeah, but then it also refers to a much broader pool of evidence.

Now, let me -- so that is the evidentiary basis. Let me go to specific, your question that you raise. The Trial Chamber did assess the reliability and the credibility of the evidence. And this we submit is primarily a task for the trier of fact. It did not

simply throw in everything and then come to a conclusion. It properly went through the three-stage approach of fact finding.

It determined which of the evidence that related to additional acts was credible and reliable and that part of the evidence it included.

Now, whether some media articles, whether some hearsay evidence is credible and reliable is a determination for the trier of fact. Nothing in law prevents a trial chamber from relying on this evidence under certain circumstances. It is a factual determination. This case, the evidence was corroborated.

The Chamber did not rely on individual items of evidence. Let's assume there was a piece of hearsay evidence, it did not rely on this in isolation. Was it corroborated? Was it consistent with others? Was there any proof in the context of the evidentiary basis as a whole that the Chamber could find it credible and reliable? In this case the Chamber determined yes, that was the case, and therefore it added it to the pool of broader evidence to inform together with the evidence that established beyond a reasonable doubt of the acts of which Mr Bemba was convicted. There is a sufficient evidentiary pool to conclude that an attack existed, i.e., that there was a forest.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:26:45] This is based on the footnote in paragraph 563. So are you saying that the Appeals Chamber has to accept that and does not need further explanation about what this evidence is? You say for example mutually corroborating evidence, but how do we know that if we don't know what the evidence is?

MR GALLMETZER: [12:27:09] Well, your Honours, the footnote on itself is not, you know, is not the only authority. The footnote, a good part of the footnote refers to other portions of the judgment and those portions of the judgment are independently supported by additional evidence. So it is not one footnote that now, as it were, is

the only source. The footnote critically refers to a large, significant pool of other evidence in which the Chamber makes factual findings in relation to acts of murder, rape, pillaging that inform its ultimate decision.

And the other evidence that is then expressly referred to in that footnote corroborates it. They corroborate each other.

So really in order to make, if you are to assess the reasonableness of the Chamber's conclusion and, again, referring back to Mrs Brady's submission the first day, it is a factual finding to which you should apply deference to the Trial Chamber, in doing so, your Honour, you need to really assess the totality of the evidence which in fact informed the Chamber's conclusion.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:28:28] Judge Morrison has a question.

JUDGE MORRISON: [12:28:30] Mr Gallmetzer, would you accept this as a proposition, that if the evidential weight of any given piece of information is zero, and there is another piece of information whose evidential weight is equally regarded as zero, that those two pieces of evidence cannot corroborate each other?

MR GALLMETZER: [12:28:56] This is an abstract question, and in the abstract I think the proposition is fair. However, in order to assess the credibility of an individual piece of evidence, you cannot look at it in isolation, even at -- not only at the fact-finding stage, also at the assessment of credibility, you need to look at all the evidence in its context, and corroboration is a factor.

So even, you know -- you need to invert it, in order to determine whether the weight of evidence is really zero, you first need to see is it corroborated and not the other way around.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:29:40] May I give you an example.

An example in the footnote is the dossier of the Investigating Judge, where you have all the individual civil parties making a declaration, numerous facts that are being declared to the Investigating Judge, would you consider that as evidence? Because in a civil law country, I'm coming from Belgium, in France, that in and of itself would not be evidence, just the starting of a case, of an investigation on a particular crime that the victim comes to report to the Investigating Judge. But is it evidence? Question mark.

MR GALLMETZER: [12:30:29] Just give me a second, please.

(OTP counsel confer)

MR GALLMETZER: [12:30:54] Your Honour, we just made sure that we all think along the same lines. And the answer is yes, absolutely, everything that the Chamber admitted in this proceedings as evidence can be properly considered to inform its decision.

Now, in a national proceeding, your example is very much focused on a national procedure and national rules, in that particular case, if an initial statement is taken, in a national proceeding that would not yet be evidence, right? However, in this context here, everything, everything that the Chamber finds to be credible and reliable can be admitted or submitted as some Chambers refer to in order to constitute the basis for a Chamber's decision under Article 74(2).

PRESIDING JUDGE VAN DEN WYNGAERT: [12:31:48] Beyond reasonable doubt?

MR GALLMETZER: [12:31:50] That then remains a matter of fact of, you know, how strong is the evidence as a whole. If your initial document that was taken, say, by a Preliminary Judge is credible and reliable, judged on the totality of the evidence as a whole, not judged in isolation, then yes, that can contribute, that can contribute to informing the overall conclusion of the Chamber.

JUDGE EBOE-OSUJI: [12:32:19] The Defence --

PRESIDING JUDGE VAN DEN WYNGAERT: [12:32:21] Sorry.

To the question of Judge Morrison, then you take a document that is not ansicht evidence as evidence in corroboration, because in and of itself it could not be evidence.

I'm sorry, Judge Eboe-Osuji, I interrupted you.

MR COSTI: [12:32:39] Can I -- sorry. Can I make a -- oh, I'm sorry.

Just a small point. As a former civil law practitioner, and I see your Honour's concern, there are investigative acts that in national proceeding are nothing unless they're brought into court and then confirmed, et cetera, et cetera. But we are not in that proceeding. We are not applying that law. What we are applying are the rules of procedure of this Court and any piece of evidence, if corroborated, if deemed credible by the Trial Chamber by other evidence, then it could be used.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:33:18] I come back to Judge Morrison's question, if the initial piece of evidence is zero, then what do you need? You can't -- well, I don't have to repeat his question.

MR GALLMETZER: [12:33:27] But can I just go back to that and perhaps reiterate what I said before. You look, in order to determine whether the initial value is really zero, you would exclude it, right? But as a prerequisite you have to make that determination in the context. If that is the case, yes, that is the first stage of decision-making. You would not find that piece of evidence credible and reliable and, therefore, you could not include it into the pool of evidence.

However, the Chamber properly followed that process. It first assessed whether the evidence before it was credible and reliable and choose then to rely then on a specific amount of evidence that it found to be credible and reliable to then go to the next

stage of fact finding, and that is to apply the standard to -- to the material fact of the existence of an attack.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:34:28] But they didn't do this with the file of the Investigating Judge, because if we would go for a civil law approach that your colleague confirms, an investigative act is not a piece of evidence, but yet it is considered, it's in the footnote.

MR GALLMETZER: [12:34:42] Your Honours, our law of evidence is pretty clear. It's a very liberal approach to admitting evidence as to freely assess the credibility of evidence. We are not bound. You, your Honours, obviously. And in the primary phase, the trier of fact, the Trial Chamber was not bound by national rules of evidence. It applied, and it correctly applied the evidentiary rules that are applicable here. Article 69(8), yeah, okay, (8), Article 96(8), if I may -- 69(8) says, "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."

Obviously, this is also corroborated by the Rules of Procedure and Evidence, Rule 63 and following, that expressly state that the Chambers freely assessed the evidence. And you are not bound by national law.

JUDGE EBOE-OSUJI: [12:36:06] But the Defence are complaining that the evidence, especially in reference to the footnote, ought not have been considered as reliable at least, we can say that, credible or reliable. Are we not to consider that complaint of the Defence?

MR COSTI: [12:36:41] Sorry. I may try to answer your question as well and which is the way in which we answered the Defence complaint in our brief. Now, I wouldn't agree that it's all in one footnote, but certainly is an important one.

JUDGE EBOE-OSUJI: [12:36:54] Wherever it is, it doesn't matter where it is.

MR COSTI: [12:36:57] That footnote we are talking about refers to the old discussion of the underlying incidents, V(C)(3), V(C)(4), V(C)(6) and so on. So it's not just referring to a few procès verbal or other general pattern evidence. It calls back the direct evidence that this Trial Chamber heard live in this Court about specific incident.

Now, was the Chamber reasonable in light of the totality of the evidence to conclude that the attack existed? Our submission is yes, that is, the Defence approach which tends to say this piece of evidence was unavailable, this was zero, this was zero --

JUDGE EBOE-OSUJI: [12:37:42] No, I'm not asking about reasonable now. I'm saying the Defence is saying that - especially now I'm focusing on the footnote - the materials in the footnotes, at least those should not have been relied upon. The question is are we not to consider that request? What are we supposed to do with that request of the Defence, ignore it?

MR COSTI: [12:38:09] Not ignore it, but dismiss it.

JUDGE EBOE-OSUJI: [12:38:12] Dismiss it why?

MR COSTI: [12:38:14] Because we believe that the Chamber properly relied upon this evidence and assessed their credibility. There is no --

JUDGE EBOE-OSUJI: [12:38:20] Your argument is -- is your argument that the Appeals Chamber can look at that and confirm that the Trial Chamber was correct or that the Appeals Chamber should not look at those because the Trial Chamber has already made a determination, in other words, the much bandied concept of deference?

MR COSTI: [12:38:45] I think deference is the answer. But, of course, the Chamber, if it reached the conclusion that the Trial Chamber conclusion was unreasonable, then no reasonable Trial Chamber could have reached that conclusion based on that

evidence, then of course they can intervene.

JUDGE EBOE-OSUJI: [12:38:58] Much of the materials in that footnote are documentary evidence. Usually the argument of deference is that there is an appellate disadvantage to an oral witness who is testifying; demeanour, the Appeals Chamber cannot really assess that, a demeanour, cannot replicate it, even if you called the witness back to testify before the Appeals Chamber. Therefore, appellant disadvantage, don't second-guess findings of credibility of an oral witness. But here we are talking about a document.

Why is it that the Appeals Chamber should not check that complaint?

MR COSTI: [12:39:51] I would just refer to what Ms Brady said two days ago in response to I believe a similar question. The documents, of course, there is not a question of second-guessing, they were never live, but at the same time the Trial Chamber wasn't just listening to the oral evidence. Eventually they sat down and discussed the documentary evidence in light of what they understood from that oral evidence.

So even for the document, we submit that pretty much deferral has to be given to a trial chamber findings and that a trial chamber was in a better position than your Honour would be in order to assess that specific evidence.

And again --

JUDGE EBOE-OSUJI: [12:40:27] All right. I didn't get why you say that. They are in a better position to assess the value, the forensic value of documentary evidence. Why is that? Can you --

MR COSTI: [12:40:37] Yes, because the Trial Chamber had the chance to assess it in light of also the oral evidence that they were exposed to during the course of a trial. They were still in a better position to look at it holistically, which is precisely what we

would invite your Honours to do when you look at the Trial Chamber's findings and --

JUDGE EBOE-OSUJI: [12:40:53] Not if we have a transcript of the oral evidence. I'm trying to see how far we go with this so as to help me. If we have the transcript of oral evidence that one may look at the documentary evidence in light of, is the Appeals Chamber necessarily in the position of disadvantage to appreciate that oral evidence for what it is worth and look at the documentary evidence in light of that? Is that something that involves appellate disadvantage?

MR COSTI: [12:41:26] Of course now I'm in a slightly different position, because my answer is yes, your Honour, you could be in a disadvantage, although I do appreciate your concern, particularly coming from a civil law country where the appeals are all de novo over and over again.

But this is not where we are here where the principle of orality is the base of this trial or proceeding, whereby I do think and we maintain that you would be in a disadvantageous position even had you the chance obviously to review the trial record to assess whether no reasonable trial chamber could have reached that conclusion, rather that re-guess whether the evidence was credible, reliable or acceptable.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:42:05] Judge Morrison has a question.

JUDGE MORRISON: [12:42:06] Mr Costi, what forensic test do you submit is to be used to determine whether, for instance, an unattributed press report standing alone is credible and reliable and therefore has a weight that can be taken into account when considering either other documentary or oral testimony?

MR COSTI: [12:42:31] If you give me just one second just to make sure again we are

on the same.

(OTP counsel confer)

MR COSTI: [12:42:51] So, your Honour, I'm not -- it's difficult to say what is the forensic stance for a specific document. I would say that you would apply the same standard you would apply when you look at any other kind of piece of evidence. But more importantly, that assessment has to be made in connection with the other evidence, unless this evidence should be excluded also altogether.

But the assessment of the credibility of this evidence has to be done in the context with the others. I wouldn't take one document in isolation and ask myself "What is the value of this?" unless I read it in the context with the other.

JUDGE MORRISON: [12:43:40] Well, if you don't do that, how can you see whether it has any relevance at all to the other evidence so as to give it evidential weight?

MR COSTI: [12:43:51] And I go back to the same point over and over again, I think it's by reading it in context. I'm sure this answer probably doesn't satisfy you. But, for example, if I have an anonymous letter suggesting that Matteo Costi is working at the ICC, alone, it's nothing. Do I have video from a 24-hour camera, a recording that I'm entering at the ICC? Do we have a record that I'm actually making a submission before this Appeals Chamber? There is an HR report that says that I was hired this date and this date. There are witnesses coming in and saying, "Costi, yeah, I saw him frequently at the ICC."

Well, then with this pool of evidence I think a reasonable trial chamber could conclude that Costi was indeed before the -- working at the ICC, including on the basis of that piece of evidence which alone had probably very limited value.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:44:50] I agree with your example. But what about my example, a dossier with all the victims?

(OTP counsel confer)

MR COSTI: [12:44:58] Sorry.

(OTP counsel confer)

MR COSTI: [12:45:18] Well, I'll maybe give back the word to Mr Gallmetzer. But the answer will be the same. I wouldn't exclude those dossier on the fact in a civil law proceeding, that's just an initial step. I wouldn't say that I can acquire documents for a domestic proceeding only when I have the final appeal judgment or when there are actually indeed evidence within before those chambers. That's for the Article 69 that we cited before.

I would then consider them in light of the entirety of the evidence. If this dossier confirmed direct evidence and other evidence brought before the Chamber, then they do have a probative value.

I mean, the threshold to admit the evidence is pretty low. The question is which weight we want to give to them. And that has to be done in a holistic way. It can't be done in isolation.

MR GALLMETZER: [12:46:23] Sorry, can I add some legal authority?

JUDGE EBOE-OSUJI: [12:46:27] Briefly, and this may be for Ms Brady, the team leader, part of what we need -- we are now in the early stages of the jurisprudence of this Court in these matters we're discussing even on questions of standards of appellate review.

In this Court we do have the right of the Prosecution to appeal acquittals, isn't that the case? Looking down the line, this is a permanent court, so we have to establish the precedent that even when a trial court, trial chamber relies on dossier from the defence, they can acquit, and the Appeals Chamber is not to look into a complaint whether or not those findings of fact are indeed valid and correct; is that where we

are, where we're going?

MS BRADY: [12:47:41] Well, the primary position we have is that there should be deference to the Trial Chamber's findings. Whether they are on the contextual elements, whether they are on discrete findings of on a particular piece of evidence, whether you are talking about a dossier or the ultimate finding, subsidiary facts or the ultimate finding of a material fact, the deference should be the same.

I think the question in this case is that the contextual element here, the attack, was based on essentially two strands of evidence. One strand was based firmly on findings that were made beyond a reasonable doubt on a number, some dozens of proven incidents of rape and murder. That was what I would call the primary evidence. It was buttressed by the surrounding evidence given by P-6 and P-9 concerning, let's say, the dossier evidence. It was this evidence in its totality.

On Judge Morrison's question on the relevant -- I mean, the evidence in the dossier was clearly relevant. The question was whether it was probative to the question of whether there was an attack. In our submission, it was. Perhaps not each individual report on its own could sustain the finding. But that's unrealistic. You don't look at findings in that way. You have to look at it in a holistic way.

If a piece of evidence is completely of no value, of no relevance, of course, you knock it out. But it would be too early in the analysis to knock it out without considering it against the other evidence.

I'm not sure if that assists your Honour.

JUDGE EBOE-OSUJI: [12:49:36] We're all asking questions to know, to get your views, and then we will consider all of the submissions and responses from the Defence and responses from the Prosecutor and the victims' counsel, of course.

Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [12:49:52] I think Judge Hofmański has a question.

JUDGE HOFMAŃSKI: [12:49:56] Thank you.

To finish this discussion about the evidence, I'd like to go back to the problem of knowledge. Mr Haynes, you said in your answer to question A that both the commander and the direct perpetrators are required to know, I suppose in the sense of Article 30, that the conduct was a part of the widespread and systematic attack against the civilian population.

Therefore, how can you explain possible confusion between the requirement of knowledge under Article 28, according to which it is sufficient when the commander should have known about crimes committed by subordinates and, on the other hand, the requirements of knowledge as a contextual element of the crime against humanity? In other words, how it's possible that law requires a perpetrator to know that the acts committed by subordinates were part of the widespread systematic attack against civilian population and at the same time the commander don't know, but because should have known that crimes had been committed.

MR HAYNES: [12:51:50] Firstly, Judge Hofmański, I really mean you no disrespect, but we've been listening to the Prosecution talking about evidence now for about 45 minutes, and I'd really like to say something about that and then I'll come to your question. I'd really --

PRESIDING JUDGE VAN DEN WYNGAERT: [12:52:11] I'm sorry. You didn't ask the floor, so I didn't give you the floor.

MR HAYNES: [12:52:16] No. I was allowing you --

JUDGE HOFMAŃSKI: [12:52:20] Of course I do.

MR HAYNES: [12:52:21] -- to follow through your logic.

I suspect you probably all know that no case in international criminal law has ever had a case file like this one before. The evidential record is simply overwhelmed with documents that were admitted from the bar table, some of them at the behest of the Prosecution, some of them at the behest of the Chamber.

I don't want to be accused of hyperbole, and I know that much of this is in our written filings. But nobody spoke to any of those documents. No author of any one of those documents came to court and said, "I interviewed these people to prepare this report for the Fédération internatoinale des droits de l'homme". No journalist came and said, "I was in Damara and I spoke to these people".

These documents are unattributed. They're unsourced. They're unreferenced. Most -- well, they're all photocopies. The newspaper reports are snippets, they're not whole reports. There was no basis, we submit, for admitting them as evidence. And I'll park that to one side for a moment.

We're here today substantially because you have invited a discussion about the elements of crimes against humanity. And I know we've been accused of jumping on the bandwagon of your questions. We've done so unapologetically, but justice has to be done.

If there are qualms about the contextual elements of crimes against humanity, then you are right to raise them, and we're right to discuss them, and you're perfectly open to make decisions that might not have been pleaded by us or by the Prosecution in our written filings.

So goes the situation for the evidential underbelly of the contextual elements. It's perfectly open to you proprio motu to re-determine whether any of those documents should have been admitted into evidence in the first place. And that is one route out of this.

But let's be clear what is being said here. What's being suggested here is that every element of multiple offences, rape and murder and pillage, including the identification of perpetrators can be proved beyond a reasonable doubt by anonymous unsourced copies of a press report allegedly corroborated by somebody saying, "I heard the MLC committed crimes in Sibut". That's what's being said. And there are different kinds of evidence, but the evidence relied upon by this Trial Chamber to find the contextual elements of crimes against humanity were proven is simply not good enough. Nobody should be convicted beyond a reasonable doubt on this sort of evidence.

Now, that submission would not work, it would not work if alternative evidence, forms of evidence had been available, civic records, hospital records, death certificates, local policemen, local officials, local priests, a journalist or two, videotape, a sprinkling of witnesses from some of these towns. But nothing. You're just left looking at photocopies of Le Citoyen, which nobody even ever said they saw, nobody even ever said was published at the time.

And your qualms are perfectly well-justified. And our submission is you need to revisit that evidence, that the usual deference does not apply. It does not apply because there was no assessment of this evidence. If no witness ever says, "Oh, yes, I remember that happening in Sibut, I was there when that happened", then the Trial Chamber's magical ability to assess evidence doesn't enter into it. You can read photo copies of newspapers just as well as anybody else.

And I want, if I can, just to draw attention to one particular piece of evidence which illustrates all of this very well. It was referred to by Mr Costi this morning. And it's the FIDH report and Mr Bemba's correspondence in relation to it, which you're told today proves that he knew his forces were committing crimes.

By all means, please look at the FIDH report. It's in evidence. If you want to know it's at CAR-OTP-0001-0034.

FIDH were on the ground in Bangui, and you can get this from the report, for one week. They interviewed some people. No names, no addresses, nothing. Just some interview accounts in a report.

On 15 February they published this report. It came to Mr Bemba's attention and sometime between 15 and 20 February, so it's pretty prompt, he called Mr Kaba, the president of FIDH and he told him that the contents of the report had come to his attention.

On 25 February 2003, he wrote to Mr Kaba. And what he was asking him for was Mr Kaba to help him. He was asking him to give him any details that might help him look into any of his subordinates who might have done wrong. And that letter is CAR-DEF-0001-0152.

It's not an acknowledgment that he knows any crimes have been committed. It's an indication that information having come into his possession, he made a perfectly proper inquiry of the source as to whether he could get better information to discharge his duty.

Six days later on 26 February, Mr Kaba wrote back to him and effectively said forget it, this file is going to the ICC. And that was the beginning of the process that brings us here today.

Now, to submit today to this Court that that proves Mr Bemba's knowledge of offences committed probably indicates exactly why you need to look at the evidence that the Trial Chamber relied upon.

And the enthusiasm to stop you is startling, startling. You've all got the systems where you can access this. But why, if they're so confident of their case, do the

Prosecution not want you to look at the evidence that underlies paragraph 563 and the infamous footnote 1736.

Now that's really me blown out on evidence and I hope that's a conclusion to the discussion. I hope Mr Costi isn't about to jump up and give us some analogy about videotape and anonymous letters because he's had quite enough time on this issue.

Do you want me to turn to Judge Hofmański's question now or are we going to take a break?

PRESIDING JUDGE VAN DEN WYNGAERT: [13:01:21] (Microphone not activated)

MR HAYNES: [13:01:25] I can't imagine I'm going to keep Professor Ambos quiet on this one.

The difficulty with command responsibility in the CAH arena is exactly that which you've identified and it's exactly why we submit that the commander's knowledge has to be equated with that of the perpetrator, because otherwise you're reducing the mental element for a commander beneath that required for the offence. It's almost impossible, although Mr Newton did give me an example earlier on, to imagine how a commander who has to have knowledge that an attack comprising multiple acts under Article 7(1) conducted in pursuance or furtherance of a State or organisational policy can be guilty on the basis that he should have known. The only possible basis would be that he should have known that a policy was developing that he was not party to.

But that just doesn't fit with the facts of this case because Mr Bemba was the de facto head of the MLC, and that has to be the organisation that had the policy. So it's a legal nonsense to suggest that he should have known. The evidence -- or the Trial Chamber had to be satisfied that he knew that offences were being committed and that he knew that those offences were being committed as part of a widespread attack,

which was being pursued pursuant to or in furtherance of an organisational policy. So that's why we say that in this context the prism through which you have to look at knowledge is Article 7 and not Article 28 because to do so, and come back to a phrase that's peppered this discussion, would be to water down the knowledge requirement under Article 7.

He's very still at the moment. I think I may have got away with that one.

MR AMBOS: [13:04:08] May I just add one. Thank you very much for the question. To clarify perhaps following up on Mr Haynes' point, knowledge of the attack in Article 7 is a very specific element. It is not a general mental element within the meaning of Article 30. We discussed this yesterday. It is framing crimes against humanity. Nowadays today we cannot think of crimes against humanity without knowledge of the attack. That's part of the package to put it like this.

Now as to the relationship between a specific offence, in this case crimes against humanity, and a mode of liability, the general question, considering the importance of knowledge of the attack, it cannot be in our view that the command responsibility mental element which goes up to until "should have known"; displaces the constitutive element of the crime against humanity.

So if you have a parallel thought, we had this discussion with the ICTY, joint criminal enterprise and genocide, yes? And genocide we say there is a specific subjective element beyond the normal mental elements and that is intent to destroy a group, okay? Now, ICTY OTP took the position in JCE cases if I have a JCE 3 case and I have foreseeability as a sufficient criterion, I could be, I could be under JCE 3 a participant in genocide without having specific intent. That's a parallel reflection we have made in literature in case law under ICTY case.

Another example would be if we have a situation of a genocide case and command

responsibility, let's assume for the sake of argument that we have a genocide charge against a commander, would we then say, and that would be the parallel question, that the commander, without having the specific intent to destroy a group can be responsive for genocide, could be génocidaire? We say no. Of course he has to have the specific, specific subjective element as under crimes against humanity, he has to have the knowledge of the attack, as a very specific element, otherwise we cannot convict someone as a commander in crimes against humanity. We don't convict him in war crimes. We convict him in crimes against humanity. In war crimes he would have only the armed conflict nexus and not the specific knowledge of the attack.

I'm not sure if this is clear, but I think that that was the intent at least to clarify the question.

JUDGE EBOE-OSUJI: [13:06:56] I will have a question for you, but after the break.

PRESIDING JUDGE VAN DEN WYNGAERT: [13:06:59] Yes. So looking at the time, it's time for us to have our lunch break, but we can continue on this discussion, but not for too long because we want to finish today. So I would propose that we convene at what, 2.15. Would that be okay? 2.15, 2.15, okay. So we raise.

THE COURT USHER: [13:07:20] All rise.

(Recess taken at 1.07 p.m.)

(Upon resuming in open session at 2.21 p.m.)

THE COURT USHER: [14:21:51] All rise.

Please be seated.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:22:26] Good afternoon. We are almost at the end of our questions and answers in relation to crimes against humanity, the contextual elements. And Judge Eboe-Osuji still has a question that he wants to

ask.

JUDGE EBOE-OSUJI: [14:22:45] One question for Mr Ambos and now later on a different for Ms Brady.

Mr Ambos, when you were submitting on the knowledge component of contextual elements, you expressed the worry, you told us to be very careful in how we approach the matter, expressing the worry that in light of the facts that Article 28 allows for "should have known" as a form of knowledge, there is then a risk that assessing the mental element or knowledge component of the commander on that level may create some sort of incongruence between the fault element of the subordinate vis-à-vis that of the commander, in other words, the commander may be short-changed because he or she could be convicted only at the level of "should have known". Is that my understanding, in a nutshell, that I ask you my question?

MR AMBOS: [14:24:26] Not exactly. I don't see the difference implicit in your question between the subordinates as perpetrators under Article 7 as opposed to the commander under Article 12 -- Article 28, sorry. I am a bit tired, 28.

So for me the question is: Which of the mental elements at play, crimes against humanity, knowledge of the attack as a specific element, and the standard of Article 28, can prevail in such a situation? And then we say that the special knowledge element is a specific element, apart from the mental element under Article 30, which anyway has to exist, has to prevail.

JUDGE EBOE-OSUJI: [14:25:28] What was the point about "should have known"? I wanted to understand what your concern was about the "should have known".

MR AMBOS: [14:25:39] Yes, I mean, the --

JUDGE EBOE-OSUJI: [14:25:41] And why it caused you that worry at the time.

MR AMBOS: [14:25:43] It really comes all back to how we understand command

responsibility. That's what we discussed yesterday at length. In our understanding, the commander is not a mere assistant. I mean, he is a commander and is responsible for not intervening in the crimes of subordinates. Article 28 refers, as you yesterday quoted, to the -- as another ground of responsibility as to the crimes within the meaning of Article 5 of the Statute.

So we are talk about responsibility for specific crimes, okay. For us, the link between the commander and the crimes is actually given by the wording of the chapeau of Article 28. If this is the situation, as in these other cases I mentioned as example showing criminal enterprise and genocide, the offence description is relevant, the offence description in this case of crimes against humanity.

Now, if this offence description has a specific mental element, knowledge of the attack, this mental element must be read into the command responsibility doctrine. I would argue the same for Article 25, you know, if we had a case of co-perpetration.

JUDGE EBOE-OSUJI: [14:27:07] But then the specific mental element, the specific mental element of the crime, then would necessarily be the mental element of the subordinate, isn't that the case, and not the commanders? I am only probing to see --

MR AMBOS: [14:27:35] Yes, yes.

JUDGE EBOE-OSUJI: [14:27:36] -- to try to understand. I haven't taken any position yet.

MR AMBOS: [14:27:38 Yes, yes, I understand.

JUDGE EBOE-OSUJI: [14:27:39] I am trying to understand you.

MR AMBOS: [14:27:42] Yes. Thank you very much. The "should have known" standard in Article 28 refers to the crimes of subordinates. As to the crimes without further definition, I mean, it could be war crimes, genocide, crimes against humanity or the crime of aggression even now, that is not further defined.

But then in a specific case like our case, of course, we have specific crimes, and here it is crimes against humanity. In this case, to qualify the commander as a criminal against humanity - because that's what we in the end do - he has to have the specific, for us, constituent fundamental element which makes out crimes against humanity. That's the idea behind it.

JUDGE EBOE-OSUJI: [14:28:37] And we are back to, I think we are back to my original thesis then. So we are then in a situation where, if you don't find fact-specific intent in the commander, you are saying it would be wrong to convict him of crimes against humanity or genocide; is that what you're saying?

MR AMBOS: [14:29:02] I am not talking about specific intent. I am talking about the cognitive element of the intent, which in this case is the knowledge. So I'm only referring to the knowledge of the attack element in crimes against humanity. As to this element, we cannot argue it away. It's there. It is in Article 7.

And how we want to displace it, the other position would be exactly the position to displace this element, this specific element. There are other mental elements, of course. We have Article 30, we have the "should have known" standard. But we are only talking of the mental element as to the context, which is the attack in crimes against humanity. And for this specific mental element, we cannot get away -- argue it away. I mean, it's there and if we want to convict someone, a perpetrator, an instigator or a commander, as a criminal against humanity, we have to have knowledge of the attack of this commander.

JUDGE EBOE-OSUJI: [14:30:03] Is it really that simple, to equate the commander with an instigator? You are now thinking about Article 25. When we consider that the commander is in a different position - I believe your colleagues yesterday accepted that - in the sense that the commander, one would say, would have been

implicated in creation of danger, isn't it the case, if that is the case, then one would say that any deficiency in that knowledge component would be made up by its implication in the creation of the danger, so that there is nothing wrong then with assessing his responsibility only from the perspective of knowledge under 28. It is all at the end of the day something to be -- any difficulties will be resolved, of fairness or so, will be resolved by sentencing; is that one way to look at it or not?

MR AMBOS: [14:31:22] In my view, we have to make a distinction between the standard in 28, knowledge or "should have known" and the knowledge of the attack. These are two different standards in two different provisions of the Statute.

Now, how do we bring this together? In my view - I only repeat myself, I cannot make the argument better - you cannot impose or displace the knowledge of the attack element by using the lower - only than we have a problem - the "should have known" standard. If we have knowledge, then it is not a problem. It's the same knowledge. I mean that epistemologically speaking, Judge Eboe-Osuji, it is the same, it is knowledge. If we talk of the knowledge level, it is not a difference.

But the issue is that we have a "should have known" standard in 28. You know, the parallel thought is if -- would you consider -- I can give you any specific intent crime in criminal law, for example theft. In certain jurisdictions, for theft, you need the intent to appropriate the object, yes? Would you consider someone a thief -- if you have such an offence definition, just imagine one moment, it depends on the jurisdiction, would you then say someone is a thief, without having this specific intent element?

Of course, there are different forms of participation in crime under our Statute, as under general criminal law. But for me, only the lowest possibility of participation, that would be the assistance under Article 25(3)(c), only under this specific situation

you may think that someone assisting in a crime against humanity may perhaps not have the knowledge of the attack.

That is actually case law, for example, in Germany regarding genocide. We had cases in Germany where assistance in genocide in the former Yugoslavia, our Supreme Court only requires knowledge and not the specific genocidal intent, yes. But that is not the commander situation. The commander is not just an assistant, you know.

In my conception, if we do not understand Article 28 as a mere dereliction of duty or failure to supervise, which is a kind of disciplinary administrative offence, but as an offence which links the commander to the crimes, it is not in the abstract. We are talking about certain specific crimes, here crimes against humanity. We link this commander to these crimes. We say we have a breach as a result of -- that's the causality, the causal nexus. But if we then link it to these crimes, the definition of this behaviour, which we stigmatise by convicting this person, comes from the offence, from the crime, and that's crimes against humanity.

JUDGE EBOE-OSUJI: [14:34:25] Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:34:26] Thank you. (Microphone not activated)

JUDGE HOFMAŃSKI: No, it is a follow-up question. Do you agree, Mr Ambos, if we accept your concept, then the Article 28 will be, as far as it concerns the "should have known" standard, will be empty in relation to the crimes against humanity and maybe also in relation to the genocide, or not?

MR AMBOS: [14:34:56] Thank you. No, because we should look at 28 and we should then -- let's look at 28. I have it here in front of me, 28(a)(i), that's the issue here. It says: "... military commander ... knew or ... should have known that the

forces were committing or about to commit such crimes". It's a much broader object of reference than knowledge of the attack.

You know, you have different elements in crimes and you have different elements in a mode of liability. The element attack is one element in crimes against humanity, as we discussed extensively today. It is not the only element. It is one element. As to this element, the States have decided: We want to have knowledge.

Now, the "should have known" refers to the "forces were committing or about to commit crimes". That has various points of reference. Anything what the forces do, other crimes, other behaviour, is covered by this "should have known" standard. So there is still something left for the "should have known" standard.

So I repeat, I only refer to the knowledge of the attack, the contextual element, and it is important because the contextual element makes the difference between ordinary crimes and international crimes, and therefore we have a specific mental standard which I think we have to respect.

MR COSTI: [14:36:38] Can I, your Honour, just a very brief submission which --

PRESIDING JUDGE VAN DEN WYNGAERT: [14:36:42] Yes.

MR COSTI: [14:36:43] We restated our position that Article 28 is the governing rule as far as the accused is concerned, not the establishment of the existence of a crime, as I tried to explain this morning. And this goes precisely, I think, with - if I understand, but I may be wrong - Judge Hofmański's questions both before and after the break.

It is difficult to understand why it would be acceptable, a theory according to which the commander is acceptable to convict him only if he should have known the crimes and yet he must have had an absolute knowledge of the context in which they were committed. So if it wasn't fair to the commander to convict under a "should have

known" standard, there should be no "should have known" standard at all, even in connection to the actual crimes.

So if I go back also to your Honour's question, I think the disbalance is not as much in Article 7 or 28, which deal with two different matter, in a way. But how can we reconcile Article 28 with two different mens rea? The commander has to, could, should have known the crime, but must know about the attack. It is likely a strange construction, in our view. I think it's more consistent to think that as far as the commander concerned, the "should have known" applies to each element of the crime.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:38:09] Mr Newton.

MR NEWTON: Very briefly, Madam President. Remember, the noun here is "crime", should have known that crimes were committed or about to be committed. And here it gets back to the question raised before lunch by Judge Hofmański about the difference between pillaging and war crimes and the elements themselves. Is it for the military commander knowledge of a violation of the laws and customs of war suffices in its own right?

We keep saying the word "attack", but remember in the context of crimes against humanity, that legal definition, by definition, literally word-for-word by definition from the Statute, embeds both knowledge of the actus reus and that those crimes were committed pursuant to or in furtherance of.

So I think that's how you get the "should have known": I should have known crimes were about to be committed, in this case crimes against humanity, which by definition includes that I should have known not only of acts, acti rei in violation of Article 7, and the existence. So in the "should have known" context, what we are really saying at the bottom of that, if you think it through, is that: I didn't form a policy, I didn't

order them, because that's a different test. There is now an emerging organisational plan or policy that I have information reasonably available to me that I should have known and therefore intervened.

And I think that's the difference in this case, and for the future, between crimes against humanity under an Article 28 standard and war crimes. War crimes is a much, much looser, broader standard, because it's inherent in the duties of the commander under the laws and customs of war. And that, we say crime in Article 28, but remember that definition of "attack" by definition includes both of those pieces.

MR AMBOS: [14:39:58] Just to clarify again because it brought me to idea now with Judge Hofmański's question. Take the following case. We have all these underlying acts in Article 7, murder, enforced disappearance and persecution. So you can have perfectly a case where a commander should have known that his troops committed murder, abductions, rapes, but that's another thing then to know of the context element. So there is space for other -- Judge Hofmański, there is space for other subjectively covered parts of crimes against humanity. So maybe that makes it clear. I mean, you have all the acts under Article 7, where of course there has to be a mental link, that's a mental element, but in addition, and that's why it is not just multiple murder, we have a context element, and for this context element we have a specific mental requirement.

JUDGE EBOE-OSUJI: [14:40:58] But for that -- I'm sorry, Madam President.

The Prosecution's submission, as I understand it, is that from the commander's perspective, all that mattered was that the commander knew that there were widespread or systematic attacks against a civilian population, whether they would have known that. And it is in that context that the crimes committed by the

subordinates need to be assessed. Not necessarily that the -- to look at the matter from the perspective of the subordinates themselves so that when the subordinate was committing whatever crime, the subordinate would have been expected to know that there were also widespread or systematic attacks being committed, and then you have to ask yourself, did the commander know that the subordinate knew that. Do you follow my question there?

MR AMBOS: [14:42:22] I get your point. I mean, the question is, what does, in subparagraph (i), mean "should have known that such crimes have" -- what is this "such crimes"? I mean, that is really the issue. I mean, it is a fair point. I mean, it is a difficult issue. I mean, I think such crimes is more than just the general crimes. I mean, it would not be sufficient to know that they are generally war crimes. We come back again to this issue of details. That's an evidentiary issue, and the question, of course: What is command responsibility? So it is all interrelated. So in our view, you have to -- you have in any case more than just a context element. You know, international crimes are complex animals, let's say. We have different elements in these crimes. One is the context element, and if you have the crime acts -- in this case, crimes against humanity -- which has a specific mental requirement for the context element, we have to accept to respect this requirement.

JUDGE EBOE-OSUJI: [14:43:30] So you do accept that we don't need to enquire whether the commander knew that the subordinate, whether or not the subordinate knew that widespread or systematic attack was happening. That's not the enquiry we need to make, is it?

MR AMBOS: [14:43:50] Exactly. Exactly. Absolutely. We have to enquire whether the commander knew that there was an attack, that the subordinates acted within the framework of an attack.

JUDGE EBOE-OSUJI: [14:43:59] Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:44:00] Judge Hofmański? No more questions?

The legal representatives?

MS DOUZIMA-LAWSON: [14:44:12] (Interpretation) A few observations.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:44:18] (Interpretation) You have something to add, otherwise I will conclude?

MS DOUZIMA-LAWSON: [14:44:22] (Interpretation) I do have something to say.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:44:26] (Interpretation) Please go ahead.

MS DOUZIMA-LAWSON: [14:44:27] (Interpretation) Yes. Thank you. I would like to pick up on one point that was made by the Defence. They seem to be questioning the admission of thousands of victims in this case. It was not Ms Douzima and her team and who selected the victims. The forms that they mentioned earlier are forms that were reviewed very carefully by both the Pre-Trial Chamber and the Trial Chamber, and the Defence had an opportunity to make their views known on these forms.

Nor is it true that all victims allowed to take part in the proceedings are called to the bar to give testimony. Of course not. We took a sample of victims, we heard from some dual-status witnesses, and they were representative of a larger group of victims.

I would also like to remind the Chamber that to my understanding a crime occurs when the actions lead to people being victimised. That victims -- victimisation happens, otherwise there are no proceedings. It is because there are victims that the International Criminal Court is seized of a matter and is now putting these people on trial.

I would also like to pick up on a question that was put about reparations, and I was not able to respond at the appropriate time. I do share the view of the Prosecution when they said that it was up to the Trial Chamber to deal with reparations and that will govern the right to reparations and the crimes that the convicted person was found guilty of. After providing his or her identity, a victim can ask to be recognised officially as a victim for the purposes of reparations, and to that end, the person must provide sufficient evidence of harm that he or she suffered and the causal link between the harm and the crime for which the person was found guilty.

So this is something that I have taken from the Lubanga decision, paragraph 81.

I would also like to touch briefly upon the accused person's responsibility to provide the specific information. In addition -- well, he is aware of the attack. He was the one who sent the troops in. He made that decision for a specific goal. And if you look carefully at the document, or, rather, the record -- and I made this point in my conclusions -- not all cities and towns in the CAR were attacked by Bemba's troops. Of the eight towns, seven were in the north, in the northern part of the CAR. Why the north? Well, merely because those places are the locations that the rebels travelled through. And that's where the MLC troops had to fight.

So the actions of the MLC troops were taken specifically to punish, to punish. Civilians were accused of being rebels or of supporting rebels, and that is what led the troops of the MLC to pillage, kill these people or rape these people. So this is another way of saying, well, it is the same modus operandi that occurred in all those towns.

Now, one particular town, Mongoumba, which is not in the north, that was also to punish the population but in a different way.

There was a problem between the MLC troops and the Central African Forces. And

this problem had to do with looting.

So those were the specific points I wanted to add to my earlier points, and I thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:50:18] (Interpretation) Thank you for your additional clarifications.

(Speaks English) So this brings us to the end of this part -- I'm sorry.

MS BRADY: [14:50:27] Not quite, your Honour. If I may, I would like to make one further submission on behalf of the Prosecution in relation to what has been submitted and the discussion we have had on group E.

In some of the discussions that we had -- I heard this morning about crimes against humanity, at times it seemed -- I got the impression that the standard of review, the deferential standard of review for factual findings, somehow has been -- I don't know how to put this -- tossed out the window or overlooked when it comes to the crimes against humanity findings. And I want to take this opportunity to remind your Honours of the importance of respecting the standard of review, including on these findings of crimes against humanity, and particular ones we have talked about this morning, that there was an organisational policy reached in paragraph 687 on the basis of its analysis of seven different indicia which lead to that ultimate finding, as well as the finding of widespread attack, that there was a widespread attack against the civilian population.

In some ways I am repeating what I said on Tuesday morning, but I wanted to stress it that the Appeals Chamber, in light of the previous standard that you have applied in cases, it is a well known standard which has been applied in all the other international tribunals, it should defer to the findings of the Trial Chamber unless the reasoning is wholly erroneous or so unreasonable that no reasonable Trial Chamber

could have made those findings. And this goes for the evident -- the decisions on the evidentiary assessments on both testimonial and documentary. And it applies for documentary just as much because the documents have to be considered in light of all the evidence. The dossier evidence was not just put into the Court without a witness. Witnesses P-6 and P-9 gave evidence relating to that, and it was actually formally tendered through one or the other. P-6, I believe.

You have got to apply that standard to the decisions on predicate facts, subsidiary facts, as well as the decision that the Trial Chamber made on the material facts, the ultimate facts, the elements of crimes and the ultimate finding of guilt. And in particular to apply this standard of review to the right -- to the right issue, to the right question, to the material fact.

And in the case of the finding, the Trial Chamber's finding that there was a widespread attack against a civilian population, the question you have to ask yourself is whether the Trial Chamber, this Trial Chamber, was so unreasonable to find that there was a widespread attack against the civilian population that no reasonable trier of fact could have made that.

And in our submission this threshold is not met here. We have made that clear in our written submissions. I am in some ways saying what we said there. But again, the Trial Chamber's decision was not based on a piecemeal assessment of the evidence, and that's not how you should apply the standard when you review the evidence. I should correct that when the Defence said that the Prosecution submitted that you shouldn't look at the evidence, that's not correct. You have to look at the evidence in order to satisfy yourself whether the Trial Chamber's finding was a reasonable one or not.

And when you do that, you will see that the findings on the decision that there was

a widespread attack, there was a widespread attack against the civilian population, was informed both by the findings on the proven episodes. That, I think, is not in contention that that is a pillar of evidence. And the other evidence which the Trial Chamber relied on together with that evidence, included the media reports, the evidence in the dossiers, together with the testimony of P-6 and P-9. And it wouldn't be right for you to be looking and parsing out each piece of this evidence and not looking and not assessing that as a whole. You have to apply the standard of review to the decision that the Trial Chamber made on the material fact as to whether there was -- that there was an attack based on the whole of the evidence and ask: Can it really be said that no reasonable trier of fact could have heard all this, having heard this evidence could have concluded that there was no widespread -- there was -- no reasonable Trial Chamber having heard it could have concluded that there was a widespread attack? In our respectful submission the answer is no. Thank you.

PRESIDING JUDGE VAN DEN WYNGAERT: [14:55:31] Thank you, Mrs Brady. So I think that this now concludes our discussion and I think the Chamber is very grateful to the parties and participants for having nurtured our thoughts with all your submissions and ideas.

We have discussed this and we want to give you, parties and participants, the opportunity to make extra observations but not a summary or a repetition of what you have said, but should you have some afterthought. So if you don't have an afterthought, if you have exhausted everything you wanted to say, it's fine. If you want to make a point that you didn't have the opportunity to make now and that you think of tonight, then you have a week. So within one week, by next Friday, all the parties and participants are allowed to make some extra submission if they so want, but not exceeding 15 pages. So 15 pages for the parties and participants.

Is that understood?

So now we are going to turn to the subject of sentencing. And on that subject we have both a Defence appeal against the sentence and a Prosecution appeal against the sentence. We have received submissions so we do not expect you to repeat what is already in your submissions because that would be not necessary. We have been able to read them. So if there is anything additional, then we would ask you to mention that to us.

So I suggest that we will start with the Defence appeal first and then turn to the Prosecution appeal.

So I think it's --

MS GIBSON: [14:57:39] Thank you, Madam President. I'll make some brief submissions on the question of sentence, following which our lead counsel Peter Haynes will conclude on this issue.

Mr Bemba's sentence of 18 years is disproportionate to the conviction. It is in fact so unreasonable as to constitute an abuse of the Trial Chamber's discretion.

The Appeals Chambers sees with two appeals from the sentencing judgment, Mr Bemba's appeal seeking a reduction of the 18-year sentence and an appeal from the Prosecution seeking an increase to 25 years of imprisonment. And in support of its request to increase the sentence, the Prosecution submitted that the Bemba case, and I quote, "is perhaps the most serious case in which a person has been exclusively convicted of superior responsibility in the history of international criminal law."

In the Military I case of the ICTR Colonel Aloys Ntabakuze was the commander of the paracommando battalion and he was convicted exclusively as a superior for genocide, for extermination, for persecution, for violence to life. His troops were responsible for stopping thousands of Tutsi refugees who were fleeing Kigali after 7 April, taking

them to Nyanza Hill and slaughtering them. Not three deaths, thousands of men and women and children.

In the Military II case, Augustin Bizimungu, who was the chef d'état major of the forces in Rwanda, who was the chief of the army during a four-month period in which nearly one million civilians were killed, he was convicted exclusively as a superior for genocide, for rape, for murder, for extermination for the killing of Tutsis by his troops throughout Rwanda.

So it's difficult to accept that Mr Bemba's case, which involved three deaths, is the most serious in the history of international criminal law. Or even comes close to these ICTR cases or ICTY cases that involved ethnic cleansing or genocide or in fact the crimes that were committed in the Sierra Leone war. It's a matter of public record that the Prosecution asked for a higher sentence to be imposed on Lubanga than they have asked in the present case.

So why is the Prosecution making this claim? Why does the Prosecution say that this is perhaps the most serious command case in the history of ICL? Because there is no other way to justify the sentence of 18 years in relation to a crime base of this type. You can't do it without trying to inflate, artificially inflate the seriousness of Mr Bemba's case, which is precisely what the Trial Chamber did.

In the sentencing judgment the Trial Chamber says that it convicted Mr Bemba on the basis of specific underlying acts that had been proven beyond a reasonable doubt, so three murders, 28 rapes, and 16 instances of pillage. But it says, and I quote, these crimes were "only a portion of the total number of crimes committed by the MLC forces during the 2002-2003 CAR operation."

If crimes have not been proven beyond a reasonable doubt as being the responsibility of Mr Bemba, then they are irrelevant for sentencing purposes. This is like if in

sentencing Lubanga Trial Chamber I had said: Mr Lubanga is being convicted beyond reasonable doubt of the conscription and use of child soldiers, but we think that's only a portion of the crimes that he actually committed.

Or a domestic judge when sentencing someone saying: The prosecution has proved beyond reasonable doubt that this man committed two murders, but I think that's only a portion of what he did during the indictment period.

And the Prosecution says this language is fine because the Trial Chamber was entitled to consider these crimes in light of the established contextual elements of crimes against humanity. But the Trial Chamber wasn't considering these crimes in the context of the contextual elements of crimes against humanity. This is the sentencing judgment.

In all the other cases when accused have been convicted of crimes against humanity you won't find one where the Trial Chamber took into account the contextual elements of crimes against humanity when computating the sentence. The two things are wholly separate.

And how do we know that this isn't just unfortunate language? How do we know that the Trial Chamber actually took these other crimes into account? Because the Trial Chamber refers in the sentencing judgment to the fact that crimes were committed throughout the temporal scope of the operation and throughout the geographical scope of the Central African Republic.

The three murders and 28 rapes for which Mr Bemba was convicted occurred in the first section of the operation in Bangui and its surrounds and then in March in Mongoumba. So if the Trial Chamber is saying that the crimes were committed throughout the CAR and throughout the operation, then they must necessarily be relying on crimes for which Mr Bemba wasn't convicted.

Also, while the Trial Chamber did impose a joint sentence of 18 years, it first imposed individual sentences for each of the convictions.

For pillage as a war crime it sentenced Mr Bemba to 16 years of imprisonment. And so for our Trial Chamber 16 instances of pillage amounted to an imprisonment of 16 years.

At the ICTY Amir Kubura was convicted exclusively as a superior for extensive and repeated plundering of numerous villages after he told his subordinates feel free to divide up the plundered goods amongst yourself. He was sentenced to two years of imprisonment.

So either our Trial Chamber's sentence of 16 years for 16 instances of pillage is manifestly disproportionate or the Trial Chamber was actually sentencing Mr Bemba on the basis of widespread pillage that went far beyond his conviction. And either scenario constitutes reversible error.

So why did the Trial Chamber feel free to enter a sentence that falls so dramatically outside the realm of an international sentencing framework? It was able to do this, it was able to put Mr Bemba into a category of seriousness in which he didn't belong because it said we are not considering any our cases. And I'm going to read this reasoning in full. This is paragraph 92 of the sentencing judgment:

"The Chamber notes the submissions of the parties and the Legal Representative concerning sentences previously imposed on convicted persons at the Court, ad hoc tribunals, and in the CAR. However, none of these cases concern the same offences committed in substantially similar circumstances. They therefore provide the Chamber with little, if any, guidance in determining the appropriate sentence."

Fifty-four commanders have been sentenced as such by the ICTY and the ICTR and the Special Court for Sierra Leone in a range of circumstances, and our Trial Chamber

said none of them are the same as this case so we are not going to look at any of them, the 54 command cases that have gone before, irrelevant because they are not the same as ours, ours is different.

But the Appeals Chamber said in Lubanga, and I quote "Previous sentencing practice is but one factor amongst a host of others which must be taken into account when determining sentence." This is filing 3122 in that case, paragraph 76, relying on the Celebici appeal judgment, the Strugar appeal judgment, the Furudzjia appeal judgment.

The Trial Chamber wasn't free to just go off on its own. But more than that, sentencing isn't about finding a case that's the same and then copy/pasting the sentence. That won't happen. No two cases will ever be exactly alike. But it's not only similarities between cases that can guide a chamber in the computation of an appropriate sentence. Differences between cases also assist, variations in the crime base, in the culpable conduct, in the mitigating circumstances, in aggravating circumstances, all of these can be just as helpful to a chamber in placing an accused within the appropriate sentencing range.

This was a legal error and it allowed the Trial Chamber to ignore two decades of international sentencing practice and this Court's only developing sentencing framework and give itself carte blanche to put Mr Bemba into a category of offenders with which he didn't belong, accused who were convicted of genocide and extermination, mass murderers who were hands on and who intended the consequence of their crimes.

But cutting through all these arguments, putting aside for the moment that, you know, the Prosecution and the victims say the sentence should be higher and Mr Bemba says the sentence should be lower, what are the facts about this conviction? What is

beyond dispute?

Mr Bemba didn't participate in the crimes. Unlike many, many commanders at the ad hocs, he wasn't standing there amongst his troops encouraging them or participating as they murdered civilians. He didn't order the perpetration of crimes. He didn't intend the crimes to occur. He wasn't motivated by any particular religious or ethnic hatred. He didn't have any discriminatory motive. He didn't share the intent of the soldiers that committed the crimes. His culpability arises from his failures regarding a fraction of his troops fighting in a foreign conflict thousands of miles away. This is all beyond dispute.

And in terms of the 54 commanders who have previously been sentenced by international courts, you will not find a commander who is more arm's length from the crime base, who had less personal involvement in the conflict and who took anywhere near the same measures to investigate and prosecute. Whatever the outcome may be, the sentence in the present case is disproportionate.

And I will now with your leave pass to our lead counsel to make some concluding remarks on sentence.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:09:34] Thank you, Ms Gibson.

MR HAYNES: [15:09:36] It doesn't matter that I have been addressing courts in this city now for I think 18 years, I still find this process a rather unusual one where you have to make remarks about the appropriate sentence when the bigger picture, the question of the accused's culpability, is still at large.

Obviously, my profound hope is that over the last few days and having read our appeal filings you have found the arguments that we have addressed as to Mr Bemba's guilt compelling and that, therefore, the issue of sentence will not need to arise.

But if it does, here are just a few, as it were, structural observations I would like to make.

There are a variety of decisions which you could come to. You could uphold all of his convictions or you could quash them all, or you could decide that somewhere in the middle was the appropriate appellate decision.

And if that third option arises, then that necessarily must impact upon the sentence in any event - and I hope this is not controversial - that the crimes listed in the Statute of Rome are often said to be listed in descending order of gravity and so, therefore, I do submit, notwithstanding the way in which the Trial Chamber sentenced him, that convictions for war crimes are necessarily less grave than convictions for crimes against humanity.

I also submit that the mental element of crimes is determinative of sentence. And were it the case that you decided that Mr Bemba were guilty as a commander on the basis that he should have known, then that is the lowest form of mental culpability known to the criminal law domestically or internationally and needs to be measured in the sentenced passed.

I also observe, as Ms Gibson has done, that for all that I don't ever seek to minimise the suffering of victims, pillage is an offence which can never demand a sentence of 16 years. I make this last observation really in response to the Prosecution's appeal - which actually I think came first in time, but we don't mind addressing you ahead of them - that these offences, being offences of a commander relating to the same period of time, occurring concurrently, there is no justification whatsoever for anything other than concurrent sentences being passed in relation to whatever of them may survive your determination.

And I'm lastly going to say this, astonishingly, it was 24 May of 2008 that Mr Bemba

was whisked from his home in Belgium. That's nine years, seven months and eleven days ago. Whatever the basis of any sentence that may need to be passed, he has now been in custody for quite long enough.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:13:55] Thank you, Mr Haynes. Before giving the floor to the Prosecution, I would like to confer with my fellow judges about something.

(Appeals Chamber confers)

PRESIDING JUDGE VAN DEN WYNGAERT: [15:14:47] I had a question which I shared with my fellow judges in relation to the timing, the timetable that we have provided. So we have provided 25 minutes to the Defence, 25 minutes to the Prosecution, and so what we didn't clarify is that we don't expect you to respond. So what we expect you to do now is to summarise your appeal, so not to respond to the Defence appeal, we are not going to engage in a conversation here.

The judges also are not going to ask questions. So we just want the parties to explain their own appeals, and so no responses. If the victims want to make a point, I will give them time to do so after the Prosecution submissions.

So, Ms Regue, can you please.

And, of course, at the end of the hearing, Judge Hofmański reminds me, Mr Bemba has the right to address the Chamber if he so wishes.

But we seem to understand -- Mr Haynes?

MR HAYNES: [15:16:05] When we reach that point, he would like me to say just a sentence or two on his behalf.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:16:10] Okay.

MR HAYNES: [15:16:12] But he does not wish to address you.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:16:15] Thank you very much.

MS BRADY: [15:16:17] I just ask a point of clarification.
You would like the parties only to discuss their own, say the Prosecution appeal, but not even to respond to what has been said just then?
PRESIDING JUDGE VAN DEN WYNGAERT: [15:16:29] No.
MS BRADY: [15:16:31] Okay.
(Pause in proceedings)
PRESIDING JUDGE VAN DEN WYNGAERT: [15:19:16] (Microphone not activated)
MR GALLMETZER: [15:19:17] Thank you, your Honour, for giving me this opportunity.
Your Honour, Mr Bemba's joint sentence of 18 years' imprisonment for the crimes of murder, rape and pillaging is not too high, it is unreasonable low.
Mr Bemba was convicted of five crimes that involved three clearly distinguishable types of criminality and victimisation, namely, sexual violence, violence to life and deprivation of property. In addition, the crimes of murder and rape and pillaging largely affect different victims.
The Prosecution does not contest the individual sentences of 18 years for the crimes of rape, 16 years for the crimes of murder, and 16 years for the crimes of pillaging.
These crimes, these convictions are perfectly appropriate. And if I may refer you to what Mr Haynes said this morning in the transcript at page 9, from lines 6 to 15, he compared convictions under articles -- for crimes under Article 71 to domestic law, and he said under domestic law any of these crimes would justify a maximum sentence comparable to a life sentence or 30 years imprisonment in our system.
The Chamber, however, erred by finding that 18 years for the crimes of rape reflect the totality of Mr Bemba's culpability and therefore imposed a joint sentence of 18 years.

The Chamber's error can best be illustrated on the basis of a practical example. Your Honours, consider a household with three family members, a couple and the husband's sister. One day armed men forcefully enter the house. They loot the sister, and because she resists, they kill her by shooting her in the head. As a result of these events, the surviving couple flees, but they come back three weeks later. A few days after their return, members of the same armed group again come to the house. This time they rape both the husband and his wife. The rape of the couple is a completely different crime from the crime of murder that was committed against the husband's sister three weeks earlier. It does not matter that these crimes were all committed in the same house against members of the same family. Even if the raped couple suffered additional harm by losing a family member, it was the husband's sister who lost her own life, and she was the one who was pillaged. Her harm is in no way subsumed in the rape that was committed against her family member three weeks after she lost her life.

Your Honours, this example is not an abstract one. It describes what happened to P-69 and what happened in his house. And this was found by the Trial Chamber in the judgment at paragraphs 496 to 501.

The total sentence of 18 years' imprisonment is based only on the harm suffered by P-69 and his wife, who were raped. However, it does not reflect in any way the harm that was suffered by P-69's sister, who was first looted and then killed.

As we have argued in our appeal, the Chamber committed three errors. First, Article 78(3) requires a chamber to impose individual sentences for each crime for which a conviction is entered and then in a distinct and reasoned step to impose a joint sentence.

By simply ordering the individual sentences to run concurrently - and please let me

remind you that counsel Haynes used exactly these words in his closing submissions - and by failing to weigh and balance all relevant factors for the purposes of the second step, the Chamber breached this requirement. In fact, it may have entirely misunderstood it.

Second, the Chamber erred in law by failing to provide sufficient reasoning for the single most important and consequential finding in the decision, namely, that 18 years for the crimes of rape reflects the totality of Mr Bemba's culpability.

Third, and in any event, in these circumstances imposing a joint sentence of 18 years' imprisonment constitutes an abuse of the Chamber's discretion. We have elaborated on each of these grounds of appeal in our appeal brief and there is no need to repeat what we have said. I just want to highlight the following.

Your Honours, this appeal has the potential to shape the sentencing practice of the Court. Sentencing under Article 78(3) is not a binary choice between the highest individual sentence and the sum of all sentences up to a maximum of 30 years' imprisonment. Instead, a Chamber should impose a sentence within this range that properly reflects all the relevant factors. This includes all forms of harm caused to all victims of the crimes for which Mr Bemba was convicted.

The Appeals Chamber must further ensure that a sentence has a general deterrent effect. A joint sentence higher than 18 years would send a signal that there is an extra cost for committing multiple crimes and multiple types of crimes, even if all crimes are committed in the same factual context.

The Appeals Chamber's clarification of the two-step approach under Article 78 will further be particularly relevant for a number of pending cases, where accused are charged with a large number of crimes. In those cases no single count adequately encompasses the overall gravity of the charges and the harm and type of victimisation

suffered by all victims. The Appeals Chamber's decision in this appeal will lead the way for all future sentencing decisions.

Your Honours, I will now address just very few points that arise from the Defence's submissions in response to our appeal, because as you will recall we have not sought leave to reply. And I'm starting with the first ground of appeal.

The Prosecution and the Defence agree that Article 78(3) requires a Chamber to undergo a two-step approach. After determining a sentence for each individual crime, a Chamber must impose a joint sentence that specifies the total period of imprisonment through a separate exercise of discretion. The Prosecution and the Defence also agree that paragraph 95 of the sentencing decision relates to the second step in the process.

The parties disagree on the scope of the second step. The Defence is of the view that when imposing a joint sentence a Chamber is not required to weigh and balance all relevant factors and that it is not required to provide any additional reasoning. According to the Defence, a joint sentence can be pronounced in a purely formalistic manner. This position, your Honours, primarily rests on a misinterpretation of Rule 145(1)(a) of the Rules of Procedure and Evidence, as I will explain now.

In the Lubanga sentencing judgment at paragraphs 33 to 34 the Appeals Chamber described the two-step process of sentencing, and referred to the overarching requirement under Rule 145(1)(a) that the totality of any sentence must reflect the culpability of the convicted person.

It continued that under the above provisions, which include Rule 145(1)(a) the Chamber must, and I quote, "balance all factors it considers relevant." End of quote.

At paragraph 43 of the same sentencing appeals judgment the Appeals Chamber

again emphasised that under Rule 145(1)(a) a Trial Chamber determines the sentence by weighing and balancing all the relevant factors.

These excerpts, your Honour, clearly indicate that especially for the determination of the joint sentence a Chamber must weigh and balance all relevant factors.

This is also the most logical interpretation of Rule 145(1)(a). When, if not for the determination of the joint sentence should all relevant factors be considered? A joint sentence that is not based on a careful evaluation of all the relevant factors would not properly reflect the totality, the total culpability of the convicted person as required under Rule 145(1)(a).

Your Honours, it does not matter that the Trial Chamber in the Lubanga and the Katanga cases provided no reasoning in support of their second step of sentencing.

In the Lubanga case neither party has appealed the manner in which Trial Chamber I imposed a joint sentence, but the Appeals Chamber nevertheless set out the proper approach to be followed for a second step under Article 78(3) and Rule 145(1)(a).

The Appeals Chamber should be guided by its own judgment in the Lubanga case as discussed previously, and not by the Trial Chamber's decision. Similarly, in the Katanga case both the Prosecution and the Defence withdrew their respective appeals.

Accordingly, the Appeals Chamber never had an opportunity to rule on the Trial Chamber's approach to sentencing. The Lubanga sentencing appeals judgment therefore remains the only authoritative decision to inform your judgment in this case.

Turning to the Prosecution's second ground of appeal. The parties agree that the Trial Chamber at paragraph 95 of the sentencing decision listed three factors that guided its decision to impose a joint sentence of 18 years.

The Prosecution's argument under its second ground of appeal is that this limited

reasoning is nevertheless inadequate because these three factors are irrelevant to the Chamber's conclusion that 18 years for the crimes of rape reflect the totality of Mr Bemba's culpability.

The first factor is limited to multiple convictions for the crimes of rape and murder both as a war crime and as a crime against humanity, but it does not affect the convictions for the different crimes of murder, rape and pillaging.

The second factor, namely, that all crimes are geographically and temporally connected is also irrelevant. It is shown by the example of the events that occurred in P-69's house. A sentence for the rape of P-69 and his wife does in no way reflect the murder and pillaging of P-69's sister three weeks earlier. It is irrelevant that all crimes were committed in the same house and within less than a month. The victimisation of P-69's sister is unrelated to the rape committed against her family member weeks after she already had lost her life.

The third factor, namely, that Bemba's responsibility for all crimes is based on the same conduct does also not support the Chamber's conclusion.

The ICTY's Appeals Chamber in the Delalic case at paragraph 741 held that an assessment of the gravity of the offences involves, in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes. Bemba's joint sentence is not based on a collective evaluation of the gravity of all the underlying crimes. It focuses on rape but omits an assessment of the gravity of murder and pillaging and the harms, the additional harms, suffered by the victims of those crimes.

Accordingly, the conclusion drawn from these three factors, namely, that the 18 years for the crimes of rape reflects the totality of Mr Bemba's culpability is not supported by sufficient reasoning.

The Defence's only argument on the third ground of appeal is that the Chamber assess the gravity of each type of crime in light of the fact that they had been committed in the context of other types of crimes. The Defence therefore implies that each individual sentence also captures the gravity of other crimes.

This argument, your Honour, misrepresents the decision. As I have mentioned before, the two-step approach of sentencing under Article 78(3) requires a Chamber first to impose individual sentences for each crime and then in a second step to impose a joint sentence that reflects the culpability of the convicted person for all crimes.

Under first step the Chamber must focus on each individual crime. At that stage it could not have considered other crimes to assess the gravity of each individual crime. Indeed, the findings relied upon by the Defence merely indicate that the criminal acts were preceded and succeeded by other violent acts and were therefore part of an attack against a civilian population which in turn then affected the gravity of each individual crime of which Mr Bemba was convicted.

In any event, as a matter of fact, this case -- in this case the individual sentence for the rape of 28 victims does not reflect the gravity of the three murders and the pillaging of 25 individual victims and six groups and institutions. This is so regardless of the fact that all crimes again were committed in the context of the same conflict and by the same armed groups. The direct murder victims were not raped. Neither were many of the indirect victims of murder. Their victimisation, their harm, is entirely based on different crimes.

Similarly, about half of the individual pillaging victims as well as the six pillaged groups and institutions were also not raped. It was therefore wholly unreasonable for the Chamber to conclude that the 18 years for the crimes of rape alone reflects the

totality of Mr Bemba's culpability.

Thank you, your Honours. This concludes my submissions.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:36:31] Thank you, Mr Gallmetzer. And I will give the floor to the legal representative.

MS DOUZIMA-LAWSON: [15:36:42] (Interpretation) Thank you, Madam President. What do the victims want? It is to be acknowledged that their status of victims should be acknowledged. The convict should be found guilty and pay for his acts proportionately to the crimes perpetrated.

For the victims, sentencing Mr Bemba to 18 years does not correspond to the accusations against him and the seriousness of the crimes. There are victims who felt that it was as if Mr Bemba simply killed one individual, whereas in this case these are widespread cases or crimes. Another victim went even further by stating that this was an insult.

As I have said before, the Defence has had the opportunity to make a statement on the file of each victim, and that is how they came about stating that there were some errors. Not all applications for participation were taken into account, otherwise we would have had more than 10,000 of those. So for the victims, the convict should have received the sentence that he merits. The victims did not carry any weapons, they did not take part in the fighting, but the soldiers of the MLC inflicted punishment on them indiscriminately, which constitute the crimes charged against the accused. And therefore that accused person should be liable to what the victims were subjected to.

Let us point out that there was no mitigating circumstances. On the contrary, the Chamber recognised beyond all reasonable doubt that there were aggravating circumstances in paragraph 23, and in this case these are crimes committed with

atrocities, a level of atrocity that defies imagination and goes against human conscience.

There was a statement made by a Defence witness in the sentencing hearing and this was Monsignor Ambongo. He stated as follows: "There are certain things that can never be forgotten and amongst those things that can never be forgotten there is rape." This was a Defence witness, a bishop who made that statement.

And referring myself to my observations on the two appeals against the sentencing decision I would say that situations that are comparable should be compared. In addition to the seriousness of the crimes there are other considerations that we feel that the Trial Chamber did not take into account. Amongst the aspects of incriminating conduct that is in relation to that, he did not express any compassion towards the victims, let alone talk about compensation. There was also his condensation in relation to those victims which he referred to as alleged victims. And this meant that these were only alleged crimes. This is the situation that he stood by all throughout the trial.

I would like to conclude by stating that the ad hoc tribunals considered that the sustainable failure of each soldier to punish which has the implicit fact of making the subordinates believe that they can perpetrate other crimes in all impunity is much more serious than any isolated failures.

Looking at the hierarchy of sentences, high-ranking commanders generally have a higher criminal liability or responsibility than subordinates.

There is another fact that should lead to the increase of this sentence, and that is that Mr Jean-Pierre Bemba did not cooperate with the Court. This led to another case within the same case that we were hearing. This means that in our opinion that sentence of 18 years is not proportionate to the crimes perpetrated by him and that

there are grounds to raise that sentence.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:44:03] Thank you, Maître Douzima.

So as I have said earlier, it was not the intention of the Chamber to engage in a debate here, we just wanted to hear the submissions of the parties.

However, the rules entitle both the Prosecution and the Defence to reply to the observations of the LRV, so I will gave the Prosecution and the Defence the floor.

And of course the Defence will have the last word, so Mr Gallmetzer.

MR GALLMETZER: [15:44:36] We have nothing to add, Your Honours.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:44:38] Thank you very much.

Mr Haynes.

MR HAYNES: [15:44:43] I will pass up the opportunity. Thank you very much.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:44:46] Well, then I have to give you the last word, because this will then conclude the hearing and we will hear from you whether Mr Bemba wants to address us.

MR HAYNES: [15:44:56] It has been under discussion throughout the course of the week, but Mr Bemba does not wish to address the Court directly. But what he does wish me to do is to express his profound gratitude to everybody in the courtroom and those who detain him, but in particular to your Honours for your obvious compassion, interest and care in dealing with his appeal. He is very grateful indeed to you.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:45:24] Thank you, Mr Bemba.

(Microphone not activated)

THE INTERPRETER: [15:45:30] Microphone.

PRESIDING JUDGE VAN DEN WYNGAERT: [15:45:33] I again want to thank the parties and participants for a very constructive debate. I think we have learned a lot

in the course of these hearings.

So we are going to adjourn now, not without thanking the interpreters and the court reporters for their help.

So the hearing is now adjourned.

THE COURT USHER: [15:45:57] All rise.

(The hearing ends in open session at 3.45 p.m.)