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THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

Public Redacted Version of "Prosecution's Document in Support of Appeal against Trial Chamber VII's 'Decision on Sentence pursuant to Article 76 of the Statute', 21 June 2017, ICC-01/05-01/13-2168-Conf"

Source: **Office of the Prosecutor**

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

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I. INTRODUCTION

1. On 19 October 2016, after convicting the five accused (Bemba, Kilolo, Mangenda, Babala and Arido) of offences against the administration of justice, involving at least 14 witnesses in the *Bemba* case,[1] the Presiding Judge of Trial Chamber VII remarked:

> "No legal system in the world can accept the bribing of witnesses, the inducement of witnesses to lie or the illicit coaching of witnesses. Nor can the International Criminal Court."

2. Yet, five months later, when the Trial Chamber pronounced the sentences against the five convicted persons, it conveyed the diametrically opposite message: that the ICC would tolerate offences against the administration of justice, and worse, that there was effectively no down side for an accused in committing them. No matter that, at the least, almost half of the Defence witnesses in the *Bemba* case were brought before the Court to lie under oath—and were persistently coached on what to lie about and how; no matter that the plan was orchestrated and implemented for a prolonged period by the accused (Bemba), his Counsel (Kilolo) and his Case Manager (Mangenda); no matter that the convicted persons bribed witnesses and even conspired to bribe them *again* once their crimes had become known; no matter that their criminal conduct was caught on tape and their illegal money transfers were uncovered; and no matter that the Trial Chamber made all those findings of guilt *beyond reasonable doubt*.

3. On 22 March 2017, all the convicted persons except Bemba (who had been sentenced to 18 years of imprisonment for crimes against humanity and war crimes in the Main Case) walked out as, effectively, free men. The Chamber sentenced Bemba—who planned, authorised and instructed the criminal scheme—to merely *one* additional year of imprisonment. Considering that Bemba was convicted for three different offences each involving 14 witnesses, his sentence amounts to a little over

[1] Also referred to as "the Main Case".

one week of imprisonment per witness and offence. Even more so, the Chamber suspended Mangenda's and Kilolo's two year and two and a half year sentences, respectively—a penalty or mechanism not foreseen in the Statute. It additionally fined Kilolo and Bemba EUR 30,000 and 300,000 respectively. However, considering the lack of clarity as to their capacity to pay the fines imposed, or the Court's ability to enforce them, such fines might as well be illusory.

4. The sentences imposed on Bemba, Kilolo and Mangenda are manifestly insufficient and unjust. The high standard of review on appeal is plainly met:[2] not only did the Chamber err in law, but also it relied on, and gave undue weight to, extraneous factors. On the facts of this case, no reasonable Trial Chamber could have imposed these sentences:

- First, the Chamber erred by pronouncing disproportionate and manifestly inadequate sentences which do not reflect the gravity of the offences and culpability of the convicted persons. The sentences were taken from the "wrong shelf".[3] Notwithstanding the Trial Chamber's repeated statements in the Conviction Judgment and Sentencing Decision about the inherent gravity of the offences and the culpability of the convicted persons, the sentences do not reflect such findings. They may as well as relate to a different case. This was an error.

[2] *See* *Lubanga* SAJ, para. 44 ("[T]he Appeals Chamber's review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion."). *See also* *Kenyatta* article 87(7) AD, para. 25 ("In addition, the Appeals Chamber may interfere with a discretionary decision amount[ing] to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously.' The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion."). *See also* *Semanza* AJ, para. 374. ("The Appeals Chamber will intervene in the sentence only if the moving party demonstrates that the Trial Chamber erred by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.").

[3] *See e.g.*, *Galić* AJ, para. 455; *Gacumbitsi* AJ, paras. 204-205.

- Second, the Chamber erred in unduly and unfairly diminishing the gravity of this case because, based on its own approach conveyed to the Parties at the start of the trial, it took into account that the witnesses lied about credibility-related issues rather than about the merits of the *Bemba* case. However, there was no automatic "hierarchy of lies" in this case, where some lies, as a matter of principle, deserved a lesser sentence—even more so when all the lies were told solely for the unlawful purpose of manipulating the Court into acquitting Bemba. Moreover, the Chamber had decided to limit the scope of the trial by not ruling on the witnesses' false testimony on the merits for pragmatic reasons only and not in order to diminish the gravity of the conduct for sentencing purposes.

- Third, the Chamber erred in finding that *ipso facto* Bemba and Kilolo deserved lower sentences for the offences that they committed as accessories. Article 25(3) contains no black and white hierarchy of blameworthiness. Legal labels should not determine sentencing; rather, culpability and appropriate penalties must be determined based on the facts, as mandated by article 78(1) and rule 145.

- Last but not least, the Chamber erred by suspending Kilolo's and Mangenda's sentences. No such penalty or mechanism exists in the Rome Statute. Nor is there a *lacuna* in the Statute's penalties regime that Trial Chamber VII needed, or was required, to fill.

5. While suspended sentences and the extensive use of fines may work domestically where rehabilitation plays an important role in sentencing and courts have effective coercive powers and monitoring mechanisms, they are not always suitable for international crimes—and related offences against the administration of justice—where deterrence and retribution are the primary purposes of sentencing,

and the Court has a reduced ability to effectively monitor the convicted persons' conduct post-sentence and locate and execute their funds and assets.

6. The Appeals Chamber should quash Kilolo's and Mangenda's suspended sentences and order them back into detention. Further, the Appeals Chamber should increase Mangenda's, Kilolo's and Bemba's sentences to five years to adequately reflect the scope and gravity of their criminally culpable conduct.

7. This appeal solely relates to Bemba, Kilolo and Mangenda. The Prosecution does not appeal Arido's and Babala's sentences. This, however, does not mean that the Prosecution agrees that their sentences of 11 months and 6 months, respectively, were adequate. However, due to the more confined nature of their convictions and bearing in mind the high standard of appellate review, the Prosecution only appeals the sentences of the three members of the common plan whose sentences evince the gravest errors.

Level of Confidentiality

8. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(1) of the Regulations of the Court, since it refers to confidential information. The Prosecution will file a public redacted version in due course.

II. FIRST GROUND OF APPEAL: THE TRIAL CHAMBER ABUSED ITS DISCRETION AND ERRED IN LAW BY IMPOSING MANIFESTLY INADEQUATE AND DISPROPORTIONATE SENTENCES ON KILOLO, MANGENDA AND BEMBA

9. In sentencing Kilolo, Mangenda and Bemba, the Trial Chamber abused its discretion and erred in law. The sentences imposed were manifestly inadequate and disproportionately low.[4] Despite finding that Kilolo, Mangenda and Bemba were the masterminds, orchestrators and key executors of the criminal scheme to thwart the course of justice in the Main Case, the Chamber rendered manifestly inadequate sentences. In reality, Kilolo and Mangenda have served only 11 months in prison as punishment for their egregious offences. Despite their convictions, and but for their limited pre-trial detention, the suspension of the remainder of their sentences means that Kilolo and Mangenda are effectively free men. Likewise, Bemba will serve no more than 12 months as his punishment for committing article 70 offences. Moreover, it is unclear whether the fines imposed on Kilolo and Bemba can be practically realised.

10. In imposing these sentences, the Chamber failed to consider the inherent gravity of the article 70 offences committed in the Main Case. The Chamber also failed to capture Kilolo's, Mangenda's and Bemba's considerable criminality and enhanced degree of participation in the criminal scheme. Moreover, the Chamber failed to appropriately punish them for their criminal conduct, and thus to deter similar crimes in the future. In doing so, it failed to protect the integrity of the Court's proceedings.

[4] *See* article 81(2)(a): a sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. *See also* *Lubanga* SAJ, para. 34 ("[The] Trial Chamber's determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person."); para. 39 ("The Appeals Chamber's role is not to determine, on its own, which sentence is appropriate, unless—as stipulated in article 83(3) of the Statute—it has found that the sentence imposed by the Trial Chamber is 'disproportionate' to the crime.").

11. A sentence is disproportionate,[5] when the punishment imposed does not fit the crime.[6] Kilolo's, Mangenda's and Bemba's punishment does not fit the gravity of their crimes or their criminal culpability. Put simply, the sentences are taken from the wrong shelf.[7] They fail to reflect the reality of this case and the Chamber's own findings of fact.

12. The quantum of the terms of imprisonment imposed on the three convicted persons is grossly inadequate. Moreover, the Chamber's further errors deprived the sentences of whatever deterrent value the Chamber may have wished to impart to

[5] *See* *Lubanga* SAJ, para. 40 ("Proportionality is generally measured by the degree of harm caused by the crime and culpability of the perpetrator and, in this regard, relates to the determination of the length of sentence. While proportionality is not mentioned as a principle in article 78(1) of the Statute, rule 145(1) of the Rules of Procedure and Evidence provides guidance on how the Trial Chamber should exercise its discretion in entering a sentence that is proportionate to the crime and reflects the culpability of the convicted person."); *see also* Brady and Jennings, p. 299 ("[Delegations]" agreed on appropriate language to describe the grounds upon which a sentence may be appealed. The question arose whether the disproportion between the crime and the sentence must be "significant". Some countries, drawing on the "manifestly inadequate" standard necessary to sustain appeals against sentence in their own systems, preferred to use the word "significant". However, other delegations did not think the word "significant" was necessary and it was deleted."). *See also* Ohlin, p. 324 (referring to two notions of proportionality: offence-gravity proportionality [which requires that the defendant receive punishment that is proportional to his or her wrongdoing, *i.e.*, proportional to the gravity of the offence for which he or she is convicted] and defendant-relative proportionality [the idea that more culpable defendants ought to be punished more severely than less culpable defendants, and that similarly situated defendants ought to be treated, *ceteris paribus*, roughly equal]).

[6] *See* *Dragan Nikolić* SAJ, para. 21 ("The Appeals Chamber finds that the principle of proportionality, in the Trial Chamber's consideration, means that the punishment must be 'proportionate to the moral blameworthiness of the offender' and requires that 'other considerations such as deterrence and societal condemnation of the acts of the offender' be taken into account. The principle of proportionality referred to by the Trial Chamber by no means encompasses proportionality between one's sentence and the sentence of other accused. As correctly noted by the Trial Chamber, the principle of proportionality implies that '[a] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender'."); *Akayesu* AJ, para. 414 ("[…] 'the degree of the magnitude of the crime is still an essential criterion for evaluation of sentence. A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.'"); *Kamuhanda* AJ, para. 359; *see also* *Todorović* SJ, para. 29 ("The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words, that the punishment be made to fit the crime. The Chamber is of the view that this principle is reflected in the account, which the Chamber is obliged by the Statute and the Rules to take, of the gravity of the crime.")

[7] *See e.g.*, *Galić* AJ, para. 455, where the Appeals Chamber found that the sentence was "taken from the wrong shelf" and vacated the sentence of 20 years imposed at trial and replaced it with a sentence of life imprisonment. ("*Although the Trial Chamber did not err in its factual findings and correctly noted the principles governing sentencing*, it committed an error in finding that the sentence imposed adequately reflects the gravity of the crimes committed by Galić and his degree of participation. *The sentence rendered was taken from the wrong shelf.* […] *In the Appeals Chamber's view, the sentence imposed on Galić by the Trial Chamber falls outside the range of sentences available to it in the circumstances of the case.* The Appeals Chamber considers that the sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct, that it is able to infer that the Trial Chamber failed to exercise its discretion properly.") (emphasis added)

them. Critically, the Chamber's decision to suspend Kilolo's and Mangenda's terms of imprisonment, and its subsequent failure to specify how the suspended sentences would work in practice, including how their behaviour would be monitored (if at all), deprives them of any real value or deterrent effect.[8] Nor is it apparent that Kilolo will pay his fine.[9] Likewise, for Bemba, the deterrent effect of a EUR 300,000 fine, albeit labelled "substantial",[10] remains on paper alone.

13. Not only are the sentences manifestly inadequate *per se* and their deterrent value rendered almost obsolete, the Chamber's decision is flawed in other crucial aspects. The Decision contains further specific errors that affect its findings about the gravity of the article 70 offences, the degree of participation of the three convicted persons, and thus the sentences imposed. Moreover, the Chamber's reasoning is inadequate in certain aspects, and otherwise internally inconsistent.

14. In particular, the Chamber's error in imposing manifestly inadequate sentences is compounded by two further errors, namely:

- *The Chamber failed to properly assess the gravity of the offences in this case:* The Chamber failed to recognise that false testimony on credibility-related issues can be as grave as false testimony on other issues, including those pertaining to the merits of a case. The coached Defence witnesses lied to unduly alter the Chamber's assessment of their credibility in the case, and impeded a key

[8] Sentencing Decision, paras. 149, 197.
[9] Sentencing Decision, paras. 198-199. *See also* Prosecution's Access Request, paras. 1-3 (seeking access to those parts of Kilolo's Letter (notified on 7 April 2017) on his "personal financial information" that relate to his ability to pay his fine to present a full and informed sentencing appeal); Kilolo's Fine Response, para. 1 (stating that the deadline to pay the fine is 22 June 2017) and paras. 6-7 (disputing the Letter's relevance to the Prosecution's appeal); Kilolo Fine AD, paras. 7-8 (noting that the Letter concerns the implementation mechanisms for Kilolo's payment of the fine imposed on him as part of his sentence, considering that it was not relevant to the Prosecution's appeal or any of its outstanding submissions, and rejecting the Prosecution's request to access the Letter); Presidency Fine Order, p. 3 (noting that in the circumstance of the case and according to article 81(4), the sentence cannot be executed unless and until the conviction is confirmed on appeal); p. 4 (noting that Kilolo's fine cannot be currently executed, and that the obligation to pay the fine within three months of conviction is also suspended for the duration of the appeals proceedings.) The Prosecution simply has no information on Kilolo's ability to pay his fine, nor if such fine can be recovered, and if so, how.
[10] Sentencing Decision, para. 261.

function of the Chamber. Moreover, the lies that were prosecuted in this case were serious, as they were induced and told for the purpose of acquitting a guilty person (Bemba). The Chamber thus incorrectly diluted the gravity of the article 70 offences, especially those under article 70(1)(a) and (b) on the giving and presenting of false testimony. It erred by considering the "nature of the false testimony" as a factor in this case which diminished automatically the gravity of the offences, and by giving it weight. In so doing, the Chamber abused its discretion. It further erred in law by failing to reconcile its earlier findings about the nature and gravity of the false testimony in this case, and thus failed to properly reason.

- *The Chamber failed to properly address Kilolo's and Bemba's culpability as accessories:* The Chamber erred in law and abused its discretion when it considered that Bemba's and Kilolo's roles as "accessories" were automatically factors which justified a decrease in their sentences for the article 70(1)(a) offences, without properly assessing their actual contributions to the offence.

15. Thus, not only did the Chamber take the sentences from the "wrong shelf", it also specifically erred in assessing the gravity of the offences committed by Kilolo, Mangenda and Bemba, and the culpability of Bemba and Kilolo as accessories. For all these reasons, the Chamber abused its discretion and erred in law in imposing a manifestly inadequate and disproportionate sentence. The Appeals Chamber should intervene to correct the Trial Chamber's errors.

II.A. SUB-GROUND 1: THE SENTENCES WERE MANIFESTLY INADEQUATE

16. The sentences imposed on Kilolo, Mangenda and Bemba were taken from the "wrong shelf".[11] They fell outside the range of sentences suitable to effectively punish the co-perpetrators of the article 70 offences in this case and to deter the future commission of such offences in other cases. The Chamber's imposition of such disproportionate and inadequate sentences does not reflect the inherent gravity of these offences, committed against the integrity of the Court's proceedings. Nor can the sentences easily be reconciled with the Chamber's earlier key findings underscoring the gravity of the offences and the need for effective deterrence at the Court. Likewise, the Chamber's sentencing decisions fail to adequately and appropriately capture and reflect the scope of the co-perpetrators' criminal behaviour and contributions. They cannot be squared with the Chamber's other findings at conviction and sentence emphasising the heightened culpability of the three co-perpetrators.

II.A.1. A sentence taken from the "wrong shelf" is manifestly inadequate

17. Sentences that are discordant and incompatible with rendered convictions are said to be taken from the wrong shelf. At their core, such sentences are so unfair and

[11] *Galić* AJ, para. 455; *Gacumbitsi* AJ, para. 204 ("The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of liability of the convicted person, it then disregarded these principles in imposing [the sentence]. The Appeals Chamber recalls that [Gacumbitsi] played a central role […] [He] was thus convicted of extremely serious offences."); para. 205 ("[The discretion that Trial Chambers are entitled to in sentencing] is not, however, unlimited. It is the Appeals Chamber's prerogative to substitute a new sentence when the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing at the Tribunal. This is such a case."); *Simba* AJ (Partially Dissenting Opinion of Judge Schomburg), para. 1 ("With all due respect, I cannot find any reason to depart from the International Tribunal's established jurisprudence on sentencing and uphold the sentence of 25 years' imprisonment for Aloys Simba. The Trial Chamber simply took this sentence from the wrong shelf. The only adequate sentence in this case is life imprisonment"). *See also* *Simba* AJ, paras. 337-338 (where the Appeals Chamber did not consider the Prosecution's argument that the Trial Chamber erred in imposing a sentence manifestly inconsistent with the Tribunal's sentencing practice in similar cases because it went "beyond the scope of the Prosecution Notice of Appeal").
See also *Semanza* AJ (Separate Opinion of Judge Shahabuddeen and Judge Gűney), paras. 2-3 (stating that genocide is "the gravest crime known to the international criminal justice system" and "would justifiably have attracted a sentence of imprisonment for the remainder of his life—the maximum sentence permitted to the Tribunal.", and thus indirectly endorsing the "wrong shelf" argument).

so unreasonable that they constitute an abuse of discretion.[12] Thus, even if a Chamber has properly entered its factual findings and correctly noted the principles governing sentencing, it must equally ensure that *the quantum* of the sentence imposed not only appropriately reflects these findings and principles, but also deters the convicted person, and others, from further offending.[13] Mere recitation of the relevant facts and principles does not discharge a Chamber from its obligation to impose a proper sentence. A Chamber must "avoid formulaic analysis that is not faithful to the whole of the circumstances and the facts of individual cases."[14] A Chamber properly exercises its sentencing discretion only when it imposes a sentence that makes sense in a case.

18. In typical "wrong shelf" appeal cases, notwithstanding the Trial Chamber's recitation of sentencing principles, the initial sentence imposed simply does not make sense. On this basis, in several cases at the *ad hoc* tribunals, the sentences were therefore found to be manifestly inadequate and increased on appeal.

19. In *Galić*, despite the Trial Chamber's correct enunciation of the facts and principles, the Appeals Chamber found that the Trial Chamber erred in imposing a sentence "taken from the wrong shelf".[15] Indeed, despite the Trial Chamber's summary of the gravity of the crime and Galić's role[16]—not unlike Trial Chamber

[12] *Lubanga* SAJ, paras. 41-45 (noting that the standard of review for discretionary decisions also applies to sentencing decisions, and that appellate interference is justified where *inter alia* "the decision is so unfair and unreasonable as to constitute an abuse of discretion". Likewise, the Appeals Chamber will intervene when "as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.")
[13] *See e.g.*, *Galić* AJ, para. 455.
[14] *Taylor* AJ, paras. 591, 665.
[15] *Galić* AJ, para. 455.
[16] *See e.g.*, *Galić* TJ, para. 764 ("The gravity of the offences committed by General Galić is established by their scale, pattern and virtually continuous repetition, almost daily, over many months. Inhabitants of Sarajevo—men, women, children and elderly persons—were terrorised and hundreds of civilians were killed and thousands wounded during daily activities […]. The Majority of the Trial Chamber also takes into consideration the physical and psychological suffering inflicted on the victims. Sarajevo […] was an anguishing environment in which, at a minimum hundreds of men, women, children, and elderly people were killed, and thousands were wounded and more generally terrorized."); paras. 606-607 ("[…] General Galić assumed the post of the commander of the Sarajevo Romanija Corps during the Indictment Period […]. For all military persons present in Sarajevo, there was no doubt that General Galić was the *de jure* SRK Corps Commander […] and remained in this capacity until 10 August 1994 […]"); para. 609 ("[He] was in charge of continuing the planning and

VII's own recapitulation[17]—it failed to impose a sentence that "adequately reflect[ed] the level of gravity of the crimes committed by Galić and his degree of participation."[18] Galic's initial sentence of 20 years' imprisonment "underestimated the gravity of Galić's criminal conduct."[19] Among other factors, his "systematic, prolonged and premeditated" participation and abuse of his senior position[20] were found to be more deserving of a sentence of life imprisonment, which the Appeals Chamber imposed on appeal.[21]

20. Likewise, in *Gacumbitsi*, the Trial Chamber abused its discretion by imposing a sentence which "simply [could] not be reconciled with the principles governing sentencing at the Tribunal."[22] As the Appeals Chamber held, although the Trial Chamber correctly noted the sentencing principles, "it then disregarded these principles in imposing a sentence of only thirty years' imprisonment [on Gacumbitsi]."[23] In light of the massive nature of the crimes and Gacumbitsi's leading role in them, as well as the relatively insignificant purported mitigating factors, the sentence imposed was found *not* to be "commensurate with the gravity of the

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execution of the military encirclement of Sarajevo."); para. 765 ("[He] was not—contrary to his assertion—just a professional soldier. […] He had a public duty to uphold the laws or customs of war. The crimes that were committed by his troops (or at least a high proportion of these) would not have been committed without his assent. […] [That he] occupied the position of VRS Corps commander, and repeatedly breached his public duty from this very senior position, is an aggravating factor."); para. 767 ("[…] General Galić was a professional soldier who not only made little effort to distinguish civilian from military objectives but willingly oversaw the targeting of civilians in Sarajevo.").

[17] *See e.g.*, Sentencing Decision, paras. 101, 154, 204 ("The offence of corruptly influencing a witness is undoubtedly grave"); paras. 102, 155, 205, ("[the] number of 14 contaminated Main Case Defence Witnesses is particularly high and, in the view of the Chamber, characterises the systematic approach of the offences and therefore the seriousness and gravity of this case."); paras. 104, 157, 207 ("[the offences] were part of a calculated plan to illicitly interfere with witnesses in order to ensure that they would provide evidence in Mr Bemba's favour."); paras. 105, 158, 208 ("[…] the offences were extensive in scope, planning, preparation and execution."). *See also* paras. 108-115, 160-167, 210-217. *See e.g.*, Sentencing Decision, para. 117 ("Mr Mangenda's contributions were manifold and comprehensive, going beyond the support of a mere 'case manager'"); para. 169 ("As Mr Bemba's counsel responsible for the Main Case Defence investigation, Mr Kilolo's contribution were the most comprehensive and direct."); para. 219 ("[Bemba's role] consisted of planning, authorising and instructing the activities relating to the corrupt influencing of witnesses and their resulting false testimonies").

[18] *Galić* AJ, para. 455.

[19] *Galić* AJ, para. 455.

[20] *Galić* AJ, para. 455.

[21] *Galić* AJ, p. 185.

[22] *Gacumbitsi* AJ, para. 205.

[23] *Ibid*., para. 204.

offences and the degree of liability of the convicted person."[24] When it failed to give proper weight to the gravity of the crimes and to his central role in those crimes, the Trial Chamber "ventured outside its scope of discretion".[25] As the Appeals Chamber found, only the maximum sentence—life imprisonment—was warranted in the circumstances of the case.[26]

21. Likewise, in *Duch* at the ECCC, the Supreme Court Chamber found that the sentence of 35 years' imprisonment was "arbitrary" and "manifestly inadequate". It did not appropriately reflect the gravity of the crimes and the individual circumstances in the case.[27] The Supreme Court Chamber found that only a sentence of life imprisonment was appropriate.[28] In so finding, the Supreme Court Chamber confirmed that despite a Trial Chamber's ample margin of appreciation in sentencing, the Supreme Court Chamber "is under a duty to substitute a new penalty where, such as in the present case, 'the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing,' duly considering the gravity of the crimes and particular circumstances of the case."[29]

22. Article 70 cases may differ from article 5 cases (such as those in *Galić*, *Gacumbitsi*, *Simba* and *Duch*) insofar as the nature of the crimes and the potential sentencing range. The same sentencing principles, however, still apply. Thus, the sentences in article 70 cases are susceptible to the same errors. As those Trial Chambers had done, this Trial Chamber too drew the sentences from the wrong shelf. Although the

[24] *Ibid*., paras. 204-205.
[25] *Ibid*., para. 205.
[26] *Gacumbitsi* AJ, para. 206; *also* *Simba* AJ (Partially Dissenting Opinion of Judge Schomburg), paras. 1-3 (finding that Simba's 25 year sentence was taken from the wrong shelf. Rather, life imprisonment was justified since, *inter alia*, Simba was a "primary player", who "abused his position and influence").
[27] *Duch* AJ, para. 383. *See also* paras. 360-373 (finding that the Trial Chamber attached undue weight to mitigating circumstances and insufficient weight to the gravity of the crimes and aggravating circumstances of the case. "Consequently, the Trial Chamber imposed a sentence that does not reflect the gravity of the crimes committed." It was both an error of law and an abuse of discretion.)
[28] *Ibid.*
[29] *Duch* AJ, para. 379.

Chamber purported to address the gravity of the offences and culpability of the perpetrators, it failed to do so in fact.

23. Indeed, a sentence, to be considered proportionate and adequate, "should reflect the gravity of the crime and its effects, *and* should also be individualised so as to hold a convicted person responsible for what he himself has done or failed to do."[30] The litmus test for an appropriate sentence is the gravity of the offence.[31] Moreover, sentences should accord with the object and purpose of the Statute. Offences against the administration of justice impede the discovery of the truth and hamper this Court's ability to deliver justice in adjudicating serious crimes.[32]

24. The sentences in this case failed to take these considerations into account. Rather, they undermine the seriousness of the convictions rendered. As shown below, the sentences imposed on Kilolo, Mangenda and Bemba are manifestly inadequate.

II.A.2. The quantum of the sentences does not reflect the gravity of the convictions and the culpability of the three co-perpetrators

25. Kilolo, Mangenda and Bemba corruptly influenced almost half of the Defence case (at least 14 out of 34 Defence witnesses).[33] They also presented the false testimony of these witnesses in the Main Case. Additionally, Kilolo and Bemba induced and solicited all of the 14 witnesses to give false testimony. And Mangenda assisted nine of the 14 witnesses to do so. Yet, the three of them were punished, in reality, with no more than a few weeks' imprisonment per offence:

[30] *Taylor* AJ, para. 664 (emphasis added).
[31] *Akayesu* AJ, para. 413 (citing *Delalić et al.* AJ, para. 731, endorsing the finding in *Kupreskić* TJ, para. 852 and cited in *Aleksovski* AJ, para. 182. *See also Kambanda* AJ, para. 125.)
[32] Sentencing Decision, para. 19. *See also* T-50, 3:21-4:5.
[33] *See e.g.*, Sentencing Decision, paras. 102, 155, 205; Judgment, para. 103.

- Despite being criminally responsible for *42 offences*, the Chamber found Kilolo's crimes warranted no more than *3 weeks* (or 21.4 days) of imprisonment as punishment per witness/offence;[34]
- Despite being criminally responsible for *37 offences*, the Chamber found Mangenda's crimes warranted no more than *2.5 weeks* (or 19.5 days) of imprisonment as punishment per witness/offence;[35] and
- Despite being criminally responsible for *42 offences*, the Chamber found Bemba's crimes warranted no more than *one week* (or 8.6 days) of imprisonment as punishment per witness/offence.[36]

26. These sentences are almost inconsequential. That the sentences minimise the gravity of the convictions entered, and are so unreasonable on the facts of this case, is amply clear from the Chamber's internally inconsistent findings. Although the Chamber professed an overwhelming objective to protect the Chambers of this Court from efforts to impede their function, these sentences cannot accomplish that goal. Nor did the Chamber explain how, in its view, they might do so. To the contrary, they plainly undermine it. Although the Chamber claimed that deterrence was the primary function of sentencing in this case, these manifestly low sentences do not deter.

II.A.2.a. The quantum of the terms of imprisonment contradicts the Chamber's finding that the offences are grave

27. The Chamber's emphasis on the intrinsic gravity of article 70 offences in the case is internally inconsistent, and squarely at odds with the sentences imposed. Despite consistently underscoring the *inherent gravity* of article 70 offences committed in the Main Case, the Chamber's manifestly inadequate sentences fail to reflect this gravity

[34] Sentencing Decision, para. 195 (Kilolo received a joint sentence of 30 months' imprisonment). Approximate figures calculated on the basis of the total number of article 70 offences (42) and the joint sentence.
[35] Sentencing Decision, para. 147 (Mangenda received a joint sentence of 24 months' imprisonment). Approximate figures calculated on the basis of the total number of article 70 offences (37) and the joint sentence.
[36] Sentencing Decision, para. 250 (Bemba received a joint sentence of 12 months' imprisonment). Approximate figures calculated on the basis of the total number of article 70 offences (42) and the joint sentence.

in its final determination. By doing so, the Chamber undermined its own earlier findings and those made by the Appeals Chamber in interlocutory decisions in this case.

28. As early as 11 July 2014, the Appeals Chamber emphasised that the commission of offences against the administration of justice had "specific and serious ramifications".[37] The Appeals Chamber considered that the gravity of article 70 offences was demonstrated by the following factors:

- They "threaten or disrupt the overall fair and efficient functioning of the *[sic]* justice in the specific case to which they refer";
- They "ultimately undermine the public trust in the administration of justice and the judiciary"; and
- "Such seriousness is only enhanced" when committed by those whose "professional mission is to serve, rather than disrupt, justice".[38]

29. On 27 March 2015, the Trial Chamber emphatically rejected a claim by the Arido Defence that this case lacked sufficient gravity. The Chamber found:

> "[…] *for a court of law, there is an intrinsic gravity to conduct[] that, if established, may amount to the offence of obstruction of justice* (with which the accused is charged). Such conduct[] [is] *certainly never in the 'interest of justice'*, and *hardly will it ever be so to tolerate [it]*. For [it] *potentially undermine[s] the very efficacy and efficiency of the rule of law* and of *the courts entrusted to administer it*."[39]

30. In its Conviction Judgment on 19 October 2016, the Trial Chamber continued to underscore the inherent gravity of article 70 offences, which it recognised

[37] Kilolo article 60(2) AD, para. 65.
[38] Kilolo article 60(2) AD, para. 65. Although the Appeals Chamber disagreed with the Pre-Trial Chamber's description of the offences as having "utmost gravity", it found no error in the Pre-Trial Chamber's observations on their gravity.
[39] Arido Charges Withdrawal Decision, para. 9.

undermined the Court's integrity. Before delivering its judgment convicting the five accused persons of article 70 offences, the Presiding Judge stated:

> "This case was about offences against the administration of justice as Article 70 of the Rome Statute puts it. This means it was about giving false testimony, presenting false evidence and corruptly influencing witnesses. Although such offences are not the core crimes this Court was established to try, it has become apparent in the short time span of the Court's existence that *preventing offences against the administration of justice is of the utmost importance for the functioning of the International Criminal Court*. Such offences have this significance because criminal interference with witnesses may impede the discovery of the truth in cases involving genocide, crimes against humanity and war crimes. They have this significance because *they may impede justice to victims of the most atrocious crimes. And ultimately they may impede the Court's ability to fulfil its mandate*."[40]

31. Also, in its Conviction Judgment, the Chamber emphasised the gravamen of article 70 offences as follows:

> "*The rationale of Article 70 of the Statute is to enable the Court to discharge its mandate when adjudicating cases falling under its jurisdiction*. The different sub-paragraphs of Article 70(1) of the Statute address various forms of conduct that may encroach upon the integrity and efficacy of the proceedings before the Court. […] articles 70(1)(a) to (c) of the Statute aim at protecting the reliability of the evidence presented to the Court by criminalising conduct of undue interference with the production and presentation of evidence […]".[41]

The Chamber further recalled its earlier finding that article 70 offences were intrinsically grave.[42]

32. In its Sentencing Decision on 22 March 2017, the Chamber once again emphasised the vital role of article 70 prosecutions—namely to protect the Court's integrity and ensure that article 5 crimes do not go unpunished.[43]

[40] T-50, 3:21- 4:5 (emphasis added). *See also* Sentencing Decision, para. 256 (where the Chamber underscored the deterrent effect of article 70 in the context of calculating sentencing credit).
[41] Judgment, para. 14 (emphasis added).
[42] Judgment, para. 15 (citing Arido Charges Withdrawal Decision, para. 9).

> "Article 70 […] seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims' right to justice and, generally, the Court's ability to fulfil its mandate."[44]

33. The Chamber further underscored the gravity of the individual offences committed in the case. It found that the article 70(1)(a), (b) and (c) offences committed were "undoubtedly grave", had "far-reaching consequences" and "undermine[d] the Court's discovery of the truth and impedes justice for victims."[45] The Chamber further emphasised the seriousness and the gravity of this case.[46]

34. And the seriousness and gravity of this case is not in doubt. This was a case in which the extent of damage and the nature of the unlawful conduct was sweeping. The co-perpetrators—Kilolo, Mangenda and Bemba—contaminated "almost half of the witnesses presented in the Main Case" over a "prolonged time period".[47] This was a case in which Kilolo, Mangenda and Bemba devised "a systematic approach" and "a calculated plan to illicitly interfere with witnesses in order to ensure that they would provide evidence in Mr Bemba's favour."[48] This was also a case where the offences were "extensive in scope, planning, preparation and execution", and one with a "degree of sophistication in the execution of the offences". This was also a case where Kilolo, Mangenda and Bemba induced "[a] coercive group dynamic".[49] All these factors were found to enhance the gravity of the offences.

35. Notwithstanding the Chamber's repeated statements throughout the proceedings and in its decisions about the inherent gravity and serious circumstances

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[43] Sentencing Decision, para. 19 ("The Court investigates and prosecutes individuals for having committed crimes falling under the jurisdiction of the Court, such as genocide, crimes against humanity and war crimes. The Preamble to the Statute states that these crimes must not go unpunished and that perpetrators do not enjoy impunity.")
[44] Sentencing Decision, para. 19.
[45] Sentencing Decision, paras. 19, 101, 108, 112, 154, 160, 164, 204, 210 and 214.
[46] Sentencing Decision, paras. 101-115, 154-167, 203-217.
[47] *See e.g.*, Sentencing Decision, paras. 101-115, 154-167, 203-217.
[48] *Ibid*.
[49] *Ibid*.

of the case, the sentences do not reflect that the offences were indeed grave. The two analyses may well have related to two different cases; they simply cannot be reconciled.

36. Moreover, the terms of imprisonment that the Chamber thought each article 70 offence warranted were manifestly inadequate. As Table 1 shows, they simply cannot be squared with the stated gravity and seriousness of the offences. The Chamber assessed Kilolo's, Mangenda's and Bemba's convictions for each article 70 offence at barely more than a month per witness. Some of the convictions drew even shorter terms of imprisonment. Assessing the seriousness of the article 70 offences in this case as warranting no more than a few weeks or month at best per witness is an abuse of discretion.

Table 1: *Terms of imprisonment as calculated by offence (individual sentences) and per witness*[50]

	Corruptly influencing witnesses ***Article 70(1)(c)*** **(per witness)**	**Presenting false testimony** ***Article 70(1)(b)*** **(per witness)**	**Assisting in giving false testimony** ***Article 70(1)(a)*** **(per witness)**
KILOLO	1.7 months (51.4 days)	1.7 months (51.4 days)	0.86 months (25.7 days)
MANGENDA	1.4 months (42.8 days)	1.29 months (38.6 days)	1.3 months (40 days)
BEMBA	0.86 months (25.7 days)	0.86 months (25.7 days)	0.7 months (21.4 days)

[50] Approximate figures calculated on the basis of number of witnesses and individual sentence per offence.

II.A.2.b. The quantum of the sentences contradicts the Chamber's assessment of culpability

37. As the Conviction Judgment underscored, the contributions by Kilolo, Mangenda and Bemba to the common plan were *essential* to the success of the criminal scheme.[51] Moreover, as both the Conviction Judgment and Sentencing Decision demonstrate, the contributions by Kilolo, Mangenda and Bemba were even more comprehensively described.[52] Yet, the actual sentences imposed on them do not reflect these findings. Although the Sentencing Decision appears to dilute the nature of their contributions (in particular for Mangenda and Bemba),[53] the Chamber's remarks contradict its earlier findings in both the Conviction Judgment and Sentencing Decision.

38. The criminal scheme that Kilolo, Mangenda and Bemba are convicted of was extraordinary. This was not a scheme that resulted from a mere temporary lapse in judgement by three persons who should otherwise have known better. Rather, this was a carefully masterminded scheme to strike at the heart of the Court's functioning, and in the first trial at the Court to involve a superior's responsibility. Nor did Kilolo, Mangenda and Bemba show any remorse, or even the slightest hesitation, for their criminal conduct. Rather, when they heard of the Prosecution's investigation, they "doubled down" on their efforts to prevent discovery and to actively derail the investigation. Their conduct shows utter contempt for the Court and its system of justice.

39. In particular, Kilolo, Mangenda and Bemba devised and implemented a criminally sophisticated scheme to tamper with evidence and to acquit Bemba at all costs that involved planning, paying money and making non-monetary promises to witnesses in exchange for their testimony, illicit witness coaching, measures to

[51] Judgment, paras. 816-820, 832-836, 846-850.
[52] *Ibid*; *see also* Sentencing Decision, paras. 116-133, 168-181, 218-238.
[53] *See e.g.*, Sentencing Decision, paras. 123 (Mangenda) and 223 (Bemba).

conceal the witness interference and remedial measures to derail the article 70 investigation.

- *Planning*: Kilolo, Mangenda and Bemba "carefully planned" and constructed a "deliberate strategy" to corruptly influence at least 14 witnesses in the Main Case.[54] Their actions were anything but spontaneous or coincidental.[55] Not only did the co-perpetrators decide to illicitly rehearse and instruct witnesses ('*faire encore la couleur*') as to what they were expected to say in court, they identified that the witnesses should be illicitly coached "in the immediate run-up to the witnesses' testimony" to be most effective.[56] Following the plan, and its minutiae, was critical to the success of their scheme. And they ensured that this happened. Thus, when D-29, despite having been coached, spoke the truth during his testimony, Mangenda and Kilolo discussed ways to "rectify" his testimony.[57] In Mangenda's view, D-29 got the "*palme d'or*" of bad witnesses for not following Kilolo's script. Mangenda said that D-29 had "performed badly in Court because [Kilolo] had not coached him the night before."[58] Kilolo and Mangenda then discussed a strategy to further prepare D-29, and his wife D-30, with Mangenda even guiding Kilolo on particular responses to elicit from D-30.[59]
- *Paying money and making non-monetary promises to witnesses in exchange for their testimony:* Bemba controlled the purse strings of this criminal scheme, and with his authorisation, Kilolo and Babala illegally paid the witnesses.[60] In a series of co-ordinated actions, witnesses were paid in cash and in kind. For instance, Kilolo gave D-2, D-3, D-4 and D-6 CFAF 540,000/550,000 each when they were handed over to the VWU. He also later gave these witnesses CFAF

[54] Judgment, para. 684.
[55] *Ibid*.
[56] Judgment, para. 685.
[57] Judgment, paras. 533-542.
[58] *Ibid*.
[59] *Ibid*.
[60] Judgment, paras. 689-703.

100,000 as a promised post-testimony "symbolic token". And D-6 received USD 1,335.16 one day before he testified.[61] Kilolo also gave D-23 USD 100 as "taxi reimbursement", an envelope with CFAF 450,000, and a brand new laptop.[62] Likewise, both D-57 and D-64 received USD 665 and 700 on the day of their travel to The Hague to testify, through Babala and his driver. D-29 was paid a similar amount.[63] Kilolo also promised witnesses the benefit of Bemba's good graces, should they testify favourably to Bemba.[64] Notably, following a discussion that D-55 had with Kilolo on suggested falsehoods relating to a document that D-55 had co-authored, D-55 expressed concerns as to that testimony, and Kilolo assured D-55 that Bemba "*le traiterait bien*".[65] When D-55 insisted on speaking to Bemba, Bemba did so to motivate D-55 to give specific testimony.[66]

- *Illicit witness coaching:* Kilolo, Mangenda and Bemba illicitly coached the 14 witnesses.[67] Bemba directed Kilolo and Mangenda on what and how the witnesses were expected to testify. Kilolo executed the illicit coaching over the telephone and in personal meetings. Mangenda was the go-between, conveying Bemba's instructions to Kilolo and advising Kilolo on the illicit coaching.[68] The illicit coaching was both detailed and persistent. Thus, Kilolo significantly coached D-15, D-26 and D-54, including on "[k]ey aspects bearing on the subject-matter of the charges in the Main Case, such as the arrival time of MLC troops in Bangui, the languages spoken by and identities of perpetrators of the crimes, and Mr Bemba's role and command of troops."[69] When D-26, on two occasions, deviated from Kilolo's narrative on the arrival of Bozizé's troops in Bangui and the start of Bozizé's rebellion, Kilolo was

[61] Judgment, para. 690.
[62] *Ibid.*
[63] *Ibid.*
[64] *E.g.*, Judgment, para. 692.
[65] Judgment, paras. 120-124.
[66] Judgment, paras. 295-298.
[67] Judgment, paras. 704-734.
[68] Judgment, para. 704.
[69] Judgment, para. 706.

quick to notice and "rectify".[70] Like Kilolo, Mangenda also played an "active role in the illicit coaching […]."[71] That Mangenda was instrumental in advancing the illicit coaching was apparent in the nature of his advice to Kilolo on the content of witness testimony.[72] Mangenda also gave Kilolo the confidential questions that the victims' legal representatives intended to put to the witnesses in advance, so that D-15 could be illicitly coached.[73] Mangenda even cautioned Kilolo about certain discrete aspects of D-25's illicit coaching. In his view, it would have been suspicious ("*ça peut para[î]tre un peu suspect*"), if D-25 had mentioned information that Defence co-counsel, Peter Haynes, had not asked for.[74] He also surmised that the Trial Chamber III Judges suspected that D-25 had been illicitly coached, but had no means to verify their suspicions.[75] Bemba, as "the ultimate beneficiary of illicit coaching", approved the coaching strategy and gave directions.[76] In relation to D-54, Bemba gave "precise and comprehensive directives" to Kilolo, through Mangenda, on the topics on which to brief and instruct the witness.[77] In relation to D-15, Bemba "not only approved of [Kilolo's] three questions and instructions to D-15, but he also gave feedback on how to handle certain issues".[78] As both Kilolo and Mangenda confirmed, Bemba's satisfaction was paramount.[79]

- *Measures to conceal the witness interference scheme:* Kilolo, Mangenda and Bemba took precautionary measures to conceal their illicit coaching of witnesses. They abused the privileged line at the Detention Centre to circumvent the Registry's monitoring system. They transferred money to witnesses through

[70] Judgment, paras. 468-471.
[71] Judgment, paras. 717-726.
[72] Judgment, paras. 719-720.
[73] Judgment, paras. 721, 575-576.
[74] Judgment, para. 489.
[75] Judgment, para. 490.
[76] Judgment, para. 727.
[77] Judgment, para. 729.
[78] Judgment, para. 729.
[79] Judgment, para. 726.

third persons so that the transfers would remain undetected. They distributed new telephones to witnesses to circumvent the VWU's cut-off date beyond which communicating with witnesses was disallowed. They used coded language in their communications.[80] Bemba "directed the commission of the offences from the ICC Detention Centre, using his privileged telephone line with his counsel to talk unmonitored and candidly not only with [Kilolo] but also with [Mangenda] and [Babala], and other individuals not entitled to legal privilege, including witnesses."[81] While Bemba was on the telephone, Kilolo "would facilitate contact with third parties, including defence witnesses and other accused, allowing [Bemba] to communicate directly without being monitored by the Registry."[82] Likewise, Kilolo asked witnesses, such as D-3, to "name a third person unknown to the Court for the purpose of making a bank transfer."[83] Kilolo, with Mangenda present and assisting, distributed new telephones to D-2, D-3, D-4, D-6, and D-23 so that they could communicate despite the VWU prohibition from doing so.[84] Not only did Bemba, Kilolo and Mangenda use coded language to conceal the content of their conversations, they also reminded each other to do so.[85] Additionally, the co-perpetrators "purposefully excluded other members of the defence team from their mission plans so that they could engage in illicit coaching."[86] They also agreed "to ensure that no physical evidence related to the illicit coaching was kept so as to minimise traceability of their illicit activities."[87]

- *Remedial measures to derail the article 70 investigation:* Once they learnt of the Prosecution's article 70 investigations, Kilolo, Mangenda and Bemba took a

[80] Judgment, para. 735.
[81] Judgment, para. 737.
[82] Judgment, para. 740.
[83] Judgment, para. 746.
[84] Judgment, para. 747.
[85] Judgment, paras. 748-761. *See* para. 753 (where Bemba reminded Kilolo about speaking in code) and para. 754 (where Mangenda reminded Kilolo to brief Bemba in code).
[86] Judgment, paras. 762-764.
[87] Judgment, paras. 765-768.

series of measures to prevent and frustrate the investigation.[88] They agreed to contact witnesses, including the Cameroonian witnesses they suspected of having spoken to the Prosecution, and to convince them not to co-operate with the Prosecution. They also agreed to pay witnesses or to offer them non-monetary assistance.[89] Mangenda was the first to caution Kilolo that they were being investigated.[90] The co-perpetrators were well aware of the illegality of their actions. Their cover-up was thus purposeful. Kilolo reported to Mangenda that he had "calmed [Bemba] down" and explained the possible consequences, namely "that they would 'lose' all the work that had been done so far and that [Bemba] could face another five-year prison sentence […]".[91] Bemba directed Kilolo to call each of the Defence witnesses that same night to ascertain whether any of them had leaked information to the Prosecution.[92] Mangenda advised Bemba that the investigation would have repercussions on the case, including "destroying all the witnesses" they had. Mangenda also counselled Bemba to "act swiftly and to incentivise the witnesses to change their minds."[93] Mangenda discussed the remedial measures with Kilolo and Bemba "on equal footing".[94]

40. In addition, Kilolo and Bemba induced and solicited the false testimony of the 14 witnesses. Mangenda aided and abetted the false testimony of nine of them.[95]

41. In rendering such disproportionate sentences, the Chamber failed to reflect its own findings.

[88] Judgment, paras. 770-801.
[89] Judgment, para. 801.
[90] Judgment, paras. 772-773.
[91] Judgment, paras. 775-776.
[92] Judgment, para. 776.
[93] Judgment, para. 790.
[94] Judgment, paras. 790-791.
[95] Judgment, paras. 852, 859, 865.

a. Kilolo

42. Kilolo was "the central figure in executing the commission of the offences and was involved in every facet of the implementation of the common plan. He primarily planned and implemented the common plan."[96] As the Chamber stated, Kilolo's contributions "were the most comprehensive and direct".[97] His actions were "calculated and persistent", and he acted "in deliberate violation of the orders of Trial Chamber III".[98] Indeed, "without Kilolo's direct and substantial intervention, the offences would not have been committed or at least not in the same way."[99] He "knew that his actions were unlawful and expressed fears that, if detected, he would be the first to be targeted."[100] Still, Kilolo persisted in his illegal actions to undermine the Court.

43. Additionally, the Chamber found three aggravating circumstances that enhanced Kilolo's culpability:

- Kilolo abused "the trust *vis-a-vis* the Court"[101]—*i.e.*, although he profited from his status as counsel and was duty-bound to act with full respect for the law, he "abused the special rights and privileges he held as counsel for Bemba in the Main Case and breached his responsibilities towards the Court"; [102]
- Kilolo abused the lawyer-client privilege to commit the offences. He abused this privilege to corruptly influence witnesses. Not only did he knowingly violate Trial Chamber III's order prohibiting witness preparation, he abused the privileged line to discuss the furtherance of the common plan with Bemba and receive related instructions;[103] and

[96] Sentencing Decision, para. 169.
[97] Sentencing Decision, para. 169.
[98] Sentencing Decision, para. 175.
[99] Sentencing Decision, para. 172.
[100] Sentencing Decision, para. 175.
[101] Sentencing Decision, para. 193.
[102] Sentencing Decision, para. 177.
[103] Sentencing Decision, para. 179.

- Kilolo attempted to obstruct the article 70 investigation.[104]

The Trial Chamber did not find any circumstances which mitigated his culpability.[105]

44. Yet, the Chamber sentenced Kilolo to a mere two years and six months of imprisonment (joint sentence) and a fine of EUR 30,000. This sentence neither reflects the extent of his culpability, nor the considerable aggravating circumstances in which he committed his crimes. Moreover, with the suspended sentence, Kilolo has served only 11 out of the imposed 30 months in pre-trial detention, and no more.[106] Therefore, pending the outcome of the appeal, and but for the promise of non-criminal conduct for three years,[107] Kilolo is effectively a free man.

b. Mangenda

45. Mangenda's contributions to the criminal scheme were "manifold and comprehensive, going beyond the support of a mere 'case manager'".[108] Along with Bemba and Kilolo, Mangenda "tainted the enquiry of the Trial Chamber III Judges in relation to the credibility of the witnesses."[109] Mangenda also "had continuous and substantive knowledge of the illicit activities and intended to engage in the relevant conduct".[110] Mangenda himself confirmed his predominant role in the criminal scheme. When Kilolo voiced his concern that the Defence co-counsel suspected them of speaking to witnesses, Mangenda brusquely brushed off those concerns, saying "[*t*]*hat's none of his business. We're the ones in charge of*…That's none of his

[104] Sentencing Decision, paras. 181, 193.
[105] Rather, the Chamber considered the absence of prior convictions, Kilolo's efforts to promote the legal profession in Belgium and the DRC, his involvement in a non-governmental organisation, his cooperation with the Court and his constructive attitude during trial as part of his "overall circumstances" under rule 145(1)(b). The Chamber further denied express mitigation to Kilolo's assertions of ill-health while in detention, the impact on his personal and professional reputation, that his career suffered as a result of inactivity while in detention, and the significant emotional and financial impact on his extended and immediate family. *See* Sentencing Decision, paras. 182-189.
[106] Sentencing Decision, paras. 190-201.
[107] *Ibid*., para. 197.
[108] Sentencing Decision, paras. 117-118.
[109] Sentencing Decision, para. 119.
[110] *Ibid*., para. 125.

business…What is his problem? He just needs to ask questions, that's all. He just needs to ask questions."[111]

46. Moreover, the Chamber found two aggravating circumstances enhanced Mangenda's culpability.

- Despite being a "lawyer by profession" and an "officer of justice", and enjoying "authoritative standing *vis-à-vis* the Main Case Defence Witnesses", Mangenda "abused the special rights and privileges he held as a member of the Main Case Defence team and breached his responsibilities towards the Court."[112] Mangenda thus abused the trust of the Court.[113]
- Mangenda attempted to obstruct the OTP's article 70 investigation.[114] As the Chamber found, he played "a critical role" in efforts to impede this investigation.[115]

The Trial Chamber did not find any mitigating factors that diminished his culpability.[116]

47. Yet, the Chamber sentenced Mangenda to a mere two years of imprisonment (joint sentence). It did not consider a fine necessary, as "imprisonment [was] a sufficient penalty."[117] The Chamber did not further explain. Thus, as of 22 March 2017 (the day when the sentences were pronounced), and but for the promise of non-

[111] Judgment, para. 724 (emphasis added).
[112] Sentencing Decision, para. 131.
[113] Sentencing Decision, para. 145.
[114] Sentencing Decision, para. 145.
[115] Sentencing Decision, para. 133.
[116] The Chamber considered the absence of prior convictions, his good and respectful behaviour and attendance record, his positive attitude during a Prosecution interview, and the prohibition on Mangenda of working in his country of residence as part of his "overall circumstances" (rule 145(1)(b)). The Chamber denied express mitigation for the violation of Mangenda's right to privacy (as a result of two Austrian national decisions). Sentencing Decision, paras. 134-141.
[117] Sentencing Decision, paras. 142-151.

criminal conduct for three years,[118] Mangenda is now virtually free of any consequence resulting from his protracted course of criminal conduct.[119]

48. Moreover, the Chamber's analysis leading to its determination of his sentence is unclear and incorrect. Notwithstanding its unmistakable findings about Mangenda's enhanced culpability and key role in the common plan, the Chamber assessed his contributions and gave weight to his "varying degree of participation in the execution of the offences".[120] It appears that the Chamber understood the concept of "degree of participation" in rule 145(1)(c) to refer to Mangenda's actions *vis-à-vis* each witness, but no more than that. Thus, rather than assessing the extent—and quality—of Mangenda's contributions to, and his key role in, the whole common plan, the Chamber perfunctorily analysed his conduct with respect to each witness. Since this analysis was unduly limited to those witnesses with whom Mangenda physically interacted, the Chamber failed to properly capture the totality and essentiality of his contributions to—and his vital role in—the whole criminal scheme.[121] This was a further error.

c. Bemba

49. Bemba—the beneficiary of the common plan—"plann[ed], authoris[ed] and instruct[ed]" the activities relating to the corrupt influencing of witnesses and their resulting false testimonies.[122] Indeed, Kilolo, Mangenda and Babala sought his

[118] Sentencing Decision, para. 149.
[119] At this stage, the impact of article 81(4) on the execution of these sentences is unclear, in particular, whether the conditional suspension is "suspended" until the Appeals Judgment is rendered or, whether the conditional suspension of sentence took effect immediately after the Sentencing Decision was delivered.
[120] Sentencing Decision, para. 124 ("Although it has been established that Mr Mangenda bears responsibility as a co-perpetrator, the Chamber notes that in assessing [his] degree of participation, it may draw upon the nature of actual contributions, since they inform his culpability. As a result, mindful of Mangenda's overall role in the common plan, the Chamber will give some weight to [his] varying degree of participation in the execution of offences.")
[121] For example, Mangenda took "an active role in the coaching exercise [of three other witnesses, D-25, D-15 and D-54] by providing the questions of the victims' legal representatives, providing feedback on the in-court testimonies, and relaying Bemba's directives regarding prospective witnesses." Sentencing Decision, para. 123.
[122] Sentencing Decision, para. 219.

permission for their respective criminal conduct.[123] He exercised "decision-making authority", including with regard to the witnesses called in his defence.[124] Even though he was detained while the offences were being committed, he had "an authoritative role in the organisation and the planning of the offences and was directly involved in their commission."[125] He "exercised an overall coordinating role over the illicit activities of the co-perpetrators."[126] "Without [Bemba's] authoritative influence […], the witnesses would not have testified untruthfully before Trial Chamber III."[127]

50. The Chamber also found that Bemba's culpability was heightened by two aggravating circumstances:

- Bemba abused the lawyer-client privilege. He knew of the privileges afforded to him as a detained person and, together with Kilolo, abused them to corruptly influence witnesses.[128]
- Bemba attempted to obstruct the Prosecution's article 70 investigation. In this regard, Bemba played a co-ordinating role from within the ICC Detention Centre.[129]

51. The Chamber also considered, as an overall circumstance, that Bemba took advantage of his long-standing and current position as President of the *Mouvement de*

[123] *Ibid*., para. 219.
[124] Sentencing Decision, para. 221.
[125] Sentencing Decision, para. 228.
[126] Judgment, para. 816. *See also* Separate Opinion, para. 18 ("Bemba played a central and overwhelming role in the offences for which he was convicted, despite being detained during the relevant time period. Kilolo and Mangenda would not have done what they did had Bemba not orchestrated the plan and its implementation.")
[127] Sentencing Decision, para. 222.
[128] Sentencing Decision, paras. 236, 248.
[129] Sentencing Decision, paras. 238, 248.

Libération du Congo ("MLC").[130] The Chamber found no specific mitigating circumstances.[131]

52. Bemba was sentenced to one year of imprisonment (joint, consecutive sentence imposed on top of his 18-year sentence for the Main Case convictions).[132] The Chamber did not deduct time from Bemba's sentence, and imposed "a substantial fine" of EUR 300,000.[133] Despite emphasising Bemba's "overall co-ordinating role" in the common plan, the Chamber found that due to his detention, his "actual contributions" were "of a somewhat restricted nature".[134] Moreover, as with Mangenda, the Chamber gave "some weight" to the "varying degree of [Bemba's] participation in the execution of the offences" and mitigated his sentence accordingly.[135] Yet, what the Chamber meant by this remains unclear. Surely, what should matter in determining an appropriate sentence for Bemba is the established essential nature of his contribution and his key role in the scheme. Further parcelling out his contributions to diminish culpability was an error.

53. Bemba's sentence is plainly anomalous. As with the others, his sentence cannot be easily reconciled with his proven role and the essentiality of his contributions. Notably, Judge Pangalangan's Separate Opinion underscored that Bemba's one-year sentence was "plainly inadequate".[136] He would have "found it more appropriate to sentence [Bemba] to something closer to four years of imprisonment".[137] As he stated:

> "Mr Bemba played *a central and overwhelming role* in the offences for which he was convicted, despite being detained during the relevant time period.

[130] Sentencing Decision, para. 234, 248.
[131] Sentencing Decision, paras. 239-244. The Chamber considered Bemba's family circumstances as an "overall circumstance". It also expressly rejected, as mitigating factors, Bemba's claims of cooperation with the Court and his renunciation of reliance on the 14 Main Case Defence witnesses in the Main Case submissions.
[132] Sentencing Decision, paras. 254-260 (where the Majority held that Bemba would not benefit from any deduction of time previously spent in detention in this case under article 78(2) since he had already benefitted from such deduction of time in the sentence imposed in the Main Case.)
[133] Sentencing Decision, paras. 249-263.
[134] Sentencing Decision, para. 223.
[135] *Ibid.*
[136] Separate Opinion, para. 18.
[137] *Ibid*.

> Mr Kilolo and Mr Mangenda would not have done what they did had Mr Bemba not orchestrated the plan and its implementation."[138]

54. Therefore, for all three co-perpetrators, their sentences were inconsistent, and even contradicted by, the Chamber's findings underlying their convictions. Despite its unmistakable findings on the inherent gravity of the article 70 offences and the co-perpetrators' heightened degree of culpability in the scheme, the Chamber imposed manifestly inadequate sentences. The Chamber thus abused its discretion by imposing sentences outside the range suitable to effectively punish these offences.

II.A.3. The sentences fail to deter

55. The sentences cannot be reconciled with the Chamber's stated purpose of punishment in this case. As the Chamber stated:

> "[T]he primary purpose of sentencing individuals under article 70 […] is rooted—as for Article 5 crimes—in retribution and deterrence. With regard, in particular, to deterrence, the Chamber is of the view that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence)."[139]

Yet, despite the Chamber's stated purpose of achieving both specific and general deterrence, the sentences are plainly inadequate to deter Kilolo, Mangenda and Bemba from further crimes to obstruct justice. Nor do the sentences send a clear message to future potential perpetrators to desist from such conduct.[140] Notwithstanding the significant convictions imposed in this case, the manifestly low sentences contradict the Chamber's assertions about the inherent gravity of article 70

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[138] *Ibid*.
[139] Sentencing Decision, para. 19.
[140] *See GAA* TJ, para. 10 ("[f]alse testimony under solemn declaration and contempt of the Tribunal [are] very grave offences, as they constitute a direct challenge to the integrity of the trial process. Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. It is therefore necessary for general deterrence and denunciation to be given high importance in sentencing policies.")

offences and the overwhelming need to deter article 70 offences. The sentences manifestly lack deterrence.

II.A.3.a. Kilolo's and Mangenda's sentences fail to deter

56. With their sentences suspended, both Kilolo and Mangenda are now, effectively, free men.[141] Notwithstanding the severity of their convictions, they have served only 11 months in prison as part of their pre-trial detention, and have not served any additional time in prison as part of their punishment following conviction. Indeed, thus far, Kilolo and Mangenda have only spent approximately 23 days in prison for each witness that they corruptly bribed and presented in the trial.[142]

57. With his sentence suspended, Mangenda faces no consequence other than ensuring that he will not "commit[] another offence anywhere that is punishable with imprisonment, including offences against the administration of justice" for a period of three years.[143] Moreover, it is unclear how this guarantee will be monitored—if it will be at all. The Chamber did not set out any mechanism to ensure that Mangenda can be monitored during the three years. Should Mangenda breach the conditions of his suspended sentence, it is unclear how such information would be brought to the Court's attention, and by whom. Therefore, any slight deterrence that *could* have been realised through a robust monitoring mechanism—albeit only for three years—remains notional.[144] Apart from that, Mangenda has no further obligations to the Court.

58. Kilolo's situation is similar to that of Mangenda's. Notwithstanding the promise of good behaviour for three years during which the sentence is suspended,[145] Kilolo is also subject to a fine of EUR 30,000. However, it is unclear how this fine—which

[141] Subject to their obligation to be of good behaviour, something expected of all members of society.
[142] Approximate figure calculated on the basis of the number of witnesses and the time served (assuming that the sentence remains suspended).
[143] Sentencing Decision, para. 149.
[144] *See below* paras. 164-169.
[145] Sentencing Decision, para. 197.

the Chamber said was "suitable" to deter counsel like Kilolo from committing such offences[146]—is in reality an effective punishment. First, the Chamber failed to assess if the amount imposed would actually deter Kilolo. Merely referring to Kilolo's Solvency Report—as the Chamber did[147]—does not illuminate the Chamber's assessment of the fine's deterrent value. **[REDACTED].**[148] **[REDACTED].** The Chamber thus failed to reason. Its Decision fails to show that it assessed the contents of Kilolo's Solvency Report with a view to setting a fine that would deter in practice. Notwithstanding his conviction for serious offences, Kilolo's life has remained effectively unaltered—for instance, he currently holds a high profile job within the DRC government.[149]

59. Second, even assuming that an amount of EUR 30,000 would sufficiently deter Kilolo, the Chamber did not determine if this fine could be realised in fact.[150] Kilolo's statements, as late as December 2016, highlight his dire financial situation, and his potential inability to pay the fine.[151] The Prosecution had sought further information about a document purportedly containing Kilolo's "personal financial information" submitted in relation to the Sentencing Decision, as it could be relevant to the sufficiency and reasoning of the sentence imposed, and thus its appeal against Kilolo's inadequate sentence.[152] Kilolo opposed the request, and the Appeals Chamber denied such access.[153] Although Kilolo appears to consider the deadline to

[146] Sentencing Decision, para. 198. *See above* fn. 9.
[147] Sentencing Decision, para. 198 ("considering [Kilolo's] solvency"), and fn. 317 (referring to the Solvency Report in relation to Kilolo and *ex parte* annex II-B.)
[148] *See* Registry's Solvency Report and **[REDACTED]**
[149] Kilolo Provisional Release Intent, para. 14.
[150] *See* para. 72 (for similar analysis for Bemba).
[151] T-54-Red, 59:1-2 ("I am working very hard now to prevent my children from being expelled from the family home simply because the mortgage hasn't been paid."). Moreover, although the Prosecution has not been privy to the legal aid requested by the convicted persons, and granted by the Registry, it seems that Kilolo has benefitted from it. *See* Bemba Legal Aid Request, para. 33 where Bemba noted that "[i]f the Registry has deemed that it is necessary and reasonable to allocate a certain amount of legal aid in order to ensure the effective representation of Me. Kilolo […]".
[152] *See* Prosecution's Access Request, paras. 1-3. *See also* Registry's 7 April 2017 Submission, paras. 1-2 (transmitting Kilolo's letter to the Appeals Chamber).
[153] Kilolo's Fine Response, p. 3; Kilolo Fine AD, paras. 7-8.

pay his fine as 22 June 2017,[154] the Presidency has found otherwise.[155] The Prosecution has—at the time of this filing (21 June 2017)—no further information on whether, in fact, he will pay, and if so, what modalities or enforcement mechanisms would govern such payment.

60. Further, although the Trial Chamber drew Kilolo's attention to "the special provision set out in rule 166(5) of the Rules",[156] it failed to further elaborate. In any event, that Kilolo may face further imprisonment—"as a last resort"—for "continued wilful non-payment" of the fine does not relieve the Chamber of its original, and primary, obligation to impose an adequate sentence, including imprisonment and fine, in the first place. Moreover, in the event that Kilolo does not pay the fine, such further imprisonment would remain a matter for the Chamber's discretion.[157] It would not necessarily follow, rather, it would be ordered only if the Chamber so decided. Such further imprisonment would only eventuate, if Kilolo's non-payment could be qualified as "continued wilful non-payment". If he claimed a willingness to pay, but said that his assets could not be executed for other reasons, it is unclear whether his inability to pay would be converted into prison time. In these circumstances, the Chamber failed to properly consider if Kilolo would be "deterred" by either the term of imprisonment or the fine.

61. Additionally, for both Kilolo and Mangenda, the Chamber incorrectly considered that "largely the same conduct" underpinned the cumulative convictions

[154] Kilolo's Fine Response, para. 1, fn. 7 ("The Trial Chamber rendered the Sentencing Decision on 2 March 2017, making the due date 22 June 2017").
[155] Presidency Fine Order, pp. 3-4 (noting that the obligation to pay the fine within three months of conviction is suspended for the duration of the appeals proceedings).
[156] Sentencing Decision, para. 199. Rule 166(5) states: If the convicted person does not pay a fine imposed in accordance with the conditions set forth in sub-rule 4, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Court, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort impose a term of imprisonment in accordance with article 70, paragraph 3. In the determination of such term of imprisonment, the Court shall take into account the amount of fine paid.
[157] *See* rule 166(5), stating that the Chamber *"may* as a last resort impose a term of punishment […]" (emphasis added).

for the three article 70 offences, thus reducing their sentences.[158] As explained below, the Chamber should have conducted a deeper analysis.[159] This error has especially serious consequences for Kilolo's and Mangenda's situations. In principle, multiple convictions are generally considered, at least, to carry the stigma of additional convictions or the loss of parole for the convicted persons.[160] But in this case, particularly in combination with the suspended sentences for Kilolo and Mangenda, they simply did not. The cumulative convictions entered for Kilolo and Mangenda were effectively inconsequential.

62. Thus, Kilolo's and Mangenda's sentences fail to deter.

II.A.3.b. Bemba's sentence fails to deter

63. The Chamber failed to consider if Bemba's combined sentence of one year additional imprisonment and the EUR 300,000 fine would sufficiently deter him.[161] Nor, based on the inadequate nature of this sentence, can it be said that Bemba would be so deterred. Despite his convictions for serious offences against 14 witnesses (in total, 42 witness offences), Bemba received only one additional year of prison time, and a fine that, notwithstanding its purportedly large amount, will be difficult to execute in practice.

64. At the very least, the Chamber failed to properly reason the basis for Bemba's combined sentence. The deficiencies in the Chamber's reasoning are illustrated by the following:

[158] Sentencing Decision, paras. 146 (Mangenda) and 194 (Kilolo); *see also* para. 249 (Bemba).
[159] *See below* paras. 67-69.
[160] *Kunarac* AJ, para. 169 (noting with respect to cumulative convictions "the stigma inherent in being convicted of an additional crime for the same conduct" and the possibility of "losing eligibility for early release under the law of the state enforcing the sentence"); *Duch* AJ, para. 295 (noting *inter alia* "multiple convictions may lead to increased sentencing and negatively affect the possibility of early release under the law of the state enforcing the sentence; and […] increased sentencing in subsequent convictions based on habitual offender laws.").
[161] Sentencing Decision, para. 263.

65. First, the Chamber failed to explain *how* it arrived at the quantum of one year imprisonment, or what criteria it used to arrive at that number. Moreover, the Chamber would have been incorrect if it had reached the figure of one year by taking into account Bemba's pre-trial detention—something the Majority had already decided would not amount to a "sentencing credit" under article 78(2) for his article 70 convictions since that time had already been credited towards Bemba's sentence for his convictions in the Main Case.[162] Interestingly, having considered Bemba's prominent role, Judge Pangalangan would have imposed a sentence of closer to four years. However, he eventually agreed with the Majority's decision to impose a one year sentence, since it would have amounted to that figure, had the sentencing credits been applied, something which he thought should have been done.[163] The Majority and Judge Pangalangan thus justified Bemba's low term of imprisonment in very different ways.

66. Second, that the Chamber imposed the bare statutory minimum of 12 months for a joint sentence under article 78(3),[164] without further explaining or recognising Bemba's multiple convictions, is yet another example of its errors.[165]

67. Third, the Chamber's reference to "the fact that *largely the same conduct* underlies the multiple convictions" to apparently reduce the sentences is unclear.[166] Although the Chamber referred to a single paragraph of the Conviction Judgment,[167] this

[162] Sentencing Decision, para. 260.
[163] *But see* Separate Opinion, para. 1 ("I concur with the Majority on all aspects of today's sentencing decision but for the reasoning leading to the determination of Mr Bemba's sentence. I believe that Mr Bemba is entitled to full sentencing credits for the entire period of his detention in this case, from his 2013 arrest to the present."); para. 18 ("Given the sentencing credits indicated above, this would lead to Mr Bemba being sentenced to one year of additional imprisonment. As this is also the result of the Majority's approach and the disposition of today's decision, I agree to the sentence imposed to this extent.")
[164] Article 78(3) requires that the period for a joint sentence should be no less than the highest individual sentence pronounced. In Bemba's case, the highest individual sentence was 12 months, which coincided with the term of his joint sentence.
[165] Sentencing Decision, para. 250.
[166] Sentencing Decision, para. 249. *See also* paras. 146 (Mangenda) and 194 (Kilolo).
[167] *See e.g.*, Sentencing Decision, para. 249, fn. 401, referring to Judgment, para. 956 ("These convictions may indeed be entered cumulatively. However, this does not mean that cumulative convictions can unduly inflate an accused's punishment. The Chamber will take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence.")

paragraph relates to the Chamber's decision to allow legally permissible cumulative convictions for articles 70(1)(a), (b) and (c). These cumulative convictions were allowed because, *notwithstanding the similar underlying conduct*, each offence—as the Chamber correctly found—contained "materially distinct elements not required by the other", and thus, "criminalise[d] entirely different forms of conduct".[168] The Chamber underscored the importance of "looking at the offence committed" to "fairly label[] the criminal conduct to reflect its true scope".[169] At that stage, and in the Chamber's words, "the specific facts of the case [did] not matter."[170]

68. However, in sentencing the co-perpetrators—in another incomplete assessment of the gravity of the offences at stake—the Chamber apparently used the "largely […] same conduct" as a factor not to enhance the criminal culpability, but to reduce the sentences. This one-dimensional assessment of the criminal conduct for sentencing purposes fails to acknowledge that the offences have "materially distinct elements", and hence, that each conviction protects different values. An anomalous situation thus emerges: although the convictions present a full picture of culpability based on the different criminality of each offence, the sentences do not.

69. Assessing gravity and culpability should not be limited to assessing allegedly similar underlying facts, but should extend to the total criminality, and the legally protected values, of those offences.[171] Nor should the fact that offences had some similar underlying conduct be determinative in assessing the gravity of the offences

[168] Emphasis added. Judgment, para. 952 ("In the view of the Chamber, Articles 70(1)(a) to (c) […] clearly capture distinct forms of conduct by way of which the administration of justice is compromised.); para. 953 ("Article 70(1)(a) […] addresses the conduct of a witness giving false evidence and centres on the legal requirement of 'false testimony', while [a]rticle 70(1)(b) […] requires the presentation of 'false or forged evidence' by a 'party'. Both provisions criminalise entirely different forms of conduct and contain 'materially distinct elements' not required by either of them. These elements are also absent from article 70(1)(c), [w]hich does not require that the conduct of the perpetrator actually influence the witness in question.")
[169] Judgment, para. 955.
[170] Judgment, para. 951 (rejecting a Defence challenge alleging the same underlying conduct for the three offences).
[171] *See e.g.*, *Gatete* AJ, para. 263, fn. 642 ("[A comparison of the evidence underpinning two elements] *may* be relevant to sentencing as "a penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted".) (emphasis added). *See also* *Ntakirutimana* AJ, para. 562; *Rutaganda* AJ, para. 591.

at sentencing when cumulative convictions are entered. A Chamber should conduct a deeper analysis. Indeed, in analogous cases of permissible cumulative convictions, Chambers have—notwithstanding the underlying conduct—still expressly further considered the impact that those permissibly cumulative convictions had on the sentencing, and in some cases, considered whether, and the extent to which, the sentences should be increased on that basis.[172] This Chamber failed to do so. Far from "unduly inflating" the punishment,[173] the Chamber failed to even consider what was necessary to properly assess the gravity and culpability in this case. Its reasoning is unclear.

70. Fourth, although the Chamber gave Bemba a substantial fine (EUR 300,000), the interaction between that fine and the term of imprisonment imposed is unclear.[174] The Majority appears to have lowered the term of imprisonment because it simultaneously imposed a substantial fine. However, Judge Pangalangan acknowledged that "[the] one-year sentence [was] plainly inadequate, even with the fine imposed."[175] Judge Pangalangan considered that a sentence of "something closer

[172] *See e.g.*, *Delalić et al.* AJ, paras. 428-429, 769 (para. 428: "[If] a decision is reached to cumulatively convict for the same conduct, *a Trial Chamber must consider the impact that this will have on sentencing*."; para. 429: "[the] governing criteria [of the final sentence] is that it should reflect the totality of the culpable conduct ("totality principle"), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate."; para. 769: "In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, *but only that conduct which is relied on only to satisfy the distinct elements of the relevant crimes*."); *Kunarac* TJ, para. 855; *Stakić* AJ, para. 367 (finding that there were permissible and impermissible convictions, and that this finding could affect sentencing); para. 428 (noting the errors made by the Trial Chamber in assessing the impact on the sentence). *See also Gatete* AJ, para. 265 (entering cumulative convictions, declining to consider any potential impact on sentencing "because the Prosecution [had] not sought an increase in sentence with respect to the additional conviction", and thereby clarifying that cumulative convictions remain relevant to determining sentence.); *Duch* AJ, para. 295, 297 (para. 295: "*multiple convictions may lead to increased sentencing and negatively affect the possibility of early release*"; para. 297 (noting that there is "no clear evidence" that multiple convictions for the same conduct have led to stiffer sentences, but not discounting the possibility of an impact on sentencing). (emphasis added). *Also Mucić et al.* SJ, para. 42 (rejecting the argument that since the number of convictions is reduced, the sentence should also be reduced. "In the case of the three accused, the totality of their criminal conduct has not been reduced by reason of the quashing of the cumulative convictions."); *Mucić et al.* SAJ, paras. 20-27 (considering the issue of cumulative sentencing when cumulative convictions entered had been found impermissible and overturned.)

[173] Judgment, para. 956.

[174] Sentencing Decision, para. 261, and in particular, footnote 412 (referring to the solvency related reports, *i.e.*, Registry's Solvency Report and Updated Solvency Report and confidential *ex parte* annexes I-B and I, respectively.)

[175] Separate Opinion, para. 18.

to four years of imprisonment" would "better reflect the severity of Bemba's conduct and the gravity of conducting over a year of systematic deception against the Court in order to subvert a conviction."[176] The Chamber's reasoning in this respect, even among the three Judges, is inconsistent.

71. Moreover, that Bemba may apparently have the means to pay a hefty fine is not reason alone to reduce his term of imprisonment. Culpability, not solvency, should be the primary consideration in determining the type of punishment.[177] Given the nature and purpose of this Court, it cannot be that, on the same facts, indigent convicted persons serve time in detention, while those with means such as Bemba avoid imprisonment, or serve as little prison time as possible.

72. Nor is it apparent why the Chamber considered that an amount of EUR 300,000 would sufficiently deter Bemba, a man of considerable means. As with Kilolo, although the Chamber considered the Bemba Solvency Report, it did not assess what amount, as a total of his funds available, would sufficiently deter Bemba from crime. Most significantly, the Chamber simply failed to consider the reality of the complicated litigation surrounding Bemba's fluid financial situation—the outcome of which will determine how much money will, in fact, be available to pay the fine. This litigation includes his claims that he is indigent, his multiple debts (legal aid and possible reparations) and the difficulty in **[REDACTED]**—all factors that could affect what assets are available to pay the fine, and all factors that the Chamber failed to expressly consider. Moreover, as documented by the Registry, Bemba has not co-operated with the Court to trace and generate income from his assets.[178] In this light,

[176] *Ibid*, para. 18.
[177] *Compare* Kilolo's term of imprisonment (2 years and six months) and fine (30,000 Euros) with Bemba's term of imprisonment (1 year) and fine (300,000 Euros).
[178] *See e.g.*, *Bemba* Sentence Appeal Response, paras. 122-127, in particular fn. 407 (citing Fourth Registry Report, p. 4 noting that "the Defence failed to comply with the Decision to report to the Registry on a monthly basis as to the steps taken to free up funds; in addition, Mr Bemba persistently failed to cooperate actively with the Registry and to provide sufficient and meaningful information in response to the Registry's various enquiries"). *See also* Sentencing Decision, fn. 412 referring to Registry's Solvency Report and Updated Solvency Report and confidential *ex parte* annexes I-B and I, respectively.

and considering the prior claims on Bemba's assets, the fine of EUR 300,000 could well be illusory. The result could well be that Bemba—despite his overall coordinating role in this notorious criminal scheme—will serve no more than one additional year in detention for his multiple serious offences.

73. And again, as with Kilolo,[179] any further imprisonment that may follow upon Bemba's "continued wilful non-payment" of the fine[180] is a poor substitute for a proper sentence in the first place. Not only is such further imprisonment discretionary and a matter of last resort, in all probability it may be available only if Bemba's non-payment of the fine reaches the exacting threshold of "continued wilful non-payment", and not if he simply claims that he has no assets available to pay or that the assets cannot be executed due to other reasons.

74. For all these reasons, the Chamber's statements on gravity, culpability and deterrence cannot be reconciled with the ultimate sentences imposed. The Chamber failed to properly assess the gravity of the offences in imposing the sentences, failed to examine if such sentences would deter Kilolo, Mangenda and Bemba from further crimes, and failed to assess if such sentences could also serve as a general deterrence and protect the Court from similar future assaults on its integrity.

II.B. SUB-GROUND 2: THE CHAMBER ERRED IN CONSIDERING EXTRANEOUS FACTORS TO DIMINISH THE GRAVITY OF THE OFFENCES AND ABUSED ITS DISCRETION

75. When it imposed these manifestly deficient sentences on Kilolo, Mangenda and Bemba, the Chamber further erred by failing to properly reflect the gravity of the article 70 offences, in particular the gravity of the offences of giving and presenting false testimony under articles 70(1)(a) and (b). By finding that the falsehoods relating to the payments, contacts and acquaintances ("non-merits") were automatically a less

[179] *See above* para. 60.
[180] Sentencing Decision, para. 262.

grave form of falsehood in this case and thus, as a matter of principle, deserved a lesser sentence, the Chamber considered an extraneous/irrelevant factor as diminishing gravity.[181] The Chamber further erred by according this factor "some weight"[182] and thus abused its discretion.

76. The Chamber's decision on 29 September 2015 to limit the scope of the falsehoods in this case to "non-merits" issues was a pragmatic one.[183] The Prosecution was never notified that the Trial Chamber on this basis would treat the case as one of lesser gravity potentially affecting its sentencing analysis. Rather, the Chamber, at the start of the trial, had only set out how it would consider the evidence led to determine guilt for conviction purposes. The Prosecution was thus unduly prejudiced at sentencing, the very last stage.

77. The Chamber further erred in law by failing to provide a reasoned opinion. Its sentencing findings are inconsistent with its findings at trial on the inherent gravity of this and other article 70 cases. Its approach contradicts the Chamber's earlier statement regarding the elements of the article 70 offences (in particular "materiality" and "falsity" under articles 70(1)(a) and (b)). Moreover, the Chamber's approach, diluting the gravity of lies on credibility-related issues, fails to resonate with its findings which had previously emphasised the crucial nature of credibility assessments at trial. Indeed, the Chamber's artificial and absolute "black and white" demarcation between false testimony on the "merits" versus false testimony on "non-merits" issues would create an alternate category of "less grave" article 70 offences, and transform this case into just that. It thus fails to reflect the very real gravity of this case.

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[181] *See* *Kenyatta* article 87(7) AD, para. 25; *see also* *Semanza* AJ, para. 374.
[182] *Ibid*. *See* Sentencing Decision, paras. 115, 145, 167, 193, 217, 248.
[183] Judgment, para. 194 ("As reiterated throughout these proceedings, the Chamber does not render judgment on substantive issues pertaining to the merits of the Main Case. […] The testimonial evidence concerning the merits of the Main Case has only been considered in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before Trial Chamber III. However, the truth or falsity of the testimonies concerning the merits of the Main Case has not been assessed by this Chamber.")

78. The Chamber's error affected each of its gravity-related assessments pertaining to the article 70(1)(a) and (b) convictions for Kilolo, Mangenda and Bemba, potentially numbering 79 assessments. These assessments tainted the Chamber's analysis, leading to disproportionate sentences.

II.B.1. In this case, the content of the false testimony should not have lessened the sentences

79. The Chamber erred in finding that the fact that "the false testimony of the witnesses concerned did not pertain to the merits of the Main Case" informed "its assessment of the gravity of the offences in this particular instance".[184] In considering the content and the nature of the lies told, the Chamber conducted an extraneous and irrelevant assessment, immaterial to the gravity of the offences. It then accorded this extraneous assessment "some weight" in its final analysis.[185] It thus abused its discretion.

80. The Chamber's incorrect analysis, although expressly articulated only for the offence of giving false testimony (article 70(1)(a)), would equally apply to the offence of presenting false evidence (article 70(1)(b)). The Chamber's flawed assessment impugns its findings on the culpability of Kilolo, Mangenda and Bemba for their articles 70(1)(a) and (b) convictions—no less than 79 discrete assessments of the gravity of these offences, and related sentencing findings.[186]

81. For Kilolo, Mangenda and Bemba, the Chamber found as follows:

[184] Sentencing Decision, paras. 115, 167 and 217.
[185] *Ibid*.
[186] For example, Kilolo and Bemba were convicted under article 70(1)(a) for 14 separate witness incidents each. Mangenda was convicted under article 70(1)(a) for 9 separate witness incidents. Likewise, Kilolo, Mangenda and Bemba were all convicted under article 70(1)(b) for 14 separate witness incidents each. All these convictions required the Chamber to determine the falsity of the testimony, and to consider the gravity of the offences in sentencing. Counting the separate witness incidents underlying these convictions, the total number of such assessments is 79.

> "In this context, the Chamber also pays heed to the nature of the false testimony that the witnesses gave before Trial Chamber III and in relation to which [Kilolo, Mangenda and Bemba were] found to be responsible. *False testimony was found to relate to three issues: (i) payments or non-monetary benefits received; (ii) acquaintance with other individuals; and (iii) the nature and number of prior contacts with the Main Case Defence.* As the Chamber stressed in the Judgment, *those questions are of crucial importance when assessing, in particular, the credibility of witnesses. They provide indispensable information and are deliberately put to witnesses with a view to testing their credibility. Yet, the Chamber notes that the false testimony of witnesses concerned did not pertain to the merits of the Main Case.* While this circumstance does not, by any means, diminish the culpability of the convicted person, *it does inform the assessment of the gravity of the offences in this particular instance.* Accordingly, the Chamber accords some weight to the fact that the false testimonies underlying the conviction related to issues other than the merits of the Main Case."[187]

82. Before imposing the sentences, the Chamber "paid heed" to the fact that the false testimony related to matters informing the credibility of witnesses.[188] The Chamber thus used the "content of the false testimony" as a factor that diluted the gravity of the offences.

83. Yet, the "content of the false testimony" should not have been considered as a factor diminishing the gravity of the offences in this case. The Trial Chamber's decision to limit the scope of this case, and its findings, to falsehoods on "non-merits" issues was merely a pragmatic one. This decision arose from the parallel conduct of this case and the Main Case trial, and the Chamber's concern that its findings in this case (if made on issues in the Main Case) could negatively affect the Main Case and its outcome. The Chamber also noted that it did not have command over, and access to, the entire pool of the Main Case evidence.[189] What the Chamber

[187] Sentencing Decision, paras. 115, 167, 217 (emphasis added).
[188] Sentencing Decision, paras. 145, 193, 248.
[189] T-10-Red, 4:6 - 6:6, in particular: "[t]he evidence on the merits of the [M]ain [C]ase was presented before Trial Chamber III, not before this Chamber. Main [C]ase witnesses may have falsely testified on issues pertaining to the merits of the [M]ain [C]ase, including for example whether they were members of certain groups or entities, the structure of these groups or entities, their movements on the ground and the names of officials. However, *this Chamber cannot assess the truth or falsity of these statements without command over*

may have found in this case as "false on the merits" could potentially have been affected by other evidence in the Main Case which this Chamber did not see, let alone assess. Thus, Trial Chamber VII thought it could not conclusively rule on the falsity of issues relating to the merits of the Main Case for the purposes of assessing the offences under articles 70(1)(a) and (b). This decision was not intended to be a legal decision or one that could be used to undermine the conviction or sentence. When the Chamber transformed this pragmatic consideration into a legal and finite factor in sentencing, it erred.

84. The Chamber further erred in failing to inform the Parties of its intention to consider the content of the lies as reducing the gravity of the offences. Indeed, at no point during the trial, did the Chamber state, or even hint, that it could do so. Rather, the Chamber's approach at sentencing was unfair to the Prosecution[190] and contradicts its stated approach at trial. The Chamber thus failed to properly reason.

85. The only notice that the Trial Chamber gave the Parties at the start of the trial was about how it would consider evidence pertaining to the Main Case for the purposes of conviction. Nowhere did it say that the scope of the case—now limited, for practical reasons, to falsity on "non-merits" issues—would be a factor in sentencing, let alone one lessening the gravity of the offences.

86. On 29 September 2015, the opening day of the trial, the Trial Chamber agreed with the Pre-Trial Chamber's concerns that "[it] was not in a position to assess the

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the evidence in the [M]ain [C]ase, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable. There is a division of responsibilities between Chambers, meaning that Trial Chamber III and not this Chamber is the judicial entity responsible for the findings in the [M]ain [C]ase. That said, and in these particular circumstances, the Chamber finds that *it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the [M]ain [C]ase*. Rather, whether or not the witness falsely testified can be ascertained in relation to other information given. Moreover, broadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of proceedings and the right of the accused to be tried without undue delay. It is also to be noted that this case could have been joined to the [M]ain [C]ase under Rule 165(4) of the Rules to resolve all case overlap issues, but no such joinder has been made or even been attempted." (Emphasis added.)

[190] *See e.g.*, *Ngudjolo* AJ Dissent, paras. 5-6 (noting that fairness also extends to the Prosecution.).

reliability and truthfulness of the witnesses' testimony on issues pertaining to the merits of the [M]ain [C]ase", and set out the extent to which such evidence could, and would, be used.[191] Thus, to determine whether accused persons had committed offences under article 70(1)(a) (*giving false testimony*) and 70(1)(b) (*presenting false evidence),* the Chamber decided it would only consider the falsity of testimonies regarding (i) prior contacts with the Defence in the Main Case, (ii) receipt of money, material benefits and non-monetary promises, and (iii) the witnesses' acquaintance with third persons. The Conviction Judgment consistently reflects this approach.[192]

87. The Chamber found that it could not assess the truth or falsity of the witnesses' testimony without having a complete command of the evidence in the Main Case, which would necessitate a partial rehearing of such evidence before Trial Chamber VII.[193] This approach accords with the Chamber's definition of "false testimony", namely to provide "*objectively* untrue statement[s]".[194] With this ruling, the Chamber expressly rejected the suggestion that the falsity of the witnesses' testimony on the merits could be decided solely on the basis of the evidence to come before it.[195]

88. In its Conviction Judgment, the Trial Chamber restated its trial position and "[did] not render judgment on substantive issues pertaining to the merits of the Main

[191] *See* T.10-Red, 5:16-6:4: "So, when the Chamber says that this case is not about relitigating the [M]ain [C]ase, what this means is that this case is about alleged false testimony of witnesses in respect of issues like: First, their previous contacts with the Defence, including those where witnesses were coached before testifying, their meetings with other prospective witnesses, their acquaintance with some of the accused or other persons associated with them, the fact that promises had been made to them in exchange for their testimony, and the fact that they had received reimbursements or transferred by Mr Bemba on his behalf for the purpose of unduly influencing the witness. *Statements pertaining to the merits of the [M]ain [C]ase could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony. However, these statements will not be considered for their truth or falsity, and evidence submitted solely for the purpose of proving the truth or falsity of such statements at trial will not be considered by the Chamber in its judgment*." (emphasis added).
[192] *See generally* Judgment, paras. 668-949.
[193] T-10-Red, 4:24 - 5:3.
[194] Judgment, para. 24. The Trial Chamber found that article 70(1)(a) requires that "the witness does not comply with the duty to tell the truth and makes an objectively untrue statement, thereby misleading the Court. […] This assessment is case-specific and cannot be determined in the abstract". (Emphasis added).
[195] *See e.g.*, Prosecution's Submission on Scope of Charges, paras. 6-9 (endorsing a "subjective" definition of false testimony). *But see* Judgment, para. 24 and fn. 36 (where the Trial Chamber acknowledged the different approaches to determine false testimony, including the subjective test, but chose an objective test.)

Case".[196] The Chamber thus noted that "the truth or falsity of the testimonies concerning the merits of the Main Case has not been assessed by this Chamber. The testimonial evidence concerning the merits of the Main Case has only been considered in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before Trial Chamber III".[197]

89. As shown above, the Chamber's more lenient approach to the falsity of "non-merits" testimony when sentencing the convicted persons does not square with the reasons why it took its pragmatic approach at trial. In these circumstances, not only was it erroneous to consider this extraneous consideration in sentencing, it was also unfair to do so in this case.

II.B.2. The Chamber contradicted its approach on the elements of the offences and the general approach taken towards credibility assessments at trial

90. The Chamber's distinction between lies on the "merits" and lies on the "non-merits" contradicts and undermines its established definitions of the elements of the article 70 offences (contained in the Conviction Judgment) and the importance the Chamber had previously given to the veracity of credibility assessments at trial.[198] Yet again, in erecting this artificial gradation for sentencing purposes, the Chamber failed to properly reason.

91. First, when it outlined the elements of the offences, the Chamber expressly rejected narrow definitions and understandings of the relevant falsehoods in any article 70 prosecution. In particular, in considering the elements of article 70(1)(a), the

[196] Judgment, para. 194.
[197] Judgment, para. 194, fn. 203 citing Payments Disclosure Decision, para. 14; Main Case Disclosure Decision, para. 12 and, notably, T-10-Red, 4: 6 - 6: 6.
[198] *See e.g.*, Judgment, paras. 22-24.

Chamber noted that "[the] Statute does not specify which kinds of false testimony fall under [that provision]."[199]

92. In considering what was "material" when determining whether particular testimony was false the Chamber stated that "materiality" pertained to "any information that has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses."[200] The Chamber also expressly rejected a Defence submission advancing a link between the false testimony "to the outcome of the case", either in favour of or against the accused.[201] In doing so, the Chamber rejected any distinction between different "types" of false testimony, including any distinction between lies on issues relating to the "merits" of the Main Case versus lies on issues relating to the "non-merits".

93. Moreover, the Chamber's approach at the conviction stage did not distinguish between various kinds of false testimony. Not only does article 70(1)(a) not require such proof, its very purpose would be contradicted by introducing such a distinction. As the Chamber noted,

> "[T]he administration of justice is already tainted if false evidence is introduced into the proceedings thus tainting the Judges' inquiry into the facts and deliberations take place on the basis of false evidence."

Indeed, "lying witnesses [could] escape responsibility simply because their testimony was not 'material to the outcome of the case'."[202]

94. Likewise, when the Chamber defined the term "false" in articles 70(1)(a) and (b), it rejected narrow interpretations. Rather, it stated that "[…] this means that the

[199] Judgment, para. 22.
[200] *Ibid*.
[201] Judgment, para. 23.
[202] Judgment, para. 23.

witness does not comply with the duty to tell the truth and makes an objectively untrue statement."[203]

95. In this light, the Chamber's distinction, when assessing gravity for purposes of sentencing, between different kinds of lies, based solely on whether they went to "merits" versus "non-merits" issues, is incorrect. Moreover, the Chamber's distinction negates the purpose of sworn testimony before a Chamber. Article 69 obliges a witness to "give an undertaking as to the truthfulness of [*all*] [his or her] evidence", and not only some select parts of the testimony alone.[204]

96. Second, although for sentencing purposes it considered credibility-related lies as less grave, the Chamber failed to reconcile this approach with its earlier findings. When it articulated the elements of the offences in the Conviction Judgment, the Chamber plainly stated that information on credibility, and indeed on the identified "non-merits" issues in the case, were of "crucial importance […]."[205] Such questions, especially when asked by the non-calling party, provide "indispensable information and are deliberately put to witnesses with a view to testing their credibility." "If the Judges are not furnished with genuine information, they will not be able to duly assess the credibility of witnesses."[206] The Chamber reiterated this finding at sentencing.[207] In this light, the Chamber's approach at sentencing, diluting the gravity of credibility-related lies, is in error.

97. Moreover, the co-perpetrators were themselves aware that credibility factors were 'material' to the case.[208] Not only was their criminal scheme geared towards enhancing the credibility of the Main Case Defence witnesses, they were acutely aware that an investigation into the witnesses' conduct would destroy their

[203] Judgment, para. 24.
[204] *See* article 69(1) (emphasis added).
[205] Judgment, para. 22.
[206] Judgment, para. 22.
[207] Sentencing Decision, paras. 115, 167, 217.
[208] Judgment, para. 789.

credibility.[209] Failing to appropriately recognise the "gravity" of their conduct when sentencing the accused—as the Chamber did—is to reward their criminal scheme and allow them to benefit from their criminal conduct. Likewise, notwithstanding the actual content of the lies themselves, the witnesses were told to improperly testify so as to conceal the criminal scheme and to acquit Bemba of his serious crimes. Perjured evidence given to secure the acquittal of a guilty person is very serious.[210]

98. The Chamber's approach also fails to reflect the overwhelming importance that Trial Chambers give to credibility-related assessments at trial. Trial Chambers weigh and evaluate the evidence before them as a whole, in light of the context and nature of the evidence itself, including the credibility and reliability of the relevant witnesses.[211] The Chamber's decision at sentencing to accord lesser gravity ("some weight") to credibility-related lies could impede a Chamber from fulfilling its basic function.[212] Its decision allows witnesses to tarnish, with impunity, the portion of their testimony relating to their credibility. This, in turn, taints a Chamber's ability, and indeed duty, to evaluate the totality of the evidence.[213]

99. Credibility assessments are not conducted in isolation, nor can they be parcelled out. The ability to accurately assess the credibility of witnesses is an integral part of a Chamber's assessment of the evidence, and an inherent part of a Chamber's ability to assess the substance of their testimony. As Chambers have found, "[d]eterminations

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[209] *Ibid*.
[210] *GAA* TJ, para. 10 ("Although all perjury is serious, the Chamber is of the view that the most serious category is where the perjured evidence is being given to lead to the conviction of an innocent person and the second most serious category is where, as in this case, the perjured evidence is given in the hope of procuring the acquittal of a guilty person.")
[211] *See e.g.*, *Akayesu* AJ, para. 292.
[212] *See e.g.*, *Rutaganda* AJ, para. 228 ("[…[the Trial Chamber is primarily responsible for assessing the credibility of a testimony").
[213] *See e.g.*, *Musema* AJ, para. 134 ("[a] tribunal of fact must never look at the evidence of each witness, as if it existed in a hermetically sealed compartment, it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear to be of poor quality, but it may gain strength from other evidence of the case."); *Halilović* AJ, para. 128 ("The task of a trier of fact is that of assessing all the relevant evidence presented with a holistic approach; this is all the more necessary in cases as complex as the ones before the International Tribunal."); *Kupreskić* AJ, para. 334 ("[the] Appeals Chamber emphasised the importance of assessing the credibility of a witness in light of the trial record as a whole."). *See also* *Ntagerura et al.* AJ, para. 174, *Tolimir* AJ, para. 247, *Mrkšić* AJ, para. 217, *Limaj* AJ, paras. 153-154.

as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgment."[214] In some cases, assessing the credibility of witnesses may be indistinguishable from assessing the substance of the falsehood.[215] The Chamber's stated approach is both impractical and erroneous.

100. Therefore, the Chamber not only erred in considering that the nature and content of the false testimony on the payments, contacts and acquaintances (an extraneous/irrelevant factor) diminished the gravity of the offences, it also failed to notify the Parties about the potential consequences of its 29 September 2015 decision, and failed to properly reason. The Chamber's sentencing findings are internally inconsistent with its earlier determinations. The Chamber abused its discretion and erred in law.

101. These errors affect all of the Chamber's gravity-related assessments pertaining to the article 70(1)(a) and (b) convictions for Kilolo, Mangenda and Bemba, potentially numbering 79 assessments. These assessments thus tainted the Chamber's analysis, and contributed to its error in imposing disproportionate sentences.

II.C. SUB-GROUND 3: THE CHAMBER ERRED IN LAW AND/OR ABUSED ITS DISCRETION IN FINDING THAT ACCESSORIES DESERVE, AS A MATTER OF PRINCIPLE, A LESSER PUNISHMENT THAN CO-PERPETRATORS

102. The Chamber erred in law in finding that accessories are, as a matter of principle, less blameworthy than co-perpetrators and thus deserve a lesser punishment. In determining Kilolo's and Bemba's sentences, the Chamber

[214] *Kvočka* AJ, para. 659.
[215] *See e.g.*, *Limaj* TJ, para. 20, noting that credibility issues are indistinguishable from the substantive ones. ("[The identification of each Accused as a perpetrator] is to be determined, however, in light of all evidence bearing on the issue of identification, evidence both for and against. In a particular case, this could include, for example, an alibi or whether an identifying witness has a motive which would be furthered by a false identification. Evidence of the visual identification of an Accused by a witness is but one piece of what may be the relevant evidence in a particular case.")

distinguished between those offences they had committed as co-perpetrators (article 70(1)(b) and (c)), and those that they had committed as accessories (article 70(1)(a)):

> "The Chamber emphasises that it has distinguished between the offences that Mr Kilolo committed as co-perpetrator and those in relation to which he was an accessory."[216]

> "The Chamber emphasises that it has distinguished between the offences that Mr Bemba committed as co-perpetrator and those in relation to which he was an accessory."[217]

As a result, the Chamber sentenced Kilolo and Bemba to a lesser punishment for the article 70(1)(a) offences, which they had committed as accessories (namely, inducing and soliciting the false testimony of the 14 witnesses) than for the article 70(1)(b) and (c) offences, which they had committed as co-perpetrators:

- Kilolo was sentenced to *12 months' imprisonment* for having induced the article 70(1)(a) offences, whereas he was sentenced to two terms of 24 months' imprisonment for having co-perpetrated the article 70(1)(b) and (c) offences.[218]

- Bemba was sentenced to *10 months' imprisonment* for having solicited the article 70(1)(a) offences, whereas he was sentenced to two terms of 12 months' imprisonment for having co-perpetrated the article 70(1)(b) and (c) offences. [219]

103. In finding that Kilolo and Bemba deserved less punishment for the article 70(1)(a) convictions solely because of their "legal label" as accessories, the Chamber relied on an artificial hierarchy between accessories and co-perpetrators: finding that the former are necessarily or "automatically" less blameworthy than the latter. This was an error. First, there is no hierarchy of blameworthiness among the different modes of liability enshrined in article 25(3). Any such determination requires an

[216] Sentencing Decision, para. 193.
[217] Sentencing Decision, para. 248.
[218] Sentencing Decision, para. 194.
[219] Sentencing Decision, para. 249.

individualised assessment of the facts. Second, article 78(1) and rule 145 do not link the penalties to the modes of liability; rather, they require a fact-specific assessment of the relevant circumstances of each case. In the alternative, the Trial Chamber abused its discretion by giving undue weight, in the circumstances, to the convicted persons' mode of liability in determining Kilolo's and Bemba's sentences.

II.C.1. The Chamber erred in law by finding that accessories deserve lesser punishment as a matter of principle

104. This case illustrates that there is no absolute hierarchy of blameworthiness among the modes of liability in article 25(3). Nor has the Appeals Chamber found otherwise. In *Lubanga*, the Appeals Chamber stated:

> "*generally speaking* and *all other things being equal*, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributed to the crime".[220]

105. Hence, although co-perpetrators may be more culpable than accessories in certain scenarios, this is not always the case.[221] Nor is it in *this* case. The Appeals Chamber, cognisant of the limitations of a blanket categorisation among modes of liability, did not preclude, but rather encouraged, a case-specific determination of a convicted person's culpability or blameworthiness.

106. Assessing a person's culpability based on the facts of a particular case accords with the complex and diverse forms of criminality in the Rome Statute (for both article 5 crimes and article 70 offences) and with the overlap among the different modes of liability.[222] It is also consistent with the principle of proportionality[223] and a

[220] *Lubanga* AJ, para. 462. Emphasis added.
[221] *See e.g.*, *Taylor* SJ, where Charles Taylor was convicted of being an aider and abettor and sentenced to 50 years of imprisonment. *See also*, *GAA* TJ, para. 11 ("The Chamber further considers the view that as a general principle the culpability of the person who induced the offence is greater than that of the person who was induced").
[222] Teani, p. 811 ("It will be difficult to establish a hierarchy of the culpability *in abstracto*, in particular because of the overlap between the fields of application of the various subparagraphs and the specific *mens rea* relating

Chamber's duty to individualise sentences to the particularities of each case and each convicted person.[224] Notably, this fact-centric approach recognises the interplay between the *actus reus* and the *mens rea* (article 30) of principals and accessories which, on the facts, may differ[225] and may even go beyond the legal requirements necessary to establish accessorial liability.[226] It also recognises that persons who may directly or physically *commit* certain crimes or offences may be limited, such as article 70(1)(a) offences. Just as it would be incorrect to ignore all these factors in determining a person's culpability, it would also be incorrect to sweepingly rely on a convicted person's "legal label" to determine his or her sentence.

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thereto"). *See also* Judge Fulford Separate Opinion, para. 7. This explains in part why Pre-Trial Chambers confirm different alternative modes of liability. *See* Ongwen Confirmation Decision, para. 35 ("The Chamber, consistently with the recent practice of Pre-Trial Chambers, is of the view that when evidence is sufficient to sustain each of the alternative forms of responsibility for the same conduct presented by the Prosecutor, it is appropriate that the charges be confirmed with the various available alternatives, in order for the Trial Chamber to determine which, if any, is established to the applicable standard of proof at trial").

[223] *Lubanga* SAJ, para. 40.

[224] *Taylor* AJ, para. 666. *See above*, para. 23.

[225] Is a co-perpetrator who is "aware that [a consequence] will occur in the ordinary course of events" pursuant to article 30(2)(b) more blameworthy than an accessory who "means to cause that consequence" also under article 30(2)(b) when their material contributions are similar?; is an accessory with the full *mens rea* (including specific intent) less blameworthy than a principal of the same crime who lacks such specific intent? *See* Goy, p. 56, distinguishing (by reference to *Milutinović* TJ, Vol. I, para. 181) between two forms of instigation: an accessorial one, where the person carrying out the crime has the full *mens rea* for the crime, and a principal one where the instigator has the full *mens rea* for the crime. Even commentators who advocate for a hierarchy of blameworthiness among the modes of participation indicate that the *mens rea* must be factored in to measure guilt. *See* Werle and Burghardt, p. 8 ("holding a person responsible for a crime that requires specific intent, even if the person does not act with the requisite *dolus specialis*, does not conflict with the principle of culpability as long as the sentence does reflect that the person is less culpable than someone who acts with specific intent") and p. 25 ("[s]uch distinctive elements [the different modes under article 25(3)] can include objective as well as subjective criteria").

[226] *See* Judgment, para. 81 (setting a legal threshold for an accessory's contribution higher than that legally required: "the 'soliciting' or 'inducing' has had a direct effect on the commission or attempted commission of the offence. This means that the conduct of the accessory needs to have a causal effect on the offence. This approach seems warranted as *the instigator, the intellectual author, without whom the offence would not have been committed, or not in this form,* prompts the commission of the offence." Emphasis added). Although in this case Bemba and Kilolo were the "intellectual authors" of the scheme of witness interference, and without them the offences would not have been committed, in general, solicitors and inducers of a crime need not be the intellectual authors or have the power to frustrate the commission of the crime. Any measurable contribution (namely, a contribution which has an *effect* on the commission of the crime) suffices (Judgment, para. 81; *Gbagbo* Confirmation Decision, paras. 244, 247 and *Ntaganda* Confirmation Decision, para. 153 refer to the soliciting/ inducing having "a direct effect" on the crime or the attempted crime). The Rome Statute does not introduce any qualification for any mode of liability under article 25(3). *See* Judge Fernández Separate Opinion to *Mbarushimana* Confirmation AD, paras. 7-15 stating article 25(3)(d) does not require a 'significant' contribution or a minimum level of contribution.

107. This is even more so when article 78(1) and rule 145 do not establish a correlation between the modes of liability and the sentence.[227] Notably, these provisions do not list "individual criminal responsibility" or "the mode of liability" as a relevant factor that Chambers must consider in determining an appropriate sentence. Nor do these provisions automatically attribute a lesser punishment to accessories, as some domestic statutes do, thus requiring domestic courts to necessarily distinguish between principals and accessories.[228] Instead, rule 145(1)(c) and (2) largely refer to fact-specific criteria, such as "the degree of participation of the convicted person" and "the degree of intent", among other relevant factors.[229]

108. This fact-specific approach was endorsed in the *Katanga* Sentencing Judgment,[230] in the *Katanga* Reparations Order[231] and in the *Bemba* Sentencing Judgment, which considered "command responsibility a *sui generis* mode of liability […] not, inherently, a hierarchically lower or higher mode of liability in terms of gravity than commission of a crime under Article 25(3)(a), or any other mode of liability identified in Article 25(3)(b) to (e)".[232]

109. Accessories under article 25(3)(b) to (d) differ from perpetrators and co-perpetrators under article 25(3)(a) in that their responsibility is *derivative* (i.e. dependent on the principal's crime).[233] Nonetheless, accessories are still punished for the principal's crime (someone who instigates rape is convicted of the crime of

[227] Van Sliedregt (2015), p. 513; Esser (2002), p. 787; Judge Fulford Separate Opinion, para. 9; *Katanga* TJ, para. 1386.
[228] Ohlin (2015), p. 530; Judge Fulford Separate Opinion, para. 11, *see* fn. 21 referring to German Criminal Code, sections 27(2) and 49(1).
[229] Judge Fulford Separate Opinion, para. 9 ("Article 78 […] and Rule 145 […], which govern the sentences that are to be imposed, provide that an individual's sentence is to be decided on the basis of 'all the relevant factors' 'including the gravity of the crime and the individual circumstances of the convicted person'. Although the 'degree of participation' is one of the factors listed in Rule 145(1)(c), these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors").
[230] *Katanga* TJ, paras. 1386-1387.
[231] *Katanga* Reparations Order, paras. 255-261 (where the Chamber assessed Katanga's contribution on the facts "*afin de fixer le montant lui incombant à titre de réparations*".) *Contra* *Al-Mahdi* SJ, para. 58.
[232] *Bemba* SJ, para. 16. Judge Steiner would have adopted the term "additional". *Contra* Werle and Burghardt, pp. 23-24 who place article 28 at a fifth level, as a subsidiary form of responsibility for failing to comply with duties under international law.
[233] Van Sliedregt (2015), p. 513; Ohlin, Van Sliedregt and Weigend, pp. 743-744.

rape).[234] This is so even if the principal only attempts the commission of the crime.[235] However, this distinction does not make accessories *per se* less liable, nor do they automatically deserve a more lenient sentence.[236] Nor did the Chamber find in its Judgment that solicitors and inducers are less blameworthy than co-perpetrators.[237] Notably, Kilolo's and Bemba's degree of participation—and the Chamber's description of their conduct in the Sentencing Decision—in inducing and soliciting the false testimony of 14 witnesses[238] is as significant as their degree of participation in the article 70(1)(b) and (c) offences for which they were convicted as co-perpetrators.[239] Indeed, in describing their relevant conduct, and apart from referring in passing to the different modes of liability,[240] the Chamber did not distinguish between Kilolo's and Bemba's *culpability* for their contributions to the article 70(1)(a) offences, and their contributions to the article 70(1)(b) and (c) offences.[241] And logically so, since none existed on the facts.

110. In sum, stark categorisations involving the modes of liability are unhelpful—since they do not necessarily reflect the true nature of the facts—and are unnecessary

[234] Van Sliedregt (2015), p. 511.
[235] *See* article 25(3)(b) to (c), which sanction a contribution to an attempted commission.
[236] Van Sliedregt (2015), p. 513; Ohlin, Van Sliedregt and Weigend, pp. 743- 744. *See also* *Taylor* AJ, para. 666 referring to aiding and abetting ("In the Appeals Chamber's view, the Trial Chamber's holding that aiding and abetting generally warrants a lesser sentence than other forms of participation is not consistent with the Statute, the Rules and this Appeals Chamber's holdings. First, the plain language of Article 6(1) of the Statute clearly does not refer to or establish a hierarchy of any kind. Second, a hierarchy of gravity among forms of criminal participation in Article 6(1) is contrary to the essential requirement of individualisation that derives from the mandate of the Court, principles of individual criminal liability and the rights of the accused. Presumptions regarding the gravity of forms of participation in the abstract preclude an individualised assessment of the convicted person's actual conduct and may result in an unjust sentence that may be either overly punitive or overly lenient. Third, the totality principle requires an individualised assessment of the total gravity of the convicted person's conduct and individual circumstances. A general presumption for sentencing purposes expressed in terms of forms of participation is thus both unnecessary and unhelpful: unnecessary because the totality principle already provides that the sentence must reflect the gravity of the convicted person's actual conduct; and unhelpful because it either improperly directs the trier of fact's attention to forms of participation in the abstract rather than actual conduct, or is a vague and extraneous statement devoid of legal meaning."). *Contra Ambos* (2013), pp. 146-147 ("article 25(3) does *not expressly* provide for a gradation in the degree of criminal liability but *implicitly* and *terminologically* distinguishes between the degrees of responsibility attached to each mode of participation"); Werle and Burghardt, pp. 11-21.
[237] Judgment, paras. 72-82.
[238] Sentencing Decision, paras. 169-173 (Kilolo) and paras. 219-221, 223 (Bemba).
[239] Sentencing Decision, para. 174 (Kilolo) and para. 222 (Bemba).
[240] For Kilolo: Sentencing Decision, paras. 169 (co-perpetration for article 70(1)(b) and (c) offences) and 174 (inducing article 70(1)(a) offences). For Bemba: Sentencing Decision, paras. 219 (co-perpetration for article 70(1)(b) and (c) offences) and 222 (soliciting article 70(1)(a) offences).
[241] Sentencing Decision, paras. 169-174 (Kilolo) and paras. 219-223 (Bemba).

for sentencing, since the legal texts already set out relevant criteria reflecting the gravity of the offences and the culpability of the convicted persons.[242]

II.C.2. The Chamber abused its discretion in giving weight to an extraneous factor in determining Kilolo's and Bemba's sentences

111. Further and/or in the alternative, the Chamber abused its discretion when it gave weight to Kilolo's and Bemba's legal qualification as inducing and soliciting, respectively, article 70(1)(a) offences to determine their sentences. Instead, and in light of Kilolo's and Bemba's "degree of participation", the Chamber should have considered the true extent and nature of Bemba's and Kilolo's contributions to the false testimony of the 14 witnesses, as described in the Conviction Judgment and Sentencing Decision, namely, that the witnesses would have not falsely testified without their contributions or would have testified in a different way.[243]

112. Since the Chamber failed to do so and instead merely relied on their mode of liability for the article 70(1)(a) offences, it erred.

[242] *Contra* Werle and Burghardt, p. 19, who appear to question the Judges' assessment of the relevant facts to determine the appropriate sentence.
[243] With respect to Kilolo, *see* Judgment, paras. 862 ("Mr Kilolo's conduct had a direct effect on the commission of the offence of giving false testimony committed by the 14 Main Case Defence witnesses") and 906 ("Without [Kilolo's] intervention, the witnesses would not have given this evidence or at least not in this form"). With respect to Bemba, *see* Judgment, paras. 857 ("Mr Bemba's conduct had an effect on the commission of the offence of false testimony by the 14 Main Case Defence witnesses") and 932 ("Mr Bemba's conduct had a direct effect on [the 14] witnesses" and "[w]ithout Mr Bemba's directives, the witnesses would not have testified untruthfully before Trial Chamber III in that manner") and Sentencing Decision, para. 222 ("Without Mr Bemba's authoritative influence, personally or through Mr Kilolo and/or Mr Mangenda, the witnesses would not have testified untruthfully before Trial Chamber III").

III. SECOND GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW AND/OR ABUSED ITS DISCRETION IN SUSPENDING MANGENDA'S AND KILOLO'S SENTENCES OF IMPRISONMENT

113. In two paragraphs, the Trial Chamber concluded that ICC Chambers have the authority to suspend sentences:

> "The Statute and the Rules remain silent as to whether prison sentences may be suspended. In the view of the Chamber, provisions on interim release or post-conviction remedies cannot be drawn upon for the purposes of suspending sentences as they are designed for different stages of the proceedings and are therefore, necessarily, of a different nature. Hence, there is a *lacuna* in the statutory scheme that cannot be filled by the application of provisions by analogy and the criteria of interpretation […]".[244]

> "[o]n one end of the spectrum, the Statute allows a Chamber to impose a sentence of imprisonment and, at the other end of the spectrum, it allows a Chamber to decline to impose any sentence. If these measures are possible, then surely the intermediate step of a suspended sentence is likewise possible. To conclude otherwise would lead to an unfair result whereby a convicted person could not serve a term of years other than by way of unconditional imprisonment, even when the Chamber considered less restrictive means to be more appropriate.[…] [T]he Chamber finds that its power to suspend a sentence of imprisonment is inherent to its power to impose and determine the sentence.[…]" [245]

The Chamber's finding would apply equally to sentences for article 5 crimes as for article 70 offences.

114. In two further paragraphs, and based on Mangenda's and Kilolo's personal and family situation, the Chamber suspended their sentences (two years imprisonment and two year and six months' imprisonment, respectively, of which they had each served 11 months in pre-trial custody) for three years:

[244] Sentencing Decision, para. 40.
[245] Sentencing Decision, para. 41.

> "Mindful of Mr Mangenda's personal circumstances, his good behaviour throughout the present proceedings and the consequences of incarceration for his family, the Chamber agrees to suspend the operation of the remaining term of imprisonment for a period of three years so that the sentence shall not take effect unless during that period Mr Mangenda commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice." [246]

> "Mindful of Mr Kilolo's family situation, his good behaviour throughout the present proceedings, and the consequences of incarceration on his professional life, the Chamber agrees to suspend the operation of the remaining term of imprisonment for a period of three (3) years so that the sentence shall not take effect (i) if Mr Kilolo pays the fine, as imposed by the Chamber in the following; and (ii) unless during that period Mr Kilolo commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice." [247]

Kilolo's suspended sentence was also conditioned upon his paying a fine of EUR 30,000 within three months of the Sentencing Decision.[248]

115. The Chamber's statutory interpretation was erroneous and its decision to suspend Mangenda's and Kilolo's sentences was unreasonable. In finding that ICC Chambers have the power to suspend sentences, or to impose suspended sentences, the Chamber erred in law (Section III.A).[249] Further or in the alternative, assuming *arguendo* that Chambers have such power, Trial Chamber VII abused its discretion[250] by failing to reason its decision to suspend Mangenda's and Kilolo's sentences; by failing to balance all relevant factors and instead solely considering, and giving

[246] Sentencing Decision, para. 149.
[247] Sentencing Decision, para. 197.
[248] Sentencing Decision, para. 198. The Presidency has noted that the execution of the fine is suspended until the appeal against the Conviction Judgment is also decided (Presidency Fine Order, pp. 3-4). It is however unclear when the three year-term of the suspended sentences comes into effect: since the Sentencing Decision was issued or once the appeals are decided.
[249] Sentencing Decision, paras. 40-41.
[250] On the standard of review for sentencing decisions, *see* *Lubanga* SAJ, para. 44. On abuse of discretion, *see also* *Kenyatta* Article 87(7) AD, para. 25. *See above* fn. 2.

undue weight to, ordinary factors; and finally, by failing to set out conditions to ensure the effective implementation of the suspended sentences (Section III.B.).[251]

III.A. THE CHAMBER ERRED IN LAW IN SUSPENDING MANGENDA'S AND KILOLO'S SENTENCES OF IMPRISONMENT

116. The Trial Chamber legally erred—and acted *ultra vires*—in finding that it had the power to suspend sentences or to render suspended sentences.[252] The Statute must be read in accordance with its ordinary meaning, in context and in light of its object and purpose.[253] In so doing, it is evident that there is no *lacuna* in the Statute and the Rules, which exhaustively regulate sentencing proceedings at the Court, the available penalties and their enforcement and execution. The ICC's penalty regime—which differs from domestic legislation and other international criminal tribunals—does not anticipate a suspended sentence as a self-standing penalty or right that convicted persons might request at sentencing. As such, there is no need to resort to the doctrine of implied or inherent powers.

117. Moreover, an unfettered discretion to render suspended sentences undermines the retributive and deterrent purpose which the Chamber found was the "primary purpose" of sentencing convicted persons of both article 70 offences and article 5 crimes.[254] It also contravenes the drafters' intentions who, after intense debates,

[251] Sentencing Decision, paras. 149, 197.
[252] Bartels (2010), p. 120 ("A suspended sentence is a fixed term of imprisonment, the execution of which has been partly or wholly suspended. The imposition of a suspended sentence involves two steps: imposing a fixed term of imprisonment and then ordering that all or part of the term be held in suspense for a specific period subject to certain conditions"). Despite these two steps, suspended sentences are *de facto* generally treated as a self-standing penalty or measure imposed at the sentencing stage rather than a power exercised during the enforcement / execution of the sentence. In this vein, in *Rašić* AJ, para. 18, the Appeals Chamber held that "the decision to suspend [a sentence] forms an integral part of the Trial Chamber's judicial discretion in determination of the sentence" and thus distinguished suspended sentences from other measures foreseen during the execution of the sentences, such as pardon, commutation or early release. Trial Chamber VII referred indistinctively to its power to impose a suspended sentence, and to its power to suspend sentences (Sentencing Decision, para. 41). The ECtHR has also noted that in practice the distinction between penalties and their execution/enforcement is not clear. *See* *Kafkaris v. Cyprus*, para. 142. Regardless of whether suspended sentences constitute a *de facto* 'penalty' or a measure pronounced at sentencing or during the execution of a penalty, the Prosecution's arguments equally apply.
[253] *See* Articles 31 and 32 VCLT.
[254] Sentencing Decision, para. 19.

carefully and exhaustively crafted the ICC penalties regime. Had the drafters intended to allow for suspended sentences, they would have expressly acknowledged such a possibility and would have regulated the conditions upon which Chambers could exercise such a power. The Sentencing Decision disregards the text and intention of the law. It must be reversed.

III.A.1. There is no *lacuna* in the Chamber's sentencing regime

118. The Sentencing Decision misunderstands—and effectively disregards—the basic criteria of treaty interpretation.[255] In interpreting the statutory provisions on sentencing and penalties according to their ordinary meaning, in their context and in light of their object and purpose, it is clear that there is no *lacuna* in the ICC's sentencing regime.

III.A.1.a. The statutory framework exhaustively regulates the penalties and sentencing regime

119. The ICC legal texts exhaustively regulate sentencing proceedings at the Court, the available penalties and their enforcement and execution:

- In the event of a conviction, article 76 requires that the Trial Chamber impose an appropriate sentence which must be pronounced in public and, whenever possible, in the presence of the accused. The Chamber must also hold a hearing upon the Prosecution's or the accused person's request.
- While articles 77 and 78 and rules 145 to 147 regulate the applicable penalties for article 5 crimes, articles 70(3) and 78 (*mutatis mutandis*), and rule 166, regulate the penalties regime for article 70 offences.[256]

[255] Consistent with article 31(1) of the VCLT, the Rome Statute must be "interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms […] in their context and in the light of its object and purpose". *See* DRC Extraordinary Review AD, para. 33.
[256] Article 70(3) envisages, as possible penalties, imprisonment up to five years and fines (which shall not exceed 50% of the value of the convicted person's identifiable assets after deducting an appropriate amount that would satisfy the financial needs of the convicted person and his/ her dependents – *see* rule 166(3)). Rule 166(2) also envisages forfeiture orders.

- While Part 10 regulates the enforcement regime for article 5 crimes, rule 163(3) indicates that only articles 103, 107, 109 and 111 apply to article 70 offences.[257] Domestic laws of the requested States govern international cooperation with respect to article 70 offences.[258]
- Article 81(3)(a) requires a convicted person to remain in custody pending an appeal against a conviction judgment and a sentencing decision, for both article 5 crimes and article 70 offences.

120. Thus, if a person is convicted under article 70 of offences against the administration of justice, he or she can only be punished according to the Statute[259] and, accordingly, may be imprisoned for a period of up to five years and/or fined.[260] The Chamber may also issue an order of forfeiture within the terms of article 77(2)(b).[261] If a person is convicted of several offences, the Chamber must impose an individual sentence for each offence and a joint sentence specifying the total period of imprisonment.[262] Unlike sentences for article 5 crimes, sentences for article 70 offences cannot be reduced and, as a result, must be served in full.[263] This is consistent with the shorter custodial sentences (maximum five years) for article 70 offences.

121. There is therefore no *lacuna*. The law is clear. Suspended sentences are not an available penalty or mechanism in the Rome Statute. Hence, even if the Chamber disagreed with the text of the law, it was required to abide by it and—as the Appeals

[257] Enforcement of sanctions imposed for article 70 offences is subject to a period of limitation of ten years from the point at which the penalty becomes final. The period of limitation is interrupted by the detention of the convicted person or while the person is outside the territory of the States Parties (*see* rule 164(3)). Further, the Court must allow a reasonable period in which to pay the fine, which may also be paid as a *lump sum* or by way of instalments. If the convicted person does not pay the fine, the Court may take appropriate measures pursuant to rules 217 and 222 and article 109 and, in cases of continued wilful non-payment, it may impose an additional term of imprisonment taking into consideration the amount of the fine already paid (*see* rule 166(5)).
[258] *See* article 70(2) and rule 167.
[259] Article 23 enshrines the principle *nulla poena sine lege*.
[260] Article 70(3).
[261] Rule 166(2).
[262] As per rule 163(1), article 78(3) applies *mutatis mutandi*. *See* Sentencing Decision, para. 33. *See also* Financial Information Decision, para. 16.
[263] *See* rule 163(3), which excludes the application of article 110.

Chamber noted in another context[264]—should have limited itself to indicating that the Assembly of States Parties could wish to amend the relevant provisions. It did not. Instead, it erroneously modified the law.

III.A.1.b. The Sentencing Decision undermines the purpose of sentencing

122. The Sentencing Decision undercuts the primary purpose of sentencing (deterrence and retribution)[265] by, first, applying a sentence—or resorting to a mechanism—unforeseen in the Statute, and second, by specifically suspending the sentences in this case.

123. First, the Chambers' alteration of the penalties regime—catering to the family and professional circumstances of the convicted persons—fosters an appearance of partiality and impunity. The Chamber (and thereby the Court) may be taken to suggest that offenders with supposedly reputable backgrounds will receive a more lenient sentence.

124. The Sentencing Decision also creates uncertainty, thus undermining the principle of legality and, in particular, potentially offending the *nulla poena sine lege* principle in article 23, which also applies to offences against the administration of justice.[266] This principle serves to limit the exercise of a Chamber's discretion: a Chamber cannot impose a punishment not set out in the Statute or Rules.[267] As a result, the list of penalties envisaged by the Rome Statute is exhaustive.[268] Likewise,

[264] *Katanga* Article 108 AD, para. 16 ("The Appeals Chamber further notes that, where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place. The Appeals Chamber therefore considers that there is merit in the Assembly of States Parties addressing whether the Court's underlying legal texts should be amended so as to permit appellate review in relation to the decision taken under article 108 of the Statute.")
[265] Sentencing Decision, para. 19.
[266] Fife (2016), p. 1878, mn. 2. The principle of *nulla poena* emanated from discussions on article 77 in the Working Group on Penalties at the Diplomatic Conference. Nevertheless this provision was included in Part 3, rather than in Part 7, because it was deemed to be a general principle of criminal law. Scalia has noted that an abrupt jurisprudential change, prejudicial to the accused and which he/she could have not foreseen constitutes a violation of the principle of legality. *See* Scalia, pp. 796-797.
[267] Schabas, p. 553; Schabas/ Ambos, p. 970, mn. 9.
[268] Fife (2016), p. 1878, mn. 1; Fife (1999), p. 339 ("[i]n accordance with the principle of *nulla poena sine lege* reflected in Article 23, the list of applicable penalties is exhaustive"). *See* p. 329 (noting that "[o]ther proposed

the execution and enforcement of the penalties—and by necessary implication a Chamber's related powers—is also comprehensively regulated in the legal texts.

125. The Decision obviates this principle. Although in this case the Chamber imposed no conditions (apart from not violating the law, as expected of all members of society), suspended sentences may limit a convicted person's fundamental rights.[269] In contrast to the Rome Statute, domestic legislation regulates such a possibility.[270] However, an accused person before the ICC can foresee at the outset that in the event of a conviction, he or she could be sentenced to a term of imprisonment, and/or a fine and/or an order of forfeiture. Such a person does not expect to be compelled to undergo, for example, community service or to report on a weekly basis to a monitoring body in a domestic jurisdiction.[271]

126. Second, and with respect to suspended sentences, commentators and domestic authorities concur that they are "*virtually of no value as a deterrent to others* who might be disposed to commit similar offences".[272] Suspended sentences are generally

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penalties included the loss of suspension of rights, disqualification and disfranchisement, i.e. loss of voting rights or the right to seek public office. However, opinions were divided as to whether such penalties should be left to be dealt with within the context of national law by national courts.") In this context, a commentator has noted that "[a] non-custodial sentence appears to be impossible under the penalties regime of the International Criminal Court". *See also* Schabas, p. 1159.

[269] See Bartels (2010), p. 142 (noting that the original model of suspended sentences contained no conditions other than the offender not committing another offence during the operational period) and pp. 144-145 (however, now "in most Australian jurisdictions, the court may increase the punitive bite of the sentence by imposing additional conditions or combining the sentence with some other order, for example, community service"). Commentators have noted that offenders may argue that civil sanctions (such as deprivation of the right to vote, or prohibition of holding office) constitute additional punishment and are therefore prohibited by article 23. *See* Schabas, p. 553; Schabas/ Ambos, p. 970, mn. 9.

[270] *See below* fns. 297 - 298.

[271] In *Kafkaris v. Cyprus*, para. 150, the ECtHR found that lack of clarity as to the scope of the penalty (life imprisonment in that case) and the manner of its execution involved a violation of article 7 of the ECHR. Although Kafkaris had been sentenced to life imprisonment in accordance with the criminal code, the executive and prison authorities operated on the basis that this term was tantamount to 20 years pursuant to the Prison Regulations and considered the 20 year-term to calculate when the prisoners would be entitled to remission for good conduct and diligence. Since the Regulations were repealed, Kafkaris was not eligible for remission when he would have been in accordance with the Regulations in force at the time the crime was committed. According to the ECtHR, the principle *nulla poena sine lege* includes three elements: foreseeability, accessibility and quality of the law. *See* Scalia, pp. 794-795 referring to *Sunday Times v UK*, para. 49.

[272] Bartels (2010), pp. 130-131 (quoting Neasey J in the Tasmanian case of *R v Percy* [1975]). Emphasis added. Bartels provides an in-depth assessment of the pros and cons of suspended sentences. As for the advantages of suspended sentences, Bartels refers to their symbolic effect, their effective specific deterrence, that they enable offenders to avoid short prison sentences and thereby reduce the size of the prison population. As to their disadvantages, Bartels indicates that they are not considered real punishment and are seen as a 'let off' by the

regarded as a 'let-off', and the offender is perceived as 'walking free' or as having received a 'slap on the wrist'.[273] Further, the principle of proportionality—which requires that a sentence reflect the gravity of the crime and the person's culpability[274]—is offended: if an offence is so serious as to merit nothing less than a sentence of imprisonment, surely the sentence cannot still be proportionate once its operation is suspended[275]—unless additional onerous conditions are imposed (which have not been in this case) or unless the suspension is combined with other punishments (only Kilolo was additionally fined,[276] and *in totum*, the sentence is still inadequate).[277]

127. Considering the Chamber's *rationale*, the Sentencing Decision may also have wide-ranging implications for sentences for article 5 crimes. The Appeals Chamber must thus correct the Chamber's erroneous legal interpretation, which is more akin to legislative intervention. Judicial discretion is not unfettered, nor should Chambers usurp the legislators' role and modify the law when they disagree with it, especially on topics as far-reaching as sentencing and penalties.

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public, the media and the offenders. The author also noted that there are theoretical difficulties in imposing them, they cause net-widening, they favour middle-class offenders, they violate the principle of proportionality, and breaches may be difficult to identify.

[273] Bartels (2010), pp. 146-147. *Also* Bagaric, pp. 9-10 (noting that suspended sentences are regarded as more lenient than almost any sentence of peremptory nature and that they do not really constitute a punishment—in particular if no conditions are attached—since the risk that the convicted person faces (of the sentence being activated if he/ she reoffends) is the same as any person in a community, *i.e.* risk of imprisonment if they commit an offence. He disagrees that the supposedly higher risk in the event of reoffending (since they would be dealt more harshly for a second offence) constitutes a punitive measure). *Contra* Bartels (2010), pp. 143 (the offender has been prosecuted, convicted and has faced the sentencing process with the real threat of going to prison as well as the stigma attached to his / her record) and 149 (suspended sentences have both a high public profile and a negative public image).

[274] Sentencing Decision, para. 36 citing *Lubanga* SAJ, para. 40.

[275] Bartels (2010), pp. 166-167.

[276] Sentencing Decision, paras. 150 (for Mangenda, the Chamber found that "imprisonment is a sufficient penalty and does not impose a fine") and 198 (for Kilolo, the Chamber found that "a fine [of EUR 300,000] is a suitable part of the sentence".) The Chamber considered Kilolo's enhanced culpability in comparison to Mangenda and his solvency to determine the amount of the fine.

[277] *See above* paras. 44, 58-60.

III.A.1.c. The drafters did not intend to allow suspended sentences as a penalty under the Statute

128. The *travaux préparatoires* further confirm that the Statute does not allow ICC Chambers to pronounce suspended sentences or to suspend sentences. The Sentencing Decision disregards the intention of the drafters who considered, but decided against, *parole* (the conditional release of a person serving a sentence),[278] which is akin to a suspended sentence. The 1994 ILC Draft originally allowed for parole under the applicable law of the State of imprisonment. This provision was, however, criticised for not establishing a uniform standard and eventually dropped.[279] In fact, the drafters deleted all references to domestic laws[280] since the sharp differences on penalties in the different domestic systems (as shown by the conflicting views expressed during the debates)[281] would have introduced uneven treatment for detainees.[282]

129. Moreover, since the suspension of Mangenda's and Kilolo's sentences will depend on domestic laws—namely the operation of the term of imprisonment is suspended unless they commit "another offence *anywhere* that is punishable with imprisonment"[283]—the Chamber has introduced an uneven treatment for convicted persons, something the drafters had precisely sought to avoid.

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[278] Parole has been defined as "a conditional release of a prisoner serving an indeterminate or unexpired sentence" (see Merriam-Webster Online Dictionary) or "[t]he conditional release of a person convicted of a crime prior to the expiration of that person's term of imprisonment, subject to both the supervision of the correctional authorities during the remainder of the term and a resumption of the imprisonment upon violation of the conditions imposed." *(see* The Free Dictionary Online).

[279] Chimimba, pp. 354-355 ("the scheme proposed by the ILC was to require the State of enforcement to notify the Court that 'pardon, parole or commutation' would be applicable [article 60 ILC Draft Statute]. *See also* Rules 123, 124 and 125 of the ICTY. The scheme was intended to give control over the release of the prisoner to the Court while allowing for a relatively uniform administration at the national level [ILC Commentary to Article 60, at 140-141]. Nevertheless the scheme was criticized for not establishing a uniform standard. It was suggested that the Court alone should have the power to decide on matters relating to the review of the sentence").

[280] Fife (2016), p. 1878, mn. 2; Fife (1999), p. 339. The same reasoning would apply to offences against the administration of justice, since the principle of *nulla poena sine lege* similarly applies and the types of penalties are the same as for article 5 crimes (imprisonment, fines and orders of forfeiture).

[281] Fife (1999), p. 334.

[282] Fife (2016), p. 1878, mn. 2; Fife (1999), p. 339.

[283] Sentencing Decision, paras. 149 and 197 ("unless during that period [they] commit[] another offence anywhere that is punishable with imprisonment, including offences against the administration of justice".)

130. The exhaustiveness of the ICC penalties regime is no coincidence. Rather, it is a carefully drafted compromise among States advocating for harsher sentences and those against them.[284] The inexorable inference against this backdrop is that the drafters would have expressly and in detail regulated the Chambers' authority to suspend sentences had they intended them to have this power.

131. In conclusion, since there is no *lacuna* in the Rome Statute, the doctrine of "inherent powers",[285] which has been invoked extraordinarily and restrictively when there is a *lacuna* in the statutory texts,[286] is inapplicable.[287]

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[284] Schabas, p. 1157 and, in particular, fn. 17, referring to the Chairman's Working Paper on Article 75, pp. 1-2. *See also* D'Ascoli, p. 264. As a result, the Statute includes provisions on imprisonment that are more rigorous than many States would have liked but (for article 5 core crimes) provided for a mandatory review of the sentence after serving two-thirds.

[285] International courts and tribunals have often referred to inherent powers to justify the exercise of judicial functions not expressly conferred upon them by their constitutive instruments. *See* Gaeta, p. 356. Whereas inherent jurisdiction and inherent powers are applied interchangeably by international courts, most commentators distinguish between "inherent" and "implied" powers. Liang states that "implied powers" are usually exercised by international organisations rather than by courts and are "powers […] conferred by necessary implication as they are essential to the performance of its duties". "Inherent powers" have been applied by international courts and tribunals and "need not be justified on the basis of any express provisions or any implication flowing from an express provision. [T]hey exist purely to assist the court in carrying out its judicial functions". *See* Liang, pp. 382-383. *See also* *Blaškić* Subpoena AD, fn. 27 (where the ICTY Appeals Chamber held: "Consonant with the case-law of the International Court of Justice, the Appeals Chamber prefers to speak of 'inherent powers' with regard to those functions of the International Tribunal which are judicial in nature and not expressly provided for in the Statute, rather than 'implied powers'. The 'implied powers doctrine' has normally been applied in the case-law of the World Court with a view to expanding the competencies of *political organs* of international organizations". Emphasis in the original.) At the ICC most chambers have also referred to inherent powers: see *Bemba* Funeral Decision I, para. 9; *Bemba* ALA Confirmation Decision, para. 52; *Bemba* Funeral Decision II, para. 13; *Bemba* Witness Order Decision, paras. 11-12; *Banda & Jerbo* Stay Decision, para. 78; *Gaddafi* Surrender Request Decision, para. 13. Other Chambers have, however, referred to the ICC's implied powers to define essentially the same doctrine but relying on article 4(1) of the Statute: *Ruto* Summons Decision, para. 81 et seq.; *Ruto* Summons AD, para. 105; *Ruto* Mistrial Decision, para. 191.

[286] *See* *DRC* Extraordinary Review AD, para. 39 (where the Appeals Chamber found that the Statute and the Rules exhaustively regulate the right to appeal and, as a result, there is no *lacuna*); *Ruto* Summons AD, para. 105 (where the Appeals Chamber found that there are no "implied powers" when a matter—the Chamber's authority to compel witnesses to appear before it—is exhaustively regulated in the Rome Statute); *Gaddafi* Surrender Request Decision, para. 13 (where the Pre-Trial Chamber held that "matters of transmission and cooperation requests are regulated comprehensively in article 87 […] and rule 176 [and] therefore does not deem it necessary to resort to its inherent powers."); *Lubanga* Reconsideration Decision, para. 18 (setting out a high threshold for the Chambers to exercise an inherent power to reconsider prior decisions.) *See also* *Banda & Jerbo* Stay Decision, para. 78 (noting that "such inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC [given] that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail".)

[287] Moreover, the Chamber's reliance on *Rašić*—to conclude that "its power to suspend a sentence is inherent to its power to impose and determine [one]" (Sentencing Decision, para. 41, fn. 62) —is misplaced. In *Rašić*, the ICTY Appeals Chamber relied on *Tadić* SAJ, para. 28 to make a similar finding (*Rašić* AJ, para. 17, fn. 55). However, *Tadić* does not stand for such proposition: the Appeals Chamber in that case was referring to, *obiter*,

132. Nor does the Chambers' general power to facilitate the fair and expeditious conduct of the proceedings pursuant to articles 64(2) and 64(6)(f) justify the suspension of Mangenda's and Kilolo's sentences. Judicial discretion is limited by the text of the law. In this case, an interpretation of the relevant statutory provisions according to the VCLT confirms that the Rome Statute does not allow for suspended sentences as a self-standing penalty or benefit to which the convicted person is entitled.[288]

133. Finally, and contrary to the Chamber's interpretation of the Statute,[289] the absence of suspended sentences in the Statute does not prevent the Court from modifying the conditions of the *execution* of a custodial sentence on a case-by-case basis, such as based on extraordinary circumstances like humanitarian grounds. Such scenarios differ from the present case where:

- the Chamber gave itself *at sentencing* a blanket power to suspend sentences, thus *de facto* introducing an unregulated penalty for all convicted persons, and

- the Chamber *unreasonably* exercised this alleged power based on nothing but ordinary factors.[290]

III.A.2. The Chamber's reasoning is flawed

134. The Chamber's faulty reasoning further evinces its legal error. First, once a Chamber enters a conviction, it has no discretion to decline to impose a sentence; rather, it *must* impose a sentence. Second, any analogies with domestic laws and the practice of other international criminal tribunals on suspended sentences are of

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the Trial Chamber's discretion to recommend a (ten-year) minimum sentence. Such a finding does not justify the Chamber's authority to suspend a sentence (*Tadić* SAJ, para. 28).

[288] *See above* paras. 116-130.

[289] Sentencing Decision, para. 41 ("To conclude [that the Statute does not allow the Chamber to suspend sentences] would lead to an unfair result whereby a convicted person could not serve a term of years other than by way of unconditional imprisonment, even when the Chamber considered less restrictive means to be more appropriate.")

[290] *See below* paras. 142-168.

limited assistance. Unlike the Rome Statute, national jurisdictions regulate their courts' authority to suspend sentences. Likewise, the penalties and enforcement regimes of other international criminal tribunals differ from that at the ICC.

III.A.2.a. In the event of a conviction, the Trial Chamber shall pronounce a sentence

135. Without citing any source, the Chamber found that it can suspend sentences since "on the one end […], [it can] impose a sentence of imprisonment and, at the other end […], [it can] decline to impose any sentence".[291]

136. Not only is the Chamber's conclusion wrong—ICC Chambers do not have the authority to render suspended sentences—but also its premise is incorrect. Once a Chamber enters a conviction, it has no discretion "to decline to impose any sentence"; instead, it *must* impose a sentence and must choose among the penalties listed in the Statute. This interpretation flows from a literal, contextual and teleological reading of the Statute. Both articles 76[292] and 78(3)[293]—which apply *mutatis mutandis* to offences against the administration of justice[294]—require a Trial Chamber to pronounce a sentence upon conviction.[295]

137. Although the Chamber gives no reasons for its conclusion, surely, it could not have drawn such a conclusion from the use of the term "may" in articles 23, 70(3) and 77(1). A plain language interpretation of "may" in those provisions does not mean that a Chamber *may decline* to impose a sentence after having convicted a person. Such a reading would be incorrect and manifestly contrary to the object and purpose of the ICC (to put an end to impunity) and sentencing (deterrence and

[291] Sentencing Decision, para. 41.
[292] Article 76(1) states that "[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account […]".
[293] Article 78(3) states "[w]hen a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment". Logically, the Chamber shall also pronounce an individual sentence if the accused is convicted of one offence.
[294] Rule 163(1).
[295] Commentators also support this position. *See* Schabas, p. 1149 ("If the accused is convicted, the Trial Chamber is required to establish the 'appropriate sentence'.")

retribution). The provisions simply emphasise that, consistent with the principle of *nulla poena sine lege*, Chambers are limited to choosing a penalty from the list set out in the Statute.

III.A.2.b. References to domestic law and international jurisprudence do not assist the Chamber

138. The domestic laws and international jurisprudence cited by the Chamber do not support its proposition.[296] Rather, they further evince its error. The cited criminal codes and domestic legislation expressly allow for suspension of sentences and carefully regulate when and under which conditions a domestic court may exercise such a power. In particular, the provisions indicate:

- The factors that courts must or may consider in deciding to suspend sentences, and limitations to the exercise of this power (for example, what range of sentences can be suspended or which convicted persons can or cannot benefit from suspended sentences);[297] and
- the conditions that the courts must or may impose during the suspension period.[298]

In contrast, the Rome Statute contains no such provisions.

[296] Sentencing Decision, fns. 63 and 64.
[297] Article 161 Afghanistan Criminal Code; article 26 Argentina Criminal Code; article 8(1) Belgium Suspension Law; article 77 Brazil Criminal Code; article 43 CAR Criminal Code; article 63 Colombia Criminal Code; article 42 DRC Criminal Code; section 189(1)(b) of the 2003 Criminal Justice Act (UK); article 132-30 and 132-31 France Criminal Code (suspension simple); section 56 German Criminal Code; article 72 Guatemala Criminal Code; article 163(1) Italy Criminal Code; article 133 Ivory Coast Criminal Code; article 277(1)(b) of Namibia Criminal Procedure Code; article 59 Republic of Korea Criminal Code; articles 65 and 66 Serbia Criminal Code; articles 80-81 Spain Criminal Code; articles 42-43 Switzerland Criminal Code; article 72 Uzbekistan Criminal Code; article 60 Vietnam Criminal Code.
[298] Article 27*bis* Argentina Penal Code; article 8(2) Belgium Suspension Law; Article 78 Brazil Penal Code (for example, community service); section 742(3) Canada Criminal Code (listing mandatory and optional conditions of probation orders, which apply to section 731(1)); article 43 CAR Criminal Code (the convicted person may conduct work of general interest); article 65 Colombia Criminal Code (prohibition on leaving the country, report change of residence); article 190(1) 2003 Criminal Justice Act (UK) (large list of requirements, such as unpaid job or supervisory requirement); article 132-54 French Penal Code (work of general interest); article 277(1)(a) Namibia Criminal Procedure Code; article 59-2 Republic of Korea Criminal Code; article 65 Serbia Criminal Code; article 44 Switzerland Criminal Code; article 72 Uzbekistan Criminal Code; article 60 Vietnam Criminal Code.

139. Similarly, jurisprudence from the *ad hoc* tribunals is not binding on this Court. Moreover, their legal texts on the execution of sentences substantially differ from—and are more flexible than—the Rome Statute and the Rules. In particular, they expressly allow for, and regulate, conditional early release (SCSL)[299] and pardon or commutation of sentences in accordance with the applicable law of the State where the convicted person is imprisoned (ICTY, ICTR, MICT, SCSL, STL).[300] In contrast, the ICC drafters expressly rejected parole and reliance on domestic law in the enforcement of sentences.

140. Further and notably, since the statutes of those international criminal tribunals were drafted sparsely and were silent on many issues, the judges—in drafting the rules—had to rely heavily on their inherent powers.[301] In contrast, the Rome Statute is comprehensive and spells out the Chambers' powers in great detail[302] and the ICC Rules, which are also complete in nature, have not been left to the discretion of the judges, but were drafted by the Preparatory Commission for the ICC and adopted by the Assembly of States Parties. Moreover, controversial powers relating to offences against the administration of justice were outlined in detail.[303] As noted by one commentator, "in the case of the ICC, directly transposing the content of inherent powers from earlier authorities of other tribunals may be a false analogy".[304]

[299] *See* SCSL Practice Direction on Conditional Early Release, article 2 (setting out the conditions to be eligible for conditional release); article 5 (listing the Registrar's preparatory steps); article 8 (the Court's decision); article 9 (setting out the conditions for release including designation of a monitoring authority in the State where the person will be released).
[300] Article 28 ICTY Statute and rules 123-125 ICTY Rules, and ICTY Practice Direction on Pardon, Commutation of Sentence, and Early Release; article 27 ICTR Statute and rules 124-126 ICTR Rules; article 26 MICT Statute and rules 149-151 MICT Rules (also referring to early release) and MICT Practice Direction on Pardon, Commutation and Early Release; article 24 SCSL Statute and rules 123-124 SCSL Rules; and article 30 STL Statute and rules 195-196 STL Rules.
[301] Liang, pp. 389-390. This is consistent with the origin of the doctrine in common law countries where, normally, there are scant or few statutory provisions on procedural matters. *See also* Gaeta, p. 365.
[302] *Banda & Jerbo* Stay Decision, para. 78.
[303] Liang, pp. 389-391, 397-398.
[304] Liang, p. 408. *See also* *Banda & Jerbo* Stay Decision, para. 78.

141. In conclusion and as noted above,[305] if the drafters had intended to allow for the suspension of sentences—for both article 5 crimes and article 70 offences—they would have indicated so, and regulated such a regime in detail.

III.B. THE CHAMBER ABUSED ITS DISCRETION IN SUSPENDING MANGENDA'S AND KILOLO'S SENTENCES ON THE BASIS OF ORDINARY CIRCUMSTANCES

142. Even assuming *arguendo* that ICC Chambers have the authority to suspend sentences based on their inherent powers[306] or a statutory provision, Trial Chamber VII abused its discretion by deciding to suspend Kilolo's and Mangenda's sentences. First, the Chamber did not reason why it was necessary in this case to invoke its "inherent powers" to suspend Kilolo's and Mangenda's sentences; second, the Chamber gave undue weight to mere ordinary factors to suspend their sentences; and third, it failed to set out an enforcement procedure.

III.B.1. The Sentencing Decision lacks reasoning

143. The Chamber relied on Mangenda's[307] and Kilolo's[308] family and professional circumstances to suspend their sentences.[309] However, it did not explain why it had

[305] *See above*, paras. 128-131.
[306] On the source of inherent powers, *see e.g.:* Gaeta, pp. 364-368 (concluding that it is a general principle of international law); Liang, pp. 384-389 (concluding that inherent powers are one of the "general principles of law that is consonant with the basic requirements of international justice"). *See* however *El-Sayed* AD, para. 47 ("[t]he combination of a string of decisions in this field, coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved").
[307] Sentencing Decision, para. 149 ("Mindful of Mr Mangenda's personal circumstances, his good behaviour throughout the present proceedings and the consequences of incarceration for his family, the Chamber agrees to suspend the operation of the remaining term of imprisonment for a period of three years so that the sentence shall not take effect unless during that period Mr Mangenda commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.")
[308] Sentencing Decision, para. 197 ("Mindful of Mr Kilolo's family situation, his good behaviour throughout the present proceedings, and the consequences of incarceration on his professional life, the Chamber agrees to suspend the operation of the remaining term of (3) years so that the sentence shall not take effect (i) if Mr Kilolo pays the fine, as imposed by the Chamber in the following; and (ii) unless during that period Mr Kilolo commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.")
[309] Sentencing Decision, paras. 149 and 197.

to suspend the sentences in the first place, and thus resort to its inherent powers in doing so. The Chamber's error is thus twofold: first, it erred by not reasoning its Decision,[310] and second, it erred by incorrectly invoking its inherent powers since no question—or unfairness—arose that required the Chamber's resolution, or to do so.[311]

144. Chambers at the ICC and other international criminal courts have resorted to their "inherent powers" to resolve ancillary but essential questions to the proper conduct of the proceedings, to ensure their fairness and to discharge their judicial functions.[312] Since the Chamber—in the Sentencing Decision—had to determine the convicted persons' sentences, suspending the terms of imprisonment for Mangenda and Kilolo had to be *indispensable* to discharge that function in order to invoke their inherent powers. The Chamber provided no such explanation. There was none.

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[310] *See* *Lubanga* First Redactions Decision, para. 20 ("The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.") *Also*, *Lubanga* Second Redactions Decision, paras. 30, 33. *See also* Ambos (2014), p. 291 (who notes that article 76(1) decisions must be reasoned and 'giving reasons' means indicating the 'motivation which relates the particular sentence to the normal range of sentences for the type of crime, and to the declared rationales for sentencing'.)

[311] *See* Gaeta, p. 368 (defining inherent powers as "[…]only powers that merely (i) aim at *regulating* the proceedings, or (ii) are *instrumental in the adjudication* of the main claim, or (iii) are designed to *safeguard the judicial character* of courts") (Emphasis added); and Liang, p. 391 citing *El-Sayed* AD, para. 48 ("[b]ased on functional justification of the court as a judicial institution, inherent powers broadly fulfil three ends: the fair administration of justice, the proper internal conduct of proceedings, and the discharge of judicial functions"). *See also* *ICJ Nuclear Tests Case*, para. 23, quoted in Gaeta p. 361 and in *Banda & Jerbo* Stay Decision, para. 76 ("it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, *to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'*.") (Emphasis added in the original).

[312] ICC Chambers have invoked inherent or implied powers to permit an accused person to attend the funerals of his father and step-mother, albeit under heavy security conditions (*Bemba* Funeral Decision I, para. 9 and *Bemba* Funeral Decision II, para. 13), to alter the order of the witnesses to be called by a party (*Bemba* Witnesses Order Decision, para. 11); not to confirm charges because the essence of the violation was subsumed in another charge (*Bemba* ALA Confirmation Decision, para. 52). In other cases, Chambers referred to this doctrine as a self-standing basis although it relied on statutory provisions (*Ruto* Mistrial Decision, para. 191; *Ruto* Summons Decision, para. 81 *et seq.*, *but* *Ruto* Summons AD, para. 105). For instances where other international courts have invoked inherent powers, *see*: Gaeta, pp. 356-361; Liang, pp. 392-406 and *El-Sayed* AD, para. 46 ("the power to take interim measures, to request stays of domestic proceedings or to stay its own proceedings, to order the discontinuance of a wrongful act or omission, to appraise the credibility of a witness appearing to testify under solemn declaration before the international court, to pronounce upon instances of contempt of the court, to order compensation in appropriate circumstances, to consider matters or issue orders *proprio motu*, and to rectify material errors contained in a court's judgment".)

145. Nor did the Chamber explain why suspended sentences were appropriate for Mangenda and Kilolo, apart from rehearsing their personal circumstances which, as the Chamber noted, are common to most, if not all, convicted persons. One may only assume—since there is no explanation in the Decision—that the Chamber considered that Mangenda's and Kilolo's family situation (they both have a spouse and children) and professional background (both are lawyers) militated in favour of their rehabilitation. However, the Chamber did not state that rehabilitation was a relevant factor in determining or suspending their sentences, nor did it explain that Mangenda and Kilolo had prospects of rehabilitation or how the suspended sentences would be effected to ensure rehabilitation. To the contrary, the Chamber only referred to retribution and deterrence as the "primary purposes" of sentencing individuals for article 70 offences, "as for Article 5 crimes".[313]

146. Although rehabilitation may play an important role in sentencing at the domestic level, it cannot play a predominant role at the ICC given the gravity of the crimes.[314] This same logic applies to article 70 offences due to their inseparable link

[313] Sentencing Decision, para. 19.

[314] *See* *Al-Mahdi* SJ, para. 67 (after noting that retribution and deterrence are the primary objectives of punishment at the ICC, Trial Chamber VIII found that "[l]astly, the extent to which the sentence reflects the culpability of the convicted person addresses the desire to ease that person's reintegration into society, *although, in particular in the case of international criminal law, this goal cannot be considered to be primordial and should therefore not be given any undue weight.* As reflected in Article 81(2)(a) of the Statute and Rule 145(1) of the Rules, and as emphasised by the Appeals Chamber, the sentence must be proportionate to the crime and the culpability of the convicted person.") (emphasis added); *Bemba* SJ, para. 11 (after finding that the Preamble considers retribution and deterrence as the primary objectives of punishment at the ICC, the Chamber found that "[r]ehabilitation is also a relevant purpose. However, *in cases concerning 'the most serious crimes of concern to the international community as a whole', rehabilitation should not be given undue weight*") (emphasis added); *Katanga* SJ, para. 38. *See also* *Delalić et al.* AJ, para. 806 ("The cases which come before the [International] Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is 'serious violations of international humanitarian law'. *Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the [International] Tribunal*. On the contrary, the Appeals Chamber (and Trial Chambers of both the [International] Tribunal and the ICTR) have consistently pointed out that *two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight*".) (emphasis added); *Kordić* AJ, para. 1079 ("I*n the light of the gravity of many of the crimes under the International Tribunal's jurisdiction, the weight of rehabilitative considerations may be limited in some cases*. This is consistent with the International Tribunal's settled jurisprudence that the gravity of the crime is the most important factor in determining the sentence. *It would violate the principle of proportionality and endanger the pursuit of other sentencing purposes if rehabilitative considerations were given undue prominence in the*

with article 5 crimes and the detrimental consequences the former have on the discovery of the truth in the latter.[315] Indeed, "justice can only prevail when witnesses can speak out without fear or favour".[316] Equally, in other international criminal courts, rehabilitation has never been the sole or chief purpose in determining the sentences for offences against the administration of justice:

- With the exception of *Kabashi SJ* (where the Trial Chamber noted—after Kabashi pled guilty—that "rehabilitation is also considered to be a relevant, though less important, purpose of sentencing"),[317] the ICTY Chambers have referred to retribution and deterrence as the purpose of imposing a sentence in contempt cases:

> "The most important factors to be taken account of in determining the appropriate penalty in this case are the gravity of the contempt and the need to deter repetition and similar conduct by others".[318]

- At the ICTR, while *Nshogoza SJ* solely mentioned deterrence,[319] the Chamber in *GAA TJ* referred to "the goals of retribution, deterrence, rehabilitation, and the protection of society"; however, it clarified that "it is […] necessary for general deterrence and denunciation to be given high importance in sentencing policies." [320] GAA also pled guilty.[321]

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sentencing process") (emphasis added); *Stakić* AJ, para. 402 (upholding the Trial Chamber's finding that "given the serious nature of the crimes, [rehabilitation] factors did not carry enough weight to alter the sentence".); *Karadžić* TJ, para. 6025.

[315] Sentencing Decision, para. 19.

[316] *Prince Taylor* SJ, para. 53.

[317] *Kabashi* SJ, para. 11.

[318] *Marijačić* TJ, para. 46. *See also Jović* TJ, para. 26; *Margetić* TJ, para. 84; *Haraqija and Morina* TJ, para. 103; *Šešelj* 2009 TJ, para. 36; *Šešelj* 2011 TJ, para. 77; *Šešelj* 2012 TJ, para. 52.

[319] *Nshogoza* TJ, para. 216 ("The Chamber recalls that with regard to contempt, the most important factors to be taken into account in determining the appropriate penalty are the gravity of the contempt and the need to deter repetition and similar conduct by others.")

[320] *GAA* TJ, paras. 8 and 10.

[321] *GAA* TJ, paras. 2-4, 12.

- In contempt cases at the SCSL, although the Chambers indicated that they were "entitled to consider" rehabilitation,[322] deterrence and retribution played a predominant role. [323]

- More recently, the STL explicitly adopted the ICTY's approach, and retribution and deterrence play the chief role in determining the sentences in contempt proceedings. [324]

147. In conclusion, since the basis for deciding to suspend the sentences is unknown, the Chamber erred.

III.B.2. The Chamber gave undue weight to ordinary factors to suspend the sentences

148. In suspending the sentences, the Chamber erred in giving undue weight to mundane factors which are common and expected of all convicted persons and which do not justify the suspension of Mangenda's and Kilolo's sentences.

III.B.2.a. The Chamber gave undue weight to ordinary factors to suspend their sentences

149. In suspending Mangenda's sentence, the Chamber relied on:

- his personal circumstances;
- his good behaviour throughout the present proceedings; and
- the consequences of incarceration for his family.[325]

[322] *Bangura* SJ, paras. 62-63; *but see* para. 83 ("It appears to me from Kanu's behaviour and from his planning and implementation of this offence that he has not reconciled to his conviction or sentence, a matter I bear in mind when considering rehabilitation"); *Senessie* SJ, para. 5; *Prince Taylor* SJ, paras. 37-38.
[323] *See e.g.* with respect to deterrence: *Bangura* SJ, paras. 73, 78, 83, 88-89. *See also Senessie* SJ, paras. 15-22; *Prince Taylor* SJ, paras. 53-55.
[324] *Al Khayat* SJ, para. 15 ("I agree with the ICTY's case-law that the most important factors in determining the appropriate penalty in a contempt case are the gravity of the conduct and the need to deter repetition and similar conduct by others. In short, in determining the penalty I will essentially focus on its retribution and deterrence functions."); *Akhbar Beirut* SJ, para. 15.

150. No further explanation is provided as to why these factors justify the suspension of Mangenda's sentence. They do not. Mangenda's personal and family situation are ordinary (he is 38 years old, has a spouse and children).[326] In fact, in determining his sentence, the Chamber *refused* to consider these same or similar factors as mitigating circumstances. In particular, the Chamber found that:

- Mangenda's good behaviour throughout the proceedings "does not *per se* represent mitigating circumstances within the meaning of Rule 145(2)(a)";[327]
- The absence of criminal proceedings cannot "be a factor in mitigation [since it] is a fairly common feature among individuals convicted by international tribunals";[328]
- Similarly, Mangenda's "claims of the prohibition […] from working in his country of residence" were also not considered in mitigation.[329]

151. No mention is made elsewhere in the Decision as to the consequences that incarceration would have for Mangenda's family—apart from being a factor justifying the suspension of his sentence.[330]

152. Likewise, the Chamber suspended Kilolo's custodial sentence based on:

- his family situation;
- his good behaviour throughout the present proceedings; and
- the consequences of incarceration on his professional life.[331]

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[325] Sentencing Decision, para. 149.
[326] Sentencing Decision, para. 135.
[327] Sentencing Decision, para. 136. The Chamber similarly refused to consider as a mitigating factor Mangenda's interview with the Prosecution. *See* para. 138.
[328] Sentencing Decision, para. 137.
[329] Sentencing Decision, para. 141.
[330] Sentencing Decision, para. 149.
[331] Sentencing Decision, para. 197.

153. However, as with Mangenda, there is nothing extraordinary in Kilolo's personal and family circumstances (44 years old, married and with children).[332] Also like Mangenda, the Chamber *declined* to consider these ordinary factors in mitigation:

- Kilolo's lack of disciplinary record and prior criminal proceedings "is a fairly common feature among individuals convicted by international tribunals and will not be counted as a relevant mitigating circumstance";[333]
- Kilolo's compliance with the Court-imposed conditions of provisional release, his good behaviour and attendance at trial hearings "is […] to be expected from persons on trial and cannot be taken into consideration to reduce the sentence";[334]
- *Notably*, the Chamber found that "the fact that Mr Kilolo's detention had a negative impact on his personal and professional reputation, his professional life and his family is a *natural consequence of the circumstances in which Mr Kilolo found himself as a result of his criminal behaviour that he has been convicted for*" and consequently, the Chamber declined to consider it as mitigating circumstance.[335]

154. Paradoxically, the Chamber subsequently relied on the majority of these ordinary factors—found not worthy of mitigation—to suspend Kilolo's and Mangenda's sentences. Unlike other cases at the *ad hoc* tribunals,[336] the Chamber failed to explain why these factors did not mitigate their sentences but were appropriate to suspend them, a measure which would *de facto* negate the sentence to

[332] Sentencing Decision, para. 183.
[333] Sentencing Decision, para. 184.
[334] Sentencing Decision, para. 186.
[335] Sentencing Decision, para. 189. (Emphasis added).
[336] This case differs from *Rašić* where the Trial Chamber rejected Rašić's psychological well-being as a mitigating factor, but relied on it to suspend the execution of her sentence (*Rašić* SJ, paras. 30-31). As noted by the Appeals Chamber, Rašić's health was a consideration that the Trial Chamber took into account, "among others", to partially suspend the execution of the sentence (*Rašić* AJ, para. 28). The Trial Chamber found that her detention at UNDU amounted to quasi solitary confinement since she was the only female detainee and that impacted on her well-being (*Rašić* SJ, para. 31; *Rašić* AJ, paras. 27-28). In that context, it was reasonable to consider Rašić's psychological well-being in suspending the execution of the sentence. In contrast, this Chamber identifies no additional factor—apart from the same three factors it rejected in mitigation.

the benefit of the convicted persons. They were not appropriate, in particular, since rehabilitation was not a factor that the Chamber took into account. Even if it did, the Chamber could not have found that Mangenda and Kilolo evinced prospects of rehabilitation simply because they were lawyers and had a family. While these factors could suffice in other cases, they do *not* on the facts of this case. It was precisely Mangenda's and Kilolo's legal knowledge and position within the Bemba Defence team that enabled them to commit the offences. In addition, the abuse of their positions and breach of their responsibilities towards the Court aggravated their sentences.[337] Certainly, their families were not a sufficient deterrent to prevent or stop them from committing their offences just a few years ago.

155. Apart from complying with the Court's order to attend trial,[338] Mangenda and Kilolo have not shown any sign of rehabilitation. Indeed, after wilfully and continuously committing offences against the administration of justice for a prolonged period[339] and despite being fully aware of their legal and ethical obligations—and of the consequences attached thereto[340]—they attempted to conceal their actions by undertaking further criminal actions.[341] Further, at trial, and despite the overwhelming evidence, including recordings of their phone conversations, Kilolo and Mangenda rejected the charges. Nor have they ever expressed genuine remorse.[342] Even now on appeal, Mangenda continues to suggest that their criminal

[337] Sentencing Decision, paras. 131 and 145 (Mangenda); and 176-179 and 193 (Kilolo).
[338] Interim Release Decision, para. 28 (i) (where the Chamber ordered as a condition of the convicted persons' release (with the exception of Bemba) to "[a]bide by all instructions and orders from the Court, including an order from this Chamber for them to be present in The Hague at their trial, scheduled to commence on 29 September 2015").
[339] Sentencing Decision, paras. 107, 159.
[340] Sentencing Decision, paras. 131 ("Mr Mangenda is a lawyer by profession, admitted to the bar in Kinshasa/Matete, a former member of the Court's Office of Public Counsel for the defence, and was a member of the Main Case Defence team. As an officer of justice, he was fully aware of his duties and obligations arising under the Court's statutory documents") and 177 ("Mr Kilolo, in his capacity as counsel and long-time member of the Brussels and Lubumbashi bars, was fully aware of his duties and obligations arising under the Court's Statutory documents, including the Code of Conduct and Trial Chamber III's orders.")
[341] The Chamber considered Mangenda's and Kilolo's attempt to obstruct the present article 70 proceedings an aggravating factor. *See* Sentencing Decision, paras. 132-133 and 145 (Mangenda) and 180-181 and 193 (Kilolo).
[342] In his submissions at sentencing Kilolo did not express genuine remorse for the offences. *See* T-54, 57:14-60:12.

conduct was legitimate witness preparation.[343] Their right not to plead guilty and defend themselves cannot, of course, be considered to increase their sentence. However, their lack of repentance cannot be considered a factor to mitigate it. Notably too, throughout the proceedings both convicted persons have made inappropriate allegations against the Prosecution and the Judges:

- Kilolo accused the Single Judge of Pre-Trial Chamber II of denying him provisional release "simply on the basis of his skin colour"[344]—a serious allegation which the Appeals Chamber found to be "evidently unfounded".[345]
- Mangenda accused the Prosecutor of "manufactur[ing]" and "conjur[ing] up a 'Congolese' conspiracy" around Bemba to "save" the Main Case "in her purely politically motivated prosecutions of Mr Jean-Pierre Bemba Gombo"[346]—an allegation the Appeals Chamber found "[was] not supported by any evidence" and "speculative".[347]

156. Against this backdrop, on the basis of mundane factors and without further explanation, it is inexplicable that the Chamber suspended Kilolo's and Mangenda's sentences. Notwithstanding the Chambers' discretion in sentencing matters, no reasonable Chamber could have made such determination on the facts of this case. Thus, by giving undue weight to ordinary factors, the Trial Chamber committed a discernible error which requires reversal of the Sentencing Decision.

[343] Mangenda Conviction Appeal, para. 164 ("Mangenda's understanding was that Kilolo was conducting himself within the limits of lawful witness preparation"). *See also* paras. 156-162.
[344] Kilolo Interim Release Appeal, para. 13.
[345] Kilolo Article 60(2) AD, para. 61.
[346] Mangenda Disqualification Response, para. 14.
[347] Disqualification AD, para. 68.

III.B.2.b. "Overall circumstances" pursuant to rule 145(1)(b) and the incongruity of the Chamber's approach

157. Although the Chamber refused to find that these ordinary factors were mitigating circumstances, it still considered them—under the umbrella of "overall circumstances" pursuant to rule 145(1)(b)[348]—to *determine* the custodial sentences,[349] and ultimately, to *suspend* them.[350] It is however unclear the weight that the Chamber effectively gave to these "overall circumstances" in *determining* the sentences. Since the Chamber relied on these factors to suspend the sentences, surely, it could have not considered them to *also* reduce the sentences, as this would belie the Chamber's own statement that those circumstances did not merit mitigation, and would amount to *de facto* improper double-counting to the benefit of the convicted person.[351] On the other hand, if the Chamber had considered those factors to impose Mangenda's and Kilolo's custodial sentences (and a fine for Kilolo), it would seem contradictory to subsequently rely on those *same* factors to suspend their custodial sentences—a measure benefiting the convicted persons whom the Chamber had already found deserved imprisonment.[352]

[348] For Mangenda: Sentencing Decision, paras. 136, 137, 138, 141. For Kilolo: Sentencing Decision, paras. 184, 186.
[349] Sentencing Decision, paras. 145 (For Mangenda: "Lastly, the Chamber took into account Mr Mangenda's […] good behaviour throughout the trial and cooperation with the Court, the absence of criminal record and the prohibition from working in his country of residence") and 193 (For Kilolo: "Lastly, the Chamber took into account Mr Kilolo's efforts to promote the legal profession in Belgium and the DRC, his involvement in a non-governmental organisation, his cooperation with the Court and constructive attitude during trial, and, finally, the absence of a criminal record and disciplinary record with the Brussels bar").
[350] Sentencing Decision, paras. 149 (Mangenda) and 197 (Kilolo). The Chamber did not consider the consequence that imprisonment had on Kilolo's professional reputation worthy of even constituting an "overall circumstance", and the Chamber disregarded that factor in determining Kilolo's sentence (paras. 189 and 193), although it later relied on this factor to suspend his sentence (para. 197).
[351] *Limaj* AJ, para. 143 ("With respect to the Prosecution's submission that Haradin Bala's subordinate role was counted twice when assessing the gravity of the crimes and when determining the factors in mitigation, the Appeals Chamber recalls that double-counting for sentencing purposes is impermissible. The Trial Chamber found in the section on the gravity of the offence that 'Haradin Bala was not in a position of command' and that his role was 'that of a guard'. Similarly, in the section on the 'aggravating and mitigating circumstances', the Trial Chamber held that Haradin Bala 'was not a person with any commanding or authoritative role in the establishment of the camp, and essentially performed duties assigned to him, as essentially a 'simple man'.' *Consequently, the Trial Chamber erred in considering twice in mitigation Haradin Bala's subordinate role*.") (emphasis added.)
[352] Bagaric, p. 3 (noting that "if all of the factors in mitigation have been considered at the outset and an immediate custodial sentence is imposed, there is nothing left which can reduce the severity of the penalty".)

158. The legal basis of this new category of factors that the Chamber defines as "overall circumstances" under rule 145(1)(b) is also unclear. The Decision provides no explanation.[353] Other Chambers have never referred to this concept as a self-standing category of factors separate from those listed in article 78(1), rule 145(1)(c) and (2).[354] Rather, rule 145(1)(b) refers to a Chamber's exercise in balancing all relevant factors.[355]

159. In sum, the uncertainty as to the role and weight the Chamber gave to these ordinary "overall circumstances" in determining Mangenda's and Kilolo's sentences further evinces the Chamber's unreasonableness in suspending their sentences on the same basis.

III.B.2.c. There is no comparable precedent in the jurisprudence of the international criminal tribunals

160. The jurisprudence of the *ad hoc* tribunals does not support the Chamber's decision to suspend Mangenda's and Kilolo's sentences. Instead, these tribunals'

[353] Sentencing Decision, para. 22 refers to "other factors set out in Rule 145(1)(b) and (c) of the Rules".
[354] Sentencing Decision, para. 22, fn. 33, refers to *Lubanga* SAJ, paras. 62-66. However, *Lubanga* SAJ refers to the factors under rule 145(1)(c), and not (b). Rule 145(1)(b) refers to the balancing exercise of all the factors (paras. 33, 42 and fn. 67). Although in some paragraphs the Appeals Chamber referred to the factors of rule 145(1)(b), from the context the Chamber appeared to refer to all factors listed in article 78(1), rule 145(1)(c) and (2) and not to a different category enshrined in rule 145(1)(b). *See* *Lubanga* SAJ, paras. 1, 42. *Bemba* and *Al-Mahdi* SJ refer to "individual circumstances" to include those rule 145(1)(c) factors which do not directly relate to the crimes or the persons culpable conduct. *See* *Bemba* SJ, para. 68 and *Al-Mahdi* SJ, para. 94.
[355] *Lubanga* SAJ, paras. 33 ("Once all of the relevant factors have been identified and taken into account, rule 145 (1) (b) of the Rules of Procedure and Evidence requires that a Trial Chamber "[b]alance all the relevant factors" and pronounce a sentence") and 42 ("rule 145 (1) (b) of the Rules of Procedure and Evidence states that the Court "shall" balance all of the relevant factors in determining the sentence."); *Katanga* SJ, para. 40 ("Lastly, according to rule 145, the Chamber must determine a sentence which reflects the degree of culpability and balance all the relevant factors"); *Bemba* SJ, para. 12 ("[t]he Chamber must first identify and assess the relevant factors in Article 78(1) and Rule 145(1)(c) and (2). It must then balance all relevant factors pursuant to Rule 145(1)(b) and pronounce a sentence for each crime, as well as a joint sentence specifying the total period of imprisonment.") and 91 ("pursuant to Rule 145(1)(a) and (b), the Chamber must balance all the relevant factors, including any mitigating and aggravating factors, and consider the circumstances both of the convicted person and the crime"); *Al-Mahdi* SJ, para. 68 ("The Chamber must first identify and assess the relevant factors in Article 78(1) and Rule 145(1)(c) and (2). It must then balance all these factors in accordance with Rule 145(1)(b) and pronounce a sentence for each crime.").

case-law shows that sentences have been suspended in extraordinary circumstances,[356] such as:

- In *Bulatović*, the Trial Chamber suspended a sentence of four months imprisonment—imposed for *Bulatović*'s refusal to answer questions in cross-examination in the absence of the accused—because he suffered "from serious health problems which would make the service of a sentence of imprisonment more burdensome in his case than in that of the average person".[357]
- In *Rašić*, the Trial Chamber suspended eight months of a 12 month sentence of imprisonment because Rašić was the only female detained at the United Nations Detention Unit and would have been placed in quasi-solitary confinement, thus detrimentally impacting on her well-being.[358] In addition, she had pled guilty[359] and had expressed remorse in an unambiguous, extensive and sincere fashion.[360]
- In *Bangura et al.*, Kargbo's sentence of 18 months' imprisonment was suspended in light of his guilty plea, his cooperation with the Court in the investigations and trial and his honest admission of wrong-doing.[361]

161. None of the above circumstances were present here, nor do the extent and scope of the offences committed by Kilolo and Mangenda compare to those cases. Thus, and contrary to the Chamber's contention, the jurisprudence of other international

[356] *Contra* Sentencing Decision, fn. 64.
[357] *Bulatović* Contempt Decision, para. 18.
[358] *Rašić* SJ, para. 31 ("[the Chamber] considered it appropriate to suspend eight months of the sentence. In so doing, the Trial Chamber took account of the particularly difficult circumstances that would been gendered by Jelena Rašić's being the only female detainee in the UNDU and the quasi-solitary confinement regime that would follow. Such quasi-solitary nature of the confinement is neither unlawful in widely accepted jurisprudence nor designed to be punitive. However, the Trial Chamber accorded significant effect to the accused's perception of her detention and the practical impact upon her well-being. In this context, the Trial Chamber considered Dr. Vera Petrovic's reports concerning Jelena Rašić's health condition, Jelena Rašić's comparably young age and that this is the first time she is sentenced to a prison sentence.") Rašić, the case manager on Milan Lukić's defence team, was charged with (and eventually pled guilty to) 5 counts of contempt of court for procuring false witness statements. She fabricated one statement and had it signed and gave two unsigned fabricated statements to the same person to seek additional witnesses to sign them.
[359] *Rašić* SJ, para. 20.
[360] *Rašić* SJ, para. 21.
[361] *Bangura* SJ, paras. 76-78, 92. Kargbo was convicted of two counts for offering a bribe to a witness and otherwise interfering with a witness who had given testimony before a Chamber.

criminal tribunals does not support the Chamber's decision to suspend the sentences, especially on the facts of this case. Instead, these cases underscore the Chamber's unreasonableness.

III.B.2.d. Failure to consider other relevant factors in suspending the sentences

162. Assuming, *arguendo,* that a Chamber can rely on the same factors *in both determining* a sentence and later *suspending* it, the Trial Chamber erred in *solely* relying on the above-listed ordinary factors to suspend Mangenda's and Kilolo's custodial sentences, and ignoring a range of relevant factors which militated against suspension, such as:

- the gravity of the offences, as outlined above, including their far-reaching consequences, which undermine the Court's discovery of the truth and impede justice; the number of witnesses interfered with (14 out of 34 Defence witnesses); and the extensive scope—and prolonged time period—of the offences (in planning, preparation and execution);[362]
- the convicted persons' culpability, reflected by their continuous and multiple criminal actions, including remedial measures,[363] and the aggravating circumstances.[364]
- Retribution and deterrence (specific and general) which are "the primary purpose of sentencing".[365] The Sentencing Decision instead embraces impunity, and lacks a general deterrent effect, since no punishment is perceived as having been imposed.

[362] Sentencing Decision, paras. 100-115 (Mangenda); 153-167 (Kilolo). *See above* paras. 27-36.
[363] Sentencing Decision, paras. 116-127 (Mangenda); 168-175 (Kilolo).
[364] Sentencing Decision, paras. 130-133 (Mangenda); 176-181 (Kilolo). *See above* paras. 37-41.
[365] Sentencing Decision, para. 19.

163. Thus, and because of the foregoing, no reasonable Trial Chamber could have suspended Kilolo's and Mangenda's sentences if all the relevant factors had been properly considered.

III.B.3. The Chamber did not set out an enforcement procedure

164. The Chamber erred by not regulating the execution of the suspended sentences. The Chamber suspended the operation of the remaining terms of imprisonment for Kilolo and Mangenda for three years "unless during that period [they] commit another offence anywhere that is punishable with imprisonment, including offences against the administration of justice".[366] However, the Chamber did not explain how the suspension would operate in practice and how the suspended sentences would eventually be enforced. In particular, the Trial Chamber failed to identify, *inter alia*:

- A monitoring mechanism to which the convicted persons would report and which would share relevant information with domestic authorities and the ICC; or
- A procedure to otherwise ensure the effective implementation of the suspended sentences, in particular, to ensure that (a) domestic authorities are aware of the suspended sentences; and (b) the ICC is informed if and when Mangenda and Kilolo commit a domestic offence or crime punishable with imprisonment.

165. Similarly, the Chamber should have clarified when a person is understood to have "committed" a crime "punishable" with imprisonment: when the person is domestically charged with the crime (thus introducing an uneven treatment for the convicted persons depending on the country in which they may reoffend), or alternatively, when there is a final decision of guilt? And then, is a decision of guilt from a first instance court enough, or is an appellate decision required? And even

[366] Sentencing Decision, paras. 149 and 197.

when the conviction is final, would the Court not have to discuss and agree with the domestic authorities on which sentence will be served first?[367] Moreover, the domestic proceedings could take years and the three years' probation period could expire before a final domestic decision is rendered.

166. The Decision does not answer these and other essential questions. Given the difficulties that this Court faces in ensuring compliance with its judicial orders, the Chamber should have set out a clear and effective procedure to secure the enforcement of the suspended sentences. The Presidency (even if responsible for the enforcement of sentences),[368] the Registry and domestic authorities cannot be expected to fill such substantive gaps without proper and prior instruction, especially since no provision in the Court's legal texts assists. Indeed, while the Statute regulates the enforcement of penalties for article 5 crimes (Part 10), only some provisions apply to article 70 offences against the administration of justice. [369]

167. Conversely, in the event of conditional early release at the SCSL, the convicted person must sign an agreement setting out the conditions for his or her release,[370] and the Court will appoint a monitoring authority in the State where the person is released[371] which annually reports to the Court.[372] Moreover, the President may also set up additional monitoring measures.[373] Similar settings are devised domestically.

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[367] See article 89(4) and rule 183.
[368] Kilolo Fine AD, para. 8 ("pursuant to rule 199 of the Rules of Procedure and Evidence ("Rules"), read in conjunction with Part 10 of the Statute to the extent applicable to the present case in accordance with rule 163 (3) of the Rules, the responsibility with respect to the enforcement of sentences lies with the Presidency".); Presidency Fine Order, p. 3.
[369] Rule 163(3) states that the provisions of Part 10 do not apply with the exception of articles 103, 107, 109 and 111.
[370] SCSL Practice Directions on Conditional Early Release, article 9(C) ("If conditional early release is granted the decision shall be conditional upon and accompanied by a Conditional Early Release Agreement containing: (i) General conditions applicable to all persons granted Conditional Early Release (ii) Special conditions relevant to the individual convicted person (iii) The name of the monitoring authority responsible for overseeing compliance with the conditions[…]".)
[371] SCSL Practice Directions on Conditional Early Release, article 9(C) (iii).
[372] SCSL Practice Directions on Conditional Early Release, article 11(A) ("the Monitoring Authority shall submit an annual report relating to the Convicted Person's compliance with the Conditional Release Agreement to the Registrar".)
[373] For example, Fofana had to report at least twice every month to the monitoring body. *See* *Fofana* Early Conditional Release Decision, para. 49/p. 23 (iv) ("The applicant shall strictly observe the reporting schedules

In Namibia, for example, the Minister may enter into international agreements to ensure, on a reciprocal basis, the operation of suspended sentences.[374]

168. This vacuum in the Sentencing Decision has a triple effect: first, it creates uncertainty for the convicted persons about the conditions governing the enforcement or execution of their sentences;[375] second, it further nurtures the public perception of impunity; and third, there is a high risk that the sentences will not be activated even if the convicted persons were to reoffend in the future. One commentator has observed that inactivity by domestic authorities in the event of breaches of suspended sentences is an unfortunate pattern "mak[ing] a farce of the suspended sentence—the sword of Damocles is barely a butter knife".[376]

169. Unless the execution of the suspended sentences is clearly regulated and the implementation of the suspension secured, there is no real "suspension", rather an outright commutation or pardon. The foregoing shows that the Trial Chamber erred by issuing an unreasonable Decision.

III.C. THE ERROR MATERIALLY AFFECTED THE DECISION

170. The Trial Chamber's error in law and/or in the exercise of its discretion vitiates the Chamber's decision to suspend Kilolo's and Mangenda's sentences. Pursuant to article 83(2)(a) and (3), the Appeals Chamber has the authority to amend and vary the Sentencing Decision and to order Kilolo and Mangenda back into custody to serve the remainder of their prison sentences or any increased term as decided by the Appeals Chamber.

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set by the Monitoring Authority and the Registrar, and shall personally report to such centre or centres as are designated, at least TWICE every month").

[374] Article 323(1) Namibia Criminal Procedure Code.

[375] There needs to be certainty as to the execution of a sentence due to its intrinsic link with the principle *ne poena sine lege*. Scalia, p. 800 referring to the UN Report of the Preparatory Committee (March, April and August 1996), para. 180 ("Suggestions were also made that punishment to be imposed on each offence, including the enforcement of penalties, should be elaborated in the Statute. The view was widely shared that elaboration of those essential elements and principles, if left to the Court to deal on a case-by-case basis, would not ensure predictability or equality before and in the law".)

[376] Bartels (2010), pp. 170-171.

IV. CONCLUSION AND RELIEF

171. For all the reasons above, and pursuant to article 83 of the Statute, the Prosecution requests the Appeals Chamber:

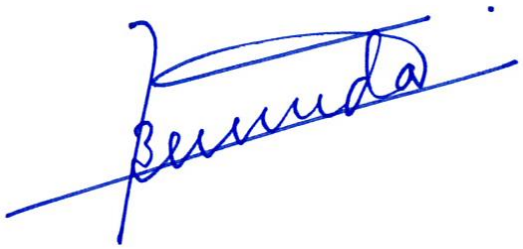
(i) in relation to the First Ground of Appeal, sub-ground 1, to find that the individual and joint sentences imposed by the Trial Chamber on Mangenda, Kilolo and Bemba are so unfair and unreasonable as to constitute an abuse of discretion;

(ii) in relation to the First Ground of Appeal, sub-ground 2, to find that the Trial Chamber abused its discretion in establishing an automatic "hierarchy of lies" in this case for the purposes of its gravity analysis that materially affected the individual and joint sentences for the article 70(1)(a) and (b) offences imposed on Mangenda, Kilolo and Bemba;

(iii) in relation to the First Ground of Appeal, sub-ground 3, to find that the Trial Chamber legally erred and/or abused its discretion in establishing a "hierarchy of blameworthiness" for principals versus accessories for the purposes of its culpability analysis that materially affected the individual and joint sentences for the article 70(1)(a) offences imposed on Kilolo and Bemba;

(iv) in relation to the Second Ground of Appeal, to find that the Trial Chamber legally erred and/ or abused its discretion in suspending the sentences of Mangenda and Kilolo, and to reverse the suspension and order Kilolo and Mangenda back into custody to serve the remainder of their sentences of imprisonment or any increased sentences as decided by the Appeals Chamber; and

(v) since the Trial Chamber has made all the necessary factual findings in the Conviction Judgment and Sentencing Decision,[377] the Appeals Chamber should amend the joint sentence of Kilolo, Mangenda and Bemba by increasing each of them to five years, pursuant to article 83(2)(a) and (3).



Fatou Bensouda, Prosecutor

Dated this 24th day of July 2017
At The Hague, The Netherlands. [378]

[377] *See* Separate Opinion of Judge Shahabuddeen in *Galić* AJ, para. 17 ("Where there are no circumstances to be investigated and evaluated by a Trial Chamber, there is no need for a remand".) *See also Duch* AJ, para. 379.
[378] The Prosecution hereby makes the required certification: *Al Senussi* Admissibility AD, para. 32.