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Date: **23 January 2017**

THE APPEALS CHAMBER

Before:

**Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofma ski**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. Jean-Pierre BEMBA GOMBO***

Confidential

Consolidated Observations of the Legal Representative of Victims on “The Appeals against Trial Chamber III’s decision on Sentence pursuant to Article 76 of the Statute”

Source: Ms Marie-Edith Douzima-Lawson, Legal Representative of Victims

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

Office of the Prosecutor

Ms Fatou Bensouda
Ms Helen Brady

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson

Legal Representatives of Victims

Ms Marie-Edith Lawson Douzima

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**Office of Public Counsel for
Victims**

Ms Paolina Massidda

Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

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(I) Introduction

(A) Procedural background

1. On 21 June 2016, Trial Chamber III (“Chamber”) handed down the “Decision on Sentence pursuant to Article 76 of the Statute” (“Decision on Sentence”)¹ against Mr Bemba.
2. On 22 July 2016, the Prosecution and Mr Bemba entered appeals against the Decision on Sentence.²
3. On 1 September 2016, the Appeals Chamber authorized the victims who had taken part at trial to participate in the present appellate proceedings by way of observations.³
4. On 21 October 2016, the Prosecution submitted its appeal brief⁴ and on 21 December 2016 the Defence filed its response.⁵
5. On 26 October 2016, the Defence submitted its appeal brief⁶ and on 22 December 2016, the Prosecution filed its response.⁷

¹ “Decision on Sentence pursuant to Article 76 of the Statute”, 21 June 2016, ICC-01/05-01/08-3399.

² “Prosecution’s Notice of Appeal against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 22 July 2016, ICC-01/05-01/08-3411 (A 2); “Defence Notice of Appeal against Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/05-01/08-3399, 22 July 2016, ICC-01/05-01/08-3412 (A 3).

³ “Decision on the participation of victims in the appeals against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 1 September 2016, ICC-01/05-01/08-3432.

⁴ “Prosecution’s Document in Support of Appeal against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 21 October 2016, ICC-01/05-01/08-3451.

⁵ “Appellant’s response to ‘Prosecution’s Document in Support of Appeal against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 21 December 2016, ICC-01/05-01/08-3485.

⁶ “Public Redacted Version of ‘Appellant’s document in support of the appeal against sentence’”, 26 October 2016, ICC-01/05-01/08-3450-Red.

⁷ “Prosecution’s response to Bemba’s appeal against sentence”, 22 December 2016, ICC-01/05-01/08-3486-Conf-Red.

(B) Confidentiality

6. The present submissions are filed as confidential in accordance with regulation 23 *bis*(2) of the Regulations of the Court.

(C) The interests of the victims which are affected by the appeal

7. In its decision of 1 September 2016, the Appeals Chamber ruled that the victims who had participated at the trial phase could do so at the phase of the appeal against the sentence. Accordingly, the Appeals Chamber authorized the Legal Representative of Victims (“Legal Representative”) to file consolidated observations on the Prosecution’s and Defence’s appeals in order to present the views and concerns of her clients “with respect to the issues on appeal insofar as their personal interests are affected”.⁸
8. The Legal Representative would recall that, in her opinion, to adjust the Decision on Sentence downwards would perforce affect her clients’ interests insofar as the Decision sentences Mr Bemba for the crimes of which they were victim and to so proceed would be incongruous with their view that the sentence passed upon him must “[TRANSLATION] reflect the gravity of the crimes and the harm suffered”.⁹
9. The observations of the Legal Representative will address the Defence’s and Prosecution’s appeals, specifically the points going to the victims’ personal interests which the parties did not tackle or addressed only in part.

⁸ “Decision on the participation of victims in the appeals against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 1 September 2016, ICC-01/05-01/08-3432, point (1) of the Decision.

⁹ ICC-01/05-01/08-3371-Conf, “*Soumissions de la Représentante légale des victimes sur la peine*”, para. 64.

(D) Applicable law

10. Article 81(2) provides: “A sentence may be appealed, in accordance with the Rules of Procedure and Evidence (RPE), by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence”.

11. Article 83(3) prescribes that “[i]f in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7” of the Statute of the Court.

(II) The 18-year term imposed on Mr Bemba is not excessive

12. Mr Bemba seeks a reduction in the sentence imposed on him. It is his view that the 18-year sentence is manifestly excessive, that he did not have actual knowledge of the aggravating circumstances and that the Trial Chamber erred in its approach to mitigating circumstances.

13. The Legal Representative points out that the Defence has, yet again, not advanced anything convincing to sustain its argument.

14. The Defence considers the 18-year term of imprisonment which Trial Chamber III handed down against Mr Bemba to be manifestly excessive.

15. The Defence contends that the Chamber

erred: (i) by imposing a sentence which falls outside both the established international framework and the Court’s own sentencing framework; (ii) by failing properly to assess the gravity of the crimes committed by Mr. Bemba’s subordinates and the degree and form of his participation in them; and (iii) in its evaluation of aggravating circumstances. These errors, individually or cumulatively, resulted in the imposition of a sentence which is disproportionate to the crimes and, accordingly, should be reduced.¹⁰

¹⁰ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal, para. 11.

(A) The international sentencing framework

16. The Defence argues that Mr Bemba's sentence is disproportionate when compared to those imposed in other international cases. The Defence takes issue with the Trial Chamber's decision not to take account of the sentences previously rendered at the Court or at the ad hoc tribunals on the basis that they did not concern the same offences committed in similar circumstances. The Trial Chamber did not err in so deciding. In fact, the Defence adverts to cleverly cherry-picked cases, whose interpretation it bungles, as it is wont to do, and draws improper comparisons. The *Kuruba* case,¹¹ for instance, was confined to pillaging perpetrated over a short time frame and its geographical ambit was very limited,¹² whereas Mr Bemba was convicted of:¹³

- (a) murder as a crime against humanity under article 7(1)(a);
- (b) murder as a war crime under article 8(2)(c)(i);
- (c) rape as a crime against humanity under article 7(1)(g);
- (d) rape as a war crime under article 8(2)(e)(vi); and
- (e) pillaging as a war crime under article 8(2)(e)(v).

17. What is more, it was underscored that the pillaging held against Bemba was systematic and committed on a large scale with great consequences for the victims.¹⁴ Regarding rape,

[t]he Chamber note[d] that the number of victims of underlying acts of rape is substantial. The underlying acts of rape were committed throughout the geographical and temporal scope of the 2002-2003 CAR Operation. They were committed as part of an attack targeting many civilians throughout the CAR between 26 October 2002 and 15 March 2003. The degree of damage caused to the victims, their families, and communities was severe and lasting. Accordingly, in light of the circumstances of time, manner, and location considered above, and the extent of damage caused, the Chamber f[ound] that, in this case, the crimes of rape are of utmost, serious gravity.¹⁵

The Chamber went on:

Before committing rape, MLC soldiers first confirmed that General Bozizé's rebels had departed, and the MLC were thereafter the only armed force in an area. Armed MLC soldiers then targeted the unarmed victims in their homes, on temporary MLC bases, or in isolated locations, such as the bush. Many victims had already fled their homes or were

¹¹ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal, para. 17.

¹² ICC-01/05-01/08-3078, para. 123.

¹³ ICC-01/05-01/08-3343, Trial Judgment, para. 752.

¹⁴ ICC-01/05-01/08-3343, Trial Judgment, para. 646; ICC-01/05-01/08-3078, "*Conclusions de la Représentante légale des victimes*", para. 21.

¹⁵ ICC-01/05-01/08-3399, Decision on Sentence, para. 40.

seeking refuge when they were targeted. Groups of MLC soldiers beat, restrained, threatened, and held under gunpoint the victims and others present, in particular, any who attempted to resist.¹⁶

18. As to murder, the Chamber found that:

these victims, who were not armed and were not taking part in hostilities, were killed in their homes, in the absence of armed groups other than the perpetrators. The killings were part of larger events targeting other members of their families, including both women and men, and/or accompanied by acts of pillaging and/or rape.

19. Furthermore, no mitigating circumstances were found to exist. Instead, the Chamber found beyond reasonable doubt that aggravating circumstances were connected to the crimes of which Bemba was convicted.¹⁷ That reasoning can also be raised against reliance on *Pandurevi*.¹⁸ The *Hadžihasanovi* case¹⁹ is irrelevant. The same can be said of *Muci*.²⁰ The gravity of the crimes ascribed to Bemba greatly exceeds the gravity depicted by the Defence in the case at bar.²¹ The example of the *Borov anin*²² case is instead to the detriment of Bemba. The gravity of the crimes of which Bemba was convicted exceeds by far the gravity in the case against Borov anin, who, nonetheless received 17 years. Bemba has failed to show any similarity between his case and those he cites. Nor does he substantiate the “recognised international sentencing framework”. Bemba also cites cases in which the accused persons received 18 years²³ but is careful not to specify their geographical reach or the scale of the crimes. In any event, the Chamber is in no way bound by the sentences meted out in said cases,²⁴ but must, however, apply the instruments of the Court, in particular articles 76, 77 and 78 of the Statute and rule 145 of the RPE.²⁵

¹⁶ *Ibid.*, para. 41.

¹⁷ ICC-01/05-01/08-3399, Decision on Sentence, paras. 32, 43, 47, 51, 54 and 57.

¹⁸ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 27.

¹⁹ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 19.

²⁰ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 23.

²¹ ICC-01/05-01/08-3399, Decision on Sentence, paras. 23, 29, 30, 42, 44, 45, 46, 54 and 57.

²² ICC-01/05-01/08-3450, Defence Document in Support of Appeal, 28-29.

²³ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal; *eši* para. 38; *or evi* para. 33; and *Deli* para. 34.

²⁴ ICC-01/05-01/08-3399, Decision on Sentence, para.12.

²⁵ ICC-01/05-01/08-3399, Decision on Sentence, para. 8.

(B) The ICC’s sentencing framework

20. It is Bemba’s opinion that the crimes for which Mr Lubanga and Mr Katanga attracted sentences of 14 and 12 years respectively were of greater gravity.²⁶ He presents those sentences as a “sentencing framework of the ICC” to which the Trial Chamber should have adhered.²⁷

21. Mr Lubanga received a 14-year term for committing jointly with other persons the crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities in Ituri.²⁸ Mr Katanga received 12 years as an accessory to the commission of the crimes of murder, attack against a civilian population, destruction of enemy property and pillaging²⁹ in the village of Bogoro.

22. Not only are the crimes of which Mr Lubanga and Mr Katanga were convicted vastly different to those held against Bemba – the same is true for the mode of responsibility – but, what is more, they are also worlds apart as regards the number of charges levied, the geographical reach of the crimes committed, and the number of victims and the impact of the crimes on them.

(C) The Trial Chamber correctly assessed the gravity of the underlying crimes and Mr Bemba’s degree of participation

23. The Defence asserts that in

assessing the gravity of the crimes, the Trial Chamber failed properly to assess the two matters which must be taken into account in superior responsibility cases: (i) the gravity of the underlying crimes committed by the convicted person’s subordinate; and (ii) the gravity of the convicted person’s own conduct in failing to prevent or punish the underlying crimes.³⁰

24. In its view, the Trial Chamber erred in its assessment of the gravity of the underlying crimes and the gravity of Mr Bemba’s conduct.³¹ The Defence makes a

²⁶ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 42.

²⁷ *Ibid.*, para. 43.

²⁸ ICC-01/04-01/06-3121, *Lubanga*, Judgment on appeal, para. 529.

²⁹ ICC-01/04-01/07-3484-tENG-Corr, *Katanga*, Decision on Sentence, para. 170.

³⁰ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal, para. 46.

³¹ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal, para. 46.

futile attempt to cast doubt on the allegations pertaining to the charges and the scale of the crimes.

25. Contrary to the Defence's claims, the Chamber gave due regard to the scale of the crimes and the number of victims – factors which have been duly established – in determining the sentence to impose on Bemba, who stands punished for the crimes of which he was convicted.

26. As the Legal Representative has had occasion to underline, the Trial Chamber's judgment pursuant to article 74 must be founded on evidence which "(i) has been 'submitted'; (ii) has been 'discussed [...] at trial', in the sense that it is part of the trial record; and (iii) has been found to be admissible by the Chamber".³² The Legal Representative would therefore refer to its observations on the Defence appeal brief against the conviction as regards the inclusion of underlying acts.³³

27. The Legal Representative notes that in the Decision on Sentence, the Chamber stated:

The gravity of the crime is a principal consideration in imposing a sentence. [...] gravity necessarily involves consideration of the elements of the offence itself. Beyond such elements, the Chamber has a degree of discretion to consider relevant factors in assessing gravity or, if exceptional, as aggravating circumstances.³⁴

The Legal Representative notes that:

[TRANSLATION] the gravity of the crimes is a criterion of admissibility of a case at the pre-trial stage of the proceedings. Therefore, had the crimes of which the Accused was convicted been of insufficient gravity, the Court would not have proceeded to consider them.³⁵

The Chamber sentenced Mr Bemba on the basis of specific underlying acts proven beyond reasonable doubt.³⁶

28. It is the Legal Representative's submission that:

[TRANSLATION] the degree of Mr Bemba's participation and intent was pivotal to the commission of the crimes by MLC troops in the CAR; moreover, the degree of his intent was very considerable, and even exceeded the intent laid down in the instruments relied on to determine his individual criminal responsibility.³⁷

³² ICC-01/04-01/06-2842, Trial Judgment, *Lubanga*, para. 101.

³³ ICC-01/05-01/08-3489, Corrected version - Legal Representative of Victims' Observations, pp.16 and 17.

³⁴ ICC-01/05-01/08-3399, "Decision on Sentence pursuant to Article 76 of the Statute", para. 15.

³⁵ ICC-01/05-01/08-3371-Conf, Legal Representative's Submissions on Sentence, para.12.

³⁶ ICC-01/05-01/08-3399, "Decision on Sentence pursuant to Article 76 of the Statute", para. 22.

³⁷ ICC-01/05-01/08-3371-Conf, Legal Representative's Submissions on Sentence, iv. The degree of Mr Bemba's participation and intent, pp.17-19.

The gravity of the crimes committed by MLC troops ensues, therefore, from failure on the part of Mr Bemba, who exerted effective control over his troops, to take action. The Legal Representative thus concludes that the Chamber did not in any way err in its assessment of the gravity of the underlying acts and Mr Bemba's degree of participation.

(D) The Trial Chamber correctly assessed the aggravating circumstances

29. The Defence takes the view that the Trial Chamber double-counted the aggravating factors of the crime of pillaging and the crime of rape. It further purports that the Chamber erred in its application of the aggravating circumstances.

30. The Defence submissions on double counting are without relevance and unworthy of the Appeals Chamber's attention. As to the gravity of the pillaging, in the Decision on Sentence, the Chamber, with reference to its trial judgment,³⁸ relied on the fact that the crime was committed on a large scale and with grave consequences for the victims. The gravity of the crime lies, therefore, in its scale and the scale of the ensuing harm to the victims. That which the Defence labels double counting amounts only to the particulars of the aggravating factors of the crime, which were set forth in the Decision.

31. Turning to the gravity of the crime of rape, it is preposterous of the Defence to treat the defencelessness of the victims under the perpetration of multiple rapes against the same victims. The Chamber did not err in its assessment of aggravating circumstances. Rather, the Defence misconstrued the Chamber's decisions. For example, the Chamber did not determine that the crimes of rape and pillaging were perpetrated with particular cruelty because MLC troops had sought to punish civilians suspected of supporting the enemy. The Trial Chamber simply took note of the evidence regarding the MLC troops' motivations for committing the crimes

³⁸ ICC-01/05-01/08-3399, Decision on Sentence, para. 49.

on such a scale.³⁹ The Legal Representative would point out that the Defence does not call into question the multiple aggravating factors of the crimes.

32. As the Legal Representative said in her Submissions on Sentence:⁴⁰ “[TRANSLATION] a number of factors brought to the fore the particular cruelty with which the crimes of rape, murder and pillaging were committed”.⁴¹ In this respect, when considering the aggravating circumstances put forward in relation to rape and pillaging, the Chamber had specific regard to several factors.⁴² The Chamber found beyond reasonable doubt that Mr Bemba knew of the factors relevant to proof of the aggravating circumstances argued.

33. Mr Bemba has therefore failed to substantiate the “double counting” of the aggravating factors or any error on the part of the Chamber in its appraisal of the factors.

(III) Mr Bemba had actual knowledge of the aggravating circumstances

34. The Defence contends: “One of the basic legal errors made by the Trial Chamber in the Judgment was that it conflated the ‘actual knowledge’ standard with the ‘constructive knowledge’ (‘should have known’) standard. This error continues in the Sentencing Decision.”⁴³ It underscores that “the Trial Chamber erred in law when it found ‘beyond reasonable doubt that Mr Bemba knew of the factors relevant to proof of the alleged aggravating circumstances’”; and that “there are no findings to support this assertion or otherwise to attribute the aggravating circumstances to Mr. Bemba in a way that reflects his individual culpability”.⁴⁴ In the view of the Defence,

[t]hese errors in the Trial Chamber’s approach to the establishment of aggravating circumstances invalidate the findings that the acts of: (i) rape were committed against particularly defenceless victims and with particular cruelty; and (ii) pillage were committed with particular cruelty.⁴⁵

³⁹ ICC-01/05-01/08-3343, Trial Judgment, paras. 563-567.

⁴⁰ ICC-01/05-01/08-3371-Conf, Legal Representative’s Submissions on Sentence.

⁴¹ *Ibid.*, para. 58.

⁴² ICC-01/05-01/08-3399, Decision on Sentence, para. 25.

⁴³ ICC-01/05-01/08-3450-Red, Defence Document in Support of Appeal, para. 78.

⁴⁴ *Ibid.*, para. 79.

⁴⁵ *Ibid.*

35. The Legal Representative draws the attention of the Appeals Chamber to the fact that the Defence made every attempt to have it believed that Bemba had no knowledge of the crimes committed by his troops in the CAR during the 2002-2003 operation. In its brief against the conviction, the Defence raised the issue of “actual knowledge” versus constructive knowledge (“should have known”),⁴⁶ to which the Legal Representative responded.⁴⁷

36. The findings of the Chamber on the matter are cogent.⁴⁸ Mr Bemba could not have not known of the aggravating circumstances of the acts committed by his troops. In a nutshell, the Defence allegations on the subject are but a diversion.

(IV) The Chamber did not err in its approach to mitigating circumstances

37. The Defence takes issue with the Trial Chamber’s approach to the assessment of mitigating circumstances;⁴⁹ that approach, it asserts, is fraught with errors which materially affect the Sentencing Decision.⁵⁰

38. In the opinion of the Legal Representative, the circumstances listed at rule 145(2)(c) cannot and should not be accepted in mitigation as Mr Bemba has, in fact, made no effort to compensate the victims and has not cooperated with the Court.

39. The Chamber did not err in following Trial Chamber I in *Lubanga*⁵¹ and Trial Chamber II in *Katanga*,⁵² when it applied the balance of probabilities standard to its assessment of mitigating circumstances.⁵³

40. In the aforecited cases, Trial Chamber I and Trial Chamber II ruled on mitigating circumstances in adjudging the Defence assertions which sought to “on a balance of probabilities [...] establish [...] the existence of such a circumstance”.⁵⁴

⁴⁶ ICC-01/05-01/08-3434, Defence Document in Support of Appeal against the Conviction, pp. 112-113.

⁴⁷ ICC-01/05-01/08-3489, Corrected version - Legal Representative of Victims’ Observations, paras. 54-56.

⁴⁸ ICC-01/05-01/08-3399, Decision on Sentence, paras. 62 and 63.

⁴⁹ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 93.

⁵⁰ *Ibid.*

⁵¹ ICC-01/04-01/06-2901, *Lubanga*, Decision on Sentence, para. 34.

⁵² ICC-01/04-01/07-3484-tENG-Corr, *Katanga*, Decision on Sentence, para. 34.

⁵³ See, above, footnotes 2 and 3.

41. The Defence misconstrues the sentencing decisions in *Lubanga* and *Katanga* when it states:

[...] Mr. Bemba was not required to convince the Trial Chamber of anything or to provide ‘concrete support’ for the requests. He was simply required to demonstrate that the mitigating circumstance in question exists or must have existed ‘more probably than not’.⁵⁵

42. The Legal Representative notes that before handing down the sentence in *Lubanga*, Trial Chamber I recognized that it “is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance”.⁵⁶ In the same case, the Chamber held that “any mitigating circumstances are to be established on a balance of probabilities”.⁵⁷

43. The Defence finds fault with the Chamber for not having attached any weight to Mr Bemba’s family circumstances in determining the sentence. It states that at this Court, “family circumstances do not have to be ‘exceptional’ to be considered in mitigation.”⁵⁸

44. The Legal Representative points out that the Defence again misconstrues the *Katanga* case and the Decision on Sentence. In actual fact, in *Katanga*, although the Chamber attached relative⁵⁹ weight to the Accused’s family circumstances, it also said that they “cannot play a determinant role considering the nature of the crimes of which he was convicted and which were committed against the [...] civilians [...]”.⁶⁰ Moreover, the family circumstances of an accused are appraised on a case-by-case basis and always in conjunction with other mitigating factors. The Legal Representative is of the view that the Chamber did not err in attaching no weight to Bemba’s family circumstances since the existence of “wider jurisprudence” on the subject does not in any way prove the Chamber wrong.

⁵⁴ ICC-01/04-01/07-3484-tENG-Corr, Decision on Sentence, *Katanga*, para. 34. See also ICC-01/04-01/06-2901, Decision on Sentence in *Lubanga*, paras. 33 and 34.

⁵⁵ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, para. 96.

⁵⁶ ICC-01/04-01/06-2901, *Lubanga*, Decision on Sentence, para. 33.

⁵⁷ *Ibid.*, para. 34.

⁵⁸ ICC-01/05-01/08-3450, Defence Document in Support of Appeal, paras. 98-99.

⁵⁹ ICC-01/04-01/07-3484-tENG-Corr, *Katanga*, Decision on Sentence, para. 88.

⁶⁰ *Ibid.*

45. The Defence also complains that the Trial Chamber disregarded Bemba's efforts at bringing peace and security to the DRC. It underlines the fact that Monseigneur Ambongo stated at the hearing on the determination of the sentence that the integration of the MLC into the national army as part of the reunification of the Congo had marked an end to "long years of war" and that he proved the MLC's part in improving the city in Equateur. However, the Defence is particularly careful not to mention what prompted Mr Bemba to integrate the ALC into the national army: self-interest, namely a quest for power. He had become one of the four Vice-Presidents of the DRC. Monseigneur Ambongo was not mistaken in telling the Court at that same hearing that "[TRANSLATION] the MLC took measures to restore peace and stability in the Equateur region in a bid for power".⁶¹ Witness P15, a senior MLC party official, explained that Equateur was inherently bound up with the history of the MLC and so Bemba had an interest in protecting the region.⁶²
46. The Chamber was therefore right in holding that the promotion of peace and reconciliation may constitute a mitigating circumstance only if "genuine" and "concrete".⁶³
47. The Defence argues that the Trial Chamber should have taken into account the measures taken by Mr Bemba throughout the 2002-2003 operation in assessing the gravity of his conduct and in mitigation of sentence. It complains that the Chamber has failed to give any consideration to the international jurisprudence which recognizes that mitigation in sentence may be appropriate where a convicted person has taken certain positive measures to minimize or reduce harm. First of all, the Legal Representative notes that the Defence does not specify the measures which Bemba purportedly took throughout the 2002-2003 operation. She would therefore refer to the Chamber's finding that Bemba's true intention was not to take necessary and reasonable measures within his power to prevent or repress the commission of crimes, but rather to counter public allegations made against the MLC and rehabilitate its public image.⁶⁴ That finding, which has not been

⁶¹ ICC-01/05-01/08-T-368-FRA ET ? p. 56 ? lines 17 0 24.

⁶² ICC-01/05-01/08-T-210-CONF-FRA ET, p. 40, lines 12-13.

⁶³ ICC-01/05-01/08-3399, Decision on Sentence, para.72.

⁶⁴ *Ibid.*, para. 63.

impugned, is necessarily an aggravating and not a mitigating factor. The Chamber further noted:

Accordingly, he did more than tolerate the crimes as a commander. Mr Bemba's failure to take action (i) was deliberately aimed at encouraging the attack directed against the civilian population of which the crimes formed part, and (ii) directly contributed to the continuation and further commission of crimes.⁶⁵

48. It is unreasonable for the Defence to place the blame on the Trial Chamber for delays to the proceedings which stood to benefit Mr Bemba: its arguments must be dismissed. In addition to the Prosecution's response concerning the suspension of the proceedings in connection with regulation 55, the Legal Representative would point out that it was in response to the Defence's request for considerable time to investigate and prepare its case⁶⁶ that the Chamber ordered the suspension.⁶⁷
49. Further still, the Legal Representative draws attention to the fact that it was also at the Defence's request that the Chamber recalled a Prosecution witness,⁶⁸ when the parties and participants had already filed their closing briefs. Yet the recall of the witness did not secure the outcome for which the Defence had hoped, that is, to do away with the overwhelming evidence brought against Mr Bemba by the witness and the protected witnesses.
50. Lastly, the Legal Representative would point out to the Defence that the conduct of some of its witnesses did nothing to assist the Chamber in its task and was the cause of suspensions beyond the control of the Bench.⁶⁹
51. Any delay to the proceedings should instead be laid at the door of Mr Bemba and cannot be accepted in mitigation. The Chamber was therefore right to find that there were no mitigating circumstances.
52. The Legal Representative thus concludes that Mr Bemba has failed entirely to show that the 18-year term is excessive. To the contrary: the sentence falls short in view of his culpability and the gravity of the crimes.

⁶⁵ *Ibid.*, para. 66.

⁶⁶ ICC-01/05-01/08-2365-Red, para. 51.

⁶⁷ ICC-01/05-01/08-2480.

⁶⁸ ICC-01/05-01/08-3139-Conf.

⁶⁹ ICC-01/05-01/08-2329.

(V) The sentence is not proportionate to the crimes and culpability of Mr Bemba

53. The Prosecution makes clear that it is bringing an appeal because the sentence stands in contrast with the Chamber's reasoning in the Decision and it is not consonant with the desire to acknowledge the harm done and to deter its reoccurrence. The Prosecution considers that the "joint sentence" of 18 years does not reflect Mr Bemba's culpability, including the gravity of all the crimes of which he was convicted, the harm suffered by all of the victims and the different types of criminality and victimization.

54. The Legal Representative submits that the 18-year term of imprisonment imposed upon Mr Bemba does not reflect the findings of fact entered by the Chamber. The Decision on Sentence, the Chamber made clear, must be read in conjunction with the judgment as a whole and in the light of the entirety of the trial proceedings.⁷⁰ It recited the terms of the Preamble to the Statute, which, in its view, establishes retribution and deterrence as the primary objectives of punishment at the ICC.⁷¹ It noted that a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace, and reconciliation. Accordingly, the Chamber went on to say, a sentence should be adequate to discourage a convicted person from recidivism as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so.⁷² Lastly, it recalled the position of the Appeals Chamber that the sentence must be proportionate to the crime and culpability of the convicted person.⁷³

(A) The sentence is not proportionate to the crimes

55. Mr Bemba was convicted under article 28(a) of the Statute on five counts, *viz.*, murder as a crime against humanity and a war crime, rape as a crime against humanity and a war crime, and pillaging as a war crime.⁷⁴

⁷⁰ ICC-01/05-01/08-3399, para. 9.

⁷¹ *Ibid.*, para. 10.

⁷² *Ibid.*, para. 11.

⁷³ *Ibid.*

⁷⁴ ICC-01/05-01/08-3343, para. 752.

56. The Chamber found that the crimes perpetrated were of serious gravity,⁷⁵ and indeed of particular cruelty,⁷⁶ and so constituted an aggravating circumstance. The Chamber found that the culpable conduct of Jean-Pierre Bemba was of serious gravity and, that being so, no mitigating circumstance existed in the case.⁷⁷

57. In its Decision on Sentence,⁷⁸ the Chamber underlined that the gravity of the crimes is a prime consideration in determination of the sentence; in an evaluation of gravity, both quantitative and qualitative factors will enter the equation. As regards the quantitative aspect, an unprecedented number of victims were authorized to participate in the proceedings.⁷⁹ As to the qualitative dimension, the findings of the Chamber are cogent.⁸⁰

58. It follows that the gravity of the crimes has equally grave repercussions on the victims in particular and the population of the Central African Republic at large. As Monseigneur Ambongo, who appeared for the Defence at the hearing on the determination of the sentence, put it: “there are certain things that can never be forgotten, and rape is one of them.”⁸¹ Rule 145(1)(c) requires the Court to afford consideration to

the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

59. The Legal Representative would draw to the attention of the Appeals Chamber the founding goal of the ICC, as underlined by Jean-Baptiste Jeangène Vilmer:

[TRANSLATION] In that field, international criminal justice, the tide has recently turned. International criminal justice, embodied by the international military tribunals of Nuremberg and Tokyo, and the ad hoc tribunals for the former Yugoslavia and Rwanda, spanning 1945 to 1998, devoted its attention to the perpetrators of the crimes, with little regard for the victims. That prevailing trend was set right on 17 July 1998 with the signing of the Rome Statute, which established an International Criminal Court.⁸²

⁷⁵ ICC-01/05-01/08-3399, paras. 32 and 40.

⁷⁶ *Ibid.*, paras. 47 and 57.

⁷⁷ *Ibid.*, para. 93.

⁷⁸ *Ibid.*, 15.

⁷⁹ ICC-01/05-01/08-3432, “Decision on the participation of victims in the appeals against Trial Chamber III’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, para. 3.

⁸⁰ ICC-01/05-01/08-3399, pp. 17-34.

⁸¹ T-368-ENG ET WT, p. 55, lines 5-6.

⁸² *Réparer l’irréparable*, Jean-Baptiste Jeangène Vilmer, Puf, 2009, p. 2.

60. The minimum term of 18 years does not, therefore, reflect the gravity of the crimes and the harm done to the victims. The Chamber has not given sufficient consideration to the cruelty with which the crimes were perpetrated against the victims so as to inflict further suffering upon them.

(B) The sentence is not proportionate to the culpability of Jean-Pierre Bemba

61. The Chamber noted that the considerations enumerated at rule 145(1)(c) were foreseen as a non-exhaustive list of aggravating and mitigating circumstances. That notwithstanding, it did not entertain other aggravating circumstances in relation to the convicted person. In actual fact, the culpable conduct of the convicted person includes the fact that he did not voice the slightest compassion towards the victims, much less compensate them. His conduct attests instead to his contempt towards them. “[A]lleged crimes” and “alleged victims” were the words the Defence used in reference to the victims on a number of occasions at trial.⁸³

62. Moreover, Bemba has never cooperated with the Court. Quite the contrary: throughout the presentation of its evidence, the Defence laid documents before the Chamber which suggest that the ALC troops were under Central African command. The documents, described by the Defence as “operational orders”, bore the signature of Mr Antoine Gambi, as Chief of Staff of the armed forces. Yet when he took the stand as a witness of the Court, Mr Gambi strenuously objected to the documents and the signature, describing them as “[TRANSLATION] fake”, “[TRANSLATION] forged documents”, and even “[TRANSLATION] crude montages”.⁸⁴ Furthermore, Mr Bemba has just been convicted of offences against the administration of justice,⁸⁵ namely of having corruptly influenced 14 witnesses and having solicited the giving of false testimony by 10 witnesses in the course of defending himself against the war crimes and crimes against humanity in the case *sub judice*.⁸⁶

⁸³ T-173-Conf-ENG, p. 40, line 7; T-134-Conf-ENG, p. 20, line 21; p. 40, line 20 and p. 52, lines 23-24.

⁸⁴ T-353-Conf-FRA, p. 39, lines 6-11.

⁸⁵ ICC-01/05-01/13-1989-Red, “Judgment pursuant to Article 74 of the Statute”.

⁸⁶ *Ibid.*, Part VII and para. 805.

63. From the foregoing, the Legal Representative concludes that the sentence passed will not be the deterrent which the Statute and the international community intended. The Legal Representative refers again to the words of Monseigneur Fridolin Ambongo, spoken at the hearing on the determination of the sentence: “[TRANSLATION] I firmly believe in the International Criminal Court. I wholeheartedly believe that the ICC is an institution which can do a great deal to ensure that there is more justice in the world. **The ICC can deter future dictators.**”⁸⁷

64. Article 77(1) of the Statute provides that the Court may impose on a convicted person imprisonment for a specified number of years, which may not exceed a maximum of 30 years, unless the extreme gravity of the crime and the individual circumstances of said person justify the imposition of life imprisonment. Rule 145(3) makes clear in this regard that “[l]ife imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances”.

65. By handing down only the minimum term of 18 years, the Chamber failed to duly apply the provisions of the aforementioned instruments.

66. For the sentence to be proportionate to the culpability of Mr Bemba and the harm caused to the victims, it must be adjusted upwards.

IN THE LIGHT OF THE AFOREGOING, the Legal Representative of Victims respectfully prays the Appeals Chamber to consider the present observations in adjudging the appeals entered by the Defence and the Prosecution.

[signed]

Ms Douzima-Lawson Marie-Edith

Dated this 23 January 2017,

At The Hague, Netherlands.

⁸⁷ T-368-FRA RT, p. 27, lines 10-17.