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No.: **ICC-01/05-01/13**
Date: **6 February 2018**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Version with Confidential Annex A and Confidential *EX PARTE* Annex B, only available to the Prosecution, Registry, and Bemba Defence

Public redacted version of "Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision", 21 August 2017, ICC-01/05-01/13-2203-Conf

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. Bemba's, Babala's and Arido's appeals against the Sentencing Decision are unwarranted and must be dismissed. They each fail to demonstrate any error materially affecting the decision, so as to render their sentences disproportionately high. Instead, the appellants largely use their appeals as a vehicle to challenge and further express their disagreement with their convictions. Since those arguments are being litigated in their appeals against the Chamber's article 74 Judgment, they should be summarily dismissed in this appeal.[1] The remainder of their arguments also lack merit and should accordingly be dismissed.

2. First, the appellants fundamentally misunderstand the law. For example, Chambers may consider conduct which does not form the basis of a conviction in determining a sentence, so long as the conduct was connected to the crimes for which the person was convicted and was foreseeable, and the convicted person had a reasonable opportunity to address the allegation. Thus, although an article 70(1)(c) offence is consummated by a perpetrator's conduct in corruptly influencing a witness, regardless of whether the witness later falsely testifies, this does not preclude a Chamber from considering any false testimony that ensues to aggravate the sentence for the article 70(1)(c) offence.

3. Second, the appellants fail to show any error in the factors that the Chamber considered in assessing the gravity of the offences, or in determining the aggravating and mitigating factors. They merely disagree with the Chamber's exercise of its discretion. Yet, this is insufficient to reverse the Sentencing Decision.[2] Babala's complaint that [REDACTED] may suffer from his conviction is wholly irrelevant to his sentence. Arido's personal circumstances are common to many convicted persons and do not deserve substantial, if any, weight in mitigation.

[1] *Lubanga* SAJ, para. 49.
[2] *Lubanga* SAJ, paras. 41-46.

Bemba repeatedly and egregiously abused his privileged communications as an ICC defendant. In addition, he—together with the other co-perpetrators and Babala—took steps to frustrate the article 70 investigation. The Chamber correctly considered those factors in aggravation.

4. Further, Bemba's culpability does not merit a lower sentence; to the contrary, his custodial sentence of one year—even considered with the fine—is disproportionately *low*. Bemba ignores the evidence and distorts the facts. His role in the Common Plan was essential. Bemba was both the beneficiary and its mastermind. He planned, authorised and instructed the activities relating to the corrupt influencing of witnesses and their resulting false testimonies.

5. Moreover, the Chamber correctly refused to deduct the period of time that Bemba spent in custody after being served with the article 70 arrest warrant from his sentence in the article 70 case. Since he had already received credit for that time spent in custody in the Main Case, it would be unfair—and inconsistent with the Statute—for him to *again* receive credit for this time in the article 70 case. Nor did the Chamber err when it imposed on Bemba a consecutive sentence to his 18-year sentence in the Main Case. To the contrary, a consecutive sentence was warranted given that Bemba's offences in the article 70 case are distinct from his offences in the Main Case.

6. Finally, the fine imposed on Bemba was not excessive, and the procedure was not unfair. The sentences imposed on Bemba, Kilolo and Mangenda were erroneous only insofar as they failed to adequately reflect the gravity of their offences and the extent of their personal culpability. The appropriate way to remedy this error is not

to reduce Bemba's fine, but to increase Bemba's, Kilolo's and Mangenda's prison sentences as requested in the Prosecution appeal against the Sentencing Decision.[3]

7. In sum, as shown further below, the three appeals should be dismissed.

Level of Confidentiality

8. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis* of the Regulations of the Court, since it refers to confidential information. It also attaches a "Confidential *Ex Parte*" (Prosecution, Registry and Bemba Defence only) Annex B which refers to information bearing the same confidentiality level. The Prosecution will file a public redacted version of this response in due course.

[3] The Prosecution has appealed the sentences of Bemba, Kilolo and Mangenda: *see* Prosecution Sentencing Brief.

II. THE CHAMBER DID NOT ERR, TO HIS DETRIMENT, IN SENTENCING BEMBA

9. Bemba's appeal against his sentence is misconceived and must fail. He shows no error by the Chamber in applying this Court's sentencing framework, under the Statute and the Rules.[4] But, more deeply, his appeal also rests upon a pervasive misunderstanding of—or disagreement with—the basic findings in the Judgment.[5] It clings to the untenable view that Bemba—who even from prison entered into new crimes to escape justice for past ones, enlisting some of his own legal team to do so—played merely a "limited" role in the Common Plan.[6] Bemba's distorted sense of what might constitute a 'proportionate' sentence follows from this abiding misconception.

10. Throughout his appeal, Bemba fails to establish that the errors he claims materially affected the Sentencing Decision, in the sense that they led to a disproportionate sentence as required by article 83(3) of the Statute.[7] His general criticism of the sentence as "vastly disproportionate and unfair",[8] or "manifestly disproportionate",[9] is unsubstantiated. His only concrete argument in this respect—that his sentence is disproportionate to the sentences of his "co-defendants, who had been found to possess a much higher degree of intent and participation"—is plainly contradicted by the Chamber's findings.[10] Bemba possessed no lesser degree of knowledge or intent than his co-perpetrators Kilolo and Mangenda. Just like them, his contribution to the crimes within the framework of the Common Plan was essential. Furthermore, Bemba played an "overall coordinating role" in the

[4] *Contra* Bemba Sentencing Brief, para. 5.
[5] *See* Bemba Sentencing Brief, para. 1.
[6] *Contra* Bemba Sentencing Brief, para. 6.
[7] *Cf.* Bemba Sentencing Brief, para. 6 (asserting that "[t]hese errors, individually or cumulatively, invalidate the overall sentence imposed").
[8] Bemba Sentencing Brief, para. 5.
[9] Bemba Sentencing Brief, para. 170.
[10] *Contra* Bemba Sentencing Brief, para. 42.

scheme[11]—if any of the co-perpetrators was a 'leader', it was him. Kilolo and Mangenda acted in Bemba's interest, with his authority, and with an evident desire to secure his approval.

11. If there is any significant disproportion between Bemba's sentence and the sentences of Kilolo and Mangenda, this only supports the Prosecution's argument that those sentences are too low.[12]

12. Likewise, comparisons with the practice of other tribunals do not avail Bemba.[13] First, and most obviously, this Court operates within its own unique legal framework, including the maximum penalties that are set out for article 70 offences. To the extent that other jurisdictions may differ in some aspects of their approach, such as the scales of fines which might be imposed, this is irrelevant. Second, this case represents an effort to pervert the course of justice at an international court or tribunal unprecedented in its scale, complexity, and audacity. Thus, it cannot be meaningfully compared to any sentence hitherto imposed on charges of contempt.

13. For these and the following reasons, therefore, the Appeals Chamber should dismiss Bemba's appeal against his sentence. It should, moreover, reverse and increase the sentence imposed on Bemba by the Chamber, for the reasons set out in the Prosecution's own appeal.[14]

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[11] Judgment, para. 816. *See also* Prosecution Conviction Response, para. 450.
[12] *See* Prosecution Sentencing Brief.
[13] *Contra* Bemba Sentencing Brief, para. 4.
[14] *See* Prosecution Sentencing Brief.

II.A. THE SENTENCING DECISION IS BASED ON CORRECT AND REASONABLE FINDINGS CONVICTING BEMBA (BEMBA GROUND 2)

14. For the reasons set out in the Prosecution's consolidated response to the appeals against the Judgment, Bemba was convicted properly.[15] The Chamber correctly applied the law, and reasonably made the necessary findings beyond reasonable doubt.

15. If the Appeals Chamber upholds the Judgment, as it should, then Bemba's failed arguments against his conviction cannot warrant "a substantial reduction in penalty".[16] The Chamber's reasoning cannot be 'nearly' wrong, or 'nearly' unreasonable—either Bemba succeeds on appeal, in which case he *may* be entitled to a remedy,[17] or he fails. The situation cannot arise in which the Appeals Chamber agrees that the Chamber failed to make necessary findings beyond reasonable doubt yet leaves those findings "undisturbed".[18] Nor will the Appeals Chamber uphold Bemba's liability as a co-perpetrator yet still reduce his sentence based merely on Bemba's opinion that he was somehow "tenuously" linked to only a "handful" of witnesses.[19]

16. Bemba's alternative claim for relief for the "violations associated with the surveillance of Mr Bemba's communications" is likewise speculative.[20] No such violations have been established.[21] Nor even if they were, *arguendo*, is a reduction in penalty necessarily the appropriate means by which Bemba's right to an effective remedy might be vindicated.

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[15] *Contra* Bemba Sentencing Brief, para. 7. *See* Prosecution Conviction Response.
[16] *Contra* Bemba Sentencing Brief, para. 8.
[17] *See below* para. 18.
[18] *Contra* Bemba Sentencing Brief, para. 8.
[19] *Contra* Bemba Sentencing Brief, para. 8.
[20] *Contra* Bemba Sentencing Brief, para. 9.
[21] *See generally e.g.* Prosecution Conviction Response, paras. 98-106, 109-131.

17. Similarly, although the Prosecution agrees that the Chamber appears to have made a harmless error in the Judgment in describing the *date* of Bemba's multi-party call with D-19,[22] the Sentencing Decision does not replicate the error. It merely refers (correctly) to the fact that Bemba "spoke on the telephone with witnesses, such as D-19 and D-55".[23] Bemba's attempt to recast the Chamber's decision not "to correct the record" as an "abuse of discretion" is overblown.[24] In marked contrast to the facts of the *M.Nikolić* case cited by Bemba,[25] the Chamber in this case appears merely to have taken the reasonable view—as it subsequently expressly explained to the Bemba Defence—that "the factual findings in the trial judgment are final" and a "corrigendum" or similar instrument "may not be used to add or alter the substance" of a trial judgment. Rather, "any alleged factual errors […] must be raised before the Appeals Chamber."[26] This cautious approach does not amount to "knowingly" maintaining findings that are "unfounded",[27] nor does it merit any reduction of sentence. Indeed, in this respect, Bemba incorrectly describes (without reference) the "number of multiparty calls" as "the lynchpin" of his culpability. To the contrary, as the Prosecution has elsewhere explained, Bemba's responsibility was based on a careful, multi-factored analysis.[28]

18. Furthermore, even if the Appeals Chamber were to determine that the Chamber erred in some part of its reasoning leading to Bemba's conviction, this still does not *necessarily* warrant a reduction in sentence. First, the Appeals Chamber should also find, as the Prosecution has argued, that the Chamber erred by

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[22] *See* Prosecution Conviction Response, paras. 462, 517, 536, 559 (Bemba spoke with D-19 on 13 January 2013, rather than 4 October 2012).
[23] Sentencing Decision, para. 220.
[24] *Contra* Bemba Sentencing Brief, para. 10.
[25] *See* Bemba Sentencing Brief, para. 10 (fn. 8: citing *M.Nikolić* SAJ, para. 72). In *M.Nikolić*, the ICTY Appeals Chamber determined that the Trial Chamber had erred by imposing a sentence which took into account its view of the "shock[ing]" and "shameful" nature of the submissions advanced on behalf of the convicted person.
[26] *See* Bemba Conviction Brief, Annex L (e-mail of 19 April 2017 at 16:06).
[27] *Contra* Bemba Sentencing Brief, para. 10.
[28] *See e.g.* Prosecution Conviction Response, paras. 439, 449, 453.

imposing a disproportionately *low* sentence on Bemba.[29] Accordingly, this factor will need to be taken into account. Second, in any event, the Appeals Chamber must also determine independently whether any reduction of sentence is actually warranted, given the nature of the errors in question. For example, errors leading to a revision of the mode of liability do not necessarily warrant a reduction of sentence if the Trial Chamber's findings on the actual conduct of the convicted person, and the seriousness of the resulting crimes, remain undisturbed.[30] Likewise, any reduction in the scope of the crimes (for example, measured by the number of victims) may have only a "limited" impact on the "overall culpability" of the convicted person.[31] Or indeed none at all. Appeals Chambers have sometimes determined that "reduction of the number of victims […] does *not* impact the sentence imposed" given the "extremely grave" nature of the crimes.[32]

19. These same principles apply to crimes under article 5 and article 70 alike. In particular, the conduct proven beyond reasonable doubt in this case—a deliberate, sustained, and organised effort to subvert the outcome of an ICC trial—must be regarded as a very grave example of the conduct prohibited by article 70. The victim of these crimes was not just an individual person,[33] but rather "the Court itself" and the "integrity of its processes, its credibility and its standing". Such conduct has "very far-reaching consequences" which risk "corrod[ing] the rendition of substantive justice" for situations and cases which cumulatively may "involve hundreds or even thousands upon thousands of victims".[34] As such, the offences determined beyond reasonable doubt in this case are no less harmful even if *arguendo* the number of affected witnesses were to vary to some minor degree.

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[29] *See* Prosecution Sentencing Brief.
[30] *See e.g. Milošević* AJ, paras. 333-334.
[31] *Milošević* AJ, para. 335.
[32] *Lukić* AJ, paras. 669-670 (emphasis added). *See also* para. 671 (finding that reversing Sredoje Lukić's convictions for a whole incident, at Uzamnica, still only warranted a 10% reduction of his sentence given the "very serious" nature of the crimes at the Memić house and Omeragić house of which he remained convicted).
[33] *See* Sentencing Decision, para . 19 (referring to the "the victims' right to justice").
[34] *See further e.g.* T-53-RED, 64:8-20.

II.B. THE CHAMBER PROPERLY CONSIDERED BEMBA'S ABUSE OF PRIVILEGED COMMUNICATIONS AND ATTEMPTS TO FRUSTRATE THE ARTICLE 70 INVESTIGATION AS AGGRAVATING CIRCUMSTANCES (BEMBA GROUND 3)

20. Bemba fails to show any legal error in the Chamber's findings that his responsibility for the charged crimes was aggravated by his abuse of the ICC Detention Centre ("ICCDC") facilities for privileged communications,[35] and his attempts to frustrate the article 70 investigation.[36] His claim that these findings amount to a conviction for "uncharged offences" is unconvincing. It appears chiefly to represent an attempt to reargue and develop matters from his appeal against conviction.[37] Notably, although Bemba challenged aspects of the Chamber's reliance on Bemba's abuse of privileged communications (concerning D-19) in ground 2.2 of his appeal against conviction (related to charging),[38] he now introduces the new claim that he was convicted "on uncharged allegations"[39] regarding his attempts to frustrate the article 70 investigation.

21. Bemba's concern about "uncharged offences" is also misguided. It is incontrovertible that his conduct in the incidents in question was *evidence* of the Common Plan to commit the charged offences, and thus was integral to this case and the trial proceedings. There was no obligation upon the Prosecution to bring separate charges in these respects. It would defeat a key aspect of sentencing—the 'individualisation' of the sentence to the responsibility of the convicted person—if the Chamber was nonetheless required arbitrarily to exclude certain trial evidence

[35] Sentencing Decision, para. 236.
[36] Sentencing Decision, para. 238.
[37] *See e.g.* Bemba Sentencing Brief, paras. 12 ("It is […] legally impossible to rely on uncharged circumstances in order to […] convict the defendant"), 18 ("but for the Chamber's erroneous reliance on these allegations in the Trial Judgment, the conviction against Mr Bemba falls away"), 19 ("The Chamber's findings concerning Mr Bemba's contribution to the 'remedial measures' served as the foundation for its conclusions concerning Mr Bemba's *mens rea* and *actus reus*; if removed, the entire conviction falls apart"), 21 ("it was manifestly incorrect to rely on these allegations for the purposes of fulfilling the elements of Article 70"), 22 ("the Defence was prejudiced […] through the Chamber's improper reliance on these allegations in order to convict Mr Bemba"). *See also* Prosecution Conviction Response, paras. 430-437.
[38] *See* Bemba Conviction Brief, paras. 74-92. *See also* Prosecution Conviction Response, paras. 430-437.
[39] *See e.g.* Bemba Sentencing Brief, para. 19.

from its consideration merely because it might potentially form the basis for further criminal charges. Rather, a Trial Chamber follows the correct approach if it applies the framework of the Statute and the Rules to analyse all the evidence presented with reference to the correct factors, and thus impose a proper sentence.

22. As the following paragraphs show, not only is there no legal requirement to charge aggravating factors in the DCC, but Bemba had ample notice of the allegations upon which the Chamber would rely: his abuse of his privileged communications and his attempts to frustrate the article 70 investigation.[40] He had full opportunity to defend himself in these respects.[41]

23. Nothing in the Chamber's reasoning or the Prosecution's submissions shows any flaw in the approach to aggravating factors.[42]

- First, Bemba confuses the distinction made in the Sentencing Decision between factors which qualify the gravity of the crime(s) and other factors which may aggravate or mitigate the sentence to be imposed for conduct of that gravity.[43] As Bemba notes, the Chamber considered it appropriate to address the attempts to frustrate the article 70 investigation in this latter context.[44] Bemba is incorrect to assert that only those factors which might qualify the gravity of the crime can be considered as aggravating factors[45]—indeed, this is entirely contrary to the logic of rule 145.[46] Moreover, in any event, the attempts to frustrate the article 70 investigation were not, strictly

[40] *Contra* Bemba Sentencing Brief, paras. 11, 20, 23.
[41] *Contra* Bemba Sentencing Brief, para. 11.
[42] *Contra* Bemba Sentencing Brief, paras. 13, 16-17.
[43] *See* Bemba Sentencing Brief, paras. 13-14 (quoting Sentencing Decision, para. 208: "the Chamber does not, for gravity purposes, take into account any conduct *after* the act since this cannot *per se* characterise the gravity of the offence as committed at the relevant time. However, the Chamber has considered this factor, if applicable, in the context of the convicted person's culpable conduct").
[44] Sentencing Decision, para. 208.
[45] *Contra* Bemba Sentencing Brief, para. 15.
[46] *See further below* paras. 27-33.

speaking, "conduct *after* the act"[47]—in fact, this conduct occurred while the offences within the Common Plan were continuing.[48]

- Second, the Prosecution's sentencing submissions are crystal clear in supporting the approach taken by the Chamber, and do not remotely suggest that the attempts to frustrate the article 70 investigation should not be weighed in sentencing.[49] To the contrary, the Prosecution stated that taking account of this conduct as an aggravating circumstance is "fully justifiable and warranted",[50] and would not constitute impermissible "double-counting" since it was neither an element of the crimes charged nor characteristic of the gravity of the crimes charged.[51] In this context, it noted that the Chamber in its Judgment had relied upon this conduct by the co-perpetrators as a "purely *evidentiary*" consideration.[52]

II.B.1. Aggravating factors need not be charged in the DCC

24. Bemba rightly concedes that "it is possible to rely on uncharged allegations as part of sentencing (if certain safeguards are complied with)".[53] In this context, the significance of his repeated reference to "uncharged separate offences" is unclear.[54] He also states that:

> Adequate notice means that the Prosecution must set out its intention to rely on such allegations as aggravating factors clearly, and this notice must be

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[47] *See* Sentencing Decision, para. 208, fn. 340.
[48] *See* Prosecution Conviction Response, paras. 445-446. The attempts to frustrate the article 70 investigation largely took place over the two weeks following 11 October 2013, whereas the offences within the Common Plan continued until at least 13 November 2013.
[49] *Contra* Bemba Sentencing Brief, para. 16.
[50] Prosecution Written Sentencing Submissions, para. 88.
[51] Prosecution Written Sentencing Submissions, paras. 89-90.
[52] Prosecution Written Sentencing Submissions, para. 90 (emphasis added). *See also e.g.* Prosecution Conviction Response, paras. 439, 449, 453, 540. *Contra* Bemba Sentencing Brief, para. 17 (alleging that Bemba was convicted "in connection with a common plan to commit uncharged offences, and in connection with his contribution to the execution of uncharged offences").
[53] Bemba Sentencing Brief, para. 12.
[54] *See e.g* Bemba Sentencing Brief, para. 22.

given sufficiently in advance of the sentencing process to enable the Defence to respond in a meaningful manner.[55]

25. On the other hand, Bemba further implies that, in practice, any conduct which may be taken into account as an aggravating factor must in essence be intrinsic to a charged crime, and cannot include conduct which could have been charged as an additional crime. This follows from his claim that the Chamber erred in treating the relevant findings (abuse of privileged communications, and attempts to frustrate the article 70 investigation) as "uncharged separate offences for the purpose of aggravating a sentence".[56]

26. Bemba's view of the law is thus contradictory and, at least in part, mistaken.

27. Rule 145(1)(b) requires that, in determining sentence, the Court shall "consider the circumstances both of the convicted person *and* of the crime" (emphasis added). The Court is required not only to look at the crimes resulting in the conviction (and the offender's conduct in participating in those crimes), but also more generally to consider appropriate circumstances of the offender *beyond* the immediately offending behaviour. This view is confirmed by rule 145(1)(c), which requires the Court to consider the "age, education, social and economic condition of the convicted person".

28. This holistic approach does not apply only in mitigation of sentence: for example, rule 145(2)(b)(i) requires the Court to consider as an *aggravating* circumstance "[a]ny relevant prior criminal convictions", and rule 145(2)(b)(vi) allows for other aggravating circumstances which are "similar" in "nature" such as other forms of relevant bad conduct. In particular, if the criminal conduct of the convicted person *prior* to the charged crimes may be relevant, criminal conduct *after*

[55] Bemba Sentencing Brief, para. 20.
[56] Bemba Sentencing Brief, para. 22.

the charged crimes may equally be relevant. The ICTY Appeals Chamber has, for example, repeatedly upheld *ex post facto* obstruction of justice as an aggravating factor,[57] as did the *Bemba* Trial Chamber in the Main Case.[58] Even the *Rajić* Trial Chamber, which was sceptical of this approach—and whose judgment in this regard was not followed in subsequent ICTY practice, such as *Popović*[59]—conceded that aggravating factors are only "*usually* intrinsically linked to the crimes or the role of the Accused during their commission".[60] Domestic law likewise permits and/or requires reference to such *ex post facto* considerations, whether as part of the gravity of the crime or in the context of the surrounding circumstances.[61]

29. Of course, the circumstances which may permissibly aggravate a sentence for the crime which resulted in conviction are not unlimited. They "must relate to the crimes upon which a person was convicted *and* to the convicted person himself" or

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[57] *See e.g.* *Delalić* AJ, paras. 789-790 (upholding the aggravation of Mucić's sentence based on "witness intimidation" during trial, stating that although such matters "could have been dealt with […] as separate and independent offences", they "were equally pertinent to [the] assessment of Mucić's character and […] his attitude towards the offences" for which he was convicted); *Popović* AJ, paras. 2046-2047 (upholding the aggravation of Miletić's sentence based on obstruction of justice resulting from his conduct in 1999 and 2000, four years after the offences for which he was convicted but prior to his surrender to the tribunal). *See further* *Delalić* TJ, paras. 1216-1217 (noting that "[i]n many civil law jurisdictions, and the United States, almost all information may be considered relevant for this purpose and very little limitation is placed on what the court properly may take into account when imposing sentence", and considering that disruptive behaviour in the courtroom, or contempt of the tribunal, "could constitute aggravating circumstances, though not expressly so recognised, and would be considered in the evaluation of the accused's character"); *Popović* TJ, para. 2199.

[58] *See* *Bemba* SJ, fn. 249.

[59] *See above* fn. 57.

[60] *Rajić* SJ, para. 134 (emphasis added). Notably, even counsel for Mr Rajić had "accept[ed] that Ivica Rajić's wilful actions to abscond from and obstruct justice constitute aggravating circumstances, which may be considered by the Tribunal": para. 131. The *Rajić* Trial Chamber also stated that if *ex post facto* obstruction of justice is not an aggravating factor, it should still be taken into account as a factor limiting the weight (if any) given to mitigating factors: para. 135.

[61] *See e.g.* *Rajić* SJ, paras. 123, 132; England and Wales: Sentencing Guideline (Seriousness), pp. i, 6 (in a publication to which every court in England and Wales "must have regard" under the *Criminal Justice Act 2003*, ss. 170(9) and 172, listing "attempt to conceal or dispose of evidence" as one of "the most important aggravating features with potential application to more than one offence or class of offences"); Canada, Ontario Court of Appeal, *R. v. Teske*, para. 106 ("the appellant's prior domestic assault and his after-the-fact conduct are significantly aggravating features"); Canada, Ontario Court of Appeal, *R. v. Sodhi*, para. 131 (attempts to cover up the crime "amounted to a serious aggravating feature"); Canada, Ontario Court of Appeal, *R. v. W (A.N.)*, para. 73 ("elaborate steps to cover up" the crime, and subsequent refusal to tell the victim's family or the authorities of the location of the victim's body, were "circumstances surrounding the commission of the offence" which could properly be considered "in fixing the period of parole ineligibility"); German Criminal Code, s. 46(2) (requiring consideration to be given to the "circumstances in favour of and against the offender" including "his conduct after the offence"); Italian Criminal Code, arts. 61(1)(8) (recognising the aggravating circumstance of exacerbating the consequences of the crime), 133(2)(3) (providing that the conduct of the accused during and after the crime is a relevant factor in determining the gravity of the crime).

herself.[62] But, as the ICTY Appeals Chamber has explained, and the SCSL Appeals Chamber has agreed, this proviso simply means that an aggravating circumstance must concern something which the convicted person has done or failed to do, such that they may be said to be responsible for it.[63] This includes the *consequences* of the relevant conduct provided they are features "of which an accused is aware or could be expected to foresee and for which it is fair to hold him [or her] responsible".[64] The logic of the ICTY Appeals Chamber in this respect is confirmed by rule 145(2)(b)(iii) and (iv).

30. Similarly, the requirement for an aggravating factor to "relate" to the crime must not be interpreted over-narrowly: it does not necessarily exclude conduct which could be (or even was) charged separately as an offence in its own right, provided it still has a sufficiently proximate link to the crime for which a conviction was entered.[65] Thus, if a person is convicted of a crime which by its nature has an extensive temporal or geographic reach, the temporal or geographic scope of relevant conduct which may aggravate the sentence for that crime may be similarly broad, provided it remains sufficiently connected to the crime. For example, in *Ndindabahizi*, even where the accused had been acquitted of one count of instigating or aiding and abetting genocide (due to lack of sufficient causation),[66] the ICTR Appeals Chamber still upheld an aggravating factor based on the same conduct in

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[62] *Bemba* SJ, para. 18; *Al Mahdi* SJ, para. 73; Sentencing Decision, para. 25. *See also* *Mrkšić* AJ, paras. 386-387; *Kunarac* TJ, para. 850.
[63] *Deronjić* SAJ, para. 124 (further noting that, "for instance, individuals are not held responsible - either for the purposes of conviction or sentencing – for the unforeseeable acts of others involved in carrying out a plan", and that the conduct of another person can also aggravate the sentence if the convicted person had "agreed with it and accepted it"); *Sesay* AJ, para. 1276. These authorities were expressly cited by the *Bemba* Trial Chamber: *see* *Bemba* SJ, para. 18, fn. 59.
[64] *Deronjić* SAJ, para. 124. *See also* *Bemba* SJ, fn. 59 (referring to *Deronjić* SAJ, para 124, as "holding that the use of aggravating factors is justified where they are features of the crime of which an accused is aware or could be expected to foresee and for which it is fair to hold him responsible"). *See also* *Lubanga* SAJ, paras. 90-91.
[65] *See also* *Delalić* AJ, para. 790.
[66] *Ndindabahizi* TJ, para. 474. *See also* *Ndindabahizi* AJ, para. 140.

relation to other counts of genocide, extermination, and murder for which he had been convicted.[67]

31. There is thus no bar in principle to a sentence being aggravated on the basis of "acts and omissions that were part of the same course of conduct or common scheme as the offence of conviction"[68]—provided that there is a sufficient nexus to the convicted person and the requirements of procedural fairness are met. Indeed, this Court has *already* established that there is no requirement to charge aggravating factors in the DCC, provided that the Defence has sufficient notice of the allegations and a reasonable opportunity to respond to them, including by adducing additional evidence under article 76(2) of the Statute.

32. In *Lubanga*, which Bemba does not address, the Trial Chamber held that neither article 76 nor rule 145 limits "the factors that are properly to be considered during sentencing to those described in the Confirmation Decision".[69] Evidence from the trial or penalty phases which "exceed[s] the facts and circumstances set out in the Confirmation Decision" may be relied upon to aggravate the sentence provided "[t]he defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial", and "an

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[67] *See* *Ndindabahizi* AJ, paras. 137-138 (noting that "[t]here is only one genocide that was committed in Rwanda"), 140 (noting that although "the Appellant 'encouraged those at the roadblock [near Nyabahanga Bridge] to kill Tutsi women married to Hutu men'", he was not convicted on this basis because "there was 'insufficient evidence to establish that the [Appellant's] conduct at the roadblocks [sic] directly and substantially contributed to the killing of Tutsi women married to Hutu men, or their children'" but it still considered it as an aggravating factor), 141 ("The Trial Chamber did not impose liability because it found that there was insufficient evidence that the Appellant's words directly and substantially contributed to killings of Tutsi women married to Hutu men, but it did find that the Appellant effectively made statements encouraging such killings. This behaviour could therefore be considered as an aggravating factor"); *Ndindabahizi* TJ, paras. 495, 508(iii). *See also* *Bizimungu* AJ, para. 381 (holding that Bizimungu's omissions with respect to other crimes committed throughout Rwanda could not be considered in aggravation because sufficient notice on the facts of that case had not been given, but otherwise endorsing *Ndindabahizi* that aggravating circumstances may include crimes beyond those for which the accused was convicted), *especially* fn. 1042 ("In reaching this conclusion, the Appeals Chamber recalls that there was only one genocide that was committed in Rwanda between 6 April 1994 and 17 July 1994 and that proven acts in furtherance of this genocide may be considered in aggravation").

[68] *Kunarac* TJ, para. 850.

[69] *Lubanga* SJ, para. 29. The Trial Chamber was unanimous: *see e.g.* Dissenting Opinion of Judge Odio Benito, para. 8.

opportunity to respond to all the submissions and evidence that have been relied on for the purposes of sentence following […] conviction."[70] Although the *Lubanga* Trial Chamber did not ultimately aggravate Lubanga's sentence based on uncharged crimes related to the charged crimes for which he was convicted, this was due only to evidentiary difficulties.[71] It expressly confirmed that "[t]he Prosecution's failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is *not determinative* of the question of whether that activity is a relevant factor in the determination of the sentence."[72]

33. The *Lubanga* Appeal Judgment can only be understood as affirming the *Lubanga* Trial Chamber's approach, of which it was clearly aware.[73] Thus, while the Appeals Chamber rejected on its merits the Prosecution's challenge to the Trial Chamber's approach to the evidence of sexual violence,[74] it recognised that such conduct could in principle be considered an appropriate aggravating circumstance:

> The Appeals Chamber notes that a review of the Sentencing Decision reveals that the Trial Chamber not only considered whether the evidence demonstrated that Mr Lubanga intended or was aware of the alleged aggravating circumstances, but also whether they (i) occurred "in the ordinary course of the crimes for which Mr Lubanga has been convicted" or (ii) could otherwise be attributable to him "in a way that reflects his culpability". Therefore, contrary to the Prosecutor's submissions, absent proof of intent or knowledge, the Trial Chamber would still have had a basis

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[70] *Lubanga* SJ, paras. 29-30. *See also* para. 31.
[71] *Lubanga* SJ, paras. 59, 69, 74-75.
[72] *Lubanga* SJ, para. 67 (emphasis added). *See further* para. 68 ("the Chamber is entitled to consider sexual violence in determining the sentence that is to be passed, notwithstanding the fact that it did not form part of the Confirmation Decision. *Given the procedural safeguards, there will be no consequential unfairness* if the Chamber decides that sexual violence is a relevant factor", emphasis added).
[73] *See e.g. Lubanga* SAJ, paras. 117-118 (dismissing *in limine* Defence arguments in this respect because they were not raised "formally").
[74] *Lubanga* SAJ, paras. 86, 90, 93.

for attributing the aggravating factors to Mr Lubanga, had any element of culpability, covering a broad range of possibilities from objective foreseeability to intent, been established beyond reasonable doubt.[75]

34. Other chambers of this Court have not found it necessary to revisit these questions.[76]

35. Nor is Bemba assisted by the ICTR Trial Judgment in *Semanza*, which is the only authority upon which he relies.[77] First, notwithstanding the Trial Chamber's apparent doubts,[78] this decision acknowledged appellate authority suggesting there is no reason in principle to require that aggravating factors be charged in an indictment.[79] The Trial Chamber merely found—on the facts of that case—that *sufficient notice* of uncharged allegations had not been given.[80] Second, ICTY and ICTR jurisprudence demonstrates more generally that practice on this question is relatively inconsistent, with no clear consensus of opinion.[81] Third, and most

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[75] *Lubanga* SAJ, para. 90.
[76] *See e.g.* *Katanga* SJ, paras. 27, 29, 31; *Bemba* SJ, para. 18; *Al Mahdi* SJ, para. 73.
[77] Bemba Sentencing Brief, para. 20 (citing *Semanza* TJ, paras. 567-570).
[78] *Semanza* TJ, para. 570.
[79] *Semanza* TJ, para. 567 (recalling that the ICTY Appeals Chamber in *Delalić* "allowed that allegations of criminal activity not specifically pleaded in the indictment *may* be considered as aggravating factors when the accused has received sufficient notice, when the Prosecution makes a specific request for a factual finding in relation to the additional crimes, and when these allegations have been proven beyond a reasonable doubt", emphasis added). Indeed, in *Delalić*, the ICTY Appeals Chamber had not rejected the Prosecution appeal (that the Trial Chamber had erred by limiting the number of victims considered in sentencing only to those specified in the indictment) in principle, but simply because the Prosecution had not *actually sought* additional findings on uncharged victims: *see* *Delalić* AJ, paras. 760, 763-764. Moreover, by its reference to the "sufficiency" of notice, and the significance of Prosecution conduct at trial, the Appeals Chamber further implied its view that aggravating factors need not be charged in the indictment: *see* *Delalić* AJ, para. 763 ("The Trial Chamber could not be expected to make findings in respect of matters which had not been specifically put before it, *whether in the Indictment or during the trial*", emphasis added). This is confirmed by the Appeals Chamber's separate endorsement of witness intimidation *during trial* as an aggravating factor, a form of conduct which manifestly could not have been charged in the indictment: *Delalić* AJ, para. 790.
[80] *Semanza* TJ, para. 569.
[81] Thus, one line of authority—which never directly addressed the contrary holding of the ICTY Appeals Chamber in *Delalić*—considers that aggravating factors must be charged in the indictment: *see e.g.* *Simba* AJ, para. 82; *Kunarac* TJ, para. 850. By contrast, another line of authority accepts that sufficient notice may be given at trial, and not just in the indictment: *see e.g.* *Popović* AJ, paras. 2046-2047 (upholding obstruction of justice as an aggravating factor; this factor was not charged in the indictment: *compare* *Popović* TJ, para. 2199, *with* *Popović* Indictment); *Prlić* TJ, Vol. 4, para. 1285 (stating that aggravating circumstances must "be put to the Chamber in the Indictment *and* during trial", emphasis added, but the use of the term "and" in this context, rather than "or", appears to be erroneous); *Popović* TJ, para. 2137 ("[o]nly circumstances which have been put

importantly, the jurisprudence of the *ad hoc* tribunals on this question is situated in their own procedure, which diverges in a key respect from that employed by this Court.

36. Notably, for example, *Semanza* employed a unified trial and penalty phase, with simultaneous filing of the Parties' closing briefs, only limited subsequent opportunity to make submissions, and no further opportunity to call evidence relevant to sentencing.[82] In these circumstances, notice in the Prosecution's *closing brief* (that evidence of uncharged conduct elicited at trial should be used in aggravation) afforded the Defence almost no opportunity to respond. By contrast, as noted in *Lubanga*, such a state of affairs is unlikely to arise at this Court due to article 76(2) of the Statute and the separate penalty phase.[83] Accordingly, even if notice in a final trial brief is insufficient at the *ad hoc* tribunals, the same does not hold true at this Court, where the separate penalty phase and hearing allow the Defence ample further notice and opportunity to respond.

II.B.2. Bemba had early and consistent notice of the allegations that he abused his privileged communications, and attempted to frustrate the article 70 investigation

37. Bemba's claim that he had "insufficient time within which to prepare an effective defence" is empty.[84] He is incorrect to suggest that he was only notified of the content and significance of so-called "specific uncharged allegations"—that he

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specifically before the Trial Chamber, whether in the Indictment *or* during the trial, may be considered in aggravation", emphasis added). Finally, other caselaw simply ignores the question: *see e.g.* *Haradinaj* AJ, paras. 329-331 (dismissing on the merits an argument that an aggravating factor was not alleged in the indictment, but not considering the divergent practice on this question); *Blaškić* AJ, para. 686 (considering both *Delalić* and *Kunarac* but not addressing the question of notice); *Tolimir* TJ, para. 1220 (citing both *Delalić* and *Simba*, but making no reference to the question of notice and acknowledging no contradiction between the two); *Perišić* TJ, para. 1798 (citing *Simba* but making no reference to the question of notice).

[82] *See* *Semanza* TJ, para. 34. The Defence had, however, contested the relevant evidence during trial: *see* para. 568.

[83] *Lubanga* SJ, para. 29.

[84] *Contra* Bemba Sentencing Brief, para. 23.

abused his privileged communications, and attempted to frustrate the article 70 investigation—from the day of the Prosecution's written sentencing submissions.[85]

38. To the contrary, Bemba had early and consistent notice of the allegations. He had ample opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial, and to respond to all the submissions and evidence concerning sentence following conviction.[86] Indeed, not only was Bemba expressly on notice that "conduct constituting offences against the administration of justice under Article 70 of the Statute can qualify as an aggravating circumstance under Rule 145(2)(b)(vi)",[87] but the trial record shows that the Prosecution consistently made the relevant allegations at every stage of proceedings. Thus:

- The Prosecution alleged in its submissions for the confirmation of charges that Bemba and Kilolo circumvented the ICCDC monitoring system, allowing Bemba "to improperly communicate with witnesses" such as D-19,[88] and that "Bemba directed what he believed to be a cover-up of the Common Plan".[89]

- In the Confirmation Decision, the Pre-Trial Chamber noted that the evidence "indicates" that Bemba, through Kilolo, "used the privileged line set up at the Court's detention centre to communicate" with three witnesses including D-19.[90] The Pre-Trial Chamber also referred to some of the conversations

[85] *Contra* Bemba Sentencing Brief, para. 23. *See above* para. 37.
[86] *See above* para. 32.
[87] Sentencing Witnesses Exclusion Decision, para. 11. *See also* Prosecution Sentencing Witness Notice, para. 3 (expressing the view, albeit in the context of a different alleged incident, that *ex post facto* "acts aimed at subverting the course of justice" constitute an aggravating circumstances under rule 145(2)(b)(vi)).
[88] Prosecution Confirmation Submission, para. 66. *See also* fn. 129 (expressly referring to D-19).
[89] Prosecution Confirmation Submission, para. 239. *See also* paras. 235-238, 240-245.
[90] Confirmation Decision, para. 98. *See also* paras. 100-101.

between Kilolo and Mangenda relevant to the attempts to frustrate the article 70 investigation.[91]

- The Prosecution alleged in its Pre-Trial Brief that, "[e]xploiting" the facilities for privileged communication at the ICCDC "in order to conceal the Common Plan, Bemba would initiate a call with Kilolo on one of the numbers designated as 'privileged'" and then "Kilolo would facilitate contact with third parties, including witnesses" such as D-19.[92] Likewise, the Prosecution alleged that "Bemba sought to frustrate the [article 70] investigation and conceal the Overall Strategy" or Common Plan.[93]

- In its Final Trial Brief, the Prosecution again alleged that, "[t]o orchestrate and direct the Overall Strategy's implementation from the [ICCDC], Bemba called third parties through Kilolo by exploiting lawyer-client privilege" and that Kilolo "facilitated Bemba's abuse of the 'privileged line' to organise his direct contact with witnesses, such as D-0055, deliberately violating the applicable Contacts Protocols and TCIII's prohibition of witness proofing."[94] Likewise, the Prosecution alleged that "Bemba […] sought to frustrate the [article 70] investigation and to conceal the Overall Strategy."[95]

- In its brief oral summary of the Judgment, the Chamber expressly affirmed that it had found that Bemba "took measures […] to conceal the common plan, including the exploitation of his privileged line at the [ICCDC] and remedial measures upon learning of the Article 70 investigation".[96] These "remedial measures were conceived and implemented with a view to

[91] Confirmation Decision, para. 69. *See also* para. 104.
[92] Prosecution Pre-Trial Brief, paras. 45-46. *See also* fn. 106 (expressly referring to D-19).
[93] Prosecution Pre-Trial Brief, para. 57. *See also* paras. 58-63.
[94] Prosecution Final Brief, paras. 81, 325. *See also* paras. 71, 83, 274-278, 319 (*especially* fn. 1104: cross-referring to the Prosecution Pre-Trial Brief, fn. 106 (expressly referring to D-19)).
[95] Prosecution Final Brief, para. 289. *See also* paras. 290-316.
[96] T-50, 5:8-11.

frustrating the Prosecution's investigation."[97] The Judgment elaborated extensively upon these findings.

- The Trial Chamber further informed the Parties a month before they made their written sentencing submissions that, in its Sentencing Decision, it would take into account the evidence presented and submissions made during the trial, potentially even including non-evidentiary submissions.[98]

- The Prosecution maintained its arguments concerning Bemba's abuse of his privileged communications, and his attempts to frustrate the article 70 investigation, in both its written and oral sentencing submissions, and argued that they should be taken into account to aggravate Bemba's sentence.[99]

39. Furthermore, neither in his written nor oral submissions during the penalty phase did Bemba argue that he had insufficient notice concerning the Prosecution's submissions on aggravating factors. To the contrary, the trial record shows that he was aware of them from the earliest days of the case.[100] Likewise, at sentencing, Bemba acknowledged that these issues "were a fundamental component of the Chamber's conclusions regarding the existence of a common plan", and merely opposed them as duplicative.[101] No complaint was made either in the specific context of submissions about D-19,[102] or Bemba's attempts to frustrate the article 70 investigation.[103]

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[97] T-50, 8:19-20.
[98] Sentencing Witnesses Decision, paras. 6-7.
[99] Prosecution Written Sentencing Submissions, paras. 64-80; T-53-RED, 65:16-67:18.
[100] *See e.g.* Bemba Confirmation Response, paras. 58, 68, 87, 95.
[101] T-54-RED, 12:9-20.
[102] Bemba Written Sentencing Submissions, para. 18; T-54-RED, 23:18-24:7.
[103] Bemba Written Sentencing Submissions, paras. 60-65; T-54-RED, 26:16-29:4. Nor did Mangenda challenge the Chamber's reliance on this aggravating factor on grounds of insufficient notice: *see* T-54-RED, 67:21-69:16.

II.B.3. The Chamber did not err in referring to Bemba's conversation with D-19 as one example of his abuse of his privileged communications

40. In finding that Bemba's abuse of his privileged communications was an aggravating factor, the Chamber relied on the evidence that Bemba "spoke with Main Case Defence Witnesses, such as D-55 and D-19," and "Mr Babala".[104] It also expressed the view that it was an "abuse[]" of "the privileged line" for Bemba to "discuss with Mr Kilolo and Mr Mangenda the furtherance of the common plan and to give related instructions."[105]

41. As the Prosecution has noted in its response to Bemba's appeal against the Judgment, the Chamber appears to have made a harmless error concerning *the date* of Bemba's illicit telephone conversation with D-19.[106] This error does not materially affect either the Judgment or the Sentencing Decision. The timing of the conversation does not alter the fact that it was improper, nor in any event was the conversation with D-19 the sole or decisive basis for the Chamber's finding of the aggravating factor.

42. Bemba mistakes the Chamber's reasoning when he complains that the illicit conversation with D-19 "shed[s] no light on the gravity of the conduct that occurred beforehand",[107] suggesting that the Chamber had relied upon this incident "as part of its assessment of the degree of Mr Bemba's participation in the charged offences".[108] To the contrary, although the Chamber did recall that Bemba had *spoken* with D-55 and D-19 in assessing his participation in the Common Plan and as an accessory to the offence of giving false testimony,[109] it did *not* consider in this context that the conversations also constituted an abuse of his privileged

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[104] Sentencing Decision, para. 236.
[105] Sentencing Decision, para. 236.
[106] *See e.g.* Prosecution Conviction Response, para. 462.
[107] Bemba Sentencing Brief, para. 26.
[108] Bemba Sentencing Brief, para. 25.
[109] Sentencing Decision, paras. 220, 222.

communications. By contrast, it only mentioned this aspect of the conversations in the section of the Sentencing Decision concerned with aggravating circumstances. These are distinct considerations. Thus, it was the mere *fact of the conversations* (by whatever means) which was material to the Chamber's assessment of the degree of Bemba's participation in his crimes; by contrast, it was the *illicit means* of the conversations which was material to the Chamber's assessment of aggravating factors. In both instances, just like the Chamber's approach in the Judgment,[110] reference to Bemba's conversation with D-19 was *evidence* of Bemba's broader conduct material to the charges. Nothing in this approach was erroneous.

43. For these same reasons, Bemba can show no error in the Chamber's approach to his sentencing submissions. In the context of the Chamber's observation that "the Bemba Defence, to a great extent, re-litigates the merits of the case by challenging the Chamber's interpretation and legal characterisation of the facts", it was not inappropriate for the Chamber to adopt the general view that "[t]he appropriate forum in which to challenge the Judgment is the Appeals Chamber."[111] Since the harmless error with regard to D-19 can have no appreciable impact on the outcome of the Sentencing Decision, nor can the Chamber's reluctance to re-engage with this question have any material impact. Bemba's preference for the Chamber to have taken a different approach is immaterial.

II.C. THE CHAMBER DID NOT IMPERMISSIBLY "DOUBLE COUNT" AGGRAVATING FACTORS (BEMBA GROUND 4)

44. Bemba fails to show that the Chamber impermissibly "double counted" aggravating factors in the Sentencing Decision.

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[110] *Contra* Bemba Sentencing Brief, para. 24 (referring to the "*ultra vires* character of the allegations concerning D-19", and asserting that "[a]lthough D-19 was not one of the 14 witnesses, and was not listed as falling within the charged incidents, the Chamber relied on allegations pertaining to contact between Mr Bemba and D-19 to establish Mr Bemba's culpability in the Trial Judgment").
[111] Sentencing Decision, para. 228. *See also* para. 233.

45. Bemba is correct that this Court may neither "double count" factors considered in assessing the gravity of the crime with aggravating factors, nor elements essential to the convictions (pertaining to the charged crime(s) and mode(s) of liability) with aggravating factors.[112] In the former respect, chambers have a measure of discretion which 'label' they assign to a factor, provided they only consider it once.[113] In the latter respect, since the factor *must* be considered in conviction, it is simply impermissible as an aggravating factor for that crime or mode of liability.

46. For example, the Court may legitimately consider the cruel manner in which a murder was committed (not an element of the crime) *either* as a question of the gravity of the crime or as an aggravating factor (provided it does so only once)—but it may *never* consider the fact that the victim died (an element of the crime) as an aggravating factor. Appeals of such questions require analysis of the relevant finding of the Trial Chamber in its full context, and close attention to the reasoning underlying both conviction and sentence.[114] Moreover, a technical error in this respect may not necessarily warrant a reduction of sentence.[115]

47. Bemba is wrong to suggest that the Chamber took an "overly narrow" view of these principles.[116] To the contrary, the Chamber expressly referred to both aspects.[117] Nor in any event is it necessarily erroneous even if the Chamber did not spell these principles out in full[118]—for example, the *Lubanga* and *Katanga* Trial Chambers adopted a concise approach.[119] Nothing in the Sentencing Decision

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[112] Bemba Sentencing Brief, para. 27. *See e.g.* *Bemba* SJ, para. 14; *Al Mahdi* SJ, para. 70. *See further* *Đorđević* AJ, para. 936; *Milošević* AJ, para. 306; *Blaškić* AJ, para. 693.
[113] *See e.g.* *Hadžihasanović* AJ, para. 317 ("[a]though gravity of the crime and aggravating circumstances are two distinct concepts, Trial Chambers have some discretion as to the rubric under which they treat particular factors"); *Vasiljević* AJ, para. 157.
[114] *See e.g.* *Milošević* AJ, para. 309; *Nzabonimana* AJ, para. 464; *Nyiramasuhuko* AJ, paras. 3356, 3385-3387.
[115] *See e.g.* *Milošević* AJ, para. 336.
[116] *Contra* Bemba Sentencing Brief, para. 27.
[117] Sentencing Decision, paras. 23, 25. *See also* paras. 55, 133, 181.
[118] By analogy, *see e.g.* *Deronjić* SAJ, para. 106 (noting that the Trial Chamber had referred to one principle of the prohibition of "double-counting" but not the other, yet reasoning on appeal that "it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting").
[119] *See e.g.* *Lubanga* SJ, para. 35; *Katanga* SJ, para. 35.

suggests that in practice the Chamber misapplied the law, or double-counted any aggravating factors.[120] Bemba shows nothing to the contrary.[121]

II.C.1. The Chamber did not "double count" Bemba's abuse of his privileged communications (Bemba Ground 4.1)

48. Bemba's complaint that the Chamber "double counted" his abuse of his privileged communications is based on a mistaken premise: this finding did not "underpin[] the Chamber's conclusions regarding [his] *actus reus* and his *mens rea*".[122] The Chamber adequately reasoned the Decision. No further clarification was required.[123]

49. Bemba confuses *evidence* relied upon in the Judgment with *findings essential to his conviction*, either as elements of the charged crimes or modes of liability. Proof of the "measure[s] taken to conceal witness interference" and the Common Plan, such as Bemba's abuse of his privileged communications, is neither required by article 70 (elements of the crime) or articles 25 and 30 (elements of modes of liability). Although this *evidence* indirectly supported and was consistent with findings essential for conviction, there is no bar to such matters being taken into account in sentencing.

50. For example, in a murder case, evidence that the perpetrator tortured the victim may well be relevant to the determination that the perpetrator killed the victim. But this does not mean that, having convicted the perpetrator only for murder (the killing), the sentence may not be aggravated based on the torture.

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[120] *Contra* Bemba Sentencing Brief, para. 28.
[121] *Contra* Bemba Sentencing Brief, paras. 24-26. *See e.g.* *Deronjić* SAJ, para. 107 ("With respect to the alleged errors concerning each specific aggravating factor, the Appellant must demonstrate that the Trial Chamber impermissibly double-counted the factor in question and considered it within the context of the gravity of the offence as well").
[122] *Contra* Bemba Sentencing Brief, para. 29.
[123] *Contra* Bemba Sentencing Brief, para. 30.

II.C.2. The Chamber did not "double count" Bemba's attempts to frustrate the article 70 investigation (Bemba Ground 4.2)

51. Bemba makes a similar mistake concerning the Chamber's reliance on his attempts to frustrate the article 70 investigation as an aggravating factor.[124] This conduct was integral neither to the objective nor the subjective elements essential for his conviction. Bemba fails to show that the Chamber erred in reaching this conclusion—mere reference to the transcript of his sentencing submissions, or those of Mangenda (without even a page reference), does not suffice.[125] Nor was the Chamber's reasoning inadequate—it was not obliged to provide express reasoning for every legal argument raised by the Parties.[126]

52. As the Prosecution noted in its Response Brief, the Common Plan was characterised not only by the commission of the crimes themselves but the need to do so in *secrecy*.[127] Although evidence of contributions to maintaining this secrecy was thus highly probative of intentional participation in the Common Plan (and thus the crimes),[128] this conduct largely did not directly *contribute* to the crimes themselves.[129] Indeed, as already noted, this conduct took place only when a number (but not all) of the witnesses had already testified.[130] The mere fact that both the Sentencing Decision and the Judgment refer to the same incident does not mean that the incident necessarily forms part of the very conduct for which Bemba is

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[124] *Contra* Bemba Sentencing Brief, para. 34. *See also* paras. 12, 21.
[125] Bemba Sentencing Brief, para. 31.
[126] *Contra* Bemba Sentencing Brief, para. 31.
[127] *See e.g.* Prosecution Conviction Response, paras. 455, 460, 484, 523; Judgment, para. 819 ("It was critical for the success of such a plan that this influence on the witnesses be concealed, as their testimony would otherwise lose all credibility").
[128] *See e.g.* Prosecution Conviction Response, para. 439.
[129] Judgment, paras. 815-816. The Trial Chamber did, however, find generally that "[a]uthorising, ensuring and/or implementing measures to conceal the common plan" formed part of Bemba's essential contribution: *see e.g.* Prosecution Conviction Response, para. 449. *See also* para. 453 (considering the attempts to frustrate the article 70 investigation as one factor among others in determining Bemba's *mens rea*).
[130] *See above* fn. 48.

convicted[131]—which is the essence of the harm which the prohibition of "double counting" is designed to avert.

II.C.3. The Chamber did not "double count" the advantage taken by Bemba of his position (Bemba Ground 4.3)

53. Bemba likewise fails to show that the Chamber engaged in "double counting" when it considered "the fact that Mr Bemba took advantage of his position as long-time and current President of the MLC".[132] Nothing in the Sentencing Decision suggests that this consideration was the same as Bemba's "use of his position as a 'non-monetary promise'" or the exercise of influence in the sense of soliciting false testimony,[133] which merely means *asking* or *urging* witnesses to testify falsely. As the Chamber expressly stated:

> Following the ordinary meaning of the notion 'solicitation', the Chamber is of the view that the perpetrators *asks* or *urges* the physical perpetrator to commit the criminal act. It *does not presuppose that the accessory is in a certain relationship with the physical perpetrator* of the offence(s).[134]

54. It was thus Bemba's mere *asking* or *urging* which constituted the *actus reus* of soliciting false testimony,[135] and also formed a small part of Bemba's overall contribution to the Common Plan.[136] Exploitation of personal status, although nonetheless highly probative for that conduct, was not legally required for a

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[131] *Contra* Bemba Sentencing Brief, para. 34.
[132] Sentencing Decision, para. 234. *See also* Bemba Sentencing Brief, para. 35.
[133] *Contra* Bemba Sentencing Brief, paras. 36-37 ("The Chamber therefore erred by relying on Mr Bemba's supposed use of his position as a 'non-monetary promise' […] the Chamber found that Mr Bemba exerted indirect influence […] and direct influence").
[134] Judgment, para. 75 (emphasis added). *See also* para. 853 ("the Chamber concludes that Mr Bemba *asked*, either personally or through Mr Kilolo, the 14 Main Case Defence witnesses to give false testimony", emphasis added).
[135] *See* Judgment, paras. 853.
[136] Indeed, the Chamber largely omitted even to refer to this aspect of Bemba's contribution in its conclusions as to his essential contribution to the Common Plan: *see e.g.* Prosecution Conviction Response, para. 449; Judgment, paras. 808-819.

conviction based on "soliciting".[137] Thus, a person entirely lacking in personal status, or unwilling to exploit their personal status, is no less able to commit crimes under article 5 or offences under article 70.

55. Consistent with this approach, the Chamber relied upon *evidence* that showed Bemba sought to take advantage of his prominent position but only to make the narrower finding that he *asked* or *urged* the witnesses to testify falsely.[138] It was not Bemba's "position" which constituted the "improper element" of this conduct, because the Chamber characterised this conduct merely as "soliciting"—what was improper was thus the mere asking of witnesses to testify falsely.[139] When analysed correctly, there is no duplication between the conduct underlying Bemba's convictions (asking witnesses to testify falsely) and the conduct underlying the additional consideration noted in sentencing (taking advantage of Bemba's position of prominence).[140]

II.D. THE CHAMBER PROPERLY DETERMINED THE DEGREE OF BEMBA'S CULPABILITY, AND GAVE ADEQUATE REASONS (BEMBA GROUND 5)

56. The main purpose of a separate penalty phase of a trial is two-fold:

- to avoid the Parties making speculative submissions on possible sentences before the predicate question of guilt or innocence is decided; and

[137] This may be distinct from "inducing" and "ordering": *see* Judgment, paras. 76 ("Compared to the form of liability of 'soliciting', the concept of 'inducing' represents a stronger method of instigation. The element of exertion of influence by the accessory over the physical perpetrator is not required when the accessory simply 'solicits', *i.e.* asks for, the commission of the criminal act"), 77 ("[soliciting and inducing] can be distinguished from 'ordering' liability […] insofar as they do not require the perpetrator to hold a position of authority *vis-à-vis* the physical perpetrator […] 'ordering' liability reflects the strongest form of influence over another person").
[138] Bemba Sentencing Brief, paras. 37-38. *See also* para. 39.
[139] *Contra* Bemba Sentencing Brief, para. 40.
[140] *Contra* Bemba Sentencing Brief, para. 40.

- to allow the Chamber to receive additional submissions or evidence on matters which are only relevant to sentencing, to consider together with the submissions and evidence from trial as well as its own findings.[141]

57. This does not mean that the penalty phase even *allows*, much less requires, the Chamber to reopen those matters which it has already adjudicated in the Judgment.

58. Consistent with these principles, the Chamber noted that "the goal of the Bemba Defence argumentation" in sentencing appeared to be "to re-litigate the merits of the Judgment", and determined that such questions were "properly raised before the Appeals Chamber" and "cannot be taken into account for the purposes of this decision."[142] Bemba's approach on appeal is not dissimilar.[143]

59. This principled position taken by the Chamber did not constitute an abuse of discretion.[144] The Chamber did not abdicate from the principle of individual responsibility, or its duty to consider the degree of Bemba's participation in and intent for the offences of which he was convicted.[145] But in accordance with the principle of *res judicata* it could—and did—discharge its sentencing duties within the framework of the findings it had already made in the Judgment, supplemented by any additional submissions or evidence presented by the Parties. Nothing obliged it to re-open matters which it had already decided beyond reasonable doubt. This did not mean that that the Chamber restricted the content of Bemba's sentencing submissions—indeed, Bemba makes no showing of this—nor that it

[141] *See also* Bemba Sentencing Brief, paras. 45-47.
[142] Sentencing Decision, para. 225. *See also* paras. 228, 233; *above* para. 43.
[143] *See also above* paras. 14-19.
[144] *Contra* Bemba Sentencing Brief, para. 41.
[145] *Contra* Bemba Sentencing Brief, para. 43. Bemba's reference to the caselaw of the *ad hoc* tribunals concerning the standard of contribution to joint criminal enterprise is, however, inapposite in the context of article 25(3)(a), which imposes a higher standard and thus permits much less variation: *contra* para. 44.

failed at least to *consider* his submissions, and to measure them against the evidence and the existing findings.[146]

60. Bemba merely disagrees with the Sentencing Decision, including those aspects based upon the Chamber's findings in its Judgment. Although he maintains the "minimal nature" of his culpability, and thus asserts that the sentence imposed upon him is "vastly disproportionate", these claims are not supported by the Judgment.[147] His attempt to cloak this disagreement by claiming the Chamber closed its eyes to the "specific inflection[s]" he sought to place on the "remarkably abstract" findings in the Judgment is unconvincing.[148] At heart, this ground of appeal is merely based on a claim of inadequate reasoning—that the Sentencing Decision "fails to reflect […] evidence and arguments" which Bemba thinks it should have included.[149] This claim must fail.

61. The Chamber was only required to reason with "sufficient clarity", and was not obliged to address every witness, piece of evidence, or argument.[150] The ten considerations merely listed by Bemba—simply repeating his arguments from trial—do not show that the Sentencing Decision or the Judgment were inadequately reasoned.[151] Bemba's claim that these considerations "significantly differentiate[] the degree" of his "culpability and participation" as determined in the Judgment is self-serving and incorrect, and does not develop any error.[152] Thus:

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[146] *Contra* Bemba Sentencing Brief, para. 45.
[147] *Contra* Bemba Sentencing Brief, para. 42.
[148] *Contra* Bemba Sentencing Brief, paras. 48-50.
[149] *See* Bemba Sentencing Brief, para. 51.
[150] *See Lubanga* Redactions AD, para. 20; *Gbagbo* Provisional Release AD, para. 48; Judgment, para. 196; *Bemba* TJ, para. 227. *See further Tolimir* AJ, para. 53; *Popović* AJ, para. 305; *Perišić* AJ, paras. 9, 95; *Hadžihasanović* AJ, para. 13; *Kvočka* AJ, para. 23; *Kunarac* AJ, para. 41; *Kalimanzira* AJ, para. 195. *See also* Sentencing Decision, para. 42 (stressing that "the present decision must be read in conjunction with the Judgment" and that the Chamber would not "set out in detail every factor considered, especially if it accords no or minor significance thereto").
[151] *See* Bemba Sentencing Brief, para. 51.
[152] *Contra* Bemba Sentencing Brief, para. 52.

- Bemba claims that he relied upon the advice of his Defence team concerning the calling of witnesses,[153] yet the Chamber found on the evidence that Kilolo and Mangenda generally "sought authorisation and approval" *from Bemba*, and that Bemba was closely involved in determining who would testify;[154]

- Bemba claims that his instruction to contact Defence witnesses was the product of a "genuine belief" that the *Prosecution* had violated article 70,[155] yet the Chamber found on the evidence that Bemba "adopted a series of remedial measures *to frustrate the Article 70 investigation*";[156] and

- Bemba claims, variously, that he could not make "informed decisions",[157] or "appreciate the distinction between the legitimate and illegitimate witness payments",[158] or "focus on witness testimony" in material respects[159]—arguments expressly noted in the Sentencing Decision.[160] Yet the Chamber found on the evidence that Bemba "*intended to engage* in the relevant conduct and […] *acted with full awareness*"[161] and that his role was not "that of a by-stander lacking awareness".[162]

62. Bemba also fails to credit the Chamber even when it (partially) agreed with him. Thus, he states that his involvement in the offences was essentially

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[153] Bemba Sentencing Brief, para. 51(i).
[154] *See e.g.* Sentencing Decision, paras. 219-222; Judgment, paras. 806, 816. *See also* Prosecution Conviction Response, paras. 449-450.
[155] Bemba Sentencing Brief, para. 51(ii).
[156] Sentencing Decision, para. 238 (emphasis added). *See also* Judgment, para. 820; Prosecution Conviction Response, paras. 439, 453.
[157] Bemba Sentencing Brief, para. 51(iii)-(iv).
[158] Bemba Sentencing Brief, para. 51(v). *See also* Sentencing Decision, para. 227 (expressly acknowledging this argument). *See further above* para. 44 (Chambers have some discretion in considering a given matter either as part of the gravity of the charged offences or in mitigation).
[159] Bemba Sentencing Brief, para. 51(vi).
[160] *See e.g.* Sentencing Decision, para. 224 (noting Bemba's argument concerning "the limited nature of the Chamber's findings concerning [his] intent").
[161] Sentencing Decision, para. 226 (emphasis added). *See also* paras. 220-222; Judgment, paras. 817-820; Prosecution Conviction Response, paras. 453, 470, 481, 484, 486, 488.
[162] Sentencing Decision, para. 228.

"passive",[163] and that there was no "nexus" between his acts and the false testimony of the witnesses.[164] But the Chamber expressly acknowledged these arguments in considering "mitigating circumstances",[165] recognised that his "actual contributions […] to the implementation" of the Common Plan were "somewhat restricted" due to his detention, and gave "some weight" to this fact.[166] Yet it refused to accept that his role was "passive" because this was inconsistent with the evidence "as explained in the Judgment."[167]

63. Furthermore, the Chamber did not convict Bemba based on "implicit knowledge" but on his actual knowledge, proven inferentially.[168] As such, the concept of "implicit knowledge"—which Bemba himself states is not a meaningful one[169]—could not affect his sentence.[170]

64. Nor does comparison with Mangenda assist Bemba.[171] For both of them, the Chamber gave "some weight" to the manner in which they provided their essential contributions to the Common Plan.[172] But this does not mean that the Chamber simplistically determined that physical absence from the "scene of witness coaching" automatically led to a reduction in culpability.[173] Bemba's appellate arguments again merely disagree with the findings in the Judgment concerning his knowledge and contributions, without even attempting to show that the

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[163] Bemba Sentencing Brief, para. 51(vii)-(viii).
[164] Bemba Sentencing Brief, para. 51(x). *See also* para. 51(ix).
[165] Sentencing Decision, para. 227. *See also above* para. 44 (Chambers have some discretion in considering a given matter either as part of the gravity of the charged offences or in mitigation).
[166] Sentencing Decision, para. 223. *But see* para. 228 (reiterating that, "in spite of his status as a detainee," Bemba "nevertheless had an authoritative role in the organisation and planning of the offences and was directly involved in their commission"); Judgment, paras. 727, 805, 816 (noting that Bemba nonetheless played "an overall coordinating role"). *See also* Prosecution Conviction Response, paras. 450, 473-474.
[167] Sentencing Decision, para. 228.
[168] *Contra* Bemba Sentencing Brief, para. 52. *See* Prosecution Conviction Response, paras. 436, 482-485.
[169] *See* Prosecution Conviction Response, para. 483.
[170] *Contra* Bemba Sentencing Brief, para. 52.
[171] *Contra* Bemba Sentencing Brief, para. 53.
[172] *See* Sentencing Decision, paras. 123-124 (Mangenda), 223 (Bemba). *See also above* para. 62.
[173] *Contra* Bemba Sentencing Brief, para. 53.

conclusions of the Chamber were unreasonable.[174] Even though he recognises the Chamber's findings that he played a leading role in the Common Plan,[175] he nonetheless insists that they must be meaningless and therefore that the Chamber provided no answer to his claim that his responsibility was minimal.[176]

65. The truth is simple. The Chamber found in the Judgment that Bemba fully participated in and played an overall coordinating role in the Common Plan, which was carried out for his benefit and with his full intent and knowledge. In sentencing, although the Chamber gave a fair hearing to Bemba's renewed arguments, it properly declined to revisit the findings it had already made beyond reasonable doubt, and provided adequate reasons for this conclusion. This discloses no error.

II.E. THE CHAMBER PROPERLY IDENTIFIED AGGRAVATING FACTORS AND OTHER RELEVANT CIRCUMSTANCES (BEMBA GROUND 6)

66. Bemba's further claims of legal and factual error in the Chamber's determination that he abused his privileged communications, and took advantage of his position, cannot succeed. The Chamber rightly took these considerations into account in the Sentencing Decision.

II.E.1. The Chamber did not err in law or fact in finding that Bemba's abuse of his privileged communications was an aggravating circumstance

67. The Chamber correctly considered that Bemba's abuse of his privileged communications falls within rule 145(2)(b)(vi). Nor was it unreasonable or unfair in finding that Bemba had done so.

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[174] *Contra* Bemba Sentencing Brief, paras. 53-54.
[175] Bemba Sentencing Brief, para. 55 (noting that the Chamber "employed language which implied that Mr Bemba was at the apex of criminal responsibility"). *See also* Prosecution Conviction Response, paras. 450, 473-474; *above* fn. 166.
[176] *See e.g.* Bemba Sentencing Brief, paras. 54-56.

68. The Chamber correctly determined that Bemba's abuse of his privileged communications is a circumstance which, "by virtue of [its] nature", is "similar" to the factors in rule 145(2)(b)(i) to (v), and hence constitutes an aggravating circumstance in the meaning of rule 145(2)(b)(vi).[177] Bemba shows no error in this conclusion, either with respect to the "gravity" or the "content" of the circumstance.[178]

69. In particular, Bemba must fail in his assertion that "abuse of […] privilege" cannot meaningfully be compared to "abuse of power or official capacity" in rule 145(2)(b)(ii).[179] Debating whether legal professional privilege is a "right" as opposed to a "benefit or special power" is beside the point.[180] The privilege is not absolute, since it can for example be pierced when it becomes instrumental to further a crime or fraud.[181] However, given the difficulties inherent in *detecting* those rare occasions when the mantle of legal professional privilege is claimed for illicit purposes, the practical operation of this concept depends principally on the integrity of its users: accused persons and their counsel. Accordingly, just like abuse of power, legal professional privilege invests a degree of public trust in its holders—to act lawfully and responsibly even in circumstances where society cannot exercise direct powers of supervision.[182] Imposing an appropriate sanction for violating that trust—by treating it as an aggravating factor under rule 145(2)(b)(vi)—is a necessary, reasonable, and proportionate response to grave conduct. Indeed, violating the trust inherent in legal professional privilege imperils this important aspect of criminal justice as a whole.

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[177] *Contra* Bemba Sentencing Brief, para. 57. *See* Sentencing Decision, paras. 235-236.
[178] *Contra* Bemba Sentencing Brief, paras. 59, 63.
[179] *Contra* Bemba Sentencing Brief, para. 64.
[180] *Contra* Bemba Sentencing Brief, para. 65.
[181] *See e.g.* Prosecution Conviction Response, para. 111.
[182] *See also* Prosecution Written Sentencing Submissions, paras. 64-66.

70. In this context, Bemba's assertion that he could not have abused privilege if he "had not been held in pre-trial detention" is doubtful.[183] Indeed, the logical corollary of such a position would mean that an ICC defendant at liberty *could not claim* legal professional privilege over any communications with counsel. This is not correct.

71. It is of course true that the Court's *facility* for privileged communications is part and parcel of the operation of the ICCDC, in the sense that special measures have to be put in place to *enable* detained persons to have privileged communications, and that such measures are unnecessary for persons at liberty. But these practical arrangements are not dispositive of the scope of legal professional privilege itself. This confuses form with substance.

72. In any event, since Bemba *was* in the ICCDC at the material times, this speculation is irrelevant.

73. Likewise, Bemba's suggestion that his specific conduct was an "insufficiently serious" abuse of his privileged communications is also flawed.[184]

74. As previously noted, the Chamber found that Bemba abused privilege by speaking with witnesses D-55 and D-19, and Babala,[185] while placing calls which were logged only as being to his counsel, Kilolo.[186] The Chamber also considered that it was an abuse for him to use communications with members of his Defence team, Kilolo and Mangenda, for the furtherance of the Common Plan.[187] Bemba's arguments confuse this reasoning. Nor indeed was it "a clear legal error" for the Chamber to consider not only that Bemba abused his privileged communications by

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[183] *Contra* Bemba Sentencing Brief, para. 65.
[184] *Contra* Bemba Sentencing Brief, para. 68.
[185] Sentencing Decision, para. 236.
[186] *See above* para. 40. *See also e.g.* Prosecution Conviction Response, paras. 460-462, 515-517, 522, 536-539.
[187] Sentencing Decision, para. 236.

using them to speak with unentitled persons (*i.e.* persons other than counsel, co-counsel, and assistants to counsel) but also by using them for illicit purposes (*i.e.* in furtherance of a crime or fraud).[188] The Chamber did not "conflate" these distinct issues, but merely recognised that they are both facets of the same general principle.[189] Thus:

- Bemba's dispute about the *content* of his communications with Babala is simply beside the point.[190] In this respect, the abuse identified by the Chamber was simply that Bemba could not properly claim the mantle of privilege for such communications with Babala, using a number the Chamber found to be registered to Kilolo.[191]

- Bemba's challenge to abuse of privilege in any relevant conversations with Mangenda is equivocal and does not address the core aspects of the Chamber's finding.[192] Nor does it show any material impact on the Sentencing Decision: the Chamber's reference to Mangenda is so peripheral to its findings on abuse of privilege that, even if erroneous, it would not affect the sentence imposed.[193] Thus:

    - Bemba's claim that the Chamber found Bemba abused privilege "by speaking to Mr Mangenda on Mr Kilolo's number" is not the only possible reading of the Sentencing Decision, which makes no express statement to this effect.[194] The Chamber did conclude in the Judgment that Mangenda had access to, and at least on 30 August 2013

[188] *Contra* Bemba Sentencing Brief, para. 83.
[189] *Contra* Bemba Sentencing Brief, para. 83.
[190] *Contra* Bemba Sentencing Brief, paras. 67-68.
[191] Sentencing Decision, para. 236. *See also* Judgment, paras. 738-739; Prosecution Conviction Response, para. 539.
[192] *Contra* Bemba Sentencing Brief, paras. 69-70.
[193] *See also* Bemba Sentencing Brief, para. 70 (maintaining that communications between Bemba and Mangenda were still protected by "Defence confidentiality", even if not privileged).
[194] *Contra* Bemba Sentencing Brief, para. 69.

conducted a call on, a landline telephone [REDACTED] that was registered as a privileged contact (in Kilolo's name) for Bemba.[195] However, although Bemba made frequent privileged calls to that same number,[196] he did not call it on 30 August 2013.[197]

- Since Mangenda was not registered as a privileged contact for Bemba at the ICCDC,[198] the Sentencing Decision can only be read to find that Bemba "abused the privileged line to discuss with *Mr Kilolo and Mr Mangenda*", jointly, "the furtherance of the [C]ommon [P]lan".[199] In other words, the Chamber contemplated circumstances in which Mangenda was party to privileged discussion with Bemba *by virtue of Kilolo's presence or otherwise in connection with Kilolo*. Notably, Bemba himself allows for the "possibility" of contacts with Mangenda in privileged calls to Kilolo.[200]

- In these circumstances, where Bemba was entitled to privilege in his dealings with Kilolo (and Mangenda, provided they were together), and unlike his contacts with D-55, D-19, or Babala, it was the

[195] Judgment, para. 600 (finding that Mangenda, using this number, spoke to Kilolo on 30 August 2013).
[196] Bemba called this number 431 times in 2010-2011 (*see* CAR-OTP-0074-0064), 166 times in 2012 (*see* CAR-OTP-0074-0065), and at least 78 times in January to August 2013 (*see* CAR-OTP-0074-0066, CAR-OTP-0074-0078).
[197] *See* CAR-OTP-0074-0078.
[198] *See* CAR-OTP-0074-0067 (not listing Mangenda among Bemba's privileged contacts). *See also* Judgment, para. 737 ("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 Mr Kilolo *but also with Mr Mangenda and Mr Babala, and other individuals not entitled to legal privilege*", emphasis added); Bemba Sentencing Brief, para. 70 (recognising the possibility that "Mangenda was not entitled to speak to Mr Bemba on the privileged line"). *See further* *Bemba* Abuse of Process Decision, para. 61 (recalling that "the Court's legal framework only affords privilege to (i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel, as referred to in Regulation 68"); Mangenda Calls Decision, paras. 4-6, 8; Prosecution Conviction Response, para. 136.
[199] Sentencing Decision, para. 236 (emphasis added).
[200] Bemba Sentencing Brief, para. 70.

prohibited *content* of those communications—in furtherance of the Common Plan—which amounted to an abuse.[201]

- Bemba's complaint about the Chamber's finding concerning his abuse of privilege in speaking with D-55 via a multi-party call with Kilolo is likewise misdirected.[202] Whether or not there is a "general prohibition or restriction" on ICC defendants contacting witnesses,[203] witnesses are not entitled to legal professional privilege. Thus, the Chamber did not aggravate Bemba's sentence in this regard because he spoke to a witness, but because he spoke to a witness *in the course of a confidential conversation* that was only permitted with certain persons, such as his counsel.[204] Nor indeed does Bemba even address in this context the additional "violation of the orders of Trial Chamber III prohibiting witness preparation".[205]

75. Bemba's assertion that abuse of privileged communications is "typically addressed and disciplined as separate detention infractions" is irrelevant.[206] First, as Bemba himself notes, the detention regime does not sanction detainees for misuse of the ICCDC communication facilities, but only imposes measures designed to terminate and/or limit such misuses when they are detected.[207] Second, Bemba has not been subject to a disciplinary measure in the sense of regulation 206 of the Regulations of the Registry, and so recognising his abuse of privilege as an aggravating circumstance does not amount to disciplining him twice.[208] Third, Bemba fails to provide any substantiation for his claim that recognising this

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[201] Sentencing Decision, para. 236. *See further below* para. 77.
[202] *Contra* Bemba Sentencing Brief, paras. 71-72.
[203] Bemba Sentencing Brief, para. 71.
[204] Sentencing Decision, para. 236 ("circumventing the Registry's monitoring regime").
[205] Sentencing Decision, para. 236.
[206] *Contra* Bemba Sentencing Brief, para. 74.
[207] *See* Bemba Sentencing Brief, para. 75 (referring to Regulations of the Registry, regulation 175).
[208] *Contra* Bemba Sentencing Brief, paras. 76, 78.

aggravating circumstance violates "due process" or the "principle of legality".[209] To the contrary, Bemba has had the benefit of full argument at trial, and in this appeal, with all the due process protections of this Court. Moreover, it must necessarily have been obvious to him—if nothing else, by the express procedures established at the ICCDC for privileged communications—that he was engaging in misconduct when he spoke to persons other than his counsel in such communications. Rule 145 provides ample notice that such circumstances may be relevant in determining the penalty for any crimes of which a person is convicted.

76. The fact that Kilolo may also share in responsibility for abusing privileged communications does not exonerate Bemba.[210] Nor is the domestic practice of some national jurisdictions relevant.[211] Indeed, Bemba offers no support for his view that "there was no duty on the part of Mr Bemba" to limit his privileged communications to matters arising from the privileged relationship.[212] Although Counsel may indeed be expected to have the expertise and responsibility to ensure that such communications do not stray inadvertently from the proper path,[213] this is not the same as saying that the defendant is wholly excused for repeated conversations in which the defendant and Counsel connive together to defy the rules and, notably, to commit various crimes. Bemba does not show that the Chamber did not "differentiate[]" between the "degree of culpability" of Bemba and Kilolo in this respect, if indeed this was warranted.[214]

77. Bemba's assertion that "communications between Mr Kilolo and Mr Bemba were predominantly related to the preparation of the case" is unsupported by any evidence, and can only be understood as merely disagreeing with the reasonable

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[209] *Contra* Bemba Sentencing Brief, para. 77. *See also* para. 82.
[210] *Contra* Bemba Sentencing Brief, paras. 79, 84, 88.
[211] *Contra* Bemba Sentencing Brief, para. 87.
[212] *Contra* Bemba Sentencing Brief, para. 80. *See also* para. 82.
[213] Bemba Sentencing Brief, para. 81.
[214] *Contra* Bemba Sentencing Brief, para. 88.

findings of fact in the Sentencing Decision and Judgment.[215] The Chamber expressly found that Bemba "issued directions and instructions to the other convicted persons",[216] and that Kilolo, among others, "sought authorisation and approval" from Bemba "for their respective criminal conduct".[217] In these circumstances, the Chamber reasonably found beyond reasonable doubt that Bemba must have abused his privileged communications by discussing matters in furtherance of the Common Plan with Kilolo.[218]

II.E.2. The Chamber did not err in law or fact in finding that Bemba took advantage of his position, and that this was a relevant circumstance

78. The Chamber reasonably found that Bemba took advantage of his position, and correctly considered this a relevant circumstance under rule 145(1)(b). Again, Bemba shows no error in either respect.[219]

II.E.2.a. The Chamber reasonably found that Bemba had taken advantage of his position

79. Bemba fails to show that the Chamber's finding that Bemba had taken advantage of his position was "not supported by any evidence in this case", or that it was otherwise unreasonable.[220]

80. The Chamber found that "Bemba took advantage of his position as long-time and current President of the MLC *to the extent specified*"—referring to Bemba's exploitation "of his position as long-time and current MLC President when he talked to D-55", and the "non-monetary promises" given to witnesses such as D-3 and D-6.[221] In this context, the Chamber recalled that "the power held by Mr Bemba

[215] *Contra* Bemba Sentencing Brief, para. 86.
[216] Sentencing Decision, para. 219. *See also e.g.* para. 220; Judgment, paras. 806, 808-813, 816, 818-819.
[217] Sentencing Decision, para. 219.
[218] *Contra* Bemba Sentencing Brief, para. 86.
[219] *Contra* Bemba Sentencing Brief, para. 89.
[220] *Contra* Bemba Sentencing Brief, paras. 90, 103.
[221] Sentencing Decision, para. 234 (emphasis added). *See also* Bemba Sentencing Brief, para. 95.

was also acknowledged by D-55 who considered Mr Bemba to be a powerful man."[222]

81. The Chamber did not find that Bemba exercised "power […] *vis-à-vis* the witnesses" as an aggravating circumstance in the meaning of rule 145(2)(b)(ii), but only that he "took advantage of his position" as a "relevant factor" in assessing his overall circumstances under rule 145(1)(b).[223] Consequently, the "specific position of Mr Bemba in the MLC" and "the role of the MLC" were not material to the Chamber's finding,[224] nor was the question whether he "misused" this power.[225] Instead, what mattered was the way he "took advantage" of his position with regard to the three particular witnesses in question. This was not limited to the giving of "directions", "orders", "directives", "or similar forms of positive conduct."[226]

82. Bemba is incorrect to assert that "no evidence underpinned" the finding that D-55 was promised that he would benefit from Bemba's "good graces".[227] As the Prosecution has already explained, although the Chamber omitted the precise citation, this finding was based on evidence that Kilolo had promised D-55 "would benefit from Mr Bemba's good graces".[228] In this context, Bemba's intervention to thank D-55 before his appearance at the Court—which he went to some effort to do covertly—was reasonably found to have been made "with the intention of motivating D-55 to give specific testimony".[229] Given D-55's further evidence that he

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[222] Sentencing Decision, para. 234.
[223] Sentencing Decision, para. 234.
[224] *Contra* Bemba Sentencing Brief, paras. 91-94.
[225] *Contra* Bemba Sentencing Brief, para. 100. *See further below* paras. 84-88.
[226] *Contra* Bemba Sentencing Brief, para. 94.
[227] *Contra* Bemba Sentencing Brief, para. 97. *See* Judgment, para. 301.
[228] *See* Prosecution Conviction Response, para. 558 (especially fn. 2126, citing Judgment, paras. 283, 286, 289-290, 301). Concerning the promise, *see* CAR-OTP-0074-0872-R03, p. 0878 ("*Lors de son séjour à Amsterdam […] Kilolo lui a assuré que Bemba le traiterait bien*").
[229] *See* Judgment, paras. 298, 305; Prosecution Conviction Response, paras. 244, 515. *Contra* Bemba Sentencing Brief, para. 96.

saw Bemba as a powerful man,[230] the Chamber thus also reasonably found that Bemba took advantage of his position.[231] Even if *arguendo* none of these pieces of evidence sufficed in isolation, they most certainly did in combination.[232]

83. Likewise, the Chamber also reasonably found that Bemba's position "played a role" in the non-monetary promises given by Kilolo to witnesses.[233] Specifically, the Chamber found that, with the aim of ensuring that their testimonies were favourable to Bemba, Kilolo promised D-3 (prior to testifying) that Bemba would meet him individually in Kinshasa, once released.[234] He made the same promise to D-6 (after testifying).[235] Bemba does not show that the Chamber was unreasonable to find that this tacit reference to Bemba's influence was done on his behalf and with his knowledge,[236] given the broader findings that:

- Bemba "was in control of the payment scheme";[237]
- the witnesses were coached on matters including the need to testify falsely about payments and non-monetary benefits received from the Main Case Bemba Defence;[238]
- the co-perpetrators, including Bemba, "agreed to pay witnesses or to offer them non-monetary assistance", and that "Kilolo implemented Mr Bemba's instructions with Mr Mangenda's assistance";[239]

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[230] Sentencing Decision, para. 234.
[231] *Contra* Bemba Sentencing Brief, para. 98.
[232] *Contra* Bemba Sentencing Brief, para. 99.
[233] Sentencing Decision, para. 234. *Contra* Bemba Sentencing Brief, para. 101.
[234] *See e.g.* Judgment, para. 692. *See also* Bemba Sentencing Brief, para. 101.
[235] Judgment, para. 692. *See also* Bemba Sentencing Brief, paras. 101-102.
[236] *Contra* Bemba Sentencing Brief, paras. 101-102.
[237] Judgment, para. 703.
[238] Judgment, paras. 704, 733, 808.
[239] Judgment, para. 801.

- notwithstanding the absence of "direct evidence" about Bemba's knowledge of instructions to testify falsely on the 'non-merits' issues (falsehoods relating to the witnesses' prior contacts with the Defence, payments they received and/ or were promised, and their acquaintances with certain persons), the only reasonable inference was that Bemba "knew about these instructions to the witnesses and expected Mr Kilolo to give them";[240] and

- Bemba solicited, directly or indirectly, the witnesses' false testimony in this respect.[241]

II.E.2.b. The Chamber correctly considered that 'taking advantage' of a personal position is a relevant factor under rule 145(1)(b) and (c)

84. The Chamber correctly determined that "relevant factors" in the meaning of rule 145(1)(b) are not limited to those in rule 145(2)(a) and (b).[242] This follows logically from rule 145(1)(c)—which Bemba ignores—which states expressly that "[i]n addition to the factors mentioned in article 78, paragraph 1" (which are the gravity of the crime(s) and the individual circumstances of the convicted person), the Court shall:

> give consideration, *inter alia*, 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 crimes; 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 conditions of the convicted person.

[240] Judgment, para. 818.
[241] Judgment, para. 852.
[242] *Contra* Bemba Sentencing Brief, paras. 104, 106, 109.

85. As the Appeals Chamber has emphasised, this is "a *non-exhaustive* list of additional factors".[243] Notably, therefore, rule 145(1)(b) requires the Court to "balance"—as Bemba stresses[244]—these factors with those listed in article 78(1) and rule 145(2). This is exactly what the Chamber did.[245]

86. It follows, as the Chamber found, that Bemba's conduct in taking advantage of his position *vis-à-vis* D-55, D-3, and D-6—whether directly or indirectly—was relevant to several rule 145(1)(c) factors including "the nature of the unlawful behaviour and the means employed to execute the crimes", "the degree of [Bemba's] participation", and "the circumstances of manner, time and location".

87. Furthermore, the Chamber did not state that it would give weight to this finding, either to aggravate or mitigate Bemba's sentence, but only said that it would "consider the fact".[246] It then reported that it had duly taken this matter "into account".[247]

88. For all these reasons, Bemba fails to show any error materially impacting the Sentencing Decision in the Chamber's analysis. The express reference to relevant considerations in rule 145(1)(c) makes his argument concerning article 23 inapposite—there is no risk of arbitrary punishment.[248] Nor was there any lack of notice: the Prosecution's reliance on Bemba's position was clear,[249] and the wording of rule 145(1)(c) readily accessible.[250]

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[243] *Lubanga* SAJ, paras. 32-33 (emphasis added; quoted at Bemba Sentencing Brief, para. 107).
[244] Bemba Sentencing Brief, paras. 105, 107-108.
[245] Sentencing Decision, paras. 21-22. *See also Bemba* SJ, para. 13.
[246] Sentencing Decision, para. 234.
[247] Sentencing Decision, para. 248. *But see also* Prosecution Sentencing Brief, para. 157 (concerning the lack of clarity in the weight that the Chamber attributed to these "overall circumstances".
[248] *Contra* Bemba Sentencing Brief, para. 111.
[249] *See e.g.* Bemba Sentencing Brief, para. 93; Prosecution Written Sentencing Submissions, para. 52.
[250] *Contra* Bemba Sentencing Brief, para. 116.

II.F. THE CHAMBER RELIED ON RELEVANT FACTORS IN ASSESSING GRAVITY (BEMBA GROUND 7)

89. In determining the gravity of the crimes, the Chamber did not rely on "factors that were not known to Mr Bemba" or which "did not otherwise concern the manner in which Mr Bemba committed the charged offences."[251] To the contrary, the lengthy duration of the Common Plan, the number of witnesses, and the means by which the crimes were committed were all properly taken into consideration. This was consistent with article 78(1) of the Statute and rule 145(1)(b) and (c), including such factors as the "extent of the damage caused", "the means employed", and the circumstances of "time".

90. The Common Plan crystallised at least by the time that P-20 (D-57)'s testimony was arranged,[252] which could have been no later than 17 October 2012,[253] and continued until at least 13 November 2013.[254] Accordingly, the Common Plan was at least some 13 months in duration; exactly how much further back in time it extended in 2012 is not expressly determined in the Judgment. It was in this context therefore that the Sentencing Decision referred to the "prolonged" and "lengthy" period over which the crimes in the Common Plan were committed, and described this as "almost two years".[255] It further noted in this regard:

> the earliest meeting of one of the co-perpetrators with witnesses D-2, D-3, D-4 and D-6 in Douala in February 2012 and the last contact with D-13 who testified last in the Main Case in November 2013 […].[256]

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[251] *Contra* Bemba Sentencing Brief, para. 125.
[252] Judgment, paras. 103, 802. *See also* Prosecution Conviction Response, paras. 416, 452.
[253] *See* Judgment, para. 246.
[254] *See* Prosecution Conviction Response, para. 446 (citing Judgment, paras. 615-653, 656-667).
[255] Sentencing Decision, para. 209.
[256] Sentencing Decision, para. 209, fn. 341.

91. Bemba's challenge to the Chamber's approach must fail. First, he fails to substantiate his claim that the Chamber placed "so much weight" on the duration of the Common Plan in determining the gravity of his offences.[257] This is not stated in the Sentencing Decision which, in contrast, sought to balance a range of factors in making this determination.[258] It is also inconsistent with his claim that the Chamber placed "significant weight" on the number of witnesses subject to interference.[259] Second, he fails to show that the Chamber was unreasonable in noting the date of the earlier (February 2012) meeting which might be relevant to the duration of the Common Plan.[260] Third, in any event, even if the Chamber was unhelpful or even in error to use the particular phrase "almost two years", the Sentencing Decision and the Judgment as a whole make clear that the Chamber properly grasped the duration of the Common Plan. Even if the Common Plan lasted only 13 months—the minimum possible duration on the Chamber's findings—the Chamber was *still* correct to characterise it as being "prolonged" and "lengthy". As such, Bemba fails to show how his arguments materially affect the Sentencing Decision.

92. Bemba's further claim that the duration of the Common Plan was dependent upon the duration of the trial, and hence out of his control, is unpersuasive.[261] The Chamber was evidently aware that the Common Plan was perpetrated in the context of Bemba's own criminal trial, and its comment on the duration of the Common Plan—with all its implications for the resolve and determination of the co-perpetrators—was necessarily made with that awareness.

93. Further reinforcing the correctness of the Chamber's approach was its reference to the number of witnesses who were subject to interference as part of the Common Plan. This demonstrates that the Chamber was correctly apprised of the

[257] *Contra* Bemba Sentencing Brief, para. 120.
[258] *See* Sentencing Decision, paras. 247-248.
[259] Bemba Sentencing Brief, para. 121.
[260] *Contra* Bemba Sentencing Brief, para. 119.
[261] *Contra* Bemba Sentencing Brief, para. 122.

scale of the Common Plan. Bemba is incorrect to describe the Chamber's reference to both the number of witnesses affected and the duration of the Common Plan as "double-counting", since *both* these factors are expressly set out in rule 145(1)(c).[262] Consistent with rule 145(1)(b), however, such factors must be "balanced", as the Chamber did,[263] and given their cumulative nature clearly do not, and did not, serve to artificially 'inflate' the gravity of Bemba's offences. Rather, this analysis is a holistic assessment.

94. Likewise, the Chamber's reference to the "means employed to execute the crime[s]" was not erroneous, but consistent with rule 145(1)(c). Bemba shows nothing in the Sentencing Decision which suggests that this factor was balanced incorrectly.[264] He shows no error in the Chamber's assessment of his degree of participation,[265] which clearly served to address his concerns about the relationship between the "means employed" and his personal "knowledge or conduct".[266] He simply disagrees with the Chamber's legal and factual findings concerning his contribution to the Common Plan as a whole, and wrongly insists that he is required to make "substantial contributions to illicit conduct concerning each of the 14 witnesses".[267] Although the Prosecution considers that such a conclusion is open on the Chamber's findings, nonetheless this is not what is required, provided that Bemba made an essential contribution to the crimes within the context of the Common Plan, with the necessary *mens rea*. This he did.[268]

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[262] *Contra* Bemba Sentencing Brief, para. 121.
[263] Sentencing Decision, paras. 247-248.
[264] *Contra* Bemba Sentencing Brief, para. 124.
[265] Sentencing Decision, paras. 218-226. *See above* paras. 56-65.
[266] *Cf.* Bemba Sentencing Brief, para. 124.
[267] *Contra* Bemba Sentencing Brief, para. 123.
[268] *See e.g.* Prosecution Conviction Response, paras. 416, 451-454, 477-480.

II.G. THE CHAMBER DID NOT ERR BY EXCLUDING MITIGATING FACTORS (BEMBA GROUND 8)

95. The Chamber did not abuse its discretion[269] by rejecting Bemba's claimed mitigating circumstances. Bemba fails to show any error, and his arguments should be dismissed.

II.G.1. Bemba's status as a "detained defendant" (Bemba Ground 8.1)

96. Bemba argues that the Chamber should have mitigated his sentence because of his claimed "vulnerability as a defendant standing trial in a criminal case, who relied on and acted through counsel appointed by the Court".[270] Yet the Chamber acted reasonably in refusing to treat this as a mitigating factor,[271] nor in any event does there seem to be any sound evidentiary basis for the claim. Bemba was not, as he suggests, a victim who was "fed […] false information" by Kilolo and Mangenda.[272] Bemba's meritless argument[273] that there was "clear evidence" that he was victimised by Kilolo and Mangenda is based on equally meritless submissions Bemba made before the Chamber.[274] As the Chamber recalled in dismissing Bemba's argument, Bemba intended to engage in the relevant conduct and acted with full awareness of the commission of the offences.[275] Far from being a victim, Bemba "exercised an overall coordinating role over the illicit activities of the co-perpetrators" by "planning, authorising and instructing the activities relating to the corrupt influencing of witnesses and their resulting false testimonies."[276]

97. It was unnecessary for the Chamber to "differentiate between [Bemba's] duties to the Court as opposed to those of his Counsel", to "examine whether […] [court]

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[269] *Lubanga* SAJ, paras. 43, 111.
[270] Bemba Sentencing Brief, para. 129.
[271] Sentencing Decision, paras. 227-228.
[272] *See* Bemba Sentencing Brief, paras.131-134.
[273] Bemba Sentencing Brief, para. 133.
[274] *See* Bemba Sentencing Brief, para. 133, fn. 178.
[275] Bemba Sentencing Brief, para. 226.
[276] Judgment, para. 806.

orders were directly applicable to [Bemba]", or to address Bemba's arguments on these matters expressly in the Sentencing Decision.[277] Bemba's sentencing arguments were an attempt to relitigate the merits of his conviction, which does not depend on whether any single court order was applicable to him personally.[278] Bemba's responsibility is based on evidence showing that he "deliberate[ly] and conscious[ly] plann[ed] and organis[ed] […] activities relating to the commission of the offences".[279]

98. The Chamber did not err by refusing to mitigate Bemba's sentence on the basis of any alleged impact that [REDACTED].[280] The portions of Dr. Korzinki's statement which Bemba refers to are incapable of showing [REDACTED]. As Dr. Korzinski confirmed, he prepared a [REDACTED] report, which was not disclosed due to [REDACTED].[281] Just at it was at trial, the Prosecution's position is that it is misleading for Bemba to rely on Dr. Korzinski's statement given that it does not set out his conclusions [REDACTED] or detail the underlying [REDACTED] rationale.[282]

99. Bemba's claim that he was deprived of an adequate opportunity to address the Prosecution's concerns relating to Dr. Korzinski is unjustified.[283] There was ample opportunity to do so at the sentencing hearing, but Bemba chose not to.[284] Furthermore, the Chamber did not reject Bemba's request to call Dr. Korzinski in person because Bemba never made such a request.[285] When notifying the Chamber that he intended to submit Dr. Korzinski's evidence during the sentencing phase,

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[277] *Contra* Bemba Sentencing Brief, paras. 138, 141.
[278] *Contra* Bemba Sentencing Brief, paras. 139-140.
[279] Sentencing Decision, para. 226. *See also* Judgment, para. 806.
[280] Sentencing Decision, paras. 227-228. *Contra* Bemba Sentencing Brief, paras. 129, 142-146.
[281] CAR-D20-0007-0271 at 0281.
[282] CAR-D20-0007-0271 at 0282-0283. *See also* Prosecution Written Sentencing Submissions, para. 122.
[283] Bemba Sentencing Brief, paras. 147-148.
[284] *See* T-54-CONF, 3:2-36 :12.
[285] *Contra* Bemba Sentencing Brief, para. 149.

Bemba indicated that Dr. Korzinski was willing to testify in person "if required."[286] The Chamber subsequently found that Bemba's request to submit Dr. Korzinski's "evaluation in writing [was] reasonable".[287]

100. Bemba claims there are "[REDACTED]" which shows that [REDACTED] "[REDACTED]".[288] Yet all that Bemba refers to are vague snippets of his defective arguments before the Chamber and [REDACTED].[289]

II.G.2. Alleged violations of Bemba's rights to privacy and family life (Bemba Ground 8.2)

101. Bemba claims that violations of his rights to privacy and family life justified mitigation,[290] but the Chamber reasonably rejected these arguments because Bemba never established[291] that he suffered any violation of these rights. Bemba's complaint[292] that the Chamber's decision was unreasoned should be dismissed as well. It was unnecessary for the Chamber to expressly address such a wholly inadequate Defence argument.[293]

102. Bemba also refers to alleged disclosure violations which he claims justify a reduction in his sentence.[294] However, what Bemba neglects to say is that the matter to which he refers relates to the disclosure of article 70 material under rule 77 *in the Main Case*, a technical breach which was found to occasion him no prejudice.[295] The Chamber acted reasonably in refusing to treat such a circumstance as mitigating in this case.

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[286] Bemba Response to Sentencing Calendar Directions, para. 2.
[287] Sentencing Witnesses Decision, para. 12.
[288] Bemba Sentencing Brief, para. 150.
[289] *See* Bemba Sentencing Brief, para. 150, fn. 200
[290] Bemba Sentencing Brief, paras. 151-152.
[291] *See* Bemba Written Sentencing Submissions, para. 136.
[292] Bemba Sentencing Brief, para. 151.
[293] *See above* fn. 150.
[294] Bemba Sentencing Brief, para. 152.
[295] *See Bemba* Prosecution Response to Request for Leave to Reply, para. 13 (cited in Bemba Written Sentencing Submissions, para. 70).

103. Bemba argues speculatively that his Defence team had insufficient training to know that what they were doing was wrong[296]—this argument should, again, be rejected. It is of no assistance to Bemba to compare his circumstances to those of Jelena Rašić. While Rašić was found not to "have been the original instigator of the broader criminal conduct of procuring false evidence",[297] Bemba's role entailed "planning, authorising and instructing the activities relating to the corrupt influencing of witnesses and their resulting false testimonies."[298] Nor are the "difficult circumstances" Bemba claims to have operated in while he co-perpetrated and solicited article 70 offences even remotely comparable to the difficult circumstances taken into account as mitigating circumstances in the *Orić*, *Hadžihasanović* and '*Čelebići*' cases.[299] Ultimately, all Bemba does is repeat his trial argument without showing how the Chamber erred in its Sentencing Decision.[300]

II.G.3. Bemba's "non-reliance" on the corrupted Defence witnesses and his "contributions" towards his legal fees (Bemba Grounds 8.3 and 8.4)

104. The Chamber did not err in refusing to treat Bemba's non-reliance on the corrupted Defence witnesses, or his payment towards his Defence costs in the Main Case, as mitigating factors.[301] As the Chamber appropriately observed, Bemba's conduct in both instances was extraneous to the present case.[302] Furthermore, Bemba's decision not to rely on the corrupted witnesses came only after his attempt to frustrate the article 70 investigation and after he had been served with an arrest warrant for the article 70 offences.[303] Bemba's conduct was not an act of cooperation

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[296] Bemba Sentencing Brief, paras. 167-168.
[297] *Rašić* SJ, para. 19.
[298] Judgment, para. 806.
[299] *Contra* Bemba Sentencing Brief, para. 168. *See* *Orić* TJ, paras. 767-772; *Hadžihasanović* TJ, para. 2081; *Delalić* TJ, paras. 1245, 1248.
[300] *See* Sentencing Decision, paras. 229-230.
[301] *Contra* Bemba Sentencing Brief, paras. 160-166.
[302] Sentencing Decision, paras. 241-242.
[303] Bemba's decision not to rely on the 14 witnesses was reported in his Main Case Closing Brief which was filed on 25 August 2014 (*see* *Bemba* (Main Case) Closing Brief, paras. 14-16). Bemba received the article 70 arrest warrant on 23 November 2013 (*see* Sentencing Decision, para. 251). *See also* Judgment, paras. 770, 773-778, 782-796, 801 addressing Bemba's role in obstructing the Prosecution's article 70 investigation.

and it deserved no mitigation.[304] Similarly, when an accused pays their Defence costs, this is not an act of cooperation for the purposes of sentencing, it is a reflection of the accused's non-indigent status.[305] Bemba's attempt[306] to draw a parallel between an accused's payment of their defence costs and compensation given to victims should be rejected.

II.H. BEMBA DESERVES A CUSTODIAL SENTENCE IN ADDITION TO HIS FINE (BEMBA GROUND 9)

105. The Chamber did not err by sentencing Bemba to a term of imprisonment. Far from being excessive, the one year sentence imposed by the Chamber was manifestly inadequate.[307] Although Bemba argues that the Chamber was required "to consider a custodial sentence as a sanction of last resort",[308] there is no such requirement at this Court given the serious crimes prosecuted here.[309] Likewise, since article 70 offences are inseparably linked to the fair and independent adjudication of the very serious crimes under this Court's jurisdiction, they too may be reasonably and proportionately punished by a custodial sentence.[310] Furthermore, Bemba's position that a custodial sentence was unnecessary in his case is based on his persistent failure to acknowledge the gravity of his offences against the administration of justice at this Court and the degree of his participation and intent.[311]

106. Indeed, Bemba's offences were "undoubtedly grave", had "far-reaching consequences" and "undermine[d] the Court's discovery of the truth and impede[s]

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[304] *Contra* Bemba Sentencing Brief, para. 163.
[305] *Contra* Bemba Sentencing Brief, paras. 164-166.
[306] Bemba Sentencing Brief, para. 166.
[307] *Contra* Bemba Sentencing Brief, para. 170.
[308] Bemba Sentencing Brief, para. 171.
[309] To support his defective assertion regarding such a requirement, Bemba merely cites a *Lubanga* interlocutory appeal decision concerning the application of article 60(2), and his own sentencing submissions before the Chamber: Bemba Sentencing Brief, fn. 259. *See also below* para. 121.
[310] *See also below* fn. 326.
[311] Bemba Sentencing Brief, paras. 179-182.

justice for victims."[312] Bemba and his co-perpetrators contaminated "almost half of the witnesses presented in the Main Case" over a "prolonged time period."[313] His offences were "extensive in scope, planning, preparation and execution" and were carried out with a "degree of sophistication".[314] The gravity of Bemba's offences is no less merely because the false testimony he solicited from witnesses and presented to the Court concerned credibility-related issues.[315] Bemba's reference to a statement by a Canadian court in the context of a single-accused perjury case is incapable of demonstrating otherwise.[316] The ability to assess witness credibility accurately and without interference 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 a witness' testimony. Bemba's offences impaired the Chamber's ability to carry out these crucial functions.

107. Furthermore, far from having played a "restricted" role in implementing the Common Plan, and having possessed an "extremely attenuated form of *mens rea*",[317] Bemba's role was essential. He was the Common Plan's beneficiary and the archetypal leadership figure who "plann[ed], authoris[ed] and instruct[ed] the activities relating to the corrupt influencing of witnesses and their resulting false testimonies."[318] Kilolo, Mangenda and Babala sought Bemba's permission to carry out their respective criminal conduct.[319] Bemba also controlled the purse strings of the criminal scheme, and with his authorisation, Kilolo and Babala illegally paid the witnesses.[320] "Without [Bemba's] authoritative influence […], the witnesses would

[312] Sentencing Decision, paras. 19, 204, 210, 214.
[313] Sentencing Decision, paras. 205-206, 209, 211, 213, 215.
[314] Sentencing Decision, paras. 208, 212, 216.
[315] *Contra* Bemba Sentencing Brief, para. 180. *See* Prosecution Sentencing Brief, paras. 75-101.
[316] *See* Bemba Sentencing Brief, para. 180 (citing *R v. Hedderson* (featuring an accused who committed perjury by lying about his prior criminal offences during an interim release hearing)).
[317] Bemba Sentencing Brief, para. 181.
[318] Sentencing Decision, para. 219.
[319] Sentencing Decision, para. 219.
[320] Judgment, paras. 689-703.

not have testified untruthfully before Trial Chamber III."[321] Bemba deserved a far greater punishment than the one year of imprisonment which the Chamber imposed on him.[322]

108. Bemba's other arguments challenging the imposition of a sentence of imprisonment should be dismissed:

- The comparison Bemba draws with contempt judgments issued by the *ad hoc* Tribunals does not advance his argument given the gravity of his offences and his culpability.[323] In any event, as Bemba acknowledges,[324] custodial sentences have "generally [been] reserved for fact scenarios which involved interference with witnesses", which is the type of case here.

- The Chamber was not wrong to focus on the principles of retribution and deterrence over rehabilitation in guiding its determination that a term of imprisonment was appropriate for Bemba.[325] In arguing otherwise, Bemba ignores relevant jurisprudence from the ICC[326] and the *ad hoc* tribunals.[327] Although Bemba refers to the *GAA* Trial Judgment which described "the goals of retribution, deterrence, rehabilitation, and the protection of society",[328] he ignores the further clarification that "it is […] necessary for

[321] Sentencing Decision, para. 222.
[322] *See e.g.* Prosecution Sentencing Brief, paras. 4, 9-141, 49-54.
[323] *See* Bemba Sentencing Brief, para. 172.
[324] Bemba Sentencing Brief, para. 172.
[325] *Contra* Bemba Sentencing Brief, paras. 183-186.
[326] It has been recognised that rehabilitation cannot play a predominant role at the ICC given the gravity of the crimes under the Statute: *Al Mahdi* SJ, para. 67; *Bemba* SJ, para. 11; *Katanga* SJ, para. 38. The same logic applies to article 70 offences due to their inseparable link with article 5 crimes and the detrimental consequences the former have on the discovery of the truth in the latter: Sentencing Decision, para. 19.
[327] *Kabashi* SJ, para. 317; *Marijačić* TJ, para. 46; *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; *Nshogoza* TJ, para. 216; *Bangura* SJ, paras. 73, 78, 83, 88-89; *Senessie* SJ, paras. 15-22; *Prince Taylor* SJ, paras. 53-55; *Al Khayat* SJ, para. 15; *Akhbar Beirut* SJ, para. 15. *See* Prosecution Sentencing Brief, paras. 145-146.
[328] *GAA* TJ, para. 8.

general deterrence and denunciation to be given high importance in sentencing policies."[329]

- Bemba's references to rules and jurisprudence applicable to domestic sentencing practices do not assist his argument.[330] The only alternative measure to a custodial sentence which may be imposed at the ICC is a fine.[331] A fine by itself would have been a wholly inadequate penalty given the gravity of Bemba's offences and his personal culpability.

- Bemba misconstrues the Sentencing Decision when he argues that the Chamber found "that the financial penalty served as an effective deterrent".[332] In addition to the period of imprisonment which it imposed, the Chamber found "a substantial fine [to be] necessary to achieve the purposes for which punishment is imposed."[333]

- The "public disapprobation that accompanied" the Judgment and Sentencing Decision, the nature of the article 70 trial, and Bemba's presence in detention during trial do not justify a lower punishment than that imposed by the Chamber.[334] To the contrary, the gravity of Bemba's offences and his personal culpability justify a higher sentence than what the Chamber imposed.[335]

- The manifestly inadequate sentences imposed on Kilolo and Mangenda cannot justify a reduction in Bemba's sentence.[336] Nor is the objective of deterrence undermined by the imposition of a custodial sentence that runs

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[329] *GAA* TJ, para. 10.
[330] Bemba Sentencing Brief, paras. 173-178.
[331] *See* Prosecution Sentencing Brief, paras. 120-121.
[332] Bemba Sentencing Brief, para. 187.
[333] Sentencing Decision, para. 261.
[334] *Contra* Bemba Sentencing Brief, para. 193.
[335] *See e.g.* Prosecution Sentencing Brief, paras. 25-41, 49-55, 63-112.
[336] *Contra* Bemba Sentencing Brief, para. 188.

consecutive to Bemba's Main Case sentence.[337] To the contrary, a consecutive sentence is essential to deterring Bemba—as well, importantly, as others who may consider committing similar offences at this Court.[338]

- Finally, there is no basis for Bemba's claim that the penalties imposed on him violated the principle of *ne bis in idem*.[339] The ECtHR cases Bemba cites in support of his position involved applicants who had been tried for the same offence in separate criminal proceedings.[340] That is not the situation Bemba faced.

II.I. BEMBA'S SENTENCE OF IMPRISONMENT SHOULD NOT BE SUSPENDED (BEMBA GROUND 10)

109. The Chamber did not err in declining to consider whether Bemba deserved a suspended sentence. As argued in the Prosecution's appeal against sentence, the Chamber erred by imposing suspended sentences on Kilolo and Mangenda.[341] Bemba's argument that he should have benefited from a similarly lenient approach should be dismissed.[342] In any event, even if the Appeals Chamber considers that the Chamber acted appropriately in suspending Kilolo and Mangenda's sentences, Bemba's circumstances are distinguishable.[343]

II.J. THE CHAMBER APPROPRIATELY REFUSED TO DEDUCT FROM BEMBA'S SENTENCE THE TIME HE SPENT IN CUSTODY ON REMAND (BEMBA GROUND 11)

110. The majority of the Chamber rightly refused to deduct the period of time Bemba spent in custody after being served with the article 70 arrest warrant, from

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[337] *Contra* Bemba Sentencing Brief, para. 188.
[338] Sentencing Decision, para. 19.
[339] Bemba Sentencing Brief, paras. 189-191.
[340] *See* *Muslija v. BiH*, paras. 6-13, 38-39; *Grande Stevens v. Italy*, paras. 20-52, 219-229.
[341] Prosecution Sentencing Brief, paras. 113-163.
[342] *See* Bemba Sentencing Brief, paras. 194- 197.
[343] *See e.g.* Sentencing Decision, paras. 219-222.

his sentence in the article 70 case, because this period of time had already been credited against Bemba's Main Case sentence.[344] In doing so, the Chamber found that while article 78(2) requires that a convicted person receives credit for his or her time in custody pursuant to an order of the Court, time deducted from an earlier sentence imposed on a convicted person cannot be deducted again in a subsequent proceeding.[345] In other words, what matters is that a convicted person receive credit for his or her time in custody, not that he or she receive credit more than once for overlapping periods of time in custody pursuant to multiple warrants of arrest.

111. Moreover, although it is true that Judge Pangalangan disagreed with the majority's approach on this issue, he made clear that his dissent should not lead to any reduction of the additional time in custody actually served by Bemba.[346]

112. Bemba's challenges to the Chamber's interpretation and application of article 78(2) should thus be dismissed.

[344] Sentencing Decision, paras. 259-260. *But see* Separate Opinion, paras. 1-17.
[345] Sentencing Decision, paras. 251, 254, 256-258.
[346] *See* Separate Opinion, paras. 3, 18.

II.J.1. The Chamber properly interpreted article 78(2) (Bemba Ground 11.1)

113. Bemba's interpretation of article 78(2) is flawed. His argument is essentially that it makes no difference that he received credit towards his sentence in the Main Case for the time he spent in custody after being served with the article 70 arrest warrant. Bemba argues that this period of time should still be deducted from his article 70 sentence for no other reason than that he was in custody pursuant to an order in the article 70 case.[347] Bemba's interpretation of article 78(2) should be rejected.

114. Although Bemba challenges the Chamber's approach to statutory interpretation,[348] it is his approach which is flawed. Bemba's one-sided interpretation, far from balancing the various interests at stake, would, as the Chamber observed:

> give almost no disincentive to commit [a]rticle 70 offences: [an accused] could be certain that if a warrant of arrest were issued with regard to offences against the administration of justice, the time spent in detention would count twice.[349]

115. It also makes no difference that the second sentence of article 78(2)—which is not at issue in this case—is worded more narrowly than the first sentence—which is at issue in this case.[350] The two sentences of article 78(2) address different situations. Whereas the first sentence regulates how time spent in custody pursuant to an order of the court should be treated, the second sentence regulates the treatment of time in custody that has not been served pursuant to an order of the Court. Nor

[347] Bemba Sentencing Brief, paras. 202-203, 250.
[348] Bemba Sentencing Brief, paras. 204-206.
[349] Sentencing Decision, para. 256.
[350] *Contra* Bemba Sentencing Brief, paras. 212-213.

should the Chamber's logical interpretation of article 78(2) be judged against Bemba's illogical interpretation[351] of other statutory provisions.

116. Bemba's further claim that the Chamber's interpretation of article 78(2) was based on "manifestly irrelevant and erroneous considerations" is simply wrong.[352] The Chamber based its interpretation on the sound and straightforward premise that a period of detention credited against a sentence in one case should not automatically be credited again, against a separate sentence in another case.[353] Rather than engaging with this premise, Bemba distorts the Chamber's reasoning by suggesting that the Chamber considered the purpose of pre-trial detention was to punish a defendant and to deter future offenders.[354] The Chamber said no such thing. Bemba remained in detention during pre-trial and trial because it was "necessary": in other words, one or more factors under article 58(1)(b) were established. While the Chamber referred to the impact on Bemba's sentence were it to deduct the time he spent in custody in this case, the Chamber did so in the context that this period of time had already been counted against Bemba's sentence in the Main Case.[355] In addition, while the Chamber noted the risk of an accused person accumulating credit that might exceed the maximum penalty under article 70(3), it did so again in the context of the specific circumstances of this case, where the detention time which the Chamber refused to deduct from Bemba's sentence counted against Bemba's sentence in the Main Case.[356]

117. Bemba also argues that the Chamber erred by failing to explain why it was "legally impossible" to award him credit for his time in custody following the Main

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[351] Bemba Sentencing Brief, paras. 208-210.
[352] *Contra* Bemba Sentencing Brief, para. 214.
[353] Sentencing Decision, paras. 254, 256-257.
[354] *Contra* Bemba Sentencing Brief, paras. 214-216.
[355] Sentencing Decision, paras. 254, 256-257.
[356] Sentencing Decision, para. 255. *Contra* Bemba Sentencing Brief, paras. 220-221.

Case sentencing decision,[357] but this argument should be dismissed as well. The rationale supporting the Chamber's refusal to deduct Bemba's time in custody following the Main Case sentencing decision, mirrors the Chamber's rationale for refusing to deduct Bemba's time in custody prior to the Main Case sentencing decision: both periods of time count towards Bemba's sentence in the Main Case.

118. Bemba speculates about his ability to secure interim release,[358] and the possibility that his 18 year sentence in the Main Case may be reduced on appeal.[359] However, these arguments do not justify granting Bemba credit for time which counts towards his sentence in the Main Case. Bemba also incorrectly suggests that the Chamber intruded upon Trial Chamber III's jurisdiction.[360] It did not. The Chamber simply recognised the reality that Bemba received full credit in the Main Case for the time he spent in custody on remand also in this case.[361] The manner in which Trial Chamber III worded its article 78(2) determination is irrelevant.[362]

119. Bemba also refers to a letter attached to his brief from Professor Mads Andenas.[363] However, Professor Andenas' observation that there "is no general rule" prohibiting Bemba from receiving credit towards his sentence in this case is irrelevant.[364] Nor should Professor Andenas' speculative concern about a disproportionate outcome arising from an acquittal or sentence reduction in the Main Case, be entertained.[365]

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[357] Bemba Sentencing Brief, para. 222.
[358] Bemba Sentencing Brief, para. 223.
[359] Bemba Sentencing Brief, paras. 218-219, 248
[360] Bemba Sentencing Brief, para. 252.
[361] Sentencing Decision, para. 259.
[362] *Contra* Bemba Sentencing Brief, para. 253.
[363] Bemba Sentencing Brief, paras. 218, 222.
[364] *See* Bemba Sentencing Brief, para. 222; Bemba Sentencing Brief, Annex C, p. 4.
[365] *See* Bemba Sentencing Brief, para. 218; Bemba Sentencing Brief, Annex C, p. 4.

II.J.2. The Chamber's interpretation of article 78(2) does not violate the principles of legality and certainty (Bemba Ground 11.2)

120. Bemba's argument that the Chamber's interpretation of article 78(2) violates the principles of legality and certainty should be dismissed.[366] The Chamber was not obliged to provide Bemba with its interpretation of article 78(2) in advance of the Sentencing Decision.[367] There was also no reasonable basis for Bemba to have expected that his time in custody could count towards *both* his Main Case and article 70 sentences.[368] The Prosecution's submissions and the court decisions and orders to which Bemba refers could not reasonably have created such an expectation.[369] These filings confirm that Bemba was detained for the purposes of the article 70 proceedings.[370] However, neither the Court, nor the Prosecution, signalled to Bemba that he would receive credit for his time in custody in this case, irrespective of whether he received credit for this same period of time in the Main Case.[371] To the contrary, in its sentencing submissions in this case, the Prosecution opposed Bemba's request to receive such credit.[372]

121. None of the jurisprudence Bemba cites advances his argument. Bemba refers to an interlocutory appeal in *Lubanga*,[373] but this does not support his argument that his time in custody could count towards his Main Case and article 70 sentences.[374] Nor is Bemba assisted by his other case references.[375] In *Dimitrov*,[376] the ECtHR's

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[366] Bemba Sentencing Brief, paras. 225-226, 236.
[367] *Contra* Bemba Sentencing Brief, para. 235.
[368] *Contra* Bemba Sentencing Brief, paras. 226-234, 236, 242.
[369] *Contra* Bemba Sentencing Brief, paras. 226-234, 236, 242.
[370] *See e.g.* Arrest Warrant Application; Arrest Warrant; Bemba Provisional Release Decision; Bemba Provisional Release Appeal; Bemba Provisional Release AD; Interim Release Decision.
[371] *Contra* Bemba Sentencing Brief, paras. 230 ("This constituted an explicit recognition that time was accrued, and that unless Mr. Bemba was technically released, time would continue to accrue for the specific purposes of the Article 70 case"), 232 ("This argument thus accepted that Mr. Bemba would be awarded credit in connection with the Article 70 detention order, and the 14 months of detention served by that juncture"), 234 ("When duly seized of the issue, instead of expressing its position that Mr. Bemba's detention was irrelevant for the purposes of the Article 70 case, the Trial Chamber acknowledged that the provisions of Article 60 regulated Mr. Bemba's detention in the Article 70 case – time counted for this case.").
[372] T-53-RED, 75:20-77:4. *Contra* Bemba Sentencing Brief, para. 235.
[373] Bemba Sentencing Brief, para. 233, fn. 313 (citing *Lubanga* Provisional Release AD, para. 121).
[374] *Lubanga* Provisional Release AD, para. 121.
[375] Bemba Sentencing Brief, paras. 238-240, 247.

determination that the principle of certainty had been breached, was based on the inconsistent manner in which the prosecuting authorities and Bulgarian courts determined the length of time the applicant had been remanded in custody.[377] Bemba also refers[378] to *Del Rio Prada*—which concerned the retroactive application of a legal precedent that had the effect of delaying the applicant's release from prison.[379] This case is not even remotely relevant to Bemba's argument that he should be credited twice for his time in custody. Bemba's other case references are equally irrelevant.[380]

II.J.3. The Chamber's interpretation of article 78(2) was not contrary to precedents of other courts and tribunals (Bemba Ground 11.3)

122. The Chamber did not inappropriately reformulate article 78(2).[381] Nor is the Chamber's interpretation of article 78(2) at odds with the "uniform practice" of the *ad hoc* tribunals, given that the "uniform practice" which Bemba refers to,[382] does not exist. Rather than developing his argument regarding such a practice in his brief, Bemba cross-references his submissions before the Chamber,[383] which merits summary dismissal.[384] In any event, Bemba's earlier submissions before the Chamber are defective. In those submissions Bemba only referred to two sources—

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[376] *See* Bemba Sentencing Brief, para. 238.
[377] *Dimitrov v. Bulgaria*, paras. 53-60. *See also* paras. 7-34.
[378] Bemba Sentencing Brief, para. 238.
[379] *Del Rio Prada v. Spain*, paras. 3, 14-22, 127-132.
[380] Bemba cites the ECJ case of *M and others* (Bemba Sentencing Brief, para. 239) which concerned the validity of restricting social security and social assistance benefits to the spouses of presumed terrorists: *see M and others*, paras. 23-31). Bemba also cites the English case of *Metcalfe* (Bemba Sentencing Brief, para. 240), but the issue there was whether the court had appropriately deprived a defendant of any credit for the period of time that the defendant spent in custody on remand (*R v. Metcalfe*, paras. 1-2, 8-14). That is not the issue here, where Bemba received credit in the Main Case for the period he spent in custody on remand in this case. Bemba also cites the ECtHR case of *PL v. France* (Bemba Sentencing Brief, para. 247), but the circumstances in that case are incomparable to Bemba's. In *PL v. France*, the applicant spent a period of one year and eighteen days in custody on remand before the order appointing the investigating judge and the investigating judge's subsequent decisions were declared null and void. After another investigating judge was appointed to investigate the case, and the case proceeded to trial, the applicant was convicted, but the sentencing judge denied the applicant's request to deduct from the applicant's sentence the initial period of custody on remand of one year and eighteen days: see *PL v. France*, paras. 14-22.
[381] *Contra* Bemba Sentencing Brief, paras. 243, 245.
[382] Bemba Sentencing Brief, para. 246.
[383] *See* Bemba Sentencing Brief, fn. 330.
[384] *See Krajišnik* AJ, para. 26.

the *Bangura* Sentencing Judgment at the SCSL and a *Šešelj* contempt judgment (2011) from the ICTY—hardly indicative of a "uniform practice".[385] Furthermore, as the Prosecution argued in its response to Bemba's sentencing submissions, neither judgment supports Bemba's position that, as a matter of right, he should be credited for time in custody already credited against his Main Case sentence.[386]

II.J.4. Bemba did not experience 'enhanced' detention measures as a result of being in custody for the article 70 proceedings (Bemba Ground 11.4)

123. Bemba was not subjected to "significant additional deprivations" that exceptionally justify granting him enhanced credit for time in custody that already counts towards his Main Case sentence.[387] Bemba's argument should be summarily dismissed.[388] Rather than developing his argument in his brief, Bemba again cross-references[389] his submissions before the Chamber where he embellished[390] the nature, severity, and exceptionality of the measures he was subjected to. The Chamber did not need to expressly address such defective arguments.[391]

124. Bemba also builds on his earlier flawed arguments before the Chamber by comparing his experience as a detained accused, with the experiences of his co-accused after their release from custody.[392] This faulty comparison does not advance Bemba's argument either. What matters is that Bemba received credit for each day he spent in custody after having been served with the article 70 arrest warrant. It makes no difference that he received this credit towards his sentence in the Main Case.

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[385] *See* Bemba Written Sentencing Submissions, fn. 125.
[386] T-53-RED, 75:20-77:4.
[387] *Contra* Bemba Sentencing Brief, para. 254-261. *See also* paras. 217, 249.
[388] *See* *Krajišnik* AJ, para. 26.
[389] *See* Bemba Sentencing Brief, fns. 340, 342-343, 346.
[390] *See* Bemba Written Sentencing Submissions, paras. 106-130.
[391] *Contra* Bemba Sentencing Brief, para. 257. *See above* fn. 150.
[392] Bemba Sentencing Brief, paras. 259-261.

125. Finally, Bemba refers[393] to Professor Andenas' observations regarding his conditions of detention, but these observations[394] should be disregarded since they merely summarise Bemba's flawed submissions from trial.[395]

II.K. BEMBA'S ARTICLE 70 OFFENCES JUSTIFIED A CONSECUTIVE TERM OF IMPRISONMENT (BEMBA GROUND 12)

126. The Chamber did not err when it refused to impose a sentence on Bemba that ran concurrently with his 18-year sentence in the Main Case. Bemba offers no valid reason why the Chamber should have imposed a concurrent sentence. To the contrary, a consecutive sentence was warranted given that Bemba's offences in the article 70 case are "not related" to his offences in the Main Case.[396]

127. There is no overlap between the crimes, the victims and the evidence presented by the Prosecution in the Main Case and the article 70 case. Rather than acknowledging these factors, which show that the Chamber appropriately concluded that the cases were distinct, Bemba falsely claims that the Prosecution obtained "a litigation advantage" in the Main Case due to its article 70 investigation and that it "blurred the lines between the two cases" to secure evidence.[397] Bemba's false claims fail to show that the Chamber erred in imposing a consecutive sentence.

128. Bemba's belated claim that the Main Case and the article 70 case should have been joined so that a single sentence would have been imposed on him should be dismissed as well.[398] All that Bemba's argument establishes is that he misunderstands the purpose of joining proceedings at the ICC. The purpose of

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[393] Bemba Sentencing Brief, paras. 255, 259.
[394] Bemba Sentencing Brief, Annex C, pp. 1-2.
[395] *Compare* Bemba Sentencing Brief, Annex C, pp. 1-2, *with* Bemba Written Sentencing Submissions, paras. 106-130.
[396] Sentencing Decision, para. 250.
[397] Bemba Sentencing Brief, paras. 267-268. *See Bemba* Abuse of Process Decision, paras. 54, 56.
[398] Bemba Sentencing Brief, paras. 269-270.

joinder is not to ensure that a convicted person receives a lower sentence,[399] but to enhance "the fairness and expeditiousness of the proceedings by avoiding the duplication of evidence, inconsistency in the presentation and assessment of evidence, undue impact on witnesses and victims, and unnecessary expense."[400] These interests would not have been advanced by joining the Main Case and the article 70 case.

129. Bemba also incorrectly claims that there is a "general practice" of ordering concurrent sentences at the international level.[401] Yet he fails to develop his argument in his brief. Instead, he merely cites his submissions before the Chamber,[402] which merits summary dismissal.[403] In any event, the paragraph of his trial submissions that Bemba cites, is the paragraph containing his defective argument concerning pre-trial credit.[404] The two judgments Bemba cited in support of his defective pre-trial credit argument—the *Bangura* Sentencing Judgment at the SCSL and the *Šešelj* 2011 judgment at the ICTY—likewise do not support his sweeping assertion regarding the existence of a general practice of ordering concurrent sentences.

- Although Šešelj initially received a concurrent sentence for a subsequent contempt charge that he was convicted of,[405] the Appeals Chamber found that the initial contempt sentence Šešelj received had been served by the time he received his subsequent contempt sentence.[406] Therefore, Šešelj had not

[399] *See* Bemba Sentencing Brief, para. 269.
[400] *Gbagbo and Blé Goudé* Joinder Decision, para. 47. *See also* paras. 63, 65-66.
[401] Bemba Sentencing Brief, para. 272.
[402] *See* Bemba Sentencing Brief, fn. 355.
[403] *See Krajišnik* AJ, para. 26.
[404] *See* Bemba Sentencing Brief, fn. 355 (citing Bemba Written Sentencing Submissions, para.105, fn. 125).
[405] *Šešelj* 2011 TJ, para. 81.
[406] *Šešelj* 2012 AJ, para. 23.

served any part of his sentence for the subsequent contempt charge by virtue of having served his sentence for the initial contempt charge.[407]

- As Bemba acknowledges,[408] in *Bangura*, Kanu and Kamara received sentences that ran consecutively to the sentences they were serving for their war crimes and crimes against humanity convictions.[409]

130. Bemba also complains that the Chamber failed to address the impact of imposing an additional custodial sentence on him, and suggests that he received an overly harsh term of imprisonment because he was sentenced separately for his article 70 offences,[410] but these arguments should be dismissed as well. Far from suffering any unfairness, the term of imprisonment Bemba received, for reasons explained in the Prosecution's sentencing appeal, was manifestly inadequate.[411] Nor does Bemba advance his position by referring to domestic jurisprudence featuring vastly different cases to those tried before the ICC.[412] In any event, in the domestic cases Bemba cites, the defendants' sentences for contempt ran consecutively to their sentences for other offences.[413]

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[407] *Šešelj* 2012 AJ, para. 23.
[408] Bemba Sentencing Brief, para. 272.
[409] *Bangura* SJ, paras. 93-94. Bemba's claim (*see* Bemba Sentencing Brief, para. 272) that Kanu and Kamara received credit for pre-trial detention "which had run concurrently to the service of [their] 'Main Case' sentence" is incorrect. The sentencing judge provided the two accused with credit for a period of two weeks in which they were in a different detention regime specifically for the contempt proceedings. This two week period did not count towards the sentence the accused were already serving (*see Bangura*, T. 2624:2-10, 11 October 2012). *See also Brima* TJ, paras. 2117, 2121 (listing the war crimes and crimes against humanity convictions entered against Kamara and Kanu).
[410] Bemba Sentencing Brief, paras. 273, 276-278.
[411] Prosecution Sentencing Brief, paras. 9-18, 22-41, 49-55, 63-112.
[412] *See* Bemba Sentencing Brief, para. 276.
[413] *See e.g.* Bemba Sentencing Brief, fn. 361 (citing *e.g. R v. Walker* (involving an accused who appeared for sentencing for offences of dangerous driving and driving while disqualified and was found in contempt for outbursts that occurred during the sentencing hearing, the judge imposed terms of 3 and 6 months imprisonment for the two incidents of contempt which were to run consecutively to the 20 months of imprisonment for the driving offences; on appeal, the contempt sentences were reduced to 3 months each to run concurrently to one another, but consecutively to the 20 months' imprisonment for the driving offences); *R v. Grant* (involving an accused who was sentenced to 12 months' imprisonment for an offence of being concerned in the supply of cannabis and to a further consecutive term of imprisonment of four months for failing to surrender to his bail during the course of his trial); *R v. Tinning* (involving an accused who was sentenced to 16 months' imprisonment for theft and a further consecutive term of two months' imprisonment for contempt due

131. The Chamber's refusal to grant Bemba credit for time spent in custody that already counts towards his Main Case sentence is not inconsistent with its imposition of a consecutive term of imprisonment.[414] Bemba's argument is based on his illogical interpretation that article 78(3) requires that his sentence in the article 70 case be "subsumed within the sentence imposed by Trial Chamber III."[415] The authority Bemba cites[416] does not support his argument. Instead, it confirms that article 78(3) addresses how sentences should be pronounced when an accused is convicted of more than one offence in a single proceeding.[417] It does not support Bemba's argument that a sentence imposed in a subsequent and separate proceeding must be concurrent to any existing sentence that a person is serving.

132. Bemba's family situation likewise does not merit the imposition of a concurrent sentence. Bemba incorrectly claims that the Chamber disregarded this factor.[418] The Chamber did not disregard Bemba's family situation, but indeed expressly considered it. However, it reasonably found that it merited only minimal weight.[419] Bemba argues that the Chamber erred in refusing to credit his separation from his family as a mitigating factor,[420] but he fails to show how the Chamber erred. The mere fact that Bemba was in custody during the pre-trial phase is incapable of showing an error, particularly since Bemba received credit for this factor in his sentence in the Main Case.[421]

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to an outburst during the accused's sentencing hearing; on appeal, the sentence for contempt was reduced to seven days of imprisonment, the term was still to run consecutively to the term of imprisonment for theft); *Attorney General's Reference* (involving an accused who was sentenced to a term of 13 months' imprisonment for an offence of attempted assault occasioning actual bodily harm and a further consecutive term of 16 months' imprisonment for conspiracy to pervert the course of justice); *R v. Sherlock and Mendoza* (involving an accused who received a term of nine years' imprisonment for riot and a consecutive term of one year of imprisonment for contempt of court for attempting to influence a witness)).

[414] *Contra* Bemba Sentencing Brief, paras. 263, 265
[415] Bemba Sentencing Brief, para. 265.
[416] *See* Bemba Sentencing Brief, fn. 354.
[417] *See* Schabas (2016), pp. 1180-1181; Jennings (2008), p. 1437; Schabas (2002), pp. 1529-1530.
[418] *Contra* Bemba Sentencing Brief, para. 275.
[419] Sentencing Decision, paras. 244, 248.
[420] Bemba Sentencing Brief, para. 279
[421] Sentencing Decision, para. 254. *Contra* Bemba Sentencing Brief, para. 279.

133. Finally, Bemba's arguments regarding the rehabilitative impact of being reintegrated with his family ignores the jurisprudence noted above,[422] which confirms that retribution and deterrence are the primary purposes of sentencing. Bemba also marginalises the value of deterrence in his case.[423] In doing so he ignores that the deterrent value of a sentence is not measured solely by the impact on the individual receiving the sentence, but also by the value of discouraging others who may consider committing similar offences.[424]

II.L. THE FINE IMPOSED BY THE CHAMBER WAS NOT EXCESSIVE NOR WAS THE PROCEDURE UNFAIR (BEMBA GROUND 13)

134. Bemba's arguments challenging the fine which the Chamber imposed should be dismissed. Given the gravity of his offences and his personal culpability, Bemba not only deserves the fine which he received, he deserves the higher prison sentence which the Prosecution requested in its appeal against sentence.[425]

135. The Chamber did not need to explain how Bemba's fine was justified in light of the fines imposed in cases at the *ad hoc* tribunals.[426] Neither the rules at the *ad hoc* tribunals, nor the outcome in cases at those tribunals, are binding on this Court. Nor is Bemba assisted by comparing the fine which he received with the fine Kilolo received,[427] given that Bemba justifies his position that he and Kilolo should have received the same fine by diminishing his own culpability.[428]

136. The sanctions imposed on Bemba and Kilolo were arbitrary, but only insofar as they failed to adequately reflect the gravity of their offences and the extent of their

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[422] *See above* para. 108.
[423] Bemba Sentencing Brief, paras. 274, 280.
[424] Sentencing Decision, para. 19.
[425] *See* Prosecution Sentencing Brief.
[426] *Contra* Bemba Sentencing Brief, para. 306.
[427] Bemba Sentencing Brief, paras. 308, 311.
[428] Bemba Sentencing Brief, para. 310.

personal culpability.[429] The appropriate way to remedy this error is not to reduce Bemba's fine,[430] but to increase both Bemba's and Kilolo's prison sentences as requested in the Prosecution's appeal against sentence.[431] Furthermore, Bemba's claim that his fine is based solely on his financial means, rather than his culpability, is based on arguments in which he incorrectly diminishes his culpability.[432]

137. Bemba's arguments challenging the Chamber's consideration of the Registry's solvency reports should also be dismissed.

- The Chamber did not need to make explicit findings regarding Bemba's financial condition or tell the Registry how it should present the information in its solvency reports.[433] What it needed to do is ensure that the fine which it imposed was within the threshold set in rule 166(3). Bemba fails to show that the fine he received exceeded the threshold in rule 166(3).[434]

- The Chamber was entitled to rely on the Registry's solvency reports in assessing whether the fine which it imposed was within the threshold set out in rule 166(3).[435] This did not turn the Registry "into an investigative arm of the Chamber" or impermissibly shift the burden of proof to Bemba.[436] As Bemba appears to acknowledge,[437] the starting point for setting a fine is the gravity of a convicted person's offences and their culpability, matters which the Registry is not involved in establishing.[438] As Bemba also acknowledges,[439] rule 166(3) operates to a convicted person's benefit, by

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[429] *Contra* Bemba Sentencing Brief, para. 311.
[430] *Contra* Bemba Sentencing Brief, para. 312.
[431] *See* Prosecution Sentencing Brief.
[432] *See* Bemba Sentencing Brief, paras. 308, 310.
[433] *Contra* Bemba Sentencing Brief, paras. 283, 297.
[434] *See* Bemba Updated Solvency Report. *See further* Confidential and *Ex Parte* Annex B.
[435] *Contra* Bemba Sentencing Brief, paras. 298-305.
[436] *Contra* Bemba Sentencing Brief, paras. 300-303, 305
[437] *See* Bemba Sentencing Brief, para. 309.
[438] *See* Statute, art. 78(1); Rules, Rule 145.
[439] *See* Bemba Sentencing Brief, para. 309.

ensuring that a fine is tailored to the convicted person's financial capacity. In these circumstances, Bemba fails to demonstrate that it was unfair for the Chamber to rely on information from the Registry to ensure that the fine which it set was within the limit set in rule 166(3).

- Due to the limited differences between the two reports, Bemba was not prejudiced by the Chamber's rejection of his request to comment on the updated solvency report.[440]

- The Chamber did not need to expressly analyse Bemba's unsubstantiated arguments challenging the amounts in the Registry's solvency reports.[441] As Bemba acknowledges,[442] the information included in these reports was collected in connection with the Registry's assessment of Bemba's eligibility for legal aid. The Regulations of the Court provides legal aid applicants—such as Bemba—with adequate recourse to seek review of assessments connected with legal aid eligibility.[443] A sentencing proceeding should not be turned into an additional opportunity to litigate such assessments.

- The Chamber's reliance on the Registry's solvency reports does not expose Bemba to "custodial consequences without the necessary due process protections."[444] Bemba's argument assumes that non-payment of a fine is automatically converted into an additional term of imprisonment which is not the case. According to rule 166(5), the court may impose an additional term of imprisonment "as a last resort", where "all available enforcement mechanisms have been exhausted" and "in cases of continued wilful non-payment".

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[440] *Contra* Bemba Sentencing Brief, para. 293. *See further* Confidential and *Ex Parte* Annex B.
[441] *Contra* Bemba Sentencing Brief, para. 295. *See also* para. 304.
[442] *See* Bemba Sentencing Brief, para. 305.
[443] *See* Regulations of the Court, regulation 85(4).
[444] *Contra* Bemba Sentencing Brief, para. 300. *See also* para. 311.

- Bemba's arguments challenging the amounts reported by the Registry signal that it may be difficult to enforce the fine imposed on him.[445] However, this does not justify lowering his fine. What it justifies is the imposition of a higher term of imprisonment as requested in the Prosecution's appeal so that Bemba's sentence adequately reflects the gravity of his offences and his personal culpability.[446]

II.M. CONCLUSION

138. For all the reasons above, Bemba's appeal against the Sentencing Decision should be dismissed in its entirety.

[445] Bemba Sentencing Brief, para. 298. *See also* para. 289.
[446] *See* Prosecution Sentencing Brief.

III. THE CHAMBER DID NOT ERR IN SENTENCING BABALA

139. Babala raises seven overlapping grounds of appeal.[447] Largely, he challenges the Chamber's assessment of the evidence and factual and legal findings founding his criminal responsibility, thus repeating most of his arguments from his appeal against the Judgment.[448] Such arguments should be dismissed summarily in this appeal against his sentence, since the Appeals Chamber will consider them in the appeal proceedings on the Judgment.[449]

140. The remainder of Babala's arguments should also be dismissed since Babala fails to identify an error in the factors the Chamber considered to determine Babala's six-month sentence, and in its balancing of those factors. Babala merely disagrees with the Chamber's exercise of discretion.

III.A. THE CHAMBER DID NOT "DENATURALISE" THE FACTS (BABALA GROUND 1)

141. Babala's First Ground ("*la dénaturation des faits par le premier juge*") should be dismissed summarily since Babala merely disagrees with the Chamber's assessment of the evidence and findings in the Judgment.[450] He fails to show an error arising from the Sentencing Decision.

142. Babala superficially argues that the written evidence[451] and the oral testimony[452] presented at trial did not establish his culpability. He also criticises the

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[447] According to Babala, the grounds of appeal revolve around four topics: Babala Sentencing Brief, para. 16 (listing: *I. La dénaturation des faits par le premier Juge; II. L'inadéquation de la motivation de la peine prononcée par le premier Juge; III. L'irrationalité de la peine infligée à l'appelant; IV. Les conséquences de la confirmation de la peine infligée à l'appelant.*). The Prosecution has grouped the same arguments raised in the different grounds of appeal and responds to them.
[448] *See* Babala Conviction Brief.
[449] *Lubanga* SAJ, paras. 48-50. *See in particular* para. 49 ("[w]ith respect to [arguments incorporating grounds of appeal from his conviction appeal], the Appeals Chamber will not re-consider its conclusions on these arguments in the [sentencing judgment]."). *See also* paras. 67, 103, 109. *Contra* Babala Sentencing Brief, para. 2.
[450] Babala Sentencing Brief, paras. 17-56.
[451] Babala Sentencing Brief, para. 24.
[452] Babala Sentencing Brief, paras. 25-29.

Chamber for not having critically assessed the facts but rather having unconditionally accepted the Prosecution's position.[453] He reiterates that there is no evidence indicating that he corruptly influenced P-20 (D-57) and P-243 (D-64);[454] that he did not seek to conceal the transfers;[455] that the use of codes in the conversations did not demonstrate his criminal *mens rea*;[456] and that he simply complied with Kilolo's instructions[457] and believed that he was transferring money to cover Bemba's needs.[458]

143. Babala raised largely the same arguments in his appeal against the Judgment.[459] They should be dismissed summarily in this appeal.[460] In any event, Babala's submissions are unfounded: as Bemba's financier and an accessory to the co-perpetrators' crimes, Babala materially assisted the co-perpetrators to corruptly influence witnesses D-57 and D-64.[461] Babala transferred an illegitimate payment personally, and through his driver to these witnesses.[462] Babala admits that he paid D-57 USD 665 (through his wife) and facilitated the payment of USD 700 to D-64 (through his daughter, with Babala's employee effecting the payment).[463] He knew that the payments were illegitimate and aimed at altering and contaminating their

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[453] Babala Sentencing Brief, paras. 30-56. *See in particular* para. 49.
[454] Babala Sentencing Brief, paras. 20, 54.
[455] Babala Sentencing Brief, paras. 27.
[456] Babala Sentencing Brief, para. 36.
[457] Babala Sentencing Brief, paras. 35, 37, 47.
[458] Babala Sentencing Brief, para. 24. *See also* paras. 37, 44.
[459] *See* Babala Conviction Brief, paras. 34-42, 285 (on the technical problems of the Detention Centre recordings); paras. 49-72 (on the Chamber's approach to evidence); paras. 75-79 (on the lack of legal aid and *sui generis* financing of Bemba Defence); paras. 80-82 (on remedial measures and the "*faux scénario*"); paras. 89-94 (on Babala's role as financier); paras. 95-99, 237-242, 249-250 (on the Chamber's misunderstanding of the coded language); paras. 100-101 (on Babala's knowledge of the internal details of the Main Case); paras. 102-106 (on the Chamber's erroneous assessment of D-57's evidence); paras. 107-139 (on the violation of article 22(2)); paras. 140-182 (on the Chamber's erroneous interpretation of article 25(3)(c) and article 30); paras. 183-196 (on the beyond reasonable doubt standard); paras. 251-252 (on the Chamber's contradictory findings because Babala was acquitted of article 70(1)(a) offences); paras. 254-270 (on the Chamber's lack of reasoning); paras. 286-297 (on the Chamber's irrational assessment of the evidence, including D-57 and D-64).
[460] *See above* para. 139.
[461] Judgment, para. 878.
[462] Judgment, para. 878.
[463] Judgment, para. 879.

testimony in favour of Bemba.[464] Moreover, Babala gave his assistance with the aim of facilitating the offences of corruptly influencing D-57 and D-64.[465]

144. The Chamber carefully and thoroughly assessed the evidence, and its findings were firmly based on credible and corroborated evidence. The Chamber's findings on Babala's role *vis-à-vis* D-57 were based on D-57's "generally forthcoming" and "essentially consistent" testimony[466] and P-242's (D-57's wife) "credible" testimony.[467] The reliable evidence included Western Union records showing the payments,[468] and the call sequence table and corresponding call data records showing contacts between D-57 and Kilolo.[469] Likewise, the Chamber's findings on Babala's role *vis-à-vis* D-64 were based on D-64's "credible" and "essentially consistent" testimony,[470] and P-272's (Babala's employee) "consistent" and "truthful" testimony.[471] Reliable evidence included the call sequence table and

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[464] Judgment, paras. 879, 893.
[465] Judgment, para. 893.
[466] Judgment, para. 231 ("The Chamber finds the witness credible as regards the core details relating to his prior contacts with [Kilolo and Babala] and payments of money. His account […] remained essentially consistent. The witness was generally forthcoming in answering questions, and did not change crucial aspects of his testimony during the Defence examination. The Chamber thus considers that it can rely on the core parts of P-20 (D-57's) testimony since he testified about facts within his personal knowledge when explaining his prior contacts with some of the Accused and the manner in which payments were effected. However, the Chamber also notes that the witness occasionally prevaricated with regard to his own conduct. In such instances, in particular when P-20 (D-57) testified as to the Accused's behaviour, the Chamber relied on his word only to the extent that it was corroborated by other evidence. The Chamber will determine on a case-by-case basis whether other aspects of his testimony can be relied upon without corroboration").
[467] Judgment, para. 233 ("The Chamber finds the witness credible as regards the core details relating to her contact with [Babala], the conduct of her husband and the payment of money. She volunteered the relevant information and remained consistent during both the Prosecution and Defence examinations").
[468] Judgment, para. 243 (noting that the 16 October 2012 transfer of USD 665 by Babala to D-57's wife was "further corroborated by the relevant Western Union records and P-242's testimony" and considering that "this mutual corroboration serves as another example of the accuracy and reliability of the Western Union records").
[469] Judgment, paras. 236-237 (finding the call sequence table/call data records reliable in showing contacts, including their duration, between Witness D-57 and Kilolo during the period concerned).
[470] Judgment, para. 257 ("The Chamber finds this witness credible as regards core details relating to the payment of money to him and his daughter and some telephone contacts with [Kilolo]. His account, as reflected in the January 2014 statement and his subsequent in-court testimony, remained essentially consistent. However, the Chamber noticed a degree of reluctance on the part of the witness to fully disclose information at the time of his January 2014 statement. […] In sum, the Chamber considers that it can rely on core parts of P-243 (D-64)'s testimony concerning his contacts with [Kilolo] and monetary payments to him and his daughter, which are facts within his personal knowledge. However, on account of the contradictions in his statement, in particular concerning the Accused's behaviour, the Chamber relied on P-243 (D-64)'s evidence only if corroborated by other evidence").
[471] Judgment, para. 260 ("The Chamber finds him credible. He was straightforward and candid in answering questions. P-272's testimony remained consistent with his prior recorded statement of March 2015. He did not

related call data records showing at least three contacts between Kilolo and D-64 on 16 October 2012, one further call after the VWU cut-off date on 17 October 2012,[472] and Babala's standalone comments in a 16 October 2012 conversation with Bemba in the ICCDC.[473]

III.B. BABALA DOES NOT SHOW THAT THE SENTENCING DECISION LACKED REASONING (BABALA GROUNDS 2 AND 5)

145. Babala's Second and Fifth Grounds of Appeal[474]—related to the retributive purpose of sentencing, gravity and Babala's culpable conduct—fail to show an error in the Sentencing Decision. His repetitive arguments solely challenging the Chamber's findings in the Judgment should also be dismissed summarily.[475] The remainder of his arguments misunderstand the relevant legal framework and the Sentencing Decision and should also be rejected.[476]

III.B.1. Babala fails to show an error in the retributive purpose of the sentence

146. Babala argues that because he is innocent, the Chamber misappreciated the retributive purpose of his sentence.[477] Arguments such as *"[l]e ressentiment profond d'injustice qui anime M. Babala réside précisément dans le fait qu'un châtiment lui est infligé alors qu'il n'a commis aucune faute. Sa culpabilité n'a pas été établie par le Procureur comme le requiert l'article 66(2)"*[478] or *"[l]a culpabilité de M. Babala n'ayant pas*

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equivocate, despite the fact that he testified against his employer, [Babala]. His admission […] and willingness to stand corrected […] reinforce the general impression that the witness intended to truthfully recount his personal experience. The Chamber thus considers that it can rely on P-272's testimony concerning payments he effected on [Babala's] behalf, which are facts within his personal knowledge").

[472] Judgment, paras. 262-263.

[473] Judgment, paras. 265-267. *See in particular* para. 267 ("[The] Chamber is satisfied that [Babala's] statement, '*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien',* stands on its own and can be relied upon").

[474] Because of the overlap between the two grounds/sections, the Prosecution will jointly address Babala's arguments on his second ground and most of his arguments on his fifth ground of appeal.

[475] *See below* paras. 148-149, 173-182.

[476] *See below* paras. 146-147, 150-152, 153-171.

[477] Babala Sentencing Brief, paras. 59-66.

[478] Babala Sentencing Brief, para. 61.

été établie au-delà de tout doute raisonnable"[479] not only fail to show an error in the Sentencing Decision, but are ill-founded. Babala was convicted and his criminal actions penalised because they impeded the discovery of the truth, the victims' right to justice and the Court's ability to fulfil its mandate.[480] No further explanation as to the retributive purpose of his sentence was required.[481]

147. Babala's arguments on the retributive purpose of the sentence should therefore be dismissed.

III.B.2. Babala fails to show an error in the Chamber's gravity assessment

148. Babala argues that the Chamber erred in assessing the gravity of the offences and, in particular, in considering the extent of the damage caused.[482] He challenges (i) the Chamber's assessment of the gravity of the article 70(1)(c) offences for which he was convicted,[483] and (ii) the Chamber's reliance on D-57's and D-64's false testimony regarding payments received from, and the number of prior contacts with, the Defence.[484] With respect to the former, Babala argues that his actions were not illegal,[485] that they did not cause harm,[486] that there is no evidence to convict him of article 70(c) offences,[487] and that the Chamber did not assess the gravity of this case *in concreto*.[488] With respect to the latter, he submits that the Chamber's reasoning is contradictory,[489] that the Main Case Defence did not rely on D-57 and

[479] Babala Sentencing Brief, para. 65. *See also* paras. 63, 66.
[480] Sentencing Decision, para. 19. *See also* fn. 30 (citing authorities).
[481] *Contra* Babala Sentencing Brief, para. 60.
[482] Babala Sentencing Brief, paras. 67-73.
[483] Babala Sentencing Brief, paras. 68-72, 173-174.
[484] Babala Sentencing Brief, paras. 70-71, 73.
[485] Babala Sentencing Brief, paras. 68, 72.
[486] Babala Sentencing Brief, para. 68.
[487] Babala Sentencing Brief, para. 69.
[488] Babala Sentencing Brief, paras. 173-174.
[489] Babala Sentencing Brief, para. 73.

D-64[490] and that, since he did not contact the witnesses or Kilolo to discuss their testimony, their false testimony cannot be imputed to him.[491]

149. None of Babala's arguments show an error in the Sentencing Decision. His first set of arguments misunderstand the elements of an article 70(1)(c) offence (which does not require a result) and the Sentencing Decision (which considered the gravity of Babala's offences *in concreto*). His second set of arguments ignores that a Chamber may consider criminal acts which are connected to, but do not form the basis of, a conviction to aggravate the sentence. The Prosecution will discuss these arguments in more detail below. Further, Babala's arguments about the legality of his conduct and the lack of evidence should be dismissed summarily since they seek to improperly re-litigate the merits of the Judgment and show no error in the Sentencing Decision.

III.B.2.a. Babala's article 70(1)(c) offences harmed the administration of justice

150. The offence of corruptly influencing witnesses proscribes the improper conduct of a perpetrator who intends to influence a witness's testimony but does not require that the perpetrator's conduct had an actual effect on the witness.[492] The harm lies in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of evidence.[493] Babala transferred money to D-57 (through his wife)[494] and through his driver to D-64 (to D-64's daughter)[495] knowing that the money was intended to influence their testimony in Bemba's favour.[496] Thus, Babala's conduct, which assisted the co-perpetrators in the tampering with the evidence in the Main Case proceedings, caused harm to the administration of justice regardless of whether the Main Case Defence relied on these two witnesses and regardless of

[490] Babala Sentencing Brief, paras. 71, 176.
[491] Babala Sentencing Brief, paras. 71, 73.
[492] Judgment, para. 48 (referred to in Sentencing Decision, fn. 69).
[493] Judgment, para. 31. *See also* para. 14. *Contra* Babala Sentencing Brief, para. 68.
[494] Judgment, paras. 115, 242-243.
[495] Judgment, paras. 117-118, 268.
[496] Judgment, paras. 254, 281, 879, 893.

whether Babala discussed the content of their testimony with them or Kilolo. The administration of justice would have been harmed even if D-57 and D-64 had not testified or their testimony had not been influenced by the payments effected. But indeed, the Chamber found that this was not the case.

151. Further, the Chamber did not assess gravity in the abstract. Rather, it considered the specific circumstances of this case and determined the gravity of Babala's offences *in concreto*.[497] The Chamber expressly noted that "Babala was convicted of having aided the corrupt influencing of two defence witnesses by having facilitated money transfers to them in the context of the [Main Case]".[498]

152. Babala's arguments as to the Chamber's assessment of the gravity of his offences should be dismissed.

III.B.2.b. The Chamber reasonably considered D-57's and D-64's false testimony to aggravate the sentence

153. Article 70(1)(c) offences are consummated by a perpetrator's conduct in corruptly influencing a witness, regardless of whether the witness later falsely testifies.[499] However, this does not preclude a Chamber from considering any false testimony that does ensue to aggravate the sentence for the article 70(1)(c) offence. A Chamber may consider crimes which do not form the basis of a conviction (uncharged crimes or charged crimes for which the person was acquitted) in determining a sentence for a crime for which a perpetrator has been convicted, as long as those crimes were connected to the crimes for which the person was

[497] Sentencing Decision, para. 23. *Contra* Babala Sentencing Brief, paras. 173-174.
[498] Sentencing Decision, para. 47. *See also* para. 66, *and generally* paras. 45-68.
[499] Sentencing Decision, para. 48; Judgment, paras. 48, 936.

convicted and were foreseable, and the convicted person had a reasonable opportunity to address them.[500]

154. Further, although such a factor has generally been considered as an aggravating circumstance, Chambers also have the discretion to consider it in determining the gravity of the offence[501] as long they do not engage in double-counting.[502]

155. On the facts of this case, it was entirely foreseeable, if not certain, that D-57 and D-64 would falsely testify about payments they received from, and their prior contacts with, the Defence.[503] Moreover, the witnesses' false testimony in Bemba's favour, including on the above-mentioned two topics, occurred in the ordinary course of events of the offences for which Babala was convicted.[504] In addition, since Babala had been charged with aiding and abetting the false testimony of the 14 witnesses, he was on notice of the facts and evidence relevant to the false testimony of these witnesses, including D-57 and D-64.[505]

III.B.2.b.i The witnesses' false testimony about payments from and prior contacts with the Defence was foreseeable

156. First, it was foreseeable that the witnesses would testify untruthfully in Bemba's favour, including about payments received and their contacts with the Defence. The following shows that it was foreseeable to Babala:

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[500] *See above* paras. 29-34.
[501] *Bemba* SJ, para. 15. *See* fn. 48 (citing authorities); *Vasiljević* AJ, para. 157; *Krajišnik* AJ, paras. 786-787; *Hadžihasanović* AJ, para. 317 ("Moreover, the Appeals Chamber finds that the Trial Chamber, within its discussion of the aggravating circumstances, considered factors going to the gravity of the underlying crimes in rendering Hadžihasanović's sentence. […]. *The Appeals Chamber recalls that though gravity of the crime and aggravating circumstances are two distinct concepts, Trial Chambers have some discretion as to the rubric under which they treat particular factors*. […]", emphasis added).
[502] Sentencing Decision, para. 23.
[503] *Lubanga* SAJ, para. 90.
[504] *Lubanga* SAJ, para. 90.
[505] *See Lubanga* SJ, paras. 29-31.

- Babala was aware of the identity of witnesses D-57 and D-64 and knew that they would be testifying in the Main Case shortly after the payments were made.[506]

- Babala understood that the payments were illegitimate since he effected or facilitated the payments knowing that the money was used as an incentive for the witnesses to testify in favour of Bemba thus contaminating their testimony.[507]

- To conceal his and the other perpetrators' criminal actions, Babala used coded language (such as '*kilos*', '*grands*' or '*sucre*') in his communications with Bemba and Kilolo to refer to payments,[508] and transferred the money in a deceptive and sophisticated manner through third persons, rather than directly to the witnesses.[509]

- Babala was aware—to some extent—of internal details of the Main Case.[510] He acted as the financier of the Main Case[511] and was in regular contact with Kilolo[512] and Bemba.[513]

- When Babala became aware of the article 70 investigation, he assisted and supported the other perpetrators in their attempt to take remedial measures, in particular by suggesting paying witnesses as an '*après-vente*' service to conceal their previous illegal conduct.[514] Babala's discussion of the *Barasa* case with Kilolo also shows that he was aware of the implications and

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[506] Sentencing Decision, para. 51; Judgment, paras. 267, 885, 890, 892-893.
[507] Sentencing Decision, para. 51; Judgment, paras. 254, 281, 879, 893.
[508] Sentencing Decision, para. 52; Judgment, paras. 267, 697-700, 703, 748, 882, 884.
[509] Sentencing Decision, para. 52; Judgment, paras. 243, 269, 272, 879, 936.
[510] Sentencing Decision, para. 51; Judgment, paras. 695-697, 885. *Contra* Babala Sentencing Brief, para. 97.
[511] Sentencing Decision, para. 51; Judgment, paras. 112, 693, 703, 779, 798, 877, 879, 887, 889, 892-893.
[512] *See e.g.* Judgment, paras. 779, 781, 799, 887-888.
[513] *See e.g.* Judgment, paras. 267, 693, 695-697, 882, 884 ("Mr Babala was in regular contact with Mr Bemba").
[514] Sentencing Decision, para. 55; Judgment, paras. 112, 410, 779-781, 799, 887-888, 891.

potential consequences of his and the co-perpetrators' illicit conduct for the *Bemba* Main Case.[515]

157. Further, the two witnesses were aware that their payments from and their prior contacts with the Defence were not legitimate since they falsely testified about these two topics.[516]

158. Finally, since the Common Plan depended on secrecy,[517] lies by the witnesses about their payments received and their contacts with the Defence were integral, and intrinsically linked, to their lies about the merits of the case. Indeed, if the criminal conduct of the perpetrators were to become known to Trial Chamber III, the witnesses' testimony about the merits of the case would be useless. Moreover, both types of lies constituted evidence in favour of Bemba, and sought to secure his acquittal.

159. In sum, and considering the Chamber's findings and the evidence before it, it was wholly foreseeable that D-57 and D-64 would testify falsely in Bemba's favour, including about the payments they received and their contacts with the Main Case Defence.

III.B.2.b.ii D-57's and D-64's false testimony occurred in the ordinary course of the offences for which Babala was convicted

160. Second, false testimony by D-57 and D-64 regarding payments they received and their contacts with the Defence occurred in the ordinary course of events of the article 70(1)(c) offences for which Babala was convicted. Indeed, the payments were

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[515] Judgment, para. 891; Sentencing Decision, para. 55.
[516] Judgment, paras. 252, 279.
[517] Judgment, paras. 251 ("If the witness revealed the true extent and nature of his contacts with the Main Case Defence, these efforts would be rendered not only fruitless, but could also entail other consequences for the accused, including criminal prosecution") and 819 ("It was critical for the success of such a plan that this influence on the witnesses be concealed"). Although Babala was not a member of the Common Plan, he was aware of the need to keep his illegitimate actions, and the actions of other perpetrators, secret.

effected to ensure the witnesses' false testimony.[518] Even though Babala was not found to be a co-perpetrator, his actions were not conducted in a vacuum but in the context of a broader criminal scheme[519] in which Bemba, Kilolo and Mangenda sought to interfere with Defence witnesses in the Main Case to ensure that they would provide evidence in favour of Bemba.[520] In implementing this Common Plan, potential Defence witnesses were recruited,[521] illicitly coached[522] and paid,[523] and then brought before the Court to give false evidence.[524] The witnesses' false testimony in Bemba's favour was a natural consequence of the payments, and thus occurred in the ordinary course of the offences for which Babala was convicted.[525]

161. With respect to D-57, the Chamber found that "[t]he temporal proximity between the money transfer and the witness's testimony, together with P-20 (D-57)'s statement that the money was sent because of his imminent departure for The Hague, clearly indicates *a link between the payment and the witness's imminent testimony*".[526] Further, "the sum of USD 665 was transferred to P-20 (D-57) not as a reimbursement of outstanding expenses, but *to motivate him to testify to particular matters in favour of Mr Bemba before Trial Chamber III*".[527] Babala was fully aware of the purpose behind the money transfer.[528] Moreover, when he testified before Trial Chamber III, D-57 knew that the money had been transferred. Indeed, on the day he travelled to The Hague, D-57's wife (P-242) informed him that she had collected the

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[518] Sentencing Decision, para. 51; Judgment, paras. 253-254, 280-281, 893.
[519] The Chamber also considered Babala's and Arido's actions, in addition to the co-perpetrators' concerted actions, to establish the existence of the Common Plan. *See* Judgment, para. 682. *See also* paras. 803 ("The Chamber infers the common plan from the concerted action of the three co-perpetrators, in connection with that of other co-accused"), 878 ("for the purpose of establishing the common plan between the co-perpetrators, it relied on their concerted actions, involving also the actions of non-members of the common plan, such as the two other co-accused, Mr Babala and Mr Arido, and other third persons").
[520] Judgment, paras. 103, 681, 802.
[521] Judgment, paras. 112, 420, 944.
[522] Judgment, paras. 704-734.
[523] Judgment, paras. 689-703.
[524] Judgment, paras. 252-254, 279-281, 900-908, 913-922, 926-933.
[525] *Lubanga* SAJ, para. 90.
[526] Judgment, para. 239 (emphasis added).
[527] Judgment, para. 240 (emphasis added).
[528] Judgment, paras. 254, 281, 879, 893.

money. D-57 agreed that she could "spend some [money] (…) and keep the rest for him".[529] D-57 thus lied under oath before Trial Chamber III to conceal the criminal scheme.[530]

162. Babala's payment to D-64 followed a similar pattern. D-64 testified before Trial Chamber VII that on 17 October 2012, while he was travelling to The Hague, Kilolo called him and enquired whether an adult was at home. D-64 gave him his daughter's telephone number.[531] Upon Babala's instruction, Babala's driver (P-272) made the payment on Babala's behalf to D-64's daughter.[532] Although D-64 testified that he learned of the transfer after his return from The Hague,[533] the Chamber did not rely on this part of his testimony and instead concluded that the witness knew about the payment when he falsely testified about it before Trial Chamber III.[534] D-64, too, provided false evidence to conceal the criminal actions of Babala and the other perpetrators.[535]

163. Thus, D-57's and D-64's false testimony about the payments they received and their contacts with the Main Case Defence occurred in the ordinary course of events following the payments effected and secured by Babala.

164. Accordingly, the Chamber did not err by considering D-57's and D-64's false testimony about the payments they received and their contacts with the Defence in assessing the gravity of Babala's actions. The Chamber's finding was entirely reasonable.

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[529] Judgment, para. 248. *See also* para. 247 ("D-57 at least knew at the time of his testimony before Trial Chamber III that the money had been transferred on 16 October 2012").
[530] Judgment, para. 252.
[531] Judgment, para. 270.
[532] Judgment, paras. 268-269, 272.
[533] Judgment, para. 271.
[534] Judgment, para. 274. The Chamber reached that conclusion because: first, it found it unrealistic that D-64 would give the name of his daughter without enquiring about the purpose; second, he accepted the money after his return from The Hague; third, that the money could have been sent by his daughter's boyfriend was a pretext abandoned in the course of his testimony; fourth, the transfer followed the same operational pattern as with respect to D-57, whose wife received a similar amount on the day of D-57's travel to The Hague.
[535] Judgment, para. 279.

III.B.2.b.iii Babala had the opportunity to address the relevant evidence

165. Third, Babala had a reasonable opportunity to address[536]—and did address and defend himself vigorously against[537]—the evidence underlying D-57's and D-64's false testimony. Babala was charged with aiding, abetting or otherwise assisting 14 witnesses, including D-57 and D-64, to testify falsely pursuant to article 70(1)(a), and with aiding, abetting or otherwise assisting Bemba, Kilolo and Mangenda to present false evidence by these 14 witnesses pursuant to article 70(1)(b).[538] Hence, Babala was fully on notice of the underlying facts and relevant evidence which the Chamber considered in assessing the gravity of his offences.[539]

166. Further, Babala's acquittal for these charges does not undermine the Chamber's decision to consider the relevant facts and evidence to aggravate his sentence.[540] Those are two different determinations: with respect to the former, the Chamber had to be satisfied beyond reasonable doubt that the evidence established the objective and subjective elements of the offence (article 70(1)(a)) and the mode of liability (article 25(3)(c) and article 30). With respect to the latter, the Chamber had to be satisfied beyond reasonable doubt that the witnesses testified falsely and that this was connected to the offences for which Babala was convicted and was foreseeable.[541] While the Chamber was not satisfied that the evidence established all of the former requirements,[542] it was satisfied that the evidence established the

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[536] *Lubanga* SJ, para. 29 ("[…] the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them"). *See also* Sentencing Witnesses Decision, paras. 6-7; Bemba Evidence Sentencing Decision, para. 18.
[537] *See* Babala Closing Brief; Babala Closing Submissions.
[538] Confirmation Decision, p. 52.
[539] Sentencing Decision, para. 48.
[540] *See* Judgment, para. 877 ("No evidence established a link between Mr Babala and the false evidence of the witnesses on any of these three points. Notably, even though Mr Babala held the role of financier, no evidence sufficiently establishes that Mr Babala assisted in the presentation of the untruthful accounts of witnesses with regard to payments"). *See also* paras. 938-942. *Contra* Babala Sentencing Brief, para. 73. *See* Babala Conviction Brief, paras. 251-252 (presenting similar arguments).
[541] *See above* para. 153, fn. 500.
[542] Judgment, paras. 938-942.

latter.[543] Indeed, since the Chamber considered the two witnesses' false testimony "to be relevant in its assessment of the gravity of the offences",[544] even though it could have been more clearly stated, the Chamber found beyond reasonable doubt that the two witnesses' false testimony about the payments they received and their contacts with the Defence[545] occurred in the ordinary course of Babala corruptly influencing the two witnesses, and that this was foreseeable.[546]

III.B.2.c. Babala's argument that D-57's and D-64's false testimony was of a lesser gravity lacks merit

167. Babala argues that because the false testimony by the two witnesses did not concern the merits of the Main Case, Babala's offences caused minimal damage.[547] This is incorrect. As the Prosecution has argued in its appeal against the Sentencing Decision, that the Chamber decided not to rule on the falsity or veracity of the witnesses' testimony on the merits of the Main Case does not mean that their false testimony about "non-merits" issues (such as payments received and contacts with the Defence) is any less grave.[548]

168. First, false testimony on such issues, which go to the witnesses' credibility, may equally constitute an offence under article 70(1)(a), since such information is of "crucial importance" and "material".[549] Assessments of a witness's credibility are an integral and inherent part of a Chamber's ability to assess the substance of a

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[543] Sentencing Decision, para. 48. Similarly *see* *Ndindabahizi* AJ, para. 141 ("There was no contradiction in the Trial Chamber's findings in this respect. The Trial Chamber did not impose liability because it found that there was insufficient evidence that the Appellant's words directly and substantially contributed to killings of Tutsi women married to Hutu men, but it did find that the Appellant effectively made statements encouraging such killings. This behaviour could therefore be considered as an aggravating factor").
[543] Sentencing Decision, para. 48.
[544] Sentencing Decision, para. 48.
[545] *See* Judgment, paras. 252-254 (on D-57's false testimony), 279-281 (on D-64's false testimony).
[546] *See above* para. 153, fn. 500.
[547] Babala Sentencing Brief, paras. 175-176. Babala erroneously assumes that the witnesses provide false testimony on the merits of the Main Case.
[548] Prosecution Sentencing Brief, paras. 75-101.
[549] Judgment, para. 22.

witness's testimony.[550] As noted by the ICTY Appeals Chamber, "[d]eterminations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgment."[551]

169. As noted above,[552] the lies told by the witnesses in this case about their prior contacts with and payments received from the Defence were crucial to conceal the larger criminal scheme so as to acquit Bemba of the serious crimes for which he was charged. False evidence given to secure the acquittal of a guilty person is particularly serious.[553]

170. Second, the Defence's approach, if adopted, would contradict the purpose of article 70(1)(a) since "the 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".[554] It would also undermine the rationale of criminalising offences against the administration of justice, namely, to enable the Court to discharge its mandate when adjudicating cases falling under its jurisdiction.[555]

171. In any event, since the Chamber considered false testimony on non-merits issues—as a matter of principle—to be less serious, the Chamber may have considered D-57's and D-64's false testimony as less important in determining the gravity of Babala's article 70(1)(c) offences. Indeed, elsewhere in the Judgment, the

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[550] *See e.g.* *Limaj* TJ, para. 20 (noting that credibility issues are indistinguishable from 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").
[551] *Kvočka* AJ, para. 659.
[552] *See above* para. 158.
[553] *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").
[554] Judgment, para. 23.
[555] Judgment, para. 14.

Chamber erroneously lessened the gravity of the article 70(1)(a) offences for which Bemba, Kilolo and Mangenda were convicted because it chose to rule only on the witnesses' false testimony related to issues other than the merits of the Main Case.[556] Hence, since the Chamber considered the *specific nature* of D-57's and D-64's false testimony (issues other than merits),[557] the Chamber—consistent with its position—appears to have considered their testimony as less serious than any false testimony on merits issues. Hence, the Chamber did exactly what Babala criticises it for having not done.

172. In sum, Babala's submissions that D-57's and D-64's false testimony caused a "lesser" harm and should be considered less grave should be dismissed.

III.B.3. Babala fails to show that the Chamber erred in assessing his culpable conduct and personal situation

173. Babala's arguments regarding the Chamber's assessment of his degree of participation and intent, the manner of commission and aggravating circumstances are yet another avenue for him to challenge the Chamber's findings on his conviction.[558] These arguments largely repeat Babala's Conviction Brief,[559] do not show an error arising from the Sentencing Decision and should be dismissed summarily. In any event, as the Prosecution has argued in its Response Brief and as set out below, Babala's submissions are incorrect.

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[556] Sentencing Decision, paras. 115, 167, 217. The Prosecution has appealed the Chamber's finding with respect to Bemba, Kilolo and Mangenda that falsehoods relating to the witnesses' prior contacts with the Defence, payments and benefits they received and/ or were promised, and their acquaintances with certain persons ("non-merits" issues) were a less grave form of falsehood and thus deserved a lesser sentence. *See* Prosecution Sentencing Brief, paras. 75-101.
[557] Sentencing Decision, para. 48 (noting that "(i) witness D-57 falsely testified in the Main Case regarding payments received and the number of prior contacts with the Main Case Defence; (ii) witness D-64 falsely testified regarding payments received and the number of prior contacts with the Main Case Defence").
[558] Babala Sentencing Brief, paras. 74-146; 177-202. *See e.g.* paras. 78 (arguing that the *actus reus* and *mens rea* of complicity are not met), 80 (trying to demonstrate that there is no evidence supporting the Chamber's findings), 180 (arguing that there is no evidence establishing that Babala was aware of the Defence team's internal details pertaining to the commission of the offences, identity of the witnesses or dates of their testimony).
[559] *See above* fn. 459.

III.B.3.a. Babala fails to show that the Chamber erred in assessing Babala's degree of participation and intent

174. The Chamber relied on six findings in the Judgment to assess Babala's degree of participation and intent: (i) that Babala was the financier of the Main Case Defence; (ii) that Babala effected or facilitated the payments knowing that the money was used as an incentive for the witnesses to testify in favour of Bemba; (iii) that Babala discussed with Bemba the importance of paying certain witnesses, in particular D-57 and D-64, in connection with their testimonies in the Main Case; (iv) that Babala was aware—to some extent—of internal details of the Main Case, including the identity of witnesses D-57 and D-64; (v) that Babala knew that the payments were made shortly before they testified in the Main Case; and (vi) that Babala understood that the payments were illegitimate in nature and aimed at contaminating the witnesses' testimonies in the Main Case.[560]

175. Rather than challenging the correctness or reasonableness of the Chamber's approach in relying on these factors to determine Babala's sentence, Babala seeks to re-litigate those findings—which were grounded on reliable and corroborated evidence—by offering his illogical and isolated interpretation of the evidence[561] and by selectively reading the Judgment.[562] Babala's failed trial arguments—repeated in different sections of his brief—have already been advanced in Babala's appeal

[560] Sentencing Decision, para. 51 (*especially* fns. 72-75, referring to the Judgment).
[561] *See e.g.* Babala Sentencing Brief, paras. 92 ("*La Défense s'étonne que la Chambre de première instance n'ait pas pris en compte tous ces éléments versés au dossier qui établissent de façon évidente l'innocence de M. Babala*"), 94 ("*Or, il s'avère qu'il n'y a, dans le dossier de l'affaire, aucun élément de preuve établissant*" that Babala and Bemba discussed the importance of paying D-57 and D-64), 95 (again arguing that *"[l]a Chambre de première instance ne présente pas les éléments de preuve sur lesquels Elle se base pour affirmer*" that Babala was aware to some extent of internal details of the Main Case), 104 (arguing that the Chamber *"ne repose sur aucun élément de preuve versé au dossier*" to conclude that Babala effected the payments shortly before the witnesses' testimony), 108 (that *"[l]a Chambre ne présente aucun élément de preuve à l'appui*" that the payments were illegitimate in nature and aimed at contaminating the witnesses' testimonies").
[562] *See e.g.* Babala Sentencing Brief, para. 177 (arguing that the Chamber did not rely on any evidence to establish Babala's *mens rea* with respect to his illegitimate payment to D-57). *But see* Judgment, paras. 267, 890-893.

against the Judgment.[563] Since they are inapposite to this appeal, they should be dismissed summarily.[564] In any event, they are incorrect:

(i) Babala's submission that Bemba was indigent and that the Bemba Main Case Defence depended on a "*sui generis*" payment system is irrelevant to establish his criminal intent and, even if correct, does not mitigate his sentence.[565] Regardless of Babala's motivations to assist Bemba ("*solidarité […] à l'égard de son ami, M. Bemba*"),[566] Babala knew that he was illicitly paying D-57 and D-64 to influence their testimony in the Main Case.[567] Notably, Babala has already made these arguments in his appeal against the Conviction Decision,[568] after the Chamber had rejected them at trial.[569]

(ii) Babala's submission that he effected the payments upon Kilolo's request, even if correct, is also inapposite to his sentence.[570] Babala was not a blameless executor of Kilolo's instructions. He knew and agreed with Kilolo's criminal actions. He was the financier of the Main Case Defence,[571] discussed financial matters with Kilolo and Bemba on an equal footing with them, and proposed and provided advice to the co-perpetrators regarding the need to illicitly pay witnesses, including D-57 and D-64.[572] Notably, even in superior-subordinate relationships—inapplicable to this factual scenario—

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[563] *See above* fn. 459.
[564] Babala Sentencing Brief, paras. 75-113, 177-181.
[565] *Contra* Babala Sentencing Brief, paras. 76(1), 81-85, 103.
[566] Babala Sentencing Brief, para. 81.
[567] Sentencing Decision, para. 51; Judgment, paras. 267, 879, 893.
[568] Babala Conviction Brief, paras. 75-79. *See* Prosecution Conviction Response, paras. 576-578.
[569] Judgment, para. 881. The Chamber correctly found that even if "the money transfers were provided out of solidarity with [Bemba]", such motivation "is irrelevant to its criminality".
[570] *Contra* Babala Sentencing Brief, para. 76.
[571] Sentencing Decision, para. 51; Judgment, paras. 112, 693, 703, 779, 798, 877, 879, 887, 889, 892-893.
[572] Judgment, paras. 265-268 ("the advice Mr Babala gave Mr Bemba in this conversation further demonstrates that Mr Babala was aware of D-64's and D-57's status as witnesses in the Main Case and the importance of paying witnesses shortly before their testimony"), 779-781 ("Mr Babala agreed, declaring that it was necessary to ensure '*le service après-vente*'"), 882 ("Mr Babala advised Mr Bemba to make payments to witnesses and that Mr Bemba would see the benefit"), 887 ("Mr Babala encouraged Mr Kilolo to maintain contact with the defence witnesses and, if necessary, to give them money ('*après-vente*')").

complying with a superior's order does no relieve a person from criminal responsibility.[573]

(iii) It is irrelevant that Babala did not know D-57 and D-64 before he made the payments[574] or that the witnesses did not know Babala.[575] What is relevant is that Babala knew that D-57 and D-64 were witnesses who were about to testify for Bemba in the Main Case,[576] and that the money transferred to them sought to influence their testimony in favour of Bemba.[577] Babala was also aware of their identities.[578] Babala himself admits that he effected and/or ensured the payments to D-57 and D-64.[579]

(iv) It is irrelevant that the money did not belong to Babala.[580] What matters is that he transferred and/ or secured the transfer of the money to the witnesses knowing that it would influence their testimony.[581]

(v) Babala incorrectly states—as he did in his Conviction Brief[582]—that *"[l]a Chambre ne présente aucune conversation entre MM. Kilolo et Babala, ni aucun enregistrement qui pourraient servir comme preuve de la connaissance par M. Babala des finalités prétendument criminelles de ces transferts [et] de son intention*

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[573] Statute, art. 33.
[574] *Contra* Babala Sentencing Brief, paras. 76, 98.
[575] *Contra* Babala Sentencing Brief, para. 99.
[576] Judgment, paras. 267, 885 ("Mr Babala admitted that he transferred money to D-57 and D-64 shortly before the commencement of their testimony in the Main Case"), 890-891. *Contra* Babala Sentencing Brief, para. 104.
[577] Judgment, paras. 879, 882, 890.
[578] Babala has himself admitted that he had contact with D-57 and D-64: *see e.g.* Babala DCC Response, paras. 126, 148; Babala Confirmation Response, para. 56; *see also* Judgment, paras. 243, 879. Likewise, as D-57 testified, Babala called D-57 on the morning of 16 October 2012 and said "he was sending a little bit of money in my [D-57's] wife's name" (T-31-RED2, 26:5-27:2; *see also* Judgment, para. 242), which necessarily implies his knowledge of the witness's identity. And as P-272 testified, he (P-272) followed Babala's instructions to send money to D-64's daughter (T-25-RED, 37:4-7)—which could not have been done without Babala's knowledge of D-64's identity. *Contra* Babala Sentencing Brief, para. 184.
[579] Judgment, para. 879. *See above* para. 143.
[580] *Contra* Babala Sentencing Brief, para. 76. *But see* Judgment para. 268 (where P-272 indicated that the money he transferred to D-64's daughter was Babala's).
[581] Judgment, paras. 879, 882, 890.
[582] Babala Conviction Brief, paras. 171-182.

de participer à la subornation de ces témoins".[583] Recorded conversations and Babala's standalone remarks between Babala and Bemba, and his comments in recorded discussions between Babala and Kilolo, plainly illustrate Babala's contemporaneous knowledge as to the illicit purpose of the money transfers (*i.e.*, to influence and contaminate the witnesses' testimony in Bemba's favour).[584] A purpose which he fully endorsed and actively encouraged.[585] For example:

- On 16 October 2012, Babala told Bemba that "*C'est la même chose comme pour aujourd'hui. Donner du sucre aux gens vous verrez que c'est bien*/It's the same thing as for today. You'll see that it is good to give people sugar",[586] referring to the payment to D-57 earlier that day and to D-64 who travelled to The Hague that day.[587] Babala's submission that the Chamber's interpretation of this conversation "*est totalement détachée de la realité*" ignores the plain terms and context of Babala's comments,[588] who unmistakably "advised Mr Bemba to make payments to witnesses and that Mr Bemba would see the benefit".[589]

- On 17 October 2013, and after he had been told about the article 70 investigation, Babala told Kilolo that it was necessary to pay the

[583] Babala Sentencing Brief, para. 89. *See also* paras. 105-113, 177, 181.
[584] *Contra* Babala Sentencing Brief, para. 178 (erroneously asserting that the Chamber relied on subsequent facts to establish Babala's *mens rea*). In any event, it is perfectly acceptable to rely on later events to establish the *mens rea* of an accused during a previous period. *See e.g.* *Stakić* AJ, para. 128 (holding that Stakić's public utterances post-dating the indictment period could be relied on to infer his earlier (indictment period) state of mind in relation to the crime of persecution).
[585] *See e.g.* Judgment, paras. 267 ("the advice Mr Babala gave Mr Bemba in this conversation […]"), 882 ("Mr Babala advised Mr Bemba to make payments to witnesses and that Mr Bemba would see the benefits"), 887 ("Mr Babala encouraged Mr Kilolo to maintain contact with defence witnesses and, if necessary, to give them money ('*après-vente'*)").
[586] Judgment, para. 267, fn. 361.
[587] Judgment, paras. 265-268, 882.
[588] Babala Sentencing Brief, para. 94. *See also* Babala Conviction Brief, paras. 237-238, 249-250 (making similar arguments); Prosecution Conviction Response, para. 624 (Prosecution response to similar arguments).
[589] Judgment, para. 882.

witnesses again to ensure "*le service après-vente*": "*Il fallait assurer le service après-vente*"/"We needed to provide after-sales service".[590]

- On 21 October 2013, in a conversation with Kilolo, Babala confirmed that he made payments with Bemba's approval.[591]

- Payments "*après-vente*" were again discussed by Babala and Kilolo in another conversation on 22 October 2013,[592] in which Babala encouraged Kilolo to make the necessary payments as "*le service après-vente*", which were seemingly small, even without Bemba's authorisation: ("Babala: *Non, non, non, je ne suis pas d'accord avec lui, là. Il faut y aller, faire le service après-vente, hein, mon gars […] Je le…je connais mon gars-là. On n'a pas besoin de lui pour ça. Ça, on peut gérer à nous deux. C'est pas des trucs important, quoi*"/"No, no, no, I don't agree with him on that point. We have to go, provide, the after-sales service, you know, mate […] I…I know my man there. We don't need him for that. The two of us can handle that. It's nothing important is it?")

(vi) Repeating the position he took in his Conviction Brief,[593] Babala incorrectly asserts that "*rien n'a laissé entrevoir [dans l'interrogatoire de D-57 et de D-64] la moindre implication de M. Babala dans la subornation de ces deux témoins*".[594] However, D-57 testified that on 16 October 2012 shortly before he left for The Hague, Babala called him from Kinshasa, confirmed his name and the transfer to be made. D-57 noted down Babala's name and the transfer number and gave it to his wife (P-242), who collected the money. In her

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[590] Judgment, paras. 779-781. *See also* paras. 887, 891.
[591] Judgment, paras. 699, 798. ("Babala: *Tu as parlé avec le client? Kilolo: J'ai parlé avec le client, oui. On a convenu ça hier soir"*/"Babala: Have you spoken to the client? Kilolo: Yes, I've spoken to the client. We agreed that last night.").
[592] Judgment, paras. 799, 888.
[593] Babala Conviction Brief, paras. 102-106, 286-294.
[594] Babala Sentencing Brief, para. 90.

testimony, P-242 confirmed these points.[595] Although D-64 did not talk to Babala, Babala's driver (P-272) testified that he transferred the money to D-64's daughter on Babala's behalf.[596] Moreover, someone ("a person from Africa") called D-64's daughter twice to ensure that the correct amount had been transferred.[597] The Chamber noted that Babala could have called D-64's daughter since he admitted contacts with the witness in connection with Western Union transfers.[598] Western Union records confirm the payments to the two witnesses.[599]

(vii) Babala's claim that the Chamber violated article 22(2) and resorted to "*raisonnement par induction ou par analogie*"[600] with respect to D-57 and D-64 misunderstands the scope of article 22(2) and ignores the Chamber's ability to draw inferences from circumstantial evidence. Article 22(2) simply provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy".[601] As the Prosecution argued in its Response[602] to these arguments in Babala's appeal against the Judgment,[603] this provision does not regulate the type of evidence that a Chamber can rely on to support its findings (direct or circumstantial), or regulate how a Chamber must reach its findings.[604] The Chamber correctly made its findings based on

[595] Judgment, para. 242.
[596] Judgment, para. 268.
[597] Judgment, para. 271.
[598] Judgment, para. 271, fn. 380 (referring to Babala DCC Response, paras. 126, 148).
[599] Judgment, paras. 243 (fn. 298), 269 (fn. 373), 271 (fn. 383).
[600] Babala Sentencing Brief, paras. 110-111.
[601] *Bemba* TJ, para. 84; *Katanga* TJ, para. 53. *See* Statute, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted").
[602] Prosecution Conviction Response, paras. 599-603.
[603] Babala Conviction Brief, paras. 107-139.
[604] Broomhall (2016), p. 960, mn. 39 ("[article 22(2)] applies only to the definitions of crimes in articles 6-8 (and 8*bis*, once it enters into force.)").

circumstantial evidence and when there was "only one reasonable conclusion to be drawn".[605]

III.B.3.b. Babala fails to show that the Chamber erred in assessing the manner of commission of the offences

176. Babala shows no error in the Chamber's assessment of the manner of commission of the offences for which he was convicted. He does not even try to do so. Instead, he disagrees with the findings in the Judgment which the Chamber relied on in its Sentencing Decision.[606] He challenges the Chamber's findings as to: (i) the deceptive and sophisticated manner in which Babala executed the offences,[607] and (ii) Babala's use of coded language in communications with Bemba and Kilolo on matters relating to the Main Case, in particular for payments.[608] Babala's arguments, once again, repeat his Conviction Brief.[609] They should be dismissed summarily. Moreover, they are selective and detached from the evidence at trial.[610]

(i) Babala's submission that he did not organise the money transfers and that he only complied with legitimate requests from Bemba's Counsel does not

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[605] Judgment, para. 188. *See also* para. 185. With respect to D-57, *see* Judgment, para. 250 (where the Chamber, after assessing the totality of the evidence, found, "as the only reasonable conclusion available, that [Kilolo] also instructed D-57 not to reveal the illegitimate transfer of money shortly before his testimony". Likewise, based on the "demonstrable pattern of instructing witnesses […] to testify to a specific and false number of prior contacts with the Main Case Defence", the Chamber correctly inferred, "as the only reasonable conclusion available on the evidence, that [Kilolo] also instructed D-57 to conceal the real number of contacts with the Main Case Defence […]."). With respect to D-64, *see* Judgment, paras. 277-278 (where the Chamber found, again on the basis of patterns of evidence, that "the only reasonable conclusion available on the evidence, [was] that [Kilolo] also instructed D-64 to conceal the real number of contacts with the Main Case Defence", and "in light of [discernible patterns of Kilolo's explicit instructions to witnesses]" and D-64's denial of payments, the Chamber properly inferred "as the only reasonable conclusion" that Kilolo had instructed D-64 to lie about money matters).

[606] *See e.g.* Babala Sentencing Brief, paras. 115 ("*Elle ne présente aucun élément de preuve qui la détermine à conclure, au-delà de tout doute raisonnable, que cette prétention est vraie*"), 116 (where Babala *"réexaminé les paragraphes 243, 269, 272, 879 et 936 du Jugement auxquels renvoie la Chambre* […]").

[607] Sentencing Decision, para. 52. *Contra* Babala Sentencing Brief, paras. 115-123, 182-185.

[608] Sentencing Decision, para. 52. *Contra* Babala Sentencing Brief, paras. 124-138, 186.

[609] Babala Conviction Brief, paras. 34-42, 83, 95-99, 237-242, 249-250, 285.

[610] *See e.g.* Babala Sentencing Brief, paras. 126 (arguing that there is no evidence showing that Babala tried to conceal the payments with the use of coded language), 127 (arguing that the Prosecutor has failed in proving Babala's culpability beyond reasonable doubt), 128-130 (on article 66(3) and arguing that "*allegations importantes qui n'ont pas été prouvées au-delà de tout doute raisonnable*"), 138 (referring to Babala Conviction Brief on his arguments about the use of codes).

undermine the fact—established by credible and corroborated evidence[611]—that Babala *executed the offences in a deceptive and sophisticated manner*.[612] Regardless of who decided to transfer the money to third persons, Babala endorsed the idea and implemented it. As noted above,[613] he ensured that the money was not transferred directly to D-57 and D-64 to conceal the existence of transfers between the Main Case Defence and the witnesses.[614]

(ii) Babala's argument that his driver had effected more money transfers and that this task was part of his driver's job description—also raised in his Conviction Brief[615]—does not detract from the fact that it was Babala who arranged the money transfer to D-64 *through D-64's daughter* to conceal the link between the Main Case Defence and the witness.[616]

(iii) Babala's argument that his use of coded language "*avait pour but de protéger la confidentialité de leurs discussions politiques et privées*"[617] is yet another attempt to re-litigate the Judgment with the same conflicting arguments that he advanced in his Conviction Brief.[618] The Chamber expressly rejected the suggestion that Bemba and Babala resorted to coded language to discuss political affairs in the Democratic Republic of the Congo ("DRC").[619] As the Chamber correctly noted, Bemba and Babala used codes to discuss the proceedings at this Court and not their political work.[620] Moreover, the Chamber correctly found that decisions by Pre-Trial Chambers II and III on

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[611] Judgment, paras. 239-247, 265-272. *Contra* Babala Sentencing Brief, para. 115 (where Babala selectively points to fn. 76 of the Sentencing Decision to argue that the Chamber simply endorsed the Prosecution's submissions).
[612] *Contra* Babala Sentencing Brief, paras. 117-120, 182-183.
[613] *See above* para. 175 (vi).
[614] Judgment, paras. 245, 272, 879, 936.
[615] *See* Babala Conviction Brief, para. 83; Prosecution Conviction Response, para. 583.
[616] Judgment, para. 272. *Contra* Babala Sentencing Brief, paras. 121-123, 185.
[617] Babala Sentencing Brief, paras. 131-132.
[618] Babala Conviction Brief, paras. 95-99. *See also* paras. 237-242, 249-250.
[619] Judgment, paras. 748, 884.
[620] Judgment, paras. 748, 884.

the use of coded language between Bemba and others in 2008 and 2009, in the context of the charges in the Main Case, were inapposite to its determination, since the Trial Chamber was tasked "to make findings on the use of coded language in the context of events that took place between 2011 and 2013 and with regard to charges of offences against the administration of justice."[621]

(iv) Babala's argument that the 16 October 2012 conversation (in which he referred to the money illicitly transferred to D-57 as '*sucre*') is unreliable due to technical problems in the recordings—also raised in his Conviction Brief[622]—is incorrect.[623] As the Prosecution stated in its Conviction Response,[624] Babala disregards the Chamber's stated careful approach.[625] The Chamber inferred the meaning of each coded remark from its immediate context, viewed in the framework of the evidence as a whole.[626] Further, the synchronisation issue affecting the Detention Centre recordings did not adversely affect the Chamber's assessment because it found that Babala's comment "stands on its own" and could be relied upon,[627] *i.e.*, the Chamber did not need Bemba's utterances to properly evaluate Babala's comment. In addition, the Chamber relied on Babala's "*donner du sucre*" comment only because it was corroborated by other statements and conduct.[628] The meaning of the terms was plain. No linguistic expert was needed.[629]

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[621] Judgment, para. 749. *Contra* Babala Sentencing Brief, paras. 131, 148.
[622] *See* Babala Conviction Brief, paras. 34-42, 285.
[623] Babala Sentencing Brief, paras. 131-134, 186.
[624] Prosecution Conviction Response, paras. 632-636.
[625] Judgment, para. 227.
[626] *See e.g.* Judgment, para. 188. *See also* paras. 882-893.
[627] Judgment, para. 267.
[628] Judgment, para. 882 ("Conducting an overall assessment of the evidence, the Chamber must view this statement against the backdrop of other evidence implicating Mr Babala"), *et seq*.
[629] *Contra* Babala Sentencing Brief, para. 136.

III.B.3.c. Babala fails to show that the Chamber erred in assessing the remedial measures as an aggravating factor

177. The Chamber correctly considered Babala's assistance and support to the co-perpetrators in their attempt to take "remedial measures" as an aggravating factor in determining his sentence.[630] Babala challenged the Chamber's findings on the remedial measures in his Conviction Brief,[631] and now rehashes the same arguments.[632] However, he shows no error in the Chamber having considered this as an aggravating factor.

178. First, that the Chamber considered the remedial measures as *evidence* of Babala's *mens rea* does not amount to improper double-counting.[633] The remedial measures taken to frustrate the Prosecution's article 70 investigation were not charged as an offence under article 70. Nor are they elements of the article 70(1)(c) offence or the mode of liability for which Babala was convicted. Further, the Chamber did not consider the remedial measures for gravity purposes.[634] Hence, the Chamber was entitled to consider such measures as an aggravating factor and to "attribute some weight to it".[635]

179. Second, Babala challenges the Chamber's finding in the Judgment about the existence of these measures.[636] He repeats his arguments from his Conviction Brief and argues that discussions about the article 70 investigation among the perpetrators purportedly related to a "*faux scénario*" (mentioned by the Independent

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[630] Sentencing Decision, para. 55.
[631] Babala Conviction Brief, paras. 80-82.
[632] *Contra* Babala Sentencing Brief, paras. 139-146, 200-202.
[633] *Contra* Babala Sentencing Brief, para. 201. *See* Judgment, paras. 887-893. *See above* paras. 49-50.
[634] Sentencing Decision, para. 55.
[635] Sentencing Decision, para. 55.
[636] Babala Sentencing Brief, paras. 139-146, 202. *See also e.g.* paras. 140 (arguing that the remedial measures are "*une affirmation grave et gratuite, car ne reposant sur aucun fondement probatoire*"), 202 ("*les éléments de preuves concernant le comportement de M. Babala après que des membres de l'équipe de Défense de M. Bemba avaient découvert l'existence d'une enquête à leur encontre, ne démontrent pas au-delà de tout doute raisonnable l'intention et connaissance de M. Babala de faciliter la subornation des témoins*").

Counsel) invented by Kilolo and Mangenda who sought to appropriate money from Bemba.[637] These arguments are incorrect and should be summarily dismissed.

180. Mangenda and Kilolo critically discussed Bemba's instruction to ascertain who, among the witnesses, may have leaked information about their scheme, and the feasibility of doing so.[638] They made genuine representations to Bemba and Babala about their intention to identify and bribe witnesses to discourage them from collaborating with the Prosecution.[639] Thus, the Chamber reasonably rejected the existence of a "*faux scénario*" along the lines that Babala suggests existed.

181. Further, there is ample evidence that supports Babala's intention to conceal his prior illicit payments to D-57 and D-64. As noted above, on 17 October 2013, Babala declared to Kilolo that, with respect to witnesses who testified in the Main Case, it was necessary to ensure "*le service après-vente*".[640] In a subsequent 22 October 2013 recording, Babala demonstrated his understanding of the legal implications of making illicit payments to witnesses, saying to Kilolo that "*[e]n tant que financier, c'est moi qui prend des risques"*/"as the 'financier', I take the risks".[641] With respect to this latter conversation, the Chamber noted correctly that "there would be no risk for Mr Babala in assisting in legitimate financial matters".[642]

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[637] Babala Sentencing Brief, paras. 141-146. *See also* Babala Conviction Brief, paras. 80-82 (noting IC Third Report, and IC Third Report Annex, pp. 22-31, 34-45, 47-50, 75-77, 84-86); Prosecution Conviction Response, paras. 579-582.
[638] Judgment, para. 778 ("Considering [Kilolo's] reluctance to follow [Bemba's] directions to approach *all* witnesses, he thereafter agreed to falsely represent to [Bemba] that the leak originated from three Cameroonian witnesses").
[639] Judgment, paras. 780 ("[Kilolo] assured [Babala] that [the situation was manageable], although he had trouble contacting one of the witnesses whom he suspected to have leaked information to the Prosecution. This evinces that [Kilolo] was determined to interfere with and frustrate the Article 70 investigation"), 790 ("[Mangenda] also reported that he advised [Bemba] to act swiftly and to incentivise the witnesses to change their minds"), 793 ("The evidence clearly demonstrates that [Kilolo] intervened and attempted to discourage the witnesses from collaborating with the Prosecution with the prospect of potential arrest"), 794 ("The following excerpt shows how [Kilolo], upon direction of [Bemba], intentionally targeted the witnesses and sought to convince them to side with the Main Case Defence").
[640] Judgment, para. 781.
[641] Judgment, para. 889, fn. 1950.
[642] Judgment, para. 892.

182. In sum, Babala's arguments in his Second and Fifth Grounds of Appeal should be dismissed.

III.C. BABALA FAILS TO SHOW THAT THE SENTENCE IS IRRATIONAL AND DISPROPORTIONATE (BABALA GROUNDS 3, 5, 6, AND 7)

183. In his Third[643] and Sixth[644] Grounds of Appeal (on the sentence being irrational and unreasonable), Babala argues that the sentence of six months is disproportionate and irrational. In his Fifth Ground (on the exercise of the Chamber's discretion), he disagrees with the Chamber's finding that there are no mitigating circumstances.[645] In his Seventh Ground ([REDACTED]), [REDACTED].[646] Yet, he shows no error. His arguments improperly challenge findings in the Judgment, and misread the legal framework and Sentencing Decision.

184. First, as already noted, Babala's incorrect submissions as to the lack of evidence supporting his conviction are set out in his appeal against the Judgment.[647] They have no place in an appeal against his sentence and accordingly should be dismissed summarily.

185. Second, Babala disregards the plain terms of the Sentencing Decision. In determining Babala's sentence, the Chamber considered Babala's participation as an *accessory* in aiding the co-perpetrators to corruptly influence two witnesses by having facilitated money transfers to them.[648] Although he argues that his sentence

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[643] Babala Sentencing Brief, paras. 147-165.
[644] Babala Sentencing Brief, paras. 203-211.
[645] Babala Sentencing Brief, paras. 187-199.
[646] Babala Sentencing Brief, paras. 212-222.
[647] *See* Babala Sentencing Brief, paras. 148, 156-158, 164, 190, 222. *See in particular* Prosecution Conviction Response, paras. 604-608 (addressing Babala's arguments that article 25(3)(c) has a special intent requirement).
[648] Sentencing Decision, paras. 46 (considering the conviction for article 70(1)(c) offences), 47 (considering that the conviction relates to "aid[ing] the corrupt influencing of two defence witnesses by having facilitated money transfers to them"), 50 (noting that Babala was convicted as an accessory of having aided the co-

of six months is disproportionally higher than that imposed in other contempt cases, he fails to point to a single case supporting his assertion.[649] In any event, comparisons among cases can be difficult as no two cases are identical.[650] Similarly, Babala's submission that his sentence is disproportionate and more burdensome than the sentences imposed on the other convicted persons is unsubstantiated.[651] In fact, the Chamber considered the more limited basis on which it founded Babala's conviction and his specific conduct in determining his sentence.[652] Babala's sentence is the shortest among the five convicted persons.

186. Further, Babala's reference to a single case of another international criminal tribunal to support his proposition that "*[s]elon le TPIY 'la complicité par aide et encouragement est une forme de responsabilité qui emporte généralement une peine inférieure à celle qui s'impose dans le cas de la coaction'*" is inapposite.[653] He disregards subsequent jurisprudence which rejects the proposition that aiders and abetters automatically deserve a lower sentence.[654] As the Prosecution has argued in its

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perpetrators in corruptly influencing two witnesses), 51 and 53 (considering Babala's degree of participation in the offences)", 66 (considering Babala's "relatively limited participation in the relevant offences and the fact that his criminal conduct amounted to nothing more than illegal money transfers to two witnesses"). *Contra* Babala Sentencing Brief, para. 149.

[649] Babala Sentencing Brief, para. 159.

[650] Sentencing Decision, paras. 37-38 (noting that "each case must be assessed individually and on the basis of the legal framework applicable, tailoring the penalty to fit the gravity of the crime and the individual circumstances of the convicted person" and "this makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case"). *See also* *Lubanga* SAJ, paras. 76-77.

[651] *Contra* Babala Sentencing Brief, paras. 205-206.

[652] Sentencing Decision, paras. 47 (where the Chamber considered that Babala was convicted for one offence involving two witnesses), 66 (noting "Babala's relatively limited participation in the relevant offences and the fact that his criminal conduct amounted to nothing more than illegal money transfers to two witnesses").

[653] Babala Sentencing Brief, para. 189, fn. 174.

[654] *Taylor* AJ, para. 666 ("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

appeal against the Sentencing Decision (with respect to the Chamber's distinction between the offences that Bemba and Kilolo committed as co-perpetrators and those they committed as accessories), stark categorisations based on modes of liability are unhelpful—since they may not necessarily reflect the true nature of the facts—and are unnecessary for sentencing—since the legal texts already set out relevant criteria reflecting the gravity of the offences and the culpability of the convicted persons.[655]

187. Third, the fact that the Chamber did not find an aggravating factor from those expressly listed in rule 145(2)(b)(i) to (v) should not be considered in mitigation. This is particularly so since the Chamber correctly identified an aggravating circumstance pursuant to rule 145(2)(b)(vi), namely, Babala's participation in the remedial measures to conceal the article 70 investigation.[656] Rule 145(2)(b)(vi) permits a chamber to consider as aggravating circumstances additional factors which "although not enumerated above, by virtue of their nature are similar to those mentioned".

188. Fourth, the Chamber reasonably gave no weight to Babala's professional background and alleged contribution to DRC politics and his positive role and services to the local community.[657] And rightly so, since Babala's allegations as to his good character were bereft of supporting evidence.[658] And even if evidence had been adduced, the Chamber would not have erred by rejecting these factors as

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in the abstract rather than actual conduct, or is a vague and extraneous statement devoid of legal meaning", emphasis supplied). *See also* *Katanga* TJ, paras. 1386-1387. *But see* Judgment, para. 85 ("When compared to Article 25(3)(a) of the Statute, the assistance form of liability under Article 25(3)(c) of the Statute implies a lower degree of blameworthiness); *Al-Mahdi* TJ, para. 58. Both the Judgment and *Al Mahdi* refer to *Lubanga* AJ, para. 462 ("*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 contributes to the crime", emphasis added). As the Prosecution has argued in its appeal against the Sentencing Decision, this paragraph of *Lubanga* AJ does not stand for the general proposition that accessories always deserve a lower sentence. Instead, it advocates for a fact-specific and case-by-case determination.

[655] *See* Prosecution Sentencing Brief, paras. 102-110.

[656] Sentencing Decision, paras. 54-55. *Contra* Babala Sentencing Brief, para. 153.

[657] Sentencing Decision, para. 61. *Contra* Babala Sentencing Brief, paras. 150, 187, 191-192, 198. *See also* paras. 151-152 (generally referring to factors considered as mitigating at the ICTY).

[658] *See* Babala Written Sentencing Submissions, paras. 49-51, 53-55, 57-64; Babala Oral Sentencing Submissions, 87:13-88:5.

mitigating. Notwithstanding the different legal framework and non-binding jurisprudence, other international criminal courts and tribunals have accorded little, if any weight, in mitigation of sentence to an accused's previous good character.[659] Babala's selective references to British jurisprudence, Swedish and Italian law show no error in the Sentencing Decision.[660] Even if some domestic jurisdictions allow a court to consider a convicted person's good character and lack of criminal propensity in determining a sentence, this does not mean that Babala should and would benefit from such consideration. Certainly, on the facts of this case, the Chamber was reasonable to reject Babala's submissions that his good character should mitigate his sentence.

189. Fifth, the Chamber reasonably found that ordinary family circumstances and his lack of prior convictions should not be considered in mitigation,[661] since these are common factors to all convicted persons.[662] In any event, the Chamber effectively considered those factors, in addition to Babala's good behaviour throughout trial, in Babala's favour in determining his sentence[663] since it found that these matters pertained to his "overall circumstances" to be balanced under rule 145(1)(b).[664]

190. Sixth, the Chamber correctly decided not to suspend Babala's sentence.[665] The three factors Babala advances to justify the suspension of his sentence (family, lack

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[659] *Babić* SAJ, para. 50; *Nahimana* AJ, para. 1069; *Kamuhanda* AJ, para. 354 (the Trial Chamber did not abuse its sentencing discretion in not mitigating the sentence because the accused was regarded as "good man who did a lot to help his commune"); *Gacumbitsi* AJ, para. 195; *Ntabakuze* AJ, para. 296; *Semanza* AJ, para. 398; *Kajelijeli* AJ, para. 301. *Contra* Babala Sentencing Brief, para. 188. *See also* para. 150.
[660] Babala Sentencing Brief, paras. 194-195, 197.
[661] *Contra* Babala Sentencing Brief, para. 188. *See also* para. 150.
[662] Family circumstances, unless exceptional, are accorded little, if any weight: Bemba SJ, para. 78 (*especially* fn. 243, citing authorities). *See further* *Prlić* TJ (Volume 4), paras. 1358, 1373, 1384; *Nahimana* AJ, para. 1069. Similarly, good character in the form of lack of previous criminal record similarly carries little, if any, weight in mitigation, absent exceptional circumstances: *see* *Nahimana* AJ, para. 1069; *Ntabakuze* AJ, para. 284; *Ntagerura* AJ, para. 439; *Lukić* AJ, para. 648.
[663] Sentencing Decision, paras. 60-62, 66.
[664] *See* Prosecution Sentencing Brief, paras. 157-159 (on the lack of clarity as to these "overall circumstances").
[665] *Contra* Babala Sentencing Brief, paras. 161-162.

of criminal record, good behaviour) are common to many convicted persons and cannot justify such an extraordinary measure which, as argued by the Prosecution in its Sentencing Appeal Brief, is foreign to the ICC sentencing regime.[666] In any event, Babala's request is moot: the imposed sentence was less than the credit Babala received pursuant to article 78(2) for the period of time that he spent in pre-trial custody. Since the Chamber considered Babala's sentence of imprisonment as served, there was no sentence to be suspended.[667]

191. Seventh, Babala's submissions as to "*la perte féroce de virginité de son casier judiciaire*" and the consequences that the sentence may have on his career are speculative, unfounded and irrelevant.[668] Any negative impact that Babala's sentence may have on his political ambitions is the natural consequence of the circumstances that he created through the criminal conduct for which he has been convicted.[669] It would be incongruous to consider such a factor in mitigation. The remaining arguments in Ground Seven ([REDACTED]) are outside the scope of this appeal and should be dismissed summarily.[670]

192. Finally, Babala's vague and unsubstantiated submissions challenging the Chamber's balancing of the relevant factors (since the factors were supposedly erroneous, and the Chamber allegedly erred in its reasoning) should be similarly dismissed.[671] Babala merely disagrees with his conviction and sentence, but he shows no error in the factors considered by the Chamber, or in the Chamber's

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[666] *See* Prosecution Sentencing Brief, paras. 116-141 (on the Chamber's legal error), 142-170 (on the Chamber's abuse of discretion in relying on ordinary factors to suspend the sentences of Mangenda and Kilolo).
[667] Sentencing Decision, para. 68.
[668] Babala Sentencing Brief, paras. 163, 206, 211-222.
[669] *See* Sentencing Decision, para. 189 (where the Chamber made such finding with respect to Kilolo's arguments that the negative impact that the sentence had on his professional reputation and life and his family should be considered in mitigation).
[670] *See* Babala Sentencing Brief, paras. 223-231.
[671] *Contra* Babala Sentencing Brief, paras. 203-211.

exercise of its discretion in balancing and weighing those factors in accordance with rule 145(1)(b).

III.D. BABALA FAILS TO IDENTIFY A PROCEDURAL ERROR (BABALA GROUND 4)

193. Babala argues that the Chamber failed to provide a reasoned opinion because it stated that it "need not set out in detail every factor considered, especially if it accords no or minor significance" and that it "is not required to expressly reference all evidence recognised as submitted at trial […] and comment upon it".[672] Babala's submissions should be dismissed since he misunderstands the Sentencing Decision and the evidentiary regime.

194. First, it is established jurisprudence in this Court, and in other international criminal tribunals, that a Chamber need not refer to and comment on each factor considered in determining the sentence, especially if it accords such factor minor importance.[673] As with any other decision, although the Chamber must indicate the basis for its decision with sufficient clarity and the facts relevant to its conclusion, the extent of its reasoning will depend on the circumstances of each case and, in any event, it will not necessarily require reciting each and every factor.[674]

195. In fact, Babala fails to identify a single factor that the Chamber failed to consider. Instead, and to the limited extent that he engages with the Chamber's assessment of the factors referred to in the Sentencing Decision, Babala merely disagrees with the Chamber's exercise of discretion.

196. Second, Babala conflates the need for a Chamber to make item-by-item assessments of the evidence with the need to issue a reasoned decision more generally. As the Prosecution has argued in its Conviction Response, Chambers are

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[672] Babala Sentencing Brief, paras. 166-169 (referring to Sentencing Decision, para. 42).
[673] Sentencing Decision, para. 42 (fn. 65, referring to *Bemba* SJ, para. 9 and further case-law in fn. 22).
[674] *Lubanga* Redactions AD , para. 20; *Lubanga* Second Redactions AD, para. 30.

not required to list every piece of evidence presented at trial in the article 74 Judgment.[675] Nor is a Chamber so obliged in its article 76 Sentencing Decision. It suffices that a Chamber set out in detail the basis for its decision.[676]

197. In addition, while Chambers can rely on "evidence submitted and discussed before it at trial" to issue the article 74 judgment,[677] Chambers may rely on "evidence presented and submissions made during the trial that are relevant to the sentence" in reaching its article 76 decision.[678] Hence, to determine an appropriate sentence, a Chamber may rely on a wider array of information, which is not always subject to the same limitations as evidentiary material.[679]

198. In any event, once again Babala does not identify a single item of evidence that the Chamber failed to consider. Accordingly, Babala's submissions as to the Chamber's purported procedural error lack merit and should be dismissed.

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[675] *See* Prosecution Conviction Response, paras. 169-173.
[676] *Lubanga* Redactions AD , para. 20; *Lubanga* Second Redactions AD, para. 30.
[677] Statute, art. 74(2).
[678] Statute, art. 76(1). *See also* Sentencing Witnesses Decision, paras. 6-7 (not requiring that statements comply with rule 68 requirements at sentencing: "Article 76(1) of the Statute provides that the Chamber shall consider the appropriate sentence to be imposed and 'shall take into account the evidence presented *and submissions made* during the trial that are relevant to the sentence' (emphasis added). The Statute therefore foresees that the Chamber may take into account non-evidentiary submissions for sentencing purposes, meaning that Rule 68 procedural pre-requisites are not a procedural bar for sentencing in the same way they are at trial. It is noted in this regard that other chambers of this Court introduced written witness statements or expert reports at sentencing without exploring whether the Rule 68 prerequisites were met. […]"); *Bemba* Evidence Sentencing Decision, para. 18 (Trial Chamber III considering the victims' views and concerns at sentencing: "[…] the Chamber, in considering the appropriate sentence pursuant to Article 76(1) of the Statute, shall take into account the relevant evidence presented and submissions made during the trial. The victims' views and concerns are equivalent to submissions. Accordingly, the Chamber will take them into account, as relevant and appropriate, in determining the sentence").
[679] *See* Sentencing Witnesses Decision, paras. 6-7.

III.E. CONCLUSION

199. In sum, Babala's appeal against the Sentencing Decision should be dismissed, and his sentence affirmed.

IV. THE CHAMBER DID NOT ERR IN SENTENCING ARIDO

200. The Chamber did not err in sentencing Arido to 11 months of imprisonment.[680] Arido's sentencing appeal should be dismissed because it fails to show that Arido's sentence is disproportionately high with respect to the offences of which he was convicted.

201. The first ground of appeal should be summarily dismissed because it does not set out an appealable error: [681] rather than challenging the Chamber's determination of his sentence, Arido argues that he should not have been convicted. This issue is outside the scope of a sentencing appeal and is being considered by the Appeals Chamber in the context of Arido's appeal against the Judgment.[682]

202. The second ground of appeal should also be dismissed since it fails to show any error impacting the Chamber's determination.

IV.A. THE CHAMBER PROPERLY CONVICTED ARIDO AND ARIDO FAILS TO SHOW AN ERROR IN HIS SENTENCE (ARIDO GROUND 1)

203. The essence of Arido's First Ground is that the sentence is disproportionate because he should have been acquitted. Arido reiterates his argument that P-256 (D-4)'s testimony during the sentencing hearing creates a reasonable doubt as to his conviction because it allegedly contradicts D-2's and D-3's testimony.[683] Arido erroneously argues that D-4's testimony "impacts upon both the legality of the conviction and thus in turn the sentence"[684] and submits that the Chamber, having

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[680] Sentencing Decision, para. 97.
[681] *Krajišnik* AJ, para. 26; *Mbarushimana* Application Release AD, para. 18; *Bemba* Review Detention AD, paras. 69-71.
[682] *Lubanga* SAJ, paras. 48-50, *especially* para. 49 ("With respect to [arguments incorporating grounds of appeal from his conviction appeal], the Appeals Chamber will not re-consider its conclusions on these arguments in the [sentencing judgment]."). *See also* paras. 67, 103, 109.
[683] Arido Sentencing Brief, paras. 13-30. *See* Arido Conviction Brief, paras. 408-422. *Contra* Prosecution Conviction Response, paras. 770-772.
[684] Arido Sentencing Brief, para. 14.

heard D-4 during the sentencing hearing, should have vacated his conviction.[685] Since Arido misunderstands the purpose and scope of a sentencing appeal and fails to set out a proper appealable error,[686] his First Ground should be summarily dismissed.[687]

204. First, contrary to Arido's understanding, the question before the Appeals Chamber in this sentencing appeal is not whether the Chamber erred in convicting Arido,[688] but whether the Chamber erred—in law, fact or procedure—by imposing a sentence that is disproportionate to his offences.[689] Further, the Appeals Chamber's determination must be based on the Chamber's findings as to the accused's overall responsibility, and not on the appellant's speculations. Arido's submissions that "*[h]ad [the judgment] resulted in an acquittal*, the sentence would have been materially different or non–existent"[690] and that "any length of a sentence is disproportionate *if* the Appeals Chamber sets aside the conviction"[691] are wholly speculative and irrelevant to this appeal.

205. That an article 74 judgment or conviction decision should not be litigated in a sentencing appeal is further confirmed by article 81(2)(b), which applies when grounds upon which the conviction might be set aside emerge in a sentencing appeal, and the matter is not dealt with in a separate conviction appeal under article 81(1). In this exceptional circumstance, the Appeals Chamber may invite the parties

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[685] Arido Sentencing Brief, para. 32.
[686] Arido Sentencing Brief, paras. 13-37.
[687] *Lubanga* SAJ, para. 49. *See also* *Krajišnik* AJ, para. 26, *Mbarushimana* Application Release AD, para. 18, *Bemba* Review Detention AD, paras. 69-71.
[688] Arido Sentencing Brief, paras. 3, 14, 32, 37. *See also* Arido Sentencing Brief paras. 34-37 (reiterating prior submissions that Arido's fundamental human rights were violated, that the proceedings were unfair and that he suffered a grave miscarriage of justice). *See further e.g.* Arido Closing Brief, paras. 140-141, 406, 410; Arido First Evidence Request, paras. 88-95; Arido Conviction Brief, paras. 80-81, 95-102, 116-122, 125-149. These submissions aimed at obtaining Arido's acquittal (Arido Sentencing Brief, para. 37), which were raised and discussed in Arido Conviction Brief, have no relevance on the Chamber's sentencing determination and whether his sentence is proportionate to the offences of which he was convicted.
[689] *See* Statute, arts. 81(2)(a), 83(2) and (3). *See* *Lubanga* SAJ, paras. 36-50.
[690] Arido Sentencing Brief, para. 14 (emphasis added).
[691] Arido Sentencing Brief, para. 8 (emphasis added).

to submit grounds of appeal under article 81(1)—thus effectively inviting them to appeal the conviction decision. Since Arido has already argued the impact of D-4's testimony on his conviction in his Conviction Brief,[692] and recently sought the admission of his testimony in that appeal,[693] this matter should not *also* be dealt with in the context of this sentencing appeal.[694]

206. Second, if, for the sake of argument, considerations on the guilt of the accused were appropriate in the context of a sentencing appeal, Arido's submissions that D-4's testimony during the sentencing hearing impacts "the legality of the conviction"[695] should be summarily dismissed. As the Prosecution has argued in its Conviction Response,[696] D-4's testimony was not part of the trial record when the Chamber decided on Arido's guilt.[697] Precisely because of the "bifurcated procedure",[698] the Appeals Chamber held in this case that evidence submitted "during the sentencing phase […] constitutes additional evidence for the purpose of the appeal against the Conviction Decision" because it was not available to the Trial Chamber when it decided on guilt or innocence.[699] Consistently, D-4's testimony may be relied upon when Arido appeals the determination of his sentence, but not when he challenges the Chamber's findings on Arido's guilt—unless it is "admitted into evidence under regulation 62."[700] Arido, cognisant of this fact, has recently—and belatedly—sought the admission of D-4's testimony in the sentencing hearing in his appeal against the Judgment.[701]

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[692] Arido Conviction Brief, paras. 408-422.
[693] *See* Arido Second Evidence Request; Prosecution Response Arido Second Evidence Request.
[694] *Lubanga* SAJ, para. 49
[695] Arido Sentencing Brief, para. 14.
[696] Prosecution Conviction Response , paras. 770-772.
[697] *See* Arido Additional Evidence Decision, para. 10. *See Krajišnik* AJ, para. 25.
[698] Arido Sentencing Brief, para. 14.
[699] Arido Additional Evidence Decision, para. 10.
[700] *See* Prosecution Conviction Response, paras. 770-772. *See* Arido Additional Evidence Decision, para. 10.
[701] *See* Arido Second Evidence Request; Prosecution Response Arido Second Evidence Request.

IV.B. ARIDO SHOWS NO ERROR IN THE SENTENCING DECISION (ARIDO GROUND 2)

IV.B.1. The Chamber properly individualised Arido's sentence

207. Arido's submission that the Chamber applied "a kind of mandatory minimum sentence" and failed to individualise his sentence[702] should be dismissed as it misrepresents the Judgment and the Sentencing Decision.

208. The Chamber was aware of its duty to consider both the culpability of the convicted person and the gravity of the crime when determining an appropriate sentence. It expressly said that "[b]oth these considerations make clear that the *sentence must be individualised* for each convicted person".[703] Consistently, *for each Accused individually* the Chamber assessed the gravity of the offences, their culpable conduct (in terms of degree of participation/intent, manner of commission and aggravating and mitigating circumstances) and their individual circumstances.[704]

209. In its Judgment, the Chamber repeated its earlier remark that article 70 offences do not need to meet the 'gravity' threshold under article 17, and noted that article 70 offences are of "an intrinsic gravity".[705] Arido bases himself on *this* finding to argue that the Chamber took a "blanket approach [and] effectively applied a kind of mandatory minimum sentence" contravening its duty to individualise the

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[702] Arido Sentencing Brief, paras. 38-45.
[703] Sentencing Decision, para. 36 (emphasis added).
[704] Sentencing Decision, paras. 44-263.
[705] Judgment, para. 15 ("Before embarking on the specific interpretation of Articles 70(1)(a) to (c) of the Statute, which is relevant to this case, the Chamber wishes to point out that Article 70 of the Statute does not require that the illicit conduct meet any 'gravity' threshold. As noted by the Prosecution, Rule 163(2) of the Rules of Procedure and Evidence ('Rules') precludes the application of Article 17 of the Statute to Article 70 offences, including gravity considerations under Article 17(1)(d) of the Statute. Indeed, on 27 March 2015, the Chamber indicated that considerations of 'gravity' or 'interests of justice' cannot be invoked in the context of Article 70 proceedings. It is worth recalling the Chamber's position here again: '[T]he Chamber considers that for a court of law, there is an intrinsic gravity to conducts that, if established, may amount to the offence of obstruction of justice (with which the accused is charged). Such conducts are certainly never in the "interest of justice", and hardly will it ever be so to tolerate them. For they potentially undermine the very efficacy and efficiency of the rule of law and of the courts entrusted to administer it'").

sentence.[706] However, this misrepresents—and takes out of context—the Chamber's findings in the Judgment and ignores its individualised sentencing determinations.

210. Arido is also incorrect[707] since the Chamber considered his relatively more limited role[708] and imposed upon him the second lowest sentence in this case. The Chamber did not consider his conduct to be "grave-by-association".[709] To the contrary, it distinguished Arido from the co-perpetrators and found that his culpable conduct was not affected by the fact that the co-perpetrators relied on Arido to further the Common Plan.[710]

IV.B.2. The Chamber reasonably considered D-2's, D-3's, D-4's and D-6's false testimony to determine the gravity of Arido's offence.

211. The Chamber was fully entitled to consider the damage and harm caused by Arido's article 70(1)(c) offences to determine their gravity.[711] First, a Chamber's analysis of the gravity of an offence is not confined to the elements of that offence.[712] Rather, by definition, factors under rule 145 go beyond the required elements of the crimes.[713] For instance causing emotional harm to the victim's family may be taken into account when assessing the gravity of a murder, although it is not an element of that crime.[714]

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[706] Arido Sentencing Brief, para. 38. *See also* paras. 39-41.
[707] Arido Sentencing Brief, paras. 42-45.
[708] *See e.g.* Sentencing Decision, paras. 72, 75, 77.
[709] Arido Sentencing Brief, para. 44.
[710] Sentencing Decision, para. 76
[711] "Even though the Chamber does not require a causal link between the illicit coaching of witnesses and their actual testimony, it is nevertheless attentive to the fact that the witnesses coached by Mr Arido subsequently testified falsely in the Main Case." *See* Sentencing Decision, para. 73. *See also* paras. 48, 103, 156, 206. *Contra* Arido Sentencing Brief, paras. 46-55.
[712] *Contra* Arido Sentencing Brief, para. 49.
[713] Sentencing Decision, para. 25 (noting that "[a] legal element of the offence(s) or the mode of criminal responsibility cannot be considered as an aggravating circumstance"). The same reasoning applies with respect to the gravity assessment. *See above* paras. 27-28, 31-34, 84-85.
[714] *See e.g.* *Bemba* SJ, paras. 29-32.

212. Second, and as noted above in response to Babala's similar arguments,[715] the offence of corruptly influencing witnesses under article 70(1)(c) proscribes the improper conduct of a perpetrator who intends to influence a witness' testimony but does not require that the perpetrator's conduct had an actual effect on the witness.[716] The harm lies in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of evidence.[717] The administration of justice would have been subverted even if the four Cameroonian witnesses had not testified or their testimony had not been influenced by the tampering and the payments.

213. Third, although the false testimony of the coached witnesses need not be proven to enter a conviction under article 70(1)(c), it can be considered to assess the gravity of the offence for which Arido was convicted or as an aggravating factor, so long as it is not double-counted.[718] As noted above, the settled jurisprudence of this Court and other international tribunals permits conduct not founding a conviction—including uncharged crimes—to be taken into account in sentencing provided they were connected to the crimes for which the person was convicted and were foreseeable, and the convicted person had sufficient notice of the allegations.[719]

214. Thus, the Chamber reasonably considered the witnesses' false testimony about their prior contacts with the Defence, payments they received from and benefits promised by the Defence, and their acquaintance with certain persons when assessing the gravity of Arido's offences.[720] The Chamber's findings and the evidence show that D-2, D-3, D-4 and D-6 gave false evidence on these issues.

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[715] *See above* para. 150-152.
[716] Judgment, para. 48 (referred to in Sentencing Decision, fn. 69).
[717] Judgment, para. 31. *See also* para. 14.
[718] *See above* paras. 29-34, 153-154.
[719] *See above* paras. 29-34. The Prosecution notes that Arido was on notice of the facts and evidence relevant to these witnesses' false testimony because he was prosecuted and acquitted of those offences. *See* Confirmation Decision, pp. 53-54; Judgment, paras. 946-949.
[720] Sentencing Decision, para. 73. *Contra* Arido Sentencing Brief, paras. 56-64.

Further, it was foreseeable that D-2, D-3, D-4 and D-6, if asked in Court, would falsely testify about these topics, and that their false testimony occurred in the ordinary course of events of the offences for which Arido was convicted.[721] The Chamber found that:

- In January 2012, Arido personally recruited D-2, D-3, D-4 and D-6 to appear as witnesses in the Main Case.[722] Arido promised them money and relocation in exchange for their testimony favourable to Bemba in the Main Case.[723] Arido knew that the witnesses had only agreed to testify before the Court as a result of the promises he had made.[724]

- In January and February 2012, Arido instructed and briefed them (or facilitated their briefing by others) to present themselves as military men to Kilolo and the Court while believing that they had no such background. He provided details about their purported military background, experience and training. He assigned the witnesses their alleged military ranks and handed out military insignia.[725] He intentionally constructed and adjusted the witnesses' false narrative so as to be favourable to Bemba.[726]

- In February 2012, Arido introduced the four Cameroonian witnesses (and other prospective witnesses) to Kilolo and [REDACTED] who interviewed them, and recorded their statements.[727] Arido was aware of this fact (*i.e.* that

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[721] *See* *Lubanga* SAJ, paras. 29, 90.
[722] Judgment, paras. 669, 944. *See also* paras. 125, 323, 327. *See further* paras 126, 324 (noting that Arido called Kilolo and put D-2 on the phone who asked Kilolo "'what Lieutenant Arido is saying to me, is it correct, because he is in that need?' So I said -- so he said, 'Yes, that is true. We are looking for witnesses who were part of the experience of what happened, witnesses who can come to testify here or who can come to testify in The Hague'"), 329 (noting that also in January 2012, Arido received a phone call from Kilolo while he was with D-3. According to D-3, Arido said that he was "together with his elements", meaning the prospective witnesses).
[723] Judgment, paras. 669, 944. *See also* paras. 126-128, 131, 320-352.
[724] Judgment, para. 944.
[725] Judgment, paras. 669, 944. *See also* paras. 126-132, 320-352.
[726] Judgment, paras. 670, 944.
[727] Judgment, paras. 131, 348-350.

the witnesses had given a statement) and further tampered with their evidence.[728]

- He knew that Kilolo would follow up on his promises of money and relocation.[729]

215. Further, the four Cameroonian witnesses testified in accordance with Arido's briefing, and because of Arido's promises of money and benefits:

- D-2 testified before Trial Chamber III in the Main Case that he was a FACA soldier, as instructed by Arido. In his testimony before Trial Chamber VII in the article 70 case, he acknowledged that "the reason for his testimony at the time was the prior preparation he received".[730] D-2 also conceded that the CFAF 10 million that Arido had proposed was his "*motivation*" to testify in the Main Case.[731]

- Consistent with Arido's instructions, D-3 testified before Trial Chamber III in the Main Case that he was a member of the FACA during the period relevant to the charges although—as he acknowledged in his testimony before Trial Chamber VII in the article 70 case— he had never been a soldier nor did he have a military background.[732] D-3 also admitted that he testified to "*get something out of it*".[733]

- The witnesses were aware of the unlawfulness of the promises made to them, since they provided false testimony about such benefits and about their prior

[728] Judgment, paras. 132, 351-352.
[729] Judgment, para. 674.
[730] Judgment, para. 388.
[731] Judgment, para. 343.
[732] Judgment, para. 391.
[733] Judgment, para. 343.

contacts with the Defence and their acquaintances with certain persons, including Arido.[734]

216. Moreover, the Chamber found that the witnesses, following Kilolo's instructions, falsely testified in the Main Case about their prior contacts with the Defence, payments and benefits they received and/or were promised, and their acquaintances with certain persons.[735] The Chamber declined to rule on the falsity of the witnesses' testimony on issues related to the merits of the case, including on their military status and background.[736]

217. Notwithstanding that the Chamber made no finding that Arido coached the Cameroonian witnesses specifically on their contacts with the Defence, payments and benefits they received and/or were promised, and their acquaintances with certain persons,[737] the Chamber did find that the criminal scheme depended on secrecy.[738] Thus, lies by the witnesses about these topics were intrinsically linked to lies they told on issues related to the merits of the case. Stating the truth about matters such as whether the witness had prior contacts with the Defence or had received payments or other benefits would have exposed the criminal scheme and even rendered the witness liable to criminal prosecution.

218. Because of the foregoing, the witnesses' false testimony on these topics was foreseeable.

219. Further, the witnesses' false testimony about their contacts with the Defence, payments and benefits they received and/or were promised and they acquaintances with certain persons including Arido, occurred in the ordinary course of the

[734] Judgment, paras. 412-414. D-6 falsely testified, *inter alia*, about his contacts with the Main Case Defence. *See* para. 415.
[735] Judgment, paras. 412-415.
[736] Judgment, para. 194. *See also* paras. 872, 947.
[737] Judgment, paras. 872, 947; Arido Sentencing Brief, paras. 56-61.
[738] Judgment, paras. 251, 819.

offences for which Arido was convicted. Arido's criminal conduct fell squarely within the criminal scheme orchestrated by Bemba, Kilolo and Mangenda, where the co-perpetrators, together with Arido and Babala, recruited and bribed witnesses and tampered with their evidence to give testimony in favour of Bemba so as to acquit him. The four Cameroonian witnesses' false testimony occurred in the ordinary course of events of the offences for which Arido was convicted. In fact, Arido's actions were pivotal: he identified and recruited the witnesses and introduced them to Kilolo so that they would testify in favour of Bemba.

220. Moreover, although the Chamber found that by the time the witnesses testified (June 2013), Arido was no longer in contact with them,[739] the evidence indicates that he had at least sporadic communications with the witnesses and/or Kilolo until 2013:

- Arido's email to D-2 on 11 February 2013 where he suggested a meeting with Kilolo in Douala the following week and cautioned the witness about how he communicated with him, advising against using social media because it would be viewable by others;[740]

- Arido's meeting with D-2 [REDACTED], where he told D-2 that he intended to withdraw as an expert from the Main Case;[741]

- Arido's article 55(2) interview indicating that he met with Kilolo over the summer of 2013 in Paris when Kilolo asked him to testify about some documents.[742]

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[739] Judgment, para. 947.
[740] Judgment, para. 675 (referring to but not relying upon CAR-OTP-0075-0762). *See* Prosecution Pre-Trial Brief, para. 257(ii); Prosecution Final Brief, para. 346. Another email exchange between D-2 and Arido dated 8 and 9 October 2012 was submitted at trial but omitted in the Judgment: *see* CAR-OTP-0075-0567.
[741] T-21-CONF, 7:3-15, 38:14-19.
[742] CAR-OTP-0074-1065 at 1068.

221. In sum, the Chamber reasonably considered the witnesses' false testimony to be relevant when assessing the gravity of the offences.[743]

222. There is no contradiction between this conclusion and the Chamber's decision to acquit Arido for aiding and abetting the offences under article 70(1)(a) and (b).[744] These are two different determinations. Although it could have spelled it out more clearly, the Chamber found that the evidence was sufficient to establish beyond reasonable doubt[745] that the false testimony was foreseeable and was the ordinary consequence of Arido's crimes to aggravate his sentence,[746] but that it was insufficient to establish Arido's guilt as an aider and abettor under article 70(1)(a) and (b).[747]

223. In any event, even if *arguendo* the Chamber had erred, it would be a harmless error: the relatively low sentence of 11 months of imprisonment remains proportionate to Arido's offence. Arido purposefully and deliberately instructed the witnesses without concern for the truth of their evidence. He promised rewards, making them believe that the arrangement would lead to a better life for them. He played a go-between role between Kilolo and the witnesses. Knowing that the witnesses did not have a military background[748] he dispelled their concerns by reassuring them that he had a military background or would put them in contact with others who would brief them.[749] In light of these findings alone, and considering the remaining factors under article 78(3) and rule 145(1)(c) and (2), Arido fails to show that his sentence of 11 months is disproportionate.

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[743] Sentencing Decision, para. 73
[744] Judgment, paras. 872, 947, 949. *Contra* Arido Sentencing Brief, paras. 56-64.
[745] Judgment, para. 25.
[746] Sentencing Decision, para. 73.
[747] Judgment, paras. 872, 947, 949.
[748] Judgment, paras. 128, 671.
[749] Sentencing Decision, para. 77. *See also* Judgment, paras. 127-128, 671-672.

IV.B.3. Arido fails to show that the Chamber erred in assessing the overall circumstances

224. In determining Arido's sentence the Chamber took into account Arido's lack of criminal record,[750] his family situation, his incarceration in a foreign country,[751] his current unemployment and his asylum application.[752] Arido's submission that the Chamber "fail[ed] to accord any weight" to these factors misunderstands the Chamber's findings and should be dismissed.[753]

225. The Chamber correctly refused to consider these factors as mitigating circumstances under rule 145(2)(a) since they are common to many convicted persons. Nevertheless, it still considered them as pertaining to Arido's "overall circumstances" under rule 145(1)(b) and weighed them as such.[754] Thus, the Chamber expressly addressed these factors and appears, *de facto*, to have taken them into account in Arido's favour—although not under rule 145(2)(a).[755] As the Chamber found in its conclusion:

> The Chamber has *weighed and balanced* all the factors as set out above. It has found no aggravating or mitigating circumstances *and took into account* Mr Arido's good behaviour throughout the trial, his personal situation, his peace, justice and reconciliation advocacy for the Central African Republic, his generosity towards compatriots and persons in need, the absence of prior convictions and family situation.[756]

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[750] Sentencing Decision, para. 89.
[751] Sentencing Decision, para. 90.
[752] Sentencing Decision, para. 91.
[753] *Contra* Arido Sentencing Brief. paras. 65-91.
[754] Sentencing Decision, paras. 89-91.
[755] *See* Prosecution Sentencing Brief, paras. 157-159 (noting the lack of clarity on the Chamber's assessment of the overall circumstances).
[756] Sentencing Decision, para. 96 (emphasis added).

226. Contrary to Arido's submission,[757] to the extent that a Chamber takes into account a factor in determining a sentence, it is immaterial whether it considers such a factor in determining the gravity of the offence or as an aggravating or mitigating factor, or under rule 145(1)(c)[758] or under rule 145(2). What matters is that the same factor is not considered twice.[759]

227. This is not a feature that is unique to international criminal law, nor is Arido assisted by the authorities that he cites.[760] Indeed, for example, the Italian Criminal Code does *not* regard the factors he raises as mitigating circumstances, but as elements to be considered in the context of the gravity of the crime.[761]

228. Nor does Arido substantiate in any other way that the Chamber's approach constituted an error of law or an abuse of discretion.[762] Not only is it hard to discern exactly where Arido considers any such error to lie, but he fails to show that it materially affects the Sentencing Decision and renders the sentence disproportionate.[763] Notably, the Chamber did consider, and appears to have given some weight to the exact factors that Arido now says it should have considered. The Chamber was not obliged to expressly account for *how much* weight it gave to each of these factors and its "ultimate impact" on the sentence imposed.[764] Such an approach is impracticable—as Arido himself concedes[765]—and is not supported by the practice of this Court or by any international tribunal.[766]

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[757] Arido Sentencing Brief, paras. 92-98.
[758] *See above* paras. 84-85.
[759] *See* *Milošević* AJ, para. 306. *See above* para. 45.
[760] Arido Sentencing Brief, para. 66 fn. 91.
[761] *See* Italian Criminal Code, arts. 62, 62*bis*, 133 (article 62*bis* expressly states that absence of prior convictions *should not* be considered *per se* a mitigating factor).
[762] *Contra* Arido Sentencing Brief, paras. 92-98.
[763] *Contra* Arido Sentencing Brief, paras. 92-98.
[764] *Contra* Arido Sentencing Brief, para. 99.
[765] *See* Arido Sentencing Brief, para. 102.
[766] *Lubanga* SAJ, para. 43 (holding that "[…] the weight given to an individual factor and the balancing of all relevant factors is at the core of a Trial Chamber's exercise of discretion as the court of first instance"). *See also* fn. 73 (citing authorities).

229. In any event, the Chamber would have not erred even if it had given no weight to Arido's good behaviour throughout trial, his family circumstances and his alleged good deeds. First, Arido's good behaviour at trial was expected from him, in particular, since he was obliged to comply with the Chamber's decision setting out the terms of his interim release. Second, his family situation is common to many convicted persons (and most regular law-abiding citizens). Third, he fails to substantiate his alleged good deeds.

IV.C. CONCLUSION

230. For all these reasons, Arido's appeal should be dismissed, and his sentence affirmed.

V. CONCLUSION, AND RELIEF SOUGHT

231. For the reasons above, the appeals brought by Bemba, Babala, and Arido against the Sentencing Decision should be dismissed.

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Fatou Bensouda, Prosecutor

Dated this 6th day of August 2018[767]
At The Hague, The Netherlands

[767] This submission complies with regulation 36, as amended on 6 December 2016: *Al Senussi* Admissibility AD, para. 32.