Separate Opinion of Judge Raul C. Pangalangan

1. I concur with the Majority on all aspects of today's sentencing decision but for the reasoning leading to the determination of Mr Bemba's sentence.[1] I believe that Mr Bemba is entitled to full sentencing credits for the entire period of his detention in this case, from his 2013 arrest to the present. This follows from the straightforward application of Article 78(2) of the Statute which requires the Court to 'deduct the time […] previously spent in detention in accordance with an order of the Court'. Even if Mr Bemba was also detained in the Main Case during this period, in the eyes of the law, he remained behind bars simultaneously by an order of this Court. Article 78(2) vests a statutory entitlement in Mr Bemba; the Court may not take that away.

2. Mr Bemba was served with the arrest warrant in this case on 23 November 2013. He was then detained until 23 January 2015, when he was released for purposes of this case by the Pre-Trial Chamber Single Judge.[2] This release was reversed and remanded by the Appeals Chamber on 29 May 2015, at which point Mr Bemba was effectively re-detained for this case.[3] No remand decision was issued because the Bemba Defence subsequently withdrew its interim release request.[4] This means that, but for the period from 23 January to 29 May 2015, Mr Bemba has been detained from 23 November 2013 to the present for purposes of this case, during which he accrued approximately three years of credit.

3. The Majority however gives Mr Bemba no credit at all in determining his sentence. It is my view that this decision is incompatible with Article 78(2) of the Statute. On the other hand, I consider the term of imprisonment imposed against Mr Bemba to be disproportionately low.

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[1] Majority, paras 251-60.
[2] ICC-01/05-01/13-798.
[3] ICC-01/05-01/13-970.
[4] *See* Decision Regarding Interim Release, 17 August 2015, ICC-01/05-01/13-1151, paras 29-30.

A. Article 78(2) of the Statute

4. Article 78(2) of the Statute states that '[i]n imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. […]'.

5. The word 'shall' means that the deduction is mandatory. The Majority itself says that the Statute 'dictates'[5] this deduction, and concludes that 'Mr Bemba is entitled to have deducted from his sentence the time previously spent in detention in accordance with an order of the Court'.[6] However, the Majority then refuses to grant this entitlement and instead finds an interpretation that withholds any credit from Mr Bemba on the ground that he had been concurrently detained under the Main Case and has been credited for his detention in that case.

6. The plain language of Article 78(2) provides no such exception. Article 78(2) could have been qualified expressly, by providing that a day in detention counts as time served in relation to only one sentence. Some domestic jurisdictions actually contain such express limitations[7] but the drafters of the Statute codified no such constraints,[8] leaving behind unqualified language.

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[5] Majority, para. 39.
[6] Majority, para. 252.
[7] In the United Kingdom, Section 240ZA(3) of the Criminal Justice Act 2003, as amended by Legal Aid, Sentencing and Punishment of Offenders Act 2012, § 108, stipulates that the 'number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served […]'. As per § 240ZA(2), it is immaterial that the offender was remanded in custody in connection with another offence at the same time. However, the exceptions to this are: (i) § 240ZA(4) – if the offender was also detained in connection with any other matter, that day is not to count as time served; and (ii) § 240ZA(5) – 'a day counts as time served – (a) in relation to only one sentence, and (b) only once in relation to that sentence'. In the United States, although some state practices are different, in federal courts the applicable rule is 18 U.S.C. § 3585. Provision § 3585(b) is entitled 'Credit for Prior Custody' and similarly states (emphasis added): '[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences— (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; *that has not been credited against another sentence*'. The Supreme Court of the United States indicated that, with this provision, 'Congress made clear that a defendant could not receive a double credit for his detention time'. *U.S. v. Wilson*, 503 U.S. 329, 337 (1992).
[8] An analysis of the drafting history of Article 78(2) of the Statute does not reveal whether this issue was discussed when drafting the Statute. The early text of Article 78(2) that appears in a draft prepared by the 1997 Preparatory Committee is functionally identical to the final Article 78(2). *See* Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Penalties, 10 December 1997, A/AC.249/1997/WG.6/CRP.7.

7. The Majority considers Mr Bemba's sentencing credit in the Main Case as the 'deduction' required under Article 78(2), noting that Article 78(2) mentions 'an order of the *Court*' instead of the '*Chamber*', and concluding that the required sentencing credit has thus been satisfied. For sure, all of Part 7 of the Statute and most of Chapter 7 of the Rules (i.e. the statutory scheme governing penalties) repeatedly indicate that it is the '*Court*' rather than the individual '*Chamber*' that determines the penalties. But, in this context, there is no 'Court' in relation to a case other than the Chambers which heard the case.[9] This is a distinction without a difference.[10]

8. While Mr Bemba has been credited for his detention in the Main Case,[11] he was detained in this case under a separate and distinct warrant of arrest.[12] It is as if Mr Bemba's detention cell was sealed with two padlocks, one from the Main Case and the other from this case. Had Mr Bemba been suddenly released in the Main Case, he still could not have walked free because of his separate warrant of arrest in the present case.

9. That warrant of arrest should not be treated as a mere symbolic formality. Indeed, Mr Bemba had been provisionally released in this case, the Prosecution appealed this release and the Appeals Chamber reversed the release decision – all against the backdrop of Mr Bemba being nevertheless detained in the Main Case the whole time. That arrest warrant was real and effective, and any period of detention served thereunder accrued credits for Mr Bemba. To give no credit to his detention in this case is to deny Mr Bemba his full statutory entitlement. The

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The main changes to this provision in the drafting history primarily concerned its heading and placement in the Statute.

[9] Bizarre results can follow from an overbroad interpretation of the word. For instance, Article 34 of the Court confirms that the 'Court' is composed of four organs: (a) the Presidency; (b) the three judicial divisions; (c) the Office of the Prosecutor and (d) the Registry. But it would be absurd argue that each of these organs (even the Prosecution!) can determine penalties because Articles 77-78 of the Statute uses the term 'Court'.

[10] *Contra* Majority, para. 258.

[11] Bemba Sentencing Decision, ICC-01/05-01/08-3399, para. 96. *See also* Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr (reclassified from under seal on 24 May 2008 and corrigendum filed 20 June 2008).

[12] ICC-01/05-01/13-1-tENG.

real issue here is not one of *double* counting[13] – it is about *not* counting the time spent on a detention order clearly falling under Article 78(2) of the Statute.

B. Interpreting Article 78(2)

10. Yet despite the plain language of Article 78(2), the Majority calls for interpretation, contending that the Article is 'not case-specific' but a 'broadly' framed provision that can be read differently depending on the 'specificities of the case'.[14] I am unable to accept this interpretive standard. All legislative measures, statutes and legal codes lay down rules of general application. It takes an actual case or controversy to call these general rules into specific application. To be general in application is one thing, to be ambiguous is another.

11. But even if it could be said that there is genuine ambiguity as regards persons detained simultaneously on two arrest warrants in two cases, that ambiguity should be resolved in favour of the convicted person (*in dubio pro reo*).

12. Article 22(2) of the Statute sets out the principle of strict construction regarding the interpretation of crimes.[15] Just as crimes require strict interpretation because they can have a dispositive effect on a person's liberty, so too should the determination of a person's sentence.[16] In the other significant interpretive rulings in today's decision (namely, on the maximum term of imprisonment in Article 70 cases and on imposing suspended sentences), the Majority exercised its interpretive latitude in favour of the convicted persons.[17] What is even more telling is that the Statute is silent on the power to suspend the service of sentence, while the Statute expressly provides for sentencing credits. Yet, on the first, the

[13] *Contra* Majority, para. 254.
[14] *Contra* Majority, paras 257-58.
[15] Article 22(2) provides: '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.'
[16] Others have also read the principle enshrined in Article 22(2) as having relevance in contexts beyond the interpretation of crimes. *See The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute - Concurring Opinion of Judge Christine Van den Wyngaert, 20 December 2012, ICC-01/04-02/12-4, para. 18; William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016), page 547.
[17] *See* Majority, paras 29-35, 40-41.

Majority divines a power not spelled out in the Statute but, on the second, withholds an entitlement expressly laid out in the Statute.

13. Moreover, it is also notable that, while the Bemba Defence argued for sentencing credits at length in its written submission,[18] the Prosecution never stated a position on this point. There is no indication in the Prosecution's written or oral submissions before this Chamber that they even oppose Mr Bemba being given full credit pursuant to Article 78(2) of the Statute. Despite an acknowledgement in today's decision of the Prosecution's express lack of opposition,[19] the Majority nevertheless goes out of its way *sua sponte*, unbidden and unprompted, to construe the statutory text unfavourably against the convicted person.

14. Finally, the Majority argues that giving Mr Bemba full credit for his almost three years' detention makes meagre deterrence against mischief. Assigning full credit would make the Article 70 proceedings 'inconsequential'.[20] It is 'unsatisfactory'.[21] It provides 'almost no disincentive' to commit Article 70 offences.[22] However, these policy arguments cannot override the express language of the law.

C. Independence of This Case from the Main Case

15. An interpretation of Article 78(2) that assigns credit to Mr Bemba independently of his Main Case sentence is also more harmonious with the rest of the Statute and with the foundational principle adopted by this Chamber in this case, namely, that the Main Case is a distinct matter and that this Chamber is not here to re-litigate the merits of the Main Case. This has been stressed on many occasions, including on the first day of trial and in the judgment.[23]

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[18] Bemba Sentencing Submission, ICC-01/05-01/13-2089-Red, paras 93-137.
[19] Majority, para. 253.
[20] Majority, para. 254.
[21] Majority, para. 254.
[22] Majority, para. 256.
[23] Judgment, ICC-01/05-01/13-1989-Red, para. 194; Decision on Defence Requests for Disclosure of Materials from the Record of the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and Related Matters, 27 August 2015, ICC-01/05-01/13-1188, para. 12; Decision on 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'information relatives au témoin de l'Accusation 169' and Related Additional Requests, 17 August

16. The Majority, by entangling Mr Bemba's sentencing credits in the Main Case with those in this case, gives rise to possible complications sought to have been avoided by the discrete and separate treatment of this case. Should Mr Bemba's Main Case conviction be overturned on appeal,[24] he will lose his pre-sentencing credit in the Main Case and he is thus denied the benefit given to him by Article 78(2) of the Statute.

17. The Majority undercuts the wisdom of the foundational principle that it has carefully maintained from the outset. And now the Majority deviates from this principle at the last hurdle. These repeated pronouncements by the Chamber have created a legitimate expectation that Mr Bemba was going to receive sentencing credit in this case independently of the Main Case sentence. The Chamber has compounded this problem by not ruling on Mr Bemba's interim release request on remand,[25] instead accepting a withdrawal which can only be reasonably construed as an attempt by Mr Bemba to accrue more sentencing credits.

D. Proportionality of the sentence

18. For the reasons above, it is my view that Mr Bemba is entitled to nearly three years of credit on his sentence. However, a one-year sentence is plainly inadequate, even with the fine imposed. Mr Bemba played a central and overwhelming role in the offences for which he was convicted, despite being detained during the relevant time period.[26] Mr Kilolo and Mr Mangenda would not have done what they did had Mr Bemba not orchestrated the plan and its implementation. I would have found it more appropriate to sentence Mr Bemba to something closer to four years of imprisonment. Such a sentence would better reflect the severity of Mr Bemba's conduct and the gravity of conducting over a

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2015, ICC-01/05-01/13-1154, para. 14; Transcript of Hearing, 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG, page 4 line 6 to page 6 line 6 (ending as follows: '[t]he main case, to make it clear, and this case are conducted independently. They are on independent tracks, so to speak, looking at evidence for different purposes').

[24] As of this writing, Mr Bemba's Main Case appeal is pending.

[25] ICC-01/05-01/13-1151, paras 29-30.

[26] *See especially* Majority, para. 220.

year of systematic deception against the Court in order to subvert a conviction. Given the sentencing credits indicated above, this would lead to Mr Bemba being sentenced to one year of additional imprisonment. As this is also the result of the Majority's approach and the disposition of today's decision, I agree to the sentence imposed to this extent.

E. Conclusion

19. For the reasons above, Mr Bemba should be given credit for the full period for which he was detained in this case and should be given a sentence commensurate with the findings made by this Chamber. I concur with my colleagues on the remainder of the sentencing decision.

Judge Raul C. Pangalangan

Dated 22 March 2017

At The Hague, The Netherlands