

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 30 August 2017

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 of “Corrected version of “Aimé Kilolo Musamba’s Response to the Prosecution’s Document in Support of Appeal against Trial Chamber VII’s Decision on Sentence pursuant to Article 76 of the Statute (ICC-01/05-01/13-2168-Conf)”” (ICC-01/05-01/13-2204-Conf-Corr)

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**AIMÉ KILOLO MUSAMBA’S RESPONSE TO THE PROSECUTION’S
DOCUMENT IN SUPPORT OF APPEAL AGAINST TRIAL CHAMBER VII’S
DECISION ON SENTENCE PURSUANT TO ARTICLE 76 OF THE STATUTE**

Aimé Kilolo Musamba, through his Counsel, hereby submits, pursuant to Regulation 59 of the ICC Regulations of the Court, his Response to the Prosecution’s Document in Support of Appeal against Trial Chamber VII’s Decision on Sentence pursuant to Article 76 of the Statute filed on 21 June 2017 (“OTP Appeal Brief”).

I. OVERVIEW

1. After conducting a full trial, hearing all the evidence, and considering the parties’ written and oral submissions, the Trial Chamber methodically and meticulously assessed all relevant findings and factors, assiduously applied the substantive and procedural jurisprudence of the ICC, and judiciously exercised its discretion in fashioning a sentence that is adequate and proportionate. The Sentencing Decision speaks for itself.
2. The Trial Chamber correctly assessed the gravity of the offenses, distinguishing between, and giving due weight to the fact that the false testimony concerned credibility-related issues rather than the merits of the case. The Trial Chamber correctly assessed Mr. Kilolo’s culpability, performing a fact-specific analysis of its findings in the Trial Judgment. The Trial Chamber correctly assessed Mr. Kilolo’s individual circumstances, finding them to be relevant factors in its weighing and balancing of all relevant factors in determining the appropriate sentence. The Trial Chamber correctly filled a *lacuna* in the statutory sentencing regime, applying a common-sense interpretation of the ICC’s statutory framework and resorting to international jurisprudence and domestic law. The Trial Chamber correctly suspended Mr. Kilolo’s sentence based on factors that are generally indicative of the success or failure of suspended sentences.
3. The Trial Chamber correctly concluded that further incarceration was inappropriate, considering Mr. Kilolo’s family situation, his good behavior throughout the proceedings, and the consequences of incarceration on his professional life. The Trial Chamber was also appreciative of the psychological and financial impact of Mr. Kilolo’s 11-month period of incarceration and the stigma he faces as a person who has committed a serious offense, of a kind that goes to the very heart of the legal profession. The Trial Chamber

correctly imposed a suspended sentence that hangs over Mr. Kilolo's head as a threat of further incarceration, meeting the sentencing objective of deterrence.

4. The Trial Chamber must be accorded deference in its exercise of discretion in determining the appropriate sentence. Having sat through the entirety of the trial, having heard all the evidence and the submissions of the parties, having taken the measure of the witnesses, having observed the conduct of the parties throughout the proceedings, and having experienced the practical demands of the case, the Trial Chamber is better positioned to assess, weigh, and balance all of the complex intangibles.
5. The OTP ignores the Trial Chamber's thorough analysis. It resorts to an inapposite talismanic invocation that the Trial Chamber took the sentence from the "wrong shelf," as if repetition of a catchy metaphor is a substitute for meeting its burden of showing that the Trial Chamber erred in law and abused its discretion in rendering the Sentencing Decision.
6. The OTP spuriously claims that the Trial Chamber imposed a manifestly inadequate and disproportionate sentence. It advances this claim by asserting that the Trial Chamber unduly diminished the gravity of the offenses by considering the nature of the false testimony, erroneously found that accessories deserve lower sentences than co-perpetrators, and, finishing with a flourish of faux outrage, declares that the imposition of a suspended sentence is somehow contrary to the Rome Statute. These assertions are meritless.
7. The OTP's bald pronouncements – that the Trial Chamber's exercise of discretion was based on an erroneous interpretation of law or that the Trial Chamber's weighing and balancing of the relevant factors resulted in a sentence that is so unreasonable as to constitute an abuse of discretion – are valueless.
8. The OTP fails to provide, as it must, the requisite credible proof and legal authority in support of its claims of legal error and abuse of discretion. Its Appeal must be dismissed.
9. To avoid unnecessary repetition and meandering, the below Response to Ground 1 will not track the OTP's arguments as set out in its Appeal Brief. Rather, it will first address the OTP's specific claims regarding the Trial Chamber's assessment of the gravity of the offenses, culpable conduct, and individual circumstances before addressing the OTP's

claim that the sentence is manifestly inadequate and disproportionate. This organizational structure is necessary to contextualize the OTP's claims and show the diligence with which the Trial Chamber followed the sentencing procedure and its careful consideration of all relevant factors in arriving at the sentence. Only after reviewing the Trial Chamber's thorough and sound assessment of the gravity of offenses, culpable conduct, and individual circumstances can the OTP's claims that the sentence is manifestly inadequate and disproportionate be addressed.

II. RESPONSE TO GROUND 1: THE SENTENCE DETERMINED BY THE TRIAL CHAMBER IS APPROPRIATE, PROPORTIONATE, AND INDIVIDUALIZED

A. The Trial Chamber correctly identified, balanced, and weighed all relevant factors in determining Mr. Kilolo's sentence

1. *The Trial Chamber correctly assessed the gravity of the offenses*

The Trial Chamber's analysis

10. The Trial Chamber found all three Article 70 offenses to be inherently grave with far-reaching consequences: they undermine the Court's truth-seeking obligations and impede the victims' right to justice.¹

11. The Trial Chamber addressed the gravity of each of the Article 70 offenses on the facts, considering the relevant factors under Rule 145(1)(c),² i.e. the extent of the damage, the nature of the unlawful behavior, and "the circumstances of time."³

a. **Extent of the damage:** The Trial Chamber considered that the number of contaminated witnesses characterizes "the systematic approach of the offence and therefore the seriousness and gravity of this case."⁴

b. **Nature of the unlawful behavior:** The Trial Chamber found "relevant in its assessment of the gravity of the offences" the degree of sophistication in the execution of the offenses.⁵

¹ Sentencing Decision, paras. 154, 160, 164.

² Rule 145(1)(c): "In addition to the factors mentioned in article 78, paragraph 1, [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 crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person."

³ Sentencing Decision, para. 153.

⁴ Sentencing Decision, paras. 155, 161, 165.

- c. **Circumstances of time:** The Trial Chamber found “relevant in its assessment of the gravity of the offences” the lengthy period over which the offenses were committed.⁶

12. The Trial Chamber “p[aid] heed to the nature of the false testimony that the witnesses gave before Trial Chamber III” when considering the nature of the unlawful behavior for the Article 70(1)(a) offenses, recalling its finding that the false testimony related to: “(i) payments or non-monetary benefits received; (ii) acquaintance with other individuals; and (iii) the nature and number of prior contacts with the Main Case Defence.”⁷

13. The Trial Chamber considered that while the nature of the false testimony (not concerning the merits of the Main Case) “does not, by any means, diminish the culpability of the convicted person, it does inform the assessment of the gravity of the offences in this particular instance.”⁸ As such, the Trial Chamber accorded some weight to its finding that the false testimony underlying the convictions concerned issues other than the merits of the Main Case.⁹

The OTP’s claims

14. The OTP claims that the Trial Chamber erred in law and abused its discretion by considering and giving weight to its finding that the witnesses gave false testimony about credibility-related issues rather than the merits of the Main Case in its assessment of the gravity of the offenses.¹⁰ It argues that:

- a. The Trial Chamber’s decision to limit the scope of the case to false testimony on credibility-related issues was a pragmatic one, which should not have affected its assessment of the gravity of the offenses.¹¹
- b. The content and nature of the false testimony are extraneous and irrelevant factors, immaterial to the gravity of the offenses.¹²

⁵ Sentencing Decision, paras. 157, 162, 166.

⁶ Sentencing Decision, paras. 159, 163.

⁷ Sentencing Decision, para. 167.

⁸ Sentencing Decision, para. 167.

⁹ Sentencing Decision, para. 167.

¹⁰ OTP SAB, paras. 4, 75.

¹¹ OTP SAB, paras. 4, 79-89.

¹² OTP SAB, paras. 75, 79-89, 100.

- c. The Trial Chamber's distinction between false testimony on merit-related issues and false testimony on credibility-related issues was inconsistent with its definitions of the offenses and the importance it gave to credibility assessments at trial, and negates the purpose of sworn testimony.¹³
- d. The Trial Chamber failed to inform the parties of its intention to consider the nature of the testimony to reduce the gravity of the offenses.¹⁴

Response

- 15. The OTP's claims are meritless; the OTP waived this supposed error of law, having acquiesced to the Trial Chamber's decision to limit the scope of the case to non-merit issues.
- 16. On the opening day of the trial, the Trial Chamber unequivocally declared that the scope of the case would be limited to non-merit issues:

The evidence on the merits of the main case was presented before Trial Chamber III, not before this Chamber. Main case witnesses may have falsely testified on issues pertaining to the merits of the main case, including for example whether they were members of certain groups or entities, the structure of these groups or entities, their movements on the ground and the names of officials. However, this Chamber cannot assess the truth or falsity of these statements without command over the evidence in the main case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable.... That said, and in these particular circumstances, the Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case. Rather, whether or not the witness falsely testified can be ascertained in relation to other information given. Moreover, broadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of proceedings and the right of the accused to be tried without undue delay.¹⁵

- 17. The OTP's argument that this decision "was not intended to be a legal decision or one that could be used to undermine the conviction or sentence,"¹⁶ is wholly *dehors* the record. The OTP does not and cannot provide support for this assertion because it never

¹³ OTP SAB, paras. 90-100.

¹⁴ OTP SAB, paras. 84, 85, 100.

¹⁵ ICC-01/05-01/13-T-10-CONF-ENG, p. 4, ll. 19-25, p. 5, ll. 1-13.

¹⁶ OTP SAB, para. 83.

sought to clarify or oppose the Trial Chamber’s limitation on the scope of the case.¹⁷ The Trial Chamber assessed, as required, the gravity of the offenses “*in concreto*,” considering specific facts and circumstances.¹⁸ Because the scope of the case was limited to false testimony on credibility-related issues,¹⁹ the Trial Chamber could not consider false testimony concerning the merits for sentencing purposes. To have done so would have been improper and unjust to Mr. Kilolo – he would have been denied his right of confrontation and his right to challenge the evidence used against him.²⁰

18. The Trial Chamber’s finding that the false testimony concerned credibility-related issues rather than merit-related issues was pertinent to its assessment of gravity.²¹ While false testimony concerning credibility-related issues is by no means insignificant, it logically follows that the gravity of the offenses would have been enhanced were the false testimony directly related to the merits of the case.

19. The Trial Chamber’s distinction between false testimony on credibility-related issues and false testimony on merit-related issues was consistent with its definitions of the elements of the offenses and the importance it gave to credibility assessments at trial.²² Beyond the elements of the offenses, the Trial Chamber had “a degree of discretion to consider relevant factors in assessing gravity.”²³ The Trial Chamber expressly considered the importance of credibility assessments when assessing the gravity of the offenses, finding that questions relating to “(i) payments or non-monetary benefits received; (ii) acquaintance with other individuals; and (iii) the nature and number of prior contacts with the Main Case Defence” were crucially important in assessing the credibility of

¹⁷ See *infra* paras. 21-22.

¹⁸ Sentencing Decision, paras. 23, 153-67. See also *Bemba* Main Case Sentencing Decision, para. 16; *Al Mahdi* TJ, para. 71.

¹⁹ ICC-01/05-01/13-T-10-CONF-ENG, p. 4, ll. 19-25, p. 5, ll. 1-13.

²⁰ See Rome Statute, Arts. 67(1)(e), 67(1)(i), 76(1). Article 67(1)(e) gives the accused or convicted person the right “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.” Article 67(1)(i) states that the accused or convicted person has the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.” Article 76(1) of the Rome Statute requires the Trial Chamber, when considering the appropriate sentence, to “take into account the evidence presented and submissions made during the trial that are relevant to the sentence.” The right to confrontation is a fundamental human right. See ICCPR, Art. 14(3)(e); ECHR, Art. 6(3)(d). See also *Saidi* Judgment, paras. 43-44 (holding that Article 6 of the ECHR “require[s] that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings.”); *Van Mechelen* Judgment, para. 51 (holding that “all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.”); *Krasniki* Judgment, para. 75.

²¹ *Contra* OTP SAB, paras. 75, 79.

²² *Contra* OTP SAB, para. 90.

²³ *Bemba* Main Case Sentencing Decision, para. 15.

witnesses.²⁴ “They provide indispensable information and are deliberately put to witnesses with a view to testing their credibility.”²⁵ After due consideration and careful deliberation, the Trial Chamber reasonably concluded that the false testimony in question was less grave than false testimony on merit-related issues.²⁶

20. The Trial Chamber’s distinction between false testimony on credibility-related issues and false testimony concerning the merits did not in any way “negate[] the purpose of sworn testimony before a Chamber.”²⁷ The OTP provides no support for this meaningless assertion. In the Trial Judgment, the Trial Chamber stated that the term “false” in Articles 70(1)(a) and (b) “means that the witness does not comply with the duty to tell the truth and makes an objectively untrue statement.”²⁸ It convicted Mr. Kilolo of having induced and presented false testimony²⁹ and punished him.³⁰ While the nature of the false testimony informed the Trial Chamber’s assessment of the gravity of the offenses,³¹ it did not negate the conviction or exempt Mr. Kilolo from punishment.

21. In claiming prejudice due to a lack of a notice that the Trial Chamber would consider the nature of the false testimony,³² the OTP has missed the boat. The OTP waived this supposed error of law, having acquiesced to the Trial Chamber’s decision.³³ The Trial Chamber notified the parties on the opening day of trial that the scope of the case would be limited to non-merit issues.³⁴ There is no indication that the OTP team had stepped out for coffee at that moment. The OTP neither raised any objections nor sought interlocutory appellate review. Rather, it proceeded with its opening statement.³⁵ The OTP made no subsequent objections in its Pre-Trial Brief,³⁶ during the trial, or in its Closing Brief.³⁷ Nor did it make any arguments in its written or oral sentencing submissions that the

²⁴ Sentencing Decision, para. 167.

²⁵ Sentencing Decision, para. 167.

²⁶ Sentencing Decision, para. 167.

²⁷ OTP SAB, para. 95.

²⁸ Judgment, para. 24.

²⁹ Judgment, p. 455.

³⁰ Sentencing Decision, para. 194-95.

³¹ Sentencing Decision, para. 167.

³² OTP SAB, paras. 84-85.

³³ See *Krajišnik* AJ, para. 25: “The Appeals Chamber will summarily dismiss arguments and allegations based on material that is not part of the trial record.”

³⁴ ICC-01/05-01/13-T-10-CONF-ENG, p. 4, ll. 6-25, p. 5, ll. 1-25, p. 6, ll. 1-8.

³⁵ ICC-01/05-01/13-T-10-CONF-ENG, pp. 24-73.

³⁶ OTP Pre-Trial Brief.

³⁷ OTP Closing Brief.

nature of the false testimony should not be considered when assessing the gravity of the offenses.³⁸

22. Mr. Mangenda explicitly requested the Trial Chamber “to assess the gravity on the basis of the three types of lies which the accused were found guilty of having promoted” in his written sentencing submission.³⁹ The OTP could have responded to his arguments during the sentencing hearing, as it had “carefully evaluated the written sentencing submissions of the respective Defence teams.”⁴⁰ It chose not to because “many of the arguments that [were] raised there [were] anticipated and dealt with in [its] own written submissions.”⁴¹ The OTP’s claim that it was somehow prejudicated due to a lack of notice is at best disingenuous; more accurately, it is a knowingly manufactured claim based on incredible *ex post facto* assertions of ignorance.

23. The Trial Chamber correctly considered the relevant factors listed under Rule 145(1)(c) in assessing the gravity of the offenses. The OTP fails to provide any support for its claim that the Trial Chamber gave undue weight to the nature of the false testimony in assessing the gravity of the offenses. This Sub-Ground of Appeal must be summarily dismissed.⁴²

2. The Trial Chamber correctly assessed Mr. Kilolo’s culpable conduct

The Trial Chamber’s analysis

24. In assessing Mr. Kilolo’s culpable conduct, the Trial Chamber considered the relevant factors under Rules 145(1)(c) and (2): the degree of participation, the degree of intent, and aggravating circumstances.⁴³

- a. **Degree of participation:** The Trial Chamber referenced 51 paragraphs from the Trial Judgment in describing Mr. Kilolo’s degree of participation in the offenses.⁴⁴ It described conduct found to have been committed as a co-perpetrator (Article 70(1)(b)

³⁸ OTP Sentencing Submission, paras. 10-23; ICC-01/05-01/13-T-53-CONF-ENG, p. 62, ll. 8-25, p. 63, ll. 1-25, p. 64, ll. 1-20.

³⁹ Mangenda Sentencing Submission, para. 41.

⁴⁰ ICC-01/05-01/13-T-53-CONF-ENG, p. 60, ll. 12-13.

⁴¹ ICC-01/05-01/13-T-53-CONF-ENG, p. 60, ll. 13-14.

⁴² *Krajišnik* AJ, para. 27: “As a general rule, mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.”

⁴³ Sentencing Decision, para. 168.

⁴⁴ Sentencing Decision, paras. 169-73 *citing* Judgment, paras. 367-71, 445, 535, 689-91, 705-13, 747-61, 823-31, 860, 896-98.

and (c) offenses) before describing conduct found to have been committed as an accessory (Article 70(1)(a) offenses), examining the factual findings relating to each offense and the precise nature of the conduct.

- b. **Degree of intent:** The Trial Chamber “recall[ed] its findings on [Mr. Kilolo’s] role as counsel for Mr Bemba in the Main Case and the sheer extent of his activities,” citing its conclusions in the Trial Judgment on Mr. Kilolo’s intent to commit the Article 70 offenses.⁴⁵
- c. **Aggravating circumstances:** The Trial Chamber found that Mr. Kilolo’s culpability was enhanced by all three aggravating circumstances advanced by the OTP:⁴⁶ abuse of trust *vis-à-vis* the Court,⁴⁷ abuse of the lawyer-client privilege,⁴⁸ and attempts to frustrate the Article 70 investigation.⁴⁹

The OTP’s claims

25. The OTP claims that the Trial Chamber “erred in law in finding that accessories are, as a matter of principle, less blameworthy than co-perpetrators and thus deserve a lesser punishment.”⁵⁰ It argues that:

- a. The Trial Chamber should have conducted a fact-specific analysis of Mr. Kilolo’s culpability.⁵¹
- b. There is no absolute hierarchy of blameworthiness among the modes of liability in Article 25 and accessories are not *per se* less liable or more deserving of lenient sentences.⁵²
- c. Article 78(1) and Rule 145 do not establish a correlation between the modes of liability and the sentence.⁵³

⁴⁵ Sentencing Decision, para. 175 *citing* Judgment, paras. 711, 760, 835-36.

⁴⁶ OTP Sentencing Submission, paras. 55-63 (abuse of trust *vis-à-vis* the Court), 64-71 (abuse of the lawyer-client privilege), and 72-80 (attempts to frustrate the Article 70 investigation).

⁴⁷ Sentencing Decision, para. 177.

⁴⁸ Sentencing Decision, para. 179.

⁴⁹ Sentencing Decision, para. 181.

⁵⁰ OTP SAB, para. 102.

⁵¹ OTP SAB, paras. 106-08.

⁵² OTP SAB, paras. 103-04, 109.

⁵³ OTP SAB, para. 107.

26. “In the alternative,” the OTP claims that the Trial Chamber abused its discretion by giving undue weight to Mr. Kilolo’s liability as a co-perpetrator or accessory in determining his sentence.⁵⁴ It argues that instead of considering the legal label, the Trial Chamber should have considered “the true extent and nature” of Mr. Kilolo’s contributions to the offenses “as described in the Conviction Judgment and Sentencing Decision, namely, that the witnesses would have not falsely testified without [Mr. Kilolo’s] contributions or would have testified in a different way.”⁵⁵

Response

27. The OTP’s claims are meritless; the OTP misrepresents the Sentencing Decision.⁵⁶

28. The Trial Chamber did not hold that accessories deserve lesser punishment “as a matter of principle”⁵⁷ and did not assess the degree of participation in the abstract. As the OTP concedes, the Trial Chamber “referr[ed] in passing to the different modes of liability [and] did not distinguish between Kilolo’s and Bemba’s *culpability* for their contributions to the article 70(1)(a) offences, and their contributions to the article 70(1)(b) and (c) offences.”⁵⁸ The Trial Chamber conducted a “fact-centric” analysis, just as the OTP suggests it should have done, “consider[ing] the true extent and nature of ... Kilolo’s contributions ... as described in the Conviction Judgment and Sentencing Decision.”⁵⁹

29. The Trial Chamber’s fact-centric analysis is demonstrated by comparing Mr. Kilolo’s and Mr. Mangenda’s sentences for Article 70(1)(a) offenses. Mr. Kilolo received a sentence of 12 months’ imprisonment for “soliciting” the Article 70(1)(a) offenses pursuant to Article 25(3)(b).⁶⁰ Mr. Mangenda received the same term of imprisonment for Article 70(1)(a) offenses, even though he was convicted of “assisting” those offenses pursuant to Article 25(3)(c),⁶¹ a less blameworthy form of participation.⁶² This was due to the specifics of Mr. Mangenda’s participation in the offenses, as found in the Trial

⁵⁴ OTP SAB, paras. 103, 111-12.

⁵⁵ OTP SAB, para. 111.

⁵⁶ See *Krajišnik* AJ, para. 18.

⁵⁷ *Contra* OTP SAB, paras. 102-03.

⁵⁸ OTP SAB, para. 109 (emphasis in original).

⁵⁹ OTP SAB, para. 111. Sentencing Decision, paras. 168-81.

⁶⁰ Sentencing Decision, para. 194.

⁶¹ Sentencing Decision, para. 146.

⁶² Judgment, para. 86: “When compared to Article 25(3)(b) of the Statute, the form of liability under Article 25(3)(c) of the Statute again implies a lower degree of blameworthiness. This is deduced from the fact that the instigator, the intellectual author of the offence, directly prompts its commission, while the assistant’s contribution hinges on the determination of the principal perpetrator to execute the offence.”

Judgment.⁶³ Had the Trial Chamber relied on a “hierarchy of blameworthiness among the different modes of liability,” as the OTP claims,⁶⁴ Mr. Mangenda would have received a lower sentence. He did not. The Trial Chamber assessed both Mr. Kilolo’s and Mr. Mangenda’s degrees of participation in Article 70(1)(a) offenses “*in concreto*, on the basis of the Chamber’s factual and legal findings in its Judgment.”⁶⁵

30. Even if the Trial Chamber gave weight to modes of liability in assessing Mr. Kilolo’s degree of participation in Article 70(1)(a) offenses, that would have been well within its discretion. Rule 145 requires the Trial Chamber to assess the convicted person’s degree of participation, which is essential to determining the convicted person’s culpability. In describing the convicted person’s degree of participation, distinguishing among the modes of liability is consistent with the principle of fair labelling – the Trial Chamber must accurately label an accused’s individual responsibility, “applying the most accurate description of his responsibility under any of the paragraphs of Article 25(3) or Article 28.”⁶⁶ The result is a more transparent and predictable sentencing process:

[T]he differentiated imposition of a title of imputation upon the defendant, based on the weight of his contribution and the degree of wrongfulness, serves justice and fairness better than treating all parties to a crime equally. In addition, to do this already at the pre-trial phase is a useful heuristic exercise. From a practical perspective, it must be stressed that this exercise will be required in each system, ultimately at the sentencing stage, where the ‘degree of participation’ must be taken into account.⁶⁷

31. The *Lubanga* Appeals Chamber endorsed this approach:

[I]t is indeed appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person’s extent of contribution to the crime. This is because the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question.⁶⁸

⁶³ Sentencing Decision, paras. 120-22.

⁶⁴ OTP SAB, para. 103.

⁶⁵ See *Katanga* Sentencing Decision, para. 61 (*italics in original*).

⁶⁶ *Katanga* Regulation 55 Decision, Judge van den Wyngaert Dissenting Opinion, para. 5. See also *Lubanga* AJ, para. 462.

⁶⁷ Ambos (2013), p. 146. See also Werle and Burghardt, p. 318: “[I]t is appropriate to consciously use and define modes of participation as indicators of the degree of individual criminal responsibility and take them into account at the sentencing stage. Such an approach to modes of participation has highly welcome procedural consequences. Thus, the prosecution must set out facts and legal elements of the charges in detail; different legal thresholds shall be applicable to the different modes of participation; and the sentencing process will become more transparent and predictable.”

⁶⁸ *Lubanga* AJ, para. 468.

Judge Fulford, who dissented in *Lubanga* and rejected “a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability,” still considered the mode of liability “one of a number of relevant factors” in assessing the degree of participation under Rule 145(1)(c).⁶⁹

32. While the *Katanga* Trial Chamber also rejected an “automatic correlation between [the] mode of liability and penalty,” it nonetheless held that “having adjudged guilt, a bench may choose to mete out mitigated penalties to accessories.”⁷⁰
33. The OTP’s alternative argument – that instead of the legal label, the Trial Chamber should have considered “that the witnesses would have not falsely testified without [Mr. Kilolo’s] contributions or would have testified in a different way”⁷¹ – also fails. The Trial Chamber explicitly considered this in the Sentencing Decision: “Without Mr. Kilolo’s direct and substantial intervention, the offences would not have been committed or at least not in the same way.”⁷² The OTP points to paragraphs 862 and 906 of the Trial Judgment in claiming that the Trial Chamber failed to consider this finding.⁷³ While paragraphs 862 and 906 are not explicitly cited in the Sentencing Decision, the Trial Chamber cited paragraph 898 of the Trial Judgment, which repeats the very same finding.⁷⁴ Merely pointing to different paragraphs of the Trial Judgment that were not explicitly cited in the Sentencing Decision does not show that the Trial Chamber failed to consider that finding. The Trial Chamber need not cite to every single paragraph of the Trial Judgment where a finding is repeated. Further, a Trial Chamber need not list every factual finding it relied on in the Sentencing Decision so long as there is no indication that the Trial Chamber completely disregarded any particular finding, just as a Trial Chamber

⁶⁹ *Lubanga* TJ, Judge Fulford Separate Opinion, para. 9: “Article 78 ... and Rule 145 ..., which govern the sentences that are to be imposed, provide that an individual’s sentence is to be decided on the basis of ‘all relevant factors,’ ‘including the gravity of the crime and the individual circumstances of the convicted person’. Although the ‘degree of participation’ is one of the factors listed in Rule 145(1)(c) of the Rules, these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors.”

⁷⁰ *Katanga* TJ, para. 1386.

⁷¹ OTP SAB, para. 111.

⁷² Sentencing Decision, para. 172.

⁷³ OTP SAB, para. 111, fn. 243.

⁷⁴ Sentencing Decision, para. 172, fn. 267.

is not required to refer to the testimony of every witness or every piece of evidence in the record in making its factual findings.⁷⁵

34. The Trial Chamber correctly considered the relevant factors listed under Rule 145(1)(c) and (2) in assessing Mr. Kilolo's culpable conduct. The OTP's assertions of error and abuse of discretion are based on a misrepresentation of the Sentencing Decision. This Sub-Ground of Appeal must be summarily dismissed.⁷⁶

3. The Trial Chamber correctly assessed, balanced, and weighed Mr. Kilolo's individual circumstances

35. While the OTP does not raise any error concerning the Trial Chamber's assessment of Mr. Kilolo's individual circumstances in Ground 1 of its Appeal, it does raise certain errors in Ground 2 that concern the Trial Chamber's assessment of individual circumstances.⁷⁷ Since these claimed errors relate more to the Trial Chamber's determination of the sentence (Ground 1) than its decision to suspend (Ground 2), the Response will address those claimed errors here.

The Trial Chamber's analysis

36. The Trial Chamber assessed Mr. Kilolo's individual circumstances, "consider[ing] all those factors that are not directly related to the offence committed, or to Mr Kilolo's culpable conduct."⁷⁸

- a. **Lack of disciplinary and criminal record:** The Trial Chamber did not consider the absence of a disciplinary or criminal record to be a "relevant mitigating circumstance," but found this factor relevant to Mr. Kilolo's "overall circumstances" pursuant to Rule 145(1)(b) in determining his appropriate sentence.⁷⁹
- b. **Cooperation with the Court and constructive attitude during trial:** The Trial Chamber was "appreciative of Mr Kilolo's good and respectful behaviour and attendance record," but declined to consider it as "a circumstance that could mitigate

⁷⁵ *Limaj et al.* AJ, para. 86. See *Lubanga* SAJ, para. 110 ("While the Trial Chamber did not refer to the delay caused by stays of proceedings in the Sentencing Decision, the Appeals Chamber infers that the Trial Chamber implicitly considered this issue with making its findings on mitigating factors").

⁷⁶ *Krajišnik* AJ, para. 18.

⁷⁷ See OTP SAB, paras. 157-59.

⁷⁸ Sentencing Decision, para. 182.

⁷⁹ Sentencing Decision, para. 184, 193.

the sentence to be imposed.”⁸⁰ However, the Trial Chamber found this factor relevant to Mr. Kilolo’s “overall circumstances” pursuant to Rule 145(1)(b) in determining his appropriate sentence.⁸¹

- c. **Efforts to promote the legal profession and NGO involvement:** The Trial Chamber found these factors relevant to Mr. Kilolo’s “overall circumstances” pursuant to Rule 145(1)(b) in determining his appropriate sentence.⁸²
- d. **Physical health:** The Trial Chamber “underst[ood] that the arrest and subsequent detention have been traumatic for Mr Kilolo,” but “recalled that reasons of ill health can only be considered in exceptional cases,” and declined to “consider this a factor to reduce his sentence.”⁸³
- e. **Damage to Mr. Kilolo’s personal and professional reputation, loss of clientele, and emotional and financial impact on Mr. Kilolo’s extended and immediate family:** The Trial Chamber found that these factors did “not constitute mitigating factors in the present case” because these factors are “common to many convicted persons who have been arrested and detained by international tribunals.”⁸⁴ The Trial Chamber also considered that these factors were natural consequences of Mr. Kilolo’s own conduct.⁸⁵

37. The Trial Chamber then balanced and weighed Mr. Kilolo’s individual circumstances against all the relevant factors in determining his sentence:

The Chamber has weighed and balanced all the factors set out above. The Chamber found three aggravating circumstances, namely Mr Kilolo’s abuse of trust *vis-à-vis* the Court, his abuse of the lawyer-client privilege and attendant rights, and his role in the attempt to obstruct the present Article 70 investigation. The Chamber emphasises that it has distinguished between the offences that Mr Kilolo committed as co-perpetrator and those in relation to which he was an accessory. The number of witnesses involved has also been taken into account. The Chamber also paid heed to the fact that the false testimony related to matters informing the credibility of witnesses. Lastly, the Chamber took into account Mr Kilolo’s efforts to promote the legal profession in Belgium and the DRC, his involvement in a non-governmental organisation,

⁸⁰ Sentencing Decision, para. 186.

⁸¹ Sentencing Decision, paras. 186, 193.

⁸² Sentencing Decision, paras. 186, 193.

⁸³ Sentencing Decision, para. 187.

⁸⁴ Sentencing Decision, para. 189.

⁸⁵ Sentencing Decision, para. 189.

his cooperation with the Court and constructive attitude during trial, and, finally, the absence of a criminal record and disciplinary record with the Brussels bar.⁸⁶

The OTP's claims

38. While the OTP fails to clearly articulate any error or abuse of discretion regarding the Trial Chamber's assessment of Mr. Kilolo's individual circumstances, it nonetheless claims that:

- a. The legal basis of the category of factors that the Trial Chamber defines as "overall circumstances" under Rule 145(1)(b) is unclear.⁸⁷
- b. The weight that the Trial Chamber gave to the "overall circumstances" in determining the sentence is unclear.⁸⁸
- c. Since the Trial Chamber relied on these factors to suspend the sentence, it could not have considered them also to reduce the sentence because this would contradict the Trial Chamber's finding that these circumstances did not merit mitigation, and would amount to *de facto* improper double-counting.⁸⁹
- d. "[T]he uncertainty as to the role and weight the Chamber gave to these ordinary 'overall circumstances' in determining Mangenda's and Kilolo's sentences further evinces the Chamber's unreasonableness in suspending their sentences on the same basis."⁹⁰

Response

39. The OTP's claims are meritless; the OTP fails to discharge its burden as an appellant to identify and articulate precise errors committed by the Trial Chamber.⁹¹

⁸⁶ Sentencing Decision, para. 193.

⁸⁷ OTP SAB, para. 158.

⁸⁸ OTP SAB, para. 157.

⁸⁹ OTP SAB, para. 157.

⁹⁰ OTP SAB, para. 159.

⁹¹ *Krajišnik* AJ, para. 26: "[T]he Appeals Chamber will, as a general rule, summarily dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error committed by the Trial Chamber." *Lubanga* SAJ, para. 3: "The Appeals Chamber will only intervene in a Trial Chamber's exercise of its discretion in determining the sentence if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law[;] (ii) the discretion was exercised based on an incorrect

40. The Trial Chamber did not create a new category of “overall circumstances,”⁹² but simply assessed Mr. Kilolo’s individual circumstances, as it was required to do under Article 78(1) and Rule 145(1)(b). In particular, Rule 145(1)(b) requires the Trial Chamber to “[b]alance *all the relevant factors*, including any mitigating and aggravating factors and consider the *circumstances both of the convicted person* and of the crime.”⁹³ Because the Trial Chamber was required to individualize the sentence,⁹⁴ a failure to consider relevant individual circumstances would have amounted to a legal error.⁹⁵

41. The Trial Chamber correctly assessed Mr. Kilolo’s individual circumstances “considering all those factors that are not directly related to the offence committed, or to Mr Kilolo’s culpable conduct.”⁹⁶ Its approach was consistent with *Al Mahdi*⁹⁷ and the *Bemba* Main Case,⁹⁸ where the Trial Chambers assessed the convicted persons’ individual circumstances considering factors that were not directly related to the offense or culpable conduct. The Trial Chamber then appropriately balanced and weighed Mr. Kilolo’s individual circumstances with all the relevant factors when fashioning the sentence.⁹⁹

42. The Trial Chamber was not required to explain the weight given to individual factors in arriving at the sentence.¹⁰⁰ “The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber’s exercise of discretion.”¹⁰¹ Other than making pronouncements, the OTP provides no evidence or supporting authority showing that the Trial Chamber gave undue weight to Mr. Kilolo’s individual circumstances when determining his sentence.¹⁰² Moreover, the situational

conclusion of fact; or (iii) as a result of the Trial Chamber’s weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.”

⁹² *Contra* OTP SAB, para. 158.

⁹³ Emphasis added.

⁹⁴ *Lubanga* SAJ, para. 76.

⁹⁵ *Lubanga* SAJ, para. 1.

⁹⁶ Sentencing Decision, para. 182.

⁹⁷ See *Al Mahdi* TJ, paras. 94: “In this section, the Chamber addresses all relevant circumstances that are not directly related to the crime committed or to Mr Al Mahdi’s culpable conduct.”

⁹⁸ See *Bemba* Main Case Sentencing Decision, para. 68: “The Chamber addresses below Mr Bemba’s circumstances that have not been previously considered, namely those that do not relate directly to the crimes or his culpable conduct.”

⁹⁹ Sentencing Decision, para. 193.

¹⁰⁰ *Lubanga* SAJ, paras. 69-70. See also *Semanza* AJ, para. 398. “[T]he Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant’s previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.” See also *Seromba* AJ, para. 235.

¹⁰¹ *Lubanga* SAJ, paras. 1, 43.

¹⁰² See e.g. *Seromba* AJ, para. 234: “The Appeals Chamber finds that the Prosecution has failed to substantiate its allegations regarding aggravating circumstances. The Prosecution merely affirms that insufficient weight was given to the listed factors and that the killing of Tutsi refugees during the destruction of the church should have

nature of the OTP's position is apparent: had Mr. Kilolo's individual circumstances been other than favorable, the OTP surely would have argued that Trial Chamber should give weight to the individual circumstances and increase the sentence.¹⁰³

43. The Trial Chamber did not use the same individual circumstances to determine the sentence and to suspend it.¹⁰⁴ In determining the sentence, the Trial Chamber expressly relied on Mr. Kilolo's efforts to promote the legal profession, NGO involvement, cooperation with the Court and constructive attitude during trial, and absence of a criminal record or disciplinary record.¹⁰⁵ The Trial Chamber relied on different factors – namely, Mr. Kilolo's family situation, good behavior throughout the proceedings, and the consequences of incarceration on his professional life – to suspend the sentence.¹⁰⁶

44. The Trial Chamber's decision to suspend the sentence was legally sound and reasonable. (See *infra* Response to Ground 2, paras. 80-117).

45. The Trial Chamber correctly considered the relevant individual circumstances under Article 78(1) and Rule 145(1)(b). The OTP fails to demonstrate any error in the Trial Chamber's analysis or abuse of discretion in its weighing and balancing of Mr. Kilolo's individual circumstances. Failing to discharge its burden as an appellant to identify and articulate precise errors committed by the Trial Chamber, the OTP's arguments must be summarily dismissed.¹⁰⁷

B. The Trial Chamber's sentence is appropriate, proportionate, and sufficient to deter Mr. Kilolo and others from committing Article 70 offenses

The Trial Chamber's analysis

46. The Trial Chamber considered that the primary purpose of sentencing individuals under Article 70 is rooted in retribution and deterrence.¹⁰⁸ It explained that for deterrence

been considered as an aggravating circumstance, without putting forth any evidence or concrete arguments in support of this assertion. The Prosecution has therefore failed to demonstrate that the Trial Chamber erred in its assessment of the aggravating factors."

¹⁰³ In *Lubanga*, the OTP argued that Mr. Lubanga's individual circumstances increased the gravity of the crimes because he was well-educated and would have understood "the gravity of depriving children of the care of their families and their education." *Lubanga* Sentencing Decision, paras. 55-56 (internal citation omitted).

¹⁰⁴ *Contra* OTP SAB, para. 157.

¹⁰⁵ Sentencing Decision, para. 193.

¹⁰⁶ Sentencing Decision, para. 197.

¹⁰⁷ *Krajišnik* AJ, para. 26.

¹⁰⁸ Sentencing Decision, para. 19.

purposes, the sentence “should be adequate to discourage a convicted person from recidivism..., as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence).”¹⁰⁹

47. In determining a proportionate sentence, the Trial Chamber considered “the fact that largely the same conduct underlies the multiple convictions.”¹¹⁰ In light of all the factors it analyzed, the Trial Chamber sentenced Mr. Kilolo to:

- a. 24 months’ imprisonment for corruptly influencing 14 witnesses as a co-perpetrator under Article 25(3)(a);
- b. 24 months’ imprisonment for presenting the false evidence of witnesses as a co-perpetrator under Article 25(3)(a); and
- c. 12 months’ imprisonment for inducing the giving of false testimony as an accessory under Article 25(3)(b).¹¹¹

48. The Trial Chamber held that Article 78(3) “establishes that the joint sentence may not be less than the highest individual sentence pronounced,” and imposed a joint sentence of 30 months’ imprisonment.¹¹² It then considered that Mr. Kilolo is entitled to have deducted the 11 months he previously spent in detention, pursuant to Article 78(2).¹¹³

49. The Trial Chamber found a fine to be a suitable part of Mr. Kilolo’s sentence, in particular, because “there is a need to discourage this type of behavior by counsel appearing before a court of law.”¹¹⁴ In making this finding, the Trial Chamber considered that it is “incumbent upon this Chamber to ensure that the repetition of such conduct on the part of Mr Kilolo or any other person is dissuaded.”¹¹⁵ The Trial Chamber considered Mr. Kilolo’s Solvency Report and determined that EUR 30,000 was an appropriate fine in addition to his custodial sentence of 30 months with credit for 11 months served, the balance suspended for three years upon good behavior and timely payment of the fine.¹¹⁶

¹⁰⁹ Sentencing Decision, para. 19.

¹¹⁰ Sentencing Decision, para. 194.

¹¹¹ Sentencing Decision, para. 194.

¹¹² Sentencing Decision, para. 195.

¹¹³ Sentencing Decision, para. 196.

¹¹⁴ Sentencing Decision, para. 198.

¹¹⁵ Sentencing Decision, para. 198.

¹¹⁶ Sentencing Decision, paras. 197-99, fn. 317.

The OTP's claims

50. The OTP claims that the Trial Chamber's sentence is manifestly inadequate and disproportionate, as if it was "taken from the wrong shelf," because the sentence contradicts the Trial Chamber's findings on the gravity of the offenses¹¹⁷ and Mr. Kilolo's culpability.¹¹⁸ It argues that:

- a. "In typical 'wrong shelf' appeal cases, notwithstanding the Trial Chamber's recitation of sentencing principles, the initial sentence imposed simply does not make sense. On this basis, in several cases at the *ad hoc* tribunals, the sentences were therefore found to be manifestly inadequate and increased on appeal."¹¹⁹
- b. "Assessing the seriousness of the article 70 offences in this case as warranting no more than a few weeks or month at best per witness is an abuse of discretion."¹²⁰

51. The OTP claims that the Trial Chamber "incorrectly considered that 'largely the same conduct' underpinned the cumulative convictions for the three article 70 offences, thus reducing [the] sentence[]." ¹²¹ Rather, the OTP claims that the Trial Chamber should have conducted a "deeper analysis" of whether, and the extent to which, the sentence should be increased due to the cumulative convictions.¹²²

52. The OTP also claims that the sentence fails to deter Mr. Kilolo from committing further Article 70 offenses,¹²³ arguing that:

- a. The Trial Chamber failed to assess if the amount imposed would actually deter Mr. Kilolo from committing offenses and whether the fine could be realized in fact.¹²⁴
- b. The Trial Chamber failed to "elaborate" on what modalities or enforcement mechanisms would govern the payment of the fine.¹²⁵

¹¹⁷ OTP SAB, paras. 27-36, 54.

¹¹⁸ OTP SAB, paras. 37-44, 54.

¹¹⁹ OTP SAB, para. 18.

¹²⁰ OTP SAB, para. 36. *See also* Table 1, calculating the term of imprisonment by offense and per witness.

¹²¹ OTP SAB, paras. 61, 67-69.

¹²² OTP SAB, para. 69.

¹²³ OTP SAB, paras. 55-62.

¹²⁴ OTP SAB, paras. 58-59.

¹²⁵ OTP SAB, paras. 59-60.

- c. The sentence cannot be reconciled with the Trial Chamber's stated purpose of punishment: retribution and deterrence.¹²⁶

Response

53. The OTP's claims are meritless: (1) the Trial Chamber's sentence is appropriate, reflecting the gravity of the offenses, Mr. Kilolo's culpable conduct, and his individual circumstances; (2) the sentence is proportionate, considering that largely the same conduct underlies the cumulative convictions; and (3) the sentence is sufficient to deter Mr. Kilolo, and others similarly situated, from committing offenses against the administration of justice.

1. *The Trial Chamber's sentence is appropriate, reflecting the gravity of the offenses, culpable conduct, and individual circumstances; it was not taken from the "wrong shelf"*

54. In claiming that the Trial Chamber's sentence does not reflect the gravity of the offenses and Mr. Kilolo's culpable conduct,¹²⁷ the OTP takes the sentence out of context, ignoring entirely the Trial Chamber's careful sentencing calculus, in particular, the balancing and weighing of *all relevant factors* and the individualization of the sentence pursuant to Rule 145(1)(b). The OTP fails to put forward any evidence that the Trial Chamber undervalued or contradicted its findings on the gravity of the offenses or Mr. Kilolo's culpable conduct; it merely presents a one-sided, un-nuanced view of the Sentencing Decision. In asserting its allegations of error in the Trial Chamber's assessment of the gravity of the offenses and Mr. Kilolo's culpable conduct, the OTP fails to demonstrate any error or abuse of discretion. (*See supra* Response to Ground 1, paras. 10-45).

55. The OTP's comparisons to "typical 'wrong shelf' appeal cases" – *Duch*, *Gacumbitsi*, and *Galić* – are inapposite and of no value.¹²⁸ There is no meaningful comparison to be drawn between this case and the cited core crimes (Article 5 type) cases for sentencing purposes. "Comparison between cases is ... generally of limited assistance. Any given case may contain a multitude of variables ... and often the differences are more significant than the similarities...."¹²⁹

¹²⁶ OTP SAB, para. 55.

¹²⁷ OTP SAB, paras. 25-44, 54.

¹²⁸ OTP SAB, paras. 19-21.

¹²⁹ *Ntabakuze* AJ, para. 298 (internal citations omitted).

56. Details conveniently omitted by the OTP show that there are no typical “wrong shelf” cases, i.e. cases where sentences were increased on appeal because “the initial sentence imposed simply does not make sense.”¹³⁰ The “wrong shelf” cases can only be taken for what they are worth – that, occasionally, Appeals Chambers have increased sentences on appeal. In each case, the Appeals Chamber increased the sentence for different, unique reasons – all of which are inapplicable to this case.

57. The OTP refers to *Duch* for the ECCC Supreme Court Chamber’s finding that the sentence was manifestly inadequate because it did not reflect the gravity of the crimes and the individual circumstances in the case.¹³¹ *Duch* is an anomaly and should not be used by the Appeals Chamber for any guidance; it belongs on a “shelf” of its own.

58. Duch had confessed to his role as Chairman of the S-21 security center and implicated other Khmer Rouge cadres in crimes before the ECCC was ever established.¹³² He was then unlawfully detained by the Cambodian Military Court for more than eight years.¹³³ Once the ECCC came into operation, Duch willingly cooperated in the judicial investigation,¹³⁴ providing statements about his role at S-21 and the crimes committed there.¹³⁵ But when it came to trial, Duch was less than forthcoming. He gave evasive, incomplete, and untrustworthy testimony, sought to minimize his role in S-21 crimes,¹³⁶ and in his closing statements, belatedly argued that he did not meet the ECCC’s jurisdictional criteria.¹³⁷

During the closing statements, the Accused acknowledged his “legal and moral” responsibility for the crimes committed at S-21, but nevertheless requested that the Chamber release him, and sought an acquittal on all crimes charged against him. The Accused’s international defence counsel, who

¹³⁰ OTP SAB, paras. 18-22.

¹³¹ OTP SAB, para. 21 citing *Duch* AJ, paras. 360-73, 383.

¹³² See Christophe Pechoux, *Interview with Kaing Guek Eav, also known as Duch, Chairman of S-21*, 28-29 April 1999 Ta Sanh village, 4-6 May 1999, Battambang. The ECCC was established by an agreement between the Royal Government of Cambodia and the United Nations reached on 6 June 2013. Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

¹³³ *Duch* TJ, para. 626.

¹³⁴ *Duch* Closing Order, para. 168: “Moreover, DUCH has cooperated willingly in the judicial investigation, neither attempting to implicate anyone who was under his orders, nor placing the blame on the upper echelons of the Party alone, in order to exonerate himself.”

¹³⁵ *Duch* TJ, para. 609.

¹³⁶ *Duch* TJ, para. 610; *Duch* AJ, para. 368.

¹³⁷ *Duch* Transcript, 25 November 2009, p. 84, ll. 24-25, p. 85, ll. 1-25, p. 86, ll. 1-4.

appeared to distance from those comments, noted that the Chamber should instead consider a number of mitigating factors in determining a sentence.¹³⁸

59. At trial, the Co-Prosecutors submitted that while a sentence of life imprisonment would reflect the gravity of the crimes and Duch's role in them, a 40-year term of imprisonment was appropriate to remedy his unlawful detention and account for his cooperation, remorse, limited acceptance of responsibility, and the impact these factors had on national reconciliation.¹³⁹ The Trial Chamber considered the coercive climate in Democratic Kampuchea in which Duch operated, and his cooperation, remorse, and prospects of rehabilitation to varying degrees as mitigating factors.¹⁴⁰ It imposed a single sentence of 35 years' imprisonment, reduced that term of imprisonment by five years to account for Duch's unlawful detention, and gave Duch credit for the eight years he spent in detention.¹⁴¹

60. After public outcry over the perceived overly-lenient sentence,¹⁴² the Co-Prosecutors appealed, arguing that the Supreme Court Chamber should impose a sentence of life imprisonment, but reduce that life sentence to a prison term of 45 years to provide an appropriate remedy for Duch's unlawful detention.¹⁴³ Curiously, the Co-Prosecutors did not explain why the sentence they sought on appeal was higher than the sentence they sought at trial or why the factors they once considered as mitigating, albeit of limited impact,¹⁴⁴ no longer constituted mitigating factors. The Duch Defence did not respond to the Co-Prosecutors' appeal, making only sparse submissions regarding mitigating factors and the appropriate sentence in its appeal of Duch's conviction.¹⁴⁵ The Supreme Court Chamber imposed a sentence of life imprisonment, having entered additional convictions for various crimes against humanity,¹⁴⁶ having reversed the Trial Chamber's assessment

¹³⁸ *Duch TJ*, para. 570.

¹³⁹ *Duch Co-Prosecutors' Final Trial Submission*, paras. 485-86.

¹⁴⁰ *Duch TJ*, paras. 606-11, 629.

¹⁴¹ *Duch TJ*, paras. 679-82.

¹⁴² Seth Mydans, *Anger in Cambodia Over Khmer Rouge Sentence*, N.Y. Times, 26 July 2010, at A4, available at <http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html>; Miranda Leitsinger, *Khmer Rouge Survivors Angry over Duch Jail Sentence*, CNN.COM, 27 July 2010, <http://edition.cnn.com/2010/WORLD/asiapcf/07/26/cambodia.khmer.rouge.verdict/index.html>; Guy De Launey, *Tears and Disbelief at Duch Verdict*, BBC NEWS, 26 July 2010 <http://www.bbc.com/news/world-asia-pacific-10763409>.

¹⁴³ *Duch Co-Prosecutors' AB*, p. 65.

¹⁴⁴ *Duch Co-Prosecutors' Final Trial Submission*, para. 486: "A further reduction of five years should be granted for [Duch's] general co-operation, limited acceptance of responsibility, remorse, and the potential impact these factors may have on national reconciliation."

¹⁴⁵ *Duch AJ*, para. 359.

¹⁴⁶ *Duch AJ*, p. 320.

and weighing of mitigating factors,¹⁴⁷ and having reversed the reduction in sentence to remedy Duch's unlawful detention.¹⁴⁸

61. The OTP refers to *Gacumbitsi* for the ICTR Appeals Chamber's finding that a sentence of 30 years' imprisonment did not reflect the gravity of the crimes or Gacumbitsi's degree of culpability.¹⁴⁹ *Gacumbitsi*, like *Duch*, belongs on a "shelf" of its own. In increasing Gacumbitsi's sentence to a term of life imprisonment, the Appeals Chamber expressly considered other factors in addition to its finding that the Trial Chamber failed to give proper weight to the gravity of the crimes and Gacumbitsi's role in them.¹⁵⁰ The Appeals Chamber entered new convictions for murder as a crime against humanity, and reversed other errors of law and fact to hold Gacumbitsi responsible for ordering acts of genocide, extermination, murder, and rape committed by a wider range of perpetrators who participated in attacks in Nyarubuye Parish and Kigarama.¹⁵¹ The Appeals Chamber expressly considered the impact of these findings on the sentence.¹⁵² The ICTR's policy of meting out life sentences for genocide convictions where there were no significant mitigating circumstances also factored into the Appeals Chamber's reasoning.¹⁵³

62. The OTP refers to *Galić* for the ICTY Appeals Chamber's finding that, despite having correctly pronounced the facts and sentencing principles, the Trial Chamber abused its discretion by imposing a sentence of 20 years' imprisonment.¹⁵⁴ If there is indeed such a thing at all, *Galić* is the only true "wrong shelf" case. *Galić* was involved in the siege of Sarajevo, which lasted for 44 months.¹⁵⁵ Hundreds of civilians were killed and thousands were wounded in the shelling and sniping.¹⁵⁶ Despite finding that the Trial Chamber did not err in its factual findings and correctly noted the sentencing principles, the Appeals Chamber increased the sentence because it was disproportionate to the gravity of the

¹⁴⁷ *Duch* AJ, para. 363.

¹⁴⁸ *Duch* AJ, paras. 389-99.

¹⁴⁹ OTP SAB, para. 20 citing *Gacumbitsi* AJ, paras. 204-05. The OTP also cites to Judge Schomburg's Dissenting Opinion in *Simba*, where he considered that Simba's sentence was taken from the wrong shelf, just like in *Gacumbitsi*. *Simba* AJ, Judge Schomburg Partially Dissenting Opinion, para. 1.

¹⁵⁰ *Gacumbitsi* AJ, para. 206.

¹⁵¹ *Gacumbitsi* AJ, para. 206.

¹⁵² *Gacumbitsi* AJ, para. 206.

¹⁵³ *Gacumbitsi* AJ, para. 206, fn. 446. See also *Galić* AJ, Judge Meron Separate Opinion, para. 8 (noting that "in *Gacumbitsi* [the Appeals Chamber] increased a sentence from thirty years to life in keeping with a line of life sentences given in ICTR genocide cases in which there were 'no especially mitigating circumstances'"). Judge Meron sat on the Appeals Chambers in both *Gacumbitsi* and *Galić*.

¹⁵⁴ OTP SAB, para. 19 citing *Galić* AJ, para. 455.

¹⁵⁵ *Galić* Indictment, para. 4. See also *Galić* TJ, paras. 206, 208, 581-94.

¹⁵⁶ *Galić* TJ, para. 581.

crimes.¹⁵⁷ But this decision was not without criticism. Two of the five Appeals Chamber Judges dissented on this issue, with Judge Meron aptly remarking:

Reasonable minds can disagree about this sentence, just as they can disagree about whether there was enough evidence to support all the convictions in the first place. Just as we review the convictions on the merits to see whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt rather than considering whether we ourselves would have entered such a conviction, so we review the sentence to see whether a Trial Chamber could reasonably impose it – rather than whether we ourselves would have done so.... [H]ad I sat as a Trial Judge, I might have called for a sentence of a longer term than 20 years, but I cannot say that all reasonable triers of fact were obligated to do the same.... It is most unfair to affirm Galić’s convictions by genuinely deferring to the findings of the Trial Chamber majority, and yet to increase Galić’s sentence by not deferring (or only nominally deferring) to the Trial Chamber’s choice of sentence.

...

The majority’s decision to increase Galić’s sentence to life imprisonment may satisfy our sense of condemnation. But this increase disserves the principles of procedural fairness on which our legitimacy rests. As the highest body in our court system, we are not readily accountable to any other authority and thus have a particular obligation to use our power sparingly. We should not substitute our own preferences for the reasoned judgement of a Trial Chamber.¹⁵⁸

63. The OTP concedes that the maximum sentence for Article 70 offenses is five years.

While the OTP argued in its sentencing submission that the statutory maximum term of years for Article 70 offenses is the same as Article 5 crimes (30 years),¹⁵⁹ it did not appeal the Trial Chamber’s holding¹⁶⁰ as an error of law, accepting, evidently, that the Trial Chamber’s holding is correct. The choice of “shelves” from which the Trial Chamber could have drawn is thus considerably narrowed.

64. The OTP’s table dividing up the sentence per witness incident¹⁶¹ is an illusion, a false statistics trap, a ham-handed attempt to inject emotion at the expense of reason. It is as misleading as it is absurd. The table is misleading because the OTP did not appeal the

¹⁵⁷ *Galić* AJ, para. 455.

¹⁵⁸ *Galić* AJ, Judge Meron Separate Opinion, paras. 11, 13.

¹⁵⁹ OTP Sentencing Submission, para. 147.

¹⁶⁰ Sentencing Decision, para. 30. Article 70(3) specifies that the Court “may impose a term of imprisonment not exceeding five years.” The Trial Chamber held that “the Statute does not allow a sentence for one or more offences against the administration of justice to exceed five years, as prescribed in Article 70(3) of the Statute.”

¹⁶¹ OTP SAB, p. 21, Table 1.

Trial Chamber's holding that Article 70(3) imposes a sentence limit of five years,¹⁶² conceding that the Trial Chamber correctly rejected its argument that the Trial Chamber should impose a sentence for each witness incident.¹⁶³ The table is absurd because it is contrary to the plain language of the Rome Statute and ICC practice. Article 78(3) requires the Trial Chamber to "pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment." The total period of imprisonment "shall be no less than the highest individual sentence pronounced."¹⁶⁴ For Article 70 offenses, the statutory limit is five years' imprisonment.¹⁶⁵ No ICC Trial Chamber has calculated the sentence per incident or imposed a joint sentence by adding up the individual sentences in cases of multiple convictions:

- a. **Lubanga:** The Trial Chamber imposed a joint sentence of 14 years' imprisonment, having imposed individual sentences of 13 years' imprisonment for conscripting children under the age of 15, 12 years' imprisonment for enlisting children under the age of 15, and 14 years' imprisonment for using children under the age of 15 to participate in hostilities.¹⁶⁶ The Trial Chamber did not make a finding as to the precise number of child recruits, but noted that "the involvement of children was widespread."¹⁶⁷ The sentence was upheld on appeal.¹⁶⁸
- b. **Katanga:** The Trial Chamber imposed a joint sentence of 12 years' imprisonment, having imposed individual sentences of 12 years' imprisonment for murder as a crime against humanity, 12 years' imprisonment for murder as a war crime, 12 years' imprisonment for the crime of attacking a civilian population as a war crime; 10 years' imprisonment for destruction of property as a war crime, and 10 years' imprisonment for pillaging as a war crime.¹⁶⁹ The Trial Chamber found that more than 30 victims were murdered during the attack on Bogoro.¹⁷⁰ Both the OTP and the Katanga Defence withdrew their appeals.¹⁷¹

¹⁶² Sentencing Decision, para. 33.

¹⁶³ Sentencing Decision, paras. 29-33.

¹⁶⁴ Rome Statute, Art. 78(3).

¹⁶⁵ Rome Statute, Art. 70(3); Sentencing Decision, para. 33.

¹⁶⁶ *Lubanga* Sentencing Decision, para. 98.

¹⁶⁷ *Lubanga* Sentencing Decision, para. 50.

¹⁶⁸ *Lubanga* SAJ, para. 119.

¹⁶⁹ *Katanga* Sentencing Decision, para. 146.

¹⁷⁰ *Katanga* TJ, para. 869.

¹⁷¹ *Katanga* Defence Notice of Discontinuance; *Katanga* OTP Notice of Discontinuance.

- c. **Bemba Main Case:** The Trial Chamber imposed a joint sentence of 18 years' imprisonment, having imposed individual sentences of 16 years' imprisonment for murder as a war crime, 16 years' imprisonment for murder as a crime against humanity, 18 years' imprisonment for rape as a war crime, 18 years' imprisonment for rape as a crime against humanity, and 16 years' imprisonment for pillaging as a war crime.¹⁷² The Trial Chamber did not make a precise account of the number of victims or incidents, but noted that the number of rape victims and incidents of pillaging were "substantial."¹⁷³ The conviction and sentence are currently on appeal.¹⁷⁴

65. A few examples from the ICTY further illustrate the absurdity of dividing up the sentence per incident:

- a. **Stanišić and Župljanin:** The Appeals Chamber confirmed Stanišić's single sentence of 22 years' imprisonment for persecution, murder, and torture.¹⁷⁵ Application of the OTP's false paradigm would translate that sentence into 3.5 days per victim for the roughly 2,300 killings in Count 4 (murder).¹⁷⁶ His co-accused, Župljanin, would have received 5 days per victim for the roughly 1,678 killings found for Counts 2 (exterminations) and 4 (murder).¹⁷⁷
- b. **Krstić:** The Appeals Chamber sentenced Krstić to a single sentence of 35 years' imprisonment.¹⁷⁸ Or, by the meaningless OTP math, he received roughly 1.7 days per victim for the 7,000 to 8,000 victims executed¹⁷⁹ or 0.6 days per victim for the 20,000 victims forcibly transferred following the take over of Srebrenica.¹⁸⁰

¹⁷² *Bemba Main Case Sentencing Decision*, para. 94.

¹⁷³ *Bemba Main Case Sentencing Decision*, para. 40 ("The Chamber notes that the number of victims of underlying acts of rape is substantial"), para. 51 ("The Chamber notes that the number of pillaging victims was substantial").

¹⁷⁴ *Bemba Main Case Conviction Appeal Brief*; *Bemba Main Case Defence Sentencing Appeal Brief*; *Bemba Main Case OTP Sentencing Appeal Brief*.

¹⁷⁵ *Stanišić and Župljanin* AJ, p. 496.

¹⁷⁶ See *Stanišić and Župljanin* TJ, Vol. 1, paras. 215-17, 278, 343, 484-86, 688-89, 691, 693-94, 696, 876, 977, 1037, 1114, 1243, 1352, 1411, 1494, 1675-76; *Stanišić and Župljanin* TJ, Vol. 2, paras. 804, 813, 818, 822, 831, 836, 844, 849, 854, 858, 868, 873, 877, 885.

¹⁷⁷ See *Stanišić and Župljanin* TJ, Vol. 1, paras. 215-217, 278, 343, 484-86, 688-89, 691, 693-94, 696, 876, 977; *Stanišić and Župljanin* TJ, Vol. 2, paras. 805, 832, 845, 850, 859, 869.

¹⁷⁸ *Krstić* AJ, para. 275.

¹⁷⁹ *Krstić* TJ, para. 84.

¹⁸⁰ *Krstić* TJ, paras. 37, 51.

66. The OTP fails to demonstrate any error of law or abuse of discretion in the Trial Chamber's determination of the sentence. This Sub-Ground of Appeal must be dismissed.

2. *The Trial Chamber's sentence is proportionate, considering that largely the same conduct underlies the cumulative convictions*

67. The OTP claims that the Trial Chamber should have considered the impact of cumulative convictions on sentencing,¹⁸¹ ignoring that the Trial Chamber expressly did so. In the Trial Judgment, the Trial Chamber found that while cumulative convictions were permissible, "this does not mean that cumulative convictions can unduly inflate an accused's punishment."¹⁸² It then took this finding into account in determining a proportionate sentence, explaining that "largely the same conduct underlies the multiple convictions."¹⁸³

68. The Trial Chamber's analysis of cumulative convictions is consistent with the approach taken at the international(ized) criminal tribunals and courts. The *Delalić et al.* Appeals Chamber noted that in the case of cumulative convictions, the Trial Chamber must take care "that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the *distinct* elements of the relevant crimes."¹⁸⁴ The ECCC Supreme Court Chamber cautioned that "[a]bsent specific norms regulating the consequences of cumulative convictions on punishment, it is thus the role of the court to ensure that the accused 'is not prejudiced by reason of the multiple convictions entered against him on the basis of the same facts.'"¹⁸⁵ The remaining cases cited by the OTP show that when considering the impact of the cumulative convictions, Trial Chambers have consistently ensured that convicted persons are not doubly penalized for the same conduct.¹⁸⁶

¹⁸¹ OTP SAB, para. 69.

¹⁸² Judgment, para. 956.

¹⁸³ Sentencing Decision, para. 194.

¹⁸⁴ *Delalić et al.* AJ, para. 769 (emphasis in original).

¹⁸⁵ *Duch* AJ, para. 297 (internal citation omitted).

¹⁸⁶ See OTP SAB, fn. 172. *Kunarac et al.* TJ, para. 855: "The Trial Chamber will consider any cumulative convictions entered with respect to the three accused and ensure that they are not penalised more than once for the same conduct, in accordance with the ruling by the Appeals Chamber in the *Delalić* case." *Stakić* AJ, paras. 367: "a proper application of the cumulative convictions test in this case allows convictions to be entered for the Article 5 crimes of extermination, deportation, other inhumane acts and persecutions. A conviction cannot be entered for the crime of murder under Article 5 as this crime is impermissibly cumulative with the crime of extermination. The effect, if any, of this finding on sentencing will be considered under the section dealing with that ground of appeal." The *Stakić* Appeals Chamber did not discuss the impact of cumulative convictions when

69. “There is no clear evidence that multiple convictions for the same [conduct] have led to stiffer sentences.”¹⁸⁷ The OTP’s argument must be dismissed.

3. *The Trial Chamber’s sentence is sufficient to deter Mr. Kilolo and others from committing Article 70 offenses*

70. The OTP is unable to show any error in reasoning or abuse of discretion in the Trial Chamber’s finding that the fine of EUR 30,000 was a suitable part of the sentence for deterrent purposes.¹⁸⁸ The Trial Chamber’s explicit consideration of the “need to discourage this type of behaviour” and reference to Mr. Kilolo’s Solvency Report¹⁸⁹ undermines the OTP’s speculative argument that the Trial Chamber failed to assess whether the imposed fine would actually deter Mr. Kilolo.¹⁹⁰ [REDACTED].

71. The OTP’s self-serving, whole-cloth conjecture that Mr. Kilolo might not be able to pay the fine¹⁹¹ does nothing to supplant the facts and evidence before the Trial Chamber. The OTP admits that it had “no further information on whether, in fact, [Mr. Kilolo] will pay,” complaining that it did not have access to a letter Mr. Kilolo sent to the Registrar.¹⁹² But as the Appeals Chamber has already found,¹⁹³ the information contained in the letter was of no relevance to the OTP’s Appeal against Mr. Kilolo’s sentence.

72. The OTP also incorrectly presupposes that the Trial Chamber was required to set out an enforcement procedure.¹⁹⁴ Enforcement of fines, as the Appeals Chamber has already found,¹⁹⁵ is a matter for the Presidency. Rule 166 sets out the applicable enforcement procedure:

- a. Rule 166(4) requires the Court to “allow the convicted person a reasonable period in which to pay the fine.”

it came to sentencing. *Gatete* AJ, para. 265 (the Appeals Chamber entered additional cumulative conviction, but declined to consider any potential impact on sentencing “this new conviction might have had ... because the Prosecution [had] not sought an increase in sentence with respect to the additional conviction”). *See also Mucić et al.* SJ, para. 42; *Mucić et al.* SAJ, paras. 20-27.

¹⁸⁷ *See* Stuckenberg, p. 362.

¹⁸⁸ *Contra* OTP SAB, para. 58.

¹⁸⁹ Sentencing Decision, para. 198.

¹⁹⁰ OTP SAB, para. 58.

¹⁹¹ OTP SAB, para. 59.

¹⁹² OTP SAB, para. 59.

¹⁹³ Kilolo Fine AD, para. 7.

¹⁹⁴ OTP SAB, para. 60.

¹⁹⁵ Kilolo Fine AD, para. 8.

- b. Rule 166(5) states that if the convicted person does not pay the fine imposed within the period set by the Court, appropriate measures may be taken by the Court pursuant to Rules 217 to 222.¹⁹⁶
- c. Rule 217 provides that the Presidency shall seek cooperation and measures for enforcement in accordance with Part IX of the Statute, including transmitting copies of relevant orders to States with which the sentenced person appears to have a direct connection.
- d. Rule 220 provides that in transmitting copies of judgments in which fines were imposed, the Presidency shall inform States Parties that national authorities must not modify the fines.
- e. Rule 221 provides that the Presidency shall decide on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court.
- f. Rule 222 provides that the Presidency shall also assist States in the enforcement of fines, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State.

In cases of continued willful non-payment, when all available enforcement mechanisms have been exhausted, Rule 166(5) allows the Court on its own motion, or upon OTP request, to impose a term of imprisonment. If, perchance, Mr. Kilolo should fail to pay his fine, nothing prevents the OTP from resorting to the Rules to ask the Presidency to enforce the fine. The OTP's claim that "it is unclear whether [Mr. Kilolo's] inability to pay would be converted into prison time,"¹⁹⁷ is both premature and based in fancy, not fact.

73. The OTP misapprehends the deterrent purpose of sentencing. Deterrence, as the Trial Chamber correctly and explicitly considered,¹⁹⁸ means sending a message that offenses will not be tolerated by the Court, not to make an example of an offender through

¹⁹⁶ Rules 218 and 219 relate to Reparation orders and are not relevant to the enforcement of fines.

¹⁹⁷ OTP SAB, para. 60.

¹⁹⁸ Sentencing Decision, para. 19.

needlessly harsh punishment.¹⁹⁹ “It is the infallibility of punishment, rather than the severity of the sanction” which fulfills the deterrent purpose.²⁰⁰ Put differently “it is the certainty of apprehension, trial, and punishment rather than the scope of the sentence that acts to deter future crimes.”²⁰¹ This has been a guiding principle in sentencing as early as 1764, when Italian criminologist and penal reformer Cesare Beccaria proclaimed: “punishment should not be harsh, but must be inevitable.”²⁰²

74. Rather than seeking deterrence, the OTP seeks vengeance. While the Trial Chamber considered retribution to be a primary purpose of sentencing,²⁰³ the purpose of retribution is to express the international community’s condemnation of the offenses, not to fulfill a desire for revenge.²⁰⁴ “[U]nlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.”²⁰⁵ And in the particular case of the ICC, “penalties are made more onerous by its international stature, moral authority and impact upon world public opinion.”²⁰⁶ This must be considered “when assessing the suitable length of sentence.”²⁰⁷

75. The Trial Chamber’s sentence fulfills the purposes of deterrence and retribution. Not only does the OTP misunderstand these guiding principles, but it relies on mere conjecture, with no showing of error or abuse of discretion. This Sub-Ground of Appeal must be dismissed.

C. Conclusion

76. In Ground 1 of its Appeal, the OTP fails to demonstrate any errors or abuses of discretion warranting the Appeals Chamber’s intervention. It fails to show that the Trial Chamber

¹⁹⁹ See *Kordić and Čerkez* AJ, para. 1078 (“General deterrence ... refers to a sentence’s effect to dissuade other potential perpetrators from committing the same or similar crimes”). Most criminologists agree that it is not the severity of punishment but “the certainty of apprehension, trial, and punishment” that deter crimes. Schabas, p. 898. Deterrence, while a legitimate sentencing consideration, must not be given undue weight. *Tadić* SAJ, para. 48.

²⁰⁰ *Furundžija* TJ, para. 290.

²⁰¹ Schabas, p. 898.

²⁰² Italian Penal Reformer Cesare Beccaria *quoted in Furundžija* AJ, para. 290.

²⁰³ Sentencing Decision, para. 19.

²⁰⁴ *Aleksovski* AJ, para. 185: “[Retribution] is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes ... Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show ‘that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.’” (internal citation omitted).

²⁰⁵ *Kordić and Čerkez* AJ, para. 1075 (internal citation omitted) (underline in original).

²⁰⁶ *Furundžija* TJ, para. 290.

²⁰⁷ *Furundžija* TJ, para. 290.

exercised its discretion based on misinterpretations of the law or incorrect conclusions of fact.²⁰⁸ It also fails to show that the Trial Chamber considered irrelevant factors, ignored relevant factors, or gave insufficient weight to the relevant factors that it did consider.²⁰⁹

77. The Appeals Chamber should only intervene in a Trial Chamber's exercise of its discretion in determining the sentence if:

(i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law[;] (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.²¹⁰

78. The Trial Chamber is "vested with a broad discretion in determining an appropriate sentence, due to [its] obligation to individualize the penalties to fit the circumstances of the convicted person and the gravity of the crime."²¹¹ In adjudicating appeals against sentencing decisions, "the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person," not to determine, on its own, which sentence is appropriate unless it finds that the imposed sentence is "disproportionate" to the crime.²¹² Deference is accorded to the Trial Chamber's discretion in determining the appropriate sentence because it "draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and the practical demands of the case, and requires a complex balancing of intangibles."²¹³

79. Having demonstrated no discernable error in the Trial Chamber's sentencing analysis, the OTP fails to show that the sentence is so unreasonable as to constitute an abuse of

²⁰⁸ See *Krajišnik* AD, para. 7; *Halilović* AD, para. 5.

²⁰⁹ See *Krajišnik* AD, para. 7; *Halilović* AD, para. 5.

²¹⁰ *Lubanga* SAJ, para. 3.

²¹¹ *Seromba* AJ, para. 228.

²¹² *Lubanga* SAJ, para. 2.

²¹³ See *Tolimir et al.* AD, para. 4 quoting *Milošević* AD, para. 9: "The Appeals Chamber has held that Trial Chambers exercise discretion in different types of decisions – 'such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.' Deference is afforded to the Trial Chamber's discretion in these decisions because they 'draw[] on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.'" See also *Lubanga* SAJ, para. 34: "The Appeals Chamber considers that the above provisions indicate that, in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors it considers relevant. Therefore, the Trial Chamber's determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person." See also *Al Mahdi* TJ, para. 107: The Chamber stresses that sentencing an individual for crimes he committed is a unique exercise for which comparison with different cases can be of very limited relevance only, if any."

discretion – that the sentence is one that no reasonable Trial Chamber could have imposed.²¹⁴ The OTP’s first Ground of Appeal must be dismissed.

III. RESPONSE TO GROUND 2: THE TRIAL CHAMBER CORRECTLY SUSPENDED THE BALANCE OF MR. KILOLO’S CUSTODIAL SENTENCE

A. The Trial Chamber has the inherent power to suspend sentences

The Trial Chamber’s analysis

80. The Trial Chamber held that “its power to suspend a sentence of imprisonment is inherent to its power to impose and determine the sentence.”²¹⁵ In resorting to its inherent powers, the Trial Chamber identified a *lacuna* in the statutory sentencing regime, finding that “[t]he Statute and Rules remain silent as to whether prison sentences may be suspended.”²¹⁶ The Trial Chamber found that this *lacuna* could not be filled by the application of other provisions by analogy, noting that the statutory provisions concerning interim release or post-conviction remedies could not be drawn upon for the purposes of suspending sentences as they are designed for different stages of the proceedings.²¹⁷ It also found that the interpretation criteria under the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute provided no guidance.²¹⁸

81. In filling this *lacuna*, the Trial Chamber noted that the Statute gives the Trial Chamber discretion to impose a sentence of imprisonment or to decline to impose a sentence of imprisonment.²¹⁹ It found that the intermediate step of a suspended sentence must be possible because “[t]o conclude otherwise would lead to an unfair result whereby a convicted person could not serve a term of years other than by way of unconditional imprisonment, even when the Chamber considered less restrictive means to be appropriate.”²²⁰ The Trial Chamber also noted that its holding that it has the inherent power to suspend sentences is consistent with the law and practice of other international and national jurisdictions.²²¹

²¹⁴ See *Krajišnik* AD, para. 7; *Halilović* AD, para. 5.

²¹⁵ Sentencing Decision, para. 41.

²¹⁶ Sentencing Decision, para. 40.

²¹⁷ Sentencing Decision, para. 40.

²¹⁸ Sentencing Decision, para. 40.

²¹⁹ Sentencing Decision, para. 41.

²²⁰ Sentencing Decision, para. 41.

²²¹ Sentencing Decision, para. 41.

The OTP's claims

82. The OTP claims that the Trial Chamber erred in law in finding that it has the inherent power to suspend sentences, arguing that:

- a. There is no *lacuna* in the law because the statutory framework exhaustively regulates penalties and sentencing.²²²
- b. The drafters did not intend to allow suspended sentences as a penalty under the Statute.²²³
- c. The Trial Chamber has no discretion to decline to impose a sentence.²²⁴
- d. Domestic and international jurisprudence do not support the Trial Chamber's proposition that it has the inherent power to suspend sentences.²²⁵
- e. The Trial Chamber's decision undermines the purpose of sentencing and creates uncertainty.²²⁶

Response

83. The OTP's claims are meritless: (1) the Trial Chamber correctly resorted to its inherent powers by identifying a *lacuna* in the statutory framework; (2) the *travaux préparatoires* do not show that the drafters intended to disallow suspended sentences; (3) the Trial Chamber did not find that it has discretion to decline to impose a sentence, but correctly considered that it has the power to decline to impose a sentence of imprisonment; (4) international and domestic sources support the Trial Chamber's conclusion that it has the inherent power to suspend sentences; and (5) the Sentencing Decision does not undermine the purpose of sentencing or create uncertainty.

²²² OTP SAB, paras. 119-21.

²²³ OTP SAB, paras. 128-33.

²²⁴ OTP SAB, paras. 134, 135-37.

²²⁵ OTP SAB, paras. 134, 138-41.

²²⁶ OTP SAB, paras. 122-27.

1. *The Trial Chamber correctly resorted to its inherent powers by identifying a lacuna in the statutory framework*

84. The Trial Chamber correctly identified a *lacuna* in the statutory framework.²²⁷ The Statute and Rules are silent as to whether suspended sentences are permissible. As suspended sentences are nearly universal in domestic legislation,²²⁸ the drafters were undoubtedly aware of their existence. Early in the discussions on the ICC's establishment, some delegations suggested that suspension of penalties be addressed,²²⁹ but this suggestion was never explicitly addressed in any draft Statute.

85. Unlike pardon, parole, and commutation of sentences, the drafters never explicitly rejected suspended sentences. Presumably, the drafters acted intentionally and purposefully in rejecting pardon, parole, and commutation of sentences and not explicitly rejecting suspended sentences.²³⁰

86. The drafters' concern with pardon, parole, and commutation of sentences was that eligibility would be dependent on domestic law, introducing the uneven treatment of convicted persons.²³¹ A concern raised by commentators was that national release or mitigation provisions would allow national authorities to circumvent sentences imposed

²²⁷ Sentencing Decision, para. 40.

²²⁸ See Sentencing Decision, fn. 63.

²²⁹ [Informal paper](#), para. 59. "It was suggested that suspension of penalties be addressed." See also [Alternative to the ILC-Draft \(Siracusa-Draft\)](#), pp. 55-57, raising the possibility of conditionally suspended sentences as an open question.

²³⁰ Instructive is the United States Supreme Court's reasoning in *Rodriguez v. United States*, wherein the Supreme Court found that Congress is presumed to act intentionally and purposefully when it includes particular language in one section of a statute, but omits it in another section. See e.g. *Rodriguez v. United States*, 480 U.S. 522, 523-25 (1987) (internal citations omitted). In *Rodriguez*, the issue was whether the Comprehensive Crime Control Act of 1984 ("CCCA") removed judges' discretion to impose suspended sentences under the Probation Act. The CCCA provided that anyone who commits a felony on provisional release must be sentenced to at least two years' imprisonment in addition to the sentence imposed for the underlying felony. The accused was arrested for selling cocaine, and while on provisional release, was arrested again for selling heroin. The sentencing judge recognized the applicability of the CCCA, but suspended the execution of the additional two-year sentence. In upholding the sentencing judge's decision to suspend the sentence, the United States Supreme Court held that "[i]t is, in short, overwhelmingly clear that, in passing the CCCA, Congress acted – as it is presumed to act – with full awareness of the well-established judicial interpretation that [the Probation Act] permits the suspension of sentences 'unless [it is] explicitly made inapplicable.'" It reasoned that "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."

²³¹ [ILC Commentary to Article 60](#), p. 67. Article 60 of the ILC Draft Statute provided that "[i]f, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the court." Chimimba, p. 355: "[T]he scheme was criticized for not establishing a uniform standard. It was suggested that the Court alone should have the power to decide on matters relating to the review of the sentence."

by the ICC.²³² Neither of these concerns have any bearing on the decision to suspend a sentence, as this would be entirely left to the Trial Chamber's discretion and would not be dependent on domestic law.

87. The resulting sentencing regime indicates that the Trial Chamber would have considerable discretion in fashioning the appropriate sentence, inclusive of which is the decision to suspend a sentence:

- a. **Article 76:** Article 76 gives the Trial Chamber discretion to “consider the appropriate sentence to be imposed,” considering “the evidence presented and submissions made during the trial that are relevant to the sentence.”²³³
- b. **Article 77:** Article 77 regulates the applicable penalties for Article 5 crimes and does not apply to Article 70 offenses. Contrasting with the more discretionary language in Article 70(3), Article 77 requires the Trial Chamber to impose a custodial sentence in the event of a conviction, only giving the Trial Chamber discretion to impose a fine in addition to the custodial sentence.²³⁴
- c. **Article 70(3):** Article 70(3) states that “in the event of a conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine ... or both,” giving the Trial Chamber discretion to decline to impose a custodial sentence.
- d. **Article 78 and Rule 145:** Article 78 and Rule 145 specify the factors the Trial Chamber must consider in determining the appropriate sentence. These provisions do not specify how the factors should be balanced,²³⁵ but merely provide guidance as to how the Trial Chamber should exercise its discretion in entering a sentence that is proportional to the crime and reflects the culpability of the convicted person.²³⁶
- e. **Rule 166:** Rule 166 lays out the sanctions regime for convictions under Article 70, specifying that the Court may take action if the convicted person does not pay the fine imposed within the time specified by the Trial Chamber.²³⁷ While Rule 166(3)

²³² Ambos (1996), p. 528.

²³³ Rome Statute, Art. 76(1).

²³⁴ See Rome Statute, Art. 77(1)-(2).

²³⁵ *Lubanga* SAJ, paras. 61-66.

²³⁶ See *Lubanga* SAJ, para. 40.

²³⁷ See ICC RPE, Rule 166(5): “If the convicted person does not pay a fine imposed in accordance with the conditions set forth in sub-rule 4, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Court, on its own

excludes the application of Article 110, which allows for a reduction of sentence for Article 5 crimes, this article is of no relevance because it relates to the reduction of sentence after it has been pronounced, executed, and partially served.²³⁸ It says nothing about suspending sentences before they have begun to be served.

- f. **Articles 103, 107, 109, and 111:** These provisions concern the role of States in the enforcement of sentences, the transfer of convicted persons, enforcement of fines and forfeitures, and escape of convicted persons. They have no bearing on the Trial Chamber's inherent power to suspend sentences.
- g. **Article 81(3)(a):** Article 81(3)(a) states that "[u]nless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending appeal," giving the Trial Chamber discretion to release or continue the provisional release of a convicted person pending any appeals. The OTP mischaracterizes this provision in claiming that it "requires a convicted person to remain in custody pending an appeal against a conviction judgment and a sentencing decision, for both article 5 crimes and article 70 offences."²³⁹

88. Interpreting these provisions in the restrictive manner that the OTP suggests – i.e. to eliminate the Trial Chamber's discretion to suspend sentences – leads to an absurd result. The Trial Chamber has discretion under Article 70(3) to impose a custodial sentence or to decline to impose a custodial sentence, and instead impose a fine. A custodial sentence may be unduly restrictive and inappropriate due to the convicted person's individual circumstances. On the other hand, a fine alone may not be a sufficient deterrent, adequately reflect the gravity of the offenses and the convicted person's culpable conduct, or be appropriate if the convicted person does not have the ability to pay. The intermediate step of a suspended sentence "allows the seriousness of the offence to be recognised and denunciation of the offender's behaviour to take place through the formal imposition of a term of imprisonment, while allowing the court to deal with the offender in a merciful way."²⁴⁰ A custodial sentence is not the only means of deterring and

motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort impose a term of imprisonment in accordance with article 70, paragraph 3. In the determination of such term of imprisonment, the Court shall take into account the amount of fine paid."

²³⁸ *Contra* OTP SAB, para. 120 citing ICC RPE, Rule 166(3): "Unlike sentences for article 5 crimes, sentences for article 70 offences cannot be reduced and, as a result, must be served in full."

²³⁹ OTP SAB, para. 119.

²⁴⁰ [Victorian Sentencing Advisory Council](#), pp. 12-13.

denouncing crimes and offenses.²⁴¹ To eliminate the Trial Chamber’s power to impose suspended sentences, or restrict their use to cases involving exceptional circumstances, does away with an important sentencing tool.

2. *The travaux préparatoires do not show that the drafters intended to disallow suspended sentences*

89. The *travaux préparatoires* do not show that the drafters intended to disallow suspended sentences.²⁴² The drafters never explicitly rejected suspended sentences.²⁴³ The OTP conflates parole with suspended sentences when noting that the drafters decided against parole.²⁴⁴ Parole is the release of an incarcerated person “before the full sentence has been served.”²⁴⁵ By contrast, a suspended sentence is a sentence that is postponed so that the convicted person is not required to serve time unless he or she commits another offense or violates some other court-imposed condition.²⁴⁶ It is not “akin to” parole²⁴⁷ because the suspension occurs before the convicted person serves any prison time.²⁴⁸

90. As discussed above in paragraph 86, suspended sentences are not dependent on domestic laws and do not “introduce[] an uneven treatment for convicted persons,” something the drafters sought to avoid in rejecting parole.²⁴⁹ The Trial Chamber has the authority to suspend the sentence, not the domestic authorities in the State in which the convicted person will serve his or her sentence. The fact that one of the conditions of Mr. Kilolo’s suspended sentence is that he not commit any offenses anywhere, does not make his suspended sentence dependent on national law. Although it will be primarily up to States to report to the ICC any potential breaches of this condition,²⁵⁰ it is solely up to the

²⁴¹ *R v. Carrillo* [2015], para. 37.

²⁴² *Contra* OTP SAB, para. 128.

²⁴³ *See supra* paras. 84-86.

²⁴⁴ OTP SAB, para. 128: “The Sentencing Decision disregards the intention of the drafters who considered, but decided against *parole* (the conditional release of a person serving a sentence), which is akin to a suspended sentence.” (emphasis in original).

²⁴⁵ BLACK’S LAW DICTIONARY 1292 (10th ed. 2014).

²⁴⁶ BLACK’S LAW DICTIONARY 1570 (10th ed. 2014).

²⁴⁷ OTP SAB, para. 128.

²⁴⁸ *See Rašić* AJ, paras. 17-18. *See also infra* para. 92.

²⁴⁹ *Contra* OTP SAB, para. 129.

²⁵⁰ Part IX of the Rome Statute sets out the requirements of States Parties in cooperating with the Court. Article 87(1)(a) gives the Court the authority to submit requests for cooperation to States Parties. Article 87(1)(b) also allows the Court to transmit requests for cooperation to the International Criminal Police Organization and regional authorities. ICC RPE, Rule 176 provides the procedure for the transmission of request for cooperation, requiring the Registrar to transmit requests by the Court and receive responses from requested States.

Presidency to determine if the condition has been breached and whether Mr. Kilolo should be remanded into ICC custody.²⁵¹

3. The Trial Chamber did not find that it has discretion to decline to impose a sentence

91. The OTP mischaracterizes the Sentencing Decision in claiming that the Trial Chamber found that it has discretion to decline to impose a sentence.²⁵² While the Trial Chamber stated that “on one end of the spectrum, the Statute allows a Chamber to impose a sentence of imprisonment and, at the other end of the spectrum, it allows a Chamber to decline to impose any sentence,” context is provided by the following two sentences:

If these measures are possible, then surely the intermediate step of a suspended sentence is likewise possible. To conclude otherwise would lead to an unfair result whereby a *convicted person could not serve a term of years other than by way of unconditional imprisonment*, even when the Chamber considered less restrictive means to be appropriate.²⁵³

This context, omitted from the OTP’s analysis, shows that the Trial Chamber was discussing sentences *of imprisonment*. The Trial Chamber’s analysis holds up – Article 70(3) does give the Trial Chamber discretion to decline to impose a sentence of imprisonment and instead impose a fine. A suspended sentence is a sentence of imprisonment,²⁵⁴ served “other than by way of unconditional imprisonment.”²⁵⁵

4. International and domestic sources support the Trial Chamber’s conclusion that it has the inherent power to suspend sentences

92. The international jurisprudence cited by the Trial Chamber supports its conclusion that it has the inherent power to suspend sentences.²⁵⁶ The ICTY²⁵⁷ and SCSL²⁵⁸ have both imposed suspended sentences, although neither tribunal’s statutory framework expressly

²⁵¹ Part X of the Rome Statute sets out the Presidency’s responsibility in enforcing sentences. See ICC RPE, Rules 199, 217, 220, 222. See also Kilolo Fine AD, para. 8. In domestic law, once a violation of a suspended sentence occurs, the decision to revoke the suspension lies within the discretion of the court. See [UK Criminal Justice Act](#), Schedule 12, para. 8. If the offender fails to comply with a community requirement or commits a further offense during the operational period of the suspended sentence imposed in a magistrates’ court, the court must activate the suspended sentence in full or in part unless it would be unjust in the circumstances to do so.

²⁵² OTP SAB, para. 134.

²⁵³ Sentencing Decision, para. 41 (emphasis added).

²⁵⁴ *R v O’Keefe* [1969], p. 29: “After all, a suspended sentence is a sentence of imprisonment.”

²⁵⁵ Sentencing Decision, para. 41.

²⁵⁶ *Contra* OTP SAB, paras. 134, 138-41.

²⁵⁷ *Rašić* AJ, para. 17; *Bulatović* TJ, para. 19.

²⁵⁸ *Bangura et al.* SJ, paras. 92, 101.

grants the power to suspend sentences. The fact that these tribunals and others have provisions allowing for conditional early release²⁵⁹ and pardon or commutation of sentences²⁶⁰ is irrelevant. As the *Rašić* Appeals Chamber found, “the power to suspend a sentence must be distinguished from the power to issue a pardon, commutation of sentence, or early release.”²⁶¹ This is because pardon, commutation, and early release “relate[] to a post-conviction change in the sentence, thus overriding the decision of the sentencing chamber in specific circumstances, where the detainee has already served part of a final sentence.”²⁶² Suspension, by contrast, “is operative at the time of sentencing, and not thereafter.”²⁶³ It forms an “integral part of the Trial Chamber’s judicial discretion in the determination of the sentence.”²⁶⁴

93. The fact that the Rome Statute is more detailed than the statutes of other international(ized) tribunals and courts does not show that the Trial Chamber erroneously relied on international jurisprudence.²⁶⁵ The Rome Statute affords considerable discretion to the Trial Chamber, and in particular the Presiding Judge,²⁶⁶ making the ICC’s procedure in many ways less restrictive than that of the *ad hoc* tribunals.²⁶⁷ The ICC’s sentencing framework does not rigidly regulate the Trial Chamber’s powers constraining it to follow a particular formula or sentencing grid; the Trial Chambers have considerable discretion in fashioning an appropriate sentence.²⁶⁸

²⁵⁹ SCSL Practice Direction on Conditional Early Release.

²⁶⁰ ICTY Statute, Art. 28; ICTY RPE, Rules 123-125; ICTY Direction on Pardon, Commutation of Sentence, and Early Release; ICTR Statute, Art. 27; ICTR RPE, Rules 124-126; MICT Statute, Art. 26; MICT RPE, Rules 149-151; MICT Directive on Pardon, Commutation and Early Release; SCSL Statute, Art. 23; SCSL RPE, Rules 123-124; STL Statute, Art. 30; STL RPE, Rules 194-196.

²⁶¹ *Rašić* AJ, para. 18.

²⁶² *Rašić* AJ, para. 17.

²⁶³ *Rašić* AJ, para. 17.

²⁶⁴ *Rašić* AJ, para. 18.

²⁶⁵ *Contra* OTP SAB, para. 140.

²⁶⁶ Article 64 of the Rome Statute and Rule 140 give the Presiding Judge wide discretion to shape the conduct of the proceedings based on his or her legal culture, experiences, and biases. Article 64(8)(b) of the Rome Statute permits the Presiding Judge to direct the conduct of the proceedings, ensuring they are fair and impartial. The parties, subject to directions from the Presiding Judge, may submit evidence as provided by the Rome Statute. Corresponding Rule 140(1) provides that should the Presiding Judge not give directions on how the proceedings will be conducted, it is up to the OTP and the Defence to agree. If they cannot, the Presiding Judge will issue directions. Article 140(2)(c) gives the Trial Chamber the power to examine witnesses before or after a witness is questioned by a participant. Under Article 64(6)(d) of the Rome Statute, the Trial Chamber “may, as necessary ... [o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.” According to Article 69(3), “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”

²⁶⁷ Werle, p. 92, mn. 256. “The trial procedure of the International Criminal Court is not as strictly regulated as the procedure of the *ad hoc* Tribunals. The structure of the trial depends to a large extent on the discretion of the Trial Chamber and the Presiding Judge.”

²⁶⁸ *See supra* para. 87(a)-(g).

94. While in *Banda and Jerbo*, the Trial Chamber considered that inherent powers should only be invoked at the ICC in a restrictive manner, considering its detailed statutory framework, it qualified its reasoning: “[t]his restrictive approach should particularly be adopted when considering a *procedural step* such as stay of proceedings.”²⁶⁹ Sentencing is not a mere “procedural step;” it is a matter of substantive criminal law.²⁷⁰
95. The domestic authorities cited by the Trial Chamber also support its conclusion that it has the inherent power to suspend sentences. As noted by the Trial Chamber, the power to suspend sentences is expressly provided for in the laws of several domestic jurisdictions,²⁷¹ indicating that such power may be considered a general principle of law under Article 21(1)(c) of the Statute. While the OTP claims that the cited domestic codes “carefully regulate when and under which conditions a domestic court may exercise such a power,” most show that the judges have discretion to suspend based on what the OTP considers to be “ordinary circumstances,”²⁷² such as the convicted person’s character, previous criminal history, and conduct after the offense.²⁷³

²⁶⁹ *Banda and Jerbo* Stay Decision, para. 78 (emphasis added).

²⁷⁰ The substantive law of sentencing includes the imposition of the appropriate sentence, including the assessment, weighing, and balancing of relevant factors in arriving at the appropriate sentence. See Book, pp. 65-160.

²⁷¹ See Sentencing Decision, fn. 63.

²⁷² See OTP SAB, paras. 142-45.

²⁷³ [Afghanistan Criminal Code](#), Art. 161 (The court should assess “the convict’s morals, background, age and other circumstances which have caused the crime, that he will not commit a crime again”); [Argentina Criminal Code](#), Art. 26 (the court should assess the convicted person’s morality, attitude towards the crime, motives, and circumstances that inconvenience the effective implementation of the deprivation of liberty); [Canada Criminal Code](#), Section 731(1) (the court should consider the age and character of the offender, the nature of the offense, and the circumstances surrounding its commission); [Colombia Criminal Code](#), Art. 63 (the court should consider the personal, social, and family history of the convicted person and the nature and severity of the punishable conduct); [German Criminal Code](#), Section 56 (the court “shall particularly take into account the character of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his circumstances and the effects to be expected from the suspension”); [Guatemala Criminal Code](#), Art. 71 (the court should consider previous criminal history, prior good behaviour prior to arrest, the nature of the crimes committed, its motives, and circumstances); [South Korean Criminal Code](#), Art. 59(1), 51 (the court should consider sincere repentance, the convicted person’s age, character, conduct, intelligence, environment, relationship with the victim, the motive and means of the commission of the offense, and circumstances after the time of commission); [Serbia Criminal Code](#), Art. 66 (the court should consider the convicted person’s personality, previous conduct, conduct after committing the offense, degree of culpability, and other circumstances relevant to the commission of the crime); [Vietnam Criminal Code](#), Art. 60 (the court may suspend the sentence based on “personal identification of the offender and extenuating circumstances, and if deeming it unnecessary to impose an imprisonment penalty”).

5. *The Trial Chamber's decision does not undermine the purpose of sentencing or create uncertainty*

96. The Trial Chamber's decision to suspend the sentence does not undermine the purpose of sentencing.²⁷⁴ To the contrary, the sentence is consistent with the purposes of retribution and deterrence. It imposes a punishment on Mr. Kilolo, penalizes him for repeating any criminal conduct during the period of suspension, and represents a threat to his liberty.²⁷⁵ The suspended sentence hangs over Mr. Kilolo's head as an ever-present threat and deterrent:

[A] clear warning to the offender which he disregards at his peril. He knows exactly what is likely to happen to him if he is convicted of a further offence committed during the operational period of the suspended sentence, and he must adjust his behaviour accordingly or face the consequences.²⁷⁶

97. The OTP's arguments that suspended sentences are valueless, a "let-off," and "a slap on the wrist"²⁷⁷ are meritless. Citing two Australian authors²⁷⁸ (one of whom agrees that "there is an important place for suspended sentences in the suite of sentencing options")²⁷⁹ and one Australian appellate judge²⁸⁰ is hardly support for the proposition that suspended sentences "are 'virtually of no value as a deterrent to others who might be predisposed to commit similar offences.'"²⁸¹ As the United States Supreme Court has found, a suspended sentence constitutes a deprivation of liberty of such significant dimension that it triggers the constitutional right to the assistance of counsel.²⁸² The deprivation of liberty is undoubtedly a deterrent to others who may be predisposed to commit similar offenses, which, in the case of Article 70 offenses, is primarily lawyers.

98. The deterrent effect of the sentence must be contextualized, considering the primary audience for Article 70 offenses. During the investigation, Mr. Kilolo experienced intrusions into his personal and professional affairs. His financial records were scrutinized by members of the OTP and his private phone calls were intercepted.²⁸³ He was arrested

²⁷⁴ *Contra* OTP SAB, paras. 122-25.

²⁷⁵ *R v. Carrillo* [2015], para. 35.

²⁷⁶ Ashworth *quoted in* Bartels (2010), p. 128.

²⁷⁷ OTP SAB, para. 126.

²⁷⁸ OTP SAB, para. 126 *citing* Bartels (2010); Bagaric.

²⁷⁹ Bartels (2010), p. 172.

²⁸⁰ *R v. Percy* [1975].

²⁸¹ OTP SAB, para. 126 *citing* Bartels (2010) and *R v. Percy* [1975]. Bartels merely repeats Judge Neasley's opinion in *R v. Percy* [1975], but does not express this view as reflective of her own.

²⁸² *United States v. Gall*, 552 U.S. 38, 47 (2007).

²⁸³ See Kilolo AB, Grounds 1 and 2.

at the Brussels airport in public view.²⁸⁴ [REDACTED].²⁸⁵ He was detained in Belgium and placed in the general population with street criminals. After he was transferred to the UNDU,²⁸⁶ he was strip searched and spent 11 months in detention.²⁸⁷ As a result of his detention, his law practice was effectively destroyed. He lost a significant portion of his clientele and source of income. He also had limited opportunities to meet with his family. The charges, the trial, and the conviction were all public, broadcasted by the ICC on its website²⁸⁸ and publicized through the press²⁸⁹ and social media.²⁹⁰ Lawyers the world over tuned in. And finally, by convicting him, the ICC stigmatized Mr. Kilolo as a person who has committed a serious offense, of a kind that goes to the very heart of the profession of trial lawyers, branding him for life, permanently tarnishing his personal and professional reputation. To conclude that these circumstances have no deterrent effect on lawyers who may be inclined to commit Article 70 offenses is ludicrous.

99. A suspended sentence is not a mere bagatelle, as the OTP seeks to cast it. It is a significant, meaningful penalty, with consequences for the individual on whom it is imposed and at the same time it is a flashing warning light of deterrence for others who would be tempted to engage in the same conduct. Moreover, the OTP errs in focusing only on the fact that there was a suspended sentence, without acknowledging that it was part of a comprehensive sentencing scheme. In addition to the substantial fine, more than a third of the sentence imposed was actually served in the insalubrious environs of the

²⁸⁴ Annex 3 to Independent Counsel Report, p. 173.

²⁸⁵ Annex 3 to Independent Counsel Report, p. 173; CAR-D21-0018-0073, p. 0078, ll. 129-42.

²⁸⁶ Arrest Warrant; ICC-01/05-01/13-T-1-ENG; ICC-01/05-01/13-T-54-CONF-ENG, p. 51, ll. 21-23.

²⁸⁷ ICC-01/05-01/13-T-54-CONF-ENG, p. 58, ll. 12-16; PTC II's Interim Release Decision.

²⁸⁸ See *Affaire Bemba et autres: La Chambre de première instance VII de la CPI déclare cinq accusés coupables d'atteintes à l'administration de la justice*, 19 October 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245&ln=fr>. See also *Bemba et al.: ICC Trial Chamber Finds Five Accused Guilty of Offences Against the Administration of Justice*, 19 October 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245>.

²⁸⁹ See e.g. *La CPI juge Jean-Pierre Bemba Coupable de Subornation de Témoins*, LE MONDE, 19 October 2016 (updated on 20 October 2016), available at http://www.lemonde.fr/afrique/article/2016/10/19/la-cpi-juge-jean-pierre-bemba-coupable-de-subornation-de-temoins_5016626_3212.html. See also Harriet Agerholm, *Congo's Jean-Pierre Bemba Guilty of Bribing Witnesses International Criminal Court Rules*, THE INDEPENDENT, 19 October 2016, available at <http://www.independent.co.uk/news/world/africa/congo-s-jean-pierre-bemba-found-guilty-witness-bribing-international-criminal-court-human-rights-war-a7370731.html>. See also *DRC Congo's Bemba Found Guilty at ICC of Witness Bribing*, BBC, 19 October 2016, available at <http://www.bbc.com/news/world-africa-37706424>.

²⁹⁰ See ICC Twitter posts dated 19 October 2016, <https://twitter.com/intlcrimcourt?lang=fr>. YouTube broadcast, *Affaire Bemba et al.: Judgement, Chambre de première instance VII*, 19 Octobre 2016, <https://www.youtube.com/watch?v=T0uzRhIsheg>; YouTube broadcast, *Bemba et al. case: Judgment, ICC Trial Chamber VII*, 19 October 2016, <https://www.youtube.com/watch?v=x4cuVgQPue8>. As of 20 August 2017, the French version of the video has been viewed 319 times. As of 20 August 2017, the English version of the video has been viewed 830 times.

Scheveningen gaol. Nearly a year in jail, and the ongoing threat of yet more time in that jail, is irrefutably both a specific and a general deterrent.

100. As to the negative perception attached to suspended sentences – that they are a “let-off” or “slap on the wrist”²⁹¹ – there is no need to let the most ignorant or ill-formed perceptions drive the ICC’s sentencing considerations. “[P]eople with more knowledge of suspended sentences were found to also have a stronger belief in their effectiveness and to perceive them as more punitive than less knowledgeable people.”²⁹²
101. The Trial Chamber’s decision to suspend Mr. Kilolo’s sentence does not create uncertainty because a suspended sentence is not a distinct penalty that is not provided in the Statute.²⁹³ It is a sentence of imprisonment that is fully or partially suspended for a certain period.²⁹⁴ Regardless of whether Mr. Kilolo will serve his sentence in prison, the sentence – a term of 30 months’ imprisonment with credit for time served and a fine of EUR 30,000 – remains unaltered. The OTP’s conjecture that a convicted person cannot foresee other conditions such as community service or weekly reporting²⁹⁵ has no basis since the Trial Chamber did not impose such conditions. The Trial Chamber imposed only two conditions: that Mr. Kilolo pay his fine within a period of three months and not commit another anywhere that is punishable with imprisonment, including offenses

²⁹¹ See OTP SAB, para. 126.

²⁹² Van Gelder et al., p. 684. Van Gelder et al. examined “public knowledge of suspended sentences in the Dutch population and the relationship between this knowledge and opinions and attitudes toward suspended sentences and general penal attitudes.” *Id.*, p. 674. The study involved 409 Dutch-speaking respondents randomly drawn from a panel of 9,000 individual in 5,000 households. *Id.* The study concluded that “the general public tends to perceive non-custodial sanctions, such as suspended sentences, as too lenient, while being largely ignorant about their nature.” *Id.*, p. 669.

²⁹³ *Contra* OTP SAB, paras. 124-25. See Ambos (1996), p. 528, fn. 51: “[T]he prevailing doctrine considers that the *nulla poena* principle only requires the establishment of a *general* penalty; a concrete indication of type and length or amount is not needed.”

²⁹⁴ [Victorian Sentencing Advisory Council](#), p. 1: “A suspended sentence involves the court: Imposing a term of imprisonment on an offender; and Ordering that all or part of the gaol term be held in suspense for a set period (‘the operational period’).” See also [UK Criminal Justice Act](#), Section 189(1): “If a court passes a sentence of imprisonment ... it may make an order providing that the sentence of imprisonment is not to take effect unless (a) during a period specified in the order ... the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment) and; (b) a court having power to do so subsequently orders ... that the original sentence is to take effect.” See also [German Criminal Code](#), Section 56: “(1) If a person is sentenced to a term of imprisonment not exceeding one year the court shall suspend the enforcement of the sentence for a probationary period if there are reasons to believe that the sentence will serve as s[ic] sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence.”

²⁹⁵ OTP SAB, para. 125.

against the administration of justice.²⁹⁶ These conditions are certainly foreseen in the Statute.²⁹⁷

102. The OTP fails to demonstrate any legal error in the Trial Chamber's reasoning. The Trial Chamber correctly resorted to its inherent powers, having identified a *lacuna* in the law. It also correctly resorted to international jurisprudence as support for its analysis. Its decision to suspend in no way undermines the purpose of sentencing or creates uncertainty. This Sub-Ground of Appeal must be dismissed.

B. The Trial Chamber correctly suspended the balance of Mr. Kilolo's custodial sentence based on his individual circumstances

The Trial Chamber's analysis

103. The Trial Chamber suspended the 19-month balance of Mr. Kilolo's 30-month sentence for a period of three years on the condition that Mr. Kilolo pay his fine within a period of three months and not commit another offense anywhere that is punishable with imprisonment, including offenses against the administration of justice.²⁹⁸ In suspending Mr. Kilolo's sentence, the Trial Chamber considered his family situation, good behavior throughout the proceedings, and the consequences of incarceration on his professional life,²⁹⁹ and undoubtedly, the fact that Mr. Kilolo had reintegrated into society.³⁰⁰

The OTP's claims

104. The OTP claims that the Trial Chamber abused its discretion in suspending Mr. Kilolo's sentence, arguing that:

- a. The Trial Chamber failed to provide a reasoned opinion as to why it had to suspend the sentence and why the factors it considered justified the suspension.³⁰¹
- b. The Trial Chamber gave undue weight to ordinary factors and ignored other relevant factors in suspending the sentence.³⁰²

²⁹⁶ *Contra* OTP SAB, para. 125. The OTP falsely asserts that the Trial Chamber imposed no conditions apart from not violating the law. The other condition attached to the suspended sentence is that Mr. Kilolo pay his fine within a period of three months. See Sentencing Decision, paras. 197-99.

²⁹⁷ See Rome Statute, Art. 70(3).

²⁹⁸ Sentencing Decision, para. 197.

²⁹⁹ Sentencing Decision, para. 197.

³⁰⁰ ICC-01/05-01/13-T-51-ENG, p. 33, ll. 19-21.

³⁰¹ OTP SAB, para. 143.

- c. The Trial Chamber failed to set out an enforcement procedure to regulate the execution of the suspended sentences.³⁰³

Response

105. The OTP's claims are meritless: (1) the Trial Chamber provided a reasoned opinion, explaining why suspension was appropriate in this case and the factors that militated towards suspension; (2) the Trial Chamber appropriately gave weight to individual circumstances that are generally indicative of the success or failure of suspended sentences; and (3) the Trial Chamber was not required to set out an enforcement procedure because the Presidency, not the Trial Chamber, is responsible for enforcing sentences.

1. *The Trial Chamber provided a reasoned opinion*

106. The Trial Chamber provided a reasoned opinion of its decision to suspend the sentence,³⁰⁴ considering suspension to be a less restrictive means of serving a term of years,³⁰⁵ and explaining the factors that militated towards suspension.³⁰⁶ The Trial Chamber, having considerable discretion in determining the relevant factors and the weight given thereto,³⁰⁷ was not required to further detail why the factors it considered justified suspending the sentence.³⁰⁸

107. Moreover, the Trial Chamber emphasized that the Sentencing Decision must be read in conjunction with the Trial Judgment.³⁰⁹ In pronouncing the Trial Judgment, the Trial Chamber rejected the OTP's request to remand Mr. Kilolo into custody, finding that Mr. Kilolo had complied with court orders, spent 11 months in custody, and reintegrated into society.³¹⁰ "[T]he convicted persons currently live with their families and have established a life in their current locations. They are integrated in their places of residency."³¹¹ The Trial Chamber's decision to suspend Mr. Kilolo's sentence is

³⁰² OTP SAB, para. 148.

³⁰³ OTP SAB, para. 164.

³⁰⁴ *Contra* OTP SAB, para. 143.

³⁰⁵ Sentencing Decision, para. 41.

³⁰⁶ Sentencing Decision, para. 197.

³⁰⁷ *Lubanga* SAJ, paras. 1, 34.

³⁰⁸ Sentencing Decision, para. 42.

³⁰⁹ Sentencing Decision, para. 42.

³¹⁰ ICC-01/05-01/13-T-51-ENG, p. 33, ll. 14-25, p. 34, ll. 1-13.

³¹¹ ICC-01/05-01/13-T-51-ENG, p. 33, ll. 19-21.

consistent with this finding, despite not expressly discussing reintegration or rehabilitation in the Sentencing Decision.

108. The OTP's argument that Mr. Kilolo did not evince prospects of rehabilitation because he did not express genuine remorse and contested the charges³¹² is absurd. Mr. Kilolo had an absolute right to present a defence and to hold the OTP to its burden of proof.³¹³ Equally absurd is the OTP's attempts to use statements by Mr. Kilolo's previous Counsel to argue that he "made inappropriate allegations against ... the Judges."³¹⁴ The statement that the Pre-Trial Chamber II denied Mr. Kilolo provisional release on the basis of his skin color was part of an appeal brief drafted by Mr. Kilolo's previous Counsel.³¹⁵ The Appeals Chamber did not summarily dismiss this argument; it examined the record before concluding that the argument was not supported in evidence.³¹⁶ It did not consider this "a serious allegation" or utterly inappropriate, as the OTP suggests.³¹⁷

109. The Trial Chamber's decision to suspend Mr. Kilolo's sentence was also consistent with the progressive sentencing principles of several international and regional organizations, which have encouraged the use of non-custodial sentences,³¹⁸ recognizing that the reasons in support of suspended sentences are substantial:

- a. Custodial measures have been proven to have detrimental effects on those subjected to them.³¹⁹
- b. Imprisonment is not always an appropriate sanction for all offenses and offenders; in particular, non-violent offenders, who are not likely to repeat offenses.³²⁰
- c. Imprisonment hinders reintegration into society.³²¹

³¹² OTP SAB, para. 155.

³¹³ Rome Statute, Art. 67(1).

³¹⁴ OTP SAB, para. 155. "Kilolo accused the single Judge of Pre-Trial Chamber II of denying him provisional release 'simply on the basis of his skin colour' – a serious allegation which the Appeals Chamber found to be 'evidently unfounded.'"

³¹⁵ Kilolo Article 60(2) AD, para. 61.

³¹⁶ Kilolo Article 60(2) AD, para. 61.

³¹⁷ OTP SAB, para. 155.

³¹⁸ [Tokyo Rules](#), Rule 1.5. See also [Commentary to the Tokyo Rules](#), p. 2. [United Nations Economic and Social Council, Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, para. 63.](#) [Report of the United Nations High Commissioner for Human Rights, Human Rights Implications of Overincarceration and Overcrowding, A/HRC/30/19](#), para. 54; [Council of Europe, Committee of Ministers, Recommendation No. R. \(99\) 22 concerning prison overcrowding and prison population inflation, African Commission on Human and Peoples' Rights, Ouagadougou Declaration and Plan of Action](#), Principle 3(a).

³¹⁹ [Commentary to the Tokyo Rules](#), p. 5.

³²⁰ *Id.*, p. 5.

- d. Imprisonment reduces offenders' sense of responsibility and their ability to make their own decisions.³²²
- e. Non-custodial measures "have the unique characteristic of making it possible to exercise control over an offender's behaviour while allowing it to evolve under natural circumstances."³²³
- f. Non-custodial measures reduce the likelihood of further crime and help offenders to become responsible citizens.³²⁴

110. The OTP fails to demonstrate any lack of reasoning in the Trial Chamber's Sentencing Decision. This argument must be dismissed.

2. The Trial Chamber appropriately gave weight to "ordinary factors" in suspending the sentence

111. The Trial Chamber appropriately gave weight to "ordinary factors" in suspending Mr. Kilolo's sentence.³²⁵ The individual circumstances the Trial Chamber considered – Mr. Kilolo's family situation, good behavior throughout the proceedings, and the consequences of incarceration on his professional life – are precisely the types of circumstances a Trial Chamber should consider in determining whether to suspend a sentence. Statistical studies on the efficacy of suspended sentences show that ordinary individual circumstances such as the age of the convicted person and the lack of a previous criminal record are determinative of the success or failure of a suspended sentence, i.e. whether the convicted person will breach a condition of the suspension or reoffend.³²⁶

112. The OTP's suggestion that "catering to the family and professional circumstances of the convicted person[] – fosters an appearance of partiality and impunity" and "suggest[s] that offenders with supposedly reputable backgrounds will receive a more lenient sentence"³²⁷ is unfounded. Lorana Bartel's article, repeatedly cited by the OTP,³²⁸

³²¹ *Id.*, pp. 5-6.

³²² *Id.*, p. 6.

³²³ *Id.*, p. 6.

³²⁴ *Id.*, p. 6.

³²⁵ *Contra* OTP SAB, para. 153.

³²⁶ Shoram and Sandberg, pp. 80-82. *Cid*, pp. 169-79.

³²⁷ OTP SAB, para. 123.

³²⁸ OTP SAB, fns. 252, 269, 272, 273, 275, 376.

suggests the opposite, that there is no “clear evidence of a bias towards middle-class offenders in the use of suspended sentences.”³²⁹

The fact that an offender’s adverse personal circumstances were also regarded as a relevant factor in imposing a suspended sentence in a number of cases would also seem to suggest that suspended sentences are certainly not the exclusive province of the well-off.³³⁰

113. The OTP’s claim that the Trial Chamber erroneously relied on ordinary factors that it rejected as mitigating factors is misguided, as this claim relies on a conflation of suspension and mitigation.³³¹ The partial suspension of Mr. Kilolo’s sentence does not equate to a reduction of his sentence.³³²

114. The OTP’s remaining claim that the Trial Chamber failed to consider other factors militating against suspension, such as the gravity of the offenses, Mr. Kilolo’s culpability, and retribution and deterrence³³³ is baseless. The Trial Chamber considered these factors throughout the Sentencing Decision.³³⁴ There is no indication that the Trial Chamber had amnesia when it came to suspending the sentence.

3. The Trial Chamber was not responsible for setting out an enforcement procedure

115. The Presidency is responsible for enforcing sentences, not the Trial Chamber. “[R]ule 199 of the Rules of Procedure and Evidence ..., read in conjunction with Part 10 of the Statute to the extent applicable to the present case in accordance with rule 163(3) of the Rules, the responsibility with respect of enforcement of sentences lies with the Presidency.”³³⁵ Rules 166, 217, 220, 221, and 222 already set out the applicable enforcement procedure. (*See supra* Response to Ground 1, para. 72). Further, Part IX of the Statute and corresponding Rule 176 provide a role for States and international and regional organizations in assisting the Presidency in the enforcement of suspended sentences:

³²⁹ Bartels (2010), p. 165.

³³⁰ Bartels (2010), p. 165 (internal citation omitted).

³³¹ *Rašić* AJ, para. 28: “the Prosecution’s submission that the Trial Chamber erroneously mitigated Rasic’s sentence by partially suspending it on the basis of her health condition is misguided as it relies again on a conflation of suspension and mitigation.”

³³² *Rašić* AJ, para. 28.

³³³ OTP SAB, para. 162.

³³⁴ *See* OTP SAB, para. 162 *citing* Sentencing Decision, paras. 153-81.

³³⁵ Kilolo Fine AD, para. 8.

- a. Article 87(1)(a) gives the Court the authority to submit requests for cooperation to States Parties.
- b. Article 87(1)(b) allows the Court to transmit requests for cooperation to the International Criminal Police Organization and regional authorities.
- c. Rule 176(2) provides the procedure for the transmission of requests for cooperation, requiring the Registrar to transmit requests by the Court and receive responses from requested States.

116. In authorizing Mr. Bemba to attend his father's funeral in Belgium, the Pre-Trial Chamber II referred to these provisions when it directed the Registrar to make necessary arrangements for implementing the decision, in particular, to coordinate with the governments of the Netherlands and Belgium and to transmit the necessary requests for cooperation.³³⁶ Although a suspended sentence is not akin to provisional release, this decision shows that the Presidency has the relevant means at its disposal to coordinate with States to oversee the enforcement of Mr. Kilolo's suspended sentence.

C. Conclusion

117. The Trial Chamber's decision to suspend Mr. Kilolo's sentence is legally sound and represents a proper use of its discretion. The OTP provides no reasonable guidance as to why a five-year custodial sentence is appropriate, especially when considering that the Trial Chamber found that Mr. Kilolo had reintegrated into society when it pronounced the Trial Judgment and rejected the OTP's request to remand Mr. Kilolo back into custody.³³⁷ An enhanced term of imprisonment does not further the purposes of deterrence or retribution, but merely fulfills a misplaced desire to exact revenge on Mr. Kilolo. The OTP's second Ground of Appeal must be dismissed.

IV. OVERALL CONCLUSION

118. The OTP's Appeal of the Sentencing Decision must be dismissed because:

- a. The OTP fails to show that the Trial Chamber exercised its discretion based on misinterpretations of the law or incorrect conclusions of fact.

³³⁶ *Bemba* Main Case Funeral Decision I, para. 8, pp. 5-6.

³³⁷ ICC-01/05-01/13-T-51-ENG, p. 33, ll. 19-21.

- b. The OTP fails to show that the Trial Chamber considered irrelevant factors, ignored relevant factors, or gave insufficient weight to the relevant factors that it did consider.
- c. The OTP fails to show that the sentence is so unfair or unreasonable as to constitute an abuse of discretion – that the sentence is one that no reasonable Trial Chamber could have imposed.
- d. The OTP fails to show why a sentence of five years' imprisonment is appropriate.
- e. The OTP fails to explain the basis for its proposed sentence, other than that it is the maximum sentence allowable under the Statute.

119. The Trial Chamber's sentence was well-thought-out, well-supported in the law, well-founded in the record and well-within its discretion. The Trial Chamber thoroughly analyzed its findings in the Trial Judgment, considered the gravity of the offenses, Mr. Kilolo's culpable conduct, and his individual circumstances, and balanced and weighed all relevant factors. Having identified a *lacuna* in the statutory sentencing regime, the Trial Chamber appropriately exercised its inherent power to suspend a portion of Mr. Kilolo's sentence. The suspended sentence ensures that Mr. Kilolo will be dissuaded from committing further offenses and others who may be predisposed to commit Article 70 offenses will refrain from doing so. It also signals to the public at large that Article 70 offenses will not be tolerated by the ICC.

WHEREFORE, for all the reasons stated in this Response, the OTP's Appeal of the Sentencing Decision must be dismissed.

Respectfully submitted, 30 August 2017,
In The Hague, the Netherlands.



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