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No.: **ICC-01/05-01/13**
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TRIAL CHAMBER VII

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

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

Public with Confidential Annexes
A, B, C and Public Annex D

Public Redacted Version of ''Defence Submissions on Sentencing'', 30 May 2018, ICC-01/05-01/13-2281-Conf-Exp

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

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1. Introduction

1. After proceedings that have lasted for almost 4 and a half years, the Trial Chamber is now called upon to determine a sentence that takes into consideration the specific errors identified by the Appeals Chamber, and Mr. Bemba's acquittal for Article 70(1)(b) offences.

2. This determination must take place within the framework of the legal and factual findings and related considerations that were not disturbed on appeal. This includes the Trial Chamber's previous determination as to:

- The appropriate punishment for Mr. Bemba's involvement in Article 70 (1)(c) offences, in light of the gravity of such offences and the degree of his involvement;
- The Chamber's factual findings concerning the degree and nature of Mr. Bemba's contributions to Article 70(1)(a) offences;
- The manner in which the Trial Chamber calculated the joint custodial sentence, based on its conclusion concerning the overlap in conduct between the different offences;
- The degree of the factual overlap in conduct between Mr. Bemba's Article 70(1)(a) and (c) offences (that is, that the conduct was "mostly" the same);
- The distinction between solicitation and inducement; and
- The imposition of a substantial fine as an appropriate form of punishment and deterrence.

3. When viewed through these fixed parameters, the errors identified by the Appeals Chamber do not warrant any increase in the overall custodial sentence imposed on Mr. Bemba.

4. The specific factors identified by the Prosecution as concerning the harm caused by the false testimony were already taken into consideration by the Trial Chamber when it calculated its initial sentence. The Trial Chamber's decision to impose a custodial sentence of 10 months rather than 12 months for Mr. Bemba's involvement in

Article 70(1)(a) offences is also consonant with the Chamber's assessment of the somewhat restricted nature of Mr. Bemba's contribution to the realisation of these offences, and the fact that his conduct was 'mostly', that is largely, but not quite the same as for Article 70(1)(c) offences.

5. Given that firstly, the Chamber's findings concerning Article 70(1)(c) were not disturbed, and secondly, the Prosecution did not appeal the manner in which the Trial Chamber calculated the joint sentence, the joint custodial sentence should remain at 12 months. If any adjustments are required, it would be appropriate to do so through the Chamber's calculation of the specific fine that should be paid by Mr. Bemba.

2. Submissions

2.1 The burden of proof rests with the Prosecution to demonstrate that the errors identified by the Appeals Chamber justify additional adverse consequences for the defendant

6. Article 67(1)(i) of the Statute sets out the accused's right not to have imposed on him any reversal of the burden of proof or onus of rebuttal. This right is not phase-specific. Accordingly, although the sentence has been remanded to the Trial Chamber, in accordance with Article 66(2) and Article 67(1)(i) of the Statute, the burden still falls on the Prosecution to prove that the conduct of the defendants has caused harm, and the level of that harm.[1] The standard of proof for such adverse sentencing factors continues to be that of 'beyond reasonable doubt'.[2] In case of ambiguity concerning the exact meaning and significance of prior finding by the Chamber, such ambiguity should be construed to the benefit of the defendant.[3]

2.2 The Prosecution has failed to adduce specific factual arguments as to why, the correct legal test established by the Appeals Chamber concerning the harm occasioned by witnesses' false testimony, justifies an increase in Mr. Bemba's sentence

7. On appeal, the Appeals Chamber acknowledged that false testimony on collateral issues *could* be a relevant factor, which justifies a lower sentence,[4] but nonetheless

[1] *Haradinaj* Re-trial Judgment, para. 10.
[2] ICC-01/05-01/13-2123-Corr, para. 25; *Delalić* AJ, para. 763; *Sikirica* SJ, para. 108.
[3] Ayyash Interlocutory Decision 16/02/2011, para 32: citing Article 2 of the ICC Statute and Military Tribunal IV, *United States of America v Friedrich Flick et al.*, Case No. 5, 19 April 1947-22 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, p. 1189.
[4] Sentencing Judgement, para. 38.

overturned the Sentencing Judgment on the grounds that the Trial Chamber had not adequately explained why it was appropriate to "pay heed" to the specific type of lies in this case.[5] The Appeals Chamber therefore concluded that the Trial Chamber's findings must have been based on an artificial hierarchy of lies. The Appeals Chamber therefore remanded the sentence to the Trial Chamber to determine on the basis of a "fact-specific assessment, in concreto, of the gravity of the particular offences for which the person was convicted".[6]

8. Contrary to the Prosecution's implication,[7] the Appeals Chamber made no findings 'in concreto' concerning the gravity of lies in this particular case. The burden therefore fell on the Prosecution to establish that gravity, and related harm. The need to focus on concrete harm is reflected by the wording of Rule 145(1)(c), which refers to "the extent of the damage caused",[8] as opposed to the "extent of the damage which *could have been caused"* or hypothetical 'danger'.[9] The notion of 'harm' thus encapsulates the concrete gravity of an offence, as compared to its abstract gravity,[10] which was already assessed by the Trial Chamber, and factored into its initial sentence.[11]

9. As demonstrated by the sentencing judgments issued in the *Lubanga,*[12] *Katanga,*[13] and *Al Mahdi* cases,[14] this notion of harm should be based on **evidence of actual**

[5] Sentencing Judgement, paras. 42-44.
[6] Sentencing Judgement, para.44.
[7] "The Appeals Chamber underscored the importance – and gravity – of the witnesses' false testimony **in this case**" (emphasis added), Prosecution submissions, para. 20.
[8] The same wording is used in other versions i.e. French: "de l'ampleur du dommage causé"; Arabic: "مدى الضـــرر الحـــاصل Spanish: "la magnitud del daño causado"
[9] According to the drafting history Rule 145 (1) (c), although a State circulated a discussion paper which included the phrase "the extent of damage caused or the danger posed by the convicted person's conduct", the language concerning the danger posed was omitted, and not included in later drafts, which referred exclusively to damage caused: *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, p. 122, fn 13. R. Fife, "Penalties", in Roy S. Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, pp. 556, 563; *Proposals submitted concerning Part VII of the Rome Statute of the International Criminal Court, on Penalties by* ***Australia, Canada and Germany***, PCNICC/1999/WGRPE(7)/DP.5, p. 1; **France** *see* DP.1, p. 1; **Spain** *see* DP.2, p. 2; **Brazil** *see* DP.3, p. 1. *See also* B. Hola et al., "International Sentencing Facts and Figures. Sentencing Practice at the ICTY and ICTR", 437.
[10] B. Holá et al., "International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR", 9 Journal of International Criminal Justice 411 (2011) at p. 423. This distinction between abstract and concrete gravity was cited by the ICC Appeals Chamber in the Lubanga Sentencing Appeal: ICC-01/04-01/06-3122, fn. 110. Trial Chamber VII also already addressed the abstract gravity of the Article 70(1)(a) offences in its sentencing determination (Sentencing Judgment, para. 214).
[11] Sentencing Judgment, paras. 214, 217.
[12] ICC-01/04-01/06-2901, para. 69. The Appeals Chamber further affirmed that the Chamber's assessment of factors under Rule 145(c) should be based on **evidence**: ICC-01/04-01/06-3122, paras. 69, 93.
[13] ICC-01/04-01/07-3484-tENG, paras. 55-60.
[14] ICC-01/12-01/15-171, para. 108.

harm and not abstract assumptions. The judgment in the Lubanga case is particularly apposite: the Majority found that although it was entitled to take into consideration uncharged consequences of the initial offence (that is, sexual violence resulting from the conscription and use of child soldiers) as part of its assessment of the harm caused by the common plan, it could only do so where the linkage between sexual violence and the acts of Mr. Lubanga, had been established beyond reasonable doubt.[15] It follows that even if the Trial Chamber can take into account the harm caused to the merits of the Main case through lies on collateral issues, it should only do so where the Prosecution has established the existence of this harm to the standard of beyond reasonable doubt.

10. But, notwithstanding this legal framework, the Prosecution's submissions include no analysis as to "the extent of the damage caused" by the specific lies of the 14 witnesses. Although the Prosecution argues that the "witnesses' false testimony on the "non-merits" issues could have affected Trial Chamber III's assessment of their testimony relating to the merits of the case, and the ultimate outcome of the trial",[16] the Prosecution does not take the necessary step of demonstrating in concreto that the lies negatively affected the Trial Chamber's assessment of their testimony relating to the merits of the case, and the ultimate outcome of the trial, and, if it did, that this impact was not already subsumed by the Trial Chamber's existing findings.

11. This level of abstraction is underscored by the Prosecution's argument that "[f]alse testimony on "non-merits" issues ***may be*** as "material" to a case as false testimony on "merits" issues may be. And such false testimony ***may be*** equally grave"(emphasis added).[17] However, for the purposes of addressing the specific error identified by the Appeals Chamber, the point is not what the level of damage caused by false testimony "may be" or "would have been",[18] but what it actually was in the specific circumstances of the Main case.

12. Similarly, in averring that "it is axiomatic that perjured evidence given to secure the acquittal of a guilty person is very serious", the Prosecution has committed the same error identified by the Appeals Chamber; that is, it has suggested that the Chamber's

[15] ICC-01/04-01/06-2901, para. 69.
[16] Sentencing Submissions, para. 18.
[17] Sentencing Submissions, para. 13.
[18] Sentencing Submissions, para. 14.

assessment of the concrete harm caused by the witnesses' lies should be based on abstract axioms concerning a hierarchy of harm, rather than the actual harm that resulted from the witnesses' lies.

13. The very essence of the Appeals Chamber's ruling is that Chamber's determination as to the quantum of damage cannot be based on abstract or general concepts; it therefore follows that it would be **equally incorrect** to give weight to Prosecution arguments, which are themselves, based on general assumptions, divorced from the specific factual circumstances of the Main case, the specific nature of the false testimony that was the subject of the Trial Chamber's judgment, and the actual harm caused by this specific false testimony.

14. Apart from its incorrect reliance on abstract notions, the Prosecution also rehashes specific elements that have no linkage to the concrete harm caused to Trial Chamber III's truth finding mandate, and which were already taken into consideration by the Trial Chamber in its initial sentence in connection with other sentencing factors. This includes the Prosecution's reliance on statements made by Mr. Bemba's co-defendants within the context of 'remedial measures',[19] and the linkage between the lies and the common plan.[20]

15. The defendants' subjective views as to the implications of an Article 70 investigation are also not proof of actual harm/concrete gravity. Indeed, the Chamber found explicitly that "the Chamber does not, for gravity purposes, take into account any conduct *after* the act since this cannot *per se* characterise the gravity of the offence as committed at the relevant time".[21] On appeal, the Prosecution defended the Trial Chamber's decision to rely on this conduct as a separate aggravating factor, rather than in connection with the gravity of the offences,[22] and further acknowledged that it would be wrong to rely on the same conduct in the Chamber's assessment of the gravity of the offence, and as an aggravating factor.[23]

[19] Prosecution submissions, para. 19. The Trial Chamber cited this conduct as an aggravating factor at paragraph of the Sentencing Judgment (para. 238), and also took it into consideration when assessing the the "degree of intent" of the defendants (paras. 218, 226, 237, 238, 248).
[20] Prosecution submissions, para. 18.
[21] Sentencing Judgment, para. 208.
[22] ICC-01/05-01/13-2203-Red, para. 38.
[23] ICC-01/05-01/13-2203-Red, para. 46.

16. As concerns the common plan, apart from the fact that the Prosecution's argument rest on pure abstraction ("the witnesses' false testimony on the "non-merits" issues *could* have affected Trial Chamber III's assessment of their testimony relating to the merits of the case" (emphasis added)),[24] the nature of the common plan was also taken into consideration by the Chamber in connection with Mr. Bemba's position as the "beneficiary" of the common plan (and related degree of participation).[25]

17. The Prosecution has therefore failed to discharge its burden of demonstrating, beyond reasonable doubt, that the harm caused by the lies in this case is an element that warrants a sentence which is higher than the sentence initially imposed by the Trial Chamber. Since the Prosecution did not appeal the manner in which the Chamber assessed other factors, it would be highly improper to revise these aspects of the Chamber's decision *post facto.* It would also constitute impermissible double counting to aggravate the sentence based on factors that were taken into consideration by the Chamber under different provisions of Rule 145.

18. Even if the Trial Chamber were to conduct its own independent inquiry into such issues (which would raise issues concerning notice),[26] as illustrated by the attached table and chronology, the record does not support the existence of a degree of concrete harm that would warrant a sentence that was higher than the sentence imposed by the Chamber.[27] As a result of the tip-off from the anonymous informant, and its subsequent Article 70 investigation, the Prosecution was not impeded from cross-examining witnesses as concerns contacts with the Defence and the possibility that improper payments had been received.[28] Indeed, in its submissions, the Prosecution states that the purpose of the false testimony was to protect the value of the testimony on the merits: "if the perpetrator's criminal conduct were to become known to Trial Chamber III, the witnesses' testimony about the "merits" of the case would have become useless".[29] But, the criminal conduct did become known: the anonymous tip-off to the Prosecution led to *ex parte* tip offs to Trial Chamber III.[30]

[24] Prosecution submissions, para. 19. As noted above, the abstract notion of potential harm was already addressed by the Trial Chamber in its assessment of the gravity of the article 70(1)(a) offences (Sentencing Judgment, para. 214).
[25] Sentencing Judgment, paras. 219, 226,
[26] Sentencing Judgment, para. 116.
[27] Annexes A, B
[28] Annex A.
[29] Prosecution Submissions, para. 18.
[30] ICC-01/05-01/08-2548 ; ICC-01/05-01/08-T-303-Red3-Eng.

As claimed by the Prosecutor in its opening statements in the Article 70 case, the perpetrator's criminal conduct "was clear to everyone. It was even clear to the judges."[31] Consequently, Trial Chamber III not only properly found that the witnesses were lacking in credibility, but went further and found that the witnesses also lacked reliability on issues concerning the merits.[32] This turn of events does not minimise the abstract gravity of the offences and the culpable conduct of the defendants but it does demonstrate that the hypothetical harm did not materialise in this particular case.

19. To pay "some heed" to the fact that the lies did not adversely affect the Chamber's truth-finding functions is also consistent with jurisprudence, which has assessed the harm caused by non-disclosure and false testimony by reference to the existence of concrete rather than abstract prejudice as concerns the party's ability to present its case.[33] In line with this jurisprudence, Trial Chamber III specifically ruled that any harm to its truth-finding functions (or the rights of the parties) would be reduced or eliminated if the parties were afforded an adequate opportunity to confront the witness in relation to such matters during his or her testimony.[34] This is consistent with *ad hoc* Tribunal jurisprudence concerning the role of cross-examination in eliminating or reducing harm associated with false, unreliable or coached testimony,[35] or witnesses who allegedly received improper inducements.[36]

20. Finally, any error in the Chamber's appreciation of the gravity of the specific Article 70 (1)(a) offences in this case would not warrant the imposition of a custodial sentence that is higher than the sentence imposed for Article 70(1)(c) offences.

21. When entering its Article 70(1)(c) conviction against Mr. Bemba, the Chamber found that the purpose of the corruption was to ensure that witnesses would testify in favour of the defendant:[37] this objective was not 'lie' specific. As a result, the Trial Chamber's error concerning the nature of the false testimony did not affect its

[31] ICC-01/05-01/13-T-10-CONF-ENG ET 29-09-2015, lines 5-8
[32] Annex A.
[33] *Nyiramasuhuko* AJ, paras 310-318; ICC-01/05-01/08-3255, paras 54-56, 62,118; ICC-01/04-02/06-1677, para. 18 *Blaškić* AJ, para. 303; *Karadžić* TC Decision 19/08/2011, paras 12-13; *Karemera* TC Decision 19/10/2006, para. 7; *Karadžić* TC Decision 17/06/2010, para. 17.
[34] ICC-01/05-01/08-3167, para. 49; ICC-01/05-01/08-3255, para. 54;
[35] *Rukundo* AJ, para. 134-136; *Karemera* TC Decision 11/05/2007, para. 13; *Karemera* TC Decision 19/10/2006**,** para. 7.
[36] *Taylor* TC Decision 11/11/2010, para. 134
[37] Trial Judgment, para. 103.

determination of the sentence for Article 70(1)(c).[38] As affirmed on appeal, Article 70(1)(c) focuses on the intended aims of the perpetrator, that is, the *attempt* to corrupt the testimony of the witness, rather than the extent to which the witness was actually corrupted.[39] The actual harm is complete as soon as the attempt is made to corrupt the witnesses. The Article 70(1)(c) sentence was therefore not only correct, but encompassed a range of conduct and actual harm that was similar, if not more extensive than the conduct and actual harm, encompassed by Article 70(1)(a).[40] Accordingly, if 12 months is the appropriate penalty for such Article 70(1)(c) conduct, there is no basis for exceeding this amount as concerns Mr. Bemba's conviction for Article 70(1)(a) offences.

2.3 The Prosecution has failed to discharge its burden of demonstrating that the Chamber's error as concerns accessory liability, warrants a change, and increase in Mr. Bemba's sentence

22. The Appeals Chamber found that by stating that it had "distinguished between the offences that [Mr Kilolo and Mr Bemba] committed as co-perpetrator[s] and those in relation to which [they were accessories]", the Trial Chamber committed a legal error, insofar as in the absence of more detailed elaboration, this distinction appeared to be the basis for the Chamber's decision to impose a lesser sentence for Article 70(1)(a) offences.[41] The Appeals Chamber did not find that as a matter of law, a sentence imposed for accessory liability could not be less than that imposed for primary liability, if the degree of participation and culpability was less; to the contrary, the Appeals Chamber reaffirmed its earlier ruling in the *Lubanga* case that all things being equal, a conviction for accessory liability should normally warrant a lower sentence.[42]

23. The burden therefore fell on the Prosecution to demonstrate why the Chamber's decision to make a minor differentiation between the respective sentences imposed for solicitation and co-perpetration did not reflect the difference in the degree of Mr.

[38] The Trial Chamber also underlined that the type of lies did not diminish its assessment of the culpability of Mr. Bemba: Sentencing Judgment, para. 271.
[39] "As found by the Trial Chamber, offences under article 70 (1) (c) of the Statute are generally grave because they have the potential to undermine the Court's functions and impede justice for victims. This is irrespective of whether, in the specific circumstances, the corrupt influence on the witness actually had such an impact on the Main Case." Sentencing Judgment, para. 262.
[40] See Appeals Judgment, para. 751, where the Appeals Chamber found that Mr. Bemba's culpable conduct under Article 70(1)(c) was broader than Article 70(1)(a).
[41] Sentencing Judgment, paras. 57-59.
[42] Sentencing Judgment, para. 59.

Bemba's involvement for these offences. Nonetheless, rather than analysing the gravity and extent of Mr. Bemba's contributions through the prism of solicitation liability, the Prosecution has attempted to augment the nature of Mr. Bemba's intent and contribution to the solicitation of Article 70(1)(a) offences, by relying on appellate findings that are unique to common plan liability, and other extraneous factors.

24. Specifically, the Prosecution has muddied the issues at play by:

a) relying on
   - irrelevant findings from the Appeals Chamber;[43]
   - the Appeals Chamber's findings concerning Mr. Bemba's contribution, as a co-perpetrator, to an agreement to commit Article 70(1)(b) and (c) offences,[44] even though the Appeals Chamber made clear that its analysis concerning Mr. Bemba's contribution to the common plan only concerned Article 70(1)(b) and (c) offences;[45]
   - the Trial Chamber and Appeals Chamber's findings concerning the degree of Mr. Bemba's knowledge and intent, which were formulated in relation to his responsibility, as a co-perpetrator under Articles 70(1)(b) and(c);[46] and
   - Conduct related to Mr. Babala, who was not convicted of being involved in Article 70(1)(a) offences (and who falls outside of the scope of the Appeals Chamber's finding that Mr. Bemba solicited false testimony through Mr. Kilolo and Mr. Mangenda);[47]

b) Ignoring key qualifications made by the Appeals Chamber, for example:
   - The Prosecution relies on the finding in the Sentencing Judgment that "[w]ithout [Bemba's] authoritative influence […], the witnesses would not

[43] Prosecution Submissions, para. 34, citing Appeals Judgment, paras. 866-87 (legal test for inferences and evidential weight of hearsay, and finding concerning the common plan (which pertain to Article 70(1)(b) and (c)).

[44] Prosecution Submissions, para. 34, citing Appeals Judgment, para. 812, which concerns Mr. Bemba's contributions to the common plan to illicitly interfere with witnesses (Article 70(1)(c)), paras. 823-825 (Article 70(1)(b) and (c) (as confirmed by para. 822); paras. 866-87 (which concern Articles 70(1)(b) and (c); and para. 995 (Mr. Babala's conduct in implementing the common plan to interfere with witnesses (Article 70(1)(c)). Prosecution Submissions, para. 35 (regarding the ""essentiality" of Bemba's contribution", which rests on appellate citations concerning Article 70(1)(c) (Appeals Judgment, paras. 812, 821, 824).

[45] "Two of these three offences – namely the charges of corruptly influencing witnesses and presenting false evidence – were allegedly perpetrated by committing, in the context of an agreement concluded between different co-perpetrators (co-perpetration)": ICC-01/05-01/13-2275-Red, para. 822.

[46] Prosecution Submissions, para. 36, citing Sentencing Decision para. 226, and Appeals Judgment paras. 827-842, upholds the Trial Chamber's findings as concerns Mr. Bemba's knowledge within the context of the the common plan to illicitly interfere with witnesses.

[47] Prosecution Submissions, para. 33, citing Appeals Chamber findings concerning the payment scheme involving Mr. Babala (Appeals Judgment, paras. 986-1008).

have testified untruthfully before Trial Chamber III",[48] whereas the Appeals Chamber only upheld the Chamber's earlier finding that "without Mr Bemba's authoritative influence, the untruthful testimony would not have occurred in the same manner before Trial Chamber III";[49]

c) Selectively quoting findings in a manner that creates an inaccurate impression:

- the Prosecution submission that Mr. Bemba's conduct "went beyond merely prompting",[50] relies on an appellate paragraph that merely states that prompting is a means of solicitation; and
- the Prosecution claim that "Bemba's contributions were not of a "somewhat restricted nature"",[51] relies on a judicial finding that Mr. Bemba's contributions were of a "somewhat restricted nature".

25. Apart from the fact that the Prosecution has attempted to conflate solicitation with co-perpetration, it has also failed to address firstly, the key distinction between solicitation and inducement, and secondly, the particular agency of witnesses in Article 70(1)(a) offences.

2.3.1 The sentence imposed by the Trial Chamber reflects the specific type of instigation for which Mr. Bemba was charged and convicted, and the particular degree of his participation in prompting witnesses to provide false testimony

26. Although the Appeals Chamber opined that hypothetically, the conduct of instigation could be graver than that of physical perpetration (particularly if the perpetrator is induced to commit the crime), this comparison is inapposite as concerns instigation *versus* co-perpetration. Instigation does not require the defendant to either possess the actual intent for the offence, or to make an essential contribution to its commission,[52] whereas for co-perpetration, it is necessary to establish that the the defendant both intended the crime to occur and controlled the means of its commission through an essential contribution. Whereas Judge Fulford queried the existence of a hierarchy of gravity between co-perpetration and accessory modes of liability on the basis of his position that an essential contribution was not

[48] Prosecution Submissions, para. 34 (see also their claim in the same para. concerning Mr. Bemba's ability to frustrate the commission of this offence, which rests on the same findings (qualified by the Appeals Chamber).
[49] Appeals Judgment, para. 848.
[50] Prosecution Submissions, para. 34, citing Appeals Judgment, para. 848.
[51] Prosecution Submissions, para. 34, citing Sentencing Decision, para. 223.
[52] "the instigator does not execute the offence and has no control over it. The control over the offence lies squarely with the physical perpetrator." Trial Judgment, para. 80.

required for co-perpetration,[53] the Appeals Chamber subsequently upheld the essential contribution requirement,[54] and that is the form of co-perpetration that was applied by the Trial Chamber for sentencing purposes.

27. In circumstances where the degree of influence exercised by the defendant equates to a form of effective control over the perpetrator, the appropriate charge would be indirect perpetration.[55] But this was not the level of influence that was alleged or charged in this case;[56] the Prosecution even argued during the pre-trial stage that the witnesses themselves could potentially be characterised as members of the common plan.[57] The witnesses' degree of autonomy is also consistent with the Appeals Chamber finding, in the context of Article 70(1)(b), that,[58]

> when calling a witness, it is beyond the party's control whether the witness will actually testify falsely. While the calling party may hope or anticipate that the witness will lie before the Chamber, it remains the independent decision of the witness to do so when he or she gives evidence in court.

28. If the parties cannot 'control' either the witness's ultimate decision as to whether to testify falsely or the content of such testimony, it follows that the parties do not 'control' the commission of the crime, and that their contribution, even if significant, is not tantamount to the control required for co-perpetration or indirect perpetration.

29. The Prosecution even accepted that where that degree of control is absent, and the physical perpetrator possesses the full *mens rea* for perpetrating the crime (as is the case with the 14 witnesses), the form of instigation is more akin, in gravity, to an accessory form of liability.[59]

30. Accordingly, for the purposes of assessing the degree of the defendant's participation under Rule 145(1)(c), it was, and remains appropriate for the Trial Chamber to pay heed to the specific charges brought against Mr. Bemba, the specific degree of participation for which he was convicted under Article 70(1)(a) ('the degree of

[53] Separate Opinion, ICC-01/04-01/06-2842, paras. 6-12, 16-16.
[54] ICC-01/04-01/06-3121-Red, para.473)
[55] ICC-01/04-01/07-717, para. 517 (distinguishing between issuing an order within an organisational framework of control, and ordinary ordering).
[56] The factual matrix of the evidentially supported allegations against the defendants did not support charges based on indirect co-perpetration: ICC-01/05-01/13-749, para. 36 (and p. 54).
[57] ICC-01/05-01/13-922, paras. 34-35.
[58] ICC-01/05-01/13-2275-Red, para. 709.
[59] ICC-01/05-01/13-2168-Conf, fn. 225.

participation of the convicted person'),[60] and the manner in which this degree of participation was alleged and litigated at trial. In doing so, the Chamber is not relying on an artificial hierarchy of gravity, but the specific degree of participation that was charged and proven at trial.

31. Apart from the difference between the degree of participation required by instigation as compared to co-perpetration, within instigation itself, there is a difference between the degree of participation required for solicitation as compared to inducement. Solicitation is comprised of asking or urging the perpetrator to commit the offence, whereas the concept of 'inducing' represents a stronger method of instigation." [61] To use the parlance of the Appeals Chamber, all things being equal, the degree of participation entailed through solicitation is therefore less than that of inducement, since the conduct for which the defendant is charged, prosecuted and convicted, is of a less intense nature.

32. It follows that even if the inducement of false testimony is considered to be of equal or similar gravity to co-perpetration or perpetration, solicitation - within the same factual matrix - is less grave. To hold otherwise would obliterate the distinction between the two different forms of liability, and result in a de facto re-characterisation of the charges against Mr. Bemba, without any of the protections of Regulation 55.

33. Of further import, although the Appeals Chamber affirmed Mr. Bemba's conviction, it remains the case that Mr. Bemba is the only defendant at an international court/tribunal to have been convicted of solicitation through a combination of tacit approval and indirect conduct. The attenuated nature of his role is relevant to the Chamber's duty, under Rule 145(1)(c), to consider the particular degree of his intent and participation as an instigator. Specifically, as concerns the Trial Chamber's findings that Mr. Bemba "at least, implicitly knew" that Mr. Kilolo gave instructions on false testimony, and "at least, tacitly approved" such instructions,[62] it is relevant that the ICTY has found that in cases of "tacit approval", the defendant's remoteness

[60] Rule 145(1)(c).
[61] ICC-01/05-01/13-1989-Conf 19-10-2016, para. 76
[62] Trial Judgment, paras. 818-819.

from the scene of the crime was likely to dilute the impact of such tacit approval.[63] Thus, even though the ICC Appeals Chamber found that physical proximity was not a legal requirement as concerns instigation based on tacit approval, it remains an evidential consideration as concerns the nature of the defendant's contribution to the commission of the resulting crimes,[64] and the resultant impact (that is whether the physical perpetrators were aware of the tacit approval).[65] Similarly, the fact that Mr. Bemba's approval was tacit must also be construed in light of the Appeals Chamber's finding – in the Appeals Judgment – that Mr. Bemba was only convicted of soliciting false testimony *through* Mr. Kilolo and Mr. Mangenda.[66] For sentencing purposes, the fact that the defendant's contributions or participation were 'indirect' has also been found to be a factor that can lessen the impact of such contributions, and thus the culpability of the defendant.[67]

34. In line with the indirect and tacit nature of his involvement in false testimony, Chamber found that "the actual contributions of Mr Bemba to the implementation and concealment of the common plan, as listed above, were of a somewhat restricted nature".[68] Whereas a co-perpetrator's essential contribution can be made at the stage at which the common plan is formulated (which can occur independently of the witnesses), the emphasis for instigation is on the defendant's actions in prompting the commission of the offences.[69] The fact that Mr. Bemba's contributions to the prompting of the false testimony "were of a somewhat restricted nature" is consonant with his conviction for solicitation rather than inducement, and, as a consequence, justifies the imposition of a sentence that reflects the "somewhat restricted nature" of his contributions to the prompting of the false testimony. The

[63] "in cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it." *Brđanin* AJ, para. 277

[64] In *Krstić*, the Appeals Chamber found that the fact that the defendant was only present for two hours at the scene where the crimes were committed was a factor that diminished his responsibility: *Krstić* AJ, paras. 272-273.

[65] *Brđanin* AJ, para . 277

[66] "when addressing solicitation of false testimony, did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses "through Mr Kilolo and Mr Mangenda"." ICC-01/05-01/13-2275-Red, para. 155.

[67] *Blaškić* AJ, para. 696; *Krstić* TJ, para. 714: "Indirect participation is one circumstance that may go to mitigating a sentence"

[68] Sentencing Judgment, para. 223.

[69] B. Goy, "Individual Criminal Responsibility before the International Criminal Court, A Comparison with the *Ad Hoc* Tribunals", p. 56.

Prosecution recognised as such on appeal, and is, therefore, precluded from resiling from its own position for the limited purposes of this resentencing phase.[70]

35. The difference between the degree of Mr. Bemba's participation in the planning stage, as compared to the prompting and commission stage of false testimony, is also consistent with the Appeals Chamber's recognition that the conduct underlying Mr. Bemba's convictions for Article 70(1)(a) and (c) "are essentially almost identical".[71] Thus, the Appeals Chamber did not find that the conduct was exactly identical, but rather, "[n]ot quite; very nearly"[72] identical. The appeals judgment thus mirrors the Trial Chamber's initial conclusion "that largely the same conduct underlies the multiple convictions",[73] that is, not exactly the same conduct, but "to a great extent; on the whole; mostly"[74] the same conduct. It would, therefore, be appropriate to impose a sentence that is almost, or largely, but not quite the same: that is, 10 months rather than 12 months.

2.4 The Prosecution failed to discharge its burden of demonstrating why any errors in the Chamber's approach to Article 70(1)(a) would justify an increase in the overall joint custodial sentence imposed by the Chamber

36. The Prosecution did not appeal the Trial Chamber's decision to impose a joint sentence or the manner in which the Trial Chamber calculated the sentence. The Chamber's finding that, in light of this overlap in conduct, it was appropriate for the joint sentence to be fixed by reference to the highest sentence concerning this conduct is, therefore, *res judicata* for the purposes of this case. And, in its submissions concerning the implications of the Article 70(1)(b) acquittal, the Prosecution reaffirmed the validity of the Chamber's conclusion that the overlap in conduct was relevant to the determination of the joint sentence.[75] Mr. Bemba is also not impacted by the Appeals Chamber's findings concerning suspended sentences, the Prosecution did not appeal the fact that custodial sentence imposed on Mr.

[70] "Bemba also fails to credit the Chamber even when it (partially) agreed with him. Thus, he states that his involvement in the offences was essentially passive" and that there was no "nexus" between his acts and the false testimony of the witnesses. But the Chamber expressly acknowledged these arguments in considering "mitigating circumstances", recognised that his "actual contributions […] to the actual implementation of the Common Plan were "somewhat restricted" due to his detention, and gave "some weight" to this fact". ICC-01/05-01/13-2203-Red, para. 62.
[71] Sentencing Judgment, para. 58.
[72] Definition of 'almost': https://en.oxforddictionaries.com/definition/almost
[73] Sentencing Judgment, para. 249
[74] Definition of "largely": https://en.oxforddictionaries.com/definition/largely
[75] Prosecution Submissions, para. 50: "the Trial Chamber already appears to have considered the overlap between the conduct underlying the offences not to increase the original joint sentences".

Bemba was less than the total suspended sentence imposed on Mr. Mangenda and Mr. Kilolo, and the Appeals Chamber did not reverse the Chamber's finding that 12 months was an appropriate custodial sentence for Mr. Bemba's conviction under Article 70(1)(c).

37. Bearing in mind these fixed parameters, the Prosecution Submissions fail to address the most salient point for sentencing, which is, that even if the Chamber erred as concerns the weight afforded to the type of false testimony, or by 'distinguishing' between accessory and principal liability, these errors do not justify imposing a sentence for Article 70(1)(a) that is higher than Article 70(1)(c), in which case, there is no basis for increasing the overall custodial sentence imposed on Mr. Bemba. Instead, the submissions advance incorrect and contradictory notions of the totality principle, and attempt to re-litigate *res judicata* underpinnings of the first decision on sentence. Once these extraneous arguments are properly disregarded, it should be clear that there is no basis to depart from the original joint custodial sentence imposed by the Trial Chamber.

2.4.1. Given the overlap in conduct between Article 70(1)(a) and (c) offences, there is no basis for disturbing the joint custodial sentence of 12 months

38. After arguing extensively that the Chamber should not have 'distinguished' between Article 70(1)(a) and (c) because the conduct underpinning the two is the same, or largely the same, the Prosecution fails to justify why, given this virtual duplication of culpable conduct between the two offences, an increase in the joint custodial sentence is required.

39. Rather than addressing this issue squarely, the Prosecution has attempted to re-litigate the Chamber's approach to the joint sentence, without demonstrating:
- how this falls within the limited scope of the remand; and
- how the specific errors identified by the Appeals Chamber result in an increase as concerns the overall degree of Mr. Bemba's culpability in connection with conduct that was 'largely' the same.

40. As concerns the first aspect, the Prosecution did not appeal the Trial Chamber's decision to impose a joint sentence. Nor did the Prosecution appeal the Chamber's determination that for the purposes of assessing the defendant's overall culpability

for the purposes of Article 78(1), it was appropriate to consider the overlap in conduct underlying Mr. Bemba's conviction for the different offences.[76] Nor has the Prosecution established that it was incorrect to conclude that there was an overlap in culpable conduct: indeed, their appellate submissions on Article 70(1)(a) were predicated on this duplication in conduct. Nor did the Appeals Chamber find it inappropriate or impermissible for the Trial Chamber to fix the joint sentence by reference to the individual sentence that reflected the high-water mark for Mr. Bemba's culpability for this duplicative conduct.

41. Bearing in mind these fixed parameters, it is illogical for the Prosecution to maintain, on the one hand, that Mr. Bemba's acquittal for a third of the charges does not impact on his overall culpability (because of the overlap in conduct), whilst on the other, averring that any adjustments to Article 70(1)(a) occasioned by the Appeals Chamber's findings concerning the similarity of conduct between Article 70(1)(a) and (c), should result in an increase in Mr. Bemba's overall culpability.

42. The underlying premise of this flawed argument appears to be that there is a critical difference in legal elements between Articles 70(1)(a) and (c) but not as concerns Article 70(1)(a) and (b).[77] But this does not reflect the findings of the Trial Chamber or the Appeals Chamber: the latter specifically found that the *actus reus* of Article 70(1)(b) was comprised of the act of presenting the evidence to the Court, whilst knowing it to be false, and further confirmed that there was an element of control that was absent from the act of soliciting witnesses to testify falsely.[78] The culpable conduct underpinning the co-perpetration of Article 70(1)(b) is thus both different from Article 70(1)(c), and graver than the solicitation of false testimony under Article 70(1)(a).

43. In contrast, whereas Article 70(1)(b) contains the materially distinct element of presenting the evidence to the Court, the Prosecution has failed to demarcate any material distinction between the act of soliciting witnesses to testify falsely (which is defined by the Chamber as being without regard to the truth or falsity of the contents of the testimony), and the act of corrupting witnesses to testify in favour of the

[76]See Prosecutions Submissions para. 52, which are predicated on the continued application of the conduct-based approach.
[77] Prosecution Submissions, para. 53.
[78]Appeals Judgment, paras. 702-703. See also Trial Judgment, para. 953

Defence (irrespective of the truth or falsity of their testimony). As affirmed by the jurisprudence cited by the Prosecution,[79] even if it is permissible to enter cumulative convictions where the same evidence/conduct fulfils similar offences combined with different modes of liability (for example, genocide and conspiracy to commit genocide), the overlap in conduct/evidence is nonetheless a factor that the Chamber must take into account in the sentence, in order to ensure that the sentence does not exceed the scope of the defendant's culpable conduct.[80]

44. Of further importance, the Prosecution argued in the charges,[81] and on appeal,[82] that the conduct underpinning Articles 70(1)(a) and (c) was the same. The Appeals Chamber also confirmed that the convictions under Article 70(1)(a) 'overlaps' with Article 70(1)(c).[83] It would be unfair to now determine that the conduct is different or graver in order to justify an increase in the joint sentence. Similarly, this limited remand should not be a vehicle for re-litigating and re-adjudicating the Chamber's approach to the gravity of Article 70(1)(c) offences, the degree of Mr. Bemba's conduct, and the type of punishment that is likely to operate as a suitable deterrent for such conduct.

45. When the Chamber issued its sentence for Mr. Bemba, the Majority made clear that this decision had been made after conducting an extensive review of both international and domestic precedents, and ultimately crafting a sentence that was tailored to the individual circumstances of Mr. Bemba and overall degree of his culpability for the charged offences.[84] Apart from the fact the Appeals Chamber noted the existence of certain factual errors that if anything, would have aggravated rather than mitigated the initial sentence,[85] the Chamber did not find that the Trial Chamber had erred in the manner in which it had calculated the gravity of Article 70(1)(c).[86] In

[79] Prosecution Submissions, fn. 165.
[80] *Gatete* AJ, para. 265, and fn. 642.
[81] ICC-01/05-01/13-1902-Conf-Corr2, para.45, citing ICC-01/05-01/13-526-Conf-AnxB1, paras. 113, 119-120, 140.
[82] The crux of the OTP appeal as concerns Article 70(1)(a) was that the Trial Chamber erred in imposing a lesser sentence because the conduct and culpability was the same as that underpinning Article 70(1)(c): "in describing their relevant conduct, and apart from referring in passing to the different modes of liability, the Chamber did not distinguish between Kilolo's and Bemba's *culpability* for their contributions to the article 70(1)(a) offences, and their contributions to the article 70(1)(b) and (c) offences. And logically so, since none existed on the facts": Prosecution Sentencing Appeal, para. 109.
[83] Appeals Judgment, para. 751.
[84] Sentencing Decision, paras. 37, 38.
[85] For example, the duration of the Article 70(1)(c) common plan, and the existence of a multi-party call with D-19 in October 2012.
[86] Sentencing Appeal, para. 262.

its initial sentence, the Trial Chamber also underlined that its findings concerning the nature of the witnesses' lies did not impact on its conclusion concerning the extent of Mr. Bemba's culpability.[87] The Prosecution has adduced no argument based on law or principle that would justify a different sentencing approach being imposed at this juncture, within the framework of the limited remand.

46. In the absence of a specific appellate directive to augment the Article 70(1)(c) sentence or to change the method of calculating the joint sentence, it would appear arbitrary if the Chamber were to now adopt a different approach in relation to issues that were not ruled upon by the Appeals Chamber. As set out in domestic case law, in order to respect the right to due process, any increase in a joint sentence imposed on remand must be based on objective and clear criteria; otherwise, a defendant might be deterred from exercising their right to appeal due to a fear of vindictiveness on the part of the sentencing judge.[88] The ICTY Appeals Chamber has in turn, confirmed that the sentencing principles applied by the Court must not deter a defendant from exercising his legitimate right of appeal against sentence.[89]

47. Apart from the fact that it would appear arbitrary, the adoption of a different approach to sentencing would also mean that Mr. Bemba has been subjected to two separate proceedings, and thus 'jeopardised' twice, for the same conduct, without the corresponding protections that would have been available in the event of an actual re-trial. Mr. Bemba has a right to know the case against him, and to defend himself in relation to that case. It is therefore necessary to respect some degree of finality in sentencing principles – including when a case is sent back to be resentenced – in order to lessen the ordeal occasioned by the sentencing process, and to avoid 'double jeopardy' as concerns individual sentences, which were not disturbed by errors on appeal.[90] The ICTY Appeals Chamber has endorsed such an approach, noting in the

[87] Sentencing Decision, para. 115.
[88] **US**: North Carolina v. Pearce, 395 U.S. 711 (1969),at 725-726, as qualified by Alabama v. Smith, 490 U.S. 794 (1989): if the aggregate sentence is increased, there is a rebuttable presumption of vindictiveness, absent affirmative indication of objective facts justifying an increased sentence. **Australia**: *R v Gilmore* (1979) 1 A Crim R 416 at 419; *R H McL v The Queen* (2000) 203 CLR 452 at [72].
The ECHR has also underscored that a defendant should not be deterred from exercising the right to appeal, due to potential adverse consequences: Yakovenko v. Ukraine (App. No. 5425/11), para. 82 (and see separate opinion).
[89] *Tadić* AJ on Sentence, para. 31.
[90] "Thus, the multiple punishment protection also values the defendant's interest in finality-the interest in not being subject to the "ordeal and . . . anxiety and insecurity" of a second sentencing proceeding", Michael P. Doss, "Resentencing Defendants and the Protection Against Multiple Punishment", p. 1420.

Aleksovski case that it "bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress".[91]

48. The Appeals Chamber affirmed Mr. Bemba's convictions on the basis of the case that the Prosecution pleaded at trial and on appeal; it only remitted the case back for resentencing and not a retrial. The Prosecution has accepted that "[t]his is not a forum to re-litigate matters which have been settled, either because they were not appealed, or by the Appeals Chamber itself." [92] These matters must therefore be considered to be *res judicata*.[93] The adoption of a new approach now to gravity or culpability (at a point when Mr. Bemba cannot adduce evidence to address this changed focus) would therefore be contrary to Mr. Bemba's protection against *non bis in idem*, and contrary to the Chamber's duty to ensure the fairness of the proceedings. For this reason, Judge Fulford cautioned in his separate opinion in *Lubanga*, even if a legal approach adopted during the trial phase might be deemed to be incorrect at a later point, it would be unfair to the accused to 'change the rules of the game' by adopting a more lenient or disadvantageous legal standard, at the conclusion of the proceedings.[94]

49. In light of these principles (and bearing in mind the protracted nature of these proceedings), both the methodology used by the Chamber to establish the joint custodial sentence, and the Chamber's framework for its assessment of the gravity of Mr. Bemba's culpable conduct, should be maintained. The errors identified by the Appeals Chamber do not impact on the nature of Mr. Bemba's culpable conduct nor do they affect the abstract or concrete gravity of the offences for which he was convicted. As will be elaborated below, any adjustments that might be required in order to reflect his acquittal can also be addressed through an adjustment to the fine.

2.5 Any adjustment should be made by reference to the amount of the fine imposed by the Chamber

[91] *Aleksovski* AJ, para. 190.
[92] Prosecution Submissions, para. 6.
[93] See *Haradinaj* AC Decision, 31/05/2011, paras. 31-32, concerning the Chambers obligation to conduct the re-trial in accordance with the parameters established by the Appeals Chamber, which in that case, included the Appeals Chamber's specific findings concerning the nature and scope of the JCE. See also *Delalić* TJ, para. 228. For case law concerning collateral estoppel/res judicata, see *Karemera* AC Decision 16/07/2008, para. 4; *Simić* TC Decision 28/02/2000, paras 9-10; *Karadžić* TC Decision 31/03/2010, para. 7; *Bizimungu* TC Decision 29/05/2007, para. 6.
[94] ICC-01/04-01/06-2842, Minority Opinion of Judge Fulford, paras 2, 19-21.

50. The Chamber's decision to impose a substantial fine, in order to complement the 12-month custodial term and satisfy the requirements of deterrence, should be maintained.

51. A substantial fine can constitute a significant criminal penalty in terms of ensuring punishment and deterrence.[95] As confirmed by the Appeals Chamber, as reflected by the wording 'or' in Article 70(3), a fine can also be an exclusive punishment, or a complementary punishment. In deciding whether to choose between or combine these options, the Chamber cannot rely on the formula that applies to Article 5 crimes, but must, rather, tailor the penalty to the gravity of the offences and circumstances of the defendant.[96]

52. Since the fine itself was fixed by reference to the more abstract notions of punishment and deterrence rather than conduct,[97] if it is necessary to make any adjustments to the sentence as a result of the errors identified by the Appeals Chamber, these adjustments should be made to precise amount of the fine, although it is accepted that the amount should still be substantial, when viewed as a percentage of the defendant's available assets.

2.5.1 The Chamber's decision that a substantial fine should operate as a component of Mr. Bemba's punishment should be maintained

53. The Trial Chamber's assessment of the most appropriate form of punishment was informed by several factors, including Mr. Bemba's family circumstances,[98] which were not affected by the Appeals Judgment. There is therefore no basis to reopen the determination that a substantial fine could itself, complement the custodial sentence by addressing issues of punishment and deterrence. The Prosecution's attempt to characterise the fine as an 'additional' rather than a complementary form of punishment,[99] therefore falls outside of the scope of the remand process, and is

[95] *A.P., M.P. and T.P. v. Switzerland* (App. No. 19958/92), para. 41; *Benedoun v. France* (App. No. 12547/86); para. 47.
[96] ICC-01/05-01/13-2276-Red, para. 200-204.
[97] Sentencing Judgment, para. 261.The Prosecution also argued at first instance that a fine would appropriately capture the defendant's culpability for the 'risk' of harm (that is, the abstract gravity of the offence), even if no concrete harm eventuated: ICC-01/05-01/13-2085-Conf, para. 159.
[98] Sentencing Judgment, para. 244.
[99] Prosecution Submissions, para. 5.

incorrectly predicated on the article 5 scheme, in which a custodial punishment is mandatory whereas a fine is optional.

54. The Prosecution's arguments concerning the impact of the fine on the funds available for reparations and their suggestion that the fine might not be paid should also be dismissed *in limine.* Apart from the fact that a reparations order has yet to be issued in the Main Case, the reparation phase commenced before the Prosecution filed its first instance sentencing submissions in this case, and yet the Prosecution still argued that a fine should be imposed in addition to a custodial sentence.[100] In responding to the Defence appeal, the Prosecution also argued that the Trial Chamber's calculation of the amount of the fine fell within the limits of its discretion, and the amount of available assets.[101]

55. Since the Prosecution did not appeal the fine, and in line with principles of fairness and the "prohibition of *reformatio in peius*",[102] the Prosecution cannot change its position now, for the purpose of obtaining a more adverse result for the defendant. Specifically, having argued that the Chamber did not err in its assessment that Mr. Bemba had the means to pay 300, 000 euros, the Prosecution cannot resile from this position, and attempt to rely on factors, such as the existence of Main Case legal representation debts,[103] that were already before the Trial Chamber in 2016. It would also be unfair to penalise the defendant for the existence of debts that arose from, or were exacerbated by the asset freeze/related confiscation of assets,[104] particularly since the issue arises from a different case,[105] and the Defence is willing to work with the Registry to adopt measures, which might mitigate or decrease the debt.

56. The Prosecution's arguments are also legally incorrect. As concerns the Prosecution's attempt to rely on a potential reparations order,[106] Rule 221 is case specific, and concerns the powers of the Presidency to enforce orders issued by the Chamber. It is predicated on the existence of such orders, and therefore has no power

[100] ICC-01/05-01/13-2085-Conf, paras. 5, 158-163.
[101] ICC-01/05-01/13-2203-Conf, paras. 135, 137.
[102] *Muvunyi* AJ, para. 170, fn. 382.
[103] Since [Redacted], the Defence understands the word "any" in ICC-01/05-01/13-2278-Conf-Exp-AnxI, p. 4, to refer to any debts since this date onwards.
[104] *Dzinic v. Croatia*, app. no 38359/13, para. 68: "while any seizure or confiscation entails damage, the actual damage sustained should not be more extensive than that which is inevitable, if it is to be compatible with Article 1 of Protocol No. 1".
[105] Sentencing Decision, paras. 241-242.
[106] Prosecution Submissions, fn. 231.

to modify their content. Rule 221 does not therefore bind the Trial Chamber for sentencing purposes in relation to the initial question as to the determination of penalties. Rule 221 is also only triggered if enforcement measures are required, whereas Rules 166(4) and (5) clarify that the Court should first afford the defendant a reasonable period within which to pay the fine (including by way of instalments) before resorting to Rule 221 enforcement measures. Mr. Bemba has repeatedly expressed his willingness to pay the fine without coercive measures. It is therefore unnecessary and premature to consider Rule 22l.

57. The Statute should also be interpreted in a manner, which ensures effectiveness and coherence. If the Prosecution's interpretation of Rule 221 were to be accepted (that is, that the Court should not fine a defendant if it were to result in less assets being available for reparations), then the very notion of fines under the Statute would become a 'dead letter'. Conversely, Article 79(2) provides that the Court may order any money or property collected through fines and forfeiture to be transferred to the Trust Fund for Victims (TFV), in which case, pursuant to Rule 221, the funds can then be applied for the purpose of reparations. There is no conflict in provisions.

58. The issuance of a fine in the Article 70 case also serves a different and additional purpose to reparations. The purpose of reparations is to achieve restorative justice for the victims – to compensate the victims rather than to punish the defendant.[107] The fact that such restorative funds have originated through a fine paid by the defendant in the Article 70 case is thus entirely irrelevant since a reparations order should not operate as a second punishment for the defendant.

59. The Prosecution's arguments also appear to be based on the flawed premise that the allocation of *any* percentage of Mr. Bemba's assets would necessarily diminish the amount available for reparations. The question as to whether there is an upper limit as concerns the percentage of assets that can be exhausted for reparations has yet to be determined by the Court. But, if Trial Chamber III were to impose an upper threshold similar to that which applies to Article 5 fines (i.e. 75%) then the imposition of a fine in the Article 70 case (which is paid to the Trust Fund) in addition to reparations, would result in **more,** not less funds for victims. For example, if, hypothetically, Mr.

[107] ICC-01/04-01/07-3778-Red, paras. 177-178. See also para. 184: "The goal of reparations is not to punish the person but indeed to repair the harm caused to others", and 185: "As said, the Appeals Chamber acknowledges that, as argued by Mr Katanga, the objective of reparations proceedings is remedial and not punitive."

Bemba is assessed as having [Redacted] euros in assets, and is fined 10% in the Article 70 case, and then 75% in the Main Case, the net result is greater than if he had just been ordered to pay 75% in the Main Case ([Redacted] euros rather than [Redacted] euros).[108]

2.5.2 Any adjustments to Mr. Bemba's sentence should be made to the specific amount of the substantial fine

60. As noted by the Chamber in its decision on sentence, Rule 166(3) of the Rules allows for fines to be imposed separately for each offence and for such fines to be cumulative.[109] Whereas the Chamber delineated the methodology used to calculate the custodial component of Mr. Bemba's punishment (a methodology that has not been altered by the Appeals Chamber), it did not specify the methodology for calculating the fine, leaving upon the possibility that it constitutes a cumulative total of the fines imposed for each offence.

61. If that is the case, then the reduction of the charges against Mr. Bemba should serve to reduce the amount of the total fine imposed by the Chamber. And, at the same time, if the Trial Chamber considers that any increase in the penalty imposed on Mr. Bemba is required as a result of the errors identified by the Appeals Chamber, then this increase should be incorporated through adjustments to the fine.

2.6 Mr. Bemba's financial obligations to his dependents

62. According to the sequence of events set out in Rule 166(3), the Court should first identify the value of the convicted person's assets (CPA), and then deduct an appropriate amount that would satisfy the financial needs of the defendant and his dependents (FN). After that amount has been established, the Court can impose a fine that may not be more than 50% of that amount i.e. 50% x (CPA-FN). This wording clarifies that in establishing the financial needs of the dependents, the Court cannot rely on the 50% that has not been used for the fine; this deduction must be calculated independently, and then ring-fenced from the assets and property that can be considered in the fine calculation.

[108] Art 70 fine = 10% of [Redacted] = [Redacted]. Main Case = 75% of ([Redacted])= [Redacted]. Art 70 + Main case = [Redacted] euros. Main case alone (75% of [Redacted]) = [Redacted] euros.
[109] ICC-01/05-01/13-2123, para. 35.

63. Rule 166(3) further specifies that the CAP shall be calculated by reference to the convicted person's assets; that is, the amount of Mr. Bemba's interest in these assets. The wording of this provision is consistent with the fact that the punishment imposed by the Court is personal in nature, and should not be transferred to, or suffered by third persons.

64. Since the wording is mandatory, the Court cannot defer its assessment as to nature and percentage of the defendant's ownership of certain property until the execution stage because to do so, would mean that the fine might be based on an inaccurate calculation of the percentage of the defendant's assets. Indeed, although *bona fide* third parties can challenge the enforcement of the seizure of assets before domestic courts, domestic courts cannot vary the financial amount of the fine, in light of such third party interests.[110]

65. This issue arises in the current case due to the fact that during the Main case, the [Redacted] .[111] [Redacted]. [Redacted].[112]

66. [Redacted],[113] [Redacted]. The ECHR has confirmed in this regard that it would constitute an unlawful appropriation of property to seize, due to criminal penalties incurred by one spouse alone, the full values of assets that are subject to a joint property regime.[114]

67. The Registry and the Prosecution have argued that a proper calculation of the extent of Mr. Bemba's interest in the assets listed by the Registry falls outside the scope of the limited context of of this sentencing remand.[115] For that reason, the Defence does not contest the fine being calculated on the basis of the assets set out in ICC-01/05-01/13.[116] This is subject to the following caveats: firstly, this should not be viewed as

[110] Rule 220.
[111] ICC-01/05-01/08-T-15-Conf-Exp-ET, p. 6 lns.19-20, p 9, lns.11-13.
[112] Articles 516-519 of the Family Code of the DRC. [Redacted]: ICC-01/05-01/08-37-Conf-Anx1.
[113] **US**: *US v. Richard J. Lester, and Sheila Lester*, Petitioner-Claimant-Appellant, 85 F.3d 1409 (9th Cir. 1996). **UK**: *see* Action against assets in criminal cases – confiscation orders, Part 3, July 2013, para. 9A.78.
[114] **ECHR:** *Frizen v. Russia*, App. no. 58254/00), paras. 28-35; *Denisova and Moiseyeva v Russia*, App. no. 16903/03, paras. 34-37, 51.
[115] ICC-01/05-01/08-3624, ICC-01/05-01/08-3625.
[116] For the purposes of assessing his financial liability, the value of his assets should also include cash Senatorial salary payments from September 2015 onwards. Any final calculation adopted by the Court should

a waiver for the purposes of raising this issue within the scope of a potential reparations order in the Main Case or as concerns the enforcement of other debts, and secondly, [Redacted] should be taken into consideration when determining the most appropriate mechanism for ensuring the family's ongoing need for accommodation.[117]

68. The latter would be consistent with the fact that the punishment imposed on Mr. Bemba should not punish his wife and children, nor impinge negatively on their right to maintain their family life in dignity.[118] Excluding [Redacted] from the list of assets will obviate the need to include housing costs in the allowance designated for dependents.

69. As concerns the specific amount that should be reserved for Mr. Bemba and his dependents, the drafting history of Rule 166(3) does not shed any light as to the specific parameters of "an appropriate amount". This issue does not appear to have been litigated previously at the Court, apart from the context of legal aid determinations, where the Registry has relied on average cost of living indexes in the specific country in question, an approach which has been accepted by the Pre-Trial Chamber in the Bemba Main Case, and the Presidency in this case.[119] Commentary to legal aid schemes also indicates that reasonable expenses (i.e. for education and health), and debts should also be calculated on top of standard living expenses.[120] This is consistent with sanction regimes that allow the targeted person to claim an exemption for both basic expenses and extraordinary expenses that might arise.[121]

70. Rule 166(3) is also silent as to the amount of time over which these costs should be projected. A proper determination cannot be reached in the abstract, but will necessarily depend on the length of the custodial sentence imposed on the defendant, the extent to which he can generate an income either during or after his detention, the time period of which this income will be allocated to the satisfaction of debts to the ICC, the age of the dependents (and their earning capacity), whether the family has to

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also take into consideration fair depreciation rates (i.e. http://www.uphelp.org/sites/default/files/pdfs/Depreciation_CP.pdf) and currency fluctuations (particularly if current value based on an earlier conversion).

[117] [Redacted]: ICC-01/05-01/08-37-Conf-Anx1.

[118] *HM Treasury v Ahmed & ors.* [2010] para. 39 concerning the impact of prolonged freezing orders on the privacy rights and dignity of family members.

[119] ICC-01/05-01/08-149-Conf, para. 8, ICC-RoC85-01/13-15-Conf-Exp, fn. 13.

[120] ECBA, "ECBA Touchstones – Minimum Standard for the right to Legal Aid"", 2013, para. 4.3 (p12)

[121] See DRC Sanctions Committee guidelines https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/1533_committee_guidelines.pdf

pay for housing in the future (or can rely on the existing residence), and the existence of other debts or liabilities.[122]

71. In terms of Mr. Bemba's particular circumstances, [Redacted].[123] [Redacted]. Mr. Bemba's understanding is that he should receive a monthly income as Senator until the next election, and for the next term, if his position is renewed.

72. [Redacted].[124] [Redacted].

73. [Redacted],[125] [Redacted],[126] [Redacted],[127] and [Redacted].[128] [Redacted].

74. [Redacted][129] and [Redacted].**[130]** [Redacted].[131] [Redacted].[132]

75. If a 12-month custodial term and a substantial fine are imposed on Mr. Bemba, he would apply to the Presidency to pay the fine in instalments over the duration of his custody (so that it would be paid in full, before his release). For the specific purposes of the Article 70 case and given his specific circumstances, it is proposed that the 'appropriate amount' for Mr. Bemba's dependents should be calculated over the period of custody/payments – being 12 months (assuming that is the custodial sentence imposed by the Chamber). This proposed time period is, however, contingent [Redacted] being excluded from the list of assets, since otherwise, Mr. and Mrs. Bemba would be encumbered by protracted mortgage payments, or rental costs for the reminder of their lives.

2.6 A hearing is not required if sentence is determined within the legal and factual parameters that were not appealed/overturned on appeal

76. The Appeals Chamber has also affirmed that the Defence must be afforded fair notice as concerns issues that could be taken into consideration in an adverse manner.[133]

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[122] [Redacted]
[123] ICC-01/05-01/08-76-Conf-Anx5
[124] [Redacted]
[125] [Redacted]
[126] [Redacted]
[127] [Redacted]
[128] [Redacted]
[129] [Redacted]
[130] [Redacted]
[131] *see* ICC-RoC85-01/13-15-Conf-Exp, fn. 13
[132] [Redacted]
[133] Sentencing Judgment, para. 116.

These submissions have been drafted on the basis of the defendant's understanding of the applicable framework for remand, and the specific allegations that were pleaded timeously during the first instance proceedings. Within this framework, and provided that the Defence is afforded an opportunity, through these submissions, to have the 'last word', a hearing is not required by the Bemba Defence. The ability of the Defence to participate, in full equality, in relation to a future hearing, or in response to future filings (such as a reply), is moreover, negatively impacted by the fact that the Registry has only allocated sentencing funds until 31 May 2018.[134]

77. These submissions have also been submitted at a time when the contents of the Main Case appeals judgment on conviction and sentence are entirely unknown. It is impossible, at this juncture, for the Defence to predict whether the Appeals Chamber's findings could be relevant to the specific sent back for remand. When faced with similar circumstances, this Trial Chamber found that even if a party knows that a specific event will happen after a deadline, Regulation 35(2) does not preclude that party from subsequently raising issues or seeking relief in relation to that event, if the content of the event and potential implications were unknown before the expiration of the deadline.[135]

3. Conclusion

78. This was an important case, in which complex legal and factual issues were discussed by the parties, and adjudicated by the Chambers. Legal principles have been defined and articulated, and apart from the individual penalties imposed on the defendants, the findings issued by the Trial Chamber and the Appeals Chamber will continue to ensure the goals of deterrence and respect for the law, for the years and cases to come.

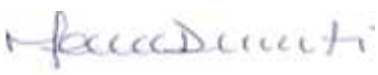
79. Within this framework, there is also a need for finality and certainty. The case was remanded, but it was a limited remand, not an invitation for the Prosecution to re-litigate its case against Mr. Bemba. But, almost five and a half years after Mr. Bemba's Article 70 arrest, the Prosecution has requested the same sentence it sought in 2016, based largely on arguments concerning issues that were not disturbed on

[134] On 23 May, the Defence submitted an urgent request for a further month of funding in order to address such eventualities, but the Registry has indicated that it will not issue a decision until 31 May 2018.
[135] ICC-01/05-01/13-1094, para. 21; ICC-01/05-01/13-1092, para. 7; ICC-01/05-01/13-1046-Red.

appeal. In contrast, Mr. Bemba has expressed his willingness to take steps to expeditiously pay a fine imposed by the Chamber, and wishes to start serving his sentence, as soon as possible.

80. Although, technically, Mr. Bemba cannot start to serve this sentence until the Main case sentence is confirmed, finalised, and completed, this Article 70 custodial sentence has been with him, in his mind and daily experiences, for the last 14 months. The Defence therefore respectfully invites the Honourable Trial Chamber to draw these proceedings to a close, and punish Mr. Bemba through a custodial sentence of 12 months, and a substantial fine.

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba



Mylène Dimitri
Associate Counsel of Mr. Jean-Pierre Bemba

Dated this 1st day of June 2018
The Hague, The Netherlands