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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 Redacted Document

Corrigendum to Submissions on Re-Sentencing

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba
Mr Michael G. Karnavas

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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I. Introduction

1. The Appeals Chamber has remanded the issue of sentencing to this Trial Chamber on the basis of four errors identified in the Trial Judgment[1] and Sentencing Decision:[2] (i) acting "*ultra vires* by suspending the remaining terms of imprisonment imposed on Mr Mangenda and Mr Kilolo";[3] (ii) finding that accessorial liability for the Article 70(1)(a) convictions of Mr Kilolo and Mr Bemba (but not Mr Mangenda) "warranted *per se* a reduction of the corresponding sentences";[4] (iii) giving "'some weight' to […] the mere fact that in the present case the false testimony 'related to issues other than the merits of the Main Case'";[5] and (iv) entering convictions under Article 70(1)(b), which were reversed.[6] The Appeals Chamber, making specific reference to these errors, decided that it was "most appropriate in the circumstances of this case to remand the matter to Trial Chamber VII for it to determine a new sentence."[7]

2. Mr Mangenda's sentence, when the foregoing errors are corrected, should be reduced to time served. An automatic conversion of the suspended term into a term of physical incarceration would bring about precisely the "unfair result"[8] that the Trial Chamber previously determined would not be appropriate for Mr Mangenda. The Appeals Chamber found only that giving a suspended sentence was *ultra vires*, not that the Trial Chamber's decision not to re-incarcerate was an abuse of discretion. The factors supporting the Trial Chamber's decision, including the likelihood that it would lead to [REDACTED], remain the same. The lapse of time, Mr Mangenda's compliance with the conditions of the now-invalid suspended sentence for almost a third of the total time required, and the quashing of 38 percent of his convictions, now make a further term in custody even more inappropriate.

3. None of the three other errors identified by the Appeals Chamber warrant an increase of sentence. First, the Prosecution claim that a higher sentence is warranted because of a purported error in discounting Mr Mangenda's individual sentence for the 70(1)(a)

[1] Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016 ("Trial Judgment"). All references in these submissions are to ICC-01/05-01/13 unless otherwise specified.
[2] Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123, 22 March 2017 ("Sentencing Decision").
[3] Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, 8 March 2018 ("Sentencing Appeal Judgment"), para. 359.
[4] Sentencing Appeal Judgment, para. 359.
[5] Sentencing Appeal Judgment, para. 45.
[6] Sentencing Appeal Judgment, para. 361, fn. 847.
[7] Sentencing Appeal Judgment, para. 361.
[8] Sentencing Decision, para. 41 (underline added).

offences should be dismissed *in limine*, as it was not appealed. Second, the error on the distinction between lies concerning the merits as opposed to credibility does not warrant any upward revision of sentence. Third, the quashing of 38 percent of the counts on which Mr Mangenda was convicted more than compensates for the remaining non-custodial conditions that have been quashed by the Appeals Chamber.

4. In the alternative, Mr Mangenda requests that the Trial Chamber defer re-sentencing until it has further indications that he has not re-offended. Although it is now clear that a suspended sentence is *ultra vires*, the Trial Chamber has undoubted authority to control its own calendar. Re-sentencing could be delayed until after a police report is provided at the end of a defined term indicating whether he has committed any offence. This is an alternative that would closely accord with the Trial Chamber's original objectives, and is within its undoubted legal authority.

II. Procedural History

5. On 22 March 2017, the Trial Chamber sentenced Mr Mangenda to two years of imprisonment, minus the period he had already spent in detention (11 months and nine days),[9] and suspended the remaining term of sentence on the condition that he refrain from committing any other offence punishable with imprisonment, including offences against the administration of justice.

6. On 8 March 2018, the Appeals Chamber rendered judgments on the appeals from both the Article 74 (merits) and Article 76 (sentencing) decisions of the Trial Chamber. The Appeals Chamber, on the basis of errors identified, decided to "remand the matter" to this Trial Chamber "to determine a new sentence."[10]

7. This submission is filed confidentially and *ex parte* Office of the Prosecutor, Registry and the Mangenda Defence pursuant to Regulation 23*bis* (2) of the Regulations of the Court.[11] A public redacted version will be filed in due course.

[9] *See* Sentencing Decision, fn. 227 ("[t]hus, Mr Mangenda spent in total 11 months and nine days in detention, in accordance with an order of the Court.")
[10] Sentencing Appeal Judgment, para. 361.
[11] Footnote 109 of this submission refers to an *ex parte* Registry filing.

III. The Impact of the Errors Identified by the Appeals Chamber on Sentence

A. *The invalidation of the suspended sentence does not warrant re-incarceration*

8. The Appeals Chamber found that imposing a suspended sentence is *ultra vires* the powers conferred on a Trial Chamber under the statutory instruments of the Court. The issue now before the Trial Chamber, and addressed in this section, is whether the quashing of the non-custodial conditions of the suspended sentence weighs in favour of additional time in physical custody for Mr Mangenda. It does not.

9. First, nothing in the Sentencing Appeal Judgment implies that the suspended term of imprisonment should or must be converted into a term of actual imprisonment. On the contrary, remand was ordered because the Appeals Chamber recognised, *inter alia*, that it could not assume that the Trial Chamber, but for the power to suspend, would have imposed the same sentence.

10. Second, the Trial Chamber's previous determination that Mr Mangenda should not be re-incarcerated remains correct. The Appeals Chamber did not suggest otherwise. Returning Mr Mangenda to physical custody is as inappropriate today as it was at the time of the Sentencing Decision.

11. Third, a return to incarceration would be particularly unjust given the substantial interval between sentencing and re-sentencing. Mr Mangenda has already complied with the conditions set by the Trial Chamber for almost one-third of the suspended term. This period between sentencing and re-sentencing, particularly when added to the period of provisional release, further weighs against re-incarceration.

(i) <u>The Appeals Chamber did not suggest re-incarceration for the suspended term</u>

12. The Appeals Chamber invalidated the suspended sentence on the basis that the Trial Chamber "erred in law in finding that it had the inherent power to impose a suspended sentence, and therefore acted *ultra vires* in ordering the conditional suspension of the remaining terms of imprisonment on Mr Kilolo and Mr Mangenda."[12]

13. The invalidation of the suspension does not mean that Mr Mangenda must be returned to custody for the suspended term. The Prosecution, to be sure, asked the Appeals

[12] Sentencing Appeal Judgment, para. 80.

Chamber for such an order.[13] The Defence argued, to the contrary, that it could not be assumed that the Trial Chamber, but for the power to suspend, would have imposed a two-year sentence.[14]

14. The Appeals Chamber denied the Prosecution request and instead remanded to this Trial Chamber for re-sentencing.[15] No suggestion was made in the Sentencing Appeal Judgment that the appropriate sentence should be two years of physical incarceration. On the contrary, the Appeals Chamber ordered remand in the awareness that the Trial Chamber might not have imposed the same term of imprisonment if it had known that it had no power to suspend.

15. Indeed, a thirteen month increase of physical incarceration would have constituted a dramatic increase in sentence from a condition not to re-offend for three years, as was imposed by the Trial Chamber. Remand was a necessary measure to give proper respect to this Trial Chamber's sentencing discretion.[16]

(ii) The Trial Chamber's previous determination that Mr Mangenda should not return to custody is unaffected

16. The Trial Chamber's first sentencing decision squarely considered whether Mr Mangenda should be returned to custody. The Trial Chamber determined that he should not.[17] The Trial Chamber explained that the purpose of a suspended sentence was precisely to avoid placing Mr Mangenda back into physical custody:

> To conclude [that suspended sentences are not available], would lead to an unfair result whereby a convicted person could not serve a term of years other than by way of unconditional

[13] 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, 21 June 2017 ("Prosecution Sentencing Appeal Brief"), para. 171(iv) ("in relation to the Second Ground of Appeal, to find that the Trial Chamber legally erred and/or abused its discretion in suspending the sentences of Mangenda and Kilolo, and to reverse the suspension and order Kilolo and Mangenda back into custody to serve the remainder of their sentences of imprisonment or any increased sentences as decided by the Appeals Chamber.")

[14] Response to Prosecution's Document in Support of Appeal against Trial Chamber VII's "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2201-Conf, 21 August 2017 ("Defence Sentencing Appeal Response"), paras. 130-132.

[15] Sentencing Appeal Judgment, paras. 359, 361.

[16] *See* Canada*, R. v. M.* (C.A.), [1996] 1 S.C.R. 500, para. 92 ("I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.")

[17] Sentencing Decision, paras. 143, 149 ("[m]indful of Mr Mangenda's personal circumstances, his good behavior throughout the present proceedings and the consequences of incarceration for his family, the Chamber agrees to suspend the operation of the remaining term of imprisonment for a period of three years so that the sentence shall not take effect unless during that period Mr Mangenda commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.")

> imprisonment, even when the Chamber considered less restrictive means more appropriate."[18]

17. The Appeals Chamber has now eliminated those means, but it does not follow that the Trial Chamber must abandon its purpose and impose "an unfair result." The Appeals Chamber did not say that the decision not to re-incarcerate Mr Mangenda was unreasonable, let alone an abuse of discretion. The Appeals Chamber's invalidation of the suspended sentence was based strictly on the legal determination that this mechanism is *ultra vires*.

18. The factors that substantiated the Trial Chamber's previous conclusion that it was not appropriate to re-incarcerate Mr Mangenda[19] remain in place. [REDACTED]. [REDACTED].[20] The most recent correspondence [REDACTED] indicates that this situation remains unchanged.[21]

19. This separation would have a serious negative impact on his wife and [REDACTED] children.[22] Although [REDACTED] is not within the direct control of the Court, let alone the Trial Chamber, it is part of the "overall" or "individual" circumstances under Rule 145(1)(b).[23] It may also occasion a violation of Article 8 of the European Convention of Human Rights and is, accordingly, directly relevant to the "application" of sentencing rules of the Court under Article 21(3) of the Statute. None of the errors identified in the Sentencing Appeal Judgment change these factors, or suggest that the Trial Chamber improperly evaluated them when determining that Mr Mangenda should not be re-incarcerated.

20. The other factors that substantiated the Trial Chamber's previous decision not to re-incarcerate Mr Mangenda[24] also remain the same. The serious consequences that he has suffered, and that he continues to suffer, include: 11 months and nine days in pre-conviction detention;[25] missing [REDACTED] during that period of detention;[26]

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[18] Sentencing Decision, para. 41 (underline added).
[19] Sentencing Decision, paras. 134-141, 149.
[20] Submissions on Sentence, ICC-01/05-01/13-2088-Red2, 8 December 2016 ("Defence Sentencing Submissions"), paras. 14-15. *See* [REDACTED]; Annex 2 to [REDACTED]; Annex 1 to [REDACTED]; Annex 2 to Registry's Fifth Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-01/05-01/13-808-Conf-Anx2, 2 February 2015, p. 4.
[21] Letter [REDACTED].
[22] Defence Sentencing Submissions, para. 12.
[23] *See* Sentencing Decision, paras. 134-141.
[24] Sentencing Decision, para. 149.
[25] Sentencing Decision, para. 148, fn. 227.
[26] Defence Sentencing Submissions, para. 12. *See also* CAR-D23-0010-0017, CAR-D23-0010-0018.

separation from his family for a further 52 days after his release from detention because of [REDACTED];[27] the [REDACTED] where his family is lawfully present;[28] the catastrophic damage to his career prospects as a result of these proceedings and conviction;[29] and the [REDACTED] while in detention,[30] which has recently worsened to the point of [REDACTED].[31]

21. The Appeals Chamber did not find that Mr Mangenda should be re-incarcerated; did not find that the Trial Chamber's sentence was manifestly deficient;[32] and did not find, outside of the two errors discussed below, that the Trial Chamber's approach to sentencing Mr Mangenda was erroneous.[33] None of these errors, viewed individually or cumulatively, warrant overthrowing the Trial Chamber's previous determination that Mr Mangenda should not be re-incarcerated. The Appeals Chamber's finding that the suspended sentence was *ultra vires*[34] does not alter the correctness or reasonableness of the Trial Chamber's previous conclusion that Mr Mangenda's re-incarceration would not be appropriate.

(iii) The invalidation of the conditions of release should not translate into time in custody

22. The quashing of the conditions for suspending sentence should not be compensated with additional time in physical custody.

23. The condition previously set by the Trial Chamber for not being re-incarcerated was that Mr Mangenda, for a period of three years, not "commit[] another offence anywhere that is punishable with imprisonment, including offences against the administration of

[27] Defence Sentencing Submissions, para 19; Annex 1 to Registry's Fifth Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-01/05-01/13-808-Conf-Anx1, 2 February 2015, p. 2; Registry's Fourth Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-1/05-01/13-751-Conf, 12 November 2014, pp. 5-6 ("[REDACTED]"); Registry's Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-01/05-01/13-722-Conf, 27 October 2014 ("First Registry Report"), paras. 22-32 (detailing the Registry's efforts at finding a solution for Mr Mangenda, who remained at the Detention Centre after the Single Judge's Release Order [REDACTED]); Annex 15 to First Registry Report, ICC-01/05-01/13-722-Conf-Anx15, p. 2.
[28] Defence Sentencing Submissions, para. 17. *See* CAR-D23-0010-0027, CAR-D23-0010-0028, CAR-D23-0010-0029 ("[REDACTED]").
[29] Defence Sentencing Submissions, para. 18.
[30] Defence Sentencing Submissions, para. 20; CAR-D23-0010-0030; CAR-D23-0010-0031; CAR-D23-0010-0032; CAR-D23-0010-0033; CAR-D23-0010-0034; CAR-D23-0010-0035.
[31] *See* Annex A ("[REDACTED]"); Annex B (REDACTED).
[32] Sentencing Appeal Judgment, para. 90.
[33] Sentencing Appeal Judgment, paras. 45, 61, 79.
[34] Sentencing Appeal Judgment, paras. 76-80.

justice."[35] The Sword of Damocles over the remaining period of the suspended sentence would have lapsed at the end of three years of compliance with this condition.

24. Thirteen months of physical incarceration is a much heavier and different type of punishment than this Sword of Damocles. The whole purpose of a suspended sentence is to not send a person into custody. Converting the period of a suspended sentence into a custodial term is directly contrary to the Trial Chamber's previous objective, which has not been invalidated or found inappropriate by the Appeals Chamber.

25. Any sentiment that the conditions of release should be replaced with something else must be further diminished by Mr Mangenda's compliance with the conditions of his sentence prior to its invalidation.[36] Indeed, almost one-third of the period of suspension was served before it was invalidated. He has also fully complied with the terms of his provisional release since 31 October 2014.[37] Compliance with such terms has been consistently taken into account by international courts.[38] Furthermore, as discussed below, any reduced punishment arising from the elimination of the condition not to re-offend is more than counter-balanced by the quashing of all convictions entered under Article 70(1)(b).

(iv) The interval between sentencing and re-sentencing weighs against the imposition of a further custodial sentence

26. Mr Mangenda now faces re-sentencing more than a year after the original Sentencing Decision. This Trial Chamber, pursuant to broad factors set out in Rule 145(1)(b) of the Rules, is entitled to consider the impact of the interval between sentencing and re-sentencing, which is not attributable to Mr Mangenda, as a factor in evaluating whether a further custodial sentence is appropriate.

[35] Sentencing Decision, p. 98.
[36] Between the date of the Sentencing Decision (22 March 2017) and the Sentencing Appeal Judgment (8 March 2018).
[37] Registry's Fourth Report on the Implementation of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (ICC-01/05-01/13-703), ICC-1/05-01/13-751-Conf, 12 November 2014, pp. 5-6; Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-703, 21 October 2014.
[38] ICTY, *Prosecutor v. Beqaj,* IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, paras. 63-64; ICTY, *Prosecutor v. Rašić*, IT-98-32/1-R77.2, Written Reasons for Oral Sentencing Judgement, 6 March 2012, para. 27; ICTY, *Prosecutor v. Blagojević & Jokić*, IT-02-60-A, Judgement, 9 May 2007, para. 342; ICTY, *Prosecutor v. Jokić*, IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, para. 82; ICTY, *Prosecutor v. Popović et al*, IT-05-88-T, Judgement*,* 10 June 2010, para. 2155; ICTY, *Prosecutor v. Milutinović et al*, IT-05-87-T, Judgement*,* 26 February 2009, paras. 1152, 1178; ICTY, *Prosecutor v. Stanišić and Župljanin,* IT-08-91-T, Judgement, vol. 2*,* 27 March 2013, para. 934.

27. The ICTY Appeals Chamber has held that re-sentencing, which is not attributable to the fault of the convicted person, weighs in favour of reducing the sentence that might otherwise be imposed.[39] The English Court of Appeal, after finding that a defendant should have been sentenced to eight years' imprisonment instead of three, nevertheless declined to impose an increased sentence on the basis that "[g]iven the delay and given his release from prison it would be wrong […] to now require him to go back to prison".[40]

28. The ICC Appeals Chamber[41] and this Trial Chamber[42] appear to have applied similar considerations in this case, albeit in the different context of provisional release.

29. Imposing a new sentence more than a year after the initial sentence gives rise to additional burdens that weigh against any further term of custody. Mr Mangenda, as he describes in his letter attached in Annex A, has taken steps to re-integrate into his family and community life that would be substantially disrupted by any re-incarceration. The belated nature of any re-incarceration arising from the interval between sentencing and re-sentencing would constitute an unfair burden. This is yet another factor that weighs against re-incarceration.

[39] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 190 ("[i]n imposing a revised sentence the Appeals Chamber 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, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer"); ICTY, *Prosecutor v Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, para. 853 ("[t]aking into account the various considerations relating to the gravity of Mucić's offences and the aggravating circumstances already referred to, as well as the mitigating circumstances referred to by the Trial Chamber and the 'double jeopardy' element involved in subjecting Mucić to a revised sentence").

[40] United Kingdom, *Attorney-General's Reference Nos. 83 & 85 of 2004 (Matthew Gardner and Mohammed Afzal),* [2005] EWCA Crim 1537, paras. 24–25.

[41] Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015, para. 57 ("given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the [Release Order]. Accordingly, despite reversing the [Release Order], the Appeals Chamber decides, in view of the exceptional circumstances, to maintain the relief ordered therein, i.e. the release of the suspects, pending the Trial Chamber's determination on this matter.")

[42] Decision Regarding Interim Release, ICC-01/05-01/13-1151, 17 August 2015, paras. 19-22 ("the Chamber considers that the length of time the Four Accused have been released - nearly ten months - without incident demonstrates that the expectation connected with the interim release previously ordered has been fulfilled. […] While released, there is no evidence that the Four Accused attempted to flee the jurisdiction of the Court, seek improper assistance from Mr Bemba's alleged network of supporters, intimidate witnesses or otherwise commit any offences against the administration of justice. […] On balance, the Chamber concludes that continued detention of the Four Accused in this case is not necessary […] The Appeals Chamber's pronouncements against detention and the Prosecution's own acknowledgement that the passage of time and the schedule of the proceedings render re-arrest 'not practicable' are consistent with this assessment.")

(v) Conclusion on the invalidation of the suspended sentence

30. The Trial Chamber's error of imposing a suspended sentence does not warrant re-incarcerating Mr Mangenda. The Appeals Chamber did not suggest that the Trial Chamber's decision not to re-incarcerate Mr Mangenda was an abuse of discretion or unreasonable. The condition previously imposed by the Trial Chamber of not re-offending for three years is not properly converted into time in custody, especially in light of the period that Mr Mangenda had already not re-offended prior to the Appeals Chamber's Judgment, and the additional prejudice to rehabilitation that would arise from belated incarceration. Neither this error nor the other errors discussed below warrant further time in custody for Mr Mangenda.

31. The only appropriate consequence of the invalidation of the suspended sentence is a revised sentence of time served.

B. *The Prosecution did not appeal the Trial Chamber's evaluation of accessorial liability in respect of Mr Mangenda which, in any event, does not warrant an upward revision of sentence*

32. The Prosecution is asking the Trial Chamber, based on extensive submissions,[43] to increase Mr Mangenda's sentence on the basis of an alleged error in the way that the Trial Chamber weighed accessorial liability in imposing an individual sentence for the Article 70(1)(a) offences.[44]

33. These submissions should be rejected *in limine*. The Prosecution did not appeal this reasoning, and the Appeals Chamber made no finding that it was erroneous. The Prosecution, apparently quite deliberately, chose to appeal the Trial Chamber's treatment of this issue in respect of Mr Kilolo and Mr Bemba only; it cannot now claim error, or request a higher sentence, on the basis of a finding that it did not appeal.

34. The reason for the Prosecution's decision to appeal the treatment of accessorial liability in respect of Mr Kilolo and Mr Bemba, but not Mr Mangenda, is readily apparent from the Appeals Chamber's reasons. The phrase that the Appeals Chamber found to be problematic, which is repeated in similar form for Mr Kilolo,[45] Mr Bemba[46] and Mr

[43] Prosecution Sentencing Submissions, ICC-01/05-01/13-2279, 30 April 2018 ("Prosecution's Re-Sentencing Submissions"), paras. 45-49.
[44] Sentencing Decision, para. 145 ("[t]he Chamber emphasises that it has distinguished between the offences in which Mr Mangenda participated as co-perpetrator and those in relation to which he was an accessory.")
[45] Sentencing Decision, para. 193.
[46] Sentencing Decision, para. 248.

Mangenda,[47] reads: "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."[48]

35. However, the Appeals Chamber relied upon an aspect of the Trial Chamber's reasoning in respect of Mr Kilolo and Mr Bemba that does not apply to Mr Mangenda:

> While the Trial Chamber did not elaborate any further – and no reference to this particular aspect is made anywhere else in the Sentencing Decision – this distinction appears to have been the basis for the Trial Chamber's imposition of a lower individual sentence for the conviction for the offence under article 70(1)(a) of the Statute which Mr Kilolo and Mr Bemba induced or solicited (within the meaning of article 25(3)(b) of the Statute) than the individual sentences for the conviction for the other offences which Mr Kilolo and Mr Bemba committed as co-perpetrators (within the meaning of article 25(3)(a) of the Statute).[49]

36. The "lower individual sentences" to which the Appeals Chamber refers was 12 months for Mr Kilolo's accessorial liability as opposed to 24 months for his co-perpetration liability,[50] and ten months for Mr Bemba's accessorial liability as opposed to 12 months for his co-perpetration liability.[51] The Appeals Chamber, noting that the "factual findings made by the Trial Chamber in this respect are essentially the same," and led to convictions on 14 counts for all offences, inferred "in the absence of any further elaboration on the part of the Trial Chamber" that these lower sentences were imposed "only because of the concerned mode of liability."[52]

37. Mr Mangenda, however, was only convicted of nine counts of the Article 70(1)(a) offences.[53] The Trial Chamber expressly noted this five times in sentencing.[54] The Trial Chamber even carefully recalled in the Sentencing Decision that some of these convictions had been for abetting, while others were for aiding.[55] Hence, Mr Mangenda's lower sentence could not be ascribed to accessorial liability alone.

[47] Sentencing Decision, para. 145.
[48] Sentencing Decision, para. 193.
[49] Sentencing Appeal Judgment, para. 58 (underline added).
[50] Sentencing Decision, para. 192.
[51] Sentencing Decision, para. 249.
[52] Sentencing Decision, para. 61.
[53] Trial Judgment, p. 456.
[54] Sentencing Decision, paras. 113, 120, 122, 144 (iii), 146 (iii).
[55] Sentencing Decision, para. 112.

38. None of this was litigated or even discussed before the Appeals Chamber because the Prosecution chose not to appeal this point in respect of Mr Mangenda. The circumstances described above suggest why. The Defence, out of an abundance of caution, expressly noted in its Sentencing Appeal Response that "the Prosecution has not claimed or argued that the Trial Chamber erred" and has "requested no relief in respect of Mr Mangenda under this sub-ground."[56] The Prosecution did not seek leave to amend its appeal brief after this submission or otherwise signal its disagreement.[57]

39. The Appeals Chamber, accordingly, did not find that the Trial Chamber had erred on this point in respect of Mr Mangenda. Its finding of error is limited to Mr Kilolo and Mr Bemba: "the Appeals Chamber finds that the Trial Chamber erred when, for the purpose of the determination of Mr Kilolo's and Mr Bemba's sentences, it pronounced lesser sentences […] on the basis of an abstract distinction […] 'between the offences that [they] committed as co-perpetrator[s] and those in relation to which [they were accessories]".[58] The Appeals Chamber's footnote to this last statement refers only to the Trial Chamber's findings in respect of Mr Kilolo and Mr Bemba: "Sentencing Decision, paras. 193 (concerning Mr Kilolo) and 248 (concerning Mr Bemba)."[59]

40. The Appeals Chamber does state much later in its Judgment, in discussing what remedy to order, that "the sentences pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo are materially affected by <u>each</u> of these errors."[60] This phrase, which is not without ambiguity, must be read in the context of its earlier findings, which were confined to Mr Kilolo and Mr Bemba. The Prosecution also acknowledges that it "did not appeal Mangenda's sentence on this aspect" and that the Appeals Chamber "made no finding with respect to Mangenda."[61] The Prosecution's attempt to introduce this issue into this re-sentencing proceeding is inappropriate, and defies its own pronouncement that "[t]his is not a forum to re-litigate matters which have been settled, either <u>because they were not appealed</u>, or by the Appeals Chamber itself."[62]

41. Even assuming that the Prosecution's submissions are receivable, they should be dismissed for the reasons discussed above. The Trial Chamber had ample reason to

[56] Defence Sentencing Appeal Response, para. 65.
[57] Regulation 61 of the Regulations of the Court (variation of grounds of appeal presented before the Appeals Chamber).
[58] Sentencing Appeal Judgment, para. 62.
[59] Sentencing Appeal Judgment, para. 62, fn. 141.
[60] Sentencing Appeal Judgment, para. 359.
[61] Prosecution's Re-Sentencing Submissions, para. 46.
[62] Prosecution's Re-Sentencing Submissions, para. 6 (underline added).

impose a lower individual sentence for Mr Mangenda's accessorial liability as opposed to co-perpetration. Most obviously, his accessorial liability involved fewer counts than his conviction for co-perpetration, as the Trial Chamber noted repeatedly in the Sentencing Decision.[63] There is no appearance, nor any indication of an actual, automatic or mechanical discount having been applied by the Trial Chamber to Mr Mangenda's individual sentence based on accessorial liability.

42. Even assuming, further, that the Trial Chamber did err by applying such an automatic or mechanical discount, correction of the error does not warrant an upward revision of sentence. The circumstances more than justify a lower sentence for accessorial liability, given the fewer number of counts involved, the nature of the offence, and the variable degree of Mr Mangenda's involvement. The Trial Chamber already correctly noted this "varying degree of participation,"[64] which is also reflected in its distinction between abetting and aiding in respect of specific witnesses.[65]

43. The Defence also relies on its previous submissions concerning the varying degree of Mr Mangenda's contribution in respect of different witnesses, to which the Trial Chamber made reference in the Sentencing Decision.[66]

C. *Correcting the error as to the nature of the lies does not yield a different assessment of gravity*

44. The Appeals Chamber found "that the Trial Chamber erred in giving 'some weight' to an extraneous consideration, i.e. the mere fact that in the presence case the false testimony 'related to issues other than the merits of the Main Case', and in determining that this consideration 'inform[ed] the assessment of the gravity of the offences' for which Mr Mangenda, Mr Kilolo and Mr Bemba were convicted."[67] The Appeals Chamber held that a Trial Chamber must avoid any categorical distinctions between lies that go to merits and lies that go to credibility, and instead base its analysis on the "evaluation of the damage that the commission of the offence caused, or could have caused on the truth-seeking function."[68] Nevertheless, the Appeals Chamber affirmed

[63] Sentencing Decision, paras. 113, 120, 122, 144 (iii), 146 (iii).
[64] Sentencing Decision, para. 145.
[65] Sentencing Decision, para. 112 ("Mr Mangenda was convicted of having aided in the giving of false testimony by the Main Case Defence Witnesses D-15 and D-54, and of having abetted in the giving of false testimony by the Main Case Defence Witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29.")
[66] Defence Sentencing Submissions, paras. 25-32.
[67] Sentencing Appeal Judgment, para. 45.
[68] Sentencing Appeal Judgment, para. 38.

that "the importance of the issues on which false testimony is given can, in principle, be of relevance to an assessment of the gravity of the offences concerned."[69]

45. This error warrants no upward revision of sentence. The Appeals Chamber appears to have been concerned that the categorical distinction between 'merit' or 'non-merit' issues could obscure "the interdependence of these matters."[70] However, in this case, the Trial Chamber also set out the precise nature of the lies upon which it would assess gravity.[71] The Appeals Chamber found no error in the characterisation of the lies, but only the Trial Chamber's indication that it gave "some weight" to the general category into which these lies fell.

46. The Defence submits that even when the erroneous merits-versus-credibility categorisation is removed from the Trial Chamber's analysis, the same assessment of gravity is reached. Not all lies are equally grave. Encouraging someone to provide a false alibi for a criminal event[72] causes substantially more harm to the truth-seeking process than the three types of lies articulated by the Trial Chamber, particularly in the absence of any finding that those lies were designed to conceal other, more serious, lies about any other subject. Both lies, to be sure, interfere with the truth-seeking process and are rightly condemned for this reason; they are nevertheless qualitatively different and rightly distinguished.

47. The same conclusion on gravity is also reached because the Appeals Chamber upheld that Trial Chamber's refusal to make findings as to whether the lies that were told were in the service of other lies. The Prosecution's attempt to eviscerate any distinction between different lies on the basis that they are all "given to secure the acquittal of a guilty person"[73] should be rejected. Not only is the precedent inapposite and directly contrary to the Appeals Chamber's own reasoning, but it would also lead to the erroneous conclusion that it is not an offence to encourage lies on behalf of an innocent person.

48. The shift of analysis from merits versus credibility to an "evaluation of the damage that the commission of the offence caused, or could have caused"[74] yields the same

[69] Sentencing Appeal Judgment, para. 40.
[70] Sentencing Appeal Judgment, paras. 43, 44.
[71] Sentencing Decision, para. 115 ("(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.")
[72] Defence Sentencing Submissions, paras. 39-43, referring, in particular, to the ICTY *Rasić* case.
[73] Prosecution's Re-Sentencing Submissions, para. 21.
[74] Sentencing Appeal Judgment, para. 38.

conclusion reached by the Trial Chamber; namely, that the nature of the specific lies is worthy of "some weight" in assessing gravity.

D. *The quashing of all convictions for presenting false evidence under Article 70(1)(b) further warrants a reduction of sentence to time served*

49. The Appeals Chamber determined that the convictions under Article 70(1)(b) were "wrongly entered and reverses the convictions in that regard."[75] Mr Mangenda was convicted of 14 counts of this offence, and received an individual sentence of 18 months.[76] As Mr Mangenda was convicted at trial of a total of 37 counts, the reversal of these counts means that the number of offences of which he stands convicted has been reduced by 38 percent.

50. The Prosecution argued on appeal that the sentence imposed by the Trial Chamber was manifestly inadequate based, *inter alia*, on a "per offence" analysis that included the Article 70(1)(b) offences. Including those 14 counts, the Prosecution argued that the Trial Chamber's sentence amounted to "no more than 2.5 weeks (or 19.5 days) of imprisonment as punishment per witness/offence."[77] The Prosecution even inserted a table into its Sentencing Appeal Brief isolating the number of days per count in respect of the 70(1)(b) offence.[78]

51. This submission, made before the Appeals Chamber, makes sense only if the Prosecution's view is that the Article 70(1)(b) convictions have some separate purchase for sentencing purposes. The Prosecution now argues the opposite.[79]

52. The Prosecution tries to explain this contradiction by asserting that the Trial Chamber erroneously failed to increase the sentence based on the Article 70(1)(b) individual sentence and there is, accordingly, now nothing to reduce: "[t]hus, and to the extent that this Chamber did not increase the original sentences – albeit incorrectly – due to an overlap between the conduct underlying the cumulative convictions, the vacation of one of these convictions cannot now be used to lower a non-existent increase."[80]

[75] Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018, para. 710.
[76] Sentencing Decision, para. 146.
[77] Prosecution Sentencing Appeal Brief, para. 25.
[78] Prosecution Sentencing Appeal Brief, para. 36, Table 1 ("Terms of imprisonment as calculated by offence (individual sentences) and per witness").
[79] Prosecution's Re-Sentencing Submissions, para. 51.
[80] Prosecution's Re-Sentencing Submissions, para. 52 (underline added).

53. This argument is wrong in fact. The Trial Chamber stated that it approached the joint sentence on the basis that "**largely** the same conduct underlies the multiple convictions."[81] The use of the word "largely" shows that the Trial Chamber gave some independent weight to the Article 70(1)(b) conduct in sentencing.

54. The Prosecution's argument is also wrong in law. The error that it now claims was committed was not raised on appeal. Errors cannot now be imputed to the Trial Chamber that were not raised on appeal – a point it acknowledges at the beginning of its own submissions.[82]

55. Thirty-eight percent of the counts of which Mr Mangenda stood convicted were quashed on appeal. The Defence accepts that the Trial Chamber considered that the conduct covered by these counts "largely" overlaps with the counts for which a conviction remains. The quashing of these convictions, and the individual sentence for these Article 70(1)(b) convictions, must have some impact on the joint sentence. The Defence submits that this more than compensates for the remaining period of conditions that have now been found *ultra vires*.

IV. The Sentence Proposed by the Prosecution is Manifestly Unreasonable and a Sentence of Time Served Remains Appropriate

56. The five-year sentence sought by the Prosecution would mean the imposition of a sentence equal to or greater than that imposed on a participant in the execution of more than 1000 prisoners;[83] one of the commanders of the notorious Omarska Camp;[84] a guard at the Keraterm Camp;[85] a General who facilitated the Srebrenica genocide;[86] a General who commanded troops involved in war crimes;[87] and a municipal official who oversaw expulsions and killings.[88] The time to be served would actually be longer than in these cases given that a person serving a sentence for an offence under Article 70

[81] Sentencing Decision, para. 146 (emphasis added).
[82] Prosecution's Re-Sentencing Submissions, para. 6.
[83] ICTY, *Prosecutor v. Erdemović*, IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, p. 22.
[84] ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 243 (in respect of Prcać).
[85] ICTY, *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, para. 239 (in respect of Dosen).
[86] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, 10 June 2010, para. 837.
[87] ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement, 22 April 2008, para. 133.
[88] ICTY, *Prosecutor v. Simić*, IT-95-9/2-S, Sentencing Judgment, 17 October 2002, para. 122.

may not receive early release.[89] The sentence proposed by the Prosecution is manifestly unreasonable.

57. A sentence of time served, particularly given the catastrophic consequences that these proceedings and conviction have occasioned for Mr Mangenda, more than serves the needs of general deterrence. The period of actual detention falls at the high end of the spectrum relative to other international cases concerning similar conduct.[90] The contempt cases in which longer periods of actual detention were imposed involved harassment or threats.[91] The personal and professional consequences for Mr Mangenda have been grave and will be long-lasting, as discussed above.[92] Any reasonably informed lawyer or case manager before the International Criminal Court would be strongly deterred by the consequences that Mr Mangenda has suffered. The ends of general deterrence are robustly protected by a sentence of time served.

58. Further, the success of the specific deterrence to Mr Mangenda is already apparent. He has abstained from any criminal behaviour since his release on 31 October 2014, more than three-and-a-half years ago, and has since been a law-abiding citizen and an asset to his community.

59. Retribution has also been served by the 11 months and nine days that Mr Mangenda spent in detention. This entire period was served prior to conviction, rather than after conviction. Mr Mangenda was in detention when [REDACTED] and [REDACTED] was delayed a further two months while Mr Mangenda [REDACTED].

V. The Prosecution's Submissions Disregard Its Own Injunction That The Proceedings Are "Not a Forum to Re-Litigate Matters Which Have Been Settled"

60. The Prosecution announces at the beginning of its submission that the re-sentencing proceedings are "not a forum to re-litigate matters that have been settled."[93] This

[89] Rule 163(3) of the ICC Rules of Procedure and Evidence, pertaining to Article 70 offenses, states that: "the provisions of Part 10, and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111." Early release is provided for in Article 110.
[90] ICTY, *Prosecutor v. Jelena Rašić*, IT-98-32/1-R77.2, Written Reasons for Oral Sentencing Judgement, 6 March 2012, paras. 31, 36 (4 months' actual imprisonment); ICTY, *Prosecutor v. Tadić*, IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, para. 173 (no imprisonment, €7000 fine); ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008, para. 120 (3 months' and 5 months' imprisonment).
[91] SCSL, *Independent Counsel v. Bangura et al.*, SCSL-2011-02-T, Judgement in Contempt Proceedings, 25 September 2012, paras. 70-101 (18-24 months' imprisonment); SCSL, *Prosecutor v. Eric Senessie*, SCSL-2011-01-T, Sentencing Judgement, 12 July 2012 (2 years' imprisonment).
[92] *See* para. 20 above.
[93] Prosecution's Re-Sentencing Submissions, para. 6.

complies with the Trial Chamber's instruction that "[m]any aspects of the Sentencing Decision were confirmed on appeal and the affected parties must treat these rulings as final."[94] The Prosecution then ignores the Trial Chamber's and its own guidance repeatedly. The Prosecution even goes so far as to assert that "beyond addressing these three individual errors, the Trial Chamber is obliged to re-assess the gravity of the offences and the conduct of the three convicted persons (in light of its existing and new findings) and to impose sentences that are proportionate to the crimes."[95]

61. Paragraphs 55 through 82 of the Prosecution's submissions, for the most part, have nothing to do with the errors identified by the Appeals Chamber. The Prosecution even asks again for a relief[96] that the Trial Chamber already specifically denied,[97] and that was not appealed.

62. These submissions should be disregarded. All of these matters have been previously litigated. The Prosecution's "re-hashing"[98] of arguments that have previously been rejected by the Trial Chamber without error should be disregarded.

63. One argument in these paragraphs that does pertain to an error identified by the Appeals Chamber is the submission that the Trial Chamber should now "disregard" any considerations that it previously relied upon to suspend the sentence. The misguided logic underlying this submission appears to be that, since the Appeals Chamber has found that suspending a sentence is *ultra vires*, any considerations cited by the Trial Chamber in favour of that suspended sentence should now "be disregarded."[99]

64. The argument is fallacious. All factors previously relied on by the Trial Chamber in determining that Mr Mangenda should not return to custody remain relevant as to whether he should be re-incarcerated, and the sentence that he should receive.

[94] Order on Sentencing Submissions Following Appeals Chamber Judgments, ICC-01/05-01/13-2277, 14 March 2018 ("Order on Sentencing Submissions"), para. 3.
[95] Prosecution's Re-Sentencing Submissions, para. 55 (underline added).
[96] Prosecution's Re-Sentencing Submissions, para. 84 ("[t]o request the Registry to notify the respective professional bodies to which […] Jean-Jacques Mangenda belong[s] of [his] conviction.")
[97] Sentencing Decision, para. 151 ("this action falls squarely within the responsibilities of the Registrar.")
[98] Corrected version of "Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal", 10 July 2017, ICC-01/05-01/13-2170-Conf, ICC-01/05-01/13-2170-Conf-Corr, 24 August 2017, para. 343.
[99] Prosecution's Re-Sentencing Submissions, para. 76.

VI. Delayed Sentencing as an Alternative to a Suspended Sentence

65. It is now clear that imposing a suspended sentence is *ultra vires*.[100] However, this Trial Chamber does have an indisputable discretion to control its calendar.[101] The Trial Chamber could, in the alternative, delay a final decision on re-sentencing for a certain period to see whether or not Mr Mangenda re-offends before passing sentence. This would accomplish the same purpose as a suspended sentence, and would be within the Chamber's undoubted powers.

66. Adjournments at the Court:

> may be necessitated by a range of practical as well as legal factors. Chambers of this Court have granted adjournments to, for example, enable further investigations, enable consideration of an issue by another Chamber, including on appeal, permit an accused to be excused, including in order to deal with an urgent domestic matter relating to national security, and due to difficulties in scheduling witnesses.[102]

67. Although reference to domestic practice is a hazardous exercise, courts in Australia may adjourn sentencing proceedings for up to 12 months after conviction before imposing a sentence, including for the purpose of "allow[ing] the offender to demonstrate that rehabilitation has taken place."[103] Other countries allow a maximum of six months.[104]

68. The lack of express statutory authorisation for such a procedure should not be taken as a bar, and nothing in the Appeals Chamber's invalidation of the suspended sentences

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[100] Sentencing Appeal Judgment, para. 80.
[101] *Kenyatta*, Decision on commencement date of trial, ICC-01/09-02/11-763-Red, 20 June 2013; *Kenyatta*, Decision adjourning the commencement of trial, ICC-01/09-02/11-847, 31 October 2013; *Ruto and Sang*, Decision concerning the start date of trial, ICC-01/09-01/11-642, 8 March 2013 (adjourning the commencement of trial to allow further defence investigations after delayed evidentiary disclosures by the Prosecution); *Mbarushimana*, Decision on the Prosecution's request for the postponement of the confirmation hearing, ICC-01/04-01/10-207, 31 May 2011 (postponing the confirmation of charges hearing to allow for the Prosecution's review of potentially privileged material); *Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 67(7)(c)(i) of the Rome Statute, ICC-02/11- 01/11-432, 3 June 2013.
[102] *Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 77.
[103] Victoria, Sentencing Act 1991, s. 83A(1A); New South Wales, Crimes (Sentencing Procedure) Act 1999, s. 11; Australian Capital Territory, Crimes (Sentencing) Act 2005, chapter 8; New South Wales Court of Criminal Appeal, *R v. Trindall* [2002] NSWCCA 364, para. 60 ("[i]n many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way.")
[104] United Kingdom, Powers of Criminal Courts (Sentencing) Act 2000, s. 1 (giving courts in England and Wales up to six months to pass sentence on a conviction to allow the court to assess the offender's post-conviction conduct); United Kingdom, *Attorney-General's Reference (No 107 of 2005) (Edward John Thomas Goldie)*, [2006] EWCA Crim 376 (affirming deferred sentence in view of the public interest); *R. v. George (Lenny Chester)* (1984) 79 Cr. App. R. 26 ("purpose of deferment is therefore to enable the court to take into account the defendant's conduct after conviction or any change in circumstances").

should be interpreted as precluding such a procedure. Although the Appeals Chamber held that "this Court's functions are regulated by a comprehensive legal framework […] leaving little room for the invocation of 'inherent powers' in the proceedings before it,"[105] it also held, absent clear statutory authorisation to remand a case back to the same Trial Chamber,[106] that "the power to remand follows from the power to reverse."[107] There remains, accordingly, some latitude in the interpretation of the legal texts of the Court, especially in the exercise of undisputed procedural powers, such as determining the timing of the Court's own processes. Mr Mangenda hereby waives any potential infringement of the right to trial without undue delay that might otherwise arise from such a deferral.

69. The Chamber, as an alternative to entering a sentence of time served, is requested to defer re-sentencing to give itself more time to evaluate Mr Mangenda's conduct. A police report in the country of residence could, for example, be obtained after a certain period and taken into account in re-sentencing. The Chamber need not impose any specific conditions during the period of deferral, which could be considered *ultra vires*.

VII. Submissions on Solvency

70. The Defence relies on its previous submissions concerning solvency,[108] which remain unchanged by the Registry's updated solvency report.[109] [REDACTED].

VIII. Conclusion

71. Mr Mangenda should not be sent back to prison. Re-incarceration would entail consequences extending far beyond Mr Mangenda's actual time in detention, including [REDACTED]. The Chamber would never impose such a sanction on Mr Mangenda or any other convicted person directly, and should take this indirect consequence into account as an individual circumstance. This consequence would exact an excessively heavy price from not only Mr Mangenda, but also from his wife and young children.

[105] Sentencing Appeal Judgment, para. 79.
[106] Article 83(2) of the Rome Statute.
[107] Sentencing Appeal Judgment, para. 362.
[108] Defence Sentencing Submissions, para. 59.
[109] Order on Sentencing Submissions, fn. 3 ("[p]arty submissions related to solvency are expected to address the amounts required to satisfy the financial needs of the convicted persons and their dependents"); Registry's Updated Report on the Solvency of the Convicted Persons, ICC-01/05-01/13-2278, 13 April 2018; Annex 3 to Registry's Updated Report on the Solvency of the Convicted Persons, ICC-01/05-01/13-2278-Conf-Exp-AnxIII, 13 April 2018.

72. The Appeals Chamber did not suggest that the Trial Chamber's previous decision not to re-incarcerate Mr Mangenda was wrong or an abuse of discretion. The errors identified by the Appeals Chamber do not alter the Trial Chamber's fundamental conclusion that Mr Mangenda should not be sent back to custody. If anything, the lapse of time, the period of compliance with the conditions of the now-invalid suspended sentence, and the quashing of 38 percent of the counts of which Mr Mangenda stands convicted, reinforce that conclusion. The Trial Chamber may consider, as an alternative, delaying sentence if it wishes to receive further indications that Mr Mangenda will not re-offend.

73. The time that Mr Mangenda has already served, combined with all of the consequences that the convictions have visited upon him and his family, has already imposed a heavy price. The price is not only proportionate to the offences themselves, but is a compelling warning to anyone who might be tempted to commit such offences in the future.

Christopher Gosnell
Counsel for Mr Jean-Jacques Kabongo Mangenda

Respectfully submitted this 4 June 2018,
At The Hague, The Netherlands