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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 version  
of  
“Corrected version of Aimé Kilolo Musamba’s Sentencing Submission on Remand (ICC-  
01/05-01/13-2282-Conf-Exp)” (ICC-01/05-01/13-2282-Conf-Exp-Corr)**

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## Table of Contents

I.	Overview .....	4
II.	Submissions on Remand .....	6
A.	The Appeals Chamber’s acquittal of one third of Mr. Kilolo’s convictions should yield a reduction of Mr. Kilolo’s sentence .....	6
B.	The Appeals Chamber’s finding that the Trial Chamber erred in concluding that the Article 70(1)(c) offenses lasted over two years should yield a reduction of Mr. Kilolo’s sentence .....	9
C.	The Appeals Chamber’s finding that the Trial Chamber erroneously assessed the gravity of the Article 70(1)(a) offenses is immaterial and does not impact Mr. Kilolo’s sentence .....	10
D.	The Appeals Chamber’s finding that the Trial Chamber erroneously assessed Mr. Kilolo’s culpability for the Article 70(1)(a) offenses is immaterial and does not impact his sentence .....	13
E.	The Appeals Chamber’s finding that the Trial Chamber erroneously suspended Mr. Kilolo’s sentence is immaterial and does not impact his sentence .....	16
F.	Mr. Kilolo’s updated circumstances since the Sentencing Decision .....	19
III.	Oral Hearing is Necessary .....	22
IV.	Conclusion and Relief Sought .....	22

Mr. Aimé Kilolo Musamba, through his Counsel (“the Kilolo Defence”), hereby submits his Sentencing Submission on Remand pursuant to the Trial Chamber’s Order on Sentencing Submissions Following the Appeals Chamber Judgments of 14 March 2018.<sup>1</sup> This Submission is filed confidential *ex parte* (OTP and Kilolo Defence only) pursuant to Regulation 23*bis* of the Regulations of the Court because it concerns Mr. Kilolo’s sensitive personal and financial information.

## I. OVERVIEW

1. On 22 March 2017, after roughly eight months of hearing evidence from the Parties and four months deliberating on the Trial Judgment,<sup>2</sup> and after reviewing the Parties’ Sentencing Submissions and further deliberation, the Trial Chamber rendered its Sentencing Decision. It weighed and considered all the evidence and arguments, the gravity of the offenses and the harm caused, Mr. Kilolo’s degree of participation in the offenses, the time he spent in pre-trial detention, and the conditions of his arrest and detention, the impact of the proceedings on his personal and professional life – and the fact that, despite the stigma attached to an arrest warrant and conviction from the ICC, Mr. Kilolo had reintegrated into society. With the benefit of all this context, the Trial Chamber concluded that the appropriate sentence for Mr. Kilolo was a total of two years and six months of imprisonment, with credit for the 11 months he had served in detention, ordering the suspension of the remaining term of imprisonment for a period of three years on condition that Mr. Kilolo pays a fine of EUR 30,000.00 within three months and does not reoffend.<sup>3</sup>
2. The Appeals Chamber now calls on the Trial Chamber to resentence Mr. Kilolo considering that he should not have been convicted of 14 counts of presenting false evidence under Article 70(1)(b), that the timeframe of the Article 70(1)(c) offenses is roughly half of what the Trial Chamber calculated in its Trial Judgment, that it failed to explain why the content of the witnesses’ lies impacted on its gravity assessment of the Article 70(1)(a) offenses in this case, that it failed to explain why it meted out a lower sentence for Mr. Kilolo’s inducement

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<sup>1</sup> ICC-01/05-01/13-2277.

<sup>2</sup> These timeframes are calculated by counting the days between the commencement of the trial on 29 September 2015 and close of evidence on 1 June 2016 (considering and excluding weekends and days not spent in court) and the days between the close of evidence and the rendering of the Trial Judgment on 19 October 2016. *See* ICC-01/05-01/13-1989-Red, para. 7.

<sup>3</sup> ICC-01/05-01/13-2123-Corr.

of the Article 70(1)(a) offenses based on the evidence, and that it was *ultra vires* to conditionally suspend the remaining term of imprisonment.

3. The reversal of one third of Mr. Kilolo's convictions and the error in the calculation of the timeframe of some of the offenses should yield a reduction of the original sentence; the erroneously ascribed conduct should be subtracted. The lack of elaboration as to why the content of the witnesses' lies informed the gravity assessment of the Article 70(1)(a) offenses is immaterial and does not impact Mr. Kilolo's sentence. The same is true for the lack of elaboration as to why Mr. Kilolo deserved a lower sentence for the Article 70(1)(a) offenses based on his participation in the offenses as an inducer (accessory); it has no impact. Neither does the reversal of the suspended sentence. The Appeals Chamber is according the Trial Chamber an opportunity to address the Article 70(1)(a) and suspension errors on remand.
4. There is neither a compelling nor a rational reason for the Trial Chamber to further incarcerate Mr. Kilolo or to increase the fine. The Appeals Chamber did not find that the Trial Chamber abused its discretion or that the sentence imposed was manifestly inadequate or disproportionate to the offenses. The Appeals Chamber remanded this case so that the Trial Chamber can reassess its findings, elaborate its reasoning, and impose a sentence in accordance with the Appeals Chamber's findings.
5. The OTP requests the Trial Chamber to sentence Mr. Kilolo to the maximum prison term of five years and "welcomes the imposition of an additional fine."<sup>4</sup> This is absurd. Such a sentence is manifestly unjust, disproportionate to the offenses, and not reflective of the Appeals Chamber's findings. The sentence requested by the OTP serves no purpose other than pure vindictiveness. Mr. Kilolo has become a productive member of society, is engaging in regular charity, and is socially and politically active, with the aspiration to advance the social and economic development of the DRC and its peoples. Further incarceration needlessly destabilizes Mr. Kilolo's future, his ability to repair his professional career, and to provide for his family.
6. The Trial Chamber's original sentence of 11 months of imprisonment and fine of EUR 30,000.00 was and is sufficient. Even though the Appeals Chamber found that suspended

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<sup>4</sup> ICC-01/05-01/13-2279, para. 5.

sentences are impermissible under the ICC's sentencing regime, Mr. Kilolo has effectively served one third of the imposed suspended period. He has abided by all the conditions imposed by the Trial Chamber, which, in deference to the Appeals Chamber's decision, can nonetheless be considered as a mitigator or as an overall circumstance, and should yield a reduction of his sentence. The Trial Chamber should refashion Mr. Kilolo's sentence within the explicit contours of the ICC's sentencing regime and effectively keep it as is; i.e., impose a sentence of 11 months served and a fine of EUR 30,000.00.

## II. SUBMISSIONS ON REMAND

### A. The Appeals Chamber's acquittal of one third of Mr. Kilolo's convictions should yield a reduction of Mr. Kilolo's sentence

7. The Appeals Chamber acquitted Mr. Kilolo of 14 of 42 convictions, finding that the Trial Chamber erroneously convicted him for presenting false oral evidence under Article 70(1)(b).<sup>5</sup> This error is material as reflected by the Appeals Chamber's findings and attendant reasoning. It reduces the number of convictions as well as the Rule 145(1)(c) gravity factors considered by the Trial Chamber in sentencing Mr. Kilolo for this offense.<sup>6</sup> Discounting the 14 convictions for presenting false oral evidence should yield a reduction of Mr. Kilolo's sentence.
8. The Appeals Chamber held that conduct under Article 70(1)(b) could not be attributed to Mr. Kilolo because *the witness* commits the offense of presenting false oral evidence.<sup>7</sup> Since Counsel cannot be held responsible for Article 70(1)(b) offenses,<sup>8</sup> any Trial Chamber findings related to the gravity of these offenses (including the offense's inherent gravity, the extent of the damage caused to the Court by the offenses, and the timeframe in which the offenses occurred)<sup>9</sup> are now irrelevant for the purpose of resentencing Mr. Kilolo.

<sup>5</sup> ICC-01/05-01/13-2275-Conf, para. 710.

<sup>6</sup> See ICC-01/05-01/13-2275-Conf, para. 709; ICC-01/05-01/13-2123-Corr, paras. 160-63.

<sup>7</sup> ICC-01/05-01/13-2275-Conf, para. 709.

<sup>8</sup> In determining the scope of Article 70(1)(b), the Appeals Chamber considered that while Counsel can hope for a certain result when a witness testifies, he/she cannot control what the witness will say, cannot "know" if the witness will lie, and resultantly cannot be held responsible for the witness's false testimony. ICC-01/05-01/13-2275-Conf, para. 709.

<sup>9</sup> ICC-01/05-01/13-2123-Corr, paras. 160-63. See also Rule 145(1)(c).

9. In claiming that this error is immaterial, the OTP neither addresses the Appeals Chamber's findings and their impact, nor proffers any relevant supporting authority. Rather, it resorts to a rigged flip-of-the-coin argument – *heads we win, tails you lose* – conceding that convictions on multiple offenses arising from the same conduct can increase a sentence, while simultaneously arguing that appellate acquittals on such offenses merit no sentence reduction.<sup>10</sup>
10. Misdirecting the Trial Chamber away from the Appeals Chamber's Judgment, the OTP baldly pronounces that the gravity of the Article 70(1)(a) and (c) offenses in and of themselves merit an increase in Mr. Kilolo's sentence.<sup>11</sup> Neither the Appeals Chamber nor the Trial Chamber made any finding to the effect that the gravity of the Article 70 offenses in this case was significantly more grave than similar offenses.<sup>12</sup>
11. The ICC's statutory regime is exhaustively enumerated and differs substantially from those of other international(ized) criminal tribunals and courts,<sup>13</sup> including its provisions related to the practice of entering cumulative convictions.<sup>14</sup>
12. Yet, in claiming that sentence impact depends on a case-specific analysis of the gravity of the convictions vacated,<sup>15</sup> the OTP impermissibly relies on non-ICC *practices*<sup>16</sup> that do not

<sup>10</sup> See ICC-01/05-01/13-2279, para. 51.

<sup>11</sup> ICC-01/05-01/13-2279, paras. 50-51.

<sup>12</sup> See e.g., *Bulatović* Contempt Judgment (the ICTY Trial Chamber suspended a four-month prison sentence it imposed on the Accused – a witness who refused to answer questions before the Chamber – for a period of two years on the condition that he does not commit any offenses); *Rašić* Appeal Judgment (the ICTY Appeals Chamber upheld the Trial Chamber's suspended sentence it imposed on the Accused – a member of the Milan Lukić Defence Team – who knowingly and willingly interfered with the administration of justice by procuring a false witness statement in exchange for money). See also *Bangura et al.* Trial Judgment (the SCSL Trial Chamber imposed a conditionally suspended sentence on Mr. Samuel Kargbo, who was convicted of knowingly and willingly interfering with the administration of justice by bribing witnesses to give false testimony).

<sup>13</sup> ICC-01/05-01/13-2276-Red, paras. 76-79.

<sup>14</sup> Compare Rule 142(2) with ICTY Rule 87(C) and ICTR Rule 87(C). Rule 142(2): "When there is more than one charge, the Trial Chamber shall decide separately on each charge. When there is more than one accused, the Trial Chamber shall decide separately on the charges against each accused." ICTY Rule 87(C): "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused." See also ICTR Rule 87(C).

<sup>15</sup> ICC-01/05-01/13-2279, para. 51.

<sup>16</sup> The Appeals Chamber held that the *practices* of other international(ized) criminal tribunals and courts, such as the practice of suspending sentences or proofing witnesses does not constitute an applicable source of law under Article 21(1) of the Rome Statute. ICC-01/05-01/13-2279, para. 79. This does not mean that ICC Chambers are precluded from relying on the *jurisprudence* of other international(ized) criminal tribunals or courts. The ICC Chambers rely

constitute an applicable source of law under Article 21(1).<sup>17</sup> The cases cited go to the ICTY's and ICTR's practices of entering cumulative convictions.<sup>18</sup> For example, in *Delalić et al.*, to which the OTP cites,<sup>19</sup> the ICTY Appeals Chamber considered the "different approaches" of other ICTY Chambers and domestic tribunals and held that cumulative convictions are permissible at the ICTY if each concerned statutory crime has a materially distinct element not contained in the other.<sup>20</sup>

13. Ignoring the Trial Chamber's stated reasoning, the OTP speculates that the Trial Chamber "appears to have taken into account 'the fact that *largely the same conduct* underlies the multiple convictions' *not* to increase" Mr. Kilolo's sentence.<sup>21</sup> This is fanciful. The Trial Chamber underlined that while "convictions may indeed be entered cumulatively ... this does not mean that cumulative convictions can *unduly* inflate an accused's punishment."<sup>22</sup> The Trial Chamber considered the impact of the cumulative convictions when it determined Mr. Kilolo's sentence.<sup>23</sup> It did not need to spell out the weight it accorded to this factor in its Sentencing Decision.<sup>24</sup>

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frequently on non-ICC jurisprudence to define such things as the elements of crimes and the modes of liability or elaborate on the Rules of Procedure and Evidence. *See e.g., Lubanga* Confirmation of Charges Decision (relying on the ICTY's *Tadić* Appeal Judgment and the ICJ's *DRC v. Uganda* in determining when a conflict is of an international character and when a territory is considered "occupied" under international humanitarian law); *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-414, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," 24 May 2012, para. 31 (considering ICTY, ICTR, and ECCC jurisprudence to be non-binding but persuasive authority). *See also Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, paras. 77-88; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2705, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, para. 15.

<sup>17</sup> ICC-01/05-01/13-2276-Red, para. 79.

<sup>18</sup> *See* ICC-01/05-01/13-2279, fn. 158, citing *Delalić et al* Second Sentencing Judgment, para. 42; *Delalić et al.* Second Sentencing Appeal Judgment, paras. 22-27; *Ntakirutimana* Appeal Judgment, paras. 562-64; *Rutaganda* Appeal Judgment, paras. 591-92.

<sup>19</sup> ICC-01/05-01/13-2279, fn. 158.

<sup>20</sup> *Delalić et al.* Appeal Judgment, para. 412.

<sup>21</sup> ICC-01/05-01/13-2279, para. 52 (*italics in original*).

<sup>22</sup> ICC-01-05-01/13-1989-Conf, para. 956 (*emphasis added*).

<sup>23</sup> *See* ICC-01-05-01/13-1989-Conf, para. 956.

<sup>24</sup> ICC-01/05-01/13-2276-Red, para. 22, quoting *Kenyatta* OA5 Judgment, paras. 22-25 (discussing the Appeals Chamber's deference to the Trial Chamber concerning its findings of fact and exercise of discretion). *See also Kvočka et al.* Appeal Judgment, para. 23 and *Kupreškić et al.* Appeal Judgment, para. 39 (holding that the Trial Chamber need not spell out the weight it accords to each piece of evidence in reaching its findings).



14. The Trial Chamber should ignore the OTP's law and logic-free assertions and reduce Mr. Kilolo's sentence to reflect the Appeals Chamber's acquittal of one third of Mr. Kilolo's convictions.

**B. The Appeals Chamber's finding that the Trial Chamber erred in concluding that the Article 70(1)(c) offenses lasted over two years should yield a reduction of Mr. Kilolo's sentence**

15. The Appeals Chamber found that the Trial Chamber erred in concluding that the Article 70(1)(c) offenses lasted over two years, finding that the timeframe of the offenses was roughly half (13 months instead of 24 months).<sup>25</sup> While the Appeals Chamber found this error was immaterial to the Trial Chamber's finding that the offenses occurred over a lengthy period of time,<sup>26</sup> the lesser (halved) timeframe is nonetheless material for the purposes of resentencing Mr. Kilolo. Discounting this period of time should yield a reduction of Mr. Kilolo's sentence.<sup>27</sup>

16. While the Appeals Chamber confirmed the Trial Chamber's finding that the Article 70(1)(c) offenses occurred over a "lengthy period of time," it substituted its finding, concluding that the starting point of the offenses began by the time D-57 testified before Trial Chamber III in October 2012 and not in February 2012, when certain witnesses were introduced to Mr. Kilolo in Douala, Cameroon.<sup>28</sup> The reduction in the timeframe of the offenses should be considered by the Trial Chamber when re-evaluating the weight to be accorded to this factor under Rule 145(1)(c).

17. The OTP claims that this significant reduction of the timeframe of the offenses – a mandatory sentencing factor under Rule 145(1)(c) – is immaterial for the purposes of resentencing. This is both contradictory and preposterous.

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<sup>25</sup> See ICC-01/05-01/13-2276-Red, paras. 167-68.

<sup>26</sup> ICC-01/05-01/13-2276-Red, paras. 167-68.

<sup>27</sup> The Trial Chamber confirmed in its Sentencing Decision that the timeframe of the offenses is a relevant factor in assessing the gravity of the offenses. Under Rule 145(1)(c) and as matter of fairness, the gravity of the Article 70(1)(c) offenses must be reassessed based on the reduction in the timeframe of the offenses, and concomitantly, should result in a reduction of his sentence. See ICC-01/05-01/13-2123-Corr, para. 159.

<sup>28</sup> ICC-01/05-01/13-2276-Red, paras. 167-68; ICC-01/05-01/13-1989-Conf, para. 331. See also ICC-01/05-01/13-2123-Corr, fn. 341.

18. Claiming that this error is immaterial, the OTP nonetheless concedes that it impacts on the Trial Chamber's gravity assessment.<sup>29</sup> It also misinterprets and misstates the Appeals Chamber's findings when claiming that "the Appeals Chamber ... noted that this error was 'immaterial to its finding that the offences [...] extended over a lengthy period of time' since the offences lasted 13 months."<sup>30</sup> In substituting its finding for that of the Trial Chamber,<sup>31</sup> the Appeals Chamber made no finding that the halving of the timeframe of the offenses was immaterial to the sentence imposed by the Trial Chamber.
19. The Trial Chamber should ignore the OTP's law and logic-free assertions and reduce Mr. Kilolo's sentence to reflect the Appeals Chamber's reduction of the timeframe of the Article 70(1)(c) offenses.

**C. The Appeals Chamber's finding that the Trial Chamber erroneously assessed the gravity of the Article 70(1)(a) offenses is immaterial and does not impact Mr. Kilolo's sentence**

20. The Appeals Chamber found that the Trial Chamber failed to explain why it considered and accorded weight to the content of the witnesses' false testimony (whether they lied about "non-merits" or "merits" issues) in its gravity assessment of the Article 70(1)(a) offenses.<sup>32</sup> This error is immaterial and does not impact Mr. Kilolo's sentence. The Appeals Chamber explicitly found that the Trial Chamber *did not* abuse its discretion in considering the content of the witnesses' false testimony.<sup>33</sup> It also did not find the error to be predicated upon an incorrect interpretation of the law or a patently false conclusion of fact.<sup>34</sup>
21. The Appeals Chamber agreed that in principle, the content of a witness's false testimony can be a relevant factor in assessing the gravity of Article 70 offenses.<sup>35</sup> It acknowledged that "the introduction of false evidence on aspects of no, or only peripheral relevance to the facts

<sup>29</sup> ICC-01/05-01/13-2279, para. 54: "Further, although the Appeals Chamber found that the Trial Chamber was unreasonable in concluding—and in considering in its assessment of gravity—that the article 70(1)(c) offences lasted two years, the Appeals Chamber also noted that this error was 'immaterial to its finding that the offences [...] extended over a lengthy period of time' since the offences lasted at least 13 months. Therefore, this error has no impact on the Chamber's assessment of the sentences" (internal citations omitted).

<sup>30</sup> ICC-01/05-01/13-2279, para. 54, quoting ICC-01/05-01/13-2276-Red, para. 168.

<sup>31</sup> ICC-01/05-01/13-2276-Red, para. 168.

<sup>32</sup> ICC-01/05-01/13-2276-Red, paras. 41, 44-45.

<sup>33</sup> ICC-01/05-01/13-2276-Red, para. 40.

<sup>34</sup> See ICC-01/05-01/13-2276-Red, para. 22 (internal citation omitted).

<sup>35</sup> ICC-01/05-01/13-2276-Red, paras. 38-40.

at issue” may be considered less grave, causing less harm than false testimony on significant issues.<sup>36</sup> While the Appeals Chamber found that the Trial Chamber’s decision to limit the scope of the trial to lies on “non-merits” issues was a pragmatic (and not procedural) one,<sup>37</sup> it also found that the OTP acquiesced to this decision not to consider whether witnesses lied on “merits” issues.<sup>38</sup> Where the Appeals Chamber felt unsatisfied was in the Trial Chamber’s lack of elaboration in its Sentencing Decision as to why the content of the witnesses’ testimony *in this case* impacted on its assessment of the gravity of the Article 70(1)(a) offenses.<sup>39</sup> By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to elaborate its reasoning.

22. Claiming that this error is material, the OTP unpersuasively reiterates the Trial Chamber’s own findings (as if it needs to be reminded), gratuitously rehashes arguments it made during the sentencing proceedings and on appeal, impermissibly relies on non-ICC practices, and makes pointless pronouncements.
23. Misrepresenting the Sentencing Appeal Judgment, the OTP claims that the Trial Chamber must increase Mr. Kilolo’s sentence for the Article 70(1)(a) offenses because the Appeals Chamber found that the fact that witnesses lied about “non-merits” issues “was not a valid factor” to lessen the gravity of the offenses.<sup>40</sup> The Appeals Chamber did not find, hold, state, or imply anywhere in its Sentencing Appeal Judgment that Mr. Kilolo’s sentence should be increased on this basis. To the contrary, the Appeals Chamber acknowledged that the content of witnesses’ false testimony can inform the gravity of Article 70 offenses, found that the Trial Chamber did not abuse its discretion in considering this factor, and found that the Trial Chamber failed to explain why it lessened the gravity in this case.<sup>41</sup>
24. Misrepresenting the Trial Chamber’s Sentencing Decision, the OTP claims that it cannot be assumed that false testimony on “non-merits” issues is inherently less grave than false testimony on “merits” issues and that the Trial Chamber assumed an artificial “hierarchy of

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<sup>36</sup> ICC-01/05-01/13-2276-Red, para. 38.

<sup>37</sup> ICC-01/05-01/13-2276-Red, para. 39, citing ICC-01/05-01/13-T-10-Red-ENG, p. 4, l. 9 to p. 6, l. 6.

<sup>38</sup> ICC-01/05-01/13-2276-Red, para. 40.

<sup>39</sup> ICC-01/05-01/13-2276-Red, para. 41.

<sup>40</sup> See ICC-01/05-01/13-2279, paras. 10-22, esp. para. 11.

<sup>41</sup> See ICC-01/05-01/13-2276-Red, para. 41.

gravity” based on the content of the witnesses’ false testimony.<sup>42</sup> The Trial Chamber made no such assumption. It conducted a fact-specific gravity assessment, finding that while the credibility of witnesses is of crucial importance, in this case, witnesses only lied on peripheral issues and this “inform[s] the assessment of the gravity of the offences *in this particular instance*.”<sup>43</sup>

25. Misrepresenting the Sentencing Appeal Judgment and attempting, improperly, to relitigate an issue it waived,<sup>44</sup> the OTP suggests that the Appeals Chamber confirmed that the content of the false testimony in this case did not concern issues of mere peripheral relevance to the facts at issue.<sup>45</sup> The Appeals Chamber made no such finding. Rather, it found that the OTP waived any issues it had regarding the Trial Chamber’s decision to limit the scope of the case to “non-merits” issues.<sup>46</sup> Hypocritically, the OTP proclaims that the Sentencing Submissions on remand are “not a forum to re-litigate matters which have been settled, either because they were not appealed, or by the Appeals Chamber itself.”<sup>47</sup> Yet, it does just that.

26. Attempting to relitigate settled matters,<sup>48</sup> the OTP claims that the Court’s truth-seeking functions were damaged by false testimony on “non-merits” and that credibility assessments are integral to the Trial Chamber’s holistic evaluation of the evidence.<sup>49</sup> Reciting what the Trial Chamber already considered is not persuasive – especially when erroneously claiming that the Trial Chamber abused its discretion in rendering a sentence by failing to appropriately consider mandatory sentencing factors. The Appeals Chamber found no abuse

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<sup>42</sup> See ICC-01/05-01/13-2279, para. 11.

<sup>43</sup> See ICC-01/05-01/13-2123-Corr, para. 167 (emphasis added).

<sup>44</sup> The Single Judge “emphasi[z]ed” at the outset of this inquiry that this is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber Judgments.” ICC-01/05-01/13-2277, para. 3. See also ICC-01/05-01/13-2276-Red, para. 40: “[T]he Appeals Chamber observes that the Prosecutor acquiesced to the Trial Chamber’s decision not to explore during the trial the issue on whether the concerned witnesses testified falsely on matters related to the ‘merits’ of the Main Case. As explained above, the Appeals Chamber also considers 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. The Appeals Chamber further recalls that it falls within the discretion of a trial chamber to identify the relevant circumstances for its assessment of the mandatory sentencing factors. For these reasons, the Appeals Chamber considers that the Trial Chamber did not abuse its discretion by taking account, in its assessment of the gravity of the offences, the content of the false testimony as established in the present case despite having itself decided not to determine the falsity of the concerned testimony with respect to issues concerning the ‘merits’ of the Main Case. The Prosecutor’s argument in this respect is therefore rejected.”

<sup>45</sup> See ICC-01/05-01/13-2279, para. 13.

<sup>46</sup> ICC-01/05-01/13-2276-Red, para. 40.

<sup>47</sup> See ICC-01/05-01/13-2279, para. 6.

<sup>48</sup> See ICC-01/05-01/13-2277, para. 3; ICC-01/05-01/13-2279, para. 6.

<sup>49</sup> See ICC-01/05-01/13-2279, paras. 14-19.

of discretion in the Trial Chamber's consideration of the content of the witnesses' testimony and confirmed that this factor *can* be relevant in assessing the gravity of Article 70 offenses.<sup>50</sup>

27. As if the Trial Chamber needs to be reminded, the OTP pointlessly proclaims that it is "axiomatic that perjured evidence given to secure the acquittal of a guilty person is very serious."<sup>51</sup> Uncontestably, perjured evidence is serious. This was considered by the Trial Chamber and factored into its determination of Mr. Kilolo's sentence.<sup>52</sup>

28. The Trial Chamber should ignore the OTP's law and logic-free assertions concerning the impact of the Appeals Chamber's findings on the gravity of the Article 70(1)(a) offenses. By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to elaborate its reasoning.

**D. The Appeals Chamber's finding that the Trial Chamber erroneously assessed Mr. Kilolo's culpability for the Article 70(1)(a) offenses is immaterial and does not impact his sentence**

29. The Appeals Chamber found that the Trial Chamber erred in considering Mr. Kilolo's culpability for the Article 70(1)(a) offenses because it failed to articulate why Mr. Kilolo deserved a lower sentence for the conduct he was found to have committed as an inducer (accessory) to the Article 70(1)(a) offenses than the conduct he was found to have committed as a co-perpetrator to the Article 70(1)(c) offenses.<sup>53</sup> This error is immaterial and does not impact Mr. Kilolo's sentence. The Appeals Chamber found no abuse of discretion in suspending his sentence. By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to elaborate its reasoning.

30. The Appeals Chamber found that, when summarizing the factors that the Trial Chamber considered in sentencing Mr. Kilolo, the Trial Chamber emphasized that it distinguished between the offenses he was found to have committed as a co-perpetrator and as an accessory

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<sup>50</sup> See *infra* para. 30.

<sup>51</sup> ICC-01/05-01/13-2279, para. 21, citing GAA Trial Judgment, para. 10.

<sup>52</sup> See ICC-01/05-01/13-2123-Corr, paras. 160, 164 (discussing the inherent gravity of Article 70 offenses, in particular, the offenses' impact on the Court's truth-seeking functions).

<sup>53</sup> ICC-01/05-01/13-2276-Red, para. 58.

(inducer), but did not mention or elaborate on this in the Sentencing Decision.<sup>54</sup> While the Appeals Chamber agreed that generally, co-perpetrators are more blameworthy than accessories,<sup>55</sup> it found that this is not always the case, and that the Trial Chamber failed to articulate why, based on the facts before it, it considered Mr. Kilolo's culpability to be lower for the Article 70(1)(a) offenses he was found to have committed as an inducer.<sup>56</sup>

31. Claiming that this error is material, the OTP ignores contrary ICC jurisprudence, misrepresents the Appeals Chamber's Sentencing Judgment, and misinterprets the Sentencing Decision.

32. Ignoring contrary ICC jurisprudence, the OTP claims that the Court's case law does not hold that "a principal perpetrator of a crime" is more blameworthy or more deserving of a higher sentence than an accessory to a crime, and that blameworthiness depends on the facts.<sup>57</sup> ICC Chambers have reached different legal conclusions as to whether co-perpetrators are more blameworthy than accessories. The *Lubanga* Pre-Trial Chamber considered that it is "appropriate to distinguish between liability as a co-perpetrator and as an accessory."<sup>58</sup> The *Katanga* Trial Chamber considered that while there is no "hierarchy" of blameworthiness among the modes of liability, Trial Chambers have discretion to mete out mitigated penalties to accessories.<sup>59</sup>

33. Even if the OTP's claim was supported by or consistent with ICC jurisprudence, the Trial Chamber did not assess Mr. Kilolo's culpability in the abstract and did not hold that accessories deserve lesser sentences as a matter of law. Rather, it analyzed Mr. Kilolo's degree of participation in the Article 70(1)(a) and 70(1)(c) offenses based on facts that are

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<sup>54</sup> See ICC-01/05-01/13-2276-Red, paras. 61-62.

<sup>55</sup> ICC-01/05-01/13-2276-Red, para. 59, quoting *Lubanga* Appeal Judgment, para. 462.

<sup>56</sup> ICC-01/05-01/13-2276-Red, para. 60.

<sup>57</sup> ICC-01/05-01/13-2279, paras. 24-26.

<sup>58</sup> *Lubanga* Appeal Judgment, para. 468: "The Appeals Chamber notes that, in so concluding, the Trial Chamber chose an objective criterion to distinguish commission liability from accessorial liability, as opposed to, for instance, a distinction based on the accused person's mental relationship to the crime in question. In the view of the Appeals Chamber, it is indeed appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person's extent of contribution to the crime. This is because the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question."

<sup>59</sup> *Katanga* Trial Judgment, paras. 1386-87.

distinct to those respective offenses.<sup>60</sup> It referred to the mode of liability in passing,<sup>61</sup> in order to fit Mr. Kilolo's conduct within the mode of liability that most aptly described his factual participation in the offenses.<sup>62</sup>

34. Ignoring the Trial Chamber's reasoning, the OTP erroneously claims that the Trial Chamber did not consider Mr. Kilolo's culpability on the facts.<sup>63</sup> The Trial Chamber considered and emphasized distinct factual findings related to Mr. Kilolo's conduct as a co-perpetrator and as an accessory. For example, for co-perpetration (and not accessorial liability), the Trial Chamber emphasized its finding that Mr. Kilolo was a central figure in the commission of the Article 70(1)(c) offenses as Lead Counsel and his control over his subordinates, and thus, his *essential contribution* to the commission of the offenses<sup>64</sup> – an element that is not required for accessorial (inducer) liability under Article 25(3)(b).<sup>65</sup> It also considered distinct conduct, such as its finding that Mr. Kilolo used coded language to conceal illicit activities.<sup>66</sup>

35. Ignoring the Appeals Chamber's reasoning and without supporting authority, the OTP baldly pronounces that Mr. Kilolo's sentence of imprisonment for the Article 70(1)(a) offenses he was found to have committed as an inducer (12 months) must automatically be increased to match his sentence for Article 70(1)(c) offenses he was found to have committed as a co-perpetrator (24 months).<sup>67</sup> The Appeals Chamber did not find, hold, state, or imply anywhere in its Sentencing Appeal Judgment that Mr. Kilolo's sentence should be increased on this basis. Rather, it found that the Trial Chamber's error in assessing Mr. Kilolo's culpability was predicated on a lack of explicit reasoning.<sup>68</sup>

36. Reciting the Trial Chamber's findings while taking liberties with some of them (misrepresenting and taking out of context and compartmentalizing them), the OTP erroneously claims that Mr. Kilolo's sentence for the Article 70(1)(a) offenses must be increased because the Appeals Chamber found that it was an error to distinguish among the

<sup>60</sup> See e.g., ICC-01/05-01/13-2123-Corr, paras. 169-72, 174.

<sup>61</sup> ICC-01/05-01/13-2123-Corr, para. 193.

<sup>62</sup> See ICC-01/05-01/13-2123-Corr, para. 167.

<sup>63</sup> See ICC-01/05-01/13-2279, paras. 23-28.

<sup>64</sup> ICC-01/05-01/13-2123-Corr, para. 169.

<sup>65</sup> See ICC-01/05-01/13-1989-Conf, paras. 72-82; ICC-01/05-01/13-2275-Conf, paras. 16-17.

<sup>66</sup> See ICC-01/05-01/13-2123-Corr, para. 172.

<sup>67</sup> ICC-01/05-01/13-2279, para. 27; ICC-01/05-01/13-2123-Corr, para. 194.

<sup>68</sup> ICC-01/05-01/13-2276-Red, para. 61.

modes of liability.<sup>69</sup> Although the Appeals Chamber found that the Trial Chamber relied on essentially the same facts to establish Mr. Kilolo's culpability as a co-perpetrator and as an accessory, this does not accurately reflect the Trial Chamber's Sentencing Decision. The Trial Chamber considered distinct facts for Mr. Kilolo's conduct as a co-perpetrator than his conduct as an accessory and assessed his culpability on the facts under the mode of liability that it found most accurately described his factual degree of participation in the offenses.<sup>70</sup> (*See supra* paragraph 34 regarding the Trial Chamber's assessment of distinct conduct in its assessment of Mr. Kilolo's degree of participation in the Article 70(1)(a) and (c) offenses).

37. The Trial Chamber should ignore the OTP's law and logic-free assertions concerning the impact of the Appeals Chamber's findings regarding Mr. Kilolo's culpability in the Article 70(1)(a) offenses. By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to elaborate its reasoning.

**E. The Appeals Chamber's finding that the Trial Chamber erroneously suspended Mr. Kilolo's sentence is immaterial and does not impact his sentence**

38. The Appeals Chamber reversed Mr. Kilolo's suspended sentence because it found that the Trial Chamber incorrectly identified a *lacuna* in the law.<sup>71</sup> This error is immaterial and does not impact Mr. Kilolo's sentence. The Appeals Chamber did not find, hold, state, or imply anywhere in its Sentencing Appeal Judgment that Mr. Kilolo's sentence should be increased on this basis.

39. The Appeals Chamber explained that, in contrast to other international(ized) criminal tribunals and courts, the ICC's sentencing regime is enumerated, explicit, and exhaustive,

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<sup>69</sup> ICC-01/05-01/13-2279, paras. 23-28, 37-44.

<sup>70</sup> ICC-01/05-01/13-2123-Corr, paras. 169-74. Notably, in addition to the inconsistent ICC jurisprudence as to the application of Article 25 discussed *supra* para. 32, there is considerable debate as to whether there is "hierarchy" among the modes of liability listed in Article 25. *See Katanga* Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 281. *See also* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. 1: FOUNDATIONS AND GENERAL PART 46 (Oxford 2013); Gerhard Werle and Boris Burghardt, *Establishing Degrees of Responsibility: Modes of Participation under Article 25 of the ICC Statute* in ELIES VAN SLIEDREGT AND SERGEY VASILIEV EDS., PLURALISM IN INTERNATIONAL CRIMINAL LAW 318 (Oxford 2014). *See generally* Jens David Ohlin, Elies van Sliedregt, and Thomas Wiegand, *Assessing the Control-Theory*, 26 LJIL 725 (2013) (discussing the different theories behind Article 25 of the Rome Statute and whether there is a hierarchy among the modes listed in it).

<sup>71</sup> ICC-01/05-01/13-2276-Red, paras. 76, 80.



providing little recourse to any “inherent powers.”<sup>72</sup> Accordingly, under Article 70(3), the ICC Chambers may only impose a term of imprisonment of zero to five years and/or a fine and may not impose penalties outside those explicitly provided penalties, such as suspended sentences.<sup>73</sup>

40. The Trial Chamber’s sentence of imprisonment was the period that Mr. Kilolo spent in detention.<sup>74</sup> The purpose of the period of suspension was to create a period of probation or parole, which the Trial Chamber believed was implicit within its authority under the Rome Statute.<sup>75</sup> The Appeals Chamber held that the Rome Statute does not provide for suspended sentences or probation.<sup>76</sup> However, this holding does not alter the Trial Chamber’s rationale, nor is it impugned by the Appeals Chamber’s reasoning for its holding. Suspended sentences are not meant to be served in custody; rather, they act as the sword of Damocles, a simulative measure so that the Convicted Person, during the suspended period, can reintegrate into society and become a productive and law-abiding citizen.<sup>77</sup> Were the Trial Chamber of the opinion that the actual sentence of incarceration should have been beyond the time Mr. Kilolo spent in pre-trial detention, it would have remanded Mr. Kilolo into custody to serve additional time.

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<sup>72</sup> ICC-01/05-01/13-2276-Red, para. 79.

<sup>73</sup> ICC-01/05-01/13-2276-Red, para. 200.

<sup>74</sup> See ICC-01/05-01/13-2123-Corr, paras. 194-97.

<sup>75</sup> ICC-01/05-01/13-2123-Corr, paras. 40-41.

<sup>76</sup> ICC-01/05-01/13-2276-Red, paras. 74-77.

<sup>77</sup> See Commentary on the United Nations Minimum Standard Rules for Non-Custodial Measures (The Tokyo Rules) (New York 1993), p. 6, available at <https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf> (concluding that non-custodial measures such as suspended sentences “have the unique characteristic of making it possible to exercise control over an offender’s behaviour while allowing it to evolve under natural circumstances”); Lorna Bartels, *An Examination of the Arguments for and Against the use of Suspended Sentences*, 12 FLINDERS L. J. 119, 120, fn. 2 (2013), quoting *R v Locke and Paterson* (1973) 6 SASR 298, 301 (“Anyone released under a suspended sentence therefore knows, or ought to know, that the sword of Damocles hangs over his head and that only his continued good behaviour and observance of the bond can prevent his automatic incarceration under the suspended sentence”). See also *R v. Carrillo* [2015] BCCA 192, para. 35: “Although suspended sentences are primarily rehabilitative in nature, they can also address deterrence because an offender can be punished for repeating his criminal conduct during the period of probation, and face serious consequences from the conviction at hand: Criminal Code ss. 732.2(5) and 733.1(1). This feature of suspended sentences (sometimes referred to as the ‘Sword of Damocles’) represents an underlying but pervasive threat to the offender’s liberty.” ICC and other international criminal jurisprudence has consistently confirmed that rehabilitation and deterrence (the objectives behind suspended sentences) are relevant considerations in sentencing. See *Katanga* Sentencing Decision, paras. 37-38; *Bemba* Sentencing Decision, para. 10. *Delalić et al.* Trial Judgment, para. 806; *Deronjić* Sentencing Appeal Judgment, para. 136; *Popović et al.* Trial Judgment, para. 1366; *Rutaganda* Trial Judgment, para. 107; *Nahimana et al.* Appeal Judgment, para. 1057.

41. The OTP claims that this error is material and merits an increase in sentence, but makes no arguments related to the Appeals Chamber's findings and their impact on Mr. Kilolo's sentence. It instead ignores binding ICC law and rehashes the Trial Chamber's findings, showing, ironically, that the Trial Chamber did what the Appeals Chamber requested it to do (i.e., sentence Mr. Kilolo on the facts). The OTP fails to justify why its requested manifestly unjust and disproportionate sentence is warranted.
42. The OTP's own arguments show that the Trial Chamber already considered the gravity of the offenses<sup>78</sup> and culpable conduct<sup>79</sup> on the facts and that the sentence should deter<sup>80</sup> (i.e., the Trial Chamber did what it was supposed to do), contradicting its overarching claim that the Trial Chamber must increase Mr. Kilolo's sentence to a five-year prison term to "effectively punish" him in light of the Appeals Chamber's findings.<sup>81</sup>
43. Ignoring binding ICC law, the OTP also claims that when a suspended sentence is reversed, the underlying analysis of the Convicted Person's individual circumstances is irrelevant in resentencing.<sup>82</sup> To the contrary, the Convicted Person's individual circumstances is a mandatory sentencing factor under Rule 145(1)(b) and must be considered in sentencing or resentencing a Convicted Person.<sup>83</sup> The Convicted Person's individual circumstances is one of the most critical factors in fashioning *individualized* sentences.<sup>84</sup>

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<sup>78</sup> ICC-01/05-01/13-2279, paras. 58, 61-66.

<sup>79</sup> ICC-01/05-01/13-2279, paras. 67-69, 71-74.

<sup>80</sup> ICC-01/05-01/13-2279, para. 77.

<sup>81</sup> ICC-01/05-01/13-2279, para. 57.

<sup>82</sup> ICC-01/05-01/13-2279, para. 51.

<sup>83</sup> ICC-01/05-01/13-1989-Conf, para. 13; ICC-01/05-01/13-2123-Corr, paras. 182-89. *See also* Lubanga Sentencing Decision, paras. 25, 54 (finding that Rule 145(1)(b) requires the Trial Chamber to balance *all* relevant factors in determining a sentence); Bemba Sentencing Decision, para. 12; Lubanga Sentencing Appeal Judgment, Key Finding 1, para. 42 ("a Trial Chamber's failure to consider one of the mandatory factors listed in rule 145 (1) (b) of the Rules of Procedure and Evidence can amount to a legal error in the context of challenging the Trial Chamber's discretionary decision on sentencing").

<sup>84</sup> The principle of individualized sentencing is universal, found in both common law and civil law jurisdictions. As States' values and interests evolved over time, they reconsidered their interests in law enforcement, taking into account Convicted Persons' liberty interests and the utility of prison sentences. Resultantly, "[s]entencing laws were crafted to allow judges latitude to fashion penalties tailored to the circumstances of individual cases." *See* MICHAEL TONRY, SENTENCING MATTERS 3 (Oxford 1996). Considering the time and page restrictions on this Submission, the Defence provides just a few examples of relevant domestic law here. Section 46(2) of the German Criminal Code requires the sentencing judge to consider the individual circumstances of the Convicted Person (both positive and negative). The French Constitutional Council recognized the principle of individualized sentencing as a principle flowing from Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789. Décision n° 2005-520 DC du 22 juillet 2005 (Loi précisant le déroulement de l'audience d'homologation de la comparution sur

44. The OTP's claims that the reversal of the suspended sentence mandates a sentence increase are meritless. The OTP had an opportunity on appeal to demonstrate an abuse of discretion and failed to do so.
45. The Trial Chamber should ignore the OTP's law and logic-free assertions concerning the impact of the Appeals Chamber's findings on the suspended sentence. By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to cure its error by sentencing Mr. Kilolo within the explicit contours of the ICC's sentencing framework.

#### **F. Mr. Kilolo's updated circumstances since the Sentencing Decision**

46. At the conclusion of the trial, when pronouncing its Judgment on 22 March 2017, the Trial Chamber found that Mr. Kilolo was fully reintegrated into society after having spent 11 months in detention.<sup>85</sup> Since the Trial Chamber rendered its Sentencing Decision of 22 March 2017, Mr. Kilolo has continued to carry on with his previous activities and has been endeavoring to resuscitate his law practice, continuing to make social and political contributions to his community and efforts to rebuild his family life – all of this despite the international headlines of his arrest, detention, trial, conviction, sentence, and appeal

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reconnaissance préalable de culpabilité). Article 132-24 of the French Criminal Code explicitly states that “sentences may be tailored following the modalities provided in the present section” (unofficial translation). The French Ministry of Justice explained that the purpose of this law was “to better act on the risk of re-offending and promote the reintegration of the convicted. To be effective and to make sense of the convicted person, the sentence must be pronounced knowingly, the judge must have the means to identify the convicted person’s personality, his environment and his social situation, his weak points (the risks of recidivism) and its strengths (the factors favoring the exit of delinquency).” French Ministry of Justice, Loi du 15 août 2014 relative à l’individualisation des peines et renforçant l’efficacité des sanctions pénales, L’individualisation de la peine, <http://www.justice.gouv.fr/loi-du-15-aout-2014-12686/lindividualisation-de-la-peine-12688/> (last accessed 30 May 2018) (unofficial translation). The Supreme Court of the United States explained that “to aid a judge in exercising [its broad sentencing] discretion intelligently, the New York procedural policy encourages [the sentencing judge] to consider information about the convicted person’s past life, health, habits, conduct, and mental health and moral propensities.” *Williams v. New York*, 337 U.S. 241, 245. In Australia, both federal and state law reflects the principle of individualized sentencing. The High Court of Australia held that sentencing judges “are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.” *Markarian v. The Queen* [2005] HCA 25, para. 27. Section 16A(2)(m) of the Australian Crimes Act of 1914 provides that: “In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court ... the character, antecedents, age, means and physical or mental condition of the person.” See also 1992 Queensland Penalties and Sentencing Act, §9; 1999 New South Wales Crimes (Sentencing Procedure) Act §21A; 1991 Victoria Sentencing Act, §5; 2017 South Australia Crimes Act, §11; Northern Territory Sentencing Act, §5; 2005 Australian Capital Territory Crimes (Sentencing) Act, §33.

<sup>85</sup> ICC-01/05-01/13-T-51-ENG, p. 33, ll. 19-21.

(including those posted on the ICC's own social media accounts) and the stigma attached thereto.<sup>86</sup> Mr. Kilolo's current professional, humanitarian, and political activities include:

- a. Professional activities: Since Mr. Kilolo's provisional release, he has been unable to obtain regular clientele in Brussels, Belgium. He has moved to the DRC, joined the Ngomo Elie Law Firm as an off-counsel. Mr. Kilolo has also been involved in other activities, such as giving a presentation on the work of the ICC at the Law Faculty of the University of Lubumbashi<sup>87</sup> and attending the *International Humanitarian Conference on the Democratic Republic of Congo* in Geneva, Switzerland, co-chaired by the United Nations, the European Union, and the Netherlands.<sup>88</sup>
- b. Humanitarian activities: Mr. Kilolo volunteers with two NGOs.
  - i. **ONG EASD** – *Projet d'Adduction d'eau potable et lutte contre les insalubrités dans des milieux publics professionnels pour sauver la population du territoire de Malemba-Nkulu* – whose mission is to fight against water pollution in Haut-Lomami province, the DRC;<sup>89</sup> and
  - ii. **JURECO** – *Justice et Réparation pour les Descendants des mains coupées et le Génocide Congolais* – whose mission is to combat the impunity for the crimes

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<sup>86</sup> See ICC-01/05-01/13-2087-Conf, para. 36. See e.g., La CPI juge Jean-Pierre Bemba Coupable de Subornation de Témoins, LE MONDE, 20 October 2016, available at [http://www.lemonde.fr/afrique/article/2016/10/19/la-cpi-juge-jean-pierre-bemba-coupable-de-subornation-de-temoins\\_5016626\\_3212.html](http://www.lemonde.fr/afrique/article/2016/10/19/la-cpi-juge-jean-pierre-bemba-coupable-de-subornation-de-temoins_5016626_3212.html). See also Harriet Agerholm, Congo's Jean-Pierre Bemba Guilty of Bribing Witnesses International Criminal Court Rules, THE INDEPENDENT, 19 October 2016, available at <http://www.independent.co.uk/news/world/africa/congo-s-jean-pierre-bemba-found-guilty-witness-bribing-international-criminal-court-human-rights-war-a7370731.html>. See also DRC Congo's Bemba Found Guilty at ICC of Witness Bribing, BBC, 19 October 2016, available at <http://www.bbc.com/news/world-africa-37706424>. See Affaire Bemba et autres: La Chambre de première instance VII de la CPI déclare cinq accusés coupables d'atteintes à l'administration de la justice, 19 October 2016, available at <https://www.icccpi.int/Pages/item.aspx?name=pr1245&ln=fr>. See also Bemba et al.: ICC Trial Chamber Finds Five Accused Guilty of Offences Against the Administration of Justice, 19 October 2016, available at <https://www.icccpi.int/Pages/item.aspx?name=pr1245>. See ICC Twitter posts dated 19 October 2016, <https://twitter.com/intlcrimcourt?lang=fr> (last accessed 30 May 2018).

<sup>87</sup> See Annex B, p. 3-6.

<sup>88</sup> See Annex B, p. 16. See also United Nations Office for the Coordination of Humanitarian Affairs, *DRC Humanitarian Conference*, <https://www.unocha.org/humanitarian-conference> (last accessed 30 May 2018).

<sup>89</sup> CAR-D21-0018-0048.

committed by the Kingdom of Belgium against the Congolese people between 1885-1961.<sup>90</sup>

- c. Political activities: After returning to the DRC, Mr. Kilolo has been involved in a political party – *Union pour le développement du Congo* (UDCO) – whose mission is to find solutions to help Congolese people and contribute to their prosperity and the DRC’s social and economic development.<sup>91</sup> Since he was appointed as UDCO’s Secretary General, Mr. Kilolo has been revitalizing the party’s activities in light of the upcoming presidential and parliamentary elections in the DRC.<sup>92</sup>
- d. Family life: Mr. Kilolo is essentially the breadwinner and main provider of his extended family.<sup>93</sup> [REDACTED].

47. As a husband and father, Mr. Kilolo is doing his best to provide for his family, though his financial situation remains precarious. Since his provisional release, [REDACTED],<sup>94</sup> [REDACTED].<sup>95</sup> [REDACTED].<sup>96</sup> [REDACTED].<sup>97</sup>

48. The Registry’s Updated Solvency Report does not accurately reflect Mr. Kilolo’s financial situation.<sup>98</sup> [REDACTED]. [REDACTED]. The Registry’s Updated Solvency Report also lacks up-to-date information, such as [REDACTED].

49. Pursuant to Rule 145(1)(b) and the principle of individualized sentencing,<sup>99</sup> in resentencing Mr. Kilolo, the Trial Chamber should consider the individual circumstances that have changed since the Sentencing Decision.

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<sup>90</sup> See Annex B, p. 7-15.

<sup>91</sup> See UDCO’s Facebook page, [https://www.facebook.com/pg/UDCO-261419997607957/about/?ref=page\\_internal](https://www.facebook.com/pg/UDCO-261419997607957/about/?ref=page_internal) (last accessed 30 May 2018).

<sup>92</sup> See Annex B, p. 17-21.

<sup>93</sup> [REDACTED].

<sup>94</sup> [REDACTED].

<sup>95</sup> [REDACTED].

<sup>96</sup> [REDACTED].

<sup>97</sup> [REDACTED].

<sup>98</sup> ICC-01/05-01/13-2278 and [REDACTED]. [REDACTED].

<sup>99</sup> See *supra* fn. 84.

### III. ORAL HEARING IS NECESSARY

50. Although the Trial Chamber has indicated that it does not consider oral arguments necessary,<sup>100</sup> Mr. Kilolo's right to be heard compels one. Procedural fairness requires that, when a decision is being contemplated that could be detrimental to the Accused or Convicted Person (such as a decision whether to impose a custodial sentence on remand), he/she must be accorded an opportunity to be heard.<sup>101</sup> Aside from this, as a matter of efficiency, an oral hearing is necessary to avoid the need for any reply submissions.

### IV. CONCLUSION AND RELIEF SOUGHT

51. The Trial Chamber should resentence Mr. Kilolo to a sentence of 11 months time served and a fine of EUR 30,000.00.

52. Individually, the reversal of 14 (one third) of Mr. Kilolo's convictions should yield a reduction of his sentence. Cumulatively, in addition to this error, the erroneous calculation of timeframe of the Article 70(1)(c) offenses and Mr. Kilolo's individual circumstances since the Sentencing Decision should yield a reduction of his sentence. Other Appeals Chamber findings concerning gravity, culpability, and the suspended sentence have no impact, contrary to the unsubstantiated claims made by the OTP. By remanding the case, the Appeals Chamber is according the Trial Chamber an opportunity to elaborate its reasoning in its Sentencing Decision and impose a sentence that is within the explicit contours of the ICC's sentencing regime.

53. The OTP insinuates – in addition to law and logic-free assertions concerning the impact of the Appeals Chamber's findings – that the Trial Chamber should impose a higher sentence because Mr. Kilolo will not be able to pay his fine,<sup>102</sup> claiming that fines are “suitable *only* when its imposition can reasonably deter *i.e., only* if the fines are substantial and the convicted persons actually pay.”<sup>103</sup> This maundering speculation should be ignored. The OTP speculates as to Mr. Kilolo's finances, acknowledging: “To the best of the Prosecution's

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<sup>100</sup> ICC-01/05-01/13-2277, para. 6.

<sup>101</sup> See *Kvočka et al.* Decision on Legal Aid, para. 39. Concerning the right to be heard, *see also Jelišić* Appeal Judgment, para. 27.

<sup>102</sup> ICC-01/05-01/13-2279, paras. 57, 80.

<sup>103</sup> ICC-01/05-01/13-2279, para. 80 (emphasis in original).

knowledge, the financial situation of all three convicted persons remains unclear.”<sup>104</sup> The record demonstrates, as opposed to unsupported prosecutorial fancy, Mr. Kilolo has the means to satisfy the EUR 30,000.00 fine.

54. The Appeals Chamber’s underlying reasoning in stating that “culpability, rather than solvency, should be the primary consideration [to determine] the appropriate type of punishment” means that under the principle of equal treatment, whether and to what extent a Convicted Person will be sentenced to imprisonment cannot be based on his or her financial solvency.<sup>105</sup> Fines are not a substitute for incarceration. They serve the sentencing purposes of deterrence, retribution, and reaffirmation of societal values.<sup>106</sup> They are also imposed to offset the costs incurred by the Court. Indigent Convicted Persons should not serve a longer term of imprisonment than wealthy Convicted Persons, simply because of their insolvency.

**WHEREFORE** for the reasons set forth in this Submission the Trial Chamber should:

- a. DENY the Prosecution’s request to impose a five-year custodial sentence and enhanced fine;
- b. REFASHION Mr. Kilolo’s sentence, effectively keeping his original sentence intact; and
- c. SENTENCE Mr. Kilolo to a sentence of 11 months time served and a fine of EUR 30,000.00.

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<sup>104</sup> ICC-01/05-01/13-2279, para. 57.

<sup>105</sup> ICC-01/05-01/13-2276-Red, para. 245.

<sup>106</sup> See K.B. Jobson, *Fines*, 16 MCGILL L. J. 633, 675, 667 (1970) (discussing the deterrent, retributive, and rehabilitative purposes of sentencing and fines). See also *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2, Judgment 10 March 2006, para. 52 where the court imposed a fine on both Accused after they were convicted of contempt offences in order to recognize “the gravity of the breach and the need for deterrence”; *R. v. McMahon*, 2006 ABQB 701, where the court held that the objective of deterrence was adequately met by imposing a fine less than what the first instance court had imposed; Tim Kurz et al., *A fine is a more effective financial deterrent when framed retributively and extracted publicly*, 54 J. OF EXPERIMENTAL SOC. PSYCHOL. 170, 177 (2014).

Respectfully submitted, 11 June 2018,

In The Hague, the Netherlands.

A handwritten signature in black ink, appearing to read 'M. Karnavas', is written over a light blue rectangular stamp.

**Mr. Michael G. Karnavas**  
**Counsel for Mr. Aimé Kilolo Musamba**