International Criminal Court
Trial Chamber VII
Situation: 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 - ICC-01/05-01/13
Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and Judge Raul Pangalangan
Sentencing Hearing - Courtroom 1
Wednesday, 4 July 2018
(The hearing starts in open session at 10.01 a.m.)
THE COURT USHER: [10:01:14] All rise.
The International Criminal Court is now in session.
PRESIDING JUDGE SCHMITT: Good morning, everyone.
Could the court officer please call the case.
THE COURT OFFICER: [10:01:40] Good morning, Mr President, your Honours.
Situation in the Central African Republic in the case of the Prosecutor versus Jean-Pierre Bemba Gombo, et al., case reference ICC-01/05-01/13.
And for the record we're in open session.
PRESIDING JUDGE SCHMITT: Thank you very much.
I ask like always for the appearances of the parties.
We start with the Prosecution, Mr Vanderpuye.
MR VANDERPUYE: [10:02:03] Good morning, Mr President, your Honours, good morning everyone. Today the Prosecution is represented by Ms Olivia Struyven seated to my left. To her left, Nema Milaninia. Behind him in the middle is Priya

Narayanan, and next to her is Meritxell Regue. And in the back row is Sylvie Wakchom on the right side. In the middle, Carmen Garcia Ramos, and to her right Yassin Mostfa. I'm Kweku Vanderpuye. Good morning.

PRESIDING JUDGE SCHMITT: Good morning. Thank you very much.

For the Defence teams I think we start with the Defence for Mr Bemba.

MS TAYLOR: [10:02:44] Good morning, Mr President, your Honours. My name is Melinda Taylor and I'm appearing on behalf of Mr Bemba today with Ms Ines Pierre de la Brière. Thank you.

PRESIDING JUDGE SCHMITT: Thank you.

Mr Karnavas, please.

MR KARNAVAS: [10:02:57] Good morning Mr President, good morning your Honours, and good morning to everyone in and around the courtroom. I'm here for Mr Kilolo. I'm along with Rosalie Mbengue and Ms Anastasiia Tatarenko. I got through the names this time.

PRESIDING JUDGE SCHMITT: Thank you.

And Mr Gosnell for Mr Mangenda.

MR GOSNELL: Good morning, Mr President, your Honours. Christopher Gosnell for Mr Mangenda this morning, assisted by Peter Robinson and Nikki Sethi. Thank you.

PRESIDING JUDGE SCHMITT: Thank you very much.

And before we start with the intervention, so to speak, and the oral submissions by the parties, I have to say a few words on behalf of the Chamber.

Just for the record, the three convicted persons are all out on interim release and have not been ordered to attend today's hearing.

By way of background, on 19 October 2016, Mr Bemba, Mr Kilolo and Mr Mangenda

were found guilty of offences against the administration of justice related to intentionally corruptly influencing witnesses and soliciting false testimonies of defence witnesses in the other case against Mr Bemba at the ICC.

On 22 March 2017, this Chamber delivered the sentences in this case.

On March 8, 2018, the Appeals Chamber confirmed the convictions in respect of most of the charges. The convictions and acquittals in relation to these three convicted persons are now final. However, in relation to their sentences, the Appeals Chamber reversed them following a successful Prosecution appeal and remanded the matter back for this Chamber to make a new determination, and this is why we are sitting here today.

The Chamber recalls at the outset that it has set a clear briefing schedule in this case. Written submissions were sought pursuant to order 2277 and have now been received from the parties. These submissions can be found across filings 2279 to 2282 in the case record.

On 12 June 2018, the Chamber announced that it would have this hearing to discuss the resentencing. This hearing also resolved multiple requests from the parties to make further submissions, including a Prosecution request for leave to reply in filing 2283.

And now we come to the current developments.

No further written submissions have been permitted in this case. Today's hearing marks the conclusion of the submissions the Chamber will receive prior to its resentencing decision, with an exception I will come shortly to, because yesterday the Prosecution filed a written submission outside the parameters of the Chamber's briefing schedule. This is filing 2296 in the case record. The Prosecution has not sought leave before doing so. However, it concerns the impact of the Main Case

appeals judgment on the resentencing. It is of course understood that the Main Case Appeals Chamber judgment post-dates the Prosecution's original written submissions. The Prosecution may therefore use its time today to raise the same arguments, should it wish to do so, and the Defence teams may use their time to orally respond to them. However, the Chamber is also aware of the fact that we have now a written submission in the case record and that the Defence is in the position to feel perhaps a little bit ambushed by this last-minute submission. So we understand that. And because of that, the Defence teams will be granted the possibility to respond to this filing by the OTP, and only to this filing and what is raised in this filing, within two weeks by written submissions.

No further submissions on any issue in this case will be permitted by the Chamber. This is out of fairness to the Defence that we allow this. But we would appreciate it a lot if Defence counsel would be able to respond today, now that we are sitting here in this hearing, orally to the filing by the Prosecution. There might be some basic considerations that an experienced Defence counsel might be able to talk about orally now, but you are permitted to respond to that. The Chamber received word that Mrs Taylor wanted to address us and make an oral application. And I hope a little bit that with my wordings that further discussions on this point might be moot.

You have the floor, Mrs Taylor.

MS TAYLOR: [10:08:04] Thank you very much, Mr President.

PRESIDING JUDGE SCHMITT: I have not finished. I have not finished. I have not finished yet.

MS TAYLOR: [10:08:14] Okay.

PRESIDING JUDGE SCHMITT: I only hoped, wanted to express my hope, that further applications by you are moot by that. You can simply give me a sign, so to

speak, or simply say yes or no.

MS TAYLOR: [10:08:29] Thank you, Mr President. I'm afraid that doesn't address the core thrust of our oral application that we intended to make. Thank you very much.

PRESIDING JUDGE SCHMITT: Then we wait until I have finished my intervention, and then you can have the floor.

The purpose of today's hearing is to hear any final supplemental arguments from the parties, particularly those arising from submissions or events subsequent to their written submissions.

There is no need for the parties to repeat their duly received written submissions, of which the Chamber is well aware. You can trust that the Chamber has read your written submissions and we don't have an oral hearing here to simply repeat the arguments. The Chamber therefore expects today's submissions to be short and sharp. We expect to finish comfortably within a single day; at least at this moment we still expect it. After the hearing, the Chamber will resume its deliberations on the appropriate sentences to impose. These new sentences will not be pronounced today, as you will expect, but will come in due course.

The Chamber will first hear from the Prosecution, then from the Defence teams in the order they deem fit. But since you have an application, I give firstly the floor to Mrs Taylor.

MS TAYLOR: [10:09:47] Thank you very much, Mr President.

Of course we appreciate that the Chamber has afforded the Defence with a remedy in relation to yesterday's submissions, but in our respectful view, and for the reasons that I will elaborate, that remedy would not cure the harm of the submission itself and of the possibility for the contents of that submission to be ventilated today.

We respectfully request through this application for the submission to be dismissed in limine and for the Prosecution to be directed to refrain from repeating the contents of that submission at today's hearing.

And there are two reasons for this request:

Firstly, the submission is based on an inadmissible premise. They are based on the premise that Mr Bemba's acquittal in the Main Case harmed the integrity of the Court and, in our respectful view, it would constitute an abuse of process to invite this Chamber to re-adjudicate final findings of the Main Case Appeals Chamber and to question Mr Bemba's acquittal in that case.

The second plank of our submission is that they are completely irrelevant to the issues before this Chamber; they fall outside the scope of this case and the scope of this hearing.

Finally, we submit that the only purpose to which the Chamber can turn to this submission is to mitigate Mr Bemba's sentence in light of the harm that has been generated through the public submission of these views.

In terms of our first argument, the Prosecution submissions are predicated entirely on their subjective view of the truth. They claim that a particular narrative is false and that because the Appeals Chamber accepted certain elements of this narrative that might not be false, the findings of the Appeals Chamber, the majority, were corrupted.

In our respectful view, this premise cannot be entertained in any shape or form. The Trial Chamber has neither the means nor the statutory authority to revisit factual findings issued by a final verdict of the Appeals Chamber or to cast its own inflection on the evidential record.

The Prosecution had a full and fair opportunity to make submissions concerning the

reliability of defence witnesses in the Main Case. It has never claimed it didn't have that opportunity. Now, the fact that it disagrees with the outcome of that litigation is neither here nor there. The outcome exists and it's final.

But, in yesterday's submissions, the Prosecutor has appointed itself judge, jury and executioner of the Main Case acquittal. And that's not how this Court works. It's not how justice works. Judges of this Court have a duty to act honourably, faithfully, impartially, conscientiously, and, as noted by the ICC President in his public statement, "when judges acquit or convict, it is because the core principles direct them to do so".

Mr Bemba was acquitted not because of Article 70 conduct, but because these core values directed the majority to enter an acquittal.

Now, it is entirely inappropriate to play to the peanut gallery by using this hearing as a forum for expressing the Prosecution's continued disagreement with the majority of the Appeals Chamber and its disagreement with Mr Bemba's acquittal.

To do so would undermine the authority of the Court and it undermines the public perception of Mr Bemba's innocence in that case.

In our respectful view it simply should not be allowed, and it would be wholly inappropriate for the Prosecution, which is tasked under Article 54 with upholding the rights of the defendant, to claim that an acquittal constitutes damage to the integrity of this Court.

Now, in terms of the second plank of our submission, these submissions, yesterday's submissions are additional arguments. They're not a reply to the arguments of the Defence. They constitute an entirely new approach, a new hypothesis on a range of issues that are unconnected to the specific points before this Chamber.

Now, as the Presiding Judge mentioned, these issues are the extent of damage, the

impact of solicitation versus co-perpetration, and the Chamber's error in granting suspended sentences. And the Prosecution has filed submissions on these issues and asked to file a reply on these issues, and none of those filings raised the matters set out in yesterday's filing. And they never asked to expand the scope of their submissions, because, if they had done so, they would have no basis to tie yesterday's submissions to the scope of this case. Yesterday's submissions bring entirely new substantive arguments as to whether defence witnesses lied on the merits of the Main Case.

These are matter that the Chamber has found fall outside the scope of this trial. It falls outside the scope of Article 70(1)(8). And the Prosecution was found on appeal to have acquiesced to this limitation, that is, that it was limited to false testimony concerning contacts and payments.

Now, this acquiescence should bind the scope of this hearing, as does the Prosecution's choices concerning charges and allegations. This case concerned 14 witnesses. Now, if they had evidential grounds to believe that other witnesses such as D-48 were corrupted, then they could have included them in the Article 70 charges. But they didn't, which speaks volumes concerning the reliability of yesterday's submissions.

Now, this is not a point on which the Prosecution can hedge its bets. It can't wait to the penalty shootout and then try and change the team and try and change the rules. That's not how a trial works. We don't need just two weeks' notice. For allegations of this sort we would need a new trial, because this is an entirely new charge.

Time is up for the Prosecution. It's simply too late to reopen the case in this matter.

My final point concerns the impact of hearing such submissions on the presumption of innocence of Mr Bemba.

The presumption of innocence, it's not just a phrase or empty words that fill out the Statute. It's a fundamental right. And it's a right that at its highest after a person has been acquitted on final appeal. And it's found by the European Court of Human Rights in Geerings versus Netherlands, following such a final acquittal, even voicing suspicions concerning the accused's innocence is no longer admissible.

Now, the Prosecution in its submission, they haven't just voiced suspicions, they have out-and-out said that the acquittal was secured through corrupt conduct. They have also said that he was only acquitted of some of the charges, clear inference being that he was guilty of others.

That can't be accepted. That's inadmissible. That basically tries to crush the life out of his acquittal. That's harmful. It's prejudicial both to his individual right to innocence, but also as concerns the fairness and impartiality of this process. And it's not the first such statement obviously. Similar statements were made during the release hearing. The Prosecutor also made a very public statement and, when we invited her to retract it, declined to do so.

We therefore ask this Chamber, in addition to dismissing these submissions in limine, to take into consideration the harm these public statements have caused to Mr Bemba's rights, and to do so in its assessment of the appropriate sentence to be imposed in this case.

And this will be consistent with the approach of Trial Chamber I in Lubanga, which took into account the statements of the Prosecution's spokesperson when sentencing him.

Thank you.

PRESIDING JUDGE SCHMITT: Yes.

Mr Karnavas, shortly, please.

MR KARNAVAS: [10:19:43] Very, very shortly, Mr President. Thank you. And I appreciate the Trial Chamber's ruling on this. However, these submissions are both deceptive and deceiving. It's not a notice. It's a full-blown submission. And the Prosecution, I don't know whether it's this gentleman or whether it's Madam Bensouda, are engaging in what I would consider guerrilla war tactics. At the last moment they file what is called a notice, when it's a submission. The notice could have been two paragraphs, the first one and the last one of this 20-page submission. Why they did this? I think my colleague explained the reasons. But I think that I would concur that it should be outright dismissed and they should not be rewarded with the opportunity to speak on this matter, on these matters that they want to raise. If we are to file submissions we should have four to six weeks. And I think because in my opinion these sort of tactics, no matter which side engages in them, when they don't file a leave or they file a bogus notice, this is borderline unethical behaviour and it warrants a sanction. Now, the sanction could be, for instance, if we're going to spend a month working on this, the Prosecution ought to pay from its budget the Defence. It should be -- because this is the only way they're going to learn to refrain from these sorts of tactics. Thank you.

PRESIDING JUDGE SCHMITT: Mr Vanderpuye, I assume that you perhaps want to make some remarks on this.

MR VANDERPUYE: [10:21:26] Thank you, Mr President. Yes, if you'd like me to. I have to say I almost can't believe my ears. And the reason why I almost can't believe my ears is that you're listening to the words of counsel who represent clients who have been convicted by this Trial Chamber on proof beyond a reasonable doubt that their clients sought to subvert the course of justice in this institution.

I'm listening to Mr Karnavas talk about the Prosecution's ethics concerning filing a

notice of the arguments it intends to make orally before this Chamber in advance of the hearing as an unethical act as compared to the client that he represents who is convicted by this Chamber and by the Appeals Chamber in affirming those convictions of 28 counts of crimes or offences against the administration of justice. I'm listening to Ms Taylor, who represents Mr Bemba, who was recently acquitted in the Main Case, but who was also convicted in this case on evidence and proof beyond a reasonable doubt of his misconduct, criminal acts designed to subvert the course of justice before this Court.

So I'm really almost at a loss for words, because at the end of the day what we assert, and they can respond to and you've invited them to do so, is that those efforts played a role to a discernible extent in the result. The result of the acquittal was the aim of the common plan which this Chamber found.

And so that is the basis for our application. We filed it as a notice to give the Defence an opportunity to respond. They can take it however they want. But we do intend to make those arguments and elucidate on them, elucidate them for the Chamber's benefit with the Chamber's leave of course.

PRESIDING JUDGE SCHMITT: Thank you.

(Trial Chamber confers)

PRESIDING JUDGE SCHMITT: So the ruling of the Chamber is the following. I address first Ms Taylor.

You have already effectively answered to the submission, so to speak, and have another possibility to do so together with the other Defence teams in written form and, therefore, no prejudice to Defence of the proceedings warrants the prohibition of the acceptance of the Prosecution's submission. The Prosecution has wide latitude in what kinds of arguments it wishes to raise before the Chamber.

The Chamber will not declare them inadmissible from the outset in the manner the Bemba Defence suggests. The request is rejected, but the Bemba's Defence concerns about the Prosecution's arguments are of course noted as any argument that is brought forward and will be of course like any argument that is brought forward considered when deciding upon the merits of the Prosecution's arguments.

That said, I invite Mr Vanderpuye to make his oral submissions. And I would really now wish from everyone in the courtroom, from every party to concentrate on the issue at stake, meaning the arguments that might be brought forward, pro and contra, a certain sentence for the three accused that are represented by counsel in this courtroom.

And the Chamber would very much appreciate it if we would now refrain from reciprocal, so to speak, reproaches. So please concentrate on reasonable arguments. This is why we are sitting in a courtroom. We are not acting for the gallery. This is addressed to everyone here.

Mr Vanderpuye, and please, as I said, short and sharp. We have written all the submissions.

MR VANDERPUYE: [10:26:16] Thank you, Mr President.

PRESIDING JUDGE SCHMITT: Not written. We have read all of those.

MR VANDERPUYE: [10:26:20] Yes.

PRESIDING JUDGE SCHMITT: Of course not written.

MR VANDERPUYE: [10:26:23] If you just bear with me one moment while I move the podium over here and set up. It will take me just a second.

PRESIDING JUDGE SCHMITT: Mr Vanderpuye, we have also to address now shortly before you start the submission by Mr Karnavas.

You wanted more time, as I understood it, four to six weeks, as I understood it. And

we reject that, frankly speaking. We have already considered two weeks to be appropriate under the circumstances. The Chamber sees no reason why it takes a month or longer to respond to this filing 2296, and the Defence have already been given longer than the standard 10-day response time limit specified in Regulation 34 of the Regulations of the Court.

I'm absolutely sure that two weeks will be enough for you to address the arguments that you want to bring forward to this Chamber. And as I also have already said, Mrs Taylor has brought forward some already.

MS TAYLOR: [10:27:40] I apologise, Mr President, I have a very discrete point which ties to the Prosecution's submissions because they are based on a lot of factual issues which simply aren't in the record in this case. We don't have disclosure of a lot of these issues. So at this point in time where it's entirely uncertain as to whether the Prosecution will disclose and what they will disclose, particularly in the absence of any direction from the Chamber, as I mentioned, it does refer to a witness who wasn't even in this case, so it does raise a point for us in terms of how we are to respond when we haven't had disclosure of the underlying Main Case materials. Thank you.

PRESIDING JUDGE SCHMITT: Mr Vanderpuye.

MR VANDERPUYE: [10:28:20] I'm not --

PRESIDING JUDGE SCHMITT: To this point.

MR VANDERPUYE: [10:28:22] Yes, Mr President. I'm not sure, I'm not sure exactly what documents Ms Taylor is referring to, but if she's referring to the CDR that is referenced in the notice, I would say that that information was in fact disclosed in this case. Not only was it disclosed, but it's in the record of the case as formally submitted. And I can provide the references for that if she would like it.

PRESIDING JUDGE SCHMITT: If we are talking about especially this part of the

record, I think it would make sense simply to clarify what is the state of affairs. We cannot do this now at the moment, and you can do this inter partes in my opinion. And if of course the Defence is not able to meaningfully respond, then we would have to reconsider perhaps the time frame we have set out.

MR VANDERPUYE: [10:29:09] Mr President, I have the references right here in front of me. If it's that, I don't know, I don't know what specific information she's talking about. But if it is that, I can provide it.

PRESIDING JUDGE SCHMITT: So what we do then is, perhaps we can, we have still a hearing until perhaps in the afternoon, the late afternoon, if you will, and we would appreciate it, I would appreciate if we could resolve this until then, what you need, Ms Taylor, and what you can provide.

And of course to keep this relatively tight time frame, we would appreciate it if you would be forthcoming, Mr Vanderpuye.

MR VANDERPUYE: [10:29:49] Thank you, Mr President. I'll do my best to move things along. I wasn't aware of what the time constraints might be with respect to the presentation and I --

PRESIDING JUDGE SCHMITT: Microphone.

MR VANDERPUYE: [10:30:02] Okay. Perhaps I was just standing a little bit -- I wasn't aware of what the time frames might be allotted to the parties to make their arguments, so I did prepare written, a written submission that I will obviously present orally. So I'll do my best to try to get through it, but I think it's probably a little bit on the long side. I'll cut it as I go, but I'm not sure exactly how long it is at this moment. I think it's about an hour.

PRESIDING JUDGE SCHMITT: About an hour is okay. But not more, please.

MR VANDERPUYE: [10:30:36] All right. I'll do my best.

PRESIDING JUDGE SCHMITT: Then please begin.

MR VANDERPUYE: [10:30:39] Thank you. All right. Good morning Mr President, your Honours, everyone, and it's my privilege to appear before you once again concerning this case on behalf of the Office of the Prosecutor and my team. I understand we have a limited amount of time, as you have stressed, so I'll do my best to try to move things along and get to the point.

Our submissions cover a few salient issues that we believe will assist the Chamber's new determination and we also believe that they're imperative to the determination of the appropriate sentences to be imposed here. And the sentences that we would ask for should reflect the true gravity of the numerous crimes that were committed, the seriousness of the criminal course of conduct that was engaged in by the defendants, the consequences of their actions, and the risk of and the actual harm done to the proceedings, the Court and to the public confidence that's necessary to its ability to fulfil its mandate.

So we will address in turn:

The impact of the Main Case Appeals Chamber's acquittal of Mr Bemba on the sentencing determination to be made by this Chamber.

We will address the impact of the Chamber having, in its determination on sentence, accorded some mitigating weight in view of its findings, on the basis of the evidence that it restricted itself to considering, for practical reasons, that the false testimony of the witnesses did not go to the weight -- did not go to the merits of the Main Case.

We will address the impact of the Chamber's having in its determination on sentence considered accessorial modes of liability per se is less culpable than those arising inhering to the acts of a principal.

And the impact of the Appeals Chamber's dismissal of the convictions entered under

Article 70(1)(b).

We will address the Defence's proposed sentencing alternatives.

And we will also address briefly the alleged circumstances, individual circumstances of the defendants.

Before I turn to these specific points, I would like to note a couple of things. The first is that while the Appeals Chamber remanded this case for new sentencing determinations, it also overwhelmingly confirmed your determination beyond a reasonable doubt that the defendants in this case indeed committed multiple violations of Article 70.

In short, the Appeals Chamber unanimously affirmed the convictions, even having dismissed the charges -- or the convictions, rather, under 70(1)(b) in respect of Mr Bemba, 28 counts, in respect of Mr Kilolo, 28 counts, and in respect of Mr Mangenda, 23 counts.

No matter how you view this, the sentence to be imposed, given the gravity of the case and the course and scope of the defendants' criminal conduct in the context of implementing a broad and pervasive scheme to pervert the course of justice and undermine the integrity of the proceedings before this Court cannot be less than the maximum allowable for any given offence, that's five years and a meaningful fine. Anything other than that in these circumstances in our view is patently untenable. And rather than stem impunity, it would promote it.

Your Honours, it just doesn't get any worse than it is in this case, a campaign to corrupt witnesses before a court in a serious case, a very serious case. And this unreservedly demands the imposition of the highest sentence available under the Statute for each of the convicted persons. It demands this high sentence because it is the only sentence that accounts for the gravity of the conduct involved, its

consequences, the damage it caused not only to the trial of the Main Case, but to its outcome, which I will come to momentarily, as well as the integrity of the proceedings and the processes before this institution.

It is the only one that accounts for the undermining of public trust that this Court depends on and needs in order to discharge its crucial mandate.

And there is one more thing, which I think answers a question of my colleague. At the initial sentencing hearing, December of 2016, a year and a half ago, we said the crimes of which the Chamber has convicted Bemba, Kilolo, Mangenda, Babala and Arido on 19 October 2016 put at risk the Court's mandate. Simply put, to do justice, justice in respect of the crimes of the most serious concern to the international community, justice in respect of the victims of those crimes, more than 5,000 of them before this Court of last resort, justice in respect of ensuring the fairness of the proceedings enshrined in the statutory framework concerning the parties and participants before this Court and, of course, justice to the Court itself, to protect its integrity, its credibility, its standing, and its authority, so that it can actually fulfil its mandate, now and in the long term. That's what we said in December of 2016.

We also said this: While one might suggest that the most immediate harm to the Court was averted in Bemba's Main Case trial because the ultimate goal of the common plan to unlawfully obtain his acquittal did not materialise, recall this: The Main Case is not final, and beyond the Main Case, only time will tell what long-term damage to the Court there may be. That's what we said a year and a half ago, long before the appeals judgment was issued.

And yet here we are, those risks have come to fruition.

The Appeals Chamber's remand of this matter for a new sentencing determination is a reprieve for this Court. Importantly, it is an opportunity for this Chamber to set

things right once and for all.

As we all know, a different composition of the Appeals Chamber recently acquitted Mr Bemba of his convictions for crimes against humanity and war crimes entered by Trial Chamber III in March of 2016.

And while there were a number of reasons for this, including what appears to have been the application of an unprecedented standard of appellate review regarding the factual determinations of a Trial Chamber before this Court, or any other international court or ad hoc tribunal, the defendants' implementation of the common criminal plan to illicitly interfere with defence witnesses in the Main Case in order to ensure that the witnesses would provide evidence in favour of Mr Bemba, this is the Chamber's finding of the common plan at paragraph 103 of the trial judgment, those actions contributed, at least in discernible part, to the Appeals Chamber's analysis of the relevant fact and its decision to acquit.

In short, the plan that was set in motion at trial before Trial Chamber III ultimately succeeded just a couple of weeks ago.

In the words of Mr Kilolo in a recent interview that he gave to the Congo Independent on 11 July 2018 that's on the Internet, he was asked the question by the interviewer: "The first question is simple, how did you feel when you heard Judge Christine van den Wyngaert of the Appeals Chamber pronounce the word 'acquittal'? What feeling did you experience?"

His response, (Interpretation) "The feeling of a duty accomplished."

(Speaks English) Indeed.

There is no doubt that the Appeals Chamber was presented with a corrupted trial record. That's clear. And it's clear based on the findings of this Chamber.

The mere fact that the Chamber found that the witnesses lied even on matters going

to the non-merits of the case is in the trial record of the Main Case, and those are lies, intentional ones, elicited, solicited and perpetrated by witnesses that were complicit with the plan and at the behest of the Defence.

The extent of that corruption is not known to this day, and it could not have been known to either the Appeals Chamber or any other Chamber confronted with that record.

The Appeals Chamber analysis was necessarily dependent on the corrupted trial record because Appeals Chamber analyses are dependent on the trial record, it had to be, and importantly, as the defendants intended it to be.

We assert in our detailed notice, which I incorporate by reference as the Chamber has also referred to earlier this morning, that the Appeals Chamber tacitly accepted the false narratives of defence witnesses in its analysis of the Trial Chamber III's assessment of evidence before it, witnesses who this Chamber determined beyond a reasonable doubt had been corruptly influenced. And it appears that there were others.

At the end of the day, the result of the appeal achieved the very objective of the common criminal plan in which these defendants participated, which was Bemba's acquittal.

And it would seem that anyone knowing the pervasive extent of the scheme to corruptly influence defence witnesses, nearly half of whom made up the charges on which the defendants were convicted in this case, even the 14 out of 34 is quite a substantial number. Any reasonable person would and rightly should wonder whether there is a connection between the defendant's criminal conduct in corruptly influencing numerous defence witnesses to unlawfully achieve Mr Bemba's acquittal, and that result having now come to pass. More than wonder, we say that there is.

The fact that there is even a reasonable uncertainty, by the way, about whether the testimony in the record before the Appeals Chamber was that of a witness or that of Mr Kilolo, is evidence of the concrete damage done to the integrity of the Court, its processes, its proceedings and its credibility, the public confidence that should inhere to it.

That there should be even a reservation or concern about a judgment issued by this Court in the Main Case is but the direct product of the defendants' course of criminal conduct. The defendants polluted the trial record deliberately.

It is a factor that this Chamber cannot ignore, should not ignore and, rather, must consider in the determination of the appropriate sentence under Rule 145.

Still, and more precisely, the Appeals Chamber made three important findings which are at the heart of its decision to acquit Mr Bemba, and we set them out in our notice. The first is that the Trial Chamber failed to pay sufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability as a remote commander to take the necessary and reasonable measures. In fact, as your Honours are probably aware, the narrative concerning the difficulties of Mr Bemba purportedly as a remote commander is found in the corrupted evidence of D-54, D-15, D-13 and D-25, all of whom are very familiar to this Chamber and all of whom were proven beyond a reasonable doubt to have been corruptly influenced by the defendants.

In the case of D-54 and D-15, you have before you the irrefutable proof in the form of intercepted communications wherein Mr Kilolo is literally feeding them the very testimony that you now see reflected in the Appeals Chamber's assessment of the evidentiary analysis that was done by the Trial Chamber, an assessment which ultimately affected the outcome of the case.

Second, the Trial Chamber failed to address Mr Bemba's statement that he wrote to the CAR prime minister requesting an international commission of inquiry to be set up, or the testimony of D-48, which attested to the existence and content of this letter. As set out in our notice, D-48, who is cited by the Appeals Chamber specifically, one of the few, one of the few witnesses that is cited in relation to these findings, he was not a witness whose corrupt influencing was charged before this Chamber. I believe that's what Ms Taylor was alluding to.

But you have before you the telephone records which show D-48's numerous contacts with Mr Kilolo in advance of his testimony in the Main Case on 6 November 2012. Those records were recognised as formally submitted before the Chamber on 24 September 2015. There are three of them, CAR-OTP-0072-0081, CAR-OTP-0072-0082, both disclosed on 13 December 2013, and CAR-OTP-0072-0391, which was formally submitted, as I said, on 24 September 2015 and disclosed on 31 January 2014 in this case.

Those CDRs demonstrate that D-48 withheld the fact of his multiple contacts and conversations with the Defence prior to his testimony in the Main Case, which included a phone call which lasted for over an hour with Mr Kilolo only days before he took the witness stand, and having been asked about that, asked about his conversations with the Defence, never divulged it. His tainting fell within the modus operandi of the common plan as you found it, and determined beyond a reasonable doubt that the defendants in this case participated.

His testimony was in the record before the Appeals Chamber, it's in the trial record just like the other 14. But the records which show that he was not truthful about his conversations with the Defence were not in the record.

And not surprisingly, he was not truthful in exactly the same manner as nearly every

witness that this Chamber determined had been corruptly influenced by the defendants pursuant to the common plan.

The Appeals Chamber could not have known about the CDRs. The Appeals Chamber could not have known about the truth or falsity of his response when asked about his conversations with the Defence and he failed to reveal those conversations. They couldn't have known because it wasn't part of the trial record.

But you know that.

The narrative that was provided by D-48 was tacitly accepted by the Appeals Chamber, however, and it informed the decision to acquit.

Third, that the Trial Chamber erred in attributing any limitations it found in the mandate, execution and/or the results of the measures that Mr Bemba undertook to him.

This narrative is found in the tainted and corrupted evidence of D-48 as well as D-54. This Chamber has before it evidence of their false testimony in the Main Case. And you have D-48 now before you because you have the records and his testimony is public, so you can see for yourself that the answer to the question that was put to him does not correspond to the evidence that you have in front of you.

While the Appeals Chamber did not identify the source of the particular narrative which formed the basis of its criticism of the Trial Chamber's analysis, that the limitations in the mandate, execution or results of the measures taken by Mr Bemba were beyond him to begin with. What is clear is that the evidence provided by these tainted and corrupted witnesses on the Mondonga inquiry and the Zongo commission resided in the trial record and remained there to be relied on by a Chamber of this Court, whether it be the Trial Chamber or the Appeals Chamber. It was there and that's what it was there for.

The acquittal obtained at the appellate level was to a discernible extent affected by the criminal conduct of Messrs Bemba, Kilolo and Mangenda in the implementation of the scheme corruptly to influence Defence witnesses, irreparably damaging the trial record on which the Appeals Chamber necessarily and foreseeably relied. There is no real question about that. And the Chamber must consider it as a consequence of the defendants' conduct. The Chamber has to take into consideration the consequences of the defendants' conduct.

PRESIDING JUDGE SCHMITT: Mr Vanderpuye, allow me at this moment, because I think it's exactly at this point that we should clarify something and because of that, I make this intervention now.

Do we agree that the Appeals Chamber in the Main Case was aware of the fact that the findings of TC VII were final?

MR VANDERPUYE: [10:51:34] Yes.

PRESIDING JUDGE SCHMITT: Do we agree on that?

MR VANDERPUYE: [10:51:36] We agree on that.

PRESIDING JUDGE SCHMITT: Okay. So could you then please clarify for the Chamber, does the OTP submit before this Chamber that the Appeals Chamber majority in the Main Case relied on evidence that they knew was tainted when they acquitted Mr Bemba?

MR VANDERPUYE: [10:51:58] That's a very good question and a difficult one to answer, because at the end of the day, we're not privy to what the Appeals Chamber relied on.

What I do know and what I can say is that the entirety of the trial record was before the Appeals Chamber, and what I can say is that even if the Appeals Chamber had some inkling of which witnesses had been corruptly influenced, based on the finality

of Trial Chamber VII's judgment, and they used that as the measure to determine which witnesses were and which witnesses had not been tampered, then I can assure you they would have been wrong, because even within the judgment of this Trial Chamber, findings were made which demonstrated the corrupt influence of witnesses that weren't charged before this -- the incidents that weren't charged before this Trial Chamber.

D-7 is one, D-9 is another, D-19 is yet another. I can't recall all of the other witnesses that were referred to by D-2 and D-3, which this Chamber credited, but we do know, we do know that the evidence that they provided before this Chamber and which this Chamber credited established that the witnesses that had been corrupted in the Main Case far exceeded the 14 that were charged, and that is the position that the Prosecution has maintained in this case since day one.

So it is entirely possible that if the Appeals Chamber relied on the finality of the convictions and the basis of the convictions in your judgment and in the Appeals Chamber's affirmation of that judgment, that they would have been wrong in the Bemba Main Case to discard or disregard 14 witnesses.

PRESIDING JUDGE SCHMITT: This is of course very hypothetical, frankly speaking, but nevertheless I would appreciate it if you move to the next point perhaps. I think enough has been said about that now.

MR VANDERPUYE: [10:54:14] Thank you, Mr President.

I just wanted to close it out, so to speak.

PRESIDING JUDGE SCHMITT: Please, shortly.

MR VANDERPUYE: [10:54:24] Just this section, by the way. What I wanted to say is, and I think it actually is responsive to the question that you just asked, is that we can't really underestimate the degree of corrosion in the record that was before the

Appeals Chamber and that the Appeals Chamber inevitably had to confront, and it was constrained to analyse the facts from.

Mr Bemba at some point during these processes withdrew his reliance on 14 witnesses. That was about a year or so after he had been charged in this case. That didn't give a good indication of the witnesses that had been corrupted because you know through your own findings that it wasn't limited to 14.

It didn't preclude the consideration of the corrupt witnesses by any Chamber. The record was never expunged with respect to the 14 witnesses or any other.

The Bemba Defence did not concede the witnesses' corrupt influencing nor did they withdraw their evidence from the record of the case.

And as it turns out, we know, as you do, 14 were not the only ones.

The Prosecution has repeatedly stated this, as I've said, and the full extent of the Defence witnesses corruptly influenced in this case, no one actually knows. They do, the defendants know, but we don't know and no Chamber of this Court knows.

That is the harm. That is the danger. And that's one of the consequences of their conduct.

I'd like to come to some of the errors that were identified by the Appeals Chamber in respect of this Trial Chamber's judgment, if I may. I see you may have some questions though.

PRESIDING JUDGE SCHMITT: No, no, no. I appreciated that you move to these points now.

MR VANDERPUYE: [10:56:47] Okay. I confused the expression. All right.

The first is that the Chamber, the Appeals Chamber found an error with respect to this Trial Chamber's assessment of the gravity of the crimes. And I won't belabour the points that are made in our previous submissions. What they determined was

that there was an error in the Chamber's assessment of false testimony which did not go to the merits of the case as somehow inherently less grave than false testimony which does.

But I think it still bears repeating that no such generalized distinction can be drawn under the statutory framework. And to the extent that the Chamber determined that witnesses testified falsely in the Main Case, the gravity of the defendants' conduct cannot be diminished on a finding that the false testimony goes to non-merits of the case, especially absent a fact-specific determination or assessment by the Chamber.

However, in this case the very purpose of the false evidence that was proffered by the corruptly influenced witnesses was clearly to ensure that the lies that they told and the illicit coaching that they received in respect of the substantive matters that they testified to in the case would go undetected. They would go undetected by the Chamber and they would reside in the trial record as such to be relied on.

The very purpose of the witnesses lying about their contacts with the Defence, their conversations, their meetings, their calls, the monies and other things of value that they received, the bribes that they received, the inducements that they received and were presented to them, the whole purpose of it was so that their credibility could not be assailed, their evidence could not be fairly assessed regarding the substantive evidence that they provided. The purpose of the non-merits lies was to ensure that those lies which went to the substantive issues in the Main Case could be more effectively delivered and influence a Chamber.

It was so that the Chamber would believe the witness. It was so that the testimony would appear spontaneous. It was so that it would be credited by the Chamber. It was so that the objectives of the common plan could be achieved without discovery.

To diminish the gravity of the defendants' conduct on this basis is not only untenable,

but if anything, in the circumstances of this case, it's even worse. The lies told on the non-merits of the Main Case concealed the corrupt influence of the witnesses on whom Trial Chamber III was made to depend, on whom the Appeals Chamber was made to depend. It allowed the insidious plan to corrupt witnesses to survive and thrive, and it made it virtually undetectable.

The corruption of witnesses who testified in Bemba's favour on core matters concerning his responsibility: That is to his effective control, the work of the commissions of inquiry, the nature and extent of investigations ostensibly conducted regarding the MLC crimes, his knowledge of those crimes committed by MLC forces, that's what it was about.

Don't forget the example of D-15's intercepted communications wherein Mr Kilolo tells him explicitly that his testimony needs to diminish Mr Bemba's knowledge. He says (Interpretation) "The idea therefore was to reduce the level of knowledge and that was my first concern."

(Speaks English) That's what he's telling the witness who was about to get on the witness stand and testify to exactly that. To advance arguments to show that it was impossible for Mr Bemba to exercise command and control over MLC forces operating in the CAR, that sounds familiar.

And he's telling the witness in this intercepted conversation that there are many arguments which show that it was impossible. That's what he's telling the witness. That there was no evidence of MLC forces commission of crimes.

(Interpretation) "There was no specific information. It was mere rumours".

(Speaks English) That's what he's telling the witness. All of these facts -- if all of these facts were true, why in the world would he go to these lengths? Why in the world would they go and coach 14 witnesses that you found that he had done?

And it's not just D-15, but it's every other witness that you considered. The non-merits lies do not give rise to any mitigating consideration in terms of the gravity of the conduct because rather they demonstrate the depth and the degree of planning, design, preparation and calculation that was done by the defendants to best ensure the success of their common criminal plan.

Preparing a witness on how best to avoid detection in giving evidence before a Chamber in a serious case where they have been illicitly coached on matters that go to the merits of that case by withholding and or lying about information which if known to the Chamber, and that's important, if it was known to the Chamber, it would justify its utter rejection of that evidence and would inevitably reveal the criminal plan. That cannot possibly entitle a defendant to some weight in mitigation of sentence. The analysis is exactly the opposite. It warrants an even greater sanction because it evidences the deliberateness of the criminal plan ever more and the surreptitious manner in which it was carried out. In Kilolo and Mangenda's case, they're both lawyers, your Honours. They knew exactly what they were doing and what it was about.

The second error, again, I won't belabour the points that we've made in our previous submissions on the Appeals Chamber's determination of error regarding the Trial Chamber having distinguished between principal and accessorial modes of liability in terms of their impact on its sentencing determinations, specifically that accessorial modes of liability are effectively less serious than those which arise under the liability form as a principal.

The error in this case principally affects the Chamber's determination of the appropriate sentences for Mr Bemba and Mr Kilolo for their Article 70(1)(a) convictions pursuant to 25(3)(b), soliciting and inducing.

But obviously the principle that was pronounced by the Appeals Chamber affects all of the Chamber's sentencing determinations which are predicated on this erroneous distinction, including the sentence it imposed on Article 25(3)(c) concerning Mr Mangenda's convictions for violations of Article 70(1)(a).

The fact that as a matter of law there is no automatic differential impact on the determination of sentence which arises from whether a mode of liability is as a principal or as an accessory means that the mitigation that was applied by the Chamber dissolves and the imposition of a higher sentence is warranted, absent any specific, any fact-specific determination of all of the variable circumstances on a case-by-case basis and correspondingly reasoned basis for any such distinction.

Here, as is the case concerning the 70(1)(b) offences which I'll come to also, the Chamber's assessment of the relevant facts, gravity and the underlying conduct for the offences for all three Article 70 offences that it found were essentially the same.

The degree of the defendants' culpability should not therefore be diminished in terms of the Chamber's assessment of sentence on the basis of the mode of liability.

Indeed, insofar as the assessment of the gravity of the defendants' culpable conduct concerns both the acts comprising the crimes themselves and those comprising the modes of liability, there is no basis in this case for mitigating the determination of sentence in respect of the accessorial modes of liability found for any given crime.

The three defendants before you are the principal participants in a common criminal plan which involved the systematic and pervasive corruption of defence witnesses in a trial of crimes of the most serious concern to the international community.

This is no small fare. It was a case, as you know, with 5,000 victims, participants. More, I think. The Chamber should not be in the business of splitting hairs in these circumstances. Not only were they culpable participants in the common plan and

essentially contributed to it, it revolved around them, these three, and their fundamental culpability and responsibility for the crimes committed pursuant to that common plan and related to that common plan that were found in this case is crystal clear. That culpability requires not less than the five years that we have requested. We'll talk about the impact of the Chamber, of the Appeal Chamber's reversal of the convictions entered under Article 70(1)(b) for the defendants.

The Appeals Chamber's dismissal of the convictions imposed under Article 70(1)(b) do not militate against the imposition of the maximum sentence for the crimes under Article 70(1)(a) and Article 70(1)(c).

The gravity of the numerous crimes for which the defendants were convicted is not changed at all by the dismissal of their convictions under Article 70(1)(b).

Simply put, because the underlying conduct which goes to the gravity of Article 70(1)(b) crimes of which all three were convicted, because that is captured in the conduct of the very same -- or, rather, in the crimes, based on the very same conduct under Article 70(1)(c), the fact that they could not be convicted of presenting those witnesses because the Appeals Chamber found that presenting evidence related to documentary evidence, that fact does not at all mitigate the sentence or their culpability under the remaining modes of -- under the remaining charges, rather.

Fundamentally, that is what the case is about and always was about, is their fundamental and incessant determination to undermine the proceedings before this Court.

However one wishes to legally characterise their conduct, the fact is that in the circumstances of this case their individual culpability for the crimes perpetrated pursuant to the common plan is immutable. It doesn't matter what they're convicted of at the end of the day under Article 70.

A simple act of bribing a witness can comprise both a solicitation or inducement of false testimony, and as a means of persuading the witness, for example, and at the same time comprise their corrupt influencing. It's the same thing. It's a difference -- or a distinction, rather, without a difference.

The Chamber itself recognised this type of overlap in its findings, and that's at paragraphs 894 through 933 of the judgment.

And the Appeals Chamber similarly recognised it in this case.

The bottom line is this, your Honours, that no matter how you turn this case around, no matter how -- what angle it's looked at from, and no matter how the defendant's conduct is characterised or recharacterised and characterised again, the gravity of the crimes and the defendants' conduct do not depend on their legal characterisation.

The gravity assessment for which a sentence is determined and imposed inheres to the totality of the criminal conduct of the defendant.

Make no mistake, the defendants before you corruptly influenced the 14 witnesses which were the subject of the charges in this case. You found that to be so beyond a reasonable doubt. And that, as I said, was nearly half of all of the Defence witnesses presented in the Main Case. And like I said, and as you know, there were more.

That's not just proved in this case, it's just a matter of common sense.

They participated in and contributed to a common plan that was designed to achieve Mr Bemba's acquittal through criminal means, and they did it.

The determination of the appropriate sentence cannot change on the basis that they were erroneously convicted of a crime that they were otherwise properly convicted of on the same basis under a different characterisation.

Again, a contrary conclusion would be completely untenable.

In respect of the Defence submissions on sentence, in a nutshell, Mr Kilolo's request is

that the Chamber re-fashion his sentence along similar lines to Mr Mangenda's request.

Mr Mangenda requested a delayed sentence. Functionally, this is pretty much the same as what was turned around by the Appeals Chamber to begin with, because it violates the Appeals Chamber's determination that a Chamber is bound to apply the statutory framework, cannot depart from it, and the statutory framework does not provide for the requested sentences.

The Chamber, this Chamber is constrained to sentence a convicted person as provided for under the statute only, and in this case a term of imprisonment, a fine, or both, is what is provided. So it's not an option. It's not an option not only because it would be ultra vires, but because it would not even approximate the scope of their culpability for the consequences of their conduct. The culpability and conduct, I might add, that none of these defendants has ever expressed any genuine remorse for. None of these defendants has ever apologised for their conduct, let alone acknowledged it. None has apologised to the victims who were before this Court of last resort to seek justice, the justice that they intentionally interfered with. None of them has issued a statement. None of them has provided information to the Court so that we don't actually have to debate the question of which witnesses were relied on and which witnesses were corrupted in the record of the Main Case.

We don't know that because nobody, nobody will tell us that. They haven't told us that. They haven't apologised for their conduct. They haven't acknowledged it. None of that is before the Chamber.

In the video -- or, rather, the statement that I referred to that Mr Kilolo made, I believe it was on 11 June, I referred to it earlier, during his interview he said the Prosecutor should resign. That, I would submit, does not show someone who has

acknowledged the conduct of which he has been convicted by this Chamber. It doesn't show a shred of remorse for the behaviour, criminal behaviour, I might add, that has been found beyond a reasonable doubt, not just by this Trial Chamber, but also by the Appeals Chamber.

This Court should take that into consideration as well in determining what the appropriate sentence is.

You're going to hear from the Defence, I am certain, regarding their individual circumstances, their personal circumstances, home, family, the hardships that they felt, the accomplishments that they have made, their contributions to the community, all to encourage the Court to mitigate the sentences that they should receive in this case. And I'm not going to get into that.

But what I will ask you to do is that when you consider and you listen to the arguments concerning them, that you weigh them against the circumstances of the victims of the crimes, which everyone knows were the subject of the Main Case.

There are victims of the crimes in that case, no question about that.

They were before this Court as a court of last resort to seek justice. They didn't get it.

The crimes that they were victims of were atrocities. They were victims of crimes committed by the MLC. The justice that they were entitled to and that this Chamber -- this Court, rather, should have been able to provide them was compromised by the acts of these defendants.

When you've done that, I would ask that you ask yourself, what are the circumstances that the victims find themselves in now? And ask yourself, what is this case worth at the end of the day?

Your Honours, when this Chamber rendered its judgment of conviction in October 2016, it said importantly, quote:

"it has become apparent in the short time span of the Court's existence that preventing offences against the administration of justice is of the utmost importance to the functioning of the International Criminal Court. Such offences have this significance because criminal interference with witnesses may impede the discovery of the truth in cases involving genocide, crimes against humanity and war crimes. They have this significance because they may impede justice to victims of the most atrocious crimes. And ultimately they may impede the Court's ability to fulfil its mandate."

The words were powerful and they resonated. But at the end of the day, they're just words. Their utterance alone doesn't give them meaning. That comes with what the Chamber, the Court, the institution actually does about these crimes.

The sentence that this Chamber imposes will determine what meaning those very powerful and resonant words and wise words will have, if any. For now, that rests with the Chamber.

As I said, the Appeals Chamber's remand of this case for a new sentencing determination is a reprieve, and it's really an opportunity for this Chamber to do what is necessary and to do what is right, and that is to impose a maximum sentence of five years and a substantial fine for all three of the defendants. And we acknowledge that that's a heavy burden and it's a responsibility that, believe me, I don't envy, but it's beyond doubt the right decision in this case, in these circumstances.

That concludes my submissions, Mr President. If you have any questions regarding them, I'll be more than happy to attend to that.

PRESIDING JUDGE SCHMITT: No. Thank you very much. I don't have any questions at the moment.

Then we could start with the Defence teams.

Which sequence, have you already conferred with each other?

And it depends a little bit also on the time that you would need. So I would say if one of the Defence teams would be able to finish in 45 minutes?

MR KARNAVAS: [11:20:05] I could, your Honour. I can go, I can go first.

PRESIDING JUDGE SCHMITT: Then if the other two, Mr Gosnell and Ms Taylor, they would not object I think to you going first. Thank you. You have the floor then, Mr Karnavas.

MR KARNAVAS: [11:20:22] Good morning again, Mr President, and your Honours. On my first appearance in Federal Court in the United States, I had an old judge tell me "I don't know if your client is paying you for one hour, three hours, five hours, I'm only going to listen to the first 15 minutes. So tell me what I need to hear in 15 minutes and then keep talking so you can bill your hour, your client." So I will speak for 15 minutes or so.

PRESIDING JUDGE SCHMITT: I would have even been more generous, but please go forward.

MR KARNAVAS: [11:21:08] You already sat through the trial, you heard all the evidence, and I have to believe that, having read the judgment, the sentencing decision, that you carefully considered all of the facts. So nothing that you've heard today is news.

I will address the issue of the acquittal at the end. But I want to focus on why we are here today.

Now, I have looked at the appeal judgment. I studied it. And I tried to figure out what was it exactly that caused them to remand this case back, remand it to you folks to resentence.

And it seems to me that there might have been some misapprehension on the part of

the Appeals Chamber on two matters, perhaps because it wasn't quite clear in the sentencing decision, that you may not have provided sufficient reasoning. And they jumped to the conclusion, if I could say that with all due respect to the Appeals Chamber, that you found as a matter of law that on the two errors, one dealing with gravity and one dealing with culpability, that there is some sort of a hierarchy. And they assumed, I think that was the word that they used, that they assumed that you applied this principle without doing an individualised factual analysis, which in my opinion, granted, I'm not a judge, so I wouldn't presume to know how they think, but it seems to me from reading the sentencing decision that you actually went through the analysis.

Be that as it may, we are very grateful to the Appeals Chamber for clarifying this legal issue. And it seems to me what they're inviting you to do is to provide further reasoning as to how is it that you reached the result that you reached. That's my interpretation. That's all I'm going to say on those two issues.

As far as the reversal of the 14 counts, the Prosecution would have you believe that, well, it doesn't really matter because it's basically the same conduct. So what? However, when I read your sentencing decision, it's very clear that you considered it. And having considered it, obviously, you must have given it some weight.

Now, the fact that those 14 counts are no longer with you, it does merit some reduction, or at least a consideration.

As far as the one factual error that was found, and it was found to be harmless, and that was the time frame, you have indicated that it was approximately close to two years versus they found 13 months where the -- the period where the offences occurred. The Prosecution correctly says, well, you know, it doesn't really make a difference because, in that instance, both the Trial Chamber and the Appeal Chamber

effectively indicated that it was a long period, it was a substantial period. And I can understand that.

But that goes, your Honour, that's a harmless error concerning not sentencing, but concerning something else. For sentencing purposes, you took into consideration, you considered this as a factor in determining the sentence, the period. It turns out that the period is much less.

So while it is lengthy, lengthy is an abstract notion. It's like asking how long is a string. It all depends. And I suggest that you didn't consider the abstract notion of lengthy, you considered the concrete fact of 20, close to 24 months versus 13 months. And therefore, now that you have a reduction in time, it seems that it warrants at least consideration in a reduction in whatever sentence you intend to impose.

Now I want to talk about the ultra vires, and here is where I really want to focus my attention to, because I think this is the -- and I think the Appeals Chamber, by the way, got it wrong. With all due respect, I think that it is within a trial Judge's inherent judicial authority, especially when it comes to sentencing, they had wide discretion. But be that as it may, its ultra vires.

But let me focus my attention to you on what it is that you found and why we maintain the 11 months is the period of actual incarceration that should be imposed here today irrespective of the errors that the Appeals Chamber found.

When you fashioned the decision, when you are deliberating, and I wasn't there, but I assume that in your mind as judges you already had considered the fact that you had the discretionary authority to suspend part of the sentence. It's quite clear that you broke it down, 12 months here, 24 months there. You shorten it to 30 months.

Then you decided, okay, based on this, based on the fact that we have this inherent authority, how much time do we actually want this individual, Mr Kilolo, to be in

prison? And the answer was 11 months.

There was never, ever, ever any intention on your part for him to serve the other 19 months. How do I know that? Because no judge, at least none that I'm aware of, actually wants to see an accused person who has a suspended sentence be back to serve it either, you know, on a part-time basis or all at once.

The purpose for putting in a suspended part of the sentence is twofold: One, get your act together. Stay clean. Get a job. Stay out of trouble. The other one is protection for society, because we want, during this period, we want a sword of Damocles hanging over this person's head to make sure that he doesn't re-offend or she doesn't re-offend.

So I have to believe that when you figured out that it was 30 months, the 19 to be suspended, what you had in mind was the actual period of incarceration should only be 11 months and no more. And therefore -- and I'm happy to hear that the Prosecution is at least not inviting you, teasing you to go with 30 months, because obviously you at least found that 30 months was warranted as a sentence. That 30-month period was with the understanding that you had the inherent power to suspend 19 months of which you never intended Mr Kilolo to serve. Why? Because you had already determined by the time that the judgment was rendered that he already re-entered society, that he was, he was abiding by all of the conditions. And dare I say, that by placing a period of probation over his head, for all intents and purposes, even though we now know it's ultra vires, he was effectively under probation. And he was at least abiding by all of the conditions of the probation. And I think at the very minimum, if it's not a mitigating factor, that is, the additional time that he has spent without re-offending, trying to get back on his feet, I think that has to be considered. That has to be considered because what is the sense, what is

the sense of putting somebody, warehousing somebody back in prison for the amount of time that the Prosecution is asking you? They're asking you for an additional 49 months. What will that do to an individual such as Mr Kilolo? Bankrupt him? You know, who knows what his family situation will be. How will he be able to get back on his feet? And how does it justify, where, where does he pick up his life from there?

But aside from that, the Prosecution tells us, be unsentimental. And judges have to be unsentimental to a certain extent. You have to be dispassionate. I understand that. And my heart goes out to the victims. Trust me. And I'm going to get to that.

However, could you have been so wrong, so wrong to have gotten between 11 months and an additional 49 months? I cannot believe that. When I look at the very attentive nature to all of the facts that you paid in both what I would consider one of the best judgments I've ever read as far as factual analysis - I'm not just saying this, I've said this privately - but also in your sentencing decision, you were very, very concrete in how you went through about making that determination. How could you have been so wrong that you were off by 49 months?

Now let's talk about the victims and let's talk a little bit about this acquittal of Mr Bemba. I don't know Mr Bemba. I never met Mr Bemba. I know the team a little bit. But I've never spoken to them about the case. I have read the appeal. I've read it rather thoroughly, in fact.

And here is what my impression is: The Prosecution failed, and they failed miserably. They didn't properly investigate the case. They didn't properly charge the case. They went to the prom with one date and then they wanted to come out with another. They charge in one way in a sense and then, at the end of the trial,

they want to argue it in another way.

And of course, on appeal, you have three judges who are highly experienced, who are not biased, one of whom, as I understand it, I could be wrong, but I think one of them also was on the Appeals Chamber that rendered for this particular case. They looked at all of the evidence.

Now, they say, as Madam Bensouda was quick to go out and publicly proclaim that there was a misapplication of the standard of review. That's bologna. That's not how I read it. I read it very carefully. They applied the standard. What they did was they did their judicial duty and go beyond the mere surface when they thought that the Trial Chamber had ignored relevant defence evidence, particularly when related to circumstantial evidence when inferences were being drawn. And they had a judicial duty to look into it.

Now the Prosecution says all of that was false, was false, was false. Now is not the time to litigate that case. Now is not the time to litigate that case. They had their chance. And if they -- and once, as I understand it, because I wasn't around that period, but as I understand it, at some point during that trial the Prosecution understood and knew and was monitoring the situation. It was at that point in time that they could have said something.

But the way I look at it and the way I've understood the appeal judgment having read it, the evidence, much of the evidence that was relied on comes through cross-examination. And so now it's more than just sour grapes. Now the Prosecution wants to whitewash and wants to scapegoat by now claiming that those 5,000 victims did not get their day in court because of these individuals over here, rather than say -- rather than accept responsibility.

And I think, your Honours, I understand, if I was the Prosecutor I would probably do

the same, I would probably submit to my devilish side and say, okay, why not go for this. But I think this is not the time. I think you need to stand fast. We're here for this case, very specific purpose. It was remanded with a very narrow purpose. This is not the time to relitigate. And while I appreciate the eloquence of my colleague, I submit that the only reasonable sentence of incarceration in total would be 11 months, the time that Mr Kilolo served, and allow the fine to stand as is. Thank you very much.

PRESIDING JUDGE SCHMITT: [11:35:21] Thank you very much. That was indeed short and sharp, let me put it this way.

So the question would be, I would like to inquire first with Ms Taylor and then with Mr Gosnell, do you have already an idea how long it will take you, and then we decide when we have a break and how long we will have a break.

MS TAYLOR: [11:35:40] Thank you, Mr President. I believe that my submissions will be approximately an hour and 15 minutes, but I'm happy to commence before the break. Thank you.

PRESIDING JUDGE SCHMITT: [11:35:52] Mr Gosnell?

MR GOSNELL: [11:35:54] Mr President, I believe I could conclude my submissions in under 25 minutes.

PRESIDING JUDGE SCHMITT: [11:35:59] Yes. Then I would simply suggest, if you don't object to that, Ms Taylor, that Mr Gosnell has now the floor and then after the intervention of Mr Gosnell, we will have the break.

MR GOSNELL: [11:36:12] Mr President, I would request to proceed on the order in the indictment, namely, third. And the reason for that, Mr President, is not to cause scheduling problems, but simply I believe that Ms Taylor's submissions may be covering some of the matters that I would or would not address depending on how

she addresses them.

PRESIDING JUDGE SCHMITT: [11:36:33] That is conceded. Then we start with Ms Taylor, perhaps half an hour. You can tell us at a point of your submissions when you think we can have a break. So please, you have the floor.

MS TAYLOR: [11:36:57] Thank you very much, Mr President.

We are here today because the Appeals Chamber ordered the Trial Chamber to determine a new sentence in light of several errors, including and importantly an error that led to a third of the charges against Mr Bemba being dismissed.

But from our perspective and most importantly, we're here today because after these proceedings commenced, the Appeals Chamber issued a judgment acquitting Mr Bemba of all charges in the Main Case.

As we've discussed, this acquittal is final and it has clear consequences for the sentence that the Chamber must now impose in this case, in particular, as concerns the type of punishment that should be imposed on someone who has already served twice the maximum length of detention for an offence of this kind.

Now, in our respectful view, none of the errors identified by the Appeals Chamber justify an increase in punishment, particularly when they are set off against his acquittal under Article 70(1)(b).

But the fact that Mr Bemba's unspent detention has gone from zero days to 10 years overnight, justifies a significant rethink and readjustment of the sentence and punishment that should be imposed at this juncture.

Now, at first glance it might appear that the best solution will be to declare a sentence that's approximate to some kind of time served and drop the fine. For example, if the ICTY Hartmann yardstick is used, that is 1,000 euros equals one day in detention, it's clear that the additional time in custody he has served under the Article 70

warrant alone equates to a fine of 1.6 million euros already.

But this sentence, this type of easy solution would be fundamentally unfair, it would be an outcome determined by extraneous circumstances rather than the degree of his culpability. It would not be a just outcome for either Mr Bemba or the victims in the Main Case.

Rather, the amount of time that he's actually served in jail has meant that the scales of justice have tipped and they have tipped towards the objectives of rehabilitation rather than vengeance.

As a result, the Chamber now has a duty to craft an outcome that doesn't entail any additional punishment beyond restorative justice, an outcome that will allow Mr Bemba, his family and the victims in the Main Case to rebuild their lives and those of others.

In our respectful view, that outcome will be to order Mr Bemba to pay a reasonable fine to the Trust Fund for Victims, which can be allocated to the victims in the Main Case and to discharge the case against him.

Now, in terms of the structure of my submissions I will address firstly, the degree of his participation under Article 70(1)(a); secondly, the degree of harm caused by the specific false testimony underpinning the conviction; thirdly, the impact of his acquittal on the length of his detention in the Article 70 case, that is under the Article 70 arrest warrant; and fourthly, the appropriate sentence that should now be imposed in light of these factors, in particular the length of his detention.

And I believe I should be able to finish the first topic before the break.

Now, in terms of this error, this issue of the degree of participation, we submit that it's correct that it is necessary to impose a lesser punishment in connection with Mr Bemba's conviction under solicitation.

Now, this distinction between co-perpetration and solicitation and the type of punishment that was imposed on him necessarily follows from the type of offence that we're dealing with here and the specific degree of his participation in that offence.

Now, this aspect was canvassed in our written submissions and this first issue refers to the fact that false testimony is, by its nature, it's driven by the witness. It is the witness who takes the oath. It is the witness who has control over the answers that they give and it is the witness who bears the primary responsibility for any lies that they have told to the Court.

And this witness-centric nature of Article 70(1)(a) stands in contrast to corruption where the focus falls on the conduct of the person who is driving the corruption, and that justifies the difference in approach adopted by this Chamber. And this difference in approach is also consistent with the degree of his participation.

Now, the Prosecution has complained that the Chamber's finding in this regard might lack elaboration. But perhaps that lack of elaboration stems in turn from the Chamber's approach to the admissibility of evidence in this case and that the findings in that section refer to the evidence or the whole evidence. So that's a symptom of the legal approach and not the validity of the Chamber's findings.

In any case, the restricted nature of his participation is consistent with the fact that he was convicted for solicitation and not for inducement and not for co-perpetration.

In the Lubanga case, the Appeals Chamber found, at paragraph 468 on the judgment on the merits, that "...the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question."

This means that this sentence can only take into consideration the actual contribution underpinning the conviction itself.

A person who has been charged, a person who has been convicted for solicitation can't be sentenced as a co-perpetrator. You simply can't use a lower threshold to secure their conviction and then rely upon a higher threshold for the purposes of sentencing.

Now, if a higher threshold was going to apply to his degree of participation, we should have had the benefit of that at trial. We should have been able to defend ourselves in relation to that against the conviction and not now at the very end of the road.

And the contributions of a person who solicits an offence are less than the person who as a co-perpetrator makes an essential contribution to that offence.

And if I may have the floor to show a document.

THE COURT OFFICER: [11:45:34] The Defence has the floor.

MS TAYLOR: [11:45:37] I believe should come up on your screen a graph which shows the gradations of participation between co-perpetration, between inducement and between solicitation, and in this graph you can see there is a difference, there is a difference in the degree of contribution.

If we use the Lubanga Appeals Chamber approach, this difference reflects a difference in culpability and necessarily a difference in the distinction in punishment.

And the Prosecution has failed to prove to the contrary and the different approach should now be adopted.

And is that a good time to finish or should I continue?

PRESIDING JUDGE SCHMITT: [11:46:16] If you want to finish here, I think it's a good time. You could also continue. But I would not want you to interrupt one of your points that you have already said you would elaborate upon.

MS TAYLOR: [11:46:34] I think now would be an appropriate time.

PRESIDING JUDGE SCHMITT: [11:46:34] Yes.

JUDGE PANGALANGAN: [11:46:38] I just have a question.

PRESIDING JUDGE SCHMITT: [11:46:39] Yes, please.

JUDGE PANGALANGAN: [11:46:40] I see the graph in front of me, Ms Taylor. Where did you get this from?

MS TAYLOR: [11:46:47] (Microphone not activated)

JUDGE PANGALANGAN: [11:46:50] I am sorry --

THE INTERPRETER: [11:46:51] Microphone.

JUDGE PANGALANGAN: [11:46:52] Please.

MS TAYLOR: [11:46:52] It's from an article which is in our table of authorities under this particular section, I believe it's by Melissa Conway, it's Ordering Individual Criminal Responsibility. It's an article that only recently came out. We were only able to obtain it last week. That's why it wasn't included in our submissions.

JUDGE PANGALANGAN: [11:47:11] Thank you.

Thank you, Mr President.

PRESIDING JUDGE SCHMITT: [11:47:13] And why not continue on that a little bit, when we look at this graph, I'm interested in the middle part, substantial, how do you, how do you read this from the bottom to the top or from the top to the bottom?

MS TAYLOR: [11:47:26] Well, one can see that co-perpetration theory, which is what Mr Bemba was convicted for under Article 70(1)(c) requires an essential contribution and that mirrors the Chamber's findings in this case. Whereas, you then have the Chamber, I understand, referred to solicitation, which must have an impact on the crime and it found that solicitation itself was almost a lesser form of inducement. So it creates here a level of contribution, not a level of hierarchy, but a hierarchy which is based on contribution, which is exactly what the Lubanga appeals judgment said that

the Court should do. Not look at whether it is Article 25(3)(a) or (b) or (c), but look at the level of contribution that was required for that specific liability.

PRESIDING JUDGE SCHMITT: [11:48:09] And is, in your opinion, in this substantial middle part a gradation between the different modes of participation? For example, between ordering and soliciting and aiding and abetting? Or is there a hierarchy or can there be? Just in your opinion I'm interested.

MS TAYLOR: [11:48:31] Well, I think this graph is looking at the specific elements of the modes of liability. For example, when one looks at co-perpetration it's necessary to make an essential contribution to the outcome and you also have to have the mens rea, you intend it to occur.

Now, for ordering, inducing and soliciting, this article posits that the degree of mens rea might be similar, but the actual contribution to the outcome of the crime differs, and it differs depending on the type of liability that one is using.

And that is fully reflective of the Chamber's approach in this case which referred to co-perpetration requiring an essential contribution and it made a distinction between inducement and between solicitation.

And it's also consistent with what the Appeals Chamber specifically says about false testimony, that is when a witness is on the stand, the witness controls the answer that they are giving. They control it, not the parties. The parties might impact upon it, but it is an impact, it's not exclusive or essential control.

PRESIDING JUDGE SCHMITT: [11:49:39] Thank you very much.

We will then have the lunch break until 2 o'clock.

MS TAYLOR: [11:49:43] Thank you.

THE COURT USHER: [11:49:46] All rise.

(Recess taken at 11.49 a.m. until 2 p.m.)

(Upon resuming in open session at 1.59 p.m.)

THE COURT USHER: [13:59:54] All rise.

PRESIDING JUDGE SCHMITT: [14:00:10] Good afternoon.

Ms Taylor still has the floor.

MS TAYLOR: [14:00:21] Thank you very much.

Just to briefly sum up, our response to the Judges' questions, normally the Appeals Chamber accepted that commission would be more blameworthy than accessory forms of liability, but it said you can't have a completely artificial hierarchy as it would depend on the specific degree of participation, but also depends on the facts of the case. And those factual circumstances depend on the specific degree of contribution that was charged, prosecuted and which underpin the conviction.

So in our view, that graph we were showing illustrates the specific degree of participation that underpinned the charges against Mr Bemba and which underpinned the Chamber's conviction of Mr Bemba and fell within the factual circumstances of their finding concerning the restricted nature of his contribution.

In terms of my second issue, it is our respectful submission that the Prosecution has failed to establish any additional basis for increasing Mr Bemba's punishment as a result of the harm caused by false testimony.

In assessing this factor, the Appeals Chamber agreed with the Trial Chamber that, in principle, lies on peripheral issues could be less grave than lies on more significant issues.

At the same time, the Appeals Chamber found that lies that concerned collateral issues such as payments or contacts did not necessarily mean that these types of lies were insignificant in the particular circumstances of the case.

Rather, it was incumbent on this Chamber to make a determination of the significance

of the lies in concreto depending on the extent of the damage caused.

Now the Trial Chamber's findings in the conviction decision, they include no findings concerning the extent of the harm caused.

Paragraph 857 simply states that Mr Bemba's conduct had an effect on the witness's testimony, that is, that they testified untruthfully in relation to payments and contacts for the Defence.

The Prosecution was then afforded an opportunity to discharge their burden of demonstrating the existence of concrete damage arising from such lies.

But instead of making evidential submissions as to the existence of concrete harm, in their written submissions, they settle for the abstract assertions, including the claim that it's axiomatic that perjured evidence given to secure the acquittal of a guilty person is very serious.

Now, this argument is predicated on three incorrect assumptions. Firstly, that damage can be assessed on the basis of hypothetical possibilities and abstract axioms.

Secondly, that the type of lies issued by the 14 witnesses were likely to cast their evidence in a more favourable light, and that they did in fact do so.

And thirdly, that Mr Bemba was in fact guilty.

And the problem is that none of those assumptions are correct.

As regards the first erroneous assumption, the Appeals Chamber has asked this Trial Chamber to consider, pursuant to Rule 145(1)(c), the extent of the damage that was caused by the witnesses' lies. The wording, that is, the harm that was caused, rather than the harm that could have been caused, is clear.

Rule 145(1)(c) lists certain factors that can, if they exist, be taken into consideration in addition to the factors otherwise set out in Article 78(1) of the Statute.

Article 78(1), in turn, lists the gravity of the crime and the individual circumstances of

the person.

In its first sentencing decision, the Chamber already issued its pronouncement on the gravity, the abstract gravity of Article 70 offences.

The Trial Chamber also took into consideration the specific matters that were raised by the Prosecution today, that is, the intended objective of the common plan.

We've been there back in December 2016 and in March 2017, the Chamber heard it. They issued the decision on those factors and the Appeals Chamber found no error in the Chamber's assessment as concerns those factors, as concerns the intended objective of the common plan. And since these were taken into consideration, it would be double counting to do so again today under the rubric of harm caused.

So that's not the issue that is before the Chamber today.

Now, this issue of harm caused only comes into play if its existence has been established and, secondly, that there is a proximate link to the charges and, thirdly, they impact on the type of sentence that should be imposed.

Now contrary to what has been suggested in the Prosecution filing, this focus on concrete reality, as compared to abstract possibility, it doesn't lead to absurd results.

For example, the conscription and enlistment of child soldiers, it's a grave war crime. This gravity of course would be the starting point of any sentence that could be imposed.

Now, it's also possible that child soldiers could as a result of their conscription be exposed to further harm such as rape or mistreatment.

But the Appeals Chamber has found that this abstract possibility that such harm could occur is not enough to trigger this factor, this specific factor under Rule 145(1)(c). That factor has to be established by evidence.

And this rationale of concrete harm also applies to Article 70 offences. For example,

in the Vujin case, the ICTY Appeals Chamber noted that contempt was a serious offence, as did this Chamber. They also noted that it could have, it could have harmed the defendant's specific interest in that case, but they nonetheless did not take that into account because in that case the nature and extent of that damage had not been investigated. It had not been established it had not been proved.

In both these cases harm was an additional possible factor that supplemented the abstract gravity of the offence, but it was a factor that needed to be established by evidence, not speculation or supposition.

And this is similar to sentencing practices at a domestic level. For example, in the UK case of R versus Archer, the Court sets out a range of factors that can be taken into consideration, a range of factors that were already taken into consideration by this Chamber. One of those factors includes whether the witness's lies had an actual impact on the proceedings in question. And that is what we should be looking at today, the actual impact on the Main Case.

And that brings me to the second erroneous assumption.

Now, the Prosecution has opined that the false evidence on issues of credibility could theoretically have caused the judges to view the defence evidence more favourably.

Now, this theoretical possibility, it's not a sufficient foundation for punishment.

We're here today to make a concrete determination, not a theoretical one. And it's instructive in this regard that in its judgment, in this case the Appeals Chamber, referred to the Limaj case concerning the impact the credibility issues could have on issues of significance.

And in that case, the Chamber was referring to a specific witness that was giving identification evidence on a defendant. Now, identification evidence is by its nature highly subjective, a person's motives go directly to reliability of their identification

evidence. There is a clear nexus between their credibility and the issue at stake. And the issue at stake in that case was the identification of a defendant. It was an issue that could have led to the acquittal or conviction of that defendant; the nexus was there.

But in this case, although given an opportunity to do so in written submissions, the Prosecution pleaded no such concrete link between the 14 witnesses, between the specific lies and actual harm or actual impact on significant issues. And they didn't provide such a concrete breakdown, because when one looks at the factual matrix of the Main Case, the Prosecution in that case specifically invited Trial Chamber III to find that the fact that Prosecution witnesses had lied about money, the fact that Prosecution witnesses had not disclosed contacts, that that did not impact upon the reliability of their testimony.

And that was how they influence the Trial Chamber's resolution of that case.

And that leads me to the second point, that the theoretical harm referred to by the Prosecution, it didn't eventuate in the Main Case.

Now, today, today and yesterday, the Prosecution has claimed it did. It's claimed that because Mr Bemba was acquitted on the basis of a majority verdict issued by three professional judges who adhere to the highest standards of integrity and professionalism, and they have made this allegation that the Main Case verdict was corrupted, even though they acknowledge today that they don't know how many witnesses were corrupted. They claim the whole record was corrupted, but they themselves don't know if that was the case or the extent to which it was the case.

Now, if they don't know this, if there are no findings beyond reasonable doubt in relation to issues that fall outside the scope of this Chamber's conviction, then these matters haven't been proved. And it's highly inappropriate, it's highly prejudicial

for the Prosecution to advance submissions based on things they don't know but are happy to recklessly assert.

They have also quite frankly acknowledged that they view this case, they view this hearing as a reprieve for them, and they have effectively invited this Chamber to revise the majority verdict.

Now, Article 84 of the Statute, it doesn't allow the Prosecution to apply for revision. They can't revise a final verdict for their own purposes. And they shouldn't be allowed to defeat this clear statutory intent by using this case as a vehicle for doing so. This Chamber doesn't have the legal authority to do so. But also, it doesn't have the means to do so. We don't have access to the Main Case record. And it's dangerous, extremely dangerous to rely on the Prosecution's selective interpretation and disclosure of that record.

Now, as example, the Prosecution has made much ado about how the majority's verdict is corrupted because they relied on D-48, who they describe as a corrupted witness, and they have claimed the majority didn't know he was corrupted because they did not have the CDRs, or the Prosecution had the CDRs. They are one Prosecution after all. They could have drawn the attention of the Trial Chamber or the Appeals Chamber to these contacts that they are now pulling out of a hat, but they didn't.

And most importantly, and this is what the majority verdict actually turned on, they never contested at trial or at appeal the substantive point of his testimony. They never contested that Mr Bemba sent the letter in question to the prime minister of the CAR. And that is what the verdict turned on, at paragraph 175 of the majority, it turned on the Prosecution's own concession.

Now, does this mean that the Prosecution is suggesting that they too were corrupted?

And that after the acquittal was issued the scales miraculously fell from their eyes? Of course not. But this is why it is dangerous and improper for this Chamber to second guess the majority's ruling. It is dangerous to accept the false syllogism on which their submissions are based, that is, because some witnesses lied about some things, any other witness who testified about some of the same things must also be lying. You can't base a conviction on such a false syllogism. It has to be based on evidence.

Now, it's also dangerous to believe that the Defence, just the two of us, can defend itself on the basis of a few scraps of selective evidence selected by the Prosecution in relation to issues that took the Main Case 10 years to investigate, prosecute and adjudicate. And for that reason this Chamber can only take judicial notice, it can only take cognizance of the Appeals Chamber's actual findings, not what we want them to be, but what they were. And when we look at those actual findings, it's clear that the opposite occurred to the Prosecution's hypothesis. Mr Bemba was not acquitted because of the Article 70 conduct, rather, the contrary.

Now, the Main Case trial judgment came out in March 2016. This was after all of the Article 70 allegations had been voiced. It was after all of the Prosecution Article 70 evidence had been heard.

Now, the Defence, it explicitly renounced its reliance on the 14 witnesses months before the Article 70 charges were confirmed. And contrary to the suggestion of the Prosecution, the Lubanga Pre-Trial Chamber confirmed that the Defence simply can't, it doesn't have the power to withdraw evidence from the record and that's in the confirmation decision at paragraph 140.

Notwithstanding the Defence's renouncement of these witnesses, the Trial Chamber still went forward and gave its opinion on the credibility and reliability of the

witnesses. And that opinion was not only that the witnesses lacked credibility, but also that the witnesses' testimony on issues that were favourable to Mr Bemba could not be believed. The collateral lies thus either had no impact on the merits or if they did have an impact, it was that it caused the Chamber to disbelieve witnesses on issues favourable to Mr Bemba.

The Chamber in turn also found that a range of other Defence evidence was unreliable and could not be believed.

Now, the recent Main Case appeals judgment did not find that the witnesses' lies on payments and contacts had somehow caused the Trial Chamber to be too lenient to the Defence. It did not find that because of these lies they reacted in a more favourable way to the Defence.

From the Main Case verdict's opinion, it would seem that the only harm, concrete harm, actual harm that arose from these lies is that they may have prompted the Chamber to adopt a more cautious and less favourable approach to Defence evidence. That is, that the Chamber wrongly excluded exculpatory evidence as a prophylactic measure and it did so in relation to witnesses, not only the 14 witnesses, but also other witnesses that had been marked by the Prosecution's invisible Article 70 ink, marked by persistent nods and winks during their testimony, marked by the Prosecution's failure to state their case clearly, to prosecute their case fairly in relation to which specific witnesses were allegedly corrupted, a failure which continues today when they want this Chamber to find that the entire record in the Main Case is corrupted, even though the Prosecution acknowledge that they simply don't know if that's the case.

Now, the majority of the Appeals Chamber has found that this was an erroneous approach of the Trial Chamber. This is paragraph 174 of the majority and paragraph

50 of the separate opinion of Judge Morrison and Judge van den Wyngaert.

Now, far from adopting an approach that was too favourable to the Defence, Judge Morrison and Judge van den Wyngaert found that the Trial Chamber failed in its assessment of evidence to apply the maximum of in dubio pro reo, that is, rather than resolving doubt to the benefit of the Defence, the Trial Chamber adopted the opposite approach in dubio pro prosecutor. If they had doubts about the reliability of evidence, they simply excluded it or took it into consideration for incriminating elements. And that's at paragraph 50. But that's exactly the same approach the Prosecution want you to adopt today. They don't know if witnesses are corrupted. They don't know who was corrupted, but they want any doubt to be resolved in their favour. And that can't be countenanced as a matter of law.

This brings me to my third incorrect assumption, that the witnesses were helping a guilty man to go free. Now, the majority verdict was that Mr Bemba is innocent and that is a verdict that has to inform today's hearing, and it's a verdict that has to inform the sentence.

Now, in line with the Prosecution's written approach, if evidence given to secure the acquittal of a guilty person is particularly harmful, then it follows that the fact that the person is actually innocent must diminish the gravity of the offence.

Now, if the Chamber does consider it appropriate to stray back into this issue of intended aims, and we don't say that they should, we say that's not actually the scope of the error, but if the Chamber does go into the Prosecution's reliance on the ICTR case law of GAA on this reliance on intended aims, then it follows that Mr Bemba's acquittal must diminish the gravity of his intended aims.

It was not false testimony that aimed to secure the acquittal of a guilty person. It was false testimony on collateral issues in relation to a defendant that was innocent.

The acquittal should also inform the Chamber's decision as to the type of sentence that will be appropriate to impose for this offence.

A cardinal rule of sentencing is that the punishment should fit the crime. The type of harm caused by the offence should influence the type of punishment and remedy imposed by the Chamber.

Now, if the actual harm in this case was harm that was detrimental to Mr Bemba, harm that led to a conviction that was subsequently overturned after being detained for ten years, if that's the concrete harm, then how do you remedy that concrete harm by imposing an additional custodial sentence? How do you remedy too much detention with more detention?

Rather, given the particular nature of the harm in this case, given the degree of punishment that Mr Bemba has already served, we submit it would be fair and appropriate to amend the obstruction of justice in the Main Case, to amend the abstract harm, to amend the intended aims through the use of an Article 70 fine which would make reparations to the Main Case victims or otherwise provide assistance to them.

Such a measure would affirm that certain specific crimes occurred and that persons were victims of those crimes. This measure would be most consistent with the Court's mandate to do justice for the victims in the Main Case and to affirm the truth of their status.

Now, this brings me to the impact of the acquittal on the credit that should be awarded to Mr Bemba. And there are two periods of detention that are relevant to this issue. The first is the period he has served under the Article 70 arrest warrant, and the second is the overall length of detention at the ICC.

Now, as concerns the length of detention served under the Article 70 warrant, it

should be fairly obvious that he should receive full credit for the 4.6 years that elapsed since it was first served on him. And this conclusion is supported by the clear text of the appeals judgment that refers to the potential credit period as running from 23 November onwards. And that's at paragraph 231 of their judgment.

It is also supported by case law from the European court and domestic case law that confirms that a defendant is entitled to full credit for the time he actually spends in detention. It doesn't matter if there is a theoretical bail decision if there's conditions attached to that decision which aren't executed.

And that's what happened here. Judge Tarfusser imposed such a condition. He said Mr Bemba can be released unless his presence is otherwise required. And because that condition was never fulfilled, he was never released. He therefore has the benefit of the entire period of custody.

Now, this period alone is a little shy of four years, seven months. Approximately 91 per cent of the maximum sentence that can be imposed for any form of contempt, including the most, the most serious.

Now, the Chamber rightly noted in the release hearing that the right to apply for early release is not set out in the Statute. There is no explicit right in the Statute to be released at the two-thirds mark. But in our respectful view, that does not mean that there is no right to early release. Indeed, in the ICTY Hartmann case, the Presidency confirmed that the two-thirds rule, the right to seek early release should also apply to contempt cases.

So the lack of explicit powers in the Statute doesn't answer the question. Rather, the absence of explicit powers for the Presidency to review this issue suggests that it should normally be answered, the application should be put before domestic courts, because that's normally where Article 70 sentences should be served. We shouldn't

be having five-year trials. We should be having trials of a few months. The sentences should be served domestically. The defendants should have the right to go before domestic courts to have the sentence reviewed.

And that's consistent with the fact that whereas the Statute prevents domestic courts from revising a fine, no such prohibition applies the revision of Article 70 offences.

So accordingly, if a five-year sentence had been imposed on Mr Bemba, he would have been able to apply for early release under domestic provisions, at either the 50 per cent or the two-thirds mark, that is two and a half years or three years and four months.

So what this means in practice is that the sentence that Mr Bemba has served at a high-security detention facility is about 15 months longer than the custodial sentence that would actually be served pursuant to the maximum penalty for these offences.

Now, in equivalent circumstances, that is where a defendant has been denied the right to even request early release, domestic courts, for example in Canada, have found that it's appropriate to award the defendant enhanced credit to reflect, even if the conditions aren't particularly harsh. I can refer you to the Canadian case of the Queen versus Summers.

We therefore submit it would be appropriate to recognize that the period of detention served under Article 70 warrant alone is at least the equivalent of a seven-year sentence.

That brings me to my next point, that this still leaves open the question as to whether Mr Bemba should only receive credit for the time served under the Article 70 warrant or whether this Chamber should take into account the continuous period of detention served over ten years.

Article 78(2) provides that imposing a sentence of imprisonment, the Court shall

deduct time, if any, previously spent in detention in connection with an order of the Court. In its initial decision on sentence, the majority of this Chamber found that the word "court" referred to any Chamber of the ICC. The fact that time was deducted in one case precluded it from being deducted in another case.

Now, the converse of this interpretation is that if the word "court" is not case specific, a defendant would also be entitled to receive credit for unspent credit in a different case, time which is often referred to as "dead time" in a domestic context.

Now, on appeal, the Appeals Chamber agreed with the majority that Mr Bemba could not receive any credit in relation to detention connected with the -- that overlapped with the Main Case detention order.

The Appeals Chamber also went further and remarked that credit could not apply across cases, even though its interpretation of Article 78(2) would suggest that it should.

Now, this was a remark, it was an obiter remark by the Appeals Chamber that was not substantiated by case law analysis. We would respectfully submit that this remark was influenced by the assumption that his conviction in the Main Case was likely to stand. As a result, they didn't contemplate or consider the full range of consequences stemming from the situation we find ourselves in today.

And we can see that in the judgment at paragraph 231, where they acknowledge the theoretical possibility he could be acquitted or the sentence could be reduced, but they then say that any form of accounting should be done by the Presidency. But the Presidency would only be competent to make such a determination if they were overseeing an enforcement of a Main Case sentence. The Presidency can't adjust a sentence if there is none to be adjusted.

The Appeals Chamber's remark cannot therefore apply to the situation where we are

here, where the matter is before the Trial Chamber and there is no time left on the Article 70 clock.

The Presidency set-off solution simply doesn't work when the Main Case clock is rewound to zero.

This solution doesn't address, it doesn't provide safeguards or remedies in relation to today's scenario, a situation where Mr Bemba has been punished in an excessive manner in this case because the tick of the credit clock was placed on mute.

As a result, we are in search of lost time, a proper accounting for the time that Mr Bemba has spent in detention.

And we submit that there are three reasons why his overall length of detention should inform the sentence imposed by this Chamber.

The first reason is that it constitutes a continuous period of detention under an order from this Court, and Mr Bemba should be credited for this continuous period as a matter of logic and fairness.

The second reason is that the punishment imposed on Mr Bemba must take into consideration the totality of punishment he has served and endured so far.

Thirdly, he has a right to a remedy for detention that was unreasonably prolonged as a result of his initial conviction in the Main Case.

As concerns the first reason, the Appeals Chamber's interpretation of Article 78(2) was ultimately based on policy considerations, the concern that if a defendant knew he could claim credit in two cases he would have no incentive not to commit contempt.

Now this policy consideration might also apply to a situation where a defendant has been acquitted and then commits a crime in the expectation he can use his banked acquitted credits against any future sentence. And that's what is referred to

domestically as banking time.

This situation does not, however, apply where the defendant is in detention for one offence and commits another before he is sentenced for the first offence and before he is acquitted for the first offence. He doesn't know he's going to have unspent credits. He can't bank time at that point.

Now, in this situation, if the defendant is later acquitted for the first offence, the first period of detention will be dead time. It's punishment for no purpose.

Now, given that the Appeals Chamber found it appropriate to interpret Article 78 in a matter which took into account policy considerations, we submit that apart from general issues of fairness and the right to an effective remedy, these policy considerations should include the consideration that the law should be applied in a manner which encourages the expeditious resolution of cases, a manner that discourages lengthy pre-trial detention. Time should count in some form or another in order to ensure that defendants are not detained and punished in a manner that exceeds their overall culpability.

Now, this policy consideration that time should count in one form or another, it's embedded in domestic jurisdictions, particularly those ones that don't allow double counting. So they don't allow double counting for credit to count twice, but the flip side of that is that they do allow defendants to use dead time, unspent credits, where the sentence is continuous, it's contiguous, and one part of it is later annulled.

Now, the New Zealand case of R versus Marino and Booth is particularly apposite to today's situation. In that case the defendant was charged and arrested in relation to allegations of family violence. He was brought into detention. When he was in detention he contacted witnesses. He perverted the course of justice and was charged with that.

Now, he was later acquitted of the charge of family violence, the first charge, but convicted for the charge of perversion of justice. The Court at first instance only gave him credit from the time period at which the perversion of justice charges were laid and not the first period.

And that was overturned on appeal. In awarding him full credit, the Supreme Court underscored that there was no basis to read a charge specific credit entitlement into the legislation. They said it would lead to arbitrary, unfair results as a defendant's right to credit would very much depend on the specific time that the charges happen to be laid. And here, the specific time the warrant was issued.

And such an approach would lead to defendants being imprisoned for longer than the sentence imposed by the Court.

And this approach is also followed in other jurisdictions. For example, United States, in particular jurisdictions even where double counting is not allowed, because if you have overlapping sentences and the first part of the sentence is later annulled or quashed, the defendant can generally receive full credit as concerns any prior detention for that invalidated sentence.

And this can occur even if the two cases are completely unrelated. The only caveat to this is there can't be a break in detention. The defendant can't be released and feel that he can use his banked credits to commit future crimes. It has to be a continuous detention period.

And the rationale for this approach is again to achieve fairness and effective remedy as concerns this dead time.

This approach is also used in the United Kingdom, again, as mentioned by Judge Pangalangan in his dissenting opinion, double counting is expressly prohibited by legislation. But the converse is that there is a safeguard, and that safeguard is that

the defendant can use unspent credit from a prior case. I can refer you to the case of R versus Karl Eric Roberts and the case of ex parte McMahon.

And even in cases where they consider there is no hard and fast rule requiring them to do so, it is generally considered to be a factor that warrants consideration. It's a factor that's relevant to what constitutes a fair and proportionate sentence. If I can refer you to R versus Taylor.

And again, as is the case with the United States, a key consideration is whether the sentence is -- whether the detention periods are continuous, whether they're overlapping as compared to whether there is any breaks. And this is also consistent with the current legislation, that is, section 270ZA(9). And that provides that if a person is sentenced on two different occasions, even if it's for different offences, the Court still treats it as one continuous sentence for the purposes of credit, et cetera.

And although this legislation post-dates the McMahon case and post-dates the Roberts case, the High Court affirmed in the case of the Queen, on the application of Galiazia, that the credit outcomes in those earlier cases were not inconsistent with the current legislation.

Now, Mr Bemba's circumstances fall squarely within those precedents. There was no break in his detention. He was charged with Article 70 offences before being convicted and before being acquitted in the Main Case.

And the majority of this Chamber has also found that Article 78(2) must be applied "examining the specificities of the case". That's paragraph 258 of the initial sentencing decision.

And in terms of those specificities, the Article 70 investigation began well in advance of the arrest warrant that was later served on him. The date of the arrest warrant is, in this sense, an arbitrary marker on which to pin credit, particularly since the Article

70 charges could have been joined to the Main Case.

The investigation and Article 70 charges were also predicated on his Main Case detention. They were predicated on his status as a detainee in the ICC detention unit who was bound by detention regulations.

In its sentencing decision, the Chamber aggravated Mr Bemba's sentence because of his abuse of detention regulations, regulations that applied to him as a detainee in the Main Case.

Now, this abuse would not have occurred if he hadn't been detained for charges for which he was acquitted. It is not a violation of ICC regulations for him to talk to a witness on a phone; it was a violation because it was an ICC detention unit phone.

So it would lead to a somewhat perverse result if Mr Bemba's Main Case detention can be used to aggravate his sentence in this case, but not to mitigate it.

And that leads me to the second basis, which is the totality principle. Now, apart from treating continuous overlapping sentences as one aggregate sentence, domestic case law has also taken into consideration previous detention under the totality principle.

Now, this principle is reflected in Rule 145(1)(a) of the ICC Rules. And it specifies, the totality of any punishment -- any sentence imposed on the individual, it can't exceed the total level of their culpability, they cannot and should not be over-punished.

Now, this assessment of the degree of punishment that will accompany a particular sentence, it has to be based on the specific circumstances of the defendant, that is, how the defendant would experience the detention, how they would experience a punishment at that point in time.

This approach is consistent with human rights principles. For example, the

European Court underscored in the Vinter case at paragraph 111 that a prisoner cannot be detained unless there are legitimate penological grounds for detention. And these grounds are not static, they shift over the course of the detention. In particular, although the balance between different sentencing aims might favour punishment at the beginning, throughout the course of a lengthy detention the balance shifts towards rehabilitation. For this reason detention must be assessed on an ongoing basis, taking into account the circumstances that exist now, the circumstances that exist when we know that he served ten years.

In terms of the application of this principle, in the same way that the ICTY found in the Rašic case that the defendant's detention as an isolated female would expose her to an additional layer of punishment, domestic courts have also taken into account the impact of prolonged detention and how it functions and as an additional layer of punishment, specifically it's recognised that the severity of a sentence increases exponentially over time, exponentially, not in a linear fashion.

As found in the Australian case of Clinch, which is in our table of authorities under the Queen versus Barry, a sentence of five years is more than five times as severe as a sentence of one year, and that is because the length of detention amplifies the defendant's sense of hopelessness and in turn undermines the prospects for rehabilitation.

For this reason, even if the sentence is unrelated, the Judges have a duty to consider whether the aggregate length of sentences would exceed the boundaries of appropriate punishment. As found by Judge Wickham in the case of Azzopardi versus The Queen, once the objectives of sentencing are met, that is enough. More than enough is wrong because the excess is not only purposeless, but it might also be harmful.

In terms of the specific scenario where the defendants have been acquitted for an early consecutive sentence, Australian courts apply the Renzalla discretion that allows them to take into consideration this dead time and they do so to ensure a proportionate result. And this totality principle also exists in Finland and The Netherlands, allowing them to take into account earlier sentences even those which apply to a convicted person.

So given that Rule 145(1)(a) obliges the ICC to apply the totality principle, it should also inform the manner in which this Court determines Mr Bemba's punishment.

Even if the Chamber finds that there is no explicit right to additional credit for dead time, the Chamber is still required to take into consideration the impact of his prior detention on the punishment that he has endured.

Article 78(2) does not prevent this Chamber from applying more than one for one credit. And we respectfully submit that they should do out of recognition that the detention Mr Bemba experienced from the sixth year onwards was much more intense than the detention he experienced on day one, because the severity increases exponentially.

Now, of course this form of accounting either giving him direct credit for dead time or enhanced credit, it will mean he served more than the maximum sentence. But we respectfully submit there would be a perverse outcome if the fact that a defendant has exceeded the maximum limit, if that outcome became an argument for ignoring the time.

Rather, the fact that the maximum limits have exceeded, underscores, firstly, why the ICC needs to account fully for time in this case and in future cases in order to ensure we don't have today's scenario repeat itself; and secondly, why Mr Bemba should be given an effective remedy for the situation that we find ourselves in.

And this brings me to the third plank, the right to an effective remedy. The European Court of Human Rights has found that even if a defendant is convicted, they should still have a right, an effective remedy as concerns a detention that was unreasonably lengthy, and if I could refer you to our authorities on this point, including Kudla versus Poland.

Now, the detention in this case was unreasonably prolonged as a result of his wrongful conviction in the Main Case, and this occurred because of the following. In January 2015, Judge Tarfusser found that it was necessary to release Mr Bemba. It was necessary to release him at that point in time 13 months in in order to avoid detention that was too lengthy. But he was not released because of his detention in the Main Case.

Now, in March 2016, the Trial Chamber convicted Mr Bemba in the Main Case. That meant that the Main Case detention order continued. That meant that for all intents and purposes it was impossible for the Defence in this case to seek his release in this case. And in March 2017, this Chamber found that because of his conviction in the Main Case, the conviction that was overturned, he couldn't get credit in this case.

Now, what that meant in practice is that even though he had served by that point in time two and a half years, that is two and a half times more than the sentence that was imposed by the Chamber, he couldn't apply to be released. He couldn't invoke Article 81(3)(b).

Now, this Article provides that if a convicted person's custody exceeds the length of the term of imprisonment, the person shall be released, the exception only being where the Prosecution has established exceptional circumstances.

This provision is mandatory. He didn't need to apply it. Rather, the Appeals Chamber should have implemented it. But they couldn't implement it because of the

Main Case, because of the Main Case conviction that was overturned. So what that meant is that Main Case conviction expanded his detention in this case and it's a conviction that has now been overturned.

Now, the fact that his detention expanded from zero years to four and a half years overnight has created clear prejudice, clear harm for him. It has meant that he had no means to seek and request provisional release until 8 June 2018.

No Judge in this case was competent to actually release him, even though release, the right to even request release is a fundamental right. There was no effective judicial supervision of his detention because of that conviction. This length of detention has also created a public perception of his guilt, and that precedes and pre-determines any sentence that can now be issued by this Court.

Now, the European court has stressed in several Article 5 cases the length of pre-trial detention shouldn't anticipate a sentence. And as remarked by Judge van den Wyngaert and Judge Morrison, at paragraph 73 of their opinion, lengthy detention creates a perverse incentive for the Trial Chamber to arrive at a conviction to justify the extended detention.

Now, that perverse incentive applies not just to the conviction, but also to the sentence and applies in full force to today's scenario, that is, the fact that Mr Bemba has been in jail too long, it shouldn't act as an unfair incentive to base his new sentence on the length of his detention rather than the limits of his culpability.

This would result in a sentence determined by extraneous factors rather than the merits. Such a sentence would also undermine his acquittal in the Main Case, since the punishment will simply have been transferred from one case to the other in order to plug the gaps in his detention.

In terms of the appropriate remedy for this prejudice, Trial Chamber I found in the

Lubanga case that Mr Lubanga's conduct in the face of delays was a mitigating factor. Now, that case was dealing with delays of a few months. Here Mr Bemba has been punished four and a half times more than the level first set by this Chamber.

In our respectful submission, this degree of delay, this degree of excessive punishment enters the territory of a potential abuse of process. And even though his detention was served on an ICC arrest warrant, the fact that it exceeded the length of the sentence first imposed by this Chamber and it exceeded it without any judicial determination as to whether he should remain in detention in this case, that means that that period is also arbitrary. And as found by the Working Group on Arbitrary Detention, in document A/HRC/30/36, at paragraph 64, the appropriate remedy for arbitrary detention is generally unconditional release.

Now, at a domestic level, English cases are instructive as to the type of approach that might be followed in such a scenario. For example, in the case of Kerrigan, the Court of Appeal underscored the Judge has a discretion to do justice on the particular facts of the case. For example, in cases of excessive delay, the Judge could reduce an otherwise appropriate sentence.

In terms of other cases, in the Crown, on the application of, Galiazia, the Court affirmed that where time on remand exceeds the sentence imposed by the judge, it extinguishes the sentence altogether and requires the immediate unconditional release of the offender.

Similarly, in the cases of Barrett and Hemmings, the Court found that in circumstances where the defendant has served longer than the appropriate custodial punishment, it would be appropriate -- it would be inappropriate to impose any custodial sentence, any custodial sentence. So in those cases, the Courts issued conditional discharges, that is, an order that the defendant would not be sentenced

unless he committed a further offence.

As a general principle, the UK Crown's sentencing guidelines also state that an absolute discharge may be imposed if the Court is of the opinion, having regard to the circumstances, including the nature of the offence, the character of the offender, that it is inexpedient to inflict punishment.

And given the particular circumstances of this case, we submit it is no longer expedient to inflict punishment on Mr Bemba. A fine followed by a discharge would not only be the fairest remedy for the length of detention he has served, it would also be the remedy, the outcome that's most consistent with ICC sentencing principles.

Now, Rule 145(1)(b) provides that the Chamber must take into consideration all relevant factors, including the circumstances of the convicted person. In terms of these circumstances, Mr Bemba is a person who has been in a high-security detention facility for ten years. He's a person who has been separated from his family for ten years. And, at this point in time, the only conviction which stands at this Court is the conviction for Article 70 offences. These circumstances are directly relevant to the sentence which should be imposed. To ignore them would be to view Mr Bemba with only one eye open.

Now, the Chamber has said that the primary objectives of sentencing are retribution and deterrence, and the Appeals Chamber has affirmed that although it's not a primary purpose, rehabilitation is also relevant.

Now, the purpose of retribution is to punish the defendant. According to the UNODC, a custodial sentence punishes the defendant by depriving him of his liberty. But in this case, Mr Bemba has already been deprived of his liberty for four and a half years under the Article 70 warrant, ten years overall.

Given that the Chamber initially determined it was appropriate to impose a 12-month

custodial sentence, it should be clear that the punishment has been meted out and the punishment that has been meted out exceeds the level of the Chamber's initial assessment. It exceeds the level of his culpability.

Now the imposition of a custodial sentence at this point in time would serve no purpose. It would not be expedient. It would also unfairly and unnecessarily amplify the degree of punishment that he has endured and it would do so in a manner that exceeds his culpability.

The formal issuance of a custodial sentence would do so by exposing him to the legal force of a sentence, the collateral consequences of a custodial sanction and a de facto effect of over four and a half years of jail time.

Now, these collateral consequences include a range of consequences like, for example, travel, work permits, his legal status, his right to residence. At a domestic level, these issues are addressed through a range of different remedies and they aim to ensure that the person does not suffer excessive punishment.

For example, as reflected in case law of Australia, Canada, United Kingdom and Sweden, the general consequences of a conviction are viewed as part of the penalty. Judges are therefore empowered to view these consequences when they decide whether it's appropriate to impose a custodial sentence as opposed to other sanctions.

And this Chamber already took into consideration collateral consequences when it decided, for example in relation to Mr Mangenda's initial sentence, that it was appropriate to consider that the fact that a conviction against Mr Mangenda would prevent him from working. So it's accepted that collateral consequences are relevant.

So in the same manner, the Chamber should consider the extent to which a formal sentence of imprisonment at this point in time, the extent to which it would aggravate

the punishment inflicted so far and the extent to which it would therefore exceed the level of Mr Bemba's culpability in this case.

In terms of deterrence, a fine rather than a custodial sentence would also be more consistent with the objectives of deterrence.

In its 2016 decision the Chamber found that a sentence should be adequate to discourage a convicted person from recidivism, specific deterrence, as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so, general deterrence.

In terms of specific deterrence, the proceedings in the Main Case have closed. He was acquitted. There is no risk of recidivism.

As far as general deterrence is concerned, the power of general deterrence lies in the extent to which the public can see that the defendant has been arrested, prosecuted and, where guilty, punished by the sentence. What counts is the public perception of these enforcement steps.

Conversely, if the public is not aware that a sentence has been passed, that it's been served, it has no deterrent value beyond the convicted person. And if I can refer you to the Australian case of Boulton, Clements and Fitzgerald.

In this case, the fact that Mr Bemba was arrested and prosecuted for this case was broadly disseminated, including to other detainees, as was his conviction. But at this point in time, there is no longer any custodial sentence in realtime to be served. The issuance of a theoretical sentence would have no visual deterrence.

In contrast a fine, it can be imposed, it can be executed, it can be distributed to victims following the Chamber's decision. There will be a public and tangible perception of punishment and redress. It will be consistent with the fact that this Chamber has found that a fine can have a deterrent effect.

Now, as noted in the case law set out in the Canadian case of the Crown versus Vujcic, notional issues of deterrence must also give way to the public interest in securing a fair and just outcome for a specific defendant, an outcome which encourages the defendant to realise their potential as a constructive member of society.

Now, although rehabilitation is not a primary goal, it's relevant and it's a factor that is particularly relevant as concerns a person who has been in detention for over 10 years.

The goal of rehabilitation is to ensure that the defendant can become a law abiding member of society. This means that the punishment and execution of this punishment should facilitate their reintegration into society.

In terms of what this implies for Mr Bemba, in his separate opinion, Judge Eboe-Osuji set out the following observation: "I must hope that Mr Bemba will use his new lease on freedom to do the following: Assist victims of violations (including victims of rape) that occurred during the period of his involvement in the CAR war, regardless of the question of his own legal responsibility to do so; and also become an ambassador for lasting peace and human development his country and continent".

Mr Bemba has studied these words closely. He wholeheartedly endorses them. He does not take the prospect of freedom lightly. Time is precious to him and he fully intends to use his time to fulfil these important expectations. And he has in fact taken steps to do so.

But as noted by Judge Colvin in the Vujcic case, if an offender is shackled with permanent collateral consequences, "it can be very difficult to overcome past mistake. It's reminiscent of Nathanial Hawthorne's novel The Scarlet Letter, the badge of shame can be impossible to remove".

Now, at a domestic level, this badge of shame can be removed at some point. The scarlet letter, it can be erased.

In England and other countries, after a certain period of time the convicted person can apply for the conviction to be declared spent. They can apply for it to be expunged from the record in order to promote rehabilitation. At the ICTY and ICTR, even in the context of war crimes, genocide the Statute still envisages that the defendant can apply to the Presidency for a pardon under Article 28 of the Statute.

And yet here in the context of Article 70 offences is a lacuna, as the Judges have recognised, Article 106 doesn't apply. The Presidency has no powers over the execution of a sentence.

So what that means concretely is that the convicted person cannot apply to the Presidency for early release, they can't apply for adjustments to the sentence. They have no means to apply for these types of relief. But what that lacuna means is that it falls to this Chamber now to craft an outcome that ensures fairness not just for today, but also for the future, an outcome that achieves justice for victims without occasioning excessive injustice for Mr Bemba.

Mr Bemba has been held to account in this case. He's been deprived of his liberty for twice the length of the maximum sentence for contempt, ten times the sentence first imposed by this Chamber. His conviction has been spent tenfold.

Given these extraordinary circumstances, given the amount of time that's been spent in jail, the fairest, the most appropriate outcome would be a complete discharge following payment of a reasonable fine to the Trust Fund for victims.

It is quite simply time to stop the clock on the proceedings of this Court and let Mr Bemba be free. Thank you.

PRESIDING JUDGE SCHMITT: [15:13:53] Thank you, Ms Taylor.

I give now the floor to the Defence of Mr Mangenda. Mr Gosnell, please.

MR GOSNELL: [15:14:00] Thank you, Mr President. Good afternoon, your Honours.

Mr President, I'm guided by your instructions that this resentencing hearing, and I quote, "is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber judgments. Many aspects of the sentencing decision were confirmed on appeal and the affected parties must treat these findings as final."

And, Mr President, it's perhaps useful to start with what is final and what has not been disturbed on appeal. And by my count, having examined the portion of your judgment concerning Mr Mangenda, you relied on 21 specific factors in determining the gravity of the offence, the culpability of the offender and his individual circumstances. You conducted a fine grained analysis of each of those factors. You decided on those factors out of those that were suggested by the Prosecution and the Defence. You didn't accept all of them. You accepted only some that had been proposed by both parties.

The Appeals Chamber found error with only 1 of those 21 factors that you relied upon in your discretionary analysis of culpability, gravity and individual circumstances. And that was in according some weight in the determination of gravity to the facts that the lies did not directly concern the merits of the case.

There were two other errors found by the Appeals Chamber in respect of Mr Mangenda's sentence and that was that he had been convicted of offences under Article 70(1)(b) improperly and that you acted ultra vires in imposing a suspended sentence.

So only one of the three errors and only one error, one factor out of the 21 on which

you relied in coming to a determination of Mr Mangenda's sentence has been disturbed on appeal. And this, Mr President, I believe is a very important starting point to bear in mind and to recall that a great many of the factors that are touched upon in the Prosecution's written and oral submissions relate in fact to the 20 factors on which you, discretionary factors that you have already set out at length in the first sentencing decision and that were undisturbed on appeal.

So what is the significance of those three errors, Mr President? The least significant error, I suggest, is in fact the first one, which had to do with the discretionary factor of according some weight to the fact that the lies did not go directly to the merits of the case rather than to matters affecting credibility.

The exact wording of the portion of your sentencing judgment with which the Appeals Chamber took issue appears at paragraph 115 of your sentencing judgment and you said as follows, quote, "Yet the Chamber notes that the false testimony of the witnesses concerned did not pertain to the merits of the Main Case. While this circumstance does not by any means diminish the culpability of the convicted person, it does inform the assessment of the gravity of the offences in this particular instance."

Uniquely in respect of that phrase as it appears in the section for Mr Mangenda, you referred to the submissions of Mr Mangenda. And in those submissions there is a discussion upon which I suggest that your Honours were relying when you wrote that sentence.

And that discussion refers to the conduct of Ms Rašic before the ICTY in which she had presented pre-prepared statements of alibi to witnesses whom she knew could not have been witnesses of truth.

And I believe that the purpose that your Honours had in mind was to distinguish between conduct of a person who engages in interference with the administration of

justice where the act itself intrinsically reveals that the perpetrator knows, not only that the person is going to tell lies about the merits of the case, but in fact that the accused is guilty of that offence, or at least that there is a very strong indication that they are guilty of that offence.

And there is simply a distinction between that conduct and, as it was put in the submissions before your Honours at the first sentencing procedure, putting the fingers on the scale of justice.

There is no excusing putting the fingers on the scales of justice. No one is suggesting that that is not in itself a grave act. Nevertheless, it is a distinction with a difference between attempting to fashion evidence and present it as favourably as possible to an accused, and doing so when you know for a fact that the person is guilty and you are trying to secure the acquittal of a guilty person.

And I suggest, your Honours, that the reference that you put at the end of that sentence in your judgment indicates that that is what you had in mind when you included that sentence.

So, Mr President, what I'm doing, perhaps pointlessly, is suggesting to your Honours that even though there may have been a labelling error that was identified by the Appeals Chamber, even though there may have been an absence of reasons that the Appeals Chamber took issue with, that underneath that formulation with which they found error, there was no error and there was no error that impacts upon gravity, culpability or individual circumstances.

The second error identified by the Appeals Chamber was the conviction of Mr Mangenda for the Article 70(1)(b) offences.

Those offences amounted to 38 per cent of the counts on which Mr Mangenda was convicted. And of course, we do not suggest that that means there should be a 38

per cent reduction in sentence. But nevertheless, it is a factor that at least outweighs any error in respect of the merits versus non-merits lies.

I come now to the third error identified by the Appeals Chamber, and I suggest it is the most thorny issue before your Honours, and that is how to refashion your sentence now that you have been deprived of the authority to issue a suspended sentence.

A highly simplistic assumption might be to decide that since the suspension power has been suspended, therefore Mr Mangenda should return to prison for the remaining 12 months and 23 days that has not yet been served.

I suggest, Mr President, that would be very wrong and very unjust for several reasons. First, the core finding that your Honour has made at the first sentencing decision was that Mr Mangenda should not be returned for further time in custody. A sword of Damocles hanging over the head of a person who is convicted for a period of three years is very different from sending someone back to prison for even just 12 months and 23 days.

And in facing a binary choice between the two, your Honours should give effect to your original intention, which was to avoid the unfair result of Mr Mangenda being sent back to custody.

Second, Mr Mangenda has by now almost served half of the period of the sword of Damocles, so to speak, that your Honours prescribed for him. The Prosecution's reliance on Article 81(4) to suggest otherwise is simply unduly formalistic.

Whether under the terms of the provisional release order or the sentencing decision, Mr Mangenda during this period has had an obligation, since the 22nd of March 2017, owed to this Court not to re-offend. He has honoured that obligation for a period now that is almost half of that that your Honours prescribed in the first sentencing

decision.

Third, the factors that your Honours took into account in deciding to suspend the sentence should now be taken into account in assessing quantum. Precisely the same unique and negative consequences that would befall Mr Mangenda that were the case at the time of the first sentencing decision remain the case today.

The consequence, in practice, is that Mr Mangenda would be removed from the country where he now resides with his family, to probably detention here in The Hague. And the stated intention of the country where that is, is to not allow him to return thereafter to that country.

The result of that is that he would not be able to remain in that country with his family for the duration of any request appeal to obtain a family reunification visa. That means in substance, in effect, in practice, that he would be separated from his family indefinitely, and we are talking about a family of three young boys aged 10, 9 and 4 being deprived of their father for a period of indefinite duration. Not a remedy that of course would be ordered directly by your Honours, but, nevertheless, a consequence that would flow surely from such a decision of re-incarceration.

Fourth, the Appeals Chamber at no time suggested that the Trial Chamber had imposed an improperly low sentence. At no time did they suggest that you had exercised your discretion improperly in finding, in reaching an improperly low sentence. What the Appeals Chamber did find is that in light of the specific errors that had been found, that it was unnecessary to make a determination on the Prosecution's ground of appeal in that respect.

The approach that was adopted by the Appeals Chamber can be contrasted with that in the Delalic case when the ICTY Appeals Chamber did find that there were specific errors committed by the Trial Chamber, but also provided guidance to the Trial

Chamber that would assist it in reaching a quantum of sentence within a range that was considered acceptable by the Appeals Chamber. That was not done by the ICC Appeals Chamber in this case and there was no suggestion of an improper quantum. In short, your Honours, the factors on which you relied, with one exception, remain the same today as they did at the time of the original sentencing decision. They have not been disturbed by the Appeals Chamber. And they should lead you to the same result, which that it would not be appropriate for Mr Mangenda to be recommitted to prison.

I come now, Mr President, to just a few remarks about the potential impact of the acquittal of Mr Bemba in the Main Case. The Prosecution submitted before your Honours in this proceeding prior to the acquittal, quote, "It is axiomatic that perjured evidence given to secure the acquittal of a guilty person is very serious. This is the reality of this case where the witnesses were told to improperly testify so as to conceal the criminal scheme and to acquit Bemba of his serious crimes."

Of course, the assumption embedded in that statement is that indeed there is knowledge by the perpetrator that he has committed those crimes.

The acquittal of Mr Bemba of course does not mean that no offence has been committed. But the acquittal of Mr Bemba does remind us that the acts of corrupt influence are very different from the egregious conduct that occurred in the Rašic case, which, as I said before, manifested in themselves knowledge of the guilt of the accused.

That was not the case with Mr Mangenda and it would be inappropriate to take it into account as an unstated background or contextual assumption, even more so now that Mr Bemba has been acquitted.

Mr President, just two final points that I wish to raise, and that is the impropriety that

would be occasioned by your Honours relying or making any findings of fact whatsoever on matters that were outside of the scope of the trial. In fact, this was already a matter that was raised at the original sentencing hearing about what factors could be taken into account. And the ruling in the Lubanga sentencing judgment is that the accused must have a fair opportunity to test the proposition, which of course, in order to be taken into account by your Honours, must be proven beyond a reasonable doubt.

The Prosecution today made reference to a witness who was outside of the scope of the 14, someone called D-48, whose testimony in the Main Case, as far as I understand it, is not actually part of the record in this case, but according to the Prosecution, at least what I heard this morning, is that it's a matter of public record. Apparently your Honours are supposed to find this transcript on your database, print it out, have a look, and decide whether or not the person actually lied in respect of the extent of his contacts with the Defence.

I can only say it's a highly improper exercise to embark upon to in any way take into account such submissions, let alone in determining a sentence on this hearing.

The second, I suggest, inappropriate factor that has been urged upon you by the Prosecution is the supposed error in respect of how your Honours took into account accessorial liability for the Article 70(1)(a) offences.

The Prosecution did not appeal this point in respect of Mr Mangenda. And we have suggested to you why that may have been the case in our written submissions. But it would be the pinnacle of unfairness to take into account as an error against an accused, against a convicted person who had not had the opportunity during the appeal proceedings to suggest that the Prosecution's submissions of error were wrong.

This point has not been adjudicated by the Appeals Chamber and we suggest that if you look at your own reasons you will in fact see that, in the case of Mr Mangenda, you in fact did commit no error. It certainly is not a basis for reducing or increasing sentence under these circumstances.

In conclusion, Mr President, your Honours, nothing in the appeals judgment has disturbed the core of your discretionary analysis in respect of gravity, culpability and individual circumstances which yielded the conclusion that it would not be appropriate to send Mr Mangenda back to prison. And that conclusion stands today. It would be inappropriate today for the same reasons and we invite you to reach that same conclusion.

Thank you, Mr President.

PRESIDING JUDGE SCHMITT: [15:31:20] Thank you, Mr Mangenda.

This concludes today's hearing. As previously indicated -- Mr Vanderpuye, yes.

MR VANDERPUYE: [15:31:32] I can tell that you want to get out of here and I don't fault you. There are a number of issues that we would like to reply to, but I understand that the Court has limited time. We all have limited time today. I certainly don't want to prolong matters, but I think there are certain representations that have been made in the course of the Defence submissions that either mischaracterised the position of the Prosecution or otherwise misstate the record, which I think should be addressed. But of course I defer to your discretion and your wisdom as to how you wish to conduct the further proceedings.

But I thought it was important to bring that to your attention.

(Trial Chamber confers)

PRESIDING JUDGE SCHMITT: [15:32:18] So let me put it this way, I will not completely prohibit that. But if you take 10 minutes, that would be okay I think.

You can address it for 10 minutes, but not more.

MR VANDERPUYE: [15:32:30] Thank you very much, Mr President, then.

The first thing I think I would like to address, maybe I'll go from the back to the front, so to speak:

Mr Gosnell made reference to the nature of the evidence that we brought to the Chamber's attention in respect of the impact of the acquittal on the sentencing determination.

Normatively, to the extent that the Prosecution or the Defence wishes to adduce evidence that is relevant to and important to a determination of the appropriate sentence, that is normally conducted in the context of a hearing, and it would be an evidentiary hearing to that effect. Obviously, this is not that.

To the extent that Mr Gosnell or any of the Defence counsel would like to proceed in that manner, we are more than happy to do so. That's number one.

PRESIDING JUDGE SCHMITT: [15:33:26] But on this matter we have heard really enough.

MR VANDERPUYE: [15:33:29] Yes, so I'm not going to go forward.

PRESIDING JUDGE SCHMITT: [15:33:31] So please the next point.

MR VANDERPUYE: [15:33:32] The next point is that Ms Taylor suggested that the acquittal of Mr Bemba was the equivalent of a declaration of his innocence, which I think the Chamber is well aware that that simply is not the case. That is not a representation that is in the judgment itself.

PRESIDING JUDGE SCHMITT: [15:33:48] But I think for these -- for these interventions --

MR VANDERPUYE: [15:33:49] Nor does the fact that the Chamber should take into consideration --

PRESIDING JUDGE SCHMITT: [15:33:51] No, no, no. I'm speaking now. For these interventions, I think we can all put these arguments that you now bring forward into perspective.

MR VANDERPUYE: [15:34:01] I appreciate it.

PRESIDING JUDGE SCHMITT: [15:34:02] So only if you really want -- think you have to say something that really corrects in your opinion what has been said by the Defence counsel.

MR VANDERPUYE: [15:34:11] Thank you, Mr President.

There was a reference made to the Prosecution submission that the Appeals Judgment was corrupt. That is incorrect. I think the Chamber understands that, too, and put that into perspective. What we said was that it was made in the context and in reliance on a record that had been corrupted by the defendants in this case.

Mr Gosnell represented just moments ago, I believe, I might be mistaken, in any event, somebody represented that the Prosecution had the opportunity to join this case to the Main Case. That is also incorrect. That is not the case at all, and the record is quite clear on that. So I want to make sure that that is also clear in the record.

The Chamber made the same mistake on the 29th of September 2015 in the opening of the trial, and I thought I had made that correction at that time as well.

The concrete harm that Ms Taylor argues that needs to be shown in concreto is an issue as Mr Gosnell pointed out that is foreclosed by the Appeals Chamber's decision, which found that the nature of the crime and the fact of its commission alone, this is a crime against the administration of justice, is a harm. It already constitutes the harm.

The position of the Prosecution, which was clear, is that in addition to that harm or the further harm is the consequence of the acquittal as a function of the acts and the

course of conduct of the defendants.

So I want to make sure that is clear. It is the perjury that is the harm and on top of that the result that it led to.

In terms of Mr Gosnell's representation concerning the Prosecution's non-appeal of Mr Mangenda's conviction, the issue that was or, rather, the principle that was stated by the Appeals Chamber is that there is not an automatic reduction or mitigation on the basis of the mode of liability that is applied. It is true that the Prosecution did not appeal it in the context of Mr Mangenda.

Nevertheless, the principle stated by the Appeals Chamber binds this Chamber to apply it. And therefore it necessarily has an effect on the Chamber's calculation of the appropriate sentence for Mr Mangenda and the gravity of the crimes given the mode of liability and the nature of the crime of which he was convicted.

In respect of the time to be credited to Mr Bemba concerning the Main Case and this case, there is a remedy that is available for a person who is incarcerated on a case which ends up being dismissed, and it does not necessarily entail the application of the time that they serve to another case. That may very well be within the discretion of the Chamber, but it is not an automatic thing, nor is it necessary in this case.

Mr Mangenda was lawfully, and I repeat, lawfully incarcerated on the Main Case for the period of time that he was in detention. The fact that he was acquitted does not undo the lawfulness of his detention. He was rightly there, and his case was rightly run through the system, and the result is what it is.

That does not entitle him to make a claim that that time should necessarily go to the calculation of time in this case.

One moment please, Mr President.

Ms Taylor made a reference to Rule 145 which talks about the damage caused. And

in that context she referred to the damage caused by the lie, the lies that were found in this case.

That's not the issue. The issue under 145 speaks to the damage caused by the defendant and the defendant's conduct, which is not synonymous with the lies that were told by the witness in this case. It entails the common plan, the planning, the execution, all of those factors that went into the corruption of those witnesses, not just the lies, but all of those factors go to the calculation by the Chamber of the gravity based on -- related to the damage caused by the accused conduct, including the consequences of the case, which is what we brought to the Chamber's attention today under Article 145(1)(c) and under Article 145(2) as well as a potential aggravating circumstance.

And just because -- and I would add with respect to the aggravating circumstance, the documents which we say demonstrate the untruthful testimony of D-48 are in evidence before this Chamber, they always have been since 24 September 2015.

The Chamber is entitled to take judicial notice of the testimony of D-48. And if it will satisfy my colleagues for the purpose of the evidentiary record of this case that we make such an application, we're willing to do that. But I think the Chamber has already determined on previous occasions that it may in fact take judicial notice of the record, of the record of proceedings before this Court and in this particular case of the Main Case.

Those are all the posties I have at the moment to remind me of what arguments I wanted to respond to. But if there are any questions that the Chamber has in respect to either of my previous submissions or the responses I have given now, I am at your disposal to answer them.

PRESIDING JUDGE SCHMITT: [15:41:01] Thank you very much, Mr Vanderpuye.

I think this concludes now today's hearing. I don't think that we need more interventions by anyone now. I think we have heard enough today, and we have a lot of written submissions, I assume that we'll get some further written submissions, so that might be enough for us to determine the new sentences.

As previously indicated, the Chamber's decision on this matter will be rendered in due course.

THE COURT USHER: [15:41:33] All rise.

(The hearing ends in open session at 3.41 p.m.)