International Criminal Court

Appeals Chamber

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 Howard Morrison, Judge Chile Eboe-Osuji, Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa

Appeals Hearing - Courtroom 1

Wednesday, 4 September 2019

(The hearing starts in open session at 10.05 a.m.)

THE COURT USHER: [10:05:59] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE MORRISON: [10:06:32] Good morning, everybody. Would the court officer please call the case.

THE COURT OFFICER: [10:06:42] Good morning, Mr President, your Honours.

In the case of The Prosecutor versus Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, case reference ICC-01/05-01/13.

And for the record, we are in open session.

PRESIDING JUDGE MORRISON: [10:07:10] Thank you.

My name is Howard Morrison and I'm the Presiding Judge in this appeal of Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII of 17 September 2018, in which the Trial Chamber resentenced Mr Bemba to one year of

imprisonment and imposed a fine of €300,000. Judge Eboe-Osuji, Judge Hofmański, Judge Ibáñez Carranza and Judge Bossa, sitting respectively on my right and left, are fellow Judges of the Appeals Chamber in this appeal.

May I ask the parties to introduce themselves for the record, starting with the Defence.

MS TAYLOR: [10:07:52] Good morning, Mr President, good morning, your Honours, and good morning to my colleagues in the Prosecution. My name is Melinda Taylor and I'm appearing on behalf of Mr Jean-Pierre Bemba Gombo today. Thank you.

PRESIDING JUDGE MORRISON: [10:08:04] Office of the Prosecutor.

MS BRADY: [10:08:06] Good morning, your Honours, and everyone in the courtroom. My name is Helen Brady, I'm the senior appeals counsel for the Prosecution, and I appear today with Ms Priya Narayanan, appeals counsel, Ms Meritxell Regué, appeals counsel, and Ms Nivedha Thiru, assistant appeals counsel, and our case manager, Ms Sylvie Vidinha. Thank you very much.

PRESIDING JUDGE MORRISON: [10:08:32] I am bound to note from the nature of the representation that the power of women in the law is increasing almost on a daily basis, which is never a bad thing.

Today we are hearing oral submissions from the parties on issues arising in this appeal.

Before inviting the parties to make their submissions, I would like to recall that on 20 August of this year the Appeals Chamber summarily dismissed some of the arguments raised on appeal. In particular, it dismissed any request for reversal of the convictions of Mr Bemba, arguments the effect of which would be to reverse or amend findings made in Trial Chamber VII's decision on Mr Bemba's conviction in the present case, and challenges to the evidentiary regime which Trial Chamber VII

adopted in the conviction proceedings.

That means that counsel for Mr Bemba should not make any submissions on those matters today.

I also wish to recall that on 28 August of this year, the Appeals Chamber issued an order on the conduct of the hearing setting out questions on which it wishes to hear the parties. We are going to hear the parties' submissions on these questions and, potentially, on other matters today.

I emphasise that the speakers are requested not merely to repeat arguments already made in their filings but to respond to the questions put to them by the Chamber.

May I also remind the parties that they are expected to complete their submissions within the time frame set by the Appeals Chamber. The court officer will be monitoring the time and will indicate to the party when it is about to expire.

As indicated in the order on the conduct of the hearing in paragraph 2, the Appeals Chamber invited the parties to address the following issues related to Mr Bemba's grounds of appeal: In relation to Mr Bemba's second ground of appeal, does a violation of the person's rights caused by the proceedings in one case before the Court count for the purposes of the reduction of sentence or a stay of proceedings in another case?

In particular, is Trial Chamber VII in the present case competent to remedy the alleged violation of Mr Bemba's rights resulting from the case ICC-01/05-01/08, otherwise known as the "Main Case".

If the answer to the previous question is in the affirmative, can a trial chamber reduce the person's sentence as a remedy for an alleged violation of that person's rights?

In the case of a more serious violation of the person's rights, can a trial chamber order an unconditional stay of the proceedings at the resentencing stage of the proceedings?

If so, does it mean that both the person's conviction and sentence are reversed? Regarding the Prosecutor's statement on Mr Bemba's acquittal in the Main Case, was the impact of such statements on his rights, if any, a relevant consideration by Trial Chamber VII when imposing the sentence?

The Appeals Chamber also invited Mr Bemba to address the following issues under paragraph 3 of the order: How does Mr Bemba's request for additional evidence relate, in any manner, to his present appeal?

Is Mr Bemba seeking a variation of grounds of appeal under Regulation 61 of the Regulations of the Court? If so, what are the reasons in support of such a request?

After we have heard Mr Bemba's and the Prosecutor's submissions on these matters, we will move on to other aspects of Mr Bemba's appeal. Counsel for Mr Bemba will then be invited to make submissions on any other matters related to one or more of the grounds of his appeal, following which the Prosecutor will have an opportunity to respond.

The Chamber will hear submissions of the parties in the following order:

Counsel for Mr Bemba's submissions in response to the Appeals Chamber's questions, which will be 30 minutes.

The Prosecutor's submissions in response to the Appeals Chamber's questions, 20 minutes.

Mr Bemba's submissions on other aspects of his appeal, 45 minutes.

And the Prosecutor's submissions in response, 30 minutes.

I now give the floor to Ms Taylor as counsel for Mr Bemba, and you have 30 minutes for your submissions in response to the questions from the Appeals Chamber.

MS TAYLOR: [10:13:04] Thank you very much, Mr President.

And I would firstly like to express, on behalf of Mr Bemba, our sincerest gratitude to

the Appeals Chamber for granting us audience to make the final submissions in this case.

And I will turn to the judges' questions:

Firstly, can violations in one case be remedied in another?

It is our submission that, yes, and that is because the two cases at hand are related. And on a purely legal level, the Appeals Chamber already recognised that the Article 70 case was related to the Main Case and it could, in principle, have been joined to the Main Case. And I refer to the decision on its disqualification, which is ICC-01/05-01/13-648 at paragraphs 33 and 35.

Article 54(1)(c) of the Statute also specifies that the Prosecutor must fully respect the rights of persons arising under the Statute. This obligation is not case specific but applies to the proceedings as a whole. The Prosecution's conduct in one case must fully respect the rights of the defendant in another case.

And on a factual level, the lines between the two cases were blurred repeatedly, to the detriment of Mr Bemba, and it is only fair and consistent that the link between the two can now be relied upon to obtain an effective remedy as concerns any resultant violation of his rights.

And during the investigation phase of this case, the Prosecution switched its Article 70 hat with its Main Case hat repeatedly to obtain access to highly sensitive evidence, which it then placed before the Main Case trial Chamber on an ex parte basis, and it used its Article 70 hat to do so.

It's not possible, or indeed necessary, to litigate today the extent to which this affected Trial Chamber III's appreciation of the evidence placed before it. It is enough to note that in its judgment of 8 June 2018 the Appeals Chamber found that Trial Chamber III had issued a judgment which disregarded key exculpatory evidence, one which failed

to comply with basic requirements concerning the burden of proof and the presumption of innocence. That's paragraphs 172-178 of the majority judgment. It was a wrongful conviction, and this wrongful conviction had significant implications for Mr Bemba's rights as a detained defendant in the Article 70 case. If Trial Chamber III had assessed the evidence properly, if they had not waited until almost all of the witnesses in the Article 70 case had been heard, if they had not waited that long to issue its verdict, Mr Bemba would have been acquitted, the Main Case detention order would have been lifted several years earlier, and in the absence of this order there would have been no barrier to his release in the Article 70 case and we would not have ended up with a situation where Mr Bemba has served four and a half times the sentence judged to be appropriate.

The violation of Mr Bemba's right to a fair trial had tangible consequences as concerns his right to liberty in the Article 70 case and his right to expeditious proceedings in this case.

And the linkage between the two cases has, and continues to act to his detriment in other ways.

After he was acquitted in the Main Case, after he was freed and finally attempted to claim his life, his innocence, the Prosecution used this case, it deliberately blurred the lines between the two to associate Mr Bemba's conviction in the Article 70 case with an ongoing perception that he's guilty in the Main Case.

The practical effect is that even though Mr Bemba was convicted for Article 70 offences and not war crimes, he has served an equivalent sentence to someone convicted for such crimes. He has endured the punishment of someone convicted for such crimes, and he continues to endure the public censure of someone convicted for such crimes.

And apart from the fact that the lines between the two cases were intentionally blurred, Mr Bemba is one person. He doesn't experience violations in a fragmented way. When he was detained, he experienced it as a continuous and ongoing period of detention irrespective of the case name on the detention order.

And when the Prosecutor was granted audience by Trial Chamber VII when it used the opportunity to attack the appeals judgment and impugn his acquittal, the fact that these statements were made across the two cases, it amplified the audience, it amplified the harm, and it created an appearance that there might have been real fire to accompany the Prosecution's hot air and smoke.

And unless the cumulative impact of these violations are assessed in a holistic manner, there is a risk that his rights will fall between the cracks, that the remedy will not be effective.

And this holistic approach is justified by ICC case law, the text of the Statute and Rules, precedents from other international tribunals, and internationally recognised human rights law.

In terms of the ICC, within the specific context of abuse of process proceedings, Trial Chamber III found that it could not review the legality of orders issued by Trial Chamber VII, but it was competent to provide a remedy in relation to any harm or violations that impacted on the case before it - and that was the Main Case filing 3255 - and it would be illogical that if Mr Bemba were to have had the right to seek a remedy before the Main Case for violations caused by the Article 70 case, but not vice versa.

And in the context of sentencing, Article 78(1) empowers the Chamber to take harm caused by another case into consideration when assessing the personal circumstances of a convicted person. And in line with its broad power, at paragraph 24 of its

March 2017 sentencing decision, Trial Chamber VII stressed that Rule 145(2)(a)(ii) mitigating circumstances need not directly relate to the offence, and are thus not limited by the scope of the confirmed charges or the judgment, although they must relate directly to the convicted person.

And in support of this position the Chamber cited sentencing decisions issued in Lubanga, Katanga, Bemba and Al Mahdi.

Rule 145(2)(b) also allows the Chamber to take into consideration convictions issued in other cases, and uncharged allegations can also inform the Chamber's assessment of gravity and the nature of the defendant's conduct as long as there is some linkage to the case. And that was confirmed in the sentencing decision, the appeal 2276 at paragraphs 114-117.

So if the Chamber can rely on convictions and uncharged allegations from other cases or as concerns other crimes under the jurisdiction of the Court, it follows that the Chamber should also have the power to take into account detention or an acquittal entered by the Court for crimes under its jurisdiction, particularly in cases where the two are related and one affects the other.

And if these factors are relevant for potential decrease or mitigation in sentence, it also follows that violations in one case are relevant to the overarching question as to whether it is possible to piece together the constituent elements of a fair sentence.

And in terms of international precedence, the ICTR, Special Court for Sierra Leone, ECCC, and STL have recognised that the right to an effective remedy imbues the Court with both the power and the duty to take into consideration violations occurred in linked proceedings or where there is a nexus.

At the Special Court for Sierra Leone in the Kanguara contempt case, the sentencing judge concluded that she was of the view that when the court considers sentence and

looks to a convicted person's past behaviour, they are entitled to look at both the good and the bad. A court should be entitled to give credit for suffering caused through breaches of a convicted person's human rights.

And as clarified in the written judgment, although his abuse had no direct nexus to the contempt case, these circumstances informed the judge's assessment of the appropriate degree of punishment that should be imposed on the defendant before her. That was at paragraphs 75 and 91.

At the Rwanda tribunal, in the Kajelijeli appeals judgment the Appeals Chamber emphasised: Firstly, that the international division of labour in prosecuting crimes should not operate to the detriment of the apprehended person; and secondly, that the Prosecution was under a particular duty of diligence to investigate the case in a manner that fully respected the rights of the suspects even when a suspect was in custody of national authorities.

And if we apply that reasoning to the current case, as soon as the Prosecution initiated the Article 70 investigation, Article 54(1)(a) of the Statute -- or (c), sorry, imposed a positive obligation of diligence to ensure that any measures that it took in the two cases would not affect the rights of Mr Bemba under the Statute. That means the Prosecution should have brought this case timeously, it should have taken steps to ensure that this case did not trigger delays in the Main Case and that delays in the Main Case did not have adverse ramifications for Mr Bemba's detention status in this case.

JUDGE EBOE-OSUJI: [10:25:18] Ms Taylor, I don't mean to interrupt your flow, I do not mean to interrupt your flow, but there are a series of questions arising. First of all, I want to ask you, noting that this train of submissions for you and with an urge for a stay of proceedings, as I seem to infer from your written matter, you are saying it

all boils down to there needs to be a stay; am I correct?

MS TAYLOR: [10:25:56] Yes, that's correct.

JUDGE EBOE-OSUJI: [10:25:59] Okay. Was that stay litigated in the Court below? Did you bring an application for stay of proceedings before the Trial Chamber on any of these grounds, not only the holistic appraisal you are making, but also at a certain point in time when you felt that certain conducts of the Prosecutor interfered with your client's right to a fair trial, did you bring any application for stay of proceedings at that stage before the Trial Chamber?

MS TAYLOR: [10:26:40] Thank you very much. During the sentencing hearing in June, our submissions were that given the extent of the punishment that he had endured, no further punishment was appropriate. And at that point, we relied upon domestic precedent to argue that he should be granted a discharge, and that as such, no conviction should be registered because it was at that point punishment did not serve a purpose.

Now, after we received the Prosecution's submissions, we then filed additional written submissions, but we argued that there had been a cumulative violation of his rights, that it was appropriate not just to take into account the overall length of detention and the impact that it had on the proceedings, but also the impact of the Prosecution's submissions and the impartiality of the proceedings. And in those submissions we argued that the attempt to controvert the acquittal also equated to an abuse of process and that that underscored our primary request was that no punishment should be imposed in this case.

JUDGE EBOE-OSUJI: [10:27:38] All right. Fair enough, I understand that, but my question was whether or not you had made the specific application for stay of proceedings. Do I take it you did not make that, in the Trial Chamber the -- as I

understood from what you said now, correct me if I got it wrong, was that you were saying that in view of the errors you pointed out, you felt that it needed to be addressed by imposing no further sentence? Is that the sum of it?

MS TAYLOR: [10:28:15] Thank you. Yes, the sum of it was that the Prosecutor's conduct we characterise as an abuse of process and in terms of our primary submissions we characterise that as saying it would be inappropriate to actually record a conviction.

JUDGE EBOE-OSUJI: [10:28:29] The reason I asked this question about whether you had raised the stay application earlier is because you are now before the Appeals Chamber and the way the thing works is that an Appeals Chamber's jurisdiction comes in to correct an error made below by a decision that should not have been made, a decision that was made in a wrong way, so the Appeals Chamber exercises appellate review powers over an earlier decision. If we haven't got a stay -- a decision that deals with stay, how do we begin to deal with that at the appellate stage? That's one question I want to ask. Can you help me with that, please.

MS TAYLOR: [10:29:15] Certainly. The authorities that we submitted were actually authorities on a stay of the proceeding, so the terminology might be different, but for example, we cited the Privy Council decision in Mills and another which actually refers to a stay of the proceedings as a potential remedy for delay. In our written submissions we also refer to the Kajelijeli appeals judgment on abuse of process where we were saying, firstly, there should be this primary remedy of a stay but also the Chamber has a lesser power as well to issue other appropriate remedies. And ultimately in our relief we said that the Chamber must have the power and we requested them to exercise the power to impose a finding which did not result in any

punishment for Mr Bemba. So we would characterise that -- one could characterise it as effectively arguing that there should have been a stay of the verdict.

JUDGE EBOE-OSUJI: [10:30:09] One last question on this matter, again, and I'll leave it there: If you look at Article 83(2)(a), Article 83(2)(a) says:

"If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) reverse or amend the decision or sentence."

Isn't that what it all boils down to here, that if there were errors in the Court below, that is something that the Appeals Chamber could address by you making appropriate submission saying that what was done below needed to be reversed or the decision or judgment amended accordingly? If that is the case, do we need to start arguing about stay of proceedings, which carries its own train of thought and jurisprudence?

MS TAYLOR: [10:31:54] I would respectfully submit that the reversal here concerns Trial Chamber's refusal or the fact that it rejected the Defence application at that point to what was effectively stay the proceedings because that was the tenor of the Defence submissions. We were arguing that given the nature of these violations, the extent of his detention and the impact that it had on Mr Bemba, it was appropriate to not exercise the Court's sentencing function in that case that should be characterised as in effect a request to stay the execution of the sentence, to stay the execution of the conviction to the extent that it is linked to the sentence. Thank you.

I will continue on from the Kajelijeli judgment to the decision of the Lebanon tribunal in El Sayed, and that's the decision dated 10 November 2010 where the

Appeals Chamber considered what obligations and powers might flow from the duty to ensure the fair administration of justice. This included the power to fill in any unforeseen gaps as concerns the regulation of the rights of persons affected or impacted before it.

The Appeals Chamber further delineated the following criteria for determining whether an individual would have standing before the Court to seek a remedy:

Firstly, whether the applicant had been negatively affected by the conduct of another person or organ. And here that criterion is satisfied as Mr Bemba's rights had been affected by the organs of this Court.

Second, that the conduct of the person or organ of the Court caused a substantial injury to the plaintiff. And again, this element is satisfied given the substantial harm to Mr Bemba's right of innocence, his reputation, and his right to be protected against unreasonably lengthy detention and proceedings.

Third, the conduct is incidental to or related to the Court's proceedings. And again, conduct arising in the Main Case related directly to the Court's proceedings. Indeed the very purpose of this case was to consider and regulate conduct arising from the Main Case.

And fourthly, is the Court in question empowered to address issues because of its jurisdictional authority? And here, the Appeals Chamber continues to exercise jurisdiction over Mr Bemba and has the power to provide the remedies that were requested at first instance. This decision was relied upon by Trial Chamber IV in the Banda and Jerbo case, paragraph 74, and it would be equally correct to rely upon these findings to assess the parameters of the Appeals Chamber's powers in this case.

I would also like to distinguish the approach of the ECCC in Duch where although the Appeals Chamber overturned a decision to grant credit for prior violations, this

turned on its conclusion that there was no legal connection between the two judicial institutions. And clearly that's not the case here because we have the same defendant, the same Prosecutor, the same Statute, and the same detention unit cell. And under human rights law the principle establishes the Chamber's responsibility to interpret the Statute and its own competencies in such a manner that it can ensure a fair and effective remedy for the defendant appearing before it.

This responsibility extends to any violations that have arisen during or in the context of the proceedings of this Court and which impact on the circumstances of the defendant.

This stems from the following:

Firstly, as a general obligation to organise judicial systems in such a way that the system is capable of respecting and ensuring a defendant's right to a fair trial and any related remedies. And I refer to Abdoella versus Netherlands.

Secondly, this obligation applies in relation to connected or parallel proceedings. For example, in Morrison versus Jamaica the Human Rights Committee underscored that there is a duty to exercise due diligence when dealing with a person who is detained pursuant to parallel proceedings.

And the fact that formal divisions between cases can't be relied upon to deny the defendant an effective remedy is also reflected by case law which establishes that:

Firstly, the duty to respect and enforce a final acquittal applies in all related cases and imposes a duty on all public officials in such cases to act in a manner that fully respects and implements the outcome of the acquittal. And I refer to Kemal Coskun versus Turkey at paragraph 43.

Secondly, the European Court has established that detention that predates the jurisdiction of the Court is still relevant, insofar as it informs the reasonableness of the

length of detention and the length of proceedings post-dating the jurisdiction of the Court. I refer to Kalashnikov v Russia. And I turn to question 2: If the answer to the previous question is in the affirmative, can a trial chamber reduce the person's sentence? And here we submit yes, for the following reasons:

Firstly, such violations concern the circumstances of the defendant, they therefore fall within the Chamber's sentencing considerations under Rule 145.

And secondly, the Appeals Chamber has found that it possesses the inherent power to stay the proceedings in case of serious violations. If it has the power to order such an exceptional remedy, it must also have the power to impose a lesser remedy in case the threshold is not met. I refer here to the Kajelijeli appeals judgment at paragraph 255.

And thirdly, the right to an effective remedy encompasses a preventative, retributive and restorative function. For this reason one particular type of remedy, such as monetary compensation, might not be appropriate or it might not be sufficient to stop ongoing harm or to remedy it. And I refer to general comment 35, paragraph 49 where the Human Rights Committee stressed that financial compensation is a specific example of a remedy, but it exists alongside what other remedies might be required to respect, protect and ensure the person's rights.

And for these reasons, the European Court has found an explicit and measurable reduction in penalty might be an appropriate form of redress for fair trial violations involving delay or an unreasonable lengthy detention. And I refer to Dzelili versus Germany.

Similarly in a study of domestic remedies in the Council of Europe concerning delays, the Venice Commission concluded that in addition to financial compensation the right to *restitutio in integrum* could be fulfilled through the discontinuance of the

Prosecution, the mitigation or reduction of sentence, an acquittal, the low-fixing of a fine, or the non-deprivation of civil and political rights. And that was at paragraph 240.

And this leads me to the third question: In case of a more serious violation, can a chamber order an unconditional stay at the sentencing phase?

And our submission again is yes, and that is, firstly, because the right to a fair trial embraces the judicial process in its entirety and this encompasses necessarily the sentencing phase. And I refer both to the Lubanga 2006 jurisdiction judgment at paragraph 38 and the European Court case of Eckle versus Germany, which confirmed that the right to expeditious proceedings continues during sentencing and on appeal.

The right to expeditious proceedings is also a free-standing right. Violations of the right must be remedied effectively even if the defendant was convicted fairly and impartially.

Thus in the case of Darmalingum, the UK Privy Council underlined at paragraph 14: "... if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time."

And in that case, even though there was no suggestion that the conviction was improper or unfounded, the Privy Council determined that the only remedy which would vindicate the defendant's rights was to quash the conviction.

Independent nature of the speedy trial guarantee was also later affirmed by the Privy Council in Mills v Her Majesty's Advocate & Anor. And in so doing, Lord Steyn stressed that delays cannot be excused or left unremedied just because the guilt of the defendant was demonstrated at a fair hearing by a competent court.

The Privy Council affirmed that a stay could be a potential remedy post-conviction, although it qualified Darmalingum by noting that a permanent stay would not be the normal or general remedy, rather it would depend on the circumstances and the extent to which other remedies might suffice.

And the second reason why it should be possible to stay the proceedings post-conviction is that both the existence and impossibility of curing fair trial violations might only become apparent at the end of the process.

THE COURT OFFICER: [10:42:32] Excuse me, counsel, you have five minutes left.

MS TAYLOR: [10:42:36] Thank you very much. I would like to respectfully request if I can have more time, given the amount of time that was used addressing questions?

PRESIDING JUDGE MORRISON: [10:42:53] I'm told that time was stopped during the question.

MS TAYLOR: [10:42:58] Okay. Well, thank you very much for clarifying that.

This position that it might only be possible to assess delays at the end is consistent with the conclusion of Trial Chamber VI in the Banda and Jerbo case, where they concluded that because a stay is an exceptional remedy it was preferable to forge ahead with the trial with a view to seeing whether it might be possible to cure any issues of unfairness during the process itself.

And I refer to the domestic authorities cited by Judge Eboe-Osuji at paragraphs 59 to 76, including the remarks of Justice Brennan in the case of Jago versus New South Wales, which infer that a court might be better placed to assess whether potential prejudice actually crystallised at the end of the process. And this particularly resonates with violations of right to a speedy process, and for this reason there are multiple examples cited in our brief and during our sentencing submissions before

Trial Chamber VII where courts have done exactly that. And I refer to the authorities set out in paragraph 148 of our defence brief.

And in terms of a recent case where such circumstances were held to exist, in the Canadian case of R versus Jordan, the Supreme Court found on appeal that a delay of 44 months in an ordinary trafficking case was unreasonable, and it stayed the proceedings and quashed the conviction. In doing so, it referred to a quote from Chief Justice McLachlin that swift, predictable justice, the most serious deterrent of crime is undermined and rendered illusory by delays.

And this mirrors the findings of the Venice Commission that after a particular lapse of time, the societal goals of punishment dissipate or are displaced by the goal of upholding the importance of speedy administration of justice.

And that is the case here, there are no longer any goals of punishment and deterrence to be met. The Trial Chamber and the Appeals Chamber have publicly condemned the conduct that underpins Mr Bemba's conviction, and he has served a sentence that manifestly exceeds the tariff.

And the problem is that given the excess punishment, there is no other way at this point to mitigate the harm, to eliminate it or remedy it, other than a stay of the proceedings.

This brings me to the question as to whether the person's conviction and sentence are reversed. And I'm very mindful here of the Appeals Chamber's order that the conviction has been upheld, so I wouldn't wish to suggest anything to the contrary. Our submission is that in case of a stay of the proceedings it's the conviction and sentence which has stayed. The conviction itself remains valid, although not executed.

In terms of the impact of statements concerning the Main Case, it is our submission

that yes they were relevant and Trial Chamber VII had a duty to take steps. Because after a person has been acquitted, that acquittal applies to all related proceedings, and there is therefore a positive duty on all persons in those related proceedings to act in a manner which is consistent with that acquittal and which protects the defendant from unwarranted brandings of guilt. And I refer here to Vanjak v Croatia and Tendam v Spain.

And this duty was brought into play by the Prosecutor's claims that he was not in fact innocent, that the Main Case verdict had denied justice to thousands of victims. These submissions were wrong and they were particularly egregious because the Prosecutor doesn't just represent a State, she represents the international community. Her words have weight and influence. For this reason, her powers are subject to the caveat the ultimate responsibility for securing justice and fairness rests with the judges. And this presupposes that the judges who exercise that power under Article 64(2), that they will take steps to ensure the fairness of the proceedings and the rights of the persons before it.

And in line with this duty, the Appeals Chamber accepted in the Lubanga case that the Prosecutor's failure to comply with one order concerning the disclosure of one item of exculpatory material could justify a temporary stay to trigger compliance. And here the Chamber was not just faced with a refusal to comply with one order, the Prosecutor controverted an entire judgment and placed herself above the authority of the judges, and she publicly undermined the highest form of protection for Mr Bemba's rights at this Court.

He also had the right to be not just judged but also prosecuted by an independent and impartial prosecutor, one that would fully comply with Article 54(1). And I note that in his separate opinion in the disqualification judgment, Judge Kouroula stressed

that although the Prosecutor had a theoretical right to prosecute both cases, she should also take the utmost care to adhere to the most rigorous standards under the code of conduct. But when the Prosecutor refused to retract her statements at our invitation, when she attempted to use this case to secure an improper purpose concerning the Main Case --

THE COURT OFFICER: [10:48:20] Excuse me, Counsel, your time is up.

MS TAYLOR: [10:48:25] Thank you. The Prosecutor --

PRESIDING JUDGE MORRISON: (Microphone not activated)

MS TAYLOR: The Prosecutor demonstrated that she lacked the will to prosecute this case in an impartial manner.

And pursuant to Article 64(2), the lack of an impartial prosecution was not something that Trial Chamber VII was free to disregard or ignore.

Thank you.

PRESIDING JUDGE MORRISON: [10:48:53] Well, being very wary of encouraging you to do so, is there going to be an application for variation of the grounds of appeal in this matter?

MS TAYLOR: [10:49:05] Thank you very much, Mr President.

I would like to confirm that our application concerning Judge Perrin de Brichambaut concerns two aspects of our appeal, in our view: One, was his statements concerning an apparent in camera decision not to imply -- apply interlocutory appeals affected the overall expeditiousness of the proceedings. And that is because as a detained person, Mr Bemba had a right that special diligence be employed, that the Chamber use any procedure in its arsenal to protect those rights, and that a preliminary decision on this point was incompatible with his right to be heard on any future interlocutory appeals. And this had an impact on the overall delays in that it meant

that the Appeals Chamber was then faced with complex and novel issues on appeal which extended in a largely appellate process. It therefore lengthened the overall length of proceedings. We therefore submit that that's relevant to ground 2 insofar as it shows that inadequate steps were taken to protect Mr Bemba's right to protection against unreasonable delays and that as a result of the fact that steps were not taken preventively at this point in time, the only remedy would be a stay to cure the violation of his right to unreasonable delay.

And secondly, we argue that it's relevant insofar as it confirms the separate opinion of Judge Pangalangan that in 2017, when the Trial Chamber sentenced Mr Bemba, they did so with the understanding that he was guilty of the Main Case, that he had actually committed the crimes and that therefore resorted to Article 70 conduct with -- and actually created witnesses with a view to controverting that conviction. And that because of that, there was an increased onus on the Trial Chamber in 2018 to take positive steps to purge the judgment, to purge its prior findings from any assumption that he was in fact guilty, and that also heightened the obligations to deprecate the statements of the Prosecutor and to positively affirm his -- not only the verdict, but his innocence in the Main Case.

And for that reason we, I respectfully submit that it is not necessary to vary the grounds of appeal because those argumentation are subsumed within our existing submissions.

PRESIDING JUDGE MORRISON: [10:51:31] You make the point I was about to make to you, that it can be dealt with without variation on its merits. Thank you. I now give the floor to the Office of the Prosecutor to respond the submissions of counsel of Mr Bemba.

MS BRADY: [10:51:48] Your Honour, before we actually start our submissions and

before the clock runs for our submissions, I do have a brief request. Ms Taylor has been speaking now for some 30, 35 minutes, taking into account that the clock was stopped during the questions. We would ask for -- if we could have a further 10 minutes to answer the questions you have in paragraph 2, because they are quite complex and they raise very far reaching -- they have far-reaching implications for other cases. We know that she was given the extra time because she had the questions in paragraph 3 relating to the additional evidence, but in fact for most of the time she did speak on these questions and we feel that these are questions of such importance that we would also ask for the additional 10 minutes.

PRESIDING JUDGE MORRISON: [10:52:40] I think that's a perfectly fair and proper request.

MS BRADY: [10:52:44] Thank you. I am sure the interpreters will appreciate that as well. Thank you.

Your Honours, Ms Narayanan will address you first on the first few question questions in paragraph 2.

MS NARAYANAN: [10:52:57] Good morning, your Honours. May I? I believe the clock can start now.

PRESIDING JUDGE MORRISON: [10:53:29] Thank you.

MS NARAYANAN: [10:53:30] I will begin the Prosecution's submissions this morning and I will address you on questions 2(a), (b), and (c), and Ms Brady will then address you on question 2(d), and possibly the additional evidence matter.

Your Honours, we'll rely on our written response for ground 2, paragraphs 75 to 159, but just at the get-go I would like to note that this morning the arguments that we heard from Mr Bemba was some combination of a relitigation of the Main Case appeal and the Article 70 appeal and some new arguments that we haven't heard in

this appeal. But nevertheless, let me turn to your questions, your Honours.
In question 2(a) you ask whether, in a situation of parallel cases such as the Main Case and the Article 70 case, an alleged violation of a person's rights in one case could count towards reducing the sentence or staying the proceedings in another case. And in particular, is Trial Chamber VII competent to address or remedy those violations alleged in the Main Case.
And in response and in principle, we say no. Alleged violations in one case are not, in principle, relevant to the question of sentencing or stay in another case. And in our view, Trial Chamber VII would not be competent to address those alleged violations from the Main Case. And our reasons for saying so are threefold:
First, these resentencing proceedings are not the competent forum to address those alleged violations in the Main Case, a different case. The Statute, read with international human rights law and, in particular, the right to effective remedy, already allows Mr Bemba an effective remedy in a different and more appropriate forum. He can seek compensation under Article 85 of the Statute if his rights are found to be violated in the Main Case. And, as you may know, your Honours, Mr Bemba has already sought such compensation in March earlier this year, raising several of the same issues that he raised in this resentencing appeal. And a compensation hearing was held at his request before Pre-Trial Chamber II. So, in this sense, Mr Bemba has already exercised his right to effective remedy regarding alleged violations in the Main Case. And Pre-Trial Chamber II is seized of this matter and Mr Bemba's rights have not fallen through the cracks.
Second, if Mr Bemba's rights in the Main Case had been violated, and it is our submission that they were not, Mr Bemba's right to an effective remedy must be respected. But having such a right does not mean that one may seize multiple

different Chambers at this Court with multiple claims of an overlapping nature. A right to an effective remedy does not mean a free licence to open a Pandora's box of procedural confusion.

And given how similar some aspects of Mr Bemba's claims in this case and in his compensation claim are, the risk of procedural confusion is only furthered heightened. Your Honours, what if, for instance, Pre-Trial Chamber II and Trial Chamber VII, while hearing the same issues, come to different, opposite and contradictory outcomes? Who would prevail? And what if the Appeals Chamber pronounced on those matter in the context of this resentencing appeal but is then asked, in the context of some future potential appeal against the compensation decision, to assess those same matters? How would it do so?

Your Honours, in our view, since Mr Bemba has already fully voiced his arguments on the Main Case, in the proper Main Case forum, his overlapping arguments relating to purported Main Case violations in the resentencing process of this case may be dismissed summarily.

Third, it is generally the practice of Chambers at this Court to confine their sentencing considerations to what may be relevant to the four corners of the proceedings before them. And on this point, we would like to refer to the general practice in other cases before this Court in considering mitigating circumstances, found at A2 of our list. And it goes without saying that in a resentencing process, the issues are even more confined to the scope of the remand. Applying this commonsensical sentencing principle in this manner is even more significant in the special context of the Main Case and the Article 70 case. As you know, it has been the consistent wisdom of Chambers hearing both these cases to keep the two proceedings separate. And this foresight and judicial restraint has allowed these two proceedings to be

conducted in parallel fairly and efficiently, without one derailing the other. And the Appeals Chamber hearing both cases has upheld this understanding. In fact, it expressly dismissed Mr Bemba's efforts to argue purported violations from the Main Case in this case. And that is at A3 on our list.

Your Honours, these resentencing proceedings, as limited as they are, are not the time or the place to revisit this approach. And although Mr Bemba blurs the distinction between these two proceedings, he should not be allowed to change the rules of the game at the eleventh hour.

For all these reasons, your Honours, we are of the view that Trial Chamber VII is not competent to review the Main Case record and decide allegations pertaining to that case so as to address them. That said, the only possible exception to this general rule - and we hesitate - may be if an alleged violation of Mr Bemba's rights in the Main Case also violates Mr Bemba's rights in these proceedings. And in that sense, Trial Chamber VII may have some limited competence to assess those violations, but based on the record of this case.

But as Mr Brady will explain, Mr Bemba's rights in this case were intact. And Mr Bemba's rights in the Main Case were not violated either. Such a violation has yet to be found.

Allow me to turn to questions 2(b) and (c), your Honours, which I will address together. You ask what remedy a competent Trial Chamber could use to address alleged violations of rights in this case. Could they reduce the sentence? Could they order an unconditional stay at the resentencing phase? Could such a stay affect the convictions in this case, now final, or the sentence?

To better assist your Honours, we will assume - but, respectfully, we do not concede - that we are indeed addressing a situation where the alleged violations of

Mr Bemba's rights in the Main Case has somehow violated his rights in this case. And to answer your questions, I will make three points at this stage.

First, the ultimate outcome of a particular case determines what remedy may be appropriate for violations in that case. And as cases from the ICTR and ICTY show, and that's at A4 of our list, if a person's rights are violated in a case where he's ultimately acquitted, the appropriate remedy may be compensation. But if a person's rights are violated in a case where he is ultimately convicted, then the appropriate remedy may lie in reducing the sentence.

Now, since many of Mr Bemba's arguments seem to allege violations of his rights in a case where he was acquitted, his remedy lies in seeking compensation before Pre-Trial Chamber II once those violations have been established.

Second, even in a case where a person is convicted, reducing or reversing the person's sentence as the remedy for established violations is not a foregone conclusion. Other remedies in international human rights law may otherwise be available, and a sentence need not be reduced if those other remedies are found sufficient. And Chambers of this Court have been circumspect in taking alleged violations of rights into account in mitigation, but they may do so in exceptional circumstances. And you may find those authorities at A5 of our list.

Moreover, even when sentences are reduced to accommodate for violations of rights, the extent to which that sentence may be reduced depends on whether or not the person in question was prejudiced. And this, in turn, would depend on the facts of each case. For instance, the authorities at A6.

Third, and this will be my last point: In principle, final convictions cannot be stayed at the resentencing phase. A stay of convictions is a drastic remedy, your Honours, and it's always to be used sparingly and cautiously. Allowing this remedy in

a resentencing phase after the Appeals Chamber has confirmed the convictions would, in our view, negate the fundamental mandate of this Court to prevent impunity.

Your Honours, the convictions in this case are final, they cannot be stayed in these resentencing proceedings.

And this may be connected to your question from earlier this morning, Judge Eboe-Osuji, Mr Bemba did not, in our view, ask for this remedy before the Trial Chamber. There, while he argued that his rights were violated, he acknowledged that paying a reasonable fine, which was part of his sentence, he did not question the convictions and, in fact, one would say that by saying that he would pay a reasonable fine he seems to have acknowledged his convictions. And we'd refer you to the filing 2304, paragraph 45, as one example.

So yes, your Honours, it does bring in a question of what the scope of appellate review is if the remedy has not been sought before the Trial Chamber. And I believe Judge Shahabuddeen in Barayagwiza was also of the same view.

PRESIDING JUDGE MORRISON: [11:05:51] In some major jurisdictions the position changes, doesn't it? In the United States, by and large, if you don't raise something at first instance you are precluded from raising it on appeal. That doesn't necessarily follow in the United Kingdom, for instance, where something may not be apparent at the trial stage and only becomes apparent on a careful reading of the trial record and you are not then precluded from raising it at the appellate level.

It seems to me that the real test ought to be: Not was it raised at the trial stage, but was it possible to raise it at the trial stage. Was this something that was within the competence of the parties to raise or is this something which has arisen de novo since the end of the trial.

That's just my -- that's just an observation; not a statement of the law.

MS NARAYANAN: [11:06:47] Yes, thank you, your Honour.

Yes, I think that's absolutely right. It was apparent on the trial record, and we heard Ms Taylor say this morning that she had made those arguments in any event.

So in that sense the argument could have been made -- it was possibly made, perhaps it was made under a different guise or a different -- using different language, but the essence was possibly the same in that sense if one were to look at it that way, but in any event, the specific remedy was not asked for either. So possibly, either which way, one does come to the same point.

And in any event, your Honours, I believe even if you were to consider that the stay of the proceedings is something that the Appeals Chamber can consider at this stage de novo, perhaps, then, we would still say that asking for a stay during resentencing proceedings is a highly exceptional remedy.

And perhaps this is the day to refer to it, but the Banda stay decision does record that fact. And I would like to again refer to Judge Eboe-Osuji's separate opinion in that case. Domestic jurisdictions on stay -- and we did hear Ms Taylor mention many of them -- they are not quite apposite to the ICC. The ICC is structured differently, and I hope I'm doing justice to your view, Judge Eboe-Osuji, is, the ICC is highly regulated, unlike perhaps some traditional common law jurisdictions where you do have superior courts, the ICC also has a different mandate to prevent impunity. So in our view, all of this should be taken into account in considering whether the Appeals Chamber can wield that power at this stage.

So, your Honours, in our view, Mr Bemba asked for this drastic remedy somehow for the first time on the second sentencing appeal, and in your 20 August 2019 decision, on the scope of the appeal, you've already discouraged arguments that asked to reverse the convictions or those that have a similar effect. Mr Bemba's request under

ground 2 to reverse his convictions is similar and should be similarly dismissed.
But in any case, the only avenue theoretically available at this stage to set aside Mr Bemba's convictions is via Article 84 for revision of final conviction, and those three situations are strictly construed.
It would circumvent the statute without the rigours of Article 84, and when Article 84 is *lex specialis*, one simply does not have to look beyond that provision. And we'd refer to A7. Your Honours, even if, for one hypothetical moment, we were to look beyond the statute, which we submit we do not need to, but at the general operation of international human rights law, we would find that reconsidering or revisiting final convictions is rare and it's done only when there are fundamental defects in the previous proceedings. But this is an exceptionally high threshold as the authorities in A8 show.
Your Honours, there are no such defects in the conviction-related proceedings. The Appeals Chamber has fully reviewed these proceedings when they confirmed the convictions in this case and there are no such defects in the limited resentencing proceedings since 8 March 2018 either.
Your Honours, short of exceptional cases of serious violations of human rights, staying or setting aside jurisdiction for an abuse of process is considered disproportionate and we would refer to the authorities in A9.
These resentencing proceedings were born out of a Prosecution appeal that was successful against the initial sentence and they were confined in scope to the specific issues on remand. And a stay of convictions at this penultimate stage would respectfully in our view be manifestly out of step with the essence of these proceedings.
Your Honours, this concludes my submissions and I'd be happy to answer your

questions -- if you have any further -- in the allocated question time. But with your permission, I would like to yield the floor to Ms Brady.

PRESIDING JUDGE MORRISON: [11:11:26] Perhaps it's more efficient to do that, to yield the floor to Ms Brady, and we can deal with any collateral issues later in the proceedings.

MS NARAYANAN: [11:11:37] Thank you, your Honours.

MS BRADY: [11:11:43] Your Honours, I'll now answer your question in paragraph 2(d) and you've asked:

"Regarding the Prosecutor's statements on ... Bemba's acquittal in the Main Case, was the impact of such statements on his rights, if any, a relevant consideration by Trial Chamber VII when imposing the sentence?"

Your Honours, the first thing we notice is that your question is broadly framed; you've used the expression, "The Prosecutor's statements". So in answering it, I will address statements made by Prosecutor Madam Bensouda, which were made outside of the courtroom, that is, in her press statement on 13 June 2018 after the Bemba Main Case appeals judgment and the later -- in a later interview and I will also briefly address statements more -- they are more submissions made by the Prosecution in court proceedings before Trial Chamber VII in the Article 70 case. And I mean by this the submissions made, the written submissions, the oral submissions made in the resentencing hearing and also in the release hearing. And I think because they address -- I will address them separately because they raised different considerations.

Turning first to Prosecutor Madam Bensouda's statements after the Main Case acquittal, in particular, her press statement. I won't repeat what we've said in our brief because I think we've argued it very fully there. But in short, our position is that her statement was proper and did not overstep her role. Her comments

didn't - as Ms Taylor this morning has argued - they did not violate Mr Bemba's right to be presumed innocent or to private life or right to reputation in relation to the Main Case and his status in that case as an acquitted person who enjoys the presumption of innocence for the charges which the Appeals Chamber reversed.

In any event, as my colleague Ms Narayanan has just explained, the remedy for any purported violation of his rights in that case, the Main Case, lies in proceedings in that case just as he's doing now in the compensation claim he's bringing to Pre-Trial Chamber II.

The question for this case, the Article 70 case, is whether Madam Bensouda's statement impacted Mr Bemba's rights in this case? And to this end, you've asked, "Well, did Trial Chamber VII treat it as a relevant consideration when resentencing?" The short answer is no. Her statement was not a relevant consideration for Trial Chamber VII when it imposed the new sentence, and it has no impact on his rights in this case, in the Article 70 case, as a person being resentenced for his Article 70 convictions.

Now firstly, your Honours, her press statement was about his acquittal in the Main Case. It wasn't about the Article 70 case. There was no blurring of the lines as Ms Taylor put it this morning.

Now it's true there was a brief reference to -- in that statement to Mr Bemba's convictions for administration of justice offences at the Court, but it cannot be said that that neutral statement of fact violated his rights in the present case.

The only question really before this Court is whether the Prosecutor's comments about his acquittal affected or violated Mr Bemba's rights in the Article 70 case in the sense that Article -- that Trial Chamber VII, when resentencing him, improperly considered them or was tainted by them and that this somehow improperly affected

their new sentence decision.

Nothing in the resentencing decision indicates that her comments or indeed any of the media, the social media commentary which reported them, nothing in there shows that they were considered by the Chamber -- by Trial Chamber VII.

There's certainly no expressed reference to them, but even assuming that the Judges of Trial Chamber VII were aware of the Prosecutor's statement - and I think that that's probably a fair enough assumption being Judges in this Court and being aware of what's going on when the Prosecutor make a press statement - but as professional Judges, their duty was to render his new sentence taking into account the errors identified by the Appeals Chamber and based on the evidence and submissions it heard before it. And I think that they did so comes out clearly from the resentencing decision and Mr Bemba's submissions that the Chamber -- Trial Chamber VII was implicitly and improperly influenced by her statements and commentary is nothing more than speculation.

So now I come to -- turn to the Prosecutor's other -- what we might call statements about Mr Bemba's acquittal. And here I'm really talking about the oral and the written submissions that the Prosecution made in these resentencing proceedings in the Article 70 case.

Well, they made submissions -- actually, the Prosecution made submissions in both the resentencing and the release, I'm primarily focusing on the resentencing submissions.

The Prosecution's submissions on how Mr Bemba's acquittal in the Main Case should impact his new sentence for his Article 70 convictions, they were squarely before Trial Chamber VII. So they're quite different from the others. They were squarely put. They were argued. They were considered. They were heard. The

Prosecution -- I don't want to belabour the point but the Prosecution in essence asked the Trial Chamber when it was deciding on the new sentence to consider the Main Case acquittal for the purposes of showing the gravity or the extent of the damage caused by Mr Bemba's Article 70 criminal conduct.

Although the submission was ultimately unsuccessful, we realise that it was ultimately unsuccessful before Trial Chamber VII. Nothing the Prosecutor said in court or in its filing overstepped its role or violated Mr Bemba's rights in this case. And I also should point out that nor were his rights violated -- and now I'm talking about both cases, the Main Case and this case, they were not violated by the specific words or language used by the Prosecution in its submissions. And I think it's important to point out that in our brief, we have corrected several misunderstandings or misrepresentations even about what Mr Bemba has said that the Prosecution allegedly said in the hearings. Again, I point you to our brief, paragraphs 142 and 144 to 145 and relevant footnotes.

Now coming back and talking about -- turning to your state -- your question again, was the impact of these Prosecution statements --

THE COURT OFFICER: [11:19:35] Excuse me, counsel, you have five minutes' left.

MS BRADY: [11:19:38] -- was the impact of these Prosecution statements on his rights -- and here, I'm talking about the submissions -- if any, are of relevant consideration by Trial Chamber VII when imposing the new sentence?

Most significantly, your Honours, at the end of the day, Trial Chamber VII rejected the Prosecution's arguments and they went into some reasoning as to why they rejected the arguments. Firstly, to do with the independence of the two cases, just as their earlier findings weren't affected by the Main Case, the same -- similarly, the Chamber said, "Well, we are not going to evaluate the extent to which the corrupted

witnesses had affected the Main Case."

But secondly, the other reason is they simply said in any event the Prosecution had failed to establish any causation between what Mr Bemba and others were convicted of in the Article 70 case and the outcome of the Main Case.

And that's why -- that reasoning is quite lengthy in there, in paragraphs 22 to 25, that's why they concluded the Main Case acquittal has no impact on the sentence to be imposed and the Chamber cannot consider the Main Case acquittal to aggravate the sentence imposed in the present case.

So it's clear that the Prosecution submissions were not a relevant consideration when they imposed the new sentence. To the contrary, they were expressly rejected.

Finally, there are similarly no merit in Mr Bemba's argument that these submissions -- and even seen in light with the media commentary, even seen in the light of the Prosecutor's statement all taken together, there's no merit in arguing that somehow all of these things implicitly tainted or biased Trial Chamber VII.

And again, there's no need for me to explain that. I stress the professional duty of the Judges. They -- and what they do when sentencing an accused person, a convicted person. And most significantly, there's simply no evidence to suggest that. And Mr Bemba has pointed to the fact that -- well, two matters. He's raised two arguments to show somehow there was this implicit tainting. But the fact that the Trial Chamber rejected his argument that the acquittal somehow reduced the gravity of his offences -- of the offences or his culpability and instead decided that the outcome of the Main Case did not make his solicitation of false testimony in an attempt to manipulate his trial any less serious, that finding by the Trial Chamber doesn't show implicit tainting or bias. That's a correct statement of the law. And it appears that it is Mr Bemba who apparently misconceives the nature of the harm

caused by Article 70 offences, which corrode the Court's ability to administer justice. And the second argument that doesn't show implicit tainting or bias is that the sentence imposed on Mr Bemba does not demonstrate that the Chamber of -- the Judges of Trial Chamber VII were implicitly biased.

Often in his submissions - in the arguments and the brief and today - he's arguing that there was this very, very high sentence of four and a half years, four and a half times. In the brief, they called it the highest penalty. But this confuses the sentence Mr Bemba actually received for the convictions for Article 70, which was 12 months' imprisonment and a €300,000 fine with the time he spent or served in detention in relation to the two parallel cases.

In sum, your Honours, the Trial Chamber did not err, and it does not evince their alleged impartiality or tainting.

Ms Taylor only made -- I think I might have ... I don't know how long I have, one minute, two minutes maybe? Ms Taylor made only very brief submissions about the additional evidence that she's seeking to have admitted and she claims that it basically does relate to the grounds that she's relying on.

Your Honours, in our view, her request to admit the additional materials should be dismissed for a very fundamental reason. They don't -- it doesn't relate to his existing grounds of appeal as required by Regulation 62, and the attempt to link it to the grounds is either not convincing or evinces an attention to go beyond the scope of the grounds.

Let me explain. In relation to ground 1, the additional evidence material relate to issues which have now been ruled outside the scope of these resentencing appeal proceedings by your Honours' decision; so it's not relevant in that respect.

THE COURT OFFICER: [11:24:38] Excuse me, Counsel, your time is up.

MS BRADY: [11:24:39] Could I have one minute to finish --

PRESIDING JUDGE MORRISON: [11:24:40] (Microphone not activated) Finish what (inaudible).

MS BRADY: [11:24:41] Okay. And in relation to -- he says that it relates to ground 2, but you may recall, your Honours, this ground was argued on a very different basis of impartiality. The basis of impartiality under ground 2 was premised on his right to be presumed innocent based on the Prosecutor's statements.

He didn't argue that he was denied a fair trial or a fair sentencing proceeding because a judge was not impartial because of his prior position or comments made about the proceedings after which -- which allegedly demonstrated bias before. So it wasn't an entirely different basis, which means the evidence is also not relevant to ground 2, and the only way this could come into this appeal is if he does vary his grounds of appeal, and as we've heard expressly this morning, he doesn't wish to vary the grounds of appeal; so that option is not now open.

But actually, even if he were to seek a variation of the grounds, in our submission, he wouldn't be able to even meet the standard for the variation if you apply the standard and the test for variation of grounds of appeal. Thank you.

PRESIDING JUDGE MORRISON: [11:25:54] Thank you, Ms Brady.

We're now going to have a break for half an hour. Upon return, counsel for Mr Bemba will have 45 minutes for her submissions on other aspects of Mr Bemba's appeal and the Prosecutor will have 30 minutes to respond to those.

So we will break now until five to 12.

THE COURT USHER: [11:26:18] All rise.

(Recess taken at 11.26 p.m.)

(Upon resuming in open session at 11.59 a.m.)

THE COURT USHER: [11:59:32] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [11:59:56] As indicated before the break, counsel for Mr Bemba now has 45 minutes to complete her submissions on any other aspect of the appeal.

MS TAYLOR: [12:00:09] Thank you very much, Mr President. I would firstly like to commence with the distinction, a key distinction to our appeal between whether an appellant requests relief for the first time on appeal as compared to whether they requested relief at first instance, but argue that the nature of the harm and the specific type of relief is best assessed at the end of proceedings. And that's the most appropriate position when one's faced with a rapidly evolving situation that concern key rights, such as the right to speedy proceedings which continue throughout the judicial process.

And in 2018, it was a rapidly evolving situation. Mr Bemba was acquitted. We didn't expect that. And the Prosecution, they didn't just ask the Trial Chamber to take this acquittal into consideration, they asked the Trial Chamber to find there is a wrongful acquittal based on corrupted evidence.

And in the face of these submissions, we tried to take steps to pre-empt the harm at first instance. During the hearing in June, at the very beginning, we submitted that these submissions constituted an abuse of process. Those were my words. And I requested the Trial Chamber to deny the Prosecution audience. The Trial Chamber rejected that request.

JUDGE EBOE-OSUJI: [12:01:35] Ms Taylor, just so you -- it's up to you how you want to argue that point, but the Prosecution had said, I don't know whether they -- I don't know whether they anticipated your argument when they said the Trial

Chamber did not take into account those utterances or arguments coming from the Office of the Prosecutor. You might want to consider whether you need to speak to that, and whether that is the issue to see whether the Trial Chamber took those views of the Prosecutor into account.

MS TAYLOR: [12:02:20] Well, certainly, Judge Eboe-Osuji, that's actually our position, that the Trial Chamber was influenced by those views insofar as that in 8 June, during the first release hearing, the Trial Chamber gave weight to Mr Bemba's prior detention and it found it was reasonable to take into account the entire length of detention in assessing whether he should be released at that point.

And yet a couple of months later, it shut the door and it disregarded any consideration of the acquittal, even if such a consideration would have been necessary for a remedy or even if it would have impacted upon their findings. So they went the other extreme because of the concerns of public censure.

And that's something I will develop in my submissions. But I would like to bookmark that with the specific references we made during those hearings, specifically transcript T-59, where we also stated that given the length of delay, we'd also entered into the territory of an abuse of process. These were all submissions which were directly put before the Chamber and we asked for a remedy.

In June we asked for the remedy of a discharge and in our written submissions, we affirmed once again that the Prosecution's submissions constituted an abuse of process.

We affirmed our request for an unconditional discharge, for remedies that would prevent further harm, and because those remedies weren't implemented, the harm metastasised and as a result, at this point in time, the harm is such that the unconditional stay is the only possible remedy to prevent further harm and to

remedy it.

And it's our submission that there are three substantive reasons why the sentence should be reversed:

Firstly, the Trial Chamber's assessment of gravity and the degree of Mr Bemba's contribution was arbitrary and based on erroneous legal principles.

Secondly, the Trial Chamber committed a manifest error of law by failing to provide a timely remedy, a timely remedy, as concerns cumulative violations of Mr Bemba's rights.

And thirdly, the Trial Chamber failed to apply the totality principle correctly. And as a result, they erred by failing to provide any set-off or remedy as concerns, firstly, the fact that he had served over four and a half times the appropriate sentence; and secondly, the *ultra vires* punishment imposed by the DRC Constitutional Court.

As concerns this first ground and first error, when the sentence was remanded to the Trial Chamber, it was directed to correct two separate errors. But although the Trial Chamber requested submissions and convened a hearing, the Chamber ultimately declined to apply the tests set out by the Appeals Chamber to the factors in question. Instead, it decided to give no weight to these factors. As a result, the sentence continues to be materially affected by these legal errors.

In terms of gravity, in the March judgment the Appeals Chamber found that the Chamber had correctly assessed the abstract gravity of the offences, but in assessing actual harm, it adopted an inappropriate reference point by distinguishing between the merits and non-merits, and it had concluded incorrectly that false testimony on issues of credibility should be given less weight.

In resolving this issue the Appeals Chamber noted a hypothetical possibility that testimony on credibility issues could be as significant as other forms of testimony, but

it didn't reach a positive determination as concerns the factual situation in this case. Instead, it directed to the Trial Chamber to make a concrete fact-specific determination of gravity, bearing in mind the extent of the damage caused by the false testimony in this case. But that didn't occur. Instead, the Trial Chamber reiterated its position that it was necessary to avoid any consideration of the merits of the Main Case and it did so in response to the Prosecution's submissions. The Trial Chamber therefore decided to give no weight to the specific type of testimony in this case and that, as a result, it increased Mr Bemba's sentence. And this was an error of equal magnitude to the same error in 2017. And that is because the Trial Chamber failed to issue the concrete fact-based determination that had been remanded to it. Instead, it merely referred to its findings in its 2017 decision. But if we look at those 2017 findings closely, it is clear that these findings didn't satisfy the Appeals Chamber's directions.

For example, paragraph 115 of the 2017 decision contained the general observation that information concerning contacts and payments provide indispensable information.

In support of this conclusion, the Chamber didn't cite to the specific testimony of the 14 witnesses or the context in which they were questioned. Instead, it cited back to paragraph 22 of the Trial Chamber judgment. And this only contained abstract legal findings concerning why testimony on such issues fall within the scope of Article 70(1)(a) of the Statute. And paragraphs 167 and 217 were identical.

There was a distinction between abstract gravity of a type of offence and the concrete gravity of actual offences and the actual false testimony in a case. And given that the Appeals Chamber had directed the Trial Chamber to apply the correct legal test to its assessment of concrete gravity and the harm caused by the false testimony in this case,

the Trial Chamber had no discretion to avoid such a determination by applying no weight.

And this is consistent with the Appeals Chamber's judgment in the situation of Registered Vessels in Comoros and elsewhere where the Appeals Chamber found that in circumstances where the Pre-Trial Chamber had directed the Prosecutor to consider certain factors in its assessment of gravity, the Prosecutor was required to consider those factors and apply the legal test established by the Chamber. It was paragraph 2 of that judgment.

The Trial Chamber in this case also incorrectly excluded Mr Bemba's acquittal from its assessment of the gravity of Mr Bemba's conduct. And it claimed that this approach was necessary to protect the defendants from prejudice. But the opposite was true, and that is because issues concerning the merits and Mr Bemba's conviction had already informed and influenced the 2017 sentencing findings.

And the Appeals Chamber recognised as such in its March 2018 judgment on conviction where it found at paragraph 168 that matters pertaining to the merits of the Main Case were part of the confirmed charges.

The Appeals Chamber also found that the Trial Chamber had correctly relied on issues concerning the merits in order to assess whether a witness had repeated coached testimony in court.

And in the context of sentencing, the Chamber emphasised Mr Bemba's position as a beneficiary of a common plan to obtain witnesses who would testify in his favour.

And this description cited back to the Trial Chamber's description of Mr Bemba as the accused in the Main Case. That was paragraph 805 of its judgment.

And this description of him as the accused cited in turn his conviction in the Main Case for war crimes and crimes against humanity. And that was footnote 1850.

An assumption of guilt was therefore embedded in the notion that Mr Bemba was the beneficiary of the plan and had instructed his Defence to secure witnesses who would testify in his favour.

This factor has different implications for Mr Bemba's -- the extent of Mr Bemba's culpability if the phrase "testifying in his favour" has a neutral connotation or if it is assumed that all witnesses who testified favourably for him must have been lying.

And we can see from Judge Pangalangan's separate opinion that the Chamber had in fact assumed the latter. Specifically at paragraph 18 of his opinion,

Judge Pangalangan referred to the gravity of conducting over a year of systematic deception against the Court in order to subvert a conviction.

And although Judge Pangalangan's opinion was a separate opinion, it was only separate as concerns the sentence. He participated in the conviction verdict. His views therefore informed the Chamber's assessment of the gravity of the offences and Mr Bemba's appreciation of this gravity.

And as I mentioned earlier, the fact that this view that Mr Bemba had attempted to subvert a conviction reflected, the position of the Chamber is further bolstered by Judge Brichambaut's 2017 statements which described Mr Bemba as not a small warlord and reference him as someone who invented witnesses himself after he was caught.

And a further example of the relevance of guilt or innocence arises from the Chamber's continued reliance on Mr Bemba's role in providing concrete instructions concerning the manner in which witnesses should testify. And that was paragraph 220 of the original sentencing decision.

And it further found at paragraph 221 that since he issued instructions on content, Mr Bemba knew that the evidence presented was false when he heard the testimony

from the witnesses and he heard it was consistent with his instructions.

Now clearly his role in providing instructions on issues concerning the merits of the case assumes a different inflection if the Chamber is relying on an assumption that he must have known that favourable witnesses were lying, and clearly the Chamber's assumption would have differed if it either purged this assumption from its conclusions or employed an assumption that was consistent with the legitimate belief that the witnesses had experienced and seen the matters described in his instructions.

Coaching a witness to provide testimony on an issue that the defendant believes to be true affects the credibility of the witness. It falls under Article 70. But the harm to the Chamber's truth-finding function is lower than if the party coaches the witnesses on issues that the party knows to be false.

Even the Prosecution acknowledged that there was an issue -- that this was an issue relevant to gravity. And in its April 2018 submissions it argued that it was axiomatic, that conduct to directing the -- to securing the acquittal of a guilty defendant was more grave than other types of contempt. That was paragraph 21.

So if the Trial Chamber had followed that approach in 2017, if it assumed that Mr Bemba was guilty and that he had attempted to subvert a conviction, then obviously they would have given it a more graver inflection. And in 2018, given that he was innocent, it was incumbent on them to purge that from their assumptions, and there was no indication that that happened because they merely adopted the same findings.

His acquittal might not have impacted on all of the false testimony in this case, but it was relevant and it was relevant to previous findings that was predicated on guilt. It therefore should not have been excluded completely and arbitrarily.

This brings me to the second error which concerns errors regarding contribution.

In its 2017 sentencing decision the Chamber found that Mr Bemba's conduct for the solicitation of false testimony was almost the same as his conduct for Article 70(1)(c) offences, almost meaning not quite, not exactly the same.

And in its 2018 decision the Chamber also recognised that there was some difference in the level of control as concerns Article 70(1)(a) offences as compared to Article 70(1)(c).

But notwithstanding these findings, in 2018 the Chamber concluded that the defendants had been convicted under both offences for essentially the same conduct. It then decided not to give any weight to the differences in mode of liability.

And this finding must be read in conjunction with paragraph 45, where the Chamber referred to Mr Bemba's essential contributions for the commission of offences; and paragraph 117, where the Trial Chamber decided to amend the Article 70(1)(a) sentence to match the Article 70(1)(c) sentence.

And read together it is clear that the Trial Chamber used the same conduct underpinning his conviction for co-perpetration of Article 70(1)(c) offences when it sentenced him for Article 70(1)(a) offences.

And this was a manifest error of law.

Firstly, it constituted an improper and impermissible recharacterisation of the Article 70(1)(a) charges and, secondly, given that the Appeals Chamber remanded this issue to the Trial Chamber, it had no discretion not to give any weight to the specific degree of its contribution to Article 70(1)(a) offences.

Mr Bemba was charged with solicitation of false testimony or, in the alternative, contribution through Article 25(3)(d). But the Pre-Trial Chamber declined to confirm the common plan theory. It only confirmed solicitation.

In September 2015 the Trial Chamber rejected a Prosecution request to give notice of a

possible recharacterisation to include common plan theory.

And in the trial judgment the Chamber explained that solicitation entailed a lower degree of persuasion and exertion than inducement. That was at paragraph 76.

In applying these findings to the evidence the Chamber convicted Mr Bemba for solicitation and Mr Kilolo for inducement, even though Mr Kilolo had been charged with both in the alternative.

This deliberate differentiation between the two reflected its position that there was a factual difference in the degree of contribution between the two defendants and that Mr Bemba's degree of contribution was of a lesser nature.

But this was not reflected in the final sentence. And although the Appeals Chamber found that the Trial Chamber had erred in the initial way it assessed contribution, the Appeals Chamber made very clear that the extent of contribution would depend on the particular facts of the case and the degree of the defendant's contribution within that factual framework.

It was therefore incumbent on the Trial Chamber to go through these steps and to do so using the charges of solicitation and Article 70(1)(a) as a framework for its analysis.

But it didn't do this. Instead, it simply coopted its Article 70(1)(c) finding, notwithstanding the differences in modes of liability and the differences in offences.

This was effectively the same thing as saying you were charged with solicitation, prosecuted for solicitation, convicted for solicitation, but at this very last step of the case we think your conduct is the same as co-perpetration so we will sentence you as a co-perpetrator based on your role in the common plan.

This was tantamount to Regulation 55 reclassification, without prior notice. And it was unlawful and highly prejudicial because there were key differences between the charges. The charges alleged there was a common plan to defend Mr Bemba

through means which included the commission of Article 70 offences. The Trial Chamber reformulated it and he was convicted of Article 70(1)(c) offences on the basis of a common plan to illicitly interfere with witnesses. The plan focussed on conduct rather than result. His responsibility for co-perpetration also focussed on his contribution to the common plan rather than the realisation of the charged offences. It was therefore possible to conclude that Mr Bemba made essential contribution to the plan without demonstrating that he made an essential contribution to the commission of the false testimony provided by each of the 14 witnesses.

And that is because firstly Article 70(1)(c) is an offence of conduct, but Article 70(1)(a) is an offence of result, it only occurs when the witness gives the false testimony.

And secondly, whereas co-perpetration focuses on the defendant's contribution to the plan, solicitation focuses on the nexus between the crimes and the actions of the defendant. And the Chamber had already acknowledged that although these contributions were almost the same, they were not exactly the same.

Because of the different focus between the different modes of liability and the two offences, it's also necessary to examine the two offences from a different angle. For Article 70(1)(c) it might be permissible to examine the role of Mr Bemba as the architect of the plan to engage in general illicit conduct, but for Article 70(1)(a) it is necessary to look at the completed offence and then work backwards in assessing the extent to which the defendant's conduct contributed or influenced the decision to provide false testimony.

JUDGE EBOE-OSUJI: [12:22:39] Ms Taylor, could you explain that proposition when you say Article 70(1)(c) is an offence of result, is that what you said?

MS TAYLOR: [12:22:55] No. I'd like to clarify it. Perhaps I misspoke. I was meaning to say that Article 70(1)(a) is an offence of result. Article 70(1)(c) is an

offence of conduct.

And to give an example, you can be convicted of corruptly influencing a witness even if the witness is not actually corrupted and even if the witness does not provide false testimony.

And that's actually what happened in this case. For example, the Trial Chamber found that Mr Kilolo had made illicit payments to D-29 and instructed him to lie about them, but the Trial Chamber also didn't find that D-29 provided false testimony on these payments.

We don't always reach the same result when we use the two offences.

By the same token, this result-based focus also means the nexus between the conduct and the witness's decision to provide false testimony might be lessened by independent factors.

For example, at paragraph 271 of the Oric trial judgment the Trial Chamber found that if a person had already decided to commit the crime, then further encouragement would constitute a lower form of contribution. And this distinction is relevant to the CAR witnesses.

In its judgment the Chamber acknowledged that before meeting the Defence, several witnesses had been instructed to lie about their backgrounds and their association with individuals such as Kokaté, and they had already planned to elicit money from the Defence. And that was Trial judgment paragraphs 320 to 346.

This might not be mitigating for a conduct-oriented offence such as Article 70(1)(c), but it does lessen culpability, it does lessen the contribution as concerns a result-based offence.

And as acknowledged by both the Appeals Chamber and the Trial Chamber in its resentencing decision, whereas the defendants in this case exercised ultimate control

of the illicit interference of witnesses, it was the witnesses themselves who ultimately controlled the issuance of false testimony.

Given these key differences, it was plainly wrong to conclude that no weight should be given to the difference between the two offences. It was wrong to impose a same sentence on this basis. It was an automatic correlation that failed to comply with the Appeals Chamber's direction.

And once again, it falls within the scope of the same error identified by the Appeals Chamber on Monday in the Comoros judgment.

For the second ground I will focus on the following two issues: The nature and severity of the violation of Mr Bemba's rights, and the impact that this had on the fairness and impartiality of the sentence.

In terms of violation of his rights there was a cumulative violation of the right to be tried fairly and impartially within a reasonable period. Given that he was a detained defendant, the Court as a whole had an obligation to act with particular diligence in determining the charges against him, and this didn't occur.

Even though the Prosecutor could and should have realised that the commencement of Article 70 proceedings would delay the conclusion of the Main Case, it took almost a year and a half to conclude these investigations and request arrest warrants.

As a result, he had been detained for five and a half years when this case started. That's a relevant consideration.

In January 2015 Judge Tarfusser ordered Mr Bemba's release on the grounds that after 14 months it was no longer reasonable to maintain his detention. But this release couldn't be implemented because of the Main Case detention order. His right to liberty in this case was affected directly by the Main Case and the length of proceedings in the Main Case.

Even though the Main Case proceedings were almost completed at end of 2013, this case, the arrest of half his team and the related disclosure of evidence pushed back the schedule for another year. And the Prosecutor has conceded that it didn't comply with its disclosure obligations in a timely manner.

And even though Trial Chamber III was aware of the nexus between the two cases, it was aware of the impact of its detention order on Mr Bemba's detention in this case, it waited for 16 months after final submissions in the Main Case to issue its judgment. And its sentence was only issued in June 2016.

At this point he had already been detained for two and a half years in this case, over two and a half years more than his sentence. Two and a half years times what Judge Tarfusser determined was reasonable.

Trial Chamber VII issued its conviction four months later. And at this point in time we had a reasonable belief based on ICTY practice and the wording of decisions in this case that detention would count and that he would be given credit for the time spent in detention. And it's notable that during the 2016 sentencing proceedings the Prosecution did not oppose such credit. I refer to sentencing decision at paragraph 253.

And although this issue impacted on his detention status, the Trial Chamber didn't rule on it until 22 March 2017 when it imposed its sentence and the fine, and that's for the first time when it found that the time would not start to run in this case. And at that point in time he had already been detained for three and a half years in this case and nine years in total. Time was of the essence.

But at the same time that the Trial Chamber took credit off the table as control mechanism, its decision that time wouldn't run in this case also meant that Article 81(3)(b) was taken off the table. He couldn't argue that his custody had exceeded the

length of detention because his length of detention was fixed to an unknown factor. In its March 2018 judgment, the Appeals Chamber recognised that this decision was conditioned on the sentence in the Main Case remaining intact. It was predicated on a conviction. The Chamber nonetheless concluded that in the event of an acquittal, the Presidency could make the necessary adjustments. This judgment didn't contemplate or set out a mechanism to address the scenario where the time was too long, and that's what happened. And we ended up with a situation where a person who was already in custody for several years served a sentence four and a half times longer.

This absence of effective control mechanisms to either prevent or mitigate delay rendered his detention arbitrary and explains why at this point in time a permanent stay is the only appropriate remedy.

As concerns the first issue, the existence of arrest warrants does not in itself satisfy the question as to whether the detention was arbitrary, and that is because detention which is lawful can be arbitrary if there's a lack of effective safeguards to control the length of detention. I refer to the case of Mooren and Germany.

The question as to what constitutes a reasonable length of detention is not just an abstract number. It's dependent on the circumstances of the case, the circumstances of the defendants, and these circumstances will be impacted, the obligation will be heightened if the defendant had already been in custody for a long time. And that's consistent with the case I mentioned before of Kalashnikov versus Russia. If you're faced with someone who had already been in detention for five and a half years, there was a heightened duty of diligence in this case to proceed expeditiously and to have appropriate safeguards.

It's further bolstered by the case of Morrison and Jamaica, where the committee found

that notwithstanding legal separation between the two cases, the applicant's detention in the first case is relevant to the assessment of the reasonableness of the length of proceedings in the second case.

And this resonates for this case. Even if Trial Chamber VII was not legally responsible for the prior detention, this prior detention was relevant to the reasonableness of his detention in this case and was relevant to the ultimate outcome. It also impacted the Court's duty to ensure that after his conviction in this case he had the means to avail himself of any available release mechanisms, including Article 81(3).

And within the context of post-conviction detention, the European Court has found that even if the defendant has the theoretical possibility to seek release or variation, this mechanism must be available and it must be applied in an effective manner.

And the case of Grava and Italy is particularly apposite to Mr Bemba's situation. In that case the defendant had been lawfully detained pursuant to a valid conviction, but because of delays in the proceedings, the final decision on the applicant's request for remission is only taken after the applicant had been released. As a result, the applicant had served two additional months than they would have served if the application had been determined in a timely manner. And the court found that this period of two months, this excess detention, was unlawful and arbitrary.

Similarly in the case of Lanzo and Perdomo, the Human Rights Committee has found that there is a situation of arbitrary detention where someone who should be released is kept in detention. Even if they have been released, they're still entitled to an effective remedy for violations as concerns their right to timely release.

In Mr Bemba's case the delays were longer than just two months. And it was because there was no effective control mechanism for counting time in this case

pending the Main Case verdict. The theoretical protection of Article 81(3) was frozen and there was a dead zone between March 2017 and June 2018. And a 13-month dead zone, it's a very long time for an Article 70 case and it's a very long time when you're faced with somebody who had already been in detention for nine years as of 2017.

And because this ticking clock could not be heard, it was not given due consideration when controlling the length of the proceedings with the result that Mr Bemba was sentenced in October 2018, almost five years after the case began.

And these violations weren't cured by the sentencing decision. It doesn't acknowledge any violations of his rights. And although it notes that credit was given for time served, this is a statutory right, not a remedy. And given that he served over four and a half times more than he should have, it doesn't equate to a concrete and measurable reduction in penalty.

And it's the absence of a timely remedy which underscores why a stay is necessary. It's a truly exceptional case. There's no other example at the international level of a defendant serving four and a half times the sentence imposed by the Court.

JUDGE EBOE-OSUJI: [12:35:16] Ms Taylor, again, sorry, what is the practical effect of the Trial Chamber during sentencing, what was the practical effect of finally saying, recognising time served, what did that do?

MS TAYLOR: [12:35:31] Essentially time served addressed just the one-year element of his sentence. It gave no remedy for the remainder of the time he had actually served. They failed to actually quantify how much time he had served. That's not acknowledged in the decision.

JUDGE EBOE-OSUJI: [12:35:49] So the time served did not impact the 12-month prison sentence that had been imposed?

MS TAYLOR: [12:35:59] It impacted on the 12-month prison sentence.

JUDGE EBOE-OSUJI: [12:36:02] How?

MS TAYLOR: [12:36:04] In the terms of under the Statute he has a right to credit for any time served, so it meant that he was given a statutory right to credit, but it didn't satisfy his right to a remedy as being a victim of the unlawful detention for the entire period.

JUDGE EBOE-OSUJI: [12:36:18] No, no, no. First of all, I want to see what the time served does to the actual sentence that had been imposed, the sentence of 12 months. Did it wipe it out? Did it delete it? To what extent did it reflect on the sentence actually imposed, the sentence of 12 months?

Let's deal with that first and see what else you may be arguing about.

MS TAYLOR: [12:36:42] I would respectfully submit that that's not clear from the decision itself. There is an ambiguity which acts to the detriment of Mr Bemba, and we can see that from Judge Pangalangan's footnote where he says that even though he wanted four years in 2017, time served is effectively over four years in his view. So in the end he submitted that he had reached the same conclusion, Mr Bemba was effectively sentenced for four years.

So in our respectful position, time served was ambiguous and acted to the detriment of Mr Bemba because it created an impression that his sentence was equivalent to the time served.

JUDGE EBOE-OSUJI: [12:37:22] Okay. If you were asked, requested by the Appeals Chamber to do something about that, what would it be in concrete terms? If it is the case that, assuming Judge Pangalangan's reasoning is accepted to that extent, that time served equalled four years but he was sentenced to 12 months imprisonment, does it amount to saying, well, the 12 months effectively were nullified

and he gets further credit for three years?

MS TAYLOR: [12:37:58] What I would respectfully suggest is that the Chamber should find that he had served four and a half years and that because the quantifiable sentence imposed on him was 12 months, there was an excess in punishment of three and a half years, and he has a right to a remedy as concerns the excess in punishment of time actually served.

JUDGE EBOE-OSUJI: [12:38:21] And then you will turn of course to the matter of the fine. How do we deal with that?

MS TAYLOR: [12:38:30] We would address it in two separate ways. Firstly, this excess in punishment means that no fine should be imposed because the first point of the fine is, is it necessary? Does it serve a punitive aspect? Does it serve a deterrent aspect? And I think when you're looking at somebody who has been in detention for four and a half years, there's no need for further deterrence, there was no need for further punishment. It was excessive in that sense. And in that sense, the issue of his assets should have been secondary to the preliminary consideration of whether any further punishment could be imposed when you're addressing someone who had served four and half years of detention. So there wasn't a need for set-off apart from the issue of the stay or in the alternative to the stay.

JUDGE EBOE-OSUJI: [12:39:15] Thank you.

MS TAYLOR: [12:39:16] In getting back to why this is an exceptional case, there is no other remedy at this point that can remedy fully the four and a half years. Even extinguishing the fine is not a complete satisfactory remedy concerning the harm. And at a domestic level, in determining whether it's appropriate to issue a stay, the Courts have emphasised the importance of first using other mechanisms at its disposal. And that's the gist of the harm in this case. At the first instance, these

mechanisms were not used and that is why the harm metastasised, that's why it's increased over the years, and that's why at this point in time if you tried to do a set-off you would end up in the negatives, you would end up with negative three and a half years. You can't reduce a sentence below zero. And even if you were to reduce the fine, that's not a sufficient remedy for the extent of the sentence.

It's our position that the length of delay in itself justifies the stay, but it's also aggravated by the violations of his right to impartial proceedings.

As I mentioned previously, in the immediate aftermath of the acquittal, the Trial Chamber acknowledged that his detention was relevant, it gave it weight. But after the sustained attacks, after the backlash initiated by the Prosecution, the pendulum of consideration swung against him.

And when it came to September, rather than deprecating the Prosecutor's conduct, rather than affirming his innocence in a positive manner, and rather than attempting to remedy this excess punishment, the Trial Chamber went to great pains to emphasise the amount of punishment that Mr Bemba would continue to endure, punishment which would extend indefinitely because of the loss of his civil rights.

As I mentioned just before, Judge Pangalangan recognised the time served was in reality the equivalent of at least a four-year custodial sentence, a sentence he thought in 2017 was appropriate when Mr Bemba had been convicted of guilt in the Main Case.

So the Chamber didn't expunge that consideration from its ultimate finding, it remained embedded in the sentence. And he remained sentenced as if he had in fact been guilty.

So in essence, there is an appearance that the Chamber didn't see him as someone who was excessively or unjustly detained. There is an appearance they saw him as

someone who was fortunate that he could benefit from time served.
Yes, he was fortunate that he was acquitted, he was very grateful that he was acquitted, but an acquittal is a legal right, it's not a privilege. And it was a right that should have been given full effect in this case through a remedy which would purge all the legal, factual or practical consequences and assumptions stemmed from his wrongful conviction.
That brings me to my last ground, the failure to apply the totality principle.
And I've already addressed the issue of the fine in responding to Judge Eboe-Osuji's questions. And that is that the Chamber never made an appropriate assessment as to whether or not in September 2018 a fine would achieve any deterrent effect, whether it was necessary to impose further punishment on Mr Bemba. They also never considered what type of remedy would be necessary to set off the excess detention in this case, and time served didn't fulfil that, it didn't set it off.
The Chamber also erred in law and exposed Mr Bemba to excessive punishment by virtue of its refusal to apply Article 23 to protect Mr Bemba from sanctions issued outside the framework of the Statute.
Article 23 specifies that a person convicted by this Court can only be punished --
THE COURT OFFICER: [12:43:18] Excuse me, Counsel, you have five minutes left.
MS TAYLOR: [12:43:21] Thank you very much.
-- in accordance with the Statute. And there are salient legal and procedural reasons for concluding that it not only applies to the ICC, but as remarked by Ambos and Schabas, it also prevents State Parties from imposing additional punishment upon those who have been convicted by the Court.
I will focus on two reasons for interpreting in that manner.
Firstly, Article 23 falls within part 3, the general part, and it should be interpreted in a

manner that is consistent with surrounding provisions. And it's notable that in this part, where the drafters intended a provision to bind the State -- to bind the Court, it explicitly says that, but when it intends to apply to the ICC framework as a whole, it refers to the Statute.

We can see this in Article 27 which concerns the irrelevance of official capacity. And this refers to the Statute and not the Court. The article therefore applies to States acting within the framework of the Statute and not just the Court itself. And this was the interpretation adopted by the Court in the Bashir case where the Court found that even though it was located in part 3, it should be read together with Article 86, which imposes an obligation on States to cooperate fully with the Court in accordance with the Statute and that this necessarily included Article 27.

This applies to Article 23. The action regulated by this article, punishment of persons convicted by this Court, is framed generally. Rather than stating that the Court may only punish persons in accordance with the Statute, it states that persons may only be punished in accordance with the Statute.

So the Statute is the key reference point.

And it also should be interpreted in a manner which is consistent with Article 86. The sentencing process is a core function of the Court and cooperation in this field implies not just a duty to furnish positive assistance but a duty to act in good faith to avoid taking steps that it could impact or interfere with the Court's sentencing processes. And I refer to the decision in the Senussi case and authorities.

And it's clear that the imposition of extra-statutory punishments would frustrate the Court's competence.

The possibility that States could impose such issues unilaterally would run roughshod over the ability of the Court to ensure certainty and equality on issues of

sentencing through a uniform penalty regime. And I refer to the article by Fife and Trifferer.

And the lacuna would be particularly problematic in Article 70 offences due to the truncated cooperation regime which applies to these offences.

For example, Article 105, which provides that the Court sentence is binding on States and that they may not modify it, that only applies to Article 5 offences. Because of Rule 613, it's excluded.

Now if we assume that this carve means that nothing regulates State obligations as concerns Article 70 offences, this would mean that nothing prevents States from revising sentences. They could increase them upwards or downwards at will.

They could also have their own appeal hearings, their own revision proceedings and their own pardon proceedings. And that would be inconsistent with the purpose of the Statute.

This brings me to my second reason, and it should interpreted in the manner of my advance because this is consistent with the specific regime of Article 70 offences.

And this regime gives a specific and primary competence to the ICC. And this is set out in Article 70(4)(b) which specifies that States can only investigate and prosecute when requested to do so by the Court.

Rule 162, paragraphs 3 and 4 further clarify that a State can't investigate or prosecute unless it gets that green light.

And this emphasis on the primary jurisdiction of the Court is consistent with the nature of these offences. These are not offences which attract universal jurisdiction. They don't impinge on the sovereignty of States. They are offences intrinsically linked to the administration and proceedings before the Court.

It's therefore logical that the ICC should exercise exclusive competence for

determining whether it would be appropriate for States to investigate such an offence and whether it would be appropriate for States penalising such an offence. And that is because the ICC plays the gatekeeper for Article 70 offences.

So Rule 168 doesn't refer to *ne bis in idem* in this sense because it's not necessary to do so. There is no scenario in which a State would investigate or prosecute an offence without the prior authorisation of the Court because it needs that prior authorisation to do so. So even if a *ne bis in idem* situation would arise, it would first have to go to the Court and raise it.

THE COURT OFFICER: [12:48:28] Excuse me, Counsel, your time is up.

MS TAYLOR: [12:48:30] I see.

JUDGE EBOE-OSUJI: [12:48:31] I have a question, or a series.

Thank you very much.

Ms Taylor, I have a number of questions for you on that line of submissions. I take it, to begin with, from the last submissions you made seeking to separate the ICC regime from essentially the national regime, what has, if anything, the concept of complementarity? Do you factor it into the submission? If so, how?

MS TAYLOR: [12:49:29] Thank you very much, Judge Eboe-Osuji. Certainly I factor this into this submission. And in fact, I was addressing the specific complementarity regime which applies to Article 70 offences because under the Statute the general complementarity regime doesn't apply. Instead, we have this truncated regime which provides that the Court must first decide whether it wants to exercise jurisdiction. It can invite the Host State to do so. And if other States wish to do so, they need to ask the Court's permission. So it's not that States can't exercise jurisdiction, it's that the Statute envisages that they must first request the Court's authorisation to do so. That's explicitly written into the text and it's linked to the

specific nature of these offences in that they are not domestic crimes, they are crimes that arise in the justice system here.

JUDGE EBOE-OSUJI: [12:50:20] So Article 70 is more or less an exception to the complementarity doctrine, that's your argument?

MS TAYLOR: [12:50:31] Yes. The Rules actually specifically say that that part doesn't apply and it substitutes a more truncated and specific regime for Article 70 offences.

JUDGE EBOE-OSUJI: [12:50:41] Fair enough. But then you complain in your submissions, both in writing, although you haven't argued it to that extent yet, you did highlight it, but in your submissions you quarrelled with the finding of the constitutional court of the DRC. Was that, did I understand you correctly, to have taken the issue with the fact that they held that Mr Bemba could not run for political office in the DRC as a consequence of his conviction in the Article 70 case at the ICC? That's your argument, isn't it?

MS TAYLOR: [12:51:27] Yes, thank you very much for allowing me to clarify that. Our argument was that this was a criminal penalty and it arose not automatically. The Court invited submissions from the DRC prosecutor general, criminal submissions, in order to conclude whether it fulfilled the elements of corruption under DRC law.

This was a domestic investigation, in essence, a domestic criminal proceeding resulting in a penalty. And it's our submission that because of Article 23, the DRC had no competence to do that, specifically given that he had never requested the permission of the ICC to initiate such investigations or proceedings against Mr Bemba and that this truncated complementarity regime within Article 70 required it to do so. In a way it creates a mini version of Article 108 and it gives the Court the competence

to ensure that ICC defendants aren't unilaterally subjected to unforeseen penalties without any form of control by the ICC itself.

JUDGE EBOE-OSUJI: [12:52:30] Is it correct to understand it is what was done in DRC was that they had interpreted within their national realm a consequence of something that occurred at the ICC? Is that a way to look at it?

MS TAYLOR: [12:52:48] We would respectfully submit that that wouldn't be entirely accurate because the DRC law specifies that the disqualification comes into play if the person has committed *chef de corruption*, so that's charges of corruption. So it wasn't acts of corruption. They weren't addressing Mr Bemba's conduct in this case, they were specifically looking as to whether his conduct fulfilled a DRC crime, and that it wasn't an automatic consequence is highlighted by the fact that they required submissions from the prosecutor general on that point.

If it had been an automatic consequence, those submissions which fall within the criminal sphere wouldn't have been required. And it wasn't a foreseen consequence because this law only came into effect at the end of 2017. So it never informed the proceedings here. Mr Bemba was never put on notice of it and that impinges the very principle of legality that Article 23 is designed to protect.

JUDGE EBOE-OSUJI: [12:53:46] For what it is worth, I'm trying again, the reason why we have these hearings is so that as we read the papers, the things that are not clear, we have the opportunity to put our confusion to counsel and they help us to clarify the mind on it.

Now, looking at Article 70, can we look at that, please, Article 70 of the Statute.

There is the -- some may say, well, we need to separate the two streams, the national from the ICC. That of course may be one way of looking at it. I'm not saying that is how we're going to do it. But others may say, and I believe this is what I deduce

from your argument, that it's not as simple as that, sometimes they may have to look at the substance.

If one looks at Article 70, your client has been convicted of Article 70(1)(a) and (1)(c) offences. (1)(a) deals with "giving false testimony when under an obligation pursuant to Article 69, paragraph 1, to tell the truth". And (1)(c) it talks about "Corruptly influencing a witness, obstructing or interfering with the attendance ... of a witness" and so on and so forth, corruptly influencing.

Where the concept of corruption comes in, even if you didn't look at Article 70(1)(c), leaving 70(1)(a) alone takes you there. But forget that.

Looking at 70(1)(c) it talks about corruption. Corruption entails the idea of spoiling something, destroying it.

One of the values of the modern world is that we can pull up dictionaries on the internet. The Oxford English Dictionary online edition, I'm looking at it, I pulled it up right now, says corrupt, quote, "to spoil or destroy ... by physical dissolution or putrid decomposition; to turn from a sound into an unsound impure condition; to cause to 'go bad'; to make rotten or rotting" so on and so forth. There are other definitions that follow, but we can leave it at that for now.

Let's assume that -- and here there is no appealing, so to speak, the Article 70(1)(c) conviction, and he says corruptly influencing a witness. Why should not that be interpreted as something of corruption anywhere where there is proscription against corruption.

MS TAYLOR: [12:57:07] I would respectfully submit that there are two reasons why it shouldn't be interpreted in that manner. Firstly, I would submit that individuals should be sanctioned and punished for concrete crimes and not abstract concepts.

And in the framework of DRC law, Article 147 doesn't mirror Article 70(1)(c). The

DRC had not implemented the ICC Statute in the domestic law. If we look at the text of Article 147 of the DRC code, which is in our table of authorities, it mirrors Article 70(1)(d), a different offence.

So effectively by reaching this conclusion, it's reached a conclusion that he's responsible for a different offence. That's a separate investigation and it fell within the criminal sphere.

JUDGE EBOE-OSUJI: [12:57:51] But even 70(1)(d) also has in it "corruptly influencing".

MS TAYLOR: [12:57:56] An official of the court.

JUDGE EBOE-OSUJI: [12:58:00] An official of the court for purposes -- okay, fair enough.

MS TAYLOR: [12:58:01] Yes. I would just -- just to finalise on that, I would point out that there's no direct concurrence between the offences. If there had been that direct concurrence, it wouldn't have been necessary to have those submissions. And it's not necessary for this Court to pronounce itself on the DRC law. What's necessary or what's relevant is that it wasn't automatic, that it resulted in additional findings after receiving criminal submissions from the Prosecutor. So there was an additional sanction which attached to additional submissions on Mr Bemba's criminal responsibility.

JUDGE EBOE-OSUJI: [12:58:38] Thank you. I'll leave it at that.

PRESIDING JUDGE MORRISON: [12:58:44] Ms Taylor, does that complete your submissions?

MS TAYLOR: [12:58:47] Yes, it does. Thank you very much.

PRESIDING JUDGE MORRISON: [12:58:50] Thank you.

Ms Brady, we've reached the stage where under the original timetable we would have

adjourned for lunch at 10 to 1. And it was predicated that we would not return after lunch if there were to be no further questions from the Bench. I anticipate there will be further questions from the Bench, so we will be returning after lunch in any event. So I'm inviting you to delay your submissions until after lunch rather than to do them now.

MS BRADY: [12:59:27] That's absolutely fine, your Honour. In fact it would be great to get some sustenance to keep going for the rest of the afternoon.

PRESIDING JUDGE MORRISON: [12:59:39] Absolutely. That being the case, then we adjourn until 2 o'clock.

THE COURT USHER: [12:59:46] All rise.

(Recess taken at 1.00 p.m.)

(Upon resuming in open session at 2.01 p.m.)

THE COURT USHER: [14:01:49] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [14:02:22] Yes, thank you.

30 minutes divided between people as you see fit.

MS REGUÉ: [14:02:29] Good afternoon, your Honours. We will respond to Mr Bemba's submissions. I will address ground one. My colleague, Ms Thiru, will address ground 3 and Ms Narayanan will address ground 2.

Your Honours, Mr Bemba has failed to show an error leading to a disproportionate sentence, nor has he shown that the sentence was unreasonable, and much less that the resentencing proceedings were unfair and affected the reliability of the sentence. I will refer your Honours to the well-established standard of appellate review set out in the authorities listed in C1 of the reference list.

We should recall, your Honours, that Mr Bemba was sentenced to one-year

imprisonment, which he served, and a fine of €300,000 to be transferred to the Trust Fund of Victims when it becomes final.

He stands convicted of soliciting the false testimony of 14 of his witnesses, and of corruptly influencing the same witnesses as a co-perpetrator.

Yet when we listen to Mr Bemba, we are surprised. We are surprised because he seems to have forgotten about the criminal scheme that he orchestrated before Trial Chamber III, a criminal scheme that last 13 months. He instructed -- he directed the illicit coaching of his witnesses. He authorised payments. He abused the Registry's privilege line at the ICC detention centre. These witnesses came here to testify and they testified falsely.

When his criminal conduct was revealed, he sought to conceal it. He seems to have forgotten that his conversations were recorded and his payments were detected and everything was submitted into evidence, and most notably, the Appeals Chamber has confirmed it all.

Your Honours, Trial Chamber VII has correctly applied the Court's legal framework in determining Mr Bemba's sentence. The Trial Chamber considered the gravity of the offences, considered his culpable conduct, considered the individual circumstances. There were no mitigating -- no expressed mitigating factors. There were aggravating factors. The Trial Chamber balanced it all and came to a sentence which was the same sentence that he received in March 2017: One-year imprisonment and a fine, and the two constitute the sentence.

Mr Bemba's arguments distort the facts and misunderstand the jurisprudence. He is again relitigating matters which have been confirmed. The definition of falsity, an Article 70(1)(a) offence, he seems now to provide another definition. Cumulative convictions, he already appealed that, the Appeals Chamber already confirmed the

cumulative convictions. That's paragraph 885 of the appeal judgment. Excuse me, 751 of the appeal judgment.

He's also challenging again the notion of beneficiary. He already appealed that and the Appeals Chamber again ruled on the fact that the notion of beneficiary was only a factor to explain the context in which the offences took place. That's paragraph 885 of the appeal judgment.

Your Honours, we want to correct two points: First, Mr Bemba had a crucial role in soliciting the false testimony of his witnesses; and, second, the false testimony caused an irreparable harm.

Starting with Mr Bemba's degree of participation, the Trial Chamber, your Honours, correctly assessed his contributions, correctly considered the facts of this case, that's what -- that's completely consistent with the sentencing appeal judgment of 8 March 2018. That's in paragraph 60.

And, your Honours, Mr Bemba's contributions were far from limited. I wish to give you three key legal findings.

And I will refer to the paragraphs listed in C2 of our list of authorities.

First, Mr Bemba directed the illicit coaching; he had an overall coordinating role from the detention centre.

Two, he provided concrete instructions on how to coach the witnesses, through Mr Kilolo, through Mr Mangenda, but he himself directly, he spoke at least with two witnesses. His instructions were detailed. They related to the substance of their testimony, but also to the manner in which the questions had to be answered. He controlled the presentation of their testimony.

Third, your Honours, he also authorised the illicit payments and other benefits.

In sum, without Mr Bemba's conduct, his witnesses will not have testified

untruthfully before Trial Chamber III in the same manner.

Now moving on to the Chamber's assessment of the damage caused by the Article 70(1)(a) offences. The Trial Chamber did not err in not diminishing the gravity of these offences because the false testimony related to the non-merits issues, that is, payments, benefits and contacts with the Defence and also with acquaintances. Mr Bemba misunderstands the harm caused by the false testimony of his witnesses before Trial Chamber III. By testifying the false evidence on the non-merits issues, entered the record of the Main Case, Trial Chamber III was deprived of genuine and invaluable information to duly assess the credibility of the witnesses. This affected the Chamber's ability to assess the reliability of their evidence as a whole. The harm was caused. This is consistent with the trial judgment, paragraph 23 and with the sentencing appeal judgment of 8 March, paragraph 43.

Your Honours, this case is markedly different from most cases before other international criminal tribunals, not only for the number of witnesses, which is unprecedented, we are talking about nearly half of the Defence witnesses, but also because the evidence was adduced, entered the record of the Main Case. And I will refer to the authorities in C4.

But, in any event, your Honours, the impact of the Chamber's approach in assessing the gravity, and also the culpability of Mr Bemba with respect to Article 70(1)(a) offences is very small.

His sentence for the Article 70(1)(a) offences was increased two months from 10 to 12 months and the overall sentence, the joint sentence of 12 months and the fine remain the same.

That concludes my submissions regarding ground one. I will now yield the floor to Ms Thiru.

JUDGE EBOE-OSUJI: [14:10:17] Before you go, please, I don't know whether you're the one to speak to these or your colleague will. Earlier you heard me ask Ms Taylor the question about the significance of the Trial Chamber saying he was to receive -- Mr Bemba, ultimately, was to receive credit for time served. What does that really mean in actual terms? Is that mere verbiage? Something, the Chamber says to complete a judgment, or does it really have meaning? If it does, what is that meaning that it has?

And how should that meaning be actually reflected in Mr Bemba's punishment? That's my first question; I have others, but I want to listen to that first, please.

MS REGUÉ: [14:11:23] My colleague, Ms Thiru is going to develop a little bit more on that point, but if I can preliminarily answer, your Honour, the way that I understand the Chamber, there are two issues that we need to consider. First, the Chamber looks at the time effectively served by Mr Bemba. It considers the time since the arrest warrant of this case started operating, that's 23 November 2013, and consider that he had already served -- sorry, excuse me, and look at the time that he had spent in detention with respect to that arrest warrant and then he determined a sentence and he considered that it had already been served.

That's the way that I understand it.

JUDGE EBOE-OSUJI: [14:12:21] So how many months would that be?

MS REGUÉ: [14:12:22] Excuse me?

JUDGE EBOE-OSUJI: [14:12:23] How many months then would that amount to?

MS REGUÉ: [14:12:24] How many months?

JUDGE EBOE-OSUJI: [14:12:29] Yes, or years when the Chamber said time served. How many months --

MS REGUÉ: [14:12:30] The 12 months, the one year. But, the second point that I

wanted to mention, and maybe that's what your Honour is asking, is the Chamber did consider the totality of the time, was mindful of the totality of the time that Mr Bemba spent in detention and that's a factor that the Chamber did take into account.

I'm not sure if I am not answering your question.

JUDGE EBOE-OSUJI: [14:13:03] Fair enough. I mean, I think you've done your best and you said your colleague would also speak to it. You're only introducing it on a preliminary basis, fair enough.

Another question -- again, whether you are the best person to answer it or your colleagues, it's up to you, but one of the things that I wanted to understand is how we relate the prison sentence handed down to the various convicted persons, how we relate that to the fines that were imposed.

We're here talking about proportionality. Ms Taylor argues that the punishment was disproportionate. She argued it from one angle, but another angle of course is, if you looked at the prison sentence handed down, Mr Bemba got 12 months' prison sentence, Mr Kilolo got 11 months' prison sentence, so did Mr Mangenda, 11 months. Now, proportionately, you begin to see that Mr Bemba's prison sentence exceeded those of Mr Kilolo and Mr Mangenda by about, say, 9 per cent in terms of ratio, we're looking at almost one-to-one ratio. But when you move to fines, you find that Mr Mangenda got zero fine, Mr Kilolo got €30,000 fine, and Mr Bemba got €300,000 fine.

How do we make sense of that difference?

Now I've listened to your argument, and you've argued how Mr Bemba was more or less the prime mover of everything; that without him all these other crimes would not have happened.

Is it possible to consider that it is that elevated or, you know, conduct on his part that would have accounted for the 9 per cent differential in prison sentence? If that is case, how do we explain that the fine of Mr Bemba amounts to about 90 per cent more than that of, of Mr Kilolo and a hundred per cent more than that of Mr Mangenda? I am trying to make sense of that differential in prison sentence relative to fines.

MS REGUÉ: [14:16:19] Ms Thiru is going to address this issue which falls within ground 3, your Honour.

JUDGE EBOE-OSUJI: [14:16:35] Thank you very much.

MS THIRU: [14:16:58] Your Honours, perhaps I'll start with the question that you posed about the fine.

So my colleague, Ms Regué had made submissions about the enhanced culpability findings that that the Trial Chamber had made about Mr Bemba and those findings are unassailable.

Having made those culpability findings, the Trial Chamber then found it needed to determine a sentence that achieved the aims of sentencing, which was not only retribution but also a deterrence, and considering that he had been sentenced to one year of imprisonment, which is already at the low end of the scale for Article 70 offences, where a maximum of five years can be imposed, the Chamber then turned its mind to Mr Bemba's solvency, and it used as a reference point Mr Kilolo for whom it had sentenced to €30,000 and noticed that given Mr Bemba was a man of considerably more means, it would need to impose a higher fine to achieve a very valid goal of sentencing, which is also deterrence.

This was perfectly reasonable in accordance with the goals of sentencing and as we have referred to in our appeal brief, it is also recognised in various domestic jurisdictions that the goal of deterrence can be one of the reasons why you would

need to increase the amount of a fine, taking into account a person's financial circumstances.

So that is how we would explain that -- the differences between the three individuals and the final sentences, but we also urge the Chamber not to focus too much on doing a comparison, especially a mathematical comparison between each of the convicted persons and the sentences that they received. At the end of the day, as this Chamber has said, sentencing is not a pure science. It is left to the determination of the judges to determine something they find is fair, and in Mr Bemba's case, considering his enhanced culpability and his solvency, we consider that the sentence is more than fair; it's on the low end of the scale.

JUDGE EBOE-OSUJI: [14:19:19] But the thing, though, Ms Thiru, is this. Again, help me understand it. Let us, for instance, look at Judge Pangalangan's separate opinion in which he too considered the 12 months was far too low.

He said it would have been more appropriate to sentence Mr Bemba to four years' prison sentence. Obviously, his colleagues didn't go along with him. They left it at where it was, 12 months.

MS THIRU: [14:20:02] 12 months.

JUDGE EBOE-OSUJI: [14:20:04] Let's assume that we could move it to Judge Pangalangan's thesis, that would give us, would it not, something like, 4-to-1 ratio, a prison sentence --

MS THIRU: [14:20:08] Yes.

JUDGE EBOE-OSUJI: And that would give us about €120,000 of fine, approximately. Beginning to relate that 300,000 is what I'm trying to understand. It's a matter of proportionality of one thing relative to the other.

MS THIRU: [14:20:33] It is difficult, as I said, your Honour, to try and deal with

mathematical calculations of (overlapping speakers)

JUDGE EBOE-OSUJI: [14:20:40] It is not a mere matter of mathematical calculation if the difference were a round figure, you can say, yes, we can approximate, we don't want to be too precise about it. The administration of justice is something of a mathematical precision in that way. But when you begin to see these sorts of variations, one's bound to want to make sense of it and that's what I am trying to do, yes. Thanks.

MS THIRU: [14:21:08] Well, what I would suggest is that we don't look at the fine in isolation, there's also the fact that he received the low 12 month sentence and they didn't impose the four and a half year sentence. I don't know, we can't infer the reasons why, but they decided that 12 months and €300,000 would be fair. We cannot --

JUDGE EBOE-OSUJI: [14:21:32] And that one-month differential is adequate to account -- in prison sentence terms is adequate to account for the enhanced culpability of Mr Bemba.

MS THIRU: [14:21:43] It's worded in a way that you might -- but it's difficult to pick apart exactly how they -- why they reasoned that one-month addition for the second offence. But, I think, your Honour, that would be going too far into trying to guess the work of the Trial Chamber rather than accepting (overlapping speakers)

JUDGE EBOE-OSUJI: [14:22:08] You begin to see why the United States have got this scales of sentencing that judges are not free --

MS THIRU: [14:22:14] That's true (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:22:15] -- to depart from, you see.

MS THIRU: [14:22:16] -- but even in scales of sentencing, there is leeway for judges to increase the value of fines where a person's solvency would show that the fine

would have no deterrent effect whatsoever. And we have -- the Chamber had received reports on Mr Bemba's solvency. In the first sentencing decision, it based its fine by calculating his solvency and the -- making sure it was within the allowable percentage in the rules.

The Appeals Chamber examined it at that stage because Mr Bemba had made the argument that the fine was primarily based on his financial circumstances and the Appeals Chamber found no error by the Trial Chamber on that occasion.

The Trial Chamber has followed much the same approach on this occasion. We submit, your Honour, there is simply no error here and no, no abuse of discretion either in how it has come to this amount.

JUDGE EBOE-OSUJI: [14:23:12] What about the matter of the -- what to make of time served? Your colleague said that you would also address that. What that really means in actual terms? How do we translate it into real affect in the punishment meted out to Mr Bemba?

MS THIRU: [14:23:35] I do know that my colleague, Ms Narayanan, when she's dealing with -- she will be dealing in the time we have left regarding the detention-related aspects and the approach to time served; so she may be able to answer that aspect of your question, your Honour.

I'll move on then. I do also want to note that in terms of the impact of the length of detention, which is another argument that was raised today by Ms Taylor, Ms Taylor had said that the Trial Chamber did not take into account the remainder of the time that Mr Bemba spent in detention. Well, I would note that this is controverted on the plain text of the decision. The Trial Chamber stated explicitly at paragraph 120 that when determining his sentence, it was mindful of the time already spent and it took this into account as part of his personal circumstances.

This was what it had done as well in its first sentencing decision when it looked at the fact he had been in detention since June 2008. It has followed the same approach here.

I'll move quickly, given I'm running out of time to the issue of the DRC disqualification.

Mr Bemba's argument is that this disqualification amounts to a criminal penalty resulting from some form of criminal trial. Our submission is that this is a completely incorrect premise. Much of Ms Taylor's submissions on this ground today repeat what was stated in the appeal brief; so I will refer to our comprehensive written response on those in paragraphs 187 to 197.

And at the outset I would like to note that Mr Bemba has provided very little information to support this particular aspect of his appeal. We have only this media article, the reference to the DRC electoral law and we are also hearing information about the proceedings through Mr Bemba's submissions.

But despite the very little information, your Honours, it is clear from the material that the DRC electoral issue was not a criminal trial, nor was his disqualification a criminal penalty, specifically. The challenge to Mr Bemba's eligibility to run for president was heard in the DRC Constitutional Court, not a criminal court.

The Constitutional Court assessed his eligibility against the criteria in the DRC electoral law. That DRC electoral law sets out the eligibility requirements for political candidates contesting elections. It does not criminalise any conduct; it does not set out any legal elements of crimes.

The DRC Constitutional Court was not called upon to examine any charge of criminal conduct. It is not, as Ms Taylor submitted before the break, that the law is only concerned with the charge of corruption, but the law examines, the law stipulates that

a person who has been subject to a final conviction of corruption is ineligible to contest the election.

The court was therefore concerned with whether the final conviction of this Court for the offences of corruptly influencing witnesses and soliciting their false testimony was equivalent to a final conviction of corruption in the DRC. It was therefore a matter of legal interpretation for that court.

Setting aside Mr Bemba's views as to whether or not the DRC court was correct in that respect, it is not for us to sit in judgment on the correctness or otherwise of the DRC authority's regulation of its electoral affairs. The Trial Chamber was correct to note in its decision on Mr Bemba's request to admit the DRC materials that how the DRC regulates its elections is purely a domestic matter in which the Chamber will not intervene.

Your Honour, there was no error in the Trial Chamber's approach. Mr Bemba also disregards the plain text of the resentencing decision, where the Trial Chamber explicitly took into account Mr Bemba's disqualification and chose to give it minimal weight. As the Chamber rightly found, the disqualification was a natural consequence of his Article 70 conviction. And this is not a controversial finding. It is natural that convicted persons will face the consequences of their convictions in their lives, whether it is in the revocation of any professional licences, or damage to their professional reputation, the restriction in any civic rights or their ability to hold public office. These consequences will vary from one domestic jurisdiction to another, and the weight to be given so such consequences is a matter within the Trial Chamber's discretion. It exercised that discretion reasonably in this instance when it chose to give minimal weight to Mr Bemba's disqualification.

Bearing in mind, Mr Bemba has been found by this Court to have taken advantage of

his position as leader of a significant political party in the DRC to corruptly influence witnesses, nearly half of the witnesses he called in his case and to have solicited their false testimony, and he was convicted as a result. It is incongruous that he claims error by the Trial Chamber for failing to more generously accommodate his ineligibility as a result of those convictions to run for president of his country.

Finally, your Honours, despite Mr Bemba's disagreement with his sentence based on personal circumstances, it must be recalled, above all, it is the gravity of his offence and his culpable conduct which provides the litmus test for determining the proportionality of the sentence. And I refer to our authorities at D2 of our list.

Bearing this in mind, it is our view that he has been sentenced at the very low end of the range for Article 70 conduct. Your Honours, this Chamber should not diminish this sentence any further.

The Trial Chamber has stated that maximum sentences are not necessary for this case to matter. But with a sentence at this low end of the scale, it is now in your Honours' hands to make sure this case still matters, that this Court will not be impeded in its truth-finding function, and that victims can be assured their search for justice will not be derailed by those who seek to pervert the course of justice.

That concludes my submissions, your Honour. I will now hand over to Ms Narayanan, who will (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:30:33] Before you do, one question: What should be the appropriate sentence? When you say --

MS THIRU: [14:30:41] Yes.

JUDGE EBOE-OSUJI: [14:30:43] -- that he had been sentenced at the very low end.

MS THIRU: [14:30:46] I don't know that that's appropriate for us to raise, your Honour. We haven't appealed the second sentence. We had been of the

view --

JUDGE EBOE-OSUJI: [14:30:55] But you're urging us to not diminish it any further.

MS THIRU: That's right. We cannot ask (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:30:59] And doesn't that imply that you --

MS THIRU: -- you to increase it.

JUDGE EBOE-OSUJI: One second -- doesn't imply that you must have some guidance for us as to what to look at as appropriate.

MS THIRU: [14:31:06] We hadn't appealed it. But we in our first sentencing appeal, which had the same sentence, we had asked for -- we had sought five years as the appropriate sentence.

JUDGE EBOE-OSUJI: [14:31:17] Thank you.

MS THIRU: [14:31:19] I will now hand over to Ms Narayanan.

MS NARAYANAN: [14:31:28] Good afternoon, your Honours. Please permit me to speak to you from the second row. Thank you.

Your Honours, I lost track of time, I'm not entirely sure how much time I had. We hadn't intended to address detention-related matters, but in light of submissions perhaps we should. So if we could have a few more minutes, maybe even 10, that might even fold in Judge Eboe-Osuji's question. I'll try my best.

PRESIDING JUDGE MORRISON: (Microphone not activated)

MS NARAYANAN: [14:31:56] Thank you very much, your Honours.

Your Honours, why is Mr Bemba's detention not arbitrary?

In a few words, because it was always lawful, reasonable, and proper.

Now, despite being already detained under a lawful warrant for the Main Case, and that detention does not turn automatically unlawful because of the acquittal, the Article 70 Pre-Trial Chamber found separately in 2013 that there were reasonable

grounds under Article 58 to detain Mr Bemba for this case. And while in detention, Mr Bemba had full access to the interim release statutory regime; that's Article 58 and Article 60. And as we know, your Honours, that is consistent with international human rights law.

But he chose not to exercise his rights under that regime. He chose not to seek his release for the Article 70 case. And on 19 June 2016 Mr Bemba specifically withdrew that request for interim release in the Article 70 case and he asked that he continue to be detained for this case.

Now, Trial Chamber VII was differently composed at that time, but Trial Chamber VII did not assess Mr Bemba's detention at that time and that was consistent with Mr Bemba's wishes.

How could Trial Chamber VII then assess his detention at that time, or any other future time, given that an Article 60(2) application is the trigger for any such review? Mr Bemba also never asked to be released for the purposes of this case during the trial or the appeal. But following his acquittal in the Main Case on 8 June 2018, he, for the first time, requested his release in this case.

Trial Chamber VII then convened - I beg your pardon - an urgent status conference on 12 June 2018, three months before it resentenced him and, in a decision issued that very day, released Mr Bemba.

In addition, in resentencing Mr Bemba, as my colleagues have already said, Trial Chamber VII was mindful of the time that he had spent in overall detention. And that is a consistent thread that runs through these proceedings, both in the first sentencing decision, and I'd refer you to paragraph 240 of that decision, and the resentencing decision, paragraphs 120 and 126.

Now Trial Chamber VII accounted for the time spent in detention under the Article 70

warrant and it imposed a custodial sentence of 12 months as served and then the fine.
Now, your Honour Judge Eboe-Osuji, this might be towards answering your question: Did Trial Chamber VII safeguard Mr Bemba's rights in substance, by giving the time served sentence, and how did it actually impact? It did so in three ways.
Now, first of all, when the Trial Chamber VII was talking about time served, Mr Bemba was already released, so he was out of physical custody and the time served discussion pertained merely to resentencing.
Second, when Trial Chamber VII imposed the sentence time served, what it did is that it ensured that Mr Bemba, or any other person for that matter, did not need to spend another day in custody serving that sentence.
Now, there seems to be a technical term that the Trial Chamber has consistently used in these proceedings, whether it's in the first sentencing proceeding or in the second, but the usage has been consistent, it's been the same. So, for example --
JUDGE EBOE-OSUJI: [14:36:29] Wasn't it the case - correct me if I got it wrong - would it be the case that by the time of the resentencing Mr Bemba would already have served his 12 months, or not?
MS NARAYANAN: [14:36:44] Well, your Honours, then there was a consecutive sentence. So in that sense, when Trial Chamber III imposed its sentence, Trial Chamber VII imposed a consecutive sentence on the back of the Main Case sentence.
JUDGE EBOE-OSUJI: [14:36:59] So that means the consecutive sentence that would happen then collapsed, wasn't it?
MS NARAYANAN: [14:37:07] Well, I mean, he still needed to be resentenced for that sentence to then happen. When the acquittal happened Mr Bemba, technically, was not resentenced at that time. He was resentenced three months later

in September of 2018.

THE COURT OFFICER: [14:37:28] Excuse me, counsel, you have five minutes left.

MS NARAYANAN: [14:37:32] Thank you.

So, in that sense, time served is a very technical use of the term, perhaps, that the Trial Chamber has used. So whether it was Mr Babala, Mr Arido in the first sentencing decision, that's paragraph 68 and 97, or whether it related to Mr Mangenda and Mr Kilolo, the Trial Chamber has been consistent. So all we are saying is what the Trial Chamber did with Mr Bemba was consistent with all the others in the case.

And my third point touches upon something that Ms Thiru has already raised and addressed, is that at the end of the day, your Honours, Mr Bemba did get a very low custodial sentence in 12 months, and although we didn't appeal we do understand that the Trial Chamber -- that was, perhaps, a factor in issuing that sentence as well. And all of these three points, in our view, show that, in essence, the Trial Chamber protected Mr Bemba's rights in substance; this wasn't just a matter of form.

Now, just very briefly on the detention-related matters. There are several hypothetical possibilities that Mr Bemba raises, so there are a lot of what ifs, but perhaps they disregard the clear record of the case, or the what is or the what was. So, in that sense, Mr Bemba was always detained for two cases, he could not have been physically released from detention at some earlier point in time. At what point would that have been? When he was serving the Main Case sentence? Surely not. And at best, even if he had secured some sort of technical release for this case, your Honours, he would still have been detained but with a different hat. So, in this sense, because his detention was always reviewed and regulated, and there are no less than 18 decisions on the Main Case record requiring his detention for that case,

Mr Bemba's detention could not be said to be arbitrary in any manner.

My last point, and I'll be very quick on this: There was mention of Article 81(3)(b), and whether the Trial Chamber could have at some point earlier invoked that provision. But, your Honours, we do have our doubts if Article 81(3)(b) even applies to this situation of two cases.

Now, when we look at the provision itself, it seems to have been designed for a one case situation, because how could somebody be physically released from one case when he or she is serving the sentence in another case? Now, this is a unique situation and, with all due respect to the drafters, perhaps this was not entirely on their radar at that time. If not, would they not have written in a specific caveat in 81(3)(b) for two cases?

In any event, your Honours, it's a little bit difficult for 81(3)(b) to be said to apply in this case because of Trial Chamber VII having imposed a consecutive sentence on Mr Bemba.

And even if Mr Bemba had sought release under this provision at that time, which Mr Bemba did not, and these resentencing proceedings are the first time that Article 81(3)(b) is being mentioned, he would not likely have met the criteria of release at that time given that he was serving a lawful sentence in another case.

And, your Honours, even if hypothetically he had secured some sort of technical release, again, your Honours, he would not have been physically released. It may have made a difference to the sentencing credits, maybe the sentencing credits instead of being four, possibly maybe three years if you start counting from March 2017, but there wouldn't have been any other effect.

And my last point, I think there was also a mention of habeas corpus. But, your Honours, Mr Bemba has never actually made a request for habeas corpus before

the trial chamber, so this is -- we are in the land of a slight hypothetical at this point, and should the Appeals Chamber pronounce on a remedy that Mr Bemba had not made before the Trial Chamber?

And it would also help to remind ourselves of the facts of other cases where habeas corpus is at issue. So, for example, in Barayagwiza, that was an extreme situation where indeed there was an 11-month delay in notifying Mr Barayagwiza of his charges.

Mr Barayagwiza was in constant communication with the court, even filed a habeas corpus that went unanswered, and there was also an issue of prosecution negligence perhaps. But, in any event, that was then reviewed and modified. But the point simply here is that we seem to be talking about a nonexistent habeas corpus vis-à-vis other cases where it was actually an issue.

And that should conclude my submissions and thank you.

Thank you, your Honours.

PRESIDING JUDGE MORRISON: [14:42:42] Ms Brady, does that conclude all the submissions that the Prosecution were --

MS BRADY: [14:42:48] Indeed it does, your Honour.

PRESIDING JUDGE MORRISON: [14:42:50] It does. Okay.

I would ask my fellow Judges if are there any further questions that the Bench would like to ask?

Yes, Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [14:43:05] For the Defence, please.

Counsel, do you agree that a concrete legal consequence of a conviction is the imposition of a sentence? First can you respond that.

MS TAYLOR: [14:43:29] (Microphone not activated) I would agree that a conviction

does not become final, it does not become enforceable until a sentence is imposed, that they are one whole in that sense.

JUDGE IBÁÑEZ CARRANZA: [14:43:42] Okay. But in any case, in any case, could we say that your response is affirmative this is a legal consequence of a conviction, yes?

MS TAYLOR: [14:43:51] It's a consequence under the ICC statute.

JUDGE IBÁÑEZ CARRANZA: [14:43:54] Okay. Being affirmative, that answer, and noting that in this case Mr Bemba has been convicted for offences against the administration of justice, on what basis can the legal consequence of imposing a sentence believe void of any effect? In this sense, on what basis is counsel arguing that the alleged violations of his rights in a different proceedings should result in a state of proceedings in this case?

MS TAYLOR: [14:44:35] Thank you very much. I would respectfully submit that the conviction is intrinsically linked to the sentence, and it is does not therefore become enforced or enforceable until the sentence is finalised and attached.

This is also linked to our submission that it's necessary to have a fair sentence. And in circumstances where it is not possible to attach a fair sentence to that conviction, it would indeed be appropriate, therefore, to suspend the enforcement of the conviction. That it cannot, therefore, come into effect, because a conviction without a sentence, if that's an unfair sentence, would only cause unfairness. This would not uphold the integrity of the proceedings to have a conviction that would generate an unfair sentence. To avoid that harm, to avoid that unfair consequence, it's therefore necessary to suspend the enforcement of the conviction.

And in terms of the impact to the Main Case, the violations of the Main Case, I would like to refer to the submissions of my colleague today, which was very much

emphasising the fact that Mr Bemba could not be released, that there was a Main Case detention order. That Article 83(1)(b) had no application to this case because of the linkages between the two cases. And in my respectful view that actually exemplifies the issue today, that there was not an effective safeguard to protect Mr Bemba's rights, to preserve his right against undue delay.

JUDGE IBÁÑEZ CARRANZA: [14:46:15] Wait a minute, please. I would like to be clear, because the reasons supporting your argument are apparently not clear to me. So, you are requesting the stay of proceedings now, but it will avoid the sentencing proceedings, the imposed sentence, the imposition of a sentence for this case, Article 70 offences?

MS TAYLOR: [14:46:43] Yes, we would respectfully request the Chamber stay the imposition of a sentence because, in our view, there's a right to speedy proceedings and that applies to the sentencing phase, it's a standalone right irrespective as to whether someone has been convicted. And when it's not possible to impose a sentence in a manner which is consistent with this overarching right to a speedy resolution of the case and which is consistent with overarching right to fairness, then it should be stayed.

JUDGE IBÁÑEZ CARRANZA: [14:47:15] Okay. Thank you very much.

MS TAYLOR: [14:47:17] Thank you.

JUDGE EBOE-OSUJI: [14:47:17] Did I understand your argument, please, are you saying that conviction is then contingent on a fair sentence?

MS TAYLOR: [14:47:37] No, sorry, to make that very clear, I am not. And that actually brings me to the Darmalingum case, which said that you can have a fair conviction, a valid conviction, but there is also an independent question as to whether the overarching proceedings are consistent with the right to speedy proceedings. So,

if the conviction can't be enforced, it should either terminated, quashed or suspended if that overarching right is violated.

JUDGE EBOE-OSUJI: [14:48:03] Well, I am thinking of severability of conviction from sentencing. That's what I am thinking about. It looks like you blended the two in your response when you began answering Judge Ibáñez's question. That's what I want to know: Are you saying that you cannot have a valid conviction without a fair sentence? I think that's putting my question.

MS TAYLOR: [14:48:26] I would respectfully submit that a conviction shouldn't be enforced, it shouldn't be finalised or executed in circumstances where it would result in an unfair sentence.

PRESIDING JUDGE MORRISON: [14:48:41] But there is a clear distinction, is there not, between - in law - between the methodology by which an accused person comes to be convicted, which is the acceptance by the court that the Prosecution has adduced evidence of guilt beyond a reasonable doubt, and then a conviction follows from that? That's in a discrete category. If the person has not been convicted then, plainly, no question of sentence arises.

But once the person has been convicted, you then move on to what is, in effect, a separate and discrete legal proceedings as to the imposition of an appropriate sentence given the nature of the conviction and the discrete circumstances that surround the defendant.

In many, many jurisdictions you have an appeal against sentence, which is an entirely separate proceeding from an appeal against conviction. Sometimes both are appealed. But in my own practise at the Bar on many occasions I appealed against a sentence as being excessive without any suggestion that the conviction was in any way avoidable or tainted.

I think you are conflating the two to a curious degree.

MS TAYLOR: [14:50:17] I would respectfully submit that it can go either way. Of course you can have a valid conviction and a tainted sentence and they can be appealed and addressed separately and in circumstances where you can modify the sentence, where it's still possible to attach a sentence to the conviction. But in circumstances where the attachment of any sentence, whether resolution of the proceedings itself would violate this speedy trial right, then that's a circumstance which could attract the obligation to intervene and actually stay the proceedings. And that's consistent with the line of authorities where they have upheld the conviction but ultimately had to terminate the proceeding because of the overarching impact on speedy proceedings. Because there was deemed to be, in those circumstances, a link, that a defendant has a right not only to be convicted but to know the sentence, to know the consequences for their culpability, and if those consequences take too long to resolve that can impinge a fundamental fair trial right.

JUDGE EBOE-OSUJI: [14:51:22] I see your concern. But the question is: It's what -- what we are trying to understand, Judge Morrison and myself, is the need to link sentencing to conviction in the way you are making it just as a consequence of what arguably may have been an erroneous process following a valid conviction. Isn't that something that's - the concern you have in mind - something that is rather addressed through other methods rather than to feed it back into the conviction process?

MS TAYLOR: [14:52:14] Certainly --

JUDGE EBOE-OSUJI: [14:52:15] For instance here, the argument you made in the morning was that all right, and that's what I was trying to tease out from the Prosecution, the meaning of time served. I asked you that question, also to

the Prosecution. If time served would, by any theory, nullify the 12 months sentence, erase it, because he has already been in detention for 12 months or more? Then the remainder of it becomes a question of legality, whether he should have been detained beyond those 12 months. To the extent it established that he was, the question is what does the system do about that? It is a separate question from saying, well, that needs to be reflected back to the conviction itself, isn't it?

MS TAYLOR: [14:53:12] I would respectfully draw the Appeals Chamber's attention to the framework within which we are working, which is somewhat limited compared to a domestic framework. Within a domestic framework one can discharge the defendant once they've served their sentence, and that can be the end of any consequences. One can eliminate the criminal record. There's a range of tools available to the Chamber to address the fact that someone has served the sentence before we even get to the sentence. There's a range of tools available to judges to ensure that the defendant is not subject to collateral consequences that exceed the level of culpability.

Now, unfortunately, we don't have those tools at our disposal here. I wish we did. And I think we were trying through some of our domestic arguments to try and reach the same result, and that is a result of fairness, that as you have said, Judge Eboe-Osuji, Mr Bemba had served the sentence before we even got to the resentencing phase, and that had a collateral impact upon the sentence.

And if we look at the figures that you were mentioning, there's an arbitrariness, can we look at it? Mr Kilolo in 2017 got 12 months for Article 70(1)(a) --

JUDGE EBOE-OSUJI: [14:54:29] But that's a separate question though than to say there needs to be a stay of proceedings if the purpose of arguing the stay of proceedings aside, suppose that is what you have in mind, would be to nullify the

process that led to the conviction in the first place.

MS TAYLOR: [14:54:48] Certainly we would not wish to nullify that result and if that was suggested (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:54:53] Thank you for that clarification.

MS TAYLOR: [14:54:56] Thank you.

PRESIDING JUDGE MORRISON: [14:55:04] I ask my colleagues if there are any further questions?

No. Well, that being the case --

MS TAYLOR: [14:55:13] Sorry.

PRESIDING JUDGE MORRISON: [14:55:14] -- it remains to thank all the parties for their assistance in this hearing. And to thank the interpreters and translators and all members of staff who have assisted in the organisation and production of this hearing today.

Sorry?

JUDGE EBOE-OSUJI: Ms Taylor was standing up.

PRESIDING JUDGE MORRISON: Yes, sorry, Ms Taylor. I didn't see.

It's not that you're short, I just didn't see you.

MS TAYLOR: [14:55:48] (Microphone not activated) I would just like to respectfully request if I could have one minute to address issues that were raised during the submissions of the Prosecution?

PRESIDING JUDGE MORRISON: [14:55:58] Is that going to be an Australian minute or a Dutch minute?

MS TAYLOR: [14:56:03] Well, as an Australian I speak very quickly, so that would be 30 seconds.

PRESIDING JUDGE MORRISON: [14:56:07] Right. Well, one Australian minute.

MS TAYLOR: [14:56:10] Thank you very much.

And it is on this issue of time served and the impact it had and this issue of the amount of the sentences. And I did want to develop that in the sense that we saw in 2017, as I mentioned, that Mr Kilolo got 12 months and in 2018 got 11 months, there was a reduction, whereas Mr Bemba's went up. And in 2017 the Chamber only referred to the enhanced culpability of Mr Kilolo, not Mr Bemba, and yet in 2018 it referred to the enhanced culpability of both. So there was an increase in Mr Bemba's culpability and a decrease of Mr Kilolo's. And I would respectfully argue their detection situation, in effect, impacted them, because Mr Kilolo's sentence ultimately was tailored to the length of his detention, whereas Mr Bemba's was longer because he had served that time. So it shows the concrete prejudice caused by the detention and the impact it had on the manner in which the Judges viewed Mr Bemba and the effect on the sentence.

Thank you.

PRESIDING JUDGE MORRISON: [14:57:11] Thank you.

Any other minutes of any nationality? No? Right.

MS BRADY: [14:57:21] No.

PRESIDING JUDGE MORRISON: [14:57:21] I repeat my thanks to all the personnel and simply say that the Appeals Chamber will issue a scheduling order for the delivery of the judgment as soon as is practical in this case.

THE COURT USHER: [14:57:37] All rise.

(The hearing ends in open session at 2.57 p.m.)