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No.: **ICC-01/05-01/13**
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THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

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

Public with Public Annexes B and C
and with Confidential Annexes A, D, E, F, G and H

Public Redacted Version of "Defence Document in Support of the Appeal against the Sentence"

Source: **Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo**

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

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1. Introduction

1. Having described Mr. Bemba as possessing 'implicit knowledge' in the Trial Judgment, the Trial Chamber acknowledged in the Sentencing Judgment that Mr. Bemba's involvement was of a "somewhat restricted nature":[1] The Chamber further conceded that a key plank underpinning the conviction of Mr. Bemba – his involvement in a so-called plan to undertake remedial measures – fell outside the scope of the Article 70 charges and had no relevance to the gravity (and thus content) of these charges. The Sentencing Judgment thus served to affirm that Mr. Bemba should never have been convicted in the first place. The essential elements of individual responsibility for Mr. Bemba were never properly fulfilled: vague presentiments and restricted participation do not a co-perpetrator make.

2. The Chamber nonetheless ignored the clear implications of its own findings, and issued a sentence that bears no relation to:
    a. the limited degree of Mr. Bemba's culpability; or
    b. Mr. Bemba's position as a detained defendant, who renounced any putative 'benefit' of the illicit conduct, and shouldered significant financial costs associated with witnesses, who lied equally to the Defence.

[1] SJ, para.223.

3. Having found that a significant fine of 300, 000 euros would act as an adequate deterrent, the Chamber further erred by imposing an additional custodial sentence of 12 months, which will run **after** the conclusion of the Main Case sentence that is currently on appeal. The Chamber also refused to award Mr. Bemba any detention credit in the Article 70 case, whilst at the same time, maintaining the existence of the Article 70 arrest warrant and detention order for the remainder of the proceedings before the ICC.

4. The cumulative impact of these findings is that:

    a. Mr. Bemba has been fined **three times the maximum amount** that applies at other international courts and tribunals and **30 times more** than the average fine that has been imposed;[2]
    b. by the time that these appellate proceedings conclude, Mr. Bemba will have served a full custodial sentence of **5 years** (which is the maximum that applies to Article 70 offences, and **10 times greater** than the average sentence imposed by the *ad hoc* Tribunals);[3] and
    c. at the indeterminate point at which Mr. Bemba's Article 70 sentence formally commences and concludes, he will have been detained **at least 1 to 2 years longer** than the maximum custodial threshold for Article 70 offences.

5. Apart from the fact that the Sentencing Judgment is tainted due to the fundamental flaws in the Trial Judgment itself, the Chamber reached this vastly disproportionate and unfair outcome due to its:
    a. reliance on conduct that falls outside the confirmed charges;
    b. improper double-counting of a range of factors;
    c. failure to give any weight to Defence evidence and argument concerning the limited nature of Mr. Bemba's individual culpability;
    d. failure to accept **any** mitigating factors raised by the Defence;
    e. failure to issue a reasoned determination as to whether it was necessary and proportionate to issue a custodial sentence in addition to a fine;
    f. refusal to award Mr. Bemba any credit for his Article 70 detention due to the linkage between the Article 70 and Main cases;

[2] ICC-01/05-01/13-2089-Conf,para.143 ; ICC-01/05-01/13-2089-AnxE
[3] ICC-01/05-01/13-T-54-CONF-ENG,p. 3;ICC-01/05-01/13-2089-AnxB

g. determination that the custodial sentence must be served consecutively, due to the 'distinct' nature of the Article 70 and Main cases; and
h. adoption of an arbitrary and disproportionately severe fine.

6. These errors, individually or cumulatively, invalidate the overall sentence imposed by the Chamber. The correct, fair and proportionate sanction would be to affirm that a reasonable fine is an appropriate and sufficient penalty for Mr. Bemba: a defendant who was convicted for limited participation in non-violent conduct, and who presents no risk of recidivism. In the alternative, if any custodial sentence is affirmed on appeal, bearing in mind the significant deprivations of liberty that Mr. Bemba experienced in connection with this case, the Appeals Chamber should either award Mr. Bemba full credit for detention served since the issuance of the Article 70 arrest warrant, or the sentence should be ordered to run consecutively with the Main Case sentence.

2. The Sentencing Judgment is *ipso facto* flawed by virtue of its reliance on erroneous legal and factual findings from the Trial Judgment

7. As set out in the Defence appeal against conviction,[4] the Trial Judgment should be reversed, and Mr. Bemba acquitted due to the Chamber's reliance on:

a. Flawed legal interpretations of the charged Article 70 offences;
b. An improperly pleaded and defined common plan;
c. Illegally collected evidence;
d. Evidential conclusions which rest on speculation, uncorroborated remote-hearsay, or thin air.

8. However, in the event that the Appeals Chamber declines to do so, each of the above grounds warrants a substantial reduction in penalty. For the purposes of sanctioning Mr. Bemba's culpability, it is particularly relevant that the Trial Judgment failed to include evidential conclusions, to the standard of beyond reasonable doubt, as concerns Mr. Bemba's involvement in each of the charged offences.[5] Thus, even if the Chamber's factual findings remain undisturbed, Mr. Bemba should only be penalized in connection with the handful of witnesses that were (tenuously) linked to

[4] ICC-01/05-01/13-2144-Conf.
[5] ICC-01/05-01/13-2144-Conf,paras.131-137.

his conduct, and only insofar as this conduct impacted, or contributed to a concrete interference in the administration of justice.

9. Similarly, even if the Chamber finds that the violations associated with the surveillance of Mr. Bemba's communications do not meet the threshold for exclusion, his right to an effective remedy remains intact. This too should translate to a substantial reduction in penalty.

10. Finally, although the Defence alerted the Chamber to the fact that certain findings rested on an incontrovertibly erroneous interpretation of the evidence (i.e. the October 2012 multi-party call with D-19 and its purported link to the D-55 call),[6] the Chamber declined to correct the record or otherwise adjust its approach in light of these errors.[7] This was an abuse of discretion; the Chamber cannot knowingly maintain findings that it knows to be unfounded.[8] Given that number of multiparty calls appears to be the lynchpin of Mr. Bemba's culpability, this error also warrants a considerable reduction in sentence.

3. The Chamber erred in law by relying on uncharged allegations to aggravate a sentence, which was based on the same uncharged allegations

11. Both the Trial and Sentencing Judgments relied on incidents and alleged offences that were never charged, including allegations concerning Mr. Bemba's communication with D-19, and the so-called plan to engage in 'remedial measures'. In both Judgments, the Chamber failed to clarify the legal basis for its reliance on these allegations in a timely manner. As a result, the Defence was denied proper notice as to the relevance of such allegations to sentencing and was therefore deprived of a reasonable opportunity to defend Mr. Bemba.[9]

12. Although it is possible to rely on uncharged allegations as part of sentencing (if certain safeguards are complied with), it is not possible at the ICC to convict a defendant in connection with uncharged allegations.[10] It is, therefore, legally impossible to rely on uncharged circumstances in order to first convict the defendant, and then rely on them as a separate basis for aggravating the sentence. Apart from

[6] ICC-01/05-01/13-2089-Conf,para.18.
[7] SJ,para.220.
[8] *Momir Nikolić* AJ, para.72.
[9] ICC-01/04-01/06-2901, para.29.
[10] Article 61(9) ICC Statute; ICC-01/04-01/06-2205, paras.1,55,91-95.

the obvious point that the double counting of such circumstances is prohibited,[11] it is impossible to sentence a defendant in connection with circumstances that should never have given rise to a conviction in the first place.

13. The Chamber appears to acknowledge the contradiction at play as concerns its reliance on these uncharged allegations, but fails to remedy its initial error, which is that the Trial Judgment was fundamentally flawed by virtue of its reliance on these allegations. The Chamber concludes as follows:[12]

> the Chamber does not, for gravity purposes, take into account any conduct after the act since this cannot per se characterise the gravity of the offence as committed at the relevant time. However, the Chamber has considered this factor, if applicable, in the context of the convicted person's culpable conduct.

14. Footnote 340 clarifies that the above finding,

> relates, in particular, to the conduct of the co-perpetrators, Mr Bemba, Mr Kilolo and Mr Mangenda, with regard to their agreement to take remedial measures in the context of the Article 70 investigation.

15. The above findings recognise that "conduct after the act" sheds no light on the content of charged conduct: if such "conduct after the act" cannot "characterise the gravity of the offence as committed at the relevant time", it equally cannot characterise the culpability of the defendant at the relevant time. The Chamber has, to all intents and purposes, conceded that its conviction of Mr. Bemba, which was based to a significant extent on evidence concerning 'conduct after the act',[13] is legally untenable.

16. The Prosecution sentencing submissions also support the ineluctable conclusion that allegations concerning "conduct after the act" should not have been relied upon in

[11] See Section 4.2.
[12] SJ, para.208.
[13] ICC-01/05-01/13-2144-AnxF

order to ascertain the Mr. Bemba's culpability for the charged offences. The Prosecution acknowledges that:[14]

> the Convicted Persons' obstructive conduct was never a part of the Prosecution's submissions concerning the gravity of the offences of which they were convicted, nor is it an element of those crimes. In particular, the cover-up operation by BEMBA, KILOLO, MANGENDA, and BABALA **was never charged, nor considered, as a separate article 70 offence.** Rather, the Chamber makes clear, that its consideration of their attempts to cover-up their earlier crimes by interfering with the Prosecution's investigation of this case was purely evidentiary, "demonstrate[ing] the existence of the common plan and the involvement of [BEMBA, KILOLO, and MANGENDA] therein." (emphasis added)

17. The above argument is built on an extraordinary series of concessions:
    i. the allegations concerning 'obstructive conduct' constitute a separate offence that was never charged; and
    ii. this separate uncharged offence was relied upon by the Chamber in order to demonstrate the existence of the common plan, and the defendants' involvement in this plan.

    The Chamber therefore convicted Mr. Bemba in connection with a common plan to commit uncharged offences, and in connection with his contribution to the execution of uncharged offences. Consequently, Mr. Bemba's conviction exceeded the scope of the charges and is invalid.

18. Although these errors stem from flaws in the Trial Judgment, they also taint the sentencing process: but for the Chamber's erroneous reliance on these allegations in the Trial Judgment, the conviction against Mr. Bemba falls away.

19. It is not possible to cure the first error (basing a conviction on uncharged allegations) by sliding the allegations into the sentencing rather than conviction category. The

[14]ICC-01/05-01/13-2085-Conf,para.90.

Chamber's findings concerning Mr. Bemba's contribution to the 'remedial measures' served as the foundation for its conclusions concerning Mr. Bemba's *mens rea* and *actus reus*; if removed, the entire conviction falls apart. For the purposes of sentencing, there was thus no culpable conduct to sanction.

20. The legally flawed status of such incidents also undermines any claim that the Defence was on notice that they could be employed as aggravating circumstances. Adequate notice means that the Prosecution must set out its intention to rely on such allegations as aggravating factors clearly, and this notice must be given sufficiently in advance of the sentencing process to enable the Defence to respond in a meaningful manner. [15]

21. Even though it was manifestly incorrect to rely on these allegations for the purposes of fulfilling the elements of Article 70, the Defence was entitled to assume that the Prosecution and Chamber would treat these allegations in a uniform manner, i.e. as part of its findings concerning the elements of the offence and Mr. Bemba's membership of the common plan. As set out in section 4, the double counting principle extends to findings concerning the accused's participation in a common plan. If the Chamber had remained consistent in its approach to these allegations, then it would have rejected them as an appropriate aggravating factor due to the double counting principle.

22. However, as things stand, the Defence was prejudiced doubly: firstly through the Chamber's improper reliance on these allegations in order to convict Mr. Bemba, and secondly, through the Chamber's *volte face* in treating the allegations as uncharged separate offences for the purpose of aggravating a sentence that pertains to a flawed conviction.

23. The Defence also cannot be deemed to be put on 'notice' regarding the possibility that these specific uncharged allegations could be used in an adverse manner, in circumstances in which the Prosecution Sentencing Brief was filed on the **same day** as that of the Defence Sentencing Brief, that is Thursday 8 December 2016, and the

[15] *Semanza* TJ,paras.567-570

hearing was then scheduled at 9am, Monday 12 December 2016. This was clearly insufficient time within which to prepare an effective defence.[16]

24. In contrast to the approach adopted in connection with 'remedial measures', the Chamber simply swept the *ultra vires* character of the allegations concerning D-19 under the carpet. Although D-19 was not one of the 14 witnesses, and was not listed as falling within the charged incidents,[17] the Chamber relied on allegations pertaining to contact between Mr. Bemba and D-19 to establish Mr. Bemba's culpability in the Trial Judgment.[18] During the sentencing phase, the Defence drew the attention of the Chamber to the fact that it appeared to have committed **a manifest error of fact** in referring to a contact on 4 October 2012, which is disproved by the call data records on that date.[19] The Prosecution's Sentencing Submissions were silent on this point.

25. The Sentencing Judgment ignored the Defence submissions. On the one hand, the Chamber set out the clear position that the Article 70 charges and conviction only concerned 14 Defence witnesses,[20] namely, D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64.[21] But at the same time, as part of its assessment of the degree of Mr. Bemba's participation in the charged offences, the Chamber cited its previous findings concerning the alleged contact with D-19.[22]

26. In order to be consistent, the Chamber should have addressed its findings concerning D-19 in the same manner as those concerning 'remedial measures'. The allegations concern an uncharged offence, and they took place after the contact between Mr. Bemba and D-55. The allegations thus shed no light on the gravity of conduct that occurred beforehand. It was therefore a manifest error for the Chamber's to base its determination as to the extent of Mr. Bemba's participation in the charged offences, on evidence that was irrelevant to Mr. Bemba's participation in the charged offences.

4. The Chamber erred in law by double counting findings that were used to establish elements of the offences or modes of liability, as separate aggravating factors.

[16] Cf ICC-01/04-01/06-2901, paras.30-31.
[17] ICC-01/05-01/13-749, pp.47-48.
[18] SJ, paras.220,222,236.
[19] ICC-01/05-01/13-2089-Conf, para.18 ; ICC-01/05-01/13-T-54-CONF-ENG, p.23, lns.18-25,p.24, lns.1-3.
[20] SJ, para.205.
[21] SJ, para.204.
[22] SJ, paras.220,222.

27. This error arises from the Chamber's overly narrow construction of the 'double-counting principle'. Whereas the Chamber underlined that "any factors that are taken into account when assessing the gravity of the offences will not be taken into account additionally as aggravating circumstances, and *vice versa*",[23] the Chamber failed to address another aspect of this principle, which is that an element of the crime or mode of liability cannot be considered as an aggravating circumstance when determining the ultimate sentence. This aspect of the principle is well established at both the ICC[24] and *ad hoc* Tribunals,[25] and was accepted by the Prosecution as being applicable to this case.[26]

28. As a result of this legal error, the Chamber double-counted the following aggravating factors:[27]

    i) Mr. Bemba's abuse of the privileges afforded to detained accused:
    ii) Mr. Bemba's attempt to obstruct justice by concocting remedial measures with Mr. Kilolo and Mr. Mangenda;
    iii) The finding that Mr. Bemba took advantage of his position as President of the MLC.

4.1 Mr. Bemba's abuse of the lawyer-client privilege and attendant rights

29. Given that this factual finding underpinned the Chamber's conclusions regarding both Mr. Bemba's *actus reus*[28] and his *mens rea*, [29] it was impermissible to rely on the same finding as an aggravating circumstance.

30. The Chamber failed to clarify how its findings concerning the abuse of the privilege line for the purposes of conviction were distinct from the manner in which it employed such findings as an aggravating circumstance.[30] For the purposes of conviction, the Chamber found that the abuse of the privileged line was a measure

[23] SJ,para.23
[24] ICC-01/12-01/15-171,para.70;ICC-01/05-01/08-3399,para.14.
[25] *Ndindabahizi* AJ,para.137; *Blaškić* AJ,para.693; *Vasiljević* AJ,paras.172-73.
[26] ICC-01/05-01/13-2085-Conf,para.89.
[27] SJ,paras.235-238.
[28] TJ,paras.109,683,803.
[29] TJ,para.817.
[30] ICC-01/05-01/08-3399, fn.44

taken to conceal witness interference. For the purposes of sentencing, the Chamber simply reiterated the same point, that Mr. Bemba abused the privileged line for this purpose.[31] The 'abuse' was an element which was inherent to both findings (the elements of the conviction and aggravation of sentence), since in relation to the former, the Chamber relied on the fact that it was an abuse in order to infer that Mr. Bemba must have done so for an improper purpose.[32]

4.2 Mr. Bemba's involvement in the so called 'remedial measures'

31. During the sentencing hearing, the Mangenda Defence argued that it would constitute double-counting to rely on the defendants' involvement in the so-called 'remedial measures' as an aggravating factor. [33] The Chamber nonetheless failed to provide a reasoned opinion on such arguments, and erred by relying on findings that had been 'counted' in connection with its findings concerning Mr. Bemba's responsibility as a co-perpetrator.[34]

32. Although the Prosecution argued in turn that the cover-up operation was only used as evidence of the common plan,[35] since the common plan was relied upon in the Chamber's findings concerning modes of liability, this argument fails to exclude the applicability of the double-counting principle.[36]

33. In any case, the Chamber further relied on Mr. Bemba's involvement in the remedial measures to infer knowledge and intent,[37] and as evidence of Mr. Bemba's contribution to the charged offences.[38] The latter includes findings that "Mr. Bemba planned and directed the taking of remedial measures upon learning of the Article 70 investigation."[39]

[31] SJ,paras 235-236, 248
[32] TJ,parad. 683, 701, 736-745, 814.
[33] ICC-01/05-01/13-T-54-CONF-ENG,p.12,lns.9-20.
[34] TJ,para.817.
[35] ICC-01/05-01/13-2085-Conf,para.90.
[36] ICC-01/12-01/15-171,para.70
[37] TJ,para.819.
[38] TJ,para.816.
[39] TJ,para.816.

34. The elements of the crime and the aggravating circumstances are therefore not distinct: Mr. Bemba's attempt to obstruct justice by concocting remedial measures' was part of both the objective and the subjective elements of the crime for which he was convicted. The specific aspect highlighted in the sentencing judgment (that Mr. Bemba instructed Mr. Kilolo to take steps to frustrate the Article 70 investigation),[40] is identical to the aspect relied upon in the Trial Judgment.[41] Unlike the *Nzabonimana* case,[42] the alleged 'remedial measures' are also not a mere example of a 'bigger' or of 'another' aggravating factor; this criterion is used as an aggravating factor in itself as concerns the determination of Mr. Bemba's sentence.[43]

4.3 The finding that Mr. Bemba took advantage of his position as President of the MLC.

35. The Chamber found that the Prosecution had not established that Mr. Bemba abused his authority and/or official capacity, but nonetheless concluded that Mr. Bemba 'took advantage' of his position as President of the MLC in relation to witnesses D-55-, D-3 and D-6,[44] and relied on this as part of Mr. Bemba's overall circumstances pursuant to Rule 145 (1) (b).[45]

36. Although the Chamber did not formally term this finding an aggravating factor, the principle against double counting (and related prohibition on double punishment for the same conduct) should apply to any factors that operate to increase the sentence. The Chamber therefore erred by relying on Mr. Bemba's supposed use of his position as a 'non-monetary promise', as both an element which the fulfilled the Article 70 offences, and as a basis for increasing sentence.

37. In the Trial Judgment, the Chamber found that Mr. Bemba exerted indirect influence on witnesses through Mr. Kilolo and direct influence on D-19 and D55.[46] Regarding the specific nature of this influence, for D-3 and D-6, the Chamber relied on promises given by Mr. Kilolo (purportedly on Mr. Bemba's behalf) that Mr. Bemba

[40] SJ,para.238.
[41] TJ,paras.110 (instructing Mr Kilolo to conduct the tour d' horizon), para.801 (Mr. Bemba gave instructions concerning measures to frustrate the Article 70 investigation).
[42] *Nzabonimana AJ*,para.264.
[43] SJ,paras.237-238.
[44] SJ,paras.231,234.
[45] SJ,para.234.
[46] TJ,para.856.

would meet the witnesses in Kinshasa.[47] With respect to D-55, the Chamber noted that D-55 described Mr. Bemba as a "powerful man with many friends outside of detention",[48] and further found (without citing evidence) that D-55 had been promised that he would benefit from "Mr. Bemba's good graces".[49]

38. In both instances, the Chamber implied the source of Mr. Bemba's influence. In confirming that Mr. Bemba was a "powerful man with many friends outside of detention", the Chamber clearly relied on Mr. Bemba position as President of the MLC, which was the only information put in evidence on this point. This vagueness in the Chamber's reasoning should not, however, operate to the detriment of the accused: an implicit finding impacts on the accused as much as an explicit finding. The Appeals Chamber should therefore look beyond the vagueness of the Chamber's reasoning, and apply the double counting principle in light of the context of this particular finding. Alternatively, in the absence of an explicit evidential foundation, the finding itself should be reversed on appeal, which eliminates its relevance for sentencing purposes.

39. In the Sentencing Judgment, the Chamber found that "Mr. Bemba took advantage of his position as long-time and current MLC President when he talked to D-55",[50] and further, that "Mr. Bemba's position also played a role when Mr. Kilolo gave non-monetary promises to witnesses, such as D-3 and D-6."[51] In its section on aggravating circumstances, the Chamber consequently "took into account the fact that, when committing the offences, Mr. Bemba took advantage of his long-standing and current position as MLC President."[52]

40. Although these findings nominally refer to Mr. Bemba's position, they turn on the fact that his position was itself used to influence witnesses. This is the very nub of the elements underlining Mr. Bemba's conviction; that Mr. Bemba's position was used by himself or others in order to influence witnesses. It is this position that constitutes the improper element of the promise. Given this framework, it would be

[47] TJ,paras.138, 373, 419.
[48] TJ,para.295.
[49] TJ,paras.301, 303.
[50] SJ,para.234
[51] SJ,para.234
[52] SJ,para.248

duplicative to rely on this for both conviction and as a factor that enhances the sentence.

5. The Chamber erred in fact and law as concerns its assessment of the degree of Mr. Bemba's culpability

41. The Chamber acknowledged that the extent of Mr. Bemba's knowledge and participation was relevant to sentencing but nonetheless committed a reversible legal error, and abused its discretion by dismissing all Defence argument and evidence on these points, on the grounds that they constituted an attempt "*to re-litigate the merits of the Judgment*".[53]

42. As a result, the ultimate sentence does not reflect the minimal nature of Mr. Bemba's culpability, and is vastly disproportionate when compared to the sentences imposed on co-defendants, who had been found to possess a much higher degree of intent and participation.

43. As argued by the Defence, the Chamber was bound to apply the principle of individual responsibility when imposing a sentence on Mr. Bemba.[54] The degree of responsibility and participation in the crime is in fact the primary consideration in sentencing.[55] These principles are reflected in article 145 (1)(c) of Rules, which provides that the Trial Chamber **shall** take into consideration the degree of participation and the degree of intent. By virtue of the term "shall", the Chamber has no discretion to disregard the limited knowledge or intent of an accused when assessing the sentence.

44. As concerns the application of these principles to collective modes of liability, the *ad hocs* have found that "findings of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence."[56] In practice, there is a "*formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions,*

[53] SJ,paras.224-225.
[54] ICC-01/05-01/13-2089-Conf,para.13.
[55] *Muhimana* AJ,paras.233,234;*Ndindabahizi* AJ,para.138;*Gacumbitsi* AJ,para.204;*Kamuhanda* AJ,para.357; *Musema* AJ,para.382;*Kayishema and Ruzindana* AJ,para.352; *Čelebići* AJ,paras.731,847-849;*Aleksovski* AJ, para.182 ; *Karera* TJ, para.574.
[56] ICC-01/05-01/13-2089-Conf, para.27.

though significant, are not as great."[57] The ICTY Appeals Chamber has further noted "that any such disparity [in the degree of participation] is adequately dealt with at the sentencing stage.[58]"

45. The Defence thus had a clear right to litigate and substantiate these issues at the sentencing phase. Article 76(2) allows the parties to introduce "additional evidence" that may be relevant for sentencing; such a bifurcated sentencing phase allows the defendant to raise mitigating factors at this juncture, whilst exercising the right to silence before the trial verdict.[59]

46. The word 'additional' in Article 76(2) further clarifies that the parties are not limited to the evidence tendered at trial. Both Trial Chambers I and II allowed the Defence to tender evidence that was relevant to the determination of an appropriate sentence.[60] The Lubanga Defence was, for example, authorized to call two witnesses to testify in connection with the "scope of the crimes".[61] Trial Chamber VII further affirmed the right to adduce additional evidence during the sentencing phase, and imposed no restrictions on this right.[62]

47. Although the Chamber later cautioned, in connection with the sentencing testimony of D-4, that the sentencing hearing "is not a further opportunity to litigate the merits of the present case,[63] there is a distinction between relitigating the 'merits' of the Trial Judgment, and providing further argument and evidence concerning the contours of the Judgment's findings. The *ad hocs* have found in this regard that for the purposes of sentencing, the nature of the accused's contribution should be determined *in concreto,* since "[*p]resumptions regarding the gravity of forms of participation in the abstract preclude an individualised assessment of the convicted person's actual conduct and may result in an unjust sentence*".[64]

48. The Trial Judgment's findings regarding Mr. Bemba were remarkably abstract. The contours of Mr. Bemba's inferred role, the nexus between this role and the 'harm

[57] *Martić* AJ,para.84; *Brdanin* AJ, para.432.
[58] *Brdanin* AJ, para.432.
[59] Schabas (2008),pp.1413-17;Cassese Memo,para.45.
[60] ICC-01/04-01/07-3437,para.7; ICC-01/04-01/06-2871,para.6.
[61] ICC-01/04-01/06-2895,paras.10,18-19.
[62] ICC-01/05-01/13-1990,p.4.
[63] ICC-01/05-01/13-2025,para.18.
[64] ICC-01/05-01/08-3399,fn.53.

suffered', and the exact parameters of implied knowledge and implicit acquiescence were drawn in broad strokes,[65] which did not account for his position as a detained defendant and his actual role within the Defence team. Nor did the Trial Judgment account for role of certain witnesses and co-accused in initiating separate schemes,[66] or Mr. Bemba's individualised state of belief concerning these schemes.[67]

49. The desire to avoid trial relitigation must also be secondary to the paramount principle of sentencing that "*an accused cannot be punished for acts that don't result from culpable conduct on their part*"; for the purpose of sanctioning Mr Bemba, what matters is "*why and what Mr Bemba did."*[68]

50. The notion of 'relitigation' is also meaningless as concerns a legal framework in which the parties can rely fully on evidence tendered at trial; it is therefore logical that the parties should be entitled to place a specific inflection on this evidence for the purposes of ascertaining the degree of culpability and the appropriate sentence.

51. As a result of the Chamber's erroneous approach, the sentence imposed by the Chamber fails to reflect the following evidence and arguments, which did not controvert the Chamber's findings concerning the defendants' responsibility, but served to flesh out and contextualise these existing findings:

5.1 The Chamber's finding (which was not witness specific) that Mr. Bemba controlled the presentation of evidence through his decision as to which witnesses should be called

i. Evidence concerning the extent to which Mr. Bemba relied on the advice, and determination of the Defence as to whether to call at least some of the 14 Defence witnesses;[69]

5.2 The Chamber's findings that Mr. Bemba instructed Mr. Kilolo to contact Defence witnesses (the tour d'horizon)

[65] SJ,para.219.
[66] Cf ICC-01/05-01/13-2089-Conf,paras.17, 21,77-80.
[67] Cf ICC-01/05-01/13-2089-Conf,paras.62-67,77.
[68] ICC-01/05-01/13-T-54-CONF,pp.17-18 ; *Ndindabahizi* AJ,para.139.
[69] CAR-D20-0007-0065 at 0065: *'Regarding the motion: the client asked what we should do with the remaining witnesses'(that are not in the order of appearance), the ones that Aimé listed. There has not been any decision on that ".*

ii. Evidence of Mr. Bemba's genuine belief (expressed to his legal assistant) that the Prosecution had paid inappropriate amounts to witnesses in exchange for their testimony, and was of the view that this should be documented in a motion and brought to the attention of the Chamber;[70]

5.3 The context of Mr. Bemba's implicit knowledge and implicit instructions

iii. [REDACTED],[71] coupled with legal commentary concerning regarding the meaning of 'informed consent' from the perspective of a client interacting with his or her lawyer;[72]

iv. [REDACTED];[73]

v. Evidence concerning the difficulties that Mr. Bemba would have faced, as a detained defendant who had no means to verify the purpose of amount of payments, to appreciate the distinction between the legitimate and illegitimate witness payments, particularly in circumstances where the amounts paid to witnesses approximated the amounts paid to the Defence for legitimate logistical expenses;[74]

vi. Videos of hearings showing the Mr. Bemba's limited focus on witness testimony concerning corollary issues such as payments and contacts;[75]

5.4 The nexus between Mr. Bemba's culpable conduct and the 'harm' caused by the Article 70 misconduct

vii. Evidence that the questions formulated for D-15 were discussed by the Defence team as a whole, and that Mr. Bemba's passive involvement in this process (which was to listen to Mr. Kilolo recounting three prospective questions, after D-15 had already been 'coached' the night before) was minimal, and had no impact on the coaching or resultant 'harm'. [76]

[70] ICC-01/05-01/13-2089-Conf,para.65 citing CAR-D20-0007-0184.
[71] CAR-D20-0007-0271 at 0282.
[72] ICC-01/05-01/13-2089-Conf,paras.51-52.
[73] ICC-01/05-01/13-2089-Conf,paras.43-45; CAR-D20-0007-0023,CAR-D20-0007-0001, CAR-D20-0007-0271 at 0284-0286.
[74] ICC-01/05-01/13-2089-Conf,paras.47, 51,55-57.
[75] ICC-01/05-01/13-2089-Conf,para.26.
[76] ICC-01/05-01/13-2089-Conf,paras.35-36.

viii. D-55's testimony that he initiated the proposal to speak to Mr. Bemba, that at the time he spoke to Mr. Bemba, he had already agreed to testify, and that Mr. Bemba did not discuss the content of his testimony with him or make him any promises;[77]

ix. The fact that the dates of the contacts between Mr. Bemba and the '[REDACTED]' number occurred during a period which preceded the timing of what the Chamber found to be Mr. Babala's culpable conduct;[78]

x. Defence argument concerning the lack of a nexus between the Chamber's findings concerning the concrete actions of Mr. Bemba, and the false testimony provided by the 14 witnesses.[79]

52. The above evidence and argumentation significantly differentiates the degree of Mr. Bemba's culpability and participation as compared to that of his co-defendants. In particular, the fact that Mr. Bemba was found to possess "implicit" rather than "actual" knowledge, should have given rise to a commensurately lower sentence. Irrespective as to the precise definition of 'implicit' knowledge, international criminal law has consistently recognised that a person's *positive* knowledge encompasses a significantly greater degree of culpability than that which is triggered by less explicit forms, such as constructive knowledge.[80]

53. The Chamber also found, in connection with the responsibility of Mr. Mangenda, that it was necessary to adopt a nuanced approach in light of the fact that he was not present at the scene of witness coaching.[81] If the same approach had been applied to Mr. Bemba, it should have resulted in a substantial reduction in his culpability since Mr. Bemba was not present when any of the illicit conduct occurred. Mr. Bemba's distance was of particular importance as concerns the Chamber's reliance on the context under which payments were made; the difference between whether a payment was considered legitimate or illegitimate often turned on a range of factors that would only have been appreciated by those who were present.[82] The existence of

[77] ICC-01/05-01/13-2089-Conf,paras.16-17,20-22.
[78] ICC-01/05-01/13-2089-Conf,para.18,fn.15.
[79] ICC-01/05-01/13-T-54-CONF-ENG, p.16-23; ICC-01/05-01/13-2089-Conf,paras.34-35.
[80] ICC-01/05-01/08-3399,para.60; *Čelibići* TJ, para.1220. "
[81] SJ,paras.123-124.
[82] ICC-01/05-01/13-2089-Conf,paras.54-57; T-54, p.25; ICC-01/05-01/13-2102-AnxD,p.2; ICC-01/05-01/13-2144-Conf,paras.49-51.

legitimate payments also undercuts the assumption that Mr. Bemba knew and intended that all payments should be illegitimate.[83] The principle of individuality of sanctions therefore required the Chamber to ascertain, beyond reasonable doubt, to which specific illegitimate payments Mr. Bemba made knowing, culpable contributions. Conversely, the Chamber was required to abstain from sanctioning him in the absence of concrete evidence on this point.

54. Similarly, Mr. Bemba's distance from the scene of the coaching and witness preparation would have impacted on his ability to appreciate the extent of the impact of such preparation. The Chamber found that Mr. Bemba intended the witnesses to testify irrespective as to whether the testimony was true or false.[84] This standard of culpability is markedly different from that of a lawyer, who interacts directly with a witness, and therefore has a more precise understanding as to which information emanates from the knowledge and belief of the witness, and which does not.[85]

55. Nonetheless, although the Chamber acknowledged that Mr. Bemba's participation and knowledge were of a more limited nature, it imposed the heaviest sanctions on Mr. Bemba, and employed language which implied that Mr. Bemba was at the apex of criminal responsibility.[86] Given that the Chamber had previously found that "*no direct evidence exists that Mr. Bemba also directed or instructed false testimony*" in relation to the three issues at stake,[87] it is apparent that the Chamber not only disregarded Defence evidence concerning the degree of Mr. Bemba's involvement and knowledge, but also relied on pure speculation concerning what happened and why it happened.

56. The Chamber thus replicated the same error in sentencing that it committed in the Trial Judgment; it inferred that because Mr. Bemba was the defendant, he should

[83] ICC-01/05-01/13-2102-AnxD.
[84] TJ,para.818.
[85] Indeed, the Chamber's finding that Mr. Kilolo implicitly requested D-23 not to mention Kokate, turned on the fact that Mr. Kilolo 'laughed' when D-23 mentioned this: TJ, para. 149. It would have been impossible for Mr. Bemba to have known of, and appreciated the implications of this exchange.
[86] SJ, para.211 ('As regards the extent of the damage, the Chamber recalls that Mr. Bemba conduct led to the presentation of false evidence given by 14 out of 34 Main Case Defence Witnesses, […]'), para.220 ('[…] Mr Bemba was in control of the payment scheme and authorised the payment of money'), para.221 ('Mr. Bemba exercised decision-making authority[….]. ('[…] the Chamber reiterates that Mr. Bemba, in spite of his status as a detainee, nevertheless had an authoritative role in the organisation and planning of the offences and was directly involved in their commission.'; Separate Opinion of Judge Pangalangan, para.18 ('Mr Bemba played a central and overwhelming role in the offences for which he was convicted, despite being detained during the relevant time period […]'.
[87] TJ,para.818

bear the greatest responsibility for any conduct committed on behalf of his Defence. This was a reversible error in the Trial Judgment and it was a reversible error in the Sentencing Judgment. As a result, the sentence fails the basis requirement of a fair and rational sanction: there is no evidential nexus between Mr. Bemba's knowledge and conduct and the harm which is meant to be sanctioned.[88]

6. The Chamber erred in its assessment of aggravating factors and 'relevant circumstances'

6.1 The Chamber erred in law and fact by considering the abuse of the privileged line as an aggravating factor, within the meaning of Rule 145(2)(b)(vi). [89]

57. The Chamber's decision to rely on this factor violated the clear language of Rule 145(2)(b)(iv), and its legal ambit. The nexus between the particular conduct relied upon, and the harm occasioned by the Article 70 offences, was also not established to the standard of beyond reasonable doubt. These errors should be reversed on appeal, and a less severe sanction imposed.

58. Although the Sentencing Judgment marked the first application of Rule 145(2)(b)(vi) at the ICC, the Chamber failed to justify how the abuse of the privileged line fits within the proper ambit of this provision. The reasoning, such that it is, focusses on the content of such communications,[90] which is, in turn, inferred from the mere existence of an infraction.

59. In terms of the infraction itself, the Chamber erred by relying on a factor that failed to satisfy either the gravity or content requirements of Rule 145(2)(b)(vi).

60. Rule 145(2)(b)(vi) does not exhaustively list the aggravating factors that can be relied upon in sentencing. Its wording was nonetheless crafted carefully in order to ensure that it would be applied with due regard for the principles of legality and foreseeability.[91] Thus, in order to address concerns regarding the existence

[88] *Muhimana* AJ, paras.234; *Kupreškic* TJ,para.852.
[89] SJ,paras.235-236.
[90] SJ,para.236.
[91] Lee, at p.564, states that: *'on the other hand, language was introduced in order to signify that the list of aggravating circumstances is not unlimited: '' Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned ''. In the ensuing discussion, it was noted that the word ''similar'' could lead to misinterpretations in other language versions. It was thus pointed out that the term*

of open-ended penal provisions in the ICC Statute and Rules, the drafters inserted phrases such as "of a similar character" in Article 7(1)(k),[92] or, in the case of Rule 145(2)(b)(ii), of a "similar nature".[93] These phrases import the *ejusdem generis* rule as an additional safeguard to ensure the principle of legality.[94]

61. The *ejusdem generis* rule provides that,[95]

> where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

62. Accordingly, by virtue of the words "of a similar nature", Rule 145 (2)(b)(vi) must be read, and applied in conjunction with the sub-provisions of Rule 145(2)(b), that is, the **'other circumstances'** ought to be similar in nature to '**those mentioned'**, in sub-provisions i, ii, iii, iv, and v.

63. Trial Chamber VII previously acknowledged that Rule 145(2)(b)(vi) requires a close nexus between the type and gravity of the aggravating circumstance, and one of the circumstances set out in the preceding sub-provisions.[96] Yet, although the Chamber had recognised that any factors relied upon under Rule 145(2)(b)(vi) needed to be "sufficiently similar"[97] in type or gravity to those set out in Rules 1452)(b)(i)-(v), it failed to demonstrate the link between the abuse of the telephone line with any of these factors. Its failure to apply this provision in a consistent manner is a legal error in itself.

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ought not to be translated into terms that could give rise to broad analogies. ***For instance, in the French version, the term 'similaire' was preferred to 'analogue'.****'*
See d'Ascoli, at p.270: '*the drafters, probably conscious of the fact that such blank reference was too wide, added the requirement that other circumstances might be taken into account* ***only when*** *'by virtue of their nature they are similar to those mentioned'.*
[92] Von Hebel and Robinson, p.102; Witschel and Rückert, p.107.
[93] Lee, p.564.
[94] Lee, p.564; H. Von Hebel and Robinson, p.102.
[95] http://thelawdictionary.org/ejusdem-generis/
[96] ICC-01/05-01/13-2038.
[97] ICC-01/05-01/13-2038.

64. The Prosecution's arguments in turn merely averred that that Mr. Bemba's abuse of the privilege was 'similar' in nature to the 'abuse of power' provided under rule 145(2) (b) (ii).[98] This analogy is overly broad, and completely misconceives both the nature of privilege and the manner in which violations occurring in a detention setting are addressed.

65. The term 'privilege' is a misnomer as concerns its application to defendants in a criminal trial: it is a fundamental right, not a benefit or special power. The 'infraction' also only exists because Mr. Bemba was detained, and not provisionally released during the Main Case. If Mr. Bemba had not been held in pre-trial detention, there would have been no restrictions as concerns his ability to speak to Mr. Babala, Mr. Mangenda, or potential Defence witnesses,[99] nor would Mr. Bemba have 'abused' privilege by virtue of his communications with Mr. Kilolo.

66. It was also necessary for the Chamber to be convinced of the existence of **aggravating** circumstances beyond reasonable doubt;[100] it is impossible to find that the mere existence of contacts between Mr. Bemba and Mr. Babala or Mr. Mr. Mangenda justify an increased sentence in the absence of any evidence of a nexus to illicit conduct related to the Article 70 case, or aggravated harm.

67. This link simply does not exist as concerns the contacts with the '[REDACTED]' number. Even if Mr. Babala was at the other end (which was never established) Mr. Babala was a political associate and not a member of the common plan. The contacts on the '[REDACTED]' number pre-date the Defence case, and the Chamber's findings concerning the extent of Mr. Babala's involvement in any illicit activity.[101] No reasonable Chamber could therefore conclude from the existence of such contacts that the only reasonable inference is that the content concerned issues directly related to Article 70

[98] ICC-01/05-01/13-2085-Conf 12-12-2016,para.64
[99] ICC-01/05-01/13-1902-Conf-Corr2,paras.153-161.
[100] ICC-01/04-01/06-2901,para.33; and ICC-01/04-01/07-34830tENG, para.34; ICC-01/05-01/08-3399, para.18; ICC-01/04-01/06-3122,para.88.
[101] ICC-01/05-01/13-T-54-CONF-ENG,p.23.

related conduct.[102] The absence of necessary proof concerning such a direct nexus fatally undermines the use of this contact as an aggravating factor.[103]

68. The Chamber's reliance on this alleged contact also falls at the next hurdle, which is that the conduct is insufficiently serious to be characterized as an aggravating factor. The Chamber acknowledged that the communications between Mr. Bemba and Mr. Babala did not reflect awareness on the part of Mr. Balaba as to the nature of illicit payments.[104] Given Mr. Babala's *de minimus* involvement and knowledge, the 'abuse' of privilege (if it occurred) would have had no impact on the integrity of the proceedings in the Main case. In the absence of a nexus between Mr. Bemba's conduct and the 'harm' suffered in the case, it was a reversible legal error to rely on this conduct to lengthen Mr. Bemba's sentence.[105]

69. With respect to the finding that Mr. Bemba 'abused' privilege by speaking to Mr. Mangenda on Mr. Kilolo's number, both the Trial Judgment and the Sentencing Judgment are evidentially deficient. The Chamber failed to issue clear and specific findings concerning the dates and content of such contacts, nor did it cite evidence supporting their existence. This vagueness is a manifest violation of the Chamber's duty to provide sufficient information as to the foundation of its conclusions.

70. Mr. Bemba was, in any case, entitled to communicate with Mr. Mangenda as a member of his Defence team. Even if Mr. Mangenda was not entitled to speak to Mr. Bemba on the privileged line, his communications with Mr. Bemba were protected by Defence confidentiality.[106] The existence of contacts between Mr. Bemba and his case manager, and their timings were also not matters that were disclosable to either the Chamber or the Prosecution. The possibility that they occurred on the privileged line did not, therefore, conceal from the Chamber or parties something that they would have otherwise been entitled to know. Outside of a detention context, the fact that a defendant has called his lawyer's

[102] ICC-01/05-01/13-2144-Conf, para. 270
[103] ICC-01/04-01/06-3122, para. 93
[104] TJ,para.883.
[105] *Češić* TJ, 11 March 2004,para.42.
[106] ICC-01/05-01/13-2144-Conf,para.330, fn.690.

phone, which is answered by his lawyer's assistant, and continued to speak to his lawyer's assistant, would not even cause raised eyebrows.

71. Regarding D-55, the Main Case witness protocol did not regulate or prohibit contact between Mr. Bemba and prospective Defence witnesses, nor can such a prohibition be presumed. Rule 119 and Regulation 101 of the RoC are instructive on this point. The former provides that provides that if a defendant is released during trial, the Chamber *may* impose certain conditions, including an order that the defendant must not contact direct or indirectly victims or witnesses (Rule 119(1)(b)). It follows that in the absence of an explicit directive, mere contact is not prohibited. Regulation 101 provides the mirror version for detained defendants; it allows the Chamber to restrict the defendant from contacting any person (including witnesses). During the pre-trial phase, the Prosecution invoked this provision in order to request the Pre-Trial Chamber to direct Mr. Bemba to refrain from contacting Prosecution witnesses.[107] In rejecting the request, the Pre-Trial Chamber underlined that such an order would constitute a significant restriction of the right of the Defence to contact witnesses, and the Prosecution had failed to demonstrate that such an incursion was necessary.[108] The Pre-Trial Chamber thus affirmed that in the absence of a judicial order, there is no general prohibition or restriction as concerns the ability of a defendant to contact specific witnesses.

72. Accordingly, in the absence of such an order as concerns contact between Mr. Bemba and prospective Defence witnesses, the mere fact that Mr. Bemba spoke to D-55 did not contravene any judicial orders or legal obligations vis-à-vis Trial Chamber III. The Main Case disclosure regime also did not oblige the Defence to disclose the existence of contacts with prospective Defence witnesses (as opposed to Prosecution witnesses).[109] The 'abuse' of the privileged line itself therefore had no adverse impact on the Prosecution's rights or ability to present its case, and it did not conceal something that the Defence were otherwise obliged to disclose.

[107] ICC-01/05-01/08-134.
[108] ICC-01/05-01/08-134,para.32.
[109] ICC-01/05-01/13-1902-Conf-Corr,para.123, fn.117

73. Given the above context, it illogical and unsound to claim that a detainee has 'abused a power', by virtue of an infraction that exists only because the detainee's powers have been stripped from him.

74. The Chamber failed to address, in this regard, the string of precedents cited by the Defence which demonstrate that such violations are typically addressed and disciplined as separate detention infractions,[110] which ensures that the defendant is not doubly punished in the trial itself by virtue of his or her pre-trial detention. This is reflected by the jurisprudence of other internationalised courts, where violations of detention regulations are not prosecuted as contempt. Generally, the regulations provide for the appropriate answer to such abuse, which is the restriction, monitoring or prohibition of the accused's communications.[111] For example, in the Šešelj case, when the accused was suspected of using his privileged phone line to communicate with unauthorized persons, the Registrar's responded by revoking the privileged status of the concerned legal associates.[112]

75. This approach is consistent with the applicable ICC regulations. Regulation 175 of the RoR provides that in case a detainee uses his communications for prohibited purposes, the appropriate response is to either terminate or monitor the communications in question. The misuse of the communication scheme is not listed as a separate disciplinary offence.[113] The rules concerning the use of privileged devices with the detainees are also directed to Counsel, not the detainee.[114]

76. Regulation 206 of the RoR also underscores that "[n]o disciplinary measures shall be imposed on a detained person without due process in accordance with these Regulations". In line with this provision, and the fact that pre-trial detention constitutes an exception to the presumptions of innocence and liberty, human rights

[110] ICC-01/05-01/13-2089-Conf, para.19 and case law cited therein. The following U.S decisions are also relevant: *King v. Fed. of Bureau of Prisons; Rutledge v. Attorney General of the U.S.*
[111] **SCSL**: Regulation 175 of the Court provides for active monitoring of telephone calls in case of detainee's abuse of the privileged line. See also *Taylor* TC Decision 10/10/2006, para.1. **ICTY**, under Rule 65(B) of the 'Detention Rules', the Registrar can decide to monitor the accused's privilege communications. Under Regulation 10 of the Regulations for a Disciplinary Procedure for Detainees, 'The removal or revocation of privileges' is foreseen as one of the disciplinary sanctions.
[112] *Šešelj* TC Decision 21/10/2009,para.8;
[113] Regulation 207 of the RoR.
[114] CAR-D20-0006-0466 at 0467(Section 2)

law also places the following limits on the manner and extent to which such infractions can be disciplined:

i. the fact that certain conduct can entail punishment and the type of punishment must be set out clearly in written rules that are disclosed in advance to the detainee, [115]and

ii. a detainee cannot be disciplined twice for the same conduct.[116]

77. It was, therefore, a violation of due process and the principle of legality to impose a sanction, through the aggravation of Mr. Bemba's sentence, for conduct that was not described by the applicable legal framework as being subject to such a sanction.

78. The appropriate disciplinary action was also already meted out in this case, prior to sentencing. The Chamber revoked privilege as concerns communications that it found to fall outside the appropriate parameters deserving of confidentiality. The defendant's communications were also monitored, transcribed and provided to the Prosecution,[117] and relied upon for the Article 70 conviction. This response precluded further punishment or sanction being imposed by the Trial Chamber in connection with the abuse of the privileged line.

79. The above conduct was also facilitated or initiated by Mr. Kilolo as Mr. Bemba's Counsel (for example, the contact with D-55, or the registration of the '[REDACTED]' number as Mr. Kilolo's privileged number), and therefore fell within Mr. Kilolo's personal responsibility under the Code of Conduct.[118]

80. This distinction is of further relevance to the Chamber's finding that Mr. Bemba's communication with Mr. Kilolo on issues not covered by privilege, constituted an abuse of privilege.[119] In particular, the Chamber erred by failing to acknowledge that there was no duty on the part of Mr. Bemba to limit his communications to issues that exclusively pertained to matters arising from the Client-Counsel relationship.

115 Mandela Rules, Rules 37, 39.1; Principles on Detention A/RES/43/173t, Principle 30; European Prison Rules, Rules 30, 57; Luanda Guidelines, Rule 25(3).
116 Mandela Rules, Rule 39.1; CoE Rec(2006)2, Rule 63.
117 ICC-01/05-01/13-T-54-CONF-ENG, p.23.
118 ICC-01/05-01/08-295-Red, pp.6-7.
119 SJ,paras.235-236.

81. Regulation 97 of the RoC does not, in this regard, impose any such duty on the detainee. Nor does it restrict the content of communications between Counsel and client, as underscored by the use of the words "communicate fully" (Regulation 97(1)), and "[a]ll communication" (Regulation 97(2)). As noted above, the administrative instruction concerning the registration of privileged numbers applies to the lawyer, not the client.[120] Article 15(3) of the Code of Conduct also places the duty of 'ensuring' that the contents of counsel-client communications are protected by confidentiality, squarely on the shoulders of the Counsel, and not the Client.[121] It therefore falls to the Counsel to ensure that the scope of communications falls within the proper ambit of confidentiality protections. The very purpose and utility of privilege would also be rendered otiose if defendants were required to pre-select what they can and cannot discuss with their lawyer.

82. Accordingly, in the absence of explicit written duties requiring Mr. Bemba, as the client, to police the content of his communications with his lawyer, there was no duty or obligation that was abused by Mr. Bemba.

83. The absence of such a restriction is further reflected by domestic approaches to privilege, although the basis for the protection differs between civil law and common law countries: the former focus on the author and recipient of the privilege (confidentiality *in personam*), whereas the latter focus on the content of the communication (confidentiality *in rem*).[122] By finding that Mr. Bemba abused privilege by speaking to Mr. Mangenda rather than Mr. Kilolo, the Chamber relied on an approach based on the *in personam* nature of privilege. But, by then focusing on the content of the communications with Mr. Kilolo, the Chamber switched to an *in rem* approach. It was a clear legal error to conflate the two distinct approaches, for the purposes of widening the degree of aggravation to the greatest extent possible.

84. In any case, irrespective as to which approach is adopted, no additional sanction should not attach to Mr. Bemba as the defendant.

[120] CAR-D20-0006-0466.
[121] Article 15(3) provides that "[w]hen communicating with the client, counsel **shall ensure** the confidentiality of such communications" (emphasis added).
[122] Van Gerven,p.585.

85. In terms of common law countries, although content is relevant, the 'dominant purpose' test employed in the United Kingdom, Canada and Australia recognises that even if counsel and clients digress into other issues, legal privilege will attach if the communications were made with the 'dominant purpose' of seeking legal advice.[123]

86. In line with this test, the communications between Mr. Kilolo and Mr. Bemba were predominantly related to the preparation of the case. The Chamber further acknowledged that none of Mr. Bemba's intercepted communications with Mr. Kilolo reflected direct evidence that Mr. Bemba was engaged in the charged illicit conduct.[124] It was therefore a clear error to designate these communications as an 'abuse' of privilege, whilst firstly, recognising that the communications did not directly evidence criminal activity, and secondly, failing to establish that they otherwise bore no connection to Defence preparation. Accordingly, irrespective as to the question (on appeal) as to whether and to which extent privilege should have been lifted, the fact that Mr. Bemba spoke to Mr. Kilolo on the privileged line (i.e. the only line which Mr. Bemba could use for speaking with Mr. Kilolo) cannot be characterized as an 'abuse' which warrants an additional sanction.

87. Regarding the civil law approach, it is notable that in France, even if professional secrecy is waived by a judge, the disclosed communication can only be used against the lawyer to prove his involvement in a criminal activity; it cannot be used against the client.[125] This principle was recently confirmed in *Versini-Campinchi et Crasnianski v. France,*[126] in which the ECHR further

[123] For Australia: 'Dominant' has been held to mean a 'ruling, prevailing or most influential' purpose (*Esso v Commissioner of Taxation*). It was said that a 'dominant purpose is one that predominates over other purposes'; it is the prevailing or paramount purpose (See AWB Ltd v Honourable Terence Rhoderic Hudson **at 105;** FCT v Pratt Holdings at 279–280 [30] per Kenny). As concerns litigation privilege, the same principle was applied by the House of Lords in the United Kingdom (*Waugh v. British Railways*) and the Canadian Supreme Court (*Blank v. Canada*, paras.59-60)

[124] TJ, para.818

[125] Articles 100, 100-5,100-7, French Code of Criminal Procedure. Importantly, the Cour de Cassation upheld the following principle :*'la conversation entre un avocat et son client ne peut être transcrite et versée au dossier de la procédure que s'il apparaît que son contenu est de nature à faire présumer la participation de cet avocat à une infraction'* (see Cass. crim. 15/01/1997; Cass. crim. 01/10/2003; Cass. crim., 17/09/2008). The *highest French Court* has also held that this principle still applies even in the case of a coded and suspicious conversation between a defendant and his counsel (see Cass. crim., 08/11/2000).

[126] *Versini-Campinchi et Crasnianski c. France*, which states that lawyer-client conversations cannot be transcribed and used in a proceeding against the client, it can only be used against the lawyer suspected of

noted that lawyers, by virtue of their legal training, can be expected to know when a communication with a client could veer into territory that is not protected by confidentiality.[127] The converse of this is that a defendant such as Mr. Bemba, who has had no legal training and whose obligations concerning the scope of privilege are not regulated by rules that have been notified to him, cannot be expected to know if and when this might be the case.

88. The Chamber therefore erred by failing to distinguish between the duties of lawyers and their clients. At the very least, the Chamber should have differentiated between their degree of culpability for this conduct (taking into account Mr. Bemba's position as a layperson), and the weight consequently afforded to it in aggravation.

6.2 The Chamber erred in law and fact by relying on findings that Mr. Bemba "took advantage of his position as long-time and current President of the MLC".[128]

89. The Chamber's reliance on Mr. Bemba's position was a reversible error of fact and law due to:
    a. The absence of any evidence concerning a nexus between Mr. Bemba's use of this position and the charged offences; and
    b. The fact that this finding fails to satisfy the legal threshold for *Rule 145(1)(b).*

6.2.1 Absence of evidence

90. The Chamber acknowledged that the beyond reasonable doubt standard applies to adverse findings for the purposes of sentencing,[129] but nonetheless relied on a prejudicial factor that was not supported by any evidence in this case.

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having committed a crime: *'La Cour réitère que ce qui importe dans ce contexte est que les droits de la défense du client ne soient pas altérés, c'est-à-dire que* ***les propos ainsi transcrits ne soient pas utilisés contre lui dans la procédure dont il est l'objet****. Or, en l'espèce, la chambre de l'instruction a annulé certaines autres transcriptions au motif que les conversations qu'elles retraçaient concernaient l'exercice des droits de la défense de M. Picart. Si elle a refusé d'annuler la transcription du 17 décembre 2002, c'est parce qu'elle a jugé que les propos tenus par la requérante étaient de nature à révéler la commission par elle du délit de violation du secret professionnel,* ***et non parce qu'ils constituaient un élément à charge pour son client.*** *[…]'*

[127] *Versini-Campinchi et Crasnianski c. France*,paras.55,83

[128] SJ,para.234.

[129] SJ,para.25; ICC-01/04-01/07-3484-tENG-Corr, para.34

91. The specific position of Mr Bemba in the MLC and the role of the MLC were not issues addressed at trial, or in sentencing. The Trial Judgment noted that "Mr Bemba is a member of the Senate of the DRC, and President of the *Mouvement de Libération du Congo* ('MLC')",[130] but cited no evidence concerning either the present role of the MLC in the DRC (as one of approximately 500 registered political opposition parties)[131] or the nature of Mr. Bemba's current responsibilities given his detention in The Hague.

92. The Chamber also failed to elaborate as to how Mr. Bemba's 'abused' his position in the MLC. The MLC is a registered political opposition party that operates in accordance with the DRC Constitution and electoral laws,[132] but the Chamber pointed to no abuse of these laws. The supposed promise to meet D-3 and D-6 in Kinshasa also does not touch on, or take advantage of any of the powers assigned to Mr. Bemba within this political party.

93. The lack of an evidential foundation for this finding stems from the evidential deficiency of the Prosecution Sentencing Brief, which argued for aggravation based on the 1999 MLC Statute.[133] This Statute predated the Sun City peace agreement, and the transformation of the MLC into a purely political party, as reflected by the Prosecution's own evidence.[134] It was therefore completely disingenuous for the Prosecution to move the Chamber to issue adverse findings on the basis of invalid, outdated evidence.

94. The Chamber's finding that Mr. Bemba took advantage of his position as "long term and current President of the MLC" is thus wholly unsubstantiated as to either which aspects of his position were taken advantage of, and how he took advantage of these aspects. Whereas 'abuse of authority' as an aggravating factor is typically manifested by directions and orders,[135] the Chamber failed to identify any such directives emanating from Mr. Bemba to the witnesses, or similar forms of positive conduct.

[130] TJ,para.8.
[131] http://www.lesoft.be/journaux/journal1310.pdf
[132] **DRC:** Constitution, Articles 6-8; Loi 04/002 (15/03/2004).
[133] ICC-01/05-01/13-2085-Conf, para.52 citing CAR-OTP-0005-0198.
[134] See CAR-OTP-0082-1393, which affirms that the MLC demobilised, and transformed into a purely political opposition party.
[135] *Popović et al.* AJ para.2020.

95. This evidential lacuna continues through to the Chamber's specific findings concerning the three incidents included within the scope of this finding: Mr. Bemba's conversation with D-55, and non-monetary promises given to D-3 and D-6.

96. Regarding D-55, the Sentencing Judgment recalled that the Trial Judgment had found that Mr. Bemba abused his position when speaking to D-55.[136] The Chamber did not provide any reference for this alleged 'finding', nor is it self-evident. The Trial Judgment noted that that D-55 had instigated the contact with Mr. Bemba, and further testified that Mr Bemba had made no promises to him.[137] When describing the entire contents of his conversation with Mr. Bemba, D-55 stated that Mr. Bemba only thanked him for testifying;[138] Mr. Bemba did not reference his position, request anything from D-55 or in any other way attempt to influence the content of D-55's testimony.

97. Moreover, although the Trial Judgment had found that D-55 was promised that he would be in Mr. Bemba's "good graces", [139] no evidence underpinned this finding. The Chamber further relied on its finding that D-55 had characterized Mr. Bemba as a "powerful man".[140] Again, this finding is overly vague, and cannot substantiate a conclusion, beyond reasonable doubt, that Mr. Bemba took advantage of his position at the time of the charges.

98. In the absence of any evidence of either positive conduct on the behalf of Mr. Bemba, or a nexus between Mr. Bemba's position, and influence exerted on D-55's testimony, D-55's description of Mr. Bemba as being 'powerful' is irrelevant for the purposes of sentencing.

99. The *Lubanga* Sentencing Decision clarified in this regard that the link between the convicted person's conduct and the context of the charges has to be proven beyond reasonable doubt.[141] This was further confirmed by the Appeals Chamber.[142] It is

[136] SJ,para.234.
[137] TJ,paras.122, 293 ; see also TJ,paras.124, 301.
[138] TJ, paras.123,293
[139] TJ,para.301.
[140] SJ,para.234, citing TJ,para.295.
[141] ICC-01/04-01/06-2901,para.75.
[142] ICC-01/04-01/06-3122,para.93.

therefore, a clear error for the Chamber to have relied on the witness's perception of Mr. Bemba rather than his conduct, when determining the sentence.[143]

100. By the same token, the Appeals Chamber has affirmed that the fact that the defendant occupied a particular position of power is irrelevant in the absence of proof that the defendant misused this position when executing the crimes/offences in question.[144] The relevant factor is not the position or authority exercised by the defendant, but the defendant's misuse of this position or authority.[145]

101. The above flaws concerning D-55 apply with equal if not greater force as concerns the Chamber's reliance on incidents pertaining to D-3 and D-6. Both D-3 and D-6 are citizens from the Central African Republic (CAR), who were purportedly informed by Mr. Kilolo that they could meet Mr. Bemba in Kinshasa at some unidentified point in the future. [146] This 'promise' has no nexus to the MLC or Mr. Bemba's position in the MLC; the witnesses were not promised that Mr. Bemba or the MLC (a DRC opposition party) could secure any positions or favours for them (as citizens from the CAR) by virtue of such a meeting. Apart from the lack of any evidence that Mr. Bemba was involved in, or endorsed Mr. Kilolo's proposal, the purpose expressed by Mr. Kilolo appears to have been of a private nature – i.e. to allow Mr. Bemba to express his gratitude in person,[147] and it was not attached to a *quid pro quo*.

102. As was the case with D-55, there is no nexus between these proposed meetings, and either the personal conduct of Mr. Bemba or the charged offences. The suggestion that the witnesses could eventually meet with Mr. Bemba was given by Mr. Kilolo; there is no evidence that Mr. Bemba was aware of, or condoned such a suggestion. In the case of D-6, Mr. Kilolo raised this possibility after D-6 testified. It was therefore a licit proposition that was unconnected to the execution of the charged offences. D-3's claim on this point, was not repeated under oath, was not

[143] ICC-01/05-01/13-2089-Conf,para.20.
[144] ICC-01/04-01/06-3122,para.82.
[145] *Stanišić and Zupljanin* AJ,para.1114.
[146] TJ,paras.138,373,419.
[147] CAR-OTP-0082-0562 at 0568, lines 193-196.

corroborated, and is coloured by his position as a self-confessed, opportunistic liar.[148]

103. Given these evidential holes and deficiencies, no reasonable trier of fact could have concluded, beyond reasonable doubt, that Mr. Bemba took advantage of his position as President of the MLC as part of the execution of the charged Article 70 offences.

6.2.2 The finding that Mr. Bemba took advantage of his political position fails to satisfy the legal threshold for Rule 145(1)(b)

104. As noted above, the Chamber recognised that the evidence did not support the conclusion, beyond reasonable doubt, that Mr. Bemba abused his position as President of the MLC *vis-à-vis* the witnesses.[149] The Chamber nonetheless considered that it was entitled to rely on a significantly watered down version of this aggravating factor, namely, that Mr. Bemba "took advantage of his position", as a *de facto* aggravating factor pursuant to Rule 145(1)(b). This was a reversible error of law.

105. Rule 145(1)(b) requires the Chamber to,

> balance all relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.

106. This rule sets out the duty of the Chamber to base its decision on all relevant issues; it is not intended to function as a standalone basis for adopting aggravating factors that fail to meet the threshold of Rule 145(2)(b).

107. This is reflected by the manner in which it has been interpreted and applied in other ICC cases. In *Lubanga*, the Appeals Chamber explained that,[150]

[148] ICC-01/05-01/13-1902-Conf-Corr2, paras.92,99-102; ICC-01/05-01/13-T-54-CONF-ENG,p.11,lns.13-15,p.38,lns.8-17; *Prince Taylor* AJ,para.38.
[149] SJ, para.234
[150] ICC-01/04-01/06-3121-Red, *paras.32-33.*

> Read together with the Preamble to the Rome Statute, these provisions establish a comprehensive scheme for the determination and imposition of a sentence. For purposes of "determining the sentence", article 78 (1) of the Statute requires that a Trial Chamber consider "such factors as the gravity of the crime and the individual circumstances of the convicted person". Rule 145 (1) (c) of the Rules of Procedure and Evidence requires, "[i]n addition to the factors mentioned" in article 78 (1) of the Statute, that the Trial Chamber give consideration to a non-exhaustive list of additional factors. Furthermore, rule 145 (2) of the Rules of Procedure and Evidence requires a Trial Chamber, to take into account, "as appropriate" "[i]n addition to the factors mentioned" in rule 145 (1) (c) of the Rules of Procedure and Evidence, the factors of any mitigating and aggravating circumstances.
>
> **Once all of the relevant factors have been identified and taken into account, rule 145 (1) (b) of the Rules of Procedure and Evidence requires that a Trial Chamber "[b]alance all the relevant factors"** and pronounce a sentence. "

108. It is clear that Rule 145(1)(b) governs the duty of the Chamber to balance all relevant factors, but does not prescribe the content of such factors. The role of Rule 145(1)(b) as a balancing provision was confirmed in the *Al-Mahdi* sentencing judgment.[151]

109. In line with the above legal directions, Rule 145(1)(b) required the Chamber to turn to Rule 145(2)(b) in order to flesh out the content of aggravating factors. Rule 145(2)(b) enumerates specific examples of aggravating circumstances and then ends with the residual provision of Rule 145(2)(b)(vi), which is discussed at paragraphs 59-63 *supra.*

110. If Rule 145(1)(b) were to be transformed into a residual catch-all provision for aggravating factors, then this would render Rule 145(2)(b)(vi) superfluous, and denude the requirement of ‘similarity’ in Rule 145(2)(b)(vi) of any force. Such a

[151] ICC-01/12-01/15-171,para.68. See also ICC-01/05-01/08-3399,para.12.

result would be contrary to the principle of effective interpretation, and the principle of legality.

111. In terms of the latter, in *Lubanga*, Trial Chamber I affirmed that its sentencing principles and findings needed to comply with Article 23,[152] which regulates the principle of *nulla poena sine lege*. One of the principal rationales underlying *nulla poena sine lege* is to protect against arbitrary punishment. The principle mandates that defendants must be able to foresee the penalties that can be imposed, or the fact that particular conduct can be penalised.[153] The principle of legality applies not only to the length of the sentence, but also to the factors employed to determine the sentence itself,[154] including the sentencing framework used to ascertain aggravating factors.[155] Article 23 thus fetters the discretion of the Trial Chamber in relation to sentencing issues;[156] in particular, it obliges the Chamber to frame the applicable sentence in accordance with specific provisions set out in the Statute or Rules of Procedure and Evidence.

112. Regarding the applicability of these legal principles to the current case, Rule 145(2)(b)(ii) governs the relevance of the accused's position or use of power. If the Chamber had restricted its analysis of aggravating circumstances to Rule 145(2)(b)(ii), its finding that Mr. Bemba 'took advantage of his position" would not have satisfied the relevant severity threshold (which requires abuse). It was therefore a clear violation of the principle of legality to rely on the general duty to balance relevant factors set out in Rule 145(1)(b), in order to avoid the specific threshold set out Rule 145(2)(b)(ii).

113. Although Rule 145(2)(b)(vi) could have provided a vehicle for relying on aggravating factors not specifically enumerated in this rule, the use of the word "other" in a residual provision also has the effect of excluding acts which are addressed in an explicit manner elsewhere.[157]

[152] ICC-01/04-01/06-2901, para.17.
[153] *Prada v. Spain*,para.77; Gallant,p.384.
[154] *Maktouf v BiH*,para.70.
[155] Cassese (2009),p.235-236; *Kunarac* AJ, para.372
[156] Schabas Commentary, p.553; Cassese Commentary, p.764; *Kunarac* AJ, para.372
[157] ICC-01/04-01/07-717, para.452.

114. It is clear that taking advantage of the accused's position meets neither the 'other' requirement (since it is simply a watered down variant of Rule 145(2)(b)(ii)), nor the requirement that the severity or gravity of the conduct is of a similar nature - a factor cannot be "similar" in nature if it is of less gravity or severity.[158]

115. If the conduct in question is excluded from the residual category of 'other' aggravating circumstances, then it would be a manifest violation of statutory interpretation and criminal law principles to sneak it in through the loose, general language of Rule 145(1)(b).[159]

116. The prejudice ensuing from the Chamber's approach was exacerbated by the fact that the Defence had no notice that the Chamber would rely on Rule 145(1)(b), or the notion that Mr. Bemba had "taken advantage of his position". The defendant's right to foresee the consequences of specific conduct and right to be heard on the applicable sentencing principles and factors are rendered meaningless in situations in which the Chamber lowers the applicable evidential and legal threshold for adverse findings, in the judgment itself.[160]

7. The Chamber's assessment of gravity was based on irrelevant factors

117. The Chamber found, for the purposes of ascertaining the gravity, that,[161]

> The offences of corruptly influencing the 14 Main Case Defence Witnesses were organised and executed over a prolonged time period – almost two years. The Chamber considers that the lengthy period over which the offences were committed is also relevant in the assessment of the gravity of the offences.

118. This period of 'almost two years' was based on the meeting between the Defence and the Cameroonian witnesses in February 2012.[162] As a preliminary point,

[158] Cf ICC-01/04-01/07-717, para. 448.
[159] ICC-01/09-02/11-382-Red,para.269.
[160] *Torres v. Spain*,para.28:"Since the finding of an aggravating circumstance led to a heavier sentence being imposed, the applicant should have been formally notified that such a finding was possible in his case."
[161] SJ,para.209.

the Trial Judgment did not find that Mr. Bemba or the Defence were aware at this point of the machinations that were engineered between the witnesses behind the scenes.[163] The only additional evidence tendered at sentencing in relation to the Douala 2012 meeting was the testimony of D-4, which only served to exculpate Mr. Bemba further.[164]

119. In the absence of any evidential findings in either the Trial or Sentencing Judgments that any of the co-perpetrators were engaged in culpable conduct during the February 2012 meeting, the fact that Mr. Kilolo met with D-2, D-3, D-4 and D-6 in February 2012 is irrelevant to the gravity of the convictions.

120. It was in any case, a clear error to place so much weight on the issue of duration since this was subsumed within the Chamber's consideration of the number of witnesses, and was otherwise attributable to factors beyond the control of Mr. Bemba.

121. Regarding the first point, the Chamber placed significant weight on the number of Defence witnesses that fell within the scope of the Article 70 charges,[165] and found that the number was reflective of the gravity and systematic nature of the offences. The Chamber nonetheless erred by failing to take account of the fact that in a criminal trial, the duration of the proceedings is linked to the number of witnesses.[166] It would therefore constitute double-counting to rely on both the number of witnesses, and duration as independent factors,

122. The duration was also linked to the factors that were beyond the control of the Defence, or otherwise irrelevant to their culpability in this case.[167] Length is also only relevant if there is a related impact on the harm occasioned by the misconduct. The Chamber erred, in this regard, by disregarding the fact that the Prosecution

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[162] SJ,fn.341.
[163] TJ,paras.132, .348.
[164] D-4 testified that he was was briefed in advance of meeting with Mr. Kilolo, for the purpose of lying to Mr. Kilolo and the Bemba Defence: ICC-01/05-01/13-T-53-CONF-FRA, p.19, lns.3-5:"Alors, comme je suis en train de le dire, ces informations, c'étaient les... le briefing d'où on avait fait au premier procès avec Narcisse, pour mentir à M. Kilolo."
[165] SJ, para.205.
[166] *Nyiramasuhuko*,AJ,paras.347,360.
[167] ICC-01/05-01/13-1997-Anx1-Red, para.119; ICC-01/05-01/13-1728-Conf-AnxA-Corr (citing ICC-01/05-01/08-2500, ICC-01/05-01/08-2446-Conf-Red, ICC-01/05- 01/08-2451-Conf-Red3, CC-01/05-01/08-2498-Conf-Red, ICC-01/05- 01/08-2664- Conf-Red *inter alia).*

learned of the existence of false witnesses before the Defence case commenced, and was, as a result, able to address issues of credibility of Defence witnesses in a timely manner. The length is also attributable to Prosecution's failure to disclose materials concerning the witnesses' misconduct, or otherwise take steps to ensure the integrity of the proceedings in the Main Case.[168] If comparable situations at the *ad hoc* Tribunals have occurred over a shorter time period or involved less witnesses, that is because the Prosecutor in those instances acted immediately to protect the integrity of the proceedings.[169]

123. The Chamber's reliance on the 'number' of witnesses in connection with Mr. Bemba specifically is also manifestly unsound given the absence of evidential findings that Mr. Bemba knew of, and made substantial contributions to illicit conduct concerning each of the 14 witnesses. Far from enhancing the seriousness of Mr. Bemba's individual criminal responsibility, the lack of such evidence should have diminished it.

124. The Chamber further erred by basing the gravity of the offences committed by Mr. Bemba on specific factors that had no evidential nexus to the personal culpability of Mr. Bemba, including the delivery of mobile phones to witnesses, and the transmission of payments to third persons, rather than the witnesses themselves.[170] The particular evidential findings relied upon by the Chamber to support these factors do not establish knowledge or conduct on the part of Mr. Bemba as concerns the specific use of these techniques.[171] The Prosecution also never argued at sentencing that these specific factors were attributable to Mr. Bemba.[172]

125. Given that the golden thread of sentencing is the need to ensure that the sentence reflects the individual culpability of each defendant,[173] it was a reversible error of law for the Chamber to rely on factors that were not known to Mr. Bemba,

[168] ICC-01/05-01/13-2089-Conf, paras.69-77
[169] *Simic et al*, TJ,para.2; *Nyiramasuhuko et al.,* TC Order 19/07/2001, p.1*; Nyiramasuhuko et al., TJ, para.6347 Lukic & Lukic*,TJ,para.21
[170] SJ,para.208.
[171] SJ,fn. 338 (use of third persons, citing TJ paras.242-248, 268-271, 396, 407-408, 520 and 746), and SJ fn.339 (distribution of mobile phones citing TJ paras.364-371, 445 and 747).
[172]ICC-01/05-01/13-2085-Conf, para.19 refers exclusively to Mr. Kilolo and Mr. Mangenda in connection with the distribution of mobile phones, and Mr. Babala and Mr. Kilolo as concerns the use of third persons for transfers of money.
[173] See paras.43-45,47,49 *supra.*

and did not otherwise concern the manner in which Mr. Bemba committed the charged offences.[174]

8. The Chamber erred by excluding mitigating factors

126. Notwithstanding the volume of Defence evidence and the lower evidential threshold that applies to mitigating factors, the Chamber found no mitigating circumstances in relation to Mr. Bemba. The Chamber's refusal to do so was, however, fundamentally flawed due to its:

a. Failure to issue a reasoned determination on Defence evidence and submissions;
b. Error in dismissing such evidence as constituting 'relitigation of the merits';
c. Finding that such issues arose from the Main Case, and were thus irrelevant to the mitigation of any Article 70 sentence.

127. As a result of these errors, the Chamber failed to mitigate Mr. Bemba's sentence in light of:

a. His position as a detained defendant who relied on the legal advice of Counsel;
b. Violations of his right to privacy and Defence confidentiality occasioned by the Article 70 investigations;
c. His timely renunciation of reliance on the 14 witnesses; and
d. His contribution to the costs associated with the 14 witnesses; and

128. These factors are accepted elements of mitigation, and, if given due weight, would have resulted in a substantially reduced penalty.

8.1 Mr. Bemba's position as a detained defendant

129. As emphasised by the Defence, of the five defendants, Mr. Bemba is the only non-lawyer.[175] Mr. Bemba was also the only defendant whose actions and capacities were regulated by a high intensity detention environment for the duration of the time period covered by the charges.[176] Given these incontrovertible facts, it was a

[174]T-54-Eng, p.17, citing *Češić* SJ, para.42.
[175] ICC-01/05-01/13-2089-Conf,para.67
[176] ICC-01/05-01/13-2089-Conf,paras.43-45.

reversible legal error for the Chamber to fail to mitigate Mr. Bemba sentence in light of:

a. His vulnerability as a defendant standing trial in a criminal case, who relied on and acted through counsel appointed by the Court; and
b. The impact of Mr. Bemba's detention environment on his ability to make informed choices and the contours of his "implicit knowledge".

130. With respect to the first matter, although the Chamber found that Mr. Kilolo and Mr. Mangenda violated their duty to the Court,[177] the Chamber was silent as concerns their violation of their particular duties towards Mr. Bemba, and the consequences it had for his case.

131. The duty to act honourably and with integrity (Articles 5, 6 and 14 of the Code of Conduct) are duties that are owed to the client, equally with the Court. Article 14 provides that Counsel must advise the Client in a full and truthful manner, and Article 15(1) further requires Counsel to provide the defendant with reasonable explanations concerning the implications of any course of action, so that the defendant can make informed decisions regarding this course of action. When read in conjunction with Article 14(2)(a), Counsel have a duty to advise the client as whether particular instructions are incompatible with the Code or any relevant orders of the Court. Article 6 also sets out Counsel's duty of independence; this applies not only *vis-à-vis* the Court but also *vis-à-vis* the client. Counsel and client are not one indivisible entities, but separate beings with separate duties and obligations.

132. These duties are an essential plank in the fairness of the proceedings and the right to effective representation.

133. The above obligations were clearly not fulfilled in this case. In both the Trial Judgment and the Sentencing Judgment, the Chamber glossed over clear evidence that Mr. Kilolo and Mr. Mangenda intentionally fed Mr. Bemba false information in order to direct him towards a particular course of action, and legal strategy.[178] The

[177] SJ,paras.130, 131, 176,177.
[178] ICC-01/05-01/13-2089-Conf,paras.60-65; ICC-01/05-01/13-1902-Conf-Corr2, paras.255-256. See also ICC-01/05-01/13-2144-Conf-AnxD.

evidence also reflects that Mr. Bemba was not provided full and clear information concerning the purposes of payments.[179]

134. The Chamber's reliance on "implicit knowledge" also does not chime with the fact that Code required Mr. Kilolo to advise Mr. Bemba in **explicit** terms of the parameters of illicit activity, and the legal consequences for Mr. Bemba. Mr. Bemba cannot be deemed to have made an informed decision concerning the strategy of his Defence, for the purposes of Article 15(1), unless that had occurred.

135. This is a marked distinction in this regard between the role of Mr. Bemba in this case as compared to other defendants who were convicted for contempt. Unlike Mr. Seselj, Mr. Bemba is not a lawyer, and did not elect to represent himself or otherwise assume the duties of Counsel. Unlike Mr. Kanu et al., Mr. Bemba did not act independently of his Defence. Mr. Bemba also did not mislead his Defence for the purpose of inducing them to commit improper acts on an unwitting basis.

136. The communications and evidence also highlight the extent to which Mr. Bemba relied on the advice of Mr. Kilolo; Mr. Kilolo is the initiator and prime interlocutor in their communications. In the handful of conversations that the Chamber relied as evidence of Mr. Bemba's involvement in the common plan, it is Mr. Kilolo who proposes the course of action that should be adopted by the Defence.[180] There is not a single example where Mr. Bemba requests Mr. Kilolo to pursue a certain course of action, Mr. Kilolo advises him that the conduct in question would be improper, and Mr. Bemba instructed him to pursue that strategy regardless.

137. The Chamber's failure to consider this legal framework and mitigate Mr. Bemba's sentence accordingly, is a clear failure of law and discretion. As noted above, the Chamber placed Mr. Bemba at the apex of responsibility for the actions of the team. The Chamber essentially treated a Defence team as a military structure, and placed the defendant at the top. The Chamber also assumed that by virtue of being at the top, all actions of the Defence should be imputed to the defendant. This is the

[179] ICC-01/05-01/13-1902-Conf-Corr2, paras.253, 25529.-256; T-54, pp.25-29.
[180] D-15: ICC-01/05-01/13-1902-Conf-Corr2, para.279. Mr Bemba's only substantive intervention was to pose a query and then retract the same query (para.281). D-54: ICC-01/05-01/13-1902-Conf-Corr2, paras.302-304. *See also* ICC-01/05-01/13-T-54-CONF-ENG,p.16,lns.21-25,p.18,lns.15-25,p.19,lns.1-11.

complete opposite of the legal paradigm governing Defence teams.[181] This is reflected by domestic case law (which was not addressed by the Chamber) which exculpates or mitigates the culpability of a client who acts through Counsel or relies on the advice of Counsel.[182]

138. Related to this error, the Trial Chamber's finding that certain conduct violated Article 70 was predicated on the fact that the conduct violated court orders.[183] Yet, for the purposes of ascertaining Mr. Bemba's personal culpability for sentencing, the Chamber did not differentiate between Mr. Bemba's duties to the Court as opposed to those of his Counsel, nor did the Chamber examine whether the orders were directly applicable to Mr. Bemba.

139. It is significant in this regard that where the drafters intended to imbue the defendant with positive obligations, the text expressly so provides.[184] Moreover, the *presumption* that defendants are personally bound by Court orders is undercut by the practice of international courts to state explicitly that the directions of the Court apply to the defendant.[185] In terms of the specific framework of the Main Case, when the Prosecution mooted the possibility that certain protective or contact orders might have been breached during the pre-confirmation phase, the Pre-Trial Chamber directed them to file a complaint against Counsel under the Code of Conduct.[186] This reflects the position of Counsel, and not the defendant, at the top of the hierarchy tree, and underscored the personal responsibility of Counsel for the manner in which the Defence was conducted.

140. The SCSL has also found in the context of contempt, that in order to convict an investigator of breaching court orders, it is necessary to assess whether the investigator would have been aware of the existence and legal implications of such

[181] ICC-01/05-01/13-2144-Conf, paras.39-40.
[182] ICC-01/05-01/13-2089-Conf, para.68.
[183] TJ,para.47.
[184] For example, the Statute imposes an explicit duty on the defendant to attend hearings, unless his or her presence is exempted (Article 63(1)). See also Rule 119, discussed at para. 71, *supra.*
[185] See also *Brđanin and Talić TC Decision* 03/07/2000 where the Trial Chamber explicitly stated that the Defendant was bound by the Court order; *Mrkšić et al* TC Decision 09/03/2005, specifying that "the public" does not refer to *inter alia*"the accused in this case [or] the defence counsel"; *Boškoski and Tarčulovski* TC Decision 20/06/2005 referring to both "accused" and "defence counsel"; and *Hadžihasanović et al* TC Order 01/02/2002 again, explicitly referring to the "accused" and "defence counsel" (at p.3).
[186] ICC-01/05-01/08-295-Red, pp.6-7.

orders.[187] This finding is even more pertinent as concerns a defendant who has no proactive duty to acquaint themselves with the existence and content of orders, and who was not otherwise provided training by the Court on relevant matters.[188]

141. Notwithstanding substantial Defence arguments on this point, the Chamber conducted no analysis as to the extent that orders were directed to Mr. Bemba, or whether he was otherwise made aware of their applicability to certain conduct.

142. Tied to this error, in one fell swoop, the Chamber discounted a significant body of evidence and argument concerning the impact of prolonged pre-trial detention on Mr. Bemba's cognitive awareness, on the grounds that the Defence was 'to a great extent' relitigating the findings of the Judgment. The Chamber also did not address arguments (the 'lesser' extent) that were not relitigating the findings in the Judgment.

143. In any case, for the reasons set out at paragraphs 46-50 above, it was a reversible error to dismiss these arguments and evidence on this basis.

144. Rule 145(2)(a)(i) clearly establishes the right of the Defence to adduce evidence and argument concerning indicia that impacted on the mental capacity of the defendant at the time of the charges. Mr. Bemba's detention environment was also relevant to the circumstances of the charged conduct, as per Rule 145(1)(c). Concretely, the notion of "implicit knowledge", which formed the basis for Mr. Bemba's conviction, assumes that Mr. Bemba had the means and information at his disposal to "fill in the dots" in relation to vague snippets of information that might have been intimated or hinted at in fleeting conversations with Mr. Kilolo or Mr. Babala. Like constructive knowledge, it assumes that Mr. Bemba had the duty, and the capacity to obtain information as to what was occurring elsewhere. This simply doesn't hold true in a detention environment.

145. By the same token, the Chamber's findings that Mr. Bemba "approved, at least tacitly, instructions regarding false testimony"[189] need to be construed within the context of Mr. Bemba's decision making processes. Mr. Bemba's knowledge and

[187] *Samura* Contempt Judgment,paras.23-27,73-74.
[188] ICC-01/05-01/13-2089-Conf,para.78.
[189] TJ,para.219.

consent depends not only on what is told to him, but his ability to visualize and appreciate certain implications. Apart from the fact that expert literature confirms that cognitive awareness diminishes during prolonged periods of detention,[190] [REDACTED].[191] [REDACTED].[192]

146. [REDACTED],[193] [REDACTED]. [REDACTED].[194]

147. [REDACTED],[195] [REDACTED],[196] [REDACTED].[197]

148. It is also pertinent that although the Prosecutor received the report on 25 November 2016, it did not raise these issues until it filed its sentencing brief (which was filed on the same day as the Defence brief, and just before the hearing itself). The Defence therefore had no time to elicit additional information or clarification from Dr. Korzinski.

149. Given that the Defence had initially requested to call Dr. Korzinski as a witness in order to tender the report through him,[198] and the Chamber had rejected this request on the grounds that it unnecessary to do so,[199] it would have been unfair and prejudicial for the Chamber to reject Dr. Korzinski's findings *in limine*, in the manner proposed by the Prosecution.

150. [REDACTED].[200] [REDACTED].

8.2 Violations of Mr. Bemba's right to privacy and right to family life

151. Although the Chamber acknowledged, in the context of the Mangenda Defence submissions, that violations of the right to privacy could warrant mitigation

[190] ICC-01/05-01/13-2089-Conf,paras.43-45.
[191] CAR-D20-0007-0271 at 0282.
[192] CAR-D20-0007-0271 at 0282.
[193] CAR-D20-0007-0271 at 0281.
[194] CAR-D20-0007-0271 at 0282
[195] CAR-D20-0007-0271 at 0282, [REDACTED].
[196] CAR-D20-0007-0271 at 0273 et seq.
[197] CAR-D20-0007-0271 at 0283.
[198] ICC-01/05-01/13-2002. The Defence proposed allocating three hours to his examination in chief, to allow for a full elucidation of all relevant matters.
[199] ICC-01/05-01/13-2025, para.6.
[200] ICC-01/05-01/13-1902-Conf-Corr2, paras.253, 93, 181 254, CAR-OTP-0079-1762 at 1768;ICC-01/05-01/13-2089-Conf, paras.60-65.

in sentence,[201] the Chamber completely failed to address, and provide a reasoned decision in relation to Bemba Defence arguments concerning the specific violations of the rights of Mr. Bemba. The ICTR Appeals Chamber has found in this regard that a failure to refer to, or address mitigating factors raised by the Defence constitutes a discernible error. [202]

152. Although these violations included the violation of the right to privilege, which was connected to the Western Union decisions, the Defence also raised the Prosecution disclosure violations,[203] and the separate violations occasioned by the Single Judge's failure to adopt an appropriate and effective mechanism for vetting Mr. Bemba's detention communications, and the materials collected by national authorities.[204] This resulted in the extensive dissemination of information concerning Mr. Bemba's private life and political beliefs to an extraordinarily wide audience. The disparity between the number of conversations transmitted to the Prosecution as compared to the mere handful that the Chamber found to be relevant to its determination, underscores the disproportionate nature of this incursion into Mr. Bemba's privacy.

153. The ICC has apparently recognised that the system adopted during the preliminary proceedings in this case was wrong and unfair. Both the *Ntaganda* and *Ongwen* cases have addressed similar issues in an *inter partes* manner, and have incorporated appropriate safeguards to limit the scope of disclosure to that which is necessary and proportionate. Mr. Bemba therefore bore the brunt of being the guinea pig as concerns the procedure which should apply to a detained defendant suspected of involvement in Article 70 offences.

154. It is notable, in this regard that the Appeals Chamber affirmed the propriety of tailoring Mr. Lubanga's sentence to address his 'cooperation' in light of delays occasioned by the actions of the Prosecution.[205] Canadian courts have also found that where a defendant's interests have been adversely impacted by the actions of the

[201] SJ,para.140.
[202] *Nyiramasuhuko et al. AJ*, paras.3477, 3482
[203] ICC-01/05-01/13-2089-Conf, paras.69-70.
[204] ICC-01/05-01/13-2089-Conf, para.136, fns. 171-172.
[205] ICC-01/04-01/06-3121-Red, paras.91,97

State/Prosecution, it be appropriate to factor this into consideration even if the conduct does not reach the level of a violation of the Canadian Charter.[206]

155. This disclosure harmed Mr. Bemba and continues to do so.[207] Concretely, as observed by Dr. Korzinski, [REDACTED].[208]

156. The right to a remedy, under human rights law, also has no trigger threshold. The Human Rights Committee emphasised explicitly in General Comment no. 32 that firstly, the State has a positive duty to ensure protection against privacy violations,[209] and secondly, that the right to an effective remedy in light of violation of rights (including privacy) is "unqualified and of immediate effect".[210] The UN Special Rapporteur on Privacy has also underscored the importance of effective remedies for privacy violations, and further noted the need for all States and entities to comply with the principles set out in the ECHR *Zakharov* decision,[211] and the ECJ *Schrems* judgment ,which found that the generalised (i.e. insufficiently targeted and proportionate) collection of content compromises "the essence of the fundamental right to respect for private life".[212]

157. Apart from the Chamber's fundamental error in failing to rule on the Defence arguments on this point, the Chamber further erred by claiming, in connection with the Mangenda request, that the 'circumstances' of a privacy violation could obviate the Court's duty to provide a remedy for it.[213] The degree of the violation might be relevant to the type of remedy, or the degree of mitigation, but it was a clear error of law for the Chamber to decline to award **any** remedy whatsoever to any of the defendants, notwithstanding the unprecedented collection and disclosure of private information in this case.

158. The oblique reference to 'circumstances' also appears to denote the view of the Chamber that the Prosecution or the Austrian authorities did not act in bad faith in collecting an unbridled amount of financial data that had no conceivable link to

[206] *R v Nasogaluak*,paras.3,4.
[207] ICC-01/05-01/13-2089-Conf, paras.114, 118-121.
[208] CAR-D20-0007-0271 at 0282.
[209] Para.8.
[210] Para.14.
[211] A/HRC/31/64, paras.32, 37. See also, ICC-01/05-01/13-2144-Conf, paras.151, 167.
[212] A/HRC/31/64, para.31, citing CJEU C-362/14, 06/10/2015,para.94.
[213] SJ, para.140.

the case and which was not supported by an independent reasonable suspicion.[214] Again, the existence of bad faith might be relevant to the question as to whether separate sanctions should be imposed on the Prosecutor, but it is not a pre-requisite as concerns the right to an effective remedy.[215]

159. The duty to provide a remedy at the level of the ICC is, moreover, impelled by fact that the defendants have been denied the right to do so at the domestic level. It is pertinent that what the Chamber described as 'technical violations' concerning the Dutch interception process would, if not leading to a nullity, warrant a reduction in sentence.[216] The findings of the Austrian Courts should have also led to the restitution of the information taken from Western Union and restoration to the *status quo ante*.[217]

8.3 Mr. Bemba's non-reliance of evidence concerning the 14 witnesses

160. For the reasons set out in the Appeal against the Judgment, the Defence contests the Chamber's finding that Mr. Bemba's position, as the alleged 'beneficiary' of misconduct, was relevant to his personal culpability.[218] Nonetheless, having predicated its conviction on this finding, it was an error of law for the Chamber to dismiss, without appropriate consideration, the mitigating effect of Mr. Bemba's non-reliance on this evidence in the Main Case.

161. Mr. Bemba's renunciation of reliance on this evidence strikes at the heart of the objectives established by the Chamber for sentencing: punishment and deterrence. Following the Chamber's logic, if the testimony of the 14 witnesses 'benefitted' Mr. Bemba, then the fact that the Defence renounced this testimony voluntarily, before the charges were confirmed, was an act of contrition and self-punishment. Any adverse impact on the administration of justice in the Main case was directly obviated by this course of action.

[214] ICC-01/05-01/13-1952, paras.17-25.
[215] ICC-01/04-01/06-1401, para.90; ICC-01/04-01/06-772,paras.36, 39.
[216] ICC-01/05-01/13-1737, Conf-AnxA, p.22, lines 723-724. See p.21 regarding the fact that the consequences are usually quite severe, even for technical violations. See also ICC-01/05-01/13-1799-Conf-AnxC, p.12. See also ICC-01/05-01/13-1692-Conf-AnxII, p.5.
[217] ICC-01/05-01/13-1952, paras.10-12; ICC-01/05-01/13-1941-Cor,para.50-64.
[218] ICC-01/05-01/13-2144-Conf,paras.209-213 *inter alia.*

162. Accordingly, if reliance on unreliable evidence is incriminating, then it follows that the fact that the defendant decided not to rely on the evidence must, at the very least, be mitigating. Trial Chamber II found in this regard that Mr. Katanga's role in demobilizing child soldiers mitigated his guilt for their mobilization.[219] It would not only be illogical to adopt a contrary approach to analogous Article 70 situation, but would give no incentive to similarly placed persons to do so in the future.

163. At the very least, the renunciation before the article 70 charges were confirmed must be construed as an act of cooperation, which merits mitigation,[220] and it was a reversible error not to treat it as such. In the same manner that a guilty plea should always merit mitigation,[221] the fact that the renunciation occurred after, and not before the Article 70 investigation became public, does not eliminate its mitigating force. This is particularly the case in light of evidence that Mr. Bemba was not aware, before this point, of the fact that Defence witnesses had provided false evidence on key issues concerning their role in the 2002-2003 events.[222]

8.4 Mr. Bemba's contributions to the costs of the Main Case

164. The Chamber erred by failing to mitigate Mr. Bemba's sentence in light of his cooperation in contributing to the costs associated with the 14 witnesses.

165. Unlike the members of his Defence team, Mr. Bemba derived no monetary benefit from the actions taken in the Main Case. To the contrary, by virtue of the Registry's assessment of his indigence, Mr. Bemba was required to fund all Main Case Defence activities over a considerable span of time, including Defence costs associated with the 14 witnesses. The Registry acknowledged in this regard that it was able to recuperate these costs through the significant cooperation of Mr. Bemba.[223]

166. This cooperation falls within the direct terms of Rule 145(2)(a)(ii). Moreover, having decided to apply the Article 5 oriented sentencing principles set out in this

[219] ICC-01/04-01/07-34830tENG, para.115.
[220] *Češić* SJ, para.62.
[221] *Todorović* SJ, para.80; Dixon and Khan,p.1450.
[222] CAR-OTP-0082-1309 at 1313, ln 95, at 1315, lns 174-176
[223] ICC-01/05-01/13-2089-Conf,para.81.

rule, it was an error for the Chamber to apply them in such a rigid manner that they could never mitigate an Article 70 sentence. Specifically, the Chamber found that the fact that Mr. Bemba had contributed to these costs was irrelevant because the 'debt' arose from the Main Case.[224] Yet, Rule 145(2)(a)(ii) provides that the Court shall take into account, in mitigation, "any efforts by the person to compensate the victim". This wording does not impose any restrictions in terms of the timing of the compensation. Given that the victim, for the purposes of an Article 70 case, is the Court, the Chamber was obligated to take into consideration efforts on the part of Mr. Bemba to compensate costs associated with the charged conduct. It was therefore a reversible error for the Chamber to refuse, outright, to do so.

167. Finally, it is notable that Mr. Bemba was also the first defendant appearing before an international court, who, on the one hand, was ordered to fund Defence costs, whilst on the other, was unable to do so due to the asset freeze imposed by the same Court. Although *ad hoc* solutions were found, the Defence effectively operated in a grey area in many regards as concerns costs that were not covered up-front by the Court, such as payments to witnesses.[225] Neither the Defence nor Mr. Bemba were given the requisite training to address such matters,[226] and, in the absence of subpoena powers, were vulnerable to the demands of witnesses and intermediaries.[227]

168. The Chamber gave the factors no weight on the basis that they were "common to many defence teams before international tribunals", and were thus neither a reason nor an excuse nor the Article70 conduct.[228] The deplorable fact that the Defence were largely left to fend for themselves with no support and no safety net is not a valid judicial reason for ignoring the difficulties this presents. The ICTY has previously mitigated contempt sentences where the defendant lacked experience.[229] By considering whether such factors presented a valid 'excuse' or 'reason', the Chamber also imposed an unreasonably high threshold; that is, it assessed relevance from the perspective as to whether these factors would exonerate the conduct rather mitigate culpability. When view through the proper threshold,

[224] SJ, para.242.
[225] ICC-01/05-01/13-1902-Conf-Corr2,paras.171-173.
[226] ICC-01/05-01/13-1902-Conf-Corr2,para.181; CC-01/05-01/13-2089-Conf, para.80.
[227] ICC-01/05-01/13-2089-Conf, para.79; ICC-01/05-01/13-1902-Conf-Corr2, paras.185-200.
[228] SJ, para. 230.
[229] *Rasic*, Oral Sentencing Judgment, para.19

these factors should have warranted mitigation, in line with legal precedents awarding mitigation in recognition of the difficult circumstances in which the defendant was compelled to exercise his duties.[230]

9. Having imposed a significant financial penalty, the Chamber erred by imposing an additional custodial sentence of 12 months

169. In deciding to fine Mr. Bemba EUR 300, 000, the Chamber found,[231]

> that a substantial fine is necessary to achieve the purposes for which punishment is imposed. In particular, the Chamber is of the view that there is a need to discourage this type of behaviour and to ensure that the repetition of such conduct on the part of Mr Bemba or any other person is dissuaded.

170. In reaching the disposition that a fine was necessary and would operate as a deterrent, the Chamber erred by failing to provide a reasoned opinion or adequate justification as to why an additional sentence involving penal sanctions was necessary and appropriate. As a result, its decision to impose a custodial sentence of 12 months was unnecessary, manifestly disproportionate,[232] and arbitrary.

171. Although Article 70(3) gave the Chamber the discretion to impose a sentence, a fine, or both, the Chamber was required to apply this discretion in a manner that is consistent with internationally recognised human rights law, as *per* Article 21(3) of the Statute. This in turn translated to a requirement to consider a custodial sentence as a sanction of last resort, which is only to be imposed where the gravity of the conduct is such that other sanctions are inadequate.[233]

172. As reflected by the practice of other international courts and tribunals, a custodial sentence is the exception rather than the rule for contempt offences, and is

[230] *Orić*, TJ, para.767; *Čelebići,* TJ, para. 1248;*Hadzihasanović* TJ, para. 2081.

[231] SJ,para.261.
[232] Cf ICC-01/04-01/06-3129, para.116.
[233] ICC-01/05-01/13-2089-Conf, para.8 ; ICC-01/04-01/06-824, para.140.

generally reserved for fact scenarios which involved interference with witnesses, or a risk to the security and safety of witnesses.[234]

173. This falls within the framework of international, regional and national texts that support the principle that imprisonment should be a measure of last resort. According to the UN Tokyo Rules, "[m]ember States shall develop non-custodial measures within their legal, systems to provide other options, thus reducing the use of imprisonment (…)."[235] The Human Rights Council has also called for "a policy to increase resort to non-custodial measures and alternatives to custodial sentence,"[236] adding that "[p]roportionate sentencing is an essential requirement of an effective and fair criminal justice system. This requires that custodial sentences are imposed as measures of last resort(…)."[237] The Council has also emphasised that:[238]

> When resorting to deprivation of liberty, States infringe upon one of the core human rights: the liberty of person. In order to justify such interference, States should apply deprivation of liberty as a measure of last resort and only after alternatives have been duly considered.

174. The Working Group on Arbitrary Detention has reiterated these principles in the context of the right to liberty and security of person provided in Article 9 of the International Covenant on Civil and Political Right, underscoring "that States should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need."[239]

175. On a regional level, the Council of Europe's Committee of Ministers has adopted the basic principle that: "[d]eprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate."[240] This was also highlighted in the European Prison Rules.[241]

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[234] ICC-01/05-01/13-2089-AnxB.
[235] Tokyo Rules), Rule 1.5. See also; Tokyo Rules Commentary, p.17; see also UNODC Handbook, pp.4 and 11; see also Joint UN Commentary, pp.1-2.; *see also* Ireland Law Reform Commission: para.2.20, pp.7-8, para.5.1; NSW Law Reform Commission, Recommendation 3.1. p.55.
[236] A/HRC/30/19,para.54.
[237] A/HRC/30/19,para.57.
[238] A/HRC/30/19,para. 64
[239] E/CN.4/2006/7, para.63
[240] CoE, Recommendation R(99)22.

176. Further, the African Commission on Human and People's Rights adopted the Ouagadougou Declaration and Plan of Action, which called for the "(…) [i]mposition of sentences of imprisonment only for the most serious offence and when no other sentence is appropriate, i.e. as a last resort and for the shortest time possible."[242] The importance of non-custodial measures has also been emphasised the in reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa, who recommended that "[a]lternative sentences, suspended sentences and probation should be implemented,"[243] adding that "[a]lternative sentences to incarceration such as community service should also be explored and encouraged."[244]

177. This is consistent with domestic practice, which affirms that non-custodial measures should be the primary mechanism for addressing non-violent offences, including offences against the administration of justice.[245] The principle that imprisonment must be a measure of last resort has been upheld in several jurisdictions including, *inter alia*, Canada,[246] France,[247] Germany,[248] Australia,[249] and England.[250] These jurisdictions have underscored the necessity of implementing non-custodial sentences on non-violent offences,[251] taking into consideration the personality of the offender as well as the material, family and social situations.[252] Several superior courts have similarly reversed judgments by lower courts due to the

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[241] CoE Rec(2006)2: "(…) no one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law."
[242] Ouagadougou Declaration; *see also* Kadoma Declaration, Recommendation No.1.
[243] AU Special Rapporteur (Uganda 2003), p.38, General Recommendations,1.
[244] AU Special Rapporteur (Ethiopia 2004), p.45, para.(i)(d).; AU Special Rapporteur (South Africa 2004), Recommendation I.(d), pp.63-64.
[245] ICC-01/05-01/13-2089-Conf, paras.82-83.
[246] Canada**:** Canada's Criminal Code, s. 718.2(d),(e); *R. v. Gladue*, para.36, 46 and 55; *R. v. Hamilton*,paras.95-96, *R. v. McDonald*; *R. v. Bickramjit Dhaliwal*,paras.114,127.
[247] French Penal Code, Art.132-19,para.2.
[248] German Penal Code, Section 56(1).
[249] NSW Crimes Act, Sect 5(1); *see also* Queensland Penalties and Sentences Act, Sect 9(2)(a)(i); W. Austl Sentencing Act, Sect 6(4).
[250] *R. v. O'Keefe*, "[t]he sentencer must first consider and reject non-custodial measures such as probation, and determine that a sentence of imprisonment is necessary(…)."*See also R. v. Trowbridge*.
[251] Canada: *R. v. Proulx*,para.21 "[conditional sentence is] a meaningful alternative to incarceration for less serious and non-dangerous offenders"; *see also R. v. Fice*; *R. v. Kendell*; Australia, Queensland Penalties and Sentences Act, Sect 9(2A), where the principle of last resort does not apply on: "(a) that involved the use of, or counselling, or procuring the use of, or attempting or conspiring the use, violence against another person; or (b) that resulted in physical harm to another person."
[252] French Penal Code, Art.132-19, para.3; Canada**:** *R. v. McLeod (R.G.)*, para.32; Australia: Queensland Penalties and Sentences Act, Sect 9(2).

lower court's failure to both demonstrate the necessity of imprisonment and justify the 'manifestly inadequate' character of all other sanctions.[253]

178. In line with these principles, it was a legal error to impose a separate custodial sentence, without any explanation or justification as to why custodial measures were required. As emphasized by the United Nations, "[w]hen non-custodial sanctions are introduced, they should, in principle, be used as real alternatives to imprisonment, not in addition to it."[254]

179. The Chamber therefore committed a reversal error in law by firstly, failing to establish that a custodial sentence was necessary given the personal culpability of Mr. Bemba, and secondly, failing to consider whether other, less intrusive measures might have achieved the same aims.

180. In terms of the particular circumstances of Mr. Bemba, the offences concerned non-violent actions that were directed to **collateral** issues. Apart from the fact that false testimony on collateral issues has not, previously been sanctioned at the international level,[255] it is instructive that the distinction between substance and collateral issues merits a significant distinction in penalty at the domestic level.[256]

181. Mr. Bemba's participation was, moreover, of a "somewhat restricted nature".[257] Of further relevance, the Chamber did not find that Mr. Bemba explicitly intended the witnesses to lie in relation to these collateral issues; only that he implicitly knew that they might lie, and intended them to testify regardless of the consequences.[258] This is an extremely attenuated form of *mens reas.*

182. As noted above, before the Article 70 charges were confirmed, Mr. Bemba withdrew the Defence reliance on the testimony of these witnesses in the Main

[253] France: *Cass. Crim. 10/11/2010* : [cassation of a judgment] *"qui prononce une peine d'emprisonnement, pour partie sans sursis, sans caractériser la nécessité de la peine d'emprisonnement ferme ni l'impossibilité d'ordonner une mesure d'aménagement."* This was also confirmed by *Cass. Crim. 12/05/2015*, and *Cass. Crim. 16/12/2015*; *see also Cass. Crim. 30/01/2013*.
[254] A/CONF.121/22/Rev.1.
[255] ICC-01/05-01/13-1902-Conf-Corr2,paras.116,122,fn.113; ICC-01/05-01/13-1900-Conf para.13; ICC-01/05-01/13-978, para.18
[256] *R. v. Hedderson*, para.63(2).
[257] SJ,para.223.
[258] ICC-01/05-01/13-2144-Conf, para. 87

Case.[259] As a result, the offending conduct did not impede Trial Chamber III from rendering its verdict in the Main Case.

183. He has also served the majority of his Main Case sentence in an environment which has no rehabilitation facilities. This enhances the need to consider whether the sanction imposed in the Article 70 will ensure his future rehabilitation and reintegration with his family. There is also consistent recognition of the fact that non-custodial measures are more effective in promoting the rehabilitation of the offender.[260] The ICTR has found in the context of contempt sentencing, that "the penalty should reflect the goals of retribution, deterrence, **rehabilitation,** and the protection of society" (emphasis added).[261]

184. At a human rights level, the ECHR underscored in a 2004 judgment that,[262]

> the approach to assessment of proportionality of State measures taken with reference to "punitive aims" has evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of prisoners (…)

185. The UN Tokyo Rules also stress that in determining which non-custodial measures should apply, the Court should adopt the measure that best promotes the rehabilitation of the convicted person.[263] It follows that the same principle must, by extension, apply to the threshold question as to whether custodial or non-custodial measures should be imposed. Rehabilitation is also now considered to be an important component of sentencing objectives at a domestic level.[264]

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[259] ICC-01/05-01/13-1902-Conf-Corr2 , para.78; ICC-01/05- 01/13-2089-Conf, para.84
[260] Rule 1.5, Tokyo Rules; **France:** Article 130-1 of the Penal Code: "*[f]avorise [l']amendement, [l']insertion ou [la] réinsertion [de l'auter de l'infraction]*"; **Canada:** *R. v. Gladue*, para.48; *R. v. Proulx* para.20.
[261] *GAA* TJ,para.8.
[262] *Khoroshenko v. Russia*, para.121.
[263] Rule 1.5.
[264] **USA:** Supreme Court, *Williams v. New York* 337 U.S. 241, 1949, at 248; **Australia: Queensland** Penalties and Sentences Act - SECT 9, subsec.2(a); NSW *Crimes Act* s 3A(d); ACT *Crimes Act* s 7(1)(d); *see also R v Phung*; *R v Berisha et al* referred to in Phung; *Lynch v Dixon*, at [49]; *R v Zamagias*, at [32]; *Vartzokas v Zanker*, at 279.

186. In contradistinction to these principles, the Chamber's explanation of the purpose of sentencing focusses solely on punishment and deterrence;[265] rehabilitation is not referenced. As a result, the Chamber failed to address the impact of a custodial sentence on Mr. Bemba's rehabilitation, or to otherwise balance this factor with the necessity for such a measure.

187. As concerns the sentencing objective of 'deterrence', the 'need' for a custodial sentence for deterrence purposes was also rendered superfluous by the Chamber's finding that the financial penalty served as an effective deterrent, both as concerns the possibility that Mr. Bemba might engage in future misconduct, and as concerns general deterrence to dissuade future perpetrators. A custodial sentence was thus unnecessary from the perspective of ensuring deterrence.

188. The Chamber's finding that it was unnecessary to impose a further custodial sentence on any other member of the common plan also undermines the possibility that a custodial sentence was necessary to prevent recidivism/further interference in the proceedings. The absence of any nexus between the custodial sentence and recidivism on the part of Mr. Bemba is further evidenced by the Chamber's determination that his sentence will only be executed once the Main Case proceedings (and sentence) are completed.

189. Regarding the retributive objective of sentencing, the Chamber had a separate obligation to consider whether the overarching punitive effect of the consecutive custodial sentence combined with the financial penalty was proportionate to Mr. Bemba's culpability. Although the Chamber acknowledged that the financial penalty was relevant to deterrence, it failed to address the fact that a financial penalty is a significant criminal sanction in and of itself, particularly in circumstances in which non-payment can expose the defendant to a further custodial sentence.[266]

190. The imposition of this type of fine therefore triggers the prescription against *non bis in idem*, which prohibits punishment being imposed twice for the same conduct.[267] For this reason, the Chamber was obliged to ensure that the punitive

[265] SJ,para.19.
[266] SJ,para.262.
[267] *Muslija v. BiH*, paras. 29-30; *Grande Stevens & Ors v. Italy*, para.229.

aspect of the fine, when combined with a custodial sentence, did not result in the defendant being punished twice for the same offences.

191. This obligation to set-off the fine against any potential custodial was raised as a pertinent issue during the drafting history of the ICC Rules of Procedure and Evidence,[268] and is further grounded in international and domestic practice,[269] and human rights law. Regarding the latter, the principle of set-off between punitive measures imposed in connection with the same acts is considered to be an element of natural justice.[270] It also derives from the principle of proportionality in criminality proceedings.[271]

192. The ICC Statute and Rules do not establish a fixed ratio between fine and prison sentences, but if the ICTY tariff of 1000 euros per day is used as a yardstick,[272] then a fine of 300 000 euros is equivalent to a custodial sentence of 300 days, roughly 10 months served time. If the two-third regime is applied,[273] the fine is itself the equivalent of an imposed custodial sentence of 15 months.

193. Even if this fine is reduced in order to comport to the proper scope of contempt cases, it would still represent a considerable sanction, particularly when viewed in light of the very public disapprobation that accompanied the public issuance of both the Article 70 trial and sentencing judgments.[274] Apart from the issue of detention credit, which will be addressed below, the very existence of a protracted Article 70 trial was a significant ordeal for a defendant who had been already endured a lengthy trial in the Main case, and who was then compelled to participate in both cases at the same time, in a detention environment.[275] The toll has been exacted. Any further punishment, beyond a fine, goes beyond the scope of contempt sentencing, and risks acting as a *de facto* lengthening of the Main Case sentence.

[268] For example, one of the proposals for the rules on sentencing elaborated that: "If the Court decides to impose a fine, this shall be taken into account in determining the sentence of imprisonment": Rule 7.2(d), PCNICC/1999/WGRPE(7)/DP.5**.**
[269] *Haxhiu* Contempt Judgment, para.36; Sharpston**,** p.437.
[270] CJEU, C-367/05, Opinion 05/12/2006; CJEU T-224/00, 09/07/2003; CJEU T-322/01**,** 27/09/2006.
[271] CJEU, C-367/05, Opinion 05/12/2006.
[272] *Hartmann* AC Order 16/11/2011.
[273] *Hartmann*, MICT Decision 28/03/16, para.19.
[274] ICC-01/05-01/13-2089-Conf,paras.27,145.
[275] T-54, p.29.

10. The Chamber erred by failing to consider or impose a suspended sentence as concerns Mr. Bemba

194. Tied to the Chamber's failure to consider whether a custodial sentence was a necessary and proportionate measure, having found that a suspended sentence was an appropriate future punishment for Mr. Kilolo and Mr. Mangenda, it was arbitrary for the Chamber to decline to consider the same option for Mr. Bemba.

195. A key element of the Chamber's decision to suspend the sentences of Mr. Kilolo and Mr. Mangenda was their cooperation and good behaviour in attending the hearings, and complying with the conditions for their release.[276]

196. Whereas the other element cited by the Chamber -impact on the defendant's family of further incarceration- is of equal applicability to Mr. Bemba, it is clear that he was unable to demonstrate cooperation with the Court on matters concerning release, *by virtue of the fact that he was never released.* Whereas the Single Judge found that Mr. Bemba *should* be released for the same reasons as his co-accused,[277] he was unable to be released because of the continuing existence of a detention order in the Main Case, which was partly motivated by the existence of the Article 70 case.[278]

197. Mr. Bemba was therefore placed in the most invidious position for sentencing purposes; the Chamber's denied him any credit for the fact that he was detained, whilst at the same time, as a result of his continued detention, Mr. Bemba continued to experience compulsory coercive mechanisms, which meant that he was unable to demonstrate voluntary cooperation. The prejudice flowing from this error is further underscored by the Registry's attestation that Mr. Bemba had fully cooperated with the Court and the Registry in connection with all instances of release in the Main Case.[279]

11. The Majority erred in law and fact as concerns their determination that Mr. Bemba would never be entitled to receive credit in this case

[276] SJ,para.130, 149,
[277] ICC-01/05-01/13-798, p.4.
[278] ICC-01/05-01/08-3221, paras.12,42; ICC-01/05-01/08-3249-Red, para.2.
[279] ICC-01/05-01/08-3375-Conf-AnxIII.

198. The Chamber acknowledged that Mr. Bemba is 'detained' in the Article 70 by virtue of the arrest warrant and related detention order issued in this case.[280] Nonetheless, although they recognised that Article 78(2) sets out a mandatory scheme for credit for time served pursuant to a detention order, the Majority nonetheless found that:[281]

i. An 'order of the Court' could be interpreted broadly to refer to any order for detention issued by the Court; and

ii. Since Mr. Bemba had received credit from Trial Chamber III in connection with a period of detention that overlapped with the Article 70 case, it was not possible for him to be credited separately for detention in the Article 70 case.

199. The Majority therefore determined that "Mr Bemba will not benefit from any deduction of time pursuant to Article 78(2) of the Statute in this case".[282]

200. This conclusion should be reversed on appeal due to the fact that the Chamber's interpretation of Article 78(2) and the notion of an 'order of the Court' under Article 78(2) was:

i. Contrary to principles of Statutory interpretation, and based on manifestly irrelevant and erroneous considerations;

ii. Unforeseen and inconsistent with the consistent manner in which Mr. Bemba's detention was addressed by the Prosecution, Pre-Trial Chamber, Trial Chamber and Appeals Chamber; and

iii. Contrary to international criminal precedents, and internationally recognised human rights law.

201. Finally, it was an error of fact for the Chamber to conclude that the specific deprivations incurred by Mr. Bemba in the Article 70 case had been credited in the Main Case. As a result of this error, Mr. Bemba was deprived of an effective remedy for these enhanced detention measures.

[280] SJ,paras.251,254.
[281] SJ,paras.257-260.
[282] SJ,para.260.

11.1 The Majority's interpretation of Article 78(2) contravened principles of Statutory interpretation, and was based on manifestly irrelevant or erroneous considerations

202. Article 78(2) sets out a mandatory scheme pursuant to which the Court must award credit at the sentencing phase as concerns any time spent in detention pursuant to an order from the Court. It is the position of the Defence that 'the Court' refers to the Chamber seized of the case; the Chamber seized of a case must award credit in connection with time spent in detention in connection with a detention order issued by that Chamber. If this article had been interpreted and applied correctly, the Chamber should have granted Mr. Bemba credit in connection with the time periods during which he was detained pursuant to a detention order issued in the Article 70 case; namely, from 23 November 2014 until 21 January 2015, and then from 29 May 2015 until 22 March 2017.

203. Instead, as a result of a legally erroneous interpretation of Article 78(2), the Majority ruled that Mr. Bemba would not be entitled to any credit in this case.[283] This applies both retrospectively, and prospectively as concerns any credit accrued during the duration of the appeal.

204. The Majority reached this conclusion on the basis of its finding that Article 78(2),[284]

> is not case-specific. The Chamber interprets the words 'an order' within the meaning of Article 78(2) of the Statute to apply across cases, since the language of the provision specifies that the accused be detained 'in accordance with *an* order of *the Court*' (emphasis added).

205. In so doing, the Majority failed to give due consideration to the fact that the phrase "the Court" is employed repeatedly throughout the Statute in contexts which concerns the specific actions of a Chamber in a case. It also failed to interpret this provision in a manner that is consistent with the overarching logic of the provision.

[283] SJ,para.260.
[284] SJ,para.258.

206. As concerns the first aspect, in line with basic principles of interpretation set out in the Vienna Convention on the Law of Treaties, the Court should adopt a meaning that is consistent with the usage of these terms in similar provisions elsewhere in the Statute.[285] The Majority nonetheless cited no examples or commentary in support of their claim that 'an order of the Court' could encompass orders issued in separate cases by different Chambers within 'the Court'. The Majority thus failed to reconcile its interpretation with other instances in which this phrase is used.

207. As observed by Judge Pangalangan, "[b]izarre results can follow from an overbroad interpretation of the word ['the Court']":[286] 'the Court', if interpreted broadly, encompasses the Prosecutor, the Presidency, Chambers, and the Registry, yet clearly the drafters did not intend for each of these entities to exercise the powers and duties entrusted in certain provisions to 'the Court'. For example, Article 17 vests ' the Court' with the power and duty to determine issues of admissibility, but clearly this role can only be exercise by the Chamber seized of the case, and not the Court as a whole, or other entities falling within the definition of 'the Court'.

208. Judge Pangalangan further notes that the phrase 'the Court' is used consistently in the Penalties section of the Statute in contexts that concern case specific actions.[287] As an example, Article 75(2) specifies that the Court may make an order against the defendant for reparations to victims. If the Majority's interpretation were to be adopted, the fact that a reparations order has been issued against a defendant in one case, would exhaust the power of the Court to issue a reparations order against the same defendant, if prosecuted in a separate case.

209. Similarly, if "the Court" were to be interpreted, for the purposes of Article 78 as a whole, to encompass all Chambers seized of cases concerning the defendant, then this would necessarily impact on the interpretation of Article 78(3). Concretely, if a defendant is convicted for more than one crime by the ICC, then the Court would be required to impose a joint sentence across cases. This means that since Trial Chamber III determined that the joint sentence imposed on Mr. Bemba should be

[285] Ulf Linderfalk,**Opinio Juris**, 5 February 2014
[286] ICC-01/05-01/13-2123-Anx, fn.9, citing Article 34 of the Statute.
[287] ICC-01/05-01/13-2123-Anx, para.7.

calculated by reference to the highest individual sentence imposed (18 years),[288] the lesser sentence imposed by Trial Chamber VII could not lengthen this joint sentence of 18 years.

210. If the Majority was convinced of the soundness of their reasoning, then they were obliged to apply it in a consistent manner. The Majority's failure to do so, by applying the same interpretive logic to Article 78(2), only serves to demonstrate that their position was not based on objective legal reasoning, but was a post-hoc attempt to deny credit to Mr. Bemba.

211. Of further relevance, although Article 78(2) refers to "the Court", it uses the singular form of "an order" as concerns the giving of credit. The act of giving credit (whether it be by the Trial Chamber or the Appeals Chamber) is therefore specific to individual detention orders (i.e. case specific detention orders).

212. These notions also need to be construed in accordance with Article 78(2) as a whole. It is pertinent in this regard that the second limb of Article 78(2) gives the Chamber the power to order additional credit for time otherwise spent in detention, but restricts this to "detention in connection with conduct underlying the crime". The Appeals Chamber confirmed in *Lubanga* that the scope of this power is governed by the nature of the charges underlying the detention; it is conduct specific.[289] The same interpretation was applied in the *Katanga* case.[290]

213. It follows from the above that the act of giving credit under Article 78(2) was intended to address detention relating to specific conduct or charges in a specific case, rather than detention in general. It was therefore impossible for Trial Chamber III to apply Article 78(2) in a manner that cut across both cases. The act of giving credit in the Main case was thus specific to the Main case, and did not satisfy the independent obligation of Trial Chamber VII to apply Article 78(2) to the specific detention orders, and related deprivations imposed in the Article 70 case.

214. Apart from their error in failing to address and apply principles of Statutory interpretation, the Majority further abused its discretion by basing its interpretation

[288] ICC-01/05-01/08-3399,paras.12 and 95
[289] ICC-01/04-01/06-2901,para.102.
[290] ICC-01/04-01/04-3484-tENG,para.171.

on manifestly irrelevant and erroneous considerations. The Majority argued that it was necessary to interpret Article 78(2) in the manner they proposed, firstly, in order to avoid the situation whereby Mr. Bemba was 'insufficiently punished' or there was an insufficient deterrent effect,[291] and secondly, due to the possibility that the length of credit could exceed the maximum length of the punishment.[292] Finally, the Majority also found, incorrectly, that because Mr. Bemba was serving his sentence in the Main case from 21 June 2016 onwards, it was legally "impossible" to award credit from that date onwards.[293]

215. The first consideration derives from the specious premise that the purpose of pre-trial detention is to punish the defendant, and deter future offenders. This assumption is wholly incompatible with the presumption of innocence, and the related presumption of liberty. Both the ECHR and the UN have underscored in this regard that pre-trial detention should never be implemented as a punitive measure or an anticipation of future punishment;[294] it is a measure of last resort which should be implemented only to the extent that is necessary to achieve a legitimate objective.[295]

216. In the case of the ICC, these objectives are set out in Article 58(1), and relate exclusively to non-punitive issues, such as the need to ensure the defendant's presence at trial, to prevent the defendant from interfering with evidence, and to ensure that the defendant does not continue to commit the crime in question or related crimes. The corollary right to credit in Article 78(2) in connection with detention orders issued under Article 58(1) does not, therefore, relate to punishment or deterrence as concerns future offences.

217. The arbitrary and erroneous linkage of the right to pre-trial credit with issues concerning sufficiency of punishment is also highlighted by the Majority's assumption that if Mr. Bemba's is awarded any credit in the Article 70 case, he will have somehow gamed the system, and escaped Article 70 punishment by virtue of his Main Case sentence. This hypothesis ignores the discrete and additional deprivations that stemmed from the Article 70 case, and falsely assumes that both the

[291] SJ,paras.256-257.
[292] SJ,para.255.
[293] SJ,para.259.
[294] *Dubinskiy v. Russia*, (§64); *Letellier v. France* (§51); CCPR/C/GC/32, para.30,citing concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para.14 and Argentina, CCPR/CO/70/ARG (2000), para.10
[295] Tokyo Rules; *A. W. Mukong v. Cameroon*, A/49/40 (vol. II), para.9.8; 155; *Tomasi v. France*, para.91, 98; *Mangouras v. Spain*, para.78; *Yaci and Sargin v. Turkey*, para.52.

conviction and the particular sentence imposed by Trial Chamber III will be upheld on appeal.

218. As concerns the latter aspect, both the Main Case conviction and sentence are on appeal before the Appeals Chamber. Even if the conviction is upheld, it is possible that the final sentence will be less than the actual amount of time that Mr. Bemba has spent in detention. Nonetheless, as a result of the Majority's categorical pronouncement that Mr. Bemba is not entitled to **any** credit for detention in this case, that additional time is effectively 'dead time': time which is not credited in any case, and which served no other lawful purpose. As noted in the legal opinion of Professor Andenas, this gives rise to a possible situation of illegal and arbitrary detention.[296]

219. Accordingly, in order to avoid the speculative and fallacious assumption that the plain reading of Article 78(2) would result in insufficient punishment, the Majority had veered towards an interpretation that risks occasioning over-punishment, and a miscarriage of justice. This is inconsistent with the fundamental tenet of *in dubio pro reo*, as set out in Article 22(2).

220. The second argument referred to by the Majority also lacks legal coherence. It is theoretically possible, in all cases at the ICC, that the total length of pre-trial detention could exceed the sentence eventually imposed on the defendant. The remedy to this issue is not, however, to restrict or reduce the right to credit, as proposed by the Majority,[297] but to organise the trial proceedings in a manner that is consistent with the defendant's right to a speedy trial.

221. In the same way that it is impermissible to enhance a defendant's sentence in order to ensure that it is longer than the length of detention,[298] it is completely *ultra vires* to restrict a right to credit due to concerns that the application of this right might give rise to a finding that the defendant has served longer than the maximum applicable sentence. Rights should be interpreted in a manner that most effectively secures the fundamental freedoms of defendants. Rights do not exist solely for appearances sake, or to otherwise protect the Court from censure. They therefore should not be interpreted or applied in this vein.

[296] Annex C,pp.2-3.
[297] SJ,para.255.
[298] *W. v Switzerland*, paras.26,33.

222. Finally, as concerns the Majority's content that it was 'legally impossible' to award credit after Mr. Bemba was sentenced in the Main Case, the Majority never explains the legal basis for this 'impossibility' in connection with an article that they acknowledge, provides for a mandatory scheme for credit. As affirmed by Professor Andenas,[299]

> There is clearly no general rule that indicates that a defendant cannot receive some form of credit for time served in two separate cases, when he is arrested and subjected to two separate detention orders, two restriction regimes, and receives separate sentences.

223. It is moreover, notable that although the Majority claims that Mr. Bemba is now serving his sentence in the Main Case, they did not lift the Article 70 detention order. As a result, it continues to apply, and regulates his Article 70 interactions.[300] If Mr. Bemba were to be granted interim release in the Main Case,[301] he would remain detained by virtue of the continuation of the Article 70 detention order. The existence of the Article 70 detention order might also implicitly operate as a disincentive to a positive decision on interim release in the Main Case. In either scenario, the Article 70 detention order acts as an ongoing constraint vis-à-vis Mr. Bemba's personal liberty, and its mere existence has profound implications as concerns his detention experience.

224. Given these adverse possibilities, it is an abuse of the Court's processes and a reversible legal error to intentionally maintain this order (with the related prejudice it causes Mr. Bemba), whilst categorically stating that Mr. Bemba can never benefit from the Statutory rights which attach to the order.

> *11.2 The Majority's interpretation flies in the face of the consistent manner in which Mr. Bemba's detention was addressed by the Prosecution, and Chambers seized of this case*

[299] Annex C, p.4.
[300] Annex F.
[301] The ICTY has granted provisional release to several defendants during the appeals phase: i.e. *Simić* AC Decision 21/10/2004; **Rašić**, AC Decision (4/04/2012); *Šainović et al*, AC Decision (03/09/2010); *Haradinaj et al.*, AC Decision (25/04/2009); *Haraqija and Morina*, AC Decision (09/02/2009).

225. The Majority's arguments as to the proper interpretation of Article 78(2) assume that the existence of detention orders in two concurrent cases is an inconvenient formality that needs to be counterbalanced at the end of the case through a restrictive interpretation of the right to credit. This approach has the effect of clarifying the effects of the detention order at the conclusion, rather than the inception of the proceedings. The Majority's approach therefore falls foul of the principle of legality and certainty, and, unless corrected on appeal, transforms Mr. Bemba's Article 70 detention into arbitrary and illegal detention.

226. From the beginning of the case, the Prosecution, Single Judge, Trial Chamber and Appeals Chamber affirmed that Mr. Bemba was independently detained for the purposes of the Article 70 case, and that time was running in connection with this order. This gave rise to a legitimate expectation that Mr. Bemba would be entitled to receive credit in connection with the Article 70 detention order.

227. In accordance with Article 58, if the Prosecution was of the position that Article 70 specific restrictions were not required, the Prosecution could, and should have requested the Single Judge to issue a summons. But instead, the Prosecutor elected to request an arrest warrant, arguing that an Article 70 specific detention order was necessary "to ensure that, independently from the main proceedings, there are reasonable grounds for BEMBA's continued detention."[302]

228. The Single Judge granted the request, finding that it was necessary to issue an detention order in the Article 70 case not because Mr. Bemba was detained in the Main Case, but "despite his current detention".[303] Both the Prosecutor and the Single Judge viewed the Article 70 detention as an additional and independent deprivation of Mr. Bemba's liberty that was necessary to maintain.

229. This position was reinforced by the Single Judge's decision of 23 January 2015, in which the Single Judge found, as concerns Mr. Bemba, that:[304]

[302] ICC-01/05-01/13-19-Red,para.39.
[303] ICC-01/05-01/13-1-Red2-tENG, para.22.
[304] ICC-01/05-01/13-798,p.4.

> the reasonableness of the duration of the detention has to be balanced inter alia against the statutory penalties applicable to the offences at stake in these proceedings and that, accordingly, the further extension of the period of the pre-trial detention would have resulted in making its duration disproportionate;

230. These findings reflect firstly, that the Single Judge considered Mr. Bemba to be detained in the Article 70 proceedings, and secondly that as of 23 January 2015, the length of this pre-trial detention was excessive in light of the potential penalty that could apply. This constituted an explicit recognition that time was accrued, and that unless Mr. Bemba was technically released, time would continue to accrue for the specific purposes of the Article 70 case. If time had only been measured in the Main case, there would have been no risk that the "the further extension of the period of the pre-trial detention" in the Article 70 case would make the "duration disproportionate" in light of the Statutory penalties that could apply to Mr. Bemba.

231. If the Article 70 detention order had been a mere technical formality, then presumably, the Prosecution would have paid little attention to the removal of this technical formality. Instead, the Prosecution appealed it,[305] arguing that the Single Judge erred in finding that length of Mr. Bemba's detention in the Article 70 case was unreasonable.[306] Notably, although a key ground of the Prosecution's appeal concerned their contention that the Single Judge erred in fact and law in finding that the length of Mr. Bemba's detention in the Article 70 case was unreasonable,[307] **the Prosecution did not dispute the fact that Mr. Bemba was detained in the Article 70 case, nor did it dispute that Mr. Bemba had been detained for a specific period of time in connection with the Article 70 detention order**.

232. To the contrary, the Prosecution acknowledged that Mr. Bemba had "served" a period of time,[308] but queried whether this period was unreasonable, given that the exact correlation between the amount of time served at that point, and the potential penalty that could apply, was unknown as long as the question as to whether the five

[305] ICC-01/05-01/13-809.
[306] See para.14, ICC-01/05-01/13-809.
[307] ICC-01/05-01/13-809,para.6.
[308] ICC-01/05-01/13-809,para.19.

year maximum applied to charges or the case as a whole, remained unresolved.[309] This argument thus accepted that Mr. Bemba would be awarded credit in connection with the Article 70 detention order, and the 14 months of detention served by that juncture.[310]

233. The Appeals Chamber similarly accepted that Mr. Bemba was detained for the purposes of the Article 70 case, and that the time which had elapsed since Mr. Bemba was served the Article 70 arrest warrant "counted" for the purposes of assessing the reasonableness of the length of this detention. [311] The Appeals Chamber does not exercise jurisdiction over hypothetical or abstract issues;[312] the Appeals Chamber therefore considered the application of Articles 60(2) and (4) to Mr. Bemba because he was, and is detained in the Article 70 case. If Mr. Bemba's detention did not "count"for the purposes of the Article 70 case, then these provisions would not have applied, and the Appeals Chamber could and should have dismissed the matter on this basis alone, as it did in the Lubanga case, where it found that Mr. Lubanga's detention in the DRC in connection with unrelated charges was irrelevant for the purposes of Article 60(2) and (4) of the Statute.[313] It also would not have remanded the issue back to the Trial Chamber.[314]

234. When duly seized of the issue, instead of expressing its position that Mr. Bemba's detention was irrelevant for the purposes of the Article 70 case, the Trial Chamber acknowledged that the provisions of Article 60 regulated Mr. Bemba's detention in the Article 70 case – time counted for this case.[315] The Defence informed the Chamber at this point that it was not seeking the release of Mr. Bemba.[316] This was not a straightforward decision; the judgment had not been issued in the Main case, and if acquitted, the continued existence of a detention order in the Article 70 would have served to prolong his detention further. Mr. Bemba nonetheless renounced his right to apply for release in light of its understanding that time in detention counted for the purposes of this case. This is reflected by the

[309] ICC-01/05-01/13-809,paras.18-19.
[310] ICC-01/05-01/13-809,para.20.
[311] ICC-01/05-01/13-970,para.27, finding that the Single Judge failed to "to appropriately balance **the duration of detention** against those risks" (emphasis added).
[312] ICC-01/04-01/06-1433,para.39; ICC-01/05-01/08-3382,para.9.
[313] ICC-01/04-01/06-824,para.121.
[314] ICC-01/05-01/13-970,para.29.
[315] ICC-01/05-01/13-1151,para.30.
[316] ICC-01/05-01/13-1016

Defence reference to the "Trial Chamber's residual duty to ensure that Mr. Bemba is not detained for an unreasonable length of time due to inexcusable delay by the Prosecutor".[317]

235. As remarked by the Majority, although the Defence expressed its position that Mr. Bemba should be afforded credit for all Article 70 detention during the sentencing proceedings, the Prosecution never advanced a contrary position.[318] Moreover, whereas one of the members of the Majority had afforded the Prosecution an opportunity to clarify the nature of its common plan during trial closing submissions,[319] the Chamber never raised the interpretation of Article 78(2) as a possible issue of contention, during the sentencing hearing. The Defence was simply never afforded a right to be heard on the Majority's novel piece of Statutory construction.

236. Given the consistent and clear train of decisions that recognised that Mr. Bemba was serving time in the Article 70 case, it was a complete violation of the principles of legality and foreseeability, to reverse this position at the very end of the case, to the detriment of the defendant.

237. The Majority had no discretion to employ such a tactic. As underlined by Judge Pangalangan,[320]

> Article 22(2) of the Statute sets out the principle of strict construction regarding the interpretation of crimes. Just as crimes require strict interpretation because they can have a dispositive effect on a person's liberty, so too should the determination of a person's sentence.

238. The ECHR has indeed confirmed the applicability of these principles to issues of detention and sentencing, averring that "where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied".[321] The conditions for deprivation of liberty should be clearly defined and the law should be sufficiently precise to allow the defendant to foresee, with

[317] ICC-01/05-01/13-1016,para.3.
[318] SJ,para.253. See also ICC-01/05-01/13-2123-Anx,para.13.
[319] ICC-01/05-01/13-T-48-Red-ENG,pp.4-6
[320] ICC-01/05-01/13-2123-Anx,para.12. See also D'Ascoli,p.20-21.
[321] *Dimitrov v. Bulgaria*, para.51.

appropriate advice, "the consequences which a given action may entail".[322] These requirements would be violated in circumstances where the domestic law on concurrent sentences and remand was unclear and applied by courts in different ways, thus causing significant uncertainty as to the defendant's prospective legal position. The principle of *nulla poena sine lege* would be further undermined when courts fail to comply with legal provisions that give rise to a reduction of the duration of detention, and this failure leads to the unlawful extension of the detention.[323]

239. The case law of the European Court of Justice also confirms that the principle of legal certainty requires legislation, which imposes "restrictive measures having considerable impact on the rights and freedoms of designated person to be clear and precise so that the persons concerned, including third parties (…) involved in the main proceedings, may know unambiguously their rights and duties and take measures accordingly."[324]

240. At a domestic level, courts have found, on appeal, that the above principles mandate that a defendant should be awarded full credit, in circumstances where it was not clear to the defendant that they would not receive such credit. For example, in *R v Metcalfe*, the Court referred to legal precedent to the effect that a,[325]

> sentencing judge who has it in mind to direct that time spent in custody on remand should not count towards sentence should raise the issue squarely with defence counsel before sentence is passed, thereby affording him the opportunity to make appropriate submissions on the point.

241. The Court therefore awarded the missing credit on appeal.

242. Given that the entire course of this case proceeded on the assumption that Mr. Bemba would be awarded credit in connection with his Article 70 detention order,

[322] *Dimitrov v. Bulgaria*, para.51.
[323] *Prada v. Spain*, para.52.
[324] CJEU C-340/08, 29/04/2010.
[325] *R v Billy Metcalfe*, para.15, citing *Barber [2006]*.

the very same principles of foreseeability, certainty and legality dictate that the Appeals Chamber should reinstate and implement this assumption.

11.3 The Majority's position was contrary to international criminal precedents, internationally recognised human rights law, and domestic practice.

243. Although clothed in the language of Statutory construction, the Majority's position is, as explained by Judge Pangalangan, motivated and based solely on policy considerations.[326] Policy considerations might be a theoretical basis for changing the law in the future, but they are a wholly unsound basis for declining to award a right that is clearly set out in the present text of the Rome Statute.[327]

244. The domestic case of R v Bailey is particularly pertinent to this point.[328] Instead of crediting the defendant for time which he had served in pre-trial detention, the Judge at first instance imposed a suspended sentence for an equivalent amount of time, on the grounds that this would act as a more effective form of deterrence. The Court of Appeal reversed the order and restored the credit in full, citing the irrelevance of the Judge's motives, and the unfairness occasioned by the lack of foreseeability of such an approach.

245. The Majority's reliance on policy, to reformulate a provision that was clearly worded and clearly understood by the participants, also trespasses on the appropriate separation of powers between Judges sitting in specific cases, and the Assembly of State Parties.[329] Such 'policy considerations' form no part of the application sources of law, set out in Article 21. If there was indeed a lacuna in Article 78(2) (which there is not) then it would have been appropriate for the Chamber to have considered supplementary sources of law set out in Article 21, such as the case law of other international courts and tribunals. Although the ICC is not bound by the case law of the *ad hocs,* it is a clear legal error to disregard this case law in favour of manifestly irrelevant and erroneous policy considerations.

[326] ICC-01/05-01/13-2123-Anx, para.14.
[327] ICC-01/05-01/13-2123-Anx, para.14. See also *Erdemović* AJ Cassese's Dissenting Opinon, para.11.
[328] (UK) *R v Bailey.*
[329] *Blaškić* AC Judgement 29/10/1997,paras.35-36; ICC-01/09-01/11-942-Anx,paras.3-5.

246. The Majority nonetheless completely failed to address Defence arguments concerning the uniform practice of such courts to award credit for pre-trial detention, irrespective as to whether it overlaps with pre-trial detention in another case, or detention concerning a conviction.[330] The equivalent wording of the legal provisions at these courts are also very similar to Article 78(2), and do not provide a basis for the completely different interpretation and approach adopted by the Majority in this case.[331] The consistency of this practice also points to a countervailing consideration (ignored by the Majority), which is that the system of mandatory pre-trial credit acts as a buttress as concerns the right to expeditious proceedings, a right which is of particular importance as concerns contempt proceedings linked to another trial at the same judicial institution.

247. In terms of the compatibility of the approach of the *ad hocs* with internationally recognised human rights law, the ECHR has underscored that even if there is no generally recognised right to credit for pre-trial credit, if the law provides for such a right, then it might be applied in a clear and foreseeable manner.[332] In such circumstances, domestic courts also have a duty to ensure that the existence of multiple proceedings does not strip the right of its full and effective force.[333] This duty is of particular importance in connection with jurisdictions in which there is no automatic right to compensation for pre-trial detention, in the event that the accused is eventually acquitted, or has been imprisoned for a time period that exceeds his sentence.[334]

248. As noted above, the ICC provides for no automatic right of compensation upon acquittal or over-penalisation; this protection is, rather, provided through the combination of sentencing credits and the right to expeditious proceedings. This protection is, however, completely undermined if Judges can determine that time in detention 'does not run' and can never be credited, as concerns specific cases.

249. Finally, whereas the ECHR declined to find that there is an absolute right to credit for pre-trial detention, the United Nations has interpreted applicable human rights norms to provide for either a right to credit, or a right to reduction in sentence

[330] ICC-01/05-01/13-2089-Conf, fn.125; ICC-01/05-01/13-T-54-CONF-ENG,pp.31-32.
[331] ICTY, Rule 101(C); SCSL: Rule 101(D):
[332] *Supra* para.238.
[333] PL v France, paras.44-47.
[334] PL v France, para.43.

in order to mitigate the effects of pre-trial detention.[335] The Majority's failure to do either, notwithstanding the clear evidence that Mr. Bemba had incurred specific deprivations of his liberty in connection with the Article 70 case, was manifestly incompatible with its duty to apply the Statute in a manner that is consistent with human rights law standards. This will be addressed in more detail in the next section.

11.4 The Chamber's erroneous conclusion that the Article 70 detention had been credited in the Main Case deprived Mr. Bemba of an effective remedy for these enhanced detention measures.

250. As set out above, Article 78(2) stipulates that '[i]n imposing a sentence, the Court *shall* deduct the time, in any, previously spent in detention in accordance with an order of the Court'. Mr. Bemba meets the requirements of this provision: he was detained following a Court order. As such, the Statute does not give the Court any other option, but to afford credit for time previously spent in detention. The term 'shall' was incorporated in Article 78(2) deliberately, and is not the result of unfortunate drafting. This is clearly expressed by the fact that the second part of Article 78(2) uses the word 'may'.

251. Although the Majority recognise the imperative nature of this provision, they argue that it was already fulfilled by virtue of the credit awarded by Trial Chamber III. This finding is patently wrong in law and in fact, and deprived Mr. Bemba of his statutory entitlement to credit.

252. Throughout the course of the Main Case, Trial Chamber III affirmed repeatedly that it had no competence to exercise jurisdiction over Article 70 decisions and orders,[336] and further cautioned against 'parallel litigation', that is, the litigation of an issue in one case that arose from, or had implications for the other.[337] As noted by Judge Pangalangan, Trial Chamber VII had also underscored the independence of the two cases, in procedure and in content.[338]

[335] A/CONF.144/28/Rev.1, p. 159 point 2(j). See also Annex C, p.4: "Deprivation of liberty is a relevant factor and the requirements of legality and proportionality and reasonableness may require a reduction of the length of any future sentence that might be imposed".
[336] ICC-01/05-01/08-3080, para.35; See ICC-01/05- 01/08-2606-Red, para.21; and ICC- 01/05-01/08-3059,paras.15-18.
[337] ICC-01/05-01/08-3029,para.26
[338] ICC-01/05-01/13-2123-Anx,paras.15-17

253. Accordingly, when the issue of credit arose in the Main Case, the Defence had every reason to believe that the issue of credit for the purposes of the Article 70 case would be addressed independently by Trial Chamber VII, and that Trial Chamber III would in any case, reject argument raised on this point. It was therefore an issue that was never litigated before Trial Chamber III. Moreover, when Trial Chamber III issued its sentencing decision, it clearly stated that its findings on credit were related to the detention order issued in the Main Case;[339] it did not use the generic term, 'an order', it specifically limited its decision to the Main Case detention order.

254. As a result of the fact that Trial Chamber III did not allocate any credit in connection with the Article 70 detention order, and the Majority of Trial Chamber VII refused to do so, Mr. Bemba was deprived of his right to a remedy as concerns the significant deprivations of liberty which were imposed in the Article 70 case.

255. The circumstances of Mr. Bemba were not analogous to a prisoner serving a sentence, in which case the existence of one or more detention orders in different cases has no material impact on the prisoner's day to day existence. Mr. Bemba was instead, subjected to significant additional deprivations, that would not have been imposed but for the Article 70 detention order. These included isolation and then segregation, intense surveillance, intrusive searches, close-armed guard during court hearings, and confinement for significant periods of time in the court holding cell.[340] In accordance with human rights standards, and as affirmed by Professor Andenas,[341] these measures qualify in themselves, as a deprivation of liberty amounting to detention. [342]

256. These measures were far more rigorous than the standard of detention that generally applies to the detention of persons accused of contempt, at a domestic level. If the Defence had been put on notice that Trial Chamber III exercised jurisdiction over such measures, the Defence could have requested enhanced credit in the Main Case, in line with domestic practice that awards additional credit in

[339] ICC-01/05-01/08-3399,paras.12 and 96-97
[340] ICC-01/05-01/13-2089-Conf,paras.106-130.
[341] Annex C,p.2 "Mr. Bemba was clearly deprived of his liberty".
[342] ICC-01/05-01/13-2089-Conf,para.94.

connection with pre-trial detention that is more of a more rigorous nature than either the enforcement of sentence regime, or the standard regime for pre-trial detention.[343] As opined by Professor Andenas, detention restrictions must be proportionate. Any measures that go beyond what is strictly necessary for a specific case "will render the detention arbitrary". This in turn, triggers a right to a remedy that may include a reduction in any future sentence.[344]

257. Although the Defence adduced a significant amount of evidence and argumentation as to these Article 70 measures, the Majority failed to address the fact that its belated interpretation of Article 78(2) prevented the Defence from putting these issues to Trial Chamber III. Indeed, these measures are referenced nowhere in the Sentencing Judgment, even though the Defence argued, in the alternative, that even if credit were not awarded, the intensity of these measure should warrant a reduction in sentence.[345]

258. The Majority's failure to take into account such relevant factors is further reflected in their claim that if Mr. Bemba was awarded credit, he would be in a more advantageous position than his co-defendants. The obvious corollary to this argument, which is not considered, is that by **not** awarding Mr. Bemba any credit in connection with the Article 70 measures, he has been punished in far more significant manner than his co-defendants, and further prejudiced in terms of the conditions under which he was compelled to present his defence.

259. Mr. Bemba's co-defendants were able to freely consult with their lawyers throughout the trial, at any time, and by any form (i.e by email, in person, by phone). Mr. Bemba was, however, impeded in his ability to consult and meet with the Defence by virtue of the Article 70 detention order. Indeed, during hearings in the Defence case, the Defence had to elect between meeting Mr. Bemba in his personal holding cell, or foregoing privileged communications for the duration of the hearing.[346] As observed by Professor Andenas, such a restriction was "unduly strict and invasive".[347]

[343] ICC-01/05-01/13-2089-Conf,paras.133-136.
[344] Annex C,pp.3-4.
[345] ICC-01/05-01/13-2089-Conf,paras.1350-136.
[346] ICC-01/05-01/13-2089-Conf, paras.128-129.
[347] Annex C,p.2.

260. During trial hearings, whereas his co-defendants were permitted to sit next to their lawyers, without restraint, Mr. Bemba was separated physically from his Defence by an array of guards, and portrayed to the public and witnesses as the only arrested person in the case. Mssrs. Babala, Arido, Kilolo and Mangenda also effectively served their sentence at a time when the case was not in trial; they were never subjected to same intense trial restrictions as Mr. Bemba, such as regular confinement in a holding cell, and daily intrusive searches.

261. Given the significant dis-equilibrium between the detention experiences of Mr. Bemba, as compared to his co-accused, the notion that Mr. Bemba should be denied the right to credit out of some misplaced notion of equality is misconceived and grossly unfair.

12. In the alternative, the Chamber erred by issuing a consecutive rather than concurrent sentence

262. In finding that the Chamber did, "not consider it appropriate that this term be served concurrently with his existing sentence as the offences are not related," [348] the Chamber committed three reversible errors:

- *firstly*, the Chamber manifestly abused its discretion by adopting radically inconsistent positions as concerns the nexus between the two cases for the purpose of joinder of sentences as compared to joinder of detention orders;
- *secondly*, the Chamber erred in fact in determining that the two cases were insufficiently connected to warrant concurrent rather than consecutive sentences, and
- *thirdly*, the Chamber erred in law in failing to consider whether the imposition of a significant sentence in the Main case satisfied or reduced the need for further custodial measures to be imposed in the Article 70 case.

263. Regarding the first error, the Chamber's conclusion that the offences were not related runs directly counter to the Majority's decision to elide Mr. Bemba's experience and participation in the two cases for the purposes of determining detention credit. As a result of the Majority's arbitrary and erroneous approach to sentencing credit, Mr. Bemba experiences the worst of both worlds: for credit

[348] SJ,para.250.

purposes, the Majority treated the two cases as an inseverable whole, but for the purposes of determining whether the sentence should be concurrent or consecutive, the Chamber treated the two cases as being wholly distinct.

264. As noted at paragraphs 160-166 above, the Chamber's approach to mitigating factors is also infected with this error. The borders between the two cases appear to have been drawn in an entirely arbitrary manner, which discriminated in effect against the Defence of Mr. Bemba.

265. Such inconsistency in the Chamber's approach to the two cases is a reversible error. The Appeals Chamber has found in this regard that once a Chamber determines that a particular factor is relevant to its decision, it must assess and apply this factor in a consistent manner.[349] As noted at paragraph 209 above, the Majority's interpretation of 'the Court' in Article 78(2) necessarily impacted on Article 78(3). Concretely, the phrase, "[w]hen a person has been convicted for more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment", should then be interpreted to mean that the sentence imposed by Trial Chamber VII would have to be joined, and subsumed within the sentence imposed by Trial Chamber III. As a result of the Chamber's inconsistent application of the law, Mr. Bemba has been unfairly compelled to serve an additional custodial term of 12 months, which is self-evidently 12 months longer than the joint sentence that would have applied if the Chamber had interpreted Article 78(3) in the same manner as Article 78(2).

266. Regarding the second error, for the purposes of credit, the Majority focused on substance rather than form, but for the purposes of determining whether the sentences should be concurrent rather than consecutive, focused purely on form. In both instances, the Chamber failed to address or remedy the specific prejudice incurred by Mr. Bemba as a result of the unitary aspect of the Prosecutor's involvement in both cases, and Mr. Bemba's entirely distinct experience as a detainee who was being prosecuted in two separate trials, that were running at the same time.

[349] ICC-01/09-02/11-1032,para.78.

267. In terms of the Chamber's focus on form rather than substance, the Chamber failed to give due consideration to the fact that although the Article 70 and Main case are two separate cases, they are substantially connected by virtue of the Prosecution's consistent tactic of using the fruits of one case, in the other, to achieve a litigation advantage. By virtue of the fact that the Prosecution is a unified entity at the ICC, it has been able to reap the benefits of the Article 70 evidence in the Main Case, and *vice versa,* without formally seeking joinder to do so.

268. Concretely, the Prosecution was able to employ the Article 70 evidence to inform its strategy and questioning of Defence witnesses during the Main Case on issues concerning credibility,[350] which were the gravamen of the subsequent Article 70 case. The Prosecution further blurred the lines between the two cases in Requests for Assistance directed to States, by citing the Main Case, and directly linking the collection of evidence to ongoing developments in the Main case.[351] Citing an Article 5 case also meant that the Prosecution was able to invoke cooperation provisions in connection with States, which were not obliged to assist in connection with Article 70 offences.[352] Conversely, the Prosecution's decision not to join the charges meant that it was able to cite ongoing Article 70 investigations as a basis for withholding disclosure of evidence concerning Main Case Defence witnesses.[353]

269. If the two cases had been formally (rather than informally) joined, then in accordance with Article 78(3), Mr. Bemba would have received one joint sentence, including those associated with the Article 70 charges. As noted above, any sanction would have been absorbed within the joint sentence of 18 years.

270. Given this legal framework, it was arbitrary and unfair to compel Mr. Bemba to serve his sentence consecutively, due to the happenstance that the Prosecutor did not request joinder and Trial Chamber III did not decide otherwise to join the case after the Article 70 charges were confirmed.

[350] ICC-01/05-01/13-2144-Red,paras.167,174; ICC-01/05-01/13-1902-Conf-Corr2,paras.75-76.
[351] CAR-OTP- 0090-1922 at 1923-1924 ; CAR-OTP- 0082-1433 ; CAR-OTP- 0090-1930
[352] ICC-01/05- 01/13-1135- Conf, para.37
[353] ICC-01/05-01/13-3039, para.2.

271. The result, that Mr. Bemba is serving consecutive sentences rather than one joint sentence, is also inconsistent with the intention of the drafters that defendants should receive a *joint* sentence for *all* crimes for which they are standing trial.[354]

272. At the international level, the general practice has been to order that the sentences should run concurrently, if the conduct occurred prior to the accused's conviction in the first case.[355] Significantly, although the contempt sentence of a SCSL defendant, who engaged in contempt after his initial conviction, was ordered to run consecutively, the defendant was nonetheless granted credit for pre-trial detention, which had run concurrently to the service of his 'Main Case' sentence.[356]

273. The Chamber's approach was also inconsistent with the duty to ensure that multiple sentences do not result in over-incarceration of a defendant, in violation of the principle of proportionality. Although the Chamber noted that the Mr. Bemba had been sentenced to a custodial sentence of 18 years, it failed to address the impact of this sentence on the proportionality of an additional custodial sentence imposed in the Article 70 case.

274. In particular, although the Chamber noted "that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence)",[357] it failed to consider or address the fact that the risk of recidivism is only possible whilst the Main Case continues. As noted at paragraphs 187-188 *supra*, the logic underpinning specific deterrence therefore militates in favour of a sentence that runs concurrently with the Main case proceedings, rather than one that commences after they have concluded.

275. The Chamber also failed to take into consideration the overall impact of an extended period of incarceration, dating from 2008 until 12 months after the conclusion of the Main case sentence, on Mr. Bemba's eventual prospects of rehabilitation and reintegration with his family.[358] The overall impact of this error is

[354] Triffterer Commentary,p.1435; Lee,p.342; Schabas Commentary,p.1180-1181; Cassese Commentary, 1529-1530.
[355] ICC-01/05- 01/13-2089- Conf, para. 105, ftn. 125
[356] *Bangura* Sentencing Judgment, para.93-94.
[357] SJ,para.19.
[358] See ICC-01/05-01/13-2089-Conf,para.85 concerning the drafters' intention that the Chamber should take into consideration the impact of the length of detention on the overall circumstances of the defendant's family.

that Mr. Bemba was issued a much heavier penalty than if the two cases had been tried jointly.

276. At a domestic level, offenders receive much shorter sentences when crimes are tried and sentenced together on a single occasion, as opposed to when they are tried and sentenced separately.[359] For this reason, there is a preference to address multiple offences in a joint trial, in order to ameliorate the prejudicial outcomes that ensue from separate proceedings.[360] In the specific context of contempt, charges are regularly combined with the charges in the Main case.[361] This facilitates the imposition of a joint sentence, which avoids the prospect of multiple sentences that give rise to unreasonable hardship and exaggerate the accused's culpability.

277. Domestic case law further clarifies that it is an appealable error to punish a defendant more severely by virtue of the fact that he was tried on two separate occasions, rather than one.[362] This is consistent with the principle of 'totality', which dictates that the multiplication of charges or cases should not operate to the detriment of the defendant, or result in a sentence that exceeds the combined culpability of the defendant. This principle of totality also applies when cases are tried separately.[363] In such circumstances , the court – when sentencing the accused in a new case – is required to take account of the sentence that was imposed in a previous trial and may decide to impose a sentence that runs concurrently with the previously imposed sentence.[364] If the previous case concerned grave crimes, resulting in a high sentence, this may preclude the imposition of a high sentence in the subsequent case.[365] The fact that the defendant will not receive additional 'punishment' in connection with the subsequent case is not a legitimate basis for eschewing these principles in favour of imposing a high sentence in the subsequent case.[366]

[359] Wasik,p.287.
[360] Wasik,p.285-286.
[361] **Netherlands:** E.g. Rechtbank Oost-Brabant 04/05/2015; Gerechtshof 's-Hertogenbosch 30/06/2014; Rechtbank Amsterdam10/02/2016; Rechtbank Zutphen, 25/05/2010. **UK:** *Regina v Samuel Thomas Walker*; *Regina v Mark Austin Grant*; *Regina v Michael Brian Tinning*; *Attorney-General's Reference Nos 14, 15 & 16 of 2015*; *Regina v Kyle Sherlock, Adam Mendoza*.
[362] *Watts [2000]*.
[363] *Mill v The Queen* at 66; *Choi v R* at 157.
[364] Frase, p.199.
[365] *R v MMK*, at 14.
[366] *R v Costello*.

278. A failure to reduce sentences for multiple crimes in order to comport to the totality principle will result in a finding that the sentence was 'manifestly excessive'.[367] Accordingly, in order to avoid such a possibility, domestic jurisdictions have enacted special regulations for situations in which a defendant is sentenced during separate trials for crimes that could have been adjudicated jointly.[368] In the context of the ICC, such regulation is achieved through a consistent interpretation of Articles 78(2) and (3): if one interpretation is adopted, the defendant would be given credit for separate detention orders, and according to the alternative interpretation, the sentences imposed in different cases would be considered jointly.

279. At a domestic level, it is also recognized that it may be necessary to impose concurrent sentences in order to produce a sentence that reflects all relevant circumstances and reduce 'the crushing effect of the sentence'.[369] These considerations may justify giving effect to mitigating factors even if these factors have already been taken into account previously.[370] In line with this principle, the Chamber erred by failing to give due consideration to the cumulative impact of Mr. Bemba's separation from his children from 2008 onwards. As a result of the fact that Mr. Bemba was never granted provisional release, Mr. Bemba has not been able to spend any time with them during their formative years. The Chamber found in this regard that loss of family members and separation from them is a common circumstance of detention;[371] this finding misses the point that pre-trial detention must always be viewed as 'exceptional', and protracted pre-trial detention even more exceptional. The Chamber therefore erred in failing to give appropriate weight to the fact that unbroken, consecutive sentences of 18 years plus 12 months has a 'crushing effect" in terms of Mr. Bemba's potential reintegration with his family and rehabilitation.

[367] Wasik, p.293.
[368] **Dutch Penal Code**, Section 63: If a person, after a punishment has been imposed on him, is again found guilty of a serious offence or of a minor offence committed prior to said imposition of punishment, the provisions pertaining to the imposition of concurrent punishments shall apply; **German Penal Code**, Section 55 provides that concurrent sentences apply to convicted persons, who had an initial sentence imposed upon them and who are then convicted subsequently of another offence which was committed before the previous conviction; **NSW Crimes Act**, Section 55; See Chapter VII, Section 6 **Finnish Penal Code**, which provides that if a person, who has already been given a custodial sentence, is charged with another offence committed before the sentence was passed, the earlier sentence of imprisonment can be taken into account as a mitigating circumstance.
[369] Ashworth, p.273-274.
[370] Ashworth, p.274.
[371] SJ,para.244.

280. Finally, if deterrence is the goal of sentencing then the immediacy with which the defendant is 'punished' is of crucial importance. A sentence that will be served at some unknown date in an unknown location has very little impact in terms of sending a message here and now.

13. The Chamber erred by determining the amount of the fine imposed on Mr. Bemba on the basis of a manifestly unfair procedure, and unknown/arbitrary criteria.

281. The Defence does not contest the decision of the Chamber to sanction Mr. Bemba through a fine. This is the most appropriate sanction for the conduct attributed to Mr. Bemba, and the Defence has and will continue to fully cooperate with the execution of any financial penalty upheld by the Appeals Chamber.[372]

282. The Defence, nonetheless, contests the amount fixed by the Chamber in light of the lack of procedural fairness as concerns this aspect of the sentencing decision, and the arbitrary and disproportionate nature of the amount fixed by the Chamber.

283. In terms of the procedure adopted for ascertaining the availability of Mr. Bemba's assets, the Single Judge requested the Registry to submit a report concerning the defendants' 'solvency',[373] but did not establish any guidelines concerning the manner in which the report should be compiled, or the threshold to be utilized.

284. This ambiguity was particularly problematic in the case of Mr. Bemba.

285. In its decision of 30 August 2016, the Single Judge of the Trial Chamber recognized that the Registry was obliged to issue a new assessment as concerns the nature of Mr. Bemba's solvency and potential entitlement to legal assistance at the commencement of each phase of the proceedings. [374]

286. After engaging in significant attempts to resolve this issue through dialogue and cooperation with the Registry,[375] on 1 November 2016, the Bemba Defence submitted a detailed request for review of Mr. Bemba's indigence status, in light of

[372] Annex E.
[373] ICC-01/05-01/13-1990,p.4.
[374] ICC-01/05-01/13-1977,paras.15-16.
[375] ICC-01/05-01/13-1997-Anx-Red,paras.5-22.

the new phase of the proceedings, and significant degradation in the value of assets, which had not been accounted for in any previous Registry reports.[376] The request included private and confidential information provided by family members and third parties, for the sole purpose of proceedings before the Registry.[377]

287. The Defence request further noted that the Registry had declined to respond to repeated requests to provide information concerning the basis for its calculations and estimations of Defence assets.[378] This includes information concerning the asset freeze ordered by Trial Chamber III, which was filed ex-parte Registry, Trial Chamber III only. Although the Defence repeatedly expressed its willingness to cooperate, the Registry declined to meet with the Defence to clarify or explain any issues that remained unclear to the Registry, and to otherwise enable the Defence to address such issues.[379] The Defence was asked, essentially, to jump through hidden hoops.

288. At the time that the Defence were required to submit evidence for sentencing on a fully *inter partes* basis, the Registry had not yet issued its determination on the Defence request, nor had the Registry requested further information or clarification.

289. Prior to the sentencing hearing, four of the Defence teams requested the Chamber to vary the sentencing calendar such that the Registry would file its report the day before the Defence deadline. The Bemba Defence responded that in light of the particularly complicated property situation of Mr. Bemba (involving assets in multiple jurisdictions, in different languages, many of which were subject to complicated ownership regimes), and the fact that as a detained person, Mr. Bemba did not have access to his financial records, the requested remedy would not be sufficient if the report provided new and unforeseen information. The Defence therefore requested to be afforded an opportunity to submit additional written observations in connection with any new and unforeseen information.[380]

290. The Registry responded in turn that it would be in position to file by 6 December, and that its observations would be based on the information submitted by

[376] ICC-01/05-01/13-1997.
[377] ICC-01/05-01/13-1997-Conf-Exp-Anx1,paras.13-22.
[378] ICC-01/05-01/13-1997-Anx1-Red,paras.5-12.
[379] ICC-01/05-01/13-1997-Anx1-Red,para.22.
[380] ICC-01/05-01/13-2075.

the Defence as part of the indigence proceedings, and would not include new or unforeseen information.[381] On the basis of these assurances, the Chamber ordered the Registry to file by 6 December, whilst rejecting the Bemba Defence request to submit additional written observations on any information that was not previously disclosed to the Defence.[382]

291. The Registry observations, which were distributed at 8.13pm on 6 December,[383] included:

a. assets and information that had never been disclosed previously to the Defence;[384]
b. information that directly contradicted Registry observations submitted in ICC-05/01-01/08;[385]
c. information that either directly contradicted, or ignored the documents and information provided by the Defence;[386] and
d. estimates that the Registry had failed to update to reflect depreciation or the accumulation of debts. [387]

292. The Registry did not provide any information or methodology concerning the estimates it attributed to specific assets, nor did it provide any documentation concerning the existence of assets or property that had not been disclosed previously.

293. Days before the scheduled issuance of the sentencing judgment, the Registry filed an updated report, which acknowledged firstly, that certain estimates of depreciable goods were calculated in 2009, and secondly, that certain assertions concerning Mr. Bemba's alleged ownership of assets were based on verbal information only.[388] The Defence filed an immediate request to be able to submitted observations concerning the impact of this information on the value of Mr. Bemba's assets.[389] The Chamber rejected this request in the judgment itself, on the basis,

[381] Annex G.
[382] ICC-01/05-01/13-2078,para.8.
[383] Annex H.
[384] ICC-01/05-01/13-2089-Conf-Exp-AnxD,pp.3- 4.
[385] ICC-01/05-01/13-2089-Conf-Exp-AnxD,p.3.
[386] ICC-01/05-01/13-2089-Conf-Exp-AnxD,pp.2-8
[387] ICC-01/05-01/13-2089-Conf-Exp-AnxD,pp.3, 5.
[388] ICC-01/05-01/13-2119.
[389] ICC-01/05-01/13-2120-Conf-Exp.

which the Defence clearly disputes, that the Defence had been afforded a 'full opportunity' to address these issues, and the new information did not impact on the Chamber's 'views'.[390]

294. The Chamber's assessment and reasoning concerning the amount of the fine imposed on Mr. Bemba, and Mr. Bemba's ability to meet the costs of such a fine through his available assets, is comprised exclusively of the following statement:[391]

> Recognising Mr Bemba's culpability, and considering his solvency, the Chamber is of the view that he must be fined EUR 300,000.

295. The Chamber's 'consideration' of Mr. Bemba's solvency was in turn, confined to a rote citation of the Registry 'Solvency Report' concerning Mr. Bemba's assets.[392] The Chamber failed to address, or issue a reasoned opinion in relation to any of the concerns and arguments raised by the Defence.

296. Rule 166(3) specifies that the total amount of any fine imposed by the Court for Article 70 offences shall not exceed,

> 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and is or her dependents.

297. Nonetheless, in determining that Mr. Bemba should be fined 300, 000 euros, the Chamber issued no findings concerning either the total value of Mr. Bemba's assets (including verification as to his ownership, and whether they were liquid or realizable), or the amount required to ensure the ongoing financial needs of Mr. Bemba's dependents. Mr. Bemba's obligations to *bona fide* third parties were also not addressed.

298. The Chamber essentially treated the Registry's assessment as adjudicated facts, notwithstanding that the assessment included assets that had never been

[390] SJ,fn. 412.
[391] SJ,para.261.
[392] SJ,fn. 412.

referenced previously, and calculations that contradicted previous Registry assessments or methods of estimation.[393] It was a clear legal error for the Chamber to firstly, delegate the duty to investigate such matters to the Registry, rather than the Prosecution, and secondly, abrogate its own decision make duties to the very same entity tasked with investigating the matter. These errors occasioned significant prejudice to Mr. Bemba by rendering him liable to pay a debt on the basis of assets that might not exist, or if they do, might be incapable of satisfying the amount set by the Chamber.[394]

299. The Chamber's approach:

a. Reversed the burden of proof, and failed to satisfy the threshold of beyond reasonable doubt;
b. Was *ultra vires* regarding the appropriate role and function of the Registry;
c. Violated the right of the Defence to be heard, and to have adequate time and facilities to respond;
d. Was contrary to the Chamber's duty to provided adequate reasons; and
e. Erred in law by placing too much weight on the amount of Mr. Bemba's assets, rather than the extent of his culpability.

300. Article 67(1)(i) provides that the accused has the right not to have imposed on him any reversal of the burden of proof, or onus of rebuttal. The threshold of beyond reasonable doubt also applies to all adverse elements concerning the sentence imposed on the defendant, which necessarily includes the penalty. Given that a fine can be converted to a prison sentence if the defendant does not pay, a lower threshold would expose the defendant to custodial consequences without the necessary due process protections.[395]

301. In contradistinction to these legal principles, the Chamber based its fine on unsubstantiated evidential assertions from the Registry, which concerned contested issues of fact, and appears to have placed the burden of proof on the defendant to disprove the accuracy of such assertions.

[393] ICC-01/05-01/13-2089-Conf-Exp-AnxD; ICC-01/05-01/13-2120-Conf-Exp,paras.7-11.
[394] For example, at the time that this brief was filed, the Registry has yet to confirm to the Defence the precise amount of funds in Mr. Bemba's frozen bank account in the DRC: Annex E.
[395] *Campbell and Fell* § 72; *Weber v. Switzerland* § 34; *Demicoli v. Malta* § 34; *Öztürk v. Germany* §49, 54

302. The Chamber effectively transformed the Registry, a neutral entity which is also responsible for servicing the needs of the Defence, into an investigative arm of the Chamber, whilst exempting it from the duties of disclosure or burden of proof that would otherwise apply to a party. This fell foul of the right to adversarial proceedings, and consistent ICC case law, affirming that the power to investigate inheres exclusively within the Prosecution;[396] "the Registrar is not given any authority to investigate alleged offences in this [Article 70] or any other context".[397]

303. The Appeals Chamber has also previously expressed caution concerning the extent to which a Chamber should rely on avenues other than the Prosecution in order to satisfy the burden of proof. The Appeals Chamber has thus underscored that the fact that the Chamber can invoke its power under Article 69(3) to allow victims to submit evidence on innocence or guilt should not displace the Prosecution's burden to establish such matters, nor should it override the presumption that evidence is primarily tendered by the parties.[398] Any evidence solicited through Article 69(3) must be disclosed to the Defence sufficiently in advance in order to respect the right to adequate time and facilities.[399]

304. In line with the above principles, and given that the Prosecution submitted no evidence or argument concerning the quantum of Mr. Bemba's assets (and requested no assistance from the Chamber to obtain information in order to do so),[400] the Chamber should have found that the burden of proof had not been satisfied in relation to particular assets or amounts that were disputed by the Defence.

305. It was also a reversible legal error to treat the Registry report as evidence that was capable to satisfying the standard of beyond reasonable doubt. The information in the Registry report was collected and compiled in connection with the legal procedures concerning the assessment of legal aid. This procedure places the burden of proof on the applicant (Mr. Bemba), as reflected in several assertions in which it clear that the Registry estimate is not based on concrete evidence, but rather on Mr.

[396] ICC-01/04-01/07-2731,para.18; ICC-01/04-01/06-T-350-Red-ENG,pp.16-17.
[397] ICC-01/04-01/06-T-350-Red-ENG,p.17,lns.7-8.
[398] ICC-01/04-01/06-1432,paras.93, 95; ICC-01/04-01/07-2288,paras.47-48.
[399] ICC-01/04-01/07-2288,paras.48,52, 53.
[400] Cf ICC-01/05-01/13-2026 concerning the OTP request for access to information concerning amounts spent on the 14 witnesses.

Bemba's failure to disprove or displace the Registry's assumption.[401] Within the realm of penal sanctions, it is an approach which is incompatible with the presumption of innocence, and the privilege against self-incrimination. [402]

306. The Chamber failed to provide an explanation as to why 300, 000 euros was an appropriate tariff for Mr. Bemba's culpability, bearing in mind that at other international and internationalised courts, "the average maximum fine that can be imposed at such courts is 44, 000 euros, and the average actual fine imposed on individuals is 11, 530 euros."[403]

307. The overall amount is indeed approaching the amount that would apply to the penalties for war crimes and crimes against humanity, as reflected by the reparations judgment in the *Katanga* case, which held that Germain Katanga was individually liable for a reparations order of USD 1,000,000 in connection with war crimes entailing the murder of at least 30 civilians.[404]

308. The disparity between the respective fines imposed on Mr. Bemba and Mr. Kilolo also leads to the conclusion that the key factor as concerns Mr. Bemba was the amount of his assets, rather than the extent of his culpability. This was a reversible legal error. Unless they are attributable to the wrongful conduct, the assets owned by a convicted person are entirely irrelevant factor for the purposes of **sanctioning** a defendant.

309. It is telling in this regard that the financial capacity of a convicted person is referenced in connection with the person's ability to pay a fine,[405] rather than in connection with their culpability, or as a factor that warrants aggravation pursuant to Rule 145. This distinction underscores that the purpose of referencing the person's financial capacity was to ensure that even if a particular numerical figure was found to be commensurate to a person's culpability (based on the factors set out in Rule 145), the Chamber would be obliged to then tailor the fine to the specific financial

[401] ICC-01/05-01/13-2081-Conf-Exp-AnxI-B.
[402] *Funke v France*, para. 44*; Campbell and Fell* § 72; *Weber v. Switzerland* § 34; *Demicoli v. Malta* § 34; *Öztürk v. Germany* §49, 54
[403] ICC-01/05-01/13-2089-Conf,para.143.
[404] ICC-01/04-01/07-3728, para.264,p.129; ICC-01/04-01/07-3484-tENG,para.47.
See ICC-01/05-01/13-1997-Red, paras.108 -110 concerning the link between reparations and fine
[405] Rule 166(3).

capacity of the defendant. This served to avoid undue hardship as concerns the person's financial dependents (who are innocent third parties) or the fine being converted to a custodial sentence due to the person's inability to meet the debt. [406]

310. The Chamber nonetheless put the cart before the horse, and determined the extent of the fine by reference to Mr. Bemba's means to pay it, rather than his degree of culpability, since no reasonable Chamber could possibly determine that 300, 000 euros is an appropriate fine to impose on a defendant:

a. Who did not financially benefit from the conduct,[407] but to the contrary, incurred a significant financial penalty by virtue of the costs expended on witnesses, whom the Chamber and Prosecution knew to be false;[408] and
b. Who was convicted on the basis of conduct directed to collateral issues rather than the merits of the case.

311. This approach is unfair, and leads to arbitrary and discriminatory results between defendants who are otherwise judged to be equally culpable.[409] This is demonstrated by the potential consequences of non-payment: using the ICTY tariffs, Mr. Kilolo would face a potential sentence of 30 days, whereas Mr. Bemba would be sentenced to an additional 300 days.[410]

312. The Defence therefore requests the Appeals Chamber to adjust the fine in order to reflect the proper extent of Mr. Bemba's culpability within the scope of this case. An appropriate fine would therefore be one that is in the same range as the fine imposed on Mr. Kilolo.

14. CONCLUSION

[406] See ICTY precedents affirming this duty, cited in ICC-01/05-01/13-2089-Conf,fn.105.
[407] *R. v. Forsythe*; *R. v. Maund*.
[408] ICC-01/05-01/13-2089-Conf, paras.73-76.
[409] ICC-01/05-01/13-2089-Conf, paras.141-142.
[410] In *R. v. Benmore*; *R. v. Chatt*; *R. v. Green and Green*, at 329, and *R. v. Michel*, at 379, the UK Court of Criminal Appeal underscored the duty of the Court to ensure tha**t** the aggregate of the sentence of imprisonment imposed for the offence, and the default term which the offender will have to serve if the fine is not paid, do not constitute an excessive sentence when considered as a whole.

313. Mr. Bemba maintains that his conviction should be reversed in full; mitigation, even if warranted, should not be awarded in lieu of a full acquittal. But, should the Appeals Chamber uphold Mr. Bemba's conviction in whole or in part, then Mr. Bemba stands ready to cooperate fully with any penalty and punishment imposed by the Court. The point of this appeal was not to avoid personal responsibility or punishment, but to move the Appeals Chamber to impose a fair and proportionate penalty that does not unnecessarily prolong Mr. Bemba's separation from his family for unnecessary or legally invalid reasons. That is the heart of this appeal: in line with the principles of sentencing for non-violent offences, the particular limits of Mr. Bemba's individual culpability, and the protracted length of his confinement and separation from them over the last 10 years, Mr. Bemba should be sanctioned in a manner that allows him to be reintegrated with his family as soon as possible. It is also an outcome that it is most consistent with the interests of justice, bearing in mind the extraordinary circumstances underpinning this first Article 70 case before the ICC, and the impact it had on Mr. Bemba's privacy and Defence rights.

314. The Defence, therefore respectfully requests the Honourable Appeals Chamber to:

i. Reverse the sentence imposed by the Trial Chamber; and
ii. Impose a reasonable and proportionate fine in full satisfaction of Mr. Bemba's culpability for the charged Article 70 offences.

315. In the alternative, should the Appeals Chamber uphold the necessity and proportionality of additional custodial measures, the Defence respectfully requests the Appeals Chamber to:

i. Afford Mr. Bemba credit for the time spent in detention since the issuance of a detention order in the Article 70 case; or
ii. Find that the sentence should be served consecutively to the sentence imposed in the Main Case, and in the event that Mr. Bemba is acquitted in the Main Case or the sentence is reduced, Mr. Bemba

should be afforded full credit in the Article 70 case for any surplus detention served in the Main Case.[411]

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Dated this 28th day of June 2017

The Hague, The Netherlands

[411] This credit should also be used to satisfy the fine: ICC-01/05-01/13-2089-Conf,fn.187.