Cour
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International
Criminal
Court

Original: **English**

No.**: ICC-01/05-01/13**
Date: **17/12/2018**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, President**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

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 Annex A and Confidential Annex B
Article 82(1)(a) Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled "Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo

Source: **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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I. Introduction

1. Pursuant to Article 82(1)(a) of the Statute, the Defence for Mr. Bemba files its appeal against the sentence imposed by Trial Chamber VII, in its 'Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo'(the Re-Sentencing Decision).[1]

2. The Defence advances three grounds in support of this appeal:

- The **First Ground** concerns the Trial Chamber's failure, and indeed inability to impose a sentence that complied with the legal tests set by the Appeals Chamber. This legal error stems from the Trial Chamber's continued reliance on a flawed evidence record, and a flawed system concerning the submission/admission of evidence. This procedural error has vitiated the ability of the Appeals Chamber to correct the errors in sentence, on appeal. Given the magnitude and particular nature of these errors, the only remedy is to quash Mr. Bemba's conviction immediately, or after receiving submissions pursuant to Article 82(1)(b) of the Statute;
- The **Second Ground** concerns the extent to which the constituent elements of Mr. Bemba's right to a fair and impartial trial were destroyed by two separate, but mutually reinforcing, violations of his fundamental rights.
    - As a result of the Trial Chamber's interpretation of the credit provisions in Article 78(2) of the Statute, the clock on Mr. Bemba's Article 70 detention stopped running during the appeals phase. Since his sentencing credit was 'frozen', he could not invoke the *habeas corpus* protection in Article 81(3)(b) of the Statute. By the time that his credit was 'unfrozen' on 8 June 2018 (pursuant to his Main Case acquittal), it had grossly exceeded the limits of his culpability. Nonetheless, as a result of a legal error concerning its definition of 'lawful detention', the Trial Chamber failed to recognise, or remedy this arbitration detention, and therefore imposed a manifestly excessive sentence;

[1] ICC-01/05-01/13-2312

- Following his Main Case acquittal, the Prosecutor initiated substantive attacks on the validity and legitimacy of this outcome. The Trial Chamber erred in procedure, and abused its discretion by granting the Prosecution 'wide latitude' to do so, and failing to deprecate or otherwise remedy the impact on Mr. Bemba's rights. There is also an appearance that these submissions tainted the impartiality of the proceedings, and impacted adversely on the manner in which the Trial Chamber appreciated the issues before it. This included the Trial Chamber's exclusion of relevant factors that derived from Mr. Bemba's Main Case acquittal.
- The right to a fair sentence is part of the right to a fair trial, but the cumulative impact of these errors is such that it is no longer possible to assess Mr. Bemba's culpability for the charged offences, in a fair and impartial manner. As observed by Judge Morrison and Van den Wyngaert, excessive detention creates a "perverse incentive for the Trial Chamber to arrive at a conviction in order to 'justify' the extended detention".[2] This incentive applies equally to sentencing evaluations of the degree of the defendant's culpability.
- The only appropriate remedy is to stay the proceedings, on a permanent basis.

- The **Third Ground** concerns the Trial Chamber's errors in law, and abuse of discretion, in relation to the application of the totality principle to Mr. Bemba's culpability and individual circumstances. The Trial Chamber imposed a manifestly excessive and disproportionate sentence as a result of its failure to consider, and provide any set-off in relation to the length of Mr. Bemba's detention. The Chamber also imposed a fine that was calculated by reference to Mr. Bemba's solvency, rather than his culpability. Finally, as a result of the Chamber's legally incorrect approach to Article 23 and related Article 70 provisions, the Trial Chamber allowed Mr. Bemba to be subjected to an *ultra vires* penalty, imposed pursuant to parallel domestic proceedings. The premature imposition of this measure, in turn, triggered Mr. Bemba's *ne bis in idem* protection against further proceedings and punishment at the ICC. To the extent that any further measures can and should be imposed on Mr. Bemba, the appropriate sentence would be a reasonable fine tailored to his culpability (for example, 30, 000 euros).

[2] Separate Opinion, Main Case Appeals Judgment, para. 73.

II. Ground One: The Trial Chamber erred in law insofar as it failed to comply with the Appeals Chamber's directive to issue a concrete determination of the degree of Mr. Bemba's participation and the harm caused by his conduct, which resulted in a disproportionate sentence. The Chamber's failure to issue such determinations is linked inextricably to a procedural error concerning its erroneous approach to evidence. Given the absence of first instance findings, it is not possible to rectify this error without revisiting and reversing Mr. Bemba's underlying convictions.

A. The Trial Chamber erred in law insofar as it failed to comply with the Appeals Chamber's directive to issue a concrete determination of the degree of Mr. Bemba's participation and the harm caused by his conduct

3. In its Judgment on Sentence, the Appeals Chamber found that the Trial Chamber's Sentencing Decision lacked clarity and elaboration as to the basis for imposing a lower sentence for Mr. Bemba's conviction for the solicitation of false testimony, as compared to his conviction under Article 70(1)(c).[3] The Appeals Chamber also found that the basis used by the Trial Chamber to assess the gravity of the offences was unsuitable,[4] and based on an artificial hierarchy.[5] The Appeals Chamber therefore directed the Trial Chamber to issue a concrete, fact-specific determination of the harm caused by the false testimony.[6]

4. The tenor of both the errors identified by the Appeals Chamber was the Trial Chamber's reliance on abstract and artificial distinctions, rather than concrete, fact-based determinations. Regrettably, the Trial Chamber's Re-sentencing Decision repeated these errors, and failed to apply the correct tests articulated by the Appeals Chamber.

1. The Degree of Mr. Bemba's Participation

5. In the Re-Sentencing Decision, the Trial Chamber confirmed its 2017 assessment of the degree of Mr. Bemba's participation in Article 70(1)(a) offences (that it was of a "somewhat restricted nature"), and furthermore, that it was correct to place weight on

[3] ICC-01/05-01/13-2276-Red, para. 61.
[4] ICC-01/05-01/13-2276-Red, para. 42.
[5] ICC-01/05-01/13-2276-Red, para. 44.
[6] ICC-01/05-01/13-2276-Red, para. 45.

the "somewhat restricted nature" of this participation.[7] Following the Appeals Chamber's findings concerning the nature of testimonial evidence, the Trial Chamber agreed that the 'control' exercised by a third person over false testimony was potentially more limited than the control exercised over the offence of corruptly influencing witnesses.[8] The Trial Chamber also did not revise its 2017 assessment that the degree of Mr. Bemba's participation in this offence was almost, but not quite the same, as the degree of his participation in Article 70(1)(c) offences.

6. If the Trial Chamber had assessed these findings by reference to the test adumbrated by the Appeals Chamber (that is, by reference to the degree of participation), there would have been no evidential basis to increase the Article 70(1)(a) sentence imposed on Mr. Bemba. And yet, the Chamber nonetheless concluded that "[a]s for Mr Bemba's degree of participation and intent, the Chamber revises its assessment to reflect its new considerations on principal versus accessorial liability in the present case."[9] These 'new considerations', as cited in footnote 196, are the entirety of section V.B of the decision. This section, in turn, contains no specific analysis of the degree of Mr. Bemba's participation in Article 70(1)(a) offences. Rather, the Chamber merely found that since the degree of participation was "almost the same" (but again, not quite the same), the Chamber simply would not give any weight to this factor.[10]

7. This was a clear error of law. Rule 145(1)(c) specifies that the Trial Chamber must give consideration to the defendant's degree of participation in the offences; the Chamber has no discretion not to consider, or give weight to this factor. The error identified by the Appeals Chamber was not that the Trial Chamber gave weight to this factor, but that the Chamber failed to elaborate how it assessed this factor in relation to Mr. Bemba's conduct. While possible that participation as an accessory might be less grave than co-perpetration, this will depend on the particular circumstances of the case, and the defendant.

8. The Chamber's counter-claim that "there is not much reason in this particular case for according specific weight to the modes of liability when determining the

[7] ICC-01/05-01/13-2312, para. 45.
[8] ICC-01/05-01/13-2312, para. 41.
[9] ICC-01/05-01/13-2312, para. 117.
[10] ICC-01/05-01/13-2312, para. 41.

sentencing"[11] raises significant concerns regarding the nature and purpose of the charges in the Article 70 case, and the precise nature of Mr. Bemba's conviction under these charges.

9. Mr. Bemba's sentence should have been restricted to the participation for which he was charged. Mr. Bemba was charged and convicted for solicitation rather than inducement. The Trial Chamber further recognised in its Trial Judgment that solicitation entailed a more restricted form of participation and control than inducement.[12] This was the legal framework under which this case was prosecuted and adjudicated, and it was not reversed on appeal. Whereas there might – depending on the facts – have been some basis for concluding that the conduct underpinning inducement is similar to co-perpetration – there should have been some gradation of difference as concerns solicitation. And yet, Mr. Bemba ultimately received a higher sentence for soliciting false testimony than Mr. Kilolo received for inducing false testimony (12 months as opposed to 11 months). The Chamber's ultimate avowal that "in this particular case", there was no difference between the different convictions suggests that Chamber had no clear basis for ascertaining the evidential findings underpinning the different convictions, and as a result, crafted an arbitrary result that overrides the proper limits of the charges against Mr. Bemba.

10. This conclusion is further bolstered by the Chamber's failure to give any consideration to appellate findings, which qualified the nature of Mr. Bemba's participation in Article 70 offences. For example, whereas the 2017 sentencing decision relied on findings concerning Mr. Bemba's indirect and direct participation in Article 70(1)(a) offences,[13] the Appeals Chamber resiled from the finding of direct participation,[14] presumably to ensure conformity with the confirmed charges.[15] Although there is no automatic hierarchy of gravity as concerns modes of liability, the nature of participation (direct or indirect) is a relevant consideration that should have been addressed by the Chamber;[16] "the blameworthiness of the person is

[11] ICC-01/05-01/13-2312, para. 41,
[12] Trial Judgment, para.76.
[13] ICC-01/05-01/13-2275-Red, para. 222.
[14] "In the section of the Conviction Decision on the legal characterisation of the conduct of the accused, the Trial Chamber, when addressing solicitation of false testimony, did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses "through Mr Kilolo and Mr Mangenda"." ICC-01/05-01/13-2275-Red, para. 155.
[15] "Mr. Bemba did not directly pay or coach the witnesses": ICC-01/05-01/13-749,para.102.
[16] *Prosecutor v. Blaškić*, Appeals Judgment, 29 July 2004, IT-95-14-A, para. 696; *Prosecutor v. Krstić*, Trial Judgment, 2 August 2001, IT-98-33-T, para. 714: "Indirect participation is one circumstance that may go to

directly dependent on the extent to which the person actually contributed to the crime in question".[17] It was therefore incumbent on the Chamber to consider the specific extent to which the matrix of Mr. Bemba's involvement (tacit approval combined with indirect participation) impacted on the witnesses' false testimony. The Chamber failed to address issues of impact, or to explain otherwise how the reduced nature of Mr. Bemba's participation in this offence was compatible with their decision to not only increase his sentence, but to also impose a sentence that was higher than those who had a more direct impact on the witnesses' false testimony. The absence of reasoning on such key points is reflective of an approach that is equally arbitrary as the Chamber's previous reliance on an artificial hierarchy of modes of liability.

2. The Gravity of Article 70 offences

11. The same lack of clarity is reflected in the manner in which the Trial Chamber addressed the gravity of the specific Article 70 offences in this case. The Appeals Chamber found that the Trial Chamber did not abuse its discretion by relying on the content of the testimony to assess the gravity of the offences.[18] Rather, the Chamber erred by failing to "explain on what basis it considered that the fact that false testimony does not relate to the "merits" of a case is generally relevant to the determination of the gravity of the concerned offences, nor why this was the case in the present instance".[19] The Appeals Chamber further found that 'merits *versus* non-merits' was not a suitable basis for assessing the gravity of the lies in question.[20] Instead, the Trial Chamber was directed to evaluate the harm caused to Trial Chamber III's truth-finding functions by the lies in question: that is, a "fact-specific assessment, *in concreto*, of the gravity of the particular offences for which the person was convicted".[21] The Trial Chamber nonetheless addressed its former error by deciding not to give any weight to the content of the false testimony,[22] and then,

mitigating a sentence"; Appeals Judgment, 19 April 2004, IT-98-33-A, para. 268; *Prosecutor v. Babić,* Sentencing Appeal Judgment, 18 July 2005, IT-03-72-A, para.40; *Prosecutor v. Kajelijeli* Judgment and Sentence, 1 December 2003, ICTR-98-44A-T, 963.

[17] ICC-01/04-01/06-3121-Red, para. 468.
[18] ICC-01/05-01/13-2276-Red, para. 41.
[19] ICC-01/05-01/13-2276-Red, para. 41.
[20] ICC-01/05-01/13-2276-Red, para. 42.
[21] ICC-01/05-01/13-2276-Red, para. 44.
[22] ICC-01/05-01/13-2312, para. 33.

assuming that in the absence of this factor, the gravity of the offences increased necessarily.[23]

12. Once again, this approach appears to be completely arbitrary. It was also an error of law and an abuse of discretion. Having employed this factor during the first sentencing process, there was no scope for the Trial Chamber to jettison it in lieu of applying the Appeal Chamber's test concerning the appropriate standard for assessing the gravity of the content of the false testimony. Discretion is not a license for inconsistency or unpredictability.

13. There was also no basis for the Trial Chamber to rely on its 2017 findings, whilst increasing the sentence, without providing any additional justification for doing so. In referring to its 2017 findings, the Trial Chamber averred that it had given "appropriate weight to the importance of the issues on which false testimony was given".[24] But if that were the case, then there would have been no basis to then increase the sentence.

14. The Trial Chamber's claim that it had apportioned weight correctly is also contradicted by the Appeals Chamber's finding that the 2017 decision was flawed due to its reliance on abstract assumptions, rather than fact-specific determinations. If it was an error for the Trial Chamber to assume that testimony on "non-merits" issues should be afforded some weight, then it would equally be an error to assume that no weight should be given to the specific type of false testimony of the different witnesses in this case, when determining the concrete gravity of the offences. As the Appeals Chamber makes clear, this concrete gravity assessment must take into consideration the facts of the case,[25] and the circumstances concerning the issues put to the witness.[26] This is consistent with the plain language of Rule 145(1)(c), which requires the Trial Chamber to assess the gravity of the offences by reference to "the extent of the damage caused",[27] as opposed to the "extent of the damage which *could have been caused"* or hypothetical 'danger'.[28] Rule 145(1)(c) therefore affords the

[23] ICC-01/05-01/13-2312, para. 114.
[24] ICC-01/05-01/13-2312, para. 35.
[25] "the required fact-specific assessment" (para 45), ICC-01/05-01/13-2276-Red
[26] "depending on the circumstances", ICC-01/05-01/13-2276-Red, para. 43.
[27] The same wording is used in other versions i.e. French: "de l'ampleur du dommage causé"; Arabic: " مدى الضرر الحاصلSpanish: "la magnitud del daño causado"
[28] According to the drafting history Rule 145 (1) (c), although a State circulated a discussion paper which included the phrase "the extent of damage caused or the danger posed by the convicted person's conduct", the

Trial Chamber no discretion to sentence the defendant exclusively by reference to the abstract gravity of the offence,[29] or abstract notions concerning the typology of testimony, which are not tied to the specifics of the case at hand. It follows that although the abstract gravity of the offence is a relevant factor, the duty to tailor the sentence to specific circumstances of the case and the defendant further requires the Chamber to consider the concrete gravity of the offence, that is, the actual harm caused by the defendant's conduct. The "extent of the damage" caused by the accused's wrongful conduct must also be based on evidence,[30] and not mere supposition or speculation, with the burden falling on the Prosecution to demonstrate its existence.

15. And yet, neither the 2017 and the 2018 sentencing decision made reference to the actual false testimony of the 14 witnesses, and the concrete impact of this false testimony on Trial Chamber III's truth-finding functions. In particular, the relevant paragraphs in the 2017 decision refer back to paragraph 22 of the Trial Judgment, which sets out a general legal approach concerning the materiality of different types of testimony, by reference to types of testimony set out in the charges (as opposed to the evidential findings in the judgment). Notably, the case law cited in this paragraph concedes that the sentence of the defendant can be reduced if the false testimony in question was incapable of influencing the judge's decision in the particular circumstances of the case.[31] The Trial Chamber nonetheless failed to apply the full spectrum of these principles to the case at hand.

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language concerning the danger posed was omitted, and not included in later drafts, which referred exclusively to damage caused: *See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum*, A/Conf.183/2/Add.1, 14 April 1998, p. 122, fn 13; R. Fife, "Penalties" in R. S. Lee (ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers, 2001), pp. 556, 563; *Proposals submitted concerning Part VII of the Rome Statute of the International Criminal Court, on Penalties by* ***Australia, Canada and Germany***, PCNICC/1999/WGRPE(7)/DP.5, p. 1; **France** *see* DP.1, p. 1; **Spain** *see* DP.2, p. 2; **Brazil** *see* DP.3, p. 1.
See also B. Hola et al.,"International Sentencing Facts and Figures. Sentencing Practice at the ICTY and ICTR", 9 *Journal of International Criminal Justice* 411 (2011), 437.

[29] B. Hola et al.,*ibid.*,p. 423. This distinction between abstract and concrete gravity was cited by the ICC Appeals Chamber in the Lubanga Sentencing Appeal: ICC-01/04-01/06-3122, fn. 110. Trial Chamber VII also already addressed the abstract gravity of the Article 70(1)(a) offences in its sentencing determination (ICC-01/05-01/13-2123, para. 214).

[30] *Prosecutor v. Tadic*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 167 (concerning the fact that the Chamber could not consider the damage the contempt caused to the rights of the defendant in the absence of evidence on this point);

[31] Trial Judgment, fn 31: "However, it is noted that Article 307(3) of the Swiss Penal Code provides for lesser punishment in cases where the testimony is objectively and a priori incapable of influencing the decision of the judge, Trechsel/Affolter-Eijsten, StGB PK, Art. 307 N 30)." The seminal UK case concerning sentencing guidelines for perjury also specifies that the Court should consider "whether the lies which are told or the

16. The Trial Chamber's decision to resort to abstraction, in lieu of such an analysis, was fundamentally prejudicial to Mr. Bemba. This abstraction resulted in a sentence that was not tailored to the individual circumstances of the case or the defendant, and further exempted the Prosecution from having to state and prove its case concerning actual harm. This is, in turn, deprived Mr. Bemba's right to a defence of any meaning.

B. The Chamber erred in law and procedure as concerns its approach to evidence: the Chamber failed to correct, or otherwise address the deficiencies of reasoning in the evidential record, the Chamber failed to establish fair and transparent guidelines concerning the system for the admission of evidence at this phase, and the Chamber failed to apply Article 69(4) to the admission of evidence.

17. The failure to assess the degree of Mr. Bemba's participation and the gravity of the offences in a correct manner was aggravated by the absence of: firstly, any clear record as to weight and relevance ascribed by the Chamber to Prosecution and Defence evidence during the first instance trial and sentencing proceedings; and secondly, any directions concerning the system and standard for admission of evidence at this phase.

18. As concerns the first impediment, the two errors identified by the Appeals Chamber required the Trial Chamber to make a factual assessment as to the specific degree of the defendant's contributions to the Article 70(1)(a) offences, and the harm this engendered. Yet, as a result of the Trial Chamber's approach to evidence, it was not possible to ascertain the precise contours of the evidential record concerning Mr. Bemba, *post* appeal, nor was it possible to ascertain the relevance and weight of specific items of evidence concerning the nature and degree of Mr. Bemba's contribution to Article 70(1)(a) offences.

19. In the Trial Judgment, the Trial Chamber declined to issue reasons concerning the admission of evidence on the grounds that although the Chamber was obliged to 'assess' the relevance and probative value of evidence, it was not required to either

fabrications which are embarked upon have any actual impact on the proceedings in question": *R v Archer* [2003] 1 Cr.App.R.(S.) 86.

record its assessment, or explain the reasons underpinning it, in the judgment.[32] As a result, Trial Chamber VII might know why it relied on certain evidence and not others, and the weight and relevance it assigned to such items in reaching certain key findings, but this knowledge was not shared with the parties or any other Chambers at this court. Nor can it be assumed that Trial Chamber VII applied the correct test to its *in camera* deliberations. As noted by the Appeals Chamber, "ultimately, the Trial Chamber did not find *any* item of documentary evidence submitted by the parties to be inadmissible".[33] Given the volume of documents submitted by the parties, it beggars belief that all were relevant and probative. And, if they were, then this also raises questions as to why the Trial Chamber did not cite to any of the hundreds of documents submitted by the Bemba Defence.[34]

20. The Appeals Judgment produced less, rather than greater clarity. The Appeals Chamber replicated the Trial Chamber's practice of referring to "the evidence" or "the evidence as a whole" to justify certain conclusions,[35] but, in the absence of specific rulings concerning relevance, it is impossible to ascertain whether the Appeals Chamber relied on the same evidential record as the Trial Chamber. Whilst it is true that "what matters is how strong and convincing the totality of the relevant evidence in relation to a particular fact is",[36] in order to apply this 'totality' approach, it is also necessary to know which items of evidence (including Defence evidence) were deemed relevant to this particular fact. Moreover, when judges refer to the 'totality of evidence', they do so on the proviso that the parties are aware of the items comprising 'the totality of evidence', and the basis by which these items were deemed relevant to the charges and of sufficient probative value to outweigh any prejudice occasioned by their admission.

21. Similarly, in the absence of rulings concerning probative value and weight, it is not possible to ascertain whether the Appeals Chamber interpreted and assessed the evidence in the same manner, particularly as concerns items that might have had more weight vis-à-vis some defendants. This issue of weight is also of particular

[32] ICC-01/05-01/13-1989-Conf, para. 193.
[33] Appeals Judgment, para. 611.
[34] ICC-01/05-01/13-1794-Conf-Corr; ICC-01/05-01/13-1794-Conf-AnxA.
[35] See for example, Trial Judgment, paras. 681, 683, 700, 806, 808, 818, 853, 856; Sentencing Decision, paras. 212 (referring to its 'considerations' on Article 70(1)(c)), 222 (relying on Trial Judgment, para. 856); Appeals Judgment, paras. 145, 151, 825, 837, 855, 875, 878, 997, 999, fn. 2448, 1195, 1211, 1229.
[36] Main Case Appeals Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 15.

importance in a case built on stacked inferences. As observed by Judge Morrison and Judge Van den Wyngaert, "drawing inferences from circumstantial evidence only adds uncertainty. Therefore, if the factual basis of the circumstantial evidence is weak, the inferences drawn from it will be even weaker." [37] This important caveat only comes into play, however, if the Trial Chamber provides a reasoned assessment as to the specific weight of the evidence from which it drew its inferences.

22. The degree of uncertainty was even more pronounced as concerns the relevance and weight of Defence evidence submitted at trial and during the first sentencing hearing. Whereas the Chamber cited some specific Prosecution items, neither the Trial Judgment nor the Sentencing Decision referenced any Defence evidence (apart from the evidence of Dr. Harrison). It was therefore impossible to determine whether the Chamber:
    a. considered that the evidence was irrelevant, unreliable, or outweighed by other Prosecution evidence;
    b. disagreed with the Defence interpretation of the Defence evidence; or
    c. relied on the evidence to reach certain findings concerning the extent of Mr. Bemba's knowledge and contribution.

23. The absence of any record of the Chamber's position on Defence evidence, which negated or qualified the degree of Mr. Bemba's contribution and intent or the harm that resulted, has deprived the Defence of any insight into the foundation of the Chamber's ultimate conclusions concerning the nature of Mr. Bemba's culpability.[38] For example, in both the 2017 and 2018 decisions, the Trial Chamber referred to the "somewhat restricted" nature of Mr. Bemba's contributions to the commission of the offences,[39] and his "varying degree of participation in the execution of the offences",[40] but provided no evidential citations for this position. It is therefore unclear as to whether the Chamber's position was based on: a lacuna in the

[37] Main Case Appeals Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 12.
[38]" the fact that Trial Chamber is not required to make explicit reference to all items of evidence it considers in relation to a particular proposition does not mean that the Trial Chamber is free to pass over contradictory evidence in silence. With respect, we do not think it is acceptable to say to the parties that if the Trial Chamber does not reference a particular item of evidence they should simply assume that the Chamber considered it unreliable. Whereas it may well be the case that the Trial Chamber did find problems with the reliability of the evidence in question, it is still incumbent upon it to provide cogent reasons for this conclusion. "Main Case Appels Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 16.
[39] ICC-01/05-01/13-2123, para. 223; ICC-01/05-01/13-2312, paras. 44-45.
[40] ICC-01/05-01/13-2123, para. 223.

Prosecution case as concerns Mr. Bemba's knowledge of, and contribution to specific incidents, a particular interpretation of certain intercepts; or, the Chamber accepted Defence arguments concerning the impact of detention on Mr. Bemba's knowledge of, and contribution to actions occurring beyond the four walls of his highly restrictive environment.

24. Confirmation as to whether the Chamber's findings were based on, or informed by particular items of Prosecution or Defence evidence would, at the very least, have allowed the Defence to gain a more precise insight into the Chamber's own understanding of Mr. Bemba's knowledge of, and contribution to specific lies from specific witnesses. Mr. Bemba's conviction rested entirely on a derivative form of responsibility in the sense that because of the 'common plan' (which was never established by direct evidence), the Chamber attributed the actions of Mr. Kilolo and Mr. Mangenda to Mr. Bemba, and further inferred that Mr. Bemba must have known and intended these actions to occur.[41]

25. Given the inferential nature of the case against Mr. Bemba, the Chamber had a duty to consider arguments and evidence that could have supported a reasonable conclusion that, even if other co-perpetrators knew and intended certain illicit conduct to occur, Mr. Bemba did not.

26. And yet, the Trial Chamber failed to provide any judicial pronouncement on Bemba Defence arguments and evidence that impacted specifically on the scope and purpose of the common plan, and Mr. Bemba's knowledge of events, and contributions to actions taken in furtherance of the plan. This included evidential submissions that:

- CAR witnesses lied to the Court and the Defence, for reasons connected to an entirely separate common plan between Joachim Kokaté and them, to instrumentalise the Bemba proceedings for the purpose of undermining the Bozizé regime,[42] which would in turn, further the objectives of Kokaté's movement, the *collectif des officiers libres.*[43] Of key importance to the degree of

[41] The Appeals Judgment acknowledged that the Trial Chamber "did not carry out an individual assessment of whether each of the co-perpetrators played a role in the illicit coaching of each individual witness. Rather, it inferred the co-perpetrators' involvement in the common plan regarding the 14 witnesses from its evidentiary assessment of their individual contributions to the commission of offences and the execution of the plan." para. 1029.
[42] T-15-Conf-Eng, p. 9, lns. 22-25, p. 18, p. 25, lns. 15-25. CAR-D21-0006-0083 at 0094, lns. 329-333.
[43]CAR-OTP-0085-0296

Mr. Bemba's responsibility for the solicitation of their false testimony, the witnesses testified that they were incentivised to testify falsely by Kokaté (about their background and issues concerning promises and contacts),[44] and believed that they would benefit politically,[45] including by being appointed as a minister in any government established by Kokaté. When the political winds in CAR turned, and their expectations that they would receive DSA and/or asylum through testifying in person in The Hague were dashed, several witnesses turned tail (including Kokaté and Arido), thus underscoring that the driving factors were independent of the Defence, and that as concerns the CAR witnesses, the tail wagged the dog rather than *vice versa.* Mr. Bemba was also unaware, for the duration of the case, that these witnesses had lied about their background;[46]

- Defence evidence which undercut any nexus between contacts with the privileged '11' number, and the common plan (for example, that the date of such contacts coincided with Mr. Kilolo's missions to DRC,[47] predated the common plan, and were subjected to detention unit voice vetting);[48]
- The Bemba Defence acknowledged, in July 2012, that it had interacted with D-54,[49] and submitted a pre-testimony summary of D-54.[50] As such, it would be implausible that Mr. Bemba would propose, in August 2013, that D-54 should deny having had <u>any</u> meetings with the Defence, to the Chamber (as opposed to his military supervisors or colleagues). It is more reasonably linked to the fact that DRC military witnesses could be prosecuted for meeting with the Defence without official authorization from their supervisors.[51] Mr. Bemba also evinced a

[44] T-20-Conf-Eng, p.71, ln. 16.
[45] T-20-Conf-Eng, p.71, lns. 17-24.
[46] D-2 utilised his false persona whilst communicating with Mr. Kilolo (CAR-D20-0005-0351), and in conversations with Mr. Bemba, Mr. Kilolo referred to them as soldiers:
CAR-OTP-0082-1309 at 1325, lns. 94-95
AK : il était très proche de … la personne qui parle trop, euh … aussi un peu plus gradé, donc il avait un peu comme une autorité sur lui […]
CAR-OTP-0082-1309 at 1325, lns. 174-176
AK : Je n'ai eu qu'une, celle-là refuse de parler, il me dit de chercher l'autre-là, parce qu'il sait qu'il sera … il parlera parce qu'il est plus gradé que lui. Moi j'ai dit non, ça n'a rien avoir avec le plus gradé. Nous ne sommes pas dans l'armée ici.
[47]CAR-OTP-0074-0065, rows 301, 303, 304, 307, 310-315, 317 and 318; CAR-OTP-0074-0065, rows 478, 480-485, 487, 505, 506, 509-514, 522, 525, 528 and 542. Missions to the DRC: 12-25 April 2012: CAR-D20-0005-0246; 5 July-10 July 2012: CAR-D21-0001-0011; 9 July to 2 August 2012:CAR-D20-0005-0222.
[48] ICC-01/05-01/08-T-303-Red3-ENG,p.17,lns.1-9.
[49] ICC-01/05-01/08-2852-Conf-Red,para.5. See also ICC-01/05-01/08-2244-Conf, paras. 20, 21, 54.
[50] CAR-D04-0004-0079.
[51] ICC-01/05-01/13- T-29-CONF-ENG,pp.20-22; CAR-D20- 0005-0598; CAR-D20-0005-0608; CAR-D20-0005-0627; CAR-D20-0005-0655; CAR-D20-0005-0732; CAR-D20-0005-0664; CAR-D20-0005-0740 CAR-D20-0005-0632; CARD20- 0005-0715; CAR-D20-0005-0717; CAR-D20-0005-0719; CAR-D20-0005-0623.

genuine belief as concerns the truthfulness of lines of inquiry directed to D-15[52] and D-54;[53] and specific witness responses that the Chamber found to be coached, resulted from lines of questioning that were drafted by the team as a whole, independently of Mr. Bemba.[54] When Mr. Kilolo was communicating with D-15 and D-54 in violation of the witness protocol, he avoided Mr. Bemba's phone calls,[55] and when Mr. Bemba managed to be connected to him, he was unaware as to why he was unable to reach Mr. Kilolo.[56]

- Certain key codes were not used in a uniform sense, and could encompass legitimate and illegitimate activities, depending on the specific context and interlocutors. For example, at the same time that Mr. Kilolo informed Mr. Mangenda that he had apparently informed Mr. Bemba of the importance of doing 'colour work' in the days before a witness came to testify,[57] he also requested a legal assistant (in an email copied to the entire Defence team) to highlight passages in a witness's statement for the witness to read in accordance with the witness familiarization protocol;[58] and,
- At the same time as the *faux* scenario, the Defence was drafting an abuse of process motion concerning improper contacts and payments given by the Prosecution to witnesses.[59] Mr. Bemba also communicated his belief to non-tainted members of the team that the Prosecution had offered improper payments to witnesses (Prosecution witnesses), and that bearing the impact this could have on future testimony, it might be wise for the Defence to meet these witnesses to investigate the extent of any improper influence (an approach which is similar to the '*tour d'horizon'* discussed with Mr. Kilolo).[60]

[52] As concerns D-15, in relation to the questions proposed by Mr. Kilolo to be put during re-examination, Mr. Bemba averred that "[A]ny way you look at it, what they're [i.e. the Prosecution are] saying there isn't possible, you know?":CAR-OTP-0091-0127 at 0131,ln.71.
[53] As concerns D-54, if Mr. Bemba (rather than D-19) had provided instructions to Mr. Mangenda to transmit to Mr. Kilolo, it is apparent that these instructions concerned information that Mr. Bemba believed to fall within the witness's own recollection: "("he shouldn't forget to mention the two vehicles they saw": CAR-OTP-0079-0131 at 0134-0135).
[54] CAR-D20-0007-0092, CAR-D20-0007-0069, CAR-D20-0007-0074, CAR-D20-0007-0082, CAR-D20-0007-0094, CAR-D20-0007-0096, CAR-D20-0007-0098, CAR-D20-0007-0100, CAR-D20-0007-0103, CAR-D20-0007-0104, CAR-D20-0007-0125.
[55] CAR-OTP-0080-0604 at 0606,lns.10-15.
[56] "Are you OK? I rang you yesterday, but I couldn't get hold of you": CAR-OTP-0082-0669 at 0671,ln.14.
[57] CAR-OTP-0080-0245 at 0248, lines 50-52
[58] CAR-D20-0007-0064. The witness protocol allowed witnesses to receive copies of their statements, and any statements provided to them or generated by them, during the familiarisation process: ICC-01/05-01/08-1016, para. 21.
[59] CAR-D20-0005-0430.
[60] CAR-D20-0007-0184.

27. The prejudice occasioned by the absence of reasons is particularly pronounced as concerns the Chamber's approach to the detention unit recordings. Notwithstanding the synchronization flaws in these recordings, the Trial Chamber admitted certain incriminating recordings, after having conducted its own independent (in camera) assessment as concerns the impact of the synchronization errors on the individual recordings.[61] Whereas the Trial Chamber relied on isolated statements from Mr. Babala for the purpose of ascertaining Mr. Bemba's knowledge, and further corroborated its interpretation by reference to external documents (such as bank transfers) to which Mr. Bemba was not privy, the Trial Chamber did not refer to the extracts of the detention unit recordings, which the Defence advanced as being exculpatory in nature,[62] nor did it refer to Defence evidence, which corroborated the exculpatory interpretation of such extracts. This included Mr. Bemba's insistence, in a key communication with Mr. Babala dated 16 October 2012, that payments should be for 'recuperation' and payment of debts only,[63] which should have been viewed in connection with:
    - other communications, which reflected Mr. Bemba's ignorance of, or opposition to payments; [64] and
    - the absence of Registry funding for the expenses of prospective witnesses,[65] the absence of any protocols or set rates concerning payments and the forms of assistance that could be provided to potential witnesses on mission,[66] and the correlation between the amounts paid to the witnesses, and the specific expenses claimed by Defence members for their own expenses.[67]

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[61] Appeals Judgment, para 1338

[62] CAR-OTP-0079-0885, lines 153-195 (which reflect Mr. Bemba's opposition to payments, and understanding that they were for Mr. Kilolo's personal comfort on missions – cf,

[63] CAR-OTP-0077-1299(lines 9-41)JPB:Oui, mais je pense que…euh…elle a déjà reçu quoi…euh…pour qui…euh…les trois-la…alors que 07, qui…que…07 récupère et puis le reste qu'il envoie chez l'enfant que tu connais pour l'aider à faire, ce que tu sais la…euh…les…les de ces dix-là, de BRAVO GOLF. Tu comprends?….Tu comprends?....Non, non, non, non, non, elle est à la messe pour le moment. Jusqu'à 20 heures 30. Mm-mm….mais...Demain donc trois. Euh ... que 07 récupère... euh ... cette partie-là, et le reste chez l'enfant…. pour ah…pour BRAVO GOLF, quoi….Comment? Comment?…Encore....**C'est ça la récupération, n'est-ce pas? Ce n'est pas ça**?…Ah ça je ne sais pas ; enfin je vais d'abord demander comme ça demain, mais OK ça va. Bon ça va. Mais, donc….euh…D'accord. OK. Mais… ça va.…Mais…Non, ça va. Donc alors, voies d'abord...fais ces histoires-là...euh...**les trois là comme vous avez payé la dette** et puis…on enlève 1 kg là et puis le reste à l'enfant. Tu comprends?"

[64] ICC-01/05-0l/13-374-Conf-Anx6; ICC-01/05-0l/13-374-Conf-Anx7 (which are both notarised with question marks). See also CAR-OTP-0082-0814 at 0819, lns.130-131.

[65] CAR-D20-0006-1325 at 1330 (response to question 6); CAR-D20-0005-0352; D21-9, ICC-01/05-01/13-T-42-CONF-ENG, p.27 lns.7-9; CAR-D20-0006-1036.

[66] CAR-D20-0006-1325 at 1334; 1D21-9, ICC-01/05-01/13-T-42-CONF-ENG, p.20, lns. 5-13, p. 27, lines 1-6; CAR-D20-0006-1325 at 1330 (response to question 6) and 1332 (response to question 13); CAR-D20-0006-2000; CAR-D20-0006-2015.

[67] CAR-D20-0005-0233 (Kinshasa: Hotel $US 250 per night; Food: $67.50 per day); CAR-D20-0005-0234: Transport, Kinshasa, $US 150 per day; CAR-D20-0005-0237 (Brazzaville: Hotel 120 000 or 150 000 CFA per

28. There can also be no presumption that the Trial Chamber and Appeals Chamber considered all exculpatory evidence, in the face of findings that demonstrate that they did not. For example, in affirming the reasonableness of the Trial Chamber's decision to reject, as speculative, Mr. Babala's contention that certain contacts corresponded to 'call-forwarding', the Appeals Chamber claimed firstly, that no 'argument' or 'substantiation' had been advanced in support of this claim, and secondly, that the Trial Chamber would only have been required to address this Defence argument if the Prosecution had adduced evidence in response to it.[68] This finding ignored the Defence arguments and evidence submitted to substantiate this very point,[69] and appears to suggest that the right to reasons, and to be heard is only actualized if the Prosecution deems a particular Defence argument to be worthy of a response.

29. Similarly in response to the Defence argument that the Trial Chamber had failed to address a raft of evidence demonstrating a break in the chain of causation as concerns the contributions imputed to Mr. Bemba, and the false testimony of the 14 witnesses, the Appeals Chamber ruled in response that this argument did "not engage with the basis of the Trial Chamber's conclusion".[70] The absence of engagement was due, however, to the fact that the Trial Chamber had itself failed to engage with Defence evidence and evidentiary submissions, and, as a result, there were no findings that the Defence could engage with, on appeal. For example, although the Trial Judgment acknowledged that the Defence had asked Kokaté to identify witnesses with genuine experience of the conflict,[71] and Judge Brichambaut appeared to recognise that Kokaté was the missing piece of the puzzle,[72] the Judgment failed

night; Food/incidentals 22 000 CFA or 101 000CFA per day); CAR-D20-0005-0239 at 0240 (Kinshasa, Brazzaville: taxi one way, either 42 euros, $US50, 42.5 euros); CAR-D20-0005-0771 at 0772 (Stockholm: Hotel, 166 euros per night; food, transport, and incidentals: 183 euros per day); CAR-D20-0005- 0258 at 0259: (Douala: Hotel 165 euros per night, food, transport, and incidentals, 178 euros per day); CAR-D20-0005-0262 (Douala: Hotel 60 000 CFA per night, food and incidentals, 18242 CFA per day); CAR-D20- 0005-0263 (Douala, Hotel, 60 000 CFA per night, Food, 23 442 CFA per day); CAR-D20-0005-0264 at 0265 (Douala, taxi – 40 or 50 euros one way, daily costs for accommodation, food, and incidentals: 262 euros per day); CAR-D20-0005-0276 at 0278 (Brazzaville, hotel, 150 euros per night, food, local transport and incidentals: 275 euros per day); See also CAR-D20-0005-0282, CAR-D20-0005-0283, CAR-D20-0005- 0297; CAR-D20-0005-0299; CAR-D20-0005-0302

[68] Appeals Judgment, para. 1406.

[69] ICC-01/05-01/13-1901-Conf-tENG, paras. 159-166, citing evidence from P-361, and the telecom operator (CAR-D22-0005-0003).

[70] Appeals Judgment, para. 888.

[71] Trial Judgment, para. 326. See also CAR-OTP-0087-2426-R01 at 2436, lns. 348 -353; T-15-Conf-Eng, p. 55, lns. 20-23.

[72] T-48-Conf-Eng, p. 5 lns. 23-25, p. 6, lns.1-6

to engage with this further, or draw the necessary conclusions as concerns the implications of this omission as concerns the cogency of the Prosecution's common plan theory, the nexus to Mr. Bemba, and the extent to which the actions of third parties could be imputed to the common plan.

30. As a result of the absence of judicial reasoning on these points, it was impossible for the Defence to quantify the impact of Mr. Bemba's conduct on the false testimony, in a vacuum. Indeed, when the Defence attempted to fill this lacuna by presenting specific arguments concerning the nature and extent of Mr. Bemba's contributions as part of its sentencing submissions, the Chamber accused the Defence of attempting to re-litigate the case.[73] On appeal against verdict, the Appeals Chamber dismissed the arguments as 'alternative theories',[74] without considering that the Trial Chamber's omission to address such alternative theories suggested that the Trial Chamber had failed to apply the proper standard of proof in a circumstantial case.[75]

31. The Defence was therefore compelled to enter the Re-Sentencing phase without the benefit of judicial clarity as to the specific contours of Mr. Bemba's knowledge and contribution to the solicitation of false testimony from each of the 14 witnesses. The absence of reasoned determinations on Bemba Defence evidential arguments also froze this case at the level of pure abstraction, which resulted in an artificially conflated perception of Mr. Bemba's actual culpability. In this regard, although the absence of mitigating factors is not an aggravating factor,[76] the reality is that if the Chamber is working from an abstract conception of either the gravity of the offence or the nature of the defendant's contributions, the absence of mitigating factors will necessarily result in a higher sentence.

32. This leads to the second impediment concerning Mr. Bemba's ability to defend himself during the Re-Sentencing phase: that is, the ability of the Defence to prove such mitigating factors was, moreover, stymied by the absence of specific directions or certainty concerning the system for admission of evidence during the sentencing

[73] ICC-01/05-01/13-2123, para. 225.
[74] See for example, Appeals Judgment, paras. 923, 957, 1049.
[75] See *Prosecutor v. Stakić* Appeals Judgment, 22 March 2006, IT-97-24-A, paras. 219-220;*Prosecutor v. Ntagerura*, Appeal Judgement, 7 July 2006, ICTR-99-46-A, paras 304-306, concerning the fact that in circumstances where the Defence has advanced alternative evidence or interpretations at trial, the Appeals Chamber must also consider whether it was "reasonable for the Trial Chamber to exclude or ignore inferences that lead to the conclusion that an element of the crime was not proven".
[76] ICC-01/05-01/13-2123, para. 25.

phase. Whereas any adverse factual findings entered at the sentencing phase must be established to the standard of beyond reasonable doubt,[77] the Trial Chamber does not seem to have either applied this standard or considered whether this threshold required the application of the standards of admissibility set out in Article 69(1) of the Statute. Rather, in a decision issued mere days before the Resentencing Decision, the Chamber averred that it was not necessary to 'admit' evidence at the sentencing phase, as a pre-requisite for relying on them in the decision.[78] Although the Chamber cites back to a 2016 decision, the 2018 decision marks a significant expansion of the previous approach, which was confined to the potential applicability of Rule 68 to character or psychological evidence.[79] Indeed, it is clear from the Chamber's consideration of an incriminating video, which was first disclosed after the 4 July hearing, that the expansive nature of this approach also extended to incriminating/adverse evidence.[80]

33. This approach constituted an error in law and procedure, as concerns the correct approach to the admission and assessment of evidence, under the Statute. As has been confirmed by the Appeals Chamber, the sentencing phase forms part of the trial process at the ICC.[81] There is, therefore, no legal basis for introducing artificial distinctions concerning the system which applies during one part of this procedure, as compared to another. Indeed, the introduction of a more lenient approach concerning evidence tendered for sentencing would render the due process protections applied at trial, otiose. The Chamber therefore erred by failing to consider the integral role that admissibility provisions play, in ensuring the fairness of the procedure. As remarked by Judge Henderson, the application of the general admissibility rule in Article 69(4) "is the practical reflection of a basic principle of procedural fairness as well as a procedural tool to manage and streamline the presentation and evaluation of evidence".[82] The exclusion of this rule creates an evidential quagmire, which impedes the preparation and effective participation of the parties.

[77] ICC-01/05-01/13-2123, para. 25
[78] ICC-01/05-01/13-2311, para. 13.
[79] ICC-01/05-01/13-2025, para. 7.
[80] ICC-01/05-01/13-2312, para. 103.
[81] ICC-01/09-01/11-1186, para. 79;ICC-01/05-01/08-3249-Red, paras. 37-38.
[82] Appeals Judgment, Dissenting Opinion, para. 44.

34. The Chamber also failed to reconcile its 2017 no-rules based approach, which was based on Rule 68-type sentencing evidence, with the Appeals Chamber's subsequent determination that Rule 68 applies, irrespective as to the purpose for which evidence has been tendered.[83] Given this judicial development, it was a remarkable error of law to persist with an erroneous approach, and further broaden it beyond Rule 68 to include further categories of incriminating evidence.

35. The Trial Chamber was also aware that a majority of the Appeals Chamber had determined that the system employed for the admission of evidence in this case was *ultra vires,* and prejudicial to the defendant. The Defence further drew the attention of the Trial Chamber to the nexus between this flawed system, and the specific errors that had been remitted to the Chamber, for correction.[84] But, although the Trial Chamber had an opportunity to correct its approach, for example, by providing reasons concerning the weight and basis for admission of the evidence relied upon to assess the issues before it, it declined to do so, and further refrained from discussing specific evidential findings. The Chamber therefore consolidated the illegality of Mr. Bemba's conviction and sentence; contrary to Article 64(1), his sentence and conviction continue to rest on an incomplete record (including *in camera* reliability tests and evidential assessments, to which the parties are not privy).

36. Apart from producing abstract results, this unpredictable and amorphous system concerning the evidential record was, by its very nature, prejudicial, as it allowed the Chamber to shape the evidence to fit certain adverse conclusions, whilst disregarding any contra-indications. This is reflected by the Chamber's reliance on:
    - the second Registry financial report (filed, without authorisation, after the deadline set by the Chamber),[85] but not the Registry report concerning Mr. Bemba's post-conviction conduct in detention,[86] which was relevant to his rehabilitation and non-repetition of the conduct that underpinned his Article 70 conviction; and
    - Mr. Kilolo and Mr. Mangenda's compliance with a suspended sentence (that was suspended during the appeal), and conditions of release as factors that militated

[83] ICC-01/05-01/13-2275-Conf, fn. 693.
[84] ICC-01/05-01/13-T-59-ENG, p.44, lns. 14-18.
[85] ICC-01/05-01/13-2312, fn.16.
[86] ICC-01/05-01/13-2299, ICC-01/05-01/13-2299-Conf-Exp-Anx.

against imposing any custodial sentence beyond 11 months,[87] but omission to rely on the same as concerns Mr. Bemba.

37. The Chamber also turned the burden of persuasion concerning the admission of evidence on its head: in a footnote, the Chamber appears to have accepted out of time and duplicative Registry observations, merely because the parties did not ask to respond to *ultra vires* submissions,[88] whereas in 2017, the Chamber refused to allow the Defence to respond to out-of-time Registry observations on the ground that the deadline for addressing such issues had expired.[89] Given that the Trial Chamber had already emphasised during the 4 July 2018 hearing that it would not entertain any further submissions beyond those specifically responding to the Prosecution filing of 2 July,[90] the Defence could not have expected that the Chamber would depart from its 2017 approach. The overall appearance generated by the Chamber's approach to evidence was that the Chamber relied on evidence only to the extent that the evidence supported a particular result (which in this case, was the maintenance of the original sentences).

C. It is not possible for the Appeals Chamber to cure these errors on appeal, by reconstructing the evidential record

38. The Trial Chamber has imposed an arbitrary and disproportionate sentence on Mr. Bemba, which was crafted on the basis of an unfair and unclear procedure, and which fails to apply the criteria established by the Appeals Chamber correctly. And, as a result of the Chamber's failure to enunciate its reasons concerning the admissibility of individual items of incriminating and exculpatory evidence, there is no objective basis for the Appeals Chamber to reconstruct the sentence, in accordance with the correct principles and procedures (absent a trial *de novo*).

39. In essence, the evidentiary reasoning provided by the Trial Chamber throughout this process has rendered it impossible for the Appeals Chamber to exercise meaningful, and impartial oversight over the sentence just issued. As observed by the Appeals Chamber,[91]

> In determining whether a given factual finding was reasonable, a trial

[87] ICC-01/05-01/13-2312, para. 53; ICC-01/05-01/13-2123-Corr, para.136.
[88] ICC-01/05-01/13-2312, fn. 16.
[89] ICC-01/05-01/13-2123, fn. 412.
[90] ICC-01/05-01/13-T-59-ENG, page 4, line 11
[91] Main Case Appeals Judgment, Majority, para. 43.

> chamber's reasoning in support thereof is of great significance. (…) when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the evidence relied upon, but also to the trial chamber's reasoning in analysing it. In particular if the supporting evidence is, on its face, weak, or if there is significant contradictory evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached.

40. And further,[92]

> If a trial chamber's reasoning in relation to a given factual finding does not conform with the principles set out in the preceding paragraphs, this may amount to a procedural error, as the trial chamber's conviction would, in respect of that particular finding, not comply with the requirement in article 74 (5) of the Statute. Such an error has a material effect in terms of article 83 (2) of the Statute because it inhibits the parties from properly mounting an appeal in relation to the factual finding in question and prevents the Appeals Chamber from exercising its appellate review.

41. In line with this observation, in order to quantify the precise degree of Mr. Bemba's contribution and intent as concerns each of the individual offences, it would be necessary to know the specific items of evidence that the Chamber considered to be relevant to these issues, what weight the Chamber attributed to them, and the reasons why the Chamber disregarded exculpatory evidence to the contrary. In the absence of such reasoning, the Appeals Chamber would be forced to either guess, or substitute its own reasoning.[93]

42. Attempts to guess or reconstruct the basis for the Trial Chamber's conclusions would constitute an inacceptable foundation for a final sentence in this case. Firstly, it would be a procedural error for the Appeals Chamber to rely on findings that fail to comport to the basic requirements of Article 74(5) of the Statute,[94] and secondly, any

[92] Main Case Appeals Judgment, Majority, para. 55.
[93] As observed by Judges Morrison and Van den Wyngaert, "a conviction "by sample" would be inacceptable for many reasons, not in the least because it would make a meaningful appellate review all but impossible" Main Case Appeals Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 23.
[94] "article 74(5) of the Rome Statute requires that the judgment of the Trial Chamber 'shall be in writing and

such reconstruction would be contrary to the Appeals Chamber's duty to exercise its functions in an independent and impartial manner. Rather than assessing whether the evidential record in this case supports certain conclusions, the Appeals Chamber would be forced to work backwards, that is, to find the evidence which potentially supports the Trial Chamber's conclusions. The fact that this process is occurring within the strictures of a sentencing process would attract an inevitable degree of bias. The imposition of a sentence presupposes the existence of a valid conviction, and a valid conviction presupposes the existence of a finding, beyond reasonable doubt that Mr. Bemba made an intentional contribution to the commission of false testimony. Nonetheless, such a presupposition strikes at the heart of the Appeals Chamber duty to render an impartial adjudication of such matters, rather than a mere 'rubber stamp'.[95]

43. A further impediment concerns the seismic impact caused by the Appeals Chamber's shift in emphasis regarding the foundation of Mr. Bemba's conviction. As noted above, at several points of the Judgment on Conviction, the Appeals Chamber provided clarifications concerning the interpretation or use of certain items of evidence. In some instances, the Appeals Chamber appears to have overturned key factual findings of the Trial Chamber (for example, that Mr. Bemba solicited false testimony in a direct manner,[96] that he gave a letter setting out instructions for D-54,[97] or that the use of codes was the means by which he contributed to the common plan)[98], created entirely new findings,[99] and in others, by adopting a restricting

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shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.' [Emphasis added.] Given the requirement upon the ICC Trial Chamber to give 'a full' and reasoned statement of its 'findings on the evidence and conclusions,' it may then not be so readily said that there is a 'discretion' in the Trial Chamber 'to evaluate whether the evidence as a whole is credible', as was asserted by the ICTY Appeals Chamber in Kvočka and since by this Appeals Chamber." Main Case Appeals Judgment, Separate Concurring Opinion, Judge Eboe-Osuji, para.39.

[95]Main Case Appeals Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 14.

[96] ICC-01/05-01/13-2275-Red, para. 155: the Appeals Chamber determined that the Trial Chamber's findings concerning Mr. Bemba's responsibility for the solicitation of false testimony "did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses "through Mr Kilolo and Mr Mangenda". Cf Trial Judgment, para. 856 (which refers to Mr. Bemba exerting a direct influence on D-19 and D-55).

[97]At para. 1225, the Appeals Chamber clarified that interpreting a communication between Mr. Kilolo and Mr. Mangenda, the Trial Chamber had in fact realised that they were referring to a Defence exhibit, and not a letter from Mr Bemba setting out instructions for them. This clarification does not, however, sit well with the Trial Chamber's conclusion that this letter was "indicative of the directive character of Mr Bemba's involvement": Trial Judgment, para. 757.

[98] Appeals Judgment, para. 434: "There is no indication that the Trial Chamber relied generally on the use of coded language as proof of criminal behaviour, but rather analysed specific passages in which codes were used." Cf, Trial Judgment, para.683 "In establishing the existence of an agreement among the three co-perpetrators,
the Chamber, in its assessment of the evidence as a whole, relied on evidence demonstrating (…)(iv) taking

interpretation of the Trial Judgment, the Appeals Chamber has highlighted the lack of probative evidence supporting key findings (for example, the absence of evidence concerning Mr. Bemba's knowledge and involvement in illicit coaching, and money and promises given to witnesses in exchange for false testimony).[100]

44. Indeed, the Trial Chamber's finding concerning Mr. Bemba's intent concerning illicit coaching (as set out at paragraph 924) relies on three general paragraphs with no evidential citations (paras. 805, 807 and 817), and the finding concerning his participation in illicit coaching (through authorising, approving and providing instructions) relies on conversations, which the Appeals Chamber claimed had not been relied upon for this purpose.[101] When read in conjunction with the Appeals Chamber's clarification that certain evidentiary findings could only be relied upon for corroborative purposes, it is difficult to ascertain what these findings were actually corroborating, and whether the totality of corroborated evidence is sufficiently probative and reliable to sustain a conviction on the issue in question.

45. For example, at paragraphs 951-953, the Appeals Chamber acknowledged that the content of the conversation between Mr. Mangenda and Mr. Kilolo regarding D-25 is unclear as to whether Mr. Mangenda was actually reporting Mr. Bemba's impressions of D-25's testimony, or merely speculating. The Appeals Chamber nonetheless confirmed that the intercept could be relied upon to demonstrate the shared awareness of Mr. Kilolo and Mr. Mangenda, and to corroborate <u>other</u> intercepts between Mr. Kilolo and Mr. Bemba, which concerns Mr. Bemba's involvement in illicit coaching. The latter finding then references several Trial Judgment paragraphs,[102] without further consideration of the fact that the evidence in these paragraphs had been qualified or re-interpreted elsewhere in the Appeals Judgment. The cumulative impact of these discrete alternations/clarification on the 'evidence as a whole' is illustrated below.

Para. 727	No evidential findings

(other) measures to conceal the implementation of the plan, such as the use of coded language".
[99] Appeals Judgment, para. 1209: that Trial Chamber III "categorically prohibited any form of witness preparation".
[100] Paras. 978, 1028 (minimisation of role of certain evidence in demonstrating Mr Bemba's involvement in false testimony of D-2 and D-3)
[101] Trial Judgment, para. 809 – referring to the 12 September conversation between Mr. Bemba and Mr. Kilolo.
[102] Appeals Judgment, fn. 2166, citing Trial Judgment, paras 727, 729-731, 806, 808-813.

Para. 729	This relies on i) an intercept dated 30 August 2013 between Mr. Mangenda and Mr. Kilolo (unauthenticated second hand hearsay), which the Appeals Chamber characterised as evidence that Mr. Bemba provided instructions as to "what and how the witnesses were expected to testify" (but not necessarily that Mr. Bemba instructed them to coach the witnesses to testify falsely), and attached the caveat that it was reasonable for the Chamber to rely on it as it was corroborated by the 12 September intercept concerning D-15 (Appeals Judgment, paras. 902-903). The Appeals Chamber also accepted that the Trial Chamber had concluded, erroneously, that Mr. Bemba had conveyed instructions that D-54 should indicate that he was visiting family members, whereas this part of the intercept was referring to 'Bravo' (a person who was not called as a witness) (Appeals Judgment, para.1223). This paragraph also refers to the 12 September intercept, which the Appeals Chamber clarified concerned Mr. Bemba's role in the presentation of evidence, rather than his impact on D-15's false testimony (para. 922).
Paras. 730-731	This concerns an intercept between Mr. Kilolo and Mr. Mangenda (unauthenticated second hand hearsay), in which Mr. Mangenda refers, in vague terms, to an uncharged incident concerning an unidentified witness (the Appeals Chamber also accepted the Chamber's reliance on this intercept on the proviso that it was corroborated by other evidence- Appeals Judgment, para. 958). Taken at its highest, this intercept also only supports the conclusion that Mr. Bemba had, at some point, provided instructions to his Defence team, in the presence of members other than Mr. Kilolo and Mr. Mangenda, in relation to the evidence which should be elicited from a witness during in-court questioning (Appeals Judgment, 959). This is not probative as to illicit coaching or the solicitation of false testimony.
Para. 806	This paragraph only cites to other paragraphs.
Para. 808	This paragraph cites no evidence and only refers to other paragraphs
Paras. 809 - 810	These paragraphs cite the same D-15 intercept referred to in para. 729.
Paras. 811	This paragraph cites the 30 August intercept, referred to in para. 729.
Para. 812	This paragraph concerns an intercept between Mr. Kilolo and Mr.

	Mangenda (unauthenticated second hand hearsay) in relation to potential witness 'Bravo' (who was not one of the 14 witnesses set out in the charges). Taken at its highest, this intercept was only found to illustrate the understanding of Mr. Mangenda and Mr. Kilolo that Mr. Bemba would decide which witnesses should be called, in contrast to their role as advisors in this process (Appeals Judgment, para. 980). The Appeals Chamber accepted that it was not unreasonable to rely on this evidence, on the basis that it was corroborated by other evidence (Appeals Judgment, para. 981), and found elsewhere that evidence concerning 'Bravo' was not used to substantiate "stand-alone" findings concerning Mr. Bemba's responsibility (Appeals Judgment, para. 156).
Para. 813.	This paragraph concerns findings regarding Mr. Bemba's awareness of payments to witnesses; it does not corroborate findings regarding illicit coaching, or the solicitation of false testimony. It should also be noted that although this is supposed to corroborate Mr. Bemba's involvement in the illicit coaching of D-25, the Trial Chamber had found that the payments to D-25 had not been demonstrated to be illegitimate (Appeals Judgment, para. 1114).

46. When these findings are viewed in accordance with the correct standard for corroboration of circumstantial evidence, it is impossible to determine how a reasonable Chamber could rely on this evidence to conclude that there was a causal nexus between Mr. Bemba's conduct and the false testimony provided by the 14 witness. Indeed, this evidence fails to identify the specific conduct of Mr. Bemba that supposedly promoted the witnesses' false testimony, and the manner in which it supposedly did so. Indeed, whereas this evidence is supposed to corroborate a finding that Mr. Bemba's was involved in the illicit coaching of D-25, it is difficult to ascertain any basis for concluding that these separate findings concerning different witnesses and different scenarios bolster the probative nature of such a conclusion. The same holds true as concerns the Appeals Chamber's ultimate finding concerning Mr. Bemba's responsibility for the solicitation of false testimony,[103] which harks back to paragraph 857 of the Trial Judgment. This, in turn, cites paras. 807-813, which, apart from 807 (which does not cite to any evidence) are addressed above in connection with D-25.

[103] Appeals Judgment, para. 848.

47. The Re-Sentencing Decision also did not take account of these clarifications and rectifications. Indeed, it is telling that the Chamber endorsed the Prosecution's reliance on past Trial Chamber findings concerning Mr. Bemba's intent and contributions,[104] notwithstanding the fact that some of these findings had been impacted directly or indirectly by the Appeals Chamber.[105] There is, therefore, an appearance that in light of the difficulty in reconstructing the evidential basis for its ultimate conclusions concerning Mr. Bemba, it was easier for the Prosecution and the Trial Chamber to continue to play a broken record. As a result, the Appeals Chamber is now seised of an appeal concerning a decision that largely ignores the intervening appellate process.

48. A further impediment, as concerns the ability of the Appeals Chamber to reconstruct the foundation for Mr. Bemba's conviction, is that the Appeals Chamber has affirmed that Mr. Bemba's conviction was produced through an *ultra vires* system for the admission of evidence. As explained cogently by Judges Morrison, Van den Wyngaert, and Eboe-Osuji in their respective opinions, Article 69(4) must be interpreted and applied in a manner that is consistent with the duty to provide a reasoned judgment (as set out in Article 74(5)), and the right to adversarial proceedings.[106] In contrast, the approach of the Art. 70 Appeals Chamber appears to have rested on an artificial interpretation of the word 'may' in Article 69(4), an outsized deference to a selective interpretation of commentaries to the drafting history, and insufficient attention to the role of judicial determinations on evidence in ensuring fair, impartial and expeditious proceedings.

49. Regarding the first aspect, when the Article 70 Appeals Chamber assumed that the word 'may' in Article 69(4) vested the Court with the discretion <u>not</u> to issue evidentiary rulings on the admissibility of evidence,[107] the Chamber failed to consider the use of the word 'may' as an enabling provision within the particular

[104] ICC-01/05-01/13-2312, para. 44.
[105] See for example, ICC-01/05-01/13-2279, para. 31: "not only did he exercise influence over the witnesses through Kilolo, but Bemba also exerted direct influence over D-19 and D-55, with whom he illicitly spoke through the Registry's privileged line.74 The Appeals Chamber has confirmed these findings".
[106] As underlined by Judge Henderson, "this particular trial was conducted along adversarial lines." Appeals Judgment, Dissenting Opinion, para. 45.
[107] Appeals Judgment, para. 607.

context of Article 69(4). As explained by Judge Shahabudeen in the context of ICTY regulations:[108]

> "may" in that sentence does not have its usual discretionary meaning: it attracts the standard jurisprudence which says that enabling words are construed as compulsory whenever the object of the power which they confer is to effectuate a legal right.

50. When viewed through this lens, it is clear that object and purpose of Article 69(4) is to enable the Chamber to consider an in-exhaustive list of criteria, as part of its duty to rule on the admissibility of evidence. This characterization is consistent with Article 64(9), which uses similar enabling language in describing the power of the Chamber to issue evidentiary determinations. The role of Article 69(4) as an enabling provision also fits squarely with the text of the corresponding Rules of Procedure and Evidence (RPE). Indeed, Article 69(4) states explicitly that the Chamber must apply this provision in accordance with the RPE, and Rule 63(2) confirms that whereas the Chamber is empowered to assess evidence freely, the Chamber must issue evidentiary determinations as part of this process. Similarly, Rule 64(2) obliges the Chamber to give reasons for any rulings it makes on evidentiary matters, and to place these rulings in the record. If a party challenges the admissibility of evidence, pursuant to Article 69(4), the Chamber cannot, therefore, dispose of this challenge by making a private assessment of relevance and reliability, which is never disclosed to the parties.

51. These provisions provide the contextual framework for Judge Henderson's conclusion that the:[109]

> distinction between articles 69 (4) and 69 (7) of the Statute is not that in the case of the former the Chamber may *rule* on admissibility and that in the case of the latter the Chamber must *rule* on admissibility. Rather, the difference is that in the case of the former the Chamber may *exclude* the evidence if there are concerns, whereas in the case of the latter the Chamber must *exclude* the evidence if the conditions are met.

[108] *Prosecutor v. Milutinovic et al.*, Decision On Interlocutory Appeal On Motion For Additional Funds, 13 November 2003, IT-99-37-AR73.2, Separate Opinion, para. 6.
[109] Appeals Judgment, Dissenting Opinion, para. 64.

52. There is, moreover, no basis in commentaries (which are a subsidiary means of interpretation) to depart from this approach. Indeed, the Appeals Chamber already had occasion to consider these commentaries when it issued its 2011 judgment concerning the legality of a similarly amorphous approach to admissibility. In so doing, the Appeals Chamber confirmed that the power to 'freely' consider evidence, and the delicate balance arrived at in Rome, did not exempt the Chamber from the duty to render an item-by-item assessment as to the admissibility of evidence, and to give reasons for this assessment.[110] Given that the Appeals Chamber's cited the Piragoff commentary in support of its affirmation as concern the duty to issue reasoned rulings on the admissibility of evidence,[111] it is difficult to comprehend how the Article 70 Appeals Chamber could have relied on the same commentary to justify a contrary approach,[112] or how it could otherwise disregard the findings in the Bemba 0A5 0A6 judgment concerning the need for evidentiary rulings/reasoned determinations in relation to items submitted under Article 69(4).[113] The Article 70 Appeals Chamber's reliance on the use of the 'submission' in Article 69(3) has also created a distinction without a difference; in adversarial trials, the parties will clearly need to have the power to 'submit' documents, in order to trigger the Chamber's corresponding duty to determine whether such documents should be 'admitted'.

53. Apart from these specific evidentiary provisions, Article 74 of the Statute provides the ultimate guide as to the scope and purpose of trial proceedings; namely, the purpose of trial proceedings is to produce a fair and impartial judgment on the charges. Since Article 74 sets out specific requirements for such a judgment, it is

[110] ICC-01/05-01/08-1386, para. 2.
[111] ICC-01/05-01/08-1386, para. 37.
[112] Appeals Judgment, para. 623.
[113] Regarding the need for reasoned rulings, see ICC-01/05-01/08-1386, para 37: "it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial."
Para. 59: "Pursuant to rule 64 (2) of the Rules of Procedure and Evidence, a "Chamber shall give reasons for any rulings it makes on evidentiary matters". The Appeals Chamber has previously held, albeit in a different context, that a Chamber must explain with sufficient clarity the basis of its decision. In other words, "it must identify which facts it found to be relevant in coming to its conclusion". As stated in the preceding section, rulings on the admissibility of evidence must be made on an item-by-item basis. This analysis must be reflected in the reasons. This is not to say that the Trial Chamber may not rule on the relevance or admissibility of several items of evidence in one decision. However, it must be clear from the reasons of the decision that the Chamber carried out the required item-by-item analysis, and how it was carried out."
Para 53: "The scheme established by article 69 (4) and (7) of the Statute and rule 71 of the Rules of Procedure and Evidence thus anticipates that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis. Whether evidence is relevant, has probative value, or would be prejudicial to the accused will depend on the specific characteristics of each item of evidence; the factors that will require consideration will not be the same for all items of evidence."

incumbent on the Chamber to conduct the proceedings in a manner which facilitates this objective. In practical terms, this means that the Chamber must ensure that its findings are confined to the facts and circumstances of the charges (Article 74(2)), which in turn, translates to an obligation to ensure that any evidence considered, as part of the judgment drafting process, is relevant to these facts and circumstances. Article 74(5) further requires the Chamber to provide a "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". As concerns the implications of this requirement within the context of a criminal trial, the ECHR has pronounced that:[114]

> according to the Court's established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017). In examining the fairness of criminal proceedings, the Court has held in particular that by ignoring a specific, pertinent and important point made by the accused, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 280, 21 April 2011).

And further, at paras. 73-74:

> Lastly, the Court observes that the domestic courts at all three levels of jurisdiction failed to give any assessment to the applicant's specific pertinent and important points about the serious flaws in the prosecution witness evidence and about the alleged unlawfulness and arbitrariness of the exclusion of all the defence witness evidence from the file (see paragraph 61 above).
>
> The foregoing considerations are sufficient to enable the Court to conclude that the criminal proceedings against the applicant, taken as a whole, constituted a violation of his right to a fair trial under Article 6 § 1 of the Convention.

[114] *Zhang v Ukraine*, 6970/15, para. 61.

54. It follows that irrespective as to whether a Court adheres to a common law or civil law system of evidence, in circumstances where the Defence has raised concerns regarding reliability and probative value of Prosecution evidence, and tendered evidence in response, the Court has a duty to give a reasoned determination in relation to such challenges. As underscored by the ECHR in the aforementioned judgment, this duty forms a fundamental component of the right to a fair trial. Evidentiary rulings are the bedrock of any judgment, particularly in a joint trial, where the admission and weight of evidence potentially varies between each defendant, and the need for independent corroboration might vary depending on against which defendant the evidence is employed, and for which purpose.

55. The Article 70 Appeals Chamber's claim, that deficiencies in reasoning could be addressed on appeal,[115] also obscured the proper role of the appellate process. The defendant has no obligation to prosecute himself; that burden falls to the Prosecution to meet, in accordance with the threshold of beyond reasonable doubt. But, in circumstances where the Chamber convicts a defendant, without issuing a determination on either Defence challenges to the relevance and probative value of the items used to sustain the conviction, or Defence evidence tendered to controvert these items, the burden of argument shifts to the Defence on appeal. This burden is very difficult to satisfy when confronted with "opaque decision making where the parties and participants may only have the satisfaction of knowing that their objections where considered but may never know what impact they had on the Chamber's reasoning, if any".[116] And, as noted above, this difficulty is further compounded in circumstances where the Appeals Chamber applies a 'reasonableness' test to its assessment of the Trial Chamber's incriminating findings, without any corollary assessment as to whether it was reasonable to disregard alternative theories as concerns conclusions based on circumstantial evidence.

56. Since the Article 70 Appeals Chamber affirmed and adopted the Trial Chamber's approach to the admission of evidence, it also declined to provide a reasoned record of any new determinations that it made as concerns the relevance and weight of the

[115] Appeals Judgment, para. 597.
[116] Dissenting Opinion Judge Henderson, para. 55.

evidence that it considered as part of its findings. When the Appeals Chamber referred to findings that were reasonable when considered in light of the 'evidence as a whole', or "all relevant evidence",[117] there is no record as to what all the relevant evidence was considered to be, and whether such evidence also included key exculpatory items or whether they were, instead, disregarded or deemed lacking in probative value. This has produced a situation of extreme opacity, which is highly detrimental to the rights of the defence, and inconsistent with the right to be heard.[118]

57. The prejudice occasioned by the lack of evidential rulings, and the limitations of such a system, were also put into sharp relief by the Re-Sentencing process. The absence of explicit evidential rulings might promote judicial economy in the short term, but it simply does not work once the case has been transferred to different judges to adjudicate: the Appeals Chamber cannot put itself in the Trial Chamber's shoes for the purpose of reviewing the reasonableness of first instance findings, if there are no shoes to be worn.

58. At this point of the process, this Chamber cannot simply ignore the legal findings set out in the Main Case Appeals Judgment, particularly as the findings of Judges Morrison, Van den Wyngaert, Eboe-Osuji concerning Articles 69(4) and 74(2) do not constitute 'new law' or a deviation from prior practice. It is, rather, the opposite: Trial Chamber VII and the Appeals Chamber (in its March 2018 composition) applied the Statute and Rules incorrectly, and in a manner that departed from the approach set out in the 2011 *Bemba* appellate ruling on the admissibility of evidence and the previous practice of the Court.[119]

59. The question is not, therefore, whether the Appeals Chamber is obliged to apply new law to Mr. Bemba, but rather whether the Appeals Chamber can validate legal findings, or a new sentence that was produced through findings that have been

[117] Appeals Judgment, para. 1219.
[118] *Zhang v. Ukraine* 6970/15 , paras 60 "Furthermore, according to the Court's well-established case-law, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly "heard", that is to say, properly examined by the tribunal (see *Carmel Saliba v. Malta*, no. 24221/13, § 65, 29 November 2016, and the cases cited therein)."
[119] Main Case Appeals Judgment, Separate Concurring Opinion, Judges Morrison and Van den Wyngaert, para. 17 (observing that it went "further" then the previous appellate ruling), Separate Concurring Opinion, Judge Eboe-Osuji, para. 296, "The Appeals Chamber was correct in saying—in the 2011 decision—that the Trial Chamber 'will have to' make a ruling at some point in the proceeding. Notably, that sense of obligation is fully underscored by the words of article 74(5), saying that the judgment on the merits 'shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.''

confirmed to be incorrect, and inconsistent with the right to a fair, adversarial trial. Clearly, it cannot. The standard of appellate review affords the Appeals Chamber with no discretion not to apply the correct law to this case, particularly in circumstances where the correct law would occasion no prejudice to the defendant, but rather remove existing prejudice. ICTY and ICTR case law concerning whether a change in the law can trigger a review of a final conviction is also inapplicable, because here, the Defence is not asking the Appeals Chamber to apply a change in the law, but rather, to apply the correct law as it stood at the time of trial and appeal. As will be elaborated in detail below, the proceedings against Mr. Bemba are also not final; the Appeals Chamber possesses the power to reverse his conviction, within the framework of this appeal against sentence (Article 82((1)(b)).

D. The extent of the error and prejudice is such, that the only feasible remedy is to quash the initial convictions, or re-open the convictions, pursuant to Article 82(1)(b)

60. As explained above, the Trial Chamber's failure to apply the tests identified by the Appeals Chamber, or to otherwise craft a fair, and evidentially sound sentence, is tied inextricably, to the flawed evidential system that continues to be applied in this case. This system strikes at the heart of procedural fairness in this case.

61. In his dissenting Opinion, Judge Henderson explained that the procedural approach to evidence adopted in this case was "erroneous as a matter of law and has resulted in their [the defendants, Mr. Arido, Mr. Babala and Mr. Bemba] suffering prejudice."[120] The Main Case Appeals Chamber also described a failure to give adequate reasons on evidentiary issues as a procedural error, which "has a material effect in terms of article 83 (2) of the Statute because it inhibits the parties from properly mounting an appeal in relation to the factual finding in question and prevents the Appeals Chamber from exercising its appellate review."[121] The Defence has set out specific examples of prejudice, and the difficulties occasioned by the amorphous and fragmented evidential record in this case in sections 1.1 and 1.2, but Judge Eboe-Osuji has also cautioned that the nature of this error is such that:[122]

[120] Appeals Judgment, Dissenting Opinion, para. 38.
[121] Main Case Appeals Judgment, Majority Opinion, para. 55.
[122] Main Case Appeals Judgment, Separate Opinion, para. 85.

> a convicted defendant becomes saddled with the burden of demonstrating, on appeal, the materiality of the admission at trial of what may have been inadmissible evidence, but in relation to which the Trial Chamber did not indicate any ruling to the effect that such evidence was not considered for purposes of the judgment. The unfairness of the burden is apparent, given that the undifferentiated receipt of all evidence 'submitted' at trial may have resulted in the adulteration of admissible evidence with the inadmissible ones, hence possibly alleviating the prosecution's burden of proof. In those circumstances, it would be unfair to require the appellant-convict to demonstrate the materiality of the error in the manner of showing that in the absence of the error, 'the judgment would have substantially differed from the one rendered'.

62. This statement ties into the finding by Trial Chamber I that since the right to a fair appeal is a part of the right to a fair trial, any appealable decision on evidentiary matters must explain in sufficient detail, and in a transparent manner, its approach to particular items of evidence; in the absence of a clear and objective record that could be consulted by the Appeals Chamber, the constituent elements of a fair trial would not be fulfilled.[123]

63. In line with these findings, the extent of the error and prejudice caused by the system of evidence in this case is such, that the only feasible remedy is quash the initial convictions.

64. The possibility that this could occur is contemplated explicitly by Article 81(2)(b), which allows the Appeals Chamber to set aside a conviction, in whole or in part, when seised of an appeal against sentence. As concerns the genesis of this provision, the commentary to the 'Proceedings on Appeal' in the 1994 draft ILC statute noted that the envisaged appeals chamber "combines some of the functions of appeal in civil law systems with some of the functions of cassation. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at

[123] ICC-01/04-01/06-T-91-ENG, p. 29, lns. 13-23, p. 32, lns. 9-16: "it is arguable that an essential ingredient of a fair trial is that any appealable decision of the first instance tribunal can be properly reviewed on appeal. This issue is potentially an appealable decision. Accordingly, it may be said that any proposal that the Trial Chamber should view the 54(3)(e) material will need to include conditions which enable it to explain in a written decision by reference to the detail of the evidence it has seen, an analysis of why it has reached any relevant conclusions."

trial".[124] The 1994 appellate procedure did not envisage a bifurcated conviction and sentence process. After that step was introduced in 1996, and following the May 1997 ICTY scheduling order in the Erdemovic case, which invited the parties to file submissions concerning the validity of a verdict within the context of a sentencing appeal,[125] the August 1997 draft proposal then introduced a proposed Article 48 1 ter, that "[i]n case of an appeal of sentence, the Appeals Chamber may also render a decision on conviction".[126] This provision, or variations thereof, was maintained in all subsequent proposals.

65. Given that the genesis of this provision was early ICTY case law concerning bifurcated proceedings, it is significant that when the ICTY still had this bifurcated procedure (i.e. the *Čelebići* case), the ICTY Appeals Chamber allowed for the possibility that a conviction upheld during the first wave of appellate proceedings, could be 'reconsidered' during a second appeal on sentence.[127] Whereas later judgments found that there was no right to seek reconsideration of a final judgment, the *Čelebići* Appeals Chamber noted that the second phase of appellate proceedings on sentence appeared to be part of a "single continuing lawsuit".[128] In line with this caveat, in the *Kajelijeli* case, the ICTR Appeals Chamber endorsed the notion that the Appeals Chamber could reconsider interlocutory appellate findings, "if a clear error of reasoning bas been demonstrated or if it is necessary to do so to prevent an injustice."[129] Of particular resonance to the current case, the Chamber emphasised that "[i]n a Tribunal with only one tier of appellate review, it is important to allow a meaningful opportunity for the Appeals Chamber to correct any mistakes it has made."[130] *Kajelijeli* forms the bridge between *Čelebići* approach, and the subsequent finding in *Žigić et al.,* that the remedy of reconsideration was not applicable to a final decision; all three judgments can be reconciled if the specific nature of bifurcated proceedings is taken into consideration. And, if the threshold of reconsideration were to be applied to the current appeal, it would be clearly met: it would be manifestly unsound to ignore the findings and consequences of an appellate judgment that was issued in connection with the same defendant, a mere

[124] ILC Draft Statute, 1994, Commentary to Article 49, p. 61, http://legal.un.org/ilc/texts/instruments/english/commentaries/741994.pdf
[125] *Prosecutor v. Erdemović*, Scheduling Order, Appeals Chamber, 5 May 1997.
[126] Prepcom report, 4 August 1997, p. 52 https://www.legal-tools.org/doc/30409e/pdf/
[127] *Prosecutor v. Delalić et al.*, Judgment on Sentence Appeal, IT-96-21-Abis, 8 April 2003, para. 49.
[128] Para. 48.
[129] Case No. ICTR-98-44A-A, 23 May 2005, para. 203.
[130] Appeals Judgment, para. 203.

three months after the Article 70 Appeals Judgment was rendered, and which overturns the core evidential foundation of Mr. Bemba's Article 70 convictions and sentence.[131] A final conviction should not rest exclusively on the happenstance of the composition of Chambers and timing of judgments, but on the correct application of the law, as applied to the evidence admitted and evaluated in the case.

66. It is, moreover, significant that in domestic jurisdictions where the conviction is bifurcated from the sentence, *res judicata* does not attach until the sentence has been finalised. For example, the Privy Council found in the case of *Richards v The Queen* that although the defendant had been found guilty, the conviction was not 'final', and subject to *res judicata*, because the sentence had yet to be finalized.[132] In the United States, the Supreme Court confirmed that a plea of *autrefois convict* (that a defendant has been finally convicted for the same conduct in another case) cannot be entertained unless the defendant has been sentenced in that case.[133] In Canada, provided that "the accused is still in the system", he or she is entitled to have the case determined in accordance with the correct application of law.[134] The rationale for this approach is "grounded in the principle that an accused should not be convicted on the basis of the interpretation of a statute which, at the appropriate time, is known to be wrong.[135] An applicant is considered to "still be in the system" if he or she has an appeal pending at the time that the change in law comes into effect. [136] This also includes a separate appeal against sentence. Thus, in the case of *R v. Keen*, even though the defendant was no longer 'in the system' as concerns a potential appeal against conviction, the Court was prepared to accept that as part of his appeal against sentence, "consideration would be given to the fact that on the basis of the law as it stands today, the four counts involving anal intercourse would not form part of the convictions [due to the fact that the law underpinning these convictions had been struck down as being unconstitutional].[137]

[131] ICC-01/09-02/11-863, para. 12, endorsing the test set out in ICC-01/04-01/06-2705, para. 18.
[132] Lloydell Richards v. The Queen Co (Jamaica) [1992] UKPC 28 (19 October 1992), http://www.bailii.org/uk/cases/UKPC/1992/1992_28.html See also Archbold: Criminal Pleading, Evidence and Practice 2003 (Sweet & Maxwell, London, 2003), p. 382, para. 4-141
[133] Roscoe, Cr. Evid. (8th ed.) 199, cited in *Coleman v Tennessee* 97 U.S. 509 (, 24 L.Ed. 1118) *https://www.law.cornell.edu/supremecourt/text/97/509*
[134] *R. v. Wigman*, 1987 CarswellBC 664
[135] *R. v. Taylor*, [1950] 2 K.B. 368 at 371, 34 Cr. App. R. 138, [1950] 2 All E.R. 170.
[136] *R. v. Wigman*, 1987 CarswellBC 664
[137] R v Keen, Decision Ontario Court of Appeal, 13 May 1996, p. 4, https://www.icc-cpi.int/RelatedRecords/CR2018_04245.PDF

67. In civil law countries, the issue of finality is impacted by the scope of the appellate process. For example, in France, there is no strict delimitation between appeals on sentence and conviction: the judgment is not, therefore, irrevocable until the appellate process is finalized.[138] Courts have referred to the principle of 'indivisibility' between the sentence and the verdict,[139] and, in the context of appeals against sentence, reversed the conviction as well.[140] The ECHR has also held the word 'conviction', in Article 5(1)(a) of the Convention,[141]

> has to be understood as signifying both a "finding of guilt" after "it has been established in accordance with the law that there has been an offence" (see the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 37,par. 100), and the imposition of a penalty or other measure involving deprivation of liberty.

68. *Res judicata* is also a principle of justice, which aims to ensure the defendant's right to certainty and finality in the judicial process. It is not an invitation for the Appeals Chamber to place its imprimatur on findings that derive from a miscarriage of law and procedure. As underscored by Judge Eboe-Osuji,[142]

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[138] J. Pradel, '*Criminal Procedure',* in Bell et al. (eds) Principles of French Law (Oxford 2008) p. 144.

[139] Cour de Cassation, criminelle, Chambre criminelle, 9 mars 2016, 15-83.927, Publié au bulletin https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032193868

[140] Cour de Cassation, Chambre criminelle, du 10 juillet 1996, 95-83.450, Publié au bulletin https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007068182

The Accused was found guilty of *violences aggravées* by the *cour d'assises* and sentenced to, *inter alia*, a term of imprisonment, partly suspended. There was an appeal against the lawfulness of the suspended sentence, which led the *Cour de Cassation* to find an error in the sentence. It held "[q]u'en raison de l'indivisibilité entre la déclaration de culpabilité et la décision sur la peine, la cassation doit être totale", and therefore annulled the whole judgment ("en toutes ses dispositions") and referred the case back to the *cour d'assises*, so that it may be tried again in accordance with the law. In the *"[a]nalyse"*, it is repeated that "[e]n raison du principe de l'indivisibilité des décisions sur la culpabilité et sur la peine prononcées par la cour d'assises, la cassation est totale et doit être prononcée avec renvoi devant une autre cour d'assises".

See also Cour de Cassation, Chambre criminelle, du 4 mai 1979, 78-93.408, Publié au bulletin https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007060826

The Accused was found guilty of *delit d'homicide par imprudence* and *d'infraction aux regles de securite sur un chantier de construction* and punished with a suspended sentence as well as various fines. There was an appeal challenging the validity of the sentence imposed. The Court of Cassation found that there was an error, and "qu'en raison de l'indivisibilité existant entre la declaration de culpabilité et la peine, l'annulation doit s'etendre a toutes les dispositions penales de l'arret", and therefore annulled the whole judgment. The case was referred back to the *cour d'appel*, in order to be judged again in accordance with the law. In the "*[a]nalyse*" it is repeated that "la méconnsaisance de cette règle doit entraîner l'annulation totale des dispositions pénales de la décision en raison de l'indivisibilité existant entre la déclaration de culpabilité et la peine".

[141] *Van Droogenbroeck v. Belgium* (ECHR), App. No. 7906/77, para. 35

[142] Main Case Appeals Judgment, Separate Concurring Opinion, Judge Eboe-Osuji, para. 34.

> anachronistic principles or those originating from mistaken (or per in curiam) circumstances must be departed from; when corrective analyses are subsequently made, clearly identifying both the original flaws and the needed corrections.

69. The importance of such corrective powers to the fair administration of justice is illustrated by a decision of the South African Constitutional Court, concerning a conviction based on a flawed approach to the admission of evidence.[143] In that case, the defendant's appeal against conviction, which was filed on the ground that the Chamber had relied wrongfully on the hearsay statements of his co-accused, was rejected, and he was denied leave to appeal to the Constitutional Court. His co-defendants then initiated a separate appeal concerning the admission of evidence, which was accepted by the Constitutional Court, which then overturned their convictions. The first defendant was then authorized to file a second application to the Constitutional Court, which led the Court to consider whether the doctrine of *res judicata* barred it from adjudicating his appeal. After considering South African domestic precedents, section 173 of the South African Constitution (which empowers the Court to protect and regulate its own process in a manner that is consistent with the interests of justice) and case law from Canada,[144] the United Kingdom,[145] and India,[146] the Court concluded that:[147]

> Legitimacy and confidence in a legal system demands that an effective remedy be provided in circumstances where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata.

[143] *Molaudzi v S* (CCT42/15)[2015]ZACC 20, http://www.saflii.org/za/cases/ZACC/2015/20.html
[144] The Court cited findings from the Court of Appeal for Ontario in the case of Amtim Capital Inc, to the effect that the doctrine of res judicata "is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create injustice" (*Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62,para. 14).
[145] The Court cited, amongst others, the House of Lords finding in *Pinochet* that "it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure" (*In re Pinochet* [1999] UKHL 1)
[146] Article 137 of the Constitution ("Subject to the provisions of any law made by Parliament or an rules made under article 145, the Supreme Court shall have the power to review any judgment pronounced or any order made by it"); *AT Sharma v AP Sharma* AIR 1979 SC 1047 regarding circumstances in which review can be invoked, including "where some mistake or error apparent on the face of the record is found"; *M S Ahlawat v State of Haryana and another* 1999 Supp (4) SCR 160: "to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience".
[147] Para 37.

70. In applying this principle to the case at hand, the Court considered that unless it entertained the appeal, the defendant would be denied the right to seek the same remedy as his co-defendants: he would be denied equality before the law. The Court therefore found that the defendant had been wrongfully convicted on the basis of the lower Court's reliance on extra-curial statements of his co-accused, and in-court testimony from co-accused that was not independently corroborated.[148] In the same vein, justice will not be served if the Appeals Chamber relies upon a flawed and incomplete evidential record to assess Mr. Bemba's sentence, nor will it be served if a sentence is appended to a conviction, that should be recognised as unsafe, due to its reliance on an illegal and prejudicial system of evidence that failed to adequately discriminate between the relevance and varying probative value of different items of evidence. It would also be perverse if Mr. Bemba were to have no right to request this Appeals Chamber to apply the same law that was applied by the Appeals Chamber in his 8 June 2018 Main Case judgment. It would also be perverse to deny a defendant in an ongoing case the right to seek a remedy that would be available once proceedings are completed.[149] As emphasized in the UK case of *R v King*, in circumstances where there the defendant could, if leave to appeal was rejected, seek review, it was preferable to accept the appeal, in order to avoid further delaying the Court's adjudication as to whether subsequent judicial determinations concerning the need for (absent) evidential safeguards, had rendered the conviction unsafe.[150]

71. In line with this approach, the appropriate remedy must also take into consideration the fact that Mr. Bemba was detained for over 4.5 years in this case, and the proceedings have now exceeded the five-year mark, due to a conviction entered on the basis of an incorrect interpretation and application of the law. Article 83(2) specifies that if the proceedings appealed from were unfair in a manner that materially impacts on the sentence, the Chamber may order a re-trial before a different Trial Chamber. This provision underlines the power of the Appeals Chamber to re-open the proceedings when faced with fundamental flaws in the sentence, but the aforementioned factors, militate in favour of an immediate quashing of the verdict, through this appeal.

[148] Paras. 46-47.
[149] The ICTY Appeals Chamber has determined that the issuance of a judgment in a connected case is a new fact, that could potentially trigger review proceedings: *Prosecutor v. Tadić*, Decision on Motion for Review, 30 June 2002, Case No. IT-94-1-R, para. 31
[150] *R v. King*,[2000] Crim. Law. 835, Annex A.

72. Nonetheless, should the Appeals Chamber consider, instead, that the lacuna in evidentiary reasoning in this case has left the Appeals Chambers no choice but to enter new determinations as to the weight and probative value of evidence, then such determinations would need to conform to the standard of beyond reasonable doubt. As explained in the ICTY *Blaškić* case:[151]

> when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal. The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt.

73. The ECHR has also found that where the fairness of a verdict is undermined through an incorrect approach to the assessment and evaluation of evidence, a trial *de novo* might be required to remedy the violation.[152] It follows, therefore, that a more superficial consideration of the reasonableness of the Chamber's findings would be insufficient to remedy the harm caused to the defendant's right to a fair trial.

74. Since many key findings by the Trial Chamber and Article 70 Appeals Chamber were issued by reference to the 'evidence as a whole' or 'all relevant evidence', it is also not possible for the Appeals Chamber to adopt a surgical approach, as even discrete items of Defence evidence would need to be appreciated in light of the totality of evidence concerning the issue in question. In essence, this means that in order to determine the correct sentence to be imposed on Mr. Bemba, it would be necessary for the Appeals Chamber to conduct an assessment *de novo* as concerns these issues, applying the threshold of beyond reasonable doubt. Nonetheless, the Appeals Chamber cannot perform this task in an impartial and independent manner,

[151] Appeals Judgment, 29 July 2004, IT-95-14-A, para. 23.
[152] *Zhang v Ukraine*, *ibid.*, para. 82.

if it is fettered from considering whether the underlying convictions stand up to proof.

75. The Appeals Chamber recently averred that:[153]

> when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them. This is not a matter of the Appeals Chamber substituting its own factual findings for those of the trial chamber. It is merely an application of the standard of proof.

76. It follows, therefore, that if, in the course of making its own assessment of the specific degree of Mr. Bemba's culpability, the Appeals Chamber determines that fundamental planks underpinning Mr. Bemba's conviction are not established to the standard of beyond reasonable doubt, then the Appeals Chamber would be required to overturn those findings. Moreover, given that firstly, the acts and conduct underlying the Article 70(1)(a) and (c) convictions are largely the same,[154] and secondly, the re-resentencing process concerned both convictions, any new findings concerning the reliability of the Article 70(1)(a) verdict would impact necessarily impact on the Article 70(1)(c) verdict as well.

77. In line with the right to adversarial proceedings, the Defence would also need to be afforded an effective opportunity to be heard in relation to whether there is a basis for concluding, beyond reasonable doubt, that Mr. Bemba's intent and conduct fulfils the criteria for a conviction of solicitation of Article 70(1)(a) offences, and co-perpetration of Article 70(1)(c) offences. Accordingly, in the alternative, and in lieu of quashing the sentence and related verdict immediately, the Defence requests the Appeals Chamber to invoke its power under Article 82(1)(b) to invite the Defence to "submit grounds under article 81, paragraph 1 (a) or (b)" as concerns the bases for reversing the conviction.[155]

[153] Main Case Appeals Judgment, (Majority), para. 46.
[154] ICC-01/05-01/13-2312, para. 65, 117.
[155] "It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it, ICC-01/04-01/07-476, para. 17, ICC-01/04-168. OA3, para. 20.

III. Ground Two: The Trial Chamber unreasonably abused its discretion, and erred in law and procedure, by failing to stay the proceedings/discharge Mr. Bemba, or otherwise provide a remedy for the cumulative impact of egregious violations of Mr. Bemba's rights. These violations undermined the fairness of the proceedings, and resulted in a disproportionate sentence. The appropriate remedy would be to terminate the proceedings against Mr. Bemba

78. Mr. Bemba was released from ICC detention on 12 June 2018: approximately 4 years and 8 months after he was served with an Article 70 detention order, and over 10 years since he was first detained by the ICC. Although the exact length of his detention might be disputed, it cannot be disputed that he was detained for more than **four times** the length of the sentence imposed at first instance in March 2017, and again in September 2018. This unreasonable and unnecessary prolongation of his detention occurred without any effective judicial oversight or possibility for redress.

79. The following procedural and legal developments led to this situation:

a. On 20 November 20113, the Single Judge determined that, notwithstanding the detention order in the Main case, it was necessary to issue a separate detention order in the Article 70 case, in order to ensure Mr. Bemba's presence for the Article 70 trial.[156]
b. On 23 January 2015, the Single Judge ruled that the length of Mr. Bemba's detention was no longer reasonable, and that he should be released.[157] The Single Judge nonetheless imposed the condition that the Article 70 detention order would not be lifted unless the Main Case detention order was lifted. The Article 70 detention order therefore remained in place.
c. On 29 May 2015, the Appeals Chamber vacated the decision, on the grounds that the Single Judge had not considered all relevant factors.[158] The Appeals Chamber did not, however, reverse the determination concerning the reasonableness of the length of detention.
d. On 20 May 2015, the Main Case Appeals Chamber upheld the Trial Chamber's reliance on the Article 70 charges, as a basis for maintaining the continued Main Case detention of Mr. Bemba, approximately 9 years after his arrest.[159]

[156] ICC-01/05-01/13-1-Red2-tENG, para.22.
[157] ICC-01/05-01/13-798, p.4.
[158] ICC-01/05-01/13-970, para.27
[159] ICC-01/05-01/08-3249-Red, para. 2.

e. On 22 March 2017, the Trial Chamber sentenced Mr. Bemba to a 12-month custodial sentence, and a fine of 300,000 euros. The Trial Chamber found that pursuant to Article 78(2), "Mr Bemba is entitled to have deducted from his sentence the time previously spent in detention in accordance with an order of the Court".[160] But, as a result of the fact that he had been convicted by Trial Chamber III on 21 June 2016, and received credit for time leading up to that date, the Trial Chamber expressed its concern that,[161]

> If Article 78(2) of the Statute were to be interpreted, in the present case, without regard to the fact that Mr Bemba was in detention for another cause (viz. the Main Case), this would lead to the following result: Mr Bemba would benefit twice from deduction of time, while being in detention. Ultimately, Mr Bemba would not be sanctioned at all given the sentence herein imposed, or would be sanctioned to a significantly reduced extent, in the context of the present case.
>
> […]
>
> There is also the consideration that accused persons in a similar situation like Mr Bemba should not accumulate credit for time spent previously in detention that – theoretically – **may even exceed the maximum penalty** available under Article 70(3) of the Statute.

f. The Trial Chamber was thus aware of the risk that Mr. Bemba's Article 70 detention could, as a result of the overlapping system, exceed reasonable limits. The Chamber nonetheless determined that the Article 78(2) should be interpreted in accordance with the underlying premise that Mr. Bemba was guilty in the Main case and should not, therefore, be able to benefit from double credit. The Chamber therefore determined that its approach to detention credit needed to take into account the Main case conviction and sentence,[162] and, as a result, "Mr Bemba will not benefit from any deduction of time pursuant to Article 78(2) of the Statute in this case".[163] The Chamber further determined that Mr. Bemba's Article 70 would run consecutively

[160] ICC-01/05-01/13-2123-Corr, para. 251.
[161] ICC-01/05-01/13-2123-Corr, para. 254-5.
[162] ICC-01/05-01/13-2123-Corr, para. 258.
[163] ICC-01/05-01/13-2123-Corr, para. 260.

from the Main case sentence,[164] even though the Appeals Chamber had yet to render its verdict on the latter.

g. Article 81(3)(b) provides that "[w]hen a convicted person's time in custody exceeds the sentence of imprisonment imposed, the person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below". The terms of this provision are mandatory, and do not need to be invoked by the defendant. But, although the Trial Chamber released Mr. Bemba's co-defendants after their convictions were issued, the Chamber did not lift Mr. Bemba's Article 70 detention order once it was clear that his sentence was less than the duration of his Article 70 detention. Nor did the Chamber take any other steps to address the possibility that Mr. Bemba could be acquitted in the Main case, or his sentence reduced. The Article 70 detention order therefore continued to apply, and regulate Mr. Bemba's conduct and Article 70-specific interactions for the entire duration of the appellate phase.

h. The Defence appealed the Chamber's finding concerning credit, and raised the specific problem of 'dead time', that is, that if Mr. Bemba were to be acquitted in the Main case or his sentence reduced, Trial Chamber VII's approach would result in him receiving no credit for the related overlapping detention, a situation which could amount to arbitrary detention.[165] The Defence further pointed out that the Chamber's recognition that the length of the overlapping credit could exceed the maximum Article 70 penalty underscored the need for procedural safeguards, to protect Mr. Bemba's right to be tried within a reasonable time.[166]

i. The Appeals Judgment on Sentence upheld the Trial Chamber's approach to credit, endorsing, in particular, the view that Article 78(2) should be interpreted through the lens of a guilty defendant, who "would not be discouraged from committing offences under article 70 as he or she would know that his time in detention would be eventually deducted from both his sentence in the main case and in the contempt proceedings."[167] Although the Appeals Chamber acknowledged that some form of accounting would need to be done if the Main Case verdict were to be reversed or the sentence reduced,

[164] ICC-01/05-01/13-2123, para. 263.
[165] ICC-01/05-01/13-2167-Conf, paras. 217-218.
[166] ICC-01/05-01/13-2167-Conf, paras. 220-221.
[167] ICC-01/05-01/13-2276-Conf-Exp, para. 225.

the Chamber averred that this adjustment could be made by the Presidency, in connection with his mandate concerning the enforcement of sentences.[168] Since the Presidency only plays such a role in connection with Main case proceedings, it is clear that the Appeals Chamber envisaged that such an accounting would only occur in connection with a Main Case sentence reduction. The Appeals Judgment on sentence did not otherwise address article 81(3)(b) or the continued necessity and proportionality of Mr. Bemba's article 70 detention at that juncture.

j. On 8 June 2018, the Appeals Chamber reversed Mr. Bemba's Main Case convictions, and withdrew the Main Case detention order.[169]

k. On 12 June 2018, the Chamber convened a hearing, during which it advised the parties that the purpose of the hearing was to determine whether Mr. Bemba should continue to be detained. The Chamber further noted that a subsequent hearing would be convened on 4 July to allow the Prosecution to reply to the existing sentencing submissions, and the Bemba Defence to address substantive issues concerning the impact of the acquittal on Mr. Bemba's sentence.[170] The Prosecution opposed the application for release, and in so doing, expressed the view repeatedly that although acquitted in the Main case, Mr. Bemba was not 'innocent', and that he had not in fact been acquitted of all Main Case charges.[171]

l. In a written decision issued later that day, Trial Chamber VII affirmed that there threshold for detention was not met, and that, given that he had already spent over 80% of the maximum possible sentence in custody, it would be disproportionate to maintain that custody. [172] The Chamber further found that neither Mr. Bemba nor the Bemba Defence were responsible for any delays in the proceedings.[173] The Trial Chamber did not address the Prosecution's statements impugning the full-force of Mr. Bemba's Main case acquittal.

m. The day after Mr. Bemba was released from custody, the Prosecutor issued a statement, in which she expressed her concern regarding certain features of the Main Case judgment, and her hope that this approach would be reversed

[168] ICC-01/05-01/13-2276-Conf-Exp, para. 231.
[169] ICC-01/05-01/08-3636-Red
[170] ICC-01/05-01/13-T-58-ENG, p.4, 6 lns. 2-8. In an email dated 19 June 2018, the Trial Chamber confirmed that the Bemba Defence would have the opportunity to present further submissions concerning the impact of the acquittal on sentence. Confidential Annex B.
[171] ICC-01/05-01/13-T-58-ENG, p.4, 6 lns. 2-8.
[172] ICC-01/05-01/13-2291, para. 22.
[173] ICC-01/05-01/13-2291, para. 22.

in future judgments.[174] The Prosecutor reinforced this position in media interviews, referring to the acquittal as "regrettable and troubling".[175] The Prosecutor further implied that the Appeals Chamber's had confirmed that the MLC had committed "the crimes", that is, all the crimes alleged.[176] The position that the acquittal was flawed and "inappropriate" was also echoed by a Special Adviser to the ICC Prosecution.[177]

n. The Defence subsequently invited the Prosecutor to withdraw her statement impugning Mr. Bemba's innocence and the correctness of the Main case acquittal.[178] The Prosecutor's representative responded by declining to withdraw the statement, and further accusing the Defence of 'misrepresenting' the relevance of Mr. Bemba's acquittal to the Article 70 sentencing hearing.[179]

o. The Prosecution then filed written submissions, in which it argued that the Main Case acquittal was wrong ("toxic"), that its factual and legal underpinnings had been adversely influenced by evidence and testimony that were tainted by Article 70 conduct, and that the Trial Chamber should take into account the flawed nature of the Main Case judgment in order to aggravate Mr. Bemba's sentence.[180] The Prosecution also indicated that it would develop these arguments further during the 4 July hearing. This submission was circulated rapidly and widely on social media, and attracted endorsements from a range of commentators, including the former ICC Chief of Prosecutions.[181]

p. In order to avert further harm to the reputation of Mr. Bemba and the integrity of the Article 70 case, the Defence applied to the Chamber to reject the submissions *in limine*, and prohibit the Prosecution from further controverting Mr. Bemba's innocence in the Main case, and the correctness of the Main case verdict, during the 4 July hearing.[182] Although the Chamber affirmed that the Prosecution had not sought authorisation to introduce such submissions in writing, it found that the appropriate response would be to

[174] ICC-01/05-01/13-2304-AnxC, pp. 83-87.
[175] ICC-01/05-01/13-2304-AnxC, p. 41, 49.
[176] ICC-01/05-01/13-2304-AnxC, p. 41, 45.
[177] ICC-01/05-01/13-2304-AnxC, pp. 26, 76, 78; Special Adviser Announcement https://www.icc-cpi.int//Pages/item.aspx?name=pr861
[178] ICC-01/05-01/13-2304-AnxA, p.2.
[179] ICC-01/05-01/13-2304-AnxA, p.3.
[180] ICC-01/05-01/13-2296, paras. 4, 5,
[181] ICC-01/05-01/13-2304-AnxC, pp. 3-5.
[182] ICC-01/05-01/13-T-59-ENG, pp. 5-9.

allow the parties to address these issues during the hearing, and for the Defence to file a written response to these submissions.[183] The Chamber further noted that the Prosecution had "wide latitude" as concerns the submissions that it could make before the Chamber.[184] As a result of this "wide latitude", the Prosecution continued to aver, throughout the public hearing, that the Main Case verdict was unsafe, that it represented the successful outcome of the Article 70 common plan between Mssrs. Bemba, Kilolo and Mangenda,[185] and that Mr. Bemba was not actually innocent as concerns all the Main case charges.[186] The Prosecution also called on the Chamber to sanction Mr. Bemba heavily, in order to compensate the more than 5000 victims who were denied justice, because of the acquittal.[187]

q. In contrast, the Defence argued that the totality of the punishment endured by Mr. Bemba, including his unreasonably lengthy detention, exceeded the level of his culpability, and that an appropriate remedy would be to discharge the case against him.[188] The Defence further argued, in oral and written pleadings, that the Prosecution's attempt to use the Article 70 case to controvert the Main case acquittal, was an abuse of process, which further justified the remedy sought by the Defence.[189]

r. On 17 September 2018, the Trial Chamber issued its Re-Sentencing Decision, in which Mr. Bemba was given the same sentence that he received in 2017, even though the Appeals Chamber acquitted him of a 1/3 of the charges in March 2018, the Main Case Appeals Chamber overturned his convictions (which in turn, meant that the Article 70 conduct was not directed towards suborning a conviction), and he had served 4.5 times the custodial sentence judged appropriate in both 2017 and 2018.

80. This outcome is vitiated by a series of interlocking errors:

- Firstly, the Chamber erred in law and procedure by basing its determination that Mr. Bemba's detention was 'lawful' on formal rather than substantive

[183] ICC-01/05-01/13-T-59-ENG, pp. 3-4.
[184] ICC-01/05-01/13-T-59-ENG, p.11, lns.24-25.
[185] ICC-01/05-01/13-T-59-ENG, p.18, lns. 14-15; p, 19,lns. 7-18.
[186] ICC-01/05-01/13-T-59-ENG, p. 84, lns. 18-21.
[187] ICC-01/05-01/13-T-59-ENG, p.17, ln. 11; p. 29, lns. 23-24; p. 33, lns 16-17: "There are victims of the crimes in that case, no question about that. They were before this Court as a court of last resort to seek justice. They didn't get it."
[188] ICC-01/05-01/13-T-59-ENG, pp. 42-43, 70, 71,75.
[189] ICC-01/05-01/13-T-59-ENG, p. 9; ICC-01/05-01/13-2304, paras. 35-45.

considerations. As a result, the Chamber excluded relevant considerations from its decision (the violations of Mr. Bemba's rights), and reached an outcome that was legally erroneous;

- Secondly, notwithstanding the fact that the right to a fair sentence is part of the right to a fair trial, the Trial Chamber erred in law and procedure by failing to take steps to ensure the fairness and impartiality of the sentencing proceedings and the rights of Mr. Bemba.
- Thirdly, the Chamber erred in law, and abused its discretion by failing to provide Mr. Bemba with an effective remedy for these cumulative violations of his rights. Had the Chamber applied the law correctly, and exercised its discretion in a reasonable manner, the appropriate remedy would have been to stay the proceedings/discharge the case against Mr. Bemba.

A. The Trial Chamber committed an error of law and procedure by concluding that Mr. Bemba's detention was lawful, and as a result, excluded relevant factors from its decision, that would have led it to conclude that Mr. Bemba was arbitrarily detained.

81. As a matter of procedure, having indicated that the Defence would be afforded an opportunity to present arguments as to the impact of the acquittal on Mr. Bemba's sentence during the 4 July hearing, the Chamber manifestly abused its discretion by basing its ultimate conclusion on a 'preliminary observation', which pre-dated this hearing. This approach ran roughshod over the Defence's right to be heard, which is a critical element of the fairness of the proceedings.[190]

82. The Trial Chamber also committed a reversible error of law by conflating the formal lawfulness of a defendant's detention with substantive lawfulness, and as a result, failed to consider relevant factors, which the Defence had provided during the 4 July hearing.[191] These included whether the overall length of Mr. Bemba's detention was necessary and proportionate, and whether he had access to an effective mechanism to

[190] ICC-01/04-01/07-2297, Dissenting Opinion of Judges Kourula and Trendafilova, para. 56;
Prosecutor v Jelisić, IT-95-10-A, Appeals Judgement, 5 July 2001 at para. 27. See also *Prosecutor v Karemera*, ICTR98-44-A15bis, Decision in the Matter of Proceedings Under Rule 15bis (D), 21 June 2004, paras.9, 10; *Zhang v Ukraine*, *ibid.*, paras.60-61, 82.

[191] "And even though his detention was served on an ICC arrest warrant, the fact that it exceeded the length of the sentence first imposed by this Chamber and it exceeded it without any judicial determination as to whether he should remain in detention in this case, that mean that that period is also arbitrary." T-59-Eng, p. 70, lns. 5-9.

seek relief, as and when his detention exceeded its proper limits.[192] If the Chamber has applied these principles, it would have found that the overall length of Mr. Bemba's detention was unnecessary and disproportionate, and that this had occurred because of the absence of effective procedural safeguards. It had, consequently, transformed into arbitrary detention.

83. Rather than applying these principles, the Trial Chamber determined that Mr. Bemba's detention was 'lawful', based solely on a preliminary observation, set out in its 12 June decision, that:[193]

> The Appeals Chamber's direction quoted above ["it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted"] suggests as much – Mr Bemba is not released automatically as a result of the Main Case AJ, but it rather falls to this Chamber to decide on his continued detention.

84. The Trial Chamber's attempt to ground the lawfulness of Mr. Bemba's detention on the Appeals Chamber's direction to convene a detention hearing in the Article 70 case, post-haste, is entirely puzzling. Firstly, this direction confirms the Article 70 Trial Chamber's competence and obligation to make determinations concerning the necessity and lawfulness of Mr. Bemba's Article 70 detention. It is, therefore, paradoxical for the Trial Chamber to use this direction for the purpose of evading its duty to make an independent determination as to the lawfulness of this detention.

85. Secondly, by directing that it fell to the Trial Chamber, and not the Presidency, to rule on Mr. Bemba's detention, the Appeals Chamber recognised that the March 2018 Sentencing Appeal had failed to establish a procedural mechanism that

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[192] "The drafting history of article 9 of the International Covenant on Civil and Political Rights "confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law", Report of the Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/22/44, para. 61, citing Human Rights Committee in *Mukong v. Cameroon*, communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8.
General Comment no. 32 on Article 14 of the ICCPR (CCPR/C/GC/32, 23 August 2007), para 12: "An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality (…) the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention".
[193] ICC-01/05-01/13-2291, para. 6.

protected Mr. Bemba's rights in face of the possibility of a Main case acquittal. This lacuna lies at the heart of Mr. Bemba's arbitrary detention.

86. Specifically, Mr. Bemba's detention went from zero, to over four and a half years, in the space of a few hours because the Trial Chamber and Appeals Chamber's approach to credit in parallel cases denuded the existing procedural safeguard (Article 81(3)(b)) of any force. This flew in the face of the requirement, under human rights law, that the "regime [for detention] must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections."[194]

87. These 'protections' have also been described as the right of *habeas corpus* –that is, the right to have the lawfulness of detention considered, in an expeditious manner, by an independent and impartial court of law.[195] This right is an "indispensable", non-derogable judicial guarantee,[196] which falls within "the first rank of the fundamental rights that protect the physical security of an individual, and as such its importance is paramount".[197]

88. The issuance of a sentence, post-conviction, will ordinarily regulate the lawfulness of that detention.[198] The detention in question must nonetheless have a sufficiently proximate nexus to the conviction itself;[199] it follows that any detention which exceeds the length of the sentence imposed in connection with that conviction, falls foul of the protection against arbitrary detention, notwithstanding the fact that it 'follows' a conviction.

89. Similarly, if the defendant's detention status has the possibility of changing, with the passage of time, then the right of *habeas corpus* is triggered, and there must then be an independent judicial mechanism tasked with adjudicating whether the criteria for

[194] General Comment no. 35, Article 9 (CCPR/C/GC/35 16 December 2014), para. 14.
[195] Advisory Opinion OC-8/87 of January 30, 1987 Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) And 7(6) American Convention On Human Rights), IACtHR, para. 33.
[196] Advisory Opinion OC-9/87 of October 6, 1987 Judicial Guarantees In States Of Emergency (Arts. 27(2), 25 and 8 American Convention On Human Rights), IACtHR, para. 30.
197 *Buzadji v. Moldavia* (ECHR), 23755/07, para. 84.
[198] *De Wilde, Ooms and Versyp v. Belgium* (ECHR), Application no. 2832/66; 2835/66; 2899/66, para. 76
[199] *Van Droogenbroeck v. Belgium* (ECHR), App. No. 7906/77, para. 35.

releasing the defendant is met.[200] A *habeas corpus* remedy must also be available in practice, and not only in theory.[201] Specifically,[202]

> it is not enough for the recourses to exist formally, but it is necessary that they be effective, that is, the person must be given a real opportunity to present a simple and prompt recourse that allows them to obtain, in their case, the judicial protection required.

90. It follows, therefore, that the ICC was required to interpret the Statute and Rules in a manner that gave effect to this right, and ensured that a defendant (including one who was tried for two simultaneous cases) was entitled to benefit from its protection.

91. In terms of the available protections under the ICC Statute, whereas Article 58(1) sets out the criteria for issuing an order for detention as concerns a specific suspect or accused, Articles 60(2) and (3) provide for a general system of judicial oversight as concerns whether these criteria continue to be met throughout the pre-trial and trial proceedings.[203] Article 81(3)(b) is then the *lex specialis* of this system, as concerns the specific detention protections which apply post-conviction. This provision imposes a proactive obligation on the Appeals Chamber to release a convicted defendant if the length of detention exceeds the length of the sentence initially imposed by the Trial Chamber. This provision therefore constitutes a fundamental plank within the defendant's right to habeas corpus as a protection against arbitrary detention, *post*-conviction.

[200] *Van Droogenbroeck v. Belgium* (ECHR), App. No. 7906/77, paras. 45-48.
201 "The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (…) The accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, mutatis mutandis, Čonka v. Belgium, no. 51564/99, §§ 46 and 55, ECHR 2002-I)." *Osmanović v. Croatia*, 67604/10, para. 45.
[202] Case of Acosta-Calderón *v.* Ecuador, Judgment of June 24, 2005 *(Merits, Reparations and Costs), para. 93.*
[203] ICC-01/05-01/08-3249-Red, paras. 37-39, and 40 in particular, "a reading of article 58 (1) (b) (i) of the Statute in context and in light of its purpose confirms that the word "trial" was intended to cover the entire period of the trial until the final determination of the matter."

92. The provision embodies a strong presumption of liberty, once the relevant threshold has been met. In case the Prosecution has also appealed sentence, the defendant's detention can only be maintained beyond this juncture if:[204]

    1. The Prosecution explicitly requests the defendant's continued detention; and
    2. On the basis of such an application, the Trial Chamber determines that exceptional circumstances warrant the continued detention of the defendant.

93. The criteria for determining whether detention should be prolonged past the point of the initial sentence is the same as that which applies to the detention of a defendant who was acquitted at first instance. The Statute thus affords the same legal *gravitas* to the detention of an innocent defendant, and the excessive detention of a convicted defendant. In practice, that means that the threshold for continued detention on appeal is likely to be met only in exceptional case, as evidenced by International Tribunals' consistent refusal to sanction the continued detention of a defendant, who was acquitted at first instance.[205] Indeed, even where the Prosecution appealed the acquittal, the acquittal was accompanied by a dissenting opinion, and the defendant had a record of evading arrest, the Tribunals still confirmed that the interests of proportionality militated against continued detention.[206] The ICC has adopted a similarly restrictive approach, with the Court rejecting Prosecution applications to maintain the detention of Mbarushimana and Ngudjolo,[207] notwithstanding the respective Prosecution appeals against the dismissal of the charges (Mbarushimana) and acquittal (Ngudjolo).

94. It follows, therefore, that if the Court had applied this restrictive threshold to any Prosecution application to maintain Mr. Bemba's detention after the first sentencing decision had been issued (at which point he had already served two and a half years longer than the 1 year sentence imposed by the Chamber), the Chamber would have rejected the application, and released Mr. Bemba.

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[204] Articles 81(3)(b) and (c).
[205] *Prosecutor v. Kabiligi,* 'Decision On Prosecution Motion Requesting the Trial Chamber to Lift Conditions on Gratien Kabiligi's Liberty', 24 March 2009, para. 4.
[206] *Prosecutor v. Bagilishema,* 'Decision on the Prosecutor's request pursuant to Rule 99(B)', 8 June 2001, para. 11.
[207] ICC-01/04-01/10-469, ICC-01/04-02/12-T-3- ENG, p. 4, lns 20-21: "At this particular stage in the proceedings, release should be more than ever the rule and continued detention should be the exception."; ICC-01/04-02/12-12, para. 22

95. And yet, notwithstanding the existence of such provisions, Mr. Bemba was deprived of any effective *habeas corpus* protection for 15 months: from the date on which the Trial Chamber determined that his detention did not 'count' in the Article 70 case, until the point at which the detention clock went into overdrive following his Main case acquittal. For the entire duration of the Article 70 proceedings leading to that point (that is, over 4 ½ years), Mr. Bemba was also placed in the invidious position whereby

- the Main case detention was used to anchor special investigative measures (such as detention surveillance), and aggravating factors (violations of the detention regulations that applied pursuant to the Main Case detention order),[208] in the Article 70 case;
- the Article 70 case was relied upon to justify a separate, and additional layer of detention restrictions and invasive measures, including isolation,[209] segregation,[210] non-contact measures,[211] surveillance,[212] and use of confinement and restrictive measures during Article 70 hearings;[213] and
- the Article 70 case was cited as a basis for justifying the continuance of Main Case detention past the 6 ½ year mark, pre-conviction,[214] and, at the exact same time, the Main case detention order prevented Mr. Bemba from being released from detention after the Article 70 Single Judge found that the length of his Article 70 detention ceased to be necessary and reasonable in January 2015.[215]

96. But notwithstanding the fact that the synergies between the two cases had been consistently employed to Mr. Bemba's detriment, the Trial Chamber and Appeals Chamber found that it would be 'unfair' to award credit in both cases, in order to address, and to some extent, alleviate this detriment.[216] As noted above, both Chambers justified this approach by reference to the need to ensure that the

[208] ICC-01/05-01/13-2123, para. 236.
[209] ICC-01/05-01/13-20.
[210] ICC-01/05-01/13-09.
[211] Restrictions on contact with with his family and third persons: ICC-01/05-01/13-13.
[212] ICC-01/05-01/13-20.
[213] Use of invasive measures: ICC-01/05-01/13-2027-Conf, para. 12; duration of confinement during hearings: ICC-01/05-01/13-2089-AnxC; privileged legal consultations occurring in the holding cells: CAR-D20-0007-0190; CAR-D20-0007-0288 .
[214] ICC-01/05-01/08-3249-Red, para. 2.
[215] ICC-01/05-01/13-798.
[216] ICC-01/05-01/13-2123-Corr, para. 251; ICC-01/05-01/13-2276-Conf-Exp, para. 225.

defendant received sufficient punishment. Even if this were to be a valid basis for statutory interpretation, punishment must be sufficient, but it should never be excessive. The Trial Chamber recognised that the circumstances before it could lead to the excessive Article 70 detention of Mr. Bemba,[217] but neither the Trial Chamber nor the Appeals Chamber took steps to prevent this from happening. At the same time, their interpretation of the credit provisions in Article 78(2) denuded Article 81(3) of any efficacy in this case; because the Article 70 clock was stopped during the appeal stage, Article 81(3) could not be triggered. The alternative mechanism devised by the Appeals Chamber (set-off by the Presidency) could not intervene while the appeals were pending, and then had no jurisdiction to do so, once Mr. Bemba was acquitted in the Main Case. These circumstances therefore gave rise to a situation of arbitrary detention due to firstly, the fact that the sum total of Mr. Bemba's detention was divorced from, and grossly exceeded the penalty attached his conviction, and secondly, the absence of any effective *habeas corpus* mechanism to prevent or mitigate this situation.

97. As noted above, the duty to ensure that a defendant has an effective *habeas corpus* right is non-derogable. But, Mr. Bemba's situation was also not one that was so unique or extraordinary that there was any objective rationale for suspending the obligation to ensure adequate safeguards against unnecessary and unreasonable detention. Parallel cases are a regular occurrence at the international and domestic level, but in contrast to this case, international and domestic courts have interpreted their credit provisions in such a manner as to protect the defendant from possibility of excessive or arbitrary detention.

98. For example, at the international level, where defendants have been detained in connection with two parallel matters, the defendants have been entitled to receive pre-conviction credit in relation to both.[218] The ICTY Appeals Chamber also recently

[217] ICC-01/05-01/13-2123-Corr, para. 255.

[218] For example, the defendants in the *Bangura et al*. case received two weeks credit for pre-trial detention in the contempt case which overlapped with their Main case sentences: Sentencing Judgment in Contempt Proceedings, dated 11 October 2012, paragraph 96, in which the Judge clearly states that Mr. Kanu was serving time as a person convicted of war crimes, at this point (i.e. whilst the contempt trial was ongoing), and paragraph 98, in which the Judge notes that even though he was housed in a different facility, Mr. Kanu was serving his war crimes sentence in Rwanda pursuant to the agreement on enforcement of sentences. This credit was never deducted from his Main case sentence: In a different decision issued in the contempt case, the Judge confirmed that a sentence begins to run from the date that it is pronounced, and the length can only be altered pursuant to a decision of the SCSL: *Prosecutor v. Bangura et al*., Decision on the Public Urgent Application for Clarification of Paragraph 101 of Sentencing Judgment in Contempt Proceedings Dated 11th October 2012

confirmed that Mr. Seselj was entitled to credit in his Main case for time, where he was detained for both his Main case and the contempt cases.[219] Although the ICC Appeals Chamber has already decided that it was not bound to follow this approach, the fact that it has rejected a specific approach does not exempt the Court from its overarching obligation to ensure that there is an equivalent procedural safeguard, which acts as an effective check or remedy in relation to excessive detention.

99. Other such approaches exist at a domestic level, where there is a prevailing understanding that there must be some type of mechanism for ensuring in parallel cases that all forms of detention 'count', even if the defendant is acquitted in one of the proceedings. For example, in jurisdictions where a defendant is not allowed to 'double count' overlapping detention credit, the defendant is nonetheless allowed to be credited with 'dead time', that is, detention credit from another, partially overlapping cases, for which the defendant was acquitted or received a sentence reduction.

100. For example, in a particularly apposite New Zealand case,[220] the defendant was first charged and arrested in connection with allegations of family violence. The defendant was then charged with attempting to pervert the course of justice in connection with conduct that occurred whilst he was in detention. He was acquitted subsequently for the family violence charge but not the allegation pertaining to his contact with witnesses. Whereas at first instance, the defendant was only given credit for the time period which followed the perversion of justice charge, on appeal, the Supreme Court reversed this decision and awarded full credit. The Supreme Court's justification for doing so was that making credit case specific would lead to arbitrary and unfair results, as the defendant's right to credit would very much fall

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And Filed On 16th October 2012, 7 November 2012.
In *Seselj*, at the same time that Mr. Seselj received credit for detention for his contempt sentences (Appeals Judgment, 28 November 2011, IT-03-67-R77.3-A, p.11) and the time also counted as concerns the Chamber's calculation of the reasonableness of the length of his Main case detention; Decision on Continuation of Proceedings, 13 December 2013, paras. 23-24.

[219] *Prosecutor v. Seselj*, Appeals Judgment, 11 April 2018, para. 177: "Rule 125(C) of the Rules provides that: "[credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the ICTY, the ICTR, or the Mechanism or pending trial or appeal.,,613. Nothing in this provision or the jurisprudence suggests that the contempt sentences should be subtracted from the time that Seselj spent in pre-trial detention. The fact remains that, whether Seselj was convicted of contempt or not, he was still subject to detention by virtue of the charges against him in his main trial. There is nothing in the contempt judgements to suggest that the contempt sentences should not be served concurrently to any main sentence."

[220] *Booth v R and Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 127, paras. 32-36, http://img.scoop.co.nz/media/pdfs/1609/BoothvR.pdf

prey to the whim of when charges in the second case happened to be laid. The Supreme Court also emphasized that a case specific approach would also be more likely to lead to defendants being imprisoned for a longer period than the sentence imposed by the Court. The Court further affirmed that provided that the defendant was charged for the second case before his first conviction, the credit period would start running from the date of his initial arrest, even if the charges were unrelated.[221]

101. The key issue is thus not whether the charges are 'related', but whether the detention periods were overlapping or directly contiguous, such that there was no break in detention between the two cases.[222] The reason for this distinction is that a defendant should not be allowed to 'bank time' for future crimes: this distinction does not, however, apply if the defendant is charged and detained in connection with the second case before he is acquitted in the first case.

102. The rational for allowing this transfer of credit is also aligned directly to *habeas corpus* protections. The duty to apply procedures and custody limits in a manner that is consistent with the presumption of innocence falls on the Court as a whole; the duty to manage the potential impact of an acquittal in one case on custody limits thus rests with the judges, and not the defendant. The possibility of a credit transfer therefore ensures that the Court is on notice of the need to manage the reasonableness of the overall length of proceedings in each case, and to keep an eye on the potential custody clock that would apply in case of an acquittal in one of the cases.

103. There is, moreover, a separate obligation to monitor the 'real' length of proceedings in parallel cases, even if the defendant is convicted in both, arising from the duty to ensure expeditious proceedings. Thus, in the case of *Morrison v Jamaica*, the Human Rights Committee underlined that Article 14(3) of the ICCPR placed an overarching duty on the Court to ensure expeditious proceedings in parallel cases,

[221] Paras. 18, 24.
[222] UK: Section 270ZA(9) Criminal Justice Act 2003(2003 c.44);
US: 18 U.S. Code § 3585 (b)(2), https://www.law.cornell.edu/uscode/text/18/3585
Commonwealth v. Marlon Holmes, 83 Mass. App. Ct. 737, paras. 743, 743
http://masscases.com/cases/app/83/83massappct737.html
Commonwealth v. Foley, 17 Mass. App. Ct. 238, 243 (1983), paras. 243-244,
http://masscases.com/cases/app/17/17massappct238.html
Australia: *El Waly v The Queen* [2012] VSCA 184, available at https://jade.io/j/#!/article/269821

even if the defendant could not be physically released from one because of a conviction, and related detention order in the other.[223]

104. In line with this duty, having declined to either award credit during overlapping periods or allow credit transfers for 'dead time', the ICC had a heightened obligation to ensure expeditious proceedings in order to minimise the duration of the overlapping detention. And yet, the Article 70 case took almost two years to get to trial (after several delays occasioned by requests from the Prosecutor, and dilatory disclosure),[224] and the sentence was not issued until the point at which Mr. Bemba had already been in detention for approximately 3 years and 4 months (that is, almost 3 ½ times longer than the custodial sentence imposed on him at this point). And, as confirmed by the Trial Chamber, none of the delays were attributable to Mr. Bemba or the Bemba Defence.[225]

105. The slow pace of the Article 70 case was further aggravated by delays, and a manifestly flawed trial verdict in the Main case. Trial Chamber III did not issue its first instance judgment until approximately **8 years** after Mr. Bemba was first arrested. In January 2015, the Article 70 Single Judge concluded that Mr. Bemba's Article 70 detention had ceased to be necessary or proportionate, but that he could not be released because of the Main case detention order. Notwithstanding the fact that Trial Chamber III was, as a result, put on notice of the impact of Main case delays on Article 70 detention, the Chamber then took a further **14 months** to issue its Trial Judgment.

106. The Appeals Chamber verdict further confirms that Trial Chamber III should have acquitted Mr. Bemba at first instance. This means that if Trial Chamber III had applied the law correctly and analysed evidence in accordance with the correct legal

[223] *Morrison* v. *Jamaica*, 635/1995, paras. 22.2–22.3

[224] The confirmation hearing was delayed twice pursuant to requests from the Prosecution: although the Single Judge granted the requests, he also noted that many of the justifications provided by the Prosecution were baseless, and the Prosecution had failed to raise them in a prompt manner; ICC-01/05-01/13-255, pp. 4-7. See also ICC-01/05-01/13-443, p.4. At the pre-trial stage, the Prosecution was extremely dilatory in addressing issues of potential expert witnesses (ICC-01/05-01/13-1002, paras. 7-11, 16-28), and then requested delays in the disclosure timetable (see for example, ICC-01/05-01/13-989). The Prosecution disclosure process was also piecemeal, partial, and tardy, which impeded preparation, and generated unnecessary litigation: ICC-01/05-01/13-1235, paras.2-3; ICC-01/05-01/13-1265-Conf, paras. 8-13; ICC-01/05-01/13-2252-Red, paras. 8-10, 15, 19-22; ICC-01/05-01/13-2241-Conf, paras. 5-9). In many cases, the Prosecution's avowal that it had complied with its disclosure obligations when it had not also impeded the Chamber from exercising effective oversight: T-34-Conf-Eng p. 71, ln 25; ICC-01/05-01/13-2241-Conf-AnxJ; ICC-01/05-01/13-2172-Red,paras. 1-15; ICC-01/05-01/13-2172-Conf-AnxB.

[225] ICC-01/05-01/13-2291, para. 22.

principles, the Main case detention order would have been lifted in March 2016, and Mr. Bemba would have been in a position to be released then, after approximately 2 ½ years of detention, rather than over two years later.

107. In sum, Trial Chamber VII and the Appeals Chamber adopted a strained, and counter-textual interpretation of Article 78(2), which completely neutered the *habeas corpus* protection set out in Article 81(3), and artificially silenced the tick of the Article 70 custody clock. Having declined to adopt the approaches used at other International Tribunals or domestic jurisdictions to regulate overlapping credit in parallel cases, the Court remained obliged to ensure that there were effective procedural safeguards in place to control the length of Mr. Bemba's Article 70 detention. But, the mechanism set out in Article 70 Sentencing Appeal (that is, the Presidency) had no jurisdiction to regulate or remedy detention in case of a Main Case acquittal. Judicial management, as a tool for controlling the length of Mr. Bemba's Article 70 detention, proved to be a patently inadequate substitute for effective *habeas corpus* controls.

108. These circumstances therefore created a situation of arbitrary detention (both because of the overall length, and the absence of effective procedural safeguards), and a violation of the right to be tried within a reasonable time period.

109. Mr. Bemba's release on 12 June 2018 also did not cure or mitigate these violations. As affirmed by the ECHR, a defendant's ultimate release does not satisfy the independent right to have a judicial determination of the lawfulness of detention, particularly where such a determination is a precondition for a remedy.[226] Conversely, the fact that a defendant cannot, or could not, be released, also does not exempt the Court from issuing a judicial determination as to the lawfulness of that detention.[227]

110. Finally, the Chamber's decision to simply subtract less than a quarter of the time that he had served, from the custodial sentence, did not in any way address or

226 " a former detainee may well have a legal interest in the determination of the lawfulness of his or her detention, even after release, as an issue can arise, for example, as regards the "enforceable right to compensation" guaranteed by Article 5 § 5 of the Convention (see *S.T.S. v. the Netherlands*, no. 277/05, § 61, 7 June 2011). Therefore the guarantee of efficiency of the review should continue to apply even thereafter (see *Kormoš v. Slovakia*, no.46092/06, § 93, 8 November 2011)." *Osmanović v. Croatia*, ibid., para. 49.

227 *Kuttner v. Austria* (ECHR), 7997/08 ,para. 31.

remedy the violations of his rights. 'Time served' is a right under Article 78(2), and not an independent remedy. Where arbitrary detention or a violation of the right to be tried within a reasonable time are at play, the Court is required to provide a remedy above and beyond the deduction of time for time served.[228] An acquittal is also not a precondition for such remedies.[229] For reasons that will be developed below, it is the positon of the Defence that a stay of the proceeding is the only appropriate remedy at this juncture.

B. The Chamber erred in law and in procedure by failing to take steps to ensure the fairness and impartiality of the proceedings, and imposed a disproportionate sentence as a result

111. The right to be presumed innocent applies to everyone, and not just specific persons in a particular case. Accordingly, although the right to be presumed innocent vis-à-vis the Main Case charges was connected to Mr. Bemba's status as a defendant in the Main case, this right triggered obligations and consequences that travelled outside the perimeters of the Main case, and into the Article 70 case.[230] These obligations were not fulfilled, Mr. Bemba was sentenced on the basis of an unfair proceeding, and as a result, received a disproportionately punitive sentence, based on reasons that lacked objective impartiality.

112. As noted above, at key points of the proceedings, the Court was presented with the option of interpreting the Statute and Rules in a manner that was consistent with the presumption of innocence in the Main case and the right to liberty in the Article 70 case, or doing so in a manner that ensured that Mr. Bemba, if guilty in

[228] *Włoch v. Poland* (2) (ECHR), 33475/08, para. 32: "a court credits a period of deprivation of liberty without making any assessment of the legality of the pre-trial detention. Accordingly, the Court considers that the fact that the total period of the applicant's pre-trial detention was automatically credited towards another penalty imposed in respect of an unrelated offence cannot be considered compliant with the enforceable right to compensation contained in Article 5 § 5 of the Convention"; *Taavitsainen v. Finland* (ECHR), 25597/07, para. 29: "29. The Court points out that the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of his or her status as a victim within the meaning of Article 34 of the Convention. However, this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner (see Eckle v. Germany, 15 July 1982, § 66, Series A no. 51, § 66, Beck v. Norway, no. 26390/95, § 27, 26 June 2001 and Cocchiarella v. Italy [GC], no. 64886/01, § 77, ECHR 2006-...)."

[229] *N.C. v. Italy*, 24952/94, para. 49

[230] *Zollmann v United Kingdom* (ECHR), App. No. 62902/00, "Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings". See further *Rywin v. Poland* (ECHR), App. No. 6091/06, 4070/07, para. 208 concerning the application of the presumption of innocence to parallel proceedings involving the same person and facts, and *Ismoilov v Russia & others* (ECHR), 2947/06, para 163.

both cases, would be punished to the full extent. The Court erred on the side of punishment, and, due to the absence of effective procedural safeguards, Mr. Bemba was detained for an excessively lengthy period of time.

113. The Chamber should have taken steps to remedy this situation, once the Appeals Chamber issued its verdict of acquittal in June 2018. But it did not. The absence of concrete, evidential findings and specific, individualised reasons makes it difficult to ascertain how and why the Chamber determined Mr. Bemba's sentence. There is, nonetheless, an appearance that the Chamber's approach to Mr. Bemba's sentence was tainted by a continued presumption of his Main case guilt: this caused the Chamber to give undue weight to irrelevant factors, whilst ignoring relevant ones. This is reflected by the fact that:

(i) After giving the Prosecution 'wide latitude' to further its public attack on the legitimacy of Mr. Bemba's acquittal and his reputation,[231] the Chamber failed to deprecate these statements or otherwise take steps to reduce or remedy the harm caused by an unprecedented attempt by an International Prosecutor to controvert a final acquittal;

(ii) The Chamber declined to make any adjustment to its findings to take into consideration Mr. Bemba's acquittal in the Main Case, or to otherwise consider its impact on Mr. Bemba's overall circumstances (Rule 145(1)(c)); and

(iii) The Chamber imposed a disproportionate sentence on Mr. Bemba, which bears no correlation to the (limited) findings concerning the nature and degree of Mr. Bemba's participation in the offences, and the description of his culpability.

1. The Trial Chamber erred in procedure, and abused its discretion by failing to regulate the Prosecution's conduct in the Article 70 case, and failing to provide Mr. Bemba with a remedy for such conduct.

114. It is understandable that following Mr. Bemba's conviction at first instance, the Prosecution and participating victims had certain expectations, and were emotional and disappointed when those expectations were not realised. The

[231]ICC-01/05-01/13-T-59-ENG, p.17, ln. 11; p. 29, lns. 23-24; p. 33, lns 16-17.

Prosecutor is, however, an impartial Minister of Justice, who has the duty to respect and uphold the rights of all persons, including in particular, persons who have been found not-guilty. It is, therefore, incomprehensible and inacceptable for such a Prosecutor to effectively cannibalise the Court from within, by using the Article 70 case as a vehicle for de-legitimising and deflating Mr. Bemba's acquittal.

115. Contrary to the oral ruling of the Chamber, the Prosecution has no latitude to abuse the court's processes and the publicity of its proceedings, for the purpose of undermining a final acquittal. Article 17(1) of the ICCPR provides that "[n]o one shall be subjected to […] unlawful attacks on his honour and reputation". The protection of the right to private life under article 8 of the ECHR also encompasses the protection of a person's reputation.**[232]** This protection extends to statements or disclosures by prosecuting authorities, which are unlawful, in the sense that the alleged crimes have not been proved.**[233]** The fact that such statements have been uttered by a Prosecution in the course of court submissions therefore offers no defence, in circumstances where a fair balance between the pursuit of lawful objectives and the private interests of the individual has not been struck.[234] To the contrary, the inclusion of unfounded accusations in Prosecution filings create an authoritative appearance, that is "likely to carry great significance", which in turn, can stigmatise the individual and have "a major impact on his person situation as well as his honour and reputation".[235] Once an acquittal is final, "even the voicing of suspicions regarding an accused's innocence is no longer admissible,[236] and, as set out above procedural history, these submissions went far beyond merely questioning the correctness of the Majority verdict.[237]

116. If it was inadmissible for these submissions to be made, it was also inadmissible to allow them to be made, in full awareness of the consequences for the defendant's reputation, and the appearance of impartiality of the proceedings. The

[232] *Chauvy and others v. France* (ECHR), App. No. 64915/01, 29 June 2004, par. 70; *Polanco Torres and Movilla Polanco v. Spain (*ECHR), No. 34147/06, 21 September 2010, par 40, citing with approval *Arakó v. Hungary N*o. 39311/05, par. 23, 28 April 2009.
[233] *Mikolajová v. Slovakia*, App. No. 4479/03, 18 January 2011, par. 57.
[234] *Beyeler v. Italy (ECHR),* App. No. 33202/96, para. 107.
[235] *Sanchez Cardenas v. Norway (ECHR),* App. No. 12148/03, para. 38. See also *Y. B. v EULEX*, Case no. 2014-37, Judgment 19 October 2016, in which the Kosovo Human Rights Review Panel found that Article 8 of the ECHR was violated in circumstances where the EULEX Prosecutor exploited proceedings in one case, to launch public, defamatory accusations that went beyond 'mere suspicion, against an uncharged individual: see paras. 44-54, http://hrrp.eu/docs/decisions/Decision%20and%20findings%202014-37.pdf
[236] *Geerings v. the Netherlands* (ECHR), App.No.30810/03, para. 49.
[237] Cf *G.C.P. v. Romania* (ECHR), App. No. 20899/03, paras 10, 57.

Prosecutor's submissions served no lawful purpose: there was no legal basis for the Prosecution to use the Article 70 case to achieve a *de facto* review of the Main Case verdict. An acquittal issued by the Appeals Chamber is final, and certainly cannot be reversed by a Trial Chamber. The language employed in the Prosecution's written submissions also went well beyond the requirements of laying out its case on the issues that were properly before Trial Chamber VII. The Trial Chamber was therefore on notice, before the 4 July 2018 hearing commenced, of the likely tenor of the Prosecution's oral submissions. Given the timing, and public nature of its submissions, the Prosecution and Trial Chamber would also have been aware that such submissions would generate severe harm to Mr. Bemba's reputation, and stigmatise him on the basis of accusations that had been dismissed by a final verdict of the Appeals Chamber. As affirmed by the Appeals Chamber, the high profile nature of particular proceedings or defendants "reinforce(s) the need for caution as well as accuracy in any public comments".[238]

117. The statements caused, and continue to cause reputational harm, thereby violating Mr. Bemba's right not to be "subjected to […] unlawful attacks on his honour and reputation".[239] Following this hearing, the Defence also demonstrated the impact of the Prosecution's actions, as viewed through the plethora of social media posts, which cited to, or parroted the wording of the Prosecution.[240] This included high profile NGO and medial organisations that have particular resonance amongst Mr. Bemba's community and peers.[241] These statements generated wrongful public condemnation of Mr. Bemba,[242] and as a result, the Article 70 case operated as a springboard for *ultra vires* punishment.[243]

[238] ICC-01/11-01/11-175, para. 30.
[239] Article 17(1), ICCPR. See also Article 8, ECHR, and *Chauvy and others v. France* (ECHR), App. No. 64915/01, 29 June 2004, par. 70; *Polanco Torres and Movilla Polanco v. Spain (*ECHR), App. No. 34147/06, par 40, citing with approval *Arakó v. Hungary N*o. 39311/05, par. 23.
[240] ICC-01/05-01/13-2304-AnxC.
[241] ICC-01/05-01/13-2304-AnxC.
[242] ABA's Model Rules of Professional Conduct provide at Rule 3.8 (f), with respect to the 'Special Responsibilities of A Prosecutor', that "The prosecutor in a criminal case shall: […] except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused (...)." https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html).
[243] *Ismoilov v Russia & others*, App. No. 2947/06, para 163: the court will ascertain "whether there was any close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicants in Uzbekistan which might be regarded as sufficient to render the applicants "charged with a criminal offence" within the meaning of Article 6 § 2 of the Convention". See also *Zollmann v United Kingdom*, App. No. 62902/00, "Article 6 § 2, in

118. The unchecked submissions also impacted adversely on the appearance of the Trial Chamber's impartiality regarding Mr. Bemba. The Trial Chamber had a positive duty to uphold the fairness and impartiality of the proceedings, and the specific rights of Mr. Bemba, including his right to an effective remedy. As explained by the Appeals Chamber,[244]

> It is the responsibility of the Pre-Trial and Trial Chambers to ensure fair and expeditious proceedings and that this responsibility empowers these Chambers to take measures where the Prosecutor's conduct is inappropriate. Statements which may be inappropriate in light of the presumption of innocence but which do not cast doubt on the Prosecutor's impartiality may be subject to, and **may require** the taking of other measures by the Pre-Trial or Trial Chamber responsible for the case (emphasis added).

119. And yet, the Re-Sentencing Decision is silent as concerns the Defence challenges to the propriety of these submissions, and the attendant harm caused to Mr. Bemba. The Trial Chamber also did not correct the record, or request the Prosecution to do so, as concerns the Prosecution's statements that Mr. Bemba was not innocent as regards the charges in the Main case, or that it was appropriate to punish him for the thousands of victims denied 'justice' in the CAR.

120. Mr. Bemba was also entitled to be viewed by Trial Chamber VII as someone who is innocent of the charges brought against him in the Main case. And yet, the Prosecution endeavoured, through its arguments, to pollute the acquittal verdict (to render it "toxic")[245] and thereby drain it of any positive value in the Article 70 case. And, it appears that the Prosecution succeeded in doing so, whilst reinforcing negative perceptions of Mr. Bemba's criminality, deriving from his position as an accused in the Main Case. The extent, to which this is reflected in the Chamber's findings, and ultimate sentence, will be addressed in the next section.

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its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings".

[244] ICC-01/11-01/11-175, para. 35.

[245] ICC-01/05-01/13-2296, paras. 4, 44.

2. The Chamber abused its discretion by declining to make any adjustment to its findings to take into consideration Mr. Bemba's acquittal in the Main Case, or to otherwise consider its impact on Mr. Bemba's overall circumstances (Rule 145(1)(c))

121. Rather than dismissing the Prosecution submissions on the basis that they were an inappropriate attempt to controvert an acquittal (an approach which would have reinforced the weight and finality of the acquittal), the Trial Chamber ruled that that Mr. Bemba's acquittal would have no impact on its Re-Sentencing Decision.[246] The Chamber therefore excluded a factor that should have informed its assessment of all relevant circumstances concerning Mr. Bemba.

122. Mr. Bemba's acquittal meant that his prior record was wiped clean. Given that the Chamber determined that the absence of a prior conviction was relevant to the overall circumstances of Mr. Babala,[247] Mr. Arido, [248] Mr. Mangenda,[249] and Mr. Kilolo,[250] Mr. Bemba's acquittal should have triggered the same consideration afforded to his co-defendants, which begs the question as to why his acquittal was dismissed in such a categorical manner. As will be elaborated in Ground 3, in light of his acquittal, the overall length of Mr. Bemba's detention at the ICC should have been considered by the Chamber as part of its assessment of Mr. Bemba's individual circumstances, and the totality of sanctions that had been imposed on him. The Trial Chamber nonetheless failed to engage with arguments on this point, and therefore ignored the human dimension and consequences of his prolonged incarceration.

123. By excluding the acquittal from its consideration, the Trial Chamber also erred by failing to adjust previous findings that were predicated on his Main case conviction, including as concerns his overall culpability, and the Chamber's characterisation of his role, as the 'beneficiary' of the Article 70 conduct.

124. As regards the first issue, in sentencing Mr. Bemba to 12 months, which was also described as 'time served', the Chamber noted that there was no practical (or measurable) difference between this sentence, and the sentence of four years, which Judge Pangalangan proposed in his 2017 dissenting opinion.[251] The Trial Chamber

[246] ICC-01/05-01/13-2312, para. 22.
[247] ICC-01/05-01/13-2123, para. 61.
[248] ICC-01/05-01/13-2123, para. 89.
[249] ICC-01/05-01/13-2123, para. 137.
[250] ICC-01/05-01/13-2123, para. 184.
[251] ICC-01/05-01/13-2312, fn. 214.

was therefore aware, and endorsed the fact that Mr. Bemba served a *de facto* sentence of at least four years. The Chamber's public comment to this effect then served to reinforce the public perception that Mr. Bemba's culpability corresponded to a four-year sentence.

125. Of further importance, Judge Pangalangan's 2017 opinion was predicated on his conclusion that Mr. Bemba had engaged in Article 70 conduct "in order to subvert a conviction." [252] This four-year threshold was therefore determined on the basis of an assumption concerning Mr. Bemba's guilt, in the Main Case. Following this Main Case verdict acquitting Mr. Bemba, this assumption is inadmissible. It was, therefore, a clear abuse of discretion for the Trial Chamber to place their imprimatur on a *de facto* 4 year sentence, based on a patently extraneous factor.

126. Similarly, in justifying its decision to 'park' the acquittal, for the purposes of the Re-Sentencing Decision, the Trial Chamber averred that the Article 70 case "has been clearly understood as independent from the Main Case".[253] At the same time, the Trial Chamber indicated that although the self-imposed separation between the cases raised practical difficulties concerning the ability of the Chamber to make factual assessments on non-merits issues,[254]

> [f]ollowing the Sentencing Judgment, the Chamber now considers that the independence of the cases warrants not giving weight to the fact that the false testimony went only to 'non-merits' issues.

127. Apart from the fact that this separation resulted in a sentence that was based on entirely abstract notions of harm, by shearing the acquittal and Main Case appellate findings from the sentencing process, the Chamber erred by excluding a factor, and findings that might have impacted on, or mitigated existing Article 70 findings that were linked intrinsically to Mr. Bemba's original Main Case conviction.

128. For example, the Trial Chamber's decision to "remove" the weight it had placed on the fact that the lies concerned "non-merits", presupposes that these "non-merits" lies must have been linked to substantive issues in the case. However, the

[252] ICC-01/05-01/13-2123-Anx, para. 18.
[253] ICC-01/05-01/13-2123, para. 23.
[254] ICC-01/05-01/13-2312, para. 33.

Main Case Appeals Chamber's finding that Trial Chamber III had not safely established the command structure and organisational control of the MLC in the CAR or the insufficiency of measures that were taken by the MLC to investigate crimes,[255] undercut any assumption that Defence witnesses testifying on such matters must lie on these specific issues.[256] Bearing in mind the need to determine penalties based on the individual circumstances of the defendant, it also undercut any assumption that in providing instructions on such matters, Mr. Bemba must have intended the Defence to induce witnesses to provide false testimony,[257] particularly in circumstances where either:

- It would appear that Mr. Bemba had a genuine belief that the witness in question personally experienced the events referred to in the instructions;[258] or
- Mr. Bemba would not have known, or would not have been in a position to have known whether the witness had personal experience of the issues put to them (for example, the CAR witnesses).

129. This distinction is also important in light of:

- The Article 70 Appeals Chamber's finding that it was correct for Trial Chamber VII to infer that a reference to the potential consistency between a Defence witness's testimony, and a Defence exhibit (a letter that Mr. Bemba wrote to the CAR President in 2013 concerning proposed measures), was probative as to an intent to solicit false testimony;[259] and
- The Main Case Appeals Chamber's subsequent finding that the Trial Chamber erred by excluding this letter, and disbelieving the genuineness of the proposed measures, in particular, given that the Prosecution had not disputed the letter's contents.[260]

130. Similarly, in its 2017 sentencing decision, the Trial Chamber placed weight on its assessment that Mr. Bemba was the "beneficiary" of the Article 70 conduct.[261]

[255] Main Case Appeals Judgment, Majority, paras. 172 -175.
[256] ICC-01/05-01/13-2304, paras. 19-26, 28.
[257] Cf. Appeals Judgment, paras. 785 (and fn.1776); Trial Judgment, paras. 606, 686, 688.
[258] For example, the instructions conveyed from Mr. Mangenda to Mr. Kilolo in connection with D-54, use language that suggests the belief that D-54 actually witnessed and experienced the specific events referred to (i.e. that D-54 shouldn't forget to mention the things they saw: CAR-OTP-0079-0131 at 0134-0135, lns. 46-72).
[259] Appeals Judgment, para. 1225.
[260] Main Case Appeals Judgment, para. 175.
[261] ICC-01/05-01/13-2123, para. 219.

The Chamber cited the following finding from the Trial Judgment in support of its reliance on Mr. Bemba's status as the 'beneficiary':[262]

> With a view to properly assessing Mr Bemba's contribution and mens rea, it is necessary to refer to his **situation as an accused in the Main case**. He is the ultimate and main beneficiary of the implementation of the common plan, as the offences were committed in the context of his defence against the charges of crimes against humanity and war crimes in the Main Case (emphasis added).

131. The reference to Mr. Bemba's "situation as an accused in the Main case" cited, in turn, to the Chamber's earlier description of Mr. Bemba, that included the element that:[263]

> Mr Bemba was convicted of the charges in the Main Case on 21 March 2016 and, on 21 June 2016, sentenced to a total of 18 years imprisonment. Mr Bemba remained in detention at the ICC Detention Centre during the time relevant to the charges.

132. Whereas the Trial Judgment refers explicitly to Mr. Bemba's Main case conviction, sentence, and detention, there is no reference to the appeals that were pending at that point. Mr. Bemba's conviction, and the degree of culpability attached to that conviction (18 years) were thus embedded in Trial Chamber VII's assessment of Mr. Bemba's role as a 'beneficiary', which in turn, impacted directly on the Chamber's assessment of his contribution and *mens rea*, for the purposes of the initial 2017 sentence.

133. Mr. Bemba's acquittal and the related findings, at the very least, underscored the need for a concrete analysis as to the gravity of the lies of each witness. But regrettably, Trial Chamber VII appears to have been reluctant to endorse findings that were so strongly impugned by the Prosecutor. The Chamber's ultimate decision to eschew such a concrete analysis is therefore reflective of an arbitrary approach, which erred in favour of the Prosecution rather than the Defence.

[262] Footnote 347 (ICC-01/05-01/13-2123) citing Judgment, ICC-01/05-01/13-1989-Red, para. 805.
[263] ICC-01/05-01/13-1989-Red, fn.1850, citing paragraph 8.

3. The Chamber imposed a disproportionate sentence on Mr. Bemba, which bears no correlation to the (limited) findings concerning the nature and degree of Mr. Bemba's participation in the offences, and the description of his culpability

134. As set out in Ground One, the absence of concrete findings and explanations renders it difficult to ascertain how and why the Trial Chamber reached its conclusions, and ultimate sentence. Nonetheless, the objective disparity between the sentence imposed on Mr. Bemba, as compared to the specific findings regarding the degree of his culpability, suggests that the embedded portrait of Mr. Bemba as a guilty defendant, who resorted to Article 70 offences to avoid a rightful conviction, travelled through to the Trial Chamber's ultimate determination of the punishment that should be imposed on him. There is, therefore, an appearance that the Trial Chamber's impartiality had been impacted.

135. In terms of the specific findings concerning Mr. Bemba's culpability, the Chamber confirmed the "somewhat restricted nature" of Mr. Bemba's contributions vis-à-vis the other co-perpetrators.[264] The Chamber also did not alter its 2017 assessment that Mr. Bemba's contributions to the Article 70(1)(a) offences were "almost" (that is, not quite) the same as the Article 70(1)(c) contributions. The Chamber nonetheless increased Mr. Bemba's Article 70(1)(a) sentence (11 months to 12 months) based on its assessment of the degree of his participation. At the same, whereas the Chamber found that the defendants' acquittals for the Article 70(1)(b) offences should be taken into account in the sentence,[265] there is no indication as to how this was applied in Mr. Bemba's case, bearing in mind the Article 70(1)(a) increase.

136. Given the more restricted nature of Mr. Bemba's participation, and the fact that as a non-lawyer, his sentence was not aggravated to reflect an abuse of trust vis-à-vis the Court,[266] it is difficult to understand how and why the Trial Chamber gave him the highest sentence, unless its assessment was affected by an implicit perception of Mr. Bemba as a guilty defendant, who used his Defence to try to escape a rightful conviction.

[264] ICC-01/05-01/13-2312, para. 45.
[265] ICC-01/05-01/13-2312, para. 65; "It is recalled for Mr Bemba that the reversed Article 70(1)(b) convictions should lead to some reduction in his joint sentence", para. 120.
[266] Cf Mr. Kilolo (ICC-01/05-01/13-2312, para. 98); Mr. Mangenda (ICC-01/05-01/13-2312, para. 81).

137. The arbitrary and partial nature of the Chamber's approach to Mr. Bemba is further evidenced by its refusal to consider any positive aspects that had applied to his co-defendants, such as the absence of a prior record, co-operation with the Court (including after he was released), or collateral consequences, such as the subsequent prohibition on his ability to participate in political life. In terms of the latter, although the Chamber stated that it would give it 'minimal weight', it appears to have given it no weight.[267]

138. As set out above, the Chamber also afforded Mr. Bemba with no remedy or mitigation as concerns the gross disparity between the length of his detention, and the length of his sentence. There is also an appearance that the sentences ultimately imposed on the three defendants were influenced by the time that they had actually served. It is notable, in this regard, that the presumption of innocence and the presumption of liberty are mutually reinforcing rights, and mutually destructive in the breach. The ICC Statute favours a presumption of liberty in order to protect the presumption of innocence.[268] Conversely, lengthy pre-trial detention undermines the presumption of innocence because it creates a perception of guilt that anticipates and influences the actual sentence.[269] This is what appears to have occurred in the present case: the sheer length of Mr. Bemba's detention at this Court has fed implicit biases and pre-conceptions concerning both his Main Case and Article 70 culpability, with the result that the Chamber employed an outsized assessment of the overall degree of his culpability, and appears to have been impervious to the impact of human rights violations on his personal situation.

[267] ICC-01/05-01/13-2312, para. 119.

[268] "It is the purpose of the periodic review under article 60 (3) of the Statute to ensure that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances. Hence, it is an essential procedural safeguard against detention that is not in accord with the Statute and internationally recognised human rights. This procedural safeguard must also be seen in the context of the detained person's right to be presumed innocent" ICC-01/05-01/08-1019, para. 49.

[269] Acosta-Calderón *v.* Ecuador, ibid., para. 111; Letellier v France (ECHR) Application no.12369/86, para. 51. See also "Being detained for the entire pretrial period is related to the likelihood of being sentenced to jail and prison, as well as the length of the sentence. When other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial. The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer",
C. Lowenkamp, Ph.D., M. VanNostrand, Ph.D. A. Holsinger, Ph.D, 'Investigating the Impact of Pretrial Detention on Sentencing Outcomes', Arnold Foundation, November 2013,
p. 10, https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf

C. The most appropriate remedy for these cumulative violations would be to stay the proceedings on an unconditional basis

139. The right to an effective remedy for arbitrary detention translates to a right to "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition".[270] As explained by the Chairperson of the UN Working Group on Arbitrary Detention, Roland Adjovi:[271]

> pardon is not always an appropriate form of reparation/remedy because the situation of arbitrary detention should not have taken place and should not have existed so *status quo* has to be restored, that is to return to a state of legal virginity that he had before the arbitrary detention.

140. It is not possible to restore lost time to Mr. Bemba, but it also possible to restore the 'legal virginity' of the case. The Prosecution's submissions have also tainted the impartiality of the proceedings to such an extent that it is impossible to separate valid findings from those, which are ineliminably polluted by the false perception of Mr. Bemba's Main Case 'guilt'. A stay of the proceedings is thus the only remedy that is capable of ensuring the goals of restitution, compensation, rehabilitation, satisfaction and non-repetition.

141. A permanent stay of the proceedings, as a remedy for an abuse of process, is a *sui generis* remedy that is available before the ICC.[272] The Appeals Chamber has sketched three scenarios where such a remedy is typically invoked at a domestic level: delays in the process of bringing a person to justice, broken promises concerning a prosecution, and bringing an accused to justice through illegal or devious means.[273] The ICC remedy is, however, grounded more in human rights principles, as befitting its genesis in article 21(3) of the Statute.[274] The threshold as to when it can be invoked is that:[275]

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[270] United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, 4 May 2015, WGAD/CRP.1/2015, para. 43
[271] Meeting, Human Rights Council, 33rd regular session, 13 September 2016, (1 hour 21 minute mark), http://webtv.un.org/meetings-events/human-rights-council/watch/clustered-id-contd-sr-on-safe-drinking-water-and-wg-on-arbitrary-detention-3rd-meeting-33rd-regular-session-human-rights-council-/5121905715001/?term=&sort=date#player
[272] ICC-01/04-01/06-772, paras. 24.
[273] ICC-01/04-01/06-772, para. 29.
[274] ICC-01/04-01/06-772, paras. 36-37.
[275] ICC-01/04-01/06-772, para. 39.

> Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.

142. This envisages a two-step test: firstly, have the rights of the defendant been violated, and secondly, have these violations undermined the possibility of a fair and impartial process. This test necessarily allows the Chamber to consider the cumulative impact of either separate or interlinking violations,[276] and does not require the defendant to establish bad faith on the part of any organs of the Court,[277] although such conduct might in itself, be a factor that demonstrates why it would be repugnant or odious to the administration of justice to allow the case to continue.[278] The emphasis on the ability to mount a defence, within the framework of Statutory rights, is also not phase specific. There is no reason why it would not apply equally to the sentencing or appeal proceedings as it does to the pre-trial phase.

143. To the contrary, the rights of the accused, as set out in Article 67(1) of the Statute, are not confined to a particular phase of the proceedings: rather, the text is clear that these rights apply to all aspects of the case that concern the determination of the charges. This is consistent with the observation of the ECHR that Article 6(1), which sets out the right to a fair trial:[279]

> guarantees certain rights in respect of the "determination of … any criminal charge ...". In criminal matters, it is clear that Article 6 § 1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence (see, for example, the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 34-35, §§ 76-77).

144. In that case, the ECHR found that the right to an independent and impartial tribunal had been infringed at the sentencing phase. As will be elaborated below, this interpretation is also consistent with domestic practice concerning a defendant's right to protection and remedies against fair trial violations, at the post-conviction phase.

[276] *Barayagwiza*, Decision, 3 November 1999, paras. 73
[277] ICC-01/04-01/06-1401, para. 91.
[278] *Barayagwiza*, Decision, para. 77.
[279] *V and T v. United Kingdom* (1999) 30 EHRR 121, para. 108.

145. In this regard, although the Appeals Chamber was at pains, in the *Lubanga* case, to emphasise that the ICC remedy was rooted in human rights law and not a specific legal tradition, it is also relevant that at a domestic level, the abuse of process doctrine has been applied to post-conviction proceedings, including in relation to defendants, who were detained for a period which exceeded length of their sentence.

146. A 2017 judgment of the High Court of South Africa is particularly instructive as concerns the present circumstances.[280] In this case, the Court was concerned with the situation of several defendants, who had remained incarcerated beyond the deadline for issuing a judgment on the review of the sentence. The reviewing judge possesses similar powers to the ICC Appeals Chamber seized of a sentencing appeal, in the sense that the reviewing judge could confirm, reverse or modify the sentence, and issue such orders as necessary to ensure justice (including quashing the underlying conviction).[281] The High Court conducted an extensive review of both South African and foreign precedents concerning the particular remedies that would apply, post-conviction, and in so doing, affirmed the following:

- the rights and remedies that apply to a person charged with an offence (including the right to be tried without undue delay) also apply to the sentencing phase, even if the conviction is final (in the sense that the person does not contest the finding of guilt);[282]
- the absence of an effective control mechanism to prevent post-conviction delays would bring the integrity of the justice system into disrepute;[283]
- bearing in mind the purpose of appellate review, "there is much less room for delay to be tolerated post-conviction than pre-";[284]

[280] *S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe* (C1191-13; B927-14; 526-14; 14-17; 682-16; 1907-16; 310-17) [2017] ZAWCHC 82; 2017 (2) SACR 546 (WCC) (16 August 2017), http://www.saflii.org/za/cases/ZAWCHC/2017/82.html

[281] Para. 8.

[282] Para. 21 referring to the Supreme Court of Canada case of *R v MacDougall* [1998] 3 SCR 45; [1998] 56 CRR (2d) 189.

[283] para. 24, citing South African decision of Sochop.

[284] Para. 34. See also para. 38: "it would be unfair and fallacious to adopt the attitude that if a conviction is sound, any post-conviction delay in the automatic review process is inconsequential and should always be condoned. That would mean that only the innocent are entitled to an expeditious review. Apart from the arch cynicism inherent in such a proposition and the fact that it goes against the fundamental grain that all are entitled to be treated equally before the law, it also suffers from a failure to appreciate that it is only if one has an expeditious system of review that we can identify those unrepresented persons who have been wrongly convicted or sentenced, and thereby prevent them from serving sentences that they should not."

- where **"**an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, for example where, by the **time the matter is reviewed he has already served the sentence that was imposed upon him, his constitutional right to a fair trial has been infringed and this may constitute a failure** of justice and a ground for the Court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings or to make any other order in connection with the proceedings as will, to the Court, seem likely to promote the ends of justice".[285]

147. Apart from the *MacDougall* case referenced in the above decision, other Canadian courts have also granted a stay of the proceedings in connection with both pre and post-conviction delays that resulted in unreasonably lengthy detention. For example, in the Cumberland Murders case,[286] the court found that there was an implicit presumption that a detained defendant would be prejudiced through delays in bringing a case to its conclusion, and that this presumption would be "virtually irrebuttable" in case of long delays that were not attributable to the defendant. There was also no discretion not to grant a stay of the proceedings in case the defendant's protection against unreasonable delay had been infringed.

148. Although not termed a 'stay', UK courts granted an unconditional release, and extinguished the sentence, as a remedy for a defendant who served excess prison time.[287] Similarly, in the cases of *Barrett*, and *Hemmings*, the Courts found that in circumstances where the defendant has already served longer than the appropriate custodial punishment – it would be inappropriate at that juncture to impose any custodial sentence.[288] In these cases, the Courts issued conditional discharges, that is, an order that the defendant would not be sentenced unless he committed a further offence.

149. The Privy Council has further acknowledged that a stay of the proceedings could be an appropriate remedy for unreasonable delay, if the nature of the violation

[285] Para. 40.
[286] *R. v. Richard Trudel and James Sauvé* [2008] 163 C.R.R. 202, http://netk.net.au/Canada/Trudel.asp
[287] *R (on the application of Galiazia) v Governor of Hewell Prison*, 2014 WL 5312005 (2014), ICC-01/05-01/13-2297-AnxB, p. 55.
[288] *R v Daniel William Barrett* [2010] EWCA Crim 365, ICC-01/05-01/13-2297-AnxB, p. 83; *R v Hemmings (David Christopher*) [2007] EWCA Crim 2413, available at https://courtappeal.vlex.co.uk/vid/-52563345

was such that it would no longer be possible to remedy the breach through a lesser remedy.[289]

150. It is also notable that in discussing whether the abuse of process doctrine had traction at the ICC, the Appeals Chamber framed it as a question as to whether there might be some violations, for which compensation would not be a sufficient remedy.[290] In line with this test, the Inter-American Court found, in the case of *Acosta-Calderón v Ecuador*, that in order to effectively remedy the harm caused by the applicant's arbitrary detention, and linked violation of the right to fair trial, it was necessary to "eliminate Mr. Acosta Calderón's name from the public registries in which he appears with a criminal record in connection to the instant case,"[291] in addition to pecuniary damages. Although this case also concerned fair trial violations, these were linked to the excessive length of his pre-trial detention (5 years). Specifically, the Court found that the length of this detention violated the presumption of innocence, as it was "tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law".[292] The Court further found a violation of the right to be tried within a reasonable time (Article 8(1) of the Convention).[293]

151. Domestic courts have also viewed the question through a similar lens and found that the right to release as a remedy for lengthy detention, may mean release from the charges themselves, if this outcome is necessary to properly redress the harm suffered. Thus, in the Namibian case of the *State v Heidenreich*,[294] the Court was called upon to determine whether a statutory provision concerning the right to release for unreasonable delay, could and should also mean 'release' from the charges. In deciding in the affirmative, the Judge concluded that,[295]

> when regard is had to the underlying purpose of Art. 12(1)(b) I am of the view that a broader, more liberal, construction should be given to the word. Once the main purpose of the sub-article is identified as being not only to

[289] Attorney General's Reference No 2 of 2001 (On Appeal from the Court of Appeal (Criminal Division)), para. 29, https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd031211/ref2-2.htm
[290] ICC-01/04-01/06-772, para. 37.
[291] *Ibid.*,para. 165.
[292] Para. 111.
[293] Para. 104.
[294] [1996] 2 LRC 115, https://namiblii.org/system/files/judgment/high-court/1996/5/1996_5.pdf
[295] pp. 13-14.

> minimise the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospects of a fair hearing, then it seems to me that "released" must mean released from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail only meets part of the purpose of the sub-article.

152. The Namibian Courts subsequently confirmed that the Court must have the power to release the defendant from the charges, as a remedy, in the cases of *Malama Keane* and *Myburgh*.[296]

153. The common thrust of these cases is that in line with the overarching principle of *habeus corpus*, domestic courts have a positive duty to supervise the continued necessity and proportionality of the defendant's detention in order to ensure that it is not unreasonably prolonged. Where that fails to occur, and where the defendant is consequently, and through no fault of his own, detained for an excessive period, an unconditional stay may be the appropriate remedy – both to cure the prejudice to the defendant, and to repair the damage caused to the integrity of the proceedings.

154. That threshold is reached in the current case. The scales of justice must always be tipped towards the presumption of innocence and *in dubio pro reo*. And yet, the approach in this case privileged punishment and presumption of culpability over the rights of the defendant. In Ground One, the Defence set out the evidential impossibility of reconstructing the case against Mr. Bemba. This impossibility is further reinforced by the various layers of bias that infect the current (amorphous) record, and the harm already suffered by Mr. Bemba, as a result of the failure to conclude these proceedings within a reasonable time, and the absence of procedural safeguards to protect him against arbitrary detention. The constituent elements of a fair trial are now broken, and they cannot be pieced together again. A stay of the

296 *S v Myburgh* (SA21/01) [2002] NASC 16 (14 October 2002), https://namiblii.org/node/1007; *Malama-Kean v Magistrate of the District of Oshakati NO and Another* (SA4/02) [2002] NASC 15 (14 October 2002), https://namiblii.org/na/judgment/supreme-court/2002/15

proceedings is therefore the most appropriate, and indeed, only appropriate remedy at this juncture. The Defence therefore requests the Appeals Chamber to reverse the decision on conviction and sentence, pursuant to Article 83(2) of the Statute.

IV. Ground Three: The Trial Chamber abused its discretion, and failed to consider relevant considerations, as a result of its failure to apply the 'totality principle' in a correct manner. The Chamber also erred in law as concerns its interpretation of Article 23, and related Article 70 provisions, and failed, as a result, to protect Mr. Bemba from unlawful penalties, or to otherwise mitigate them. The Chamber therefore imposed a sentence, which when viewed in light of the total punishment endured by Mr. Bemba, exceeds the level of his culpability. It is, therefore, disproportionate, as per Article 81(2)(a).

155. Although the 'totality principle' is oft-cited by the Prosecution as a justification for increasing sentences in order to reflect the myriad of different legal classifications and distinctions, without differences, woven into their cases, the principle derives from the basic human right to protection against excessive and disproportionate punishments. The core thrust of the principle is that the total punishment meted out to a defendant must be proportionate to the defendant's culpable conduct.[297] Once the goals of sentencing have been met (that is, the defendant has endured a punishment that is commensurate to his culpability, and which meets the objectives of deterrence), anything beyond that, would be harmful,[298] and counter-productive to the rehabilitation of the offender.[299] It is considered to be a sentencing error not to apply principle, for the purpose of ascertaining whether the overall length of detention served by the defendant, exceeds

[297] Separate and Dissenting Opinion, Judge Khan, *Prosecutor v. Kayishema & Ruzindana*, Trial Judgment, para. 52. See also *Prosecutor v. Krnojelac* "Decision on the Defence Preliminary Motion on the Form of the Indictment', 24 February 1999, para. 10.

[298] *Azzopardi v The Que*en [2011] VSCA 372, paras. 61-61 (Australia, https://jade.io/article/257028?at.hl=Azzopardi+v+R+%255B2011%255D+VSCA+372)"The rationale underlying the principle is that a "just measure" of an offender's total criminality is a sentence which satisfies all sentencing objectives applicable to the entirety of that criminal conduct. Only implicitly in all of the statements of the principle of totality in its application is the proposition that a sentencing judge undertaking the adjustment of the sentence does so in order to ensure that the final sentence is no more than is necessary to satisfy the various objectives of sentencing. Considerations of mercy may further influence the sentencing judge to increase any downward adjustment. As Wickham J was to recognise in Magee v The Queen the sentence should be no longer "than is necessary to meet the various purposes of criminal punishment". Once the aggregate sentence satisfies both the mitigatory sentencing objectives as well as the punitive principles of just punishment, retribution, denunciation, deterrence and protection of the community, "that it is enough". Wickham J also opined that "[m]ore than enough is wrong because the excess is not only purposeless but might be harmful". See also High Court decision of *Mill v The Queen* (1988) 166 CLR 59, para. 8, https://jade.io/j/#!/article/67476

[299] *Vinter & Others v. United Kingdom* (ECHR), 66069/09, 130/10 and 3896/10, paras. 111, 115.

the level of his criminality.[300] The principle is embodied in Rule 145(1)(a) and (b), which require the Court to ensure firstly, that the "totality of any sentence of imprisonment and fine, as the case may be, (…) reflect(s) the culpability of the convicted person", and secondly, that the sentence reflects an appropriate balance of all relevant factors, including the circumstances of the sentenced individual.

156. Notwithstanding these principles and extensive Defence submissions on this point,[301] the Re-Sentencing Decision does not refer to the totality principle. The Decision also fails to:

a. address the consequences of Mr. Bemba's prolonged detention at the ICC, as a relevant factor concerning the 'punishment' endured by Mr. Bemba, and his individual circumstances;
b. assess the amount of his fine by reference to his culpability, rather than the Registrar's assessment of his means; or
c. apply the Statutory protections against *ne bis in idem*, and penalties that fall outside the exhaustive Article 70 regime.

157. As a result of errors in law and related failure to consider circumstances that are relevant to the totality principle, the overall sentence imposed on Mr. Bemba is excessive and disproportionate.

A. The Trial Chamber abused its discretion, and ignored relevant factors, by failing to address the consequences of Mr. Bemba's prolonged detention at the ICC

158. In its findings on Mr. Bemba's sentence, the Trial Chamber stated that it was "mindful of the time already spent in detention" when it "weighed and balanced all these factors for purposes of re-sentencing, revising its earlier assessments as necessary".[302] Nonetheless, when these individual factors are analysed, there is no indication that the Chamber revised any 'earlier assessments', in order to take account of the impact of Mr. Bemba's prolonged detention on the sentencing objectives of retribution, deterrence and rehabilitation. There are also three contra-indications that sign-post the Chamber's exclusion of this factor:

a. There is no measurable impact on the sentence imposed on Mr. Bemba

[300] Australia: *Choi v R* [2007] NSWCCA 150, para. 157 (ICC-01/05-01/13-2297-AnxB, p. 2.
[301] ICC-01/05-01/13-T-59-ENG, pp. 61, 65-67, 71-75.
[302] ICC-01/05-01/13-2312, para. 120.

b. In response to Defence arguments that duration of Mr. Bemba's detention had, itself, satisfied these sentence objectives, the Trial Chamber "recall[ed] its finding that the Main Case acquittal has no impact on the sentences to be imposed, and consider[ed] that it would not adequately reflect Mr Bemba's culpability for him to have no term of imprisonment declared against him".[303] The Chamber also noted "that Bemba Defence presents an array of arguments that Mr Bemba's credit already exceeds the maximum sentence which can be imposed, but the Chamber has already expressly found to the contrary";[304] and

c. The Chamber endorsed the imposition of ongoing deterrence measures against Mr. Bemba,[305] thereby confirming that it did not consider that the total length of Mr. Bemba's detention exhausted the objective of deterrence.

159. As concerns the first such signpost, the Chamber acknowledged that "if the Chamber maintains the same fines as those set in the Sentencing Decision despite the loss of the Article 70(1)(b) convictions, this actually constitutes a relatively higher penalty than the fines imposed in the Sentencing Decision."[306] It follows that when the Article 70(1)(b) acquittal is taken into consideration, Mr. Bemba received a more severe sentence in 2018 than he received in 2017. This means that there was absolutely no measurable reduction to take into account the excess detention of 3 ½ years, and excess punishment that had been served as a result.

160. At the heart of the Chamber's error is its focus on form rather than substance. The Chamber appears to have concluded that in assessing the proportionality of the sentence, it was only required to consider the proportionality of the sentence imposed by the Chamber, and not the punishment experienced by the defendant. The Chamber therefore closed its eyes to the proportionality of any detention served beyond the 12-month sentence imposed by the Chamber.

[303] ICC-01/05-01/13-2312, para. 121.
[304] ICC-01/05-01/13-2312, para.124.
[305] ICC-01/05-01/13-2312, para. 127: "the Chamber again finds that a fine is a suitable part of the sentence. The Chamber recalls 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"; para. 134: "Fines for Mr Bemba and Mr Kilolo create some **additional penalty** for the violation of two provisions under Article 70 of the Statute" (emphasis added); See also para. 138.
[306] ICC-01/05-01/13-2312, para. 133.

161. In line with this overarching focus on form rather than substance, the Chamber also failed to distinguish between the relevance of Mr. Bemba's overall detention for credit purposes, and its relevance pursuant to the totality principle. In Ground 2, the Defence has addressed the Chamber's legal error as concerns its wrongful conclusion that Mr. Bemba's detention was 'lawful'. But, even if the Chamber had been correct to determine that Mr. Bemba's detention was lawful, and to further exclude any period pre-dating November 2013 from its calculation of credit, these determinations did not answer the separate issue as to the relevance of this detention to the individual circumstances of Mr. Bemba, and objectives of sentencing.

162. At a domestic level, the overall amount of time that a defendant has spent in detention for different offences is considered to fall within the totality principle.[307] It is, therefore, a factor that must be balanced against the need for further punishment. As explained in the case of *R v. Barry*, the justification for doing so is that:[308]

> [...] the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of

[307] Rikoslaki, Penal Code of Finland (39/1889),
https://www.finlex.fi/en/laki/kaannokset/1889/en18890039_20150766.pdf
Chapter VII, Section 6 - Taking an earlier sentence
of imprisonment into account (751/1997)
(1) If a person who has been unconditionally sentenced to imprisonment is charged with another offence committed before the sentence was passed, the earlier sentence of imprisonment may be taken into account, to a reasonable degree, as a mitigating circumstance or as a ground for reducing the punishment. In addition, the sentence of imprisonment passed for the new offence may be shorter than the minimum provided for it or the earlier sentence may be deemed to be a sufficient sanction also for the act which was later taken up for a hearing.
(2) The judgment of the court shall indicate which earlier sentence or sentences have been taken into account when sentencing under this section.
Netherlands: Penal Code of the Netherlands, Wetboek van Strafrecht, 03 March 1881
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 of this Part pertaining to the imposition of punishments to run concurrently shall apply.
Germany: German Criminal Code of 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] l p.3322
Section 55
Subsequent fixing of aggregate sentence
(1) Sections 53 and 54 shall also apply to a convicted person who has had a sentence imposed upon him by a final judgment which has neither been enforced, barred by the statute of limitations nor remitted, when that person is convicted of another offence which he committed before the previous conviction. That previous conviction shall be the judgment in those proceedings in which the factual findings underlying the new conviction could last have been examined.
United Kingdom: 'Offences Taken Into Consideration and Totality Definitive Guideline', https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf

[308] [2011] QCA 119, para. 16, https://jade.io/article/253339?at.hl=R+v+Barry+%255B2011%255D See also *Azzopardi v The Queen ibid.*, para. 62. Canada: *R. v. M.* (C.A.), [1996] 1 SCR 500, 1996 CanLII 230 (SCC), para. 42, https://www.canlii.org/en/ca/scc/doc/1996/1996canlii230/1996canlii230.html

> seven years may be appropriate for one set of offences and a sentence of eight years [may] be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences. The second matter that is considered under the totality principle is the proposition that an extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform.

163. Similarly, in the *Vintner* case, the ECHR underlined that,[309]

> the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence

164. Although the manner in which these principles is applied is discretionary in some jurisdictions, as with any discretionary factor, judges have no discretion not to consider an application to exercise this discretion, and to provide a reasoned determination as to the manner in which they exercised this discretion. Judges also have no discretion to exclude factors that impact on the proportionality of the overall sentence, since to do so, would result in a sentence that exceeds the culpability of the defendant.

165. This approach is consistent with the ICC sentencing regime. Whereas Rule 145(1)(b) affords the Chamber broad discretion to consider any factors that are relevant to the circumstances of the defendant, this discretion must be exercised in a manner that is consistent with the Chamber's duty, under Rule 145(1)(a), to impose a proportionate sentence. Thus, even if the period pre-dating the Article 70 arrest warrant is irrelevant for credit purposes, it is a 'circumstance' that should have

[309] *Ibid.*, paras. 111, 115.

informed the Chamber's assessment of the intensity (and proportionality) of the measures that had been applied to Mr. Bemba, and the proper balance between retribution and rehabilitation.

166. The indisputable reality is that Mr. Bemba spent **over ten years** in custody at the ICC, but was ultimately convicted for offences, that attracted a penalty of 12-months' imprisonment, and a 300 000 euro fine. That amounts to a significant imbalance between the punishment that he has endured, as compared to the degree of culpability assessed by the Trial Chamber. And, since time in custody is experienced in an exponential, rather than linear fashion, the time that Mr. Bemba spent in detention from November 2013 onwards was more intense, and had a more profound effect, because of the 5 ½ years which preceded it. A custodial sentence also 'punishes' the defendant by depriving him of his liberty, and restricting contacts.[310] Notwithstanding the multiple applications for provisional release filed by his Defence, Mr. Bemba was only released on two occasions, for the purpose of attending the funeral of his father, and that of his step-mother. The impact on his ability to enjoy meaningful family connections was therefore *greater* in the 10th year of separation, than it was in the first year. Mr. Bemba experienced 10 years of deprivation of liberty and restricted contacts, and as a result, the impact of the 4 ½ years of Article 70 detention was magnified, and affected him in a more intense manner, as compared to someone entering the detention unit for the first time in November 2013.

167. The arbitrary nature of the Chamber's approach is further underscored by the Chamber's subtraction of the time between the Single Judge's decision on Mr. Bemba's release, which was never implemented, and the Appeals Chamber's reversal of this decision.[311] This suggests that the Chamber privileged superficial technicalities over a proper assessment of Mr. Bemba's circumstances - once again, a triumph of form over substance. Mr. Bemba remained in detention each day, between 23 January 2015 and 20 May 2015. The Article 70 detention order also remained in place during this time period because of the condition attached by the

[310] UN Office on Drugs and Crime, "Handbook of basic principles and promising practices on Alternatives to Imprisonment", p. 27 https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf
[311] ICC-01/05-01/13-2312, paras. 125-126.

Single Judge to his potential release.[312] Apart from the fact that the ongoing existence of the order triggered a right to credit,[313] the Single Judge's decision that Mr. Bemba met the criteria for release had no impact on the deprivation of liberty that he experienced during this period.

168. Even if the Chamber was right to close its eyes to any judicial consideration of the time served in custody before November 2013, it is impossible to ascertain the basis for concluding that any further sanctions were required, or otherwise failing to set-off the excess detention (at least 3 ½ years) against such measures.[314] Indeed, reading between the lines, it appears that if anything, the Chamber considered that further deterrent measures were required because of, rather than despite Mr. Bemba's acquittal. Specifically, there is an appearance that the Chamber viewed Mr. Bemba's Main Case acquittal and release as a 'windfall', that could diminish the deterrent effect of his Article 70 sentence. This undercurrent runs through the Chamber's acceptance of the premise advanced by the Prosecution that Mr. Kilolo's description of the acquittal as "the feeling of a duty accomplished", acknowledges a nexus between Article 70 conduct and Mr. Bemba's acquittal.[315] The Trial Chamber also took great pains to emphasise that:[316]

> Future accused persons can look at Mr Bemba's conviction as a cautionary example as to what consequences obstructing the course of justice can have. Mr Bemba's acquittal in the Main Case should have been the end to his exposure to the Court, yet he **continues** to have the spectre of this institution hanging over him because of his obstruction of the administration of justice." (emphasis added).

169. This emphasis on Mr. Bemba's ongoing punishment suggests a concern that current and future ICC defendants might otherwise view the Main case acquittal as an incentive to engage in Article 70 conduct. Misguided perceptions are a manifestly inappropriate consideration for sentencing. The Chamber's concern with

[312] ICC-01/05-01/13-798, p. 5: "ORDERS that Jean-Pierre Bemba Gombo be released from the Detention Centre of the Court, **unless** his detention is otherwise required."(emphasis added).
[313] The Appeals Chamber's judgment on sentence suggests as much, by describing the overlapping credit period as running from 23 November 2015 onwards: ICC-01/05-01/13-2276-Conf-Exp, para. 231. See also
[314] As was the case in the *Prosecutor v. Haxhiu*, Judgment on Allegations of Contempt (Trial Chamber), 2 July 2008 IT-04-84-R77.5, para. 36, where the Chamber subtracted the time spent in detention from the fine it imposed.
[315] ICC-01/05-01/13-2312, para. 103.
[316] ICC-01/05-01/13-2312, para. 138.

such matters is also entirely inconsistent with the presumption of innocence (or actual innocence in the case of a final acquittal), and further bolsters the arguments set out in Ground 2.

170. The objectives of general deterrence also should not take precedence over the Chamber's duty to apply the totality principle to Mr. Bemba, and, craft a sentence that reflects his individual culpability. Mr. Bemba should not be punished because of the wrongful perception (engendered by the Prosecution) that his acquittal represents the successful realisation of the 'common plan'. Moreover, the general interests of deterrence are harmed by disproportionate sentences, as such sentences undermine public confidence in the fairness and impartiality of the judiciary.[317]

171. The existence of such additional measures tips the scales of punishment too far. The Defence therefore requests the Appeals Chamber to reverse the sentence, and impose one that recognizes that Mr. Bemba's detention exhausted the objectives of sentencing, and that as such, no further measures or sanctions should be applied.

B. The Chamber erred in law, and abused its discretion, as concerns the calculation of Mr. Bemba's fine

172. The Trial Chamber provided the following rational as concerns the fines imposed on Mr. Kilolo and Mr. Bemba:

> Fines for Mr Bemba and Mr Kilolo create some additional penalty for the violation of two provisions under Article 70 of the Statute while balancing the fact that the same conduct underlies each conviction. Given that Mr Bemba has considerably more means than Mr Kilolo, Mr Bemba's fine would need to be substantially higher in order to have an equivalent deterrent effect.

173. The fines were therefore intended to embody any culpability that exceeded the joint custodial sentence imposed by the Chamber. In the case of Mr. Kilolo, since the Chamber sentenced him to 11 months for Article 70(1)(a) offences, and 11 months for Article 70(1)(c) offences, the fine of 30, 000 euros is supposed to represent the extent of any culpability that is not captured by the joint sentence of 11

[317] 'Policy Paper on Mandatory Sentencing', Law Council of Australia, paras 192-193, https://www.aph.gov.au/DocumentStore.ashx?id=c05f81ff-d005-4738-8e1b-28469555b76a&subId=298819

months. In contrast, in the case of Mr. Bemba, the Chamber determined that it was necessary to impose a fine of ten times that magnitude, in order to reflect the so-called excess culpability, between his joint sentence of 12 months, and the individual Article 70(1)(a) and (c) sentences of 12 months. But, although the fine was justified by reference to 'excess culpability', there are no evidential findings concerning the nature of this excess culpability. To the contrary, the key argument underpinning the Prosecution's appeal of the Article 70(1)(a) sentence was the degree to which the acts and conduct underpinning the two overlapped.[318] And at no point, did the Prosecution or Chamber identify any conduct that was captured by the Article 70(1)(a) offence that was not captured by the Article 70(1)(c) offence (and Article 70(1)(c) sentence).

174. Even if there was such additional culpability, it is impossible to determine how it could amount to a fine of 300, 000 euros. Bearing in mind the similarity between the custodial sentences imposed on Mr. Bemba and Mr. Kilolo, the disparity between the two fines is facially illogical, and discriminatory. If, in the absence of any objective criteria provided by the Chamber, the *Hartmann* yardstick of 1000 euros = 1 day is used,[319] a 300, 000 euro fine is the equivalent of 300 days: that is, a 10 month sentence. Bearing in mind repeated affirmations that the conduct underpinning Article 70(1)(a) and (c) were "largely the same", it is impossible to ascertain who the Chamber could have concluded that this sum represented the punishment gap produced by Mr. Bemba's joint sentence. Rather, the key to this disparity is in the Chamber's assertion that "[g]iven that Mr Bemba has considerably more means than Mr Kilolo, Mr Bemba's fine would need to be substantially higher in order to have an equivalent deterrent effect."[320] This statement flies in the face of the Appeals Chamber's directive that:[321]

> culpability, rather than solvency, should be the primary consideration for a determination of the appropriate type of punishment. Indeed, this constitutes a guarantee of equal treatment of convicted persons as the determination on whether or not it is appropriate to impose a custodial sentence (and, if so, its quantum) as part of a sentence for offences under article 70 of the Statute

[318] ICC-01/05-01/13-2168-Conf, para. 109
[319] *Prosecutor v. Hartmann,* 'Second Order on Payment of Fine', IT-02-54-R77.5-A, 16 November 2011.
[320] ICC-01/05-01/13-2312, para. 134.
[321] ICC-01/05-01/13-2276-Conf-Exp, para. 245.

cannot be determined on the basis of the convicted person's financial means and his or her ability to pay a fine of high monetary value.

175. The Trial Chamber's attempt to pin the difference on 'deterrence' is also misconceived. Deterrence has two components: general and individual. The general deterrent effect of a fine is independent of the means of the defendant; Mr. Bemba's means are irrelevant to the extent to which this sentence deters other detainees from engaging in Article 70 offences. And, as noted above, a fine which is disproportionate to culpability is counter-productive as it undermines the legitimacy of the sentence, and public confidence in the fair administration of justice. As concerns individual deterrence, given that the Main Case proceedings are completed, the Re-Sentencing Decision fails to explain why this factor warrants any further penalty, let alone a fine of 300, 000 euros.

176. Finally, it is concerning that the Chamber justifies this amount by reference to Defence submissions that pre-dated the acquittal,[322] whilst ignoring the adjustments that the Defence called for subsequently.[323] Once more, this bolsters the appearance that the Prosecution's attack on the Main Case judgment deterred the Chamber from giving any effect to the consequences of the acquittal. Indeed, whilst the Defence did not oppose the Chamber ordering Mr. Bemba to pay a reasonable fine tailored to culpability, the Chamber's insistence that Mr. Bemba should pay an amount, which approaches the reparations figures awarded in other cases, suggests that the Chamber gave, at the very least, some weight to the Prosecution's call to punish Mr. Bemba for the thousands of Main Case victims 'denied justice'. Apart from being manifestly disproportionate, this fine, once more, underscores the extent to which the constituent elements of fair proceedings were destroyed in this case.

177. In terms of an appropriate remedy, there is no indication that the fine imposed on Mr. Kilolo would have been higher, if not for his financial situation. This amount therefore constitutes the appropriate yardstick for a reasonable fine for the conduct in question. This position is of course subject to the Defence position that at this point, any further measures would be disproportionate.

[322] ICC-01/05-01/13-2312, fn. 216.
[323] It its post-acquittal submissions, the Defence proposed a 'reasonable' fine, rather than a substantial one (ICC-01/05-01/13-T-59-ENG,p. 75), and later submissions emphasised the totality of punishments that had already been imposed on Mr. Bemba (ICC-01/05-01/13-2307, para.47).

C. The Trial Chamber erred in law in relation to its refusal to protect Mr. Bemba from the operation of parallel proceedings and penalties imposed by the DRC

178. In its appeal against sentence, the Prosecution argued that suspended sentences offended the principle of legality because any violation of the terms of a suspended sentence could expose the defendant to domestic penalties, and such penalties are inconsistent with the exhaustive nature of the penalties regime established by Article 70(2).[324] The Appeals Chamber upheld this appeal, finding that:[325]

> the "inherent power" invoked by the Trial Chamber relates to the penalties and sentencing regime before the Court. The Appeals Chamber observes that this regime is directly and explicitly constrained by the principle of legality under article 23 of the Statute, which provides – encapsulating the principle of *nulla poena sine lege* – that "[a] person convicted by the Court may be punished only in accordance with th[e] Statute". Accordingly, the Statute and related provisions contain an **exhaustive** identification of the types of penalties that can be imposed against the convicted person and specify mandatory aggravating and mitigating circumstances as well as the parameters to be considered for the determination of the *quantum* of such penalties (emphasis added).

179. In line with these findings, the Defence requested the Trial Chamber's intervention in relation to a significant penalty imposed by DRC authorities in connection with the conduct underlying the Article 70 convictions.[326] Specifically, in 2017, the DRC amended its electoral provisions to disqualify anyone convicted of this crime (pursuant to a final judgment) from participating in DRC elections. The DRC Constitutional Court then found, on the basis of submissions from the DRC Prosecutor, that the conduct underlying Mr. Bemba's Article 70 convictions, could be characterized as the crime of 'corruption'. Notwithstanding the ongoing nature of ICC proceedings, the dissonance between the charges,[327] and the retrospective nature of the law, the Court ruled that Mr. Bemba was duly disqualified on an indefinite

[324] ICC-01/05-01/13-2168-Conf, paras. 1166-121, 124-125.
[325] ICC-01/05-01/13-2276-Conf-Exp, para. 77.
[326] ICC-01/05-01/13-2307.
[327] CAR-D20-0010-0001.

basis, and thereby prevented from exercising his right to participate in the public life of his country.[328]

180. The gravamen of the Defence request was that this finding offended Article 23 insofar as it subjected Mr. Bemba to a penalty that was not previewed by the ICC Article 70 penalties regime. The imposition of a final penalty by the DRC could also trigger Article 70 *ne bis in idem* provisions. Given that the DRC was never authorised to initiate any such proceedings against Mr. Bemba in relation to this conduct, the Defence requested the Chamber to clarify the ICC's exclusive jurisdiction over the proceedings, or in the alternative, consider the penalty as part of its consideration of the totality principle.

181. The Chamber gave short shrift to the request. After intimating that a request amounted to an attempt to 'instrumentalise' the court,[329] the Court denied that Article 23 had any vertical effect vis-à-vis the DRC,[330] and that defendants had, therefore, no Statutory protection as concerns the possibility that State parties could prosecute and punish them for the same conduct underlying ICC charges.[331] This fell to the prerogative of States, to resolve in accordance with domestic law.[332]

182. The Trial Chamber provided no legal justification for its sweeping conclusion that Article 23 was concerned with punishments imposed by the ICC, and not those of domestic Courts, which concerned defendants standing trial at the ICC, and the same underlying conduct. Nor does the Trial Chamber appear to have considered the implications of this position as concerns the overarching issue as to whether provisions in Part 3 of the Statute have vertical effect as concerns the obligations of State Parties. This error has far ranging consequences, not only for Mr. Bemba, but also as concerns the effective functioning of international justice. It should therefore be corrected forthwith.

183. The Defence is aware that the Appeals Chamber has had the benefit of receiving expert legal submissions on the issue of vertical versus horizontal application of a key provision in Part 3 of the Statute,[333] and that there is,

[328] CAR-D20-0010-0001.
[329] ICC-01/05-01/13-2311, para. 10.
[330] ICC-01/05-01/13-2311, para. 8.
[331] ICC-01/05-01/13-2311, para. 9.
[332] ICC-01/05-01/13-2311, para. 9.
[333] ICC-02/05-01/09-331, para. 21; ICC-02/05-01/09-377, para. 7;

consequently, very little that the Defence can add to the extensive submissions and academic elaborations on the object and purposes of the Statute, and its drafting history.[334]. It is, nonetheless, worth noting the need to adopt a uniform approach to similar provisions. And, given the synergies between prior Prosecution submissions and the Defence application, it is a matter of concern that:

- whereas the Prosecution relied on Article 23, the exhaustive nature of the Statute's penalty regime, and the *ultra vires* nature of independent domestic measures, in order to convince the Appeals Chamber to reject suspended sentences for Mr. Mangenda and Mr. Kilolo;[335]and
- in the very same week that the Prosecution was advancing the position that Part III of the Statute has vertical effect vis-à-vis State Parties,[336] they claimed the opposite in this case, and resiled from their appellate position concerning the exhaustive nature of the penalties that apply to Article 70.[337]

184. Consistency is a hallmark of fair and impartial justice. The Court cannot interpret its Statute in one way, in order to further its ability to arrest and punish defendants, only to recoil whenever the Defence requests it to do the same, for the purpose of protecting the rights of defendants.

185. In particular, although those submissions took place in reference to Article 27, many arguments are also applicable to the proper interpretation of Article 23.

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334 This includes more recent articles, such as D. Akande, and T. De Souza Tias, "Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute', EJIL: Talk!, 12 November 2018, which argues for vertical effect, on the basis of object and purposes, principle of effectiveness, and the drafting history which suggests a linkage between this provision and cooperation provisions. https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/

335 ICC-01/05-01/13-2168-Conf, para. 120, 124-125. See in particular, fn. 268: "Fife (2016), p. 1878, mn. 1; Fife (1999), p. 339 ("[i]n accordance with the principle of *nulla poena sine lege* reflected in Article 23, the list of applicable penalties is exhaustive"). *See* p. 329 (noting that "[o]ther proposed penalties included the loss of suspension of rights, disqualification and disfranchisement, i.e. loss of voting rights or the right to seek public office. However, opinions were divided as to whether such penalties should be left to be dealt with within the context of national law by national courts.") In this context, a commentator has noted that "[a] non-custodial sentence appears to be impossible under the penalties regime of the International Criminal Court". *See also* Schabas, p. 1159.", and fn. 269: "**Commentators have noted that offenders may argue that civil sanctions (such as deprivation of the right to vote, or prohibition of holding office) constitute additional punishment and are therefore prohibited by article 23**. *See* Schabas, p. 553; Schabas/ Ambos, p. 970, mn. 9." (emphasis added).

336 Transcript, 10 September 2018, ICC-02/05-01/09, p. 46 -47, 53 (in particular, as concerns State's obligations to act in a manner that is consistent with Article 27), p. 55.

337 ICC-01/05-01/13-2309, paras. 3 (Art. 23 and Rule 166 not applicable) and para. 5, arguing that DRC courts were competent to issue such penalties.

Like Article 27, the wording of Article 23 is not directed exclusively to the Court; the passive inflection in the wording "may be punished" prohibits the imposition of any punishment falling outside the framework of the Statute, irrespective of the identity of the actor imposing the punishment.[338] Similarly, the principle of effective interpretation and the object and purposes of the Statute also call for a vertical application of Article 23. Indeed, the whole point of ICC proceedings would be rendered nugatory if States could impose their own punishments on defendants, who had already been subjected to an entire ICC process (including the death penalty, or pardons). In line with the categorical nature of the Article 23 prohibition, the question, therefore, is not whether other provisions of the Statute prohibit States from imposing additional penalties on persons convicted on Article 70 offences, but whether it permits them to do so. And, in the specific context of Article 70 offences, the Statute and Rules has created a closed regime that allows for no additional sanctions or variations in sentence, at the domestic level. In the absence of such permissive powers, Article 23 acts as an absolute bar.

186. Of further importance, as noted by the Prosecutor,[339] "[t]he principle of *nulla poena* emanated from discussions on article 77 in the Working Group on Penalties at the Diplomatic Conference. Nevertheless this provision was included in Part 3, rather than in Part 7, because it was deemed to be a general principle of criminal law." [340] The penalty provision was, in turn, drafted with the intention of ensuring the "principle of equality of justice through a uniform penalties regime for all persons convicted by the Court".[341] This equality would be undermined if State parties were to impose, unilaterally, their own penalties on individuals, who have already been sentenced by the Court (or are in the process of being sentenced). The relocation of the *nulla poena sine lege* provision to Part 3 therefore evidences the drafters' intent to erect a general bar as concerns the punishment of ICC defendants outside of the framework of the ICC penalties and enforcement regime. The very act of ratifying the ICC Statute also triggered an obligation on State Parties not to act in manner that would frustrate the object and purposes of provisions in the Statute (such as the *nulla*

[338] "A person convicted by the Court **may be punished only in accordance with this Statute**." (emphasis added).
[339] ICC-01/05-01/13-2168-Conf, fn. 266.
[340] R. Fife, 'Part 7: Penalties', in Trifferer, Ambos (eds.) Commentary on the Rome Statute (2016, Hart, 3rd ed.), fn.1.
[341] R. Fife, 'Part 7: Penalties', *ibid.*, p. 1878.

poena sine lege provision).[342] By jumping the queue, and issuing a pronouncement as concerns Mr. Bemba's culpability for a particular crime, and attaching consequences to that pronouncement, the DRC Court proceedings undermined the impartiality of the pending ICC process, and triggered the application of *ne bis in idem* (as will be discussed below).

187. It is, moreover, necessary to construe the various provisions in a manner that ensures consistency with the overarching tenor of the Article 70 regime. Whereas Article 5 crimes are subject to the detailed complementarity provisions set out in Articles 17-20, Article 70 offences are subject to a more truncated procedure. Pursuant to Rule 162, at the beginning of the case, the Court consults with States who may have jurisdiction, and then makes a decision as to whether to assume jurisdiction.[343] If the case has been completed at the Court or the domestic level, the ICC cannot re-try it.[344] There is no 'test' as to whether the domestic prosecution was genuine or a sham, because in accordance with Article 70(4), States cannot initiate a prosecution unless requested to do so by the ICC. There is no corresponding provision as to whether domestic courts can re-try a defendant who has been convicted by the ICC, because the necessary implication of the Article 70(4)(b) and Rule 162 procedures is that once the Court decides to exercise jurisdiction over an Article 70 offence, the case is then prosecuted exclusively at the ICC. This either/or dichotomy is further reflected by the absence of any provisions concerning parallel proceedings, and the plain language of Rule 162, including Rule 162(3), which provides that the Court must first waive its jurisdiction, before the Host State can exercise jurisdiction over the case.

188. The same truncation also applies to the Article 70 enforcement provisions. Article 105, which prohibits States from modifying any sentence imposed by the Court, does not apply to Article 70 offences.[345] This does not mean that State Parties have free rein to apply domestic early release provisions or penalties to Article 70 defendants. Rather, the 'gap' is filled by Article 23, in conjunction with Rule 166; because the latter is exhaustive, the former prevents States from deviating from the terms of the sentencing decision. Accordingly, Article 70 offences can be enforced,

[342] Article 26, Vienna Convention on the Law of Treaties.
[343] Rule 162(1) and (2).
[344] Rule 168.
[345] It is excluded by Rule 163.

but never varied at the domestic level. This is consistent with the fact that the Presidency's supervisory role does not apply to Article 70 offences,[346] because there are no variations to be supervised. In line with this regime, given that the DRC never requested to exercise jurisdiction over the same conduct underlying the Article 70 charges,[347] DRC courts had no legal competence to impose a penalty on Mr. Bemba in connection with this conduct, particularly given that the conviction against Mr. Bemba is not yet enforceable. And, given that Article 119 applies to Article 70 offences, the ICC was competent to issue a ruling to this effect.

189. The judicial decision, to disqualify Mr. Bemba from standing for political office for life, was also not merely a 'natural consequence' of the Article 70 conviction.[348] The electoral law was amended in 2017 to specify that this measure applies to persons who have been convicted, pursuant to an irrevocable judgment, of the crime of corruption.[349] Apart from the fact that the enforcement period for the Article 70 conviction does not commence until the ICC proceedings have concluded,[350] the DRC has also failed to enact the provisions of Article 70 into domestic law. The domestic crime of corruption is also not directly transposable to Mr. Bemba's convictions, as it is directed towards corruption of, or by certain categories of persons.[351] For these reasons, the penalty was not imposed as a 'natural consequence' of the Article 70 conviction; rather, the DRC Court issued an independent determination concerning his culpability, based on arguments from the DRC Prosecutor-General as to why the conduct in question should be classified as 'corruption' under DRC law.[352] Mr. Bemba has therefore effectively received an additional, unforeseen conviction and penalty, for the crime of corruption.

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[346] It is excluded by Rule 163.

[347] Cf ICC-01/05-01/13-78-Anx6, p. 3: "*notre pays n'est partie ni à l'affaire qui oppose Monsieur Fidèle BABALA WANDU au Procureur de la Cour Pénale Internationale, ni à celle concernant Monsieur Jean-Pierre BEMBA GOMBO, relative à la situation en République Centrafricaine".*

[348] ICC-01/05-01/13-2312, para. 119; ICC-01/05-01/13-2311, para. 10.

[349] Article 10 *Loi Electorale* http://www.presidentrdc.cd/IMG/pdf/-27.pdf

[350] Rule 164(3) specifies that the statute of limitations for the enforcement of Article 70 offences only commences on "the date on which the sanction has become final". Similarly, Rule 202 specifies that the enforcement of a sentence cannot take place until the sentence is final.

[351] Article 147, DRC Penal Code,

Tout fonctionnaire ou officier public, toute personne chargée d'un service public ou parastatal, toute personne représentant les intérêts de l'Etat ou d'une société privée, parastatale ou d'économie mixte en qualité d'administrateur, de gérant, de commissaire aux comptes ou à tout autre titre, tout mandataire ou préposé des personnes énumérées cidessus, tout arbitre ou tout expert commis en justice qui aura agréé des offres, des promesses, qui aura reçu des dons ou présents pour faire un acte de sa fonction, de son emploi ou de sa mission, même juste mais non sujet à salaire, sera puni de six mois à deux ans de servitude pénale et d'une amende de cinq à vingt zaïres.

https://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd004fr.pdf

[352] CAR-D20-0010-0001.

190. In terms of the extent to which such a development can be squared with the principle of legality, as explained by the Prosecution,[353] "an accused person before the ICC can foresee at the outset that in the event of a conviction, he or she could be sentenced to a term of imprisonment, and/or a fine and/or an order of forfeiture. Such a person does not expect to be compelled to undergo, for example, community service or to report on a weekly basis to a monitoring body in a domestic jurisdiction". By the same token, an accused before the ICC also does not expect the same conduct to be penalised by unforeseen sanctions, related to a different crime, in a domestic jurisdiction, while the ICC proceedings are still ongoing.

191. In this connection, the Chamber misapprehended the Defence arguments concerning Rule 168; the prohibition on *ne bis in idem* arises because the DRC Court conducted its assessment of Mr. Bemba's criminal responsibility for the crime of corruption, and attached a final penalty. As recognised during the Statute's drafting history, the imposition of such a measure is a 'penalty'; this is reflected by initial proposals to include such measures within the penalties that applied to Article 5 crimes (thereby underscoring the severity of the measure).[354]

192. The consequences and manner in which the disqualification was imposed also triggers the classification of a criminal charge and sanction, as understood by human rights law. The right to participate in public life, through holding electoral office, is a fundamental human right; to be disqualified from doing (on a permanent basis) is a severe deprivation of this right. As underlined by the ECHR in the case of *Matyjek v. Poland*:[355]

> The prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. (…) This sanction should thus be regarded as having at least partly punitive and deterrent character.

[353] ICC-01/05-01/13-2168-Red, para. 125.
[354] Part 7: Penalties A/AC.249/1998/CRP.13 l April 1998, https://www.legal-tools.org/doc/555e98/pdf/ A/AC.249/1997/WG.6/CRP.6
https://www.legal-tools.org/doc/11050c/pdf/
[355] Application no. 38184/03 (Decision on admissibility), para. 55.

193. Of key importance, Mr. Bemba's disqualification did not come into effect automatically; there was a separate domestic process, and the Court reached its determination on the basis of advice from the DRC Prosecutor-General, thereby underscoring the criminal nature of the determination. The fact that this determination amounted to a new, and additional conviction (for a different offence) is also underlined by the fact that none of the Requests for Assistance executed by the DRC during the Article 70 trial referred to the domestic crime of corruption, as the domestic legal basis for acts in question; they only referenced Article 70.[356] Mr. Bemba therefore had no notice, or opportunity to defend himself during the Article 70 trial, in relation to the possibility that his conduct could be subjected to a potential reclassification, to the DRC crime of corruption. This situation is therefore once again, analogous to the *Matyjek* case, where the ECHR found that the applicant's disqualification amounted to a criminal charge, because it was preceded by a judicial finding that the applicant's conduct fulfilled the elements of a particular criminal offence.[357] The applicability of *ne bis in idem* to the current scenario is further supported by the ICTY Appeals Chamber's determination that although the Registrar possessed an independent power to strike Mr. Vujin from the list of counsel,[358]

> it is necessary to consider what other consequences may flow from the finding by the Appeals Chamber that the Respondent is in contempt of the Tribunal, **so that those consequences may be taken into account in that determination.** (emphasis added).

194. In line with these principles, since the Trial Chamber did not request the DRC authorities to defer to the competence of the ICC (at the very least whilst this case is still ongoing), this domestic decision triggers Rule 168 by preventing the ICC from exercising its competence over the case. The proceedings against Mr. Bemba in the DRC amount to a final adjudication of his responsibility for the DRC crime of corruption. Rule 168 specifies that that the ICC cannot proceed against a defendant, who has been convicted by a domestic Court, in relation to the same conduct. The scenario therefore strikes at the heart of the Appeals Chamber's sentencing powers,

[356] See for example, ICC-01/05-01/13-24-Anx6-Red, p.2; CAR-OTP-0072-0145.
[357] *Ibid.*, para. 24.
[358] Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin', 31 January 2000, paras. 168, 172.

and requires a resolution that ensures Mr. Bemba's protection against unforeseen penal sanctions, and parallel criminal adjudications.

V. Conclusion

195. The Statute affords a defendant standing trial and sentence for Article 70 offences the same fair trial rights as a defendant prosecuted for genocide and war crimes. The legal provisions concerning evidence also make no distinction between the different types of crimes. Every case is important to the defendant, who bears the consequences, and there is, as such, an equal right to justice.

196. The sentence imposed on Mr. Bemba was disproportionate, and the findings which led to it were flawed. These errors cannot be corrected. The full evidential record in this case is missing in action, and the degree of antipathy toward Mr. Bemba and the Main Case acquittal were allowed to build to such a crescendo that it is impossible to believe that any Chamber could now impose a fair and impartial sentence. The perception of Mr. Bemba's culpability has also been tainted, inevitably and ineliminably, by the length of his detention at this Court. The interests of justice would no longer be served through the continuation of these proceedings. The Defence therefore requests the Appeals Chamber to quash Mr. Bemba's conviction and sentence, and failing that, ensure that no further punitive measures are imposed on him.

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Dated this 17th day of December 2018

The Hague, The Netherlands