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THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public with Public Annexes A and B

**Public Redacted Version of “Appellant’s document in support of the appeal
against sentence”**

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INTRODUCTION.....	5
I. FIRST GROUND: MR. BEMBA’S 18 YEAR SENTENCE IS MANIFESTLY EXCESSIVE	8
A. The sentence falls outside the recognised international sentencing framework	8
1. Mr. Bemba’s sentence is disproportionate when compared with sentences imposed in other international cases	10
2. Mr. Bemba’s sentence is disproportionate when compared with sentences imposed at the ICC	17
B. The Trial Chamber failed properly to assess the gravity of the underlying crimes and the degree of Mr. Bemba’s participation	20
1. The Trial Chamber erred in assessing the gravity of the underlying crimes	20
2. The Trial Chamber erred in assessing the gravity of Mr. Bemba’s conduct	25
C. The Trial Chamber erred in evaluating aggravating circumstances	29
1. Factors were impermissibly double-counted	29
2. Other errors affect the aggravating circumstances	30
D. Conclusion.....	34
II. SECOND GROUND: MR. BEMBA DID NOT HAVE ACTUAL KNOWLEDGE OF THE AGGRAVATING CIRCUMSTANCES	34
A. The Trial Chamber conflated the “actual knowledge” standard with the “constructive knowledge” standard.....	35
B. There is no evidential basis that Mr. Bemba knew of the aggravating circumstances.....	36
C. No other basis exists to attribute the aggravating circumstances to Mr. Bemba.....	38
III. THIRD GROUND: THE TRIAL CHAMBER ERRED IN ITS APPROACH TO MITIGATING CIRCUMSTANCES	40
A. An incorrect legal standard was applied to proof of mitigating circumstances.....	40
B. The Trial Chamber erred in failing to accord any weight to Mr. Bemba’s family circumstances as a mitigating factor	42
C. The Trial Chamber erred in failing to take Mr. Bemba’s contribution to establishing peace and security as a mitigating factor	44
1. The Trial Chamber ignored directly relevant evidence	44

2. The Trial Chamber erred in dismissing peacebuilding activities on the basis that they were “unrelated to the CAR”	49
3. The use of Mr. Bemba’s peacebuilding activities in the DRC to his detriment was unreasonable	50
D. The Trial Chamber erred by failing to give any weight in mitigation to the measures taken by Mr. Bemba to prevent or repress the commission of crimes.....	52
E. The Trial Chamber erred in failing to take into account the significant delays in proceedings in mitigation.....	56
F. The Trial Chamber erred in failing to mitigate the sentence on the ground that the appellant had already been penalised by the Court by reason of the seizure, freezing and depletion in value of his property	59
1. The Trial Chamber erred in finding that the depletion of Mr. Bemba’s assets was “not a sanction”	60
2. The Trial Chamber erred in concluding that the question of whether Mr. Bemba had already been financially penalised was “not relevant to the sentence”	61
3. The Trial Chamber erred in finding that it was “unable to assess the Defence submissions concerning the alleged depreciation of Mr. Bemba’s property”	64
CONCLUSION	66

INTRODUCTION

1. In passing a sentence upon Mr. Bemba of 18 years' imprisonment for the crimes against humanity and war crimes of murder and rape and the war crime of pillage, Trial Chamber III placed this case into a category of seriousness to which it did not truly belong.¹ Such sentences have, throughout the short history of international criminal law, invariably been the preserve of those who actually committed the worst offences, the *génocidaires*, exterminators and mass murderers, and moreover, those who were "hands-on", intended the consequences of their actions and even took pleasure in what they did.

2. Mr. Bemba's sentence is the longest sentence to be handed down by this Court to date. It surpasses comfortably sentences passed upon those directly responsible for murdering thousands of people at Srebrenica, torturing, murdering and raping hundreds of people in Balkan prison camps, recruiting and deploying hundreds of child soldiers in the Congo, and aiding and abetting the razing of a village to the ground whilst its inhabitants are murdered.

3. Whilst the appellant fully accepts that Trial Chambers possess a broad measure of discretion in computing sentence, he submits that such discretion must be exercised reasonably and fairly, and that the breadth of it cannot extend to the point of arbitrariness. In purporting to find no helpful guidance in the prior sentencing decisions in other international cases (including those of the Appeals Chamber at this Court), the Trial Chamber effectively cast off a natural and necessary fetter upon its discretion. In its findings about the gravity of the offences, the appellant's culpability for them, the existence of and his knowledge about aggravating circumstances, and in its refusal to accept that there was a single mitigating feature of the case, the Trial Chamber committed errors of law and fact and acted both unreasonably and unfairly.

¹ ICC-01/05-01/08-3399, "Decision on Sentence pursuant to Article 76 of the Statute", 21 June 2016, ("Sentencing Decision").

4. Mr. Bemba did not kill anybody, he did not rape anybody and he did not steal anything. He did not tell anybody to do those things and he was hundreds of miles away in a different country when they happened. He was the commander-in-chief of an armed force, perhaps six or seven links apart in the chain of command from the individuals committing the offences. With the exception of seven individuals who were court martialled for offences of theft, nobody to this day has provided him with a single name of any of those soldiers who committed offences. It is simply impossible to imagine a more remote example of criminal culpability.

5. Neither do the underlying offences merit unfavourable comparison with the majority of offences dealt with previously at this Court or at the other international tribunals. MLC soldiers were found to have committed 3 offences of murder, 28 offences of rape and pillage. Moreover, although the temporal scope of the confirmed charges covered a period of five months, those offences fell within two short time periods at the start and end of the conflict, and occurred in four or five relatively limited geographical areas.

6. On any objective analysis, a sentence of 18 years' imprisonment was manifestly excessive.

7. In order to arrive at that figure, the Chamber exaggerated the gravity of the crimes and doubled up certain features of the crimes to aggravate them further. It also made wholly untenable findings about the appellant's knowledge of the manner of the commission of offences and in that way effectively attributed to him personally the worst elements of some of the offences committed by soldiers a country away.

8. The fact that Mr. Bemba was a family man, with no prior convictions, who ran a disciplined army which he gave away, that he brought peace and stability to a large area of the Congo, that he had been in custody awaiting the resolution of the charges against him for a long time, and that he had suffered significant financial losses arising from the seizure and freezing of his assets by the Court were all indisputable. Some or all of those facts were eminently capable of ameliorating the appellant's position before the Trial Chamber and causing a reduction in his sentence. Perhaps some may have had more weight than others. The Trial Chamber's blanket rejection of every single argument advanced as mitigating Mr. Bemba's position, however, suggests an unbalanced approach to his case.

9. Indeed, in certain cases, the Trial Chamber's approach is patently unreasonable and unfair. The plain suggestion in the Trial Chamber's reasoning that the appellant's good character or good deeds actually put him in a worse position than somebody who had lead a thoroughly bad life, because demonstrably he should have known better, is absurd. The Trial Chamber's deferral of the question of the appellant's financial losses to the reparations Chamber effectively removes the matter as mitigation because the present Trial Chamber was unwilling to grapple with it.

10. The myriad of errors outlined herein had a profound impact upon the sentence passed. The Appeals Chamber must intervene, not only to do justice in the instant case, but to preserve the Court's fledgling sentencing jurisprudence and to ensure that this case takes its proper place in the wider sentencing matrix of international criminal and humanitarian law. Properly reviewed, the sentence passed upon Mr. Bemba should be reduced substantially in length.

I. FIRST GROUND: MR. BEMBA'S 18 YEAR SENTENCE IS MANIFESTLY EXCESSIVE

11. The Trial Chamber erred by imposing a manifestly excessive sentence of 18 years' imprisonment on Mr. Bemba. The Trial Chamber erred: (i) by imposing a sentence which falls outside both the established international framework and the Court's own sentencing framework; (ii) by failing properly to assess the gravity of the crimes committed by Mr. Bemba's subordinates and the degree and form of his participation in them; and (iii) in its evaluation of aggravating circumstances. These errors, individually or cumulatively, resulted in the imposition of a sentence which is disproportionate to the crimes and, accordingly, should be reduced.²

A. THE SENTENCE FALLS OUTSIDE THE RECOGNISED INTERNATIONAL SENTENCING FRAMEWORK

12. Mr. Bemba's 18-year sentence is manifestly disproportionate in comparison with other sentences imposed on persons convicted of international crimes. Left undisturbed, this excessive sentence risks being viewed as an aberration and of no precedential value. More importantly, it will mean Mr. Bemba serves a sentence disproportionate to the crimes for which he was convicted and which falls dramatically outside an established international sentencing framework.

13. In addition to the other errors identified in this brief, this sentence was imposed on the basis that none of the sentences previously rendered at this Court, or at the *ad hoc* tribunals, concern the same offences committed in substantially similar circumstances.³ As such, the Trial Chamber dismissed them as providing it

² Rome Statute ("Statute"), Article 83(3).

³ Sentencing Decision, para. 92.

with “little, if any, guidance in determining the appropriate sentence”.⁴ This was an error.

14. No two cases will ever be exactly alike. This is not, of itself, a basis upon which to disregard either the international sentencing framework established by over two decades of international criminal jurisprudence or this Court’s developing sentencing framework. Moreover, the Trial Chamber’s view was erroneously blinkered. It is not only the parallels between cases which can properly guide a Chamber in the computation of an appropriate sentence. Variations between cases in the gravity of crimes, the culpable conduct, as well as the existence of aggravating or mitigating circumstances can be just as helpful in placing a convicted person within the proper sentencing range. Accordingly, it is both the similarities and variations in cases which create a legitimate sentencing framework. A sentencing Chamber must have regard to this framework in order to properly calibrate its sentences. It is the Trial Chamber’s failure to pay any regard to the existing sentencing framework which has resulted in the imposition of an excessive sentence which stands as an outlier as compared with other international cases.

15. In addition to the foregoing, it is acknowledged that there is an obligation to individualise sentences⁵ and to apply, “in the first place”, the Court’s “own Statute and legal instruments”.⁶ However, this does not mean that the Trial Chamber could dismiss the wider sentencing jurisprudence. This is the first time an individual has been sentenced at this Court solely on the basis of command responsibility. In the absence of any precedent, the Trial Chamber ought to have had regard to the existing international practice for sentencing commanders and others convicted of international crimes, at least as “one factor among a host of others which **must** be taken into account when determining the sentence.”⁷ Indeed, in *Lubanga*, Trial

⁴ Sentencing Decision, para. 92.

⁵ Sentencing Decision, para. 92.

⁶ *Lubanga* Sentencing Appeal Judgment, paras. 76-77.

⁷ *Lubanga* Sentencing Appeal Judgment, para. 76 citing to *Strugar* AJ, para. 349 (emphasis added).

Chamber I recognised that “the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing.”⁸ The *ad hoc* tribunals apply similar sentencing principles, *i.e.* the primacy of gravity in sentence determination and consideration of the individual circumstances of the convicted person, and aggravating and mitigating circumstances.⁹

1. Mr. Bemba’s sentence is disproportionate when compared with sentences imposed in other international cases

16. The sentences imposed at the *ad hoc* tribunals, particularly those imposed solely for command responsibility, demonstrate that Mr. Bemba’s sentence should be significantly reduced.

17. Given the overlap in terms of mode of liability and the crime for which the accused was convicted, the *Kubura* case is directly relevant. Kubura, a senior officer of the Army of Bosnia and Herzegovina, was convicted of failing to take necessary and reasonable measures to punish his subordinates who plundered five villages in June and November 1993. The Trial Chamber found that Kubura’s subordinates plundered “everything they found” such as cars, food and furniture.¹⁰ Kubura was not at arms-length from the plunder being committed by his troops. He issued an order which provided not only for the establishment of collection points, but also for the creation of two commissions, both tasked with organising collections of war booty. His sentence was aggravated by the systematic nature of the plunder, and his “deep” involvement in the commission of the offence.¹¹ He accepted and organised the plunder, and thus shared a wilfulness with the direct perpetrators.¹² Kubura was sentenced to 2.5 years at trial, reduced to two years on appeal.¹³

⁸ *Lubanga* Sentencing Decision, para. 12.

⁹ See the ICTY Statute, Article 24 and the ICTY Rules of Procedure and Evidence, Rule 101.

¹⁰ *Hadžihasanović* TJ, paras. 1841, 1968-1969.

¹¹ *Hadžihasanović* TJ, paras. 2091-2092.

¹² *Hadžihasanović* TJ, paras. 2091-2092.

¹³ *Hadžihasanović* TJ, p. 627; *Hadžihasanović* AJ, p. 134.

18. Mr. Bemba, who was geographically remote from the crimes and did not issue any orders to his troops to pillage, was sentenced to 16 years in respect of acts of pillage which, like Kubura, only occurred at five locations in two time periods.¹⁴ It is acknowledged that “[a]ny given case contains a multitude of variables” which may impact on whether it can truly be considered similar to another.¹⁵ However, Kubura’s culpable conduct is significantly more serious, in terms of degree of participation and intent, as compared with that of Mr. Bemba, yet merited an eighth of the sentence. This disparity in sentence “gives rise to an inference that the Trial Chamber must have failed to exercise its discretion properly in applying the law on sentencing.”¹⁶ This inference logically extends to the sentences imposed for the crimes of murder and rape, that is 16 and 18 years respectively.¹⁷

19. The case of Kubura’s co-accused, Hadžihasanović, who was also convicted and sentenced solely on the basis of command responsibility, is also instructive. Following appeal, Hadžihasanović was convicted of failing to take necessary and reasonable measures to prevent or punish his subordinates who carried out psychological and physical violence, which constituted cruel treatment, against detainees at one location over a period of some seven months.¹⁸ He was sentenced to 3.5 years.¹⁹

20. Prior to his appeal, his command responsibility conviction extended to two acts of murder carried out by his subordinates, including one particularly heinous incident where the victim was ritually beheaded, and to cruel treatment of detainees by his subordinates at another five locations.²⁰ Broad parallels can be drawn between: (i) the murder conviction in the present case which covers three

¹⁴ ICC-01/05-01/08-3343, “Judgment pursuant to Article 74 of the Statute”, 21 March 2016, (“Judgment”), para. 640; Sentencing Decision, para. 94(e).

¹⁵ *Kvočka* AJ, para. 681.

¹⁶ *Strugar* AJ, para. 349.

¹⁷ Sentencing Decision, paras. 94(a), 94(b), 94(c), 94(d).

¹⁸ *Hadžihasanović* AJ, p. 133, para. 305.

¹⁹ *Hadžihasanović* AJ, p. 133.

²⁰ *Hadžihasanović* TJ, pp. 618-625.

incidents and the murder conviction in *Hadžihasanović* which covered two; and (ii) the rape convictions in the present case which occurred at four locations during a limited temporal timeframe and the cruel treatment in *Hadžihasanović*. However, while Mr. Bemba was sentenced to 16 and 18 years for murder and rape respectively, Hadžihasanović was sentenced by the Trial Chamber to five years in total.²¹

21. In Hadžihasanović's case, the Trial Chamber's sentencing determination was informed by the fact that "the *sui generis* nature of command responsibility [...] may justify the fact that the sentencing scale applied to those Accused convicted solely [as principle perpetrators], or cumulatively [as principle perpetrators and commanders], is not applied to those convicted solely [as commanders], in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility."²² The ICTY Appeals Chamber did not dispute this reasoning but amended the sentence to take account of the various reversals of convictions.

22. *Hadžihasanović* establishes that, as a starting point and absent any specific circumstances that would allow responsibility "to be assimilated or linked to individual responsibility",²³ commanders who lack the intent to commit the crimes and lack the same direct involvement as the subordinates who perpetrated them, should attract a penalty at the lower end of the sentencing scale.

23. Mucić was the commander of the Čelebići prison camp for seven months. In the ICTY's first command responsibility case, Mucić was convicted of five counts as a superior and two counts of direct responsibility regarding crimes committed at the Čelebići prison camp, including wilfully causing great suffering or serious

²¹ *Hadžihasanović* TJ, p. 625.

²² *Hadžihasanović* TJ, para. 2076. See also *Orić* TJ, para. 724.

²³ *Hadžihasanović* TJ, para. 2076.

injury, unlawful confinement of civilians, wilful killings, torture and inhuman treatment.²⁴

24. The underlying acts were particularly shocking. In relation to some of the crimes for which Mucić was held responsible as a commander: (i) eight detainees were beaten to death and another shot as he attempted to escape a beating; (ii) six detainees were tortured, the torture involving the rape of two detainees and the use of heated pincers on the tongue and ear of another; and (iii) six detainees were subjected to inhuman treatment which involved the use of a cattle prod on two detainees, forcing two brothers to commit fellatio on each other in the presence of other detainees and a father and son being forced to beat one another.²⁵ Mucić's original sentence of seven years was increased on appeal to nine years.²⁶

25. Even acknowledging the variables which may exist to differentiate cases, sentences imposed on commanders for international crimes should fit within a sentencing framework. However, there is no correlation between Mucić's sentence and Mr. Bemba's sentence. Mr. Bemba's sentence is exactly double that of Mucić whose convictions for particularly shocking offences, including killings, encompassed his direct responsibility, and were not limited to his responsibility as a commander.

26. The fact that an 18-year sentence is manifestly excessive and falls outside the international sentencing framework is demonstrated when, in a command responsibility case, such as this, where one third of the crimes relate to property, the crimes occurred in a relatively limited temporal period and the convicted person did not directly participate or share the intent of the perpetrators, it still exceeds the

²⁴ *Čelebići* Sentencing Judgment, paras. 12-18.

²⁵ *Čelebići* Judgment on Sentence Appeal, para. 34.

²⁶ *Čelebići* Sentencing Judgment, para. 2(a), 44. This sentence was confirmed by the Appeals Chamber. See *Čelebići* Judgment on Sentence Appeal, para. 39.

sentences of those convicted for their involvement in the Srebrenica genocide, one of the most shocking crimes in modern history.

27. Pandurević was the commander of the Zvornik Brigade in July 1995.²⁷ His men transported Bosnian Muslims to execution sites, providing practical assistance which had a “substantial effect” on the commission of their executions. Members of the brigade then executed Bosnian Muslims at different execution sites.²⁸ Others aided and abetted in their murder by digging mass graves in various locations.²⁹ Pandurević knew of this murder operation.³⁰ He had reason to know that his troops were involved.³¹ There was no evidence that Pandurević “took **any** steps to prevent or stop the participation of members of the Zvornik Brigade in the detention, execution, and burial of the prisoners.”³² On appeal, he was convicted as a superior for extermination, murder, and persecution through murder, and cruel and inhumane treatment. Significantly, his conviction also encompassed, *inter alia*, aiding and abetting the above crimes against Bosnian Muslims at other detention locations.³³ He was sentenced to 13 years imprisonment.³⁴

28. During the slaughter in Srebrenica, on 13 July 1995, two busloads of Bosnian Muslim men were transported to the Kravica Warehouse. Another column was forced to march there on foot. The men were packed into the West and East rooms of the Warehouse, where they were slaughtered.³⁵ Survivors describe hiding under piles of bodies and pretending to be dead.³⁶ Borovčanin was the commander of the unit who committed murder at the Warehouse. Borovčanin was convicted of aiding and abetting by omission the murder, extermination, and persecution of at least

²⁷ *Popović et al* TJ, para. 1839.

²⁸ *Popović et al* TJ, para. 2017.

²⁹ *Popović et al* TJ, para. 2018.

³⁰ *Popović et al* TJ, para. 2037.

³¹ *Popović et al* TJ, para. 2040.

³² *Popović et al* TJ, para. 2044 (emphasis added).

³³ *Popović et al* AJ, pp. 715-716.

³⁴ *Popović et al* TJ, p. 838.

³⁵ *Popović et al* TJ, paras. 424-432.

³⁶ *Popović et al* TJ, para. 435.

1,000 Bosnian Muslim men.³⁷ He was also responsible as a superior for the killing of the busload of Bosnian Muslim prisoners at the Kravica Warehouse through his failure as a superior to punish his troops.³⁸ He was sentenced to 17 years in prison.³⁹ Neither Borovčanin nor the Prosecution appealed.

29. The crimes for which Pandurević and Borovčanin were sentenced encompassed a loss of life far beyond the 3 murders for which Mr. Bemba has been found culpable. Pandurević and Borovčanin were present on the ground during the massacres in Kravica and Zvornik. Their sentences of 13 and 17 years also encompassed their perpetration as aiders and abettors in widespread murder and were not – as in Mr. Bemba’s case – limited to culpability solely as a superior.

30. Against the above backdrop, the sentence imposed in the present case is dramatically out of step. Should the next commander tried at the ICC be convicted of crimes of similar gravity to Pandurević, or Borovčanin, and to have been directly involved and/or present during their commission such as with Mucić, the Court must have the ability to distinguish their sentences from the instant case.

31. A survey of some of the cases where an 18-year sentence has been imposed is also instructive and demonstrates the disconnect between the imposition of such a sentence in the present case and the wider international sentencing practice.

32. An 18-year sentence equates Mr. Bemba’s criminal culpability with individuals such as Češić who was convicted on the basis of individual criminal responsibility of murder and humiliating and degrading treatment, as a war crime, and murder and rape which included other forms of sexual assault as a crime

³⁷ *Popović et al* TJ, para. 2182.

³⁸ *Popović et al* TJ, para. 2187.

³⁹ *Popović et al* TJ, p. 835.

against humanity.⁴⁰ Amongst other crimes, Češić admitted to killing 10 individuals, two of whom died as a result of beatings.⁴¹

33. The sentence also places Mr. Bemba on a par with Đorđević who was convicted of participation in a joint criminal enterprise which had the purpose of changing the ethnic balance of Kosovo to ensure Serbian control over the province and was implemented through the crimes of murder, deportation, other inhumane acts (forcible transfer), and persecutions.⁴² As an example of the scale of the crimes for which Đorđević was convicted, it was found that the forces, acting at Đorđević's direction, with his encouragement, or with his support, perpetrated crimes which resulted in the forced deportation of approximately 800,000 Kosovo Albanian civilians.⁴³

34. Another of the Čelebići accused, Delić was sentenced, following appeal, to 18 years.⁴⁴ Delić was convicted as a direct perpetrator of wilful killings, torture by way of rape, wilfully causing great suffering or serious injury and inhuman treatment.⁴⁵ Delić severely beat a detainee twice, who died as a consequence of the second beating; raped two victims on several occasions; and deliberately used a shock device on numerous detainees of the prison camp, an action which provided Delić with sadistic pleasure from the suffering and humiliation caused.⁴⁶

35. The Trial Chamber failed to impose a just and appropriate sentence which fairly reflected Mr. Bemba's culpability. An 18-year sentence in the circumstances of this case means that, as the above survey demonstrates, Mr. Bemba's sentence falls dramatically outside the international sentencing framework. Accordingly, the Trial

⁴⁰ Češić Sentencing Judgment, paras. 33, 106, 107, 111.

⁴¹ Češić Sentencing Judgment, para. 33.

⁴² Đorđević TJ, *see* paras. 2003, 2130, 2134, 2149, 2152, 2193, 2210, 2213. This was confirmed in the Appeals Judgment, *see* paras. 145, 153, 159, 696, 902.

⁴³ Đorđević AJ, paras. 196, 696.

⁴⁴ Čelebići Sentencing Judgment, para. 33.

⁴⁵ Čelebići Sentencing Judgment, para. 29.

⁴⁶ Čelebići Sentencing Judgment, para. 29; Čelebići Judgment on Sentence Appeal, para. 40.

Chamber acted outside its discretion, warranting the intervention of the Appeals Chamber.

2. Mr. Bemba's sentence is disproportionate when compared with sentences imposed at the ICC

36. When determining Mr. Bemba's sentence, the Trial Chamber also erred by failing to give due consideration to the sentencing framework of the ICC, namely the sentences imposed in the *Lubanga* and *Katanga* cases. These cases should have been addressed for the reasons hereinafter set out.

37. While the accused was not convicted as a commander in either case, they both provide necessary guidance to the matrix into which Mr. Bemba's sentence must be inserted. Additionally, taking proper consideration of such guidance gives effect to the principle of *nulla poena sine lege*, which ensures legal certainty through the prevention of arbitrary sentences.⁴⁷ Further, both cases provide a basis for comparison as to the gravity and scope of the crimes. By rejecting the need to give any consideration to the sentences previously imposed at this Court, the Trial Chamber imposed a sentence on Mr. Bemba which is manifestly excessive, bears no relation to the sentences imposed in *Lubanga* and *Katanga*, and, thus, undermines the establishment of the Court's sentencing framework.

38. Lubanga was convicted of having conscripted and enlisted a significant number of children under the age of 15, and used them to participate actively in hostilities.⁴⁸ The Prosecution asked the Trial Chamber to impose a sentence of 30 years,⁴⁹ arguing that the use of child soldiers was "one of the most serious crimes of concern to the international community as a whole".⁵⁰ The crimes were directed at "the most vulnerable and defenceless, notably the girl child soldiers and the young,

⁴⁷ *Katanga* Sentencing Decision, para. 18.

⁴⁸ *Lubanga* TJ, para. 1358.

⁴⁹ ICC-01/04-01/06-T-360-Red2-ENG, 33:4-5.

⁵⁰ ICC-01/04-01/06-T-360-Red2-ENG, 32:14-15.

including 5 year old children.”⁵¹ The crimes had a “severely debilitating and emotional impact on the victims, their families, and their communities”. There was a “broader social impact on the entire community – even children who were not recruited and their families suffered from the traumatic experience”.⁵²

39. The Trial Chamber agreed, finding that the conscription and use of child soldiers were “undoubtedly very serious crimes that affect the international community as a whole.”⁵³ It imposed a sentence of 14 years, having regard to: (i) the widespread recruitment and the significant use of child soldiers; (ii) the position of authority held; and (iii) Lubanga’s essential contribution to the common plan.⁵⁴ Although the Chamber took into account mitigating factors such as the “considerable unwarranted pressure”⁵⁵ by the conduct of the Prosecution, the sentence of 14 years was deemed appropriate, and upheld on appeal.⁵⁶

40. Katanga was found guilty, by Majority,⁵⁷ as an accessory in the attack on Bogoro, a village in the DRC, which was perpetrated on 24 February 2003 and resulted in the killing of at least 30 civilians, including 11 children, although “the killings far exceeded that figure.”⁵⁸ He was convicted of murder as a crime against humanity and as a war crime; attacks against a civilian population as such or against individual civilians; destruction of enemy property; and pillaging.⁵⁹

41. The Prosecution argued that the crimes committed in Bogoro “are amongst the most serious that this Court was established to address”,⁶⁰ asking for a sentence

⁵¹ ICC-01/04-01/06-2881, para. 4.

⁵² ICC-01/04-01/06-2881, paras. 5-6.

⁵³ *Lubanga* Sentencing Decision, para. 37.

⁵⁴ *Lubanga* Sentencing Decision, para. 97.

⁵⁵ *Lubanga* Sentencing Decision, para. 97.

⁵⁶ *Lubanga* Sentencing Decision, para. 97; *Lubanga* Sentencing Appeal Judgment, para. 119.

⁵⁷ *Katanga* TJ, pp. 658-659.

⁵⁸ *Katanga* Sentencing Decision, para. 47.

⁵⁹ *Katanga* Sentencing Decision, para. 1.

⁶⁰ ICC-01/04-01/07-T-344-Red-ENG, 53:11-13.

between 22 and 25 years.⁶¹ Again, a Majority of the Trial Chamber agreed with the Prosecution's characterisation of the crimes, noting particularly that "Germain Katanga's degree of participation and intent in the instant case must not be underrated, especially as the commission of the crimes [...] involved particular cruelty."⁶² It imposed a sentence of 12 years,⁶³ which was not appealed.⁶⁴

42. The *Lubanga* and *Katanga* cases concerned widespread crimes against children, an attack of extreme brutality with a discriminatory dimension, and a greater degree of personal participation and degree of intent than in the present case. However, sentences of 14 and 12 years respectively were imposed. Given the facts of those cases, the gravity of the underlying crimes, and the gravity of the convicted person's conduct, Mr. Bemba's sentence of 18 years is patently excessive.

43. The above survey of cases precludes any sensible argument that an 18 year sentence, in the circumstances of this case, is consistent with international sentencing practice. This may well explain the Trial Chamber's deliberate untethering of Mr. Bemba's sentence from the body of existing cases.⁶⁵ However, the computation of sentence cannot be performed in a vacuum. As between two convicted persons, he who committed graver crimes, and exhibited graver conduct, should in principle receive a more severe sentence. In this way, sentencing fulfils the criteria of being "proportionate to the crime and the culpability of the convicted person".⁶⁶ Courts must necessarily have regard to the framework of sentences established by cases which have gone before. Without this framework, sentences imposed will not only be inconsistent, but will necessarily be arbitrary⁶⁷ and fail to provide legal certainty both for accused and victims.

⁶¹ *Katanga* Sentencing Decision, para. 141, ICC-01/04-01/07-T-344-Red-FRA, 56:20-22.

⁶² *Katanga* Sentencing Decision, para. 69.

⁶³ *Katanga* Sentencing Decision, para. 170.

⁶⁴ ICC-01/04-01/07-3498.

⁶⁵ Sentencing Decision, para. 92.

⁶⁶ Sentencing Decision, para. 11.

⁶⁷ *Katanga* Sentencing Judgement, para. 18.

44. As the Prosecutor submitted in *Lubanga*, “two accused convicted of similar crimes in similar circumstances” are not expected in principle “to receive widely different sentences.”⁶⁸ An 18 year sentence, in the circumstances of this case, is widely different from that imposed on other commanders, and other accused before the international courts. Its imposition was only possible after the Trial Chamber disregarded the very framework to which it should have had regard. This error warrants the intervention of the Appeals Chamber, and the reduction of Mr. Bemba’s sentence.

B. THE TRIAL CHAMBER FAILED PROPERLY TO ASSESS THE GRAVITY OF THE UNDERLYING CRIMES AND THE DEGREE OF MR. BEMBA’S PARTICIPATION

45. In addition to being excessive on its face, the 18-year sentence was reached through a number of legal and factual errors on the part of the Trial Chamber which also warrant the imposition of a new (and reduced) sentence.

46. In assessing the gravity of the crimes, the Trial Chamber failed properly to assess the two matters which must be taken into account in superior responsibility cases: (i) the gravity of the underlying crimes committed by the convicted person’s subordinate; and (ii) the gravity of the convicted person’s own conduct in failing to prevent or punish the underlying crimes.⁶⁹

1. The Trial Chamber erred in assessing the gravity of the underlying crimes

47. In sentencing Mr. Bemba, the Trial Chamber made a series of errors when assessing the gravity of the underlying crimes. The effect of these errors was improperly to overstate the gravity of the underlying crimes for which Mr. Bemba was convicted.

⁶⁸ ICC-01/04-01/06-2950, para. 45.

⁶⁹ Sentencing Decision, para. 15. *See also* *Hadžihasanović* AJ, para. 313 citing to *Čelebići* AJ, para. 732.

48. *First*, one of the most striking features of this case is that the parameters of the crimes for which Mr. Bemba was charged and convicted are extremely narrow.⁷⁰ Rather than fairly reflecting this in its gravity assessment, when considering the extent of the damage caused pursuant to Rule 145(1)(c) of the Rules of Procedure and Evidence (“Rules”), the Trial Chamber erred by focusing primarily on the impact of the criminal conduct on victims and their relatives. As such, in relation to the crimes for which Mr. Bemba was actually convicted, the Trial Chamber failed to give proper consideration to the scale of the crimes and the number of victims.⁷¹

49. The Trial Chamber’s erroneous approach is presaged in its general discussion of the crimes. In an apparent attempt to mitigate the narrow basis of Mr. Bemba’s conviction, the Trial Chamber found that the underlying acts for which Mr. Bemba was convicted “were only a portion of the total number of crimes committed by MLC forces during the 2002-2003 CAR Operation.”⁷² The suggestion that the crimes are only representative of a larger number is not only unfortunate but improper as it risks broadening Mr. Bemba’s culpability beyond the crimes which were found proven beyond reasonable doubt. As argued more fully below, Mr. Bemba must only be punished for the crimes for which he has been convicted. In the absence of any of these additional crimes being charged in the Second Revised Amended DCC⁷³ and then proven beyond reasonable doubt as being the responsibility of Mr. Bemba, they are irrelevant for sentencing purposes.⁷⁴

⁷⁰ Indeed, the Appellant’s position is that the case against him is even narrower and the crimes for which he was convicted exceed the charges. See ICC-01/05-01/08-3434-Conf, Section III.

⁷¹ See Hola, Dr. B., “*Sentencing of International Crimes at the ICTY and ICTR, Consistency of Sentencing Case Law*”, Amsterdam Law Forum, Vol. 4:4, 2012, 3 at 13, “[i]n the latest case law, the concept of gravity has been interpreted as encompassing two aspects: i) the particular circumstances of the case, *i.e.* the magnitude of harm caused by the offender and represented by, for example, **the scale of the crime, the number of victims**, the extent of victims’ suffering, or the impact of the criminal conduct on victims and their relatives; and ii) the form and degree of the accused’s participation in the crime – the offender’s culpability” (emphasis added).

⁷² Sentencing Decision, para. 22.

⁷³ ICC-01/05-01/08-856.

⁷⁴ See *Čelebići AJ*, paras. 760-766. The ICTY Appeals Chamber held that the Trial Chamber did not err in failing to have regard to the fact that the crimes specifically alleged in the relevant paragraphs of

50. More specifically, in the context of the Trial Chamber's gravity discussion for each crime, it found in relation to: (i) murder: that the "acts of murder were committed near the beginning and end of the 2002-2003 CAR Operation, in three different locations"; (ii) rape: that "the number of victims of underlying acts of rape is substantial" and the "underlying acts [...] were committed throughout the geographical and temporal scope of the 2002-2003 CAR Operation"; and (iii) pillage: that "the number of pillaging victims was substantial and the underlying acts covered the geographical and temporal scope of the 2002-2003 CAR Operation."⁷⁵ No further consideration was given to the relatively short duration of the crimes or any consideration given to the limited scale of the crimes.

51. Mr. Bemba's conviction encompasses 3 murders, 28 instances of rape and 16 instances of pillage.⁷⁶ The 3 incidents of murder occurred in three locations but are restricted to two timeframes, the end of October / beginning of November 2002 and 5 March 2003.⁷⁷ Further, contrary to the Trial Chamber's description which gives the false impression of a consistent course of criminal conduct being perpetrated in all the charged locations and regularly throughout the charged time period, the specific acts of rape and pillage which were found beyond reasonable doubt to have been committed by MLC soldiers are limited in duration and location. The acts of rape occurred in four locations,⁷⁸ with all the incidents, bar two, taking place at the end of October and November 2002.⁷⁹ The two other incidents occurred a number of months later on 5 March 2003.⁸⁰ Similarly, the acts of pillage occurred in five locations,⁸¹ with the majority of incidents taking place at the end of October and

the Indictment for which Mucić was found responsible did not represent the totality of the relevant criminal acts committed against the detainees in the Čelebići prison-camp.

⁷⁵ Sentencing Decision, paras. 32, 40, 51.

⁷⁶ Judgment, paras. 624, 633, 640.

⁷⁷ Judgment, paras. 471, 476, 485, 496, 624.

⁷⁸ The locations are Bangui, PK12, PK22 and Mongoumba.

⁷⁹ Judgment, para. 633(a)-(j).

⁸⁰ Judgment, para. 633(k)-(l).

⁸¹ The locations are Bangui, PK12, PK22, Sibut and Mongoumba.

November 2002 and a further two taking place in the second half of February 2003 and 5 March 2003.⁸²

52. Rather than fairly recognising and reflecting the limited scope of the underlying crimes for which Mr. Bemba was convicted, the Trial Chamber focused primarily on the extent of the victims' suffering in its assessment of the harm caused. While the victims' suffering is a relevant factor when assessing the extent of the damage, it should have been balanced by a critical assessment of the scale of the crimes. This critical assessment is absent from the Sentencing Decision. This failure to provide the necessary balance when weighing the overall gravity of the underlying crimes constitutes a discernible error.

53. *Second*, when assessing the gravity of the underlying crimes, the Trial Chamber erred by taking into account evidence related to incidents for which Mr. Bemba was neither charged nor convicted and which was not later admitted under Article 76(2) of the Statute for the purposes of sentencing.

54. The sentence imposed "must reflect the culpability of the convicted person".⁸³ A consideration of the gravity of the crimes involves "consideration of the gravity of the conduct of the accused [and] consideration of the seriousness of the underlying crimes." However, "the gravity of the crime does not refer to a crime's 'objective gravity'".⁸⁴ In addition, "only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence".⁸⁵

55. Notwithstanding these established limits, the Sentencing Decision is replete with references to the evidence of witnesses who did not testify to the specific underlying acts which form the basis of the convictions in this case. To take one

⁸² Judgment, para. 640(a)-(p).

⁸³ Rule 145(1)(a) of the Rules of Procedure and Evidence.

⁸⁴ *Mrkšić et al* AJ, para. 375.

⁸⁵ *Čelebići* AJ, para. 763.

example, in relation to the impact of murder, the Trial Chamber found that “[p]ersons who relied on the direct victim for support, whether financial, physical, emotional, psychological, moral, or otherwise, were also affected.” The only sources cited in support of this statement are P119 and a/0480/08. However, the Trial Chamber did not find Mr. Bemba responsible for either the murder of P119’s son or a/0480/08’s father.⁸⁶ By relying on evidence which does not directly relate to a specific underlying act that the Trial Chamber found beyond reasonable doubt was committed by MLC soldiers and was not called on for the purposes of sentencing, the Trial Chamber improperly bolstered the perception of the gravity of the underlying crimes.

56. *Third*, the gravity assessment is flawed because the Trial Chamber considered factors not supported by the evidence or which have no legal basis. On two occasions the Trial Chamber noted that all acts of murder were committed “in the presence” of other civilians.⁸⁷ The tenor of this observation is that Trial Chamber considered that the perpetrators increased the gravity of the offence by deliberately further traumatising the terrified onlookers. However, one of the three incidents does not conform to this description. P87’s “brother” was not deliberately shot in front her. Instead, she was hiding behind the house, looking in through a gap,⁸⁸ and only testified as to hearing the shots.⁸⁹ The perpetrators, self-evidently, had no reason to believe she was even in the vicinity. In light of the limited number of incidents at issue – three – this discrepancy is not insignificant.

57. There is no legal basis for the Trial Chamber’s statement that “sexual crimes, in particular, against children” are “especially grave” as opposed to any other crime

⁸⁶ See Sentencing Decision, fns. 93 (reference to a/0511/08), 96 (references to P119 and a/0480/08), 97 (reference to P9), 110 and 117 (reference to a/0542/08), 119 (reference to a/0555/08), 157 (references to a/0394/08 and a/0555/08). *Also* Sentencing Decision, paras. 49 and 50 (references to P6, P9 and P38).

⁸⁷ Sentencing Decision, paras. 28, 32.

⁸⁸ Judgment, para. 475.

⁸⁹ T-44-CONF-ENG, 29:2-24.

within the jurisdiction of the Court.⁹⁰ The legal provisions cited by the Trial Chamber in support of this assertion simply identify that victims of sexual crimes and young victims have special needs.⁹¹ The Trial Chamber's inclusion of young victims of sexual crimes in its gravity assessment is additionally problematic because it amounts to double-counting. The fact that some of the victims were children is also taken into account when concluding that the rapes were aggravated by being committed against "particularly defenceless victims".⁹²

2. The Trial Chamber erred in assessing the gravity of Mr. Bemba's conduct

58. The Trial Chamber made three errors in assessing Mr. Bemba's "degree of participation" and "degree of intent" in the crimes for the purposes of Rule 145(1)(c).

59. Firstly, the Trial Chamber erred in law when it concluded that the "nexus requirement considerably elevates the significance of the commander's role."⁹³ A causal link between a superior's conduct and the commission of crimes does not make his conduct any more grave, or worthy of a more severe punishment.⁹⁴ The existence of a causal connection as a legal requirement of Article 28 of the Statute serves to limit the scope of the crimes for which a superior can be held liable. The causal connection does not alter the superior's own intention or level of contribution, it merely limits the scope of the relevant crimes.

⁹⁰ Sentencing Decision, para. 35.

⁹¹ Sentencing Decision, fn. 102.

⁹² Sentencing Decision, paras. 42, 43.

⁹³ Sentencing Decision, para. 60. *See also* Sentencing Decision, para. 59, where the Trial Chamber found that the nexus requirement is "of particular relevance" in assessing the gravity of Mr. Bemba's culpable conduct.

⁹⁴ The Trial Chamber's whole approach to causation is challenged by the Appellant. *See* ICC-01/05-01/08-3434-Conf, paras. 381-413. One of the challenges concerns the Trial Chamber's conflation of the "measures" and "causation" requirements. This error is repeated in the discussion on "Mr. Bemba's Culpable Conduct" in the Sentencing Decision and is the basis on which the Trial Chamber links the gravity assessment and the nexus requirement. *See* para. 66.

60. Secondly, as discussed above, should the Trial Chamber's findings remain undisturbed on appeal, the relevant crimes are those identified at paragraphs 624, 633 and 640 of the Judgment. In assessing Mr. Bemba's "degree of participation" in and "degree of intent" regarding these crimes, the Trial Chamber failed to give any or sufficient weight to the fact that his participation and intent were extremely limited.⁹⁵ He was not present during their commission, nor did he share the intent of the perpetrators, who were not acting on his orders or instructions. It is acknowledged that superior responsibility allows an individual to be convicted of a crime even though he had no part in its commission, and never intended that the crime be committed. However, unlike many of the other superior responsibility cases which have come before the international courts, this case is exceptional in that there is no evidence of any direct involvement or participation in the crimes. It is purely about omissions or failures to act. Further, Mr. Bemba's "failures", which underpin the Trial Chamber's conduct discussion, are not supported by a proper weighing of the evidence or are without evidential basis.

61. As discussed more fully below, a fair and reasonable assessment of the evidence of the measures taken by Mr. Bemba in the face of allegations about the commission of crimes in the CAR establishes that, contrary to the Trial Chamber's finding, there was no "climate of acquiescence surrounding and facilitating the crimes."⁹⁶ Further, there is no evidential basis (or reasoning in support) for the Trial Chamber's finding that the failure on the part of Mr. Bemba to take action was "deliberately aimed at encouraging the attack against the civilian population of which the crimes formed part".⁹⁷ As explained in the Conviction Appeal Brief, paragraph 685 of the Judgment simply rehashes the legal requirements needed to establish the implementation of an "organisational policy" through a failure to act.⁹⁸ No attempt is made to substantiate the requirements and evidence to the contrary is

⁹⁵ Rule 145(1)(c) of the Rules of Procedure and Evidence.

⁹⁶ Sentencing Decision, para. 66.

⁹⁷ Sentencing Decision, para. 66 citing to Judgment, para. 685.

⁹⁸ ICC-01/05-01/08-3434-Conf, para. 427.

dismissed without reasoning. This criticism applies equally to the Trial Chamber's recycling of this argument in the Sentencing Decision.

62. Thirdly, the Trial Chamber's finding that "Mr. Bemba's repeated and ongoing failures over approximately four and a half months [...] demonstrate that his culpable conduct was of serious gravity",⁹⁹ fails to give appropriate weight to the concrete measures taken by Mr. Bemba in response to the allegations of crimes. In plain terms, Mr. Bemba's failures were not "ongoing".¹⁰⁰ Instead, Mr. Bemba took a considerable number of different measures throughout the 2002-2003 CAR Operation, all of which were directed towards the repression and/or prevention of crime. The Trial Chamber's outright dismissal of these measures and failure to accord them any weight demonstrates a clear failure to properly exercise its discretion.¹⁰¹

63. In the Judgment, the Trial Chamber accepted that Mr. Bemba took a number of measures directed at ensuring the discipline of the MLC troops. The MLC had a Code of Conduct which was in force throughout the time period relevant to the charges.¹⁰² Not only was the Code established and popularised,¹⁰³ it was enforced through a court-martial, and disciplinary councils within military units which could immediately reprimand breaches.¹⁰⁴ Mr. Bemba travelled to PK12 to issue a public warning to his troops "against abuse of the civilian population".¹⁰⁵ Seven soldiers were arrested and put on trial in public proceedings, convicted, and imprisoned,¹⁰⁶ and in spite of the failure to arrest soldiers for more serious offences, objectively at

⁹⁹ Sentencing Decision, para. 67. *See also* Sentencing Decision, para. 66, "Mr. Bemba's failures were ongoing throughout the 2002-2003 CAR Operation."

¹⁰⁰ This is not a situation akin to that of Mucić in the *Čelebići* case where "Mucić's **consistent failure to act** in relation to the conditions and unlawful conduct within the camp must have had such an encouraging effect" (emphasis added). *See Čelebići* AJ, para. 739.

¹⁰¹ Sentencing Decision, paras. 63, 65.

¹⁰² Judgment, para. 392.

¹⁰³ Judgment, para. 393.

¹⁰⁴ Judgment, para. 402.

¹⁰⁵ Judgment, paras. 594-596, 719, 721.

¹⁰⁶ Judgment, paras. 597-600, 719.

least, these arrests and prosecutions must have sent out a message of zero tolerance towards any unlawful conduct. Two commissions were dispatched to investigate allegations of criminal conduct.¹⁰⁷ Mr. Bemba wrote to international organisations asking for assistance in investigating allegations of abuses.¹⁰⁸ A mission was sent to Sibut, in response to allegations of crimes, accompanied by the international press at the invitation of the MLC, including a journalist from the media organisation who had reported the allegations.¹⁰⁹

64. The Trial Chamber dismissed all these measures as being neither genuine nor adequate.¹¹⁰ This characterisation is disputed in the Conviction Appeal Brief.¹¹¹ However, setting aside these challenges, the fact is that measures **were** taken and that these were not isolated events. The Trial Chamber erred by failing to ascribe any weight to them and finding that “[t]hey do not reduce [Mr. Bemba’s] culpability or justify mitigation.”¹¹² The palpable error in this approach is illustrated by reference to other situations both considered by the ICC itself and within the public domain, for example: (i) despite ultimately committing the crimes, Mr. Al Mahdi’s initial reluctance to commit them and his decision not to use a bulldozer in their commission in order to minimise the collateral damage were given weight, albeit in mitigation;¹¹³ and (ii) Mr. Bemba’s measures stand comparison to those taken by commanders apparently beyond criticism.¹¹⁴

¹⁰⁷ Judgment, paras. 582-589, 601-603, 719.

¹⁰⁸ Judgment, paras. 604-611, 719.

¹⁰⁹ Judgment, paras. 612-620, 719.

¹¹⁰ Sentencing Decision, paras. 63, 65.

¹¹¹ See, e.g., ICC-01/05-01/08-3434-Conf, paras. 325-380.

¹¹² Sentencing Decision, para. 65.

¹¹³ *Al Mahdi* TJ, paras. 89, 91, 93.

¹¹⁴ Following allegations of 108 instances of rape against UN and French troops in the CAR, measures taken by the French President François Hollande, and the UN Secretary-General Ban-Ki Moon mirror those taken by Mr. Bemba almost precisely. However, no criticism has been made of the French Ministry of Justice for openly questioning the veracity of the claims. See CAR-D04-0005-0397 at 0398; CAR-D04-0005-0402; CAR-D04-0005-0535; CAR-D04-0005-0389; CAR-D04-0005-0397; CAR-D04-0005-0402; CAR-D04-0005-0404; CAR-D04-0005-0493. Nor has the failure to identify any perpetrators over the course of two years, or the failure to withdraw the troops despite ongoing allegations, exposed these commanders to criminal charges. See CAR-D04-0005-0395; CAR-D04-0005-0404.

65. In light of the foregoing, the Trial Chamber's approach to assessing the gravity of the crimes was materially affected by a number of errors. Therefore, the sentence should be reduced.¹¹⁵

C. THE TRIAL CHAMBER ERRED IN EVALUATING AGGRAVATING CIRCUMSTANCES

1. Factors were impermissibly double-counted

66. When evaluating the gravity of murder and the aggravating factors applied to the crimes of rape and pillage, the Trial Chamber fell into error by double-counting. In addition to the double-counting identified above in relation to the age of the victims of sexual crimes, two other instances of double-counting undermine the finding that Mr. Bemba's sentence should be aggravated.

67. The first instance relates to pillage. In concluding that "the crime of pillage is of serious gravity", the Trial Chamber considered the extent of the damage caused.¹¹⁶ It found that the consequences for victims "were far-reaching, impacting various aspects of their personal and professional lives, often leaving victims with nothing."¹¹⁷ However, this concern is mirrored in the Trial Chamber's conclusion that the acts of pillage were aggravated by particular cruelty based on the fact that the perpetrators targeted victims "without regard to the victims' livelihood or well-being".¹¹⁸ At their core, both factors seek to address the same mischief in imposing a just sentence, namely the negative consequences of the acts of pillaging for the victims.

¹¹⁵ Statute, Article 83(2)(a).

¹¹⁶ Sentencing Decision, para. 51.

¹¹⁷ Sentencing Decision, para. 50. *See also* para. 51, "[t]he crimes impacted various aspects of the victims' lives, often leaving them without basic necessities."

¹¹⁸ Sentencing Decision, para. 56.

68. The second instance of double-counting relates to the aggravating circumstances applied to rape. One of the factors relied on to find that rape was committed against “particularly defenceless victims” was that the victims were “targeted by multiple armed MLC soldiers”.¹¹⁹ Similarly, to prove the aggravating circumstance that the rapes were committed with “particular cruelty”, the Trial Chamber relied on the fact that the perpetrators committed the rapes “repeatedly against the same victims”.¹²⁰ In essence, the aggravation in both instances is that the victim was attacked by multiple perpetrators. This factor was impermissibly counted twice.

2. Other errors affect the aggravating circumstances

69. In addition to aggravating factors being affected by double-counting, others relied on by the Trial Chamber have no (or insufficient) evidential basis and/or are irrelevant. The Trial Chamber, thus, committed a discernible error in the exercise of its discretion when determining an appropriate sentence to impose on Mr. Bemba.

70. The Trial Chamber’s finding that rape and pillage were committed with “particular cruelty” because one of the perpetrators’ motives was “to punish suspected enemies and their sympathisers” is not supported by sufficient evidence.¹²¹ To support this finding in respect of rape, the Trial Chamber relied on paragraphs 565 to 567 in the section of the Judgment dealing with “General conduct of MLC troops during the 2002-2003 CAR Operation”.¹²² No reference is provided in the Sentencing Decision to support the conclusion that acts of pillage were motivated by a desire to punish.¹²³ However, it is assumed that reliance is again

¹¹⁹ Sentencing Decision, para. 43.

¹²⁰ Sentencing Decision, para. 47.

¹²¹ Sentencing Decision, paras. 47, 56.

¹²² Sentencing Decision, fn. 140. Note that only parts of paras. 565 to 567 of the Judgment are relevant to the punishment motivation. *See* Judgment, para. 565, fn. 1747 and para 567, fn. 1760.

¹²³ Sentencing Decision, para. 56.

placed on paragraphs 565 to 567 of the Judgment.¹²⁴ The Trial Chamber's reliance on these generalised findings was an error. Only circumstances directly related to the specific underlying acts of rape and pillage for which Mr. Bemba was charged and convicted can be relied on to prove aggravation.¹²⁵

71. A proper analysis of these underlying acts establishes that there is minimal evidence to support the Trial Chamber's conclusion that the attacks were carried out as punishment. Specifically, the only evidence that perpetrators sought to punish suspected rebels or rebel sympathisers came from P23, P22 and P42.¹²⁶ The evidence of three witnesses is manifestly insufficient to support a finding as to the perpetrators' motives generally, or in relation to each of the crimes for which Mr. Bemba was convicted.¹²⁷ Therefore, any reliance on the assertion that the perpetrators were motivated to commit rape or pillage in order to punish suspected enemies and their sympathisers was without proper evidential support.

72. In finding that rape was committed with "particular cruelty", the Trial Chamber held that the perpetrators "committed the underlying acts of rape [...] for self-compensation".¹²⁸ This is one of the more extraordinary findings made in the Judgment and repeated in the Sentencing Decision.¹²⁹ In the first place, the Trial Chamber provides no reasoning to explain why receiving inadequate financial

¹²⁴ Sentencing Decision, para. 52, "many of the same factors considered in relation to the circumstances aggravating the crime of rape are equally applicable in assessing the aggravating circumstances alleged for pillaging."

¹²⁵ See *Fofana & Kondewa* Sentencing Judgement, para. 36 citing to *Kunarac et al* TJ, para. 850 and *Hadžihasanović* TJ, para. 2069. Note in *Kunarac et al*, Vuković was charged with and convicted of certain rapes. The Trial Chamber held that incidents of other uncharged rapes could not be used to aggravate sentence because "an offender can only be sentenced for conduct for which he has been convicted" (*Kunarac et al* TJ, para. 850). See also *Čelebići* AJ, para. 763, "[t]he Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence."

¹²⁶ P22: T-40-CONF-ENG, 20:19-23; P23: T-51-CONF-ENG, 31:2-25; P42: T-64-CONF-ENG, 16:22-17:21.

¹²⁷ It is recalled that Mr. Bemba was convicted in respect of 28 instances of rape and 16 instances of pillage.

¹²⁸ Sentencing Decision, para. 47.

¹²⁹ Judgment, paras. 565-567, 739; Sentencing Decision, paras. 44, 47.

compensation is linked to the commission of rape and the need to “self-compensate” as opposed to the taking of food or other items necessary to survive in the field.

73. In the second place, the finding is without evidential basis. The Trial Chamber found that payments and rations were provided by the Central African government.¹³⁰ More specifically, there is no evidence that any of the 28 underlying acts of rape were committed for “self-compensation” or, put another way, that these specific acts were motivated or linked in any way to any grievance regarding inadequate financial compensation. Instead, it appears that the Trial Chamber erroneously relied on general findings unrelated to the underlying acts for which Mr. Bemba was convicted.¹³¹

74. A similar situation arises with respect to the Trial Chamber’s reliance on “pecuniary gain” as a factor to prove that the acts of pillage were carried out “with particular cruelty”.¹³² There is no evidential basis to support the assertion that any of the 16 instances of pillage were carried out for pecuniary gain. As discussed in the Conviction Appeal Brief, no considered analysis of the items taken by the soldiers, how they were used and whether their appropriation was lawful pursuant to the principle of military necessity, was undertaken by the Trial Chamber in respect of each of the specific underlying acts of pillage for which Mr. Bemba was convicted.¹³³ Many of the items taken are ostensibly capable of military use and, thus, fell within those considered lawful appropriations covered by military necessity, *e.g.*, radios, food and livestock, foam mattresses, generators and kitchen items such as utensils, pots, cassava mills and coffee makers.¹³⁴

¹³⁰ Judgment, para. 412. The corroborated trial evidence, ignored by the Trial Chamber, establishes that rations were sufficient. *See* ICC-01/05-01/08-3434-Conf, para. 395.

¹³¹ Sentencing Decision, fn. 139 citing to Judgment, paras. 565-567.

¹³² Sentencing Decision, paras. 53, 56.

¹³³ ICC-01/05-01/08-3434-Conf, para. 455.

¹³⁴ ICC-01/05-01/08-3434-Conf, para. 455.

75. Instead, the finding that the acts of pillage were carried out for pecuniary gain appears to stem from the general statements, unconnected to any of the acts for which Mr. Bemba was convicted, that “MLC soldiers traded pillaged items for other goods”, “forced civilians to buy back goods taken from them or their neighbours” and sold pillaged goods in the DRC.¹³⁵ These statements do not directly relate to the specific acts of pillage for which Mr. Bemba was charged and convicted, and cannot be used in the evaluation of aggravating circumstances.¹³⁶

76. The impermissible double-counting, and errors in the evaluation of the aggravating circumstances affect several of the factors relied on by the Trial Chamber to prove the aggravations of “particularly defenceless victims” in respect of rape¹³⁷ and “particular cruelty” in respect of both rape¹³⁸ and pillage.¹³⁹ It is submitted that this erosion of the underlying factors is fatal to the establishment of the aggravating circumstances because the remaining factors are insufficient to provide the necessary substantiation. However, even if the remaining factors are considered sufficient, the change in evidential basis for the aggravating circumstances warrants a reduction in the sentence.

¹³⁵ Judgment, para. 566. This paragraph is relied on at Sentencing Decision, fn. 165.

¹³⁶ See, e.g., *Fofana & Kondewa* Sentencing Judgement, para. 36 citing to *Kunarac et al* TJ, para. 850 and *Hadžihasanović* TJ, para. 2069. Note in *Kunarac et al*, Vuković was charged with and convicted of certain rapes. The Trial Chamber held that other incidents of uncharged rapes could not be used to aggravate sentence because “an offender can only be sentenced for conduct for which he has been convicted” (*Kunarac et al* TJ, para. 850). See also *Čelebići* AJ, para. 763, “[t]he Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.”

¹³⁷ The factors are that the rape victims and other civilians present were: (i) targeted by multiple armed MLC soldiers in their homes, on MLC bases, in isolated locations, such as the bush, and/or while seeking refuge; and (ii) children.

¹³⁸ For the aggravation that the rapes were committed with “particular cruelty”, the factors affected are: (i) self-compensation; (ii) punishment of suspected enemies and their sympathisers; and (iii) that the rapes were committed repeatedly against the same victims, sometimes penetrating the same victim orally, vaginally, and anally.

¹³⁹ For the aggravation that the acts of pillage were committed with “particular cruelty”, the factors affected are: (i) for pecuniary gain; (ii) punishment of suspected enemies and their sympathisers; and (iii) that the acts were committed without regard to the victims’ livelihood or well-being.

D. CONCLUSION

77. As is evident from the foregoing, the basis on which the Trial Chamber determined the imposition of an 18-year sentence is riddled with errors. The result of these errors, individually or cumulatively, is the imposition of a disproportionate sentence which should be significantly reduced.

II. SECOND GROUND: MR. BEMBA DID NOT HAVE ACTUAL KNOWLEDGE OF THE AGGRAVATING CIRCUMSTANCES

78. One of the basic legal errors made by the Trial Chamber in the Judgment was that it conflated the “actual knowledge” standard with the “constructive knowledge” (or “should have known”) standard.¹⁴⁰ This error continues in the Sentencing Decision.

79. As a result of the failure properly to distinguish and apply these standards, the Trial Chamber erred in law when it found “beyond reasonable doubt that Mr Bemba knew of the factors relevant to proof of the alleged aggravating circumstances.”¹⁴¹ Separately, there are no findings to support this assertion or otherwise to attribute the aggravating circumstances to Mr. Bemba in a way that reflects his individual culpability. These errors in the Trial Chamber’s approach to the establishment of aggravating circumstances invalidate the findings that the acts of: (i) rape were committed against particularly defenceless victims and with particular cruelty; and (ii) pillage were committed with particular cruelty, and, thus, materially affects the sentence.¹⁴²

¹⁴⁰ ICC-01/05-01/08-3434-Conf, paras. 287-324.

¹⁴¹ Sentencing Decision, para. 26.

¹⁴² Sentencing Decision, paras. 43, 47, 57.

A. THE TRIAL CHAMBER CONFLATED THE “ACTUAL KNOWLEDGE” STANDARD WITH THE “CONSTRUCTIVE KNOWLEDGE” STANDARD

80. The legal error arises from the Trial Chamber’s statement that “various sources put Mr Bemba on consistent notice of the factors relevant to proof of the alleged aggravating circumstances.”¹⁴³ It is on the basis of this statement that the Trial Chamber concluded that Mr. Bemba “knew of the factors relevant to proof of the alleged aggravating circumstances”.¹⁴⁴

81. Being “put on notice” is a classic indicator of the “constructive knowledge” standard.¹⁴⁵ This standard was not applicable in this case. Having declined to re-characterise the charges to include the “should have known” standard,¹⁴⁶ the Trial Chamber was confined to an inquiry of Mr. Bemba’s “actual knowledge”. Therefore, the Trial Chamber’s reliance in the Sentencing Decision on its “findings in the Judgment and the evidence admitted at trial, [that] demonstrate that various sources put Mr Bemba on consistent notice of the factors relevant to proof of the alleged aggravating factors”¹⁴⁷ was an error.

82. There is no legal basis for the broadening of the inquiry into Mr. Bemba’s *mens rea* at the sentencing stage. Rule 145(1)(a) requires that “any sentence of imprisonment [...] imposed [...] must reflect the culpability of the convicted person”. Mr. Bemba was convicted on the basis of actual knowledge. Therefore, Mr. Bemba’s culpability is restricted to what he actually knew, and cannot be expanded to what he “should have known”.

¹⁴³ Sentencing Decision, para. 26.

¹⁴⁴ Sentencing Decision, para. 26.

¹⁴⁵ Čelebići AJ, para. 241; Blaškić AJ, para. 62; Kordić & Čerkez TJ, para. 437. See also ICRC Commentary of 1987 on Additional Protocol I, para. 3545, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BA2C2393DA08B951C12563CD00437A1C>.

¹⁴⁶ Judgment, paras. 196, 718.

¹⁴⁷ Sentencing Decision, para. 26.

B. THERE IS NO EVIDENTIAL BASIS THAT MR. BEMBA KNEW OF THE AGGRAVATING CIRCUMSTANCES

83. In the Sentencing Decision, the Trial Chamber relied on various specific factors to find that the rapes were aggravated by being committed against particularly defenceless victims¹⁴⁸ and with particular cruelty¹⁴⁹ and, by Majority, that the acts of pillage were aggravated by being committed with particular cruelty.¹⁵⁰ There are no findings made beyond reasonable doubt in the Judgment that Mr. Bemba had actual knowledge that any of these specific factors accompanied the commission of the crimes of rape and pillage, nor does the evidence support such a conclusion.

84. Instead, the Trial Chamber heard evidence that Mr. Bemba received information about generalised allegations of crimes,¹⁵¹ and even then the information was largely limited to rape and pillage.¹⁵² While the significance of this evidence in relation to proving Mr. Bemba's "actual knowledge" of the crimes is challenged in the Conviction Appeal Brief,¹⁵³ it is clear that, at its highest, the

¹⁴⁸ The factors were that the rape victims and other civilians present were: (i) unarmed; (ii) targeted by multiple armed MLC soldiers in their homes, on MLC bases, in isolated locations, such as the bush, and/or while seeking refuge; (iii) forcefully restrained; and/or (iv) children. *See* Sentencing Decision, para. 43.

¹⁴⁹ The factors were that the perpetrators committed the rapes: (i) for self-compensation; (ii) to punish suspected enemies and their sympathisers; (iii) without regard to age, gender or social status, including against multiple members of the same family and local officials; (iv) in the presence of the victims' family members, neighbours, and/or other civilians or soldiers, thereby heightening the victims' humiliation; (v) in conjunction with acts of murder, pillaging, and other violence and abuse during the same events and against the same direct and indirect victims; and/or (vi) repeatedly against the same victims, sometimes penetrating the same victim orally, vaginally, and anally. *See* Sentencing Decision, para. 47.

¹⁵⁰ The factors were that the perpetrators targeted the unarmed victims: (i) in their homes, places of business, and places of civilian sanctuary, such as churches and hospitals, on MLC bases, in isolated locations, such as the bush, and/or while seeking refuge; (ii) for pecuniary gain; (iii) to punish suspected enemies and their sympathisers; (iv) in conjunction with acts of murder, rape and other violence and abuse during the same events and against the same victims; (v) repeatedly against the same victims and the same families; (vi) without regard to the victims' livelihood or well-being. *See* Sentencing Decision, paras. 56-57.

¹⁵¹ Judgment, paras. 425, 576, 708, 709, 711-715.

¹⁵² ICC-01/05-01/08-3434-Conf, paras. 321-324.

¹⁵³ ICC-01/05-01/08-3434-Conf, paras. 287-324.

evidence does not establish that Mr. Bemba received information about the specific underlying factors relied on to prove the aggravating circumstances.

85. Further, no reliance can be placed on media or NGO reports to infer Mr. Bemba's knowledge of the specific factors.¹⁵⁴ In the first place, an analysis of these reports establishes that they do not refer to **all** the specific underlying factors relied on to prove the aggravating circumstances. Secondly, there is no evidence that Mr. Bemba read any of the media and NGO reports referred to in the Judgment. Instead, all that the Trial Chamber was able to conclude was that "Mr. Bemba followed and discussed with senior MLC officials international media reports, which often reported his personal reactions to the allegations of crimes by MLC soldiers."¹⁵⁵ In the absence of any evidence that Mr. Bemba actually read any of the reports referred to, such evidence is relevant to the "constructive knowledge" standard which is not applicable in this case.

86. It is acknowledged that there is evidence that Mr. Bemba was aware of a report produced by FIDH alleging crimes by MLC troops. However, this evidence does not prove that Mr. Bemba knew of any of the underlying aggravating factors. Significantly, this report is dated February 2003, and, thus, was published at the very end of the 2002-2003 CAR Operation.¹⁵⁶ Mr. Bemba's response to the report was to telephone and write to the FIDH President Sidiki Kaba, offering to establish the truth of the events in question.¹⁵⁷ Therefore, for the reasons given in the Conviction Appeal Brief and in view of the totality of the evidence, this evidence is not sufficient to support a finding beyond reasonable doubt that Mr. Bemba actually knew about the commission of crimes, as opposed to being in possession of rumours and allegations, let alone that he actually knew about the various, very

¹⁵⁴ Sentencing Decision, fn. 84 citing, *inter alia*, Judgment, paras. 576-578, 607-608, 709, 717.

¹⁵⁵ Judgment, para. 709. *See also*, paras. 576, 711.

¹⁵⁶ EVD-T-OTP-00395/CAR-OTP-0001-0034.

¹⁵⁷ Judgment, para. 610.

specific factors relied on to prove the aggravating circumstances.¹⁵⁸ Indeed, the evidence referred to by the Trial Chamber in the section dealing with “Media allegations” acknowledges the lack of detail in the media reports and the limits of Mr. Bemba’s knowledge.¹⁵⁹

C. NO OTHER BASIS EXISTS TO ATTRIBUTE THE AGGRAVATING CIRCUMSTANCES TO MR. BEMBA

87. There is also no basis on which any of the factors relied on to prove the aggravating circumstances can otherwise be attributed to Mr. Bemba in a way that reflects his individual culpability. More specifically, the Trial Chamber did not make any findings beyond reasonable doubt that the factors relevant to proof of the aggravating circumstances were objectively foreseeable, nor is such a finding supported by the evidence.¹⁶⁰

88. The finding that “MLC soldiers committed the crimes pursuant to a consistent *modus operandi* in each of the locations that fell under their control”¹⁶¹ is not only erroneous but irrelevant to proving objective foreseeability of the underlying aggravating factors. The absence of any evidential basis for the finding is discussed

¹⁵⁸ ICC-01/05-01/08-3434-Conf, paras. 287-324.

¹⁵⁹ Judgment, fn. 1781 citing to, *inter alia*, (i) P15: T-208, 28:1-12; T-209, 16:10-16, 17:21-25 who testified that the RFI and FIDH reported on acts of sexual violence and pillaging by the MLC soldiers against civilians, but that he did not know whether Mr. Bemba was aware of “specific facts”, for example “the number of victims and types of demonstrations, or types of actions”; and (ii) D48: T-267, 34:8-22, who testified that the information broadcast on RFI was vague, in that it referred to the “Banyamulengué” or the MLC soldiers in the CAR, without giving specific information about the alleged perpetrators, or even the victims or their locations.” *See also* D48: T-268-CONF-ENG, 29:5-6, “Q. And you think that the RFI reports provided vague information; is that right? A. I believe so because there were no details, as far as I am concerned” and P44: T205-CONF-ENG, 51:7-20, testifying that General Mustapha would not have informed Mr. Bemba about the commission of crimes but would have provided military updates only.

¹⁶⁰ *Lubanga* Sentencing Appeal Judgment, paras. 88-90. *See also* *Deronjić* Sentencing Appeal Judgement, para. 124, “individuals are not held responsible – either for the purposes of conviction or sentencing – for the unforeseeable acts of others involved in carrying out a plan” and, in respect of certain features, held that they were “all features of the crime of which an accused is aware or could be expected to foresee and for which it is fair to hold him responsible.”

¹⁶¹ Sentencing Decision, para. 22.

in the Conviction Appeal Brief¹⁶² and is further supported by the acknowledgement in the Sentencing Decision that rapes were committed in various locations¹⁶³ and not just in the course of searching “house-to-house” for remaining rebels or conducting “mop [...] up” operations while committing rape, pillage and murder.¹⁶⁴

89. Even if, *arguendo*, the Appeal Chamber sustains the finding that the MLC soldiers used a consistent *modus operandi*, it does not support the conclusion that any of the underlying aggravating factors occurred in the ordinary course of the crimes, *e.g.*, the purported *modus operandi* did not involve the targeting of young, unarmed children, require the presence of third parties to heighten the victims’ humiliation, require the crime to be committed with particular violence and pursuant to any motive or in places of civilian sanctuary and be perpetrated repeatedly against the same victims.¹⁶⁵

90. Further, given that Mr. Bemba did not order, encourage or participate in the crimes, was geographically remote from the crimes sites, did not see or meet the victims, and was actively seeking information from the field regarding the rumours of crimes, there is no reasonable evidential basis on which to conclude that Mr. Bemba could be expected to foresee any of the underlying aggravating factors.¹⁶⁶

91. Finally, as detailed in the Conviction Appeal Brief, the totality of the evidence establishes that MLC soldiers were properly trained, with the length of training taking account of any prior military experience, and that the MLC had a Code of Conduct which was popularised, enforced through a court-martial and disciplinary

¹⁶² ICC-01/05-01/08-3434-Conf, paras. 428-432.

¹⁶³ Sentencing Decision, paras. 22, 41.

¹⁶⁴ Judgment, paras. 564, 676.

¹⁶⁵ The *modus operandi* identified by the Trial Chamber was that “after General Bozizé’s rebels had departed an area, MLC soldiers searched “house-to-house” for remaining rebels, raping civilians, pillaging their belongings, and occasionally killing those who resisted”, *see* Judgment, para. 676. *See also* the summary of the aggravating factors given at Sentencing Decision, para. 25.

¹⁶⁶ ICC-01/05-01/08-3434-Conf, paras. 297-308.

councils within military units and prohibited murder, rape and theft.¹⁶⁷ The MLC's prison records and communication logs evidence that criminal behaviour was prosecuted and punished.¹⁶⁸ This evidence of a professional military environment established by Mr. Bemba to promote discipline and compliance with the laws of war supports the conclusion that none of the underlying aggravating factors could be reasonably foreseen as occurring in the ordinary course of the crimes. In simple terms, criminal conduct was prohibited and, in the case of any breach, punished.

92. In the absence of any proper legal or evidential basis on which to attribute the various factors relied on to prove the aggravating circumstances in a way that reflects Mr. Bemba's individual culpability, the findings on aggravation must be invalidated and Mr. Bemba's sentence reduced accordingly.

III. THIRD GROUND: THE TRIAL CHAMBER ERRED IN ITS APPROACH TO MITIGATING CIRCUMSTANCES

93. The Trial Chamber's finding that "no mitigating circumstances exist in this case" is fundamentally flawed.¹⁶⁹ Underpinning this conclusion is a series of errors affecting the Trial Chamber's approach to mitigating circumstances which, individually or cumulatively, materially affect the Sentencing Decision. As a consequence, Mr. Bemba's 18-year sentence must be reduced.

A. AN INCORRECT LEGAL STANDARD WAS APPLIED TO PROOF OF MITIGATING CIRCUMSTANCES

94. The Trial Chamber's erroneous approach to mitigating circumstances is framed at the outset by the fact that it incorrectly identified the standard of proof to which such circumstances must be established. The Trial Chamber stated that it "must be **convinced** of the existence of mitigating circumstances on a balance of

¹⁶⁷ ICC-01/05-01/08-3434-Conf, paras. 397-401.

¹⁶⁸ ICC-01/05-01/08-3434-Conf, para. 402.

¹⁶⁹ Sentencing Decision, para. 93.

probabilities.”¹⁷⁰ This is a legal error. It is well-established that no such exacting standard, effectively requiring certainty, is required. Instead, an appellant is only required to establish mitigating circumstances to the lower civil standard, balance of probabilities.¹⁷¹ This standard has been articulated as meaning that “the circumstance in question must have existed or exists ‘more probably than not’”.¹⁷² This is clearly a lower standard than “convincing” a Trial Chamber that a mitigating circumstance existed or exists.

95. As a result of this legal error, the Trial Chamber found that Mr. Bemba had failed to “provide[] concrete support” for his request for mitigation on the basis that: (i) there is no likelihood of his reoffending; and (ii) he had no means of identifying the victims before his assets were frozen and was willing to provide assistance to victims.¹⁷³ The Trial Chamber, thus, perfunctorily and erroneously dismissed Mr. Bemba’s requests.

96. Contrary to the Trial Chamber’s approach, to substantiate his above detailed requests for mitigation, Mr. Bemba was not required to convince the Trial Chamber of anything or to provide “concrete support” for the requests. He was simply required to demonstrate that the mitigating circumstance in question exists or must have existed “more probably than not” – a requirement which Mr. Bemba discharged.¹⁷⁴

97. The Trial Chamber’s failure properly to assess Mr. Bemba’s above detailed requests for mitigation according to the correct legal standard materially affected

¹⁷⁰ Sentencing Decision, para. 19 (emphasis added).

¹⁷¹ *Lubanga* Sentencing Decision, para. 34; *Katanga* Sentencing Decision, para. 34.

¹⁷² *Babić* Judgement on Sentencing Appeal, para. 43 citing to *Čelebići* AJ, para. 590.

¹⁷³ Sentencing Decision, para. 70.

¹⁷⁴ See ICC-01/05-01/08-3376-Conf. The request for mitigation based on: (i) the fact that there is no likelihood of Mr. Bemba re-offending is dealt with at para. 85; (ii) his willingness to provide assistance to victims is dealt with at para. 99.

the Sentencing Decision. Given that each request was established to the requisite standard, Mr. Bemba's sentence should be reduced.

B. THE TRIAL CHAMBER ERRED IN FAILING TO ACCORD ANY WEIGHT TO MR. BEMBA'S FAMILY CIRCUMSTANCES AS A MITIGATING FACTOR

98. The Trial Chamber's refusal to accept the existence of any mitigating circumstances in Mr. Bemba's case is further shown to be unreasonable and, thus, erroneous by its failure to accord any weight to Mr. Bemba's family circumstances in mitigation of sentence.¹⁷⁵ Such a perfunctory approach conflicts with the prevailing international case law.

99. Contrary to the Trial Chamber's finding,¹⁷⁶ at this Court family circumstances do not have to be "exceptional" to be considered in mitigation. The fact that Mr. Katanga is the father of six children was found to be a relevant factor in mitigation albeit that, when balanced against the nature of the crimes for which he was convicted, it was accorded very little weight.¹⁷⁷ The fact remains that this factor, "common to many convicted persons"¹⁷⁸ and in the absence of exceptional circumstances, was taken into account, particularly since it would, in part, "likely [...] make rehabilitation and reintegration easier",¹⁷⁹ rather than being accorded no weight at all.

100. The wider jurisprudence supports the approach that some weight should have been given to Mr. Bemba's family circumstances. The ICTY Appeals Chamber has held that "[f]amily concerns should in principle be a mitigating factor."¹⁸⁰ Such

¹⁷⁵ Sentencing Decision, para. 78.

¹⁷⁶ Sentencing Decision, para. 78.

¹⁷⁷ *Katanga* Sentencing Decision, para. 88.

¹⁷⁸ Sentencing Decision, para. 78.

¹⁷⁹ *Katanga* Sentencing Decision, para. 144.

¹⁸⁰ *Kunarac et al* AJ, para. 362.

recognition conforms with the obligation to individualise the sentence.¹⁸¹ The ICTY Appeals Chamber has also confirmed that “good character has been recognised as a mitigating circumstance **in most cases**”.¹⁸² In fact, in both the ICTY and ICTR decisions relied on by the Trial Chamber some weight in mitigation was given to the family situations of the convicted persons.¹⁸³ Of note, in light of the submissions made above regarding the Hadžihasanović case, is that Mr. Hadžihasanović’s family situation was recognised as a mitigating circumstance.¹⁸⁴

101. Therefore, having proper regard to the requirement to “take into account [...] the individual circumstances of the convicted person”,¹⁸⁵ the approach taken by Trial Chamber II and the fact that family circumstances are “in most cases” taken into account in the prevailing international jurisprudence,¹⁸⁶ the Trial Chamber should have taken Mr. Bemba’s family circumstances into account in mitigation of sentence. The Trial Chamber’s outright dismissal of Mr. Bemba’s request for mitigation based on his family circumstances and its refusal to accord these circumstances even limited weight was unreasonable. This amounts to a discernible error. While the effect of this error on the overall sentence may be marginal, it was made in combination with a series of other errors and, thus, should be taken into account in any revision of sentence.

¹⁸¹ *Kunarac* AJ, para. 362 in which reference is made to Article 24(2) of the ICTY Statute.

¹⁸² *Babić* Judgement on Sentencing Appeal, para. 49 (emphasis added). At the ICTY, family circumstances have been considered alongside prior good character. See *Babić* Judgement on Sentencing Appeal, para. 50.

¹⁸³ Sentencing Decision, fn. 243 citing to, *inter alia*, *Ntabakuze* AJ, para. 284; *Babić* Judgment on Sentencing Appeal, paras. 50-51. See also *Babić* Sentencing Judgment, para. 89.

¹⁸⁴ *Hadžihasanović* TJ, para. 2079, “[t]he Chamber finds the family situation of the Accused Hadžihasanović, in particular the fact that he is married and is the father of two children, to be a mitigating circumstance.”

¹⁸⁵ Statute, Article 78(1).

¹⁸⁶ See, e.g., *Blaškić* TJ, para. 779; *Vasiljević* TJ, para. 300; *Furundžija* TJ, para. 284; *Jelisić* TJ, para. 124; *Banović* Sentencing Judgement, para. 74-76.

C. THE TRIAL CHAMBER ERRED IN FAILING TO TAKE MR. BEMBA'S CONTRIBUTION TO ESTABLISHING PEACE AND SECURITY AS A MITIGATING FACTOR

1. The Trial Chamber ignored directly relevant evidence

102. It is extraordinary that a Trial Chamber, seized with a question of whether a convicted person's peacebuilding and humanitarian efforts warrant a reduction of sentence, should ignore the central factors relied upon in support of this submission.

103. In 2003, Mr. Bemba agreed to transfer the military wing of the MLC, comprised of 20,000 men to his political adversary, for integration into the Forces Armées de la République Démocratique du Congo, or national army, in the name of peace. In 2006, following his defeat in the Congolese general elections, Mr. Bemba acted immediately to reassure the international community that he would never call for violence, would respect the democratic institutions of the State, and would commit to leading a constructive and peaceful opposition.¹⁸⁷

104. These two aspects feature nowhere in the Sentencing Decision. The Trial Chamber failed to consider this evidence (and the Defence submissions thereon), and failed to provide a reasoned opinion as to why it was entitled to find that Mr. Bemba's peacebuilding and humanitarian efforts were not "sincere" or "implemented"¹⁸⁸ despite these indications to the contrary. This was an error.

105. The integration of the MLC into the FARDC is a historical fact, and beyond dispute. Nonetheless, Monseigneur Fridolin Ambongo, "a Bishop and President of the Episcopal Justice and Peace Commission, who was President of the CDI-

¹⁸⁷ ICC-01/05-01/08-3376-Conf, para. 76; T-368-ENG, 22:25-23:22; T-370-ENG, 41:17-43:5; 44:16-45:9; ICC-01/05-01/08-200-Anx3-tENG; EVD-T-D04-00109/CAR-D04-0005-0499.

¹⁸⁸ Sentencing Decision, para. 73.

Bwamanda project and superior of the Capuchin friars in the DRC,”¹⁸⁹ testified during the sentencing hearing. He told the Trial Chamber about the assimilation of the MLC into the national army, as part of the reunification of the Congo, and which signalled an end to the “long years of war”:¹⁹⁰

Q. [...] Simple question, what happened to the ALC, the military wing of the MLC?

A. I didn't quite understand the question.

Q. That's probably because it wasn't a very good question. The MLC military force ceased to exist, didn't it? It became part of the national army. Did you witness that process?

A. Yes. Yes, I experienced this while I was in Kinshasa. After the Sun City agreements and the formation of the government which we referred to as one plus four, one president and four vice presidents, so four vice presidents, and the president of the MLC was one of the four vice presidents, so once the peace agreement had been signed, which was very well received in the Congo, I think more than enthusiastic, people were hopeful because we had been involved in war since 1997 and up to 2003, it had been long years of war, so that was the end of the war, the Sun City agreements. From the point of view of the population it was the reunification of the Congo which had been divided. There had been the part that belonged to the government, the bit that belonged to the RCD in the east with Ruberwa and so on. There was the north Équateur and part of the province Orientale, which belonged to MLC. So the country had been split. So Sun City meant for us the reunification of the Congo. So once the Sun City agreements had been signed, logically and as had been agreed in Sun City, the MLC militia was integrated into the regular army, so we no longer spoke about the MLC, they were no longer spoken of following the signing of the Sun City agreements.

¹⁸⁹ ICC-01/05-01/08-3384, para. 25.

¹⁹⁰ T-368-ENG, 22:25-23:22.

106. Defence submissions built upon this evidence, and addressed the significance of Mr. Bemba's decision to relinquish the MLC army, and the weight it should be ascribed as a mitigating circumstance:¹⁹¹

[...] the International Criminal Court sentencing jurisprudence recognizes that peace building is a legitimate mitigating factor. So far the ICC has sentenced two accused to prison terms. In both of those cases the Trial Chamber accepted that a contribution to peace and stability should count as a mitigating factor. This is the ICC's practice. In *Katanga*, the Trial Chamber reduced Katanga's sentence on the basis of his support for the disarmament and demobilisation of child soldiers in Ituri. Mr Bemba agreed to demobilise his entire force of 20,000 men and agreed for them to be merged in the national army led by his adversary, all in the name of peace, all in the name of stability. None of this is open to challenge. It's historical fact. These steps towards peace in one of the most protracted and complicated conflicts of modern times should be given significant weight.

107. Mr. Bemba's relinquishing of the MLC army to facilitate peace in the Congo was not given any or any adequate weight. In fact, it was not even acknowledged. The Trial Chamber erroneously dismissed Mr. Bemba's contribution to peace without reference to this fact, these submissions, or this testimony.

108. Contributions to peace on an objectively smaller scale have resulted in the reduction of sentences in similar circumstances. An ICTY Trial Chamber credited Blagojević for organising a system of "demining" in the army of the Republika Sprska.¹⁹² Similarly Jokić's sentence was reduced on the basis of his part in training de-mining personnel.¹⁹³ Milošević's sentence was reduced on the basis that, amongst other factors, he negotiated and signed an "anti-sniping agreement".¹⁹⁴

¹⁹¹ T-370-ENG, 44:21-45:9.

¹⁹² *Blagojević* TJ, paras. 858, 860.

¹⁹³ *Blagojević* TJ, paras. 859, 860.

¹⁹⁴ *Milošević* TJ, para. 1003.

Plašvić was recognised to have demonstrated considerable support for the 1995 Dayton Agreement, and “attempted to remove obstructive officials from office “.¹⁹⁵ Katanga’s contribution to the process of disarming and demobilising child soldiers,¹⁹⁶ while significant, is not the same scale as the relinquishing of an entire armed force, particularly when this army is being handed to a political (and former military) opponent.

109. Secondly, the Sentencing Decision also makes no reference to the efforts of Mr. Bemba to maintain the DRC’s fragile peace following the 2006 elections. The Trial Chamber was referred to the statement of Mr. Louis Michel, the former Belgian Minister of Foreign Affairs, who formed the following impression of Mr. Bemba as an impartial observer during his mediation to promote peace in the DRC:¹⁹⁷

Each time I approached him about moderating his positions and showing flexibility in order to reconcile viewpoints, he responded positively [...] after the presidential and legislative elections in the DRC [...] he agreed to draft a letter that was transmitted to the Foreign Ministers of the European Union and to the major partners in the international community, including the Secretary-General of the United Nations, in which he committed himself to leading a constructive opposition and to refraining from any military or armed initiatives and from any statement which might lead to an escalation of the violence. He even expressed his willingness to give the elected majority sufficient time to allow it to implement its plan. He gave me the genuine impression that he had permanently embraced the role of an opposition leader who respects the institutions of a constitutional State.

110. Again, Mr. Bemba’s active steps to ensure the peaceful aftermath of the 2006 elections are nowhere in the Sentencing Decision. This is particularly egregious, given the existence of directly corroborating contemporaneous evidence, which was

¹⁹⁵ *Plašvić* Sentencing Judgment, paras. 85, 94.

¹⁹⁶ *Katanga* Sentencing Decision, para. 115.

¹⁹⁷ ICC-01/05-01/08-200-Anx3-tENG. See ICC-01/05-01/08-3376-Conf, para. 76; T-370-ENG, 42:2-18.

also ignored. On 6 December 2006, the President of the UN Security Council issued a statement in the following terms:¹⁹⁸

The Security Council welcomes Mr. Jean-Pierre Bemba's commitment, in his statement on 28 November 2006, to continue to participate actively in Congolese politics within the framework of the institutions of the Republic.

111. Despite having been admitted into evidence as relevant to the assessment of Mr. Bemba's sentence, and despite corroborating the 2008 statement of Mr. Michel, this statement was not taken into account by the Trial Chamber.

112. It is useful to contrast the Trial Chamber's blanket failure to acknowledge these central acts, with the approach adopted in *Katanga*. Trial Chamber II conducted a detailed and exhaustive review of the documents, testimony and submissions concerning Katanga's efforts to promote peace and reconciliation. All aspects of the Defence submissions were considered, and a reasoned opinion was provided.¹⁹⁹ Trial Chamber III was required to do the same.

113. A Trial Chamber is entitled to consider and provide a reasoned opinion as to why it does not accept that the peacebuilding or humanitarian efforts of a convicted person are sufficient to warrant a reduction in sentence. It is not entitled to ignore direct and credible evidence of these efforts, and then conclude, in a sweeping manner, that peacebuilding efforts were never "implemented".²⁰⁰ The Trial Chamber's failure either to consider or provide a reasoned opinion as to central aspects of Mr. Bemba's promotion of peace is fatal to its finding. Mr. Bemba has demonstrated a pattern of commitment to peace through concrete actions contributing to peace in a conflict of almost unparalleled complexity and duration.

¹⁹⁸ EVD-T-D04-00109/CAR-D04-0005-0499.

¹⁹⁹ *Katanga* Sentencing Decision, paras. 89-115.

²⁰⁰ Sentencing Decision, para. 73.

This commitment should properly be considered as a mitigating factor, warranting a reduction in sentence.

2. The Trial Chamber erred in dismissing peacebuilding activities on the basis that they were “unrelated to the CAR”

114. The Trial Chamber found that even if it were to accept that Mr. Bemba contributed to peace in the DRC “such efforts are, in and of themselves, unrelated to the CAR.”²⁰¹

115. This reasoning is incompatible with the Trial Chamber’s earlier recognition that mitigating circumstances “need not be directly related to the crimes and are not limited by the scope of the charges or Judgment”.²⁰²

116. The Defence sought leave to call three witnesses during the sentencing hearing. The Trial Chamber authorised only the presentation of Monseigneur Ambongo’s evidence. Relevantly, the Defence submitted that the Monseigneur would testify about Mr. Bemba’s peacebuilding efforts in Équateur in the DRC, and not about the events in the Central African Republic. The Defence submitted that he had been “present in Equateur, in the area controlled at that time by the MLC” and could testify as to “the role of both Mr. Bemba and the MLC in bringing peace and stability to the region during the relevant events.”²⁰³

117. The Legal Representative of Victims (LRV) objected to his evidence, on the basis that it “concerns matters falling outside the geographical scope of the Bemba case.”²⁰⁴ The Trial Chamber expressly rejected the LRV’s argument, finding that

²⁰¹ Sentencing Decision, para. 75.

²⁰² Sentencing Decision, para. 19.

²⁰³ ICC-01/05-01/08-3372-Conf, paras. 10-11.

²⁰⁴ ICC-01/05-01/08-3378-Conf, paras. 9-10.

“[c]ontrary to the Legal Representative's submissions, mitigating circumstances are not limited to those falling within the geographical scope of the Charges”.²⁰⁵

118. The Trial Chamber then entertained Monseigneur Ambongo's evidence concerning Mr. Bemba's activities in the DRC, without objection. No suggestion was made during the course of his testimony that his evidence was irrelevant to factors to be considered in assessing sentence. The Trial Chamber's subsequent decision, dismissing this evidence on the basis that it is “unrelated to the CAR” is accordingly unreasonable, and incompatible with the principle it elsewhere cites.²⁰⁶

119. The Trial Chamber's approach would also prejudice accused who, like Mr. Bemba, are charged in relation to acts which occurred in a state other than the one in which they carry out their personal and professional activities. Should a future accused making meaningful and significant contributions to the peace and humanitarian welfare of the population in the area in which he lives, and then be convicted in relation to an incursion in a foreign state with which he had no other links, the Trial Chamber's approach would necessarily preclude any reduction of sentence for even a lifetime of good works, on no basis other than an accident of geography.

120. The Trial Chamber erred in dismissing evidence of Mr. Bemba's acts and conduct on the basis that they were “unrelated to the CAR”.²⁰⁷ Mr. Bemba's peacebuilding activities in the DRC properly warrant a reduction in sentence.

3. The use of Mr. Bemba's peacebuilding activities in the DRC to his detriment was unreasonable

121. In addition to these errors, the Trial Chamber's reasoning in dismissing Mr. Bemba's contribution to peace is flawed, in a more fundamental way.

²⁰⁵ ICC-01/05-01/08-3384, para. 27.

²⁰⁶ Sentencing Decision, para. 19.

²⁰⁷ Sentencing Decision, para. 75.

122. The Trial Chamber, in fact, held Mr. Bemba's contributions to peace in the DRC, and the MLC's assistance to the population of Equateur, directly against him. The Trial Chamber reasoned that:²⁰⁸

Rather than constituting a mitigating circumstance, the Chamber considers that Mr. Bemba's alleged contributions to peace in the DRC and the well-being of the population of Équateur demonstrate his experience and capacity to engage in peacebuilding efforts and assist civilians. However, despite invitations and repeated opportunities to make the same efforts in the CAR, he failed to do so.

123. By this logic, anyone convicted of crimes before the International Criminal Court could never rely on humanitarian assistance or peacebuilding activities as a mitigating factor, except insofar as it related to the affected territory.

124. The Trial Chamber's reasoning creates the perverse reality that Mr. Bemba would have been better off engaging in no humanitarian or peacebuilding activities in the DRC. Indeed, it was these "alleged" acts which the Trial Chamber used against him, to show that he could have engaged in such actions in the Central African Republic. Putting aside that Mr. Bemba was not Central African, could never hold political office there, and had no Central African armed force to confer on his Central African opponent, the Trial Chamber's logic is fundamentally flawed.

125. Monseigneur Ambongo gave direct evidence of the role that the MLC played in dramatically improving the lives of people in Équateur. He described the situation in this province prior to the arrival of the MLC in 1998. The area had been decimated by war. The population was living in poverty and fear. Roads and

²⁰⁸ Sentencing Decision, para. 76.

schools and hospitals had been attacked and pillaged and abandoned. The population was under constant threat from bombing by government forces.²⁰⁹

126. When the MLC arrived, in Monseigneur Ambongo's words, "life started to begin again."²¹⁰ Health centres and hospitals reopened with the MLC securing safe passage for medicine and other medical supplies. The MLC worked with NGOs to open schools and make sure children got an education. Economic activity restarted and the population was able to sell coffee, corn and soya and build businesses and live and survive.²¹¹

127. These actions played no part in determining Mr. Bemba's sentence. Like all evidence demonstrative of Mr. Bemba's commitment to the welfare of the Congolese population, it was simply discarded. These are precisely the kind of acts that the International Criminal Court should encourage, and commend. The Trial Chamber's reasoning does the exact opposite.

D. THE TRIAL CHAMBER ERRED BY FAILING TO GIVE ANY WEIGHT IN MITIGATION TO THE MEASURES TAKEN BY MR. BEMBA TO PREVENT OR REPRESS THE COMMISSION OF CRIMES

128. The various measures which Mr. Bemba took throughout the 2002-2003 CAR Operation in response to allegations of criminal activity by his troops are discussed above.²¹² It is Mr. Bemba's primary position that these measures should have been taken into account in assessing the gravity of his conduct. However, should the Appeals Chamber reject this argument, then these measures should have been taken into account in mitigation of sentence and the Trial Chamber's failure to

²⁰⁹ T-368-ENG, 13:16-18:5.

²¹⁰ T-368-ENG, 18:10; T-370-ENG, 43:14.

²¹¹ T-368-ENG, 19:8-21:16; 22:1-2; *See also* Sentencing Submissions, T-370-ENG, 43:15-19.

²¹² Ground 1, paras. 11-77.

accord them any weight amounts to a discernible error in the exercise of its discretion.²¹³

129. The failure to accord any weight to the measures taken by Mr. Bemba to prevent or repress the commission of crimes was informed, in part, by the Trial Chamber's erroneous conclusion that "the Defence's submissions appear to be an attempt to re-litigate the nature of and intentions behind the measures Mr. Bemba took."²¹⁴ The Trial Chamber stated that "[t]he Defence cannot attempt to re-litigate issues that have already been decided upon in the Judgment by claiming that they are mitigating circumstances."²¹⁵ An analysis of Mr. Bemba's sentencing submissions reveals the Trial Chamber's findings are without foundation.

130. In Mr. Bemba's sentencing submissions, the Trial Chamber's criticisms of "the extent and efficacy of these measures" were acknowledged but not challenged.²¹⁶ Instead, the focus of the request for mitigation was the bare fact that the Trial Chamber had "accepted that [the measures] were, in fact, taken."²¹⁷ This fact was contrasted, in the first place, with the vast majority of other superior responsibility cases where the commanders at issue had either taken no measures to prevent or punish the crimes of subordinates, or were participating and present when the crimes were committed.²¹⁸

131. This comparison did not seek to re-litigate any issue but rather to highlight that this case is exceptional in that measures, whatever the underlying motivation, were taken. Mr. Bemba's measures were also contrasted with those taken by other international leaders to show the similarities between them.²¹⁹ The similarities and

²¹³ A factor cannot be considered in mitigation twice. See *Limaj* AJ, para. 143.

²¹⁴ Sentencing Decision, fn. 196.

²¹⁵ Sentencing Decision, fn. 196 citing to *Kunarac et al* AJ, para. 388.

²¹⁶ ICC-01/05-01/08-3376-Conf, para. 70.

²¹⁷ ICC-01/05-01/08-3376-Conf, para. 70.

²¹⁸ ICC-01/05-01/08-3376-Conf, paras. 71-72.

²¹⁹ ICC-01/05-01/08-3376-Conf, para. 73.

the fact that the international measures had not been subject to criticism were highlighted to demonstrate that Mr. Bemba's measures, regardless of motivation, had substance and weight. Therefore, at no point was any attempt made to re-litigate issues determined in the Judgment. Any dismissal of Mr. Bemba's measures as a mitigating factor based on this re-litigation concern was an error.

132. Separately, the Trial Chamber's finding that Mr. Bemba's ability to take measures to prevent and repress crimes "underscores [his] superior failures" and, thus, the measures which were taken "do not reduce his culpability or justify mitigation" constitutes an abuse of discretion for the reasons hereinafter set out.²²⁰

133. *First*, this finding fails to give sufficient recognition and weight to the positive effect the measures would have had. It is recognised that proof of a mitigating circumstance does not automatically entitle a convicted person to a 'credit'.²²¹ However, a 'credit' is warranted in this case. Notwithstanding the Trial Chamber's criticisms of the measures taken, on any fair and balanced view it is clear that they would have had at least some effect on preventing or punishing the conduct of MLC soldiers. For example, the measures taken were not isolated, it is accepted that the Code of Conduct, which prohibited rape, murder and theft, was popularised and enforced, Mr. Bemba's warning "against abuse of the civilian population" was made in public, soldiers were arrested and prosecuted for crimes and investigative commissions were initiated.²²² The Trial Chamber's failure to accord any weight to these measures in mitigation and, instead, to use them to Mr. Bemba's detriment is unreasonable.

134. *Second*, the Trial Chamber's approach fails to give any consideration to the international jurisprudence which recognises that mitigation in sentence may be appropriate where a convicted person has taken certain positive steps or measures

²²⁰ Sentencing Decision, para. 65.

²²¹ *Niyitegeka* AJ, para. 267.

²²² *See above*, paras. 61-65.

to minimise or reduce harm, such as to ameliorate the conditions of detainees or to assist potential victims of genocide.²²³ By recognising these steps and measures, the sentence imposed is properly individualised, a sentencing requirement at both the *ad hoc* tribunals and this Court,²²⁴ and fairly reflects all the circumstances of the case. Indeed, it is recalled that mitigating factors mitigate punishment, not the crime.²²⁵

135. Of note, is that Trial Chamber VIII recently gave effect to the foregoing approach in the *Al Mahdi* case. Notwithstanding the fact that the convicted person in that case used a bulldozer at one site, his recommendation not to use a bulldozer when destroying the mausoleums at all the other sites in order to minimise collateral damage was recognised as a mitigating circumstance.²²⁶ Of course, the decision in the *Al Mahdi* case was rendered after the Sentencing Decision. Nevertheless, in light of the international jurisprudence and the requirement to impose a sentence which fairly reflects all the individual circumstances of the convicted person, the approach taken by Trial Chamber VIII should also have been taken by Trial Chamber III when assessing the measures taken by Mr. Bemba in response to the allegations of crimes.

136. *Third*, the Trial Chamber's approach is flawed because the use of positive steps – no matter how limited²²⁷ – to a convicted person's detriment leads to absurd results. The Trial Chamber's approach creates the perverse reality that convicted persons would be better off not engaging in positive actions.²²⁸

²²³ *Sikirica* Sentencing Judgment, para. 242; *Serushago* Sentencing Judgment, para. 38.

²²⁴ ICTY Statute, Article 24(2); ICTR, Article 23(2); Statute, Article 78(1).

²²⁵ *Kambanda* TJ, para. 56.

²²⁶ *Al Mahdi* TJ, paras. 91, 93.

²²⁷ It is acknowledged that the Trial Chamber found the measures taken by Mr. Bemba to be "minimal and inadequate". See Sentencing Decision, para. 65. This characterisation is disputed in ICC-01/05-01/08-3434-Conf. See paras. 325-380. However, even if the challenge made to the characterisation of the measures is rejected, it is submitted that the measures should still have been considered in mitigation.

²²⁸ See *above*, paras. 124-127.

137. In conclusion, the Trial Chamber's failure to give any weight in mitigation to the measures taken by Mr. Bemba to prevent or repress the commission of crimes is a discernible error. These measures should have mitigated Mr. Bemba's sentence. As a result, his sentence should be reduced.

E. THE TRIAL CHAMBER ERRED IN FAILING TO TAKE INTO ACCOUNT THE SIGNIFICANT DELAYS IN PROCEEDINGS IN MITIGATION

138. This single accused case concerning a limited geographic and temporal crime base, one mode of liability and five charges has currently taken over 8 years.²²⁹ The inordinate length of the case is due in part to significant delays not attributable to Mr. Bemba.

139. Despite recognising that "a reduction in sentence may, in exceptional circumstances, be a remedy where the length of proceedings is disproportional due to no fault of the convicted person",²³⁰ the Trial Chamber committed a discernible error by failing to mitigate Mr. Bemba's sentence on the basis of the delays. Contrary to the Trial Chamber's finding, Mr. Bemba did "demonstrate a violation", did "substantiate [his] suggestion that [his rights] were violated" and did "explain why a reduction in sentence would be an appropriate remedy".²³¹ As a result, the Trial Chamber was "obliged to consider this factor" in mitigation.²³²

140. As detailed in Mr. Bemba's sentencing submissions, delay has affected this case from the outset.²³³ In 2009, delay was caused by the Prosecution's filing of an

²²⁹ In comparison, in: (i) the *Lubanga* case, which was also a single accused case, the time period between Lubanga's transfer into ICC custody (16 March 2006) and the rendering of the Article 74 judgment (14 March 2012) took just under 6 years; (ii) the *Katanga* case, which was initially a two accused case, the time period between Katanga's transfer into ICC custody (17 October 2007) and the rendering of the Article 74 judgment (7 March 2014) took just over 6 years.

²³⁰ Sentencing Decision, para. 88.

²³¹ Sentencing Decision, paras. 88-89.

²³² Sentencing Decision, para. 88.

²³³ ICC-01/05-01/08-3376-Conf, paras. 93-97.

amended DCC, elongating the confirmation process by some months.²³⁴ In 2010, the initial start-date of the trial of 5 July was pushed back,²³⁵ with opening speeches eventually being given on 22 November 2010. In 2011, the trial stalled for Prosecution witnesses to postpone their testimonies for personal and professional reasons,²³⁶ despite Defence concerns [REDACTED].²³⁷ During the Defence case, proceedings were temporarily suspended for two months in order to resolve the Trial Chamber's Regulation 55 notice.²³⁸ However, the most significant delay lay squarely with the Trial Chamber. The Judgment in this case was rendered on 21 March 2016, 15 months after the presentation of closing arguments on 12 and 13 November 2014.²³⁹

141. These submissions were ignored by the Trial Chamber. This was an error. The delays outlined should properly have been considered in mitigation. Mr. Bemba had the statutory right to be tried within a reasonable time.²⁴⁰ While Mr. Bemba relies on each of the delays identified above and their effect on the overall length of proceedings to date, an unduly lengthy stage in proceedings – in the present case 15 months to issue a judgment, where Mr. Bemba was in custody – establishes a lack of diligence required to meet the obligation to ensure trial within a reasonable time.²⁴¹

²³⁴ ICC-01/05-01/08-388, the Single Judge rendered a decision in which it requested the Prosecution to consider filing an amended DCC within 27 days, *i.e.* by 30 March 2009. The Defence was given until 24 April 2009 to file submissions in response to the amended DCC. The confirmation decision was issued on 15 June 2009, exactly 5 months after the end of the confirmation hearings.

²³⁵ ICC-01/05-01/08-803, vacating the 5 July 2010 start date and ordering opening speeches to be given on 14 July 2010 and evidence to commence on 30 August 2010 after the judicial recess.

²³⁶ *See, e.g.*, ICC-01/05-01/08-1904-Conf; ICC-01/05-01/08-2146. P15, P44 and P45 all requested to delay their testimony so they could [REDACTED]. P36 was scheduled to testify at the end of 2011, but as a result of a first postponement, was rescheduled to early 2012. He was then scheduled to testify on 16 February 2012. In the end, he testified on 13 March 2012. The transcripts evidence the 28 day gap in evidential hearings: ICC-01/05-01/08-T-211 and ICC-01/05-01/08-T-213.

²³⁷ ICC-01/05-01/08-1893-Conf-Red, fn. 5.

²³⁸ ICC-01/05-01/08-2480; ICC-01/05-01/08-2500.

²³⁹ ICC-01/05-01/08-3191; ICC-01/05-01/08-3343.

²⁴⁰ Statute, Article 67(1)(c). *See also* European Convention on Human Rights and Fundamental Freedoms, Article 6(1).

²⁴¹ *See Matwiejczuk v. Poland* (Application no. 37641/97), 2 December 2003, unreported. *See also McCourt v. HM Advocate* [2012] JC 336.

To place this delay in context, in both the *Lubanga* case and the *Ngudjolo* case, the Article 74 judgments were rendered just over 6 months after closing arguments.

142. Considering the specific circumstances of this case, there was no reasonable basis for the considerable delay in rendering the judgment.²⁴² As noted above, this is a single accused case. The five charges are limited to one mode of liability and are narrowly defined in terms of geographic and temporal scope. The 15-month period was not interrupted by any exceptional situation which merited litigation by the parties and participants and/or the Trial Chamber's extended attention.²⁴³

143. Given these significant delays,²⁴⁴ Mr. Bemba had the right to a remedy. As underscored by Judge Pikis, "[d]elay in the proceedings cannot be at the expense of the detainee".²⁴⁵ Even if the delays in question did not warrant a significant reduction in sentence, they did constitute a mitigating factor which should have been properly taken into account.²⁴⁶ The Trial Chamber's failure to do so is an error which materially affects the Sentencing Decision.

²⁴² *Minshall v. UK* [2011] ECHR 2243, para. 45, the reasonableness of the length of the proceedings must be assessed in light of the circumstances of the case and with reference to the complexity of the case, the conduct of the affected person and the relevant authorities and what was at stake for the affected person.

²⁴³ E.g., in *Katanga & Ngudjolo*, during deliberations Trial Chamber issued a decision severing the case of Katanga from Ngudjolo and stating its intention to implement regulation 55 of the Regulations of the Court, ICC-01/04-01/07-3319.

²⁴⁴ Note the fact that any delay that was caused by logistical difficulties in calling witnesses is irrelevant. These delays are attributed to the State, or in this case the Prosecution, and must be remedied. See *Taavitsainen v. Finland* (Application no. 25597/07), para. 37.

²⁴⁵ Separate Opinion, ICC-01/04-01/06-824, para. 22.

²⁴⁶ *Taavitsainen v. Finland* (Application No. 25597/07) paras. 29-37; *Cocchiarella v. Italy* (Application No. 64886/01), para. 17-23; *Beck v. Norway* (Application no. 26390/95), paras. 27-28; *Scordino v Italy*, (Application no. 36813/97), paras. 65-70. See also *McCourt v. HM Advocate* [2012] JC 336, para. [19].

F. THE TRIAL CHAMBER ERRED IN FAILING TO MITIGATE THE SENTENCE ON THE GROUND THAT THE APPELLANT HAD ALREADY BEEN PENALISED BY THE COURT BY REASON OF THE SEIZURE, FREEZING AND DEPLETION IN VALUE OF HIS PROPERTY

144. Prior to trial, the Court seized and froze many if not all of Mr. Bemba's proprietary assets, including not just monetary assets, in the form of bank accounts, but real estate and perishable chattels.²⁴⁷ By reason of its failure properly or adequately to manage these assets, the Court allowed many of them to become depleted [REDACTED].²⁴⁸

145. The consequent financial loss to Mr. Bemba amounts to a financial penalty imposed by the Court. It also prejudices his position by depriving him of the ability to make reparations from these assets. He is entitled to a remedy for this inappropriate interference with his proprietary rights. The only apposite remedy is a reduction in his sentence commensurate with the extent of the depletion of his assets. In the proper exercise of its sentencing discretion, the Trial Chamber should have accorded this reduction to Mr. Bemba as a mitigating circumstance in accordance with the requirement to "take into account [...] the individual circumstances of the convicted person"²⁴⁹ and to give consideration to the "economic condition of the convicted person."²⁵⁰

146. Instead, the Trial Chamber wrongly concluded that the depletion of his assets was "not a sanction",²⁵¹ and erred in finding that the matter was "not relevant"²⁵² to the issue of sentence but could be dealt with during the reparation phase of the process. The Trial Chamber further erred in determining that: (i) Mr. Bemba had not

²⁴⁷ ICC-01/05-01/08-8; [REDACTED].

²⁴⁸ ICC-01/05-01/08-3376-Conf, paras. 102-103.

²⁴⁹ Statute, Article 78(1).

²⁵⁰ 145(1)(c) of the Rules of Procedure and Evidence.

²⁵¹ Sentencing Decision, para. 83 (Even though the wording is that the freezing is not a sanction, not the depletion of his assets).

²⁵² Sentencing Decision, para. 84.

exhausted his rights of redress with the Registry or other competent authorities; and (ii) by reason of its inability precisely to calculate Mr. Bemba's loss, the Chamber was unable to consider it as a mitigating circumstance.²⁵³

1. The Trial Chamber erred in finding that the depletion of Mr. Bemba's assets was "not a sanction"²⁵⁴

147. Freezing orders are intended to be preservative rather than punitive in nature.²⁵⁵ The appellant's assets were frozen at the request of the Court. At the time, the Pre-Trial Chamber held that the Trial Chamber had the duty to take steps to preserve Mr. Bemba's assets in order to ensure their availability for a future reparations order.²⁵⁶ Article 57(3)(e) of the Statute requires that such measures must be taken with due regard for the rights of the parties concerned. This was not done.

148. Neither the Registry, nor the Prosecutor, made any attempt to preserve the value of the assets seized, nor use their income-generating potential. [REDACTED].²⁵⁷ [REDACTED].²⁵⁸ [REDACTED].²⁵⁹ [REDACTED].²⁶⁰ [REDACTED]²⁶¹ [REDACTED].²⁶²

149. The Trial Chamber's assertion that the measures were "not a sanction"²⁶³ bears no sensible analysis.

²⁵³ Sentencing Decision, para. 84.

²⁵⁴ Sentencing Decision, para. 83.

²⁵⁵ ICC-01/05-01/08-8, para. 6.

²⁵⁶ See, e.g., ICC-01/05-01/08-339-Red, para. 11.

²⁵⁷ EVD-T-D04-00112/CAR-D04-0005-0511, para. 5.

²⁵⁸ EVD-T-D04-00112/CAR-D04-0005-0511, para. 2.

²⁵⁹ ICC-01/05-01/08-583-US, p. 8 cited in EVD-T-D04-00110/CAR-D04-0005-0501, para. 25.

²⁶⁰ ICC-01/05-01/08-583-US-Anx1, cited in EVD-T-D04-00110/CAR-D04-0005-0501, para. 25.

²⁶¹ [REDACTED]; ICC-01/05-01/08-76-Conf-Anx6-tENG.

²⁶² [REDACTED]: EVD-T-D04-00112/CAR-D04-0005-0511, para. 4; and [REDACTED]: ICC-01/05-01/08-3375-Conf-AnxII, p. 3.

²⁶³ Sentencing Decision, para. 83.

2. The Trial Chamber erred in concluding that the question of whether Mr. Bemba had already been financially penalised was “not relevant to the sentence”²⁶⁴

150. The Trial Chamber’s assertion that these “matters are [...] better addressed at the reparations phase of proceedings and are not relevant to the sentence”²⁶⁵ is incorrect in two respects. Firstly, in its latent assumption that the fact that the Mr. Bemba’s assets had been depleted by the actions of the Court (whether the Registry or the Prosecution) would in some way alleviate him from some or all of his liability to pay reparations, and secondly, in its conclusion that the fact that Mr. Bemba had suffered some incidental financial penalty by reason of his arrest had no bearing on the appropriate sentence.

151. The phrase “are better addressed” is of itself enigmatic and incongruous alongside the later rejection in the same sentence of the matters as relevant. If it is only “better” for them to be “addressed” at a later stage, then the inference is that they may (on balance) be relevant for present purposes.

152. However, more significantly, the assertion is underpinned by a misapprehension of the Court’s jurisdiction on reparations. Far from the matter of an accused’s having lost a large sum of money through the actions of the Court being irrelevant to the issue of sentence, it is reparations to which it is “not relevant”.

153. Article 75(2) provides that the Court “may make an order directly against a convicted person specifying appropriate reparations” or “may order that the award be made through the Trust Fund”. However, in either case it is always the accused’s liability personally to pay reparations.²⁶⁶ Where an order is made “through the

²⁶⁴ Sentencing Decision, para. 84.

²⁶⁵ Sentencing Decision, para. 84.

²⁶⁶ ICC-01/04-01/06-3129, paras. 70, 76.

Trust Fund” the convicted person retains a liability to the Trust Fund to repay monies paid out on his behalf.²⁶⁷

154. The (differently composed) Trial Chamber which ultimately makes an order for reparations has no obligation to take account of the freezing orders and seizures made in the pre-trial phase and their impact upon the convicted person’s current finances in terms of quantifying his liability. It may only have an effect upon the mechanism of payment. Put shortly, Mr. Bemba cannot expect the Trial Chamber dealing with reparations to give him a discount because of the depreciation of the value of [REDACTED].

155. By contrast, financial penalties imposed on a convicted person are relevant to the sentence imposed by the Chamber. Rule 146(1) provides that: “In determining whether to order a fine under article 77, paragraph 2(a), and in fixing the amount of the fine, the Court shall determine whether imprisonment is a sufficient penalty”. By necessary and logical extension, Rule 145(1)(a) compels the sentencing Chamber to have regard to any financial penalty in the computation of the appropriate sentence of imprisonment.

156. The relationship between custodial and financial penalties is recognised in the Court’s legal regime. Rule 146(5) provides that, where there is wilful non-payment of a fine, a convicted person’s term of imprisonment may be extended as a last resort for a period not to exceed a quarter of such term or five years, whichever is less. The relationship was also illustrated in Mr. Bemba’s sentencing submissions by reference to the *Hartman* case at the ICTY, in which a 7,000 euro fine was commuted to a 7-day prison sentence.²⁶⁸ Moreover, the conversion of fines, confiscation and reparation orders into terms of imprisonment is commonplace in national jurisdictions. In England and Wales, for example, there are statutory tariff bands for

²⁶⁷ Regulation 117, Regulations of the Court, ICC-01/04-01/06-3129, paras. 104, 115.

²⁶⁸ *Hartmann*, Second Order on Payment of Fine Pursuant to Rule 77 *bis* and Warrant of Arrest.

the default periods of imprisonment to be served upon a failure to make payments under confiscation orders. The default period for amounts over 1 million pounds is 10 years imprisonment.²⁶⁹ In Australia, offenders who fail to pay a penalty, may be imprisoned for periods not exceeding 14 days *per* penalty unit or a term expressed in dollars *per diem*.²⁷⁰ In Canada, offenders may be imprisoned for failure to pay penalties for up to 5 years for an indictable offence; 6 months for a summary offence, the precise term being calculated by reference to the amount of the fine and the minimum wage at the time.²⁷¹

157. Finally, the depletion of Mr. Bemba's assets as a result of the actions and omissions of the Court was a factor which the Trial Chamber was required to consider when assessing Mr. Bemba's individual circumstances, including his economic condition.²⁷² While the Trial Chamber recognised this obligation in the Sentencing Decision in broad terms,²⁷³ it failed to discharge it.

158. In short, the question of whether Mr. Bemba had already been financially penalised was relevant to sentence for the foregoing reasons. The Trial Chamber's failure to consider the financial penalties in the computation of Mr. Bemba's sentence was, therefore, an error.

²⁶⁹ See Section 139 of the *Powers of Criminal Courts (Sentencing Act)*, United Kingdom, 2000.

²⁷⁰ See, e.g., Section 182A of the *Queensland Penalties and Sentencing Act*, 1993. A "unit" is equivalent to AUD \$121.90.

²⁷¹ Canadian Criminal Code, para. 734.

²⁷² Statute, Article 78(1); Rule 145(1)(c) of the Rules of Procedure and Evidence; *Lubanga* Sentencing Decision, para. 54.

²⁷³ Sentencing Decision, para. 68.

3. The Trial Chamber erred in finding that it was “unable to assess the Defence submissions concerning the alleged depreciation of Mr. Bemba’s property”²⁷⁴

a) The Chamber misapplied the standard of proof for the establishment of a mitigating circumstance

159. The Defence only had to establish the existence of a mitigating circumstance on a balance of probability, a standard which was satisfied in relation to the depletion of Mr. Bemba’s assets.²⁷⁵ Specifically, the Defence made extensive submissions on these matters in his sentencing submissions,²⁷⁶ averring, in particular:²⁷⁷

“Not only has Mr. Bemba been prevented from deriving income from these assets, they have been significantly devalued. Principal amongst these [REDACTED],²⁷⁸ [REDACTED].²⁷⁹”

Further that:²⁸⁰

“[REDACTED].²⁸¹ [REDACTED],²⁸² [REDACTED].²⁸³”

The Defence stated further:²⁸⁴

“The ICC could have taken measures to preserve Mr. Bemba’s assets against depreciation.²⁸⁵ This was not done.”

²⁷⁴ Sentencing Decision, para. 84.

²⁷⁵ Sentencing Decision, para. 84. It is recalled that the Trial Chamber incorrectly identified the standard of proof applicable to the establishment of mitigating circumstances. *See above*, paras. 94-97.

²⁷⁶ ICC-01/05-01/08-3376-Conf, paras. 98-104.

²⁷⁷ ICC-01/05-01/08-3376-Conf, para. 102.

²⁷⁸ ICC-01/05-01/08-583-US, p. 8 cited in EVD-T-D04-00110/CAR-D04-0005-0501, para. 25.

²⁷⁹ ICC-01/05-01/08-583-US-Anx1.

²⁸⁰ ICC-01/05-01/08-3376-Conf, para. 103.

²⁸¹ EVD-T-D04-00112/CAR-D04-0005-0511, para. 2.

²⁸² [REDACTED]; ICC-01/05-01/08-76-Conf-Anx6-tENG. [REDACTED].

²⁸³ [REDACTED]: EVD-T-D04-00112/CAR-D04-0005-0511, para. 4; [REDACTED]: ICC-01/05-01/08-3375-Conf-AnxII, p. 3.

²⁸⁴ ICC-01/05-01/08-3376, para. 104.

²⁸⁵ As is the case with sanctions issued by the European Union or United Nations: *see* United Nations Fact Sheet regarding the Al Qaeda Sanctions Regime, at

160. The Prosecution, LRV and the Registry were all invited to make submissions on the issues arising on sentence.²⁸⁶ A two-day hearing was set aside for oral submissions to answer written filings.²⁸⁷

161. The Prosecution submitted that “the fact that those assets can no longer be used for reparation to victims does not justify mitigating the sentence as if Mr Bemba had compensated victims of MLC crimes. Any speculation by the Defence as to how Mr Bemba would have used those resources, if not discovered and frozen, is totally irrelevant.”²⁸⁸

162. [REDACTED].²⁸⁹ [REDACTED].²⁹⁰

163. The Registry did not respond to the Defence submissions either in a filing or orally at the sentencing hearing. The Trial Chamber was driven to find that the Defence had established on a balance of probabilities that Mr. Bemba had suffered substantial losses and a concomitant financial penalty as a result of the Court’s mismanagement of his seized and frozen assets. Significantly, however, it found only that it was “unable to assess the Defence submission concerning the alleged depreciation of Mr Bemba’s property”.²⁹¹

164. Mr. Bemba is bound to ask rhetorically, “how could it not?”. The submission was made, it was supported by cogent evidence, and it was not opposed. Applying the proper burden and standard of proof to the matter, the Trial Chamber was required to find on a balance of probabilities that the submission was correct.

http://www.un.org/sc/committees/1267/fact_sheet_assets_freeze.shtml See also Article 2a of EU Regulation No. 561/2003; and UN Panel of Experts Report, (S/2016/209), para. 257.

²⁸⁶ ICC-01/05-01/08-3344, para. 11.

²⁸⁷ ICC-01/05-01/08-3384, para. 5; ICC-01/05-01/08-3387, para. 5.

²⁸⁸ T-370-ENG, 26:8-18.

²⁸⁹ ICC-01/05-01/08-3375-Conf-AnxII.

²⁹⁰ T-15-CONF-EXP-ENG, 2:12-19; ICC-01/05-01/08-545-Conf-Exp-Anx2, p. 2.

²⁹¹ Sentencing Decision, para. 84.

b) The financial loss suffered by Mr. Bemba is a mitigating circumstance

165. The loss suffered by Mr. Bemba was in the form of an unwarranted financial penalty brought about by the lack of due care on the part of the Court. The Trial Chamber was required to take account of this penalty as a mitigating circumstance pursuant to its obligation to individualise the sentence and to consider the “economic condition of the convicted person”.²⁹² It was also relevant to the computation of his sentence, as set out above, under Rules 145(1)(a) and Rule 146(1)(a).

166. It was further and alternatively relevant under Rule 145(2) as a mitigating circumstance as a (frustrated) effort by Mr. Bemba to compensate the victims or, alternatively, because Rule 145(2) permits the Court to take into account matters not specifically mentioned in sub paragraphs (i) and (ii), insofar as it provides that it “shall take into account, as appropriate, mitigating circumstances, such as” the matters thereafter set out.

167. The Chamber’s failure to take account of this mitigating circumstance materially affected the sentence, which ought by reason of this failure alone to be reduced.

CONCLUSION

168. The sentencing phase of this case has thus far generated over a hundred pages of legal argument and decisions and a similar amount of pages of transcript recording the evidence called by the parties and their oral submissions. That exercise must have some purpose. It cannot be the case that the parties file extensive submissions only for the Chamber to pluck a figure out of the air without any regard to prior sentencing practice in an apparent exercise of its discretion.

²⁹² Statute, Article 78(1); Rule 145(1)(c) of the Rules of Procedure and Evidence.

169. The purpose of this extensive debate must be to bring precision and science to the Court's sentencing process, to allow the parties to place the offences and the level of culpability of the accused within reasonably narrow brackets, and to simplify the task of the sentencing Chamber. A necessary part of that process must be to address the question of where the case falls within the already established sentencing matrices.

170. There is nothing novel about this idea. National jurisdictions produce sentencing guidelines, whereby almost exact parity between cases is achieved. Judges can be confident in resorting to them, lawyers can give precise advice to their clients. No two people convicted of offences bearing the same label within the same jurisdiction can expect to receive sentences that are significantly different. Similarly, those convicted of the most serious offences can expect to receive higher sentences than those whose crimes are less grave. Sentences should fit within an established and properly calibrated framework.

171. As a matter of practical reality, this Court will never have the turnover of cases of the ad hoc tribunals, nor, for that matter will it try every case concerning international crimes in the future. Its decisions, perhaps most importantly of all in terms of sentence, must, nonetheless, fit within the broader context of international criminal law. To do otherwise would risk injustice to defendants and victims alike, and further question the credibility and relevance of the institution itself.

172. Nothing in these submissions is intended to belittle or undermine the suffering of those who were victims of crime in the Central African Republic. However, that is not the sole or even the main criteria in computing a sentence. As has been exhaustively submitted herein, the principle points of focus of the Chamber's inquiry were necessarily the gravity of the offences and the level of the accused's participation or culpability.

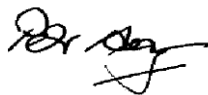
173. Commanders as remotely culpable as Mr. Bemba simply do not receive sentences of 18 years' imprisonment for failing to prevent the commission 3 murders, 28 rapes and 16 instances of pillaging, or punish their subordinates for them. There was no feature of this case which justified the imposition of such a sentence. It is wildly outside the parameters of consistent sentencing practice for such cases.

174. The appropriate level of sentence would see Mr. Bemba's immediate release from detention.

175. For the above reasons, the Appellant requests the Appeals Chamber in relation to:

- a. The First Ground of Appeal, to find Mr. Bemba's sentence disproportionate to the crimes and reduce the sentence accordingly;
- b. The Second Ground of Appeal, to invalidate the findings on aggravation and to reduce the sentence accordingly; and/or
- c. The Third Ground of Appeal, to find that Mr. Bemba's sentence should have been mitigated on the basis of any one or all of the factors identified and to reduce the sentence accordingly.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 26 October 2016

It is hereby certified that this document contains a total of 20,934 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.