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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

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

*Public Redacted with Public Annexes A, B, C, E and Confidential Ex Parte Annex D,
Prosecution and Bemba Defence Only*

Public Redacted Version of ‘Defence Submission on Sentencing’

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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Table of Contents

1. INTRODUCTION.....	4
2. SUBMISSIONS.....	4
<i>2.1 The Specific Nature of Article 70 convictions</i>	4
<i>2.2 The limited nature of the Trial Chamber's findings concerning the intent and wrongful conduct of Mr. Bemba.</i>	6
<i>2.3 Mr. Bemba's role as a detained defendant in a criminal process, who relied on, and was dependent on the legal advice of others</i>	12
<i>2.4 The circumstances at the time of the events mitigate Mr. Bemba's culpability ...</i>	19
<i>2.5 Mr. Bemba's cooperation with the Court and subsequent conduct are mitigating</i>	20
<i>2.6 The personal circumstances of Mr. Bemba do not warrant the imposition of a further custodial sentence, or an onerous fine</i>	21
<i>2.7 Mr. Bemba must be given credit for detention associated with Article 70 case ...</i>	22
2.7.1 Mr. Bemba is detained by virtue of Article 70 orders for detention	23
2.7.2 Mr. Bemba is detained by virtue of stringent restrictions on his movements and contacts, and surveillance measures, ordered in the Article 70 case.....	25
<i>2.8 Given the intensity and context of the detention measures, more than 1:1 credit is appropriate</i>	30
<i>2.9 The Appropriate Sanction to Impose on Mr. Bemba is a Suspended Fine</i>	32
3. CONCLUSION.....	33

1. Introduction

1. The sanction imposed on Mr. Bemba should reflect:
 - i. The specific nature of the Article 70 conviction;
 - ii. The limited nature of the Trial Chamber's findings concerning the intent and wrongful conduct of Mr. Bemba;
 - iii. Mr. Bemba's role as a detained defendant in a criminal process, and his dependence on the legal advice of others;
 - iv. The environment and circumstances which prevailed at the time the conduct took place, and contributing factors;
 - v. Mr. Bemba's conduct and cooperation with the Court after the acts; and
 - vi. Mr. Bemba's family circumstances, and the interests of rehabilitation.
2. With these factors in mind, the most appropriate penalty is to impose a suspended fine and/or public reprimand.
3. The implementation of the penalty should, in addition, take into consideration:
 - i. Time served by Mr. Bemba; and
 - ii. His contribution to the costs of the 14 witnesses in the Main Case
4. In terms of the latter, Mr. Bemba has already been detained for over three years in the Article 70 case (likely to be four years by the end of the process), in conditions which are much more severe than would normally apply to offences of this type. This exceeds the maximum sentence that can be imposed for Article 70, and vastly exceeds the range that would normally apply to the type of conduct concerned by this case.
5. Mr. Bemba has therefore already been sanctioned above and beyond what is proportionate and reasonable for his conduct.

2. Submissions

2.1 The Specific Nature of Article 70 convictions

6. The Trial Chamber is seised of the first contempt sentencing judgment before the ICC.

7. As emphasized by the ICC Appeals Chamber, Article 70 offences cannot be considered to have the same level of gravity as Article 5 crimes.¹ This is reflected firstly, by the fact that the Statute imposes a maximum sentence of five years,² and secondly, by the sentencing tariffs imposed by international tribunals for contempt,³ which are “are often fines of a few thousand euros or light prison sentences not exceeding a few months”.⁴

8. As opposed to the prosecution of Article 5 crimes, the primary objective of Article 70 is to preserve the integrity of the proceedings, rather than pursuing retribution. Accordingly, the sanction imposed should be tailored strictly to the need to preserve the administration of justice. A custodial sentence should be considered as a sanction of last resort, only to be imposed where the gravity of the conduct is such that other sanctions are inadequate.⁵ This is also consistent with international human rights law and domestic practice, which favour non-custodial sentences for non-violent offences.⁶

9. The imposition of a purely punitive custodial sentence would be counter-productive - the ICC cutting off its nose to spite its face. The costs of imprisonment are extremely high,⁷ both for the ICC, and for the State required to provide social welfare due to the convicted person’s inability to generate income for their family whilst in detention.

10. In the absence of specific references to Article 70 in the Agreements concluded by the Court, there is also a significant risk that convicted defendants will be forced to serve their custodial term at the ICC detention unit, which – apart from being costly for the ICC - is not geared for post-conviction rehabilitation.

11. Although deterrence is also an important element of sentencing, the fact that this is the first contempt sentencing judgment before the ICC should not translate to a sanction that is likely to be more severe than future judgments involving similar conduct. More than deterrence:⁸

¹ ICC-01/05-01/13-558, para. 64.

² Although the Prosecution has argued, in release litigation, that the maximum sanction set out in Article 70(3) can be applied cumulatively to different counts, the provision must be construed in a manner that is consistent with a) its plain meaning (i.e., a ‘term’ refers to the full length of sentence emanating from a conviction judgment) b) Article 77(1)(B), which employs ‘term’ to mean the maximum amount that can be given in a conviction judgment; and c) Rule 166(3), which – in establishing a maximum fine – makes clear that this maximum applies to the judgment as a whole, and not individual counts.

³ Annex B.

⁴ *Petkovic* Judgment, para.77.

⁵ ABA Sentencing Handbook, p.3. See also, UNWGAD Report,E/CN.4/2006/7,para.63.

⁶ See, The Tokyo Rules, Principle 2.

⁷ CAR-D20-0007-0191 at 0244. See also, Judge Kaufman (1960).

⁸ ABA Sentencing Handbook,p.3.

Uniformity in sentencing is crucial. Similarly situated defendants should receive similar punishment, as disparity in sentencing may erode the public's confidence in the integrity of the criminal justice system.

12. Mr. Bemba should be judged and sentenced in a proportionate manner, on the basis of the extent of his personal culpability, not the actions of current and future defendants at this Court. There is, for this reason, a “law of diminishing returns”⁹ as concerns the imposition of high sentences as a deterrent, since disproportionate sentences undermine the perceived legitimacy of the process. The administration of justice would not be served if the Court were to impose a sentence that is perceived as unduly harsh or discriminatory as concerns these specific defendants.

2.2 The limited nature of the Trial Chamber's findings concerning the intent and wrongful conduct of Mr. Bemba.

13. Although Article 25 of the Statute allows for group modes of liability, the principle of individual responsibility is still the touchstone for holding a person accountable;¹⁰ it would thus be wrong, and unfair to sanction Mr. Bemba for acts which have no causal nexus to culpable conduct on his part, even if the acts were purportedly executed for his “benefit”.

14. The Trial Chamber convicted Mr. Bemba for all counts, but it did so on the basis of a limited set of findings concerning Mr. Bemba's intent, and culpable conduct. In particular, the Judgment:

- i. Did not find that Mr. Bemba intended witnesses to lie in relation to material facts,¹¹ and relied otherwise on inferred “implicit” knowledge and “implicit” instructions on the part of Mr. Bemba; and¹²
- ii. Relied on the detention unit communications between Mr. Bemba and Mr. Babala for knowledge of witness payments, but found that apart from two witnesses, it was unable to infer awareness of the illicit nature of such payments.¹³

15. In the absence of evidence concerning Mr. Bemba's actual knowledge or intent, the gravamen of Mr. Bemba's culpable conduct appears to lie more with the findings that Mr. Bemba's implicitly knew that witnesses were lying in relation to contacts with the Defence

⁹ Judge Kaufman (1960).

¹⁰ Article 25(2), Statute.

¹¹ “The illicit coaching encompassed instructions on (i) information regarding the merits of the Main Case, irrespective of its truth or falsity”, Judgment, para. 808.

¹² Judgment, paras. 734, 818, 853.

¹³ Judgment, para. 883.

and the receipt of payments, and that members of his team would use information provided by him to “coach” witnesses.

16. As concerns the first aspect, the only specific contact that Mr. Bemba was involved in, and possessed direct knowledge of, was his contact with D-55. Although the Chamber considered that the contact with D-55 itself was a violation of the detention regulations, there is a significant distinction between a contravention of a detention regulation, and intent to interfere with the administration of justice.

17. The contact, was initiated by D-55 (who admitted that he had demanded to speak to Mr. Bemba),¹⁴ and facilitated by Me. Kilolo (Mr. Bemba’s lead counsel).

18. In terms of the notion that there was a pattern of such contacts at this period, the Chamber’s finding concerning another “multi-party” call on 4 October 2012 with D-19 is erroneous: the call data records concerning 4 October 2012 do not reflect any contacts with D-19. The Judgment also did not find, beyond reasonable doubt, that contacts involving D-51 were multi-party calls.¹⁵

19. Contacts between defendants and witnesses are also not unlawful outside of a detention context, particularly if they occur with or through Counsel.¹⁶ In a detention context, such conduct would be punished through disciplinary measures, rather than a further sentence or fine.¹⁷

20. It appears, therefore, that for the Chamber, the tipping point between licit and Article 70 conduct in this instance was the application of influence to secure D-55’s testimony. But, D-55 (whom the Chamber found to be credible in his testimony) testified that Mr. Bemba had not himself made any promises to him, and had only thanked him for agreeing to testify. The “influence” therefore lies in the Trial Chamber’s inference that the witness may have

¹⁴ Judgment, para. 293.

¹⁵ The judgment contains inconsistent findings, but given that para. 742 constitutes a reasoned analysis as to why such call patterns involving D-51 and the “11” number are not, beyond reasonable doubt, multi-party calls, this finding must take precedence. Moreover, although the Judgment found that Mr. Bemba contacted Mr. Babala through the “11” number, there are no findings concerning the nexus between a contact with Mr. Babala (whom the Chamber found to have only very limited involvement with illicit conduct concerning witnesses) and Article 70 offences. Since the contacts between Mr. Bemba and the “11” number occurred when Me. Kilolo was on mission in the DRC (and in immediate proximity to Mr. Babala no matter which phone number was used: CAR-D20-0005-0778), this supposed “scheme” to use “11” to contact Mr. Babala did not make Article 70 conduct any more or less likely.

¹⁶ Closing Submissions, paras. 153-159.

¹⁷ i.e. a two-week restriction on telephone contacts: Closing Submissions, para. 160. See also, *Ezeh and Connors v. UK* – for prison disciplinary measures in the UK, the sanction of additional days of imprisonment (it is “extremely rare” for anything beyond 28 days to be imposed para. 15), is reserved for the most serious of offences, such as crimes, drug offences, escape attempts, or physical assaults on staff (para. 13)

extrapolated from the “thank you” that he would benefit from certain non-monetary advantages or protection.

21. There is no evidence that Mr. Bemba had instructed or requested his Defence to make promises to D-55; the fact that the idea for the contact initiated from D-55 also undermines any inference that there was a premeditated plan on the part of Mr. Bemba to influence him through such a contact. D-55’s acknowledgement that he was unable to positively identify Mr. Bemba from the limited conversation,¹⁸ further indicates that Mr. Bemba did not take any steps to emphasise his identity or reinforce his alleged position of influence. The Chamber’s findings concerning Mr. Bemba’s culpability rest on D-55’s subjective perception of benefits or influence,¹⁹ rather than the intent and positive conduct of Mr. Bemba.

22. There are also no findings or evidence that Mr. Bemba was aware, or intended for D-55 to testify falsely, or sought to motivate D-55 to do so. Nor can such knowledge or intention be inferred, since D-55 testified that he did not discuss his testimony with Mr. Bemba. Mr. Bemba’s role can thus be distilled to the conclusion that he allowed himself to be used for the purpose of motivating a witness to testify.

23. When viewed in light of the particular context of the Main Case, in which witnesses were routinely thanked, and Prosecution witnesses received significant financial benefits in order to ensure that they felt sufficiently safe to testify,²⁰ it would have been difficult for Mr. Bemba, as a layperson, to appreciate that his expression of gratitude in itself fell foul of Article 70.

24. In terms of the issue of contacts, although D-55 testified that Me. Kilolo had advised him not to mention this contact, there is no evidence that Mr. Bemba was aware of, or endorsed this advice.²¹ During his testimony, D-55 was also **never** questioned as to his most recent contacts with Mr. Bemba.²²

¹⁸ Judgment, para. 294.

¹⁹ Judgment, para. 295. See, Closing Submissions, para. 102.

²⁰ Closing Submissions, paras. 146, 188-193.

²¹ Judgment, para. 299.

²² The following questions were put to D-55: “Witness, could you tell us how far back your first contact goes, how far your contact with Jean-Pierre Bemba goes back?” (ICC-01/05-01/08-T-264-CONF-ENG, p. 55, lines 11-12); and “This first contact that you had with the Defence team of Mr. Bemba, was it with one of the members of the Defence currently present here in the room?” (p. 55, lines 19-20). Given the fact that the Prosecution differentiated between Mr. Bemba and his Defence team (and did not inquire in relation to recent contacts with Mr. Bemba), it would have been difficult for Mr. Bemba – as a layperson – to appreciate that the witness had made a culpable omission in his responses.

25. There is also no evidence that Mr. Bemba registered that D-55 (or indeed, other Defence witnesses) provided false evidence or culpable omissions on these points. Nor, that he understood that - as an accused protected by the right of silence and privilege against self-incrimination - he had any positive duties in this regard, particularly as there is no indication that the parties took steps to correct misinformation provided by witnesses during the course of the Main Case.²³

26. As a defendant, his role in following the proceedings was more passive than a lawyer – who would actively follow the transcript. This is evidenced by the videos of the hearings, showing that Mr. Bemba was often distracted or tired at the point where these peripheral issues were discussed;²⁴ when the matter is raised with D-55, Mr. Bemba is yawning.²⁵ The Chamber’s conviction on this point thus rests on the most tenuous of omissions; Mr. Bemba’s duty as an accused to correct the record as concern an issue on which the witness did not testify.

27. The Trial Chamber has already affirmed that it would be unfair to punish an accused for failing to incriminate himself.²⁶ The degree to which the accused actively participates in the crime is also relevant to sentencing; Mr. Bemba’s limited and passive role therefore warrants a lower sanction, as “generally it may be said that a finding of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence”.²⁷ Finally, the Chamber’s determination as to the appropriate “sanction” should be guided by ICTY precedents, sanctioning similar omissions to disclose evidence reflecting conduct that may have influenced a witness, through a public reprimand.²⁸

28. The second set of specific evidential findings on Mr. Bemba concerned his knowledge of, or participation in contacts with D-15 and D-54 after the commencement of their testimony.

²³ Although P-169 falsely asserted that he had not received money directly from the Prosecution, the Prosecution did not take steps to correct this omission: Closing Submissions, para. 112.

²⁴ CAR-D04-PPPP-0003, at 10:55:15-10:55:17 (25-06-2013); CAR-D04-PPPP-0013, at 12:01:20-12:01:23 (14-11-2013); CAR-D04-PPPP-0023, at 16:05:01-16:05:07 (22-11-2013); CAR-D04-PPPP-0026, at 10:10:22-10:10:24 (23-08-2013); CAR-D04-PPPP-0057, 10:17:04-10:17:08 (23-08-2013); CAR-D04-PPPP-0057, at 10:09:05-10:09:12 (18-10-2012); CAR-D04-PPPP-0064, at 09:22:08-09:22:12 (23-10-2012); CAR-D04-PPPP-0064, at 09:27:31-09:27:50 (23-10-2012).

²⁵ CAR-D04-PPPP-0055, at 12:39:10-12:39:25 (29-10-2012).

²⁶ Judgment, para. 822.

²⁷ *Babic* Sentencing Appeal Judgment, para. 40; *Kajelijeli* Judgment and Sentence, 963; *Krstic* Appeals Judgment, para. 268.

²⁸ *Haradinaj* Disclosure Decision, paras. 58-64.

29. As concerns D-54, the Trial Chamber relies heavily on an intercepted communication between Me. Kilolo and Mr. Mangenda, in which Mr. Mangenda allegedly conveyed instructions from “notre frère” whom the Chamber has identified as Mr. Bemba. Neither Me. Kilolo nor Mr. Mangenda testified in this case; the Bemba Defence therefore had no opportunity to cross-examine them in relation to what they meant, and whether the specific language employed by Mr. Mangenda was an accurate reflection of the suggestions provided to him.²⁹

30. There is an obvious prejudice to the Defence of using un-examined, ambiguous intercepts of third parties in a sentencing context; nuances of language and expression are of fundamental import to culpability, and such nuances cannot be explored or tested in unsworn, second-hand hearsay.

31. A key example of such prejudice is the Chamber’s assumption that a reference from Mr. Mangenda to “*la lettre du Client*” reflected specific testimonial instructions provided by Mr. Bemba.³⁰ It would appear that the Chamber was not aware that Mr. Mangenda was referencing a well-known Main Case exhibit; a letter from Mr. Bemba to the UN Secretary-General that included information concerning the dates of MLC movements.³¹

32. If this conversational snapshot had been elicited or tendered through witness testimony, the Defence could have clarified the matter. The Defence has no ability, however, to shadowbox whatever interpretations and inflections might be cast on intercepts, whilst they are being read, untested, in judicial offices.

33. In any case, the ‘instructions’ discussed between Mr. Mangenda and Me. Kilolo do not entail false testimony,³² and the Chamber did not find that Mr. Bemba intended to elicit false testimony on material facts. The proposed contact pre-dated the cut-off point, and falls squarely within the scope of standard, adversarial witness preparation.³³ This conversation is therefore not relevant to the sanction that should be imposed for culpable conduct.

34. In terms of the October 2013 communication between Me. Kilolo and Mr. Bemba, even if it is accepted that the conversation between Me. Kilolo and Mr. Bemba concerned D-

²⁹ Cf Judgment, para. 605.

³⁰ Judgment, para. 757.

³¹ ICC-01/05-01/08-3121-Red, para. 706.

³² The communications ascribed by the Chamber to Mr. Bemba use language which make very clear that the events in question actually occurred (“he shouldn’t forget to mention the two vehicles they saw”) CAR-OTP-0079-0131 at 0134-0135.

³³ It is not prohibited to assist a witness to recollect matters, or to put to them evidence that might be contrary to their initial recollection: CAR-D20-0007-0031 at 033.

54, and that Mr. Bemba was aware – through Me. Kilolo’s obscure references – that Me. Kilolo had spoken to D-54 the night before, Mr. Bemba’s knowledge post-dates the prohibited contact. Mr. Bemba could not have contributed to something that had already occurred.

35. With respect to the Chamber’s findings concerning Mr. Bemba’s involvement in post-cut off contact between Me. Kilolo and D-15, the Chamber found that, “Mr Kilolo reported to Mr Bemba that he had rehearsed with D-15 the three questions he would put to him in court that day”.³⁴ Even if Mr. Bemba was apparently informed of the contact, again, he could not have contributed to something that had already occurred.

36. Mr. Bemba’s passive support for the three questions that were to be put to D-15 subsequently in Court must also be viewed within the broader framework of inter-team discussions and suggestions regarding the questions to be put to D-15.³⁵ It would have been impossible for Mr. Bemba to understand that, in the context of regular inter-team collaboration on specific questions, his passive approval amounted to illicit conduct.

37. The fact that Mr. Bemba raises the issue of the Thurayas, and then suggests that it can be addressed in submissions,³⁶ also undercuts the inference that Mr. Bemba understood Me. Kilolo to be reporting on something that had already occurred. The language employed by Mr. Bemba also evinces his belief that the object of the questions was to elicit truthful testimony.³⁷

38. In any case, Mr. Bemba’s personal culpability in both instances results from the Chamber’s finding that he apparently should have known that Me. Kilolo had breached the Court order prohibiting post cut-off contact. Breach of an order is more akin to civil rather than criminal contempt, and should be sanctioned accordingly.³⁸

39. In terms of the issue of witness payments, the Trial Chamber relied on the communications between Mr. Bemba and Mr. Babala as evidence of “Mr. Bemba’s direct involvement and knowledge of the payments effected, including illicit payments to

³⁴ Judgment, para. 568.

³⁵ See, CAR-D20-0007-0092, CAR-D20-0007-0069, CAR-D20-0007-0074, CAR-D20-0007-0082, CAR-D20-0007-0094, CAR-D20-0007-0096, CAR-D20-0007-0098, CAR-D20-0007-0100, CAR-D20-0007-0103, CAR-D20-0007-0104, CAR-D20-0007-0125.

³⁶ CAR-OTP-0079-1744 at 1747&1748.

³⁷ “[A]ny way you look at it, what they’re saying there isn’t possible, you know?”:CAR-OTP-0091-0127 at 0131,ln.71.

³⁸ Contempt in the form of breach of orders may be purged by apology, payment of compensation/reparation and payments of costs: Australia, *Australian Consolidated Press v. Morgan*(1965) at 489; *Evans v. Citibank*(2000).

witnesses”.³⁹ However, at the same time, the Trial Chamber found that apart from one communication, it was unable to conclude that Mr. Babala was aware from such communications of the illicit nature of payments that might be made by Me. Kilolo to witnesses.⁴⁰ Since the evidence for both defendants is the same, the Chamber’s conclusions concerning Mr. Babala must mitigate the extent of Mr. Bemba’s knowledge and culpability as concerns illicit payments. Further mitigation is also warranted in light of Mr. Bemba’s understanding and insistence that payments should be for “recuperation” and payment of debts only.⁴¹

40. Finally, although Mr. Bemba was convicted for 14 counts as concerns Article 70(1)(a)(b) and (c), in the absence of evidence concerning Mr. Bemba’s contribution to acts directed to specific witnesses, the judgment relies heavily on Mr. Bemba’s general patterns of conduct as an accused, and inferences based on his relationship with his co-defendants. Mr. Bemba’s conduct is interlinked in time, and geography, and must be considered as one unified course of conduct or sequence of events.⁴² Given that this same conduct is relied upon to impute responsibility to Mr. Bemba for each of the counts, it would be prejudicial, and duplicative to impose separate sanctions for each count.⁴³

41. For the reasons which will be developed in the next section, Mr. Bemba’s general ability to make informed decisions and contributions was also impeded by his detention environment.

2.3 Mr. Bemba’s role as a detained defendant in a criminal process, who relied on, and was dependent on the legal advice of others

42. At the critical time period, Mr. Bemba had been detained for roughly 4½-5½ years in a maximum security environment.

³⁹ Judgment, para. 695.

⁴⁰ Judgment, para. 883.

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

⁴² ICC-01/11-01/11-344-Red, paras. 84-88 (irrelevance of legal classification to definition of conduct); *Van Esbroeck* Judgment, paras. 35-36; *Bangura et al.* Sentencing Judgment, paras. 90-91.

⁴³ Closing Submissions, paras. 38-50. The Trial Chamber has already recognised that it should “take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence”: Judgment, para. 956.

43. As regards the objective impact of these factors on a detainee in Mr. Bemba's circumstances, psychological studies refer to a direct link between prolonged detention and a decrease in general cognitive awareness; this includes a negative impact on concentration and memory.⁴⁴ There is also decreased personal initiative coupled with increased sense of dependency on external parties.⁴⁵

44. Detainees' relationship with, and cognitive understanding of their internal and external environment is also impacted by the process of "prisonization", which "involves the incorporation of the norms of prison life into one's habits of thinking, feeling, and acting".⁴⁶ In essence, the longer a person is detained, the more likely it is that the four walls confining them becomes the limits of their horizons; anything extrinsic to this immediate "universe" only exists in a semi-surreal, amorphous manner.⁴⁷

45. In the same manner, the prolonged sense of being an object in a highly regulated system dulls the person's sense of personal responsibility for decision making processes.⁴⁸ If, (as was the case with the famous experiment with Pavlov's dog), a person's life is governed by fixed routine and instruction, their mindset responds accordingly; order and predictable instruction trigger a response, ambiguities and lacuna do not.

46. [Redacted].⁴⁹

47. [Redacted].⁵⁰[Redacted].

48. [Redacted].⁵¹ [Redacted].⁵² Brief conversational tropes,⁵³ such as "hmm", or "ok", which are issued in response to garbled, rushed, and in some cases, false information, cannot be considered to be representative of informed consent.

49. These matters strike at the heart of the extent and gravity of Mr. Bemba's culpability.

50. The conviction against Mr. Bemba rests on snippets of quickly conducted, and obscurely worded conversations between Mr. Bemba and third persons. These

⁴⁴ CAR-D20-0007-0023 at 0028.

⁴⁵ CAR-D20-0007-0001 at 0005.

⁴⁶ CAR-D20-0007-0001 at 0004.

⁴⁷ CAR-D20-0007-0001 at 0004.

⁴⁸ Commentary to the Tokyo Rules, p.6.

⁴⁹ CAR-D20-0007-0271 at 0282. The arguments and positions set out in this Brief are wholly consistent with [redacted] full evaluation.

⁵⁰ CAR-D20-0007-0271 at 0282. [Redacted]

⁵¹ CAR-D20-0007-0271 at 0282.

⁵² CAR-D20-0007-0271 at 0282.

⁵³ ICC-01/05-01/13-1682-Conf-AnxB, pp. 27-28.

communications are relied upon by the Chamber to conclude that Mr. Bemba “implicitly” knew and intended for illicit activity to take place.

51. In terms of what Mr. Bemba knew, the concept of “implicit” knowledge assumes that in light of the person’s position, skills, and power to verify information, they had the means and ability to infer logical outcomes and make informed choices. For a detainee – the opposite holds true. Detainees have no ability to verify information – and, as a result of their internationalization of their immediate environment, have very limited ability to extrapolate from information concerning external events and factors. In legal proceedings, it is, moreover, problematic to assume that a layperson is in a position to infer specific consequences from a set of procedural actions. For this reason, the Model Code of Conduct, promulgated by the American Bar Association, specifies that for the purpose of its ethics and disciplinary regime, knowledge means actual knowledge.⁵⁴

52. Similarly, the ABA Model Rules of Professional Conduct also underscores that “informed consent” of a client (irrespective as to whether they are detained) means “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁵⁵ International case law further supports the proposition that to impute responsibility for the consequences of Counsel’s actions to the Accused, it is necessary to ascertain “knowing, intelligent and voluntary” action on the part of the accused.⁵⁶

53. These distinctions between actual knowledge and implied knowledge, and informed consent is of critical importance as concerns nuanced conduct in complex criminal proceedings.

54. Of particular relevance, Mr. Bemba’s acts and conduct were neutral in nature (or would not have been penalized outside of a detention environment); payments to witnesses are not *per se* illegal, instructing Counsel regarding potential questions to be put to an actual or potential witness is not *per se* illegal.

55. The Chamber’s conclusions regarding culpability rested on the particular context and end-use of such contributions (i.e. how information was used, how payments were made).

⁵⁴ ABA Model Rules for Professional Conduct, Rule 1.0(f) “‘**Knowingly**,’ ‘**known**,’ or ‘**knows**’ denotes actual knowledge of the fact in question”. The ABA Model Rules was the model for the ICTY Code: ICC-01/05-01/13-977, fn.24.

⁵⁵ ABA, Model Rules of Professional Conduct, Rule 1.0(3).

⁵⁶ ICC-01/05-01/13-977, para.35.

Throughout the judgment, the Trial Chamber determined on a case by case basis whether certain payments were illicit: i.e. the Chamber found that money was given or transferred to D2, D3, D4, D6, D-25, D-55, D-57, D-64 for legitimate purposes,⁵⁷ but at other points of the judgment, concluded that roughly the same amount of money was provided for illegitimate reasons due to the specific context of the handover or transfer (for example, as concerns D-23).

56. There is, however, no evidence that Mr. Bemba was - in advance - informed of, and understood the difference in contextual circumstances. Concretely, there is no evidence that Mr. Bemba was aware that the funds provided for D-23 would and did exceed his actual taxi fare, whereas they did not for D2, D3, D4 et cetera.

57. Although the Defence were required to fund the logistical costs of witnesses during the investigations phase, neither they nor Mr. Bemba were advised of the specific bright line at which they should not do so.⁵⁸ Nor would Mr. Bemba have known that payments should relate to actual rather than projected costs, as Mr. Bemba was himself billed by the Registry for Defence missions in accordance with Daily Subsistence Rates, even if such rates exceeded the actual costs incurred by the Defence.⁵⁹

58. A further nuance concerns the difference between refreshing a witness's memory before their testimony, and illicitly coaching a witness. The Main Case protocol allowed the parties to provide witnesses with copies of their statements during the familiarisation process,⁶⁰ and, apparently, to highlight in colour relevant sections that were likely to be addressed in Court.⁶¹

59. Given this context, there is a very fine line between assuming that the defendant was aware that a witness had been "coached" because of the precision of his testimony,⁶² as opposed to the defendant appreciating focussed testimony linked to licit witness preparation. Various ICC Chambers have found that the Prosecution have erroneously conflated these notions,⁶³ it is, therefore, unreasonable to expect Mr. Bemba – the detained layperson – not to have done so.

⁵⁷ Judgment, paras. 279, 288, 234, 160.

⁵⁸ Closing Submissions, para. 183, fn. 200.

⁵⁹ CAR-D20-0005-0308, at 0309.

⁶⁰ ICC-01/05-01/08-1016, para. 21.

⁶¹ CAR-D20-0007-0064.

⁶² Cf Judgment, para. 161.

⁶³ ICC-01/04-01/06-679, paras. 40-42.

60. Mr. Bemba's ability to make an informed assessment of factual scenarios was also undermined by the fact that persons he depended on provided him with inaccurate or false information.⁶⁴

61. In the judgment, the Chamber placed significant weight on its finding that "Mr Bemba ordered that all Main Case Defence witnesses be contacted with a view to interfering with the witnesses and thereby frustrating the Prosecution's investigation".⁶⁵ Mr. Bemba's suggestion that Me. Kilolo conduct a "*tour de horizon*" to verify whether Defence witnesses had been contacted by the Prosecution must, however, be considered and construed in light of evidence as concerns Mr. Bemba's actual belief at the time.

62. In this regard, it might appear obvious to the Chamber that in October 2013, the Prosecution was not bribing Defence witnesses to change their testimony; it was not necessarily obvious to a detainee who lived in a cloistered state of hyper-reality and anxiety,⁶⁶ and who was aware of at least one example of a Prosecution witness who claimed to have been suborned by the Prosecution.⁶⁷ The Prosecution were not actually contacting Defence witnesses, but from Mr. Bemba's perspective, if they had been doing so, it would have been *ipso facto* illegal, as the Prosecution had not obtained authorisation from the Chamber.

63. Similarly, although the Judgment refers to a suggestion from Mr. Bemba that in the worst case scenario, Me. Kilolo could deny the allegations, this suggestion must be construed in a manner that is consistent with Mr. Bemba's interventions throughout the conversation: for example, Me. Kilolo informed Mr. Bemba that witnesses were unhappy with the level of institutional support they are receiving,⁶⁸ and that as a means of capitalising on this vulnerability, witnesses have reported being offered payments by the Prosecution in order to testify;⁶⁹ Mr. Bemba cautioned Me. Kilolo against doing the same, reminding him that his ethical obligations would prevent it and adding that in any event, these statements to the Prosecution would be mere "tall tales";⁷⁰ reflecting on the likely next steps, Mr. Bemba

⁶⁴ Closing Submissions, para. 87.

⁶⁵ Judgment, para. 815.

⁶⁶ CAR-D20-0007-0001 at 0002, 0013.

⁶⁷ Closing Submissions, paras. 216-221.

⁶⁸ CAR-OTP-0082-1309, at 1313, lns. 116-117.

⁶⁹ CAR-OTP-0082-1309, at 1314, lns. 100-102.

⁷⁰ CAR-OTP-0082-1309, at 1314, lns. 147-150.

surmised that surely reasons will be required for the witnesses' change of heart and their apparent willingness to "suddenly speak" before the Court.⁷¹

64. These interventions reflect Mr. Bemba's belief that the Defence witnesses were being pressured or improperly influenced by the Prosecution to provide false testimony; since "les histoires" were unfounded, lacked credibility, and the Defence should not engage in the same improper conduct attributed to the Prosecution, it would suffice for Me. Kilolo to simply deny what Mr. Bemba considered to be lies.

65. Mr. Bemba genuine, albeit false, belief that there was an illicit attempt by the Prosecution to suborn witnesses in October 2013, is also reflected by evidence that:⁷²

- i. Mr. Bemba discussed this belief with other members of his team; and
- ii. Asked his Defence team to consider contacting witnesses to obtain evidence of improper Prosecution conduct.

66. *Per* Article 32(1) of the Statute, mistake of fact can exclude criminal responsibility if it negates the mental knowledge. It follows that cognitive difficulties in conceptualising and extrapolating information in connection with nuanced circumstances must mitigate responsibility, in the same manner as other types of cognitive difficulties.⁷³ It has been reasoned in this regard that "when [a] defendant has a mistaken view of a fact, he reasons with reference to this view, and his responsibility must be tested in the light of his belief."⁷⁴

67. Detainees are also at the bottom of the pyramid as concerns any interactions with third persons, who are free when they are not. This differential is of particular importance as concerns interactions between a detained layperson, and lawyers. It is relevant, in this regard, that apart from Mr. Bemba – all the charged and uncharged actors in the common plan were lawyers/ persons with law degrees.⁷⁵ If, as implied by Article 25(3)(a), they were acting "in concert" with each other, then Mr. Bemba was acting with lawyers, or on the

⁷¹ CAR-OTP-0082-1309, at 1318, lns. 213-216.

⁷² CAR-D20-0007-0184.

⁷³ See in this regard, UK, *M'Naghten's case* (1843); US, *Atkins v. Virginia* (2002) at 320; Australia, New South Wales Sentencing Act, Part I, Section 9(2)(e); German Criminal Code, Section 21; Chinese Criminal Code, Article 18(1); Japanese Criminal Code, Article 39(2). See also, Australia, New South Wales Law Reform Commission Consultation Paper 6, para. 8.48; New Zealand, Supreme and Federal Court Judges' Conference (2011), pp. 2-4.

⁷⁴ Keedy (1908) at 96.

⁷⁵ Mssrs. Arido, Kilolo, Mangenda, Babala and Kokate all possess law degrees.

advice of lawyers. His reliance on such advice on matters concerning the choice of witnesses is in fact, reflected in the evidence.⁷⁶

68. Mr. Bemba's position therefore falls squarely within domestic legal precedents, which affirm that if not entirely exculpatory for criminal contempt,⁷⁷ reliance on legal advice is also, at the very least, a mitigating factor.

69. The degree to which Mr. Bemba was able to provide informed consent regarding specific actions undertaken by third parties was also undermined by the Prosecution's failure to disclose evidence suggesting that several Defence witnesses had concocted false military histories.

70. The Prosecution has since acknowledged that timely disclosure of such materials is necessary to ensure the integrity of the proceedings,⁷⁸ and that the disclosure of this specific material in the Main Case "might not have been timely".⁷⁹ In light of the particular consequences for this case, a sentence reduction would be an appropriate remedy for this conceded disclosure violation.⁸⁰

71. Of further import, Trial Chamber III and the Registry were also aware - from November 2012 onwards – of evidence that suggested that prospective witnesses intended to lie on material facts.⁸¹

72. The right to effective legal representation translates to a duty to step in to replace Counsel, or to take remedial steps to ensure the right, where necessary to guarantee the overall fairness of the proceedings.⁸² This duty is of heightened importance as concerns a detainee who is a layperson, and whose decision making powers was likely to be impacted by prolonged detention.

73. However, no entity at the ICC stepped in to protect either the integrity of the proceedings in the Main Case, or Mr. Bemba's overarching right to a fair trial.

⁷⁶ "[T]he client asked what we should do with the remaining witnesses (that are not in the order of appearance, the ones that Aimé listed. There has not been any decision on that": CAR-D20-0007-0065.

⁷⁷ ICC-01/05-01/13-977, fn.27; See also US, *US v. Westbrooks*(2015); US, *In re Walters*(1989). See also, US, *US v. Armstrong* (1986); US, *NLRB v. Berkley Machine W. & F. Co.*(1951).

⁷⁸ ICC-01/04-02/06-1616, paras. 3,17.

⁷⁹ ICC-01/05-01/08-3478, para.13

⁸⁰ *Ndindiliyimana* Judgment, paras. 2191-93.

⁸¹ Closing Submissions, para. 82.

⁸² See, *Artico v. Italy*; *Daud v. Portugal*; *Czekalla v. Portugal*; *Sialkowska v. Poland*; *Staroszyk v. Poland*; *Sannino v. Italy*; *Michael Edward Cooke v. Austria*; *Cuscani v. UK*.

74. To the contrary, although the Defence informed VWU and the Trial Chamber that they lacked the necessary resources and expertise to organise witnesses *in situ*,⁸³ the Trial Chamber confirmed that the Defence remained responsible for contacting Defence witnesses, and making the necessary arrangements.⁸⁴ This determination was reached in February 2013 - after the Prosecution had alerted the Chamber to the existence of Article 70 allegations.

75. The Registry authorised, and billed Mr. Bemba for Defence missions concerning such witnesses,⁸⁵ and the Chamber allowed the Defence to call these witnesses, even though – according to the Prosecution – “it was even clear to the Judges” that they were liars.⁸⁶

76. As a result of these combined failure to step in immediately to protect the fairness and integrity of the proceedings, the “costs” to the Court were much greater than they would have been if the Prosecution had disclosed Rule 77 materials in a timely manner or asked the trial to be suspended pending an investigation of the matter, or if the Chamber had intervened to secure Mr. Bemba’s right to effective representation. Indeed, if the administration of justice had actually been adversely impacted in the Main Case to the detriment of the Prosecution, then this begs the question as to why Trial Chamber III did not reopen the case, once the Article 70 allegations became public.

2.4 The circumstances at the time of the events mitigate Mr. Bemba’s culpability

77. Having been thrust into complex legal proceedings before a completely foreign jurisdiction, the evidence is clear that Mr. Bemba did his utmost to be defended by a team of professional and reputable lawyers. The evidence is also clear that Mr. Bemba instructed the Defence (and through them, third parties) to find sincere witnesses,⁸⁷ and those “qui a vécu les choses”.⁸⁸

78. Nonetheless, for reasons beyond Mr. Bemba’s control, there were key departures from the team,⁸⁹ Defence requests for funding for a professional investigator were rejected,⁹⁰ the investigations were conducted by, and under the supervision of a Counsel who acknowledged that he had no experience in doing so,⁹¹ and neither the Defence nor Mr.

⁸³ ICC-01/05-01/08-2497, para. 5 ; CAR-D20-0005-0697; CAR-D20-0005-0725.

⁸⁴ ICC-01/05-01/08-2500, paras.23-25.

⁸⁵ CAR-D20-0005-0304.

⁸⁶ ICC-01/05-01/13-T-10-Conf-ENG, p. 63, ln 8. See also ICC-01/05-01/08-T-345-CONF-ENG, pp. 11-12.

⁸⁷ CAR-D20-0007-0188.

⁸⁸ Closing Submissions,fn.80.

⁸⁹ ICC-01/05-01/08-460.

⁹⁰ ICC-01/05-01/08-510, para.5.

⁹¹ CAR-D20-0005-0031; CAR-D20-0005-0767.

Bemba were given any training or guidance as to the modalities and amounts of payments for potential Defence witnesses.⁹²

79. At the same time that the Defence were experiencing considerable difficulties in securing the attendance of witnesses (exacerbated by the absence of *subpoena* powers), the Defence had to respond to demands for payments and assistance, originating from the witnesses themselves: for example, the Cameroonian cabal had a pre-arranged, and independent ‘*topo*’, and other witnesses demanded payments for sick children or accommodation for security reasons.⁹³

80. The fact that firstly, the relevant conduct was proposed or initiated by third parties, and secondly, the defendants were compelled to respond without either the necessary experience or institutional support and training, must be viewed as mitigating circumstances.⁹⁴

2.5 Mr. Bemba’s cooperation with the Court and subsequent conduct are mitigating

81. In July 2014, the contents of Mr. Bemba’s bank account were transferred to the ICC, in order to meet Main Case Defence costs.⁹⁵ This payment occurred as a result of significant cooperation on the part of Mr. Bemba,⁹⁶ which must be duly credited in sentencing.⁹⁷

82. Recognising Mr. Bemba’s cooperation and contribution would be consistent with domestic jurisdictions, which allow defendants in contempt proceedings to “purge” themselves of the contempt, including by paying compensation/reparation/costs.⁹⁸ In such cases, discontinuing the contempt is in and of itself the action required to vacate the charge of contempt of court.⁹⁹

⁹² CAR-D20-0006-1325 at 1322(response,question 13),1328;D21-9,ICC-01/05-01/13-T-42-CONF-ENG, p. 19,lns.1-3.

⁹³ **D-2:**CAR-D21-0007-0001;CAR-D21-0007-0011;CAR-D20-0005-0351;CAR-D21-0013-0260;CAR-D20-0005-0349;CAR-D20-0005-0350;ICC-01/05-01/13-T-19-CONF-ENG,p.26,lns.19-25,p.28,lns.6-10;ICC-01/05-01/13-T-20-CONF-ENG, p.9,lns.13-20, p.19,lns. 9-14;ICC-01/05-01/13-T-21-CONF-ENG, p.47, lns. 16-19. **D-3:** ICC-01/05-01/13-T-26-CONF-ENG, pp.48-52. **D-6:**CAR-OTP-0088-1332(audio), CAR-OTP-0082-0562(transcript) at 0563. **D-23:**CAR-OTP-0087-2521-R01 at 2531,lns. 366-376 and at 2532,lns. 377-398;ICC-01/05-01/13-T-15-CONF-ENG,pp.46-48.**D-29:**ICC-01/05-01/13-T-40-CONF-ENG,p.31-32.**D-55:**CAR-OTP-0089-1149,lns.120-129.

⁹⁴ Basic Sentencing Judgment,para.19.

⁹⁵ CAR-OTP-0094-2406 at 2407.

⁹⁶ ICC-01/05-01/08-3232-Conf-Exp-Corr, para.6, cited in ICC-01/05-01/08-3381-Conf, para. 34.

⁹⁷ Rule 145(2)(a)(ii).

⁹⁸ Australia, *Australian Consolidated Press v Morgan* (1965) at 489; *Evans v. Citibank*(2000).

⁹⁹ US, *Parisi v. Broward County*(2000).

83. In domestic jurisdictions, it is also rare that imprisonment for a non-continuing contempt would exceed a few days or months.¹⁰⁰ Imprisonment, which is reserved for cases of serious deliberate disobedience, violence or wilful interference with the course of justice,¹⁰¹ is also, in practice, suspended on condition that the disobedience not be repeated, such that the contemnor only went to prison if they continued their disobedience.¹⁰²

84. Mr. Bemba's conduct after the act in renouncing any reliance on the 14 witnesses in his Main Case submissions- before the Article 70 charges were confirmed¹⁰³-must be given significant credit in this regard, *per* Rule 145(2)(a)(ii) of the Rules.

2.6 The personal circumstances of Mr. Bemba do not warrant the imposition of a further custodial sentence, or an onerous fine

85. Rule 145(1)(c) specifies that the Chamber should take into consideration the "circumstances" of the convicted person in determining the appropriate penalty. The drafting history indicates that key States intended such a consideration to encompass "[t]he effect of the length of the sentence on the convicted person's family".¹⁰⁴

86. ICTY contempt precedents also take into consideration the accused's personal/ and family situation, including the interests of the children to parental and financial support.¹⁰⁵ The 'rehabilitation' objective of sanctions is also best served by measures that ensure that the convicted person is in an environment that promotes well-being and stability, which is very rarely a custodial setting.¹⁰⁶

87. In terms of the applicability of such principles to Mr. Bemba, Mr. Bemba's well-being and stability would be best served by allowing him to return to his family environment, as soon as possible.

¹⁰⁰ See, Canada, *R. v. Cohn*(1984).

¹⁰¹ UK, *E.F.S. v. P.D.L.*(1995). See also, UK Civil Procedure Rules, Part 81.31. In the UK, where a contemnor is committed to prison, the court has power to order his discharge prior to completion of sentence where the contemnor purges his contempt.

¹⁰² Canadian Judicial Council Guidelines on Contempt Powers, p.41

¹⁰³ ICC-01/05-01/08-3121-Red, paras.14-16.

¹⁰⁴ Joint Proposal on Penalties, PCNICC/1999/WGRPE(7)/DP.5,p.2.

¹⁰⁵ *Beqaj* Judgment,paras.63-64; *Haxhiu* Judgment,para.35; *Hartmann* Judgment,para.83; *Petkovic*, Judgment,para.69; *Tabakovic* Sentencing Judgment,para.13; *Tupajic* Judgment,para.34; *Nshogoza* Judgment,para.228.

¹⁰⁶ Commentary to The Tokyo Rules,pp.2,5.

88. Since 2009, Mr. Bemba experienced multiple bereavements in succession, whilst in detention: [Redacted].¹⁰⁷

89. Despite multiple requests, and a clearly evinced desire to maintain his connection with his young family,¹⁰⁸ all requests for interim release from 2008 until the present were either rejected, or not implemented.

90. Without intruding into the confidential matters discussed between Mr. Bemba and Dr. Korzinski, it is relevant that Dr. Korzinski concluded that Mr. Bemba was not in a position to receive appropriate assistance in his current environment.¹⁰⁹ As affirmed by the ICTY Appeals, the negative impact of detention on the defendant's well-being can militate in favour of a suspended sentence.¹¹⁰

91. In terms of the impact of the potential sanction on Mr. Bemba's family, the prolongation of Mr. Bemba's detention serves to punish not only Mr. Bemba, but also his innocent children, who are compelled to visit their father in a high security penitentiary environment.

92. In considering whether to fine Mr. Bemba (beyond the significant amount that he has already contributed to the Court), the Chamber should bear in mind that since Mr. Bemba will remain in a custodial setting for the near future due to the Main Case, the impact of the fine will fall on his family rather than him.¹¹¹ At the same time, it was underscored during the drafting of the Statute that it would be unfair to impose a custodial term merely because the defendant lacks the sufficient means to pay a fine as an alternative.¹¹²

2.7 Mr. Bemba must be given credit for detention associated with Article 70 case

93. Pursuant to Article 78(2) of the Statute, the Trial Chamber must credit Mr. Bemba with the time spent in detention from 20 November 2013 until such point that he is not subject to a detention order, or otherwise deprived of his liberty in connection with Article 70 proceedings. This is likely to be at least four years.

94. Mr. Bemba's circumstances fully satisfy the legal definition of detention. Detention has been defined as "the act of confining a person to a certain place, whether or not in

¹⁰⁷ CAR-D20-0007-0271, at 0286:[Redacted]

¹⁰⁸ ICC-01/05-01/08-3375-Conf-AnxIII.

¹⁰⁹ CAR-D20-0007-0271, CAR-D20-0007-0287, at CAR-D20-0007-0273.

¹¹⁰ *Rasic* Appeals Judgment, para.28.

¹¹¹ See, *Tabakovic* Sentencing Judgment, para.13, where the Trial Chamber declined to impose a fine due to the impact on the defendant's dependents; ICC-01/05-01/13-1977-Conf-EXP-Anx1, paras.160-169.

¹¹² ICTY Comments on the Draft RPE (1999), para. 40(Part 8)

continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities”.¹¹³ More recent concepts emphasise the possibility to leave the area of confinement, the intensity of the surveillance and control on the person's movements, the degree of isolation and the possibility of social contacts.¹¹⁴ The UN has further affirmed that “further restrictions on a person who is already detained must be included in the definition of deprivation of liberty, such as in the case of solitary confinement or the use of physical restraining devices”.¹¹⁵

95. In accordance with these notions, Mr. Bemba is indisputably detained in the Article 70 case:

- i. There is an Article 70 order to confine Mr. Bemba at the ICC detention unit, and Mr. Bemba cannot leave the detention unit as long as this order remains in effect; and
- ii. Mr. Bemba is subject to stringent restrictions on his movements and contacts and surveillance measures, ordered in the Article 70 case, which amount to a deprivation of his liberty.

2.7.1 Mr. Bemba is detained by virtue of Article 70 orders for detention

96. On 19 November 2013, the Prosecution requested the Single Judge to issue an Article 70 arrest warrant for Mr. Bemba, arguing that it was necessary “to ensure that, independently from the main proceedings, there are reasonable grounds for BEMBA’s continued detention.”¹¹⁶

97. The arrest warrant and order for detention issued the next day, duly underlined that the issuance of such an Article 70 order was necessary, “despite his current detention”.¹¹⁷

98. Since that date, Mr. Bemba has been detained in the custody of the Court, and the Pre-Trial Chamber, Trial Chamber, and Appeals Chamber have repeatedly affirmed that he is detained for the purposes of the Article 70 case.

99. On 23 January 2015, the Single Judge found in relation to Mr. Bemba that:¹¹⁸

¹¹³ UNWGAD Report, A/HRC/22/44, para 52, citing UN Study of the right of everyone to be free from arbitrary arrest, detention and exile, E/CN.4/826/Rev.1, para.21.

¹¹⁴ *Guzzardi v. Italy*; *H.M. v. Switzerland*, §45; *H.L. v. UK*, §73.

¹¹⁵ UNHRC General Comment No. 35, para.5.

¹¹⁶ ICC- 01/05-01/13-1-Red2-tENG, para.39.

¹¹⁷ ICC-01/05-01/13-1-Red2-tENG, para.22.

¹¹⁸ ICC-01/05-01/13-798, p.4.

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

100. These findings reflect firstly, that the Single Judge considered Mr. Bemba to be detained in the Article 70 proceedings, and secondly that as of 23 January 2015, the length of this pre-trial detention was excessive in light of the potential penalty that could apply.

101. Although finding that Mr. Bemba should be released (which could only happen if he was already detained), the Single Judge noted that Mr. Bemba could not actually be released “absent a decision to the same effect to be taken by Trial Chamber III”.¹¹⁹ The Single Judge was aware at this point that Trial Chamber III had already dismissed a request for release, and in so doing, relied upon the Article 70 charges and related evidence in order to justify the continuation of the Main Case detention order.¹²⁰ Mr. Bemba thus continued to be detained in, and for reasons associated with, both cases.

102. The concrete nature of the Article 70 detention order was, in any case, demonstrated by Prosecution’s decision to appeal the release decision, on the basis that the Single Judge erred in finding that length of detention in the Article 70 case was unreasonable;¹²¹ in so doing, the Prosecution accepted that Mr. Bemba was in fact detained in the Article 70 case.

103. Although the Appeals Chamber overturned the decision, due to the Single Judge’s omission to balance the length of detention with possible risks of release,¹²² the Chamber accepted that Mr. Bemba was detained for the purposes of the Article 70 case, and that the time which had elapsed since Mr. Bemba was served the Article 70 arrest warrant “counted”.

104. The Appeals Chamber does not exercise jurisdiction over hypothetical or abstract issues;¹²³ the Appeals Chamber would only consider the application of Articles 60(2) and (4)

¹¹⁹ *Ibid*, p.4.

¹²⁰ ICC-01/05-01/08-3221, paras.12,42

¹²¹ See, e.g., para.14.

¹²² ICC-01/05-01/13-970, para.27.

¹²³ ICC-01/04-01/06-1433, para.39; ICC-01/05-01/08-3382, para.9.

to Mr. Bemba, and order the Trial Chamber to conduct a new Article 60 inquiry,¹²⁴ because he was, and is detained in the Article 70 case.

105. Finally, it is notable that international courts have afforded contempt defendants with credit for pre-trial remand, even if served concurrently with detention linked to substantive offences.¹²⁵

2.7.2 Mr. Bemba is detained by virtue of stringent restrictions on his movements and contacts, and surveillance measures, ordered in the Article 70 case

106. From the very outset of the Article 70 proceedings, the particular deprivations of liberty imposed by the Chamber and the Registry expanded upon and intensified the detention measures already in place.

107. As he experienced the physical and emotional shock of being served an arrest warrant in prison, Mr. Bemba was then segregated from all other detainees for a period of 8 days.¹²⁶ In addition to his further physical isolation, Mr. Bemba was prevented from communicating with any persons other than his Counsel for an initial period of 72 hours.¹²⁷ On 22 November 2013, the Registry extended this for a further 14 days.¹²⁸

108. Although formally termed ‘segregation’, the cumulative impact of the restrictions imposed on Mr. Bemba (including segregation from other detainees) amounted to a form of isolation,¹²⁹ which is characterised by a quantitative and qualitative reduction of meaningful social contacts.¹³⁰

109. These measures would have been experienced as an intense form of privation, which was linked directly to the Article 70 case. This is not unusual for detainees: solitary confinement of just a few days has been found to cause psychological damage;¹³¹ each additional day exacerbates the risk of significant harm.¹³² After seven days, the damage may

¹²⁴ ICC-01/05-01/13-1151, para.30.

¹²⁵ At the SCSL, even though the Judge ordered the contempt sentence to run consecutively for, credit was given for detention in remand in Kigali (which ran concurrently to the sentenced being served in Kigali): *Bangura* Sentencing Judgment, para.93-94. For ICTY, see *Seselj* Contempt Judgment, para.81.

¹²⁶ ICC-01/05-01/13-20.

¹²⁷ ICC-01/05-01/13-09.

¹²⁸ ICC-01/05-01/13-09.

¹²⁹ ICC-01/04-01/07-322.

¹³⁰ UN Special Rapporteur Interim Report (2011), para.25.

¹³¹ UN Special Rapporteur Interim Report (2011), para.55.

¹³² UN Special Rapporteur Interim Report (2011), para.66.

be irreversible.¹³³ For these reasons, the Committee against Torture recommends against its use during the pre-trial phase.¹³⁴

110. Once Mr. Bemba was returned from segregation, he was then subject to active surveillance of his contacts with his co-defendants.¹³⁵

111. As a further form of isolation, the Main Case contact arrangements with Mr. Bemba's family were usurped by the instigation of the Article 70 case. International human rights law dictates that an arrested person must be allowed to contact a family member upon arrest.¹³⁶ Yet, it was not until five days after his Article 70 arrest that the Registry modified the contacts regime to allow Mr. Bemba to make a fully supervised call to his family, of only 10 minutes duration.¹³⁷ In addition to his segregation from other detainees, Mr. Bemba was further deprived of his contact with his family during a period of significant emotional hardship.

112. Mr. Bemba was also restricted from contacting any other third persons during this period.¹³⁸

113. Although lawful, the fact that the ICC Prosecution were allowed to access and search and Mr. Bemba's cell would have been experienced as a profound intrusion into his privacy and equilibrium. After facing the Prosecution in Court, day in and day out, as a litigation adversary, they were then allowed to step into the only sanctuary available to Mr. Bemba in detention.

114. At the same time that this search took place, Mr. Bemba would have been notified that the Prosecution had received, *via* national authorities and the Independent Counsel, covertly monitored communications with his Lead Counsel and Case Manager spanning about 5 months, and *via* the Registry, all privileged call logs, and non-privileged communications deemed relevant by the Prosecution, spanning back to his entry into detention. This discovery would have been as if the entire Prosecutor's office entered his cell, his family life, and into his inner world.

¹³³ UN Special Rapporteur Interim Report (2011), para.64

¹³⁴ UN Special Rapporteur Interim Report (2008), para.80.

¹³⁵ ICC-01/05-01/13-20.

¹³⁶ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16(1); the Mandela Rules, Rules 44(3) and 92. See also, EU Directive 2013/48/EU, Article 5.

¹³⁷ ICC-01/05-01/13-13.

¹³⁸ *Onoufriou v. Cyprus*, para.80.

115. The Defence is not re-litigating the legality of these surveillance measures; rather, these submissions concern the *impact* of such measures on Mr. Bemba, and the fact that he would have experienced them as a further, and particularly harsh form of detention. This is consistent of international human rights law, which recognises that surveillance, in combination with other restrictions, can amount to a deprivation of liberty,¹³⁹ and be experienced as a punishment.¹⁴⁰

116. At a domestic level, it is also well-established that the notion of a criminal sanction can also include electronic monitoring:¹⁴¹ thus, in many jurisdictions, detainees who have been placed under electronic surveillance are entitled to sentencing credit.¹⁴² While domestic practice generally concerns the situation of pre-trial detainees who are monitored *via* electronic bracelets, the particular forms of electronic surveillance applied to Mr. Bemba were much more intrusive than surveillance through an electronic bracelet.¹⁴³

117. The Prosecution not only knew where Mr. Bemba was at all times, it received a precise record of every single person Mr. Bemba communicated with (through the call logs), and the contents of communications on every facet of Mr. Bemba's life (including for time-periods that coincided with the deaths of significant persons in his life).

118. The breadth of the disclosure of communication records is also relevant to the degree and length of punishment that has already been imposed on Mr. Bemba. The Prosecution was allowed unfettered and un-vetted access to all detention unit recordings, dating from 2008 until 2013. Trial Chamber III and the Presidency confirmed that this deep intrusion into Mr. Bemba's detention experience lay squarely within the responsibility of the Article 70 Single Judge.¹⁴⁴

119. The fact these recordings were transmitted to the Prosecution on an *ex parte* basis heightens the impact of surveillance on Mr. Bemba. If a person *could* be monitored at any time, and has no means of knowing if and when they are actually monitored, then this

¹³⁹ *Amuur v. France*, para.45; *Guzzardi v. Italy*, para.92; UK, *Secretary of State for the Home Department v. JJ* (2007), para.75; UNWGAD Opinion, E/CN.4/2006/7/Add.1 (No. 12/2005), para.13

¹⁴⁰ See, UN Handbook on Alternatives to Imprisonment, p.41.

¹⁴¹ Albrecht(2010), pp.37-40; CoE Report on Electronic Monitoring, PC-CP(2012)7 rev,p.2.

¹⁴² For example, Sweden adopted a system of intensive supervision by electronic monitoring during the 1990s in which the "days under electronic tagging were matched one-to-one with the days the offender would have been served in prison." UN Handbook on Alternatives to Imprisonment, p.40. See also, French Criminal Procedure Code, Art 723-13; Belgian Criminal Code, Art. 37ter; UK Criminal Justice and Court Services Act 2000, s.62; Luxembourg Ministry of Justice on electronic monitoring.

¹⁴³ With respect to the minimum standards applicable to non-custodial sentences, see The Tokyo Rules 3.11, 3.12.

¹⁴⁴ ICC-RoR221-03/14-3-Conf-Exp; ICC-01/05-01/08-3101, para.21.

operates to create a permanent sense of being monitored – a form of internal imprisonment, whereby the person regulates their own behavior in reaction to the perception that he or she is being watched. This phenomenon is reflected in both psychological studies,¹⁴⁵ and human rights case law.¹⁴⁶

120. The impact of this forced loss of privacy continues to influence Mr. Bemba's ability to exercise his rights before this Court. Mr. Bemba has a genuine concern that any private information disclosed to the Court could end up in unforeseen places and used for unforeseen (and potentially harmful) purposes.¹⁴⁷ The Defence, in turn, cannot assure Mr. Bemba that private information will not end up on someone's desk in Kinshasa, when that has in fact occurred in the past.¹⁴⁸

121. This concern regarding the ever-present risk of surveillance and disclosure is punitive. It hinders Mr. Bemba from pursuing valid lines of defence, it impacts on his ability to disclose information that might be necessary to obtain medical help or remedies, and it undermines his ability to maintain meaningful communications with his family. The impact will also continue to be experienced as long as Mr. Bemba remains in a detention environment that is susceptible to multiple forms of covert and overt surveillance.

122. Apart from measures taken at the detention unit itself, Mr. Bemba was also subjected to Article 70 specific custodial measures in relation to Court hearings (fifty-three in total, by the conclusion of sentencing).

123. [Redacted].¹⁴⁹ [Redacted],¹⁵⁰ [Redacted].¹⁵¹ Given that the average duration of a hearing day was 4 hours 50 minutes,¹⁵² [Redacted].

124. During hearings scheduled during the winter months, it was often the case that Mr. Bemba left and returned to the detention unit in darkness,¹⁵³ which would have affected his choice whether to avail himself of the theoretical right to have one hour of fresh air. The

¹⁴⁵ Foucault (1983), pp.208-226.

¹⁴⁶ The right to effective representation will be rendered illusory in circumstances in which the defendant could be monitored irrespective as to whether the defendant is monitored: *Castravet v. Moldavia*, para.51. See also *S. v. Switzerland*, §48.

¹⁴⁷ CAR-D20-0007-0271, at 0278.

¹⁴⁸ CAR-OTP-0091-0469.

¹⁴⁹ ICC-01/05-01/13-2027-Conf, para. 12.

¹⁵⁰ ICC-01/05-01/13-2031-Conf, para. 6.

¹⁵¹ ICC-01/05-01/13-2027-Conf, paras. 10 and 11.

¹⁵² Annex C.

¹⁵³ CAR-D20-0007-0036, CAR-D20-0007-0038, CAR-D20-0007-0040, CAR-D20-0007-0042, CAR-D20-0007-0044, CAR-D20-0007-0046, CAR-D20-0007-0048, CAR-D20-0007-0050, CAR-D20-0007-0052, CAR-D20-0007-0054, CAR-D20-0007-0056, CAR-D20-0007-0058, CAR-D20-0007-0060, CAR-D20-0007-0062

ECHR has repeatedly found in this regard that lack of access to natural light or daylight impacts on the severity of detention.¹⁵⁴

125. [Redacted]. The holding cell is grey, stark, and has no access to fresh air or natural light.¹⁵⁵ For several hearings, due to issues concerning the scheduling of witnesses, he was kept in the holding cell for significant lengths of time.¹⁵⁶

126. During the hearings themselves, whereas the other defendants were free to move around the courtroom and sit with their lawyers, Mr. Bemba was required to enter the courtroom accompanied by guards, and was flanked by guards during the hearing itself. He was thus singled out both in his own subjective experience, and public perception, as the only detained accused.

127. Detention restrictions and regulations also applied to Mr. Bemba's Article 70 Defence team; unlike other teams, the Bemba Defence could not simply call Mr. Bemba at any hour, email him documents, or meet with him as needed.

128. After the move to the Permanent Premises, legal interactions during hearings were particularly fraught. Due to the fact that the meeting room adjacent to the courtroom did not allow the guards to visually survey the meetings, ICC security insisted that all such meetings take place with an "open door".

129. Although the Defence raised the matter with the Registry and the Trial Chamber,¹⁵⁷ the only 'privileged' solution was for the Defence to meet Mr. Bemba in his actual holding cell.¹⁵⁸ The Defence does not contest the Registry's good faith, but the situation in which it was placed underscores that –even in an Article 70 case – Mr. Bemba was consistently subjected to the most intense security regime available.

130. These deprivations of Mr. Bemba's liberty would not have been implemented if not for the Article 70 case; he would otherwise have been free to meet with his family during visiting hours, to enjoy one hour of fresh air whilst it was still daylight, to move around the detention quarters rather than being confined in a dull-grey cell devoid of natural sunlight.

¹⁵⁴ See, *Modarca v. Moldova*; *Dougoz v. Greece*.

¹⁵⁵ ICC-01/05-01/13-2031-Conf-Exp-Anx1, pp.2-3. This runs counter to Rule 14(a), The Mandela Rules.

¹⁵⁶ Annex C.

¹⁵⁷ ICC-01/05-01/13-T-39-Conf-ENG, pp.41-42.

¹⁵⁸ CAR-D20-0007-0190; CAR-D20-0007-0288.

2.8 Given the intensity and context of the detention measures, more than 1:1 credit is appropriate

131. Article 78(2) of the Statute does not restrict the Chamber from granting more credit, or a sentence reduction in recognition of:

- i. The nature of the charges;
- ii. The arduous nature of pre-conviction detention; and
- iii. The particularly intense and stringent measures implemented.

132. Since the ICC does not have a separate detention facility/regime for contempt offences, Mr. Bemba was detained in the Article 70 case in the same manner as if he was being prosecuted for genocide or war crimes. As a result, Mr. Bemba was detained in a harsher environment, and deprived of the type of privileges that should have applied to a person serving their sentence for Article 70 offences.¹⁵⁹

133. Domestic jurisdictions recognise that pre-conviction detention is more intense and arduous; this is reflected either through increased emphasis on pre-trial release (with an enforceable remedy such as release or sentence reduction if the defendant is detained for an unreasonable length of time),¹⁶⁰ or through the provision of enhanced credit, for example, in Canada, pre-conviction detention is generally credited at a rate of between 1.5:1¹⁶¹ and 2:1¹⁶²; in South Africa and Ukraine, the same holds true.¹⁶³

134. Where pre-trial release is not possible, strict regulations are put in place to ensure that pre-trial security measures are no more rigorous than what is required to ensure the accused's presence at trial.¹⁶⁴ Anything exceeding this constitutes punishment, and credited in sentencing at a ratio of 3:1.¹⁶⁵

¹⁵⁹ Persons convicted of non-violent offences punishable by 5 years or less, are generally detained in low security facilities allowing greater privileges and freedoms (i.e., permission to participate in day release programmes, community based work assignments outside the prison). See, e.g., Dutch Custodial Institutions Act, Article 13; Dutch Regulations on Selection, Placement and Transfer of Detainees, Articles 2, 3, 4 and 5; Dutch Regulations on Temporary Leaving from the Facility, Articles 19, 20 and 20a; UK Prison Service Instruction 40/2011; Australia (Victoria) Sentence Management Manual Part 2(AC 3), s. 1; Canada, Commissioner's Directive 705-7,s.27; Sweden Prison Treatment Act, s.7 and s.57.

¹⁶⁰ See, Belgian Criminal Procedure Law, Art 21ter; CoE Recommendation on the use of remand in custody, Rec(2006)13, Recommendation 33; *Assanidze v. Georgia*, para.198; *Eckle v. Germany (Art 50)*, paras.32-53; *Constitutional Rights Project v. Nigeria*. See also, Van Dijk (2006)p.492.

¹⁶¹ Canadian Criminal Code, s.719(3.1); Canada, *R. v. Summers* (2014),§ 71; Canada, *R. v. Rezaie* (1996).

¹⁶² Morton-Bourgon and Grech (2011),p.34.

¹⁶³ South Africa, *S. v. Stephen and another* (1994)§168f; South Africa, *S. v. Brophy and another*(2007); Ukrainian Amendment of Criminal Code.

¹⁶⁴ US, Uniformed Code of Military Justice, Article 13.

¹⁶⁵ See, US, *United States v. Suzuki*(1983).

135. International criminal law precedents also support the power of the Judges to reduce or mitigate sentence in recognition of the severity of detention conditions, even if such conditions are not intentionally harsh, or attributable to the case before the Chamber.¹⁶⁶ The same holds true for violations of human rights occurring in a detention or investigative context: “any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy”.¹⁶⁷ This applies even if the violations were committed by third parties.¹⁶⁸

136. Accordingly, either Mr Bemba’s time served in pre-trial detention should be calculated at an enhanced rate, or he should be given a sentence reduction, in recognition of the following:

- i. Mr. Bemba was required to prepare for trial at the same time that he was subject to various levels of restraint, which would have impeded such preparation;¹⁶⁹
- ii. The specific forms of restraint and confinement exceeded the amount strictly required for security purposes in an Article 70 case;¹⁷⁰
- iii. Violations of Mr. Bemba’s privacy (and that of his family)¹⁷¹ that occurred throughout the proceedings;¹⁷²
- iv. The ICC pre-detention regime is more severe than post-conviction regimes geared to rehabilitation and reintegration,¹⁷³ and does not feature the types of release and reintegration programmes available to convicts,¹⁷⁴ including convicted war criminals;¹⁷⁵

¹⁶⁶ In *Rasic*, the Chamber took into consideration the accused’s “position as the only female detainee in the UNDU and the quasi-solitary nature of the confinement regime that would follow”, and decided to suspend the further sentence of eight months (*Rasic* Sentencing Judgment, para. 31). In *Bangura*, the Chamber also afforded the defendant a sentencing remedy as concerns human rights violations – even though they were not attributable to the SCSL (*Bangura* Sentencing Judgment, para.91).

¹⁶⁷ *Semanza* Appeals Judgment, para.125.

¹⁶⁸ *Barayagwiza* Order, para. 73; *Barayagwiza* Decision on Review, para.74.

¹⁶⁹ CoE Report on Abuse of Pre-Trial Detention, para.41.

¹⁷⁰ Segregation and non-contact measures were implemented to assist the Prosecution to obtain evidence: the Prosecution requested these restrictions to further its intention “to gather as much information as possible from the suspects before they communicate and contaminate each other.” ICC-01/05-01/13-19-Conf, para.124. See also, UN Special Rapporteur Interim Report (2011), para.73.

¹⁷¹ *Y.B. v. EULEX*, paras.44-54.

¹⁷² Extremely personal details of Mr. Bemba’s life, and his interactions with his family and friends were dissected and cited in written and oral submissions. Private information concerning Mr. Bemba, his family (his sister), and his Defence was transmitted to national authorities and third parties. Although domestic courts affirmed that the transmission of information was disproportionate and unjustified (Judgment, para. 212). No remedy has been provided.

¹⁷³ The Mandela Rules, Rules 3-5, 87.

¹⁷⁴ The Mandela Rules, Rule 87.

¹⁷⁵ Holo & van Wijk (2014) p.121.

- v. Mr. Bemba was kept in pre-trial detention for almost two years after the Single Judge found that it was no longer reasonable to maintain his Article 70 detention.¹⁷⁶

137. In terms of the latter aspect, the fact that Mr. Bemba was not, and could not be released following the 25 January 2015 decision is completely contrary to Article 9 of the ICCPR.¹⁷⁷ This Chamber must have the power to release Mr. Bemba in practice and not in theory, and yet, Mr. Bemba continues to face the unacceptable prospect that he will continue to be detained in the Article 70 case as long as his Main Case detention continues.

2.9 The Appropriate Sanction to Impose on Mr. Bemba is a Suspended Fine

138. The Rules refer to Article 70 sanctions rather than penalties, and a sanction is primarily declarative: it promotes the rule of law by clarifying what is permissible. The Chamber has achieved this primary objective through the public issuance of its judgment on the conduct of the accused.

139. Given the precarious tight rope that the Defence were expected to walk in the Main Case without the benefit of such jurisprudential guidance,¹⁷⁸ it would be unfair to judge the current accused more harshly than future accused, who – thanks to the Trial Judgment - can and should know better.

140. If, however, the Chamber deems that further deterrence is required, then it would be appropriate to achieve this through a suspended fine.¹⁷⁹ This would put future defendants on notice as concerns the potential penalties that apply, and ensure that the present defendants respect the integrity of the Court's processes in the future. Article 71 of the Statute reflects the virtue of providing defendants with notice, and an opportunity to correct improper conduct, and domestic case law suggests that a suspended sentence should be the first option considered in contempt cases.¹⁸⁰

141. In calculating a potential fine (suspended or otherwise), the correct approach should be to determine the appropriate sum, and then, if required by the thresholds set out in Rule

¹⁷⁶ Although the Appeals Chamber determined that the Single Judge erred by failing to give due weight to issues such as the flight risk, it did not overturn the Single Judge's assessment concerning the unreasonable nature of the length of detention: ICC-01/05-01/13-969.

¹⁷⁷ UNHRC Views on *A v. Australia*, CCPR/C/59/D/560/1993, para.9.5.

¹⁷⁸ See, Gut (2012) p. 281, concerning the fact that Article 70(1)(c) leaves much room for interpretation.

¹⁷⁹ The ICTY Appeals Chamber has affirmed that the power to suspend a sentence inheres from the power to impose it: *Rasic* Appeals Judgment, para.17.

¹⁸⁰ UK, *Hale v. Tanner*, Practice Note (2000).

166(3), reduce the sum in order to avoid undue prejudice to indigent accused, or hardship to their families.

142. Accordingly, apart from the fact that the Registry's assessment concerning Mr. Bemba's assets was prepared in a procedurally unfair manner, and is riddled with plainly incorrect and misleading information,¹⁸¹ it should not be used in a manner that is detrimental to Mr. Bemba. To use the accused's alleged wealth as a yardstick would contravene the principle that penalties should reflect culpability, and result in discriminatory sentencing patterns, which would undermine the legitimacy of the process.

143. The Chamber's initial determination of the fine should also take into consideration the range of penalties imposed by other international courts and tribunals; the average **maximum** fine that can be imposed at such courts is 44, 000 euros,¹⁸² and the average actual fine imposed on individuals is 11, 530 euros.¹⁸³

3. Conclusion

144. When considered through the lens of the above "contempt" sentencing principles, Mr. Bemba has already been sanctioned in a manner that exceeds the level of his culpability.

145. Mr. Bemba was publicly reprimanded, and the prominent public portrayal of Mr. Bemba as either the only, or the only detained accused in this case, has sanctioned Mr. Bemba in the public eye in a manner that is equal to, if not greater than any further penalty.¹⁸⁴

146. The length of Mr. Bemba's Article 70 detention (which is likely to surpass four years by the end of the process) exceeds both the maximum length of detention that can be imposed for Article 70,¹⁸⁵ and the average prison time imposed for contempt cases, which is 6 months.¹⁸⁶

¹⁸¹ See, Annex D.

¹⁸² Annex E.

¹⁸³ Annex B.

¹⁸⁴ The ICC website refers to the case as "Bemba et al.", the only photograph of an accused on the main Article 70 case page is Mr. Bemba's (taken from the Main case) (<https://www.icc-cpi.int/car/Bemba-et-al>). The sight of a defendant in restraints may unconsciously influence a judicial fact finder and affect the public's perception of that person and cause prejudice. See, e.g., US, *People v. Best* (2012); US, *Estes v. Texas* (1965). Negative publicity has resulted in sentence reduction due to the stigma and related impact on integration and rehabilitation. See The Netherlands, *Rb. Den Bosch* (2010); the Netherlands, *Rb. Oost Brabant* (2013).

¹⁸⁵ Even if sentenced to the maximum, Mr. Bemba would have been eligible to apply for release after 3.3 years (Article 110).

¹⁸⁶ Based on 37 sentences imposed: Annex B.

147. In line with the position that contempt should be sanctioned primarily through non-custodial measures, the length of detention should be set off against any potential fine.¹⁸⁷ If converted to a fine, time served is already the equivalent of 1.095 million euros,¹⁸⁸ and would exceed this if enhanced credit is applied.

148. Mr. Bemba's payment of Defence costs, including those associated with the 14 witness, vastly exceeded the amount that would normally apply to Defence costs in domestic litigation,¹⁸⁹ and the amount of any fine that should be imposed at this point. Mr. Bemba has also been significantly penalised through the depreciation caused by the ICC asset freeze.¹⁹⁰

149. There is no need or basis to sanction Mr. Bemba further; rather, the focus of the Trial Chamber should be on how to ensure Mr. Bemba's real – as opposed to hypothetical – freedom within the context of the Article 70 case.



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Dated this 14th day of December 2016

The Hague, The Netherlands

¹⁸⁷ *Haxhiu* Judgment, para.36.

¹⁸⁸ Although there are no specific set-off proportions at an international level, the ICTY has converted a 7000 euro fine to 7 days in prison. See, *Hartmann* Second Fine Payment Order and Arrest Warrant.

¹⁸⁹ ICC-01/05-01/13-1997-Conf-Exp-Anx1, paras.115-133.

¹⁹⁰ Annex D; ICC-01/05-01/13-1997-Conf-Exp-Anx1, paras.90-114