



Original: English

No.: ICC-01/05-01/08 A 03

Date: 2 February 2017

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 redacted document, *with* public redacted Annex A

Public redacted version of “Prosecution’s response to Bemba’s appeal against sentence’, 22 December 2016, ICC-01/05-01/08-3486-Conf-Red

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Mr Kai Ambos
Mr Michael A. Newton

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

I. INTRODUCTION.....	4
II. RESPONSE TO GROUND 1: BEMBA’S 18-YEAR SENTENCE IS NOT MANIFESTLY EXCESSIVE	6
A. Bemba’s reliance on a purported “recognised international sentencing framework” is inapposite	7
i. Bemba’s reliance on select ICTY case law is unpersuasive.....	9
ii. Bemba’s reliance on two previous ICC sentences is inapposite	15
B. The Chamber correctly assessed the gravity of the underlying crimes and Bemba’s culpable conduct ...	17
i. The Chamber correctly assessed the gravity of the underlying crimes	17
ii. The Chamber correctly assessed the gravity of Bemba’s conduct	26
C. The Chamber properly evaluated the aggravating circumstances	30
i. The Chamber did not “double-count”	30
ii. The aggravating factors were well-founded in evidence.....	34
D. Conclusion.....	37
III. RESPONSE TO GROUND 2: THE CHAMBER CORRECTLY FOUND THAT BEMBA KNEW OF THE AGGRAVATING CIRCUMSTANCES	38
A. The Chamber correctly applied the legal standard for actual knowledge	38
B. The Chamber’s findings that Bemba knew of the facts establishing aggravating circumstances of “particularly defenceless victims” and “particular cruelty” was reasonable.....	39
C. The aggravating circumstances are otherwise attributable to Bemba	45
D. Conclusion.....	47
IV. RESPONSE TO GROUND 3: THE CHAMBER REASONABLY FOUND THAT THERE WERE NO MITIGATING CIRCUMSTANCES	47
A. The Chamber correctly defined and applied the legal standard to prove mitigating circumstances	47
B. The Chamber reasonably gave no weight to Bemba’s family circumstances as a mitigating factor	49
C. The Chamber reasonably rejected Bemba’s submissions on peace building in DRC as a mitigating factor.....	53
i. The Chamber considered all relevant evidence	53
ii. The Chamber reasonably found that Bemba’s actions showed no awareness of the wrongfulness of his actions in CAR.....	55
iii. The Chamber did not use Bemba’s alleged peace building efforts in DRC to his detriment	56
D. The Chamber reasonably attached no weight in mitigation to the minimal, inadequate and insincere measures taken by Bemba	57
E. The Chamber reasonably found that Bemba’s rights were not violated	60
F. The Chamber reasonably dismissed Bemba’s arguments that he was penalised by the seizure, freezing and depletion of his property	63
i. The Chamber reasonably declined to rule on Bemba’s submissions as to the depreciation of his assets	63
ii. The Chamber correctly found that article 57(3)(e) orders to identify, seize and freeze assets are not sanctions	65
iii. The Chamber reasonably declined to consider the alleged depreciation of Bemba’s assets in mitigation.....	66
G. Conclusion.....	66
V. CONCLUSION AND RELIEF.....	67

I. INTRODUCTION

1. Trial Chamber III did not impose an excessive sentence. Bemba's appeal that his sentence is unwarranted fails to recognise the judicial findings on his repeated and ongoing failures to act in the face of heinous crimes committed by his subordinates over almost five months, his consistent knowledge of these crimes and his ultimate authority over those subordinates.

2. In fact, many of Bemba's arguments are simply another conduit to challenge the Chamber's findings on his conviction. His appeal fails to show that the Chamber erred in law or fact, or was so unreasonable so as to be an abuse of discretion. His claim that the sentence is manifestly excessive rests on partisan and only partially interpreted cases in support. Although he claims that the Chamber erred in evaluating the gravity of the crimes and Bemba's culpable conduct, he shows no error. Likewise, although he disputes the Chamber's assessment of the factors relied on as aggravating his sentence, and its rejection of alleged mitigating circumstances, once again, he shows no error.

3. That Bemba fails to show error does not mean that the Chamber did not err. As the Prosecution has argued, the 18-year joint sentence does not reflect the *totality* of Bemba's culpable conduct and should be increased.¹ However, Bemba's appeal gives the Appeals Chamber no reason to depart from exercising its well-established deference towards this Trial Chamber's proper exercise of discretion in making factual findings and imposing the individual sentences in this case.²

¹ [Prosecution Sentence Appeal](#), para. 3 (“[t]he ‘joint sentence’ of 18 years’ imprisonment—which, being equivalent to the individual sentences for the crimes of rape, was the absolute *minimum* term permitted by the Statute in these circumstances—does not reflect the totality of Bemba's culpability, including the gravity of *all* the crimes of which he was convicted, the harm suffered by *all* victims and the different types of criminality and victimisation.”); *see also* paras. 7-9.

² *See* [Prosecution Sentence Appeal](#), para. 5 (“[t]he Prosecution does not challenge the Chamber's determination of the sentences for *each of the individual crimes* (rape: 18 years; murder: 16 years; pillage: 16 years), or the relevant underlying factual findings. To the contrary, the Chamber's analysis in these respects was both reasonable and correct”); para. 24 (“[a]s previously stated, the Chamber in this case properly exercised its

4. Accordingly, Bemba's appeal should be dismissed.

Level of Confidentiality

5. The Prosecution files this submission as "Confidential *Ex parte*" pursuant to regulation 23bis(2) of the Regulations of the Court, since it refers to certain information available only to the Chamber and the Registry. [REDACTED]. The Prosecution will file a confidential redacted version available to the Defence simultaneously. [REDACTED]. The Prosecution will also file a public redacted version in due course.

discretion in determining individual sentences for the crimes of rape, murder and pillage in its 35-page analysis.")

II. RESPONSE TO GROUND 1: BEMBA’S 18-YEAR SENTENCE IS NOT MANIFESTLY EXCESSIVE

6. Bemba’s 18-year joint sentence is not manifestly excessive. Bemba cannot and has not shown that it is so. Rather, as the Prosecution’s appeal against the Sentencing Decision demonstrates,³ Bemba’s 18-year joint sentence does not reflect the totality of his culpability and should be revised upwards.⁴

7. Bemba’s plea for a lower sentence must fail. *First*, he has not shown that the imposed sentence is so high so as to “[fall] outside both the established international framework and the Court’s own sentencing framework”.⁵ Indeed, what he proposes as an “international sentencing framework” consists of some scattered, misinterpreted and partisan references to ICTY case law. Not only are his recommendations inapposite; without a more detailed survey of the sentencing practices at other international courts and tribunals, they cannot be said to represent the trend of the “international sentencing framework” as he claims. Likewise, his comparison to the sentences rendered against two convicted persons at this Court—Thomas Lubanga and Germain Katanga—sentenced for different crimes, based on article 25 liability and involving different factual circumstances, overlooks that this case was the Court’s first to convict and sentence a superior for criminal responsibility under article 28 of the Statute. His proposed framework is thus unsuitable.

8. *Second*, Bemba has not shown that the gravity of the crimes committed by his subordinates and the degree and form of his participation in these crimes justify a lower sentence.⁶ *Third*, he also fails to demonstrate that the Chamber’s evaluation of the aggravating circumstances required the Chamber to impose a lower sentence.⁷

³ [Prosecution Sentence Appeal](#), paras. 3, 7-9.

⁴ See [Prosecution Sentence Appeal](#), paras. 5, 24.

⁵ *Contra* [Brief](#), para. 11.

⁶ [Brief](#), para. 11.

⁷ [Brief](#), para. 11.

He fails to demonstrate that the Chamber erred in exercising its sentencing discretion in imposing the individual sentences for the crimes and that the 18-year joint sentence was excessive.⁸ Indeed, his appeal—recycling, in large part, his arguments previously advanced in his appeal against conviction—fails to show error and that the sentence was materially affected and resulted in an excessive sentence.⁹

9. The Appeals Chamber should dismiss Ground 1.

A. Bemba's reliance on a purported "recognised international sentencing framework" is inapposite

10. Bemba argues that the Chamber erred by rejecting the comparison based on sentencing practices at the *ad hoc* tribunals and at the Court (advanced in his earlier submissions),¹⁰ but fails to show that the Chamber erred in exercising its discretion. Bemba now draws two unsustainable comparisons based largely on his submissions at trial:¹¹

- *First*, he challenges his 18-year sentence on the basis that (a) lower sentences were given to five ICTY convicted persons whose cases he claims are similar to his own, and that (b) 18-year sentences were given to three ICTY convicted persons whose cases he claims were factually dissimilar from his own.¹² However, his comparisons are inapposite;

⁸ [Lubanga SAJ](#), para. 41 (referring to [Kony Admissibility AD](#), paras. 79-80). *See also* para. 44 (reaffirming that the Appeals Chamber's review in such circumstances will be deferential, intervening only if (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion).

⁹ [Lubanga SAJ](#), para. 45; article 83(2).

¹⁰ [Brief](#), paras. 12-44.

¹¹ Compare e.g., [Brief](#), paras. 12-44 with [Defence Sentence Submissions](#), paras. 18-39.

¹² [Brief](#), paras. 16-35.

- *Second*, he challenges his 18-year sentence *vis-à-vis* the sentences imposed on two ICC convicted persons,¹³—even though the latter were convicted and sentenced for different crimes based on different circumstances.

These challenges must fail.

11. Bemba fails to demonstrate that the Chamber erred by rejecting his sentencing comparative analysis. Indeed, the Chamber “noted the [Defence submissions] concerning sentences imposed on convicted persons at the Court, *ad hoc* tribunals, and in the CAR”,¹⁴ but found that “[n]one of these cases concern the same offences committed in substantially similar circumstances.”¹⁵ In claiming therefore that “[the Chamber] *fail[ed]* to pay any regard to the existing sentencing framework”,¹⁶ Bemba’s submissions are inaccurate. Moreover, the Chamber’s finding accords with the Appeals Chamber’s enunciated principles.¹⁷ And, as shown below, none of the cases relied on by Bemba “concern[ed] the same offences committed in substantially similar circumstances.” And even if select cases were comparable, the Chamber could, as it did, still properly exercise its discretion to impose a higher sentence. Not only did the Trial Chamber have an intimate knowledge of the case,¹⁸ but the Appeals Chamber should defer to the Trial Chamber’s exercise of discretion absent a showing that the Chamber erred in law or fact or imposed a manifestly excessive sentence such that the Chamber abused its discretion.¹⁹ Bemba merely disagrees with the Trial Chamber but fails to show error.

¹³ [Brief](#), paras. 36-44.

¹⁴ [Decision](#), para. 92.

¹⁵ [Decision](#), para. 92.

¹⁶ [Brief](#), para. 14 (emphasis added).

¹⁷ [Lubanga SAJ](#), para. 76 (“The Appeals Chamber notes that the ICTY Appeals Chamber has held that, while recognising that ‘[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances’, any assistance may be limited, given the Trial Chamber’s overriding obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused.”)

¹⁸ [Lubanga SAJ](#), para. 34.

¹⁹ [Lubanga SAJ](#), para. 44.

12. In his challenge, Bemba pays only lip service to the well-established sentencing tenet that “[n]o two cases are alike.”²⁰ Despite this cardinal principle, he incorrectly suggests that several cases in the “international sentencing framework” fall within the same paradigm as his own. To the contrary, his suggested comparisons advance disparate and selectively chosen cases under the guise of their similarity.

13. Bemba’s submissions reveal an incorrect and selective understanding of sentencing jurisprudence and misstate the Court’s law. Thus, although he correctly cites the *Lubanga* Trial Chamber as stating that “[t]he *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing”,²¹ he disregards the Appeals Chamber’s finding in that same case. The Appeals Chamber found that “[t]he value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court.”²² This finding, unacknowledged by Bemba, significantly dilutes his reliance on the *Lubanga* Trial Chamber’s finding.

i. Bemba’s reliance on select ICTY case law is unpersuasive

14. Bemba’s claim that his 18-year sentence was excessive and “dramatically outside an established international sentencing framework” rests precariously on (i) *five* ICTY cases he claims are factually similar to his own, but in which lower sentences were rendered; and (ii) *three* ICTY cases he claims are more egregious than his own, in which 18-year sentences were imposed.²³ Bemba claims that these cases represent “the existing international practice for sentencing commanders and others

²⁰ See e.g., [Lubanga SAI](#), para. 76 (“[t]his obligation to individualise the sentence means that ‘it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another’”); para. 77 (“[a]ccording to the Court’s provisions, the sentence must be ‘appropriate’ and must be based on all the relevant factors of the specific case. This makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case.”); [Brief](#), para. 14, (“[n]o two cases will ever be exactly alike.”).

²¹ [Lubanga SD](#), para. 12.

²² [Lubanga SAI](#), para. 77.

²³ [Brief](#), paras. 12-35 (emphasis added).

convicted of international crimes”.²⁴ Nevertheless, his survey neglects the practice of every other international court and tribunal other than the ICTY. Critically, Bemba’s argument does not acknowledge that even when cases may be superficially similar, each Trial Chamber is obliged to individualise the sentence imposed on a convicted person based on all the relevant factors of the specific case.²⁵ Moreover, a sentencing decision is—at its core—a discretionary decision based on a Chamber’s weighing and balancing of all relevant factors.²⁶ Sentencing cannot be condensed into a pithy mathematical equation. Several *other unrelated* factors, beyond the numerical equivalence of the sentence, may place a given case within *Bemba’s* sentencing range, including various aggravating and mitigating factors particular to the case. Bemba’s analysis disregards this inherent quality of sentencing decisions. Nor does his casual linking of cases and intricate dissection of serious international crimes show that the Chamber abused its discretion to impose an excessive sentence.²⁷

15. Bemba’s reliance on *five* ICTY cases which involved superior responsibility is inapposite. Bemba also recycles his earlier sentencing submissions.²⁸

- i. *First, Kubura is not “directly relevant”*.²⁹ Indeed, being a case that concerned crimes against property only on two occasions in two areas, separated by a period of five months,³⁰ it is irrelevant. Moreover, although the plunder was widespread on the two occasions, Kubura’s subordinates were not found to have engaged in plunder on a frequent basis while under his command.³¹ The

²⁴ [Brief](#), para. 15.

²⁵ [Lubanga SAJ](#), paras. 76-77.

²⁶ [Lubanga SAJ](#), paras. 34, 40, 42, 73.

²⁷ See e.g., [Brief](#), paras. 12-35.

²⁸ [Defence Sentence Submissions](#), paras. 22, 28-29, 37-39, 71.

²⁹ *Contra* [Brief](#), paras. 17-18.

³⁰ [Hadžihasanović TJ](#), paras. 2087-2093, pp. 625-627 (convicting Kubura for two counts of plunder (failing to take the necessary and reasonable measures to punish plundering in the villages of Šušanj/Ovnak/Brajkovići/Grahovčići in June 1993 and failing to take the necessary and reasonable measures to prevent or punish plundering in the village of Vareš in November 1993), and otherwise acquitting him). [Hadžihasanović AJ](#), para. 358 (vacating the conviction for failure to take necessary and reasonable measures to prevent, though not to punish, his subordinates’ acts of plunder in Vareš, and reducing his sentence from 2.5 years to two); see also [Hadžihasanović AJ](#), para. 267.

³¹ [Hadžihasanović AJ](#), para. 267.

crimes for which Bemba stands convicted extend well beyond crimes against property and include heinous crimes against persons including 28 rapes, three murders and a swathe of pillaging episodes over a period of approximately four and a half months.³² Moreover, Kubura benefitted from several mitigating factors—both personal and factual.³³ No mitigation was awarded to Bemba.³⁴

- ii. *Second*, the case of *Hadžihasanović*—Kubura’s co-accused—is not instructive for Bemba’s case.³⁵ Bemba fails to mention that Hadžihasanović, among other mitigating factors, was also credited for voluntarily surrendering to the Tribunal. He also benefitted from several factual mitigating circumstances, including the overall context in which the crimes took place.³⁶ Nor does the reference in *Hadžihasanović* to the *sui generis* nature of superior responsibility necessarily lead to mitigation in Bemba’s case³⁷ when this Chamber found that “[Bemba’s] culpable conduct was of serious gravity”³⁸ and “[h]e did more than tolerate the crimes as a commander.”³⁹
- iii. *Third*, Bemba’s analysis of *Mucić* is inapposite.⁴⁰ The findings in *Mucić* were not exclusively limited to superior responsibility. Mucić—the commander of the Čelebići detention camp—was found guilty as a superior for crimes of murder, torture and inhuman treatment committed by his subordinates. He was also found personally responsible for the unlawful confinement of

³² [Decision](#), para. 94.

³³ [Hadžihasanović TJ](#), paras. 2088-2090 (in particular, “[Kubura] acted swiftly to comply with the order given to him[...] to put a stop to the depredations in the town of Vareš and to withdraw his troops from there. [He] prohibited the members of the 7th Brigade from entering or remaining in the town of Vareš in order to protect the property of the people living there.”). See also [Hadžihasanović AJ](#), paras. 354-355.

³⁴ [Decision](#), para. 93.

³⁵ *Contra* [Brief](#), paras. 19-22. See [Hadžihasanović TJ](#), pp. 620-625 (sentencing Hadžihasanović to five years, for his failure as a superior for two murders and 6 instances of cruel treatment); [Hadžihasanović AJ](#), paras. 356-357, p. 133, (vacating a number of convictions and reducing his sentence to three and a half years).

³⁶ [Hadžihasanović TJ](#), paras. 2078-2081.

³⁷ *Contra* [Brief](#), paras. 21-22. See [Hadžihasanović TJ](#), para. 2076.

³⁸ [Decision](#), para. 67.

³⁹ [Decision](#), para. 66.

⁴⁰ [Brief](#), paras. 23-25.

civilians.⁴¹ Bemba's submissions also ignore the procedural history behind Mucić's sentencing. In that case, the Appeals Chamber upheld the Prosecution's appeal against sentence and found that the original Trial Chamber had erred in imposing a sentence of seven years because it did not adequately reflect the gravity and totality of his conduct.⁴² The Appeals Chamber also found that the original Trial Chamber, when sentencing Mucić, had erred by drawing adverse inference from Mucić's failure to testify at trial.⁴³ The Appeals Chamber directed a new Trial Chamber to consider the errors, indicating that an appropriate sentence for Mucić was "around ten years".⁴⁴ The new Trial Chamber considered the errors and *bearing in mind the Appeals Chamber's sentence indication*, imposed a sentence of nine years, one which also took into account the original Trial Chamber's error in wrongly considering his failure to testify as an aggravating factor.⁴⁵ The factual and procedural differences between the two cases—unacknowledged by Bemba—suffice to distinguish Mucić.

- iv. *Fourth*, Bemba's comparison with *Pandurević* is similarly flawed.⁴⁶ Not only does he fail to acknowledge the different factual circumstances and findings,⁴⁷

⁴¹ See *Mucić et al. SJ*, paras. 12-18. See also *Delalić et al. TJ*, pp. 441-443.

⁴² *Delalić et al. AJ*, p. 306.

⁴³ *Delalić et al. AJ*, p. 306.

⁴⁴ See *Delalić et al. AJ*, para. 853 ("Taking into account the various considerations relating to the gravity of Mucić's offences and the aggravating circumstances already referred to, as well as the mitigating circumstances referred to by the Trial Chamber and the "double jeopardy" element involved in subjecting Mucić to a revised sentence, the Appeals Chamber would have imposed on Mucić a heavier sentence of a total of around ten years imprisonment"); *Mucić et al. SJ*, para. 5; *Mucić et al. SAJ*, paras. 5, 33-39.

⁴⁵ *Mucić et al. SJ*, paras. 12-27 (affirmed on appeal, *Mucić et al. SAJ*, paras. 33-39.)

⁴⁶ *Brief*, paras. 27, 29.

⁴⁷ See e.g., *Popović et al. TJ*, para. 2210 ("[i]n more than one respect, Pandurević's case presents an uncommon and extraordinary set of facts and circumstances"); paras. 2211, 2213 (Pandurević was neither a participant in the JCE to Forcibly Remove, or the JCE to Murder); p. 837 (convicting Pandurević, as an aider and abettor, for the crimes of murder, persecution and inhumane acts (forcible transfer) as crimes against humanity, and murder as a war crime, and, as a superior, for the crimes of murder as a crime against humanity and war crime) See also *Popović et al. AJ*, pp. 715-716 (entering several new convictions on appeal under both articles 7(1) and 7(3)). On appeal, in addition to the additional article 7(1) convictions, Pandurević was further found guilty, as a superior, for crimes of persecution through cruel and inhumane treatment as a crime against humanity, extermination as a crime against humanity, murder as a war crime, and persecution through murder as well as through cruel and inhumane treatment as a crime against humanity. One conviction, under article 7(3), for murder as a crime against humanity and war crime, was set aside on appeal.

he disregards that the Chamber which sentenced Pandurević found no aggravating factors, and several mitigating factors, including actions which enabled the safe passage of thousands of detained Bosnian Muslim men.⁴⁸ Bemba's actions cannot be meaningfully compared. Not only did his failures have a "knowing and willing impact on the crimes [...]",⁴⁹ the Chamber found several factors that aggravated his crimes, and none that mitigated them.⁵⁰

- v. *Fifth*, Bemba omits to consider the totality of the circumstances in *Borovčanin*.⁵¹ Yet again, he fails to acknowledge the case's unique facts, the lack of aggravation, and the noticeable mitigation, including that Borovčanin provided substantial cooperation to the Prosecution.⁵² No parallel can be drawn to Bemba's case.

16. Bemba invokes selectively from the vast ICTY sentencing jurisprudence, but disregards every other inconvenient comparison in the international sentencing regime. Indeed, other international cases involving superior responsibility, notably from the ICTR, have imposed significantly higher sentences than 18 years.⁵³ Bemba's approach cannot show that his sentence is excessive and "dramatically out of step".⁵⁴

⁴⁸ [Popović et al. TJ](#), paras. 2216-2225. See also [Popović et al. AJ](#), para. 2116 (affirming the 13-year sentence, while emphasising Pandurević's actions to save the lives of thousands of Bosnian Muslims).

⁴⁹ [Decision](#), para. 66.

⁵⁰ [Decision](#), para. 93.

⁵¹ [Popović et al. TJ](#), pp. 835-836 (convicting Borovčanin, as an aider and abettor under article 7(1), for extermination, persecution and inhumane acts (forcible transfer) as crimes against humanity, and murder as a war crime, and as a superior under article 7(3), for murder as a crime against humanity and war crime).

⁵² [Popović et al. TJ](#), para. 2181 (noting "[the] very unusual and particular circumstances" "diminish[ing] the gravity of his involvement"); paras. 2188-2194. See also [Popović et al. AJ](#), para. 8 (Borovčanin did not appeal his trial convictions or sentence. Nor did the Prosecution).

⁵³ See e.g., [Prosecution Sentence Submissions](#), paras. 121-124. See e.g., [Bagosora AJ](#), para. 740 ("The Appeals Chamber considers that the fact that Bagosora is no longer found guilty pursuant to Article 6(1) of the Statute does not reduce his culpability. The Appeals Chamber stresses in this regard that, in the circumstances of this case, superior responsibility under Article 6(3) of the Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the Statute."); pp. 259-260 (sentencing Bagosora, as a superior (for crimes of genocide, extermination and persecution as crimes against humanity, violence to life as a war crime, murder, rape and other inhumane acts as crimes against humanity, and outrages upon personal dignity as a war crime), to 35 years of imprisonment); [Ntabakuze AJ](#), para. 313 (affirming on appeal convictions as a superior for crimes of genocide, extermination and persecution as crimes against humanity, violence to life as a war crime); para. 316 (sentencing Ntabakuze, as a superior, to 35 years of imprisonment.)

⁵⁴ *Contra* [Brief](#), para. 30.

Nor does Bemba substantiate his view that his sentence would hinder the Court in considering its next superior responsibility case.⁵⁵

17. Bemba's references to *three* other ICTY cases where 18-year sentences were rendered are also inapt.⁵⁶ Bemba claims that his 18-year sentence places him on par with three dissimilar individuals (Češić, Đorđević and Delić). But his assumption is incorrect. He reduces sentencing—essentially a matter of discretion—to a mathematical, even impossible, science. That a sentence of 18 years may have been awarded in dissimilar cases is perfectly possible—and does not reveal that this Trial Chamber erred. Indeed, as was done in the three ICTY cases, a sentence is reached after a Chamber has considered, weighed and balanced a variety of different facts arising in the case. Bemba's analysis fails to grasp that these three cases may indeed be incongruent with his own facts and circumstances and yet the sentences imposed may be the same as his.

18. Moreover, the three cases do not assist Bemba. None of them even pertain to convictions relating to superior responsibility. Their underpinning sentencing rationales are also distinct—a fact that Bemba fails to acknowledge.

- i. *First*, the sentencing logic in Češić is wholly different from Bemba's. Indeed, not only had Češić entered a plea of guilt, thereby saving the court's time, effort and resources,⁵⁷ but he expressed sincere remorse and substantially cooperated with the Prosecution.⁵⁸ These features are absent in Bemba's case.
- ii. *Second*, Đorđević's 27-year sentence imposed at trial⁵⁹ was reduced to 18 years on appeal because several convictions were vacated on appeal.⁶⁰ The 18-year

⁵⁵ [Brief](#), para. 30.

⁵⁶ [Brief](#), paras. 31-34.

⁵⁷ [Češić SJ](#), paras. 58-60, 109.

⁵⁸ [Češić SJ](#), paras. 62, 66, 109.

⁵⁹ [Đorđević TJ](#), para. 2231.

sentence in *Dorđević* was thus reached in very different circumstances. A mere numerical coincidence in the actual sentence awarded is hardly instructive for Bemba's case.

- iii. *Third*, no sensible parallel can be drawn between Delić and Bemba.⁶¹ The 18-year sentences in both cases were reached in circumstances unique to each case. Notably, Delić's sentence on appeal was a result of a reduction in the totality of his criminality on appeal.⁶²

19. Bemba's submissions must fail: not only are his comparisons constrained and limited to a handful of disparate ICTY cases; he neither portrays the sentencing rationales of these decisions cogently nor accurately. He fails to show any error in the Chamber's exercise of discretion.

ii. Bemba's reliance on two previous ICC sentences is inapposite

20. Bemba's reference to sentences rendered in two completed cases—*Lubanga* and *Katanga*—as suitable parallels for Bemba's case is fatally flawed.⁶³ These two cases, being the first two cases at this Court, cannot be expected to comprise an exhaustive sentencing matrix to measure all future cases by, including Bemba's. Nor are they even congruent: as Bemba himself concedes,⁶⁴ neither Lubanga nor Katanga were convicted and sentenced as superiors. Lubanga and Katanga were *not* convicted of similar crimes in similar circumstances.⁶⁵ Since Bemba's case is the first of its kind at this Court, previous cases cannot be considered analogous.⁶⁶

⁶⁰ [Dorđević AJ](#), para. 980 (“[t]he convictions entered by the Trial Chamber which have now been overturned on appeal, outweigh the new convictions entered by the Appeals Chamber—not only in terms of number of victims but also by way of Dorđević's level of responsibility”); p. 380. *Contra* [Brief](#), para. 33.

⁶¹ *Contra* [Brief](#), para. 34.

⁶² [Mucić et al. SJ](#), para. 33; [Mucić et al. SAJ](#), para. 61.

⁶³ [Brief](#), paras. 36-44.

⁶⁴ [Brief](#), para. 37.

⁶⁵ *Contra* [Brief](#), para. 44 (emphasis added).

⁶⁶ *Contra* [Brief](#), paras. 36-44.

21. Likewise, Bemba's attempt to parcel out the seriousness of the different cases into discrete categories is futile and incorrect.⁶⁷ Claiming that *Lubanga* and *Katanga* are different in their seriousness is a red herring. Indeed, considering the Court's mandate to prosecute and punish "the most serious crimes of concern to the international community as a whole",⁶⁸ making wholesale distinctions about the objective seriousness of different cases and their related crimes is often forced and simplistic. All cases at this Court involve serious crimes. In keeping with this principle, the Prosecution's submissions in *Lubanga* and *Katanga* emphasised *inter alia* the objective seriousness of their crimes.⁶⁹ Likewise, the Prosecution's submissions in this case, and the Chamber's findings, equally underscored the objective seriousness of the crimes, the gravity of the crimes committed by Bemba's subordinates and Bemba's own culpable conduct.⁷⁰

22. Bemba failed to persuade the Trial Chamber.⁷¹ Recycling similar, even identical, arguments before the Appeals Chamber does not show error.

23. Like can only be compared to like. But Bemba compares cases which are by and large "un-like". As his submissions on the "international sentencing framework" and "the Court's developing sentencing framework" show no error, they should be rejected.

⁶⁷ [Brief](#), paras. 38-42 (relying in part on the Prosecution's characterisation of the crimes as "serious").

⁶⁸ Preamble, [Statute](#).

⁶⁹ *Contra* [Brief](#), paras. 38-42.

⁷⁰ See e.g., [Prosecution Sentence Submissions](#), paras. 18-102; [Decision](#), paras. 27-33, 36-40, 49-51, 66-67.

⁷¹ [See Defence Sentence Submissions](#), paras. 48-56; [Decision](#), para. 92.

***B. The Chamber correctly assessed the gravity of the underlying crimes
and Bemba's culpable conduct***

24. Bemba shows no error in the Chamber's assessment of the gravity of his subordinates' crimes and Bemba's own culpable conduct and degree of participation.⁷² The Chamber properly assessed the gravity of the crimes of murder,⁷³ rape,⁷⁴ and pillage.⁷⁵ It also correctly determined the gravity of Bemba's own conduct as a superior.⁷⁶ Bemba attempts to parse and re-interpret the Chamber's clear findings but with little new argument adapted to the sentencing context. Rather, a significant number of Bemba's submissions mirror those he has already advanced in challenging his convictions in his appeal against conviction. The Appeals Chamber should reject such challenges in his sentencing appeal.⁷⁷

i. The Chamber correctly assessed the gravity of the underlying crimes

25. Bemba's challenge to the Chamber's assessment of the gravity of the crimes committed by his subordinates rests on several incorrect premises.⁷⁸ Bemba (i) disagrees with the Chamber's proper assessment of the parameters of his case and his convictions; (ii) incorrectly suggests that the Chamber relied on irrelevant evidence for sentencing purposes; and (iii) wrongly claims that the Chamber relied on unsupported factors. However, his claims are misplaced. None show error.

26. *First*, the parameters of Bemba's convictions are not "extremely narrow".⁷⁹ Indeed, as the Chamber correctly found, MLC soldiers—under Bemba's command—

⁷² [Brief](#), paras. 45-65.

⁷³ [Decision](#), paras. 27-33.

⁷⁴ [Decision](#), paras. 36-40.

⁷⁵ [Decision](#), paras. 49-51.

⁷⁶ [Decision](#), paras. 59-67. *See also* [Prosecution Sentence Appeal](#), paras. 3, 5, 9, 14-16, 24 (emphasising that the Chamber properly exercised its discretion in determining individual sentences for the crimes of murder, rape and pillage).

⁷⁷ [Lubanga SAJ](#), para. 49 ("[w]ith respect to [arguments incorporating grounds of appeal from his conviction appeal], the Appeals Chamber will not re-consider its conclusions on these arguments in the [sentencing judgment].") *See generally* Conviction Appeal Response.

⁷⁸ [Brief](#), paras. 45-57.

⁷⁹ *Contra* [Brief](#), para. 48.

committed multiple acts of murder, rape and pillage against civilians.⁸⁰ Not only were the numbers of underlying crimes significant, they were committed over a large geographical area.⁸¹ Bemba was convicted as a superior for murder based on three underlying murders.⁸² Bemba was also convicted as a superior for rape, based on acts of rape against 28 girls, women and men.⁸³ Bemba was further convicted as a superior for pillage, based on the underlying acts of pillage against 25 individual direct victims, as well as P87's family, P42's family, a church, nuns, priests and the gendarmerie in Mongoumba.⁸⁴ The crimes were committed over approximately four and a half months during the 2002-2003 CAR Operation.⁸⁵ The crimes were committed over a large geographical area, including in and around Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, Yaloke, and Mongoumba.⁸⁶ Nothing in this description suggests "extremely narrow" parameters. Nor does Bemba explain how it could be so described.⁸⁷

⁸⁰ [Decision](#), para. 22.

⁸¹ [Decision](#), para. 22.

⁸² [Decision](#), para. 27: P87's "brother" in Bangui at the end of October 2002; P69's sister in PK12 the day after the MLC's arrival in PK12; and an unidentified "Muslim" man on 5 March 2003 in Mongoumba.

⁸³ [Decision](#), para. 34: P68 and her sister-in-law in Bangui at the end of October 2002; two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002; P87 in Bangui on or around 30 October 2002; eight unidentified women in Bangui at the end of October or beginning of November 2002; P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002; P69 and his wife in PK12 at the end of November 2002; P22 in PK12 on or around 6 or 7 November 2002; P79 and her daughter in PK12 several days after the MLC arrived in PK12; P42's daughter in PK12 around the end of November 2002; a woman outside of PK22 in November 2002; P29 in Mongoumba on 5 March 2003; and VI in Mongoumba on 5 March 2003.

⁸⁴ [Decision](#), para. 48: P68 and her sister-in-law in Bangui at the end of October 2002; P119 in Bangui after 30 October 2002; P87 and her family in Bangui on or around 30 October 2002; P23, P80, P81, and P82 in Bangui in early November 2002; P69's sister in PK12 the day after the MLC arrived; P69 in PK12 in November 2002; P108 in PK12 during the MLC's presence; P110 in PK12 the day after the MLC arrived; P112 in PK12 in November 2002; P22 and her uncle in PK12 on or around 6 or 7 November 2002; P79 and her brother in PK12 several days after the MLC's arrival; P73 in PK12 at the end of November 2002; P42 and his family in PK12 at the end of November 2002; a woman outside PK22 in November 2002; V2 in Sibut in the days after the MLC's arrival; and V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, the gendarmerie, and mayor in Mongoumba on 5 March 2003.

⁸⁵ [Decision](#), para. 22.

⁸⁶ [Decision](#), para. 22.

⁸⁷ To the extent that Bemba claims that his convictions exceeded the charges ([Brief](#), fn. 70), see Conviction Appeal Response, paras. 72-107.

27. The Chamber did not unduly focus on the impact of the crimes on the victims and their relatives, excluding all other criteria.⁸⁸ Rather, as the Decision's reasoning shows, the Chamber considered all the relevant rule 145(1)(c) factors when assessing gravity.⁸⁹ In assessing the gravity of the crime of murder, the Chamber considered the extent of damage caused, the nature of the unlawful behaviour, the means employed to execute the crime, and the circumstances of manner, time and location.⁹⁰ Likewise for the crimes of rape and pillage, the Chamber considered the necessary factors, while also paying heed to the "special nature of [these] crimes in the *Bemba* case[...]" ⁹¹

28. The Chamber's statement that "[t]he crimes committed by MLC soldiers caused lasting damage to the victims and affected communities"⁹² merely acknowledges the realities of this case. It shows no error. It does not supplant the Chamber's assessment of all the relevant criteria. Bemba fails to recognise the Chamber's relevant findings and takes one sentence out of context.⁹³ Moreover, Bemba's argument that the Chamber failed to consider "[the] scale of the crimes and the number of victims"⁹⁴ fails to recognise that the Chamber did precisely that.⁹⁵ Assessment of the scale of the crimes and the number of victims was an integral part

⁸⁸ *Contra* [Brief](#), para. 48.

⁸⁹ [Decision](#), para. 24. For the crimes of rape and pillage, factors unaddressed in gravity were addressed in aggravation.

⁹⁰ [Decision](#), paras. 24, 27-33.

⁹¹ [Decision](#), para. 24, fn. 74. The Chamber exercised its discretion to consider the relevant rule 145(1)(c) criteria—unaddressed in relation to the gravity of rape and pillage—as aggravating factors. These included the nature of the unlawful behaviour and the means employed to execute the crime, and the circumstances of manner, time and location *beyond those considered in relation to the gravity of the crimes*. See also [Decision](#), paras. 34-58.

⁹² [Decision](#), para. 23.

⁹³ [Brief](#), para. 48.

⁹⁴ [Brief](#), para. 48.

⁹⁵ [Decision](#), para. 40 ("[t]he number of victims of underlying acts of rape is substantial. The underlying acts of rape were committed throughout the geographical and temporal scope of the 2002-2003 CAR Operation. They were committed as part of an attack targeting many civilians throughout the CAR between 26 October 2002 and 15 March 2003. [...] Accordingly, in light of the circumstances of time, manner, and location considered above, and the extent of damage caused, the Chamber finds that, in this case, the crimes of rape are of utmost, serious gravity."); para. 49 ("[t]he Chamber found that MLC soldiers pillaged property from CAR civilians on a large scale and with grave consequences for the victims."); para. 51 ("[t]he number of pillaging victims was substantial and the underlying acts covered the geographical and temporal scope of the 2002-2003 CAR Operation. [...] Accordingly, in light of the circumstances of time, manner, and location considered above, and the extent of damage caused, the Chamber finds that, in this case, the crime of pillaging is of serious gravity.")

of the Chamber's analysis. Moreover, Bemba's reliance on a single academic comment on ICTY and ICTR sentencing practices is unclear.⁹⁶ The cited passage of the article appears only to set out a non-exhaustive list of criteria to assess gravity.⁹⁷ Notwithstanding, the cited passage cannot displace the clear text of rule 145(1)(c) and the Chamber's findings.

29. Further, there is no indication that Bemba was punished for crimes beyond those for which he was convicted.⁹⁸ The Chamber assessed his sentence on the basis of the same crimes as those for which he was convicted.⁹⁹

30. The Chamber stated:

The Chamber based Mr Bemba's conviction on specific underlying acts that it found beyond reasonable doubt were committed by MLC soldiers. It found that these underlying acts were only a portion of the total number of crimes committed by MLC forces during the 2002-2003 CAR Operation.¹⁰⁰

The Chamber's findings recapitulated its conviction findings. The Chamber's statement that "[these] underlying acts were only a portion of the total number of crimes committed by MLC forces [...]"¹⁰¹ merely came from its findings in the Conviction Judgment relating to the contextual elements for crimes against humanity. In establishing both the "course of conduct" and the "widespread nature of the attack" under article 7, the Chamber noted that the specific underlying acts committed by the MLC soldiers were only a segment of the total number of crimes

⁹⁶ [Brief](#), para. 48, fn. 71(citing an article by Holá, Dr. B.).

⁹⁷ [Brief](#), fn. 71.

⁹⁸ *Contra* [Brief](#), para. 49.

⁹⁹ [Decision](#), paras. 27-58.

¹⁰⁰ [Decision](#), para. 22.

¹⁰¹ [Decision](#), para. 22, fn. 72 (referring to [Judgment](#), paras. 671 and 688).

their forces committed.¹⁰² As the Chamber stated, the Decision must be read in conjunction with the Judgment as a whole, and the entirety of the trial proceedings.¹⁰³ In relying on its conviction findings, the Chamber therefore did not err.

31. The Chamber's reliance on the findings in the Judgment does not show that Bemba was punished for crimes other than those for which he was convicted. As the Decision makes abundantly clear, the Chamber properly limited its determination of Bemba's sentence to only those crimes for which he was convicted.¹⁰⁴ Further, it was entitled to consider these crimes in light of the established contextual elements of crimes against humanity. Bemba shows no error.

32. Bemba's different view,¹⁰⁵ and his mere disagreement with the Decision reiterating his earlier failed submissions,¹⁰⁶ cannot impugn the Chamber's well-founded assessment. His arguments should be dismissed.

33. *Second*, Bemba fails to show that the Chamber relied on irrelevant evidence in sentencing.¹⁰⁷ Although he alleges that "[the Decision] is replete with references to [such irrelevant evidence]", he substantiates only one purported example.¹⁰⁸ Nor is that example—referring to the accounts of P119 and a/0480/08—persuasive. His other alleged "examples" are addressed in a single footnote and lack any accompanying argument.¹⁰⁹ They should be dismissed summarily.

¹⁰² [Judgment](#), paras. 671 and 688.

¹⁰³ [Decision](#), para. 9.

¹⁰⁴ See e.g., [Decision](#), para. 24 ("[the] Chamber addresses each of the crimes for which it entered a conviction[...]"); para. 27 ("In convicting Mr Bemba of murder, the Chamber relied, in particular, on the underlying murders of the following victims[...]"); para. 34 ("In convicting Mr Bemba of rape, the Chamber relied, in particular, on the underlying rapes of the following victims[...]"); para. 48 ("In convicting Mr Bemba of pillaging, the Chamber relied, in particular, on the underlying acts of pillaging of items of property from the following individual and groups of victims[...]").

¹⁰⁵ [Brief](#), paras. 50-52.

¹⁰⁶ See e.g., [Defence Sentence Submissions](#), paras. 9-15.

¹⁰⁷ [Brief](#), paras. 53-55.

¹⁰⁸ [Brief](#), para. 55.

¹⁰⁹ [Brief](#), fn. 86. See below para. 37.

34. The Chamber's statement that "[p]ersons who relied on the direct victim for support[...] were also affected"—referring to the accounts of P119 and a/0480/08¹¹⁰—was not based on irrelevant evidence. The proposition is one of common sense. Further, it merely restated its earlier observation—relating to P69's highly relevant evidence, as a witness to his sister's murder, a crime for which Bemba was convicted.¹¹¹ As such, the Chamber's subsequent similar observation—referring to the accounts of P119 and a/0480/08—needed no further support. Referring to P69's evidence would have been sufficient; the Chamber's reference to P119's and a/0480/08's accounts was thus superfluous. Moreover the Chamber's reference to their evidence was merely illustrative of the type of harm suffered by indirect victims of murder.¹¹² Bemba's argument should be rejected.

35. Moreover, P119—[REDACTED] in 2002-2003¹¹³—was in a position to describe the impact on victims more generally. Evidence relied on at trial remains relevant at sentencing.¹¹⁴ And as the Trial Chamber previously noted, according to article 76(2), the sentencing hearing is part of the trial; accordingly evidence relevant to guilt is equally relevant to sentencing.¹¹⁵ The Chamber relied on P119's evidence at trial and did not doubt her credibility.¹¹⁶ Her evidence thus remains relevant for sentencing. Bemba overlooks the Chamber's observation that the Decision should be read together with the Judgment.¹¹⁷

¹¹⁰ [Decision](#), para. 30.

¹¹¹ See [Decision](#), para. 29 (“Murder deprives the direct victim of life, the ultimate harm. *Relatives and dependants left behind are not only deprived of the direct victim, an impact that cannot be underestimated, but may also be directly injured—physically and/or psychologically—as a result of the murder*”) (referring, by example, to P69's testimony). (emphasis added).

¹¹² See [Decision](#), para. 30, fn. 94 (using the phrase “for example”). See T-84-RED2, 8:16-9:3 (P119 describes a 55-year old woman, who lived with her son (a travelling salesman [REDACTED])). When he was killed by the Banyamulengué, she did not see her son's body); T-369-RED, 66:16-20 (a0480/08 describes that her father's disappearance caused them sadness, as they had felt safe in his shadow).

¹¹³ [REDACTED].

¹¹⁴ See also article 76(1) [Statute](#): “In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.”

¹¹⁵ [Sentencing Evidence Decision](#), para. 18.

¹¹⁶ See e.g., [Judgment](#), paras. 303 (fn. 726), 329, 467-470, 476, 486, 520, 531, 564, 634.

¹¹⁷ [Decision](#), para. 9.

36. Likewise, a/0480/08's account was pertinent to sentencing, including as general evidence supporting a common sense and reasonable proposition that persons who relied on the victims of murder would be affected. In fact, the Chamber found a/0480/08's evidence "[r]elevant to sentencing in light of various findings in the Judgment, in particular, concerning the crimes committed in Bossembélé, and *the impact of the crimes of rape, murder, and pillaging on victims and their families*."¹¹⁸ "[Victim] a/0480/08's account [was] representative of a larger number of victims[...]."¹¹⁹

37. Even if the Chamber erred by referring to the accounts of P119 and a/0480/08, considering the repetitive nature of their evidence, any such error would be harmless. It would not affect Bemba's sentence. Likewise, the Chamber's reference to other witness testimony as providing additional support to general propositions and findings already established in the Conviction Judgment would not affect his sentence. The Chamber was entitled to rely on the trial record for sentencing purposes. Once again, not only does Bemba fail to read the Decision, the Judgment, and the trial record together,¹²⁰ he also takes an unduly restrictive view of the evidence relevant to sentencing.

¹¹⁸ [Sentencing Evidence Decision](#), para. 39 (emphasis added).

¹¹⁹ [Sentencing Evidence Decision](#), para. 39. *See also* para. 34 (noting that "[the] victims' views and concerns may assist the Chamber in its approach to the evidence" and "[are] equivalent to submissions". Accordingly, the Chamber will take them into account, as relevant and appropriate, in determining the sentence.") *See further* para. 35 ("[the] Chamber considers whether (i) the personal interests of the individual victims are affected and (ii) the accounts expected to be provided are representative of a large number of victims, taking into account the nature of the harm suffered and the location of the events.")

¹²⁰ [Brief](#), fn. 86. [Decision](#), fn. 93 (referring to a/0511/08) is additional to P69's evidence; fn. 96 (referring to P119 and a/0480/08) is additional to P87's evidence; fn. 97 (referring to P9) is additional to P87's evidence; fn. 110 and 117 (referring to a/0542/08) is additional to established findings in the Judgment, and *inter alia* the evidence of P22, P69, P82 and P229; fn. 119 (referring to a/0555/08) is additional to established findings in the Judgment and V1's evidence; fn. 157 (referring to a/0394/08 and a/0555/08) is additional to established findings in the Judgment and the evidence of P23, P80, P108, P81, P112; paras. 49 and 50 (referring to P6, P9 and P38) is additional to *inter alia* established findings in the Judgment.

See also [Sentencing Evidence Decision](#), para. 38 ("[t]he Chamber considers that victim a/0555/08's account is representative of a larger number of victims and decides to authorise her to present her views and concerns.")

38. *Third*, Bemba fails to show that the Chamber, in assessing gravity, relied on unsupported factors.¹²¹ In attempting to impugn the Chamber's finding on the murder of P87's brother, Bemba wrongly claims that the murder was not committed in her presence. His submission also impermissibly challenges the findings on conviction. As the Chamber found, P87—although she “went behind the house” (at the time of her brother's murder)—she “could clearly see two ‘Banyamulengués’ in the sitting room”.¹²² She “could see how [her brother] went into the bedroom where the [motorbike] was”.¹²³ She “could see what was happening in the house.”¹²⁴ She identified the voices she heard coming from the room where the motorbike was kept as those of her “brother” and a “Banyamulengué”. After the shots, she saw a third soldier enter the sitting room, before all three soldiers left the house.¹²⁵ Bemba's submission challenging P87's presence during the attack fails to undermine the Chamber's findings.

39. Moreover, the Chamber's finding that “[a]ll acts of murder were committed in the presence of other civilians”¹²⁶ addressed the impact of these murders on the persons witnessing them, including P87, as a factor enhancing the gravity of the crimes. Although Bemba attributes a different meaning to this finding, its purpose was to assess the gravity of the murders (in contrast, for example, to aggravating circumstances, such as “particular cruelty”, which assesses the perpetrators' conduct and the manner in which the crimes were committed). Whether or not the perpetrators were aware of the presence of other persons was thus irrelevant to the Chamber's determination.

¹²¹ *Contra* [Brief](#), paras. 56-57.

¹²² [Judgment](#), para. 475. See also [Decision](#), para. 28 and Conviction Appeal Response, para. 365. See further [Prosecution Sentence Appeal](#) para. 67.

¹²³ [REDACTED];

¹²⁴ [REDACTED].

¹²⁵ [Judgment](#), para. 475.

¹²⁶ [Decision](#), paras. 28, 32.

40. Bemba’s attempt to diminish the gravity of sexual crimes against children is baseless.¹²⁷ That sexual crimes, in general, are grave is uncontroversial—more so, when they are perpetrated against children. The Chamber correctly recognised that the Statute and Rules accord a special status to sexual crimes, crimes against children, and the victims thereof,¹²⁸ in view of their gravity. Nor can there be any dispute that the sexual crimes in *this case* were of “utmost gravity”.¹²⁹

41. Bemba raises the spectre of double-counting, but fails to show error.¹³⁰ Although Bemba alleges that the Chamber considered the “young victims of sexual crimes” under the rubric of both gravity and aggravating factors, it did not. Rather, before conducting its specific gravity analysis, the Chamber only emphasised—*qualitatively* and as a normative statement—that sexual crimes, particularly against children, are grave.¹³¹ Indeed, apart from this general statement, the fact that the children were particularly defenceless during the attack because of their age does not feature in the Chamber’s specific gravity analysis. Rather, its gravity analysis focused on the impact on the various victims, including some children, and, significantly, the stigma that followed the victims.¹³² When considering aggravating factors, in particular the factor of particularly defenceless victims, the Chamber considered the concrete *quantitative* aspects of the sexual violence crimes. Indeed, at least eight of the known rape victims were between 10 and 17 years old, and thus, particularly vulnerable and defenceless.¹³³ Once again, Bemba fails to show error.

42. For the reasons above, Bemba’s challenge to the Chamber’s assessment of the gravity of the underlying crimes should be rejected.

¹²⁷ [Brief](#), para. 57.

¹²⁸ [Decision](#), para. 35.

¹²⁹ [Decision](#), para. 40.

¹³⁰ [Brief](#), para. 57.

¹³¹ [Decision](#), para. 35.

¹³² [Decision](#), paras. 36-40.

¹³³ [Decision](#), para. 42, fn. 129.

ii. The Chamber correctly assessed the gravity of Bemba's conduct

43. In challenging the Chamber's findings on the gravity of his conduct, Bemba raises three unsustainable arguments:¹³⁴ (i) He wrongly impugns the relevance of the "nexus" requirement to the sentence imposed; (ii) he impermissibly re-litigates several conviction-related findings relating to his degree of participation and degree of intent; and (iii) he disputes—without substantiation—the Chamber's findings rejecting the alleged measures he took in response to allegations about the commission of crimes. Bemba's submissions should be rejected.

44. *First*, Bemba's argument highlights an apparently inconsistent approach with his sub-ground of appeal challenging the purported causation requirement in article 28.¹³⁵ In his conviction appeal, Bemba considered causation "an essential element of the crime".¹³⁶ In his sentencing appeal, on the other hand, he considerably dilutes the significance of this purported element when he suggests that it "[d]oes not alter the superior's own intention or level of contribution, it merely limits the scope of the relevant crimes."¹³⁷ His equivocal submissions do not show error.

45. Notwithstanding, as the Prosecution has submitted, causation is not an element of article 28 liability. Article 28 does not require that a superior causally contributed to the occurrence of the crimes for which he or she is held responsible.¹³⁸ In any event,¹³⁹ the Chamber correctly found on the facts that this nexus existed, and that, it elevated the gravity of Bemba's conduct.¹⁴⁰ Not only was his role as a commander key to the criminal conduct of his subordinates, his failures were ongoing throughout the 2002-2003 CAR Operation.¹⁴¹ Critically, as the Chamber

¹³⁴ [Brief](#), paras. 58-65.

¹³⁵ Compare [Conviction Appeal Brief](#), paras. 381-413 with [Brief](#), paras. 58-59.

¹³⁶ [Conviction Appeal Brief](#), paras. 381-388.

¹³⁷ [Brief](#), para. 59.

¹³⁸ Conviction Appeal Response, paras. 220-253. *Contra* [Decision](#), paras. 60, 67.

¹³⁹ See [Judgment](#), paras. 213, 735-741. See further [Decision](#), paras. 62-66.

¹⁴⁰ [Decision](#), paras. 60-67.

¹⁴¹ [Decision](#), paras. 60, 66.

found, “[he] did more than tolerate the crimes as a commander”.¹⁴² His failure to take action was deliberately aimed at encouraging the attack against the civilian population, and directly contributed to the continuation and further commission of crimes.¹⁴³ As the Chamber correctly stated, “[his] culpable conduct was of serious gravity.”¹⁴⁴ Bemba’s conduct was inextricably linked to the further commission of the crimes,¹⁴⁵ and, as provided in rule 145(1)(c), enhanced his degree of participation. The Chamber therefore did not err in considering that the “nexus”, as a factual matter, between Bemba’s failure to exercise control properly over the forces under his effective control and his subordinates’ crimes heightened the gravity of his criminal culpability.

46. *Second*, Bemba’s opinion “that his participation and intent were extremely limited” is in stark contrast with the Chamber’s clear findings.¹⁴⁶ Not only did he have *actual*—not constructive—knowledge of crimes, he directly contributed to them.¹⁴⁷ The Chamber correctly found that “[over] the course of approximately four and a half months, [Bemba] had consistent information of crimes committed by MLC soldiers in the CAR, over which he had ultimate, effective authority and control.”¹⁴⁸ Moreover, although Bemba disputes his presence when the crimes were committed, he fails to acknowledge the express finding that “[although] not physically present, [Bemba] maintained a *constant, remote presence*, requiring and receiving regular, if not daily, reports and affirmatively exercising his authority[...].”¹⁴⁹ Indeed, by unduly focussing on “his physical presence”, Bemba obfuscates his argument.

¹⁴² [Decision](#), para. 66.

¹⁴³ [Decision](#), para. 66.

¹⁴⁴ [Decision](#), para. 67.

¹⁴⁵ Conviction Appeal Response, paras. 254-274. See [Judgment](#), paras. 213, 741 (the Chamber was satisfied that its factual finding was *more demanding* than the standard actually required by law.) (emphasis added).

¹⁴⁶ [Decision](#), paras. 60-67; [Brief](#), para. 60.

¹⁴⁷ [Decision](#), paras. 61-62, 67 (emphasis added).

¹⁴⁸ [Decision](#), para. 62 (citing [Judgment](#), Sections VI(F)(2) and VI(F)(3)).

¹⁴⁹ [Decision](#), para. 62 (emphasis added).

47. Bemba's attempts to impugn the Chamber's findings on the "climate of acquiescence surrounding and facilitating the crimes" and the implementation of the "organisational policy" are not compelling.¹⁵⁰ Nor—apart from claiming an alleged lack of "evidential basis" or "reasoning in support"¹⁵¹—does Bemba say any more. His arguments should be dismissed summarily.¹⁵² In any event, the Judgment,¹⁵³ the Decision,¹⁵⁴ and the Prosecution's response to Bemba's conviction appeal¹⁵⁵ appropriately and adequately address these arguments.

48. *Third*, Bemba impermissibly revives his incorrect arguments—from his conviction appeal¹⁵⁶—on the alleged adequacy of the measures he took to ensure MLC troop discipline.¹⁵⁷ Bemba's statement suggesting he had taken "[a number of measures] directed at ensuring the discipline of the MLC troops" misstates the findings.¹⁵⁸ The Code of Conduct was deficient in several respects.¹⁵⁹ The few measures taken over the course of the 2002-2003 CAR Operation were found to be "limited in mandate, execution, and/or results."¹⁶⁰ They were "[neither] properly [nor] sincerely executed", and "were a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge."¹⁶¹ His submissions are no more than a second attempt to re-argue his conviction appeal. He failed to show error in that appeal; he likewise fails here.

49. Bemba merely disagrees, but fails to show that the Chamber erred by making the finding that "[the] means at [Bemba's] disposal to take measures to prevent and

¹⁵⁰ [Brief](#), para. 61. See e.g., [Judgment](#), paras. 675-687.

¹⁵¹ [Brief](#), para. 61.

¹⁵² [Lubanga AJ](#), paras. 29-34 (requiring the appellant to substantiate his arguments).

¹⁵³ See e.g., [Judgment](#), paras. 737-741.

¹⁵⁴ [Decision](#), para. 66.

¹⁵⁵ See Conviction Appeal Response, paras. 296-310.

¹⁵⁶ See e.g., [Conviction Appeal Brief](#), paras. 325-380, 398-413.

¹⁵⁷ [Brief](#), para. 63.

¹⁵⁸ [Brief](#), para. 63. See Conviction Appeal Response, paras. 195- 219, 265-274 and [Judgment](#), paras. 719-734.

¹⁵⁹ See [Judgment](#), paras. 392-393; [Decision](#), para. 65.

¹⁶⁰ See [Judgment](#), paras. 719-734; [Decision](#), para. 65. *Contra* [Brief](#), paras. 63-64.

¹⁶¹ [Judgment](#), para. 727.

repress crimes]” underscored “[his] superior failures”.¹⁶² They did not “reduce his culpability or justify mitigation”.¹⁶³ And the one example—from the *Al Mahdi* case—that Bemba provides is inapposite.¹⁶⁴ Not only did the *Al Mahdi* case involve a different crime, a different mode of liability and an admission of guilt;¹⁶⁵ the Trial Chamber hearing that case properly found, on the facts of that case, that Al Mahdi was “initially reluctant” to destroy the mausoleums and mosques described as cultural property.¹⁶⁶ He also advised against using a bulldozer at all but one site. These facts were taken in mitigation.¹⁶⁷ No sensible parallel can be drawn between the *Al Mahdi* case and Bemba’s. Here, in sharp contrast, Bemba did not genuinely intend to take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes.¹⁶⁸ He failed to take any measures to respond to allegations of crimes reported internally within the MLC. Whatever limited measures he took to react to public allegations of crimes were merely to “rehabilitate the public image of the MLC.”¹⁶⁹

50. Further, the purported comparison of the alleged measures taken by Bemba to measures purportedly taken by French President François Hollande and United Nations Secretary General Ban Ki-Moon in a different situation repeats his conviction appeal.¹⁷⁰ They remain opaque and inapposite. They do not show error.

51. For the reasons above, Bemba’s challenge to the gravity of his own culpable conduct should be rejected.

¹⁶² [Decision](#), para. 65; [Brief](#), paras. 62-64.

¹⁶³ [Decision](#), para. 65. *See also* fn. 196 (noting Bemba’s attempt to re-litigate).

¹⁶⁴ [Brief](#), para. 64.

¹⁶⁵ [Al Mahdi TJ](#), paras. 11-63.

¹⁶⁶ [Al Mahdi TJ](#), para. 89.

¹⁶⁷ [Al Mahdi TJ](#), paras. 91, 93.

¹⁶⁸ [Decision](#), para. 63.

¹⁶⁹ [Decision](#), para. 63; [Judgment](#), para. 728 (citing Section V(D), including paras. 582, 604).

¹⁷⁰ Compare [Brief](#), para. 64, fn. 114 with [Conviction Appeal Brief](#), paras. 362-363. *See* Conviction Appeal Response, para. 213.

C. *The Chamber properly evaluated the aggravating circumstances*

52. Bemba fails to show that the Chamber erred in evaluating the aggravating factors. No factor was impermissibly double-counted.¹⁷¹ Nor was the evidential basis insufficient or irrelevant.¹⁷² Rather, the Chamber's factual findings that the crimes of rape were aggravated because they were committed with particular cruelty and against particularly defenceless victims are unassailable.¹⁷³ Likewise, the factual findings by the Chamber's Majority that the crimes of pillage were aggravated because they were committed with particular cruelty are well-founded.¹⁷⁴

i. *The Chamber did not "double-count"*

53. The Chamber correctly set out the test for double-counting. It held that, in considering all relevant factors, it cannot "double-count" any factors assessed in relation to the gravity of the crimes as aggravating circumstances and *vice-versa*. Further, a legal element of the crimes or mode of liability cannot be considered as an aggravating circumstance.¹⁷⁵ Bemba does not contest this.

54. Rather, he advances three unsustainable arguments to claim that the Chamber erred by "double-counting".¹⁷⁶

55. *First*, although Bemba claims that the Chamber erred by considering the same factor twice in assessing the gravity of pillage and aggravating factors for the crime, it did not.¹⁷⁷ For gravity, the Chamber assessed the *extent of damage*, by noting the substantial number of pillage victims and the geographical and temporal scope of the 2002-2003 CAR Operation. In this context, it noted that "[the] crimes impacted

¹⁷¹ *Contra* [Brief](#), paras. 66-68.

¹⁷² *Contra* [Brief](#), paras. 69-76.

¹⁷³ [Decision](#), paras. 41-47.

¹⁷⁴ [Decision](#), paras. 52-58. The Majority (Judges Aluoch and Ozaki) found particular cruelty as an aggravating circumstance for pillage. Judge Steiner found that the crimes were committed against particularly defenceless victims, as the aggravating factor. *See also* response to Ground 2.

¹⁷⁵ [Decision](#), para. 14. *See also* [Lubanga SAJ](#), paras. 66 and 85; [Milošević AJ](#), para. 306.

¹⁷⁶ *Contra* [Brief](#), paras. 66-68.

¹⁷⁷ *Contra* [Brief](#), para. 67.

various aspects of the victims' lives, often leaving them without basic necessities."¹⁷⁸ On the other hand, as an aggravating circumstance, the Majority assessed that the pillaging was committed with *particular cruelty*. That these crimes were committed "*without regard to the victims' livelihood or well-being*"¹⁷⁹ only further emphasised the callousness and cruelty with which they were perpetrated. The two factors—the extent of damage and the particular cruelty of the pillaging—are distinct. There was no "double-counting".¹⁸⁰ Bemba merely refers to the underlying findings and evidence, and not the aggravating factors themselves.¹⁸¹ Nor are the underlying factual aspects of these aggravating factors similar. For gravity, the relevant facts underscored the devastating *impact* of the pillage on various aspects of the *victims' lives*. As an aggravating factor, the relevant facts emphasised the *perpetrators' conduct and cruelty* and that they committed the crimes "*without regard*" to the victims' well-being.¹⁸² Bemba's argument that "both factors" addressed "the negative consequences of the acts of [pillage] for the victims" is simplistic and should be rejected.¹⁸³

56. *Arguendo*, even if the Chamber had considered the same facts twice, in its gravity analysis and as an aggravating factor, any potential impact would, indeed, be negligible. Not only was the underlying finding only one out of six illustrating the particular cruelty of the pillaging, the other five findings, underpinning the Chamber's assessment of aggravating factors, overwhelmingly demonstrate the

¹⁷⁸ [Decision](#), para. 51.

¹⁷⁹ [Decision](#), para. 56 (emphasis added).

¹⁸⁰ See e.g., [Lubanga SAJ](#), para. 85 (where the Appeals Chamber limited its analysis to whether *the abuse of power* as an aggravating factor was also considered in gravity); [Milošević AJ](#), para. 307 (*abuse of superior position* was double-counted in gravity and aggravation).

¹⁸¹ [Brief](#), para. 67. See [Decision](#), fn. 44. See also [Nzabonimana AJ](#), paras. 464-466 (indicating that findings and circumstantial evidence used to infer a legal element may also be considered in proving aggravating factors, so long as the element and aggravating factor are distinct.); [Nyiramasuhuko AJ](#), paras. 3356, 3385-3387; see also [Nikolić SAJ](#), para. 61 (finding there was double-counting, when there was no "identifiable difference in the facts cited" in gravity and aggravation).

¹⁸² Emphasis added. *Contra* [Milošević AJ](#), para. 308 (where "indiscriminate shelling of civilian areas" and "use of the blatantly inaccurate modified air bombs" was double-counted because both "described the immense terrorising effect of the shelling and sniping on the civilian population"); [Gatete AJ](#), para. 275 (where the number of victims—as described in the "loss of life on a massive scale" in gravity—could not be considered in aggravation.)

¹⁸³ [Brief](#), para. 67.

crime's particular cruelty.¹⁸⁴ No change in the Chamber's sentence would be warranted.

57. *Second*, Bemba's claim alleging "double-counting" between the two aggravating factors—particularly defenceless victims and particular cruelty—is incorrect.¹⁸⁵ This Court has yet to rule on whether *two* aggravating factors can be "double-counted".¹⁸⁶ Assuming a "double-counting" argument may be raised as *between* two aggravating factors, as the Chamber correctly acknowledged, the two factors are indeed two distinct factors under rule 145(2)(b).¹⁸⁷ Further, the Chamber correctly identified different underlying facts for each aggravating circumstance. Its clarity of process was deliberate and unquestionable.¹⁸⁸ Indeed, the two factors are distinct, and address different aspects of harm. While the factor of "particularly defenceless victims" views the crimes through the lens of the victims, and assesses the impact on them, the factor of "particular cruelty" assesses the conduct of the perpetrators, and the manner in which the crimes were committed. Once again, Bemba's submissions target the underlying findings and evidence, and not the aggravating circumstances themselves.¹⁸⁹

58. In any event, Bemba's submissions fail on the facts. He claims that the aggravating feature for both factors "[i]s that the victim was attacked by multiple

¹⁸⁴ [Decision](#), para. 56 ("multiple, armed MLC soldiers 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 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 [...].")

¹⁸⁵ [Brief](#), para. 68.

¹⁸⁶ See [Lubanga SAJ](#), para. 85 (implicitly approving the double-counting principle as it applied to gravity and aggravation, and citing [Lubanga SD](#), para. 51; see also [Lubanga SD](#), para. 35, elucidating that very principle, and no more). See further [Al Mahdi TJ](#), para. 70; [Katanga SD](#), para. 35. See also [Gatete AJ](#), para. 275; [Ntabakuze AJ](#), paras. 269-274; [Bagosora AJ](#), para. 421; [Nikolić SAJ](#), para. 61; [Stakić AJ](#), para. 411.

¹⁸⁷ [Decision](#), paras. 41-43 (particularly defenceless victims); paras. 44-47 (particular cruelty) (emphasis added).

¹⁸⁸ See e.g., [Krajišnik AJ](#), para. 751 (rejecting arguments of impermissible "double-counting", when the Chamber had explained its choice and noting that "[the] Trial Chamber indeed distinguished between aggravating circumstances on the one hand and the gravity of the crimes on the other, albeit considering them under the same heading"); [Deronjić SAJ](#), paras. 106-107 ("albeit considering under the same heading", "it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting by taking into account matters relevant to the gravity of the offence as additional aggravating circumstances as well.")

¹⁸⁹ See [Decision](#), fn. 44. See also [Nzabonimana AJ](#), paras. 464-466; [Nyiramasuhuko AJ](#), paras. 3356, 3385-3387; see also [Nikolić SAJ](#), para. 61.

perpetrators”.¹⁹⁰ However, when the Chamber considered—for the criterion of particularly defenceless victims—that “[the victims] were targeted by multiple armed MLC soldiers in their homes, on MLC bases, in isolated locations, such as the bush, and/or while seeking refuge”, the Chamber emphasised not only that the victims were targeted by *multiple attackers*, but also that these attacks took place in locations where the victims were most vulnerable.¹⁹¹ Bemba’s argument does not fully reflect the Chamber’s reasoning.¹⁹² On the other hand, for the criterion of “particular cruelty”, the Chamber considered *inter alia* that the MLC soldiers committed the underlying acts of rape “repeatedly against the same victims, sometimes penetrating the same victim orally, vaginally, and anally.”¹⁹³ Here the Chamber—different from its earlier analysis—assessed that the particular cruelty derived from the fact that the *same victim* was raped several times, and in different brutal ways.¹⁹⁴ Once again, Bemba’s argument fails to accurately reflect the Decision’s text.¹⁹⁵

59. *Third*, as shown above,¹⁹⁶ the Chamber did not “double-count” the age of the victims for the crime of rape.

60. Bemba does not show that the Chamber erred. His submissions should be dismissed.

¹⁹⁰ [Brief](#), para. 68.

¹⁹¹ [Decision](#), para. 43.

¹⁹² [Brief](#), para. 68 (stating only “[the] victims were ‘targeted by multiple armed MLC soldiers’”).

¹⁹³ [Decision](#), para. 47.

¹⁹⁴ [Decision](#), para. 47.

¹⁹⁵ [Brief](#), para. 68 (stating only “repeatedly against the same victims”).

¹⁹⁶ See *above* para. 41. *Contra* [Brief](#), para. 66.

ii. The aggravating factors were well-founded in evidence

61. Although Bemba claims that the aggravating circumstances “lack evidential basis and/or are irrelevant”,¹⁹⁷ he shows no error. Rather, his arguments improperly repeat his submissions against his conviction appeal, disregarding the sentencing context. Indeed, his arguments are little more than a veiled second challenge to his convictions. The Appeals Chamber should dismiss such arguments.¹⁹⁸

62. Nonetheless, Bemba misstates the Judgment and the Decision. He also fails to acknowledge the Chamber’s clear findings that it was not obliged to set out in detail every factor considered, and that the findings in the Judgment, and the relevant trial record, inform the Decision.¹⁹⁹ Bemba’s unsubstantiated arguments should be dismissed summarily.²⁰⁰

63. *First*, there is sufficient evidence that the perpetrators of rape and pillage were motivated “to punish suspected enemies and their sympathisers”.²⁰¹ Although Bemba disregards these findings, the Judgment made clear that “[MLC] soldiers sought to punish civilians in the CAR, for example, for MLC losses or as suspected enemies or enemy sympathisers.”²⁰² Moreover, the Chamber’s clear findings on Bemba’s knowing and willing impact on the crimes as the MLC commander undeniably links them to him.²⁰³ Nor, in view of the Chamber’s elaborate findings, is it apparent why Bemba believes that the evidence was limited to three specific witnesses (P23, P22 and P42), nor why that evidence was “manifestly insufficient”.²⁰⁴ Bemba shows no error.

¹⁹⁷ [Brief](#), paras. 69-76.

¹⁹⁸ [Lubanga SAJ](#), para. 49.

¹⁹⁹ [Decision](#), para. 9.

²⁰⁰ [Lubanga AJ](#), paras. 29-34.

²⁰¹ *Contra* [Brief](#), paras. 70-71. See e.g., (for the crime of rape) [Decision](#), para. 44 and fn. 140 (referring to [Judgment](#), paras. 565-567; P925: T-368, 106: 12-15; P229: T-100, 8:21-9:7); (for the crime of pillage), [Decision](#), para. 52 (noting that many of the same factors aggravating rape equally apply to pillage).

²⁰² [Judgment](#), paras. 565-573, 664-666. See also Conviction Appeal Response, paras. 296-328.

²⁰³ *Contra* [Brief](#), para. 70.

²⁰⁴ [Brief](#), para. 71.

64. *Second*, Bemba’s challenge to the finding that the perpetrators committed rape “for self-compensation” is equally unsubstantiated and without merit.²⁰⁵ While claiming that the finding is “extraordinary”,²⁰⁶ and instead of reading the Chamber’s findings in context, he wrongly limits his understanding to “financial compensation” alone, thus disregarding all other forms of compensation. The Chamber found *inter alia* that “[when] applying ‘Article 15’, MLC soldiers in the CAR secured—including by acts of murder, rape, and pillaging—compensation, *in cash and kind*, from the civilian population.”²⁰⁷ Nor does Bemba convincingly challenge the evidential basis.²⁰⁸ His manifestly unfounded arguments must fail.

65. *Third*, Bemba unacceptably re-litigates the Chamber’s findings on “pecuniary gain” in relation to the crime of pillage.²⁰⁹ He has already challenged these findings in his appeal against conviction. By raising them again now in his sentence appeal he shows no error.²¹⁰

66. Moreover, Bemba’s argument—that the findings on the manner in which the MLC soldiers committed pillage (including trading pillaged items for other goods) were “unconnected to any of the acts for which [Bemba] was convicted”—obfuscates the issue.²¹¹ Aggravating factors potentially include “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.”²¹² Moreover, as the *Lubanga* Appeals Chamber has held,

²⁰⁵ [Brief](#), paras. 72-73.

²⁰⁶ [Brief](#), para. 72.

²⁰⁷ [Judgment](#), para. 565 (emphasis added).

²⁰⁸ See e.g., Conviction Appeal Response, paras. 262-264. See also [Judgment](#), para. 644 (emphasising “[the] Chamber’s findings regarding the motives of the perpetrators, in particular, self-compensation in the absence of adequate payment and rations. At most, the Chamber considers that the MLC hierarchy, which created the relevant circumstances, tacitly approved the measures that MLC soldiers took, including pillaging, to ‘make ends meet’”).

²⁰⁹ [Brief](#), paras. 74-75.

²¹⁰ See [Conviction Appeal Brief](#), paras. 445-461; Conviction Appeal Response, paras. 329-337; [Judgment](#), paras. 643-645, 664-666.

²¹¹ [Brief](#), para. 75.

²¹² [Decision](#), para. 18, fn. 59 (citing [Deronjić SAJ](#), paras. 120, 124). See further [Deronjić SAJ](#), para. 124 (“[The statement] that aggravating circumstances must relate ‘to the offender himself’ is not to be taken as a rule that such circumstances must specifically pertain to the offender’s personal characteristics. Rather, it simply reflects the general principle of individual responsibility that underlies criminal law: a person cannot be held responsible

aggravating factors may be attributed to Bemba as long as he “[had] *any* element of culpability, covering a broad range of possibilities from objective foreseeability to intent [...]”²¹³ Bemba was well aware of the manner in which the MLC soldiers committed pillage.²¹⁴ This aggravating factor is undeniably connected to him. The Chamber’s statement that “[MLC troops] self-compensated through acts of pillaging” was intended to reflect the MLC’s policy, which Bemba encouraged, and which was proved beyond reasonable doubt. Indeed, the Chamber’s findings on the motives for and the manner of the crimes of pillage²¹⁵ informed the Chamber’s later finding that these motives (including self-compensation) were condoned by the MLC hierarchy.²¹⁶ Bemba himself was at the pinnacle of the MLC hierarchy.²¹⁷

67. Bemba advances no more than an unsustainable challenge to the Chamber’s conclusion that “[the] crimes were [*not*] the result of an uncoordinated and spontaneous decision of the perpetrators, acting in isolation.”²¹⁸ Rather, as the Chamber correctly found, “[Bemba’s failures] to take action [were] deliberately aimed at encouraging the attack.”²¹⁹ Moreover, the MLC soldiers were acting on behalf of the MLC organisation at the time they committed the crimes.²²⁰ Bemba’s effort to distance the MLC soldiers’ crimes from himself lacks merit.

for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, 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. Holding an individual responsible for taking advantage of the vulnerability of his victims, on the other hand, falls well within this notion of individual responsibility”); see also [Sesay AJ](#), para. 1276.

²¹³ [Lubanga SAI](#), para. 90. (emphasis in original)

²¹⁴ See below response to Ground 2.

²¹⁵ See e.g., [Judgment](#), paras. 565-567, 643-645, 664-666.

²¹⁶ See e.g., [Judgment](#), para. 678.

²¹⁷ See e.g., [Judgment](#), para. 675.

²¹⁸ See e.g., [Judgment](#), para. 685 (emphasis added). [Brief](#), para. 75.

²¹⁹ [Judgment](#), para. 685.

²²⁰ [Judgment](#), para. 686. See also Conviction Appeal Response, paras. 296-328.

68. The Chamber's Decision has not been "eroded".²²¹ Rather, the findings are reasonable, well-grounded in evidence and accurate. No error is shown. Bemba's arguments should be rejected.

D. Conclusion

69. Bemba fails to show that the 18-year sentence imposed upon him for his criminal liability as a superior for his subordinates' crimes of rape, murder and pillage is manifestly excessive. He further fails to show that the Chamber erred in evaluating the gravity of the crimes and his culpable conduct. Likewise, he fails to show that the Chamber erred in assessing the aggravating circumstances. Ground 1 should be dismissed.

²²¹ [Brief](#), para. 76.

III. RESPONSE TO GROUND 2: THE CHAMBER CORRECTLY FOUND THAT BEMBA KNEW OF THE AGGRAVATING CIRCUMSTANCES

70. The Chamber correctly found that “Bemba knew of the factors relevant to proof of the alleged aggravating circumstances”,²²² namely that MLC troops committed rapes against particularly defenceless victims and with particular cruelty and that they committed pillaging with particular cruelty.²²³ Bemba’s challenges to this finding under his Second Ground of Appeal²²⁴ rest on an incorrect interpretation of the Decision. In addition, he contests specific strands of evidence in isolation without showing that the Chamber’s overall findings were unreasonable, or advances otherwise unsupported arguments. This ground should therefore be dismissed.

A. *The Chamber correctly applied the legal standard for actual knowledge*

71. Bemba’s argument²²⁵ that the Chamber conflated the standard for actual knowledge with that for constructive knowledge is premised on an incorrect interpretation of the Decision. In finding beyond reasonable doubt that Bemba knew of the facts relevant to prove the aggravating circumstances, the Chamber clearly applied an actual knowledge standard and not a constructive knowledge one.²²⁶ It concluded that Bemba knew of these facts based on its findings in the Judgment and the evidence admitted at trial relating to Bemba’s actual knowledge of MLC crimes.²²⁷

72. The Chamber’s finding that “various sources put Mr Bemba on consistent notice” of the factors relevant to proof of the aggravating circumstances,²²⁸ does not

²²² [Decision](#), para. 26.

²²³ [Decision](#), paras. 41-47, 52-58.

²²⁴ [Brief](#), paras. 78-92.

²²⁵ [Brief](#), paras. 80-82.

²²⁶ [Decision](#), para. 26. *See also* para. 60.

²²⁷ [Judgment](#), para. 717. *See* [Decision](#), para. 26 (fn. 84 stating that the factual and evidentiary basis for its conclusion are contained in particular in paras. 425, 576-578, 607-608, 706-718 (section VI(F)(3)) of the [Judgment](#)). *See also* para. 9.

²²⁸ [Decision](#), para. 26.

show that the Chamber applied a “constructive knowledge” standard.²²⁹ It simply means that Bemba received from various sources information from which he actually knew about the aggravating circumstances. It is irrelevant that some ICTY cases use the term “put on notice” in the context of the ICTY Statute’s article 7(3) “had reason to know” standard.²³⁰ It is clear from the Chamber’s reasoning that it used the term “notice” in this context to describe Bemba as a person who received information and not as a legal term of art.

73. Nor does the ICRC commentary relied on by Bemba support his argument.²³¹ It merely provides some examples of how actual or constructive knowledge may be established, but emphasises that each situation must be assessed on a case-by-case basis.²³²

74. This argument should be dismissed.

B. The Chamber’s findings that Bemba knew of the facts establishing aggravating circumstances of “particularly defenceless victims” and “particular cruelty” was reasonable

75. Bemba has not shown that the Chamber was unreasonable to conclude that he knew of the factors relevant to proof of the alleged aggravating circumstances.²³³

76. The Chamber found that Bemba knew that MLC troops committed rapes against particularly defenceless victims and with particular cruelty and that they committed pillaging with particular cruelty²³⁴ based on his knowledge of the following eight factors that characterised the MLC crimes: (a) the victimisation of multiple family members; (b) the young age of many victims; (c) the commission of

²²⁹ [Brief](#), para. 81.

²³⁰ [Blaskić AJ](#), para. 62; [Kordić TJ](#), para. 437. *Contra* [Brief](#), fn. 145.

²³¹ [Brief](#), fn. 145.

²³² [ICRC Commentary](#), para. 3545.

²³³ [Brief](#), paras. 83-86.

²³⁴ [Decision](#), paras. 41-47, 52-58.

crimes by multiple perpetrators; (d) the attack of persons seeking refuge and attacks on victims in their homes and places of sanctuary; (e) the fact that victims were unarmed; (f) the repeated nature of the crimes; (g) the perpetrators' motives; and (h) the violent and humiliating nature of the crimes, including the abuse and threats accompanying the crimes.²³⁵ The Chamber's findings that Bemba knew of the aggravating features of the crimes are based on the same evidence as relied on by the Chamber to find that he knew of the crimes themselves.²³⁶

77. Bemba shows no error in the Chamber's conclusion. *First*, his argument that the Chamber did not find beyond reasonable doubt that Bemba knew that any of the above factors accompanied the commission of the crimes²³⁷ incorrectly applies the standard of proof. He conflates the Prosecution's duty to establish beyond reasonable doubt the material facts of the aggravating circumstances,²³⁸ with a need to establish the underlying evidence or "subsidiary facts" from which proof of those material facts may be inferred to the requisite standard.²³⁹ The Chamber analysed the underlying evidence as to the eight factors identified above and concluded that Bemba knew of the material facts relevant to the aggravating circumstances, namely that the crimes were committed against particularly defenceless victims and with

²³⁵ [Decision](#), fn. 84; *see also* para. 25. In her partly dissenting opinion, Judge Steiner similarly held that "the fact that most acts of pillaging were committed by groups of soldiers, all of them well-armed, against entire families—including children—in their homes, on the streets, inside their small businesses, and many times simultaneous to rape and murder, demonstrate that the crimes were committed against particularly defenceless victims." ([Decision](#), para. 58).

²³⁶ [Decision](#), para. 26. *See below* para. 82.

²³⁷ [Brief](#), paras. 83, 85, 86.

²³⁸ [Decision](#), para. 18; [Brief](#), para. 79.

²³⁹ [Sentencing Evidence Decision](#), para. 27; [Banda Confirmation Decision](#), paras. 36-37; [Lubanga AJ](#), para. 22: "not each and every fact in the Trial Judgment must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends". In this respect, a clear distinction must be made between facts constituting the elements of the crime and mode of liability falling under the subject matter of the case, *and any other set of facts introduced by the different types of evidence.*" (emphasis added). *See also* [Lubanga Regulation 55 AD](#), fn. 163.

particular cruelty.²⁴⁰ This is consistent with how international and domestic jurisdictions apply the relevant evidentiary standard in the fact finding process.²⁴¹

78. *Second*, Bemba's general contention that "it is clear that [...] the evidence does not establish that Mr. Bemba received information about the specific underlying factors relied upon to prove the aggravating circumstances"²⁴² is insufficient to establish an error of fact. Since the Appeals Chamber "must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial",²⁴³ the Appellant has the burden to demonstrate that "it cannot [be] discern[ed] how the [Trial] Chamber's conclusion could have reasonably been reached from the evidence before it".²⁴⁴ It is not for the Appeals Chamber to conduct *proprio motu* an exhaustive

²⁴⁰ [Decision](#), para. 26 and fn. 84.

²⁴¹ The Appeals Chambers of the UN *ad hoc* Tribunals have endorsed this approach. They found that "not every factual finding in the Trial Judgment must be established beyond a reasonable doubt. [...] '[T]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.'" ([Halilović AJ](#), para. 125; [Blagojević AJ](#), para. 226; [Ntagerura AJ](#), para. 174). The High Court of Australia ruled that "[T]he prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact—every piece of evidence—relied upon to prove an element by inference must itself be proved beyond reasonable doubt. [...] Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately. [...] In none of [the cases] was it suggested that, where the prosecution relies upon circumstantial evidence, an inference of guilt can properly be drawn only from facts which have been proved beyond reasonable doubt. Nor was it suggested that the jury should be given a direction to that effect." (*Shepherd v. R.* at 164-166; *see also Chamberlain v. R.*, at 626). Similarly, the Supreme Court of Canada found that "[i]t is misdirection to instruct the jury to apply the standard of reasonable doubt to individual pieces of evidence. [...] The two-stage application of the criminal standard is wrong in principle because the function of a standard of proof is not the weighing of individual items of evidence but the determination of ultimate issues. [...] During the process of deliberation, the jury must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt." (*R. v. Morin*, at 346-347, 354-362; *see also R. v. JMH* at 31; *R. v. MacKenzie*.) The New Zealand Court of Appeal also found that it is only the elements of the offence, the essential factual components or *facta probanda*, which the prosecution has to prove beyond reasonable doubt. It is an error to dissect the evidence down into its component parts and decide whether they are free from reasonable doubt. (*Thomas v. The Queen*, at 37-38. This holding has been approved and adopted by Northern Ireland Court of Appeal: *R. v. Meehan*, at 32-34; *see also R. v. Murray*, at 126-127). The US Court of Appeals, 2nd Circuit stated that "[i]t is settled that 'the Government's burden of proof beyond a reasonable doubt applies to each element of each offense charged. It is also true that the burden does not operate upon each of the many subsidiary facts on which the prosecution may collectively rely to persuade the jury that a particular element has been established beyond a reasonable doubt'." (*United States v. Viafara-Rodriguez*, at 913 (footnotes omitted)).

²⁴² [Brief](#), para. 84.

²⁴³ [Ngudjolo AJ](#), para. 24.

²⁴⁴ [Lubanga AJ](#), para. 21; [Ngudjolo AJ](#), para. 22.

review of all the trial evidence. Where an appellant fails to substantiate his or her submissions, the appeal should be dismissed.²⁴⁵

79. *Third*, Bemba's arguments that the Chamber erred by relying on media or NGO reports to establish his knowledge of the aggravating features of the MLC crimes because, in his view, they do not refer to *all* the specific factors relied upon by the Chamber and because there is no evidence that Bemba read any of the media and NGO reports²⁴⁶ should be rejected.

80. Bemba fails to support his submission that an analysis of these media or NGO reports establishes that they do not refer to *all* the specific underlying factors relied on to prove the aggravating circumstances.²⁴⁷ He has failed to refer to any such reports.²⁴⁸ His unsupported argument should be rejected on that basis alone.

81. In addition, Bemba incorrectly considers the media and NGO reports in isolation. The Chamber, however, considered these reports, together with a pool of other evidence, to conclude that Bemba knew of the aggravating features of the MLC crimes. These reports include clear, consistent and direct evidence that Bemba received information that MLC crimes were committed against particularly defenceless victims and with particular cruelty.²⁴⁹ Furthermore, they are corroborated by a large body of circumstantial evidence relied upon by the Chamber.

²⁴⁵ [Lubanga AJ](#), paras. 29-34, 134-137.

²⁴⁶ [Brief](#), paras. 85-86.

²⁴⁷ [Brief](#), para. 85.

²⁴⁸ Bemba merely refers to P15's testimony that he did not know whether Bemba was aware of the specific facts relating to the individual crimes and D48's evidence that in his view RFI's reporting on MLC crimes was "vague": [Brief](#), para. 86 (fn. 159).

²⁴⁹ See CAR-OTP-0001-0034 (FIDH Report), pp. 17-19. See also the following international media reports relied on by the Chamber in the [Judgment](#) to find that Bemba knew of the MLC crimes (and their aggravating features) (at fn. 1777): CAR-OTP-0004-0874; CAR-OTP-0031-0093, track 6, from 00:05:49 to 00:08:24; CAR-OTP-0004-0667, at 0672; CAR-OTP-0004-0667, at 0667; CAR-OTP-0004-0667, at 0670-0671; CAR-OTP-0004-0667, at 0676-0679; CAR-OTP-0036-0041, at 0044-0045; CAR-OTP-0004-0345, at 0346-0348; CAR-OTP-0056-0278, at 0280; CAR-OTP-0008-0413; CAR-OTP-0005-0133; CAR-OTP-0057-0243, at 0247; CAR-OTP-0004-0345, at 0346 to 0348; CAR-OTP-0005-0135.

82. In particular, the Chamber found that Bemba knew of the aggravating circumstances of the MLC's crimes by also considering the wealth of other evidence, which proved that he knew about the crimes themselves,²⁵⁰ namely: (a) Bemba's position and authority in the MLC and the ALC;²⁵¹ (b) Bemba's regular direct communications with field commanders, who reported to him;²⁵² (c) Bemba's visits to the CAR;²⁵³ (d) the detailed information on MLC crimes given to Bemba from the MLC leadership;²⁵⁴ (e) reports of MLC crimes given to Bemba by his intelligence services, directly or through the General Staff;²⁵⁵ (f) Bemba's reactions to allegations of MLC crimes;²⁵⁶ and (g) Bemba's express references in his speeches and communications to MLC "misbehaviour", "stealing", and "brutalis[ing]" the civilian population in the CAR²⁵⁷ and to allegations concerning MLC crimes.²⁵⁸

83. Even if, *arguendo*, media or NGO reports on their own were insufficient to give rise to Bemba's knowledge of *all* eight factors considered, the Chamber was not unreasonable to rely on these reports to support its overall conclusion that Bemba knew that the MLC crimes were committed against particularly defenceless victims and with particular cruelty.

84. Bemba's argument that there is no evidence that he read any of the media or NGO reports does not correctly reflect the evidence or the Chamber's findings in the Judgment. The Chamber held that Bemba followed international media reports, and discussed them with senior MLC officials.²⁵⁹ Bemba does not show that these findings were unreasonable.²⁶⁰ In addition, Bemba took concrete measures to react to

²⁵⁰ [Decision](#), para. 26, fn. 84, referring to facts and evidence in [Judgment](#), paras. 425, 576-578, 607-608 and section VI(F)(3): paras. 706-718.

²⁵¹ [Judgment](#), para. 706; *see also* paras. 382-403, 410-449.

²⁵² [Judgment](#), paras. 707, 716; *see also* paras. 419-446.

²⁵³ [Judgment](#), para. 707; *see also* paras. 590-596.

²⁵⁴ [Judgment](#), paras. 712-713; *see also* paras. 582-589, 594-603.

²⁵⁵ [Judgment](#), para. 708; *see also* para. 425.

²⁵⁶ [Judgment](#), paras. 709, 713, 715; *see also* paras. 576, 582-583, 590, 594, 601, 612.

²⁵⁷ [Judgment](#), para. 711; *see also* paras. 594-596.

²⁵⁸ [Judgment](#), para. 714; *see also* paras. 604-606, 610.

²⁵⁹ [Judgment](#), paras. 709, 711, 714; *see also* paras. 576, 582, 594-596, 604-606, 610.

²⁶⁰ *See also* Conviction Appeal Response, paras. 185-186.

media allegations of MLC crimes, such as establishing the Mondonga Inquiry²⁶¹ and dispatching the Zongo Commission²⁶² and the Sibut Mission.²⁶³ Moreover, Bemba mentioned in his letters to the UN representative in the CAR and to the FIDH president that he learned of the allegations of MLC crimes from the media.²⁶⁴

85. *Finally*, Bemba fails to show any error in the Chamber's reliance on the FIDH report.²⁶⁵ This document, of which Bemba concedes to have been aware, includes a detailed description of the manner in which MLC troops raped and pillaged in the CAR. These details go directly to prove that Bemba knew that MLC troops committed rapes against particularly defenceless victims and with particular cruelty and that they committed pillaging with particular cruelty.²⁶⁶

86. The fact that Bemba read the FIDH report only towards the end of the 2002-2003 CAR Operation²⁶⁷ is irrelevant. When he read that report, he received corroboration of other information on the MLC's crimes and their aggravating features, which he had a duty to prevent, repress and report. Accordingly, it was reasonable for the Chamber to rely on the FIDH report, together with other evidence, to support its finding that Bemba knew of the aggravating features of the MLC crimes.

87. Bemba's argument should therefore be dismissed.

²⁶¹ [Judgment](#), paras. 582-583, 590.

²⁶² [Judgment](#), para. 601.

²⁶³ [Judgment](#), para. 614.

²⁶⁴ [Judgment](#), paras. 583, 605, 610. On the correctness of the Chamber's findings on Bemba's knowledge of MLC crimes, see also Conviction Appeal Response, paras. 195-219.

²⁶⁵ [Brief](#), para. 86.

²⁶⁶ CAR-OTP-0001-0034, pp. 17-19.

²⁶⁷ [Brief](#), para. 86.

C. The aggravating circumstances are otherwise attributable to Bemba

88. Since Bemba has not shown that the Chamber erred in finding that he knew of the aggravating circumstances, the Appeals Chamber need not address his alternative argument that the aggravating circumstances cannot otherwise be attributed to Bemba because they were not objectively foreseeable.²⁶⁸

89. If the Appeals Chamber decides to entertain Bemba's argument, it should be dismissed. The aggravating features of the MLC crimes—particularly defenceless victims and particular cruelty—were “objectively foreseeable”. Accordingly, the reasoning in *Lubanga* that aggravating circumstances may nevertheless be attributed to a convicted person if it is established beyond reasonable doubt that they were objectively foreseeable is applicable.²⁶⁹ In the circumstances of this case, the Chamber did not deem it necessary to make such a finding because it had found that Bemba *knew* about the aggravating circumstances.

90. However, if *arguendo* the Appeals Chamber were to find that the Trial Chamber erred in finding that Bemba knew of the aggravating features of the MLC crimes, it could enter a finding, consistent with the *Lubanga* Appeals Judgment, that the aggravating circumstances in this case can nevertheless be attributed to Bemba because it was objectively foreseeable that MLC troops would commit rapes against particularly defenceless victims and with particular cruelty and that they committed pillage with particular cruelty.²⁷⁰

91. *First*, the facts and evidence that led the Chamber to conclude that Bemba actually knew of the MLC crimes and their aggravating features²⁷¹ could also

²⁶⁸ [Brief](#), paras. 87-92.

²⁶⁹ [Brief](#), para. 87 (citing [Lubanga SAJ](#), paras. 88-90). *Lubanga* is consistent with the other authority quoted by Bemba ([Brief](#), fn. 160: citing [Deronjić SAJ](#), para. 124), according to which a person can be held responsible for as aggravating factors for “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.”

²⁷⁰ [Lubanga SAJ](#), paras. 88-90.

²⁷¹ [Judgment](#), paras. 425, 576-578, 607-611, 706-718; [Decision](#), para. 26 (fn. 84). *See above* paras. 81-82.

reasonably establish that the crimes' aggravating features were objectively foreseeable.

92. *Second*, the Appeals Chamber could reasonably rely on the MLC's consistent *modus operandi* to establish the objective foreseeability of the aggravating circumstances.²⁷² The Chamber did not err as to the finding on the MLC's consistent *modus operandi*.²⁷³ Further, the Chamber's findings on the MLC's *modus operandi* are based on many of the same factors that informed its conclusion that Bemba knew of the aggravating features of the MLC crimes, such as that the crimes of rape and pillaging were committed against CAR civilians at their residence, often by multiple perpetrators and through repeated acts, as well as the violent nature of the crimes.²⁷⁴

93. *Third*, Bemba merely repeats some arguments from the Conviction Appeal Brief that the Chamber erred in finding that Bemba knew of the MLC crimes and that he took appropriate measures to address any allegations of MLC crimes, and argues that the aggravating features of the MLC crimes were not objectively foreseeable.²⁷⁵ The Prosecution has answered these challenges in its Conviction Appeal Response.²⁷⁶ Because the underlying premise of Bemba's arguments is incorrect, they must fail.

94. Because none of Bemba's arguments undermine the objective foreseeability of the aggravating features of the MLC crimes, they should be dismissed.

²⁷² *Contra* [Brief](#), paras. 88-89. The Chamber made a finding on the MLC's consistent *modus operandi* to establish the contextual elements of crimes against humanity ([Judgment](#), paras. 676-677).

²⁷³ Conviction Appeal Response, paras. 305-310; *contra* [Brief](#), para. 88.

²⁷⁴ Compare [Judgment](#), paras. 676-677 with [Decision](#), fn. 84. See [Brief](#), para. 89.

²⁷⁵ [Brief](#), paras. 90-91. In particular, he reiterates his submissions that Bemba did not know of the MLC crimes because he 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 ([Brief](#), para. 90 (citing [Conviction Appeal Brief](#), paras. 297-308)). In addition, he repeats his arguments that the MLC soldiers were properly trained, that the MLC had a Code of Conduct which was enforced thorough courts-martial and disciplinary councils, and that the MLC's criminal behaviour was prosecuted and punished ([Brief](#), para. 91 (citing [Conviction Appeal Brief](#), paras.397-402)).

²⁷⁶ Conviction Appeal Response, paras. 178-219, 222, 261-273.

D. Conclusion

95. For these reasons, the Chamber did not err. Ground 2 should be dismissed.

IV. RESPONSE TO GROUND 3: THE CHAMBER REASONABLY FOUND THAT THERE WERE NO MITIGATING CIRCUMSTANCES

A. *The Chamber correctly defined and applied the legal standard to prove mitigating circumstances*

96. The Chamber correctly defined and applied a “balance of probabilities” standard of proof for mitigating circumstances. Bemba shows no error and misapprehends the Decision and the standard. By stating that “it must be *convinced* of the existence of mitigating circumstances on a balance of probabilities”,²⁷⁷ the Chamber did not heighten or alter this standard. Plainly, the Chamber noted that it must be *satisfied* or *persuaded* that the Defence has established a mitigating factor on a balance of probabilities, namely, that “[this factor] must have existed or exists ‘more probably than not’”.²⁷⁸ The Chamber’s language must be understood in accordance with its plain English meaning.²⁷⁹ Bemba thus confuses the standard with the Chamber’s duty to ensure (and convince itself) that the standard is met. Similarly, the Chamber must also be convinced (satisfied or persuaded) that an aggravating factor is established beyond reasonable doubt.²⁸⁰

97. Notably, other Chambers have used the same language. Trial Chamber VIII in *Al Mahdi* stated that “[t]he Chamber must be *convinced* of the existence of mitigating

²⁷⁷ [Brief](#), para. 94 referring to [Decision](#), para. 19 (emphasis added).

²⁷⁸ [Babić SAJ](#), para. 43 (cited in [Decision](#), fn. 61 and in [Brief](#), fn. 172).

²⁷⁹ For example, being “convinced” is analogous to being “persuaded” or being “certain”. See Merriam-Webster and Cambridge Online Dictionaries.

²⁸⁰ [Decision](#), para. 18 (“[t]he Chamber must be convinced of the existence of aggravating circumstances beyond reasonable doubt”).

circumstances on a balance of probabilities”.²⁸¹ That the Chamber’s approach was correct is further evinced by its reference to *Lubanga* and *Katanga* Sentencing Decisions, which set out the same standard, and upon which the Chamber relies and Bemba does not contest.²⁸²

98. Nor has Bemba shown an error in the Chamber’s application of this standard.²⁸³ Conversely, by implying that his word alone suffices to meet the threshold, Bemba fundamentally misunderstands the standard.²⁸⁴ For the Chamber to have considered the alleged factors in mitigation, Bemba was required to substantiate²⁸⁵ and provide evidence²⁸⁶ that it was more probable than not (i) that he would not reoffend and (ii) that he had intended to assist the victims.²⁸⁷ Bemba provided no such evidence,²⁸⁸ and there was none. In April 2016, the Registry indicated that it had no information about any measure undertaken by Bemba to compensate the victims of the crimes for which he now stands convicted,²⁸⁹ despite his consistent knowledge.²⁹⁰ And tellingly, Bemba has reoffended: although the Chamber did not consider the article 70 proceedings,²⁹¹ as recently as 19 October

²⁸¹ [Al Mahdi TJ](#), para. 74 (“[t]he Chamber must be convinced of the existence of mitigating circumstances on a balance of probabilities”). Similarly, on aggravating circumstances: para. 73 (“[t]he Chamber must be convinced of the existence of aggravating circumstances beyond reasonable doubt”).

²⁸² [Lubanga SD](#), para. 34 and [Katanga SD](#), para. 34, cited in [Decision](#), fn. 61.

²⁸³ No appellant is excused from the obligation to substantiate an argument to show an error. [Lubanga AJ](#), paras. 29-34.

²⁸⁴ [Brief](#), paras. 95-96.

²⁸⁵ See [Muhimana AJ](#), para. 231 (the accused “bears the burden of establishing mitigating factors by a preponderance of the evidence”); [Stakić AJ](#), para. 406 (“Concerning other potential mitigating factors, [...] the burden of proof is on the Appellant to show that they exist”).

²⁸⁶ Black’s Law Dictionary definition of the standard, as quoted by Trial Chamber I in its [Lubanga Reparations Decision](#) (fn. 439) where the same standard was deemed applicable: “The term ‘balance of probabilities’ is also described as a ‘preponderance of proof’ or ‘balance of probability’. Black’s Law Dictionary defines it as: ‘the greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.’” Black’s Law Dictionary, p. 1220.

²⁸⁷ [Decision](#), para. 70 (referring to [Defence Sentence Submissions](#), paras. 85, 99-103). *Contra* [Brief](#), para. 95.

²⁸⁸ [Defence Sentence Submissions](#), paras. 85 (merely stating that Bemba is no longer in command of any forces and will not act as a military commander or send troops into a foreign intervention in the country) and 99 (simply stating that “[p]rior to the freezing of his assets, Mr. Bemba had no means of identifying the victims of MLC crimes”).

²⁸⁹ [Decision](#), para. 70, fn. 215 (citing [Registry Solvency and Conduct Report](#), para. 6.) [REDACTED].

²⁹⁰ [Decision](#), para. 62; [Judgment](#), paras. 706-717.

²⁹¹ [Decision](#), para. 80.

2016, Trial Chamber VII convicted Bemba of offences against the administration of justice pursuant to articles 70(1)(a), (b) and (c).²⁹²

99. The Chamber was thus left to “speculate in the abstract as to what Mr Bemba might have done, might have been willing to do, or might do in future”²⁹³, which is clearly insufficient to discharge the Defence’s burden and establish a mitigating factor on a balance of probabilities. This approach is consistent with the jurisprudence of this and other international criminal tribunals where unsubstantiated allegations are similarly and sensibly dismissed.²⁹⁴ Likewise, Bemba’s submissions on appeal must be rejected.

B. The Chamber reasonably gave no weight to Bemba’s family circumstances as a mitigating factor

100. The Chamber reasonably gave no weight to Bemba’s family situation (*i.e.* being married and having five grown children).²⁹⁵ Bemba fails to show error. Article 78(1)—requiring the Chamber to take into account the convicted person’s individual circumstances—does not mean that *any* “individual circumstance” (and much less simply having a family) operates as a mitigating factor.²⁹⁶ In this case, the Chamber assessed Bemba’s family circumstances²⁹⁷ and reasonably considered that they are common to many convicted persons—thus not exceptional—and attached no weight to them.²⁹⁸

²⁹² [Bemba et al TJ](#), p. 455.

²⁹³ [Decision](#), para. 70.

²⁹⁴ [Bemba et al Mangenda AC Compensation Decision](#), paras. 27-28; [Lubanga AJ](#), para. 30. See also [Dorđević AJ](#), para. 945: “a trial chamber is not ‘under an obligation to hunt for information that counsel did not put before it at the appropriate time’”; [Kvočka AJ](#), para. 711, [Karera AJ](#), para. 388 and [Galić AJ](#), para. 426 - all cited in [Decision](#), para. 70, fn. 216. See further [Stakić AJ](#), para. 406 (above, fn. 287).

²⁹⁵ [Decision](#), paras. 77-78. *Contra* [Brief](#), paras. 98, 101.

²⁹⁶ *Contra* [Brief](#), paras. 100-101 and fn. 181 (citing [Kunarac AJ](#), para. 362).

²⁹⁷ [Decision](#), paras. 68-69 (where the Chamber identifies Bemba’s circumstances that do not relate directly to the crimes or to his culpable conduct) and 77-78 (where the Chamber considers Bemba’s submissions on his family situation). See [Decision](#), para. 12 (fns. 34-36 citing [Lubanga SAJ](#), paras. 32-35) where the Chamber explains how it will conduct its assessment.

²⁹⁸ [Decision](#), para. 78. See also fn. 243 (“Family circumstances are accorded little, if any weight, in sentencing, unless exceptional.”) and authorities cited. See further [Prlić TJ](#) (Volume 4), paras. 1358 (on Petković: “The

101. “[W]ider jurisprudence” does not prove the Chamber was in error.²⁹⁹ Given the vastly distinct personal and family situations of convicted persons, the relevance and weight of these factors are necessarily case-specific, and related jurisprudence must be approached with caution. For example, Katanga committed the crimes at a young age and was the father of six young children when he was convicted.³⁰⁰ According to Trial Chamber II, these factors made “[Katanga’s] rehabilitation and reintegration easier”.³⁰¹ In any event, “very limited weight” was accorded to them.³⁰² Conversely, Bemba was 40 years old and already a father of five children when he committed the crimes.³⁰³ Bemba has not explained why his family situation would now facilitate his rehabilitation and reintegration when the same circumstances did not deter his criminal conduct back in 2002-2003.³⁰⁴

102. Nor does jurisprudence of other tribunals, with different legal frameworks,³⁰⁵ suggest that Bemba’s family situation should mitigate his sentence.³⁰⁶ If anything, the

Chamber deems in this case that the age and family situation of the Accused Petković, namely that he is 63 years-old and the father of two married daughters, do not constitute mitigating circumstances.”), 1373 (on Ćorić—stating that his family situation is not a mitigating circumstance although it had considered it during his detention) and 1384 (on Pušić—noting that his family situation – married and father of three children - is a mitigating factor with no weight). See also on the need for exceptional circumstances for family situation to have weight in mitigation: [Nahimana AJ](#), para. 1069 (on Barayagwiza: “[a]s to a defendant’s family situation, the Tribunal and the ICTY do not treat it as an important factor, save in exceptional circumstances, the main factor being the gravity of the crimes.”). Also [Strugar TJ](#), para. 469 (considering the accused’s family circumstances as mitigating because both Strugar and his wife have poor health and being away from his wife would cause hardship to both.)

²⁹⁹ *Contra* [Brief](#), paras. 99-101.

³⁰⁰ [Katanga SD](#), paras. 81, 84, 88.

³⁰¹ [Katanga SD](#), para. 144.

³⁰² [Katanga SD](#), paras. 88 and 144, cited in [Decision](#), fn. 243.

³⁰³ [Judgment](#), para. 1. See Confidential [Defence Sentence Submissions](#), para. 82.

³⁰⁴ See also above fn. 292.

³⁰⁵ In determining the sentence, other international criminal tribunals have considered the practice of domestic jurisdictions. See [ICTY Statute](#), article 24(1) and Rules, rule 101 (B)(iii) (“the general practice regarding prison sentences in the courts of the former Yugoslavia); [ICTR Statute](#), article 23(1) and Rules, rule 101(B)(iii) (“the general practice regarding prison sentences in the courts of Rwanda”); [SCSL Statute](#), article 19(1) (“practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone”). See [Lubanga SAJ](#), para. 77 with respect to sentencing practices: “the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own Statute and legal instruments”.

³⁰⁶ *Contra* [Brief](#), paras. 100, 101.

cases cited underscore the fact-sensitive nature—and great discretion³⁰⁷—of the Chambers’ determination in this regard:

- In *Kunarac*, the Appeals Chamber “[had] recourse to the practice of the courts of the former Yugoslavia” when it found that the Trial Chamber should have considered that Kunarac was the father of three young children as mitigating factor.³⁰⁸ However, the Appeals Chamber effectively gave no weight to this factor and affirmed the sentence in light of the number and severity of the offences committed.³⁰⁹
- *Babić* and *Blaškić* are inapposite because of their different personal situations. Babić was a protected witness and feared retribution from those who viewed him as a traitor.³¹⁰ In *Blaškić*, the Chamber considered multiple factors, such as Blaškić’s lack of criminal record, his professionalism and the assistance he rendered to some victims, and concluded that “the weight [of these factors] is limited or even non-existent”.³¹¹

³⁰⁷ [Decision](#), para. 19 (“The Chamber has a considerable degree of discretion, in light of the particular circumstances of a case, in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded thereto”). Also [Milošević AJ](#), para. 316 (“what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion. The Trial Chamber is endowed with a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified”). Also [Stanišić and Župljanin AJ](#), para. 1130; [Ntabakuze AJ](#), para. 280; [Ndahimana AJ](#), para. 223. The jurisprudence regarding “personal circumstances”, including family situation, is not consistent in the *ad hoc* tribunals. See Holá, p. 71 noting that some chambers have accepted personal (including family) circumstances in mitigation without qualification (*see below*, fn. 308); others have assigned limited weight (*see below* fns. 312-315) and others have refused to accept them in mitigation because they are common among many accused persons (*see above*, fn. 298).

³⁰⁸ [Kunarac AJ](#), para. 362, cited in [Brief](#), para. 100 (fns. 180-181). The Trial Chambers in [Hadžihasanović TJ](#), para. 2079 and [Vasiljević TJ](#), para. 300 followed the same approach. [Brief](#), paras. 100 and 101 (fns. 184 and 186).

³⁰⁹ [Kunarac AJ](#), paras. 362, 413.

³¹⁰ [Babić SJ](#), paras. 87-89. Moreover, the Appeals Chamber held that the convicted person’s “good character” (being a law abiding citizen) is not always a mitigating factor, “varies with the circumstances” and, “in isolation”, only counts in mitigation in exceptional circumstances. [Babić SAJ](#), paras. 49-50. Bemba selectively quotes [Babić SAJ](#), para. 49 at [Brief](#), para. 100 (fn. 182). The full quote reads: “while it is correct to say that good character has been recognised as a mitigating circumstance in most cases, this is not a constant practice but instead varies with the circumstances”. If considered, it has been given “little weight”. See [Furundžija TJ](#), para. 284 and [Jelisić TJ](#), para. 124. *Contra* [Brief](#), para. 100 (fns. 182-183).

³¹¹ [Blaškić TJ](#), paras. 780-782.

- Other cases cited—*Ntabakuze*,³¹² *Furundžija*,³¹³ *Jelisić*³¹⁴ and *Banović*³¹⁵—do not demonstrate that the Chamber’s decision was unreasonable.³¹⁶ Rather, those Chambers noted an array of diverse factors related to the convicted persons’ situation, which went beyond having a family, and which were given none or insignificant weight, as those circumstances “may be said of many accused persons”.³¹⁷

103. In conclusion, Bemba fails to show an error in the Chamber’s decision to accord no weight to his family situation. Even if *arguendo* the Chamber erred and should have given some weight to this factor, such error would have a “marginal” impact on the Decision, as Bemba concedes,³¹⁸ due to the gravity of the crimes and Bemba’s culpable conduct compounded by the absence of any other error in the Chamber’s Decision.³¹⁹

³¹² [Ntabakuze AJ](#), para. 284 referring to Ntabakuze’s family situation, his lengthy public service, his social, educational and professional background. The Chamber however concluded that “the aggravating factors greatly outweighed these mitigating factors [and] that in general only little weight is afforded to the family situation of the convicted person in the absence of exceptional family circumstances” cited in [Decision](#), para. 78, fn. 243. *Contra* [Brief](#), para. 100 (fn. 183).

³¹³ [Furundžija TJ](#), para. 284. The Chamber referred to Furundžija’s young age (23 years) at the time of the commission of crimes. Then it noted his lack of previous convictions and his young child and concluded that “this may be said of many accused persons and cannot be given any significant weight in a case of gravity”. *Contra* [Brief](#), para. 101 (fn. 186).

³¹⁴ [Jelisić TJ](#), para. 124 referring to his young age when the crimes were committed (23). The Chamber also noted his lack of prior convictions for violent crimes and that he was the father of a young child and concluded, like *Furundžija*, that “many accused are in that same situation and, in so serious a case, the Judges cannot accord too great a weight to considerations of this sort”. *Contra* [Brief](#), para. 101 (fn. 186).

³¹⁵ [Banović TJ](#), paras. 74-76 referring to Banović’s young age, his wife’s unemployment and his three years-old son, lack of prior conviction and involvement in politics, his good character before the war. Nevertheless, the Chamber added that “these factors cannot play any significant part in mitigating international crimes [as] many accused share these personal factors and, in the Trial Chamber’s view, the weight to be accorded to them is limited”. *Contra* [Brief](#), para. 101 (fn. 186).

³¹⁶ *Contra* [Brief](#), paras. 100-101.

³¹⁷ [Furundžija TJ](#), para. 284. *See above* fns. 312-315.

³¹⁸ [Brief](#), para. 101.

³¹⁹ [Decision](#), paras. 32, 40, 51, 67. *See* [Nahimana AJ](#), para. 1108: “The Appeals Chamber notes that, in general, the Tribunal and the ICTY do not accord great weight to the family situation of the accused, given the gravity of the crimes committed. Therefore, even if the Trial Chamber had erred, such error could not have had any impact in this particular case, given the gravity of the crimes committed by the Appellant and the absence of exceptional family circumstances.” *See also* [Kunarac AJ](#), para. 413.

C. The Chamber reasonably rejected Bemba's submissions on peace building in DRC as a mitigating factor

104. The Chamber reasonably declined to consider Bemba's alleged peace-building efforts in the DRC as a mitigating factor.³²⁰ Bemba fails to show an error in the Chamber's decision.

i. The Chamber considered all relevant evidence

105. *First*, the Chamber considered Bemba's brief and vague submissions and evidence presented on this topic.³²¹ Although the Chamber need not have expressly referred to or commented on all the evidence,³²² the Chamber nevertheless referred to the alleged MLC goal of establishing a democratic DRC, to the MLC being party to the 1999 Lusaka ceasefire agreement and the Sun City negotiations,³²³ and to Bemba's purported role in negotiating an end to the Hema and Lendu conflict in Ituri in 2001³²⁴ and in contributing to the well-being of the population of *Équateur* Province (DRC).³²⁵

³²⁰ [Decision](#), paras. 71-76. *Contra* [Brief](#), paras. 102-127.

³²¹ *Contra* [Brief](#), paras. 104, 107, 109-111.

³²² The Chamber must however consider all relevant evidence admitted and submissions made at trial. *See* [Decision](#), para. 9 (citing [Lubanga SAJ](#), paras. 69-70); [Munyakazi AJ](#), para. 174. The Chamber cannot be found in error for not expressly referring to three lines from a statement from the President of the Security Council (congratulating Mr Kabila for his 2006 electoral victory and welcoming Bemba's reaction to his defeat) which the Defence referred to in passing in its Oral Submissions (T-370, 43:2-5; *contra* [Brief](#), paras. 110-111); to the letter of Mr Louis Michel (former Belgian MFA) drafted upon the Defence's request ([Brief](#), para. 109) which in any event the Chamber clearly considered (*see below* fn. 323); or to the 2003 integration of the MLC military wing into the FARC, which does not clearly feature in the Defence Sentence Submissions (*contra* [Brief](#), paras. 103, 105) and which the Chamber nevertheless considered in the context of the Sun City negotiations and D63's evidence ([Decision](#), para. 73 (fns. 225, 227); *contra* [Brief](#), paras. 105, 107).

³²³ [Decision](#), para. 71 (citing [Defence Sentence Submissions](#), paras. 75-76 and Defence Sentence Oral Submissions (T-370), 41:13-42:18). The Chamber thus clearly considered the 2008 letter written by Mr Louis Michel (former Belgian MFA) upon the Defence's request. *Contra* [Brief](#), paras. 109-110.

³²⁴ [Decision](#), para. 71 (citing [Defence Sentence Submissions](#), paras. 77-78 and Defence Sentence Oral Submissions (T-370), 40:10-41:12).

³²⁵ [Decision](#), para. 71 (citing [Defence Sentence Submissions](#), para. 81 and Defence Sentence Oral Submissions (T-370), 43:6-23, where the Defence referred to Monseigneur Fridolin Ambongo's testimony).

106. Further, the Chamber also reasoned why Bemba's alleged peace-building efforts in the DRC did not appear "sincere, genuine, or ever implemented". The Chamber noted that:³²⁶

- The ALC still existed and possessed weapons in October 2002, and thus the Lusaka ceasefire and disarmament agreement was never implemented;³²⁷
- P15 testified that Bemba refused to implement the first agreement reached in Sun City in early 2002, delaying and complicating negotiations until a second agreement was signed in early 2003;³²⁸
- Before, during and after the negotiations and other alleged acts, Bemba and the MLC were engaged in the 2002-2003 CAR Operation during which MLC soldiers committed murder, rape and pillage, and in conflicts in other regions of the DRC where MLC soldiers were allegedly committing crimes against civilians;³²⁹ and
- The only evidence regarding Bemba's role to end the Hema and Lendu conflict in 2001 was his own book.³³⁰ D63 (Monseigneur Fridolin Ambongo) was unable to provide clear and first-hand information concerning Bemba's role in such negotiations.³³¹

107. In addition, the jurisprudence cited by Bemba is distinguishable because the convicted persons contributed with concrete and genuine measures to rectify the damage caused by the conflict to which their crimes related.³³² In any event, this

³²⁶ [Decision](#), para. 73. *Contra* [Brief](#), paras. 104, 113.

³²⁷ [Decision](#), para. 73 (fn. 224) citing [Judgment](#), fn. 1269.

³²⁸ [Decision](#), para. 73 (fn. 225) citing T-208 38:8-20, T-209-CONF, 49:24-53:11; T-210-CONF, 4:1-9.

³²⁹ [Decision](#), para. 74 (fns. 228-229) citing [Judgment](#), paras. 380, 461, 486, 520, 525, 527, 531, 534, 543, 563, 671, 677, 688 and 397-400, 403. *See also* T-368, 64:3-65:16.

³³⁰ [Decision](#), para. 73 (fn. 226) citing [Defence Sentence Submissions](#), fns. 173-177.

³³¹ [Decision](#), para. 73 (fn. 227) citing T-368, 66:15-21.

³³² [Blagojević TJ](#), paras. 858-860 (planning, managing and organising a system of demining in the army of the Republika Srpska); [Milošević TJ](#), para. 1003 (negotiating and signing the Anti-sniping Agreement, which the Appeals Chamber noted was "to some extent" implemented: [Milošević AJ](#), para. 317); [Plavšić SJ](#), paras. 86-94 where the Chamber rehearsed the evidence presented to support Plavšić's support to the Dayton agreement; [Katanga SD](#), paras. 91 (requiring that the peace efforts be "palpable and genuine, without the need to demand results") and 109-115. Cited in [Brief](#), para. 108.

jurisprudence is of limited guidance in light of the Chambers' discretion to assess the circumstances of a particular case and the fact-sensitive nature of such determinations.³³³

ii. The Chamber reasonably found that Bemba's actions showed no awareness of the wrongfulness of his actions in CAR

108. *Second*, the Chamber's finding that Bemba's purported peace-building efforts in DRC, even if accepted, were "unrelated to the CAR"³³⁴ was not determinative.³³⁵ The Chamber had already refused to consider this factor in mitigation because such alleged efforts were not implemented and appeared insincere.³³⁶ In any event, this finding was entirely reasonable on the facts. While factors in mitigation need not necessarily be directly related to the crimes and are not limited by the scope of the charges,³³⁷ the converse is not true. Thus, a Chamber has discretion to require a connection with respect to certain mitigating factors such as those alleged by Bemba.³³⁸ To hold otherwise would unnecessarily curtail a Chamber's discretion in determining an appropriate sentence.

109. Hence, in addressing Bemba's purported good deeds in DRC, the Chamber reasonably required a link between his actions and this case and its victims. Bemba presented none. Indeed, Bemba's alleged assistance to the peace process in DRC, leaving aside its insincerity and uneven implementation, showed no "awareness of the wrongfulness of his actions or his intentions to make amends by promoting peace in the CAR or assistance to the victims".³³⁹ If anything, his actions in the DRC underscored his omissions in the CAR, where he had opportunities to engage in peace efforts and to assist civilians, and the experience and capacity to do so.³⁴⁰

³³³ Holá, pp. 69-70.

³³⁴ [Decision](#), para. 75.

³³⁵ *Contra* [Brief](#), paras. 114-120.

³³⁶ [Decision](#), paras. 72-74. See [Decision](#), para. 75: "[i]n any event".

³³⁷ Such as cooperation with the Prosecution. See [Katanga SD](#), para. 32, cited in [Decision](#), para. 19, fn. 62.

³³⁸ See also [Decision](#), para. 72.

³³⁹ [Decision](#), para. 76.

³⁴⁰ [Decision](#), para. 76.

Instead, Bemba's actions in the CAR created the circumstances in which the crimes for which he was convicted were committed.³⁴¹ As such, it would be absurd to consider Bemba's actions in DRC to mitigate his sentence.

110. Further, the Chamber's approach is consistent with jurisprudence of this and other tribunals where, to be considered in mitigation, the convicted person's peace-building efforts or assistance to victims had to have a direct connection with the charges³⁴² or sought to rectify the damage caused by the conflict and to alleviate the suffering of the victims.³⁴³ This case law also indicates that selective assistance to some victims (such those of the same ethnicity as the convicted person) has been accorded little or no weight.³⁴⁴

iii. The Chamber did not use Bemba's alleged peace building efforts in DRC to his detriment

111. Finally, the Chamber did not use Bemba's alleged peace-building efforts in DRC "against him", either as an aggravating factor or in the Chamber's assessment

³⁴¹ [Decision](#), para. 75. Chambers have refused to consider in mitigation actions in assistance taken by persons who were in a position, such as Bemba, to take steps to control or prevent the crimes. See [Krajišnik TJ](#), para. 1162 and [Delalić et al. AJ](#), para. 776 (noting that Mucić "was a commander who was in a position to take steps to control and prevent all acts of violence").

³⁴² [Kunarac AJ](#), para. 408 (refusing to consider in mitigation Kunarac's aid to other Bosnian Muslims: "the Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked."). Some Chambers have even declined to consider assistance to the direct victims of the crimes in mitigation. See [Perišić TJ](#), para. 1831 (where the Chamber found that the accused had assisted his victims but declined to give any weight to this factor on the grounds that he "had himself helped precipitate this situation").

³⁴³ E.g. [Katanga SD](#), paras. 106-113 (demobilisation centre in Aveda, Ituri, the same region where Bogoro is located). See also [Krajišnik TJ](#), para. 1162 (permitting in mitigation contemporaneous actions to save lives or alleviate the suffering of the victims or persons of the same ethnicity as the victims); [Simić TJ](#), para. 1096 (noting that Miroslav Tadić helped some Bosnian Muslims during the war). See also the cases cited by Bemba in para. 108 of his [Brief](#) (see above, fn. 332).

³⁴⁴ [Munyakazi TJ](#), para. 520 ("it is well within the province of a Trial Chamber to disregard such 'selective assistance' to Tutsis as a mitigation factor"); [Muvunyi 2nd TJ](#), para. 150 ("[e]xercising its discretion, the Chamber does not consider that the assistance Muvunyi provided to a handful of Tutsis during the genocide warrants mitigation because it was limited and selective"); [Rukundo TJ](#), para. 602 ("the assistance provided by Rukundo to a selected number of Tutsi carries only limited, if any, weight as a mitigating factor"); [Kvočka AJ](#), para. 693 ("selective assistance is 'less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes'. It is less decisive still when those victims are assisted because they are known to the accused or they share similar characteristics with the accused. This suggests that they are being helped, not because they are innocent victims, but because the accused considers them to be 'like' himself."). Also cases cited in [Decision](#), para. 72, fn. 223.

of the gravity of the crimes and Bemba's culpable conduct.³⁴⁵ The Chamber simply addressed and dismissed Bemba's submissions that this factor should be considered in mitigation.³⁴⁶ Bemba fails to show that the Chamber's decision was unreasonable.

D. The Chamber reasonably attached no weight in mitigation to the minimal, inadequate and insincere measures taken by Bemba

112. Likewise, the Chamber sensibly reasoned that the "minimal and inadequate"³⁴⁷ measures taken by Bemba were "not properly and sincerely executed"³⁴⁸ and could not count in mitigation. Notably, Bemba does not dispute the insufficiency and dishonesty of his measures,³⁴⁹ but argues that they should nevertheless mitigate his sentence because they "would have had at least some effect".³⁵⁰ Bemba's arguments lack merit.

113. *First*, it fell squarely within the Chamber's discretion not to reward Bemba's insufficient and inadequate measures.³⁵¹ And it was the right decision. Despite learning about the crimes of murder, rape and pillage,³⁵² and despite having a wide range of available measures at his disposal,³⁵³ Bemba *chose* to only take certain minimal measures³⁵⁴ constituting a "grossly inadequate response" to address the entirety of the allegations.³⁵⁵ Rather, with these measures he merely sought "to

³⁴⁵ *Contra* [Brief](#), paras. 121-127.

³⁴⁶ [Decision](#), paras. 71-76.

³⁴⁷ [Decision](#), para. 65. See [Judgment](#), para. 727 ("the Chamber finds that the measures Mr Bemba took were a grossly inadequate response"; "[t]he inadequacy of the minimal measures Mr Bemba took").

³⁴⁸ [Judgment](#), para. 727: "they were not genuine, the manner in which such measures were executed, and the fact that only public allegations of crimes by MLC soldiers prompted any reaction, and then only to limited extent. There is no evidence that Mr Bemba took any measures in response to information transmitted internally within the MLC") and 728 ("[h]is primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty"). See also [Decision](#), para. 63.

³⁴⁹ [Brief](#), para. 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"). See also para. 131 ("whatever the underlying motivation" and "regardless of motivation").

³⁵⁰ [Brief](#), para. 133.

³⁵¹ [Judgment](#), para. 728; [Decision](#), para. 63.

³⁵² [Judgment](#), paras. 706-717.

³⁵³ [Judgment](#), para. 729-731.

³⁵⁴ [Decision](#), paras. 63, 65; [Judgment](#), paras. 727-728.

³⁵⁵ [Judgment](#), para. 727.

counter public allegations and [to] rehabilitate the public image of the MLC”.³⁵⁶ These actions both evidenced the means at Bemba’s disposal to prevent and repress the crimes³⁵⁷ and underscored his failures as a superior.³⁵⁸ It would be preposterous if he were now to be credited, and his sentence reduced, for these very same insincere actions which founded his criminal responsibility.

114. A review of the measures adopted confirm their insufficiency and insincerity:

- The Mondonga Inquiry, replete with procedural irregularities,³⁵⁹ did not pursue relevant leads, such as the responsibility of commanders and alleged perpetrators among Moustapha’s *Poudrier* Battalion and Moustapha himself. Rather, the Inquiry solely led to the court-martial trial in Gbadolite of seven low-ranking soldiers for pillaging minor goods and small sums of money.³⁶⁰
- Crimes and allegations attributed to MLC continued³⁶¹ after Bemba’s speech at PK12, where he warned his troops against further misconduct.³⁶²
- The Zongo Commission, established after public allegations of murder, rape and pillaging, was created to solely investigate whether pillaged

³⁵⁶ [Judgment](#), para. 728 (citing Section V(D), which includes paras. 582, 604).

³⁵⁷ [Judgment](#), para. 731 (“*In light of the wide range of available measures at his disposal*, the Chamber finds that the measures Mr Bemba did take patently fell short of ‘all necessary and reasonable measures’ to prevent and repress the commission of crimes within his material ability”). (emphasis added). See also [Judgment](#), paras. 697 (“Mr Bemba had disciplinary powers over MLC members, including the power to initiate inquiries and establish courts-martial”) and 703 (“Mr Bemba retained primary disciplinary authority over the MLC troops in the CAR, including through the establishment of commission of inquiry, powers of arrest, and the convening of courts-martial”). See further [Decision](#), para. 65 (“such [...] measures [...] demonstrate the means at Mr Bemba’s disposal to take measures to prevent and repress crimes.”).

³⁵⁸ [Judgment](#), paras. 728 (“Mr Bemba used the above minimal and inadequate measures as a basis to address *all* allegations of crimes against the MLC”), 731 (“In light of the wide range of available measures at his disposal, the Chamber finds that *the measures Mr Bemba did take patently fell short of ‘all necessary and reasonable measures’* to prevent or repress the commission of crimes within his material ability”). (emphasis added). [Decision](#), paras. 63 (“Mr Bemba did not genuinely intend to take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty”) and 65 (“Such ability [to use the means at Bemba’s disposal] underscores Mr Bemba’s superior failures.”).

³⁵⁹ [Judgment](#), para. 720. For example no guidelines were produced and the interviews were conducted in the middle of the night.

³⁶⁰ [Judgment](#), para. 720. See also paras. 582-589.

³⁶¹ [Judgment](#), para. 596.

³⁶² [Judgment](#), para. 721. See also paras. 594-596.

goods from the CAR were entering DRC through Zongo. It was only comprised of MLC officials who interviewed eight Zongo inhabitants who exercised public functions or worked for the MLC.³⁶³

- Although Bemba requested assistance in investigating allegations of MLC crimes in his letters to General Cissé on 4 January 2003 (UN Representative in the CAR)³⁶⁴ and to FIDH President Mr. Sidiki Kaba on 20 February 2003,³⁶⁵ there is no evidence that he took any concrete measure as a result of these steps.³⁶⁶
- Reporters were taken to Sibut to speak with a narrow selection of people, some of whom exercised public functions or were linked to Pattassé, and under the vigilance of MLC armed soldiers.³⁶⁷
- Some soldiers received no or minimal training prior to deployment.³⁶⁸ Moreover, the MLC code of conduct was deficient, not translated into Lingala and unevenly disseminated. For example, the Code did not contain provisions prohibiting the crime of pillaging,³⁶⁹ and some MLC troops were not familiar or had not received training on the Code.³⁷⁰

115. *Second*, Bemba does not present evidence showing that the measures “were not isolated” and “would have had at least some effect”.³⁷¹ These are empty submissions insufficient to discharge his burden on appeal and prove that the Chamber’s decision was unreasonable.³⁷²

³⁶³ [Judgment](#), para. 722. *See also* paras. 601-603. Notably, no soldiers were interviewed and the definition of pillaging was limited and did not include the stealing of animals and mattresses, which were items frequently pillaged by MLC soldiers in the CAR.

³⁶⁴ [Judgment](#), para. 723. *See also* paras. 604-606.

³⁶⁵ [Judgment](#), para. 724. *See also* paras. 607-611.

³⁶⁶ [Judgment](#), paras. 723-724.

³⁶⁷ [Judgment](#), para. 725. *See also* paras. 612-620.

³⁶⁸ [Judgment](#), para. 391.

³⁶⁹ [Judgment](#), para. 392. Moreover, although the Code provided that a number of “infractions” (including “murder of a civilian or some other person” and “abduction and rape” “may be punishable by death”), it does not explain further nor does it distinguish between civilians and combatants.

³⁷⁰ [Judgment](#), para. 393.

³⁷¹ [Brief](#), para. 133.

³⁷² [Lubanga SAJ](#), paras. 41, 44-46.

116. Moreover, the cases cited are inapposite, as they are factually distinct.³⁷³ In any event, jurisprudence also indicates that insufficient, selective and insincere measures to prevent or punish the commission of crimes cannot be counted in mitigation.³⁷⁴

117. *Finally*, and contrary to Bemba's suggestion, the Chamber did not consider these measures to Bemba's "detriment".³⁷⁵ The Chamber simply addressed Bemba's submissions and reasonably concluded that "[the measures] do not reduce his culpability or justify mitigation".³⁷⁶ Moreover, and to the extent that Bemba disputes the Chamber's resort to these actions as evidence to establish his criminal liability, these submissions must be dismissed as he is effectively and improperly re-litigating the Judgment.³⁷⁷

E. The Chamber reasonably found that Bemba's rights were not violated

118. The Chamber reasonably found that because Bemba's rights were not violated while in detention, he did not merit a sentence reduction on this basis, and nor would it consider this factor in mitigation.³⁷⁸ Bemba shows no error; rather, he

³⁷³ [Brief](#), paras. 134-135 citing [Sikirica SJ](#), para. 242 (Kolundžija pled guilty for the crimes of persecution committed while he was shift leader at a camp while being aware of the inhumane conditions for over a month and a half. The Chamber considered in mitigation his genuine actions to alleviate the appalling conditions of some detainees, such giving them blankets and allowing them to use the toilets); [Serushago SJ](#), para. 38 (Serushago was the de facto leader of the *Interahamwe* militia and pled guilty to genocide, murder, torture and extermination. He also assisted many people to cross the border between Rwanda and DRC. *Contra*: selective assistance has not been considered in mitigation or attached little weight in other cases: *see above*, fn. 344); and [Al Mahdi TJ](#), paras. 89, 91, 93, 98-105 (Al Mahdi cooperated with the Prosecution, expressed genuine remorse for his acts and empathy to the victims and admitted his guilt as co-perpetrator for directing an attack against protected objects under article 8(2)(e)(iv) in Timbuktu. The Chamber considered as mitigating his recommendation not to use a bulldozer for all but one site and his initial reluctance to destroy the sites).

³⁷⁴ [Karadžić TJ](#), paras. 6053, 6064 (noting that Karadžić's alleged assistance to victims/detainees and prevention of crimes was not considered as mitigating due to the severe gravity of crimes and the accused's central involvement); [Stanišić and Župljanin TJ](#) (Volume 2), para. 953 (noting that Župljanin only issued "ineffective and general orders, which were not genuinely meant to be effectuated. Nor did he take steps to ensure that these orders were in fact carried out."). *See also* fns. 341-342, 344.

³⁷⁵ [Brief](#), para. 136.

³⁷⁶ [Decision](#), para. 65.

³⁷⁷ [Decision](#), fn. 196.

³⁷⁸ [Decision](#), paras. 88, 89. The Chamber noted that, throughout the proceedings, the Chamber has addressed and, where appropriate, remedied alleged rights violations. (*See* fn. 269). Moreover, throughout the proceedings the Defence has failed to substantiate its allegations of human rights violations. (*See* fn. 268).

improperly rehashes his sentencing submissions.³⁷⁹ But even then, by selectively glossing over the case's procedural background, he fails to show undue delay and, much less, any prosecutorial malfeasance or Chamber negligence in the conduct of the proceedings.³⁸⁰

- On 3 March 2009, Pre-Trial Chamber III adjourned the confirmation hearing and requested the Prosecution to consider amending the charges, as allowed by article 61(7)(c)(ii).³⁸¹
- The start of the trial was postponed to 22 November 2010 for several reasons, including the Defence appeal against the admissibility of the case.³⁸²
- In November 2011, rather than stalling the trial, the Chamber instructed the Prosecution to move forward its last witness (P69) to avoid non-sitting days before the winter recess.³⁸³ Moreover, P36's testimony was postponed for health reasons [REDACTED].³⁸⁴
- On 13 December 2011, the Chamber suspended the proceedings to allow the Defence to prepare its case in light of the regulation 55

³⁷⁹ Compare [Brief](#), para. 140 with [Defence Sentence Submissions](#), paras. 95-96. The Chamber addressed the Defence submissions and noted that it had failed to substantiate a violation. [Decision](#), para. 89. See fn. 268-269. *Contra* [Brief](#), para. 141

³⁸⁰ [Brief](#), para. 140.

³⁸¹ [Brief](#), para. 140 (fn. 234). See [Confirmation Hearing Decision](#), paras. 19-20.

³⁸² [Brief](#), para. 140. See T-30, p. 4, lns. 10-20, setting the date of commencement of trial because the Appeals Chamber had decided on the admissibility of the case and the schedule for the timely management of the pending victims' applications for participation in the proceedings had been settled. Notably, the Defence, in appealing the Chamber's admissibility decision, requested suspension of the proceedings until the Appeals Chamber ruled on the appeal. See [Trial Postponement Order](#) referring to [Suspensive Effect Application](#). Although the Appeals Chamber rejected the Defence request, the Chamber chose to wait until the judgment was issued. See [Suspensive Effect AD](#). Moreover, the Defence objected to the Prosecution's second amended DCC and, on 20 June 2010, the Chamber instructed the Prosecution to file another version by 13 October 2010. See [Judgment](#), para. 9. Further, on 20 July 2010, the Presidency constituted Trial Chamber III with its current composition: [Replacing TCIII Judges Decision](#).

³⁸³ *Contra* [Brief](#), para. 140 (fn. 236). See [Prosecution Witness Schedule Decision](#), para. 35. Witness P69 testified from 28 November until 2 December 2011 (T-192 to T-196).

³⁸⁴ And, after several postponements, the Chamber required the witness to testify on 13 March 2012. *Contra* [Brief](#), para. 140 (fn. 236). See generally [Scheduling Order Witness 36](#). Also, *Taavitsainen v Finland*, para. 37, does not stand for the broad proposition that "delay that was caused by logistical difficulties in calling witnesses is irrelevant [and] attributed [...] to the Prosecution" ([Brief](#), fn. 244). Rather, in a fact-sensitive judgment, the ECtHR held that the Government should have purchased video-conferencing equipment to facilitate the testimony of witnesses residing abroad. Because of such a lack of diligence, the delay of the proceedings was attributable to the Government.

notification, as required by regulation 55(2). Once the Defence asked to lift the suspension, the Chamber resumed the proceedings.³⁸⁵

- Over the 15-month period between the closing submissions and the Judgment, the Chamber decided on several Defence requests for relief for abuse of process, to stay the proceedings and for additional disclosure.³⁸⁶

119. Notably, in light of the particular circumstances of this case, the length of the proceedings was not unreasonable.³⁸⁷ Although in the past Bemba has relied on the complexity of the case,³⁸⁸ he now suggests that because this case was simpler than other ICC cases, the proceedings should have been shorter.³⁸⁹ This is unsustainable. Comparisons among cases are unsafe because no two cases are identical.³⁹⁰ Moreover, this case related to the superior responsibility of the President and Commander-in-Chief of a DRC-organised armed group, who was charged with international crimes committed by those troops in a foreign territory, the CAR.³⁹¹ It involved 77 witnesses and 733 items of evidence.³⁹² It involved novel factual and legal questions, both substantive and procedural.³⁹³ Bemba's first lead counsel died

³⁸⁵ [Brief](#), para. 140. See [Judgment](#), para. 11.

³⁸⁶ [Abuse of Process Decision](#) (and [Abuse of Process ALA Decision](#)); [Stay of Proceedings Decision](#); [Further Disclosure Decision](#). The Chamber also issued other decisions, such as: [P33 Reopening Decision](#); [Jeune Afrique Statement Decision](#) and [Jeune Afrique ALA Decision](#). *Contra* [Brief](#), paras. 140-142.

³⁸⁷ See *Minshall v. UK*, para. 45 ("The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants"). Although cited by Bemba ([Brief](#), fn. 242) this judgment does not support his proposition. Rather, if the factors outlined by the Court are considered, the length of the proceedings are not deemed unreasonable.

³⁸⁸ [Time Extension Request](#), paras. 10-12 (requesting an extension of the time limit to file the appeal brief against the Judgment in light of the appeal's factual and legal complexity due to the characteristics of the case); [Page Extension Request](#), para. 6 (requesting an extension of page limit on the same grounds).

³⁸⁹ [Brief](#), paras. 138, 141, 142.

³⁹⁰ Bemba case related to an accused person for five crimes committed within a limited geographical area for almost five months. *Lubanga* case also referred to one accused prosecuted for the war crime of enlisting, conscripting and using children under the age of fifteen to actively participate in hostilities under article 8(2)(e)(vii) in a confined territorial area (Ituri) for 15 months ([Lubanga TJ](#), paras. 1351-1357). *Katanga and Ngudjolo* case related to two accused for eight crimes against humanity and war crimes committed in one municipality one day. Notably, in *Katanga*, 22 months (23 May 2012 until 7 March 2014) elapsed from closing submissions until the Judgment was rendered ([Katanga TJ](#), paras. 7-10, 23).

³⁹¹ See *above* fn. 388, where Bemba relied on these facts to request an extension of time and pages to file his appeal brief against the Judgment.

³⁹² [Judgment](#), para. 17.

³⁹³ E.g. [Conditional Release AD](#); [Admissibility AD](#); [LoE Admission AD](#). See *above* fns. 381, 385-386.

in February 2012. During the case, offences against the administration of justice involving 14 witnesses by the accused himself, his lead counsel and his case manager (the latter two who were arrested in November 2013) were committed. This case was different from other ICC trials, yet equally complex.

120. Accordingly, as Bemba's rights were not violated while in detention, the Chamber reasonably refused to reduce his sentence on this basis or to consider this factor in mitigation.³⁹⁴ Nor does the selective ECtHR and domestic jurisprudence cited by Bemba show the unreasonableness of the Chamber's decision or reveal the Chamber's negligence in the conduct of the proceedings.³⁹⁵

121. Because of the foregoing, Bemba's submissions must be dismissed.

F. The Chamber reasonably dismissed Bemba's arguments that he was penalised by the seizure, freezing and depletion of his property

122. Bemba's submissions as to the depletion of his property are inaccurate in fact and incorrect in law. Their flaws only underscore the reasonableness of the Chamber's decision.

i. The Chamber reasonably declined to rule on Bemba's submissions as to the depreciation of his assets

123. The Chamber could not assess, and declined to rule on, the alleged depreciation of Bemba's assets.³⁹⁶ And reasonably so, because Bemba's cursory,

³⁹⁴ The cases cited by Bemba ([Brief](#), fn. 246) are inapposite because the relevant courts found that the proceedings' length were unreasonable. No such finding was entered in this case: *See Taavitsainen v. Finland*, paras. 37-39; *Beck v. Norway*, paras. 26-29; and *McCourt v HM Advocate*, para. 18. *Cocchiarella v. Italy*, paras. 17-23 and *Scordino v. Italy*, paras. 65-70 are equally inapposite. The paragraphs cited only indicate that the damages awarded by the Italian authorities for the breaches were found insufficient.

³⁹⁵ The facts of *Matwiejczuk v Poland*, paras. 24-35, 79, 86 are distinguishable from Bemba's as Poland had not adequately justified the 13-month gap between the confirmation of the indictment and the first hearing. Conversely, Bemba fails to substantiate any unreasonable and unjustified delay of the proceedings. Any analogy with *McCourt v HM Advocate*, paras. 15-16 (where the appeal court took 18 months to announce its decision on the appeals against the sentence where the issues were not of "unusual complexity" and the convicted persons had pled guilty) is similarly misplaced in light of the distinct facts. *Contra* [Brief](#), fn. 241.

³⁹⁶ [Decision](#), para. 84. This does not mean that the Chamber failed to consider Bemba's "economic condition" pursuant to rule 145 (1)(c). Rather, the Chamber considered Bemba's submissions on this topic ([Decision](#), para.

nebulous and inaccurate submissions, bereft of any supporting evidence, failed to establish their depreciation.³⁹⁷

124. Although Bemba alleges that [REDACTED],³⁹⁸ he provides no supporting evidence.³⁹⁹ There is none. In fact, [REDACTED],⁴⁰⁰ [REDACTED]⁴⁰¹ [REDACTED].⁴⁰² Significantly, [REDACTED] [REDACTED].⁴⁰³

125. [REDACTED]. [REDACTED].⁴⁰⁴ [REDACTED].⁴⁰⁵ [REDACTED].⁴⁰⁶

126. Thus, while Bemba alleges cooperation with the Court to trace and generate income from his assets, his conduct reveals the opposite.⁴⁰⁷ [REDACTED].⁴⁰⁸ [REDACTED].⁴⁰⁹ [REDACTED].⁴¹⁰

127. Finally, as the Chamber did not impose fines or forfeiture orders as penalties pursuant to article 77(2), and in light of the ongoing reparation proceedings, the Chamber aptly noted that Bemba had yet to exhaust all available and reasonable measures to address the value of his assets with the Registry or competent

68) but found that he had not proven the depreciation of his assets to be counted in mitigation ([Decision](#), paras. 82-84). *Contra* [Brief](#), paras. 145, 157.

³⁹⁷ *Contra* [Brief](#), paras. 159, 163-164. Bemba did not discharge his burden to prove on a balance of probabilities that the property had depreciated. Bemba's "extensive submissions" on the depreciation of his assets were limited to two paragraphs where he referred [REDACTED]. See Confidential [Defence Sentence Submissions](#), paras. 102-103; in particular, fns. 233 (citing CAR-D04-0005-0501), 234 ([REDACTED]) and 238 [REDACTED].

³⁹⁸ [Brief](#), paras. 148, 159 referring to Confidential [Defence Sentence Submissions](#), paras. 102-103.

³⁹⁹ Assets Declaration cited in [Brief](#), fn. 260.

⁴⁰⁰ [REDACTED].

⁴⁰¹ [REDACTED].

⁴⁰² [REDACTED].

⁴⁰³ [REDACTED]; [REDACTED].

⁴⁰⁴ [REDACTED]. [REDACTED] ([REDACTED].)

⁴⁰⁵ [REDACTED].

⁴⁰⁶ [REDACTED].

⁴⁰⁷ [REDACTED]; Fourth Registry Report, p. 4 noting that "the Defence failed to comply with the Decision to report to the Registry on a monthly basis as to the steps taken to free up funds; in addition, Mr. Bemba persistently failed to cooperate actively with the Registry and to provide sufficient and meaningful information in response to the Registry's various enquiries"; [REDACTED]; [REDACTED]. *Also* [REDACTED].

⁴⁰⁸ [REDACTED]. [REDACTED].

⁴⁰⁹ [REDACTED].

⁴¹⁰ [REDACTED]. [REDACTED].

authorities at the appropriate time.⁴¹¹ This is particularly so since Bemba has conceded that [REDACTED].⁴¹²

ii. The Chamber correctly found that article 57(3)(e) orders to identify, seize and freeze assets are not sanctions

128. Further, the Chamber correctly noted that orders of identification, seizure and freezing of Bemba's property and assets pursuant to article 57(3)(e) were not sanctions; rather, the orders were "*a protective measure for the purpose of forfeiture, in particular, for the ultimate benefit of the victims*".⁴¹³ Indeed, the issuance of such orders *for the purpose* of forfeiture must be distinguished from the *effective* forfeiture (or deprivation of property)⁴¹⁴ either as a penalty after conviction pursuant to article 77(2), or to benefit the victims for the purposes of a reparations award pursuant to article 75(2). As the Chamber expressly declined to penalise Bemba with a fine or forfeiture order,⁴¹⁵ no effective forfeiture has been effected for these purposes. Because of this, Bemba's submissions as to the computation of concurrent fines and imprisonment as penalties are inapposite.⁴¹⁶

129. However, Bemba's frozen assets can —and likely will— be used to benefit the victims pursuant to a reparations order in the context of the ongoing reparation proceedings before Trial Chamber III. Thus, the Chamber's remark as to the irrelevance of Bemba's assets for sentencing and their more appropriate bearing on reparations is unassailable.⁴¹⁷ Indeed, although a reparations order would always be

⁴¹¹ [Decision](#), para. 84.

⁴¹² [REDACTED].

⁴¹³ [Decision](#), para. 83. Emphasis added. See also para. 84 referring to Assets Decision, para. 7. See [ACRed-01/16 Asset Freezing AD](#), para. 45: "the Appeals Chamber is of the view that 'the purpose of forfeiture' referred to in article 57(3)(e) of the Statute does not refer only to the penalty of forfeiture under article 77(2)(b) of the Statute, but incorporates other types of forfeiture envisaged by the Statute and the Rules. [...] [A]s is apparent from rule 99 of the Rules of Procedure and Evidence, property may also be forfeited for the purpose of reparations pursuant to article 75 of the Statute." See also para. 49: "protective measures under article 57(3)(e) of the Statute must be taken 'in particular for the ultimate benefit of victims' and 'considers that this indication is consistent with the view that such measures may be taken in relation to a potential reparations order'".

⁴¹⁴ [ACRed-01/16 Asset Freezing AD](#), para. 45.

⁴¹⁵ [Decision](#), para. 95.

⁴¹⁶ [Brief](#), paras. 155-156.

⁴¹⁷ [Decision](#), para. 84. Contra [Brief](#), para. 154.

directed against the convicted person even if indigent,⁴¹⁸ his financial situation will nonetheless be considered, for example, in determining the adequate modalities of reparation. In the Amended Order for Reparations in the *Lubanga* case, the Appeals Chamber found that the availability of the convicted person's funds is relevant in determining whether compensation is a feasible modality of reparation.⁴¹⁹

iii. The Chamber reasonably declined to consider the alleged depreciation of Bemba's assets in mitigation

130. Finally, as the Chamber did not find that Bemba's assets were depreciated, it logically did not consider such a factor as relevant in mitigation of his sentence. Bemba's misleading arguments must be dismissed.⁴²⁰ Even if, *arguendo*, any such depreciation had been established, the Chamber's decision not to consider this factor in mitigation would still be reasonable, particularly considering Bemba's apparent failure to cooperate in tracing and freeing up his assets⁴²¹ (despite being a "man of considerable means"),⁴²² and his lack of assistance to victims⁴²³ (despite disingenuously claiming that he would have tried to compensate them, had he known their identities).⁴²⁴

131. In conclusion, the Chamber's decision not to give weight to any mitigating factor was correct in law and reasonable in fact. Bemba's submissions must be dismissed.

G. Conclusion

132. For these reasons, the Chamber did not err in rejecting mitigation of Bemba's sentence. Ground 3 should be dismissed.

⁴¹⁸ [Lubanga Reparations AJ](#), paras. 5, 70, 115, 116. In cases of indigence, the Trust Fund may advance its resources and the convicted person remains liable and must reimburse the Trust Fund.

⁴¹⁹ [Lubanga Reparations Amended Order](#), para. 37.

⁴²⁰ [Brief](#), paras. 157, 165-167.

⁴²¹ See *above* fns. 407 and 408.

⁴²² [Legal Assistance Decision Summary](#), para. 1.

⁴²³ [Decision](#), para. 84 citing [Registry Solvency and Conduct Report](#), para. 6.

⁴²⁴ [Brief](#), para. 95; [Defence Sentence Submissions](#), para. 99.

V. CONCLUSION AND RELIEF

133. Bemba fails to show that his 18-year joint sentence imposed upon him for his liability as a superior for his subordinates' crimes of rape, murder and pillage is manifestly excessive. To the contrary, as the Prosecution's appeal shows, his 18-year joint sentence does not reflect the totality of his culpability and should be revised upwards.

134. Bemba also fails to show that the Chamber erred in assessing the gravity of the crimes and his conduct. He further fails to show that the Chamber erred in evaluating the aggravating circumstances, and in rejecting mitigation of Bemba's sentence.

135. Accordingly, the Prosecution requests the Appeals Chamber to reject Bemba's appeal.

Word count: 24, 674⁴²⁵



Fatou Bensouda, Prosecutor

Dated this 2nd day of February 2017
At The Hague, The Netherlands

⁴²⁵ As of 6 December 2016, the Regulations of the Court were amended to modify *inter alia* regulations 36 and 38. Page limits are no longer calculated on the basis of "300 words per page average". On this basis, the word count/compliance with regulation 36 certification may no longer be necessary. Notwithstanding and pending the Appeals Chamber's directions, the Prosecution hereby makes the required certification: [Al Senussi AD](#), para. 32.