Cour Pénale Internationale

International Criminal Court

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THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

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

Public with Public Annex A, Confidential Annex B and Confidential Ex Parte Annex C Prosecution and Bemba Defence Only

Public Redacted Version of ''Corrigendum to the ''Bemba Defence Response to Prosecution's Appeal Brief on Sentence'', (ICC-01/05-01/13-2202-Conf-Red), 21 August 2017''

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

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

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INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Appeals Chamber to dismiss the Prosecution's Appeal against the sentence of Mr. Bemba, and relief requested, in its entirety.

2. The Prosecution's Appeal Against Sentence can be distilled to the simple fact that they disagree with the sentence imposed by Trial Chamber VII, and would have preferred that a longer custodial sentence be imposed. This is a patently inadequate foundation for appellate intervention.

3. Rather than identifying clear errors, the Prosecutor merely reiterates (8 times), that a sentence, which is **10** times greater than the average custodial sentence and **30** times more than the average fine imposed for contempt,[1] was "taken from the wrong shelf". But, if it was indeed taken from the wrong shelf, then the only error was that it was taken from a shelf that was too high.

4. The remaining arguments fail to demonstrate that that the Chamber erred by imposing a custodial sentence, which was too low. Indeed, many only serve to buttress Defence appellate arguments that the sentence was unfair and unduly onerous vis-à-vis Mr. Bemba. This includes the following arguments:

    a. The Chamber erred by imposing a fine that was based exclusively on Mr. Bemba's alleged assets rather than Mr. Bemba's culpability;[2]
    b. The Chamber was required to act in a manner that is consistent with the principle of legality;[3] and

[1] ICC-01/05-01/13-2167-Conf, para. 4.
[2] Appeal Brief, para. 71; *Cf* Defence arguments set out at ICC-01/05-01/13-2167-Conf, paras. 308-309.
[3] Appeal Brief, para. 124; *Cf* Defence arguments set out at ICC-01/05-01/13-2167-Conf, para. 77.

c. Rule 145(1)(b) is a balancing provision not a source of independent sentencing criteria.[4]

5. This response has been filed on a confidential *ex parte* Bemba Defence, Prosecution only basis due to the fact that it cites to financial information that has not been disclosed to the other parties. A confidential redacted version, and public redacted version will be filed forthwith.

GROUND ONE SHOULD BE DISMISSED

A. Sub-Ground 1: The Prosecution has failed to demonstrate that the Chamber abused its discretion by failing to impose a lengthier custodial sentence

1. II.A.1.A The sentence was not taken from a shelf that was too low

6. The main tenor of the Prosecution's first ground of appeal is that the Chamber erred by taking the sentence from the 'wrong shelf'. The Prosecution offers no legal criteria or relevant precedent as to why a 12-month custodial sentence and 300, 000 euro fine is a shelf <u>too low</u> for the Article 70 conviction of Mr. Bemba.

7. The ICTY and ICTR judgments cited by the Prosecution are distinguishable, and inapplicable to Article 70 offences, which are not sanctioned exclusively through a custodial sentence.

8. In particular, whereas the Prosecution has argued on the basis of these judgments that the Appeals Chamber can simply substitute a higher sentence for the one imposed by the Trial Chamber due to the Appeals Chamber's diverging opinion as to whether the sentence imposed was sufficiently harsh, in several of these judgments, the Appeals Chamber's decision to overturn

[4] Appeal Brief, para. 158; *Cf* Defence arguments set out at ICC-01/05-01/13-2167-Conf, paras. 105-106.

the sentence was linked to specific legal errors of the Trial Chamber. This included, for example, the Trial Chamber's treatment of the defendant as an accessory rather than principle perpetrator,[5] or the Trial Chamber's improper reliance on mitigating factors.[6]

9. The Simba Appeals Judgment also undermines the position of the Prosecution, by underscoring that the Appeals Chamber will not increase a sentence on appeal due to mere disagreement as to the Trial Chamber's assessment of the gravity.[7]

10. The exception, which is the *Galić* case, was accompanied by two strong dissenting opinions, and based on reasoning that it is not transposable to the current case. The Majority in that case granted the Prosecution appeal due to <u>exceptional</u> circumstances, namely that,[8]

> Galić's crimes were characterized by exceptional brutality and cruelty, his participation was systematic, prolonged and premeditated and he abused his senior position of VRS Corps commander. In the Appeals Chamber's view, the sentence imposed on Galić by the Trial Chamber falls outside the range of sentences available to it in the circumstances of this case.

11. The ICTY Appeals Chamber reached this determination in 2006, after the ICTY had already issued several judgments which allowed the Appeals Chamber to situate the siege of Sarajevo ("an anguishing environment in which, at a minimum hundreds of men, women, children, and elderly people

[5] *Semanza* AJ, paras. 388.
[6] *Duch* AJ, paras. 360-368.
[7] *Simba* AJ, para. 336
[8] *Galić* AJ, para. 455.

were killed, and thousands were wounded and more generally terrorized")[9] within the range of sentences that had been issued previously. This was the same objective rationale underlying the *Gacumbitsi* Appeals Judgment.[10]

12. In contrast, the gravamen of the Prosecution complaint is not that the Trial Chamber's failed to issue a sentence that fell within the standard sentencing range of conduct for this kind. Instead, the gist of the Prosecution complaint is that Chamber erred because it failed to craft an entirely new, and unsupported sentencing range for this case: to create a new shelf just for Mr. Bemba.

13. Indeed, if the Prosecution had applied the test enunciated in the Galic case to the facts before the Appeals Chamber, then it would be clear that that their appeal cannot succeed. According to Judge Shahabuddeen,[11]

> not every leniency betokens error, error is present where the court of appeal considers that the leniency calls into question the soundness of the conviction; where no reasonable Trial Chamber would have imposed a sentence as lenient as that passed, the Appeals Chamber must intervene in keeping with its mission.

14. To establish that "no reasonable Trial Chamber would have imposed a sentence as lenient as that passed", the Prosecution would need to establish that this sentence falls outside the ballpark for contempt sentences for similar conduct. Yet, as set out in the Defence Appeal Against Sentence,[12] if the sentence is outside the ballpark, it is because it is in fact <u>harsher</u> than the

[9] *Galić* AJ,para. 455.
[10] *Gacumbitsi* AJ, paras. 204-205
[11] *Galić* AJ Shahabuddeen's Separate Opinion, para. 37.
[12] ICC-01/05-01/13-2167-Conf, para. 4.

sanctions imposed for equivalent conduct at other courts and tribunals, and at a domestic level.

15. The Prosecution's claim that the sentences in this case are a manifest abuse of discretion, thus effectively asks the ICC Appeals Chamber to find that the wealth of contempt jurisprudence from these courts, and sentences imposed for similar conduct, were issued by Judges, who also manifestly abused their discretion. Such a claim is clearly untenable.

16. There is, moreover, no basis for jettisoning the sentencing yardsticks afforded by the other international courts. The ICC is clearly not bound by ICTY or ICTR precedents. But, although the ICC must craft its sentences in a manner that is consistent with the specific text of the ICC legal framework, the only key difference between the legal texts of the ICC and those of the ICTY/ICTR as concerns contempt sentencing is that the ICC must ensure that its contempt sentences are consistent with internationally recognised human rights. Given that this corpus of law militates against custodial or lengthy custodial sentences for non-violent offences,[13] this difference is grounds for lessening, rather than increasing the length of the custodial sentences imposed for contempt at the ICC.

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[13] As emphasised by the Parliamentary Assembly of the Council of Europe, "Community sanctions should be the punishment of choice, except when the seriousness of the crime prohibits any penalty other than a prison sentence." CoE, Resolution 1938(2013), Principle 1.
See also the following:
"When resorting to deprivation of liberty, States infringe upon one of the core human rights: the liberty of person. In order to justify such interference, States should apply deprivation of liberty as a measure of last resort and only after alternatives have been duly considered": A/HRC/30/19, para. 64 See also The Tokyo Rules, Rule 1.5. See also; The Tokyo Rules Commentary, p.17; see also UNODC Handbook, pp.4 and 11; see also Joint UN Commentary, pp.1-2.; see also Ireland Law Reform Commission: "*The Commission is unanimous in recommending that a sentence of imprisonment should only be regarded as a sanction of last resort.*", para.2.20, also, pp.7-8, para.5.1; NSW Law Reform Commission, July 2013, Recommendation 3.1. p.55: "(…) The court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate (imprisonment as a last resort)."

17. The integrity of justice is also neither more nor less important at the ICC than it was at the ICTY, ICTR and SCSL. The particular vulnerabilities of the ICC were experienced equally at its precedents. Indeed, the *Vujin* contempt judgment was heard at a time when the ICTY was experiencing significant difficulties in securing State cooperation from key States, and yet the sentence imposed on Mr. Vujin (15 000 guilders) was motivated by considerations of personal conduct shaped by the principle of legality, rather than political context. Although it is of course important that potential perpetrators are aware that Article 70 conduct will be prosecuted and punished at the ICC, this message will backfire if it is accompanied by sentences that appear to be based on political rather than legal considerations (for example, the imposition of 'strong sentences' in order to counter any perception that the ICC is weak).

18. The fact that, unlike the ICTY/ICTR/SCSL, the ICC is bound to apply the Statute in a manner that is consistent with international human rights law, warrants an additional degree of caution as concerns the imposition of a higher sentence on appeal, in particular, in light of Article 14(5) of the International Covenant on Civil and Political Rights, which provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".[14] As noted by Schabas, this provision operates to prevent the Appeals Chamber from increasing a sentence on appeal. [15]

[14] As concluded by the Human Rights Committee: "Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect." CCPR/C/GC/32. See also HRC, *Conde v. Spain*.
[15] *Schabas Commentary*, p.952.

19. In the *Lubanga* case, the Appeals Chamber did not exclude the possibility that a sentence could be increased, upon appeal by the Prosecution, although they did not positively endorse the possibility.[16] In any case, the fact that no higher form of review exists should, when considered in light of the unique circumstances of this case, serve to narrow the range of circumstances in which it would be appropriate to disturb the Trial Chamber's discretion by increasing the length of a custodial sentence on appeal.

20. In particular, additional caution is warranted in light of the fact that this is the first Article 70 case to be litigated before the ICC. If, under such circumstances, the Appeals Chamber were to find that the sentencing range imposed by the Trial Chamber in this case (and by the ICTY/ICTR/SCSL/STL in all other comparable cases) was manifestly unreasonable, then the correct sentencing parameters and principles would be established for the first time in the appeal judgment itself. The situation is thus distinguishable from ICTY and ICTR precedents, in which the defendants had some degree of notice as concerns the applicable sentencing parameters, due to prior sentences issued and confirmed on appeal at the Tribunal in question.

21. The situation is further distinguishable from ICTY/ICTR precedents, by virtue of the unique characteristics of contempt sanctions. Indeed, whereas the sentences in genocide, war crimes and crimes against humanity cases have been increased on appeal, the Defence is unaware of any example where that has occurred in a contempt case. [17]

22. Of further relevance, whereas an increased penalty in a war crimes/crimes against humanity case automatically equates to a lengthier custodial sentence, that is not the case with contempt: additional punishment could be achieved through a further fine, public reprimand, or additional suspended

[16] ICC-01/04-01/06-3122, para.3.
[17] See sentences set out in ICC-01/05-01/13-2089-AnxB.

sentence. A decision to increase the severity of the sanction would raise a host of legal issues that were never addressed at first instance, including the issue as to whether it would defeat the purpose of the statutory maximum of 5 years to impose a fine in addition to the maximum custodial sentence.[18]

23. Although this dilemma could be resolved by sending the case back to the Trial Chamber to determine a new sanction based on the correct parameters, such an option would also fall foul of Mr. Bemba's right to expeditious proceedings, which are of particular concern given his status as a detained person.

24. Accordingly even if the Appeals Chamber agrees that the sanctions imposed in this case are, in principle, too lenient ,a more appropriate, and proportionate option would be to clarify the appropriate range of sanctions that should be imposed for the conduct in question, without actually imposing it in this case on appeal. This would be consistent with the course of action adopted in the *Stakic*, and *Krstic* cases, and proposed by Judge Pocar in his dissenting Opinion in *Gatete*:

> I believe that the Appeals Chamber had another avenue before it under Article 24 of the Statute. The option available to the Appeals Chamber was the one taken in the *Krstic* Appeal Judgement. In that case, the Appeals Chamber found that the trial chamber committed an error of law in disallowing the appellant's convictions for extermination and for persecutions as crimes against humanity, on grounds that they were impermissibly cumulative with his conviction for genocide based on the same facts. However, rather than entering

[18] As underlined by the Parliamentary Assembly of the Council of Europe, "non-custodial sentences should be imposed as a replacement for prison sentences and not as a way of further widening the scope of criminal punishment"; it follows that the inclusion of the option of a fine in Article should be viewed as a mechanism for increasing the non-custodial options available to the Chamber, and not as a mechanism for increasing the overall punishment inflicted on the defendant. Principle 7, CoE Resolution 1938 (2013).

two new convictions on appeal against the appellant, the Appeals Chamber simply pronounced the trial chamber's findings erroneous and, in the Disposition, noted that the trial chamber had incorrectly disallowed the convictions. The Appeals Chamber corrected the trial chamber's error of law without entering a new conviction and thus, the appellant's right to an appeal was not violated. This approach was also adopted in, *inter alia*, the *Stakic* Appeal Judgement. Following such an avenue is preferable when the Appeals Chamber would consider, as in the present case, that a conviction should have no impact on the sentence.

25. In the *Jelisić* case, whilst the ICTY Appeals Chamber found that the Trial Chamber had erred by dismissing the genocide charge, it also found that it would not be in the interests of justice to send the case back for a re-trial;[19] the interests of deterrence were served through the Appeals Chamber's clarification of the applicable legal principles.

26. In the same manner, the exposition of future sentencing parameters for comparable conduct would act as an effective deterrent as concerns potential perpetrators, whilst ensuring that the defendants in this case are not unfairly sentenced in connection with penalties, whose propriety was never litigated before a higher Chamber.

2. II.A.2 The quantum of the sentence is not insufficient in light of the gravity of Mr. Bemba's conviction, and his culpability

27. The Prosecution has sought to demonstrate that the Chamber erred by imposing an insufficiently harsh sentence by firstly, relying on judicial statements concerning the gravity of Article 70 offences, and secondly, complaining that the overall sentence equates to a minimal sentence *per*

[19] *Jelisić* AJ, paras. 74-77.

charged incident. The first prong of this approach is fundamentally misconceived, and the second only serves to prove that the sentence imposed on Mr. Bemba is manifestly excessive in light of the established degree of his culpability.

28. As concerns the first element, the Prosecution's argument that Article 70 offences are grave, and should be taken seriously, is not contested. This argument nonetheless fails to disclose any basis for increasing the defendants' sentences in this case. The myriad of judicial pronouncements cited by the Prosecution on this point do nothing more than confirm that it is right and proper that the ICC has the jurisdiction and power to take measures to sanction all those who take steps to undermine the integrity of the proceedings before it.

29. At the same time, the Statute expressly contemplates that such offences, whilst grave, can be sanctioned <u>exclusively</u> through a fine, as reflected by the deliberate insertion of the word "or" in Article 70(3). In the very Appeals Judgment cited by the Prosecution, one appellate Judge noted firstly, that at the ICTY and ICTR, the sanctions imposed for contempt "in **<u>comparable</u>** cases are often relatively lenient" (emphasis added),[20] and secondly, that the same holds true for domestic jurisdictions.[21] The Judge further noted that the existence of a 5 year statute of limitations period further reinforced the statutory intent that such offences, whilst grave, should not be prosecuted or sanctioned in the same manner as serious crimes.[22]

[20] ICC-01/05-01/13-558-Anx2, Dissenting Opinion of Judge Usascka, para. 8.
[21] ICC-01/05-01/13-558-Anx2, paras. 9-10.
[22] ICC-01/05-01/13-558-Anx2, para. 8 citing Rule 164(2)

30. Whilst ICTY and ICTR case law has consistently affirmed the grave nature of contempt and offences against the administration of justice,[23] an ICTY Trial Chamber likewise observed that the sanctions for such offences are often "fines of a few thousand euros or light prison sentences not exceeding a few months".[24] The need to sanction contempt in a manner that is consistent with its gravity, does not necessarily equate to the imposition of a custodial sentence, let alone a sanction that is heavier than 12 months in custody and a fine of 300 000 euros.

31. The Prosecution's reliance on generic statements concerning the gravity of Article 70 offences therefore fails to reveal any error as concerns the Chamber's imposition of a sentence that is already at the highest spectrum of sanctions imposed for such offences.

32. The Prosecution's complaint that the sentence does not reflect the Chamber's findings of culpability from the Conviction Judgment, and "appears to dilute the nature of the contributions",[25] is incorrect, and as such, there is no basis for appellate intervention. The Prosecution has failed to identify any relevant factors or evidential findings that were not considered by the Trial Chamber in formulating Mr. Bemba's sentence. As demonstrated by the table below, the litany of generic findings referred to by the Prosecution at pages 23-27 were taken into consideration by the Trial Chamber in formulating the sentence; the recitation of factors that were fully accounted for therefore serves no appellate purpose.[26]

[23] *Beqaj* Contempt TJ, para. 60; *Jokić* Contempt TJ, para. 40; See also, *Pećanac* Contempt TJ, para. 41; *Tupajić* Contempt TJ, para. 33
[24] *Petković* TJ, para. 77.
[25] Appeal Brief, para. 37.
[26] In the absence of a manifest abuse of discretion, "*A Trial Chamber's sentencing decision may therefore only be disturbed on appeal if the Appellant shows that the Trial Chamber erred in the weighing process either by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered*." *Ndindabahizi* AJ, para. 132; See also ICC-01/04-01/06-3122, paras. 1-3.

FACTOR CITED BY OTP	FACTOR CITED BY CHAMBER IN SENTENCING JUDGMENT
Prevent discovery and derail the investigation (Para. 38)	Adopted a series of remedial measures to frustrate the article 70 investigation (Para. 238)
Mr. Bemba controlled the purse strings of his criminal scheme and with his authorisation Kilolo and Babala illegally paid witnesses (Para. 39, p. 23)	Mr. Bemba was in control of the payment scheme and authorised the payment of money, including illicit payments to witnesses prior to their testimony and ensured that financial means were available to Mr. Kilolo and Magenda (Para. 220)
Mr. Bemba spoke to D-55 on the phone to motivate him to give specific testimony (Para. 39, p. 24)	Mr. Bemba spoke on the phone with D-55 (Para. 220)
Mr. Bemba directed Kilolo and Magenda on what and how the witnesses were expected to testify (Para. 39, p. 24)	Mr. Bemba provided concrete instructions as to what and how witnesses should testify. Mr. Bemba was kept informed at all times about the illicit coaching (Para. 220)
Mr. Bemba approved the coaching strategy and gave directions (Para. 39,p.25)	Mr. Bemba exercised decision-making authority including giving directions concerning witnesses to be called and issued instructions concerning the coaching activities and the content thereof (Para. 221)
Abused privileged line (Para. 39, p. 25)	Mr. Bemba knew about the privileges afforded to him and together with Mr. Kilolo, deliberately abused it (Para. 236)
Transferred money to witnesses through third persons (Para. 39, p. 26)	The use of third parties to effect payments (Para. 208)
They distributed new telephones to witnesses to circumvent the WVU cut off date (Para. 39, p. 26)	The distribution of cell phones to some of the 14 Main Case Defence Witnesses without the knowledge of the Registry (Para. 208)
They used coded language in their communication (Para. 39, p. 26)	Mr. Bemba took steps, as agreed, to conceal the common plan, such as the use of coded language (Para. 220)
Bemba directed Kilolo to call each of the Defence witnesses the same night to ascertain whether any of them had leaked information to the Prosecution (Para. 39, p. 27)	Mr. Bemba instructed Mr. Kilolo to immediately contact, in a *tour d'horizon*, all Main Case Defence Witness with a view to identify the person who had possibly leaked information to the Prosecution (Para. 238)

33. By the same token, the Prosecution's attempt to rely on the so-called disparity between the harsh words employed by the Presiding Judge at the

Judgment Hearing and in the Trial Judgement, and the actual sentences issued in the Sentencing Judgment,[27] is also misconceived. At the time of the Judgment hearing, the Chamber had not received any evidence or argument concerning the degree of Mr. Bemba's participation, his personal circumstances, or the existence of mitigating or aggravating circumstances. It would be plainly improper to use words issued before the sentencing hearing as a grounds for fettering the Chamber's discretion concerning its eventual decision.

34. The fact that Mr. Bemba's conduct was denounced in extremely harsh terms at the judgment hearing and in the Trial Judgment also constituted a sanction in itself. This, in turn, served as an effective measure of ensuring deterrence. The ICTR *GAA* case, which is relied upon by the Prosecution to stress the importance of deterrence,[28] refers specifically to 'denunciation' as an important component of contempt sentencing policies. The UN 'Tokyo Rules' also recognise that verbal sanctions, such as admonitions and reprimands, have a punitive element, and are an acceptable alternative to custodial measures.[29]

35. The ICC has itself used public deprecation as a tool for sanctioning forms of misconduct, and deterring repeat behaviour.[30] Of particular relevance, in *Mbarushimana,* the Majority of the Pre-Trial Chamber deprecated the practice of the Prosecution in using extremely leading questions during its investigative questioning of key witnesses (in some instances, effectively, implying that the witnesses should change their answers), but did not consider it necessary to sanction the specific staff members further.[31] The ICTY also found that a public reprimand was a sufficient sanction for a

[27] Appeal Brief, paras. 30-31.
[28] Appeal Brief, para. 55, fn. 140.
[29] Section 8.2
[30] ICC-01/09-42, para. 22; ICC-01/04-01/06-2433, paras. 50-52.
[31] ICC-01/04-01/10-465-Red, para. 51.

Prosecution trial attorney who failed to disclose information concerning assistance provided to a witness that might have influenced the content of the witness's testimony.[32]

36. Article 42(1)(a) and (b) of the Code of Conduct for Counsel further recognises that an admonishment or public reprimand constitutes a type of sanction for misconduct. Domestic practice further recognises that the stigma resulting from such adverse publicity can, in itself, constitute a sanction for contempt,[33] or otherwise warrant a sentence reduction.[34]

37. Given this legal framework, it would constitute a 'double punishment' to rely on Mr. Bemba's public denunciation in order to justify imposing additional sanctions on him.

38. In a clear attempt to downplay the actual harshness of the sanctions imposed on Mr. Bemba, the Prosecution also repeatedly fails to refer to, or account for the punitive aspect and deterrent effect of the 300 000 euros fine. For example, 'Table 1', which purports to reflect the breakdown of the sanction per charged offence, makes no reference to the fine. If broken down in the same manner, the fine would equate to 21,428 euros *per* witness, an amount which is still higher than the maximum fine that has been imposed by any other international court.[35]

39. The Prosecution attempt, through 'Table 1' , to analyse the sanction on a *per* witness basis, also serves to underscore the minimal degree of Mr. Bemba's

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[32] Haradinaj Disclosure Decision, paras.58-64.

[33] See *R (on application of Bempoa) v Southwark LBC*, in which the public humiliation attached to the public issuance of the judgment was found to be a sufficient sanction.

[34] Negative publicity has resulted in sentence reduction due to the stigma and related impact on integration and rehabilitation. See The Netherlands, Rb. Den Bosch (2010); The Netherlands, Rb. Oost Brabant (2013).

[35] The highest fine that has been imposed is 20, 000 euros: ICC-01/05-01/13-2089-AnxB.

own involvement in the charged offences. This, in turn, militate for a decrease rather than increase of sentence on appeal.

40. If the same table is broken down - as demonstrated below - in order to show the specific incidents concerning each witness, and the Chamber's findings concerning Mr. Bemba's involvement in each incident, it becomes abundantly clear that – even if all of the Chamber's evidential findings are affirmed on appeal – the degree of Mr. Bemba's involvement was extremely minimal.

WIT-NESS	CHAMBER'S FINDINGS		EVIDENTIAL BASIS FOR INCIDENT	EVIDENTIAL FINDING ON MR. BEMBA
D-57	**a)**	Corruptly influenced (USD 665).[36]	**No Evidence Re Corruption/ Based On Circular Inference**[37]	**No Finding Based On Evidence**
	b)	Illicitly coached with regards to his *prior contact with the Defence* and the *payment of money*.[38]	**No Evidence/ Based On Circular Inference**[39]	**No Finding Based On Evidence**
D-64	**a)**	Corruptly influenced (USD 700).[40]	**No Evidence Re Corruption/ Based On Circular Inference**[41]	The Chamber Found Mr. Bemba Had Knowledge Of This Payment But Did Not Make Specific Evidence-Based Finding Regarding Intent Or Authorization.[42]

[36] TJ, para.254
[37] See ICC-01/09-02/11-728-Anx3-Corr2-Red, para.20 concerning the fact that "more is required to prove fraud than the mere inference".
[38] TJ, para.252
[39] Annex B, p. 4.
[40] TJ, para.279, 281
[41] Annex B, p. 4-5.
[42] TJ, para.267. However, this adverse finding has been contested by the Defence of Mr. Bemba on appeal: *see* ICC-01/05-01/13-2144-Conf, para.51, 96, 134, 261, 325

	b)	Illicitly coached with regards to his *prior contact with the Defence* and *payment of money*.[43]	**No Evidence/ Based On Circular Inference**	**No Finding Based On Evidence**
D-55	**a)**	Illicitly coached with regards to his *prior contact with the Defence*, the *payment of money* and *non-monetary promises*.[44]	**No Evidence/ Based On Circular Inference**	**No Evidential Finding Concerning the Conduct of Mr. Bemba**[45]
	b)	Mr. Bemba spoke to D-55 in order to motivate him to give specific testimony.[46]	**No Evidence Re Motivation/ Based On Circular Inference**[47]	**Mr Bemba spoke with D-55 by telephone before his testimony and thanked him for agreeing to testify In his favour.**[48]
D-2	**a)**	Corruptly influenced through monetary promises and payments (550,000 CFAF and 100,000 CFAF)[49] and non-monetary promises (relocation to Europe).[50]	**No Evidence That D-2 Told To Lie About Contacts, That Payments Were For Corruption,**[51] **Or That The Defence Promised Relocation**[52]**/Based On Circular Inferences**[53]	**No Evidential Finding Concerning the Conduct of Mr. Bemba**[54]

[43] TJ, para.279
[44] TJ, para.303
[45] The Chamber found that D-55 lied about not having been promised that he would benefit from Mr Bemba's good graces (see TJ, para.692, para.301, 303), but did not make evidential findings regarding Mr. Bemba's conduct in this specific incident. This also has to be read in conjunction with D-55's testimony that Mr Bemba did not make any promises to him or otherwise discuss the content of his testimony (see ICC-01/05-01/13-T-36-CONF-ENG, p.36, lns 17-21, p.37, lns 10-15, p.65, lns 8-25, p.66 lns 1-12; see also TJ, para.293).
[46] TJ, para.298, 305
[47] Annex B, pp. 9-10.
[48] TJ, para.305. However, this adverse finding has been contested by the Defence of Mr. Bemba on appeal: *see* ICC-01/05-01/13-2144-Conf, paras. 122, 214, 242-245.
[49] TJ, para.374, para.419
[50] TJ, para.420
[51] D-2 testified that he did not view the receipt of the money as a bribe : ICC-01/05-01/13-T-19-CONF-ENG,p.39,lns.20-24,p.81,ln.23-p.82,ln.2; p. 35 lns. 2-15; ICC-01/05-01/13-T-20-CONF-ENF, p.16 lns.8-10.
[52] TJ, para 310; T-19 at page 78
[53] Annex B, pp. 6-7.
[54] D-2 claimed that MR. Kilolo told him the money was a ''small gift'' from Mr Bemba which the Chamber found to be an encouragement to testify, see TJ, para.374, 380. The Chamber nonetheless did not make any evidential finding concerning Mr. Bemba's conduct vis-a-vis this specific incident.

	b)	Illicitly coached with regards to: • *His prior contact with the Defence or the fact that their statements had not been recorded,*[55] • *The payment of money and any other sort of benefits,*[56] • *His acquaintance with third persons (Mr. Arido, Mr. Kokate and D-7),*[57] • *Specific aspects of his testimony (such as his military background).*[58]	**No Evidence That Defence Were Responsible For His Decision To Lie About His Military Background,[59] And Evidence Of Coaching Contradicted By Recording[60]**	**No Finding Based On Evidence**
	c)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order *through the distribution of a new phone.*[61]	**Evidence Contradicted By Call Data Records[62]**	**No Finding Based On Evidence**
D-3	**a)**	Corruptly influenced through monetary promises and payments (540 000 CFAF and 100,000 CFAF)[63] and non-monetary promises (relocation to Europe and meeting with Mr. Bemba in Kinshasa).[64]	**No Evidence That Payments Were For Corruption[65]/Based On Circular Inference[66]**	**No Evidential Finding Concerning the Conduct of Mr. Bemba[67]**

[55] TJ, para.412, para.400, para. 417
[56] TJ, para.412
[57] TJ, para.412
[58] TJ, para.416, 420
[59] D-2 testified that he was instructed to pretend to be CAR soldiers before he met the Defence: CAR-OTP-0080-0021, 0031 at lns.343-357; CAR-OTP-0080-0043, 0051 at lns.264-292; CAR-OTP-0080-0069, 0074 at lns.165-171
[60] D-2 testified that Mr. Kilolo coached him in May 2013 to include the issue of Thurayas in his testimony (T-19, p.12, lns 17-19), even though this issue was in the account he gave the Defence during the February 2012 meeting: T-19, pp.51- 52.
[61] TJ, para.418
[62] D-2 testified that he was told by Arido to lie about not having a phone (since he was pretending to live in the bush) and to demand a new one from the Defence: TJ, para. 131. D-2 also testified that during his testimony, he communicated with Mr. Kilolo on the following number (and not an unknown number), even though there are no records of these contacts in the call data records concerning this number: ICC-01/05-01/13-T-19-CONF-ENG, p. 21 lines 6-8;
[63] TJ, para.376, para.419
[64] TJ, para.417 and para.419

	b)	Illicitly coached with regards to: • *His prior contact with the Defence or the fact that their statements had not been recorded,*[68] • *The payment of money,* [69] • *His acquaintance with third persons (Mr. Arido, Kokate and D-7).* [70] • *Specific aspects of his testimony (such as his military background).*[71]	**No Evidence That Coached With Respect To Contacts With Defence**[72]	**No Finding Based On Evidence**
	c)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order *through the distribution of a new phone.*[73]	**Evidence Contradicted By Call Data Records**[74]	**No Finding Based On Evidence**
D-23	**a)**	Corruptly influenced (new laptop, 100 USD, 450,000 CFAF).[75]	**No Evidence/**[76] **Based On Circular Inference**[77]	**No Finding Based On Evidence**

[65] D-3 testified that he did not view the receipt of money as a bribe: ICC-01/05-01/13-T-23-CONF-ENG, p.11 lns.11-47.
[66] Annex B, pp. 8-9.
[67] The Chamber found that Mr. Kilolo promised the witnesses that once released from detention Mr. Bemba would meet the witnesses in Kinshasa to show his gratitude, see TJ, para.419. The Chamber nonetheless did not make any evidential finding concerning Mr. Bemba's conduct vis-a-vis this specific incident.
[68] TJ, para.400 and para.417
[69] TJ, para.413
[70] TJ, para.413
[71] TJ, para.416, 420
[72] Annex B, p. 8.
[73] TJ para.418
[74] The Chamber found that the witnesses were told by Arido to pretend not to have a phone and to demand a new one from the Defence. TJ, para. 131. D-3's claim to be in contact with Mr. Kilolo during his testimony is contradicted by the call data records.
[75] TJ. Para.453
[76] The witness testified in the Article 70 case that he did not view the money as a bribe: P-0261: ICC-01/05-01/13-T- 13-CONF-ENG, p.68 lns.13-17, p.69 lns.9-10; ICC-01/05-01/13-T-14-CONF-ENG, p.17 lns.10-22, p.19 lns.1- 28.
[77] Annex B, pp. 5-6.

	b)	Illicitly coached with regards to the *payment of money*, his *acquaintance with a third person* (Mr. Kokate), and *specific topics of his testimony*.[78]	**No Evidence/ Based On Circular Inferences**[79]	**No Finding Based On Evidence**
	c)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order *through the distribution of a new phone*.[80]		**No Finding Based On Evidence**
D-26	**a)**	Illicitly coached with regards to his *contact with the Defence* and *specific topics of his testimony*.[81]	**No Evidence/ Based On Circular Inferences**[82]	**No Finding Based On Evidence**
	b)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order.[83]		**No Finding Based On Evidence**
D-25	**a)**	Illicitly coached with regards to the *payment of money* and *specific aspects of his testimony*.[84]	**No Evidence/ Based On Circular Inferences**[85]	The Chamber found Mr. Bemba had knowledge and approved the illicit coaching of D-25 because of Mr. Bemba's reported satisfaction regarding the precision of his testimony.[86]
	b)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order.[87]	**No Evidence**[88]**/ Based On Circular Inference**	**No Finding Based On Evidence**

[78] TJ, para.452-453
[79] Annex B, pp. 5-6.
[80] TJ, para.445, 453
[81] TJ, para.475.
[82] Annex B, p. 6.
[83] TJ, para.476
[84] TJ, para.503
[85] Annex B, pp. 13-14.
[86] TJ, para.506. However, this adverse finding is contested by the Defence of Mr. Bemba on appeal: *see* ICC-01/05-01/13-2144-Conf, paras. 134, 214.
[87] TJ, para. 504
[88] The Trial Chamber acknowledged that it was unable to attribute a particular number to D-25, and as such, could not rely on CDRs to establish contact between D-25 and Mr. Kilolo : TJ, para 486. The Chamber nonetheless inferred that such contacts must have taken place: TJ, para. 497.

D-29	**a)**	Corruptly influenced (649.43 USD).[89]	**No Evidence That Purpose Was For Corruption/Based On Circular Inference**[90]	**No Finding Based On Evidence**
	b)	Illicitly coached regarding his *prior contact with the Defence*[91] and *acquaintance with Mr Kokaté*,[92] and the *payment of money*.[93]	**No Evidence**	**No Finding Based On Evidence**
D-15	**a)**	Illicitly coached regarding his prior contact with the Defence,[94] and the narrative of his testimony.[95]		Mr. Bemba knew about and approved Mr. Kilolo's Illicit Coaching Activities,[96] and Mr. Kilolo conveyed Mr. Bemba's satisfaction of his Performance in the Courtroom.[97]
	b)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order.[98]		**No Finding Based On Evidence**

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[89] TJ, para.541.
[90] Annex B, pp. 14-15.
[91] TJ, para.540.
[92] TJ, para.528.
[93] TJ, para.541.
[94] TJ, para.589
[95] TJ, para.590
[96] TJ, para.592. However, this adverse finding has been contested by the Defence of Mr. Bemba on appeal: *see* ICC-01/05-01/13-2144-Conf, paras.122, 134, 191 (fn 358), 232-241. This must also be read in conjunction with the Prosecution's concession that in light of the timing of the call, Mr. Bemba s conduct would not have had an impact on the content of the witnesses 'testimony, in particular that is it would be almost certainly too late to "solicit Mr Bemba's input concerning *answers* which could or should be given by the witness". See ICC-01/05-01/13-2170-Conf, para.510. In its Document Containing the Charges, the Prosecution case was that "as Lead Counsel for the Bemba Defence, Kilolo was responsible for the presentation of all evidence in the Bemba Case (para. 24).
[97] TJ, para.569
[98] 'TJ, para.590.

D-54	**a)**	Illicitly coached regarding his *prior contact with the Defence, the payment of money,* and *specific aspects of his testimony.*[99]	**No Evidence Regarding Payment Of Money/[100]Based On Inferences[101]**	The Chamber Found Mr. Bemba Had Knowledge, Approved And Directed (Through Mr. Mangenda) The Illicit Coaching Of D-54.[102]
	b)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order.[103]		**No Finding Based On Evidence**
D-13		Illicitly coached regarding his contact with the Defence, 8 and his expected testimony.[104]	**No Evidence/ Based On Inferences[105]**	**No Finding Based On Evidence**

[99] TJ, para.650, 651
[100] During his testimony, D-54 denied receiving any money or promises of assistance from the Defence : ICC-01/05-01/13-T-29-CONF-ENG,p.4 ln.24 – p.5 ln.11;; ICC-01/05-01/13-T-29-CONF-ENG,p.61 lns.6-18
[101] Annex B, pp. 10-11.
[102] TJ, para.653. However, this adverse finding is been contested by the Defence of Mr. Bemba on appeal: *see* ICC-01/05-01/13-2144-Conf, paras. 122, 134, 214, 215-231.
This must be read in light of the fact that the OTP has conceded that the conversation is at best relevant to Mr. Bemba's knowledge of Kilolo's coaching of D-54, but not Mr. Bemba's intent or contribution. See ICC-01/05-01/13-2170-Conf, para. 504.
[103] TJ, para.651
[104] TJ, para.666
[105] Annex B, p. 15

D-4	**a)**	Corruptly influenced through monetary promises and payments (550,000 CFAF and 100,000 CFAF).[106]	**No Evidence/ Based On Inferences**[107]	**No Finding Based On Evidence**
	b)	Illicitly coached with regards to: • *His acquaintance with third persons (Mr. Arido, Mr. Kokaté and D-7),*[108] • *Contact with and knowledge of members of defence,*[109] • *Payment of money or non-monetary benefits,*[110] • *Specific aspects of his testimony (such as his military background).*[111]	**No Evidence/ Based On Inferences**[112]	**No Finding Based On Evidence**
	c)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order *through the distribution of a new phone.*[113]	**No Evidence/ Based On Inferences**[114]	**No Finding Based On Evidence**

[106] TJ, para.419
[107] Annex B, pp. 2-3
[108] TJ, para.414
[109] TJ, para.366.
[110] TJ, para.366.
[111] TJ, paras.416-417, 420.
[112] Annex B, pp. 2-3
[113] TJ, para.418
[114] Annex B, pp. 2-3

D-6	**a)**	Corruptly influenced through monetary promises and payments (550,000 CFAF and 100,000 CFAF),[115] (USD 1,309.80)[116] and non-monetary promises/incentives.[117]	**No Evidence/ Based On Inferences**[118]	**No Evidential Finding Concerning The Conduct Of Mr. Bemba**[119]
	b)	Illicitly coached with regards to: • *Prior contact with the Defence,*[120] • *Introduction to Mr Kilolo by a 'committee designed to harmonise the evidence',*[121] • *The payment of money,* [122] • *his acquaintance with third persons (main case Defence witnesses),*[123] • *Specific aspects of his testimony (such as military background)*[124]	**No Evidence/ Based On Inferences**[125]	**No Finding Based On Evidence**
	c)	Improper contacts after the VWU cut-off point in violation of Trial Chamber III's court order *through the distribution of a new phone.*[126]	**No Evidence/Based On Inferences**[127]	**No Finding Based On Evidence**

[115] TJ, para.419
[116] TJ, para.397.
[117] TJ, para.419.
[118] Annex B, p. 3.
[119] The witness was informed by Mr. Kilolo that Bemba was pleased with testimony and would meet him once released, see TJ, para.419. The Chamber nonetheless did not make any evidential finding concerning Mr. Bemba's conduct vis-a-vis this specific incident.
[120] TJ, para.415.
[121] TJ, para.415.
[122] TJ, para.415.
[123] TJ, para.415.
[124] TJ, paras.416-417, 420.
[125] Annex B, p. 3.
[126] TJ, para.418, 420.
[127] Annex B, p. 3.

41. As set out above, the Chamber's findings concerning Mr. Bemba's conduct were limited to the following:

   a. Thanking D-55 for testifying;
   b. Giving feedback on the questions that Mr. Kilolo planned to put to D-15 during re-examination; and
   c. Providing instructions as concerns the lines of inquiry to pursue with a potential witness (D-54);
   d. Being aware of payments made to D-64.

42. The degree of Mr. Bemba's involvement and the nature of his actions cannot reasonably be characterised as being graver than ICTY/SCSL precedents, in which the defendants bribed Prosecution witnesses to change their testimony,[128] completely fabricated the entirety of the witnesses' testimony,[129] or procured false testimony through threats and intimidation.[130] When viewed through this lens (i.e. the minimal degree of Mr. Bemba's culpable conduct), it is clear that overall penalty imposed on Mr. Bemba was too harsh, not too lenient.

43. The Prosecution is obviously aware that the limited degree of Mr. Bemba's actual participation is the Achilles' heel in its appeal. The Prosecution therefore attempts to protect its position by arguing that Mr. Bemba's sentence should have been calculated by reference to his involvement in the common plan, rather than by reference to his involvement in the commission of the charged offences.[131]

[128] *Bangura* et al. TJ; *Senessie* TJ.
[129] *Rašić* SJ.
[130] *Tadić* Judgment on Contempt.
[131] Appeal Brief, para. 52.

44. As a first point, this argument should be summarily dismissed due to the fact that there is no evidence that the Chamber actually lessened Mr. Bemba's sentence as a result of the limited nature of his participation in the charged offences. Although the Chamber noted that Mr. Bemba's contributions were "of a somewhat restricted nature",[132] the custodial sentence of 12 months is more than the 11 months that were served by Mr. Kilolo and Mr. Mangenda. The fine of 300, 000 euros is ten times greater than the fine imposed on Mr. Kilolo. The Chamber's decision to maintain the arrest warrant and detention order, whilst denying Mr. Bemba any past or future credit, is also a far more stringent restraint than a suspended sentence. The Chamber's findings concerning the limited degree of Mr. Bemba's involvement had no impact on the penalties that were imposed on him.

45. The Prosecution's position is, in any case, legally flawed. Rule 145(1)(c) requires the Chamber to take into consideration "the degree of participation of the convicted person; the degree of intent". The mere fact that a defendant has been found to have participated in the charged offences, with intent, does not therefore, eliminate the Chamber's additional duty to assess the <u>degree</u> of this intent and participation, and to then tailor the sentence to the individual circumstances of the defendant.

46. The Prosecution has sought to evade this rule of sentencing by arguing that for the purposes of co-perpetration, the degree of Mr. Bemba's contribution to each of the charged offences is irrelevant. Instead, the Prosecution has requested the Appeals Chamber to accept that the degree of Mr. Bemba's culpability should be assessed in light of firstly, the Chamber's finding that he was a co-perpetrator, and secondly, his role in the general 'scheme' rather than the charged offences.[133]

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[132] SJ, para. 223.
[133] Appeal Brief, para. 52.

47. This approach is plainly wrong. If the Chamber's finding that Mr. Bemba is a co-perpetrator ended any further assessment of the nature and degree of his participation, then the wording in Rule 145(1)(c) would serve no purpose. For this reason, the fact that a defendant must make a 'significant' contribution in order to be convicted as a co-perpetrator at the ICTY/ICTR has not eliminated the duty of ICTR/ICTY to assess the specific degree of the defendant's participation in the crimes at the sentencing stage.[134] Although the Chamber's finding that Mr. Bemba's actual contributions were of a "somewhat restricted nature", might appear at odds with the Chamber's decision to convict him as a co-perpetrator, this inconsistency speaks to the unjustness of Mr. Bemba's conviction; it is not, however, a valid reason for imposing a sentence that fails to reflect the degree of Mr. Bemba's actual, rather than hypothetical, culpability.

48. Given the particular factual matrix of this case, it would also be unjust, and legally incorrect to calculate Mr. Bemba's punishment on the basis of his 'role' in the 'scheme', rather than the degree of his wrongful intent and participation in realising the charged offences. As reflected in the charges,[135] Prosecution Pre-Trial and Final Trial Briefs,[136] and the Trial Judgment,[137] Mr. Bemba's 'role' in the 'common plan', was that he was the defendant in the Main Case, and putative 'beneficiary' of the actions of his Defence. Within this framework, it would be illegal and fundamentally unfair to penalise Mr. Bemba for the fact that he was the defendant, and in that capacity, contributed to a defence of not-guilty. The ICC Appeals Chamber recently underscored the importance of the presumption of innocence, and the

[134] *Martić* AJ,para. 84; *Brđanin* AJ, para. 432; *Muhimana* AJ,paras. 233,234; *Ndindabahizi* AJ,para. 138; Gacumbitsi AJ, para.204; *Kamuhanda* AJ, para. 357; *Musema* AJ, para. 382; *Kayishema and Ruzindana* AJ, para.352; *Čelebići* AJ, paras. 731, 847-849; *Aleksovski* AJ, para. 182; *Karera* TJ, para. 574; See also ICC-01/05-01/13-2089-Conf, para. 27.
[135] ICC-01/05-01/13-749, paras.52, 97, 105.
[136] See ICC-01/05-01/13-1110-Conf, para. 1, 17, 237, 240, 248; *see also* ICC-01/05-01/13-1905-Conf, para. 1, 5, 12, 318.
[137] ICC-01/05-01/13-1989-Conf, para.99, 106, 678, 727, 802, 805.

defendant's related right not to suffer adverse consequences at trial by virtue of their decision to enter a not-guilty plea.[138] As further explained by the High Court of Australia in the case of *R v Siganto,*[139]

> A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.

49. In light of his legal right to defend himself and to be defended, Mr. Bemba's particular contributions to the common scheme would only be relevant to his sentence in this case, if the contributions in question constituted intentional contributions to the realisation of the specific charged offences.[140] If there is such a nexus between the contributions to the scheme, and the realisation of the charged offences, then focussing on the degree of Mr. Bemba's contribution to the charged offences would automatically capture all <u>relevant</u> contributions to the common scheme itself.

50. The Prosecution's attempt to argue that Mr. Bemba would have received an unfairly lenient sentence if the Chamber had only focussed on his participation in the commission of the offences, is therefore misconceived. If Mr. Bemba had in fact "played a central and overwhelming role in the offences for which he was convicted",[141] then this role would have been reflected by the Chamber's evidential findings concerning his contributions to each charged offence. In contrast, if the Chamber were to have focussed exclusively on Mr. Bemba's contributions to an unclearly defined 'scheme',

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[138] ICC-02/11-01/15-992-Red, para. 68.

[139] R v Siganto [1998] HCA 74, at para. 22: See also R v Gray [1977] VicRp 27; [1977] VR 225 at 231: "It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence."

[140] *Češić* AJ, para. 42.

[141] Separate Opinion, para. 18 cited by the Prosecution, Appeal Brief, para. 53.

then there is a risk that their analysis would have swept up non-criminal conduct.

51. There is a heightened need for precision on this point due to the inherently vague nature of the common plan, and the difference between the manner in which this common plan was articulated in the charges, and the Chamber's formulation of the common plan in the Trial Judgment. In the latter, the Chamber found that there was an agreement to illicitly interfere with witnesses, in particular, that the defendants had agreed to motivate the witnesses to provide objectively untruthful information, by providing the witnesses with payments, promises or material benefits.[142] In this formulation, given that the objective of the common plan was to commit Article 70 offences, contributions to the common plan would necessarily contribute to the realisation of the charged offences, and *vice versa*.

52. Within this type of common plan, if certain conduct does not have a clear nexus to a charged offence, then it must have fallen outside of the scope of the common plan. Similarly, if there is no evidence of a particular defendant's involvement in a particular offence, then the defendant would not be part of the common plan to commit this specific offence and cannot be punished as a co-perpetrator as concerns this specific offence.[143] Accordingly, within this type of common plan, it is necessary to focus on the defendant's involvement in the realisation of the charged offences in order to ensure that the defendant is not punished for lawful conduct that falls outside of the scope of the common plan, or in connection with offences that fell outside the scope of the defendant's joint agreement.

[142] TJ, para. 681.
[143] The ICTY Appeals Chamber emphasised in the *Krajišnik* case that if a common plan changes over time, for examples, the nature of its objective expands, it is necessary to establish that the defendant knew of, and accepted the amended common plan: AJ, paras. 173-177.

53. Concretely, unless it is established that particular payments authorised by Mr. Bemba were given to the 14 witnesses for illegitimate purposes, the mere fact that Mr. Bemba authorised payments would be evidentially irrelevant to this common plan. Similarly, if there is no evidence that Mr. Bemba contributed to, or was otherwise involved in the illegal coaching or corruption of a particular witness, then there would be no basis to conclude that he was involved in a joint plan to 'illicitly interfere' with this particular witness.

54. A sentencing approach, which focusses on the degree of the defendant's involvement in the charged offences (rather than the degree of the defendant's involvement in the scheme), would not result in an unduly lenient sentence, because the degree of participation <u>should</u> be the same irrespective as to which approach is adopted. Putting aside the issue that the charge of illicit interference was never confirmed in this case,[144] if the common plan is to illicitly interfere with D-2, then contributions to the common plan, and the charged offence, should be one and the same.

55. Moreover, if there was no, or only minimal evidence that the accused was involved in the commission of specific charged offences, then it would not be unduly <u>lenient</u> to mitigate the sentence on this basis, because the accused should not have been convicted as a co-perpetrator as concerns these offences in the first place. The evidential foundation for concluding that the defendant was part of a common plan, which involved the commission of the charged offence, would be fundamentally unsafe. For example, if the accused is charged with being part of a common plan to illicitly interfere with D-2

[144] Although the Prosecution has claimed that 'illicit interference' is a generic term that captures the charged conduct, its description of the conduct of the defendants focusses heavily on uncharged evidential interference: i.e. "they "doubled down" on their efforts to prevent discovery and to actively derail the investigation"(para. 38); "Kilolo, Mangenda and Bemba devised and implemented a criminally sophisticated scheme to tamper with evidence"(para. 39); "Bemba attempted to obstruct the Prosecution's article 70 investigation"(para.50).

and D-3, but there is no evidence concerning the accused's contribution to the illicit interference of D3 (and the accused has not been charged with indirect perpetration), then there is no basis for convicting and sentencing the defendant as a co-perpetrator in connection with both offences.

56. Although the Chamber defined the common plan in the above terms (i.e. as a joint agreement to illicitly interfere with witnesses), the Chamber also acknowledged that according to the original charges, the 'scheme' was to defend Mr. Bemba through means which included the commission of an unspecified percentage of Article 70 offences.[145] It would also appear that the Chamber applied the two common plans interchangeably, presumably due to the difficulty of applying the Chamber's common plan to the evidence in this case. For example, the Chamber found that Mr. Bemba "approved the payment of money, including illicit payments, to witnesses and was aware that the purpose of such payments was to ensure that witnesses testified in his favour"[146] - a finding which is formulated in terms that mirror the Prosecution's flawed common plan language.

57. The way that the Prosecution's common plan was constructed, the commission of Article 70 offences was not the consequence of the common plan, but one of the means through which the common plan was achieved. As a result, it was entirely possible to contribute to the overall goal of defending Mr. Bemba without engaging in, or contributing to unlawful conduct. The Trial Chamber recognised as such in its finding that key members of the former defence team (Mr. Haynes QC and Ms. Kate Gibson) were not involved in any illicit activity.[147] The same would hold true of other members, such as Professor Mettraux, who contributed to the Defence of Mr. Bemba without contributing to Article 70 offences.

[145] TJ, para. 99.
[146] TJ, para. 816.
[147] TJ, paras. 762-764.

58. If the common plan is not criminal, and was achieved through means which included lawful and unlawful conduct, then contributions to the common plan might not have any had link to unlawful conduct: this link would only be captured if the focus was on conduct that contributed to the realisation of the criminal conduct in question. The Prosecution's approach would, therefore, violate the principle of individual culpability by punishing Mr. Bemba for conduct that has no culpable link to the commission of the charged offences.

59. To provide an example of the impact of the above analysis on the context of this case, Mr. Bemba's authorisation of logistical payments would have facilitated a general scheme, in that it would have allowed Mr. Bemba to be defended through defence investigations. However, unless his authorisation knowingly captured illicit payments to the 14 witnesses that were for the purpose of corruption, his conduct would not have had an intentional impact on the realisation of the charged offences in this case. As will be demonstrated below, the Prosecution's proposal that the extent of Mr. Bemba's culpability should be assessed by reference to his contributions to this vague scheme, rather than the realisation of the offences, would therefore capture conduct that is protected by Article 67 of the Statute.

60. The payment of witnesses was not *ipso facto* illicit. Neither CSS nor VWU provided funds for logistical costs associated with potential Defence witnesses at the investigation stage.[148] As a result, the Defence were compelled to meet these costs itself, as part of legitimate and lawful Defence activities. Of the 14 witnesses in this case, the Chamber found that 14 of the 34 payments were illegitimate.[149] This case concerns only 14 of the 60

[148] ICC-01/05-01/13-1902-Conf-Corr, paras. 170-171; CAR-D20-0006-1325 at 1330 (response to question 6); CAR-D20-0005-0352; D21-9, T-42-Conf-Eng, p. 27, lns. 7-9.
[149] ICC-01/05-01/13-2102-AnxD (excluding the laptop which was not a financial payment).

potential witnesses who were initially included by the Defence in its initial list of witnesses,[150] some of whom would have received legitimate expenses in connection with interviews during the investigation stage. The Defence also received, and expended funds in connection with legitimate costs concerning mission expenses (flights, hotels), due to the Registry's refusal to provide advance funds.[151] There appears to have been at least 12 such missions during the course of 2012-2013.[152] Money was also deposited at the detention unit by visitors, including Mr. Mangenda, Mr. Babala, or the Defence team) on approximately 23 occasions during 2012-2013.[153] This means that there were **at least** 115 different Defence related payments,[154] of which, only 14 concerned illegitimate payments in this case.

61. This means that if a conversation between Mr. Bemba and Mr. Babala referred to a payment in a Defence context (i.e. a payment to the *'Collègue d'en Haut'*),[155] there was only **at best** a 14 in 115 chance (i.e. 12.1% chance) that it concerned an illegitimate payment in this case. By the same token, there was only a 12.1% probability that Mr. Bemba's authorisation of a Defence related payment contributed to the realisation of the charged offence of corruption of witnesses through illegitimate payments. This is hardly a "virtually certain" outcome that should attract a custodial sentence of 5 years.

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[150] Based on the submissions of Mr. Kilolo: ICC-01/05-01/13-600-Conf, fn. 201.
[151] ICC-01/05-01/13-1902-Conf-Corr, paras. 172-173.
[152] According to CSS requests (as compiled in the Bemba Defence Bar Table Motion), Mr. Kilolo conducted at least 8 different missions namely 2 in Cameroon, 3 in Congo-Brazzaville, 3 in the Democratic Republic of Congo and 1 in Sweden: See ICC-01/05-01/13-1794-Conf-Corr, ftn. 38, 39. In addition, Mr. Kilolo also conducted at least once mission in each of the following countries; Belgium, France, Netherlands and Ukraine: See ICC-01/05-01/13-600-Conf, para. 118.
[153] CAR-D20-0001-0013.
[154] If it is assumed that each witness received a payment in connection with transport and meals, then the payments = 34 payments corresponding to the 14 witness in this case + 46 payments concerning the other 26 witnesses + 12 missions + 23 deposits = 115 payments.
[155] See TJ, para. 695.

62. Similarly, if Mr. Bemba provided instructions to his Defence concerning the lines of inquiry that should be put to potential witnesses, this would have contributed to the general scheme by facilitating the ability of the Defence to firstly, identify potential witnesses, and secondly, draft relevant questions to be put either during the investigations stage or during in court testimony. However, unless Mr. Bemba knew and intended that his instructions should be used for illicit coaching, and unless the instructions in question <u>were</u> in fact used for illicit coaching, his conduct would not have had an intentional impact on the realisation of the charged offences. The approach advocated by the Prosecution would result in Mr. Bemba being punished for conduct that is <u>protected</u> by Article 67(1) of the Statute.

63. The fact that the Prosecution has attempted to argue for a scheme-centric rather than offence-based sentencing approach suggests their awareness that the Trial Judgment is ultimately flawed due to the absence of evidential findings concerning a causal link between Mr. Bemba's contributions to the 'scheme' and the realisation of the charged offences. The Prosecution has therefore eliminated the need for such a link by arguing that the sole focus of inquiry should be on contributions to the scheme, rather than contributions, which have a causal nexus to the realisation of the offences. In so doing, the Prosecution is effectively requesting the Appeals Chamber to re-write the basic tenets underlying Article 30 and co-perpetration liability. The Prosecution approach, if adopted, would contravene established case law, and the principle of legality, by creating a legal Frankenstein: a watered down amalgam of conspiracy and JCE III liability, that punishes individuals for lawful conduct, and unlawful conduct that has no nexus to the actions of the defendant.

64. Article 30(1) provides that, "[u]nless otherwise provided, a person shall be criminal responsible and liable for punishment for a crime within the

jurisdiction of the Court only if the material elements are committed with intent and knowledge". Article 30(2) then provides that "[f]or the purposes of this article, a person has intent where:

(a) In relation to conduct, the person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".

65. When read together, Articles 30 (1) and (2) proscribe the Chamber from punishing Mr. Bemba in the absence of evidence based findings that Mr. Bemba either engaged in conduct that he knew would result in the fulfilment of the material elements of the specific charges offences, or, engaged in conduct that he knew would bring about the fulfilment of the material elements of the specific charged offences, in the ordinary course of events.

66. The Prosecution's approach equates to automatic liability for Mr. Bemba, since all of the offences committed during the course of the defence case would not have occurred unless the Bemba case existed, and unless Mr. Bemba had instructed his Defence to put forward a defence case. The mere fact that he is the putative beneficiary of the illicit conduct would render him liable for it, even if he did not intend such conduct to occur, and even if he did not make an essential contribution to the commission of the illicit conduct. In contrast, the wording of Article 30 excludes Mr. Bemba's punishment for any offences that were not a virtually certain consequence of his intentional conduct. If these principles are applied to this scenario, the mere fact that Mr. Bemba is the beneficiary of the actions of his Defence team would not equate to liability for unlawful conduct of his Defence, unless Mr. Bemba took specific steps that he knew would result in the unlawful conduct in question.

67. These essential notions are not altered or diluted by virtue of the application of co-perpetration, 'joint control of the crime' in this case. In the *Lubanga* case, the Appeals Chamber affirmed the applicability of the 'joint control of the crime' theory to the ICC, and Trial Chamber VII subsequently decided to apply it to the Article 70 offences in this case.[156] Having applied this theory of liability to Mr. Bemba's conviction, this was the prism through which the Chamber was required to assess the degree of Mr. Bemba's knowledge and intent.

68. As opposed to indirect co-perpetration or indirect perpetration, the application of the control theory to co-perpetration consistently required proof of the defendant's involvement in bringing about the specific charged crimes or offences.

69. For example, in the *Gbagbo* case, the Pre-Trial Chamber confirmed Mr. Gbagbo's responsibility under Article 25(3)(a) after finding that Mr. Gbagbo shared the intent to commit "the crimes", and exercised control over the specific means by which each crime was committed, such that without his contributions, "the crimes" would not have been committed, or would have been committed in a different way.[157]

70. In the *Bemba* Main case, the Pre-Trial Chamber underscored that one of the essential elements of co-perpetration, whether direct or indirect, was the objective requirement the accused "must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime".[158] In term of subjective requirements, it was further necessary to demonstrate that the defendant:[159]

[156] TJ, para. 64.
[157] ICC-02/11-01/11-656-Red, para. 230.
[158] ICC-01/05-01/08-424, para. 350.
[159] ICC-01/05-01/08-424, para. 351.

must (a) fulfil the subjective elements of the crimes charged, namely intent and knowledge as required under article 30 of the Statute; (b) be aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (c) be aware of the factual circumstances enabling him to control the crimes jointly with the other co-perpetrator.

71. The above elements require, at a minimum, that the defendant must make knowing and intentional contributions, which have a nexus to the execution of the material elements of the specific charged crimes. If the defendant does not control the physical perpetrator (indirect perpetration), and has not made an essential contribution to the realisation of the material elements of the crime (co-perpetration), there is simply no basis to find that the defendant exercises control over the crime.

72. Although the notion of vicarious liability for the actions of fellow co-perpetrators was referred to in the *Lubanga* Confirmation Decision, the Pre-Trial Chamber underscored that the key pre-condition for such reciprocal imputation was that <u>all</u> of the co-perpetrators must have made a coordinated contribution to the realisation of the objective elements of the crime.[160]

73. The Chamber further explained that if the defendant is not charged with direct perpetration, then it is necessary to establish either that:[161]

   a. The accused controlled the commission of the crime through his control over the direct physical perpetrators (indirect perpetration); or

[160] ICC-01/04-01/06-803-tEN, para. 326.
[161] ICC-01/04-01/06-803-tEN, para. 332.

b. The accused controlled the crime by virtue of making an essential contribution to the realisation of the crime.

74. The emphasis is thus on the control of the crime and not a vague 'scheme'. In order to have such control within the context of co-perpetration, each accused must have contributed to the crime in question, and have the ability to frustrate the commission of the crime in question by withholding essential tasks.[162]

75. In his dissenting Opinion in *Gacumbitsi*, Judge Schomburg explained the distinction between co-perpetration and indirect perpetration, as based on the 'control theory', in the following terms (emphasis added):[163]

> Co-perpetration in general requires "joint functional control over a crime". Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. **Each co-perpetrator must make a contribution essential to the commission of the crime**.
>
> The worldwide accepted legal scholar, Claus Roxin, provides the following typical example: If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.

[162] ICC-01/04-01/06-803-tEN, para. 342.
[163] *Gacumbitsi* AJ, (Separate Opinion of Judge Schomburg), paras. 17-18.

> Indirect perpetration (perpetration by means) requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, i.e., the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.

76. Judge Schomburg then summarised the position of co-perpetration as follows:[164]

> A person who participated in the commission of a crime in concert with others is responsible for having "committed" that crime irrespective of whether he or she carried out the criminal act by his or her own hand (co-perpetrator, co-principal, first category of joint criminal enterprise).

77. When applying these co-perpetration principles in the context of sentencing, the Trial Chamber emphasised in the ICTY *Stakic case* that "the Trial Chamber will sentence only according to the specific and individual role of the Accused in the commission of the offences".[165]

78. The notion that it is necessary to establish either that the defendant controlled the physical perpetrator, or contributed to the execution of the crime, was further noted by Judge Bonomy in the *Milutinovic* case, on the basis of his examination of the domestic origins of co-perpetration, including Argentina, where,[166]

[164] Para. 25.
[165] *Stakić* TJ, para. 905.
[166] *Milutinović* TC Decision 22/03/2006, Separate Opinion: "Argentine Penal Code, Libro Primero, Título 7 § 45 ("Los que tomasen parte en la ejecución del hecho o prestasen al autor o autores un auxilio o cooperación sin los cuales no habría podido cometerse, tendrán la pena establecida para el delito. En la misma pena incurrirán los que hubiesen determinado directamente a otro a

The Argentine Penal Code imposes the same penalty upon a person who physically takes part in the execution of the *actus reus* of a crime as upon a person who directly induces the perpetration of the *actus reus* by another or lends assistance of cooperation "without which the crime could not have been committed".

79. The emphasis on the penalty in the above provision underscores the importance of the degree of participation to the penalty imposed on the defendant. Unless the defendant has made an essential contribution to the commission of the crime, it would be unfair and illogical to punish the accused in the same manner as if the accused had committed the entirety of the crime himself. Anything less than this degree of participation should attract a lower penalty.

80. Apart from the fact that co-perpetration requires the existence of a causal nexus between the conduct of the defendant and the materialisation of the charged offence, the Trial Chamber also found that a necessary element of solicitation is that the "conduct of the accessory needs to have a causal effect on the offence."[167] The Prosecution has not challenged this legal definition. For the purposes of sentencing, the degree of Mr. Bemba's participation in the realisation of the charged offences was of clear relevance to the nature of his unlawful behaviour and the impact of his conduct on the testimony of the witnesses.

81. Within the context of considering the relevance of uncharged crimes in connection with the potential sentence of the defendant, the Appeals

cometerlo."). The Costa Rican Criminal Code contains a substantially similar provision: "Es autor del hecho punible tipificado como tal, quien realizare por sí o sirviéndose de otro u otros y, coautores los que los realizaren conjuntamente con el autor." *Costa Rican Criminal Code*, Art. 45."
[167] TJ, para. 81.

Chamber has also confirmed that there must be a sufficient nexus between the commission of such crimes, and the intent or actions of the defendant, in order to sufficiently reflect the culpability of the defendant.[168]

82. This is, therefore, no form of co-perpetration or solicitation liability, or principle of sentencing which allows a defendant to be punished in connection with crimes that have no nexus to the knowledge and contributions of the defendant. By the same token, there is no principle of sentencing which would prevent the Chamber, in a case concerning co-perpetration, rather than indirect perpetration or indirect co-perpetration, from taking into consideration the degree of the accused's participation in the commission of the crimes as an element which is relevant to the penalty which should be imposed.

83. The Prosecution's argument that the Chamber erred by assessing the degree of Mr. Bemba's culpability by reference to the extent of his contributions to the charged offences, is therefore legally flawed, and should be dismissed in its entirety.

84. Finally, the Defence observes that the Prosecution's appellate arguments have, like the Trial Chamber, 'double-counted' the issue of Mr. Bemba's alleged involvement in undertaking remedial measures. For the purposes of outlining the gravity of the offences and degree of Mr. Bemba's involvement, the Prosecution allege repeatedly that the defendants attempted to "derail" the Article 70 investigation.[169] The Prosecution then avers that the sanction should have been further increased in light of the Chamber's finding that such attempt to derail the Article 70 investigation were an aggravating circumstance.[170] The same holds true as concerns arguments that Mr. Bemba

[168] ICC-01/04-01/06-3122, para. 90.
[169] Appeal Brief, paras. 38, 39.
[170] Appeal Brief, para. 50.

abused the privilege line to circumvent the Registry's monitoring system: this factor is cited both as an element that heightens Mr. Bemba individual culpability,[171] and as a separate aggravating circumstance.[172]

85. The Prosecution's arguments thus highlight the fact that the existing sentence is predicated on factors that the Chamber ought not to have considered. The Appeals Chamber's intervention should thus be restricted to lessening the sanction, not increasing it.

II.A.3. The Prosecution has failed to establish that the Trial Chamber manifestly abused its discretion by imposing a sentence that fails to deter

86. The Prosecution's key arguments in relation to this sub-ground are marked by a mere disagreement with the Chamber's approach to deterrence, a prosecutorial preference for custodial sentences rather than fines as a deterrent measure, and irrelevant arguments concerning the execution of the fine imposed on Mr. Bemba. These arguments reveal no error or abuse of discretion on the part of the Chamber, which would warrant an increase in Mr. Bemba's sentence.

87. The Prosecution claims from the outset that the Chamber failed to consider whether the particular combination of sanctions imposed on Mr. Bemba would ensure either his individual deterrence, or the deterrence of future perpetrators.[173] The Defence agrees that the Chamber's decision to impose a one year custodial sentence was defective in its reasoning: the Chamber provided no explanation or justification as to why a <u>custodial</u> sentence was a necessary and proportionate means for retribution and deterrence.[174] But, contrary to the arguments of the Prosecution, the Chamber found, and

[171] Appeal Brief, para. 39 (p. 25).
[172] Appeal Brief, para. 50.
[173] Appeal Brief, paras. 63-64.
[174] ICC-01/05-01/13-2167-Conf, paras. 169-179.

provided reasons, in relation to its determination that a fine would operate as an effective deterrent, and otherwise fulfil the objectives of sentencing.[175] Article 70(3) does not, however, require a mandatory custodial sentence, nor does it impose a hierarchy between custodial sentence and fines. Any error lay in the Chamber's assumption that a custodial sentence should be imposed, in circumstances where a fine could satisfy the objectives of sentencing. The appropriate remedy on appeal would therefore be to overturn the decision to impose an unmotivated and unjustified custodial sentence, not lengthen it.

88. Apart from the fact that the Prosecution's appellate sub-ground fails to accurately reflect the Chamber's reasoning, it also lacks any explanation or justification either for the Prosecution's assumption that custodial sentences were required in this case for all defendants, or for their central position that the maximum custodial sentence is necessary to ensure deterrence. In the absence of empirical proof of an established link between the length of the custodial sentence and deterrence, the Prosecution's claim that Mr. Bemba's sentence will fail to ensure deterrence simply because the custodial component is too short, is untenable, and should be dismissed.

89. In contrast to contempt allegations in other cases, this case involved no threats or physical harm. As observed by the United Nations Office of the High Commissioner for Human Rights, "[w]hile imprisonment is necessary in many cases involving violent offenders, it does not constitute a panacea with regard either to crime prevention or to the social reintegration of offenders."[176]

[175] SJ, para. 261.
[176] OHCHR Training Manual, Chapter 9, p. 373.

90. A United Nations Handbook on Basic Principles and Practices regarding Alternatives to Imprisonment, also disputes the assumption that imprisonment is the more effective punishment, arguing as follows:[177]

> Given that imprisonment inevitably infringes upon at least some human rights and that it is expensive, is it nevertheless such an effective way of achieving these objectives that its use can be justified? The reality is that most of the objectives of imprisonment can be met more effectively in other ways. Alternatives may both infringe less on the human rights of persons who would otherwise be detained and may be less expensive. Measured against the standards of human rights protection and expense, the argument against imprisonment, except as a last resort, is very powerful.
>
> […]
>
> In the case of sentenced prisoners, the issue of effectiveness is complicated by the multiple objectives that the sentence of imprisonment is designed to achieve. If the primary objective is to attempt to ensure that offenders desist from future crime, there is no evidence that imprisonment does that more effectively than community-based alternative punishments. On the contrary, studies on the comparative impact of different forms of punishment on recidivism suggest that imprisonment makes it hard for offenders to adjust to life on the outside after release and may contribute to their reoffending. Using imprisonment to incapacitate offenders works only to the extent that while they are serving their sentences, they are not reoffending in the community. However, the vast majority of prisoners will return to the community, many without the skills to reintegrate into society in a law-abiding manner. Offenders are

[177] UNODC Handbook pp. 6-7.

incapacitated while serving their sentences, but on release are more likely to commit further crime than those who are not imprisoned as part of their sentence. Thus, relying on sentences of imprisonment to prevent criminal re-offending is not an effective strategy in the long term.

91. A Council of Europe White Paper has described the belief that prison works as a deterrent as "erroneous".[178] Multiple studies also conclude that there is no nexus between higher sentences and deterrence.[179]

92. Given the absence of any clear nexus between the imposition of a custodial sentence (and the length of such a sentence), there is, therefore, no basis for finding that the particular sentence imposed by the Chamber was a manifest abuse of its discretion due to lack of deterrence.

93. The Prosecution's separate argument that the overall sentence lacks deterrence because of the Chamber's finding that the conduct underpinning

[178] CoE, CDPC White Paper on Prison Overcrowding, para. 53.

[179] "At this point, we think it is fair to say that we know of no reputable criminologist who has looked carefully at the overall body of research literature on "deterrence through sentencing" who believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts. The evidence supporting this conclusion has been accumulating for decades. In the 1970s, thoughtful reviewers were cautious in their conclusions, suggesting only that the deterrent impact of harsh sentences had not been adequately demonstrated. More recently, we, and others, have been more definitive in our conclusions: crime is not deterred, generally, by harsher sentences. This is not, of course, a new conclusion.' p. A-3 Doob (2014), See also p.A-4 and p. B-36.
"Existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms. In fact, research findings imply that increasingly lengthy prison terms are counterproductive. Overall, the evidence indicates that the deterrent effect of lengthy prison sentences would not be substantially diminished if punishments were reduced from their current levels." Wright (2010), pp. 1, 4 and 9.
"Despite enormous research efforts, no credible and consistent body of evidence has been found to support the conclusion that harsher sentences (within ranges conceivable in Western democracies) achieve marginal deterrent effects on crime. (…) it would seem that the responsible approach until such time is to conclude that currently in western countries, with the methods and measures presently available, variation in sentence severity does not affect the levels of crime in society. In more practical terms, DTS should no longer be a basis of determining sentence severity. Indeed, the continued centrality of this deterrence theory as a sentencing objective constitutes a false promise, contributing to a waste of resources and a reduction in the public's confidence in the criminal justice system, while encouraging policy makers to ignore more effective crime control strategies." Petersilla (2012), p. 174.

the convictions was largely the same,[180] lacks coherence, and fails to disclose any legal error or abuse of the Chamber's discretion.

94. As a first point, the Prosecution's claim that the Chamber <u>reduced</u> the sentences due to the existence of overlapping conduct,[181] is erroneous. Notwithstanding the overlap, the Chamber assessed the degree of Mr. Bemba's culpability by reference to all of the charged incidents, in connection with each of the charged offences. Thus, the Chamber's assessment of gravity as concerns Article 70(1)(a) includes the same conduct referenced in connection with Article 70(1)(b), and in turn, Article 70(1)(c).[182] The Chamber also issued a uniform finding concerning the degree of Mr. Bemba's intent, which did not differentiate between his involvement in the different offences,[183] and used the same conduct as the basis for its findings concerning the degree of Mr. Bemba's involvement in each of the charged offences.[184] In summarising the relevant factors that informed the specific sentences imposed by the Chamber, the Chamber made no reference to the overlap in conduct which underpinned its findings on gravity, culpability, intent, and aggravating circumstances.[185] The Prosecution's claim that the Chamber reduced its assessment of the gravity of each of the offences and the degree of Mr. Bemba's culpability because of overlap in Mr. Bemba's conduct,[186] is not supported by the Chamber's actual findings in the Sentencing Judgment.

95. Although the Chamber mentioned this overlap in its ultimate sentencing disposition, it is clear from the context and particular footnote cited by the Chamber, that this overlap was not taken into consideration when

[180] Appeal Brief, paras. 67-68.
[181] Appeal Brief, para. 68.
[182] SJ, paras. 204-217.
[183] SJ, para. 226.
[184] SJ, paras. 219-222.
[185] SJ, para. 248.
[186] Appeal Brief, para. 69.

formulating the individual sentences, but was instead, a factor that led to the imposition of a joint sentence. Thus footnote 401 of the Sentencing Judgment cites to paragraph 956 of the Trial Judgment, where the Chamber found that,

> These convictions may indeed be entered cumulatively. However, this does not mean that cumulative convictions can unduly i**inflate** an accused's punishment (emphasis added). The Chamber will take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence.

96. It is clear from this language that the objective of Chamber was not to reduce the sentences imposed on Mr. Bemba, but to ensure, rather, that the overall punishment was not over-inflated as a result of the overlap in conduct: that duplication in conduct did not result in duplication in punishment.

97. Although framed in unclear and ambiguous terms, it would appear that the heart of the Prosecution's complaint is that the Chamber issued a joint sentence that was based on the largest individual sentence that was imposed. And yet, the Prosecution fail to identify any legal error or abuse of discretion in the Chamber's decision to do so. Article 78(3) allows the Chamber to impose a joint sentence. Although such a sentence may not be less than the maximum individual sentence imposed, it does not need to exceed the maximum individual sentence. Indeed, in all three prior sentencing judgments at the ICC, the Trial Chambers calculated the joint sentence by reference to the maximum individual sentence that was imposed.[187]

[187] Bemba Sentencing Judgment (ICC-01/05-01/08-3399), paras. 94-95; Katanga Sentencing Judgment (ICC-01/04-01/07-3484-tENG), para. 146; *Lubanga* Sentencing Judgment (ICC-01/04-01/06-2901), paras. 98-99.

98. In the *Bemba* case, the Trial Chamber considered that the existence of overlap in conduct was relevant to its decision to impose such a joint sentence.[188] In *Lubanga,* the Appeals Chamber upheld the proportionality of the joint sentence imposed by the Trial Chamber,[189] notwithstanding the absence of any justification for the Trial Chamber's decision that the joint sentence should be calculated by reference to the maximum individual sentence. This suggests that the mere fact that Trial Chamber VII cited a factor that was legally relevant to its decision to impose a joint sentence of 12 months, cannot be a basis for disturbing the significant discretion that the Trial Chamber enjoys in this matter.

99. Trial Chamber VII's recitation of the degree of overlap in connection with its decision to impose a joint sentence is also consistent with the case law of the *ad hocs*. For example, the ICTR Appeals Chamber, referring to the Blaškić case, found that:[190]

> where the crimes ascribed to an accused, regardless of their characterisation, form part of a single set of crimes committed in a given geographic region during a specific time period, it is appropriate for a single sentence to be imposed for all convictions, if the Trial Chamber so decides.

100. Similarly, in the *Nahimana* case, the ICTR Appeals Chamber affirmed that,[191]

> [t]he imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction.

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[188] Bemba Sentencing Judgment (ICC-01/05-01/08-3399), para. 95 "all crimes are geographically and temporally connected and Mr Bemba's responsibility is based on the same conduct".
[189] ICC-01/04-01/06-3122, paras. 73, 77.
[190] *Kambanda* AJ, para. 111, citing *Blaškić* TJ, para. 807.
[191] *Nahimana* et al. AJ, para. 1041, citing *Blaškić* TJ, para. 807, and *Krstić* TJ, para. 725.

101. In the context of cumulative convictions, the ICTY Appeals Chamber has stressed that the Trial Chamber retains the discretion to impose concurrent sentences for each conviction, or a global sentence, provided that the overall sentence reflects the totality of the defendant's culpable conduct.[192]

102. Contrary to the Prosecution's attempt to cast the totality principle as a formula for increasing sentences,[193] this principle speaks to the importance of imposing a sentence that is not over-inflated due to the existence of multiple convictions that are based on the same underlying conduct. As adumbrated by Judge Khan in a separate, dissenting opinion in the ICTR *Kayishema* case,[194] the ICTY/ICTR approach to cumulative convictions and sentencing,

> avoids entering into the legal quagmire of overlapping acts, elements and social interests at the stage of conviction. Rather, it concentrates upon the criminal conduct at the stage of sentencing. In doing so, it ensures that the accused's culpable conduct is reflected in its totality and avoids prejudice through concurrent sentencing.

103. Judge Khan further concluded that cumulative convictions should have been entered in the case before him, <u>but</u> subject to the proviso that:[195]

> Both Kayishema and Ruzindana will be sentenced according to their culpable conduct which, in this case, is the leadership role they played in massacring thousands of Tutsi men, women and children, due purely to their ethnicity. Whether this conduct offends one or three crimes, the sentence imposed must be the same.

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[192] *Čelebići* AJ, para. 429.
[193] Appeal Brief, fn. 172.
[194] *Kayishema & Ruzindana,* TJ Separate and Dissenting Opinion, para. 52.
[195] Para. 37.

104. In *Krnojelac,* the Trial Chamber further underscored that:[196]

> [t]he prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment imposed will do the same. Of course, **great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges** (emphasis added).

105. This is consistent domestic practice, which mitigates sentences in order to protect defendants from the adverse consequences of 'multiplication of charges'.[197]

106. The Prosecution's fourth claim, that the Chamber improperly lowered the custodial sentence due to its imposition of a substantial fine,[198] does not arise from the Sentencing Judgment. The Defence agrees wholeheartedly with the notion that "[c]ulpability, not solvency, should be the primary

[196] *Krnojelac* TC Decision 24/02/1999, para. 10.
[197] In *US v. Campbell*, the US Military Court observed that "relief is warranted where multiple charges reference "a single impulse or intent," or reflect "a unity of time" with a "connected chain of events" " (p. 12), and further concluded that although the Judge had not erred by imposing separate convictions for conduct which offended different criminal purposes, the Court concluded "for sentencing purposes the three specifications should be merged and that it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense. It is not difficult to see how the three specifications in this case might have exaggerated Appellant's criminal and punitive exposure in light of the fact that, from Appellant's perspective, he had committed one act implicating three separate criminal purposes." (p. 16)
[198] Appeal Brief, para. 70.

consideration in determining the type of punishment".[199] This notion operates to protect both indigent defendants from unnecessary custodial sentences, and solvent defendants from exorbitant fines that have been over-inflated due to the defendant's wealth rather than the defendant's culpability. It does not, however, militate in favour of custodial sentences for any defendants, whether they are indigent or not.

107. This is the incurable flaw in the Prosecution's appeal: their arguments herald from the dark-ages of sentencing practices, and assume that the imprisonment is the best and primary form of punishment for all crimes and all offences. This notion no longer holds true. Human rights law and domestic practice recognise that for non-violent offences, non-custodial sanctions are a powerful sanction and deterrent, which avoid unnecessary costs of imprisonment and inflicting unnecessary pain on the defendant's family.[200] Human rights law further stipulates that the Court must first

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[199] Appeal Brief, para. 71.
[200] See fns.176-179 *supra*.

See also:

United Kingdom:
"Financial penalties, set at the right level, can be just as effective as a community sentence at deterrence and punishment. They also have the advantage that they do not affect opportunities for employment or impact on family responsibilities and so prevent the further acceleration into a criminal lifestyle." UK Ministry of Justice Green Paper.

"[F]ines, particularly the heavier ones, appear to be among the most "successful" penalties for almost all types of offender", UK Home Office Handbook, para. 163.

Germany: "The predominant criminal sanction under German criminal law is the monetary fine; section 47 of the German Criminal Code provides that the court shall impose short terms of imprisonment of less than six months only in exceptional cases." Contribution by the Federal Republic of Germany to OHCHR report.

Australia: "Magistrates reported that they believed that fines: achieve the goals of sentencing; (…) act as both a personal and general deterrent": NSW Sentencing Council, para. 2.40.

"In deciding that each respondent should be fined for his offending, his Honour, vastly experienced in criminal matters, no doubt had in mind the substantial body of research which suggests that a fine can, in appropriate cases, be an extremely effective deterrent." *DPP v Fucile and Tran* at [105] consider whether non-custodial measures can meet the objectives of sentencing, before having recourse to more restrictive deprivations of the defendant's liberty; custodial sentences should only be imposed to the extent that it is necessary and proportionate to do so.[201] It follows, therefore, that where non-custodial measures are available, prison terms should either be eliminated, or reduced to the minimum amount necessary, such that the defendant indeed serves "as little prison time as possible".[202]

108. There is, moreover, no indication that the Chamber lowered Mr. Bemba's custodial sentence as a result of this fine, although it would have been appropriate and indeed, necessary for the Chamber to have done so. The Chamber's recitation of the factors that informed the length of Mr. Bemba's sentence does not refer to its decision to impose a fine.[203] Even though Mr. Bemba's had less aggravating factors than his co-perpetrators, and his participation was of a restricted nature,[204] the custodial sentence imposed on Mr. Bemba is <u>longer</u> than the actual custodial sentence served by Mr. Kilolo and Mr. Mangenda (12 months as opposed to 11 months). The Chamber's error in these circumstances is that, contrary to the claim of the Prosecution, the Chamber failed to actually lower the custodial sentence or re-evaluate its necessity in light of the substantial fine imposed on Mr. Bemba.

109. In terms of the Prosecution's arguments concerning the flaws in the Chamber's reasoning regarding the amount of Mr. Bemba's assets and the extent to which he can freely dispose of them,[205] the Defence agrees that the

[201] CoE Rec(2006)2: "(…) no one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law"; The Tokyo Rules, Principle 2; Khoroshenko v. Russia, para.121; UNWGAD, E/CN.4/2006/7, para.63.; ICC-01/05-01/13-2089-Conf, para.8 ; ICC-01/04-01/06-824, para.140
[202] Cf Appeal Brief, para. 71.
[203] SJ, para. 248.
[204] SJ, para. 223.
[205] Appeal Brief, paras. 72.

Judgment lacks reasoning and any evidential foundation and analysis as concerns the Chamber's ultimate finding that 300, 000 euros was an appropriate fine.

110. Whereas the Chamber based its disposition entirely on the solvency report filed by the Registry,[206] the Registry has since acknowledged that the specific figures that it included in this report were a mere "estimate",[207] which could have a margin of error of <u>350%</u> vis-à-vis the actual monetary worth of the asset in question. Nonetheless, as argued by the Prosecution, "[g]iven the nature and purpose of this Court, it cannot be that, on the same facts, indigent convicted persons serve time in detention"; [208] the possibility that the sum total of Mr. Bemba's assets might be much less than the estimate provided by the Registry is not a valid basis for substituting his fine with a hefty custodial sentence. Indeed, the fact that Chamber imposed a shorter custodial sentence and a fine of only 30, 000 euros on Mr. Kilolo, demonstrates that the sum total of Mr. Bemba's culpability can and should be reflected in a much lower fine, even if his custodial sentence is not increased.

111. It is, moreover, particular inapposite for the Prosecution, as an impartial Minister of Justice, to argue <u>in this case</u> that the fine should be replaced with a custodial sentence due to Mr. Bemba's purported lack of cooperation in ensuring the availability of his assets, whilst at the same time, intervening in the <u>Main Case</u> to oppose efforts by Mr. Bemba to preserve and ensure the availability of these assets.[209]

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[206] SJ, para. 261.
[207] Annex C.
[208] Appeal Brief, para. 71.
[209] See ICC-01/05-01/08-3540-Red, in which the Prosecution opposed the Defence request that the Main Case Appeals Chamber take steps to ensure the availability of Mr. Bemba's funds, arguing that such steps were premature and unnecessary.

112. Indeed, it is particularly trite for the Prosecution to cite the debts that have accrued in connection with certain assets as justification for replacing the fine with a custodial sentence, given that it was the Prosecution's conduct that led to these debts; namely, the complete devaluation of [Redacted], and related loss of income and accrual of debts.[210]

113. In any case, as set out in the Defence Appeal on Sentence, Mr. Bemba is committed to meeting the costs of the fine,[211] and has and will continue to liaise with the Registry to ensure the disposability of his assets, if his conviction is affirmed on appeal.[212] Any hypothetical issues that might arise in connection with the execution of the fine are matters that are properly for the Presidency; given their hypothetical nature, they do not arise from the Sentencing Judgment.

114. The Prosecution's ancillary complaint that the imposition of a custodial sentence upon non-payment would only be imposed as a "matter of last resort", and upon proof of "continued wilful non-payment"[213] reveals no error or abuse of discretion on the part of the Chamber; rather, it boils down to the fact that the Prosecution disagrees with the legal principles underpinning the Statute and human rights law. Custodial sentences should always be a measure of last resort: the fact that the Prosecution disagrees with this does not justify appellate intervention. The hypothetical possibility that Mr. Bemba might not be sanctioned in connection with non-wilful non-payment is a mere reflection of the Statute and Rules. Moreover, if the fine was artificially inflated due to mistakes in the Registry's estimates, it would only be fair and just that Mr. Bemba does not incur a further penalty as a result of these mistakes.

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[210] [Redacted] See ICC-01/05-01/13-1997-Conf-Exp-Anx1-Red2 (which was notified to the Bemba Defence and Prosecution), paras. 85-86. See also table on p.56.
[211] ICC-01/05-01/13-2167-Conf, para. 281.
[212] ICC-01/05-01/08-3537; ICC-01/05-01/08-3548-Red.
[213] Appeal Brief, para. 73.

115. The Prosecution's appellate arguments therefore fail to establish the existence of any legal or factual error, or abuse of discretion arising from the Sentencing Judgment, that would lead to the remedy requested by the Prosecution (that is, the imposition of the highest possible custodial sentence of five years).

B. Sub-ground 2 should be dismissed: the Prosecution failed to demonstrate that the Chamber erred in relying on extraneous factors to diminish the gravity of the offences, or that it otherwise abused its discretion.

1. II.B.1: The Prosecution fails to demonstrate that no reasonable Chamber could have found that the particular content of the false testimony was relevant to gravity of the offences.

116. The Prosecution refer to no legal principles or precedent in support of its contention that the content of the false testimony is not relevant to the gravity of the offence. In the absence of legal principle or principle supporting the Prosecution's position, the thrust of the Prosecution's argument is that the Prosecution was 'unaware' that the limited scope of the false testimony could attract a lower sentence, or that it was otherwise relevant to the gravity of the offence. This is completely incorrect.

117. The link between the content and scope of the false testimony, and the gravity of the offences, was raised by different parties from the very beginning of the case. At the *ad hocs*, false testimony concerning collateral issues is considered to be insufficiently grave to warrant a contempt conviction.[214] These decisions were cited by various Defence teams in

[214] *Tadić Contempt Judgment*, para. 134; *Niyitegeka* MICT Decision, 28/01/2014, para.17 ("it is necessary for the party alleging the falsehood to prove […] the possible bearing of the said statements on the judge's decision on a material matter in the case"); *Ntakirutimana* MICT Decision, 02/03/2016, fn.35; *Ntahobali* TC Decision, 07/11/2008, para.20 ("[t]here must be a relevant connection between the statement and a material issue in the case"); *Nyiramasuhuko* TC Decision, 19/03/2009, paras.11,14; *Karemera* TC Decision, 29/12/2006, para.6; *Karemera* TC Decision, 26/09/2007, para.4; *Rutaganda* TC Decision, 10/03/1998, p.2; *Ntahobali* TC Decision, 07/11/2008, para.23; *Akayesu*

submissions that were filed well in advance of the trial.[215] The Prosecution was thus on 'notice' that the link between the content of the false testimony, and the gravity of the charges would be an issue in any future judgment. The fact that the Prosecution disagrees with the approach eventually adopted by the Trial Chamber is not in itself, a basis for appellate intervention.

118. It is, moreover, unfounded for the Prosecution to claim that it has been prejudiced as a result of the limited nature of its own charges. The Prosecution brought limited charges, litigated limited charges, and, according to the Chamber, evidentially substantiated these limited charges at trial. This was the case for which Mr. Bemba was convicted, and the Prosecution did not appeal the Chamber's decision to enter convictions in connection with this limited scope of the false testimony. There is thus absolutely no basis for the Prosecution to complain that the Chamber should have sentenced Mr. Bemba in connection with a wholly different set of allegations.

119. It is, moreover, incorrect to suggest that the Trial Chamber, and not the actions of the Prosecution, limited the scope of this case. The Prosecution did not request joinder of the two cases,[216] nor did it request Trial Chamber

TC Decision, 09/03/1998, pp.2-3 ("WHEREAS, in many judicial systems, the false testimony must be directly linked to the facts of the case; some judicial systems even add that statements, which are deemed to be false, must have some bearing on the outcome of the trial, during which the witness was heard; in other words, the false statement must be able to influence the decision of the judge, either in favour of or against the accused […]; WHEREAS it is indeed appropriate to add that false testimony is a deliberate offence, which supposes wilful intent on the part of the perpetrator to mislead the judge and thus to cause harm."); *Niyitegeka* MICT Decision, 28/01/2014, paras.18-19; *Bagosora* et al. TC Decision, 03/10/2003, paras. 8-9.
See also ICC-01/05-01/13-2167-Conf, para.180; ICC-01/05-01/13-1902-Conf-Corr2, para.116, 122; ICC-01/05-01/13-1900-Conf, para.13; ICC-01/05-01/13-978, para.18; ICC-01/05-01/13-949, para. 21

[215] In ICC-01/05-01/13-978, paras. 11, 18, the Arido Defence argued that to fall within the scope of Article70, it was necessary for there to be a connection between the false statement and a material issue in the case. A similar argument was raised by the Mangenda Defence in ICC-01/05-01/13-974-Conf, paras. 6-9.

[216] Rule 165(4) envisages that the Trial Chamber may – where appropriate – direct that Article 70 charges be joined to the Main Case.

III to stay the Main Case whilst the Article 70 allegations were adjudicated, even though it would have been consistent with the practice of International Tribunals to do so.[217] The fact that the Prosecution did not consider its necessary or strategically useful to request joinder speak volumes concerning the Prosecution's ability to successfully employ the fruits of its Article 70 investigation in the Main Case, on covert basis.

120. As a result of non-joinder, it would have been contrary to the principle of *lis pendens* for Trial Chamber VII to enter findings of fact in relation to the same issues that were before Trial Chamber III. This is not an issue of 'pragmatism', but a fundamental protection against the type of double jeopardy that could ensue if the Prosecution were able to use the Article 70 case as a forum for re-litigating issues on the merits from the Main Case.[218]

121. The Prosecution DCC also failed to set out any specific particulars of false testimony on issues other than those concerning contacts and payments, or the military background of the Cameroonian witnesses (which was based on lies that were not attributable to the Defence). For example, although the Prosecution repeatedly claimed that witnesses were illicitly coached in relation to issues concerning merits, the charges do not clarify whether the answers were known by the defendants to be false.[219] By the same token, although the charges claim that promises were made to witnesses in

[217]See for example, the findings of the ICTR Appeals Chamber in *Kamuhanda* AJ, paras. 219-221, which preceded the indictment issued against Witness GAA on 11 July 2007 (see Prosecutor v. GAA, Sentencing Judgment, 4 December 2007, para. 1). *Lukić* AC Decision 28/11/2008, the 'false evidence' was disclosed to the Prosecutor but was never tendered at trial, the witness and Defence team member involved acknowledged that the evidence was false, and the indictments in the contempt case were issued several months after the trial judgment was issued on 20 July 2009: See *Rašić* SJ; *Tabaković* Indictment.

[218] See ICC-01/05-01/13-1161, para. 12-16.

[219] See for example, ICC-01/05-01/13-526-Conf-AnxB1, para. 22. At para.37, the Prosecution claimed that the scripted answers included 'falsehoods' but did not clarify whether such falsehoods concerned the merits or peripheral details (such as contacts).

exchange for false testimony, the charges do not specify whether such false testimony included false testimony on the merits (other than as concerns the background of the Cameroonian witnesses).[220] As complained by the Defence, the Prosecution DCC also failed to cite evidence that might have shed light on the specific nature of the falsity of the evidence.[221]

122. When presented with these vague allegations (which, apart from the background of the Cameroonian witnesses, were not supported by evidence establishing the objective falsity of issues concerning the charges in the Main Case), the Pre-Trial Chamber found that "[t]his Chamber is obviously not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case."[222] Significantly, the Chamber then delineated the specific aspects of the charges which it had found to be supported by sufficient evidence ("Nevertheless, there is evidence that (…)").[223]

123. When read in this context, it is clear that the Pre-Trial Chamber's statement that it was "not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case",[224] was not a 'pragmatic' decision, but a legal finding based on the Prosecution's failure to take the necessary steps to charge, and substantiate allegations that the 14 witnesses had lied in relation to issues concerning the merits of the Main Case charges.

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[220] ICC-01/05-01/13-526-Conf-AnxB1, paras. 22, 41.

[221] ICC-01/05-01/13-599-Red2, para 73: "*Paragraph 41 "As directed by BEMBA, KILOLO illicitly coached witnesses to testify falsely about the substance of their evidence, such as their military backgrounds and key facts bearing on the Defence's case theory": This allegation not only lacks specificity as to the dates on which the direction for such "illicit coaching" was given and what aspects of the Defence case theory were to be supported by false evidence, but it is also totally unsupported by any reference to the evidence. As the Prosecutor has now admitted, this allegation is, in fact, a generalized summary of its case as presented in paragraphs 46-109 inclusive of the DCC."*

See also ICC-01/05-01/13-598-Conf, para. 79.

[222] ICC-01/05-01/13-749, para. 64.

[223] ICC-01/05-01/13-749, para. 64.

[224] ICC-01/05-01/13-749, para. 64.

124. The Prosecution also fully endorsed the limited scope of the Article 70 case, when it was to their advantage to do so. For example, the Prosecution repeatedly opposed Defence requests to access Main Case filings or Main Case evidence.[225] The Prosecution even went so far as to claim that the following categories of Main Case materials were not material to Defence preparation in the Article 70 case:[226]

(i) Testimony of Prosecution witnesses, tending to show that the falsehoods allegedly encouraged by the Accused were not, in fact, falsehoods;

(ii) Submissions and testimony (including of Prosecution witnesses (that assist in understanding the nature of the issues on which the Prosecution alleges the Accused have encouraged false testimony.

125. The Prosecution's charging strategy, and conduct throughout the case therefore gave rise to the limited nature of its own case. The Prosecution's regret concerning the fruits of its strategy is not a basis for increasing Mr. Bemba's sentence.

126. Finally, the Prosecution argument fails to reveal any error in the <u>outcome</u> of the sentencing judgment. Rule 145(1)(c) states that in calculating the appropriate sentence, the Chamber shall give consideration to the extent of the damage caused by the wrongful conduct, and the nature of the wrongful conduct itself. Even if false testimony on issues pertaining to witness credibility is sufficiently grave to trigger Article 70(1)(a), there is plainly no error in considering such testimony to be less grave than

[225] ICC-01/05-01/13-1162; ICC-01/05-01/08-2953-Conf; ICC-01/05-01/13-1034-Conf; ICC-01/05-01/13-542; ICC-01/05-01/13-716.
[226] ICC-01/05-01/13-1162, paras. 2,6.

testimony on issues going to the heart of the case. Indeed, if the Court were to have no discretion to distinguish between the concealment of issues affecting the credibility of a witness, and false testimony that directly inculpates or exculpates an accused, this would mean that the ICC would be prevented from crafting a sentencing range that reflects the different levels of gravity, and damage to the integrity of the proceedings. The sentences imposed in connection with Article 70 would be out of sync with the evidential tendency to recognise that false or unreliable testimony on peripheral issues gives rise to less damage to the evidential integrity of the case.[227]

127. In terms of a concrete illustration of this tendency, in the Main Case, a key Prosecution witness falsely denied, under oath, that he had received direct payments from the Prosecution,[228] lied about contacts with other witnesses,[229] submitted false documentation to VWU in order to obtain benefits,[230] fabricated threats in order to impugn the defendant,[231] and threatened to recant his testimony unless further payments were made.[232] The Prosecution nonetheless maintained its reliance on this witness, and argued the following:

> The Defence attempts to portray P169 as corrupted by money. The Defence's reference to his testimony is taken out of its context and misinterpreted. The wording clearly indicates that P169 is referring to his acceptance of the remuneration in return for the work he was asked to do. P169 makes it clear that such payment had nothing to do with his testimony, stating that

[227] See fn. 214 above; ICC-01/09-02/11-868-Red, para.92;ICC-01/05-01/08-1478-Conf, para. 15; Nyiramasuhuko et al., Appeal Judgment, 14 December 2015, Case No. ICTR-98-42-A, para. 331
[228] ICC-01/05-01/08-T-361-CONF-ENG ET, 22 October 2014, p.32, lines 22 to 23.
[229] CC-01/05-01/13-1033-Conf-Exp, para. 45.
[230] ICC-01/05-01/13-1902-Conf-Corr2, para. 194; ICC-01/05-01/08-T-361-Conf-Red, p.28, lines 7-21.
[231] ICC-01/05-01/13-1033-Conf-Exp, para. 22.
[232] ICC-01/05-01/13-1902-Conf-Corr2, paras. 192, 195; CAR-OTP-0072-0504-R01, p.4; CAR-OTP-0083-1212-R01.

"nobody gave me any money". Contrary to Defence's assertions, he eye-witnessed MLC crimes. P169's accounts are corroborated by those of several other witnesses at trial and documentary evidence."[233]

[…]

P- 169's behaviour may be termed unsavoury or inappropriate, but this does not mean that he is not credible or that his testimony is not reliable. His behaviour was triggered by post - testimony events that were not present before or during his initial testimony and have no bearing on the truth of the 2002-2003 CAR events described in his testimony. P-169's behaviour was triggered by his belief that he was entitled to financial compensation associated with loss of income due to [Redacted]; nothing on the record suggests pre -meditated or opportunistic behaviour aimed at gaining financial benefits from his status as a witness in this case.[234]

[…]

Therefore P-169's credibility must be assessed, as with every other witness, by the wide range of possible factors affecting the credibility of a witness. The Defence will argue that P-169 admitted to some lies in his letters and therefore is incapable of belief. Such a position seeks to remove the Chamber's basic duty to freely assess witness credibility and reliability of evidence in favour of a fictitious standard that stipulates that once a person behaves in a disproving or controversial manner or admits to providing incorrect information, any information provided by that person should be automatically excluded. This rigid and artificial standard would automatically exclude

[233] ICC-01/05-01/08-3141-Conf, para. 109.
[234] ICC-01/05-01/08-3182-Conf-Corr, para. 24.

certain categories of evidence, such as insider testimony where that witness seeks to minimise or conceal his role in spite of other evidence showing that other parts of his evidence are truthful. Although the Defence would have it so, there is no simple formula for assessing credibility short of a detailed assessment of the veracity of P- 169's evidence as a whole. Nor is there any basis on articles 69 or 74 of the Statute for this position.[235]

128. In sum, the Prosecution argued that a witness has lied on peripheral issues does not impact on the credibility of the witness's testimony concerning the charges, or otherwise interfere with or compromise the Chamber's ability to freely assess the evidence. The Prosecution therefore accepted, and relied upon the critical distinction between false testimony concerning the merits of a case, and false testimony on other issues, such as payments and contacts.

129. The *GAA* Judgment, which the Prosecution relies upon to support the gravity of the offences,[236] also supports the Chamber's decision to assess the gravity of the offences in light of the specific content of the false testimony. In that judgment, the ICTR Trial Chamber found that the most serious category of perjury concerned testimony which aimed to convict a person. The ICTR Trial Chamber therefore recognised that it was legally appropriate to grade the gravity of perjury, depending on the content and purpose of the false testimony.

130. It therefore fell fully within the Chamber's discretion to take the content of the false testimony into consideration. Consequently, the Prosecution's appeal on this point should be dismissed in its entirety.

[235] ICC-01/05-01/08-3182-Conf-Corr, para. 25.
[236] Prosecution Appeal, para. 97, fn. 210.

2. II.B.2 Reveals No Discernible Error and Should be Dismissed

131. The Prosecution has failed to frame this sub-ground in a manner that clearly identifies the legal, factual or procedural error that arises from the Sentencing Judgment, and which vitiates its outcome. This warrants the summary dismissal of this sub-ground.[237]

132. The tenor of its argument in this sub-ground appears to be that because the Chamber confirmed that different types of false testimony can be sanctioned under Article 70(1)(a), the sanction should be the same. This is a complete non-sequitur. The murder of 5 persons, or 500 persons can both be characterised as murder as a crime against humanity (if the contextual elements are present), but it would be plainly wrong to treat them as equivalent crimes for the purposes of sentencing.

133. The Prosecution's attempt to blur any distinction in the common plan between testimony on the merits, and testimony on collateral issues only serves to highlight the lack of clarity concerning the charges, and the ever-shifting and vague nature of the common plan in this case. Whereas the Trial Chamber convicted Mr. Bemba due to his association with a common plan to "illicitly interfere with defence witnesses in order to ensure that these witnesses would testify in favour of Mr Bemba",[238] the Prosecution has now argued on appeal that the "criminal scheme [was] geared towards enhancing the credibility of the Main Case Defence witnesses".[239]

[237] ICC-02/04-01/05-408, para.48; *Miloševic* AJ, para. 16.
[238] TJ, para. 802.
[239] Appeal Brief, para. 96.

134. This change is not a matter of mere semantics: if the purpose of the common plan was to enhance credibility, then Mr. Bemba would have fallen outside of its scope due to the plethora of evidence that:

a. The witnesses lied on a range of matters for personal reasons that were unconnected to legal strategy of the Defence, including lies that were intended to conceal the true identity of the witnesses from both the Court and the Defence;[240]

b. The 'lies' of witnesses contradicted Defence submissions concerning the number of contacts, and therefore diminished, rather than enhanced their credibility;[241] and

c. Mr. Bemba requested his Defence to find 'truthful' witnesses and probative evidence.[242]

135. The above evidence severs any automatic nexus between measures taken to conceal payments and contacts, and the lawful objective of defending Mr. Bemba with a view to securing an acquittal. Indeed, when stripped of its hyperbole, this is a case that concerned false testimony on issues that were not disclosable,[243] and in many cases, would have fallen

[240] P-260 and P-245 testified that they were instructed to pretend to be CAR soldiers before they met the Defence (For P-260: CAR-OTP-0080-0021, 0031 at lns.343-357; CAR-OTP-0080-0043, 0051 at lns.264-292; CAR-OTP-0080-0069, 0074 at lns.165-171. For P-245: CAR-OTP-0078-0206-R01, 0211 at lns.143-159; CAR-OTP-0078-0206-R01, 0213 at ln.244 – 0214 at ln.270; ICC-01/05-01/13-T-27-CONF-ENG, p.42, lns.16-19), and that they maintained this pretence during their interactions with Defence team members (CAR-OTP-0078-0248-R01, 0263 at ln.509-513; CAR-OTP-0080-0021, 0041 at lns.708-717). This included sending emails, which were signed 'Sous-Lieutenant (ICC-01/05-01/13-T-19-CONF-ENG ET,p.47, lns.8-19; CAR-D21-0007-0003 at 0003). *See also* ICC-01/05-01/13-1902-Conf-Corr2, para. 92.

[241] CAR-OTP-0079-0114 at 0119, lns.134-160; CAR-OTP-0090-0831 at 0832 fn.1; ICC-01/05-01/08-T-352-Red-ENG,pp. 35-36; *see also* ICC-01/05-01/13-2144-Conf, para. 211.

[242] CAR-D20-0007-0188 : "Le client m'a dit de vous dire ceci, qu'il faut retenir toue personne qui sera en mesure de parler de manière sincère sur chaque message porté".

P-261 statements reflect the fact that the Defence were looking for eye witnesses: P-261 wanted to introduce his sister to Me. Kilolo as she had experienced the events 'tu as vécu la chose personnellement' see CAROTP-0087-2426-R01 at 2436, lns.348-353; when the Defence met P-261, they thought he was a soldier, see CAR-OTP-0087-2426-R01 at 2460, lns.1289-1291, ICC-01/05-01/13-T-15-CONF-ENG, p.55, lns 20-23.

[243] ICC-01/05-01/08-2141, paras. 29, 36(c) (iv); ICC-01/05-01/08-T-244-Eng,p 58, lns. 24 –p.62, ln.18.

outside the range of appropriate questions that could be put to a witness.[244] It would therefore be completely unfair and disproportionate to impose a sanction that puts these defendants in the same category as persons, who have intentionally conspired to put an innocent man in jail.

136. When the shoe was on the other foot, that is, when the Prosecutor was facing requests for access to information concerning its payments to, and contacts with Prosecution witnesses, the Prosecution maintained that such information was "*prima facie* irrelevant" to credibility.[245] In terms of the frequency of contacts with witnesses, the Prosecution further averred that:[246]

> Not every contact with witnesses, let alone those who are not called as the Prosecution's witnesses in this case, is material to the Defence's preparation. Absent a specifically articulated purpose, such information is not disclosable.

In this case, the Prosecution argued that according to ICC case law, "information about witness payments or assistance is disclosable only if they are extraordinary": ICC-01/05-01/13-1118, para. 2. The Prosecution for the Special Tribunal for Lebanon has also stated on the record that they do not consider any financial amounts falling within the scope of necessary and reasonable assistance, to constitute "payments" (*Ayyash* Witness Payments Response, fn.7). It follows that a witness who denies receiving "payments" would not, under this definition, be lying if the forms of financial assistance were necessary and reasonable.

[244] In *Prosecutor v. Blaškić,* the Chamber prevented the Defence from questioning a witness in connection with meetings between the Prosecution and the witness on the grounds that it was "not appropriate": *Blaškić* Transcript 21/08/1997, pp. 1812-1813.

In *Abu Garda,* the Pre-Trial Chamber found that although the Defence was not required to submit its line of questioning to the Prosecution in advance, any questions put to a Prosecution investigator could only concern objective facts related to the charges in the case; "questions merely aimed at challenging the investigative methods followed by the OTP will be deemed as not admissible by the Chamber, either *proprio motu* or upon a request by the Prosecutor": ICC-02/05-02/09-186, pp.5-6.

In *Katanga,* the Trial Chamber called a Prosecution investigator to testify in relation to the general conditions under which the investigations were conducted, and the methods used to identify exculpatory information, but prohibited the Defence from putting questions that concerned specific witnesses: ICC-01/04-01/07-1603; See also Transcript of 25 November 2010, p38 line 25 – p. 39 line 4; p. 65 lines 17-20.

In this case, the Prosecution also strenuously opposed the Defence putting questions to Prosecution witnesses concerning the modalities of their questioning, on the grounds that such questions were not relevant to the charges: (ICC-01/05-01/13-T-37-CONF-ENG).

[245] ICC-01/05-01/13-1118, para. 6.

[246] ICC-01/05-01/13-1118, para. 13.

137. During the course of the Main Case, Trial Chamber III also prevented the Defence from questioning Prosecution witnesses about payments, and at one point, stated that it would be "offensive" to put so matters to a Prosecution witness without an established foundation for doing so.[247]

138. At the beginning of the Defence case, the Chamber originally rejected a Prosecution request to question a Defence expert witness about payments.[248] The Prosecution then met with P-267, requested, and received confidential data concerning 67 persons (including all persons on the Defence list of witnesses), notwithstanding the fact that the Prosecution had no basis for suspecting that the 67 persons in question had received improper payments.[249]

139. In November 2012, the Prosecution informed the Trial Chamber that it was conducting an Article 70 investigation into Defence witnesses concerning improper payments.[250]

140. Unsurprisingly, the Prosecution was granted free reign to question Defence witnesses about all such peripheral matters for the rest of the case, and in many cases, appear to have done so for the specific purpose of building up its covert Article 70 investigation. [251]

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[247]ICC-01/05-01/08-T-154-Red2-ENG, p.3, lines 13-14; ICC-01/05-01/08-T-157-Red2-ENG, p.30, lines 1-6, p.31, lines 22-25; p.53, lines 10-25, p.54, lines 1-3.

[248] ICC-01/05-01/08-T-244-ENG, pp. 58-60.

[249] In *ex parte* submissions filed before Trial Chamber IIII, the Prosecution acknowledged that it only attempted to ascertain whether the payments had a link to suspicious activity <u>after</u> it had already received the confidential financial data: ICC-01/05-01/08-2548-Red4, para. 4. See also Defence arguments in ICC-01/05-01/13-1941-Corr, paras. 67-68.

[250] ICC-01/05-01/08-2412.

[251] During the testimony of D-15 (which took place after the Prosecution started to receive call data records), the Prosecution trial attorney went to so far as to intimate to the Chamber:
"MR IVERSON: Madam President, I believe he's giving an indication. But if any Trial Chamber later on were to look at this testimony in the context of any proceedings, it might be difficult for them to determine whether or not this is a clear statement of fact, and that's why I continued to ask the question and insist that he provide a clear answer." ICC-01/05-01/08-T-345-CONF-ENG ET 13-09-2013, page 11/12.

141. It would appear, therefore, that these issues became relevant in the Main Case because the Prosecution made them relevant by virtue of a completely separate investigation. It is, moreover, logically incoherent for the Prosecution to argue that the concealment of this information from Trial Chamber III (by virtue of the witnesses' lies by omission) struck at the heart of the administration of justice, when the Prosecution wilfully concealed (by virtue of non-disclosure) the same information from the Main Case Defence, even though the Prosecution had accepted that information concerning the credibility of Defence witnesses fell within the Prosecution's disclosure obligations.[252] Bearing in mind the Prosecutor's special duties as a Minister of Justice, it is arguable that the Prosecution's failure to disclose this information to the Defence was equally, if not more grave. This non-disclosure prevented Trial Chamber III from addressing these issues timeously, and with the benefit of open, adversarial litigation.[253]

142. The Prosecution cannot, therefore enhance the gravity of the specific issues underpinning the Article 70 case without enhancing the gravity of their omission to disclose information concerning these same issues. The Prosecution's acknowledged disclosure violations should, in turn, trigger the right to a remedy, such as a reduction rather than increase in Mr. Bemba's sentence.[254]

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[252]During the Main case, the Prosecution acknowledged that information concerning the credibility of Defence witnesses fell within the scope of Rule 77, and further avowed that it had fully complied with its disclosure obligations: ICC-01/05-01/08-2283, para. 14. Notwithstanding its written assurances, the Prosecution did not disclose critical information concerning the fact that several Defence witnesses had invented military backgrounds (which was unknown to the Defence) nor did they disclose their foundation for querying witnesses on payments and contacts. The Prosecution has also since acknowledged that its disclosure "might not have been timely": ICC-01/05-01/08-3478, para. 13.

[253] At the ICTY, the Judges affirmed that order to confront a witness with allegations of impropriety, fairness dictates that both the witness and the Defence must be disclosed the foundation for such allegations, or the allegation must be withdrawn: *Krajišnik* TC Decision, 15/12/2005; *Gotovina* Transcript, 30/09/2009.

[254] *Ndindiliyimana* TJ, paras. 2191-2193.

143. The need to send a message in this case also should not distort the countervailing need to ensure that sanctions are applied in an equitable manner throughout the Court. Within the context of both the Main case and this case, the Prosecution repeatedly provided incorrect information and concealed, through non-disclosure, information which, objectively, fell within the Prosecution's duties of disclosure.[255] Although the non-disclosure of exculpatory or otherwise relevant information is a grave matter, no sanction or reprimand was issued in connection with this conduct.

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[255] Apart from information concerning the 14 witnesses, in the Main case, the Prosecution provided incorrect information to the Defence concerning its contacts with P-169: ICC-01/05-01/13-1033-Conf-Exp, paras. 36-37; CAR-D20-0005-0010.

D-57 (P-20) also testified that the Prosecution had attempted to engage in substantive discussions with D-57 after the cut-off point for his testimony, and in violation of the witness contact protocol in the Main Case: T-31, p. 81, l. 14 – p. 82, ln. 7; ICC-01/05-01/13-1902-Conf-Corr2, para. 221; CAR-D20-0005-0001)

In response to a Main case disclosure request, the Prosecution claimed that it had not received any information or assistance from DRC authorities in connection with the Defence case in the framework of the Article 70 investigation: CAR-D20-0005-0019. Through subsequent Article 70 disclosure, the Defence received the RFAs that demonstrated the opposite : CAR-OTP-0091-0473; CAR-OTP-0091-0677; CAR-OTP-0091-0481

Notwithstanding the fact that the Prosecution divulged the names of all Defence witnesses to Western union and the Austrian authorities, and sent RFAs to DRC, France, Sweden, and Cameroon which mentioned the names and details of specific Defence witnesses (CAR-OTP-0091-0539 at 0544-0545; CAR-OTP-0091-0701; CAR-OTP-0091-0481; CAR-OTP-0091-0333 at 0336-0337), the Prosecution claimed to the Main Case defence that "No confidential information concerning the Defence case or which identified Defence witnesses as such was divulged to any external sources, including the DRC authorities": CAR-D20-0005-0023.

In the Article 70 case, after opposing the disclosure of its correspondence with P-267, the Prosecution then averred to the Chamber that it had <u>no</u> internal emails with P-267, and the only internal documentation was one memorandum which had been disclosed (T-33, p. 9, ln.1-9, p. 35,lns. 1-6) . P-267 also initially denied meeting the Prosecution. (T-34-Conf-ENG p. 30 lns 1-5; p. 32, ln1 to p. 40 ln. 19). It was only through the cross-examination of P-267 that the Defence was able to discover that the Prosecution had engaged in substantial email communications with P-267, and had in fact received the Western Union records directly by email: T-35, p. 45 l. 23 to p. 60 ln. 6.

The Prosecution also stated in the record that it had complied fully with disclosure orders when it had not: ICC-01/05-01/13-2172-Conf, paras.6-7, para. 14, fn 35; ICC-01/05-01/13-2150-Conf, paras 9-11, para. 15, para 25.

It also incorrectly claimed to the Defence that it had disclosed information concerning the chain of custody of CDR when it had not done so, and in fact, had not disclosed the CDR in question: ICC-01/05-01/13-2188-Conf, paras. 9-11.

144. Similarly, in the *Lubanga* case, the Chamber found that there was evidence that:[256]

> intermediaries 321 (REDACTED) and 316 (REDACTED) may have misused their positions in varying ways, but the underlying allegation is that they have persuaded or invited witnesses to give false testimony to the Court. Moreover, there is evidence that this behaviour may have extended beyond those two intermediaries.

145. In the Trial Judgment itself, the Chamber concluded that "there were <u>strong</u> reasons to believe" (emphasis added) that certain intermediaries had manipulated vulnerable witnesses to provide false evidence concerning issues that directly concerned the charges (i.e. whether children under the age of 15 years were conscripted by the UPC).[257] The Prosecution nonetheless concluded that there were insufficient grounds to open an Article 70 investigation.[258]

146. Similarly, in the *Katanga* case, although the Prosecution acknowledged that a Prosecution witness had provided a false statement, and Trial Chamber II invited the Prosecution to open an Article 70 investigation,[259] the Prosecution declined to do so.

147. It cannot be that the size of the sanction depends on the side of the court-room. Misconduct <u>should</u> be sanctioned and condemned but the tariffs imposed in this case should not be completely disproportionate, and objectively unfair in light of the practice adopted by the Court in other cases

[256] ICC-01/04-01/06-2434-Red2, para. 140.
[257] ICC-01/04-01/06-2842, paras. 480-483.
[258] ICC-01/04-01/06-3069.
[259] ICC-01/04-01/07-T-190-Red-ENG, page 3, lines 14 to 22; ICC-01/04-01/07-2731, ICC-01/04-01/07-2731, para. 18.

or other instances. There is an objective dissonance as concerns the Prosecution's claim that the sentences imposed in this case are manifestly unreasonable, given that many other incidents have never been sentenced due to the lack of investigative activity on the part of the Prosecution.

148. Bearing in mind the degree of leniency that has been applied to the benefit of the Prosecution and Prosecution intermediaries in other cases, the imposition of a custodial sentence of unprecedented length in the first ICC contempt case - a case which was brought by the Prosecution against the same Defence team that it was facing in court – is likely to appear anomalous and exceptional. In turn, this appearance of exceptionality would undermine the legitimacy of this particular sentence, and dilute its potency as a deterrent for all court participants, witnesses and third parties.

C. Sub Ground 3 Should be Summarily Dismissed

149. The Prosecution's argument that the Chamber erred by imposing a lower sentence for offences committed as accessories should be dismissed *in limine* due to the Prosecution's failure to argue, and therefore demonstrate, that the alleged error impacted on the outcome of the judgment.

150. Although the Chamber decided to impose a custodial sentence of 10 months in connection with Mr. Bemba's conviction as an accessory, the Chamber also determined that in accordance with Article 78(3) of the Statute, the sentences should be aggregated to a joint sentence of 12 months.[260] In so doing, the Chamber noted that Article 78(3) provides that such a joint sentence cannot be lower than the highest individual sentence, which was 12 months.[261] It is therefore clear that the reference point was the sentence

[260] SJ, para. 250.
[261] SJ, para. 250.

imposed in connection with Mr. Bemba's conviction as a co-perpetrator. Accordingly, by virtue of the fact that Article 78(3) prevented the Chamber from imposing a joint sentence that was lower than the punishment meted out in connection with his role as a co-perpetrator, the fact that he received a lower individual sentence for his conviction as an accessory had no material impact on the outcome of the sentence.

151. The sub-ground is therefore purely hypothetical, and incapable of attracting appellate scrutiny. The Appeals Chamber has stated, in clear terms, that it will,[262]

> use its power under rule 158 of the Rules of Procedure and Evidence to reverse an impugned decision only if the decision was materially affected by an error. Regulation 64(2) of the Regulations of the Court must be read in light of these decisions. Accordingly, as part of the reasons in support of a ground of appeal, an appellate is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision.

152. In *Lubanga*, the Appeals Chamber further clarified that,[263]

> Article 83(2) of the Statute requires that the sentence be "materially affected by error of fact or law or procedural error." The material effect of such an error is only established if the Trial Chamber's exercise of discretion lead to a disproportionate sentence.

[262] ICC-02/04-01/05-408, para. 48.
[263] ICC-01/04-01/06-3122, para. 4.

153. The absence of argument or explanation as to how the alleged error materially affected the joint sentence imposed by the Chamber therefore precludes any appellate consideration of this sub-ground.

1. Sub-Ground 3: The Prosecution Failed to Demonstrate that the Chamber Erred in Law or Abused its Discretion by Imposing a Lower Sentence for Accessory Conduct

154. The Prosecution's argument that the Chamber erred in law, and or abused its discretion, by imposing a lower sentence for accessory conduct, misconstrues the Chamber's approach.

155. Whereas the Prosecution claimed that the Chamber imposed a lower sentence in connection with Mr. Bemba's conviction under Article 25(3)((b) due solely to its 'legal label' as accessory liability,[264] the Prosecution failed to cite a specific section of the Judgment which supports their argument that "the Chamber relied on an artificial hierarchy between accessories and co-perpetrators: finding that the former a necessarily or "automatically" less blameworthy than the latter".[265]

156. The mere fact that Mr. Bemba received a lower sentence for his Article 25(3)(b) conviction does not, in itself, demonstrate that the Chamber did so mechanically. The Chamber stated that it had "distinguished between the offences that Mr Bemba committed as a co-perpetrator and those in relation to which he was an accessory and considered Mr Bemba's varying degree of participation within the common plan".[266] To 'distinguish' does not mean to impose an automatic hierarchy; rather, it means to assess the appropriate

[264] Prosecution Appeal, para. 103.
[265] Prosecution Appeal, para. 103.
[266] SJ, para. 248.

sentence for different offences based on their particular characteristics. There is thus no error in this particular aspect of the Chamber's judgment.

157. In arguing that the Chamber abused its discretion in imposing a lower sentence for solicitation, the Prosecution appeal is also guilty of the same error that it erroneously attributes to the Chamber; namely, its arguments are based on abstract notions of legal principle rather than the facts and circumstances underpinning Mr. Bemba's conviction for solicitation. Although it might be theoretically possible that 'solicitation' could warrant a similar or greater sentence than perpetration or co-perpetration, the Prosecution Appeal is devoid of any explanation as to why no reasonable Trial Chamber could have imposed a lower sentence for solicitation, as opposed to co-perpetration, in this case.

158. The Trial Chamber defined solicitation as a situation in which the "perpetrator asks or urges the physical perpetrator to commit the criminal act". [267] In contrast to co-perpetration, the physical perpetrator (and not the person accused of solicitation) exercises full control over the execution of the crime.[268] Solicitation is, therefore, a diluted, and lesser included form of the 'joint control' theory of co-perpetration. The fact that solicitation requires, under this definition, a lesser degree of participation and impact on the overall commission of the offence, is, in itself, an objective basis for imposing a lower sentence.

159. This would be consistent with the ICTY Appeals Chamber's finding it was appropriate to lower the sentence of Radislav Krstic by a considerable amount as a consequence of the Appeals Chamber's findings that firstly, his conviction as a co-perpetrator should be overturned and replaced with

[267] TJ, para. 75.
[268] TJ, para. 80.

aiding and abetting, and secondly, that as an aider and abetter, it was not necessary to establish intent.[269]

160. In seeking to establish the factual gravity of Mr. Bemba's conduct as an accessory, the Prosecution relies only on paragraph 223 of the Sentencing Judgment, which in turn, cites to paragraph 857 of the Trial Judgment. Of key importance, in its original findings, the Chamber found that without Mr. Bemba's authoritative influence, "the untruthful testimony would not have occurred in the same manner";[270] the Chamber did not find that without Mr. Bemba's influence, the untruthful testimony would not have occurred. The broader wording in the Sentencing Judgment does not assist the Prosecution as it has no foundation in the original Trial Judgment. Nor, in light of clear testimony from D-23, D-2, and D-3 that they decided to lie to the Court on fundamental issues concerning their identities and experiences, prior to any contact with the Defence,[271] does it have any foundation in the evidence itself.

161. In any case, the particular paragraph cited by the Prosecution only serves to underscore the fundamental flaw in the Chamber's original conviction of Mr Bemba under Article 25(3)(b). In order to establish Mr. Bemba's knowing contribution under Article 25(3)(b), the Chamber incorporated by reference its findings concerning Mr. Bemba's role as a co-perpetrator.[272] The Chamber's findings concerning Mr. Bemba's conduct as

[269] *Krstić* AJ, para. 268.
[270] TJ, para. 257.
[271] See fn 240 *supra*; TJ, para. 128, : "Mr Arido admitted that he instructed D-2, D-3, D-4 and D-6 to present themselves to Mr Kilolo and to the Court as FACA soldiers, even though he believed that they had no military background". See also paras. 129-132. The fact that Mr. Bemba was not aware that the witnesses had lied about their background is further reflected by the contents of his conversations with Mr. Kilolo: CAR-OTP-0082-1309 at 1313 ln. 95, at 1315, lns. 174-176
[272] TJ, para. 857, citing paras 807-813. In its Final Trial Brief, the Prosecution's submissions on solicitation were confined to the assertion that "BEMBA is also criminally responsible for soliciting the giving of false testimony under article 25(3)(b). Further, and in the alternative to his responsibility as a direct co-perpetrator, BEMBA is criminally responsible for soliciting the

an accessory was thus fully subsumed by the Chamber's findings concerning his role as a co-perpetrator. Given the equivalence of conduct, and the lack of a direct intent requirement for solicitation, there is no objective basis for disturbing the Chamber's decision to impose a lesser sentence for what was, essentially, a lesser included offence.

162. In such circumstances, any error lay not in the Chamber's decision to impose a lower sentence for accessory conduct, but in its earlier decision to impose multiple convictions for identical, or lesser included conduct.[273]

163. This sub-ground is thus completely hollow, and irrelevant to the outcome of the Sentencing Judgment.

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presentation of false evidence and the corrupt influence of witnesses. The same evidence proving BEMBA's criminal responsibility under 25(3)(a) establishes his responsibility under 25(3)(b)." (ICC-01/05-01/13-1905-Conf, para.323).

[273] See *Kunarac* AJ, para. 170: "Typically, the issue of multiple convictions or cumulative convictions arises in legal systems with a hierarchy of offences in which the more serious offences within a category require proof of an additional element or even require a specific mens rea. It is, however, an established principle of both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*). The rationale here, of course, is that the greater and the lesser included offence constitute the same core offence, without sufficient distinction between them, **even when the same act or transaction violates two distinct statutory provisions**. (emphasis added)"

At a domestic level, in Italy, Art. 377 (perverting the course of justice) of the Italian Criminal Code punishes those who solicit false testimony but expressly requires that the event (the false testimony) does not occur. On the contrary, if the solicitation is successful, the solicitor shall be only charged as as co-perpetrator of the false testimony committed by the witness (art. 372 of the Italian Criminal Code). In other words, the two offences cannot concur. This conclusion, based on the wording of article 377, is confirmed by well-established case-law :

"372 e quello di cui all'art. 377 cod. pen. In altre parole, come avvertito dalla Corte territoriale, sono giuridicamente incompatibili le ipotesi accusatorie prospettate nel presente processo e sopra ricordate." [as a result the formal concurrence between articles 372 and 377 is excluded. In other words, as suggested by the territorial Court, the criminal charges suggested by the prosecution prospected are legally incompatible"]

<u>Italian Court of Cassation, V Criminal Division, decision n. 32371/2017. See also Italian Court of Cassation, VI Criminal Division, decision no. 50008/2015</u>

The law of England and Wales also prevents someone who has already been punished for contempt to be prosecuted for the same conduct as a different criminal offence, see Aldridge, Eady & Smith on Contempt, Sir David Eady and Professor A. Smith (eds.), Thomson Reuters (Professional) 2011, para. 14-65.

CONCLUSION

164. The Prosecution appeal is devoid of any concrete arguments as to why the sentence imposed on Mr. Bemba is too lenient. The Prosecution appeal focusses heavily on the need to ensure deterrence, but fails to explain why a lengthier custodial sentence is required to ensure deterrence.

165. As expressed by Beccaria:[274]

« ***Ce n'est point par la rigueur des supplices qu'on prévient le plus sûrement les crimes, c'est par la certitude de la punition*** »

166. It is, therefore, irrational and unfounded to argue that a longer custodial sentence must be imposed in this case in order to ensure the objectives of deterrence. The objectives of deterrence can only be met if each and every person appearing before the ICC is aware that they can and will face a similar sanction if they engage in comparable conduct.[275] This militates in favour of realistic sanctions that <u>will</u> be imposed in an even and impartial manner, rather than exaggerated sanctions that only exist within the confines of this case.

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[274] Beccaria (1764), p.39 Chapitre XXVII. De la douceur des peines.

[275] "Criminology research establishes that increasing the probability of detection has much greater effects on crime than increasing the size of criminal sanctions. Increasing the size of a sanction has a marginal effect (if any) on deterrence. It seems that individuals are risk loving; they are deterred more by low sanctions with high probabilities of detection than by harsh sanctions with low probabilities of detection. How can this phenomenon be explained? Increasing the size of a sanction from one year prison term to a two-year prison term dos not double the deterrent effects of the sanction, because of a psychological phenomenon called discounting of the future." Elgar (2012), p. 22.

"Punishment certainty is far more consistently found to deter crime than punishment severity" Nagin (2001).

"Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits" Wright (2010), p.1.

167. The Prosecution appeal also fails to address the negative consequences, which stem from inconsistent or overly onerous contempt sanctions. As remarked by the American Bar Association in the context of sanctions imposed on lawyers,[276]

> **Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.**

168. A sanction which falls outside the accepted range of contempt penalties imposed by all other courts will undermine the deterrent effect of all jurisdictions. It will create the impression that other courts are too lenient on such matters. At the same time, this case will also have no precedential value or deterrent effect vis-à-vis future ICC proceedings if, due to the magnitude of the sanctions and their inconsistency with the sentencing practices of other international courts, the case is viewed as an anomaly, rather than an objective yardstick as to the type of sanctions that could be attracted by similar conduct. Nor will it deter if it is blindingly obvious that the ICC does not have the resources and capacity to pursue and punish each future incident of contempt in the manner proposed by the Prosecution.[277] In line with the above principles, the most effective form of deterrence would be to craft a sentence that future Chambers would be willing to impose whenever comparable conduct arises in the proceedings, and able to impose

[276] ABA Standards for Imposing Lawyer Sanctions, p. 1.
[277] As observed by Nobel Prize winner Joseph Stiglitz in a key report which debunks the notion that heavy sentences promote deterrence: a "prodigious rate of incarceration is not only inhumane, **it is economic folly**" (emphasis added): NYU Brennan Report, foreword, p. 1. Page 7 of the Report further cites a 2014 report from the Brookings Institution's Hamilton Project, which "explained that incarceration has "diminishing marginal returns." In other words, incarceration becomes less effective the more it is used."

without diverting crucial time and resources from the core mandate of the Court.

169. Finally, although the Prosecution's appeal concerns Mr. Bemba's sentence, it is glaringly obvious that its portrait of Mr. Bemba's culpability bears no reality to the evidential foundation in this case. In order to be effective, sanctions must be viewed as being fair and legitimate. This will not be the case if the need to send a message triumphs over basic precepts of due process, individual responsibility, and evidential rigour, thereby resulting in the wrongful conviction of Mr. Bemba.

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Dated this 30th day of January 2018

The Hague, The Netherlands