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No: **ICC-01/05-01/13**
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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 redacted version

Response to Prosecution's Document in Support of Appeal against Trial Chamber VII's "Decision on Sentence pursuant to Article 76 of the Statute"

Source: **Defence for Jean-Jacques Mangenda Kabongo**

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

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I. INTRODUCTION

1. The Prosecution appeal seeks reversal of the sentence imposed on Mr Mangenda on the basis that it is "manifestly insufficient and unjust,"[1] claiming that it was taken from "the wrong shelf."[2]

2. The appeal should be rejected. A Trial Chamber, "based on its intimate knowledge of the case,"[3] enjoys a "broad discretion in the determination of a sentence."[4] The Prosecution has failed to identify a single relevant fact that was not taken into consideration by the Trial Chamber; fails to identify any error of law; fails to show that anything less than the maximum sentence was an abuse of discretion; and fails to cite even a single contempt case from any jurisdiction from which the sentence deviates. The Prosecution's "wrong shelf" argument is unsupported by any description of the bookcase, the shelves, or even a single book.

3. The single specific error articulated by the Prosecution in respect of Mr Mangenda is that the Chamber should not have considered the nature of the lies for which he was convicted.[5] This was no error. On the contrary, failing to consider all the circumstances of the commission of the offence – including the nature of the lies that were the basis of the convictions – would have been an error.

4. The Prosecution's second ground of appeal – that the Trial Chamber had no power to suspend any part of a term of imprisonment for an Article 70 offence – is unfounded. The power to suspend is intrinsic to the power to order. Chambers of the ICC routinely exercise their powers subject to conditions subsequent, without any separate statutory authorization to do so. The ICC Statute, furthermore, does not exhaustively regulate sentencing for Article 70 offences, especially as compared to national legislation; has previously been interpreted as conferring inherent or implied powers; and reflects no legislative intention to deny the power to suspend a term of imprisonment. The widespread practice of the *ad hoc* international tribunals and national systems is to permit suspension of sentences, especially in respect of contempt offences.

[1] Appeal, para. 4. This filing is a public redacted version of ICC-01/05-01/13-2201-Conf filed on 21 August 2017.
[2] Appeal, paras. 4, 11, 15, 16, 17, 18, 19, 22.
[3] *Lubanga* SAJ, para. 34.
[4] *Lubanga* SAJ, para. 40.
[5] Appeal, paras. 14, 76-77.

5. Finally, the appropriate remedy, assuming that either of the Prosecution's grounds is granted, is to remand the question of sentence to the Trial Chamber for re-determination. International human rights law precludes the Appeals Chamber from increasing sentence without a review or appeal of that decision. If the Appeals Chamber finds that suspending any portion of Mr Mangenda's term of imprisonment was legal error, the matter should be remanded to the Trial Chamber for re-determination of the appropriate sentence. The Trial Chamber's decision to suspend part of the term of imprisonment was integral to its evaluation of the overall punishment to be imposed. If that component is removed from the sentencing decision, then the Trial Chamber should be accorded the opportunity to make a *de novo* assessment of the appropriate sentence.

II. STANDARD OF APPELLATE REVIEW

6. Article 82(1)(a) of the Statute permits a party to appeal a sentence "on the ground of disproportion between the crime and the sentence." Article 83 provides that

> 2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may: a) Reverse or amend the decision or sentence; […] 3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

7. The *Lubanga* Appeals Chamber has indicated that:

> the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber's role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is "disproportionate" to the crime. Only then can the Appeals Chamber "amend" the sentence and enter a new, appropriate sentence.[6]

8. The proportionality of a sentence to the crime is, according to the Appeals Chamber, embodied in the criteria for determining sentence set out in Article 78(1) of the Statute and Rule 145(1) of the Rules of Procedure and Evidence ("Rules"):

[6] *Lubanga* SAJ, para. 39.

> While proportionality is not mentioned as a principle in article 78 (1) of the Statute, rule 145 (1) of the Rules of Procedure and Evidence provides guidance on how the Trial Chamber should exercise its discretion in entering a sentence that is proportionate to the crime and reflects the culpability of the convicted person.[7]

9. Conversely, disproportionality cannot be evaluated independent of the criteria for determining a proportionate sentence set out in Article 78 and Rule 145. Furthermore, the evaluation of these criteria at first instance "involves an exercise of discretion":

> The Appeals Chamber considers that the above provisions indicate that, in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors it considers relevant. Therefore, the Trial Chamber's determination involves an exercise of discretion with the aim to impose a proportionate sentence that reflects the culpability of the convicted person.[8]

10. The standard of appellate review of discretionary decisions before the Appeals Chamber is well-established:

> 79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre- Trial Chamber. 80. [...][T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[9]

[7] *Lubanga* SAJ, para. 40.
[8] *Lubanga* SAJ, para. 34 (underline added).
[9] *Kony et al*. Judgement on Admissibility, paras. 79-80. *See also Ruto et al.* Judgment on Admissibility, paras. 89-90.

11. The Appeals Chamber has also held that reversible error is only demonstrated, in addition to these three conditions, "if the Trial Chamber's exercise of discretion led to a disproportionate sentence."[10] This is a further indication that disproportionality cannot be evaluated separately or independent of the criteria for determining sentence set out in the Statute and Rules.

12. The nature of the Trial Chamber's sentencing discretion, and the degree of deference to which it is entitled, is reflected in the multifaceted balancing exercise that is inherent in the statutory "factors" for determining sentence. Article 78(1) of the Statute provides that:

> In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

13. Rule 145 of the Rules further specifies that:

> 1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:
>
> (a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;
>
> (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;
>
> (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.
>
> 2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:
>
> (a) Mitigating circumstances such as:
>
> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility,

[10] *Lubanga* SAJ, para. 45.

such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

14. Sentencing decisions, therefore, are not ordinary discretionary decisions. They involve "weighing and balancing all the relevant factors"[11] under Article 78 and Rule 145. The Appeals Chamber has, accordingly, underscored that in determining sentence a Trial Chamber possesses a "broad discretion,"[12] and that the Appeals Chamber's review of that discretion "must be deferential."[13]

III. RESPONSE TO FIRST GROUND OF APPEAL

A. SUB-GROUND 1: THE PROSECUTION HAS FAILED TO SHOW THAT THE SENTENCE IMPOSED WAS "AN ABUSE OF DISCRETION"

1. The Prosecution Does Not Challenge Almost Any Aspect of the Chamber's Reasoning or Methodology, But Merely Challenges the Outcome

15. The Prosecution has complained of no reversible error in respect of the following aspects of the Sentencing Decision:

[11] *Lubanga* SAJ, para. 43.
[12] *Lubanga* SAJ, para. 40.
[13] *Lubanga* SAJ, para. 44.

- the maximum sentence available under the Statute for the Article 70 offences – five years;[14]
- the purpose of sentencing;[15]
- the factors relevant to sentencing;[16]
- the case law cited as being relevant to sentencing based on similar offences at other international courts;[17]
- the propriety of taking into account the accessorial mode of liability for which Mr Mangenda was convicted under Article 70(1)(a);[18]
- the definition of "gravity" adopted by the Trial Chamber;[19]
- the factual characterization of Mr Mangenda's criminal conduct;[20]
- the factors – with one exception – identified by the Trial Chamber as legally relevant to the determination of sentence;[21]
- the analysis of mitigating factors;[22]
- the analysis of aggravating circumstances;[23] or
- Mr Mangenda's individual circumstances.[24]

16. The Prosecution, despite failing to challenge any of these findings and failing to establish any specific factual or legal error, asserts in Ground 1 that the Trial Chamber "abused its discretion and erred in law."[25] The Prosecution's complaint, accordingly, is not with the Trial Chamber's methodology, but the outcome.

[14] SJ, paras. 29-35.
[15] SJ, para. 19.
[16] SJ, paras. 21-26.
[17] SJ, paras. 37-38.
[18] SJ, para. 122. The Prosecution has asserted that the Trial Chamber erred in law in so doing in respect of Kilolo and Bemba, but not Mangenda. Appeal, paras. 102-112. *See also* SJ, para. 122 (taking into account the mode of liability by which Mr Mangenda was convicted for nine counts under Article 70(1)(a)).
[19] SJ, para. 100.
[20] SJ, paras. 101-133.
[21] SJ, paras. 101-133.
[22] SJ, paras. 128-129.
[23] SJ, paras. 130-133.
[24] SJ, paras. 134-141.
[25] Appeal, para. 9.

2. Reversing Sentence Based on Unreasonableness Alone Is Exceptionally Rare in the Practice of Other International Courts, and Is Always Based on an Unexplained Deviation from Previous Sentencing Practice

17. The Prosecution's main argument is that, notwithstanding the absence of specific discernible errors in the Sentencing Decision, the sentence imposed is "manifestly inadequate"[26] and, therefore, an "abuse of discretion."[27]

18. The Prosecution relies on jurisprudence from other international courts that it describes as "'wrong shelf' appeal cases."[28] The Prosecution refers to "typical 'wrong shelf' appeal cases,"[29] as if to imply that there are so many such cases that it is possible to speak of a typology. The essential feature of these cases, says the Prosecution, is that "notwithstanding the Trial Chamber's recitation of sentencing principles, the initial sentence imposed simply does not make sense."[30] The Prosecution further deduces that these cases show that "a Chamber properly exercises its sentencing discretion only when it imposes a sentence that makes sense in a case."[31] The consequence is that a Trial Chamber's sentence is subject to reversal whenever it does not "make sense".

19. Trial Chamber sentences are not reversible merely because they do not, in the eyes of the Prosecution, "make sense." Furthermore, there is no category of jurisprudence from international tribunals known as "wrong shelf" cases. From amongst all the appeal cases cited by the Prosecution, only two involved an upward revision of sentence based on manifest inadequacy: *Galić* and *Gacumbitsi*. In all the other appeal cases cited, the Trial Chamber's sentence was maintained (*Simba*,[32] *Akayesu*,[33] *Kamuhanda*[34]); reduced (*D. Nikolić*);[35] increased after conviction of an additional crime (*Semanza*);[36] or increased on the basis of a specific error of fact or law in the

[26] Appeal, paras. 9, 13, 14, 15, 17, 18, 24, 36, 54.
[27] Appeal, paras. 9, 15, 17, 36.
[28] Appeal, paras. 4, 11, 15, 16, 17, 18, 19, 22.
[29] Appeal, para. 18.
[30] Appeal, para. 18 (underline added).
[31] Appeal, para. 17 (underline added).
[32] *Simba* AJ, p. 103 ("AFFIRMS, Judge Schomburg dissenting, the Appellant's sentence").
[33] *Akayesu* AJ, para. 421 ("[w]ith the exception of the single error referred to above, the Appeals Chamber can discern no error in the Trial Chamber's overall analysis, nor in the sentence imposed on Akayesu (and, besides, none has been pointed to the Appeals Chamber). Such minor error by the Trial Chamber does not suffice to warrant a revision of the trial sentence by the Appeals Chamber.")
[34] *Kamuhanda* AJ, para. 364 ("the Appeals Chamber dismisses in its entirety the appeal in respect of sentencing").
[35] *D. Nikolić* SAJ, para. 4, p. 44 (reducing the Trial Chamber's sentence to 20 years from 23 years).
[36] *Semanza* AJ, p. 126.

sentencing analysis identified by the Prosecution during the appeal (*Duch*).[37] The term "wrong-shelf" has only appeared once in a majority judgment in all the cases cited by the Prosecution.[38] That singular reference contains no explanation, and is supported by no citation. Never has the origin or meaning of the term been discussed in any context, nor is it part of the recognized lexicon of analysis of any international court.[39] The term has never been used in any ICC case.

20. The two cases in which sentence was determined to be manifestly inadequate – *Gacumbitsi* and *Galić* – involved exceptional circumstances that are absent from the present case. *Gacumbitsi* involved a Prosecution appeal from a 30-year sentence for a genocide conviction of a leadership-level accused. The Prosecution on appeal did not argue merely that the sentence did not "make sense," but that "for genocide […] the principle that the default punishment is life imprisonment is clearly established."[40] This claim was supported by reference to eighteen previous sentences imposed on individuals convicted of genocide, of which eleven had involved life terms, with the seven others characterized by exceptional mitigating circumstances.[41] The Appeals Chamber then examined the conduct for which Gacumbitsi had been convicted by the Trial Chamber and noted that he had been involved "as a primary player", had instigated rape, and had "exhibited particular sadism."[42] It also found that "unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here."[43]

[37] *Duch* AJ, paras. 367-369. The Supreme Court found that the sentence was tainted be specific, discernible errors including, *inter alia*, that the Trial Chamber had given undue weight to the accused's cooperation with the court, including by finding that such co-operation must "'mandate' a finite sentence" and had failed to take account of his lack of remorse.
[38] *Galić* AJ, para. 455 ("[t]he sentence rendered was taken from the wrong shelf.")
[39] Judge Schomberg used the term in paragraph 1 of his partially dissenting opinion in *Simba* AJ. He also used the term as an *obiter dictum* in paragraph 1 of his separate opinion in *Martić* AJ. Judge Shahabuddeen, in his separate opinion in the *Galić* AJ at paragraph 46, says that this terminology is from "the language of German jurisprudence," but cites no source or authority for his assertion that this language or terminology has any basis in German jurisprudence or law. The Defence, aside from these four references, has been unable to find any other reference in the jurisprudence of any other international court to the term "wrong shelf" as a sentencing concept.
[40] *Gacumbitsi* AJ, para. 202 (underline added).
[41] *Gacumbitsi* AJ, para. 202 ("[i]n addition to the [Appellant], the ICTR has, to date, found eighteen people guilty of crimes under Article 2 of the Statute. Out of these eighteen, eleven have been sentenced to imprisonment for the remainder of their lives. In two of the remaining cases, *Ruzindana* and *Gérard Ntakirutimana*, the Tribunal passed a sentence of 25 years' imprisonment. In only five instances, where the accused was found guilty of genocide, have sentences of less than 25 years' imprisonment been imposed. These include the sentences of Semanza, who received 15 years for complicity in genocide, Imanishimwe, who was sentenced to 15 years' imprisonment for genocide, and Elizaphan Ntakirutimana, who was sentenced to 10 years' imprisonment for genocide. The other two cases are Omar Serushago, who received 15 years' imprisonment, and Ruggiu, who received 12 years' imprisonment for incitement to commit genocide, following their guilty pleas.")
[42] *Gacumbitsi* AJ, para. 204.
[43] *Gacumbitsi* AJ, para. 204.

The Appeals Chamber, on this basis, concluded that the Trial Chamber had "ventured outside its scope of discretion by imposing a sentence of only thirty years' imprisonment", rather than life.[44]

21. The *Galić* case involved an accused whose conduct – as compared to previous perpetrator convicted by the ICTY – fell into the "'worst case' category."[45] The bare 3-2 majority which accepted this characterization of Galić's conduct decided, against the backdrop of the previously-decided "worst case' category" cases, that the twenty-year sentence "fell outside of the range of sentences available to [the Trial Chamber] in the circumstances."[46] The Appeals Chamber held that the sentence was "so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct, that it is able to infer that the Trial Chamber failed to exercise its discretion properly"[47] and that the sentence had been "taken from the wrong shelf."[48] The importance of previous sentencing practice implied by the word "shelf" is made explicit in the dissent of Judge Meron:

> where a Trial Chamber properly identifies the relevant factors that should govern its decision and where no new convictions are entered on appeal, I would increase its chosen sentence only if one of two conditions is met: either the sentence is clearly <u>out of proportion with sentences we have given in similar situations</u>, or the sentence is otherwise so low that it demonstrably shocks the conscience. Any more stringent review denies the Trial Chamber the broad discretion vested in it.[49]

22. Galić's twenty-year sentence, because of this purported deviation from established sentencing categories, was increased to life.

23. A third relevant decision, not discussed by the Prosecution, is *Aleksovski*. The ICTY Appeals Chamber increased the sentence from 2.5 to 7 years based substantially, but not exclusively,[50] on the argument that the term of imprisonment insufficiently reflected the gravity of the crime.[51] Again, the Appeals Chamber specifically relied not

[44] *Gacumbitsi* AJ, para. 205.
[45] *Galić* AJ, para. 438.
[46] *Galić* AJ, para. 455.
[47] *Galić* AJ, para. 455.
[48] *Galić* AJ, para. 455.
[49] *Galić* AJ, Separate and Partially Dissenting Opinion of Judge Meron, para. 6 (underline added).
[50] *Aleksovski* AJ, para. 187 (relying not only on the inadequate sentence as such, but also the "fail[ure] to treat [the accused's] position as commander as an aggravating feature in relation to his responsibility").
[51] *Aleksovski* AJ, para. 183 ("[t]he Appeals Chamber accepts the Prosecution argument in this connection and holds that the Trial Chamber erred in not having sufficient regard to the gravity of the conduct of the Appellant.

only on previous practice, but on the binding statutory minimum prescribed by the Yugoslav criminal code, which was five years' imprisonment.[52] The Trial Chamber's sentence, accordingly, defied the statutory minimum in the territory where the offence was committed, which is mandated in the ICTY Statute as a relevant sentencing consideration.[53]

24. These appeal cases – as exceptional as they are – reflect a basic principle: that the proportionality of a sentence to the crime must take into account previous sentencing practice. As explained by the ICTY Appeals Chamber in *Jelisić*:

> The cross-appellant argues that the Trial Chamber failed to have regard to a tariff of sentences discernible in the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("the ICTR"). The Appeals Chamber understands that what is being referred to is not a legally binding tariff of sentences but a pattern which emerges from individual cases, and that the argument is that a Trial Chamber has a duty to take that pattern into account. Whether the practice of the Tribunal is far enough advanced to disclose a pattern is not clear. The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.[54]

25. Unexplained disregard of well-established and unambiguous sentencing practice – as in *Gacumbitsi* and *Galić* – may, accordingly, support an inference that a Trial Chamber has abused its discretion in determining an appropriate sentence.

His offences were not trivial […] Thus, the instant case is one of a prison warden who personally participated in physical violence against detainees when, by virtue of his rank, he should have taken steps to prevent or punish it. The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.")

[52] *Aleksovksi* AJ, para. 188 ("the Appeals Chamber also points out that Article 142 of the SFRY Criminal Code imposed a minimum term of imprisonment of not less than five years for 'crimes against humanity and international law' such as 'killing, torture, inhumane treatment of the civilian population, causing great suffering or serious injury to body and health … use of measures of intimidation and terror and the unlawful taking to concentration camps and other unlawful confinement'.")

[53] ICTY Statute, Art. 24 (1): "In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."

[54] *Jelisić* AJ, para. 96 (underline added). *See also Kalimanzira* AJ, para. 236; *Kanyarukiga* AJ, para. 280.

26. Reversals of sentence on the basis of a purported clear deviation from established sentencing practice is exceptionally rare because, in reality, each case involves "a 'multitude of variables, ranging from the number and types of crimes committed to the personal circumstances of the individual' which need to be taken into account in order to individualise sentences."[55] The *Lubanga* Appeals Chamber has underscored that a sentence "must be based on all the relevant factors of the specific case" and that this "makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case."[56]

27. The appeal cases where even purported deviations from established sentencing practice have not led to reversal of sentence far outnumber *Galic* and *Gacumbitsi*. The ICTR Appeals Chamber in *Simba*, not long after *Gacumbitsi*, declined to revise a non-life sentence for a genocide conviction. The Appeals Chamber particularly noted that the Prosecution had "not demonstrated how the Trial Chamber may have committed an error in exercising its discretion or departed from the Tribunals' case law by imposing a sentence of 25 years' imprisonment."[57] The Prosecution's failure to identify any specific discernible error beyond its mere claim that the quantum of sentence was disproportionate was, accordingly, a further factor against interfering with the Trial Chamber's discretion.[58]

28. The ICTY Appeals Chamber in *Stanišić and Župljanin* similarly observed that "comparisons with the sentences imposed in other cases are, as a general rule, 'of limited assistance' as 'often the differences [between cases] are more significant than the similarities, and the mitigating and aggravating factors dictate different results'".[59] In *Kalimanzira*, the ICTR Appeals Chamber underscored that "[j]ust as there is no category of cases within the jurisdiction of the Tribunal where the imposition of a sentence of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated. Each case remains to be examined on its own individual facts."[60] Even in cases that may appear to involve similar facts, according to the ICTR Appeals Chamber in *Bikindi*, "the very fact that Trial Chambers are entitled to a margin of

[55] *Simba* AJ, para. 336.
[56] *Lubanga* SAJ, para. 77.
[57] Simba AJ, para. 336 (underline added).
[58] Only Judge Schomburg dissented from this Judgement and found that the sentence had been taken from "the wrong shelf." *Simba* AJ, Partially Dissenting Opinion of Judge Schomburg, para. 1 ("I cannot identify any factors which would permit a distinction to be made between this judgement and previous cases, in particular *Gacumbitsi v. The Prosecutor*.")
[59] *Stanišić & Župljanin* AJ, para. 1185, citing *Čelebići* AJ, para. 719 and *Babić* SAJ, para. 32, quoting *D. Nikolić* SAJ, para. 19.
[60] *Kalimanzira* AJ, para. 238.

discretion in sentencing matters implies that some disparity is possible, even between cases that may involve similar facts."[61] The Appeals Chamber in *Kamuhanda*, in upholding a Trial Chamber sentence, affirmed that "the Trial Chamber is not bound by previous sentencing practices."[62]

29. Three principles emerge from this jurisprudence. First, an inference of abuse of discretion arising solely from the duration of the term of imprisonment imposed is almost unprecedented. Second, the exceptional cases where this has occurred – *Gacumbitsi* and *Galić* – involved a substantial and unexplained deviation from previous sentencing practice in cases deemed to be substantially similar. Third, most cases are sufficiently dissimilar for sentencing purposes that such comparisons are inappropriate.

30. The Prosecution has not identified any sentencing practice from which the Trial Chamber's sentence on Mr Mangenda deviates so markedly as to demonstrate an abuse of discretion. Such practice, despite its absence at the ICC, does exist within the sources of law set out in Article 21 of the ICC Statute. The Prosecution appeal, however, presents the Appeals Chamber with no case law or other sentencing guidance from any of the sources listed in Article 21. No sentencing cases from the ICTY, ICTR, SCSL, or ECCC involving offences identical to those listed under Article 70 are cited.[63] No national case law is cited. No national statutory provisions are cited. In fact, the case law cited by the Trial Chamber in the Sentencing Decision[64] – and treated with appropriate caution – are not even addressed by the Prosecution. Rather than establishing that the Trial Chamber has deviated from an established sentencing range for similar offences in similar circumstances, the Prosecution merely offers its own opinion of what "makes sense."

31. The basis for the appeal is, accordingly, manifestly unsubstantiated. The Prosecution has not shown that the Trial Chamber has deviated from any relevant sentencing practice – let alone deviated in a substantial way from well-established sentencing practice as occurred in the exceptional cases of *Gacumbitsi* and *Galić*. No basis exists

[61] *Bikindi* AJ, para. 203.
[62] *Kamuhanda* AJ, para. 362.
[63] The Prosecution is aware of this jurisprudence since it was discussed by both the Prosecution and the Defence in its submissions before the Trial Chamber. The Prosecution apparently does not consider such jurisprudence to be relevant to its appeal since it has not been included in its appeal brief.
[64] SJ, paras. 37-38.

for asserting that the Trial Chamber has deviated without explanation from established sentencing practice or principles in a way that demonstrates an abuse of its discretion.

32. On the contrary, the sentencing practice of other international tribunals shows that Mangenda's sentence – unlike in *Gacumbitsi* and *Galić* – was taken from a higher shelf than any potentially relevant sentencing practice. Two lawyers convicted at the ICTY of offenses against the administration of justice – Nobilo and Vujin – received no imprisonment at all.[65] An investigator – Nshogoza – received ten months imprisonment,[66] while Rašić – a case manager who purposefully sought false witness declarations from three witnesses – received eight months imprisonment suspended, and four months served.[67]

33. The shelf for sentences of five years' imprisonment, as suggested by the Prosecution, contains Erdemović, who participated in the execution of more than 1000 prisoners;[68] Prcać, one of the commanders of the notorious Omarska Camp;[69] Dosen, a guard at the notorious Keraterm Camp;[70] General Gvero, who facilitated the Srebrenica massacres;[71] General Hadžihasanović, who commanded troops involved in war crimes;[72] and Milan Simić, who oversaw expulsions and killings as a municipal official in Bosnia.[73] Those receiving lesser sentences for war crimes included Naser

[65] *Nobilo* Contempt Judgement, para. 57; *Tadić* Judgement Against Milan Vujin, p. 7. **Nobilo** received a fine of 10,000 Dutch guilders (4000 guilders to be paid to Registry up front, and 6000 guilders to be paid in case of re-offense within 12 months) (reversed on appeal) and **Vujin** received a fine of 15,000 Dutch guilders and no term of imprisonment.
[66] *Nshogoza* AJ, paras. 5, 93, 112. *See* Partially Dissenting Opinion of Judge Robinson in *Nshogoza* AJ, para. 7 ("the custodial sentence of 10 months of imprisonment stands in stark contrast to other prevailing practice at the Tribunal and the ICTY, where conduct of similar gravity is either not prosecuted or typically results exclusively in a fine. In the present case, the appropriate penalty, based on Nshogoza's specific conduct as found by the Trial Chamber, would either have been a reprimand or at most a fine of $1,000.") *See also* Partially Dissenting Opinion of Judge Güney in *Nshogoza* AJ, para. 2 ("in light of the jurisprudence of the *ad hoc* Tribunals, the imposition of 10 months of imprisonment could be considered excessive.")
[67] *Rašić* AJ, p. 26 ("AFFIRMS the sentence of 12 months' imprisonment imposed by the Trial Chamber which: (i) suspended the last eight months of the sentence, explaining that Rašić would only have to serve this time if she were to be convicted for another crime punishable with imprisonment…")
[68] *Erdemović* SJ, p. 22.
[69] *Kvočka* AJ, p. 243.
[70] *Sikirica et al.* SJ, para. 239.
[71] *Popović* TJ, p. 837.
[72] *Hadžihasanović* AJ, p. 133 ("REDUCES the sentence of five years of imprisonment imposed on Hadžihasanović by the Trial Chamber to a sentence of three years and six months of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Hadžihasanović has already spent in detention").
[73] *Milan Simić* SJ, para. 122.

Orić, sentenced to two years for wanton destruction,[74] and Rasim Delić, who was sentenced to three years for cruel treatment.[75]

34. The Prosecution, not the Trial Chamber, has reached for the wrong shelf.

3. The Prosecution's "Per Witness/Offence" Analysis is, at Best, Irrelevant

35. The Prosecution asserts that the sentence imposed on Mr Mangenda is "almost inconsequential"[76] because "[d]espite being criminally responsible for 37 offences, the Chamber found Mangenda's crimes warranted no more than 2.5 weeks (or 19.5 days) of imprisonment as punishment per witness/offence."[77] The Prosecution also presents a table in which it asserts that Mr Mangenda received sentence of 42.8, 38.6 and 40 days per offence in respect of the corruptly influencing, presenting false testimony, and aiding and abetting false testimony, respectively.[78] These claims are, at best, irrelevant.

36. First, the Prosecution's table is not based on the joint sentence of 24 months actually imposed by the Trial Chamber.[79] The table is instead based on the hypothetical sentence that the Trial Chamber would have imposed for each crime if it had not imposed a joint sentence.[80] The table is not based on the actual sentence imposed and is, accordingly, unhelpful.

37. Second, relying on the notional sentences that would have been imposed is especially inappropriate given that each act of offending conduct was cumulatively charged as three different offences under Article 70(1)(a)-(c). Trifurcating each wrongful event into three separate events, therefore, overstates the gravity of the offences.

38. Third, the Prosecution's attempt to substitute a "per count" analysis resuscitates by the back door its argument that failed before the Trial Chamber – and that it has not appealed – that the maximum sentence should be based on stacking the counts on top of each other so that the maximum total sentence could far exceed the statutory

[74] *Orić* TJ, para. 783 (imposing a two-year sentence for wanton destruction of cities, towns or villages as a war crime).
[75] *Delić* TJ, para. 597 (sentenced to three years for cruel treatment as a war crime).
[76] Appeal, para. 26.
[77] Appeal, para. 25.
[78] Appeal, para. 36.
[79] SJ, para. 147.
[80] SJ, para. 146.

maximum of five years.[81] This argument was rightly rejected by the Trial Chamber.[82] The Prosecution's current "per count" analysis seems to be a roundabout attack on the statutory maximum, rather than the manner in which the Trial Chamber exercised its discretion within that statutory framework.

39. Fourth, the Prosecution's claim that Mr Mangenda received a joint sentence of only 19.5 days "per witness/offence"[83] is only be true if it is read as meaning simply "per offence." The sentence imposed on Mr Mangenda, per witness, is actually 52.14 days per witness.[84] This is the median – even assuming that such a statistic has any meaning whatsoever – number of days when the denominator includes also the five witnesses to whose lies Mr Mangenda, according to the Trial Chamber itself,[85] did not contribute at all.

40. Fifth, even if the full five years as requested by the Prosecution were to be imposed, this would amount to 49.32 days per "count".[86] If a sentence of 19.5 days per overlapping count really is "inconsequential," then it is hard to see that a sentence of 49.32 days is much less "inconsequential."

41. Sixth, the Prosecution's trivialization of the consequences of this case for Mr Mangenda as "inconsequential"[87] ignores not only that he was detained for almost one year,[88] but also that he has suffered very serious personal consequences as a direct result of the proceedings. This includes being prohibited from employment in the country where his family lives,[89] and having his previous visa status revoked as a result of these proceedings, with a serious risk of eventual deportation.[90] The

[81] Prosecution's Submission on Sentencing, para. 144.
[82] SJ, paras. 29-35.
[83] Appeal, para. 25.
[84] 2 years (730 days) divided by 14 witnesses is 52.14 days per witness.
[85] TJ, para. 920 ("there is no direct or indirect link between Mr Mangenda's activities and the false testimony given by D-23, D-26, D-55, D-57 or D-64.")
[86] 5 years (1825 days) divided by 37 counts is 49.3 days per count.
[87] Appeal, paras. 26, 47.
[88] Mr Mangenda was, in addition, detained for a period of nine days without judicial authorization because the visa to the country where his family lives was abruptly, and without notice to the ICC, cancelled. *See* Annex III to Urgent UK Submissions, ICC-01/05-01/13-719-Conf-AnxIII, 22 October 2014, p. 1 ("[REDACTED]"). *See also Bemba et al.*, Request for Compensation for Unlawful Detention, ICC-01/05-01/13-921-Red, 21 April 2015, paras. 6-15.
[89] SJ, para. 145 ("the Chamber took into account Mr Mangenda's role vis-à-vis the other co-perpetrators, his good behavior throughout the trial and cooperation with the Court, the absence of criminal record, and the prohibition from working in his country or residence.") *See e.g.* CAR-D23-0010-0027; CAR-D23-0010-0028; CAR-D23-0010-0029.
[90] *See e.g.* CAR-D23-0010-0008. *See also* ICC-01/05-01/13-808-Conf-Anx2, p. 4.

consequences of this case for Mr Mangenda, far from being "inconsequential", have been catastrophic.

4. The Prosecution Ignores the Factors Demonstrating that Imposing Less than the Statutory Maximum Was Not an Abuse of Discretion

42. The Prosecution has not challenged the correctness of a number of factors relied upon by the Trial Chamber as militating in favour of something less than the maximum available sentence for Mr Mangenda. These factors include:

- his "varying degree of participation in the execution of the offences;"[91]
- his "role *vis-à-vis* the other co-perpetrators"[92] in response to Mr Mangenda's argument that he was neither in an authoritative role nor instigated the offences;[93] and
- his "cooperation with the court"[94] in the form of his first interview with the Court which reflected a "positive attitude" that was a factor appropriately considered under Rule 145(1)(b);[95] and
- lack of any previous criminal record, good behaviour, and that nine of the convictions were based on accessorial liability.[96]

43. The Prosecution has also not challenged other personal circumstances taken into account by the Trial Chamber, including that he has been prohibited from working in his country of residence as a direct consequence of the current proceedings.[97]

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[91] SJ, paras. 145, 223. *See* SJ, para. 121, referring to, *inter alia*, Mangenda Sentencing Submissions, para. 30 ("[t]hese distinctions, which are believed to arise from a fair, if not necessarily exhaustive, recitation of the Trial Chamber's findings on contribution to the common plan, suggest that the Chamber discerned three, or possibly four, degrees of contribution by Mr. Mangenda: (1) no contribution in respect of the coaching of five witnesses; (2) giving 'moral support and encouragement to Mr. Kilolo' of the coaching of four witnesses at the Yaoundé meetings in circumstances where he could not have failed to apprehend that witness coaching was afoot; (3) giving moral support in respect of the coaching of D-13, and contributed to the coaching of a witness outside of the DCC, namely D-30, through his description to Mr. Kilolo of the testimony of D-29; and (4) being actively involved in planning and facilitating the execution of the coaching of D-25, D-15 and D-54") (citations omitted).
[92] SJ, para. 145.
[93] SJ, paras. 128-129, referring to, *inter alia*, Mangenda Sentencing Submissions, para. 24 ("[t]he Chamber may safely infer, based on all the circumstances, that Mr. Mangenda was neither in a 'commanding or authoritative role,' nor the 'instigator' of the offences of which he now stands convicted as a co-perpetrator. These are factors that have in the past been considered relevant to sentencing, even when not relevant to conviction. As a mitigating circumstance, this assessment is to be made according to the standard of balance of probabilities") (citations omitted).
[94] SJ, para. 145.
[95] SJ, para. 138.
[96] SJ, para. 145.
[97] SJ, paras. 141, 145.

44. The Trial Chamber, accordingly, had appropriate grounds to assess that Mr Mangenda's personal culpability was not so high as to warrant the maximum sentence, and that his personal circumstances warranted a reduction of sentence. The Prosecution, despite not challenging these grounds, nevertheless asks the Appeals to impose the maximum sentence. The Prosecution's failure to challenge these factors, however, directly contradicts this position.

5. *The Prosecution Embellishes the Trial Chamber's Findings Regarding Culpability*

45. The Prosecution, aside from failing to address the factors in the previous section, exaggerates and embellishes the factors identified by the Trial Chamber as reflecting Mr Mangenda's culpability. The Prosecution is incorrect in implying that the Trial Chamber found that Mr Mangenda had played a "predominant role in the criminal scheme."[98] The Trial Chamber made no such finding. On the contrary, the Trial Chamber expressly stated in the Sentencing Decision that it would give "some weight to Mr Mangenda's varying degree of participation in the execution of the offences,"[99] that it would "take […] into account"[100] the Defence's submissions that Mr Mangenda was not "'in a commanding or authoritative' role and that he ha[d] not been an instigator of the offences,"[101] and his "role vis-à-vis the other co-perpetrators."[102] These factors have not been challenged as incorrect findings or as irrelevant to the determination of sentence.

46. The Prosecution assertion that the "Trial Chamber did not find any mitigating factors that diminished his culpability"[103] is correct only in the narrowest sense. The Trial Chamber *did* find that all of the factors described in the previous section – which militate in favour of a lesser sentence – were relevant to the determination of sentence under Article 78(1) or as "overall circumstances" under Rule 145(1)(b).[104]

[98] Appeal, para. 45.
[99] SJ, para. 124.
[100] SJ, para. 129.
[101] SJ, para. 128.
[102] SJ, para. 145.
[103] Appeal, para. 46.
[104] *See e.g.* SJ, paras. 129 ("[t]he Chamber clarifies that the factors presented by the Mangenda Defence do not represent mitigating circumstances within the meaning of Rule 145(2)(a) of the Rules. At the same time, the Chamber notes that these elements reflect Mr Mangenda's culpable conduct. Accordingly, the Chamber will take them into account as 'circumstances (…) of the [offence]', pursuant to Rule 145(1)(b) of the Rules, when, ultimately, determining the appropriate sentence"), 136, 137,138, 141, 145.

6. *The Prosecution's Criticism of the Trial Chamber's Methodology in Determining Sentence As "Unclear and Incorrect" Is Ambiguous and Should Be Rejected* In Limine

47. The Prosecution asserts at paragraph 48 of its appeal brief, as if as an afterthought, that "[m]oreover, the Chamber's analysis leading to its determination of his sentence is unclear and inconsistent."[105] The Chamber's analysis, elaborates the Prosecution, was of Mr Mangenda's "varying degree of participation" was "unduly limited" to his "actions *vis-à-vis* each witness" rather than his purported "key role in, the whole common plan."[106] Without further explanation, the Prosecution then claims that the Chamber "failed to properly capture the totality and essentiality of his contributions to – and his vital role in – the whole criminal scheme."[107] This paragraph appears under Sub-Ground 1 of Ground 1, and this argument is characterized as "a further error."[108]

48. The gist of Prosecution Sub-Ground 1 is that the sentence, in itself, is so manifestly inadequate that it is indicative of an abuse of discretion. The argument in paragraph 48, on the other hand, appears to suggest a methodological deficiency in the Chamber's reasoning. The methodological deficiency, however, is vague, unsupported by specific citation, ambiguous, and irrelevant to Sub-Ground 1. The argument should, accordingly, be rejected *in limine*. As the ICTY and ICTR Appeals Chambers have frequently stated:

> In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made. Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[109]

49. The argument, in any event, has no merit. The Trial Chamber expressly stated in the context of this specific discussion that "[a]s a result, mindful of Mr Mangenda's overall role in the common plan, the Chamber will give some weight to Mr Mangenda's varying degree of participation in the execution of the offences."[110] The

[105] Appeal, para. 48.
[106] Appeal, para. 48.
[107] Appeal, para. 48.
[108] Appeal, para. 48.
[109] *Nyiramasuhuko* AJ, para. 35; *Muhimana* AJ, para. 10; *See also Ndindabahizi* AJ, para. 12; *Gacumbitsi* AJ, para. 10; *Kajelijeli* AJ, para. 7; *Vasiljević* AJ, para. 11.
[110] SJ, para. 124 (underline added).

Trial Chamber discussed at length (and in far more detail than does the Prosecution in its appeal brief) Mr Mangenda's role in and contribution to the "illicit coaching activities" in general, including his contribution to the activities of the other co-perpetrators.[111] The Prosecution's complaint that the Trial Chamber's discussion was "unduly limited" to direct interaction with witnesses is, therefore, without foundation.

7. The Claim that Mr Mangenda's Sentence Fails to Deter Is Speculative and Incorrect

50. The Prosecution says that the sentence imposed on Mr Mangenda fails to deter, in particular, because "Mangenda faces no consequence" at all because the Prosecution is not aware of any mechanism to monitor the three-year probationary period. The Prosecution thus says that "any slight deterrence that could have been realised through a robust monitoring mechanism – albeit only for three years – remains notional."[112]

51. The Prosecution's submissions suggest a concern primarily with specific deterrence – *i.e.* making sure that Mr Mangenda does not re-offend. Mr Mangenda, however, is prohibited from working in the country where he resides.[113] He is also not a lawyer in the country where he resides.[114] The Prosecution's suggestion that there is a danger of re-offending is speculative and wrong.

52. The prohibition on working, combined with almost a year of incarceration, does constitute a general deterrent. The Prosecution's assertion that Mr Mangenda's sentence "fail[s] to deter"[115] is speculation that reflects nothing more than mere disagreement with the Trial Chamber's assessment of the proper sentence to be imposed based on all relevant considerations, including the need for deterrence. Deterrence, furthermore, is far from the only consideration in determining the appropriate sentence.

53. The fact that the accused "walked out as effectively free men,"[116] to which the Prosecution appears to attach particular symbolic significance, ignores that Mr Mangenda only "walked out" because he had already spent more than eleven months in pre-trial detention. Deterrent effect cannot be dependent on whether a term of

[111] *See e.g.* TJ, paras. 110, 114, 115, 118-119.
[112] Appeal, para. 57.
[113] SJ, para. 145. *See also* CAR-D23-0010-0027; CAR-D23-0010-0028; CAR-D23-0010-0029.
[114] *See* CAR-OTP-0094-2314; CAR-OTP-0074-0717, l. 1359.
[115] Appeal, para. 62.
[116] Appeal, para. 3.

imprisonment is imposed after or before the pronouncement of sentence, or the public's capacity to understand that a convicted person has already spent a considerable period in detention already.

B. SUB-GROUND 2: THE TRIAL CHAMBER WAS ENTITLED TO TAKE INTO ACCOUNT THE NATURE OF THE LIES INDUCED

54. The Prosecution claims that "the content of and the nature of the lies told" is "immaterial to the gravity of the offences."[117] The Prosecution asserts that by taking into consideration the nature of the lies that were the object of the offence for which Mr Mangenda was convicted, the Trial Chamber took into account an "extraneous/irrelevant factor" in assessing "the gravity of the article 70 offences."[118] The lies in this case were treated as "automatically a less grave form of falsehood" than lies about the merits.[119] The Prosecution posits that the Trial Chamber drew a "black and white" distinction between these lies concerning credibility, and lies concerning the merits of the Main Case:

> [t]he Chamber's artificial and absolute "black and white" demarcation between false testimony on the "merits" versus false testimony on "non-merits" issues would create an alternate category of "less grave" article 70 offences, and transform this case into just that. It thus fails to reflect the very real gravity of this case.[120]

55. The Prosecution also claims that the Trial Chamber was "unfair to the Prosecution" by failing to declare "or even hint" that its assessment of gravity would be limited to the lies actually adjudicated during trial.[121]

56. The Prosecution's arguments mischaracterize the Trial Chamber's reasoning and are, in any event, groundless. The Trial Chamber correctly took into account the nature and circumstances of the offence – including the nature of the lies – in assessing gravity;[122] correctly recognized that circumstances could not be treated as "aggravating" unless proven beyond a reasonable doubt,[123] which was not the case in respect of the allegation that lies had been procured about the merits of the Main Case; and adopted

[117] Appeal, para. 79. *See also* para. 76.
[118] Appeal, para. 75.
[119] Appeal, para. 75.
[120] Appeal, para. 77.
[121] Appeal, para. 84.
[122] SJ, para. 115.
[123] SJ, para. 25. *See also Lubanga* SJ, para. 33; *Katanga* SJ, para. 34; *Bemba* SJ, para. 18; *Al-Mahdi* SJ, para. 73; *Lubanga* SAJ, paras. 88-93.

an appropriately cautious approach to the nature of the lies as a consideration, stating that this factor was only entitled to "some weight."[124]

57. First, all aspects of the commission of the offence – if proven beyond a reasonable doubt – are relevant to assessing gravity. Rule 145(1)(c) expressly states that the "nature of the unlawful behaviour" is a relevant consideration in assessing gravity. The "nature of the unlawful behaviour" is not a fixed notion for each crime, but depends on all the circumstances including, for example, "the nature of the crimes, the scale and brutality of the crime, the role of the accused and the overall impact of the crimes upon the victims and their families."[125] As stated in *Katanga*, "[i]n order to determine gravity, the particular circumstances as well as the nature and degree of participation of the convicted person in the commission of the crime must be take into account."[126]

58. Second, merely because the Trial Chamber distinguished between different types of lies does not mean that it gave undue weight to the distinction, or that they were treated as "automatically" less grave. On the contrary, the Trial Chamber understood that lies that affect the ability to assess witness credibility could be very grave indeed:

> False testimony was found to relate to three issues: (i) payments or non-monetary benefits received; (ii) acquaintance with other individuals; and (iii) the nature and number of prior contacts with the Main Case Defence. As the Chamber stressed in the Judgment, those questions are of crucial importance when assessing, in particular, the credibility of witnesses. They provide indispensable information and are deliberately put to witnesses with a view to testing their credibility. Yet, the Chamber notes that the false testimony of the witnesses concerned did not pertain to the merits of the Main Case. While this circumstance does not, by any means, diminish the culpability of the convicted person, it does inform the assessment of the gravity of the offences in this particular instance. Accordingly, the Chamber accords some weight to the fact that the false testimonies underlying the conviction related to issues other than the merits of the Main Case.[127]

[124] SJ, para. 115.
[125] *Boškoski* TJ, para. 588. *See e.g. Al-Mahdi* TJ, para. 76 (evaluating "the extent of the damage caused, the nature of the unlawful behavior and, to some extent, the circumstances of the time, place and manner"); *Galić* AJ, para. 455; *Tolimir* TJ, para 1217; *Bagosora* TJ, paras. 2263-2270.
[126] *Katanga* SJ, para. 43.
[127] SJ, para. 115.

59. The foregoing passage demonstrates that, contrary to the Prosecution's characterization, the Trial Chamber did not adopt a "'black and white' demarcation"[128] in respect of such lies, did not find that they were "automatically […] less grave," and did not find that they categorically "deserved a lesser sentence."[129] The Trial Chamber only acknowledged that this was a relevant factor in assessing sentence "in this particular instance" that was entitled to "some weight."[130]

60. Third, the Prosecution's approach that the nature of the lies should be disregarded for sentencing purpose. This would imply that, for example, conspiring with other witness to give false testimony directly implicating an accused or to confirm an alibi is no more grave than any other lie. This defies common sense and established jurisprudence. In *GAA*, the accused falsely recanted testimony that he had been present and physically seen an accused commit crimes. The Trial Chamber acknowledged that some types of lies were more grave than others:

> Although all perjury is serious, the Chamber is of the view that the most serious category is where the perjured evidence is being given to lead to the conviction of an innocent person and the second most serious category is where, as in this case, the perjured evidence is given in the hope of procuring the acquittal of a guilty person.[131]

61. Jelena Rašić, similarly, was found guilty of five counts of contempt of the ICTY after having paid bribes to witnesses to sign pre-prepared statements to substantiate a false alibi.[132] The circumstances are egregious not only as to the content of the lies, but their pre-fabrication, which could leave no doubt as to their potential to profoundly damage the proceedings. The Prosecution's claim that taking into account any such considerations would "contradict[]" the "very purpose" of Article 70(1)(a)[133] is unsupported and unsound. All the circumstances of a murder can be taken into account for the purposes of sentencing without "contradicting the very purpose" of the prohibition on murder.

62. Fourth, the Trial Chamber was under no obligation, having determined that the scope of the trial would not extend to determining whether substantive lies had been

[128] Appeal, para. 77.
[129] Appeal, para. 75.
[130] SJ, para. 115.
[131] *GAA* SJ, para. 10.
[132] *Rašić* SJ, paras. 10-13.
[133] Appeal, para. 93.

procured, to provide "notice" to the Prosecution[134] that such allegations could not be relied upon for sentencing purposes. The Prosecution must be taken to be aware of ICC jurisprudence concerning the standards of proof for sentencing. The Trial Chamber's statement that it would not adjudicate merits lies "for the purposes of conviction,"[135] – *i.e.*, beyond a reasonable doubt – necessarily also entailed consequences for sentencing. "Notice" was provided right at the start of trial. If the Prosecution had wished to object, it could have done so. It did not.

63. Fifth, the Prosecution's suggestion that the Trial Chamber's approach to this issue was necessitated only by "pragmatic"[136] considerations is obscure. The approach adopted at trial was based on a principled understanding of the Pre-Trial Chamber's decision. Even assuming that the decision was based on any "pragmatic" considerations (whatever that might mean), fairness requires that all parties abide by the consequences of the limits of the trial as defined at its outset. Depriving the accused of the chance to litigate the supposed merits lies, but then sentencing him as if that allegation had been proven, would have been unjust.

64. Sixth, the Chamber's finding that the lies were "material" is not inconsistent[137] with taking into account the nature of the lies for sentencing. A lie can at one and the same time be important enough to clear the threshold of "materiality," but less egregious than other lies. The Trial Chamber in its Conviction Judgment did comment that non-merits lies concerning contacts with the Defence could be "of crucial importance when assessing the credibility of witnesses."[138] The Sentencing Decision, contrary to the Prosecution's suggestion,[139] says exactly the same thing. These observations are not inconsistent with giving "some weight to the fact that the false testimonies underlying the conviction related to issues other than the merits of the Main Case."[140]

[134] Appeal, para. 85.
[135] The Prosecution is correct in acknowledging that the Trial Chamber gave "notice" about "how it would consider evidence pertaining to the Main Case for the purposes of conviction." Appeal, para. 85. The Prosecution is incorrect, however, in asserting that "[t]he Conviction Judgment consistently reflects this approach." Appeal, para. 86. The Trial Chamber, as is argued in the Defence's appeal, disregarded in the Conviction Judgment the limits that it imposed at the start of trial.
[136] Appeal, para. 89.
[137] Appeal, paras. 93-100.
[138] TJ, para. 22 ("to be of crucial importance when assessing the credibility of witnesses").
[139] SJ, para. 115 ("those questions are of crucial importance when assessing, in particular, the credibility of witnesses").
[140] SJ, para. 115.

C. SUB-GROUND 3: THE PROSECUTION HAS NOT ARGUED THAT THE TRIAL CHAMBER ERRED IN LAW OR ABUSED ITS DISCRETION IN TAKING INTO ACCOUNT THE ACCESSORIAL MODE OF LIABILITY IN RESPECT OF MR MANGENDA'S CONVICTION FOR THE ARTICLE 70(1)(A) OFFENCES

65. The Prosecution has argued that the Trial Chamber erred in law in taking into account that the mode of liability by which Kilolo and Bemba were convicted of offences under Article 70(1)(a). However, the Prosecution has not claimed or argued that the Trial Chamber erred in so doing in respect of Mr Mangenda,[141] and has requested no relief in respect of Mr Mangenda under this sub-ground.[142]

66. This sub-ground, accordingly, requires no response from Mr Mangenda.

IV. RESPONSE TO SECOND GROUND OF APPEAL

A. THERE WAS NO ERROR IN SUSPENDING PART OF MR MANGENDA'S SENTENCE OF IMPRISONMENT

1. Introduction

67. The Prosecution has not disputed, nor can it be disputed, that the Trial Chamber possessed the authority to impose on Mr Mangenda a custodial sentence limited to the time he had already served in prison – 11 months and seven days, and nothing more. The Prosecution has asserted, however, that the Trial Chamber did not have the authority to impose a custodial sentence of 11 months and seven days, combined with a suspended term of just over one year. The Prosecution claims that the Trial Chamber does not possess the authority to make a sentencing order prescribing conditions that permit the execution of any portion of the term of imprisonment to be suspended.

68. The Trial Chamber did possess such authority. First, Trial Chambers frequently suspend the execution of orders in the absence of an express statutory power to do so. Second, the Statute does not regulate the modalities of sentencing so comprehensively as to suggest that any power not expressly conferred is denied. Other powers not expressly specified in the Statute, such as to those to dismiss charges mid-way through a case[143] or to stay proceedings,[144] have been recognized even in respect of issues that

[141] Appeal, paras. 102-112.
[142] Appeal, para. 171(iii).
[143] *Ruto & Sang* OTP Submissions on Conduct of Proceedings, para. 7. *See Ruto & Sang* Decision No. 5 on No Case to Answer, paras. 10-17.

are subject to more detailed statutory regulation than Article 70 sentencing. Third, there is no indication of legislative intent to deprive Trial Chambers of this power. Fourth, the widespread practice of international courts and national legal systems confirms that the authority to suspend is intrinsic to the power to sentence, especially for offences against the administration of justice.

2. Suspension Is Inherent, Implied, or Intrinsic to the Power to Issue an Order

69. ICC Trial Chambers frequently suspend execution of an order subject to conditions subsequent. For example, Rule 68(2)(b) permits the admission of prior recorded testimony only subject to the fulfillment of the attestation prescribed by Rule 68(2)(b)(ii). Trial Chambers frequently order the admission of such statements conditional upon the subsequent fulfillment of the attestation requirements. This practice, despite the lack of express authorization in the Rules or any other of the Court's statutory instruments, is nevertheless routine.[145] Trial Chambers have recognized expressly that any such orders are made on a "conditional" basis.[146]

70. Trial Chambers have similarly made orders conditionally admitting documents subject to future translation,[147] conditionally admitting prior recorded testimony under Rule

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[144] *Lubanga* 10 June 2008 Status Conference, p. 28 ("[t]he Prosecution tends to agree that the Trial Chamber has indeed inherent powers in respect of staging the discontinuance of prosecution, and I make this point taking into account ICTY's jurisprudence in that respect.")

[145] *Gbagbo* Rule 68 Decision, para. 73 ("[u]pon receipt of the declaration, the witness statements shall be considered submitted to the Chamber in their entirety"); *Ongwen* Rule 68 Decision, para. 222 ("the introduction of the prior recorded testimony of these witnesses is subject to the receipt and filing in the record of the case of the accompanying declaration by each of the witnesses concerned in accordance with Rule 68(2)(b)(ii) and (iii) of the Rules"); *Gbagbo* Rule 68 Decision II, para. 23 ("[u]pon receipt of the declaration, the witness statement and its annexes shall be considered submitted to the Chamber in their entirety"); *Ongwen* Decision on Evidence and Witnesses, para. 29 ("subject to both the prompt provision of an Acholi translation and the necessary Rule 68(2)(b)(ii) and (iii) declarations, the Chamber introduces the prior recorded testimony of P-1 under Rule 68(2)(b) of the Rules"); *Bemba et al.* Decision on Kilolo Rule 68 Motion, para 20 ("[t]he Chamber notes the impending arrival of the declarations pursuant to Rule 68(2)(b)(ii) of the Rules and conditionally admits the prior recorded testimony of witnesses D21-7 and D21-8 upon the presentation of those accompanying declarations").

[146] *Ntaganda* Scheduling Order, para. 7 ("[w]ith respect to Rule 68(2)(b) specifically, the Chamber hereby indicates that such applications may be made in advance of the required accompanying declarations having been obtained, while noting that any favourable ruling on such applications could only be made on a conditional basis"); *Bemba et al.* Decision on Kilolo Rule 68 Motion, para. 20 ("[t]he Chamber notes the impending arrival of the declarations pursuant to Rule 68(2)(b)(ii) of the Rules and conditionally admits the prior recorded testimony of witnesses D21-7 and D21-8 upon the presentation of those accompanying declarations.")

[147] *Uganda* Evidence Submission Decision, para. 9 ("the Chamber deems it appropriate to recognise the un-translated materials objected to by the Defence as submitted conditional on the provision of translation into a working language of the Court"); *Ongwen* Decision on Evidence and Witnesses, paras. 28-29 ("[w]hile the Chamber agrees with the Defence that the Prosecution is obliged to provide a translation in Acholi pursuant to Rule 76(3) of the Rules, the current lack thereof does not prevent its introduction pursuant to Rule 68. Rather, the Chamber hereby instructs the Prosecution to provide the Defence with a translation of P-1's prior recorded testimony in Acholi. Considering the above and subject to both the prompt provision of an Acholi translation and the necessary Rule 68(2)(b)(ii) and (iii) declarations, the Chamber introduces the prior recorded testimony of P-1 under Rule 68(2)(b) of the Rules, together with its associated documents").

68(3),[148] and conditionally admitting an expert report.[149] The Statute does not expressly confer a power to suspend execution of any of these expressly conferred powers. Trial Chambers have rightly not asked themselves whether such an express power is conferred because it is already encompassed within the power to order the relief in question. As rightly stated by the Trial Chamber in respect of its power to impose a term of imprisonment as a sentence, the "its power to suspend a sentence of imprisonment is inherent to its power to impose and determine the sentence."[150]

71. The word "inherent" potentially refers to powers that, though not expressly conferred, are necessary for the functioning of any criminal court.[151] "Inherent" may also be used to describe a power that is so inextricably related to an expressly conferred power that it is necessarily implied. Pre-Trial Chamber II, for example, has described its power to "make necessary alterations to documents issued by the Chamber" as "inherent".[152] The Prosecution has similarly suggested that a Chamber's power to reconsider previous decisions is "inherent" or "implicit."[153] The power to reconsider previous decisions, though not expressly conferred in the Statute or Rules, is now broadly recognized as a power possessed and exercised by Trial Chambers.[154] These powers, whether described as "inherent" or "implied", may be understood as necessary corollaries of powers expressly conferred.

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[148] *Gbagbo* Rule 68 Decision III, para. 22 ("[t]he Chamber therefore finds, in principle, that the written statements of Witnesses P- 0106, P-0107, P-0117 and P-0578 are suitable for introduction under Rule 68(3) of the Rules. Introduction of the statements of Witnesses P-0106, P-0107 and P-0117 can, however, only occur when all of the conditions of the rule are met. The witnesses will appear before the Chamber, and will be asked whether they object to the introduction of their written statements. If they do not object, their written statements will be considered as submitted.")

[149] *Bemba et al.* Decision on Submission of Expert Report, para. 11 ("[t]he Chamber notes that the Mangenda Defence's Rule 68(3) request is unopposed, and the Chamber will recognise the formal submission of this report on condition that the formal requirements of this rule are met during D23-1's examination.")

[150] SJ, para. 41.

[151] *Banda* Decision on Temporary Stay of Proceedings, para. 77 (referring to the "'inherent jurisdiction', [which] is well-grounded in international law, [and] which generally recognises that an international body or organisation 'must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties'").

[152] *Kony et al*. Decision on Urgent OTP Application, p. 4.

[153] *Kenyatta* OTP Motion for Reconsideration, fn. 25 (arguing, in the context of a request for reconsideration, that "[t]he Prosecution notes that the Appeals Chamber has affirmed the ability of this Court to exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule allows it (ICC-01/04-01/06-772OA4, paras.36-39)"); *Bemba et al.* OTP Motion for Reconsideration, para.4 ("[a]lthough the Statute does not expressly provide for reconsideration as a procedural remedy, as such, the power of a Chamber to reconsider its own decisions is inherently within its discretion. Further, the Appeals Chamber has affirmed the Court's ability to exercise its inherent judicial powers in the absence of an express statutory provision"); *Lubanga* OTP Motion for Reconsideration, para. 7 ("[w]hile the power to reconsider final decisions is usually express, and often subject to prescribed conditions, the power to reconsider and vary interlocutory decisions and orders is more commonly an implicit or inherent power").

[154] *Ongwen* Decision on Defence Partial Reconsideration Request, para. 4 (referring to reconsideration as part of the "established practice of Trial Chambers of the Court").

72. The inherent or implied authority to condition, modify or revoke an order does not relate only to minor or technical issues. For example, the Statute confers on Trial Chambers no express authority to excuse an accused from being present at trial. On the contrary, Article 63(1) seems, at first sight, to impose on an accused an obligation to be continuously present at trial. The Appeals Chamber, having found that this obligation was subject to exceptions, had no difficulty in finding a correlative power to authorize the absence of an accused – and to do so subject to the fulfillment of certain conditions.[155] The authority to define conditions for absence from court is not expressly authorized in the Statute or Rules, but correctly arose from the power to excuse an accused from presence during trial.[156]

73. The power to suspend a term of imprisonment is, likewise, inherent to its power to order that term of imprisonment. ICC Trial Chambers routinely suspend the execution of decisions within their express authority, subject to certain conditions. The Trial Chamber correctly recognized that the power to suspend the term of imprisonment that it had itself imposed implied a power to impose conditions for that suspension. The Trial Chamber did not err.

3. The Text of the Statute Does Not Reflect Exhaustive Regulation of Sentencing Modalities, Especially When Compared to Other Areas Where Inherent or Ancillary Powers Have Been Recognized

74. The Prosecution argues that the absence of any statutory provision expressly permitting the suspension of a custodial sentence means that there is no such authority because the Statute and Rules "exhaustively regulate sentencing proceedings at the Court, the available penalties and their enforcement and execution."[157] The Prosecution also asserts that the "exhaustiveness of the ICC penalties regime" leads to the "inexorable inference" that the "drafters would have expressly and in detail regulated the Chambers' authority to suspend sentences had they intended them to have this power."[158] The nub of the Prosecution's argument appears to be that since

[155] *Ruto* Judgment on Presence at Trial, paras. 55-56 ("the Appeals Chamber concludes that the Trial Chamber did not err in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused person, on a case-by-case basis, from continuous presence at trial…the Trial Chamber enjoys a measure of discretion under article 63 (1) of the Statute").
[156] *Ruto* Decision on Excusal from Presence at Trial, paras. 103-105 ("the Chamber is persuaded that it is reasonable to grant the request made by the Ruto Defence, with the conditions indicated below. Such a conditional grant of the request is the best way to strike the 'balance that protects all the different competing concerns.' [….] From the perspective of the imperatives of judicial control, the presence of the accused as a question of his duty established the default position [….] Violation of any of these conditions of excusal may result in the revocation of the excusal and/or the issuance of an arrest warrant as appropriate.")
[157] Appeal, para. 116.
[158] Appeal, para. 130.

some aspects of sentencing are regulated in detail – pronouncement of the judgment in public, maximum penalties available, modalities for transfer to a State to serve sentence, purported presumption in favour of custody during appeal proceedings[159] – it must follow that the Statute would have likewise expressly regulated suspended sentencing if such a power existed. Having not done so, argues the Prosecution, the drafters must be taken to have intended not to confer any power to suspend a term of imprisonment.

75. The premise of the Prosecution argument – that sentencing for Article 70 offences is exhaustively regulated – is incorrect. Article 70(3), which regulates sentencing for Article 70 offences, is limited to a single sentence: "[i]n the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both." The evident purpose of the provision, rather than addressing whether or not a term of imprisonment could be suspended, is to define the maximum penalties that may be imposed for Article 70 offences. The only detailed regulation concerning sentencing specific to Article 70 offences is Rule 166, which offers detailed guidance on the issue of fines, and only on the issue of fines. Nothing is said in either of these provisions about whether a term of imprisonment may, or may not, be suspended.

76. Second, there are express indications in the Statute that Trial Chambers have greater flexibility in sentencing Article 70 offences as opposed to Article 5 offences. Article 77 (2), which regulates the imposition of fines for Article 5 crimes, provides that:

> 2. **In addition to** imprisonment, the Court may order:
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.
> *(emphasis added)*

Article 70, on the other hand, allows the imposition of only a fine without any term of imprisonment:

> 3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, **or** a fine in accordance with the Rules of Procedure and Evidence, or both.

[159] Appeal, paras. 119-120.

(emphasis added)

This corresponds, as discussed below in more detail,[160] with the practice of *ad hoc* international criminal tribunals where sentences have frequently been suspended for the equivalent of Article 70 offences, but have never been suspended for "core crimes."

77. Third, Article 70(3) refers specifically to the Trial Chamber's authority to impose a "term of imprisonment," whereas Article 77(1) refers to the power to "impose … [i]mprisonment for a specified number of years." Article 77(2) likewise refers to "imprisonment" rather than a "term of imprisonment." The notion of a "term" of imprisonment, unlike "imprisonment," does not necessarily entail imprisonment itself.

78. Fourth, Article 70(3) clearly confers upon the Trial Chamber the authority to impose a sanction more stringent than a suspended term – up to a total of five years' imprisonment. The Trial Chamber reasoned correctly that having a power to do more is suggestive of a power to do less without express statutory grant.[161]

79. The degree of comprehensiveness with which sentencing for Article 70 offences are regulated in the Statute and Rules is usefully compared with four other areas where inherent or implied powers have – or have not – been recognized.

80. One area where the Statute has been found to be exhaustive relates to the circumstances in which a decision may be appealed. Article 82(1) opens with the words: "Either party may appeal any of the following decisions." Four specific circumstances are then enumerated. The plain wording and structure of the provision suggests that these four circumstances are meant to be exhaustive. The Appeals Chamber, in rejecting a Prosecution request to lodge an appeal in a circumstance not expressly authorized in the Statute, held that "the statute defines exhaustively the right to appeal against decisions of first instance courts"; that there was no "gap noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions"; and that the "lacuna postulated by the Prosecution is inexistent."[162] The Appeals Chamber also rejected the Prosecution's assertions that

[160] *Infra*, paras. 95, 102.
[161] TJ, para. 41.
[162] DRC Extraordinary Review Decision, para. 39.

there was a uniform rule to the contrary in national jurisdictions and international human rights principles.[163]

81. The exhaustive statutory regulation found in Article 82(1) may be contrasted with three areas where Chambers of the ICC have recognized powers that are not expressly conferred in the Statute or Rules. These powers have been recognized in respect of stays of proceedings, reconsideration and dismissal of charges before the end of trial. All of these areas fall within the domain of trial procedure, which the Statute and Rules regulate to a high degree of specificity, but only in specific areas. Express statutory regulation of certain areas of trial procedure did not, however, preclude the recognition of inherent or implied powers in other areas. These powers have sometimes been recognized on the basis that they are necessary to the functioning of the court, and at other times because the power is closely related to, or encompassed within, another power expressly granted.

82. First, the Appeals Chamber has recognized that trial chambers possess an inherent authority to stay proceedings permanently:

> Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. […] If no fair trial can be held, the object of the judicial process is frustrated and must be stopped. […] Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.[164]

83. The Appeals Chamber subsequently extended this reasoning to a "conditional stay of proceedings":

> The Judgment of 14 December 2006, however, did not rule out the imposition of a conditional stay of proceedings in suitable circumstances. If the unfairness to the accused person is of such

[163] DRC Extraordinary Review Decision, paras. 27 ("[i]t emerges from the above that nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal. The Appeals Chamber concludes that the Prosecution's submissions in this respect is ill-founded"); 38 ("[i]s a right to appeal against every decision of a hierarchically subordinate court to a court of appeal, or specifically an interlocutory decision of a criminal court to the court of appeal, acknowledged by universally human rights norms? The answer is in the negative. Only final decisions of a criminal court determinative of its verdict or decisions pertaining to punishment meted out to the convict are assured as an indispensable right of man.")
[164] *Lubanga* Decision of 14 December 2006, paras. 37, 39.

> nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy.[165]

84. The Prosecution also acknowledged these powers relying, *inter alia*, on the practice of the *ad hoc* tribunals: "[t]he Prosecution tends to agree that the Trial Chamber has indeed inherent powers in respect of staging the discontinuance of prosecution, and I make this point taking into account ICTY's jurisprudence in that respect."[166] The Prosecution did not argue, as it has argued here,[167] that the overall degree of regulation in the Statute and Rules implies that the framers of the Statute would have inserted detailed provisions regulating such a power if it had been intended to be granted.

85. Second, Trial Chambers have recognized that they have a general power to reconsider previous decisions despite the absence of express statutory grant to do so. The first ICC decision on this question decided otherwise, denying the existence of any such power on the basis that disparate provisions of the Statute and Rules allowed reconsideration and, accordingly, implied the absence of such a power in any other circumstances.[168] Case law of the *ad hoc* tribunals was dismissed as irrelevant.[169] This reasoning, accordingly, adopted the "exhaustive regulation" approach despite the absence of a statutory provision expressly reflecting such an intention, as is the case with Article 82(1).

86. This approach to reconsideration has been overwhelmingly rejected in subsequent jurisprudence. A general power of reconsideration is now "part of the "established practice of Trial Chamber of the Court."[170] The Prosecution has often expressly

[165] *Lubanga* Decision of 21 October 2008, para. 80.
[166] *Lubanga* 10 June 2008 Status Conference, p. 28.
[167] Appeal, para. 130.
[168] *Situation in Uganda*, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, 28 October 2005, para. 18 (referring to Articles 15(5), 19(10), 61(8) of the Statute and Rules 118(2), 125(3) and 135(4) of the Rules of Procedure and Evidence as expressly defining the circumstances in which a previous decision could be reconsidered).
[169] *Situation in Uganda*, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, 28 October 2005, para. 19.
[170] *Ongwen* Decision on Defence Partial Reconsideration Request, para. 4 (referring to reconsideration as part of the "established practice of Trial Chamber of the Court"). *See Lubanga* Decision on Numbering of Evidence, paras. 12-18; *Bemba et al.* Reconsideration Decision, para. 4 ("the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *propria motu*"); *Ongwen* Decision on Defence Partial Reconsideration Request, para. 4 ("it must be emphasised that the power of a chamber to reconsider its interlocutory decisions is exceptional and should only be exercised if a clear error reasoning is demonstrated"); *Ruto & Sang* Reconsideration Decision, para.19; *Kenyatta* Decision on OTP Motion for Reconsideration, para.

requested the exercise of this power.[171] Trial Chambers have also expressly rejected the "exhaustive regulation" argument, holding that "it would be incorrect to state that decisions can only be varied 'if permitted by an express provision of the Rome Statute framework.'"[172] This subsequent jurisprudence often does not characterize whether the power is "inherent" – i.e. deriving from the general attributes that a court must possess – or "implied" – i.e. inseparable from the power to issue decision. Either way, there is little doubt but that this power is now firmly entrenched as part of the acknowledged powers of Chambers of the ICC.

87. Third, Trial Chambers have recognized that they possess, despite the lack of any express statutory basis, the power to dismiss charges for lack of sufficient evidence at the close of the Prosecution case. This power has been found despite the numerous provisions governing trial proceedings. Indeed, Article 74 – which is entitled "Requirements for the decision" – prescribes that "[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations." An obtusely literalistic interpretation of this phrase could be that no decision on the charges is permissible until "each stage of the trial" has been completed. The Prosecution, instead of advocating such a formalistic interpretation, correctly acknowledges that a Trial Chamber does possess the authority to dismiss charges before the end of trial:

> the Prosecution submits that the Chamber has authority under the Statute to entertain "no case to answer" proceedings in the instant case. The authority to insert a "half-way" procedure aimed at determining whether the Prosecution has presented a "case to answer" derives, firstly (as noted by academic commentators) from the general authority enshrined in Article 64(3)(a). Second, it can be considered inherent in the powers of the Chamber under Articles 64(2) and (6)(f) to entertain and rule on a "no case to

11; *Ntaganda* Reconsideration Decision, para. 12 ("the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, whether prompted by one of the parties or *proprio motu*").

[171] *Kenyatta* OTP Motion for Reconsideration, para. 3 ("[t]he Prosecution accordingly seeks reconsideration by the Trial Chamber of its decision of 18 October 2013"); *Lubanga* OTP Motion for Reconsideration II, para. 5 ("[t]he OTP therefore seeks reconsideration to determine if it is the Chamber's intention to enforce strictly certain of the general principles identified in the 19 May 2006 Decision"); *Uganda* OTP Motion for Reconsideration, para. 8 ("the OTP respectfully requests that the Chamber grant a motion for reconsideration of its determination, *sua sponte*, to redact the dates, places, and characteristics of the crimes committed by the named persons"); *Ntaganda* OTP Application for Reconsideration, para. 49 ("the Prosecution requests that the Trial Chamber grant the request for reconsideration").

[172] *Kenyatta* Decision on OTP Motion for Reconsideration, para. 11, quoting *Lubanga* Decision on Numbering of Evidence, para. 12 ("[w]ithout in any sense questioning the Pre-Trial Chamber's decision not to reconsider its order in that case, in the judgment of the Majority the apparent statement of principle emerging from that case – that Decisions can only be varied if permitted by an express provision of the Rome Statute framework – does not entirely reflect the true position in law.")

answer" application from the Defence.[173]

88. The Trial Chamber – despite the absence of any express statutory authorization permitting such a practice – accepted the Prosecution's position on the basis of provisions granting general powers of trial management conferred under Article 64(6)(f) and Rule 134, and its obligation under Article 64(2) to ensure the fairness and expeditiousness of the proceedings.[174]

89. The three foregoing powers – to stay proceedings, reconsider decisions and dismiss charges – may all be characterized as falling within the subject of trial procedure. The Statute and Rules regulate some aspects of trial procedure, as with some aspects of sentencing, in extreme detail. Issues such as the wording of the testimonial oath,[175] exclusionary rules in respect of past sexual history,[176] compellability of self-incriminating testimony,[177] disclosure,[178] and instruments of restraint in the courtroom[179] are all regulated in great detail. Other areas of trial procedure, however, are relatively unregulated, especially when compared to the criminal procedure codes of most countries.[180] These areas of specific regulation have rightly not been treated as implying that the drafters of the Statute and Rules, if they had intended to include a power to stay proceedings, to reconsider decisions, or to dismiss charges before the end of trial, would only have done so by express provision.

90. The acknowledgement of these inherent or implied powers is perfectly consistent with the VCLT, which requires treaty language to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ICC Statute is a treaty with a special – and at the international level, an unprecedented – purpose: to constitute a functional system of criminal adjudication. Powers that are not expressly enumerated

[173] *Ruto & Sang* OTP Submissions on Conduct of Proceedings, para. 7.
[174] *See Ruto & Sang* Decision No. 5 on No Case to Answer, paras. 10-17.
[175] Rule 5 of the Rules.
[176] Rules 70 and 71 of the Rules.
[177] Rule 74 of the Rules.
[178] Article 67(2) of the Statute; Rules 76-79 and 81-82 of the Rules.
[179] Rule 120 of the Rules.
[180] The German Code of Criminal Procedure and the German Criminal Code, together, have 176,515 words when translated into English. The Statute and Rules, by comparison, have 65,032 words. As crude as this measure concededly is, it nevertheless provides an example of the difference between codes of criminal procedure that could intrinsically be treated as exhaustive, as compared to the ICC Statute and Rules. Commentators have also remarked on the degree to which the ICC Statute and Rules were the product of political compromises as opposed to systematic codification. *See* Triffterer 3d ed., p. 311 ("multilateral political compromises [...] do not always add as much clarity and coherence as desired, as was to be expected with over 100 states from different legal systems participating in the negotiations.")

in the Statute and Rules may nevertheless be deemed to be inherent to the existence of the Court or inherent to other powers expressly conferred.[181]

91. Accordingly, neither the provisions on sentencing nor the overall architecture of the Statute regulate sentencing – especially in respect of Article 70 offences – in a comprehensive manner that would evince a legislative intention to exclude any power or disposition that is not expressly granted. The statutory context of Article 70 sentencing is entirely different from that of Article 82(1), which was found to be exhaustive. The situation is much more similar to the occasions where inherent or implied powers have been acknowledged, as in the case of stays of proceedings, reconsideration or dismissal of charges before the end of trial. This approach is reinforced in the present case because the power to suspend an order is encompassed within the power to issue an order. The Prosecution has not shown that the Trial Chamber erred in finding that Article 70(3) does not exclude the power to suspend a "term" of imprisonment that it imposed.

4. The Travaux Préparatoires *Do Not Reveal Any Intention Not to Confer a Power to Suspend a Term of Imprisonment*

92. The working papers and commentaries on the drafting of the Statute and Rules do not reveal any intent to prohibit a Chamber from suspending part of a sentence of imprisonment for offenses against the administration of justice. The sentencing provision that became Article 70(3) appears not to have been debated at all.

93. The Prosecution nevertheless asserts that the non-inclusion of provisions on parole that had appeared in a 1994 draft of the Statute indicates a legislative intent not to permit suspended sentencing.[182] The argument is erroneous for several reasons.

94. First, parole is fundamentally different than suspension of sentence. Parole typically involves extensive conditions and monitoring that raise a host of issues that are not usually present in respect of the minimal conditions usually associated with the suspension of sentence. The former raises concerns relating to State cooperation to a degree that is entirely different from a straightforward suspension of sentence. The removal of the parole provision is far more likely attributable to this concern. As stated in the *Rašić* Appeals Judgement:

[181] *See* Sudan Referral Decision, p. 6 ("the Court has the inherent power to inform the Security Council of such a failure"), citing ICTY, *Blaskić*, IT-95-14, Appeal Judgement, 29 October 1997, para. 33.
[182] Appeal, para. 128.

> [T]he power to suspend a sentence must be distinguished from the power to issue a pardon, commutation of sentence, or early release. Such suspension of a sentence, either in full or in part, does not infringe the authority of the enforcing State to execute the sentence in accordance with the applicable law of that State… Rather, the decision to suspend the last eight months of Rašić's sentence of 12 months' imprisonment forms an integral part of the Trial Chamber's judicial discretion in the determination of the sentence.[183]

95. Second, the draft parole provisions concerned core crimes, not Article 70 offences. The issue presently before the Appeals Chamber concerns only whether the Trial Chamber had the power to suspend a term of imprisonment for the latter. The degree of difference is illustrated by the practice of the *ad hoc* tribunals, where terms of imprisonment have frequently suspended for crimes equivalent to those encompassed by Article 70,[184] but never for "core crimes." The elimination from a draft version of the ICC Statute of a parole provision designed to apply indiscriminately to all crimes under the Statute may have related to its inappropriateness in respect of Article 5, rather than Article 70 offences.

96. Third, the Prosecution cites no legislative record to support its hypothesis that the removal of the parole provision reflects any intentions in respect of the power to suspend a term of imprisonment. More likely reasons exist, as described above, for the removal of the parole provision. The Prosecution's assertions are not only speculative, but implausible.

97. Fourth, if the removal of the parole provision reflects an intention to preclude suspending sentences for Article 70 offences, then it is surprising that there is no indication of this intention anywhere in the Statute or Rules. The situation is, accordingly, starkly different from the legislative purpose behind Article 82(1), which was not only clearly indicated by the provision itself, but also express indications in the *travaux préparatoires*.[185]

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[183] *Rašić* AJ, para. 18.

[184] *Nobilo* Contempt Judgement (2001) para. 22 (suspending part of a fine); *Bulatović* SJ (2005) paras. 18-19 (suspending four-month sentence of imprisonment); *Rašić* SJ (2012) para. 31 (suspending 8 months of 12-month sentence of imprisonment); *Bangura* SJ (2012) para. 92 (suspending 18-month sentence of imprisonment).

[185] DRC Extraordinary Review Decision, paras. 40-41 ("[t]he interpretation accorded hereinabove to subparagraph (d) of paragraph 1 of article 82 of the Statute and article 82 generally is confirmed by the *travaux préparatoires* that establish as laid down in article 32 of the Vienna Convention on the Law of Treaties supplementary means of interpretation designed to provide a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the Vienna Convention of the Law of Treaties and b) the clarification of ambiguous or obscure provisions and c) the avoidance of manifestly absurd or unreasonable results. The *travaux préparatoires* reveal that a specific suggestion made by the Kenyan delegation to the

98. Fifth, the *travaux préparatoires* evidence a general preference for flexibility and judicial discretion in sentencing. After recounting in great detail the deliberations leading to the adoption of the Court's sentencing scheme, William Schabas has written:

> [T]he final result [of the penalties provisions] is a regime that potentially leaves great discretion in the hands of the judges of the new Court. If there is an overall picture that emerges from the four articles of Part 7 of the Statute, it is of a relatively enlightened and humane sentencing scheme…Both the text of the provisions and the *travaux préparatoires* send messages to the judges of relative clemency.[186]

99. Ambassador Rolf Fife of Norway, who served as Chair of the Working Group for Penalties in the lead up to the Rome Conference, has noted that the preference for judicial flexibility repeatedly won the day during deliberations, and the drafters declined to set either minimum or maximum periods of imprisonment for specific offenses. Ambassador Fife observed that:

> The consensus that emerged out of the Preparatory Committee for having a single, general provision on imprisonment for all crimes, instead of setting precise maximum penalties for specific crimes, was confirmed during the Diplomatic Conference. Giving such flexibility to judges was not found to be inconsistent with any of the requirements of the principle of legality.[187]
>
> […]
>
> Another issue was whether to include minimum periods of imprisonment as proposed during the Preparatory Committee. Opinions were divided during the negotiations…It was agreed to leave this to the discretion of the judges, as the number and importance of possible mitigating and aggravating circumstances may in any case require concrete considerations.[188]

Committee of the Whole at the 1998 United Nations Diplomatic Conference of Plenipotentiaries designed in essence to give effect to the right claimed by the Prosecutor was turned down. The suggestion was: "Other decisions may be appealed with the leave of the Chamber concerned and in the event of refusal such refusal may be appealed." The dismissal of the suggestion rules out any possibility that the content of article 82 (1) (d) of the Statute was anything other than deliberate. The *travaux préparatoires* confirm that article 82 (1) (d) of the Statute reflects what was intended by its makers.")

[186] Schabas, "Penalties" in *Cassese,* p. 1533.

[187] Fife, "Penalties" in *Triffterer,* p. 1881.

[188] Fife, "Penalties" in *Triffterer,* p. 1883.

100. The removal of the parole provisions from a 1994 draft version of the ICC Statute is not indicative of any intent in respect of suspending sentence.

5. Suspended Sentences Are Well Established in International and Domestic Practice

101. The Trial Chamber, in the absence of definitive guidance from the Statute or Rules properly examined international and domestic practice concerning sentencing. This methodology is well-established before the ICC Appeals Chamber.[189]

102. Suspending a term of imprisonment, subject to a condition subsequent such as not re-offending, has a lineage dating back to ecclesiastical courts in the fourteenth century.[190] As the Prosecution acknowledges,[191] suspending part of a sentence is a common practice in most countries of the world, and has been repeatedly utilized at the *ad hoc* international criminal tribunals in respect of the same offences encompassed by Article 70. In fact, from 2001 to 2012, Trial Chambers at the ICTY and SCSL suspended part or all of a sentence for offenses against the administration of justice at least four times.[192] The ICTY Appeals Chamber in *Rašić*, when the Prosecution belatedly challenged this established practice, declared unequivocally that "the Trial Chamber's power to suspend a sentence is inherent to its authority to impose one."[193]

103. The Prosecution even asserts that the ICTY Appeals Chamber erred in *Rašić*. The Prosecution incorrectly claims, in particular, that its reliance on the *Tadić* Sentencing Appeals Judgement was "misplaced."[194] The *Tadić* Sentencing Appeals Judgement –

[189] *Lubanga* SAJ, paras. 46 ("[t]he Appeals Chamber notes that the ICTY/ICTR and SCSL Appeals Chambers review sentencing decisions as discretionary decisions and that these Appeals Chambers will only revise a sentence where the Trial Chamber has committed a 'discernible error' in exercising its discretion"); 76 ("[t]he Appeals Chamber notes that the ICTY Appeals Chamber has held that, while recognising that "[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances", any assistance may be limited, given the Trial Chamber's overriding obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused"); 77 ("[t]he Appeals Chamber finds that the approach of the ICTY Appeals Chamber is persuasive in this respect"); 82 ("[i]n this respect, the Appeals Chamber of the ICTY and the ICTR has determined that "[a] high rank in the military or political field does not, in itself, merit a harsher sentence") (internal footnotes and citations omitted).
[190] *Bagaric*, p. 536.
[191] Appeal, paras. 138-39.
[192] *Nobilo* Contempt Judgement (2001) para. 22 (suspending part of a fine); *Bulatović* SJ (2005) paras. 18-19 (suspending four-month sentence of imprisonment); *Rašić* SJ (2012) para. 31 (suspending 8 months of 12-month sentence of imprisonment); *Bangura* SJ (2012) para. 92 (suspending 18-month sentence of imprisonment).
[193] *Rašić* AJ, para. 17.
[194] Appeal, fn. 287.

at the urging of the Prosecution, incidentally[195] – holds that Trial Chambers posses "powers inherent in its judicial function" in respect of sentencing.[196] The holding was not "obiter," as claimed by the Prosecution, but was essential to its determination that it possessed the discretion to recommend minimum sentences – a power not conferred expressly under the ICTY Statute. The *Rašić* Appeals Chamber did not err in relying on this principle, and nor did the *Tadić* Appeals Chamber err in enunciating it.

104. The Prosecution does not dispute the widespread nature of suspended sentences in national jurisprudence and laws. The Trial Chamber referenced 20 national jurisdictions as examples of States that had provisions in its laws for suspended sentences.[197] Article 21(1)(c) of the Statute suggests that the national laws of States that would normally exercise jurisdiction over the crime are to be considered. The Netherlands, where the offenses against the administration of justice primarily took place, also authorises suspended sentences.[198]

105. The Prosecution contends that this national practice is actually contrary to the Trial Chamber's finding of an inherent power because, unlike the ICC Statute and Rules, this sentencing practice is based on powers expressly conferred in national legislation.[199]

106. This argument is flawed on two grounds. First, the national criminal codes cited by the Prosecution[200] are far more extensive and comprehensive than Statute and Rules.[201] Suggesting that the absence of a power in the latter should be treated in the same way

[195] *Tadić*, OTP Response to Appellant's Sentencing Appeal Brief, para. 6.3 ("[i]n making such a minimum term recommendation and stating that the credit for time in confinement should not be applied against that minimum term, the Trial Chamber was exercising its duty and discretion to arrive at an appropriate sentence for this case. The Appellant has not shown the decision to be an abuse of that discretion; the Trial Chamber recommendation as to minimum term and application of the credit should not be disturbed.")
[196] *Tadić* SAJ, para. 28 ("[n]either the Statute nor the Rules provide guidance for judicial discretion with respect to the recommendation of a minimum sentence. The discretion of a Trial Chamber to recommend a minimum sentence flows from the powers inherent in its judicial function and does not amount to a departure from the Statute and the Rules. However, the judicial discretion of Trial Chambers to attach conditions to sentences is subject to the limitations imposed by fundamental fairness.")
[197] SJ, fn. 63.
[198] Dutch Criminal Code, Article 14(a) (unofficial English translation: "Section 14a 1. In cases where a term of imprisonment not exceeding two years, detention other than default detention, community service or a fine is imposed, the court may order that the punishment shall not be enforced in whole or in part. 2. If a term of imprisonment of at least two years and not exceeding four years is imposed, the court may order that a part of the punishment, not exceeding two years, shall not be enforced. 3. The court may also order that additional punishments imposed shall not be enforced in whole or in part.")
[199] Appeal, para. 138.
[200] Appeal, fn. 297.
[201] The German Code of Criminal Procedure and the German Criminal Code, together, as mentioned above, are almost three times longer than their ICC counterparts.

as the absence in the former is misplaced. On the contrary, as previously established, ICC Chamber have properly identified important and necessary powers not expressly enumerated in the Statute that are commonly regulated by express provision in national legislation. They include – in addition to the powers to stay proceedings and dismiss charges discussed previously – the power to determine the order of witnesses at trial,[202] temporarily transfer an accused to the custody of a State,[203] or decline to confirm a charge for reasons of judicial economy.[204]

107. The Prosecution tries to dismiss the practice of the *ad hoc* international tribunals on the basis that its Statutes are shorter than that of the Court and that, accordingly, judges were accorded more latitude to develop their own powers.[205] This, however, can only be an argument of degree. The ICC Statute and Rules are also sparse in some areas of criminal proceedings[206] and, relative to national codes, are themselves sparse. The jurisprudence of the *ad hoc* tribunals, accordingly, remains relevant, especially in areas of the ICC Statute that are unregulated or sparsely regulated. Suspending sentences for Article 70 offences – in light of the extreme brevity of the applicable provision – is one such area. Furthermore, the *ad hoc* tribunals also have the unique attribute of being criminal justice systems that emerge from the same tradition and face many of the same problems as the ICC. The manner in which common problems have been addressed, though by no means binding, can nevertheless be helpful in providing insight as to the purpose of suspended sentencing, the circumstances in which it has been found appropriate, and whether it is a domestic practice that can be usefully transposed to the international context.

108. The suspension of part of a sentence of imprisonment for offenses against the administration of justice is fully consonant with international and domestic practice.

6. There Are No Impediments to Imposing or Enforcing Suspended Sentences

109. The Prosecution contends that suspending any part of a term of imprisonment violates *nullem poena sine lege* because it subjects a person to penalties of which she has no advance notice.[207] This may be a valid argument subjects an accused to burdens that

[202] *Bemba* Decision on Order of Witnesses, paras. 15-16.
[203] *Bemba* Funeral Decision I, para. 9 and *Bemba* Funeral Decision II, para. 13.
[204] *Bemba* ALA Confirmation Decision, para. 52
[205] Appeal, para. 140
[206] *Ruto & Sang* Decision No. 5 on No Case to Answer, para. 17 ("[t]he Chamber observes that the Statute does not prescribe a fixed structure for the manner or order in which evidence should be presented at trial.")
[207] Appeal, para. 124.

are not foresee in the Statute. However, the Prosecution concedes in this case that the only condition imposed on Mangenda is to not to violate prescribed law, which is expected of all members of society.[208]

110. The Prosecution also claims that there is no adequate means of enforcing a suspended sentence.[209] The same could have been said in the four cases in which the ICTY and SCSL imposed suspended sentences. The absence of express procedures for enforcement of a suspended sentence in the Statute and Rules of those institutions did not prevent the respective Chambers from suspending the sentences and did not result in any enforcement problems. Should the Court be presented with a judgement of conviction of Mr Mangenda in the three years during which the remainder of his sentence of imprisonment is suspended, it could issue a warrant for his arrest and place him in detention to serve the suspended portion of his sentence, as the Mechanism for International Criminal Tribunals did when a person convicted of an offence against the administration of justice at the ICTY failed to pay her fine.[210]

111. The Prosecution also claims that the Trial Chamber erred when opining that it could have declined to impose any sentence.[211] While the Chamber did not elaborate, it may well have been referring to the fact that under Article 70(3), as opposed to Article 77, it could have declined to impose any sentence of imprisonment and imposed only a fine.

112. There are no impediments to the Trial Chamber's suspension of part of a sentence of imprisonment for offenses against the administration of justice and to the enforcement of its sentence.

B. THE TRIAL CHAMBER DID NOT ABUSE ITS DISCRETION IN SUSPENDING PART OF THE SENTENCE OF IMPRISONMENT

113. In both international and domestic practice, a sentence or part of a sentence may be suspended to achieve a number of objectives. These include (1) specific deterrence by hanging a penalty over the offender's head;[212] (2) general deterrence by establishing a

[208] Appeal, para. 125.
[209] Appeal, paras. 164-69.
[210] *See* MICT, Hartmann Registry Notification of Arrest; MICT, Hartmann Warrant of Arrest and Order for Surrender.
[211] Appeal, paras. 135-37, citing SJ, para. 41.
[212] *Bagaric*, p. 537: "They are commonly described as a threat perched like the Sword of Damocles over the head of offenders during the period of operation."

normative sentence to be imposed for criminal conduct, but for the specific circumstances of this offender; and (3) individual sentencing by taking such specific circumstances into account.

114. The Irish Minister of Justice recently explained:

> Suspended sentences are an integral part of the judicial sentencing regime, indeed of the criminal justice system in general. They can be used as an alternative to the imposition of a custodial sentence where the court considers that the person might benefit from a second chance and that justice might be better served with the imposition of a suspended sentence. Suspended sentences are a valuable sentencing mechanism for the courts - a deterrent to the commission of further offences - since the threat of the original prison sentence remains. A suspended sentence is imposed for a certain time period and is subject to a number of conditions. The primary condition is that the person must "keep the peace and be of good behaviour" – a breach of this condition can result in automatic revocation of the suspended sentence.[213]

115. The Prosecution's challenge is one of form over substance. The Chamber had the authority to impose a single term of imprisonment of 11 months and seven days, with no further conditions imposed. The Chamber instead chose to impose that sentence with additional obligations and conditions. Those obligations and conditions continue for three years. If Mr Mangenda commits an infraction during that time, he will, in addition to any penalty for that infraction, also be subject to the additional punishment of the suspended sentence. This is an appropriate and tailored technique of specific deterrence.[214]

116. The Chamber, by imposing the 24-month sentence, also laid down a benchmark of the appropriate measure of punishment that should be imposed for such offences barring individual circumstances warranting leniency. The length of sentence, regardless of whether it was suspended, sends a clear signal as to the seriousness of the offences.[215] This promoted general deterrence by signalling to the public at large that such an offense against the administration of justice could be expected to result in a 24-month sentence, absent special circumstances, and by providing a reference point to be used in future sentencing for offenses against the administration of justice. A suspended

[213] Address of Irish Minister of Justice and Equality, 24 January 2017.
[214] SJ, para. 19 ("a sentence should be adequate to discourage a convicted person from recidivism [specific deterrence] as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so [general deterrence].")
[215] *See* ICC Press Release of 22 March 2017. *See also* The Guardian article of 22 March 2017.

sentence, accordingly, served in a balanced manner the interests of general deterrence and of specific deterrence. The Trial Chamber accomplished more than it would have been able to do without resorting to those powers.

117. The Prosecution's claim that the suspended sentence "fosters an appearance of partiality and impunity"[216] should be categorically rejected. No basis has been presented to substantiate this purported "appearance." The argument, furthermore, overlooks that suspended sentences are widely regarded in most civilized systems of law as a normal and appropriate sentencing tool. Claiming that this practice "fosters an appearance of partiality and impunity" is an unjustified condemnation of a practice that is well-established and well-regarded in many civilized legal systems.

118. Pursuant to Article 78(1), the Chamber must take into account the gravity of the crime and the individual circumstances of the convicted person.[217] Rule 145(2)(a) allows consideration of mitigating circumstances, including the conduct of the convicted person after the act, such as cooperation with the court.

119. The Trial Chamber cited Mr Mangenda's personal circumstances,[218] his good behaviour throughout the present proceedings[219] and the consequences of incarceration for his family[220] when suspending the remaining 13 months of the term of imprisonment.[221] The Prosecution's disagreement with the sentence on this point simply repeats its arguments under Ground I that the sentence is inadequate. Since it was well within the Trial Chamber's discretion to impose a sentence of 11 months' imprisonment, there can be no abuse of that discretion when it imposed a 24-month term and a three-year condition that Mr Mangenda not be convicted of any offence.[222]

120. Therefore, the Trial Chamber did not abuse its discretion in its exercise of its inherent power to suspend part of Mr Mangenda's sentence of imprisonment.

[216] Appeal, para. 123.
[217] SJ, para. 21
[218] SJ, para. 137. Personal circumstances were also a basis for the suspended sentence in *Bulatović* SJ, para. 18.
[219] SJ, para. 136. Cooperation with the Court was also a basis for the suspended sentence in *Bangura* SJ, paras. 78, 92.
[220] SJ, para. 141. The consequences of incarceration were also a basis for the suspended sentence in *Rašić* SJ, para. 31.
[221] SJ, para. 149.
[222] *See* Mr Mangenda's arguments under Ground I, *supra*.

V. THE PROSECUTION'S PROPOSED REMEDY OF INCREASING SENTENCE WITHOUT FURTHER REMAND WOULD VIOLATE INTERNATIONAL HUMAN RIGHTS

121. The Prosecution has requested: (i) in respect of any error found under Ground 1, that Mr Mangenda's sentence be increased to five years; and, (ii) in respect of Ground 2, that Mr Mangenda be ordered back into custody to serve any remaining term of imprisonment. The Prosecution asserts that a longer term of imprisonment can be imposed directly by the Appeals Chamber without further remand to the Trial Chamber "since the Trial Chamber has made all necessary findings in the Conviction Judgment and Sentencing Decision."[223]

122. Neither of these remedies is appropriate even if the Chamber finds any error.

123. Article 14(5) of ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." The United Nations Human Rights Committee has specified that this principle applies to convictions and sentences imposed for the first time by an appellate court following a prosecutor's appeal.[224]

124. The ICTY is not a State and, accordingly, it is not formally required to comply with international human rights norms. The Appeals Chamber in *Tadić*, however, commented in the context of convictions that the principle expressed in Article 14(5) of the ICCPR is "an imperative norm of international law to which the Tribunal must adhere."[225] The Appeals Chamber explained in *Delalić* that some issues are so important that there must be a right of appeal.[226]

125. ICTY appellate jurisprudence does not uniformly embrace the obligatory nature of international human rights law, however. Judge Pocar, in dissent, has attempted to argue, unsuccessfully, that Article 14(5) of the ICCPR applies to ICTY proceedings:

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[223] Appeal, para. 171(v).
[224] *See Mario Conde v. Spain*, para. 7.2 ("the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant"); *Moreno v. Spain*, para. 7.2 ("[t]he Committee recalls its jurisprudence that the absence of any right of review in a higher court of a conviction handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant").
[225] *Tadić* Judgement Against Milan Vujin, p. 3.
[226] *Čelebići* AJ, para. 711 ("[a]s the Appeals Chamber cannot be reconstituted in its present composition, and as, in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.")

> The standard of human rights espoused by the United Nations is that a person convicted on appeal following an acquittal at first instance is entitled to a review of his or her conviction by a higher tribunal according to law. Pursuant to the ICCPR and its interpretation by the HRC, over 150 States are held to this standard. It would be unjustifiable for the International Tribunal to adopt a lower standard of human rights.[227]

126. Judge Pocar's view is that if international human rights law were to be treated as directly applicable to the ICTY's proceedings, then there could be no doubt that it would be impermissible for the ICTY Appeals Chamber – from which there is no appeal or review – to increase an accused's term of imprisonment:

> The Appeals Chamber is bound to apply Article 25(2) of the Statute of the International Tribunal ("ICTY Statute") in such a manner as to comply with fundamental principles of human rights as enshrined in, inter alia, the International Covenant on Civil and Political Rights ("ICCPR"). Article 14(5) of the ICCPR 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". Accordingly, the right to appeal convictions, not excluding convictions entered for the first time on appeal, should be granted to an accused before the International Tribunal.[228]

127. The only appropriate remedy where there is a finding of sentencing error, according to Judge Pocar, "is to quash the Trial Chamber's sentence and remit it back to the Trial Chamber […] for a redetermination of the sentence consistent with the Appeals Chamber's decision."[229]

128. The ICC Statute – unlike the ICTY Statute – makes clear that international human rights law is directly applicable to ICC proceedings. As stated in Article 21(3), the "application and interpretation of law pursuant to this article" – which includes the Statute as a source of law – "must be consistent with internationally recognized human rights." The power accorded under Article 83(3) of the ICC Statute to "vary the sentence" when found to be "disproportionate to the crime" is, accordingly, limited by the requirements of international human rights. The provision is conspicuously silent

[227] *Mrkšić*, Partially Dissenting Opinion of Judge Pocar, p. 171.
[228] *Mrkšić*, Partially Dissenting Opinion of Judge Pocar, p. 171 ("I do not believe that the Appeals Chamber has the power to impose a new sentence on the accused that is higher than that which was imposed by the Trial Chamber.") *See also Semanza* AJ, para. 1; *Rutaganda* AJ, p. 3; *Galić* AJ, Partially Dissenting Opinion of Judge Pocar, para. 2 ("the modalities of the Appeals Chamber's intervention under Article 25(2) of the Statute of the International Tribunals to correct errors committed by a Trial Chamber must be interpreted so as to comply with the fundamental human rights principle that any conviction *and or* sentence must be capable of review by a higher tribunal according to law.")
[229] *Galić* AJ, Partially Dissenting Opinion of Judge Pocar, para. 3.

as to whether this phrase is meant to include an upward variation. Whether it does or not, however, is immaterial to the applicable hierarchy of norms: Article 83(3), if interpreted as purported to confer a power to increase sentence on appeal, must give way to any contradictory international human rights law.

129. Article 14(5) of the ICCPR is clear: "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." This rule would be violated if the Appeals Chamber were to increase Mr Mangenda's sentence on the basis of its alleged disproportionality. The accused has the right to know the reasons behind a five-year sentence and to challenge this reasoning. A decision by the Appeals Chamber to increase the sentence without subsequent review or appeal would violate this right, and cause substantial, concrete, and real prejudice to Mr Mangenda.

130. The Prosecution's second remedy – quashing the suspended sentence and directly ordering Mr Mangenda back into custody for the term of imprisonment imposed by the Trial Chamber – is likewise inappropriate. The Appeals Chamber does not know, and no findings have been made, that the Trial Chamber would have imposed a two-year sentence if the suspension of any part thereof was unavailable. On the contrary, the duration of the term of imprisonment imposed on Mr Mangenda is inextricably connected to the Trial Chamber's decision to suspend the sentence. Indeed, the Trial Chamber stated expressly that the factors relevant to sentencing would "be taken into account when, ultimately, determining the appropriate sentence, including whether or not to suspend the sentence."[230]

131. Quashing the suspension, which would more than double the time of actual imprisonment, substantially increases the practical severity of the punishment. Such a substantial increase should not be visited on Mr Mangenda on the assumption that the Trial Chamber would have imposed the same sentence in the absence of a suspended term. The contrary is far more likely. The Trial Chamber, given its intimate knowledge of the facts, should have the opportunity to re-evaluate the sentence in accordance with any corrective directions given by the Appeals Chamber.

132. The appropriate remedy, in the event that the Appeals Chamber finds any of the purported errors raised by the Prosecution to be well-founded, is to remand to the Trial

[230] SJ, paras. 136,137, 138 (underline added).

Chamber the issue of sentence in accordance with any instructions as may be deemed by the Appeals Chamber necessary and appropriate. All of the judges of the Trial Chamber are still judges of the ICC and, accordingly, any decision following remand could be rendered efficiently and expeditiously. Remand will both ensure compliance with international human rights norms, and ensure that the Trial Chamber's intentions as to sentence are not disregarded.

VI. CONCLUSION

133. The Prosecution has failed to identify any error of law or fact that justifies quashing the Trial Chamber's sentence, let alone demonstrating that the Trial Chamber abused its discretion. The Prosecution has not demonstrated that the term of imprisonment imposed on Mr Mangenda manifestly deviated from established sentencing practice, nor has it shown that taking into consideration the nature of the offence was legally incorrect. Having shown no error, the Prosecution's first ground of appeal should be dismissed.

134. The Prosecution has failed to show that the Trial Chamber erred in law in suspending a portion of the term of imprisonment imposed subject to conditions. The practice of suspending orders is well-established at the ICC, including in respect of the power to compel the presence of an accused at trial. Inherent and implied powers have been recognized under the Statute in appropriate circumstances, including stays of proceedings, reconsideration and dismissal of charges, despite the absence of express statutory authorization. This reflects an appropriately limited textual and contextual interpretation of the Statute. The practice of conditional sentencing, furthermore, is widely recognized in the practice of international tribunals and States. The Prosecution's second ground of appeal should, accordingly, be dismissed.

135. If the Appeals Chamber decides otherwise, the appropriate remedy is to remand the issue to the Trial Chamber for re-determination of sentence in accordance with any corrective guidance as may be deemed necessary by the Appeals Chamber. The Trial Chamber continues to enjoy the intimate familiarity with the case that justifies doing so.

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Respectfully submitted this 31 January 2018,

At The Hague, The Netherlands