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Date: **18 February 2019**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibánez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

Prosecution's Response to Bemba's "Article 82(1)(a) *[sic]* Appeal" against the Re-sentencing Decision

Source: **Office of the Prosecutor**

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

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I. INTRODUCTION

1. Bemba is entitled to exercise his statutory right to appeal against the Re-sentencing Decision issued by Trial Chamber VII on 17 September 2018. Yet, his Appeal traverses obtuse, tangential and unsuitable topics, extraneous to appeals under article 81(2)(a) of the Rome Statute. Bemba's arguments must be dismissed. Bemba's *third* Appeal should not make us lose sight of what this case was about.[1] This was an unprecedented case concerning a sophisticated and concerted plan to frustrate the Court's mandate to fairly adjudicate the most serious crimes of international concern. No other international criminal court or tribunal has encountered a similar level of witness interference. Over an extended period of time, Bemba, Kilolo and Mangenda designed and implemented a sophisticated criminal scheme to recruit potential Defence witnesses, pay them, give them non-monetary promises and benefits, and illicitly coach them by instructing them on the content of their testimony and on how to give evidence. They extensively scripted, rehearsed and harmonised the evidence of witnesses, and presented before this Court *at least* 14 of them who, having been bribed and coached to provide false evidence to secure Bemba's acquittal, testified falsely about their contacts with the Defence, payments received from and benefits promised by the Defence, and their acquaintances with certain persons. Throughout, Bemba, Kilolo and Mangenda sought to conceal their criminal conduct: they abused the Registry's privileged line, effected money transfers through third persons, distributed cell phones to the witnesses after the Victims and Witnesses Unit ("VWU") 'cut-off' date and used coded language. Once they became aware that they were the subject of an investigation, they conspired to pay off the witnesses with incentives and money to frustrate their potential cooperation with the Prosecution. Arido perpetrated and Babala contributed to some of the offences. The evidence of the Accuseds' acts, captured in *inter alia* intercepts, communications and bank transfers was irrefutable.

2. On 19 October 2016, Trial Chamber VII unanimously convicted Bemba, Kilolo and Mangenda of offences under article 70(1)(a), (b) and (c) of the Statute involving 14 witnesses, and Babala and Arido of offences under article 70(1)(c) involving two and four witnesses respectively.[2] On 22 March 2017, the Chamber sentenced them.[3] While the five convicted persons appealed their convictions, only Bemba, Babala and Arido, and the Prosecution,

[1] Bemba Re-sentencing Appeal.
[2] Trial Judgment, pp. 455-458. The Prosecution will refer to Trial Chamber VII, Trial Chamber or the Chamber interchangeably.
[3] Sentencing Decision, pp. 98-99.

appealed the sentences imposed in the Sentencing Decision. On 8 March 2018, the Appeals Chamber unanimously confirmed the convictions of Babala and Arido under article 70(1)(c). It also unanimously confirmed the convictions of Bemba, Kilolo and Mangenda under articles 70(1)(a) and (c),[4] but it quashed their convictions under article 70(1)(b) because it determined that this offence does not include testimonial evidence.[5] Also on 8 March 2018, the Appeals Chamber granted the Prosecution's appeal against the sentences imposed in the Sentencing Decision, and remanded the matter back to Trial Chamber VII to determine new sentences for Bemba, Kilolo and Mangenda.[6] On 17 September 2018, Trial Chamber VII imposed effectively the same sentences on the three convicted persons as in the original Sentencing Decision.[7] Bemba was sentenced to a one year joint sentence (based on one year for each of the article 70(1)(a) and (c) offences) and a fine of € 300,000 to be paid within three months to the Trust Fund for Victims ("TFV").[8]

3. Only Bemba appealed the Re-sentencing Decision. His Appeal must fail for several reasons.

- *First*, Bemba's arguments far exceed the scope of an appeal against his new sentence. Sections of his brief bear no connection to the Re-sentencing Decision (the decision under appeal), but rather, directly challenge findings in the Trial and Appeal Judgments. Yet, the Court's statutory framework—when properly and reasonably interpreted—does not entitle Bemba to re-litigate these settled findings, nor to seek re-consideration of his convictions which have been confirmed on appeal. Many of his arguments must be dismissed *in limine* on this basis alone.

- *Second*, Bemba's arguments are incorrect. He fails to show any error in the Chamber's proper exercise of discretion in determining his new sentence.[9] The proceedings against Bemba were at all times fair, and his rights were fully respected. His detention was lawful, reasonable and proportionate. The re-sentencing procedure—confined in

[4] Appeal Judgment, para. 1631. Judge Henderson, while agreeing with the outcome, appended a separate opinion on the 'submission' evidentiary regime adopted by Trial Chamber VII, and regarding the Majority's interpretation of article 69(7) and (8). *See* Judge Henderson Separate Opinion.
[5] Appeal Judgment, para. 710.
[6] Sentencing Appeal Judgment, paras. 357-362.
[7] Re-sentencing Decision.
[8] Re-sentencing Decision, paras. 122-123, 127-128.
[9] As to the standard of review for appeals against sentencing decisions, *see*: Sentencing Appeal Judgment, paras. 21-25 citing and quoting *Lubanga* SAJ, paras. 39-40, 44; and quoting *Kenyatta* Article 87(7) AD, paras. 22-25.

nature—was clear, reasonable and correct: the Chamber considered the concrete errors identified by the Appeals Chamber and properly factored in any new relevant considerations. Bemba's arguments are unsupported and must be dismissed.

- *Third*, several of Bemba's arguments are so obscure that at times they are difficult to comprehend. His appeal often takes positions contradicting his earlier submissions and strategies. He frequently fails to comply with basic principles of substantiation.[10] He also obfuscates the record of the case, and misunderstands the Court's and domestic jurisprudence he relies on.

4. The Rome Statute was created to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and thus to contribute to the prevention of such crimes.[11] While the Court should perform its mandate under the Statute with the utmost respect for the norms of due process, the Statute does not cater to—nor should the Court provide its limited resources to—whimsical party strategies. Litigation must be conducted within the parameters of the Court's legal framework. This permits the Court to effectively pursue its much needed mandate. The principles of certainty and finality call for bringing these proceedings to an expeditious end.

[10] *Al-Senussi* Admissibility AD, para. 167 (noting that "the Pre-Trial Chamber was reasonable in placing an 'evidential' burden on the Defence sufficiently to substantiate the factual allegations it was making.")
[11] Preamble Rome Statute, paras. 4-5.

II. RESPONSE TO GROUND 1: BEMBA IMPROPERLY RE-LITIGATES HIS CONVICTIONS

5. Bemba's First Ground of Appeal is a transparent attempt to re-litigate and seek reconsideration of his convictions for article 70(1)(a) and (c) offences, which have been confirmed on appeal. Although cast as a challenge to the Trial Chamber's assessment of his contributions and the gravity of his offences in the Re-sentencing Decision, Bemba's first ground far exceeds the scope of an appeal against his new sentence. Notwithstanding his comprehensive appeals against his convictions and sentence to the Appeals Chamber on 24 April[12] and 28 June 2017,[13] he again disputes the Trial Chamber's factual findings, and the 'submission' evidentiary regime adopted in this case. Bemba disregards that the Appeals Chamber upheld the Chamber's factual and legal findings.[14] Bemba not only repeats arguments that he made to the Appeals Chamber, and which the Appeals Chamber has already dismissed, but now he seeks to improperly supplement his arguments with additional points he did not previously raise.

6. Bemba's arguments suffer from two fatal defects. *First*, they are *ultra vires*: the Statute—when properly and reasonably viewed—does not support Bemba's request to re-open his convictions. *Second*, they are erroneous: neither the Trial Chamber nor the Appeals Chamber erred in applying the 'submission' evidentiary regime in this case,[15] and the *Bemba* Main Case Appeals Judgment does not stand for that proposition.[16] Bemba's convictions are *final* following a full and vigorous appeal by Bemba and his four co-accused. The Court seeks to establish the truth while respecting the rights of parties and participants. But it should not be asked to displace judicial certainty in favour of devoting countless time and resources to frivolous and obscure litigation. Bemba's First Ground of Appeal should be dismissed.

7. The Prosecution distils two threads of arguments in Bemba's First Ground (Sections A, B, C and D) to which it will respond in turn:

[12] Bemba Conviction Appeal.
[13] Bemba Sentencing Appeal.
[14] *See* fn. 4 above regarding the scope of Judge's Henderson dissenting opinion as to some aspect's of the Majority's interpretation of the law.
[15] *Contra* Bemba Re-sentencing Appeal, paras. 58 (stating that "[…]Trial Chamber VII and the Appeals Chamber (in its March 2018 composition) applied the Statute and Rules incorrectly […]") and 59 ("The question is […] whether the Appeals Chamber can validate legal findings, or a new sentence that was produced through findings that have been confirmed to be incorrect […]").
[16] *Contra* Bemba Re-sentencing Appeal, paras. 35, 48, 58, 59, 70.

- *First*, Bemba incorrectly argues in Section A that the Trial Chamber did not properly assess his contributions to the article 70(1)(a) offences[17] and their gravity[18] because it purportedly did not follow the Appeals Chamber's "directives".[19] Similarly, in a few paragraphs in Section B, he suggests that the Chamber's procedure and evidentiary approach in the re-sentencing proceedings was unclear.[20] These arguments are incorrect. The Chamber's findings are reasonable, and its re-sentencing procedure was clear. This part of his First Ground should be dismissed.

- *Second*, in the remainder of Section B[21] and Sections C[22] and D[23] Bemba makes a transparent and improper attempt to re-litigate the Trial Judgment, and effectively seeks reconsideration of his convictions,[24] even though they have been confirmed on appeal. He argues that Trial Chamber VII was unable to adequately assess his contributions in the Re-sentencing Decision because the 'submission' evidentiary regime that the Trial Chamber had applied in this case tainted all the proceedings.[25] Hence, Bemba, once again, challenges the 'submission' evidentiary regime adopted by Trial Chamber VII.[26] And he, once again, disputes some of the Trial Judgment's factual findings by selectively referring to only some items of evidence, and by misreading the Trial Judgment and Appeal Judgment.[27] In so doing, Bemba also does not accurately state the law.[28]

8. Moreover, Bemba incorrectly suggests that the Appeals Chamber cannot assess the reasonableness of the Chamber's findings because the 'submission' evidentiary regime applied in this case "has rendered it impossible for the Appeals Chamber to exercise meaningful and impartial oversight".[29] Instead, he requests the Appeals Chamber to take more extreme measures such as assessing the evidence *de novo*, entering its own findings, and

[17] Bemba Re-sentencing Appeal, paras. 5-10 (Section A).
[18] Bemba Re-sentencing Appeal, paras. 11-16 (Section A).
[19] *See* Bemba Re-sentencing Appeal, paras. 4, 12, 38.
[20] Bemba Re-sentencing Appeal, paras. 32-34, 36-37 (Section B).
[21] Bemba Re-sentencing Appeal, paras. 17-31, 35.
[22] Bemba Re-sentencing Appeal, paras. 38-59.
[23] Bemba Re-sentencing Appeal, paras. 60-77.
[24] *See* Bemba Re-sentencing Appeal, paras. 63-77.
[25] Bemba Re-sentencing Appeal, paras. 17-23.
[26] Bemba Re-sentencing Appeal, paras. 18-23, 31, 35 (Section B) and paras. 48-59 (Section C) and paras. 60-63 (Section D).
[27] Bemba Re-sentencing Appeal, paras. 24-30 (Section B), paras. 43-47 (Section C).
[28] Bemba Re-sentencing Appeal, paras. 20 (Section B), 41, 53-55 (Section C),74 (Section D).
[29] Bemba Re-sentencing Appeal, para. 39.

quashing the convictions.[30] In the alternative, Bemba requests—also without foundation—that the Appeals Chamber "invoke its power under Article 82(1)(b) *[sic]*" to re-open the convictions.[31] In either scenario, Bemba seeks to provide further submissions.[32] Although Bemba refers frequently to article 82(1)(a)[33] or (b)[34] in his Appeal, the Prosecution understands Bemba to rely on article 81(2)(b),[35] since the Re-sentencing Decision is obviously not a decision on admissibility or jurisdiction, nor on release.

9. As developed below, these arguments should be dismissed *in limine* on one or more of the following grounds:

- *First*, a convicted person cannot challenge their conviction in an appeal against a sentencing decision. This is more so when the sentence has been imposed following a remand to the Trial Chamber after the successful Prosecution's appeal against the sentences and the dismissal by the Appeals Chamber of appeals against the convictions brought by the convicted persons. Even article 81(2)(b)—a provision that Bemba relies on—is inapt for his purposes. The proper avenue for a convicted person to appeal their conviction is by an appeal against the conviction decision under article 81(1)(b). But Bemba cannot now file such an appeal since *he already did so* on 24 April 2017,[36] and the Appeals Chamber fully addressed his appeal by issuing a determinative 699-page Appeal Judgment.[37] His convictions for article 70(1)(a) and 70(1)(c) offences are therefore final.

[30] Bemba Re-sentencing Appeal, paras. 38 ("there is no objective basis for the Appeals Chamber to reconstruct the sentence, in accordance with the correct principles and procedures (absent a trial *de novo*)"), 39 ("the evidentiary reasoning provided by the Trial Chamber throughout this process has rendered it impossible for the Appeals Chamber to exercise meaningful and impartial oversight over the sentence just issued") and 42 (arguing that the Appeals Chamber would have to "guess or reconstruct the basis for the Trial Chamber's conclusions" which would be "contrary to the Appeals Chamber's duty to exercise its functions in an independent and impartial manner"). *See also* paras. 72-76 (rendering similar arguments).
[31] *See* Bemba Re-sentencing Appeal, para. 77 (requesting the Appeals Chamber "to invoke its ower under Article 82(1)(b) to invite the Defence to 'submit grounds under article 81, paragraph 1 (a) and (b)' as concerns the bases for reversing the conviction"). *See also* paras. 64-65.
[32] Bemba Re-sentencing Appeal, para. 77.
[33] *See e.g.* Bemba Re-sentencing Appeal, cover page (referencing 82(1)(a) in the document title), para. 1 (citing 82(1)(a) in the introduction).
[34] *See e.g.* Bemba Re-sentencing Appeal, paras. 2, 59, 77. *See also* p. 36 (reflecting reference to 82(1)(b) in the heading to Section D).
[35] *See* Bemba Re-sentencing Appeal, para. 64. *See* Bemba Re-sentencing Notice, para. 16 and Bemba Reply Urgent Request, para. 9.
[36] Bemba Conviction Appeal.
[37] Appeal Judgment.

- *Second*, the *Bemba* Main Case Appeals Chamber could not have found the 'submission' evidentiary regime adopted in the Article 70 case *ultra vires* since the issue did not arise in that appeal. Logically so, since Trial Chamber III, which heard the *Bemba* Main Case, did not adopt the 'submission' evidentiary regime but rather issued admissibility rulings throughout trial. In any event, only one judge in the *Bemba* Main Case Appeals Chamber made *obiter* remarks about the 'submission' evidentiary regime applied in the Article 70 case in an Appendix to his Separate Opinion.[38]

- *Third*, the Court's legal texts do not permit reconsideration of final judgments, much less on the grounds advanced by Bemba.

10. Since Bemba's arguments should be dismissed *in limine*, the Prosecution will not repeat arguments from its Final Brief[39] or its Conviction Appeal Response[40] concerning the issues Bemba raises again in this appeal. It will however clarify some of Bemba's mis-statements of the record and the law. If the Appeals Chamber were to decide to entertain Bemba's submissions, and his related request to revisit his final convictions, and bearing in mind the importance of the principle of finality to the Court, the Prosecution—like Bemba—requests the opportunity to provide further submissions.

II.A. THE TRIAL CHAMBER REASONABLY ASSESSED BEMBA'S PARTICIPATION AND THE GRAVITY OF HIS OFFENCES, AND ADOPTED A CLEAR RE-SENTENCING PROCEDURE

11. The Chamber reasonably assessed Bemba's participation as an accessory to article 70(1)(a) offences, and their gravity. Bemba's arguments are obscure, unsubstantiated and misapprehend the Re-sentencing Decision and the Appeal Judgment. They do not raise any doubt—let alone a serious one—as to the reasonableness of the Chamber's approach, much less show any error.

12. *First*, the Chamber's confined re-sentencing proceedings were reasonable and correct. Since it issued its Briefing Schedule, Trial Chamber VII has underscored the limited scope of

[38] Appendix I to Judge Eboe-Osuji Concurring Separate Opinion, pp. 95-104.
[39] Prosecution Final Brief.
[40] Prosecution Conviction Appeal Response.

the re-sentencing proceedings,[41] to which Bemba agreed.[42] Consequently, in its Re-sentencing Decision, the Trial Chamber considered the concrete errors identified by the Appeals Chamber, namely, (i) the Chamber's initial consideration that the false testimony went to 'non-merits' issues; (ii) the Chamber's initial distinction between principal and accessorial liability; (iii) the Chamber's initial decision to suspend sentences; (iv) the effect of the Chamber's reversal of the article 70(1)(b) convictions, and (v) the impact of the error relating to the time frame of the article 70(1)(c) offences.[43] The Chamber also considered new factors,[44] and re-assessed all relevant sentencing factors.[45] Whenever the Chamber's original assessment in the Sentencing Decision remained valid, it referred to it.[46] This approach was reasonable and correct.

13. The Chamber re-visited its assessment as to (i) Bemba's degree of participation as an accessory to the article 70(1)(a) offences, (ii) the gravity of those article 70(1)(a) offences, and (iii) the impact on his sentence of quashing his conviction under article 70(1)(b).[47] Like the Appeals Chamber,[48] the Trial Chamber found that the shorter duration of the article 70(1)(c) offences (13 months instead of 2 years) was immaterial, since the offences were still "organised and executed over a prolonged period".[49] It also considered Bemba's time in detention,[50] and gave "minimal weight" to the impact that the convictions had on Bemba's professional life.[51] This approach was also reasonable and correct.

14. *Second*, Bemba misunderstands the Sentencing Appeal Judgment, as reflected by his obscure references to "tests" that the Appeals Chamber purportedly established.[52] The

[41] Re-sentencing Briefing Schedule, para. 15.
[42] *See below*, paras. 43-44.
[43] Re-sentencing Decision, para. 15.
[44] Re-sentencing Decision, para. 16.
[45] Re-sentencing Decision, para. 75 ("The Chamber will therefore re-assess all sentencing factors considered in the next section and determine a sentence that reflects the culpability of the convicted person and is proportionate to the offence within the meaning of Articles 81(2)(a) and 83(3) of the Statute. When the Chamber considers that its prior considerations remain accurate, cross-references will be used to reflect which paragraphs from the Sentencing Decision are incorporated by reference in this decision. On the basis of its complete re-assessment, the Chamber will impose new sentences for the Three Convicted Persons"). *See also* para. 17.
[46] *See e.g.* Re-sentencing Decision, paras. 18, 75.
[47] Re-sentencing Decision, paras. 114, 117, 120.
[48] Sentencing Appeal Judgment, para. 168 (the Appeals Chamber emphasised that this error was "immaterial to its finding that the offences […] extended over a lengthy period of time").
[49] Re-sentencing Decision, para. 70 . *See also* para. 71.
[50] Re-sentencing Decision, para. 126. *See also* para. 120.
[51] Re-sentencing Decision, para. 119.
[52] *Contra* Bemba Re-sentencing Appeal, paras. 4 (referring to "correct tests articulated by the Appeals Chamber"), 6 (identifying "[a] test adumbrated by the Appeals Chamber"), 12 (referring to "the Appeals Chamber's test"), 38 (making general reference to "criteria established by the Appeals Chamber").

Appeals Chamber did not set out a "test" that the Trial Chamber was required to follow; instead, the Appeals Chamber identified some errors made by the Trial Chamber in its original Sentencing Decision[53] and directed the Chamber to determine a *new sentence* in light of these errors.[54]

15. As described below, Bemba fails to show any error as to (1) the Chamber's assessment of his contributions; (2) the gravity of the offences; (3) and the procedure adopted at re-sentencing. His arguments must be dismissed.

II.A.1. The Trial Chamber reasonably assessed Bemba's degree of participation for Bemba's new sentence

16. Bemba argues both that the Chamber did not consider (or gave insufficient weight to) his degree of participation[55] and that the Chamber did not adequately reason "such key points".[56] Both arguments are unsupported. The Chamber reasonably considered Bemba's degree of participation, and adequately reasoned the Decision. Bemba fails to show error in the Chamber's approach.

17. The Appeals Chamber held in its Sentencing Appeal Judgment that principals to the crime are not necessarily more blameworthy than accessories,[57] and found that the Chamber had failed to explain why Bemba deserved a higher sentence as a co-perpetrator of article 70(1)(c) offences than as an instigator of article 70(1)(a) offences.[58] In its Re-sentencing Decision, the Trial Chamber agreed that:

[53] Sentencing Appeal Judgment, paras. 45, 62, 80, 168 and fn. 847 (referring to the Appeals Chamber's decision in the Appeal Judgment to quash the article 70(1)(b) convictions, which also had an impact on the determination of the new sentences).
[54] Sentencing Appeal Judgment, para. 361 (the Appeals Chamber "remand[ed] the matter to Trial Chamber VII for it to determine a new sentence").
[55] *See generally* Bemba Re-sentencing Appeal, paras. 5-10.
[56] Bemba Re-sentencing Appeal, para. 10.
[57] Sentencing Appeal Judgment, para. 60 (noting that "[a] principal perpetrator of a crime/offence [does not] necessarily deserve[] a higher sentence than the accessory to that crime/offence" and that "[w]hether this is actually the case ultimately depends upon all the variable circumstances of each individual case." The Appeals Chamber further made clear that "that the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence"). *See also* Re-sentencing Decision, para. 37.
[58] Sentencing Appeal Judgment, para. 61. *See also* Re-sentencing Decision, para. 37.

> "the differences in principal and accessorial liability *in this particular case* do not lead to much of a distinction in the appropriate sentences" since "Bemba [is] responsible for both these offences on the basis of *essentially the same acts and conduct*".[59]

18. Consequently, the Chamber re-visited its prior consideration of this factor. Having found that its original factual assessment of Bemba's participation and intent as set out in its original Sentencing Decision remained apposite and valid,[60] it then emphasised that the applicable mode of liability (solicitation under article 25(3)(b) for Bemba) had no impact on the sentence.[61] Based on this new assessment (and the Chamber's re-visited consideration of the 'non-merits' issue),[62] the Chamber increased Bemba's sentence for his article 70(1)(a) conviction from 10 months to 1 year, to match his sentence for his article 70(1)(c) conviction.[63] This approach was correct. Bemba speculates without foundation and his arguments should be dismissed for the following reasons:

19. *First*, in view of the confined scope of the re-sentencing proceedings, the Trial Chamber need not have repeated in full its factual assessment of Bemba's participation and intent which it had already elaborated on in its Sentencing Decision,[64] as long as it remained valid.[65]

20. *Second*, Bemba did not deserve a lower sentence for soliciting false testimony than the sentence imposed on Kilolo for inducing false testimony.[66] As the Appeals Chamber underscored, the Chambers need to conduct fact-specific assessments of a convicted person's contributions, rather than giving undue weight to legal labels.[67] This is precisely what the Trial Chamber did in the Re-sentencing Decision. Comparisons to sentences imposed on other convicted persons are often inapposite and unhelpful.

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[59] Re-sentencing Decision, para. 41 (italics added). *See also* Sentencing Appeal Judgment, para. 61.
[60] Re-sentencing Decision, para. 116(i) citing Sentencing Decision, paras. 219-223.
[61] Re-sentencing Decision, para. 41. *See also* para. 117.
[62] *See* below, paras. 23-31.
[63] Re-sentencing Decision, paras. 117, 122.
[64] *Contra* Bemba Re-sentencing Appeal, paras. 6-7. *See also* para. 8 (Bemba's assertion that the Chamber's findings on relevance of modes of liability in sentencing "raises significant concerns regarding the nature and purpose of the charges in the Article 70 case, and the precise nature of Mr. Bemba's conviction under these charges" is unclear).
[65] *See* Re-sentencing Decision, paras. 15 ("It is recalled that re-sentencing 'is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber Judgments'. In the Sentencing Decision, the Chamber already gave full and individualised consideration to the appropriate sentences for the Three Convicted Persons"), 75 ("When the Chamber considers that its prior considerations remain accurate, cross-references will be used to reflect which paragraphs from the Sentencing Decision are incorporated by reference in this decision"), 118 ("For the remaining factors, the Chamber considers that its previous balancing of them remains accurate"). *See also* para. 116(i) referring to Sentencing Decision, paras. 219-223.
[66] *Contra* Bemba Re-sentencing Appeal, para. 9.
[67] Sentencing Appeal Judgment, para. 60.

21. *Third*, Bemba misstates the Appeal Judgment, which did not modify the Trial Chamber's findings.[68] To the contrary, the Appeals Chamber dismissed Bemba's arguments when affirming the Chamber's reliance on Bemba's interactions with non-charged witnesses (such as D-19 and Bravo) as *evidence* establishing, together with other evidence, Bemba's liability for offences involving the 14 charged witnesses.[69] Bemba's conflation of the Chamber's conclusion that Bemba, through Kilolo and Mangenda, solicited the false testimony of the 14 witnesses, with the evidence it considered in reaching such a conclusion reflects his clear misunderstanding of the Appeal Judgment.[70]

22. In sum, Bemba's arguments challenging the Chamber's assessment of his participation in the article 70(1)(a) offences to determine his new sentence should be dismissed.

II.A.2. The Trial Chamber reasonably assessed the gravity of the article 70(1)(a) offences for Bemba's new sentence

23. Bemba challenges the Trial Chamber's decision in its Re-sentencing Decision not to consider the fact that the false testimony only went to 'non-merits' issues to decrease the gravity of the article 70(1)(a) offences.[71] He argues that the Chamber "was directed" by the Appeals Chamber to evaluate the "concrete impact" of the witnesses' "false testimony on Trial Chamber III's truth-finding functions" and, thus, it had to consider this factor.[72] He also mistakenly contends that, as a result, the Chamber failed to consider "the extent of the damage caused" as required by rule 145(1)(c).[73] Bemba's arguments are incorrect and should be dismissed for the following reasons:

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[68] *Contra* Bemba Re-sentencing Appeal, para. 10.
[69] Appeal Judgment, para. 154 ("despite the fact that witness D-19 was not one of the 14 witnesses, the Trial Chamber was at liberty to consider, examine and rely on evidence concerning Mr Bemba's conduct in connection with witness D-19 in determining the factual findings against Mr Bemba"). *See also* para. 156 (reflecting rejection of similar arguments by Bemba with respect to another non-charged witness).
[70] Appeal Judgment, para. 155 (noting that "[i]n the section of the Conviction Decision on the legal characterisation of the conduct of the accused, the Trial Chamber, when addressing solicitation of false testimony, did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses [through Kilolo and Mangenda]. Thus, it is clear that the Trial Chamber did not find that Mr Bemba had solicited witness D-19 to testify falsely").
[71] Bemba Re-sentencing Appeal, paras. 11-16. The witnesses' false testimony on 'non-merits' issues in this case related to three aspects relevant to determine the witnesses' credibility: (i) payments or non-monetary benefits received by the witnesses; (ii) their acquaintance with other individuals; and (iii) the nature and number of prior contacts the witnesses had with the *Bemba* Main Case Defence. *See* Re-sentencing Decision, para. 32.
[72] Bemba Re-sentencing Appeal, paras. 11, 12, 15.
[73] Bemba Re-sentencing Appeal, paras. 14, 16.

24. *First*, Bemba misunderstands the Sentencing Appeal Judgment. The Appeals Chamber did not instruct the Trial Chamber to consider the "concrete impact" that the false testimony of the 14 witnesses had on the record of the Main Case.[74] Rather, it found that the Chamber's original approach—based on an artificial "hierarchy" of lies—was incompatible with "the required *fact-specific assessment*, *in concreto*, of the gravity of the particular offences for which the person was convicted".[75]

25. Although the Appeals Chamber found that the content of the false testimony "may be a relevant consideration in the assessment of the gravity" of the offences,[76] it concluded that the Chamber erred in giving "some weight" to "the mere fact that in the present case the false testimony 'related to issues other than the merits of the Main Case'" without further explanation.[77] The Appeals Chamber reasoned that:

> "[a]ssuming a hierarchy of gravity in this regard is indeed artificial and ultimately incompatible with the required fact-specific assessment, *in concreto*, of the gravity of the particular offences for which the person was convicted. In relying on an extraneous consideration to diminish the gravity of the offences, rather than determining *in concreto* their actual gravity bearing in mind the extent of the damage, the Trial Chamber erred". [78]

26. Based on this and other errors, the Appeals Chamber remanded the matter back to the Trial Chamber to determine a new sentence.[79]

27. *Second*, Trial Chamber VII conducted a fact-specific assessment of the gravity of the offences, including "the extent of the damage caused" by the offences, as required by rule

[74] *Contra* Bemba Re-sentencing Appeal, paras. 11, 15.
[75] *See* Sentencing Appeal Judgment, para. 44 (italics added).
[76] Sentencing Appeal Judgment, para. 38 ("The introduction of false evidence on aspects of no, or only peripheral relevance to the facts at issue before a chamber may indeed be considered less grave than the introduction of false evidence on issues of particular significance for the case. In essence, this relates to the evaluation of the damage that the commission of the offence caused, or could have caused on the truth-seeking function of the Court that is ultimately protected by the relevant incriminating provisions"). *See also* para. 40 ("[…] the importance of the issues on which false testimony is given can, in principle, be of relevance to an assessment of the gravity of the offences concerned. The Appeals Chamber further recalls that it falls within the discretion of a trial chamber to identify the relevant circumstances for its assessment of the mandatory sentencing factors. For these reasons, the Appeals Chamber considers that the Trial Chamber did not abuse its discretion by taking account, in its assessment of the gravity of the offences, the content of the false testimony as established in the present case despite having itself decided not to determine the falsity of the concerned testimony with respect to issues concerning the 'merits' of the Main Case").
[77] Sentencing Appeal Judgment, para. 45 (internal quotations omitted). *See also* para. 41.
[78] Sentencing Appeal Judgment, para. 44.
[79] Sentencing Appeal Judgment, para. 361 ("The Appeals Chamber, having reversed the sentence, finds that it is most appropriate in the circumstances of this case to remand the matter to Trial Chamber VII for it to determine a new sentence").

145(1)(c).[80] The Chamber referred to its fact-specific gravity assessment in its original Sentencing Decision and found that—but for its approach to giving weight to the 'non-merits' issues to diminish the gravity—it remained apposite and valid.[81] In particular, and with respect to "the extent of the damage caused", the Chamber relied on the fact that Bemba's interference involved 14 (out of 34) *Bemba* Main Case Defence Witnesses.[82] The Chamber was not legally required to specifically assess the impact of the false testimony of the witnesses on the *Bemba* Main Case outcome. Fundamentally, Bemba disregards that the article 70 offences are 'conduct offences': the damage to the administration of justice results from introducing the false evidence into the record of a case.[83]As the Trial Chamber found:

> "[T]he administration of justice is already tainted if false evidence is introduced into the proceedings thus tainting the Judges' inquiry into the facts and deliberations take place on the basis of false evidence." [84]

28. The Appeals Chamber confirmed this approach and noted that:

> "[i]ssues concerning the 'merits' of a case may be more or less significant to an eventual determination of the charges by a trial chamber, as more or less significant can be the issues raised by the parties with a view to testing the credibility of witnesses who testify before it on matters relevant to the charges."[85]

29. *Third*, the Chamber's approach not to lower the sentence merely because the false testimony related to 'non-merits' issues was reasonable and well within the Chamber's

[80] *Contra* Bemba Re-Sentencing Appeal, paras. 14, 16.
[81] Re-Sentencing Decision, paras. 113 (listing the four factors the Chamber considered in the Sentencing Decision), 114 (holding that "its previous balancing of factors (i)-(iii) remain[ed] accurate" though "[a]s to the nature of the false testimony, the Chamber revise[d] its assessment […]", and noting that for Bemba, "this mean[t] that, all other things being equal, his Article 70(1)(a) sentence would increase. But the effect [was] relatively small, as the Chamber's original assessment already gave proper weight on this point in most material respects"), 115 (disregarding the Chamber's assessment of gravity in relation to the article 70(1)(b) offences).
[82] Sentencing Decision, para. 215, cited in Re-Sentencing Decision, para. 113 (ii), fn. 186.
[83] Trial Judgment, para. 31 ("The offences are of conduct and the harm is captured in the illicit and deliberate conduct of the perpetrator to tamper with the reliability of the evidence"). *Contra* Bemba Re-sentencing Appeal, para. 14, fn. 28. The drafting history of rule 145(1)(c) does not support Bemba's arguments. Although "the danger posed by the convicted person's conduct" was not ultimately included as a factor in rule 145(1)(c), this does not mean that "the extent of damaged caused" requires the Chambers to conduct Bemba's requested analysis. There is no indication in the *travaux* which supports this proposition.
[84] Trial Judgment, para. 23.
[85] Sentencing Appeal Judgment, para. 42. The Appeals Chamber added that "[it] is not persuaded that, for instance, false testimony as to the fact that a witness had received payments from the defence and had had improper contacts with members of the defence team is inherently less grave than false testimony on *any* matter 'pertaining to' the 'merits' of a case. […]".

discretion to determine the sentence.[86] Bemba fails to show the contrary. The Chamber's decision is consistent with the following considerations:

- The falsehoods in this case related to crucial credibility matters. Credibility assessments are an *integral* and *indissoluble* part of a Chamber's assessment of a witness's substantive evidence.[87] Evidentiary assessments are not conducted in isolation, nor can they be parcelled out. Rather, as Chambers have found, "[d]eterminations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgment."[88] The Appeals Chamber confirmed the *interdependence* between the two issues in its Sentencing Appeal Judgment:

> "[T]he assessment by a trial chamber of the credibility of witnesses (based, *inter alia*, on 'non-merit' issues) is an integral part of its ability to assess the substance of the witnesses' testimony (on 'merit' issues).[…] Indeed, false testimony on issues which go to the credibility of a witness prevents the Court from obtaining correct information which may be necessary for an accurate assessment of the reliability of his or her evidence on the 'merits' of a case. […] [T]he purpose of questioning witnesses on issues concerning their credibility is to receive genuine information that a chamber would consider in assessing the substance of the witnesses' testimony as part of its ultimate duty to discover the truth."[89]

- The false testimony proscribed under article 70(1)(a) does not require that the falsehood be 'material' "to the outcome of the case", either in favour of or against the accused.[90] For the purposes of article 70(1)(a), the Chamber defined 'materiality' as

[86] Re-sentencing Decision, para. 33. As to a Chamber's discretion in sentencing, *see*: *Lubanga* SAJ, paras. 1 ("A Trial Chamber enjoys broad discretion in determining a sentence"), 40 ("[T]he Appeals Chamber considers that the Trial Chamber has broad discretion in the determination of a sentence"); and Sentencing Appeal Judgment, para. 40 ("The Appeals Chamber [] recalls that it falls within the discretion of a trial chamber to identify the relevant circumstances for its assessment of the mandatory sentencing factors"). A different question is whether a Chamber has failed to consider a mandatory factor listed in rule 145(1) and (2). However, the Chamber considered the 'extent of the damage caused' as set out in rule 145(1)(c). *See above* para. 27.

[87] *See e.g. Akayesu* AJ, para. 292 (indicating that reliability and probative value of evidence is determined, "in light of the context and of the nature of the evidence itself, including the credibility and reliability of the relevant witness").

[88] *Kvočka* AJ, para. 659.

[89] Sentencing Appeal Judgment, para. 43 (also noting that "depending on the circumstances, 'credibility issues' can be indistinguishable from the 'substantive ones', for instance, with respect to a determination on whether a witness may have a motive to falsely implicate or exculpate the accused person"); Re-sentencing Decision, para. 35 ("Both in the Sentencing Decision and now, the Chamber stresses the centrality of witness credibility when assessing evidence and the importance of the issues on which false testimony was proven in the present case").

[90] Trial Judgment, para. 23. Bemba's reference (Bemba Re-sentencing Appeal, para. 15, fn. 31) to domestic jurisdictions, one of which was cited in fn. 31 of the Trial Judgment is selective and inapposite. As is clear in

"any information that has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses",[91] and underscored that the witnesses' false testimony in this case did not relate to "aspects of […] only peripheral relevance to the facts at issue",[92] but to issues of "crucial importance […]."[93]

- The independence between this case and the *Bemba* Main Case also warrants not giving weight to the fact that the false testimony went only to 'non-merits' issues.[94] On 29 September 2015, before the trial began, Trial Chamber VII pragmatically decided to limit the scope of the falsehoods in this case to crucial 'non-merits' issues because, among other reasons, it did not have command over, and access to, the entire pool of the *Bemba* Main Case evidence.[95] Thus, once the Chamber had decided to proceed to trial solely on the basis of falsehoods on 'non-merits' issues, it was reasonable to assess the gravity of that testimony within the parameters that the Chamber had determined.

30. *Finally*, the impact of the Chamber's approach not to consider that the false testimony of the witnesses on 'non-merits' issues decreased the gravity of Bemba's article 70(1)(a) offences, taken together with the Chamber's other considerations,[96] was 'relatively small' and had 'marginal' effect.[97] As the Trial Chamber noted "the Chamber's original assessment

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footnote 31, the Chamber conducted a comparative analysis of *nine* different jurisdictions identifying the different approaches.

[91] Trial Judgment, para. 22.

[92] Sentencing Appeal Judgment, para. 38.

[93] *See* Sentencing Decision, paras. 115, 167, 217; Re-sentencing Decision, para. 35. *See also* Trial Judgment, para. 22.

[94] Re-sentencing Decision, para. 33 ("[T]he Chamber now considers that the independence of the cases warrants not giving weight to the fact that the false testimony went only to 'non-merits' issues").

[95] *See* T-10-Red, 4:24-5:13 ("this Chamber cannot assess the truth or falsity of these statements without command over the evidence in the [M]ain [C]ase, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable. […] [B]roadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of proceedings and the right of the accused to be tried without undue delay"). *See also* Trial Judgment, para. 194 ("As reiterated throughout these proceedings, the Chamber does not render judgment on substantive issues pertaining to the merits of the Main Case. […] The testimonial evidence concerning the merits of the Main Case has only been considered in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before Trial Chamber III. However, the truth or falsity of the testimonies concerning the merits of the Main Case has not been assessed by this Chamber.") *See also* Sentencing Appeal Judgment, para. 39.

[96] *See* Re-sentencing Decision, paras. 41 and 117 (the irrelevance of the modes of liability in this case to determine Bemba's sentence), 65 and 120 (the impact of the Appeals Chamber's decision to quash the article 70(1)(b) offences), 119 (individual circumstances), 120 (time spent in detention).

[97] Re-sentencing Decision, paras. 114, 129.

already gave proper weight on this point in most material respects".[98] Moreover, the Chamber increased Bemba's sentence for article 70(1)(a) offences (from 10 months to 1 year) as a result of *its overall re-assessment* of the factors, which also included Bemba's participation in the article 70(1)(a) offences.[99] In any event, Bemba's joint sentence remained as one year of imprisonment.[100]

31. In sum, Bemba's arguments challenging the Chamber's assessment of the gravity of his article 70(1)(a) offences should be dismissed.

II.A.3. The re-sentencing procedure was clear

32. Bemba challenges the Chamber's procedure and evidentiary regime during the re-sentencing proceedings.[101] However, Bemba misunderstands the limited scope and specific purpose of sentencing (and re-sentencing) proceedings,[102] and fails to show an error. Moreover, even if the Trial Chamber had erred in the procedure it adopted during the re-sentencing proceedings (which it did not), it would have no material impact: the Trial Chamber considered the materials that Bemba submitted.[103] Bemba's arguments should be dismissed for the following reasons:

33. *First*, after the issuance of the Sentencing Appeal Judgment Trial Chamber VII gave clear directions to the Parties as to the evidence and submissions to be presented during the re-sentencing proceedings.[104]

- On 14 March 2018, the Chamber issued a Briefing Schedule regulating the proceedings.[105] The Chamber permitted the Parties to make new submissions on the appropriate sentences in light of the two Appeal Judgments issued in this case on 8

[98] Re-sentencing Decision, para. 114. *Contra* Bemba Re-sentencing Appeal, paras. 15-16.
[99] *See* Re-sentencing Decision, paras. 111-129, in particular, paras. 114, 117, 129. *Contra* Bemba Re-sentencing Appeal, paras. 11, 13.
[100] *Compare* Sentencing Decision, para. 250 with Re-sentencing Decision, para. 123.
[101] Bemba Re-sentencing Appeal, paras. 32-34, 36-37. Bemba's submissions are often opaque. *See in particular*, para. 32 (where Bemba argues that the Chamber did not apply the 'beyond reasonable doubt' standard to enter adverse factual findings but provides no example).
[102] *See below*, paras. 35-36.
[103] *See below*, para. 38.
[104] *Contra* Bemba Re-sentencing Appeal, para. 32 (referring to "the absence of specific directions or certainty concerning the system for admission of evidence during the sentencing phase").
[105] Re-sentencing Briefing Schedule.

March 2018.[106] The Trial Chamber also directed the Registry to file updated reports on the solvency of the three convicted persons.[107] The Chamber highlighted the confined nature of these proceedings by noting that "[m]any aspects of the Sentencing Decision were confirmed on appeal and the affected parties must treat these rulings as final".[108] The Prosecution filed its Re-sentencing Submissions on 30 April 2018,[109] and the three convicted persons filed theirs on 30 May 2018.[110]

- Following Bemba's acquittal in the *Bemba* Main Case on 8 June 2018, the Chamber held an urgent hearing on 12 June to determine whether Bemba's detention remained justified in this case while deliberating the new sentence.[111] After the hearing, the Chamber conditionally released Bemba.[112] The Chamber scheduled a hearing on 4 July for Bemba, and the other Parties to provide further submissions on sentencing.[113] Bemba's email on 19 June 2018 leaves no doubt that he understood the purpose of the hearing.[114]

- On 4 July 2018, the second sentencing hearing was held. The Prosecution, Bemba and the other two convicted persons all made submissions at the hearing. The Chamber allowed the Prosecution's Notice of Additional Re-sentencing Submissions filed on 2 July 2018,[115] and permitted the three convicted persons to respond by 19 July.[116] The Chamber reiterated that no additional submissions would be allowed.[117]

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[106] Re-sentencing Briefing Schedule, para. 4.
[107] Re-sentencing Briefing Schedule, para. 5. *See also* para. 6 (the Chamber considered that, in principle, there was no need for an additional sentencing hearing, but that the parties could argue otherwise).
[108] Re-sentencing Briefing Schedule, para. 3.
[109] Prosecution Re-sentencing Submissions.
[110] Bemba Re-sentencing Submissions, Kilolo Re-sentencing Submissions and Mangenda Re-sentencing Submissions.
[111] Bemba Release Hearing, 2:24-3:22.
[112] *See generally* Bemba Release Decision.
[113] Bemba Release Hearing, 5:14-23. The Chamber rejected the Prosecution's request to reply to the Defence re-sentencing submissions.
[114] *See* Bemba Defence email of 19 June 2018 at 10:48 (quoting the Chamber's ruling issued during the Bemba Release Hearing and noting that "[w]e understood from this ruling that the purpose of the hearing on 4th July was, in part, to afford the Bemba Defence with an opportunity to make further submissions on the sentence to be imposed, in light of the Appeals Judgment issued in the Main Case. We further understood that since the hearing has already been scheduled, it was not necessary for us to file a written application seeking authorisation to introduce submissions on this point at the 4 July hearing. If our understanding is incorrect, we would be grateful if this could be clarified so that we can submit any necessary applications in a timely manner"). Trial Chamber VII responded at 11:26 indicating that Bemba's understanding was correct and that no further application was necessary.
[115] Prosecution Notice Additional Re-sentencing Submissions.

- On 29 August 2018, the Chamber announced that it would deliver its Re-sentencing Decision on 17 September 2018.[118]

- On 10 September 2018, Bemba filed an urgent request with the Chamber to admit, or consider, annexed media material regarding the DRC Constitutional Court Decision that had found Bemba ineligible to hold office in the DRC. Bemba requested the Chamber to issue a declaration that the DRC authorities did not have the competence to unilaterally exercise jurisdiction over conduct for which Bemba had been convicted.[119] On 14 September, the Chamber decided to consider the annexed material for the purposes of the re-sentencing proceedings,[120] but rejected the remainder of Bemba's request. It clarified that it "[would] not intervene in [DRC election] proceedings, nor [would] it tolerate being instrumentalised in an attempt to influence them".[121]

34. Nothing in the above description suggests that the procedure governing the confined re-sentencing proceedings was unclear. Moreover, the Chamber rapidly reacted to the different issues that arose within a very short time frame.[122]

35. *Second*, the procedure adopted by the Chamber for the re-sentencing proceedings was consistent with the Rome Statute.[123] Following its existing practice in the trial and first sentencing proceedings,[124] the Chamber did not make formal rulings to 'admit' material but

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[116] Second Sentencing Hearing, 4:5-10. *See generally* Bemba Re-sentencing Notice Response, Kilolo Re-sentencing Notice Response, Mangenda Re-sentencing Notice Response.
[117] Second Sentencing Hearing, 4:11.
[118] Scheduling Order Re-sentencing Decision.
[119] Bemba DRC Media Material Request, para. 46.
[120] DRC Media Material Decision, paras. 13 (recalling "its previous finding that the Chamber may take into account non-evidentiary submissions for sentencing purposes. This means that it is unnecessary for the Chamber to 'admit' the identified media materials as a prerequisite to considering them in the re-sentencing decision"), 14 (noting that the DRC Constitutional Court Decision cited was rendered on 3 September 2018 thus preventing Bemba from raising the matter sooner).
[121] DRC Media Material Decision, para. 10.
[122] *See above*, para. 33.
[123] *Contra* Bemba Re-sentencing Appeal, para. 33. *See also* para. 34 (reflecting Bemba's arguments of non-conformity with respect to the Rules of Procedure and Evidence).
[124] *See e.g.* Kilolo Evidence Decision, para. 5 (noting that "[a]s has been its practice throughout the trial, the Chamber will not rule on the 'admission' of any submitted documents"); Prosecution Evidence Decision, paras. 9 ("[I]n respect to the objections that the Report lacks probative value, the Single Judge notes that the Chamber will assess the materials submitted for sentencing at a later stage"), 10 (granting the Prosecution's belated request to add an NGO report to the List of Evidence "without [any] prejudice to the actual assessment of the information and arguments that are ultimately presented by the parties"). *See also* First Sentencing Hearing, 4:7-9 (where the Chamber "confirms that all the material which are the subject of the aforementioned filings have been duly submitted to the Chamber and will be considered when deliberating its sentencing determinations").

rather authorised its submission.[125] Additionally, as it did in the first sentencing proceeding,[126] the Chamber considered the limited purpose of the sentencing phase in light of the relevant statutory provisions.[127] The provisions make clear that while a Chamber must consider "only […] evidence submitted and discussed before it at the trial" *to determine the guilt or innocence of the accused person*,[128] a Chamber is required to consider "evidence presented and submissions made during the trial that are relevant to the sentence" *in determining the appropriate sentence of a convicted person*.[129] Accordingly, the Chamber held that, consistent with its broad discretion at sentencing, a "Chamber may take into account non-evidentiary submissions for sentencing purposes".[130] In addition, a Chamber may also consider in determining a sentence facts and circumstances going beyond the Confirmation Decision, provided that the convicted person had a reasonable opportunity to address them.[131]

36. Although part of the trial proceedings, the sentencing phase is a distinct component.[132] Moreover, a sentencing hearing has a confined purpose and scope.[133] Thus, the evidentiary regime at sentencing is not a "more lenient approach",[134] nor a "no-rules based approach";[135]

[125] DRC Media Material Decision, paras. 13, 15.
[126] Sentencing Witnesses Decision, paras. 6-7 ("[t]he Statute therefore foresees that the Chamber may take into account non-evidentiary submissions for sentencing purposes").
[127] DRC Media Material Decision, para. 13 (recalling "its previous finding that the Chamber may take into account non-evidentiary submissions for sentencing purposes").
[128] Article 74(2).
[129] Article 76(1).
[130] *See* DRC Media Material Decision, para. 13 citing Sentencing Witnesses Decision, para. 7 (referring in footnote 17 to "views and concerns of victims" as an example of "non-evidentiary submissions" that could be considered at the sentencing phase). *See also* *Bemba* Evidence Sentencing Decision, para. 34 ("the Chamber, in considering the appropriate sentence pursuant to Article 76(1) of the Statute, shall take into account the relevant evidence presented and submissions made during the trial. The victims' views and concerns are equivalent to submissions. Accordingly, the Chamber will take them into account, as relevant and appropriate, in determining the sentence").
[131] *Lubanga* SJ, para. 29. *See also* Khan in Triffterer *et al.*, 'Article 78', p. 1894, mn. 10 ("Article 78 does not limit the factors that are properly to be considered during sentencing to those described in the document containing the charges"). *See also* rule 145(1)(c) (requiring a Trial Chamber to consider factors that could fall outside the Confirmation Decisions including "the extent of the damage caused, in particular the harm caused to the victims and their families") and rule 145(2) (similarly referring to mitigating factors that necessarily would fall outside the Confirmation Decision). *See also* Sentencing Appeal Judgment, paras. 115, 116, 263, 334 (allowing for the possibility to consider as an aggravating factor the consequences of crimes and uncharged crimes in certain instances and subject to certain limitations).
[132] *See e.g.* Sentencing Appeal Judgment, para. 336 (distinguishing between the Chamber's findings in the conviction decision from those in the sentencing decision). *See also* Arido Additional Evidence AD, para. 10 (rejecting the Prosecution's request to dismiss *in limine* Arido's request to submit as additional evidence material that he had submitted during the sentencing phase in his appeal against the Conviction Decision).
[133] *Bemba* Sentencing Hearing Decision, para. 11 ("The Chamber further stresses the limited purpose and scope of the sentencing hearing […]").
[134] *Contra* Bemba Re-sentencing Appeal, para. 33.
[135] *Contra* Bemba Re-sentencing Appeal, para. 34.

rather, it is an approach tailored to the limited purpose and scope of the sentencing phase,[136] and accords with specific statutory provisions in the Rome Statute.[137] Further, the Chamber's approach is consistent with that of other Chambers. They do not strictly apply the evidentiary rules as they did at trial; *relevance* appears to be the touchstone for considering proffered items.[138] Significantly, the Appeals Chamber in its Sentencing Appeal Judgment has endorsed the identical approach and procedure adopted by the Chamber during its first sentencing proceedings.[139]

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[136] An analogy could be drawn with pre-trial proceedings. Chambers have interpreted rule 122(9) to mean that "the rules concerning evidence in article 69 of the Statute, including the authority of the Chamber to request the submission of further evidence, apply at the pre-trial stage of the proceedings, taking into account the specific purpose and limited scope of the confirmation of the charges." *See* *Bemba* Timetable Disclosure Decision, para. 10. It could be argued that evidentiary rules designed to assess guilt or innocence at the trial stage should not apply in the same way or to the same degree at sentencing.

[137] *See* articles 76, 77, 78 of the Statute and Part 7 of the Rules (rules 145 to 148). *Note* however the particularities of article 70 proceedings as per rule 163 with regards to the application of the Statute and the Rules. There are other procedural differences that exist at sentencing as compared to at trial. As an example, while article 63 mandates that an accused "be present during the trial", article 76(4) "suggests a less strict approach" at sentencing in that the "presence of the accused" at the announcement of sentencing is only required "wherever possible." Klamberg, p. 585, n. 636. Additionally, a comparison of article 69(2) with 76(2) reflects that while the principle of orality prevails at trial, a sentencing hearing is not mandatory. *See also*, Schabas & Ambos in Triffterer *et al.*, 'Article 76', p. 1872, mn. 3 and p. 1874, mn. 6 (comparing the different order of presentation of evidence and submissions at the *Lubanga* and *Katanga* sentencing hearings); Sentencing Calendar, para. 2(i) (where the Chamber noted that "[it] may intervene in the selection and presentation of [the] evidence in order to ensure a fair and expeditious conduct of the trial"); Schabas (2016), p. 1148 (noting that the commentary to the ILC Working Group's 1993 Draft "said that sentencing was 'generally considered to represent a separate process which is distinct from the trial'[and] that the rights of the accused might not be as extensive at the sentencing stage as at trial").

[138] *See* Bemba Evidence Sentencing Decision, paras. 12 (granting a Prosecution's request to present an expert given the relevance of the "anticipated evidence" and "of [potential] assistance" in sentencing considerations), 27 (granting a Defence request to present one character witness, since it appeared relevant to mitigating factors), 44 (noting that some items tendered had already been admitted during trial and that "[p]ursuant to Article 76(1), the Chamber can consider these documents, as relevant and appropriate, in determining the sentence"), 46 (dismissing the Defence request to tender some documents on the grounds that the "Defence has not demonstrated how these documents are relevant to the purposes for which it submits them, let alone to the factors set out in Article 78 […] and Rule 145 […]"), 48 (finding some Defence documents "*prima facie* relevant"). *See* Katanga Evidence Sentencing Decision, paras. 8, 10, and *Lubanga* Evidence Sentencing Decision, paras. 19-20 (where the Chamber granted the Defence request to present two witnesses at the sentencing hearing as it deemed the evidence to be provided as "prima facie relevant" to sentencing matters), 22-23 (where the Chamber granted the Defence request to introduce an electoral card, diploma, and a letter into evidence given their potential relevance to sentencing). In Lubanga, Trial Chamber I permitted the submission of evidence relevant to sentencing during trial for purposes of efficiency. *See* *Lubanga* Judicial Questioning Decision, para. 38.

[139] Sentencing Appeal Judgment, para. 301 (dismissing Babala's arguments that "the Trial Chamber erred procedurally by not issuing decisions on the admissibility of each item of evidence that had been submitted to it for the purposes of sentencing [because the] Appeals Chamber has already addressed this question in the context of appeals against the Conviction Decision in the present case and concluded that such a ruling is not required, for the reasons set out in its judgment on the appeals against the Conviction Decision. The same considerations apply to the sentencing phase of the proceedings"). *Contra* Bemba Re-sentencing Appeal, para. 34 (citing Appeal Judgment, fn. 693 and arguing that "[t]he Chamber also failed to reconcile its 2017 no-rules based approach, which was based on Rule 68-type sentencing evidence, with the Appeals Chamber's subsequent determination that Rule 68 applies, irrespective as to the purpose for which evidence ha[d] been tendered"). However, only nine of the 215 documents submitted during the first sentencing proceedings were statements.

37. *Third*, Bemba's submissions on the Registry's updated financial report are likewise incorrect. The report was not filed out of time. It was an *update* to a previous report (filed within the timeframe given by the Chamber) because the Registry had received more recent financial information from States on Kilolo and Bemba.[140] Moreover, the Chamber's failure to expressly refer to the Custody Officer Report (as to Bemba's respectful behaviour in detention) does not mean that the Chamber did not consider it.[141] Further, it fell within the Chamber's discretion not to rely on the report in mitigation. Good behaviour while in detention is expected of all inmates, and Chambers have generally not considered this factor in mitigation unless exceptional.[142]

38. Finally, not only was the Chamber's procedure in the re-sentencing proceedings reasonable and correct, but even if it had erred (which it did not), Bemba has suffered no prejudice since the Chamber considered, and rightly gave limited weight to, the media material (regarding a DRC Constitutional Court Decision disqualifying him as a presidential candidate) that Bemba submitted.[143] Hence, any error would not have materially impacted Bemba's sentence of one year imprisonment and € 300,000 fine which was exactly the same penalty as he received in the original Sentencing Decision.

39. In sum, Bemba's arguments challenging the Chamber's procedure and evidentiary regime during the re-sentencing proceedings should be dismissed. In addition, since Bemba has failed to show an error in the Chamber's exercise of its discretion in determining his sentence,[144] Bemba's request that the Appeals Chamber assess the evidence *de novo* and enter new findings similarly fails.[145]

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[140] *Contra* Bemba Re-sentencing Appeal, para. 36 (referring to Registry Updated Report).
[141] *Contra* Bemba Re-sentencing Appeal, para. 36 (referring to Custody Officer Report). This report was produced upon request of the Chamber by email on 4 July 2018.
[142] *Bemba* Main Case SD, para. 81; *Katanga* SD, paras. 127-128.
[143] *See* Re-Sentencing Decision, paras. 10, 119 (fn 199) referring to Annex A of DRC Media Material Request: "As to the Bemba Defence arguments that this case has affected his professional life, the Chamber will only give minimal weight to this for purposes of re-sentencing. The fact that Mr Bemba's conviction had a negative impact on his professional life is a natural consequence of the circumstances Mr Bemba found himself as a result of the criminal behaviour that he has been convicted for"). In addition, the Chamber also considered material attached to Bemba's submissions: two e-mails and a compilation of social media material (Re-Sentencing Decision, fn. 18 referring to the three annexes that Bemba attached to his Bemba Re-sentencing Notice Response) and list of filings, chronology of events, and extracts of *Bemba* Main Case Trial Judgment and of Prosecution's cross-examinations (Re-Sentencing Decision, fn. 10 referring to the annexes that Bemba attached to his Bemba Re-sentencing Submissions).
[144] *See above* fn. 9.
[145] Bemba Re-sentencing Appeal, paras. 71-77.

II.B. BEMBA'S ARGUMENTS CHALLENGING HIS CONVICTIONS WHICH HAVE BEEN UPHELD ON APPEAL SHOULD BE DISMISSED *IN LIMINE*

40. By his Re-sentencing Appeal, Bemba effectively seeks full re-consideration of his convictions, even though the Appeals Chamber rendered on 8 March 2018 its comprehensive final decision affirming Trial Chamber VII's Trial Judgment that established his guilt. Bemba's request finds no support in the Rome Statute. Consequently, the Prosecution requests dismissal *in limine* of Bemba's submissions which seek to re-litigate findings which have been affirmed on appeal, and his related request that this Chamber enter findings *de novo*, and quash or re-open his convictions for article 70(1)(a) and (c) offences.[146]

41. Bemba's arguments must be rejected *in limine* for one or more of the following three reasons:

II.B.1. Sentencing appeals cannot be used as a vehicle to appeal Conviction Decisions

42. *First*, Bemba inappropriately uses this Re-sentencing Appeal to appeal, again, the Trial Judgment. The Appeals Chamber has made clear that an appeal against a sentencing decision *cannot* be used to challenge a conviction decision. An appellant must present arguments challenging the propriety of a conviction in an appeal against a conviction decision.[147] This finding is even more apposite when it pertains to an appeal against a new sentence imposed after a remand by the Appeals Chamber to the Trial Chamber following the Appeals Chamber's upholding of the Prosecution's appeal against the sentence and dismissal of the accused's appeal against his convictions. Such an appeal should be limited to the sentencing

[146] Bemba Re-sentencing Appeal, Sections B (paras. 18-23, 31, 35), C and D.

[147] *See* Sentencing Appeal Judgment, paras. 138 (the Appeals Chamber agreed with the Trial Chamber that, in the sentencing phase, a Trial Chamber may legitimately reject renewed arguments against the Conviction Decision. In the view of the Appeals Chamber, "even though a decision on sentence will, to a certain extent, rely on findings made in the conviction decision the appropriate avenue to challenge these findings is in an appeal against the conviction decision […] and not in an appeal against sentence") and 254 ("The proper avenue for challenging a conviction is an appeal against the Trial Chamber's decision under article 74 of the Statute, as provided for by article 81 (1) of the Statute – a right of which Mr Babala has availed himself with his appeal against the Conviction Decision. If an appeal against a conviction decision is successful and leads to a full reversal of the conviction by the Appeals Chamber, the sentence that the Trial Chamber has imposed loses its basis and therefore will be vacated as well, irrespective of whether it has been appealed or not. Nevertheless, it cannot be argued in an appeal against the sentence that the convicted person should not have been convicted in the first place; rather, such arguments must be made in an appeal that is directed against the conviction decision. If it were otherwise, the appeal against the sentence would, in effect, be a second appeal against the conviction decision, thereby leading to unnecessary duplication and circumventing the relevant time and page limits for such appeals").

issues on remand. Bemba cannot at this stage (re)appeal the Trial Judgment as he has already done so,[148] and the Appeals Chamber has ruled on it: on 8 March 2018, the Appeals Chamber largely rejected his arguments challenging his convictions.[149]

43. Moreover, the scope of the re-sentencing proceedings was limited. [150] On 8 March 2018, the Appeals Chamber remanded the case to the Trial Chamber to determine new sentences for Mr Bemba, Mr Kilolo and Mr Mangenda[151] in light of the confined errors it had identified in the Trial Chamber's original Sentencing Decision.[152] In its Re-sentencing Briefing Schedule, the Chamber underscored that the re-sentencing proceedings were not an opportunity to re-litigate final matters definitively resolved by the Appeals Chamber.[153] Bemba's acquittal in the *Bemba* Main Case did not modify this approach. In the hearing convened to decide on Bemba's release in this case following his acquittal in the Main Case, Trial Chamber VII reiterated the finality of Bemba's convictions under article 70(1)(a) and (c).[154] The Chamber convened the second sentencing "to discuss the resentencing" and "to hear any final supplemental arguments from the parties" on the issue.[155] In its Re-sentencing Decision the Chamber recalled the limited scope of its decision,[156] and considered the five errors[157] and any new considerations which could affect the new sentences to be imposed.[158]

[148] Bemba Conviction Appeal.
[149] Appeal Judgment, para. 1631.
[150] *See above*, paras. 12-13.
[151] Sentencing Appeal Judgment, para. 361.
[152] Re-sentencing Decision, para. 15 (referring to Sentencing Appeal Judgment, paras. 45, 62, 80 and 168 and Appeal Judgment, para. 710). *See also* Sentencing Appeal Judgment, paras. 168 (referring to the Chamber's immaterial error in finding that offences lasted two years rather than 13 months), 359 (referring to the Chamber's error as to the gravity of the offences, the convicted persons' culpability and suspended sentences), fn. 847 (referring to the reversal of the article 70(1)(b) convictions). *See above* para. 12.
[153] *See* Re-sentencing Briefing Schedule, para. 3 ("The Single Judge emphasises at the outset of this inquiry that this is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber Judgments. Many aspects of the Sentencing Decision were confirmed on appeal and the affected parties must treat these rulings as final").
[154] Bemba Release Hearing, 3:9-11 ("in the present case, Mr Bemba has been convicted for offences against the administration of justice under Article 70(1)(a) and (c) of the Statute. These convictions have been upheld on appeal. They are final").
[155] Second Sentencing Hearing, 3:15-16, 5:7-8.
[156] Re-sentencing Decision, para. 15 ("It is recalled that re-sentencing 'is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber Judgments'") (internal quotations omitted).
[157] Re-sentencing Decision, para. 15.
[158] Re-sentencing Decision, para. 16. The Chamber also affirmed and relied on previous findings (paras. 15, 18) when determining the new sentences (paras. 17, 75).

44. Bemba did not challenge the Chamber's approach. To the contrary, he conceded that "[t]he case was remanded, but it was a limited remand".[159] He cannot now reverse his position in this appeal.

45. In sum, Bemba's arguments challenging the findings in the Trial Judgment which have been affirmed by the Appeals Chamber in its Appeal Judgment must be dismissed *in limine*.

II.B.2. The *Bemba* Main Case Appeal Judgment did not rule on the 'submission' regime

46. *Second*, Bemba's effective request for revision or reconsideration of the Appeals Judgment in this case pivots on his claim that the *Bemba* Main Case Appeal Judgment contains a "finding" that the 'submission' evidentiary regime is *ultra vires*.[160] However, the *Bemba* Main Case Appeal Judgment contains no such finding. The premise of Bemba's arguments is plainly wrong: in its 80-page Appeal Judgment, the Majority of the *Bemba* Main Case Appeals Chamber did not rule on the 'submission' evidentiary regime.[161] Bemba in fact relies on the *separate opinions* of Judge Eboe-Osuji and Judges Morrison and Van der Wyngaert.[162] Although separate opinions and dissenting opinions may be jurisprudentially valuable, and are formally part of a decision or judgment to which they are appended,[163] they are not part of the operative part of the decision or judgment.[164] In principle, separate opinions and dissenting opinions should not modify or expand the Majority's decision; such a decision

[159] Bemba Re-sentencing Submissions, para. 79.
[160] *See e.g.*, Bemba Re-sentencing Appeal, paras. 35 ("The Trial Chamber was also aware that a majority of the Appeals Chamber had determined that the system employed for the admission of evidence in this case was *ultra vires* and prejudicial to the defendant"), 48 ("The Appeals Chamber has affirmed that Mr Bemba's conviction was produced through an *ultra vires* system for the admission of evidence. As explained cogently by Judges Morrison, Van den Wyngaert and Eboe-Osuji in their respective opinions, Article 69(4) must be interpreted and applied in a manner that is consistent with the duty to provide a reasoned judgment […]"), 58 ("[T]his Chamber cannot simply ignore the legal findings set out in the Main Case Appeals Judgment, particularly as [to] the findings of Judges Morrison, Van den Wyngaert, Eboe-Osuji concerning Articles 69(4) and 74(2)[…]") . *See also*, paras. 59, 65, 70.
[161] *Bemba* Main Case Appeal Judgment.
[162] *See* Appendix I to Judge Eboe-Osuji Concurring Separate Opinion, paras. 293-320 (Judge Eboe-Osuji did not consider his opinion on the 'submission' regime to be part of his Separate Opinion (see para. 30) but rather included it as an Appendix); and Judges Morrison and Van den Wyngaert Separate Opinion, paras. 17-18.
[163] Judge Van den Wyngaert Minority Opinion *Katanga* TJ, fn. 1 ("Article 74(5) provides: 'The Trial Chamber shall issue one decision. Where there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority.' As such, this constitutes the Minority Opinion and forms an integral part of Trial Chamber II's judgment on the charges pursuant to article 74").
[164] *Norman* Subpoena AD, para. 41 (noting that "[i]t must be emphasised [] that the operative portion of a judgement or decision is that of the majority" and stating that "[n]o appeal may arise from a concurring or dissenting opinion").

should be self-contained and its findings clear and sufficiently reasoned.[165] Similarly, an appeal should generally be directed against the Majority's decision.

47. The *Bemba* Main Case Appeals Chamber could not rule on the 'submission' evidentiary regime because the matter did not arise on appeal.[166] Logically so, since Trial Chamber III did not adopt a 'submission' evidentiary regime at trial but instead ruled on the admissibility of evidence tendered by Parties throughout the proceedings.[167]

48. Moreover, not only does Bemba misunderstand the *Bemba* Main Case Appeal Judgement, but he also misrepresents the *obiter* comments made in the Separate Opinions. Judge Eboe-Osuji indeed disagreed with, and openly criticised, the Appeal Judgment in this case (validating Trial Chamber VII's 'submission' regime) in Appendix I of his Separate Opinion.[168] However, Judges Morrison and Van den Wyngaert did not. While they expressed their concerns about applying the 'submission' regime to article 5 cases, they considered that such a regime appeared "unproblematic" when applied to Article 70 proceedings.[169] And understandably so, since Judge Morrison was among the Majority of four judges who rejected

[165] Similarly, the Appeals Chamber has previously disapproved of a Chamber's practice of introducing clarifications in subsequent decisions to alter, or to add to, the substance of a previous decision. *See* *Lubanga* Regulation 55 AD, para. 92.

[166] Judges Morrison and Van den Wyngaert Separate Opinion, para. 17 (noting that the issue of the Chambers' obligation to make admissibility rulings "[..] *although not formally arising from the Conviction Decision*, did come up in this case") (italics added). By noting that this issue "did come up in this case", the Judges probably alluded to the litigation triggered by the *Bemba* LoE Admissibility Decision. The Majority of Trial Chamber III (Judge Ozaki Dissenting Opinion) had found the Prosecution's List of Evidence *prima facie* admitted as evidence for the purpose of the trial. However, in its *Bemba* Admissibility AD, the Appeals Chamber overturned this decision. As a result, Trial Chamber III decided to rule on the admissibility of the materials tendered by the Parties during trial (*see* Bemba Admissibility Order). Judge Eboe-Osuji indicated, and Bemba argues, that the Appeals Chamber in this case misinterpreted the *Bemba* Admissibility AD.

[167] *See* *Bemba* Admissibility Order (where Trial Chamber III set out the procedure for the parties to submit, and for the Chamber to admit evidence after the Appeals Chamber's *Bemba* Admissibility AD); *Bemba* First Admissibility Decision (where Trial Chamber III ruled on the first set of materials submitted by the Parties).

[168] Appendix I to Judge Eboe-Osuji Concurring Separate Opinion. *See in particular* paras. 293-294.

[169] *See* Judges Morrison and Van den Wyngaert Separate Opinion, paras. 17 ("This brings us to a point, which, although not formally arising from the Conviction Decision, did come up in this case. We are referring to the vexed question as to whether or not Trial Chambers are under an obligation to make admissibility ruling in relation to each and every item of evidence that is submitted during the trial. In an interlocutory appeal earlier in this case, the Appeals Chamber decided that Trial Chambers have the option to either rule on admissibility at the moment of submission or to postpone such rulings until the deliberation phase. More recently, the Appeals Chamber in the sister case of *Bemba et al.* went significantly further by holding, by majority, that Trial Chambers do not have to make individual admissibility rulings at all") and 18 ("Whereas this may have been unproblematic in the context of a case relating to offences against the administration of justice. We are of the opinion that it is not appropriate in cases relating to article 5 of the Statute. In this respect we agree with our colleagues Eboe-Osuji and Henderson. […]").

the Defence appeals against the 'submission' evidentiary regime adopted by Trial Chamber VII in this case.[170]

49. On this basis alone, the Appeals Chamber should dismiss *in limine* Bemba's arguments challenging the factual and legal findings made by Trial Chamber VII in its Trial Judgment which have been affirmed by the Appeals Chamber in its Appeal Judgment in this case.

II.B.3. Bemba's convictions are *final.* Bemba cannot seek review or reconsideration of the findings in the Trial Judgment which have been affirmed by the Appeals Chamber in its Appeal Judgment.

50. *Third*, there is no provision in the Statute through which Bemba can seek review or reconsideration of the findings in Trial Chamber VII's Trial Judgment as affirmed by the Appeals Chamber in its Appeal Judgment. Neither article 81(2)(b), nor any other statutory provision, permits what Bemba ultimately seeks: the review and/or reconsideration of a trial judgment affirmed on appeal based solely on the views expressed by one Judge in an Appendix to his Separate Opinion in another case where the issue did not arise.

51. Article 81(2)(b)[171] does not apply to the present proceeding, where a conviction has already been reviewed and confirmed by the Appeals Chamber.[172] The Appeals Chamber heard five appeals against the Trial Judgment[173] and four appeals against the Sentencing Decision.[174] It considered extensive arguments raised by the Parties and thoroughly analysed the Trial Judgment and the Sentencing Decision issued by Trial Chamber VII, even beyond the issues raised,[175] and "render[ed] a decision on conviction in accordance with article 83".[176] Thus, by hearing and determining the appeals against the Trial Judgment issued by Trial

[170] Appeal Judgment, paras. 572-627.
[171] Article 81(2)(b) ("If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83").
[172] *Contra* Bemba Re-sentencing Appeal, paras. 64, 77.
[173] Bemba Conviction Appeal, Kilolo Conviction Appeal, Mangenda Conviction Appeal, Babala Conviction Appeal and Arido Conviction Appeal.
[174] Bemba Sentencing Appeal, Babala Sentencing Appeal, Arido Sentencing Appeal, and Prosecution Sentencing Appeal.
[175] *See e.g.* Appeal Judgment, fn. 697 and para. 307 (the Appeals Chamber found that the Chamber erred in admitting an investigator's report without recourse to rule 68. It found that rule 68 applies when testimonial evidence is presented with a view to proving or disproving any fact in issue before a chamber).
[176] *See* article 81(2)(b).

Chamber VII, the Appeals Chamber has already exercised the powers that article 81(2)(b) would have afforded to it. Although academic commentary differs as to the scope of application of this provision, none allows for Bemba's proposition.[177] In short, article 81(2)(b) cannot be read in the manner Bemba suggests.

52. Interpreting the statutory framework to allow this Appeals Chamber to now re-open final convictions in these appeal proceedings against the new sentence, based on Judge Eboe-Osuji's *obiter* views in the Appendix of his Separate Opinion, would be tantamount to allowing *ultra vires* reconsideration or review of a final conviction. A good faith reading of article 81(2)(b) according to its plain terms, context, and considering the object and purpose of the Statute, simply does not support Bemba's arguments.[178]

53. Article 84 (Revision of conviction or sentence)[179] permits an accused to file a request for revision of a final judgment on conviction or sentence upon *discovery of certain new evidence*, or due to judicial misconduct.[180] Although Bemba initially announced he was going to file such a request,[181] he did not, "after further research and review".[182] In any event, such a request would have been futile as neither article 84, nor any other statutory provision (including article 81(2)(b)), permits review or reconsideration of a final conviction based on a later and only tangentially related development in appeal jurisprudence (and in any event,

[177] Some commentators argue that the Appeals Chamber has the power to review both the conviction and sentence even if the appellant has not appealed both decisions (Roth & Henzelin in Cassesse *et al.*, p. 1546). Others understand that the Appeals Chamber would ask a party to extend its grounds of appeal to cover the matter that it has identified (Ambos, p. 554). Others do not specify whether the Parties must have appealed both decisions to permit the application of this provision (Trigeaud in Fernandez and Pacreau, 'Article 81', pp. 1737-1738 and Staker & Eckelmans in Triffterer *et al.*, 'Article 81', p. 1944, mn. 70-71).
[178] *See* article 31(1) VCLT ("A treaty shall 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 Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of the Vienna Convention also apply to the interpretation of the Statute. *See* Appeal Judgment, para. 675.
[179] *See* article 84(1) Rome Statute ("(a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.").
[180] Staker & Nerlich in Triffterer *et al.*, 'Article 84', pp. 1991-1995.
[181] Bemba Re-sentencing Notice Response, para. 8 ("The Defence therefore notifies the Chamber that it intends to file an Article 84 application in the coming weeks").
[182] Bemba Reply Urgent Request, para. 9 (since he considered that "[a]rticle 81(2)(b) and [a]rticle 24(2) provide legal avenues for the Court to address the ramifications of the Main Case judgment and findings, in a manner, which avoids unnecessary duplication of procedures and delays in a multi-accused case").

non-existent in this case), or based on an *obiter* remark made in a separate opinion.[183] If such were the law, any final conviction would be subject to review whenever an Appeals Chamber Judge issues an individual opinion on relevant or even peripheral issues and regardless of whether the issue even arose in that case.

54. In a similar vein, the ICTY Appeals Chamber rejected the Prosecution request[184] to reconsider an Appeal Judgment acquitting the accused person[185] on the basis of a later Appeal Judgment which overturned the legal basis of the first Appeal Judgment.[186] The Appeals Chamber reasoned that:

> "the Appeals Chamber has repeatedly held that it has no power to reconsider its final judgements as the Statute […] only provides for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgment…[it] has underscored the importance of certainty and finality of legal judgements for both victims and individuals who have been convicted or acquitted by the Tribunal, and that existing appeal and review proceedings under the Statute provide for sufficient guarantees of due process for the parties in a case before the [...] Tribunal".[187]

55. In a different but related context, Judge Shahabuddeen of the ICTY Appeals Chamber similarly underscored the principles of judicial security and predictability when he refused to compose the majority in the Appeal Judgment in *Orić* on a controversial issue of command responsibility, despite having the opportunity to steer the law in the direction of his dissenting view on the same topic in a previous interlocutory appeals decision in *Hadžihasanović*:

> 14. A decision to reverse turns upon more than theoretical correctness; it turns upon *larger principles concerning the maintenance of the jurisprudence, judicial security and predictability*. Included in those principles is, I believe, a practice for a judge to

[183] Moreover, *Tadić* Review AD does not stand for the proposition that "the issuance of a judgment in a connected case is a new fact, that could potentially trigger review proceedings". *Contra* Bemba Re-sentencing Appeal, fn. 149. In *Tadić* Review AD, the Appeals Chamber dismissed the Defence motion for review since the findings of the Contempt Judgment identified by the Defence did not meet all the criteria under rule 119 for judicial review on new facts. *See in particular* para. 41 (where the Appeals Chamber held that "legal developments in the case law cannot be deemed to constitute new facts within the meaning of Rule 119, for the term 'new fact' refers primarily to materials of an evidentiary nature rather than legal findings reached in another case"). *See also* Staker & Nerlich in Triffterer *et al.*, 'Article 84', p. 1992, mn. 16.

[184] Prosecution *Perišić* Reconsideration Motion (where the Prosecution asked that the Appeals Chamber reconsider the reversal of Perišić's aiding and abetting convictions on the basis that a subsequent bench of the Appeals Chamber found in the Šainović AJ that elements of the relevant reasoning "were based on a clearly erroneous legal standard which misconstrued the prevailing law").

[185] *Perišić* AJ, para. 122.

[186] The Appeals Chamber departed from Perišić regarding the requirement of 'specific direction' as an element of aiding and abetting. *See* *Šainović* AJ, paras. 1649-1650.

[187] *Perišić* Reconsideration AD, p. 2 (internal quotations omitted).

> observe restraint in upholding his own dissent. Thus, in *Queensland v. The Commonwealth* Gibbs and Stephen, JJ., declined to form, on the basis of their previous dissents, a majority with a newly composed bench of the High Court of Australia. I do not assert that a dissenting judge can never form part of a subsequent majority upholding his earlier dissent, but I think that the preferred lesson of the cases is that he is expected to do so with economy.
>
> 15. Since I was one of the two dissenting judges in the earlier case (the other has since demitted office in the ICTY), I consider that, in the circumstances of the present case, a reversal should await such time when a more solid majority shares the views of those two judges. Meanwhile, the decision in Hadžihasanovic continues to stand as part of the law of the Tribunal.[188]

56. The same need for finality and certainty militates against Bemba's request for review and reconsideration of his convictions and the findings upon which they were based.

57. Bemba's submissions are not only contrary to the Statute's text, but also contradict this Court's appeals jurisprudence. Although Pre-trial and Trial Chambers have exceptionally permitted reconsideration of a decision if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice,[189] this does not appear possible with respect to final decisions, and much less final convictions due to their inextricable link to the principle of legality and the need for finality. ICC Chambers have recognised, unlike other courts and tribunals, that the Court's functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out by the drafters in great detail, thus leaving little room for the invocation of "inherent powers" in the proceedings before it.[190] Consequently, and as noted by the Appeals Chamber in this case, the Court should resort to "inherent powers" restrictively, when there is a '*lacuna'* in the primary legal texts and for procedural matters.[191] Bemba has not identified a 'gap' in the legal texts, or 'an objective not being given effect', that must be filled by resort to "inherent powers" or other sources of

[188] Judge Shahabuddeen Declaration *Orić* AJ, paras. 14-15 (italics added).
[189] Reconsideration might be granted in exceptional circumstances when a clear error of reasoning has been demonstrated or if it is necessary to reconsider to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment. *See e.g.* Disclosure Reconsideration Decision, para. 8; *Ntaganda* Reconsideration Decision, para. 12; *Ntaganda* Clarification Decision, para. 13; *Ruto* Reconsideration Decision, para. 19. *But see recently Al-Hassan* Reconsideration Decision, para. 25 ("The Chamber […] recalls that the legal framework established by the Statute and the Rules does not provide for motions for reconsideration as a procedural remedy against a decision taken by a Pre-Trial Chamber or Single Judge, and that Pre-Trial Chambers have constantly denied requests for reconsideration as having no statutory support").
[190] *Banda and Jerbo* Stay Decision, para. 78; *see also*, Sentencing Appeal Judgment, para. 75 (citing *Banda and Jerbo* Stay Decision and defining "inherent powers" or "incidental jurisdiction" as "powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ('inherent to') other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments").
[191] Sentencing Appeal Judgment, paras. 2, 75.

law.[192] To the contrary, Bemba's claim lacks merit: the Appeals Chamber has already exhaustively reviewed the correctness of his convictions, and there has been no change in the governing law.

58. Further, the ICTY and ICTR jurisprudence that Bemba relies on is inapposite.[193]

- *First*, unlike this case, the *Erdemović* guilty plea had not been previously reviewed and confirmed by the ICTY Appeals Chamber, since the Defence had only appealed the sentence.[194]

- *Second*, *Kajelijeli* only recognises that the Appeals Chamber in its final appeal judgment may reconsider a previous *interlocutory* decision by the Appeals Chamber.[195]

- *Third*, *Čelebići* and *Kajelijeli* were issued when the ICTY and ICTR tribunals still permitted re-consideration of final decisions on limited extraordinary grounds.[196] But

[192] "'A gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions'. The nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether there are gaps justifying recourse to subsidiary sources of law or invocation of 'inherent powers'." Sentencing Appeal Judgment, para. 76 (partially quoting paragraph 39 of DRC Extraordinary Review AD).
[193] *See* Bemba Re-sentencing Appeal, paras. 64-65.
[194] *See* *Erdemović* AJ, paras. 10-11. In the Disposition portion of the Judgment (p. 17), the Appeals Chamber, after examining the nature of the guilty plea entered by the accused, dismissed the accused's appeal but remitted the case to the Trial Chamber to allow the accused the opportunity to re-plead in full knowledge of the nature of the charges and the consequences of his plea. Bemba speculates as to the role that *Erdemović* had in the drafting of article 81(2)(b). There is no evidence in the *travaux* to support this suggestion.
[195] *See* *Kajelijeli* AJ, para. 203 ("Thus, under the jurisprudence of this Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its 'inherent discretionary power' to do so 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice'"). Further, it is unclear what Bemba means by stating that *Kajelijeli* forms 'the bridge' between *Čelebići* and *Žigić* and that all three cases can be reconciled if the bifurcated proceedings are considered: *see* Bemba Re-sentencing Appeal, para. 65.
[196] *See* *Čelebići* SAJ, para. 49 ("The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice. Whether or not a Chamber does reconsider its decision is itself a discretionary decision. Those decisions were concerned only with interlocutory decisions, but the Appeals Chamber is satisfied that it has such a power also in relation to a judgment which it has given – where it is persuaded:(a)(i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or (ii) that the previous judgment was given *per incuriam*; and (b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice"). The Appeals Chamber rejected the Defence's request to re-consider the Appeals Chamber's previous decision to reject his appeal against his conviction in his appeal against the second sentencing judgment because, contrary to the Defence submission, it held that *Kupreškić* AJ did not lay down a new test regarding the sufficiency of evidence. *See* *Čelebići* SAJ, paras. 54-55.

both tribunals later departed from that jurisprudence (in part because of its frivolous abuse),[197] and since 2006 have not allowed reconsideration of final decisions.[198]

59. Even if reconsideration of final decisions were possible at this Court, Bemba's case would patently fall outside the realm of exceptional circumstances that could justify it.[199]

60. Further, Bemba's reliance on domestic case law is similarly unhelpful.[200]

- *First*, Bemba's summary of the legal holdings in several cases is inaccurate and misleading.[201]

- *Second*, a substantial number of the cases he relies on are factually and procedurally distinct from the present appeal, and thus simply bear no significance.[202]

- *Third*, cases that Bemba cites do not portray a comprehensive or accurate record of domestic laws or practice.[203]

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[197] *Žigić* Reconsideration AD, para. 8 (the Appeals Chamber noted that Žigić merely repeated arguments he presented to the Appeals Chamber alleging errors of fact on the part of the Trial Chamber and labelled his motion as a "frivolous application, which constitutes an abuse of process").
[198] *Žigić* Reconsideration AD, para. 9. *See also* *Perišić* Reconsideration AD, p. 2 and in particular fn 9 (where the Appeals Chamber listed the relevant jurisprudence).
[199] *See* the restrictive criteria set out in *Čelebići* SAJ, para. 49.
[200] Bemba Re-sentencing Appeal, paras. 66-72.
[201] Bemba's summary of the United States Supreme Court decision in *Coleman v. Tennessee*, an 1878 decision issued following the Civil War, is inaccurate since the case had nothing to do with the plea of *autrefois convict* (or *res judicata*) and the Court did not rule on these legal principles; rather, the issue involved whether a Tennessee state court had jurisdiction to convict and sentence a U.S. soldier, who had previously been convicted for the same offence by a U.S. military tribunal. The case involved a conflict between federal and state powers. In *Molaudzi v. S* , the Court held that only in exceptional, limited circumstances may a court revisit a final determination. In *AT Sharma v. AP Sharma*, the Court affirmed that judicial review of prior decisions can be exercised when there is a patent and obvious error of fact or law, but it can not be done on the grounds that the decision was erroneous on the merits.
[202] In *Lloydell Richards v. The Queen*, the issue was whether a plea agreement in a criminal proceeding for manslaughter (which ultimately was discontinued) effectively barred a subsequent prosecution for murder on the same facts; the case did not involve the issue of whether a conviction affirmed on appeal could be re-opened at sentencing. The three French cases before the *Cour de Cassation, Chambre criminelle* did not involve cases where a conviction had been affirmed on appeal and only the sentence remanded. The ECtHR *Van Droogenbroeck v. Belgium* did not involve issues relating to the finality of a conviction, but rather, the definition of 'conviction' for the purposes of article 5(1)(a) of the ECHR regulating exceptions to the right to liberty. Moreover, *Amtim Capital Inc v Appliance Recycling Centres of America* involved the *res judicata* effect of a foreign judgment in a civil case; the court rejected a Defence appeal to dismiss the proceeding on *res judicata* grounds due to the foreign proceeding. In *re Pinochet*, the case related to the arrest and extradition of Augusto Pinochet in which a request to set aside a prior order restoring the arrest warrant was granted given the exceptional circumstances of potential conflicts of interest with one of the presiding judges. In *R v. King*, the Court granted leave to appeal a 13-year conviction given exceptional circumstances and "unusual facts of the case" in which the propriety of evidence that served as the basis for a conviction was called into question. The facts of ECtHR *Zhang v. Ukraine* are inapposite, since the Court found that the person's due process rights had been violated.

61. In any event, article 21(1)(a) requires the Chamber to apply, in the first place, the Rome Statute, the Rules and the Elements. Since there is no *lacuna*, the Chamber need not revert to article 21(a)(c) (general principles of law derived from national laws).

62. Significantly, Bemba acknowledged the finality of his convictions in his Re-sentencing Submissions (which were filed before the *Bemba* Main Case Appeal Judgment).[204] He conceded that "there is also a need for finality and certainty", and criticised the Prosecution for "re-litigat[ing] its case against Mr Bemba".[205] Although in his written and oral submissions in the re-sentencing proceedings post-dating the *Bemba* Main Case Appeal Judgment, he referred cryptically to "appellate findings concerning the system for admission of evidence", and noted in passing the purported impact "that this system might have had on the amount of reasoning concerning the degree of Mr. Bemba's participation in the solicitation of false testimony",[206] he never asked Trial Chamber VII to consider those purported appellate findings in its Re-sentencing Decision.[207] Instead, Bemba announced that he would file an article 84 application.[208] However, less than two months later, in an apparent

[203] Bemba relies on three cases – *Wigman, Taylor and Keen* – in asserting that Canadian law provides an accused deemed "in the system" with the ability to invoke new laws to challenge a conviction and asserts that an appeal of either a conviction or sentence would render an accused "in the system." First, the *Wigman* case stands for the proposition that an appeal of a conviction renders a defendant "in the system" – not an appeal of sentence. Second, the *Taylor* case is a UK case that involved an appeal of a conviction for bigamy. Third, the *Keen* case stands for the proposition that an appeal of sentence would render an accused 'to be outside the system' and thus, unable to invoke new law. Additionally, Bemba relies on *LLoydell Richards v .Queen* to broadly assert that under UK law, a conviction is not final until a sentence is rendered. Other UK case law and treatises, however, reflect that the case law is split and in certain instances, a judgment will be deemed final upon a finding of guilt. *See* Archbold (2019), p. 479, section 4-205 (citing case law disputing the holding in *Richards*, such as *R v. Ali (Ahmed)*, and *R v. Bayode*).

[204] *See e.g.* Bemba Re-Sentencing Submissions, paras. 33 ("[…]the Appeals Chamber affirmed Mr. Bemba's conviction[…]"), 48 ("[t]he Appeals Chamber affirmed Mr. Bemba's convictions on the basis of the case that the Prosecution pleaded at trial and on appeal; it only remitted the case back for resentencing and not a retrial.[…]These matters must therefore be considered to be *res judicata*"), 79 ("Within this framework, there is also a need for finality and certainty.[…]").

[205] Bemba Re-sentencing Submissions, para. 79.

[206] Bemba Re-sentencing Notice Response, para. 7(b). *See also* Second Sentencing Hearing, 44:14-18 ("Now, the Prosecution has complained that the Chamber's finding in this regard might lack elaboration. But perhaps that lack of elaboration stems in turn from the Chamber's approach to the admissibility of evidence in this case and that the findings in that section refer to the evidence or the whole evidence. So that's a symptom of the legal approach and not the validity of the Chamber's findings").

[207] Bemba Re-sentencing Appeal, para. 35 (citing Second Sentencing Hearing, 44:14-18 and incorrectly arguing that "[t]he Defence further drew the attention of the Trial Chamber to the nexus between this flawed system, and the specific errors that had been remitted to the Chamber, for correction"; also arguing that "although the Trial Chamber had an opportunity to correct its approach, […] it declined to do so […]").

[208] Bemba Re-sentencing Notice Response, para. 8.

change in strategy, he decided to challenge his convictions in his re-sentencing appeal through article 81(2)(b).[209]

63. The nature of Bemba's moving strategy in this appeal is of consequence. Appeals Chambers across international tribunals have reiterated that the appeal process is not designed to allow the parties to remedy their own failings and oversights during trial.[210]

II.B.4. In the alternative, if the Appeals Chamber were to decide to revisit Bemba's convictions, the Prosecution requests leave to make further submissions

64. In the event that the Appeals Chamber does not dismiss *in limine* Bemba's arguments in Sections B, C, and D, and decides to re-open or reconsider Bemba's convictions, the Prosecution—like Bemba—requests the opportunity to provide further submissions.[211] In the section below the Prosecution will clarify some of Bemba's inaccuracies of the facts and the law.[212] However, the Prosecution will not repeat the factual and legal arguments advanced in its 362-page Response to the Defence Conviction Appeals[213] and in its 150-page Final Brief.[214]

65. Bemba should not be permitted to disregard the Court's legal framework to again challenge his convictions which have been confirmed on appeal. The Appeals Chamber largely dismissed Bemba's factual arguments since he had read the evidence in isolation and had misunderstood the application of the standard of proof to material facts.[215] Further, the Majority of the Appeals Chamber confirmed the consistency of the 'submission' evidentiary

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[209] Bemba Reply to Urgent Request, para. 9.
[210] *Erdemović* AJ, para. 15. *See also Lubanga* AJ, paras. 57, 75 (noting that an appellant who did not present evidence at trial due to his/her trial strategy should bear the consequences and not assume that the evidence would be admitted on appeal without further restrictions).
[211] As to Section B, the Prosecution only requests dismissal *in limine* of paragraphs 18-23, 31 and 35 where Bemba challenges again the 'submission' evidentiary regime. The Prosecution has addressed the rest of the arguments from Section B in paras. 32-38.
[212] *See below* paras. 67-73.
[213] Prosecution Conviction Appeal Response.
[214] Prosecution Final Brief.
[215] *See e.g.* Appeal Judgment, para. 912 ("Mr Bemba's argument merely expresses disagreement with the Trial Chamber's interpretation of the conversation on 1 November 2013, without demonstrating that, in light of all the other items of evidence, the Trial Chamber's conclusions were unreasonable. The Appeals Chamber recalls that, while individual items of evidence, when seen in isolation, may be reasonably open to different interpretations, including interpretations favourable to the accused, this does not necessarily mean that a trial chamber's interpretation of an item of evidence that is unfavourable to the accused is unreasonable in light of all the relevant evidence"). *See also* paras. 908, 997.

regime with the Rome Statute,[216] and its drafting history,[217] and confirmed that the evidentiary regime was correctly applied in this case.[218] The Majority expressly addressed Bemba's (and Babala's) arguments based on their understanding of the *Bemba* Admissibility Appeal Decision which, as the Majority of the Appeals Chamber observed, had previously validated the 'submission' regime.[219] That Bemba still reads this decision differently does not allow him to *ultra vires* seek reconsideration of his convictions, nor does it justify the extreme nature of his requested relief.[220] The findings contained in the Appeal Judgment in this case are *final*, and must remain so.

66. Moreover, if this Appeals Chamber were to decide to re-visit the previous findings in the Appeal Judgment on the 'submission' evidentiary regime, the Prosecution respectfully notes that this could give rise to an appearance of bias for Judge Eboe-Osuji.[221] Judge Eboe-Osuji, as the Presiding Judge in this case before Trial Chamber VII for over seven months, had endorsed the 'admission' evidentiary regime.[222] He was replaced before the trial began.[223] The

[216] Appeal Judgment, paras. 572-587, 593-599, 607-609. *See also* paras. 603, 611 (where the Appeals Chamber further noted that a Chamber must balance its discretion under article 69(4) with its duty under article 64(2) to ensure that the trial is fair and expeditious and is conducted with full respect of the accused's rights. This may require that, in certain circumstances, it renders separate rulings on the relevance and/or admissibility of individual items of evidence).
[217] Appeal Judgment, paras. 588-592.
[218] Appeal Judgment, paras. 600-601, 610.
[219] Appeal Judgment, para. 594 ("The Appeals Chamber is of the view that Mr Babala and Mr Bemba misrepresent its *Bemba* OA5 OA6 Judgment. In that judgment, the Appeals Chamber, recognising the discretion envisaged in article 69(4) of the Statute, found that while a chamber '*may* rule on the relevance and/or admissibility when evidence is submitted[…] and then determine the weight to be attached to the evidence at the end of the trial', a chamber may also 'defer its *consideration* of [the relevance, probative value and potential prejudice] until the end of the proceedings, *making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person*'. […] Thus, contrary to Mr Babala's and Mr Bemba's suggestion, the Appeals Chamber did not indicate that a trial chamber must render rulings on the relevance or admissibility of each item of evidence. Rather, what a trial chamber must do in any case is to consider the relevance, probative value and potential prejudice of the evidence submitted and the issues raised by the parties in this respect, and may do so as 'part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person'"). *See* *Bemba* Admissibility AD, para. 37.
[220] Bemba Re-sentencing Appeal, para. 52 (criticising the Appeals Chamber for "how it could otherwise disregard the findings in the Bemba OA5 OA6 judgment concerning the need for evidentiary rulings/reasoned determinations in relation to items submitted under Article 69(4)").
[221] *Lubanga* Sentence Review Disqualification Decision, para. 28 (noting that "[p]rior Plenaries of the Court have established that 'it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; the appearance of grounds to doubt his or her impartiality will be sufficient'").
[222] In a status conference held on 24 April 2015, Judge Eboe-Osuji allowed the Prosecution's request to submit *in limine* bar-table motions in advance of the trial, ahead of the evidence being led. The Prosecution had asked the Chamber to determine these issues *in limine* but some Defence preferred a decision later or even at the end of the trial. Judge Eboe-Osuji rejected a Defence suggestion for the Chamber to "defer" its decision on the bar table motion until after witness testimony. *See* T-8-Red, 50:13-17 (where he stated: "Mr Larochelle, the ruling of the --- or, the direction of the Chamber on the matter, of course, dispenses with your suggestion. One sees very limited purpose in receiving submissions and those two Bar table (sic) ahead of the trial and then waiting until the end to make the ruling on it. The purpose may well have been spent in the meantime. So Mr Vanderpuye can make his motion on the matter as he intended").

new Presiding Judge then applied the 'submission' regime throughout the proceedings.[224] Later, in an Appendix to his Separate Opinion in the *Bemba* Main Case Appeal Judgment, Judge Eboe-Osuji was critical of the 'submission' evidentiary regime in this case, and of the Appeals Chamber's reasoning in the Appeals Judgment of this case upholding this regime.[225] The Prosecution fully respects the presumption of impartiality that Judges enjoy at this Court.[226] That notwithstanding, it could be said that a reasonable observer could reasonably apprehend bias on the part of Judge Eboe-Osuji as an Appeals Chamber Judge in the present case based on the views he expressed in his Separate Opinion of the *Bemba* Main Case Appeal Judgment on the 'submission' evidentiary regime applied in this case, in particular, in light of his role as Presiding Judge in this case, where he had adopted the 'admission' evidentiary regime.[227] On this basis, pursuant to article 41(2)(a) of the Statute, a party could request his disqualification (or he could recuse himself). However, because Bemba's arguments regarding the 'submission' evidentiary regime are, in the Prosecution's view, *ultra vires* and cannot be entertained on their merits, after careful consideration, the Prosecution does not consider that any further action is required at this stage.

II.B.5. Bemba misunderstands the record and the Court's jurisprudence

67. Finally, in light of the extent and scope of Bemba's misrepresentations, the Prosecution will address some of Bemba's inaccuracies which, notably, do not relate to the Re-sentencing Decision, but to the Trial Judgment and Appeal Judgment. Bemba also misapprehends the Court's jurisprudence.

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[223] Trial Chamber VII was composed on 30 January 2015. Judge Eboe-Osuji was appointed as the Presiding Judge on 13 February 2015 and he served until 24 August 2015 when he and Judge Carbuccia were replaced by Judge Pangalangan and Judge Perrin de Brichambaut. As Presiding Judge of the Trial Chamber in this case, Judge Eboe-Osuji issued over 50 decisions. *See* Presidency Replacement Decision.

[224] Submission Decision, para. 9.

[225] Appendix I to Judge Eboe-Osuji Concurring Separate Opinion, paras. 293-294 ("I wholly reject the import of the recent judgment of the Appeals Chamber, the effect of which is to say that an ICC Trial Chamber is free to decline to make any ruling at all on the admissibility of evidence even when such evidence has been challenged by the opposing party. It is one thing to accept (as I do) that the Trial Chamber enjoys the discretion of timing as to when to make the ruling. It is altogether a very different proposition—indeed startling—to say that the Chamber may ignore making any ruling at all at any time. […] It is all too clear that the judgment of the Appeals Chamber in question was motivated by the need to make life more convenient for judges who may be strangers to the tradition of evidential rulings on the spot."). *See also* paras. 298, 303, 304, 305, 307, 310.

[226] *Lubanga* Sentence Review Disqualification Decision, para. 29.

[227] *Lubanga* Sentence Review Disqualification Decision, para. 28 ("The relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge. This standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable") (internal quotations omitted). *See also* *Mladić* Disqualification Decision, para. 19 ("The ICTY Appeals Chamber specified that the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality […] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold") (internal quotations omitted).

II.A.5.a. Bemba does not accurately present the Trial Judgment and the Appeal Judgment

68. *First*, Bemba misrepresents the Trial Judgment and the Appeal Judgment, repeats speculative, unsupported and unconvincing theories which were largely considered and discarded on appeal; and puts forward new ones.[228] Bemba's arguments fail to cast any doubt on the integrity of either Judgment, much less the Re-sentencing Decision. For example:

- Bemba's unsupported theory—advanced only *after* he had appealed the Judgment—that CAR witnesses lied to the Court and the Defence for reasons connected to a separate plan involving Kokate.[229] The Appeals Chamber dismissed those arguments because they effectively constituted an additional ground of appeal that had been filed *ultra vires*;[230]

- The attribution of the '11' number which Bemba called through the privilege line.[231] The Appeals Chamber addressed and dismissed these arguments;[232]

- Bemba's unsubstantiated—and shifting—theories as to the motivations behind the co-perpetrators interactions with two of the charged witnesses, D-54[233] and D-15.[234] The Appeals Chamber addressed and dismissed these arguments;[235]

- The use of "codes".[236] Similar arguments were addressed and dismissed.[237] Bemba now argues, for the first time, that 'colour work' relates to Kilolo's purported request

[228] *See* Bemba's re-litigation of factual arguments in Bemba Re-sentencing Appeal, paras. 24-30 (Section B) and paras. 43-47 (Section C).
[229] *Compare* Bemba Re-sentencing Appeal, para. 26 (first item) with Bemba First Request for a Remedy, filed on 13 November 2017.
[230] *See* Appeal Judgment, paras. 66-67, 71-71 (the Appeals Chamber rejected this argument because it effectively entailed a new ground of appeal which Bemba had put forward in his Bemba First Request for a Remedy).
[231] *Compare* Bemba Re-sentencing Appeal, para. 26 (second item) with Bemba Conviction Appeal, para. 279 and Bemba Sentencing Appeal, para. 67.
[232] *See* Appeal Judgment, para. 1048-1049 (dismissing the same argument) and Sentencing Appeal Judgment, para. 150 (dismissing the same argument).
[233] *Compare* Bemba Re-sentencing Appeal para. 26 (third item) with Bemba Conviction Appeal, paras. 215-231. With respect to D-54, Bemba seems now to put forward a new theory with respect DRC military witnesses lying because they believed that they could be prosecuted for meeting the Defence without official authorisation.
[234] *Compare* Bemba Re-sentencing Appeal para. 26 (third item) with Bemba Conviction Appeal, paras. 232-240.
[235] *See* Appeals Judgment, paras. 900-904, 908, 912-913 (on D-54, noting, *inter alia*, in para. 900 the Chamber's 'detailed' reasoning). *See* Appeals Judgment, paras. 925, 927 (D-15).
[236] *Compare* Bemba Re-sentencing Appeal para. 26 (fourth item) with Bemba Conviction Appeal, paras. 269-270 (arguing that it could not be assumed that codes had a unitary meaning and that codes were a mechanism to achieve privacy).
[237] *See* Appeal Judgment, paras. 1034-1035.

to a legal assistant to highlight witness statements.[238] Notwithstanding their creativity, these arguments have only just emerged. The Trial Chamber and the Appeals Chamber could not have addressed them; nor, given the undeniable evidence in the case on the use of "codes", would they have had to;

- Bemba's 'well-intended' suggestion to contact Defence witnesses due to his sincere belief that the Prosecution was tampering with them.[239] These arguments, proffered for the first time on appeal, were also dismissed by the Appeals Chamber;[240]

- The Chamber's reliance on communications which Bemba largely considers "unauthenticated second or third hand hearsay".[241] These arguments were also dismissed by the Appeals Chamber;[242]

- Bemba inaccurately cites to the Trial Judgment on several matters (including the Chamber's assessment of conversations affected by synchronisation issues[243] and Bemba's arguments as to the Defence responsibility in funding witnesses' expenses).[244] Bemba also 'cherry-picks' paragraphs to assert that the Chamber's findings were unfounded.[245] He labels Bemba's case as 'inferential';[246] yet he ignores

[238] Bemba Re-sentencing Appeal para. 26 (fourth item, fn. 58).
[239] *Compare* Bemba Re-sentencing Appeal para. 26 (fifth item) with Bemba Conviction Appeal, paras. 284, 288 and Bemba Sentencing Appeal, para. 51 (ii).
[240] *See* Appeal Judgment, para. 1060 and Sentencing Appeal Judgment, paras. 138 (dismissing the same arguments).
[241] *Compare* Bemba Re-sentencing Appeal, para. 45 at p. 28 (citing Trial Judgment, paras. 730-731 and Appeal Judgment paras. 958-959) and Bemba Conviction Appeal, para. 249; *see also* Bemba Conviction Appeal, paras. 290, 308-309, 311). *Compare* Bemba Re-sentencing Appeal, para. 45 at pp. 28-29 (referring to Appeal Judgment, paras. 980-981) and Bemba Conviction Appeal, para. 290.
[242] Appeal Judgment, paras. 957-959 (dismissing Bemba's isolated reading of the evidence and his characterisation of the evidence as hearsay: the Chamber reasonably relied on the 17 October 2013 communication, jointly with others, and it was not hearsay since Mangenda gave an account of his personal experience). *See also* Appeal Judgment, paras. 980-981.
[243] *Compare* Bemba Re-sentencing Appeal para. 27 (regarding synchronisation flaws and the Chamber's assessment of certain conversations) with Bemba Conviction Appeal, paras. 256-266, 312-315 (in particular para. 256). *See* Appeal Judgment, paras. 996-1008 (dismissing Bemba's arguments because, among other reasons, he did not accurately portray the Chamber's findings which were not based on a single conversation).
[244] *Compare* Bemba Re-sentencing Appeal para. 27 (enumerated item on Defence funding) with Bemba Conviction Appeal, para. 200. *See* Appeal Judgment, para. 625, fn. 1354 (dismissing the same arguments).
[245] Bemba Re-sentencing Appeal, para. 44 (citing Trial Judgment para. 924 which refers to paras. 805, 807 and 817 to erroneously argue that the Chamber's findings on Bemba's *mens rea* on illicit coaching lacks evidential foundation. Yet, a proper reading of the Trial Judgment indicates that para. 924 refers back to other paragraphs of the Trial Judgment where the Chamber made factual findings and reached conclusions: paras. 805-820 where the Chamber made findings as to Bemba's essential contributions to the common plan and his *mens rea* after analysing in detail the relevant evidence regarding each of the 14 witnesses. Bemba also makes unsupported and erroneous assertions about the Appeals Judgment modifying the Trial Judgment). *See also* Bemba Re-sentencing Appeal, para. 45/ pp. 27-28 (referring to Trial Judgment paras. 727, 806, 808, 809-810, 812, which are

that the Trial Chamber relied on both indirect but also *direct* evidence to establish Bemba's essential contributions to the common plan, and his criminal responsibility;[247]

- Bemba also selectively and inaccurately reads the Appeal Judgment.[248] In particular, he incorrectly asserts that the Appeals Chamber modified or overturned some of the Trial Chamber's findings.[249]

69. In sum, Bemba's arguments re-litigating the factual findings contained in the Trial Judgment—and confirmed on appeal—should be dismissed.

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introductory paragraphs or paragraphs summarising the evidence previously assessed), and p. 29 (referring to Trial Judgment, para. 813, which is a conclusory paragraph which refers back to paras. 693-700 and 790-791, where the Chamber assessed the evidence). *See also* para. 46 (citing Trial Judgment, para. 857, which is also a conclusory paragraph).

[246] *See* Bemba Re-sentencing Appeal, para. 25.

[247] *See e.g.* Trial Judgment, paras. 808-816 (findings reflecting Bemba directed and approved the illicit coaching and illicit payments of witnesses and their presentation to the Court, and authorised, ensured and/ or implemented measures to conceal the common plan). *See also* Appeal Judgment, paras. 782-783, 812.

[248] Bemba Re-sentencing Appeal paras. 28 (referring to Appeal Judgment, para. 1406: the Appeals Chamber stated that a party must substantiate its arguments), 29, fn. 70 (referring to Appeal Judgment, para. 888: the Appeals Chamber had already addressed Bemba's misreading of the Trial Chamber's conclusion that the illicit coaching was done for Bemba's benefit; Appeal Judgment, para. 885). *See also* Bemba Re-sentencing Appeal, para. 45 (referring to Appeal Judgment, paras. 951-953: Bemba misreads the Appeal Judgment since the Appeals Chamber did not acknowledge that the 27 August 2013 conversation between Kilolo and Mangenda was unclear; rather, it found that the "Trial Chamber's reasoning is clear and coherent" and reliance on this intercept was not unreasonable; it also noted that the Appeals Chamber relied on other evidence such as conversations between Kilolo and Bemba to reach its conclusions as to Bemba's involvement in illicit coaching); para. 45 at p. 28 (referring to Trial Judgment para. 729 and Appeal Judgment, paras. 902-904: the Appeals Chamber dismissed the Defence argument and found that the Chamber had reasonably relied on the communication challenged in addition to other communications to conclude that Bemba gave instructions regarding the testimony of the illegally coached witnesses); Appeal Judgment, para. 922 (dismissing Bemba's arguments since he misunderstood the purpose for which the Chamber had relied on the evidence). *See also* Bemba Re-sentencing Appeal, para. 45 at p. 29 (citing Appeals Judgment para. 156: the Appeals Chamber confirmed that the Chamber could rely on uncharged witnesses as evidence to establish Bemba's responsibility with respect to the charged witnesses); para. 45 (p. 29 citing Appeal Judgment, para. 1114: the Appeals Chamber confirmed the Trial Chamber's assessment of D-25's testimony; even if the Chamber did not establish that the payments were illegitimate it did find that D-25 falsely testified in denying any Defence payments).

[249] Bemba Re-sentencing Appeal, para. 43 at fn. 96 (referring to Appeal Judgment, para. 155 and Trial Judgment, para. 856: the Appeals Chamber corrected Bemba's misreading of the Trial Judgment; since D-19 was not part of the charges, the Chamber did not find that Bemba had solicited D-19 to testify falsely, although Bemba had urged witness D-19 to cooperate and follow Kilolo's instructions); para. 43 at fn. 97 (referring to Appeal Judgment, para. 1225 and Trial Judgment para. 757: the Appeals Chamber corrected Mangenda's reading of the Trial Judgment, which referred to a letter tendered into evidence); para. 43 at fn. 98 (referring to Appeal Judgment, para. 434 - although erroneously, since he likely meant para. 1434 - and Trial Judgment, para. 683: the Appeals Chamber addressed Babala's argument and noted that the Trial Chamber "analysed specific passages in which codes were used"); para. 43 at fn. 99 (referring to Appeal Judgment para. 1209; Bemba's submission is unclear, since Trial Chamber VII prohibited witness preparation); para. 43 at fn. 100 (referring to Appeal Judgment, paras. 978 and 1078, where the Appeals Chamber also dismissed Bemba's arguments because he misconstrued the basis on which the Chamber had determined his responsibility). *See also* Bemba Re-sentencing Appeal, paras. 44, 45 and 47 (making similar allegations without any support).

II.A.5. b. Bemba criticises Trial Chamber VII's and the Appeals Chamber's findings based on his inaccurate reading of the Court's jurisprudence

70. *Second*, Bemba surprisingly disagrees with the Trial Chamber's—and the Appeals Chamber's—holistic evaluation of the evidence.[250] He further argues that the Trial Chamber, in its Judgment, did not indicate the relevant items of evidence, their weight and the reasons why it disregarded contrary exculpatory evidence with respect to each of the individual offences.[251] Bemba's arguments are factually and legally incorrect and misapprehend the level of detail of the Chamber's evidentiary assessment, and the extent of reasoning in the Trial Judgment.

71. The Trial Chamber thoroughly assessed the evidence submitted, analysed several procedural issues, and entered reasoned factual and legal findings in accordance with article 74(5).[252] In doing so, the Chamber analysed witness testimony and other evidence "to an extent which provides a full and reasoned statement of its findings on the evidence and conclusions […]."[253] Contrary to Bemba's submissions, the Trial Chamber relied on relevant evidence (*i.e.* evidence that pertained "to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused"); and assessed its probative value, taking into account its reliability and, where applicable, the potential prejudice of the evidence.[254] In its Trial Judgment, the Trial Chamber discussed the evidence upon which it relied to convict the Accused.[255] The Chamber did not discuss "*every* incriminating piece of evidence submitted by the Prosecution […]";[256] nor did it refer to specific evidence "when there [was] significant contrary evidence on the record."[257] The Chamber was not obliged to do so. The 458-page Trial Judgment is adequately reasoned and complies with article 74(5). Bemba's arguments misunderstand the applicable law. Notably:

- A Trial Chamber "*is obliged* to carry out a 'holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue'".[258] The Appeals Chamber

[250] *See* Bemba Re-sentencing Appeal, paras. 20, 56, 74.
[251] Bemba Re-sentencing Appeal, para. 41. *See also* more generally paras. 18-19, 21-23.
[252] Trial Judgment, paras. 185-893.
[253] Trial Judgment, para. 195.
[254] Trial Judgment, para. 195.
[255] Trial Judgment, para. 196. *See* paras. 202-893.
[256] Trial Judgment, para. 196.
[257] Trial Judgment, para. 196 (partially quoting *Bemba* Main Case TJ, para. 227 ("in performing its 'holistic evaluation and weighing of *all the evidence*', [the Chamber] is under no obligation 'to refer to the testimony of every witness or every piece of evidence on the trial record'.") (internal quotations omitted)).
[258] Appeal Judgment, para. 1540 (italics added) (quoting *Lubanga* AJ, para. 22).

correctly dismissed many of Bemba's arguments on the basis that he approached items of evidence in isolation.[259]

- The Trial Chamber correctly applied the standard of proof for factual findings based on inferences drawn from circumstantial evidence.[260] Bemba made the same arguments in his Conviction Appeal. The Appeals Chamber dismissed them, and confirmed that the Chamber's findings were *the only reasonable conclusion* that could be drawn from the evidence.[261] Bemba disregards that a Trial Chamber must make findings to the standard of proof beyond reasonable doubt only in relation to 'material facts', namely, those facts that correspond to "the elements of the crime and mode of liability of the accused as charged".[262] Conversely, non-material facts or individual pieces of evidence need not be established beyond reasonable doubt, even if the Trial Chamber relies upon multiple inferences to establish a material fact.[263]

- A co-perpetrator need *not* "make an intentional contribution to each of the specific crimes […] that were committed on the basis of the common plan [.]"[264] Provided that the crimes "occur within the framework of a criminal common plan, to which the co-perpetrator made an essential contribution with intent and knowledge", it is not required for the co-perpetrator "to make an essential contribution to each criminal incident."[265] Bemba already raised this argument in his Conviction Appeal, and the

[259] Appeal Judgment, para. 912 (noting that "while individual items of evidence, when seen in isolation, may be reasonably open to different interpretations, including interpretations favourable to the accused, this does not necessarily mean that a trial chamber's interpretation of an item of evidence that is unfavourable to the accused is unreasonable in light of all the relevant evidence."). *See also* para. 923.
[260] *Contra* Bemba Re-sentencing Appeal, paras. 30 (arguing that the Trial Chamber had failed to apply the proper standard in a circumstantial case), 46 (obscurely referring to "the correct standard for corroboration of circumstancial evidence" but not explaining which standard this is). *See also* para. 25 (obscurely arguing that the Chamber had to consider evidence/arguments that although the co-perpetrators had the required *mens rea*, Bemba did not).
[261] Appeal Judgment, para. 868 (also stating that "[i]t is indeed well established that it is not sufficient that a conclusion reached by a trial chamber is merely *a* reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the *only* reasonable conclusion available. If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he or she must be acquitted"). *See also* *Bemba* Main Case AJ, para. 43.
[262] Appeal Judgment, para. 96 (citing to *Lubanga* AJ, para. 22); *see also* Trial Judgment, para. 186.
[263] *See* Appeal Judgment, para. 868. *See also* paras. 1095, 1166.
[264] Appeal Judgment, para. 821. *See also* para. 812.
[265] Appeal Judgment, para. 812.

Appeals Chamber dismissed it. Now he seeks an improper second attempt to challenge it.[266]

- A Trial Chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision. The Appeals Chamber in both the Main Case and this case have confirmed as much.[267] Moreover, a Chamber has a degree of discretion as to what to address and what not to address in its reasoning. Bemba fails to identify any shortcoming in the Chamber's reasoning, nor does he point to a relevant piece of evidence which the Chamber improperly omitted.[268] In any event, not every actual or perceived shortcoming in the reasoning in the final decision constitutes a breach of article 74(5). Rather, this is a case-specific inquiry dependent on an assessment of the evidence. The Appeals Chamber in both this case and the *Bemba* Main Case has reiterated this well-established jurisprudence.[269]

[266] See *e.g.* Bemba Re-sentencing Appeal, paras. 24 (incorrectly arguing that Bemba's conviction rested entirely on a derivative form of responsibility in the sense that because of the 'common plan' (which was never established by direct evidence), the Chamber attributed Kilolo's and Mangenda's actions to Bemba's), 46 (arguing that Bemba's contribution only involved the illicit coaching of one witness). *See also* paras. 29, 30.

[267] *See Bemba* Main Case AJ, para. 53 and Appeal Judgment, para. 105 (further adding that "it is to be presumed that the Trial Chamber evaluated all the evidence before it, 'as long as there is no indication that [it] completely disregarded any particular piece of evidence'. This presumption may be rebutted 'when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning'") (internal quotations omitted). *But see* Appendix I to Judge Eboe-Osuji Concurring Separate Opinion, para. 35(a) (referring to this text as "[s]ome of those troubling choices of analytical formulae and approaches advocated and sometimes followed in the Minority Opinion, ostensibly based on earlier pronouncements of the Appeal Chamber, […]"). *See also* Appeal Judgment, para. 870 (noting that although "a trial chamber is not required to articulate every step of its reasoning", it "should always indicate the basis for its inference" and "has to explain in more detail how it reached the factual conclusion in question" when the "inference is made to reach an essential finding, for example, in relation to the elements of charged crimes / offences and modes of liability").

[268] *See* Bemba Re-sentencing Appeal, paras. 19, 22; Bemba Conviction Appeal, paras. 199-201. *See similarly* Appeal Judgment, para. 625 (finding that "Mr Bemba exclusively refers to some arguments that he had made at trial without identifying the evidence that, in his view, was overlooked, the findings that he alleges to be unreasonable because of allegedly disregarded evidence or how any error in this respect would materially affect his conviction. Thus, the Appeals Chamber sees no merit in Mr Bemba's submissions concerning an alleged violation of his right to present evidence under article 67 (1) (e) of the Statute").

[269] *Bemba* Main Case AJ, para. 54 (further adding that "lest it becomes impossible to determine - based on the reasoning provided and the evidence in question – how the trial chamber reached the conclusion it did"); Appeal Judgment, para. 106 (further adding that "[i]t is important to underline that whether the Trial Chamber's reasoning was *convincing* or whether a reasonable Trial Chamber could have reached the factual finding in question is *not* relevant to the determination of whether there was a breach of article 74(5) of the Statute"). In the same paragraphs, both judgments also noted that "If particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed".

72. Bemba ignores this consistent appeals jurisprudence. In fact, it was the Appeals Chamber *in this case* which underscored the significance of a Chamber's reasoning in reaching factual findings.[270] The *Bemba* Main Case Appeal Judgment reproduced those paragraphs.[271] Bemba only cites the latter but ignores the former,[272] thus incongruously relying on the same jurisprudence that he seeks to overturn. His selective quoting and mischaracterisation is regrettable, although not new. The Appeals Chamber was alive to this consistent practice and properly rejected many of Bemba's arguments because he misrepresented the Trial Judgment or the facts,[273] read the evidence in isolation,[274] misunderstood the purpose for which the evidence was considered,[275] or simply disagreed with and put forward an alternative interpretation of the evidence while failing to show an error.[276]

73. Bemba should not be permitted to repeat these shortcomings again. His arguments must be dismissed.

74. For all the reasons above, Ground 1 of Bemba's appeal should be dismissed.

[270] Appeal Judgment, paras. 97 (quoting *Samphan & Chea* AJ, para. 90), 98. *See also* paras. 102-108 (on the reasoning required by article 74(5)).
[271] *Bemba* Main Case AJ, paras. 43 (also quoting *Samphan & Chea* AJ, para. 90), 44 (reproducing Appeal Judgment, para. 98 without sourcing it). *See also* paras. 49-56 (largely reproducing Appeal Judgment, paras. 102-108).
[272] Bemba Re-sentencing Appeal, paras. 39-40 quoting *Bemba* Main Case AJ, paras. 43 and 55.
[273] Appeal Judgment, para. 779 (regarding remedial measures not being an *ex post facto* contribution to the common plan); paras. 799-800 (noting that the Trial Chamber did not base its findings on Bemba's purported 'bad character'); paras. 963, 966 (on Bemba's expressed satisfaction with witnesses' testimony and thanking them);
[274] *See e.g.* Appeal Judgment, paras. 908, 997 (on Bemba's knowledge of witnesses payments).
[275] *See e.g.* Appeal Judgment, para. 922.
[276] *See e.g.* Appeal Judgment, para. 997.

III. RESPONSE TO GROUND 2: THE PROCEEDINGS AGAINST BEMBA WERE AT ALL TIMES FAIR AND HIS RIGHTS WERE RESPECTED.

75. The Court fully respected Jean-Pierre Bemba Gombo's rights at all times. Bemba shows neither that his rights were violated, nor error on appeal. Bemba also fails to show—in the absence of a violation—why he deserves any remedy at all, let alone one to terminate proceedings against him.[277] Moreover, in the course of Ground 2, Bemba also rehearses several issues already settled on appeal. They should be dismissed *in limine.*

76. *First*, contrary to Bemba's arguments, his detention was lawful, reasonable and proportionate at all times.[278] Trial Chamber III (and the Appeals Chamber) properly and regularly reviewed Bemba's detention in the Main Case. Likewise, for the duration of his detention in the Article 70 case, Bemba was always detained lawfully. By seeking to distinguish the "formal lawfulness" of his detention from its "substantive lawfulness", Bemba relies on a distinction that does not exist under the Court's legal framework.[279] Moreover, at all times Bemba had access to an effective mechanism to review his detention (articles 60(2) and (3)): yet, he chose not to exercise his rights under this mechanism—preferring instead to withdraw his request for release from detention.[280] Trial Chamber VII ensured, nonetheless, that Bemba was always detained under a lawful warrant in the Article 70 case, and that he was released soon after he was acquitted in the Main Case.[281] In these circumstances, Bemba's request for an unspecified "independent judicial mechanism" to exercise "[his] right of *habeas corpus*" is incorrect, strained and unnecessary.[282]

77. *Second*, the re-sentencing proceedings were fair.[283] Following his acquittal in the Main Case, Bemba's rights were protected in that case. Moreover, Bemba fails to show why his

[277] Bemba Re-sentencing Appeal, paras. 78-154. *See* *Lubanga* AJ, paras. 153, 155 and Dissent to *Bemba* Main Case AJ, paras. 386-388 (requiring the appellant to identify errors).
[278] Bemba Re-sentencing Appeal, paras. 81-110.
[279] Bemba Re-sentencing Appeal, para. 82 ("The Trial Chamber also committed a reversible error of law by conflating the formal lawfulness of a defendant's detention with substantive lawfulness, and as a result, failed to consider relevant factors […]").
[280] Bemba Withdrawal Release Request.
[281] 12 June 2018 Release Decision, para. 24.
[282] Bemba Re-sentencing Appeal, para. 89.
[283] *Contra* Bemba Re-sentencing Appeal, paras. 80, 111-138.

acquittal should be relevant in the manner that he suggests to the re-sentencing in this case (conduct for which he has been found guilty, with convictions confirmed on appeal).[284]

78. *Third*, in claiming that the Trial Chamber imposed a disproportionate sentence, Bemba merely re-litigates settled findings confirming his participation in the offences and his established culpability.[285]

79. *Finally*, Bemba's rights were not violated. No remedy—let alone one as drastic as a permanent stay of proceedings—is warranted.[286]

III.A. BEMBA'S RIGHTS WERE RESPECTED WHILE HE WAS DETAINED

80. Three months before the Article 70 trial began, Bemba, despite having every opportunity to request a review of his detention in the case, withdrew his request for his release in the Article 70 case.[287] He requested Trial Chamber VII "to suspend any consideration of [his] detention, *pending a change in [his] detention status in Case No. ICC-01/05-01/08 [the Main Case]"*.[288] The Trial Chamber granted Bemba's request and did not assess his detention at that time.[289] Accordingly, as Bemba sought, "the legal *status quo* revert[ed] to the situation prior to December 2014 […] and he remained [lawfully] detained [under the Article 70 warrant]".[290] Bemba requested no further release in the course of the Article 70 proceedings. Bemba's detention status in the Main Case changed on 8 June 2018 (when his convictions for crimes against humanity and war crimes were overturned and he was acquitted).[291] Following an urgent hearing convened on 12 June 2018, Trial Chamber VII found that Bemba's

[284] Bemba Re-sentencing Appeal, paras. 121-133.
[285] Bemba Re-sentencing Appeal, paras. 134-138.
[286] Bemba Re-sentencing Appeal, paras. 139-154.
[287] *See generally* Bemba Withdrawal Release Request.
[288] Bemba Withdrawal Release Request, paras. 2, 18 (italics added).
[289] 17 August 2015 Interim Release Decision, para. 30 ("[W]ithout prejudice to any future ruling as to whether and when a Chamber should assess an accused's detention in the absence of a release request, the Chamber will not conduct any further assessment of Mr Bemba's detention at this time given that he has affirmatively withdrawn the request which led to the decision reversed and remanded by the Appeals Chamber.")
[290] Bemba Withdrawal Release Request, para. 14 ("If Mr Bemba now withdraws his request, the legal *status quo* reverts to the situation prior to December 2014. Mr Bemba will remain detained pursuant to the decision on the arrest warrant. Should he file an application for release in the future, it would be determined in accordance with [a]rticle 60(2) of the Statute."); para. 9 ("[I]n the absence of a specific request for release from Mr Bemba, the Trial Chamber is not required to issue a decision on detention as concerns Mr Bemba.")
[291] *Bemba* Main Case AJ, paras. 199-200 ("The Appeals Chamber notes that in the case of an acquittal, the acquitted person is to be released from detention immediately. […] Thus, while the Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on the basis of the present case, it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted.")

detention for the purposes of the Article 70 proceedings was no longer necessary and granted his release.[292] Bemba was released that same day. Indeed, Bemba was released following a change in his detention status in the Main Case—exactly in line with his own earlier request to Trial Chamber VII.

81. Bemba's appeal against his detention stands in marked contrast to his stated position at trial,[293] and even at the release hearing held on 12 June 2018 where he acknowledged his strategy and choice to withdraw his request for release at trial.[294] Having taken this considered position at trial, Bemba—in a *volte-face* in this second sentencing appeal in the case—cannot claim prejudice. Notwithstanding Bemba's strategy to avoid any review of his detention, four different Chambers of this Court (Trial Chamber VII, Trial Chamber III, *Bemba* Main Case Appeals Chamber, Article 70 Appeals Chamber) carefully and correctly decided Bemba's detention, consistent with his rights. Bemba fails to show error.

82. Of note, Bemba's appeal on his detention is somewhat of a moving target. He challenges his "detention" at the Court in broad terms and remains inconsistent as to exactly which aspects of his detention are relevant to his complaint and why.[295] That said, no aspect of his detention—whether in the Main Case or the Article 70 case or both—shows error.

III.A.1 Bemba selectively portrays the procedural history

83. Bemba's appeal cherry-picks the case-record.[296]

84. *First*, although Bemba's choice *not* to review his detention in pre-trial and trial was a critical part of his defence strategy, his partisan chronology—and indeed his appeal—makes no mention of it.[297]

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[292] 12 June 2018 Release Decision, paras. 18-24.
[293] Bemba Re-sentencing Appeal, paras. 78-110.
[294] Bemba Release Hearing, 6:24-7:3 ("I would firstly like to address the burden of proof that concerns this application. *Now, since Mr Bemba withdrew his previous application, this is legally speaking the first determination that will be made by this Chamber under Article 60(2).* The corollary of that is that the burden falls on the Prosecution, not the Defence, to justify that the criteria under Article 58 are met at this point in time. […]"). Italics added. *See also* Separate Opinion Sentencing Decision, para. 17 (noting that Bemba's withdrawal of his release request could only be reasonably construed as an attempt to accrue more sentencing credits.)
[295] *See e.g.*, Bemba Re-sentencing Appeal, paras. 78, 79, 82-86, 88-98, 106.
[296] *See e.g.*, Bemba Re-sentencing Appeal, para. 79.
[297] *See* Bemba Re-sentencing Appeal, paras. 78-110 (and para. 79, in particular).

85. In fact, so central is Bemba's choice *not* to request review of his detention in this case to the resolution of his appeal that the ground may even be seen to give rise to a potential appearance of bias affecting Judge Eboe-Osuji's participation in this appeal. As Presiding Judge of the Article 70 trial for seven months in the pre-trial phase, Judge Eboe-Osuji heard Bemba's request to withdraw his release request and granted it.[298] The Prosecution considers that, on its own, Judge Eboe-Osuji's participation in a single decision at trial on detention matters would not warrant excusal or disqualification and thus has not made such a request. The Prosecution fully respects the presumption of impartiality that judges at this Court enjoy. The Prosecution is also aware that a judge's very limited involvement at trial would not *per se* disqualify him or her from hearing an appeal in the same case.[299] However, Bemba's appeal now appears to criticise Trial Chamber VII's overall handling of his detention—of which Judge Eboe-Osuji's 17 August 2015 decision was a significant part. In analogous situations relating to detention matters—when such issues have been "grounded in factual circumstances similar to those raised in the Appeal"—a judge's excusal has been considered appropriate.[300] Accordingly, considering the significance that this matter has now assumed on the appeal (given Bemba's arguments, which only became apparent after fully analysing Bemba's re-sentencing appeal) and Bemba's shifting strategy throughout the case, the Prosecution considers itself ethically bound to draw attention to the matter and does so at the earliest possible opportunity, so that the parties and the Appeals Chamber are aware of this procedural history.

86. *Second*, Bemba incorrectly suggests that, despite the Article 70 Appeals Chamber's May 2015 decision vacating the Pre-Trial Chamber's January 2015 assessment of his detention, some aspects of the latter's findings relating to the "[un]reasonableness" of the detention still remained in effect.[301] Rather, the Appeals Chamber found that the Pre-Trial Chamber had

[298] *See* 17 August 2015 Interim Release Decision, para. 30.
[299] *See e.g.*, *Lubanga* Excusal Decision, pp. 6-7 (where Judge Ušacka was permitted to participate in *Lubanga* appellate proceedings since she had previously only issued *one* decision of a limited nature).
[300] *Gbagbo* Excusal Decision, p. 4 ("[…] Mr Gbagbo's detention is the very subject of the Appeal from which they request excusal. Accordingly, there is a high degree of congruence with respect to the legal issues as [the judges had] previously deliberated on and issued decisions touching upon the subject matter of the appeal."), p. 5.
[301] Bemba Re-sentencing Appeal, para. 79(c) (incorrectly stating that "[the] Appeals Chamber did not, however, reverse the determination concerning the reasonableness of the length of detention") and Bemba Release Hearing, 9:24-10:6 (making the same incorrect proposition); 23 January 2015 Bemba Release Decision, p. 4 (finding that it was "necessary and appropriate" to grant Bemba's release in case 01/05-01/13).

committed three distinct errors that affected its decision.[302] It reversed the entire decision, tasking Trial Chamber VII—then seised with the case—with a new review.[303] Since the Appeals Chamber found those same three errors in its counterpart decision rendered that same day on the detention/release of Bemba's co-accused (Kilolo, Mangenda, Babala, Arido) and considered that they *could* be re-arrested on that basis, there is no doubt that the Appeals Chamber's reversal vitiated the entire assessment granting release at first instance.[304] Although the Appeals Chamber did not ultimately order their re-arrest "in the interests of justice",[305] this did not alter the decision's import. Suggesting otherwise (*i.e.*, that aspects of a first instance decision remain despite appellate reversal) also contravenes appellate understanding and practice.[306]

87. *Third*, Bemba incorrectly implies that Trial Chamber VII—in its article 78(2) analysis on time spent in detention—somehow recognised a "risk" associated with Bemba's purportedly lengthy detention.[307] The Chamber did not acknowledge any "risk" regarding *the reasonableness of Bemba's time in detention.*[308] Rather, as a plain reading of the Sentencing Decision shows, the "risk" that the Chamber mentioned related to the *credit* for time spent previously in detention, which if given twice for overlapping time in detention in both cases, could exceed the maximum penalty. Indeed, this is why both the Trial Chamber and the Appeals Chamber granted Bemba credit for overlapping time in detention once, and not

[302] 29 May 2015 Bemba Interim Release AD, para. 21 (noting that the Pre-Trial Chamber had (i) incorrectly interpreted article 60(4) of the Statute; (ii) failed to properly balance the duration of detention against the risks set out in article 58(1)(b) of the Statute; and (iii) failed to conduct a proper assessment of the risks set out in article 58(1)(b) of the Statute).
[303] 29 May 2015 Bemba Interim Release AD, p. 3, para. 29 (reversing the impugned decision and remanding the matter to the Trial Chamber seised).
[304] 29 May 2015 Kilolo *et al.* Interim Release AD, paras. 39, 56-57; *see also* 17 August 2015 Interim Release Decision, para. 30 (noting that the Trial Chamber was required to conduct a new article 60(2) inquiry) and Bemba Withdrawal Release Request, para. 14.
[305] 29 May 2015 Kilolo *et al.* Interim Release AD, para. 57 ("[The] Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision. Accordingly, *despite reversing the Impugned Decision*, the Appeals Chamber decides, in view of the exceptional circumstances, to maintain the relief ordered therein, *i.e.*, the release of the suspects, pending the Trial Chamber's determination on this matter.") Italics added.
[306] *See, by analogy*, article 83(2), Statute.
[307] Bemba Re-sentencing Appeal, paras. 79(e) and (f) (alleging "[…] the risk that Mr Bemba's Article 70 detention could, as a result of the overlapping system, exceed reasonable limits"), relying on the Sentencing Decision, paras. 254-255 ("[T]here is also the consideration that accused persons in a similar situation like Mr Bemba should not accumulate credit for time spent previously in detention that—theoretically—may even *exceed* the maximum penalty available under Article 70(3) of the Statute." italics in original.)
[308] *Compare* Sentencing Decision, paras. 254-255 *with* Bemba Re-sentencing Appeal, para. 79(f).

twice.[309] Bemba conflates the discrete questions of the length of detention *and* credit for time spent in detention (in terms of article 78(2)).

III.A.2 Bemba fails to show that the Trial Chamber erred procedurally

88. Trial Chamber VII properly determined the issue of Bemba's detention. In arguing that the Trial Chamber erred procedurally, Bemba misreads the plain text of various decisions and merely speculates.[310]

89. *First*, by claiming that Trial Chamber VII erred procedurally by purportedly "evading its duty to make an independent determination as to the lawfulness of [his detention]", and relying instead on a "preliminary observation" reflecting the *Bemba* Main Case Appeals Chamber's finding deferring the matter to Trial Chamber VII,[311] Bemba misunderstands the 12 June 2018 Release Decision.[312] As the record shows, Trial Chamber VII—following the 12 June 2018 status conference—independently determined whether, despite being acquitted in the Main Case, Bemba's continued detention remained necessary for the purposes of the Article 70 case.[313] Bemba limits his analysis to the Chamber's preliminary comment (made before it analysed the issue of Bemba's detention *in this case*)—acknowledging the Main Case Appeals Chamber's remark that despite his acquittal in the Main Case, Bemba remained convicted in the Article 70 case.[314] This preliminary comment merely noted that *at that moment* following his acquittal in the Main Case, Bemba was not automatically released "as a result of the Main Case AJ".[315] Put simply, the Main Case acquittal did not automatically

[309] Sentencing Decision, paras. 254-260; Sentencing Appeal Judgment, paras. 223-231.
[310] Bemba Re-sentencing Appeal, paras. 81, 83-85.
[311] Bemba Re-sentencing Appeal, paras. 83-84.
[312] *Contra* Bemba Re-sentencing Appeal, paras. 81, 83.
[313] 12 June 2018 Release Decision, paras. 18-24. *Contra* Bemba Re-sentencing Appeal, para. 84 ("The Trial Chamber's attempt to ground the lawfulness of Mr Bemba's detention on the Appeals Chamber's direction to convene a detention hearing in the Article 70 case, post-haste, is entirely puzzling. […] It is, therefore, paradoxical for the Trial Chamber to use this direction for the purpose of evading its duty to make an independent determination as to the lawfulness of this detention.")
[314] 12 June 2018 Release Decision, para. 6 ("As a preliminary point of law, Mr Bemba is lawfully detained in this case as of this moment. The Appeals Chamber's direction quoted above suggests as much—Mr Bemba is not released automatically as a result of the Main Case AJ, but it rather falls to this Chamber to decide on his continued detention. […]"); *Bemba* Main Case AJ, para. 199 ("The Appeals Chamber notes that in the case of an acquittal, the acquitted person is to be released from detention immediately. However, the Appeals Chamber is cognisant of the fact that Mr Bemba was convicted of offences against the administration of justice under article 70(1)(a) and (c) of the Statute by this Court in another case. […] Thus, while the Appeals Chamber finds that there is no reason to continue Mr Bemba's detention on the basis of the present case, it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted.")
[315] 12 June 2018 Release Decision, para. 6.

mean that Bemba should be released in relation to the Article 70 case as well. But this comment did not supersede the Trial Chamber's subsequent separate determination that the article 58 criteria were no longer met and that his detention was unnecessary for the purposes of the Article 70 case.[316]

90. *Second*, in challenging Trial Chamber VII's initial remark that Bemba's detention had been lawful until that time, Bemba fails to acknowledge that, as of 8 June 2018 (when he was acquitted in the Main Case), his detention in both cases was already established as lawful and reasonable. Bemba attempts to distinguish between the "formal" and "substantive" lawfulness of his detention.[317] But, as the Appeals Chamber has found, the legal regime contained in articles 58 and 60 of the Statute is the standard by which the legality of *all* detention (both formally and substantively) at this Court is measured.[318] Bemba's detention, as shown below, has always met this standard.

- As at least 18 different decisions in the Main Case record show, his detention was regularly reviewed in that case, confirming its lawfulness. There are at least *five* related decisions at pre-trial,[319] *seven* decisions at trial,[320] and *six* decisions on appeal.[321] That the respective Chambers conducted their review consistently with human rights standards is also apparent.[322]

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[316] 12 June 2018 Release Decision, paras. 6, 18-24.
[317] Bemba Re-sentencing Appeal, para. 82.
[318] *See e.g.*, 29 May 2015 Kilolo *et al.* Interim Release AD, para. 43 ("[article 60(3], which governs the review of detention in the present circumstances, must be interpreted and applied consistently with 'internationally recognised human rights', pursuant to article 21(3) of the Statute. Therefore, this provision is also a proper legal avenue to protect the right to liberty of a person, as well as the right to be tried within a reasonable period of time or to release pending trial.")
[319] 20 August 2008 *Bemba* Interim Release Decision, paras. 37, 50-60; 16 December 2008 *Bemba* Interim Release Decision, paras. 32-48; 14 April 2009 *Bemba* Interim Release Decision, paras. 36-50; 3 July 2009 *Bemba* Conditional Release Decision, paras. 8-9; 14 August 2009 *Bemba* Interim Release Decision, paras. 43-101 (granting Bemba conditional release, but reversed on appeal).
[320] Trial Chamber III reviewed Bemba's detention, although the Statute expressly only refers to the Pre-Trial Chamber's review of detention, *see* 8 December 2009 *Bemba* Interim Release Decision, 24:10-29:17; 1 April 2010 *Bemba* Interim Release Decision, paras. 25-34; 28 July 2010 *Bemba* Interim Release Decision, paras. 30-39; 17 December 2010 *Bemba* Interim Release Decision, paras. 30-48; 27 June 2011 *Bemba* Interim Release Decision, paras. 43-74; 26 September 2011 *Bemba* Interim Release Decision, paras. 15-42; 23 December 2014 *Bemba* Interim Release Decision, paras. 23-64.
[321] 16 December 2008 *Bemba* Interim Release AD, paras. 51-58, 64-68; 2 December 2009 *Bemba* Interim Release AD, paras. 57-89, 104-109; 19 November 2010 *Bemba* Interim Release AD, paras. 40-57, 68-71, 88-95; 19 August 2011 *Bemba* Interim Release AD, paras. 43-62, 71-74, 82-86; 23 November 2011 *Bemba* Interim Release AD, paras. 33-38, 47-51, 64-67; 20 May 2015 *Bemba* Interim Release AD, paras. 85-95.
[322] *See e.g.*, 20 August 2008 *Bemba* Interim Release Decision, paras. 37 ("[The] right to liberty is of fundamental importance for everyone […] for any deprivation of liberty to be acceptable, it must be on such grounds and in accordance with such procedure as are established by the applicable legal regime. Furthermore, it must not be

- Similarly, Bemba's detention in the Article 70 case was lawful. He was detained under a lawful warrant, a fact that Bemba has himself acknowledged.[323] If Bemba had not considered his detention as lawful, then the Bemba Defence's decision to forego his detention review before trial would be inexplicable. Moreover, for the time common to both warrants, the Main Case record shows that such detention was always reviewed and found reasonable. Further, as the Main Case Appeals Chamber found, the article 70 charges justified Bemba's further detention.[324]

91. *Third,* Bemba fails to substantiate his claim that he had not been heard on detention matters.[325] This submission should be dismissed *in limine*. Notwithstanding, Bemba's right to be heard on detention matters was upheld throughout the proceedings,[326] not least when he presented lengthy arguments on detention at the 12 June 2018 status conference and at the 4 July 2018 re-sentencing hearing.[327] Bemba had ample opportunity to challenge his detention. And he fails to show otherwise.

92. Further, none of Bemba's cited authorities (in footnote 190) are apposite.

93. Firstly, although Bemba relies on a single paragraph in a dissent to the *Katanga* Unlawful Detention Appeal Decision rehearsing the law on a party's right to be heard on its motion, he fails to acknowledge its facts and larger context.[328] As the Majority of the *Katanga* Appeals Chamber held, the Trial Chamber had correctly found that Katanga had waited too long to challenge his detention, despite several earlier opportunities to do so.[329] The Appeals Chamber also noted that "expeditiousness is a recurrent theme in the Court's legal

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arbitrary."); 50; 16 December 2008 *Bemba* Interim Release Decision, para. 31 ("[W]hen dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not a rule. […]"); 14 April 2009 *Bemba* Interim Release Decision, para. 36; 14 August 2009 *Bemba* Interim Release Decision, paras. 35-38.

[323] Bemba Withdrawal Release Request, para. 14.

[324] 20 May 2015 *Bemba* Interim Release AD, paras. 70-71 (finding that the article 70 charges were relevant to maintaining Bemba's detention in the Main Case).

[325] *See* Bemba Re-sentencing Appeal, para. 81 (stating in a single sentence ,"[t]his approach ran roughshod over the Defence's right to be heard, which is a critical element of the fairness of the proceedings.")

[326] *Contra* Bemba Re-Sentencing Appeal, para. 81.

[327] *See* Bemba Release Hearing, 6:11-14:2, 19:5-22:3; Second Sentencing Hearing, 42:5-75:24.

[328] Bemba Re-sentencing Appeal, fn. 190 (referring to *Katanga* Unlawful Detention AD (Judges Kourula and Trendafilova Dissent), para. 56). Significantly, the Dissenting Judges' view in *Katanga* turned on whether Katanga had an adequate opportunity to be heard (*i.e.,* whether he had certainty on when he had to file his motion) (para. 58). By contrast, Bemba had ample opportunity to challenge his detention and did so. There was no uncertainty.

[329] *Katanga* Unlawful Detention AD, paras. 40-42.

instruments", and accordingly, the Code of Professional Conduct for counsel enjoins counsel representing the accused to act "expeditiously with the purpose of avoiding unnecessary delay in the conduct of the proceedings."[330] Parties must submit motions "that have repercussions on the conduct of the trial" in "a timely manner". What is reasonable or not depends on the circumstances of the case, including *the conduct of the person seeking the Court's* assistance.[331] In this context, Bemba's belated attempt to argue that he had not been heard on detention matters—despite the procedural history showing the contrary and despite his conscious choice to relinquish judicial review of his detention[332]—is misguided and unconvincing.

94. Secondly, Bemba's reference to two cases from the *ad hoc* tribunals does not support his argument.[333] In *Jelisić*, the Appeals Chamber found that parties had a right to be heard (whether in writing or orally) when the Trial Chamber acted *proprio motu*.[334] Bemba was heard on detention, and no Chamber acted *proprio motu* on this matter. Further, in *Karemera,* the Appeals Chamber endorsed the parties' right to be heard before a decision affecting their rights is made.[335] This is uncontroversial. On the facts, the *Karemera* Appeals Chamber found that Nzirorera was not heard on the specific question of resuming or restarting the trial, following one judge's withdrawal.[336] These facts are not comparable, as Bemba was fully heard on the specific issue of his detention several times. Bemba has not shown otherwise.

95. Thirdly, *Zhang v. Ukraine* does not support Bemba's claims either.[337] In this case, the ECtHR held that the right to a fair trial cannot be effective if the parties are not "truly

[330] *Katanga* Unlawful Detention AD, paras. 43-44.
[331] *Katanga* Unlawful Detention AD, para. 54 ("In the view of the Appeals Chamber, a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right.[…]"). *See also Kanyabashi Habeas Corpus* Decision, paras. 68-69 (noting ECtHR law that the "reasonable time" requirement must also include the conduct of the applicants); by analogy, Terrier in Cassese *et al.*, 'Powers of the Trial Chamber', pp. 1264-1265 (emphasising the need to give judges of the Court, a "means for ensuring the rapidity of the proceedings and blocking any dilatory strategy a party might seek to pursue.")
[332] *Katanga* Unlawful Detention AD, para. 64 ("[The] accused's rights are given full respect so long as the accused person has been given adequate opportunity to assert them. […]"); para. 71 ("In light of Mr Katanga's arguments in the Defence Motion, the Appeals Chamber finds it reasonable to have expected Mr Katanga to utilise the reviews of his detention to raise the issue of his alleged unlawful arrest and detention in the DRC, in order to put an end to what he considered to be an ongoing illegal detention.")
[333] Bemba Re-sentencing Appeal, fn. 190.
[334] *Jelisić* AJ, paras. 22-29 (regarding the Trial Chamber's *proprio motu* decision to enter a judgment of acquittal under rule 98*bis*(B))
[335] *Karemera* rule 15*bis* AD, paras. 8-10.
[336] *Karemera* rule 15*bis* AD, paras. 7, 12.
[337] Bemba Re-sentencing Appeal, fn. 190.

heard".[338] The fair trial violation in that case related to the domestic courts' failure to analyse the "serious shortcomings" in their rulings, despite inconsistencies in the evidence.[339] Bemba has not explained the comparison, nor can such be made. Merely because the Trial Chamber did not agree with Bemba's submissions on the purported impact of the Main Case acquittal on his sentence in this case does not mean, in principle or in fact, that Bemba was not heard.

96. *Fourth*, Bemba merely speculates that the Main Case Appeals Chamber had "recognised that the [Article 70 Appeal Chamber] had failed to establish a procedural mechanism that protected Mr Bemba's rights in [the] face of the possibility of a Main case acquittal".[340] Significantly, Bemba fails to explain why any Chamber should establish "procedural mechanisms" for hypothetical situations, over and above what the Statute requires. Indeed, it would have been inappropriate for one Chamber (the Article 70 Appeals Chamber) to have set up an entire mechanism—in the manner that Bemba suggests—three months in advance of when a different Chamber (the Main Case Appeals Chamber) actually acquitted a convicted person.

97. Further, the two Appeal Judgments in the two cases (the Main Case and the Article 70 case) are entirely consistent. As the plain text of the *Bemba* Main Case Appeal Judgment shows, the *Bemba* Main Case Appeals Chamber did not find that the Article 70 Appeals Chamber had erred in this respect. Nor could it. The Article 70 Appeals Chamber's findings—interpreting how time in detention may be deducted if Bemba were to be acquitted in the Main Case—are correct.[341] Moreover, in misinterpreting the Article 70 Appeals Chamber's remarks, Bemba incorrectly argues that it had somehow required *the Presidency* to

[338] *Zhang v. Ukraine*, paras. 60-61.
[339] *Zhang v. Ukraine*, paras. 65-73.
[340] Bemba Re-sentencing Appeal, para. 85 (referring to the findings in *Bemba* Main Case AJ, paras. 199-200 and Sentencing Appeal Judgment, para. 231 and stating "[By] directing that it fell to the Trial Chamber, and not the Presidency, to rule on Mr Bemba's detention, the [*Bemba* Main Case] Appeals Chamber recognised that the March 2018 Sentencing Appeal [Judgment] had failed to establish a procedural mechanism that protected Mr Bemba's rights in [the] face of the possibility of a Main case acquittal.")
[341] *See* Sentencing Appeal Judgment, para. 231 ("[The] Trial Chamber's decision not to deduct time can only be reasonably understood as meaning that, if the conviction or sentence in the Main Case were to be reversed on appeal, the time Mr Bemba has spent in detention pursuant to the warrant of arrest issued in the proceedings relating to offences under article 70 of the Statute would be automatically deducted from the sentence of imprisonment imposed by the Trial Chamber in the present case. The same would apply *mutatis mutandis* if Mr Bemba's sentence in the Main Case were to be reduced on appeal if the time spent in detention from 23 November 2013—the date on which he was served the warrant of arrest in the proceedings relating to offences under article 70 of the Statute—to the date of the reduction of the sentence on appeal exceeds the term of the reduced sentence in that case. The Appeals Chamber notes that *the Presidency*, as the entity charged with issues related to the enforcement of sentences, will be in a position to make the necessary adjustments […]") italics added.

"rule on [Bemba's] detention".[342] But as the Sentencing Appeal Judgment shows, the Article 70 Appeals Chamber's comment can only be reasonably read as delineating the Presidency's role regarding enforcement issues relating to sentences,[343] and *not* detention. Therefore, while it was for the Presidency to consider issues of enforcement once the sentences were final in both cases,[344] it was for Trial Chamber VII to decide if Bemba's continued detention, following the acquittal, was necessary.[345] Nothing in either Appeal Judgment—whether in the *Bemba* Main Case or in the Article 70 case—stands for a different proposition. Bemba's submissions should be dismissed.

III.A.3 Bemba fails to show that the Trial Chamber erred legally

98. Bemba fails to show that his detention was "arbitrary" at any time. He also misinterprets article 81(3)(b) and re-litigates failed arguments on the Trial Chamber's approach to time spent in detention under article 78(2).[346]

III. A. 3. a Bemba's detention was not "arbitrary"

99. Bemba argues that his detention was "arbitrary", but provides no support for this claim.[347] Bemba's argument is misplaced: in order to make the finding of "arbitrary detention" as he urges, it would require the Appeals Chamber to overturn every previous decision in two different case records establishing his lawful, reasonable and necessary detention. As human rights norms establish, "arbitrary detention" is not a phrase used lightly, or simply on a whim.[348] Bemba fails to meet the high threshold for "arbitrary detention" and

[342] Bemba Re-sentencing Appeal, para. 85.
[343] *See* Sentencing Appeal Judgment, para. 231. *See also* Second Sentencing Hearing, 60:21-23, where Bemba has previously acknowledged the Presidency's role in enforcing sentences ("[…]The Presidency would only be competent to make such a determination if they were overseeing an enforcement of a Main Case sentence.")
[344] Rule 199, Rules.
[345] *Bemba* Main Case AJ, paras. 199-200 ("[…] it rests with *Trial Chamber VII* to decide, as a matter of urgency, whether Mr Bemba's continued detention in relation to the case pending before it is warranted.") italics added.
[346] Bemba Re-sentencing Appeal, paras. 82, 86-110.
[347] Bemba Re-sentencing Appeal, para. 82.
[348] *See e.g.,* Schabas (2015), p. 232 (regarding article 5 of the ECHR, "detention will be deemed 'arbitrary' where there is an element of bad faith or deception by the authorities, even if national law has been observed in a technical sense. [Meeting] the test of 'lawfulness', deprivation of liberty must also be necessary in the circumstances. […]"); Shah, in Moeckli *et al.*, 'Detention and Trial', p. 257 ("[D]etention is arbitrary when it takes place without a legal basis, as well as where 'it is not necessary in all the circumstances of the case'."); Burgorgue-Larsen *et al.*, p. 481 mn. 19.13 (noting the law at the IACtHR (in *Chapparo Álvarez Íñiguez v. Ecuador)* which establishes that the reasons for detention must respect four requirements, to ensure that the measure is not arbitrary, namely, legitimate purpose, appropriate, necessary, and strictly proportionate); Harris *et al.*, pp. 307-309 (noting that the ECtHR had not produced an all-encompassing definition of "arbitrariness" under article 5(1), but that this included *inter alia* elements of bad faith/deception on the part of the authorities, and where the detention was not based on a reasonable suspicion, was disproportionate etc); *Saadi v. United Kingdom*, paras. 67-74 (setting out the notion of "arbitrariness" under article 5 (1) ECHR, *i.e.*, to avoid being

fails to engage with any of the established criteria. For instance, he neither shows that his detention lacked any legal basis; or violated any of the specific rights or freedoms in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights; or violated fair trial norms of "such gravity"; or used discriminatory reasons to justify detention.[349] An appellant seeking to establish arbitrariness must, at least, attempt to relate the abstract legal standard to the facts of the case. Without that, his view that his detention was "arbitrary"—however frequently expressed—remains just that: a personal opinion or a self-serving hypothesis without legal force.[350]

100. *First*, Bemba misinterprets the international legal standard on "arbitrary detention". Although some of the documents he cites interpret the conditions that constitute "arbitrary detention", Bemba overlooks their import.[351] Significantly, a person's right to liberty is not absolute. Article 9 of the ICCPR recognises that liberty may be deprived to enforce criminal law.[352]

101. Further, remand in custody on criminal charges must be reasonable and necessary in light of all the circumstances. Detention is *not* arbitrary when it is periodically reviewed to justify continuing detention or when it follows a judicially imposed sentence for a fixed period of time.[353] At the very least, the time that Bemba spent in detention under the lawfully-

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branded as arbitrary, therefore, such detention must be carried out in good faith, must be closely connected to the purpose, the place and conditions of detention should be appropriate, and the length of detention should not exceed that reasonably required for the purpose.)

[349] *See* HRC Arbitrary Detention Report, para. 38 (Arbitrary detention under customary international law includes "(i) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; (ii) the deprivation of liberty results from the exercise of rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights; (iii) the total or partial non-observance of the international norms relating to a fair trial […] is of such gravity as to give the deprivation of liberty an arbitrary character; (iv) asylum seekers, immigrants or refugees are subjected to prolonged administrative custody […]; (v) the deprivation of liberty constitutes a violation of international law for reasons of discrimination […]"). The specific rights in the Universal Declaration of Human Rights relate to the rights to equality (article 7), freedom of movement and right to seek asylum (articles 13 and 14), right to freedom of thought, conscience and religion (article 18), right to freedom of opinion and expression (article 19), right to freedom of peaceful assembly and association (article 20) and right to take part in the government of his country, directly or through freely chosen representatives (article 21).

[350] *See e.g.*, Bemba Re-sentencing Appeal, paras. 82 (claiming, without support, that his detention "had, consequently, transformed into arbitrary detention"); 85 ("This lacuna lies at the heart of Mr Bemba's arbitrary detention").

[351] *See* Bemba Re-sentencing Appeal, fns. 192 (citing the standard, without applying it to the facts), 194.

[352] Article 9 (1), ICCPR: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; *see* ICCPR General Comment No. 35, para. 14 ([…] Article 9 expressly recognises that individuals may be detained on criminal charges […]"); article 5, ECHR.

[353] ICCPR General Comment No. 35, paras. 10,12. *Contra* Bemba Re-sentencing Appeal, fn. 192 (incorrectly relying on content of ICCPR General Comment No. 32, para. 12 on the right of equal access to remedies).

issued Article 70 arrest warrant was time he equally spent in detention in the Main Case when his detention was periodically reviewed and justified in the Main Case (from 23 November 2013 onwards), and then when he was serving his judicially imposed sentence in the Main Case (from 21 June 2016 onwards). Bemba fails to explain how this lawful detention might not be "reasonable, necessary and proportionate".[354]

102. Likewise, although Bemba claims that "arbitrariness" should not be merely equated with "against the law",[355] he does not acknowledge that in the case he relies on (*Mukong v. Cameroon*), the State Party had failed to consider if remand in custody was necessary to prevent flight or interference with witnesses.[356] Therefore, it is inapposite, since this determination was made for Bemba, both "substantively" and in accordance with the Statute's interim release legal regime.[357]

103. Moreover, as Chambers of this Court have underscored, the interim release regime in articles 58 and 60 of the Statute itself reflects international human rights norms (both formally and substantively).[358] According to some views, it may even go beyond such norms in terms of protecting an accused's rights.[359] If the conditions set out in article 58(1) are satisfied,

[354] ICCPR General Comment No. 35, para. 12 ("The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. […]"); *see* HRC Arbitrary Detention Report, para. 61. *See also* Schabas (2015), p. 235 (noting that "post-conviction detention is obviously not a violation of article 5 [ECHR]"); Shah in Moeckli *et al.*, 'Detention and Trial', pp. 255-256 (noting that article 5(1), ECHR allows detention *inter alia* in the execution of a sentence after conviction by a competent court and when there is a reasonable suspicion of having committed an offence etc.) and p. 257 ("[…] As a safeguard against [arbitrary detention] there is a right to *periodic* review of detention in certain circumstances. If the circumstances surrounding the detention have not changed, or the detention has only been for a short period of time, then there is no review requirement. […]")

[355] Bemba Re-sentencing Appeal, fn. 192.

[356] HRC Arbitrary Detention Report, para. 61, citing *Mukong v. Cameroon*, para. 9.8 (finding that Cameroon had merely indicated that the arrest and detention was in application of rules of criminal procedure, without considering other factors regarding whether remand in custody was necessary).

[357] *See above* para. 90. *See also* Zeegers, p. 201 (setting out the two "substantive requirements" for lawful provisional release as the existence of a reasonable suspicion, and of relevant and sufficient reasons to justify detention […]").

[358] *See e.g.*, 29 May 2015 Bemba Interim Release AD, para. 23 (interpreting the interim release regime in line with "internationally recognised human rights"); *Lubanga* Interim Release AD, Separate Opinion of Judge Pikis, para. 23 ("The provisions of the Statute relevant to the detention of a person prosecuted, pre-trial detention in particular, viewed as a whole, give expression to internationally recognised human rights bearing on the judicial process. *They ensure that detention may only be ordered by a judicial authority and then solely for a valid cause* […]. *Moreover, it must be necessary for the purposes signified in article 58(1)(b) […] the arrestee is assured a right to contest the justification of the warrant of arrest and sequentially his/her detention* […]") italics added. *See also* Zeegers, pp. 279, 283-285 (noting that the ICC's legal framework is in line with international human rights law and can be justified accordingly).

[359] *See e.g.*, *Katanga* Interim Release Decision, fn. 22 (noting that the interpretation of article 60 "not only meets the *minimum* guarantees provided for by the case law of the Inter-American Court of Human Rights and the European Court of Human Rights […], but establishes a higher standard.")

detention of a suspect will already be justifiable and consonant with internationally recognised human rights.[360] As the Appeals Chamber has found, whether or not detention is unreasonable must be assessed against the conditions of article 58(1)(a) and the risks under article 58(1)(b).[361] Provided therefore that detention is properly assessed under the Statute's interim release regime, no claim of "arbitrary detention" arises.

104. *Second*, as the *Bemba* Main Case Appeals Chamber and the Trial Chambers in both the Main Case and in this case have found, Bemba's detention was both reasonable and necessary, and thus justified under the Statute.[362] Bemba's appeal obfuscates relevant facts. The only reason that Bemba offers to justify his conclusion that his detention was "arbitrary" is that, in his view, "[his] detention went from zero, to over four and a half years, in the space of a few hours".[363] This statement is based on several flawed premises.

105. Firstly, by suggesting that his Article 70 detention period was suddenly jump-started (from "zero" to "four" in "the space of few hours") following his Main Case acquittal,[364] Bemba artificially splices the overlapping time in detention that he spent pursuant to both warrants. The time that Bemba spent in detention from 23 November 2013 remained *the same four years*—whether under the Main Case warrant or the Article 70 warrant or both. In arguing otherwise, Bemba contradicts himself.[365] Nor does Bemba's argument recognise that both the Trial Chamber and the Appeals Chamber in this case took their approach to credit for time in detention in the two cases (the Main Case and the Article 70 case) precisely because he was, in fact, detained *in parallel* under the two warrants.[366] Having any discussion on

[360] 11 July 2014 Babala Interim Release AD, para. 66; 11 July 2014 Kilolo Interim Release AD, para. 68 ("[P]re-trial detention, whilst to be ordered exceptionally, does not breach internationally recognised human rights or criminal law principles such as the presumption of innocence where it is justified under articles 58(1) and 60(2) […]").
[361] 29 May 2015 Bemba Interim Release AD, para. 23 ("[A]ccordingly, a Chamber may also determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, in its decision pursuant to article 60(2) of the Statute. This determination requires finding that the condition under article 58(1)(a) is met and balancing the risks under article 58(1)(b) of the Statute that are found to be met against the duration of detention, 'taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.'")
[362] Arrest Warrant, para. 15; 29 May 2015 Bemba Interim Release AD, paras. 20-28 (reversing the 23 January 2015 Decision to release Bemba, finding several errors in the Pre-Trial Chamber's assessment); 17 August 2015 Interim Release Decision, para. 30 (in effect granting Bemba's request not to review his detention). *See also* 20 May 2015 Bemba Interim Release AD, paras. 70-71 (finding that the article 70 charges were relevant to maintaining Bemba's detention in the Main Case). *See above* para. 90.
[363] Bemba Re-sentencing Appeal, para. 86.
[364] Bemba Re-sentencing Appeal, para. 86.
[365] Bemba Withdrawal Release Request, para. 14 (acknowledging in June 2015 that he was detained pursuant to the article 70 warrant).
[366] Sentencing Decision, paras. 251-260; Sentencing Appeal Judgment, paras. 223-232.

allocating credit for time spent in detention for *overlapping time* under article 78(2) would otherwise have been meaningless. Further, although Bemba suggests that his Article 70 detention started only after his Main Case acquittal, this would have rendered the Article 70 warrant served on Bemba on 23 November 2013 wholly redundant.

106. Secondly, Bemba would be wrong if he implies that the fact of his Main Case acquittal vitiated the lawfulness of all of his prior detention. As human rights standards show, an acquittal does not change the lawfulness of any prior detention.[367] They are separate questions. Indeed, even if the detention order itself was found erroneous on appeal, this would not *necessarily* vitiate the lawfulness of the detention itself.[368] It is axiomatic then that even though the Main Case convictions fell away, Bemba's detention remained proper. Bemba's reliance on his Main Case acquittal to challenge his detention in this case is misguided, and should be dismissed.

107. Thirdly, *even if* the period of time he spent in detention pursuant to the Article 70 warrant were considered separately, Bemba's time spent under the Article 70 warrant was itself proper. Indeed, Bemba's argument is opportunistic. Challenging the propriety of his detention at this time contradicts his earlier strategic decision that prevented Trial Chamber VII from even reviewing his detention under article 60(2).[369] As the Appeals Chamber has found, and as Bemba confirms, an accused's request to review detention is a pre-requisite for an article 60(2) decision.[370] Bemba withdrew his request to review his detention in this case.

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[367] *See* *Benham v. United Kingdom*, para. 42 ("A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred […] in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law […]"); *Bozano v. France*, para. 55 (rejecting the argument that a "police action" was automatically deprived of any legal basis when the deportation order was retroactively quashed, and finding that when authorities have conducted themselves "unlawfully in good faith", a subsequent finding that there has been a failure does not affect the validity of any implementing measures taken in the meantime.); Harris *et al.*, p. 311 ("[…] Detention will not be rendered retroactively 'unlawful' […] because the conviction or sentence upon which it is based is overturned by a higher municipal court of appeal."); Schabas (2015), p. 236; *Ngudjolo* Compensation Decision, paras. 15-19 (noting that an acquittal does not render previous detention illegal if founded on the article 58 criteria).

[368] *Mooren v. Germany*, para. 74 ("[n]ot every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of Article 5(1)").

[369] 17 August 2015 Interim Release Decision, para. 30. *See also* First Sentencing Hearing Day 2, 30:5-23 (acknowledging that Bemba had been detained for over three years under the article 70 warrant).

[370] *Lubanga* Interim Release AD, para. 94 ("The ruling that the Pre-Trial Chamber is required to review pursuant to article 60(3) of the Statute is *the determination that it has made in response to an application for interim release pending trial under article 60(2).*") italics added; *see also* Bemba Withdrawal Release Request, paras. 12-14; *contra* Bemba Re-sentencing Appeal, para. 109.

And even if Bemba's ostensible reason for doing so at the time was to preserve sentencing credit in terms of article 78(2) (by remaining "detained" in both cases) or to avoid an unfavourable ruling in August 2015 (following the Appeals Chamber's reversal), he could have requested release once the Trial Chamber provided its article 78(2) determination in its Sentencing Decision on 22 March 2017 (dismissing his argument),[371] and even when the Appeals Chamber confirmed this analysis in its Sentencing Appeal Judgment on 8 March 2018.[372] But he did not do so.

108. It is no excuse that Bemba could not have been "released" since he was also serving the Main Case sentence at the time: a chamber could still have judicially assessed his detention, if he wished.[373] An article 60(2) decision could have confirmed or denied whether the article 58 criteria continued to be met in relation to the Article 70 case.[374] Yet, Bemba chose to keep the issue of his detention in this case beyond judicial purview, until this second sentencing appeal. This shows that Bemba did not consider his detention in the Article 70 case to be anything but proper.

109. Notwithstanding, despite his decision not to have his detention reviewed, Trial Chamber VII ensured that Bemba suffered no prejudice. Despite his convictions for article 70 offences, he was released from custody four days after his Main Case acquittal, which, in the Trial Chamber's view, changed the nature of its assessment of the article 58 criteria.[375] This was the earliest he could have been released. The Trial Chamber especially considered his time in detention as relevant to his sentencing in this case, for which he received a sentence which was considered as served.[376] It thus ensured that Bemba did not spend an additional day detained, following his 12 June 2018 release.

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[371] Sentencing Decision, paras. 251-260. *Contra* Bemba Re-sentencing Appeal, para. 95.
[372] Sentencing Appeal Judgment, paras. 223-232.
[373] *See also* Bemba Re-sentencing Appeal, para. 103 (misquoting the Human Rights Committee in *Morrison v. Jamaica*, paras. 22.1-22.4 (finding that since the person was *lawfully detained* in one case, he had no right to be released in the parallel case. Article 9 of the ICCPR was not violated. Article 14(3)(c) was violated since the State Party had failed to explain the delay in bringing the second case to trial).
[374] *Lubanga* Interim Release AD, para. 134 ("[T]he decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) […] continue to be met, the detained person *shall* be continued to be detained or *shall* be released. […]") italics in original.
[375] 12 June 2018 Release Decision, para. 18 ("[T]he Chamber is not satisfied that any of the Article 58(1) Risks justifies Mr Bemba's further detention. This conclusion is reached primarily on the basis of three developments (i) Mr Bemba's acquittal in the Main Case, which the Chamber still considers of significance despite the independence of this case from the Main Case.")
[376] Re-sentencing Decision, paras. 120, 126.

110. Fourthly, Bemba assumes, but fails to demonstrate, that the *duration* of his Article 70 detention was "arbitrary" in any way. The lapse of time in detention is not in itself a factor.[377] Whether the detention period is reasonable must be determined on a case-by-case basis, considering, the level of complexity of the case, the gravity and the nature of the crimes charged, the number of accused, and the volume of the evidence.[378] The Article 70 case was a five-accused case, with figures comparable to or even higher than some proceedings for article 5 crimes (for instance, 354 written decisions at trial, with the Defence teams filing up to 729 submissions). The Main Case involved, in trial alone, a total of 77 witnesses, 733 items of evidence, 1219 written decisions, orders, notifications and cooperation requests and 277 oral decisions and orders.[379] The appeals record in the two cases was equally complex. Bemba's submissions should be dismissed.

III.A.3.b Bemba misinterprets article 81(3)(b) and misunderstands the right to habeas corpus

111. Criminal trials are conducted with a firm eye on the road ahead. Yet, in re-tracing selected parts of the case's procedural history solely in light of his Main Case acquittal, Bemba insists on viewing the case record *only* in the rear-view mirror. Not only is his approach—to assess the legality of his detention solely in light of his acquittal—counter-intuitive, it is also speculative and takes a piecemeal view of an extensive record. Subsequent developments in criminal proceedings do not void earlier legally founded decisions to detain accused persons in this manner. Moreover, in incorrectly relying on article 81(3)(b) and other unspecified review mechanisms that do not apply,[380] Bemba obscures his own role in preventing judicial review of his detention under the statutory scheme.

112. *First*, although he insists at this late stage that his detention ought to have been reviewed earlier, Bemba neglects to acknowledge his own role and choice in avoiding such review. Before the trial began, Bemba clearly stated that the only review of his detention possible was if article 60(4) applied.[381] Article 60(4) applies only if the detention period was unreasonable

[377] *Gbagbo* Detention AD, para. 75.
[378] *See e.g.*, *Gbagbo* Detention Decision, para. 56 (citations omitted); *Lubanga* Interim Release AD, paras. 122 ("[t]he unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of the case."), para. 123 (the complexity of the case is considered for these purposes).
[379] *See Bemba* Main Case TJ, para. 17.
[380] Bemba Re-sentencing Appeal, paras. 86-96.
[381] Bemba Withdrawal Release Request, para. 15.

"due to inexcusable delay by the Prosecutor".[382] There being no such prosecutorial delay, the Chamber's review under article 60(4) was not needed. By failing to trigger an article 60(2) review, Bemba precluded all further judicial review of his detention under article 60(3)—despite the Chamber's best intentions to do so.[383]

113. *Second*, Bemba claims—at this late stage of the case—that the Chambers should have invoked article 81(3)(b) to release him at an earlier unspecified point. Bemba misapplies article 81(3)(b).

114. Firstly, *as a matter of law*, interpreting article 81(3)(b) as a general *"habeas corpus"* provision for automatic release at any time *post conviction* disregards the provision's plain text.[384] In so doing, Bemba overlooks that article 81(3)(b) applies only in the limited circumstance of when the time in custody exceeds the sentence of imprisonment imposed. Moreover, if the Prosecutor is appealing, such release may be subject to further conditions specified in article 81(3)(c).[385] The plain text of article 81(3)(b) makes that clear: therefore, any discussion of a convicted person's release based on time spent in detention requires a sentence to first be imposed. For instance and for the purposes of this appeal, Bemba was not sentenced until 17 September 2018. It follows then that any germane discussion of article 81(3)(b) *in this appeal* could have arisen *only when he had been re-sentenced*—at which point the Chamber *could have* assessed his sentence against the time spent in detention in terms of article 81(3)(b) to decide the question of his release. That said, the Chamber did not have to apply article 81(3)(b) in the re-sentencing proceedings—since Bemba was actually released

[382] 29 May 2015 *Kilolo et al.* Interim Release AD, para. 42 (finding that the PTC had erred when it applied article 60(4) where the period of pre-trial detention was *not* due to the Prosecutor's inexcusable delay).
[383] 17 August 2015 Interim Release Decision, para. 30.
[384] *Contra* Bemba Re-sentencing Appeal, para. 91 ("[A]rticle 81(3)(b) is then the *lex specialis* of this system, as concerns the specific detention prorections which apply post-conviction. […] Article 81(3)(b) therefore constitutes a fundamental plank within the defendant's right to habeas corpus as a protection against arbitrary detention, *post*-conviction.") italics in original.
[385] Article 81(3)(b), Statute provides that—generally speaking—a convicted person shall be released "when [his or her] time in custody exceeds his sentence of imprisonment"; *see* Roth and Henzelin, in Cassese *et al.*, 'The Appeal Procedure of the ICC', p. 1547; Schabas (2016), pp. 1218-1219 ("[T]he exception to the general rule on detention pending appeal arises when the time spent in custody exceeds the sentence of imprisonment set by the Trial Chamber. In such circumstances, the person will be released, unless the Prosecutor is seeking an increase in the sentence, in which case he may apply to the Trial Chamber for an order.") By contrast, *see e.g.*, with respect to articles 58/60, 20 May 2015 Bemba Provisional Release AD, para. 40 ("[A] reading of article 58(1)(b)(i) of the Statute in context and in light of its purpose confirms that the word 'trial' was intended to cover the entire period of the trial until the final determination of the matter."); 12 June 2018 Release Decision, paras. 12-13 ("[T]he Chamber considers it would be an illogical interpretation of this framework to remove the possibility for a convicted person to seek release while awaiting sentencing with no pending appeal" and (noting article 81(3)(b) but applying article 60(2) to release Bemba pending sentencing.)

on 12 June 2018, soon after his acquittal in the Main Case and well before he was actually re-sentenced in this case.

115. Secondly, Bemba's arguments on some earlier unspecified release are unclear. Bemba fails to specify *exactly when*, in his view, he should have been released. Nor did Bemba ever seek any such release—more so under article 81(3)(b)—at any earlier point.[386]

116. To the extent that Bemba appears to argue that he should have been released "after the convictions were issued",[387] Bemba overlooks that he was simply not in the same position as his fellow accused. Unlike them, Bemba was detained pursuant to two warrants, and not one. Moreover, at the time he was convicted for his article 70 offences, he had already been sentenced by Trial Chamber III to 18 years' imprisonment for war crimes and crimes against humanity convictions in the Main Case. It is reasonable to assume that article 81(3)(b) was formulated for the conventional (one warrant), and not the atypical (two warrants) situation.[388] Otherwise, its operation, in the manner Bemba suggests, would negate, in whole, the parallel proceedings. Even if an accused's detention was legally warranted in one case (under articles 58 and 60) and/or if he was serving a judicially imposed sentence in that case (as Bemba was), such lawful purposes could never be met due to his automatic release in the other case.

117. Accordingly, since Bemba was sentenced to an 18-year sentence in the Main Case on 21 June 2016,[389] he could not have been released on 19 October 2016 (when he was convicted for article 70 offences)[390] or on 22 March 2017 (when he was first sentenced in the Article 70 case)[391] or at any later time during the appeal proceedings in this case.

118. Since article 81(3)(b) was never relevant to Bemba's situation, he cannot now rely on this provision as his "get out of jail free" card. When seen in this proper light, article 81(3)(b) was neither the appropriate "procedural safeguard", nor was it "denuded" by the Trial and

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[386] *See e.g.*, Bemba Release Request, para. 6 (requesting release under article 60(2)); Bemba Release Hearing, 6:14-15 ("Today, *pursuant to [article] 60(2),* the Defence is requesting this Chamber to grant Mr Bemba's immediate interim release to Belgium where he resides with his family. […]"); 7:21-22 ("And in line with the Chamber's oral decision of October 2016, if there are no appeals pending, the mandatory custody provision in [a]rticle 81(3) doesn't apply. […]"). Italics added.
[387] Bemba Re-sentencing Appeal, para. 79(g).
[388] *See by analogy*, Sentencing Appeal Judgment, paras. 236-239 (noting that article 78(3) applies *within the same case*).
[389] *See generally* *Bemba* Main Case SD.
[390] *See generally* Trial Judgment.
[391] *See generally* Sentencing Decision.

Appeals Chambers' approach to credit in parallel cases.[392] Rather, Bemba simply fails to acknowledge the lawful and judicially imposed developments of the Main Case.

119. Thirdly**,** by equating his detention in this case to that of an "innocent defendant", Bemba minimises his convictions in this case.[393] For this reason, his reliance on case-law to show the "ICC's restrictive approach" to detention is misplaced. In *Mbarushimana* and *Ngudjolo,* release followed the dismissal of charges at confirmation and a unanimous acquittal at trial, respectively.[394] Similarly, in the ICTR cases of *Kabiligi* and *Bagilishema*, release followed their acquittals.[395] Having had his convictions confirmed on appeal, Bemba is not in a comparable position.

120. *Third,* in implying that the right to *habeas corpus* is apposite to the circumstances of his detention, Bemba misunderstands the right and yet again, his circumstances.[396] In so doing, he incorrectly extends the right to *habeas corpus* (a remedy to determine *whether* someone is legally detained) to a situation where detention has already been lawfully established and regularly reviewed by the Chambers under the Statute.[397]

121. The right to *habeas corpus* in international human rights law is a guarantee against arbitrary detention: detainees should have the opportunity to challenge the legality of their detention, and be released should it be considered unlawful.[398] Moreover, in order for this right to be effective, detainees must have access to a lawyer, and individuals should not be

[392] *Contra* Bemba Re-sentencing Appeal, para. 86.
[393] Bemba Re-sentencing Appeal, para. 93.
[394] *Contra* Bemba Re-sentencing Appeal, para. 93. *See* *Mbarushimana* Release Decision, p. 5 ("[a] warrant of arrest previously issued ceases to have effect with respect to any charges not confirmed […]"); *Ngudjolo* Release Decision, 4:20-21 (in relation to a unanimous acquittal, "[r]elease should be more than ever the rule and continued detention should be the exception); *Ngudjolo* Suspensive Effect AD, paras. 21-25 (setting out release in the context of an acquittal).
[395] *See* *Kabiligi* Liberty Decision, para. 5 (lifting conditions on liberty once the Prosecution had decided not to appeal the acquittal) and *Bagilishema* Conditional Release Decision, para. 11 (imposing conditional release).
[396] Bemba Re-sentencing Appeal, paras. 87-90 (incorrectly relying on human rights case law). Procedures such as the writ of *habeas corpus* in common law jurisdictions are comparable to *amparo* or *tutela* in some civil law jurisdictions (Shah in Moeckli *et al.*, 'Detention and Trial', p. 484).
[397] Burgorgue-Larsen *et al.*, p. 139 mn. 6.20 ("The origins of *habeas corpus*, literally '[we command that] you have the body', go back to the Magna Carta of 1212, and today it is a central element of proceedings in common law systems. Much used in the legal systems of Latin America, it is seen by the Inter-American Court as the 'normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty. Given the high number of cases of forced disappearance, the Court has regularly confirmed this position and stated that '*habeas corpus* represents the best means 'to control the respect of life and humane treatment, to avoid his disappearance or indetermination of his detention place, as well as to protect someone against cruel, inhumane, or degrading punishment or treatment''.")
[398] Shah in Moeckli *et al.*, 'Detention and Trial', p. 259.

kept *incommunicado*.[399] Bemba's detention was not arbitrary in these terms, nor has he shown differently. The Trial Chamber and the Appeals Chamber in the Main Case have repeatedly ruled on his detention. He always had access to his lawyers who have executed his defence strategy before the Chambers in both the Main Case and in this case. Furthermore, part of the strategy of his legal team in the present case was to forsake the review of his detention in this case, to gain sentencing credit in parallel cases. Applying the right of *habeas corpus* to this situation flies in the face of its expected use.

122. The very cases that Bemba relies on disapprove his point.[400] For instance, the cases from the IACtHR underscore that *habeas corpus* is of fundamental importance in situations where a state of emergency is declared or where preventive detention without legal justification is imposed, and judicial review of detention is required.[401]As they state, the purpose of the *habeas corpus* remedy "is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse."[402] Even when the right to personal liberty is suspended, the writ of *habeas corpus* allows the judge to determine if the warrant of arrest meets the test of reasonableness.[403]

123. Similarly, the ECtHR cases cited do not support Bemba's *habeas corpus* argument. For instance, in *Conka v. Belgium*, factors that were found to have made the applicants' *habeas corpus* remedy ineffective included their inability to contact a lawyer or use an interpreter.[404] None of these circumstances apply to Bemba.

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[399] Shah in Moeckli *et al.*, 'Detention and Trial', p. 259; Burgorgue-Larsen *et al.*, p. 488, mn. 19.25 (citing the *Chapparo Álvarez Íñiguez v. Ecuador* case at the IACtHR, setting out that *habeas corpus* was not permitted as an effective remedy "when a judge rejects the remedies filed without ruling on the allegations").
[400] Bemba Re-sentencing Appeal, paras. 87-89 (citing IACtHR and ECtHR case law on *habeas corpus*).
[401] IACtHR, Habeas Corpus Advisory Opinion, para. 41 (citing the *Cámara Federal de Apelaciones en lo Criminal y Correccional of Buenos Aires*, Argentina (Case No. 1980 of April 1977: "[T]he general interest has also to be balanced by individual liberty so that it must in no way be supposed that those who are detained *at the pleasure of the Executive* are simply to be left to their fate and are removed beyond the scope of any review by the national judiciary […]"). Italics added. *See also* IACtHR, Judicial Guarantees Advisory Opinion, paras. 18-41 (setting out the judicial guarantees that cannot be suspended in emergencies). *See also* IACtHR, *Acosta-Calderón v. Ecuador*, paras. 90-100 (concerning preventive detention for over five year without producing justification for the arrest).
[402] IACtHR, Habeas Corpus Advisory Opinion, paras. 12, 33, 35, 36, 40-41.
[403] *Ibid*., para. 12.
[404] ECtHR, *Conka v. Belgium*, paras. 44-46, 53-55; *see also Osmanović v. Croatia*, paras. 45-52 (concerning the complaint against the Constitutional Court's dismissal of a complaint against detention merely because a fresh decision extending such detention had already been made); *Van Droogenbroeck v. Belgium*, paras. 43-49

III.A.3.c Bemba misinterprets and re-litigates the law and findings on article 78(2)

124. Bemba disputes the Chambers' approach to article 78(2) (credit for time spent in detention) in this case—for the second time on appeal. In doing so, he fails to distinguish between what the Trial Chamber did when it considered his sentence as served (in light of his time in detention) and the need for any further remedial measures (which could potentially apply only if his rights had been grossly violated, but which were not).[405]

125. *First*, Bemba's attempt to re-litigate the Chambers' settled approach to article 78(2) (time spent in detention) in parallel cases should be dismissed *in limine*.[406] The Trial Chamber set out its approach.[407] Bemba was allowed to appeal it, and did.[408] The Appeals Chamber confirmed the Trial Chamber's approach.[409] Bemba merely seeks to re-visit this legal issue. This appeal against his new sentence should not be used as a vehicle to re-litigate issues that were finally decided by the Appeals Chamber.

126. *Second*, Bemba fails to show what impact the Chambers' approach on sentencing credit had on his rights. No matter the approach, the time Bemba spent in detention following the Article 70 warrant was properly accounted for. What matters to protect his rights is that a convicted person receives credit for his or her time in custody, not that he or she receives credit more than once for overlapping periods of time in custody in parallel proceedings.

127. The Chambers properly accounted for Bemba's time in detention. The Article 70 Appeals Chamber had correctly interpreted the Trial Chamber's decision not to deduct the overlapping time in the Article 70 case to mean that "if the conviction or sentence in the Main

(concerning the question of whether the Minister of Justice's decision to "detain" a supposed "recidivist" was subject to judicial review).

[405] Bemba Re-sentencing Appeal, paras. 86-88, 95-110.

[406] *See e.g.*, Bemba Re-sentencing Appeal, para. 107. *See also* Sentencing Decision, paras. 251-260; Sentencing Appeal Judgment, paras. 223-232. *See above* para. 9 (on the scope of a re-sentencing appeal).

[407] Sentencing Decision, paras. 254-259 (noting, *inter alia*, that "an interpretation of [article 78(2)] that would not take into account the fact that a convicted person is detained for two different causes would give almost no disincentive to commit Article 70 offences: he or she would be certain that if a warrant of arrest were issued with regard to offences against the administration of justice, the time spent in detention would count twice. The deterrent effect of [article 70] would thus be considerably hampered."); para. 257 ("[A] solution must be found which accommodates the interests of the convicted person and, importantly, ensures that any punishment is meted out and actually effective in the end. […]").

[408] Bemba Sentencing Appeal, paras. 198-261; Prosecution Sentencing Appeal Response, paras. 110-125.

[409] Sentencing Appeal Judgment, para. 225 ("However, in circumstances where an accused has spent time in detention as a result of warrants of arrest issued in different cases, time spent in detention can only be taken into account once. […] The interpretation advanced by Mr Bemba would be difficult to reconcile with one of the purposes of article 70 of the Statute—namely to deter the commission of offences against the administration of justice. […]").

Case were to be reversed on appeal", the time spent under the Article 70 warrant would be "automatically deducted" from the sentence of imprisonment imposed in the Article 70 case.[410] This is what the Trial Chamber did when it re-sentenced Bemba to a 12 month term of imprisonment and ultimately considered the sentence as served.[411] The Trial Chamber's decision was correctly based on the number of days that Bemba had been detained in this case.[412] The Chamber's approach also accommodated Judge Pangalangan's view that Bemba should have been awarded an approximate four-year sentence.[413] In Judge Pangalangan's view, Bemba had served more than four years in detention in this case, and had accrued sentencing credits to cover the four-year sentence he had proposed.[414] Therefore, in Judge Pangalangan's view, "a time-served sentence" was appropriate.[415]

128. Bemba's reference to one SCSL case, one ICTY case, and one domestic case is misplaced.[416] They do not show that Bemba was entitled to double credit as a matter of right.[417]

129. *Third*, Bemba conflates the question of when it was reasonable to release him from detention with the question of what an appropriate sentence is.[418] Likewise, Bemba's submissions muddy three distinct concepts: credit for time in detention under article 78(2); a

[410] Sentencing Appeal Judgment, para. 231 (also considering that if the Main Case sentence was less than the time between 23 November 2013 and 8 June 2018 (hypothetically, the date of the reduction of the sentence on appeal, the same applied *mutatis mutandis*). *Contra* Bemba Re-sentencing Appeal, para. 79(i) (incorrectly suggesting that the Chambers viewed article 78(2) through the lens of a guilty defendant).
[411] Re-sentencing Decision, para. 126 ("[Mr] Bemba has been detained for the purposes of this case for four years and two months. This counts all the time Mr Bemba was detained in the present case from 23 November 2013 to 12 June 2018, minus the four-month period in 2015 when Mr Bemba was technically released and then re-detained. Since the imposed sentence is far less than the credit to be applied for the period of time Mr Bemba has been in custody, the Chamber considers the sentence of imprisonment as served.")
[412] Re-sentencing Decision, para. 124.
[413] Re-sentencing Decision, fn. 214 ("Since Mr Bemba has now served more than four years in detention in this case, he has accrued enough sentencing credits to cover the four-year sentence proposed by Judge Pangalangan, who accordingly concurs that a time-served sentence for Mr Bemba is appropriate.")
[414] Re-sentencing Decision, fn. 214.
[415] Re-sentencing Decision, fn. 214.
[416] Bemba Re-sentencing Appeal, paras. 98-100. *See* SCSL, *Bangura et al.* SJ, para. 99 ("[a] person convicted by an international war crimes tribunal does not give them some superior status to other convicted persons […]"); para. 100 (deducting two weeks from the sentence for "the various changes to location, travel, and inconveniences arising from this trial"); *Bangura et al.* Clarification Decision, pp. 2-3 (finding that the provisions of the Prisons Ordinance Act (national law) did not apply to a sentence imposed by the Court); MICT, 11 April 2018 *Šešelj* AJ, paras. 175-180 (noting that contempt sentences should be served concurrently to any main case sentence); New Zealand, *Booth v. R*, paras. 1-39 (setting out the domestic approach in light of the specific wording of the domestic legislation on calculating credit).
[417] *See* First Sentencing Hearing, 75:20-77:4; Prosecution Sentencing Appeal Response, para. 122.
[418] Bemba Re-sentencing Appeal, para. 110.

sentence considered as served; and "remedial" sentencing measures upon egregious violations of rights.

- Firstly, *credit for time in detention:* Bemba was entitled to sentencing credit for time spent in detention under the Article 70 warrant.[419] As a plain reading of the Re-sentencing Decision shows, the four years and two months he spent detained in this case were accounted for.[420] Indeed, in this sense, Bemba got the full benefit of any "dead time" purportedly caused by the overlapping detention in the two cases.[421] His submissions claiming otherwise should be dismissed.

- Secondly, *the sentence considered as served*: Bemba argues that "time-served" is a "right under article 78(2)", not an "independent remedy".[422] Having his time in detention accounted for was Bemba's right—as was done by the Trial Chamber. That the Chamber then considered his sentence as served was a *consequence* of the sentence awarded in *this case* and the fact that the Chamber imposed a 12-month custodial sentence, which was less than his time spent in detention. Considering the sentences as served—like other sentencing aspects—falls within the Chamber's discretion.[423] Bemba's interpretation would put a chokehold on a chamber's proper exercise of its sentencing discretion and inflexibly link the time in detention and the sentence given. Merely because the time spent in detention exceeded the actual sentence does not vitiate the latter.[424] Significantly, Bemba has himself previously argued that time in detention should not influence or curtail the sentence itself.[425] In line with this approach, and, as a testament to its careful consideration of Bemba's rights and his particular situation, the Trial Chamber—even after releasing him from

[419] Schabas (2016), p. 1179 ("It seems only fair to credit a condemned person with time served in pre-trial detention when the sentence is finally determined" and "t]he norm concerning time served pursuant to an order of the Court [under the Rome Statute] is inflexible. It is simply a right to which the convicted person is entitled and it applies automatically."); Khan in Triffterer *et al.*, 'Article 78', p. 1893 mn. 6 ("[d]elegations accepted that it was fair to require the Court to take account of time spent in detention" when determining a sentence.")
[420] Re-sentencing Decision, para. 126.
[421] *Contra* Bemba Re-sentencing Appeal, p. 47, para. 99.
[422] Bemba Re-sentencing Appeal, para. 110.
[423] *See e.g.*, Sentencing Decision, para. 68 (Babala), para. 98 (Arido); Re-sentencing Decision, para. 90 (Mangenda).
[424] *Contra* Bemba Re-sentencing Appeal, para. 88 (arguing that the detention did not have a "nexus" with the sentence).
[425] First Sentencing Hearing Day 2, 9: 2-9 ("So it cannot be the case that just because Mr Bemba has served 3 years in detention, his sentence must be at least 3 years. This sentence, *this prior detention, might be relevant for credit, but it can't influence the initial decision as to whether a custodial sentence is in the first place necessary and proportionate*.") italics added.

custody on 12 June 2018—still determined that Bemba warranted a custodial sentence of 12 months, which was then considered as served.[426] Although before his re-sentencing on 17 September 2018, it was still open that Bemba could serve additional time in custody, the Chamber—by imposing this sentence—ensured that Bemba did not have to spend an additional day in prison following sentencing.[427]

- Thirdly, *"remedial" sentencing measures for gross violation of rights:* As shown above, this does not arise in Bemba's case.[428]

III.A.3.d Bemba relies on extraneous factors

130. Bemba's unsubstantiated submissions—re-litigating his reasonable detention conditions and various lawful investigative measures used—should be dismissed *in limine*.[429] The Appeals Chamber has confirmed the "special investigative measures" as fair and necessary.[430] Bemba also fails to acknowledge that his abuse of his detention privileges was an aggravating factor: he abused the trust the Court placed in him, for criminal purposes.[431] And to the extent that Bemba appears to suggest that he faced "restrictions" as a detainee, as the Appeals Chamber in *Ntaganda* has already found in an analogous situation, procedures to limit a detainee's access are not *per se* unfair.[432]

131. Likewise, Bemba's various insinuations—*en passant*—of "dilatory disclosure" and "delays" by the Prosecutor and the purported "slow pace of the [a]rticle 70 case" are unfounded.[433] By rehearsing these issues, Bemba fails to recognise the Appeals Chamber's explicit findings, dismissing several of his claims.[434]

[426] Re-sentencing Decision, paras. 121, 126.
[427] Re-sentencing Decision, para. 126 and fn. 214.
[428] *Contra* Bemba Re-sentencing Appeal, paras. 88, 98, 110.
[429] Bemba Re-sentencing Appeal, para. 95, fn. 211, 213 (referring—without substantiation— to restrictions on contact with his family, use of invasive measures, duration of confinement during hearings, privileged legal consultations occurred in the holding cells); Prosecution Sentencing Appeal Response, paras. 123-125
[430] *See* Appeal Judgment, paras. 353-551; Sentencing Appeal Judgment, para. 179.
[431] Sentencing Decision, para. 236; Sentencing Appeal Judgment, paras. 150-162 ("[Mr Bemba was entrusted with the ability to make privileged calls with his counsel for legitimate purposes, yet he abused and violated this trust for criminal purposes. […]").
[432] *Ntaganda* Restrictions AD, para. 89 (regarding *ex parte* procedures).
[433] Bemba Re-sentencing Appeal, paras. 104-105.
[434] Appeal Judgment, paras. 23-88 (rejecting Bemba's various arguments alleging disclosure violations).

132. For the reasons above, Bemba fails to show that his detention was anything but lawful, reasonable and proper.

III. B THE RE-SENTENCING PROCEEDINGS WERE FAIR

133. The proceedings against Bemba at this Court were, at all times, fair.[435] Bemba's effort to impugn various Prosecution statements and in-court submissions, and the Trial Chamber's approach to those submissions, fails in law and fact. Likewise, Bemba merely disagrees with the Chamber's dismissal of his submissions on the purported impact of the Main Case acquittal—but shows no error. Further, Bemba, yet again, re-litigates findings on his culpability confirmed on appeal. In all, there is neither violation nor error on appeal.

III.B.1 The Prosecution's post-acquittal statements and submissions were proper.

134. Bemba fails to show error.[436] The Prosecutor's public statements following the Main Case acquittal and the Prosecution's in-court submissions in the Article 70 re-sentencing proceedings were proper. Moreover, Bemba only speculates that, by allowing the Prosecution to be heard as a litigating party, the Trial Chamber's "appearance of impartiality" was affected in some way.

III.B.1.a The Prosecutor's public statements following Bemba's *Main Case acquittal were proper*

135. The Prosecutor's public statement on 13 June 2018 (issued after the *Bemba* Main Case Appeal Judgment was rendered) clearly accepted the decision acquitting Bemba in the Main Case and its finality.[437] Moreover, the Prosecution has since underscored Bemba's presumption of innocence following that outcome.[438] Bemba's mere conjecture shows no error.[439] Further, the Prosecutor's public statements were made in accordance with her public information role—a role that the human rights courts, the Appeals Chamber and other *ad hoc*

[435] *Contra* Bemba Re-sentencing Appeal, paras. 111-138.
[436] Bemba Re-sentencing Appeal, paras. 114-120.
[437] Prosecutor's Statement, p. 1 ("As Prosecutor and an officer of the Court, I must and will respect the decision and its finality. I must uphold the integrity of the Court's processes and accept the outcome. […]"); p. 2 ("In the Court's legal framework, the Appeals Chamber is the highest appellate judicial body and its decisions are final. There is no further possibility to appeal its judgments. […]") p. 3 ("Notwithstanding the ultimate outcome of this decision […]").
[438] *See Bemba* Prosecution Reparations Submissions, para. 16 ("[f]ully respecting Mr Bemba's presumption of innocence following the conclusion of this case […]").
[439] Letter from Melinda Taylor to the Prosecutor, 14 June 2018 and Letter from Kweku Vanderpuye to Melinda Taylor, 19 June 2018. *See also* Bemba Re-sentencing Appeal, para. 79(n).

tribunals have previously endorsed.[440] Likewise, any such statement needs to be considered in light of the broader circumstances[441] and the specific language used.[442] And based on these circumstances, as shown below, Bemba's presumption of innocence in the Main Case was fully respected.

136. In particular, following the Main Case Appeal Judgment, the Prosecutor issued a statement, which while conveying her "disappointment" with the outcome and its impact on the victims, accepted and respected the Judgment's finality, in no uncertain terms.[443] Mindful of the victims' interests,[444] and her own independence,[445] the Prosecutor also provided a preliminary analysis of the factual and legal issues, which, in her view, resulted in the outcome.[446] She was entitled to do so. Moreover, her analysis drew from findings in the Main Case Appeal Judgment and the judges' different views expressed in the Majority and Dissenting Opinions on several issues including the standard of review applied, all already part of the public record.[447]

137. The Prosecutor was equally entitled to state that she found the decision "troubling".[448] Indeed, as the Prosecutor has noted in her statement, "the carnage and suffering caused by [the] crimes were very real".[449] Showing compassion was humane and appropriate, including

[440] *See e.g.*, ECtHR, *Allenet de Ribemont v. France*, para. 38 ("[article 6(2) ECHR] cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected."); *Gaddafi* Disqualification AD, para. 27 ("[…] Given his responsibility for carrying out investigations and collecting evidence, […] the Prosecutor may play an important role in informing affected communities and the public at large about ongoing investigations and prosecutions. In doing so, however, he is constrained by his duty to respect the presumption of innocence."); ICTY, *Haradinaj* Interview Decision, para. 7 ("[…] The Prosecutor, in addition to the normal prosecutorial duties, has the broader task of presenting her office's position both to the public and in forums such as the Security Council. […]"); SCSL, *Sesay* Media Comments Decision, para. 29 ("[T]he wider view is that the Prosecution 'has a duty towards the interests of justice which transcends its role as Party to the proceedings.'")
[441] *Gaddafi* Disqualification AD, para. 28.
[442] Schabas (2015), p. 305 ("[I]n particular, the Court will look to the language used by the decision-maker to determine whether the presumption of innocence was breached.")
[443] *See e.g.*, Prosecutor's Statement, p. 1 and *Bemba* Prosecution Reparations Submissions, para. 16.
[444] Article 54(1)(b) and Article 68(1), Statute (measures for the protection of victims and witnesses).
[445] Article 42(1), Statute and Regulation 13, Regulations of the Office of the Prosecutor. *See also* Code of Conduct for the Office of the Prosecutor.
[446] Prosecutor's Statement, pp. 1-2 ("[…] However, there are certain features of the Majority's ruling that cause me concern and which I hope will see a redirection over time. […]", and explaining her views on the standard of appellate review of factual errors and the charging practice of cases involving mass criminality).)
[447] Prosecutor's Statement, pp. 1-2 (referring to the *Bemba* Main Case Dissenting Judges' views on the standard of appellate review).
[448] *Contra* Bemba Re-sentencing Appeal, para. 79(m) (misquoting the Prosecutor as stating that she found the *acquittal* regrettable and troubling). *See* Bemba Media Survey, pp. 41, 45, 49 (on the Prosecutor's reported comments in several media articles).
[449] Prosecutor's Statement, p. 1.

towards victims who suffered sexual violence. Further, Bemba does not explain why it may have been inappropriate for the Prosecutor to have acknowledged the record indicating that the *Mouvement de Libération du Congo* (MLC) troops had committed crimes that resulted in great suffering.[450] The trial record—and the appeals record—confirmed as much.[451] Bemba's Counsel in the Main Case has also acknowledged this fact.[452]

138. Indeed, although the Prosecutor has a duty as a highly-placed public authority to respect the presumption of innocence in a non-court setting, Bemba misinterprets the standards and facts that apply. The Prosecutor did not express any opinion on the guilt or innocence of an accused or the merits of the issues that are *sub judice.*[453] That said, the Prosecutor is not expected to remain silent on the status of cases, especially when they are no longer pending.[454] Nor can it be said that the statements contained any "declaration of guilt".[455] Moreover, although Bemba suggests that the statements amounted to "voicing suspicions regarding an accused's innocence" after he was acquitted, the cases he cites are easily distinguishable.[456]

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[450] *See* Bemba Media Survey, p. 41 (quoting the Prosecutor, as reported in media articles, as saying "[the] judgement does not deny that Mr Bemba's troops committed the crimes which resulted in great suffering in the Central African Republic at their hands").
[451] *See* *Bemba* Main Case AJ, para. 192 ("[…] It must be noted that the 2002-2003 CAR Operation was conducted within the short space of a few months, which notwithstanding, Mr Bemba took numerous measures in response to *crimes committed by MLC troops*."); para. 194 ("[…] Mr Bemba cannot be held criminally liable under that provision for the *crimes committed by MLC troops during the 2002-2003 CAR Operation*.") (italics added). Judges Van den Wyngaert and Morrison Separate Opinion, para. 74 ("There was undeniable suffering on the part of the many victims of violence and cruelty at the hands of persons or groups that are related to the accused."); para. 77 (noting the crimes that were committed against the population of the Central African Republic"); para. 78 ("It is not excluded […] it would have been possible to hold Mr Bemba criminally responsible for his failure as commander in relation to *some or all of the crimes that were committed by MLC soldiers in the CAR*.") (italics added); *Bemba* Reparations Decision, paras. 3, 6.
[452] *See* Haynes, Justice Hub Interview, 13 June 2018 (noting *inter alia* "in order to negate the fact that [Mr Bemba had] taken steps to prevent and punish crimes" and "[t]here are still victims, we don't deny that.") (https://justicehub.org/article/bembas-lawyer-the-fact-that-there-are-victims-doesnt-mean-that-the-man-in-the-dock-is-guilty/ accessed on 17 February 2019).
[453] *Gaddafi* Disqualification AD, para. 28.
[454] *Gaddafi* Disqualification AD, para. 27.
[455] ECtHR, *Fatullayev v. Azerbaijan*, paras.159-163 (regarding public statements, in the context of pending criminal proceedings, that indicated that the applicant had committed the crime of threat of terrorism); *Allenet de Ribemont v. France*, paras. 38-41 (also regarding statements, made without qualification or reservation, that the applicant instigated the murder).
[456] ECtHR, *Geerings v. The Netherlands*, paras. 41-50 (where, in confiscation proceedings, the applicant was found to have unlawfully benefitted from the crimes, even though it had not been found beyond reasonable doubt that he had committed the crime); *Mikolajova v. Slovakia*, paras. 53-63 (regarding a police decision, disclosed to a third party, that stated that the person was guilty of a violent crime).
See also *Asan Rushiti v. Austria*, paras. 7-16, 24-32 (regarding specific judicial findings in compensation proceedings that acquittals for "lack of evidence" did not entitle the person to be compensation, since the innocence had not been "proven") and *Sekanina v. Austria*, paras. 23-31 (where the impugned compensation

139. Further, Bemba's effort to impugn Professor Leila Sadat's legal analysis on the *Bemba* Main Case Appeal Judgment (provided on a blog) is unfounded.[457] As is clear from the comments, they were made in her personal capacity,[458] and cannot be attributed to the Prosecutor or the Court as such. Moreover, Professor Sadat (like other legal scholars) may, indeed, express critical views on judicial decisions. Bemba's effort to limit critical thought on legal issues is misplaced.[459]

III.B.1.b. The Prosecution's in-court submissions were proper

140. The Prosecution is a litigating party in this case. Bemba does not explain—nor can he—why it may not make submissions on issues relevant to the case. Nor have these submissions affected Bemba's rights—and in particular, his presumption of innocence in the Main Case—in any manner. Rather, Bemba distorts the record.[460]

141. *First*, contrary to Bemba's argument, the Prosecution was fully entitled to address Bemba's role as a convicted person in the Article 70 case—in writing and orally, at the 12 June 2018 status conference and during the re-sentencing proceedings. As the Appeals Chamber has said, the Prosecutor (and her team) is expected to argue to support a position in court proceedings and seeking to persuade the judges, in this context, is legitimate.[461] This applies to the release and sentencing proceedings in this case. The presumption of innocence, in this context, does not oblige the Prosecution to refrain from expressing any view on the

proceedings undertook a reassessment of the acquitted person's guilt and found that suspicion of guilt had not been "dispelled".) *See also* Schabas (2015), p. 306.

[457] Bemba Re-sentencing Appeal, para. 79(m) (citing Bemba Media Survey, pp. 26, 76, 78).

[458] *See* Leila N. Sadat, Fiddling while Rome burns? The Appeals Chamber's curious decision in *Prosecutor v. Jean-Pierre Bemba Gombo*, 12 June 2018, EJIL: *Talk! :* Blog of the European Journal of International Law (stating that "this post represents the personal views of the author and nothing in it is attributable to or connected with any organ of the International Criminal Court").

[459] *Compare* Bemba Media Survey, pp. 26, 76, 78 (where remarks attributed to Professor Sadat stated that it was "inappropriate" for the appeals court to substitute its judgment for a [trial court]") with Bemba Re-sentencing Appeal, para. 79(m) (claiming, incorrectly that the *acquittal* was "inappropriate"). Italics added.

[460] Bemba Re-sentencing Appeal, paras. 79, 111-120.

[461] *Gaddafi* Disqualification AD, para. 25 ("[…] In this sense, the presumption of innocence does not oblige the Prosecutor to refrain from expressing an opinion on evidence in support of the guilt or innocence of a suspect or accused, at least within court proceedings […] At each stage of the proceedings, the Prosecutor should be, and is reasonably and objectively expected to be, convinced by the evidence in support of his claims and to seek to persuade the judges.[…] The Prosecutor is not only expected but required to make statements within the context of court proceedings which would be inappropriate if made by a judge in an ongoing trial.")

guilt of a person, especially one convicted of article 70 offences, and in the context of proceedings to determine his release and/or sentence.[462]

142. *Second*, Bemba argues that the Prosecution, in the 12 June 2018 status conference on release "expressed the view repeatedly that although acquitted in the Main Case, Mr Bemba was not 'innocent'". This misrepresents what the Prosecution had said.[463] As the record shows, the Prosecution argued that Bemba did not enjoy "any presumption of innocence *in this case*", *i.e.*, the Article 70 case where his convictions were final (confirmed on appeal).[464] The Prosecution did not comment on the Main Case. Likewise, that Bemba was not "acquitted" of all charges in the Main Case—but that proceedings based on some of those charges were "discontinued"—is a matter of public judicial record.[465] The mere stating of this legal nuance reflected in the Main Case Appeal Judgment did not affect Bemba or his rights. The Trial Chamber in the *Bemba* Main Case has itself acknowledged this very nuance.[466]

143. *Third*, the Prosecution was entitled, and even obliged, to address the factors under rule 145 for the re-sentencing proceedings, including the impact of the Main Case acquittal on the Article 70 proceedings.[467] In fact, the Prosecution's legal argument was that Bemba's acquittal in the Main Case was a "new fact" to demonstrate an aggravating circumstance under rule 145: it evidenced the "damage caused" by the conduct of the convicted persons in the Article 70 case, since the very objective of the common plan that Bemba, Kilolo and Mangenda had participated in had been realised.[468]

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[462] ECtHR, *Geerings v. Netherlands*, para. 43 ("[…] Once an accused has properly been proved guilty of that offence, [a]rticle 6(2) can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process […]"); Harris *et al*., p. 461.
Contra Bemba Re-sentencing Appeal, fn. 235 mis-citing, for instance, *Sanchez Cardenas v. Norway*, paras. 33-39 (relating to a passage in a judgment which amounted to an affirmation of suspicion that the person had committed sexual abuse) and EULEX Human Rights Review Panel, *Y.B. v. The Prosecutor*, paras. 44-54 (finding, regarding a right to privacy violation, that naming a person in an indictment, as a "co-perpetrator" or a "gang boss", amounted to an affirmation that he had committed the crimes, despite not being having been indicted.)
[463] Bemba Re-sentencing Appeal, para. 79(k). *See* Bemba Release Hearing, 1:22-2:1, 14:5-19:2.
[464] Italics added. Bemba Release Hearing, 15:19-21 ("Mr Bemba has been found guilty, and he no longer benefits from any presumption of innocence *in this case*. Therefore, [a]rticle 60 does not apply at this stage of the proceedings, nor does Rule 119, regarding conditional release […]"). Italics added.
[465] Bemba Release Hearing, 18:20-19:2. *Compare* Bemba Re-sentencing Appeal, para. 79(k) with *Bemba* Main Case AJ, paras. 116, 118, 197-198.
[466] *Bemba* Reparations Decision, para. 2.
[467] Bemba Re-sentencing Appeal, para. 116 (claiming, without support, that the Prosecution had no legal basis to make submissions).
[468] Prosecution Notice Additional Re-sentencing Submissions, para. 1.

144. Other than handpicking a few words out of context, Bemba makes no specific argument.[469] Moreover, as a reasonable reading of the Prosecution's submissions shows, it did not label the "acquittal" as toxic: the argument was significantly more nuanced in law and fact. As the record shows, the Prosecution referred to the consequences that, in its view, the article 70 offences had on the Court's administration of justice.[470] Nor is it clear why the use of the word "toxic", in this context, should impugn Bemba's presumption of innocence in the Main Case.

145. Similarly, at the 4 July 2018 re-sentencing hearing, the Prosecution was entitled to develop its legal argument.[471] Bemba mischaracterises the Prosecution's submissions yet again. The Prosecution was entitled to correct the record of the re-sentencing proceedings following the *Bemba* Main Case Appeal Judgment, that as a matter of technical and legal accuracy, there were crimes for which he was "acquitted", and others for which the proceedings were discontinued, in the sense that he was deemed never to have been tried for those crimes.[472] This did not in any way mean that the Prosecution questioned Bemba's acquittal, or his ensuing presumption of innocence in the Main Case, in any broader sense.[473]

146. Moreover, Bemba also misinterprets the Prosecution's submissions stating that the convicted persons' article 70 conduct had an impact on the Court's mandate, including the

[469] Bemba Re-sentencing Appeal, para. 79(o).
[470] Prosecution Notice Additional Re-sentencing Submissions, para. 4 ("[…] Here, the toxic effects of the corrupt and tainted evidence adduced by Messrs Bemba, Kilolo and Mangenda at trial affected not only the immediate proceedings in which it was tendered, but inevitably, subsequent proceedings. […]"); Second Sentencing Hearing, 85:9-12 ("There was a reference made to the Prosecution submission that the [a]ppeals Judgment was corrupt. That is incorrect. I think the Chamber understands that, too, and put that into perspective. What we said was that it was made in the context and in reliance on a record that had been corrupted by the defendants in this case. […]").
[471] Second Sentencing Hearing, 15:2-34:22; 83:14-87:24.
[472] Second Sentencing Hearing, 84:18-21 ("The next point is that Ms Taylor suggested that the acquittal of Mr Bemba was the equivalent of a declaration of his innocence, which I think the Chamber is well aware that that simply is not the case. *That is not the representation that is in the judgment itself.");* (italics added). *But see* Bemba Re-sentencing Appeal, para. 79(p) (claiming, incorrectly, that the Prosecution had said "[Bemba] was not actually innocent as concerns all the Main case charges"); Second Sentencing Hearing, 56:12-18 (where Bemba argued that "the majority verdict was that Mr Bemba is innocent" and that "if evidence given to secure the acquittal of a guilty person is particularly harmful, then it follows that the fact that the person is actually innocent must diminish the gravity of the offence").
[473] *See e.g.*, *Ngudjolo* Compensation Decision, paras. 65-68 (finding that a statement in the Trial Judgment interpreting the standard of proof—*i.e.*, "[…]finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent"—did not lead to a miscarriage of justice, and that the Trial Chamber had acknowledged his presumption of innocence under article 66).

victims of the Main Case who had come before this Court.[474] Corrupting the Court's processes—as Bemba did—does have such an impact. The Trial Chamber has also said so previously.[475] The Prosecution was entitled to ask the Chamber to "sanction [Bemba] heavily" because of his article 70 criminal conduct.[476] Bemba's argument must fail.

147. *Fourth*, Bemba's arguments that the social media commentary that followed the *Bemba* Main Case Appeal Judgment and the Prosecution's submissions resulted in "his wrongful condemnation" are unconvincing.[477] Bemba's argument that he was "tried" *by* social media is misplaced. Moreover, he cannot hold the Court responsible for commentary by "high profile NGO and [media] organisations", or if commentary on the Prosecution's submissions fuelled interest on social media.[478] In any event, Bemba's interests were well-represented on social media at the time, even with members of his legal team taking part. In this context, Bemba cannot show that he suffered "harm", in any objective sense. [479]

III.B.1. c Bemba fails to show that the Trial Chamber was "partial"

148. Claims that a chamber did not appear "impartial" should not be made lightly. Yet, Bemba provides no support for his allegation, but rather, reads the record selectively.[480] These submissions should be dismissed *in limine.*

149. Nonetheless, the Trial Chamber did not err in procedure, or abuse its discretion, in allowing the Prosecution to makes its submissions during the re-sentencing proceedings.

150. *First*, in claiming that the Trial Chamber did not view him as "innocent" of the charges in the Main Case, Bemba merely speculates and disregards the record.[481]

[474] Second Sentencing Hearing, 17: 6-16, 32:15-16, 33:12-20 (arguing the impact of article 70 offences on the Court's mandate, including the victims before it); Bemba Re-sentencing Appeal, para. 79(p).
[475] *See e.g.*, Sentencing Decision, para. 19 (underscoring the seriousness of the article 70 cases and the impact that article 70 conduct has on the core proceedings of this Court).
[476] *Contra* Bemba Re-sentencing Appeal, para. 79(p).
[477] Bemba Re-sentencing Appeal, para. 117.
[478] Bemba Re-sentencing Appeal, paras. 79 (o), 117.
[479] *See* Harris *et al.*, pp. 466-467 ("[…] some press comment on a trial involving a matter of public interest must be expected […] In addition, the test is not 'the subjective apprehensions of the suspect as to the impact of the comment, but whether 'his fears can be held to be objectively justified'").
[480] Bemba Re-sentencing Appeal, para. 118 ([…] impacted adversely on the appearance of the Trial Chamber's impartiality regarding Mr Bemba"), para. 137 ("arbitrary and partial nature of the Chamber's approach"). *See* paras. 176-179 (Response to Ground 3)
[481] *See e.g.*, Bemba Release Hearing, 2:19-3:6; Bemba Re-sentencing Appeal, para. 120.

151. *Second*, as shown above, neither the Prosecutor's public statements nor the Prosecution's in-court legal submissions caused Bemba any harm.[482] Most significantly, Bemba fails to acknowledge that the Trial Chamber dismissed the Prosecution's argument that the "corrupted and tainted evidence introduced by the convicted persons affected the Main Case appeal proceedings".[483] Accordingly, the Chamber found that the Main Case acquittal did not affect the sentences to be imposed.[484]

152. For these reasons, Bemba's arguments should be dismissed.

III.B.2 The Trial Chamber correctly dismissed Bemba's arguments on the impact of his acquittal in the Main Case

153. Bemba's submissions alleging that the Chamber erred by dismissing his arguments on the impact of the acquittal in the Main Case reveal no error.[485] He over-states the purported impact of his Main Case acquittal on his sentence for his article 70 offences.

154. *First*, although Bemba argues that the Chamber did not consider his Main Case acquittal as an "absence of prior convictions" in mitigation, he fails to note the Chamber's consistent finding that this factor was not an express mitigating circumstance.[486] Contrary to Bemba's submissions, the Chamber did not consider this factor to mitigate any of the sentences imposed in this case. Nor does Bemba explain why he should be treated differently from the other convicted persons.

155. *Second*, in arguing that the Chamber failed to engage with his arguments on his "overall detention" at the ICC, Bemba merely disagrees with the findings.[487] But there is no error. In

[482] *See above* paras. 133-147.
[483] Re-sentencing Decision, paras. 19-25.
[484] Re-sentencing Decision, paras. 19-25.
[485] Bemba Re-sentencing Appeal, paras. 121-133.
[486] Sentencing Decision, para. 184 ("[The] absence of prior convictions is a fairly common feature among individuals convicted by international tribunals and will not be counted as a relevant mitigating circumstance"), only noting it as relating to Kilolo's overall circumstances in relation to the suspended sentence, later overturned on appeal.(Sentencing Appeal Judgment, paras. 73-80, para. 350); for similar findings on the absence of prior convictions, paras. 61 (Babala), 89 (Arido), 137 (Mangenda). *See also Al Mahdi* SJ, para. 96; Sentencing Appeal Judgment, paras. 349-352 (upholding the Trial Chamber's assessment); Re-sentencing Decision, para. 119.
[487] *See e.g.*, Re-sentencing Decision, para. 120 ("Mindful of the time already spent in detention, the Chamber has weighed and balanced all these factors for purposes of re-sentencing, revising its earlier assessments as necessary. […]")

re-sentencing Bemba, the Chamber was mindful of the time spent in detention, but found that, in view of his culpability, a custodial sentence was still warranted.[488]

156. *Third,* Bemba has canvassed his arguments relating to the "harm" caused by the "lies" under Ground 1, and the Prosecution relies on its response to that ground.[489] Significantly, Bemba's core premise is incorrect: merely because he was acquitted in the Main Case does not mean that the common plan was not orchestrated for his benefit, and in this sense, he remains the "beneficiary of the article 70 conduct".[490] The Chamber was not therefore required to adjust its previous findings on his "overall culpability".[491] Bemba's attempt to draw a "distinction" in the findings of the two Appeal Judgments in the Article 70 case and the Main Case respectively is vague and its relevance unexplained.[492] Bemba also incorrectly limits Judge Pangalangan's view that a four-year sentence was appropriate to the 2017 Sentencing Decision. It is clear that the Judge still remains of that view, despite the Main Case outcome.[493]

III.B.3 Bemba merely disagrees with the Chamber's findings

157. Bemba fails to show how his sentence was disproportionate to the findings concerning his culpability in the proceedings, as found by the Trial Chamber and confirmed on appeal.[494] His submissions are speculative, repetitive, and merely re-litigate the various factors considered by the Trial Chamber in the proper exercise of its discretion.[495] Yet again, Bemba's allegation that the Chamber was "arbitrary and partial" is unsupported.[496]

[488] Re-sentencing Decision, paras. 120-121.
[489] Bemba Re-sentencing Appeal, paras. 126-128. *See above* paras. 23-31.
[490] *Contra* Bemba Re-sentencing Appeal, paras. 123; Sentencing Decision, para. 219.
[491] *Contra* Bemba Re-Sentencing Appeal, para. 123.
[492] *See* Bemba Re-sentencing Appeal, para. 129. *See also* Appeal Judgment, para. 1225 (in relation to Bemba's instructions to influence D-54 on his "membership of the CCOP"); Trial Judgment, paras. 606, 686, 688 and *Bemba* Main Case AJ, para. 175 (regarding the Chamber's findings that "[Bemba] had transmitted a letter to the CAR Prime Minister").
[493] Re-sentencing Decision, fn. 214.
[494] Bemba Re-Sentencing Appeal, paras. 134-138.
[495] *See generally* responses to Grounds 1 and 3.
[496] Bemba Re-sentencing Appeal, para. 137.

III.C. BEMBA'S SUGGESTED REMEDY OF A STAY OF PROCEEDINGS IS UNWARRANTED

158. As shown above, Bemba has failed to show that his rights were violated. No remedy is warranted.[497] When Bemba's arguments are examined reasonably and shorn of their hyperbole, it is clear that there was no "abuse of process", and Bemba has not shown otherwise. Bemba's requested remedy (of an unconditional stay) is manifestly out of step with the case's history, a case in which several Chambers of this Court have reviewed various aspects. A remedy as drastic as an unconditional stay of proceedings should be used sparingly,[498] and much less so, in a case when the convictions have already been confirmed on appeal. Bemba's submissions requesting this remedy should be dismissed *in limine*.

159. For all the reasons above, Ground 2 of Bemba's appeal should be dismissed.

[497] Bemba Re-Sentencing Appeal, paras. 139-154 (relying on inapposite case law and propositions).
[498] *See e.g.*, *Lubanga* Stay AD, paras. 30-31.

IV. RESPONSE TO GROUND 3:THE TRIAL CHAMBER CORRECTLY TOOK INTO ACCOUNT RELEVANT CONSIDERATIONS AND BALANCED THEM APPROPRIATELY IN DETERMINING A SENTENCE THAT REFLECTED BEMBA'S CULPABILITY

160. Bemba fails to show that the Chamber erred—either in law or in exercising its discretion—in imposing his sentence.[499] Ground 3 of Bemba's appeal should be dismissed since: (i) Bemba misconstrues the Chamber's application of the totality principle, which took into account all relevant considerations and balanced them appropriately in determining his sentence; (ii) the Chamber appropriately assessed the amount of Bemba's fine *primarily* by reference to *his enhanced culpability*, and then his solvency, so as to impose a sentence that deterred; and (iii) the Chamber correctly gave minimal weight to Bemba's subsequent disqualification as a presidential candidate in the DRC as a factor in re-sentencing. His disqualification was not a criminal charge or penalty, but simply a natural consequence of his article 70 convictions. Bemba's submissions should be dismissed.

IV.A. THE CHAMBER CORRECTLY APPLIED THE TOTALITY PRINCIPLE

161. The Chamber did not err in applying the totality principle. According to the principles in rules 145(1)(a) and (b), the totality of any sentence must be proportionate to the culpability of the convicted person, and the Chamber must balance all relevant factors when determining a sentence. The Chamber correctly applied these principles,[500] determining Bemba's sentence by reference to the gravity of the offences for which he was convicted,[501] his culpable conduct (including his actual contributions to the crimes)[502] and his individual circumstances.[503] The Chamber revised its assessments considering the nature of the false testimony relevant to article 70(1)(a)[504] and the differences in liability between principals and accessories, leading to an increase in the sentence for his article 70(1)(a) conviction.[505] The Chamber took all

[499] *Contra* Bemba Re-sentencing Appeal, paras. 156-157.
[500] *Contra* Bemba Re-sentencing Appeal, paras. 156, 166. *See e.g.* Re-sentencing Decision, paras. 75 ("The Chamber will therefore re-assess all sentencing factors […] and determine a sentence that reflects the culpability of the convicted person and is proportionate to the offence within the meaning of Article 81(2)(a) and 83(3) of the Statute"), 121 ("The Chamber is again called upon to determine a sentence that is proportionate to the offences committed and which reflects Mr Bemba's culpability").
[501] *See e.g.*, Re-sentencing Decision, paras. 17, 111-115.
[502] *See e.g.*, Re-sentencing Decision, paras.17, 45, 116-118, 127.
[503] *See e.g.*, Re-sentencing Decision, paras. 17, 119, 126.
[504] Re-sentencing Decision, para. 114.
[505] Re-sentencing Decision, para. 117.

these considerations into account as a whole to impose a new sentence reflecting Bemba's convictions.[506] Bemba shows no error.

IV.A.1. Bemba misconstrues the Chamber's application of the totality principle

162. Bemba's challenge to the Chamber's approach focuses on form over substance.[507] The Chamber was not required to explicitly name "the totality principle" in the Re-sentencing Decision, or to phrase it in Bemba's suggested terms.[508] To the contrary, and as shown above, the Chamber took into account all relevant considerations thereby applying the totality principle. The Chamber clearly expressed the factors that it considered relevant in determining a proportionate sentence.[509]

163. The purported "contra-indications" that Bemba identifies do not controvert the overwhelming evidence that the Chamber applied the totality principle.[510]

- *First*, in claiming that there was no "measurable impact" of his time in detention on his sentence, Bemba disregards the plain text of the Decision. The Chamber not only considered his time in detention in weighing and balancing various sentencing factors, but also in considering the sentence as served.[511]

- *Second*, if Bemba seeks a mathematical calculation of the various factors considered by the Chamber to demonstrate how each factor had a "measurable impact" on the sentence,[512] he will not get it; sentencing is a matter falling within the broad discretion of judges who weigh and balance different factors to arrive at a fair penalty.[513]

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[506] Re-sentencing Decision, paras. 120-122, 133-134, 138.
[507] *Contra* Bemba Re-sentencing Appeal, para. 160.
[508] *Contra* Bemba Re-sentencing Appeal, para. 156.
[509] *See* Sentencing Appeal Judgment, para. 247 (making clear that "a trial chamber is not required to address all the arguments raised by the parties or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision").
[510] *Contra* Bemba Re-sentencing Appeal, para. 158.
[511] *See e.g.* Re-sentencing Decision, paras. 120 (in determining the sentence the Chamber noted: "[m]indful of the time already spent in detention, the Chamber has weighed and balanced all these factors for purposes of re-sentencing, revising its earlier assessments as necessary"), 126 (indicating that "[s]ince the imposed sentence is far less than the credit to be applied for the period of time Mr Bemba has been in custody, the Chamber considers the sentence of imprisonment as served"), 138 (in considering the Prosecution's arguments on the deterrent effect of the sentence in this case, the Chamber stated that it "places special emphasis on the fact that the Three Convicted Persons have been imprisoned for significant periods of time in the present case (Mr Bemba for over four years[…])").
[512] Bemba Re-sentencing Appeal, para. 158(a).
[513] Re-sentencing Decision, para. 137; Sentencing Appeal Judgment, para. 22. *See also* *Lubanga* SAJ, para. 40.

- *Third*, that the Chamber, despite the *Bemba* Main Case acquittal, declined to limit Bemba's sentence to only a fine to account for his detention under the Main Case[514] does not show that it "ignored" the time spent in detention. Indeed, in suggesting that the Chamber did so, Bemba yet again conflates the acquittal and his detention.[515] As shown, the Chamber appropriately considered Bemba's time in detention when re-sentencing him and considered that a fine alone "would not adequately reflect Mr Bemba's culpability".[516]

- *Fourth*, Bemba's attempt to (mis)characterise the fine as an "ongoing deterrence measure" is unfounded. The fine is part of the sentence imposed, not an additional or independent "measure" imposed to deter.[517] In speculating that there was "absolutely no measurable reduction" of the sentence,[518] Bemba focuses on the loss of the article 70(1)(b) convictions, but disregards all other factors.

164. Further, Bemba shows no error in the Chamber's exclusion of the four-month period between the Pre-Trial Chamber's January 2015 decision to provisionally release Bemba, and the Appeals Chamber's reversal of that decision (May 2015) in calculating his sentencing credit.[519] As he has himself acknowledged, he was "released" for the purposes of this case in that time.[520] Based on a plain reading of article 78(2), this time would not count as "time in detention" for the purposes of this case. That said, no matter the approach, this issue has no impact on the calculation of sentencing credit *vis-à-vis* Bemba's sentence; even if the Chamber had included the 4-month period in its calculation, it would not have changed its determination that a 12-month custodial sentence should be imposed nor its view that Bemba had served his sentence. In any event, the Chamber provided its reasoning for excluding this period from its calculation of credit for time spent in detention.[521] Rather than being "arbitrary", its approach was reasonable.

[514] *Contra* Bemba Re-sentencing Appeal, para. 158(b).
[515] *See* para. 106.
[516] Re-sentencing Decision, para. 121.
[517] *Contra* Bemba Re-sentencing Appeal, para. 158(c).
[518] Bemba Re-sentencing Appeal, para. 159.
[519] *Contra* Bemba Re-sentencing Appeal, para. 167.
[520] Bemba Withdrawal Release Request, paras. 11-13; 12 June 2018 Release Decision, para. 1; Re-sentencing Decision, para. 126.
[521] Re-sentencing Decision, paras. 125-126 (noting that Bemba was technically released "in the context of the present case" but subsequently "re-detained").

165. Finally, that the Chamber arrived at the same sentence in its Re-sentencing Decision[522] as it did in its first Sentencing Decision[523] does not show that the Chamber failed to revise its earlier assessments taking into account the impact of Bemba's time in detention.[524] As demonstrated below, the Chamber took this factor into account. Moreover, the Chamber confirmed that many of its new considerations cut in opposite directions, leading to a sentence similar to that pronounced in the original Sentencing Decision.[525] Bemba fails to acknowledge this.

IV.A.2. The Chamber took into account the relevant considerations when re-sentencing Bemba

166. Bemba incorrectly asserts that the Chamber did not consider the "consequences" of his time in detention.[526] To the contrary, the Chamber expressly and reasonably set out the considerations relevant to its exercise of discretion in determining a proportionate sentence,[527] being "mindful of the time already spent in detention".[528] The length of Bemba's detention therefore factored in a very real way into the Chamber's assessment of the sentence.[529] Bemba's argument should be dismissed on this basis alone.

167. Moreover, the Chamber's consideration of Bemba's detention was evident both in its approach to his release and sentencing. The Chamber released Bemba at the earliest possible stage, that is, after his acquittal in the Main Case, after concluding that the article 58 conditions were no longer met.[530] The Chamber's sentence ensured that Bemba did not have to be re-detained a day further than was necessary.[531] The Chamber factored in Bemba's detention when it imposed the sentence, and when it considered his sentence as served

[522] Re-sentencing Decision, paras. 123, 127.
[523] Sentencing Decision, paras. 250, 261.
[524] *Contra* Bemba Re-sentencing Appeal, para. 158.
[525] Re-sentencing Decision, para. 131.
[526] Bemba Re-sentencing Appeal, paras. 156 (arguing that the Chamber failed to "address the consequences" of detention), 166 (asserting that as a result of his ten years of detention, "the impact of the $4\frac{1}{2}$ years of Article 70 detention was magnified, and affected him in a more intense manner"), 168 (indicating that "it is impossible to cscertain why" the Chamber "fail[ed] to set-off the excess detention (at least $3\frac{1}{2}$ years)" served in the Article 70 case).
[527] Re-sentencing Decision, paras. 136-139.
[528] Re-sentencing Decision, para. 120.
[529] *Contra* Bemba Re-sentencing Appeal, paras. 160, 161.
[530] *See above*, paras. 80-81, 109 citing 12 June 2018 Release Decision, para. 18.
[531] *See above*, para. 109.

because his 12-month custodial sentence was less than the time he had spent in detention for the Article 70 case. [532]

168. *Finally*, Bemba's suggestion that he should *further* benefit from his time in detention at this stage (when it has already been accounted for at several earlier stages) is unwarranted, especially in circumstances where Bemba's imprisonment term is now already set at the lower range permitted for article 70 offences and the amount of the fine reflected his enhanced culpability.[533] Any further reduction—and that too without justification—would render the punishment for the Article 70 case inconsequential.

IV.A.3. Bemba fails to demonstrate any "exponential harm" from his detention to further reduce his sentence

169. Sentencing considerations relevant to the personal circumstances of the convicted person must of course be assessed on a case-by-case basis. Although Bemba argues that his ability to enjoy meaningful family connections had diminished by his tenth year of detention,[534] he does not otherwise substantiate his claim that he has suffered any "exponential" impact from the length of his detention, and certainly not in a way that would warrant a reduction of his sentence.

170. Bemba's underlying premise is also flawed: although he claims that any "custodial sentence" at this stage would "punish" him, he does not acknowledge, again, that his sentence was considered as served. The possibility of any further "restrictions on liberty or contacts" arising from a custodial sentence is purely hypothetical,[535] and does not apply to Bemba.

171. The "exponential impact" of his detention cannot be simply inferred from the facts of this case, either. As stated above, that there was a difference between Bemba's actual time spent in detention and his final sentence is not *per se* an indicator of excessive detention,[536] let alone one that caused any "exponentially increasing" impact.

[532] Re-sentencing Decision, para. 126.
[533] Re-sentencing Decision, paras. 132-135.
[534] Bemba Re-sentencing Appeal, para. 166.
[535] Bemba Re-sentencing Appeal, para. 166.
[536] *Contra* Bemba Re-sentencing Appeal, paras. 86, 88.

172. *Finally*, this Chamber should not overlook the incongruity of a situation in which Bemba seeks to reduce his overall sentence on the basis of his time in detention, when it was his own criminal conduct *while in detention* in the Main Case that led to his further arrest and detention in this case. Even if Bemba was indeed experiencing an exponential impact of his continued detention, then his involvement in criminal conduct under article 70 of the Statute did nothing to mitigate that impact, and everything to enhance it.

IV.A.4. The case law Bemba cites is inapposite

173. The domestic case law that Bemba cites is irrelevant to his case.[537] Bemba refers to one Australian case (*R v. Barry*) in which the sentence was reduced to account for an exponential impact of detention, asserting that the Chamber should have reduced his sentence in the same manner.[538] Significantly, the appeals judge in that case underscored that such reductions should not be automatic, and "the mere fact that an aggregate term of imprisonment is not reduced to take into account the totality principle does not necessarily demonstrate error in the sentencing process. The totality principle does not require such a reduction in every case. […]."[539] Bemba fails to justify why the reduction in sentence is warranted in his case, which can be distinguished from *R v. Barry* in a number of respects.

174. The cited case concerned a convicted person who was already sentenced and serving time for a conviction in one case, and who faced the prospect of *ongoing* detention as a result of a conviction for a subsequent offence.[540] The sentence for the subsequent offence was reduced on appeal to take into account the likely impact of the additional detention on the convicted person, the fact that the convicted person had been sentenced at the high end of the range for the second offence, and that there were mitigating circumstances that warranted a reduction.[541] There is nothing controversial in this approach, however it does not apply to the circumstances of Bemba's case for the following reasons.

[537] *See* Bemba Re-sentencing Appeal, para. 162.
[538] Bemba Re-sentencing Appeal, para. 162. Bemba cites one Australian case from the Queensland Court of Appeal, *R v. Barry* in which the convicted person's sentence was reduced on appeal to take into account that she was already serving a sentence of imprisonment in another case, thus better reflecting the totality of her criminal conduct.
[539] *R v. Barry*, para. 18.
[540] *R v. Barry*, para. 1.
[541] *R v. Barry*, paras. 19-20.

- *First*, Bemba was re-sentenced at a time when he had already been released, and where his sentence of imprisonment for the article 70 offences was considered served such that he did not face the prospect of any further detention.

- *Second*, unlike the convicted person in the cited case, Bemba received a sentence of imprisonment that was already at the lower end of the scale for article 70 offences in light of the maximum five-year penalty.

- *Third*, there were no express mitigating circumstances in Bemba's situation. Moreover, the Chamber had already taken into consideration Bemba's time spent in detention when determining his sentence.

175. Bemba similarly takes out of context the ECtHR case he cites.[542] In that case, the ECtHR stated that life imprisonment terms imposed on convicted persons must be subject to regular review, with the possibility of release in order to comply with the European Convention on Human Rights.[543] The case is relevant to the approach to be taken in determining *ongoing detention* in the particular context of life imprisonment terms. It is inapposite in Bemba's case, in which a defined custodial sentence (and not a sentence of life imprisonment) was imposed upon Bemba once he had already been released and faced no further prospect of detention. In any event, Bemba's detention in the Main Case was regularly reviewed and he was given every opportunity to request his release in the Article 70 proceedings. This was entirely consistent with the ECtHR's approach. This approach, as demonstrated above,[544] led the Chamber to release Bemba at the earliest possible stage.

IV.A.5. The Main Case acquittal had no impact on the determination of Bemba's sentence

176. Bemba's claim that the Chamber imposed "further deterrent measures […] because of rather than despite [Bemba's] acquittal" leading to the "appearance that the Chamber viewed

[542] The case is not fully cited in Bemba's Re-sentencing Appeal (*see* para. 163 and footnote 309) but presumably Bemba is referring to: *Vinter & Others v. United Kingdom*.
[543] *Vinter & Others v. United Kingdom*, paras. 110-111.
[544] *See above* para. 109.

[Bemba's] Main Case acquittal and release as a 'windfall' that could diminish the deterrent effect of his Article 70 sentence"[545] is unfounded and should be dismissed *in limine*.

177. Bemba's reasoning mischaracterises the Chamber's statements and findings in the Re-sentencing Decision. *First*, Bemba misunderstands the Chamber's statement that Bemba "continues to have the spectre of this institution hanging over him" despite his acquittal in the Main Case,[546] speculating that it shows "a nexus between Article 70 conduct and [his] acquittal".[547] The Chamber's comment was primarily directed at emphasising the seriousness of the article 70 offences and deterring other article 70 offenders, and was specifically made in response to the Prosecution's argument on its sentencing appeal that the sentence imposed under the first Sentencing Decision did not deter.[548] In no way does the Chamber suggest that Bemba's acquittal in the Main Case was a relevant factor in its determination of the Article 70 sentence. To the contrary, the Chamber has emphatically asserted that the Main Case acquittal had no impact on these proceedings and that the cases have long been understood as being independent of one another.[549] *Second*, Bemba takes the Chamber's finding regarding Kilolo's interview out of context.[550] That Kilolo may have linked the result of the Main Case with the article 70 conduct does not mean that the Chamber did so as well. Moreover, as the context makes clear, the Chamber's findings on Kilolo's interview pertained to a different issue, *i.e.* his words "reveal[ed] no hint of an apology or acknowledgement of wrongdoing".[551] Bemba advances no more than conjecture.

178. Moreover, Bemba errs in stating that the Chamber was influenced by the Prosecution's "attack on the Main Case judgment" so as to "ignor[e]" Bemba's request to consider the consequences of the acquittal.[552] *First*, the Chamber explicitly rejected the Prosecution's

[545] Bemba Re-sentencing Appeal, para. 168 (underlined in original). Bemba repeats this argument in the context of challenging the amount of his fine, *see* Bemba Re-sentencing Appeal, para. 176.
[546] Re-sentencing Decision, para. 138 ("Future accused persons can look at Mr Bemba's conviction as a cautionary example as to what consequences obstructing the court of justice can have. Mr Bemba's acquittal in the Main Case should have been the end to his exposure to the Court, yet he continues to have the spectre of this institution hanging over him because of his obstruction of the administration of justice. Maximum prison sentences are not necessary for this case to matter").
[547] Bemba Re-sentencing Appeal, para. 168.
[548] Prosecution Sentence Appeal, para. 55; *see also* Prosecution Re-sentencing Submissions, paras. 57, 77.
[549] Re-sentencing Decision, paras. 22-23.
[550] Bemba Re-sentencing Appeal, para. 168; Re-sentencing Decision, para. 103 ("[…] The Chamber notes the Prosecution's reference to Mr Kilolo's recent interview in which he described the Main Case acquittal as 'the feeling of a duty accomplished' […] The Chamber certainly agrees that these words reveal no hint of an apology or acknowledgement of wrongdoing. […]")
[551] Re-sentencing Decision, para. 103.
[552] Bemba Re-sentencing Appeal, para. 176.

submissions on the possible impact of the Main Case acquittal on the re-sentencing proceedings.[553] *Second,* the Chamber did acknowledge Bemba's submissions as to the consequences of the *Bemba* Main Case acquittal, but found them to be unconvincing.[554] Bemba does not acknowledge this. *Third*, Bemba fails to show *why* the Main Case acquittal had an impact on his circumstances so as to warrant further adjustments to his sentence, *in addition* to those already made.[555] Further, although he speculates that Bemba's fine of € 300,000 "approaches the reparations figures awarded in other cases",[556] he fails to note that the Chamber had determined that as an appropriate amount reflecting Bemba's enhanced culpability *even before* the Main Case acquittal occurred.[557] The fact that when re-sentencing Bemba, the Chamber remained of the view that the amount of the fine was appropriate considering his enhanced culpability, demonstrates that the Main Case acquittal—rightly—had no impact on the Chamber's assessment of his sentence.[558] Bemba's calculations are in any case incorrect since reparation figures have been substantially higher.[559]

179. For the reasons outlined above, the Chamber correctly applied the totality principle when re-sentencing Bemba. Bemba's submissions should be dismissed.

IV.B. BEMBA SHOWS NO ERROR REGARDING THE FINE IMPOSED

180. Culpability, not solvency, *was* the Chamber's primary consideration in calculating the amount of the fine:[560] the Chamber correctly took into account Bemba's enhanced culpability, owing to his overall coordinating role in the criminal scheme.[561]

181. Bemba incorrectly argues that the Chamber provided no evidential findings of Bemba's enhanced culpability.[562] Rather, the case record accurately reflects the Trial Chamber's

[553] Re-sentencing Decision, paras. 20-25.
[554] *See e.g.* Re-sentencing Decision, paras. 119, 124.
[555] *See above* paras, 154-156.
[556] Bemba Re-sentencing Appeal, para. 176.
[557] Sentencing Decision, para. 261.
[558] *See* Re-sentencing Decision. paras. 127, 134.
[559] The amount for reparations in *Lubanga* was USD 10 M; in *Katanga* USD 1 M and in *Al-Mahdi* E 1.7 M.
[560] *Contra* Bemba Re-sentencing Appeal, para. 173. *See* Sentencing Decision, para. 261 ("Recognising Mr Bemba's culpability, and considering his solvency, the Chamber is of the view that he must be fined EUR 300,000"); Sentencing Appeal Judgment, para. 245 (stating that "[c]ulpability, rather than solvency, should be the primary consideration for a determination of the appropriate type of punishment […] there is no indication in the Sentencing Decision that the Trial Chamber primarily based its determination on Mr Bemba's financial situation").
[561] Re-sentencing Decision, para. 127.
[562] Bemba Re-sentencing Appeal, para. 173.

findings of the enhanced nature of Bemba's culpability—which Bemba disregards. Specifically, the Chamber considered the fact that Bemba was the beneficiary of the common plan,[563] and while he could not participate in the crimes in the same manner as Kilolo and Mangenda because he was detained,[564] he played a directing role in planning, authorising and approving the criminal conduct,[565] he was kept informed at all times,[566] he exerted an authoritative influence over witnesses by instructing Kilolo, knowing that Kilolo would act accordingly,[567] he controlled the payment scheme and authorised the payments to witnesses,[568] and he gave instructions to counsel to present evidence at trial that he knew to be false.[569] The Chamber also correctly took into account the fact that Bemba took advantage of his long-standing position as the president of the MLC and that he abused the rights of lawyer-client privilege that belonged to him as a defendant before this Court.[570]

182. A mechanical comparison of the fine imposed on Kilolo provides no relevant benchmark for calculating Bemba's fine.[571] The Chamber correctly took into account Bemba's individual circumstances, both his specific culpability and his specific solvency, in determining a fine that was proportionate in light of the totality of the sentence and the totality of Bemba's criminal responsibility.

183. While solvency cannot be the primary consideration in determining the reasonable amount of a fine, it is nonetheless a relevant consideration.[572] The Appeals Chamber has said so.[573] The same approach has been applied in domestic jurisdictions, where solvency may result in the increase of a fine in order for it to have a deterrent effect.[574] Ignoring Bemba's

[563] Sentencing Decision, para. 219, affirmed in the Re-sentencing Decision, para. 118.
[564] Sentencing Decision, para. 223, affirmed in the Re-sentencing Decision, para. 118.
[565] Sentencing Decision, para. 219, affirmed in the Re-sentencing Decision, para. 118.
[566] Sentencing Decision, para. 220, affirmed in the Re-sentencing Decision, para. 118.
[567] Sentencing Decision, para. 222, affirmed in the Re-sentencing Decision, para. 118.
[568] Sentencing Decision, para. 220, affirmed in the Re-sentencing Decision, para. 118.
[569] Sentencing Decision, para. 221, affirmed in the Re-sentencing Decision, para. 118.
[570] Sentencing Decision, para. 248, affirmed in the Re-sentencing Decision, para. 118.
[571] *Contra* Bemba Re-sentencing Appeal, paras. 173-174, 177.
[572] Sentencing Appeal Judgment, para. 245.
[573] Sentencing Appeal Judgment, paras. 245, 247.
[574] Australia: *Jahandideh v. R*, paras. 14 (indicating that a fine should have practical impact on the convicted person), 17 ("[C]onsideration of the financial circumstances [of the convicted person] may increase, rather than decrease, a fine in order for it to be a deterrent for the offender"); Canada: Criminal Code, section 734(2) (indicating that absent certain exceptions, a court must be satisfied of the offender's ability to either pay the fine or discharge it), section 737(3) (authorising a court to order payment of a victim surcharge exceeding the prescribed amount in the legislation if appropriate under the circumstance, and the court is satisfied that the offender is able to pay the higher amount); Finland: Finnish Penal Code, Chapter 2, section 4a(1) ("A day-fine shall be set […] at an amount that is to be deemed reasonable, at the time of sentencing, with regard to the solvency of the person fined"), section 4a(2) ("One third of the average gross daily income of the person fined

solvency would have resulted in a fine that had no specific deterrent effect, thus failing to achieve one of the critical purposes of sentencing and resulting in a punishment with no effect.

184. Indeed, Bemba himself argued in his Re-sentencing Submissions that his personal circumstances were a factor, in addition to the gravity of the offence, that was relevant in determining his penalty.[575] Bemba argued that his sentence should consist of a fine that "should still be substantial, when viewed as a percentage of the defendant's available assets".[576] Bemba now resiles from that position, appearing to justify his change of view on the grounds that the Main Case acquittal had achieved various goals of sentencing.[577] His submissions should be dismissed.

IV.C. THE CHAMBER CORRECTLY CONSIDERED THE CONSEQUENCES FOR BEMBA'S PROFESSIONAL LIFE

185. The Chamber correctly gave minimal weight to Bemba's arguments that his convictions had a negative impact on his professional life, specifically Bemba's disqualification from presidential candidacy in the DRC.[578] As the Chamber correctly found, this was "a natural consequence of the circumstances [Bemba] found himself as a result of the criminal behaviour that he has been convicted for".[579] This finding is unassailable.

186. In arguing that the Chamber purportedly erred in dismissing the relevance of the DRC decision disqualifying him from contesting the presidential elections, Bemba misunderstands

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shall be deemed a reasonable day-fine, unless the day-fine is to be set at a larger or smaller amount due to the wealth or maintenance liability of the person fined, or to other circumstances affecting his solvency"); Germany: German Criminal Code, section 40(2) ("The court shall determine the amount of [the daily rate of a fine] taking into consideration the personal and financial circumstances of the offender); Poland: Polish Penal Code, article 33 § 3 ("In setting the daily rate, the court shall consider the income of the perpetrator, his personal situation, family situation, property relationships and his earning capacity […]"); United Kingdom: Criminal Justice Act, sections 164(2) ("The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence"), 164(3) ("In fixing the amount of any fine to be imposed on an offender […] a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court"), 164(4) ("Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine").

[575] Bemba Re-sentencing Appeal, para. 51.

[576] Bemba Re-sentencing Appeal, para. 52; Second Sentencing Hearing, 75:20-24. Bemba, however, has never committed to an amount.

[577] Bemba Re-sentencing Appeal, paras. 166, 171.

[578] Re-sentencing Decision, para. 119.

[579] Re-sentencing Decision, para. 119.

the Statute and the Rules.[580] *First*, Bemba incorrectly invokes the principle of *ne bis in idem* in rule 168:[581] Bemba was not tried before the Court for conduct which formed the basis of an offence for which he had already been convicted. *Second*, Bemba's reliance on the principle of *nulla poena sine lege* in article 23 of the Statute is inapt:[582] his electoral disqualification by the DRC authorities was their prerogative, and did not constitute a "penalty" for the purposes of article 23. Since it was not a "penalty" in this sense, the Court was not required to "preview" or authorise the disqualification.[583] Rather than show any violation of his rights, Bemba misreads the Statute and the Rules. No remedy is warranted.

IV.C.1. The DRC electoral proceedings were not criminal proceedings

187. To claim a purported violation of his rights, Bemba incorrectly relies on the *ne bis in idem* provision in rule 168. Bemba misunderstands rule 168 and the nature of the DRC electoral proceedings in two respects:

- *First*, Bemba was not exposed to a parallel criminal adjudication and an unforeseen penal sanction *via* the DRC electoral proceedings.[584] Since the DRC Constitutional Court's determination was—definitively—*not* an adjudication of his criminal conduct,[585] the Chamber could not have been expected to request the DRC authorities to defer to the competence of this Court.[586]

- *Second*, the DRC Constitutional Court's finding that Bemba was ineligible for presidential candidacy did not amount to a "new, and additional conviction".[587] It follows, therefore that this development need not have "prevented" the Chamber from sentencing Bemba in the Article 70 case.[588]

[580] Bemba Re-sentencing Appeal, paras. 178-194.
[581] Bemba Re-sentencing Appeal, para. 191. *See* rule 168: "In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court".
[582] Bemba Re-sentencing Appeal, para. 180. *See* article 23: "A person convicted by the Court may be punished only in accordance with this Statute".
[583] Bemba Re-sentencing Appeal, para. 180.
[584] Bemba Re-sentencing Appeal, paras. 193-194.
[585] *Contra* Bemba Re-sentencing Appeal, para. 193.
[586] *Contra* Bemba Re-sentencing Appeal, para. 194.
[587] Bemba Re-sentencing Appeal, para. 193.
[588] *Contra* Bemba Re-sentencing Appeal, para. 194.

188. Although Bemba suggests that the Chamber should have intervened (that is, to request the DRC authorities to cease their electoral proceedings),[589] he provides no legal basis for such a power. The Court's relation with States Parties is carefully governed by the Statute and the Rules. Apart from what is specifically provided for in this legal framework, there are no other powers for the Chamber to intervene in the manner that Bemba claims it should have. The Chamber has itself correctly held that the DRC's electoral process manifestly does not fall within the scope of this framework.[590] Likewise, Bemba's passing reference to "Article 119" is obscure: no "settlement of disputes", in the sense of this provision, is germane to the article 70 re-sentencing process.[591]

189. In any event, rule 168 does not apply in this context.[592] With regard to article 70 offences, rule 168 prevents the Court from prosecuting a person for conduct which formed the basis of an offence for which the person was already convicted or acquitted by this Court or another court. Essentially, and as the Chamber has affirmed, the rule regulates the powers of *this Court* in relation to subsequent prosecutions for the same conduct.[593]

- Bemba's argument misinterprets the DRC electoral proceedings. It was before *this* Court that Bemba was charged, tried, convicted and sentenced with respect to article 70 offences—in other words, it was before this Court that he faced criminal prosecution. The DRC Constitutional Court proceedings, by contrast, were not criminal proceedings within the meaning of rule 168, as a number of factors show. The DRC electoral law amendments that Bemba cites do not criminalise any conduct. The law states only that persons sentenced by an irrevocable judgment of corruption are ineligible to run for political office.[594] In other words, the electoral law does not provide any avenue to prosecute individuals for corrupt conduct—the judgment of corruption must have already been rendered against them.

[589] Bemba Re-sentencing Appeal, para. 194.
[590] *See* Bemba DRC Media Material Decision, para. 10 ("[…] The Chamber does not consider that a DRC court attaching electoral consequences to Mr Bemba's convictions in this case amount to some sort of jurisdictional conflict of the kind the Bemba Defence asserts").
[591] Bemba Re-sentencing Appeal, para. 188.
[592] *See* Prosecution Response DRC Media Material Request, para. 3.
[593] Bemba DRC Media Material Decision, para. 9.
[594] Article 10(3) of the DRC Electoral Law ("*Sans préjudice des textes particuliers, sont inéligibles:* […] *3. les personnes condamnées par un jugement irrévocable du chef de viol, d'exploitation illégale des ressources naturelles, de corruption, de détournement des deniers publics, d'assassinat, des tortures, de banqueroute et les faillis*").

- The purpose of the electoral law is to determine the eligibility of candidates for political election.[595]

- Only when a person seeks candidacy for political office is the electoral law triggered to determine their eligibility to do so.[596]

- Bemba was not charged with any crime concerning his article 70 conduct before the DRC Constitutional Court. The DRC Constitutional Court was only called upon to determine whether the conduct underlying his article 70 convictions amounted to a judgment of corruption within the meaning of the DRC's electoral law.

190. The Chamber properly rejected Bemba's attempt to muddy the waters as to the nature of the DRC Constitutional Court proceedings. As the Chamber correctly stated, it was completely within the DRC authorities' prerogative to ensure that candidates running for political office are eligible to do so,[597] and it would be foreseeable to any potential candidate that they would be screened for their eligibility to contest elections.[598] To suggest that the DRC Constitutional Court was not "authorised to initiate […] proceedings" against Bemba[599] is a further unconvincing attempt to paint the DRC proceedings as a "final adjudication"[600] of his criminal conduct, so as to foreclose the jurisdiction of the Chambers of this Court.

191. For these reasons, the DRC Constitutional Court proceedings did not amount to a further trial for the same conduct underlying the article 70 convictions, and therefore, *ne bis in idem* does not apply. Bemba's submissions should be dismissed.

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[595] *See* DRC Electoral Law, Explanatory Statement ("*[L]a présente loi poursuit les objectifs suivants:* […] *3. Moraliser le comportement des acteurs politiques par le renforcement des conditions d'éligibilité des candidats aux différents scrutins*").
[596] *See* DRC Electoral Law, article 21(1) ("*Une candidature est irrecevable lorsque le candidat: 1. est inéligible conformément aux articles 9 et 10 ci-dessus*"), article 25 ("*La Commission électorale nationale indépendante arrête et publie provisoirement les listes des candidats à la date fixée par elle. Dans un délai de cinq jours suivant la publication des listes provisoires des candidats, ces listes peuvent être contestées devant la juridiction compétente* […]"), article 27(1) ("*Les juridictions compétentes pour connaître du contentieux concernant une déclaration ou une liste de candidature sont: 1. la Cour constitutionnelle, pour les élections présidentielle et législatives*").
[597] Bemba DRC Media Material Decision, para. 10.
[598] *Contra* Bemba Re-sentencing Appeal, para. 194 (alleging that Bemba was subjected to an "unforeseen penal sanction[]").
[599] Bemba Re-sentencing Appeal, para. 180.
[600] Bemba Re-sentencing Appeal, para. 194.

IV.C.2. Bemba's electoral disqualification was a natural consequence of his criminal conduct

192. Bemba also mischaracterises his disqualification from the DRC presidential elections as a "penalty" or "sanction" within the meaning of article 23 of the Statute.[601] Article 23 limits the Court's sentencing framework: a person convicted by the Court cannot be punished in ways that are not set out in the Statute or the Rules.[602] In claiming that the principle of *nulla poena sine lege* enshrined in article 23 of the Statute has been violated,[603] Bemba errs in two ways: *first*, Bemba's electoral disqualification was not a "penalty" within the meaning of article 23; *second*, the Chamber properly assessed the electoral disqualification when it re-sentenced Bemba. Bemba does not show otherwise.

193. Bemba incorrectly asserts that the DRC electoral disqualification amounted to a criminal penalty within the meaning of article 23,[604] relying on the ECtHR case of *Matyjek v. Poland* to support his claim. That case is inapposite to these proceedings. In *Matyjek v. Poland*, the ECtHR found that the organisation and the course of the proceedings in that case were based on a criminal trial subject to criminal procedural rules, with appeal available against the first instance and a cassation appeal.[605] By contrast, and as shown above, the DRC electoral proceedings cannot be compared to criminal proceedings. Further, the applicant's conduct was being examined for the first time by the ECtHR to determine whether it violated the applicant's conditions of holding office, and whether punitive or disciplinary measures were required as a result. Bemba's conduct was not examined *de novo* before the DRC Constitutional Court, but rather only for the purpose of establishing whether it amounted to a judgment of corruption.[606] No relevant comparisons can be drawn between that case and Bemba's circumstances.

194. Similarly, Bemba's reliance on the ICTY Appeals Chamber's conviction and sentencing of Milan Vujin for contempt of the Tribunal is misplaced.[607] In sentencing Vujin, the ICTY Appeals Chamber directed the Registrar to consider striking him off the list of assigned

[601] Bemba Re-sentencing Appeal, paras. 179, 180.
[602] Lamb in Cassese, p. 764; Schabas & Ambos in Triffterer *et al.*, "Article 23: Nulla poena sine lege", p. 970, mn. 9.
[603] Bemba Re-sentencing Appeal, para. 185.
[604] Bemba Re-sentencing Appeal, paras. 191.
[605] *Matyjek v. Poland*, paras. 49-50.
[606] *Contra* Bemba Re-sentencing Appeal, para. 193.
[607] *Contra* Bemba Re-sentencing Appeal, para. 193.

counsel before the ICTY and reporting his conduct to his professional body, and stated that it had determined Vujin's punishment (a fine) on the basis that the Registrar would carry out these actions.[608] The professional sanctions that Vujin were to face would prevent him from appearing as counsel in the Tribunal, and were a result of his misconduct in that very Tribunal. The Appeals Chamber's approach does not evince any acknowledgement that such sanctions might amount to parallel criminal proceedings and thus trigger the applicability *ne bis in idem*.[609] Moreover, unlike Vujin, Bemba was not a long-standing member of any profession at the time of his sentencing who then faced professional sanctions. Indeed, the Chamber acknowledged a similar distinction.[610] In any event, as noted above, the Chamber did not disregard the impact on his professional life, but appropriately gave it minimal weight.[611]

195. Without commenting on the merits of the DRC authorities' actions in respect of Bemba's electoral disqualification (and it is unnecessary to do so in any event), the Prosecution observes that, as a matter of general principle, it would be counter-intuitive to suggest that a prior criminal conviction would not be foreseeably relevant in determining a person's eligibility for political office, let alone for presidential office.[612] Bemba seeks to characterise his disqualification not only as a criminal penalty, but one that violated his right to run for public office.[613] Bemba's claim is a significant overreach—while there is a fundamental right to civic participation through voting and running for public office, this right is not absolute and is subject to reasonable restrictions.[614] Bemba is already aware of this—the Trial Chamber in the Main Case denied his application for provisional release so as to register for elections in the DRC in 2011, finding that his inability to register for the DRC elections was an "unavoidable consequence" of his status as an accused and detained person in this Court and was not an unreasonable restriction of Bemba's right to participate in the

[608] *Vujin* Contempt Judgment, paras. 168-173.
[609] *Contra* Bemba Re-sentencing Appeal, para. 193.
[610] Re-sentencing Decision, fn. 200 (recognising the difference between a total prohibition from working in country of residence as an individual circumstance and mere harm to one's career which does not constitute a mitigating factor).
[611] Re-sentencing Decision, para. 119.
[612] *Contra* Bemba Re-sentencing Appeal, paras. 190, 193.
[613] Bemba Re-sentencing Appeal, para. 192.
[614] 27 June 2011 *Bemba* Interim Release Decision, para. 70 ("The Chamber is mindful that participation in the democratic process through voting in elections or running for public office is a fundamental right, enshrined in key human rights instruments such as the ICCPR and the ECHR. But these instruments, and case law decided pursuant to them, make clear that the right to participation in the democratic process is not absolute and is subject to reasonable restrictions").

democratic process.[615] The Appeals Chamber upheld this view.[616] The right to civic participation is one that can be expressed through numerous avenues, not just through contesting public office. Bemba has not been prevented from exercising his right to participate in the public life of his country.[617] Bemba has only been prevented from potentially serving as his country's president at this stage.

196. Bemba's disqualification from political candidacy must therefore be seen as a natural consequence of the circumstances he finds himself in as a result of his criminal conduct, as the Chamber has rightly determined.[618]

197. Moreover in relation to article 23, Bemba's reference to submissions made before the Appeals Chamber on any "vertical effects" of other specific statutory provisions in the context of the *Situation in Darfur* and academic blog posts commenting on that litigation[619] should be dismissed *in limine*. The *Bashir* litigation is *sub judice* pending the Appeals Chamber's decision: the Prosecution cannot comment on its submissions at this time, nor can the Appeals Chamber do so. Bemba's attempt to engage with this unrelated litigation is inappropriate and should be discouraged. That said, his submissions are inapposite: in the *Situation in Darfur*, the question of vertical and horizontal effects was considered in the very different context of States Parties' cooperation obligations and the operation of article 27 of the Statute. There is no meaningful comparison to be made with this case.[620]

198. Since Bemba erroneously interprets the scope and application of article 23 and mischaracterises the nature of his electoral disqualification, Bemba's claim regarding a violation of the principle of *nulla poena sine lege* must fail.

199. For all the reasons above, Ground 3 of Bemba's appeal should be dismissed.

[615] 27 June 2011 *Bemba* Interim Release Decision, para. 72.
[616] 19 August 2011 *Bemba* Interim Release AD, para. 85.
[617] *Contra* Bemba Re-sentencing Appeal, para. 179.
[618] Re-sentencing Decision, para. 119.
[619] Bemba Re-sentencing Appeal, paras. 181-183.
[620] *Contra* Bemba Re-sentencing Appeal, paras. 181-183.

V. CONCLUSION AND RELIEF

200. For all the reasons above, the Prosecution requests the Appeals Chamber to dismiss Bemba's Re-sentencing Appeal.

Dated this 18th day of February 2019
At The Hague, The Netherlands. [621]

[621] The Prosecution hereby makes the required certification: *Al Senussi* Admissibility AD, para. 32.