International Criminal Court
Trial Chamber VII - Courtroom 1
Situation: 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
ICC-01/05-01/13
Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and Judge Raul Pangalangan
Sentencing Hearing
Tuesday, 13 December 2016
(The sentencing hearing starts in open session at 9.05 a.m.)
THE COURT USHER: [9:05:18] All rise.
The International Criminal Court is now in session.
PRESIDING JUDGE SCHMITT: Good morning.
Could the court officer please call the case. And I understand that you have to make a short, another announcement as I've understood it.
THE COURT OFFICER: [9:05:46] Thank you, your Honour. Situation in the Central African Republic, in the case of The Prosecutor versus Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, case number ICC-01/05-01/13.
Everyone please kindly be informed that the transcript of yesterday's hearing will bear a number T-53 and today's transcript will bear a number T-54. Please accept our apologies for the mistake.
PRESIDING JUDGE SCHMITT: Thank you very much.
And could counsel please introduce for themselves, Mrs Struyven for the Prosecution,

please.

MS STRUYVEN: Thank you, Mr President. For the Prosecution today we have Nema Milaninia, Sylvie Wakchom, Sylvie Vidinha, Ester Kosova and myself, Olivia Struyven, and we will be joined by Kweku Vanderpuye, the senior trial lawyer, shortly.

PRESIDING JUDGE SCHMITT: Thank you very much. And for the Defence please.

MR KARNAVAS: [9:06:49] Good morning, your Honours. For Mr Kilolo is Michael Karnavas, myself; Steven Powles, Lueka Groga and Rosalie Mbengue. Thank you.

PRESIDING JUDGE SCHMITT: Thank you. And Mr Taku.

MR TAKU: May it please your Honours. I appear for Mr Arido, who is present. With me today is Mr Michael Rowse.

PRESIDING JUDGE SCHMITT: Mr Gosnell.

MR GOSNELL: Good morning, Mr President and your Honours. Appearances for Mr Mangenda are the same as yesterday. Thank you.

PRESIDING JUDGE SCHMITT: Mr Kilenda.

MR KILENDA: (Interpretation) Good morning, your Honours. Our team is the same as the previous day.

MS TAYLOR: Good morning, Mr President, your Honours. The Bemba Defence is also the same. Thank you.

PRESIDING JUDGE SCHMITT: Thank you.

Have counsel decided amongst themselves who will start with the statements? Since somebody is rising, which is Mrs Taylor, I assume that you are the first to speak.

MS TAYLOR: Yes, that is correct. Thank you very much, Mr President.

PRESIDING JUDGE SCHMITT: Then you have the floor.

MS TAYLOR: Good morning, Mr President, your Honours.

In their sentencing submissions the Prosecution requested 8 years for Mr Bemba. They requested this for deterrence, to send a message. Eight years. The average custodial sentence imposed by other courts and tribunals is six months, but the Prosecution wants the Chamber to throw out this consistent sentencing practice and impose a sentence which is 16 times greater than any other average for Mr Bemba. They want 8 years for a contempt case.

Now, at the ICTY, Zlatko Aleksovski, a commander of a prison camp convicted for subjecting 500 prisoners to physical and psychological mistreatment, including using them as human shields, on appeal in a case where there was no guilty plea, over 500 victims, he received 7 years.

Mario Čerkez, convicted for murder, cruel treatment in relation to about 300 victims, no guilty plea. On appeal he received 6 years.

Milan Gvero, for being -- convicted for being part of a joint criminal enterprise that terrorised and committed cruel treatment against thousands of Bosnia Muslims at Srebrenica, no guilty plea. For this he received 5 years, three years less than the sentence requested by the Prosecution in this case.

Miroslav Kvočka, convicted for crimes at Omarska camp, including his personal involvement in the murder of 2 detainees, no guilty plea. He received 7 years.

Co-defendants Milojica Kos and Dragoljub Prcac, no guilty plea. They received 5 years each, again, three years less than what the Prosecution is asking for Mr Bemba.

All of these defendants received sentences for war crimes, crimes against humanity that were less than what the Prosecution requested for Mr Bemba.

Now, what message does it send to the thousands of victims of crimes that the ICC

thinks that offences against the administration of justice are graver than murder, cruel treatment, using human shields and forcibly displacing thousands of people?

At the ICC, Thomas Lubanga, convicted for the war crime of recruiting and using child soldiers. Children were killed, abused. He did not plead guilty. He received 14 years and no fine.

Germain Katanga, convicted for war crimes and crimes against humanity for his role in being part of a joint criminal enterprise to wipe out Bogoro, he did not plead guilty. He was convicted to 12 years and released after serving just over 8, 8 years.

If the aim of sentencing is deterrence, if the aim is to send a message, what message does it send to the victims of Bogoro that the ICC Prosecution thinks that the pain they suffered from the loss of their loved ones is roughly similar to the harm caused by a contempt offence.

What kind of deterrence will there be for future war criminals if the message being sent by this case is that the ICC treats and sentences war crimes and crimes against humanity in roughly the same manner as contempt offences.

The golden thread for sentences is that they have to be necessary. They have to be proportionate to sentences imposed by other courts and tribunals for similar conduct. But if the sanctions imposed in this case are completely at odds with the sentencing tariffs, this will only serve to raise the question why is it different? Why is the ICC treating Jean-Pierre Bemba in a manner that is so vastly different than, for example, Vojislav Šešelj, someone who, apart from disclosing confidential information concerning protected Prosecution witnesses, endangering their safety, repeatedly insulted the Court, someone who referred to the ICTY Prosecutor by a word I don't even want to say in court, someone who engaged in repeated contempt, three separate convictions, but received a maximum of only two years.

Issuing disproportionate sentences will only serve to undermine the legitimacy of this Court. It will create a clear impression that the ICC is meting out vastly harsher treatment to Mr Bemba as compared to the treatment of other defendants at the ICTY, ICTR or Special Court for Sierra Leone.

It is also striking the sentence requested by the Prosecution for Mr Bemba, 8 years to be served consecutively, would, if granted, equate to the total sentence of 26 years. Now, that's almost exactly what they requested Trial Chamber III to impose in the Main Case in June. And on appeal, they've also called for Mr Bemba to be given at least 25 years. There is now an obvious appearance that by calling for a long sentence in the contempt case, the Prosecution is using this case as a vehicle for getting the sentence they failed to obtain in the Main Case, to re-litigate the gravity of Mr Bemba's conduct as head of MLC.

This even comes through in their sentencing arguments that the Chamber should rely on Article 5 penalties and they should aggravate Mr Bemba's sentence due to his position in the MLC.

But this is not the purpose of Article 70. Contempt cases cannot be used as a back-up to pursue a defendant when the Prosecution's strategy in the Main Case fails to bear fruit.

Contempt is an ancillary power that aims to assist the Court's main purpose, not supplant it.

States built this Court, they signed up for it because they thought its time and resources would be poured into investigating and prosecuting the most serious crimes known to humanity. For that reason the ICC stands for International Criminal Court, not international court for contempt.

But in this case the Prosecution used these powers and used these resources to treat a

simple contempt case as if it was a war crimes case. During the investigation, states were under the impression that they were being asked to engage in extraordinarily intrusive measures because the defendants in this case were suspected of genocide, war crimes, crimes against humanity, but they weren't. And the defendants have yet to receive a remedy for this false and harmful labelling.

And now the Bench is being asked to sentence five defendants whose have been convicted of non-violent offences as if they had committed war crimes or crimes against humanity.

It's time to strip this case of any exaggerated rhetoric. Mr President, your Honours, I would respectfully invite you to disregard any attempt to inflate these proceedings into an affair befitting Ozymandias, the gargantuan ruler in Shelley's poem whose threatening words ended up disappearing into mere sand and dust.

The Prosecution's compass in this case is geared towards war crimes or crimes against humanity, and that is simply the wrong direction.

The Defence therefore urges you, respectfully urges you, to view the judgment's findings through the lens of appropriate and reasonable contempt sentencing principles.

To that end, today I intend to address the following matters: Fundamental principles that should apply to the sentencing of contempt cases, the principles of culpability in this case and the limits of Mr Bemba's culpability, the punishment that Mr Bemba has already incurred, and mitigating factors.

In terms of the first issue, in its July 2014 judgment on provisional release, the Appeals Chamber found that it would be improper to exaggerate the gravity of offences in this case. A contempt case should not be treated as if it was a war crimes case.

Given this direction, it's clearly improper for the Prosecution to request the Chamber to impose a sentence that exceeds the maximum sentence for contempt offences and exceeds it by three years and to impose a fine that takes into consideration 75 per cent of the accused's assets rather than the 50 percent mandated by Article 70.

The Prosecution's attempt to do so simply defeats the purpose of the maximum set out in Article 70(3).

If this purpose only applied to specific charges rather than the overall term, this would mean that it could be possible to impose 5 years for each count; five plus five plus five ad infinitum. This would mean that there is no upper maximum. The word "maximum" in Article 70(3) would in effect be meaningless.

The drafters chose to establish a clear, a transparent maximum and it is now the responsibility of the Chamber to interpret this provision in a manner that there is a pre-established upper threshold.

The Prosecution's attempted to rely on Article 78(3), but that is a provision that has no applicability to Article 70. It refers to crimes, not offences, as reflected in its reference to Article 77, not Article 70. And it would also be inconsistent with the practice of other international courts and tribunals. The sentences imposed by those courts very rarely approach the maximum limit, and they have never exceeded it.

And these courts, they've never exceeded it for good reason. To have a real impact on the integrity of the proceedings, contempt proceedings need to be prosecuted, adjudicated quickly, efficiently. This purpose isn't served by multiple overlapping counts which just aim to drive up the sentence.

It would mean that the defendant could be held hostage by the Prosecution's charging policy. The Prosecution could draw and bulk up a relatively simple contempt case with a purpose of merely evading the 5 year limit.

Doing so would also result in sentences that are simply unenforceable. At present there are no agreements with States to take persons convicted of contempt sentences and there will be necessary delays in finding such a State. From a practical perspective, this means to put these people back in jail or to keep them in jail, the Court would need to go back to the Assembly of States Parties and explain in these straightened times the Court even needs a significant amount of more money to keep these people in detention, and we're talking about hundreds of thousands of euros, or we need more State cooperation to sanction defendants who have already been in jail much longer than the average sentence at other courts.

Mr President, your Honours, this only serves to underscore the vast gap between what the Prosecution is asking for in this case and the reality which should apply. This case exists in the real world and has to apply real life sentences.

Apart from the fact that the specific sentence proposed by the Prosecution is ultra vires as concerns the maximum threshold, the more important point is that a custodial sentence is neither necessary nor proportionate as a sanction for Mr Bemba.

In this July 2014 appeals judgment the Appeals Chamber stated, at paragraph 67, "The provisions of the Statute have to be applied like every other provision -- in the detention provisions, like every other provision, must be interpreted and applied in accordance with internationally recognized human rights."

And according to the Appeals Chamber, when you do this, you come to the conclusion that there is an exceptionality of detention.

This exceptionality of detention is reflected in human rights principles concerning sentencing. They stress that deprivation of liberty should only be regarded as a sanction of last resort.

It should only be imposed insofar as it is necessary to meet a pressing societal need,

and it should only be used in a proportionate manner.

This exceptionality of detention is reflected in the wording of Article 70(3). The Article presents the Chamber with a clear choice between imposing a custodial sentence or a fine. This "or" cannot be ignored. The choice between a custodial sentence and a fine cannot be arbitrary or discriminatory. 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.

It is necessary to start with a blank slate. The burden then falls on the Prosecutor to establish beyond a reasonable doubt why imposing Mr Bemba with a fine or a suspended fine would not be an adequate remedy, why it would not be an appropriate sanction.

Since this is the first contempt case at the ICC, it's instructive to consider how the ICTY dealt with a similar set of circumstances in its first contempt case and what sanction was considered sufficiently serious to act as an effective deterrent.

Now, in the Vujin case, the ICTY Appeals Chamber found defendant, the former lawyer Duško Tadić to be guilty of serious acts of contempt, and these acts involved the submission of false evidence and manipulating witnesses. The Chamber nonetheless determined that a custodial sentence would not be appropriate. They imposed a fine of 15,000 guilders, and that's roughly 7,000 euros in today's money. So if 7,000 euros was considered by a Bench of five ICTY Judges to be an adequate and appropriate sanction for a lawyer, an officer of the court, and an effective deterrent for all future ICTY contempt cases, why is anything more required to sanction Mr Bemba?

If there was no pressing societal need to jail Mr Vujin, who is personally responsible for convincing witnesses to lie, why is there a need to jail Mr Bemba?

There is certainly no need to detain Mr Bemba in the Article 70 case to protect society, because the charges involved no suggestion of violence, threats or intimidation tactics.

There is also no need to detain Mr Bemba to protect the integrity of the proceedings when, in 2014, the Prosecution served the underlying evidence concerning the 14 witnesses, Mr Bemba, through his Defence, took steps to protect the integrity of the Main Case. The Defence renounced its reliance on these 14 witnesses July 2014, two and a half years ago.

Now, of course, the Prosecution tried to minimise that yesterday and claimed that the Defence took over a year to do so. Well, it's simply not correct. The Article 70 charges in this case were not filed until 30 June 2014. The Defence final trial brief was filed in August 2014, and this was even several months before the Article 70 charges were confirmed.

Since that date the Bemba Article 70 Defence did not call fact witnesses. The Defence did not elicit testimony concerning the facts of the Main Case from any witnesses in this case, whether called by Prosecution or Defence. Mr Bemba presents no risk to the ongoing integrity of the proceedings.

Imposing a custodial sentence simply serves no purpose. It would be a complete waste of the resources of the Court.

Apart from the fact that the Prosecution has failed to justify the imposition of a custodial sentence, it has also failed to address why a suspended sentence is not the most appropriate sanction in this case.

A suspended sentence should be the first port of call for any non-violent offence. If

the aim is to defer future conduct, then a suspended sentence provides much more leverage to do so.

I will now turn onto my second topic: Who bears the culpability in this case?

In deciding whether these men should go to jail for even a month more than they have already served, it is necessary to locate their responsibility within the conduct of the primary perpetrators in this case, and that is the witnesses themselves. As the Chamber is aware, Mr Bemba is not from the Central African Republic. His lawyers are not from the Central African Republic. They were reliant on people on the ground to help them find witnesses, and these witnesses have affirmed in their testimony the Defence were looking for genuine witnesses, witnesses qui a vercule le chose, lived the events. Defence emails also reflect Mr Bemba's desire to find genuine sincere witnesses.

D-2, D-3, D-23, now D-6, they've admitted to creating entirely false personas, false on material issues, and that they hid this from the Defence and from Mr Bemba, who from his jail cell in Scheveningen would have had no way to verify things.

D-6 was even clear that apart from lying to Maître Kilolo, he lie to the Defence even when interviewed by them in 2014 and 2015.

The witnesses lied in relation to the most material of facts, and they did so for their personal reasons. They wanted the benefits that came from the Court itself. They wanted protective measures. They wanted relocation. They wanted the daily subsistence allowance that comes when you testify in The Hague. They schemed to exploit the Defence for their own private purposes. And they didn't have a change of heart and recant to Trial Chamber III. They only provided testimony after they were dragged over coals by national authorities, after they were provided the equivalent of an immunity agreement by the Prosecution. These witnesses had no

mitigating circumstances.

None of these witnesses have been prosecuted. None of them have been fined. To the contrary, they've received substantial financial benefits and assistance, much more than the amounts that are the subject of this case.

To put Mr Bemba in jail, to put any of these defendants in jail when there are no findings that he was aware or intended for these witnesses to lie about who they were and while these witnesses continue to enjoy the fruits of their original transgressions, it simply isn't fair, just or proportionate.

In terms of Mr Bemba's culpability, the Trial Chamber's findings can be distilled to four categories: His involvement in coaching, violations of the privileged telephone line, payments to witnesses for the purpose of ensuring that they testified for him, his involvement in the October to November 2013 discussions regarding the existence of a contempt investigation.

The Prosecution has relied both on the last series of events and the contravention of the detention unit regulation as aggravating factors.

These two findings were a fundamental component of the Chamber's conclusions regarding the existence of a common plan, and this is reflected explicitly in the judgment at paragraph 803.

It is therefore impermissibly duplicative to rely on these findings in order to aggravate a sentence.

In terms of the issue of coaching, the Chamber will be aware that the Defence has filed a notice of appeal. There is therefore an obvious difficulty in appearing before the Chamber to address findings that may be contested on appeal.

The Defence nonetheless respectfully advances the position that as concerns these findings, before imposing a specific sanction on Mr Bemba, it would be appropriate to

carefully assess the scope, the gravity of Mr Bemba's conduct, as concerns each set of findings.

The principles of sentencing require that before sanctioning Mr Bemba, the Chamber must satisfy themselves beyond reasonable doubt that there is probative evidence that Mr Bemba was personally blameworthy in each instance.

The Chamber has convicted Mr Bemba for being a member of a joint plan. In the judgment the Chamber noted the Prosecution's failure, even at the end of the case, to articulate a definition of the common plan. The Chamber nonetheless found it could infer or conclude that such a plan existed from the evidence.

This means that in concrete terms the parameters of Mr Bemba's involvement in his plan must be determined by the evidence in the case.

You can infer the existence of a common plan on the basis of evidence of joint action, but you can't infer the existence of a common plan on the basis of inferences of joint action.

This would be an impermissibly circular inference. You can't have an inference of an inference.

So let's review the evidence. In terms of the allegations of coaching, the first piece of evidence cited by the Chamber concerning Mr Bemba is a conversation dated 29 August 2013. This means that there is no evidential proof of Mr Bemba's involvement in concerted action directed to the common plan of coaching before this date, before 29 August 2013.

The evidence itself is untested third-hand hearsay. It's a conversation.

Mr Bemba reports a conversation he himself had with Mr Bemba, but we have no record of that original conversation. We don't know if Mr Mangenda used the same phrases or words as Mr Bemba. It's therefore well-nigh impossible to conclude

beyond reasonable doubt what Mr Bemba's knowledge and understanding might have been on the basis of a conversation that might and might not have taken place. Mr Mangenda refers to what he told the client, but he does not refer to Mr Bemba's response. We have no evidence that Mr Bemba endorsed or agreed with the views put to him. And it would be impermissibly speculative to guess. Mr Bemba as a defendant cannot and should not be sanctioned on the basis of evidence that a member of his team expressed a view to him. He is not accountable for their views. The Chamber also relied on a conversation between Mr Mangenda and Maître Kilolo that occurred the next day. In relevant sections Mr Mangenda refers to "notre frère" and not "le Client." He also refers to "Mike" and "Romeo Mike" separately. If we accept the "notre frère" as Mr Bemba, we still do not have a record of the precise language used by notre frère. It is untested third-hand hearsay. It's not possible to ascertain on the basis of a rushed in code conversation the specific manner in which the questions were initially put to Mr Mangenda.

Mr Mangenda himself says that his version is "c'est un peu en gros ce qu'il m'aviat demandé de transmettre." I apologise for my French. It was more or less what the person said to him. But we don't know how much more, how much less, and we don't know what got lost in translation.

The conversation also concerns contact before the cut-off point with a witness or even a potential witness, but this was not prohibited or improper.

It is the lawful prerogative of an accused to ask his lawyers to meet with a witness and it is a lawful prerogative of the accused to ask his lawyer to test the witness on certain issues, to ensure that the Defence is in a position to make an informed choice as to whether to put evidence forward.

In its decision of 15 April 2015, and that's decision 907, this Chamber recognized this

right. This Chamber found that it was contrary to the Statute to require an accused to produce evidence that was potentially harmful to its case.

It might not happen in civil law countries, but in adversarial criminal cases throughout the world, the accused sits down with his lawyers. He provides his case, the accused's position about what happened, when it happened, where it happened, who might be in a position to corroborate this case.

The accused then asks his lawyer, "Go out and find evidence that supports my case."

Yesterday the Presiding Judge emphasised that of course Defence counsel may defend under the assumption that the accused is not guilty. There is therefore nothing wrong with investigating the accused's case and putting the accused's case to witnesses.

In terms of how this case is put, international criminal courts are adversarial. The Defence investigate. They call their own witnesses. And as confirmed by the ICTY Appeals Chamber in the Krstić appeals decision of 1 July 2003, paragraph 8, it would be professionally irresponsible for a lawyer to call a witness to give evidence cold, that is without knowing what he will say in relation to the client's case. Lawyers should not be expect -- they should not be expected to talk to the clouds when the witness appears in court.

Of course, in carrying out such instructions, lawyers must ensure that they don't suggest or encourage the witness to provide false testimony or refuse to answer questions. But that's the obligation of the lawyer, not the client, and it turns heavily on the manner in which the instructions are executed, again, the duty of the lawyer, not the instructions themselves.

Commentary prepared by the American Bar Association, the ABA, states that in putting a case to the witness, preparation may include the following: Discussing the

role of the witness and effective courtroom demeanour, discussing the witness's recollection and probable testimony, revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's memory in that light, discussing applicability of law to the events in question, reviewing the factual context into which the witness's observations will fit, reviewing documentary or physical evidence that will be introduced, discussing possible lines of cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest a choice of words that might be employed to make the witness's meaning clear.

This was set out in CAR-D20-0007-0031.

The ABA model code does not bind the ICC, but it is mitigating that the conduct is expressly permitted by a code which formed the basis for the ethical codes of the ICTY and the ICTR. It is mitigating that these forms of preparation are undertaken in many adversarial jurisdictions, including the ICTY and ICTR. They're undertaken on a daily basis, without harming the integrity of the proceedings, without resulting in sanctions of 8 years.

Given this context, it is unfair to sanction Mr Bemba due to the manner in which such instructions may have been communicated or understood.

It is unfair to sanction him for the language used by a third person and nuances that Mr Bemba himself, a layperson, would not have appreciated.

As concerns subsequent conversations between Mr Bemba and his lawyers in relation to D-15 and D-54, the salient point is that they occurred after contacts between the lawyer and the witness had already taken place. Since they occurred after the contact had occurred, Mr Bemba's passive responses to Maître Kilolo's questions had no causal impact on the conduct.

Causal nexus is an essential element for sentencing.

In the Ngudjolo acquittal judgment, Judge Van den Wyngaert emphasised that to underpin a conviction under the joint control theory of the crime, "...there must, in my view, be a direct contribution to the realisation of the material elements of the crime. This follows from the very concept of joint perpetration. Under Article 25(3)(a), only persons who have committed a crime together can be held responsible. The essence of committing a crime is bringing about its material elements." Paragraph 44 of her concurring opinion.

In terms of the application of this principle to sentencing, in the absence of a causal nexus between the accused's conduct and the harm suffered, the accused cannot be considered blameworthy. An accused cannot be punished for acts that don't result from culpable conduct on their part, and this was recognized by the ICTY Appeals Chamber in its judgment in the Ranko Češić case. This was dated 11 March 2004. Although the Appeals Chamber accepted that relatives had suffered harm after the death of a victim, the Chamber found that in the absence of evidence concerning the causation between the accused's conduct and the specific harm suffered by the relatives, they could not take it into account in sentencing. That's paragraph 42 of the judgment.

By the same token, in order to take into account the impact on the integrity of the proceedings on Mr Bemba's sentence, it's necessary to establish a causal link, a causal nexus, between his conduct and the specific harm suffered.

Causality is such a fundamental principle of criminal law that it's not enough to claim that people did things for Mr Bemba's benefit. For the purpose of sanctioning Mr Bemba, it doesn't matter why and what X, Y, Z did. It matters why and what Mr Bemba did. And if we examine these conversations carefully, there is simply no

evidence that Mr Bemba made an intentional contribution to illicit conduct.

The conversation of 12 September occurred at 7.58 in the morning, just before the Court hearing. The Trial Chamber has read and interpreted this intercept on the basis of the other evidence in this case. I think it's fair to say that on the basis of the masses of disclosure of intercepts, emails, call data records, the Chamber is in a position to view the events and to see what's happening on each moving part as if they were an all-knowing, all-seeing entity perched on high. But that same power was not possessed by the moving parts. The moving parts, Mr Bemba, he didn't share that all-seeing perspective. And in fact, he had the most limited access to information of anyone in this case. He was a detainee. He had no power to collect or verify information. If someone didn't clearly tell him that something was happening, he had no way of knowing it was happening.

And there is simply nothing in the text of this conversation which refers to contact between Mr Kilolo and D-15, nothing.

Given that, at this time period, the Defence team as a whole were formulating questions for D-15, it cannot be concluded beyond reasonable doubt that Mr Bemba would have known that it was illicit or improper for him to say, "Okay, okay, okay" to three questions being run by him. And that's all he does. He doesn't propose the questions. He doesn't propose answers to the questions. And although it has been described as a report, he doesn't ask Maître Kilolo to report on what answers will be provided.

The only positive contribution from Mr Bemba is to suggest that the issue of the Thurayas be addressed in closing arguments, and that was a suggestion that wasn't even directed to testimony.

This means that Mr Bemba's sole contribution in this conversation had no causal

nexus to false testimony.

The same holds true for the conversation concerning D-54. Mr Bemba starts the conversation complaining he couldn't reach Maître Kilolo the night before. He doesn't know what he was doing. Clearly, there could not have been a prearranged plan for Maître Kilolo to contact D-54 during the night, because if there had, Mr Bemba would have known exactly what he was doing.

Mr Bemba also makes clear that the purpose of the call was to discuss political matters, and that's what he wants to focus on.

So there is no evidence from this conversation that Mr Bemba knew, that he planned for Maître Kilolo to contact D-54 or that he contributed to it taking place. There is no causal nexus between his conduct and the harm suffered.

I'll now move onto the topic of detention unit violations.

In a judgment, the Chamber found that Mr Bemba had abused the privilege line by speaking to D-55, Mr Babala, and D-19.

I'll address the causality and gravity of each in turn.

With D-55, this was a witness that the Chamber found to be credible in his testimony. During re-examination, D-55 was asked by the Prosecution to recount the contents of his conversation with Mr Bemba. He did so by stating it was very short, Mr Bemba did not identify himself. He just expressed gratitude to D-55 for having agreed to testify as a witness.

D-55 testified that they did not discuss the contents of his testimony and Mr Bemba did not promise him anything in exchange for his testimony.

In the judgment, the Chamber found that D-55 had been promised that he would benefit from the good graces of Mr Bemba. But there is simply no evidence that Mr Bemba knew or requested such a promise to be made, and there is more

importantly no evidence that Mr Bemba took any steps in furtherance of this most nebulous of promises.

For example, Mr Bemba didn't call anyone and ask them to assist D-55. It is also telling that neither Mr Bemba nor D-55 referred to such a promise during their conversation.

So again, there is simply no causal nexus between Mr Bemba's acts and conduct and the promise D-55 claimed was made to him.

A further issue of causation is that this conversation occurred at the request of D-55, not Mr Bemba. And if Mr Bemba was thanking him for having agreed to testify, this must mean that Mr Bemba believed that D-55 had already agreed to testify. It was already done. Mr Bemba was not attempting to persuade him, because it seems Mr Bemba understood that D-55 had already agreed to do so. Mr Bemba was not intending to influence him to testify because he understood that this was already done. The witness had agreed. His contribution had no causal connection to that.

Thanking a witness is also a neutral act. The Prosecution, the Judges do it routinely. It would have only been improper if Mr Bemba thanked him for lying. But since they did not discuss the contents of his testimony, there is no evidence that his thank you was intended to produce false testimony or that Mr Bemba knew that it might do so.

Of critical importance in the trial judgment, the Chamber recognized that D-55 made clear to the lawyer that he did not agree with the case put to him by Maître Kilolo and that he would not testify in a manner that D-55 considered not to be true.

So there couldn't have been an attempt to influence him to lie because the witness had already said he would not put forward a case he did not believe. Mr Bemba's actions, if culpable, must be considered to be on the lowest rung of culpability. He didn't

threaten D-55. He didn't arrange to give him a bus. And unlike the ICTY Prosecutor in the Haradinaj case, he didn't write D-55 a support letter for the asylum claim and then hide it.

If a public reprimand was sufficient for the ICTY Prosecutor, an officer of the Court, then it should also suffice for Mr Bemba.

I'll move onto the contacts with Mr Babala. And I'm going to call the number in question, the XX number, so we don't have to go into private session.

In the judgment, the Chamber found that Mr Bemba used a privileged number registered by his counsel to contact Mr Babala. Now, if we check the detention call logs, after this number was registered to that counsel, the only contacts between Mr Bemba and this number occurred over two periods, 13 to 21 April 2012 and 6 to 24 July 2012.

The Defence argued during the trial that the pattern and timing of these contacts is consistent with it being used by Mr Bemba to contact Mr Kilolo on mission, which is in turn consistent with the fact the Defence submitted evidence that Maître Kilolo was on mission at this time.

Can we go briefly into private session?

PRESIDING JUDGE SCHMITT: Yes, we go into private session.

MS TAYLOR: Thank you very much.

(Private session at 10.01 a.m.)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Open session at 10.03 a.m.)
THE COURT OFFICER: [10:03:07] We're in open session, your Honour.
MS TAYLOR: So first we have to assume that when Maître Kilolo was in the same country and most likely the same city as Mr Babala, rather than just passing on messages from Mr Bemba himself or giving Mr Babala his own phone, there was an elaborate scheme to allow Mr Babala to contact Mr Bemba on a phone that was vetted by detention unit guards.
As is reflected by the detention call logs, Mr Babala called Mr Bemba from his registered phone during the same period, in many instances on the same day, doubling the chances that the guards would have recognized his voice on the XX number.
But even if defying all logic and reasoning Mr Bemba were to have spoken to Mr Babala on the XX number on these occasions, it would not have undermined the integrity of the Main Case proceedings. The calls happened in April, July 2012.

This predates the commencement of the common plan.

The Chamber also found that Mr Babala was not a co-perpetrator or a member of the common plan, whereas Maître Kilolo was.

So how does speaking to Mr Babala rather than Maître Kilolo further the common plan? Logically, the opposite would be true; that is, if Mr Bemba was speaking to Mr Babala rather than Maître Kilolo, then it would be less likely that the conversation had anything to do with the common plan because Mr Babala was not a part of this common plan and, secondly, the common plan hadn't been formulated or initiated yet.

Accordingly, if these communications occurred, there is no causal nexus between them and Article 70 misconduct charged or otherwise. They would have been a violation of the detention unit regulations, but if so, that's the way they should be sanctioned.

At the ICTY such infractions might be punished through temporary restrictions or live monitoring. And in this case the Prosecution was allowed to receive the transcripts of Mr Bemba's calls with Mr Babala both in realtime and retrospectively. This amounted to a far greater sanction on Mr Bemba.

In terms of D-19, the Defence respectfully submits this doesn't meet the standard of beyond reasonable doubt for the purposes of sentencing. In the judgment there appears to be a typographical error. The judgment refers to a contact occurring in October 2012, when in fact the call logs have no registered number on that date. The judgment uses this contact to find that because Maître Kilolo and Mr Bemba had engaged in a multiparty call with D-19 prior to the contact with D-55, it was in their mind to do so.

Elsewhere in the judgment it says that it occurred in January, not October. So if the

call occurred in January, the relevance drops away. The call with D-55 happened several months earlier, so what did or didn't happen in January 2013 could not have influenced Mr Bemba's state of mind back in October 2012.

There is also no evidence as to what might have been discussed during such a call or if it had any linkage to testimony. So again, there is simply insufficient evidence to conclude beyond reasonable doubt that it should be treated as anything but a breach of detention regulations. It doesn't justify imposing a substantive sanction.

Regarding witness payments, the Chamber found that Mr Bemba approved payments of money to witnesses that happened to include illicit payments. The Chamber did not find that Mr Bemba knew at the time he approved the payments that they were illicit.

Similarly, although the Chamber found that Mr Bemba was aware that the purpose of the payments was to ensure a witness testified for him, they did not find that Mr Bemba knew and intended witnesses to testify falsely as a result of such payments.

These distinctions are of crucial importance as concerns the degree of Mr Bemba's culpability and sanction that should be imposed, particularly given the lack of clarity as to what was and wasn't illicit payment.

In his testimony, D-21-9, he affirmed that it was completely acceptable for a party to cover reasonable costs incurred in meeting a witness or arranging for a witness. These costs could include a range of expenses such as travel accommodation, medication, pocket money, incidental expenses such as cigarettes, measures required to ensure the witness's safety and protection.

D-21-9 also testified that there was no legal prohibition as concerns providing humanitarian assistance to a witness. And in the Vujin case, the ICTY Appeals

Chamber found that it was not prohibitive to provide witnesses small amounts as a humanitarian gesture after their testimony.

This is not a closed list of payments. And at the time of the event the issue of payments to potential witnesses, it wasn't regulated. There was no rule to say what you could and couldn't pay or how much you should pay. There was no upper limits established by the Court.

Given this context for Mr Bemba, a non-lawyer, a person in a cloistered detention environment who is used to be being told exactly what he should do, a person who had no way to Google or verify rates, it would have been well-nigh impossible for him to make precise calculations as to what was and was not permissible. Of course he could have checked whether the amounts requested by his lawyers for witness expenses were roughly similar to logistical costs claimed by the lawyers themselves. But they were, they were similar.

Mr Bemba could also check if different witnesses were being paid roughly the same amounts for the same expenses. But again they were, except that the Chamber concluded the payment of 100 euros for one group of witnesses for taxis was legitimate, but for D-23, it wasn't. So it seems that the difference came down to the specific context in which the witnesses were paid, how it was paid, not what was paid.

For Mr Bemba, a detainee in Scheveningen, was not involved in direct payments. He didn't know what was said to witnesses when it was given to them, nor was there any evidence it was discussed with him in advance.

It's also pertinent that in support of Mr Bemba's knowledge of payment, the Chamber relied on Mr Bemba's communications with Mr Babala. But at the same time the Chamber found that, apart from two witnesses, Mr Babala was not aware of the illicit

nature of these payments.

In terms of the two witnesses referred to by the Chamber, the Chamber found that they were referred to in a conversation between Mr Bemba and Mr Babala. This is a conversation that the Defence attempted to play in its closing submissions but for technical reasons the interpreter didn't read out Mr Bemba's contribution. But if the interpreter had read out Mr Bemba's contribution, not Mr Babala's, the Trial Chamber would have heard Mr Bemba refer repeatedly to recuperation, to debts, reflecting his understanding this was the purpose of the payments.

So if there is no evidence that Mr Kilolo told Mr Bemba that the payments were for illicit purposes and if the conversations with Mr Babala did not reflect any intent on Mr Bemba to pay witnesses for improper purposes, it follows Mr Bemba's knowledge and involvement has to be on the outer limits of culpability.

Mr Bemba has paid all the Defence costs associated with the 14 witnesses. The Defence submits that in itself sanctions him sufficiently for his responsibility in these matters.

In terms of the issue regarding the remedial measures in October, November, the first scenario was exactly that, it was a fictitious plan. For the duration of the trial it was alleged, it was charged as such, that lies were told to Mr Bemba for the purpose of obtaining money for personal reasons.

Mr Bemba's reality, actual reality, fundamentally diverged. They were on different planes. For this reason it's unfair to use real-life events to judge and sanction Mr Bemba in relation to his reaction to fake events.

Yes, there was an ongoing Article 70 investigation at the time. But the actual reality is that the Prosecution were not contacting Defence witnesses in 2013. They had not met with or attempted to meet with D-2 or any other Cameroonian witness.

There was therefore nothing to interfere with because nothing was happening.
According to the version of reality fed to Mr Bemba, Defence witnesses had reported being offered payment by the Prosecution to change their testimony.
Mr Bemba responded by referring to changes in their testimony as "les histoires," tall tales. He surmised that the Judges would be unlikely to accept an unexplained change of heart.
These comments reflect his belief that the Defence witnesses were genuine witnesses, truthful witnesses. They don't reflect a guilty mind.
Mr Bemba was informed that these were vulnerable witnesses, witnesses who felt abandoned by the VWU or the Defence. Maître Kilolo even offered to show Mr Bemba emails in which the witnesses listed their grievances against how they had been treated by the Court.
Given this context, it is understandable that, yes, of course Mr Bemba would be concerned about this, he'd be concerned for the implications for the Defence case.
He was reaching the end of a lengthy, exhausting trial. He had been in detention for its entire duration. His stepmother, grandmother, lead counsel died during this trial.
Of course he would be dismayed by the prospect of the trial reopening or being extended further or falling apart due to what he considered to be improper conduct.
It is the same way that the Prosecutors here themselves have expressed concern, dismay in relation to Kenya cases collapsing due to witness intimidation.
But what is of key importance is that when he presented with this false scenario, Mr Bemba emphasised that the Defence should contact the witnesses and emphasised in turn that the witnesses couldn't play off the parties. The Defence, with their ethical obligations, couldn't compete in a bidding war.
And we simply don't have a clear record after this point as to what was actually said

to Mr Bemba and what his actual response was. We just have untested third-hand hearsay which references many persons, none by name.

But there is no record of Mr Bemba instructing Maître Kilolo to tell the witnesses not to talk to the Prosecution. That doesn't exist in the evidence.

It is worth noting though that in 2013 there was a witness contacts protocol at place in the Main Case, and it did prevent the Prosecution from contacting Defence witnesses without first informing the Defence. Now, Judge Tarfusser indicated in an ex parte decision that it didn't apply to the Article 70 case, but the Defence didn't know that. Mr Bemba didn't know that. In Mr Bemba's mind, any unauthorized contact between the Prosecution and Defence witnesses would have been illegal. It would have been something that would have been useful for the Defence to verify, to document, to bring to the Chamber.

We also know that throughout October, November Mr Bemba had a genuine, albeit incorrect, belief that the Prosecution was bribing witnesses in October. And we know this because Mr Bemba called his legal assistant and discussed this belief with her, someone who was not in any way connected with the joint plan in this case.

Mr President, your Honours, Mr Bemba was a defendant who as a detainee was doubly vulnerable. There is no way he could make informed decisions about his Defence strategy when he was effectively living in a fake, alternative universe, a universe where the Article 70 investigation involved the Prosecution exploiting and bribing Defence witnesses.

In Mr Bemba's universe this was an illegal investigation. It was entirely logical for the Defence to wish to prove to the Prosecution that they were conducting an illegal investigation.

This faux scenario was developed independently of Mr Bemba. The independent

counsel observed that its objective appears to be to take advantage of Mr Bemba. Given this context, given Mr Bemba's vulnerability and the fact that his reactions were triggered by false information, false advice, it would be disproportionate to sanction Mr Bemba for a figment of his own imagination.

In terms of issues of credit, in his dissenting opinion in the Kenya confirmation decisions, Judge Kaul refers to the enormous consequences of a trial for the person charged. He emphasises the necessary public stigmatisation, the other negative consequences for the person over the foreseeable long time span of that trial. That's decision 373, paragraph 56.

Mr President, your Honours, this trial was an ordeal with a significant amount of public stigmatisation. There have been press releases, press conferences. The Prosecution even co-hosted a very public briefing in this case at the Assembly of State Parties.

Mr Bemba has been publicly sanctioned and reprimanded on multiple occasions. And uniquely in the field of international criminal law, he's been subjected to the punishing regime of participating in two complex criminal trials simultaneously whilst he was in detention. He has faced overlapping deadlines in both cases which has diverted, diluted his energy and time.

His funds have also been exhausted. He was, until July this year, required to provide full or partial Defence funds in both cases. This includes funds for Defence missions to meet witnesses who have since admitted that they were briefed by Bob to lie to the Defence.

These costs were much higher than that which would have been incurred by a domestic defendant, and they were, moreover, inflated by the length of the Main Case, the length of the Article 70 case. And the length of both these cases could have been

avoided if the Prosecutor had disclosed the Bob evidence as soon as it bobbed into their custody, as is required by the rules.

This unnecessary complexity, this unnecessary prolongation, it not only aggregated the costs, it lengthened Mr Bemba's detention.

Mr Bemba is detained in the Article 70 case. He has been detained since 23 November 2013 when the Registry served him with an Article 70 arrest warrant that the Prosecution argued was necessary to ensure his detention. He was detained when the Appeals Chamber affirmed that Article 60(2) applies to him in this case.

I know everyone is very familiar with the article, but for the public this article states as follows: "A person subject to an arrest warrant may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58, paragraph 1 are met, the person shall continue to be detained."

Now, the Trial Chamber, in its oral decision of 19 October this year, confirmed that a person can only remain in custody if they are already in custody. By the same token, a detainee can only continue to be detained if they are already detained.

It follows that the Appeals Chamber would not have rendered a judgment on Article 60(2). It would not have ordered Trial Chamber VII to conduct a new review of Mr Bemba's detention under Article 60(2) unless Mr Bemba was already detained in the Article 70 case.

And Mr Bemba remains detained before you today in this courtroom, and as reflected by the two guards flanking him, the guards that will take him back to his holding cell when we recess. And he has been detained for over three years. That's one year longer than the longest custodial sentence that's ever been issued for contempt.

Yesterday the Prosecution claimed that essentially what Mr Bemba seeks is to have his time count twice. But, Mr President, your Honours, it's the Prosecution who is

attempting to have its cake and eat it too.

The Prosecution requested the Article 70 arrest warrant. If at any point they didn't believe it was necessary, they could have applied to withdraw it. They never did. They repeatedly insisted before both the Single Judge and the Appeals Chamber that it was necessary to maintain his detention in the Article 70 case.

They also relied on his detention as a deterrent effect. For example, during their interview with D-6 on 4 October 2016, the Prosecution informed him - I'm just translating this - that there is a warrant of arrest dated 20 November that has led to the arrestation, the arrest of the five mentioned persons. They wanted that arrest warrant because they could use it. They wanted it because it sent a message. But having sent that message, Mr Bemba must be given credit for it.

Yesterday the Prosecution also sought to dispute the relevance of the decisions in the Kanu and Šešelj cases.

As concerns Kanu, the Prosecution argued that the Defence had not proved that the two weeks credited to Kanu were not then put on top of the Main Case sentence. Well, Mr President, your Honours, we can't prove a negative, but we have verified that there were no decisions from the Special Court Presidency, Appeals Chamber or Trial Chamber. In the absence of such a decision, there would be no lawful authority to extend the length of the sentence in the Main Case conviction beyond the original period. So no, it simply wasn't added on top.

Our submissions, contrary to what was advanced yesterday, also clearly referenced the fact that the Chamber had decided that the future sentences for Kanu should be served consecutively. But we don't need to ask whether Mr Bemba should serve a future sentence consecutively with his Main Case, because by the time the sentencing judgment comes out, he will have served two-thirds of the maximum sentence. He

will be eligible for release. And he must be.

In terms of the Šešelj case, as noted in our brief, when he received the second contempt judgment, the Judge ordered it should run concurrently, not consecutively. Now, it is correct that it was modified on appeal, but this modification only serves to bolster our position further. The Appeals Chamber did not overturn the Trial Chamber's rationale that it would be fair for the two sentences to run concurrently. Rather, they found that this was a practical impossibility because Mr Šešelj had already served the first sentence by the time the second sentence started to run.

Now, Mr President, your Honours, this means that although the primary and original basis for Mr Šešelj's detention was a war crimes case, the Appeals Chamber counted this detention for the purpose of time served in the contempt case.

Time ran in both cases.

A further relevance in the 13 December 2013 decision on the continuation of the proceedings, which was issued by the Main Case Trial Chamber in Šešelj, the Trial Chamber explicitly counted the time periods that overlapped with Mr Šešelj's contempt sentence in its assessment of the length of Mr Šešelj's detention in the Main Case. Paragraphs 23 and 24 of that decision.

So the contempt Chamber counted the Main Case detention for contempt purposes and the Main Case Chamber counted contempt detention for Main Case purposes.

The loop is closed. The detention counted twice.

But we don't even to need to look at these cases because the arrest warrant should be definitive. And if the Prosecutor, if the Chamber had any ambiguity in this matter, then the arrest warrant should have been withdrawn. Mr Bemba should have been told that he's not detained.

The Single Judge found in January 2015 that the length of this detention was already

unreasonable, but he's remained detained. He's not been released to be with his family, even though he's always made clear since 2008 that his number one priority is to be with his family, to be with his children; even though at a domestic level persons accused of contempt would never face such restrictions, even though convicted war criminals are allowed out on weekend release as part of their rehabilitation.

Mr Bemba was also initially segregated from all detainees and, except for his counsel, was prevented from contacting anyone, including his family.

The purpose of these restrictions was to assist the Prosecutor to gather evidence in the contempt case. It was not for general security reasons. It was not related to the Main Case. It was for Article 70 alone.

Similarly, in the specific context of the contempt case, the Prosecution was granted the right to access all of Mr Bemba's non-privileged detention recordings. The Prosecution had complete discretion to determine what was relevant.

Notwithstanding that the Appeals Chamber found in the Ngudjolo case that detainees do have a right to privacy and private information should be redacted before it's transmitted to the Prosecution, no redactions were implemented.

Detainees have a right to privacy and it's important. It's not just because that they're in a prison that privacy is important. The opposite is true. In such an environment, every tiny shred of privacy is important because it's all they have. It's the only bit of their life that they can keep to themselves.

Dostoevsky, a former detainee himself, describes this sensation of forced loss of privacy as follows: "Besides the loss of freedom, besides the forced labour, there is no other torture in prison life almost more terrible than any other, that is compulsory life in common. I could never have imagined, for instance, how terrible and agonising it would be never once for a single minute to be alone for the ten years of

my imprisonment. At work to always be with a guard at home with 200 fellow prisoners; not once, not once alone!"

And that's the effect of surveillance, not once, not once alone, to have every aspect of your life open for scrutiny. This forced loss of privacy would have been experienced by Mr Bemba as an additional and particularly traumatic layer of detention that reached back in time, beyond even the start of the contempt case. This surveillance restricted his liberty in a manner more intrusive than electric bracelet or a curfew.

As a result of this covert surveillance, Mr Bemba has an ongoing concern that confidentiality doesn't mean confidentiality. This is a justified concern. During the investigation the Prosecution obtained confidential records from the Counsel Support Section, from Victim and Witnesses Unit, from Western Union. And even today, when we're given assurances by the Registry that confidential information will stay within the Registry, we still see it going to the Prosecution without our prior knowledge and consent.

This is a debilitating concern. Given the very short time constraints involved, the Defence was unable to assure Mr Bemba that private information in an expert report would remain private, that it would not be disseminated further without knowledge and consent.

The expert affirmed Mr Bemba's inability to choose to put this information before the Court. By the deadline in question he confirmed it was consistent with his evaluation of Mr Bemba. And in his evaluation he concluded that, in light of his environment and dependency on others, Mr Bemba will not be in a position to give informed consent on important matters concerning his case unless matters are discussed with him fully.

Mr Bemba needs time to review matters, to refine them in his mind and to articulate a

point and a position on nuances.

Mr President, your Honours, this assessment goes to the crux of the case as concerns Mr Bemba, a detained defendant.

And this comes to my final point, Mr Bemba's position is mitigating, not aggravating. The Prosecution argued that Mr Bemba abused his official position. But what official position? He had none. He was not an officer of the Court. He was a detained defendant, a position of weakness, of vulnerability, of dependence.

As a detained defendant, his horizon was the four walls of the Scheveningen penitentiary. His life was governed by express rules and regulations, not nuances, not inferences. Mr Bemba was dependent on everyone else for advice, information assistance. He was represented by counsel. And as made clear by the Presiding Judge during the Ongwen opening arguments, a represented accused should not displace the role of the lawyer.

The evidence is also clear that Mr Bemba requested and relied on his lawyers' advice. Mr Bemba is not Vojislav Šešelj. He didn't represent himself. He didn't publish books himself directly insulting the Court's authority.

Mr Bemba is also not Kanu or Bazzy Brima, Kamara. These defendants directly contacted Prosecution witnesses. They directly attempted to bribe them for the explicit purpose of recanting their testimony. Mr Bemba spoke to D-55, but D-55 confirmed they did not discuss his testimony. Mr Bemba only thanked him for agreeing to testify. A thank you in the scale of culpability is a far call from a bribe.

Unlike Šešelj, Kanu and Kamara, Mr Bemba also made a significant financial distribution to the costs of his trial and to the overall administration of justice.

PRESIDING JUDGE SCHMITT: Mrs Taylor, you are aware of the time?

MS TAYLOR: I have one more minute and also Mr Karnavas --

PRESIDING JUDGE SCHMITT: That's okay. Okay, please.

MS TAYLOR: -- very kindly gave me some time from his ... Mr Bemba is also at the very lowest scale of defendants who have been prosecuted for contempt, and yet Mr Bemba has already been punished more than any other defendant prosecuted for contempt.

Mr President, your Honours, in light of the limited extent of Mr Bemba's knowledge and involvement, in light of his role as a detained defendant, the constraints of his detention environment, in light of the amount of punishment he's already suffered in full public view, we respectfully request you to afford Mr Bemba leniency and to afford no further sanction or punishment.

Thank you. And I would like to wish everyone in this courtroom a happy festive season.

PRESIDING JUDGE SCHMITT: Thank you very much, Mrs Taylor. Who will be the next from the Defence teams? I assumed it because I see preparations here.

Mr Karnavas, you have the floor.

MR KARNAVAS: [10:38:53] Good morning, Mr President and your Honours.

Mr Powles will go first. He will have about 20 minutes and that will be -- less than 20 minutes, and then we can take our morning break. Thank you.

MR POWLES: May it please the Court, Mr President, your Honours. The aim of my submissions are to address the appropriate sentence based on the findings in the Trial Chamber's judgment as compared to the sentences imposed for like offences at other international criminal tribunals.

Before reaching that issue, may we observe that on 19 October of this year, Mr President, your Honours, indicated that you wished to send a message that Article 70 offences are unacceptable and undermine the processes of this Court.

Mr Kilolo through his lawyers has asked us to express at the outset that he wishes to reiterate his respect for this prestigious Court, for its noble mission in the promotion of human rights, in particular the rights of victims who have suffered atrocities and the aim of the Court at ending impunity.

Mr President, your Honours, your aim was to send a message. That message has been sent loud and clear.

At paragraph 148 of the Prosecution's submissions on sentencing, they say the egregiousness and gravity of the defendant's conduct has no comparison in international criminal proceedings, a fact which makes comparison with contempt cases before the ICTY, the ICTR, the STL and the Special Court for Sierra Leone, in the Prosecution's word, facile.

The Prosecution, in paragraph 148, they then go onto refer to the ICTY case of Rašić, the Special Court for Sierra Leone case of Bangura and the Special Court for Sierra Leone case of Senessie.

Having had some involvement in at least two of those cases, we would submit that far from any comparison being facile, comparison with those cases is in fact apposite.

Before looking at the cases from other international criminal tribunals and while fully acknowledging that your Honours don't need to be reminded of the basis upon which you have convicted the defendants in this case, after all, you have heard all the evidence and you have set out your findings in a meticulous analysis of all of your findings in a detailed and lengthy judgment, but it bears repeating, perhaps in answer to the Prosecution's claim that comparison with other contempt cases is facile, that in relation to the 14 witnesses that featured in this case, the findings of the Trial Chamber highlight that Mr Kilolo and other co-defendants have been convicted in the most part for securing false testimony, not in relation to substantive material issues in

the case but on ancillary matters such as the date of last conduct with the Defence and denying that they had received money from the Defence.

And those ancillary issues went to how the Bemba Trial Chamber might assess the credibility of those witnesses rather than affecting the substantive issues and their assessment of the substantive issues in the case. The exceptions to that of course are D-15, D-54, and perhaps regard to the involvement with the Cameroonian witnesses in Yaoundé.

It is important to stress that in relation to those witnesses, the Cameroonian witnesses who adopted completely false personas and gave a root-and-branch false testimony in the Bemba Main Case as to their role in the conflict, that D-2, D-3, D-4 and D-6, in relation to the very worst aspects of their false testimony, namely claiming that they were not soldiers, Mr Kilolo was as much a victim of their deception as was this Court. D-2 and D-3 stated as much in their evidence before this Trial Chamber, as did D6.

One of the matters that the Prosecution highlights is that the Trial Chamber found that Mr Kilolo ignored -- and this is at paragraph 31 of the sentencing brief, that Mr Kilolo ignored the contact prohibition order imposed by Trial Chamber III after the handover of witnesses to the VWU.

That is obviously right, and Mr Kilolo has of course been convicted of Article 70 offences. However, Article 71, as distinct from Article 70, provides that for a deliberate refusal to comply with directions of a Court, which is the gravamen of not complying with a Trial Chamber order, that in relation to deliberate refusal to comply with directions under Article 71, "that the Court may sanction such persons with a fine or other administrative measures other than imprisonment."

At paragraphs 91 to 95 of the Prosecution's sentencing submissions, they argue that Mr Kilolo has repeatedly violated the Code of Conduct. On the Trial Chamber's

findings, so much is self-evident. However, before considering that as an aggravating circumstance, it is worth recalling that as a result of violating the Code of Conduct, Mr Kilolo will almost certainly be separately sanctioned for his violation of that code under that code. He faces being struck off the list of counsel of this Court as a direct result of your findings that he has breached the Code of Conduct of counsel. And that he will be separately punished under the code makes it unfair, we respectfully submit, for him to be additionally punished by the Trial Chamber by considering it, as invited by the Prosecution in this case, as an aggravating feature.

Based on the findings of the Trial Chamber, the Prosecution say that Mr Kilolo deserves an 8 year sentence of imprisonment. Respectfully, and without diminishing the Trial Chamber's findings about the seriousness of the matters for which Mr Kilolo has been convicted, the 8 year suggestion is, we respectfully submit, far, far, far too high. So much so that we submit it is positively unhelpful.

We stress that by imposing a sentence of time served and, in addition, potentially a fine, the Court still will be sending a very powerful message that Article 70 offences are totally unacceptable.

Unlike Mr Kilolo, for whom the majority of his convictions relate to procuring false testimony on ancillary matters, the cases of Rašić, Bangura and Senessie all relate to people who procured false testimony on core issues in their respective cases.

Starting first with the case of Rašić, Jelena Rašić at the ICTY, the sentencing judgment is dated 6 March 2012, and at paragraphs 10 to 13 of that judgment, the Trial Chamber set out the conduct upon which Ms Rašić was sentenced.

She had bribed a man called Zuhdija Tabaković, a man who I appeared on behalf of at sentence at the ICTY and during the lead-up to that sentencing hearing.

Ms Rašić had bribed Mr Tabaković by showing him a pre-prepared witness statement

for use in the Lukić and Lukić case, asking him to sign and verify it in exchange for 100 euros. That is contained at paragraph 10 of the sentencing judgment.

That pre-prepared statement was not one that he had ever seen or been involved in the preparation of. Ms Rašić knew it to be completely false. She also promised him more money if he were to come to The Hague and testify in accordance with that statement that she knew to be false.

In addition to that, she also incited Rašić -- Tabaković, Rašić also incited Tabaković to offer bribes to other potential witnesses and gave him another two pre-prepared statements to be used. The makers of the statements were left blank and he was asked to fill in the names of two individuals that he could find to testify to the issues contained in their statements, regardless of whether they agreed with the contents of those statements or not.

He was given money to give them -- to pay them to sign the statements and instruct them that they would receive more money once, once they had testified in accordance with those statements.

She therefore not only corruptly influenced, corruptly influenced him, she sought to corruptly influence him to corruptly influence others.

Tabaković had introduced her to two such men. Each man received 100 euros to sign their respective statements.

On one view, all of that is just as serious, if not more serious than anything Mr Kilolo did. She got 12 months, of which 8 months were suspended.

Moving on then to the Special Court for Sierra Leone case of Bangura, a case in which Mr Kargbo, Bangura and Mr Kanu were convicted of interfering with witnesses who had testified. Mr Kargbo received an 8 month sentence of imprisonment that was suspended, Mr Bangura 18 months, of which I believe 16 -- 6 were deducted after trial,

and Mr Kargbo got two years again after trial.

Again, their actions went to the core issues in their case. I'll spend a little bit more time, if I may, on the Special Court for Sierra Leone case of Senessie, the third case cited by the Office of the Prosecutor in their brief. I also had a little involvement in that case in that I appeared on behalf of Mr Senessie at his provisional release hearing and initial appearance.

In the sentencing judgment of his case issued on 12 July 2012, at paragraph 2, it's worth noting that the Prosecutor or the independent counsel, because he was prosecuted by an independent counsel, that the Prosecutor in that case, as in this case, asked for an incredibly inflated sentence. The Prosecutor asked for a sentence of 5 to 7 years, 7 years being the maximum sentence that the Special Court for Sierra Leone could impose for such conduct.

Notwithstanding their request, the Trial Chamber for the 8 counts of which Mr Senessie was convicted sentenced him to two years' imprisonment for each count, all to run concurrently. So the maximum sentence that he would serve was to be two years.

So this is another case in which the Prosecution were asking for an extraordinarily high sentence, vastly greater than the one that the Trial Chamber ultimately imposed.

Your Honours will see from paragraph 17 of the sentencing judgment in that case that the Trial Chamber found and convicted Mr Senessie on the basis of clearly offering bribes of money and relocation to witnesses to give evidence on core issues in that case.

The Trial Chamber found that multiple witnesses were approached, and moreover, as an aggravating factor, Senessie was, at paragraph 19 of the sentencing judgment, it was found that Senessie was a community leader who abused his leadership position.

He was a leader in the RUFP and a church leader, I believe a pastor.
He had also during the course of his trial accused witnesses of conspiring against him.
At paragraph 148 of their sentencing submissions, the Prosecution say that Mr Senessie only got two years because he "acknowledged his offences and showed remorse." But it is worth highlighting, if I may, that Senessie did not accept his responsibility from the outset. He was convicted only after trial, a trial at which he took the stand and on oath gave evidence that was found by the Trial Chamber of which he appeared before to be false, and it was on that basis that he was convicted. He only accepted responsibility after conviction and before sentence, and one might assume that that was done in order to get a lighter sentence. And he also offered to give evidence against a co-perpetrator, a man called Prince Taylor.
Senessie then gave evidence against Prince Taylor. His evidence was the core evidence against him and there had been no prospect of prosecuting him until Senessie cooperated with them. Senessie then gave evidence at the trial of Prince Taylor and Prince Taylor was convicted.
But the Special Court for Sierra Leone Appeals Chamber then quashed the Prince Taylor conviction in a judgment dated 3 October 2013, at paragraph 66 stating that "no reasonable trier of fact could have placed decisive weight on Senessie's evidence in convicting Prince Taylor." They therefore reversed his contempt conviction.
So Senessie's only acknowledgment of the offences, and he only showed remorse as a means of getting a lower sentence, as the Prosecution in this case say at paragraph 107 of their sentencing submissions, "admission at such a stage is meaningless or of limited value at best."
THE INTERPRETER: [10:55:57] Message from the interpreter. Could counsel please slow down. He's reading incredibly dense text and the French booth is

having difficulty. Thank you. And for the future, could we please be provided with speaking notes. Thank you so much.

MR POWLES: My sincere apologies for that, and I will in the last 2 minutes endeavour to speak a little bit slower, although I'm tempted to try --

PRESIDING JUDGE SCHMITT: Which will likely become 3 minutes then.

MR POWLES: Yes, yes. I'm very grateful Mr President.

A final case worth highlighting, and it's already been touched upon by my learned friend Ms Taylor, is the case of Vujin. Like this case being the first Article 70 case at the ICC, Vujin was the ICTY's first contempt case. Now, I was an associate legal officer of one of the ICTY Appeals Chamber Judges at the time the judgment was rendered in that case, so I would be the last person to claim that associate legal officers rather than Judges assist in any way in the writing of judgments at the ICTY, but I think it's fair to say that I have some knowledge of the matters that were set out in the judgments of the Appeals Chamber in the Vujin case.

Mr Vujin, like Mr Kilolo, was a lawyer. And his conduct extraordinarily went against the interests of his client and was designed to go against the interests of his client. The judgment of the Appeals Chamber of 31 January 2000, a summary of which of the findings of the Chamber set out at paragraph 160 of that judgment, it highlights that Mr Vujin was convicted of two matters essentially, first, putting into evidence fresh evidence on appeal pursuant to the ICTY's Rule 151 procedure, fresh evidence which was known to him to be false about the killing of two Muslim policemen.

The second matter was that he had manipulated two witnesses by seeking them to avoid their identification by them in their statements of persons who may have been responsible for crimes, the very crimes for which Tadić had been convicted. He was

thereby working against the interests of his client by seeking to protect people higher up the chain of command. Again, that is truly a reprehensible lawyer, behaviour for any lawyer to go against the interests of their client in seeking to reduce false evidence before a court against the interests of their client.

For that reprehensible conduct, Milan Vujin was fined 15,000 Dutch guilders and struck off the list of counsel. That decision, and it was an Appeals -- he was convicted before the Appeals Chamber at First Instance, so a second Appeals Chamber was reconstituted to consider the appeal from that First Instance Appeals Chamber. So two ICTY Appeals Chambers upheld that sentence of 15,000 guilders fine.

So in conclusion, on the basis of the authorities of the ICTY, Special Court for Sierra Leone and on the basis of this Trial Chamber's findings, we respectfully submit that it is not wholly unreasonable to suggest 11 months time served is an appropriate sentence for Mr Kilolo.

He has already been reintegrated into society. He will commit no further offences and has suffered enough embarrassment and ignominy as a result of this case.

Mr President, your Honours, on 14 November 2013, Mr Kilolo stood as I stand before you now, as a lawyer before Trial Chamber III. Nine days later he was arrested.

On 25 November 2013, he was transferred to the ICC detention unit.

He was there bent over naked and searched. Time in custody would no doubt have a profound effect on anyone, perhaps all the more so a lawyer who not more than 10 days before had been standing before a court as a lawyer.

From the point of his arrest, from the point of his transfer to the ICC detention unit, Mr Kilolo's life changed forever. It will never be the same again. We respectfully submit that he has suffered enough.

Mr President, your Honours rightfully want to send a powerful message. Again, we respectfully submit that that message has already been sent loud and clear.

PRESIDING JUDGE SCHMITT: Thank you very much, Mr Powles. We will then have a half an hour break, perhaps 5 minutes past, 11.35 to be exact. Thank you.

THE COURT USHER: [11:01:33] All rise.

(Recess taken at 11.01 a.m.)

(Upon resuming in open session at 11.37 a.m.)

THE COURT USHER: [11:37:15] All rise.

PRESIDING JUDGE SCHMITT: Before the break we have concluded with Mr Powles. Mr Karnavas, do you want the floor?

MR KARNAVAS: [11:37:22] Yes, Mr President, your Honours.

PRESIDING JUDGE SCHMITT: Then, please, you have the floor.

MR KARNAVAS: [11:37:25] Good morning. And there may be a couple of overlaps, but I hope to finish within 15, 20 minutes.

Let me begin by stating that this is an opportunity for you to hear submissions on sentencing. You sat through the trial. You've heard the evidence. You've watched the witnesses. You looked, you assessed their demeanour. You heard closing arguments. You've read final submissions, you deliberated and you made findings of facts and conclusions of law. And we understand that it is on the basis of your findings -- and might I say that in my 30-some years of practising law, your findings are exact and detailed. It's one of the best I've ever seen.

It does not mean that we are conceding that there are no errors of fact or law, with respect. But there is a forum for that, and that's the Appeal Chamber.

But we recognize that we're here today to make submissions based on the findings that you have made. And we are not contesting today those findings for the

purposes of this sentencing. So I wanted to get this out so you know that we respect the findings and we're not challenging them for sentencing purposes.

Now, yesterday the Prosecutor, my learned friend there, made some broad, sweeping remarks. I would say, at least when it comes to this particular Defence, he was flirting with mendacity, I would go that far, with respect to my learned friend when he noted on page -- I'm reading from the transcript from yesterday. On page 86, he said, "Instead of acknowledging," this is page 86, line 23, "But, again, instead of acknowledging the criminal acts and taking responsibility for them, their written submissions set upon distorting the findings of the Chamber, minimising their role in the crimes regardless of the Chamber's findings, downplaying the damage or risk to the Court as a result of their repeated criminal acts and, frankly, repackaging and repainting their prior conduct to the point that it is no longer -- it no longer bears any semblance of reality."

Now, that caused me some concern, because then I went to our written submissions, and of course far be it for me to lecture to you how to read our submissions or what the law is. You know the law. You know how to apply the law. You certainly know how to read our submissions. But it caused me some concern thinking how was it that we manipulated the facts, your findings of facts or ignored them.

And if you go to our submissions, you will see that we actually are very, very measured. And that's why I began by reaffirming what Mr Powles said, that we accept the findings of fact for what they are for the purposes of this hearing. And we do contest those general remarks by the Prosecutor because at no time did we try to disregard your findings in our submissions.

Now, in reading your oral judgment, it was the summary of the judgment on 19 October, I came across a passage, it's on page 3, that I want to read out, and I'll do it

very slowly for the interpreters, because I think it echos exactly our sentiments so that you know, not only that we hear the message that you wish to convey outside, but we also acknowledge that this is in fact what we believe everyone's responsibilities are, especially lawyers that appear before this Court, be they Prosecutors, Defence, victims lawyers.

You note starting with line 19, "This case was about offences against the administration of justice as Article 70 of the Rome Statute puts it. This means it was about giving false testimony, presenting false evidence or corruptly influencing witnesses. Although such offences are not the core crimes of this Court, this Court was established to try, it has become apparent in the short time span of the Court's existence that preventing offences against the administration of justice is of the utmost importance for the functioning of the International Criminal Court."

This is the sort of language that academics and those who blog on this including myself write about, because this is exactly our understanding. You go on to say, "Such offences have this significance because criminal interference with witnesses may impede the discovery of the truth in cases involving genocide, crimes against humanity and war crimes. They have this significance because they may impede justice to victims of the most atrocious crimes and ultimately they may impede the Court's ability to fulfil its mandate."

We fully agree and accept that, and I hope that my learned friend on the Prosecution side recognized at least this particular Defence is in full agreement with the Court and recognising the Court's mission.

Now, in our brief, and it's not my intention to read off it, but I wish to point out that in conjunction with this very cogent observation that you have made, we also pointed out that when it comes to Article 70 offences, they're not as grave as the crimes under

Article 5. I think this is a fact. It is not a means of minimising anyone's conduct, but it is a fact.

And your colleagues, which I think, with respect, do deserve consideration have noted, and this is Judge Kourula in his dissenting opinion, he noted that Article 70 offences for which Mr Kilolo has been charged, quote, "Are not at the higher end of the scale of seriousness."

Judge Ušacka echoed what Judge Kourula said saying, "While Article 70 offences are undoubtedly directed against an important value, the proper and efficacious administration of international criminal justice, their gravity does not even come close to that of the core crimes."

Now, I highlight these things because obviously, and again it's not my intention to lecture to you on what the law is, I give you the facts, you tell us what the law is, that's how it works. But I think that you need to take your observations with the observations of your colleagues, and I think together in conjunction we need to recognize that the offences for which Mr Kilolo and the others have been convicted are not as grave and as a consequence the sentences should reflect the conduct itself.

So let's look at what sort of things a court would look at in fashioning a sentence. And again I'm going to just refer to a couple of passages from our brief which sort of highlights the law. Obviously, the degree of culpability and the offence, the proportionality of the offence.

Now, you have to look at retribution, deterrence and rehabilitation. The world over, at least where the rule of law applies, basically that's what sentencing is all about. It's not about revenge. It should be about retribution, deterrence, rehabilitation. And retribution has been, you know, is to condemn the offence. In the United States we would call it reaffirming societal norms, making sure that everybody understands

that these are the norms by which all of us have to abide by. And when you violate those norms, you should be punished appropriately. Sending the message you could say, that may be one way of putting it.

The Prosecution, if I understand it, if I may paraphrase, I don't want to wish to put words into their mouth, but it would appear to me that by asking for an 8 year sentence, and the hyperbolic presentation, although it was delivered marvelously, I must commend my learned colleague, it's as if they're asking to make Mr Kilolo an example. There is a difference between sending a message and making an accused the poster child for others to come, the example.

With all due respect, sentencing is not about making someone an example. And that's not what we talk about when we speak of retribution.

But I also dare say that when it comes to Article 5 crimes, this is of the highest importance upon which, you know, you will sentence. And why is that? You're dealing with physical perpetrators or someone who manipulated physical perpetrators or worked in conjunction with a physical perpetrator to ensure that crimes were committed as opposed to offences which deal with the administration of justice.

And by that, let me make sure that we're very, very clear, we are not minimising the importance of lawyers abiding by the code of professional responsibility and ensuring that they do nothing that interferes with the administration of justice. I want to make sure that there is no misunderstanding.

When it comes about deterrence, obviously the sentence has to be somewhat proportionate to deter others, that they know that if they were to commit this offence, there are these repercussions, there is a penalty to pay.

And my good friend and learned colleague, Mr Powles, noted about or talked about

the deterrent factor and the message already that you've sent that will deter others, and I'll talk a little bit more about that.

Then we're talking about rehabilitation. Now, what do we mean by rehabilitation? That's the third aspect. And I dare say that when we're dealing with a career criminal, somebody who is a recidivist, that's probably the lowest thing that a judge is looking at, because they are normally unable to get back into society and especially if they've been institutionalised or they're career criminals.

But for someone who has committed an offence, for someone who has a clean record, for someone who has never violated any laws, who is a first offender, an offender of an offence as opposed to a crime, I dare say that rehabilitation is of primary importance, especially I would say in Article 70 offences.

And there lies the distinction between the two. And the Prosecution, I dare say, were pitching their message as if you were dealing with an Article 5 crime as opposed to an Article 70 offence.

Now let me just talk very briefly about Mr Kilolo, because I want to get into that aspect of it. Unlike many others, I've been trained at sentencing to talk about the accused because now is the time for you to make a determination now that he's been convicted on what sort of sentence you should fashion for him.

Well, let's talk about his background a little bit. He's a father. He's a husband. He's a son. He's a cousin. He's an uncle. Lots of people depend on him.

He's a professional, someone who had a career that was unblemished, unblemished until this incident for which now he stands convicted and unless, unless this conviction is overturned on appeal, it is something that follows, that will follow him forever.

It's what I call the untangible tangibles. We don't see them. Right now we have a

figure, 11 months that was -- that he actually spent. But what are the other incidental penalties or the price that he's already paid and will continue to pay? It's sort of the punishment that keeps on punishing. For those of us who are privileged, as my learned friend noted, and I agree, privileged to be in this Court or in this profession, we only have one reputation to lose in our entire career. We build -- we try to build our career throughout our entire life, and it can be taken away.

And if this conviction stands on appeal, forever this will affect him. He will always have to put down on a form, on an entry form whether he had been convicted of a crime. He may lose his ability to practise law or sanctioned for a significant period of time.

Obviously it will impact his ability to earn a livelihood. So that you have these untangible tangibles. But let's step back and not talk about the future, but let's talk about the 11 months. Here he was in a detention facility. Now, the Prosecutor yesterday, and rightly so, noted how important it is that lawyers abide by the Code of Professional Conduct and so on and so forth. But let's just look at the Kenya cases. How many thousands of people were alleged to have been killed or were killed allegedly by those who were brought before the ICC? They got on a plane, first class, they were invited, they came. They stayed at 5-star hotels. They appeared. They went back. They hitched up as a political party, they won the election, president and vice-president are back here again, never once spending a single solitary moment in a detention facility; whereas Mr Powles indicated Mr Kilolo went there, was stripped, stripped of his clothing, stripped of his dignity and searched, cavity searched. That is an intangible tangible that stays with him forever.

And that is part of the price that you must consider, not just the 11 months, and I dare say it's not just 11 months, because if we look at the jurisprudence in the international

courts, we know that if one behaves properly, and this is why it's a mitigator and something to be considered, judges normally would allow the accused to be, the convicted person to be released after serving two-thirds of the sentence.

So when you look at this 11 months and you factor in the notion that he was a model inmate at the UNDU, model afterwards when he was provisionally released, effectively he has served a 17 to 18-month sentence. That's how you have to look at it.

But getting back to the intangibles, his practice was frozen for 11 months. We all know that clients come to you because of your reputation, either you are a great lawyer, like Mr Powles here and people come to you because they want somebody who has a fabulous reputation, others come to you because you have a relationship from within the community.

11 months his office was closed. 11 months the phone rang, but nobody was there to answer it. 11 months he was unable to receive a client. 11 months his family were unable to be provided the way he was able to provide for them while he was practising. He couldn't see them whenever he wanted to see them. He's being told when to get up and when to go to bed, when he can have fresh air and when he has to be in the cell.

And let me say one thing that was not mentioned by Mr Powles, that when he was first arrested, it was not in The Hague, he was arrested in Brussels. And he was taken there. And he stayed there one night, two nights in a common facility where you have real criminals, where you have physical perpetrators, and there he is among all of them without protection, without security.

This is an untangible tangible. The psychological impact that this has had on Mr Kilolo will stay with him forever. And this is something that you have to factor

in.

Now, the Prosecutor will say, "Well, but he should have known better." That's not an issue. We're not dealing with a common criminal. We're dealing with a professional who obviously at some point made some errors. It's debatable, and this is something for the other court to what extent those errors rise to the level of offences. But I understand you've made your findings of facts. But be that as it may, this is not the sort of conduct that a professional should have to endure for the offences for which he was charged.

Why couldn't the Prosecutor in this particular case when Mr Kilolo came back to The Hague say, "Oh, by the way, you know, we're charging you. And let's have a hearing on provisional release."

Instead, he's taken in, unlike Kenyatta, he's taken in and he's kept in there and denied provisional release for 11 months, 11 months where effectively the life that he knew vanished.

And when he was provisionally released, now he's got to go back and try to pick it up. But in the meantime it's been advertised what he did, to what extent he was involved, effectively killing his career.

Now, the Prosecutor yesterday said, "Well, but when he got out he was unrepentant. He made certain comments."

Well, Mr Kilolo, like many of us, has made comments even before he was provisionally released, before he was arrested, commenting on this institution or all institutions, the general nature of international criminal law, and I think it would be fair to say that there is a certain amount of politics in international criminal law. It's the nature of the beast. I write about it all the time. Nobody has arrested me yet. I haven't been found in contempt. It's not that I disregard the institution, but I think

there are questions to be raised why this person is charged and that person is not charged. You know, why in one courtroom you have this procedure being played out whereas in another courtroom you have another one. These are legitimate issues.

But let me remind you, your Honours, that while he was out on provisional release, he did not violate any conditions. Had he said something that was contrary to the conditions of provisional release or something that was inappropriate and contrary to the Code of Conduct, the Prosecution because they have it in for Mr Kilolo, I'm not saying personally, but this is the sort of offence that drives them nuts because they've had problems in other cases, and I perfectly sympathise with them, but had he violated any conditions of his release they would have run to the Court and they would have asked him to be back in there. And you need to factor that in.

As far as what somebody else might have set out in a press release, who then claims that he's speaking for, where is the evidence? There is nothing that ties Mr Kilolo to whatever else somebody else said, even if that person was working on the team who immediately was disavowed and is no longer on the team. The previous lead counsel indicated so, and that is not an aggravating circumstance. And certainly the Prosecution has not proved beyond a reasonable doubt that Mr Kilolo was behind that statement or sanctioned that statement.

Who is Mr Kilolo? He's someone who never had a criminal offence before, never been sanctioned by his bar, had a stellar professional career. He has cooperated with the Court. To the extent that one can cooperate and at the same time, and at the same time exercise their fair trial rights, what's the sense in saying, "You have the right to remain silent but then, well, now that you're exercising it we're going to use it as an aggravator. You're not cooperating."

In some jurisdictions silence can be viewed negatively, but that's not the case. We're here, you can't judge him by the fact that his lawyers are advising him how to conduct himself during the trial, whether to testify or not testify. That's not an issue. And you can't say that he hasn't cooperated because he's exercised his fair trial rights. The Prosecution, "Well, even after the trial they haven't renounced anything."

We haven't been sentenced. He's filing an appeal. It would be malpractice for a lawyer -- I would be up to lose my licence if I were to advise my client, "Oh, by the way, now that we're appealing, well, renounce, admit, do something," in order to get a lesser sentence, "let's pander ourselves before the Trial Chamber in order to get a sentence." That's not how it works.

Mr Kilolo we can see from his -- from our submissions you can see has made lots of efforts to enhance the professionalism of the legal profession between the Congo and Belgium.

He has been involved in and doing NGO work or community work for the betterment of those who are less fortunate. He has been involved in his church. So we see somebody that has a good character, was a productive member of society.

Recognising the findings that you've made, you have to look at the entire package, not this one moment. Sometimes when lawyers make a mistake, we are judged by that, the lowest common denominator, that one moment of weakness. Everything else that we've done before or after is almost ignored. We're remembered for that one dark moment. This is the unfortunate part of our profession, which is why we always need to be vigilant.

But I dare say, your Honours, you have to look at all of these intangibles, the fact that it will impact his career at least in the very short run, and if his conviction is not overturned, for a very long time, he has to live with the fact that he is a convicted

individual.

He probably will never be able to practise again before an international tribunal. He may have problems with his licences in Belgium and the Congo. These are untangible tangibles.

So you have to consider all of that.

Now let's look at what are we asking for, a sentence. As I noted, your Honours, he's already spent 11 months in confinement. It's a prison facility. When you look at with credit for, a good credit served, we're talking about a 17 month sentence. We submit, considering what he has suffered and what he will continue to suffer and all the things that I've noted that are not seen by just this one figure of 11 months, considering that we're dealing with a professional with a clean record and how much he has suffered as a result of being provisionally released, I mean detained -- what if he had not been detained? For 11 months he could have been practising. That is something, that is a price that he's had to pay.

And what's the sense of saying at some point years later, "Oh, go back and serve some more time." How does that help him reintegrate into society and help him with his rehabilitation? It does nothing.

We submit that if you were to consider a higher sentence, think of in the alternative of imposing a higher fine than what you may have in mind, if you have a fine in mind. And I dare say considering that, the costs that he has already paid with the loss of income and what have you, that no fine should be imposed. But were you to consider that he should have a higher sentence, first suspend it. Have the sword of Damocles hang over his head to ensure that for the time that he would be on probation with the sentence being suspended, that he would abide by all of the conditions. For instance, were you to impose a fine to ensure that within this period

he would have to actually pay the fine. But if you are entertaining, and I'm not trying to give you any suggestions that you should, but if, if you want to go beyond the 11 months, think of a higher penalty, a higher fine, something that would enable him to continue working, enable him to have what little dignity is left for him to continue in the profession in order to pay the fine, to assist his family, to assist all those around that depend on him and to assist him on the road of rehabilitation.

It's my understanding, your Honours, I don't have any more to say, I may have gone a little bit longer than I thought I would. I apologise to the interpreters if I spoke too fast or too loud or got carried away with my emotions.

Mr Kilolo wishes to say a few words. Since it's within our time frame, I think an allocution by Mr Kilolo would be appropriate and we ask for your indulgence.

PRESIDING JUDGE SCHMITT: Thank you very much, Mr Karnavas, and of course Mr Kilolo can say a few words.

MR KILOLO MUSAMBA: (Interpretation) Mr President, your Honours, I would like to say a few words to express how affected and upset I am given the facts that have been established against me and in particular the qualification of those facts in your sovereign ruling. And I would like to say this with the utmost respect, the utmost respect for you, your Honour, your Honours.

Your ruling, I read each paragraph over and over again, each sentence, each word during these last two months, and often I also reread those passages during long nights of insomnia. And when you referred to the message, to me as counsel before this Court, I understood that message. Indeed, it is the tribunal of my own conscience, enlightened by the verdict of this Chamber, which now is carrying out a terrible trial for me, the trial of my own conscience, calling me to -- requiring me to call into question my own identity.

Since the verdict of guilt was handed down, I spent a lot of time soul-searching, examining each and every one of my acts as lead counsel of Mr Jean-Pierre Bemba in the Main Case.

And having thought it over and enlightened by the trial and your ruling, your judgment, I can say that I might have, I could have probably done better.

Mr President, your Honours, and this is also the opinion of many of my colleagues, lawyers and interns, both in The Hague, in Brussels, in the Congo. It is their opinion of me that I must live with. It's the questions put to me by the closest members of my family, my spouse, my children. Their friends in school are asking them questions, friends are asking them questions. They're asking me questions, my neighbours, my former clients, and many anonymous individuals wherever I go.

I have paid a heavy price in this trial, handcuffed, arrested, transferred to the detention centre for 11 months. I had to get undressed and physically constrained by the agents of this very court working in the penitentiary.

I had to kneel to check in my most intimate cavities to be searched. It was a very shocking and humiliating experience. It was such a trauma that I never even dared complain because I felt so weakened by the process.

Your Honour, I'm married. I have many children, four children. These children are minors, and they have undergone a trauma, the trauma of this trial, the fact that I was arrested, the publicity around the case. And they no longer have me by their side to follow their schooling, their health, to spend the necessary time with them for their development and fulfilment.

These last two years after I was provisionally released, I have only been able to rebuild what had been broken by my 11-month detention in terms of my family life, psychologically, physically and even professionally.

I am working very hard now to prevent my children from being expelled from the family home simply because the mortgage hasn't been paid. I can now attend parents' meetings at their schools. I can now take my -- accompany my older son when he plays football like other parents do. I can be involved in following their schoolwork. Again, I can -- once again, I can help one of my children who needs therapy.

As far as I am concerned, I have benefited from special medical care to get over the trauma of my own detention. Since I was released in October of 2014, I have followed training. In particular I have taken examinations for the Belgian bar, in particular in ethics, professional ethics in the field of the law.

Since I was released, I am committed to providing free defence to people in Belgium who cannot afford legal advice. And I've been working full time with the legal services. I have helped more than 1,000 individuals from various social environments, and I continue doing so today.

Many distinguished lawyers, both Belgian and Congolese who were former bâtonniers members of the Brussels bar and the Lubumbashi bar and who are veritable guardians of professional ethics, those colleagues have written and know me, they know me, they've worked with me. They know of my morals. They know my commitment in the service of justice, both in Belgium and in the Congo. I have worked in favour of justice at their side in order to continue providing in the Congo, the country of my ancestors, providing more equitable justice, safer justice, justice in fact.

In addition, since the month of July 2016, I have been working pro bono to promote projects within a development aid NGO in order to provide vital assistance to the most impoverished people in the most landlocked and poorest area of the Congo.

These people are threatened by cholera epidemics, simply because they don't have basic water provision.

All of the basic structures, the basic infrastructure was destroyed during armed conflicts. This project and its implementation which will continue until 2018 will have an impact on a very wide-ranging population which is very vulnerable and very poor, suffering from extreme poverty, many women and children.

I'm talking about Malemba-Nkulu in the province of Haut-Lomami in the Democratic Republic of the Congo composed of 670,000 inhabitants and some 404 villages which run the risk of being decimated. So yes, this is a new passion that I have discovered in recent months when I went myself there to rediscover my own birth country. And I am deeply committed to that cause.

Thank you, your Honours.

PRESIDING JUDGE SCHMITT: Thank you very much, Mr Kilolo.

Who wants to continue from the Defence?

Mr Gosnell, you have the floor.

MR GOSNELL: Good afternoon, Mr President. Good afternoon, your Honours. It's a privilege to again have the opportunity to address you this afternoon, in respect of a responsibility that I can only imagine is for your Honours one of the heaviest. And you are called upon to tailor the punishment that you will impose upon the accused, tailored to their individual circumstances, primarily the nature of their individual participation in the crime, but also how their circumstances may affect whether the penalty that you impose upon them is harsh enough, stands out as sufficient retribution and deterrence to others. It's an assessment that is uniquely discretionary. It's as much a matter of your conscience as it is a matter of intellect because it requires you to weigh disparate elements that are not easily compared with

one another.

And unique and particular circumstances have arisen for Mr Mangenda as a result of this case. In addition to having spent almost a year in detention, he has been prohibited as a result of this case from working since the time he was released. He faces, as a result of this case, deportation from the country where his children and his wife are lawfully resident.

Now, Mr President, I am not going to recapitulate all that was said in our written submissions to your Honours. You have those. But what we say is that what is in those submissions are by far and away the considerations that should be given the greatest weight, not exclusive weight, but the greatest weight in deciding an appropriate sentence for Mr Mangenda.

But I do propose today, Mr President, to address five issues that were addressed during the Prosecution's oral submissions yesterday and in its written submissions and, coincidentally enough, I will also highlight five considerations that we say should be given the greatest weight by your Honours in determining sentence.

Now the first of the issues that was raised yesterday that I propose to address was an aggravating factor which was said to be the intemperate remarks by Mr Mangenda's counsel which were referenced at paragraph 101 of the Prosecution's submissions and page 95 of yesterday's transcript. Now, those remarks concerned allegations about a Congolese conspiracy and the political motivations behind certain Prosecutions.

Now, in case your Honours were wondering, this was not an allegation that I made. This was an allegation that was made by apparently Mr Mangenda's former counsel. It's not unusual, it's not novel for counsel to make intemperate remarks as your Honours may have probably seen already in the course of this proceeding. That's not new.

What is new is to try to take those kinds of remarks into account and say that the accused should be sentenced to a harsher penalty as a result, especially when, at least to my knowledge, the counsel in question was not sanctioned and the Prosecution made no request for the counsel in question to be sanctioned. So in other words, it's only Mr Mangenda who is to suffer for these intemperate and unfounded allegations highlighted by the Prosecution.

Mr President, the ICTY Appeals Chamber has held that it is improper to give an accused credit as a mitigating circumstance for the good conduct of their counsel, and I submit equally that it would be entirely improper to consider as an aggravating circumstance the conduct of counsel in their submissions before the Court, particularly when those submissions, their nature go beyond what would normally be the object of instructions by the client. And the reference for the proposition I just stated is paragraph 262 of the Krnojelac appeals judgment.

The second aggravating circumstance that was raised by the Prosecution, and I'll say it was for the first time yesterday and in its written submissions was the allegation that Mr Mangenda and Mr Kilolo conspired together to frame the Prosecution with false allegations. And this was at page 81 of yesterday's transcript and paragraph 80 of their written submissions.

The Prosecution alleges in that paragraph and I quote, that Mr Mangenda and Mr Kilolo were attempting to, quote, "bring entirely fabricated charges against the Office of the Prosecutor, the Prosecutor and members of her office, including the senior trial attorney prosecuting the Main Case. Their plan was to reach out to several prosecution witnesses in the Main Case and, according to Mangenda as many as 22 of them, and to get them to sign false statements alleging that the Prosecution had paid them in order to initiate an abuse of process claim against the Prosecution."

Now, I can say, Mr President, that this is an allegation properly because this is not a subject of the trial judgment. You made no findings in respect of this allegation. In fact, this allegation was not part of the Prosecution case. And one has to wonder why, given such an allegation of such gravity, why it wasn't. But the question here is: Is it fair and appropriate for this allegation to be taken into account now?

According to the Lubanga Trial Chamber at paragraph 29 in respect describing aggravating circumstances, quote, "The evidence admitted at this stage can exceed the facts and circumstances set out in the confirmation decision provided the Defence has a reasonable opportunity to address them."

Now, what does that mean in particular circumstances? According to the Lubanga Trial Chamber, it was permissible to consider allegations of sexual violence against child soldiers as a potential aggravating circumstance, because that evidence was raised and discussed during the trial. The Defence had the opportunity to refute the evidence, to bring evidence contrary to that evidence and to cross-examine the basis of that evidence.

And, thus, the Trial Chamber found at paragraph 68 of its sentencing judgment, quote, "Given the procedural safeguards, there will be no consequential unfairness if the Trial Chamber decides that sexual violence is a relevant factor."

Your Honours may think that this is something of a technical objection and, well, isn't the intercept clear on its face that there is something very nefarious going on here, and why shouldn't we be able to just read the intercept and draw negative inferences and take it into account as an aggravating circumstance.

Mr President, let's look at some of the rest of the intercept that was not referred to by the Prosecution. And it is on evidence 1 at the moment, and in particular at line 32. And what we see at line 32, and just above line 32 is the fact that there is a section of

this conversation that has been redacted from the transcript. It's not available. If the Prosecution had brought forward this allegation earlier, if the Defence had been aware that this was going to be a matter in this case that potentially could be given significant weight in deciding how much time or how much penalty is to be imposed on Mr Mangenda, then steps could have been taken to try to have that redacted portion removed so that your Honours can see what is it that has triggered the comment that follows the redacted portion, because as Mr Mangenda says there or is reported as having said, quote, (Interpretation) "That leads us to believe that there was collusion of the witnesses."

(Speaks English) Your Honours won't be able it see that portion and I won't be able to put it in front of you because of the circumstances in which the allegation has been brought up.

The good news, however, Mr President, is that there have been some filings that you have seen in this case that indirectly relate to this subject matter. One of them is filing ICC-01/05-01/08-3077-RED.

And at paragraph 3 of that filing you will see a recitation of the subject matter that is evidently referred to in this intercept.

And it concerns a subject matter that your Honours may remember concerning two witnesses, P-169 and P-178. And that's discussed at paragraph 83 of the Mangenda final trial brief.

One aspect of that behaviour that emerges from those documents is the revelation that there had been contact between witnesses who were protected and who in consequence should not have known one another's identity, and even further than that, that these individuals had been discussing with one another about their complaints about not having received enough money from the International Criminal

Court.

This was the triggering for the conversation that you see in this particular intercept. It's not a fanciful thing. It's not something that was made up in the mind of Mr Mangenda. This was a disclosure that was provided and was a matter of legitimate and appropriate concern by the Prosecution itself.

If Mr Mangenda and Mr Kilolo were planning on engaging in an exercise to frame the Prosecutor by producing false statements by these witnesses, then it must have been done surreptitiously. That must surely have been the intention of Mr Mangenda as expressed in this particular intercept.

And yet if we turn to line 127 which is ERN page 1145 of this document, we see the phrase, quote, (Interpretation) "I believe that he might also look for you, but I am certainly in his understanding he is waiting for us to provide authorisation for them to meet."

(Speaks English) Now from whom is Mr Mangenda suggesting that authorisation is going to be obtained? Mr President, I'm afraid we need to go into private session for just a moment.

PRESIDING JUDGE SCHMITT: Private session.

(Private session at 12.30 p.m.)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Open session at 12.32 p.m.)
THE COURT OFFICER: [12:32:08] We're in open session, your Honour.
MR GOSNELL: And if we turn now to the next page, which is 11.46, line 150, (Interpretation) "Because this is the evidence that they requested money and other things, and then we were talking to them, others are going to open up their hearts and tell us the truth."
(Speaks English) Now it is true, of course, as you can see on the page that just below that the word "couleur" is used. But we also see a clear expression that what is being sought in respect of these individuals is that they come clean in what is at this time legitimately suspected to be potential collusion between witnesses about the truthfulness of the testimony that they were bringing before the Court.
And your Honours drew inferences and made findings based on the word "couleur" in the trial judgment, and your Honours also made findings about the use of the word "verité" when it was used by Mr Mangenda during the intercepts. And you found that in fact that word was meant at face value. And here we see again the word being used, and I suggest to you also that in this conversation, in particular the fact that this conversation is not known to be listened to, at least that's the position that was taken by the Prosecution during trial, that that word can be taken at face value.
Who else was involved in thinking about whether or not an abuse of process motion could be brought based upon the facts and circumstances? Line 165, (Interpretation)

"That is why at that moment we are going to do other things in line with Peter's strategy, notably to go after Bensouda for tales and other things."

THE INTERPRETER: Overlapping speakers.

MR GOSNELL: (Speaks English) This is not a case of a hidden conspiracy based upon totally unfounded suspicions about whether or not witnesses are colluding with one another to give false testimony. There was a foundation to have that concern at the time, and it was being pursued in legitimate and proper fashion including by, if necessary, seeking authorisation to contact the witnesses in question.

Now, Mr President we say that this entire passage, this intercept, the allegation the Prosecution has made in its brief and yesterday, we say that it is not appropriate for your consideration. We say that you should reject its consideration entirely in limine. But even if you were to give this one scintilla of weight, there is not a shred of evidence that has been brought to you that anything was ever done on the basis of this conversation, that a single preparatory step, which is usually a requirement for a conspiracy, was taken to follow up on this discussion.

So even if you were to look underneath, even if you were to ignore the stage at which it was brought, we suggest that it would in any event not properly be considered as an aggravating circumstance, in particular because it has not been proven beyond a reasonable doubt, and that is the accepted standard for taking into account an aggravating circumstance.

The third aggravating circumstance that was raised by the Prosecution yesterday and at paragraph 19 of its submissions was the allegation that there was a cover-up following the revelation of the existence of an Article 70 investigation, and the Prosecution was at pains to underscore that that amounted to an obstruction of this case and somehow separate or different from the offence itself, which is the subject

matter of these proceedings.

And if you look carefully at the Prosecution's written submissions, you'll see that the allegation of cover-up as an aggravating factor goes far beyond the post facto or the post-revelation of the Article 70 case because at paragraph 19 they discuss at length the measures of concealment that were adopted implicitly as an aggravating factor, apparently to give a higher sentence.

Now, Mr President, we say that this reasoning is misguided and that this should not be taken into account as an aggravating factor.

Now, first of all, the Prosecution does not cite a single authority for its view that concealment of a crime either while it is ongoing or after the fact is legitimately to be taken into account as an aggravating factor.

And the Prosecution has failed to find a directly contradictory precedent, which is from the Rajic judgment at the ICTY, that's R-A-J-I-C, which consisted of a mixed bench of eminent jurists, namely, Judge Van den Wyngaert, Judge Nosworthy and Judge Hopfel.

And their analysis at paragraph 132 to 134 of their sentencing judgment is worthy of quotation, so I will quote it, and it starts at paragraph 132, quote, "The Trial Chamber is not convinced by the arguments of the Prosecution in which it claims that absconding from justice and participation in a cover-up should aggravate the sentence. The Prosecution has not proven that these elements are aggravating circumstances pursuant to customary international law or general principles of law. Indeed, in support of its position regarding the participation and cover-up activities, the Prosecutor solely relies on the legal systems of the United States and England and Wales as well as the case law of the Ontario Court of Appeal of Canada.

When arguing that absconding from justice is an aggravating factor, the Prosecution

solely relies on the Sentencing Guidelines of the United States."

And then at paragraph 134, after there is a discussion about why it was taken into account in Čelebići as an aggravating circumstance in a case of superior responsibility, the Trial Chamber went on to say the following, "The Trial Chamber also observes that aggravating factors are usually intrinsically linked to the crimes or the role of the accused during their commission. However, absconding from justice relates only to Ivica Rajic's conduct after the commission of the crimes, apart from the burning of bodies which has already taken into consideration when evaluating the gravity of the crimes. Participation in a cover-up includes acts which arose after the perpetration of the offences."

Now, we say, Mr President, that the reasoning of this passage is equally applicable here. It is clearly correct, and that in fact when the Prosecution defends in its written submissions against the argument that it would constitute double counting they are in fact perfectly correct that it would be double counting to take into account these circumstances of concealment, which are already a matter of the gravity of the offences that your Honours will take into account.

Two further matters were raised Mr President, yesterday that I propose to address that were not aggravating circumstances, but that were mentioned as a refutation of arguments presented in the Defence sentencing brief.

The first was the suggestion that Mr Mangenda's submission to a lengthy interview with the Office of the Prosecutor stands as no mark of cooperation whatsoever but was in fact an act of obstruction, from which I imagine that the Prosecution would say that not only is that not a mitigating factor, but I presume an aggravating factor. I didn't hear them go that far, but it seems to me that would be the logical corollary.

Mr President and your Honours, I invite you to look at the 83-page transcript of

Mr Mangenda's interview, because what you will see in that interview is that although he, like anyone else who would be denying the charges against them, does deny ultimately those charges, he also provides a wealth of factual information which as it turns out has been proven to be correct.

That was an act of cooperation, and it should be taken into account as such. He continued to sit during that 83-page transcript of interview even though there were allegations made by the investigators which we now know were not correct, and that he sat through the interview, and he provided the information that was asked of him in respect, including of important matters in this case.

That's not obstruction, Mr President. It is cooperation. And in the Orić trial judgment at paragraph 750, the Trial Chamber said that it is important even to consider some cooperation. It may not be absolute, it may not be as much as it could have been, it may not be as much as it should have been, but it is still worthy of consideration that it occurred.

And related to this point was the suggestion yesterday, which I think was somewhat flippant, that the Defence had suggested that going to trial is a mitigating circumstance.

That was not the suggestion, Mr President. The suggestion was that going to trial is never an aggravating circumstance, and still less, could it ever be considered an aggravating circumstance when there are charges that have been rejected by the Trial Chamber as was the case here.

So the decision to go to trial, and this is somewhat of a paradox, on the one hand it cannot be ever considered an aggravating circumstance, on the other hand not going to trial can be considered a mitigating circumstance. What I'm suggesting, Mr President, is that the gulf between those two should not be too great, less de facto

what we have is a system which prevails in many countries where there is great pressure, substantial pressure, too much pressure to submit to a plea agreement because of fear out of the consequences of proceeding to trial. That has not generally been the ethos of international courts and does not seem to be the ethos of the International Criminal Court.

The fifth issue that was discussed yesterday again in refutation of the written submissions by the Mangenda Defence was the Rašić case. And the essence of those submissions by the Prosecution was that the Rašić case from the ICTY is of no guidance to your Honours and could be casually discarded as irrelevant and too different from the facts of this case to be worthy of consideration.

Mr President, every case, especially when it comes to the fine-grained assessment of sentencing will have very unique features, features that will distinguish it one from the other. Some features will be more mitigating than the case at hand, some features will be more aggravating.

But the Prosecution is not correct to say that that case offers no guidance to your Honours because, even though the case did involve a smaller number of witnesses, it clearly involved a much higher level of mens rea in terms of wrongfulness. We're talking about a convicted person who took pre-prepared statements to the witnesses, handed them to the witnesses and said "sign."

In respect of one of the three witnesses, the accused went to that person and said, "Can you find me two other people who will sign these two other statements?"

It's an extraordinary act. And it reflects a degree of culpability that I suggest goes beyond -- without in any way minimising the findings in this case, it goes beyond the type of conduct, the type of egregious or at the level of egregiousness goes beyond what is seen in this case, at least in respect of the participation of Mr Mangenda, and

that's what we're discussing at the moment.

The Prosecution also relied heavily on the guilty plea in the Rašić case to suggest that it was not worthy as a precedent in this case, and that's true. The accused did confess to her crime, but her cooperation could not have been said to have been fulsome, at least to the extent that despite this person being of such inexperience and in the hierarchy of the team so low in the team, there was never any information provided apparently as to who might else be involved or who had instructed her to commit these offences.

Now, in those circumstances, yes, we are talking about remorse. We are talking about cooperation. Perhaps not at such a level as to say this is a case that should be dismissed entirely from your consideration.

In any event, Mr President, the precedents that are set out in the Defence sentencing submissions are not there to bind you. They are not there to say that these are exactly the same. But they are there to give you cumulatively, viewed in the round, a sense of how these cases have been addressed in the past.

And that includes cases that involved substantially greater levels of culpability, I suggest, than exist in the case in terms of intimidation being directed towards certain witnesses, the flagrancy of the lies that were being produced in the sense that they went straight to the case, including an alibi in respect of whether a person was committing a crime at the time or whether they were somewhere else, and even in terms of the number of witnesses, because the number of witnesses was not inconsiderable in some of these cases. We're talking about three to five witnesses in some of these, in some of these cases, certainly enough to have affected the course of the case when the subject matter of their testimony is considered, and certainly enough to have presented the same systemic threat to the administration of justice

that is the case here when fingers are put on the scale of that justice in order to achieve a more favourable view of witnesses who are testifying before the Trial Chamber.

Mr President, there are five -- having now addressed the arguments that were presented by the Prosecution, I suggest to you there are five factors that really deserve great consideration and the greatest weight in coming to an assessment of a proper sentence for Mr Mangenda.

First, the Trial Chamber found, at paragraph 920 of the trial judgment that, quote, "There is no direct or indirect link between Mr Mangenda's activities and the false testimony given by D-23, D-26, D-55, D-57 or D-64." That's a third of the witnesses involved in this case.

The Trial Chamber also gave a nuanced view of the degree of Mr Mangenda's participation in respect of the remaining nine witnesses. I will not, your Honours, give back to you the submission, the findings in the trial judgment. You know those submissions far better than I could. But we have set out what we consider to be the important findings in respect of the fine-grained degree of involvement that is relevant to assessing sentence in a way that may not be relevant in determining whether or not somebody is guilty of a particular offence.

And we say that those fine-grained assessments in the judgment are now appropriate for your consideration on sentencing.

Second factor, one that is mentioned frequently by the Prosecution, Mr Mangenda is a qualified lawyer. And with that background, he certainly should have known better than to have engaged in the offences that the Trial Chamber found him guilty of.

But with the exception of the first 18 months since he was accepted and qualified as a lawyer, he has been a case manager. In fact, he has been a case manager at this very

institution. And with all due respect to the wonderful training and experience that one can get at this institution, the horizons are rather limited here. One may not necessarily have a full awareness of the type of positive obligations that one has as a lawyer when one is in a large team as opposed to when you are representing a single client as a solo practitioner and then you must revisit constantly the notion of your own personal obligations and positive obligations as a counsel. And I say that with all due respect to all of the case managers in the room, of course.

Third, Mr Mangenda has already spent almost a year in prison for the offences of which he is convicted. This is not out of proportion to the sentences that are mentioned in the sentencing submissions for Mr Mangenda. They are not out of proportion in terms of the culpability of the accused in those cases. They do provide a framework for your Honours and they do indicate in general terms the degree of sentence that would be appropriate for a person.

Fourth, Mr Mangenda has not been able to work since being released from custody. He is prohibited from working under the terms of his admission to the country where his family lives. That prohibition is a direct result of the current proceedings. This is a prohibition that has not only been in place for the last three years, but that is likely to remain in place indefinitely. That's a heavy, heavy price to pay.

And this is not one that occurs in all cases. This is not a consequence that would in fact, if this were a domestic court or if your Honours had control over all of the conditions in which a person was going to be released into, this is not a punishment that would be visited on a person as a result of a case such as this. This is a byproduct of the situation that we are in, that this Court is in and that Mr Mangenda is in. Nonetheless it's a very heavy burden and a consequence for Mr Mangenda that we suggest your Honours should properly take into account.

Fifth, Mr Mangenda does face deportation from the country where he lives and where his family is fully and legally settled, and for reasons that are discussed in the sentencing submissions, it's not likely nor is it reasonable to expect that they could relocate to the country where Mr Mangenda would likely have to go if he is deported. Is that deportation a certainty? No, Mr President. But you have seen the submissions and you do know the attitude of the country involved and you do know the firmness that appears to be displayed in respect of this matter and what the likely outcome is going to be. And even if somehow that outcome does not eventuate, we are talking about a consequence, a very heavy moment for a person who is a young father with three children, a wife and who has to live with that likelihood coming to pass at some point in the near future as a result of the offences that he has been found guilty of.

Your Honours, taking into account those unique circumstances of Mr Mangenda in no way belittles or undermines the gravity of the offences that your Honours found. As was stated in the Orić trial judgment at paragraph 747, quote, "A finding of mitigating circumstances relates to the assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime." Mr Mangenda is in a situation where he may never recover from the consequences. It's a heavy price to pay for a man of his age, for a man of his relative youth, for a man of his potential. It's not a tragedy, because he is the author of that misfortune. But it is a tragedy for his family, and they will pay the price and have paid the price of the separation and the unique consequences that he has suffered and will suffer.

And these are precisely the type of circumstances that are important not only from the point of view of mitigation, but also when you consider one of the main pillars, the main purposes of sentencing, which is rehabilitation. And for many individuals it

might be said that that is a very remote consideration, one that doesn't come to the heart or even come close to the top of the list in respect of the types of offences that normally are heard by this Court.

But given the consequences that have already been suffered by Mr Mangenda, it is a consideration that I urge on your Honours as being a very serious concern whether or not the sentence, if there is any further custodial sentence, is one that will push him to the point where it is impossible to come back.

Even splitting the difference with what the Prosecution has proposed, which is, let's remember, they've asked for 7 years, an additional 6 years of detention, we say that even thinking in terms of some proportion of that amount is simply not useful. It is too heavy a burden to bear and one that would ignore the purpose of rehabilitation in the particular circumstances of Mr Mangenda.

If your Honours do believe that any further punishment should be visited on Mr Mangenda for the offences that he has been found to have committed, then we request that you consider earnestly and seriously whether there are any possibilities other than further incarceration for such punishment to serve all of the purposes that your Honours must be guided by in coming to an appropriate sentence, because Mr Mangenda is, notwithstanding the offences that he has been found to have committed, still a man of promise. He is still a man with potential. And further incarceration will substantially reduce the possibility that he can recover from the consequences that he has already suffered as a result of these offences.

Further incarceration would substantially reduce the possibility that he could ever become a productive member of society again, that he could ever become a breadwinner for his family, that he could ever become a loving father again in the full sense that he wants to be. And these are Mr Mangenda's individual circumstances

and we ask that you take them into account in deciding an appropriate sentence.

Thank you, Mr President. Thank you, your Honours.

PRESIDING JUDGE SCHMITT: Thank you very much, Mr Gosnell. Considering the advancement of the submissions, the Chamber can return now, we think so, to normal sitting hours. So this would mean this afternoon we have a session from 14.30, half past 2 until to 4 o'clock and tomorrow from 9.30 until 11 o'clock. We have a break now until 2.30.

THE COURT USHER: [13:00:48] All rise.

(Recess taken at 1 p.m.)

(Upon resuming in open session at 2.30 p.m.)

THE COURT USHER: [14:30:57] All rise.

PRESIDING JUDGE SCHMITT: I have heard it's now the turn of the Defence of Mr Babala. Mr Kilenda, are you starting?

MR KILENDA: (Interpretation) Mr President, your Honours, the French politician, lawyer and writer Gilbert Collard wrote in a pamphlet entitled "Le désordre judiciaire," which could be translated "the Judiciary Disorder," and it was published in 1992 at the French publishing house Les Belles Lettres in Paris and described a man in the grips of the judiciary system at the moment when he least expected it, lost in the meanders of corridors from one austere courtroom to another and confused by the esoteric legal language that he heard, he thought that he had fallen prey to a totalitarian system where it was indeed the reign of highfalutin language. And in this pamphlet the lawyer made a plea for the coming of what he called true judicial democracy.

And even though our International Criminal Court is a far cry from the scene described by Gilbert Collard, because here we do our best indeed, thanks to the

highest standards in the area of human rights, using recognized international human rights standards to render justice in an impartial and independent manner. Our professional judges are competent and have considerable experience in criminal law. And it is thanks to that experience, both in human terms and also in criminal law that you, Mr President, your Honours, are indeed able to understand that the man described by Gilbert Collard is a bit similar to Mr Babala.

Indeed, right from the initial appearance on November 27, 2013, Mr Babala, to whom the Single Judge asked whether he had understood the charges that had been notified to him, he responded loud and clear that he didn't understand a single word.

My client indeed wondered why he should be brought to the International Criminal Court, whereas all he did was to help out a friend in distress by transporting money, money of his own that was intended to enable the Defence team in the Main Case to function. This money was not dirty money.

Our client, although a jurist, but a layman as concerns international criminal procedure, was not a member of the Bemba Defence team. He was never aware of the Defence team strategy. He recognizes, having transferred to the Scandinavian witnesses, as Mr Steven Powles has called them, certain amounts of money upon request of the lead counsel, and that's it. Whether it be with the counsel or with the witnesses, he never had any discussion of the contentious nature of the amounts of money.

However, in your sovereign wisdom, you, Mr President, your Honours, you have decided that because of those two money transfers, and I repeat two money transfers, to declare that our client is guilty of interference with witnesses under Articles 25(3)(c) and 70(1)(c) of the statute.

Mr Babala's Defence is not coming before you today to discuss the legal value of the

guilty verdict that you handed down October 19, 2016. The Defence, Mr President, your Honours, takes note of this guilty verdict. And in keeping with the philosophy of this phase of the procedure, the Defence would simply like to present a number of mitigating factors that will enable you to consider an adequate sentence in favour of Mr Babala.

In order to do so, the Defence is going to discuss two theories as follows. First of all, the declaration of guilt on the part of Mr Babala warrants an individualized and personalised treatment. Secondly, a suspended sentence as the appropriate response to the declaration of guilt on the part of Mr Babala.

These two theories will be developed by myself, Jean-Pierre Kilenda, main counsel, and by our legal assistant sitting to my right, Mr Bokolombe. These two theories are necessary because of the conclusions presented by the OTP that we suspected in fact even before we had read the written conclusions.

Let me begin by presenting an introduction to these aspects. The underlying message on the part of the OTP emphasised solely the enforcement approach which is contrary to modern criminology. It is incompatible with the principle of individualisation and proportionality which indeed governs the principle of sentencing at the ICC. It was mentioned aggravating circumstances, certain facts that don't even come under the criterion of beyond any reasonable doubt.

Let's speak specifically of the charges held against Mr Babala, and we will show the senselessness of these charges one after the other.

First of all, the Prosecutor submitted that Mr Babala had abused of his position of authority by using MLC funds to finance the common plan. The practice of collecting funds in Congolese political parties is not specific to the MLC. It's something that all parties do. It does not require any order from the higher -- the

hierarchy. It's something that existed within the MLC even before Mr Babala became a member. It's not something that's related to the case before the ICC as regards war crimes or crimes against humanity. Funds have always been collected. There are many reasons for such money collection, to pay the rent for the party headquarters, to pay the water bill, the electricity bill, to pay administrative personnel, purchasing office supplies, et cetera.

It is true that in the case of the MLC fund collecting was absolutely necessary. The arrest in 2008 of the president of the party and his detention in the penitentiary of the ICC led to a wave of solidarity amongst all of the cadres and militants of the party in order to come to his aid. Indeed, it was necessary to provide for his Defence team, to provide the financial means to enable it to function without neglecting the basic needs of the president. And indeed it is when times are hard that you discover who your true friends are. Who wouldn't have acted in such a way?

In Belgium in 1995 when the tragic Dutroux case occurred, the so-called spaghetti dinners were organised to collect funds in order to pay for the lawyers' fees of the civil parties. Now, why would a similar gesture be a bad thing in the tropics? And such a collection of funds is the natural reaction. It doesn't require any authority on the part of Mr Babala.

The Defence emphasises that use of funds with the members of the MLC was known by the members and done with their agreement. This is stated in document CAR-D22-0001-0001, document which was communicated to the Defence during the preliminary phase.

It's the very first time in a procedure that the OTP alleged illegality in these proceedings. We emphasise that it's not the result of a decision on the part of Mr Babala, and in fact the Prosecutor did not provide any evidence proving that that

was not the case in his various submissions. And in fact, he is merely making suppositions.

Two, as regards the OTP's argument whereby Mr Babala had abused his position of authority by using his own chauffeur to make these money transfers, it's true that Mr Babala did on occasion ask his chauffeur to make certain transfers. This was at a time when he was very busy because he was a member of parliament. This was not limited to transfers relating to this case, but it was part of the regular tasks asked of P-0272, as he described himself before this very Chamber as questioned by the OTP. And such an act in and of itself is not criminal and does not come under what could be called an abuse of authority. The chauffeur in fact testified that he didn't even discuss the purpose of these transfers and therefore knew nothing of the actual facts involved.

Three, as regards the charges regarding finances entrusted to Mr Lungwana, the mention of Mr Lungwana's name here is inappropriate. The Prosecutor here is combining various different sources of evidence in order to mislead the Chamber. The conversation referred to by the OTP in support of his affirmation that Mr Babala was convinced that Mr Bemba appointed Mr Lungwana as the person in charge of finances of the party, finances which apparently were to have served in part to influence witnesses dated March 7, 2012. Mr Lungwana, in fact, was already in charge of finances and logistics in the party, had been for several years, and at least since the year 2008 according to press releases that are easy to find on the Internet. In addition, the extract that the Prosecutor referred to was taken out of context, has absolutely no relationship with this case. In fact, until the very end of the case the Prosecutor had only stated that Mr Lungwana had been in charge of managing the funds of the party for illicit goals, and there was no element submitted to link the

transfers made both by Mr Lungwana and Mr Babala. So here the purpose here today of course is not to discuss the evidence.

Four, as regards the attempts to prevent investigation in this case of the so-called false scenario, the Defence will not emphasise the substance of this issue. We already stated in our pleadings in June that this false scenario under criminal law was an impossible offence. Whether it's the description of the facts or the explanation of the mode of liability held against Mr Babala, the Chamber did not support the attempt to prevent investigation. Its involvement in the conversations in October 2013 was used by the Chamber only to support the inference of the knowledge of Mr Babala and the goals for which the payments were made to Witnesses D-57 and D-64. No conclusions or convictions were decided by the Chamber regarding the involvement of Mr Babala intending to hide the common plan.

The Defence submits that none of the elements referred to by the OTP regarding aggravating circumstances have been proven beyond a reasonable doubt according to the firmly established case law in this Court, and here I refer to Lubanga and Katanga, in particular the judgments ICC-01/04-01/06-2901, paragraph 33, and ICC-01/04-01/07-3484, paragraph 34.

Five. The Prosecutor submits in addition that the refusal to admit the proposals of facts initiated by the OTP and the fact of not having regretted committing the offences should be considered as aggravating circumstances.

Mr President, your Honours, to this day Mr Babala is not aware of having committed offences against the proper administration of justice. Should he have admitted in order to please the OTP simply to develop -- to enable them to develop their theory in a letter sent to the OTP in June of 2015 to inform them of the decision of Mr Babala to not plead guilty, it was indicated that it was in fact a reversal of the burden of proof.

And not knowing exactly what the factual inferences that the OTP was going to deduct from said admissions, Mr Babala did not intend to do something that could be seen as self-incrimination.

Mr Babala, is it not true that he has the right to defend himself against what he considers is unfair accusations? What legal provisions enable the OTP to consider that as an aggravating circumstance? In fact, Mr Babala has the right not to self-incriminate, Article 55(1) of the Statute and Article 67(1)(g) of the Statute as well as the right to present exculpatory witnesses, Article 67(1)(e).

He also has the right not to testify against himself in this particular case. He knew nothing of the goals of the monies transferred to D-57 and D-64.

We must also remember that the OTP tried to impute blame to Mr Babala of the fact of not having recognized the 42 charges that the Chamber did not hold against him, the fact of having transferred money to the two Scandinavian witnesses, accusations that were in fact retained by the Chamber, was admitted by Mr Babala in the preliminary phase. Now, to consider that as an aggravating circumstance would be totally illogical and would cancel out the fundamental right of being able to remain silent without that silence being interpreted against the individual.

Six. As regards the disparagement of the Court in the statements made by Mr Babala before the Chamber, Mr President, your Honours, Mr Babala made several statements before the Trial Chamber. He made statements directly by himself under Article 67(1)(h) of the Statute as well as the opening statement made by his main counsel on February 29, 2016. Both statements show Mr Babala's total faith in justice.

The Prosecutor is one party in the criminal proceedings, but the other parties have the right to describe their behaviour without it being considered as an insult.

This should not be seen as contempt of court, because isn't Mr Babala in fact, through

his counsel, has already stated that as regards the judges of this Chamber, they are like gods, they are the gods of criminal procedure. The Court was described as the Olympus of criminal law. Now, how else could he have shown his respect that the Prosecutor has asked for?

Now as regards the main counsel, Mr Babala has given him mandate of course to defend him. It would seem to me it would be misunderstanding the situation if you were to confuse the Court and the various organs that function within it. It was also stated that one of the judges was called into question, in particular, that he had spoken sarcastically saying that he was impressed by the rapid reading that had been given by the judge of the evidence that has been submitted to him. This is your Honours' statement, but it's not a criticism. This Court is not a place where you castrate the various competitors in the legal system. We're not in competition. We are all trained in dialectics. Mr Babala has the right in respect of all of the various parties to criticise the way things function and the arguments brought up by the various other parties, and this cannot be considered as sarcasm.

The Prosecutor also stated yesterday that Mr Babala attacked the independent counsel. Mr Babala never made personal criticisms against the counsel, the independent counsel. He did criticise the action of this person, who didn't seem to come under any particular structure within the Court, and this was done in full respect of the legal procedures.

Mr President, your Honours, contrary to the OTP, the Defence believes that many mitigating circumstances may indeed be granted in favour of Mr Babala. I would like to show you at this point that the verdict of guilt on the part of Mr Babala does indeed warrant an individualised and personalised sentence. The sentencing process is a process that was described objectively by the drafters of the fundamental

texts of the ICC, and it includes provisions which do away with anything arbitrary or subjective.

Therefore, given this concern for an objective position, your Chamber has indicated to the parties, whereas the full French translation of the judgment dated October 19, 2015 had not yet been made available, indicated therefore the chapters to study most carefully in order to prepare the sentencing phase. And you also established a reasonable schedule to enable us to prepare our sentencing submissions.

The principles that guide your action during this phase are described in the provisions of Article 78 of the Statutes and Rule 145 of the Rules of Procedure and Evidence, which ensure an individualisation of the sentence fully, completely.

And indeed, my learned friends who have spoken before me have emphasised that this must be examined usefully. We mustn't let ourselves be tempted by blind vengeance. As a subject under the law, Mr Babala is eligible to these provisions and there is no legal reason to exclude him from that and let me explain the reasons for this.

One, Mr Babala was only declared guilty of being an accomplice in witness interference of D-57 and D-64 in keeping with Articles 25(3)(c) and 70(1)(c) of the statutes.

He was not involved in the common plan and witness interference. See paragraph 112 of the October 19 judgment of this year. That was the ruling that was the judgment of this Chamber.

The Defence feels that the respect of judicial decisions means that the rule is now the exclusion of the common plan. Any inclusion of such a plan as the OTP suggested in their submissions would be setting aside completely a legal ruling and therefore to be as they spoke about the convicted persons as a group and refusing to consider an

individual approach of individual cases of each individual is -- in doing so the OTP has violated Regulation 136 of the RPE, which provides that each individual in a trial with several accused must benefit from the same rights as if he or she had been judged alone.

Two, the lie on the part of the two witnesses, the two Scandinavian witnesses in fact did not have the effect of boosting the Defence's theory in the Main Case. This lie of an existential nature had the sole purpose of enabling the respective families of the witnesses to survive. It was a mere question of subsistence while Mr Babala was testifying -- while the witnesses, pardon, the witnesses were testifying in The Hague. In addition, Mr Babala was not at the origin of the design of this lie, and in fact it has been admitted that this lie had absolutely no effect on the Main Case. Far from being negligible, this liability has already been mitigated by the fact that Mr Babala never actually participated in any intent of sabotaging the judicial procedure in the Main Case.

Three. Now, completely foreign from the Defence team in the Main Case, Mr Babala was never a member of that team and therefore the Prosecutor cannot state that he would have had knowledge of privileged procedures or ex parte strategy that might have been put in place in the Defence of the interests of the accused in this case.

So, your Honour, your Honours, this is what we have referred to as the mitigating circumstances related to the case itself. This Chamber, Mr President, your Honours, will also decide mitigating circumstances related to the family and professional situation of Mr Babala. The slurs associated with the sentence must not have an effect on the young children, whose greater interest must be taken into account as is stated in Article 3(1) of the International Convention on the Rights of the Child as well as in Article 7(1) of the very same convention.

Mr Babala is also a grandfather. His granddaughter is 2 years old today, has missed him, has not seen him for these 11 months when he was detained in Scheveningen. And he learned with sadness that his granddaughter, another granddaughter was born and was suffering from being so far from her.

The Prosecutor has mentioned that the family situation must not be considered as a mitigating circumstance unless it's exceptional. Now, this is in total contradiction with international case law. For example, the state of health was taken into account as a mitigating circumstance in the case of witness interference in the case Milan Tupajić before the ICTY IT-95-5/18-R77.2, judgment, paragraph 10; and in the Rašić case before the same court.

Even if the Chamber did not consider that the state of health was a mitigating circumstance, they did take account of that and granted a suspended sentence.

Mr President, your Honours, Mr Babala is a member of parliament. He is an active member of the opposition coalition which is fighting for the restoring of democracy and the rule of law in the DRC. Mr Babala has done everything he possibly can to bring his country out of darkness and despair that it has been found in for the last 56 years.

And from a strictly professional point of view as a member of parliament, Mr Babala has never hesitated in using his own income, which is modest, in order to carry out certain works of general interest, for example, rebuilding a dam in order to -- for flood prevention. At this day and age where the Congolese government has pretty much resigned from its sovereign functions, such a gesture on the part of our client I believe warrants a certain amount of respect and encouragement.

Mr Babala devotes much of his time to speaking with his voters in his constituency in Tshangu, where he was elected twice with a majority of the votes. He was elected to

two five-year terms in a large city like Kinshasa shows indeed that Mr Babala has a spotless reputation.

Mr Babala's fight in favour of democracy in his country leaves no room for any doubt. In a country where pauperisation and savagery is rampant, Mr Babala's work provides some reassurance and lifts the spirits of his compatriots. During his interim release, Mr Babala behaved in an exemplary fashion, respectful of the Courts and the Chamber's orders. The Registry, which is a neutral organ of this Court, can attest to that.

As stated in the Defence's submissions and contrary to the allegations made by the OTP, this aspect was and has been taken into account by various international tribunals.

During his life as a student and during his professional life, Mr Babala has never had a criminal record. Contrary to what the OTP has stated, the very absence of a criminal record and the good behaviour during detention and during his preliminary release is something that has been taken account of in other international tribunals in particular as regards the determination of the sentence in similar cases, for example, in Beqa Beqaj at the ICTY, judgment, dated May 27, 2005, paragraph 63 to 64, the case Haxhiu in the same court, judgment, dated July 24, 2008, paragraph 35, and there are many other examples that you will find in the written submissions of the Defence team.

Given what I have stated, Mr President, your Honours, the sentence requested against Mr Babala by the OTP is an exaggeration clearly. 12 of the 14 witnesses, the influenced witnesses, the tampered witnesses have been excluded from the perimeter regarding Mr Babala. He has only been accused or convicted rather as regards two witnesses, in particular the faulty statements made that had no effect on the merits of

the Main Case. The status of accomplice that was also recognized in the judgment dated October 19, 2016 should also lead to benefiting from particular attention. Such is the very subject to be dealt with by our legal assistant, Mr Godefroid Bokolombe.

MR BOKOLOMBE: (Interpretation) Mr President, your Honours, upon reading the Prosecution brief and closing arguments produced yesterday in the sentencing hearing, I am carried back into the past, 45 years back in fact.

Indeed, whilst at primary school, as many of my elders and peers, I read the story of an adorable parrot by the name of Jackot whose owners had taught to sing "Jackot is happy. Jackot is happy." He would lift his owners' spirits and fill them with joy when they would arrive home, and especially when people would come and visit and he would sing again, "Jackot is happy, Jackot is happy."

One day, unfortunately, having got too close to a lit candle, Jackot burnt his wings. Eaten up by pain, poor Jackot carried on singing nevertheless, "Jackot is happy, Jackot is happy."

In telling this story, I do not seek to insinuate that the Prosecution team, for whom I have only respect and regard, is affected with cynicism. But I would like to state that I find its constant rehashing or worse still its obstinate repression improper.

It is as if the trial never even took place, yet there were 15 months of trial, 2000 -- and our case manager provided us with these figures this morning, Adriana Manolescu, 15 months of trial, 2,100 filings approximately were produced by the Chamber and parties, 400-odd written decisions and approximately 50 days of hearings, 28 witnesses, of which 15 were Prosecution witnesses. All of this cannot leave the initial positions unblemished. The requests, the speeches, the psychological dispositions and attitudes must comply with the evolution in the search for the truth.

Despite the fact that your august Chamber found Mr Babala guilty of only two counts

of a total of 44 levelled against him by the Prosecution, the Prosecution nevertheless has not changed its tack. From the Prosecution's standpoint, therefore, it is still even at this sentencing stage a purely punitive approach. From the standpoints adopted to the jurisprudence cited, all point to a repressive approach, twisting the essential and modern principles of a criminal trial, whilst the ICC by virtue of its ambitions and nobility is a court where the highest principles should be adhered to as should the highest standards of criminal proceedings. Maître Kilenda on other occasions spoke of the ICC as the Olympus of criminal law.

We do not find the equivalent of Article 54(1) of the ICC Statute before any other International Criminal Court. It obliges the Prosecution to conduct incriminating and exonerating investigations in the search for the truth. This provision was inserted in the legislative arsenal of the ICC by the German delegation, thereby seeking to grant the Prosecution the noble status of organ rather than mere party. Under the rather iconoclastic title of Les juges marchent par la tête: un droit du Procureur au procès équitable, which could be rendered as Judges on their Heads, the Prosecutor's right to a fair trial of the minority opinion of the judges on the appeals judgment confirming the acquittal of Mathieu Ngudjolo Chui, Fabrice Bousquet said, and I quote a paragraph from this allegation that I feel is relevant, "For these reasons this proposal provides for a full investigation to be led by the Prosecution expressly with regard to circumstances that exonerate the suspect. The investigations must cover all the relevant circumstances with regard to sentencing, namely the suspect's personality, his or her personal situation and the context in which the crimes can be placed." End of quote.

Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence abundantly cited in our final written submissions say exactly the same thing.

Sentences shall be individual and proportionate to the gravity of the facts and guilt. In its written and oral final arguments, the Prosecution finds no mitigating circumstances in favour of Mr Babala, only aggravating circumstances. Whilst mitigating circumstances are under the terms of the 1832 reform of French criminal law, that is two centuries in the past, they are, as I said, unlimited.

Should we therefore believe that Mr Babala is the devil or, rather, that the Prosecution is attempting to demonise him? Is this the role of the Prosecution in accordance with Articles 54(1) and 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence.

This demonisation is illustrated in the use of terminology. The term used in the statute to describe the facts brought before your Chamber is that of offences. But the Prosecution knowingly uses the term and abundantly uses the term "crime" to confer excessive gravity upon these facts and with a view to misleading the Chamber.

In the Prosecution's final arguments yesterday the Prosecution used, for example, the term "crime" 30 times and the term "offence" only 21 times. In their written filings there were 131 references to "crimes" and 92 references to "offences" only.

As a further illustration the Prosecution is still adhering to the position of the Single Judge, who described this case as, I quote, and this is a free translation, "Of the most grave, also with the regard to the crimes that are the most grave within the jurisdiction of court." But partially this veils the position of the Appeals Chamber that indicated that the gravity of the offences against the administration of justice is not comparable to those reprimanded under Article 5 of the Statute. And here I am referring to the judgment number ICC-01/05-01/13-558, paragraph 64, dated 11 July 2014.

And in addition, the Prosecution is coming away from your conclusion as a very

embodiment of the judgment that clearly states and I compare in comparison with Article 25(3)(a) of the Statute, "The mode of responsibility engaged under Article 25(3)(c) imply a lesser degree of blame." End of quote.

When Mr Babala's team raises these findings of both the Appeals and Trial Chamber in order to grant appropriate proportion to these procedural facts, the Prosecution accuses them of minimising the facts. Mr Babala is not minimising the facts. These must retain their true measure, however. "High are the hills and very high are the trees," as the poet said in the Chanson de Roland.

The various serious crimes are those described under Article 5 of the Statute. A further illustration is that the Prosecution is inventing irrelevant aggravating circumstances. None of those are mentioned, for example, in Rule 145(2)(b) of the Rules of Procedure and Evidence.

He goes as far as to condemn Mr Babala's exercise of his right to defend himself and elevates the crime of lèse-majesté to an aggravating circumstance.

Mr Babala does not have the right to criticism -- to criticise the Single Judge, but the texts do enable to him to recuse him and seize the Court of Appeal in application of the principle of the right to appeal to a higher court in order to challenge the decisions that to him seem unjust.

He does not have the right to criticise the Prosecution, who acts as a party rather than an organ of the Court. In this regard the Defence would like to underscore that the findings referred to by the Prosecution yesterday are repeated in the requests for recusal submitted in application of the procedure by the Defence. Enjoying the right to a defence and demanding fair proceedings cannot be deemed an aggravating circumstance against Mr Babala. The contrary would be to entirely do away with the right of an individual to defend themself.

Mr President, your Honours, the ICC Statute, the Rules of Procedure and Evidence and the various modern courts favour the judgment of the act committed and the perpetrator of said act. It follows that the punishment is determined upon the gravity of the act committed whilst taking into consideration the perpetrator of said act, namely a complex individual with a past and a future life living in a social and cultural environment.

Taking into account the objective gravity of the act and the personality of the perpetrator is the embodiment itself of the great powers bestowed upon you as judges in criminal cases, that of knowing in all wisdom whether it is necessary or not to inflict a punishment, and if so, and if so to graduate the punishment on a broad scale and choose the most appropriate.

To repeat the expression of Georges Vermell, "Yours are the weapons of criminal law as the keys of a piano are to a pianist." It is you, Mr President, your Honours, who know the facts for having investigated them and you who know the accused, especially Mr Babala through testimony, discussions and the case study of his personality that the Defence had the honour to present to you.

You were able to note that Mr Babala has no criminal record, that he obeyed all orders of your Chamber and that he has a family and social situation to maintain.

The Defence has submitted in its written filings the examples of jurisprudence where such aspects were taken into account in the determination of a sentence contrary to that alleged by the Prosecution.

In living memory the punishment to be inflicted upon a guilty individual has always sought to fulfil one or several purposes. Generally speaking, there are three such purposes, that of retribution and expiation, intimidation and re-socialisation. The function of retribution of expiation are the purposes preferred by the Prosecution.

The Prosecution has stated that the accused must be punished for offences against the administration of justice, for having had Trial Chamber III run the risk of not being able to punish Mr Bemba. That is all.

The Prosecution is reducing international society to an arena of torments.

The Prosecution then attempts to bestow upon the infliction of a severe sentence against Mr Babala the purpose of intimidation. Such a sentence would have the sole aim of instilling fear and as such prevent Mr Babala from committing another offence. But in reality, as in the apology of the abandoned island, the Prosecution is still animated by a spirit of retribution. Even if Mr Babala is no longer called upon to provide the current Bemba Defence team with funds, he must still be punished.

Furthermore, according to the Prosecution, the severe sentence requested against Mr Babala will have the advantage of dissuading potential delinquents.

The Defence does not see how Mr Babala's conviction, come to 3 years of imprisonment, can dissuade any major criminals who engage in the disembowelment of women, who kill babies and slit men's throats in Beni in the DRC. It has been sufficiently shown today that one is dissuaded on the strength of one's own sentiments alone.

The Prosecution's final arguments are devoid of any favourable circumstances for the reinsertion and rehabilitation of the accused, notably Mr Babala such as the suggestion of alternative measures such as a suspended sentence.

Mr President, your Honours, the findings you have reached with regard to the lesser gravity of the facts and mode of responsibility with which Mr Babala is charged, in addition to those elements we have introduced, such as the absence of any criminal record, the taking into consideration of his family, social and political situation, the lengthy preventive custody and his exemplary behaviour before your august

Chamber all call for the delivery of a suspended sentence.

The granting of a suspended sentence is submitted to three conditions, all of which in our opinion are met by Mr Babala. Indeed, with regard to the length of sentence which must be equal to or less than 5 years, Article 73 of the statute punishes offences, "against the administration of justice by imposing a term of imprisonment not exceeding 5 years or a fine in accordance with the Rules of Procedure and Evidence or both." End of quote.

With regards to the absence of any prior conviction as attested to by Mr Babala's empty criminal record and certificate of good conduct and morality issued in his name, Mr Babala has never been convicted over the past 10 years or indeed throughout his 60-year life span. The Defence has submitted official certificates attesting to this, and I am here referring to document CAR-D22-0006-0004 and CAR-D22-0006-0005.

Lastly, with regard to the subsequent non-commission of reprehensible offences, there is no risk that Mr Babala commit any such reprehensible acts. Were the Chamber to choose to impose a fine, Mr Babala respectfully requests that be taken into account his high monthly costs in order to meet the needs of his family and community.

The Defence requests that the Chamber take note of the Registry's report on Mr Babala's solvency, which is incompatible with his current buying power.

The Prosecution's argument that the charges levelled against Mr Babala do not have any comparison in international jurisprudence is quite simply incorrect. Our learned colleagues taking to the floor just before us gained a number of jurisprudential examples which contradict this line of thought.

We shall rely, Mr President, your Honour, upon your wisdom in the practical

application of these judicial decisions in the instant case. For these reasons we respectfully request, your Honours, that were there to be a need for a sentence to be imposed, that it be the lightest possible conceivable suspended sentence for Mr Babala. And we thank you in advance.

PRESIDING JUDGE SCHMITT: Thank you very much.

I assume that the Defence of Mr Arido does not want to start and have only half an hour now. I would assume that you want to take your time tomorrow morning; is that correct, Mr Taku?

MR TAKU: That's correct, your Honours.

PRESIDING JUDGE SCHMITT: Then the hearing is closed for today and we resume tomorrow morning at 9.30.

THE COURT USHER: [15:27:25] All rise.

(The hearing ends in open session at 3.27 p.m.)