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Date: 8 March 2018

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted

Judgment
on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Mr Aimé Kilolo Musamba
Mr Michael G. Karnavas

Counsel for Mr Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Mr Fidèle Babala Wandu
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Mr Charles Achaleke Taku
Ms Beth Lyons

Registrar
Mr Herman von Hebel

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The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu, Mr Narcisse Arido and the Prosecutor against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute" of 22 March 2017 (ICC-01/05-01/13-2123-Corr),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1) The sentences imposed on Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo and Mr Jean-Pierre Bemba Gombo are reversed and remanded to Trial Chamber VII for a new determination.

2) The sentences imposed on Mr Fidèle Babala Wandu and Mr Narcisse Arido are confirmed.

REASONS

I. KEY FINDINGS

1. A mode of liability describes a certain typical factual situation that is subsumed within the legal elements of the relevant provision. The difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145 (1) (c) of the Rules. This however does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case.

2. In the legal framework of this Court, "inherent powers" should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure. When a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported "inherent powers" to fill in non-existent gaps.

3. The powers of a trial chamber at sentencing are limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its *quantum.* No "inherent powers" may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court, including to pronounce suspended sentences.

4. The "gravity of the crime" mentioned in article 78 (1) of the Statute, the "extent of the damage caused", the "degree of participation of the convicted person" mentioned in rule 145 (1) (c) of the Rules and the aggravating circumstances listed in rule 145 (2) (b) of the Rules are not neatly distinguishable and mutually exclusive categories. Rather, certain facts may reasonably be considered under more than one of the categories. What is of importance, therefore, is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once.

5. The consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person. This approach takes into account that, when sentencing the convicted person, a trial chamber must assess, *inter alia*, the gravity of the crime, including the harm caused. However, as the eventual sentence must reflect the culpability of the convicted person, it must be demonstrated that these consequences were, at least, objectively foreseeable. This applies both for the assessment of gravity of the crime or offence and for potential aggravating circumstances. If it were otherwise, there would be a risk that a person is punished beyond his or her culpability.

6. In circumstances where an accused has spent time in detention as a result of warrants of arrest issued in different cases, time spent in detention can only be taken into account once for the purpose of article 78 (2) of the Statute.

II. INTRODUCTION

A. Procedural history[1]

1. Proceedings before the Trial Chamber

7. On 19 October 2016, Trial Chamber VII ("Trial Chamber") convicted Mr Jean-Pierre Bemba Gombo ("Mr Bemba"), Mr Aimé Kilolo Musamba ("Mr Kilolo"), Mr Jean-Jacques Mangenda Kabongo ("Mr Mangenda"), Mr Fidèle Babala Wandu ("Mr Babala") and Mr Narcisse Arido ("Mr Arido") for offences against the administration of justice pursuant to article 70 of the Statute.[2] The Trial Chamber pronounced their respective sentences on 22 March 2017.

8. Mr Bemba was convicted as a co-perpetrator for corruptly influencing 14 witnesses and having presented their false evidence, pursuant to articles 70 (1) (b) and (c), in conjunction with article of 25 (3) (a), of the Statute.[3] He was also convicted of having solicited the giving of false testimony by 14 witnesses, pursuant to article 70 (1) (a), in conjunction with article 25 (3) (b), of the Statute.[4] The Trial Chamber sentenced him to a joint sentence of 12 months of imprisonment, to be served consecutively to his existing sentence (imposed by Trial Chamber III in the Main Case) and ordered that the time Mr Bemba had spent in detention pending trial would not be deducted from the prison sentence. The Trial Chamber also imposed a fine of EUR 300,000, to be paid by Mr Bemba within three months of the Sentencing Decision.[5]

9. Mr Kilolo was convicted as a co-perpetrator for having corruptly influenced 14 witnesses and having presented their false evidence, pursuant to articles 70 (1) (b) and (c), in conjunction with article 25 (3) (a), of the Statute.[6] He was also convicted for having induced the giving of false testimony by 14 witnesses, pursuant to article 70 (1) (a), in conjunction with article 25 (3) (b), of the Statute.[7] The Trial Chamber sentenced him to a joint sentence of 30 months of imprisonment and imposed a fine of

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[1] For ease of reference, an annex containing defined terms, abbreviations and material relied upon in this judgment is appended: Annex A - Cited Materials and Defined Terms.
[2] Conviction Decision, pp. 455-457.
[3] Conviction Decision, p. 455.
[4] Conviction Decision, p. 455.
[5] Sentencing Decision, p. 99.
[6] Conviction Decision, p. 455.
[7] Conviction Decision, p. 455.

EUR 30,000 to be paid within three months of the Sentencing Decision. The Trial Chamber ordered the suspension of the remaining term of imprisonment (after deduction of time spent in detention) for a period of three years so that the sentence shall not take effect (i) if Mr Kilolo pays the fine within three months; and (ii) unless during that period Mr Kilolo commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.[8]

10. Mr Mangenda was convicted as a co-perpetrator for having corruptly influenced 14 witnesses and having presented their false evidence, pursuant to articles 70 (1) (b) and (c), in conjunction with article 25 (3) (a), of the Statute.[9] He was also convicted for having aided in the giving of false testimony by witnesses D-15 and D-54, and having abetted in the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25, and D-29, pursuant to article 70 (1) (a), in conjunction with article 25 (3) (c), of the Statute.[10] The Trial Chamber sentenced him to a joint sentence of 24 months of imprisonment. The Trial Chamber ordered the suspension of the remaining term of imprisonment (after deduction of time spent in detention) for a period of three (3) years so that the sentence shall not take effect unless during that period Mr Mangenda commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.[11]

11. Mr Babala was convicted for having aided in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda the offence of corruptly influencing witnesses D-57 and D-64, pursuant to article 70 (1) (c), in conjunction with article 25 (3) (c), of the Statute.[12] The Trial Chamber sentenced him to six months of imprisonment, which it considered served in light of the time he had already spent in detention pending trial.[13]

12. The Trial Chamber convicted Mr Arido for having corruptly influenced witnesses D-2, D-3, D-4, and D-6, pursuant to article 70 (1) (c), in conjunction with article 25 (3) (a), of the Statute.[14] The Trial Chamber sentenced him to 11 months of

[8] Sentencing Decision, p. 99.
[9] Conviction Decision, pp. 455-456.
[10] Conviction Decision, p. 456.
[11] Sentencing Decision, p. 98.
[12] Conviction Decision, p. 456.
[13] Sentencing Decision, p. 98.
[14] Conviction Decision, p. 457.

imprisonment, which it considered served in light of the time he had already spent in detention pending trial.[15]

2. Proceedings before the Appeals Chamber

13. On 13 April 2017, Mr Babala filed a notice of appeal against the Sentencing Decision.[16] On 24 April 2017, Mr Arido, Mr Bemba and the Prosecutor filed their respective notices of appeal against the Sentencing Decision.[17]

14. On 21 June 2017, Mr Babala,[18] Mr Arido,[19] Mr Bemba,[20] and the Prosecutor[21] filed their respective appeal briefs against the Sentencing Decision.

15. On 21 August 2017, the Prosecutor filed a consolidated response to Mr Babala's, Mr Arido's, and Mr Bemba's appeal briefs.[22] On the same day, Mr Bemba,[23] Mr Mangenda,[24] and Mr Kilolo[25] filed their respective responses to the Prosecutor's appeal brief.

16. On 8 March 2018, the Appeals Chamber reversed the convictions entered by the Trial Chamber in respect of Mr Bemba, Mr Kilolo and Mr Mangenda for the offence under article 70 (1) (b) of the Statute and confirmed the remaining convictions in respect of Mr Bemba, Mr Kilolo and Mr Mangenda as well as the convictions entered by the Trial Chamber in respect of Mr Babala and Mr Arido.[26]

B. General overview of the appeals

1. The Prosecutor

17. The Prosecutor raises two grounds of appeal against the Sentencing Decision regarding the sentences pronounced against Mr Kilolo, Mr Mangenda and Mr Bemba. Under her first ground of appeal, the Prosecutor submits that the "Trial Chamber

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[15] Sentencing Decision, p. 98.
[16] Mr Babala's Notice of Appeal.
[17] Mr Arido's Notice of Appeal; Mr Bemba's Notice of Appeal; Prosecutor's Notice of Appeal.
[18] Mr Babala's Appeal Brief.
[19] Mr Arido's Appeal Brief.
[20] Mr Bemba's Appeal Brief.
[21] Prosecutor's Appeal Brief.
[22] Prosecutor Consolidated Response.
[23] Mr Bemba's Response.
[24] Mr Mangenda's Response.
[25] Mr Kilolo's Response.
[26] *Bemba et al.* Appeal Judgment.

abused its discretion and erred in law by imposing manifestly inadequate and disproportionate sentences on Kilolo, Mangenda and Bemba".[27] The Prosecutor argues that the Appeals Chamber should "amend the joint sentence of Kilolo, Mangenda and Bemba by increasing each of them to five years, pursuant to article 83(2)(a) and (3)".[28] Under her second ground of appeal, she avers that the Trial Chamber erred in law and/or abused its discretion in suspending the sentences of imprisonment of Mr Mangenda and Mr Kilolo.[29] The Prosecutor requests that the Appeals Chamber "reverse the suspension [of the sentences] and order Kilolo and Mangenda back into custody to serve the remainder of their sentences of imprisonment or any increased sentences as decided by the Appeals Chamber".[30]

2. Mr Bemba

18. Mr Bemba raises 12 grounds of appeal and requests the Appeals Chamber to reverse the sentence imposed by the Trial Chamber and impose a reasonable and proportionate fine.[31] In the alternative, should the Appeals Chamber uphold the imposition of a custodial sentence, he requests that the Appeals Chamber afford him credit for the time spent in detention since the issuance of a detention order in the present case; or find that the sentences imposed in the present case and the Main Case should be served concurrently.[32] Finally, Mr Bemba requests that, if he is acquitted in the Main Case, or his sentence reduced, any surplus detention served in the Main Case should be credited to him in this case and should also be used to satisfy his fine.[33]

3. Mr Babala

19. Mr Babala raises several grounds of appeal and requests the Appeals Chamber to set aside the sentence that the Trial Chamber imposed on him.[34]

4. Mr Arido

20. Mr Arido raises two grounds of appeal. Under his first ground of appeal, Mr Arido submits that the Trial Chamber erred in disregarding portions of witness P-256

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[27] Prosecutor's Appeal Brief, paras 9-112.
[28] Prosecutor's Appeal Brief, para. 171 (v).
[29] Prosecutor's Appeal Brief, paras 113-170.
[30] Prosecutor's Appeal Brief, para. 171 (iv).
[31] Mr Bemba's Appeal Brief, para. 314.
[32] Mr Bemba's Appeal Brief, paras 262-280, 315.
[33] Mr Bemba's Appeal Brief, para. 315, fn. 411.
[34] Mr Babala's Appeal Brief, p. 79.

(D-4)'s testimony during the sentencing hearing, which, in his opinion, could have rendered the Conviction Decision "nugatory and the sentencing unnecessary".[35] Mr Arido also alleges that the Trial Chamber erred by not taking into account the violations of fundamental human rights he had raised in his Written Closing Submissions as well as at trial; he argues that this failure resulted in unfair proceedings against him.[36] Under his second ground of appeal, Mr Arido argues that the Trial Chamber failed to individualise his sentence and erred in its assessment of gravity of the offence,[37] erred when it found that there were no mitigating circumstances and failed to provide a reasoned opinion regarding the weight given to the overall circumstances.[38] Mr Arido requests that the Appeals Chamber set aside his conviction, acquit him and annul his sentence.[39] In the alternative, he requests that the Appeals Chamber provide him with "a remedy which it deems fair and equitable".[40] Lastly, he requests that the Appeals Chamber declare that he is entitled to "effective compensation for a grave and manifest miscarriage of justice, pursuant to Article 85 of the Statute".[41]

III. STANDARD OF REVIEW

21. The Appeals Chamber recalls that its primary task in an appeal against a sentencing decision is to review whether the Trial Chamber made any errors in sentencing the convicted person.[42] As the Appeals Chamber has previously stated:

> [Its] role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is "disproportionate" to the crime. Only then can the Appeals Chamber "amend" the sentence and enter a new, appropriate sentence.[43]

22. The Appeals Chamber also recalls that Trial Chambers have broad discretion in the determination of the appropriate sentence.[44] The Appeals Chamber set out the

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[35] Mr Arido's Appeal Brief, paras 13-33.
[36] Mr Arido's Appeal Brief, paras 34-37.
[37] Mr Arido's Appeal Brief, paras 38-64.
[38] Mr Arido's Appeal Brief, paras 65-103.
[39] Mr Arido's Appeal Brief, para. 104.
[40] Mr Arido's Appeal Brief, para. 106.
[41] Mr Arido's Appeal Brief, paras 5, 107.
[42] *Lubanga* Sentencing Appeal Judgment, para. 39.
[43] *Lubanga* Sentencing Appeal Judgment, para. 39.
[44] *Lubanga* Sentencing Appeal Judgment, para. 40.

relevant standard of review for a decision involving the exercise of discretion in a judgment in the case of *Prosecutor v. Uhuru Muigai Kenyatta*:

> The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.
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> With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.
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> With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.
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> In addition, the Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a

> Chamber may depend upon the nature of the decision in question.[45] [Footnotes omitted.]

23. The Appeals Chamber considers that the above standard of review also applies to sentencing decisions.

24. As previously stated by the Appeals Chamber:

> [Its] review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.[46]

25. Finally, the Appeals Chamber recalls that, pursuant to article 83 (2) of the Statute, the appellant is required to show that the sentence "was materially affected by error of fact or law or procedural error".

IV. THE PROSECUTOR'S APPEAL

26. The Prosecutor raises two grounds of appeal against the Sentencing Decision regarding the sentences pronounced against Mr Kilolo, Mr Mangenda and Mr Bemba.

27. The first ground of appeal reads: "The Trial Chamber abused its discretion and erred in law by imposing manifestly inadequate and disproportionate sentences on Kilolo, Mangenda and Bemba".[47] Under this ground of appeal, the Prosecutor raises three sub-grounds: (i) "[t]he sentences were manifestly inadequate" (sub-ground 1.1.);[48] (ii) "[t]he Chamber erred in considering extraneous factors to diminish the gravity of the offences and abused its discretion" (sub-ground 1.2.);[49] and (iii) "[t]he Chamber erred in law and/or abused its discretion in finding that accessories deserve, as a matter of principle, a lesser punishment than co-perpetrators" (sub-ground 1.3).[50] The Prosecutor submits that, because of these errors, the Appeals Chamber should

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[45] *Kenyatta* OA5 Judgment, paras 22-25.
[46] *Lubanga* Sentencing Appeal Judgment, para. 44.
[47] Prosecutor's Appeal Brief, paras 9-112.
[48] Prosecutor's Appeal Brief, paras 16-74.
[49] Prosecutor's Appeal Brief, paras 75-101.
[50] Prosecutor's Appeal Brief, paras 102-112.

"amend the joint sentence of Kilolo, Mangenda and Bemba by increasing each of them to five years, pursuant to article 83(2)(a) and (3)".[51]

28. The second ground of appeal reads: "The Trial Chamber erred in law and/or abused its discretion in suspending Mangenda's and Kilolo's sentences of imprisonment".[52] In terms of relief, the Prosecutor requests that the Appeals Chamber "reverse the suspension [of the sentences] and order Kilolo and Mangenda back into custody to serve the remainder of their sentences of imprisonment or any increased sentences as decided by the Appeals Chamber".[53]

29. As explained in more detail below, the Appeals Chamber observes that sub-ground 1.1. of the Prosecutor's first ground of appeal concerns a purported irreconcilability between the facts of the case and the sentences eventually pronounced against Mr Mangenda, Mr Kilolo and Mr Bemba. Conversely, sub-ground 1.2 and 1.3 of the Prosecutor's first ground of appeal and her second ground of appeal concern alleged errors made by the Trial Chamber in arriving at the determination of the *quantum* and type of the imposed sentences. In these circumstances, the Appeals Chamber finds it appropriate to analyse, first, this latter set of arguments as consideration of sub-ground 1.1. of the Prosecutor's first ground appeal depends precisely on the *quantum* and type of the pronounced sentences.

A. Alleged error in considering extraneous factors to diminish the gravity of the offences

1. Relevant part of the Sentencing Decision

30. As part of its assessment of the gravity of the offences, the Trial Chamber "paid heed" to the nature of the false testimony that the concerned witnesses gave before Trial Chamber III of which Mr Mangenda, Mr Kilolo and Mr Bemba were found to be criminally responsible.[54] The Trial Chamber recalled in this regard that the false testimony was found to relate to payments or non-monetary benefits received, acquaintance with other individuals, and nature and number of prior contacts with Mr

[51] Prosecutor's Appeal Brief, para. 171 (v).
[52] Prosecutor's Appeal Brief, paras 113-170.
[53] Prosecutor's Appeal Brief, para. 171 (vi).
[54] Sentencing Decision, paras 115 (concerning Mr Mangenda), 167 (concerning Mr Kilolo) and 217 (concerning Mr Bemba).

Bemba's defence team in the Main Case.[55] The Trial Chamber explained that, while these issues are of "crucial importance" and "indispensable" to a proper assessment of the credibility of witnesses, the fact that "the false testimony of the witnesses concerned did not pertain to the merits of the Main Case […] inform[ed] the assessment of the gravity of the offences in this particular instance".[56] The Trial Chamber therefore accorded "some weight" to this fact.[57] Thereafter, when recalling the relevant factors for its eventual determination of the appropriate sentences, the Trial Chamber reiterated that it "[had] paid heed to the fact that the false testimony related to matters informing the credibility of witnesses".[58]

2. Submissions of the parties

(a) The Prosecutor

31. Under sub-ground 1.2. of her first ground of appeal, the Prosecutor argues that the Trial Chamber erred by failing to properly reflect the gravity of the offences, in particular, those under articles 70 (1) (a) and (b) of the Statute.[59] More specifically, the Prosecutor submits that the Trial Chamber, "[b]y finding that the falsehoods relating to the payments, contacts and acquaintances […] were automatically a less grave form of falsehood in this case and thus, as a matter of principle, deserved a lesser sentence", considered an extraneous and irrelevant factor as diminishing the gravity of the offences and, in addition, abused its discretion by according such factor "some weight".[60] In that regard, the Prosecutor presents, essentially, two sets of arguments.

32. First, the Prosecutor argues that in this particular case it was the Trial Chamber itself that, at the commencement of the trial, decided to limit the scope of the falsehoods in this case to "non-merits" issues.[61] She submits that this decision – which only concerned how the Trial Chamber would consider the evidence to determine whether the accused persons had committed offences under article 70 (1) (a) and 70

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[55] Sentencing Decision, paras 115, 167, 217.
[56] Sentencing Decision, paras 115, 167, 217.
[57] Sentencing Decision, paras 115, 167, 217.
[58] Sentencing Decision, paras 145 (concerning Mr Mangenda), 193 (concerning Mr Kilolo), 248 (concerning Mr Bemba).
[59] Prosecutor's Appeal Brief, para. 75.
[60] Prosecutor's Appeal Brief, para. 75.
[61] Prosecutor's Appeal Brief, para. 76.

(1) (b) of the Statute – was based exclusively on pragmatic reasons, and was never intended to be a legal decision or a decision that could be used to undermine the conviction or sentence.[62] She argues that the Trial Chamber erred when it "transformed [its] pragmatic consideration into a legal and finite factor in sentencing".[63] The Prosecutor also emphasises that the Trial Chamber at no point stated, or "even hint[ed]", that the scope of the case – "now limited, for practical reasons, to falsity on 'non-merits' issues" – would be a factor lessening the gravity of the offences for the purposes of sentencing.[64] Thus, in the Prosecutor's view, "not only was it erroneous to consider this extraneous consideration in sentencing, it was also unfair to do so in this case".[65]

33. Second, the Prosecutor submits that the Trial Chamber's "artificial and absolute 'black and white' demarcation" between false testimony on the "merits" and false testimony on "non-merits" issues "fails to reflect the very real gravity of this case" and creates "an alternate category of 'less grave' article 70 offences".[66] According to the Prosecutor, the Trial Chamber's "artificial gradation" for sentencing purposes contradicts its own approach at the conviction stage that did not distinguish between different kinds of false testimony as well as its own findings emphasising the crucial nature of credibility assessments at trial.[67] The Prosecutor argues in this regard that the Trial Chamber's findings are inherently inconsistent with its earlier determinations, and its decision to accord less gravity to "credibility-related lies" is not properly reasoned.[68] She avers that there was no automatic "hierarchy of lies" in this case, "even more so when all the lies were told solely for the unlawful purpose of manipulating the Court into acquitting Bemba".[69] Moreover, according to the Prosecutor, the Trial Chamber's approach fails to reflect the overwhelming importance that trial chambers give to the assessment of the credibility of witnesses at trial in weighing and evaluating the evidence before them as a whole, and the fact that

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[62] Prosecutor's Appeal Brief, para. 83. *See also* para. 76.
[63] Prosecutor's Appeal Brief, para. 83.
[64] Prosecutor's Appeal Brief, paras 76, 84-86.
[65] Prosecutor's Appeal Brief, para. 89.
[66] Prosecutor's Appeal Brief, para. 77.
[67] Prosecutor's Appeal Brief, paras 77, 90-96, 100, referring to Conviction Decision, paras 22-24 and Sentencing Decision, paras 115, 167, 217.
[68] Prosecutor's Appeal Brief, paras 77, 90, 96. *See also* para. 100.
[69] Prosecutor's Appeal Brief, para. 4. *See also* para. 97.

the ability to assess accurately the credibility of witnesses is "an integral part of Chamber's assessment of the evidence, and an inherent part of a Chamber's ability to assess the substance of their testimony".[70] In this regard, the Prosecutor further submits that, in some cases, an assessment of the credibility of witnesses may be indistinguishable from the assessment of "the substance of the falsehood".[71] On this basis, the Prosecutor argues that the Trial Chamber's approach is both impractical and erroneous.[72]

(b) Mr Mangenda

34. Mr Mangenda submits that the Prosecutor's arguments mischaracterise the Trial Chamber's reasoning.[73] He argues that the Trial Chamber correctly recognised that the allegation that lies had been procured about the merits of the Main Case could not be treated as aggravating circumstances since they had not been proven beyond reasonable doubt, and "adopted an appropriately cautious approach to the nature of the lies as a consideration, stating that this factor was only entitled to 'some weight'".[74] In particular, Mr Mangenda avers that the mere fact that the Trial Chamber distinguished between different types of lies does not mean that it gave undue weight to this distinction, or that lies on "non-merit" issues were treated by the Trial Chamber as automatically less grave and categorically deserving a lesser sentence.[75] Finally, Mr Mangenda submits that the Trial Chamber, having decided that the scope of the trial would not extend to a determination on whether the concerned witnesses testified falsely on the merits of the Main Case, was "under no obligation […] to provide 'notice' to the Prosecut[or] that such allegations could not be relied upon for sentencing purposes", and that it would have been unjust if the Trial Chamber had "[d]epriv[ed] the accused of the chance to litigate the supposed merits lies, but then sentenc[ed] him as if that allegation had been proven".[76]

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[70] Prosecutor's Appeal Brief, paras 98, 99.
[71] Prosecutor's Appeal Brief, para. 99.
[72] Prosecutor's Appeal Brief, para. 99.
[73] Mr Mangenda's Response, para. 56.
[74] Mr Mangenda's Response, para. 56.
[75] Mr Mangenda's Response, paras 58, 59.
[76] Mr Mangenda's Response, paras 62, 63.

(c) Mr Kilolo

35. Mr Kilolo argues that the Prosecutor "waived this supposed error of law, having acquiesced to the Trial Chamber's decision to limit the scope of the case to non-merit issues".[77] He submits in this regard that the Prosecutor "missed the boat" as she neither raised any objections nor sought interlocutory appellate review of the Trial Chamber's decision.[78] In addition, Mr Kilolo avers that while false testimony concerning credibility issues is "by no means insignificant", the Trial Chamber, "[a]fter due consideration and careful deliberation", reasonably concluded that the false testimony was less grave than false testimony on "merit-related issues", and that this was a pertinent finding to its assessment of gravity of the offences.[79]

(d) Mr Bemba

36. Mr Bemba argues that the Prosecutor's position that she was unaware that the limited scope of the false testimony in the present case could attract a lower sentence is "completely incorrect".[80] In particular, he submits that already before the commencement of the trial Mr Arido and Mr Mangenda had argued that in order to fall within the scope of article 70 of the Statute a connection between the false statement and a material issue in the case was necessary.[81] Therefore, in Mr Bemba's view, the Prosecutor was "on 'notice' that the link between the content of the false testimony, and the gravity of the charges would be an issue in any future judgment".[82] Further, according to Mr Bemba, it was the Prosecutor who "brought limited charges, litigated limited charges, and, according to the Chamber, evidentially substantiated these limited charges";[83] in addition, Mr Bemba emphasises that the Prosecutor did not appeal the Trial Chamber's decision to enter convictions "in connection with this limited scope of the false testimony".[84] Thus, according to Mr Bemba, the

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[77] Mr Kilolo's Response, para. 15.
[78] Mr Kilolo's Response, para. 21.
[79] Mr Kilolo's Response, paras 18, 19.
[80] Mr Bemba's Response, para. 116.
[81] Mr Bemba's Response, para. 117 and fn. 215, referring to Mr Arido's Submissions on Legal Elements, paras 11, 18; and Mr Mangenda's Submissions on Legal Elements, paras 6-9.
[82] Mr Bemba's Response, para. 117.
[83] Mr Bemba's Response, para. 118. *See also* paras 119-125.
[84] Mr Bemba's Response, para. 118.

Prosecutor's argument that she was eventually prejudiced by the limited scope of the present case is unfounded.[85]

37. Mr Bemba also observes that according to rule 145 (1) (c) of the Rules, in calculating the appropriate sentence, consideration shall be given to the damage caused by the wrongful conduct and the nature of the wrongful conduct itself, and thus the sentences range for offences under article 70 of the Statute must reflect the different levels of gravity and the damage to the integrity of the proceedings.[86] On this basis, Mr Bemba argues that there is no error in considering false testimony on issues pertaining to witness credibility to be less grave than false testimony on issues going to the heart of the case.[87] According to Mr Bemba, stating otherwise would result in sentences imposed in connection with offences under article 70 of the Statute to be "out of sync with the evidential tendency to recognise that false or unreliable testimony on peripheral issues gives rise to less damage to the evidential integrity of the case".[88]

3. Determination by the Appeals Chamber

38. The Appeals Chamber agrees that, in principle, the importance of the issues on which false testimony is given (within the meaning of article 70 (1) (a) of the Statute) or false or forged documentary evidence is presented (within the meaning of article 70 (1) (b) of the Statute) may be a relevant consideration in the assessment of the gravity of these offences. The introduction of false evidence on aspects of no, or only peripheral relevance to the facts at issue before a chamber may indeed be considered less grave than the introduction of false evidence on issues of particular significance for the case. In essence, this relates to the evaluation of the damage that the commission of the offence caused, or could have caused on the truth-seeking function of the Court that is ultimately protected by the relevant incriminating provisions.

39. That said, the Appeals Chamber notes the Prosecutor's first argument that, in the particular circumstances of the present case, it was unfair for the Trial Chamber to

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[85] Mr Bemba's Response, para. 118.
[86] Mr Bemba's Response, para. 126.
[87] Mr Bemba's Response, para. 126.
[88] Mr Bemba's Response, para. 126, referring to, *inter alia*, *Kenyatta* Decision on Stay of Proceedings, para. 92.

take into account the nature of the issues on which the witnesses testified falsely.[89] The Appeals Chamber appreciates that, as submitted by the Prosecutor,[90] it was the Trial Chamber itself that indicated that for its eventual determination of the charges brought for the offences under article 70 (1) (a) and (b) of the Statute, it would not consider any evidence going to prove that the concerned witnesses testified falsely on issues related to the "merits" of the Main Case.[91] As no such limitation appeared in the charges as confirmed by the Pre-Trial Chamber,[92] the Appeals Chamber agrees with the Prosecutor[93] that this decision was taken for pragmatic rather than procedural reasons,[94] and only concerned the evidence to be submitted at trial rather than impacting on the confirmed charges as such.[95]

40. However, the Appeals Chamber observes that the Prosecutor acquiesced to the Trial Chamber's decision not to explore during the trial the issue on whether the concerned witnesses testified falsely on matters related to the "merits" of the Main Case. As explained above, the Appeals Chamber also considers that the importance of the issues on which false testimony is given can, in principle, be of relevance to an assessment of the gravity of the offences concerned. The Appeals Chamber further recalls that it falls within the discretion of a trial chamber to identify the relevant circumstances for its assessment of the mandatory sentencing factors. For these reasons, the Appeals Chamber considers that the Trial Chamber did not abuse its

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[89] Prosecutor's Appeal Brief, paras 76, 83-89, 100.
[90] Prosecutor's Appeal Brief, paras 76, 83.
[91] Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 9 to p. 6, line 6.
[92] Confirmation Decision, pp. 47-51.
[93] Prosecutor's Appeal Brief, paras 76, 83.
[94] *See* Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 4, line 24 to p. 5, line 15 ("[T]his Chamber cannot assess the truth or falsity of these statements without command over the evidence in the main case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable. […] That said, and in these particular circumstances, the Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case. Rather, whether or not the witness falsely testified can be ascertained in relation to other information given. Moreover, broadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of proceedings and the right of the accused to be tried without undue delay. It is also to be noted that this case could have been joined to the main case under Rule 165(4) of the Rules to resolve all case overlap issues, but no such joinder has been made or even been attempted").
[95] *See also* Transcript of 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG (WT), p. 5, lines 7-10 ("[T]he Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case. Rather, whether or not the witness falsely testified can be ascertained in relation to other information given"). *See also* p. 5, line 16, to p. 6, line 4.

discretion by taking account, in its assessment of the gravity of the offences, the content of the false testimony as established in the present case despite having itself decided not to determine the falsity of the concerned testimony with respect to issues concerning the "merits" of the Main Case. The Prosecutor's argument in this respect is therefore rejected.

41. However, as submitted by the Prosecutor,[96] the Appeals Chamber observes that, in its consideration of the "nature" of the false testimony by the concerned witnesses as a relevant aspect to its assessment of the gravity of the offences, the Trial Chamber distinguished lies on "merit" issues, on the one hand, and lies on "non-merit" issues, on the other hand, based on the assumption that the latter are inherently less grave than the former.[97] The Trial Chamber noted, in broad terms, the issues on which the concerned witnesses testified falsely and, while recognising their "crucial importance", clarified that, "[y]et", they "did not pertain to the merits of the Main Case".[98] On this basis, it described, as a relevant consideration to which it would accord "some weight", "the fact that the false testimonies underlying the conviction related to issues other than the merits of the Main Case", and explained that this consideration, while of no relevance to an assessment of the convicted persons' culpability, did "inform the assessment of the gravity of the offences".[99] The Appeals Chamber notes that the Trial Chamber did not explain on what basis it considered that the fact that false testimony does not relate to the "merits" of a case is generally relevant to the determination of the gravity of the concerned offences, nor why this was the case in the present instance.

42. The Appeals Chamber is of the view that the distinction between lies on the "merits" and lies on other matters relied upon by the Trial Chamber is an unsuitable point of reference to measure the gravity of the concerned offences. The Appeals Chamber is not persuaded that, for instance, false testimony as to the fact that a witness had received payments from the defence and had had improper contacts with members of the defence team is inherently less grave than false testimony on *any* matter "pertaining to" the "merits" of a case. Issues concerning the "merits" of a case

[96] *See* Prosecutor's Appeal Brief, paras 77, 98-99.
[97] Sentencing Decision, paras 115, 167, 217.
[98] Sentencing Decision, paras 115, 167, 217.
[99] Sentencing Decision, paras 115, 167, 217.

may be more or less significant to an eventual determination of the charges by a trial chamber, as more or less significant can be the issues raised by the parties with a view to testing the credibility of witnesses who testify before it on matters relevant to the charges.

43. In this regard, the Appeals Chamber emphasises that the assessment by a trial chamber of the credibility of witnesses (based, *inter alia*, on "non-merit" issues) is an integral part of its ability to assess the substance of the witnesses' testimony (on "merit" issues). Thus, the Court's truth-seeking functions are not necessarily less damaged by false testimony on "matters informing the credibility of witnesses"[100] than they are by false testimony on matters concerning the "merits" of a case. Indeed, false testimony on issues which go to the credibility of a witness prevents the Court from obtaining correct information which may be necessary for an accurate assessment of the reliability of his or her evidence on the "merits" of a case. The Appeals Chamber also agrees with the Prosecutor that, depending on the circumstances, "credibility issues" can be indistinguishable from the "substantive ones",[101] for instance with respect to a determination on whether a witness may have a motive to falsely implicate or exculpate the accused person. In the view of the Appeals Chamber, the Trial Chamber's consideration that the issues on which the concerned witnesses testified falsely are crucial to assess the credibility of the witnesses *but* "did not pertain to the merits of the Main Case" fails to recognise the interdependence of these matters, and that the purpose of questioning witnesses on issues concerning their credibility is to receive genuine information that a chamber would consider in assessing the substance of the witnesses' testimony as part of its ultimate duty to discover the truth.

44. For these reasons, the Appeals Chamber considers that the fact that false testimony pertains to "merit" or "non-merit" issues of a case is not in and of itself reflective of the actual gravity of the offences. Assuming a hierarchy of gravity in this

[100] *See e.g.* Sentencing Decision, paras 145 and 193.
[101] *See* Prosecutor's Appeal Brief, fn. 215, referring to *Limaj et al.* Trial Judgment, para. 20 ("the identification of each Accused as a perpetrator […] is to be determined […] in light of all evidence bearing on the issue of identification, evidence both for and against. In a particular case, this could include, for example, an alibi or whether an identifying witness has a motive which would be furthered by a false identification. Evidence of the visual identification of an Accused by a witness is but one piece of what may be the relevant evidence in a particular case").

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

45. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in giving "some weight" to an extraneous consideration, *i.e.* the mere fact that in the present case the false testimony "related to issues other than the merits of the Main Case", and in determining that this consideration "inform[ed] the assessment of the gravity of the offences" for which Mr Mangenda, Mr Kilolo and Mr Bemba were convicted.[102]

B. Alleged error in finding that accessories deserve, as a matter of principle, a lesser sentence than co-perpetrators

1. Relevant part of the Sentencing Decision

46. When determining the appropriate sentences for Mr Kilolo and Mr Bemba for the three offences for which they were convicted, the Trial Chamber "emphasise[d] that it ha[d] distinguished between the offences that [they] committed as co-perpetrator[s] and those in relation to which [they were accessories]".[103] Thus, the Trial Chamber distinguished Mr Kilolo's and Mr Bemba's conviction for having instigated the false testimony of the 14 witnesses under article 70 (1) (a) of the Statute (for which Mr Kilolo was sentenced to 12 months' imprisonment,[104] and Mr Bemba to ten months' imprisonment[105]) from their conviction for the commission of the offences under article 70 (1) (b) and 70 (1) (c) of the Statute (for which Mr Kilolo was sentenced to two terms of 24 months' imprisonment,[106] and Mr Bemba to two terms of 12 months' imprisonment[107]).

[102] Sentencing Decision, paras 115 and 145 (concerning Mr Mangenda), 167 and 193 (concerning Mr Kilolo) 217 and 248 (concerning Mr Bemba).
[103] Sentencing Decision, paras 193 (concerning Mr Kilolo) and 248 (concerning Mr Bemba).
[104] Sentencing Decision, para. 194.
[105] Sentencing Decision, para. 249.
[106] Sentencing Decision, para. 194.
[107] Sentencing Decision, para. 249.

2. Submissions of the parties

(a) The Prosecutor

47. Under sub-ground 1.3. of her first ground of appeal, the Prosecutor argues that the Trial Chamber erred "in finding that *ipso facto* Bemba and Kilolo deserved lower sentences for the offences that they committed as accessories".[108] She submits that in determining that Mr Kilolo and Mr Bemba deserved less punishment for the convictions for the offence under article 70 (1) (a) of the Statute exclusively because of the "'legal label' as accessories", the Trial Chamber relied on an "artificial hierarchy" and a non-existent "black and white hierarchy of blameworthiness" between accessories and co-perpetrators.[109] In particular, the Prosecutor argues that "in finding that accessories are, as a matter of principle, less blameworthy than co-perpetrators and thus deserve a lesser punishment", the Trial Chamber erred in law, given that: (i) there is no "hierarchy of blameworthiness" among the different modes of liability under article 25 (3) of the Statute, but the level of blameworthiness requires an individual assessment of the facts; and (ii) article 78 (1) of the Statute and rule 145 of the Rules do not link the penalties to the modes of liability, but require a fact-specific assessment of the relevant circumstances of each case.[110]

48. The Prosecutor argues that although co-perpetrators may be more culpable than accessories in certain scenarios, this is not always the case.[111] She submits that the Appeals Chamber itself did not find that there was an absolute hierarchy of blameworthiness among the modes of liability in article 25 (3) of the Statute, but, "cognisant of the limitations of a blanket categorisation among modes of liability, did not preclude, but rather encouraged, a case-specific determination of a convicted person's culpability or blameworthiness".[112] According to the Prosecutor, assessing a person's culpability on the basis of the facts of each particular case, following a "fact-centric approach" as opposed to one based on the convicted person's "legal label", accords with: (i) "the complex and diverse forms of criminality in the Rome Statute"; (ii) the overlap among the different modes of liability; (iii) the principle of

[108] Prosecutor's Appeal Brief, para. 4.
[109] Prosecutor's Appeal Brief, paras 4, 103.
[110] Prosecutor's Appeal Brief, para. 102-103.
[111] Prosecutor's Appeal Brief, para. 105.
[112] Prosecutor's Appeal Brief, para. 104-105, referring to *Lubanga* Appeal Judgment, para. 462.

proportionality and the duty to individualise sentences to the particular circumstances of each case and each convicted person; (iv) "the interplay between the *actus reus* and the *mens rea* (article 30) of principals and accessories which, on the facts may differ and may even go beyond the legal requirements necessary to establish accessorial liability"; and (v) the fact that for certain crimes or offences, such article offences under article 70 (1) (a) of the Statute, may only be *committed* by certain persons.[113]

49. In addition, the Prosecutor submits that, as found by other chambers of the Court, article 78 (1) and rule 145 of the Rules do not establish any correlation between the modes of liability and the sentence and, contrary to some domestic statutes which require domestic courts to distinguish between principals and accessories for the purposes of the sentence, they do not automatically attribute a lesser punishment to accessories.[114] In this regard, the Prosecutor argues that rule 145 (1) (c) and (2) of the Rules rather refer to fact-specific criteria, such as the "the degree of participation of the convicted person" and "the degree of intent".[115]

50. The Prosecutor avers that Mr Kilolo's and Mr Bemba's degree of participation, as well as the Trial Chamber's description of their conduct, in inducing and soliciting the false testimony of 14 witnesses "is as significant as their degree of participation in the article 70(1)(b) and (c) offences for which they were convicted as co-perpetrators", as also indicated by the fact that the Trial Chamber itself did not distinguish Mr Kilolo's and Mr Bemba's culpability for the contributions to the offence under article 70 (1) (a) of the Statute and their contributions to the offences under article 70 (1) (b) and (c) of the Statute.[116]

51. The Prosecutor argues that "stark categorisations involving the modes of liability are unhelpful – since they do not necessarily reflect the true nature of the facts – and are unnecessary for sentencing, since the legal texts already set out

[113] Prosecutor's Appeal Brief, para. 106 (footnote omitted).
[114] Prosecutor's Appeal Brief, para. 107.
[115] Prosecutor's Appeal Brief, para. 107.
[116] Prosecutor's Appeal Brief, para. 109.

relevant criteria reflecting the gravity of the offences and the culpability of the convicted persons".[117]

52. Finally, the Prosecutor submits that, "[f]urther and/or in the alternative", the Trial Chamber abused its discretion in relying on Mr Kilolo's and Mr Bemba's modes of liability for the offences under article 70 (1) (a) of the Statute, rather than considering their actual degree of participation in the offence and "the true extent and nature of [their] contributions to the false testimony of the 14 witnesses", as described by the Trial Chamber.[118] According to the Prosecutor, the Trial Chamber therefore erred in giving weight to an extraneous factor in determining Mr Kilolo's and Mr Bemba's sentences.[119]

(b) Mr Kilolo

53. Mr Kilolo contends that the Prosecutor misrepresents the Sentencing Decision, as "[t]he Trial Chamber did not hold that accessories deserve lesser punishment 'as a matter of principle'".[120] According to Mr Kilolo, the Trial Chamber's "fact-centric" analysis is demonstrated by the fact that he and Mr Mangenda received the same term of imprisonment for the offences under article 70 (1) (a) of the Statute despite the fact that he was convicted as an instigator under article 25 (3) (b) of the Statute and Mr Mangenda as an aider and abettor under article 25 (3) (c) of the Statute.[121] Mr Kilolo also argues that, in any case, even if the Trial Chamber gave weight to the mode of liability in the assessment of his degree of participation in the offence under article 70 (1) (a) of the Statute, "that would have been well within its discretion" and would be "consistent with the principle of fair labelling".[122]

(c) Mr Bemba

54. Mr Bemba submits that the Prosecutor does not demonstrate that the Trial Chamber's alleged error in imposing a lower sentence for offences committed as

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[117] Prosecutor's Appeal Brief, para. 110.
[118] Prosecutor's Appeal Brief, para. 111, referring to Conviction Decision, paras 862 and 906 (concerning Mr Kilolo) and paras 857 and 932 (concerning Mr Bemba), and to Sentencing Decision, para. 222 (concerning Mr Bemba).
[119] Prosecutor's Appeal Brief, section II.C.2.
[120] Mr Kilolo's Response, paras 27-28. *See also* para. 34.
[121] Mr Kilolo's Response, para. 29.
[122] Mr Kilolo's Response, para. 30.

accessories has an impact on the outcome of the Sentencing Decision.[123] He argues in this regard that although the Trial Chamber imposed on him a custodial sentence of ten months in connection with his conviction as an accessory, article 78 (3) of the Statute provides that in case of multiple convictions, a joint sentence cannot be lower than the highest individual sentence, which was 12 months.[124] Therefore, according to Mr Bemba, given that "the reference point was the sentence imposed in connection with [his] conviction as a co-perpetrator […] the fact that he received a lower individual sentence for his conviction as an accessory had no material impact on the outcome of the sentence".[125]

55. In addition, Mr Bemba submits that the mere fact that he received a lower sentence for his conviction for the offence under article 70 (1) (a) of the Statute "does not, in itself, demonstrate that the Chamber did so mechanically", as there is no indication that the Trial Chamber imposed any "automatic hierarchy".[126] In this respect, Mr Bemba acknowledges that it is "theoretically possible that 'solicitation' could warrant a similar or greater sentence than perpetration or co-perpetration".[127] Nonetheless, according to Mr Bemba, the Prosecutor fails to explain "why no reasonable Trial Chamber could have imposed a lower sentence for solicitation, as opposed to co-perpetration, in this case".[128]

56. Finally, Mr Bemba argues that the fact that in order to establish his contribution under article 25 (3) (b) for the offence of article 70 (1) (a) of the Statute, the Trial Chamber incorporated by reference its findings concerning Mr Bemba's role as co-perpetrator "only serves to underscore the fundamental flaw in the Chamber's original conviction of Mr Bemba under Article 25(3)(b)".[129] In particular, Mr Bemba submits that "any error lay not in the Chamber's decision to impose a lower sentence for

[123] Mr Bemba's Response, para. 149.
[124] Mr Bemba's Response, para. 150.
[125] Mr Bemba's Response, para. 150.
[126] Mr Bemba's Response, para. 156.
[127] Mr Bemba's Response, para. 157.
[128] Mr Bemba's Response, para. 157.
[129] Mr Bemba's Response, para. 161, referring to Conviction Decision, para. 857.

accessory conduct, but in its earlier decision to impose multiple convictions for identical, or lesser included conduct".[130]

3. Determination by the Appeals Chamber

57. The Appeals Chamber disagrees with Mr Bemba's argument that this sub-ground of appeal warrants dismissal *in limine* because the joint sentence imposed on him was calculated by reference to the highest individual sentence (that is, the sentences for the offences under article 70 (1) (b) and 70 (1) (c) of the Statute), while the individual sentence affected by the error alleged by the Prosecutor is the one for the individual sentence under article 70 (1) (a) of the Statute (which was lower than the others).[131] The Appeals Chamber notes that at no point did the Trial Chamber state that the joint sentence imposed on Mr Bemba ought to correspond to the highest individual sentence. No such principle otherwise exists in the legal framework of the Court. To the contrary, according to article 78 (3) of the Statute, the highest individual sentence constitutes the *minimum* possible joint sentence. Thus, any error in the determination of an individual sentence – even if not the highest one – may, in principle, have an impact on the determination of the joint sentence. In addition, the Prosecutor's argument is that the Trial Chamber failed to properly consider the culpability of Mr Bemba (as well as Mr Kilolo) for the offence under article 70 (1) (a) of the Statute. If that is the case, it is evident that, contrary to Mr Bemba's suggestion, any such error might correspondingly affect the determination of the total culpability which must indeed be reflected in the ultimate joint sentence. For these reasons, the Appeals Chamber will address this sub-ground of appeal on its merits.

58. The Appeals Chamber notes that the Trial Chamber, when summarising all identified factors for its ultimate determination of the sentences, "emphasise[d] that it ha[d] distinguished between the offences that [Mr Kilolo and Mr Bemba] committed as co-perpetrator[s] and those in relation to which [they were accessories]".[132] While the Trial Chamber did not elaborate any further – and no reference to this particular aspect is made anywhere else in the Sentencing Decision – this distinction appears to have been the basis for the Trial Chamber's imposition of a lower individual sentence

[130] Mr Bemba's Response, para. 162.
[131] Mr Bemba's Response, paras 149, 150.
[132] Sentencing Decision, paras 193 (concerning Mr Kilolo) and 248 (concerning Mr Bemba).

for the conviction for the offence under article 70 (1) (a) of the Statute which Mr Kilolo and Mr Bemba induced or solicited (within the meaning of article 25 (3) (b) of the Statute) than the individual sentences for the conviction for the other offences which Mr Kilolo and Mr Bemba committed as co-perpetrators (within the meaning of article 25 (3) (a) of the Statute).[133] Indeed, the Appeals Chamber notes that the Trial Chamber's descriptions of the relevant facts for the assessment of Mr Kilolo's and Mr Bemba's respective culpability – in terms of degree of participation and degree of intent – for their role as co-perpetrators of the offences under article 70 (1) (b) and (c) of the Statute and their role as accessories of the offence under article 70 (1) (a) of the Statute are essentially almost identical.[134] Also the assessment of the gravity of the three concerned offences is essentially the same.[135]

59. The Appeals Chamber recalls its previous holding that "generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons".[136] As correctly pointed out by the Prosecutor, this statement does not suggest that, as matter of law, a person who commits a crime within the meaning of article 25 (3) (a) of the Statute is automatically more blameworthy – and thus deserves a higher punishment – than the person who contributes to it. The Appeals Chamber's finding was indeed made only "generally speaking" and under the condition of "all other things being equal". Especially with respect to the distinction between the mode of liability under article 25 (3) (a) of the Statute and that under article 25 (3) (b) of the Statute, the Appeals Chamber is not persuaded that a person who instigates someone to commit a crime is to be generally considered less culpable

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[133] In terms of individual sentences, Mr Kilolo was sentenced to 12 months for the offence under article 70 (1) (a) of the Statute, 24 months for the offence under article 70 (1) (b) of the Statute and 24 months for the offence under article 70 (1) (c) of the Statute, and Mr Bemba to 10 months, 12 months and 12 months, respectively. The Appeals Chamber recalls that in its judgment on the appeals against conviction in the present case, it found that the convictions for the offence under article 70 (1) (b) of the Statute were wrongly entered, and accordingly reversed those convictions. Nevertheless, for the limited purpose of its disposal of this ground of appeal, the Appeals Chamber will take into account the Trial Chamber's determination of the sentences also in connection with this offence as this is warranted in order to determine the validity of the Prosecutor's argument that the individual sentences under article 70 (1) (a) of the Statute were lower than those under article 70 (1) (b) and (c) only because of the different "legal label" of the mode of liability rather than for fact-specific considerations.
[134] *See* Sentencing Decision, sections "Mr Kilolo's Culpable Conduct" (paras 169-175) and "Mr Bemba's Culpable Conduct" (paras 219-226).
[135] *See* Sentencing Decision, paras 153-167, 203-217.
[136] *Lubanga* Appeal Judgment, para. 462.

than the person who acts upon that instigation. Mr Bemba himself concedes as much.[137]

60. The Appeals Chamber recognises that a mode of liability describes a certain typical factual situation that is subsumed within the legal elements of the relevant provision, and that the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145 (1) (c) of the Rules. This however does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case.[138] In this regard, the Appeals Chamber observes that the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence. Rather, as pointed out by the Prosecutor,[139] the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case.

61. The Trial Chamber stated that it relied on the mode of liability as a basis to distinguish the three individual sentences for the three offences for which Mr Kilolo and Mr Bemba were convicted.[140] However, it did not provide any explanation as to why, on the facts of the case, it considered Mr Kilolo's and Mr Bemba's respective culpability to be lower for the offence they had instigated than for the offences they had committed as co-perpetrators. On the contrary, as observed above, the relevant factual findings made by the Trial Chamber in this respect are essentially the same. In these circumstances, and in the absence of any further elaboration on the part of the

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[137] Mr Bemba's Response, para. 157.
[138] *See also* *Katanga* Conviction Decision, para. 1386 ("article 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime does not under any circumstances constitute a "hierarchy of blameworthiness", let alone enunciate a tariff, not even implicitly. […] [N]either the Statute nor the Rules of Procedure and Evidence prescribe a rule for the mitigation of penalty for forms of liability other than commission and the Chamber sees no automatic correlation between mode of liability and penalty. From this it is clear that a perpetrator of a crime is not always viewed as more reprehensible than an accessory").
[139] Prosecutor's Appeal Brief, paras 103, 107, 108.
[140] Sentencing Decision, paras 193 and 248.

Trial Chamber, it appears that the Trial Chamber assumed that a reduction of the sentence for the offence under article 70 (1) (a) of the Statute was due only because of the concerned mode of liability. This amounted to an error.

62. Accordingly, the Appeals Chamber finds that the Trial Chamber erred when, for the purpose of the determination of Mr Kilolo's and Mr Bemba's sentences, it pronounced lesser sentences for their convictions for the offences under article 70 (1) (a) of the Statute on the basis of an abstract distinction based on the different mode of liability "between the offences that [they] committed as co-perpetrator[s] and those in relation to which [they were accessories]".[141]

C. Alleged error in suspending Mr Mangenda's and Mr Kilolo's sentences of imprisonment

1. Relevant part of the Sentencing Decision

63. The Trial Chamber found, as a matter of law, that it had the "inherent power" to suspend a sentence of imprisonment.[142] The Trial Chamber's reasoning in this respect reads as follows:

> The Statute and the Rules remain silent as to whether prison sentences may be suspended. In the view of the Chamber, provisions on interim release or post-conviction remedies cannot be drawn upon for the purposes of suspending sentences as they are designed for different stages of the proceedings and are therefore, necessarily, of a different nature. Hence, there is a *lacuna* in the statutory scheme that cannot be filled by the application of provisions by analogy and the criteria of interpretation, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute.
>
> The Chamber notes that, on one end of the spectrum, the Statute allows a Chamber to impose a sentence of imprisonment and, at the other end of the spectrum, it allows a Chamber to decline to impose any sentence. If these measures are possible, then surely the intermediate step of a suspended sentence is likewise possible. To conclude otherwise would lead to an unfair result whereby a convicted person could not serve a term of years other than by way of unconditional imprisonment, even when the Chamber considered less restrictive means to be more appropriate. It has been argued that the Chamber's power to suspend a sentence of imprisonment is inherent to its authority to impose a sentence. As a result, the Chamber finds that its power to suspend a sentence of imprisonment is inherent to its power to impose and determine the

[141] Sentencing Decision, paras 193 (concerning Mr Kilolo) and 248 (concerning Mr Bemba).
[142] Sentencing Decision, para. 41.

> sentence. Furthermore, this finding accords with the law and the practice of other national and international jurisdictions.[143] [Footnotes omitted.]

64. The Trial Chamber subsequently decided to exercise such "inherent power" in the present case. In particular, "[m]indful of Mr Kilolo's family situation, his good behaviour throughout the present proceedings, and the consequences of incarceration on his professional life", the Trial Chamber decided to "suspend the operation of [his] remaining term of imprisonment" for a period of three years "so that the sentence shall not take effect" if he pays the fine imposed on him by the Trial Chamber and does not "commit[] another offence anywhere that is punishable with imprisonment".[144] Similarly, "[m]indful of Mr Mangenda's personal circumstances, his good behaviour throughout the present proceedings and the consequences of incarceration for his family", the Trial Chamber suspended, for a period of three years, the operation of the remaining term of imprisonment imposed on Mr Mangenda on the condition that during that period he does not "commit[] another offence anywhere that is punishable with imprisonment".[145]

2. Submissions of the parties

(a) The Prosecutor

65. Under her second ground of appeal, the Prosecutor argues that the Trial Chamber erred in law in finding that it had the power to pronounce conditionally suspended sentences or suspend the operation of a sentence, and therefore acted *ultra vires* in suspending Mr Mangenda's and Mr Kilolo's remaining term of imprisonment.[146] In particular, she submits that, when the Statute is read in accordance with its ordinary meaning, in context and in light of its object and purpose, "it is evident that there is no *lacuna* in the Statute and the Rules, which exhaustively regulate sentencing proceedings at the Court, the available penalties and their enforcement and execution".[147] According to the Prosecutor, the Trial Chamber, in finding that there exists a *lacuna* in the legal instruments of the Court, "misunderstands – and effectively disregards – the basic criteria of treaty

[143] Sentencing Decision, paras 40, 41.
[144] Sentencing Decision, para. 197 and p. 99.
[145] Sentencing Decision, para. 149 and p. 98.
[146] Prosecutor's Appeal Brief, paras 116-141.
[147] Prosecutor's Appeal Brief, para. 116.

interpretation".[148] She submits that "[t]he law is clear" and "[s]uspended sentences are not an available penalty or mechanism in the Rome Statute".[149] In this regard, the Prosecutor argues that even if the Trial Chamber disagreed with the text of the law, it was nonetheless mandated to abide by it. In the Prosecutor's view, the Trial Chamber, if it indeed disagreed with the law, "should have limited itself to indicating that the Assembly of States Parties could wish to amend the relevant provisions" – as done by the Appeals Chamber in another context – rather than "erroneously modif[ying] the law".[150] The Prosecutor therefore requests the Appeals Chamber to correct the Trial Chamber's erroneous interpretation of the law, "which is more akin to legislative intervention" given that "[j]udicial discretion is not unfettered, nor should Chambers usurp the legislator's role and modify the law when they disagree with it, especially on topics as far-reaching as sentencing and penalties".[151] In this regard, she emphasises that the principle of legality, and, in particular the *nulla poena sine lege* principle in article 23 of the Statute serves as a further limit to the exercise of a chamber's discretion on precisely these issues.[152]

66. The Prosecutor also argues that the drafting history further confirms that the Statute does not permit trial chambers to pronounce suspended sentences or suspend sentences.[153] She submits in this regard that "the exhaustiveness of the ICC penalties regime is no coincidence", but a "carefully drafted compromise among States".[154] In the Prosecutor's view, the "inexorable inference" is that "the drafters would have expressly and in detail regulated the Chamber's authority to suspend sentences had they intended them to have this power".[155]

67. The Prosecutor thus concludes on this point by arguing that "since there is no *lacuna* in the Rome Statute, the doctrine of 'inherent powers', which has been invoked extraordinarily and restrictively when there is a *lacuna* in the statutory texts,

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[148] Prosecutor's Appeal Brief, para. 118.
[149] Prosecutor's Appeal Brief, paras 118-121.
[150] Prosecutor's Appeal Brief, para. 121, referring to *Katanga* Article 108(1) Decision, para. 16.
[151] Prosecutor's Appeal Brief, para. 127.
[152] Prosecutor's Appeal Brief, para. 124.
[153] Prosecutor's Appeal Brief, para. 128.
[154] Prosecutor's Appeal Brief, para. 130.
[155] Prosecutor's Appeal Brief, para. 130.

is inapplicable".[156] In this regard, the Prosecutor submits that, in any case, "inherent powers" are powers "to resolve ancillary but essential questions to the proper conduct of the proceedings, to ensure their fairness and to discharge their judicial functions".[157] In the Prosecutor's view, there is no basis to argue that the power to suspend a term of imprisonment is indispensable to a trial chamber's ability to discharge its function to determine the convicted person's sentence, such that the former may be invoked as an "inherent power".[158]

68. Finally, the Prosecutor argues that the Trial Chamber's reliance on domestic laws and international practice does not support its proposition, but "further evince[s] its error".[159] In particular, she submits that the domestic legislations cited by the Trial Chamber "expressly allow for suspension of sentences and carefully regulate when and under which conditions a domestic court may exercise such a power" while the Statute does not contain any such provision.[160] Similarly, with respect to practices of *ad hoc* tribunals, the Prosecutor argues that "their legal texts on the execution of sentences substantially differ from – and are more flexible than – the Rome Statute and the Rules",[161] and that, in any case, the level of detail (and drafting history) of such legal texts justified a heavy reliance on the doctrine of "inherent powers" which is not possible at this Court, whose legal texts are comprehensive, spelt out in detail and have been elaborated and adopted by the States Parties as part of diplomatic negotiations.[162]

(b) Mr Mangenda

69. Mr Mangenda argues that a trial chamber possesses the authority "to make a sentencing order prescribing conditions that permit the execution of any portion of the term of imprisonment to be suspended".[163] Mr Mangenda submits that "inherent powers" are those powers that, while not expressly conferred, "are necessary for the functioning of any criminal court" or "[are] so inextricably related to an expressly

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[156] Prosecutor's Appeal Brief, para. 131 (footnotes omitted).
[157] Prosecutor's Appeal Brief, para. 144.
[158] Prosecutor's Appeal Brief, para. 144.
[159] Prosecutor's Appeal Brief, para. 138.
[160] Prosecutor's Appeal Brief, para. 138.
[161] Prosecutor's Appeal Brief, para. 139.
[162] Prosecutor's Appeal Brief, para. 140.
[163] Mr Mangenda's Response, paras 67-68.

conferred power that [they are] necessarily implied", and that, in this sense, are "necessary corollaries of powers expressly conferred".[164] He argues that the Statute is a treaty with the "special purpose" of "constitut[ing] a functional system of criminal adjudication", and that powers not expressly enumerated in the legal instruments of the Court "may nevertheless be deemed to be inherent to the existence of the Court or inherent to other powers expressly conferred'.[165] Against this backdrop, in Mr Mangenda's view, "the power to suspend a term of imprisonment is […] inherent to [the] power to order that term of imprisonment", not dissimilarly from the powers – frequently exercised by trial chambers of the Court notwithstanding the absence of an express legal basis – to suspend the execution of their orders.[166] He also argues that the Trial Chamber's holding that it had the inherent power to pronounce a suspended sentence is comparable to other inherent powers relied upon in other decisions of this Court.[167] Mr Mangenda also submits that the drafting history of the legal instruments of the Court does not reveal the legislative intent to deprive trial chambers with the power to suspend a sentence of imprisonment,[168] nor are the provisions on sentencing regulated in such a manner that would indicate the legislator's intention to "exclude any power or disposition that is not expressly granted".[169]

70. On this basis, Mr Mangenda argues that "[i]n the absence of definitive guidance from the Statute or Rules", it was proper for the Trial Chamber to consider national and international practices concerning sentencing, and conclude that the power to suspend a sentence of imprisonment is "fully consonant" to such practices.[170]

(c) Mr Kilolo

71. Mr Kilolo submits that, given that the Statute and the Rules "are silent as to whether suspended sentences are permissible", the Trial Chamber was correct in identifying a lacuna in the statutory framework, and accordingly resorting to its "inherent powers".[171] He submits that the drafters of the legal instruments of the Court

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[164] Mr Mangenda's Response, para. 71.
[165] Mr Mangenda's Response, para. 90.
[166] Mr Mangenda's Response, para. 73.
[167] Mr Mangenda's Response, paras 81-91.
[168] Mr Mangenda's Response, paras 59, 92-100.
[169] Mr Mangenda's Response, para. 91.
[170] Mr Mangenda's Response, paras 101, 108.
[171] Mr Kilolo's Response, paras 83-84.

"were undoubtedly aware of the[] existence [of suspended sentences]" in domestic legislation, and suggestions had in fact been made by some delegations to address the issue of suspension of penalties.[172] However, according to Mr Kilolo, these suggestions "[were] never explicitly addressed in any draft Statute" and "[t]he drafters never explicitly rejected suspended sentences".[173]

72. In addition, Mr Kilolo submits that, contrary to the Prosecutor's argument, "international and domestic sources" support the Trial Chamber's holding that suspending sentences falls within its "inherent powers", in that (i) both the ICTY and the SCSL did impose suspended sentences although their statutory framework does not expressly grant them such power; and (ii) the power to suspend sentences is in fact, as noted by the Trial Chamber, expressly provided for in the laws of several domestic jurisdictions, indicating that it may possibly be considered under article 21 (1) (c) of the Statute.[174]

3. Determination by the Appeals Chamber

73. The Appeals Chamber notes the Prosecutor's submission that it remains unclear whether the Trial Chamber found that it had the "inherent power" to impose a conditionally suspended sentence of imprisonment as a different type of penalty from an "unconditional" custodial sentence, or rather the power to conditionally suspend the execution of an imposed custodial sentence.[175] According to the Prosecutor, the Trial Chamber erred in law irrespective of whether a suspended sentence must be understood as a self-standing penalty or as a sentencing measure concerning the execution of a sentence.[176] The Appeals Chamber notes that the Trial Chamber indeed referred to the imposition of a "suspended sentence" as an "intermediate step" between the imposition of *a* sentence of imprisonment and the imposition of *no* sentence,[177] as well as to the possibility of suspending the *operation* of an imposed sentence of imprisonment.[178] In light of what follows, the Appeals Chamber finds it

[172] Mr Kilolo's Response, para. 84.
[173] Mr Kilolo's Response, paras 84, 89.
[174] Mr Kilolo's Response, paras 83, 92-95.
[175] Prosecutor's Appeal Brief, para. 116, fn. 252.
[176] Prosecutor's Appeal Brief, fn. 252.
[177] Sentencing Decision, para. 41.
[178] Sentencing Decision, para. 41. *See also* paras 149, 197.

unnecessary to determine the exact type of sentencing measure that the Trial Chamber considered to be within its "inherent powers".

74. The Appeals Chamber notes at the outset that there exists no explicit provision in the legal framework of the Court providing for the possibility of a trial chamber to pronounce a conditionally suspended sentence or suspend the operation of a sentence of imprisonment. The Trial Chamber stated that "[t]he Statute and the Rules remain silent as to whether prison sentences may be suspended" and "[h]ence there is a *lacuna* in the statutory scheme".[179] It then considered that a suspended sentence (as an "intermediate step" within the spectrum of the available penalties) "surely" was possible. On this basis, it found that the power to suspend a sentence of imprisonment was "inherent to its power to impose and determine the sentence".[180]

75. The Appeals Chamber observes that the notion of "inherent powers" – or "incidental jurisdiction"[181] – refers to judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ("inherent to") other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments.[182] The Appeals Chamber emphasises

[179] Sentencing Decision, para. 40.
[180] Sentencing Decision, para. 41.
[181] *See* *Banda and Jerbo* Stay of Proceedings Decision, para. 75 ("The Chamber considers it important to clarify that 'inherent' powers or jurisdiction in the context of ICC proceedings should be understood as meaning 'incidental jurisdiction'.")
[182] *See* *Banda and Jerbo* Stay of Proceedings Decision, para. 77, referring to ICJ Advisory Opinion, p. 174 at p.182 ("[An international body or organisation] must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties."). *See also* STL Jurisdiction Appeal, para. 45 ("With regard to the Tribunal, by 'inherent jurisdiction' we mean the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction"); *Nuclear Tests* Judgment, p. 253 at para. 23 ("[I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' […] Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.").

that, in the legal framework of this Court, "inherent powers" should be invoked in a very restrictive manner[183] and, in principle, only with respect to matters of procedure.

76. The Appeals Chamber notes that the Trial Chamber's basic premise for its reliance on its alleged "inherent powers" was the existence of a lacuna within the Court's legal framework.[184] The Appeals Chamber recalls that, in accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules. Recourse to the subsidiary sources of law enumerated at paragraphs 1 (b) and (c) of the same provision may only be made in case there exists a lacuna in the primary sources of law when interpreted in accordance with the applicable canon of interpretation. The Appeals Chamber also recalls that it has previously found that a lacuna does not exist when, for instance, a matter is exhaustively defined in the legal instruments of the Court.[185] Similarly, the Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported "inherent powers" to fill in non-existent gaps. In addition, it is clear that not every "silence" in the legal framework of the Court constitutes a lacuna. The Appeals Chamber recalls that in order to determine whether the absence of a power constitutes a "lacuna", it has previously considered whether "[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions".[186] The nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether there are gaps justifying recourse to subsidiary sources of law or invocation of "inherent powers".

77. The Appeals Chamber notes that the "inherent power" invoked by the Trial Chamber relates to the penalties and sentencing regime before the Court. The Appeals Chamber observes that this regime is directly and explicitly constrained by the principle of legality under article 23 of the Statute, which provides – encapsulating the

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[183] *See* *Banda and Jerbo* Stay of Proceedings Decision, para. 78 ("[T]he Chamber wishes to stress that such inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC. This caveat is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail.").
[184] Sentencing Decision, para. 40.
[185] *See* *DRC* Judgment OA3, para. 39.
[186] *DRC* Judgment OA3, para. 39.

principle of *nulla poena sine lege* – that "[a] person convicted by the Court may be punished only in accordance with th[e] Statute". Accordingly, the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person[187] and specify mandatory aggravating and mitigating circumstances as well as the parameters to be considered for the determination of the *quantum* of such penalties.[188] The corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute[189] and a determination of its *quantum*. No "inherent powers" may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court, as the Trial Chamber did in the present instance in pronouncing suspended sentences.

78. In the Appeals Chamber's view, this conclusion is not called into question by the Trial Chamber's holding that its finding that it had the "inherent power" to suspend a sentence also "accorded" with the legislations of certain national jurisdictions.[190] While recalling its considerations above, the Appeals Chamber also observes that in all domestic systems referred to by the Trial Chamber,[191] the power to impose a suspended sentence or conditionally suspend the operation of a sentence is expressly provided in their laws, rather than being invoked as an "inherent power".[192] In these domestic systems, suspension of sentences is indeed regulated by the respective legislations which also stipulate requirements for a convicted person to be eligible to such benefit (in particular, as concerns the types of crimes involved and/or qualities of the convicted person),[193] conditions that shall or may be imposed as part

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[187] *See*, and article 70 (2) with respect to offences against the administration of justice

[188] *See* articles 77 and 78 of the Statute and rules 145 to 147 of the Rules as concerns crimes under article 5 of the Statute; and articles 70 (3), 77(2) (b) and 78 and rules 145, 147 and 166 of the Rules.

[189] That is, for crimes under article 5 of the Statute, a term of imprisonment combined with an additional fine or a term of imprisonment only (*see* article 77 of the Statute), and, for offences under article 70 of the Statute, a term of imprisonment, a fine, or a combination of the two (*see* article 70 (3) of the Statute).

[190] Sentencing Decision, para. 41 and fn 63.

[191] *See* fn. 63 of the Sentencing Decision, listing the specific provisions in the concerned domestic legislations regulating the suspension of sentences.

[192] *See, similarly, DRC* Judgment OA3, para. 26, ("[N]one of the countries referred to acknowledge […] an inherent power to the court of appeal to review decisions of a subordinate court disallowing an appeal. In all countries the right to review decisions of such a nature is vested in the hierarchically higher courts as the court of appeal by statutory adjectival law").

[193] *See e.g.* Argentina: Article 26 of the Criminal Code; Belgium: Article 8(1) of the Act of 29 June 1964 entitled 'Loi concernant la suspension, le sursis et la probation'; Brazil: Article 77 of the Criminal Code; Canada: Section 731(1) of the Criminal Code; Central African Republic: Article 43(1) of the

of the possible suspension of the sentence,[194] as well as monitoring mechanisms and enforcement methods.[195] No such provision exists in the legal framework of the Court. In addition, the Appeals Chamber observes that given the absence of any pre-established mechanism of cooperation with States, the Court – contrary to domestic systems – has also no legal or practical power to oversee or monitor compliance with conditions upon which conditionally suspended sentences are imposed.

79. Finally, the Appeals Chamber notes that the Trial Chamber, in support of its finding that it had the power to suspend a sentence, also relied on the fact that the ICTY, on two occasions, and the SCSL, on one occasion, had also imposed suspended sentences despite such power not being expressly provided for in their respective legal frameworks.[196] The Appeals Chamber finds it sufficient to recall that the practices of other international tribunals do not constitute a source of law under article 21 of the Statute. They cannot therefore provide a legal basis for suspension of sentences at this Court. In any case, the Appeals Chamber also emphasises that contrary to other international courts and tribunals, this Court's functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out

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Criminal Code; Colombia: Article 63 of the Criminal Code; Democratic Republic of Congo: Article 42 of the Criminal Code; Côte d'Ivoire: Article 133 of the Criminal Code; England and Wales: Section 189(1) of the Criminal Justice Act 2003; France: Articles 132-30, 132-31 and 132-41 of the Criminal Code; Germany: Section 56 of the Criminal Code; Guatemala: Article 72 of the Criminal Code; Italy: Articles 163-164 of the Criminal Code; Republic of Korea: Articles 59-1 and 62 of the Criminal Code; Namibia: Article 322(1) of the Criminal Procedure Act; Serbia: Article 66 of the Criminal Code; Spain: Article 80 of the Criminal Code; Switzerland: Article 42(1) of the Criminal Code; Uzbekistan: Article 72 of the Criminal Code; Vietnam: Article 60(1) of the Criminal Code.

[194] *See e.g.* Argentina: Article 27 *bis* of the Criminal Code; Belgium: Article 1(2 *bis*) of the Act of 29 June 1964 entitled 'Loi concernant la suspension, le sursis et la probation'; Brazil: Articles 78-79 of the Criminal Code; Canada: Section 731(1) of the Criminal Code; Central African Republic: Article 43(2) of the Criminal Code;: Colombia: Article 65 of the Criminal Code; Côte d'Ivoire: Article 87(1) of the Criminal Code; England and Wales: Sections 189(1A) and 190(1) of the Criminal Justice Act 2003; France: Articles 132-43, 132-44 and 132-45 of the Criminal Code; Germany: Sections 56b-56c of the Criminal Code; Guatemala: Article 97 of the Criminal Code; Italy: Article 165 of the Criminal Code; Republic of Korea: Articles 59-2 and 62-2 of the Criminal Code; Namibia: Article 322(1) of the Criminal Procedure Act; Serbia: Articles 71 and 73 of the Criminal Code; Spain: Article 83 of the Criminal Code; Uzbekistan: Article 72 of the Criminal Code.

[195] *See e.g.* Belgium: Article 9 of the Act of 29 June 1964 entitled 'Loi concernant la suspension, le sursis et la probation'; Central African Republic: Article 45 of the Criminal Code; Côte d'Ivoire: Article 87(2) of the Criminal Code; England and Wales: Section 191(1) of the Criminal Justice Act 2003; Germany: Section 56d(1) of the Criminal Code; Guatemala: Article 97 of the Criminal Code; Namibia: Article 322(1) of the Criminal Procedure Act; Spain: Article 83(3) of the Criminal Code; Uzbekistan: Article 72 of the Criminal Code.

[196] Sentencing Decision, para. 41 and fn. 64.

by the drafters to a great degree of detail, thus leaving little room to the invocation of "inherent powers" in the proceedings before it.[197]

80. In light of the above reasons, the Appeals Chamber considers that the Trial Chamber erred in law in finding that it had the inherent power to impose a suspended sentence, and therefore acted *ultra vires* in ordering the conditional suspension of the remaining terms of imprisonment imposed on Mr Kilolo and Mr Mangenda.

D. Alleged abuse of discretion in pronouncing sentences that are manifestly disproportionate and inadequate

1. Relevant part of the Sentencing Decision

81. The Trial Chamber described the purpose of sentencing in the present case as follows:

> Article 70 of the Statute seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims' right to justice and, generally, the Court's ability to fulfil its mandate. Accordingly, the Chamber considers that the primary purpose of sentencing individuals under Article 70 of the Statute is rooted – as for Article 5 crimes – in retribution and deterrence. With regard, in particular, to deterrence, the Chamber is of the view that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence).[198] [Footnotes omitted.]

82. After assessing the gravity of the offences[199] and the culpability of each of the three co-perpetrators,[200] finding a number of aggravating circumstances[201] and no mitigating circumstances,[202] and considering a number of "individual circumstances"

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[197] *See also* *Banda and Jerbo* Stay of Proceedings Decision, para. 78.
[198] Sentencing Decision, para. 19.
[199] Sentencing Decision, paras 100-115 (with respect to the offences committed by Mr Mangenda), 153-167 (with respect to the offences committed by Mr Kilolo), 203-217 (with respect to the offences committed by Mr Bemba).
[200] Sentencing Decision, paras 116-127 (with respect to Mr Mangenda), 168-175 (with respect to Mr Kilolo), paras 218-226 (with respect to Mr Bemba).
[201] Sentencing Decision, paras 130-133 (with respect to Mr Mangenda), 176-181 (with respect to Mr Kilolo), paras 231-238 (with respect to Mr Bemba).
[202] Sentencing Decision, paras 128, 129 (with respect to Mr Mangenda), paras 227-230 (with respect to Mr Bemba). No mitigating circumstances were found for Mr Kilolo either.

for each of them,[203] the Trial Chamber sentenced Mr Mangenda, Mr Kilolo and Mr Bemba as follows:

(i) Mr Mangenda to 12 months' imprisonment for the offence under article 70 (1) (a) of the Statute, 18 months' imprisonment for the offence under article 70 (1) (b) of the Statute and 20 months' imprisonment for the offence under article 70 (1) (c) of the Statute. The Trial Chamber imposed on him a joint sentence of 24 months' imprisonment, with the remaining term of imprisonment, after deduction of the time spent in pre-trial detention, suspended.[204]

(ii) Mr Kilolo to 12 months' imprisonment for the offence under article 70 (1) (a) of the Statute, 24 months' imprisonment for the offence under article 70 (1) (b) of the Statute and 24 months' imprisonment for the offence under article 70 (1) (c) of the Statute. The Trial Chamber imposed on him a joint combined sentence of 30 months' imprisonment, with the remaining term of imprisonment, after deduction of the time spent in pre-trial detention, suspended, and a fine of EUR 30,000.[205]

(iii) Mr Bemba to ten months' imprisonment for the offence under article 70 (1) (a) of the Statute, 12 months' imprisonment for the offence under article 70 (1) (b) of the Statute and 12 months' imprisonment for the offence under article 70 (1) (c) of the Statute. The Trial Chamber imposed on him a joint combined sentence of 12 months' imprisonment and a fine of EUR 300,000.[206]

2. Submissions of the parties

(a) The Prosecutor

83. Under sub-ground 1.1. of her appeal, the Prosecutor requests the Appeals Chamber to "find that the individual and joint sentences imposed by the Trial Chamber on Mangenda, Kilolo and Bemba are so unfair and unreasonable as to constitute an abuse of discretion".[207] In particular, she submits that the Trial Chamber erred by imposing on Mr Mangenda, Mr Kilolo and Mr Bemba "disproportionate"

[203] Sentencing Decision, paras 134-141 (with respect to Mr Mangenda), 182-189 (with respect to Mr Kilolo), paras 239-244 (with respect to Mr Bemba).
[204] Sentencing Decision, paras 146-149.
[205] Sentencing Decision, paras 194-198.
[206] Sentencing Decision, paras 249, 250, 261.
[207] Prosecutor's Appeal Brief, para. 171 (i).

and "manifestly inadequate" sentences which in her view do not reflect the gravity of the offences and the culpability of the convicted persons, and cannot be reconciled with the Trial Chamber's own findings underscoring: (i) the inherent gravity of the offences; (ii) the actual gravity of the offences committed in the present case; (iii) the scope of the co-perpetrators' criminal behaviour and contributions; and (iv) the need for effective deterrence at the Court.[208] On this basis, the Prosecutor argues that the sentences imposed on Mr Mangenda, Mr Kilolo and Mr Bemba are therefore "discordant and incompatible" with the rendered convictions and "fell outside the range of sentences suitable to effectively punish [them] in this case and to deter the future commission of such offences in other cases".[209] In this regard, the Prosecutor emphasises that while the determination of a sentence is discretionary in nature, a trial chamber properly exercises such discretion only when it imposes a sentence that "makes sense" in a case, as a trial chamber does not discharge its obligation to impose a proper sentence simply by "[m]ere recitation of the relevant facts and principles".[210]

84. In this case, the Prosecutor avers, "[a]lthough the Trial Chamber purported to address the gravity of the offences and culpability of the co-perpetrators, it failed to do so in fact", and that while the Trial Chamber professed an overwhelming objective to protect chambers of this Court from efforts to impede the exercise of their function, the sentences imposed in the present case "cannot accomplish that goal" – nor did the Trial Chamber explain how, in its view, they might do so – but, to the contrary, "plainly undermine it".[211] In sum, according to the Prosecutor, the sentences imposed on Mr Bemba, Mr Kilolo and Mr Mangenda are "almost inconsequential", "minimise the gravity of the convictions entered" and are "unreasonable on the facts of this case".[212] According to this Prosecutor, this is "amply clear from the Chamber's internally inconsistent findings".[213]

85. The Prosecutor submits that the present case is comparable in this regard with some other cases before the ICTY, ICTR and ECCC in which sentences were found to

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[208] Prosecutor's Appeal Brief, paras 4, 16
[209] Prosecutor's Appeal Brief, paras 16, 17.
[210] Prosecutor's Appeal Brief, para. 17.
[211] Prosecutor's Appeal Brief, paras 22, 26.
[212] Prosecutor's Appeal Brief, para. 26.
[213] Prosecutor's Appeal Brief, para. 26.

be manifestly inadequate and increased on appeal, notwithstanding correct enunciation of facts and recitation of sentencing principles by the relevant trial chambers, on the grounds that they did not appropriately reflect those facts and principles.[214] She emphasises in this respect that cases for offences under article 70 of the Statute and those on crimes under article 5 of the Statute may differ with respect to the nature of the crimes and the potential sentencing range, but the same sentencing principles apply and sentences for offences under article 70 of the Statute are susceptible to the same errors.[215]

(b) Mr Mangenda

86. Mr Mangenda submits that the appeal cases at other international(ised) tribunals that are referred to by the Prosecutor were exceptional and reflect the basic principle that the proportionality of a sentence to the crime must take into account previous sentencing practice.[216] He argues that "[u]nexplained disregard of well-established and unambiguous sentencing practice [….] may […] support an inference that a Trial Chamber has abused its discretion in determining an appropriate sentence",[217] although, at the same time, "most cases are sufficiently dissimilar for sentencing purposes that such comparisons are inappropriate".[218] According to Mr Mangenda, the Prosecutor's argument that the sentences in the present case "do not make sense" is manifestly unsubstantiated as she does not identify any sentencing practice – either international or domestic – from which the sentence imposed on him by the Trial Chamber deviates "so markedly as to demonstrate an abuse of discretion".[219]

(c) Mr Kilolo

87. Mr Kilolo submits that the Prosecutor "fails to put forward any evidence that the Trial Chamber [in its determination of the appropriate sentence] undervalued or contradicted its findings on the gravity of the offenses or Mr. Kilolo's culpable conduct".[220] He argues that the Prosecutor ignores the Trial Chamber's "careful sentencing calculus" and its balancing and weighing of all relevant factors and

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[214] Prosecutor's Appeal Brief, paras 18-21.
[215] Prosecutor's Appeal Brief, para. 22.
[216] Mr Mangenda's Response, para. 24. *See also* paras 19-23.
[217] Mr Mangenda's Response, para. 25.
[218] Mr Mangenda's Response, para. 29. *See also* paras 26-28.
[219] Mr Mangenda's Response, paras 30-31.
[220] Mr Kilolo's Response, para. 54. *See also* para. 42.

individualization of the sentence.[221] Importantly, in Mr Kilolo's view, the Trial Chamber was not required to explain the weight given to individual factors in arriving at the sentence.[222] In addition, Mr Kilolo submits that the Prosecutor's comparison with certain decisions by Appeals Chamber at other international(ised) tribunals increasing sentences on appeal is "inapposite and of no value", given that, first, no meaningful comparison can be drawn for sentencing purposes between the present case and cases on core crimes of the type of article 5 of the Statute, and, second, in each of those other cases sentences were increased on appeal because of "different, unique reasons" which are inapplicable to the present case.[223]

(d) Mr Bemba

88. Mr Bemba submits that the Prosecutor offers no "legal criteria or relevant precedent" in support of her contention that the sentence imposed on Mr Bemba is too low.[224] She argues that the judgments of the other international(ised) tribunals cited by the Prosecutor are distinguishable and inapplicable to offences under article 70 of the Statute as these offences are not sanctioned exclusively through a custodial sentence.[225] In addition, Mr Bemba submits that in order to establish an error on the part of the Trial Chamber, the Prosecutor "would need to establish that th[e] sentence falls outside the ballpark for contempt sentences for similar conduct".[226] In his view, however, the sentence imposed on Mr Bemba is "outside the ballpark" only in the sense that it is harsher than those imposed for equivalent conduct at other international and domestic courts.[227] He also argues that the Prosecutor fails to identify any relevant factors or evidential findings that were not considered by the Trial Chamber in the determination of Mr Bemba's sentence, and thus the Prosecutor's "recitation of factors that were fully accounted for […] serves no appellate purpose".[228]

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[221] Mr Kilolo's Response, para. 54. *See also* para. 41.
[222] Mr Kilolo's Response, para. 42, referring to, *inter alia*, *Lubanga* Sentencing Appeal Judgment, paras 69-70.
[223] Mr Kilolo's Response, paras 55, 56. *See also* paras 57-62.
[224] Mr Bemba's Response, para. 6.
[225] Mr Bemba's Response, para. 7.
[226] Mr Bemba's Response, para. 14. *See also* paras 10-13.
[227] Mr Bemba's Response, para. 14.
[228] Mr Bemba's Response, para. 32.

3. Determination by the Appeals Chamber

89. The Prosecutor argues that the sentences imposed on Mr Bemba, Mr Kilolo and Mr Mangenda are plainly inadequate and disproportionately low in light of the facts of the case as established by the Trial Chamber itself as well as of the basic principles of sentencing correctly enunciated by the Trial Chamber.[229] She submits that a trial chamber does not discharge its obligation to impose a proper sentence simply by "[m]ere recitation of the relevant facts and principles", but must also impose sentences that "make sense".[230] In her view, the Trial Chamber failed to so in the present case when determining the sentences for Mr Mangenda, Mr Kilolo and Mr Bemba.

90. The Appeals Chamber recalls that while its review of a trial chamber's exercise of its discretion in determining the sentence must be deferential, it will intervene if, *inter alia*, "as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion".[231] This requires the Appeals Chamber to measure the reasonableness of the sentence as pronounced by a trial chamber. However, the Appeals Chamber found above that the Trial Chamber erred in relying on certain irrelevant circumstances for the determination of the *quantum* of the sentences for Mr Mangenda, Mr Kilolo and Mr Bemba. In addition, the Appeals Chamber found that the Trial Chamber acted *ultra vires* in pronouncing suspended sentences against Mr Mangenda and Mr Kilolo. These errors warrant reversal of the sentences and remand to the Trial Chamber for a new determination. The Appeals Chamber therefore considers it unnecessary to determine at this point whether the sentences pronounced against Mr Mangenda, Mr Kilolo and Mr Bemba are so manifestly low and inadequate *per se* as to constitute an abuse of discretion on the part of the Trial Chamber.

E. Overall conclusion

91. Accordingly, to the extent reasoned above, the Prosecutor's appeal is upheld.

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[229] Prosecutor's Appeal Brief, paras 16-57, 63.
[230] Prosecutor's Appeal Brief, para. 17.
[231] *Lubanga* Sentencing Appeal Judgment, para. 44.

V. MR BEMBA'S APPEAL

92. In his appeal, Mr Bemba raises 12 grounds of appeal and requests the Appeals Chamber to reverse the sentence imposed by the Trial Chamber and impose a reasonable and proportionate fine.[232] In the alternative, should the Appeals Chamber uphold the imposition of a custodial sentence, he requests that the Appeals Chamber afford him credit for the time spent in detention since the issuance of a detention order in the present case; or find that the sentences imposed in the present case and the Main Case should be served concurrently.[233] Finally, Mr Bemba requests that, if he is acquitted in the Main Case, or his sentence reduced, any surplus detention served in the Main Case should be credited to him in this case and should also be used to satisfy his fine.[234]

A. Alleged Incorrect Reliance on erroneous legal and factual findings from the Conviction Decision

1. Submissions of the parties

(a) Mr Bemba

93. Under his first ground of appeal, Mr Bemba takes issue with the Trial Chamber's legal and factual findings in the Conviction Decision and submits that, if the Appeals Chamber leaves these findings undisturbed, he should nevertheless benefit from "a substantial reduction in penalty".[235] In his view, he "should only be penalized in connection with the handful of witnesses that were (tenuously) linked to his conduct, and only insofar as this conduct impacted, or contributed to a concrete interference in the administration of justice".[236] In addition, Mr Bemba asserts that if the Appeals Chamber finds that the surveillance of his communications did not amount to any violation warranting the exclusion of such evidence, "his right to an effective remedy remains intact" which "should translate [into] a substantial reduction in penalty".[237] Lastly, Mr Bemba argues that the failure of the Trial Chamber to correct certain errors in its interpretation of the evidence, despite being alerted to such

[232] Mr Bemba's Appeal Brief, para. 314.
[233] Mr Bemba's Appeal Brief, paras 262-280, 315.
[234] Mr Bemba's Appeal Brief, para. 315, fn. 411.
[235] Mr Bemba's Appeal Brief, paras 7-8.
[236] Mr Bemba's Appeal Brief, para.8.
[237] Mr Bemba's Appeal Brief, para. 9.

errors, is an abuse of discretion.[238] In this regard, Mr Bemba points to an error with the Trial Chamber's findings in respect of the *date* of a multi-party call between him and witness D-19 and its "purported link" to the call with witness D- 55.[239] In his view, as the "number of multiparty calls appears to be the lynchpin of Mr Bemba's culpability, this error also warrants a considerable reduction".[240]

(b) The Prosecutor

94. The Prosecutor argues that "[i]f the Appeals Chamber upholds the [*Bemba et al*. Appeal] Judgment […] then Bemba's failed arguments against his conviction cannot warrant 'a substantial reduction in penalty'".[241] In her view, it is only if Mr Bemba succeeds on his appeal against his conviction would he be entitled to "a substantial reduction in penalty".[242]

2. Determination by the Appeals Chamber

95. The Appeals Chamber notes that Mr Bemba fails to identify any specific finding in the Sentencing Decision that this ground of appeal purports to impugn. Apart from referring to his grounds of appeal against the Conviction Decision and replicating some of the arguments under these grounds,[243] the mainstay of his challenge appears to be that even if these grounds of appeal are ultimately rejected by the Appeals Chamber they should nevertheless warrant a "substantial reduction in penalty".[244] Mr Bemba fails to substantiate this argument and the Appeals Chamber cannot discern why it would reduce his sentence on the basis of grounds of appeal that were rejected by the Appeals Chamber in its *Bemba et al*. Appeal Judgment.

96. Accordingly, the Appeals Chamber dismisses *in limine* Mr Bemba's first ground of appeal.

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[238] Mr Bemba's Appeal Brief, para. 10.
[239] Mr Bemba's Appeal Brief, para. 10.
[240] Mr Bemba's Appeal Brief, para. 10.
[241] Prosecutor's Consolidated Response, para. 15.
[242] Prosecutor's Consolidated Response, para. 15.
[243] *See* Mr Bemba's Conviction Appeal Brief, paras 7, 8-56 (flawed legal interpretations of the charged article 70 offences), 57-137 (an improperly pleaded and defined common plan), 141-187 (Illegally collected evidence) and 203-331 (evidential conclusions which rest on speculation, uncorroborated remote-hearsay). *See also* Mr Bemba's Appeal Brief, paras 7-10.
[244] Mr Bemba's Appeal Brief, para. 8.

B. Alleged Legal Error in Relying on uncharged allegations to aggravate the sentence

1. Relevant part of the Sentencing Decision

97. When addressing the gravity of the offence under article 70 (1) (c) of the Statute for which Mr Bemba was convicted, the Trial Chamber considered, *inter alia*, the "nature of the unlawful behaviour".[245] It stated, however, that it would not:

> [F]or gravity purposes, take into account any conduct *after* the act since this cannot *per se* characterise the gravity of the offence as committed at the relevant time. However, the Chamber has considered this factor, if applicable, in the context of the convicted person's culpable conduct.[246] [Footnote omitted.]

98. In footnote 340, which related to this passage, the Trial Chamber explained:

> This relates, in particular, to the conduct of the co-perpetrators, Mr Bemba, Mr Kilolo and Mr Mangenda, with regard to their agreement to take remedial measures in the context of the Article 70 investigation.

99. When considering aggravating circumstances, the Trial Chamber took into account and attached weight to its finding in the Conviction Decision that Mr Bemba, upon learning of the Prosecutor's investigations of potential offences under article 70 of the Statute, had taken "a series of remedial measures to frustrate [these] investigation[s]", noting the role Mr Bemba had played in this regard.[247]

100. When discussing Mr Bemba's culpable conduct, the Trial Chamber noted, *inter alia*, that:

> Mr Bemba, while in detention, planned, authorised and approved the illicit coaching of the 14 Main Case Defence Witnesses and provided concrete instructions as to what and how witnesses should testify which were relayed by Mr Kilolo. Mr Bemba was kept informed at all times about the illicit coaching activities. He also spoke on the telephone with witnesses, such as D-19 and D-55.[248] [Footnotes omitted.]

101. The Trial Chamber also noted that, "Mr Bemba was updated on, and expressly authorised and directed, the illicit coaching of witnesses and gave directions, through

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[245] Sentencing Decision, paras 203, 207.
[246] Sentencing Decision, para. 208.
[247] Sentencing Decision, para. 238.
[248] Sentencing Decision, para. 220.

Mr Kilolo or personally (in the case of D-19 and D-55), on how and to what the witnesses were expected to testify".[249]

102. The Trial Chamber found in addition that Mr Bemba's abuse of the "privileged line" at the Detention Centre by using it to speak to witnesses D-55 and D-19 constituted an aggravating circumstance. [250]

2. Submissions of the parties

(a) Mr Bemba

103. Under his second ground of appeal, Mr Bemba submits that the Trial Chamber erred because it relied, both in the Conviction Decision and when determining the sentence, on "incidents and alleged offences that were never charged, including allegations concerning Mr. Bemba's communications with D-19, and the so-called plan to engage in 'remedial measures'", without timely clarification of the legal basis for doing so.[251] He argues that the Trial Chamber should not have relied on these "uncharged allegations" to convict him and, therefore, also cannot rely on them for sentencing purposes.[252] Recalling the Trial Chamber's statement that it would not rely on "conduct after the act" and footnote 340 of the Sentencing Decision reproduced above, he submits that the Trial Chamber conceded that Mr Bemba's conviction was based on "conduct after the fact" and was, therefore, "legally untenable".[253] He also submits that the Prosecutor conceded in her sentencing submissions that the "cover-up" was not part of the charged offences, but was relied upon as evidence of the common plan and co-perpetrators' involvement therein; in Mr Bemba's view, this means that the conviction exceeded the scope of the case because it hinges on "uncharged allegations".[254]

104. He argues further that this also means that the "uncharged incidents" cannot be relied upon as aggravating circumstances.[255] He avers that doing so would violate the prohibition of 'double-counting' and that the Defence received notice that the

[249] Sentencing Decision, para. 222 (footnote omitted).
[250] Sentencing Decision, para. 236.
[251] Mr Bemba's Appeal Brief, para. 11.
[252] Mr Bemba's Appeal Brief, para. 12.
[253] Mr Bemba's Appeal Brief, para. 15.
[254] Mr Bemba's Appeal Brief, paras 16-19.
[255] Mr Bemba's Appeal Brief, para. 20.

incidents might be considered as aggravating circumstances too late, as the Prosecutor filed her sentencing submissions on the same day as Mr Bemba.[256]

105. In relation to the Trial Chamber's reliance on a telephone call with witness D-19, Mr Bemba argues that the Trial Chamber made a significant error of fact in this regard because there was no indication that the phone call had taken place on 4 October 2012, as found by the Trial Chamber in the Conviction Decision; he recalls that he had indicated this error to the Trial Chamber, which, however, ignored it in the Sentencing Decision.[257] He avers that the Trial Chamber, in keeping with the principle it had stipulated regarding conduct after the fact, should not have taken into account the phone call with witness D-19 because it had occurred after Mr Bemba had been in contact with witness D-55 – and therefore it could "shed no light on the gravity of conduct that occurred beforehand".[258]

(b) The Prosecutor

106. The Prosecutor responds that Mr Bemba has not identified any legal error in the Trial Chamber's decision to consider, as aggravating factors, the abuse of his right to privileged communications from the Detention Centre and the "remedial measures" he took to frustrate the investigations under article 70 of the Statute.[259] She argues that she was not obliged to bring separate charges in respect of the so-called "uncharged offences" and that it would be arbitrary to exclude from consideration at the sentencing stage certain evidence that was led at trial solely because it could have been the basis for additional charges.[260] In the Prosecutor's view, there is no requirement under the Statute that aggravating factors must be "charged" in the document containing the charges and Mr Bemba had been put on ample notice of the purported "uncharged allegations", enabling him to properly defend himself.[261] She argues further that the Sentencing Decision distinguished between the gravity of the offence and aggravating factors and asserts that it would be incorrect to hold that only factors qualifying the offence for which the person was convicted may be considered

[256] Mr Bemba's Appeal Brief, paras 21-23.
[257] Mr Bemba's Appeal Brief, paras 24-25.
[258] Mr Bemba's Appeal Brief, para. 26.
[259] Prosecutor's Consolidated Response, para. 20.
[260] Prosecutor's Consolidated Response, para. 21.
[261] Prosecutor's Consolidated Response, para. 22.

in aggravation.[262] She also notes that the "remedial measures" which the Trial Chamber took into account in the case at hand were not truly conduct "after the fact" because the common plan was still being implemented while the co-perpetrators took measures aimed at frustrating the Prosecutor's investigation into offences under article 70 of the Statute.[263] The Prosecutor avers that she had made it clear that the remedial measures should be taken into account for sentencing.[264]

107. In support of the argument that aggravating factors do not have to be charged in the document containing the charges, the Prosecutor recalls that under rule 145 (1) (b) of the Rules, the sentence must be determined considering the "circumstances both of the convicted person and the crime", while rule 145 (2) (b) (i) of the Rules provides that "relevant prior criminal convictions" may be taken into account for sentencing, and that it is therefore logical that subsequent criminal conduct may also be taken into account, recalling that the ICTY Appeals Chamber has upheld that *post facto* obstruction of justice may be taken into account in aggravation.[265]

108. The Prosecutor agrees with the view adopted in the Sentencing Decision and in the sentencing decisions in the cases of *Prosecutor v. Bemba* and *Prosecutor v. Al Mahdi* that aggravating circumstances must "relate to the crimes upon which a person was convicted *and* to the convicted person himself", arguing, however, that this may include the consequences of the relevant conduct "provided they are features 'of which an accused is aware or could be expected to foresee and for which it is fair to hold him [or her] responsible'".[266] She also submits that there is "no bar in principle to a sentence being aggravated on the basis of 'acts and omissions that were part of the same course of conduct or common scheme as the offence of conviction' – provided that there is a sufficient nexus to the convicted person and the requirements of procedural fairness are met".[267] She avers that this was accepted by Trial Chamber I in the *Lubanga* case and – at least implicitly – affirmed by the Appeals Chamber in that case.[268] The Prosecutor also notes that the case law of the *ad hoc* tribunals is

[262] Prosecutor's Consolidated Response, para. 23.
[263] Prosecutor's Consolidated Response, para. 23.
[264] Prosecutor's Consolidated Response, para. 23.
[265] Prosecutor's Consolidated Response, paras 27, 28.
[266] Prosecutor's Consolidated Response, para. 29.
[267] Prosecutor's Consolidated Response, para. 31 (footnote omitted).
[268] Prosecutor's Consolidated Response, para. 33.

inconclusive as to whether aggravating factors need to be charged in the indictment, and that, in any event, the procedural regime of these tribunals differs significantly in relation to the sentencing regime, usually employing a "unified" trial and sentencing phase.[269]

109. The Prosecutor also submits that, throughout the pre-trial, trial and sentencing phases of the proceedings, Mr Bemba had been given sufficient notice of the allegations upon which the Trial Chamber relied as aggravating factors.[270] She notes that Mr Bemba did not complain about lack of notice during the trial or sentencing phases.[271]

110. Specifically in relation to Mr Bemba's abuse of the "privileged line" by speaking to witness D-19, the Prosecutor submits that the Trial Chamber's mistake regarding the date of the conversation was inconsequential.[272] She notes that, contrary to Mr Bemba's suggestion, the Trial Chamber referred to this conversation not in assessing the gravity of the offence, but when determining his culpable conduct – as part of its discussion of Mr Bemba's involvement in the common plan; the abuse of privilege, on the other hand, was considered only in the context of aggravating circumstances.[273] She argues that both were evidence of Mr Bemba's "broader conduct material to the charges".[274]

3. Determination by the Appeals Chamber

111. The Appeals Chamber notes that the Trial Chamber referred to Mr Bemba's telephone call with witness D-19 when addressing his culpable conduct, notably his degree of participation; it also referred to this phone call when considering the abuse of the communication privileges afforded to him while in detention as an aggravating factor.[275] The Trial Chamber referred to Mr Bemba's conduct seeking to frustrate the Prosecutor's investigation of the article 70 offences also as an aggravating factor. Mr Bemba's ground of appeal raises the issue of whether "uncharged offences" or

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[269] Prosecutor's Consolidated Response, para. 35.
[270] Prosecutor's Consolidated Response, para. 38.
[271] Prosecutor's Consolidated Response, para. 39.
[272] Prosecutor's Consolidated Response, para. 41.
[273] Prosecutor's Consolidated Response, para. 42.
[274] Prosecutor's Consolidated Response, para. 42.
[275] *See* Sentencing Decision, paras 220, 236.

"uncharged allegations" may be taken into account for the purpose of determining sentence.

112. The Appeals Chamber is of the view that the "gravity of the crime" mentioned in article 78 (1) of the Statute, the "extent of the damage caused", the "degree of participation of the convicted person" mentioned in rule 145 (1) (c) of the Rules and the aggravating circumstances listed in rule 145 (2) (b) of the Rules are not neatly distinguishable and mutually exclusive categories. Rather, certain facts may reasonably be considered under more than one of the categories. What is of importance, therefore, is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence,[276] carefully avoiding that the same factor is relied upon more than once.

113. The Appeals Chamber recalls that the sentence imposed on a convicted person for crimes and offences under the jurisdiction of the Court must be proportionate to the crime or offence and reflect the culpability of the convicted person.[277] The convicted person is sentenced for the crime or offence *for which he or she was convicted*, not for *other* crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court's procedural framework.

114. This is not to say that the fact that a convicted person may have committed other offences is entirely irrelevant to sentencing. Indeed, rule 145(2) (b) (i) of the Rules specifically provides that prior criminal convictions may be taken into account, under certain circumstances, as aggravating factors. However, this provision does not mean that offences committed *after* the offence for which the convicted person was

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[276] *See* also *Lubanga* Sentencing Appeal Judgment, paras 61-65, discussing potential alternative interpretations of the interplay between the factors in article 78 (1) of the Statute and those in rule 145 (1) (c) of the Rules and concluding, at para. 66, that, "the issue is whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence".

[277] *Lubanga* Sentencing Appeal Judgment, para. 40.

convicted, may never be taken into account. This is because conduct – including criminal conduct – that occurred after the offence for which the convicted person is convicted may also be relevant for the sentencing phase to establish that offence's gravity or the convicted person's culpability in that regard or may amount to an aggravating circumstance. It would be arbitrary to exclude such conduct from consideration merely because it could potentially have been charged as a separate offence. The Appeals Chamber notes that this approach finds support in the case law of the ICTY and ICTR, which, however, as noted by the Prosecutor, is not entirely consistent on this point.[278] Nevertheless, it must be underlined that conduct *after* the offence must not be taken into account for its own sake. This is because the convicted person is not punished for it. Nevertheless, it may inform the assessment of the gravity of the crime or offence or the convicted person's culpability or give rise to an aggravating circumstance.

115. The Appeals Chamber considers that from the above also follows the natural limitation of the consideration of conduct, including criminal conduct that occurred after the offence for which the convicted person is convicted. As the person is sentenced for these offences – and only for these offences – there must be a sufficiently proximate link with them.[279] In the absence of such a link, the conduct in question would be irrelevant to the sentence that is to be imposed.

116. The Appeals Chamber considers that it is impossible to describe in the abstract how close this link has to be; this is a question of the circumstances of each case. Nevertheless, considerations of procedural fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence. This does not mean that such facts need to be specifically set out in the document containing the charges. The purpose of the confirmation process is to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes

[278] *See* Prosecutor's Consolidated Response, para. 28, referring, *inter alia*, to *Delalić et al.* Appeal Judgment, paras. 789-790; *Popović et al.* Appeal Judgment, paras. 2046-2047; *Delalić et al.* Trial Judgment, paras. 1216-1217; *Popović et al.* Trial Judgment, para. 2199.
[279] *See* Prosecutor's Consolidated Response, para. 30; *Bemba* Sentencing Decision, para. 18; *Al-Mahdi* Sentencing Decision, para. 73; *Deronjić* Sentencing Appeal Judgment, para. 124.

charged",[280] not to identify potential aggravating factors. If a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction. The convicted person must, therefore, expect that they may be taken into account by the trial chamber in sentencing. If, on the other hand, the trial chamber wishes to rely upon facts in aggravation that could not reasonably be expected by the convicted person, it may only do so if proper notice has been provided – for instance in the submissions of the Prosecutor on sentencing – so as to allow the convicted person to defend him- or herself.

117. Turning to the specific allegations of Mr Bemba under this ground of appeal, the Appeals Chamber finds that the Trial Chamber did not err. First, the Appeals Chamber considers that, for the reasons set out in the preceding paragraphs, there was no principled reason not to rely on the "remedial measures" as an aggravating factor,[281] irrespective of whether they constituted criminal conduct that had not been charged. The "cover up" was directly related to the offences for which Mr Bemba was convicted. In addition, as noted by the Prosecutor,[282] it occurred at a time when the offences for which Mr Bemba was convicted were not yet concluded. In these circumstances, it was not unreasonable to take the remedial measures into account as an aggravating circumstance.

118. Nor is the Appeals Chamber convinced that Mr Bemba lacked sufficient notice of this as a potential aggravating circumstance. The findings regarding the remedial measures were included in the Conviction Decision and addressed in a separate section.[283] Given its direct link to the offences for which Mr Bemba was convicted, he cannot claim that he could not have anticipated that this may be relevant to aggravation and therefore was not able to defend himself properly. In addition, the Trial Chamber had, in a decision issued on 21 November 2016, indicated that "conduct constituting offences against the administration of justice under Article 70

[280] Article 61 (7) of the Statute.
[281] Sentencing Decision, para. 238.
[282] Prosecutor's Consolidated Response, para. 23.
[283] Conviction Decision, paras 770-801.

of the Statute can qualify as aggravating circumstances".[284] In the Prosecutor's Sentencing Submissions, which were filed on the Thursday before the sentencing hearing, which commenced on a Monday, the Prosecutor specifically addressed the "remedial measures" and argued that they constituted aggravating circumstances.[285] Thus, Mr Bemba could have addressed this issue at the sentencing hearing.

119. As regards the Trial Chamber's reference to the telephone call with witness D-19, the Trial Chamber referred to this phone call, first, in its description of Mr Bemba's culpable conduct, noting that he "also spoke on the telephone with witnesses, such as D-19 and D-55".[286] In the view of the Appeals Chamber, the phone call to witness D-19 was not irrelevant to Mr Bemba's culpable conduct, in particular because the Trial Chamber had found that Mr Bemba had made a similar phone call with witness D-55. As to the Trial Chamber's reliance on the phone call with witness D-19 in its discussion of the abuse of Mr Bemba's communication privilege at the detention centre,[287] the Appeals Chamber also does not consider that the Trial Chamber's approach was erroneous. It was relevant to the question of the abuse of the communication privilege, which the Trial Chamber also saw established on the basis of the phone call with witness D-55. As to the Trial Chamber's error in relation to the date of the phone call with witness D-19,[288] the Appeals Chamber recalls that in its judgment against the Conviction Decision, it has found that the Trial Chamber indeed erred in that regard.[289] However, the exact date of the telephone call was not relevant to how the Trial Chamber relied on this telephone call for either the assessment of Mr Bemba's culpable conduct or for the breach of the communication privilege as an aggravating circumstance.

120. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments under his second ground of appeal that the Trial Chamber erred by relying on uncharged allegations to aggravate the sentence.

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[284] Decision on Mr Arido's Request Concerning Sentencing Witnesses, para. 11.
[285] Prosecutor's Sentencing Submissions, paras 74 et seq.
[286] Sentencing Decision, para. 220.
[287] Sentencing Decision, para. 236.
[288] *See* Mr Bemba's Appeal Brief, para. 24.
[289] *Bemba et al.* Appeal Judgment, paras 1040-1041.

C. Alleged Double-counting

1. Relevant part of the Sentencing Decision

121. When setting out the applicable law, the Trial Chamber found that a "legal element of the offence(s) or the mode of criminal responsibility cannot be considered as an aggravating circumstance".[290] When assessing whether any aggravating circumstances had been established in respect of Mr Bemba, the Trial Chamber found that it had not been established in the Conviction Decision that Mr Bemba had abused his power *vis-à-vis* the witnesses.[291] However, the Trial Chamber took into account, pursuant to rule 145 (1) (b) of the Rules and as part of Mr Bemba's "overall circumstances", the fact that Mr Bemba had taken "advantage of his position as long-time and current MLC President" in his interaction with witnesses and through Mr Kilolo's interaction with them.[292]

122. The Trial Chamber found that Mr Bemba's abuse of his privilege to "communicat[e] freely and in confidence with his counsel" at the detention centre, as established in the Conviction Decision, constituted an aggravating circumstance that "enhance[d] Mr Bemba's culpable conduct".[293] The Trial Chamber recalled further that, upon learning of the commencement of the article 70 investigation, Mr Bemba took a number of measures to frustrate them.[294] It found that upon Mr Bemba's instructions, Mr Kilolo took measures to frustrate the investigation and that this amounted to an aggravating circumstance to which the Trial Chamber "attribute[d] weight".[295]

2. Submissions of the parties

(a) Mr Bemba

123. Under his third ground of appeal, Mr Bemba argues that the Trial Chamber erred in law by failing to address and apply an aspect of the principle of impermissible double-counting, namely that an element of the crime or mode of

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[290] Sentencing Decision, para. 25.
[291] Sentencing Decision, para. 234.
[292] Sentencing Decision, para. 234.
[293] Sentencing Decision, para. 236.
[294] Sentencing Decision, para. 238.
[295] Sentencing Decision, para. 238.

liability cannot be considered as an aggravating factor.[296] He asserts that the Trial Chamber double-counted in relation to aggravating factors (i) Mr Bemba's abuse of the lawyer-client privilege;[297] (ii) his attempt to obstruct justice by taking remedial measures upon learning of the article 70 investigation;[298] and (iii) the finding that Mr Bemba took advantage of his position as president of the *Mouvement de Libération du Congo* ("MLC").[299] Mr Bemba submits that these factual findings were relied upon to establish the objective and subjective legal elements of the offence and mode of liability in the Conviction Decision.[300]

(b) The Prosecutor

124. The Prosecutor avers that Mr Bemba's argument that the Trial Chamber double-counted the abuse of his "privileged communications is based on a mistaken premise", namely that this finding underpinned the Trial Chamber's findings regarding the objective and subjective legal elements.[301] She submits that Mr Bemba's abuse of privileged communications was evidence that supported findings essential to his conviction.[302]

125. With respect to the consideration of Mr Bemba's attempts to frustrate the article 70 investigation as an aggravating factor, the Prosecutor submits that this aspect of Mr Bemba's conduct was not "integral" to the essential objective and subjective elements for his conviction.[303]

126. In relation to the consideration as an aggravating factor that Mr Bemba took advantage of his position when interacting with witnesses, the Prosecutor submits that the *actus reus* of the offence of soliciting false testimony is asking or urging witnesses to testify falsely.[304] She therefore contends that although exploitation of personal

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[296] Mr Bemba's Appeal Brief, para. 27.
[297] Mr Bemba's Appeal Brief, paras 28-30.
[298] Mr Bemba's Appeal Brief, paras 28, 31-34, referring to *Nzabonimana* Appeal Judgment, para. 264.
[299] Mr Bemba's Appeal Brief, paras 28, 35-40.
[300] Mr Bemba's Appeal Brief, paras 29-40.
[301] Prosecutor's Consolidated Response, para. 48.
[302] Prosecutor's Consolidated Response, para. 49.
[303] Prosecutor's Consolidated Response, para. 51.
[304] Prosecutor's Consolidated Response, para. 54.

status is "highly probative for that conduct", it is "not legally required for a conviction based on [solicitation]".[305]

3. Determination by the Appeals Chamber

127. The Appeals Chamber notes that, contrary to Mr Bemba's submission,[306] the Trial Chamber specifically noted that a legal element of the offence or the mode of liability in relation to which an accused was convicted cannot be considered as an aggravating factor for sentencing purposes.[307]

128. Turning to the manner in which the Trial Chamber applied this principle, the Appeals Chamber finds no merit in Mr Bemba's arguments. In the context of determining whether the legal elements of article 25 (3) (a) of the Statute were met, the Trial Chamber relied, *inter alia*, upon Mr Bemba's abuse of the privileged communications at the detention centre and his attempts to frustrate the article 70 investigation to conclude that there was a common plan,[308] that Mr Bemba provided an essential contribution to the common plan,[309] and that he intended to bring about the material elements of the offences.[310] Similarly, the Trial Chamber relied upon Mr Bemba's position as a powerful man in relation to witnesses and his "indirect influence" on witnesses through Mr Kilolo to conclude that he solicited the offence of giving false testimony by 14 defence witnesses pursuant to article 70 (1) (a) and 25 (3) (b) of the Statute.[311] However, although these factual findings serve to prove the legal elements of the crimes for which Mr Bemba was convicted – *e.g.* the existence of a common plan; Mr Bemba's essential contribution thereto; his intention to bring about the material elements of the offence; soliciting the offence of giving false testimony –, they *did not* constitute in or of themselves legal elements or the material factual findings underpinning the legal elements.[312] Therefore, contrary to Mr Bemba's contention, the Trial Chamber did not violate the principle according to

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[305] Prosecutor's Consolidated Response, para. 54.
[306] Mr Bemba's Appeal Brief, para. 27.
[307] Sentencing Decision, para. 25.
[308] Conviction Decision, paras 683, 803.
[309] Conviction Decision, paras 814-817.
[310] Conviction Decision, paras 817, 819.
[311] Conviction Decision, paras 851-857.
[312] See in this regard *Naletilić and Martinović* Appeal Judgment, para. 610: "The Appeals Chamber considers, however, that the Trial Chamber erred in another respect: with regard to his convictions under Article 7(3) of the Statute, it double-counted his position of authority as both an element of the offence and an aggravating factor."

which a legal element of the offence or the mode of liability cannot be considered as an aggravating factor.

129. The Appeals Chamber notes Mr Bemba's reference to the ICTR *Nzabonimana* Appeal Judgment in arguing that unlike the situation in his case, in that case the factual findings relied upon were "mere example[s] of a 'bigger' or of 'another' aggravating factor".[313] The Appeals Chamber observes that in that case, the ICTR Appeals Chamber rejected the appellant's submission that certain factual findings on his influence had been double counted.[314] In reaching this conclusion, the ICTR Appeals Chamber found no error in the Trial Chamber's reliance on the same factual findings to establish that the accused had genocidal intent – a legal element of the charges that formed the basis for the conviction – and his abuse of influence as an aggravating factor.[315] The reference in that case to the factual findings not being aggravating circumstances in themselves was in response to an argument brought by the appellant and was, as such, not decisive for the ICTR Appeals Chamber's determination. Indeed, what is decisive is that the legal elements of the offence – and the material factual findings underpinning them – are not considered as aggravating factors.[316] As explained above, in the present case the legal elements of the offences

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[313] Mr Bemba's Appeal Brief, para. 34, referring to *Nzabonimana* Appeal Judgment, para. 264 (emphasis in original). The Appeals Chamber notes that the reference to paragraph 264 does not concern any matter regarding sentencing.
[314] *Nzabonimana* Appeal Judgment, para. 464.
[315] *Nzabonimana* Appeal Judgment, para. 464: "The Appeals Chamber recalls that a factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance. The Appeals Chamber also recalls that the Trial Chamber convicted Nzabonimana of instigating genocide for the killings of Tutsis at the Nyabikenke commune office on 15 April 1994. The Trial Chamber noted "the extensive circumstantial evidence of Nzabonimana's genocidal intent" which included, *inter alia*, Nzabonimana's forcible release of prisoners in Rutobwe commune and his statement at the Nyamabuye commune office to destroy the house of a dead Tutsi. The Appeals Chamber observes that the Trial Chamber considered Nzabonimana's abuse of influence, not his mere influence, as an aggravating circumstance, and specifically, Nzabonimana's encouragement for the intensification of the massacres instead of using his position of authority and his influence to protect Tutsis. Furthermore, contrary to Nzabonimana's submission, the release of the Rutobwe commune prisoners and his order of destruction of a house in Nyamablye commune served as examples of Nzabonimana's abuse of his position of influence and were not aggravating circumstances in themselves. Thus, the Appeals Chamber rejects Nzabonimana's contention that the Trial Chamber engaged in double-counting in relation to his influence and the events in Rutobwe and Nyamabuye communes."
[316] *See in this regard Blaškić* Appeal Judgment, para. 693: "The Appeals Chamber finds that the Trial Chamber did not err in holding that 'a discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element.' A discriminatory state of mind is not an element of the crime of murder under Article 3 of the Statute and was not therefore taken into account in convicting the Appellant for the crime of murder. It could however be taken into account in estimating the gravity of the murder. This is the way the Trial

that formed the basis for Mr Bemba's conviction were not considered as aggravating factors.

130. Accordingly, the Appeals Chamber rejects Mr Bemba's third ground of appeal.

D. Alleged legal and factual errors in the assessment of the degree of Bemba's culpability

1. Relevant part of the Sentencing Decision

131. In addressing Mr Bemba's culpable conduct, and, in particular, the degree of Mr Bemba's intent, the Trial Chamber dismissed some of Mr Bemba's arguments *in limine* on the basis that they constituted an attempt to "re-litigate the merits" of the Conviction Decision.[317] Notably, the Trial Chamber considered that Mr Bemba's arguments in relation to the degree of intent concerned challenges to its assessment of the evidence in relation to "(i) D-55 claiming that Mr Bemba 'was not aware or intended for D-55 to testify falsely, or sought to motivate D-55 to do so'; and (ii) D-15 and D-54 alleging that the evidence did not establish that Mr Bemba had given instructions entailing false testimony".[318] In the Trial Chamber's view, these arguments were "properly raised before the Appeals Chamber" in Mr Bemba's appeal against the Conviction Decision and could not be taken into account for the purposes of sentencing.[319]

132. Similarly, and in relation to Mr Bemba' arguments in mitigation of sentence, the Trial Chamber found that Mr Bemba, to a "great extent, re-litigates the merits of the case by challenging the Chamber's interpretation and legal characterisation of the

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Chamber used it. The discriminatory state of mind was used once in order to assess the gravity of the crime of murder and, of course on another occasion, in order to establish that the Appellant had the requisite discriminatory intent of the crime of persecution. The Trial Chamber committed no error in holding that a discriminatory state of mind can be regarded as an aggravating factor in relation to the crime of murder"; *Deronjić* Sentencing Appeal Judgment, para. 127: "While it is correct to say that the civilian status of the population against which the attack is directed is an element of crimes against humanity and that therefore such status cannot be taken into account as an aggravating circumstance, the Appeals Chamber notes that the issue before it is not whether the intrinsic vulnerability of civilians can be taken into account but rather whether there are additional elements amounting to particular circumstances showing that the victims were subjected to a special vulnerability. In the present case, not only had the civilians been disarmed and denied any warning about their fate, but moreover had been deceived by a statement on the Appellant's behalf into believing they were safe. These facts are not inherent in the population's civilian status."

[317] Sentencing Decision, paras 224-225 and 227-228.

[318] Sentencing Decision, para. 224 (footnotes omitted).

[319] Sentencing Decision, para. 225.

facts [in the Conviction Decision] and inviting the Chamber to follow [*his*] understanding of Mr Bemba's beliefs".[320] These arguments included Mr Bemba's "passive and limited role as an accused in the Main Case during the commission of the offences"; the fact that "Mr Bemba was in detention at the relevant time and dependent on the advice of others"; the negative effect of prolonged detention on Mr Bemba's cognitive awareness; the argument that Mr Bemba's actions were neutral in nature and that given his "contextual circumstances, he could not have been aware of the difference between legitimate and illegitimate payments, or between legitimate witness preparation and illicit coaching".[321] The Trial Chamber considered that it had already adjudicated these arguments in the Conviction Decision and that the arguments were more appropriately challenged in Mr Bemba's appeal against the Conviction Decision.[322] Nevertheless, in response to Mr Bemba's general contention concerning his "passive and limited role", the Trial Chamber found that, despite being a detainee, Mr Bemba's role "was neither passive nor that of a by-stander lacking awareness".[323]

2. Submissions of the parties

(a) Mr Bemba

133. Under his fourth ground of appeal, Mr Bemba contends that the Trial Chamber abused its discretion when it dismissed all of his arguments relating to his degree of culpability on the basis that they constituted an attempt to re-litigate the merits of the Conviction Decision.[324] Mr Bemba submits that, in doing so, the Trial Chamber committed a "reversible legal error" which resulted in a sentence that fails to reflect the "minimal nature of Mr. Bemba's culpability".[325] Mr Bemba argues that "there is a distinction between relitigating the 'merits' of the Trial Judgment, and providing further argument and evidence concerning the contours of the Judgment's findings".[326] He submits that the arguments were meant to "flesh out and

[320] Sentencing Decision, para. 228.
[321] Sentencing Decision, para. 227.
[322] Sentencing Decision, para. 228.
[323] Sentencing Decision, para. 228.
[324] Mr Bemba's Appeal Brief, paras 41-51.
[325] Mr Bemba's Appeal Brief, para. 41-42.
[326] Mr Bemba's Appeal Brief, para. 47.

contextualise [the] existing findings" and not "controvert the Chamber's findings concerning the defendants' responsibility".[327]

134. Mr Bemba argues further that, given that he "was found to possess 'implicit' rather than 'actual' knowledge", his sentence should have been "commensurately" lower.[328] In addition, he contends that, as decided in relation to Mr Mangenda, since he "was not present when any of the illicit conduct occurred", "it should have resulted in a substantial reduction in his culpability".[329] In his view, the fact that he was not present when payments were made or when witnesses were being coached impacted on his ability to appreciate whether a payment was legitimate or not[330] and the extent of the witness preparation.[331] Lastly, Mr Bemba argues that even though the Trial Chamber found that his "participation and knowledge were of a more limited nature" it nonetheless imposed the heaviest sanctions on him.[332] In his view, this is indicative of the Trial Chamber's disregard of evidence concerning his involvement and knowledge and its reliance on "pure speculation concerning what happened and why it happened".[333]

(b) The Prosecutor

135. The Prosecutor submits that the Trial Chamber's rejection of Mr Bemba's arguments "did not constitute an abuse of discretion".[334] In her view, the Trial Chamber was not obliged to "re-open matters which it had already decided beyond reasonable doubt".[335] The Prosecutor contends that Mr Bemba "merely disagrees with the Sentencing Decision" and that this ground of appeal is "merely based on a claim of inadequate reasoning – that the Sentencing Decision 'fails to reflect […] evidence and arguments' which Bemba thinks it should have included".[336]

136. With respect to Mr Bemba's arguments that his role was essentially "'passive', and that there was no 'nexus' between his acts and the false testimony of the

[327] Mr Bemba's Appeal Brief, para. 51.
[328] Mr Bemba's Appeal Brief, para. 52.
[329] Mr Bemba's Appeal Brief, para. 53.
[330] Mr Bemba's Appeal Brief, para. 53.
[331] Mr Bemba's Appeal Brief, para. 54.
[332] Mr Bemba's Appeal Brief, para. 55.
[333] Mr Bemba's Appeal Brief, para. 55.
[334] Prosecutor's Consolidated Response, paras 56-59.
[335] Prosecutor's Consolidated Response, para. 59.
[336] Prosecutor's Consolidated Response, para. 60.

witnesses", [337] the Prosecutor submits that the Trial Chamber "expressly acknowledged these arguments in considering 'mitigating circumstances'" and recognised that, due to his detention, his actual contributions to the Common Plan were "somewhat restricted".[338] However, the Prosecutor notes that the Trial Chamber "refused to accept that his role was 'passive' because this was inconsistent with the evidence 'as explained in the Judgment'".[339]

137. The Prosecutor avers further that Mr Bemba was not convicted based on "implicit knowledge", but on his "actual knowledge" and that, therefore, the concept of "implicit knowledge" could not affect his sentence.[340] She submits that the Trial Chamber did not "simplistically determin[e] that physical absence from the 'scene of witness coaching' automatically led to a reduction in culpability".[341] Instead, she maintains that the Trial Chamber, for both Mr Mangenda and Mr Bemba, gave "some weight" to the manner in which they provided their essential contributions to the Common Plan.[342]

3. Determination by the Appeals Chamber

138. The Appeals Chamber notes that Mr Bemba lists ten arguments that he made in his submissions on sentencing before the Trial Chamber that he claims "significantly differentiate[d] the degree of [his] culpability and participation as compared to that of his co-defendants".[343] The Appeals Chamber notes that these arguments, which challenged the Trial Chamber's findings on Mr Bemba's knowledge of, and contribution to, the offences that formed the basis of his conviction were also raised by Mr Bemba in his appeal against the Conviction Decision.[344] Furthermore, the Appeals Chamber notes that, in Mr Bemba's Sentencing Submissions, these arguments are essentially repeated before the Trial Chamber without any inflection as to its relevance to the issue of sentencing.[345] In these circumstances, the Appeals Chamber sees no error in the Trial Chamber's finding that these arguments, which

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[337] Prosecutor's Consolidated Response, para. 62 (footnote omitted).
[338] Prosecutor's Consolidated Response, para. 62.
[339] Prosecutor's Consolidated Response, para. 62.
[340] Prosecutor's Consolidated Response, para. 63.
[341] Prosecutor's Consolidated Response, para. 64.
[342] Prosecutor's Consolidated Response, para. 64.
[343] Mr Bemba's Appeal Brief, para. 52.
[344] Mr Bemba's Conviction Appeal Brief, paras 120-134, 200-201, 232-241, 244-245,279-280.
[345] *See* Mr Bemba's Sentencing Submissions, paras 16-39, 43-47, 51-52, 55-57, 65.

have been properly raised before the Appeals Chamber, constitute an attempt to re-litigate the merits of the case.[346] The Appeals Chamber considers that, even though a decision on sentence will, to a certain extent, rely on findings made in the conviction decision the appropriate avenue to challenge these findings is in an appeal against the conviction decision, pursuant to article 81(1) of the Statute, and not in an appeal against sentence.[347] Accordingly, Mr Bemba's argument that the Trial Chamber abused its discretion by dismissing these arguments is rejected.

139. In relation to Mr Bemba's argument that his sentence should have been "commensurately" lower, given that he was found to have had "implicit" rather than "actual" knowledge, the Appeals Chamber recalls that it found in this regard that the Trial Chamber did not establish a lower standard of *mens rea* when it referred to "implicit" knowledge. Rather, the reference to "implicit" knowledge indicated that his knowledge was established inferentially.[348] Mr Bemba's argument is therefore rejected.

140. Mr Bemba also contends that, given that he was detained and not present when any of the illicit conduct occurred, his role was limited, which should have resulted in a much lower sentence.[349] In his view, the Trial Chamber disregarded his degree of participation and relied instead on speculation. The Appeals Chamber considers these arguments to be unpersuasive. The Trial Chamber expressly acknowledged Mr Bemba's more limited role because of his status as a detainee, but "reiterated" that, despite this status, he "had an authoritative role in the organisation and planning of the offences and was directly involved in their commission".[350] In light of this, Mr Bemba fails to demonstrate why a lower sentence was warranted. The arguments are therefore rejected.

141. Accordingly, the Appeals Chamber rejects Mr Bemba's fourth ground of appeal.

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[346] Sentencing Decision, paras 225, 228.
[347] *See infra* paras 253-254.
[348] *Bemba et al.* Appeal Judgment, V.B.
[349] Mr Bemba's Appeal Brief, paras 53-55.
[350] Sentencing Decision, para. 228.

E. Alleged legal and factual errors in the assessment of aggravating factors and "relevant circumstances"

1. Relevant part of the Sentencing Decision

142. The Trial Chamber held that the factors set out in article 78 (1) of the Statute are specified or complemented by those provided for in rule 145 (1) (b) and (c) of the Rules.[351] It noted further that, after identifying all the relevant factors, it must weigh and balance them pursuant to rule 145 (1) (b) of the Rules.[352] As noted above, the Trial Chamber considered the fact that Mr Bemba took advantage of his position as "long-time" and current President of the MLC when inter-acting personally or through Mr Kilolo with witnesses D-55, D-3 and D-6 "as part of Mr Bemba's overall circumstances, pursuant to Rule 145(1)(b) of the Rules".[353]

143. In support of its finding that Mr Bemba's abuse of his communication privileges constituted an aggravating factor pursuant to rule 145 (2) (b) (vi) of the Rules, the Trial Chamber recalled that Mr Bemba communicated with witnesses D-55 and D-19 "with a view to corruptly influencing them".[354] It also recalled that Mr Bemba abused the privilege afforded to communicate with persons not entitled to privilege, referring in particular to Mr Babala, Mr Kilolo and Mr Mangenda with whom he discussed the furtherance of the common plan and to whom he gave instructions.[355]

2. Submissions of the parties

(a) Mr Bemba

144. Under his fifth ground of appeal, Mr Bemba first challenges the Trial Chamber's consideration of the abuse of the privileged communication line at the detention centre as an aggravating circumstance, raising legal and factual errors.[356] Second, he challenges the Trial Chamber's determination that he took advantage of his position as president of the MLC and that this aggravated his sentence.[357]

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[351] Sentencing Decision, para. 22.
[352] Sentencing Decision, para. 26.
[353] Sentencing Decision, para. 234.
[354] Sentencing Decision, para. 236, referring to Conviction Decision, paras 293-298, 740-741.
[355] Sentencing Decision, para. 236, referring to Conviction Decision, paras 701, 737-738, 884.
[356] Mr Bemba's Appeal Brief, paras 57-88.
[357] Mr Bemba's Appeal Brief, paras 89-116.

145. In relation to the first set of arguments, Mr Bemba submits that the Trial Chamber erred in law in finding that the alleged abuse of the privileged communication line constituted an aggravating circumstance within the meaning of rule 145 (2) (b) (vi) of the Rules.[358] He recalls that the provision is open-ended, but contains an additional safeguard, namely that other aggravating circumstances not exhaustively enumerated in rule 145 (2) (b) must be of a "similar nature".[359] Mr Bemba argues that the Trial Chamber "failed to demonstrate" that his alleged abuse of the privileged communication line was sufficiently similar to the aggravating circumstances enumerated in rule 145 (2) (b) (i) to (v) of the Rules.[360]

146. On the facts, Mr Bemba argues that there was no nexus between "the mere existence of contacts between Mr. Bemba and Mr. Babala or Mr. Mangenda" and "illicit conduct related to the Article 70 case, or aggravated harm".[361] In this regard, he challenges some of the Trial Chamber's factual findings concerning (i) the existence and content of the communications between him and other co-accused;[362] and (ii) his abuse of the communication line in the detention centre when speaking to witness D-55.[363] He also submits that it was a "violation of due process and the principle of legality" to aggravate his sentence for the alleged abuse of the privileged communication line.[364] Finally, Mr Bemba challenges the Trial Chamber's findings concerning the concept and scope of "privilege".[365]

147. In relation to the second set of arguments, Mr Bemba submits that there is no evidence establishing a link between his alleged abuse of his position as President of the MLC and the offences for which he was convicted.[366] He submits further that the Trial Chamber's factual finding that he abused his position as President of the MLC lacks evidentiary basis.[367] Second, and with reference to the *Lubanga* Sentencing Appeal Judgment, Mr Bemba argues that, as a matter of law, rule 145 (1) (b) of the

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[358] Mr Bemba's Appeal Brief, paras 57-58.
[359] Mr Bemba's Appeal Brief, para. 60.
[360] Mr Bemba's Appeal Brief, paras 58-59, 62-63.
[361] Mr Bemba's Appeal Brief, paras 66, 68.
[362] Mr Bemba's Appeal Brief, paras 67, 69-70.
[363] Mr Bemba's Appeal Brief, paras 71-73.
[364] Mr Bemba's Appeal Brief, paras 74-78.
[365] Mr Bemba's Appeal Brief, paras 79-88.
[366] Mr Bemba's Appeal Brief, paras 90-103.
[367] Mr Bemba's Appeal Brief, paras 90-103.

Rules "is not intended to function as a standalone basis for adopting aggravating factors that fail to meet the threshold of rule 145(2)(b)".[368] He further contends that rule 145 (2) (b) of the Rules would be superfluous if the Trial Chamber's approach were to be accepted and that the Trial Chamber violated the principle of legality.[369]

(b) The Prosecutor

148. In response to Mr Bemba's first set of arguments, the Prosecutor submits that the Trial Chamber did not err in finding that Mr Bemba's abuse of privileged communications is similar to the factors set out in rule 145 (2) (b) (i) to (v) of the Rules and therefore amounts to an aggravating factor.[370] In particular, she argues that this factor is similar to an "abuse of power or official capacity" under rule 145 (2) (b) (ii) of the Rules.[371] On the facts, the Prosecutor submits that Mr Bemba did abuse his privileged communications while in detention and that his challenges to this factual finding should be dismissed as speculative, flawed, irrelevant and/or unsubstantiated.[372]

149. In relation to Mr Bemba's second set of arguments, the Prosecutor avers that the Trial Chamber's finding that Mr Bemba took advantage of his position when interacting with some of the defence witnesses is sufficiently supported by evidence.[373] She submits further that, in arguing that the Trial Chamber erred in law by relying on these circumstances under rule 145 (1) (b) of the Rules, Mr Bemba ignores rule 145 (1) (c) of the Rules, which provides for additional factors to be considered by the Trial Chamber in determining the appropriate sentence.[374]

3. Determination by the Appeals Chamber

150. In relation to Mr Bemba's first set of arguments concerning the Trial Chamber's consideration of the abuse of the privileged communication line at the detention centre as an aggravating circumstance, the Appeals Chamber notes that some of Mr Bemba's arguments, namely those relating to the Trial Chamber's finding that he

[368] Mr Bemba's Appeal Brief, paras 106-107.
[369] Mr Bemba's Appeal Brief, paras 110-116.
[370] Prosecutor's Consolidated Response, para. 68.
[371] Prosecutor's Consolidated Response, para. 69.
[372] Prosecutor's Consolidated Response, paras 70-77.
[373] Prosecutor's Consolidated Response, paras 79-83.
[374] Prosecutor's Consolidated Response, paras 84-88.

abused the privileged line in the detention centre for illicit purposes[375] and the scope of the lawyer-client privileges[376] – have already been addressed and rejected in the context of disposing of Mr Bemba's appeal against the Conviction Decision.[377] These arguments are therefore also rejected insofar as Mr Bemba repeats them in his appeal against the Sentencing Decision.

151. As to Mr Bemba's contention that the Trial Chamber failed to establish beyond reasonable doubt "[t]he nexus between the particular conduct relied upon, and the harm occasioned by the Article 70 offences",[378] the Appeals Chamber considers that what must be established is a sufficiently proximate link between the factor being considered as aggravating and the offences that formed the basis for the conviction.[379] Thus, once a trial chamber has identified an aggravating factor and a sufficiently proximate link exists between this factor and the offences that formed the basis for the conviction, a "nexus between the particular conduct […] and the harm occasioned"[380] is properly established. In the case at hand, the Trial Chamber found, *inter alia*, beyond reasonable doubt that Mr Bemba's abuse of the communication privilege allowed him to communicate with Mr Babala, who was not entitled to such privilege, including Mr Kilolo and Mr Mangenda with whom he discussed the furtherance of the common plan and to whom he gave instructions.[381] In light of this, the Appeals Chamber finds that there is a link between Mr Bemba's abuse of the communication privilege and the offences that formed the basis of his conviction. Mr Bemba's argument is therefore rejected.

152. In support of his contention that the Trial Chamber erred in considering that his alleged abuse of privileged communications constituted an aggravating factor, the Appeals Chamber understands Mr Bemba to be raising two broad arguments, namely that: (i) an abuse of a privileged communication line cannot be considered, as a matter of law, as an aggravating factor; and (ii) the aggravation of his sentence on the basis

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[375] Mr Bemba's Appeal Brief, paras. 66-67, 69-71, 73, 79. *See also* Mr Bemba's Conviction Appeal Brief, paras 272-280 challenging the Trial Chamber's findings on the improper use of the Registry's privileged line.
[376] Mr Bemba's Appeal Brief, 80-88. *See also* Mr Bemba's Conviction Appeal Brief, 141-187.
[377] *Bemba et al.* Appeal Judgment, sections X.A.8.(b) and section VI.D.3.(a).
[378] Mr Bemba's Appeal Brief, para. 57. *See also* para. 68.
[379] *See supra* para. 115
[380] Mr Bemba's Appeal Brief, para. 57. *See also* para. 68.
[381] Sentencing Decision, para. 236, referring to Conviction Decision, paras 701, 737-738, 884.

of an abuse of the privileged communication line amounted to a violation of due process and the principle of legality.

153. With respect to Mr Bemba's arguments that consideration of his alleged abuse of privileges amounts to a violation of due process and the principle of legality, the Appeals Chamber agrees with the Prosecutor that they are unsubstantiated and warrant rejection.[382] Contrary to Mr Bemba's submissions,[383] he was not "punished" by the investigative measures that included revoking privilege with respect to communications falling outside the parameters deserving confidentiality. Accordingly, his claim that by considering his alleged abuse of privilege in aggravation of sentence amounted to disciplining him twice, are without merit and are rejected.

154. As to Mr Bemba's argument that an abuse of a privileged communication line cannot be considered, as a matter of law, as an aggravating factor, the Appeals Chamber notes that the Trial Chamber seems to have implicitly accepted the Prosecutor's submission that an abuse of the privileges afforded to Mr Bemba is similar in nature to the "[a]buse of power or official capacity provided under rule 145(2)(b)(ii)" of the Rules,[384] although it did not refer to this provision in its finding.[385] The Appeals Chamber understands that Mr Bemba's arguments concern the interpretation of rule 145 (2) (b) (vi) of the Rules which reads as follows:

> In addition to the factors mentioned above, the Court shall take into account, as appropriate:
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> […]
>
> (b) As aggravating circumstances:
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> […]
>
> (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

[382] Mr Bemba's Appeal Brief, paras 74-78; Prosecutor's Consolidated Response, para. 75.
[383] Mr Bemba's Appeal Brief, para. 74, 76, 78.
[384] Sentencing Decision, para. 235, referring to Prosecutor's Sentencing Submissions, paras 64-71.
[385] *See* Sentencing Decision, para. 236.

155. The circumstances included in rule 145 (2) (b) (i) to (v) of the Rules are the following:

> (i) Any relevant prior criminal conviction for crimes under the jurisdiction of the Court or of a similar nature;
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> (ii) Abuse of power or official capacity;
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> (iii) Commission of the crime where the victim is particularly defenceless;
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> (iv) Commission of the crime with particular cruelty or where there were multiple victims; and
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> (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3.

156. The Appeals Chamber agrees with Mr Bemba that the wording of rule 145 (2) (b) (vi) of the Rules indicates that the list of aggravating circumstances is not exhaustive,[386] but that circumstances other than those explicitly provided in rule 145 (2) (b) (i) to (v) of the Rules may only be considered if they are similar to them "by virtue of their nature".[387] Thus, the Rules provide for a safeguard that ensures compatibility with the principle of legality.[388] Indeed, the language of rule 145 (2) (b) (vi) of the Rules seems to reflect a compromise between opposing views of States during the Rome conference, where some States advocated that considerable flexibility should be given to the Court,[389] while other States argued for an exhaustive list to ensure more legal certainty and predictability.[390]

157. Nevertheless, the Appeals Chamber finds no merit in Mr Bemba's contention that rule 145 (2) (b) (vi) of the Rules provides for a gravity requirement.[391] The wording of this provision only contains a qualitative requirement, namely that the circumstance be similar in nature to those provided under rule 145 (2) (b) (i) to (v) of

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[386] Mr Bemba's Appeal Brief, para. 60.
[387] *See* rule 145 (2) (b) (vi) of the Rules *in fine*.
[388] *See in this regard* K. Ambos, *Treatise on International Criminal Law* Vol. II (Oxford University Press, 2014), p. 281 "While this adds an element of uncertainty to the list, it is still in line with the […] flexible *nulla poena* principle."
[389] *See* 1 December 1999 Australia, Canada and Germany Proposal on Penalties; 19 November 1999 France Proposal on Penalties.
[390] *See* 23 November 1999 Spain Proposal on Penalties; 30 November 1999 Brazil and Portugal Proposal on Penalties. *See also* Rolf Einar Fife, "Penalties" in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), 558.
[391] Mr Bemba's Appeal Brief, paras 59-60, 62-63.

the Rules. No gravity requirement is contained under rule 145 (2) (b) (vi) of the Rules.[392]

158. In the circumstances of the present case, the Appeals Chamber considers that the Trial Chamber did not err in considering Mr Bemba's abuse of privileged communications while in detention as being similar in nature to an "abuse of power or official capacity" under rule 145 (2) (b) (ii) of the Rules. As argued by the Prosecutor,[393] Mr Bemba was entrusted with the ability to make privileged calls with his counsel for legitimate purposes, yet he abused and violated this trust for criminal purposes. Rather than using this privilege to exercise his right to freely communicate with his counsel, Mr Bemba abused the privilege afforded to him for illicit purposes. Thus, the Appeals Chamber finds that the Trial Chamber did not err in considering Mr Bemba's abuse of the privileged line while in detention as an aggravating factor under rule 145 (2) (b) (vi) of the Rules.

159. Turning to Mr Bemba's second set of arguments concerning the Trial Chamber's determination that he took advantage of his position as president of the MLC and that this aggravated his sentence, for the reasons explained below, the Appeals Chamber finds no merit in these arguments. The Appeals Chamber finds that the fact that Mr Bemba, in committing the offences, took advantage of his long-standing and current position as MLC President is a relevant consideration for sentencing purposes. Indeed, as noted by the Prosecutor,[394] Mr Bemba seems to ignore rule 145 (1) (c) of the Rules, which stipulates that the Court "shall give consideration, *inter alia*, to […] the nature of the unlawful behaviour and the means employed to execute the crimes; the degree of participation of the convicted person; […] the circumstances of manner, time and location". As the Appeals Chamber has already stated, in determining the appropriate sentence, the Trial Chamber *must*

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[392] *See in this regard* Jens Peglau, "Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence", in H. Fischer et al. (eds.) *International and National Prosecution of Crimes Under International Law* (Berliner Wissenschafts-Verlag, 2nd ed., 2004), p. 147, "The discretion of the Court is more restricted with respect to aggravating factors. The list is not exhaustive, but other factors apart from those explicitly mentioned may only be considered if they are similar to them 'by virtue of their nature'. Totally different factors which are only similar in gravity but not in nature, are not supposed to be considered (they can only come into play in the general factors of Rule 145, para. 1 lit. (c). This solution offers a very clear guideline to the Court, without taking away too much flexibility."
[393] Prosecutor's Consolidated Response, para. 74
[394] Prosecutor's Consolidated Response, paras 84, 86.

identify all relevant factors and weigh them,[395] which it did in the present case. The Appeals Chamber finds no error in the Trial Chamber's determination as the factor considered was relevant for sentencing purposes.

160. In relation to the factual challenges raised by Mr Bemba concerning the Trial Chamber's determination that he took advantage of his position as president of the MLC and that this aggravated his sentence, the Appeals Chamber notes that, contrary to his submissions,[396] the Trial Chamber set out the basis upon which it considered Mr Bemba's position as a relevant factor. The Trial Chamber explained that Mr Bemba took advantage of his position in his interaction with witness D-55, recalling its finding in the Conviction Decision that D-55 testified that he considered that Mr Bemba was a powerful man.[397] In relation to witnesses D-3 and D-6, the Trial Chamber recalled that Mr Bemba's position was of relevance when Mr Kilolo made non-monetary promises to them.[398]

161. The Appeals Chamber considers that it is clear from the Sentencing Decision that Mr Bemba's advantage concerned the importance of his position within the MLC and the concomitant influence and impact that he had on witnesses D-3, D-6 and D-55. As such, Mr Bemba's arguments that the Trial Chamber failed to support its finding with evidence are unfounded.[399] As to Mr Bemba's remaining arguments, in particular his challenges to the Trial Chamber's finding concerning him exerting direct influence on D-55[400] and his link to the meetings between Mr Kilolo and D-3 and D-6,[401] the Appeals Chamber rejects them as they constitute an attempt to re-litigate findings made in the Conviction Decision that have been confirmed on appeal.[402]

162. Accordingly, Mr Bemba's fifth ground of appeal is rejected.

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[395] *Lubanga* Sentencing Appeal Judgment, paras 32-33, 42, 66 (emphasis added).
[396] Mr Bemba's Appeal Brief, para. 92.
[397] Sentencing Decision, para. 234, referring to Conviction Decision, para. 295.
[398] Sentencing Decision, para. 234, referring to Conviction Decision, para. 692.
[399] Mr Bemba's Appeal Brief, paras 90-94, 99-100.
[400] Mr Bemba's Appeal Brief, paras 95-98. *See in this regard* Mr Bemba's Conviction Appeal Brief, paras 242-245.
[401] Mr Bemba's Appeal Brief, paras 95, 101-103. *See in this regard* Mr Bemba's Conviction Appeal Brief, paras 250-252.
[402] *Bemba et al.* Appeal Judgment, paras 935-939; 963-966.

F. Assessment of gravity of the offences based on alleged irrelevant factors

1. Relevant part of the Sentencing Decision

163. In assessing the gravity of the offence of having, as a co-perpetrator, corruptly influenced witnesses, the Trial Chamber considered, *inter alia*, the extent of damage caused.[403] In this regard, it noted that the offences involved a high number of defence witnesses in the Main Case which, in turn, characterised the "systematic approach of the offence" and consequently "the seriousness and gravity of this case".[404] The Trial Chamber also took into consideration the "timeframe in which the offences occurred".[405] It held that the offences took place over a lengthy time period of "almost two years".[406] The Trial Chamber also considered the extensive "scope, planning, preparation and execution" of the offences.[407] In this context, it noted the sophistication of the measures adopted to conceal the illicit activities, including "the use of codes, the use of third parties to effect payments, and the distribution of cell phones" to some of the defence witnesses without the Registry's knowledge.[408]

2. Submissions of the parties

(a) Mr Bemba

164. Under his sixth ground of appeal, Mr Bemba submits that the Trial Chamber erred in relying, for the purpose of determining the gravity of the offences, on the period of time over which the offences were committed.[409] He submits that at the meeting on 12 February 2012 in Douala, which the Trial Chamber considered to have been the starting point of the period during which offences were committed, none of the co-perpetrators "were engaged in culpable conduct".[410] He further contends that, in any case, the "the issue of duration […] was subsumed within the Chamber's consideration of the number of witnesses, and was otherwise attributable to factors beyond the control of Mr. Bemba".[411] Mr Bemba argues that the Trial Chamber erred

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[403] Sentencing Decision, paras 203, 205.
[404] Sentencing Decision, para. 205.
[405] Sentencing Decision, para. 209.
[406] Sentencing Decision, para. 209.
[407] Sentencing Decision, para. 208.
[408] Sentencing Decision, para. 208 (footnotes omitted).
[409] Mr Bemba's Appeal Brief, para. 118.
[410] Mr Bemba's Appeal Brief, paras 118-119.
[411] Mr Bemba's Appeal Brief, para. 120.

in double-counting the number of witnesses and the duration of the proceedings because, "in a criminal trial, the duration of the proceedings is linked to the number of witnesses".[412] He also contends that the Trial Chamber failed to properly assess whether there was a "related impact on the harm occasioned by the misconduct".[413] Finally, Mr Bemba submits that there is no evidence that he knew of and substantially contributed to the offences or there was no "evidential nexus to the personal culpability of Mr. Bemba" in particular the delivery of mobile phones to witnesses and payments to third parties.[414]

(b) The Prosecutor

165. The Prosecutor responds that the long duration of the common plan, the number of witnesses involved and the manner in which the offences were committed were properly considered by the Trial Chamber.[415] She submits that the common plan "was at least 13 months in duration" and argues that even if the Trial Chamber was "in error" in stating that it lasted almost two years, it was correct in stating that it was "'prolonged' and 'lengthy'" and therefore any such error would be immaterial.[416] She submits that Mr Bemba's arguments that the duration of the illicit activity was "dependent upon the duration of the trial, and hence out of his control, is unpersuasive".[417] She argues that the Trial Chamber did not double count the duration of the illicit activity and the number of witnesses affected since both factors are provided in rule 145 (1) (c) of the Rules.[418] Finally, the Prosecutor submits that Mr Bemba disagrees with the Trial Chamber's findings regarding his contributions to the common plan, but shows no error in the Trial Chamber's determination with respect to the gravity of the offences.[419]

3. Determination by the Appeals Chamber

166. The Appeals Chamber notes Mr Bemba's submission that there is no evidence of the illicit nature of the meeting that the Trial Chamber considered as the starting

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[412] Mr Bemba's Appeal Brief, para. 121.
[413] Mr Bemba's Appeal Brief, para. 122 (emphasis in original).
[414] Mr Bemba's Appeal Brief, paras 123-125.
[415] Prosecutor's Consolidated Response, para. 89.
[416] Prosecutor's Consolidated Response, paras 90-91.
[417] Prosecutor's Consolidated Response, para. 92.
[418] Prosecutor's Consolidated Response, para. 93.
[419] Prosecutor's Consolidated Response, para. 94.

point of the period during which offences were committed and the basis for its finding that the offences occurred over a period of two years.[420] In this regard, the Appeals Chamber also notes the Prosecutor's submission that the offences occurred, at least, over a period of 13 months.[421]

167. In the Sentencing Decision, the Trial Chamber referred to a meeting held in Douala in February 2012 between Mr Kilolo, witnesses D-2, D-3, D-4 and D-6 as the starting point in assessing the period of time over which the offences took place.[422] However, the Trial Chamber did not indicate that that meeting was of an illicit nature. This aspect of the meeting is also not apparent from the paragraphs of the Conviction Decision relied upon by the Trial Chamber in support of its finding, which merely refers to those who attended the meeting and some other descriptive aspects and telephone contacts between Mr Kilolo and witness D-13 in November 2013.[423]

168. In light of the foregoing, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to conclude that the period during which offences were committed started with the meeting in Douala held in February 2012 and therefore lasted two years. However, as noted by the Prosecutor,[424] it is clear from the findings in the Conviction Decision that Mr Bemba, Mr Kilolo and Mr Mangenda agreed to the plan to illicitly interfere with witnesses, at least by the time witness D-57 testified before Trial Chamber III, namely 17 October 2012 and continued until November 2013.[425] In this context, the Appeals Chamber finds that the Trial Chamber's error was immaterial to its finding that the offences for which Mr Bemba was convicted extended over a lengthy period of time.[426]

169. As to Mr Bemba's argument concerning alleged double-counting and the period of time over which offences were committed, the Appeals Chamber notes that, contrary to Mr Bemba's contention,[427] the number of the witnesses involved in the common plan and the duration of the illicit activities executed are distinct and equally

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[420] Mr Bemba's Appeal Brief, paras 118-119.
[421] Prosecutor's Consolidated Response, paras 90-91.
[422] Sentencing Decision, fn. 341.
[423] Sentencing Decision, fn. 341, referring to Conviction Decision, para. 331, 656.
[424] Prosecutor's Consolidated Response, para. 90.
[425] Conviction Decision, paras 103, 246, 802.
[426] Sentencing Decision, para. 209.
[427] Mr Bemba's Appeal Brief, paras 120-121.

valid considerations when determining the gravity of the offences. While not explicitly stated by the Trial Chamber, the Appeals Chamber notes that the number of witnesses involved relates to the nature of the unlawful behaviour[428] and the duration of the offences relates to the circumstances of time which were factors relevant to the gravity assessment of the offences under rule 145 (1) (c) of the Rules. Thus, Mr Bemba's argument regarding double-counting is flawed. Moreover, the Appeals Chamber finds no merit in Mr Bemba's argument that the Trial Chamber had considered the length of the proceedings as a relevant factor when assessing the gravity of the offences.[429] The period of time considered by the Trial Chamber concerns the duration of the illicit activities for which Mr Bemba was found guilty and, as such, Mr Bemba cannot claim that this factor was beyond his control or irrelevant to his culpability.[430] His arguments in this regard are therefore rejected.

170. Turning to Mr Bemba's argument that some of the factors upon which the Trial Chamber relied have "no evidential nexus to [his] personal culpability", the Appeals Chamber notes that he refers, in particular, to the delivery of mobile phones to witnesses and payments to third parties.[431] The factual findings referred to by the Trial Chamber – "the use of codes, the use of third parties to effect payments and the distribution of cell phones to [the witnesses]"[432] – were relevant to establish the existence of the common plan, which is one of the legal elements of the mode of liability that formed the basis of Mr Bemba's conviction.[433] As explained above, the Trial Chamber considered these measures in the context of assessing the "scope, planning, preparation and execution" of the offences *for which Mr Bemba was convicted*.[434] In light of these particular actions by the accused, the Trial Chamber noted the sophistication of the measures adopted to conceal the illicit activities and found this to be relevant in its gravity assessment.[435] Thus, contrary to Mr Bemba's submissions, the Appeals Chamber considers that there is a clear link between Mr Bemba's personal culpability and considerations relevant to the scope, planning,

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[428] *See* Sentencing Decision, para. 207.
[429] Mr Bemba's Appeal Brief, paras 120-122.
[430] Mr Bemba's Appeal Brief, paras 120, 122.
[431] Mr Bemba's Appeal Brief, paras 123-125.
[432] Sentencing Decision, para. 208, fns 337-340.
[433] Conviction Decision, paras 746-761.
[434] Sentencing Decision, para. 208.
[435] Sentencing Decision, para. 208.

preparation and execution of the offences for which he was convicted. Mr Bemba's argument in this regard is thus rejected. Finally, to the extent that Mr Bemba attempts to re-litigate factual findings made in the *Bemba et al*. Appeal Judgment, in particular the Trial Chamber's finding regarding Mr Bemba's knowledge and substantial contribution to the illicit coaching of 14 defence witnesses[436] and the existence of a common plan as a legal element of co-perpetration and Mr Bemba's essential contribution thereto,[437] the Appeals Chamber rejects them.[438]

171. Accordingly, the Appeals Chamber rejects Mr Bemba's sixth ground of appeal.

G. Alleged error in excluding mitigating circumstances

172. Under his seventh ground of appeal, Mr Bemba submits that the Trial Chamber erred by failing to consider mitigating circumstances which, if considered, would have resulted "in a substantially reduced penalty".[439] He refers in particular to (i) his position as a detained defendant; (ii) violations of his right to privacy and family life; and (iii) his decision not to rely on 14 defence witnesses in the Main Case and his contributions to the costs of the Main Case.[440] The Appeals Chamber will address each of these circumstances in turn.

1. Position as a detained defendant

(a) Relevant part of the Sentencing Decision

173. The Trial Chamber noted Mr Bemba's submission that he had been in detention at the relevant time, but found that he was attempting to re-litigate the Trial Chamber's findings in the Conviction Decision and therefore decided not to entertain his arguments about the effects of the prolonged detention on him which impacted his "cognitive awareness".[441] With regard to Mr Bemba's submissions as to his "passive and limited role", the Trial Chamber recalled its findings in the Conviction Decision that, despite him being in detention, he "had an authoritative role in the organisation

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[436] Mr Bemba's Appeal Brief, para. 123. *See in this regard* Mr Bemba's Conviction Appeal Brief, paras 116-137.
[437] Mr Bemba's Appeal Brief, para. 124. *See in this regard* Mr Bemba's Conviction Appeal Brief, paras 93-106, 116-122.
[438] *Bemba et al.* Appeal Judgment, sections IX.A.1; IX.A.4; IX.A.5.
[439] Mr Bemba's Appeal Brief, paras 126-128.
[440] Mr Bemba's Appeal Brief, paras 129-168.
[441] Sentencing Decision, paras 227-228.

and planning of the offences and was directly involved in their commission".[442] For that reason, it decided not to consider these factors in mitigation.[443]

(b) Submissions of the parties

(i) Mr Bemba

174. Mr Bemba submits that the Trial Chamber failed to consider that, as a detained accused in the Main Case, he was vulnerable and relied on the legal advice of his lawyers who had duties towards the Court and him as their client.[444] He further contends that the Trial Chamber should have considered the impact that the detention environment had "on his ability to make informed choices and the contours of his 'implicit knowledge'" on his "cognitive awareness".[445]

(ii) The Prosecutor

175. The Prosecutor submits that the Trial Chamber did not abuse its discretion by refusing to consider in mitigation Mr Bemba's status as a detained defendant and the alleged impact that the detention environment had on his cognitive awareness.[446] She argues that Mr Bemba merely attempts "to relitigate the merits of his conviction".[447]

(c) Determination by the Appeals Chamber

176. As stated above,[448] the Appeals Chamber sees no error in the Trial Chamber's finding that Mr Bemba's arguments constitute an attempt to re-litigate the Trial Chamber's findings relevant to Mr Bemba's knowledge of, and contribution to the offences that formed the basis of his conviction.[449] The Appeals Chamber recalls that it has confirmed these findings of the Trial Chamber.[450] Accordingly, it rejects Mr Bemba's arguments.

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[442] Sentencing Decision, para. 228.
[443] Sentencing Decision, para. 228.
[444] Mr Bemba's Appeal Brief, paras 127, 129-141.
[445] Mr Bemba's Appeal Brief, paras 129, 144-150.
[446] Prosecutor's Consolidated Response, paras 96-100.
[447] Prosecutor's Consolidated Response, para. 97.
[448] *See supra* para. 138.
[449] Sentencing Decision, para. 228.
[450] *Bemba et al.* Appeal Judgment, sections IX.A.4; IX.A.5.

2. Alleged violations of the right to privacy and family life

(a) Submissions of the parties

(i) Mr Bemba

177. Mr Bemba submits that the Trial Chamber failed to address and provide reasons in relation to his argument that his right to privacy had been violated.[451] He further argues that the Trial Chamber failed to consider the Prosecutor's disclosure violations and other violations caused by the Single Judge's failure to put in place an effective mechanism to vet his communications while in detention.[452] Referring to the jurisprudence of the Court, Mr Bemba submits that the "preliminary proceedings in this case [were] wrong and unfair".[453] By reference to domestic and human rights case law and human rights instruments, he contends that he has a right to a remedy, which should be a reduction of his sentence.[454]

(ii) The Prosecutor

178. The Prosecutor submits that the Trial Chamber reasonably rejected Mr Bemba's arguments because he failed to establish any violation of his rights.[455] She further argues that it was unnecessary for the Trial Chamber to address "such a wholly inadequate" argument.[456] The Prosecutor adds that the disclosure violations to which Mr Bemba referred relate to "article 70 material under rule 77 in the Main Case".[457]

(b) Determination by the Appeals Chamber

179. The Appeals Chamber notes that Mr Bemba is primarily challenging the Trial Chamber's decision not to consider in mitigation the purported violation of his right to privacy. In the Sentencing Decision, the Trial Chamber did not address Mr Bemba's arguments in this regard. However, the Appeals Chamber recalls its finding in the *Bemba et al.* Appeal Judgment that the Trial Chamber correctly concluded that the Detention Centre Materials had not been obtained by means of a violation of Mr Bemba's right to privacy.[458] Having found that Mr Bemba's right to privacy was not

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[451] Mr Bemba's Appeal Brief, paras 127, 151-159.
[452] Mr Bemba's Appeal Brief, para. 152.
[453] Mr Bemba's Appeal Brief, para. 153.
[454] Mr Bemba's Appeal Brief, paras 154, 156-159.
[455] Prosecutor's Consolidated Response, para. 101.
[456] Prosecutor's Consolidated Response, para. 101.
[457] Prosecutor's Consolidated Response, para. 102 (emphasis in original omitted).
[458] *Bemba et al.* Appeal Judgment, section VI.C.

violated, the Appeals Chamber finds it unnecessary to determine whether the Trial Chamber erred by failing to address Mr Bemba's arguments as, in any event, any such error would have no material impact on the determination of his sentence. His arguments are accordingly rejected.[459]

180. With respect to Mr Bemba's argument concerning purported disclosure violations by the Prosecutor, the Appeals Chamber notes that Mr Bemba does not identify any specific disclosure violation and simply refers in a footnote to two paragraphs of his closing submissions.[460] The Appeals Chamber recalls that arguments of an appellant must be contained in his or her filing in relation to that particular appeal in order to enable the Appeals Chamber to understand the position of the appellant without requiring reference to arguments made by that participant elsewhere.[461] Furthermore, as rightly pointed out by the Prosecutor,[462] the Appeals Chamber notes that the purported disclosure violations occurred in the context of the Main Case and therefore have no bearing in the present case.[463]

181. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments.

3. Decision not to rely on 14 defence witnesses in the Main Case and contributions to the costs of the Main Case

(a) Relevant part of the Sentencing Decision

182. The Trial Chamber was of the view that Mr Bemba's agreement to transfer contents of his bank account to the Court in order to meet the costs of his defence in the Main Case and his decision not to rely on 14 defence witnesses in the Main Case as mitigating were "extraneous to the present case" because these actions "took place in the context of the Main Case and do not amount to a circumstance that could mitigate the sentence to be imposed in this case".[464]

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[459] Mr Bemba's Appeal Brief, paras 151-159.
[460] Mr Bemba's Appeal Brief, para. 152, fn. 203, referring to Mr Bemba's Sentencing Submissions, paras 69-70.
[461] *Lubanga* OA6 Judgment, para. 29.
[462] Prosecutor's Consolidated Response, para. 102.
[463] Mr Bemba's Sentencing Submissions, paras 69-70
[464] Sentencing Decision, paras 241-242.

(b) Submissions of the parties

(i) Mr Bemba

183. Mr Bemba submits that his decision not to rely on 14 defence witnesses in the Main Case obviated "[a]ny adverse impact on the administration of justice in the Main [C]ase"[465] and therefore it should have been considered in mitigation.[466] He contends that, "[a]t the very least", his non-reliance on these witnesses must be understood "as an act of cooperation" meriting mitigation.[467]

184. Mr Bemba also argues that the Trial Chamber erred by failing to consider in mitigation the fact that he funded for a considerable period of time the defence activities of the Main Case, which included the costs related to the 14 defence witnesses.[468] In his view, this action constitutes cooperation with the Court within the meaning of rule 145 (2) (a) (ii) of the Rules.[469]

(ii) The Prosecutor

185. The Prosecutor responds that the Trial Chamber did not err by refusing to consider in mitigation Mr Bemba's non-reliance on the 14 defence witnesses and his payments towards the defence in the Main Case.[470] She further submits that Mr Bemba's decision not to rely on the witnesses only occurred after he attempted to frustrate the article 70 investigations and after he was served with an arrest warrant in the present case.[471] The Prosecutor adds that the act of paying for its own defence "is not an act of cooperation for the purposes of sentencing, it is a reflection of the accused's non-indigent status".[472]

(c) Determination by the Appeals Chamber

186. Rule 145 (2) (a) of the Rules reads:

> In addition to the factors mentioned above, the Court shall take into account, as appropriate:

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[465] Mr Bemba's Appeal Brief, para. 161.
[466] Mr Bemba's Appeal Brief, paras 127, 160-162.
[467] Mr Bemba's Appeal Brief, para. 163.
[468] Mr Bemba's Appeal Brief, paras 127, 164-168.
[469] Mr Bemba's Appeal Brief, para. 166.
[470] Prosecutor's Consolidated Response, para. 104.
[471] Prosecutor's Consolidated Response, para. 104.
[472] Prosecutor's Consolidated Response, para. 104.

> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
>
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

187. The Appeals Chamber recalls that, in determining what constitutes a mitigating circumstance, in addition to those explicitly set out in rule 145 (2) (a) of the Rules, trial chambers are "endowed with a considerable degree of discretion […], as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified".[473]

188. The Trial Chamber stated that mitigating circumstances need not directly relate to the offences.[474] As noted above, it rejected Mr Bemba's request to consider certain acts in mitigation on the basis that they "took place in the context of the Main Case".[475] In light of the considerable degree of discretion afforded to the Trial Chamber in determining what constitutes a mitigating circumstance, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to require a link between Mr Bemba's actions and these proceedings for them to be considered in mitigation.

189. Moreover, the Appeals Chamber finds no merit in Mr Bemba's argument that his decision not to rely on 14 defence witnesses obviated any adverse impact on the administration of justice.[476] The Appeals Chamber concurs with the Trial Chamber that the purpose of punishing criminal behaviour qualifying as offences against the administration of justice under article 70 of the Statute is "to protect the integrity of the proceedings before the Court".[477] Mr Bemba's criminal conduct had a negative impact on the integrity of the proceedings in the Main Case regardless of whether the corrupted witnesses were later relied upon by Mr Bemba.

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[473] *See* *Lubanga* Sentencing Appeal Judgment, para. 43, fn. 73, quoting *D. Milošević* Appeal Judgment, para. 316 (footnotes omitted).
[474] Sentencing Decision, para. 24.
[475] Sentencing Decision, para. 242.
[476] Mr Bemba's Appeal Brief, paras 160-162.
[477] Sentencing Decision, para. 19.

190. Turning to Mr Bemba's argument that his actions constitute acts of cooperation under rule 145 (2) (a) (ii) of the Rules and therefore should have been considered by the Trial Chamber, the Appeals Chamber considers that funding the costs for his defence in the Main Case does not constitute an act of cooperation with the Court. Article 67 (1) (d) of the Statute recognises an accused person's right to legal assistance, including "without payment if the accused lacks sufficient means to pay for it". Thus, the assumption is that an accused person pays for his or her defence, which, in turn, cannot be seen as constituting cooperation with the Court. A different conclusion would lead to unfair results because accused with substantial financial means would benefit from reduction of sentences as a result of their "cooperation" in funding their own defence. Furthermore, the Appeals Chamber notes the different nature of the acts that have been considered as "cooperation with the Court" such as "'notable cooperation with the Court' […] in the 'aftermath' of certain 'onerous' circumstances attributable to the Prosecutor";[478] admission of guilt and cooperation with the Prosecution;[479] and "positive attitude" during the giving of testimony.[480]

191. As to Mr Bemba's decision not to rely on the 14 witnesses, the Appeals Chamber notes that, as pointed out by the Prosecutor,[481] Mr Bemba decided not to rely on these witnesses *after* attempting to frustrate the article 70 investigations, and after having been served with an arrest warrant in these proceedings.[482] In these circumstances, the Appeals Chamber considers that, contrary to Mr Bemba's assertion,[483] it was not unreasonable for the Trial Chamber to find that his conduct falls short of an act of cooperation under rule 145 (2) (a) (ii) of the Rules.

192. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments.

4. Conclusion

193. In light of the above reasons, the Appeals Chamber rejects Mr Bemba's seventh ground of appeal.

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[478] *Lubanga* Sentencing Appeal Judgment, para. 24.
[479] *Al-Mahdi* Sentencing Decision, paras 101-102.
[480] *Katanga* Sentencing Decision, paras 126-129.
[481] Prosecutor's Consolidated Response, para. 104.
[482] Mr Bemba's Appeal Brief, para.163; Conviction Decision, paras 770, 773-778.
[483] Mr Bemba's Appeal Brief, para. 163.

H. Alleged error in imposing additional custodial sentence

1. Relevant part of the Sentencing Decision

194. The Trial Chamber considered that the primary purpose of sentencing individuals for offences under article 70 of the Statute "[was] rooted […] in retribution and deterrence".[484] It further held that it enjoyed a considerable degree of discretion in determining the appropriate sentence.[485] The Trial Chamber stated, however, that in exercising such discretion it was cognisant of the fact that "the sentence must reflect the culpability of the convicted person" under rule 145 (1) (a) of the Rules, and that "the sentence must be proportionate" to the offence.[486]

195. In determining Mr Bemba's sentence, the Trial Chamber first noted that he had been convicted of the offences under article 70 (1) (b) and (c) of the Statute of presenting false evidence of 14 witnesses and corruptly influencing these witnesses as a co-perpetrator and for soliciting the giving of false testimony of the 14 witnesses.[487] It then recalled the two aggravating circumstances found and the fact that, when committing the offences, Mr Bemba had taken advantage of his position as president of the MLC.[488] The Trial Chamber also distinguished the offences based on the modes of liability for which Mr Bemba was convicted.[489] The Trial Chamber further considered "Mr Bemba's varying degree of participation within the common plan, […] the number of witnesses involved, […] the fact that the false testimony related to issues other than the merits of the Main Case, […] Mr Bemba's family situation" and "the fact that largely the same conduct underl[ay] the multiple convictions".[490] In light of the foregoing considerations, the Trial Chamber imposed individual sentences for each of the offences and a joint sentence of 12 months of imprisonment to be served consecutively to Mr Bemba's sentence imposed in the Main Case.[491]

196. The Trial Chamber considered that a "substantial fine [was] necessary to achieve the purposes [of sentencing]", in particular "to discourage this type of

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[484] Sentencing Decision, para. 19.
[485] Sentencing Decision, para. 36.
[486] Sentencing Decision, para. 36.
[487] Sentencing Decision, para. 247.
[488] Sentencing Decision, para. 248.
[489] Sentencing Decision, para. 248.
[490] Sentencing Decision, paras 248-249.
[491] Sentencing Decision, para. 250.

behaviour and [prevent] repetition of such conduct on the part of Mr Bemba or any other person".[492] It decided to impose a fine of EUR 300,000 and determined that the sentence of one additional year of imprisonment and the payment of the fine was an appropriate sentence for Mr Bemba.[493]

2. Submissions of the parties

(a) Mr Bemba

197. Under his eighth ground of appeal, Mr Bemba submits that the imposition of a custodial sentence was "unnecessary, manifestly disproportionate, and arbitrary".[494] Mr Bemba contends that the Trial Chamber erred in law by imposing a custodial sentence without explaining or justifying the need for such a sanction and by not considering "less intrusive measures".[495] He maintains that the Trial Chamber was required to exercise its discretion under article 70 (3) of the Statute "in a manner that is consistent with internationally recognised human rights law", which involves consideration of a "custodial sentence as a sanction of last resort".[496] Referring to regional and international human rights instruments and the practice in domestic jurisdictions, Mr Bemba submits that custodial sentences are exceptional in the context of contempt offences.[497] He argues that the false testimony of the witnesses concerned "collateral issues", that his participation in the offences was limited and that Trial Chamber III was not prevented from rendering its verdict in the Main Case.[498]

198. As to the purpose of sentencing, Mr Bemba argues that a non-custodial sentence would be more effective for his rehabilitation, an aspect of sentencing that the Trial Chamber failed to address and that the deterrence objective was rendered superfluous by the Trial Chamber's imposition of a fine.[499] He argues that the Trial Chamber's decision not to impose custodial sentences to the other members of the common plan "undermines" the fact that "a custodial sentence was necessary to prevent

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[492] Sentencing Decision, para. 261.
[493] Sentencing Decision, paras 261, 263.
[494] Mr Bemba's Appeal Brief, para. 170 (footnote omitted).
[495] Mr Bemba's Appeal Brief, paras 170, 178-179.
[496] Mr Bemba's Appeal Brief, para. 171.
[497] Mr Bemba's Appeal Brief, paras 172-177.
[498] Mr Bemba's Appeal Brief, paras 180-182 (emphasis in original).
[499] Mr Bemba's Appeal Brief, paras 183-187.

recidivism".[500] Mr Bemba further argues that the imposition of a financial penalty together with a custodial one "triggers the prescription against *non bis in idem*" and was disproportionate.[501]

(b) The Prosecutor

199. The Prosecutor submits that there is no requirement to consider custodial sentences as a sanction of last resort.[502] In her view, Mr Bemba's submissions are premised on his "failure to acknowledge" the gravity of the offences that formed the basis for his conviction and his "degree of […] participation and intent".[503] The Prosecutor argues that the Trial Chamber did not err in focusing on the principles of retribution and deterrence over rehabilitation and that Mr Bemba's remaining arguments are without merit.[504]

3. Determination by the Appeals Chamber

200. The Appeals Chamber notes Mr Bemba's apparent contention that, as a matter of law, custodial sentences should be exceptional in the context of offences under article 70 of the Statute.[505] The Appeals Chamber finds no merit in this argument. Article 70 (3) of the Statute provides that "[i]n the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine […] *or both*" (emphasis added). The wording of this provision clearly indicates that it is within the Court's discretion to determine the appropriate sentence in cases of conviction for offences against the administration of justice. The word "or" indicates that it is open for the Court to determine whether a term of imprisonment, or a fine, or both are appropriate in light of the circumstances of each case. As rightly held by the Trial Chamber,[506] the sentence must reflect the culpability of the convicted person under rule 145 (1) (a) of the Rules, and must be proportionate to the offence.[507] In the Appeals Chamber's view, if the drafters of the Statute had intended custodial sentences to be a last resort measure in the context of convictions under article 70 of

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[500] Mr Bemba's Appeal Brief, para. 188.
[501] Mr Bemba's Appeal Brief, paras 189-193.
[502] Prosecutor's Consolidated Response, para. 105.
[503] Prosecutor's Consolidated Response, paras 105-107.
[504] Prosecutor's Consolidated Response, para. 108.
[505] Mr Bemba's Appeal Brief, paras 171-177.
[506] *See* Sentencing Decision, para. 36.
[507] *Lubanga* Sentencing Appeal Judgment, paras 32-34.

the Statute, this requirement would have been explicitly set out in the text of the relevant provisions.

201. Mr Bemba's argument that the imposition of both a fine and a term of imprisonment for the same offences require consideration of the principle *ne bis in idem* enshrined in article 20 of the Statute is without merit. Article 20 of the Statute prohibits the trial of a person for conduct "which formed part of crimes for which a person has been convicted or acquitted by the Court". Article 20 of the Statute is clearly irrelevant to the imposition of a fine in addition to prison sentence – an outcome specifically foreseen by article 70 (3) of the Statute –, imposed at the end of the same trial. His argument in this regard is rejected.

202. With respect to Mr Bemba's submission that the Trial Chamber failed to justify the need for a custodial sentence,[508] the Appeals Chamber notes that rule 146 of the Rules, which concerns the imposition of fines under article 77 of the Statute in relation to convictions for article 5 crimes, mandates the Court "to determine whether imprisonment is a sufficient penalty". However, rule 166 of the Rules, which addresses the sanctions under article 70 of the Statute, stipulates that article 77 and any rule related thereto does not apply to sentencing for offences under article 70 of the Statute. Moreover, no such requirement – either in relation to imprisonment or fines – is included in rule 166 of the Rules. In the Appeals Chamber's view, it was sufficient for a Trial Chamber to base its determination of the appropriate sentence – imprisonment, fine or both – on an analysis of the factors relevant for sentencing purposes as set out in the legal framework of the Court.[509] No further justification as to the type of penalty considered to be the most appropriate was required, as long as the basis for the Trial Chamber's determination of the sentence was sufficiently clear.

203. In the present case, the Trial Chamber identified and weighed the factors it considered relevant for the purpose of determining the appropriate sentence.[510] In doing so, the Trial Chamber discussed the gravity of the offences, Mr Bemba's culpable conduct and his individual circumstances. Therefore, the Appeals Chamber

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[508] Mr Bemba's Appeal Brief, paras 170, 178-179.
[509] *Lubanga* Sentencing Appeal Judgment, paras 32-33, 42, 66.
[510] Sentencing Decision, paras 247-248.

considers that Mr Bemba's contention that the Trial Chamber failed to sufficiently explain the basis for its determination that a custodial sentence was appropriate is without merit.

204. Moreover, given the Trial Chamber's "overriding obligation to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused",[511] Mr Bemba's argument comparing his sentence to those imposed to his co-accused is inapposite.

205. Finally, the Appeals Chamber notes Mr Bemba's argument that the Trial Chamber failed to consider his rehabilitation as a relevant objective of sentencing and this resulted in the disproportionate imposition of a custodial sentence.[512] The Trial Chamber explained that, in its view, the *primary* purposes of sentencing in the context of article 70 of the Statute were, as with article 5 crimes, retribution and deterrence.[513] In so finding, it referred to sentencing decisions in the Main Case, as well as in the *Katanga* and *Al Mahdi* cases, all of which supported the Trial Chamber's finding,[514] while recognising that rehabilitation was also a consideration in sentencing, although not a primordial one.[515] Thus, it cannot be said that the Trial Chamber entirely disregarded rehabilitation as a purpose of sentencing, albeit not a primary one. The Appeals Chamber considers that the Trial Chamber's approach was not unreasonable and Mr Bemba's argument in this regard is rejected.

206. In light of the foregoing considerations, the Appeals Chamber finds that the Trial Chamber did not err in imposing both a fine and a custodial sentence, and accordingly Mr Bemba's eighth ground of appeal is rejected.

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[511] *Lubanga* Sentencing Appeal Judgment, para. 76.
[512] Mr Bemba's Appeal Brief, paras 183-186.
[513] Sentencing Decision, para. 19.
[514] Sentencing Decision, para. 19, fn. 30.
[515] *See* *Katanga* Sentencing Decision, para. 38; *Bemba* Sentencing Decision, para. 11; *Al-Mahdi* Sentencing Decision, para. 67.

I. Alleged error in failing to consider or impose a suspended sentence

1. Submissions of the parties

(a) Mr Bemba

207. Under his ninth ground of appeal, Mr Bemba submits that the Trial Chamber's lack of consideration of a suspended sentence for him was arbitrary.[516] He argues that a "key element" of the Trial Chamber's "decision to suspend the sentences of Mr. Kilolo and Mr. Mangenda was their cooperation and good behaviour in attending the hearings, and complying with the conditions [of] their release".[517] Mr Bemba avers that he could not have demonstrated cooperation with the Court in the context of release because, contrary to the situation of his co-accused, Mr Bemba "was unable to be released because of the continuing existence of a detention order in the Main Case".[518]

(b) The Prosecutor

208. The Prosecutor responds that the Trial Chamber did not err in not considering suspending Mr Bemba's sentence.[519] She argues that Mr Kilolo and Mr Mangenda should not have received suspended sentences and that, in any event, "[Mr Bemba's] circumstances are distinguishable" from those of his co-accused.[520]

2. Determination by the Appeals Chamber

209. The Appeals Chamber notes that, in disposing of the Prosecutor's appeal against the Sentencing Decision, it found that the legal framework of the Court does not allow for the possibility of imposing suspended sentences[521] Therefore, Mr Bemba's ninth ground of appeal is dismissed.

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[516] Mr Bemba's Appeal Brief, para. 194.
[517] Mr Bemba's Appeal Brief, para. 195.
[518] Mr Bemba's Appeal Brief, para. 196.
[519] Prosecutor's Consolidated Response, para. 109.
[520] Prosecutor's Consolidated Response, para. 109.
[521] *See supra* Section IV.C.3.

J. Alleged error in refusing to grant credit in the present case

1. Relevant part of the Sentencing Decision and Separate Opinion of Judge Pangalangan

210. As to whether the time Mr Bemba had spent in detention pending trial could be credited, the Trial Chamber stated that the use of the word "shall" in article 78 (2) of the Statute indicates that it is mandatory to deduct time previously spent in detention in accordance with an order of the Court.[522] It held that Mr Bemba was entitled to this credit.[523] The Trial Chamber then recalled the various decisions on interim release rendered by the Court in relation to Mr Bemba in these proceedings and the sentence imposed by Trial Chamber III in the context of the Main Case.[524] It also noted that the Prosecutor had not opposed giving sentencing credits to Mr Bemba.[525] After recalling that Mr Bemba had benefitted from the deduction of time previously spent in detention in the context of the Main Case until the date of the sentencing decision in that case, the Trial Chamber noted that there was a time overlap with the present case in which Bemba is also entitled to a deduction of time spent in detention, namely since 23 November 2013 – the date on which Mr Bemba was served the warrant of arrest in the present case – until at least 21 June 2016 – the date on which Trial Chamber III rendered the sentencing decision in the Main Case.[526]

211. The Trial Chamber observed that an interpretation of article 78 (2) of the Statute in the present case without regard to the time overlap during which Mr Bemba was detained both in relation to these and the Main Case proceedings would result in Mr Bemba benefiting twice from deduction of time.[527] It considered that, "[u]ltimately, Mr Bemba would not be sanctioned at all given the sentence herein imposed, or would be sanctioned to a significantly reduced extent, in the context of the present case", rendering the article 70 proceedings inconsequential.[528] In the Trial Chamber's

[522] Sentencing Decision, para. 251.
[523] Sentencing Decision, para. 251.
[524] Sentencing Decision, paras 251-252.
[525] Sentencing Decision, para. 253.
[526] Sentencing Decision, para. 254.
[527] Sentencing Decision, para. 254.
[528] Sentencing Decision, para. 254.

view, this would ignore the need to protect the integrity of the proceedings and would be unsatisfactory.[529]

212. The Trial Chamber also considered that article 78 (2) of the Statute should be applied having regard to the factual circumstances of the cases, noting that otherwise in some cases an accused could accrue credit in detention for a period exceeding the maximum applicable sentence available under article 78 (3) of the Statute.[530]

213. In the Trial Chamber's view, an interpretation of article 78 (2) that would not take into consideration that an accused has been in detention in relation to two different causes "would give almost no disincentive to commit Article 70 offences", as the person would know that the time spent in detention would count twice.[531]

214. The Trial Chamber considered that article 78 (2) of the Statute is framed broadly and deemed that in principle time previously spent in detention can only be taken into account once, regardless of the existing number of warrants of arrest.[532] According to the Trial Chamber, the word "an order" in article 78 (2) should be interpreted as applying across cases.[533] It then held that, when applying article 78 (2) of the Statute in the context of this case, it would consider the ruling of Trial Chamber III to deduct the time spent by Mr Bemba in detention in the context of the Main Case and the resultant sentence of 18 years' imprisonment.[534] The Trial Chamber concluded that it would be illogical to deduct time spent in detention until 21 June 2016 because Mr Bemba had already benefitted from deduction in the Main Case.[535] It further concluded that deducting time from 21 June 2016 would also be impossible because Mr Bemba remains in detention because of his conviction and sentence in the Main Case.[536] The Trial Chamber therefore determined that Mr Bemba would not

[529] Sentencing Decision, para. 254.
[530] Sentencing Decision, para. 255.
[531] Sentencing Decision, para. 256.
[532] Sentencing Decision, para. 257.
[533] Sentencing Decision, para. 258.
[534] Sentencing Decision, para. 258.
[535] Sentencing Decision, para. 259.
[536] Sentencing Decision, para. 259.

benefit from any deduction of time pursuant to article 78 (2) of the Statute in this case.[537]

215. In his separate opinion, Judge Pangalangan considered that Mr Bemba was entitled to full sentencing credits for the time spent in detention in relation to this case from the moment he was served the warrant of arrest onwards.[538] He considered that article 78 (2) of the Statute vests a statutory entitlement in Mr Bemba that cannot be removed even if Mr Bemba was also detained in the Main Case during this period.[539] In Judge Pangalangan's view, the plain language of article 78 (2) of the Statute does not allow for exceptions and notes that some domestic jurisdictions expressly stipulate that a day in detention counts as time served in relation to only one sentence.[540] He maintained that "the Court" in article 78 (2) of the Statute can only be understood as the chamber that determines the penalty.[541]

216. Judge Pangalangan further found that the warrant of arrest issued in this case cannot be considered a mere formality and Mr Bemba should not be denied his full statutory entitlement to be granted credit for time spent in detention in relation to this case.[542] He stated that even if there was some ambiguity concerning a person being detained on the basis of two different warrants of arrest, that ambiguity should be resolved in favour of the convicted person.[543] Judge Pangalangan considered that policy considerations "cannot override the express language of the law".[544]

217. Judge Pangalangan also considered that an interpretation of article 78 (2) of the Statute that would assign credit to Mr Bemba independently of the sentence imposed in the Main Case would be more in line with the Statute and the "foundational principle" adopted in this case that the Main Case was a distinct matter.[545] He reasoned that if Mr Bemba's conviction or sentence were to be reversed on appeal, he

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[537] Sentencing Decision, para. 260.
[538] Separate Opinion of Judge Pangalangan, para. 1.
[539] Separate Opinion of Judge Pangalangan, para. 1.
[540] Separate Opinion of Judge Pangalangan, para. 6.
[541] Separate Opinion of Judge Pangalangan, para. 7.
[542] Separate Opinion of Judge Pangalangan, para. 9.
[543] Separate Opinion of Judge Pangalangan, paras 11-12.
[544] Separate Opinion of Judge Pangalangan, para. 14.
[545] Separate Opinion of Judge Pangalangan, para. 15.

would be denied the benefit afforded to him by article 78 (2) of the Statute.[546] Judge Pangalangan concluded that Mr Bemba should be entitled to nearly three years of credit on his sentence but also held that a one-year sentence was "plainly inadequate" and would have found it more appropriate to impose a sentence closer to four years of imprisonment.[547]

2. Submissions of the parties

(a) Mr Bemba

218. Under his tenth ground of appeal, Mr Bemba submits that the Trial Chamber's interpretation of article 78 (2) of the Statute was (i) contrary to the principles of statutory interpretation; (ii) unforeseen and inconsistent with the manner in which article 70 proceedings *vis-à-vis* the Main Case had been considered; and (iii) contrary to international jurisprudence and internationally recognised human rights.[548] In relation to the first point, Mr Bemba contends that the word "Court" in article 78 (2) of the Statute refers to the chamber seized of a particular case.[549] Referring to the separate opinion of Judge Pangalangan, Mr Bemba argues that a broad interpretation of the word "Court" would lead to bizarre results.[550] He also submits that, if the word "Court" were understood, for the purposes of article 78 of the Statute, to include all chambers, then a joint sentence for these and proceedings in the Main Case should have been imposed pursuant to article 78 (3).[551] He argues that the singular form of "an order" in article 78 (2) indicates that the credit to be granted is specific to individual detention orders.[552] He further argues that the Trial Chamber erroneously relied on policy considerations in determining that Mr Bemba should not be granted credit for time spent in detention in relation to these proceedings.[553] Mr Bemba also submits that if, in the context of the Main Case, his conviction were to be reversed or

[546] Separate Opinion of Judge Pangalangan, para. 16.
[547] Separate Opinion of Judge Pangalangan, para. 18.
[548] Mr Bemba's Appeal Brief, para. 200.
[549] Mr Bemba's Appeal Brief, para. 202.
[550] Mr Bemba's Appeal Brief, para. 207.
[551] Mr Bemba's Appeal Brief, para. 209.
[552] Mr Bemba's Appeal Brief, para. 211.
[553] Mr Bemba's Appeal Brief, para. 214.

his sentence reduced, he would not be given any credit for time spent in detention in these proceedings.[554]

219. On the second aspect, Mr Bemba submits that the approach of the Majority of the Trial Chamber clarified the effects of his detention at the conclusion rather than at the commencement of these proceedings, thereby transforming his detention in this case into "arbitrary and illegal detention".[555] In this regard, Mr Bemba recalls that, since the beginning of these proceedings, the Prosecutor, the Single Judge, the Trial Chamber and the Appeals Chamber have affirmed that Mr Bemba was independently detained in connection to this case.[556] He contends that the Trial Chamber never raised the interpretation of article 78 (2) of the Statute as a contested issue thereby denying him the possibility of being heard on this issue.[557] Mr Bemba contends that the principle of *nulla poena sine lege* is infringed if a chamber fails to comply with a provision that mandates reduction of the duration of the sentence which in turn results in an unlawful extension of the detention.[558]

220. On the third point, Mr Bemba submits that the approach of the majority of the Trial Chamber is in contradiction with international criminal jurisprudence, human rights law and domestic practice.[559] He avers that the majority of the Trial Chamber failed to address his arguments concerning the practice at the *ad hoc* tribunals to grant credit for pre-trial detention irrespective of whether it overlaps with detention in relation to another case.[560]

221. Finally, Mr Bemba argues that the Trial Chamber's decision not to award him credit for time spent in detention in relation to these proceedings deprived him of an effective remedy for "enhanced detention measures".[561] He argues that, since the Trial Chamber emphasised throughout the proceedings that the two cases were

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[554] Mr Bemba's Appeal Brief, para. 218.
[555] Mr Bemba's Appeal Brief, para. 225.
[556] Mr Bemba's Appeal Brief, paras 226-236.
[557] Mr Bemba's Appeal Brief, para. 235.
[558] Mr Bemba's Appeal Brief, para. 238.
[559] Mr Bemba's Appeal Brief, paras 243-249.
[560] Mr Bemba's Appeal Brief, para. 246.
[561] Mr Bemba's Appeal Brief, paras 250-261.

independent, he had reason to believe that the issue of credit would also be dealt with separately.[562]

(b) The Prosecutor

222. The Prosecutor responds that the Trial Chamber did not err in refusing to grant Mr Bemba credit for time spent in detention in connection with these proceedings.[563] She submits that Mr Bemba's interpretation of article 78 (2) of the Statute would have almost no deterrent effect on the commission of article 70 offences as time spent in detention would count twice.[564] The Prosecutor argues that, although it is true that Mr Bemba was and is detained for the purposes of the article 70 proceedings, nothing could have created an expectation that he would be awarded credit for time spent in detention in relation to these proceedings.[565] She also contends that the jurisprudence to which Mr Bemba refers does not support his argument that he should be credited twice for time spent in detention.[566] The Prosecutor finally submits that Mr Bemba did not experience enhanced detention measures and requests dismissal of this argument.[567]

3. Determination by the Appeals Chamber

223. Article 78 (2) of the Statute reads in relevant part:

> In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. […]

224. The Appeals Chamber agrees with the Trial Chamber and Mr Bemba that article 78 (2) of the Statute mandates the Court to deduct time previously spent in detention in accordance with an order of the Court. Indeed, the text of this provision is clear – "the Court shall deduct the time"; no discretion is afforded to the Court.

225. However, in circumstances where an accused has spent time in detention as a result of warrants of arrest issued in different cases, time spent in detention can only be taken into account once. As noted by the Trial Chamber,[568] in situations such as in

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[562] Mr Bemba's Appeal Brief, paras 252-253.
[563] Prosecutor's Consolidated Response, paras 110-124.
[564] Prosecutor's Consolidated Response, para. 114.
[565] Prosecutor's Consolidated Response, para. 120.
[566] Prosecutor's Consolidated Response, paras 121-122.
[567] Prosecutor's Consolidated Response, paras 123-125.
[568] Sentencing Decision, para. 254.

the present case, the existence of article 70 proceedings would be inconsequential. The interpretation advanced by Mr Bemba would be difficult to reconcile with one of the purposes of article 70 of the Statute – namely to deter the commission of offences against the administration of justice. An accused in detention would not be discouraged from committing offences under article 70 as he or she would know that his time in detention would be eventually deducted from both his sentence in the main case and in the contempt proceedings. Thus, the Appeals Chamber finds that the interpretation proposed by Mr Bemba would lead to a result that is incompatible with the interests protected by article 70 of the Statute.

226. Moreover, the Appeals Chamber finds no merit in Mr Bemba's argument that the Trial Chamber's interpretation of article 78 (2) of the Statute must have an impact on the interpretation of article 78 (3) of the Statute.[569] In the Appeals Chamber's view, it is clear that both provisions do not apply across cases.

227. Mr Bemba's arguments that the Trial Chamber's interpretation of article 78 (2) of the Statute is in contradiction with international criminal jurisprudence, human rights law and domestic practice[570] are rejected for the following reasons. The case law of the ECHR is inapposite as the facts in those cases are clearly distinguishable from those in the present case.[571] In support of his argument that the Trial Chamber ignored the "uniform practice of [other] courts", Mr Bemba refers in a footnote to arguments made in this regard in his written and oral submissions before the Trial Chamber without explaining the relevance, if any, of the two cases to which he refers.[572]

228. In the present case, the Appeals Chamber finds no merit in Mr Bemba's argument that the Trial Chamber's decision not to award him credit for time spent in detention in relation to these proceedings deprived him of an effective remedy for

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[569] Mr Bemba's Appeal Brief, para. 209.
[570] Mr Bemba's Appeal Brief, paras 243-249.
[571] Mr Bemba's Appeal Brief, paras 244, 247 referring to two cases from the ECHR. While in the first case, time spent in pre-trial detention had not been deducted given that a suspended sentence had been imposed, in the second one time spent in detention had not been deducted since the proceedings had been declared null and the pre-trial detention of the accused was deemed to never have existed.
[572] Mr Bemba's Appeal Brief, para. 246 referring to Mr Bemba's Sentencing Submissions, fn. 125 and Transcript of 13 December 2016, ICC-01/05-01/13-T-54-Conf-ENG, pp. 31-32.

"enhanced detention measures".[573] Mr Bemba's alleged expectation that time spent in detention would be deducted from both the sentence imposed in the Main Case and in these proceedings does not demonstrate any error on the part of the Trial Chamber.

229. Furthermore, contrary to Mr Bemba's contention, the Trial Chamber did not question the fact that he was independently detained in connection with this case.[574] To the contrary, the Trial Chamber acknowledged the existence of different warrants of arrest and noted the time overlap for which Mr Bemba had been in detention in connection with both cases.[575] Furthermore, the Trial Chamber did not err in finding that Mr Bemba had already benefitted from the deduction of time previously spent in detention in relation to both the Main Case and these proceedings. As a result, the Appeals Chamber finds that the Trial Chamber did not err in not deducting time previously spent in detention from the term of imprisonment imposed in these proceedings.

230. That being said, the Appeals Chamber notes that both the conviction and the sentence imposed in the Main Case have been appealed and a decision by the Appeals Chamber is pending. Mr Bemba argues that, should the Appeals Chamber grant his appeal in the Main Case – against the conviction or the sentence imposed –, he would not benefit from any time previously spent in detention pursuant to article 78 (2) of the Statute.[576] The Appeals Chamber is not convinced by this argument. The Trial Chamber was aware that Mr Bemba's conviction and sentence in the Main Case were under appeal and that the sentence in that case was, therefore, not final.[577] The Trial Chamber also found that article 78 (2) of the Statute must be applied "examining the specificities of the case", and, for that reason, took into account the ruling of Trial Chamber III regarding the deduction of time.[578]

231. In these circumstances, the Appeals Chamber considers that the Trial Chamber's decision not to deduct the time Mr Bemba had spent in detention pending trial in the present case was conditioned on the sentence in the Main Case remaining

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[573] Mr Bemba's Appeal Brief, paras 250-261.
[574] Mr Bemba's Appeal Brief, paras 226-236.
[575] Sentencing Decision, paras 251-254.
[576] Mr Bemba's Appeal Brief, para. 218.
[577] Sentencing Decision, para. 252.
[578] Sentencing Decision, para. 258.

intact. The Trial Chamber's decision not to deduct time can only be reasonably understood as meaning that, if the conviction or sentence in the Main Case were to be reversed on appeal, the time Mr Bemba has spent in detention pursuant to the warrant of arrest issued in the proceedings relating to offences under article 70 of the Statute would be automatically deducted from the sentence of imprisonment imposed by the Trial Chamber in the present case. The same would apply *mutatis mutandis* if Mr Bemba's sentence in the Main Case were to be reduced on appeal if the time spent in detention from 23 November 2013 – the date on which he was served the warrant of arrest in the proceedings relating to offences under article 70 of the Statute – to the date of the reduction of the sentence on appeal exceeds the term of the reduced sentence in that case. The Appeals Chamber notes that the Presidency, as the entity charged with issues relating to the enforcement of sentences,[579] will be in a position to make the necessary adjustments as to when the sentence of Mr Bemba in the present case would be considered completed, should the conviction or sentence in the Main Case be reversed on appeal.

232. Accordingly, the Appeals Chamber rejects Mr Bemba's tenth ground of appeal.

K. Alleged error by issuing a consecutive rather that a concurrent sentence

1. Relevant part of the Sentencing Decision

233. In the Sentencing Decision, the Trial Chamber considered that it was not appropriate for the term of imprisonment imposed to be served concurrently with Mr Bemba's existing sentence in the context of the Main Case "as the offences are not related".[580]

2. Submissions of the parties

(a) Mr Bemba

234. Under his eleventh ground of appeal, Mr Bemba submits that the interpretation of article 78 (2) of the Statute necessarily impacts on the interpretation of article 78 (3) of the Statute.[581] He submits that the latter provision should be interpreted to mean

[579] *See* rule 199 of the Rules.
[580] Sentencing Decision, para. 250.
[581] Mr Bemba's Appeal Brief, para. 265.

that the sentence imposed by the Trial Chamber would have to be subsumed within the sentence imposed in the Main Case.[582] Mr Bemba further argues that the Court is required to take into account any sentence imposed in a previous trial and could decide to impose a concurrent sentence.[583] He also refers to the practice of some domestic jurisdictions in which concurrent sentences are imposed in situations where an accused is sentenced during separate trials.[584]

(b) The Prosecutor

235. The Prosecutor responds that the Trial Chamber did not err in ordering that the sentence imposed be served consecutively to the sentence imposed in the Main Case.[585] She submits that Mr Bemba's offences in these proceedings are not related to the crimes in the Main Case.[586] The Prosecutor also contends that there is not a general practice at the international level of imposing concurrent sentences.[587] In the Prosecutor's view, article 78 (3) of the Statute concerns the imposition of sentences when an accused is convicted of more than one offence in a single proceeding.[588]

3. Determination by the Appeals Chamber

236. Article 78 (3) of the Statute reads in relevant part:

> When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. […]

237. The Appeals Chamber finds no merit in Mr Bemba's argument that the Court is required to take account of any sentence imposed in a previous trial and could decide to impose a concurrent sentence.[589] The legal framework of the Court does not stipulate such a requirement. It is clear that rule 78 (3) of the Statute regulates the imposition of joint sentences if a person is convicted of more than one crime or offence *in the same case*.

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[582] Mr Bemba's Appeal Brief, para. 265.
[583] Mr Bemba's Appeal Brief, para. 277.
[584] Mr Bemba's Appeal Brief, para. 278.
[585] Prosecutor's Consolidated Response, para. 126.
[586] Prosecutor's Consolidated Response, paras 126-128.
[587] Prosecutor's Consolidated Response, para. 129.
[588] Prosecutor's Consolidated Response, para. 131.
[589] Mr Bemba's Appeal Brief, para. 277

238. The Appeals Chamber notes the parties' reference to jurisprudence of the ICTY concerning the imposition of consecutive or concurrent sentences.[590] However, in light of the textual interpretation of article 78 (3) of the Statute, and considering the different legal provisions governing sentencing proceedings before the ICTY, the Appeals Chamber finds this jurisprudence inapposite and of limited, if any, guidance. Unlike rule 78 (3) of the Statute, rule 87 (C) of the ICTY Rules of Procedure and Evidence explicitly states that it is within a Trial Chamber's discretion to impose sentences to be served consecutively or concurrently. The drafting history of the Statute shows that a similar text was proposed, but ultimately not adopted.[591] Thus, if a person is convicted of more than one crime or offence in the same case, the trial chamber is required to pronounce a sentence for each of them and, on that basis, impose a joint sentence, respecting the limitations of the second sentence of article 78 (3) of the Statute. If, on the other hand, a person who has been sentenced in one case before the Court is convicted and sentenced for other crimes or offences in another case, the trial chamber will have to pronounce the appropriate sentence for that latter conviction. In neither scenario is there room for the ordering of concurrent sentences.

239. In light of the foregoing considerations, the Appeals Chamber finds that it was not erroneous for the Trial Chamber to determine that the term of imprisonment imposed should be served consecutively with Mr Bemba's existing sentence in the context of the Main Case given that the offences are unrelated.[592]

240. Accordingly, Mr Bemba's eleventh ground of appeal is rejected.

L. Alleged error regarding the determination of the amount of the fine imposed

1. Relevant part of the Sentencing Decision

241. In the Sentencing Decision, the Trial Chamber found, in relevant part, that "a substantial fine is necessary to achieve the purposes for which punishment is imposed", placing particular emphasis on the "need to discourage this type of

[590] Mr Bemba's Appeal Brief, para. 272, Prosecutor's Consolidated Response, para. 129.
[591] 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, pp. 122-123.
[592] Sentencing Decision, para. 250.

behaviour" and "ensure that the repetition of such conduct on the part of Mr Bemba or any other person is dissuaded.[593] It then stated that "[r]ecognising Mr Bemba's culpability, and considering his solvency, […] he must be fined EUR 300,000".[594] In a footnote, the Trial Chamber referred to two reports prepared by the Registrar on Mr Bemba's solvency.[595]

2. Submissions of the parties

(a) Mr Bemba

242. Under his twelfth ground of appeal, Mr Bemba submits that the procedure preceding the imposition of the fine was unfair and argues that the amount fixed by the Trial Chamber was arbitrary and disproportionate.[596] As to the procedure, Mr Bemba submits that the Trial Chamber failed to provide the Registry with guidelines to prepare the solvency report which resulted in a report prepared on the basis of outdated estimates and verbal information only.[597]

243. Mr Bemba also submits that the Trial Chamber failed to observe rule 166 (3) of the Rules because it made no findings concerning the total value of Mr Bemba's assets, the amount required to ensure the ongoing financial needs of his dependents and Mr Bemba's obligations towards third parties.[598] He contends that the Trial Chamber's approach reversed the burden of proof, violated his right to be heard, was contrary to the duty to provide adequate reasons and placed too much weight on Mr Bemba's financial situation rather than the extent of his culpability.[599] In particular, Mr Bemba submits that the Trial Chamber failed to explain why the amount imposed as a fine was proportionate to his culpability.[600] He also argues that the assets owned by a convicted person are entirely irrelevant for purposes of sanctioning a person.[601]

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[593] Sentencing Decision, para. 261.
[594] Sentencing Decision, para. 261.
[595] Sentencing Decision, para. 261, fn. 412.
[596] Mr Bemba's Appeal Brief, para. 282.
[597] Mr Bemba's Appeal Brief, paras 283-293.
[598] Mr Bemba's Appeal Brief, paras 296-297.
[599] Mr Bemba's Appeal Brief, paras 299-311.
[600] Mr Bemba's Appeal Brief, paras 306-307.
[601] Mr Bemba's Appeal Brief, paras 308-311.

(b) The Prosecutor

244. The Prosecutor submits that Mr Bemba's arguments under this ground of appeal should be rejected.[602] She contends that Mr Bemba's claim that his fine was based solely on financial means rather than on his culpability is premised "on arguments in which he incorrectly diminishes his culpability".[603] The Prosecutor contends further that Mr Bemba's arguments challenging the solvency report prepared by the Registry are without merit.[604]

3. Determination by the Appeals Chamber

245. The Appeals Chamber notes Mr Bemba's arguments that the Trial Chamber placed too much weight on his financial situation rather than the extent of his culpability and that the assets owned by a convicted person are irrelevant for purposes of sanctioning a person.[605] The Appeals Chamber considers that culpability, rather than solvency, should be the primary consideration for a determination of the appropriate type of punishment. Indeed, this constitutes a guarantee of equal treatment of convicted persons as the determination on whether or not it is appropriate to impose a custodial sentence (and, if so, its *quantum*) as part of a sentence for offences under article 70 of the Statute cannot be determined on the basis of the convicted person's financial means and his or her ability to pay a fine of high monetary value. Nevertheless, contrary to Mr Bemba's submissions,[606] there is no indication in the Sentencing Decision that the Trial Chamber primarily based its determination on Mr Bemba's financial situation. Mr Bemba's arguments in this regard are accordingly rejected.

246. Turning to the alleged errors in relation to the calculation of the fine, the Appeals Chamber notes that rule 166 (3) of the Rules addresses sanctions under article 70 and states that

> [u]nder no circumstances may the total amount [of the fine] exceed 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable,

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[602] Prosecutor's Consolidated Response, para. 134.
[603] Prosecutor's Consolidated Response, para. 136.
[604] Prosecutor's Consolidated Response, para. 137.
[605] Mr Bemba's Appeal Brief, paras 308-311.
[606] Mr Bemba's Appeal Brief, paras 308-311.

> and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents.

247. In the Sentencing Decision, the Trial Chamber referred to this provision at footnote 412 together with a reference to the solvency reports filed by the Registry. The Appeals Chamber notes that it would have been desirable for the Trial Chamber to elaborate on how it calculated and deducted an appropriate amount that would satisfy the financial needs of Mr Bemba and his dependents. However, the Appeals Chamber finds no error in the Trial Chamber's approach. Rule 166 (3) of the Rules does not require a trial chamber to specify the percentage or value of the convicted person's assets that is imposed as a fine; it must only ensure that the total amount of the fine does not exceed 50 percent of the convicted person's identifiable assets. In the present case, the Trial Chamber referred to this provision, accompanied by a reference to the solvency reports filed by the Registrar. As noted by the Prosecutor, the fine imposed is [redacted] of the value of Mr Bemba's reported assets,[607] thus providing a sufficient margin to cover for potential variations in the value of his reported assets. Furthermore, with respect to Mr Bemba's argument that the Trial Chamber failed to address his challenges to the reliability of the solvency reports, the Appeals Chamber recalls that a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision.[608] Mr Bemba's arguments in this regard are accordingly rejected.

248. The Appeals Chamber also finds no merit in Mr Bemba's argument that he was not afforded an opportunity to comment on the new information included in the updated solvency report.[609] The updated solvency report submitted by the Registry did indeed contain some new, albeit limited, information as to the value of certain assets, the existence of newly discovered ones and the total amount of Mr Bemba's assets.[610] The Trial Chamber, however, rejected his request to file observations on the updated report on the basis that Mr Bemba had had an opportunity to comment on the

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[607] Annex B to Prosecutor's Consolidated Response.
[608] *Bemba et al.* Appeal Judgment, section IV.
[609] Mr Bemba's Appeal Brief, para. 293.
[610] Annex I to Updated Solvency Report, pp. 2-4 referring to [redacted].

solvency report filed by the Registry on 6 December 2016 and its consideration that the content of the updated report did "not affect the Chamber's view as to the solvency of Mr Bemba or the decision on sentencing being issued today".[611] The Appeals Chamber notes that, while it is correct that Mr Bemba had an opportunity to comment on the report filed by the Registry on 6 December 2016, he was not afforded an opportunity to respond to the updated one.

249. Nevertheless, the Appeals Chamber finds that the fact that Mr Bemba was not afforded an opportunity to comment on the updated report did not render the proceedings leading up to the imposition of the fine unfair for the following reasons. First, the difference between the information contained in the two solvency reports filed by the Registry is minimal. Second, Mr Bemba was afforded an opportunity and which he availed himself of, to comment on the first report.[612] Third, the Trial Chamber explicitly set out that the content of the updated report did not have an impact on "the Chamber's view as to the solvency of Mr Bemba or the decision on sentencing".[613] Mr Bemba's arguments in this regard are accordingly rejected.

250. In light of the foregoing, Mr Bemba's twelfth ground of appeal is rejected.

M. Overall conclusion

251. For the reasons stated above, Mr Bemba's appeal is rejected.

VI. MR BABALA'S APPEAL

252. In his appeal against the Sentencing Decision, Mr Babala raises several grounds of appeal and requests the Appeals Chamber to set aside the sentence that the Trial Chamber imposed on him.[614]

A. Submissions challenging the Conviction Decision and other submissions that will not be considered

253. The Appeals Chamber recalls that under the Court's legal framework, a Trial Chamber is required to decide, first, on the question of guilt in accordance with article

[611] Sentencing Decision, fn. 412.
[612] Mr Bemba's Sentencing Submissions, para. 142.
[613] Sentencing Decision, fn. 412.
[614] Mr Babala's Appeal Brief, p. 79.

74 of the Statute. If the Trial Chamber enters a conviction, it will proceed to pronounce a sentence in accordance with article 76 of the Statute. The decisions on the conviction and on the sentence are thus separate. This is reflected in article 81 of the Statute, which provides, in its first paragraph, for appeals against decisions taken under article 74 of the Statute, while its second paragraph provides for appeals against the sentence. In relation to the former, article 81 (1) (b) of the Statute stipulates that the convicted person, or the Prosecutor on his or her behalf, may appeal conviction decisions on the ground of procedural errors, errors of fact or law or any other ground that affects the fairness or reliability of the proceedings or decision. In relation to the latter, article 81 (2) (a) of the Statute provides that a sentence may be appealed "on the ground of disproportion between the crime and the sentence". Accordingly, appeals against conviction decisions and appeals against sentencing decisions are distinct.

254. Mr Babala argues that, given that he is entitled to raise the disproportionality of the sentence imposed in an appeal against the sentence, he must be able to raise, as part of such an appeal, that his guilt has not been properly established because, in such a case, the imposition of any sentence would not only be disproportionate, but entirely unfounded.[615] In light of the legal regime for appeals against conviction and sentencing decisions, as set out in the preceding paragraph, the Appeals Chamber is not persuaded by this argument. The proper avenue for challenging a conviction is an appeal against the Trial Chamber's decision under article 74 of the Statute, as provided for by article 81 (1) of the Statute – a right of which Mr Babala has availed himself with his appeal against the Conviction Decision.[616] If an appeal against a conviction decision is successful and leads to a full reversal of the conviction by the Appeals Chamber, the sentence that the Trial Chamber has imposed loses its basis and therefore will be vacated as well, irrespective of whether it has been appealed or not. Nevertheless, it cannot be argued in an appeal against the sentence that the convicted person should not have been convicted in the first place; rather, such arguments must be made in an appeal that is directed against the conviction decision. If it were otherwise, the appeal against the sentence would, in effect, be a second appeal against

[615] Mr Babala's Appeal Brief, para. 6. *See also* paras 65, 67.
[616] *See* Mr Babala's Conviction Appeal Brief; Mr Babala's Conviction Notice of Appeal.

the conviction decision, thereby leading to unnecessary duplication and circumventing the relevant time and page limits for such appeals.[617]

255. As a result, any arguments that Mr Babala raises in his appeal against the Sentencing Decision that seek to demonstrate that the Trial Chamber erred when it found him guilty, under article 70 (1) (c) in conjunction with article 25 (3) (a) of the Statute, of having assisted in the offence of corruptly influencing witnesses D-57 and D-64[618] are not properly before the Appeals Chamber. For that reason, the Appeals Chamber dismisses *in limine* Mr Babala's arguments (i) under his first ground of appeal,[619] except the argument contained in paragraph 33, 34 and 46 of Mr Babala's Appeal Brief; (ii) under his second ground of appeal,[620] except the arguments contained in paragraphs 68, 70, 71, 73, 115 to 123 and 139 to 146 of Mr Babala's Appeal Brief; (iii) in paragraphs 155 to 159, 163 and 164 of his third ground of appeal;[621] (iv) and in paragraphs 177 to 180 and 202 of his fifth ground of appeal.[622]

256. Furthermore, the Appeals Chamber will not consider Mr Babala's submissions that are general statements about the law without alleging any errors in the Sentencing Decision[623] or do not allege any errors in the Sentencing Decision.[624]

257. Finally, the Appeals Chamber notes that the Sentencing Decision relies on findings made in the Conviction Decision. To the extent that Mr Babala has challenged these findings as part of his appeal against the Conviction Decision, the Appeals Chamber will not reconsider these matters in the present appeal.[625]

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[617] *See e.g.* Mr Babala's Appeal Brief, para. 22 where Mr Babala submits that his submissions made in his Conviction Appeal Brief against the Conviction Decision "should be understood as reproduced here in full". *See also* paras 48, 110, 164.
[618] Conviction Decision, p. 456.
[619] Mr Babala's Appeal Brief, paras 17-56 ("The Trial Chamber's Mischaracterization of the Facts").
[620] Mr Babala's Appeal Brief, paras 57-113 ("The Trial Chamber's Failure to Provide Adequate Reasons for the Sentence Handed Down").
[621] Mr Babala's Appeal Brief, paras 147-165 ("The Unreasonableness of the Sentence Imposed on the Appellant").
[622] Mr Babala's Appeal Brief, paras 170-186 ("The Trial Chamber's Exercise of Discretion Relied on an Erroneous Interpretation and an Erroneous Application of the Law").
[623] *See* Mr Babala's Appeal Brief, paras 170-172, 207-211. The Appeals Chamber notes that paragraphs 147-154 contain "preliminary considerations", which summarise the subsequent submissions under this ground of appeal. The Appeals Chamber shall therefore not address the "preliminary considerations" separately.
[624] *See* Mr Babala's Appeal Brief, paras 163, 212-231.
[625] *See* *Lubanga* Sentencing Appeal Judgment, para. 49.

B. Alleged errors regarding the gravity of the offence

1. Relevant part of the Sentencing Decision

258. The Trial Chamber explained that, when assessing the gravity of the offences, it considered, "in particular, the extent of the damage caused".[626] The Trial Chamber found that the offence of corruptly influencing witnesses was "undoubtedly grave" and "undermines the Court's discovery of the truth and impedes justice for victims".[627] It recalled that Mr Babala had been convicted for aiding the corrupt influencing of witnesses D-57 and D-64.[628] While noting that a causal link between the corrupt influence and the witnesses' testimonies was not required, it nevertheless recalled that witnesses D-57 and D-64 had testified falsely before Trial Chamber III about payments received and the number of prior contacts with the Main Case Defence, which the Trial Chamber considered "relevant in its assessment of the gravity of the offences".[629]

2. Submissions of the parties

(a) Mr Babala

259. Mr Babala submits that the offences for which he was convicted did not harm any victims or the integrity of the proceedings before Trial Chamber III because the Main Case Defence had decided not to rely on the testimonies of witnesses D-57 and D-67.[630] He notes that the lies the witnesses were found to have told did not support Mr Bemba's case, but related to payments of money and contacts with the Main Case Defence.[631] Mr Babala also submits that it was inconsistent for the Trial Chamber, on the one hand, to find that no causal link between the money payments and the witnesses' testimonies was required, yet to note, on the other hand, that witnesses D-57 and 64 testified falsely before Trial Chamber III.[632] According to Mr Babala, the

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[626] Sentencing Decision, para. 45.
[627] Sentencing Decision, para. 46.
[628] Sentencing Decision, para. 47.
[629] Sentencing Decision, para. 48.
[630] Mr Babala's Appeal Brief, paras 71, 176.
[631] Mr Babala's Appeal Brief, paras 71, 176.
[632] Mr Babala's Appeal Brief, para. 73.

Trial Chamber should have analysed the concrete damage that his conduct and the witnesses' lies caused to the Court's ability to establish the truth.[633]

260. Mr Babala submits further that the Trial Chamber, when assessing the gravity of the offence, failed to take into consideration that he was convicted for having aided the corrupt influencing of witnesses, and not as a principal perpetrator.[634] In addition, he argues that the Trial Chamber failed to consider the gravity of the offences in the concrete circumstances.[635]

(b) The Prosecutor

261. The Prosecutor submits that Mr Babala's arguments regarding the Trial Chamber's gravity assessment should be rejected.[636] The Prosecutor submits that the offence for which Mr Babala was convicted caused harm to the administration of justice, irrespective of whether the Trial Chamber relied on the testimonies of witnesses D-57 and D-64.[637] She also argues that the Trial Chamber did not assess the gravity in the abstract, but considered the concrete offences for which he was convicted.[638] The Prosecutor avers that it was not wrong for the Trial Chamber to take into account that witnesses D-57 and D-64 testified falsely before Trial Chamber III because a Trial Chamber may, when assessing the gravity of an offence, take into account other offences for which the convicted person was not charged or was even acquitted, as long as these offences were connected to those for which the person was convicted and "were foreseeable, and the convicted person had a reasonable opportunity to address them".[639] The Prosecutor submits in this regard that witnesses D-57's and D-64's false testimony before Trial Chamber III was foreseeable and occurred in the ordinary course of events, and therefore, the Trial Chamber acted reasonably when it took this into account when considering the gravity of the offence for which Mr Babala had been convicted.[640] The Prosecutor also disputes Mr Babala's argument that the offence caused no or only minimal damage, noting that the lies

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[633] Mr Babala's Appeal Brief, para. 175.
[634] Mr Babala's Appeal Brief, para. 173.
[635] Mr Babala's Appeal Brief, para. 174.
[636] Prosecutor Consolidated Response, paras 149, 152.
[637] Prosecutor Consolidated Response, para. 150.
[638] Prosecutor Consolidated Response, para. 151.
[639] Prosecutor Consolidated Response, para. 153.
[640] Prosecutor Consolidated Response, paras 153-166.

were relevant to Trial Chamber III's credibility assessment and that Mr Babala's argument would contradict the purpose of article 70 (1) (a) of the Statute.[641] The Prosecutor also recalls that the Trial Chamber, in her view, erroneously, considered lies not going to the substance of the case to be less serious and therefore did what Mr Babala submits it should have done.[642]

3. Determination by the Appeals Chamber

262. The Appeals Chamber is not persuaded that the Trial Chamber erred in its assessment of the gravity of the offence for which Mr Babala was convicted. As found by the Trial Chamber, offences under article 70 (1) (c) of the Statute are generally grave because they have the potential to undermine the Court's functions and impede justice for victims. This is irrespective of whether, in the specific circumstances, the corrupt influence on the witness actually had such an impact on the Main Case. For that reason, Mr Babala's arguments that, in the present case, there were no victims and that the Main Case Defence had decided not to rely on the witnesses' testimonies are unpersuasive. In addition, as correctly noted by the Prosecutor, while the Trial Chamber did not find that the witnesses had lied in relation to the substance of the case against Mr Bemba, their lies nevertheless concerned matters relevant to the credibility assessment of the Trial Chamber, which is "an integral and inherent part of a Chamber's ability to assess the substance of a witness's testimony".[643]

263. The Appeals Chamber also sees no error in the Trial Chamber's reference to the fact that, in the case at hand, witnesses D-57 and D-64 subsequently testified falsely before Trial Chamber III. The Appeals Chamber finds that the consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person. This is because it takes into account that, when sentencing the convicted person, a trial chamber must assess, *inter alia*, the gravity of the crime, including the harm caused.

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[641] Prosecutor Consolidated Response, paras 167-170, 172.
[642] Prosecutor Consolidated Response, para. 171.
[643] Prosecutor Consolidated Response, para. 168.

However, as the eventual sentence must reflect the culpability of the convicted person, it must be demonstrated that these consequences were, at least, objectively foreseeable. This applies both for the assessment of gravity of the crime or offence and for potential aggravating circumstances. If it were otherwise, there would be a risk that a person is punished beyond his or her culpability. While the Trial Chamber did not consider the giving of false testimony by witnesses D-57 and D-64 as an aggravating circumstance in relation to Mr Babala, but rather as an aspect relevant to the assessment of the gravity of the offence for which he was convicted,[644] the Appeals Chamber agrees with the Prosecutor[645] that the same considerations apply: it is within the discretion of a Trial Chamber when assessing the gravity of an offence to consider the consequences of that offence that were objectively foreseeable. The Trial Chamber found in the Conviction Decision that Mr Babala had effected payments to witness D-57's wife and witness D-64's daughter "knowing that the payments were made for illegitimate purposes" and that he "knew [that these payments] were aimed at contaminating these witnesses' testimony and intentionally aided Mr Kilolo in corruptly influencing the two witnesses".[646] These findings, which have not been reversed on appeal,[647] provide a sufficient basis to establish, as a minimum, that it was objectively foreseeable that witnesses D-57 and D-64 would testify falsely before the Court as to the payments they had received as well as contacts with Mr Bemba's defence team in the Main Case.

264. Nor is the Appeals Chamber persuaded by the argument that the Trial Chamber should have taken into consideration that Mr Babala was convicted for having aided in the commission of the offence, and not as a principal perpetrator. While the Trial Chamber was fully aware of this fact and took it into account when considering Mr Babala's degree of participation and intent,[648] it was not relevant to the question of the gravity of the offence.

265. Accordingly, the Appeals Chamber rejects the arguments of Mr Babala on the Trial Chamber's findings on the gravity of the offence.

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[644] Sentencing Decision, para. 48.
[645] Prosecutor Consolidated Response, para. 154.
[646] Conviction Decision, para. 936.
[647] *Bemba et al*. Appeal Judgment, section X.D.8.
[648] *See* Sentencing Decision, para. 50.

C. Challenge to the finding that offences were executed in "deceptive and sophisticated manner"

1. Relevant part of the Sentencing Decision

266. When considering the "manner of commission" of the offences, the Trial Chamber took into account the "deceptive and sophisticated manner in which the offences were executed by Mr Babala", noting, *inter alia*, that Mr Babala had "arranged the money transfers in a manner intended to conceal any link between the witnesses and the Main Case Defence" and that he had not made the payments directly to witnesses D-57 and D-64, but to their wife and daughter, respectively, using for the latter payment his employee.[649] In support of its findings, the Trial Chamber referred to the Prosecutor's submissions on sentencing as well as various paragraphs of the Conviction Decision.[650]

2. Submissions of the parties

(a) Mr Babala

267. Mr Babala submits that the Trial Chamber did not provide any evidence that would support its findings that the offence was executed in a "deceptive and sophisticated manner", thereby failing to provide a reasoned opinion.[651] Mr Babala also submits that the Trial Chamber simply relied on submissions of the Prosecutor.[652] He submits further that the paragraphs cited by the Trial Chamber in support of its finding also do not establish the Trial Chamber's claim.[653] He recalls that it had not been he, but Mr Kilolo, who had arranged for the payments to be made, while he had merely responded to Mr Kilolo's requests, which he believed to be legitimate.[654] He submits that he did not know the two witnesses, or their wife and daughter, and that he had asked his employee, witness P-272, to effectuate one of the payments not to conceal it, but as part of a normal errand.[655] Mr Babala argues further that the Trial Chamber's finding was contradictory because it took into account that he had

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[649] Sentencing Decision, para. 52.
[650] Sentencing Decision, para. 52, referring to Conviction Decision, paras 243, 267, 269, 272, 697-700, 703, 748, 879, 882, 884, 936; Prosecutor's Sentencing Submissions, para. 44.
[651] Mr Babala's Appeal Brief, para. 34. *See also* paras 52, 182-185.
[652] Mr Babala's Appeal Brief, para. 115. *See also* para. 46.
[653] Mr Babala's Appeal Brief, para. 116.
[654] Mr Babala's Appeal Brief, para. 117. *See also* para. 183.
[655] Mr Babala's Appeal Brief, paras 118-123. *See also* para. 184.

instructed witness P-272 to effectuate the transfer in relation to one of the witnesses, while it also found that witness P-272 was acting within his employer-employee relationship with Mr Babala.[656]

(b) The Prosecutor

268. The Prosecutor submits that Mr Babala largely repeats arguments raised in his appeal against the Conviction Decision, which should be dismissed summarily.[657] She argues that, irrespective of who arranged the payments, Mr Babala ensured that the payments were not made directly to the witnesses, but to their relatives, to conceal the link to the Main Case defence.[658]

3. Determination by the Appeals Chamber

269. The Appeals Chamber rejects Mr Babala's argument that the Trial Chamber's finding that he executed the offence in a "deceptive and sophisticated manner" at paragraph 52 of the Sentencing Decision was not based on evidence. The basis for the Trial Chamber's finding are provided in the remainder of the paragraph, where the Trial Chamber refers to findings made in the Conviction Decision that Mr Babala "had arranged the money transfers in a manner intended to conceal any link between the witnesses and the Main Case Defence" and "did not make the payments directly to the witnesses" and noted that his intention to conceal was also reflected in the use of coded language in conversations with Mr Bemba and Mr Kilolo.[659] In the Appeals Chamber's view, these findings may reasonably be understood as showing deceptive and sophisticated execution of the offence. This is regardless of the fact – of which the Trial Chamber clearly was aware – that the decision that the money be sent not directly to witnesses D-57 and D-64, but *via* their relatives – was not taken by Mr Babala, but by Mr Kilolo.

270. The Appeals Chamber also sees no contradiction in the Trial Chamber's findings regarding witness P-272. This witness effectuated, on Mr Babala's instruction, the money transfer to witness D-64's daughter. Whether the witness did

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[656] Mr Babala's Appeal Brief, para. 185.
[657] Prosecutor Consolidated Response, para. 176.
[658] Prosecutor Consolidated Response, para. 176.
[659] Sentencing Decision, para. 52, referring to Conviction Decision, paras 243, 267, 269, 272, 607-700, 703, 748, 879, 882, 884, 936.

so as part of his employment contract was irrelevant; what was of the essence for the Trial Chamber's finding was that the money was sent not directly to witness D-64, but to his daughter.

271. Accordingly, the Appeals Chamber rejects Mr Babala's arguments.

D. Alleged error regarding "aggravating circumstances"

1. Relevant part of the Sentencing Decision

272. As an aggravating factor, the Trial Chamber noted that, when Mr Bemba, Mr Kilolo and Mr Mangenda had become aware of investigations under article 70 of the Statute against them, Mr Babala had "encouraged Mr Kilolo to maintain contact with the Main Case Defence Witnesses and to ensure that they were paid after their testimonies as an *'après-vente'* service", and that he was fully aware of the legal implications of his suggestion.[660]

2. Submissions of the parties

(a) Mr Babala

273. Mr Babala submits that there was no evidence in support of the Trial Chamber's finding as to the '*après-vente'* service, and that the Trial Chamber simply followed the Prosecutor's arguments without scrutinising them.[661] He submits that, rather than relating to corruptly influencing witnesses, the comment regarding *'après-vente'* service related to a "fictitious scenario" to dishonestly extract money of which he and Mr Bemba were the victims.[662] Mr Babala submits further that the Trial Chamber erroneously "double-counted" his assistance in the obstruction of the article 70 investigation because it had used this assistance to establish his *mens rea* and therefore could not rely on it again as an aggravating circumstance.[663]

(b) The Prosecutor

274. The Prosecutor submits that Mr Babala's assistance in the cover-up could be considered as an aggravating circumstance because it had not been considered either

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[660] Sentencing Decision, para. 55.
[661] Mr Babala's Appeal Brief, paras 139-142.
[662] Mr Babala's Appeal Brief, paras 142-146.
[663] Mr Babala's Appeal Brief, paras 200-201.

as an element of the offence or as part of the Trial Chamber's gravity assessment.[664] She also argues that Mr Babala is merely repeating arguments regarding the purported "fictitious scenario", which the Trial Chamber reasonably rejected, and that there is ample evidence that Mr Babala intended to conceal his prior payments to witnesses D-57 and D-64.[665]

3. Determination by the Appeals Chamber

275. The Appeals Chamber is not persuaded by Mr Babala's arguments. First, it does not consider that the Trial Chamber erroneously "double-counted" his assistance in the cover-up of the corrupt influencing of the witnesses both as a basis for his conviction and as an aggravating circumstance. While the Trial Chamber relied on conversations between him and Mr Kilolo in October 2013 as an indication of his awareness of the purpose of the payments to witnesses D-57 and D-64 in October *2012*,[666] it did not convict Mr Babala in relation to the events in October 2013.[667] Accordingly, the Trial Chamber was not barred from considering Mr Babala's remarks and conduct in October 2013 for the purpose of identifying an aggravating circumstance.

276. Second, the Appeals Chamber notes that Mr Babala largely repeats arguments regarding the "fictitious scenario" that he has raised in his appeal against the Conviction Decision.[668] Importantly, he fails to show that the Trial Chamber's reliance on Mr Babala's assistance to remedial measures was incorrect and merely provides an alternative interpretation of the evidence, which the Trial Chamber had considered – and rejected – in the Conviction Decision.[669] The Appeals Chamber recalls that it has addressed – and rejected – Mr Babala's corresponding arguments on appeal against the Conviction Decision and therefore sees no merit in reconsidering its findings on these arguments.[670]

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[664] Prosecutor Consolidated Response, para. 178.
[665] Prosecutor Consolidated Response, paras 179-181.
[666] *See* Conviction Decision, paras 779-781, 798-799 and 886-893 (emphasis added).
[667] *See* Conviction Decision, paras 936-937.
[668] *See* Mr Babala's Conviction Appeal Brief, paras 80-82.
[669] *See* Conviction Decision, para. 800.
[670] *Bemba et al*. Appeal Judgment, para. 1437.

277. Accordingly, the Appeals Chamber rejects Mr Babala's arguments regarding the aggravating circumstances.

E. Alleged failure to consider mitigating circumstances

1. Relevant part of the Sentencing Decision

278. The Trial Chamber found that Mr Babala's professional background and, in particular, his positive contributions to local communities were not relevant to its determination of the sentence and decided not to give them weight.[671] As to Mr Babala's family circumstances, notably that he is a father of two minor children, the Trial Chamber found that his circumstances were "common to many convicted persons before international tribunals and cannot be taken into account in mitigation in the present case", though it took his family situation into account as one of the "overall circumstances" pursuant to rule 145 (1) (b) of the Rules.[672]

279. After identifying the relevant factors, the Trial Chamber stated that it had "weighed and balanced" all of them.[673] The Trial Chamber noted that it had found one aggravating factor, but that that this must be balanced against Mr Babala's limited participation in the offence, good behaviour, family circumstances and lack of prior convictions.[674]

2. Submissions of the parties

(a) Mr Babala

280. Mr Babala submits that the Trial Chamber refused to take into account his role in the community, even though rule 145 (1) (c) of the Rules "refers to the social and economic condition of the convicted person".[675] He also argues that his family circumstances should have been considered as a mitigating factor.[676] While he accepts that such circumstances are not always afforded much weight, this should not apply in

[671] Sentencing Decision, para. 61.
[672] Sentencing Decision, para. 62.
[673] Sentencing Decision, para. 66.
[674] Sentencing Decision, para. 66.
[675] Mr Babala's Appeal Brief, para. 187.
[676] Mr Babala's Appeal Brief, paras 188, 199.

this case as he did not commit any crime and was found liable only under article 25 (3) (c) of the Statute.[677]

281. Mr Babala also argues that the Trial Chamber should have taken into account as a mitigating factor his good character, notably his position as an opposition politician in the Democratic Republic of Congo, his "key role in the democratic development of the [Democratic Republic of Congo]" and his lack of propensity to commit crimes.[678] In support of his submissions, he refers to the Appeals Chamber to domestic systems that take into account the convicted person's good character.[679] He submits further that the Trial Chamber failed to properly weigh the factors it had identified as being relevant, violating his right to a reasoned decision.[680]

(b) The Prosecutor

282. The Prosecutor submits that the Trial Chamber correctly gave no weight to his professional position and good character, as he had not presented any evidence in support before the Trial Chamber; in any event, even if he had, the Prosecutor submits that the Trial Chamber was not wrong in not mitigating his sentence on account of his purported good character.[681] She also avers that the Trial Chamber reasonably determined that Mr Babala's family situation should not be considered in mitigation and notes that, in any event, the Trial Chamber took his family situation into account as part of the "overall circumstances" of Mr Babala.[682]

3. Determination by the Appeals Chamber

283. The Appeals Chamber recalls that, pursuant to article 78 (1) of the Statute, in determining the sentence, a Trial Chamber shall take into account, *inter alia*, the "individual circumstances of the convicted person". Rule 145 (1) (c) of the Rules provides that a Trial Chamber shall give consideration, *inter alia*, to the "age, education, social and economic condition of the convicted person". According to rule 145 (b) of the Rules, a Trial Chamber shall "[b]alance all the relevant factors"

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[677] Mr Babala's Appeal Brief, para. 189.
[678] Mr Babala's Appeal Brief, para. 190-192, 198-199.
[679] Mr Babala's Appeal Brief, para. 193-197.
[680] Mr Babala's Appeal Brief, para. 190.
[681] Prosecutor Consolidated Response, para. 188.
[682] Prosecutor Consolidated Response, para. 189.

and "consider the circumstances both of the convicted person and of the crime". The Appeals Chamber also recalls that it has previously held that the Court's sentencing regime indicates that, "in order to determine a sentence, the Trial Chamber, based on its intimate knowledge of the case, will have to balance all factors *it considers relevant*".[683] Thus, while failure to consider a mandatory factor may amount to a legal error, the identification and weighing of the relevant factors lies at the core of the Trial Chamber's exercise of discretion.[684]

284. Turning to the case at hand, the Appeals Chamber recalls that the Trial Chamber found that Mr Babala's role in the community was not a relevant factor in sentencing.[685] The Appeals Chamber does not consider that this amounted to an erroneous exercise of discretion. While a convicted person's professional position and role within the community may be qualified in the abstract as part of his or her "social condition" in terms of rule 145 (1) (c) of the Rules, it nevertheless remains primarily for the Trial Chamber to determine whether the professional position and role are relevant to the determination of the sentence in the circumstances of the case under consideration. The Appeals Chamber recalls that the factors which Mr Babala argues the Trial Chamber should have taken into account relate to his general role as a politician in the Democratic Republic of Congo and in his community.[686] The Appeals Chamber considers that Mr Babala has not demonstrated that these factors were of such relevance to the determination of the sentence for the offence for which he was convicted that the Trial Chamber's refusal to take them into consideration amounted to an error in the exercise of its discretion. Accordingly, the Appeals Chamber rejects Mr Babala's argument in this regard.

285. As to Mr Babala's family circumstances, which he submits the Trial Chamber should have taken into account as a mitigating circumstance,[687] the Appeals Chamber notes that the Trial Chamber took this factor into account, albeit as part of the "overall circumstances" of Mr Babala.[688] In the view of the Appeals Chamber, there is no

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[683] *Lubanga* Sentencing Appeal Judgment, para. 34 (emphasis added).
[684] *Lubanga* Sentencing Appeal Judgment, paras 42, 43.
[685] Sentencing Decision, para. 61.
[686] *See* Mr Babala's Sentencing Submissions, paras 49-64.
[687] Mr Babala's Appeal Brief, para. 188.
[688] Sentencing Decision, para. 62.

indication that the Trial Chamber's failure to consider his family circumstances specifically in mitigation amounted to an erroneous exercise of discretion. Accordingly, the Appeals Chamber rejects his argument.

286. As to Mr Babala's argument that the Trial Chamber merely mentioned factors, but failed to properly weigh them,[689] the Appeals Chamber recalls that the Trial Chamber identified the factors it considered relevant and explained how it weighed the factors against one another.[690] Thus, Mr Babala's argument is without basis.

287. Accordingly, the Appeals Chamber rejects Mr Babala's arguments.

F. Alleged disproportionate sentence compared to other accused

1. Relevant part of the Sentencing Decision

288. The Trial Chamber sentenced: (i) Mr Babala to six months of imprisonment and did not impose a fine; (ii) Mr Arido to 11 months of imprisonment without ordering a fine; (iii) Mr Mangenda to two years of imprisonment, which it suspended for a period of three years, and did not order a fine; (iv) Mr Kilolo to two years and six months of imprisonment, which it suspended for a period of three years, and imposed a fine of EUR 30,000; and (v) Mr Bemba to one year of imprisonment and imposed a fine of EUR 300,000.[691]

2. Submissions of the parties

(a) Mr Babala

289. Mr Babala submits that the sentences imposed on his co-accused demonstrate that the sentence imposed on him was disproportionate, noting that he was convicted of two charges only and acquitted of 42, while the "co-perpetrators" were each convicted of 44 charges.[692] He also argues that his conviction is "more injurious than that of the other co-accused, […] because, if it were upheld, it would defile his

[689] Mr Babala's Appeal Brief, para. 190.
[690] *See* Sentencing Decision, paras 66, 67.
[691] Sentencing Decision, pp. 98-99.
[692] Mr Babala's Appeal Brief, para. 205.

otherwise unblemished record", putting him at a clear disadvantage.[693] Mr Babala also argues, albeit in the context of his family circumstances, that the ICTY has held that a person found guilty of aiding and abetting generally warrants a lower sentence than someone found guilty as a participant in a joint criminal enterprise.[694]

(b) The Prosecutor

290. The Prosecutor submits that Mr Babala's arguments are unsubstantiated and recalls that the Trial Chamber specifically considered the more limited basis of Mr Babala's conviction and that his sentence is the shortest of all five convicted persons in this case.[695] As to the argument that, according to the ICTY's jurisprudence, an aider and abettor deserves a lower sentence than a participant in a joint criminal enterprise, the Prosecutor submits that Mr Babala disregards subsequent jurisprudence that indicates that aiders and abettors do not automatically merit a lower sentence.[696]

3. Determination by the Appeals Chamber

291. The Appeals Chamber is not persuaded by Mr Babala's argument that the sentence that the Trial Chamber imposed on him was disproportionate if compared to the other four accused in this case. The Trial Chamber considered each convicted person's circumstances and determined which sentence would be appropriate.[697] With respect to Mr Babala, the Trial Chamber specifically took into account that his participation in the offences was relatively limited[698] and imposed the lowest sentence on Mr Babala. Thus, he has not demonstrated that his sentence was disproportionate.

292. The Appeals Chamber also rejects Mr Babala's argument that, as he was only convicted as an aider and abettor, he should receive a lower sentence.[699] The Appeals Chamber notes in this regard that the Trial Chamber took into account the mode of

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[693] Mr Babala's Appeal Brief, para. 206. *See also* para. 163.
[694] Mr Babala's Appeal Brief, para. 189.
[695] Prosecutor Consolidated Response, para. 185.
[696] Prosecutor Consolidated Response, para. 186.
[697] *See* Sentencing Decision, paras 49-68 (in relation to Mr Babala), 74-98 (in relation to Mr Arido), 116-151 (in relation to Mr Mangenda), 168-201 (in relation to Mr Kilolo), 218-263 (in relation to Mr Bemba).
[698] Sentencing Decision, para. 66.
[699] Mr Babala's Appeal Brief, para. 189.

liability on the basis of which Mr Babala had been convicted.[700] Mr Babala's argument is therefore without a basis.

293. Accordingly, the Appeals Chamber rejects Mr Babala's arguments.

G. Alleged failure to suspend the sentence

1. Relevant part of the Sentencing Decision

294. In a section of the Sentencing Decision generally addressing the Court's sentencing framework, the Trial Chamber found that it has the power to suspend a sentence of imprisonment.[701] The Trial Chamber sentenced Mr Babala to six months of imprisonment, which it considered served in light of the time he had spent in detention pending trial.[702] It did not address the suspension of Mr Babala's sentence.

2. Submissions of the parties

(a) Mr Babala

295. Mr Babala submits that the Trial Chamber erred because, without providing any reasons, it did not suspend his sentence, even though it suspended sentences of his co-accused and the suspension of his sentence was also "wholly justified".[703]

(b) The Prosecutor

296. The Prosecutor submits that, under the Court's legal framework, a Trial Chamber may not suspend a sentence and that, in any event, Mr Babala's argument is moot because the imposed sentence was less than the time he had spent in detention pending trial; thus, there was no sentence that could be suspended.[704] She also submits that the Trial Chamber reasonably found that Mr Babala's family circumstances were not extraordinary and, nevertheless, effectively considered them.[705]

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[700] Sentencing Decision, para. 50.
[701] Sentencing Decision, paras 40-41.
[702] Sentencing Decision, paras 67-68.
[703] Mr Babala's Appeal Brief, paras 161-162. *See also* para. 209.
[704] Prosecutor Consolidated Response, para. 190.
[705] Prosecutor Consolidated Response, para. 190.

3. Determination by the Appeals Chamber

297. In light of the Appeals Chamber's finding that the Trial Chamber erred in finding that suspension of a sentence was possible under the Court's legal regime,[706] the Appeals Chamber rejects Mr Babala's argument.

H. Alleged failure to issue a reasoned decision on admission of evidence

1. Relevant part of the Sentencing Decision

298. The Trial Chamber noted that "[it] is not required to expressly reference all evidence recognised as submitted at trial, including at the sentencing stage, and comment upon it".[707] The Trial Chamber did not issue a separate decision on the admission of evidence that the parties had submitted for sentencing purposes.

2. Submissions of the parties

(a) Mr Babala

299. Mr Babala argues that the Trial Chamber committed a procedural error because it failed to issue a reasoned decision on the admission of the evidence that had been submitted for sentencing purposes.[708] In Mr Babala's submission, the Trial Chamber misunderstood its obligations in respect of evidence, referring only to the submission of evidence, "as though the dichotomy between admitted and non-admitted evidence did not even exist and even less was necessary".[709]

(b) The Prosecutor

300. The Prosecutor responds that Mr Babala "misunderstands" the Court's evidentiary regime as that there is no need for a Trial Chamber to make an item-by-item assessment of the evidence, as long as the Trial Chamber sets out the basis of its decision.[710] She submits that, for sentencing, the Trial Chamber may rely on a "wider array of information" than that for determining the guilt or innocence of the accused

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[706] *See supra* IV.C.3.
[707] Sentencing Decision, para. 42.
[708] Mr Babala's Appeal Brief, para. 169. *See also* para. 167.
[709] Mr Babala's Appeal Brief, para. 168.
[710] Prosecutor Consolidated Response, paras 193, 196.

person.[711] She also notes that Mr Babala has failed to indicate which items of evidence the Trial Chamber failed to consider and that the argument should therefore be dismissed.[712]

3. Determination by the Appeals Chamber

301. Mr Babala alleges that the Trial Chamber erred procedurally by not issuing decisions on the admissibility of each item of evidence that had been submitted to it for the purposes of sentencing. The Appeals Chamber has already addressed this question in the context of appeals against the Conviction Decision in the present case and concluded that such a ruling is not required, for the reasons set out in its judgment on the appeals against the Conviction Decision.[713] The same considerations apply to the sentencing phase of the proceedings.

302. Accordingly, the Appeals Chamber rejects Mr Babala's argument.

I. Overall conclusion

303. For the reasons stated above, Mr Babala's appeal is rejected.

VII. MR ARIDO'S APPEAL

304. In his appeal against the Sentencing Decision, Mr Arido raises two grounds of appeal. Under his first ground of appeal, Mr Arido submits that the Trial Chamber erred in disregarding portions of witness P-256 (D-4)'s testimony during the sentencing hearing, which, in his opinion, could have rendered the Conviction Decision "nugatory and the sentencing unnecessary".[714] Mr Arido also alleges that the Trial Chamber erred by not taking into account the violations of fundamental human rights he had raised in his Written Closing Submissions as well as at trial; he argues that this failure resulted in unfair proceedings against him.[715]

305. Under his second ground of appeal, Mr Arido argues that the Trial Chamber failed to individualise his sentence and erred in its assessment of the gravity of the

[711] Prosecutor Consolidated Response, para. 197.
[712] Prosecutor Consolidated Response, para. 198.
[713] *Bemba et al.* Appeal Judgment, section VII.A.
[714] Mr Arido's Appeal Brief, paras 13-33.
[715] Mr Arido's Appeal Brief, paras 34-37.

offence,[716] erred when it found that there were no mitigating circumstances and failed to provide a reasoned opinion regarding the weight given to the overall circumstances.[717]

306. Mr Arido requests that the Appeals Chamber set aside his conviction, acquit him and annul his sentence.[718] In the alternative, he requests that the Appeals Chamber provide him with "a remedy which it deems fair and equitable".[719] Lastly, he requests that the Appeals Chamber declare that he is entitled to "effective compensation for a grave and manifest miscarriage of justice, pursuant to Article 85 of the Statute".[720]

A. First Ground of Appeal

1. Submissions of the parties

(a) Mr Arido

307. Mr Arido submits that the Trial Chamber erred in not considering the testimony that witness P-256 (D-4) gave at the sentencing hearing as this evidence "materially contradict[ed] the conviction".[721] Mr Arido argues that the testimony undermines the basis of his conviction, in particular the Trial Chamber's findings regarding (i) his instruction to witness D-4 to present himself as a soldier; (ii) him assigning the witness a military rank; (iii) the erroneous status of witnesses D-2 and D-3 as soldiers; and (iv) witness D-4's recruitment by Mr Arido.[722] Mr Arido avers that, as these "contradictions" were brought to the Trial Chamber's attention in his Written Closing Submissions, the Trial Chamber "should have re-considered" the Conviction Decision and amended its verdict.[723] Mr Arido adds that the Trial Chamber failed to provide reasons for not "revisit[ing]" the Conviction Decision and that such an error

[716] Mr Arido's Appeal Brief, paras 38-64.
[717] Mr Arido's Appeal Brief, paras 65-103.
[718] Mr Arido's Appeal Brief, para. 104.
[719] Mr Arido's Appeal Brief, para. 106.
[720] Mr Arido's Appeal Brief, paras 5, 107.
[721] Mr Arido's Appeal Brief, paras 13-14. *See also* paras 15-30.
[722] *See* Mr Arido's Appeal Brief, paras 15-30.
[723] Mr Arido's Appeal Brief, para. 32.

constitutes a "discernible error of fact and law" because it deprived him of the right to seek appellate review.[724]

308. Mr Arido alleges further that the Trial Chamber failed to take into account and accord weight to "a series of violations of fundamental human rights", which he had raised in his Written Closing Submissions.[725] He reiterates the claims made at trial and in his appeal against the Conviction Decision regarding (i) the threats on one member of his family; (ii) the Prosecutor's "illegal" Western Union investigation; (iii) violation of his and his family's right to privacy; (iv) his "harmful characterization" by the Prosecutor; and (v) the Prosecutor's disclosure violations.[726] Mr Arido argues that such failure "resulted in unfair proceedings that ultimately affected the reliability of the Sentencing Decision".[727] He requests that the Appeals Chamber acknowledge these alleged human rights violations and set aside the Conviction as well as the Sentencing Decisions, and enter a verdict of acquittal.[728]

(b) The Prosecutor

309. The Prosecutor argues that Mr Arido's first ground of appeal should be summarily dismissed as he fails to "set out an appealable error" and because Mr Arido is effectively re-litigating his conviction which is not within the purpose and scope of a sentencing appeal.[729] She submits that the impact of witness P-256 (D-4)'s testimony on Mr Arido's conviction should not be addressed in the context of Mr Arido's appeal against the Sentencing Decision as he has already raised this issue in his appeal against the Conviction Decision and in his application to have this testimony admitted as additional evidence on appeal.[730] The Prosecutor adds that, since P-256 (D-4)'s testimony was not part of the trial record when the Trial Chamber rendered the Conviction Decision, it may not be relied upon to challenge the findings relevant to Mr Arido's guilt.[731]

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[724] Mr Arido's Appeal Brief, paras 14, 33.
[725] Mr Arido's Appeal Brief, para. 34.
[726] Mr Arido's Appeal Brief, paras 35-36, referring to Mr Arido's Conviction Appeal Brief, paras 80-81, 95-102, 116-122, 125-149, pp. 101-104.
[727] Mr Arido's Appeal Brief, para. 34.
[728] Mr Arido's Appeal Brief, para. 37.
[729] Prosecutor Consolidated Response, paras 201, 203-205.
[730] Prosecutor Consolidated Response, para. 205.
[731] Prosecutor Consolidated Response, para. 206.

2. Determination by the Appeals Chamber

310. Mr Arido submits that on the basis of witness P-256 (D-4)'s testimony at the sentencing hearing, the Trial Chamber should have reconsidered the Conviction Decision. Similarly, in respect of Mr Arido's argument concerning the alleged human rights violations, the Appeals Chamber notes that while Mr Arido purports to challenge the "reliability of the Sentencing Decision",[732] he is in fact requesting the Appeals Chamber to set aside the Conviction Decision and enter a verdict of acquittal on the basis "that the above-listed human rights violations led to a grave and manifest miscarriage of justice".[733]

311. As found above in relation to Mr Babala's appeal, an appeal against a sentence is not an occasion to argue that the Trial Chamber erred when it found the convicted person guilty.[734] Accordingly, the Appeals Chamber dismisses *in limine* Mr Arido's first ground of appeal.

B. Second Ground of Appeal

312. Mr Arido submits that the Trial Chamber (i) failed to individualise the sentence; (ii) erred in considering damage as part of its gravity assessment; and (iii) erred in not finding any mitigating circumstances and failing to provide a reasoned opinion regarding the weight given to the "overall circumstances" that it had identified.

1. Alleged failure to individualise the sentence

(a) Relevant part of the Sentencing Decision

313. In the applicable law section of the Sentencing Decision, the Trial Chamber found that the assessment of the "gravity of the crime" as one of the factors relevant to the determination of the sentence must be done "*in concreto*", that is, by taking into account the "circumstances of the case".[735] The Trial Chamber found that "[n]ot all offences forming the grounds for conviction are necessarily of equivalent gravity and the Chamber must weight each of them".[736] It emphasised that factors it considered in

[732] Mr Arido's Appeal Brief, para. 34.
[733] Mr Arido's Appeal Brief, para. 37.
[734] *See supra* para. 263.
[735] Sentencing Decision, para. 23.
[736] Sentencing Decision, para. 23.

its gravity assessment would not be taken into account again as aggravating circumstances.[737]

314. The Trial Chamber recalled in a subsequent section pertaining specifically to Mr Arido's culpable conduct, that he had been "convicted of having personally corruptly influenced witnesses D-2, D-3, D-4 and D-6" and that, in relation to this offence, his involvement regarding these four witnesses was "comprehensive and direct".[738] Discussing the various aspects of the degree of his participation and intent, the Trial Chamber noted Mr Arido's "hands-on approach" in relation to the coaching of these witnesses, "execut[ing] the offences on his own initiative and with particular insistence over two days in Douala".[739] The Trial Chamber also recalled its findings in the Conviction Decision as to his intent where Mr Arido "meant to engage in the conduct of influencing" the concerned witnesses.[740]

(b) Submissions of the parties

(i) Mr Arido

315. Mr Arido submits that the Trial Chamber did not "individualise its assessment of the 'inherent gravity' as required by Article 78(1) and Rule 145(1)(a)".[741] Mr Arido refers to paragraph 15 of the Conviction Decision, in which, according to him, the Trial Chamber considered the "inherent gravity" of the offences and argues that "[g]iven its placement in the general law section", this finding "applies to all charges and all those convicted".[742] In Mr Arido's view, this finding also "formed part of the Sentencing Decision".[743]

316. Mr Arido alleges that, while the Trial Chamber found that the offences underpinning the convictions were not necessarily equivalent in gravity, it failed to distinguish between Mr Arido's "temporally short and geographically limited conduct" and that of the other convicted persons.[744] Mr Arido claims that in fact the

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[737] Sentencing Decision, para. 23.
[738] Sentencing Decision, para. 75.
[739] Sentencing Decision, para. 75.
[740] Sentencing Decision, para. 77, referring to Conviction Decision, paras 127, 320-323, 328, 334, 338, 341-342, 344, 349, 671-672.
[741] Mr Arido's Appeal Brief, para. 39 (footnotes omitted).
[742] Mr Arido's Appeal Brief, paras 39-40, referring to Conviction Decision, para. 15
[743] Mr Arido's Appeal Brief, para. 41.
[744] Mr Arido's Appeal Brief, para. 42.

Trial Chamber elevated his conduct to that of the other convicted persons involved in the common plan by underlining Mr Arido's "particular insistence over two days in Douala" and that during that time he "did not miss any opportunity to coach the four witnesses concerned".[745] He adds that the Trial Chamber contradicted its finding in the Conviction Decision on Kokaté's role by stating in the Sentencing Decision that "Mr Arido executed the offences on his own initiative".[746]

(ii) The Prosecutor

317. The Prosecutor responds that Mr Arido's submissions under his second ground of appeal should be dismissed as they misrepresent the Conviction Decision and the Sentencing Decision.[747] The Prosecutor argues that the Trial Chamber assessed the sentence for each convicted person individually.[748] She avers that Mr Arido misrepresents and takes out of context the Trial Chamber's finding in the Conviction Decision that article 70 offences are of inherent gravity and do not need to meet the gravity threshold under article 17 of the Statute.[749] In this regard, the Prosecutor avers that the Trial Chamber did, in fact, consider his relatively limited role, by distinguishing it from that of the co-perpetrators' role in the common plan, and by imposing upon him "the second lowest sentence" in this case.[750]

(c) Determination by the Appeals Chamber

318. Mr Arido's claim that the Trial Chamber failed to individualise his sentence is based on the finding at paragraph 15 of the Conviction Decision about the "inherent gravity" of the offences under article 70 (1) (a) to (c), which according to him, forms part of the Sentencing Decision. This argument is unconvincing because the Trial Chamber did not refer to the impugned finding in the Sentencing Decision. Moreover and contrary to Mr Arido's contention, the Trial Chamber held in the Sentencing Decision that the gravity of each offence must be assessed "*in concreto*", i.e. in light

[745] Mr Arido's Appeal Brief, paras 42-43, quoting Sentencing Decision, para. 75.
[746] Mr Arido's Appeal Brief, para. 43, quoting Sentencing Decision, para. 75.
[747] Prosecutor Consolidated Response, para. 207.
[748] Prosecutor Consolidated Response, para. 208.
[749] Prosecutor Consolidated Response, para. 209, referring to Conviction Decision, para. 15.
[750] Prosecutor Consolidated Response, para. 210.

of the particular circumstances of the case and did consider the offence of corruptly influencing a witness to be "undoubtedly grave".[751]

319. Turning to Mr Arido's argument that the Trial Chamber failed to distinguish his conduct from that of the co-perpetrators involved in the common plan, the Appeals Chamber notes that the Trial Chamber recalled that Mr Arido was convicted for having personally corruptly influenced witnesses D-2, D-3, D-4, and D-6.[752] It described the degree of his involvement in the commission of the offence and held that Mr Arido "executed the offences on his own initiative and with particular insistence over two days in Douala" and "[h]e had a hands-on approach and did not miss any opportunity to coach the four witnesses concerned".[753]

320. The Appeals Chamber finds no merit in Mr Arido's argument that these findings show that the Trial Chamber did not distinguish his conduct from that of the co-perpetrators involved in the common plan and, as a result, elevated his sentence to that of those imposed on the co-perpetrators. The Trial Chamber expressly held that the proportionality of a sentence is "generally measured by the degree of harm caused by the [offence] and the culpability of the perpetrator" and that these two factors "make clear that the sentence must be individualised for each convicted person".[754] The Appeals Chamber notes that the Trial Chamber indeed evaluated the culpable conduct and participation of each convicted person individually when it determined their respective sentences.[755] Furthermore, the Trial Chamber recalled that "Mr Arido executed the offences within the objectives of the common plan" that were furthered by Mr Bemba, Mr Kilolo and Mr Mangenda, who in turn relied upon other individuals, including Mr Arido, to further their goal. However, the Appeals Chamber notes that the Trial Chamber expressly found that Mr Arido's culpable conduct was not affected by the co-perpetrators' conduct.[756] Therefore, Mr Arido misrepresents the Sentencing Decision when he contends that the Trial Chamber considered his

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[751] Sentencing Decision, paras 23, 71.
[752] Sentencing Decision, para. 75.
[753] Sentencing Decision, para. 75.
[754] Sentencing Decision, para. 36.
[755] *See* Sentencing Decision, paras 49-68 (in relation to Mr Babala), 74-98 (in relation to Mr Arido), 116-151 (in relation to Mr Mangenda), 168-201 (in relation to Mr Kilolo), 218-263 (in relation to Mr Bemba).
[756] Sentencing Decision, para. 76.

culpable conduct on the "same level" as of the conduct of the co-perpetrators involved in the common plan.[757]

321. Accordingly, The Appeals Chamber rejects Mr Arido's arguments.

2. Alleged errors in the assessment of damage as part of the gravity assessment

(a) Relevant part of the Sentencing Decision

322. The Trial Chamber considered that the purpose of sentencing under article 70 of the Statute was "rooted […] in retribution and deterrence", as it is with crimes under article 5 of the Statute.[758] In respect of the gravity of the offences, the Trial Chamber recalled that such gravity must be assessed "*in concreto*, namely in light of the particular circumstances of the case" and that any factors taken into account for this assessment "will not be taken into account additionally as aggravating circumstances".[759] As regards aggravating circumstances, the Trial Chamber held that they must relate to the "commission of the offence(s) of which the accused is convicted, or to the convicted person him- or herself".[760] It stated that that they must be established beyond reasonable doubt, pointing however, that, a legal element of the relevant offence or the mode of liability "cannot be considered as an aggravating circumstance".[761]

323. The Trial Chamber considered that the offence of corruptly influencing witnesses committed by way of "briefing and scripting his or her testimony" and promising money or other benefit as encouragement was "undoubtedly grave" as this prevented the Court from executing its mandate.[762] The Trial Chamber noted specifically that four out of the 14 witnesses subjected to interference were instructed by Mr Arido "with the aim of influencing their testimony" and considered this factor relevant to its gravity assessment of the offence.[763]

324. The Trial Chamber found further that

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[757] Mr Arido's Appeal Brief, paras 43, 45.
[758] Sentencing Decision, para. 19.
[759] Sentencing Decision, para. 23.
[760] Sentencing Decision, para. 25.
[761] Sentencing Decision, para. 25.
[762] Sentencing Decision, para. 71.
[763] Sentencing Decision, para. 72.

> [e]ven though the Chamber does not require a causal link between the illicit coaching of witnesses and their actual testimony, it is nevertheless attentive to the fact that the witnesses coached by Mr Arido subsequently testified falsely in the Main Case. Specifically, (i) D-2 testified falsely regarding payments, his acquaintance with other individuals and the nature and number of prior contacts with the Main Case Defence; (ii) D-3 testified falsely regarding payments and his acquaintance with other individuals; (iii) D-4 testified falsely regarding his acquaintance with other individuals; and (iv) D-6 testified falsely regarding payments, the nature and number of prior contacts with the Main Case Defence and his acquaintance with other individuals. The Chamber considers this to be relevant in its assessment of the gravity of the offences.[764] [Footnotes omitted.]

325. The Trial Chamber stated further that it had not found any aggravating circumstances.[765]

(b) Submissions of the parties

(i) Mr Arido

326. Mr Arido submits that the Trial Chamber erred (i) in considering damage in its gravity assessment;[766] and (ii) in attributing damage caused by others to Mr Arido.[767]

327. Mr Arido argues that the Trial Chamber erred in law in including damage in its gravity assessment of the offence under article 70 (1) (c) of the Statute.[768] He argues that, since the Trial Chamber considered, in the Conviction Decision, that the offence under article 70 (1) (c) of the Statute was a conduct-based offence and "damage [was] not part of the *actus reus"* of this offence, the "Trial Chamber went beyond the required elements of the offence" in considering any results when assessing gravity.[769] Mr Arido argues further that the only alternative available to the Trial Chamber was to consider damage as an aggravating circumstance.[770] However, since the Trial Chamber did not find any aggravating circumstances and was "unable to rely upon damage as an aggravating factor the Trial Chamber sought to rely upon it anyway by impermissibly disguising this unproven and unestablished factor" within its gravity

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[764] Sentencing Decision, para. 73, referring to Conviction Decision, paras 48, 142-145, 389, 392, 394-404, 412-415.
[765] Sentencing Decision, para. 96. *See also* paras 78-85.
[766] Mr Arido's Appeal Brief, paras 46-55.
[767] Mr Arido's Appeal Brief, paras 56-64.
[768] Mr Arido's Appeal Brief, para. 46.
[769] Mr Arido's Appeal Brief, paras 46, 49.
[770] Mr Arido's Appeal Brief, para. 50.

assessment.[771] Mr Arido argues that the Trial Chamber's error ultimately led to an inflated sentence.[772]

328. Mr Arido submits further that the Trial Chamber improperly attributed damage caused by others to Mr Arido when discussing his causal contribution to the subsequent false testimony of witnesses D-2, D-3, D-4, and D-6 in the Main Case and that this error inflated the gravity of the offence and, consequently his sentence.[773] In that regard, he argues that the Trial Chamber found in the Conviction Decision that the four witnesses' false testimony about payments, acquaintances and the number of prior contacts in the Main Case were explicitly attributed to Mr Kilolo whereas in the Sentencing Decision, it attributed these instances of false testimony, and hence damage caused, to him.[774] Mr Arido argues that the Trial Chamber therefore "mis-assessed" the source of the damage by attributing Mr Kilolo's acts to him in contradiction of its finding in the Conviction Decision.[775] Mr Arido submits that the Trial Chamber's consideration of the false testimony in the Main Case as a relevant factor in its assessment of gravity[776] is erroneous because he did not cause this "harm or damage".[777] He avers that the link between his acts and the false testimony was not established.[778] Mr Arido adds that the attribution of the harm resulting from the false testimony was a "major component of the Trial Chamber's reasoning" as regards the gravity of the offence and therefore, his sentence is founded on a manifest error.[779]

(ii) The Prosecutor

329. The Prosecutor responds that the Trial Chamber was "fully entitled" to take the "damage and harm caused" into account since the gravity assessment of an offence "is not confined to the elements of that offence".[780] The Prosecutor argues, that, for the purposes of article 70 (1) (c) of the Statute, the harm "lies in the illicit and deliberate

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[771] Mr Arido's Appeal Brief, paras 50-52, 54.
[772] Mr Arido's Appeal Brief, para. 55.
[773] Mr Arido's Appeal Brief, paras 56-57, referring to Sentencing Decision, para. 73.
[774] Mr Arido's Appeal Brief, para. 62, referring to Sentencing Decision, para. 73, referring to Conviction Decision, paras 360, 363, 366.
[775] Mr Arido's Appeal Brief, para. 56.
[776] Mr Arido's Appeal Brief, para. 58.
[777] Mr Arido's Appeal Brief, para. 59.
[778] Mr Arido's Appeal Brief, paras 59-60, referring to Conviction Decision, paras 872, 947.
[779] Mr Arido's Appeal Brief, para. 64.
[780] Prosecutor Consolidated Response, para. 211.

conduct of the perpetrator to tamper with the reliability of evidence".[781] She avers that the false testimony of the coached witnesses could be considered to assess the gravity of the offence or as an aggravating circumstance as "long as it is not double-counted", as it is connected to the offences for which Mr Arido has been convicted, and were foreseeable by him.[782] The Prosecutor argues that the four witnesses gave false evidence on issues concerning prior contacts with the Main Case Defence, payments received, and their acquaintance with certain persons; and that this shows that it was foreseeable that these witnesses "would falsely testify about these topics, and that their false testimony occurred in the ordinary course of events of the offences for which Arido was convicted".[783]

330. The Prosecutor avers further that the four witnesses "testified in accordance with Arido's briefing" and promises of money and benefits to them.[784] The Prosecutor contends that, while the Trial Chamber did not find that Mr Arido coached the four witnesses "on their contacts with the Defence, payments and benefits they received and/or were promised, and their acquaintances with certain persons", it did find that "the criminal scheme depended on secrecy".[785] She maintains that the witnesses' lies "about these topics were intrinsically linked to [the] lies they told on issues related to the merits" of the Main Case as the truth about prior contacts with the Defence or payments/benefits received "would have exposed the criminal scheme".[786] For these reasons, the Prosecutor argues that the four witnesses' false testimony was foreseeable by Mr Arido and the Trial Chamber reasonably considered that their false testimony was relevant to the gravity assessment of the offence.[787]

331. The Prosecutor argues further that Mr Arido's actions were "pivotal" as "he identified and recruited the witnesses and introduced them to Kilolo so that they

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[781] Prosecutor Consolidated Response, para. 212.
[782] Prosecutor Consolidated Response, para. 213.
[783] Prosecutor Consolidated Response, paras 214, 219, referring to Conviction Decision, paras 125-132, 320-352, 669-670, 674, 944.
[784] Prosecutor Consolidated Response, para. 215, referring to Conviction Decision, paras 388, 343, 391, 412-415.
[785] Prosecutor Consolidated Response, para. 217, referring to Conviction Decision, paras 251, 819, 872, 947.
[786] Prosecutor Consolidated Response, para. 217.
[787] Prosecutor Consolidated Response, paras 218, 221.

would testify in favour of Bemba".[788] According to the Prosecutor, there is no contradiction between the Trial Chamber's finding in the Sentencing Decision and its conclusion in the Conviction Decision to acquit him for aiding and abetting the offences under article 70 (1) (a) and (b) of the Statute as these are "two different determinations".[789] She argues that, while the Trial Chamber could have been clearer, it found "that the evidence was sufficient to establish beyond reasonable doubt that the false testimony was foreseeable and was the ordinary consequence of Arido's crimes to aggravate his sentence, but it was insufficient to establish Arido's guilt as an aider and abettor".[790]

332. Finally, the Prosecutor argues that even if the Trial Chamber erred in this regard, such an error would be "harmless" given that a sentence of 11 months of imprisonment is relatively low and proportionate to the offence for which Mr Arido was convicted.[791]

(iii) Determination by the Appeals Chamber

333. Mr Arido argues that because the Trial Chamber considered that the offence under article 70 (1) (c) of the Statute was a "conduct-based" offence, the damage caused, which is the result of the conduct, but not part of the offence itself, should not have been considered as part of the gravity assessment and alleges that alternatively the Trial Chamber could only consider damage as an aggravating circumstance. The Appeals Chamber is unpersuaded by this argument. As explained at paragraph 112 above, what is of importance is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence carefully, avoiding that the same factor is relied upon more than once. Therefore, whether the extent of the damage caused was considered as part of the gravity assessment of the offence rather than an aggravating circumstance is immaterial. The Appeals Chamber therefore rejects Mr Arido's arguments.

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[788] Prosecutor Consolidated Response, para. 219.
[789] Prosecutor Consolidated Response, para. 222, referring to Conviction Decision, paras 872, 947, 949.
[790] Prosecutor Consolidated Response, para. 222, referring to Conviction Decision, para. 25; Sentencing Decision, para. 73.
[791] Prosecutor Consolidated Response, para. 223.

334. Mr Arido argues further that the Trial Chamber erred in relying, for its gravity assessment, on the fact that the four witnesses subsequently testified falsely about payments, acquaintances and the number of prior contacts, even though the Trial Chamber had found that there was no link between his conduct and the false testimony, which instead had been attributed to Mr Kilolo.[792] This argument gives rise to the issue of whether the fact that witnesses D-2, D-3, D-4 and D-6 testified falsely about payments, acquaintances and the nature and number of prior contacts may be considered – in the determination of Mr Arido's sentence – as a consequence of his conduct of corruptly influencing them on issues related to the "merits" of the Main Case. The Appeals Chamber has explained above[793] that consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person.

335. The Appeals Chamber recalls that the Trial Chamber found that Mr Arido, by promising money and relocation to Europe "as encouragement to give certain evidence in the Main Case",[794] recruited and briefed the four witnesses with the intent "to manipulate [their] testimonial evidence".[795] These findings which have not been reversed on appeal, provide a sufficient basis to establish that it was objectively foreseeable by Mr Arido, as a result of his corrupt influence on the witnesses in relation to issues related to the "merits" of the Main Case, that these witnesses would testify falsely about payments, acquaintances and the nature and number of prior contacts.

336. The Appeals Chamber considers that this conclusion is not contradicted by the Trial Chamber's finding in the Conviction Decision that the false testimony of the four witnesses was not linked to Mr Arido's conduct.[796] This finding was made in the context of determining Mr Arido's criminal responsibility for assisting these witnesses in giving false testimony as an offence under article 70 (1) (a) of the

[792] Mr Arido's Appeal Brief, paras 57, 59, 62, referring to Sentencing Decision, para. 73; Conviction Decision, para, 872.
[793] *See supra* para. 263.
[794] Sentencing Decision, para. 77.
[795] Sentencing Decision, para. 75.
[796] Conviction Decision, para. 872.

Statute, and his liability under article 25 (3) (c) of the Statute in relation to this offence. Instead, for the purpose of assessing the gravity of the offence in relation to which Mr Arido was convicted the question was a different one, namely whether the false testimony of the witnesses about payments, acquaintances and the nature and number of prior contacts – was at least objectively foreseeable by Mr Arido.

337. Therefore, the Appeals Chamber does not consider that the Trial Chamber erred when as part of its assessment of an appropriate sentence for Mr Arido, it took into account the fact that witnesses D-2, D-3, D-4 and D-6 testified falsely about payments, acquaintances and the nature and number of prior contacts.

338. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

3. Alleged errors regarding mitigating circumstances

(a) Relevant part of the Sentencing Decision

339. The Trial Chamber noted that, whilst the mitigating circumstances listed under rule 145 (2) (a) (ii) of the Rules do not need to directly relate to the offences and are not limited to the scope of the confirmed charges or the Conviction Decision, they must relate "directly to the convicted person" and be established on a balance of probabilities.[797] The Trial Chamber observed further that the existence of mitigating circumstances "does not lessen the gravity of the offence but becomes relevant for diminishing the sentence".[798]

340. In considering Mr Arido's individual circumstances, the Trial Chamber stated that it had considered "all those factors that are not directly related to the offence committed, or to Mr Arido's culpable conduct".[799] The Trial Chamber considered that his good behaviour and cooperation with the Court did not *per se* amount to mitigating circumstances within the meaning of rule 145 (2) (a) of the Rules.[800] Similarly, the Trial Chamber considered that the absence of prior convictions[801] and

[797] Sentencing Decision, para. 24.
[798] Sentencing Decision, para. 24.
[799] Sentencing Decision, para. 86.
[800] *See* Sentencing Decision, para. 88, referring, *inter alia*, to Mr Arido's Sentencing Submissions, paras 23-38.
[801] *See* Sentencing Decision, para. 89, referring, *inter alia*, to Mr Arido's Sentencing Submissions, para. 22.

his continued support for his family were not factors in mitigation.[802] It reasoned that the absence of any prior conviction and the "impact on Mr Arido's family of his incarceration in a foreign country" were common to many individuals convicted by international tribunals.[803] Likewise, the Trial Chamber considered that his current unemployment situation and asylum situation in France to be "extraneous considerations to the present proceedings and are likely to change in the future".[804]

341. Nevertheless, the Trial Chamber took into account these aforementioned factors as part of Mr Arido's overall circumstances pursuant to rule 145 (1) (b) of the Rules when determining the appropriate sentence.[805] It also considered, as part of Mr Arido's overall circumstances, his claims of advocacy towards peace, justice and reconciliation for Central African Republic, and his generosity towards compatriots and persons in need.[806] Regarding Mr Arido's allegation about the assault on one of his family members, the Trial Chamber found that even if this claim were to be "accepted on a balance of probabilities", it could "only have a very limited weight".[807]

342. When determining Mr Arido's sentence, the Trial Chamber concluded that

> [it] has weighed and balanced all the factors as set out above. It has found no aggravating or mitigating circumstances and took into account Mr Arido's good behaviour throughout the trial, his personal situation, his peace, justice and reconciliation advocacy for the Central African Republic, his generosity towards compatriots and persons in need, the absence of prior convictions and family situation.[808]

(b) Submissions of the parties

(i) Mr Arido

343. Mr Arido submits that the Trial Chamber erred in finding that there was no mitigating circumstances.[809] He argues that the Trial Chamber departed from its obligation to apply the "principles and rules of international law" as well as

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[802] *See* Sentencing Decision, para. 90, referring, *inter alia*, to Mr Arido's Sentencing Submissions, paras 39-49, 52-56.
[803] Sentencing Decision, paras 89-90.
[804] *See* Sentencing Decision, para. 91, referring to Mr Arido's Sentencing Submissions, paras 2, 39, 41.
[805] Sentencing Decision, paras 88-91.
[806] Sentencing Decision, para. 92, referring, *inter alia*, to Mr Arido's Sentencing Submissions, paras 57-68.
[807] Sentencing Decision, para. 90, referring *inter alia*, to Mr Arido's Sentencing Submissions, para. 47.
[808] Sentencing Decision, para. 96.
[809] Mr Arido's Appeal Brief, para. 65, referring to Sentencing Decision, para. 96.

"principles of law derived by the Court from national laws of legal systems of the world" pursuant to article 21 (1) (b) and (c) of the Statute.[810] Mr Arido avers that, while the Trial Chamber distinguished between article 5 'crimes' and 'offences' under article 70 of the Statute, it failed to apply this conceptual distinction when considering mitigating factors.[811]

344. In this regard, Mr Arido alleges that the Trial Chamber erred in failing to accord any weight to the fact that Mr Arido had no prior convictions,[812] his specific family circumstances, [813] as well as to his "incarceration in foreign countries, current unemployment situation and asylum application in France".[814] Furthermore, he argues that it is unclear why the Trial Chamber did not consider his "good character or individual circumstances that lead to the additional hardships of the sentence" when these factors were "clearly and directly related to him",[815] a requirement that the Trial Chamber itself acknowledged.[816]

345. Mr Arido argues further that the Trial Chamber's "restrictive interpretation" of mitigating circumstances finds no support in the Rules.[817] Mr Arido argues that the Trial Chamber rejected without explanation the factors that he had pleaded as mitigating factors and instead erred by characterising them "under the head of 'overall circumstances'", yet discussing them in the "individual circumstances" section.[818] He argues that the term "overall circumstances" is not a legal term found within the Statute or the Rules.[819] According to Mr Arido, the scope of rule 145 (2) (a) of the Rules "goes beyond factors that mitigate" one's culpability such as "diminished mental capacity" because the Rules provide that "'conduct after the act' should be considered".[820] Mr Arido adds that the Trial Chamber failed to provide a reasoned

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[810] Mr Arido's Appeal Brief, para. 66.
[811] Mr Arido's Appeal Brief, paras 67, 70, referring to Sentencing Decision, para. 32.
[812] Mr Arido's Appeal Brief, paras 68-77.
[813] Mr Arido's Appeal Brief, paras 78-83.
[814] Mr Arido's Appeal Brief, paras 84-91.
[815] Mr Arido's Appeal Brief, para. 97 (footnote omitted).
[816] Mr Arido's Appeal Brief, para. 96, referring to Sentencing Decision, para. 24.
[817] Mr Arido's Appeal Brief, para. 97.
[818] Mr Arido's Appeal Brief, para. 94 (footnotes omitted).
[819] Mr Arido's Appeal Brief, para. 95.
[820] Mr Arido's Appeal Brief, para. 97.

opinion for its conclusions, which makes it impossible to discern which standard of proof was applied.[821]

346. Finally, Mr Arido submits that the Trial Chamber failed to provide a reasoned opinion as to the weight it gave to the various factors considered under the "Overall Circumstances" and their impact on the sentence imposed.[822] He argues that, while "a holistic reading of the [Sentencing Decision] indicates 'individual circumstances' probably do not include factors that could increase sentence", the Trial Chamber, but for the alleged assault on a family member, failed to articulate in what direction the factors forming part of the "overall circumstances" would operate, i.e. whether they would diminish or increase a sentence.[823] Mr Arido concedes that although it is not always possible to assign a "precise quantity" of consideration to a specific factor across the multitude of factual scenarios that can arise in sentencing,[824] the real impact of these factors is not known because of the Trial Chamber's lack of reasoning.[825] He adds that the lack of explanation as to the weight and impact of the "overall circumstances" upon the sentence constitutes an abuse of discretion that materially affects the Sentencing Decision.[826]

(ii) The Prosecutor

347. The Prosecutor responds that the Trial Chamber took into account Mr Arido's identified mitigating factors.[827] The Prosecutor argues that the Trial Chamber "correctly refused to consider these factors as mitigating circumstances under rule 145(2)(a) since they are common to many convicted persons".[828] She avers that the Trial Chamber considered them in relation to Mr Arido's "overall circumstances" under rule 145 (1) (b) of the Rules.[829] The Prosecutor contends that the Trial Chamber expressly addressed these factors and appears "to have taken them into account in

[821] Mr Arido's Appeal Brief, para. 98.
[822] Mr Arido's Appeal Brief, para. 99.
[823] Mr Arido's Appeal Brief, para. 101 (emphasis in original), referring to Sentencing Decision, paras 25, 86.
[824] Mr Arido's Appeal Brief, para. 102, referring to Sentencing Decision, paras 90, 96.
[825] Mr Arido's Appeal Brief, para. 103.
[826] Mr Arido's Appeal Brief, para. 103.
[827] Prosecutor Consolidated Response, para. 224.
[828] Prosecutor Consolidated Response, para. 225.
[829] Prosecutor Consolidated Response, para. 225.

Arido's favour - although not under rule 145(2)(a)".[830] The Prosecutor argues that, to the extent that the Trial Chamber has considered a factor in its determination of a sentence, it is "immaterial whether it considers such a factor in determining the gravity of the offence or as an aggravating or mitigating factor, or under rule 145(1)(c) or under rule 145(2)" of the Rules, as long as the "same factor is not considered twice".[831] She submits that Mr Arido does not substantiate how the Trial Chamber's approach "constituted an error of law or an abuse of discretion" or how the alleged error "materially affects the Sentencing Decision and renders the sentence disproportionate".[832]

348. The Prosecutor maintains further that the Trial Chamber was under no obligation "to expressly account for *how much* weight it gave to each of these factors and its 'ultimate impact' on the sentence imposed" as "[s]uch an approach is impracticable" and unsupported "by the practice of this Court or by any international tribunal".[833] Lastly, the Prosecutor avers that "the Chamber would not have erred even if it had given no weight to Arido's good behaviour throughout trial, his family circumstances and his alleged good deeds".[834] The Prosecutor argues that it is expected that he should behave well at trial and that his family situation is a common factor to many convicted persons and that "he fails to substantiate his alleged good deeds".[835]

(c) Determination by the Appeals Chamber

349. Mr Arido essentially argues that the Trial Chamber erred (i) in finding that the factors he claimed to be mitigating did not constitute mitigating circumstances and in considering the "overall circumstances" in a section relating to Mr Arido's individual circumstances; and (ii) in failing to provide reasons as to the weight it gave to the various factors considered under the "overall circumstances" and their impact on the sentence imposed.

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[830] Prosecutor Consolidated Response, para. 225, referring to Sentencing Decision, para. 96. *See also* Prosecutor Consolidated Response, para. 228.
[831] Prosecutor Consolidated Response, para. 226 (footnote omitted).
[832] Prosecutor Consolidated Response, para. 228.
[833] Prosecutor Consolidated Response, para. 228.
[834] Prosecutor Consolidated Response, para. 229.
[835] Prosecutor Consolidated Response, para. 229.

350. Turning to Mr Arido's first argument, the Trial Chamber considered that his good behaviour and cooperation with the Court, the absence of prior convictions, his continued support for his family, his current unemployment situation and asylum situation in France were not relevant mitigating circumstances, though it stated that it would take these factors into account as part of the "overall circumstances".[836] The Appeals Chamber observes that the legal basis for the Trial Chamber's reference to "overall circumstances" as a separate category of factors is unclear. While the Trial Chamber referred to rule 145 (1) (b) of the Rules the Appeals Chamber recalls that this provision concerns a trial chamber's ultimate balancing of all the relevant factors, without introducing any additional factors to those listed in article 78 (1) of the Statute and rule 145 (1) (c) and (2) of the Rules.

351. Notwithstanding this, the Appeals Chamber recalls that what is of importance is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once.[837] In the case at hand, the Appeals Chamber observes that the Trial Chamber did identify and examine factors it considered relevant,[838] including those referred to by Mr Arido, and took them into account when weighing and balancing all these factors.[839] In this context, the Appeals Chamber finds that the Trial Chamber did not err when it decided not to consider the factors referred to by Mr Arido as mitigating circumstances under rule 145 (2) (a).

352. Turning to Mr Arido's contention that the Trial Chamber failed to explain what weight it gave to the various factors considered under the "overall circumstances" and their impact on the sentence imposed, the Appeals Chamber notes that the Trial Chamber did provide reasoning when it considered why some factors did not amount to mitigating circumstances.[840] However, in assigning weight to each of Mr Arido's individual circumstances, the Appeals Chamber notes that the Trial Chamber did not specify what weight it considered to be reasonable. In these circumstances, while it

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[836] *See* Sentencing Decision, paras 88-91.
[837] *See supra* para.112.
[838] *See* Sentencing Decision, paras 87-92.
[839] *See* Sentencing Decision, paras 87-91, 96.
[840] *See* Sentencing Decision, paras 88-91.

would have been desirable for the Trial Chamber to do so, the Appeals Chamber nevertheless considers that in the exercise of its discretion the Trial Chamber did in fact consider these factors and assign weight to them in its determination of an appropriate sentence.

353. Accordingly, the Appeals Chamber rejects Mr Arido's arguments.

C. Request for compensation under article 85 of the Statute

354. The Appeals Chamber notes that Mr Arido requests the Appeals Chamber to declare that he is entitled to "an effective compensation for a grave and manifest miscarriage of justice, pursuant to Article 85 of the Statute".[841] Having dismissed his appeal against the Sentencing Decision, there is no basis for such a finding and the Appeals Chamber dismisses this request *in limine*. It follows therefore, that the Appeals Chamber sees no need to consider whether, in light of rule 173 (1) of the Rules, Mr Arido's request should have been addressed to the Presidency. For the reasons stated above, Mr Arido's appeal is rejected.

D. Overall conclusion

355. For the reasons stated above, Mr Arido's appeal is rejected.

VIII. APPROPRIATE RELIEF

356. Article 83 (2) (a) and (b) of the Statute stipulates that, in an appeal against a sentence, if the Appeals Chamber finds factual, legal or procedural errors materially affecting the sentence, or unfairness affecting its reliability, it may reverse or amend the sentence or order a new trial before a different trial chamber. Pursuant to article 83 (3) of the Statute, "[i]f in an appeal against sentence, the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7".

357. The Appeals Chamber recalls that it has rejected all grounds of appeal advanced by Mr Arido and Mr Babala against their respective sentences. The sentences imposed on them are therefore confirmed.

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[841] Mr Arido's Appeal Brief, paras 5, 107.

358. The Appeals Chamber has also rejected all grounds of appeal raised by Mr Bemba against his sentence.

359. In relation to the Prosecutor's appeal, the Appeals Chamber has found that the Trial Chamber committed a series of errors with respect to the sentences pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo. In particular, the Trial Chamber determined the gravity of the offences in the present case with reference to an irrelevant consideration and improperly considered that the form of responsibility for the convictions under article 70 (1) (a) of the Statute warranted *per se* a reduction of the corresponding sentences. In addition, it acted *ultra vires* by suspending the remaining terms of imprisonment imposed on Mr Mangenda and Mr Kilolo. The Appeals Chamber considers that the sentences pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo are materially affected by each of these errors. In these circumstances, the Appeals Chamber considers it appropriate to reverse their sentences. Therefore, it becomes necessary to impose a new sentence on Mr Bemba, Mr Mangenda and Mr Kilolo.

360. The Prosecutor requests that the Appeals Chamber itself impose such a new sentence and sentence each of the three convicted persons to five years of imprisonment.[842] Mr Mangenda responds that, should the Appeals Chamber find any of the Prosecutor's grounds to be well-founded, it should remand the matter to the original Trial Chamber, so that it could enter a new sentence, which would also be efficient and expeditious.[843] He also argues that it would not be in compliance with international human rights if the Appeals Chamber were to determine the sentence itself. [844] Mr Kilolo responds that the Prosecutor fails to demonstrate the appropriateness of and basis for the proposed sentence of five years of imprisonment.[845] Mr Bemba responds that, if the Appeals Chamber were to allow the Prosecutor's appeal and find that the imposed sentence was too lenient, it should

[842] Prosecutor's Appeal Brief, para. 171 (v).
[843] Mr Mangenda's Response, para. 132.
[844] Mr Mangenda's Response, paras 121-132.
[845] Mr Kilolo's Response, para. 118.

clarify the appropriate range of sentence for the future, "without actually imposing it in this case on appeal", so as to ensure fairness.[846]

361. The Appeals Chamber, having reversed the sentence, finds that it is most appropriate in the circumstances of this case to remand the matter to Trial Chamber VII for it to determine a new sentence.[847]

362. The Appeals Chamber considers that the power to remand follows from its power to reverse the sentence in case it has found errors materially affecting the sentence because, if the sentence is vacated, a new sentence has to be determined. The Appeals Chamber notes the arguments advanced by Mr Mangenda and Mr Bemba that, if their sentences are reversed on the ground of the Prosecutor's appeal, any new determination of their sentence should be made by the original chamber. The Appeals Chamber considers that in the particular circumstances of this case, taking into account, *inter alia,* the nature of the offences and the errors identified above, remanding the matter to the same chamber is the most appropriate remedy.

Done in both English and French, the English version being authoritative.

Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 8th day of March 2018
At The Hague, The Netherlands

[846] Mr Bemba's Response, paras 24, 26.
[847] The Appeals Chamber recalls that in its judgment on the appeals brought against the Conviction Decision, it has confirmed Mr Bemba's, Mr Mangenda's and Mr Kilolo's convictions for the offences under article 70 (1) (a) and (c) of the Statute, and has reversed their convictions for the offence under article 70 (1) (b) of the Statute.