



**Original: English**

**No. ICC-01/05-01/13 A10**

**Date: 27 November 2019**

**THE APPEALS CHAMBER**

**Before:**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

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

**Public document**

**Judgment**

**on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII of 17 September 2018 entitled ‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’**

**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 Jean-Pierre Bemba Gombo**  
Ms Melinda Taylor

**REGISTRY**

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**Registrar**  
Mr Peter Lewis

Judgment .....	5
I. Key findings.....	5
II. Introduction.....	6
III. Mr Bemba’s application for additional evidence and related matters .....	8
IV. Standard of review .....	14
V. Merits .....	15
A. First ground of appeal .....	15
1. Gravity of the offence .....	17
(a) Relevant part of the <i>Bemba et al</i> Sentencing Appeal Judgment .....	17
(b) Relevant part of the Re-Sentencing Decision .....	18
(c) Determination by the Appeals Chamber .....	19
2. Mr Bemba’s degree of participation .....	23
(a) Relevant part of the <i>Bemba et al</i> Sentencing Appeal Judgment.....	23
(b) Relevant part of the Re-Sentencing Decision .....	23
(c) Determination by the Appeals Chamber.....	25
3. Conclusion .....	29
B. Second ground of appeal.....	29
1. Whether Mr Bemba was arbitrarily detained.....	29
(a) Background and relevant parts of the Re-Sentencing Decision.....	30
(i) Release from detention following acquittal in the Main Case .....	30
(ii) Credit for time spent in detention.....	30
(b) Determination by the Appeals Chamber.....	32
(i) Whether the Trial Chamber disregarded Mr Bemba’s right to be heard	32
(ii) Whether the Trial Chamber erred in finding Mr Bemba’s detention	33
lawful .....	33
2. Whether the Trial Chamber erred by failing to take into consideration Mr	37
Bemba’s acquittal in the Main Case .....	37

(a)	Background and relevant parts of the Re-Sentencing Decision.....	37
(i)	The Prosecutor’s statements and submissions regarding the acquittal in the Main Case .....	37
(ii)	Impact of the acquittal in the Main Case on the sentence .....	39
(b)	Determination by the Appeals Chamber.....	39
3.	Conclusion .....	44
C.	Third ground of appeal.....	44
1.	Alleged failure to address the consequences of Mr Bemba’s prolonged detention.....	45
(a)	Relevant part of the Re-Sentencing Decision .....	45
(b)	Determination by the Appeals Chamber.....	46
2.	Alleged error regarding the calculation of the imposed fine .....	49
(a)	Relevant part of the Re-Sentencing Decision .....	49
(b)	Determination by the Appeals Chamber.....	50
3.	The Trial Chamber did not apply the statutory protection against ne bis in idem and penalties that fall outside article 70.....	55
(a)	Background and relevant part of the Re-Sentencing Decision .....	55
(b)	Determination by the Appeals Chamber.....	57
4.	Conclusion .....	58
VI.	Appropriate relief.....	58

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled ‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’ of 17 September 2018 (ICC-01/05-01/13-2312),

After deliberation,

Unanimously

*Delivers* the following

## JUDGMENT

1. The ‘*Request to Admit Additional Evidence*’ (ICC-01/05-01/13-2319) and the ‘Request for Leave to Reply to Prosecution’s response to Bemba’s Request to Admit Additional Evidence’ (ICC-01/05-01/13-2323) are rejected.
2. The ‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’ (ICC-01/05-01/13-2312) is confirmed.

## REASONS

### I. KEY FINDINGS

3. It is unhelpful to compare the sentences imposed on different convicted persons without reference to the specific facts and individual circumstances of each person.
4. It is not an error to consider solvency as a relevant factor for the determination of a fine. Solvency is a relevant consideration in numerous jurisdictions and its underlying rationale is the need to ensure a deterrent effect.

## II. INTRODUCTION

5. Following appeals against an initial guilty verdict for offences against the administration of justice pursuant to article 70 of the Statute,<sup>1</sup> the Appeals Chamber confirmed two of Mr Jean-Pierre Bemba Gombo's convictions in 2018, namely, the convictions for having corruptly influenced 14 defence witnesses and for having solicited the giving of false evidence by these witnesses under article 70(1)(a) and (c) of the Statute, respectively.<sup>2</sup> The Appeals Chamber overturned Mr Bemba's conviction for having presented evidence that a party knows to be false or forged under article 70(1)(b) of the Statute.<sup>3</sup>

6. Following the imposition of a sentence of one year imprisonment and a fine of 300,000.00 euros by Trial Chamber VII (the 'Trial Chamber'),<sup>4</sup> the Prosecutor successfully appealed the suspended sentences and other sentencing matters. The Appeals Chamber found that the Trial Chamber committed errors with respect to the pronounced sentences.<sup>5</sup> In particular, the Appeals Chamber found that the Trial Chamber erred (i) in its assessment of the nature of the false testimony given by witnesses on non-merits issues; (ii) in its justification for distinguishing principal from accessorial liability in this case; (iii) with respect to its power to suspend sentences; and (iv) in its assessment of the length of the time frame at issue in this

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<sup>1</sup> Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red (the '[Conviction Decision](#)'); confidential version notified same day), p. 455.

<sup>2</sup> Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red (the '[Bemba et al Appeal Judgment](#)'); confidential version notified same day), para. 1631.

<sup>3</sup> [Bemba et al Appeal Judgment](#), para. 1631.

<sup>4</sup> Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr (the '[Sentencing Decision](#)'), p. 99. Judge Pangalangan was of the opinion that Mr Bemba should have been 'entitled to the full sentencing credits for the entire period of his detention in this case, from his 2013 arrest to the present'. He also considered the one year imprisonment to be too low and would have proposed a sentence 'closer to four years of imprisonment'. See Separate Opinion of Judge Raul C. Pangalangan, 22 March 2017, ICC-01/05-01/13-2123-Anx ('[Judge Pangalangan's Separate Opinion](#)'), paras 1-3, 17-19.

<sup>5</sup> 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", 8 March 2018, ICC-01/05-01/13-2276-Red (the '[Bemba et al Sentencing Appeal Judgment](#)'); confidential version notified same day), para. 359.

case.<sup>6</sup> Consequently, the Appeals Chamber reversed Mr Bemba's sentence and remanded the matter to the Trial Chamber for a new determination.<sup>7</sup>

7. On 8 June 2018, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* concerning crimes under article 5 of the Statute (the 'Main Case'), the Appeals Chamber, by majority, discontinued the proceedings with respect to some of the criminal acts charged and acquitted Mr Bemba of the remaining charges.<sup>8</sup> Following Mr Bemba's acquittal in the Main Case, the Trial Chamber ordered, on 12 June 2018, the conditional release of Mr Bemba (the '12 June 2018 Decision').<sup>9</sup>

8. On 17 September 2018, the Trial Chamber re-sentenced Mr Bemba to one year imprisonment and imposed a fine of 300,000.00 euros to be paid by Mr Bemba within three months (the 'Re-Sentencing Decision').<sup>10</sup>

9. Mr Bemba is appealing the Re-Sentencing Decision on the following three grounds:<sup>11</sup>

(i) The Trial Chamber did not comply with the Appeals Chamber's directions on the determination of the new sentence.<sup>12</sup>

(ii) The Trial Chamber abused its discretion, and erred in law and procedure, by failing to remedy 'the cumulative impact of egregious violations of [his] rights'.<sup>13</sup>

(iii) The Trial Chamber abused its discretion by imposing a disproportionate sentence and fine, failed to consider relevant considerations and erred in law by imposing a sentence which exceeds the level of his culpability.<sup>14</sup>

<sup>6</sup> [Bemba et al Sentencing Appeal Judgment](#), paras 41-45, 60-61, 63-80, 168.

<sup>7</sup> [Bemba et al Sentencing Appeal Judgment](#), paras 361-362.

<sup>8</sup> Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red (the '[Bemba Appeal Judgment](#)'; confidential version notified same day).

<sup>9</sup> [Decision on Mr Bemba's Application for Release](#), 12 June 2018, ICC-01/05-01/13-2291, para. 26, p. 13.

<sup>10</sup> [Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo](#), 17 September 2018, ICC-01/05-01/13-2312, pp. 50-51.

<sup>11</sup> Notice of Appeal, 18 October 2018, ICC-01/05-01/13-2313 (the '[Notice of Appeal](#)'); Article 82(1)(a) [*sic*] Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled "Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo", 17 December 2018, ICC-01/05-01/13-2315 (the '[Appeal Brief](#)'), with [Annex A](#) (ICC-01/05-01/13-2315-AnxA) and Annex B (ICC-01/05-01/13-2315-Conf-AnxB).

<sup>12</sup> [Appeal Brief](#), paras 2, 3-16.

<sup>13</sup> [Appeal Brief](#), p. 45.

<sup>14</sup> [Appeal Brief](#), p. 79.

10. The Prosecutor responds that the Appeals Chamber should dismiss Mr Bemba's appeal because he fails to show any error in the Trial Chamber's determination of the sentence.<sup>15</sup>

11. The Appeals Chamber recalls that on 20 August 2019, having considered arguments by the parties,<sup>16</sup> it summarily dismissed the following parts of Mr Bemba's appeal: (i) any request for reversal of his convictions; (ii) arguments of which the effect would be to reverse or amend findings made in the Conviction Decision; and (iii) challenges to the evidentiary regime which the Trial Chamber adopted in the conviction proceedings.<sup>17</sup> The Appeals Chamber will therefore not consider these matters in the present judgment.

12. In addition to the written submissions received on 4 September 2019, the Appeals Chamber held a hearing<sup>18</sup> at which Mr Bemba and the Prosecutor made submissions on various aspects of the appeal, including on questions which the Appeals Chamber had posed to the parties.<sup>19</sup>

### III. MR BEMBA'S APPLICATION FOR ADDITIONAL EVIDENCE AND RELATED MATTERS

13. On 18 February 2019, Mr Bemba filed an application (the 'Additional Evidence Application')<sup>20</sup> in which he requests the Appeals Chamber to admit as additional evidence on appeal: (i) two transcripts and the video-recording of public interventions from Judge Marc Perrin de Brichambaut at events organised by the Centre for International Law Research and Policy in May 2017 at the Peking University Law School in Beijing and the Judge's written and oral interventions in Florence in October 2017;<sup>21</sup> (ii) the Judge's curriculum vitae; (iii) two public information sources

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<sup>15</sup> Prosecution's Response to Bemba's "Article 82(1)(a) [*sic*] Appeal" against the Re-sentencing Decision, 18 February 2019, ICC-01/05-01/13-2320 (the '[Response](#)'), paras 3, 200, with [Annex A](#) (ICC-01/05-01/13-2320-AnxA).

<sup>16</sup> [Response](#), paras 3, 5-10, 32-63, 68-69, 73-74; Reply to the Article 81(2)(a) Appeal against the Resentencing [*sic*] Decision, 15 July 2019, ICC-01/05-01/13-2334 (the '[Reply](#)'), paras 1, 13-20.

<sup>17</sup> Decision on the scope of the appeal of Mr Jean-Pierre Bemba Gombo, 20 August 2019, ICC-01/05-01/13-2337 (the '[Decision on the Scope of the Appeal](#)'), p. 3; para. 18.

<sup>18</sup> Transcript of hearing, 4 September 2019, ICC-01/05-01/13-T-61-ENG (the '[Transcript of Hearing of 4 September 2019](#)').

<sup>19</sup> [Order in relation to the conduct of the hearing](#), 28 August 2019, ICC-01/05-01/13-2340.

<sup>20</sup> [Request to Admit Additional Evidence](#), 18 February 2019, ICC-01/05-01/13-2319, with [Annex A](#) (ICC-01/05-01/13-2319-AnxA-Red) and [Annex B](#) (ICC-01/05-01/13-2319-AnxB).

<sup>21</sup> [Additional Evidence Application](#), para. 5, [Annex A](#).



from the American Ministry of Defence and the French Ministry of Defence; (iv) two media articles; and (v) selected pages of two reports of the French Ministry of Defence (the ‘Additional Evidence’).<sup>22</sup> Mr Bemba contends that the material he seeks to admit was not available to him at trial.<sup>23</sup>

14. Mr Bemba submits that the Additional Evidence is relevant to his first ground of appeal, concerning the Trial Chamber’s alleged failure to follow the Appeals Chamber’s directives regarding the correct approach to sentencing, ‘which stemmed in turn from the Chamber’s erroneous approach to evidence’,<sup>24</sup> and to the second ground, which concerns the Trial Chamber’s alleged failure to provide an effective remedy for violations of Mr Bemba’s right to fair and impartial proceedings.<sup>25</sup> In his view, this evidence indicates that the Trial Chamber’s decision ‘to conduct the article 70 proceedings as a civil law trial [...] was contrary to the Statute, and resulted in an arbitrary and unfair conviction and sentence’.<sup>26</sup> He further contends that this evidence, read in conjunction with the Judge’s ‘background in the French Ministry of Defence’, shows that ‘Judge Perrin de Brichambaut possessed specific preconceptions as concerns Mr. Bemba’s role and responsibility, and on fundamental points of law and procedure’ which in his view ‘fundamentally undermined the fairness and impartiality of the proceedings’.<sup>27</sup>

15. At the hearing before the Appeals Chamber, Mr Bemba clarified that Judge Perrin de Brichambaut’s statements that the Trial Chamber would not grant leave to appeal interlocutory decisions had an impact on the length of the proceedings in that the Appeals Chamber was then faced with complex and novel issues, which extended the length of the appellate proceedings.<sup>28</sup> Mr Bemba also argued that the Additional Evidence confirms that in 2017 the Trial Chamber sentenced Mr Bemba ‘with the understanding that he was guilty in the Main Case’ and that when re-sentencing him, there was an onus on the Trial Chamber ‘to purge its prior findings from any

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<sup>22</sup> [Additional Evidence Application](#), para. 6, [Annex A](#).

<sup>23</sup> [Additional Evidence Application](#), paras 5-8.

<sup>24</sup> [Additional Evidence Application](#), paras 1, 10-27.

<sup>25</sup> [Additional Evidence Application](#), paras 1, 28-42.

<sup>26</sup> [Additional Evidence Application](#), para. 1.

<sup>27</sup> [Additional Evidence Application](#), paras 1, 5. *See also* paras 8, 23, 28.

<sup>28</sup> [Transcript of Hearing of 4 September 2019](#), p. 20, line 18 to p. 21, line 7.

assumption that he was in fact guilty'.<sup>29</sup> Mr Bemba seeks the reversal of his conviction and his acquittal pursuant to article 81(2)(b) of the Statute.<sup>30</sup>

16. The Prosecutor argues that Mr Bemba does not demonstrate why the material 'should be admitted as additional evidence at this late stage' as he fails to show 'the necessary diligence' given that all items are open-source material.<sup>31</sup> At the hearing before the Appeals Chamber, the Prosecutor submitted that, as far as the first ground of Mr Bemba's appeal is concerned, the Additional Evidence Application relates to issues that were ruled to be outside of the scope of the present appeal.<sup>32</sup> Regarding the second ground of appeal, the Prosecutor averred that the argument on impartiality under that ground has a different basis from the one put forward at the hearing, thus the Additional Evidence Application is not relevant to the second ground of appeal.<sup>33</sup>

17. On 4 March 2019, Mr Bemba filed a request for leave to reply (the 'Request for Leave to Reply')<sup>34</sup> to the Prosecutor's response to the Additional Evidence Application. Mr Bemba requests leave to reply on the following points: (i) the Prosecutor's 'endorsement and reliance' on the "admission" rather than the "submission" evidentiary regime as a basis to reject the Application;<sup>35</sup> (ii) that Judge Perrin de Brichambaut's former position at the French Ministry of Defence is not relevant to the present case;<sup>36</sup> (iii) that the Application is a 'dilatatory strategy to unnecessarily prolong these limited re-sentencing proceedings';<sup>37</sup> (iv) that 'Judge Perrin de Brichambaut was not afforded a right to be heard on issues concerning his former role';<sup>38</sup> (v) the Prosecutor's contention that Mr Bemba 'misstates' the Judge's

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<sup>29</sup> [Transcript of Hearing of 4 September 2019](#), p. 21, lines 8-17.

<sup>30</sup> [Additional Evidence Application](#), para. 43.

<sup>31</sup> Prosecution's response to Bemba's Request to Admit Additional Evidence, 26 February 2019, ICC-01/05-01/13-2322 (the '[Response to Additional Evidence Application](#)'), para. 3.

<sup>32</sup> [Transcript of Hearing of 4 September 2019](#), p. 35, lines 22-24.

<sup>33</sup> [Transcript of Hearing of 4 September 2019](#), p. 36, lines 4-11.

<sup>34</sup> [Request for Leave to Reply to Prosecution's response to Bemba's Request to Admit Additional Evidence](#), 4 March 2019, ICC-01/05-01/13-2323.

<sup>35</sup> [Request for Leave to Reply](#), paras 3, 5-9.

<sup>36</sup> [Request for Leave to Reply](#), paras 3, 10-13.

<sup>37</sup> [Request for Leave to Reply](#), paras 3, 14-26.

<sup>38</sup> [Request for Leave to Reply](#), paras 3, 27-30.

comments and ‘quotes them out of context’,<sup>39</sup> and (vi) the Prosecutor’s submission that the Trial Chamber’s approach was ‘consistent with adversarial proceedings’.<sup>40</sup>

18. Noting regulation 24(5) of the Regulations of the Court, the Appeals Chamber considers that Mr Bemba has not shown that the issues he wishes to reply to are new and could not reasonably have been anticipated by him. Having considered the nature of the issues identified by Mr Bemba, the Appeals Chamber finds that a reply to these issues is not necessary to determine the admissibility or otherwise of the evidence sought. Accordingly, his Request for Leave to Reply is rejected.

19. Turning to the Additional Evidence Application itself, the Appeals Chamber recalls that regulation 62 of the Regulations of the Court provides in relevant part:

1. A participant seeking to present additional evidence shall file an application setting out:

(a) The evidence to be presented;

(b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

2. The Appeals Chamber may:

(a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or

(b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response.

20. Given the nature of Mr Bemba’s arguments raised under his first and second grounds of appeal and the intended use of the additional evidence, the Appeals Chamber considers it appropriate to follow the procedure under regulation 62(2)(b) of the Regulations of the Court and shall rule on the admissibility of the additional evidence in the present judgment.

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<sup>39</sup> [Request for Leave to Reply](#), paras 3, 31-44.

<sup>40</sup> [Request for Leave to Reply](#), paras 3, 45-48.

21. In interpreting regulation 62 of the Regulations of the Court, the Appeals Chamber has affirmed that when deciding whether to admit additional evidence on appeal, ‘due consideration shall be given to the distinct features of the appellate stage of proceedings, in particular as concerns the corrective nature of appeal proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence’.<sup>41</sup> As to the relevant criteria to determine the admissibility of additional evidence, the Appeals Chamber has held that such evidence would be admissible if

(i) the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence; and (ii) it is demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part.<sup>42</sup>

22. Finally, the Appeals Chamber recalls that ‘the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81 (1) and (2) of the Statute’.<sup>43</sup>

23. The Appeals Chamber notes that, as observed by the Prosecutor,<sup>44</sup> Mr Bemba’s argument that ‘[t]here is an objective appearance that the Trial Chamber lacked impartiality *vis-à-vis* Mr. Bemba’<sup>45</sup> could have been raised at a much earlier stage of the proceedings. Mr Bemba refers to Judge Perrin de Brichambaut’s role in the French Ministry of Defence as a circumstance that would warrant, in his view, the disqualification of the judge. However, Mr Bemba at no point sought the disqualification of the judge on the basis of any potential bias. His attempt to raise this new argument on appeal on the basis of information that has been in the public domain since 2014<sup>46</sup> denotes a lack of diligence on his part, which warrants the rejection of his application.

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<sup>41</sup> [Bemba et al Appeal Judgment](#), para. 509.

<sup>42</sup> [Bemba et al Appeal Judgment](#), para. 509.

<sup>43</sup> [Bemba et al Appeal Judgment](#), para. 509.

<sup>44</sup> [Response to Additional Evidence Application](#), paras 6-9.

<sup>45</sup> [Additional Evidence Application](#), p. 15.

<sup>46</sup> See [https://asp.icc-cpi.int/en\\_menus/asp/elections/judges/2014/Nominations/Pages/PERRIN-DE-BRICHAMBAUT.-Marc-Pierre.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/judges/2014/Nominations/Pages/PERRIN-DE-BRICHAMBAUT.-Marc-Pierre.aspx).

24. If Mr Bemba had concerns regarding one of the bench judge's potential bias and had acted upon it in a diligent manner, he should have raised the argument in a timely manner and identified the material he seeks to admit earlier. This would have included the transcripts and video-recordings of Judge Perrin de Brichambaut's intervention in May 2017 that pre-date the rendering of the Re-Sentencing Decision. Any potential bias would have been discussed, litigated and adjudicated at a much earlier stage. Mr Bemba does not provide any plausible reason for the Appeals Chamber to consider the arguments advanced and the material he seeks to admit as additional evidence at this late stage.

25. Turning to the relevance of the material Mr Bemba seeks to admit to his grounds of appeal, the Appeals Chamber recalls its previous finding in its decision on the scope of Mr Bemba's appeal. The Appeals Chamber held that it will not consider his submissions challenging (i) his convictions; (ii) findings otherwise related to his convictions; and (iii) the Trial Chamber's approach to the evidence.<sup>47</sup> Therefore, insofar as the proposed evidence concerns the Trial Chamber's 'erroneous approach to evidence',<sup>48</sup> it cannot be the basis for the admission of additional evidence, as it is relevant to an argument which has been summarily dismissed.

26. The Appeals Chamber notes that Judge Perrin de Brichambaut's alleged preconceptions as to Mr Bemba's role and responsibility<sup>49</sup> could potentially relate to the second ground of appeal, where the Trial Chamber's impartiality is questioned. The Appeals Chamber observes that Judges of the Court should, in principle, be very cautious when expressing views on matters of relevance to ongoing cases. However, for the reasons that follow, it is clear that the record of Judge Perrin de Brichambaut's statements is in any event not relevant to the present appeal. The Appeals Chamber notes that under the second ground of appeal Mr Bemba addresses the issue of impartiality in the context of (i) the Prosecutor's statement and submissions regarding his acquittal in the Main Case, as well as the impact of that acquittal in general;<sup>50</sup> and (ii) the allegedly disproportionate sentence imposed on him.<sup>51</sup> He does not allege a

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<sup>47</sup> [Decision on the Scope of the Appeal](#), p. 3; para. 18.

<sup>48</sup> [Additional Evidence Application](#), paras 1, 10-27.

<sup>49</sup> [Additional Evidence Application](#), paras 1, 5. *See also* paras 8, 23, 28.

<sup>50</sup> [Appeal Brief](#), paras 114-133.

<sup>51</sup> [Appeal Brief](#), paras 134-138.

personal bias on the part of Judge Perrin de Brichambaut such that the Additional Evidence could be of any relevance.

27. Finally, at the hearing before the Appeals Chamber, Mr Bemba raised the alleged impact of Judge Perrin de Brichambaut's statements about interlocutory appeals on the length of the appellate proceedings.<sup>52</sup> To the extent Mr Bemba argues that Judge Perrin de Brichambaut's statement affords the trial chamber too much discretion in deciding on whether to grant leave to appeal, the Appeals Chamber recalls that article 82(1)(d) of the Statute provides for discretion. This is manifested by, for instance, the requirement that one of the criteria for granting leave is met 'in the opinion of the Pre-Trial or Trial Chamber'. In any event, the Appeals Chamber notes that under his second ground of appeal Mr Bemba only refers to delays allegedly occasioned by the Prosecutor and to the length of the trial proceedings in the Main Case and in this case.<sup>53</sup> Mr Bemba does not refer to delays in the context of the appellate proceedings and the remarks of Judge Perrin de Brichambaut on leave to appeal are thus not relevant to the second ground of Mr Bemba's appeal.

28. For these reasons, the Appeals Chamber finds that Mr Bemba has not shown that the Additional Evidence is relevant to any of the grounds of his appeal presently before the Appeals Chamber.<sup>54</sup> Accordingly, the Appeals Chamber rejects the Additional Evidence Application.

#### IV. STANDARD OF REVIEW

29. The Appeals Chamber recalls that trial chambers have broad discretion in the determination of an appropriate sentence.<sup>55</sup> The Appeals Chamber's primary task in an appeal against a sentencing decision is to review whether the Trial Chamber made

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<sup>52</sup> [Transcript of Hearing of 4 September 2019](#), p. 20, line 18 to p. 21, line 7.

<sup>53</sup> [Appeal Brief](#), paras 104-106.

<sup>54</sup> The Appeals Chamber notes that Mr Bemba indicated during the hearing that he does not intend to request a variation of grounds of appeal. See [Transcript of Hearing of 4 September 2019](#), p. 20, lines 14-16, p. 21, lines 18-20.

<sup>55</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 22; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014, ICC-01/04-01/06-3122 (the '[Lubanga Sentencing Appeal Judgment](#)'), para. 40.

any errors in sentencing the convicted person.<sup>56</sup> 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.<sup>57</sup>

30. 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.<sup>58</sup>

31. 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’.

## V. MERITS

### A. First ground of appeal

32. In its Decision of 20 August 2019, the Appeals Chamber summarily dismissed several arguments raised under the first ground of appeal for being outside of the permissible scope of the present appeal.<sup>59</sup> The remainder of Mr Bemba’s arguments under this ground of appeal are addressed below.

33. Mr Bemba argues that the Trial Chamber failed to comply with the Appeals Chamber’s directive to issue a concrete determination of the degree of his participation and the harm caused by his conduct in the offences under article 70(1)(a) and (c) of the Statute.<sup>60</sup> In response, the Prosecutor submits that the Trial Chamber’s

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<sup>56</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 21; [Lubanga Sentencing Appeal Judgment](#), para. 39.

<sup>57</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 21, quoting [Lubanga Sentencing Appeal Judgment](#), para. 39.

<sup>58</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 24, quoting [Lubanga Sentencing Appeal Judgment](#), para. 44.

<sup>59</sup> [Decision on the Scope of the Appeal](#), p. 3; para. 18.

<sup>60</sup> [Notice of Appeal](#), paras 4-6; [Appeal Brief](#), paras 4-16.

findings are reasonable and that it correctly considered Mr Bemba's participation as an accessory and the gravity of the article 70(1)(a) offence in its assessment.<sup>61</sup>

34. Before addressing Mr Bemba's arguments, the Appeals Chamber recalls that in the *Bemba et al* Sentencing Appeal Judgment, the Appeals Chamber found errors 'only on limited points'.<sup>62</sup> The Trial Chamber noted the limited scope of the re-sentencing proceedings.<sup>63</sup> The Re-Sentencing Decision was thus 'focus[ed] on these errors and any new considerations which may affect the sentences to be imposed'.<sup>64</sup>

35. The Trial Chamber revised its assessment of the factors relevant to Mr Bemba's degree of participation and intent in order 'to reflect its new considerations on principal versus accessorial liability in the present case'.<sup>65</sup> It considered that 'its previous balancing [of the remaining factors] remain[ed] accurate'.<sup>66</sup> The Trial Chamber was of the view that in light of this revised assessment, in combination with the 'new considerations on the nature of the false testimony', an increase of Mr Bemba's sentence for the article 70(1)(a) offence was justified to match his sentence for the article 70(1)(c) offence.<sup>67</sup> The Trial Chamber also revised its assessment 'to the extent it considered Mr Bemba's participation and intent in relation to the reversed Article 70(1)(b) offences'.<sup>68</sup>

36. The Appeals Chamber will first address Mr Bemba's challenges to the Trial Chamber's re-assessment of the gravity of the offences for which Mr Bemba was convicted. It will then consider the alleged errors in the Trial Chamber's re-assessment of his degree of participation.

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<sup>61</sup> [Response](#), paras 7, 11-13, referring to [Re-Sentencing Decision](#), paras 15-16, 18, 75.

<sup>62</sup> *See supra* para. 6.

<sup>63</sup> [Re-Sentencing Decision](#), paras 15-17.

<sup>64</sup> [Re-Sentencing Decision](#), para. 16.

<sup>65</sup> [Re-Sentencing Decision](#), paras 117-118.

<sup>66</sup> [Re-Sentencing Decision](#), paras 117-118.

<sup>67</sup> [Re-Sentencing Decision](#), para. 117.

<sup>68</sup> [Re-Sentencing Decision](#), para. 117.



1. *Gravity of the offence*

(a) **Relevant part of the *Bemba et al* Sentencing Appeal Judgment**

37. In the *Bemba et al* Sentencing Appeal Judgment, the Appeals Chamber noted that when assessing the nature of the false testimony given by the concerned defence witnesses as a relevant factor for the gravity of the offences, the Trial Chamber had ‘distinguished lies on “merit issues”’ from ‘lies on “non-merit” issues’, and assumed that the ‘latter are inherently less grave than the former’.<sup>69</sup>

38. The Appeals Chamber found 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’ and that the Trial Chamber had discretion in identifying the relevant circumstances for its assessment of the mandatory sentencing factors.<sup>70</sup> However, the Appeals Chamber was of the view that the Trial Chamber erred in not explaining ‘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 offences’ under article 70(1)(a) of the Statute, and ‘why this was the case in the present instance’.<sup>71</sup>

39. With respect to the distinction between lies on the ‘merits’ and lies on other matters, the Appeals Chamber considered that such distinction was ‘an unsuitable point of reference to measure the gravity of the concerned offences’.<sup>72</sup> In particular, it was not persuaded that ‘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’.<sup>73</sup> The Appeals Chamber further highlighted a potentially comparable significance of issues concerning the credibility of the witnesses.<sup>74</sup> It noted in this regard that ‘the purpose of questioning witnesses on issues concerning their credibility is to receive genuine information that a chamber would consider in

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<sup>69</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 41, referring to [Sentencing Decision](#), paras 115, 167, 217.

<sup>70</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 40.

<sup>71</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 41.

<sup>72</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 42.

<sup>73</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 42.

<sup>74</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 42.

assessing the substance of the witnesses' testimony as part of its ultimate duty to discover the truth'.<sup>75</sup>

40. The Appeals Chamber was of the view 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'.<sup>76</sup> It held that the assumption of 'a hierarchy of gravity in this regard is indeed artificial and ultimately incompatible with the required fact-specific assessment, *in concreto*, of the gravity'.<sup>77</sup> Thus, the Appeals Chamber found that the Trial Chamber erred 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'.<sup>78</sup> The Trial Chamber also erred 'in determining that this consideration "inform[ed] the assessment of the gravity of the offences" for which [...] Mr Bemba were convicted'.<sup>79</sup>

#### (b) Relevant part of the Re-Sentencing Decision

41. The Trial Chamber held that it would keep any assessment of the merits of the Main Case to a minimum.<sup>80</sup> Referring to the *Bemba et al* Sentencing Appeal Judgment, the Trial Chamber considered that 'the independence of the cases warrants not giving weight to the fact that the false testimony went only to "non-merits" issues'.<sup>81</sup> The Trial Chamber was not persuaded by Mr Bemba's argument that in assessing the degree of harm, consideration should be given to the fact that the Prosecutor knew about the falsity of the testimony and that the false testimony was secured in a case in which he ultimately was acquitted.<sup>82</sup> In this regard, it considered that 'these facts do not minimise the gravity of the offences'.<sup>83</sup>

42. The Trial Chamber noted that in the Sentencing Decision '[d]espite specifying that the false testimony went only to "non-merits" issues', it did afford appropriate weight to the nature of the false testimony, which it considered to be 'of crucial

<sup>75</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 43.

<sup>76</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 44.

<sup>77</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 44.

<sup>78</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 44. *See also* para. 45

<sup>79</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 45, *referring, inter alia, to* [Sentencing Decision](#), paras 217, 248 (concerning Mr Bemba).

<sup>80</sup> [Re-Sentencing Decision](#), para. 33.

<sup>81</sup> [Re-Sentencing Decision](#), para. 33.

<sup>82</sup> [Re-Sentencing Decision](#), para. 34.

<sup>83</sup> [Re-Sentencing Decision](#), para. 34.

importance when assessing [...] in particular, the credibility of witnesses'.<sup>84</sup> In this regard, it stressed 'the centrality of witness credibility when assessing evidence and the importance of the issues on which false testimony was proven in the present case'.<sup>85</sup>

43. When re-assessing the gravity of the article 70(1)(a) offences, the Trial Chamber recalled the relevant factors it had considered in the Sentencing Decision, namely:

(i) Giving false testimony before the Court has far-reaching consequences. A witness falsely testifying renders his or her evidence unreliable, which affects the integrity of the proceedings. Ultimately, giving false evidence undermines the Court's discovery of the truth and impedes justice for victims.

(ii) The extent of the damage caused.

(iii) The nature of the unlawful behaviour.

(iv) The nature of the false testimony.<sup>86</sup>

44. The Trial Chamber was of the view that 'its previous balancing of factors (i)-(iii) remain[ed] accurate'.<sup>87</sup> The Trial Chamber revised its assessment relating to the nature of the false testimony to reflect its new considerations.<sup>88</sup> The Trial Chamber therefore found that while this would increase Mr Bemba's sentence for the article 70(1)(a) offence, the 'effect is relatively small' since it had already given proper weight to this factor 'in most material respects' in the Sentencing Decision.<sup>89</sup>

### (c) Determination by the Appeals Chamber

45. Mr Bemba submits that the Trial Chamber failed to apply 'the Appeals Chamber's test concerning the appropriate standard for assessing the gravity of the content of the false testimony'.<sup>90</sup> In Mr Bemba's view, the Trial Chamber failed to provide 'any additional justification' for increasing his sentence.<sup>91</sup> The Prosecutor

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<sup>84</sup> [Re-Sentencing Decision](#), para. 35.

<sup>85</sup> [Re-Sentencing Decision](#), para. 35.

<sup>86</sup> [Re-Sentencing Decision](#), para. 113 (footnotes omitted), referring to [Sentencing Decision](#), paras 214-217.

<sup>87</sup> [Re-Sentencing Decision](#), para. 114.

<sup>88</sup> [Re-Sentencing Decision](#), para. 114, referring to section V.A of the [Re-Sentencing Decision](#).

<sup>89</sup> [Re-Sentencing Decision](#), para. 114.

<sup>90</sup> [Appeal Brief](#), para. 12. See also [Transcript of Hearing of 4 September 2019](#), p. 39, lines 14-17.

<sup>91</sup> [Appeal Brief](#), para. 13.

argues that it was within the Trial Chamber's discretion not to lower the sentence for the article 70(1)(a) offence 'because the false testimony related to "non-merits" issues' as the falsity in the present case related to credibility issues.<sup>92</sup> She avers that such 'assessments are an integral and indissoluble part of a Chamber's assessment of a witness's substantive evidence'.<sup>93</sup> In particular, the Prosecutor avers that the false testimony under article 70(1)(a) 'does not require that the falsehood be "material" "to the outcome of the case", either in favour or against the accused'.<sup>94</sup>

46. The Appeals Chamber notes that Mr Bemba's arguments seem to be based on a misreading of the *Bemba et al* Sentencing Appeal Judgment. In that judgment, the Appeals Chamber rejected the Trial Chamber's abstract distinction between lies on merits and non-merits issues for the purpose of determining the gravity of the offences.<sup>95</sup> Considering this, the Trial Chamber noted in the Re-Sentencing Decision what follows:

it has been a cardinal principle in this trial that the present case has always been independent of the Main Case. From the outset, the Chamber decided to keep any assessment of the merits of the Main Case to a minimum. This was done in the interest of procedural fairness to the accused, as otherwise this Article 70 case would have devolved into a much longer, expansive, and duplicative inquiry. Following the Sentencing Judgment, the Chamber now considers that the independence of the cases warrants not giving weight to the fact that the false testimony went only to 'non-merits' issues.<sup>96</sup>

47. Given that the weight afforded to the distinction between false testimony on 'merits' and false testimony on 'non-merits' in the Sentencing Decision had arguably led to a slight reduction in the sentence initially imposed, excluding this distinction in the Re-Sentencing Decision naturally led to a slight increase in the sentence. In addition, the Trial Chamber recalled that appropriate weight should be given to 'the importance of the issues on which false testimony was given' which were 'determined to be "of crucial importance when assessing [...] in particular, the credibility of witnesses"'.<sup>97</sup> The Trial Chamber was therefore not required to provide 'any

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<sup>92</sup> [Response](#), para. 29.

<sup>93</sup> [Response](#), para. 29.

<sup>94</sup> [Response](#), para. 29.

<sup>95</sup> [Bemba et al Sentencing Appeal Judgment](#), paras 42, 44.

<sup>96</sup> [Re-Sentencing Decision](#), para. 33 (footnotes omitted).

<sup>97</sup> [Re-Sentencing Decision](#), para. 35.

additional justification’ to increase the sentence.<sup>98</sup> Its conclusions in this regard were not unreasonable.

48. Mr Bemba submits further that the Trial Chamber erred by assuming that ‘no weight should be given to the specific type of false testimony of the different witnesses’.<sup>99</sup> The Trial Chamber noted that the Sentencing Decision gave ‘appropriate weight to the importance of the issues on which false testimony was given’.<sup>100</sup> It also pointed out that it considered the nature of the false testimony to be ‘of crucial importance when assessing [...] in particular, the credibility of witnesses’ in the Sentencing Decision.<sup>101</sup> The Trial Chamber stressed ‘the centrality of witness credibility when assessing evidence and the importance of the issues on which false testimony was proven in the present case’.<sup>102</sup> The specific fact to which the Trial Chamber attached no weight was ‘that the false testimony went only to “non-merits” issues’.<sup>103</sup> As explained above, this was done by the Trial Chamber to reflect the Appeals Chamber’s findings in the *Bemba et al* Sentencing Appeal Judgment.<sup>104</sup> The Appeals Chamber observes that Mr Bemba appears to conflate two distinct aspects of the Trial Chamber’s analysis, namely its assessment of the extent of the damage and the discrete re-assessment of the relevance of any distinction between lies on merits or non-merits issues. His argument is therefore rejected.

49. The Appeals Chamber notes Mr Bemba’s argument that pursuant to rule 145(1)(c) of the Rules of Procedure and Evidence (the ‘Rules’) a trial chamber must consider the extent of the damage as a mandatory sentencing factor.<sup>105</sup> In its re-assessment of the sentence, the Trial Chamber recalled that, in the Sentencing Decision, it had considered the extent of the damage caused by the article 70(1)(a)

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<sup>98</sup> [Appeal Brief](#), para. 13.

<sup>99</sup> [Appeal Brief](#), para. 14.

<sup>100</sup> [Re-Sentencing Decision](#), para. 35.

<sup>101</sup> [Re-Sentencing Decision](#), para. 35.

<sup>102</sup> [Re-Sentencing Decision](#), para. 35.

<sup>103</sup> [Re-Sentencing Decision](#), para. 33.

<sup>104</sup> [Re-Sentencing Decision](#), para. 33.

<sup>105</sup> [Appeal Brief](#), paras 14-15.

offences.<sup>106</sup> In its assessment of this factor, the Trial Chamber took into account the fact that Mr Bemba’s article 70 conduct had involved 14 witnesses.<sup>107</sup>

50. A due consideration of the extent of the damage is also apparent from the Trial Chamber’s finding that ‘[g]iving false testimony before the Court has far-reaching consequences’.<sup>108</sup> The Trial Chamber held that ‘[a] witness falsely testifying renders his or her evidence unreliable, which affects the integrity of the proceedings’.<sup>109</sup> The Trial Chamber further found that ‘[u]ltimately, giving false evidence undermines the Court’s discovery of the truth and impedes justice for victims’.<sup>110</sup>

51. In addition, Mr Bemba seems to be arguing that in order to assess the extent of the damage, the Trial Chamber should have assessed the concrete impact that the false testimony of the 14 witnesses had on the truth-finding function of the Main Case trial chamber.<sup>111</sup> The Prosecutor argues that the Appeals Chamber did not direct the Trial Chamber to consider the “concrete impact” that the false testimony of the 14 witnesses had on the record of the Main Case’.<sup>112</sup> Rather, she avers, it held that the ‘Chamber’s original approach – based on an artificial “hierarchy” of lies – was incompatible with “the required fact-specific assessment, *in concreto*, of the gravity of the particular offences for which the person was convicted”’.<sup>113</sup>

52. The Appeals Chamber notes that in the *Bemba et al* Sentencing Appeal Judgment, the Appeals Chamber did not identify any material errors in the original factual analysis of the Trial Chamber in the Sentencing Decision. Therefore, this aspect of the gravity assessment was not part of the remand.<sup>114</sup> Furthermore, the Appeals Chamber recalls that ‘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’.<sup>115</sup> This

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<sup>106</sup> [Re-Sentencing Decision](#), para. 113.

<sup>107</sup> [Re-Sentencing Decision](#), fn. 186, referring to [Sentencing Decision](#), para. 215.

<sup>108</sup> [Re-Sentencing Decision](#), para. 113.

<sup>109</sup> [Re-Sentencing Decision](#), para. 113.

<sup>110</sup> [Re-Sentencing Decision](#), para. 113.

<sup>111</sup> [Appeal Brief](#), para. 15. See also [Transcript of Hearing of 4 September 2019](#), p. 39, line 24 to p. 40, line 6.

<sup>112</sup> [Response](#), paras 24-25.

<sup>113</sup> [Response](#), paras 24-25.

<sup>114</sup> See *supra* para. 6.

<sup>115</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 43.

was the basis of the Trial Chamber's assessment of the gravity of the offences for which Mr Bemba was convicted and the extent of the damage caused by them. Mr Bemba fails to show an error in the Trial Chamber's assessment.

## 2. *Mr Bemba's degree of participation*

### (a) **Relevant part of the *Bemba et al* Sentencing Appeal Judgment**

53. In the *Bemba et al* Sentencing Appeal Judgment, the Appeals Chamber stated that it was not convinced that 'the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence'.<sup>116</sup> The Appeals Chamber observed that within the legal framework of the Court there is no 'automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence'.<sup>117</sup> It held that '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'.<sup>118</sup>

54. The Appeals Chamber was of the view that the Trial Chamber did not explain why Mr Bemba's culpability was considered 'to be lower for the offence [Mr Bemba and Mr Aimé Kilolo Musamba] had instigated than for the offences they had committed as co-perpetrators'.<sup>119</sup> The Appeals Chamber observed that 'on the contrary, [...] the relevant factual findings made by the Trial Chamber in this respect are essentially the same'.<sup>120</sup> Therefore, the Appeals Chamber found that the Trial Chamber erred in assuming 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'.<sup>121</sup>

### (b) **Relevant part of the Re-Sentencing Decision**

55. In the Re-Sentencing Decision, the Trial Chamber considered that 'while the degree of participation and intent must correspond to the degree of blameworthiness,

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<sup>116</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 60 (footnotes omitted).

<sup>117</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 60.

<sup>118</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 60 (footnotes omitted).

<sup>119</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 61 (footnote omitted).

<sup>120</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 61 (footnote omitted).

<sup>121</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 61 (footnote omitted). *See also* para. 62, referring to [Sentencing Decision](#), paras 193 (concerning Mr Kilolo), 248 (concerning Mr Bemba).



the differences in principal and accessorial liability in this particular case do not lead to much of a distinction in the appropriate sentences for Mr Bemba and Mr Kilolo'.<sup>122</sup> It considered that 'some difference' lay in 'their control over' the offences under article 70(1)(a) and (c) of the Statute.<sup>123</sup> It reasoned that for the article 70(1)(c) offence, 'no one outside the common plan was needed'; however, for the offence under article 70(1)(a) 'they still had to hope or anticipate that others would testify falsely'.<sup>124</sup> The Trial Chamber noted that Mr Bemba and Mr Kilolo's responsibility for both offences was based on 'essentially the same acts and conducts'.<sup>125</sup> The Trial Chamber considered that it was not necessary in this case to accord 'specific weight to the modes of liability when determining the sentencing'.<sup>126</sup>

56. Furthermore, the Trial Chamber noted that Mr Bemba's 'actual' contribution was 'a valid, fact-specific consideration in assessing the appropriate sentence to be imposed'.<sup>127</sup> In its view, this finding did not contradict its conclusion that Mr Bemba 'made "essential contributions"', because of its reasoning that 'people can have varying degrees of participation in the execution of the offences even while all of them are making essential contributions to the common plan'.<sup>128</sup>

57. When re-assessing Mr Bemba's culpable conduct, the Trial Chamber recalled its previous consideration in the Sentencing Decision of his '[d]egree of participation, including his varying degree of participation in the execution of the offences'.<sup>129</sup> It then revised 'its assessment [of that factor] to reflect its new considerations on principal versus accessorial liability'.<sup>130</sup> It considered that this revised assessment in combination with the 'new considerations on the nature of the false testimony, justifies increasing Mr Bemba's Article 70(1)(a) sentence to match his Article 70(1)(c) sentence'.<sup>131</sup>

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<sup>122</sup> [Re-Sentencing Decision](#), para. 41.

<sup>123</sup> [Re-Sentencing Decision](#), para. 41.

<sup>124</sup> [Re-Sentencing Decision](#), para. 41, referring to [Bemba et al Sentencing Appeal Judgment](#), para. 709.

<sup>125</sup> [Re-Sentencing Decision](#), para. 41.

<sup>126</sup> [Re-Sentencing Decision](#), para. 41.

<sup>127</sup> [Re-Sentencing Decision](#), para. 45.

<sup>128</sup> [Re-Sentencing Decision](#), para. 45.

<sup>129</sup> [Re-Sentencing Decision](#), para. 116.

<sup>130</sup> [Re-Sentencing Decision](#), para. 117.

<sup>131</sup> [Re-Sentencing Decision](#), para. 117.



**(c) Determination by the Appeals Chamber**

58. Mr Bemba submits that if the Trial Chamber had correctly applied the ‘test adumbrated by the Appeals Chamber [...] there would have been no evidential basis to increase’ the sentence for the article 70(1)(a) offence.<sup>132</sup> The Prosecutor contends that Mr Bemba ‘misunderstands’ the *Bemba et al* Sentencing Appeal Judgment.<sup>133</sup> She argues that the Appeals Chamber merely identified errors in the Sentencing Decision and directed the Trial Chamber to make a new determination of the sentences in light of these errors.<sup>134</sup>

59. The Appeals Chamber considers that Mr Bemba’s argument seems to be based on a misreading of the *Bemba et al* Sentencing Appeal Judgment. As noted by the Prosecutor, the Appeals Chamber identified discrete errors, including justifying how to (or failing to) distinguish principal from accessorial liability in this case. It then remanded the matter for a new determination. Notably, the Appeals Chamber observed that the relevant factual findings underpinning the article 70(1)(a) and 70(1)(c) offences were ‘essentially the same’.<sup>135</sup>

60. In the Re-Sentencing Decision, the Trial Chamber implemented the Appeals Chamber’s directions by increasing the sentence imposed for the article 70(1)(a) offence. In doing so it explained that although ‘there is some difference in [Mr Bemba’s] control’ over the article 70(1)(a) and 70(1)(c) offences, he is ‘responsible for both offences on the basis of essentially the same acts and conducts’.<sup>136</sup> Contrary to Mr Bemba’s argument, the Trial Chamber followed directions issued by the Appeals Chamber. The increase of the sentence for the article 70(1)(a) offence was a direct consequence of those directions.

61. Mr Bemba further submits that the Trial Chamber’s finding on its new considerations on principal versus accessory liability lacks specific analysis of his participation in this offence.<sup>137</sup> The Prosecutor stresses that while the Trial Chamber found that its original factual assessment of Mr Bemba’s participation and intent

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<sup>132</sup> [Appeal Brief](#), para. 6.

<sup>133</sup> [Response](#), para. 14.

<sup>134</sup> [Response](#), para. 14.

<sup>135</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 61 (footnote omitted).

<sup>136</sup> [Re-Sentencing Decision](#), para. 41.

<sup>137</sup> [Appeal Brief](#), para. 6, referring to [Re-Sentencing Decision](#), paras 41, 117.

remained valid, it reconsidered this factor by finding that the mode of liability of solicitation had no impact on the sentence.<sup>138</sup> Given the limited scope of the re-sentencing proceedings, the Prosecutor avers that it was not necessary for the Trial Chamber to repeat its factual assessment of this factor ‘as long as it remained valid’.<sup>139</sup>

62. The Appeals Chamber considers that Mr Bemba’s argument is again based on a misreading of the Re-Sentencing Decision. When assessing Mr Bemba’s culpable conduct, the Trial Chamber recalled that in the Sentencing Decision it had considered Mr Bemba’s degree of participation, ‘including his varying degree of participation in the execution of the offences’.<sup>140</sup> In making this finding, the Trial Chamber referred to the relevant paragraphs of the Sentencing Decision in which the Trial Chamber set out a detailed factual assessment of Mr Bemba’s degree of participation.<sup>141</sup> It was precisely on the basis of this factual assessment that the Appeals Chamber, when reviewing the Sentencing Decision, found that ‘the relevant factual findings’ underpinning the convictions entered for article 70(1)(a) and (c) offences were ‘essentially the same’.<sup>142</sup> Mr Bemba seems to omit the factual assessment carried out by the Trial Chamber and reviewed by the Appeals Chamber in the *Bemba et al* Sentencing Appeals Judgment.

63. Turning to Mr Bemba’s contention that the Trial Chamber failed to explain how it assessed the degree of participation in the offence,<sup>143</sup> the Appeals Chamber notes that, contrary to Mr Bemba’s assertion, the Trial Chamber considered his degree of participation in the offences as per rule 145(1)(c) of the Rules. The Trial Chamber recalled its considerations regarding Mr Bemba’s degree of participation as set out in the Sentencing Decision.<sup>144</sup> It then ‘revise[d] its assessment to reflect its new considerations on principal versus accessorial liability’.<sup>145</sup> The Trial Chamber concluded that, given that the acts and conduct underpinning the article 70(1)(a) and

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<sup>138</sup> [Response](#), para. 18.

<sup>139</sup> [Response](#), para. 19.

<sup>140</sup> [Re-Sentencing Decision](#), para. 116.

<sup>141</sup> [Re-Sentencing Decision](#), fn. 191, *referring to* Sentencing Decision, paras 219-223.

<sup>142</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 61 (footnote omitted).

<sup>143</sup> [Notice of Appeal](#), para. 11; [Appeal Brief](#), para. 7.

<sup>144</sup> [Re-Sentencing Decision](#), para. 116.

<sup>145</sup> [Re-Sentencing Decision](#), para. 117.

(c) offences are ‘essentially the same [,] there is not much reason in this particular case for according specific weight to the modes of liability when determining the sentencing’.<sup>146</sup> The Appeals Chamber notes that the Trial Chamber clearly set out its assessment of Mr Bemba’s degree of participation. This assessment led the Trial Chamber not to afford specific weight to the comparison of modes of liability.

64. Mr Bemba argues further that his sentence should have been based only on the participation for which he was charged, namely solicitation rather than inducement, and that by ‘us[ing] the same conduct underpinning his conviction for co-perpetration of Article 70(1)(c) offences when it sentenced him for Article 70(1)(a) offences’, the Trial Chamber improperly and impermissibly re-characterised the article 70(1)(a) charges.<sup>147</sup> He further argues that his sentence for soliciting false testimony was higher than that of Mr Kilolo for inducing false testimony.<sup>148</sup> The Prosecutor submits that, as stressed by the Appeals Chamber, the Trial Chamber only needed ‘to conduct fact-specific assessments of a convicted person’s contributions, rather than giving undue weight to legal labels’ and that comparisons of sentences imposed on other convicted persons are often unhelpful.<sup>149</sup>

65. The Appeals Chamber does not find merit in Mr Bemba’s argument. The Appeals Chamber has already held that under the legal framework of the Court there is not ‘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’.<sup>150</sup> Indeed, ‘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’.<sup>151</sup> The sentences imposed on the persons convicted in this case were fact-specific and based on their individual circumstances. It is therefore unhelpful to compare the sentences imposed on different convicted persons without reference to the specific facts and individual circumstances of each person. In these circumstances, Mr Bemba’s abstract comparison between the modes of liability for inducement – for

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<sup>146</sup> [Re-Sentencing Decision](#), para. 41.

<sup>147</sup> [Appeal Brief](#), para. 9; [Transcript of Hearing of 4 September 2019](#), p. 44, line 14 to p. 46, line 21.

<sup>148</sup> [Appeal Brief](#), para. 9.

<sup>149</sup> [Response](#), para. 20, referring to [Bemba et al Sentencing Appeal Judgment](#), para. 60.

<sup>150</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 60.

<sup>151</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 60.

which he was not convicted – and solicitation does not warrant any further consideration.

66. Mr Bemba further contends that the Trial Chamber failed to consider the Appeals Chamber’s findings on the nature of his participation in the offences.<sup>152</sup> He argues that while there is no hierarchy of gravity regarding the modes of liability, ‘the nature of participation (direct or indirect) is a relevant consideration that should have been addressed by the Chamber’.<sup>153</sup> The Prosecutor avers that Mr Bemba conflates the Trial Chamber’s conclusion that he, ‘through Kilolo and Mangenda, solicited the false testimony of the 14 witnesses, with the evidence it considered in reaching such a conclusion’.<sup>154</sup>

67. The Appeals Chamber notes that Mr Bemba appears to misread the *Bemba et al* Appeal Judgment and the *Bemba et al* Sentencing Appeal Judgment. In those decisions the Appeals Chamber did not ‘qualif[y] the nature of [his] participation’.<sup>155</sup> Rather, the Appeals Chamber rejected all arguments raised by Mr Bemba challenging the Trial Chamber’s assessment of the nature and extent of his contributions to the commission of the crimes.<sup>156</sup>

68. Mr Bemba’s argument that the Trial Chamber failed to address the impact of his conduct on the witnesses’ false testimony is equally unpersuasive.<sup>157</sup> As explained above, when reviewing the assessment of the gravity of the offences, the Trial Chamber considered the extent of the damage caused by the offences for which Mr Bemba was convicted.<sup>158</sup>

69. Finally, the Trial Chamber considered specifically the varying degree of participation in the execution of the offences as a relevant sentencing factor.<sup>159</sup> When assessing this factor, it referred to its previous findings that the actual contributions of

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<sup>152</sup> [Appeal Brief](#), para. 10.

<sup>153</sup> [Appeal Brief](#), para. 10 (emphasis in original omitted).

<sup>154</sup> [Response](#), para. 21.

<sup>155</sup> [Appeal Brief](#), para. 10.

<sup>156</sup> [Bemba et al Appeal Judgment](#), paras 813, 826; [Bemba et al Sentencing Appeal Judgment](#), para. 40.

<sup>157</sup> [Appeal Brief](#), para. 10.

<sup>158</sup> *See supra* paras 47-48.

<sup>159</sup> [Re-Sentencing Decision](#), para. 116.

Mr Bemba ‘were of a somewhat restricted nature’.<sup>160</sup> The Appeals Chamber finds that, contrary to Mr Bemba’s contention, the Trial Chamber duly considered the nature of his participation.

### 3. Conclusion

70. The Appeals Chamber rejects Mr Bemba’s arguments under his first ground of appeal.

## B. Second ground of appeal

71. Under his second ground of appeal, Mr Bemba alleges violations of his right to a fair and impartial trial. He argues that

[t]he Trial Chamber unreasonably abused its discretion, and erred in law and procedure, by failing to stay the proceedings/discharge Mr. Bemba, or otherwise provide a remedy for the cumulative impact of egregious violations of Mr. Bemba’s rights. These violations undermined the fairness of the proceedings, and resulted in a disproportionate sentence. The appropriate remedy would be to terminate the proceedings against Mr. Bemba.<sup>161</sup>

72. Mr Bemba argues further that following his acquittal in the Main Case, the Trial Chamber erred and abused its discretion by allowing the Prosecutor to make submissions challenging ‘the validity and legitimacy’ of the acquittal.<sup>162</sup> According to him, these submissions affected the ‘impartiality of the proceedings’ and the Trial Chamber’s assessment of the issues before it.<sup>163</sup>

73. As a remedy, Mr Bemba requests a permanent stay of the proceedings.<sup>164</sup>

### 1. Whether Mr Bemba was arbitrarily detained

74. Mr Bemba argues that the Trial Chamber erred in law and procedure in finding that his detention was ‘lawful’ and, consequently, ‘excluded relevant factors from its decision, that would have led it to conclude that Mr. Bemba was arbitrarily detained’.<sup>165</sup>

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<sup>160</sup> [Sentencing Decision](#), para. 223.

<sup>161</sup> [Appeal Brief](#), p. 45.

<sup>162</sup> [Appeal Brief](#), para. 2.

<sup>163</sup> [Appeal Brief](#), para. 2.

<sup>164</sup> [Appeal Brief](#), para. 2.

<sup>165</sup> [Appeal Brief](#), p. 51.

(a) **Background and relevant parts of the Re-Sentencing Decision**

(i) *Release from detention following acquittal in the Main Case*

75. On 12 June 2018, following Mr Bemba's acquittal in the Main Case,<sup>166</sup> the Trial Chamber ordered his conditional release.<sup>167</sup> The Trial Chamber held that Mr Bemba was 'lawfully detained' in the present case.<sup>168</sup> The Trial Chamber noted that Mr Bemba had been detained for over four years in the present case, 'but less than the possible five year statutory maximum for his convictions under Article 70(1)(a) and (c) of the Statute'.<sup>169</sup> The Trial Chamber found that the risks listed under article 58(1) of the Statute no longer justified Mr Bemba's continued detention given (i) Mr Bemba's acquittal in the Main Case, a factor the Trial Chamber considered 'of significance despite the independence of this case from the Main Case'; (ii) Mr Bemba's convictions under article 70(1)(a) and (c) of the Statute having being upheld on appeal and as a result being final; and (iii) 'the percentage of the possible maximum sentence Mr Bemba has already served in detention', that is 'over 80% of the 5 year maximum term'.<sup>170</sup>

(ii) *Credit for time spent in detention*

76. In the Sentencing Decision, the Trial Chamber noted that '[w]hile in detention for the purpose of the present proceedings, Mr Bemba was also in detention for the purpose of the Main Case'.<sup>171</sup> The Trial Chamber thus held that Mr Bemba would not benefit from any deduction of time<sup>172</sup> and that he would serve his sentence consecutively to his sentence in the Main Case.<sup>173</sup> The Trial Chamber was of the view that if no regard were to be had to that other detention, 'Mr Bemba would benefit

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<sup>166</sup> [Bemba Appeal Judgment](#), paras 196-200.

<sup>167</sup> [12 June 2018 Decision](#), paras 24-26, p. 13.

<sup>168</sup> [12 June 2018 Decision](#), para. 6, referring to [Bemba Appeal Judgment](#), para. 200.

<sup>169</sup> [12 June 2018 Decision](#), para. 6.

<sup>170</sup> [12 June 2018 Decision](#), paras 18-19, 22. See also para. 24.

<sup>171</sup> [Sentencing Decision](#), para. 259.

<sup>172</sup> [Sentencing Decision](#), para. 260.

<sup>173</sup> [Sentencing Decision](#), para. 263.

twice from deduction of time<sup>174</sup> and this would render the proceedings in his case inconsequential.<sup>175</sup>

77. Mr Bemba appealed this aspect of the Sentencing Decision. In the *Bemba et al* Sentencing Appeal Judgment, the Appeals Chamber found that the Trial Chamber did not err in not deducting time previously spent in detention from the term of imprisonment imposed in these proceedings.<sup>176</sup> The Appeals Chamber considered this finding of the Trial Chamber to be ‘conditioned on the sentence in the Main Case remaining intact’.<sup>177</sup> The Appeals Chamber found 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.<sup>178</sup>

78. In the Re-Sentencing Decision, the Trial Chamber held that pursuant to article 78(2) of the Statute the ‘appropriate credit to be given [was] a straightforward calculation of how many days Mr Bemba was detained in accordance with the arrest warrant issued in the present case’.<sup>179</sup> In that regard, the Trial Chamber held that this calculation was to start from 23 November 2013 which corresponds to the day on which Mr Bemba, while in detention, received the warrant of arrest in the present case.<sup>180</sup> The Trial Chamber recalled that on 23 January 2015, Pre-Trial Chamber II granted Mr Bemba’s application for interim release<sup>181</sup> and ‘technically’ released him from detention. However, on 29 May 2015, the Appeals Chamber reversed this decision and remanded the matter to the Trial Chamber.<sup>182</sup> It noted that Mr Bemba

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<sup>174</sup> [Sentencing Decision](#), para. 254.

<sup>175</sup> [Sentencing Decision](#), para. 254.

<sup>176</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 229.

<sup>177</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 231.

<sup>178</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 231.

<sup>179</sup> [Re-Sentencing Decision](#), para. 124.

<sup>180</sup> [Re-Sentencing Decision](#), para. 125, referring to Pre-Trial Chamber II, Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MAGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, 20 November 2013, ICC-01/05-01/13-1-tENG (the ‘[Arrest Warrant](#)’).

<sup>181</sup> Under article 60(2) of the Statute.

<sup>182</sup> [Re-Sentencing Decision](#), para. 125, referring to Pre-Trial Chamber II, [Decision on “Mr Bemba’s Request for provisional release”](#), 23 January 2015, ICC-01/05-01/13-798; Appeals Chamber, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled “Decision on ‘Mr Bemba’s Request for provisional release’”](#), 29 May 2015, ICC-01/05-01/13-970 (OA10).



was thus never provisionally released, as he continued to be detained in the Main Case.<sup>183</sup> Further, the Trial Chamber observed that Mr Bemba subsequently withdrew his article 60(2) application for interim release in the present case.<sup>184</sup> In this context, the Trial Chamber concluded that Mr Bemba had been detained in the present case for four years and two months which represented the period of ‘23 November 2013 to 12 June 2018, minus the four-month period in 2015 when Mr Bemba was technically released and then re-detained’.<sup>185</sup> As the sentence imposed was lower than the amount of time Mr Bemba spent in detention, the Trial Chamber considered that the sentence of imprisonment had been served.<sup>186</sup>

## (b) Determination by the Appeals Chamber

### (i) *Whether the Trial Chamber disregarded Mr Bemba’s right to be heard*

79. Mr Bemba submits that the Trial Chamber disregarded his right to be heard, by basing its conclusion on a ‘preliminary observation’ that pre-dated the re-sentencing hearing held on 4 July 2018 (the ‘Re-Sentencing Hearing’),<sup>187</sup> after having indicated that he would be afforded an opportunity to present arguments on the impact of the acquittal in the Main Case.<sup>188</sup> The Prosecutor argues that Mr Bemba fails to substantiate his claim that he had not been heard on detention matters.<sup>189</sup>

80. The Appeals Chamber understands Mr Bemba’s argument to be that the Trial Chamber disregarded submissions which he had made at the Re-Sentencing Hearing. The ‘preliminary observation’ to which Mr Bemba refers appears to be the following one, made in the 12 June 2018 Decision:

As a preliminary point of law, Mr Bemba is lawfully detained in this case as of this moment. The Appeals Chamber’s direction [...] suggests as much – Mr Bemba is not released automatically as a result of the Main Case [Appeal

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<sup>183</sup> [Re-Sentencing Decision](#), para. 125.

<sup>184</sup> [Re-Sentencing Decision](#), para. 125, referring to [Defence Observations on continued detention or release](#), 19 June 2015, ICC-01/05-01/13-1016.

<sup>185</sup> [Re-Sentencing Decision](#), para. 126.

<sup>186</sup> [Re-Sentencing Decision](#), para. 126.

<sup>187</sup> [Transcript of hearing](#), 4 July 2018, ICC-01/05-01/13-T-59-Eng.

<sup>188</sup> [Appeal Brief](#), para. 81.

<sup>189</sup> [Response](#), para. 91.



Judgment], but it rather falls to this Chamber to decide on his continued detention.<sup>190</sup>

81. The Appeals Chamber notes that the Trial Chamber referred to this finding in the Re-Sentencing Decision.<sup>191</sup> The Trial Chamber also referred to ‘an array of arguments’ made by Mr Bemba at the re-sentencing hearing of 4 July 2018, which included submissions on the impact of his acquittal on the amount of time to be credited for time spent in detention.<sup>192</sup> The Trial Chamber thus considered Mr Bemba’s arguments, even if it did not expressly address them. Mr Bemba has not shown that his right to be heard was affected in any way. Accordingly, the Appeals Chamber rejects his argument.

*(ii) Whether the Trial Chamber erred in finding Mr Bemba’s detention lawful*

82. Mr Bemba raises a series of issues regarding (i) the length of his detention;<sup>193</sup> (ii) the availability of an effective mechanism to seek relief ‘when his detention exceeded its proper limits’;<sup>194</sup> (iii) the right to *habeas corpus* post-conviction;<sup>195</sup> and (iv) delays in the conduct of the Prosecutor’s investigations and the proceedings before the Trial Chamber.<sup>196</sup> He argues that despite all these alleged procedural shortcomings, the Trial Chamber failed ‘to make an independent determination as to the lawfulness of this detention’<sup>197</sup> and to ‘address and remedy the violations of his rights’.<sup>198</sup> Mr Bemba contends that ‘a stay of the proceeding is the only appropriate remedy at this juncture’.<sup>199</sup>

83. The Prosecutor argues that the re-sentencing proceedings were fair and Mr Bemba’s rights were protected.<sup>200</sup> She submits that Mr Bemba withdrew his

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<sup>190</sup> [12 June 2018 Decision](#), para. 6, referring to [Bemba Appeal Judgment](#), para. 200 (‘while the Appeals Chamber finds that there is no reason to continue Mr Bemba’s detention on the basis of the present case, it rests with Trial Chamber VII to decide, as a matter of urgency, whether Mr Bemba’s continued detention in relation to the case pending before it is warranted’).

<sup>191</sup> [Re-Sentencing Decision](#), para. 124.

<sup>192</sup> [Re-Sentencing Decision](#), para. 124; [Re-Sentencing Hearing](#), p. 57, line 21 to p. 65, line 12.

<sup>193</sup> [Appeal Brief](#), paras 81-82.

<sup>194</sup> [Appeal Brief](#), paras 82, 85.

<sup>195</sup> [Appeal Brief](#), paras 86-103.

<sup>196</sup> [Appeal Brief](#), paras 104-105.

<sup>197</sup> [Appeal Brief](#), para. 84.

<sup>198</sup> [Appeal Brief](#), para. 110.

<sup>199</sup> [Appeal Brief](#), paras 110, 153-154.

<sup>200</sup> [Response](#), para. 77.

request for interim release in the article 70 proceedings and cannot now claim prejudice.<sup>201</sup> The Prosecutor avers that Mr Bemba incorrectly extends the right of *habeas corpus* ‘to a situation where detention has already been lawfully established and regularly reviewed by the Chambers under the Statute’.<sup>202</sup> The Prosecutor avers further that Mr Bemba was detained pursuant to two arrest warrants and that, at the time he was convicted for his article 70 offences, Mr Bemba had already been sentenced to 18 years in prison in the Main Case.<sup>203</sup>

84. The Appeals Chamber understands Mr Bemba’s argument to be that the Trial Chamber erred in failing to remedy the alleged violations of his rights by ordering a stay of the proceedings. The Appeals Chamber notes that throughout the entire period of his detention in relation to the present case, Mr Bemba was also detained in relation to the Main Case. The unavailability or potential ineffectiveness of remedies with respect to his alleged unlawful or excessively long detention in the present case was a result of his detention in the Main Case. Any remedy aimed at his release would be ineffective, as he continued to be detained in the Main Case. If seized with an application for interim release in the present case, the Trial Chamber would not be able to release Mr Bemba, whether or not release was warranted.

85. The Appeals Chamber finds that Mr Bemba has failed to provide any persuasive argument or authority to support his proposition that a convicted person can seek remedies with respect to arbitrary or excessive detention in one case, whilst the person is also detained in another case. At the hearing before the Appeals Chamber, Mr Bemba referred to, amongst others, the views of the United Nations (UN) Human Rights Committee in the case of *Everton Morrison v. Jamaica*, which, he argued, shows that ‘the applicant’s detention in the first case is relevant to the assessment of the reasonableness of proceedings in the second case’.<sup>204</sup> However, the cited decision does not appear to support Mr Bemba’s proposition. On the contrary, the UN Human Rights Committee acknowledged in that case that a person lawfully detained in one case has no right to be released in another case. Instead, it found a violation relating to

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<sup>201</sup> [Response](#), paras 76, 80-81, 84. *See also* paras 91, 93, 107-109.

<sup>202</sup> [Response](#), para. 120.

<sup>203</sup> [Response](#), para. 116.

<sup>204</sup> [Transcript of Hearing of 4 September 2019](#), p. 50, line 25 to p. 51, line 4.

the person's right to be tried without undue delay. The UN Human Rights Committee held in that regard:

When the author was first informed of the charges against him concerning the murder of Mr. Hunter, he was in detention in connection with the murder of Ms. Baugh-Dujon. He was subsequently convicted of this later murder, before his trial in the Hunter case began. As the author was lawfully being detained in the Baugh-Dujon case, *he had no right to be released in the Hunter case. Article 9 was therefore not violated.* However, the trial in the Hunter case did not take place for two and a half years after he was first charged with the Hunter murder. In the absence of an explanation by the State party for this delay, the Committee finds that the delay amounted to a violation of the author's right under article 14, paragraph 3 (c) of the Covenant, to be tried without undue delay.<sup>205</sup>

86. Similarly, the Appeals Chamber is not persuaded that Mr Bemba can reasonably claim a violation of his right to be released in the present case. Until his acquittal in the Main Case on 8 June 2018, he was detained in the Main Case firstly on the basis of a series of decisions on detention, and secondly on the sentence imposed by Trial Chamber III. On 12 June 2018, the Trial Chamber ordered his release shortly after the acquittal in the Main Case, when his continuing detention was only for the purposes of the present case.

87. All that the Trial Chamber was able to do in this case was to credit the time Mr Bemba spent in detention when sentencing, which it did.<sup>206</sup> Insofar as Mr Bemba complains about adverse consequences of the uncredited part of that detention, without prejudice to whether his complaint would have merit, it is in relation to the Main Case that the complaint can be made.

88. The Appeals Chamber therefore finds that Mr Bemba has not shown that his right to be released has been violated.

89. The Appeals Chamber notes further that Mr Bemba argues his right to be tried without undue delay has also been violated. He submits that the *Bemba et al* proceedings 'took almost two years to go to trial' and 'the sentence was not issued until the point at which Mr. Bemba had already been in detention for approximately 3

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<sup>205</sup> UN Human Rights Committee, *Everton Morrison v. Jamaica*, [Communication no. 635/1995](#), 16 September 1998, CCPR/C/63/D/635/1995, para. 22.3 (emphasis added).

<sup>206</sup> [Re-Sentencing Decision](#), paras 124-126.

years and 4 months'.<sup>207</sup> The Prosecutor submits that Mr Bemba's 'various insinuations [...] of "dilatatory disclosure" and "delays" by the Prosecutor and the purported "slow pace of the [a]rticle 70 case" are unfounded'.<sup>208</sup>

90. The Appeals Chamber notes that Mr Bemba raises this argument on appeal for the first time. Neither in his appeal against the Conviction Decision nor in his appeal against the Sentencing Decision did he argue that his right to be tried without undue delay was violated, despite the fact that this alleged violation occurred before those two impugned decisions were rendered. For this reason, the Appeals Chamber could decline to consider this argument.

91. In any event, even if it were to consider Mr Bemba's allegation of undue delay, the Appeals Chamber would reject it for the following reasons. The proceedings in the present case lasted about two years and eleven months – from the warrant of arrest, issued on 20 November 2013,<sup>209</sup> to the Conviction Decision, rendered on 19 October 2016.<sup>210</sup> In that period of time, a number of procedural steps were taken. For instance, on 11 November 2014, Pre-Trial Chamber II partially confirmed the charges against Mr Bemba.<sup>211</sup> The trial commenced on 29 November 2015<sup>212</sup> and concluded on 1 June 2016.<sup>213</sup> There appear to have been no unreasonable periods of inactivity on the part of Pre-Trial Chamber II or the Trial Chamber.

92. Mr Bemba refers to some delays in the proceedings, which he attributes to the Prosecutor.<sup>214</sup> However, in one of the instances to which he refers, Pre-Trial Chamber II acknowledged that the cause of the delay was 'beyond the control of either the Prosecutor or the Court'.<sup>215</sup> Mr Bemba does not raise arguments that would

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<sup>207</sup> [Appeal Brief](#), paras 104, 108. *See also* [Transcript of Hearing of 4 September 2019](#), p. 9, lines 14-21; p. 48, lines 12-19.

<sup>208</sup> [Response](#), para. 131.

<sup>209</sup> [Arrest Warrant](#). The Arrest Warrant was notified to Mr Bemba on 23 November 2013 (*see* [Re-Sentencing Decision](#), para. 125).

<sup>210</sup> [Conviction Decision](#).

<sup>211</sup> [Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 11 November 2014, ICC-01/05-01/13-749.

<sup>212</sup> [Conviction Decision](#), para. 7.

<sup>213</sup> [Conviction Decision](#), para. 7.

<sup>214</sup> [Appeal Brief](#), para. 104, fn. 224.

<sup>215</sup> [Decision on the "Prosecution's request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges" dated 3 March 2014](#), 14 March 2014, ICC-01/05-01/13-255, pp. 6-7. *See also* [Decision amending the calendar for the confirmation of the](#)

demonstrate that this finding was incorrect. In another instance referred to by Mr Bemba,<sup>216</sup> there was no delay at all, as the extension of time requested by the Prosecutor did not affect the commencement of the trial.<sup>217</sup> Mr Bemba has thus failed to show that the length of the proceedings was excessive, such that his right to be tried without undue delay was affected.

93. As Mr Bemba has not demonstrated a violation of his rights, the question of whether a stay of the proceedings would have been an appropriate remedy in the present case<sup>218</sup> and the related question of whether Mr Bemba sought such a remedy before the Trial Chamber do not arise.<sup>219</sup> The Appeals Chamber rejects the present sub-ground of Mr Bemba's second ground of appeal.

2. *Whether the Trial Chamber erred by failing to take into consideration Mr Bemba's acquittal in the Main Case*

94. Mr Bemba submits that his sentence is disproportionately punitive (i) due to the Trial Chamber's failure to regulate the Prosecutor's conduct (her statements controverting his acquittal in the Main Case) and to remedy the harm thus caused; (ii) due to the Trial Chamber's failure to adjust his sentence in view of his acquittal in the Main Case; and (iii) because his sentence has no correlation to his participation in the offences and his culpability.<sup>220</sup>

**(a) Background and relevant parts of the Re-Sentencing Decision**

*(i) The Prosecutor's statements and submissions regarding the acquittal in the Main Case*

95. On 13 June 2018, the Prosecutor issued a public statement regarding Mr Bemba's acquittal in the Main Case. She stated that she joined the Legal Representative of Victims in the case 'in her disappointment over this decision and its

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[charges](#), 28 May 2014, ICC-01/05-01/13-443, p. 4 (amending the calendar for the confirmation of charges for the same reason).

<sup>216</sup> [Appeal Brief](#), fn. 224.

<sup>217</sup> [Decision on "Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of an Expert Report"](#), 24 June 2015, ICC-01/05-01/13-1027, para. 11 ('The requested three week extension results in a 21 July 2015 deadline, ten weeks before the trial commencement date.').

<sup>218</sup> [Appeal Brief](#), para. 154.

<sup>219</sup> [Transcript of Hearing of 4 September 2019](#), p. 10, lines 9-22; p. 11, lines 4-7; p. 12, lines 16-23; p. 28, lines 3-25; p. 37, lines 14-22; p. 38, lines 14-21.

<sup>220</sup> [Appeal Brief](#), paras 111-113.

impact, first and foremost, on the victims’, but noted that she would ‘respect the decision and its finality’.<sup>221</sup>

96. On 2 July 2018, the Prosecutor filed a document setting out her submissions in advance of a hearing scheduled by the Trial Chamber to discuss the impact of the acquittal in the Main Case on the re-sentencing proceedings in the present case.<sup>222</sup> In her submissions, the Prosecutor stated that ‘the convicted persons’ concerted and unlawful efforts may have ultimately succeeded, not at trial as originally intended, but at the appellate stage’.<sup>223</sup>

97. At the Re-Sentencing Hearing on 4 July 2018, Mr Bemba requested the Trial Chamber to dismiss *in limine* the Prosecutor’s submission and to direct her to refrain from repeating the contents of that submission at the hearing.<sup>224</sup> The Trial Chamber rejected the request and noted that no prejudice to Mr Bemba ‘warrant[ed] the prohibition of the acceptance of the Prosecution’s submission’.<sup>225</sup>

98. At the Re-Sentencing Hearing, the Prosecutor submitted that the reason for the acquittal in the Main Case was ‘the defendants’ implementation of the common criminal plan to illicitly interfere with defence witnesses in the Main Case in order to ensure that the witnesses would provide evidence in favour of Mr Bemba’.<sup>226</sup>

99. In the Re-Sentencing Decision, the Trial Chamber noted the Prosecutor’s submissions that (i) ‘the corrupted and tainted evidence introduced by the convicted persons affected the Main Case appeal proceedings’; (ii) ‘the Appeals Chamber Majority’s conclusions [in the *Bemba* Appeal Judgment] are based on a “limited evaluation of an evidentiary record deliberately and criminally tainted and scripted by the convicted persons”’; and (iii) ‘the acquittal evidences the damage caused by the conduct of the convicted persons and constitutes an aggravating circumstance’.<sup>227</sup> The Trial Chamber considered that the Prosecutor had not established ‘causation between

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<sup>221</sup> [Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo.](#)

<sup>222</sup> [Prosecution Detailed Notice of Additional Sentencing Submissions](#), ICC-01/05-01/13-2296 (the ‘Prosecutor Additional Submissions’), para. 1.

<sup>223</sup> [Prosecutor Additional Submissions](#), para. 4. *See also* para. 44.

<sup>224</sup> [Re-Sentencing Hearing](#), p. 6, lines 1-3.

<sup>225</sup> [Re-Sentencing Hearing](#), p. 11, lines 23-24.

<sup>226</sup> [Re-Sentencing Hearing](#), p. 18, lines 8-10.

<sup>227</sup> [Re-Sentencing Decision](#), para. 20.

what the Three Convicted Persons were convicted of and the outcome of the [*Bemba* Appeal Judgment]’.<sup>228</sup>

(ii) *Impact of the acquittal in the Main Case on the sentence*

100. The Trial Chamber considered that Mr Bemba’s acquittal had ‘no impact on the sentences to be imposed’.<sup>229</sup> The Trial Chamber recalled that the present case was ‘understood as independent from the Main Case’.<sup>230</sup> The Trial Chamber considered that following the *Bemba et al* Sentencing Appeal Judgment, ‘the independence of the cases warrants not giving weight to the fact that the false testimony went only to “non-merits” issues’.<sup>231</sup> It reasoned that ‘none of the Chamber’s evidentiary findings in this case were affected by the [*Bemba* Appeal Judgment] in any way’.<sup>232</sup> The Trial Chamber did not consider that ‘the outcome of the Main Case makes Mr Bemba’s solicitation of false testimony in an attempt to manipulate his trial any less serious’.<sup>233</sup>

**(b) Determination by the Appeals Chamber**

101. Mr Bemba submits that his sentence is disproportionately punitive due to the Trial Chamber’s failure to prevent the Prosecutor from making statements controverting his acquittal in the Main Case, which ‘impacted adversely on the appearance of the Trial Chamber’s impartiality’.<sup>234</sup>

102. The Prosecutor argues that her public statements made after the Main Case acquittal ‘clearly accepted the decision acquitting Bemba in the Main Case and its finality’ and ‘were made in accordance with her public information role’.<sup>235</sup> The Prosecutor submits further that her in-court submissions are proper because, as a litigating party in the present case, she has a right to make submissions on relevant issues.<sup>236</sup>

103. The Appeals Chamber finds that it would have been preferable for the Prosecutor to have used more moderate language when making her out-of-court

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<sup>228</sup> [Re-Sentencing Decision](#), para. 25.

<sup>229</sup> [Re-Sentencing Decision](#), paras 22, 121.

<sup>230</sup> [Re-Sentencing Decision](#), paras 23, 33.

<sup>231</sup> [Re-Sentencing Decision](#), para. 33.

<sup>232</sup> [Re-Sentencing Decision](#), para. 23.

<sup>233</sup> [Re-Sentencing Decision](#), para. 34.

<sup>234</sup> [Appeal Brief](#), paras 111-120, 140.

<sup>235</sup> [Response](#), para. 135.

<sup>236</sup> [Response](#), paras 140-147.



statements. It notes that Mr Bemba alleges that the Prosecutor's statement and submissions had an impact on the Trial Chamber's findings and sentence.<sup>237</sup> Therefore, the Appeals Chamber will focus on their effect on the Re-Sentencing Decision, as alleged by Mr Bemba, rather than on their propriety.

104. For the reasons that follow, the Appeals Chamber finds that Mr Bemba has not shown that the findings of the Trial Chamber and the sentence imposed were affected by the Prosecutor's statement and submissions regarding the acquittal in the Main Case, nor that they were otherwise 'reflective of an arbitrary approach'.

105. Mr Bemba argues that the Trial Chamber failed to duly consider the absence of his prior conviction, a factor which he submits 'was relevant to the overall circumstances of Mr. Babala, Mr. Arido, Mr. Mangenda, and Mr. Kilolo'.<sup>238</sup> The Prosecutor submits that contrary to Mr Bemba's contention, the Trial Chamber consistently found that 'an absence of prior convictions' 'was not an express mitigating circumstance'.<sup>239</sup>

106. The Appeals Chamber notes that, contrary to Mr Bemba's submission, the Trial Chamber found this factor not to be a relevant mitigating circumstance for each of the other four convicted persons.<sup>240</sup> He fails to explain why the Trial Chamber should have ruled otherwise with respect to him and how this purportedly shows 'an arbitrary approach'.<sup>241</sup>

107. Mr Bemba submits that the Trial Chamber failed to consider the overall length of his detention.<sup>242</sup> The Prosecutor avers that Mr Bemba merely expresses disagreement with the Trial Chamber's findings by arguing that the Trial Chamber did not consider his 'overall detention'.<sup>243</sup> As will be discussed under the third ground of

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<sup>237</sup> [Appeal Brief](#), paras 111, 113, 117, 120, 140. *See also* [Transcript of Hearing of 4 September 2019](#), p. 6, lines 17-23.

<sup>238</sup> [Appeal Brief](#), para. 122 (emphasis in original omitted, footnotes omitted), *referring to* [Sentencing Decision](#), paras 61, 89, 137, 184.

<sup>239</sup> [Response](#), para. 154.

<sup>240</sup> [Sentencing Decision](#), paras 61 ('the absence of prior convictions is a fairly common feature among individuals convicted by international tribunals and will not be counted as a relevant mitigating circumstance' (footnote omitted)), 89, 137, 184.

<sup>241</sup> [Appeal Brief](#), para. 133.

<sup>242</sup> [Appeal Brief](#), para. 122.

<sup>243</sup> [Response](#), para. 155.



Mr Bemba's appeal, the Trial Chamber did take into account the time Mr Bemba had spent in detention.<sup>244</sup>

108. Mr Bemba contends that the Trial Chamber failed to adjust its previous findings based on the conviction in the Main Case, notably the characterisation of his role as the 'beneficiary' of the article 70 conduct.<sup>245</sup> The Prosecutor argues that Mr Bemba's main 'premise is incorrect: merely because he was acquitted in the Main Case does not mean that the common plan was not orchestrated for his benefit, and in this sense, he remains the "beneficiary of the article 70 conduct"'.<sup>246</sup>

109. Mr Bemba cites the following finding made in the Sentencing Decision:

[Mr Bemba] was the beneficiary of the common plan as the offences were committed in the context of his defence against the charges of crimes against humanity and war crimes in the Main Case.<sup>247</sup>

110. This finding refers to the following finding made in the Conviction Decision:

With a view to properly assessing Mr Bemba's contribution and *mens rea*, it is necessary to refer to his situation as an accused in the Main case. He is the ultimate and main beneficiary of the implementation of the common plan, as the offences were committed in the context of his defence against the charges of crimes against humanity and war crimes in the Main Case.<sup>248</sup>

111. The Appeals Chamber recalls that it examined the correctness of this finding in the *Bemba et al* Appeal Judgment and found that '[this finding] related to the analysis of Mr Bemba's position and role in the framework of the common plan, as well as his contribution to the offences'.<sup>249</sup> The Appeals Chamber finds that Mr Bemba has not shown that this finding required any adjustment in view of his acquittal in the Main Case. Assuming it was in fact relied upon in the Re-Sentencing Decision, the Appeals Chamber notes that the finding in question refers to Mr Bemba's 'situation as an accused in the Main case'. The finding concerns the assessment of his contribution and *mens rea* in the context of the commission of offences under article 70 of the

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<sup>244</sup> See *infra* para. 128.

<sup>245</sup> [Appeal Brief](#), paras 123, 130-132. See also [Transcript of Hearing of 4 September 2019](#), p. 41, line 20 to p. 42, line 3.

<sup>246</sup> [Response](#), para. 156.

<sup>247</sup> [Appeal Brief](#), para. 130, referring to [Sentencing Decision](#), para. 219.

<sup>248</sup> [Conviction Decision](#), para. 805 (footnote omitted).

<sup>249</sup> [Bemba et al Appeal Judgment](#), para. 885 (footnotes omitted).

Statute. The relevant ‘situation’ was one at the time when the crimes were committed and/or his contribution was made. At the time, Mr Bemba was an accused person in the Main Case. Mr Bemba fails to explain why his acquittal in the Main Case should have affected the finding in question.

112. Mr Bemba further argues that the Trial Chamber ‘endorsed the fact that Mr. Bemba served a *de facto* sentence of at least four years’ and it thus reinforced ‘the public perception that Mr. Bemba’s culpability corresponded to a four-year sentence’, which was proposed by Judge Pangalangan in 2017 in his dissenting opinion.<sup>250</sup> The Prosecutor contends that Judge Pangalangan’s view is not affected by the acquittal in the Main Case.<sup>251</sup> Mr Bemba refers to the Trial Chamber’s finding which reads as follows:

Since Mr Bemba has now served more than four years in detention in this case, he has accrued enough sentencing credits to cover the four-year sentence proposed by Judge Pangalangan, who accordingly concurs that a time-served sentence for Mr Bemba is now appropriate.<sup>252</sup>

113. This statement merely conveys that one of the judges of the Trial Chamber was of a different view as to the length of the suitable sentence for Mr Bemba. However, this does not affect the clear position of the majority.

114. Mr Bemba argues that the opinion of Judge Pangalangan was predicated on his conclusion that Mr Bemba’s conduct aimed to subvert a conviction, and that it is based on an assumption which, after the acquittal in the Main Case, amounts to an abuse of discretion.<sup>253</sup>

115. The impugned observation of Judge Pangalangan reads as follows:

Such a sentence would better reflect the severity of Mr Bemba’s conduct and the gravity of conducting over a year of systematic deception against the Court in order to subvert a conviction.<sup>254</sup>

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<sup>250</sup> [Appeal Brief](#), para. 124.

<sup>251</sup> [Response](#), para. 156.

<sup>252</sup> [Re-Sentencing Decision](#), fn. 214.

<sup>253</sup> [Appeal Brief](#), para. 125.

<sup>254</sup> [Judge Pangalangan’s Separate Opinion](#), para. 18.

116. The Appeals Chamber finds that Mr Bemba has not shown that this observation amounts to an abuse of discretion by the Trial Chamber. The impugned observation only states that the goal of the ‘systematic deception against the Court’ was to subvert a conviction. It is not concerned with whether Mr Bemba was ultimately convicted or not in the Main Case.

117. Mr Bemba submits that the Trial Chamber erred in its assessment of the nature of the unlawful testimony by relying on ‘entirely abstract notions of harm’ and ‘shearing the acquittal [...] from the sentencing process’.<sup>255</sup> In view of the Appeals Chamber’s considerations regarding the distinction between lies on merits and non-merits issues for the purpose of determining the gravity of the offences, as well as the independence of the present case from the Main Case in this context,<sup>256</sup> this argument is rejected.

118. Mr Bemba argues that the Trial Chamber imposed a disproportionate sentence. In support of this contention he refers to (i) the Trial Chamber’s finding that his contributions to the article 70(1)(a) offences were almost the same as the article 70(1)(c) contributions;<sup>257</sup> (ii) the Trial Chamber’s failure to indicate how it took into account his acquittal for the article 70(1)(b) offences;<sup>258</sup> (iii) the imposition of a higher sentence than those imposed on the other convicted persons in this case;<sup>259</sup> (iv) the Trial Chamber’s failure to consider the absence of his prior record, co-operation with the Court and the prohibition on his ability to participate in political life;<sup>260</sup> and (v) the Trial Chamber’s failure to afford him a remedy regarding the length of his detention.<sup>261</sup> The Prosecutor submits that Mr Bemba does not demonstrate ‘how his sentence was disproportionate to the findings concerning his culpability in the proceedings’ which were decided by the Trial Chamber and confirmed on appeal.<sup>262</sup>

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<sup>255</sup> [Appeal Brief](#), paras 126-129, 133.

<sup>256</sup> *See supra* paras 44-46.

<sup>257</sup> [Appeal Brief](#), para. 135.

<sup>258</sup> [Appeal Brief](#), para. 135.

<sup>259</sup> [Appeal Brief](#), para. 136.

<sup>260</sup> [Appeal Brief](#), para. 137.

<sup>261</sup> [Appeal Brief](#), para. 138.

<sup>262</sup> [Response](#), para. 157.

119. The Appeals Chamber refers to its findings regarding these matters made elsewhere in this judgment<sup>263</sup> and rejects these arguments of Mr Bemba for the same reasons. Regarding the Trial Chamber's alleged failure to consider Mr Bemba's co-operation with the Court, he has not explained what aspects of his co-operation were in his view relevant to the calculation of his sentence and how the Trial Chamber's failure to consider them impacted on his sentence. With respect to the prohibition on his ability to participate in political life, the Trial Chamber explained it would give 'minimal weight' to this factor because, in its view, the fact that Mr Bemba's conviction could negatively impact on his professional life 'is a natural consequence of the circumstances Mr Bemba found himself as a result of the criminal behaviour that he has been convicted for'.<sup>264</sup> While Mr Bemba acknowledges that the Trial Chamber stated that it would give 'minimal weight' to this factor, he argues that the Trial Chamber 'appears to have given it no weight'.<sup>265</sup> He does not explain how he reaches this view. The Appeals Chamber finds that Mr Bemba merely disagrees with the Trial Chamber's finding without showing an error of reasoning.

120. In light of the above considerations, this sub-ground of Mr Bemba's second ground of appeal is rejected.

### 3. Conclusion

121. For the above reasons, the Appeals Chamber rejects the second ground of Mr Bemba's appeal.

## C. Third ground of appeal

122. Mr Bemba submits that the Trial Chamber imposed a sentence that exceeds the level of his culpability when viewed within the context of the total punishment.<sup>266</sup> He argues that his sentence is disproportionate under article 81(2)(a) of the Statute because the Trial Chamber failed to refer to the 'totality principle' embodied in rule 145(1)(a) and (b) of the Rules.<sup>267</sup> In that regard, he argues that the Trial Chamber

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<sup>263</sup> See *supra* paras 60-61, 63, 84-88, 106; *infra* para. 129.

<sup>264</sup> [Re-Sentencing Decision](#), para. 119.

<sup>265</sup> [Appeal Brief](#), para. 137 (emphasis in original omitted), referring to [Sentencing Decision](#), para. 119.

<sup>266</sup> [Notice of Appeal](#), para. 34; [Appeal Brief](#), paras 155-157.

<sup>267</sup> [Appeal Brief](#), paras 2, 155.

(i) failed to consider the consequences of his prolonged detention as a relevant factor affecting his punishment and individual circumstances;<sup>268</sup>

(ii) incorrectly assessed the amount of his fine owed in terms of his means, rather than his culpability;<sup>269</sup> and

(iii) should have applied the Statutory protections against *ne bis in idem* and penalties that fall outside the article 70 regime. In particular, the Trial Chamber erred in rejecting his request regarding the decision of the Constitutional Court of the Democratic Republic of the Congo (the ‘DRC’) ruling out Mr Bemba’s eligibility as a presidential candidate for the DRC elections.<sup>270</sup>

123. The Prosecutor submits that Mr Bemba fails to show that the Trial Chamber erred in its reasoning.<sup>271</sup> In her view, (i) Mr Bemba misconstrues the Trial Chamber’s application of the totality principle; (ii) the Trial Chamber correctly assessed the amount of Mr Bemba’s fine, considering primarily his enhanced culpability and then his solvency; and (iii) the Trial Chamber did not err in giving minimal weight to the disqualification of Mr Bemba as a presidential candidate in the DRC as a sentencing factor.<sup>272</sup>

*1. Alleged failure to address the consequences of Mr Bemba’s prolonged detention*

**(a) Relevant part of the Re-Sentencing Decision**

124. In determining the appropriate sentence, the Trial Chamber held that being ‘[m]indful of the time already spent in detention, [it] weighed and balanced all these factors’ and revised ‘its earlier assessments as necessary’.<sup>273</sup> The Trial Chamber considered that Mr Bemba’s acquittal in the Main Case did not impact the sentence to be imposed in the present case<sup>274</sup> and that Mr Bemba’s request not to have a term of imprisonment would inadequately reflect his culpability.<sup>275</sup> Consequently, the Trial Chamber sentenced Mr Bemba:

(i) As a co-perpetrator, under Article 25(3)(a) of the Statute, of the 14 offences of corruptly influencing witnesses, to 12 months’ imprisonment.

<sup>268</sup> [Appeal Brief](#), paras 2, 156.

<sup>269</sup> [Appeal Brief](#), paras 2, 156.

<sup>270</sup> [Notice of Appeal](#), para. 35; [Appeal Brief](#), paras 2, 156.

<sup>271</sup> [Response](#), para. 160.

<sup>272</sup> [Response](#), para. 160.

<sup>273</sup> [Re-Sentencing Decision](#), para. 120.

<sup>274</sup> [Re-Sentencing Decision](#), para. 121. *See also* paras 19-25.

<sup>275</sup> [Re-Sentencing Decision](#), para. 121.

(ii) As an accessory, under Article 25(3)(b) of the Statute, to the 14 offences of soliciting the giving of false testimony of the witnesses while under the obligation to tell the truth, to 12 months' imprisonment.<sup>276</sup>

125. Pursuant to article 78(3) of the Statute, the Trial Chamber imposed a joint sentence of 12 months' imprisonment.<sup>277</sup> In light of article 78(2) of the Statute, the Trial Chamber considered that, '[s]ince the imposed sentence is far less than the credit to be applied for the period of time Mr Bemba has been in custody', the sentence of imprisonment was served.<sup>278</sup>

### (b) Determination by the Appeals Chamber

126. Mr Bemba argues that the Trial Chamber failed to apply the 'totality principle' embodied in rule 145(1)(a) and (b) of the Rules.<sup>279</sup> His argument focuses mainly on the Trial Chamber's alleged failure to take into account the impact of his alleged prolonged detention and the 'imbalance between the punishment that he has endured, as compared to the degree of culpability assessed by the Trial Chamber' when determining the sentence.<sup>280</sup> Mr Bemba contends that such prolonged detention 'falls within the totality principle'.<sup>281</sup> In his view, given his acquittal for the article 70(1)(b) offence, his new sentence should have been less than the one imposed in 2017.<sup>282</sup> He adds that he 'should not be punished because of the wrongful perception (engendered by the Prosecution) that his acquittal represents the successful realisation of the "common plan"'.<sup>283</sup>

127. The Prosecutor submits that Mr Bemba disregards the plain text of the Trial Chamber's decision which considered his time in detention when 'weighing and balancing various sentencing factors' as well as when 'considering the sentence as served'.<sup>284</sup> She adds that Mr Bemba 'conflates the acquittal and his detention' and contrary to his contention, the Trial Chamber 'appropriately considered Mr Bemba's

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<sup>276</sup> [Re-Sentencing Decision](#), para. 122.

<sup>277</sup> [Re-Sentencing Decision](#), para. 123.

<sup>278</sup> [Re-Sentencing Decision](#), para. 126.

<sup>279</sup> [Appeal Brief](#), paras 155-156; [Transcript of Hearing of 4 September 2019](#), p. 56, lines 7-13.

<sup>280</sup> [Appeal Brief](#), paras 158, 166.

<sup>281</sup> [Appeal Brief](#), para. 162.

<sup>282</sup> [Notice of Appeal](#), para. 34; [Appeal Brief](#), paras 158-159, 168.

<sup>283</sup> [Appeal Brief](#), para. 170.

<sup>284</sup> [Response](#), para. 163; [Transcript of Hearing of 4 September 2019](#), p. 73, line 21 to p. 74, line 3, p. 78, line 25 to p. 79, line 10, p. 80, lines 10-15.

time in detention when re-sentencing him’, and considered that a fine alone ‘would not adequately reflect Mr Bemba’s culpability’.<sup>285</sup>

128. The Appeals Chamber finds no merit in Mr Bemba’s submissions. In deciding to impose a sentence that is not substantially different from the original imprisonment sentence, the Trial Chamber noted that several of its new considerations ‘cut in opposing directions and, to an extent, cancel each other out.’<sup>286</sup> This led to a result that was ‘akin to what was pronounced’ in the Sentencing Decision.<sup>287</sup> In this regard, the Appeals Chamber recalls the broad discretion enjoyed by trial chambers in the determination of the appropriate sentence.<sup>288</sup>

129. In particular, the Trial Chamber recalled its discussion on the gravity of the offences, Mr Bemba’s culpable conduct and his individual circumstances.<sup>289</sup> It revised its assessment on the nature of the unlawful behaviour, the nature of the false testimony and took into account its new considerations on principal versus accessorial liability.<sup>290</sup> As a consequence of this re-assessment and the new consideration, the Trial Chamber was of the view that the sentence for the offence under article 70(1)(a) should be increased.<sup>291</sup> Contrary to Mr Bemba’s contention regarding his acquittal for the article 70(1)(b) offence,<sup>292</sup> the Trial Chamber also considered that the reversal of the article 70(1)(b) convictions ‘should lead to some reduction in his joint sentence’.<sup>293</sup>

130. The Appeals Chamber considers that by imposing a joint custodial sentence of one year imprisonment, the Trial Chamber did take into account the time Mr Bemba spent in detention. As noted by the Prosecutor,<sup>294</sup> the Trial Chamber explicitly held that when weighing and balancing all relevant factors and revising its previous

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<sup>285</sup> [Response](#), para. 163, referring to [Re-Sentencing Decision](#), para. 121.

<sup>286</sup> [Re-Sentencing Decision](#), para. 131.

<sup>287</sup> [Re-Sentencing Decision](#), para. 131.

<sup>288</sup> See *supra* para. 26.

<sup>289</sup> [Re-Sentencing Decision](#), paras 111-114, 116-119, referring to [Sentencing Decision](#), paras 204-209, 214-217, 219-226, 234, 236, 238, 244.

<sup>290</sup> [Re-Sentencing Decision](#), paras 114, 117.

<sup>291</sup> [Re-Sentencing Decision](#), paras 114, 117. See also paras 34-35.

<sup>292</sup> [Notice of Appeal](#), para. 34; [Appeal Brief](#), paras 158-159, 168.

<sup>293</sup> [Re-Sentencing Decision](#), para. 120.

<sup>294</sup> [Response](#), paras 163, 166.

assessments, it was '[m]indful of the time already spent in detention'.<sup>295</sup> In addition, when assessing the proportionality of the sentence, the Trial Chamber placed 'special emphasis' on the fact that Mr Bemba, along with Mr Kilolo and Mr Mangenda, had 'been imprisoned for significant periods of time in the present case [...and that] [t]he case has had significant effects on their professional reputations, financial circumstances [...] and family circumstances'.<sup>296</sup> Therefore, contrary to Mr Bemba's contention, the Trial Chamber took the length of detention into account. Mr Bemba merely disagrees with the Trial Chamber's findings without showing any error in its assessment.

131. As to Mr Bemba's argument regarding the proportionality of his sentence, the Trial Chamber held that the imposed penalties were 'proportionate relative to the seriousness of the offences in this case and reflect all relevant factors set out previously, especially as regards mitigating factors'.<sup>297</sup> Mr Bemba fails to substantiate his argument and merely expresses his disagreement with the Trial Chamber's finding.

132. Mr Bemba's argument that there is no basis for 'any further sanctions' given the length of his detention<sup>298</sup> merely repeats his unsuccessful contention made before the Trial Chamber, without showing any error in the Trial Chamber's reasoning and findings. The Trial Chamber rejected Mr Bemba's similar argument that only a fine should be imposed given the time spent in detention following his acquittal in the Main Case.<sup>299</sup> The Trial Chamber considered that 'it would not adequately reflect Mr Bemba's culpability for him to have no term of imprisonment declared against him'.<sup>300</sup> Mr Bemba does not identify any error in the Trial Chamber's present finding.

133. Mr Bemba contends that the Trial Chamber's statement that 'he continues to have the spectre of [the Court] hanging over him because of his obstruction of the administration of justice' – despite his acquittal in the Main Case – shows that the

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<sup>295</sup> [Re-Sentencing Decision](#), para. 120.

<sup>296</sup> [Re-Sentencing Decision](#), para. 138.

<sup>297</sup> [Re-Sentencing Decision](#), para. 139.

<sup>298</sup> [Appeal Brief](#), para. 168.

<sup>299</sup> [Re-Sentencing Decision](#), para. 121, referring to [Re-Sentencing Hearing](#), p. 42, line 5 to p. 43, line 15, p. 68, line 1 to p. 75, line 24.

<sup>300</sup> [Re-Sentencing Decision](#), para. 121.



Trial Chamber had ‘misguided perceptions’ of this acquittal, which justifies his ‘ongoing punishment’.<sup>301</sup> The Appeals Chamber finds Mr Bemba’s argument unconvincing. The Trial Chamber did not call into question his acquittal in the Main Case, but merely recalled – factually correctly – that he had been convicted in the present case because of his obstruction of the administration of justice. Mr Bemba fails to explain why this finding of the Trial Chamber amounts to an error in its exercise of discretion in its sentencing determination.

2. *Alleged error regarding the calculation of the imposed fine*

(a) **Relevant part of the Re-Sentencing Decision**

134. With respect to the imposition of a fine, the Trial Chamber was of the view that to dissuade Mr Bemba from repeating the conduct that formed the basis of his conviction a fine would be ‘the most appropriate way to reflect’ his convictions for the two distinct offences.<sup>302</sup> According to the Trial Chamber, such fine would create an ‘additional penalty for the violation of two provisions under Article 70 of the Statute while balancing the fact that the same conduct underlies each conviction’.<sup>303</sup> In imposing the fine, the Trial Chamber considered Mr Bemba’s ‘enhanced culpability’, ‘solvency’, and that compared to Mr Kilolo, Mr Bemba had ‘considerably more means’.<sup>304</sup> It concluded that the fine should be ‘substantially higher in order to have an equivalent deterrent effect’.<sup>305</sup> It fined Mr Bemba ‘for the same amount as before: EUR 300,000’.<sup>306</sup>

135. The Trial Chamber noted that Mr Bemba ‘at one point requested that a substantial fine “should be maintained”’.<sup>307</sup> The Trial Chamber considered that statement as confirming that Mr Bemba’s and his dependents’ financial needs – as

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<sup>301</sup> [Appeal Brief](#), paras 168-169, referring to [Re-Sentencing Decision](#), para. 138. See also [Appeal Brief](#), paras 170-171.

<sup>302</sup> [Re-Sentencing Decision](#), paras 127, 133-134, referring to [Sentencing Decision](#), para. 261.

<sup>303</sup> [Re-Sentencing Decision](#), para. 134.

<sup>304</sup> [Re-Sentencing Decision](#), paras 127, 134, referring to rule 166(3) of the Rules; Annex II to Updated Registry’s Report on the Solvency of Messrs. Aimé Kilolo Musamba and Jean-Pierre Bemba Gombo, 2 July 2018, ICC-01/05-01/13-2295-Conf-Exp-AnxII; Annex I to Registry’s Updated Report on Solvency of the Convicted Persons, 13 April 2018, ICC-01/05-01/13-2278-Conf-Exp-AnxI; [Defence Submission on Sentencing](#), 1 June 2018, ICC-01/05-01/13-2281-Red (a confidential version was registered on 30 May 2018), paras 50, 62-75; and Annex C, ICC-01/05-01/13-2281-Conf-AnxC.

<sup>305</sup> [Re-Sentencing Decision](#), para. 134.

<sup>306</sup> [Re-Sentencing Decision](#), para. 127.

<sup>307</sup> [Re-Sentencing Decision](#), fn. 216.

required under rule 166(3) of the Rules – ‘will still be met by imposing an identical fine to the one specified in the Sentencing Decision’.<sup>308</sup>

136. The Trial Chamber concluded that the imposed penalties were ‘proportionate relative to the seriousness of the offences in this case and reflect all relevant factors set out previously, especially as regards mitigating factors’.<sup>309</sup>

### (b) Determination by the Appeals Chamber

137. Mr Bemba contends that ‘there are no evidential findings concerning the nature of [his] excess culpability’.<sup>310</sup> He maintains that even if he is subject to additional culpability, the Trial Chamber had no rational basis for a fine amounting to 300,000 euros.<sup>311</sup> The Prosecutor submits that Mr Bemba’s culpability, rather than solvency, was the Trial Chamber’s primary consideration when calculating the fine.<sup>312</sup>

138. The Appeals Chamber recalls that, as stated above, trial chambers are vested with broad discretion in determining an appropriate sentence.<sup>313</sup> In this case, the Trial Chamber deemed it necessary in order to reflect Mr Bemba’s culpability to impose both a term of imprisonment and a fine.<sup>314</sup> The Trial Chamber made factual findings supporting its conclusions regarding his culpable conduct with references to the relevant parts of the Sentencing Decision.<sup>315</sup> Mr Bemba merely disagrees with the Trial Chamber’s findings and conclusions without showing an error. His argument is therefore rejected.

139. Mr Bemba also takes issue with the purported disparity between the fines imposed on him and Mr Kilolo.<sup>316</sup> He argues that this disparity goes against the Appeals Chamber’s ‘directive’ regarding fines.<sup>317</sup> Mr Bemba avers that the Trial Chamber’s attempt to rationalise Mr Bemba and Mr Kilolo’s differing fines based on ‘deterrence’ is problematic because his ‘means are irrelevant to the extent to which

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<sup>308</sup> [Re-Sentencing Decision](#), fn. 216.

<sup>309</sup> [Re-Sentencing Decision](#), para. 139.

<sup>310</sup> [Appeal Brief](#), para. 173.

<sup>311</sup> [Appeal Brief](#), para. 174.

<sup>312</sup> [Response](#), paras 163, 180.

<sup>313</sup> *See supra* para. 26.

<sup>314</sup> [Re-Sentencing Decision](#), para. 121.

<sup>315</sup> [Re-Sentencing Decision](#), para. 116; [Sentencing Decision](#), paras 218-238.

<sup>316</sup> [Appeal Brief](#), paras 172, 174, *referring to* [Re-Sentencing Decision](#), para. 134.

<sup>317</sup> [Appeal Brief](#), para. 174.

this sentence deters other detainees from engaging in Article 70 offences'.<sup>318</sup> The Prosecutor contends that, as stated by the Appeals Chamber, the fine imposed on Mr Kilolo is not a 'relevant benchmark'.<sup>319</sup>

140. The Appeals Chamber recalls that it has previously rejected Mr Bemba's argument that the Trial Chamber, in the Sentencing Decision, had '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'.<sup>320</sup> The Appeals Chamber found that there was 'no indication [...] that the Trial Chamber primarily based its determination on Mr Bemba's financial situation'.<sup>321</sup>

141. The Appeals Chamber was of the view that the primary consideration when determining the appropriate type of punishment should be 'culpability, rather than solvency'.<sup>322</sup> It considered that such consideration 'constitutes a guarantee of equal treatment of convicted persons'.<sup>323</sup> The Appeals Chamber reasoned that

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.<sup>324</sup>

142. With respect to the calculation of the fine, the Appeals Chamber observed that the Trial Chamber had referred to rule 166(3) of the Rules<sup>325</sup> and the solvency report filed by the Registry.<sup>326</sup> While the Appeals Chamber noted that the Trial Chamber could have 'elaborate[d] on how it calculated and deducted an appropriate amount that would satisfy the financial needs of Mr Bemba and his dependents', it found no

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<sup>318</sup> [Appeal Brief](#), para. 175, referring to [Re-Sentencing Decision](#), fn. 216.

<sup>319</sup> [Response](#), paras 182-183.

<sup>320</sup> [Bemba et al Sentencing Appeal Judgment](#), paras 245, 247, 249-250.

<sup>321</sup> [Bemba et al Sentencing Appeal Judgment](#), paras 245, 247, 249-250.

<sup>322</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 245.

<sup>323</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 245.

<sup>324</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 245.

<sup>325</sup> Rule 166(3) of the Rules provides that '[e]ach offence may be separately fined and those fines may be cumulative. Under no circumstances may the total amount exceed 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would justify the financial needs of the convicted person and his or her dependants'.

<sup>326</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 247.

error in the Trial Chamber's approach.<sup>327</sup> It did so because under rule 166(3) of the Rules, a trial chamber is not required '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.'<sup>328</sup> The Appeals Chamber noted that the fine imposed respected the percentage of the value of Mr Bemba's asset as required under rule 166(3).<sup>329</sup>

143. In the present appeal, the Appeals Chamber finds no error in the Trial Chamber's approach. The Trial Chamber's determination of the fines was not confined to the solvency status of Mr Bemba and Mr Kilolo. In that respect, it explained that the use of fines was 'the most appropriate way to reflect that [Mr Kilolo and Mr Bemba] have been convicted for two distinct offences'.<sup>330</sup> Referring to rule 166(3) of the Rules, it noted that 'statutory scheme set[] very few limits on imposing fines – so long as the fine falls within the statutory maximum, the Chamber may impose them whenever it considers them to be an appropriate penalty'.<sup>331</sup> It held that fines created an 'additional penalty for the violation of two provisions under Article 70 of the Statute while balancing the fact that the same conduct underlies each conviction'.<sup>332</sup> When imposing the fine, the Trial Chamber considered Mr Bemba's 'enhanced culpability' and 'solvency' on the basis of rule 166(3) of the Rules and two Registry reports on Mr Bemba's solvency.<sup>333</sup>

144. In addition, the Trial Chamber's main consideration in determining an appropriate fine was Mr Bemba's culpability. Indeed, Mr Bemba's 'enhanced culpability' transpires from the Trial Chamber's factual findings and assessment as discussed in the determination of the first ground of appeal.<sup>334</sup> In particular, when addressing Mr Bemba's culpable conduct, the Trial Chamber referred to its findings made in the Sentencing Decision on Mr Bemba's degree of participation in the

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<sup>327</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 247.

<sup>328</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 247 (footnotes omitted).

<sup>329</sup> [Bemba et al Sentencing Appeal Judgment](#), para. 247 (footnotes omitted).

<sup>330</sup> [Re-Sentencing Decision](#), para. 133.

<sup>331</sup> [Re-Sentencing Decision](#), para. 133, fn. 220.

<sup>332</sup> [Re-Sentencing Decision](#), paras 133-134.

<sup>333</sup> [Re-Sentencing Decision](#), para. 127, referring to rule 166(3) of the Rules; ICC-01/05-01/13-2295-Conf-Exp-AnxII; ICC-01/05-01/13-2278-Conf-Exp-AnxI. See also [Re-Sentencing Decision](#), fn. 220.

<sup>334</sup> See *supra* paras 46, 49, 59-60.

offences.<sup>335</sup> In that decision, the Trial Chamber found that Mr Bemba was the ‘beneficiary of the common plan as the offences were committed in the context of his defence [...] in the Main Case’.<sup>336</sup> It added that Mr Bemba ‘issued directions and instructions to the other convicted persons’ and that ‘Mr Kilolo made clear that he was acting on behalf of Mr Bemba’ and the other convicted persons were ‘concerned with pleasing Mr Bemba and implementing his instructions to his satisfaction’.<sup>337</sup> The Trial Chamber noted that Mr Bemba ‘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’.<sup>338</sup> The Trial Chamber also referred to the finding that Mr Bemba had been ‘informed at all times about the illicit coaching activities’ and that ‘he was in control of the payment scheme’.<sup>339</sup>

145. Mr Bemba contends further that the Trial Chamber erred in explaining the difference between the fines imposed on Mr Bemba and Mr Kilolo on the ground of ‘deterrence’ because the general deterrent effect of a fine should be independent of a person’s means.<sup>340</sup> He argues that the Trial Chamber fails to explain why deterrence warrants any further penalty, such as the imposed fine.<sup>341</sup> The Trial Chamber emphasised the ‘need to discourage this type of behaviour and to ensure that the repetition of such conduct on the part of Mr Bemba or any other person is dissuaded’.<sup>342</sup> The Trial Chamber was of the view that compared to Mr Kilolo, Mr Bemba ‘has considerably more means’; therefore, the fine should be ‘substantially higher in order to have an equivalent deterrent effect’.<sup>343</sup>

146. The Appeals Chamber finds no error in considering solvency as a relevant factor for the determination of a fine. As noted by the Prosecutor,<sup>344</sup> solvency is a relevant consideration in numerous jurisdictions and its underlying rationale is the

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<sup>335</sup> [Re-Sentencing Decision](#), para. 116, referring to [Sentencing Decision](#), paras 219-223.

<sup>336</sup> [Sentencing Decision](#), para. 219.

<sup>337</sup> [Sentencing Decision](#), para. 219.

<sup>338</sup> [Sentencing Decision](#), para. 220.

<sup>339</sup> [Sentencing Decision](#), para. 220.

<sup>340</sup> [Appeal Brief](#), para. 175.

<sup>341</sup> [Appeal Brief](#), para. 175.

<sup>342</sup> [Re-Sentencing Decision](#), para. 127.

<sup>343</sup> [Re-Sentencing Decision](#), para. 134.

<sup>344</sup> [Response](#), para. 183.

need to ensure a deterrent effect.<sup>345</sup> As far as individual deterrence is concerned, it was reasonable for the Trial Chamber to impose a higher fine on Mr Bemba than on Mr Kilolo to achieve the aim of individual deterrence. Moreover, the Appeals Chamber recalls that the Trial Chamber's primary responsibility in sentencing is 'to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused'.<sup>346</sup> The sentences imposed on the persons convicted in this case were fact-specific and based on their individual circumstances. It is therefore inapposite to compare the sentences imposed on different convicted persons. Mr Bemba's comparison of his fine with that imposed on Mr Kilolo, without reference to the different convictions and different individual circumstances, is therefore rejected.

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<sup>345</sup> See for instance United States of America: United States Code, 2000 Edition, (U.S.C.A.), section §3572 (a) 'Factors to be considered, (1) the defendant's income, earning capacity, and financial resources'; U.S. Federal Sentencing Guidelines, §5E1.2: '[...] (d) In determining the amount of the fine, the court shall consider: (1) the need for the combined sentence [...] to afford adequate deterrence; (2) any evidence presented as to the defendant's ability to pay the fine [...] in light of his earning capacity and financial resources [...]'; U.S. Court of Appeals, Second Circuit, *United States of America v. Morris E. Zukerman*, 897 F.3d 423, 431–32 (2d Cir. 27 July 2018) (Docket No. 17-948), p. 18 ('It stands to reason that a defendant's wealth is relevant in determining whether a particular fine will deter illegal conduct. [...] A fine can only be an effective deterrent if it is painful to pay, and whether a given dollar amount hurts to cough up depends upon the wealth of the person paying it');

Australia: Criminal Act 1914, Section 16C(1): 'Subject to subsection (2), before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account'; Queensland Penalties and Sentences Act (as at 27 October 2017) – Act 48 of 1992, section 48(1): 'If a court decides to fine an offender, then, in determining the amount of the fine and the way in which it is to be paid, the court must, as far as practicable, take into account - (a) the financial circumstances of the offender; and (b) the nature of the burden that payment of the fine will be on the offender'; Court of Criminal Appeal of New South Wales, *Mahdi Jahandideh v. R.*, [2014] NSWCCA 178 of 8 September 2014, paras 15-17;

United Kingdom: Criminal Justice Act, 2003 (c. 44), section 164(3): 'In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court';

Canada: Criminal Code (R.S.C., 1995, c. C-46), section 734(2);

France: French Penal Code, article 132-24: '[...] When the court imposes a fine, it determines its size taking into account the income and expenses of the perpetrator of the offence';

Finland: Finish Penal Code, (19 December 1889/39), section 4a [29 July 1976/650]: '(1) A day-fine shall be set in full FIM at an amount that is to be deemed reasonable, at the time of sentencing, with regard to the solvency of the person fined';

Germany: German Criminal Code (13 November 1998), section 40(2) 'The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day net income of the offender or the average income he could achieve in one day [...]';

Poland: Polish Penal Code, article 33(3).

<sup>346</sup> Bemba et al Sentencing Appeal Judgment, para. 204, quoting Lubanga Sentencing Appeal Judgment, para. 76.

147. Finally, Mr Bemba argues that the Trial Chamber abused its discretion in justifying the amount of his fine by referring to Mr Bemba's submissions which predated his acquittal.<sup>347</sup> He contends that in his 'post-acquittal submissions', he suggested a "reasonable" fine rather than a substantial one'.<sup>348</sup> Mr Bemba avers that in so doing, the Trial Chamber 'bolster[ed] the appearance that the Prosecution's attack on the [*Bemba Appeal*] [J]udgment deterred the Chamber from giving any effect to the consequences of the acquittal'.<sup>349</sup> The Appeals Chamber finds this argument speculative and it is accordingly dismissed.

3. *The Trial Chamber did not apply the statutory protection against ne bis in idem and penalties that fall outside article 70*

(a) **Background and relevant part of the Re-Sentencing Decision**

148. On 10 September 2018, Mr Bemba sought the Trial Chamber's assistance in relation to a decision from the DRC Constitutional Court.<sup>350</sup> According to Mr Bemba, the Constitutional Court decided that he was not eligible to hold office in the DRC as the conduct which led to his conviction in the present case equated to the crime of corruption under DRC law.<sup>351</sup> Mr Bemba requested the Trial Chamber to (i) issue a declaration that the DRC authorities did not have competence to unilaterally exercise jurisdiction over the conduct for which Mr Bemba had been convicted; or (ii) alternatively to take into account the DRC Decision for re-sentencing purposes.<sup>352</sup>

149. The Trial Chamber rejected Mr Bemba's request in its 14 September 2018 Decision and held that it was not persuaded by Mr Bemba's submissions regarding the declaration sought.<sup>353</sup> Mr Bemba had argued that the DRC Constitutional Court decision violated article 23 of the Statute because '(i) the domestic court took into account [his] conviction at the ICC before the Article 70 proceedings [had] been

<sup>347</sup> [Appeal Brief](#), para. 176.

<sup>348</sup> [Appeal Brief](#), fn. 323, referring to [Re-Sentencing Hearing](#), p. 75, lines 21-22 ('Given these extraordinary circumstances, given the amount of time that's been spent in jail, the fairest, the most appropriate outcome would be a complete discharge following payment of a reasonable fine to the Trust Fund for victims'); Urgent Request, 10 September 2018, ICC-01/05-01/13-2307 (the '[Urgent Request](#)'), para. 47.

<sup>349</sup> [Appeal Brief](#), para. 176 (emphasis in original omitted).

<sup>350</sup> [Urgent Request](#), para. 1.

<sup>351</sup> Decision on Bemba Defence Request Following DRC Election Decision, 14 September 2018, ICC-01/05-01/13-2311 (the '[14 September 2018 Decision](#)'), para. 2.

<sup>352</sup> [14 September 2018 Decision](#), para. 2.

<sup>353</sup> [14 September 2018 Decision](#), paras 7, 11.



concluded; and (ii) the [decision] “subject[ed] Mr Bemba to measures and legal consequences that were not in force at the time that the Article 70 conduct occurred”<sup>354</sup>. The Trial Chamber considered that article 23 of the Statute was ‘principally concerned with punishments that this Court imposes on convicted persons. A loss of the right to seek office by a domestic court is beyond its ambit’<sup>355</sup>.

150. With respect to Mr Bemba’s contention that the DRC Constitutional Court ruling violated the *ne bis in idem* principle provided under rule 168 of the Rules, the Trial Chamber was of the view that ‘this provision only regulates the powers of this Court to launch subsequent domestic prosecutions against persons convicted by the Court. It is unrelated to subsequent domestic proceedings’<sup>356</sup>. Consequently, the Trial Chamber considered that the issue of ‘whether Mr Bemba can be tried and punished for the same Article 70 conduct before domestic courts is a matter to be resolved with reference to domestic law’<sup>357</sup>. The Trial Chamber found further that

it is not for the Chamber to consider how Mr Bemba’s convictions in this case should be treated under DRC electoral law. Should Mr Bemba be dissatisfied with the DRC Decision, it is for him to pursue this before an appropriate venue in the DRC. The Chamber does not consider that a DRC court attaching electoral consequences to Mr Bemba’s convictions in this case amounts to some sort of jurisdictional conflict of the kind the Bemba Defence asserts.<sup>358</sup>

151. The Trial Chamber concurred with the Prosecutor that it was for the ‘competent domestic authorities to regulate their own electoral proceedings’<sup>359</sup>. In these circumstances, the Trial Chamber was of the view that it ‘will not intervene in such proceedings, nor will it tolerate being instrumentalised in an attempt to influence them’<sup>360</sup>. The Trial Chamber permitted Mr Bemba to include the DRC Decision as an

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<sup>354</sup> [14 September 2018 Decision](#), para. 8.

<sup>355</sup> [14 September 2018 Decision](#), para. 8 (emphasis in original omitted; footnote omitted). The Trial Chamber considered that this interpretation of article 23 was consistent with the Appeals Chamber’s discussion of this provision in relation to the corresponding powers of the trial chambers of this Court. [14 September 2018 Decision](#), para. 8, referring to [Bemba et al Sentencing Appeal Judgment](#), paras 77-78.

<sup>356</sup> [14 September 2018 Decision](#), para. 9.

<sup>357</sup> [14 September 2018 Decision](#), para. 9.

<sup>358</sup> [14 September 2018 Decision](#), para. 10 (footnotes omitted).

<sup>359</sup> [14 September 2018 Decision](#), para. 10.

<sup>360</sup> [14 September 2018 Decision](#), para. 10.



additional sentencing submission but deferred its decision on the weight to be given, if any, to that decision to a later date, namely in the Re-Sentencing Decision.<sup>361</sup>

152. In the Re-Sentencing Decision, the Trial Chamber considered that its previous assessment of Mr Bemba's individual circumstances, in particular his family situation, remained 'accurate'.<sup>362</sup> It only gave 'minimal weight' to Mr Bemba's claim that his conviction 'affected his professional life' as any negative impact was 'a natural consequence of the circumstances Mr Bemba found himself as a result of the criminal behaviour that he has been convicted for'.<sup>363</sup> The Trial Chamber recalled that it had addressed the issue of a 'total prohibition from working in country of residence' which could harm 'one's career' in its Sentencing Decision and concluded that it 'does not constitute a mitigating factor'.<sup>364</sup>

#### **(b) Determination by the Appeals Chamber**

153. Mr Bemba contends that the Trial Chamber erred in refusing to protect him against parallel proceedings in the DRC and the penalty imposed on him by the DRC Constitutional Court.<sup>365</sup> He argues that the Trial Chamber failed to provide 'legal justification' regarding its conclusion on article 23 of the Statute and failed to consider the implications of such position regarding the 'overarching issue as to whether provisions of Part 3 of the Statute have vertical effects as concerns the obligations of States Parties'.<sup>366</sup> The Prosecutor argues that (i) the DRC electoral proceedings were not criminal proceedings and that Mr Bemba was thus not subjected to a parallel criminal adjudication or unforeseen penal sanction; and (ii) the DRC Constitutional Court's finding that Mr Bemba was ineligible for presidential candidacy did not amount to a new conviction.<sup>367</sup>

154. Article 23 of the Statute provides that '[a] person convicted by the Court may be punished only in accordance with this Statute'. Rule 168 of the Rules provides that

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<sup>361</sup> [14 September 2018 Decision](#), paras 14-15.

<sup>362</sup> [Re-Sentencing Decision](#), para. 119, referring to [Sentencing Decision](#), para. 244.

<sup>363</sup> [Re-Sentencing Decision](#), para. 119, referring to [Sentencing Decision](#), paras 141, 188-89; [Annex A to the Urgent Request](#), 10 September 2018, ICC-01/05-01/13-2307-AnxA. See also [Urgent Request](#), with [Annex B](#) (ICC-01/05-01/13-2307-AnxB).

<sup>364</sup> [Re-Sentencing Decision](#), fn. 200, referring to [Sentencing Decision](#), paras 141, 188-189.

<sup>365</sup> [Appeal Brief](#), paras 179-182.

<sup>366</sup> [Appeal Brief](#), para. 182; [Transcript of Hearing of 4 September 2019](#), p. 56, line 14 to p. 58, line 1, p. 59, lines 4-8, p. 60, line 21 to p. 61, line 2.

<sup>367</sup> [Response](#), paras 185-199; [Transcript of Hearing of 4 September 2019](#), p. 74, line 15 to p. 76, line 5.

‘[i]n respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another Court’.

155. The Appeals Chamber notes that contrary to Mr Bemba’s claim, the DRC Constitutional Court ruling, as summarised by Mr Bemba, does not amount to a criminal proceeding for corruption or for an offence against the administration of justice in the DRC. As stated by Mr Bemba, the DRC Constitutional Court concluded in its decision that he was not eligible to hold office in the DRC, as Mr Bemba’s conduct in the article 70 case amounted to the crime of corruption.<sup>368</sup> The DRC Constitutional Court appears to have ruled only on the required eligibility criteria for presidential candidates who wish to run for presidential office in the DRC. The scope of that decision is limited to the eligibility assessment of presidential candidates. The Constitutional Court’s pronouncement on Mr Bemba’s conviction is a mere reference to the proceedings before this Court, without making any determinations as to Mr Bemba’s guilt. Therefore, the issue of *ne bis in idem* does not arise in the present situation and the Appeals Chamber considers it unnecessary to address the applicability of rule 168 of the Rules. The Trial Chamber correctly found that it was not for this Court to intervene in the DRC domestic electoral proceedings.<sup>369</sup>

156. Accordingly, the Appeals Chamber rejects Mr Bemba’s arguments under this sub-ground of appeal.

#### 4. Conclusion

157. For the foregoing reasons, the Appeals Chamber rejects the third ground of Mr Bemba’s appeal.

## VI. APPROPRIATE RELIEF

158. In the present case, the Appeals Chamber has not found any errors in the Trial Chamber’s findings and has rejected all grounds of appeal. It is therefore appropriate to confirm the Re-Sentencing Decision.

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<sup>368</sup> [14 September 2018 Decision](#), para. 2.

<sup>369</sup> [14 September 2018 Decision](#), para. 10.

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

A handwritten signature in black ink, appearing to read 'H. Morrison', is written over a horizontal line.

**Judge Howard Morrison**  
**Presiding**

Dated this 27th day of November 2019

At The Hague, The Netherlands