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TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.* Jean-Pierre Bemba Gombo**

Public
With Confidential ex Parte Annex A (Prosecution, Defence) and Public Annex B

Public Redacted Version of Submissions on Sentence, ICC-01/05-01/08-3376-Conf

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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I. INTRODUCTION

1. Fifty-four commanders have been sentenced as such by the ICTY, ICTR and SCSL. Unlike Mr. Bemba, many of these commanders personally ordered the violent crimes for which they were convicted, were found to have been motivated by genocidal or discriminatory intent, and were present at (or even participated in) the crimes.

2. By contrast, no suggestion has ever been made that Mr. Bemba intended that the crimes of murder, pillage, or rape occur, or that he shared the intent of the principal perpetrators. The crimes in question contain no discernible discriminatory element and all occurred in a relatively limited temporal period.[1]

3. Whilst no two cases are the same, sentencing of accused for international crimes cannot be an arbitrary process. The Defence endorses the Prosecution's own submissions in the *Lubanga* case, namely that, "two accused convicted of similar crimes in similar circumstances" are not expected in principle "to receive widely different sentences."[2]

4. This may be the first superior responsibility case at the ICC, but it now forms part of an established and wider body of precedent applicable to sentencing commanders. A recognised framework is already in place into which this judgment must fit. The Court, still in its relative infancy, must be viewed as legitimate, and not wildly out of step with domestic and international practice. Legitimacy is the *sine qua non* for achieving not only the objectives of the ICC, but the objectives of international criminal law as a whole.

5. As such, the ICC must ensure that defendants are convicted and sentenced for their own individual conduct, not held responsible for the violent trauma suffered by entire nations. This is not an argument against accountability; it is an argument for accountability with precision in its scope. Proper calibration of individual responsibility is essential to ensuring a legitimate system, through the calm application of principles that will stand the test of time.

6. The Prosecution's proposed sentence of not less than 25 years,[3] and the LRV's proposed sentence of more than the maximum threshold set by the ICC Statute,[4] fall

[1] The vast majority of murders and incidents of rape found by the TC occurred between the end of October and the first two weeks of November 2002: ICC-01/05-01/08-3343, paras. 624, 633.
[2] ICC-01/04-01/06-2950, para. 45.
[3] ICC-01/05-01/08-3363-Red, para. 4.
[4] ICC-01/05-01/08-3371-Conf, para. 65.

dramatically outside the established framework for sentencing superiors. A sentence of this severity would run the risk of the *Bemba* judgment being viewed by the international community as a mere aberration; a case of no precedential value given its dramatic deviation from a body of practice carefully established over years of considered reflection by those involved in sentencing superiors before international courts.

II. APPLICABLE PRINCIPLES

7. Article 81(2)(a) of the Statute requires the Chamber to ensure that the sentence is in proportion to the crime. Article 78 of the Statute and Rule 145 of the Rules require the Chamber to take into account factors such as the gravity of the crime and the individual circumstances of the convicted person. The principle of individualised sentencing requires the Chamber to take into account the individual circumstances of the convicted person and the global context of the conviction.[5]

8. Article 78 of the Statute and Rule 145 of the Rules also require a Chamber to consider any mitigating and aggravating circumstances. While aggravating circumstances must be established "beyond reasonable doubt", the Chamber may consider a mitigating circumstance where, "on a balance of probabilities", the Defence establishes its existence.[6]

III. SENTENCING SUBMISSIONS

A. THE CONVICTIONS

9. The principle of proportionality compels a Chamber to tailor penalties to fit the gravity particular to each crime.[7]

10. The convictions in the present case encompass 3 murders,[8] 28 instances of rape,[9] and 16 instances of pillage.[10] The Trial Chamber elsewhere held that the "appropriation of civilian property by MLC soldiers in the CAR was on a large scale."[11]

[5] ICC-01/04-01/07-3484-tENG-Corr, para. 39.
[6] ICC-01/04-01/06-2901, para. 34; ICC-01/04-01/07-3484-tENG-Corr, para. 34.
[7] ICC-01/04-01/07-3484-tENG-Corr, para. 39; See also ICC-01/04-01/07-3484-tENG-Corr, para. 32; Article 78(1) of the Statute; Rule 145(1)(a) of the Rules.
[8] ICC-01/05-01/08-3343, paras. 622-630.
[9] ICC-01/05-01/08-3343, paras. 631-638.
[10] ICC-01/05-01/08-3343, paras. 639-648.
[11] ICC-01/05-01/08-3343, para. 646.

11. The Defence acknowledges that "[m]urder, the unlawful taking of the life of another person, is considered a most serious crime worthy of the harshest of punishment."[12] Nonetheless, international criminal law recognises that even murder can be aggravated still, and the harshest sentences need to be reserved for those convicted of the graver crimes of genocide, extermination, persecutory murder, and murder on a very large scale. The sentences handed down by the ICTR[13] and ICTY[14] illustrate that.

12. Neither the Defence, nor the accused himself has ever sought to deny that rape "is one of the most horrific crimes that a human being can inflict upon another."[15] Mr. Bemba's own attempts to prevent its commission by ALC soldiers speak to that.[16] Nonetheless, its gravity relative to crimes of deliberate homicide is important and needs to be observed at the risk of creating dangerous precedent.

13. Pillage "is also a serious crime",[17] although, acquisitive crimes are generally viewed as less grave than those concerning violence to the person.[18] As an illustration, Amir Kubura was convicted as a superior by the ICTY for "extensive" and "repeated" plundering in numerous villages, having given his consent to his subordinates to share the plundered goods. He was sentenced to 2 years imprisonment.[19]

14. In superior responsibility cases, the nature of the crimes committed by subordinates is directly relevant to the sentence:[20]

> …the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.

15. As such, a superior responsibility case where subordinates were found to have committed 3 murders, 28 rapes and pillage, even on a large scale, over a relatively limited

[12] ICC-01/05-01/08-3363-Red, para. 20.
[13] See, for example, *Akayesu* TJ, *Bagosora* TJ, *Niyitegeka* TJ, *Ndindiliyimana* TJ, *Nyiramasuhuko* TJ, *Setako* TJ.
[14] See, for example, *Krstić,* TJ, *Popović,* TJ, *Tolimir,* TJ, *Blagojević* TJ, *Nikolić* SJ.
[15] ICC-01/05-01/08-3363-Red, para. 19; *Obrenović* SJ, *Karadžić* TJ.
[16] CAR-D04-0002-1513.
[17] ICC-01/05-01/08-3363-Red, para. 21.
[18] ICC-01/04-01/07-3484-tENG-Corr, para. 145.
[19] *Hadžihasanović* TJ, p.627.
[20] *Čelebići* AJ, para. 732.

period, must necessarily attract a lower sentence than a case where the subordinates in question perpetrated mass murders or extermination, where the superior himself was directly involved, or were convicted of genocide, the so-called "crime of crimes".[21]

B. SENTENCING FRAMEWORK

(i) Computation of Sentence

16. Mr. Bemba stands convicted of murder and rape, both as a war crime and a crime against humanity, and pillage as a war crime.[22] Article 78(3) of the Statute provides the Chamber must pass both a sentence for each crime and a joint sentence specifying the total period of imprisonment. At the ICC, the joint sentence has been determined by the longest individual sentence, acknowledging the principle that concurrent behaviour calls for concurrent sentencing.[23] This practice is particularly apposite in superior responsibility cases, where the conviction stems from the same failure to prevent or punish. Accordingly, the sentences passed in the instant case for murder, rape, and pillage must run concurrently, the total length being determined by the offence which the Chamber deems the most grave.

17. It would, moreover, be impermissible to aggravate Mr. Bemba's sentence by reference to the fact that he was convicted of both crimes against humanity, and war crimes in relation to the same underlying conduct (rape and murder). Although the Chamber found that there was sufficient differentiation in the elements of the offences to warrant cumulative convictions, these differences, based on chapeau elements, do not reflect any heightened degree of individual culpability on the part of Mr. Bemba.[24]

(ii) The sentencing of commanders

18. Superior responsibility is exceptional in law. It allows an individual to be convicted of a crime even though he had no part in its commission, and never intended that the crime be committed. Characterised as "indirect" or "passive" responsibility,[25] it focuses on the culpable omissions of commanders or superiors, rather than acts on their behalf. In general, it is used to

[21] *Akayesu* TJ. See also *Kambanda* TJ, para. 14.
[22] ICC-01/05-01/08-3343, para. 752.
[23] ICC-01/04-01/07-3484-tENG-Corr, para. 146; ICC-01/04-01/06-2901, para. 98.
[24] *Mucić* AJ, para. 25.
[25] ICC-01/05-01/08-3343-AnxII, para. 6.

secure convictions of high-level officials when there is no proof of their direct involvement in the crimes.

19. Without reference to any authority, the Prosecution asserts that "the Court's legal regime, like that of the *ad hoc* Tribunals, generally accords command responsibility parity with individual criminal responsibility."[26]

20. This is incorrect. Firstly, the Trial Chamber in the *Bemba* judgment emphasised the importance of recognising that "the responsibility of a commander under Article 28 **is different** from that of a person who "commits" a crime within the jurisdiction of the Court"[27] the crimes for which the commander is held responsible being "committed" by subordinates, rather than by the commander directly.[28]

21. Secondly, this affirms two decades' precedent from the *ad hoc* Tribunals, where the culpability of superiors was consistently distinguished from the culpability of principal perpetrators. This distinction does not mean that a superior is necessarily "less culpable", or that liability as a commander is not to be "taken seriously".[29] Rather, it acknowledges the reality that the superior's responsibility is a parallel form of liability. In sentencing superiors, therefore, Trial Chambers at the ICTY and ICTR have not automatically equated their conduct with that of the principal perpetrators, but rather have had regard to the gravity of the crimes committed, and the degree of the accused's participation in them.

22. In *Čelebići*, the first command responsibility case before the ICTY, the concrete effect of this approach can be seen. In that case, four accused were charged with offences of murder, torture and inhumane acts at a prison camp. Delalić and Mucić were charged as superiors, and Delić and Landžo were charged as direct perpetrators. Delalić was acquitted, but Mucić was found guilty of 11 counts for crimes committed by his subordinates, including murder and torture. He was found to have allowed "the most heinous of offences without taking any disciplinary action". The Chamber, however, recognised that there was no evidence that Mucić had any active or direct participation in the crimes charged, and sentenced him to 7 years imprisonment, increased to 9 years on appeal.[30] Landžo and Delić, who were found

[26] ICC-01/05-01/08-3363-Red, para. 26.
[27] ICC-01/05-01/08-3343, para. 173.
[28] ICC-01/05-01/08-3343, paras. 173-174.
[29] ICC-01/05-01/08-3363-Red, para. 30.
[30] *Čelebići* TJ, pp.441-443; *Čelebići* SJ, para. 44.

personally to have participated in the wilful torture, murder, cruel treatment and serious injury of prisoners, were sentenced to 15 and 20 years (reduced to 18 years on appeal) respectively.[31] Their direct participation warranted a heavier penalty.

23. Milorad Krnojelac, the commander of in the infamous Foča prison camp, was convicted both as a direct perpetrator of cruel treatment and persecution, and as the superior of subordinates who were carrying out inhumane acts and cruel treatment. He was sentenced to 7.5 years.[32] The Appeals Chamber accepted that he had committed additional crimes as a direct perpetrator, imprisoning others in inhumane conditions and subjecting them to cruel treatment. His sentence was increased to 15 years.[33] The increased direct participation of the accused, and the gravity of the crimes, warranted a longer sentence.

24. This accepted practice of linking the severity of the sentence to the degree of direct participation was explicitly acknowledged in *Hadžihasanović*, the first accused to be convicted exclusively as a commander:[34]

> When a person is found responsible solely [as a principal perpetrator], or cumulatively in conjunction [as a commander] **the gravity of the offence is evaluated in view of two elements: the inherent gravity of the acts committed and the form and degree of the Accused's participation in the crimes in question.** The concept of command responsibility in this regard is exceptional in law in that it allows for a superior to be found guilty of a crime even if he had no part whatsoever in its commission (absence of an actus reus), and even if he never intended to commit the crime (absence of mens rea). Accordingly, the Chamber finds that the *sui generis* nature of command responsibility… may justify the fact that the sentencing scale applied to those Accused convicted solely [as principle perpetrators], or cumulatively under [as principle perpetrators and commanders], is not applied to those convicted solely [as commanders], in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility.[35]

25. Soon after, Naser Orić, the Senior Commander of the Bosnian Muslim forces in eastern BiH was tried. Convicted at first instance of failing to take necessary and reasonable measures to prevent murder and cruel treatment between December 1992 and March 1993, the Trial Chamber agreed with "what was recently stated in the *Hadžihasanović* case, namely,

[31] *Čelebići* TJ, pp.443-448; *Čelebići* SJ, para. 44.
[32] *Krnojelac* TJ, para. 536.
[33] *Krnojelac* AJ, p.115.
[34] *Hadžihasanović* TJ, paras. 2075-2076.
[35] *Hadžihasanović* TJ, paras. 2075-2076.

[as a commander], an individual is not convicted for the crimes committed by his subordinates, but for the failure to prevent or punish the said crimes. On that basis, the Trial Chamber held that the *sui generis* nature of superior responsibility… allowed for an even greater flexibility in the determination of sentence."[36] Orić was sentenced to 2 years imprisonment, before being acquitted on appeal.[37] The Special Court for Sierra Leone adopted the same approach.[38]

26. The Prosecution disregards this consistent and persuasive body of law, asserting, "the military commander who fails to exercise his or her authority to stop these atrocities is responsible for the cumulative whole of the criminal acts of all his or her subordinate forces."[39] This statement is contrary to the consistent sentencing practice of commanders.

27. In any event, Mr. Bemba is not asserting that command responsibility is a "lower" form of culpability, or that it must attract, in the abstract, a "lower" sentence than direct participation.[40] The practice of international courts is more nuanced. It recognises that, *prima facie*, there is a difference in the culpability of superiors and direct perpetrators, and that the Chamber must have regard to the scope and gravity of the crimes, and the accused's level of participation. Of course, a superior who authorises genocide, extermination or widespread killings, is present during these killings, and who takes no measures to prevent or punish crimes may attract a sentence which equates to that of the subordinates who took up machetes and slaughtered civilians. However, as a starting point commanders lack the intent to commit the crimes, and often lack the same direct involvement as the subordinates who perpetrated them. Absent "specific circumstances that would allow that responsibility to be assimilated or linked to individual responsibility",[41] their conduct attracts a lesser penalty.

(iii) Sentencing guidance from the international criminal courts

(a) Pillage

28. In purely numerical terms, the majority of the crimes for which Mr. Bemba has been convicted are instances of pillage. To this end, the *Kubura* case is instructive. Kubura was the

[36] *Orić* TJ, para. 724.
[37] *Orić* TJ, para. 783, *Orić* AJ, p.64. See also, *Halilović* TJ, para. 54.
[38] See, for example, ARFC TJ, para. 783.
[39] ICC-01/05-01/08-3363-Red, para. 120.
[40] ICC-01/05-01/08-3363-Red, para. 27.
[41] *Hadžihasanović* TJ, paras. 2075-2076.

superior of troops who engaged "extensive" and "repeated" plunder. His subordinates plundered "everything they found: cars, food, household appliances and furniture."[42] Kubura was not at arms-length from the plunder being committed by his troops. He issued an order which provided not only for the establishment of collection points, but also for the creation of two commissions, both tasked with organising collections of war booty. His sentence was aggravated by the systematic nature of the plunder, and his "deep" involvement in the commission of the offence.[43] He accepted and organised the plunder, and thus shared a wilfulness with the direct perpetrators.[44] Kubura was sentenced to 2.5 years at trial, reduced to 2 years on appeal.[45]

(b) Murder and other offences against the person

29. Kubura was tried together with Enver Hadžihasanović, the Commander of the 3rd Corps of the Army of BiH. Hadžihasanović's subordinates murdered prisoners of war and inflicted cruel treatment on civilians and prisoners of war in five detention facilities in 1993.[46] The particularly heinous nature of one victim's beheading, the prolonged period over which the crimes were committed, and the large number or victims served as aggravating factors.[47] He was given a 3.5 year sentence.[48]

30. As referred to above, prior to his acquittal, on appeal, Naser Orić, for committing murder and inhumane acts as a crime against humanity, was sentenced to 2 years' imprisonment.[49] For committing persecution and inhumane acts as crimes against humanity, and cruel treatment as a war crime, Milorad Krnojelac, was sentenced to 7.5 years as a commander (15 on appeal when convicted as a principal perpetrator).[50]

(c) Genocide, Extermination and Mass Murder

[42] *Hadzihasanović* TJ, paras. 1841, 1968-1969.
[43] *Hadžihasanović* TJ, para. 2092.
[44] *Hadžihasanović* TJ, paras. 2091-2092.
[45] *Hadžihasanović* TJ, p.627, *Hadžihasanović* AJ, p.134.
[46] *Hadžihasanović* TJ, paras. 1240, 1461.
[47] *Hadžihasanović* TJ, paras. 2082-2084.
[48] *Hadžihasanović* AJ, p.133.
[49] *Orić* TJ, para. 783.
[50] *Krnojelac* TJ, para. 536, *Krnojelac* AJ, p.115.

31. In support for its proposed sentence of no less than 25 years, the Prosecution cites only to one case[51] and two accused. This reliance is wholly inapposite having regard to the gravity of the offences committed by those men.

32. Colonel Théoneste Bagosora, the former *directeur du cabinet* in the Rwandan MINADEF,[52] was sentenced to 35 years' imprisonment.[53] His subordinates committed, *inter alia*, genocide, mass rape, and extermination. As the genocide commenced on 7 April 1994, they murdered 10 Belgian peacekeepers in Camp Kigali,[54] and slaughtered and sexually assaulted the Prime Minister at her house in front of her children.[55] Subsequently, they committed a series of mass murders, rapes, and other serious violations, in many locations; the pattern of killings included systematically selecting, gathering and killing Tutsis.[56] People seeking refuge from such threats were deliberately attacked, as at the Kibagabaga mosque, where around 300 refugees had gathered. In Kabeza, Bagosora's men "were going from house to house (…) killing civilians".[57] Military personnel systematically killed Tutsi civilians in schools, churches[58] and at roadblocks.[59] The perpetrators also engaged in sexual assault and rape during the attacks.[60]

33. The Kigali area roadblocks, manned by Bagosora's subordinates, were the scene of the most brutal crimes of modern times. General Roméo Dallaire, the UN Force Commander in Kigali observed "dead men and women around roadblocks throughout Kigali, including children. The bodies of the dead were frequently piled near the roadblocks and at times were collected by local officials. Female victims were left lying on their back with their legs spread and stained with semen. Dallaire saw objects crushed or implanted in vaginas, breasts cut off, stomachs opened and the mutilated genitals of men."[61]

34. Major Aloys Ntabakuze was the commander of the Para-Commando Battalion, responsible as such for the crimes committed at Nyanza Hill, where his subordinates stopped thousands of Tutsi refugees fleeing Kigali and marched them several kilometres to Nyanza

[51] ICC-01/05-01/08-3363-Red, paras. 116-127.
[52] *Bagosora* TJ, para. 50.
[53] *Bagosora* TJ, para. 2277, *Bagosora* AJ, p.260.
[54] *Bagosora* TJ, para. 796.
[55] *Bagosora* TJ, paras. 723-724.
[56] *Bagosora* TJ, paras. 8686, 938.
[57] *Bagosora* TJ, para. 926.
[58] *Bagosora* TJ, para. 972.
[59] *Bagosora* TJ, para. 2123.
[60] *Bagosora* TJ, para. 988.
[61] *Bagosora* TJ, para. 1908.

hill, where they slaughtered them.[62] At the IAMSEA Institute, his subordinates separated Tutsi from Hutu refugees and led around 60 Tutsis to a location where they were killed."[63] The Appeals Chamber affirmed Ntabakuze's conviction as a superior for genocide, extermination, persecution, and violence to life for the killings at the two locations. The Appeals Chamber emphasised Ntabakuze's "high degree of involvement in the crimes",[64] accepting that the killings were an "organised military operation" which "would only have occurred following Ntabakuze's orders or with his authorisation."[65] He was sentenced to 35 years imprisonment.

35. No sensible parallels can be drawn between the facts of those cases and the instant one. Rather than demonstrating that superiors can receive "long imprisonment terms",[66] the gravity of the crimes, and the personal level of involvement of Bagosora and Ntabakuze mitigate in favour of a vastly reduced sentence in the present case.

36. The ICTY command cases, many discussed above, similarly direct the Trial Chamber to a sentence falling significantly below those requested by the Prosecution and LRV. No more serious cases have come before the ICTY, and arguably any court, than those relating to the Srebrenica genocide. In July 1995, more than 7,000 Bosnian Muslim men and boys were massacred in killings which shocked the collective conscience of the international community.

37. The ICTY indicted 20 people for the crimes committed in Srebrenica, a small number as commanders. Vinko Pandurević was the commander of the Zvornik Brigade in July 1995.[67] His men transported Bosnian Muslims to execution sites, practical assistance which had a "substantial effect" on the commission of their executions.[68] Members of the brigade then executed Bosnian Muslims at different execution sites. Others aided and abetted in their murder digging mass graves in various locations.[69] Pandurević knew of this murder operation.[70] He had reason to know that his troops were involved.[71] There was no evidence that Pandurević "took **any** steps to prevent or stop the participation of members of the

[62] *Bagosora* TJ, para. 2136.
[63] *Bagosora* TJ, para. 2137.
[64] *Bagosora* AJ, para. 304.
[65] *Bagosora* AJ, para. 304.
[66] ICC-01/05-01/08-3363-Red, para. 122.
[67] *Popović,* TJ, para. 1839.
[68] *Popović,* TJ, para. 2017.
[69] *Popović* TJ, para. 2018.
[70] *Popović* TJ, para. 2037.
[71] *Popović* TJ, para. 2040.

Zvornik Brigade in the detention, execution, and burial of the prisoners."[72] On appeal, he was convicted as a superior for extermination, murder, and persecution through murder, and cruel and inhumane treatment. Significantly, his conviction also encompassed, *inter alia*, aiding and abetting the above crimes against Bosnian Muslims at other detention locations. He was sentenced to 13 years imprisonment.[73]

38. During the slaughter in Srebrenica, on 13 July 1995, two busloads of Bosnian Muslim men were transported to the Kravica Warehouse. Another column was forced to march there on foot. The men were packed into the West and East rooms of the Warehouse, where they were slaughtered.[74] Survivors describe hiding under piles of bodies and pretending to be dead.[75] Ljubomir Borovčanin was the commander of the unit who committed murder at the Warehouse. Borovčanin was convicted of aiding and abetting by omission the murder, extermination, and persecution of at least 1,000 Bosnian Muslim men.[76] He was also responsible as a superior for the killing of the busload of Bosnian Muslim prisoners at the Kravica Warehouse through his failure as a superior to punish his troops.[77] He was sentenced to 17 years in prison.[78] Neither Borovčanin nor the Prosecution appealed.

39. The crimes for which Pandurević and Borovčanin were sentenced encompassed a loss of life far beyond the 3 murders for which Mr. Bemba has been found culpable. Pandurević and Borovčanin were present on the ground during the massacres in Kravica and Zvornik. Their sentences of 13 and 17 years also encompassed their perpetration as aiders and abettors in widespread murder and were not – as in Mr. Bemba's case – limited to culpability solely as a superior. Against this backdrop, the sentences proposed by the Prosecution and LRV in the present case are wildly out of step. Should the next commander tried at the ICC be convicted of crimes of similar gravity to Bagosora, Ntabakuze, Pandurević, or Borovčanin, and to have been personally involved and/or present during their commission, the Court must have the ability to distinguish their sentences from the instant case.

(d) Causal Link between the Crimes and the Commander's Failures

[72] *Popović* TJ, para. 2044.
[73] *Popović* AJ, p.838.
[74] *Popović* TJ, paras. 424-432.
[75] *Popović* TJ, para. 435.
[76] *Popović* TJ, para. 2182.
[77] *Popović* TJ , para. 2187.
[78] *Popović* TJ, p.835.

40. The sentencing practice of the *ad hoc* tribunals remains persuasive in determining Mr. Bemba's sentence. Despite the existence of a "causality" requirement under Article 28 of the ICC Statute,[79] there is no legitimate basis for departing from the sentencing matrix established by the other international courts and tribunals.

41. Firstly, tribunal judgments have indeed rejected "the existence of a requirement of proof of causation as a separate element of superior responsibility".[80] However, while the causal link between the commander's failure and the commission of the crimes is not "an element of command responsibility that requires proof by the Prosecution in all circumstances of a case", it is "a question of fact to be established on a case by case basis."[81] In other words it may, nonetheless, exist in some cases.

42. In Č*elebići* the Trial Chamber, in rejecting causality as a separate element of command responsibility, held, nonetheless, that the principal still applied "insofar as it relates to the **responsibility** of superiors for their failure to prevent the crimes of their subordinates."[82] In fact, the Trial Chamber held that "a recognition of a necessary causal nexus may be considered to be **inherent** in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them."[83]

43. In *Hadžihasanović*, the Trial Chamber concluded that the doctrine of command responsibility does not require this causal link as a question of law. However, "command responsibility may be imposed only when there is a **relevant and significant nexus** between the crime and the responsibility of the superior accused of having failed in his duty to prevent. Such a nexus is **implicitly part of the usual conditions** which must be met to establish command responsibility."[84] Not a legal requirement *per se*, but an inherent aspect of the doctrine.

[79] ICC-01/05-01/08-3343-AnxI, para. 17; ICC-01/05-01/08-3343-AnxII, para. 11.
[80] *Čelebići* TJ, para. 398.
[81] *Blaškić* AJ, para. 77.
[82] *Čelebići* TJ, para. 399.
[83] *Čelebići* TJ, para. 399.
[84] *Hadžihasanović* TJ, para. 192.

44. Unsurprisingly therefore, many ICTY cases have found that a causal link in fact exists.[85] Even in cases where the Trial or Appeals Chamber have rejected the existence of causality as a separate legal element of command liability, it has gone on to find that the causal link nonetheless existed.

45. Secondly, the existence of a causal link between a superior's conduct and the commission of crimes does not make his conduct any more grave, or worthy of a more severe punishment. The existence of a causal connection as a legal requirement serves to limit the scope of the crimes for which a superior can be held liable. A superior can only be responsible for those crimes which were "reasonably foreseeable",[86] or where there was a "high probability" that had the commander discharged his duties, the crime would have been prevented.[87] The causal connection does not alter the superior's own intention or level of contribution, it merely limits the scope of the relevant crimes.

46. In any event, a causality requirement does not alter the fundamental nature of superior responsibility, whereby an individual is deemed responsible without the requisite intent to commit the crime. Despite the expression 'the result of' in Article 28(a) and (b), any suggestion that superiors are held liable as principals for the "commission by omission" of their subordinates' crimes would require that the superior possess the requisite intent for its commission, as well as any *dolus specialis* to motivate the commission of the crime.[88] This would transform the purpose and nature of superior responsibility, which criminalises the failure of senior political and military leaders to prevent or interrupt crimes,[89] and limit its application to those who possess the requisite intent for their commission. The causality requirement causes no such transformation, nor does it render the sentencing practice of the tribunals inapplicable.

47. The above submissions are, moreover, uncontentious. Had the Prosecution thought that this legal distinction impacted the applicability of these cases, it would doubtless have addressed the Trial Chamber on this point.

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[85] *Čelebići* AJ, para. 739, *Strugar* TJ, para. 421, *Blaškić* TJ, para. 754, *Krnojelac* TJ, para. 190, *Popović* TJ, paras. 2048-2049; *Delić* TJ, para. 550, See also, *Cyangugu* TJ para. 656.
[86] ICC-01/05-01/08-3343-AnxII, para. 23.
[87] ICC-01/05-01/08-3343-AnxI, para. 24.
[88] H. Olásolo, 'The Criminal Responsibility of Senior Political and Military Leaders and Principals to International Crimes', (2009) p.108.
[89] ICC-01/05-01/08-3343-AnxII, para. 6.

(iv) Sentencing guidance from the ICC

48. The ICC has already sentenced two people to terms of imprisonment, Thomas Lubanga and Germain Katanga. While neither was convicted as a commander, their sentences are no less instructive in giving a basis for comparison as to the gravity and scope of crimes.

49. Over a period of approximately 12 months, between September 2002 and August 2003, a "significant number of children under the age of 15" were recruited, trained, and forced to participate actively in hostilities" in Ituri province.[90] These girls and boys were exposed to "violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families […] exposing them to an environment of violence and fear."[91]

50. Lubanga was convicted of having conscripted and enlisted the children in question, and used them to participate actively in hostilities.[92] The Prosecution asked the Trial Chamber to impose a sentence of 30 years,[93] arguing that the use of child soldiers was "one of the most serious crimes of concern to the international community as a whole".[94] The crimes were directed at "the most vulnerable and defenceless, notably the girl child soldiers and the young, including 5 year old children."[95] The crimes had a "severely debilitating and emotional impact on the victims, their families, and their communities". There was a "broader social impact on the entire community – even children who were not recruited and their families suffered from the traumatic experience".[96]

51. The Trial Chamber agreed, finding that the conscription and use of child soldiers were "undoubtedly very serious crimes that affect the international community as a whole."[97] It imposed a sentence of 14 years, having regard to (i) the widespread recruitment and the significant use of child soldiers; (ii) the position of authority held; and (iii) Lubanga's essential contribution to the common plan.[98] Although the Chamber took into account

[90] ICC-01/04-01/06-2842, para. 811.
[91] ICC-01/04-01/06-2901, para. 38.
[92] ICC-01/04-01/06-2842, para. 1358.
[93] ICC-01/04-01/06-T-360-Red2-ENG, p.33 lines 4-5.
[94] ICC-01/04-01/06-T-360-Red2-ENG.
[95] ICC-01/04-01/06-2881, para. 4.
[96] ICC-01/04-01/06-2881, para. 6.
[97] ICC-01/04-01/06-2901, para. 37.
[98] ICC-01/04-01/06-2901, para. 97.

mitigating factors such as the "considerable unwarranted pressure" by the conduct of the Prosecution, the sentence of 14 years was deemed appropriate, and upheld on appeal.[99]

52. Before dawn on 24 February 2003, the village of Bogoro was attacked. At least 30 civilians were killed, including 11 children, although "the killings far exceeded that figure".[100] Bogoro was "strewn with corpses". The attackers were "particularly violent", cutting up their victims "limb by limb before taking their lives." The attackers not only "opened fire on fleeing villagers, but also attacked them with bladed weapons as they tried to run away". These "particularly cruel acts" caused "extreme physical suffering to those who were subjected to them before being killed and to those who somehow survived the injuries inflicted". The use of machetes caused "serious and persistent trauma both to the survivors who had to have a limb amputated and to people who witnessed the suffering". Afterwards, the attackers pursued villagers who had taken cover in the bush, "flushed people out of their hiding places; sexually assaulted some of them; and killed others."[101] The attack against the civilian population had "an obviously discriminatory dimension."[102]

53. Katanga was found guilty as an accessory in the attack, and was convicted for murder as a crime against humanity and as a war crime; attacks against a civilian population as such or against individual civilians; destruction of enemy property; and pillaging.[103]

54. The Prosecution argued at sentencing that the crimes committed in Bogoro "are amongst the most serious that this Court was established to address",[104] asking for a sentence between 22 and 25 years.[105] Again, a Majority of the Trial Chamber agreed with the Prosecution's characterisation of the crimes, noting particularly that "Germain Katanga's degree of participation and intent in the instant case must not be underrated, especially as the commission of the crimes… involved particular cruelty."[106] It imposed a sentence of 12 years,[107] which was not appealed.[108]

[99] ICC-01/04-01/06-3122.
[100] ICC-01/04-01/07-3484-tENG-Corr, para. 47.
[101] ICC-01/04-01/07-3484-tENG-Corr, paras. 46, 48-49.
[102] ICC-01/04-01/07-3484-tENG-Corr, para. 54.
[103] ICC-01/04-01/07-3484-tENG-Corr, para. 1.
[104] ICC-01/04-01/07-T-344-Red-ENG, p.53.
[105] ICC-01/04-01/07-3484-tENG, para. 141, ICC-01/04-01/07-T-344-Red-FRA WT, p.56.
[106] ICC-01/04-01/07-3484-tENG-Corr, para. 69.
[107] ICC-01/04-01/07-3484-tENG-Corr, para. 170.
[108] ICC-01/04-01/07-3498.

55. These cases give insight into the framework into which Mr. Bemba's sentence must be inserted. The Prosecution asked for a higher sentence to be imposed on Lubanga than it has asked for Mr. Bemba.[109] It asked for a similar sentence to be imposed on Katanga as in the present case. The Trial Chambers in those cases, dealing with widespread crimes against children, an attack of extreme brutality with a discriminatory dimension, and a greater level of personal involvement than in the present case, nonetheless, assessed the appropriate punishment as 14 and 12 years respectively.

56. In the Defence submission, a sentence above this range would undermine the fledgling sentencing framework of the ICC, and run contrary to the principle of *nulla poena sine lege,* which ensures legal certainty through the prevention of arbitrary sentences.[110] It would also run the risk of sending an unintended message to the victims of the *Lubanga* and *Katanga* cases that their suffering cannot be equated to, and has not been ascribed the same value, as that of the victims in the CAR.

(v) Sentencing in the Central African Republic

57. The LRV invites the Chamber to consider how the matter might have been dealt with in the CAR and cites apocryphally one case as authority for the proposition that Mr. Bemba should be sentenced to a term exceeding the Court's statutory limit. The submissions are surprising for both their substance and inaccuracy. Nonetheless, the Defence accepts that local sentencing practice is a relevant factor at the ICTY and ICTR,[111] and the Chamber should have regard to what the LRV contends is an appropriate guideline case.

58. The Defence will not repeat the submissions made in paragraphs 63 and 64 of the LRV Sentencing Submissions, nor the summary of Jean-Bedel Bokassa's convictions set out in Annex A thereto. However, for completeness, his death penalty was voided in February 1988, and firstly commuted to a life sentence, then reduced to 20 years. Bokassa was granted a general amnesty and released in August 1993. In 2010, he was fully rehabilitated and pardoned by President Bozizé and declared "a son of the nation recognised by all as a great

[109] ICC-01/04-01/06-T-360-Red2-ENG, p.33, lines 4-5; ICC-01/05-01/08-3363-Red, para. 127.
[110] ICC-01/04-01/06-2901, para. 18.
[111] Art 24(1) ICTY Statute; Article 23(1) ICTR Statute.

builder".[112] In total Bokassa spent a little over 4 years in detention for his crimes, an outcome which could be achieved by passing upon Mr. Bemba a sentence of 6-7 years' imprisonment.

C. ALLEGED AGGRAVATING CIRCUMSTANCES

(i) Double Counting

59. The Prosecution asks the Chamber to consider two aggravating factors: the "particularly defenceless" victims of crimes,[113] and their commission "with particular cruelty."[114] Should the Trial Chamber take these factors into account in assessing the gravity of the underlying crimes, they cannot additionally be taken into account as aggravating circumstances.[115] To do so would amount to impermissible "double counting" and a legal error.

(ii) Exceeding the scope of personal culpability

60. Rule 145(2)(i), prohibits the Court from considering allegations, which have not resulted in a criminal conviction. The references by the Prosecution and the LRV to alleged crimes must therefore be excluded from the Trial Chamber's consideration.[116] This is particularly the case as regards allegations of torture, which the Pre-Trial Chamber already found to be subsumed within the conduct supporting the charge of rape.[117] The Trial Chamber's reliance on the same conduct which underpins the rape conviction would violate Article 20(1) of the Statute.

61. Secondly, as recognised by the Prosecution itself,[118] the Trial Chamber's determination of sentence must reflect the limits of Mr. Bemba's individual culpability, and in particular, his actual knowledge.[119] The Trial Chamber convicted Mr. Bemba on the basis of actual knowledge, not constructive knowledge. Anything falling outside this standard of actual knowledge constitutes an allegation, rather than a conviction.

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[112] http://www.bbc.com/news/world-africa-11890278; http://www.theguardian.com/world/2010/dec/03/jean-bedel-bokassa-posthumous-pardon; https://en.wikipedia.org/wiki/Jean-B%C3%A9del_Bokassa.
[113] ICC-01/05-01/08-3363-Red, paras. 103-108.
[114] ICC-01/05-01/08-3363-Red, paras. 109-115. See also ICC-01/05-01/08-3371-Conf, paras. 42-67.
[115] ICC-01/04-01/06-2901, para. 35, ICC-01/04-01/07-3484-tENG-Corr, para. 35. See also *Krnojelac* TJ, para. 517, *Plavšić* SJ, para. 58, *Banović* SJ, para. 53, *Obrenović* SJ, para. 101, *Češić* SJ, para. 53.
[116] ICC-01/05-01/08-3363-Red, para. 100, ICC-01/05-01/08-3371-Conf, paras. 47, 49-50, 53 (destruction of goods, physical labour).
[117] ICC-01/05-01/08-424, para. 205.
[118] See ICC-01/05-01/08-2263-Conf, para. 73 *et seq.*
[119] ICC-01/04-01/06-3122, para. 90.

62. The Prosecution and LRV repeatedly fail to establish any nexus between Mr. Bemba's actual knowledge and his personal culpability.[120] Despite submissions concerning trauma suffered by victims and the degree of impact of the crimes, the Prosecution and the LRV do not establish, beyond reasonable doubt, that Mr. Bemba had knowledge of these aggravating factors, or was aware of that such acts would occur in the ordinary course of events.

(iii) The lack of aggravating circumstances

63. Many commonly aggravating factors of sentence are absent from the present case. Mr. Bemba did not voluntarily participate in the crimes, nor did so with "particular zeal."[121] Nor did the Trial Chamber find any "premeditation",[122] or that Mr. Bemba acted pursuant to any discriminatory intent or feelings of revenge.[123] Nor did he derive any "pleasures" from committing the crimes,[124] which occurred a country away. The crimes herein did not have at their root any unlawful act of aggression on the part of the MLC. On the contrary, the presence of MLC troops in the CAR was legal, sanctioned by the international community,[125] and at the request of a democratically elected head of state.[126]

64. These are relevant considerations. Mr. Bemba's sentence will form part of an overall body of sentencing practice at the ICC. If the next commander to stand trial before the Court is a direct participant in the crimes, or demonstrates a premeditated or enthusiastic participation, or acts pursuant to ethnic or discriminatory motives, there must be scope for future Trial Chambers to aggravate sentence accordingly. Mr. Bemba's sentence must reflect his position within a range of convictions, even those yet to be handed down.

D. MITIGATING CIRCUMSTANCES

65. Mitigating factors do not need to relate to the charged offences,[127] and are generally constituted by a broad range of circumstances, particularly given Rule 145(2)(a)(ii) of the Rules refers to "the convicted person's conduct after the act" in the context of sentencing.

[120] ICC-01/05-01/08-3363-Red, paras. 73-80; ICC-01/05-01/08-3371-Conf, paras. 40-41.
[121] *Kayishema & Ruzindana* AJ, para. 351.
[122] *Lukić & Lukić* TJ, para. 1067; *Serushago* SJ, para. 30.
[123] *Vasiljević* TJ, para. 278.
[124] *Lukić & Lukić* TJ, para. 1087.
[125] EVD-T-D04-00049/CAR-DEF-0001-0102; EVD-T-OTP-00407/CAR-OTP-0667at 0669.
[126] ICC-01/05-01/08-3343, para. 308.
[127] ICC-01/04-01/06-2901, para. 34; ICC-01/04-01/07-3484-tENG-Corr, para. 32.

66. On 18 April 2016, the Defence sought leave to call additional evidence and make additional submissions on sentencing.[128] Self-evidently, the Defence intends to rely on this material as an evidential basis for the below submissions, which are presented without prejudice to any additional filing.

(i) Measures taken to prevent or repress the commission of crimes

67. The MLC had measures aimed at ensuring a disciplined army. These set the MLC apart from all other rebel movements. None of the other groups that use armed conflict to seek political change - Séléka, the FARC, the SPLM-IO, the Sudan Revolutionary Front, even General François Bozizé's rebels – come close to approaching the efforts of the MLC in ensuring discipline within their ranks.

68. Central to these measures was the code of conduct.[129] To enforce the code, resources were directed away from the war effort to set up a judicial system.[130] Soldiers who committed infractions were tried, sentenced, and imprisoned,[131] taking them away from the frontlines. No other rebellion in history has trained and appointed political commissioners to ensure "that there was a good relationship" with the civilian population.[132] No other has established "disciplinary councils" within military units which could immediately reprimand breaches.[133]

69. These measures were directed towards repression and/or prevention of crime. Mr. Bemba could have established a movement without any of these disciplinary processes. The choice to direct resources towards disciplinary measures was a deliberate one, which not only sets the MLC apart from other rebellions, by regulating its interaction with the civilian population, but gives a clear indication of Mr. Bemba's personal concern for those impacted by the presence of armed forces. Nobody who instigated such measures can properly be assessed as lacking empathy for victims.

[128] ICC-01/05-01/08-3372-Red, ICC-01/05-01/08-3372-Conf-AnxA.
[129] ICC-01/05-01/08-3343, paras. 392-393, 703.
[130] ICC-01/05-01/08-3343, para. 402, fn. 1054.
[131] EVD-T-OTP-00450/CAR-OTP-0017-0349; EVD-T-OTP-00451/CAR-OTP-0017-0351.
[132] ICC-01/05-01/08-3343, para. 393
[133] ICC-01/05-01/08-3343, para. 402.

70. The Trial Chamber acknowledges that Mr Bemba took **some** measures to prevent or repress crimes.[134] Although the Chamber criticised the extent and efficacy of these measures,[135] it accepted that they were, in fact, taken.

71. In the vast majority of superior responsibility cases, the commander either took **no measures** to prevent or punish the crimes of subordinates, or was **participating or present** when the crimes were committed.

- The Trial Chamber found "no evidence suggesting that [the commander Mucić] **ever** took appropriate action to punish anyone for mistreating prisoners."[136]
- Strugar "**failed entirely** to take reasonable measures",[137] and although "he had full material and legal ability to act himself to investigate or take disciplinary or other adverse action", the accused chose "to take **no action of any type**".[138]
- Krnojelac "failed to take **any appropriate measures** to stop the guards from beating and mistreating detainees"[139] and took no steps to punish them.
- Blaškić's subordinates were implicated in numerous attacks on civilians.[140] "**At no time did he take even the most basic measure**."[141]
- Naletilić was "**present** during instances of plunder," but "**disregarded** his duties of taking reasonable measures".[142]
- Martinović was "**present** on some occasions when his soldiers committed acts of looting, sometimes explicitly organising how plunder should take place" and "**failed to take** the necessary and reasonable measures to prevent it or to punish the perpetrators."[143]
- Aleksovski "took **no measures** to prevent the crimes committed." In fact, "**far from ordering guards to cease the assaults, the accused sometimes even took part in them".**[144]
- Borovčanin when confronted with a pile of dead bodies, accepted an implausible explanation and "**did not report anything to anyone**."[145]

[134] ICC-01/05-01/08-3343, para. 719.
[135] ICC-01/05-01/08-3343, para. 720.
[136] *Čelebići* TJ, para. 722.
[137] *Strugar* TJ, para. 434.
[138] *Strugar* TJ, paras. 444, 446.
[139] *Krnojelac* TJ, para. 318.
[140] *Blaškić* TJ, paras. 9, 452.
[141] *Blaškić* TJ, para. 734.
[142] *Naletilić & Martinović* TJ, para. 631.
[143] *Naletilić & Martinović* TJ, para. 628.
[144] *Aleksovski* TJ, para. 117.

- For Pandurević, the Chamber found "**no evidence** to indicate that he "**took any steps** to prevent or stop the participation of members of the Zvornik Brigade in the detention, execution, and burial of the prisoners."[146]
- Delić was convicted as "**nothing was done or even attempted to be done**" to prevent or punish violations,[147] and there was "**no evidence**" that any subordinates "were subjected to disciplinary or criminal proceedings".[148]
- Jokić initiated "**no investigation**" following shelling, **nor were any disciplinary measures taken, to punish** the violation of the standing JNA order to protect the Old Town of Dubrovnik."[149]
- Kayishema, was convicted after "**no evidence was adduced that he attempted to prevent** the atrocities that he knew were about to occur and were within his power to prevent",[150] and "**no action was commenced** which might ultimately have brought those responsible."[151]
- Musema not only "**failed to take** necessary and reasonable measures to prevent the commission of said acts by his subordinates", but rather "abetted in the commission of those acts, **by his presence and personal participation**."[152]
- Bagosora "failed in his duty to prevent the crimes because **he in fact participated** in them. There is **absolutely no evidence** that the perpetrators were punished afterwards."[153]
- Ntabakuze "failed in his duty to prevent the crimes because **he in fact participated** in them. There is **absolutely no evidence** that the perpetrators were punished afterwards."[154]
- Nsengiyumva "failed in his duty to prevent the crimes because **he in fact participated** in them. There is **absolutely no evidence** that the perpetrators were punished afterwards."[155]
- Brima appointed a provost marshal to enforce rules regarding "which troops were entitled to rape civilians or prohibited rape at specified times." This was not held to demonstrate an attempt to prevent or punish crimes, but was "**indicative of the**

[145] *Popović* TJ, paras. 1574-1576.
[146] *Popović* TJ, para. 2044.
[147] *Delić* TJ, paras. 468, 550.
[148] *Delić* TJ, para. 554.
[149] *Blagojević* TJ, para. 24.
[150] *Kayishema & Ruzindana* TJ, para. 513.
[151] *Kayishema & Ruzindana* TJ, para. 514.
[152] *Musema* TJ, paras. 895, 899-901, 905, 914, 916, 919.
[153] *Bagosora* TJ, para. 2040.
[154] *Bagosora* TJ, para. 2067.
[155] *Bagosora* TJ, para. 2083.

tolerance and institutionalised nature of the commission of the crimes within the AFRC forces."[156]

- Kanu **failed** to take the necessary and reasonable measures" to prevent or punish crimes, and in fact "**presided over a system that institutionalised serious abuse** of civilians."[157]

72. Mr. Bemba stands alone in this survey in terms of the measures he took in response to allegations of criminal activity by his troops. Mr. Bemba travelled to PK12 to issue a public warning to his troops "against abuse of the civilian population".[158] Seven soldiers were arrested and put on trial in public proceedings, convicted, and imprisoned,[159] and in spite of the failure to arrest soldiers for more serious offences, objectively at least, theses arrests and prosecutions must have sent out a message of zero tolerance towards **any** unlawful conduct. Two commissions were dispatched to investigate allegations of criminal conduct.[160] Mr. Bemba wrote to international organisations asking for assistance in investigating allegations of abuses.[161] A mission was sent to Sibut, in response to allegations of crimes, accompanied by the international press at the invitation of the MLC, including a journalist from the media organisation who had reported the allegations.[162]

73. Mr. Bemba's measures also stand comparison to those taken by commanders apparently beyond criticism. Following allegations of 108 instances of rape against UN and French troops in the CAR,[163] measures taken by the French President François Hollande, and the UN Secretary-General Ban-Ki Moon mirror those taken by Mr. Bemba almost precisely. Mr. Bemba's calls for justice in the light of Central African allegations have been repeated almost word for word.[164] However, no criticism has been made of the French Ministry of Justice for openly questioning the veracity of the claims.[165] Nor has the failure to identify any perpetrators over the course of two years, or the failure to withdraw the troops despite ongoing allegations, exposed these commanders to criminal charges.[166] Inaction by the ICC

[156] *AFRC* TJ, para. 1741.
[157] *AFRC* TJ, para. 2041.
[158] ICC-01/05-01/08-3343, paras. 594-596, 719, 721.
[159] ICC-01/05-01/08-3343, paras. 597-600, 719.
[160] ICC-01/05-01/08-3343, paras. 582-589; 601-603, 719.
[161] ICC-01/05-01/08-3343, paras. 604-611, 719.
[162] ICC-01/05-01/08-3343, paras. 612-620, 719.
[163] CAR-D04-0005-0397 at 0398; CAR-D04-0005-0402.
[164] CAR-D04-0005-0535, CAR-D04-0005-0389, CAR-D04-0005-0397, CAR-D04-0005-0402, CAR-D04-0005-0404.
[165] CAR-D04-0005-0493.
[166] CAR-D04-0005-0395, CAR-D04-0005-0404.

Prosecutor runs the risk of exposing the Court to allegations that it ascribes different values to the actions and words of leaders from different regions.

(ii) Peacebuilding

74. A contribution to establishing peace and stability should be taken into account as a mitigating factor.[167]

75. The MLC Statute, declares its goal as "to establish a democratic state in the DRC based on free and transparent elections and respect for individual human rights".[168] In this context, the MLC was a party to the ceasefire agreement reached in Lusaka in July 1999,[169] and took part in negotiations concerning the disarmament of the factions in the DRC.[170] It also participated in the Sun City negotiations, to establish a framework for a multi-party government in the DRC, and set a timeline for democratic elections.[171]

76. Mr. Louis Michel, Belgian Minister of Foreign Affairs in 2002-2003, formed the following impression of Mr. Bemba as an impartial observer during his mediation to promote peace in the DRC:[172]

> Each time I approached him about moderating his positions and showing flexibility in order to reconcile viewpoints, he responded positively… after the presidential and legislative elections in the DRC… he agreed to draft a letter that was transmitted to the Foreign Ministers of the European Union and to the major partners in the international community, including the Secretary- General of the United Nations, in which he committed himself to leading a constructive opposition and to refraining from any military or armed initiatives and from any statement which might lead to an escalation of the violence. He even expressed his willingness to give the elected majority sufficient time to allow it to implement its plan. He gave me the genuine impression that he had permanently embraced the role of an opposition leader who respects the institutions of a constitutional State.

77. These steps demonstrate genuine efforts by Mr. Bemba towards peace. Lesser known steps also warrant mention. In early 2001, Mr. Bemba was responsible for negotiating an end

[167] ICC-01/04-01/06-2901, para. 15, citing SCSL, *Fofana* SJ, para. 94; ICC-01/04-01/07-3484, para. 91, *Jokić* SJ, para. 858; *Milošević* TJ, para. 1003, *Plavšić* SJ, para. 85.
[168] EVD-T-OTP-00808/CAR-OTP-0069-0363, at 0363.
[169] EVD-T-D04- 00048/CAR-D04-0003-0527, at 0532.
[170] ICC-01/05-01/08-3343, para. 382.
[171] EVD-T-OTP-00824/CAR-OTP-0010-0471.
[172] ICC-01/05-01/08-200-Anx3-tENG.

to the century-long conflict between the Hema and Lendu tribes in Ituri province. With the support of humanitarian agencies,[173] Mr. Bemba travelled to Ituri, and addressed the local population via radio, stating:[174]

> I am neither Hema, Lendu, nor Nande, I'm just a Congolese, a son of the country, shocked to see that we can still kill each other in the name of a logic of extermination of a clan, tribe or ethnic group.

78. He disarmed the militias on both sides and installed a system of justice for war crimes.[175] He chaired a 3-day conference which ultimately led to a Memorandum of Understanding on the resolution of the conflict, addressing security, political and administrative, judicial, economic and social matters.[176] On 17 April 2001, 159 traditional chiefs, notables and political-administrative authorities signed the agreement, and Mr. Bemba and his troops returned to Gbadolite.[177] The MLC had nothing to gain from this process, except the end to the bloodshed in a neighbouring province.

(iii) Character

79. The Prosecution's depiction of Mr Bemba draws on scraps of evidence from implausible sources concerning allegations that fall far outside the case.[178] The references to unconfirmed charges such as an alleged killing of an ANR officer, and orders to execute prisoners of war are incredible, are unrelated to either the confirmed charges or Mr. Bemba's conviction, have been impermissibly relied upon, and should be disregarded by the Chamber.[179]

80. The allegation that "[Mr.] Bemba's character shows someone that had disregard for human life and bodily integrity"[180] cannot be reconciled with his emphasis on the importance of life in documents available to the Trial Chamber.[181] As a father, as the husband of someone who works to improve the lives of widows and orphans,[182] and as the commander who

[173] EVD-T-CHM-00028/CAR-OTP-0069-0372 at 0474.
[174] EVD-T-CHM-00028/CAR-OTP-0069-0372 at 0475 (Unofficial translation).
[175] EVD-T-CHM-00028/CAR-OTP-0069-0372 at 0476.
[176] EVD-T-CHM-00028/CAR-OTP-0069-0372 at 0476-0478.
[177] EVD-T-CHM-00028/CAR-OTP-0069-0372 at 0478.
[178] ICC-01/05-01/08-3363-Red, paras. 97-102.
[179] ICC-01/05-01/08-3363-Red, para. 100.
[180] ICC-01/05-01/08-3363-Red, para. 102.
[181] CAR-D04-0002-1513.
[182] CAR-D04-0005-0536.

worked to end the bloodshed in Ituri for no other reason than the sanctity of human life, these submissions are irreconcilable with fact.

81. Good character prior to, or after the conflict,[183] is also mitigating factor which should be taken into account. Mr. Bemba's contributions to peace in the DRC, and his contribution to the safety, security, health and education of the population under the MLC's control in Equateur mitigate in favour of a reduced sentence.[184]

(iv) Family Circumstances

82. Mr. Bemba is married to Liliane Bemba Teixeira. They have five children: [REDACTED].

83. Mr. Bemba's years in detention represent the seminal years in the lives of these five children, who were deprived of the emotional, financial and educational care and attention of a father. In turn, Mr. Bemba has been denied participation in their lives as they have moved into adulthood. The family circumstance of an accused is a mitigating factor in sentencing,[185] particularly when, as in Mr. Bemba's case, "[REDACTED]".[186] A reduction in sentence takes into account the extreme hardship suffered by a family as a result of the incarceration.[187]

84. While in prison, Mr. Bemba has suffered the loss of [REDACTED],[188] [REDACTED],[189] his Counsel, Richard Nkwebe Liriss,[190] and [REDACTED]. Separated from them at the time of their deaths, [REDACTED]. As [REDACTED]. This hardship should also contribute to a reduction in sentence for family circumstances.

(v) Likelihood of Reoffending

85. Mr. Bemba is no longer in command of any armed forces nor will his future entail a position whereby he will act as a military commander, or send troops into a foreign

[183] *Kalimanzira* TJ, para. 752, *Orić* TJ, para. 759, *Krajišnik* TJ para. 1164, *Bisengimana* TJ, para. 165, *Nikolić* SJ, para. 164, *Karera* TJ, para. 582.
[184] D-39, T-308-Red2-ENG-WT, p.50, line 10–p.51, line 4.
[185] *Bisengimana* TJ, para. 143, *Kunarac et al* AJ, para. 362, *Vasiljević* TJ, para. 300, *Rugambarara* SJ, para. 39, *Nchamihigo* AJ, para. 396.
[186] ICC-01/05-01/08-3375-Conf-AnxIII, p.2.
[187] *Strugar* TJ, para. 469, *Mrđa* SJ, paras. 105-109.
[188] ICC-01/05-01/08-430-Conf.
[189] ICC-01/05-01/08-1106-Conf.
[190] T-213-CONF-ENG ET, p.1, line 25–p.3, line 12.

intervention where they could have contact with civilians of a foreign state. There is no likelihood of reoffending, a factor to which the Chamber can properly have regard in sentencing.

(vi) Mr. Bemba as the sole individual to be punished for crimes in the CAR

86. Unlike in Rwanda and Yugoslavia where thousands of principal perpetrators were punished by local courts, Mr. Bemba will likely be the sole individual to be punished for the crimes committed in the CAR.

87. Despite the prosecutor finding reasonable cause to charge,[191] *inter alia,* Ange-Félix Patassé, General Ferdinand Bombayake, Abdoulaye Miskine, and Victor Ndoubabe; each of these individuals has evaded the reach of national and international courts. So too have François Bozizé and his subordinates, whom contemporaneous media reports accused of committing crimes,[192] in a manner corroborative of the Prosecution evidence.[193]

88. This widespread impunity for the crimes committed during the 2002-2003 conflict gives rise to a perceived sense of injustice on the part of the accused. Individual perpetrators remained in the Central African Republic including, for example, Miskine and his men who slaughtered civilians during the relevant period,[194] or Baril and his subordinates who were the subject of similar accusations.[195] Moreover, the events of 2002-2003 pale by comparison with the horrendous waves of violence which have gripped the CAR in the years since the MLC withdrawal. Those offences have avoided both domestic and international investigation.[196]

89. Mr. Bemba should not bear the weight of the failures of domestic and international courts to prosecute 15 years' of crimes in the CAR. He cannot face responsibility for the lack of accountability in this state. Rather, his sentence should be mitigated, not aggravated, by reason of the fact that he alone falls to be sentenced for these events, when every other individual responsible for the crimes continues to walk free. Moreover, such measures as he was able to take (within the limited timeframe of practicability) remain the only concrete

[191] CAR-OTP-0004-0065; CAR-OTP-0019-0137.
[192] ICC-01/05-01/08-3343, para. 578, fn.1786.
[193] P-173, T-147-Red2-ENG-WT, p.18, line 7–p.20, line 11, P-22, T-42-Red2-ENG-WT, p.30, lines 17-21, P-80, T-63-Red2-ENG-WT, p.44, lines 5-19, EVD-T-OTP-00345/CAR-OTP-0039-0058.
[194] P-38, T-36-Red2-ENG-CT, p.5, line 23–p.6, line 7, P-23, T-52-Red2-ENG-CT2, p.14, line 14–p.15, line 11; P-6, T-95-Red-ENG-CT, p.30, line 22–p.34, line 10, P-9, T-104-Red3-ENG-CT, p.4, line 10–p.5, line 5, T-107-ENG-ET, p.23, line 3–p.31, line 10, P-173, T-145-Red2-ENG-WT, p.36, line 18–p.37, line 16.
[195] P-9, T-104-Red3-ENG-CT, p.4, line 10–p.5, line 5, T-107-ENG-ET, p.23, line 3–p.31, line 10.
[196] See, for example, EVD-T-OTP-00411/CAR-OTP-0004-1096, p.29.

measures taken against perpetrators by anybody to date. This also should serve as a mitigating factor in sentence.

(vii) Cooperation with the court, and mitigation for delays

90. Although arrested on warrant, Mr Bemba stated publicly his willingness to surrender and cooperate with the Court.[197] His voluntary expression of willingness should be given significant weight.[198] It accords with Mr. Michel's impression that he was "eager to respect the ICC and… does not intend to elude in any way whatsoever the proper judgment of the Court."[199]

91. Mr. Bemba was arrested on 24 May 2008 pursuant to an *ex parte* arrest warrant. Although detained in Belgium, this period of time must be counted for the purposes of sentencing.[200] The process since arrest has lasted approximately eight years. His behaviour in detention has been commendable.[201] [REDACTED].[202] [REDACTED].[203] [REDACTED].[204]

92. His comportment in the courtroom during a long trial has been exemplary. [REDACTED],[205] and throughout the trial, the MLC has adopted a respectful and diplomatic stance towards the ICC.[206] He has consistently instructed his Defence team to take all necessary measures to ensure an expeditious continuation of the trial.

93. Delays during the trial, for reasons not attributable to the Defence, should also be considered a mitigating factor.[207] The right to a speedy trial applies to all defendants, irrespective of whether they are ultimately convicted. Even if the total length of detention

[197] ICC-01/05-01/08-457, para. 23.
[198] *Stanišić and Simatović,* Decision on Appeal against Decision on Provisional Release (*Simatović)*, para. 15.
[199] ICC-01/05-01/08-200-Anx3-tENG.
[200] Article 78(2).
[201] ICC-01/05-01/08-3375-Conf-AnxIII.
[202] ICC-01/05-01/08-445-Conf, para. 12.
[203] ICC-01/05-01/08-445-Conf, paras. 3, 7.
[204] ICC-01/05-01/08-1106-Conf, para. 2.
[205] ICC-01/05-01/08-3375-Conf-AnxIII, p.1.
[206] CAR-D04-0005-0514, http://www.congo365.com/index.php?option=com_content&view=article&id=539:journees-parlementaires-du-mlc-bemba-rassure-lopposition&catid=47:politique.
[207] ICC-01/04-01/06-3122, para. 110; *Taavitsainen v. Finland* (Application No. 25597/07) paras 29-37; *Cocchiarella v. Italy* (Application No. 64886/01), para. 77; *Beck v. Norway* (Application no. 26390/95), paras. 27-28; *Scordino v Italy*, (Application no. 36813/97), paras. 184-188.

does not exceed the total length of a possible sentence, the strict limits of pre-conviction detention have a purpose, and demand a remedy if violated.[208]

94. Lengthy pre-conviction detention is *ipso facto* incompatible with the presumption of innocence;[209] it creates an impression that the accused is guilty (which, apart from reputational harm, can deter cooperation from witnesses). It can also impact on an accused's ability to instruct his Defence in an objective manner: the fact of lengthy detention can deter the defendant from approving any strategy which – albeit in his best interests – might prolong the trial.

95. There were significant delays. In 2009 delays were caused by disputes over legal funding,[210] and the Prosecution's filing of an amended DCC.[211] The start-date of the trial was pushed back,[212] following which the trial then stalled for Prosecution witnesses to postpone their testimonies for personal and professional reasons,[213] despite Defence concerns over the "unacceptable number of non-sitting days".[214] The trial stalled again after the close of the Prosecution Case, before the hearing of LRV evidence.[215] Two months passed during the resolution of the Trial Chamber's Regulation 55 notice.[216] The judgment was rendered 15 months after the presentation of closing arguments.[217]

96. Even if these delays did not, in themselves, invalidate the trial process, Mr. Bemba has a right to a remedy for any periods inconsistent with his right to a speedy trial, and a related right not to be detained for an unreasonable length of time during the trial.[218] The logistical delays in calling witnesses also fall within the ECHR's ruling in the *Taavitsainen* case that

[208] *Taavitsainen v. Finland* (Application No. 25597/07), paras 29-37; *Cocchiarella v. Italy* (Application No. 64886/01), para. 77; *Beck v. Norway* (Application No. 26390/95), paras. 27-28; *Scordino v Italy*, (Application No. 36813/97), paras. 184-188.
[209] *Ecuador*, ICCPR, A/53/40 vol. I (1998) 43 at para. 286.
[210] See for example, ICC-01/05-01/08-452; ICC-01/05-01/08-524, which led to two of Mr Bemba's counsel withdrawing from the case. The decision was rendered two months after the Defence request was filed, ICC-01/05-01/08-530.
[211] ICC-01/05-01/08-388, the Single Judge rendered a decision in which it requested the Prosecution to consider filing an amended DCC and gave 27 days to the Prosecution (until 30 March 2009) and the Defence was given until the 24 April 2009 to file submissions in relation to the amended DCC.
[212] ICC-01/05-01/08-803, ordering the postponement of the trial after the judicial recess, from 5 July 2010 to 30 August 2010.
[213] See, for example, ICC-01/05-01/08-1904; ICC-01/05-01/08-2146: P-36 was scheduled to testify at the end of 2011, a first postponement was granted to early 2012. He was then scheduled to testify on 16 February 2012 but testified only on 13 March 2012. The transcripts also demonstrate the 30 day lapse in hearings: ICC-01/05-01/08-T-210 and ICC-01/05-01/08-T-212.
[214] ICC-01/05-01/08-1893-Conf-Red, paras. 5-6.
[215] ICC-01/05-01/08-2180.
[216] ICC-01/05-01/08-2480l ICC-01/05-01/08-2500.
[217] ICC-01/05-01/08-3191, ICC-01/05-01/08-3343.
[218] P.van Dijk et al., 'Theory and Practice of the European Convention on Human Rights', p.492.

these delays are attributed to the State, and must be remedied.[219] As underscored by Judge Pikis, "[d]elay in the proceedings cannot be at the expense of the detainee".[220]

97. Even if the threshold for an abuse of process finding was not met, the multiple violations of Mr. Bemba's right to benefit from privileges and immunities, legal privilege, confidentiality privacy and timely disclosure also constitute a mitigating factor for sentencing.[221]

(viii) Assistance to victims and payments to fine

98. The sentence imposed by the Chamber should be reduced to take into consideration the resources that Mr. Bemba has contributed to the trial and reparation process. Rule 145(1)(a) stipulates that the totality of any sentence of imprisonment and fine, must reflect the culpability of the convicted person. It follows a fine absorbs some of the culpability of the accused, which in turn, must be reflected in the length of the sentence. Similarly, Rule 145(a)(ii) provides that any efforts by the person to compensate victims must be considered as a mitigating factor. Moreover, sanctions imposed in relation to the same conduct must be taken into consideration in sentencing.[222] The principle of *ne bis in idem* precludes the imposition of criminal fines on an accused for the same conduct which has attracted a criminal sentence.[223] The question as to whether victims have been compensated for losses is also an element of the crime of pillage;[224] it follows that any form of restitution must at the very least, be given significant weight as a mitigating factor, particularly in the absence of any evidence that Mr. Bemba derived a personal profit from the acts of pillage.

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[219] *Taavitsainen v. Finland* (Application no. 25597/07), para. 37.
[220] Separate Opinion, ICC-01/04-01/06-824, para. 22.
[221] ICC-01/05-01/13-1799-AnxA-Conf ("Confidential Ex Parte Annex A"). See also ICC-01/05-01/08-3239-Red2; ICC-01/05-01/13-1799-Red, paras. 26- 85; *Barayagwiza*, Decision on Review, para. 74.
[222] Opinion of Advocate General Sharpston, Case C-367/05, para. 58 and authorities cited therein, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005CC0367#Footref31. In German and Austrian sentencing, it is preferred that incarceration be converted to a "day fine", the financial value of a single day of incarceration multiplied by the total number of days the defendant would be detained in prison. The German "day fine" is calculated based on three variables: the number of days, the financial ability of the defendant and the seriousness of the crime. Albrecht, Hans-Jörg, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 2013, Law and Contemporary Problems, vol. 76, at pp.211, 215; For Austria see: Albrecht, Hans-Jörg, *Sanction Policies and Alternative Measures to Incarceration: European Experiences with Intermediate and Alternative Criminal Penalties*, 142nd International Training Course Visiting Experts' Papers, p.30, available at:
http://www.unafei.or.jp/english/pdf/RS_No80/No80_07VE_Albrecht.pdf.
[223] *Grande Stevens & Ors v. Italy*, (Application Nos. 18640/10 18647/10 18663/10, 18668/10 and 18698/10), para. 229.
[224] ICC-01/05-01/08-3343, fn 291; ICC-01/05-01/08-3079-Conf, paras. 361, 370, 377, 379, 384, 409, and 413.

99. In 2008, the Pre-Trial Chamber requested States Parties to freeze Mr. Bemba's assets, for future reparations.[225] Prior to the freezing of his assets, Mr. Bemba had no means of identifying the victims of MLC crimes. After [REDACTED] froze the account used to fund Mr. Bemba's defence, the Trial Chamber agreed to advance funds on the condition that steps would be taken to recover the amounts from the frozen assets.[226] The amount paid to his Defence in lieu of legal aid was thus deducted from the amount, which would have otherwise been available for reparations.

100. [REDACTED].[227] [REDACTED].[228]

101. [REDACTED].[229] Mr. Bemba's current inability to fund reparations is due to factors beyond his control, and should not operate to his detriment. Firstly, notwithstanding the freezing order, the Registry determined that Mr. Bemba was not indigent and required to fund his Defence. The Pre-Trial Chamber therefore ruled that Mr. Bemba was permitted to fund the necessary and reasonable expenses of his Defence from the assets, which were otherwise subject to the freezing order.[230] Defence costs were tied to the amount available under the ICC legal aid scheme, and distributed on a monthly basis.[231] Consequently, the total amount, which totals millions of euros,[232] was increased due to the length of the proceedings.

102. Secondly, frozen assets dwindle rather than appreciate. Not only has Mr. Bemba been prevented from deriving income from these assets, they have been significantly devalued. Principal amongst these is [REDACTED],[233] [REDACTED].[234]

103. [REDACTED].[235] [REDACTED].[236] [REDACTED],[237] [REDACTED].[238]

[225] ICC-01/05-01/08-08, paras. 6-7.
[226] ICC-01/05-01/08-568.
[227] [REDACTED], cited CAR-D04-0005-0501, para. 8.
[228] CAR-D04-0005-0511.
[229] [REDACTED].
[230] ICC-01/05-01/08-149-Conf.
[231] ICC-01/05-01/08-568.
[232] In December 2014, Mr. Bemba owed €2,799,380.94 in the Main Case alone: ICC-RoC85-01/13-28, p.6.
[233] [REDACTED] cited in CAR-D04-0005-0501, para. 25.
[234] [REDACTED].
[235] CAR-D04-0005-0511, para. 5.
[236] CAR-D04-0005-0511, para. 2.
[237] [REDACTED].
[238] [REDACTED].

104. The ICC could have taken measures to preserve Mr. Bemba's assets against depreciation.[239] This was not done. The fact that these assets can no longer be used to contribute to reparations, should not be used against him. The Defence disputes key aspects of the Registry's report on Mr. Bemba's solvency, which will be challenged in a separate filing.[240] Regardless, the losses incurred ancillary to the ICC process should be taken into consideration in mitigation of his sentence. Although there are no specific set-off proportions at an international level, the ICTY has converted a 7000 euro fine to 7 days in prison.[241]

IV. CONCLUSION

105. With the MLC troops intervening for less than 5 months between October 2002 and March 2003, Mr. Bemba cannot be held liable, either legally or symbolically, for decades of suffering in the CAR, despite the widespread impunity afforded to perpetrators of crimes therein.

106. Mr. Bemba was not present during the commission of crimes. Nor did he share the intent of the perpetrators, who were not acting on his orders or instructions. The crimes, while of the utmost seriousness, did not encompass widespread killings or extermination, nor were they committed pursuant to a genocidal plan or with discriminatory intent.

107. Mr. Bemba took steps both to prevent and punish the crimes, and demonstrably worked towards peace in the DRC and the wider region. He is at no risk of reoffending, and stands alone to be punished for crimes in the CAR, in which he took no direct part. Mr. Bemba has cooperated with these proceedings, and has been financially penalised as a result. His imprisonment has had a significant impact on the quality of life of his wife, and their five children.

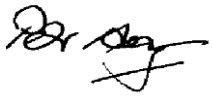
108. Even in the absence of mitigating factors, a sentence of 25 years falls so out of step with the established body of precedent on sentencing commanders, it will risk rendering this case an anomaly, to which future courts will have no regard. In accordance with Article 78(3) and the established practice of the Court, the Chamber must pass individual sentences to run

[239] As is the case with sanctions issued by the European Union or United Nations: See United Nations Fact Sheet regarding the Al Qaeda Sanctions Regime, at http://www.un.org/sc/committees/1267/fact_sheet_assets_freeze.shtml See also Article 2a of EU Regulation No. 561/2003; and UN Panel of Experts Report, (S/2016/209), para. 257.
[240] ICC-01/05-01/08-3375-Conf-AnxII.
[241] *Hartmann*, Second Order on Payment of Fine Pursuant to Rule 77 and Warrant of Arrest.

concurrently with each other, and a joint sentence equal to the longest individual sentence passed. Pursuant to Article 78(2), the Chamber must also deduct the time spent in detention both in Belgium and in The Hague.

109. All the circumstances of this case point to Mr. Bemba receiving a joint sentence in the lower range of sentences previously passed on commanders before the international criminal courts.

The whole respectfully submitted.



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26 April 2016

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