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No: **ICC-01/05-01/13**
Date: **14 February 2017**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public

Detailed Notice of Appeal

Source: Defence for Jean-Jacques Mangenda Kabongo

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

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DETAILED NOTICE OF APPEAL

I. INTRODUCTION

1. Mr Jean-Jacques Mangenda's conviction was materially affected by legal, factual and procedural errors. The Trial Judgment,¹ which did not address many arguments presented by the Defence, fails to adequately distinguish between the knowledge of Mr Mangenda, who participated in no conversation with any witness about the content of their testimony, and Mr Kilolo, the supposed executor of the illicit coaching; imputes knowledge of the latter to the former without adequate reasons or evidential foundation; fails to make findings concerning Mr Mangenda's knowledge of, and contribution to, to the subject-matter of coaching to which the conviction was limited; relies on alleged falsehoods that the Trial Chamber declared at the beginning of trial would not be adjudicated as such; and fails to adequately define or distinguish between permissible zealous witness preparation in an adversarial trial and criminal coaching. The Trial Chamber also erroneously inferred from telephone conversations that a bribery scheme existed to cover-up the crimes, whereas the Prosecution (and Independent Counsel) acknowledged at the start of trial that those conversations had an entirely different meaning that was inconsistent with such an inference.
2. The Trial Chamber compounded these errors by entering convictions on the basis of a common criminal plan that it acknowledged had not been adequately defined throughout trial; convicting Mr Mangenda through a common criminal plan even in respect of witnesses to whose illicit coaching, according to the Trial Chamber itself, he did not contribute directly or indirectly; and making no findings adequately substantiated by evidence, or at all, as to when Mr Mangenda supposedly joined the common plan.
3. Last, but far from least, Mr Mangenda's conviction rested decisively on telephone surveillance that was authorized on the basis of financial records reviewed and obtained by the Office of the Prosecutor without any judicial authorization. The Trial

¹ *Bemba et al.*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Conf, 19 October 2016 ("TJ" or "Trial Judgment"). All further references are to the *Bemba et al.* case unless otherwise specified.

Chamber erred in admitting the telephone surveillance, and in failing to exclude information arising from such a serious violation of fundamental human rights.

4. These errors, individually and cumulatively, materially affect the Judgment. The telephone conversations obtained in violation of fundamental human rights were indispensable to the Trial Chamber's findings against Mr Mangenda. The necessary and appropriate remedy under the circumstances is to reverse the Judgment in all respects as regards Mr Mangenda, and to quash all convictions against him.

II. PROCEDURAL HISTORY

5. On 23 November 2016, the Appeals Chamber invited the appellants in this case to "inform the Appeals Chamber briefly of, at the very least, the legal findings in the Conviction Decision that they intend to challenge."² The Decision specifies that "the filing of a detailed notice of appeal is without prejudice to the actual formulation of the grounds of appeal that the appellants may wish to advance in their documents in support of the appeal."³
6. The errors in the Judgment that the Defence intends to substantiate in its document in support of its appeal are set out below in the form of intended grounds of appeal. The Defence reserves the right to modify, supplement, add to, or eliminate the intended grounds of appeal as set out below.

III. OVERVIEW

7. The Trial Chamber found that Mr Aimé Kilolo, as Lead Counsel for Mr Jean-Pierre Bemba, "illicitly coached"⁴ fourteen witnesses in a manner that constituted offences against the administration of justice under Article 70 of the Statute. The illicit coaching was limited, for the purposes of the Judgment, to three subjects: (i) the nature and number of prior contacts with the Main Case Defence, (ii) payments or monetary or non-monetary benefits given or promised by the Main Case Defence,

² The Appeals Chamber will be requested to reverse the Judgment and quash all convictions of Mr Mangenda.

³ Decision on requests for an extension of time limit for the filing of the documents in support of the appeal, ICC-01/05-01/13-2046, 23 November 2016, para. 20.

⁴ TJ, paras. 681, 802, 833.

and/or (iii) acquaintance with other individuals.”⁵ The limitation to these three was determined by the Trial Chamber from the start of trial.⁶ Mr Kilolo was found to have illicitly coached witnesses on these three subjects as part of a common criminal plan starting not later than June 2012 and continuing until the arrest of the accused in November 2013.⁷

8. The Trial Chamber found that Mr Mangenda knew about, and participated in, this criminal plan. Mr Mangenda knew, according to the Trial Chamber, that Mr Kilolo’s discussions with witnesses went beyond permissible preparation, and included illicit coaching.⁸ This inference was based decisively on the Trial Chamber’s interpretation of telephone communications between Mr Mangenda and Mr Kilolo from 26 August 2013 onwards.

9. The Trial Chamber’s findings in respect of Mr Mangenda’s role are erroneous, and merit appellate reversal. The evidence shows that Mr Mangenda never spoke to any witness about the content of their testimony and that he never participated in or listened to any conversation between Mr Kilolo and any witness about their testimony.⁹ His knowledge of the content of any witness preparation discussions, accordingly, depended exclusively on information provided to him by Mr Kilolo. Mr Mangenda’s telephone conversations with Mr Kilolo reflect – as far as Mr Mangenda was aware at the time – zealous but permissible witness preparation designed to ensure that testimonial evidence was adduced in a manner most favourable to Mr Bemba. The evidence does not show beyond a reasonable doubt that Mr Mangenda understood a different purpose, or that he knew or would inevitably have inferred that criminal means were being used during witness preparation sessions.

10. The Trial Chamber’s contrary conclusion is based on a series of factual and legal errors, including: imputing interpretations of words to Mr Mangenda based on

⁵ *Id.* paras. 107, 704, 733, 808, 877. *See e.g.* paras. 896(a)(ii)-(iv), 902, 905, 914.

⁶ T.10, 4:21-6:4.

⁷ TJ, paras. 107, 681, 802.

⁸ *Id.* paras. 108, 169, 505, 536, 537, 539, 542, 576, 591, 652, 715, 720, 722, 734, 757, 837-850, 909-922.

⁹ *Contra* TJ, para. 849 (“Mr Mangenda was regularly informed *or even present* when Mr Kilolo illicitly instructed witnesses”) (italics added).

information known only to Mr Kilolo;¹⁰ failing to adequately define or distinguish between witness preparation and criminal coaching; interpreting ambiguous words and expressions to Mr Mangenda's detriment based on a standard lower than reasonable doubt; failing to adequately consider whether Mr Mangenda's words could reasonably be interpreted as consistent with only non-criminal purposes; failing to consider all circumstances, including those specifically raised by the Defence in its submissions, as to the explanations for various words and expressions; adopting incorrect interpretations of codes and adopting those interpretations based on an improperly low standard of proof; and imputing to Mr Mangenda's knowledge and intent based on failures to object to or oppose statements by Mr Kilolo.

11. The Trial Chamber also erred in failing to limit its analysis of Mr Mangenda's knowledge of illicit coaching within the framework that it had defined at the beginning of the case.¹¹ On the contrary, the Trial Chamber relied on alleged criminal illicit coaching that pertained to "the merits of the Main Case."¹² The Trial Chamber had expressly stated at the outset of trial that it would not adjudicate the truth of falsity of such matters, and yet its determination of the falsity of certain propositions was vital to its determination of the illicit nature of conversations to which Mr Mangenda was a party.¹³ Although facts falling outside of the scope of the charges may normally be relied upon to infer guilt in respect of matters within the scope of the charges, here the Trial Chamber expressly limited the parties to addressing the falsity (or truth) of testimony concerning previous contacts with the Defence, acquaintances with other persons, or receipt of money or promises of money in relation to their testimony.¹⁴ The Judgment, however, relies substantially on falsehoods going beyond

¹⁰ See e.g. TJ, paras. 103-104, 108, 488, 495, 505, 542, 566, 591, 667, 704, 715, 717, 718, 722, 726, 734, 757, 824, 834, 839, 844, 846, 847, 848, 849, 867, 868.

¹¹ Decision on 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation 169' and Related Additional Requests, ICC-01/05-01/13-1154, 17 August 2015, para. 14 ("[t]he Chamber emphasises that it is not the purpose of these proceedings to re-litigate the Main case. Submissions that attempt to do so will not be entertained"); ICC-01/05-01/13-1188, para. 12 ("[t]urning to the merits, the Single Judge recalls that the Chamber has already cautioned the parties that the purpose of these proceedings is not to re-litigate the Main Case. Submissions which attempt to do so, or evidence presented solely for this purpose, will not be entertained.")

¹² TJ, paras. 180, 636, 717, 818, 819, 896(a)(i).

¹³ See e.g. TJ, paras. 489, 495 (inferring that "*couleurs*" refers to lies based on substantive testimony), 534-536, 542, 598-612, 652, 839 ("[i]n relation to D-54, Mr Mangenda advised Mr Kilolo on the witness's lack of knowledge about the 'CCOP' and how to ensure that D-54's testimony remained consistent with the rest of the defence evidence"), 896(a)(i) (illicitly coaching witnesses to provide "particular information during their testimony in relation to the merits of the Main Case"), 896(a)(i).

¹⁴ T.10, 4:21-6:4.

those limits, and concerning issues that were never adjudicated to be false, and that the Trial Chamber announced at the beginning of trial would not be adjudicated as false or true. This is particularly significant for Mr Mangenda who acknowledges that he communicated with Mr Kilolo about elements of testimony to be adduced from witnesses, but strongly disputes that he knew any of those elements to be false. Further, the Trial Chamber erred in failing to make findings that, and failing to address whether, Mr Mangenda knew that Mr Kilolo was coaching witnesses to lie about these specific issues.

12. The Trial Chamber's failure to limit its findings according to the case as charged, and upon which evidence was heard, was compounded by the Trial Chamber's own finding that the Prosecution had failed – even through to its closing statement – to articulate the definition of the common plan.¹⁵ Articulating a common plan for the first time in the Judgment, and using it as a basis for conviction, violated Mr Mangenda's right to a fair trial.
13. The telephone communications that were the basis for these inferences were recorded by the Dutch authorities on the basis, *inter alia*, of a decision of a Single Judge of the ICC.¹⁶ That decision, in turn, was based on financial records that were reviewed and obtained by investigators of the ICC without any judicial authorization. The Prosecution did not disclose this fact until the middle of trial – on the very day of the appearance of a witness who had knowledge of these matters.¹⁷ The manner in which this search was conducted violated internationally recognized human rights. The violation was serious not only in itself, but also because the fruits of that violation were used to induce a Single Judge of the ICC to authorize, and the Dutch authorities to implement, the most intrusive and far-reaching invasion of privacy imaginable: listening to all conversations on Mr Mangenda's mobile telephone. The Trial Chamber erred in admitting these intercepted communications.

¹⁵ TJ, para. 681.

¹⁶ *Situation in Central African Republic*, Decision on the 'Prosecutor's Request for judicial assistance to obtain evidence for investigation under Article 70', ICC-01/05-46-Conf, 8 May 2013.

¹⁷ T.43, 3 November 2015.

14. The Trial Chamber incorrectly inferred that Mr Mangenda advocated covering up previous misconduct by bribing witnesses.¹⁸ The Trial Chamber erred in fact in its interpretations of conversations concerning this alleged cover-up; erred in law by ignoring concessions that had been made by the Prosecution at the beginning of the case (and findings of the Independent Counsel)¹⁹ that these conversations did not reflect a cover-up;²⁰ and erred in law by finding that any alternative interpretations of the alleged “cover-up” conversations were “irrelevant,”²¹ while at the same time relying on its own interpretation of these conversation to substantiate its finding that Mr Mangenda knew about, and participated in, the common criminal plan.²²
15. The Trial Chamber erred in relying on a meeting with four witnesses in Yaoundé in May 2013 to infer that Mr Mangenda had knowledge of Mr Kilolo’s allegedly improper coaching. The Trial Chamber contradicted its own findings in asserting that Mr Mangenda was “present when Mr Kilolo illicitly instructed witnesses”;²³ erred in inferring that the distribution of telephone could not have failed to cause Mr Mangenda to infer that Mr Kilolo was, or would be, engaged in Article 70 offences with the witnesses;²⁴ and erred in finding that Mr Mangenda heard Mr Kilolo promise money to the witnesses in return for lies.²⁵
16. The Trial Chamber, despite expressly finding that “there is no direct or indirect link between Mr Mangenda’s activities and the false testimony given by D-23, D-26, D-55, D-57 or D-64,”²⁶ erroneously found that Mr Mangenda was part of a common plan to corruptly influence and coach these witnesses. This error reflects the Trial Chamber’s erroneous imputation to Mr Mangenda of a criminal *mens rea* throughout the duration of the common plan, but without making any finding, or offering any

¹⁸ See e.g. TJ, paras. 109-110, 765-768, 772-800, 803, 805.

¹⁹ ICC-01/05-01/13-1110-Conf, 31 July 2015 (“Pre-Trial Brief”), para. 55; CAR-OTP-0074-1029:20-34.

²⁰ Opening 67:7 (“[t]hey devised to tell Bemba that the individuals on the Defence side had given the Prosecution information about their criminal plan and they would have to be bought off”); *id.* 68:9-10 (“although Kilolo’s and Mangenda’s stories about informers being among Defence witnesses in October 2013 were entirely made up, the reactions of Mr Bemba and Mr Babala were not”); Pre-Trial Brief, para. 63.

²¹ TJ, para. 800.

²² See e.g. TJ, paras. 109-110, 169, 505, 536, 537, 539, 542, 576, 591, 652, 715, 720, 722, 734, 747, 765-768, 772-800, 803, 805, 837, 845, 847, 848, 909-922.

²³ *Id.* paras.133, 134, 138, 140, 373, 849.

²⁴ *Id.* paras. 367, 371, 421, 747, 833, 910, 921.

²⁵ *Id.* paras. 138, 373, 681, 803.

²⁶ *Id.* para. 920.

substantiation of a finding, as to when Mr Mangenda joined the common plan.²⁷ The same errors infect its finding that Mr Mangenda was involved in any common plan in respect of D-2-D-3, D-4 and D-6.

17. The Trial Chamber erred in fact and in law in finding that Mr Mangenda aided false testimony by D-15 and D-54 and that he abetted the false testimony of D-2, D-3, D-4 D-6, D-13, D-25 and D-29.²⁸ The alleged “moral support” through presence,²⁹ tacit approval by silent listening,³⁰ and “aid[ing] logistically” arising from “being present”³¹ are based on mischaracterizations of the facts or on erroneous legal definitions.
18. These errors, viewed individually or cumulatively with the other errors, invalidate the Chamber’s findings concerning a common plan and aiding and abetting, and/or have occasioned a miscarriage of justice. These errors are numbered below in a sequence designed to facilitate the most efficient appellate review.

IV. INTENDED GROUNDS OF APPEAL

A. INTENDED GROUND 1: Improper Admission of Audio-Surveillance Evidence

19. The Trial Chamber erred in admitting evidence of intercepted conversations where the Office of the Prosecutor’s (1) illegal acquisition of Western Union information that led to the intercepts, and (2) misstatements and omissions in obtaining authorisation for the interceptions by Dutch authorities, rendered admission of the intercepted conversations at trial antithetical and seriously damaging to the integrity of the proceedings under Article 69(7)(b).³²

²⁷ *Id.* paras. 838, 848-850, 870.

²⁸ *Id.* para. 922.

²⁹ *Id.* para. 867.

³⁰ *Id.* para. 868.

³¹ *Id.* para. 867.

³² The decisions which are challenged under this ground of appeal are, *inter alia*, (1) *Decision on Requests to Declare Telephone Intercepts Inadmissible*, ICC-01-05-01-13-1284, 24 September 2015; (2) *Decision on Requests to Obtain Western Union Documents and Other Evidence Pursuant to Article 69(7)* ICC-01/05-01/13-1854, 29 April 2016; and (3) *Decision on Request in Response to two Austrian Decisions*, ICC-01/05-01/13-1948, 14 July 2016. All legal findings against Mr Mangenda in the Judgment will be challenged on this basis since all those findings as against Mr Mangenda were based in whole or in part on the intercepted conversations

Sub-grounds:

- a. The Trial Chamber erred by finding that Article 69(8) applied to the OTP's collection of Western Union information and in crafting a "manifestly unlawful" standard under Article 69(8).
- b. As a result of its erroneous application of Article 69(8), and undervaluation of the misconduct of the OTP, the Trial Chamber erred in concluding that admission of the intercepted conversations would not be antithetical to, or seriously damage the proceedings.

B. INTENDED GROUND 2: Errors in Relation to Knowledge of, and Participation in, Any Criminal Plan

20. The Trial Chamber erred by finding that Mr Mangenda knew about, and participated in, a common plan to coach witnesses to tell lies about their contacts with the defence, payments by the defence, or contacts or associations with third persons.

Sub-grounds:

- a. The Trial Chamber erred by entering a conviction based on a common plan that remained undefined until the Trial Judgment.³³
- b. The Trial Chamber erred by relying on findings that it had indicated it would not adjudicate, namely, alleged falsehoods going to the merits of the Main Case.³⁴
- c. The Trial Chamber erred by failing to distinguish between indications of permissible witness preparation and criminal coaching, and in fact by

that should have been excluded. Findings derived from the intercepts that were particularly significant in this regard are found in paragraphs 839-50 and 865-70 of the Trial Judgment.

³³ See e.g. TJ, para. 681. For the Trial Chamber's articulation of the common plan, see e.g. TJ, paras.103-113. See also TJ, paras. 682, 683.

³⁴ See e.g. TJ, paras. 180, 489, 495, 534-536, 542, 598-612, 652, 839, 896(a)(i).

repeatedly failing to adequately distinguish between Mr Mangenda's knowledge and Mr Kilolo's knowledge. In particular, the Trial Chamber erred in inferring that Mr Mangenda had any knowledge that instructions being conveyed from Mr Bemba to Mr Kilolo concerned false information, or that discussing such matters with a witness constituted or necessarily implied improper coaching;³⁵ erred in inferring that reporting on witnesses' performance in court was indicative of a coaching scheme as opposed to a lawful scheme to effectively defend Mr Bemba;³⁶ and erred in inferring that sending the questions of the Legal Representatives of the Victims to Mr Kilolo indicated his participation in a common criminal plan.³⁷

C. INTENDED GROUND 3: Errors in Relying on an Alleged Cover-Up to Establish Participation in a Common Plan

21. The Trial Chamber erred in interpreting Mr Mangenda's words in the intercepted communications as reflecting a cover-up and, in turn, treating that cover-up as probative of his knowledge of, and participation in, the Common Plan.

Sub-grounds:

- a. The Trial Chamber erred in ignoring concessions that had been made by the Prosecution before the commencement of trial concerning the interpretation of the words subsequently adjudicated to be a cover-up. The Trial Chamber also erred in law in dismissing Defence arguments as immaterial to the Trial Chamber's findings, but then using those findings as a basis to infer Mr Mangenda's involvement in the Common Plan.³⁸

³⁵ See e.g. TJ, paras.108, 169, 505, 536, 537, 539, 542, 576, 591, 652, 715, 720, 722, 734, 757, 837-850, 909-922.

³⁶ See e.g. TJ, paras. 161, 165, 167, 172, 495, 601, 606, 685, 686, 688, 704, 713, 717, 725, 732, 774, 787, 788, 790, 791, 801, 811, 837, 842, 843, 910.

³⁷ See e.g. TJ, paras. 108, 169, 721, 910.

³⁸ See e.g. TJ, para. 800, 801, 802, 803, 804.

- b. The Trial Chamber erred in finding that Mr Mangenda's words as spoken in the intercepted communications reflected a cover-up of any criminal conduct in respect of any witnesses.

D. INTENDED GROUND 4: Errors in Relying on the Yaoundé Meeting (With D-2, D-3, D-4 and D-6) as Indicating Involvement in the Common Plan

22. The Trial Chamber erred in finding that Mr Mangenda's conduct, or his observations, at the Yaoundé meeting with Witnesses D-2, D-3, D-4 and D-6 indicate his awareness of, and involvement in, the Common Plan.³⁹

Sub-grounds:

- a. The Trial Chamber erred in inferring that the distribution of telephones demonstrated knowledge of the Common Plan.⁴⁰
- b. The Trial Chamber erred in finding beyond a reasonable doubt that Mr Mangenda was aware of a promise of money made by Mr Kilolo to the witnesses, let alone that that promise was intended as an inducement to tell lies.⁴¹
- c. The Trial Chamber erred in finding that Mr Mangenda's presence at the Yaoundé meeting, as opposed to any other members of the Defence team, was indicative of his involvement in the Common Plan.⁴²

E. INTENDED GROUND 5: Errors Concerning the Scope of Mr Mangenda's Involvement in the Common Plan

23. The Trial Chamber erred in finding that Mr Mangenda was involved in a common plan encompassing all fourteen witnesses.

³⁹ See e.g. TJ, paras. 867, 971.

⁴⁰ See e.g. TJ, paras. 109, 371, 747, 841, 867, 910, 921.

⁴¹ See e.g. TJ, para. 109, 138, 373.

⁴² See e.g. TJ, paras. 133, 134, 138, 140, 354, 367, 369, 371, 373, 418, 421, 516, 747, 840.

Sub-grounds:

- a. The Trial Chamber erred in finding that Mr Mangenda was part of any common plan encompassing D-23, D-26, D-55, D-57 or D-64.
- b. The Trial Chamber erred in finding that Mr Mangenda was part of any common plan encompassing D-2, D-3, D-4 or D-6.⁴³

F. INTENDED GROUND 6: Errors Concerning Convictions for Aiding and Abetting Witnesses to Give False Testimony under Article 70(1)(a)

24. The Trial Chamber erred in finding that Mr Mangenda aided D-15 and D-54 to give false testimony, or that he abetted D-2, D-3, D-4 D-6, D-13, D-25 and D-29 to give false testimony.

Sub-grounds:

- a. The Trial Chamber erred in finding that Mr Mangenda conveyed instructions to Mr Kilolo that he knew to be false, that he advised Mr Kilolo on coaching, or that he provided information about courtroom testimony for the purposes of aiding or abetting the giving of false testimony.⁴⁴
- b. The Trial Chamber erred in finding that conveying Mr Bemba's instructions to Mr Kilolo about D-54's testimony aided D-54's false testimony within the scope of the charges, or that discussions with Mr Kilolo about D-15's testimony and conveying the Victims' questions to Mr Kilolo aided D-15's false testimony within the scope of the charges.⁴⁵

⁴³ See e.g. TJ, paras. 865, 867, 896, 899, 910, 912, 914, 915, 917, 921, 922.

⁴⁴ See e.g. TJ, paras. 681, 844, 847, 849, 870, 914, 915, 921.

⁴⁵ See e.g. TJ, paras. 167,171,173,174,565,566,574-577,591,597,601,602,606,652, 841, 842, 843.

- c. The Trial Chamber erred in finding that Mr Mangenda abetted D-2, D-3, D-4, D-6, D-13, D-25 or D-29 – to whom he did not speak about the content of their testimony – to give any false testimony.⁴⁶

V. CONCLUSION

25. The foregoing errors of law, fact and procedure rendered the proceedings unfair and materially affect the Judgment under Article 83 of the Statute. The Appeals Chamber will be requested to reverse the Judgment and quash all convictions of Mr Mangenda.



Christopher Gosnell
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Respectfully submitted this 14th day of February 2017,
At The Hague, The Netherlands

⁴⁶ See e.g. TJ, para. 922.