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**TRIAL CHAMBER VII**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Raul Pangalangan

**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 with Public Annex A**

**Prosecution Sentencing Submissions**

**Source:** Office of the Prosecutor

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

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## TABLE OF CONTENTS

Introduction.....	4
Submissions.....	6
A.    The impact of the Chamber’s error in assessing the gravity of Bemba’s, Kilolo’s and Mangenda’s sentences for article 70(1)(a) offences.....	8
B.    The impact of the Chamber’s error in assessing Bemba’s and Kilolo’s culpable conduct for article 70(1)(a) offences .....	13
(a) <i>Bemba</i> .....	16
(b) <i>Kilolo</i> .....	20
(c) <i>Mangenda</i> .....	23
C.    The Appeals Chamber’s reversal of the article 70(1)(b) convictions does not affect the sentences .....	27
D.    The Chamber’s error on the duration of the article 70(1)(c) offences does not affect the sentences .....	30
E.    The Chamber should impose sentences proportionate to the facts of this case.	30
(a) <i>The sentences must reflect the gravity of this case</i> .....	33
(b) <i>The sentences must appropriately recognise the extent of Bemba’s, Kilolo’s and Mangenda’s culpable conduct</i> .....	36
(c) <i>The sentences should deter</i> .....	40
(d) <i>Five years’ imprisonment is appropriate</i> .....	40
(e) <i>Further oral hearing is not required</i> .....	44
Conclusion and Relief.....	44

## Introduction

1. This Chamber has already underscored the gravity and damaging effects of offences against the administration of justice. It is well aware of the gravity of the offences of which Bemba, Kilolo and Mangenda were convicted. It well knows their high level of culpability. The Appeals Chamber has now asked this Chamber to impose sentences that reflect the facts of this case.

2. Bemba, Kilolo and Mangenda masterminded a criminal scheme to illicitly interfere with at least 14 witnesses<sup>1</sup>—out of 34 Defence witnesses—to elicit favourable testimony to Bemba, who was being tried before Trial Chamber III for crimes against humanity and war crimes (the “Bemba Main Case”). They bribed and illicitly coached the witnesses on core substantive issues in the Bemba Main Case (“merits” issues), and on crucial credibility matters such as their contacts with members of the Defence, their acquaintance with third persons and payments and non-monetary benefits received or promised (“non-merits” issues). They solicited, induced, or aided and abetted the witnesses’ false-testimony on “non-merits” issues. The witnesses then testified in Court and provided false testimony on these “non-merits” issues, and gave testimony on “merits” issues which were affected by the illicit coaching. Kilolo and Mangenda were lawyers and knew the rules of the game. But, they disregarded—and violated—these rules, while fully aware that their actions were illegal. Bemba orchestrated their actions. When they became aware that they were being investigated, the three convicted persons sought to further bribe and illicitly coach the witnesses to cover up their criminal conduct. They acted with total disrespect to this Court’s function and its personnel, to the States Parties who are responsible for ensuring the Court’s functioning and, notably, to the thousands of victims who trust this Court to provide justice. The Court cannot tolerate this conduct. It must be properly punished and deterred.

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<sup>1</sup> [Judgment](#), paras. 103, 802.

3. The Appeals Chamber has confirmed Bemba's, Kilolo's and Mangenda's convictions for articles 70(1)(a) and (c) offences.<sup>2</sup> It reversed their convictions for article 70(1)(b) offences because it found that this provision did not encompass oral testimony.<sup>3</sup> Notably, the Appeals Chamber reversed Bemba's, Kilolo's and Mangenda's sentences. It found that the Trial Chamber had erred on three issues: in suspending Kilolo's and Mangenda's sentences, in considering that accessories necessarily deserve a lower sentence than co-perpetrators, and in deeming that false testimony on "non-merits" issues is automatically less grave than false testimony on "merits" issues. It remanded the matter to the Trial Chamber for a new sentence.<sup>4</sup>

4. In deciding on the new sentences to be imposed, the Trial Chamber should take a global view of the case in light of the errors found by the Appeals Chamber and increase the individual and joint sentences for each of the three convicted persons to a five-year term of imprisonment. This is proportionate and reasonable in this case. The false testimony given by witnesses on "non-merits" issues in this case was grave. The information was crucial for the Bemba Main Case Chamber to determine the witnesses' credibility and the reliability of their evidence. Matters relating to the credibility of witnesses are integral to a Chamber's holistic evaluation of the evidence: they cannot be divorced from such assessment. Further, Bemba and Kilolo deserve a sentence which is commensurate with their criminal responsibility for having contributed to the false testimony of 14 witnesses. Mangenda's sentence should likewise reflect the true extent of his assistance to the false testimony of nine witnesses.

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<sup>2</sup> The Appeals Chamber also confirmed Arido's and Babala's convictions for article 70(1)(c) offences and their sentences.

<sup>3</sup> [Appeal Judgment](#), paras. 710, 1631.

<sup>4</sup> [Sentencing Appeal Judgment](#), paras. 361-362.

5. The Prosecution requests that Bemba, Kilolo and Mangenda each receive (joint) sentences of five years' imprisonment. Further, the Prosecution welcomes the imposition of an *additional* fine. However, given that the convicted persons' financial situations are unclear at this stage, the Prosecution defers to the Trial Chamber on whether such additional effective fine can be imposed in the circumstances. In any event, as the Appeals Chamber has said, culpability, and not solvency, should determine such a fine: it should be substantial enough to deter the convicted persons, and it should be realised within a reasonable period of time. It should, in no case, serve as a substitute for an appropriate imprisonment term, which in this case should be no less than five years for each of the convicted persons.<sup>5</sup>

### Submissions

6. The scope of these submissions is limited to the impact that the Sentencing and Conviction Appeals Judgments have on the Trial Chamber's Sentencing Decision and the original sentences imposed on Bemba, Kilolo and Mangenda.<sup>6</sup> This is not a forum to re-litigate matters which have been settled, either because they were not appealed, or by the Appeals Chamber itself. Indeed, "[m]any aspects of the Sentencing Decision were confirmed on appeal and the affected parties must treat these rulings as final".<sup>7</sup>

7. The Appeals Chamber reversed Bemba's, Kilolo's and Mangenda's sentences because the Trial Chamber erred by:

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<sup>5</sup> See below paras. 57, 80-82.

<sup>6</sup> [Sentencing Decision](#).

<sup>7</sup> [Sentencing Order](#), para. 3. See also [Delalić et al. AJ](#), para. 712 ("[a]s it will be an issue as to whether any *adjustment* should be made to the sentences because of the matters referred to above, and not a complete rehearing on the issue of sentence[...]") and [Delalić et al. Clarification Decision](#) ("CONSIDERING that the Appeals Chamber has defined the issues for determination by the Trial Chamber (after the parties have had the opportunity of making relevant submissions) as involving an adjustment of sentence and not a re-hearing; and that, accordingly, no further evidence is necessary").

- suspending Kilolo’s and Mangenda’s sentences, since the Rome Statute does not foresee suspended sentences.<sup>8</sup>
- having considered that “the mere fact” that the false testimony related to “non-merits” issues informed the assessment of the gravity of Bemba’s, Kilolo’s and Mangenda’s article 70(1)(a) offences, and in giving it “some weight”.<sup>9</sup>
- having considered that simply because Bemba and Kilolo were accessories—for soliciting and inducing the false testimony of 14 witnesses—, they deserved a lower sentence for their article 70(1)(a) offences.<sup>10</sup>

8. The Appeals Chamber quashed the totality of Bemba’s, Kilolo’s and Mangenda’s sentences, namely both the terms of imprisonment imposed—and their suspension—and, contrary to Bemba’s submission before Trial Chamber III,<sup>11</sup> the fines imposed on Kilolo and Bemba.<sup>12</sup> In addition, the Appeals Chamber reversed Bemba’s, Kilolo’s and Mangenda’s convictions for article 70(1)(b) offences (presentation of false/ forged evidence) since it found that the offence does not include oral testimony.<sup>13</sup> Further, although it found that the Trial Chamber was unreasonable in concluding—and considering in assessing the gravity<sup>14</sup>—that the article 70(1)(c) offences lasted two years,<sup>15</sup> this error was “immaterial to its finding that the offences [...] extended over a lengthy period of time” since the offences lasted at least 13 months.<sup>16</sup>

<sup>8</sup> [Sentencing Appeal Judgment](#), paras. 73-80.

<sup>9</sup> [Sentencing Appeal Judgment](#), paras. 38-45.

<sup>10</sup> [Sentencing Appeal Judgment](#), paras. 58-62.

<sup>11</sup> Annex C to [Bemba Access Request](#). See also paras. 18, 31. Bemba apparently argues that the fine was not overturned on appeal.

<sup>12</sup> This Chamber made clear that the fine was part of the sentence. See [Sentencing Decision](#), paras. 198 (with respect to Kilolo, noting that “a fine is a suitable part of the sentence”) and 263 (with respect to Bemba, determining a “combined sentence” of one-year imprisonment and a fine).

<sup>13</sup> [Appeal Judgment](#), paras. 710, 1631.

<sup>14</sup> [Sentencing Decision](#), para. 209 (Bemba); [Sentencing Decision](#), para. 159 (Kilolo) and [Sentencing Decision](#), para. 107 (Mangenda).

<sup>15</sup> [Sentencing Appeal Judgment](#), paras. 167-168.

<sup>16</sup> [Sentencing Appeal Judgment](#), para. 168 (“it is clear from the findings in the Conviction Decision that Mr Bemba, Mr Kilolo and Mr Mangenda agreed to plan to illicitly interfere with witnesses, at least by the time witness D-57 testified before Trial Chamber III, namely 17 October 2012 and continued until November 2013”).

9. Finally, since the Appeals Chamber identified three errors in the Sentencing Decision and on this basis vacated the original sentences, it did not assess the Prosecution's first sub-ground of appeal regarding the manifestly inadequate and disproportionate sentences initially imposed.<sup>17</sup> The Prosecution will address the impact of these issues in turn.

**A. The impact of the Chamber's error in assessing the gravity of Bemba's, Kilolo's and Mangenda's sentences for article 70(1)(a) offences**

10. In the Sentencing Decision, the Trial Chamber noted that the witnesses' false testimony related to "non-merits" issues. It considered that this fact "inform[ed] the assessment of the gravity of the [article 70(1)(a) and (b)] offences" and gave "some weight" to it in determining Bemba's, Kilolo's and Mangenda's sentences.<sup>18</sup> The Appeals Chamber found that this was an error. Once the Trial Chamber takes this error into account, it should increase Bemba's, Kilolo's and Mangenda's individual sentences for article 70(1)(a) offences, and their joint sentences.

11. Although the Appeals Chamber recognised that the content of the false testimony might be relevant in some cases to evaluate the damage caused, and thus to assess the gravity of the offences,<sup>19</sup> it found that "*the mere fact* that in the present case the false testimony 'related to issues other than the merits of the Main Case'" was not a valid factor for lessening the gravity of the offences.<sup>20</sup> Indeed, it cannot be

<sup>17</sup> [Sentencing Appeal Judgment](#), paras. 29, 90.

<sup>18</sup> [Sentencing Decision](#), paras. 115, 167, 217. Before imposing the sentences, the Trial Chamber "paid heed" to the fact that the false testimony related to matters informing the credibility of witnesses. *See* paras. 145, 193, 248.

<sup>19</sup> [Sentencing Appeal Judgment](#), para. 38 (noting that "the importance of the issues on which false testimony is given [under article 70(1)(a)] or false or forged documentary evidence is presented [under article 70(1) (b)] may be a relevant consideration in the assessment of the gravity of these offences. The introduction of false evidence on aspects of no, or only peripheral relevance to the facts at issue before a chamber may indeed be considered less grave than the introduction of false evidence on issues of particular significance for the case. In essence, this relates to the evaluation of the damage that the commission of the offence caused, or could have caused on the truth-seeking function of the Court that is ultimately protected by the relevant incriminating provisions."). *See also* para. 40 ("the importance of the issues on which false testimony is given can, in principle, be of relevance to an assessment of the gravity of the offences concerned").

<sup>20</sup> [Sentencing Appeal Judgment](#), paras. 41, 42, 45.



assumed that false testimony on “non-merits” issues are “inherently less grave” than false testimony on “merits” issues.<sup>21</sup> Assuming a hierarchy of gravity in this regard is artificial and incompatible with the required fact-specific assessment, *in concreto*, of the gravity of the particular offences.<sup>22</sup>

12. The Appeals Chamber’s reasoning is consistent with this Trial Chamber’s own reasoning in its Conviction Decision, where it underscored the gravity, and damaging effects of the witnesses’ false testimony on the Court’s truth-seeking function in this case.<sup>23</sup>

13. *First*, the “threshold” for article 70(1)(a)—the “materiality” of the false testimony, namely, “any information that has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses”<sup>24</sup>—was met in this case. False testimony on “non-merits” issues may be as “material” to a case as false testimony on “merits” issues may be. And such false testimony may be equally grave. Indeed, the content of the false testimony in this case—(i) payments or non-monetary benefits received by the witnesses; (ii) their acquaintance with other individuals; and (iii) the nature and number of prior contacts the witnesses had with the Main Case Defence—are not “aspects of [...] only peripheral relevance to the facts at issue”.<sup>25</sup> As the Trial Chamber noted in its Conviction Decision and its Sentencing Decision, information on credibility, and on the “non-merits” issues in the case, was of “crucial importance [...]”.<sup>26</sup> Questions on such matters, especially when asked by the non-calling party, provide “indispensable information and are

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<sup>21</sup> [Sentencing Appeal Judgment](#), para. 41. The Appeals Chamber found that the Trial Chamber did not explain on what basis it considered that false testimony that does not relate to the “merits” of a case is generally relevant to the determination of the gravity of the offences, nor why it was so in this case.

<sup>22</sup> [Sentencing Appeal Judgment](#), para. 44. *See also* para. 42 (“the distinction between lies on the ‘merits’ and lies on the other matters relied upon by the Trial Chamber is an unsuitable point of reference to measure the gravity of the concerned offences”).

<sup>23</sup> *See below*, paras. 13-15, 59-66.

<sup>24</sup> [Judgment](#), para. 22.

<sup>25</sup> [Sentencing Appeal Judgment](#), para. 38.

<sup>26</sup> [Judgment](#), para. 22. *See also* [Sentencing Decision](#), paras. 115, 167, 217.

deliberately put to witnesses with a view to testing their credibility. If the Judges are not furnished with genuine information, they will not be able to assess duly the credibility of witnesses.”<sup>27</sup>

14. Indeed, in this case, the Court’s truth-seeking functions would have been as damaged by false testimony on “non-merits” issues as they would have been on “merits” issues.<sup>28</sup> This approach is consistent with the very purpose of article 70(1)(a), since:

“[T]he administration of justice is already tainted if false evidence is introduced into the proceedings thus tainting the Judges’ inquiry into the facts and deliberations take place on the basis of false evidence.”<sup>29</sup>

15. *Second*, in defining the elements of the offences, the Trial Chamber expressly rejected narrow definitions and understandings of the relevant falsehoods in any article 70 prosecution. In particular, the Chamber expressly rejected a Defence argument requiring a link between the false testimony “to the outcome of the case”, either in favour of or against the accused.<sup>30</sup>

16. Nonetheless, although a link between false testimony on “non-merits” issues and the outcome of a case is not required as a matter of law, this does not mean that there cannot be such a link in fact, since credibility assessments are an *integral* and *indissoluble* part of the Chambers’ assessment of the evidence of the witnesses. Trial Chambers must weigh and evaluate the evidence before them as a whole, in light of the context and nature of the evidence itself, including the credibility of the relevant witnesses and the reliability of their testimony.<sup>31</sup> Credibility assessments are not conducted in isolation, nor can they be parcelled out. The ability to accurately assess

<sup>27</sup> [Judgment](#), para. 22. *See also* [Sentencing Decision](#), paras. 115, 167, 217.

<sup>28</sup> [Sentencing Appeal Judgment](#), para. 43.

<sup>29</sup> [Judgment](#), para. 23.

<sup>30</sup> [Judgment](#), para. 23.

<sup>31</sup> *See e.g.*, [Akayesu AJ](#), para. 292.

the credibility of witnesses is an integral part of a Chamber's assessment of the evidence, and an inherent part of its ability to assess the substance of the testimony given by witnesses. As Chambers have found, "[d]eterminations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgment."<sup>32</sup>

17. The Appeals Chamber has confirmed the *interdependence* between the two issues:

"[T]he assessment by a trial chamber of the credibility of witnesses (based, *inter alia*, on 'non-merit' issues) is an integral part of its ability to assess the substance of the witnesses' testimony (on 'merit' issues).[...] Indeed, false testimony on issues which go to the credibility of a witness prevents the Court from obtaining correct information which may be necessary for an accurate assessment of the reliability of his or her evidence on the 'merits' of a case. [...] [T]he purpose of questioning witnesses on issues concerning their credibility is to receive genuine information that a chamber would consider in assessing the substance of the witnesses' testimony as part of its ultimate duty to discover the truth."<sup>33</sup>

18. *Third*, lies told by the witnesses about "non-merits" issues were integral, and intrinsically linked, to their lies about the "merits" of the case. The Common Plan—to illicitly interfere with witnesses to ensure that they would testify in favour of Bemba—depended on secrecy;<sup>34</sup> if the perpetrators' criminal conduct were to become known to Trial Chamber III, the witnesses' testimony about the "merits" of the case would have been useless. The 14 witnesses—out of a total of 34 Defence witnesses—were called to testify to core issues of the case, such as Bemba's effective control over

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<sup>32</sup> [Kvočka AJ](#), para. 659.

<sup>33</sup> [Sentencing Appeal Judgment](#), para. 43 (also noting that "depending on the circumstances, 'credibility issues' can be indistinguishable from the 'substantive ones', for instance, with respect to a determination on whether a witness may have a motive to falsely implicate or exculpate the accused person").

<sup>34</sup> [Judgment](#), paras. 251 ("[i]f the witness revealed the true extent and nature of his contacts with the Main Case Defence, these efforts would be rendered not only fruitless, but could also entail other consequences for the accused, including criminal prosecution"), 819 ("[i]t was critical for the success of such a plan that this influence on the witnesses be concealed"), 853 ("[t]he success of this plan depended on the influence on these witnesses remaining hidden, as their testimony would otherwise lose all credibility"). *See also* paras. 775-776.

the *Mouvement de Libération du Congo* (“MLC”) troops at the time of the charges. Although no finding was made by the Trial Chamber about the falsehood of these matters going to the “merits” of the Bemba Main case, the witnesses’ false testimony on the “non-merits” issues could have affected Trial Chamber III’s assessment of their testimony relating to the merits of the case, and the ultimate outcome of the trial.<sup>35</sup>

19. The gravity of the lies told by the witnesses was further heightened since the co-perpetrators were themselves aware that credibility factors were “material” to the Bemba Main Case.<sup>36</sup> They were acutely aware that an investigation into the witnesses’ conduct would destroy their credibility.<sup>37</sup> Hence, once they learned of the Prosecution’s article 70 investigation, they expressed concern that it would “destroy[...] all the witnesses” they had<sup>38</sup> and, as a result, “they would ‘lose’ all the work that had been done so far and that [Bemba] could face another five-year prison sentence [...]”.<sup>39</sup>

20. The Appeals Chamber underscored the importance—and gravity—of the witnesses’ false testimony in this case when stating that it was not:

“[...] persuaded that, for instance, false testimony as to the fact that a witness had received payments from the defence and had had improper contacts with members of the defence team is inherently less grave than false testimony on any matter ‘pertaining to’ the ‘merits’ of a case”.<sup>40</sup>

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<sup>35</sup> [Sentencing Appeal Judgment](#), para. 38 (“[...] this relates to the evaluation of the damage that the commission of the offence caused, *or could have caused* on the truth-seeking function of the Court that is ultimately protected by the relevant incriminating provisions”) (emphasis added).

<sup>36</sup> [Judgment](#), para. 789.

<sup>37</sup> *Ibid.*

<sup>38</sup> [Judgment](#), paras. 788-789.

<sup>39</sup> [Judgment](#), paras. 775-776.

<sup>40</sup> [Sentencing Appeal Judgment](#), para. 42.

21. *Fourth*, it is axiomatic that perjured evidence given to secure the acquittal of a guilty person is very serious.<sup>41</sup> This was the reality of this case, where the witnesses were told to improperly testify so as to conceal the criminal scheme and to acquit Bemba of his serious crimes.

22. In conclusion, in recognition of the error identified by the Appeals Chamber, the Trial Chamber should increase the individual (and joint) sentences of Bemba, Kilolo and Mangenda for their article 70(1)(a) offences. The nature of the false testimony given by witnesses on “non-merits” issues was grave and deserves proportionately high, and hence increased, sentences.

#### **B. The impact of the Chamber’s error in assessing Bemba’s and Kilolo’s culpable conduct for article 70(1)(a) offences**

23. The Trial Chamber, when summarising all relevant factors for its ultimate determination of the sentences, “emphasise[d] that it ha[d] distinguished between the offences that [Mr Kilolo and Mr Bemba] committed as co-perpetrator[s] and those in relation to which [they were accessories]”.<sup>42</sup> This abstract distinction between the two modes of liability appeared to be the basis for the Chamber’s imposition of a lower sentence for Kilolo and Bemba for inducing and soliciting (under article 25(3)(b)) for article 70(1)(a) offences than that imposed on them as co-perpetrators (under article 25(3)(a)) for article 70(1)(c) offences.<sup>43</sup> While Bemba was sentenced to 12 months’ imprisonment for his article 70(1)(c) offences, he was

<sup>41</sup> [GAA TJ](#), para. 10 (“Although all perjury is serious, the Chamber is of the view that the most serious category is where the perjured evidence is being given to lead to the conviction of an innocent person and the second most serious category is where, as in this case, the perjured evidence is given in the hope of procuring the acquittal of a guilty person.”)

<sup>42</sup> [Sentencing Appeal Judgment](#), para. 58 quoting [Sentencing Decision](#), paras. 193 (Kilolo) and 248 (Bemba).

<sup>43</sup> [Sentencing Appeal Judgment](#), para. 58, fn. 133 (noting that Kilolo was sentenced to 12 months for the offence under article 70(1)(a), 24 months for the offence under article 70(1)(b) and 24 months for the offence under article 70(1)(c), and Mr Bemba to 10 months, 12 months and 12 months, respectively.)

sentenced to only 10 months for his article 70(1)(a) offences.<sup>44</sup> Similarly, whereas Kilolo was sentenced to 24 months for his article 70(1)(c) offences, he was sentenced to only 12 months for his article 70(1)(a) offences.<sup>45</sup>

24. The Appeals Chamber found that in so doing, the Trial Chamber erred.<sup>46</sup> It held that a principal perpetrator of a crime or offence does not necessarily deserve a higher sentence than an accessory of that crime or offence.<sup>47</sup> Nor does the Court's case law state that perpetrators are automatically more blameworthy than accessories.<sup>48</sup> Whether this is the case ultimately depends upon all the variable circumstances of each individual case.<sup>49</sup>

25. Assessing a person's culpability based on the facts of a particular case accords with the complex and diverse forms of criminality in the Rome Statute (for both article 5 crimes and article 70 offences) and with the overlap among the different modes of liability.<sup>50</sup> It is also consistent with the principle of proportionality<sup>51</sup> and a Chamber's duty to individualise sentences to the particularities of each case and each convicted person.<sup>52</sup> Notably, this fact-centric approach recognises the interplay between the *actus reus* and the *mens rea* of principals and accessories which, on the facts, may differ and may even go beyond the legal requirements necessary to establish accessorial liability.<sup>53</sup> It also recognises that the persons who can directly or

<sup>44</sup> [Sentencing Decision](#), para. 249.

<sup>45</sup> [Sentencing Decision](#), para. 194.

<sup>46</sup> [Sentencing Appeal Judgment](#), paras. 58-62.

<sup>47</sup> [Sentencing Appeal Judgment](#), para. 59. The Appeals Chamber further noted that, especially, a person who instigates someone to commit a crime (under article 25(3)(b)) is not to be generally considered less culpable than the person who acts upon that instigation.

<sup>48</sup> [Sentencing Appeal Judgment](#), para. 59 referring to [Lubanga AJ](#), para. 462.

<sup>49</sup> [Sentencing Appeal Judgment](#), para. 60 (quoting [Katanga TJ](#), para. 1386 and noting that the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case).

<sup>50</sup> Teani, p. 811 ("It will be difficult to establish a hierarchy of the culpability *in abstracto*, in particular because of the overlap between the fields of application of the various subparagraphs and the specific *mens rea* relating thereto"). See also Judge [Fulford Separate Opinion](#), para. 7.

<sup>51</sup> [Lubanga SAJ](#), para. 40.

<sup>52</sup> [Taylor AJ](#), para. 666.

<sup>53</sup> Although in this case Bemba and Kilolo were the "intellectual authors" of the scheme of witness interference, and without them the offences would not have been committed, in general, solicitors and inducers of a crime

physically *commit* certain crimes or offences may be limited, as happens in the case of article 70(1)(a) offences.

26. Notably, the Court’s legal framework does not automatically co-relate the form of responsibility for the crime/ offence for which a person has been convicted and the sentence. Nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/ offence.<sup>54</sup> Although the modes of responsibility encapsulate different factual situations generally reflecting varying degrees of participation and intent, a convicted person’s sentence is still “fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case.”<sup>55</sup>

27. Since—as noted by the Appeals Chamber—the Chamber’s factual findings are essentially the same for all the offences,<sup>56</sup> Bemba’s and Kilolo’s sentences for their article 70(1)(a) offences must at least be increased to match their sentences for their article 70(1)(c) offences. As a result, their joint sentences should also be increased. The Appeals Chamber has confirmed as much when it found that:

“any such error [on the Trial Chamber’s assessment of Bemba’s and Kilolo’s culpability for their article 70(1)(a) offences] might

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need not be the intellectual authors or have the power to frustrate the commission of the crime. Any measurable contribution (namely, a contribution which has an *effect* on the commission of the crime) suffices. See [Appeal Judgment](#), paras. 847-848 (“what matters is that there is a causal relationship between the act of instigation and the commission of the crime, in the sense that the accused person’s actions prompted the principal perpetrator to commit the crime or offence.” However, “the means by which Mr Bemba’s influence was communicated did not itself need to be direct, provided that it had the requisite effect on the principal – *i.e.*, in the case at hand, on the witnesses testifying falsely in the proceedings before Trial Chamber III”). The Rome Statute does not introduce any qualification for any mode of liability under article 25(3). See Judge [Fernández Separate Opinion to Mbarushimana Confirmation AD](#), paras. 7-15 stating article 25(3)(d) does not require a ‘significant’ contribution or a minimum level of contribution.

<sup>54</sup> [Sentencing Appeal Judgment](#), para. 60.

<sup>55</sup> [Sentencing Appeal Judgment](#), para. 60.

<sup>56</sup> [Sentencing Appeal Judgment](#), paras. 58, 61. See [Sentencing Decision](#), paras. 169-175 (Kilolo’s culpable conduct) and 219-226 (Bemba’s culpable conduct) and paras. 153-167 (gravity of Kilolo’s offences) and 203-217 (gravity of Bemba’s offences).

correspondingly affect the determination of the total culpability which must indeed be reflected in the ultimate joint sentence”.<sup>57</sup>

28. As the Trial Chamber has found, the facts underlying Bemba’s and Kilolo’s degree of participation and intent for soliciting and inducing the false testimony of 14 witnesses in the Main Case reflect their very high level of culpability. Their actions did not result from a miscommunication or misunderstanding about the conduct of the proceedings before the Court, but rather were meticulously planned, deliberate and persistent. Notably, Bemba’s and Kilolo’s contributions as accessories went beyond the legal requirement of article 25(3)(b) and were *essential* to the success of the criminal scheme. Without their actions to solicit and induce, the 14 witnesses would not have given their false testimony before the Court, or at least not in the same way.<sup>58</sup> Their conduct and *mens rea*—as summarised below—shows complete disrespect for the truth-seeking function of this Court.

(a) *Bemba*

29. Bemba solicited, personally or through Kilolo and Mangenda, the 14 witnesses’ false and intentional testimonies on the “non-merits” issues.<sup>59</sup> Bemba’s actions were indeed essential to the criminal scheme, including to the false testimony of the 14 witnesses. Without Bemba’s intervention, the offences would have not been committed.<sup>60</sup>

30. *First*, Bemba, Kilolo and Mangenda agreed to illicitly interfere with witnesses to ensure that they would provide evidence in favour of Bemba.<sup>61</sup> Bemba planned, authorised and instructed this criminal scheme, including the resulting witnesses’

<sup>57</sup> [Sentencing Appeal Judgment](#), para. 57.

<sup>58</sup> See below paras. 34, 43.

<sup>59</sup> [Judgment](#), para. 852; [Sentencing Decision](#), para. 222.

<sup>60</sup> [Appeal Judgment](#), paras. 812 (recalling [Judgment](#), para. 816), 823-825, 848 (recalling [Judgment](#), para. 857) and 886-887. See also [Judgment](#), paras. 924, 932 and [Sentencing Decision](#), para. 222.

<sup>61</sup> [Judgment](#), paras. 103, 681, 688. See also [Appeal Judgment](#), paras. 140, 823, 853.



false testimony.<sup>62</sup> Even though Bemba was detained while the offences were committed, he had “an authoritative role in the organisation and the planning of the offences and was directly involved in their commission.”<sup>63</sup> Further, and since the success of this criminal scheme depended on its secrecy, Bemba, Kilolo and Mangenda also agreed to hide their illicit activity.<sup>64</sup> Bemba urged Kilolo to take concrete actions in that respect, including instructing witnesses to lie about the “non-merits” issues.<sup>65</sup> He, personally or through Kilolo and Mangenda, asked for or urged conduct with the consequence of prompting each of the 14 witnesses to provide false testimony.<sup>66</sup> The Appeals Chamber has confirmed these findings.<sup>67</sup>

31. *Second*, Bemba, as “the ultimate beneficiary of illicit coaching”,<sup>68</sup> was updated on and authorised and directed the coaching strategy, including on how and what the witnesses were expected to testify about.<sup>69</sup> For example, in relation to D-54, Bemba gave “precise and comprehensive directives” to Kilolo, through Mangenda, on the topics on which to brief and instruct the witness.<sup>70</sup> In relation to D-15, Bemba “not only approved of [Kilolo’s] three questions and instructions to D-15, but he also gave feedback on how to handle certain issues”.<sup>71</sup> As both Kilolo and Mangenda confirmed, Bemba’s satisfaction was paramount.<sup>72</sup> Bemba was also informed of the content of the rehearsed testimony to be given by the witnesses.<sup>73</sup> Further, not only did he exercise influence over the witnesses through Kilolo, but Bemba also exerted

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<sup>62</sup> [Sentencing Decision](#), para. 219. *See also* [Judgment](#), paras. 729, 806, 816, 853-854.

<sup>63</sup> [Sentencing Decision](#), paras. 222, 228.

<sup>64</sup> [Judgment](#), para. 854.

<sup>65</sup> [Judgment](#), para. 854.

<sup>66</sup> [Sentencing Decision](#), para. 222.

<sup>67</sup> *See e.g.* [Appeal Judgment](#), paras. 812, 823-825 (recalling [Judgment](#), para. 924), 848, 886-887.

<sup>68</sup> [Judgment](#), para. 727.

<sup>69</sup> [Judgment](#), para. 854; [Sentencing Decision](#), paras. 220, 222. *See also* [Judgment](#), paras. 727, 732, 808-812, 829, 932.

<sup>70</sup> [Judgment](#), para. 729.

<sup>71</sup> [Judgment](#), para. 729.

<sup>72</sup> [Judgment](#), para. 726.

<sup>73</sup> [Sentencing Decision](#), para. 222; [Judgment](#), para. 854. *See also* para. 829.

direct influence over D-19 and D-55, with whom he illicitly spoke through the Registry's privileged line.<sup>74</sup> The Appeals Chamber has confirmed these findings.<sup>75</sup>

32. Notably, Bemba spoke with these witnesses from the ICC Detention Centre, thus abusing the lawyer-client privilege.<sup>76</sup> Bemba "directed the commission of the offences from the ICC Detention Centre, using his privileged telephone line with his counsel to talk unmonitored and candidly not only with [Kilolo] but also with [Mangenda] and [Babala], and other individuals not entitled to legal privilege, including witnesses."<sup>77</sup> The Appeals Chamber has confirmed these findings,<sup>78</sup> and the Trial Chamber's reliance upon them as an aggravating factor.<sup>79</sup>

33. *Third*, Bemba controlled the purse strings of this criminal scheme and authorised Kilolo and Babala to illegally pay and make non-monetary promises to the witnesses.<sup>80</sup> The Appeals Chamber has also confirmed these findings.<sup>81</sup>

34. Bemba's actions—as confirmed by the Appeals Chamber—were *essential* to the criminal scheme and the execution of the offences.<sup>82</sup> Indeed, "[w]ithout [Bemba's] authoritative influence [...], the witnesses would not have testified untruthfully before Trial Chamber III."<sup>83</sup> "Bemba was in a position to frustrate [...] the presentation of the witnesses in the Main Case, by issuing other directions or otherwise refusing his approval".<sup>84</sup> Thus, on the facts, Bemba's conduct went beyond

<sup>74</sup> [Sentencing Decision](#), para. 222; [Judgment](#), para. 856.

<sup>75</sup> [Appeal Judgment](#), paras. 891-928 (on Bemba's instructions with respect to D-54 and D-15); paras. 929-939 (on Bemba's influence over D-19 and D-55) and paras. 940-959 (on Bemba's being kept updated on the illicit coaching).

<sup>76</sup> [Judgment](#), paras. 701, 737-738, 856; [Sentencing Decision](#), para. 236.

<sup>77</sup> [Judgment](#), para. 737.

<sup>78</sup> [Appeal Judgment](#), paras. 1037-1051 (on Bemba's illegal use of the privileged line).

<sup>79</sup> [Sentencing Appeal Judgment](#), paras. 121-130, 158.

<sup>80</sup> [Sentencing Decision](#), paras. 220, 222; [Judgment](#), para. 854. *See also* paras. 689-703, 813.

<sup>81</sup> *See e.g.* [Appeal Judgment](#), paras. 986-1008.

<sup>82</sup> [Appeal Judgment](#), paras. 812 (recalling [Judgment](#), para. 816), 823-825, 848 (recalling [Judgment](#), para. 857), 886-887, 955 (noting that "the Trial Chamber's overall conclusions regarding his contribution to and knowledge of the common plan were not unreasonable".)

<sup>83</sup> [Sentencing Decision](#), para. 222; [Judgment](#), para. 857. *See also* [Appeal Judgment](#), para. 848.

<sup>84</sup> [Appeal Judgment](#), para. 812 (recalling [Judgment](#), para. 816).

merely *prompting* the 14 witnesses to give false testimony;<sup>85</sup> his contributions not only had “an effect on the commission of the offences of false testimony by the 14 Main Case Defence witnesses”,<sup>86</sup> but he could have frustrated their commission.<sup>87</sup>

35. Further, Bemba’s culpability should not be diminished because he did not directly contribute to each of the 14 criminal incidents. Bemba did not have to directly influence any of the witnesses to testify falsely. The Appeals Chamber found that the means by which Bemba influenced the witnesses did not need to be direct, provided that it had the requisite effect on the principal<sup>88</sup>—which it had. To do so would also be inconsistent with the Appeals Chamber’s assessment of, and conclusion regarding, the “essentiality” of Bemba’s contribution,<sup>89</sup> which was based on largely the same facts relied upon by the Chamber to establish Bemba’s responsibility as accessory.<sup>90</sup> Bemba’s contributions were not of a “somewhat restricted nature”.<sup>91</sup>

36. As to Bemba’s intent, the Trial Chamber found that Bemba knew with certainty that Kilolo would instruct the witnesses, and that the witnesses would, as a result, testify untruthfully in Court with respect to “non-merits” issues.<sup>92</sup> The Appeals Chamber has also confirmed the Trial Chamber’s conclusion.<sup>93</sup>

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<sup>85</sup> [Appeal Judgment](#), para. 848. *See also* [Judgment](#), para. 857 (noting that “Mr Bemba’s conduct had an effect on the commission of the offences of false testimony by the 14 Main Case Defence witnesses” but also that “without Mr Bemba’s authoritative influence, personally or through Mr Kilolo and/ or Mr Mangenda, the untruthful testimony would not have occurred in the same manner before Trial Chamber III”).

<sup>86</sup> [Judgment](#), para. 857.

<sup>87</sup> [Judgment](#), para. 857; [Sentencing Decision](#), para. 222. *See also* [Appeal Judgment](#), para. 848.

<sup>88</sup> [Appeal Judgment](#), para. 847.

<sup>89</sup> [Appeal Judgment](#), paras. 812, 821 (finding that a co-perpetrator need not “make an intentional contribution to each of the specific crimes [...] that were committed on the basis of the common plan”), 824.

<sup>90</sup> *Compare* [Judgment](#), paras. 805-820 and [Sentencing Decision](#), paras. 219-220, 224-226 (on co-perpetration of article 70(1)(c) offences); and [Judgment](#), paras. 851-857 and [Sentencing Decision](#), paras. 222-226 (on soliciting article 70(1)(a) offences).

<sup>91</sup> *Contra* [Sentencing Decision](#), para. 223 (where the Trial Chamber noted that Bemba’s contributions to the implementation and concealment of the common plan were of “somewhat restricted nature” because Bemba was detained during the relevant time and considered “Bemba’s varying degree of participation in the execution of the offences”). It is unclear what the Trial Chamber meant in considering “Mr Bemba’s varying degree of participation in the execution of the offences”.

<sup>92</sup> [Sentencing Decision](#), para. 226; [Judgment](#), para. 857.

<sup>93</sup> [Appeal Judgment](#), paras. 827-842.

*(b) Kilolo*

37. Kilolo induced, personally and by telephone, the false and intentional testimonies on the “non-merits” issues given by the 14 witnesses.<sup>94</sup> He was the principal executor of the criminal scheme,<sup>95</sup> which he also planned and agreed on.<sup>96</sup> Like Bemba, his contributions were essential and, without them, the offences would not have been committed.<sup>97</sup>

38. *First*, Kilolo was “the central figure in executing the commission of the offences.”<sup>98</sup> He was responsible for the investigation of the Main Case and suggested those witnesses who would be called.<sup>99</sup> He contacted, personally interviewed and instructed the witnesses by relaying Bemba’s and his own instructions.<sup>100</sup> Kilolo illicitly coached and made the witnesses understand that they were expected to adhere to the agreed narrative.<sup>101</sup> Kilolo’s illicit coaching was both detailed and persistent. As prominently shown with D-15, D-26 and D-54, Kilolo scripted or corrected their future answers, rehearsed the questioning, and gave concrete instructions to the witnesses to dissemble when giving evidence, so as to act with indecision or show equivocation.<sup>102</sup> When D-26, on two occasions, deviated from Kilolo’s narrative, Kilolo was quick to notice and “rectify”.<sup>103</sup> Kilolo requested Mangenda to send him the questions of the victims’ legal representatives, so that he could rehearse those questions with the Defence witnesses, such as D-15 and D-54.<sup>104</sup>

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<sup>94</sup> [Judgment](#), para. 859; [Sentencing Decision](#), para. 174.

<sup>95</sup> [Sentencing Decision](#), para. 169; [Judgment](#), paras. 824-827.

<sup>96</sup> [Appeal Judgment](#), para. 140; [Judgment](#), paras. 103, 681, 688, 824.

<sup>97</sup> *See below* para. 43.

<sup>98</sup> [Sentencing Decision](#), para. 169; [Judgment](#), paras. 824-827.

<sup>99</sup> [Judgment](#), para. 821.

<sup>100</sup> [Judgment](#), para. 860; [Sentencing Decision](#), para. 174.

<sup>101</sup> [Judgment](#), para. 860. *See also* paras. 705-716, 824-827.

<sup>102</sup> [Judgment](#), paras. 706, 825, 860, 862, 863.

<sup>103</sup> [Judgment](#), paras. 468-471.

<sup>104</sup> [Judgment](#), paras. 721, 575-576, 828.

39. Kilolo also manipulated and harmonised the Main Case Defence evidence by instructing prospective witnesses to repeat information contained in other witnesses' testimonies.<sup>105</sup> He exerted continuous influence over the witnesses, by telephone and in personal meetings.<sup>106</sup> He kept close contact with them shortly before and during their testimonies.<sup>107</sup>

40. *Second*, Kilolo illegally paid the witnesses in cash and in kind<sup>108</sup> and promised the benefit of Bemba's good graces, should they testify favourably to Bemba.<sup>109</sup> For instance, Kilolo gave D-2, D-3, D-4 and D-6 CFAF 540,000/550,000 each when they were handed over to the VWU. He also later gave these witnesses CFAF 100,000 as a promised post-testimony "symbolic token". D-6 received USD 1,335.16 one day before he testified.<sup>110</sup> Kilolo also gave D-23 USD 100 as "taxi reimbursement", an envelope with CFAF 450,000, and a brand new laptop.<sup>111</sup> Likewise, both D-57 and D-64 received USD 665 and 700 on the day of their travel to The Hague to testify, through Babala and his driver. D-29 was paid a similar amount.<sup>112</sup> Further, and as part of the precautionary measures that Kilolo took to conceal the illicit coaching of witnesses, he transferred money to witnesses through third persons so that the transfers would remain undetected. Kilolo asked witnesses, such as D-3, to "name a third person unknown to the Court for the purpose of making a bank transfer."<sup>113</sup>

41. *Third*, Kilolo facilitated Bemba's contact with witnesses (such as D-19 and D-55), enabling Bemba to personally influence them.<sup>114</sup> Notably, following a discussion that D-55 had with Kilolo on suggested falsehoods relating to a document that D-55 had

<sup>105</sup> [Judgment](#), para. 860. *See also* para. 826.

<sup>106</sup> [Sentencing Decision](#), paras. 171, 174; [Judgment](#), para. 860. *See also* paras. 704-716.

<sup>107</sup> [Judgment](#), paras. 860-861.

<sup>108</sup> [Sentencing Decision](#), para. 171; [Judgment](#), paras. 861, 863. *See also* paras. 689-703, 823.

<sup>109</sup> *See e.g.*, [Judgment](#), para. 692.

<sup>110</sup> [Judgment](#), para. 690.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> [Judgment](#), para. 746.

<sup>114</sup> [Judgment](#), paras. 831, 861.

co-authored, D-55 expressed concerns about his testimony, and Kilolo assured D-55 that Bemba “*le traiterai bien*”.<sup>115</sup> When D-55 insisted on speaking to Bemba, Kilolo facilitated the contact so that Bemba could motivate D-55 to give specific testimony.<sup>116</sup> By doing so, Kilolo abused “the trust *vis-a-vis* the Court”<sup>117</sup>—*i.e.*, he “abused the special rights and privileges he held as counsel for Bemba in the Main Case and breached his responsibilities towards the Court”.<sup>118</sup> Moreover, he abused the privileged line to discuss the execution of the offences with Bemba and received related instructions.<sup>119</sup>

42. *Fourth*, Kilolo also made logistical arrangements, such as distributing, with Mangenda present and assisting, new telephones to D-2, D-3, D-4, D-6, and D-23 so that they could communicate with him despite the VWU prohibition from doing so<sup>120</sup> and so that Kilolo could maintain influence over the witnesses.<sup>121</sup>

43. In conclusion, not only did Kilolo induce the 14 witnesses to give false testimony about the “non-merits” issues,<sup>122</sup> but his conduct was essential to the criminal scheme and the execution of the offences. He “was in a position to frustrate [...] the presentation of the witnesses in the Main Case, by refusing the execution of his actions”.<sup>123</sup> Indeed, “without Kilolo’s direct and substantial intervention, the offences would not have been committed or at least not in the same way.”<sup>124</sup> Notably, the Chamber relied on essentially the same facts to establish Kilolo’s responsibility as

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<sup>115</sup> [Judgment](#), paras. 120-124.

<sup>116</sup> [Judgment](#), paras. 295-298.

<sup>117</sup> [Sentencing Decision](#), para. 193.

<sup>118</sup> [Sentencing Decision](#), para. 177.

<sup>119</sup> [Sentencing Decision](#), para. 179.

<sup>120</sup> [Sentencing Decision](#), para. 171; [Judgment](#), para. 861. *See also* paras. 747, 824.

<sup>121</sup> [Sentencing Decision](#), para. 174.

<sup>122</sup> [Judgment](#), paras. 859, 862.

<sup>123</sup> [Judgment](#), paras. 821, 833; [Sentencing Decision](#), para. 172.

<sup>124</sup> [Sentencing Decision](#), para. 172. *See also* [Judgment](#), para. 821 (“Without Mr Kilolo’s direct intervention, the offences would not have been committed”) and para. 833 (“[w]ithout Kilolo’s various contributions the offences would not have been committed”).

co-perpetrator and as accessory.<sup>125</sup> Hence, Kilolo's actions had more than a "direct effect" on the witnesses' false testimony.<sup>126</sup>

44. Finally and with respect to Kilolo's degree of intent, the Chamber noted his role as Bemba's Counsel in the Main Case and "the sheer extent of his activities",<sup>127</sup> and concluded that Kilolo knew with certainty that the witnesses would testify untruthfully in Court as a consequence of his conduct.<sup>128</sup> Kilolo "knew that his actions were unlawful and expressed fears that, if detected, he would be the first to be targeted."<sup>129</sup> Kilolo's actions were "calculated and persistent", and he acted "in deliberate violation of the orders of Trial Chamber III".<sup>130</sup> Kilolo's intent is also evidenced by his planning and performance, together with Bemba and Mangenda, of a series of measures to frustrate the Prosecution's article 70 investigation.<sup>131</sup> The Appeals Chamber has confirmed Kilolo's conviction.<sup>132</sup>

*(c) Mangenda*

45. Like Bemba and Kilolo, Mangenda's sentence for aiding and abetting the witnesses' false testimony under article 70(1)(a) was unjustifiably lower than his sentence for article 70(1)(c) offences as a co-perpetrator: Mangenda was sentenced to 20 months' imprisonment for the latter, but to 12 months' imprisonment for the former.<sup>133</sup> Like Bemba and Kilolo, the Chamber also considered Mangenda's responsibility as an accessory for the article 70(1)(a) offences as a relevant factor to

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<sup>125</sup> Compare [Judgment](#), paras. 821-836 and [Sentencing Decision](#), paras. 170-172, 175 (on co-perpetration article 70(1)(c) offences), and [Judgment](#), paras. 858-863 and [Sentencing Decision](#), paras. 174-175 (on inducing article 70(1)(a) offences).

<sup>126</sup> [Judgment](#), para. 862.

<sup>127</sup> [Sentencing Decision](#), para. 175.

<sup>128</sup> [Judgment](#), para. 863.

<sup>129</sup> [Sentencing Decision](#), para. 175. See also [Judgment](#), paras. 775-776.

<sup>130</sup> [Sentencing Decision](#), para. 175.

<sup>131</sup> [Judgment](#), para. 863.

<sup>132</sup> [Appeal Judgment](#), paras. 1070-1187.

<sup>133</sup> [Sentencing Decision](#), para. 146.



lessen his culpability and determine his related lower sentence.<sup>134</sup> However, while Bemba and Kilolo solicited and induced the false testimony of 14 witnesses, Mangenda aided and abetted the false testimony of *nine* witnesses.<sup>135</sup> Moreover, in the Conviction Decision, the Chamber distinguished between the modes of liability under article 25(3)(a),(b) and (c), and found aiders and abettors less blameworthy than co-perpetrators.<sup>136</sup>

46. The Appeals Chamber noted that “[e]specially with respect to the distinction between the mode of liability under article 25(3)(a) of the Statute and that under article 25(3)(b) [...], the Appeals Chamber is not persuaded that a person who instigates someone to commit a crime is to be generally considered less culpable than the person who acts upon that instigation”.<sup>137</sup> However, since the Prosecution did not appeal Mangenda’s sentence on this aspect, the Appeals Chamber ultimately found that the Trial Chamber erred in considering Bemba’s and Kilolo’s accessorial responsibility to diminish their culpability and determine lesser sentences,<sup>138</sup> but made no finding with respect to Mangenda. Nonetheless, the Appeals Chamber set out principles of law that would apply to all accessories. In particular, it found that:

- The Court’s legal framework does not indicate an automatic correlation between the accused’s form of responsibility and the sentence, or mandatory mitigation for it;<sup>139</sup>
- The Trial Chamber did not provide any explanation as to why, on the facts of the case, the convicted persons were less culpable for the offences that they

<sup>134</sup> [Sentencing Decision](#), paras. 120, 145, 146.

<sup>135</sup> [Sentencing Decision](#), paras. 112, 120.

<sup>136</sup> [Judgment](#), paras. 72-82 (soliciting and inducing) and 83-98 (aiding and abetting). *See in particular* para. 85 (“When compared to Article 25(3)(a) of the Statute, the assistance form of liability under Article 25(3)(c) of the Statute implies a *lower degree of blameworthiness*” since the co-perpetrator essentially contributes to the commission of the crime and exercises control over the offence jointly with others while the aider and abettor does not exercise control but merely contributes to or otherwise assists in an offence committed by the principal perpetrator) (emphasis added).

<sup>137</sup> [Sentencing Appeal Judgment](#), para. 59.

<sup>138</sup> [Sentencing Appeal Judgment](#), para. 62.

<sup>139</sup> [Sentencing Appeal Judgment](#), para. 60.



had committed as accessories than for the offences that they had committed as co-perpetrators,<sup>140</sup>

- A Chamber's determination of a person's criminal responsibility under article 25(3) is different from the Chamber's assessment of the relevant factors to establish a sentence;<sup>141</sup> and notably,
- The determination of a sentence is fact-specific.<sup>142</sup>

47. Based on the above, and notwithstanding that the Appeals Chamber did not directly find error on this aspect relating to Mangenda's conviction as an aider and abettor of article 70(1)(a) offences, the Prosecution considers that the Sentencing Appeals Judgment has an impact—albeit more limited—on the Trial Chamber's new determination of Mangenda's sentence for the article 70(1)(a) offences. Mangenda's degree of participation and intent when assisting the false testimony of the nine witnesses was also critical. Notably:

- Mangenda was “deeply involved” in the planning of Kilolo's illicit coaching activities.<sup>143</sup> He “advised Kilolo on equal footing” on the content of the coaching activities, and gave moral support and encouragement to Kilolo through his presence at meetings and participation in missions.<sup>144</sup>
- Mangenda updated, and advised, Kilolo on the testimony of witnesses, in particular, when Kilolo was not in the courtroom. This “indispensable assistance” permitted Kilolo to subsequently illicitly coach witnesses in a focused manner.<sup>145</sup> Mangenda was also involved in the strategic selection of witnesses.<sup>146</sup>

<sup>140</sup> [Sentencing Appeal Judgment](#), para. 61.

<sup>141</sup> [Sentencing Appeal Judgment](#), para. 336 (where the Appeals Chamber confirmed that a co-perpetrator could be acquitted of assisting the witnesses' false testimony but, still, that false testimony could be considered - if it was objectively foreseeable - for sentencing to assess the gravity of the article 70(1)(c) offences for which he was convicted).

<sup>142</sup> [Sentencing Appeal Judgment](#), para. 60.

<sup>143</sup> [Judgment](#), para. 866.

<sup>144</sup> [Judgment](#), paras. 839-840, 844, 867-868; [Sentencing Decision](#), para. 120.

<sup>145</sup> [Judgment](#), para. 866. [Sentencing Decision](#), para. 120.

<sup>146</sup> [Judgment](#), para. 844.

- Mangenda logistically aided Kilolo in the illicit coaching of witnesses by being present when cell phones were distributed to witnesses D-2, D-3, D-4 and D-6 and by sending Kilolo the questions of the victims' legal representatives.<sup>147</sup>
- Mangenda reported to Bemba and informed him about Kilolo's coaching activities, which enabled Bemba to issue further instructions.<sup>148</sup> In turn, Mangenda relayed Bemba's directives which Kilolo impressed upon the witnesses.<sup>149</sup>

48. Further, Mangenda "abused the special rights and privileges he held as a member of the Main Case Defence team and breached his responsibilities towards the Court" in carrying out the above actions.<sup>150</sup> Mangenda's involvement went far beyond that of a mere case manager; he was *de facto* on an equal footing with Kilolo.<sup>151</sup> Notably, Mangenda's contribution to the criminal scheme was essential,<sup>152</sup> and the Chamber largely relied on the same facts to establish his responsibility as co-perpetrator and as accessory.<sup>153</sup>

49. Finally, with respect to Mangenda's degree of intent, Mangenda assisted Kilolo and Bemba with the aim of facilitating the offence of false testimony. He knew and intended that the witnesses would give false evidence on the "non-merits" issues. Mangenda's "elevated *mens rea*" is evident in several of his conversations with Kilolo, in which Mangenda advised Kilolo on how best to coach the witnesses.<sup>154</sup> The Appeals Chamber has confirmed Mangenda's conviction.<sup>155</sup>

<sup>147</sup> [Judgment](#), paras. 841, 867-868; [Sentencing Decision](#), para. 120.

<sup>148</sup> [Judgment](#), paras. 842-843, 866.

<sup>149</sup> [Judgment](#), para. 866; [Sentencing Decision](#), para. 120.

<sup>150</sup> [Sentencing Decision](#), paras. 131, 145.

<sup>151</sup> [Judgment](#), paras. 837, 867.

<sup>152</sup> [Judgment](#), para. 847; [Appeal Judgment](#), para. 1248.

<sup>153</sup> Compare [Sentencing Decision](#), para. 118 and [Judgment](#), paras. 837-850 (on co-perpetrating article 70(1)(c) offences) and [Sentencing Decision](#), paras. 120-122 and [Judgment](#), paras. 864-870 (on aiding and abetting article 70(1)(a) offences).

<sup>154</sup> [Judgment](#), para. 870.

<sup>155</sup> [Appeal Judgment](#), paras. 1188-1333.

### C. The Appeals Chamber's reversal of the article 70(1)(b) convictions does not affect the sentences

50. The Appeals Chamber found that article 70(1)(b)—presentation of false/forged evidence—does not include the presentation of oral testimony.<sup>156</sup> As a result, it reversed Bemba's, Kilolo's and Mangenda's convictions as co-perpetrators under article 25(3)(a) for article 70(1)(b) offences.<sup>157</sup> Nonetheless, this reversal should have no impact on Bemba's, Kilolo's and Mangenda's sentences. The gravity of the article 70(1)(a) and (c) offences *alone* by the three convicted persons in and of themselves deserve a five-year imprisonment term. Moreover, the Trial Chamber already appears to have considered the overlap between the conduct underlying the offences not to increase the original joint sentences.

51. *First*, the gravity of the article 70(1)(a) and (c) offences, and the related culpability of Bemba, Kilolo and Mangenda, *alone* merit at least the statutory maximum of a sentence of five years' imprisonment. Hence, the reversal of the article 70(1)(b) convictions—on the facts of this case—has no impact on Bemba's, Kilolo's and Mangenda's joint sentences. Thus, although convictions for more than one offence based on the same conduct may be relevant to, and can increase, a sentence imposed for those convictions, the Appeals Chamber's vacation of one of the underlying convictions does not necessarily impact the overall sentence. Whether the sentence will be affected will require a case-specific assessment considering the gravity of the convictions vacated, and the totality of the remaining convictions.<sup>158</sup>

<sup>156</sup> [Appeal Judgment](#), para. 710. *See also* para. 709 (noting that the conduct of “presenting” evidence denotes the formal submission of the evidence in the proceedings and, in the case of oral testimony, ‘including’ a witness in the list of witnesses (e.g., by counsel or accused) or ‘calling’ a witness in court is not equivalent to ‘presenting’ evidence. Moreover, whether the witness will give false testimony is beyond the party's control—they can only hope for a certain result but cannot “know” that the evidence which does not yet exist, is false or forged within the terms of article 70(1)(b)).

<sup>157</sup> [Appeal Judgment](#), paras. 710, 1631.

<sup>158</sup> *See e.g. Delalić et al. 2<sup>nd</sup> SJ*, para. 42 (“The Trial Chamber finds that the argument that the number of convictions is reduced and, therefore, the sentence should be reduced, is not, in the Trial Chamber's view, realistic. *In the case of the three accused, the totality of their criminal conduct has not been reduced by reason of the quashing of the cumulative convictions.* The original Trial Chamber specifically had this factor in mind in passing the sentence which clearly would have been the same without the cumulative convictions. Accordingly,

This approach is consistent with the principles of totality<sup>159</sup> and proportionality.<sup>160</sup> On the facts of this case, no reduction or adjustment is required resulting from the reversal of the article 70(1)(b) convictions due to the gravity of their remaining article 70(1)(a) and 70(1)(c) convictions.

52. *Second*, the Trial Chamber appears to have taken into account “the fact that *largely the same conduct* underlies the multiple convictions” *not* to increase Bemba’s, Kilolo’s and Mangenda’s original joint sentences for article 70(1)(a), (b) and (c) offences.<sup>161</sup> Thus, and to the extent that this Chamber did not increase the original sentences—albeit incorrectly<sup>162</sup>—due to an overlap between the conduct underlying the cumulative convictions, the vacation of one of those convictions cannot now be used to lower a non-existent increase.

53. Nonetheless, any factual overlap between the conduct underlying article 70(1)(a) and (b) offences is inapposite between article 70(1)(a) and (c) offences. As this Chamber and the Appeals Chamber have found, both offences have different

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no adjustment to the original sentences will be made on this account”) (emphasis added). *See also* [Delalić et al. 2<sup>nd</sup> SAJ](#), paras. 20-27 (confirming the Trial Chamber’s decision not to decrease the sentence as a result of vacating cumulative convictions). *See also* [Ntakirutimana AJ](#), paras. 562-564 and [Rutaganda AJ](#), paras. 591-592 (where the Appeals Chamber did not alter the original sentences due to the gravity of the crimes and the culpability of the convicted persons despite it quashed some of the convictions).

<sup>159</sup> [Delalić et al. AJ](#), para. 429: (“[the] governing criteria [of the final sentence] is that it should reflect the totality of the culpable conduct (‘totality principle’), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.”)

<sup>160</sup> [Lubanga SAJ](#), para. 40 (“Proportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator and, in this regard, relates to the determination of the length of sentence”).

<sup>161</sup> [Sentencing Decision](#), paras. 146 (Mangenda), 194 (Kilolo) and 249 (Bemba) (emphasis added), and fns. 225, 313 and 401, referring to [Judgment](#), para. 956 (“These convictions may indeed be entered cumulatively. However, this does not mean that cumulative convictions can unduly inflate an accused’s punishment. The Chamber will take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence.”).

<sup>162</sup> Permissible cumulative convictions relate to offences/crimes which contain materially different elements and which require proof of a fact not required by any element of the other offence: *see* [Delalić et al. AJ](#), para. 412, which the [Appeal Judgment](#), para. 750 only partially quotes. Chambers should consider the impact of permissible cumulative convictions in sentencing, in particular in light of the total criminality and the distinct legally protected values. *See* [Delalić et al. AJ](#), paras. 428-429, 769 (para. 428: “[If] a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing.”; para. 429: “[the] governing criteria [of the final sentence] is that it should reflect the totality of the culpable conduct (‘totality principle’), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.”; para. 769: “In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, *but only that conduct which is relied on only to satisfy the distinct elements of the relevant crimes.*”) (emphasis added).

legal elements and require proof of different facts: the offence under article 70(1)(a) is committed when a witness intentionally affirms a false act or negates a true fact when directly asked or, although not directly asked, the witness intentionally withholds information that is true and is inseparably linked to the issues explored during questioning.<sup>163</sup> On the other hand, the offence under article 70(1)(c) (corruptly influencing a witness) does not require proof that the conduct had an actual effect on the witness since it penalises the perpetrator's conduct who seeks to unduly influence or contaminate the evidence.<sup>164</sup> Moreover, using the same evidence to fulfil the elements of the offences and the modes of liability is permissible and should not be used to decrease the sentence.<sup>165</sup> This evidentiary matter does not affect—let alone diminish—the gravity of the offences or the culpable conduct of the convicted person.

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<sup>163</sup> [Judgment](#), paras. 19-31; [Appeal Judgment](#), paras. 689-690, 692.

<sup>164</sup> [Judgment](#), paras. 43-50; [Appeal Judgment](#), paras. 720-722, 731-732, 737.

<sup>165</sup> As the ICTR Appeals Chamber found in *Gatete*, the same evidence can be used to fulfil the requirements of the elements of the offences or crimes and the modes of liability. See [Gatete AJ](#), para. 263 (“[...]the Trial Chamber inferred from the evidence establishing that Gatete participated in a joint criminal enterprise that he also entered into an agreement to commit genocide. On this basis, it found that entering a conviction for the crime of genocide would render a conviction for conspiracy redundant. The Appeals Chamber recalls that conspiracy to commit genocide is a crime under the Statute, while joint criminal enterprise is a form of criminal responsibility. The Appeals Chamber considers, Judge Agius dissenting, that a *comparison of the evidence underpinning these two elements is irrelevant when deciding whether convictions can be entered for both crimes of genocide and conspiracy to commit genocide, as the issue of cumulative convictions arises only between crimes.*”) (emphasis added). *But see* fn. 642 (noting that “[h]owever, this factor may be relevant when it comes to sentencing as “a penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted”). Further, the current situation is different from the situations described by the Appeals Chamber as possible bars for cumulative convictions. See [Appeal Judgment](#), para. 751 (“it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it”).

**D. The Chamber's error on the duration of the article 70(1)(c) offences does not affect the sentences**

54. Further, although the Appeals Chamber found that the Trial Chamber was unreasonable in concluding—and in considering in its assessment of gravity<sup>166</sup>—that the article 70(1)(c) offences lasted two years,<sup>167</sup> the Appeals Chamber also noted that this error was “immaterial to its finding that the offences [...] extended over a lengthy period of time” since the offences lasted at least 13 months.<sup>168</sup> Therefore, this error has no impact on the Chamber's assessment of the sentences.

**E. The Chamber should impose sentences proportionate to the facts of this case**

55. The Appeals Chamber has asked the Trial Chamber to impose new sentences on Bemba, Kilolo and Mangenda.<sup>169</sup> In this way, the Appeals Chamber has addressed any purported unfairness that the Defence claimed would have resulted if new sentences had been imposed on appeal.<sup>170</sup> Consequently, in imposing new sentences, the Trial Chamber must first take into account and adjust accordingly for the three errors that the Appeals Chamber specifically identified in the Sentencing Decision.<sup>171</sup> Specifically, as discussed above,<sup>172</sup> it must reassess the gravity of the witnesses' false

<sup>166</sup> [Sentencing Decision](#) para. 209 (Bemba); [Sentencing Decision](#), para. 159 (Kilolo) and [Sentencing Decision](#), para. 107 (Mangenda).

<sup>167</sup> [Sentencing Appeal Judgment](#), paras. 167-168. Although the Appeals Chamber refers to the “offences”, the Trial Chamber only considered that the article 70(1)(c) offences lasted two years.

<sup>168</sup> [Sentencing Appeal Judgment](#), para. 168 (“it is clear from the findings in the Conviction Decision that Mr Bemba, Mr Kilolo and Mr Mangenda agreed to plan to illicitly interfere with witnesses, at least by the time witness D-57 testified before TCIII, namely 17 October 2012 and continued until November 2013”).

<sup>169</sup> [Sentencing Appeal Judgment](#), paras. 361-362 (finding that having reversed the sentences, remanding the matter to Trial Chamber VII to “determine a new sentence” was appropriate.)

<sup>170</sup> [Sentencing Appeal Judgment](#), paras. 360-362 (“The Appeals Chamber notes the arguments advanced by [Mangenda and Bemba] that, if their sentences are reversed on the ground of the Prosecutor's appeal, any new determination of their sentence should be made by the original chamber.”)

<sup>171</sup> [Sentencing Appeal Judgment](#), para. 359 (“In particular, the Trial Chamber determined the gravity of the offences in the present case with reference to an irrelevant consideration [the nature of the lies] and improperly considered that the form of responsibility for the convictions under article 70(1)(a) [accessorial modes of liability] warranted *per se* a reduction of the corresponding sentences. In addition, it acted *ultra vires* by suspending the remaining terms of imprisonment imposed on [Mangenda and Kilolo].”)

<sup>172</sup> See *above* paras. 10-49.

testimony and must re-evaluate the convicted persons' culpable conduct as accessories. Moreover, the Trial Chamber must reconsider the appropriate sentences in light of the Appeals Chamber's findings on suspended sentences. As the Appeals Chamber found, ordering the conditional suspension of imprisonment terms—whether as an “intermediate” penalty or in the operation of a sentence—is *ultra vires*.<sup>173</sup> But, beyond addressing these three individual errors, the Trial Chamber is obliged to re-assess the gravity of the offences and the conduct of the three convicted persons (in light of its existing and new findings) and to impose sentences that are proportionate to the crimes.<sup>174</sup> In other words, having addressed the three specific errors found by the Appeals Chamber, and their impact, the Trial Chamber should then take a global view of the case in assessing the *quantum* of the sentences and in imposing new sentences that fit the offences and the culpability of the convicted persons.

56. The new sentences should reflect the inherent gravity of the offences that Bemba, Kilolo and Mangenda committed, and their criminal roles and participation. The new sentences should also sufficiently deter the convicted persons, and others, from further offending. The new sentences should be reasonable. Since the Appeals Chamber vacated the initial sentences because of the three specific errors it identified, the Appeals Chamber did not consider it necessary to find—in the abstract—whether the initial sentences had been “manifestly low”.<sup>175</sup> That said, the

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<sup>173</sup> [Sentencing Appeal Judgment](#), paras. 73, 80.

<sup>174</sup> See e.g., article 81(1)(2)(a): A sentence may be appealed [...] on the ground of disproportion between the crime and the sentence. See also [Sentencing Appeal Judgment](#), para. 113 (“The Appeals Chamber recalls that the sentence imposed on a convicted person for crimes and offences under the jurisdiction of the Court must be proportionate to the crime or offence and reflect the culpability of the convicted person.”)

<sup>175</sup> [Sentencing Appeal Judgment](#), para. 90 (“[H]owever, the Appeals Chamber found above that the Trial Chamber erred [...] These errors warrant reversal of the sentences and remand to the Trial Chamber for a new determination. The Appeals Chamber therefore considers it unnecessary to determine at this point whether the sentence pronounced against [Mangenda, Kilolo and Bemba] are so manifestly low and inadequate *per se* as to constitute an abuse of discretion on the part of the Trial Chamber.”). The Appeals Chamber did not address the Prosecution's first sub-ground of appeal.



Appeals Chamber confirmed that it was required to “measure the reasonableness” of any sentence imposed by a Trial Chamber.<sup>176</sup>

57. A five-year custodial sentence for Bemba, Kilolo and Mangenda would fit the facts of this case. Such a sentence is eminently reasonable, and is the *least* required to effectively punish the three co-perpetrators. While respecting the utility of fines as a type of sentence more generally under the Statute,<sup>177</sup> there is some doubt that any substantial fines capable of deterring the three convicted persons in this case can be realised in fact. To the best of the Prosecution’s knowledge, the financial situation of all three convicted persons remains unclear. At this stage, the Prosecution also does not know how much each convicted person will claim as necessary to satisfy their financial needs and those of their dependants (in terms of rule 166(3)).<sup>178</sup> Given this ambiguity, the Prosecution is not in a position to suggest concrete amounts as fines as part of the sentences, but defers to the Chamber on whether such fines might, in fact, be effectively realised within a reasonable period of time in this case. If, however, the Trial Chamber were to impose a substantial fine (that could be effectively realised) *in addition* to the five-year custodial sentence, the Prosecution would welcome such imposition.

58. As this Trial Chamber has previously noted, many of its findings were confirmed on appeal.<sup>179</sup> The story of this case is writ large in those findings. And when those findings are read as whole (along with the new findings that the

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<sup>176</sup> [Sentencing Appeal Judgment](#), para. 90 (“The Appeals Chamber recalls that while its review of a trial chamber’s exercise of its discretion in determining the sentence must be deferential, it will intervene if, *inter alia*, ‘as a result of the Trial Chamber’s weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion’. This requires the Appeals Chamber to measure the reasonableness of the sentence pronounced by a trial chamber.”)

<sup>177</sup> Article 77(2)(a), Statute.

<sup>178</sup> See e.g., [Sentencing Order](#), fn. 3. See also rule 166(3): Each offence may be separately fined and those fines may be cumulative. Under no circumstances may the total amount exceed 50 per cent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.

<sup>179</sup> [Sentencing Order](#), para. 3.



Chamber will make to address the specific errors), they lead to only one conclusion: Bemba, Kilolo and Mangenda should be sentenced to five years' imprisonment.

*(a) The sentences must reflect the gravity of this case*

59. This Chamber—and the Appeals Chamber—have consistently underscored the *inherent gravity* of article 70 offences committed in the Main Case.

60. Article 70 offences under the Statute are grave.<sup>180</sup> As the Appeals Chamber has underscored, the commission of offences against the administration of justice has “specific and serious ramifications”<sup>181</sup>, namely,

- They “threaten or disrupt the overall fair and efficient functioning of the [*sic*] justice in the specific case to which they refer”;
- They “ultimately undermine the public trust in the administration of justice and the judiciary”; and
- “Such seriousness is only enhanced” when committed by those whose “professional mission is to serve, rather than disrupt, justice”.<sup>182</sup>

61. At all previous stages of this case, the Trial Chamber has consistently recognised the “intrinsic gravity” of the article 70 offences committed. The new sentences should reflect this.

62. In particular, before trial, and based on the charges confirmed, the Trial Chamber emphatically rejected a Defence claim that this case lacked sufficient gravity. The Chamber found:

<sup>180</sup> See e.g., [Sentencing Appeal Judgment](#), para. 262 (“[Offences] under article 70(1) (c) of the Statute are generally grave because they have the potential to undermine the Court’s functions and impede justice for victims. [...]”).

<sup>181</sup> [Kilolo article 60\(2\) AD](#), para. 65.

<sup>182</sup> [Kilolo article 60\(2\) AD](#), para. 65. Although the Appeals Chamber disagreed with the Pre-Trial Chamber’s description of the offences as having “utmost gravity”, it found no error in the Pre-Trial Chamber’s observations on their gravity.

“[...] for a court of law, there is an intrinsic gravity to conduct[] that, if established, may amount to the offence of obstruction of justice (with which the accused is charged). Such conduct[] [is] certainly never in the ‘interest of justice’, and hardly will it ever be so to tolerate [it]. For [it] potentially undermine[s] the very efficacy and efficiency of the rule of law and of the courts entrusted to administer it.”<sup>183</sup>

63. The Trial Chamber, in its Conviction Judgment, also underlined the inherent gravity of article 70 offences, which it recognised undermined the Court’s integrity.

In the Presiding Judge’s words when reading the summary of the Judgment:

“This case was about offences against the administration of justice as Article 70 of the Rome Statute puts it. This means it was about giving false testimony [...] and corruptly influencing witnesses. Although such offences are not the core crimes this Court was established to try, it has become apparent in the short time span of the Court’s existence that *preventing offences against the administration of justice is of the utmost importance for the functioning of the International Criminal Court*. Such offences have this significance because criminal interference with witnesses may impede the discovery of the truth in cases involving genocide, crimes against humanity and war crimes. They have this significance because *they may impede justice to victims of the most atrocious crimes. And ultimately they may impede the Court’s ability to fulfil its mandate*.”<sup>184</sup>

64. Also, in its Conviction Judgment, the Chamber emphasised the gravamen of article 70 offences as follows:

“*The rationale of Article 70 of the Statute is to enable the Court to discharge its mandate when adjudicating cases falling under its jurisdiction*. The different sub-paragraphs of Article 70(1) of the Statute address various forms of conduct that may encroach upon the integrity and efficacy of the proceedings before the Court. [...] articles 70(1)(a) to (c) of the Statute aim at protecting the reliability of the evidence presented to the Court by criminalising conduct of undue interference with the production and presentation of evidence [...]”.<sup>185</sup>

<sup>183</sup> [Arido Charges Withdrawal Decision](#), para. 9. See also [Severance Decision](#), para. 23 (“The alleged conduct in this case is quite serious and, as the Chamber has held previously, goes to the integrity of the Court’s judicial process.”)

<sup>184</sup> [T-50](#), 3:19- 4:5 (emphasis added). See also [Sentencing Decision](#), para. 256 (where the Chamber underscored the deterrent effect of article 70 in the context of calculating sentencing credit).

<sup>185</sup> [Judgment](#), para. 14 (emphasis added).

The Chamber further recalled its earlier finding that article 70 offences were intrinsically grave.<sup>186</sup>

65. In its Sentencing Decision, this Chamber once again emphasised the vital role of article 70 prosecutions—namely to protect the Court’s integrity and to ensure that article 5 crimes do not go unpunished.<sup>187</sup>

“Article 70 [...] seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims’ right to justice and, generally, the Court’s ability to fulfil its mandate.”<sup>188</sup>

66. The Chamber correctly underscored the gravity of the individual offences committed in the case. It found that the article 70(1)(a) and (c) offences committed were “undoubtedly grave”, had “far-reaching consequences” and “undermine[d] the Court’s discovery of the truth and impedes justice for victims.”<sup>189</sup> The Chamber further emphasised the seriousness and the gravity of this case.<sup>190</sup> This was a case in which the extent of damage and the nature of the unlawful conduct were extensive. The co-perpetrators—Kilolo, Mangenda and Bemba—contaminated almost half of the witnesses presented in the Main Case over a “prolonged time period”.<sup>191</sup> This was a case in which Kilolo, Mangenda and Bemba devised “a systematic approach” and “a calculated plan to illicitly interfere with witnesses in order to ensure that they would provide evidence in Mr Bemba’s favour.”<sup>192</sup> This was also a case where the offences were “extensive in scope, planning, preparation and execution”, and one with a “degree of sophistication in the execution of the offences”. This was also a

<sup>186</sup> [Judgment](#), para. 15 (citing [Arido Charges Withdrawal Decision](#), para. 9).

<sup>187</sup> [Sentencing Decision](#), para. 19 (“The Court investigates and prosecutes individuals for having committed crimes falling under the jurisdiction of the Court, such as genocide, crimes against humanity and war crimes. The Preamble to the Statute states that these crimes must not go unpunished and that perpetrators do not enjoy impunity.”)

<sup>188</sup> [Sentencing Decision](#), para. 19.

<sup>189</sup> [Sentencing Decision](#), paras. 19, 101, 112, 154, 164, 204 and 214.

<sup>190</sup> [Sentencing Decision](#), paras. 101-107, 112-115, 154-159, 164-167, 204-209, 214-217.

<sup>191</sup> See e.g., [Sentencing Decision](#), paras. 101-107, 112-115, 154-159, 164-167, 204-209, 214-217.

<sup>192</sup> *Ibid.*

case where Kilolo, Mangenda and Bemba induced “[a] coercive group dynamic”.<sup>193</sup> All these factors enhanced the gravity of the offences. And in rejecting the Defence appeals against the Sentencing Decision, the Appeals Chamber concurred with these findings.<sup>194</sup>

*(b) The sentences must appropriately recognise the extent of Bemba’s, Kilolo’s and Mangenda’s culpable conduct*

67. Bemba, Kilolo and Mangenda were convicted, as co-perpetrators, of corruptly influencing 14 witnesses (article 70(1)(c)). Bemba and Kilolo were further convicted, as accessories, of soliciting and inducing respectively the giving of false testimony by the same 14 witnesses (article 70(1)(a)), and Mangenda of aiding and abetting the giving of false testimony by 9 of those witnesses.<sup>195</sup> As the Appeals Chamber confirmed, the relevant facts to assess Bemba’s and Kilolo’s culpability as co-perpetrators and accessories are “essentially almost identical”.<sup>196</sup> The same principle applies to Mangenda, notwithstanding that he aided and abetted nine witnesses.<sup>197</sup> Therefore, Bemba, Kilolo and Mangenda are not any less culpable merely because they were accessories.

68. Indeed, the criminal scheme that Bemba, Kilolo and Mangenda are convicted of was remarkable. This was not a scheme that resulted from a mere temporary lapse in judgement by three persons who should have known better. Rather, this was “industrial-scale” corruption, engineered through a carefully masterminded scheme to strike at the heart of the Court’s functioning, and in the first trial at the Court to involve a superior’s responsibility for crimes of his subordinates. Bemba, Kilolo and

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<sup>193</sup> *Ibid.*

<sup>194</sup> [Sentencing Appeal Judgment](#), paras. 357-358. *See e.g.*, [Sentencing Appeal Judgment](#), para. 168 (confirming that the offences for which [Bemba] was convicted extended over a lengthy period of time); para. 169 (confirming that the number of witnesses involved in the common plan and the duration of illicit activities executed are distinct and equally valid considerations when determining the gravity of the offences).

<sup>195</sup> [Sentencing Appeal Judgment](#), para. 16.

<sup>196</sup> [Sentencing Appeal Judgment](#), para. 58.

<sup>197</sup> *See above* fn. 153.

Mangenda showed no remorse, or even the slightest hesitation, for their criminal conduct. Rather, when they heard of the Prosecution's investigation, they "doubled down" on their efforts to prevent discovery and to actively derail the investigation. Their conduct shows utter contempt for the Court and its system of justice.

69. This Trial Chamber has previously found that several aggravating factors enhanced the convicted persons' culpability.<sup>198</sup> And it found no factors in mitigation.<sup>199</sup> The Appeals Chamber has confirmed the Trial Chamber's analysis.<sup>200</sup>

70. In particular, Bemba's culpability was heightened by *two* aggravating circumstances:

- Bemba abused the lawyer-client privilege. He knew of the privileges afforded to him as a detained person and, together with Kilolo, abused them to corruptly influence witnesses.<sup>201</sup>
- Bemba attempted to obstruct the Prosecution's article 70 investigation. In this regard, Bemba played a co-ordinating role from within the ICC Detention Centre.<sup>202</sup>

71. This Chamber also considered, as an overall circumstance, that Bemba took advantage of his long-standing and current position as President of the MLC.<sup>203</sup> The Chamber found no specific mitigating circumstances.<sup>204</sup>

<sup>198</sup> [Sentencing Decision](#), paras. 130-133, 176-181, 231-238.

<sup>199</sup> [Sentencing Decision](#), paras. 128-129, 134-141, 182-189, 227-230, 239-244.

<sup>200</sup> [Sentencing Appeal Judgment](#), para. 117 ("The 'cover-up' was directly related to the offences for which [Bemba] was convicted. In addition, as noted by the Prosecutor, it occurred at a time when the offences for which [Bemba] was convicted were not yet concluded. In these circumstances, it was not unreasonable to take the remedial measures into account as an aggravating circumstance."); paras. 127-130 (rejecting Bemba's argument on 'double-counting' relating to his abuse of privileged communications); para. 158 (confirming that Bemba's abuse of privileged communications while in detention was similar in nature to an "abuse of power or official capacity"); paras. 159-161 (confirming the Trial Chamber's analysis that Bemba took advantage of his long-standing and current position as MLC President); paras. 172-193 (confirming the Trial Chamber's analysis of mitigating factors).

<sup>201</sup> [Sentencing Decision](#), paras. 236, 248. *See also* [Sentencing Appeal Judgment](#), para. 158 ("[Bemba] was entrusted with the ability to make privileged calls with his counsel for legitimate purposes, yet he abused and violated this trust for criminal purposes. Rather than using this privilege to exercise his right to freely communicate with his counsel, [Bemba] abused the privilege afforded to him for illicit purposes.").

<sup>202</sup> [Sentencing Decision](#), paras. 238, 248.

72. Similarly, *three* aggravating circumstances enhanced Kilolo’s culpability:

- Kilolo abused “the trust *vis-a-vis* the Court”<sup>205</sup> — *i.e.*, although he profited from his status as Counsel and was duty-bound to act with full respect for the law, he “abused the special rights and privileges he held as counsel for [Bemba] in the Main Case and breached his responsibilities towards the Court”;<sup>206</sup>
- Kilolo abused the lawyer-client privilege to commit the offences. He abused this privilege to corruptly influence witnesses. Not only did he knowingly violate Trial Chamber III’s order prohibiting witness preparation, he abused the privileged line to discuss the furtherance of the common plan with Bemba and receive related instructions;<sup>207</sup> and
- Kilolo attempted to obstruct the article 70 investigation.<sup>208</sup>

73. The Trial Chamber did not find any express circumstances mitigating Kilolo’s culpability.<sup>209</sup>

74. Moreover, to the extent that the Trial Chamber had considered certain factors (the absence of prior convictions, and other claims such as Kilolo’s efforts to promote the legal profession in Belgium and the DRC, his involvement in a non-governmental organisation, his cooperation with the Court and constructive attitude during trial)

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<sup>203</sup> [Sentencing Decision](#), paras. 234, 248. *See also* [Sentencing Appeal Judgment](#), para. 161 (“The Appeals Chamber considers that it is clear from the Sentencing Decision that [Bemba’s] advantage concerned the importance of his position within the MLC and the concomitant influence and impact that he had on witnesses [...]”).

<sup>204</sup> [Sentencing Decision](#), paras. 239-244. The Chamber considered Bemba’s family circumstances as an “overall circumstance”. It also expressly rejected, as mitigating factors, Bemba’s claims of cooperation with the Court and his renunciation of reliance on the 14 Main Case Defence witnesses in the Main Case submissions.

<sup>205</sup> [Sentencing Decision](#), para. 193.

<sup>206</sup> [Sentencing Decision](#), para. 177.

<sup>207</sup> [Sentencing Decision](#), para. 179.

<sup>208</sup> [Sentencing Decision](#), paras. 181, 193.

<sup>209</sup> Rather, the Chamber considered the absence of prior convictions, Kilolo’s efforts to promote the legal profession in Belgium and the DRC, his involvement in a non-governmental organisation, his cooperation with the Court and his constructive attitude during trial as part of his “overall circumstances” under rule 145(1)(b). The Chamber further denied express mitigation to Kilolo’s assertions of ill-health while in detention, the impact on his personal and professional reputation, that his career suffered as a result of inactivity while in detention, and the significant emotional and financial impact on his extended and immediate family. *See* [Sentencing Decision](#), paras. 182-189.

as relevant to whether his sentence could be suspended, they are now redundant. When a suspended sentence is itself disallowed at this Court, any underlying analysis relevant to such a determination should also be vitiated.<sup>210</sup> Moreover, this Chamber has already rejected the value of these factors as express mitigating circumstances, and to the extent that it considered these factors as overall circumstances, it appears to have given them little weight in mitigation.<sup>211</sup> These issues should not be re-opened in these new sentence proceedings.

75. Likewise, *two* aggravating circumstances enhanced Mangenda's culpability:

- Despite being a "lawyer by profession" and an "officer of justice", and enjoying "authoritative standing *vis-à-vis* the Main Case Defence Witnesses", Mangenda "abused the special rights and privileges he held as a member of the Main Case Defence team and breached his responsibilities towards the Court."<sup>212</sup> Mangenda thus abused the trust of the Court.<sup>213</sup>
- Mangenda attempted to obstruct the OTP's article 70 investigation.<sup>214</sup> As the Chamber found, he played "a critical role" in efforts to impede this investigation.<sup>215</sup>

76. The Trial Chamber did not find any express mitigating factors that diminished Mangenda's culpability.<sup>216</sup> Moreover, as with Kilolo, any analysis of Mangenda's

<sup>210</sup> See [Sentencing Decision](#), paras. 182-189, 197. [Sentencing Appeal Judgment](#), para. 80. In particular, the Trial Chamber refused to consider the negative impact that these proceedings may have had on Kilolo's professional reputation. See [Sentencing Decision](#), para. 189.

<sup>211</sup> [Sentencing Decision](#), paras. 182-189. See also [Sentencing Appeal Judgment](#), paras. 350-351 ("The Appeals Chamber observes that the legal basis for the Trial Chamber's reference to "overall circumstances" as a separate category of factors is unclear. [...] Notwithstanding this, the Appeals Chamber recalls that what is of importance is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once.")

<sup>212</sup> [Sentencing Decision](#), para. 131.

<sup>213</sup> [Sentencing Decision](#), para. 145.

<sup>214</sup> [Sentencing Decision](#), para. 145.

<sup>215</sup> [Sentencing Decision](#), para. 133.

<sup>216</sup> The Chamber considered the absence of prior convictions, his good and respectful behaviour and attendance record, his positive attitude during a Prosecution interview, and the prohibition on Mangenda of working in his country of residence as part of his "overall circumstances" (rule 145(1)(b)). The Chamber denied express mitigation for the violation of Mangenda's right to privacy (as a result of two Austrian national decisions).



“overall circumstances” (the absence of prior convictions, his positive attitude during a Prosecution interview and the prohibition on his working in his country of residence) to suspend his sentence is no longer relevant, and should be disregarded.<sup>217</sup> Likewise, the Trial Chamber has also found that these factors did not expressly mitigate Mangenda’s culpability, and to the extent that the Chamber may have considered them as “mitigation” in the overall circumstances, it gave them limited weight.<sup>218</sup> Accordingly, they should not be revisited in these new sentence proceedings.

*(c) The sentences should deter*

77. As the Trial Chamber has stated:

“[T]he primary purpose of sentencing individuals under article 70 [...] is rooted—as for Article 5 crimes—in retribution and deterrence. With regard, in particular, to deterrence, the Chamber is of the view that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence).”<sup>219</sup>

Any sentences imposed should not only deter Bemba, Kilolo and Mangenda from criminality in the future, but should equally send a clear message to future potential perpetrators to desist from such conduct.<sup>220</sup>

*(d) Five years’ imprisonment is appropriate*

78. Sentencing Bemba, Kilolo and Mangenda to five years’ imprisonment is appropriate—and proportionate—in this case.

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[Sentencing Decision](#), paras. 129, 134-141. *See also* [Appeal Judgment](#), paras. 347-349 (finding that there was no violation of the right to privacy).

<sup>217</sup> [Sentencing Decision](#), paras. 134-141, 149; [Sentencing Appeal Judgment](#), para. 80.

<sup>218</sup> [Sentencing Decision](#), paras. 128-129, 134-141.

<sup>219</sup> [Sentencing Decision](#), para. 19.

<sup>220</sup> *See GAA TJ*, para. 10 (“[f]alse testimony under solemn declaration and contempt of the Tribunal [are] very grave offences, as they constitute a direct challenge to the integrity of the trial process. Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. It is therefore necessary for general deterrence and denunciation to be given high importance in sentencing policies.”)



79. Moreover, the Appeals Judgment should guide the quantum of the sentences imposed in this case:

- *First*, a suspended sentence is not a valid penalty under the Statute.<sup>221</sup> Nor does the Statute allow the operation of an imprisonment term to be suspended.<sup>222</sup> The Chamber's analysis should therefore omit such an assessment.
- *Second*, the Court's legal framework does not require that the joint sentence must correspond to the highest individual sentence. Rather, according to article 78(3) of the Statute, the highest individual sentence constitutes the *minimum* possible joint sentence.<sup>223</sup> This Chamber can, therefore, set a joint sentence that is greater than the highest individual sentence.
- *Third*, in circumstances where an accused has spent time in detention as a result of warrants of arrests issued in two different cases, time spent in detention can only be taken into account *once*.<sup>224</sup> This statement of law applies to Bemba's situation. As Judge Pangalangan had said, in these circumstances, a sentence of "something closer to four years of imprisonment" would "better reflect the severity of [Bemba's] conduct and the gravity of conducting over a year of systematic deception against the Court to subvert a conviction".<sup>225</sup>
- *Fourth*, any term of imprisonment imposed on Bemba can be served consecutively with his existing sentence in the Main Case since the offences are unrelated.<sup>226</sup>

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<sup>221</sup> [Sentencing Appeal Judgment](#), para. 77 ("The corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its *quantum*. No 'inherent powers' may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court, as the Trial Chamber did in the present instance in pronouncing suspended sentences."), paras. 209, 297.

<sup>222</sup> [Sentencing Appeal Judgment](#), para. 73.

<sup>223</sup> [Sentencing Appeal Judgment](#), para. 57.

<sup>224</sup> [Sentencing Appeal Judgment](#), para. 225.

<sup>225</sup> [Separate Opinion](#), para. 18. *See also* [Sentencing Appeal Judgment](#), para. 231 (noting that the Presidency, as the entity charged with issues relating to the enforcement of sentences, can make the necessary adjustments, should Bemba's conviction or sentence in the Main Case be reversed on appeal).

<sup>226</sup> [Sentencing Appeal Judgment](#), para. 239.

80. Further, although fines are, in general, a legitimate penalty under the Statute, the Prosecution believes that a fine is suitable *only* when its imposition can reasonably deter *i.e., only* if the fines are substantial and the convicted persons actually pay such fines. The imposition of fines, on paper alone, has no value. Therefore, the Trial Chamber should consider whether any fines imposed could be effectively realised by the Court within a reasonable period of time. Likewise, although two of the convicted persons have expressed their willingness to pay fines,<sup>227</sup> the Appeals Chamber has underscored that “culpability, rather than solvency, should be the primary consideration [to determine] the appropriate type of punishment.”<sup>228</sup> Determining whether a custodial sentence is warranted, and if so its quantum, is not contingent on a convicted person’s financial ability.<sup>229</sup> The imposition of a fine, therefore, is not a substitute for imprisonment.

81. The Prosecution does not have sufficient information at this stage to conclude that any fine imposed can be paid within a reasonable period of time. The financial situation of the three convicted persons remains unclear. In particular:

- Bemba’s ability to pay a fine depends on the outcome of complicated litigation before several different Chambers at this Court involving his multiple debts (legal aid and possible reparations). As the Registry has recently confirmed, not only does Bemba owe a “significant debt” to the Court for funds advanced to him “for over 10 years”, Bemba has not, to date, proposed any “practicable measures” to assist the Registry to make assets available to reimburse the

<sup>227</sup> See e.g., [Kilolo’s Fine Response](#), para. 1, fn. 7 (“The Trial Chamber rendered the Sentencing Decision on 22 March 2017, making the due date 22 June 2017”); [Sentencing Appeal Judgment](#), paras. 197-198 (where Bemba argued for non-custodial sentences).

<sup>228</sup> [Sentencing Appeal Judgment](#), para. 245.

<sup>229</sup> [Sentencing Appeal Judgment](#), para. 245 (“Indeed, this constitutes a guarantee of equal treatment of convicted persons as the determination on whether or not it is appropriate to impose a custodial sentence (and, if so, its *quantum*) as part of a sentence for offences under article 70 of the Statute cannot be determined on the basis of the convicted person’s financial means and his or her ability to pay a fine of high monetary value.”)

amounts.<sup>230</sup> Given the various competing claims on Bemba's assets and the general priority given to reparations,<sup>231</sup>—and if Bemba's identified assets are insufficient to pay all his debts—the Prosecution would prefer that Bemba's available finances first go towards victims' reparations in the Main Case—a question that will soon be determined in view of the upcoming Appeals Judgment in the Main Case and Trial Chamber III's reparations order.

- Likewise, notwithstanding the Registry's most recent solvency report, Kilolo's statements, as late as December 2016, highlight his financial situation, and his potential inability to pay the fine.<sup>232</sup> Moreover, the Chamber must ensure that the total amount of a fine does not exceed 50 percent of the convicted person's identifiable assets.<sup>233</sup> As such, the Prosecution does not know how much money Kilolo requires to support himself and his family—and more critically, whether any fine resulting from his remaining assets (after deducting his family expenses) will be sufficient to deter him. In these circumstances, any fine imposed should not be only nominal in nature.
- Similarly, based on the Registry's most recent information,<sup>234</sup> the Prosecution cannot comment on the suitability of Mangenda's assets for an appropriate fine. Further, the Prosecution has no information yet on how much Mangenda would require for his family expenses.

<sup>230</sup> [19 April 2018 Registry Observations](#), paras. 15-16. See also [Bemba Sentence Appeal Response](#), paras. 122-127, in particular fn. 407 (citing Fourth Registry Report, p. 4 noting that “the Defence failed to comply with the Decision to report to the Registry on a monthly basis as to the steps taken to free up funds; in addition, Mr Bemba persistently failed to cooperate actively with the Registry and to provide sufficient and meaningful information in response to the Registry's various enquiries”).

<sup>231</sup> See e.g., rule 221 (2): In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced persons, it shall give priority to the enforcement of measures concerning reparations to victims.

<sup>232</sup> [T-54-Red](#), 59:1-2 (“I am working very hard now to prevent my children from being expelled from the family home simply because the mortgage hasn't been paid.”). Moreover, although the Prosecution has not been privy to the legal aid requested by the convicted persons, and granted by the Registry, it seems that Kilolo has benefitted from it. See [Bemba Legal Aid Request](#), para. 33 where Bemba noted that “[i]f the Registry has deemed that it is necessary and reasonable to allocate a certain amount of legal aid in order to ensure the effective representation of Me. Kilolo [...]”.

<sup>233</sup> [Sentencing Appeal Judgment](#), para. 247.

<sup>234</sup> See [Registry's Solvency Report](#).

82. For all these reasons, the Prosecution requests the Chamber to sentence Bemba, Kilolo and Mangenda to five years' imprisonment each. That said, should the Chamber impose an effective substantial fine *in addition* to the five-year imprisonment term, the Prosecution would welcome such a sentence.

*(e) Further oral hearing is not required*

83. A further oral hearing on the new sentences to be imposed is unnecessary.<sup>235</sup> This Chamber has already made the necessary factual findings, many of which were confirmed on appeal. Moreover, the Parties' written submissions will suitably address any new findings that the Chamber must now make. They need no further ventilation by way of a further hearing. However, if the Defence submissions filed on 30 May 2018 raise new or unforeseen issues, the Prosecution may seek leave to reply in writing to specific issues, if necessary.

### **Conclusion and Relief**

84. For these reasons, the Prosecution respectfully requests the Chamber
- i. To sentence Jean-Pierre Bemba, Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo each to five years' imprisonment;
  - ii. To order Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo back into custody to serve the new sentences imposed;<sup>236</sup>
  - iii. To request the Registry to notify the respective professional bodies to which Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo belong of their convictions (now confirmed on appeal) and to remove them from the Court's lists of counsel and assistants to counsel;<sup>237</sup> and

<sup>235</sup> See [Sentencing Order](#), para. 6 (noting that the hearing held prior to the Sentencing Decision satisfies the requirements of article 76(2) of the Statute).

<sup>236</sup> The Prosecution understands that the conditions set out in the [Second Release Decision](#), para. 28 have applied to Kilolo and Mangenda since the reversal of their sentences.

<sup>237</sup> [Sentencing Decision](#), paras. 151, 201 (noting that the Registry is responsible for such matters).

- iv. To request the Registry to notify the ICC Bar Association—if Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo are members—of their convictions which have been confirmed on appeal.



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Fatou Bensouda, Prosecutor

Dated 30<sup>th</sup> day of April 2018  
At The Hague, The Netherlands