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Date: 19 July 2018

**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**

**Response to Prosecution's Detailed Notice of Additional Sentencing Submissions**

**Source:** Defence for Jean-Jacques Kabongo Mangenda

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

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 (Participation/Reparation)**

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## **REGISTRY**

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**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## I. Introduction

1. The Prosecution's "Notice" argues that the Appeals Chamber's recent acquittal of Mr Bemba<sup>1</sup> is part of the "damage"<sup>2</sup> arising from the Article 70 offences of which Mr Mangenda has been convicted. The Prosecution asserts that the Main Case Appeals Judgment was "infiltrated"<sup>3</sup> by the testimony on the merits of some of the 14 witnesses whose non-merits testimony is within the scope of this case, and that the Appeals Chamber judges may have relied on evidence that "they knew was tainted."<sup>4</sup> The Prosecution also suggests for the first time in this case that Main Case witness D-48 told non-merits lies at the behest of Mr Mangenda and that D-48's merits testimony in the Main Case had a direct impact on the Appeals Judgment.<sup>5</sup> The Prosecution characterises this re-sentencing as "an opportunity for this Chamber to set things right once and for all"<sup>6</sup> and as "a reprieve for this Court."<sup>7</sup>
2. The Prosecution's submissions are unsound and inappropriate. The proper venue for litigating the reliability of testimony relevant to the merits of the Main Case was the Main Case. A failure by the Prosecution to bring any salient information to the attention of the Chambers seised of the Main Case, including alleged non-merits lies that might affect the overall credibility of witnesses, is its own oversight or choice. The Prosecution's speculation that the Main Case Appeals Judgment was "infiltrated" by testimony of any witness who has been found untruthful by this Trial Chamber is, in any event, entirely specious.
3. The Prosecution's reference to D-48 at this stage of the proceedings is untimely and inappropriate. Still more inappropriate is the Prosecution's suggestion that Mr Mangenda is responsible for a wrongful acquittal of Mr Bemba by the Appeals Chamber and that this must be redressed by this Trial Chamber by imposing on him a heavier sentence. This unfounded suggestion – which directly undermines the authority and

<sup>1</sup> *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, 8 June 2018 ("Main Case Appeals Judgment").

<sup>2</sup> Prosecution Detailed Notice of Additional Sentencing Submissions, ICC-01/05-01/13-2296, 2 July 2018 ("Notice"), paras. 5, 47; ICC-01/05-01/13-T-59-ENG, 16:24-17:3. All citations are to the *Bemba et al.* case unless otherwise specified.

<sup>3</sup> Notice, paras. 4, 24, 37, 40.

<sup>4</sup> ICC-01/05-01/13-T-59-ENG, 23:18.

<sup>5</sup> Notice, paras. 38-43.

<sup>6</sup> ICC-01/05-01/13-T-59-ENG, 17:25-18:1 (underline added).

<sup>7</sup> ICC-01/05-01/13-T-59-ENG, 17:24-25 (underline added).

integrity of the Appeals Chamber – should be taken into account as a further reason for limiting Mr Mangenda’s sentence to time served.

## II. Procedural History

4. On 22 March 2017, this Trial Chamber imposed a suspended sentence of two years on Mr Mangenda, with credit given for 11 months and nine days previously served.<sup>8</sup>
5. On 8 March 2018, the Appeals Chamber reversed and remanded this sentence on the basis of three errors: (i) acting “*ultra vires* by suspending the remaining terms of imprisonment imposed on Mr Mangenda and Mr Kilolo”;<sup>9</sup> (ii) giving “‘some weight’ to [...] the mere fact that in the present case the false testimony ‘related to issues other than the merits of the Main Case’”;<sup>10</sup> and (iii) entering convictions under Article 70(1)(b), which were reversed.<sup>11</sup>
6. On 14 March 2018, the Trial Chamber issued the briefing schedule for the parties’ re-sentencing submissions,<sup>12</sup> ordering successive written submissions from the Prosecution and the Defence on 30 April 2018 and 30 May 2018, respectively. The Prosecution sought leave to reply to the latter submissions on 4 June 2018<sup>13</sup> to which responses were filed by the Defence on 6 June 2018.<sup>14</sup>
7. On 8 June 2018, the Appeals Chamber acquitted Mr Bemba of all charges in the Main Case. On 12 June 2018, the Trial Chamber held a status conference at which an oral hearing on re-sentencing was scheduled for 4 July 2018.<sup>15</sup> The Trial Chamber specifically directed, in ruling on the Prosecution’s request for leave to reply, that “no

<sup>8</sup> Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr, 22 March 2017, paras. 147-148.

<sup>9</sup> Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/05-01/13-2276-Red, 8 March 2018 (“Sentencing Appeal Judgment”), para. 359.

<sup>10</sup> Sentencing Appeal Judgment, para. 45.

<sup>11</sup> Sentencing Appeal Judgment, para. 361, fn. 847.

<sup>12</sup> Order on Sentencing Submissions Following Appeals Chamber Judgments, ICC-01/05-01/13-2277, 14 March 2018 (“Order on Sentencing Submissions”).

<sup>13</sup> Prosecution’s Request for Leave to Reply to Bemba’s, Kilolo’s and Mangenda’s Sentencing Submissions, ICC-01/05-01/13-2283, 4 June 2018.

<sup>14</sup> Aimé Kilolo Musamba’s Response to Prosecution’s Request for Leave to Reply to Bemba’s, Kilolo’s and Mangenda’s Sentencing Submissions, ICC-01/05-01/13-2285, 6 June 2018; Defence Response to Prosecution’s Request for Leave to Reply (ICC-01/05-01/13-2283-Red), ICC-01/05-01/13-2286, 6 June 2018; Defence Response to the Prosecution’s Request for Leave to Reply to Bemba’s, [REDACTED] and Mangenda’s Sentencing Submissions, ICC-01/05-01/13-2287, 7 June 2018.

<sup>15</sup> ICC-01/05-01/13-T-58-ENG, 5:23.

further written submissions are necessary, and that all of these matters can be discussed *inter partes* in a second sentencing hearing.”<sup>16</sup>

8. Two days prior to the sentencing hearing, the Prosecution filed its twenty-one page Notice setting out extensive arguments as to why Mr Bemba’s acquittal should lead to a heavier sentence for Mr Mangenda, Mr Kilolo and Mr Bemba in this case.

### III. Submissions

#### A. Trial Chamber III and the Appeals Chamber Were the Exclusive Fora for Submissions on the Credibility of Testimony Concerning the Merits of the Main Case

9. The gist of the Prosecution’s submissions is that the Main Case Appeals Judgment was a consequence of the common criminal plan for which Mr Mangenda has been convicted.<sup>17</sup> The Prosecution alleges that the testimony of D-25, D-15, D-54, and D-13 concerning the merits of the Main Case – though not mentioned in the Main Case Appeals Judgment – “infiltrated” the reasoning of the Main Case Appeals Judgment.<sup>18</sup>
10. The Prosecution asserts that the Main Case Appeals Judgment was also influenced by two witnesses who were not amongst the 14 witnesses within the scope of this case, D-19 and D-48, but whom the Prosecution says should now be found to have told non-merits lies as part of the common criminal plan of which Mr Mangenda was convicted.<sup>19</sup> The posited remedy for the acquittal of Mr Bemba, which is described as a “damage”<sup>20</sup> resulting from Mr Mangenda’s actions, is the imposition of a heavier sentence by this Trial Chamber.<sup>21</sup> In short, the Prosecution is seeking a heavier sentence in the Article 70 case for Mr Bemba’s acquittal in the Main Case.
11. The legal, logical and factual flaws in the Prosecution’s argumentation are unprecedented.

<sup>16</sup> ICC-01/05-01/13-T-58-ENG, 5:14-23.

<sup>17</sup> Notice, para. 4 (“Mr Bemba’s acquittal was, at least to a discernible extent, resulting from, and predicated on, evidence affected by a pervasive campaign of witness tampering, which eventually but not unforeseeably, infiltrated the Bemba AJ [...] In short, the convicted persons’ concerted and unlawful efforts may have ultimately succeeded, not at trial as originally intended, but at the appellate stage.”)

<sup>18</sup> Notice, paras. 4, 24, 37, 40.

<sup>19</sup> Notice, paras. 33-43.

<sup>20</sup> Notice, paras. 5, 47.

<sup>21</sup> Notice, para. 5 (“Mr Bemba’s acquittal comprises ‘the damage caused’ or an ‘aggravating circumstance[]’ within the contemplation of rule 145”).

12. *First*, the evaluation of the credibility of testimony in the Main Case as it pertains to the outcome of that case is the exclusive jurisdiction of the Main Case Trial Chamber and Appeals Chamber. The Prosecution, as a party to the Main Case, had every opportunity to make any submissions it wished concerning those issues. It also had every opportunity to make submissions or introduce evidence about the findings in, or the content of, the Article 70 case as it might impact the evaluation of the merits of the Main Case. The Main Case Trial Chamber and Appeals Chamber, if seised of such a request, would have evaluated the admissibility of such information and, if admitted, would subsequently have evaluated that information in weighing the overall reliability of these witnesses' testimony. This would have been done on the basis of *inter partes* submissions by the parties involved in that case, and evaluated in the context of all the evidence admitted in the Main Case. The only Chambers competent to make any determinations concerning the proper weight to be accorded to such information in relation to the charges in the Main Case were the Main Case Trial and Appeals Chambers.
13. *Second*, this Trial Chamber has from the outset renounced any authority to pronounce on matters within the exclusive jurisdiction of the Main Case. As a practical matter, this meant that Trial Chamber VII did not permit submissions, did not entertain evidence, and did not make rulings as to whether witnesses told lies about the merits of the Main Case. As this Trial Chamber held at the beginning of this case:

this Chamber cannot assess the truth or falsity of these statements [in the Main Case] without command over the evidence in the main case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate parts of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable. There is a division of responsibilities between Chambers, meaning that Trial Chamber II and not this Chamber is the judicial entity responsible for the findings in the main case. That said, and in these particular circumstances, the Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case [...] broadening the scope of this trial to such a degree would dramatically compromise the expeditiousness of proceedings and the right of the accused to be tried without undue delay. It is also to be noted that this case could have been joined to the main case under Rule 165(4) of the Rules to resolve all case overlap issues, but no such joinder has been made or even attempted. So, when the Chamber says that this case is not about relitigating the main case, what this means is that this case is about alleged false testimony of witnesses in respect of issues like: First, their previous

contacts with the Defence, including those where witnesses were coached before testifying; their meetings with other prospective witnesses; their acquaintance with some of the accused or other persons associated with them; the fact that promises had been made to them in exchange for their testimony; and the fact that they had received reimbursements or transferred by Mr Bemba on his behalf for the purpose of unduly influencing the witness. Statements pertaining to the merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching. was in fact repeated during testimony. However, these statements will not be considered for their truth or falsity, and evidence submitted solely for the purpose of proving the truth or falsity of such statements at trial will not be considered by the Chamber in its judgment. The main case, to make it clear, and this case are conducted independently. They are on independent tracks, so to speak, looking at evidence for different purposes.<sup>22</sup>

14. The corollary of this guidance is that there is no incompatibility between a finding in this case that a witness lied concerning some non-merits issue – such as money received – and a finding in the Main Case that some weight could nevertheless be placed on the same witness's testimony concerning a merits issue. Indeed, this was precisely the finding in respect of some Prosecution witnesses in the Main Case.<sup>23</sup> This could even be the case in respect of testimony that was “scripted,” since scripted testimony might nevertheless be truthful and even reflect the genuine views of the witness.<sup>24</sup>
15. Whether this was or was not the case in respect any witness is of no proper concern to this Trial Chamber. The impact of any non-merits lies on the credibility of merits issues was, and remains, within the exclusive purview of the Main Case, to which the Prosecution had a full opportunity to make any submissions or offer information relevant to the credibility of any witness. The Prosecution's failure to bring information or findings from this case to the attention of the Main Case Chambers reflects its own neglect or its own choice.
16. The Prosecution's suggestion that the outcome in the Main Case is merely the fruit of the criminal offences of which Mr Mangenda has been convicted, which were restricted

<sup>22</sup> ICC-01/05-01/13-T-10-Red-ENG, 4:24-5:24.

<sup>23</sup> See e.g. *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, paras. 317-329, 542 (relying on witnesses who told various untruths about their contacts with the Court and one another, but still placing weight on their testimony when corroborated).

<sup>24</sup> A compelling illustration of “scripting” of testimony that is true is provided in Season 1, Episode 7, of the Netflix series “The Staircase.” At 40:05 remaining in the episode, a North Carolina lawyer rehearses not only the questions that he will ask to an expert witness, but also the answers that he expects to receive. Although the circumstances are different from those in the present case, the exchange illustrates that rehearsal of testimony does not necessarily imply untruthful content.

to non-merits lies, is wholly misplaced and unsound. Any impact of those offences on the overall credibility of any Defence witness in the Main Case was a matter that could only be litigated and evaluated in the Main Case. Describing a judicial decision in that case as “damage”<sup>25</sup> is legally improper and displays a lack of respect for this institution and its processes.

**B. The Main Case Appeals Judgment Did Not Rely Upon Any of the Witnesses Whose Testimony is the Object of this Case**

17. The Trial Chamber, for the reasons addressed above, should not embark on any evaluation of the Prosecution’s Notice. If such an evaluation is undertaken, however, this Trial Chamber will find that the Prosecution’s insinuations have no proper foundation, let alone meet the standard of proof necessary, to be taken into account as an aggravating factor in sentencing.
18. Matters outside the scope of facts found in the conviction may be taken into account as aggravating circumstances only if two conditions are satisfied: (i) the convicted person has had a fair opportunity to test the allegation, which may not be the case unless facts are raised during trial; and (ii) the fact is proven beyond a reasonable doubt.<sup>26</sup>
19. The Prosecution’s claim that the Main Case Appeals Judgment relies on witnesses falling within the scope of the offences of which Mr Mangenda stands convicted<sup>27</sup> is false. The Main Case Appeals Judgment places no reliance on D-25, D-15, D-54, or D-13. Undeterred by facts, the Prosecution indulges in rhetorical obscurities such as that the testimony of these witnesses “infiltrated the Bemba AJ.”<sup>28</sup> More specifically, the Prosecution suggests that the Appeals Chamber’s finding that the Trial Chamber had erred in its “assessment of the commissions and inquiries that Mr Bemba purportedly established” was tantamount to “tacitly accepting the narrative advanced by scripted and tainted Defence witnesses.”<sup>29</sup>
20. In reality, however, the Appeals Chamber did not rely on D-25, D-15, D-54, or D-13 for any such finding. Instead, the Appeals Chamber relied on the testimony of

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<sup>25</sup> Notice, paras. 1, 5, 47.

<sup>26</sup> *Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, paras. 68, 69; *Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 23 May 2014, para. 33.

<sup>27</sup> Notice, para. 44.

<sup>28</sup> Notice, paras. 4, 24, 37, 40.

<sup>29</sup> Notice, para. 7.



Prosecution witness P-36.<sup>30</sup> In particular, as is appropriate for appellate review, the Appeals Chamber found fault in the fact “that the Trial Chamber did not expressly refer to this aspect of P36’s testimony, despite its significance and direct relevance to the issues at hand.”<sup>31</sup> The Appeals Chamber found, on this basis, that “the Trial Chamber did not conduct a proper assessment as to whether, in the particular circumstances that existed at the time, the range of measures taken by Mr Bemba could be regarded as the extent of the necessary and reasonable measures that he could have taken, given the limitations upon his material abilities.”<sup>32</sup>

21. The Prosecution Notice also incorrectly asserts that the testimony of a witness who has never formed any part of this case, D-48, “played an important role in the Majority’s decision to overturn part of Mr Bemba’s convictions: the Majority concluded that Trial Chamber III had erred on the basis of its lack of reference to portions of D-48’s testimony purported letter in the Judgment.”<sup>33</sup> The Prosecution dramatically overstates the Appeals Chamber’s reliance on D-48. Following an extensive discussion of the Trial Chamber’s failure to address P-36’s testimony, the Appeals Chamber merely “note[d]” the absence of such reasoning in respect of D-48 by the Main Case Trial Chamber:

The Appeals Chamber also notes that the Trial Chamber did not address Mr Bemba’s statement that he wrote to the CAR Prime Minister requesting an international commission of inquiry to be set up, nor the testimony of D48 which attested to the existence and content of the letter.<sup>34</sup>

22. Doubt about the reliability and accuracy of the Prosecution’s submissions about the Main Case is raised by the following statement by the Appeals Chamber: “The Prosecutor did not contest at trial that Mr Bemba had transmitted a letter to the CAR Prime Minister, nor does she do so on appeal.”<sup>35</sup> If this is true, then it is thoroughly inappropriate for the Prosecution to attempt, before this Chamber, to now fault the Appeals Chamber for “tacitly accepting” a “narrative” that the Prosecution itself did not contest. This inconsistency illustrates the pitfalls and the inappropriateness of this Trial Chamber scrutinising the content or outcome of an Appeals Judgment in another case.

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<sup>30</sup> Main Case Appeals Judgment, para. 172.

<sup>31</sup> Main Case Appeals Judgment, para. 172.

<sup>32</sup> Main Case Appeals Judgment, para. 173.

<sup>33</sup> Notice, para. 43.

<sup>34</sup> Main Case Appeals Judgment, para. 174.

<sup>35</sup> Main Case Appeals Judgment, para. 175 (underline added).

23. The testimony of witnesses impacted by the offences for which Mr Mangenda stands convicted, accordingly, finds no reflection in the Main Case Appeals Judgment. Furthermore, no proper basis has been adduced for the suggestion that the Main Case Appeals Chamber weighed inappropriately the testimony of any witness, including as a result of any offence of which Mr Mangenda has been convicted.

**C. The Prosecution's Insinuations About the Main Case Appeals Chamber's Unstated Reliance on False Testimony Are Unfounded and Inappropriate**

24. The Notice repeatedly uses the word “infiltrated”,<sup>36</sup> implying that false testimony surreptitiously found its way into the reasoning of the Appeals Chamber. The Prosecution does not say who engineered this “infiltration.” During the sentencing hearing following the Notice, the Presiding Judge directly addressed the implication of this word:

PRESIDING JUDGE SCHMITT: [...] Do we agree that the Appeals Chamber in the Main Case was aware of the fact that the findings of TCVII were final? MR VANDERPUYE: Yes. [...] PRESIDING JUDGE SCHMITT: Okay. So could you then please clarify for the Chamber, does the OTP submit before this Chamber that the Appeals Chamber majority in the Main Case relied on evidence that they knew was tainted when they acquitted Mr Bemba? MR VANDERPUYE: That's a very good question and a difficult one to answer, because at the end of the day, we're not privy to what the Appeals Chamber relied on. What I do know and what I can say is that the entirety of the trial record was before the Appeals Chamber, and what I can say is that even if the Appeals Chamber had some inkling of which witnesses had been corruptly influenced, based on the finality of Trial Chamber VII's judgment, and they used that as the measure to determine which witnesses were and which witnesses had not been tampered, that I can assure you they would have been wrong, because even within the judgment of this Trial Chamber, findings were made which demonstrated the corrupt influence of witnesses that weren't charged before this – the incidents that weren't charged before this Trial Chamber. D-7 is one, D-9 is another, D-19 is yet another [...] So it is entirely possible that if the Appeals Chamber relied on the finality of the convictions and the basis of the convictions in your judgment and in the Appeals Chamber's affirmation of that judgment, that they would have been wrong in the Bemba Main Case to discard or disregard 14 witnesses.<sup>37</sup>

25. The Prosecution's submissions should be a matter of serious concern.

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<sup>36</sup> Notice, paras. 4, 24, 37, 40.

<sup>37</sup> ICC-01/05-01/13-T-59-ENG, 23:11-24:16.

26. *First*, the Prosecution should have immediately repudiated any interpretation of its submissions that might suggest that any judge of this Court would ever knowingly rely on information they knew to be “tainted” or in any other way false. It did not do so. The Prosecution may have misspoken or not fully understood the question, in which case a clarification should be made.
27. *Second*, the Prosecution is incorrect in asserting that this Trial Chamber found that D-7, D-9 or D-19 gave false testimony. Even assuming that the Trial Chamber’s observation that D-19 was influenced can be treated as a “finding”,<sup>38</sup> there was no finding that he told any lies about the merits of the Main Case. In any event, the Main Case Appeals Judgment places no reliance on D-19’s testimony.
28. *Third*, the Prosecution’s suggestion that the Main Case Appeals Chamber had only an “inkling” about who may, or may not, have been corruptly influenced is, if true, attributable squarely to the Prosecution’s own submissions in the Main Case. The Prosecution had full latitude in the Main Case to make submissions concerning which witnesses were unreliable, including on the basis of alleged or adjudicated corrupt influence. Any deficiency in those submissions is entirely a matter for the Main Case, not this one.
29. *Fourth*, the Prosecution’s submissions are nothing more than unfounded speculation. They do not come close to having been substantiated beyond a reasonable doubt, and no fair opportunity has been afforded to the Defence to contest these speculative insinuations.
30. The Prosecution’s submissions concerning unstated reliance by the Main Case Appeals Chamber on the testimony of any of the 14 witnesses, or any other witnesses, are unfounded, speculative and constitute an inappropriate collateral attack on the correctness of the Main Case Appeals Judgment.

**D. The Prosecution’s Suggestion That D-48 Was Part of the Common Plan or That He Gave False Testimony on Any Subject, Merits or Non-Merits, Is Inappropriate, Untimely and Unfounded**

31. The Prosecution’s submission that D-48 lied on any subject is inadmissible before this Chamber. If the Prosecution had evidence that D-48 was part of the common plan, then it could have charged Mr Mangenda with this offence and subjected these allegations to

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<sup>38</sup> Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016, para. 856.

appropriate scrutiny during this trial. Proper scrutiny includes full and proper disclosure by the Prosecution of the source and basis for the information that has now been inappropriately placed before the Trial Chamber; the opportunity to examine and offer submissions concerning whether D-48 actually did tell any non-merits lies; and the opportunity to call any witnesses relevant to this allegation, including D-48 himself. D-48's testimony, the *res gestae* of the Article 70(1)(a) offence, has not even been admitted as evidence in this case.

32. Still worse, the Prosecution relied on D-48's testimony as credible before the Appeals Chamber.<sup>39</sup> As to his testimony concerning the letter written by Mr Bemba to the CAR Prime Minister, the Prosecution did not even suggest that D-48's testimony in this respect was not reliable, let alone that he had been manipulated to give this testimony. The Prosecution instead argued in the Main Case that this testimony was "not relevant" to the Trial Chamber's conclusions and, accordingly, did not need to be specifically addressed in the Trial Chamber's reasons.<sup>40</sup> The Prosecution could have challenged D-48's credibility before the Appeals Chamber on the basis that is now presented to this Chamber; it chose not to do so.
33. Even taken at face value, the Prosecution's submissions do not show that D-48 gave incorrect testimony about the extent of his contacts with the Defence. The Prosecution does not allege that Mr Kilolo had contact with the witness after the cut-off date<sup>41</sup> or that Mr Mangenda had any knowledge whatsoever of any of these contacts. D-48's answers as recited by the Prosecution are, at best, ambiguous. The least that should have been done, especially in light of the Prosecution's knowledge of the purpose of its questions, was to clarify how many times, when and for how long D-48 says he had spoken to the Defence on the telephone. This was not done.
34. The Prosecution's reliance on D-48 demonstrates once again the inappropriateness of the exercise proposed in the Notice. The Main Case was the proper and exclusive venue

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<sup>39</sup> *Bemba*, Public Redacted Version of "Corrected Version of 'Prosecution's Response to Appellant's Document in Support of Appeal'", 19 January 2017 (originally filed on 21 November 2016), ICC-01/05-01/08-3472-Conf, ICC-01/05-01/08-3472-Corr-Red, 19 January 2017 ("Prosecution's Appeal Response") para. 160 ("[t]he Chamber reasonably found that Bemba ordered the MLC withdrawal from the CAR, based on the evidence of P36, P169, P213 and P178, who were corroborated in various respects by P15, P44, P45 and D48; contemporaneous news reports; and the Chamber's other relevant findings"); para. 206 ("[t]he Chamber expressly *relied* on D48 to find that Bemba set up the Zongo Commission and excluded CAR territory from its jurisdiction, and thus did not fail to consider his evidence. Yet nothing in this evidence demonstrates that *Bemba* lacked the power to send investigative missions to the CAR if he chose, nor does it contradict any other relevant evidence concerning Bemba's powers to investigate MLC crimes in the CAR") (italics in original).

<sup>40</sup> Prosecution's Appeal Response, paras. 207-209.

<sup>41</sup> Notice, para. 42.

for evaluating D-48's testimony, including his credibility and reliability, in relation to the charges in the Main Case. The Prosecution is flat wrong in suggesting that the Appeals Chamber "could not have known about the CDR's" that purportedly demonstrate that D-48 lied about the extent of his contacts with the Defence.<sup>42</sup> The Appeals Chamber *could* have known about that if the Prosecution had chosen to impeach D-48 before Trial Chamber III and/or the Appeals Chamber on this basis. That it did not do so was its own choice or failure. If the Prosecution chose not to make such submissions – or worse, chose to make submissions that are contradictory to those now made before this Trial Chamber – then this is exclusively a matter for the Main Case. Raising them before this Chamber — and requesting the imposition of a heavier sentence on Mr Mangenda as a result — improperly invites this Trial Chamber to review matters that are within the exclusive province of the Main Case, and that fall far beyond the limitations announced by this Chamber at the start of trial.

**E. The Prosecution's Submissions Are a Further Factor in Favour of a Sentence of Time Served for Mr Mangenda**

35. The Trial Chamber has, from the outset, clearly defined the parameters of this re-sentencing procedure. It has made clear that this re-sentencing procedure "is not an opportunity to relitigate matters which have been definitively resolved by the Appeals Chamber judgments."<sup>43</sup>
36. The Prosecution's written and oral submissions, however, allege harm attributable to Mr Mangenda's offences that go far beyond the scope of this re-sentencing procedure, and the scope of this case as a whole. The Prosecution, to be clear, has asserted that Mr Mangenda, with his co-perpetrators, is responsible for a wrongful acquittal by an Appeals Chamber of the ICC:

The acquittal obtained at the appellate level was to a discernible extent affected by the criminal conduct of Messrs Bemba, Kilolo and Mangenda in the implementation of the scheme corruptly to influence Defence witnesses, irreparably damaging the trial record on which the Appeals Chamber necessarily and foreseeably relied. There is no real question about that. And the Chamber must consider it as a consequence of the defendants' conduct.<sup>44</sup>

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<sup>42</sup> ICC-01/05-01/13-T-59-ENG 22:3-5.

<sup>43</sup> Order on Sentencing Submissions, para. 3.

<sup>44</sup> ICC-01/05-01/13-T-59-ENG, 23:1-7.

37. The Prosecution asserts that the “damage” attributable to Mr Mangenda, and that should be taken into account in his sentencing, is “not only to the trial of the Main Case, but its outcome.”<sup>45</sup> The remand of sentencing to this Trial Chamber is characterised as “a reprieve for this Court” and “an opportunity for this Chamber to set things right once and for all.”<sup>46</sup> A “reprieve”, as defined by the Oxford English Dictionary, is to “cancel or postpone the punishment or demise of.”<sup>47</sup> The meaning of this phrase, accordingly, is that this re-sentencing is an opportunity to redress a wrong that would otherwise result in the punishment or demise of “this Court.”
38. The meaning of these submissions is clear: Mr Bemba’s acquittal was wrongful; this wrongful acquittal is attributable at least in part to the “infiltration” of “tainted” evidence arising from Mr Mangenda’s offences; and Mr Mangenda should pay the price with a heavier sentence.
39. Parties must be accorded wide latitude in the tone and content of their submissions concerning matters subject to litigation. Issues such as disclosure or interpretation of evidence can often involve allegations reflecting negatively on the other party, and there is nothing improper in the Prosecution alleging that an accused is guilty even before the Trial Chamber seised of a case has made a determination on guilt.
40. Submissions made outside of the forum in which the matter is being litigated, however, are subject to stricter limits. In *Lubanga*, Judge Fulford instructed the Prosecution, in particular a spokeswoman named Ms Le Fraper du Hellen, to cease engaging in “satellite litigation” in the press:

Finally, in her concluding remarks, Ms Beatrice Le Fraper Du Hellen, in praising the witnesses called by the Prosecution - which, in itself, is a questionable thing to do for an independent Prosecutor who is supposed to be fairly and impartially presenting the evidence - then alleges against the accused that he has been making signs to the audience, he is smiling, he is doing a lot of body language and, through his actions, he is being -- behaving in a way, and I quote again, “that is very terrifying for the children.” That allegation has never been put to us. To the contrary, the allegation has been that people sitting in the public gallery have been making gestures intimidating to the accused. Now, I want to know from the Prosecution prosecuting this case as to whether, in fact, you are alleging that that is how Mr Lubanga has been behaving, and if you are alleging it, why it has never been raised for our consideration. And if it is being alleged, I want to see copies, please, of the videos in which the Prosecutor himself is alleging that

<sup>45</sup> ICC-01/05-01/13-T-59-ENG, 16:24-17:3 (underline added).

<sup>46</sup> ICC-01/05-01/13-T-59-ENG, 17:24-18:1.

<sup>47</sup> Oxford English Dictionary, 10<sup>th</sup> ed. Revised, 2002, p. 1215.

this has occurred; and I want your comments on whether you accept that this is a direct imputation on the Judges as to how we have been conducting this case. Because if it is to be suggested that we have been allowing the accused, through his actions, to terrify Prosecution witnesses, that is to allege that the three of us have not been discharging our functions properly. Now, from you who are prosecuting the case, rather than acting as a spokesperson for the Prosecutor himself, is that allegation being made and, if so, on what foundation? Generally speaking, and finally, Ms Samson, you might like to remind Ms Beatrice Le Fraper Du Hellen that a very considerable time ago, when we were considering the whole issue of witness summaries and what was to be published in the press, I gave a very firm indication that the Judges did not expect to see satellite litigation in the press with the issues which we are considering being the subject of some kind of debate, with commentators on one or both sides seeking to litigate the issues in this trial in a different forum. It was expressed by us then that this is an inappropriate activity, particularly for the Prosecutor to undertake, and you may like to remind this individual of our views on that subject.<sup>48</sup>

41. In a subsequent decision, the *Lubanga* Trial Chamber explained that “respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine.”<sup>49</sup> The Trial Chamber found that the Prosecution spokeswoman had violated these rules by: suggesting that it was improper for the Defence, in the context of litigation, to call into question the integrity of intermediaries relied on by the Prosecution in that case;<sup>50</sup> describing the intermediaries as “very courageous and brave” and “very credible” despite indications to the contrary raised during trial;<sup>51</sup> claiming that the Prosecution had complied with its disclosure obligations, whereas the Trial Chamber had previously determined there had been “inexcusable delays” in such disclosure;<sup>52</sup> “seriously intrud[ing] on the role of the Chamber” by asserting, in relation to a pending request for a stay of proceedings, that the motion had no merit;<sup>53</sup> and prejudging the outcome of the case by stating ““Mr Lubanga is going away for a long time.””<sup>54</sup> The Trial Chamber expressed “the strongest disapproval of the content of this interview.”<sup>55</sup>

<sup>48</sup> *Lubanga*, ICC-01/04-01/06-T-264-Red-ENG, 17 March 2010, 4:12-5:22.

<sup>49</sup> *Lubanga*, Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04-01/06-2433, 12 May 2010 (“*Lubanga* Press Interview Decision”), para. 40.

<sup>50</sup> *Lubanga* Press Interview Decision, para. 41.

<sup>51</sup> *Lubanga* Press Interview Decision, para. 42.

<sup>52</sup> *Lubanga* Press Interview Decision, paras. 43-46.

<sup>53</sup> *Lubanga* Press Interview Decision, para. 49.

<sup>54</sup> *Lubanga* Press Interview Decision, para. 49.

<sup>55</sup> *Lubanga* Press Interview Decision, para. 53.

42. The principle to be drawn from this decision is that it is inappropriate for a party to publicly contradict decisions already issued by a Chamber. This does not mean that criticisms cannot be raised, or regret expressed, about a particular outcome. The limits of proper comment by a Prosecutor following an acquittal is the statement of the Prosecutor of the ICTY, Serge Brammertz, following acquittals in the *Gotovina et al.* case.<sup>56</sup>
43. The written and oral submissions by the Prosecution in this case have not been made to the media, but they have also not been made before the forum responsible for adjudicating the merits of the Main Case. The Prosecution submissions improperly question the correctness of Mr Bemba's acquittal and very publicly suggest that the Main Case Appeals Judgment is the consequence of offences committed by Mr Mangenda.
44. The Trial Chamber should take the Prosecution's submissions into account as another factor against any further period of physical incarceration of Mr Mangenda. The Prosecution has inappropriately suggested that Mr Mangenda's offences in relation to non-merits lies of witnesses are responsible for procuring a wrongful acquittal of Mr Bemba. The claim is unfounded, inappropriate and unfairly tarnishes Mr Mangenda's reputation, as well as the integrity of the judicial organs of this Court.

#### **IV. Conclusion**

45. The Prosecution's suggestion that Mr Bemba's acquittal is a consequence of an offence directly impugns the respect that must be accorded to the judicial organs of the ICC. The Prosecution had every opportunity in the Main Case to make any submissions it considered necessary and appropriate for the proper evaluation of witness testimony in that case. In any event, the Appeals Chamber placed no reliance on any of the witnesses who have been the object of the present case. The Appeals Chamber's findings are a reminder, however, that this Chamber's findings concerning non-merits lies do not exclude the possibility that these witnesses told the truth about merits issues in the Main Case. This reinforces the inappropriateness of the Prosecution's repeated insinuations

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<sup>56</sup>See "Statement of the ICTY Prosecutor Serge Brammertz in Relation to the *Gotovina* and *Markac* Appeal Judgement", 21 November 2012, available at: [http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/121121\\_prosecutor\\_brammertz\\_en.pdf](http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/121121_prosecutor_brammertz_en.pdf) (last accessed 19 July 2018).



that this Trial Chamber should assess gravity based on the assumption that the testimony concerning the merits of the case was untruthful.

46. The Prosecution's submissions on the Main Case Appeals Judgment display a lack of respect for the judicial organs of the Court and mischaracterise the consequences of the conduct for which Mr Mangenda has been convicted by this Trial Chamber. The unfair impact of these submissions on Mr Mangenda's reputation should be recognised as another factor against any further period of incarceration.



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**Christopher Gosnell**  
**Counsel for Mr Jean-Jacques Kabongo Mangenda**

Respectfully submitted this 19 July 2018,  
At The Hague, The Netherlands.