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Date: **23 February 2017**

**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 Redacted Document**
**With Public Annex A**

**Submissions on Sentence**

**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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# I. INTRODUCTION

1. Jean-Jacques Mangenda was, at the commencement of the offences of which he has been found guilty, 33 years old and relatively inexperienced. He has served 11 months and seven days in detention for the offences of which he now stands convicted. His conviction will likely entail very serious personal consequences going beyond that period of imprisonment including: (i) [REDACTED] (ii) [REDACTED]; and (iii) [REDACTED], which is a direct consequence of these proceedings, remains in place.

2. The overriding goal of sentencing, as stated by the Appeals Chamber, is "to tailor a penalty to fit the gravity of the crime and the individual circumstances of the accused."[1] The gravity of the offence, which involves an individualised assessment of the person's role and culpability, has been described as the "principal"[2] or "primary"[3] consideration in determinations of sentence. The principle of deterrence, though a highly relevant purpose of sentencing,[4] "must not be accorded undue prominence in the overall assessment of the sentences to be imposed."[5]

3. The offences of which Mr. Mangenda has been convicted are serious. The personal consequences that he has suffered have also been, and will continue to be, very serious indeed: he has been imprisoned for almost a year; [REDACTED]; and his working life has been, in effect, destroyed. These consequences constitute a strong deterrent to others who might be tempted to commit the same offences and, taking into account his particular circumstances, adequately sanction his specific role in the offences as found by the Trial Chamber.

4. Mr. Mangenda accordingly requests that a sentence be imposed upon him of a term of imprisonment not exceeding the time he has already served in detention; or, in the alternative, that any further term of imprisonment be suspended, subject to good

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[1] *Lubanga* AJS, para. 76. This submission is a public redacted version of filing ICC-01/05-01/13-2088-Conf-Red.

[2] *Lubanga* SJ, para. 36 ("[t]he 'gravity of the crime', as set out in Article 78(1) of the Statute and in Rule 145 of the Rules, is one of the principal factors to be considered in the determination of the sentence, which should be in proportion to the crime (Article 81(2)(a) of the Statute), and it should reflect the culpability of the convicted person (Rule 145(1)(a) of the Rules)"); *Katanga* SJ, para. 40 ("the Chamber must determine a sentence which reflects the degree of culpability and balance all the relevant factors.") All future references to "Article", unless otherwise indicated, refer to Articles of the Rome Statute.

[3] *Delalić* AJ, para. 731.

[4] *Katanga* SJ, para. 38.

[5] *Tadić* AJS, para. 48.

behaviour or the imposition of other conditions customarily associated with probation that are deemed appropriate by the Trial Chamber.

## II. PROCEDURAL HISTORY AND PURPOSE OF THE PRESENT SUBMISSIONS

5. On 19 October 2016, the Chamber rendered its Judgment pursuant to Article 74 of the Statute,[6] convicting Mr. Mangenda on 37 counts of offences against the administration of justice under Article 70, involving 14 witnesses. The Presiding Judge established a Sentencing Calendar requiring the parties to file written submissions "on the additional evidence presented and appropriate sentences to be imposed by 7 December 2016."[7]

6. The purpose of the present submissions is limited to the appropriate sentence *on the basis of* the findings in that Trial Judgment and additional evidence concerning Mr. Mangenda's individual circumstances. These submissions are not understood as an opportunity to request reconsideration of the Trial Chamber's findings, question those findings, or interpret those findings in a tendentious manner. Good faith characterisations of the Trial Judgment will nevertheless be made with a view to expounding on the degree of Mr. Mangenda's personal culpability given the nature of his involvement in those offences as found by the Trial Chamber. These submissions are, accordingly, responsive to the first criterion for determination of sentence in Article 78(1): gravity.

7. The present submissions also address the second factor in the determination of sentence expressed in Article 78(1), namely the "individual circumstances of the convicted person."

[6] *Bemba et al.* TJ ("Trial Judgment").
[7] Sentencing Calendar, para. 2 (iii).

## III. STATUTORY FRAMEWORK AND APPLICABLE PRINCIPLES

8. Article 78 of the Statute provides that:

> 1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
>
> 2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

9. Rule 145, concerning "Determination of sentence," declares that:

> 1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:
>
> (a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;
>
> (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;
>
> (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.
>
> 2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:
>
> (a) Mitigating circumstances such as:
>
> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
>
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;
>
> (b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

10. The Appeals Chamber has addressed, without expressly deciding, whether the Rule 145 factors are illustrative of, or additional to, those set out in Article 78.[8] In any event, the Appeals Chamber has described these criteria collectively as establishing a "comprehensive scheme for the determination and imposition of sentence."[9]

## IV. MR. MANGENDA'S INDIVIDUAL CIRCUMSTANCES

11. Article 78(1) requires the Chamber to "take into account […] the individual circumstances of the accused" in determining sentence. Rule 145(1)(c) also requires that "age, education, social and economic condition" be considered in the determination of sentence. Many of these factors may be characterised as "mitigating" circumstances even though they are not listed under Rule 145(2)(a). Factors in mitigation are assessed according to a "balance of probabilities" standard, whereas aggravating circumstances are to be taken into account only when established "beyond reasonable doubt."[10]

12. Mr. Mangenda has [REDACTED]. [REDACTED], born while Mr. Mangenda was in custody at the ICC Detention Centre, is [REDACTED]; [REDACTED], is [REDACTED]; and [REDACTED], is [REDACTED].[11] Mr. Mangenda is bringing up

[8] *Lubanga* AJS, paras. 62-66.
[9] *Id*. para. 32.
[10] *Katanga* SJ, para. 33. The Prosecution is noted as having agreed that this is the appropriate standard of proof.
[11] CAR-D23-0004-0211. For the relevance of family circumstances specifically, including the number of children and impact of sentencing on family members, *see Kunarać* AJ, para. 362 ("[f]amily concerns should in principle

these children with his wife [REDACTED], to whom he has been married since [REDACTED].[12] They live together just outside of [REDACTED]. Any further period of detention would deprive [REDACTED] at an impressionable age and when they need him most.

13. The conviction gives rise to, or reinforces, serious consequences for Mr. Mangenda that are relevant to assessing whether any further custodial sentence is warranted.[13]

14. First, the conviction substantially increases the prospect that [REDACTED].[14] Mr. Mangenda's connection to the [REDACTED], is [REDACTED]. The [REDACTED]. It has stated expressly its [REDACTED].[15] The [REDACTED],[16] and Mr. Mangenda has been permitted on that basis to [REDACTED].[17]

15. Mr. Mangenda's attempts to [REDACTED], on the basis of the seriousness of the offences with which he had been charged.[18] The prospect of ever [REDACTED] is now substantially reduced by the conviction. Mr. Mangenda, aside from the stress and anxiety caused by the prospect of separation from his family, now faces [REDACTED]. [REDACTED], that this may and should be taken into account in sentencing.

16. Second, [REDACTED] will have a serious impact on his family and on his family life. Mr. Mangenda's wife has been granted [REDACTED].[19] She and the children are now [REDACTED], where the children are [REDACTED].[20] In these circumstances, it is not reasonable to expect that Mrs. Mangenda could re-locate herself and Mr.

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be a mitigating factor"); *Haraqija & Morina* TJ, para. 117 ("the Trial Chamber takes into account as a mitigating circumstance that Astrit Haraqija has two children of eight and four years of age"); *Krajišnik* TJ, para 1164.

[12] CAR-D23-0004-0214.

[13] *Vujin* AJ, paras. 168, 172 ("[b]efore determining what punishment should be imposed, however, it is necessary to consider what other consequences may flow from the finding by the Appeals Chamber that the Respondent is in contempt of the Tribunal, so that those consequences may be taken into account in that determination"); *Prince Taylor* SJ, para. 51 (taking into account "the bad effect on his family" of loss of employment occasioned by proceedings and conviction).

[14] CAR-D23-0010-0008. *See also* ICC-01/05-01/13-808-Conf-Anx2, p. 4.

[15] ICC-01/05-01/13-808-Conf-Anx2, p. 4 ("[REDACTED]")

[16] ICC-01/05-01/13-1088-Conf-AnxII, p.4 ("[REDACTED]"); *see also* ICC-01/05-01/13-1981-Conf-Exp-Anx1.

[17] ICC-01/05-01/13-808-Conf-Anx1, p. 2 ("[REDACTED]"); *see also* ICC-01/05-01C/13-1088-Conf-AnxII; ICC-01/05-01/13-1981-Conf-Exp-Anx1.

[18] CAR-D23-0010-0001; CAR-D23-0010-0003; CAR-D23-0010-0008.

[19] CAR-D23-0010-0019; CAR-D23-0010-0010.

[20] CAR-D23-0010-0010; CAR-D23-0010-0019; CAR-D23-0010-0024; CAR-D23-0010-0025; CAR-D23-0010-0026.

Mangenda's three young children [REDACTED], nor would this be in the children's best interests.

17. Third, the terms of [REDACTED], which has changed as a result of the present proceedings, [REDACTED].[21] He has, consequently, REDACTED].

18. Fourth, the consequence of the Trial Judgment is such that [REDACTED].

19. Fifth, Mr. Mangenda has already spent 11 months and seven days in detention for the offences of which he now stands convicted, and a further fifty-two days separated from his family before being allowed to enter the [REDACTED] during his Court-mandated provisional release.[22]

20. Sixth, Mr. Mangenda has developed, since being incarcerated, [REDACTED].[23] This is a [REDACTED]. [REDACTED] is an additional factor that should be taken into consideration in evaluating whether a further custodial sentence is necessary and appropriate given his personal circumstances.[24]

21. Seventh, further incarceration would presumably occur in The Netherlands. A UN report, albeit in the context of longer-term detention, has underscored the impact of such detention on the family members of the detainee:

> Finally, the humanitarian argument is also applicable to the needs of the family and dependents of a sentenced person who is held in a foreign prison while they remain in their country of origin. Research suggests that prisoners' families face an array of challenges as a consequence of their family member's imprisonment that include marital difficulties, financial and housing problems, social stigma and victimization, loneliness, anxiety and emotional hardship. Prisoners' children may experience psychological harm and develop behavioural problems. Such indirect consequences of imprisonment are highly likely to be exacerbated by the imprisonment of a family member abroad.[25]

[21] CAR-D23-0010-0027; CAR-D23-0010-0028; CAR-D23-0010-0029.
[22] ICC-01/05-01/13-808-Conf-Anx1, p. 2 ("[REDACTED].")
[23] CAR-D23-0010-0030; CAR-D23-0010-0031; CAR-D23-0010-0032; CAR-D23-0010-0033; CAR-D23-0010-0034; CAR-D23-0010-0035.
[24] *Rašić* SJ, para. 31 ("the Trial Chamber accorded significant effect to the accused's perception of her detention and the practical impact upon her well-being. In this context, the Trial Chamber considered Dr. Vera Petrović's reports concerning Jelena Rašić's health condition, Jelena Rašić's comparatively young age and that this is the first time that she is sentenced to a prison sentence.")
[25] United Nations Office of Drugs and Crime *Handbook on the International Transfer of Sentenced Persons,* (New York: United Nations 2012), pp. 12-13.

Mr. Mangenda's family, as a practical matter, is not likely to [REDACTED]. His wife, [REDACTED] during his period of pre-trial detention.

22. These consequences are very substantial, in particular for a man of Mr. Mangenda's age. His career has, in effect, been destroyed. [REDACTED], with no prospect of that changing in the near future. His ability to live with his family [REDACTED] is in jeopardy, particularly in light of the conviction. He has served almost a year in jail. These are heavy consequences that will have a permanent effect on Mr. Mangenda and his family.

## V. MR. MANGENDA'S ROLE IN THE OFFENCES

### *i. Mr. Mangenda's Position, Age and Experience at the Time of the Offences*

23. Mangenda was 33 years old at the commencement of the common plan as found by the Trial Chamber.[26] He was admitted to [REDACTED].[27] In June 2006, just 18 months later, he started working as a Case Manager with the ICC's Office of Public Counsel for the Defence (OPCD).[28] During the short interval between having qualified as a lawyer and being employed with the OPCD, he worked under the supervision of other lawyers in a small law office. In October 2008, Mr. Mangenda joined the defence team of Mr. Jean-Pierre Bemba.[29] Most of his career since being called to the bar, accordingly, has consisted of working as a Case Manager on the defence team in the *Bemba* trial. Mr. Mangenda has never had an independent law practice, has never been inscribed on the ICC List of Legal Assistants, and has never been on the ICC List of Counsel.

24. The Chamber may safely infer, based on all the circumstances, that Mr. Mangenda was neither in a "commanding or authoritative role,"[30] nor the "instigator"[31] of the offences of which he now stands convicted as a co-perpetrator. These are factors that have in the past been considered relevant to sentencing, even when not relevant to

[26] *See* [REDACTED].
[27] [REDACTED].
[28] [REDACTED].
[29] *Id.* l. 1377.
[30] *Limaj* TJ, para. 732.
[31] *Rašić* SJ, para. 19 ("Jelena Rašić was not, and could not, have been the original instigator of the broader criminal conduct of procuring false evidence for use in the *Lukić and Lukić* trial.")

conviction. As a mitigating circumstance, this assessment is to be made according to the standard of balance of probabilities.[32]

*ii. The Varying Degree of Mr. Mangenda's Contribution In Respect of Different Witnesses*

25. The Trial Chamber found that Mr. Mangenda jointly agreed with Mr. Kilolo and Mr. Bemba to illicitly interfere with Defence witnesses "at the latest when the Main Case Defence arranged for the testimony of D-57,"[33] who appeared to give testimony on 17 October 2012. The Trial Chamber summarised Mr. Mangenda's essential contribution to the common plan (*i.e.*, his *actus reus*) as: (i) reporting to and updating Mr. Kilolo on the testimony of the affected witnesses to be able to engage in further illicit interference;[34] (ii) advising and planning with Mr. Kilolo on which witnesses needed to be illicitly coached and how;[35] (iii) providing the questions of the victims' legal representatives for the purpose of facilitating illicit coaching;[36] and (iv) conveying Mr. Bemba's instructions to facilitate coaching.[37] Further acts in support of the plan included assisting in the distribution of telephones to four witnesses for which Mr. Mangenda "could not have surmised any legitimate purpose"[38]; using coded language during telephone conversations with Mr. Kilolo; and agreeing to destroy physical evidence of *post facto* bribes.[39] The Trial Chamber also concluded that Mr. Mangenda was not only "regularly informed" of Mr. Kilolo's coaching activities, but was "even present when Mr. Kilolo illicitly instructed witnesses."[40] The Trial Chamber concluded that Mr. Mangenda played a "critical role" and "acted as an equal in the implementation of the common plan."[41]

26. The Trial Chamber also noted, however, that the degree of Mr. Mangenda's contribution was not the same for all witnesses. For example, the Trial Chamber found

[32] *Katanga* SJ, para. 33 ("[w]ith regard to possible granting of mitigating circumstances, the parties also concur that that (sic) the assessment should not be conducted with respect to the criterion of reasonable doubt but rather with respect to the standard commonly referred to as the 'balance of probabilities.'")
[33] Trial Judgment, para. 103.
[34] *Id*. paras. 108, 839, 844.
[35] *Id*. paras. 108, 839.
[36] *Id*. para. 108.
[37] *Id*. para. 108, 842-843.
[38] *Id*. paras. 371, 421.
[39] *Id*. para. 109.
[40] *Id*. para. 849.
[41] *Id*. para. 847.

that "there is no direct or indirect link between Mr. Mangenda's activities and the false testimony given by D-23, D-26, D-55, D-57 or D-64."[42]

27. A distinction or gradation also appears to have been noted by the Trial Chamber in respect of the remaining nine witnesses found to be part of the common plan. The contribution of Mr. Mangenda to the coaching of the four [REDACTED] witnesses was described by the Trial Chamber as follows:

- "aid[ing] logistically in the illicit coaching by being present for the distribution of the cell phones to witnesses D-2, D-3, D-4 and D-6";[43]
- giving "moral support and encouragement to Mr. Kilolo through his presence at meetings";[44]
- this moral support extended implicitly to the giving of phones and the promise of money, where Mr. Mangenda was found to be present,[45] but implicitly did not extend to the actual giving of money to witnesses, where Mr. Mangenda was found to be not present;[46]
- Mr. Mangenda was not involved in discussions with witnesses regarding the substance of their testimony;[47] and
- the Trial Chamber did not make findings that Mr. Mangenda knew about the content of the coaching discussed at paragraphs 355 through 366 of the Judgment.[48]

28. The highest level of contribution is reserved for the five final witnesses, in particular D-25, D-15 and D-54. The Trial Chamber found that Mr. Mangenda was "firmly involved in" the illicit coaching of D-15, *inter alia*, by providing the victims' questions to Mr. Kilolo while the witness was under oath;[49] "partook in Mr. Kilolo's overall illicit coaching activities by updating Mr. Kilolo on the details elicited from D-25" and in respect of other matters;[50] and "conveyed Mr. Bemba's instructions to Mr.

[42] *Id*. para. 920. *See also* para. 865.
[43] *Id*. para. 867.
[44] *Id*.
[45] *Id*. paras. 373, 367, 420.
[46] *Id*. para. 376.
[47] *Id*. para. 354.
[48] *Id*. paras. 354-380, 418, 421.
[49] *Id*. para. 591.
[50] *Id*. para. 505.

Kilolo to influence D-54" and then discussed with Mr. Kilolo how best to "ensure consistency with other evidence and avoid contradictions on D-54's part."[51]

29. A somewhat lesser – but by no means negligible – contribution appears to have been found in respect of D-13 and D-29. Mr. Mangenda's contribution to Mr. Kilolo's coaching of D-13 rests on the fact that "Mr. Kilolo discussed his illicit coaching activities with Mr. Mangenda over the phone,"[52] and that he "listen[ed] to Mr. Kilolo's updates and complaints about such activities and tacitly approv[ed] them."[53] The Trial Chamber appears to have circumscribed its finding in this way given that the only evidence concerning communications between Mr. Mangenda and Mr. Kilolo in respect of this witness was a complaint by the latter of the onerous nature of the task, and the former's response "*Hum*".[54] In respect of D-29, the Trial Chamber observed that Mr. Mangenda "approved and partook in Mr. Kilolo's overall illicit coaching strategy" but, given the timing of the communication between them, noted that his contribution to the common plan consisted of "updating Mr. Kilolo on the details elicited from witness D-29 so that the latter, *inter alia*, could prepare D-30, D-29's wife, accordingly."[55]

30. These distinctions, which are believed to arise from a fair, if not necessarily exhaustive, recitation of the Trial Chamber's findings on contribution to the common plan, suggest that the Chamber discerned three, or possibly four, degrees of contribution by Mr. Mangenda: (1) no contribution in respect of the coaching of five witnesses; (2) giving "moral support and encouragement to Mr. Kilolo" of the coaching of four witnesses at the [REDACTED] meetings[56] in circumstances where he could not have failed to apprehend that witness coaching was afoot;[57] (3) giving moral support in respect of the coaching of D-13, and contributed to the coaching of a witness outside of the DCC, namely D-30, through his description to Mr. Kilolo of the testimony of D-29; and (4) being actively involved in planning and facilitating the execution of the coaching of D-25, D-15 and D-54.

[51] *Id*. para. 652.
[52] *Id*. para. 667.
[53] *Id*. para. 868.
[54] *Id*. paras. 659-660; CAR-OTP-0080-1419, l. 15 (French translation).
[55] Trial Judgment, para. 542.
[56] *Id*. para. 867.
[57] *Id*. para. 371.

31. The degree of a person's contribution to a common plan, even given the requisite *mens rea,* is relevant to sentencing.[58] One of the criteria expressly mentioned in Rule 145(1)(c) is "the degree of participation of the convicted person", which may be viewed as relevant to the gravity of an individual's conduct and their culpability. As stated at the ICTY in respect of contributions to a JCE, "[i]t is up to the trier of fact to consider the level of contribution […] when assessing the appropriate sentence, which shall reflect not only the intrinsic gravity of the crime, but also the personal criminal conduct of the convicted person and take into account any other relevant circumstance."[59] The degree of "actual involvement" in an offence involves a more nuanced exercise in respect of sentencing that entering a conviction according to one or another mode of criminal responsibility.[60]

32. Mr. Mangenda's contribution was zero in respect of five of the coached witnesses whereas he was "firmly involved" in the design of the coaching of three witnesses. The degree of his involvement in respect of the other six coached witnesses falls between these two end-points, and there is no need to further characterise the precise findings of the Chamber in that regard. The variation in the degree of Mr. Mangenda's role in respect of the fourteen witnesses is a matter to be appropriately taken into consideration in sentencing.

*iii. No Direct Execution of the Act of Coaching, and the Impact of Mr. Mangenda's Degree of Knowledge of the Scale of Coaching*

33. Mr. Mangenda never had any discussion with any of the 14 witnesses concerning the content of their testimony, and there is no finding or evidence that he participated – in the sense of listening and contributing – while any act of coaching occurred. In total, there are nine witnesses (the four [REDACTED] witnesses and the five witnesses to whose coaching he did not contribute) in respect of which Mr Mangenda was not found to have any knowledge of the content of the coaching that occurred. The degree of knowledge in respect of two others, D-29 and D-13, has been described in the last section.

[58] *Katanga* SJ, para. 43 ("in order to determine the gravity, the particular circumstances as well as the nature and degree of participation of the convicted person in the commission of the crime must be taken into account.")
[59] *Martić* AJ, para. 84.
[60] *Krstić* AJ, para. 273.

34. This observation is not intended to detract from the Trial Chamber's finding that Mr. Mangenda participated in the common plan, or that he was "fully integrated into the *planning* of Mr. Kilolo's illicit coaching activities."[61] Nevertheless, personal involvement in the execution of an offence provides knowledge of the nature of the offence in a way that planning may not. This is a distinction that may be considered in assessing personal culpability, and a proportionate sentence.

35. The Chamber is invited to also consider the degree of his knowledge even in respect of the three witnesses in respect of whom Mr. Mangenda was found to have made the highest contribution. The extent of D-54's coaching is particularised in paragraph 622 of the Trial Judgment. The Trial Chamber acknowledged that the 19 October 2013 conversation between Mr. Mangenda and Mr. Kilolo did not, contrary to the Prosecution's allegations, concern D-54.[62] The consequence is that the Trial Judgment reflects no finding that Mr. Mangenda had any discussion with Mr. Kilolo about D-54 after 9 September 2013, which was seven full weeks before the commencement of his testimony. The Trial Chamber found that there were fourteen coaching conversations with the witness that occurred between 9 September and 31 October 2013, many of extended duration.[63] However, there is no finding that Mr. Mangenda was informed of the content of these conversations.

36. The degree of involvement in the execution of an offence is relevant to a holistic assessment of a perpetrator's "role" in that offence and, consequently, their degree of blameworthiness. In that respect, the Trial Chamber did not find that Mr. Mangenda had knowledge of the degree and extent of D-54's coaching; that the coaching included testifying falsely about the three types of facts that were encompassed by the DCC;[64] or that the coaching occurred beyond the cut-off date, let alone after the witness had taken the oath.

37. The same observation can be made in respect of participation in and knowledge of specific payments to some witnesses. The Trial Chamber did not find that Mr.

[61] Trial Judgment, para. 839 (italics added).
[62] *Id*. para. 619.
[63] *Id*. para. 622.
[64] *Id*. paras. 865, 914 ("[a]s previously held, the Chamber has considered the falsity of the testimonial evidence relating only to the witnesses' evidence on (i) prior contacts with the defence in the Main Case, (ii) the receipt of money, material benefits and non-monetary promises, and (iii) the witnesses' acquaintance with third persons"), 919. The precise matters on which Mr Mangenda was found to have relayed instructions from Mr Bemba to Mr Kilolo in respect of D-54 are set out at paragraphs 605-606, 609, and 611-612.

Mangenda was aware of the payments to D-29 or the other non-[REDACTED] witnesses.[65] The Trial Chamber did find that Mr. Mangenda was aware of the promise of a payment to the four [REDACTED] witnesses, but also found that he was not present when the payments that were made, including when further conversations took place about the nature of the *quid pro quo* in return for the money.[66]

38. The absence of Mr. Mangenda's involvement in the direct execution of witness coaching is, in itself, relevant in assessing his degree of culpability for the offences. His knowledge of the acts of coaching and the nature of the inducements being offered fell far short of those found by the Trial Chamber to have taken place. This is exemplified, in particular, by the degree of coaching that the Trial Chamber found to have occurred in respect of D-54 as compared to the findings concerning Mr. Mangenda's knowledge thereof. The same observation is particularly salient in respect of the Trial Chamber's findings regarding D-13, D-25, D-2, D-3, D-4, D-6 and even D-15. This degree of knowledge is highly relevant to assessing culpability and sentence.

*iv. The Object of the Offence*

39. The Trial Chamber limited its findings to three categories of false testimony:

> (i) prior contacts with the defence in the Main Case, (ii) the receipt of money, material benefits and non-monetary promises, and (iii) the witnesses' acquaintance with third persons.[67]

40. This finding was in accordance with the Trial Chamber's determination early in the trial that the parties should limit the evidence to be adduced to matters that concern only the truth or falsity of testimony falling within the three foregoing categories.[68] The truth or falsity of other facts – notably, contested matters in the Main Case such as the timing of the arrival of troops in the Central African Republic, languages used by troops, the perpetration of specific crimes, etc. – was excluded from the scope of the trial. Previous case-law has held that although matters outside of the scope of the

[65] *Id*. paras. 520-527.
[66] *Id*. paras. 374-375.
[67] *Id*. para. 902.
[68] ICC-01/05-01/13-1154, para. 14 ("t]he Chamber emphasises that it is not the purpose of these proceedings to re-litigate the Main case. Submissions that attempt to do so will not be entertained");A ICC-01/05-01/13-1188, para. 12 ("[t]urning to the merits, the Single Judge recalls that the Chamber has already cautioned the parties that the purpose of these proceedings is not to re-litigate the Main Case. Submissions which attempt to do so, or evidence presented solely for this purpose, will not be entertained.")

charges may be considered in assessing gravity or as an aggravating circumstance for the purpose of sentencing, this is only permissible where: (i) no unfairness would arise given the particular procedural safeguards that were in place at trial (*i.e.*, the existence of an opportunity to refute the facts in question); and (ii) the aggravating fact is proven beyond a reasonable doubt.[69] The former condition is not fulfilled in the present case given the framework that governed the proceedings from the outset and, in consequence, the latter cannot safely be established by any fact-finding that could occur only within the sentencing phase.

41. The Trial Chamber is accordingly requested to assess gravity on the basis of the three types of lies of which the accused were found guilty of having promoted. The falsehoods in question are by no means insignificant, as they pertain to the ability of the Trial Chamber to assess the credibility of witnesses and, consequently, the substance of their testimony. This cannot be disputed. The Trial Chamber may nevertheless consider whether gravity is enhanced when, for example, a lie is concocted and produced that is directly relevant to the merits of the case. Some of the comparable international cases discussed below involved the production of lies that were designed not only to enhance the credibility of witnesses, but which the perpetrators could not have failed to understand involved obvious falsehoods that went to the merits of the case under adjudication.

42. Jelena Rašić, for example, was found guilty of five counts of contempt of the ICTY for having paid bribes to three witnesses to sign pre-prepared statements that substantiated a false alibi.[70] Two pre-prepared statements were presented to one of the three witnesses so that he could find a second and third person to affirm the truth thereof, upon which basis the Trial Chamber was able to find that "she knew that the statements were false.[71] The accused was sentenced to one year, with the last eight months thereof suspended.[72] That sentence was upheld on appeal.[73]

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[69] *See Lubanga* SJ, para. 68 (finding in respect of a conviction in respect of the conscription and use of child soldiers that "the Chamber is entitled to consider sexual violence in determining the sentence that is to be passed, notwithstanding the fact that it did not form part of the Confirmation Decision. Given the procedural safeguards, there will be no consequential unfairness if the Chamber decides that sexual violence is a relevant factor").
[70] *Rašić* SJ, paras. 10-13.
[71] *Id*. para. 18; *Rašić* AJ, para. 3.
[72] *Rašić* SJ, paras. 31, 36.
[73] *Rašić* AJ, para. 44.

43. Special circumstances were relied upon, in particular, as the basis for suspending the last eight months of sentence. The one-year sentence is nevertheless instructive for present circumstances to the extent that it involves lies that were even more central to the assessment of the merits of the case than were the lies found to have been produced with Mr. Mangenda's participation. Putting fingers on the scale of justice is undoubtedly a serious offence, but may be viewed as somewhat less egregious than seeking out witnesses to sign pre-prepared statements in full knowledge that their entire contents are false.

*v. Obligation to Follow Instructions and Passivity at the Earlier Stage of the Offences*

44. A mitigating factor that may also be considered is Mr. Mangenda's obligation to perform certain acts and the practical consequences of refusal. Providing documents filed in the case, such as the questions of the legal representatives of victims in respect of D-15, was a task he was obliged to perform as part of his responsibilities as Case Manager for the Bemba Defence.[74] His only practical alternative course of action during the [REDACTED] meeting aside from passivity would have been denunciation or resignation.[75] These were necessary courses of action to avoid criminal responsibility. The Trial Chamber may nevertheless take into account the quality of these acts in assessing Mr. Mangenda's degree of blameworthiness. He was, at that time, [REDACTED]. Losing his job as a Case Manager would have had serious consequences. These are matters that may be relevant to culpability and sentencing, even if they are irrelevant to the findings of criminal responsibility.

45. Passivity is also qualitatively different from alacrity or enthusiasm, which is an aggravating factor in sentencing.[76] The Chamber did not further qualify Mr. Mangenda's conduct and mental state during the [REDACTED] meetings as reflecting enthusiastic participation, discomfort, or uncertainty. These are factors that, at least at that stage of the commission of the offences, may appropriately be taken into account as mitigating factors.

[74] Trial Judgment, para. 591.
[75] *Id*. para. 368-371, 373.
[76] *Blaškić* AJ, para. 686; *Jelisić* AJ, para. 86; *Kayishema & Ruzindana* AJ, para. 351.

## VI. COMPARABLE CASES

46. No two cases are exactly alike especially given the myriad factors that are relevant to sentencing. Each of the international cases below involves interference with between one and five witnesses. Although the number of witnesses involved is less than the number in respect of whom Mr. Mangenda has been convicted, some of these cases also arguably involved a higher level of gravity and direct culpability of the perpetrator.

47. The *Rašić* case involved three witnesses. The accused presented pre-prepared statements to establish an alibi for the accused.[77] The accused, in these circumstances, could not have failed to be fully aware that the entirety of the substance of the statements was false. Further, the accused was herself responsible for recruiting two of the three makers of the false statements. This behaviour reflected a high level of knowledge of the nature of the offence and the breadth of the falsehoods being presented to the Court. The ICTY Trial Chamber imposed a sentence of one year, eight months of which were suspended.[78] This sentence was upheld on appeal.[79]

48. The *Vujin* case at the ICTY involved a Lead Counsel manipulating the testimony of two witnesses and making false statements to the court in respect of a third witness.[80] The type of manipulation in question was not substantially different than that which the Trial Chamber has found occurred in the present case. The Appeals Chamber of the ICTY found the contempt to be "serious," noting that courts "necessarily rely very substantially upon the honesty and propriety of counsel in the conduct of litigation."[81] The Appeals Chamber, after directing that the Lead Counsel be struck off the list of counsel for his misconduct, decided:

> The Chamber has anxiously considered whether a term of imprisonment should be imposed, but it has decided that it would be inappropriate in the present case. A substantial fine is nevertheless necessary in this case to achieve the purposes for which punishment is imposed. The Appeals Chamber fixes that fine at Dfl 15,000.[82]

[77] *Rašić* SJ, paras. 10-13.
[78] *Id*. paras. 31, 36.
[79] *Rašić* AJ, para. 44.
[80] *Vujin* AJ, para. 160.
[81] *Id*. para. 165.
[82] *Id*. para. 173 (just under 7000 Euros).

49. Eric Senessie was convicted by a single judge of the Special Court for Sierra Leone for interfering with five witnesses, including through bribery.[83] He directly offered bribes to induce former Prosecution witnesses to recant their testimony. Furthermore, the execution of the offence appears to have involved harassment to the extent that the accused was a leader in the community and the targets of the offence were approached repeatedly after having refused the bribe in order to "persuade them to recant their testimony."[84] The Independent Counsel prosecuting the case asked for a custodial sentence of five to seven years.[85] The accused received a sentence of two years.

50. Prince Taylor, an investigator with the Defence team of Charles Taylor, was convicted of the same scheme involving Senessie described above. He was acquitted of interference through bribery, but convicted of interference by other means. Prince Taylor was sentenced primarily on the basis that he had used Senessie to commit the offences and then encouraged him to lie to investigators who were investigating the conduct. The Independent Counsel prosecuting the case called for a sentence of 4-5 years.[86] Prince Taylor was sentenced on four counts to a sentence of 2 years, and on a fifth count, to two-and-a-half years, all to be served concurrently.[87] The conviction was subsequently reversed on appeal.[88]

51. The *Bangura et al*. case involved attempting to pressure and bribe a key Prosecution witness to recant his testimony in support of a potential post-conviction review proceeding. The bribes offered were substantial,[89] and the threats serious enough to cause the witness to fear for his life.[90] The four accused's involvement in initiating and executing the scheme to pressure and bribe witnesses varied somewhat, accounting for a variation in their sentences between 18 months and two years.[91] The Single Judge imposed on one of the defendants a suspended sentence on the condition that he remain on good behaviour for a period of two years from the date of the judgement.[92]

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[83] *Senessie* SJ, para. 1; *Senessie* TJ, para. 3 (four of the five witnesses were sought to be influenced by way of a bribe, and the fifth was not).
[84] *Senessie* SJ, para. 18.
[85] *Id*. para. 2.
[86] *Id*. para. 5.
[87] *Prince Taylor* SJ, paras. 44-49, 56-57.
[88] *Prince Taylor* AJ, para. 66.
[89] *Bangura et al.* TJ, paras. 160, 678 (the target mentioned an offer of bribe of $10,000, although the Trial Chamber did not accept this evidence as credible).
[90] *Id*. para. 174 ("Sesay said that he told the Court that he feared for his life").
[91] *Bangura et al*. SJ, paras. 70-101.
[92] *Id.* para. 92 ("I sentence him to a period of 18 months imprisonment on each count, to be served concurrently but in the light of his plea, his cooperation with the Court, his acceptance of his wrong-doing, and his honest

Two of the accused were already serving lengthy sentences for war crimes and crimes against humanity.

52. The *Morina and Haraqija* case involved only a single witness, but also involved acts of intimidation. The pressure put on the witness, which was found to have "constituted intimidation" despite having been "staged in a friendly atmosphere", involved "alluding to severe negative consequences" for the witness, who was a protected prosecution witness.[93] The perpetrators were a government minister and the emissary acting on his behalf who conveyed the message.[94] The Prosecution, relying on the "difficulties which the Trial Chamber in the *Haradinaj et al*. case faced in securing witness testimony in an atmosphere that many witnesses perceived to be unsafe"[95] placed particular emphasis on deterrence in asking for a sentence of two years for the minister, and one year for the emissary. The Trial Chamber imposed a sentence of 5 and 3 months, respectively.[96]

## VII. OTHER FACTORS IN MITIGATION

53. Mr. Mangenda has never previously been the object of any criminal proceedings.[97] There is no evidence of any non-criminal bad character. He co-operated with the Prosecution to the extent of providing a candid and lengthy interview in which he denied the charges, but provided factually correct information about, for example: his telephone numbers;[98] the number of missions in which he participated;[99] his degree of contact with witnesses, at least in respect of conversations relating to their testimony;[100] and a variety of other matters. He did not cease the interview even when confronted with information that has turned out to be incorrect such as, for example, the allegation that he had paid money to witnesses[101] and that he had forged documents.[102]

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admission of wrong doing, I suspend the entire sentence provided he is of good behaviour for a period of two years from today's date. I also release him from the terms and conditions of his bail.")

[93] *Haraqija & Morina* TJ, para. 60.
[94] *Id*. paras. 1-2.
[95] *Id*. para. 113.
[96] *Id*. para. 120.
[97] *See* CAR-D23-0010-0037. *See Senessie* SJ, para. 22 ("I have not been informed that the Defendant had any prior convictions and he comes before this court as a first offender.")
[98] CAR-OTP-0074-0717, ll. 988-1233.
[99] *Id*. l. 1852.
[100] *Id*. ll. 1560, 2554-2560.
[101] *Id*. ll. 2644-2655.
[102] *Id*. l. 2639.

54. Mr. Mangenda has complied fully with the orders of the Court during these proceedings in respect of his attendance at trial and the conditions of his provisional release.[103] He behaved impeccably during his period of detention. He has put forward a defence based on a sincerely-held view of events as he understood them at the time, and without seeking to delay proceedings or otherwise waste the resources of the Court. He has been acquitted of several of the original charges against him, including the allegation that he had been involved in the production of false documents and that he had aided and abetted the false testimony of five witnesses. A defendant's failure to plead guilty is not an aggravating factor, but the failure to plead guilty given the acquittal on certain charges and the rejection of various factual elements of the case should also be considered in determining his overall level of cooperation as a mitigating factor.

55. Mr. Mangenda is a family man who has never before been in trouble with the law. This, in itself, is evidence of good character that the Trial Chamber ought to consider in reaching a just and appropriate sentence that balances mercy and retribution, and takes due account of the interests of rehabilitation.

56. Rehabilitation is an important consideration in the present case, especially given Mr. Mangenda's relative youth and his enormous potential to contribute to society. The Special Court for Sierra Leone has noted that, unlike in respect of crimes against humanity and war crimes, rehabilitation is a sentencing purpose in contempt cases that should not be accorded less weight than retribution and deterrence.[104] A sentence that promotes Mr. Mangenda's re-integration into society as soon as possible, especially given the period of detention already served and the absence of any danger of re-offending, is a goal that should be accorded substantial weight in determining an appropriate sentence.

[103] *See Blagojević & Jokić* AJ, para. 342 ("[m]ere compliance with the law is not ordinarily a factor in assessing an accused's good character, but the Appeals Chamber has noted that a Trial Chamber, in the exercise of its discretion, may credit an accused for fully complying with certain obligations, such as the terms and conditions of an accused's provisional release").
[104] *Senessie* SJ, para. 5.

## VIII. THE VIOLATION OF MR. MANGENDA'S RIGHTS SHOULD BE ACKNOWLEDGED BY A REDUCTION OF SENTENCE

57. The Trial Chamber, in its Decision on Request in Response to Two Austrian Decisions, declared on the basis of two rulings issued by an Austrian court, that "the internationally recognised right to privacy" of, *inter alia*, Mr. Mangenda, had been violated in the course of the Prosecution's investigation.[105] The Trial Chamber also found, however, that the threshold for exclusion of those payment records under Article 69(7) was not met.[106]

58. The violation of Mr. Mangenda's privacy rights should be recognised, at least symbolically, by way of a reduction of sentence. As stated in *Katanga*, "should it be established that the convicted person's fundamental rights were violated, it would indeed be appropriate to take that into account in mitigation of the sentence to be in imposed on him."[107] Violation of rights has in the past been reflected in sentencing, particularly when no other remedy was readily available to vindicate the violation.[108] A reduction of sentence of some degree is warranted on this basis.

## IX. COMMENTS ON THE REGISTRY'S SOLVENCY REPORT

59. Mr. Mangenda [REDACTED]. Mr Mangenda stayed [REDACTED]. Mr Mangenda moved [REDACTED] sometime in [REDACTED].[109] The information in [REDACTED]. Mr. Mangenda has provided, in the course of the current proceedings, information concerning [REDACTED]. The [REDACTED]. The [REDACTED] mentioned [REDACTED]. Prior to that period, Mr. Mangenda's [REDACTED]. The [REDACTED].

[105] ICC-01/05-01/13-1948, para. 28 ("[i]n view of the Austrian Rulings, the Chamber considers that any further assessment whether there was manifestly unlawful conduct is not necessary and concludes that the internationally recognised right to privacy has been violated. The Chamber is not persuaded by the Prosecution's interpretation that the 'in accordance with the law' requirement when assessing privacy infringements means only that the correct procedural safeguards were applied, irrespective of the correctness of their application. Following this view would lead to a merely formalistic interpretation of this safeguard to interfere with a person's right to privacy, and which does not provide an effective protection of this right") (internal citations omitted).
[106] *Id*. para. 40.
[107] *Katanga* SJ, para. 136.
[108] *Kajelijeli* AJ, para. 255. *See Ndindiliyimana* TJ, paras. 2190-93; *Bangura et al.* SJ, para. 91 ("when a court considers a sentence and looks to a convicted person's past behaviour, both good and bad, a court should be entitled to give some credit for suffering caused through a breach of that convicted person's human rights.")
[109] [REDACTED].

## X. CONCLUSION AND RELIEF REQUESTED

60. The personal consequences for Jean-Jacques Mangenda of his conviction have been, and will continue to be, very substantial: he has already served a custodial sentence of nearly one year; [REDACTED]; he faces a substantial probability of separation from his family; and he has been unable to work, despite hitherto having been the main breadwinner for his family, for more than three years. These are all consequences flowing directly from the charges in this case and are all consequences that have had, and will continue to have, a permanent and irreversible effect on his life.

61. The Trial Chamber is respectfully requested to impose a custodial sentence not exceeding the time that Mr. Mangenda has already served in detention: 11 months and seven days. If any additional period of custody is imposed, the Trial Chamber is requested to suspend the execution of such sentence according to any terms and conditions as are deemed appropriate, and as are usually imposed in national systems by way of probation. For example, the Trial Chamber may consider making the suspension of any further period of custody conditional on non-performance of any illegal act, continued good behaviour and/or the imposition of some form of community service.

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Respectfully submitted this 23 February 2017,
At The Hague, The Netherlands