

1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean Pierre Bemba Gombo - ICC 01/05 01/08
5 Presiding Judge Silvia Fernández de Gurmendi, Judge Sanji Mmasenono Monageng,
6 Judge Howard Morrison, Judge Geoffrey Henderson and Judge Piotr Hofmański
7 Judgment on Appeals - Courtroom 2
8 Thursday, 8 March 2018
9 (The hearing starts in open session at 10 a.m.)
10 THE COURT USHER: [10:00:13] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning.
14 Would the court officer please call the case.
15 THE COURT OFFICER: [10:01:17] Good morning, Madam President, your Honours.
16 Situation in the Central African Republic in the case of The Prosecutor versus
17 Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,
18 Fidèle Babala Wandu and Narcisse Arido, case reference ICC-01/05-01/13.
19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
20 My name is Silvia Fernández de Gurmendi and I am the presiding Judge on the
21 appeal arising from the case of The Prosecutor versus Jean-Pierre Bemba Gombo, et al.
22 My colleagues on this appeal are Judge Sanji Mmasenono Monageng,
23 Judge Howard Morrison, Judge Geoffrey Henderson and Judge Piotr Hofmański.
24 I am also joined today by members of the legal staff of the Appeals Division,
25 Mr Volker Nerlich, Ms Savina Savidis, Ms Marianne Saracco, Mr Silvestro Stazzone,

- 1 Mr Juan Calderon Meza and Ms Shannon Ghadiri-Asli.
- 2 May I ask the parties to introduce themselves for the record, please, starting with the
3 Defence, the Defence for Jean-Pierre Bemba Gombo, please
- 4 MS TAYLOR: [10:02:37] Good morning, Madam President. Good morning, your
5 Honours. Good morning to all my colleagues in the courtroom. I would firstly like
6 to wish everyone happy International Women's Day. Appearing for Mr Bemba
7 today we have Ms Mylène Dimitri, Ms Ines Pierre de la Brière, Ms Yuqing Liu and
8 myself, Melinda Taylor. Thank you very much.
- 9 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.
10 The Defence for Aimé Kilolo Musamba.
- 11 MR KARNAVAS: Good morning, Madam President, good morning, your Honours,
12 and good morning to everyone in and around the courtroom. I'm Michael Karnavas
13 along with Rosalie Mbengue and Anastasia Tatarenko for Mr Kilolo.
- 14 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
15 The Defence for Jean-Jacques Mangenda Kabongo.
- 16 MR GOSNELL: Good morning, Madam President, and good morning to your
17 Honours. Christopher Gosnell for Mr Mangenda, who is not present this morning,
18 assisted by Nikki Sethi and Stephanie Erian. Thank you.
- 19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you.
20 The Defence for Fidèle Babala Wandu.
- 21 MR KILENDA: (Interpretation) Good morning, your Honours. Mr Fidèle Babala
22 Wandu is represented by Godefroid Bokolombe, legal assistant; Adriana-Marie
23 Manolescu, case manager; and myself, Jean-Pierre Kilenda, lead counsel.
- 24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you.
25 The Defence for Narcisse Arido, please.

1 MR TAKU: May it please your Honours, my name is Chief Charles Achaleke Taku
2 appearing for Mr Narcisse Arido. My learned distinguished colleague Beth Lyons
3 would have loved to be here. Unfortunately, the Court could not bring her here, but
4 Mr Arido insisted that I should at least put her name on the record because of her
5 distinguished contribution to his defence.

6 Also here today you have Mr Tibor Bajnovic, Mr Michael Rowse. And one of my
7 assistants, Francis Sinsai, is assigned to other duties in the office this morning.

8 Thank you very much. Mr Arido himself is present here today, your Honour.

9 Thank you so much.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you. Thank you very
11 much.

12 Now the Office of the Prosecutor, please.

13 MS BRADY: Good morning, Madam President, your Honours and everybody in the
14 courtroom. Appearing on behalf of the Prosecution, Helen Brady, senior appeals
15 counsel, and I'm here today with appeals counsel Meritxell Regue, Priya Narayanan,
16 Reinhold Gallmetzer, George Mugwanya, Matteo Costi and Matthew Cross. Thank
17 you.

18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you. Thank you very
19 much.

20 The Appeals Chamber is sitting today in accordance with Article 83(4) of the Statute,
21 Rule 158(2) of the Rules of Procedure and Evidence and the scheduling order it issued
22 on 27 February 2018 for the delivery of its judgment in relation to the appeals of
23 Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda
24 Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of
25 Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" issued on

1 19 October 2016. I will refer to this decision hereafter as the Conviction Decision.
2 Now, let me start by giving some background on the appeals proceeding.
3 On 19 October 2016, Trial Chamber VII convicted Mr Bemba, Mr Kilolo,
4 Mr Mangenda, Mr Babala and Mr Arido for offences against the administration of
5 justice pursuant to Article 70 of the Statute. It acquitted Mr Mangenda, Mr Babala
6 and Mr Arido on some counts.
7 The Trial Chamber found that Mr Bemba, Mr Kilolo and Mr Mangenda jointly agreed
8 to illicitly interfere with defence witnesses in order to ensure that these witnesses
9 would provide evidence in favour of Mr Bemba. The Trial Chamber further found
10 that the agreement was made during Mr Bemba's trial before Trial Chamber III on
11 charges of war crimes and crimes against humanity, which I will hereafter refer to as
12 the Main Case, and that this agreement involved the corrupt influence of, at least, 14
13 defence witnesses, together with the presentation of their evidence.
14 Mr Bemba, in detention at the time the offences were committed, was found to have:
15 (i) approved of the illicit coaching strategy, (ii) planned and given precise instructions
16 regarding the witnesses, (iii) been updated about illicit coaching activities, and (iv)
17 expressed satisfaction with the testimony of the illicitly coached witnesses.
18 Mr Kilolo, as counsel for Mr Bemba in the Main Case, led the defence investigation
19 activities. He was found by the Trial Chamber to have implemented Mr Bemba's
20 instructions and illicitly coached the witnesses over the telephone or in personal
21 meetings shortly before the witnesses' testimony. The Trial Chamber found that the
22 main focus of the illicit coaching activities was on (i) key points bearing on the subject
23 matter of the Main Case, and (ii) matters bearing on the credibility of the witnesses,
24 such as prior contacts with the Defence, payments of money or promises received
25 from the Main Case Defence, or acquaintances with certain third parties.

1 Mr Mangenda was the case manager in Mr Bemba's defence team in the Main Case,
2 advising both Mr Kilolo and Mr Bemba and liaising between the two. The Trial
3 Chamber found that Mr Mangenda (i) updated Mr Kilolo on the testimonies of the
4 witnesses whenever Mr Kilolo was not physically present in the courtroom, (ii)
5 advised on which witnesses performed badly or needed to be instructed, making
6 proposals on how best to carry out the illicit witness preparation, and (iii) conveyed
7 Mr Bemba's instructions and made Mr Kilolo aware of what Mr Bemba wished to
8 implement when illicitly coaching the witnesses.

9 The Trial Chamber also found that the three co-perpetrators, Mr Bemba, Mr Kilolo
10 and Mr Mangenda, relied on their co-accused Mr Babala and Mr Arido, who, though
11 not part of the common plan, made efforts to further its goal.

12 Mr Babala, a close political associate of Mr Bemba, and his financier, was found to
13 have transferred illicit payments to some witnesses at Mr Bemba's behest. The Trial
14 Chamber also found that Mr Babala encouraged Mr Kilolo to pay witnesses after their
15 testimonies in the Main Case.

16 Mr Arido, a former member of the Central African Republic armed forces, was found
17 by the Trial Chamber to have recruited four defence witnesses for the Main Case,
18 under Mr Kilolo's instruction. The Trial Chamber found that Mr Arido briefed the
19 four witnesses and promised them compensation and relocation in Europe for their
20 testimony.

21 Now, on the background of the appellate proceedings, let me recall that the Appeals
22 Chamber became seized of the present appeal on 1 November 2016 when the first
23 notice of appeal was registered. On 24 April 2017, Mr Arido, Mr Babala,
24 Mr Mangenda, Mr Bemba and Mr Kilolo filed their respective appeal briefs. On 10
25 July 2017, the Prosecutor filed her consolidated response to these appeal briefs.

1 The appellants have raised numerous grounds of appeal against the Conviction
2 Decision. These grounds of appeal concern: (i) the charges, (ii) the admissibility of
3 documentary evidence, (iii) alleged procedural errors, (iv) the interpretation of the
4 legal elements of Article 70 offences, (v) the interpretation of the modes of liability
5 under Articles 25(3)(a), (b) and (c) of the Statute, and (vi) the Trial Chamber's
6 assessment of the evidence. The appellants request that the Appeals Chamber
7 reverse all findings of guilt and vacate the Conviction Decision.

8 The written judgment is long and comprehensive. This is because it disposes of five
9 appeals, and because, as part of their respective appeals, the appellants raise
10 numerous issues related to the conduct of the investigations leading to the present
11 case, as well as procedural errors allegedly committed at both the pre-trial and trial
12 phases of the case. In the written judgment, the Appeals Chamber also disposes of
13 the outstanding procedural motions that were filed during the appeal proceedings.
14 Given the length of the judgment, I will not address all issues discussed therein, but
15 only summarise certain key aspects. This summary is not part of the written
16 judgment, which is the only authoritative account of the Appeals Chamber's rulings
17 and reasons. The written judgment will be made available to the parties later today.

18 I now turn to the appellants' arguments in relation to the admissibility of
19 documentary evidence, addressing first the issue of immunities, second, Western
20 Union records, third, the Detention Centre materials, and fourth, the Dutch intercept
21 materials.

22 We now turn to the arguments concerning the purported violation of Mr Kilolo's and
23 Mr Mangenda's immunities.

24 Mr Kilolo and Mr Babala argue that the investigation and prosecution in the present
25 case are vitiated by the violation of Mr Kilolo's and Mr Mangenda's immunities as

1 members of Mr Bemba's defence team in the Main Case.

2 Contrary to Mr Kilolo's and Mr Babala's arguments, the Appeals Chamber considers
3 that there is no legal basis for any such immunity. Immunities from legal
4 proceedings for defence counsel practicing before the Court apply exclusively to the
5 exercise of jurisdiction by national courts. They do not constitute a bar to the
6 operation of the Court's own process. In other words, Mr Kilolo and Mr Mangenda
7 did not enjoy any immunity vis-à-vis the Court, and therefore, there was no
8 immunity that needed to be "waived".

9 Accordingly, the Appeals Chamber rejects Mr Kilolo's and Mr Babala's arguments in
10 this regard.

11 I will now turn to the appellants' challenges regarding the admissibility of Western
12 Union records.

13 First I will address the issue of the alleged violations of Article 69(7) of the Statute.
14 Mr Kilolo, Mr Mangenda, Mr Arido and Mr Babala argue that the Trial Chamber
15 erred by not excluding, as inadmissible evidence under Article 69(7) of the Statute,
16 records of money transfers made through Western Union and received by the
17 Austrian authorities. I will hereafter generally refer to these records as "Western
18 Union records".

19 The Appeals Chamber considers that Article 69(7) of the Statute envisages two
20 consecutive inquiries of analysis. First, it must be determined whether the evidence
21 at issue was, I quote, "obtained by means of a violation of the Statute or
22 internationally recognised human rights". An affirmative answer to this question is
23 not sufficient for the concerned evidence to be inadmissible. The second step is to
24 consider whether, I quote, "the violation casts substantial doubt on the reliability of
25 the evidence", end of quote, pursuant to Article 69(7)(a) of the Statute or, I quote, "the

1 admission of the evidence would be antithetical to and would seriously damage the
2 integrity of the proceedings", end of quote, pursuant to Article 69(7)(b) of the Statute.
3 In case of an affirmative answer to both the first and second step of the inquiry, the
4 concerned evidence shall not be admissible.

5 The Appeals Chamber is of the view that information encompassed within Western
6 Union records, while arguably more limited than information relating to bank
7 accounts in general, is, in principle, also protected by the internationally recognised
8 human right to privacy, within the meaning of Article 69(7) of the Statute.

9 The Appeals Chamber notes that the internationally recognised right to privacy is not
10 absolute, but may be subject to legitimate interference in accordance with the law, and
11 as necessary for the protection of important public interests. The possibility of
12 legitimate interference with the right to privacy raises the question of the scope of the
13 inquiry the Court should undertake concerning compliance with national laws for the
14 purposes of a determination under Article 69(7) of the Statute.

15 The Appeals Chamber notes that Article 69(8) of the Statute explicitly addresses this
16 issue in that it mandates that, I quote, "when deciding on the relevance or
17 admissibility of evidence collected by a State, the Court shall not rule on the
18 application of the State's national law". Taking into account the text of the provision,
19 also in the context of its drafting history, the Appeals Chamber considers that Article
20 69(8) of the Statute establishes an unequivocal separation between the national and
21 international spheres in the respective competencies of the Court and the States. The
22 Appeals Chamber further considers that this bar in considering the application of
23 national laws also applies when the evidence is collected by a State in execution of a
24 request for assistance by the Court or when evidence is directly obtained by the
25 Prosecutor.

1 The execution by a State of a request for cooperation and the transmission to the
2 Court of the requested evidence by the competent authorities of that State are an
3 indication that the collection of the evidence has taken place in accordance with the
4 State's national laws and relevant domestic procedures. In any event, a breach of a
5 State's national laws in the collection of evidence does not per se indicate that such
6 evidence was obtained by means of a violation within the meaning of the chapeau of
7 Article 69(7) of the Statute.

8 The Trial Chamber found that in determining whether a violation occurred under
9 Article 69(7) of the Statute, it would still "review the application of national law", but
10 it would, I quote, "engage with national law solely to determine if something so
11 manifestly unlawful occurred that it amounts to a violation of the Statute or
12 internationally recognised human rights". The Trial Chamber, in its application of
13 this standard contrasted these "manifest violations" of domestic law with "mere
14 infringements" of domestic law. The Appeals Chamber considers that the Trial
15 Chamber's introduction of a "manifestly unlawful" standard to justify an inquiry into
16 the application of national law has no statutory foundation. Any such inquiry is
17 incompatible with the unequivocal prohibition contained in Article 69(8) of the
18 Statute.

19 The Appeals Chamber concludes that the Trial Chamber erred in law in finding that
20 the scope of inquiry under Article 69(7) of the Statute includes an assessment of
21 whether there had been violations (whether "manifest" or otherwise) of Austrian law
22 in the collection of the Western Union records.

23 Having found an error of law, the Appeals Chamber turns to the application of the
24 correct law to the relevant facts. In light of the arguments brought by the appellants,
25 the Appeals Chamber addresses in turn three circumstances of relevance to the

1 determination on whether the Western Union records were obtained in violation of
2 the Statute or an internationally recognised human rights, namely: (i) the
3 Prosecutor's direct access to the Western Union database prior to the receipt of the
4 Western Union records from the Austrian authorities; (ii) the allegedly overly broad
5 character of the information contained in the Western Union records; and (iii) the
6 issuance of two rulings by the Higher Regional Court of Vienna in connection with
7 the execution by Austria of the Prosecutor's requests for assistance.

8 First, the Appeals Chamber is not persuaded by Mr Kilolo's arguments that the
9 Western Union records were obtained by means of a violation of Part 9 of the Statute
10 as a result of the Prosecutor's previous direct access to materials located in the
11 territory of Austria.

12 The Appeals Chamber considers that Part 9 protects the sovereign competencies of
13 States within their territories while ensuring, at the same time, certain mandatory
14 forms of cooperation which the Court is entitled to request. States may go beyond
15 the explicit duties and conditions contained therein and offer additional cooperation
16 unilaterally through their implementing laws or through agreements and informal ad
17 hoc arrangements with the Court. Through voluntary cooperation, States may
18 provide additional forms of cooperation with the Court or facilitate autonomous and
19 direct activities by the Prosecutor on their territory beyond what is already required
20 of them under Part 9 of the Statute.

21 In this regard, as the Part 9 of the Statute safeguards the competences of States,
22 additional forms or modalities of cooperation requested by the Court are consistent
23 with its provisions, provided that they are indeed accepted by States and are not
24 otherwise contrary to the Statute, including internationally d human rights in
25 accordance with Article 21(3) of the Statute.

1 The Appeals Chamber notes that by the time the Austrian authorities received the
2 Prosecutor's request for assistance, they had been abundantly apprised of the fact that
3 the Prosecutor had already accessed certain information on financial transactions.
4 Whether the information was accessed by email or through the live "screening" at the
5 Western Union offices in Vienna is immaterial in this regard. The Appeals Chamber
6 notes that at no point did the Austrian authorities raise any concerns regarding the
7 autonomous activities conducted by the Prosecutor. The Austrian authorities further
8 confirmed this process by executing the Prosecutor's three requests for assistance.
9 The Appeals Chamber concludes that the Prosecutor's direct access to financial
10 information prior to the receipt of the Western Union records was consistent with
11 Part 9 of the Statute. Mr Kilolo fails to demonstrate an error.
12 The Appeals Chamber is also unpersuaded by Mr Mangenda's, Mr Babala's and
13 Mr Arido's arguments that because of the Prosecutor's direct access to the information
14 on the Western Union database, the Western Union records must be deemed to have
15 been obtained by means of a violation of the internationally recognised human rights
16 to privacy within the meaning of Article 69(7) of the Statute. These arguments
17 essentially rest on an interpretation of Austrian law. The Appeals Chamber,
18 however, is of the view that the Court is precluded from ruling on whether and under
19 which particular requirements the performance of a particular investigative activity is
20 allowed by the national law of the relevant State. The Court can only apply its own
21 sources of law as set out in Article 21 of the Statute. Therefore, the Court is not
22 permitted, and in any case, not in a position, to determine whether in the factual
23 circumstances of the present case Austrian law did or did not allow the Prosecutor to
24 access information on financial transactions conducted through Western Union
25 without a prior court order. Accordingly, the Appeals Chamber rejects the

1 appellants' arguments in this regard.

2 Second, with regard to arguments that the Prosecutor's requests for assistance to
3 Austria were overly broad and as such disproportionate, the Appeals Chamber finds
4 that the Trial Chamber erred in law when it stated that it was precluded from
5 addressing the issue of the proportionality in the collection of the Western Union
6 records. The Appeals Chamber has accordingly undertaken this analysis itself.

7 In this regard, and discussed in further detail in the written judgment, the Appeals
8 Chamber recalls that the Western Union records are Excel spreadsheets itemising
9 money transfers through Western Union. The dates of the transactions and their
10 amounts as well as the names, dates of birth, identification numbers and addresses of
11 both senders and receivers of these transactions are indicated in these spreadsheets.

12 The 68 individuals identified in these spreadsheets included, among others, potential
13 witnesses, members of the Defence team in the Main Case, political associates and a
14 family member. The Appeals Chamber is of the view that the Western Union
15 records requested and obtained in relation to financial transactions involving these 68
16 individuals, as identified in the Prosecutor's requests for assistance, was
17 proportionate to the investigative needs of the Prosecutor.

18 With respect to information concerning money transfers made before the issuance of
19 the warrant of arrest against Mr Bemba in the Main Case, the Appeals Chamber
20 considers that this information is relatively limited, does not concern details of a
21 particularly intimate or sensitive nature and was not relied upon by the Trial
22 Chamber. The Appeals Chamber therefore concludes that the information was not
23 obtained by means of a disproportionate interference with the concerned individuals'
24 internationally recognised human rights to privacy. The Appeals Chamber therefore
25 finds that the Trial Chamber's legal error in failing to address the issue of the

1 proportionality in the collection of the Western Union records does not affect its
2 ultimate conclusion that the alleged "overly broad" nature of the Western Union
3 records did not amount to a violation of an internationally recognised human rights
4 in their collection.

5 Third, concerning the issuance of two rulings by the Higher Regional Court of Vienna
6 in connection with the execution by Austria of the Prosecutor's requests for assistance,
7 it must be stressed that any domestic decision is not, as such, directed at the Court,
8 nor is it otherwise binding on the Court. The Court must apply its own sources of
9 law and cannot simply "import" findings made by national courts, including for a
10 determination of admissibility of evidence under Article 69(7) of the Statute.

11 The Appeals Chamber notes that the Austrian authorities never communicated the
12 concerned domestic rulings to the Court or indicated any problem with the collection
13 and transmission of the Western Union records. The Appeals Chamber is therefore
14 of the view that the issuance of the two rulings by the Higher Regional Court of
15 Vienna do not indicate that a violation of a Statute or internationally recognised
16 human rights occurred in the collection of the Western Union records.

17 Before moving forward, I would like to note that Judge Henderson appends a
18 separate opinion to the judgment where he addresses the issue of the admissibility of
19 the Western Union records. In his view the Prosecutor's approach to gathering the
20 evidence resulted in a violation of the accused's right to privacy. He also disagrees
21 with the majority's decision to ignore the Austrian Appeals Court's decision.

22 Notwithstanding this, he States that while the Western Union records were obtained
23 in violation of the international human right to privacy, the infringement of this right
24 does not in the present case rise to the level where it would be antithetical or seriously
25 damaging to the integrity of the proceedings if the Western Union records were

1 not excluded.

2 In conclusion, and for the reasons explained in more detail in the written judgment,
3 the Appeals Chamber finds that the Trial Chamber in its two decisions concerning the
4 admissibility of the Western Union records committed a series of errors. In
5 particular, the Trial Chamber:

6 i. Erred in law in stating that its inquiry under Article 69(7) of the Statute could
7 extend to a determination of whether there has been "manifest" violations of national
8 law in the collection of the Western Union records;

9 ii. Erred in law in failing to make a determination on whether the collection of the
10 Western Union records was a disproportionate interference with the individually
11 recognised human rights to privacy; and

12 iii. Erred in law in finding that "in view of" the two subsequent domestic rulings of
13 the Higher Regional Court of Vienna, the Western Union records had been obtained
14 by means of a violation of the internationally recognised human right to privacy.

15 Nonetheless, upon application of the law to the relevant facts, the Appeals Chamber
16 considers that none of these errors, whether on their own or in combination, affects
17 the Trial Chamber's ultimate conclusion that the Western Union records were not
18 inadmissible under Article 69(7) of the Statute. For these reasons, the Appeals
19 Chamber rejects Mr Mangenda's, Mr Kilolo's, Mr Babala's and Mr Arido's grounds of
20 appeal concerning the purported inadmissibility of the Western Union records.

21 I now turn to the challenges regarding the admissibility of Detention Centre
22 materials.

23 Mr Bemba challenges the admissibility of detention centre materials, which consist of
24 selected recordings and logs of his non-privileged telephone communications at the
25 Court's detention centre, alleging that they were obtained in violation of his right

1 to privacy.

2 The Appeals Chamber considers that the monitoring of Mr Bemba's non-privileged
3 telephone communications at the detention centre was not as a measure of "covert
4 surveillance", but is specifically provided for by the ordinary detention regime
5 applicable at the detention centre of this Court, pursuant to regulation 174(1) of the
6 Regulations of the Registry.

7 The Pre-Trial single Judge authorised the transmission of recordings and logs of
8 Mr Bemba's non-privileged telephone communications to the Prosecutor. The
9 Appeals Chamber considers that this measure had a sufficient basis in law, and may
10 be taken in accordance with Article 57(3)(a) of the Statute, upon request by the
11 Prosecutor, and to the extent required for the purpose of an investigation.

12 At the same time, the Appeals Chamber considers that the measure ordered by the
13 Pre-Trial Single Judge constituted an additional interference into Mr Bemba's right to
14 privacy in that it entailed an expansion of the circle of individuals granted access to a
15 detainee's non-privileged telephone communications. In consideration of whether
16 this measure is "required for the purposes of an investigation" within the meaning of
17 Article 57(3)(a) of the Statute, a chamber must be satisfied that the Prosecutor's
18 request for any such measure has a sufficient factual basis justifying this additional
19 intrusion into the detainee's privacy. In the view of the Appeals Chamber, the
20 information made available to the Pre-Trial Single Judge provided a sufficient factual
21 basis for him to reasonably conclude that an additional intrusion into Mr Bemba's
22 right to privacy was, I quote, "of essence for the Prosecutor to be able to shed further
23 light on the relevant facts", end of quote, and therefore justified within the meaning of
24 Article 57(3)(a) of the Statute.

25 The Appeals Chamber also dismisses Mr Bemba's submission that the transmission of

1 the recording at issue, which had been obtained through the ordinary regime of
2 passive monitoring and transmitted to the Prosecutor pursuant to a judicial
3 authorisation by the Pre-Trial Single Judge, should have only occurred "after prior
4 judicial vetting as to relevance and redactions". A further judicial control on the
5 recordings actually transmitted to the Prosecutor was unwarranted given that the
6 Single Judge determined, on the basis of the information brought to his attention, that
7 access to the pre-existing recordings of Mr Bemba's non-privileged telephone calls
8 was required for the purpose of the Prosecutor's investigation within the meaning of
9 Article 57(3)(a) of the Statute.

10 Concerning Mr Bemba's argument that he should have been afforded an opportunity
11 to challenge the surveillance measures and obtain a remedy, the Appeals Chamber
12 notes that Mr Bemba did make such a challenge and that the Trial Chamber
13 considered it on its merits in the decision on admissibility of detention centre
14 materials. The fact that Mr Bemba disagrees with the merits of the Trial Chamber
15 disposal of his argument - which he challenges in the present appeal - does not
16 indicate that he was denied the right to present his arguments in this regard and have
17 the Trial Chamber address them.

18 The Appeals Chamber therefore concludes that the Pre-Trial Single Judge's order was
19 lawful.

20 I now turn to the appellants' challenges regarding the admissibility of Dutch intercept
21 materials.

22 Let me start by referring to the scope of legal professional privilege.

23 In the course of the trial, the Trial Chamber was confronted with the issue of whether
24 the Dutch intercept materials ought to be excluded as inadmissible evidence under
25 Article 69(7) of the Statute on the grounds that they had been obtained in violation of

1 the Statute due to their allegedly privileged nature. This material consists of logs
2 and recordings of Mr Kilolo's telephone conversations which had been collected by
3 the Dutch authorities and transmitted to the Prosecutor in execution of requests for
4 assistance.

5 Mr Bemba and Mr Kilolo argue that the Trial Chamber erred in failing to exclude and
6 ultimately relying on the Dutch intercept materials relating to Mr Kilolo's telephone
7 communications which, in their submission, had been obtained in violation of a legal
8 professional privilege.

9 In accordance with Rule 73(1) of the Rules, communications between a person and his
10 or her legal counsel are privileged when: (i) such communications were made in the
11 context of their professional relationship; and (ii) the client has neither voluntarily
12 consented to the disclosure of the communication nor has already disclosed its
13 content to a third party who gives evidence of that disclosure. Communications
14 between a lawyer and his or her client that do not take place in the context of a
15 professional relationship are therefore not covered by this provision. Thus, it is the
16 definition of "privilege", as provided for in Rule 73(1) of the Rules itself, that excludes
17 communications made in furtherance of criminal activities, rather than an implied
18 exception to a presumption of privilege attached to all lawyer-client communications.
19 The Appeals Chamber therefore considers that communications that are made in the
20 context of the implementation of a criminal activity are *ab initio* non-privileged even
21 if they occur between a person and his or legal counsel.

22 The Appeals Chamber finds that the Trial Chamber did not err in its determination
23 that the Dutch intercept materials had not been obtained in violation of the Statute or
24 an internationally recognised human right within the meaning of Article 69(7) of the
25 Statute, nor did it err in its reliance on this material for its factual findings in the

1 Conviction Decision.

2 Having summarised some of the Appeals Chamber's key findings with regard to the
3 admissibility of documentary evidence, I now turn to the issue of alleged procedural
4 errors.

5 So now I turn to alleged procedural errors.

6 I will start with errors concerning the absence of rulings on the relevance or
7 admissibility of all the evidence submitted.

8 Mr Babala, Mr Arido and Mr Bemba argue that the Conviction Decision is vitiated by
9 errors concerning the system in which documentary evidence has been introduced in
10 the course of the trial.

11 The Appeals Chamber notes that, at the beginning of the trial, the Trial Chamber
12 issued a decision which stated that, "as a general rule", it would defer its assessment
13 of the admissibility of evidence until deliberating its judgment pursuant to
14 Article 74(2) of the Statute", and would "consider the relevance, probative value and
15 potential prejudice of each item of evidence submitted at that time, though it may not
16 necessarily discuss these aspects for every item submitted in the final judgment".

17 The Trial Chamber did not make individual rulings on the relevance or admissibility
18 of items of documentary evidence submitted by the parties - neither in the course of
19 the trial nor as part of the Conviction Decision. Rather, the Trial Chamber disposed
20 of requests for the exclusion of evidence under Article 69(7) of the Statute and verified,
21 prior to the introduction of prior recorded testimony, that the relevant requirements
22 under Rule 68 of the Rules had been met. When no such "procedural bars" were
23 found to exist or none were raised, the Trial Chamber "recognised" the "submission"
24 of the concerned evidence by the relevant party. Subsequently, in the Conviction
25 Decision, the Trial Chamber assessed the oral evidence elicited at trial as well as the

1 documentary evidence submitted in the proceedings as part of its determination of
2 the guilt or innocence of the accused persons.

3 The Appeals Chamber considers that, a trial chamber, upon the submission of an item
4 of evidence by a party, has discretion to either: (i) rule on the relevance and/or
5 admissibility of such item of evidence as a pre-condition for recognising it as
6 "submitted" within the meaning of Article 74(2) of the Statute, and assess its weight at
7 the end of the proceedings as part of its holistic assessment of all evidence submitted
8 or; (ii) recognise the submission of such item of evidence without a prior ruling on its
9 relevance and/or admissibility and consider its relevance and probative value as part
10 of the holistic assessment of all evidence submitted when deciding on the guilt or
11 innocence of the accused.

12 Evidence is properly before a trial chamber for the purpose of its decision on the guilt
13 or innocence of the accused when it has been "submitted" in accordance with the
14 procedure adopted by a trial chamber and discussed at trial, unless it is ruled as
15 irrelevant or inadmissible. Any item of submitted evidence that is not excluded at
16 trial must therefore be presumed to be considered by a trial chamber not to be
17 inadmissible under any applicable exclusionary rule. For this reason, both the
18 procedure for the submission of evidence at trial and the status of each piece of
19 evidence as "submitted" within the meaning of Article 74(2) of the Statute must be
20 clear. This is a fundamental guarantee for the rights of the parties at trial as well as
21 for the purpose of any subsequent appellate review.

22 The Appeals Chamber finds that the procedure set out and implemented by the Trial
23 Chamber for the submission of evidence at trial was consistent with the legal
24 framework of this Court. The appellants fail to demonstrate that the Trial Chamber
25 caused undue prejudice to the rights of the accused persons in deciding not to rule on

1 the relevance and/or admissibility of evidence and in relying for the purpose of the
2 Conviction Decision on the evidence which it had recognised as "submitted".
3 I would like to note that Judge Henderson's separate opinion also concerns the issue
4 of the submission and admission of evidence. He is of the view that the approach of
5 the majority effectively undermines the compromise reached by States Parties
6 between common law and civil law systems. He considers that the Statute's
7 admissibility regime is considerably less formal than what exists in most common law
8 jurisdictions, but it does not go so far as to dispense with the need to consider the
9 question of the admissibility of evidence altogether. Judge Henderson notes that,
10 while there may be no need for an admissibility filter when that trial is conducted on
11 the basis of a central dossier and where the presentation of evidence is driven by the
12 Presiding Judge, it is important to bear in mind that a trial in the present case was
13 conducted along adversarial lines. In Judge Henderson's view, the Trial Chamber's
14 approach of not making admissibility rulings when objections are raised by the
15 parties was unfair.

16 I now turn to the appellants' challenges with respect to the Trial Chamber's
17 interpretation of offences under Article 70 of the Statute.

18 So I will now turn to the alleged errors regarding the offences under Article 70 of the
19 Statute and I will first address the chapeau of Article 70(1) of the Statute.

20 Mr Bemba argues that the Trial Chamber erred by not requiring a showing of special
21 intent and by not excluding accessorial modes of liability on the basis of the intent
22 requirement set out in the chapeau of Article 70(1) of the Statute.

23 The Appeals Chamber considers that, when read in context with other provisions, it is
24 clear that the word "intentionally" in Article 70 of the Statute refers to the basic intent
25 required by Article 30 of the Statute. As correctly found by the Trial Chamber, the

1 basic intent under Article 30 of the Statute applies to the offences against the
2 administration of justice pursuant to Rule 163(1) of the Rules. In the Appeals
3 Chamber's view, the explicit reference to "intentionally" in Article 70 does not depart
4 from the standard set out in Article 30 of the Statute, but simply clarifies that the same
5 standard applies to offences listed therein.

6 The Appeals Chamber further considers that all modes of liability set forth in Article
7 25(3) of the Statute are applicable, in principle, pursuant to Rule 163(1) of the Rules.
8 In the view of the Appeals Chamber, nothing in Rule 163(1) of the Rules restricts the
9 application of Article 30 of the Statute to offences against the administration of justice,
10 and the reference to "intent" in the chapeau of Article 70(1) of the Statute must not be
11 understood narrowly as referring to only Article 30(2) of the Statute, but to the
12 provision as a whole.

13 The Appeals Chamber therefore finds that Mr Bemba fails to demonstrate an error on
14 the part of the Trial Chamber.

15 Now I turn to Article 70(1)(a) of the Statute.

16 Mr Bemba submits that the Trial Chamber erred in finding that the offence of giving
17 false testimony pursuant to Article 70(1)(a) of the Statute can be committed by
18 withholding information on matters that were not directly asked of the witness.

19 In the view of the Appeals Chamber, the phrase "giving false testimony" must be
20 understood in the context of the witness's obligation to speak "the whole truth" under
21 Article 69(1) of the Statute and Rule 66 of the Rules. Thus, distorting the truth by
22 intentionally withholding some information amounts to "giving false testimony" in
23 terms of Article 70(1)(a) of the Statute. The Appeals Chamber accordingly considers
24 that a witness gives false testimony in terms of Article 70(1)(a) of the Statute when he
25 or she intentionally provides incomplete responses to the questions by omitting facts

1 that he or she is specifically asked about or by omitting facts that are necessarily
2 encompassed within or inseparably linked to the information sought during the
3 testimony.

4 Thus, the Appeals Chamber finds the Trial Chamber did not err in finding that
5 intentionally withholding information inseparably linked to the questions asked of a
6 witness amounts to giving false testimony.

7 Now I turn to Article 70(1)(b) of the Statute.

8 Mr Bemba also submits that the Trial Chamber erred in finding that Article 70(1)(b) of
9 the Statute covers any member of the Defence team, including an accused who de
10 facto plays a significant role in the defence strategy.

11 The Appeals Chamber agrees with Mr Bemba and the Trial Chamber that the focus of
12 Article 70(1)(b) of the Statute is on the incriminated conduct (presenting false
13 testimony) rather than on the quality of the perpetrator as a "party". The Appeals
14 Chamber also agrees with the Trial Chamber that the term "presenting evidence"
15 denotes the formal submission of evidence in proceedings. Given the overall
16 purpose of the provision to prevent the presentation of false or forged evidence, the
17 Appeals Chamber is of the view that the offence under Article 70(1)(b) of the Statute
18 may be perpetrated by all those who - irrespective of their formal status as a
19 "party" - have, in fact, the ability to present evidence, whether as a matter of statutory
20 rights or because authorised to do so by the Chamber in the concrete circumstances of
21 the case.

22 The Appeals Chamber understands that the Trial Chamber considered that in the case
23 at hand it was Mr Kilolo who had carried out the actual act of presenting false
24 evidence and was therefore the "physical perpetrator" of the offence. Mr Kilolo's
25 conduct was then imputed to Mr Bemba and Mr Mangenda by virtue of all three

1 being co-perpetrators. The Trial Chamber's attribution to Mr Kilolo of the physical
2 act of "presenting" the false oral evidence raises the issue of the scope of the actual
3 conduct incriminated by Article 70(1)(b) of the Statute and, in particular, its
4 applicability in connection with oral evidence.

5 The Appeals Chamber agrees with the Trial Chamber that the term "evidence" in
6 Article 70(1)(b) of the Statute does not distinguish between different forms of
7 evidence for the purpose of the applicability of this provision. However, this offence
8 is committed when evidence is "presented" - that is when it is formally submitted in
9 the proceedings - knowing that it is false or forged. In terms of testimonial evidence,
10 when calling a witness, it is beyond the party's control whether the witness will
11 actually testify falsely. While the calling party may hope or anticipate that the
12 witness will lie before the Chamber, it remains the independent decision of the
13 witness to do so when he or she gives evidence in court. Thus, a party calling a
14 witness can hope for a certain result but cannot "know" that the evidence (which does
15 not yet exist) is false or forged within the terms of Article 70(1)(b) of the Statute.

16 The Appeals Chamber is of the view that the wording of Article 70(1)(b) of the Statute
17 cannot be reconciled with the nature of oral testimony and it is therefore meant to
18 encompass only the presentation of false or forged documentary evidence. The
19 Appeals Chamber therefore finds that the Trial Chamber erred in finding that this
20 provision encompassed oral evidence. Consequently, the Appeals Chamber grants
21 Mr Bemba's sub-ground of appeal 1.4. As Mr Bemba, Mr Kilolo and Mr Mangenda
22 were convicted of the offence under Article 70(1)(b) of the Statute for the
23 "presentation" of false oral evidence, the Appeals Chamber considers that these
24 convictions were wrongly entered and reverses these convictions in that regard.
25 Article 70(1)(c).

1 Mr Bemba, along with Mr Mangenda and Mr Arido, also challenge the Trial
2 Chamber's interpretation of Article 70(1)(c) of the Statute.
3 The Appeals Chamber considers that for the purposes of Article 70(1)(c) of the Statute,
4 the term "witness" must also be understood broadly, taking into account the context
5 and purpose of the provision. The Appeals Chamber shares the view of the Trial
6 Chamber that the term "witness" in Article 70(1)(c) requires a broader understanding
7 of the concept than the one used in Article 70(1)(a) of the Statute, or the Protocol on
8 Witnesses, which has different purposes. However, the Appeals Chamber considers
9 that the term "witness" within this provision does not need to be qualified further by
10 requiring that the individuals must have been interviewed by either party. In the
11 view of the Appeals Chamber, the offence under Article 70(1)(c) of the Statute is
12 committed when the perpetrator corruptly influences a person who knows or is
13 believed to know information that may be relevant to the proceedings before the
14 Court, regardless of whether or not such person has been previously contacted by
15 either party.
16 The Trial Chamber defined the concept "influencing a witness", pursuant to
17 Article 70(1)(c) of the Statute as conduct "capable of influencing the nature of the
18 witness's evidence", aimed at procuring certain testimony by the witness or
19 modifying the witness's testimony, thereby "compromising the reliability of the
20 evidence". The Appeals Chamber notes that the Trial Chamber acknowledged that
21 there are lawful ways in which forthcoming testimony may be discussed with a
22 witness, but drew a distinction between such permissible conduct and conduct that
23 would fall under the offence listed in Article 70(1)(c) of the Statute by clarifying that, I
24 quote, "the use of the word 'corruptly' signifies that the relevant conduct is aimed at
25 contaminating the witness's testimony". The Appeals Chamber considers, contrary

1 to the submissions of Mr Bemba and Mr Mangenda, that the Trial Chamber did not
2 have in mind behaviour that could be considered legitimate interactions with
3 witnesses. The Trial Chamber found that Mr Kilolo had instructed witnesses to
4 testify about events and facts relating to the Main Case although they had no
5 knowledge thereof. Such a situation constitutes influencing a witness to give false
6 testimony because the witness had no actual experience of the events and facts in
7 question. The Appeals Chamber therefore considers that the Trial Chamber did not
8 define the term "corruptly influencing" too broadly.

9 The Appeals Chamber recalls that the Trial Chamber found that the offence of
10 corruptly influencing a witness under Article 70(1)(c) of the Statute "does not require
11 proof that the conduct had an actual effect on the witness". The Appeals Chamber
12 agrees with this finding, which is supported by the wording of the provision, by
13 stipulating that "corruptly influencing" a witness amounts to an offence, without any
14 mention of a result stemming from this conduct. In the view of the Appeals
15 Chamber, this is an appropriate interpretation also in light of the purpose of the
16 provision, which seeks to avoid improper influence on witnesses, even witnesses who,
17 in fact, may never testify before the Court.

18 The Appeals Chamber finds that the appellants fail to demonstrate an error in the
19 Trial Chamber's interpretation of Article 70(1)(c) of the Statute.

20 So now I will finalise by reading the disposition of this Appeals Chamber.

21 In light of the foregoing, the Appeals Chamber, unanimously:

- 22 1) Reverses the convictions of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo
23 Musamba and Mr Jean-Jacques Mangenda Kabongo for the charged offence of
24 presenting false evidence under Article 70(1)(b) of the Statute;
- 25 2) Confirms the remaining convictions entered by the Trial Chamber regarding the

1 charged offence of giving false testimony and corruptly influencing witnesses under
2 Articles 70(1)(a) and (c) of the Statute in respect of Mr Jean-Pierre Bemba Gombo,
3 Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo as well as the
4 convictions entered by the Trial Chamber in respect of Mr Fidèle Babala Wandu and
5 Mr Narcisse Arido for the charged offence of corruptly influencing witnesses under
6 Article 70(1)(c) of the Statute;

7 And the Appeals Chamber rejects all remaining procedural requests.

8 This concludes my summary of the judgment on appeals from conviction. We will
9 now take a 15-minute break before continuing with the sentencing judgment.

10 THE COURT USHER: [11:07:57] All rise.

11 (Recess taken at 11.07 a.m.)

12 (Upon resuming in open session at 11.25 a.m.)

13 THE COURT USHER: [11:25:28] All rise.

14 Please be seated.

15 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: So good morning again.

16 On resumption of this hearing, the Appeals Chamber is delivering its judgment on
17 the appeals of the Prosecutor, Jean-Pierre Bemba Gombo, Fidèle Babala Wandu and
18 Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on
19 Sentence pursuant to Article 76 of the Statute". In today's summary, I will refer to
20 this decision as the Sentencing Decision.

21 In a moment, I shall summarise the Appeals Chamber's judgment, which was taken
22 unanimously. This summary is not part of the written judgment, which is the only
23 authoritative account of the Appeals Chamber's ruling and reasons. The written
24 judgment will be made available to the parties and participants later today.

25 By way of background, following Mr Bemba's, Mr Kilolo's, Mr Mangenda's,

1 Mr Arido's and Mr Babala's convictions for offences against the administration of
2 justice pursuant to Article 70 of the Statute, the Trial Chamber pronounced their
3 respective sentences on 22 March 2017.

4 In relation to Mr Bemba, the Trial Chamber sentenced him to a joint sentence of 12
5 months of imprisonment to be served consecutively to his existing sentence (imposed
6 by Trial Chamber III in the Main Case) and ordered that the time Mr Bemba had
7 spent in detention pending trial would not be deducted from the prison sentence.
8 The Trial Chamber also imposed a fine of 300,000 euros to be paid by Mr Bemba
9 within three months of the Sentencing Decision.

10 In relation to Mr Kilolo, the Trial Chamber sentenced him to a joint sentence of 30
11 months of imprisonment and imposed a fine of 30,000 euros to be paid within three
12 months of the Sentencing Decision. The Trial Chamber ordered the suspension of
13 the remaining term of imprisonment (after deduction of time spent in detention) for a
14 period of three years so that the sentence shall not take effect (i) if Mr Kilolo pays the
15 fine within three months; and (ii) unless during that period Mr Kilolo commits
16 another offence anywhere that is punishable with imprisonment, including offences
17 against the administration of justice.

18 Likewise, with respect to Mr Mangenda, the Trial Chamber sentenced him to a joint
19 sentence of 24 months of imprisonment. The Trial Chamber ordered the suspension
20 of the remaining term of imprisonment (after deduction of time spent in detention)
21 for a period of three years so that the sentence shall not take effect unless during that
22 period Mr Mangenda commits another offence anywhere that is punishable with
23 imprisonment, including offences against the administration of justice.

24 In relation to Mr Babala, the Trial Chamber sentenced him to six months of
25 imprisonment, which it considered served in light of the time he had already spent in

1 detention pending trial. Mr Arido was sentenced to 11 months of imprisonment,
2 which the Trial Chamber considered served in light of the time he had already spent
3 in detention pending trial.

4 On 21 June 2017, Mr Babala, Mr Arido, Mr Bemba, and the Prosecutor filed their
5 respective appeal briefs against the Sentencing Decision and on 21 August 2017 the
6 parties filed their respective responses to the appeal briefs.

7 Turning to the merits of the present appeals, I wish to clarify, as I did before on the
8 judgment decision on the conviction, I wish to clarify that due to the number of issues
9 raised on appeal and given that this is merely a summary of the judgment, I will
10 endeavour to highlight only the key findings of the Appeals Chamber as they relate to
11 the more significant issues raised across all four appeals.

12 Beginning with Mr Bemba's appeal, the Appeals Chamber notes that he raises 12
13 grounds of appeal against the Sentencing Decision. In relation to his second ground,
14 Mr Bemba argues that the Trial Chamber erred in relying on incidents and alleged
15 offences that were never charged, including allegations concerning Mr Bemba's
16 communications with Witness D-19, and the so-called plan to engage in remedial
17 measures, that is Mr Bemba's conduct that sought to frustrate the Prosecutor's
18 investigation of the Article 70 offences.

19 The issue arising is therefore whether "uncharged offences" or "uncharged
20 allegations" may be taken into account for the purpose of determining sentence. The
21 Appeals Chamber recalls that the sentence imposed on a convicted person for crimes
22 and offences under the jurisdiction of the Court must be proportionate to the crime or
23 offence and reflect the culpability of the convicted person. The convicted person is
24 sentenced for the crime or offence for which he or she was convicted, not for other
25 crimes or offences that the person may also have committed, but in relation to which

1 no conviction was entered. This is not to say that the fact that a convicted person
2 may have committed other offences is entirely irrelevant to sentencing. This is
3 because conduct - including criminal conduct - that occurred after the offence for
4 which the convicted person has been convicted may also be relevant for the
5 sentencing phase to establish that offence's gravity or the convicted person's
6 culpability in that regard or may amount to an aggravating circumstance.

7 A natural limitation of the consideration of conduct, including criminal conduct that
8 occurred after the offence for which the person was convicted is that there must be a
9 sufficiently proximate link with them. In the absence of such a link, the conduct in
10 question would be irrelevant to the sentence that is to be imposed. In addition, the
11 Appeals Chamber finds that considerations of procedural fairness and the rights of
12 the defence require that the convicted person be sufficiently put on notice of the facts
13 that are taken into account to aggravate the sentence.

14 Turning to the specific allegations of Mr Bemba under this ground of appeal, the
15 Appeals Chamber finds that the Trial Chamber did not err. The Appeals Chamber
16 considers that, for the reasons set out in the preceding paragraphs, there was no
17 principled reason not to rely on the so-called "remedial measures" as an aggravating
18 factor. Given that such measures were directly related to the offences for which
19 Mr Bemba was convicted, it was not unreasonable to take the remedial measures into
20 account as an aggravating circumstance. Nor is the Appeals Chamber convinced
21 that Mr Bemba lacked sufficient notice of this as a potential aggravating circumstance.
22 For reasons more fully explained in the judgment, the Appeals Chamber also does not
23 consider that the Trial Chamber erred by relying on the phone call with Witness D-19
24 in its discussion of the abuse of Mr Bemba's communication privilege at the detention
25 centre. Accordingly, the Appeals Chamber rejects Mr Bemba's arguments under his

1 second ground of appeal.

2 Under Mr Bemba's tenth ground of appeal, he argues, inter alia, that the Trial
3 Chamber erroneously relied on policy considerations in determining that Mr Bemba
4 should not be granted credit for time spent in detention in relation to these
5 proceedings. In this regard, the Appeals Chamber considers that Article 78(2) of the
6 Statute mandates the Court to deduct time previously spent in detention in
7 accordance with an order of the Court. However, in circumstances where an
8 accused has spent time in detention as a result of warrants of arrest issued in different
9 cases by different chambers, time spent in detention can only be taken into account
10 once. As noted by the Trial Chamber, in situations such as in the present case, the
11 existence of Article 70 proceedings would become inconsequential. The
12 interpretation advanced by Mr Bemba would be difficult to reconcile with one of the
13 purposes of Article 70 of the Statute - namely to deter the commission of offences
14 against the administration of justice. As a result, the Appeals Chamber finds that the
15 Trial Chamber did not err in not deducting time previously spent in detention from
16 the term of imprisonment imposed in these proceedings.

17 That being said, the Appeals Chamber notes that both the conviction and the sentence
18 imposed in the Main Case have been appealed and a decision by the Appeals
19 Chamber is pending. In these circumstances, the Appeals Chamber considers that
20 the Trial Chamber's decision not to deduct the time Mr Bemba had spent in detention
21 pending trial in the present case was conditioned on the sentence in the Main Case
22 remaining intact.

23 The Trial Chamber's decision not to deduct time can only be reasonably understood
24 as meaning that, if the conviction or sentence in the Main Case were to be reversed on
25 appeal, the time Mr Bemba has spent in detention pursuant to the warrant of arrest

1 issued in the proceedings relating to offences under Article 70 of the Statute would be
2 automatically deducted from the sentence of imprisonment imposed by the Trial
3 Chamber in the present case. The same would apply *mutatis mutandis* if
4 Mr Bemba's sentence in the Main Case were to be reduced on appeal if the time spent
5 in detention from 23 November 2013 - the date on which he was served the warrant of
6 arrest in the proceedings relating to offences under Article 70 of the Statute - to the
7 date of the reduction of the sentence on appeal exceeds the term of the redacted
8 sentence in that case. The Appeals Chamber notes that the Presidency, as the entity
9 charged with issues relating to the enforcement of sentences, will be in a position to
10 make the necessary adjustments as to when the sentence of Mr Bemba in the present
11 case would be considered completed, should the conviction or sentence in the Main
12 Case be reversed on appeal. Accordingly, the Appeals Chamber rejects Mr Bemba's
13 tenth ground of appeal.

14 For reasons more fully elaborated in the judgment, Mr Bemba's remaining grounds of
15 appeal are also rejected.

16 Turning to the appeals of Mr Babala and Mr Arido, the Appeals Chamber notes that
17 they both predominantly raise arguments that seek to challenge their convictions
18 under Article 70(1)(c) in conjunction with Article 25(3)(a) of the Statute. The Appeals
19 Chamber dismisses their arguments *in limine* on the basis that it cannot be argued in
20 an appeal against the sentence, that the convicted person should not have been
21 convicted in the first place; rather, such arguments must be made in an appeal that is
22 directed against the Conviction Decision.

23 With respect to other arguments raised by both Mr Babala and Mr Arido in their
24 respective appeals, the Appeals Chamber notes that they both challenge the Trial
25 Chamber's assessment of the gravity of the offence for which they were convicted.

1 Both argue that the Trial Chamber erred in taking into account certain consequences
2 of the offence for which they were convicted for its gravity assessment.
3 In this regard, the Appeals Chamber considers that the consequences of a crime or
4 offence in relation to which a person was convicted may be taken into account to
5 aggravate the sentence in one way or another as long as these consequences were at
6 least objectively foreseeable by the convicted person. Thus, in Mr Babala's case, the
7 Appeals Chamber notes that the Trial Chamber found in the Conviction Decision that
8 Mr Babala had effected payments to Witness D-57's wife and Witness D-64's daughter,
9 "knowing that the payments were made for illegitimate purposes" and that he, I quote,
10 "knew [that these payments] were aimed at contaminating these witnesses' testimony
11 and intentionally aided Mr Kilolo in corruptly influencing the two witnesses".
12 In the Appeals Chamber's view, these findings which have not been reversed on
13 appeal provide a sufficient basis to establish, as a minimum, that it was objectively
14 foreseeable that Witnesses D-57 and D-64 would testify falsely before the Court as to
15 the payments they had received as well as contacts with the Main Case Defence.
16 Likewise, in Mr Arido's case, the Trial Chamber found that Mr Arido, by promising
17 money and relocation to Europe, I quote, "as encouragement to give certain evidence
18 in the Main Case", end of quote, recruited and briefed the four witnesses with the
19 intent to manipulate their testimonial evidence. These findings which have not been
20 reversed on appeal provide a sufficient basis to establish that it was objectively
21 foreseeable by Mr Arido as a result of his corrupt influence on the witnesses in
22 relation to issues related to the "merits" of the Main Case that these witnesses would
23 testify falsely about payments, acquaintances and the nature and number of prior
24 contacts. The Appeals Chamber therefore rejects these arguments of Mr Babala and
25 Mr Arido.

1 For reasons more fully explained in the judgment, the remaining arguments of
2 Mr Babala and Mr Arido are rejected.

3 Turning to the Prosecutor's appeal, the Appeals Chamber notes that she raises two
4 grounds of appeal against the Sentencing Decision. Under her first ground of appeal,
5 the Prosecutor submits that the Trial Chamber abused its discretion and erred in law
6 by imposing manifestly inadequate and disproportionate sentences on Mr Kilolo,
7 Mr Mangenda and Mr Bemba. The Prosecutor argues that the Appeals Chamber
8 should amend the joint sentence of Mr Kilolo, Mr Mangenda and Mr Bemba by
9 increasing each of them to five years, pursuant to Article 83(2)(a) and (3) of the
10 Statute.

11 The Prosecutor's first argument is that the Trial Chamber erred in relying on the fact
12 that the false testimony of the witnesses did not pertain to the merits of the Main Case
13 as a relevant circumstance for its assessment of the gravity of the offences. In this
14 regard, the Appeals Chamber notes that in assessing the gravity of the offences, the
15 Trial Chamber distinguished lies on "merit" issues, on the one hand, and lies on
16 "non-merit" issues on the other hand, based on the assumption that the latter are
17 inherently less grave than the former.

18 The Appeals Chamber emphasises that the assessment by a Trial Chamber of the
19 credibility of witnesses is an integral part of its ability to assess the substance of the
20 witnesses' testimony. Thus, the Court's truth-seeking functions are not necessarily
21 less damaged by false testimony on matters informing the credibility of witnesses
22 than they are by false testimony on matters concerning the "merits" of a case. The
23 Appeals Chamber considers that the fact that false testimony pertains to "merit" or
24 "non-merit" issues of a case is not in and of itself reflective of the actual gravity of the
25 offences. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in

1 giving "some weight" to this extraneous consideration, which in the words of the Trial
2 Chamber "informed the assessment of the gravity of the offences" for which
3 Mr Mangenda, Mr Kilolo and Mr Bemba were convicted.

4 The Prosecutor's second argument relates to the sentences imposed on Mr Kilolo and
5 Mr Bemba for their conviction for having induced or solicited the commission of the
6 offences under Article 70(1)(a) of the Statute. She argues that the Trial Chamber
7 erred in giving a lower sentence for these convictions than those for the offences
8 which they committed as co-perpetrators, exclusively on the basis of the different
9 mode of liability.

10 The Appeals Chamber recognises that the difference between committing a crime and
11 contributing to the crime of others would normally reflect itself in a different degree
12 of participation and/or intent within the meaning of Rule 145(1)(c) of the Rules. This,
13 however, does not mean that the principal perpetrator of a crime or offence
14 necessarily deserves a higher sentence than the accessory to that crime or offence.

15 Whether this is actually the case ultimately depends upon all the variable
16 circumstances of each individual case.

17 Indeed, the Court's legal framework does not indicate an automatic correlation
18 between the convicted person's form of responsibility and the sentence, nor does it
19 stipulate any form of mandatory mitigation in case of conviction as an accessory to a
20 crime or offence. Rather, the sentencing factors in the Statute and the Rules are
21 fact-specific and ultimately depend on a case-by-case assessment of the individual
22 circumstances of each case.

23 The Appeals Chamber observes that the Trial Chamber stated that it distinguished
24 between the offences that Mr Kilolo and Mr Bemba committed as co-perpetrators and
25 those in relation to which they were accessories. The Trial Chamber did not

1 elaborate any further on this. However, this distinction appears to have been the
2 basis for the imposition of a lower individual sentence for the offences under Article
3 70(1)(a) for which Mr Kilolo and Mr Bemba were convicted as accessories than the
4 sentences for the offences which they committed as co-perpetrators. Indeed, the
5 Appeals Chamber notes that the Trial Chamber's descriptions of the relevant facts for
6 the assessment of Mr Kilolo and Mr Bemba's respective culpability for their role as
7 co-perpetrators of the offences under Article 70(1)(b) and (c) of the Statute and their
8 role as accessories of the offence under Article 70(1)(a) of the Statute are essentially
9 almost identical. Also the assessment of the gravity of the three concerned offences
10 is essentially the same. It therefore appears that the Trial Chamber assumed that a
11 reduction of the sentence for the offence under Article 70(1)(a) of the Statute was due
12 only because of the concerned mode of liability. This amounted to an error.
13 Under her second ground of appeal, the Prosecutor submits that the Trial Chamber
14 erred in law and/or abused its discretion in suspending the sentences of
15 imprisonment of Mr Mangenda and Mr Kilolo. The Prosecutor requests that the
16 Appeals Chamber reverse the suspension of the sentences and order Mr Kilolo and
17 Mr Mangenda back into custody to serve the remainder of their sentences of
18 imprisonment or any increased sentence as decided by the Appeals Chamber.
19 The Prosecutor argues that when the Statute is read in accordance with its ordinary
20 meaning, in context and in light of its object and purpose, it is evident that there is no
21 lacuna in the Statute and the Rules which exhaustively regulate sentencing
22 proceedings at the Court, the available penalties and their enforcement and execution.
23 The Prosecutor submits that by finding that a lacuna exists in the legal instruments of
24 the Court, the Trial Chamber "misunderstands - and effectively disregards - the basic
25 criteria of treaty interpretation".

1 The Appeals Chamber observes that on the basis of its assessment that a lacuna exists
2 in the Court's statutory framework, the Trial Chamber considered that its power to
3 suspend a sentence of imprisonment derived from its inherent power to impose and
4 determine the sentence. The Appeals Chamber emphasises that in the legal
5 framework of this Court, "inherent powers" should be invoked in a very restrictive
6 manner and, in principle, only with respect to matters of procedure.

7 The Appeals Chamber recalls that in accordance with Article 21 of the Statute, the
8 Court shall apply in the first place the Statute and the Rules. The Appeals Chamber
9 recalls further that it has previously found that a lacuna does not exist when, for
10 instance, a matter is exhaustively defined in the legal instruments of the Court.

11 The Appeals Chamber considers that when a matter is regulated in the primary
12 sources of law of the Court, there is also no room for chambers to rely on purported
13 "inherent powers" to fill in non-existent gaps. The Appeals Chamber notes that the
14 "inherent power" invoked by the Trial Chamber relates to the penalties and
15 sentencing regime before the Court. The Appeals Chamber observes that this regime
16 is directly and explicitly constrained by the principle of legality under Article 23 of
17 the Statute, which provides - encapsulating the principle of *nulla poena sine*
18 *lege* - that, I quote, "a person convicted by the Court may be punished only in
19 accordance with the Statute".

20 Accordingly, the Statute and related provisions contain an exhaustive identification of
21 the types of penalties that can be imposed against a convicted person and specify
22 mandatory aggravating and mitigating circumstances as well as the parameters to be
23 considered for the determination of the quantum of such penalties. The
24 corresponding powers of a Trial Chamber are therefore limited to the identification of
25 the appropriate penalty among the ones listed in the Statute and a determination of

1 its quantum. No "inherent powers" may be invoked to introduce unregulated
2 penalties or sentencing mechanisms not otherwise foreseen in the legal framework of
3 the Court, as the Trial Chamber did in the present instance with respect to the
4 suspension of sentences.

5 Thus the Appeals Chamber considers that the Trial Chamber erred in law in finding
6 that it had the inherent power to impose a suspended sentence, and therefore acted
7 ultra vires in ordering the conditional suspension of the remaining terms of
8 imprisonment imposed on Mr Kilolo and Mr Mangenda.

9 Lastly, the Prosecutor submits that the Trial Chamber abused its discretion by
10 imposing on Mr Mangenda, Mr Kilolo and Mr Bemba "disproportionate" or
11 "manifestly inadequate" sentences which in her view do not reflect the gravity of the
12 offences and the culpability of the convicted persons. Having found that the Trial
13 Chamber erred in relying on certain irrelevant circumstances for the determination of
14 the quantum of the sentences for Mr Mangenda, Mr Kilolo and Mr Bemba and that
15 the Trial Chamber acted ultra vires in pronouncing suspended sentences against
16 Mr Mangenda and Mr Kilolo, the Appeals Chamber considers that these errors
17 warrant reversal of the sentences and remand to the Trial Chamber for a new
18 determination. The Appeals Chamber therefore considers it unnecessary to
19 determine this point whether the sentences pronounced against Mr Mangenda,
20 Mr Kilolo and Mr Bemba are so manifestly low and inadequate per se as to constitute
21 an abuse of discretion on the part of the Trial Chamber.

22 In sum, the Appeals Chamber recalls that it has rejected all grounds of appeal
23 advanced by Mr Arido and Mr Babala against their respective sentences. The
24 sentences imposed on them are therefore confirmed.

25 The Appeals Chamber has also rejected all grounds of appeal raised by Mr Bemba

1 against his sentence.

2 In relation to the Prosecutor's appeal, the Appeals Chamber has found that the Trial
3 Chamber committed a series of errors with respect to the sentences pronounced
4 against Mr Bemba, Mr Mangenda and Mr Kilolo. In particular, the Trial Chamber
5 determined the gravity of the offences in the present case with reference to an
6 irrelevant consideration and improperly considered that the form of responsibility for
7 the considerations under Article 70(1)(a) of the Statute warranted per se a reduction of
8 the corresponding sentences.

9 In addition, it acted ultra vires in suspending the remaining terms of imprisonment
10 imposed on Mr Mangenda and Mr Kilolo. The Appeals Chamber considers that the
11 sentence pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo are materially
12 affected by each of these errors. In these circumstances, the Appeals Chamber
13 considers it appropriate, for the reasons advanced more fully in the judgment, to
14 reverse their sentences and remand the matter to the original Trial Chamber for a new
15 determination of their sentences.

16 This concludes my summary of the judgment. I thank the interpreters, court
17 reporters and parties and participants.

18 This session is now closed.

19 THE COURT USHER: [11:56:59] All rise.

20 (The hearing ends in open session at 11.57 a.m.)