Cour Pénale Internationale

International Criminal Court

Summary of the judgment on the appeals of The Prosecutor, Jean-Pierre Bemba Gombo, Fidèle Babala Wandu and Narcisse Arido (Conviction)

Delivered by Judge Silvia Fernández de Gurmendi

Presiding Judge in this appeal

8 March 2018

This summary is not part of the written judgment. Please note that only the written judgment is authoritative.

A. Introduction

1. The Appeals Chamber renders its judgment today in accordance with article 83 (4) of the Statute, rule 158 (2) of the Rules of Procedure and Evidence, and the Scheduling Order it issued on 27 February 2018 for the delivery of its judgment in relation to the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu, and Mr Narcisse Arido against the decision of

Trial Chamber VII (entitled "Judgment pursuant to Article 74 of the Statute") issued on 19 October 2016 ("Conviction Decision").

B. Background of the Appeals Proceeding

2. On 19 October 2016, Trial Chamber VII convicted Mr Bemba, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido for offences against the administration of justice pursuant to article 70 of the Statute. It acquitted Mr Mangenda, Mr Babala and Mr Arido on some counts.

3. The Trial Chamber found that Mr Bemba, Mr Kilolo, and Mr Mangenda jointly agreed to illicitly interfere with defence witnesses in order to ensure that these witnesses would provide evidence in favour of Mr Bemba. The Trial Chamber further found that the agreement was made during Mr Bemba's trial before Trial Chamber III on charges of war crimes and crimes against humanity ("Main Case") and that this agreement involved the corrupt influence of, at least, 14 defence witnesses, together with the presentation of their evidence.

4. Mr Bemba, in detention at the time the offences were committed, was found to have: (i) approved of the illicit coaching strategy, (ii) planned and given precise instruction regarding the witnesses, (iii) been updated about

illicit coaching activities and (iv) expressed satisfaction with the testimony of the illicitly coached witnesses.

5. Mr Kilolo, as counsel for Mr Bemba in the Main Case, led the defence investigation activities. He was found by the Trial Chamber to have implemented Mr Bemba's instructions and illicitly coached the witnesses over the telephone or in personal meetings shortly before the witnesses' testimony. The Trial Chamber found that the main focus of the illicit coaching activities was on (i) key points bearing on the subject-matter of the Main Case, and (ii) matters bearing on the credibility of the witnesses, such as prior contacts with the defence, payments of money or promises received from the Main Case Defence, or acquaintances with certain third parties.

6. Mr Mangenda was the case manager in Mr Bemba's defence team in the Main Case, advising both Mr Kilolo and Mr Bemba and liaising between the two. The Trial Chamber found that Mr Mangenda (i) updated Mr Kilolo on the testimonies of the witnesses whenever Mr Kilolo was not physically present in the courtroom; (ii) advised on which witnesses performed badly or needed to be instructed, making proposals on how best to carry out the illicit witness preparation; and (iii) conveyed Mr Bemba's

instructions and made Mr Kilolo aware of what Mr Bemba wished to implement when illicitly coaching the witnesses.

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

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

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

C. Appellate Proceedings

10. The Appeals Chamber became seised of the present appeal on 1 November 2016 when the first notice of appeal was registered. On 24 April

2017, Mr Arido, Mr Babala, Mr Mangenda, Mr Bemba and Mr Kilolo filed their respective appeal briefs. On 10 July 2017, the Prosecutor filed her consolidated response to these appeal briefs.

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

12. The written judgment in this appeal is long and comprehensive. This is because it disposes of 5 appeals, and because, as part of their respective appeals, the appellants raise numerous issues related to the conduct of the investigations leading to the present case, as well as procedural errors allegedly committed at both the pre-trial and trial phases of the case. In the written judgment, the Appeals Chamber also disposes of the outstanding procedural motions that were filed during the appeal proceedings.

13. Given the length of the judgment, I will not address all issues discussed therein, but only summarise certain key aspects. This summary is not part of the written judgment, which is the only authoritative account of the Appeals Chamber's rulings and reasons. The written judgment will be made available to the parties later today.

D. Alleged errors concerning the admissibility of documentary evidence

1. Arguments concerning the purported violation of Mr Kilolo's and Mr Mangenda's immunities

14. Mr Kilolo and Mr Babala argue that the investigation and prosecution in the present case are vitiated by the violation of Mr Kilolo's and Mr Mangenda's immunities as members of Mr Bemba's defence team in the Main Case.

15. Contrary to Mr Kilolo's and Mr Babala's arguments, the Appeals Chamber considers that there is no legal basis for any such immunity. Immunities from legal proceedings for defence counsel practicing before the Court apply exclusively to the exercise of jurisdiction by national courts. They do not constitute a bar to the operation of the Court's own process. In other words, Mr Kilolo and Mr Mangenda did not enjoy any

immunity vis-à-vis the Court, and therefore, there was no immunity that needed to be "waived".

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

2. Admissibility of Western Union Records

(a) Alleged violations of article 69 (7) of the Statute

17. Mr Kilolo, Mr Mangenda, Mr Arido and Mr Babala argue that the Trial Chamber erred by not excluding, as inadmissible evidence under article 69 (7) of the Statute, records of money transfers made through Western Union and received by the Austrian authorities ("Western Union Records").

18. The Appeals Chamber considers that article 69 (7) of the Statute envisages two consecutive inquiries of analysis. First, it must be determined whether the evidence at issue was "obtained by means of a violation of th[e] Statute or internationally recognized human rights". An affirmative answer to this question is not sufficient for the concerned evidence to be inadmissible. The second step is to consider whether "[t]he violation casts substantial doubt on the reliability of the evidence"

(pursuant to article 69 (7) (a) of the Statute) or "[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings" (pursuant to article 69 (7) (b) of the Statute). In case of an affirmative answer to both the first and second step of the inquiry, the concerned evidence shall not be admissible.

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

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

21. The Appeals Chamber notes that article 69 (8) of the Statute explicitly addresses this issue in that it mandates that "when deciding on the

relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law". Taking into account the text of the provision, also in the context of its drafting history, the Appeals Chamber considers that article 69 (8) of the Statute establishes an unequivocal separation between the national and international spheres in the respective competences of the Court and the States. The Appeals Chamber further considers that this bar in considering the application of national laws also applies when the evidence is collected by a State in execution of a request for assistance by the Court or when evidence is directly obtained by the Prosecutor.

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

23. The Trial Chamber found that, in determining whether a violation occurred under article 69 (7) of the Statute, it would still "review the application of national law", but it would "engage[] with national law solely to determine if something so *manifestly unlawful* occurred that it amounts to a violation of the Statute or internationally recognized human rights". The Trial Chamber, in its application of this standard contrasted these "manifest violations" of domestic law with "mere infringements" of domestic law. The Appeals Chamber considers that the Trial Chamber's introduction of a "manifestly unlawful" standard to justify an inquiry into the application of national law has no statutory foundation. Any such inquiry is incompatible with the unequivocal prohibition contained in article 69 (8) of the Statute.

24. The Appeals Chamber concludes that the Trial Chamber erred in law in finding that its scope of inquiry under article 69 (7) of the Statute includes an assessment of whether there had been violations (whether "manifest" or otherwise) of Austrian law in the collection of the Western Union Records.

25. Having found an error of law, the Appeals Chamber turns to the application of the correct law to the relevant facts. In light of the arguments

brought by the appellants, the Appeals Chamber addresses, in turn, three circumstances of relevance to the determination on whether the Western Union Records were obtained in violation of the Statute or an internationally recognised human rights, namely: (i) the Prosecutor's direct access to the Western Union database prior to the receipt of the Western Union Records from the Austrian authorities; (ii) the allegedly overly broad character of the information contained in the Western Union Records; and (iii) the issuance of two rulings by the Higher Regional Court of Vienna in connection with the execution by Austria of the Prosecutor's requests for assistance.

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

27. The Appeals Chamber considers that Part 9 protects the sovereign competences of States within their territories while ensuring, at the same time, certain mandatory forms of cooperation, which the Court is entitled to request. States may go beyond the explicit duties and conditions contained therein and offer additional cooperation unilaterally through their

implementing laws or through agreements and informal *ad hoc* arrangements with the Court. Through voluntary cooperation, States may provide additional forms of cooperation with the Court or facilitate autonomous and direct activities by the Prosecutor on their territory, beyond what is already required of them under Part 9 of the Statute. In this regard, as the Part 9 of the Statute safeguards the competences of States, additional forms or modalities of cooperation requested by the Court are consistent with its provisions, provided that they are indeed accepted by States and are not otherwise contrary to the Statute, including internationally recognised human rights, in accordance with article 21 (3) of the Statute.

28. The Appeals Chamber notes that by the time the Austrian authorities received the Prosecutor's requests for assistance, they had been abundantly apprised of the fact that the Prosecutor had already accessed certain information on financial transactions – whether the information was accessed by e-mail or through the live "screening" at the Western Union offices in Vienna is immaterial in this regard. The Appeals Chamber notes that at no point did the Austrian authorities raise any concerns regarding the autonomous activities conducted by the Prosecutor. The Austrian

authorities further confirmed this process by executing the Prosecutor's three requests for assistance. The Appeals Chamber concludes that the Prosecutor's direct access to financial information prior to the receipt of the Western Union Records was consistent with Part 9 of the Statute. Mr Kilolo fails to demonstrate an error.

29. The Appeals Chamber is also unpersuaded by Mr Mangenda's, Mr Babala's and Mr Arido's arguments that, because of the Prosecutor's direct access to information on the Western Union database, the Western Union Records must be deemed to have been obtained by means of a violation of the internationally recognised human right to privacy within the meaning of article 69 (7) of the Statute. These arguments essentially rest on an interpretation of Austrian law. The Appeals Chamber, however, is of the view that the Court is precluded from ruling on whether, and under which particular requirements, the performance of a particular investigative activity is allowed by the national law of the relevant State. The Court can only apply its own sources of law, as set out in article 21 of the Statute. Therefore, the Court is not permitted – and, in any case, not in a position – to determine whether, in the factual circumstances of the present case, Austrian law did or did not allow the Prosecutor to access information on

financial transactions conducted through Western Union without a prior court order. Accordingly, the Appeals Chamber rejects the appellants' arguments in this regard.

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

31. In this regard, and discussed in further detail in the written judgment, the Appeals Chamber recalls that the Western Union Records are Excel spreadsheets itemising money transfers through Western Union. The dates of the transactions and their amounts, as well as the names, dates of birth, identification numbers and addresses of both senders and receivers of these transactions are indicated in these spreadsheets. The 68 individuals identified in these spreadsheets included, among others, potential witnesses, members of the defence team in the Main Case, political associates, and a family member. The Appeals Chamber is of the view that the Western Union Records requested and obtained in relation to financial

transactions involving these 68 individuals, as identified in the Prosecutor's requests for assistance, was proportionate to the investigative needs of the Prosecutor.

32. With respect to information concerning money transfers made before the issuance of the warrant of arrest against Mr Bemba in the Main Case, the Appeals Chamber considers that this information is relatively limited, does not concern details of a particularly intimate or sensitive nature, and was not relied upon by the Trial Chamber. The Appeals Chamber therefore concludes that the information was not obtained by means of a disproportionate interference with the concerned individuals' internationally recognised human right to privacy. The Appeals Chamber therefore finds that the Trial Chamber's legal error in failing to address the issue of the proportionality in the collection of the Western Union Records does not affect its ultimate conclusion that the alleged "overly broad" nature of the Western Union Records did not amount to a violation of an internationally recognised human right in their collection.

33. Third, concerning the issuance of two rulings by the Higher Regional Court of Vienna in connection with the execution by Austria of the Prosecutor's requests for assistance, it must be stressed that any domestic

decision is not, as such, directed at the Court nor is it otherwise binding on the Court. The Court must apply its own sources of law and cannot simply "import" findings made by national courts, including for a determination of admissibility of evidence under article 69 (7) of the Statute.

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

35. Judge Henderson appends a separate opinion to the judgment where he addresses the issue of the admissibility of the Western Union Records. In his view, the Prosecutor's approach to gathering the evidence resulted in a violation in the accused's right to privacy. He also disagrees with the majority's decision to ignore the Austrian Appeal Court's decision. Notwithstanding this, he states that, while the Western Union Records were obtained in violation of the international human right to privacy, the infringement of this right does not, in the present case, rise to the level

where it would be antithetical or seriously damaging to the integrity of the proceedings if the Western Union Records were not excluded.

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

i. erred in law in stating that its inquiry under article 69 (7) of the Statute could extend to a determination of whether there had been "manifest" violations of national law in the collection of the Western Union Records;

ii. erred in law in failing to make a determination on whether the collection of the Western Union Records was a disproportionate interference with the internationally recognised human right to privacy; and

iii. erred in law in finding that "in view of" the two subsequent domestic rulings of the Higher Regional Court of Vienna, the Western Union Records had been obtained by means of a

violation of the internationally recognised human right to privacy;

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

3. Admissibility of Detention Centre Materials

38. Mr Bemba challenges the admissibility of Detention Centre Materials, which consist of selected recordings and logs of his non-privileged telephone communications at the Court's detention centre, alleging that they were obtained in violation of his right to privacy.

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

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

41. At the same time, the Appeals Chamber considers that the measure ordered by the Pre-Trial Single Judge constituted an additional interference into Mr Bemba's right to privacy in that it entailed an expansion of the circle of individuals granted access to a detainee's non-privileged telephone communications. In consideration of whether this measure is "required for the purposes of an investigation" within the meaning of article 57 (3) (a) of the Statute, a chamber must be satisfied that the Prosecutor's request for any such measure has a sufficient factual basis justifying this additional intrusion into the detainee's privacy. In the view of the Appeals Chamber, the information made available to the Pre-Trial Single Judge provided a sufficient factual basis for him to reasonably conclude that an additional intrusion into Mr Bemba's right to privacy was "of essence for the

Prosecutor to be able to shed further light on the relevant facts", and therefore justified within the meaning of article 57 (3) (a) of the Statute.

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

43. Concerning Mr Bemba's argument that he should have been afforded an opportunity to challenge the surveillance measures and obtain a remedy, the Appeals Chamber notes that Mr Bemba did make such a challenge and that the Trial Chamber considered it on its merits in the Decision on Admissibility of Detention Centre Materials. The fact that Mr Bemba disagrees with the merits of the Trial Chamber disposal of his argument –

which he challenges in the present appeal – does not indicate that he was denied the right to present his arguments in this regard and have the Trial Chamber address them.

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

4. Admissibility of Dutch Intercept Materials

(a) Scope of legal professional privilege

45. In the course of the trial, the Trial Chamber was confronted with the issue of whether the Dutch Intercept Materials ought to be excluded as inadmissible evidence under article 69 (7) of the Statute on the grounds that they had been obtained in violation of the Statute due to their allegedly privileged nature. This material consists of logs and recordings of Mr Kilolo's telephone conversations which had been collected by the Dutch authorities and transmitted to the Prosecutor, in execution of requests for assistance.

46. Mr Bemba and Mr Kilolo argue that the Trial Chamber erred in failing to exclude and ultimately relying on the Dutch Intercept Materials relating

to Mr Kilolo's telephone communications which, in their submission, had been obtained in violation of a legal professional privilege.

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

48. The Appeals Chamber finds that the Trial Chamber did not err in its determination that the Dutch Intercept Materials had not been obtained in

violation of the Statute or an internationally recognised human right within the meaning of article 69 (7) of the Statute, nor did it err in its reliance on this material for its factual findings in the Conviction Decision.

E. Alleged procedural errors

1. Errors concerning the absence of rulings on the relevance or admissibility of all the evidence submitted

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

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

51. The Trial Chamber did not make individual rulings on the relevance or admissibility of items of documentary evidence submitted by the

parties– neither in the course of the trial nor as part of the Conviction Decision. Rather, the Trial Chamber disposed of requests for the exclusion of evidence under article 69 (7) of the Statute and verified, prior to the introduction of prior recorded testimony, that the relevant requirements under rule 68 of the Rules had been met. When no such "procedural bars" were found to exist or none were raised, the Trial Chamber "recognised" the "submission" of the concerned evidence by the relevant party. Subsequently, in the Conviction Decision, the Trial Chamber assessed the oral evidence elicited at trial as well the documentary evidence submitted in the proceedings as part of its determination of the guilt or innocence of the accused persons.

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

of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.

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

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

evidence and in relying for the purpose of the Conviction Decision on the evidence which it had recognised as "submitted".

55. **Judge Henderson's** separate opinion also concerns the issue of the submission and admission of evidence. He is of the view that the approach of the majority effectively undermines the compromise reached by States Parties between common law and civil law systems. He considers that the Statute's admissibility regime is considerably less formal than what exists in most common law jurisdictions, but it does not go so far as to dispense with the need to consider the question of the admissibility of evidence altogether. Judge Henderson notes that, while there may be no need for an admissibility filter when a trial is conducted on the basis of a central dossier and where the presentation of evidence is driven by the presiding judge, it is important to bear in mind that the trial in the present case was conducted along adversarial lines. In Judge Henderson's view, the Trial Chamber's approach of not making admissibility rulings, when objections are raised by the parties, was unfair.

F. Alleged errors regarding the offences under article 70 of the Statute

1. Chapeau of article 70 (1) of the Statute

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

57. The Appeals Chamber considers that, when read in context with other provisions, it is clear that the word "intentionally" in article 70 of the Statute refers to the basic intent required by article 30 of the Statute. As correctly found by the Trial Chamber, the basic intent under article 30 of the Statute applies to the offences against the administration of justice pursuant to rule 163 (1) of the Rules. In the Appeals Chamber's view, the explicit reference to "intentionally" in article 70 does not depart from the standard set out in article 30 of the Statute, but simply clarifies that the same standard applies to offences listed therein.

58. The Appeals Chamber further considers that all modes of liability set forth in article 25 (3) of the Statute are applicable, in principle, pursuant to rule 163 (1) of the Rules. In the view of the Appeals Chamber, nothing in

rule 163 (1) of the Rules restricts the application of article 30 of the Statute to the offences against the administration of justice, and the reference to "intent" in the *chapeau* of article 70 (1) of the Statute must not be understood narrowly as referring to only article 30 (2) of the Statute, but to the provision as a whole.

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

2. Article 70 (1) (a)

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

61. In the view of the Appeals Chamber, the phrase "giving false testimony" must be understood in the context of the witness's obligation to speak "the whole truth" under article 69 (1) of the Statute and rule 66 of the Rules. Thus, distorting the truth by intentionally withholding some information amounts to "giving false testimony" in terms of article 70 (1) (a) of the Statute. The Appeals Chamber accordingly considers that a witness gives false testimony in terms of article 70 (1) (a) of the Statute

when he or she intentionally provides incomplete responses to the questions by omitting facts that he or she is specifically asked about or by omitting facts that are necessarily encompassed within, or inseparably linked to, the information sought during the testimony.

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

3. Article 70 (1) (b)

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

64. The Appeals Chamber agrees with Mr Bemba – and the Trial Chamber – that the focus of article 70 (1) (b) of the Statute is on the incriminated conduct (*presenting* false evidence) rather than on the quality of the perpetrator as a "party". The Appeals Chamber also agrees with the Trial Chamber that the term "presenting evidence" denotes the formal submission of evidence in proceedings. Given the overall purpose of the provision to prevent the presentation of false or forged evidence, the

Appeals Chamber is of the view that the offence under article 70 (1) (b) of the Statute may be perpetrated by all those who – irrespective of their formal status as a "party" – have, in fact, the ability to present evidence, whether as matter of statutory rights or because authorised to do so by the Chamber in the concrete circumstances of the case.

65. The Appeals Chamber understands that the Trial Chamber considered that, in the case at hand, it was Mr Kilolo who had carried out the actual act of presenting false evidence and was therefore the "physical perpetrator" of the offence. Mr Kilolo's conduct was then imputed to Mr Bemba and Mr Mangenda by virtue of all three being co-perpetrators. The Trial Chamber's attribution to Mr Kilolo of the physical act of "presenting" the false oral evidence raises the issue of the scope of the actual conduct incriminated by article 70 (1) (b) of the Statute and, in particular, its applicability in connection with oral evidence.

66. The Appeals Chamber agrees with the Trial Chamber that the term "evidence" in article 70 (1) (b) of the Statute does not distinguish between different forms of evidence for the purpose of the applicability of this provision. However, this offence is committed when evidence is "presented" – that is when it is formally submitted in the proceedings –

knowing that it *is* false or forged. In terms of testimonial evidence, when calling a witness, it is beyond the party's control whether the witness will actually testify falsely. While the calling party may hope or anticipate that the witness will lie before the chamber, it remains the independent decision of the witness to do so when he or she gives evidence in court. Thus, a party calling a witness can hope for a certain result but cannot "know" that the evidence (which does not yet exist) *is* false or forged within the terms of article 70 (1) (b) of the Statute.

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

4. Article 70 (1) (c)

68. Mr Bemba, along with Mr Mangenda and Mr Arido, also challenge the Trial Chamber's interpretation of article 70 (1) (c) of the Statute.

69. The Appeals Chamber considers that for the purposes of article 70 (1) (c) of the Statute, the term "witness" must also be understood broadly, taking into account the context and purpose of the provision. The Appeals Chamber shares the view of the Trial Chamber that the term "witness" in article 70 (1) (c) requires a broader understanding of the concept than the one used in article 70 (1) (a) of the Statute, or the Protocol on Witnesses, which has different purposes. However, the Appeals Chamber considers that the term witness within this provision does not need to be qualified further by requiring that the individuals must have been interviewed by either party. In the view of the Appeals Chamber, the offence under article 70 (1) (c) of the Statute is committed when the perpetrator corruptly influences a person who knows or is believed to know information that may be relevant to the proceedings before the Court, regardless of whether or not such person has been previously contacted by either party.

70. The Trial Chamber defined the concept "influencing a witness", pursuant to article 70 (1) (c) of the Statute as conduct "capable of

influencing the nature of the witness's evidence", aimed at procuring certain testimony by the witness or modifying the witness's testimony, thereby "compromising the reliability of the evidence". The Appeals Chamber notes that the Trial Chamber acknowledged that there are lawful ways in which forthcoming testimony may be discussed with a witness, but drew a distinction between such permissible conduct and conduct that would fall under the offence listed in article 70 (1) (c) of the Statute by clarifying that "[t]he use of the word 'corruptly' signifies that the relevant conduct is aimed at contaminating the witness's testimony". The Appeals Chamber considers, contrary to the submissions of Mr Bemba and Mr Mangenda, that the Trial Chamber did not have in mind behaviour that could be considered legitimate interactions with witnesses. The Trial Chamber found that Mr Kilolo had instructed witnesses to testify about events and facts relating to the Main Case although they had no knowledge thereof. Such a situation constitutes influencing a witness to give false testimony because the witness had no actual experience of the events and facts in question. The Appeals Chamber therefore considers that the Trial Chamber did not define the term "corruptly influencing" too broadly.

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

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

G. Disposition

73. In light of the foregoing, the Appeals Chamber, unanimously:

1) **REVERSES** the convictions of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo for the charged offence of presenting false evidence under article 70 (1) (b) of the Statute;

2) **CONFIRMS** the remaining convictions entered by the Trial Chamber regarding the charged offences of giving false testimony and corruptly influencing witnesses under articles 70 (1) (a) and (c) of the Statute in respect of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo as well as the convictions entered by the Trial Chamber in respect of Mr Fidèle Babala Wandu and Mr Narcisse Arido for the charged offence of corruptly influencing witnesses under article 70 (1) (c) of the Statute; **AND**

3) **REJECTS** all remaining procedural requests.