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No.: ICC-01/05-01/13

Date: 31/01/2017

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public Redacted with Public Annexes A, B, C and D

**Public Redacted Version of 'Bemba Defence Filing Identifying Errors in the Trial
Judgment'**

Source: Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. The Judgment of 19 October 2016 was flawed by multiple legal, factual and procedural errors. These flaws, when considered either in isolation or cumulatively, vitiate Mr. Bemba's conviction on all counts.
2. Mr. Bemba was convicted on the basis of a common plan, which was never pleaded, elucidated or substantiated at trial.
3. Throughout the trial, the Prosecution case that there was a common plan to bring false witnesses to testify on behalf of Mr. Bemba collapsed: witness after witness testified that an independent scheme was hatched by a cabal of desperate persons, who saw the ICC and the Defence as a means to an end that benefited them, and not the Defence.
4. Faced with this contradiction, one of the Judges was compelled, at the very end of the case (after final briefs had been filed), to request the Prosecution to explain the nature of its common plan, and the evidence that supported it.¹
5. The Judgment states explicitly that the Prosecution failed to do so,² a finding which should have resulted in the dismissal of the charges.
6. Instead, the Trial Chamber appears to have created a new, and entirely illogical common plan. The plan supposes that Mr. Bemba knew and intended for select members of his Defence to defend him by convincing persons the Defence believed to be genuine witnesses, to lie about legitimate

¹ ICC-01/05-01/13-T-48-Red-ENG, pp.4-6.

² "The Chamber notes the Prosecution's failure in its closing statements to clearly articulate a definition of what it considered to be the common plan between Mr Bemba, Mr Kilolo and Mr Mangenda, for the purposes of assessing their responsibility under Article 25(3)(a) of the Statute." Judgment, para.681.

payments that the witnesses had not yet received, and the precise number of contacts, that the witnesses had not yet had.

7. The purpose? To conceal the scheme to lie about legitimate payments and contacts. In essence, they engaged in illegal actions for the purpose of concealing those actions.
8. In terms of Mr. Bemba's role in this plan, the Chamber acknowledged that:³

no direct evidence exists that Mr Bemba also directed or instructed false testimony regarding (i)the nature and number of prior contacts of the witnesses with the Main Case Defence, (ii) payments and material or non-monetary benefits received from or promised by the Main Case Defence, and/or (iii) acquaintances with other individuals (emphasis added).

9. The Chamber addressed this evidentiary lacuna through extensive reliance on inferences (which in many instances, did not rise above the level of mere speculation), and indirect evidence that was wholly unreliable. The latter is reflected by the fact that of the 57 key findings concerning Mr. Bemba:
 - 14 are not supported by any evidence;
 - 35 were founded exclusively on unauthenticated, coded intercepts involving co-accused, who never testified;
 - 15 are based exclusively on remote second-hand or third-hand hearsay; and
 - 10 were derived exclusively from heavily de-synchronised recordings, which the Chamber found had to be corroborated,⁴ or treated with the "utmost caution".⁵

³ Judgment, para.818.

⁴ Judgment, para.227.

10. The combination of a flawed and illogical common plan, and missing or unreliable evidence, resulted in findings concerning Mr. Bemba that were either illogical, counter-factual, disclose no culpability, or are *non-sequiturs*.
11. These errors are elaborated below.

Errors concerning the collection and admission of evidence

- I.** The Chamber erred by relying on evidence, which was obtained by means that violated the Statute and internationally recognised human rights. The admission of this evidence further undermined the integrity of the proceedings. This included:
- Information obtained from Western Union;
 - Call data records and intercepts collected by the Dutch authorities; and
 - Call logs and intercepts collected from the ICC Detention Unit.
- II.** Even if the threshold for exclusion under Article 69(7) of the Statute was not met, the Chamber erred by basing key aspects of its judgment exclusively on information obtained in a manner that violated the Statute and internationally recognised human rights.
- III.** The conviction against Mr. Bemba rests on information that should have been excluded pursuant to Article 69(5) of the Statute and Rule 73(1) of the Rules, as a result of:

⁵ Judgment, para.266.

- The absence of an effective and impartial system for identifying and vetting confidential and privileged information; and
- An erroneous legal definition of privilege.

IV. The system employed by the Chamber for evaluating and admitting evidence was contrary to Article 69(2) and (4) of the Statute, appellate case law,⁶ and the requirements of open and adversarial justice, and resulted in:

- There being no reasoned determination of the relevance, probative value, and prejudicial impact of individual items of evidence;⁷
- Entire categories of evidence (such as call data records compiled by different telecom service providers) being admitted *en masse*, even though the cumulative requirements for admissibility were not met for individual items or particular sub-categories;⁸
- The conviction resting on interpretations of Prosecution evidence that were never put to the Defence during the trial proceedings, or particular interpretations of 'codes' from which the Prosecution had resiled; and
- Key exculpatory evidence being disregarded, for no apparent reason.⁹

⁶ ICC-01/05-01/08-1386, paras.2,3, 37.

⁷ Judgment, paras.189-194.

⁸ Judgement, para.219.

⁹ Apart from the testimony and report of Dr. Harrison, the judgment does not refer to a single item of evidence tendered by the Bemba Defence. As illustrated by Annexes B and C, this omission is particularly problematic in light of the Chamber's heavy reliance on inferences.

- V. As reflected by Annex A, the Chamber's extensive reliance on Rule 68 statements and bar table evidence was legally flawed, and resulted in an "iceberg" case, in which only a very small percentage of evidence was discussed and addressed in court. This approach was contrary to the presumption of orality, deprived the Defence of an effective opportunity to challenge and respond to key aspects of the Prosecution case, and resulted in a conviction that rests more on Prosecution theories than sworn evidence.
- VI. The Chamber appears to have admitted prior statements for the truth of their contents, even where Chamber declined to admit the statements through Rule 68.¹⁰
- VII. The Chamber adopted an erroneous approach to the authentication, attribution and admission of digital evidence, namely, the Chamber:
- Failed to comply with the standard of beyond reasonable doubt,¹¹ and reversed the burden of proof in requiring the Defence to establish that digital evidence was not authentic or reliable;¹²
 - Incorrectly relied on metadata produced by digital evidence to authenticate the same digital evidence;¹³
 - Failed to rule on the reliability of any digital evidence other than the detention unit communications;
 - Failed to attribute key telephone numbers to specific individuals for specific time periods or contacts;¹⁴ and

¹⁰ Judgment, para.205.

¹¹ I.e. the Chamber's reliance on the "likely" origin of CDRs: Judgment, para.221

¹² Judgment, para.224.

¹³ Judgment, para.281.

- Failed to refer to, or take into consideration key “dis-attribution” evidence for telephone numbers.¹⁵

Errors concerning the scope and nature of the charges

VIII. Mr. Bemba’s right to be informed promptly of the nature of the charges was contravened in fundamental aspects: the charges against Mr. Bemba concerning the “common plan” were impermissibly vague, and mutated in key aspects throughout the proceedings (including in the judgment itself). This includes as concerns:

- The object of the common plan;
- The specific elements of criminality, which violated Article 70 of the Statute;
- The date on which the common plan was formulated, and the date on which Mr. Bemba became a member of the common plan;
- The nature of Mr. Bemba’s essential contribution to the common plan and/or the material elements of the charges;
- The timing of such contributions;
- The Prosecution case concerning the means by which Mr. Bemba controlled the presentation of Defence evidence; and
- The material facts underpinning the allegation that Mr. Bemba solicited false testimony, in particular, as concerns the

¹⁴ Judgment, para.738 - the Chamber found that an undated contacts list was sufficient to attribute the [Redacted] number to Mr. Babala, notwithstanding the existence of detention unit and CSS records that attributed the number to Mr. Kilolo for specific time periods that corresponded to the specific dates of the contacts between this number and Mr. Bemba (ICC-01/05-01/13-1902-Conf-Corr2, para.129-132). The latter evidence is not referred to in the Judgment.

¹⁵ In describing as speculative the Babala Defence argument that the call data records could reflect calls forwarded from this number, the Chamber also erroneously claimed that the Babala Defence had not submitted any evidence on this point (Judgment, para.739); the Babala Defence had in fact submitted information from Base Belgium that corroborated their interpretation of the call data records (CAR-D22-0005-0003, ICC-01/05-01/13-1817).

close causal link between the actions of Mr. Bemba, and the false testimony of the 14 witnesses.

IX. The conviction against Mr. Bemba rests on key incidents, allegations, and evidence, which fell outside the scope of the charges. This included findings concerning:

- “Interference” with witnesses (which the Pre-Trial Chamber explicitly excluded from the charges);¹⁶
- Witnesses (such as D-19, and D-51), who were not part of the 14 witnesses comprising the charges; and
- The nature of Mr. Bemba’s essential contributions to the common plan, including the means by which Mr. Bemba allegedly violated the detention unit regime for privileged communications.¹⁷

X. The Chamber erred by convicting Mr. Bemba on the basis of cumulative charges, which were predicated on the same underlying facts and conduct.¹⁸

Errors concerning the legal elements of the offences

XI. The Chamber erred by finding that Article 70(1) had neither a gravity requirement, nor special intent to interfere with the administration of justice;¹⁹

¹⁶ Judgment, para.103; Cf. ICC-01/05-01/13-749, paras.17-18.

¹⁷ The charges asserted that Mr. Bemba furthered the common plan by speaking directly to third persons through Mr. Kilolo’s privileged telephone line (ICC-01/05-01/13-526-AnxB1-Red, para. 30). The Judgement relies on the finding – never asserted or litigated at trial – that Mr. Kilolo violated the privileged telephone regime due to the fact that he “simultaneously and unlawfully relayed information to third persons during privileged line calls” (para.109).

¹⁸ Judgment, paras.950-966.

¹⁹ Judgment, paras.15,30-32,55.

- XII.** The Trial Chamber erred by finding that Article 70(1)(a) extends to “omissions” concerning issues, which were not put directly to the witness during questioning;²⁰
- XIII.** The Chamber erred in its definition of “material facts”,²¹ including by finding that such facts do not need to impact on the outcome of the judgment, and can include issues concerning the specific number of contacts with the Defence and *de minimis* witness payments (including those assessed as reasonable by the Chamber);
- XIV.** The Chambered erred by concluding that an accused, who does not represent himself, has not given evidence under oath, and has not requested or been given rights of audience, can be considered as a party for the purposes of Article 70(1)(b);²²
- XV.** The Chamber erred by finding that false evidence elicited from a Defence witness during cross-examination by the Prosecution, could trigger responsibility under Article 70(1)(a) or (b) for a defendant protected by the privilege against self-incrimination.²³
- XVI.** The Chamber erred by finding that Article 70(1)(b) encompasses evidence on which the Defence did not rely.²⁴
- XVII.** The Chamber erred by adopting an overly broad definition of “corruptly influencing” that encompasses forms of witness

²⁰ Judgment, para.21.

²¹ Judgment, paras.22-23.

²² Judgment, paras.33-37.

²³ Although the Judgment did not address Defence legal arguments on this point (as set out in ICC-01/05-01/13-1902-Conf-Corr2, paras.105-123), the Trial Chamber convicted Mr. Bemba under Article 70(1)(a) and (b) in relation to false information concerning payments and contacts with the Defence, which was elicited under cross-examination (Judgment, para.819).

²⁴ Judgment, para.40. Cf. ICC-01/05-01/13-1902-Conf-Corr2, para.123.

preparation and assistance that were not prohibited at the time of the charges, and were not otherwise directed to procuring testimony that the Defence knew and intended to be false. This includes:

- Thanking a witness for testifying:²⁵ and
- Informing witnesses who had completed their testimony that the Defence was “pleased” with their testimony.²⁶

XVIII. The Chamber’s finding that illicit coaching includes providing “instructions to (i) testify according to a particular script concerning the merits of the Main Case, regardless of the truth or falsity of the information therein”,²⁷ is based on a standard of recklessness, which is insufficient for the purposes of Articles 70(1) and 30 of the Statute.

Errors concerning modes of liability

XIX. The Chamber erred by concluding that only the “physical perpetrator” must possess intent under Article 70(1).²⁸

XX. The Chamber erred by finding that the standard of “implicit knowledge” (which is akin to the “should have known” standard of constructive knowledge in Article 28) satisfied the requirements of individual criminal responsibility set out in Article 30 of the Statute.²⁹

XXI. The Chamber erred by relying on Mr. Bemba’s position as the accused (and so-called beneficiary of the illegal conduct), to impute membership in, and responsibility for the common plan.³⁰

²⁵ Judgment, paras.170, 293.

²⁶ Judgment, para.406.

²⁷ Judgment, para.336.

²⁸ Judgment, para.26. Cf ICC-01/05-01/13-977, paras. 14-28; ICC-01/05-01/13-949, paras.12-21.

²⁹ Judgment, para.818.

³⁰ Judgment, paras.106, 727, 805.

XXII. The Chamber erred by finding that Mr. Bemba’s “tacit approval” of the conduct of his lawyers constituted an “essential contribution” for the purpose of Article 25(3)(1)(a) liability.³¹

XXIII. The Chamber erred by relying on the factual findings concerning the “common plan” to establish Mr. Bemba’s liability through Article 25(3)(b) of the Statute, thereby conflating the two forms of liability.³²

Errors concerning the Chamber’s assessment of evidence

XXIV. The Trial Chamber erred by adopting unclear and arbitrary standards on key issues,³³ such as:

- The distinction between legitimate and illegitimate payments,³⁴ or non-monetary promises;³⁵
- The point at which it was more likely than not for an overlapping telephone contact to be a multi-party call; and

³¹ Judgment, para.855. Cf, ICC-01/05-01/13-977, paras.29-39.

³² Judgment, para.853-857.

³³ *Prosecutor v. Gotovina et al.*, Appeals Judgment, 16 November 2012, para.58-61.

³⁴ Annex D.

³⁵ Improper influence

Promising that a witness would have nothing to fear, or that the accused would meet a witness after the case was completed (Judgment, para.692).

Not improper influence

- Interviewing [Redacted] before national police in a custodial setting while informing them they were suspected of Art 70 offences, (D-2, D-3),
- Escorting witnesses to the police station “in military fashion” along with the witness’s [Redacted], who were also interrogated in custody (D-57 – who described it as the worst day of his life, D64);
- The counter-terrorism police interrogating a witness at the police station without a lawyer or verbatim transcript of interview in a manner that the witness (whom the Chamber found to be generally credible) described as “robust and rigorous”, amounting to “psychological torture”(D-55):

Judgment, paras.286,232,258, ICC-01/05-01/13-1294-Conf-Corr2, paras.18-24, T-20-Conf-ENG, p.42,lns. 12-13, T-31-Red-ENG,p. 15,lns.5-15, T-32-Red-ENG,p. 72,lns. 2-22; T-37-Conf-ENG,pp.45-46.

- The point at which a telephone contact must have involved a substantive conversation (as opposed to voicemail, a pocket dial, or poor reception).

XXV. The Trial Chamber failed to refer to, or give due weight to Mr. Bemba's position as an accused, his right to seek legal advice in a manner that is protected by the privilege against self-incrimination, and the responsibility of Counsel for executing instructions in a manner that is consistent with Counsel's obligations under the Statute;

XXVI. The Trial Chamber's failure to refer to, or give evidential weight to the decision of the Bemba Main Case Defence not to rely on the evidence of the 14 witnesses;

XXVII. Key findings of fact concerning Mr. Bemba are not supported by the evidence: either no evidence has been cited, or the cited evidence cannot – under any reasonable interpretation – support the Chamber's findings. This includes:

- The adoption of rigid cut-off points for contacts with witnesses³⁶ on the basis of unsworn estimates provided by the Victims and Witnesses Unit;³⁷ and
- Findings that:
 - a. Mr. Bemba made non-monetary promises to witnesses;³⁸

³⁶ Judgment paras. 235 (D-57), 291 (D-55), 262 (D-64).

³⁷ ICC-01-05/01/13-207-Conf, paras.3,5.

³⁸i.e. The Chamber's finding at para. 301 that D-55 was promised the benefit of being in "Mr. Bemba's good graces" cites no evidence because none exists.

- b. Expenses borne by a witness in accordance with their Main Case testimony were born exclusively by the Court;³⁹
- c. There was a multi-party call involving Mr. Bemba and D-19 on 4 October 2012;⁴⁰
- d. D-2 and D-2 were called by Mr Kilolo during their testimony on an “unidentified number”, which flies in the face of D-2’s identification of a specific number for the alleged contacts, and call data records showing no contacts during this period;⁴¹ and
- e. D55 “concealed, despite being asked, his meeting with Mr Kilolo in Amsterdam and the telephone call with Mr Bemba”, despite the fact that he was not asked this.⁴²

XXVIII. As reflected in Annex A, key findings concerning Mr. Bemba’s individual criminal responsibility were based exclusively on:

- Uncorroborated, remote hearsay, which derived from coded intercepted communications between co-defendants, who never testified; or
- Extracts from coded, and heavily de-synchronised intercepts from the detention unit involving the utterances of a co-accused who did not testify.

XXIX. As illustrated by the table attached in Annex B, and the diagram in Annex C, the Chamber erroneously:

³⁹ Trial Judgment, para. 442. Cf, CAR-D20-0006-1325 at 1332, ICC-01/05-01/13-T-42-CONF-ENG, p.27, ln 23, p.28, ln.9,p.29, lns.6-7, p.113, lns.21-25.

⁴⁰ Judgment, para.741.

⁴¹ Judgement, paras.384-5.

⁴² Judgement, para.301. Cf, ICC-01/05-01/08-T-264-CONF-ENG p.55, lns.11-12,19-20.

- Inferred a pattern of “similar fact evidence”;
- Relied on this “similar fact evidence” to infer the existence of concerted action, from which it inferred the existence of a common plan;
- Inferred that because there was a common plan, the accused must have engaged in illicit conduct regarding certain witnesses, for whom no other evidence existed; and
- Circuitously, inferred the existence of “similar fact evidence” from this common plan.

These inferences are:

- Complete non-sequiturs;
- Not supported by a reliable evidentiary foundation (including inferences based on inferences); or
- Not the only reasonable inference to be drawn from the evidence.

XXX. The Trial Chamber employed improper “inferences of fact” to plug holes in the Prosecution case. If the testimony of a Prosecution witness contradicted the Prosecution case on specific issues, the Chamber:

- Found the witness to be lacking credibility in relation to these specific issues;
- Declined to rely on the witness’s testimony on these issues; and then,
- Made inferences of fact in favour of the Prosecution as concerns these issues.⁴³

⁴³ Annex B, pp.10-16.

XXXI. As illustrated by Annex A, the Chamber employed a flawed approach to corroboration. The Chamber either:

- Failed to corroborate unreliable evidence;
- Corroborated unreliable evidence with other similarly unreliable evidence; or
- Found there to be corroboration even when the evidence pertained to different matters.

XXXII. No reasonable triers of fact could have relied on the evidence of accomplice/perjurers such as D2 and D3 without reliable, independent corroboration.⁴⁴

XXXIII. No reasonable trier of fact could have relied on the de-synchronised detention unit recordings to make key findings concerning Mr. Bemba's individual responsibility.⁴⁵

Errors concerning the Chamber's application of the facts to the law

XXXIV. The findings concerning Mr. Bemba do not reach the level required to convict him as a co-perpetrator under Article 70(1)(b) and (c), or for solicitation under Article 70(1)(a). In particular, the factual findings do not support the conclusion that Mr. Bemba:

- i. intended to commit the charged Article 70 offences;

⁴⁴ ICC-01/04-02/12-271-Corr, paras.1,168, Independent Counsel v. Prince Taylor, Judgment in Contempt Proceedings (SCSL Appeal), 30 October 2013, paras.35-39. The Presiding Judge's eye-roll –captured at 11:46:25-11:46:50 of D'2's testimony on 13 October 2015 - speaks volumes as concerns the Chamber's contemporaneous perception of the witness's credibility.

⁴⁵Annex A, Judgement, para.700.

- ii. intentionally made an essential contribution to the realisation of the material aspects of these specific offences; or
- iii. urged or asked the 14 witnesses to provide testimony under oath that Mr. Bemba knew to be false in relation to material issues.



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Dated this 31st day of January 2017

The Hague, The Netherlands

Word count: 3263 (Filing) 2699 (Annex B, which contains written argument and not verbatim quotes)