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No.: **ICC-01/05-01/13**
Date: **01/06/2015**

TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Bertram Schmitt

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 with Public Annex A   **Defence Submissions on modes of liability and elements of crimes (ICC-01/05-01/13-T-8-Conf-Eng)**

Source: **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. During the hearing of 24 April 2015, the Trial Chamber ruled as follows:[1]

> Elements of crime and modes of liability in relation to Article 70 of the Rome Statute. Parties have made several submissions relating to the elements of Article 70 offences and the applicable modes of responsibility. The Chamber will or rather the Chamber does direct the parties to make full submissions in writing on the matter. Since it appears that the matter resonates the most in the Defence submissions, Defence counsel are to file their written submissions by 31 May 2015 and the Prosecution will respond according to the usual time-limit.

2. The Defence for Mr. Jean-Pierre Bemba hereby files its submissions in accordance with this ruling.

Submissions

The context of this filing

3. The Trial Chamber has indicated that it does not require extended submissions at this point.[2] In line with this ruling, the Defence has refrained from advancing detailed, or fact-oriented submissions, which the Defence might be compelled to resile from or modify at a later stage of the proceedings due to the following considerations.

4. It is difficult, if not impossible, for the Defence to elucidate or explain its position on the scope and interpretation of certain legal aspects of the case, without advancing a positive case concerning the Defence interpretation of the evidence and the case against it.

5. Nonetheless, both the nature of the Defence case and the Defence's interpretation of the evidence against it are likely to evolve further.

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[1] ICC-01/05-01/13-T-8-ENG RT 24-04-2015, p. 7, lines 13-23.
[2] ICC-01/05-01/13-968, p. 4.

6. Concretely, the Prosecution disclosure process is ongoing, and will continue until 30 June 2015.[3]

7. There is also a pending Regulation 55 application before the Trial Chamber, which might alter and enlarge the modes of liability that might apply to Mr. Bemba. Additionally, there may be further jurisprudential developments concerning the nature and scope of Article 25(3)(a), (b) and (c) prior to the conclusion of this case.

8. The Defence also cannot exclude the possibility that the Prosecution might modify the legal position it advanced at the confirmation hearing in light of the Pre-Trial Chamber's findings, or in light of developments in other cases.

9. The right of the Defence to adapt its case to both the Prosecution evidence and the Prosecution's case theory is also protected by Article 67(1)(g) and (i), which set out the right to silence, and the right not to have imposed on the Defence any reversal of the burden of proof or any onus of rebuttal.

10. In this regard, the Pre-Trial Chamber addressed the modes of liability and elements of Article 70 as part of the merits of the confirmation hearing in this case. The Appeals Chamber has also found that arguments concerning the contours or elements of offences or modes of liability are matters to be heard and determined at trial.[4]

11. Independent of the present filing, the Defence has the right to present closing submissions on matters concerning the interpretation of the elements of Article 70 and any applicable modes of liability after the completion of the trial, and

[3] ICC-01/05-01/13-960.
[4] ICC-01/09-01/11-414, para. 31. See also ICC-01/09-01/11-1122, para. 16.

to have the last word in doing so (as per Rule 141(2) of the Rules of Procedure and Evidence).[5]

12. These factors militate in favour of advancing concise and focussed submissions in relation to issues of key importance to case of Mr. Bemba.

13. The present submissions therefore focus on the issue of intent, and its specific application to Article 70 and the charges against Mr. Bemba.

Submissions on intent

14. As set out in the 'Defence Response to Prosecution's Application for Notice to be given under Regulation 55(2) on the Accused's Individual Criminal Responsibility (ICC-01/05-01/13-922)', [6] Article 70 (1) imposes a specific, non-derrogable requirement that the Prosecution must establish that the accused committed the Article 70 offence in question with intent.

15. Rule 163(1) specifies that apart from specific enumerated provisions, the Statute and Rules apply *mutatis mutandis* to Article 70. The phrase '*mutatis mutandis'* means that the Statute and Rules only apply to the investigation or prosecution of Article 70 offences, where necessary to give effect to the plain meaning of Article 70, and its purpose.[7] Statutory provisions, which are inconsistent with the wording or the purpose of Article 70, must either be disregarded, or modified in order to ensure compliance with Article 70.

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[5] The Trial Chamber has indicated that "[t]he Chamber is already aware of the legal issues arising from this case, and these issues will be discussed across the entire proceedings", ICC-01/05-01/13-968, para. 6.

[6] ICC-01/05-01/13-949.

[7] "The definition of mutatis mutandis given in legal dictionaries is "with the necessary changes in points of detail meaning that matters or things are generally the same, but to be altered when necessary" as to names, offices and the like. [378 E-F]" Extension of an earlier Act mutatis mutandis to a later Act brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the thing changed, subject to express provisions made in the later Act. [378 H, 379 A]": Ashok Service Centre & Another Etc vs State of Orissa on 18 February, 1983, 1983 AIR 394, 1983 SCR (2) 363, http://indiankanoon.org/doc/1434255/

16. The chapeau element "when committed intentionally" therefore operates to exclude (or at the very least modify) any Statutory provisions which do not require the Prosecution to establish that the accused committed the prescribed conduct with intent.[8]

17. Apart from the fact that the language of Article 70 dictates that the intent component must be applied, the drafting history of Article 70 supports the conclusion that intent to commit the offence is an essential element for criminal responsibility under this provision.

18. During the drafting process of Article 70, there were two different approaches to the Court's jurisdiction over this offence.[9] The first approach (exemplified by proposals from France) did not envisage that the ICC would prosecute offences such as perjury; the presumption was that these offences would be prosecuted by States, in accordance with the definition of these offences in national legislation.[10] These proposals did not address in detail substantive elements of the definition of the offence (such as conduct or intent) as these matters were to be regulated by national law.

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[8] This would operate in the same manner as the approach of the ICTR Trial Chamber in *Nshogoza* case; namely, in its Trial Judgment, the Trial Chamber considered the definition of 'incitement' which had been adopted by the ICTR in connection with substantive crimes, and found that as concerns Rule 77 offences, it was necessary to superimpose the requirement that the accused must have acted wilfully and knowingly:

> *"The Prosecutor v. Akayesu stated that "[i]ncitement is defined in Common law systems as encouraging or persuading another to commit an offence", and that Civil law systems punished "act[s] intended to directly provoke another to commit a crime or a misdemeanour." In order to be punishable as contempt, an act of incitement would also have to be knowing and wilful pursuant to Rule 77(A)."*

Prosecutor v. Nshogoza, Trial Judgment, Case No. ICTR-07-91-T , 7 July 2009, para. 195.

[9] W. Schabas, *The International Criminal Court : A Commentary On the Rome Statute* (Oxford University Press 2010) 855

[10] Preparatory Committee on the Establishment of an International Criminal Court 4-15 August 1997 Working Group on Procedural Matters Abbreviated Compilation of Proposals on Procedural Matters, p. 44; A/AC.249/L.3 - 6 August 1996, http://www.legal-tools.org/uploads/tx_ltpdb/doc21181.pdf

19. The second approach envisaged that offences against the administration of justice could be prosecuted at the ICC. All proposals advocating this approach contained an explicit or implicit intent requirement.

20. For example, the proposal submitted by Australia and The Netherlands referenced Rule 77 of the ICTY Rules of Procedure and Evidence as a potential model for contempt.[11] The ICTY has consistently interpreted this provision to require the Prosecution to establish that the accused wilfully and knowingly engaged in the prescribed conduct.[12]

21. The contemporaneous United States proposal delineated the different types of contempt which might be committed by different participants in the proceedings. For each category, the proposal included the requirement that the accused must commit the key elements of the prescribed conduct with intent.[13]

22. This requirement reflects the distinction in the United States of America between civil and criminal contempt: whereas negligence might suffice to invoke the former, criminal responsibility cannot be imposed in connection with the latter in the absence of intent to commit the offence in question.[14]

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[11] 'Working Paper submitted by Australia and The Netherlands', 26 July 1996, Preparatory Committee, A/AC.249/L.2, p. 26.

[12] ICC-01/05-01/13-949, fn. 14.

[13] Offenses against the Integrity of the Court: Preparatory Committee on the Establishment of an International Criminal Court: Proposal Submitted by the United States of America, A/AC-249/WP-41, 24 August 1996. See also W. Schabas, *The International Criminal Court : A Commentary On the Rome Statute* (Oxford University Press 2010) 855

[14] Intent "is an essential element of criminal contempt, and . . . must be proved beyond a reasonable doubt": United States v. Consol. Prods., Inc., 326 F. Supp. 603, 606 (C.D. Cal. 1971); *see also* United States v. United Mine Workers, 330 U.S. 258, 303 (1947); In re Floersheim, 316 F.2d 423, 428 (9th Cir. 1963); Yates v. United States, 316 F.2d 718, 723 (10th Cir. 1963); MacNeil v. United States, 236 F.2d 149, 152 (1st Cir. 1956); U.S. v. Seale, C.A.7 (Ill.) 1972, 461 F.2d 345

23. This requirement of intent was not disputed throughout the drafting process. For example, the 1997 proposal submitted by Japan iterates an intent requirement in relation to each sub-category of the offences against the administration of justice.[15]

24. The December 1997 version confirmed the consensus that the ICC should have the ability to prosecute the offence itself, but noted that the draft article required further elaboration concerning the definition of the offence.[16] The draft then referred back to the August 1997 compilation containing the Japanese proposal.[17]

25. The penultimate and final versions consolidated the intent requirement, which was set out in individual provisions of the Japanese and United States' proposals, into the chapeau wording "when committed intentionally". [18]

26. As set out in the Defence Response to the Regulation 55 Application, domestic implementing legislation reflects the understanding of State parties that Article 70 of the Statute only required them to penalise intentional forms of contempt.[19]

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[15] Preparatory Committee on the Establishment of an International Criminal Court 4-15 August 1997 Working Group on Procedural Matters Abbreviated Compilation of Proposals on Procedural Matters, pp.45-46.

[16] 'Decisions taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997', A/AC.249/1997/L.9/Rev.1, p. 31.

[17] Footnote 33. The 1997 compilation consisted of a proposal from France and one from Japan. The French proposal reflected the approach that the offence should be defined and prosecuted by national authorities: Preparatory Committee on the Establishment of an International Criminal Court 4-15 August 1997 Working Group on Procedural Matters Abbreviated Compilation of Proposals on Procedural Matters, p. 44.

[18] See Preliminary Draft Consolidated Text Article 63 [44bis] (Preparatory Committee, 25 March 1998) A/AC.249/1998/WG.4/CRP.3, http://www.legal-tools.org/uploads/tx_ltpdb/doc21108.pdf
United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/2/Add.1 - 14 April 1998, p. 111.

[19] ICC-01/05-01/13-949, paras. 14-18.
See also:
Articles 16, 17, 18, 19, 20, 21, Crimes Against Humanity and War Crimes Act (2000) (Canada), http://iccdb.webfactional.com/documents/implementations/pdf/Canada_-_CAH_and_War_crimes_Act_amend_2001.pdf.
Part 2, Section11, International Criminal Court Act (2006) (Ireland), http://iccdb.webfactional.com/documents/implementations/pdf/International_Criminal_Court_Act_2006_Ireland.pdf

27. The fact that this intent requirement did not engender dispute or disagreement during the drafting process resonates with the fact that intent is a requirement for Article 70-type conduct in a significant number of domestic jurisdictions.[20]

28. Although intent is not a universal requirement in domestic jurisdictions, the principle of legality does not require universal recognition of the strictest definition, but rather the contrary; i.e in order to establish through article 21(1)(c) of the Statute

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Chapter 1, Section 10, International Criminal Court Implementation Act 2002 (Netherlands) http://iccdb.webfactional.com/documents/implementations/pdf/Netherlands_ICC_Implementation_Act_2002.pdf; Articles 5-1(1) and 207-1, Dutch Criminal Code (Wetboek van Strafrecht), http://iccdb.webfactional.com/documents/implementations/pdf/Netherlands-_Penal_Code_Dutch_2013.pdf.
Articles 20, 21, 23, International Criminal Court Act 2007, No.26 (Samoa), http://iccdb.webfactional.com/documents/implementations/pdf/Samoa_ICC_Act_2007.pdf
Articles 18, 19, 20, 21, The International Criminal Court Act 2006 (Trinidad and Tobago), http://iccdb.webfactional.com/documents/implementations/pdf/Trinidad___Tobago_The_International_Criminal_Court_Act_2006.pdf.
Article 4, The International Criminal Court (SCOTLAND) ACT 2001, http://iccdb.webfactional.com/documents/implementations/pdf/UK_-_ICC_Scotland_Act_2001_amend_2002.pdf

These articles are compiled in Annex A.

[20] Articles 193, 194, the Penal Code, 1860 (ACT NO. XLV OF 1860), Bangladesh; Articles 251, 254, 258, 250, 262 of the Belize Criminal Code; Article 236 of the Criminal code of Bosnia and Herzegovina; Articles 113, 116 of the Penal Code of Botswana; R. c. Beaudry, 2007 SCC 5, 2007 CarswellQue 235 (para. 52), Canada; Articles 305-308, Criminal Law of the People's Republic of China; Articles 124, and 128 of the Crimes Act 1996, Cook Islands; Article 304(1) of the Croatian Criminal Code; Article 320(1) and (2) of the Estonian Penal Code; Article 184 of the Fijian Crimes Decree 2009 (Decree no. 44 of 2009); Article 434-13 of the Code Penal, France, as interpreted by the 2012 Annual Report of the Court of Cassation; Sections 158 and 210 of the Criminal Code 1960 (Act 29) Ghana; Article 361 and 362 of the Criminal Code, Grenada; Articles 325 and 326 of the Criminal Law (Offences) Act Guyana; Article 148, 162 of the Iceland Penal Code; Articles 217, 221, 224, 225, 242 of the Indonesian Penal Code; Articles 104 and 105-2 of the Japanese Penal Code; Article 339 of the Criminal Code, Kazakhstan; Articles 317, 318, 325, 332 of the Criminal Code, Kyrgyzstan; Article 233 and 235 of the Criminal Code, Lithuania; Articles 111, 148 of the Criminal Code, Marshall Islands; Article 390 of the Criminal Code of the Republic of Montenegro; Articles 117, 120, 122 of the Criminal Code Act, Nigeria; Articles 121, 122, 124 of the Criminal Code Act 1974, Papua New Guinea; Articles 294, 295, 296, 297, 301, 302, 303, 307, 309 of the Criminal Code of the Russian Federation; Articles 374, 383, 384, 385, 291, of the Criminal Code St Lucia; Article 336 of the Criminal Code, Serbia; Article 192, 193, 204, and 204A of the Penal Code of Singapore; Article 344 of the Criminal Code Slovakia; Articles 285 and 286 of the Criminal Code, Slovenia; Articles 110, 114, 122, 124 of the Criminal Code, Solomon Islands; Article 115(1) of the Criminal Code, Sudan; Article 104 of the Penal Code, Tuvalu; Articles 108, 110, 111 of the Penal Code, Zambia; Article 184 of the Criminal Code, Zimbabwe; Title 18, Sections 1621(1) and (2) and 1622 of the United States Code: These articles are compiled in Annex A.

that non-intentional contempt should be penalised as a general principle of law, it would be necessary to establish wide-spread recognition of any definition, which departs from the strictest definition.[21] The fact that so many States require intent to be proven in order to establish criminal contempt renders this impossible.

29. There are, in any case, no gaps in the Statute which would require the Court to have recourse to general principles of law.[22] Article 70(1)(a),(b), and (c) are drafted to capture exhaustively the different means by which the participants in a case can commit crimes concerning false evidence or testimony:

i. As a witness (article 70(1)(a));
ii. As a party (Article 70(1)(b)); and
iii. Any person, including third parties (Article 70(1)(c)).

30. Articles 70(1)(a) and (b) are drafted to reflect the specific obligations and duties of witnesses and Counsel. A witness has a duty under Article 69(1) to present truthful evidence. Counsel are under a duty pursuant to Article 25(2) of the Code of Conduct not to submit evidence that he or she knows to be incorrect.

31. In contrast, non-lawyers - such as the accused or third parties – are under no such duty since it is not their role to assess the truthfulness of evidence or make the final decision as to whether it is tendered in Court: that is the duty of Counsel. This is reflected in Article 24(2) of the Code of Conduct, which stipulates that:

[21] *Prosecutor v. Furundzija* Trial Judgement of 10 December 1998, at para 178: "reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world". See also Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 32, referring to universal adoption of a rule.
[22] Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 39.

Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgment on the substance purpose of statements made and questions asked.

32. Article 14 of the Code further specifies:

firstly, that Counsel shall abide by the client's decisions concerning the overall objectives of the Defence, provided that such objectives are consistent with Counsel's legal obligations; and

secondly, that Counsel must consult with the client, but by inference, is not obliged to comply with the client's decisions concerning the means by which the objectives of the Defence are met.[23]

33. Counsel's personal judgment concerning the means by which Defence objectives should be achieved constitutes a break in any causal nexus between the wishes of the individual defendant, and the specific actions of the Defence.

34. Since a client cannot be presumed to understand the nuances of the law, the client also has a right to consult with his lawyer regarding possible courses of actions (whether legal or illegal), without adverse consequences. It is the duty of Counsel to advise the client regarding the illegality of a proposed course of action - the client cannot be faulted for merely raising the issue with his or her lawyer.[24]

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[23] The ICTY Appeals Chamber has also confirmed that whilst Counsel must abide by the client's decisions concerning the overall objectives of representation, Counsel are not obliged to comply the client's decisions as concerns the means by which those objectives are achieved: *Prosecutor v. Blagojevic*,' Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defense Team' , 7 November 2003, pp. 13-14.

[24] For example, Rule 1.2(d) of the American Bar Association (ABA) Model Rules of Professional Conduct states that: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

35. The Appeals Chamber of the Special Court for Sierra Leone has also underscored that it cannot be presumed that an accused, who is a layman, understands and appreciates the consequences of actions undertaken by Counsel.[25] In order to impute responsibility for the consequences of Counsel's actions to the Accused, it is necessary to ascertain "knowing, intelligent and voluntary" action on the part of the accused.[26]

36. For this reason, *ad hoc* Tribunals have never indicted or prosecuted the accused for the conduct of his Defence, in the absence of proof that the accused

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http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html

The ABA Model Rules were apparently the model for the ICTY Code of Conduct: see T. Gut *Counsel Misconduct Before the International Criminal Court* (Hart Publishing 2012) p. 12.

In France, Counsel has a positive duty to advise the client that certain conduct is unlawful, and to withdraw from the Case if the client insists that such conduct should be pursued. See Décision à caractère normative n° 2005-003 portant adoption du règlement intérieur national (RIN) de la profession d'avocat (Article 21-1 de la loi du 31 décembre 1971 modifiée), article 1er (1.3 et 1.5).
The client has an absolute entitlement to put such matters to his Counsel – it would be a criminal office for the Counsel to violate professional secrecy by reporting the client.
Article 2 : le secret professionnel (L. 31 déc. 1971, art. 66-5 ; D. 12 juill. 2005, art. 4 ; C. pénal, art. 226-13**) 2.1 Principes**
L'avocat est le confident nécessaire du client.
Le secret professionnel de l'avocat est d'ordre public. Il est général, absolu et illimité dans le temps.
Sous réserve des strictes exigences de sa propre défense devant toute juridiction et des cas de déclaration ou de révélation prévues ou autorisées par la loi, l'avocat ne commet, en toute matière, aucune divulgation contrevenant au secret professionnel.
Under Code Penal article 226-13, lawyers risk a year of imprisonment and a fine of 15 000 euros if the confidentiality (secret) principle is violated.
This conception of the Counsel-Client relationship appears to have influenced the drafting of the ICC Code of Conduct. Thus, whilst an initial draft of the Code required Counsel to report any requests from the Client to enter into a fee-splitting arrangement, this provision appears to have been dropped in light of concerns that it would be incompatible with legal privilege.
See ADC-ICTY Report on Draft Code, p 12, http://adc-icty.org/Documents/icc_code_report.pdf. 'The Legal Representation Team of the Coalition for the International Criminal Court (CICC) Submission to the 4th session of the Assembly of States Parties Comments on Article 22 of the Draft Code of Professional Conduct for Counsel acting before the ICC', November 2005. http://www.iccnow.org/documents/LR_article22_teampaper_Nov05.pdf

[25] *Prosecutor v. Taylor,* 'Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief', 3 March 2011, paras. 59-64.

[26] Para. 65.

independently fulfilled the *actus reus* and *mens rea* criteria for offences against the administration of justice.[27]

37. Given that defendants are not officers of the Court and are not subject to same Statutory duties as parties or witnesses under oath, their conduct is captured by Article 70(1)(c), and not Articles 70(1)(a) or (b). Article 70(1)(c) requires that the person must have engaged in intentional conduct which is contrary to the administration of justice, such as corruptly influencing a witness, or obstructing or interfering with the attendance of or testimony of a witness.

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[27] Apart from the *Seselj* case (in which the accused is his own counsel), and cases concerning a refusal by the defendant to testify as a witness (*Jokic* and *Krstic*) there are limited instances in which accused have been prosecuted for contempt. In such cases, the Prosecution alleged that the accused knowingly and wilfully engaged in the prescribed conduct himself. For example, in the Milan Simic case, the Prosecution indicted Mr. Simic on the basis of allegations that "Milan Simić was alleged to have threatened the witness over the telephone, and once by firing a gun into the air from his vehicle in the middle of the night near the witness' home. Between January and May 1999, he also allegedly incited the witness to give false testimony on his behalf, promising in exchange money, an apartment, and a job. *Prosecutor v. Simić et al*, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, IT- 95-9-R77, 30 June 2000, Para.6. At the Special Court for Sierra Leone, the accused Kamara and Kanu were indicted (and convicted) for contempt, on the basis of direct actions taken by the accused to intimidate/bribe witnesses: 'Decision on public with confidential annexes Prosecution motion for an investigation into contempt of the Special Court for Sierra Leone', SCSL-04-1 6-ES , 18 March 2011, p. 15; Judgment in Contempt Proceedings, 25 September 2012, SCSL-2011-02-T, paras. 76, 77, 631, 656, 664, 684, pp. 182-183.
In contrast, the *ad hoc* Tribunals have taken no action against defendants in connection with situations where counsel have been found to have engaged in conduct, which obstructs the course of justice, on the basis of instructions from the client. In such instances, the Tribunals ruled that Counsel have a duty not to comply with the instructions: *Prosecutor v. Barayagwiza,* 'Decision on Defence Motion to Withdraw', 2 November 2000, para. 24. Where Counsel fails to comply with a Court order due to instructions from the client, any sanctions attach to Counsel and not the Client: *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Decision to Sanction the Defence for Failure to Comply with the Chamber's Orders, 11 March 2009.
In terms of domestic law, Section 238 of the Hungarian Criminal Code specifies that an accused cannot be punished for the fact that his Defence tendered false documents or evidence; the accused could only be held to account if he or she "strives to persuade another person to give false evidence in criminal or civil proceedings"(Section 242 of the Criminal Code): http://iccdb.webfactional.com/documents/implementations/pdf/Hungarian-Criminal-Code-English-.pdf
In Russia, in a civil case, the applicant in the proceedings can be held accountable for falsification of evidence, but in criminal cases, responsibility is limited to the legal representatives participating in the case: Article 303 of the Criminal Code of the Russian Federation (Annex A).

38. The application of non-intentional forms of liability to the different offences encompassed by article 70(1)(a) and (b) would have the effect of conflating the different duties of the different participants. It would transpose, improperly, the particular duties of witnesses and Counsel to third parties (including the defendant).

39. The dilution of the intent requirement in Article 70(1)(c) would also improperly extend the Court's penal jurisdiction over acts and conduct, which are not considered to be criminal in many State parties.[28]

40. For the specific purposes of this case, it is therefore necessary for the Prosecution to establish that Mr. Bemba committed the prescribed *actus reus* of the charged Article 70 offence in question with intent.

Relief sought

41. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Trial Chamber to adopt the above legal principles.

Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Date this 1st day of June 2015

The Hague, The Netherlands

[28] See footnote 20 *supra*.