Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No: **ICC-01/05-01/13**
Date: **18 July 2016**

TRIAL CHAMBER VII

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public Redacted Version with
Public Annexes A-D

Final Trial Brief

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

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I. INTRODUCTION

1. The Prosecution has charged Jean-Jacques Mangenda with participation in a scheme of procuring lies from fourteen witnesses over a period of twenty-three months.[1] The Prosecution, during its Opening Statement, promised the Trial Chamber that the evidence of Mr Mangenda's participation in this alleged scheme would be unequivocal.[2] Nothing less is required in a criminal trial where the Prosecution's burden is to prove *beyond any reasonable doubt*.

2. The Prosecution has not met its burden. The evidence does not show: (i) that Mr Mangenda had any knowledge at all of the testimony or interviews of five witnesses (D-57, D-64, D-55, D-23 and D-26); (ii) that he knew that any lies had been procured from the four [REDACTED] witnesses (D-2, D-3, D-4 and D-6); or (iii) that he knew that any lies had been procured from the five witnesses allegedly discussed during intercepted communications (D-25, D-29, D-15, D-54 and D-13).

3. The evidence does not reliably establish that Mr Mangenda heard any alleged promise of money at the [REDACTED] in Yaoundé; but even if it did, the evidence does not show that Mr Mangenda knew that this promise was offered in exchange for any falsehoods. He had no involvement in the discussions about the content of the witnesses' future testimony and therefore had no opportunity to observe any alleged procurement of lies. Further, he had no basis to exclude the reasonable possibility that the sum was offered, in accordance with the accepted practice of the Court and of the OTP itself, as reimbursement for past expenses or loss of income. The intercepted conversations from several months later reveal no scheme to conceal the *Bemba* Defence's contacts with these witnesses. The Prosecution itself acknowledges that a fictitious plan to do so was "entirely made up."[3] Indeed, D-2 and D-3's testimony confirms that not the slightest suggestion was made that they should conceal anything about their previous contacts with the Defence, or that there was even a prospect of a potential Article 70 investigation. This is inconsistent with any *post facto* consciousness of guilt.

[1] This submission is a public redacted version prepared pursuant to the Chamber's direction in its *Decision Closing*
[2] Opening 27:2-3,34:13-14,34:19-20,35:9-10.
[3] *Id.* 68:10.

4. The Prosecution's interpretations of the intercepted conversations are speculative, hyperbolic and wrong. The Prosecution has not shown that the terms "*couleur*" or "*enseignements*" implied going beyond the techniques of witness interviewing that it has itself advocated as being perfectly proper. The Prosecution has not established which, if any, of the objective falsehoods within the scope of this case were known to Mr Mangenda, or whether he had any role in the procurement, or assisting the procurement, of those lies.

5. Only one outcome is available on the evidence: that Mr Mangenda be found not guilty on all counts.

II. THE STANDARD OF PROOF AND THE IMPORTANCE OF CHRONOLOGY

6. The criminal standard of proof is "beyond reasonable doubt." Every material element of the crime (the *actus reus*) must be proven beyond reasonable doubt. The requisite mental state (*mens rea*) must also be proven beyond reasonable doubt to have existed at the moment of the alleged *actus reus*, not later.[4]

7. Precision is required in making findings as to *when* an accused possessed the relevant *mens rea*. The *Krajišnik* Appeals Chamber quashed a conviction pertaining to alleged ongoing co-perpetration because of the Trial Chamber's inability, or failure, to have found precisely *when* the *mens rea* came into existence. The Appeals Chamber faulted the Trial Chamber for using such vague terms as "soon", "very soon" or even referring to a "particular month":[5]

> The Trial Chamber did not find, however, at *which point in time* the leading members of the JCE became aware of each of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber has found that the Trial Chamber committed a legal error by convicting Krajišnik for the expanded crimes.[6]

8. Convictions were reversed in *Šainović* for orders that ostensibly contributed to crimes where the Trial Chamber could not have found beyond a reasonable doubt that the accused possessed the *mens rea* until six weeks later.[7] Knowledge of a criminal purpose obtained just *one day after* the event has been deemed an insufficient basis on which to infer the existence of the *mens rea* the day before.[8]

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[4] *Naletilić*, para.114 ("[t]he principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime"); Bouloc, p.234 ("*[i]l faut que l'élément moral se joigne à l'élément matériel (qu'il apparaisse avant ou au même moment) pour que l'infraction soit constituée*"); § 16 Abs. 1 StGB: "[w]hosoever at the time of the commission of the offence is unaware of a fact which is a statutory element of the offence shall be deemed to lack intention. Any liability for negligence remains unaffected.")
[5] *Krajišnik*, para.173.
[6] *Id.* para.203.
[7] *Šainović*, para.1667 ("[a]ccordingly, Lazarević's issuance of the *Grom 3* order to the Priština Corps units on 7 February 1999 cannot be considered as an act of assistance to the commission of deportation and forcible transfer by the VJ forces, as it was not established that at the time of its issuance, he had the requisite *mens rea* for aiding and abetting the commission of forcible displacement by the VJ.")
[8] *Blagojević*, para.298.

9. The "*totality* of the evidence"[9] is relevant to assessing whether and when *mens rea* came into existence. On the other hand, the presumption of innocence and the requirement of proof beyond reasonable doubt require close scrutiny of whether *post facto* events and/or knowledge demonstrate retrospectively the existence of knowledge at an earlier time. The same care is required in respect of *post facto* evidence of *actus reus*:

> [a]s regards *the evidence which related to events postdating the attack on Bogoro*, the Trial Chamber stated that "this evidence […] does not support a finding beyond reasonable doubt that Mathieu Ngudjolo was indeed the commander-in-chief of the Lendu combatants from Bedu-Ezekere who were *present in Bogoro on 24 February 2003*."[10]

10. The Prosecution has not approached timing with adequate care. Its Pre-Trial Brief, rather than discussing the alleged lying witnesses in chronological sequence of testimony, addresses them as follows: 12-13-9-8-5-4-7-6-1-2-3-11-14-10.[11] This obscures the key issues that, as discussed above, are essential to assessing the totality of the evidence in its proper context, and properly assessing what inferences can be drawn beyond reasonable doubt. The present submissions are, accordingly, structured chronologically so that the Trial Chamber has a fair opportunity to assess what Mr Mangenda could or would have known over time.

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[9] *Lubanga*, para.22, citing *Mrkšić*, para.217.
[10] *Ngudjolo*, para.115 (italics added).
[11] PTB, paras.65-219.

III. THE DEFINITION OF THE CONFIRMED OFFENCES AND MODES OF LIABILITY

(i) Aiding and Abetting "Giving False Testimony"[12]

11. "Giving false testimony" – by its plain language – encompasses only the making of statements that are false. The identically-worded offence of having "given false testimony" at the ICTR[13] and the MICT[14] has been consistently interpreted as requiring the giving of a "false statement",[15] which may "consist of *either* an affirmation of a false fact or negation of a true fact."[16]

12. The *actus reus* is constituted by a conscious and wilful lie.[17] A statement is not "false" where it is incorrect, mistaken or confused.[18] The falsity must be given "knowingly and wilfully."[19]

13. International tribunals have consistently required that the false statement concern "a material issue in the case".[20] Materiality is often assessed according to whether "the alleged false testimonies could have some bearing on the ultimate disposition of the case"[21] and whether there is a matching *mens rea* to have such an impact.[22] As recognised in *Akayesu*,[23] this approach mirrors that of many (albeit not all) national jurisdictions.[24]

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[12] Confirmation Decision, para.76.
[13] ICTR Rule 91(B).
[14] MICT Rule 108. *See also* ICTY Rule 91(B). The ICTY has not had to address false testimony in its proceedings.
[15] *Ntahobali* Decision, para.20.
[16] *Akayesu* Decision, p.3 (italics added).
[17] *Akayesu* Decision, p.3 ("the witness must believe at the time the statement was made that it was false"); *Bizimungu* Decision, para.5.
[18] *Dunnigan*, p.94 (false testimony does not arise where the incorrect statement arises from "confusion, mistake or faulty memory").
[19] MICT Rule 108(B); ICTY Rule 91(B); ICTR Rule 91(B); STL Rule 152(A); RSCSL Rule 91(B).
[20] *Niyitegeka* Decision, para.17 ("it is necessary for the party alleging the falsehood to prove […] the possible bearing of the said statements on the judge's decision on a material matter in the case"); *Ntakirutimana* Decision, fn.35; *Ntahobali* Decision, para.20 ("[t]here must be a relevant connection between the statement and a material issue in the case"); *Nyiramasuhuko* Decision, paras.11,14; *Karemera* 29 December 2006, para.6; *Karemera* 26 September 2007, para.4; *Rutaganda* Decision, p.2.
[21] *Ntahobali* Decision, para.23; *Bizimungu* Decision, paras.5,15.
[22] *Simba*, fn.68; *Rutaganda*, para.20; *Ntakirutimana* Decision, para.10; *Bagilishema* Decision, p.3 ("[t]his does not suffice to demonstrate that the witness intended to mislead the Chamber and to cause harm").
[23] *Akayesu* Decision, pp.2-3 ("WHEREAS, in many judicial systems, the false testimony must be directly linked to the facts of the case; some judicial systems even add that statements, which are deemed to be false, must have some bearing on the outcome of the trial, during which the witness was heard; in other words, the false statement must be able to influence the decision of the judge, either in favour of or against the accused […]; WHEREAS it is indeed

Dispensing with this well-established element as a matter of international criminal law would violate *nullum crimen sine lege*.

14. Testimony has been found not to be "material to the case" where a witness lied about a pre-testimonial interview with a party,[25] and even when a witness offered substantive testimony about an accused's presence at an incriminating meeting where "the Prosecution ha[d] elected to not attempt to prove [the accused's] presence either by phone or in person."[26] The ICC OTP has opposed Article 70 investigations for a witness who testified falsely about how he knew the identity of another protected witness,[27] and for another who testified falsely that he had not received any payments from the Prosecution.[28]

15. Article 25(3)(c), the only form of liability for this offence confirmed by the Pre-Trial Chamber in respect of Mr Mangenda,[29] requires that a person "[f]or the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." The meaning of "purpose" is self-evident, and that purpose must be to "facilitat[e] the commission" of the crime. As stated in *Mbarushimana*, "unlike the

appropriate to add that false testimony is a deliberate offence, which supposes wilful intent on the part of the perpetrator to mislead the judge and thus to cause harm.")

[24] Philippines, Revised Penal Code, Art.183; *Tomas v. Philippines*, fn.15 ("[t]he elements of perjury under Article 183 are: (a) That the accused made a statement under oath or executed an affidavit upon a material matter"); NSW Crimes Act, s327(1) ("[a]ny person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years"); France, *Code pénal*, p.1339 [Commentary]: "*[l]e faux témoignage n'est un crime ou un délit que lorsqu'il est prouvé qu'il pouvait exercer une influence sur la décision du juge […] [l]e faux témoignage consiste dans une altération volontaire de la vérité portant sur les circonstances essentielles du fait poursuivi. […] [l]a simple inexactitude portant sur une circonstance accessoire et sans effet sur le sens réel de la déposition ne saurait constituer le délit*"); UK, Perjury Act, s1(1); US, 18 USC §1621; *Kungys*, pp.786-787 ("'[m]aterial' means 'having real importance' or 'great consequences' […] [t]he adjective 'material' is widely used to distinguish false statements that are actionable at law from those that are not. In the context of criminal false statements, the term 'material' has been said to require that the false statement be one that had 'a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed.")

[25] *Bagosora* Decision, paras.2,8,11 ("[t]he Chamber has difficulty accepting the witness's explanation […] [h]owever, the statement does not concern a matter material to the case […] [o]ne of the elements of false testimony is lacking and, therefore, the requirements of Rule 91(B) are not met.")

[26] *Karemera* 6 April 2010, para.7.

[27] *Bemba* 16 October 2013, para.8 ("the prosecution opposes the defence Application, arguing that the matter relates to the credibility of Witness 42's testimony, which is to be tested during questioning at trial, rather than through an independent investigation. The prosecution argues that 'it is not necessary or desirable to establish an extraordinary mini-tribunal in the middle of trial to deal with what the defence suggests is false testimony'").

[28] *Infra* note 218.

[29] Confirmation Decision, p.51.

jurisprudence of the *ad hoc* tribunals, article 25(3)(c) of the Statute requires that the person act with the *purpose* to facilitate the crime; *knowledge is not enough for responsibility under this article*."[30]

16. The assisting conduct, as is well-established in international law, must have had a substantial effect on the commission of the crime.[31] The Prosecution cites no authority to the contrary.[32] This Trial Chamber should also consider what degree of directness is required to satisfy the *actus reus*, and that some forms of assistance are so remote that they cannot constitute the *actus reus*. Finally, assistance in the form of encouragement must have been known to the perpetrator at the time of his crime.[33]

17. This Trial Chamber has defined the parameters of the alleged falsehoods that fall within the scope of the present case as being limited to

> issues like: First, [witnesses'] previous contacts with the Defence, including those where witnesses were coached before testifying; their meetings with other prospective witnesses; their acquaintance with some of the accused or other persons associated with them; the fact that promises had been made to them in exchange for their testimony; and the fact that they had received reimbursements or transferred by Mr Bemba on his behalf for the purpose of unduly influencing the witness. Statements pertaining to the merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony. ***However, these statements will not be considered for their truth or falsity***.[34]

Accordingly, the lies that Mr Mangenda must be found to have purposefully and substantially assisted are the alleged lies – if any – as defined above.

18. The Trial Chamber may, in summary, guide its analysis of each count of aiding and abetting false testimony as follows:

[30] *Mbarushimana* Confirmation, para.274 (italics added).
[31] *Ntawukulilyayo*, para.216; *Kalimanzira*, para.74; *Karera*, para.321; *Muvunyi*, para.79; *Seromba*, para.44; *Blaškić*, para.46.
[32] PTB, para.233.
[33] *Brđanin*, para.277; *Nyiramasuhuko,* para.2088 (quashing a conviction in the absence of evidence that the perpetrators were aware of the alleged encouragement).
[34] Opening 5:18-6:2 (emphasis added). *See* Confirmation Decision, para.28 ("objectively false").

- Was there an incorrect statement by the witness in relation to the issues defined above?
- Was the incorrect statement by the witness a lie?
- Was the lie, as a threshold matter, "material"?
- Was Mr Mangenda aware that the witness was committing the offence (*i.e.* aware of that a material lie was being wilfully uttered and was not the product of confusion or mistake)?
- If so, did Mr Mangenda provide substantial assistance to this material lie?
- If so, did Mr Mangenda provide this substantial assistance for the purpose of facilitating the material lie in court?

(ii) Presenting False Testimony

19. The Pre-Trial Chamber did not confirm the charge of presenting forged documents.[35] Accordingly, the only "false evidence" alleged to have been presented is testimony. The elements of giving false testimony should logically also apply to the presentation of false testimony. The notion of "presenting" oral testimony, however, presupposes advance or contemporaneous knowledge that someone else – *i.e.* the witness – is going to commit the offence of giving false testimony. Learning subsequently that the evidence was false cannot fit within the meaning of "[p]resenting". Further, it is doubtful whether responses to questions by the non-calling party can be characterised as "presented" by the calling party.

20. The forms of "committing" under Article 25(3)(a) include as "an individual, jointly or with another or through another person." This "co-perpetration" with another under Article 25(3)(a) requires that the accused: (i) be "part of a common plan or an agreement" with others; and (ii) contribute essentially and in a coordinated manner to the fulfilment of the material elements of the offence.[36] *Dolus directus*, or direct intent, in relation to the

[35] Confirmation Decision, pp.49-52.
[36] *Bemba* Confirmation Decision, para.350 ("co-perpetration requires the proof of two objective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime"); *Banda* Confirmation Decision, para.128 ("(a) the suspect must be part of a common plan or an agreement with one or more persons; and (b) the suspect and the other co-perpetrator(s) must carry out

crime is required for liability to arise, just as much as it would be in respect of the direct physical commission of the *actus reus*.[37]

21. Articles 14 and 24 of the Code of Professional Conduct do not confer the authority to "present" evidence at the ICC on a Case Manager.[38] Mr Mangenda cannot have "committed", even through co-perpetration, the offence of "presenting" false testimony. Article 25(3)(c) might, arguably, apply in such circumstances.

22. A mere suspicion, or even strong indications, of falsity by the presenter are insufficient: the presenter must know[39] – in the sense of "actual knowledge"[40] – that the proposition is false. Further, if a witness gives testimony *ex improviso* that the lawyer realises (either at the moment it is uttered or subsequently) is false, not all legal systems require the lawyer to denounce the lie to the Court, although some remedial measures may be required.[41] Most, if not all, of these remedial measures – such as being required to cease questioning on that issue after hearing a lie, or being required to declare that no reliance is placed on the testimony – are beyond the authority of a Case Manager.

23. The same six elements mentioned above in respect of aiding and abetting false testimony also apply in respect of the presentation of false testimony. The main difference is that the principal is the "presenter" of the testimony, rather than the witness. The six elements need, accordingly, to be re-formulated as follows:

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essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime.")

[37] *Stakić*, para.65; *Kvočka*, para.83; *Vasiljević*, paras.97,101; *Stanišić & Simatović*, para.1258, fn.2193 ("[i]t follows from that and the above that the first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice").

[38] Code of Conduct, Arts.14,24.

[39] *Id*. Art.25(1) ("[h]e or she shall not introduce evidence which he or she knows to be incorrect"); Italy, Code of Conduct, Art.50.1 ("*[l]'avvocato non deve introdurre nel procedimento prove, elementi di prova o documenti che sappia essere falsi*") (translation: "[i]nto the trial, a lawyer shall not introduce evidence, elements of proof or documents which he knows to be false"); NY Professional Code, DR 7-102(A)(4); NY Rules of Professional Conduct ("Rule 3.3. Conduct Before a Tribunal (a) A lawyer shall not knowingly: (3) offer or use evidence that the lawyer knows to be false").

[40] ABA Rule 1.0(f) (defining "knowledge" in this context as "actual knowledge of the fact in question").

[41] IBA Guideline 11; NZ Lawyers and Conveyancers Act, Rule 13.10.1 ("[i]f a witness (not being the lawyer's client) gives material evidence in support of the lawyer's client's case that the lawyer knows to be false, the lawyer must, in the absence of a retraction, refuse to examine the witness further on that matter"); NY Rules of Professional Conduct, Rule 3.3(a)(3) ("[i]f […] a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.")

- Was there an incorrect statement by the witness in relation to the issues defined above?
- Was the incorrect statement by the witness a lie?
- Was the lie, as a threshold matter, "material"?
- Did the presenter have actual and advance knowledge that a material lie would be spoken and did he intend that it be spoken?
- If so, did the assister provide substantial assistance to the presentation of the material lie?
- If so, did the assister provide this substantial assistance with the purpose of facilitating the presentation of the lie in court?

(iii) Corruptly Influencing

24. Article 70(1)(c) confers jurisdiction over "[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying or tampering with or interfering with the collection of evidence."

25. The offence requires, at the very least, that the inducements be offered *for the purpose of* producing false testimony. "*Subornation de témoins*" – as the offence is defined in the equally authentic French text – is well-recognised in French-speaking countries as requiring the purpose of suppressing testimony entirely or of procuring a falsehood:

> *[l]e fait d'user de promesses, offres, présents, pressions, menaces, voies de fait, manœuvres ou artifices au cours d'une procédure ou en vue d'une demande ou défense en justice afin de déterminer autrui soit à faire ou délivrer une déposition, une déclaration ou une* ***attestation mensongère****, soit à* ***s'abstenir de faire ou délivrer une déposition****, une déclaration ou une attestation, est puni de trois ans d'emprisonnement et de 45000 euros d'amende, même si la subornation n'est pas suivie d'effet.*[42]

[42] France, *Code pénal*, Art.434-15. *See* Cass.crim. 25 January 1984: *Bull.Crim. N°33* ("*[a]lors que le délit de subornation d'autrui n'est constitué que s'il est fait usage de l'un des moyens prévus par l'article 365 [de l'ancien Code pénal, et 434-15 du nouveau Code pénal] du Code pénal en vue d'obtenir une fausse déclaration d'une personne qui est légalement tenue de dire la vérité en justice*"); Sénégal, *Code pénal*, Art.359 (*"à faire ou délivrer […] une attestation mensongère"*); Morocco, *Code pénal*, Art.373 (*"à délivrer une attestation mensongère"*); Gabon, *Code pénal*, Art.179 (*"à faire ou délivrer une déposition, une déclaration ou une attestation mensongère"*); Madagascar, *Code pénal*, Art.365; Algeria, *Code pénal*, Art.236. Belgium goes further, requiring that the lie be

These two purposes correspond to the interpretation of the word "corruptly"[43] in the US legislation that was apparently the inspiration for the language in the English text of the Statute.[44]

26. The Pre-Trial Chamber confirmed the counts of "corruptly influencing" against Mr Mangenda in respect of each of the fourteen witnesses on the basis that he liaised between Mr Bemba and Mr Kilolo; advised Mr Kilolo on payments to all fourteen witnesses; and that he affected the content of their testimony by "providing cell phones" and "by actively participating in meetings where witnesses were illicitly coached."[45] The mode of liability confirmed is co-perpetration (Article 25(3)(a)) or, in the alternative, aiding and abetting (Article 25(3)(c)).

27. The Trial Chamber may guide its analysis of corruptly influencing, either as a principal or an accessory, in respect of each witness as follows:

- Was an inducement provided to the witness to tell a lie in court?
- If so, did Mr Mangenda provide an essential (co-perpetration) or substantial (aiding and abetting) contribution to the offering of this inducement?
- If so, did Mr Mangenda provide this substantial assistance with the direct intent (co-perpetration) or purpose (aiding and abetting) of inducing the witness to tell a lie in court?

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produced: Cour. Cass. 27 June 2007 (*"[p]our qu'il y ait subornation de témoin punissable, il faut que le témoin ait fait une fausse déclaration et que le suborneur ait déterminé ledit témoin à déposer d'une façon contraire à la vérité"*).

[43] *Baldridge*, p.1143 ("the 'corruptly persuades' element 'requires the government to prove a defendant's action was done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person'"); *Burns*, p.540 ("Burns attempted to 'corruptly persuade' Walker by urging him to lie about the basis of their relationship, to deny that Walker knew Burns as a drug dealer, and to disclaim that Burns was Walker's source of crack cocaine").

[44] Schabas, p.855.

[45] Confirmation Decision, pp.49-50.

IV. SUBMISSIONS

(i) Witnesses Who Testified in October 2012

a. Introduction

28. The Prosecution has alleged that Mr Mangenda was involved in procuring false testimony from [REDACTED],[46] [REDACTED],[47] and [REDACTED].[48]

b. COUNTS 28 to 30: [REDACTED] (D-57), 17-19 October 2012

29. D-57 testified that he met Mr Kilolo alone in [REDACTED] prior to his testimony.[49] There is no allegation by the Prosecution,[50] and no evidence,[51] that he ever met or spoke to Mr Mangenda. There is no evidence indicating that Mr Mangenda had any advance knowledge of the content of D-57's testimony or the content or nature of any discussions by Mr Kilolo with the witness before his testimony; that he had any knowledge, before or after the witness's testimony, that any part of D-57's testimony was incorrect or a lie; or that any such lies had been induced by instructions from Mr Kilolo or any other co-accused.[52] Counts 28 to 30 are, accordingly, unproven as against Mr Mangenda.

c. COUNTS 31 to 33: [REDACTED] (D-64), 22-23 October 2012

30. D-64 testified that he met Mr Kilolo "alone"[53] in [REDACTED][54] prior to his testimony in the Main Case. There is no allegation by the Prosecution[55] and no evidence that he ever spoke to or met Mr Mangenda. The Prosecution alleges that D-64 "withheld" – *i.e.* failed

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[46] PTB, para.170.
[47] *Id*. para.177.
[48] *Id*. para.184.
[49] T-31-CONF-FRA 19:11-12 ("*[c]'est le seul – ils ne sont pas deux ni trois – c'est le seul que j'avais rencontré en … à [REDACTED]*.")
[50] PTB, paras.170-176; Confirmation Submissions, paras.192-196.
[51] CAR-OTP-0074-1112-R01 at -1122:351.
[52] PTB, para.176 (identifying the lie as being the fact that he "withheld" the fact that "he had other contacts with **KILOLO**, including a phone call on the same day that money was sent to his wife, as well as the multiple contacts in October 2012, shortly before his testimony. He further denied receiving any money from the *Bemba* Defence or from anyone acting on their behalf") (internal citations omitted).
[53] T-32-CONF-ENG 45:7-8 ("Q. Did you meet Mr Kilolo alone or was he accompanied by somebody? A. I met with him alone.")
[54] *Id.* 43:20-22, 46:1-2.
[55] PTB, paras.177-183; Confirmation Submissions, paras.197-205; DCC, paras.93-96.

to volunteer – information about some of his contacts with Mr Kilolo.[56] No evidence demonstrates that Mr Mangenda was aware that this testimony was incorrect; that this incorrect testimony was a lie; or that this lie had been induced by instructions from Mr Kilolo or any other co-accused. Counts 31 to 33 are, accordingly, unproven as against Mr Mangenda.

d. COUNTS 34 to 36: [REDACTED] (D-55), 29-31 October 2012

31. D-55 testified that he travelled to [REDACTED] prior to his testimony, where he stayed one night and met with Mr Kilolo.[57] The Prosecution has not alleged, and there is no evidence, that Mr Mangenda ever met or spoke to D-55.[58] No evidence shows that Mr Mangenda was aware of the contacts between D-55 and Mr Kilolo or of their content, or that he had any advance knowledge of the allegedly false testimony to be given by D-55. The Prosecution asserts that D-55, during his testimony, "withheld"[59] two facts, and "denied"[60] two other facts that were true. No evidence substantiates that Mr Mangenda knew about the falsity of the two "denied" facts, let alone about the two "withheld" facts; knew that these allegedly incorrect facts were lies; or knew that any co-accused had induced these alleged lies by D-55. Counts 34 to 36 are, accordingly, unproven as against Mr Mangenda.

(ii) COUNTS 10 to 18 and 40 to 42: The [REDACTED] Witnesses [REDACTED]

a. Introduction

32. Four Main Case defence witnesses who testified by video-link between 12 and 24 June 2013 were met by Mr Kilolo and Mr Mangenda at the [REDACTED] in Yaoundé on or

[56] PTB, para.183.
[57] T-35-CONF-ENG 29:24-30:5.
[58] PTB, paras.184-193; Confirmation Submissions, paras.206-216; DCC, paras.97-100. In a prior statement, which is not evidence in this case and cannot be used for the truth of its content, the witness said he was picked up at the airport in [REDACTED] by Mr Kilolo "[REDACTED]" accompanied by another person, [REDACTED] CAR-OTP-0091-1031 at -1034. [REDACTED] was not asked about the identity of this [REDACTED] during his testimony, and the Prosecution did not suggest in its pleadings, questions or submissions that this person was Mr Mangenda.
[59] PTB, para.192. The Prosecution's claim that the witness "withheld" information is tendentious and inaccurate. The witness acknowledged, when asked a general question about contacts with the Defence after the death of Mr Bemba's former lead counsel, that "I had many contacts". *See* ICC-01/05-01/08-T-264-CONF-ENG 63:24. The witness never lied about, or denied, that he had met and spoken to Mr Kilolo as late as the previous June – which was the date of his meeting with Mr Kilolo in [REDACTED].
[60] PTB, para.192.

about 22 and 23 May 2013. The Confirmation Decision relied on the statements of [REDACTED] for the proposition that Mr Mangenda was aware of and participated in a criminal scheme to present false evidence of, corruptly influence, and contribute to the giving of false testimony by, those witnesses.[61]

33. The material facts cited by the Prosecution and relied on in the Confirmation Decision, are that: (i) Mr Mangenda was involved in providing mobile telephones to the witnesses knowing that the purpose of doing so was to permit Mr Kilolo to remain in contact with them after the cut-off (and hence, presumably, to encourage them to tell lies);[62] (ii) Mr Mangenda "was present" while "Mr Kilolo explicitly instructed D-3, D-2, D-4 and D-6 on the content of their testimony";[63] and (iii) Mr Mangenda was present when an unreasonably large non-reimbursable payment was made to [REDACTED].[64]

34. A fourth material fact that is neither relied on in the Confirmation Decision nor cited by the Prosecution is the assertion that (iv) Mr Mangenda was in physical proximity when an alleged promise was made by Mr Kilolo to all the [REDACTED] witnesses together that they would receive a gift in exchange for their testimony.

35. None of these allegations is substantiated by the evidence.

36. **First**, the evidence does not confirm that Mr Mangenda heard, or that he inferred, the alleged illicit purpose of the mobile telephones allegedly conveyed by Mr Kilolo to the witnesses.[65]

37. **Second**, [REDACTED] both testified that Mr Mangenda was not involved in any discussions about the substance of their testimony with Mr Kilolo.[66]

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[61] Confirmation Decision, paras.74-75; PTB, paras.138-139.
[62] Confirmation Decision, para.74; PTB, para.139; Opening 45:14-15 ("[t]hese phones helped ensure that the Defence could maintain contact with the witnesses after their handover to the Victim Witness Unit").
[63] Confirmation Decision, para.74; DCC, para.69 (Kilolo instructed [REDACTED] "in **MANGENDA's** presence on what and how to respond to questions that would be put to him in court"); OTP Confirmation Response, para.136 ("**MANGENDA** was present while D-3 was being coached […] by **KILOLO**.")
[64] Confirmation Submissions, para.151 ("**KILOLO** gave D-3 CFA 540,000 in cash, and a further EUR 250 in **MANGENDA**'s presence") (internal citations omitted); OTP Confirmation Response, para.136 ("**MANGENDA** was present while D-3 was […] given money by **KILOLO**.")
[65] *Infra* section IV(ii)(b).
[66] *Infra* section IV(ii)(c).

38. **Third**, [REDACTED] both testified that Mr Mangenda was <u>not</u> present when they received the undocumented payment from Mr Kilolo.[67]

39. Neither the Confirmation Decision nor any of the Prosecution's charging documents gave notice of Mr Mangenda's alleged knowledge of a promise of money by Mr Kilolo to the witnesses. The only proper remedy is to disregard the evidence in respect of this material fact of which there is no proper notice. Even if the Trial Chamber is minded to rely on this testimony, it is **fourth**: (i) facially ambiguous; (ii) uncorroborated by Mr [REDACTED], who was present; (iii) flatly contradictory and inconsistent; and (iv) not plausible that Mr [REDACTED] would reliably remember Mr Mangenda's exact distance at the exact moment of the alleged promise. The testimony was, furthermore, only elicited after an abusively misleading question by the Prosecution to a witness to whom it had paid quadruple the amount that he asserts previously induced him to lie.[68] The specific testimony about the exact position of Mr Mangenda at the time of the promise, in these circumstances, and any inferences that could be drawn therefrom, is manifestly unreliable and unsafe.

40. **Fifth**, even assuming that Mr Mangenda did hear the alleged promise, he would not have inferred that the promise was a *quid pro quo* to tell lies in the absence of any involvement in the substantive discussions with the witnesses. A possible inference is that Mr Mangenda considered that the promise was nothing more than a reimbursement for past or future costs and expenses, such as lost income, not specifically related to the travel to Yaoundé. The Prosecution has covered such expenses in the past, including "reasonable loss of income or daily expenses".[69] The Prosecution has even argued that such payments are so "routine"[70] and "ordinary"[71] that they are irrelevant to assessing witness credibility and, accordingly, need not be disclosed. The amount allegedly promised by Mr Kilolo was not so large that it would justify the inference that Mr Mangenda knew that it was a bribe being offered as a *quid pro quo* to tell lies.

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[67] *Infra* section IV(ii)(d).
[68] *Infra* section IV(ii)(e)(iv).
[69] *Ntaganda* OTP Response, para.39.
[70] *Id.* para.41.
[71] OTP Response, 3 August 2015, para.11.

b. The Evidence Does Not Show That Mr Mangenda Knew That Mobile Phones Were Provided for Any Criminal Purpose

41. Mr [REDACTED] testified that between 7 and 8 pm[72] on 25 May 2013, which was the evening before the meeting with five prospective witnesses on 26 May 2013,[73] he met Mr Kilolo at the [REDACTED] "alone."[74] When asked by the Prosecutor a second time whether Mr Kilolo was alone, he then asserted that Mr Kilolo "introduced someone to me as Maître Jean-Jacques, who was responsible for our protection. So there were two people, Mr Kilolo and Mr Jean-Jacques."[75] During this meeting, which lasted about one hour,[76] Mr Kilolo showed him a "court document"[77] with a "seal and the marking 'Confidential'"[78] "issued by the ICC to the Cameroonian authorities."[79] Mr [REDACTED] claims that Mr Kilolo gave him a new mobile telephone "and he said that I had to use a different SIM card because the Victims and Witnesses Unit was going to take phones away, take the telephone that I had away from me."[80] He also claims he received 150 Euros from Mr Kilolo to reimburse transportation costs,[81] which is memorialised in a receipt submitted by the *Bemba* Defence to the Registry.[82] "Other than that, we did not discuss any other topic"[83] during the meeting on the evening of 25 May 2013.

42. When pressed as to whether he could recall whether Mr Mangenda was present when this alleged surreptitious purpose of the telephones was explained, Mr [REDACTED] acknowledged that Mr Mangenda had absented himself from the conversation for a certain period, upon Mr Kilolo's instructions, to go get the telephones from elsewhere in the hotel.[84] The witness ultimately conceded, while maintaining that Mr Mangenda was present when the phone was given to him, that he did "**not remember**" whether Mr Mangenda was present during the explanation of the alleged surreptitious purpose:

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[72] T-27-CONF-ENG 78:3 ("it wasn't beyond 8 in the evening. It was between 7 and 8 o'clock the first meeting").
[73] T-23-CONF-ENG 14:16 ("I believe I had already stated that on the 25th I met him alone. It was on the following day, that is, the 26th of May 2013 there was myself, [REDACTED].")
[74] *Id.* 9:14 ("I met him alone").
[75] *Id.* 9:19-21.
[76] T-27-CONF-ENG 79:20.
[77] *Id.* 80:12.
[78] T-23-CONF-ENG 9:24-10:1.
[79] *Id.* 10:22-23.
[80] *Id.* 10:2-4.
[81] *Id.* 11:2-5.
[82] CAR-OTP-0088-2917 at -2918.
[83] T-23-CONF-ENG 11:12.
[84] T-27-CONF-ENG 83:4-22.

> Q. And is it possible that explanation was given while Maître Mangenda was absent while seeking the phones? Is that possible, or do you simply not remember? A. **I don't remember.**[85]
>
> …
>
> PRESIDING JUDGE SCHMITT: it's – it's perhaps a similar problem that we had with the interpretation of the word "presence." And it could be a similar problem with the interpretation of the word "meeting."
> Mr GOSNELL: Yes, I take your point Mr President. […] the question is whether Maître Jean-Jacques was participating, present, within earshot, could hear when those instructions were given, or do you not remember whether he was present at that specific moment in time? **A. I do not remember. I know that there were two of them when the telephone was given to me.**[86]

43. The circumstances would also not have led Mr Mangenda to infer that the phones were given to the witnesses for an illicit purpose.

44. First, the phones were not provided on the eve of handover and cut-off. The phones were provided, in Mr [REDACTED]'s case, six days before handover; 22 days before the cut-off date; and 27 days before the start of testimony.[87] Roughly the same intervals apply in respect of Mr [REDACTED].[88] Having a means of communicating with the witness at least until the handover, if not the cut-off, was a reasonable non-criminal purpose for providing a mobile telephone. The need to provide telephones in the African context is illustrated by the Prosecution's practice of providing mobile telephones[89] and calling credit[90] to its own witnesses, sometimes on multiple occasions for the same witness,[91] up to 26 days before the start of testimony.[92]

[85] *Id.* 82:22-24.
[86] *Id.* 83:4-22.
[87] *See* VWU, p.5 (VWU verifying the cut-off date as 13 June 2013, and the handover date as 28 May 2013, whereas the telephone, according to the witness, was provided on 25 May 2013). *See also* CAR-OTP-0090-0612 at -0616 (referring to *Bemba* Defence Submissions, 14 May 2013, para.12 and *Bemba* 15 May 2013, paras.5,7).
[88] VWU, p.5 (indicating that D-2's first in-person meeting with VWU was on 27 May 2013, and his cut-off date was 10 June 2013).
[89] *See e.g.* CAR-OTP-0054-0676; CAR-OTP-0065-0017; CAR-OTP-0065-0018; CAR-OTP-0065-0918; CAR-OTP-0065-0919; CAR-OTP-0065-0923; CAR-OTP-0065-0924; CAR-OTP-0065-0193; CAR-OTP-0065-0194.
[90] *See e.g.* CAR-OTP-0058-0434; CAR-OTP-0058-0435; CAR-OTP-0046-0431; CAR-OTP-0065-0925.
[91] *See* CAR-OTP-0054-0676; CAR-OTP-0065-0194.
[92] *See* CAR-OTP-0065-0918 (referring to a purchase of a "Mobile Telephone" and "Credit Card" for Witness W-0178, for which the receipt was signed "le 03/08 2011" with a notation at the top indicating that the exchange rate is to be determined with reference to "Aug-11". This witness commenced his testimony on 30 August 2011.)

45. Second, both Mr [REDACTED][93] and Mr [REDACTED][94] had told Mr Kilolo in Douala in February 2012 that they did not possess mobile telephones. Mr Kilolo had promised on that occasion, without any involvement of Mr Mangenda, that he would provide them with telephones.[95] No evidence suggests that Mr Mangenda had any reason to think that the phones were provided for any purpose other than to remain in contact with the witnesses up until the handover and/or cut-off date.

46. Third, Mr [REDACTED] contradicted himself concerning the purpose of the phones as explained by Mr Kilolo. In his prior statement, he acknowledged that Mr Kilolo had explained that the purpose of the phones was to remain in contact *before*, not *after*, handover to the VWU:

> *[REDACTED]*.[96]

47. Fourth, Mr [REDACTED] answered "yes" when asked whether Mr Mangenda was "around" when the phones were given to the witnesses,[97] but also explained that Mr Mangenda was not following Mr Kilolo's conversations with each witness. The Prosecution did not further clarify the circumstances as to when Mr Kilolo offered this explanation to "us."[98] Since, as the witness explained, "we shared information amongst each other, amongst ourselves,"[99] the witness's use of the word "us" does not exclude that Mr Kilolo's alleged explanation was given during the individual meetings (to which Mr Mangenda was not privy).

48. Fifth, the Prosecution's "call sequence" report confirms that "[n]o contact between [Mr [REDACTED]] and the accused has been identified between the start of the VWU Cut-Off period and the end of [Mr [REDACTED]]'s testimony."[100] That report also records no

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[93] T-19-CONF-ENG 17:25-18:3 ("[w]hen Maître Kilolo arrived on the first occasion we told him that we did not have any telephones at our disposal […] and we said that we wanted to have a telephone"); *id.* 55:4 ("I have not yet bought a telephone, but when I leave I could get one.")
[94] T-22-CONF-ENG 62:21-23 ("Q. Did you tell him that you didn't have a telephone? A. Yes, that is correct.")
[95] T-19-CONF-ENG 18:3-4 ("[h]e promised us we would"); T-22-CONF-ENG 66:21 ("[w]hat Mr Kilolo had promised to us was to send us telephones.")
[96] CAR-OTP-0080-0100-R01:729-732 (emphasis added).
[97] T-19-CONF-ENG 32:5-14.
[98] *Id.* 31:25.
[99] *Id.* 11:19-20.
[100] CAR-OTP-0090-0612 at -0617.

such contacts with Mr [REDACTED][101] or with D-6.[102] Three reported contacts with D-4 totalling 11 minutes occurred on the day of the handover, but none were recorded during the period of his testimony.[103]

49. Sixth, even assuming that there were contacts other than those on the call sequence tables, both Mr [REDACTED] and Mr [REDACTED] confirmed the innocuous nature of those contacts. The former testified that during his only contact with Mr Kilolo during his testimony that he "did not discuss any topic relating to [his] testimony, that [he] talked only about [his] state of health";[104] the latter said in relation to his one and only alleged contact during his testimony[105] that "he said, 'Are you okay?' And I said, 'I'm fine.' And then I said it was the first day of my testimony and he said that he was listening to my testimony online but he was a bit busy with another case. That's what he said. That's what we said to one another."[106]

50. Seventh, even assuming, contrary to these direct and circumstantial indications, that Mr Mangenda knew or could have suspected that Mr Kilolo wished to be, or was, in touch with Mr [REDACTED] or any of the three other [REDACTED] witnesses after the cut-off date, there is no evidence that Mr Mangenda knew that the content of these conversations would be to present false evidence. Such contact, as turned out to be the case in reality, could be limited to re-assuring, encouraging, or even advising the witness on how to best articulate their answers. Improper as any of these purposes might have been, they do not constitute offences under Article 70.

c. The Evidence Shows That Mr Mangenda Was Not Privy to Alleged Instructions to the Witnesses to Tell Lies

[101] CAR-OTP-0090-0630 at -0631.
[102] *Id*. at -0650.
[103] *Id*. at -0643.
[104] T-27-CONF-ENG 17:25-18:1.
[105] The witness testified for only two days, 12 and 13 June 2013. The witness testified that "[d]uring those two days of testimony, I called each evening, that is to say after I had finished testifying" (T-19-CONF-ENG 26:7-8).
[106] *Id.* 28:21-24.

51. Mr [REDACTED] testified that Mr Mangenda "did not take part in the discussion"[107] that he had with Mr Kilolo about the content of his testimony. The conversation with Mr Kilolo, according to Mr [REDACTED], took place "a little bit off to the side with him"[108] after "we withdrew from the group."[109] Meanwhile, Mr Mangenda was discussing, separately, the other witnesses' security concerns:

> Maître Jean-Jacques was exclusively in charge of security issues. He needed to receive each one of us and take their details relating to their identity and then subsequently submit an application to the base, so to speak. Meanwhile, we continued to have other discussions with Maître Kilolo.[110]
>
> …
>
> Mr Mangenda was there and he was there to talk about protection. And we were supposed to talk to him and he was going to ask us questions about our safety.[111]
>
> …
>
> The only thing that Mr Jean-Jacques spoke about related to my protection. We had a conversation about my protection. But apart from that, we did not discuss anything else.[112]

52. Mr Mangenda took extensive notes based on these conversations about protection.[113] As Mr [REDACTED] explained in respect of the witnesses' conversations with Mr Kilolo, "Maître Mangenda **did not know what we were doing** because his table was as far as you are from me, and the table where we were seated was on the other side, so each person was seated around that table with their document before them."[114] The evidence accordingly does not show that Mr Mangenda was following Mr Kilolo's substantive discussions with the witnesses, let alone with the degree of attention required to assess the

[107] T-27-CONF-ENG 74:18; 74:3-5 ("[h]e drew me aside to a particular place where we sat down. I wasn't with the others. He withdrew me from the group. We withdrew from the group.")
[108] *Id.* 73:24-25.
[109] *Id.* 74:4-5.
[110] [REDACTED]: T-19-CONF-ENG 32:11-14.
[111] [REDACTED]: *id.* 9:4-5.
[112] [REDACTED]: T-27-CONF-ENG 83:12-14.
[113] Annex 3 to IC Report on Seized Materials, pp.5-14.
[114] T-19-CONF-ENG 12:1-4 (emphasis added).

propriety and truthfulness of the detailed matters[115] that the Prosecution alleges were the object of coaching.

53. Despite the Prosecution's misinterpretation[116] of the term "present,"[117] Mr [REDACTED] had already made perfectly clear in his statement to the OTP – despite being urged by the investigators to "make a bit more of an effort for us" – that Mr Mangenda did not take part in the substantive discussions about testimony:

> *[REDACTED]*[118]

d. The Evidence Shows That Mr Mangenda Was Not Present During Any Undocumented Payment to Any Witness

54. The Prosecution alleges, though the Confirmation Decision did not confirm that there were grounds to believe,[119] that Mr Mangenda was present when Mr Kilolo allegedly made an undocumented cash payment of about 540,000 [REDACTED] Francs (CFA) (about 821 Euros) to Mr [REDACTED] as an inducement to lie.[120]

55. Mr [REDACTED] repeated **four times** during his testimony that he was alone with Mr Kilolo when he received this money: "There was no one. What I meant was Mr Kilolo and myself were at the [REDACTED][REDACTED] in the waiting room. There was no one else";[121] "when he gave me the money, I was with him, alone with him";[122] "when he gave me the 540,000 francs, there were only two of us present. And it was at about 1 a.m.

[115] T-23-CONF-ENG 12:2-12 (exact date of entry of troops into CAR and of a specific massacre); *id.* 12:25 (knowledge of Mr [REDACTED]); *id.* 13:14-15 (denial of having received money from Bemba's lawyers); T-19-CONF-ENG 12:12-21 (use of "Thuraya" radio sets by the MLC); *id.* 16:15 (the exact number of contacts with the Defence).

[116] T-27-CONF-ENG 75:15-16 (explaining that his use of the expression "in the presence of" meant only that "you're present in the room, even if there are different parts, but you are indeed within the room"). The witness testified it was a "large room" (*id.* 84:22) and accepted as "correct" the description of the area as consisting "mainly of groups of lounge chairs surrounding low tables and that these are spread out through a fairly large area" (*id.* 85:1-3).

[117] DCC, para.69.

[118] CAR-OTP-0078-0248-R01:480-492 (emphasis added).

[119] Confirmation Decision, para.74.

[120] Confirmation Submissions, para.151 ("**KILOLO** gave D-3 CFA 540,000 in cash […] in **MANGENDA**'s presence").

[121] T-23-CONF-ENG 16:7-8.

[122] *Id.* 16:19.

in the morning."[123] Despite this answer having been already given three times, the Prosecution asked the following question during re-direct: "**Q. With respect to the 540,000 CFA you received from Mr Kilolo in the presence of Maître Jean-Jacques…**"[124] The witness – for the fourth time – testified that "when I was given the money, he [Mr Mangenda] was not there."[125]

56. The only payments made to Mr [REDACTED] and the other witnesses in Mr Mangenda's presence were properly recorded in a receipt,[126] and submitted to the Registry.[127] The sum was reasonable, documented, and a miniscule fraction of the sums paid by the Prosecution to Mr [REDACTED][128] and Mr [REDACTED].[129] Nothing in the amount or circumstances of the documented payments of which Mr Mangenda was aware suggests any impropriety.

e. The Evidence Does Not Establish That Mr Mangenda Heard Mr Kilolo's Alleged Promise to Pay Witnesses

i. The Evidence Should Be Disregarded Because of Lack of Notice of the Material Fact It Ostensibly Supports

57. The Prosecution may be expected to claim that Mr [REDACTED] testified that Mr Mangenda was within earshot when Mr Kilolo allegedly promised the witnesses 600,000 CFA as an inducement to testify. The Prosecution, contrary to Article 61(7)(a), has not articulated this material fact in any of its pleadings, nor is it mentioned as a material fact in the Confirmation Decision. The appropriate remedy, as is well-established at other international tribunals in cases of "lack of notice" of material facts,[130] is to exclude any

[123] T-27-CONF-ENG 20:13-14.
[124] *Id.* 97:13-14. *See also id.* 97:15-17 ("MR GOSNELL: That completely misstates the record, Mr President. PRESIDING JUDGE SCHMITT: Mr Vanderpuye -- Mr Vanderpuye, you have to rephrase the question because I'm not sure if it really represents what has been said.")
[125] *Id.* 97:23-24.
[126] CAR-OTP-0088-2917 at -2918; Annex 1 to IC Report on Seized Materials, pp.7-11.
[127] CAR-D21-0003-0187.
[128] The OTP paid Mr [REDACTED] a total sum of [REDACTED] CFA for various reimbursements (CAR-OTP-0090-2121), 573,000 CFA of which constituted reimbursements on behalf of the VWU.
[129] The OTP paid Mr [REDACTED] at least [REDACTED] CFA for various reimbursements (CAR-OTP-0090-2120), of which [REDACTED] CFA constituted reimbursements on behalf of the VWU.
[130] *Kvočka*, para.28 ("the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice"); *Bagosora*, para.96; *Kupreškić*, para.114; *Munyakazi*, para.36; *Kalimanzira*, para.46.

consideration of this testimony. Reliance on such a material fact, in the absence of appropriate pleading, would violate Article 61(7)(a).

ii. *Mr [REDACTED]'s Testimony Is Ambiguous as to Whether Mr Mangenda Was Within Earshot at the Moment of, and Heard, the Alleged Promise*

58. The witness testified that Mr Kilolo:

> promised us, the five of us who were supposed to testify, [REDACTED][REDACTED]. We were in a group. It was not just me. But when he gave me the money, I was with him, alone with him. Q. And when you discussed this payment or promise of 600,000 with the group, Mr Kilolo and the group, where was Maître Jean-Jacques? A. Jean Jacques was present.[131]

The Prosecution elicited no further details during its direct examination.

59. During cross-examination the witness clarified that his use of the word "presence" meant only that "you're present in the room, even if there are different parts, but you are indeed within the room."[132] The room in which this purported event occurred, according to the witness, was "a large room;"[133] he also agreed, except to the extent of replacing "chairs" with "sofas",[134] that the area "consist[ed] mainly of groups of lounge chairs surrounding low tables and that these [we]re spread out through a fairly large area."[135] The witness did not answer whether Mr Mangenda was sitting at the same group of sofas around a table, stating that that he was "not sitting on the first row of sofas"[136] but that "[t]here was a sofa behind after the first row of sofas. That is where he was seated."[137] On the other hand, the witness acknowledged that "I do not precisely remember where I, myself, was seated on that day."[138]

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[131] T-23-CONF-ENG 16:17-22.
[132] T-27-CONF-ENG 75:15-16.
[133] *Id.* 84:22.
[134] *Id.* 85:3.
[135] *Id.* 84-85:3.
[136] *Id.* 87:21-22.
[137] *Id.* 87:15.
[138] *Id.* 87:16.

60. When first asked to estimate Mr Mangenda's distance from himself, the witness used a hand gesture that appeared to indicate directly in front of him, and used the words "in front of me as I'm indicating".[139] The witness repeated that same hand gesture a few moments later.[140] He also indicated that his recollection was that Mr Mangenda absented himself "briefly" during "this particular phase" of the meeting:

> Q. At any time during this meeting, did Maître Jean-Jacques get up and go anywhere, or did he sit there continuously throughout this particular phase of your meeting? A. He went away briefly before coming back.[141]

61. During re-direct, the Prosecution posed the misleading question mentioned above, falsely asserting that the witness had said that "[w]ith respect to the 540,000 CFA you received from Mr Kilolo in the presence of Maître Mangenda…."[142] The witness could not have failed to apprehend the Prosecution's message. The Prosecution, having sent that message, then returned to the subject of Mr Mangenda's location at the time of the alleged promise of money:

> Q. The 540,000 CFA that you received from Mr Kilolo, did you discuss that money in the presence of Mr Jean-Jacques, Maître Jean-Jacques? Q. As I said, Jean-Jacques was just behind us when we were speaking; but when I was given the money, he was not there. Q. Do you see the microphone that I'm speaking into right now? Was Maître Jean-Jacques as close as this microphone is to you or farther away from the microphone? He was slightly closer. The microphone you are showing me is further off."[143]

62. These passages, even leaving aside any assessment of their reliability and plausibility, *might* indicate that Mr Mangenda heard the alleged promise; but they do not exclude the reasonable possibility that he did not hear the alleged promise.

63. First, the distance is not so close as to infer that Mr Mangenda necessarily heard or was paying attention at the time of the alleged promise. Even though the witness asserted that "[p]eople were not circulating in that area,"[144] he also acknowledged that "there were

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139 *Id.* 87:11.
140 *Id.* 87:23.
141 *Id.* 87:25-88:2.
142 *Id.* 97:13-14.
143 *Id.* 97:21-98:2.
144 *Id.* 85:11-12.

many people"[145] in the hall; that *"[i]l y avait des gens, bien sûr, mais ils étaient un peu à l'écart*";[146] that his group was "off to the side";[147] and that "people were passing by elsewhere."[148] The setting was not as serene and quiet as a courtroom. The witness confirmed that the room was laid out in clusters of chairs, but never confirmed that Mr Mangenda was sitting at the same cluster, and even left open the possibility that he was sitting at a different cluster – on a "sofa behind after the first row of sofas."[149] This ambiguity as to the cluster at which he was seated is particularly significant in the absence of any testimony about: (i) which direction Mr Mangenda was facing; (ii) whether he was facing Mr Kilolo; (iii) any reaction by Mr Mangenda; or (iv) any other details that would indicate that he heard and understood this alleged promise.

64. This ambiguity is the Prosecution's responsibility. It could have cleared up this ambiguity, but chose not to. "The Prosecution's burden," in case of ambiguity, "[i]s to elicit clarifications, which it did not do."[150] The *Ngudjolo* Appeals Chamber has likewise recognised that "it was for the Prosecutor to clarify" ambiguous testimony,[151] and declined to accept an inference in the face of ambiguity where "[n]o other questions on the alleged admission itself appear to have been asked of the witness."[152] Inference should not remedy lack of evidence when the Prosecution could easily have dispelled the ambiguity simply by asking the witness to clarify. It did not do so.

65. The Prosecution also failed to address a second ambiguity. The witness clarified that Mr Mangenda was not present "continuously throughout *this particular phase*" of the meeting, testifying that "[h]e went away briefly before coming back."[153] On re-direct, the witness did say that "Jean-Jacques was just behind us when we were speaking",[154] but then clarified that "just behind" meant the distance between himself and the prosecutor's

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[145] *Id.* 85:6.
[146] T-27-CONF-FRA 90:25. The English translation erroneously translates "*a l'écart*" as "far away", whereas other translations of this expression consistently use the translation "off to the side" or "off to one side": T-27-CONF-ENG 73:24-25; T-25-CONF-ENG 29:5-6; T-23-CONF-ENG 11:23-24.
[147] T-27-CONF-ENG 84:23.
[148] *Id.* 85:14.
[149] *Id.* 87:15.
[150] *Blagojević*, para.298.
[151] *Ngudjolo*, para.66.
[152] *Id.* para.59.
[153] T-27-CONF-ENG 88:1-2 (italics added).
[154] *Id.* 97:23.

microphone.[155] The Prosecution did not address or clarify, however, the timing of Mr Mangenda's having gone "away briefly", even when that answer was specifically in response to "this particular phase" of the meeting. Reasonable doubt arises as to whether Mr [REDACTED] meant to say that Mr Mangenda was at that distance at the precise moment when the promise was made, or whether he was speaking more generally. The potential confusion is made more likely because the Prosecution's initial question used the term "presence" which, as the witness had previously clarified,[156] meant no more than that Mr. Mangenda was *somewhere* in the room.

66. These ambiguities leave doubt as to whether Mr [REDACTED] even testified that Mr Mangenda was within earshot at the moment of the promise, let alone paying attention or reacting in a manner that could lead to the inference that he heard and understood the alleged promise. Mr [REDACTED]'s testimony shows no more than a *possibility* that he heard the promise. For all that Mr [REDACTED]'s testimony shows, even taken at its highest, Mr Mangenda may have had his back to the group; may not have registered any discernible reaction; and may have not even been present at the moment of the promise. The Prosecution adduced none of the details that would assist the Trial Chamber in assessing whether Mr Mangenda heard the promise, which is the Prosecution's burden to prove.

[155] *Id.* 98:2.
[156] *Id.* 75:15-16.

iii. Mr [REDACTED], Who Was Present, Did Not Corroborate the Presence of Mr Mangenda at the Moment of the Alleged Promise

67. Mr [REDACTED] was also present at that moment,[157] yet Mr [REDACTED] never testified that Mr Mangenda was present when this alleged promise was made.[158] Mr [REDACTED] had no motive to lie or conceal Mr Mangenda's presence.[159] The Prosecution simply chose not to ask Mr [REDACTED] whether Mr Mangenda was present. The inference should be drawn that these questions were not asked because the Prosecution knew that the testimony would not assist its case:

> Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, ***the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution***.[160]

iv. Mr [REDACTED]'s Purported Capacity to Recall Mr Mangenda's Precise Distance at the Precise Moment of the Promise Is Unreliable and Implausible

68. Mr [REDACTED] purported to recall, with a high degree of precision, Mr Mangenda's exact distance from Mr Kilolo at a precise moment.

69. This claim is unreliable. The witness's description of Mr Mangenda's location – "in front of me" (and then gesturing as if to indicate right next to him);[161] "just behind us";[162] and then just shy of the distance to the Prosecutor's microphone, which is almost 5 metres[163] – was inconsistent and contradictory. He could not even recall his own physical location at the time.[164] The inconsistency of his answers suggest that the witness was guessing, prompted by the Prosecution's abusively misleading question cited above which would have left no doubt in the mind of someone who had been paid quadruple the amount that

[157] T-23-CONF-ENG 16:17; T-19-CONF-ENG 34:21.
[158] T-19-CONF-ENG 34:1-35:9, 36:7-15; T-20-CONF-ENG 10:19-11:9.
[159] *Mpambara*, para.124 ("[t]he present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness's testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content.")
[160] *Mucić*, para.452 (italics added).
[161] T-27-CONF-ENG 87:11,23.
[162] *Id*. 97:23.
[163] CAR-D23-0005-0016.
[164] T-27-CONF-ENG 87:16 ("I do not precisely remember where I, myself, was seated on that day").

he says previously caused him to lie,[165] [REDACTED], that he should do his best to incriminate Mr Mangenda.

70. This feat of memory is also anomalous when compared with other similarly specific facts that the witness could not remember:

- how long it took Mr Mangenda the evening before to retrieve the telephones;[166]
- whether Mr Mangenda was present at the moment of Mr Kilolo's alleged explanation of the purpose of the telephone;[167]
- Mr [REDACTED]'s response to the alleged promise of money;[168]
- the number of days the witness testified in the Main Case;[169] and
- the number of telephone calls in early 2014 with the Prosecution investigators between their first and second set of interviews.[170]

v. The Payments to Mr [REDACTED], Combined With the Immunity Agreement, Create an Inducement to Try to Remember Details That He Perceives as Incriminating

71. D-3 has received more than [REDACTED] Euros of which the Defence is aware.[171] The witness evidently understood – as was frankly acknowledged by D-2,[172] and less frankly by D-3 himself[173] – the Prosecution's role in receiving this money. D-3's direct reliance on the OTP for money extended to sending a list of household items to Mr [REDACTED] for which he wanted reimbursement,[174] and relying on the OTP to advocate on his behalf, often strenuously, to the [REDACTED].[175]

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[165] *Id*. 88:12-15 ("you lied during the main case essentially for 540,000 [REDACTED] francs. That was the incentive for your lying in the Bemba case; is that correct? A. Yes, that is correct.")
[166] *Id.* 80:18 ("I don't remember").
[167] *Id.* 82:24 ("I don't remember"); 83:21 ("I do not remember.")
[168] *Id.* 86:14 ("I do not remember any such thing"). [REDACTED] testified: "And so I said for myself, speaking for myself, 'I would like to collect the money myself because I don't have anyone else who can collect it on my behalf'" (T-19-CONF-ENG 35:5-6).
[169] T-27-CONF-ENG 62:25 ("[w]ell, if I don't remember, I'm saying I don't remember").
[170] *Id.* 72:19 ("I no longer remember").
[171] *See* Mangenda Bar Table Motion, Categories C, D and E.
[172] T-18-CONF-ENG 66:16-18 ("[REDACTED] that is how I explained the situation [REDACTED].")
[173] T-27-CONF-ENG 94:20-95:1 ("Q. And did you understand or was it the case that [REDACTED] was advocating on your behalf to [REDACTED] in order to receive certain sums? [REDACTED].")
[174] CAR-OTP-0091-0294.
[175] *See e.g.* CAR-OTP-0091-0264-R01 at -0268 (from unidentified OTP official to unidentified ICC official), in respect of Mr [REDACTED]: "[REDACTED].")

72. The Prosecution also agreed to an "*Accord Relatif à Une Déclaration Destinée à un Usage Limité*" with the witness.[176] Regardless of whether the witness understood that this was not a full grant of immunity, the witness would have understood it as an inducement.

73. The Defence position, to be clear, is not that the Prosecution encouraged the witness to lie or that the general features of his testimony are necessarily unreliable. However, the extent of payments to the witness, [REDACTED], give him a strong motivation to keep the Prosecution happy, if necessary, by embellishing his ability to remember certain details.[177] If the witness had any doubt about what the Prosecution wanted from him, this was more than dispelled by the Prosecution's egregiously misleading statement immediately prior to the witness's amazing recollection of exactly where Mr Mangenda was sitting at the precise moment of this alleged promise of money.

vi. The Circumstances In Which Alleged Payments Were Made to the Witnesses Suggests that Mr Mangenda Did Not Know About the Promise

74. D-2[178] and D-3[179] both testified that they received their payments from Mr Kilolo late at night, without Mr Mangenda or anyone else being present. The circumstances are consistent with concealing the existence of these payments from Mr Mangenda, which is a further circumstantial indication that the payments would have been discussed in his absence.

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[176] CAR-OTP-0077-1095.

[177] *Martić*, paras.34,38 (witness who pled guilty and had expectation of benefits should be treated with caution and requires corroboration).

[178] T-19-CONF-ENG 34:6 ("later on I came back to counsel to collect that money, the 500,000 francs"), 35:7-9, 36:13-15; T-20-CONF-ENG 11:4-5 ("I went back, I retraced my steps back to Mr Kilolo's hotel to get the 550,000 francs.")

[179] T-23-CONF-ENG 15:20-21 ("that was at midnight at [REDACTED]"); T-27-CONF-ENG 20:13-14 ("when he gave me the 540,000 francs, there were only two of us present. And it was at about 1 am in the morning.")

f. The Evidence, Even Assuming That Mr Mangenda Did Hear the Promise, Does Not Show That He Knew It Was Offered in Exchange for Lies During Testimony

i. Introduction

75. The evidence does not show, even assuming there was a promise heard by Mr Mangenda, that he knew it was in exchange for lies. Mr Mangenda (i) had no involvement in the substantive discussions during which the lies were allegedly concocted; (ii) heard the witnesses' incessant complaints about money and insecurity, thereby providing a possible justification for Mr Kilolo's promise; and (iii) gained no subsequent knowledge of any untruths being spoken by the [REDACTED] witnesses, with the exception of the marginal issue addressed in section "g" below.

ii. The Promise Itself Conveyed No Improper Purpose

76. Neither D-2 nor D-3 suggests that the promise of money was expressed by Mr Kilolo as a *quid pro quo* for false testimony:

> [W]e told him that we were not happy with the situation. Then, following our remarks, he said, no, well, Mr Bemba had given him a little something for us and that he was going to pass on that gift, that small gift to us on that occasion.[180]
>
> …
>
> [H]e told me that the money was a gift that he was giving on behalf of Mr Bemba.[181]
>
> …
>
> We told him that Arido had come to lie and to promise that we would be able to go to Europe. And we said this time it's not going to be like before, that we were going to meet him personally. But before going to testify, each person would receive 600,000 francs.[182]

77. The passages show that the witnesses, not Mr Kilolo, initiated the discussion about money. This is, itself, probative that the money was not intended as being in exchange for

[180] T-19-CONF-ENG 36:9-12.
[181] T-20-CONF-ENG 10:23-25.
[182] T-23-CONF-ENG 15:14-17.

lies.[183] Although this *quid pro quo* might have been addressed during the one-on-one discussions with the witnesses about their testimony, it was not implied or expressed in the promise ostensibly heard by Mr Mangenda.

78. Indeed, it is not even clear whether the word "gift" was used. D-2 contradicted himself as to whether the word was used during that meeting[184] or only later when he met Mr Kilolo alone.[185] D-3 makes no mention of the word "gift."[186] But even assuming that the word "gift" was used by Mr Kilolo, this still does not exclude the reasonable possibility that the amount was intended to cover costs and expenses.

79. No evidence shows that Mr Mangenda would have thought otherwise. He had not been present during the discussions with the witnesses in Douala fifteen months prior – in particular, about what expenses would be covered in the period between the meeting in Douala and the meeting in Yaoundé. In fact, the Yaoundé mission was Mr Mangenda's first-ever mission with the *Bemba* Defence. Mr Mangenda could have reasonably thought that the money was to reimburse past costs and expenses claimed by the witnesses, not a *quid pro quo* for future lies: "*[REDACTED]*."[187]

80. Demands by witnesses to be reimbursed for various costs and expenses without proper documentation, as discussed below, is a regrettably routine aspect of international criminal investigations in sub-Saharan Africa. The long period that the witnesses were ostensibly on stand-by as Defence witnesses (more than a year) apparently gave them a pretext to complain about money. Mr Kilolo's promise of 900 Euros is not an amount that, viewed in light of all the circumstances, would have led Mr Mangenda to know that a bribe was being offered in return for lies.

[183] *Taylor* Contempt Decision, para.145 ("the Trial Chamber notes that it is not alleged that a member of the Prosecution offered inducements to DCT-261, but rather that DCT-261 himself instigated this, so that any payments made by the Prosecution were therefore only in response to DCT-261's request.")
[184] T-19-CONF-ENG 36:11-12.
[185] *Id.* 34:6-8 ("later on I came back to counsel to collect that money, the 550,000 francs CFA. He gave me that money saying that it was a small gift from -- from the accused.")
[186] T-23-CONF-ENG 15:14-17.
[187] CAR-OTP-0074-1032:564-569 ("*[REDACTED]*.")

iii. *The Prosecution View Is That Much Larger Sums Paid to Its Own Witnesses Are "Routine" and "Ordinary"*

81. Payments by a party to witnesses, in many national systems, is strictly forbidden or regulated. For good or ill, this is not the case before most international criminal courts. The ICC OTP[188] and other international prosecutors[189] have in practice made substantial payments to their witnesses. The ICC OTP even asserts that it has no obligation to disclose such payments that it deems to be "routine," which it deems to include: (i) "reasonable loss of income"; (ii) "care of dependents during absence from home"; (iii) "reasonable out-of-pocket costs or expenses such as copying of documentary evidence provided"; (iv) "transport" to meetings with the OTP; (v) "transporting referred witnesses to VWU assessment meetings"; (vi) "accommodation"; (vii) "phone credit"; (viii) "moderate medical expense for a medical condition that might affect the witness's fitness for interview"; and (ix) "related reasonable costs of individuals that must travel with the witness to the interview."[190] These are direct payments by the OTP to witnesses that the OTP says need not be disclosed to anyone.

82. An example is offered in this very case by the Prosecution's refusal to disclose payments to D-2 and D-3. Each of these witnesses received *quadruple* the amount allegedly promised by Mr Kilolo, yet the Prosecution considered this quantum to be so "ordinary" that it could not even be reasonably perceived as affecting these witnesses' credibility.[191] Though not accepted by this Trial Chamber, this position has been accepted by other ICC Chambers[192] and some other international courts[193] to the extent of any and all payments "reasonably required for the proper management"[194] of witnesses.

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[188] *E.g. Lubanga* 31 May 2010, para.77 ("[t]he defence prays in aid the records disclosed by the prosecution for witness expenses. The defence estimates that $23,000 was spent on expenses for prosecution witness and intermediary 31").

[189] *Taylor* Contempt Decision, para.60 ("the so-called 'offer' of $90,000 was part of the costs of relocation and finds that the Defence have not demonstrated that this was excessive"); *id*. para.111 ("[t]he Trial Chamber notes that DCT-097 received a total amount of $40,441.37 from the Prosecution"); *Taylor* Payments Decision, para.18 ("[t]he Defence submits that in his interview of 21 July 2010, Witness DCT-097 further informed members of the Defence […] that […] the Prosecution paid DCT-097 a monthly 'allowance' of approximately $1,200 a month from sometime in 2004 until 2006; *(b)* that the Prosecution did not provide this allowance for any specific purpose, but for DCT-097's general 'upkeep'; *(c)* that this allowance would be given to DCT-097 in cash if he was in Freetown or would be sent to him via Money Gram if he was travelling throughout the sub-region; *(d)* that this allowance stopped when DCT-097 met with the Prosecution […] and the Prosecution told DCT-097 that they were not getting what they needed from him"); *Karemera* 27 October 2008.

[190] *Ntaganda* OTP Response, para.39.

[191] OTP Response, 3 August 2015, para.11.

[192] *Ntaganda* 16 October 2015, para.32.

83. Witnesses have a tendency to complain that they are not receiving enough money. Main Case Prosecution witness P-178 received [REDACTED] per month over an undefined period, but still complained vigorously to the OTP that this was inadequate.[195] P-169 appears to have received [REDACTED] per month over an extended period,[196] and a mini-bus.[197] The OTP sometimes paid sums to these witnesses without advance Registry approval,[198] or took the lead in vigorously advocating (with the knowledge of the witness) for payments.[199] P-169, apparently still unhappy with the amounts paid, accused the VWU of "l[ying] all the time" and threatened to recant his testimony unless he received money that he believed had been promised him.[200]

84. Just as it would not be reasonable to infer that any of these payments by the Prosecution to its witnesses, even when not disclosed, is *prima facie* evidence of bribery, it would have been unreasonable to expect Mr Mangenda to infer that the alleged promise of money to Defence witnesses by Mr Kilolo, without more indications that this was its purpose, was offered as a bribe for false testimony.

iv. Mr Mangenda Was Not Privy to Other Indications That the Money Was Offered as an Inducement to Fabricate Evidence

85. Mr Mangenda did not participate in the substantive discussions concerning the witnesses' testimony. Nothing he witnessed after the promise provided circumstantial evidence that the money was intended as a bribe to produce lies.

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[193] *Ayyash* Decision, paras.10-15; *Karemera* 7 October 2003, para.16; *Karemera* 23 August 2005, para.7.
[194] *Karemera* 29 May 2008, para.12.
[195] CAR-OTP-0083-1489-R01 at -1489 to -1491.
[196] CAR-OTP-0065-0989.
[197] *Bemba* Defence Submissions, 5 February 2016, para.45.
[198] *Id*.
[199] *Id*.
[200] ICC-01/05-01/08-T-361-Red-ENG 33:20-34:3 ("the VWU staff in (Redacted) lie all the time. Lying to them is second nature. […] My lost earnings were (Redacted) I was given that letter as a copy to keep and I was supposed to wait in order to receive that money, but to this day I'm wondering where that money is"); ICC-01/05-01/08-T-362-Red-ENG 9:24-10:9.

86. Further, there is no evidence that Mr Mangenda learned that these payments were ever made. He was not, as both D-2 and D-3 testified,[201] present when the late-night payments were made. There is no evidence that Mr Mangenda knew whether Mr Kilolo intended to, or did, document any such payment. Without knowledge of any of these additional circumstances – let alone knowledge of the substantive conversations about testimony – there is no basis upon which to impute to Mr Mangenda knowledge that the promise exceeded reasonable witness payments, that it was illicit, or that it was intended as a bribe in return for lies.

87. The *Kenyatta* Trial Chamber, in the context of Article 70(1)(c) allegation against a Prosecution intermediary, observed:

> The supporting materials do tend to suggest that Witness 118 was telling [REDACTED] to incriminate Mr Kenyatta and [REDACTED]. But this only suggests a conspiracy to fabricate evidence ***if these witnesses were encouraged to provide accounts of events different from what, to their knowledge, actually happened***.[202]

88. Hence, even influencing a witness's testimony is not an offence unless the purpose of the influence is to procure a lie. Improper meetings, as the foregoing quotation illustrates, has not been considered by the OTP as a sufficient basis to even suspect the procurement of lies.[203] Mr Mangenda, for the same reason, would not have reason to suspect that a promise of payment of 821 Euros to witnesses who were complaining about money, and who had been prospective witnesses for more than a year, was for the purpose of procuring lies.

89. Mr Kilolo's promise, given all these circumstances, cannot be taken as having indicated to Mr Mangenda any impropriety, let alone the commission of any Article 70 offence.

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[201] T-19-CONF-ENG 34:6, 35:7-9, 36:13-15; T-20-CONF-ENG 11:4-5; T-23-CONF-ENG 15:20-21; T-27-CONF-ENG 20:13-14.
[202] *Kenyatta* 5 December 2013, para.37 (italics added).
[203] *Karemera* 27 October 2008, para.7 ("the benefits paid to Witness T go beyond that which is reasonably required for the management of a witness").

g. Alleged Lies Concerning Documented Reimbursements

90. Mr [REDACTED], Mr [REDACTED] and Mr [REDACTED] did not deny having received documented reimbursements from the Defence.

91. Mr [REDACTED] acknowledged "that Maître Kilolo reimbursed the money that I spent on transportation […] the second time" that he had met the Defence.[204] He slightly understated the amount,[205] but not to such a degree as to be indicative of a lie. Mr [REDACTED] was not asked about such payments.[206] Mr [REDACTED] was asked two questions about payments, neither of which unambiguously addressed documented reimbursements. He was first asked whether he had received "any type of payment from the Defence or *anyone else acting on Mr Bemba's behalf*?"[207] After the witness responded in the negative, Prosecution counsel rectified the ambiguity in her question, asking: "when you met Mr Kilolo *the first time* [*i.e.* in Douala when Mr Mangenda was not present] you weren't reimbursed for any travel expenses or food; is that correct?"[208] Curiously, no follow-up was asked about the Yaoundé meeting.

92. Mr [REDACTED], however, did answer "*non*" when asked whether "*vous avez été indemnisé ou remboursé des moindres dépenses que vous auriez eu à faire*".[209] Even though this testimony is incorrect, the witness may have misunderstood the question or simply forgotten.

93. Even assuming that it was an intentional lie, there is no evidence that Mr Mangenda had any advance notice that the witness would say this, or that the witness had been encouraged to say this by Mr Kilolo. In fact, such an instruction would have been implausible from Mr Mangenda's point of view considering that he received from the witnesses,[210] and submitted to the Registry,[211] receipts for those reimbursements. This

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[204] ICC-01/05-01/08-T-328-CONF-ENG 29:14-19.
[205] ICC-01/05-01/08-T-329-CONF-ENG 22:21; PTB, para.159.
[206] PTB, paras.164-169.
[207] ICC-01/05-01/08-T-330-CONF-ENG 21:23-24.
[208] *Id*. 22:1-2.
[209] ICC-01/05-01/08-T-322-CONF-FRA 26:8-9.
[210] Annex 1 to IC Report on Seized Materials, p.8 ("*Attestation de Reconnaissance*" of payment of 350 Euros signed by [REDACTED] [REDACTED] signed on 26 May 2013).
[211] VWU, p.5 ("[REDACTED]").

would not be consistent with an intention by Mr Kilolo to have encouraged the witness to lie about this reimbursement. Furthermore, there is doubt, given the relatively small sum involved, that the lie is even material.

94. Did Mr Mangenda's failure to denounce Mr [REDACTED]'s incorrect testimony constitute any dereliction of duty and, if so, did the failure to discharge such a duty, as the Prosecution alleges,[212] make him guilty of aiding and abetting the lie? As a preliminary matter, the Confirmation Decision did not confirm this allegation.[213] In any event, omissions, as has been recognised at the international criminal tribunals, are not equivalent to actions.[214] A pre-condition of omission liability is the existence of a particular *type* of duty. Such duties are extremely rare in domestic[215] and international criminal law[216] and involve intense levels of control or protection. The Prosecution, without specificity, has invoked the "professional duty" of denunciation "as a lawyer" as the unfulfilled duty.[217] As discussed under Applicable Law, many ethical codes do not require Counsel – let alone a person who is not a Counsel – to denounce a possible lie uttered by a witness. In fact, Prosecution witnesses have uttered *probable* lies, including denials of reimbursement of expenses by the OTP, without Prosecution Case Managers (or Senior Trial Attorneys, for that matter) correcting the lie.[218] Imposing such a duty of denunciation would not only be impracticable and chaotic, it would generate an unacceptable opposition of interest between counsel and client. Accordingly, the failure to

[212] PTB, paras.245,254.
[213] *See infra* section V(i).
[214] *Tolimir*, para.1117.
[215] Bouloc, p.209; Moreillon, p.65; Gosnell, pp.120-121 (describing the notion of "guarantee" in German law).
[216] ICC Statute, Art.28; *Popović*, paras.1548,1556 (imposing liability for culpable omissions in respect of crimes by third parties against prisoners in the accused's custody).
[217] PTB, para.245.
[218] P-169 testified during the Main Case on 5 July 2011 (ICC-01/05-01/08-T-138-Red2-ENG 52:23) that "[n]obody gave me money" in response to a question about whether he had received money from the OTP. The Prosecution not only did not correct this statement, but subsequently resisted requests for disclosure of any Prosecution payments to the witness. OTP P-169 Disclosure Response, paras.5,16. When evidence later emerged that the witness had written a letter to the ICC threatening to recant his testimony unless he was given more money by the VWU, the Defence demanded that he be recalled. On 22 October 2014, the witness testified even more categorically that he "did not receive a single dime from the Prosecutor, nothing at all, and that is the truth" (ICC-01/05-01/08-T-361-Red-ENG 32:24). The Prosecution failed to correct or seek qualification of that incorrect statement in court. On 12 February 2016, the Prosecution offered its final submissions in respect of P-169's testimony, stating that "P-169 was provided with reimbursement of ordinary expenses, such as transportation, meals, and communication means as necessary." OTP P-169 Final Submissions, para.5. The Prosecution did not acknowledge that this conflicted with the statements that P-169 had made in court in 2011 and 2014 and, in fact, argued that neither this incorrect statement nor any of the witness's other conduct even undermined his credibility.

denounce Mr [REDACTED]'s incorrect statement was not an ethical violation and, even if it was, it is not a duty whose non-fulfilment is the equivalent of an action.

h. Mr Mangenda's Intercepted Conversations With Mr Kilolo After August 2013 Reflect No *Post Facto* Consciousness of Guilt In Respect of the [REDACTED] Witnesses

i. Introduction

95. The Prosecution asserts that Mr Mangenda became aware of the existence of an Article 70 investigation on 11 October 2013.[219] It also asserts, and the evidence suggests, that Mr Kilolo met D-2, and contacted D-3, on or about 26 October 2013. If Mr Kilolo and Mr Mangenda had procured false testimony from D-2 and D-3, one would expect to find: (i) discussions during those two weeks about the need for a cover-up; and (ii) that Mr Kilolo raised the potential existence of an Article 70 investigation, and the need for a cover-up, with D-2 and D-3.

96. Neither occurred. First, the Prosecution[220] and the Independent Counsel[221] both concede that rather than discussing an *actual* cover-up, Mr Kilolo and Mr Mangenda discussed a *fictitious cover-up*. Indeed, the intercepted conversations show that neither Mr Kilolo nor Mr Mangenda had the slightest idea that the possible Article 70 investigation had anything to do with the testimony of the [REDACTED] witnesses.

97. Second, Mr Kilolo did not even *mention* the issue of a potential Article 70 investigation when he met D-2 in Douala on 26 October 2013. Rather than reflecting any consciousness of guilt in respect of past acts, this conduct demonstrates an *absence* of consciousness of guilt.

98. The following sections address: (i) whether any discussions between Mr Kilolo and Mr Mangenda in respect of the [REDACTED] witnesses reflect a consciousness of guilt; and

[219] PTB, para.55; CAR-OTP-0074-1029:20-34.
[220] Opening 67:7 ("[t]hey devised to tell Bemba that the individuals on the Defence side had given the Prosecution information about their criminal plan and they would have to be bought off"); *id.* 68:9-10 ("although Kilolo's and Mangenda's stories about informers being among Defence witnesses in October 2013 were entirely made up, the reactions of Mr Bemba and Mr Babala were not"); PTB, para.63.
[221] Annex to Third IC Report, p.17.

(ii) whether there is any indication of an *actual* cover-up in relation to the [REDACTED] witnesses. The following sections focus on the [REDACTED] witnesses as charged in Counts 10 to 18 and 40 to 42, since these intercepts refer to these witnesses, and because the Prosecution has specifically tied these statements to a cover-up in relation to the [REDACTED] witnesses.[222]

ii. *The Intercepts Reveal No Consciousness of Wrong-Doing in Respect of the [Redacted] Witnesses*

99. On 11 October 2013, according to the Prosecution, Mr Mangenda heard a rumour that the Prosecution had opened an investigation targeting himself and Mr Kilolo for alleged offences under Article 70 of the Statute.[223] Mr Mangenda informed Mr Kilolo about this rumour, who responded that "*[REDACTED]*".[224]

100. Mr Mangenda speculates about two potential sources of the Article 70 investigation. First, he speculates that the investigation may centre on the written statements of two prospective Defence witnesses, [REDACTED] and another prospective witness. These were potential witnesses who had apparently previously been unfavourable to the Defence and who, after meetings with Mr Kilolo, produced statements perceived by Mr Mangenda as being surprisingly favourable.[225] As Mr Mangenda is recorded as stating, "*[REDACTED]*".[226] Mr Mangenda speculates that other members of the Defence team would infer that the change of position of these two witnesses had arisen from an improper inducement (" *[REDACTED]*").[227] He then wonders whether other members of the team, while "*[REDACTED]*", may have revealed these suspicions to individuals in the Office of the Prosecutor.[228]

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[222] PTB, paras.142,154.
[223] *Id.* para.55; CAR-OTP-0074-1029:20-34.
[224] CAR-OTP-0074-1030:43-44.
[225] CAR-OTP-0074-1030:89-116 ("*[REDACTED]*.")
[226] CAR-OTP-0074-1030:123.
[227] CAR-OTP-0074-1030:112.
[228] CAR-OTP-0074-1030:121-128 ("*[REDACTED]*"). Note that "*le livre*" in the former quotation is, as the context shows, not a reference to money but rather to "statement" or "summary".

101. Second, Mr Mangenda then speculates in the alternative[229] whether the Prosecution "*[REDACTED]*"[230] by the Prosecution. In other words, the Prosecution may have inferred, without any further concrete basis, that the similarity of the Defence witnesses' testimony gives rise to a suspicion that their testimony was procured by committing offences under Article 70. Mr Mangenda does not specify which witnesses may have engendered this impression; he does not give this impression any credence in reality; and he does not express any concern that the Article 70 investigation might relate to the [REDACTED] witnesses.

102. The Prosecution purports to explain the lack of indications of consciousness of guilt by asserting that Mr Kilolo and Mr Mangenda had "complete confidence that they had been careful enough not to be caught."[231] This is rank speculation. A far more likely inference is that Mr Mangenda simply did not believe that anything improper, let alone criminal, had taken place in respect of any of the [REDACTED] witnesses. Indeed, Mr Mangenda's readiness to speculate about the possible sources of the investigation led him to speculate about other causes; if he had had even a suspicion that the [REDACTED] witnesses could be the source of the investigation, then he would have mentioned it. The failure to mention it at all is strongly indicative of the absence of consciousness of guilt of any wrong-doing in respect of these witnesses.

iii. The Intercepts Do Reveal Discussions of a Fictitious Scenario – Not a Real Plan – Which Was Never Intended to Be, and Never Was, Put Into Practice

103. The intercepts between Mr Kilolo and Mr Mangenda reveal a discussion to use the possibility of an Article 70 investigation to *claim* that payments needed to be made to past witnesses, not a discussion about *actually* making such payments. The Prosecution itself acknowledges that "stories about informers being among Defence witnesses in October 2013 were entirely made up".[232]

[229] CAR-OTP-0074-1030:186-190 ("*[REDACTED]*").
[230] CAR-OTP-0074-1030:186-194.
[231] Opening 67:4.
[232] *Id.* 68:9-10.

104. The three informers who are mentioned as the object of this fictitious scenario in the intercepted communications are the witnesses from "[REDACTED]"[233] – which the Prosecution asserts to be a code for Yaoundé.[234] These fictitious informers are identified as the "*[REDACTED]*"[235] (which corresponds to Mr [REDACTED]'s position as described in the Main Case);[236] a witness who is "*[REDACTED]*" (most likely a reference to D-3, who was the youngest of the [REDACTED] witnesses);[237] and a third who is not further described.

105. The Prosecution, despite acknowledging the fictitiousness of this scenario,[238] contradictorily cites aspects of this scenario as if it were real. An entire section of the Pre-Trial Brief is entitled "Cover-up of the Overall Strategy"[239]. The Prosecution even asserts that Mr Kilolo's invitation to [REDACTED] to pick up 152 Euros through Western Union was made "pursuant to the '*système en mains propres*' designed by Mangenda and Kilolo to conceal the transfer of funds to witnesses from the article 70 investigations."[240]

106. This claim is unsubstantiated and incoherent. **First**, as the Prosecution has conceded, the scenario to pay witnesses was fictitious from the start and was never implemented.[241] **Second**, this is incontrovertibly confirmed by the fact that D-2, who had no bias in favour of Mr Kilolo, did not suggest that there was the slightest suggestion by Mr Kilolo during their meeting on or about 26 October 2013 about the need to cover-up anything,[242] or even the slightest mention of a potential Article 70 investigation.[243] **Third**, D-3 likewise makes no such claim.[244] **Fourth**, the trivial sum alleged to have been paid by Mr Kilolo to

[233] CAR-OTP-0074-1032:137-148 ("*[[REDACTED]*"). [REDACTED] is later considered as a possible fictitious intermediary, which is then rejected. CAR-OTP-0800-1324:243-244 ("*[REDACTED]*.")
[234] PTB Annex A, paras.151-154.
[235] CAR-OTP-0074-1032:193,195,196,229,231,234,236; CAR-OTP-0080-1324:273.
[236] ICC-01/05-01/08-T-326-CONF-ENG 26:6-17.
[237] CAR-OTP-0080-1324:420,467;CAR-OTP-0080-1416:27;ICC-01/05-01/08-T-325-CONF-ENG 9:23-24; ICC-01/05-01/08-T-321-CONF-ENG 9:14-15; ICC-01/05-01/08-T-325bis-CONF-ENG 7:24-25; ICC-01/05-01/08-T-328-CONF-ENG 8:17-18.
[238] Annex to Third IC Report, p.17 ("*[c]es derniers s'accordent pour faire croire à leur client qu'ils ont identifié des témoins de la Défense qui auraient parlé au Bureau du Procureur et qu'ils ont besoin d'argent pour convaincre les témoins de se rétracter*"); PTB, para.63.
[239] PTB, paras.55-63.
[240] *Id.* para.142.
[241] Opening 68:9-10.
[242] T-19-CONF-ENG 33:24.
[243] T-21-CONF-ENG 85:2-3 ("[w]e chatted for awhile. It took a little while. He gave me some money. He paid for the transportation so that I could go there.")
[244] T-23-CONF-ENG 18:14.

D-2 and D-3 bears no relation whatsoever to the amount alleged by the Prosecution as encompassed by the fictitious scenario.[245] **Fifth**, the purpose of the "*mains propres*" fiction as described by the Prosecution was to provide an excuse for the lack of traceable documentation whereas, in fact, the Prosecution alleges that Mr Kilolo paid D-3 through Western Union. The payment was not, and cannot, even accepting the Prosecution's own logic, be a reflection of the "*mains propres*" fiction.

107. If Mr Kilolo, with Mr Mangenda's knowledge, had bribed the [REDACTED] witnesses in exchange for lies, then the least that would be expected is (i) *some* effort by Mr Kilolo to encourage D-2 and D-3 to conceal these misdeeds; and (ii) *some* genuine discussion between Mr Kilolo and Mr Mangenda about whether their contact with these witnesses could be construed by the witnesses as impropriety, and how to protect against the Prosecution offering large sums of money that might induce them to falsely implicate Mr Kilolo or Mr Mangenda. Yet, at least in the conversations to which Mr Mangenda was privy, there is no such discussion at all. The Prosecution's claim that "the accused did everything possible to cover it up" in October 2013 is flatly contradicted by the evidence and by its own assertions; on the contrary, the *post facto* conduct and conversations of Mr Mangenda reflect a distinct absence of consciousness of guilt.

iv. Conclusion Regarding the [REDACTED] Witnesses

108. The contemporaneous and *post facto* evidence does not show that Mr Mangenda knew that any Article 70 offence was being, or had been, committed, with the [REDACTED] witnesses. The evidence does not confirm that he heard the allegedly incriminating promise by Mr Kilolo; even if he did, there were non-criminal explanations for the promise. Mr Mangenda had no role in the substantive discussions about testimony, and was not present when any payments were made to the witnesses. None of Mr Mangenda's *post facto* conduct reflects any consciousness of guilt. The evidence viewed in its totality,

[245] The Prosecution alleges that they each received about 152 Euros, whereas it alleges that the amounts contemplated under the fictitious scenario were 15,000 or 30,000. PTB, fn.154 ("30000" or "15000"); PTB Annex A, para.173 ("15,000"). The amount alleged to have actually been paid corresponds much more closely to the amounts that the witnesses may have believed they were still owed in accordance with the previous alleged promise of 600,000 CFA, of which Mr [REDACTED] testified that he only received 550,000 CFA in Yaoundé, leaving a balance of 50,000 CFA (about 76 Euros) (T-19-CONF-ENG 34:5-8); and of which Mr [REDACTED] had not been paid 60,000 CFA (about 91 Euros) (T-27-CONF-ENG 20:9-13).

both contemporaneous and *post facto*, does not establish beyond a reasonable doubt any criminal participation in Counts 10 to 18 and 40 to 42.

(iii) Witnesses Heard After Commencement of Audio-Surveillance

a. COUNTS 37 to 39: [REDACTED] (D-23), 20-22 August 2013

109. D-23 testified in the Main Case between 20 and 22 August 2013. Prior to his testimony, he was met by Mr Kilolo and Ms Gibson. There is no allegation, and no evidence, that he ever spoke to Mr Mangenda.[246] The Prosecution alleges that "after VWU's cut-off date and, more importantly, in the course of his sworn testimony, Kilolo contacted D-23 five times on the evening of 20 August and morning of 21 August 2013."[247] There is no evidence that Mr Mangenda was aware of any of these contacts.

110. The Prosecution also alleges that D-23 "falsely testified that that he had not received any payment in exchange for his testimony, despite having received significant sums of money and a new laptop from Kilolo."[248] The only sum given to D-23 of which there is evidence of Mr Mangenda having been aware was the reimbursement of 105.59 Euros that was submitted to the Registry. The witness did not deny having received this reimbursement. The Prosecution asked only whether the witness had "received any payment or offer of payment ***in exchange for your testimony*** in this case from any person?"[249] The witness's negative response reflects nothing more than a denial of any payments as a *quid pro quo*. Mr Mangenda had no reason to think that this answer was anything but correct and truthful.

111. There is no evidence that Mr Mangenda is guilty of Counts 37 to 39.

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[246] PTB, paras.121-130.
[247] DCC, paras.101-104; Confirmation Submissions, para.220.
[248] PTB, para.128. *See also* Confirmation Submissions, para.221.
[249] ICC-01/05-01/08-T-334-CONF-ENG 17:23-24.

b. COUNTS 7 to 9: [REDACTED] (D-26), 20-23 August 2013

112. D-26 testified on 20 through 23 August 2013. The Prosecution alleges that he had many contacts with Mr Kilolo, including after the cut-off date. There is no allegation[250] or evidence that he ever spoke to Mr Mangenda.

113. The Prosecution alleges, however, that Mr Kilolo used Mr Mangenda's phone after the witness had taken the oath on 20 August 2013 and spoke with him.[251] The Prosecution cites no evidence in support of its mere supposition that Mr Mangenda "provided"[252] the phone, let alone that Mr Mangenda "provided" the phone knowing that Mr Kilolo intended to call, was calling, or did call, the witness. The only argument that has ever been provided by the Prosecution in support of this claim, which is not repeated in its Pre-Trial Brief, is that "[c]onsidering the weight of evidence demonstrating Mangenda's intimate knowledge of Kilolo's illicit coaching, the fact that the call was made after the VWU's contact cut-off date and immediately before D-26 was to testify, and Kilolo's extensive coaching of D-26, the most reasonable inference is that Mangenda knew of the coaching and provided his phone to facilitate it."[253] No evidence has been adduced that Mr Mangenda knew the witness's telephone number, that he checked his phone and identified the number as being of the witness, or any other evidence that would demonstrate any awareness of the identity of the person called by Mr Kilolo using his telephone.

114. Even the Prosecution's speculative claim that the "most reasonable inference"[254] is that Mr Mangenda would have known that Mr Kilolo called the witness is insufficient. Proof by circumstantial evidence requires that the asserted fact be the *only* – not the "most" – reasonable inference.[255]

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[250] PTB, paras.108-117.
[251] *Id*. para.109.
[252] *Id.*
[253] OTP Confirmation Response, para.135.
[254] The Prosecution also does not specify Mr Mangenda had any knowledge of the alleged objective lies spoken by the witness (that he had not had improper contacts while testifying, had not had recent contacts with the Defence, and had not received two transfers of money from Mr [REDACTED]. PTB, paras.115-117.
[255] *Milošević*, para.20; *Popović*, paras.1369,1385.

115. The Prosecution does not allege that the witness lied about having received reimbursements from the Defence.[256]

116. There is no evidence that Mr Mangenda is guilty of Counts 7 to 9.

c. COUNTS 22 to 24: [REDACTED] (D-25), 26-27 August 2013

117. There is no allegation or evidence that Mr Mangenda ever met or spoke to D-25. The only source of Mr Mangenda's knowledge of alleged lying, or procurement of lies, is the information allegedly provided by Mr Kilolo during two conversations on 26 and 27 August 2013. The conversations show no such awareness or participation.

118. First, the fact that Mr Kilolo would call Mr Mangenda and ask for an update on the witness's testimony is not, in itself, indicative of any criminal scheme. In the absence of a common mother tongue, it is unexceptional that Mr Kilolo would call Mr Mangenda, rather than Mr Haynes, for an update on the progress of the trial in which he was Lead Counsel.

119. Second, Mr Kilolo gives no indication during his two conversations with Mr Mangenda that he had been in touch with the witness after the cut-off date, much less that he was going to get in touch with the witness while he was still under oath.[257] Although Mr Kilolo does make reference to his meetings with the witness, there is no indication that he is not referring to meetings that occurred prior to the witness's hand-over.

120. Third, a full review of the items of testimony described by Mr Mangenda does not reflect any knowledge that any of those propositions were false:

- [REDACTED];[258]
- [REDACTED];[259]
- [REDACTED];[260]

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[256] PTB, paras.114-117.
[257] *Id.* para.213.
[258] CAR-OTP-0074-0991:15-24.
[259] CAR-OTP-0074-0991:39-44.
[260] CAR-OTP-0074-0991:51-57; CAR-OTP-0074-0992:66-68.

- [REDACTED];[261]
- [REDACTED];[262]
- [REDACTED];[263]
- [REDACTED];[264]
- [REDACTED];[265]
- [REDACTED];[266]
- [REDACTED];[267] and
- [REDACTED].[268]

The Prosecution has not shown that any of these assertions by the witness were lies, that Mr Mangenda knew that these were lies, that Mr Mangenda knew or thought that Mr Bemba knew or thought they were lies, or that Mr Mangenda knew that conveying this information was anything other than a normal part of his functions as Case Manager. On the contrary, these propositions were well-known aspects of the Defence case.

121. Fourth, Mr Mangenda did acknowledge one fact as being incorrect: the witness's denial that he had met with [REDACTED]. Mr Mangenda learned this not because of any awareness of coaching by Mr Kilolo but rather because upon hearing this testimony, he "quickly pulled out Seara's report, [to see] if Seara mentioned his name, and in fact he had mentioned his name":

> *JJM: … mais le seul truc qui … qui a un tout petit peu cloché … je pense qu'on avait oublié de lui dire de lui rappeler par rapport avec sa rencontre avec SEARA […] J'ai dit on lui a … on avait oublié de lui rappeler par rapport avec sa rencontre avec SEARA. L'expert militaire. AK: Ah … ah merde! JJM: Parce qu'on lui a beaucoup posé des questions là-dessus bon lui ne pouvait pas avouer … **alors moi j'ai vite fait sortir le rapport de SEARA, si SEARA avait mentionné son nom, effectivement SEARA avait mentionné son nom.***[269]

[261] CAR-OTP-0074-0991:59-76.
[262] CAR-OTP-0074-0991:118-134.
[263] CAR-OTP-0074-0992:15-27.
[264] CAR-OTP-0074-0992:41-62.
[265] CAR-OTP-0074-0992:71-82.
[266] CAR-OTP-0074-0992:94-102.
[267] CAR-OTP-0074-0992:121-132.
[268] CAR-OTP-0074-0992:134-169.
[269] CAR-OTP-0074-0992:135-149 (emphasis added).

122. The Prosecution claims that in response to this information, Mr Kilolo then describes to Mr Mangenda "that an illicit coaching meeting had taken place":[270]

> *AK: Bon ce qui est bien au moins il a nié, parce-que ça c'était vraiment une erreur grave. Ce qui est bien c'est qu'il a nié, parce-que tu t'imagines s'il avait accepté et puis qu'il dise qu'on était à trois, moi, lui, et SEARA … tu t'imagines un peu? JJM: Eh … Voilà aussi, il y a aussi ce qui … ça allait être encore grave.*[271]

123. The basis for characterising this meeting as "illicit" is unclear. There is no rule against counsel being present during a meeting between an expert and a potential or actual witness. Prosecution military expert witnesses at the ICTY often participated in witness interviews with Prosecution counsel.[272] In fact, Mr Kilolo does not affirm that he was present during the meeting, but only that it would look bad if Mr [REDACTED] were to have said so. Mr Mangenda's agreement that that "would be even worse" does not reflect knowledge as to whether there ever was such a meeting *à trois*, but merely that that would have given an impression that would undermine the independence of the expert report.

124. Fifth, the Prosecution asserts that Mr Kilolo's use of the word "*enseignements*" is indicative of the procurement of lies:

> [*REDACTED*].[273]

125. Mr Kilolo responds to this summary, regretting that the witness had not described events at PK12 more fully.[274] Mr Mangenda disagrees, explaining that if the witness answers too comprehensively "from A to Z" ("*[REDACTED]*")[275] that this could undermine the witness's credibility ("*[REDACTED]*")[276] and be viewed as, indeed, suspicious ("*[REDACTED]*.")[277]

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[270] PTB, para.216.
[271] CAR-OTP-0074-0992:158-162.
[272] *See Hadžić*, T.4380.
[273] CAR-OTP-0074-0991:59-68,78 (emphasis added).
[274] CAR-OTP-0074-0991:80-85.
[275] CAR-OTP-0074-0991:95-96.
[276] CAR-OTP-0074-0991:86.
[277] CAR-OTP-0074-0991:96.

126. This exchange does not reflect Mr Mangenda's knowledge that the word "*enseignements*" meant instructions to tell lies, let alone that this is what Mr Kilolo meant.[278]

127. First, the statement addresses what may be erroneously perceived, not what has actually occurred. This is identical to the statement about the allegedly forged documents that the Pre-Trial Chamber correctly recognised was fallacious and should not be confirmed.[279]

128. Second, parties have wide latitude as to techniques that may be used during witness interviews in general. In the United States, for example, "persistent[ly] and aggressive[ly]" putting a party's theory of the case to a witness is not only not unethical or a criminal offence, but entirely proper.[280] The ICTR has likewise confirmed that an interview may urge a witness to be more forthcoming about the good things that may have been done by an accused.[281] Aside from the prohibitions set out in Article 70 itself, and those set out in Article 29 of the Code of Conduct, the manner in which either the Prosecution or the Defence is permitted to interview witnesses is not regulated.

129. Third, even after the "cut-off" and within the context of "witness preparation" immediately prior to testimony, the OTP has advocated that it be permitted to use the following five techniques:

- "Review the topics to be covered in examination and ***the likely topics of cross-examination***";[282]
- "Review and clarify ***their evidence*** with counsel";[283]
- "Review, with the witness, his/her ***prior statements***";[284]

[278] PTB, para.214; Confirmation Submissions, para.115.
[279] Confirmation Decision, para.48.
[280] *Resolution Trust*, p.341 (reversing sanctions on counsel for alleged "'manufacturing' evidence" in the absence of evidence showing that "the attorneys did not have a factual basis for the additional statements included in the draft affidavit" and finding that "[a] court obviously would be justified in disbarring an attorney for attempting to induce a witness to testify falsely under oath" but finding that being "persistent and aggressive in presenting their theory of the case" did not come close to such conduct, and finding that the "attorneys' sometimes laborious interviews with [the witness] were conducted with the goal of eliciting an accurate and favorable affidavit from a key witness.") *See* Gershman.
[281] *Nyiramasuhuko* 30 November 2001, para.32.
[282] *Ruto* OTP Motion, para.5 (italics added).
[283] *Ntaganda* OTP Motion, para.4.
[284] *Ruto* OTP Motion, para.5.

- "Confirm whether the statements are accurate, ***clarify additional points***, and document additions or retractions the witness may deem appropriate";[285] and
- "Show potential exhibits to the witness for his/her comment".[286]

130. The purposes on which these techniques have been justified include:

- "***streamlin[ing]*** in-court examinations and ***tailor[ing]*** them to the most relevant or contested issues";[287]
- "'help[ing] to increase witnesses' confidence and [] reduce their reluctance to reveal sensitive information on the stand'";[288]
- "ensuring that witnesses give 'clear, relevant, ***structured***, ***focused*** and efficient testimonies' in Court";[289]
- "help[ing] witnesses […] recall events that may have occurred years earlier";[290] and
- "enable potential exhibits to be discussed with witnesses, which would 'enable[] a more accurate, complete, methodical and efficient presentation of the evidence'".[291]

131. The Prosecution has gone further than this, including: repeatedly asking, even after a witness had completed correcting their statement, whether specific sections needed to be corrected;[292] and showing information to witnesses of which they had no previous knowledge,[293] and arguing that this is acceptable "as a matter of law."[294] These techniques fit into the American model of "witness prepping" which is defended as being:

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[285] *Id.*
[286] *Id.*
[287] *Ntaganda* OTP Motion, para.22.
[288] *Id.* para.25.
[289] *Ruto* OTP Motion, para.4.
[290] *Id.*
[291] *Id.*
[292] International Justice Monitor ("the defence faulted the prosecution for asking the witness to read and confirm the accuracy of his statement on 'more than 34 occasions' after he had just made corrections to the statement. 'The witness read this material, made corrections and clarifications he thought necessary, then you ask him again to confirm the accuracy of this and that part?' posed Bourgon.")
[293] *Id.* ("[t]he defence took issue with the prosecution for showing Witness P963 a video taken at a UPC training camp, making him listen to audio recordings of the group's communications, and asking if he recognized the material or could 'provide a link' between the material and his evidence. 'The material can easily influence the witness,' said Bourgon.")

> valuable in that it enables a prosecutor to provide a witness with factual and legal context on how his or her testimony will likely influence the case and the role his or her testimony will play. In addition, witness preparation allows a prosecutor to rehearse a witness's testimony with the witness, which will make the witness more comfortable when testifying in court. The prosecutor can discuss effective courtroom demeanour with the witness and give the witness examples of the questions he or she may face on cross-examination.[295]

132. The use of the word "*enseignement*" as used in the intercept above indicates no conduct going beyond permissible witness interviewing as described above. The expression is no different from when common law lawyers say that they "hope that the witness's testimony will 'come up to proof'"[296] – *i.e.* that the witness will repeat, clearly and convincingly, all the details that the witness has stated during prior interviews. Mr Mangenda is merely expressing the view, which also happens to be correct, that Judges may view a witness providing too much detail as excessively prepared rather than spontaneous.[297] This does not demonstrate any awareness that D-25 had been improperly coached, let alone that he had been coached to tell lies; rather, it is a reflection that some witnesses perform better than others under the stresses of courtroom examination, and that permissible witness preparation can impact that performance. If this were not the case, and if it were not legitimate, the Prosecution would not have fought so hard to be permitted to do it, including seeking leave to appeal this Trial Chamber's decision on the issue.[298]

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[294] T-40-CONF-ENG 52:13-19 ("as a matter of law, a party can put any document which he alleges relates to that witness, irrespective of whether the witness was a participant in that conversation, author of that conversation, or even knew about the conversation.")

[295] Cohen, pp.989-990.

[296] *See e.g.* Wilson, p.445 ("[t]he advocate will hope that the witness will 'come up to proof', i.e. give evidence in accordance with his statement"); Monaghan, p.353 ("[a]n unfavourable witness is one who fails to 'come up to proof'. This means that the witness does not say in his testimony what he was expected to say in his examination-in-chief, i.e. what was in his witness statement or proof of evidence"); Keane, p.199 ("[a] party seeking to elicit evidence in support of his version of the facts may call a witness who, in the witness box, fails to come up to proof"); Gooch, p.295 ("[a] witness is said not to have come up to proof if he fails to testify in accordance with his proof").

[297] ICC-01/04-02/06-T-88-ENG 11:19-12:24.

[298] OTP Proposed Witness Protocol, paras.4,6 ("[c]onsidering that this is the first case before the Court prosecuting article 70 crimes, the Prosecution believes that it is particularly important that witnesses are fully apprised of the factual and the legal issues"); OTP Leave to Appeal Witness Protocol Decision, paras.9,14; *Banda* OTP Motion, para.4 ("[t]he Prosecution requests this Chamber to […] permit witness preparation […] [s]uch a ruling […] will produce significant benefits, including: […] • [a]ssisting witnesses in providing (and assist counsel in eliciting) clear, focused and structured testimony, which will facilitate a fair and expeditious trial; and • [c]ontributing to the well-being of witnesses, including by helping reduce their stress and anxiety about testifying, and by ensuring that they understand the unique features of this case.")

133. The Prosecution also relies[299] on Mr Mangenda's statement, after the completion of the witness's testimony, that Mr Bemba "*a vu vraiment que non … un travail appréciable de couleurs a été effectivement fait*" and Mr Kilolo's response that Mr Bemba "*[REDACTED]*."[300]

134. Once again, the expression "*couleurs*" indicates nothing exceeding the limits of permissible witness interviewing as described above. A witness's ability to remember details may, indeed, have something to do with the five techniques described above by the Prosecution as permissible and appropriate. Neither the use of the word "*couleur*" nor the word "*enseignement*" suggests otherwise.

135. The Prosecution also relies on Mr Mangenda's description of the reaction amongst the Judges and Prosecution when the witness testified that the soldiers at PK-12 were speaking French and Lingala as indicative of awareness of a scheme to procure lies:

> *[REDACTED]*.[301]

136. Mr Kilolo was permitted, within the framework of the five techniques mentioned above, to draw the witness's attention to languages spoken by soldiers as a likely topic of questioning and, according to the Prosecution, to provide information coming from other persons about these issues. Perhaps the judges found it risible that the witness's answer was the same as previous witnesses. Mr Mangenda, however, was not privy to those conversations, and his description of this reaction does not mean that he was.[302] His reaction is not probative of any wrongdoing, or knowledge of any wrongdoing.

137. Mr Mangenda's use of the term "*amener*" illustrates the fallacy at the core of the Prosecution's interpretation of the words "*couleurs*" and "*enseignements*":

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299 PTB, para.217; Confirmation Submissions, para.190.
300 CAR-OTP-0074-0992:108-117.
301 CAR-OTP-0074-0991:28-35.
302 The Prosecution asserts that Mr Mangenda says "the Judges appeared to suspect that the witness had been illicitly coached, but had no means to verify their suspicion." The Prosecution's insertion of the word "suspicion" is not reflected in the transcript of the conversation. *See* PTB, para.219; CAR-OTP-0074-0991:32.

[*REDACTED*][303]

Mr Haynes, of course, did not literally "lead the witness to understand," nor did he improperly coerce the witness; but Mr Mangenda is not a robot and Lingala is not classical Latin. People use metaphors and, in the heat of a trial, sometimes those metaphors invest colour that could be subject to misinterpretation. Investing the words "*enseignements*" and "*couleurs*" – which are far less suggestive of impropriety than the word "*amener*" – with nefarious meaning is fallacious.

138. Finally, the only alleged "objective lie" is D-25's denial of receiving "legitimate reimbursement of travel and other expenses."[304] Contrary to the Prosecution's claim, the witness did <u>not</u> deny having received reimbursement of legitimate expenses:

> Q. On the occasion of this encounter or meeting that you had with the Defence, were you reimbursed for the expenses you incurred, whether it be for transport, communication, food or anything else? A. You should be specific. Are you talking about the time when they came to see me in the company of a white lady, or are you talking about the time when they said that I would be coming to meet those people who are in charge of logistics? Q. Well, I might put the question to you in another manner. Now, apart from the logistics unit, did you ever receive any sum of money from the members of the Defence team, whether it be for reimbursement of expenses ***or as a form of support for your testimony***? A. No, the Defence did not give me anything ***to help them with my testimony***, but I would say that all the expenses incurred, notably for food, for accommodation in the hotel, it was people from the logistics unit who reimbursed that sum. ***As for the invoice for my hotel accommodation, that was given to them in front of me.***[305]

139. The witness acknowledged having been reimbursed for hotel accommodation, but denied having received money "***to help them with my testimony***." The witness was entitled to answer "no" to the question as posed; the Prosecution was at fault for failing to clear up the ambiguity; and the witness had no motivation to lie about the non-hotel reimbursement (which was only worth 55 Euros). The statement is, in any event, of such minor importance as to be immaterial.[306]

140. Counts 22 to 24 are unproven as against Mr Mangenda.

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[303] CAR-OTP-0074-0992:17-18 (emphasis added).
[304] PTB, para.218.
[305] ICC-01/05-01/08-T-337-Red-ENG 40:7-20 (emphasis added).
[306] *Supra* note 218.

d. COUNTS 19 to 21: [REDACTED] (D-29), 28-29 August 2013

141. There is no allegation,[307] and no evidence,[308] that Mr Mangenda was present during any conversation of substance with D-29. The Prosecution claims that two intercepted conversations on 29 August 2013 are indicative of Mr Mangenda's awareness of, and participation, in a scheme to procure false testimony from D-29.[309]

142. Mr Mangenda ostensibly told Mr Kilolo on the morning of the second day of the witness's testimony that he had "really screwed up" by testifying that MLC troops had committed rapes at [REDACTED].[310] Mr Kilolo responds in apparent frustration:

> *[REDACTED]*.[311]

143. Mr Kilolo's wish to have been in contact "one or two days" is not suggestive of any misconduct since D-29 was handed over to the VWU only two days before his testimony.[312] In any event, there is no evidence and no allegation[313] that Mr Mangenda knew that Mr Kilolo was in touch with the witness after the cut-off date. Mr Kilolo's reference to calling the next witness,[314] who had not yet started her testimony, is a reference to D-29's wife, D-30, who had not yet been handed over to the VWU[315] and who forms no part of the present case.

144. Mr Mangenda merely speculates and presumes that Mr Kilolo had not addressed this harmful testimony during his interviews with the witness, and that the witness was testifying based on speculation rather than direct knowledge.[316] Mr Kilolo confirms this

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[307] PTB, paras.197-202.
[308] Despite the witness denying that he knew the name "Mangenda" (T-40-CONF-ENG 42:23), the Prosecution cited his name at least ten times before being instructed to stop by the Presiding Judge. *Id.* 42:13, 42:21, 58:19, 60:19, 61:8, 61:15, 62:10, 73:8, 73:10, 73:22. Despite this flagrant effort at contamination, the witness still affirmed that Mr Kilolo's colleague "did not speak to me" (*id.* 74:19).
[309] The Prosecution alleged in its confirmation submissions that an earlier conversation that same day included a coded reference to the witness as "[REDACTED]" by Mr Kilolo. Confirmation Submissions, para.365. This claim, which is wrong, is not repeated in the Prosecution's Pre-Trial Brief (PTB, paras.194-203) and not accepted in the Confirmation Decision. This claim should be deemed abandoned.
[310] CAR-OTP-0074-0997:10-20.
[311] CAR-OTP-0074-0997:50-59.
[312] VWU, p.7.
[313] PTB, para.202.
[314] CAR-OTP-0074-0993:218-222.
[315] D-30 was handed over to the VWU on 28 August 2013. *See* VWU, p.7.
[316] CAR-OTP-0074-0997:78-81,98-99 ("*[REDACTED].*")

view, stating that the witness "hasn't seen himself"[317] these events, but that he is still affirming these propositions based on widely-held and notorious perceptions of what had happened at Mongoumba. "*Deconné*" in this context cannot be taken to mean anything more than that the witness took it upon himself to speculate wildly, and in a manner that happened to be prejudicial to the accused. Conversely, a common and permissible instruction to a witness, either during a regular interview or during a pre-testimonial interview, is that they should not speculate.[318]

145. The Prosecution's English translation recites the following exchange that occurs much later in the conversation, after Mr Kilolo and Mr Mangenda have discussed other issues:

> [REDACTED].[319]

146. The Prosecution offers no interpretation of this passage,[320] but cites it as if it is somehow incriminating. The passage, on the contrary, is highly ambiguous. It may be read as displaying nothing more than black humour about a witness whose testimony may be correct, but that is nevertheless unsubstantiated speculation, damaging to the client and that *possibly* – not necessarily, but *possibly* – could have been avoided within the limits of proper witness preparation.

147. The Prosecution asserts that Mr Kilolo says later in this conversation that he would contact the witness to ensure that the next morning "*il rectifie au moins deux, trois choses*."[321] The actual passage is more ambiguous than the Prosecution claims:

> AK: If, for example, if we're lucky, they'll finish with him today. Then perhaps I could get him to catch up, so that tomorrow morning, he can correct at least two or three things.[322]

148. The passage is not coherent. If the witness "finish[es] today" – as he in fact did – then of course he would no longer be able to "correct" anything at all. In any event, Mr Mangenda does not assent or agree to this, stating instead: "But that's impossible. How's

[317] CAR-OTP-0074-0997:103.
[318] Cohen, pp.989-990.
[319] CAR-OTP-0074-0997:175-183.
[320] PTB, para.201.
[321] *Id.* para.199.
[322] CAR-OTP-0074-0997:204-206.

he going to catch up? They'll really take him for a liar."[323] The response is ambiguous as to whether the impossibility arises from the potential damage to the witness or changing his testimony, or whether it arises from the fact that the witness is under oath. Either way, Mr Mangenda saw the witness finish his testimony that day, which would have foreclosed any intention or plan by Mr Kilolo to surreptitiously contact the witness.

149. The "objective" lie cited by the Prosecution is that the witness was allegedly met by the Defence nine times instead of five times.[324] The Prosecution has not established that this was anything other than a mistake, that Mr Mangenda knew it to be incorrect, that he knew it to be a lie, or that knew it to have been a lie procured by Mr Kilolo.

150. Counts 19 to 21 have no evidential basis as against Mr Mangenda.

e. COUNTS 1 to 3: [REDACTED] (D-15), 11-13 September 2013

151. There is no allegation[325] and no evidence that Mr Mangenda ever spoke to D-15. The only source of Mr Mangenda's knowledge of alleged procurement of lies is the information allegedly provided by Mr Kilolo during their two alleged conversations concerning D-15 on 11 September at 23.09, and another on 12 September at 21.49.[326]

152. The Prosecution alleges that Mr Kilolo had 33 contacts with D-15 prior to the start of his testimony on 11 September 2013.[327] In particular, the Prosecution alleges that Mr Kilolo called D-15 four times on the eve of his testimony, on 10 September 2013.[328] The Prosecution does not allege, and there is no evidence, that Mr Mangenda was informed of any of these pre-testimonial contacts between Mr Kilolo and D-15, let alone the content of any of those contacts. For example, there is no evidence or even allegation that Mr Kilolo called Mr Mangenda on the evening of 10 September 2013, after his four alleged contacts with the witness, to describe the content of any of those conversations, or even the fact that he had had such communications.[329]

[323] CAR-OTP-0074-0997:207.
[324] T-41-CONF-ENG 45:20-47:15-17.
[325] PTB, paras.65-81.
[326] *Id.* paras.75-79.
[327] *Id.* para.66.
[328] *Id.* para.67.
[329] *Id.*

153. On the evening of 11 September, at 23.09, after the witness's first day of testimony, Mr Kilolo allegedly calls Mr Mangenda and spends most of the call describing a visit to a spa.[330] At the very end of the call, Mr Kilolo says:

> [REDACTED].[331] [REDACTED][*End of transcript*][332]

154. The Prosecution confidently interprets this passage – which is the entire exchange of substance – as follows: "Later that evening, Kilolo called Mangenda to update him on what he instructed D-15 to say."[333] The implication of the word "update" is that Mr Mangenda knew about previous conversations by Mr Kilolo with the witness, and that he would have understood this additional information as arising from a conversation that had just occurred.

155. **First**, the Prosecution's attempt to characterise this information as an "update" of previously supplied is unfounded and misleading. There is no evidence of Mr Kilolo having previously provided information to Mr Mangenda regarding conversations with D-15.

156. **Second**, the passage is ambiguous as to the identity of the "person" being referred to. Mr Kilolo does not identify the "person" by name. Mr Mangenda manifests no acknowledgement of the identity of the "person". Future witnesses, especially Mr [REDACTED], whose cut-off had not yet occurred,[334] testified on similar subjects.[335] The reasonable possibility exists that Mr Mangenda was unsure about the identity of "the

[330] CAR-OTP-0074-1004:19-57.
[331] The Prosecution's English translation erroneously translates "*on*" in the French transcript [CAR-OTP-0074-1004:61 ("*[REDACTED]*")] as "we". The literal translation of "*on*" is "one" (*i.e.* "one has chatted to the witness"), but in context it is clear that Mr Kilolo is referring to himself as the "one". Using the term "we" creates a false impression. The best translation would be "the witness has been chatted to".
[332] CAR-OTP-0074-1004:61-75. The Prosecution has inserted punctuation, including quotation marks, that are not present in the French version and that slant how Mr Kilolo's words are to be understood.
[333] PTB, para.75.
[334] VWU, p.8.
[335] ICC-01/05-01/08-T-347-CONF-ENG 18:6-27,41:8-22,45:18-46:16,51:23-29 (referring to the names of other military leaders in command of troops); *id.* 13:2-11 (referring to events after the fall of Mobutu); *id.* 52:1-13 (referring to Gbadolite).

person", or thought that it was Mr [REDACTED]. His responses of "Mm", "Mm-mm" and "Mm, mm"[336] do not dispel that ambiguity.

157. **Third**, even assuming that Mr Mangenda inferred that Mr Kilolo was referring to a conversation with D-15, there is no indication that he perceived any of these three items of potential evidence as a lie, or even incorrect. Although the Prosecution asserts that the three facts mentioned by Mr Kilolo were "false," and that D-15 gave "false responses" during his testimony the next day, the Trial Chamber has made clear such substantive statements "***will not be considered for their truth or falsity***.[337] Even assuming that Mr Kilolo's recitation reflects issues that he discussed with D-15, there is no basis to say – and it is not within the proper scope of these proceedings to say – that they were false.

158. The next day, 12 September 2013, at 21:49, Mr Kilolo called Mr Mangenda and excoriated him for not having already sent to him the proposed questions to be asked by the Legal Representatives for Victims.[338] Mr Mangenda's task was purely mechanical, as reflected in Mr Kilolo's comment that "since Kate gave birth, I've noticed there are things that that that I no longer have … You see? She used to send that automatically. JJM: Oh. OK. OK."[339]

159. Mr Kilolo does not inform Mr Mangenda that he had an alleged lengthy conversation with the witness earlier in the evening, or the content thereof.[340] Mr Kilolo does not say that he will encourage the witness to tell lies. In fact, Mr Kilolo does not subsequently confirm that he actually *did* contact the witness. He says only that "he" is "waiting for it."[341] This statement, while possibly manifesting an intention to be in contact with the witness, does not constitute knowledge that the contact did take place.

160. The alleged objective lie is D-15's testimony on 13 September 2013 that the last time he had spoken with Mr Kilolo was in "January of this year."[342]

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[336] CAR-OTP-0074-1004:62, 64, 67.
[337] Opening 5:18-6:2 (italics added). *See* Confirmation Decision, para.28 ("objectively false").
[338] CAR-OTP-0074-1010:5-8 ("[REDACTED].")
[339] CAR-OTP-0074-1010:16-18.
[340] CAR-OTP-0074-1008 (lasting 31 minutes).
[341] CAR-OTP-0074-1010:36.
[342] ICC-01/05-01/08-T-345-CONF-ENG 10:2; PTB, para.81.

161. As a preliminary matter, there is doubt as to whether the witness lied. The witness was asked "when was the last time that you ***spoke*** with Mr Kilolo", the witness reacted as if he had already answered the question: "***I said*** that it was in January of this year."[343] Ambiguity arises from the expression "I said" because the witness had just finished answering "[h]ow many ***meetings*** did you have with the Defence".[344] The witness answered that question by saying that "the last time that I ***met*** the Defence was in January this year."[345] The reference back to his previous answer gives rise to the possibility that the witness believed that he was again being asked about meetings, not contacts.[346]

162. Even assuming that the witness did lie, this would not necessarily have been apparent to Mr Mangenda.

163. **First**, Mr Mangenda may have perceived the witness – justifiably or not – was conflating "meetings" and "contacts."

164. **Second**, there is no evidence that Mr Mangenda ever received any further indication as to whether Mr Kilolo did, or did not, subsequently have contact with the witness.

165. **Third**, there is no evidence that Mr Mangenda had any advance notice that the witness would utter this falsehood, let alone that any knowledge that Mr Kilolo had urged him to utter this falsehood.

166. **Fourth**, providing the LRV questions did not contribute to this or any other lie. Hence, even if at that moment Mr Mangenda suspected that the witness was lying, he would have no reason to suspect or believe that his actions contributed in any way to that lie. A Case Manager's role does not encompass second-guessing the purpose for which a document is requested by a Senior Trial Attorney – let alone refusing to send a document to which the Senior Trial Attorney is entitled.

[343] ICC-01/05-01/08-T-345-CONF-ENG 10:2 (emphasis added).
[344] *Id.* 9:5-6 (emphasis added).
[345] *Id.* 9:10 (emphasis added).
[346] The witness may also have been highly defensive at this moment, having just been accused of lying in a manner that prompted a warning from the Presiding Judge to the Prosecution to avoid "misunderstandings." *Id.* 8:19-23.

167. **Fifth**, the Prosecution has vaguely invoked Mr Mangenda's "professional duty" to denounce either the conduct of Mr Kilolo or of the witness[347] as constituting the *actus reus* of the crime of offences against the administration of justice. The deficiency of this allegation in general has been previously addressed.[348] Further, the need to denounce anything in relation to D-15 has not been established beyond a reasonable doubt. First, as previously discussed, a reasonable observer in Mr Mangenda's position could have inferred that the witness was simply confused about the question he was answering, rather than lying. Second, even though Mr Mangenda could have perhaps surmised that there was a likelihood that Mr Kilolo had been in touch with the witness, he did not know this for sure and he knew nothing about the content of that communication. Third, Mr Mangenda had no basis to know that the witness had been instructed to lie about this contact by Mr Kilolo. He also had no reason to believe, nor is there any reason to believe, that forwarding the LRV questions to Mr Kilolo (to which questions Mr Kilolo was entitled) contributed to the lie in any degree. Imposing an affirmative duty of denunciation, and making non-fulfillment thereof a criminal offence, on all members of the Prosecution and the Defence whenever there are grounds to suspect violations of any important rule pertaining to the presentation of evidence would be unprecedented and cause chaos.

168. Finally, the alleged seriousness of any omission of denunciation should be evaluated in light of the fact that although contact with the witness after the cut-off violated the VWU witness contact protocol, the testimonial oath in many countries does not entail a prohibition on contact between a party and its own witness.[349] Indeed, the Main Case Trial Chamber did not make any such prohibition part of D-15's oath.[350]

169. In the absence of much more specific knowledge, there is no basis to impute to Mr Mangenda criminal responsibility for failing to denounce the witness's purported lie.

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[347] PTB, paras.245,254.
[348] *Supra* para.94. *See also infra* section V(i).
[349] Barber, p.61 ("in the absence of an order from the trial judge, a lawyer is generally permitted to talk with a witness during testimony as long as the lawyer does not cross the line into unethical coaching"); *Chamberlin*; *Kingery*; *Thesen zur Strafverteidigung*, Thesis 30.
[350] ICC-01/05-01/08-T-343-CONF-ENG; ICC-01/05-01/08-T-344-CONF-ENG.

170. Counts 1 to 3 are unproven as against Mr Mangenda.

f. COUNTS 4 to 6: [REDACTED] (D-54), 30 October-1 November 2013

171. There is no allegation[351] or evidence that Mr Mangenda ever spoke to D-54. The Prosecution places exclusive reliance on five conversations between Mr Mangenda and Mr Kilolo between 30 August and 19 October 2013 as showing Mr Mangenda's knowledge of, and participation, in a scheme to procure false testimony from D-54.

172. On 30 August 2013, a full two months before the start of the witness's testimony, Mr Mangenda relayed the issues to be addressed with the witness. These issues were well-known aspects of the Defence case theory, not lies. They included such matters as the fact that [REDACTED];[352] that two large vehicles were there;[353] that he was present at PK-12;[354] that [REDACTED];[355] that [REDACTED];[356] that [REDACTED];[357] that [REDACTED];[358] that [REDACTED];[359] that [REDACTED];[360] that [REDACTED];[361] [REDACTED];[362] that [REDACTED];[363] and that [REDACTED].[364]

173. These details were based upon information previously provided by the witness himself, or upon propositions that constituted part of the Defence's case theory. D-54 testified that he had already provided the details on which he gave testimony to Mr Bemba's late Lead Counsel in 2009.[365] Mr Mangenda is not dictating a list of instructions, as reflected by his interjection more than once that "[REDACTED]"[366] and "[REDACTED]."[367] Conveying a list of elements that a client wishes the Lead Counsel to adduce from a witness is not indicative of any impropriety. There is nothing wrong with a counsel taking instructions

[351] PTB, paras.65-81.
[352] CAR-OTP-0074-0995:51.
[353] CAR-OTP-0074-0995:55.
[354] CAR-OTP-0074-0995:60.
[355] CAR-OTP-0074-0995:66.
[356] CAR-OTP-0074-0995:80-84.
[357] CAR-OTP-0074-0995:86-87.
[358] CAR-OTP-0074-0995:90-91,102-103.
[359] CAR-OTP-0074-0995:97-98.
[360] CAR-OTP-0074-0995:120.
[361] CAR-OTP-0074-0995:122-123.
[362] CAR-OTP-0074-0995:136-138.
[363] CAR-OTP-0074-0995:149.
[364] CAR-OTP-0074-0995:150.
[365] T-29-CONF-ENG 7:6-12,9:3-9.
[366] CAR-OTP-0074-0995:60-61.
[367] CAR-OTP-0074-0995:122-23.

from his client as to the issues that might be addressed with a witness – even when they are conveyed insistently in a private conversation between two team members as being essential and necessary.

174. The request that the witness be told not to respond "*tic au tac*"[368] – *i.e.* to take his time and answer questions deliberately and slowly – also does not constitute improper coaching.[369]

175. The Prosecution asserts that Mr Mangenda told Mr Kilolo that D-54 should "pretend" something in the course of his testimony: ""(iii) pretend ('*[REDACTED]*."[370] The Prosecution interpretation is grossly inaccurate. First, Mr Mangenda and Mr Kilolo are not discussing D-54 in this passage but rather [REDACTED] – "[REDACTED]" according to the OTP's own codes[371] – as is mentioned twice immediately prior to this passage. Second, the discussion is not about testimony, but rather about how [REDACTED] can meet with Mr Kilolo without the knowledge of [REDACTED]. Accordingly, "*[REDACTED]*";[372] only later, when his "*[REDACTED]*"[373] – *i.e.* when a final decision has been made as to whether he will be a witness – is [REDACTED] to reveal his potential status as a witness. Third, "*prétendre*" does not, in any event, mean "pretend".[374] Fourth, the original Lingala does not even contain any word corresponding to "*prétendre*" – the Prosecution has simply inserted this word to suit its purposes.[375]

176. Mr Mangenda's alleged communication of Mr Bemba's instruction that Mr Kilolo speak with the witness before Mr Haynes[376] also suggests nothing untoward. Mr Kilolo, unlike Mr Haynes, was able to speak to the witness in his mother tongue and would have known the content of prior interviews better that Mr Haynes. This is a possible, reasonable and typical reason for a "local" lawyer to speak to a witness before the "international" lawyer.

368 PTB, para.84.
369 Cohen, pp.989-991.
370 *Id. See also* CAR-OTP-0074-0995:170.
371 PTB Annex A, para.62.
372 CAR-OTP-0074-0995:172-173.
373 CAR-OTP-0074-0995:175.
374 T-26-CONF-ENG 31:11 ("[w]hat was the duration of the meeting that you **claim** to have had with Jack and Arido"). Mangenda Motion, para.12.
375 CAR-OTP-0074-0995:165-166 ("*[REDACTED]*.")
376 PTB, para.85.

177. The Prosecution alleges that Mr Kilolo told Mr Mangenda on 1 September 2013 that D-54 had "agreed to testify falsely according to Bemba's instructions."[377] Mr Kilolo's actual statement was that "[REDACTED]."[378] There is no hint that he has agreed to "testify falsely", although there is a hint of the witness's concern that there might be negative repercussions if [REDACTED]. As the witness stated, "in such circumstances, I could lose my employment."[379]

178. Fear of self-incrimination also appears to be the source of his reluctance to testify about the "[REDACTED]." The Prosecution alleges that Mr Kilolo was trying to get the witness to lie that he had been affiliated with the [REDACTED] knowing that this was untrue, whereas, in fact, Mr Kilolo makes clear that he believes that the witness actually may have been part of the [REDACTED] but was simply afraid to acknowledge that:

> AK: But in any case, he doesn't really agree to be *[unintelligible]* in the [REDACTED]. JJM: OK. AK: Now, I don't know if it's because he's afraid or else really…JJM: Of course he's afraid because…AK: because he wasn't there *[unintelligible]*. JJM: when he *[unintelligible]* that he [REDACTED], he thought "I run the risk of also being prosecuted." Even so [unintelligible]…AK: I'll try again to convince him. JJM: Yes. AK:…to see if I can accept to be the *[unintelligible]* observer at the [REDACTED], even if only for a few days. JJM: That's it.[380]

179. The word "convince", read in context, implies no inducement to lie, but rather an inducement to tell the truth notwithstanding fears that doing so could be self-incriminating for the witness. Prosecution investigators adopted the same approach, quite aggressively, during their own interviews.[381]

180. The Prosecution asserts that in a conversation on 9 September 2013 – seven weeks before the witness's testimony – Mr Mangenda and Mr Kilolo "discussed how to shape D-54's testimony to align it with the rest of the evidence and not to give the Prosecution an opportunity to discredit him."[382] The discussion focused, in particular, on the consistency of the witness's testimony with a letter apparently written by Mr Bemba at the time, and

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[377] *Id.* para.86.
[378] CAR-OTP-0074-0999:33-35.
[379] T-29-CONF-ENG 9:16.
[380] CAR-OTP-0074-0999:101-113.
[381] CAR-OTP-0080-0135:132-155 ("*[REDACTED]*")
[382] PTB, para.87.

with other evidence in the case.[383] Nothing in these discussions was improper, nor contemplated anything improper, let alone contemplated committing an offence under Article 70. The Prosecution itself believes that plausibility and consistency with the rest of the case is a matter that can be explored with a witness in light of its five techniques – which includes being allowed to put potential exhibits to the witness, and even the statements of other witnesses.[384] The Prosecution apparently does not think that this conduct is improper, let alone constitutive of an offence under Article 70. Mr Kilolo's and Mr Mangenda's use the expressions "*logique*"[385] – disparagingly translated as "rationale"[386] – and "*couleurs*" are perfectly suitable shorthand expressions for coherence, plausibility and consistency. The official translation of "*logique*" is "makes sense".[387] Counsel is not prohibited from openly discussing with a witness apparent inconsistencies in prior statements, to discuss whether something makes sense or appears absurd, and to present problematic or contradictory materials – including other evidence of which the witness was not previously aware – in order to seek an explanation.

181. The Prosecution erroneously asserts that "the only reasonable inference" of an excerpt of the 19 October 2013 conversation is that Mr Kilolo and Mr Mangenda are discussing payments to D-54; that this is indicative that D-54 received such payments; and that, accordingly, his denial of such payments was a lie of which Mr Mangenda had knowledge constituting an offence under Article 70.[388]

182. The premise is preposterously wrong, as are the conclusions. The discussion has nothing to do with D-54, but rather concerns another prospective Defence witness, [REDACTED] (whom the Prosecution says is "[REDACTED]"). This is corroborated by other intercepts showing that the Defence was in ongoing discussions with this witness, and that he was complaining about money: For example, on 29 August 2013, Mr Kilolo complains that "*[REDACTED]*"[389]

[383] CAR-OTP-0074-1001:110,130.
[384] *Supra* paras.128-132.
[385] CAR-OTP-0074-1001:70,72.
[386] CAR-OTP-0074-1001:68,70.
[387] T-29-CONF-ENG 38:3; T-29-CONF-FRA 40:15.
[388] PTB, para.90.
[389] CAR-OTP-0074-0997:124-125,145. *See also* CAR-OTP-0074-0993:80 (referring to meeting with "[REDACTED]").

183. The rest of the intercept also shows that this conversation between Mr Kilolo and Mr Mangenda concerned "[REDACTED]" and, in particular, a disagreement with "*les blancs*" not about payments to witnesses, but rather disclosure of an initial version of [REDACTED] statement taken by Mr Kilolo.[390] Ms Gibson suggested that it had to be disclosed, with which Mr Mangenda disagrees:

> *[REDACTED].*

Mr Kilolo and Mr Mangenda talk about dividing the work so that Mr Kilolo will be responsible for [REDACTED] and making the decision about disclosure, thereby "*[REDACTED]*."[391] None of these discussions concern D-54 and none are about concealing illegal conduct from the "white" members of the Defence team.

184. The Prosecution only cites two facts as objective lies. The first is that the witness lied about his last contact with Mr Kilolo as being "***one-and-a-half to two months ago***."[392] This contact would have complied with the witness's cut-off date, which was just one day before his testimony started,[393] and was consistent with Mr Mangenda's knowledge of Mr Kilolo's last contact with the witness.[394] Mr Kilolo does make a fleeting reference on 19 October 2013 to having "just spoken to" D-54, but there is no indication that this was a discussion of substance, and appears to have only concerned logistics about arrival at the video-link location. The circumstance is such Mr Mangenda may have understandably forgotten about this fleeting reference to a meeting which, after all, was well before the cut-off date[395] and would not have been remarkable or memorable for any other reason.

[390] CAR-OTP-0080-1416:95-97 ("*[REDACTED]*.")
[391] CAR-OTP-0080-1416:71-76 (*"[REDACTED]*.")
[392] ICC-01/05-01/08-T-349-CONF-ENG 44:1. The Pre-Trial Brief inaccurately states that the witness testified that his last contact "took place ***two months*** prior to his testimony." PTB, para.105.
[393] VWU, p.8.
[394] The three intercepts between Mr Kilolo and Mr Mangenda concerning Mr [REDACTED] occurred on 30 August, 1 September and 9 September 2013 – all of which are one-and-a-half months before the witness's testimony. *See* CAR-OTP-0074-0995; CAR-OTP-0074-0999; CAR-OTP-0074-1001.
[395] VWU, p.8.

185. The Prosecution's second alleged objective lie is that the witness "denied even knowing" Mr Kilolo. This is wrong: the witness acknowledged that "Maître Kilolo called me to ask where I was" and that he spoke to him.[396]

186. The Prosecution in its Opening Statement refers to Mr Mangenda having sent the LRV's questions concerning D-54 to Mr Kilolo. Mr Kilolo was entitled to these questions and nothing in the circumstances suggested that Mr Kilolo was going to communicate these questions to the witness. The Prosecution's attempt to establish some pattern between D-15 and D-54 – at least in respect of Mr Mangenda's knowledge – is specious and misleading.[397]

187. Counts 4 to 6 are unproven as against Mr Mangenda.

g. COUNTS 25 to 27: [REDACTED] (D-13), 12-14 November 2013

188. The Prosecution relies on a single conversation between Mr Mangenda and Mr Kilolo on 10 November 2013 as showing Mr Mangenda's knowledge of, and participation, in a scheme to procure false testimony from D-13.[398] The Prosecution does not allege, and there is no evidence, that Mr Mangenda ever spoke to D-13.

189. The conversation between Mr Kilolo and Mr Mangenda in which Mr Kilolo allegedly referenced his discussions with D-13 occurred before his handover to the VWU and was, accordingly, not improper.[399] The passage that the Prosecution cites as giving Mr Mangenda notice of the commission of Article 70 offences is the following:

> *Moi, par exemple, je suis occupé avec LES COULEURS de cette personne parce que tu vois le type ... comme ça faisait déjà longtemps, dans sa tête il savait qu'il n'allait plus venir, donc il avait ... il n'avait plus ces choses-là dans sa tête. Donc j'ai juste essayé avec lui comme ça ... même ce qu'il nous avait dit lors de notre rencontre avec KATE, il n'en peut plus.*[400]

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[396] The witness testified that he did "not even know him" in the context of stating that "I have never seen him," but he acknowledged having spoken to him and, to that extent, knowing of him. ICC-01/05-01/08-T-349-CONF-ENG 43:1, 44:5.
[397] Opening 45:3-7.
[398] PTB, para.208.
[399] VWU, p.8.
[400] PTB, para.208; CAR-OTP-0080-1419:10-14.

190. The passage does not indicate that Mr Kilolo is doing anything improper with the witness, let alone committing an offence under Article 70. Pre-testimonial meetings, as the Prosecution has itself advocated, may include reviewing and discussing the witness's prior statement. The use of the word "*couleurs*" to describe reviewing previous statements "that he gave to us during our meeting with Kate"[401] is yet another indication that the word "*couleurs*" does not imply any impropriety, let alone the commission of an offence under Article 70.

191. The alleged objectively false testimony is the witness's assertion that his last contact with Mr Kilolo before his testimony was "about three weeks ago"[402] – although the witness also said "I don't remember very well."[403] There is no evidence that Mr Mangenda knew about any contacts within this time period. Mr Kilolo in the passage above does not exclude that it might have been a couple of weeks before. Even assuming that Mr Mangenda could have inferred that the last contact had been recently, or even that day, the information would not have been remarkable because the VWU cut-off had not yet occurred (the intercept was on 10 November 2013 whereas the cut-off was 11 November 2013). There is no evidence that Mr Mangenda had any advance notice that the witness would make an incorrect statement, that the incorrect statement was a lie, or that Mr Kilolo had told him to utter this lie.

192. Counts 25 to 27 as against Mr Mangenda are unproven.

V. THE EVIDENCE VIEWED IN ITS TOTALITY

(i) Summary of Objectively Verifiable "Lies"

193. The evidence in its totality reveals no pattern of lies strengthening the Prosecution case. The table below summarises the evidence about any incorrect statements by the witnesses (columns 1, 3 and 5) and whether Mr Mangenda had any knowledge thereof (columns 2, 4 and 6).

[401] CAR-OTP-0080-1419:13.
[402] PTB, para.211.
[403] ICC-01/05-01/08-T-352-CONF-ENG 35:19-20.

TABLE OF ALLEGED "OBJECTIVE" MISSTATEMENTS BY WITNESSES AND MR MANGENDA'S KNOWLEDGE THEREOF						
Witness	**Incorrect About Promise of Money?**	**Mangenda's Knowledge?**	**Incorrect About Reimbursements?**	**Mangenda's Knowledge?**	**Incorrect About Contacts With Defence?**	**Mangenda's Knowledge?**
D-57 D-64 D-55 D-23 D-26	No evidence of any knowledge by Mr Mangenda of the truth or falsity of any testimony.[404]					
D-2	Ambiguous[405]	No[406]	Yes,[407] but not necessarily a lie	No advance knowledge and disclosed payments to Registry[408]	No	n/a
D-3	Not asked	n/a	Not asked about reimbursements at [REDACTED] meeting[409]	n/a	No	n/a
D-4	Not asked	n/a	Not asked	n/a	No	n/a
D-6	Ambiguous: "to come and give evidence for Jean-Pierre Bemba?"[410]	No;[411] in any event, answer ambiguous	Acknowledges reimbursements but understates the amount[412]	No advance knowledge of understatement; disclosed payments to Registry	Yes[413]	None
D-25	No	n/a	Ambiguous: OTP asks about payments "in exchange" or "as a form of support" for testimony; acknowledges hotel reimbursement[414]	No; in any event, too ambiguous to indicate lying	No	n/a
D-29	Arguably[415]	None	Arguably[416]	None	Acknowledged five	None

[404] *See supra* IV(i)(b)-(d); IV(iii)(a)-(b).
[405] ICC-01/05-01/08-T-322-CONF-ENG 26:24-27:9 (denying being promised a "benefit […] if you were to take part in this trial.")
[406] *Supra* section IV(ii)(e)(iii).
[407] *Supra* para.92; ICC-01/05-01/08-T-322-CONF-ENG 26:19-22.
[408] *Supra* para.93.
[409] *Supra* para.91.
[410] ICC-01/05-01/08-T-328-CONF-ENG 28:25-29:2.
[411] *Supra* sections IV(ii)(a)-(f).
[412] *Supra* para.91.
[413] ICC-01/05-01/08-T-329-CONF-ENG 21:13-18.
[414] *Supra* paras.138-139.
[415] ICC-01/05-01/08-T-339-CONF-ENG 43:6-12.

					rather than nine contacts[417]	
D-15	No	n/a	Yes[418]	None	Depends on distinction between "met" and "spoke"[419]	No concrete knowledge that any such contact did ultimately occur
D-54	No	n/a	No	n/a	OTP alleges 34 contacts within period denied by witness	No knowledge whatsoever except for fleeting reference eleven days before[420]
D-13	No	n/a	No	n/a	Yes, but contact was before cut-off[421]	No

194. Mr Mangenda had no actual nor advance knowledge of any lie uttered by any witnesses. In fact, as the table above illustrates, almost all the "objective" lies upon which the Prosecution purports to rely were not lies at all or could easily have been perceived as merely incorrect.

195. Furthermore, the Prosecution has not shown that Mr Mangenda had any knowledge that any of these "objective" lies were uttered at the behest of Mr Kilolo.

196. The Prosecution alleges that an unfulfilled "professional duty […] as a lawyer"[422] to "thwart the unlawful activities of his co-perpetrators"[423] constituted Mr Mangenda's *actus reus*. The Confirmation Decision did not confirm the charges on this basis and does not mention this theory.[424] The Trial Chamber has held that the Confirmation Decision, not the Pre-Trial Brief or the DCC, "define[s] the parameters of the case for the purpose of

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416 *Id.* 43:13-24.
417 *Supra* para.149.
418 ICC-01/05-01/08-T-345-CONF-ENG 15:1-6.
419 *Supra* para.161.
420 *Supra* para.184.
421 *Supra* para.191.
422 PTB, para.245.
423 *Id.* para.254.
424 Confirmation Decision, paras.73-76.

ensuing trial proceedings."[425] The Trial Chamber further held that "the Confirmation Decision sets out clearly the 'facts and circumstances' of the case for the accused."[426] Accordingly, the Prosecution's nebulous "commission by omission" theory of liability should be rejected *in limine*.

197. The allegation is, in any event, unfounded. The only indication that Mr Mangenda had of any alleged contact by Mr Kilolo with any witness after the VWU cut-off date is the conversation allegedly concerning D-15 on 12 September 2013.[427] As discussed above, Mr Mangenda did not have actual knowledge that the contact subsequently took place; did not have any knowledge of the content of the discussion; and did not have any knowledge that the contact was connected to any false testimony. Even assuming that Mr Mangenda had some ethical obligation to report something to someone in relation to this incident, the failure to have done so does not amount to the performance of the *actus reus* of an offence against the administration of justice. If this were the case, then Prosecution Case Managers who had reason to believe that their supervisors are violating Article 67(2) or Rule 77 would be subject to criminal sanction for failing to report such non-disclosures to the Trial Chamber. The OTP presumably does not believe this to be the case, as the events surround P-169 suggest.[428]

(ii) Other References to "Couleur" Do Not Demonstrate a Plan to Procure Lies

198. All references to "*couleur*" mentioned in paragraphs 115 through 120 of the Annex A of the Prosecution Pre-Trial Brief have been addressed in the context of the discussion of each of the fourteen witnesses. The Prosecution also cites other references to "*couleur*" in relation to potential witnesses who never testified, and within the framework of the fictitious scenario, as demonstrative that the term entailed illicit conduct.[429]

199. None of these references indicate that "*couleur*" implies exceeding the acceptable limits of witness interviewing that have been previously discussed. The first allegedly damning

[425] Auxiliary Documents Decision, para.12.
[426] *Id*. para.19.
[427] PTB, para.79.
[428] *Supra* note 218.
[429] PTB Annex A, paras.121-123.

reference[430] occurs on 7 November 2013 and concerns a potential witness code-named "[REDACTED]."[431] The entire discussion is hypothetical and, in fact, never transpires. The reference to *couleur* simply implies questioning a witness to determine whether he will testify positively in relation to the Defence's view of the facts – "*s'il accepte la couleur, c'est bon*."[432] Testing, probing and putting propositions for this purpose, as previously discussed,[433] is not prohibited. As stated in a recent decision by the MICT:

> it is legitimate, and probably common, that a defence investigator who interviews a potential witness to determine whether he or she should be called to testify seeks to ascertain not only whether the potential witness has evidence that may tend to rebut the prosecution evidence but also whether the witness has evidence which, if adduced under cross-examination, could hurt the defence case. Hence, what ANAU understood as an admonishment not to implicate Ngirabatware or [*redacted*], if called to testify, could have been an inquisitive way of making certain that he did not possess incriminating evidence which could be adduced on cross-examination if called to testify for the *Ngirabatware* Defence."[434]

200. The expression "*qu'on y mette un peu de couleur*"[435] likewise implies no impropriety. The many other uses of the term "*couleur*" shows that all that is being referred to is within the normal limits of witness interviewing. Relying on the verb "*mettre*" to change that obvious meaning is no more valid that would be interpreting "*amener*" as suggesting anything nefarious or improper.[436]

201. The same dynamic is at play in respect of the intercepted communication on 10 November 2013, in which Mr Kilolo and Mr Mangenda discuss rumours that a group of Prosecution witnesses had colluded to give false testimony. What is being proposed is not anything illicit,[437] but that, indeed, financial resources will be required to interview and obtain signed witness statements as soon as possible. As Mr Mangenda states, the objective is not to secure lies, but that "*nous nous entretenons avec eux, d'autres vont nous ouvrir leur cœur et disent la vérité*."[438] The Prosecution simply ignores this

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430 *Id.* para.121.
431 CAR-OTP-0080-1376:105,113.
432 CAR-OTP-0080-1376:119.
433 *Supra* paras.128-132.
434 *Sebureze*, para.34.
435 CAR-OTP-0080-1376:118-119.
436 *Supra* para.137.
437 PTB Annex A, paras.114,122.
438 CAR-OTP-0080-1419:150-151.

inconvenient passage; asserts a speculative and unfounded interpretation of "*couleur*"; and then asserts that every use of the word "*couleur*" over the previous two months must have implied manufacturing lies.[439] The reasoning is speculative and the conclusions unfounded.

202. The Prosecution relies[440] on a reference to "*couleur*" within the framework of the fictitious scenario on 26 October 2013. Mr Mangenda momentarily floats the idea of persuading Mr Bemba that Mr Kilolo cannot keep a record of the payments to the hypothetical informants because "*[REDACTED]*."[441] However, Mr Mangenda quickly abandons this suggestion,[442] possibly because he realised that such expenses were, in fact, documented and traceable – as is illustrated by the fact that much of the Prosecution's case against one accused depends on such documentation. The Prosecution's attempt to associate this reference to "*couleur*" with lack of documentation is therefore spurious.

203. Finally, the Prosecution relies on a reference to Mr Haynes being unhappy about not being involved in more missions, upon which Mr Mangenda remarks "*[REDACTED]*."[443] As previously explained, Mr Kilolo had better knowledge of previous interviews with witnesses (whether from Mr Nkwebe or with Ms Gibson); spoke the languages of the witnesses (whereas Mr Haynes did not); and was, quite frankly, more likely able to establish a rapport of trust and confidence with witnesses who might otherwise be reluctant to cooperate (than would be the case in respect of a foreign lawyer who could not speak their language). Mr Mangenda's remark that Mr Haynes would not be capable of effectively conducting pre-testimonial interviews carries with it no suggestion that the reference to "*couleurs*" entails manufacturing lies.

204. Mr Mangenda refers to Mr Haynes again later in the same conversation, stating "*[REDACTED]*."[444] The Prosecution's interpretation of "*couleurs*" as "manufacturing lies" ignores a simpler explanation: that Mr Haynes was frustrated not by the manufacture of lies but because he is not being kept assiduously informed of any new facts mentioned

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[439] Opening 38:15.
[440] PTB Annex A, para.123.
[441] CAR-OTP-0080-1362:56-57.
[442] CAR-OTP-0080-1362:59-60 ("*[REDACTED]*.")
[443] PTB Annex A, para.126.
[444] CAR-OTP-0074-1026:84-86 ("*[REDACTED]*.")

by a witness during pre-testimonial interviews. This may indeed have been a source of discontent; but the ICC Detention Centre would be over-flowing if every expression of discontent, rancour or accusation of incompetence within a Defence team were evidence of an offence under Article 70.

205. The Prosecution likewise misinterprets Mr Kilolo's statement to Mr Mangenda on 30 August 2013 that if "all hell broke loose" and if "someone were to mess up, he would mention someone's name."[445] The Prosecution assumes that the "he" refers to the witness, and then leaps to the conclusion that Mr Kilolo is worried about a witness denouncing him for encouraging false testimony.[446] The interpretation is speculative and, as even a cursory consideration of the context reveals, false. Mr Kilolo's discontent arises in the context of D-29's "screw-up" involving Mongoumba, which has previously been discussed.[447] Mr Kilolo is not concerned about denunciation by a witness, but rather that he will take the blame for any unexpectedly bad testimony. The "he", in this context, appears to be a reference to the possibility of Mr Haynes telling Mr Bemba that such "screw-ups" are Mr Kilolo's fault. Indeed, Mr Mangenda's response to Mr Kilolo's concern is not "don't worry, no one suggested that you told them to lie", but rather "[REDACTED]"[448] and apparently goes on to suggest that Mr Haynes also thought, and told the client, that the witness's testimony had ultimately gone well.

206. None of these passages show that Mr Mangenda understood the word "*couleur*" to mean procuring lies from witnesses. Indeed, the Prosecution has failed to connect any of these uses of "*couleur*" and any of the alleged lies that are subject to adjudication in this case. The Prosecution's interpretation is unsubstantiated and speculative and must be rejected.

[445] CAR-OTP-0074-0995:223-226.
[446] PTB Annex A, para.128; Opening 41:12-24.
[447] *Supra* paras.142-144.
[448] CAR-OTP-0074-0995:230-232.

(iii) Mr Mangenda Did Not "Relay[]" Illicit Instructions from Mr Bemba to Mr Kilolo

207. The Confirmation Decision accepted the Prosecution's submissions that Mr Mangenda was "liaison person between Mr Bemba and Mr Kilolo" in the execution of offences against the administration of justice.[449]

208. Despite having access to hundreds of hours of conversations between Mr Mangenda and Mr Bemba, none substantiate this claim, and few even cleared the threshold of relevance. The absence of any such evidence demonstrates no such illicit instructions and that Mr Mangenda did not act as a liaison in the execution of any offences.

(iv) Use of Codes Is Not Indicative of Any Offence

209. The use of codes in conversations between Mr Mangenda and Mr Kilolo or Mr Bemba is not, as the Prosecution asserts,[450] indicative of the commission of any offence. Intelligence services and private individuals have the capacity to eavesdrop on telephone conversations, and it is widely believed (justifiably) that conversations at the UNDU are recorded and might be shared with the OTP. Using codes to refer to specific contacts with specific individuals, rather than concealing illicit conduct, is an understandable measure to prevent leakage of information to persons who might undertake proper or improper contacts with prospective Defence witnesses. Even proper contacts by the Prosecution or third parties can cause witnesses to cease their cooperation with the Defence, especially if they feel themselves to be in vulnerable circumstances.

(v) Discussions About the Kenya Contempt Cases Is Not Indicative of Any Offence

210. The Prosecution's fanciful interpretation of the intercepts is highlighted by its assertion that a conversation between Mr Bemba and Mr Mangenda about the contempt cases in Kenya[451] reflects consciousness of guilt.[452] If Mr Bemba was as "pre-occupied" as the

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[449] Confirmation Decision, paras.74-75; Opening 26:4-5,42:13-15; PTB, para.245.
[450] PTB, paras.53,245.
[451] CAR-OTP-0079-0192:77-161.
[452] Opening 66:8-13.

Prosecution claims,[453] he would not have waited until the second half of the phone call, after addressing various team management issues, to raise this issue. Further, this conversation occurred on 2 October 2013 – before any indication of any Article 70 investigation. Mr Mangenda describes a variety of details of the Kenya contempt cases that could have no possible application to Mr Bemba – including the potential jurisdiction of Kenya,[454] which Kenya case the alleged contempt concerned,[455] and whether the Vice-President of Kenya could be arrested.[456] These details would have no application or relevance to Mr Bemba, and yet he expresses genuine interest – as does Mr Mangenda – in these details. In fact, a far more plausible explanation is that Mr Bemba was interested to know whether Mr Ruto might soon join him at the Detention Centre.

(vi) Conclusion: Nothing in the Evidence Viewed as a Whole Strengthens the Evidence In Relation to the Individual Counts; on the Contrary, the Evidence Shows No Pattern of Conduct Reflecting Any Criminal Plan Involving Mr Mangenda

211. The intercepted communications between Mr Mangenda and Mr Kilolo, and between Mr Mangenda and Mr Bemba, should, if the Prosecution's case theory is correct, contain abundant evidence of offences against the administration of justice. Instead, the intercepts reflect typical conversations amongst counsel and team members about witness interviews; concerns and mistrust about lack of coordination within the team; and contentment or disappointment about the performance of witnesses. The Prosecution promised the Trial Chamber in its opening statement that the evidence would establish Mr Mangenda's guilt "unequivocally".[457] The evidence has come up far short of that promise. The evidence, viewed in context and in its totality, does not show that Mr Mangenda had any knowledge that witness interviews exceeded its acceptable limits, let alone that witnesses were being encouraged to tell lies, and still less the specific lies under adjudication in this case.

212. The Prosecution's case does not meet the exigent standard of proof beyond a reasonable doubt. It is unsubstantiated by evidence, rests on a myriad of slanted translations and

[453] *Id.* 66:11.
[454] CAR-OTP-0079-0192:89-95,120-122.
[455] CAR-OTP-0079-0192:111-112.
[456] CAR-OTP-0079-0192:141.
[457] Opening 34:13-14, 34:19-20, 35:9-10.

speculative interpretations, and is manifestly deficient. None of the counts have been proven beyond a reasonable doubt.

VI. RESERVATION

213. The foregoing submissions do not constitute a tacit admission of any fact, even when the word "allegedly" has not been placed before an allegation that constitutes part of the Prosecution case.

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Respectfully submitted this 18 July 2016,
At The Hague, The Netherlands