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THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

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

Public with Confidential Annexes A and B

**Public Redacted Version of “Defence Request for Leave to Reply to the
“Prosecution’s Consolidated Response to the Appellants’ Documents in Support
of Appeal””, 24 July 2017, ICC-01/05-01/13-2183-Conf**

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

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

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1. Introduction

1. Pursuant to Regulation 60 of the Regulations of the Court, the Defence for Mr. Jean-Pierre Bemba respectfully requests authorisation from the Appeals Chamber to submit a reply to the Prosecution Response to the Defence Appeal Brief (the Response).¹

2. The topics on which the Defence seeks leave to reply fall into the following categories:
 - a. Inaccurate or misleading statements of fact and law;
 - b. Specific points raised by the Prosecution which the Defence does not contest, and the impact of explicit or implicit concessions in the Prosecution Response Brief on key findings which impact on the outcome of the Judgment;
 - c. Changes in the Prosecution theory of the case and common plan, which have been introduced for the first time in the Prosecution's Response Brief;
 - d. New legal arguments concerning:
 - i. Specific elements of co-perpetration liability;
 - ii. The alleged notion that there is no separation between Counsel and Client;
 - iii. The test for privilege, and its exclusion, in light of the Prosecution's investigative powers;
 - iv. The relationship between the Document Containing the Charges, the Confirmation Decision, and 'Auxiliary Documents', and evidence submitted in the case, within the ICC legal framework
 - e. The erroneous approach advanced by the Prosecution with respect to the standard of appellate review.

3. Granting the Defence leave to adduce a reply in relation to the above categories will serve the interests of justice by ensuring the correctness of the record, identifying issues which are not in dispute, and ensuring that issues that are likely to be of seminal importance to the resolution of this case, and also future cases, are

¹ ICC-01/05-01/13-2170-Conf

adjudicated after hearing from the Defence and receiving relevant legal and evidential argument.

4. In terms of the deadline for the reply, given that firstly, the Defence response to the Prosecution Sentencing Appeal is due on 21 August 2017, and secondly, the judicial recess runs from 21 July until 14 August 2017, the Defence further requests the Appeals Chamber to set the deadline for 21 September 2017. The Prosecution has indicated that they would not object to the deadline being delayed until 30 days after the deadline for submitting the Defence response to the Prosecution Appeal on the Sentencing Judgment (i.e. 21 September 2017).²
5. The present filing has been submitted confidentially due to the fact that it cites to confidential information in the Response. A public redacted version will be filed forthwith.

2. Submissions

2.1 The Threshold for leave to reply for Rule 150 appeals filed by the Defence

6. Regulation 60 specifies that “[w]henever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in the order”. The threshold for granting leave to reply is thus broader than the standard set out in Regulation 24, which is limited, in general, to new issues arising from the response, which could not be foreseen in the initial application.
7. The broader nature of this threshold is confirmed by the Appeals Chamber’s decision in the *Bemba* Main Case that it would be in the “interests of justice” to authorise the Defence to file a reply on issues that would assist the Appeals Chamber in its determination, and which were relevant to the issues raised in the appeal itself.³ As opposed to the more technical requirements of Regulation 24, the key considerations appear to be whether the issues are relevant to the existing scope of the appeal, and whether further submissions would facilitate the ability of the Appeals Chamber to render an informed adjudication of the appeal.

² Annex A.

³ ICC-01/05-01/08-3480, para. 8.

8. These considerations should also not be amended, or subjected to further caveats, due to the fact that the current application arises in connection with an Article 70 appeal rather than one falling under Article 5. As will be set out below, the specific issues, on which the Defence seeks leave to reply, concern core issues of individual criminal responsibility, and the right to be informed of the charges. The Appeals Chamber's ultimate determination will have significant ramifications for all future cases before the ICC. This is also the first appellate case to concern important procedural issues, such as the test for excluding privilege.

9. Although future Article 70 cases might be subjected to a more streamlined appellate procedure, this is not a standard Article 70 case. Apart from the fact that it is the first Article 70 appeal,⁴ it is comprised of over 2170 filings, which were submitted over a four-year time span. There are, in addition, "a high number of items of non-oral evidence."⁵ This size and complexity militate in favour of receiving submissions that will assist the Appeals Chamber to identify all relevant considerations to the issues in dispute.

10. It is also pertinent that the current appeal was initiated by the Defence. Whilst the right of the Defence to have the last word does not necessarily translate to a right to have the last word in written filings, it is an important consideration in appellate proceedings, which at present, are determined primarily on the basis of written filings. This is reflected by the Appeals Chamber's determination that the Defence for Mr. Ngudjolo could file a response to the Prosecution's reply in the appellate proceedings in that case.⁶ Both the Nudjolo and Lubanga Defence teams were also permitted to have the last word during the appeal hearings.⁷

11. Finally, neither the Bemba Main Case Defence nor the Lubanga Defence set out the specific issues to which they requested authorisation to reply, in exhaustive detail. For example, both the Lubanga and Bemba Main Case Defence teams requested a general right to address alleged misstatements or evidentially unfounded assertions

⁴ The Appeals Chamber found that the fact that the Lubanga case was the first appeal before the ICC constituted an additional justification for authorising a reply: ICC-01/04-01/06-2982, para.7.

⁵ TJ, para. 209.

⁶ ICC-01/04-02/12-123-Conf

⁷ ICC-01/04-02/12-210, p. 4; ICC-01/04-01/06-3083, pp.6-7.

made by the Prosecutor.⁸ Nonetheless, given that the current application is arising in connection with an Article 70 rather than an Article 5 case, it is unclear as to whether the same approach will apply. The Defence has therefore erred on the side of providing greater detail in order to assist the Appeals Chamber to gauge the relevance of these issues, and the time required to substantiate them. The inclusion of detailed information in the current application occasions no prejudice to the Prosecution, as it has an automatic right to respond to this application, and if leave to reply is granted, the additional detail will be incorporated in the Defence reply.

12. If the Defence is authorised to file a reply in relation to certain issues, such as alleged misstatements or misleading characterisations of the record, the provision of specific examples in the current application should not, however, prevent the Defence from including other examples falling within the same issue, subject to the overarching proviso that the Defence will address all issues in a succinct and focused manner, which does not repeat arguments advanced in its Appeal Brief.

2.2 Issues upon which the Defence Seeks Leave to Reply

A) Inaccurate or misleading statements of fact and law

13. In both the Lubanga and Bemba cases, the Appeals Chamber found that it would be in the interests of justice to receive submissions, allowing the Defence to address incorrect or misleading positions set out in the Prosecution response.⁹ In line with these precedents, it would be equally in the interests of justice for the Defence in this case to be afforded a discrete opportunity to draw the attention of the Appeals Chamber to specific arguments that are predicated on an erroneous characterisation of the facts, procedure or law. Although it is the ultimate responsibility of the Appeals Chamber to determine the correct interpretation of the contested issue, this process would be assisted through the receipt of relevant information as concerns specific developments and filings in this case. In particular, given the size and complexity of the case, it might be difficult for the Appeals Chamber to identify, *proprio motu*, that particular points advanced by the Prosecution misstate the record, are misleading, or are contradicted by other filings or evidence in the record. It

⁸ ICC-01/05-01/08-3475, para. 17.

⁹ ICC-01/04-01/06-2982, para. 7; ICC-01/05-01/08-3480, para. 8.

would clearly not be in the interests of justice for a judgment to be based on erroneous information, due to the fact that the Defence was not afforded a discrete opportunity to address such matters.

14. The Defence has already identified several key issues that have been presented in a misleading terms in the Response. These include but are not limited, to the following:

- a. Statements that certain issues were not raised by one Defence team,¹⁰ when they were in fact raised by other Defence teams, and put before the Trial Chamber in filings that are not alluded to by the Prosecution;
- b. The assertion that the Austrian authorities did not find that the Prosecution's prior screening of Western Union documents violated bank secrecy;¹¹
- c. Prosecution arguments that were rejected by the Trial Chamber, and which cannot, therefore, support the validity of the Trial Chamber's determinations;¹²
- d. Selective quotations which are contradicted by later sections of the cited decisions;¹³
- e. The statement that the Vienna Court did not rule on the immunity of Caroline Bemba,¹⁴ which is misleading in light of the fact that the Prosecution had failed to obtain judicial authorisation to access and use the Western Union records pertaining to Caroline Bemba;
- f. Although the Prosecution acknowledge that they were explicitly advised that an Austrian court order would be required before the Prosecution could "use" the Western Union information at the ICC,¹⁵ the Prosecution claim to have "acted in good faith",¹⁶ and consistently with this advice,¹⁷ even though they then introduced Western Union information before both Trial Chamber III and the Single Judge, in advance of the relevant court orders;

¹⁰ Response para.88.

¹¹ Response, paras. 58, 69. Cf CAR-D24-0005-0045, CAR-D24-0005-0033, and English translation CAR-D23-0011-0006 at 0012: "Under SS 116-4 of the Austrian Code of Criminal Procedure, the order requiring the disclosure of information and the decision validating this order must specific the procedure and the act on which the procedure is based, as well as their legal characterisation (no.1); the facts that give rise to the necessity and proportionality (ss5) of the order (no.4); and the period concerns if it is an order provided for in sub-paragraph 2-3.(...) **Bank secrecy may not be lifted to confirm suspicions; in any case, there must be pre-existing indications forming the basis of such suspicions**" (emphasis added).

¹² Response, para. 71.

¹³ Response, para. 101

¹⁴ Response, para. 105.

¹⁵ Response, para. 58 (p. 31).

¹⁶ Response, para. 58 "The Chamber correctly found that the Prosecutor acted in good faith".

¹⁷ Response, para. 58 (p. 31).

- g. The claim that P-361 gave ‘expert’ testimony on the origins of the CDRs;¹⁸
- h. The claim that the Single Judge based his assessment of the necessity of receiving detention unit recordings concerning Mr. Bemba on a reasonable suspicion, based on “evidence” from sources, witnesses and resources persons,¹⁹ even though the “evidence” pertaining to Mr. Bemba was not filed in the Article 70 case, and, even if it had been filed, would not have been capable of supporting a reasonable suspicion that Mr. Bemba was engaged in ‘witness bribery’ (as alleged at the time);
- i. Assertions that the Dutch authorities reviewed both the legality of the interception process (“multiple layers”) and the “evidentiary support provided by the Prosecution”, and that the Dutch District Court “upheld the lawfulness of the intercept process”;²⁰
- j. The misleading claim that the [Redacted] confirmed the legality of “seized items”, an observation which pertained to the seizure of tangible items (not the 2013 CDRs and intercepts), which was addressed in an *inter partes* manner with the full involvement of the Dean;²¹
- k. The assertion that the Defence did not contest at trial that Mr. Bemba did not always understand Mr. Babala’s codes;²²
- l. In keeping with the shift in the common plan to one that is focused on concealment, and in order to embrace irrelevant conduct of Mr. Bemba and Mr. Babala within the scope of this common plan, the Prosecution has now asserted that the codes used by Mr. Babala and Mr. Bemba did not concern political issues,²³ whereas their Pre-Trial Brief and Bar Table Motions concede the opposite;²⁴
- m. The Prosecution asserted that the fact that Main Case Prosecution lawyers accessed Article 70 filings does not establish access to the Mangenda

¹⁸ Response, para.189

¹⁹ Response, para. 98.

²⁰ Response, paras. 125, 128.

²¹ Response, para.130

²² Response, para 528. Cf ICC-01/05-01/13-1902-Conf-Corr2, paras. 202-203, fn.228, and evidence tendered to demonstrate the cognitive dissonance between Mr. Bemba and Mr. Babala’s understanding of different codes: ICC-01/05-01/13-1794-Conf-Corr,para.60, ICC-01/05-01/13-1794-Conf-AnxA, p.5-6, ICC-01/05-01/13-1844-Conf. The Trial Chamber recognised the formal submission of items tendered to demonstrate this point: ICC-01/05-01/13-1858, para.13.

²³ Response, para.589

²⁴ ICC-01/05-01/13-1110-Conf-AnxA, para.187

detention recordings,²⁵ whereas the specific filings listed by the Defence include extracts of Mangenda detention recordings;²⁶

- n. The Prosecution has asserted that bad character evidence can, in certain jurisdictions, be admitted in connection with attempts to interfere with witnesses,²⁷ but failed to clarify that this is limited to circumstances in which the interference occurs in the same case (i.e. where the defendant has not been charged, and prosecuted in a separate case for the alleged interference with witnesses);
- o. The Prosecution has misstated the legal position with respect to the conditions governing the use of co-conspirator hearsay in the United States,²⁸ and the use of intercepts of counsel-client communications in civil law countries,²⁹
- p. The Prosecution has introduced a misleading, and unhelpful distinction between the application of the beyond reasonable doubt standard to facts which are relied upon for the conviction, and facts which are “essential” to the conviction;³⁰
- q. The Prosecution has also improperly sought to lessen the evidential threshold that applies to findings based on inferences by either mischaracterising several key findings as ‘intermediate’ inferences,³¹ or glossing over the distinction between the overall assessment as to whether a reasonable Chamber could have reached a particular conclusion, and the separate but more pertinent question as to whether the Chamber acted within the parameters of reasonableness by excluding all other reasonable conclusions in connection with findings based on inferences;³²

²⁵ Response, para. 106

²⁶ i.e. ICC-01/05-01/13-1113-Conf-AnxA, p.28, row 35

²⁷ Response, para. 446.

²⁸ Response, para.550. In the United States, the hearsay declaration of a co-conspirator cannot be relied upon to establish the existence of the conspiracy or the defendant’s membership of it; these elements must be established by independent evidence as condition precedents to the possible admission of any such hearsay statements from co-conspirators : *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). See also *United States v. Weaver*, 507 F.3d 178, 181 (3d Cir. 2007), which found that in order to trigger the exception to hearsay, the court must first find that: “(1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.” The Chamber’s reliance on the statements of Mr. Kilolo and Mr. Mangenda to establish the common plan and Mr. Bemba’s membership of the common plan, and *ex post facto* statements, falls outside the scope of this exception.

²⁹ Response, para. 550;

³⁰ Response, para. 485, fn. 1794, para. 527; Cf *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-A, Appeal Judgment, 7 July 2006, paras. 166-175

³¹ For example, Response, paras. 499, 504, 515, 532, 543, 544.

³² Response, para. 465, 553.

- r. The Prosecution has misstated the law and regulations as concerns the purpose of detention unit monitoring, and the application of privilege and confidentiality to ICC detention unit communications;³³
- s. The Prosecution's erroneous claim that the Defence never suggested alternative means of investigating the case, other than through direct and unfettered access to detention unit communications;³⁴
- t. The Prosecution has misconstrued the relevance of the Trial Chamber's findings concerning the existence of a multiparty call on 4 October 2012 with D-19 (which the Prosecution's concedes did not occur), to the Chamber's analysis and inferences related to the call that occurred on 5 October 2012;³⁵
- u. The Prosecution has unfairly intimated that the Defence did not cite particular videos of Mr. Bemba during witness testimony due to the fact that the video might support the Chamber's finding (i.e. D-25),³⁶ whereas the video simply does not show Mr. Bemba at the relevant time, which rendered it impossible for either the Defence or any reasonable trier of fact to establish whether Mr. Bemba heard, and registered the import of the testimony in question.

15. An element, which is of particular importance to the Trial Judgment, is the Prosecution's misleading information provided about Ringtail, which conflates the notion of the creation date (which was not alluded to by the Defence), with Ringtail information concerning chain of custody, which is based exclusively on metadata created by the Prosecution.³⁷ If leave to reply is granted, the Defence will be in a position to demonstrate that the Prosecution either:

- i. inserted inaccurate and misleading information concerning the chain of custody concerning several CDRs pertaining to Mr. Kilolo's numbers, including the the [Redacted] number';
- ii. failed to disclose all the CDRs that it received directly from the Dutch authorities on 13 September 2013;or
- iii. disclosed modified versions of these CDRs rather than the original version received on particular dates.³⁸

³³ Response, para. 101.

³⁴ Response, para. 102.

³⁵ Response, para. 461.

³⁶ Response, para. 485.

³⁷ Response, para. 131.

³⁸ The Prosecution provided no information concerning the date of the chain of custody for these CDRs in its Bar Table Motions, and no documentation concerning the legal decisions which authorised the transmission of which numbers for which time periods. In Ringtail and E-Court, the Prosecutor provided the chain of custody

16. If leave to reply is granted, the Defence would address the above issues in a succinct and focused manner, which identifies the contested issue, and the information or records which are of key importance to a correct adjudication of the matter in issue.

B) Specific points raised by the Prosecution which the Defence does not contest, and the impact of explicit or implicit concessions in the Prosecution Response Brief on key findings which impact on the outcome of the Judgment

17. In connection with several appellate grounds, the Prosecution has created a ‘straw man’ by constructing erroneous versions of Defence arguments, which it then ‘refutes’ in lieu of the actual argument presented by the Defence. Indeed, in some cases, the Defence does not disagree with arguments or case law advanced by the Prosecution. At the same time, the Prosecution has also explicitly or implicitly conceded several points of law or fact.

18. Without repeating arguments, it would streamline the process to allow the Defence to clarify the specific issues which are in dispute, those which are not, and the impact of particular concessions on the Trial Judgment. At the same time, it is particularly important in connection with issues concerning technical or expert evidence that the waters are not muddied by misleading slants on the issues in dispute.

19. The Defence has identified the following non-exhaustive examples, which fall under this category:

- a. The Prosecution has argued that it is not wrong in principle to rely on conduct that occurred after the commencement of the common plan.³⁹ The Defence does not dispute this; the dispute lies rather with the issue of ‘contributions’/conduct that post-date the execution of the offence/s, and the separate legal issue as to whether contributions should be directed to specific charged incidents, or the plan in general (which will be addressed below);
- b. The Prosecution has argued that D-20-2 confirmed that the technical problems in the detention unit recordings did not affect the sequences of

date of 10 October 2013 or March 2014 for the Kilolo [Redacted] CDRs even though they received a CDR concerning this number on 13 September 2013. The Prosecution has thus far declined to provide any clarity on this issue (Annex B).

³⁹ Response, paras. 445-446.

words spoken by each speaker in isolation.⁴⁰ The Defence does not dispute this; the issues lies instead with the inability to determine the length of pauses between utterances (the flaw in metering silence), which means that it is impossible to ascertain whether two separate sentences were, in real time, one utterance, or two utterances separated by a pause, and intervention from Mr. Bemba;

- c. The Prosecution has advanced the position that several evidential findings either were not relied upon to convict Mr. Bemba, were not essential for the conviction,⁴¹ were not relied upon for specific elements such as intent⁴² or authorisation,⁴³ or were not relied upon for specific Article 70 offences.⁴⁴ This has clear implications as concerns the sufficiency of the remaining evidential and legal foundation of the Trial Judgment;

20. In terms of the latter aspect, since the Trial Chamber never issued a clear determination as to the weight allocated to items of evidence, the question as to what was, or was not of determinative importance to the conviction could not be litigated at trial. Similarly, since the Prosecution did not include an elements based chart, or specific metadata concerning the link between items of evidence and specific elements of the offence/s or otherwise address the link between its evidence and specific elements of the offences for which Mr. Bemba was charged, this matter also never clearly arose at trial.

21. If leave to reply is granted, the Defence will address the above matters in a succinct manner that does not repeat previous submissions.

C) Changes in the Prosecution theory of the case and common plan, and factual arguments, which have been introduced for the first time in the Prosecution's Response Brief

⁴⁰ Response, para. 553.

⁴¹ Response, para. 539

⁴² Response para. 504 .

⁴³ Response para. 527 (the JPB-FB conversation regarding 'sucre' cannot establish authorisation on the part of Mr. Bemba).

⁴⁴ Response, paras. 442 (JPB-FB interactions only relevant to Article 70(1)(c)); 509, 510 (the AK-JPB conversation only relied upon for control over the presentation of evidence, and not involvement in illicit coaching).

22. As will be addressed below, Mr. Bemba's conviction hinges squarely on the manner in which the Chamber interpreted and applied co-perpetration liability, which in turn, is anchored on the notion of a common plan, and Mr. Bemba's role in this common plan.

23. The right to fair and adversarial proceedings therefore dictates that Mr. Bemba should be afforded an opportunity to be heard in connection with any changes in either the definition of the common plan, or Mr. Bemba's specific role in this common plan, which arise for the first time in the context of the Prosecution's Response.

24. This includes, but is not limited, to the following examples:

- a. The new claim that Mr. Bemba's contribution to the common plan was comprised of being its 'mastermind' and architect,⁴⁵ which contradicts previous pleadings, and the decision of the Pre-Trial Chamber not to confirm indirect perpetration as a mode of liability;
- b. Inconsistent variations of the common plan, which are advanced at paragraphs 2, 398, 416, 425, and variations which diverge from the Chamber's findings (paragraphs 430, 489);
- c. The assertion that the common plan was one to illicitly interfere with Defence witnesses in general, rather than specific witnesses;⁴⁶
- d. The transformation of the common plan into one which focusses on concealment, amounting to an interference with the collection of evidence,⁴⁷ rather than the specific charged Article 70 offences;
- e. A new Prosecution theory that Mr. Bemba was informed of the 'true' Article 70 investigation on 16th October 2013 during an in person meeting with Mr. Kilolo (which is only alluded to in an intercepted conversation between Mr. Kilolo and Mr. Mangenda), and then informed of a separate false investigation (or variants thereof) on 17th October during a phone conversation with Mr. Kilolo.⁴⁸

⁴⁵ Response, paras. 430, 474.

⁴⁶ Response, para. 398, 527

⁴⁷ Response, paras. 432, 445, 455, 460

⁴⁸ Response, para. 543.

25. Having failed to adduce evidence, testimony or argumentation at trial as to why a certain reference to ‘notre frère’ in the 30 August 2013 conversation between Mr. Kilolo and Mr. Mangenda must be Mr. Bemba, the Prosecution has now averred in its Response that the use of ‘il’ in a certain component of this conversation demonstrates that [Redacted] cannot be D-19.⁴⁹ This assertion in turn, is based on the Prosecution translation of the intercept (relied upon by the Chamber), which translates ‘il’ in such a way as to conform to the Prosecution’s theory. This is, however, no incompatibility with this extract, and the much more reasonable likelihood that ‘notre frère’ is D-19. If granted leave to reply, the Defence will be in a position to demonstrate that the sentence construction of both this extract, and the conversation as a whole, is compatible with this possibility.

D) New legal arguments arising from the Prosecution Response

i. The notion of co-perpetration liability

26. The Response advances specific legal theories concerning co-perpetration, including the following positions:

- a. That it does not need to be virtually certain that the common plan will result in the offences for which the defendant has been charged;⁵⁰
- b. That even if the common plan does not have a criminal objective, a defendant’s essential contribution need only be directed to the common plan itself, and not the realisation of the charged offences;⁵¹ and
- c. That co-perpetration should be defined separately than perpetration, and thus the threshold for establishing the defendant’s intent or contribution to the commission of specific crimes should be lower;⁵²

⁴⁹ “Nor is this argument assisted by Mangenda’s references in the 30 August 2013 conversation to [Redacted], which read in context clearly refer to a different person than “il””. Response, para. 506.

⁵⁰ Response, paras. 382, 416.

⁵¹ Response, para. 477: “It is not necessary for a co-perpetrator to make an essential contribution to each charged criminal *incident*, provided that those incidents occur within the framework of the common plan, to which the co-perpetrator *did* make an essential contribution, with intent and knowledge.” This formulation raises a clear issue as to causation: i.e. if accepted, it would mean that an accused can be convicted due to contributions directed to the non-criminal aspects of the common plan, which have no impact (or no substantial impact) on the realisation of the charged crimes.

⁵² Response, paras. 479, 480.

- d. That within the context of co-perpetration, the physical remoteness of the defendant from the execution of the crimes by alleged co-perpetrators is not evidentially relevant to the extent to which the Chamber can infer the existence of a shared criminal objective and concerted action between such co-perpetrators, from the commission of the remote crimes;⁵³
- e. The legal argument that an accused's essential contribution to the execution of the charged offences can be satisfied through the defendant's role as the architect of the plan;⁵⁴
- f. That causative concerns regarding 'neutral acts' are less, rather than more relevant to co-perpetration, as compared to aiding and abetting.⁵⁵

27. Although the Prosecution did not appeal the Trial Judgment, several of these legal positions broaden, and dilute the specific legal notion of co-perpetration adopted by the Trial Chamber. These matters were also not substantively argued, or clearly articulated at trial. They thus constitute new legal arguments arising from the Response, which are of crucial importance to the resolution of the appeal.

ii. The alleged notion that there is no separation between the identity of Counsel and Client;

28. The Prosecution did not proffer legal arguments at trial as why a defendant, who is represented by Counsel, should be considered a party, or to control the presentation of evidence. Nonetheless, in its Response, the Prosecution has now advanced the notion that there is unity of identity between counsel and client, unless it is shown that counsel acted beyond his or her mandate or instructions.⁵⁶ The Prosecution has further relied on a finding by the Single Judge in this case, concerning Mr. Bemba's right to determine which members of his team can access his case file, in order to establish that this principle is equally applicable to the ICC.

29. The latter decision does not warrant a reply of substance since it does no more than replicate the Single Judge's acceptance of the Prosecution legal theory of this case, and is not, in any case, irrelevant to the case at hand. Indeed, by the Prosecution's

⁵³ Response, para. 476.

⁵⁴ Response, para. 474.

⁵⁵ Response, para. 472.

⁵⁶ Response, para. 230.

logic, the fact that a patient also controls the confidentiality of medical records means that the patient has the same powers and duties as his or her Doctor.

30. The ICTY case law cited by the Prosecution concerning unity of counsel and client when a counsel acts in accordance with his proper mandate does, however, raise a new issue as to scope of counsel's 'mandate'. The scope of this 'mandate' also has implications for the scope of legal privilege: if all of the actions undertaken by Mr. Kilolo in the Main Case fell within the scope of his mandate, then they should also have been protected by legal privilege. Conversely, if the scope is defined narrowly to exclude any acts that are inconsistent with Court's orders or the Counsel's obligations under the Code, then any actions falling outside this scope should not be automatically attributed to Mr. Bemba.

31. These legal arguments also go beyond the specific findings of the Trial Chamber, and, depending on how the notion of a mandate is defined, could result in the actions of Counsel being imputed to the Client even in the absence of evidence that the Client instructed Counsel to pursue a course of action, or otherwise factually 'controlled' Counsel's actions.

32. The Defence therefore seeks leave to reply to the issue as to what constitutes a proper mandate, for the purposes of assuming unity of identity between counsel and client, and on whom the burden falls to establish whether counsel was acting pursuant to a mandate or instructions provided by the defendant, for the purposes of Article 70 proceedings (rather than litigation concerning the admission of evidence).

iii. The test for privilege, and its exclusion, in light of the Prosecution's investigative powers;

33. In the Response, the Prosecution argued, for the first time, that there is a distinction between the legal exception to privilege, and the scope of materials covered by this exception.⁵⁷ The Prosecution further advanced the novel position that the scope of privilege and its exception should be determined by reference to the Prosecution's

⁵⁷ Response, para. 111.

power, under Article 54(3)(1), to collect evidence that is relevant to an Article 70 investigation.⁵⁸

34. The Defence agrees with the Prosecution that there is a distinction between legal privilege, which applies vis-à-vis the Court, and privileges and immunities, which apply vis-à-vis States.⁵⁹ Nonetheless, the Prosecution's reliance on its Article 54(1) powers to exclude both legal privilege and privileges and immunities,⁶⁰ raises a fundamental issue as to the balance between Prosecution powers and duties, and the extent to which investigative powers can override specific Statutory privileges.

iv. The relationship between the Document Containing the Charges, the Confirmation Decision, and 'Auxiliary Documents', and evidence submitted in the case, within the ICC legal framework

35. Throughout its Response, the Prosecution has advanced new legal arguments concerning the linkage between the Pre-Trial Chamber's decision on the confirmation of the charges, the charges themselves, and the Prosecution's Pre-Trial Brief.⁶¹ Whilst arguing that the Chamber did not rely on evidence concerning D-19 and Bravo to convict Mr. Bemba,⁶² the Prosecution has also averred that it was appropriate for the Chamber to rely on evidence concerning D-19 and Bravo in order to establish the common plan.⁶³

36. The Defence does not dispute that it is the Pre-Trial Chamber's decision that defines the parameters of the charges for trial,⁶⁴ but it is a separate issue as to whether it does so in reference to the charging document submitted by the Prosecution (and whether the Pre-Trial Chamber has the power to go beyond these charges). Moreover, although the Lubanga Appeals Judgment refers to 'auxiliary documents', the Response raises a new legal issue as to the extent to which, in the ICC legal

⁵⁸ Response, para. 114.

⁵⁹ Response, para. 93

⁶⁰ The Prosecution has asserted that the mere commencement of an Article 70 investigation against certain members of the Defence, which is not subject to prior judicial authorisation or approval, voids the application of Defence privileges and immunities vis-à-vis States. Response, para. 88.

⁶¹ Response, paras. 420, 422, 428.

⁶² Response, para. 460

⁶³ For example, Response, para. 464.

⁶⁴ Response, para. 420.

framework, a Pre-Trial Brief can cure defects in the charges, particularly in circumstances in which the Trial Chamber affirmed that the charging document remained the key document for ascertaining the scope of the charges.

E. The erroneous approach advanced by the Prosecution with respect to the standard of appellate review

37. Throughout the Response, the Prosecution has sought to refute alleged errors in the Chamber's appreciation of the evidence, or their application of the law, by either referring to the Chamber's findings, or the Chamber's recitation of the law. For example:

- a. In response to Defence arguments that the Single Judge failed to apply the reasonable suspicion standard in his 8 May 2013 decision, the Prosecution refer to the fact that the Single Judge noted that the purpose of monitoring is to allow the authorities to listen if there is a 'suspicion' as to the 'behaviour' of the accused;⁶⁵
- b. In response to Defence arguments concerning the Chamber's reliance on 'neutral acts', the Prosecution argues that the Chamber found that Mr. Bemba acted with intent, by citing to the general law provisions of the Judgment, rather than the evidential findings concerning Mr. Bemba;⁶⁶
- c. In response to Defence arguments concerning the Chamber's improper reliance on uncharged incidents to establish core components of Mr. Bemba's responsibility (including his membership of, and contribution to the common plan), the Prosecution argues that this evidence must have been relevant to the charges (and thus admissible to establish the charges), because the Chamber in fact relied upon it to establish the charges.⁶⁷

38. These arguments raise the common issue as to the appropriate standard of appellate scrutiny. The Defence therefore seeks leave to reply in relation to the propriety of the common legal standard adopted in these arguments, in particular, in case the Defence appeal asserts that the Chamber erred in its legal or evidential conclusions, is it sufficient for the Appeals Chamber to simply identify that the Chamber stated the correct legal standard, or, is the Appeals Chamber also required to verify that the

⁶⁵ Response, para. 101.

⁶⁶ Response, para. 470.

⁶⁷ Response, paras. 463-464.

Chamber applied the correct standard to its assessment of the evidence and application of the law.⁶⁸

3. Relief Sought

39. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Appeals Chamber to:

- i. Authorise the Defence to file a reply to the Prosecution Response to the Defence Appeal Brief; and
- ii. Set the deadline for the reply as 21 September 2017.



Melinda Taylor
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Dated this 31th day of August 2017

The Hague, The Netherlands

⁶⁸ *Prosecutor v. Lukic*, Appeals Judgment, 4 December 2012, Dissenting Opinion of Judge Morrison, para. 28; *Prosecutor v. Haradinaj*, Appeals Judgment, 21 July 2010, para.11.