



Original: English

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

Date: 04/09/2017

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

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

Public Redacted

Defence Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision'

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:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Mylène Dimitri

Counsel for the Defence of Mr Aimé Kilolo Musamba

Michael G. Karnavas

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Peter Robinson

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

**Victims Participation and Reparations
Section**

Detention Section

Other

1. Introduction

1. Pursuant to Regulation 60 of the Regulations of the Court (RoC), the Defence for Mr. Jean-Pierre Bemba Gombo respectfully seeks leave to reply to the ‘Prosecution’s Consolidated Response to Mr Bemba’s, Mr Babala’s, and Mr Arido’s Appeals against the Sentencing Decision’ (the Response).¹
2. The Response raises, for the first time, issues that are of fundamental importance to the resolution of Defence appeal against sentence. In contravention of the Prosecution’s duty of objectivity,² the Prosecution has also mischaracterised or selectively cited filings from ICC, ICTY and SCSL cases. It would be in the interests of fair and adversarial justice to receive Defence submissions on these important points of law and evidence.
3. The Response further petitions the Appeals Chamber to adopt specific positions that fall outside the scope of the Defence Appeal against Sentence. It is procedurally inappropriate and unfair to advance such submissions within the context of the Response. As such, they should be completely disregarded by the Appeals Chamber. Nonetheless, should the Appeals Chamber decide to entertain such submissions, fairness dictates that the Defence should be afforded a full opportunity to respond.
4. Finally, the Response is, unhelpfully, marked by language which distorts and mischaracterises the Chamber’s findings, the Defence submissions and the legal foundation of the case. Of particular concern, the Prosecution repeatedly utilises the term ‘crime/s’ to refer to the Article 70 offences in this case,³ and employs legal argument based on the provisions concerning Article 5 crimes.⁴ The Prosecution also relies on damaging factual propositions, as if they were established fact, even though the Prosecution continues to be unable to cite any evidence in support of such claims.⁵ Apart from the fact that the use of such language in a filing that will eventually become public causes harm to Mr. Bemba, it also risks distorting the record, and transforming the case into one based on innuendo, and the wrong legal

¹ ICC-01/05-01/13-2203-Conf

² ICC-01/04-01/07-322, p. 12.

³ See for example, Response, paras. 9, 10, 18, 19, 20, 23, 25, 42, 49, 52, 76, 89, 90, 94, 105, 127, 143, 208, 211, 222.

⁴ Response, para. 105.

⁵ For example, the Prosecution asserts, at para. 9, that “if any of the co-perpetrators was a ‘leader’ it was him” (an allegation unsupported by evidence). See also para. 76, which is unsupported by reference to evidence.

and factual framework. The Defence respectfully invites the Appeals Chamber to disregard all submission based on such language.

5. The current request has been filed on a confidential basis due to the fact that it cites information concerning [Redacted]. A public redacted version will be filed at the same time.

2. Issues for which Leave to Reply is Requested

2.1 The Prosecution's new argument concerning the relevance of so-called plan to engage in remedial measures, and reliance on case law cited out of context

6. The Prosecution has mischaracterised the position of the Defence in order to create a false dispute, framing the Defence position as an argument that “any conduct which may be taken as an aggravating factor must in essence be intrinsic to a charged crime, and cannot include conduct which could have been charged as an additional crime”.⁶ The Prosecution then claims that because this (Prosecution-generated) position is legally incorrect, the Defence ground concerning double-counting should be dismissed.
7. This syllogistic premise is misleading, and warrants a correction.
8. In its appeal, the Defence expressed the clear position that it was legally incorrect for the Chamber to rely on the remedial measures and communications with D-19 to both convict Mr. Bemba and aggravate his sentence.⁷ The fact that the Trial Chamber recognised, in the sentencing judgment, that the conduct related to an uncharged offence was relevant to the following issues:
 - a. The issue of notice as to whether this conduct could be characterised as a separate aggravating offence, because the Prosecution had, for the duration of the trial, treated these allegations as part and parcel of the charges, and the Trial Chamber had, in turn, relied on conduct concerning these allegations in order to convict Mr. Bemba;
 - b. The issue of double counting: since this conduct had been used to establish key elements of Mr. Bemba's responsibility, and in the Chamber's

⁶ Response, para. 25.

⁷ ICC-01/05-01/13-2167-Conf, paras. 11-26.

assessment of the gravity of the offence, it constituted double counting to rely on it as a separate aggravating circumstance; and

- c. The issue of prejudice: by using allegations concerning uncharged offences to both convict Mr. Bemba and lengthen his sentence, the Chamber was effectively convicting and punishing Mr. Bemba for offences that were never charged, which is contrary to Articles 61(9) and 74(2) of the Statute.⁸

9. As concerns the first point, it is misleading for the Prosecution to assert that the Defence was put on notice in a timely manner, when the Prosecution is unable to point to a single trial reference (i.e. one pre-dating the sentencing brief filed on the same day as the Defence sentencing brief) in which the character of the remedial scheme as a potential aggravating circumstance was pleaded by the Prosecution.⁹

10. The litigation concerning Mr. Arido is inapposite in that firstly, the evidence of ‘obstruction’ was not submitted previously in support of the charges, secondly, the ‘obstructive’ conduct arose during the course of the Article 70 trial, and not the Main case proceedings,¹⁰ thirdly, the allegations concerned obstructive ‘conduct’ and not mere conversations based on a *faux scenario*,¹¹ and fourthly, the Chamber did not express a clear position as to whether the conduct could constitute an aggravating factor (as compared to evidence that might disprove mitigating circumstances alleged by the defendant).¹² The Chamber’s decision that the evidence allegedly linked to Mr. Arido could be admitted potentially for the purposes of sentencing also stipulated that it could not be used to relitigate and thus enlarge the extent of Mr. Arido’s responsibility:¹³ the double counting issue therefore never arose in connection with the Prosecution’s attempt to adduce evidence concerning Mr. Arido’s alleged involvement in evidence obstruction.

11. In contrast to the stance adopted by the Prosecution in connection with the Arido materials, the Prosecution maintained a deliberate stance of ambiguity as to the exact

⁸ It is not possible to convict a defendant on the basis of crimes/offences that were not formally charged, prior to trial: ICC-01/09-01/11-1123.

⁹ Response, para. 38.

¹⁰ ICC-01/05-01/13-2038, para. 13.

¹¹ Prosecutor v. Delalić et al., Appeal Judgement, 20 February 2001, para. 763 (“The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence”).

¹² ICC-01/05-01/13-2038, para. 12.

¹³ ICC-01/05-01/13-2038, para. 13.

nature of the *faux scenario*, and whether it fell inside or outside the charges in order to mould its case to the evidence. The Document Containing the Charges (DCC) makes no reference to ‘remedial measures’, ‘obstruction’ or a ‘cover-up’. The sole reference to these so-called remedial measures is a claim that Mr. Bemba “conspired” to bribe or corruptly influence potential Article 70 witnesses.¹⁴ The DCC does not specify there, or elsewhere his co-conspirators or the specific potential witnesses targeted, nor does it describe any acts taken in furtherance of this conspiracy, which is particular problematic in light of the Prosecution’s reliance on conversations which the Independent Counsel described as pertaining to a “*faux scenario*”.¹⁵ Apart from the fact that a naked conspiracy does not entail liability under the Rome Statute, the DCC footnote which is supposed to illustrate how this ‘conspiracy’ relates to Mr. Bemba’s knowledge and intent, cites to a conversation between Mssrs. Mangenda and Kilolo regarding the *messages portés* (an allegation that was excluded from the confirmed charges).

12. The prejudice arising at the trial phase from the Prosecution’s failure to clarify its position as to whether this conduct fell inside or outside the charges is also clear: if the Prosecution had demarcated the character of this conduct as uncharged aggravating circumstances, then the Defence would have had an obvious basis to oppose the Prosecution’s attempt to rely on these incidents at trial, in order to plug evidential holes in the confirmed charges.

13. In turn, the fact that the Chamber (improperly) allowed the Prosecution to do so should, at the very least, have precluded the Prosecution from being entitled to rely on the same conduct in aggravation, by virtue of the double-counting principle. The prejudice even continues on appeal with the Prosecution relying, in its appeal against sentence, on the same factors to heighten the gravity of the offences, and as aggravation.¹⁶ Indeed, whereas the Prosecution has, within the context of this filing, likened the conduct to “*ex post facto* obstruction of justice”,¹⁷ the Prosecution has also, in this Response,¹⁸ and its response to the Defence appeal against conviction,

¹⁴ ICC-01/05-01/13-526-Conf-AnxB1, para. 119.

¹⁵ CAR-OTP-0080-1138 at 1159.

¹⁶ ICC-01/05-01/13-2168-Conf, paras. 28, 38, 39, 50.

¹⁷ Response, para. 28.

¹⁸ Response, para. 23.

argued that this conduct was very much part of the *facto* itself (i.e. the charged course of conduct).¹⁹

14. The fact that after almost four years, the Prosecution has yet to settle on a specific status for these incidents only serves to highlight the prejudice faced by Mr. Bemba in attempting to defend himself in the equivalent of legal quicksand.²⁰
15. In these circumstances, if the Appeals Chamber were to entertain the Prosecution's arguments as to the relevance of this conduct to the sentencing phase, it would be fair to afford the Defence a proper opportunity to reply.
16. As concerns the second and third points, although the Prosecution has now resurrected a skein of case law in order to support its ability to rely on allegations of obstruction as an aggravating circumstance,²¹ this point was never made at trial or during sentencing. The case law in question has also been cited out of context, in a misleading manner, which obscures the fact that the case law supports the Defence position.
17. For example, whilst it is correct that Trial Chamber III found, in the *Bemba* Main case that evidence of witness obstruction could be cited as an aggravating factor, the Chamber also attached the important caveat that the Prosecutor had to choose between either pursuing charges in connection with this conduct, or relying on the conduct as an aggravating factor: it could not do both.²² The decision therefore supports the position of the Defence that the Chamber erred by relying on the *faux scenario* for the tripartite purpose of convicting Mr. Bemba, assessing the gravity of the offences, and as separate aggravating factors. Similarly, in the *Mucic* case, although the Appeals Chamber acknowledged that Mr. Mucic's conduct during the

¹⁹ ICC-01/05-01/13-2168-Conf, ICC-01/05-01/13-2170-Conf, paras. 445-446.

²⁰ "Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context. (...) Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "change in the statement of facts", something the Appeals Chamber has found to be clearly prohibited by Regulation 55(1)." Dissenting Opinion, Judge Van den Wyngaert, para. 55, ICC-01/04-01/07-3319.

²¹ Response para. 28.

²² ICC-01/05-01/08-3399, para. 80, fn. 249.

trial could be considered as an aggravating factor,²³ this conduct had not been taken into account for the purposes of the accused's initial conviction.²⁴

18. Of further importance, this case law, when read in context, also highlights the impropriety of relying on the uncharged allegations concerning the *faux scenario* as part of the initial conviction itself. Although the ICC has, in the *Lubanga* and *Bemba* cases, foreshadowed that such allegations could be relevant to sentencing, its case law has consistently found that it would be unduly prejudicial, and contrary to charging framework, to rely on evidence of uncharged offences in connection with the Chamber's assessment of the guilt or innocence of the accused.²⁵

19. In terms of the case law from the *ad hocs*, although the *Celebici* Trial Chamber considered such allegations as an aggravating circumstance for sentencing purposes, the Chamber had earlier rejected a Prosecution request to lead evidence of consciousness of guilt during the trial, underlining that "the principle of consciousness of guilt is not a legal principle upon which the Motions may be based in the circumstances".²⁶ Similarly, in *Lukic*, the Trial Chamber did not accept the Prosecution's argument that such allegations could establish intent, and relied on

²³ Prosecutor v. Delalic et al., Appeals Judgment, 20 February 2001, para. 790.

²⁴ The Trial Chamber only addressed issues of collusion and fabrication in connection with sentencing: Trial Judgment, 16 November 1999, para. 1244.

²⁵ In the *Lubanga* case, although the charging document referred to the fact that child soldiers had been subjected to further mistreatment, the Trial Chamber found that it could not base the judgment on evidence concerning this mistreatment, which constituted uncharged offences, although it could be relevant for sentencing (ICC-01/04-01/06-2842, paras. 630-631). In an earlier appeal concerning victim participation, the Appeals Chamber also underscored that the subject matter of the case was defined by the charged crimes, and those in turn "define the issues to be determined at trial and limit the Trial Chamber's authority to the determination of those issues": ICC-01/04-01/06-1432, para. 63. In terms of the specific position as to uncharged allegations of witness obstruction, the Appeals Chamber has underlined the Chamber's positive duty to ensure that the use of evidence concerning uncharged acts of witness intimidation does not adversely impact on the accused's presumption of innocence, and the fairness and impartiality of the proceedings (ICC-01/04-01/07-1718, para. 52). In line with this principle, such evidence has only been used for the purposes of impugning witness credibility, and not as evidence of consciousness of guilt. ICC-01/04-02/12-271, paras. 287-288. In particular, in the *Ngudjolo* case, the Trial Chamber found that materials concerning contacts with witnesses were not "factual information related to the case at hand", and therefore could only be used, if at all, to test the credibility of witnesses (ICC-01/04-01/07-3120-Conf-Exp-tENG, paras. 28, 32). In the *Ntaganda* case, the Chamber rejected an initial Prosecution request to admit such materials from the bar on the grounds that "the probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused" (ICC-01/04-02/06-1799, para. 6).

²⁶ Prosecutor v. Delalic et al., 'Order on the Motion for Leave to Call Witness V as a Witness, the Motion for Protective Measures for Witness V, the Motion for Leave to Re-Call Witness J and the Motion to Allow Witness J to Testify from Remote Witness Room', 26 November 1997.

them only for the purposes of assessing the reliability of witnesses.²⁷ This position was also adopted in the SCSL *Taylor case*.²⁸

20. Given the importance of these legal precedents, it would be in the interests of justice to grant the Defence leave to reply for the specific purpose of providing the full legal context in which the decisions were issued.

2.2 The Prosecution's erroneous characterisation of incidents as 'evidence'

21. In the context of 'double counting', the Prosecution has claimed that the Chamber's findings concerning specific incidents and conduct, which the Chamber then relied upon to infer intent and Mr. Bemba's membership of the common plan, should be characterised as "'evidence' relied upon in the Judgment [and not] *findings essential to his conviction*, either as elements of the charged crimes or modes of liability".²⁹

22. If accepted, this distinction would have significant implications for defendants who are convicted on the basis of a series of evidential findings based on inferences. The defendant is firstly prejudiced by virtue of the fact that the initial conviction rests on evidence concerning conduct that it is tenuously, if at all, connected to the charges, and inferences based on this conduct, which the defendant has no ability to confront in court. For the purposes of sentencing, the defendant would be even further prejudiced if the Prosecution's approach were to be adopted, since the double counting rule would only apply to the inferred conclusions, and not the actual findings that served as the evidential foundation for his conviction.

23. In terms of the application of this distinction, in this case, the Chamber cited evidence of specific conduct (for example, Mr. Bemba speaking to D-55 in violation of the detention unit telephone regime), which the Chamber then relied upon to infer that an element of the offence or mode of liability had been fulfilled (i.e. because Mr. Bemba spoke to D-55 *via* improper means, he must have done so for an improper

²⁷Trial Judgment, 20 July 1999, para. 168 compared with para. 21, in which the Chamber stated that such allegations were relevant to issues of witness reliability

²⁸ The Trial Chamber declined to rely on evidence concerning the commission of *post facto* crimes as "consciousness of guilt", finding that, "to consider this evidence would, in the view of the Trial Chamber, be extremely prejudicial to the Accused. The Prosecution argues that the crimes are relevant to his "consciousness of guilt" However, the Accused has not been charged or tried for these crimes. And notwithstanding all the evidence that has been introduced, the Accused is not on trial for these crimes in this Court. For this reason it would be inappropriate for the Trial Chamber to draw conclusions from the evidence on the "consciousness of guilt" of the Accused, as suggested by the Prosecution" (Trial Judgment, 18 May 2012, para. 155).

²⁹ Response, para. 49.

purpose, which must have been executed, therefore Mr. Bemba's intent and contribution to the illicit corruption of D-55 is fulfilled).³⁰

24. In line with this approach, the Chamber's relied on its findings concerning:

- a. Mr. Bemba's abuse of his privileged communications with D-55 in order to infer that Mr. Bemba contributed to the corrupt influencing of witnesses (Article 70(1)(c)),³¹ and the solicitation of false testimony (Article 70(1)(a));³²
- b. Mr. Bemba's abuse of his privileged communications with Mr. Babala, D-19, and D-55, in order to infer that Mr. Bemba contributed to the concealment of illicit activities, from which the Chamber further inferred that Mr. Bemba contributed to the overall common plan to corruptly influence witnesses;³³
- c. Mr. Bemba's involvement in the remedial measures plan, from which the Chamber inferred that Mr. Bemba contributed to the overall plan to corruptly influence witnesses;³⁴
- d. The use of Mr. Bemba's position (by others or by himself) in order to infer that witnesses had been corrupted through non-monetary promises (Article 70(1)(c)),³⁵ and Mr. Bemba's authoritative influence had given rise to the solicitation of false testimony (Article 70(1)(a)).³⁶

25. According to the Prosecution, the 'double counting' principle cannot apply to the Chamber's preliminary evidential findings because they do not, in themselves, fulfil the element of the offence.³⁷ For example, although the Prosecution concedes that the "Chamber relied upon *evidence* that showed Bemba sought to take advantage of his prominent position",³⁸ the Prosecution claims that the Chamber did so

³⁰ TJ, para 298 (relying on the 'context' of the call), para. 856: "that the fact that he illicitly spoke to them on his privileged line in the ICC Detention Centre indicates that he urged them to cooperate and follow the instructions given by Mr Kilolo".

³¹ TJ, paras. 298, 305, 692.

³² TJ, para. 856.

³³ TJ, paras. 109, 737, 924.

³⁴ TJ, para. 110.

³⁵ TJ, paras. 146, 406, 692, 138, 373, 419, 692.

³⁶ TJ, para. 857.

³⁷ Response, para. 49

³⁸ Response, para. 55.

only to make the narrower finding that he *asked* or *urged* the witnesses to testify falsely. It was not Bemba's "position" which constituted the "improper element" of this conduct, because the Chamber characterised the conduct merely as "soliciting" – what was improper was thus the mere asking of witnesses to testify falsely".³⁹

26. The flaw in this argument is that there is no evidence that Mr. Bemba asked witnesses to testify falsely; rather, the Chamber inferred (i.e. speculated) that witnesses understood that they should testify falsely because they might receive an unidentified benefit at some unidentified point by virtue of Mr. Bemba's position as President of the MLC. The latter conclusion is therefore inextricably linked to the initial conduct (his position) that served as the foundation of these inferences.⁴⁰

27. Given the absence of independent evidence to support the Chamber's ultimate conclusions, the Prosecution's concession that the initial evidential findings (only) "indirectly supported" the conviction,⁴¹ should be grounds for acquittal. Nonetheless, should the Appeals Chamber decide to uphold Mr. Bemba's conviction on a case built on remote and indirect inferences, then for the purposes of sentencing, the Response raises the issue as to whether Mr. Bemba's protection against double jeopardy should have triggered a right to protection against double punishment in connection with findings that are ultimately based on the same conduct.⁴²

28. A further issue that arises from the above is whether the Prosecution has wrongly characterised subsidiary facts, as 'evidence'. The 'evidential' allegations that Mr. Bemba abused privilege are set out in the DCC. If – as is now claimed by the

³⁹ Response, para. 55.

⁴⁰ As observed by Justice Brennan in *Edwards v The Queen* (1993) 178 CLR 193, para. 17 "The drawing of an inference is part of the process of finding material facts: if it be right to say that no inference of guilt can be drawn unless the jury is satisfied that reasonable hypotheses consistent with innocence are excluded, the jury must be satisfied beyond reasonable doubt as to the facts from which the inference is drawn and on which the validity of the inference necessarily depends. It is logically impossible to be satisfied beyond reasonable doubt that an inferred fact exists without being satisfied beyond reasonable doubt of the existence of those facts from which the inference is drawn. If the emergence of an accused from the scene of the murder holding a smoking gun is the only evidence offered in proof of guilt, the case against him fails if there be a reasonable doubt about the identity of the person seen or the place where the fatal shot was fired or that the thing held by the accused was a smoking gun. There can be no superstructure erected without the foundations needed to support it."

⁴¹ Response, 49.

⁴² The Chamber relied on the degree of sophistication of the scheme (i.e the fact that the defendants abused privilege in order to conceal the plan) as a factor concerning the gravity of the offences (Sentencing Judgment, para. 212) and as an aggravating circumstance (para. 236). The Prosecution's own sentencing appeal highlights the degree of duplication between the Chamber's reliance on the same conduct for different sentencing purposes : ICC-01/05-01/13-2168-Red, paras. 39, 50, 51.

Prosecution – these allegations are not ‘material’ to the charges, then this distinction should have been made clear in the charges.

29. The accused has the right to know, prior to the commencement of the trial, not only which are the material facts underpinning the charges,⁴³ but also the distinction between material facts and subsidiary facts.⁴⁴ Notice, for the purposes of Article 67(1)(a) of the Statute, includes not only the factual basis of the allegations, but also the legal relevance. The inclusion of scattershot allegations in the charging document is distinctly unhelpful in the absence of clear and consistent information as to the relevance of such information to the charges themselves. Otherwise, the accused is exposed to the very prejudice that is evident in this appeal process – that is, after the trial has concluded, the Prosecutor erects arbitrary distinctions as to whether the facts in question were essential to the conviction in order to avoid double jeopardy protections,⁴⁵ and the application of the beyond reasonable doubt standard.⁴⁶ The proper and timely characterisation of these allegations as subsidiary facts would also have prevented the Trial Chamber from entering a conviction against Mr. Bemba which is based exclusively on facts, which are incapable of establishing the elements of the offences without the benefit of speculative flights of fancy and leaps in logic.⁴⁷

30. The Defence therefore seeks leave to file a reply in relation to the scope of the double counting rule, in a case built on inferences/subsidiary facts.

2.3 The Prosecution’s new theory concerning joint breaches of privilege by Mr. Kilolo, Mr. Mangenda and Mr. Bemba.

31. In its Response, the Prosecution has advanced a new and entirely speculative theory that the Sentencing Judgment should be read to mean that “Chamber contemplated circumstances in which Mangenda was party to privileged discussion with Bemba by virtue of Kilolo’s presence or otherwise in connection with Kilolo”.⁴⁸ The Prosecution further avers that “Bemba himself allows for the “possibility” of

⁴³ ICC-01/04-01/06-2205, fn. 163.

⁴⁴ ICC-02/04-01/15-T-6-ENG, pp. 20-21.

⁴⁵ Response, para. 49 et seq.

⁴⁶ ICC-01/05-01/13-2170-Conf, paras. 485, fn. 1794

⁴⁷ As noted by Judge Van den Wyngaert, Article 74(2) of the ICC Statute does not permit the Chamber to convict a defendant on the basis of subsidiary facts: Dissenting Opinion, para. 17, ICC-01/04-01/07-3319.

⁴⁸ Response, para. 74.

contacts with Mangenda in privileged calls to Kilolo”⁴⁹ – a claim which deliberately conflates legal argument with evidence.⁵⁰

32. Significantly, the Prosecution has conceded that “in these circumstances, where Bemba was entitled to privilege in his dealings with Kilolo (and Mangenda, provided they were together), and unlike his contacts with D-55, D-19 or Babala – it was the prohibited content of these communications – in furtherance of the common plan – which amounted to an abuse.”⁵¹ It would appear from the manner in which the Prosecution has framed this position that it does not dispute the Chamber’s finding that Mr. Kilolo oversaw the communication with D-55.⁵² Nonetheless, the Prosecution nonetheless disputes the applicability of Rule 73(1) to a situation, which is analogous to a defendant speaking to both his Counsel, and a case manager (who is not entitled to privileged communications), or circumstances in which Counsel meets with a prospective witness, in the presence of the client.

33. Apart from the fact that the Prosecutor failed to seek leave to appeal the earlier ruling of the Trial Chamber that defence confidentiality (and the protection against self-incrimination) could extend to recordings of meetings between the Defence and Defence witnesses,⁵³ the position articulated in its response invites the Appeals Chamber to depart from the broader notion of Defence confidentiality established in the *Ngudjolo* case, and the specific application of privilege in *Mbarushimana*.⁵⁴

34. Thus, whilst the Defence agrees that exceptions to privilege should be governed by content and not form, the Defence seeks leave to reply to the discrete (and arbitrary) distinction introduced by the Prosecution, that this content based test does not apply to third parties, in circumstances in which they interacted with the Defence in relation to Defence issues, under conditions of confidentiality.

2.4 Misleading or inaccurate arguments concerning the issue of sentencing credit

⁴⁹ Response, para. 74.

⁵⁰ Response, para. 74, citing para. 70 of the Bemba Sentencing Appeal.

⁵¹ Response, para. 74.

⁵² TJ, para. 740. In the DCC, the Prosecution described the contact as a conference call between Mr. Kilolo, Mr. Bemba and D-55: ICC-01/05-01/13-526-AnxB1-Red, para. 9, and maintained this description at the trial stage: ICC-01/05-01/13-1262-Conf, para. 13.

⁵³ ICC-01/05-01/13-907, para. 14.

⁵⁴ ICC-01/04-01/07-2187-tENG-Red, p. 58, ICC-01/04-01/10-237, p. 7. See also ‘Offences against the administration of justice and fair trial considerations before the International Criminal Court’ IBA Report, August 2017, pp. 49, https://www.ibanet.org/ICC_ICL_Programme/Reports.aspx#2017

35. The Prosecution's response to the key issue as to whether Mr. Bemba should have received credit in connection with time served pursuant to a detention order issued in the Article 70 case advances erroneous assumptions that are not supported by the texts of the Court, and which misstates the findings of ICTY and SCSL case law.⁵⁵

36. The Prosecution concedes both the necessity of Mr. Bemba's detention in the Article 70 case ("Bemba remained in detention during pre-trial and trial because it was "necessary": in other words, one or more factors under article 58(1)(b) were established"),⁵⁶ and that Mr. Bemba was in fact "detained for the purposes of the article 70 proceedings".⁵⁷ Nonetheless, by asserting that "[w]hat matters is that Bemba received credit for each day he spent in custody after having been served with the article 70 arrest warrant",⁵⁸ the Prosecution implies that there is a limit in Article 78(2) as to the amount of credit that can be allocated on a daily basis, even though there is no such limit in the text, or international and domestic practice.

37. Of particular concern, the Prosecution has advanced the erroneous position that in the Bangura case, the two weeks of credit that was awarded to the defendants for the time spent in detention during the contempt trial, was deducted from his Main Case sentence.⁵⁹ The particular filings cited by the Prosecution do not support this conclusion: at the time that the defendants were awarded the two week credit in the contempt case, they had already been sentenced in the 'Main Case'. There are no subsequent decisions in the Main case 'freezing' or deducting this two week period of credit, from the Main Case sentence.⁶⁰

38. During the sentencing hearing, the Defence for Mr. Bemba already alerted the Prosecution to the fact that there were no orders or decision suspending Mr. Kanu's war crimes sentence, or otherwise deducting this period from the service of his sentence.⁶¹ The Prosecution clearly had time to verify this, and was itself unable to

⁵⁵ Response, para. 122.

⁵⁶ Response, para. 116.

⁵⁷ Response, para. 120.

⁵⁸ Response, para. 124.

⁵⁹ Response, fn. 409.

⁶⁰ In a different decision issued in the contempt case, the Judge confirmed that a sentence begins to run from the date that it is pronounced, and the length can only be altered pursuant to a decision of the SCSL: Prosecutor v. Bangura et al., Decision On The Public Urgent Application For Clarification Of Paragraph 101 Of Sentencing Judgment In Contempt Proceedings Dated 11th October 2012 And Filed On 16th October 2012, 7 November 2012.

⁶¹ T-54-ENG, lines 14-20.

adduce any such decision or order. It is therefore concerning that the Prosecution would phrase its submissions in such a way as to imply the contrary.

39. Indeed, the fact that the time was credited twice is clearly set out in the written judgment,⁶² as evidenced by firstly, the arguments of the Defence (that additional contempt specific credit should be awarded because the detainees were detained during the contempt trial in a prison that was of a lower standard than the facility in which they usually housed), and secondly, the Judge's clarification that Mr. Kamara and Mr. Kanu was serving time as a convicted person during the contempt trial,⁶³ but should get additional credit as a result of the specific and additional inconveniences occasioned by the contempt trial (i.e. travel, changes in routine and facilities).⁶⁴

40. The *Seselj* decisions cited by the Prosecutor also directly contradict the assumption advanced by the Prosecution, in that they demonstrate that Mr. Seselj was able to serve a contempt sentence, whilst being detained in his "Main Case",⁶⁵ and whilst also having this contempt sentence/detention count for the purposes of calculating the reasonableness of the length of his detention in his Main Case.⁶⁶ The ICTY Appeals Chamber also did not reverse the legal rationale for ordering that the two contempt sentences should run concurrently; it only found that it was not possible for this to occur due to the fact that the first sentence had been completed.

41. The Defence should therefore be entitled to reply to ensure that the Appeals Chamber has all relevant information available for its determination.

3. Issues which fall outside the proper scope of a Sentencing Response

3.1 The Prosecution's attempt to establish an evidential basis for the Chamber's conclusion that Mr. Bemba's position was used for the purpose of providing non-monetary promises to D-55

⁶² Sentencing Judgment in Contempt Proceedings, dated 11 October 2012

⁶³ See paragraph 96, in which the Judge clearly states that Mr. Kanu was serving time as a person convicted of war crimes, at this point (i.e. whilst the contempt trial was ongoing), and paragraph 98-98, in which the Judge notes that even though he was housed in a different facility, Mr. Kanu was serving his war crimes sentence in Rwanda pursuant to the agreement on enforcement of sentences.

⁶⁴ Para. 100.

⁶⁵ The ICTY Appeals Judgment cited by the Prosecution (Response fn. 406), the Appeals Chamber found that that the initial contempt sentence had run (and in fact was completed) whilst Mr. Seselj was simultaneously detained for war crimes and crimes against humanity.

⁶⁶ Prosecutor v. Seselj, Decision on Continuation of Proceedings, 13 December 2013, paras. 23-24.

42. As a preliminary point, although the Prosecution has now attempted to provide an evidential foundation for the Chamber's conclusion (in the Trial Judgment) that D-55 was promised that he would be in Mr. Bemba's good graces if he testified for the Defence,⁶⁷ this alleged promise was not explicitly relied upon by the Chamber as part of its conclusion that Mr. Bemba abused his position in connection with D-55; although the Trial Chamber referenced the Prosecution's reliance on the 'good graces' findings in its recitation of the parties arguments, in its findings, the Chamber refers only to Mr. Bemba's direct communication with D-55, and D-55 subjective perception of Mr. Bemba,⁶⁸ and D-55 is not mentioned in connection with the non-monetary promises provided (by Mr. Kilolo) to D-3 and D-6. During the sentencing phase, the Prosecution failed to cite any evidence in support of its contention that Mr. Bemba had abused his position in connection with D-55, merely citing to the Trial Judgment itself,⁶⁹ which failed to cite any evidence.

43. In such circumstances, it would be unfair to permit the Prosecution to use its response to attempt to cure the ambiguity and evidential deficiencies of the Chamber's finding that Mr. Bemba abused his position in connection with D-55, unless the Defence is permitted to address the evidential citation belatedly proffered by the Prosecution.

44. A reply would, moreover, serve the interests of justice by allowing the Defence to correct, and respond to the misleading manner in which this 'evidence' has been characterised by the Prosecution. Thus, whereas the Prosecution has claimed that D-55 gave evidence that he was told by Mr. Kilolo that he would "benefit from Mr. Bemba's good graces",⁷⁰ this 'evidence' is a mere extrapolation from police notes of an unrecorded interview during which D-55 had no legal representation,⁷¹ which should have been given no evidential value.⁷²

⁶⁷ Response, para. 82.

⁶⁸ ICC-01/05-01/13-2123-Corr, para. 234.

⁶⁹ ICC-01/05-01/13-2085-Conf, para. 52.

⁷⁰ Response, para. 82.

⁷¹ D-55 testified that during the January 2014 interview (which was not recorded) "I didn't have a lawyer as such, but at the outset they told me that at any juncture I could request the assistance of a lawyer. And I remember that when we started, well, in the middle of the hearing or the interview, I asked the individual from the judicial police, that is the chief inspector, when we started again in the afternoon, I said to him that I needed a lawyer. So he said that, "If we assign you counsel, we will have to start all over again." He told me that he needed to tell me that, and if he didn't, he would be hiding something. And subsequently he told me that he was also a legal man. And I said, "Well, I would like there to be a lawyer by my side." He said that to me. I didn't take that into account and subsequently I continued with the interview. But at the outset he did talk to me about this business of having a lawyer." T-36-Conf-Eng, p.45, lines 11-22. Trial Chamber Va has

45. When the Prosecutor tendered this summary under Rule 68(3), it also averred that it was relying on it in connection with issues that were “not materially in dispute”, such as the existence of the meeting in Amsterdam, and the existence of a contact between Mr. Bemba and D-55.⁷³ In deciding whether to admit the summary, the Chamber further noted that these specific issues were corroborated by other evidence in the record.⁷⁴ In contrast, the absence of any corroboration as concerns the specific extract of the summary, on which the Prosecution now relies, is starkly attested to by the Prosecution’s inability to cite any other evidence in support of this point.

46. If a party proposes to admit evidence for a certain purpose, then fairness dictates that it should only be considered for that purpose (including on appeal), unless the other parties are provided with a full opportunity to address any other factual propositions arising from the evidence.⁷⁵

47. The prejudice that would arise from allowing the Prosecution to advance evidential submissions for the first time, *via* an appellate response, is further aggravated by the fact that the Prosecution has now changed its case concerning the relevance of this extract, in order to moult it to the evidentially unsubstantiated findings of the Trial Chamber.

48. Thus, in its Pre-Trial Brief, the Prosecution presented this extract in its full context:⁷⁶

*‘in the meeting, D-55 told **KILOLO** that “il avait peur de Bemba” and expressed concern of the consequences that his testimony may have for him and his family. In response, **KILOLO** promised D-55 that “Bemba le traiterait bien”.’*

cautioned that the Court should be very cautious in accepting that a suspect has voluntarily waived counsel, in circumstances in which the suspect might believe that asking for legal representation could appear to be an admission of guilt: ICC-01/09-01/11-1753-Red, para. 37

⁷² The January 2014 interview with D-55 was not audio or video-recorded and the witness was not represented by Counsel. The interview, which lasted over 12.5 hours was reduced to a truncated summary of approximately 6 pages. ICC-01/05-01/13-1294-Conf, para. 19, 20. D-55 testified that the investigator had told him certain information that was in dispute (such as the date on which he allegedly received money from the Defence – T-35-Conf-Eng, p. 26, lines 15-17), which suggests that the interview was conducted in a highly leading manner. This is confirmed by the transcript of the August 2015 interview, which was conducted by the same national inspector: CAR-OTP-0091-1038 at 1042, lns.94-95; 1043, lns. 148-149

⁷³ ICC-01/05-01/13-1262-Conf, para. 21.

⁷⁴ ICC-01/05-01/13-1478-Conf, para. 92.

⁷⁵ ICC-01/04-01/07-2635, para. 17.

⁷⁶ ICC-01/05-01/13-1110-Conf, para. 188

49. Nonetheless, the Prosecution has now denuded this extract of its linkage to a jittery witness's security concerns,⁷⁷ and implied that it refers to a concrete "benefit" (a word that does not appear anywhere in the summary), rather than an assurance of safety.

50. The Prosecution never put this interpretation to D-55 during his testimony. D-55 also testified, under oath, that the interview which served the basis for this summary had occurred in circumstances akin to 'psychological torture'.⁷⁸ D-55 further testified that although the summary was correct in general, it was inaccurate as concerns specific nuances.⁷⁹

51. Given these circumstances, it would have been a clear and reversible error for the Trial Chamber to have extrapolated from the January 2014 summary that improper benefits had been promised to D-55 on Mr. Bemba's behalf, particularly when such a conclusion is contradicted by the explicit, sworn testimony in the Article 70 case that Mr. Bemba made no promises to him or threats in connection with his testimony.⁸⁰

52. Accordingly, if the Appeals Chamber does not exclude this summary from its consideration due to the fact that it was not cited by the Trial Chamber, it would be in the interests of justice to allow the Defence to file a reply in relation to the issue as to whether the Trial Chamber's conclusion that Mr. Bemba abused his position in connection with D-55 could be supported, to the standard of beyond reasonable doubt, by the specific evidence now proposed by the Prosecution.

3.2 The Prosecution's suggestion, which has been advanced for the first time, that the Appeals Chamber can simply revise the mode of liability, if the elements of co-perpetration or solicitation are not fulfilled

⁷⁷ The Main Case Defence requested protective measures on D-55's behalf in order to address these concerns: T-36-Conf-Eng, p. 17.

⁷⁸ ICC-01/05-01/13-T-36-CONF-ENG, p. 44, line 16.

⁷⁹ T-34-Conf, p. 87, line 24- p. 88, line 1, p. 89, lines 20-25, p. 90 lines 13-16: "this is very important, because these are nuances – you see, I speak [Redacted], but my [Redacted] is not really fluent. And what is happening here is this, there may be a few things here and there that are not totally correct". D-55 also explained that because he did not have the summary before him, he could not put out all the instances in which it did not reflect what he intended to say (T-35-Conf-Eng, p. 18, lines 13-16). Although D-55 requested the Prosecution to direct him to all relevant issues so that he could clarify whether the summary was correct (T-35-Conf-Eng, pp. 23-24), the Prosecutor never put this particular extract to him. The only questions that the Prosecution put to D-55 regarding this summary were whether he remembered signing it in the presence of [Redacted] police and ICC investigators: T-36-Conf-Eng, p. 36.

⁸⁰ T-36-CONF-ENG, pp.36-37.

53. The Prosecution has advanced the notion that even if the Appeals Chamber finds that the Trial Chamber erred in connection with the mode of liability applied to Mr. Bemba, the sentence can be maintained “if the Trial Chamber’s findings on the actual conduct of the convicted persons, and the seriousness of the resulting crimes, remain undisturbed”.⁸¹
54. Bearing in mind that the Pre-Trial Chamber expressly declined to confirm indirect co-perpetration and liability under Article 25(3)(d),⁸² it would appear that the Prosecution is suggesting that the Appeals Chamber can substitute solicitation for co-perpetration in connection with Articles 70(1)(b) and (c).
55. As a matter of procedure, it is inappropriate to include a specific request in a response.⁸³ Moreover, although the Prosecution had a fully opportunity to argue this point in its response to the Defence appeal against Judgment, it failed to do so. It would therefore be unfair for the Prosecution to use its sentencing response as a vehicle for raising arguments that could and should have been addressed at an earlier point in time.
56. As a matter of fairness, if the Appeals Chamber entertains such a submission, the Defence should be entitled to adduce arguments concerning the legal and evidential possibility of such a re-characterisation, and the impact on the rights of the Defence as concerns a potential conviction and related sentence, which are entered for the first time on appeal. The possibility that the conduct attributed to Mr. Bemba could be characterised as solicitation of offences under Article 70(1)(b) or (c) would also raise issues as to whether:
- a. there is duplication in conduct as concerns the solicitation of false testimony (Article 70(1)(a)) and the solicitation of the presentation of false evidence (which is testimony) (Article 70(1)(b));
 - b. whether the details of solicitation were set out in the charges in a sufficiently clear and un-contradictory manner;⁸⁴
 - c. in light of the Pre-Trial Chamber’s refusal to confirm indirect co-perpetration in relation to Mr. Bemba (which created an expectation that Mr. Bemba

⁸¹ Response, para. 18.

⁸² ICC-01/05-01/13-749, p.54.

⁸³ ICC-01/05-01/13-1154, para. 8.

⁸⁴ ICC-01/04-01/06-2054, para. 25.

would not be convicted in connection with offences perpetrated *through* another person), it would be fair to convict him for soliciting the offences *through* the acts of another person (particularly in light of the vagueness of the charges on this point).

4. Relief Sought

57. The Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Appeals Chamber to:

- i. Grant leave to reply in relation to the issues set out in sections 2.1, 2.2, 2.3 and 2.4; and
- ii. Exclude the Prosecution's submissions, as set out in Sections 3.1 and 3.2, or in the alternative, grant the Defence leave to reply to these issues.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba



Mylène Dimitri
Associate Counsel of Mr. Jean-Pierre Bemba

Dated this 4th day of September 2017

The Hague, The Netherlands