Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No: **ICC-01/05-01/13**
Date of Original Filing: **15 May 2017**
Date of Corrected Filing: **13 October 2017**

THE APPEALS CHAMBER

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

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 Annex

Corrected Version of Appeal Brief

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

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

The Office of the Prosecutor
Ms Fatou Bensouda
Ms Helen Brady

Counsel for Jean-Jacques Kabongo Mangenda
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba
Mr Michael G. Karnavas
Mr Steven Powles

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila
Prof Jean-Pierre Fofe Djofia Malewa

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Ms 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

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. Jean-Jacques Mangenda never spoke to any witness about the content of their testimony, and never observed Kilolo doing so. Mr Mangenda was nevertheless convicted of having induced the false testimony of 14 witnesses on such specific subjects as their last contact with the Defence, money paid by the Defence, and their associations with other witnesses. The basis for this conviction was the content of telephone conversations between Mr Mangenda and Kilolo during the testimony of the last five of these witnesses; and his presence at the distribution of mobile telephones to four witnesses in circumstances where, according to the Trial Chamber, he could not have failed to surmise that Kilolo would use them for illicit coaching.

2. The Chamber's conclusion is based on several fatal errors of law and of fact. First, the Chamber should never have admitted the fruits of telephone surveillance authorised on the basis of financial records that had been obtained without judicial authorization. The Prosecution could not have been unaware that a court order was required, as is reflected in its promise to Austria that no copies of such records would be made. This promise was broken. The acquisition of a court order after the material had already been obtained is irrelevant at best or, at worst, encourages future violations of the law.

3. Second, the Chamber's conviction of Mr Mangenda, unlike Kilolo, relies overwhelmingly on discussions about the *merits of the Main Case*. However, the Chamber indicated at the start of trial that it could not and would not adjudicate whether propositions about the *merits of the Main Case* were true or false. Relying on these discussions, as if they involved false testimony, violated the framework of the case set by the Chamber at the start of trial.

4. Third, the Chamber erred in law and in fact in failing to define or apply a standard of "corruptly influencing a witness" that requires an intent to induce a falsehood; failing to distinguish between illicit coaching and witness preparation; and failing to consider whether Mr Mangenda's discussions about testimony could have been executed by Kilolo within the broad latitude of witness preparation permitted before international courts.

5. Fourth, the Chamber erred in finding that Mr Mangenda concealed the common criminal plan, in particular, by participating in a bribery scheme of three witnesses. The Chamber ignored the position of the Pre-Trial Chamber, the Independent Counsel,

and even the Prosecution at the beginning of trial that this "bribery scheme" was nothing more than pretext to obtain money from Bemba that was never, and was never intended to be, implemented.

6. Fifth, the Chamber failed to recognise that the telephones were distributed far enough in advance of the "cut-off" for contacts with the witnesses to leave open the reasonable possibility that they were for legitimate "pre-cut-off" contacts. As with so many of the Chamber's factual findings, no reasons are given for rejecting realistic possibilities consistent with Mr Mangenda's innocence.

7. The Chamber also erred in inferring that Mr Mangenda was part of a common plan encompassing all witnesses, that he aided and abetted the false testimony of any witnesses, or that his contribution to the common plan was significant.

8. The Chamber's legal errors are material, and its factual errors are clear. The factual errors are numerous and, to a striking degree for a Judgment of almost 500 pages, are accompanied by a failure to give adequate or any explanation for rejecting relevant evidence or arguments especially in respect of Mr Mangenda. The extent and importance of these errors, combined with the failure to state reasons, are beyond the margin of deference accorded to a trier of fact. The appropriate remedy is to overturn all convictions against Mr Mangenda.[1]

II. STANDARD OF APPELLATE REVIEW

9. Legal standards adopted and applied by a trial chamber are reviewed according to a standard of correctness. Such errors lead to reversal of the conviction where the judgment is "materially affected" by the error – that is, where the trial chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error".[2]

10. Findings of fact are entitled to a margin of deference. They are nevertheless subject to reversal where the error of fact is clear; that is, the Chamber mis-appreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.[3] The Appeals Chamber's intervention is required when an unreasonable assessment of the facts occasions a "miscarriage of justice", which constitutes a factual error.[4] The

[1] This filing is a public redacted version of ICC-01/05-01/13-2143-Conf-Corr, filed on 12 October 2017.
[2] *Lubanga* AJ, paras.18-19.
[3] *Id.* para.21.
[4] *Id.* paras.21,25.

factual errors identified in this brief are all of sufficient importance to Mangenda's conviction that they occasion a miscarriage of justice.

11. The deference accorded to the trier of fact is conditional upon expressed reasons. A reasoned opinion is essential to the "useful exercise" of an appellant's right of appeal,[5] and is a pre-condition for the Appeals Chamber's ability to discharge its statutory function.[6] As the *Lubanga* Appeals Chamber stated:

> the Appeals Chamber's ability to review impugned decisions, and an effective and meaningful right to appeal, Trial Chambers should set out with clarity which factual findings are the basis for each of the elements of a crime, including the subjective elements.[7]

12. The failure to provide adequate reasons is an error of law.[8] The consequence of this error is *de novo* review of the evidence.[9] This *de novo* review is undertaken in light of the Appeals Chamber's limited fact-finding capacity, the absence of any further appeal, and mindful that no conviction can be entered in such circumstances unless "all reasonable doubt of the accused's guilt has been eliminated."[10]

13. Whether there has been a failure to state reasons usually comes down to whether the trier of fact has explained why it rejected "all realistic possibilities consistent with innocence."[11] Failures to state reasons have been found in findings of fact such as accepting a witness's identification of an accused;[12] failing to address associations of witnesses that could affect their credibility;[13] preferring the testimony of one crucial witness over another where they are contradictory;[14] failing to address the testimony of important Defence witnesses;[15] or any other factual finding that is significant to an accused's conviction.[16] In *Zigiranyirazo*, for example, the trial chamber "fail[ed] to provide a reasoned opinion in relation to the feasibility of travel" between two locations, which, in turn, determined the earliest moment when the accused could have

[5] *Hadžihasanović* AJ, para.13. *Naletilić* AJ, para.603 (a reasoned opinion "makes it possible for an individual to exercise their right of appeal").
[6] *Karera* AJ, para.20; *Limaj* AJ, para.81.
[7] *Lubanga* AJ, para.313.
[8] *Ndindiliyimana* AJ, para.56.
[9] *See e.g. Zigiranyirazo* AJ, para.44 (accepting the Defence's estimate on appeal of travel times between two locations as "a reasonable estimate" in the absence of Trial Chamber findings on the issue).
[10] *Orić* AJ, para.12; *Hadžihasanović* AJ, para.12.
[11] *Ruto* Decision on Defence Acquittal Applications.
[12] *Lukić* AJ, para.118
[13] *Id.* para.62.
[14] *Haradinaj* AJ, para.196.
[15] *Perišić* AJ, para.95.
[16] *Ndindiliyimana* AJ, para.56 (finding that a particular unit was under the command of the accused).

arrived at the scene.[17] Ndindiliyimana's conviction was quashed in part because the trial chamber failed to explain why it found that a gendarmerie unit was deemed to be under his command, as commander of the gendarmerie, in the face of evidence that most gendarmerie units were under the command of the army.[18]

14. One would expect a judgment of more than 500 pages to provide abundant reasoning for all its important findings of fact. Surprisingly, this is not the case. The Chamber systematically failed to address the Defence's arguments in respect of many of the key issues. Most importantly, the Chamber systematically failed to address alternatives to the Prosecution's interpretation of the Intercepted Communications between Mangenda and Kilolo, and failed to address salient circumstances surrounding the distribution of the mobile telephones to the Yaoundé witnesses. These matters were raised, but ignored, by the Chamber.

15. The Prosecution often argues, unhelpfully, that the Defence "merely disagrees"[19] with the trier of fact. The issue is not whether there is disagreement, but whether a trial chamber has committed clear error, in particular, by failing to address all relevant and necessary arguments and evidence. Furthermore, since the contested evidence against Mangenda was not testimonial, and since the Intercepted Communications were never commented upon by any witness, the usual deference arising from the immediate observation of testimony does not apply.

III. GROUND ONE: THE TRIAL CHAMBER IMPROPERLY ADMITTED AUDIO-SURVEILLANCE EVIDENCE

A. INTRODUCTION

16. The Prosecution obtained evidence used to convict Mangenda on the basis of information provided to States Parties that was untimely, inaccurate, and insufficient to allow them to exercise their sovereign responsibilities, including their sovereign responsibility to ensure compliance with their law concerning criminal investigations and respect for internationally-recognised human rights. Ironically, the Chamber then denied any remedy before this Court out of purported deference to State sovereignty and the primacy of State responsibility for the acknowledged violations that occurred. The Chamber erred in so finding. Indeed, the denial of any remedy is particularly ironic given that the conviction of Mangenda, as discussed in the grounds that follow,

[17] *Zigiranyirazo* AJ, para.44.
[18] *Ndindiliyimana* AJ, para.56.
[19] *See e.g.* OTP Response to *Bemba* Defence Appeal Brief, paras.43,51,54,69,123,214,263,266,327,337,390, 400,403.

relies so heavily on non-compliance with the Court's protocols and regulations, whereas the Prosecution's non-compliance with Austrian law and international human rights law did not even have an impact on the admissibility of evidence.

17. The Prosecution's violation of both international human rights and State sovereignty in the gathering of evidence in this case was antithetical and seriously damaging to integrity of this Court's proceedings. Exclusion of the evidence obtained is the only remedy suitable to dissuade future violations and to preserve the Court's integrity.

18. Article 69(7) provides that:

> [e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
>
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

Article 69(7) requires a two-step process. First, there must be a violation of internationally recognised human rights in the obtaining of evidence.[20] Without a violation, there is no further inquiry.[21] Even then, not every violation will result in exclusion of evidence. The second step requires that the admission of the evidence would be antithetical and seriously damaging to the integrity of the proceedings.[22]

19. The internationally recognised human right that was violated in this case is the right to privacy in private telephone conversations and Western Union financial records.[23]

20. The Prosecution violated this right to privacy when, without waiting – or even asking – for the Austrian court's authorisation, it solicited and received financial information directly from Western Union. The Prosecution also failed to limit the financial information it obtained to that proportional to the needs of its investigation, obtaining information of 922 separate financial transactions involving 283 individuals, including Mangenda, over a seven and a half year period.[24] The Prosecution then failed to provide the courts of Austria and The Netherlands with concrete and accurate facts

[20] Mangenda does not contend on appeal that the ICC Statute was violated.
[21] Intercepts Decision, para.17.
[22] Mangenda does not contend on appeal that the evidence was unreliable.
[23] The Trial Chamber accepted that the right to privacy is an internationally recognised human right. Intercepts Decision, para.18; Western Union Decision, para.46.
[24] CAR-OTP-0092-0024; CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0090-0031; CAR-OTP-0090-0032; CAR-OTP-0092-0034; CAR-OTP-0092-0037.

justifying its requests for court authorisations for the Western Union records and the intercepts.

B. RELEVANT FACTS

21. In June 2012, the Prosecution received an anonymous email alleging that four Defence witnesses in the *Bemba* case were paid to provide false testimony.[25] The informant later claimed that money was being paid to the witnesses via Western Union and that Bemba's Congolese lawyer was behind the payments.[26] The Prosecution launched an investigation.

Violation #1: The Prosecution Obtained Protected Financial Information Before Obtaining Court Authorisation

22. The Prosecution first set out to obtain financial information from Western Union from its offices in Vienna, Austria. Instead of seeking judicial authorisation to obtain the records, on 28 September 2012, a Prosecution investigator contacted Western Union directly and requested it to check its records for transactions involving three persons. He represented that these persons were involved in suspect transactions over the past 12 months, and that the records check was urgent.[27] The investigator implied in the first email inquiry – although did not expressly state – that the inquiry in question related to a different Situation before the Court.[28] As far as Western Union could have perceived, the inquiry related to this different Situation. The Prosecution sought no authorization from, and gave no notice to, the Austrian government or any Austrian official to conduct investigations into this new Situation, case, or investigation on Austrian territory.[29]

23. On 11 October 2012, an official of Western Union responded to that email request by providing the Prosecution with an Excel spreadsheet detailing approximately 200 financial transactions involving those three persons dating back to December 2005.[30]

24. Prosecution investigators travelled to Austria on 18-19 October 2012 and again on 4-5 November 2012 with a list of 67 names to be searched in Western Union's financial

[25] First OTP Request to PTC, para.9.
[26] *Id.* para.10.
[27] CAR-OTP-0092-0021.
[28] Art 69(7) Request, fn.3.
[29] *Id.* ("CAR-OTP-0092-0018 [Investigation Report of [REDACTED], 3 November 2015]…[indicating that these prior contacts 'centered on the [REDACTED] situation']").
[30] CAR-OTP-0092-0024.

records.[31] Prior to these dates, the Prosecution gave notice under Article 99(4) that these visits would be undertaken, but falsely represented in the first notice that the investigation related to a different Situation before the Court.[32] At least four Excel spreadsheets containing additional Western Union financial information were provided to the Prosecution during these visits,[33] despite the Prosecution's express promise to Austrian authorities that no documents or copies of documents would be taken from Western Union during its mission to Austria.[34]

25. By the time the Prosecution applied for authorisation from an Austrian court to obtain the Western Union information on 2 November 2012,[35] and by the time the Austrian court authorised the Prosecution to obtain the information on 15 November 2012,[36] the Prosecution had already obtained all the information encompassed by the terms of its request. The same "cart-before-the-horse" procedure was followed again and again in subsequent requests by the Prosecution to Western Union through January 2015.[37]

Violation #2: The Prosecution Obtained Financial Records Disproportionate to the Time Period It Was Investigating

26. On 7 November 2012, the Prosecution requested that Western Union check the name "Jean Jacques Kabongo Mangenda", to see if he sent or received funds.[38] Western Union sent the Prosecution a spreadsheet on the same day, detailing 300 transactions dating back to 2005 – four years before Mangenda joined the Bemba defence team.[39] The hundreds of records obtained for 282 other individuals also went back to 2005, well before any scheme to pay defence witnesses could have possibly been conceived.

[31] CAR-OTP-0092-0018.
[32] Art 69(7) Request, fn.3.
[33] CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032. Metadata for the four excel spreadsheets shows that they were created before 5 November 2012.
[34] CAR-OTP-0092-0892; CAR-OTP-0092-0890.
[35] CAR-OTP-0091-0351.
[36] CAR-D24-0002-1363.
[37] CAR-OTP-0092-0861 transmitting Western Union records before issuance of order, as the Prosecution requested. CAR-OTP-0085-0844 and CAR-OTP-0087-0008 (French Translation).
[38] CAR-OTP-0092-0028.
[39] CAR-OTP-0092-0033.

Violation #3: The Prosecution Provided the Austrian Authorities No Concrete Facts to Justify the Order for Release of Financial Information

27. The Request for Assistance ("RFA") to the Austrian authorities, which requested the same records on the 67 individuals that Prosecution already received directly from Western Union, provided a one-paragraph factual justification:

> [a]s part of its investigation, the OTP is giving particular attention to the identification of all financial means directly and/or indirectly under the control of persons believed to be involved in the commission of crimes under our jurisdiction or associated with suspects in our cases before the Court. In the course of the ongoing proceedings in the case of The *Prosecutor v J.P. Bemba*, the OTP is aware of money transfers that have taken place and which could involve funds under the control of our suspect or persons associated with him. It appears that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court, such as offenses against the administration of justice.[40]

28. The Austrian court stated its understanding of the factual basis as follows:

> [a]ccording to the ICC's Request for the Assistance (RFA) from 2 November 2012 Jean-Pierre Bemba Gombo is suspected of committing crimes against humanity, in particular rape and murder, and war crimes, in particular rape, murder and pillaging, at the territory of CAR. The persons listed in the Annex are suspected of having taken part in the actions of Jean-Pierre Bemba Gombo. The investigation of requested Bank information is necessary in order to be able to clarify the involvement of the persons listed in the Annex. The Order is proportionate because of the importance of the matter.[41]

29. A higher Austrian court later ruled that the Prosecution's request failed to provide a reasoned suspicion and should not have been granted.[42]

Violation #4: The Prosecution Misrepresented the Western Union Information to the Pre-Trial Chamber and Dutch Authorities

30. After seeking[43] and obtaining[44] records and recordings of Bemba's non-privileged calls from the Detention Unit, the Prosecution requested authorisation from the ICC Pre-Trial Chamber to apply to authorities in Belgium and The Netherlands to intercept calls on telephones used by Kilolo and Mangenda.[45]

[40] CAR-OTP-0091-0351.
[41] CAR-D24-0002-1363.
[42] CAR-D24-0005-0013 (German); CAR-D24-0005-0033 (French Translation); CAR-D23-0011-0016 (English).
[43] First OTP Request to PTC.
[44] PTC Decision on First OTP Request.
[45] Second OTP Request to PTC.

31. In its request, the Prosecution represented that Bemba "frequently speaks to the very individuals, including Kilolo and Mangenda, **who have sent Western Union payments to Defence witnesses**."[46] This was not an accurate statement. In fact, the Western Union records did not reflect any payment from Mangenda to any defence witness.[47]

32. In its request, the Prosecution also represented that "the times and dates of the transfers of exact sums of money suggest that Kilolo and Mangenda may be paying witnesses while they are at the seat of the Court."[48] This was also not an accurate statement. In fact, no pattern existed between the funds received by Mangenda via Western Union and defence witnesses while they were present at the seat of the court giving testimony. 16 of the 19 Western Union transfers to Mangenda from Babala were made at times **when no defence witnesses were at the seat of the Court**. The three payments that purportedly substantiated the Prosecution's suspicion that Mangenda was paying witnesses in The Hague was outweighed by the absence of any payment corresponding to the dates of appearance of the other 25 witnesses heard to that date.[49] Although the Prosecution listed all payments in an annex to its request for authorization for telephonic surveillance, it did not highlight which payments were allegedly coincident with witness appearance in The Hague, nor did it even list the dates of appearance of Defence witnesses in The Hague. The Single Judge was, accordingly, not alerted to the possible inaccuracy of the Prosecution's claims concerning the alleged coincident pattern. Furthermore, the Prosecution, with the exercise of minimal diligence, would have discovered that Mangenda promptly deposited all Western Union payments he received into Bemba's account at the Detention Unit for Bemba's personal expenses such as food and telephone credit.[50]

33. These representations, made *ex parte* and while seeking the most invasive and pervasive form of surveillance, should have been made with the utmost diligence, transparency and caution. Instead, the information provided gave the false impression to the Single Judge that: (i) there was direct evidence that Mangenda had paid witnesses through Western Union (untrue); and (ii) there was circumstantial evidence that Mangenda was paying witnesses in person in The Hague (untrue). The Single

[46] *Id.* para.14.
[47] Mangenda Motion on Inadmissibility of Intercepts, para.11.
[48] Second OTP Request to PTC, para.21.
[49] Mangenda Motion for Reconsideration of Intercepts Decision, para.3.
[50] Defence Provision of Information; CAR-OTP-0080-0296, at 0298; Registry Report on Detention Centre.

Judge, relying on these representations, authorised the Prosecution to seek State authorisation to intercept and record telephone calls placed or received by Kilolo and Mangenda.[51] The Prosecution repeated those misrepresentations to Dutch authorities as part of its RFA.[52]

34. The Dutch examining Magistrate ordered the interception of Kilolo's and Mangenda's phones, finding that there were concrete suspicions that Bemba used, among others, Kilolo's and/or Mangenda's telephones to contact witnesses in his case and that Kilolo and Mangenda issued payments to witnesses in Bemba's case.[53] At that time, however, there was no evidence that Bemba ever used Mangenda's phone to contact witnesses or that Mangenda paid any witnesses. There is no such evidence of those facts to this very day. They were untrue.

35. From 14 August until the arrests on 23 November 2013, Dutch authorities intercepted the conversations on the telephones of Kilolo and Mangenda.[54] These intercepted conversations were admitted in the trial and were the principal evidence that led to Mangenda's convictions.[55]

C. THE IMPUGNED DECISIONS

36. In its first *Western Union Decision*, the Chamber held that Article 69(8) applied to the collection of the Western Union documents,[56] and that it would only engage with national law insofar as to determine if something so manifestly unlawful occurred that it amounted to a violation of the Statute or internationally recognised human rights.[57] Using those criteria, the Chamber determined that the Prosecution's obtaining Western Union documents before the Austrian court's authorisation was not so manifestly unlawful that it failed to be 'in accordance with the law' and, consequently, no violation of an internationally recognised human right occurred.[58]

37. The Chamber based its conclusion on the fact that an Austrian Prosecutor advised the Prosecution that it could view material from Western Union in advance,[59] that the

[51] PTC Decision on Second OTP Request, p.7.
[52] CAR-D20-0006-3562, -3584 (list of documents submitted, item c.)
[53] *Id.* pp.2-3.
[54] OTP Response to Mangenda Motion on Inadmissibility of Intercepts, para.5.
[55] TJ, paras.108-09,717,721,726,748,768,839-49.
[56] Western Union Decision, para.38.
[57] *Id.* para.34.
[58] *Id.* para.60.
[59] *Id.* para.56.

Prosecution did not conceal having done so,[60] and that when it applied for authorisation, the Austrian authorities were aware that the Prosecution already accessed the information.[61]

38. The Chamber found that the Prosecution's information to Austrian authorities "that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court such as offenses against the administration of justice" was adequate.[62]

39. The Chamber refused to assess if the national authorities should not have granted the RFA due to the alleged overly broad character of the request because it believed itself "barred from assessing the concrete application of national law".[63]

40. The Chamber went on to conclude that even if there was a violation of internationally recognised human rights, the admission of the Western Union documents would not be antithetical or seriously damaging to the integrity of the proceedings because the Prosecution did not act with the deliberate intention to circumvent national law or violate of the right to privacy and the Austrian authorities later provided the information lawfully.[64]

41. The Chamber later agreed to partially reconsider this decision after two higher Austrian courts struck down the authorisations on the grounds that the Prosecution's applications failed to provide sufficiently concrete information.[65] In the *Second Western Union Decision*, the Chamber held that although the Prosecution violated the right to privacy by obtaining Western Union information without presenting concrete facts,[66] the violation was not so severe as to warrant the exclusion of the evidence.[67]

42. The Chamber found that the violation was caused by "an error of legal reasoning by a lower national court", and that the Prosecution had to assume that it obtained the Western Union documents lawfully, because Austrian courts repeatedly authorised it to obtain the information.[68]

[60] *Id.* para.57.
[61] *Id.* para.58.
[62] *Id.* para.52.
[63] *Id.* para.53.
[64] *Id.* para.69.
[65] CAR-D23-0011-0006, CAR-D23-0011-0016.
[66] Second Western Union Decision, para.28.
[67] *Id.* para.39.
[68] *Id*.

43. The Chamber also denied motions challenging the legality of the intercepts finding (1) that the Prosecution's representations when seeking authorisation to intercept Mangenda's telephone conversations were supported by sufficient circumstantial evidence to have been reasonably brought forward;[69] and (2) no manifestly unlawful conduct occurred in the Dutch authorities' interception of conversations.[70]

D. ARGUMENT

1. The Chamber erred in law when finding that Article 69(8) applied to the Prosecution's collection of Western Union information and in crafting a "manifestly unlawful" standard under Article 69(8)

a. *Article 69(8) did not apply to the Prosecution's collection of Western Union Information*

44. The Chamber's first error was in applying Article 69(8) to limit its inquiry into the Prosecution's violation of international human rights. Article 69(8) provides that:

> When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

45. Article 69(8) applies to "evidence collected by a State". The Chamber erred when it rejected the argument that Article 69(8) did not apply.[71] The Western Union information was not collected "by a State" but rather by ICC investigators who were not even acting under the colour of authority of an Austrian court order.[72] The fact that the same information was provided a second time after an Austrian court order is nothing more than window-dressing; indeed, the application for the court order itself expressly relied on information that had already been unlawfully obtained by the ICC investigators.[73]

46. The necessity of looking at substance over form is illustrated by the American case of *Nesbitt*, in which law enforcement officials obtained the defendant's financial records directly from a bank without legal process. The prosecution argued on appeal that the records could have been obtained without legal process by other means – in particular, under provisions that allowed the bank to provide records in cases in which it was a

[69] Intercepts Decision, paras.22-23.
[70] Art 69(7) Exclusion Decision, paras.15,35.
[71] *Id.* paras.37-38.
[72] Western Union Decision, para.42.
[73] CAR-OTP-0091-0360 ("[b]ased on the review of information available to the OTP, including the information already received from the Austrian authorities, the OTP established a pattern of suspicious payments made to defence witnesses. The OTP has strong indications that further similar transactions and movement of money have continues to occur after the initial period mentioned in our request dated 2 November 2012 and are likely to be directly relevant to our continuing investigations.")

victim. The Court rejected that argument, finding that legality must be assessed to the situation as it existed at the time, not *post hoc* rationalizations that did not exist at the time.[74] The Appellate Court affirmed that the trial court's decision to suppress the bank records. In *Burrows,* the California Supreme Court held that financial records obtained by law enforcement from a bank without legal process must be excluded. The Court noted that this applied not only to the original records obtained by the bank, but photocopies.[75] The fact that copies of the Western Union records were later provided by the Austrian authorities is thus of no consequence.

47. Even if the Western Union information is considered to have been "collected" only at the time the Austrian authorities provided it to the Prosecution, Article 69(8) would still not apply. The entire context can leave no doubt that Austria was acting as nothing more than the ICC Prosecutor's agent. The information that legitimised the request had already been obtained by Prosecution investigators without the assistance of any Austrian official. This is not the situation contemplated by Article 69(8) in which Sate officials conduct their own investigation.

48. Applying Article 69(8) to any situation where there is any element of State involvement would inappropriately exempt the Prosecution from well-accepted international human rights norms. The need to subject the ICC Prosecutor to these norms is magnified – as illustrated in his very case – by the trust or fear that may be presumed to cause few private individuals or companies to resist or even question the legality of requests for cooperation by the International Criminal Court.[76]

49. The deference to State sovereignty sought to be achieved by Article 69(8) is not applicable when the evidence is obtained directly by the Prosecution, or at the Prosecution's direct behest. In those cases, the Prosecution must be held to an international standard.[77] The Chamber erred in applying Article 69(8) to evidence collected by or on behalf of the Prosecution.

[74] *Nesbitt*, p.11.
[75] *Burrows*, fn.1.
[76] *See*, for example, testimony of Western Union official Herbert Smetana, T-35-Red-ENG 70:4-5 ("I…was aware of African war crimes. I heard about these things and that these kind of things is very, for me, very urgent"); CAR-OTP-0075-0049.
[77] *See* Article 21(3): The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

b. *The Chamber erred in applying a "manifestly unlawful" standard for the first requirement of Article 69(8)*

50. Even if Article 69(8) were found to apply, the Chamber erred in creating a "manifestly unlawful" test that allowed it to derogate from its duty to determine if evidence was collected in violation of international human rights law.

51. The Chamber believed that the provisions of Article 69(8) created a "tension" when applying Article 69(7) to conduct that involved an invasion of privacy rights guaranteed by State law. This purported tension was reconciled by creating a rule, heretofore unknown in international criminal jurisprudence, that it would "engage with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights".[78]

52. It then applied this rule of its own creation to find that the Prosecution's receipt of Western Union documents before the court authorised it was not so manifestly unlawful that it failed to be "in accordance with the law".[79] Using this rule, the Chamber also refused to assess at all "if the national authorities should not have granted the RFA due to the alleged overly broad character of the request."[80]

53. This was error. Accessing protected financial records before obtaining a court order and obtaining a disproportionate amount of financial records violates the right to privacy under international norms.[81] An individual's protection from violations of privacy is not reduced to only manifestly unlawful acts simply because domestic – in this case, Austrian – law regulates the privacy of financial records.

54. The "manifestly" unlawful standard is inherently inconsistent, in particular, with the need to prevent disproportionate infringements of privacy and other rights. As the European Court of Human Rights held in *Prezhadarovi*:

> the court that approved the measure did not consider the scope of the [search and seizure] operation and did not make a distinction between information which had been necessary for the investigation and information which had not been relevant […] the lack of any consideration of the relevance of the seized information for the investigation and of the applicants' complaint regarding the personal character of some of the information stored […] deprived

[78] Western Union Decision, para.34.
[79] *Id.* para.60.
[80] *Id.* para.53.
[81] *Miailhe*, para.39, cited in *Lubanga Confirmation Decision*, para.79.

the applicants of sufficient safeguards against abuse. [82]

55. That Court has also held that in the absence of specific reasons for finding it necessary for the investigation to search of all of an applicant's data, such a search will generally be disproportionate, as it goes beyond what is necessary to achieve a legitimate aim.[83] Here, on the other hand, the Chamber's "manifestly" unlawful standard ratified the Prosecution's unlawful acquisition of 922 Western Union transactions dating back to 2005—even though Bemba was not arrested until 2008 and his trial did not start until 2010. This directly contravenes the principle of proportionality which is at heart of preserving and protecting the right to privacy.[84]

56. The Chamber's approach also conflicts with that of the Trial and Pre-Trial Chambers in *Lubanga*, where Congolese authorities seized many documents during a search attended, but not directed, by an ICC Prosecution investigator. The Pre-Trial Chamber held that the search and seizure of so many documents infringed the principle of proportionality because (1) the interference did not appear to be proportionate to the national authorities' objective, and (2) the nature of the search and seizure was indiscriminate, involving hundreds of items.[85] The Pre-Trial Chamber held that the infringement could be characterised as a violation of internationally recognised human rights,[86] but decided not to exclude the evidence given the preliminary nature of the confirmation hearing.[87] This approach contrasts with that of the *Bemba et al*. Trial Chamber, which deemed the disproportionate collection of Western Union records not to be "manifestly unlawful".[88]

57. The "manifestly unlawful" standard is also inconsistent with the approach adopted by the *Lubanga* Trial Chamber. After agreeing with the Pre-Trial Chamber that the disproportionate amount of material amounted to an unjustified violation of the individual's right to privacy,[89] it held that the Statute does not "quantify" the violation of the internationally recognised human right by reference to the degree of "seriousness". Even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of Article 69(7) is satisfied.[90]

[82] *Prezhadarovi*, para.49.
[83] *Robathin.*
[84] Alamuddin p.285 citing *Camenzind*, para.45.
[85] *Lubanga* Confirmation Decision, para.81.
[86] *Id*. para.82.
[87] *Id.* para.90.
[88] Western Union Decision, para.53.
[89] *Lubanga* Bar Table Decision, para.38.
[90] *Id.* para.35.

58. The *Lubanga* Trial Chamber supported this interpretation of Article 69(7) by referring to the fact that the 1994 *International Law Commission Draft Statute for an International Criminal Court* contained a proposed rule that evidence shall not be admissible if obtained "by means of a **serious** violation of this statute or other rules of international law", but that the text of Article 69(7) adopted by the Rome Conference omitted the word "serious".[91]

59. The Chamber's imposition of the "manifestly unlawful" standard imposes the very "seriousness" requirement removed from the Statute and found to be inapplicable in *Lubanga.*

60. The Chamber's "manifestly unlawful" test is also contrary to the legislative intent of Article 69(8). Piragoff states the following:

> [a]ccording to another view which was widely supported, the Court […] should apply international law and should exclude evidence on the basis of a violation of international standards, regardless of what national standards might be concerning the manner of its collection […] Reference to national law in article 69 could lead to specialized interpretations of national law in the evidentiary context, a result not desired by the drafters.[92]

61. The Chamber's "manifestly unlawful" test was unnecessary and unjustified. Compliance or lack of compliance with national law was a relevant part of the factual context,[93] but was not dispositive whether the interference with the right of privacy was according to law. Investigative activities are measured not against domestic law, but by whether they conform to internationally recognised human rights. The violation of national law is neither a necessary nor sufficient condition of exclusion under Article 69(7).[94]

62. An interference with the right to privacy not according to law is a pre-condition to considering the impact of admitting the evidence under Article 69(7)(b).[95] The Chamber's "manifestly unlawful" standard precluded consideration of whether admitting the evidence derived from acquiring disproportionate Western Union information, or acquiring information without a court order, would be antithetical or seriously damaging to the proceedings.

[91] *Id.* fn.87 (emphasis added).
[92] Triffterer, p.1311.
[93] *Id.* p.1336.
[94] Viebig, p.181.
[95] Triffterer, pp.1310,1334.

63. Article 69(7)(b) sets a high bar to the exclusion of evidence and adequately ensures that mere infringements of national laws or rules will not lead to the exclusion of evidence. But by *prima facie* excluding from consideration acquiring financial records without a court order, or collecting disproportionate financial records, the Chamber undervalued the misconduct of the Prosecution.

c. *Conclusion*

64. The Chamber erred in applying Article 69(8) to evidence collected by the Prosecution. Alternatively, if Article 69(8) applied, it did not operate to insulate all but "manifestly unlawful" violations of the right to privacy. The Chamber erred in the first step under Article 69(7) by excluding, as potential violations of international human rights, the acquisition of financial records without a court order, and collection of unnecessarily overbroad financial records. This then precluded, or relegated to hypotheticals, the second step--considering the impact of these violations under Article 69(7)(b).

2. The Chamber erred in law in concluding that admission of the intercepted conversations would not be antithetical to, or seriously damage the integrity of the proceedings

65. The rationale for this second step in Article 69(7) is that the Court's use and admission of evidence obtained by means of a violation of its own Statute or internationally recognised human rights would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights.[96] The *Lubanga* Trial Chamber held that applying Article 69(7) involves balancing a number of values found in the Statute, including "respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes".[97]

66. An important factor is the Prosecution's involvement in the violation. The *Lubanga* Trial Chamber noted that the ICTY has held that the exclusionary rules contained in the Tribunal's framework are not intended to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence in international proceedings.[98] Where the investigator from the ICC Prosecution was present at the search by Congolese state authorities, but did not control the search, this factor weighed in favour of admitting the evidence, notwithstanding that the evidence

[96] *Id.* p.1334.
[97] *Lubanga* Bar Table Decision, para.42.
[98] *Id.* para 45, citing *Brđjanin* Decision, para.63.

was obtained by violating international human rights law.[99] The Appeals Chamber likewise reasoned that the Prosecution's mere knowledge of the investigations carried out by the Congolese authorities would not justify a stay of proceedings.[100]

67. Conversely, when the ICTR Prosecutor was responsible for the violation – interviewing a protected defence witness in violation of a protective measures order – the Chamber excluded the statement taken from the witness. It found the Prosecution's violation of the procedure for contacting defence protected witnesses antithetical and seriously damaging to the integrity of the proceedings.[101]

68. Amal Alamuddin explains:

> [i]n the International system, the prosecutor will often be using evidence collected not only by his own investigators but by national police forces in cooperating states; therefore, the deterrence rationale is said to be attenuated. But deterrence *is* relevant to the international prosecutor's *own* collection of evidence…It is also relevant to national authorities collecting evidence on his behalf, as the prosecutor may be turning to the same states repeatedly to gather evidence in support of his investigations. This suggests that the courts should focus not for instance on whether an OTP investigator was or was not *present* when the evidence was gathered, but rather on whether the evidence was collected *at the behest of the international prosecutor or as part of a concerted action between the two authorities.*[102]

Petra Viebig has stated:

> [t]he greater the extent to which OTP staff was involved, the more intense is the connection with the Court. Conversely, where domestic authorities act without the involvement of the Prosecutor, this would call for lowering the degree of attribution. While the Court cannot free itself from any responsibility for domestic mistakes, admitting evidence gathered by means of an illicit act committed by its own prosecutor would deeply affect its integrity.[103]

69. The Prosecution here exercised exclusive control over the steps that violated the right to privacy. It then used the unlawfully-obtained information to induce the Austrian authorities to issue a *post facto* court order – which, incidentally, was later found to be

[99] *Id.* para.46. *See also* Alamuddin, p.301 ("…if the ICC investigator had done more than merely be present…this may have…resulted in exclusion of the evidence collected.")
[100] *Lubanga* Arrest Judgment, para.42.
[101] *Kajelijeli*, paras.14-15.
[102] Alamuddin, p.304 (italics added).
[103] Viebig, p.182.

unlawful. The Prosecution was directly responsible for violating human rights; failed to provide full disclosure to the Austrian authorities of the steps that it was taking in Austria that constituted a violation of human rights; and was responsible for inducing the Austrian authorities to violate human rights. This was antithetical to, and seriously damaging of, not only of the *Bemba et al*. proceedings, but the proceedings of the International Criminal Court as a whole.

a. *The Chamber undervalued the violations*

70. The Prosecution committed three violations of international human rights law when obtaining the Western Union records: (1) acquiring the records before court authorisation; (2) acquiring records temporally disproportionate to the need for the information; and (3) failing to provide the Austrian authorities with sufficient information to sustain a valid exercise of its judicial discretion.

71. Although Mangenda argued that the admission of the intercepted conversations would be antithetical and seriously damaging to the proceedings because they derived from the illegal acquisition of the Western Union information,[104] the Chamber never reached that issue.

72. Instead, it fragmented and compartmentalised its analysis. First, it refused to look at the proportionality issue, concluding that failing to provide time parameters for the records obtained was not "manifestly unlawful."[105] Second, after it found no "manifestly unlawful" conduct in the screening issue,[106] it considered the impact of admitting the evidence solely on a hypothetical basis.[107] Third, in the wake of two Austrian decisions striking down the Austrian authorisations, it accepted that the lack of information provided to Austrian authorities violated the right of privacy,[108] but analysed the impact of that violation in a vacuum, failing to also consider the screening and disproportionality issues, or the Prosecution's related misconduct when obtaining the intercepted conversations themselves.[109]

73. The Appeals Chamber should correct those errors by itself taking a holistic view of the trial record and determining whether the Prosecution's conduct in obtaining the Western Union information and intercepted conversations made admission of those

[104] Art 69(7) Request, para.51.
[105] Western Union Decision, para.53.
[106] *Id.* para.60.
[107] *Id.* para.61.
[108] Second Western Union Decision, para.28.
[109] *Id.* paras.34-39.

conversations antithetical and seriously damaging to the proceedings.

b. *The Chamber erred in relying upon unverified information*

74. The Chamber, in its analysis of the Prosecution's conduct, significantly relied upon an unsigned, unsworn, non-contemporaneous one-page "Investigator's report" to conclude that "a senior public prosecutor of the Austrian Ministry of Justice had advised that the Prosecution was allowed to screen material from Western Union unless it was required for evidentiary purposes, in which case a RFA was needed to obtain a court order."[110] The report, dated 3 November 2015, claims that the investigator was told this by an Austrian prosecutor some 4 1/2 years earlier, on 16 March 2011.[111] The Chamber concluded that – on this basis – it could be assumed that the Prosecution believed itself to act according to existing law during the prior contacts with Western Union because the Austrian authorities themselves gave the impression that a previous screening of financial information complied with Austrian law.[112]

75. The Chamber erred in giving any evidential weight whatsoever to the Investigator's report. The report was not signed. No attestation of truth or accuracy is made or offered. It is self-serving in the extreme, given that the author is the very person whose conduct was unlawful. It is not even close to contemporaneous and, despite being asked, the Prosecution refused to produce a contemporaneous record of this meeting.[113] The Investigator's report, contrary to its title, was prepared for the purposes of litigation. Indeed, it was written only after, and for the purpose of trying to dispel, the cloud of impropriety that had emerged when the Defence learned, *during the cross-examination of a Western Union official at trial*,[114] that the Prosecution had obtained financial information prior to the issuance of an Austrian court order. This information was not previously known because the Prosecution had failed, in violation of its obligations, to disclose emails showing that financial information had been obtained without judicial authorization. The author of the Investigator's report was privy to these emails,[115] implying that he was personally responsible for having failed to bring those emails to the attention of the Prosecution trial lawyers for disclosure. Further, the Western Union official who did testify, and who attended the meeting at

[110] Western Union Decision, para.56.
[111] CAR-OTP-0092-0018.
[112] *Id.* para.68.
[113] *See* correspondence attached as Annex A to this brief.
[114] T-33-Red-ENG, p.8.
[115] CAR-OTP-0092-0028-R01: an email from [REDACTED] to Herbert Smetana on 7 November 2012 at 15:41.

which this alleged advice was given, failed to corroborate that this advice was given.[116] Last but not least, it is uncontested that this advice was provided in respect of a different Situation, a different case, and for which a different legal regime may have applied for reasons that the Prosecution has declined to disclose to the Defence.[117]

76. The Chamber erred in rejecting Mangenda's objections to admission of or reliance on the Investigator's report;[118] in placing any weight on it whatsoever; and, in particular, in placing any weight on it in order to reach factual findings of such consequence as to excuse or justify the Prosecution's illegal acquisition of the Western Union records.

77. In the *Lubanga* judgment, the Chamber declined to rely on documents that were unsigned.[119] In the *Katanga* judgment, Judge van den Wyngaert, in her minority opinion, found that the Chamber erred in relying upon documents whose authors had not testified, where the contents of the documents were disputed and "opaque".[120]

78. Documents prepared for litigation have the "recognized potential…for fabrication and misrepresentation by their makers and of such documents being carefully devised by lawyers or others to ensure that they contained only the most favourable version of the facts stated."[121] Likewise, in this case, the Trial Chamber erred in relying upon the investigator's unsigned, unsworn, and uncorroborated 2015 report of a 2011 meeting with Austrian officials, without even noting any of these cautionary factors.

c. *The Chamber erred in shifting responsibility for the violations onto the State*

79. When determining that the admission of the evidence was not antithetical or seriously damaging to the integrity of the proceedings, the Chamber relied upon the fact that the information from the "screening" was later also provided lawfully via cooperation with the Austrian authorities.[122]

80. In taking this approach, the Chamber allowed the Prosecution to illegally obtain the financial information from Western Union and then request a court order for

[116] T-35-Red-ENG, pp.72-74.
[117] T-34-Red-ENG 52:18-21 ("MS STRUYVEN: Yes, your Honour. Maybe just to clarify, the information that we gave to the Judges and the parties beforehand, which was that the cooperation is not limited to this particular case, and we would not want to have any information about any other cases being revealed; if this cryptic way of saying things could help?")
[118] Art 69(7) Request, fn.60; Western Union Decision, para.2; Mangenda Request for Leave to Appeal Art 69(7) Exclusion Decision, para.7(d).
[119] *Lubanga* TJ, paras.1182,1184.
[120] *Katanga* Minority Opinion, para.201.
[121] *Galić* Decision, para 29.
[122] Western Union Decision, para.69.

information it already found. This is akin to allowing a police officer to conduct an illegal search and, upon finding what he was looking for, obtain a search warrant. The search warrant does not "vitiate" the illegal search where the decision to apply for the warrant was based upon that discovered in the illegal search.[123] Likewise, a *post facto* Austrian court authorisation cannot vitiate the illegal "screening".[124]

81. When refusing to exclude the evidence as antithetical to and significantly damaging to the integrity of the proceedings,[125] the Chamber relied upon its conclusion that Austrian authorities were aware of the Prosecution's prior contacts with Western Union and the exchange of information.[126]

82. The Prosecution relied on the illegally-obtained information to substantiate its request for judicial authorization, while at the same time obfuscating what information has been obtained or how:

> [o]n 19 October 2012, a meeting was facilitated by Mr. Herbert Smetana, Director of International Security of Western Union…and a subsequent screening of documents has identified a number of transactions and movements of large sums of money in connection with a number of individuals which appear to be of relevance to the ongoing investigation.[127]

As far as the Austrian authorities were concerned, the "subsequent screening of documents" could have referred to a review of the documents conducted by Western Union alone, with the disclosure of those documents to be made only following the court authorisation.

83. The Prosecution's notifications of missions to Austria of 15 October and 1 November 2012 likewise did not indicate that the Prosecution would be accessing Western Union's financial records. The notification said that:

> [p]lease be informed that the purpose of this meeting…is to identify and if applicable screen all relevant information that may be in possession of Western Union and which can be relevant to our ongoing investigations. No formal interview will be conducted *and no documents or copies thereof will be taken by the OTP*

[123] *R v N*, para.45; *Murray*.
[124] The decision to apply for the authorisation for the Western Union records was only made after the prosecution obtained the records and found them useful to its investigation. Compare CAR-OTP-0092-0892 (Request for Authorisation on 15 October 2012) with CAR-OTP-0092-0023 (provision of records on 11 October 2012).
[125] Western Union Decision, para.61.
[126] *Id.* paras.66,68.
[127] CAR-OTP-0091-0351, para.6.

representatives during this mission.[128]

84. The Prosecution never indicated that it would obtain the Western Union financial information at these meetings; on the contrary, it promised that it would not do so. The "screening" was indicated to be something substantially more limited than obtaining all details of all transactions over a period of years. The Chamber erred in concluding that the Austrian authorities were aware that the Prosecution already obtained the financial information sought by the order, and further manifestly erred in finding that the Prosecution "tried at all times to apprise the Austrian authorities of its actions in respect of obtaining the Western Union Documents."[129] On the contrary, the Prosecution violated its promise not to take documents or copies during any on-site visit in Austria, and then did not reveal that this had taken place in the request for judicial authorization.

85. The Chamber also erred in its analysis of the impact on the integrity of the proceedings by failing to consider that the Prosecution misled the Austrian authorities. By the time it represented on 1 November 2012 that it would not take documents or copies thereof from Western Union, its investigators had already taken copies of records of hundreds of transactions.[130] It later took copies of hundreds more before the Austrian court authorisation.[131] Even as late as January 2015, the Prosecution obtained copies of documents from Western Union before the authorisation for it to receive that information was issued.[132]

86. The Chamber also erred in failing to consider that the Prosecution misrepresented to Western Union that its request was urgent.[133] The misrepresentation was significant because, as Smetana explained, he would provide financial transaction information without a court order in urgent cases only—"otherwise I wouldn't give it."[134]

87. The Chamber repeated its errors when reconsidering, after learning of the two Austrian decisions holding that the authorisations were based upon insufficient information. The Chamber concluded that the violation of the right to privacy was caused by "an error

[128] CAR-OTP-0092-0892 (italics added). The second notification used the same language: CAR-OTP-0092-0890.
[129] *Id.* para.36.
[130] CAR-OTP-0092-0023.
[131] CAR-OTP-0092-0033; CAR-OTP-0092-0035.
[132] Compare CAR-OTP-0092-0858, CAR-OTP-0092-0861 (records received in Nov. 2014 and Jan 2015) with 6 February 2015 authorisation, CAR-OTP-0085-0843.
[133] CAR-OTP-0092-0021.
[134] T-35-Red-ENG 70:14.

of legal reasoning by a national court".[135] The Chamber declined to exclude the Western Union information because the Prosecution had not circumvented national procedures intentionally, took the necessary steps to obtain the material legally, and was entitled to presume that these steps were in compliance with national.[136] In particular, the Chamber found that the Prosecution was in no position to know that the information it provided was insufficient, and had reason to believe that it complied with all the requirements of Austrian law, since the Austrian public prosecutor's office did not request further information and proceeded to request authorisation to collect the Western Union Documents via judicial order;[137] that the Prosecution "had to assume that it had fulfilled all necessary requirements to legally obtain the material since the first-instance court granted the order"; and "was prevented from potentially providing further information to the Austrian authorities that would have more substantiated the requests to meet the requirements of the Austrian law by the fact that the orders were granted at first instance."[138]

88. This analysis is undermined by the Prosecution's intentional copying of documents contrary to its promise not to; by the fact of giving such a promise, which must be taken to reflect an understanding that to do otherwise would be illegal; and by the vague and non-transparent nature of the information provided in the *Request for Assistance*.[139] These acts were wilful, particularly given that the Prosecution has an entire department whose job is to ensure compliance with national law.

89. The Chamber erred in blaming the Austrian authorities for the Prosecution's treatment of the State as a rubber stamp. Instead, it should have issued a sharp rebuke to the Prosecution by holding that its conduct was antithetical and seriously damaging to the proceedings.

90. The Chamber also erred when finding, as a factor against excluding the evidence, that the higher court rulings hinted at the possibility that further substantiating information

[135] Second Western Union Decision, para.39.
[136] *Id*. paras.39-40.
[137] *Id.*
[138] *Id*. para.37.
[139] CAR-OTP-0091-0351 ("[a]s part of its investigation, the OTP is giving particular attention to the identification of all financial means directly and/or indirectly under the control of persons believed to be involved in the commission of crimes under our jurisdiction or associated with suspects in our cases before the Court. In the course of the ongoing proceedings in the case of The *Prosecutor v J.P. Bemba*, the OTP is aware of money transfers that have taken place and which could involve funds under the control of our suspect or persons associated with him. It appears that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court, such as offenses against the administration of justice.")

may have been available at the time.[140] Indeed, further substantiating information was available at the time, but that information came from the prosecution's illegal access to the Western Union records before obtaining the order. The Chamber's compartmentalised analysis of the Prosecution's multiple violations led it to reward the Prosecution for one illegality while excusing it for another.

91. The Chamber also erred when concluding that the Defence had a full opportunity during trial to challenge the authenticity and use of the Western Union records; that the way in which these records were obtained did not affect the Defence's ability to challenge them in any meaningful way; and that the fairness of the trial was guaranteed in relation to these records, despite the manner in which they were obtained.[141] The same could have been said for a confession obtained by torture.[142] What is at stake, rather than ostensible reliability, is whether the nature of the violations in obtaining the evidence are antithetical and seriously damaging to the proceedings. If reliability becomes the sole yardstick of admissibility, then this would merely encourage well-intentioned investigators to break that law in pursuit of their understanding of justice. Exclusion is particularly warranted where the product of the law enforcement's violation was the principal evidence against an accused, as the intercepted conversations here.[143]

92. The Chamber also erred in failing to appreciate that even if an Austrian official agreed to, or even suggested, a scheme to violate individual privacy rights by obtaining private Western Union financial records in advance of court authorisation, such a practice would still be antithetical and seriously damaging to the integrity of this Court's proceedings.

93. Subjecting requests for personal data to judicial scrutiny before collecting such information, and only collecting the information that is reasonably required, are crucial components to ensuring the integrity of proceedings and upholding the rule of law. The United Nations endorses this principle.[144] It is indeed a central tenet of international human rights standards that persons acting in an official capacity must exercise powers of covert investigation and surveillance in a manner that is both

[140] Second Western Union Decision, para.34.
[141] *Id*. para.38.
[142] *See, inter alia*, *Gäfgen*, para.147 ("[t]he Chamber considered that there was a strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 rendered a trial as a whole unfair in the same way as the use of the extracted confession itself.")
[143] *Id*. paras.178-80.
[144] UNHRC Fourth Report, p.9 (a State should ensure that any interference with the right to privacy and correspondence "complies with the principles of legality, proportionality and necessity").

proportionate and subject to independent safeguards against abuse. The most effective arbiter in such a situation is ordinarily the judiciary.[145]

94. In *Lubanga*, the Prosecution and the United Nations entered into agreements that prevented the disclosure of exculpatory information to the defence. The Chamber refused to tolerate such a practice between the Prosecution and a third party at the expense of the rights of the accused. It held that the Prosecution was not allowed to enter into an agreement that subverts the ICC Statute.[146] Likewise, it would be antithetical to and seriously damaging to the proceedings for the Prosecution and Austria to have agreed to violate individuals' privacy rights in financial records.

d. *The Chamber erred in failing to exclude the intercepts as derivative evidence of the Western Union misconduct*

95. Because it found that the Western Union information was not illegally obtained, the Chamber concluded that no basis existed to exclude the Intercepted Communications.[147] Thus it never reached the issue of whether Article 69(7) includes the exclusion of derivative evidence.

96. The Intercepted Communications derived directly from the illegally obtained Western Union information. The only evidence of the offence of interfering with the administration of justice referred to in the Prosecution's *Request for Assistance* to The Netherlands requesting the interceptions derived directly from the Western Union information.[148]

97. The issue of exclusion of derivative evidence under Article 69(7) has not previously arisen at the Court. Viebig suggests that under Article 69(7)(b), exclusion of derivative evidence would not be warranted "where the connection between the evidence and the violation is so remote that the damage to the integrity of the proceedings no longer

[145] *Klass and Others*, para.56 ("[t]he Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge").
[146] *Lubanga* Disclosure Decision para.75, rev'd on other grounds; *Lubanga* Disclosure Judgment.
[147] Western Union Decision, para.73.
[148] CAR-D21-0005-0001, para.5 ("[i]n the course of the ongoing proceedings in the case, the OTP has received information about money transfers which could involve funds under the control of Mr J.-P. BEMBA and persons associated with him. It appears that these money transfers could potentially be linked to the commission of crimes under the jurisdiction of the Court such as offences against the administration of justice (Article 70(1)(c) of the Rome Statute). The information we have would tend to point towards possible bribery of witnesses providing testimony at the trial by Mr. J.-P. BEMBA and/or individuals closely associated with him and instigations of making false testimonies before the Court.") Reference was also made to logs and recordings of calls by Bemba to Kilolo and Mangenda to establish that the phones sought to be intercepted were being used to commit the offences revealed by the money transfer information. *Id.* para.6.

justifies the cost of exclusion."[149]

98. Under this test, since the Prosecution used the Western Union material as the factual basis in its request to Dutch authorities to intercept the conversations, the connection between the illegally obtained Western Union information and the ability to obtain the intercepted conversations is a direct one.

99. The ECtHR has stated:

> [t]he repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair.[150]

100. Many national jurisdictions exclude derivative evidence under similar exclusionary schemes. Evidence found in a house after the occupants were heard discussing the location of the fruits of a robbery during an illegally intercepted conversation was excluded by a South African Court on the grounds that to admit the evidence would bring the justice system into disrepute by creating an incentive for officers to disregard the rights of citizens.[151]

101. In the context of this case, the line of causation could not have been more direct. The Prosecution obtained the Western Union information and then used it to obtain the intercepted conversations. The integrity of the proceedings would be damaged if the line of causation were cut off at the primary illegality, allowing the Prosecution to profit from its misconduct. For example, excluding a statement obtained under torture, but allowing the admission of a bomb found at the place where the accused said it was while being tortured, would frustrate the purpose of deterring torture. This would be antithetical to and seriously damage the proceedings. In the same way, excluding only the Western Union information, but allowing the admission of the intercepted conversations, would frustrate the purpose of deterring invasions of personal privacy.

102. Therefore, the Chamber erred in refusing to exclude the intercepted conversations as

[149] Viebig, p.205.
[150] *Gäfgen*, para.178.
[151] South Africa: *Pillay*, para.94. *See also* Australia: *R v N;* Brazil: Thaman Article, p.709; Canada: *Burlingham*; Colombia: Madden, p.471; Netherlands: Thaman, pp.215-216; Philippines: *Compacion*; Taiwan: Thaman, p.359; United States: *Wong Sun*.

derivative evidence of the illegally obtained Western Union information.

e. *The Prosecution failed to provide concrete facts to the Dutch authorities*

103. The manner in which the intercepted conversations were obtained, apart from the Western Union illegality, supports the argument that their admission would be antithetical and seriously damaging to the integrity of the proceedings in this case.

104. As with the Austrian authorities, the Prosecution treated the Dutch authorities as a rubber stamp. Like the RFAs that two Austrian courts later found to have been insufficiently concrete, the RFA for the intercepts only contained conclusory information that (1) the money transfers could ostensibly be linked to the commission of crimes under the Court's jurisdiction such as offences against the administration of justice; (2) the information in the Prosecution's possession would tend to suggest possible bribery by Bemba and/or individuals closely associated with him of those witnesses providing testimony at the trial and instigations of making false testimonies before the Court;[152] and (3) the information collected so far by the Prosecution indicated large scale bribery of Defence witnesses.[153]

105. Nothing from this information allowed Dutch authorities to make their own determination that intercepting the telephone calls was warranted. They weren't provided with the dates of the money transfers, the identity of the senders or recipients, the relationship of the recipients to witnesses at the trial, or any other details. They could only take the Prosecution at its word, which they did because of their belief that they were obliged to cooperate with the Court.[154]

106. In effect, the Prosecution was allowed to intercept the conversations by merely telling the Dutch authorities that they wanted to do so. This unchecked power in the hands of a prosecutor vitiates the requirement of judicial, not prosecutorial, approval for court orders. It would be antithetical and seriously damaging to the proceedings if this Court were to condone this abuse of judicial oversight and State sovereignty.

[152] Request for Assistance, CAR-D21-0005-0001, para.5.
[153] *Id*. para.7.
[154] CAR-D20-0006-3562 ("[a] state which is a party of the Rome statute must comply with Requests for Assistance from the ICC. This includes the recording of telecommunications after authorisation for this is granted by the Investigating Judge.")

f. *The Prosecution misrepresented the evidence to the Pre-Trial Chamber and Dutch authorities*

107. The Prosecution misrepresented the facts when seeking authorisation from the Pre-Trial Chamber to apply to the Dutch authorities to intercept the conversations, and repeated those misrepresentations when forwarding its request to the Pre-Trial Chamber to the Dutch authorities.

108. In its request, the Prosecution represented that Mangenda "sent Western Union payments to Defence witnesses."[155] In fact, the Western Union records in the Prosecution's possession did not reflect any payment from Mangenda to any defence witness.[156] The Prosecution's representation on this point was unequivocal. There was no qualification to this statement by suggesting that there are reasonable grounds for suspecting that payments are being made, or that it may be the case that payments are being made. The Prosecution's claim that it "did not present the situation as an established fact"[157] is manifestly incorrect.

109. The Prosecution also represented that "the times and dates of the transfers of exact sums of money suggest that Kilolo and Mangenda may be paying witnesses while they are at the seat of the Court."[158] In fact, no pattern existed between the funds received by Mangenda via Western Union and defence witnesses being at the seat of the court. 16 of the 19 Western Union transfers from Babala to Mangenda were made at times when no defence witnesses were at the seat of the Court.[159] And, with a minimum of diligence, the Prosecution could have discovered that all Western Union payments to Mangenda from Babala were promptly deposited into Bemba's account at the Detention Unit for personal expenses such as food and telephone credit.[160]

110. The Single Judge and, in turn, the Dutch authorities, relied upon these misrepresentations when finding that there were grounds to authorise intercepting Mangenda's telephone conversations. The concrete suspicions that the Dutch examining Magistrate believed justified the intercepts—that Mangenda paid defence witnesses and that Bemba used Mangenda's phone to communicate with defence witnesses[161]– were untrue.

[155] First OTP Request to PTC, para.14.
[156] Mangenda Motion on Inadmissibility of Intercepts, para.11.
[157] OTP Response to Mangenda Motion on Inadmissibility of Intercepts, para.22.
[158] Second OTP Request to PTC, para.21.
[159] Mangenda Motion for Reconsideration of Intercepts Decision, para.3.
[160] Defence Provision of Information; CAR-OTP-0080-0296, at -0298; Registry Report on Detention Centre.
[161] CAR-D20-0006-3584.

111. The Chamber excused these misrepresentations due to the preliminary nature of the proceedings, characterizing them as "an intermediate result of an on-going investigation"[162] This was error. All applications for search warrants and other evidence-gathering orders are necessarily preliminary to the conclusion of an investigation. Yet courts have regularly excluded evidence when applications are based upon misrepresentations.[163] To do anything less would be to encourage law enforcement to make misstatements to obtain incriminating evidence and would be antithetical and seriously damaging to the proceedings.

g. *The facts in possession of the Prosecution at the time did not provide probable cause to intercept Mangenda's calls*

112. The absence of information provided to the Dutch authorities and the misrepresentations to the Single Judge and Dutch authorities allowed the Prosecution to intercept Mangenda's telephone conversations at a time when it lacked probable cause to believe that he was part of the scheme to bribe witnesses or that evidence of that scheme would be obtained by intercepting his calls. This makes the omissions and misrepresentations all the more serious, and increases the need for exclusion of the intercepted conversations as antithetical and seriously damaging to the integrity of the proceedings.

113. At the time it applied for the intercepts, the prosecution had received information about the scheme to pay defence witnesses from three informants. None of those three informants implicated Mangenda.[164]

114. As noted above, the Western Union records showed no payments from Mangenda to defence witnesses, nor evidence that Mangenda used money he received via Western Union for anything other than deposits to Bemba's detention unit account—a lawful activity for a case manager. And the Prosecution's review of the logs and recordings it obtained from Bemba's calls at the detention unit did not reveal any wrongdoing by Mangenda, or that he used his telephone to enable Bemba to be in contact with defence witnesses.[165]

115. The interception of Mangenda's telephone conversations was without probable cause. Because of the Prosecution's lack of information and misrepresentations to Dutch

[162] Intercepts Decision, para.22.
[163] *Morelli*; *Garofoli*, paras.69-72; *Sussex Police*; *Delaware*.
[164] First OTP Request to PTC, paras.9-11.
[165] *Id.* paras.15-20.

authorities, it escaped meaningful judicial review. To admit those conversations was antithetical and seriously damaging to the integrity of the proceedings.

h. *Other misconduct*

116. Evaluating the Prosecution's conduct to determine whether the admission of the intercepted conversations would be antithetical and seriously damaging to the proceedings would not be complete without considering how the Prosecution used the Article 70 investigation, and the intercepted conversations, to obtain a tactical advantage in its main case against Bemba. Those facts are extensively set forth in the *Bemba* appeal brief in the main case,[166] and are incorporated by reference herein.

i. *Conclusion*

117. A comprehensive evaluation of the Prosecution's conduct in obtaining the Western Union information and the intercepted conversations demonstrates that the Chamber undervalued the violations of international human rights law that led to the production of this evidence, shifted the blame for the violations from the Prosecution to the States, and failed to conduct a comprehensive review of all of the circumstances leading to the admission of the evidence.

118. When the Appeals Chamber examines this issue in its proper context, it should conclude that the admission of the intercepted conversations—the product of a litany of prosecutorial misconduct—was antithetical and seriously damaging to the integrity of the proceedings.

119. In national jurisdictions with similar standards as those in Article 69(7), courts have found that the admission of illegally obtained direct and derivative evidence would be antithetical to the integrity of the proceedings in similar circumstances.

120. In Australia, the Queensland Supreme Court held that the invasion of privacy from the obtaining of text messages from a telephone unlawfully seized from the accused, balanced against public policy interests in favour of eradicating drug crimes, required that the evidence not be admitted.[167]

121. In Canada, the Supreme Court held that where police trespassed unto property and found marijuana under cultivation, then withdrew and obtained a search warrant, the

[166] *Bemba* Defence Appeal Brief, paras.13-114.
[167] *R v N*, paras.67-69.

administration of justice would suffer far greater disrepute from the admission of the evidence than from its exclusion. While the accused were guilty, and the exclusion of the evidence would mean they would go free, "this Court must not be seen to condone deliberate unlawful conduct designed to subvert the legal and constitutional limits of police power to intrude on individual privacy."[168]

122. The Senior Trial Attorney responsible for this prosecution[169] has written academically that the admission of illegally obtained evidence by the ICC "carries the potential appearance of complicity in the illegalities that produced the evidence. As a result, the institution's integrity may be substantially compromised."[170] He further suggested that "Article 69(7) should normatively express the fundamental importance and extent of the underlying substantive human rights it is intended to protect and not merely assert a wholly impossible and ineffectual remedy for their violation."[171] He noted that "if… the ICC exists in part to vindicate the rights of those subjugated and subjected to the excesses and abuses of state power…it follows that the application of the exclusionary rule should be informed by a principle of deterring tacit judicial condonation and participation in the government abuses which likewise produced the impugned evidence."[172] He concluded that:

> [t]here could be nothing more damaging to the integrity of the administration of justice than for the foremost tribunal for the prosecution of the greatest abuses of sovereign power to legitimate a state's abuses of an individual through the use of the fruits of such violations. Simply put, how can the court propose to engender the highest respect for human rights in the international community when it may be rightly perceived as sanctioning their subversion?[173]

E. CONCLUSION

123. The Appeals Chamber has an opportunity to uphold the principles of international human rights and State sovereignty. Requests for collection of evidence in a State

[168] *Kokesh* ("[s]ection 24(2) of the Canadian Charter on Rights and Freedoms (1982) provides: "[w]here…a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.")
[169] He was not involved in the investigation at the time the illegal acts complained of here occurred.
[170] Vanderpuye, p.130.
[171] *Id.*
[172] *Id.*p.171.
[173] *Id.*p.172.

should respect State sovereignty and the privacy rights of its citizens.[174] The Prosecution in this case trampled on both.

124. Excluding evidence necessarily has a cost of allowing persons to escape punishment for wrongdoing. But the interest of the world community to put persons accused of even the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[175] Democratic values such as personal integrity, privacy and private property rights, cannot always be sacrificed to meet law enforcement goals.[176]

125. As a court created to defeat impunity, the International Criminal Court cannot allow those who operate in its name to act with impunity. It must, instead, protect the integrity of its proceedings by excluding evidence, like the intercepted conversations in this case, when collected in disregard for State sovereignty and in violation of international human rights. As "guardians of the stream of justice", judges must "see that the stream of justice flows unpolluted."[177]

126. The Chamber erred in law and fact when admitting intercepted conversations obtained in violation of international human rights. It made legal errors when misinterpreting Article 69(8) and unreasonably shifting responsibility for the violation to the States. It made factual errors when unreasonably relying on unreliable information and undervaluing the violations by compartmentalizing its analysis of them. The result of these errors, individually and cumulatively, was to admit evidence antithetical and seriously damaging to the integrity of this Court's proceedings. Since all of Mangenda's convictions rested squarely on the illegally intercepted conversations, the Appeals Chamber should reverse all of those convictions and enter a judgment of acquittal.

IV. GROUND TWO: THE TRIAL CHAMBER ERRED IN FINDING THAT MANGENDA WAS PART OF A COMMON CRIMINAL PLAN BASED ON THE INTERCEPTED CONVERSATIONS CONCERNING D-25, D-29, D-15, D-54 AND D-13 (THE "INTERCEPT WITNESSES")

127. The Chamber found that Mangenda, Bemba and Kilolo together induced the Intercept Witnesses to tell the following five lies within the confirmed charges:

[174] *See* T. M. Mukimapa ("[t]he DRC, notably faced with a deficit in this area [technological resources], cannot unfortunately help but express its frustration at having so little benefit from the ICC's consideration, when it could reasonably expect a better fate.")
[175] *Lubanga* Arrest Judgment, para.39.
[176] *R v N*, para.11.
[177] *Lubanga* Arrest Judgment, para.28.

- **D-25**: denying a legitimate and documented payment of $132.61 for travel expenses;[178]
- **D-29**: acknowledging only six[179] out of eight contacts with Kilolo, and failing to volunteer the existence of telephones calls, all of which were before the "cut-off" date for contact with the Defence;[180]
- **D-15**: "evad[ing]"[181] a question concerning the date of his last meeting with Kilolo in order to conceal telephone contacts, including after the "cut-off";[182]
- **D-54**: lying that his last contact with Kilolo had been "one and a half to two months ago", thereby denying telephone contact that had occurred thereafter, including three telephone calls after the "cut-off";[183] and
- **D-13**: lying that his last contact with Kilolo was "several weeks before his testimony"[184] whereas contacts subsequent to that date had occurred, all of which were, however, before the "cut-off".[185]

Mangenda's conviction is based on these particular lies, rather than purported lies about more substantive issues, because the Chamber declared at the beginning of trial that it could not and would not adjudicate the truth of falsity of testimony concerning the Main Case.[186]

128. The Chamber did not find that Mangenda intended that Kilolo should, or knew that he would, induce these specific lies. The Chamber instead inferred his intent and knowledge because of his purported knowledge of "Kilolo's ***overall*** illicit coaching."[187] The Chamber inferred on this basis that Mangenda intended to participate in a common plan that included these lies.

129. Legal and factual errors materially affect this conclusion and compel reversal.

[178] TJ, paras.483,500.
[179] As discussed below, the Chamber incorrectly counts the witness as having acknowledged only five, rather than six, of his eight contacts with the Defence.
[180] TJ, paras.517,528,541. As addressed below, there were eight, not nine, contacts with this witness.
[181] TJ, para.582.
[182] TJ, paras.551,590.
[183] TJ, paras.622,646,651.
[184] TJ, para.662.
[185] TJ, paras.656,664,666.
[186] Opening 5:18-6:2.
[187] TJ, paras.505 (D-25) (italics added), 542 ("overall illicit coaching strategy" (D-29)), 591 ("illicit coaching activities" (D-15)), 652 ("knew that Mr Kilolo intended to and did illicitly coach D-54"), 667 ("illicit coaching activities").

130. **First**, the Chamber erred in law by assuring Mangenda at the beginning of the trial that he was not on trial for lies about the *merits of the Main Case*, then using those purported lies to establish the *mens rea* necessary to convict him.[188] This error was compounded by reliance on a common criminal plan that the Chamber itself found had not been adequately defined throughout the case.[189]

131. **Second**, the Chamber erred in law by not requiring intent to induce falsehoods. The Chamber adopted a definition of Article 70(1)(c) falling below such intent, and applied that lower standard in assessing Mangenda's *mens rea*. This was an error of law that materially affected the Chamber's findings.

132. **Third**, the Chamber erred in fact in inferring that Mangenda knew that Kilolo was inducing witnesses to lie or engaging in "illicit coaching." The key factual issue in this case was whether Mangenda's conversations with Kilolo reflected his intent that Kilolo should resort to criminal influencing or whether, rather, it is reasonably possible that Mangenda could have understood those conversations as not requiring criminal means. The Chamber failed to define or consider the latitude of witness preparation techniques allowed at the ICC; failed to consider whether Mangenda could have understood his conversations with Kilolo as not exceeding that framework; failed to consider the tendency of lawyers to exaggerate in their private conversations; and failed to appreciate the wide divergence between the scale of Kilolo's contacts with witnesses compared to the timing and content of Mangenda's knowledge thereof. The Chamber's analysis of the evidence concerning the Intercept Witnesses ignored relevant considerations, mis-appreciated the evidence and was clear error.

133. **Fourth**, the Chamber erred in fact in finding that Mangenda made an essential contribution to the common criminal plan and, in particular, to the five lies in purported execution of that plan. Mangenda's contribution to the preparation of four of the five witnesses was non-existent or *de minimis*. Providing the LRV's questions to D-15[190] did not contribute to any purported lie, let alone an essential contribution. The information he provided concerning in-court testimony did not assist Kilolo's purported inducement of any lies, and certainly none of the five objective lies.

[188] TJ, para.681 ("knowing the testimony to be false") vs. TJ, para.704 ("regardless of the truth or falsity").
[189] TJ, para.681.
[190] TJ, para.721.

134. These errors, individually and collectively, materially affected the Judgment; indeed, they are integral to the Chamber's ultimate finding that Mangenda presented false testimony and corruptly influenced witnesses.

A. *SUB-GROUND 2(A):* THE CHAMBER ERRED IN LAW BY RELYING ON MATTERS BEYOND THE SCOPE OF THE CHARGES, AND AN UNDEFINED COMMON PLAN, TO INFER MANGENDA'S *MENS REA* IN RESPECT OF THE INTERCEPT WITNESSES

135. The Chamber's reliance on testimony concerning the merits of the Main Case violated Mangenda's right to be informed of the charges against him under Article 67(1)(a), Article 74(2), and its own guidance at the beginning of trial. The Chamber indicated at the start of trial that it would not, based on its understanding of the Confirmation Decision, adjudicate or entertain evidence concerning the truth or falsity of the testimony concerning "the merits of the main case":

> [t]he Pre-Trial Chamber in this case explained explicitly that it was, and I quote, "Obviously not in a position to assess the reliability and truthfulness of the witnesses' testimony on issues pertaining to the merits of the main case." End of quote. This assessment of the Pre-Trial Chamber has not changed. This Chamber is similarly incapable of making such assessments. The evidence on the merits of the main case was presented before Trial Chamber III, not before this Chamber. Main case witnesses may have falsely testified on issues pertaining to the merits of the main case, including for example whether they were members of certain groups or entities, the structure of these groups or entities, their movements on the ground and the names of officials. However, this Chamber cannot assess the truth or falsity of these statements without command over the evidence in the main case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and relitigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this to be untenable. […] **the Chamber finds that it is not necessary to extend its inquiry as to whether or not the witnesses testified falsely to the merits of the main case.** […] So, when the Chamber says that this case is not about relitigating the main case, what this means is that this case is about alleged false testimony of witnesses in respect of 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.**[191]

136. The Chamber's guidance, in summary, was that the falsity of testimony concerning the merits of the Main Case would not be used to impute guilt.[192] A defendant would not be permitted, accordingly, to show that particular portions of testimony, or discussions about testimony, were, in fact, true. This was vital guidance since the offences defined in Article 70(1)(b) and (c) both require intent to induce a falsehood[193] and, in the case of Article 70(1)(b), the presentation of an actual falsehood.

137. The Chamber did not, however, categorically exclude the possible relevance of testimony or discussions about the merits of the Main Case. The Chamber stated that "[s]tatements 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."[194] The narrowness of this exception was addressed shortly after the start of trial:

> PRESIDING JUDGE SCHMITT: I remind you that I said that - and that is of course true, what you are saying, we are not relitigating the main case - none of the statements that have been given relating to the main case, to the merits of the main case to be precise, will be considered with regard to their truth or falsity. So this is perfectly clear. *We made a little reservation insofar, but not in the substance that we also said that what can of course be discussed in this courtroom is if coaching, preparation of a witness, however you would call it, has resulted in a certain content of a testimony, regardless of the truth or falsity. This is the line that we are going to draw and this is the line that this Chamber will stick to. I assure you that*.[195]

The "little reservation" appears to refer to showing that testimony of a witness mirrored the content of witness preparation in a way that could be probative of what

[191] Opening 4:16-6:4 (emphasis added). *See* Confirmation Decision, para.28 ("objectively false").
[192] The Confirmation Decision was somewhat ambiguous in this regard. On the one hand, the Confirmation Decision stated that the "Chamber is obviously not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case," but then went on state that there was evidence of falsehoods having been induced and given under oath in respect of "other substantive issues related to the charges against Mr Bemba in the Main Case, such as the witnesses' membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials." Confirmation Decision, para.64. The Chamber, however, excluded this category of "other substantive issues" in the guidance it provided at the start of trial.
[193] *See* Sub-ground 2(A).
[194] Opening 5:24-6:1.
[195] T-14-Red-ENG 16:2-10 (italics added).

the Chamber describes in the Judgment as "scripting."[196] An example of this analysis is paragraph 581 of the Judgement. Aside from this limited purpose, the Chamber reiterated that "none of the statements" about the merits of the Main Case "will be considered with regard to their truth or falsity."

138. Despite this guidance, the Chamber relied overwhelmingly on discussions about the *merits of the Main Case* to infer Mangenda's *mens rea*, and not within the "little reservation" foreseen by the Chamber. The extent to which the Chamber did so is illustrated by contrast with its findings concerning Kilolo:

- **D-13**: Kilolo was found to have urged D-13 to "give an incorrect account of the number of contacts with the Main Case Defence" (the objective lie).[197] Mangenda's knowledge, in contrast, was of Kilolo's "illicit coaching activities"[198] generally, inferred on the basis of Kilolo's comment to Mangenda that he was "busy with the colours of this person because you know the type … since it's already been a long time, in his mind he was not going to come anymore so he doesn't have these things in his head anymore."[199] This appears to have been a tacit reference to testimony concerning the *merits of the Main Case*.
- **D-54**: Kilolo's *mens rea* arose from the finding that he had directly instructed the witness to "testify incorrectly about his prior contacts with the Main Case Defence"[200] (the objective lie). Mangenda's knowledge,[201] in contrast, was based on conveying (far in advance of the witness's testimony)[202] Bemba's "instructions to Mr Kilolo to influence D-54 to testify to certain, specific matters" "to ensure consistency with other evidence."[203] These "instructions" concerned exclusively the *merits of the Main Case*.[204]

---

[196] *See e.g.* TJ, paras.825 ("Mr Kilolo gave the defence witnesses precise instructions on what to say when questioned in court, scripted their replies, rehearsed the questioning (even in the order in which the questions would be put), and provided instructions to them to dissemble when giving evidence, such as to act with indecision or show equivocation with a view to cover the illicit coaching that they had received"), 860, 862 ("the most instructive examples can be found in the illicit coaching of D-15 and D-54, with whom Mr Kilolo rehearsed extensively the scripted questions over the telephone and the witnesses, true to their preparation, reproduced the exact same answers in court, including false testimony concerning contacts with the Main Case Defence.")
[197] TJ, para.666.
[198] TJ, para.667.
[199] TJ, para.659 (English translation provided).
[200] TJ, para.651.
[201] TJ, para.652.
[202] The witness's testimony started on 30 September 2017 and Mangenda's last discussion with Kilolo concerning the anticipated substance of the witness's testimony was on 9 September 2017. *See* TJ, paras.597, 611-612.
[203] TJ, para.652.
[204] TJ, paras.606,609,611-612 (concerning such Main Case substantive issues as the witness's knowledge of events in Mongoumba, the witness's lack of military authority, the mixed composition of the troops, the timing

- **D-29**: Kilolo's *mens rea* concerning objective lies arose from the fact that he had purportedly instructed these lies.[205] Mangenda, instead of having been found to know that this testimony was untrue, let alone that it had been given at the urging of Kilolo,[206] again traversed the prohibited territory of the Main Case, inferring that Mangenda "approved and partook in Mr Kilolo's overall illicit coaching strategy"[207] based on his report to Kilolo about how badly the witness had testified about the *merits of the Main Case*.[208]
- **D-25**: Kilolo's *mens rea* about payments of money again arose from his own instructions to the witness,[209] whereas Mangenda's *mens rea* is again inferred through the use of the word "*couleurs*" in Mangenda's conversations with Kilolo and their discussion about the witness's performance on the stand in relation to the *merits of the Main Case* to infer that he "knew about, approved and partook in Mr Kilolo's overall illicit coaching activities."[210]

139. The Chamber was able to find that Mangenda knew about post-cut-off contact by Kilolo with exactly one of the 14 witnesses: D-15.[211] The Chamber may have inferred this meant that Mangenda could also have inferred, or at least had a strong suspicion, that Kilolo also told the witness not to reveal the post-cut-off contact – *i.e.* a lie within the scope of the charges. But Mangenda became aware of this only on 12 September 2013.[212] The Chamber did not find that Mangenda made any positive contribution to Kilolo's witness preparation after this date.[213] The Chamber, in the absence of evidence that Mangenda knew anything about the objective lies, relied overwhelmingly, if not exclusively, on Mangenda's discussions with Kilolo about witness testimony concerning the *merits of the Main Case* to infer guilt.

---

of the arrival of troops at PK12; a visit to his family at a certain time; what he filmed; the number of vehicles that arrived at a location; and his membership in the CCOP).

[205] TJ, para.541.
[206] TJ, para.538.
[207] TJ, para.542.
[208] TJ, para.534 (the witness had "*déconné à mort*" by talking about rumours of rapes at a place called Mongoumba and commenting that "*parmi nos témoins, le plus mauvais, c'est lui, c'est lui qui a maintenant la palme d'or*."), 539.
[209] TJ, para.504.
[210] TJ, para.505.
[211] TJ, paras.575-576.
[212] *Id.*
[213] Mangenda's last positive act in respect of the preparation of D-54, who appeared after D-15, was on 9 September 2013. *See* TJ, paras.610-612. The Chamber made no finding that Mangenda contributed to the corrupt influencing of D-13 other than by listening to Kilolo complaining on 10 November 2013 about being busy with the "*couleurs*" of this person. *See* TJ, paras.659-660.

140. The error is not avoided by the Chamber's ostensibly neutral formulation that Kilolo scripted testimony "regardless of the truth or falsity of the information therein."[214] First, Mangenda never participated in or observed Kilolo's preparation of witnesses so as to be able to infer that Kilolo was "scripting" in this manner. The Chamber's inference that Mangenda knew that Kilolo was engaging in illicit coaching was therefore based either on a judgment about the falsity of the *merits of the Main Case* discussed in the Kilolo-Mangenda intercepts, or was based on information that he did not have. As to the former, this was precisely what the Chamber at the beginning of the case stated was beyond the scope of the charges. Second, this formulation is legal error, as discussed in Ground 2(b), to the extent that it implies that recklessness as to truth is a sufficient *mens rea* for corrupt influencing. The Chamber itself defined common criminal purpose as influencing witnesses to give testimony "**knowing the testimony to be false**, at least in part."[215] "Scripting" may imply knowledge of falsity, but this would necessarily require knowledge of the method of witness preparation that the evidence showed Mangenda did not have.

141. The Chamber's failure to abide by the framework established at the beginning of trial violated Mangenda's right to be "informed promptly and in detail of the nature, cause and content of the charge" to be met. It also violated Article 74(2), since the Chamber's instructions were expressly based on its understanding of the charges.[216] The Defence proceeded on the basis of that framework, and the Chamber prevented the parties from litigating the truth or falsity of testimony going to the *merits of the Main Case*.[217] Convicting an accused on the presumption that such testimony was false, or intended to be false, was unfair.

142. Mangenda's conviction was materially affected by this legal error. The Chamber relied overwhelmingly on Mangenda's comments about testimony on the *merits of the Main Case* to infer that he was aware of Kilolo's "overall illicit coaching," on the basis of which the Chamber, in turn, inferred that Mangenda knew about and intended the inducement of the objective lies. The Chamber, but for the error, would have had to render a substantially different judgment.[218]

---

[214] TJ, paras.704,733.
[215] TJ, para.681.
[216] *See e.g.* Opening 4:15-19 ("[t]he Pre-Trial Chamber in this case explained that it was, and I quote, 'Obviously not in a position to assess the reliability and truthfulness of the witnesses' testimony on issues pertaining to the merits of the main case.' End of quote. This assessment of the Pre-Trial Chamber has not changed. This Chamber is similarly incapable of making such assessments.")
[217] *See e.g.* T-13-CONF-ENG 18:5-16; T-16-CONF-ENG 39:17-25 ("[REDACTED].")
[218] Situation in the DRC, para.84.

143. This error was compounded by reliance on a common plan defined for the first time in the Judgment itself. The Chamber, during closing arguments, suggested that the articulation of the common criminal plan had, up to that point, been deficient.[219] The Prosecution then tried to verbally articulate the common criminal plan.[220] The Chamber found, however, that the Prosecution had "fail[ed] in its closing statements to clearly articulate a definition of what it considered to be the common plan between Mr Bemba, Mr Kilolo and Mr Mangenda."[221] The Chamber then propounded, for the first time, its own definition of the common criminal plan:

> [t]he Chamber is convinced that Mr Bemba, Mr Kilolo and Mr Mangenda, in the context of defending Mr Bemba from the charges in the Main Case, agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour. More precisely, Mr Bemba, Mr Kilolo and Mr Mangenda agreed to instruct or motivate Defence witnesses to give a specific testimony, knowing the testimony to be false, at least in part, by giving monies, material benefits or promises, and subsequently to present these witnesses to the Court.[222]

144. The purpose of the criminal plan through which a person is alleged to commit a crime falls within the scope of the "nature, cause and content of the charge" of which the Accused must be "informed promptly and in detail" under Article 67(1)(a). The failure to articulate this purpose at the start of trial "constitutes a defect in the indictment."[223] The lack of a properly articulated criminal purpose throughout trial is self-evidently prejudicial.[224]

145. The failure to have adequately defined the common plan violated Mangenda's rights under Article 67(1). The appropriate remedy, particularly when viewed in conjunction with the Chamber's circumvention of the parameters for the trial that it set out at the beginning of trial concerning the merits of the Main Case, is to quash Mangenda's

[219] Closing 4:16-5:3 ("JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) […] the jurisprudence of the Court says that a common plan with more than two people to commit the crimes in question is a necessary element so that the mode of liability of direct perpetration as set out in Article 25 can be established. Now, in your final brief you said in a footnote, footnote – by its terms -- (Speaks English) 'By its terms, the overall strategy is properly legally characterised as a common plan.' (Interpretation) In the absence of an official translation, I understand this to mean that in light of the wording "overall strategy," this must be understood as representing a common plan from a legal point of view. Yet the part of your brief that is devoted to the overall strategy is made up of 120 pages and no other indication is provided regarding the content of the common plan in light of the activities of Mr Bemba, Mr Mangenda and the others.")
[220] Closing 4:16-6:10.
[221] TJ, para.681.
[222] *Id.*
[223] *Mugenzi & Mugiraneza*, para.116.
[224] *Mugenzi* AJ, para.122.

convictions for presenting false testimony and corruptly influencing witnesses on the basis of participation in any common criminal plan.

B. *SUB-GROUND 2(B):* THE CHAMBER ERRED IN DEFINING THE OFFENCE OF "CORRUPTLY INFLUENCING" AS NOT REQUIRING AN INTENT TO INDUCE A FALSEHOOD

146. The Chamber erred in law by applying a *mens rea* standard for the offences of presenting false evidence and corruptly influencing witnesses that did not include the intent to induce a witness to lie. The Chamber committed this error, albeit not consistently, both in its formal definition of the offences, and in the standard that it actually applied.

147. The Chamber defined the *actus reus* of Article 70(1)(c) as any conduct that "*modifies* the witness's testimony by instructing, correcting or scripting the answers to be given in court."[225] "[R]ecapitulating" information was deemed non-criminal, whereas "rehearsal" of testimony could be criminal if "the physical perpetrator *contaminated* the witness's evidence."[226] The Chamber did not expressly define "contamination," but described it as conduct that "render[s] it difficult, if not impossible, to differentiate between what emanates genuinely from the witness and what emanates from the instructor" or in a manner that "defeats the principle of immediacy and orality and renders impossible any adequate assessment of the credibility of the witness."[227]

148. The Chamber reduced the vagueness of this formulation somewhat by stating that any definition of the *actus reus* would have to "pay heed" to the "regime regulating those contacts [with witnesses], such as decisions on witness preparation and/or witness familiarization."[228] This definition, in effect, replaces the intent to induce falsehoods with the intent to violate the preparation or contact protocols. The zenith of the Chamber's "broad conception"[229] of these criminal offences is that:

> the Statute does not describe any specific form of such "influencing" but seeks to encompass any conduct via an open-ended provision. It therefore finds that Article 70(1)(c) of the Statute **is to be construed broadly**, allowing many different modes of commission to be captured thereunder **that are capable of influencing the nature of the witness's evidence.**[230]

[225] TJ, para.46.
[226] *Id.*
[227] TJ, para.46 (italics added).
[228] TJ, para.47.
[229] TJ, para.44.
[230] TJ, para.45.

149. The Chamber defined *mens rea* on the basis of the *actus reus* elements: whenever the perpetrator "knows that his or her action will bring about the material elements of the offence […] with the purposeful will (intent) or desire to bring about those material elements of the offence."[231] The *mens rea* required, accordingly, is the intent to "unduly influence the nature of the witness's testimonial evidence"[232] or to "compromise[e] the reliability of the evidence."[233] The Chamber found this definition consistent with Article 70's purpose to "criminalise any conduct that is intended to disturb the administration of justice by deterring the witness from testifying according to his or her recollection."[234]

150. The Chamber uses the term "illicit coaching" throughout the Judgment, which it defines as "encompass[ing] instructions to (i) testify according to a particular script concerning the merits of the Main Case, **regardless of the truth or falsity** of the information therein; (ii) testify falsely on the number of contacts with the Main Case Defence; (iii) testify falsely about payments […] and (iv) testify falsely about acquaintances with other persons."[235] Element (i) therefore seems to contemplate recklessness as to truth or falsity, even though the Chamber also expressly rejected recklessness as a standard for the offence of giving false testimony under Article 70(1)(a).[236]

151. The Chamber erred to the extent that it did not strictly adhere to a definition of presenting false evidence and corrupt influencing as requiring intent to induce a falsehood. As stated by the Pre-Trial Chamber:

> [a]s regards article 70(1)(c) of the Statute, the provision proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, *inducing the witness to falsely testify or withhold information before the Court*.[237]

[231] TJ, para.50.
[232] TJ, para.44 (italics added).
[233] TJ, para.46.
[234] TJ, para.44.
[235] TJ, paras.704,733 (emphasis added).
[236] TJ, para.29 ("[a]ccordingly, any lower *mens rea* threshold, such as *dolus eventualis*, recklessness and negligence, is insufficient to establish the offence under Article 70(1)(a) of the Statute.")
[237] Confirmation Decision, para.30 (italics added).

152. The equally authentic French version of Article 70(1)(c), *"[s]ubornation de témoins*," is a term that in the French criminal code and numerous other civil law codes[238] entails inducing *either* non-appearance of a witness *or* having a witness tell falsehoods:

> *[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.*[239]

153. The French text is entitled to particular weight given the prominent role that was apparently played by France in the evolution of the wording of this provision.[240] The term "corruptly influence" was first proposed by the United States for inclusion in the ICC Statute not in respect of witnesses, but officials:

> [a] person who […] directly or indirectly offers anything of value to an official of the International Criminal Court with intent to **corruptly influence** any official act […] shall be punished by a maximum of [ten] years' imprisonment.[241]

This language was put forward as a proposal in the second report of the Preparatory Committee,[242] and now appears in Article 70(1)(d) of the ICC Statute. The same report also proposed an article entitled "Obstructing the functions of the court" that encompassed: (i) "offer[ing] anything of value" or using "physical force, intimidation, or threats" to "prevent the attendance or testimony" of a witness; (ii) engaging in that same conduct "with intent to retaliate" against a witness for their testimony; or (iii) "destroy[ing], alter[ing], or conceal[ing] a record or other object" "with intent to impair its integrity" in an investigation or proceedings before the Court.[243] American

[238] 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 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*")[emphasis added].

[239] France, *Code pénal*, Art.434-15; 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*")[emphasis added].

[240] Friman, pp.607,619.

[241] A/AC.249/WP.41.

[242] 1996 Preparatory Committee Report, vol. 2, p.212.

[243] 1996 Preparatory Committee Report, vol. 2, pp.212-213. The offence of "corruptly persuading" a person not to testify, or to cause a person to "withhold testimony, or withhold a record, document or other object, from an official proceeding," to "evade legal process summoning that person to appear as a witness," or to be "absent from an official proceeding to which such person has been summoned" is expressly criminalised in 18 U.S. Code

law is unequivocal that the offence "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."[244]

154. Article 25 of the 2003 UN Convention Against Corruption, entitled "Obstruction of justice", likewise adopts the requirement when the "corrupt influence" concerns testimony:

> to induce *false testimony or to interfere in the giving of testimony* or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention.[245]

155. *Beqaj* and *Nshogoza*, relied on by the Chamber, provide no support to the contrary. Both cases involved inducing, and intending to induce, falsehoods.[246] The failure to expressly mention the falsehood requirement in cases where the requirement was clearly met, and not legally contested, is unsurprising and not legally significant.[247]

156. The Chamber's extremely "broad conception" of the offence as any conduct that "defeats the principle of immediacy and orality"[248] ignores other purposes underlying the definition of these offences, including the need for legal certainty and not curtailing robust, but permissible, witness preparation. The ICC OTP has advocated

§ 1512, entitled "Tampering with a witness, victim, or an informant". For an account of the genesis of these words as an American proposal, *see* Schabas, p.854.

[244] *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"); *LaShay*, p.718 ("corrupt persuasion occurs where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it"); *Khatami*, pp.911-12 ("[s]ynthesizing these various definitions of "corrupt" and "persuade," we note the statute strongly suggests that one who attempts to "corruptly persuade" another is, given the pejorative plain meaning of the root adjective "corrupt," motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior-such as impeding an ongoing criminal investigation"); *Shotts* ("[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose"); *Farrell*, p.488 (holding that 'corrupt persuasion' includes 'attempting to persuade someone to provide false information to federal investigators')"); *Cruzado-Laureano*, p.487 ("[t]rying to persuade a witness to give false testimony counts as 'corruptly persuading' under §1512(b)").

[245] United Nations Convention Against Corruption, Art. 25.

[246] *Nshogoza* TJ, para.194 ("that the Accused procured false statements from Witnesses GAA and A7/GEX, as well as the allegations that the Accused manipulated or instigated Witnesses GAA and A7/GEX to sign false statements and give false testimony according to these principles"); *Beqaj* TJ, paras.1-3 ("that between June and October 2004, Beqa Beqaj sought on six occasions to 'convince' two potential witnesses […] to withdraw heir statements against the accused in the *Limaj et al*. case"), 19 ("[t]he Prosecution suggested that the Accused otherwise interference with witnesses by suborning perjury, that is by secretly inducing potential witnesses to lie under oath.")

[247] Schabas, p.854; Friman, p.605.

[248] TJ, para.46.

the following techniques of witness preparation even immediately before the start of a witness's testimony:[249]

- "Review[ing] the topics to be covered in examination and **the likely topics of cross-examination**";[250]
- "Review[ing] and clarify[ing] **their evidence** with counsel";[251]
- "Review[ing], with the witness, his/her **prior statements**";[252]
- "Confirm[ing] whether the statements are accurate, **clarify[ing] additional points**, and document[ing] additions or retractions the witness may deem appropriate";[253] and
- "Show[ing] potential exhibits to the witness for his/her comment".[254]

157. The purposes for which these techniques have been justified include:

- "**streamlin[ing]** in-court examinations and **tailor[ing]** them to the most relevant or contested issues";[255]
- "help[ing] to **increase witnesses' confidence** and [] reduc[ing] their reluctance to reveal sensitive information on the stand";[256]
- "ensuring that witnesses give 'clear, relevant, **structured**, **focused** and efficient testimonies' in Court";[257]
- "**help[ing] witnesses […] recall events that may have occurred years earlier**";[258] and

[249] *Ntaganda* OTP Witness Preparation Motion, para.40 ("[p]roper witness preparation will enable witnesses to re-engage with their evidence in a more meaningful manner than by simply reading their prior statements alone. Having the opportunity to review these statements with counsel present allows witnesses to clarify their evidence, confirm the accuracy and completeness of their prior statement, disclose any new information that may be relevant and ask questions of counsel about what to expect. It also enables counsel to develop a vital rapport with witnesses to enhance their comfort and confidence, and to provide them assurances with respect to the overall process and the measures available to ensure their safety and well-being"); *Ntaganda* Witness Preparation Annex, p.4 ("[d]uring preparation sessions, the questioning lawyer may: 19. Review the statements together with the witness and question the witness on inconsistencies in his or her prior statements. 20. Explain, in general terms, the topics that the calling party intends to cover in examination-in-chief. 21. Explain, in general and neutral terms, the topics on which, in the calling party's opinion, the witness may be questioned during cross-examination. 22. Explain to the witness that he or she may not be questioned in court on matters upon which investigators previously questioned the witness. 23. Show the witness potential exhibits and ask him or her to comment on them for the purpose of determining the utility of using the exhibits in court. 24. Explain the role of the various participants in the courtroom"); *Ruto* OTP Witness Preparation Motion, para.5.
[250] *Ruto* OTP Witness Preparation Motion, para.5 (italics added).
[251] *Ntaganda* OTP Witness Preparation Motion, para.4.
[252] *Ruto* OTP Witness Preparation Motion, para.5.
[253] *Id.*
[254] *Id.*
[255] *Ntaganda* OTP Witness Preparation Motion, para.22.
[256] *Id.* para.25.
[257] *Ruto* OTP Witness Preparation Motion, para.4.
[258] *Id.*

- "enabl[ing] potential exhibits to be discussed with witnesses, which would '**enable[] a more accurate, complete, methodical and efficient presentation of the evidence**'".[259]

158. The Prosecution has, in practice, gone even further than this including by: repeatedly asking, even after a witness had completed correcting their prior statement, whether specific sections needed to be corrected;[260] and showing information of which the witness had no previous knowledge,[261] and arguing that this is an acceptable practice "as a matter of law."[262] In this very case, the Prosecution investigators showed documents not previously seen by the witness to suggest that their account is inaccurate; used information from unidentified sources to challenge a witness's initial story for the same purpose; and reminded witnesses that they might be prosecuted while encouraging them to make a better effort at remembering a specific event.[263] These various techniques have been deployed in conjunction with large payments to witnesses for expenses, such as lost income,[264] that the ICC Prosecution has argued are so immaterial they need not even be disclosed.[265]

159. The ICTY has authorised witness proofing, which is understood to include "informing the witness of appropriate and effective witness behaviour," raising "questions or inconsistencies between prior statements and information provided in witness proofing," and showing the witness not only "exhibits likely to be used" during testimony, but also "any other relevant material."[266]

---

[259] *Id.*

[260] 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.")

[261] *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 recognised the material or could 'provide a link' between the material and his evidence. 'The material can easily influence the witness,' said Bourgon.")

[262] T-40-Red2-ENG 52:13-19.

[263] CAR-OTP-0080-0135:132-155 ("*[i]ntervieweur 1: M. GANG, je veux juste vous rappeler ceci, hein? Parce que c'est important. Votre conseil est là. Mon collègue, il est là. C'est important que vous soyez véridique. Moi, je vous dis: l'accord relatif à la déclaration limitée peut être un couteau à double tranchant. […] Et je ne voudrais pas que vous vous sentiez menacé ou bien qu'il y ait une sorte de...d'impru...que vous pensiez que c'est de la contrainte*.") *See also* CAR-OTP-0080-0069:977-989.

[264] Main Case witnesses received thousands of dollars either directly from the OTP or based on the OTP's direct advocacy on their behalf that was known by the witnesses. CAR-OTP-0065-0989; *Bemba* Defence Submissions, 5 February 2016, para.45. *See also Lubanga* Intermediaries Decision, 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"); *Taylor* Contempt Decision, para.111 ("DCT-097 received a total amount of $40,441.37 from the Prosecution"); *Karemera* 27 October 2008.

[265] *Ntaganda* OTP Disclosure Response, para.49.

[266] *Haradinaj* Witness Proofing Decision, fn 20 ("[w]itness proofing can also include showing the witness their prior statements for the purpose of refreshing their memory; showing the witness exhibits likely to be used during the witnesses's testimony or any other relevant material; questioning the witness on areas relevant to their

160. These techniques follow the American model of witness preparation which permits, for example, "persistent[ly] and aggressive[ly]" putting a party's theory of the case to a witness.[267] Urging a witness to be more forthcoming with information that the calling party's counsel or investigator believes may assist an accused has been specifically approved as permissible at the ICTR.[268] 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."[269]

161. American prosecutors are allowed 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.[270]

162. Nothing in the Statute, Rules or Regulations of the Court suggest that any of the foregoing techniques are improper, let alone criminal. The witness contact protocols are silent as to the proper scope of pre-cut-off witness preparation. This level of preparation was allowed until shortly before testimony in the Main Case: the average cut-off for the fourteen witnesses, with the exception of one anomalous case, was four

---

testimony which should include questions on inconsistencies between prior statements and information provided in witness proofing"); *Limaj* Witness Proofing Decision, p.2 ("[t]he process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of the deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial").

[267] *Resolution Trust*, p.341. *See* Gershman.

[268] *Nyiramasuhuko* 30 November 2001, para.32.

[269] *Sebureze*, para.34.

[270] Cohen, pp.989-990.

days before testimony.[271] Five witnesses were permitted to be contacted within two days of their testimony. Re-interviewing in accordance with the foregoing purposes was also particularly necessary since formal statements were not taken from the Defence's witnesses, and since many witness had not been contacted for many months.[272] Such interviews, especially when conducted within the limits of the practices described above, may well be "capable of influencing the nature of the witness's evidence"; may, to some extent, "defeat[] the principle of immediacy and orality"; or may, depending on interpretation, "contaminate" a witness's testimony.[273] They are nevertheless accepted practice,[274] serve goals that have been deemed legitimate by the OTP and other international courts, and cannot, accordingly, properly be treated as probative of criminal *mens rea*. The Chamber, however, failed to even address the scope of permissible witness preparation, and ignored entirely extensive submissions on this issue.[275]

163. Mangenda's conviction is materially affected by this legal error. The actual standard applied by the Chamber to Mangenda repeatedly shows that it applied a *mens rea* standard falling below the requirement of intent to induct a falsehood. In particular, the Chamber relied on the following as probative of his *mens rea*:

- seeking to "influence" witness testimony;[276]
- a suggestion that Kilolo should advise a witness not to speculate or repeat unsubstantiated rumours;[277]
- proposing "recapitulat[ing] at least two of the three questions" that would be posed to a witness during testimony;[278]

[271] The average time between the handover of the 13 Defence witnesses and their testimony in the Main Case was four days. The cut-off dates as provided by the Registry show the following intervals, in days, before testimony: D-2 (2); D-3 (5); D-4 (4); D-6 (8); D-13 (1); D-23(4); D-25 (9); D-26 (4); D-29 (2); D-54 (1); D-55 (6); D57 (1); D-64 (5). D-15's cut-off was 2 months before his testimony, which arose only because the witness's testimony was re-scheduled several times. Even then, the Chamber authorised contacts well after the official cut-off. *See* VWU Annex.
[272] *Bemba* Reply to LRV's Observations, para.61; *Bemba* LRV Observations, para.95.
[273] TJ, paras.45,46,936.
[274] *See e.g. Limaj* Witness Proofing Decision, p.3 ("[a]lso particularly relevant are the cultural differences encountered by most witnesses in this case, when brought to The Hague and required to give a detailed account of stressful event, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. These matters, in the Chamber's view, are properly the realm of proofing.")
[275] The Chamber, notably, failed to address the submissions before it on this issue. *See e.g.* FTB, paras.81-82,129-131.
[276] TJ, paras.606,652.
[277] TJ, para.539 ("Mr Mangenda indicated to Mr Kilolo that a particular response should be elicited from D-30 in court: ***Mangenda**: ... peut-être qu'ils vont poser à sa femme le même genre des questions, si elle avait entendu des rumeurs comme son mari avait aussi entendu au sujet de Mongoumba ... sur les crimes commis par les gens du MLC, là vraiment au moins qu'elle réponde qu'elle ne sait pas.* ***Kilolo**: Euh là... là je sais comment nous allons nous entretenir."*)

- using expressions in a conversation with Kilolo that Bemba's instructions were that the witness "should clearly state", "has to say" or "[i]s going to say";[279]
- discussing the "best approach to ensure consistency with other evidence and avoid contradictions" by the witness;[280]
- "concretely predicting"[281] to Kilolo a witness's testimony or "expect[ing]" a witness to "state certain facts";[282] and
- referring to the "preparation" of witnesses.[283]

164. None of these actions are probative of *mens rea*. These references are, on the contrary, exculpatory to the extent that they show that Mangenda's understanding was that Kilolo was conducting himself within the limits of lawful witness preparation. That error was particularly important for Mangenda given the absence of any evidence, or finding, that Mangenda ever observed Kilolo's witness preparation techniques, including purported "scripting" that would be demonstrative of inducing lies.

165. The key distinction that is not reflected in the Chamber's analysis is between "influencing" and "influencing *to induce a falsehood*." The former is an inevitable consequence of the witness preparation techniques that have been long accepted at this Court and advocated by the OTP itself; the latter is a criminal offence. The legal standard adopted and applied by the Chamber eviscerates or blurs this key distinction. If the Chamber had upheld this distinction, as it was required to do, it would have rendered a judgment "substantially different from the decision that was affected by the error."[284] The only appropriate remedy is to reverse the finding that Mangenda participated in a common plan to commit offences against the administration of justice[285] and reverse conviction on all counts pursuant to Article 25(3)(a).[286]

[278] TJ, para.566.
[279] TJ, para.605.
[280] TJ, para.652.
[281] TJ, para.605.
[282] TJ, para.488.
[283] TJ, para.536.
[284] *Lubanga* AJ, para.19.
[285] TJ, paras.802,848,910,914.
[286] TJ, p.455.

C. *SUB-GROUND 2(C):* THE CHAMBER ERRED IN FACT IN CONCLUDING THAT MANGENDA KNEW THAT KILOLO WAS INDUCING THE INTERCEPT WITNESSES TO LIE

1. Introduction

166. There was no evidence, and the Chamber did not find, that Mangenda participated in any witness interview concerning testimony. The Chamber instead relied on Mangenda's telephone conversations with Kilolo in respect of D-25, D-29, D-15, D-54 and D-13 to find that "Mangenda was informed on a substantive and continuous basis of Mr Kilolo's activities" and knew that Kilolo's meetings with these witnesses included a practice and strategy of inducing them to lie.[287]

167. The Chamber's conclusion is clear error. Mangenda knew little to nothing about the scale or content of Kilolo's preparation of witnesses. The conclusion to the contrary is based on numerous errors of fact, including mis-appreciating and misinterpreting the intercepted conversations; failing to assess whether the conversations are probative of Mangenda's knowledge that Kilolo was inducing lies as distinct from knowledge that Kilolo was preparing witnesses by non-criminal means; failing to compare the extent of Kilolo's contacts with witnesses to the evidence of Mangenda being informed thereof; and investing the word "*couleur*" with unwarranted meaning. Further, the Chamber made no finding that Mangenda knew that Kilolo had induced, let alone engaged in any action intending to produce, any of the five "objective" lies for which Mangenda was convicted.

168. The Chamber also failed to take into consideration that communications between co-workers in a (supposedly) private setting may contain exaggerations. Mangenda used words such as "*amener*" in a context that verifiably involved no improper witness influence, even though the word itself might imply such a meaning. Colleagues speaking in private conversation seldom insert all caveats necessary to convey to an eavesdropper that these objectives are not to be achieved by resort to improper pressure or influencing to tell lies.

[287] TJ, para.847.

2. Factual Errors Concerning D-25

169. The Chamber made no finding that D-25 lied on any subject other than his denial of having received a legitimate reimbursement of travel expenses to the tune of $132.61.[288]

170. The Chamber imputes to Mangenda knowledge that Kilolo was engaging in illicit coaching based on five elements from two conversations: (i) the use of the words *enseignement* ("teaching") or *renseignement* ("information") in Mangenda's comment on D-25's testimony that *"il a bien suivi [les enseignements]";*[289] (ii) Mangenda's comment that if the witness had answered in an excessively detailed or perfect manner that "*ça peut paraître un peu suspect*";[290] (iii) Mangenda's comment that the Judges were smiling or laughing in response to an answer from the witness that appeared to corroborate another witness too perfectly, which could have indicated to that "*un entretien s'était tenu secrètement*";[291] (iv) Mangenda's comment that the witness had erroneously indicated that he had not met with the Defence military expert;[292] (v) Kilolo's comment that he had given the witness "clear instructions" that he should not embark on discussions when something is not clear;[293] and (vi) Mangenda's reference to the client mentioned that considerable "*couleurs*" work had been done, and Kilolo's response that how could "*quel qu'un peut lui sortir des vérités […] Et puis surtout avec cette précision-là*."[294]

171. (i) The Chamber found that the word "*enseignements*" was understood by Mangenda as denoting illicit coaching because, in response to Kilolo's question using this word, he "affirmed and answered by explaining the substance of the witness's testimony."[295] This does not show, however, that the information was a lie or that the information was not genuinely known to be true by D-25. The reference to *enseignements* could equally refer to the process of reviewing, confirming, clarifying, streamlining, structuring or focusing a witness's testimony in accordance with the techniques of permissible witness interviewing described above.[296] Notably, the Chamber did not find that the testimony in question was false, that D-25 knew this information to be

[288] TJ, para.500.
[289] TJ, para.488.
[290] TJ, para.489.
[291] TJ, para.490.
[292] TJ, para.493
[293] *Id.*
[294] TJ, para.495.
[295] TJ, para.488.
[296] *Supra* Sub-ground 2(B).

false, that Kilolo knew this information to be false, or that Mangenda knew it was false. The Chamber's reliance on the juxtaposition of "*enseignements*" immediately followed by an element of testimony is not probative of illicit coaching, let alone that Mangenda knew that this was a falsehood induced by Kilolo.

172. What is *not* said in the phone calls between Kilolo and Mangenda is also relevant to its proper interpretation. The cut-off date for D-25 was eleven days before his testimony.[297] After the cut-off, Kilolo purportedly spoke to D-25 to him on five occasions for a total of 25 minutes (*i.e.* an average of five minutes per call).[298] Kilolo mentions none of these post-cut-off conversations to Mangenda; even if there had been such mention, this would indicate no more than that Kilolo was engaging in unauthorised contacts with the witness, not that he was necessarily inducing him to tell lies. Kilolo also engaged in unauthorised contact on the evening after his first day of testimony, and on the morning of his second day of testimony, for a total of 33 minutes.[299] Kilolo makes no mention, or even any implied reference, to such conversations having taken place. The Chamber does not even mention the absence of such information in the telephone calls between Mangenda and Kilolo as being relevant to its assessment.

173. The unduly literal interpretation of "*enseignement*" is illustrated by other examples of Mangenda exaggerating. For example, in describing the skill with which Haynes had conducted a re-direct examination of a witness, Mangenda says:

> *il a fallu que PETER revienne là-dessus* ***pour l'amener à comprendre*** **[to lead him to understand]** *que que … la toute première compagnie qui avait traversé c'était juste pour la reconnaissance avant la grande traversée*.[300]

This passage is, in fact, little different from most other passages relied on by the Chamber to indicate Mangenda's knowledge or intent that Kilolo should induce witnesses to lie. If this comment had been made about Kilolo, rather than Haynes, the words "lead him to understand" could also be read overly-literally as meaning that the witness should be improperly influenced to a certain conclusion. The context, however, demonstrates that Mangenda is referring to questions asked in a proper and skilful manner to yield a favourable response.

[297] TJ, para.484;VWU Provision of Information.
[298] TJ, para.484.
[299] TJ, para.485.
[300] CAR-OTP-0074-0992:17-18 (emphasis added).

174. (ii) Mangenda's comment about an excessively detailed answer potentially being perceived as suspicious does not indicate knowledge of illicit coaching or corruptly influencing D-25:

> *[m]ais lui il se limitait […] à répondre aux questions qu'on lui posait. Maintenant là...euh...on te pose la question A, mais toi, tu réponds jusqu'à Z. Ça démontre déjà...euh... ça peut para[î]tre un peu suspect quoi*.[301]

Mangenda's comment is about appearance, not that the suspicions are well-founded. The Pre-Trial Chamber noted that Mangenda had made a similar comment about the authenticity of certain documents and found – correctly – that this was a comment about appearance rather than reality. The charge was not confirmed.[302] The Judgment itself questions the credibility of witness who offered testimony "unprompted and out of context."[303] Mangenda's words may be reasonably interpreted as expressing the view that Judges may view a witness answering unasked questions perceived as excessively prepared rather than spontaneous.[304] The Prosecution has likewise argued that it is permissible to advise a witness during proofing to be "concise."[305] Interpreting the words "*ça peut paraître suspect*" as meaning that there was a basis of such perceptions misreads the passage, is speculative, and excludes other reasonable – and much more likely – interpretations of what Mangenda meant to say.

175. (iii) Mangenda did "surmise" that the Judges perceived D-25's testimony to be excessively and suspiciously corroborative of other evidence and that "if that was corroborated, that means that a meeting was held in secret […] But there were no grounds for them to establish that…."[306] The corroboration apparently concerned the language being spoken by soldiers at a particular location, PK12.[307] The Chamber made no finding that this was a lie, or that Kilolo or D-25 – let alone Mangenda – knew this was a lie. Mangenda, as the passage indicates, merely describes the Judges' reaction. The Chamber's interpretation – that "the accused were keen on making sure that the witness stayed on script, but were also concerned that their illicit activities

[301] CAR-OTP-0074-0991:93-96 ("he confined himself to answering the questions that he was asked. Now, [if] you're asked question A and you respond all the way to Z. That already shows … that can appear a bit suspicious.")
[302] Confirmation Decision, para.48.
[303] TJ, para.547.
[304] *Ntaganda*, T-88-ENG 11:19-12:24.
[305] *Ntaganda* OTP Witness Preparation Motion, para.40 ("[i]nform the witness about appropriate witness behaviour, including the need to speak slowly and concisely.")
[306] TJ, para.490; CAR-OTP-0074-0991:28-35.
[307] CAR-OTP-0074-0991:15.

may be suspected"[308] – is speculative and unsubstantiated by evidence. More specifically, the passage is not probative of any acknowledgement by Mangenda that any improper meeting had, in fact, taken place; Mangenda is again describing what he perceived to be the judges' reaction and what he inferred to be their suspicion. Even assuming that his statement reflects his own knowledge or suspicion of a post-cut-off communication with D-25, the statement is still not probative that Mangenda had any awareness that D-25's statement was false, or that Kilolo had induced him to give false testimony in that regard.

176. (iv) The Chamber asserts that Mangenda's description of D-25's denial that he had met with the Defence's military expert refers to "an illicit coaching meeting."[309] This is manifestly incorrect. The Prosecution had already been notified of the meeting by way of disclosure of military expert French General Jacques Seara's report.[310] In fact, Mangenda only realises that D-25's testimony was erroneous, as he says to Kilolo, because he "quickly pulled out Seara's report, [to see] if Seara mentioned his name, and in fact he had mentioned his name."[311] Mangenda's comment that "*[o]n avait oublié de lui rappeler par rapport avec sa rencontre avec Seara*"[312] – to which Kilolo responds "*[a]h … ah merde*!"[313] – does not reflect any suggestion of improper witness preparation. Kilolo, using the techniques advocated by the Prosecution, was perfectly entitled to "show potential exhibits to the witness for his/her comment".[314] This would have included the Seara report, where D-29's name is mentioned as having been interviewed or consulted. D-29 would have thus been reminded of this interview and may have testified accurately. Nothing in these facts reflects any impropriety; the Chamber's finding to the contrary is symptomatic of a systematic failure to distinguish between permissible and impermissible witness preparation.

177. Kilolo does express relief that D-25 had not testified that Kilolo had been present when D-25 met with Seara.[315] The relief is misplaced insofar as there is no impropriety in counsel being present during a meeting between an expert and a witness.[316] In any event, there is no foundation for the view that Kilolo's relief arose

[308] TJ, para.490.
[309] TJ, para.493.
[310] CAR-D24-0003-0342 at -0350; T-229 4:15-19; T-230 15:20-23.
[311] CAR-OTP-0074-0992:148-149.
[312] CAR-OTP-0074-0992:144.
[313] CAR-OTP-0074-0992:146.
[314] *Ruto* OTP Witness Preparation Motion, para.5.
[315] TJ, para.493, CAR-OTP-0074-0992:158-160.
[316] *See Hadžić*, T.4380 (Prosecution expert military witness describing his presence at interviews of witnesses with Prosecution counsel).

from a concern to conceal any inducement of D-25 to tell falsehoods. Indeed, it is implausible that Kilolo would have induced D-25 to tell falsehoods during a meeting with a French military expert. This exchange is not probative of Mangenda's knowledge that Kilolo was inducing any witness to tell falsehoods.

178. (v) The Chamber indicated that it placed "great weight on Mr Kilolo's admission that the reason D-25 had testified to his satisfaction was due to his 'clear instructions.'"[317] The phrase that Kilolo uses – shortly after saying "*merde ... merde…*" as result of D-25's incorrect answers regarding his meeting with Seara[318] – is "Yes, but because the problem is that I had given him clear instructions, that is to say, that anything that isn't clear, that he really should not engage in that discussion."[319] The "clear instructions" may have been no more than "do not speculate" – an instruction that falls within the scope of what the OTP has advocated at the ICTY.[320]

179. (vi) The Chamber relies on Mangenda's comment that Bemba "*a vu vraiment que non ... un travail appréciable de couleurs a été effectivement fait*" and Kilolo's response that Bemba "*a dû se rendre compte, parce que comment quelqu'un peut lui sortir des vérités? […] Et puis surtout avec cette précision-là, parce-que c'est le seul finalement […] qui dit Kibonge comme ça, Luhaka comme ça […] bon voilà le ... le ... le ... au moins [REDACTED], ça c'était clair […] Et puis très tôt le matin et tout ça*."[321] Although these comments may reflect satisfaction with illicit coaching, they might also reflect satisfaction with non-illicit witness preparation. Indeed, Kilolo's refers the witness's testimony as "truths." Kilolo's reference to "precision" is little different from the objectives defended by the OTP as legitimate: "streamlin[ing]", "tailor[ing]", "focus[ing]" and "helping witnesses […] recall events that may have occurred year earlier."[322] The use of the word "*couleurs*" in this context undermines the Chamber's theory that "*couleurs*" is a reference to inducing lies rather than engaging in witness preparation.

180. None of these passages, taken individually or as a whole, show that Mangenda knew that Kilolo had induced D-25 to lie on any subject, let alone to lie about having

[317] TJ, para.494.
[318] CAR-OTP-0074-0992:163.
[319] TJ, para.493; CAR-OTP-0074-0992:179-180.
[320] *Haradinaj* Witness Proofing Decision, fn 20 ("[w]itness proofing includes […] informing the witness on the areas likely to be asked in examination, cross-examination and re-examination as well as the form in which questions are likely [to] be asked and expected to be answered; informing the witness of appropriate and effective witness behaviour.")
[321] CAR-OTP-0074-0992:108-117.
[322] *Ntaganda* OTP Witness Preparation Motion, paras.22-25; *Ruto* OTP Witness Preparation Motion, para.4.

received a reimbursement of $132.61. The phrases manifestly do not support this interpretation or are ambiguous as to whether Kilolo is referring to permissible preparation or the inducement of lies. Even Kilolo's concern regarding the Seara meeting demonstrates only relief about impropriety, not the commission of an offence under Article 70. Kilolo does not affirm that the content of any of D-25's testimony was untruthful, nor does the Chamber make any finding that any elements of D-25's testimony were falsehoods. Kilolo does not reveal to Mangenda during the conversation after the first day of testimony that he intends to call D-25 that evening. In short, the Chamber erred in fact in interpreting these conversations as demonstrating Mangenda's knowledge that Kilolo was corruptly influencing D-25, or his intent to participate in a criminal plan with Kilolo to do so.

3. Factual and Legal Errors Concerning D-29

181. The only lie that the Chamber determined had been told by D-29 during his Main Case testimony was that, despite truthfully acknowledging six contacts with the Defence, he had lied insofar as he "withheld all other contacts."[323] The Prosecution asserted that these "other contacts" consisted of two non-acknowledged telephone calls by Kilolo and one non-acknowledged in-person contact, during which Mangenda was present.[324] The Chamber accepted this argument, finding that one of the contacts about which D-29 had lied consisted of "his encounter with Mr Kilolo, together with Mr Mangenda, when they escorted D-29 and D-30 to their meeting with the VWU."[325]

182. The Chamber committed clear error in finding that the witness had lied about his encounter with Kilolo and Mangenda when he was introduced to the VWU. The witness expressly acknowledged this meeting during his Main Case testimony:

> [t]hey told me they were coming. Then we made an appointment. **They took me to the hotel and they introduced a lady** to me as an assistant in the Court, and there was also a gentleman who is a psychologist, as well as a security officer.[326]

183. The Prosecution, during its cross-examination of D-29 in the Article 70 case, spuriously asserted that the taxi-ride to the hotel for introductions to the VWU should be treated as a separate "contact":

---

[323] TJ, para.528.
[324] T-41-Red2-ENG 45:20-47:15-17; OTP Closing Brief, para.218 ("KILOLO was in contact with D-0029 at least 12 times").
[325] TJ, para.528.
[326] T-339 36:2-4.

> [y]ou told us today that you shared a taxi ride with Mr Kilolo and a male colleague to the hotel in which you met representatives of the VWU, and that **you had a conversation with him during that taxi ride in which your wife was also present, but you don't mention that contact when you testified in August of 2013; isn't that correct? A. I -- I don't know**. I don't know. But I -- I took a taxi with Maître Kilolo and his colleague, and we went to link up with the VWU team at the hotel. That team is aware of what happened and that is it. Maybe I didn't mention this during my testimony and that would be correct.[327]

184. The witness was right and the Prosecution was wrong: D-29 had said during the Main Case that the Defence "**took me to the hotel**." The witness did not deny – or even fail to mention – that the Defence had taken him to that meeting. The Prosecution in the Main Case asked no follow-up. Even the Chamber elsewhere in the Judgment refers to the escorting and the handover as a single "meeting."[328] The Chamber's finding that the witness lied about a contact with the Defence at which Mangenda was present is, accordingly, manifestly wrong; on the contrary, D-29 acknowledged this very contact.

185. The Chamber also erred in fact in finding that D-29's failure to mention the two remaining contacts with Kilolo was a lie, rather than merely a mistake.[329] D-29 had two in-person meetings with Kilolo – one in Brazzaville in April 2012[330] and another on 13 August 2013 when he was introduced to the VWU.[331] D-29's cut-off date was 26 August 2013, 2 days before the commencement of his testimony.[332] On 28 and 29 August 2013, D-29 testified *via* video-link that he had had a total of six contacts with Kilolo – four calls and two meetings.[333] D-29 testified that he had one phone call from Kilolo shortly before a meeting with Kilolo and a white woman in April 2012 in

[327] T-41-Red2-ENG 46:12-19.
[328] TJ, para.515.
[329] TJ, para.528. ("[h]e deliberately withheld all other contacts, including (i) his encounter with Mr Kilolo, together with Mr Mangenda, when they escorted D-29 and D-30 to their meeting with the VWU, and (ii) his telephone call to Mr Kilolo during which he requested assistance in relocating his son.")
[330] T-339 20:8-21:2.
[331] T-339 35:18-36:6 ("Q. Did you meet or had any contact with them after that? A. Yes, I met with them again recently. Before meeting with them, they called me on the phone and told me that the Prosecutor needed to speak with us - with me - and I said, "No, I prefer not to speak any longer. Maybe only on the day of the courtroom." And they said, well, they understand, and when they came to Brazzaville, they told me they were in Brazzaville – […] They told me that they were coming. Then we made an appointment. They took me to the hotel and they introduced a lady to me as an assistant in the Court, and there was also a gentleman who is a psychologist, as well as a security officer. They introduced me to those people and told me that from that day I would have no further contact with them and that I would be dealing with those people.")
[332] VWU Annex, p.7.
[333] T-339 36:21-37:4 ("Q. Any type: Telephone, emails, face-to-face. Any type of contact. A. No, I believe I have told you everything. They told -- they called me. He called me the first time, introduced himself as a lawyer. I asked him how he had my contacts and then he told me that he had his own contacts. The second time he announced to me that he was travelling to where I was. Then he came with a white woman. They received me. Then he called me again to say that the people at the Court needed to speak with me and I said, no, I did not want to speak with them. Then he called me again to introduce me to someone, [REDACTED], and others. I believe that is all. That's all."); VWU Annex, p.7 ("13.08.2013 at location of testimony (first meeting in person in the presence of the defence)")

Brazzaville.[334] He did not indicate that Kilolo had advised him not to mention these dates. Rather, he testified that Kilolo had advised him that he, Kilolo, would not be in further contact after the cut-off date.[335] The witness's last two contacts with Kilolo were between two to six weeks before his testimony.[336] The only contact of substance that he failed to mention was one phone call to Kilolo requesting for assistance in relocating his son, which was on 10 August 2013[337], before the cut-off date.

186. Mangenda's conviction must be reversed on the basis of this error alone. The absence of an objective lie means that no lie within the scope of the charges can be attributed to Mangenda.

187. The Chamber also relied extensively on discussions about the merits of the Main Case as providing indications that Mangenda knew that Kilolo had engaged in offences against the administration of justice with D-29.

188. The first purported indication is Mangenda's description to Kilolo of the concerns of co-counsel Haynes, who was conducting the examination, that he was not aware of all elements of the witness's anticipated testimony, and that some such elements had taken him by surprise.[338] The main element of surprise appears to concern the witness's testimony that certain perpetrators at a place called PK12 had been speaking Lingala, which Haynes considered to be negative for Bemba's defence.[339] The Chamber interprets these various discussions as "demonstrat[ing] the emergence of suspicion within the defence team in the Main Case about the actions of the two perpetrators"; expressing concern that Haynes "may have understood the co-perpetrators' illicit coaching strategy"; as demonstrating their mutual understanding of the need to "keep their illicit coaching activities secret from other members of the

[334] T-339 20:2-21:2.
[335] T-339 42:24-43:5 ("A. I explained to you at the outset that the Defence contacted me, saying that they were coming to Brazzaville and that I was due to meet with them at the Poto Poto cross-roads. That's where they gave me an appointment. I took a taxi, got to the Poto Poto cross-roads. There's a hotel not far afield from them. And they introduced me to those agents. They said that from that day on I would not be entering into any further contact with them, except for those gentlemen who would be explaining to me what would happen and they would then lead me on to the trial.")
[336] T-339 43:16-17 ("Q. And when did they introduce you to the other agents of the Court? A. Recently, I believe a week or maybe a little bit more ago. That's right"); VWU Annex, p.7 ("01.07.2013 by phone in HQ (joint phone call the VWU and the Defence, 13.08.2013 at location of testimony (first meeting in person in the presence of the defence)").
[337] CAR-OTP-0090-0630, at -0707.
[338] CAR-OTP-0074-0993:22 ("*l'a personne l'a surprise avec ses déclarations quoi*.")
[339] CAR-OTP-0074-0994:28-30 ("*[n]on, il a seulement si, est-ce que nous avions rencontre cette personne-là? Lui, sa seule plainte c'est par rapport à ce qu'ils disent que les auteurs de crimes parlaient Lingala. Et que ça peut prêter à confusion avec les gens du MLC, et que ça peut être mal apprécié*.")

defence team"; and as "strikingly" illustrating that Mangenda discussed "illicit coaching of the defence witnesses, on an equal footing with Mr Kilolo."[340]

189. These passages do reflect an apparent discontent by Haynes that he was not fully informed, as examining counsel, about the prospective testimony of witnesses. Being so informed is an essential component of an effective examination of a witness, including deciding what should or should not be asked. Haynes' concern, however, is not that unexpectedly *good* testimony has been heard, but unexpectedly *bad* testimony.[341] Mangenda's concern is not that illicit coaching will be discovered, but rather that Haynes will blame Kilolo in front of Bemba for not having alerted him to this harmful testimony. Mangenda, in the course of explaining Haynes' apparent "frustration," "surprise," and complaints to the client, offers a highly important overview of **his own** understanding of Kilolo's witness preparation, as well as the dynamics within the Defence team:

> *AK: […] C'est là qu'il [Haynes] nous a écrit en disant que «ni moi ni le Client n'avons été informé.» […] JJM: Non moi, j'avais parlé avec le Client, j'avais parlé avec le Client par rapport à cela dans la salle d'audience. Je lui ai parlé rapidement ... AK: Mm. JJM: Expliquer quoi oui. Lui maintenant il … lui, je ne le comprends pas. Lui, les interviews de ces témoins-là, sont d'ailleurs des interviews préliminaires. Ce qui se passé es que, lorsque vous rencontrez pour la* **première fois vous** *enregistrez, vous écrivez. On ne tient pas compte de ces interviews-là. D'ailleurs une Interview pareille, en principe ce qui se passe est que, dès que vous terminez à transcrire vous amenez au témoin, le témoin quand il va lire, ah ... ah d'ailleurs j'avais oublié, il change encore, c'est après que vous allez rédiger la version finale, qui sera propre à être signée, c'est sur ça que vous allez vous baser.* ***Lui, il*** **[referring evidently to Haynes]** ***fait comme ... AK: Mm. JJM: Les.. les... toutes premières rencontres, ces interviews-là, lui est en train de les prendre comme les paroles d'évangile.*** *AK: Mm, mm, mmm. JJM: Même le procureur, i' fait ça, il fait des… des pre-recording sur. .. c'est après cela qu'il analyse s'il constate que c'est bon c'est à ce moment qu'il viendra faire une interview proprement dite. Mm. AK: Mm, mm, ... mm, exactement. JJM: Mm. AK: C'est, c'est comme le ... en fait, c'est pas les fiches, les screening notes? JJM: Ah, oui, les screening notes, voilà ciest ça. AK: Ce sont les screening notes. JJM: C'est ce que le procureur lui appelle les screening notes, pourquoi est-ce qu'il appelle ça les screening notes? C'est quand il fait, c'est juste pour faire une analyse. Vous voyez? AK: Mm. JJM: Donc s'il voit que le témoin est ban, la, il veut maintenant faire les interviews. AK: Oui. JJM: Bon, mais la maintenant PETER chez nous nos screening notes, il prend ça*

[340] TJ, para.726.
[341] CAR-OTP-0074-0994:28-30 ("*[n]on, il a seulement si, est-ce que nous avions rencontre cette personne-là ? Lui, sa seule plainte c'est par rapport à ce qu'ils disent que les auteurs de crimes parlaient Lingala. Et que ça peut prêter à confusion avec les gens du MLC, et que ça peut être mal apprécié*.")

> *pour des paroles d'évangile avec des témoins disant ... mais il ne fait que prendre des screening notes au moment de l'interview ... euh .. proprement dite le témoin se rappelle d'autres choses et il change ... C'est tout. AK: Exactement. JJM: Bon, moi, moi ... En tout cas moi le stagiaire m'avait posé cette question, c'est comme cela que je leur ... je leur ai répondu. Je dis mais non lace sont des screening notes. AK: Mm. Mm. Mm. JJM: ou 'est-ce que ça se passe, normalement, quand on prend des screening notes la? AK: Mm. JJM: Et. .. , et, vous vous faites une idée si le témoin est ban pour vous. Et après vous part ... vous allez partir pour faire des interviews proprement dit {sic.]. Et même quand vous terminer avec ces interviews-là, avant de faire signer ça au témoin, vous devez lui faire lire ... parce qu'il peut encore se souvenir d'autres choses et ça peut changer certaines aspects. Et ce n'est qu'après avoir fait cela que le témoin signe. C'est en ce moment-là, qu'on peut dire non, non, on ne peut ne pas changer X, You Z.* ***Je dis mais la ce ne sont que des screening notes. Tellement qu'on n'avait pas de temps on a juste fait des recordings. Et puis nous-même nous venons transcrire. Le témoin n'a jamais vu cela, voilà il n'a jamais signé cela ... AK: Mm. Mm. Mm. JJM: II se peut, que, les idées générales sont préservées sur certains aspects des choses, le témoin peut porter ... apporter des détails tout consort donc, voire même des détails contraires à ce qu'il avait dit lors des screening notes. AK: Mm, mm, exact. JJM: Dans ce cas, c'est PETER qui… euh ... AK: Mm. JJM: Mais je comprends sa frustration. Sa frustration étant déjà que : il y a eu un travail qui a été effectué, auquel il n'a pas été associe. Ça le frustre.*** *AK: Mm-mm, OK. JJM: Alors pour, pour lui il aurait souhaité vraiment que ce travail-là auquel il n'a pas été associe, que ce soit réellement catastrophique. Pour le de ... en* ***tout cas il est en train de chercher par taus les voies et moyens cette occasion-là de pouvoir dire bon voilà vous avez effectué un travail a mon insu, et … vous voyez le dommage que ce travail-là a causé dans le dossier***.[342]

190. This explanation shows that Mangenda's understanding is that Haynes's concern is not – contrary to the Chamber's finding – that testimony is being fabricated by way of "illicit coaching," but rather that Kilolo is not updating and supplementing the first witness interview notes and recordings. This is a lapse of internal procedure, and certainly would have been very frustrating and unacceptable to the examining counsel, but does not demonstrate suspicion of illicit, let alone criminal, preparation.

191. Mangenda's understanding also corresponds to the witness's own acknowledgement during his testimony in the Main Case that he had had two contacts with Kilolo between the first interview and the cut-off[343] during which witness preparation was still permitted.[344] The first such contact was a telephone call, and the second was in-

[342] CAR-OTP-0074-0994:52-122.
[343] VWU Annex, p.7.
[344] T-339 35:19-37:4. The Prosecution, notably, did not ask the witness whether he had had any discussions concerning the substance of his testimony with the Defence when they called and conveyed the OTP's request

person, immediately prior to the hand-over.[345] The Prosecution did not elicit details about all the subjects discussed by Kilolo with the witness during those contacts, or the duration or circumstance of the contacts.[346] The cut-off, moreover, was just two days before the witness' testimony began.[347] There was, accordingly, ample opportunity for licit witness preparation to justify Haynes's suspicion that this element of testimony had not been conveyed to him by Kilolo.

192. The Chamber interprets the following passage as providing a further indication of concealment as "reflect[ing] the two co-perpetrators' intention to keep their illicit coaching activities secret from other members of the defence team":[348]

> *AK: Hum...maintenant il lui a demandé, il a demandé si nous avons rencontré cette personne là... non, il ne faut pas accepter que nous...nous sommes entretenus avec lui avant.*
> *JJM: Non, non, non, dans cela la seule logique est que nous ne sommes rencontrés qu'au moment de faire le handover, c'est tout.*
> *AK: Mm.*
> *JJM: C'est tout.*
> *AK: Ah ! Il t'a donc demandé si nous nous sommes rencontrés et que nous nous sommes entretenus. En fait, en d'autres termes c'est pour savoir, est-ce que c'est vous qui lui avez dit?*
> *JJM: Non, je lui ai répondu...que les témoins sont...*
> *AK: Si quelqu'un a déjà dit qu'on ne s'est pas rencontré, comment il pose encore une question?*
> *JJM: Les témoins...ils...moi...mon discours est que les témoins sont là on ne s'est vu qu'au moment, de les prendre et d'aller les remettre pour faire le handover, c'est tout.*
> *AK: C'est tout.*
> *JJM: C'est tout.*
> *AK: Ah!* ***C'est que vérité est que nous nous nous sommes entretenus****. En fait, en d'autres termes, c'est pour savoir, est-ce que c'est vous qui lui avez dit?*
> *JJM: Non je lui ai répondu … que les témoins sont …*
> *AK: Si quelqu'un a déjà dit qu'on ne s'est pas rencontre, comment il pose encore la question?*
> *JJM: Les témoins … ils … moi …* ***mon discours est que les témoins sont là on ne s'est vu qu'au moment, de les prendre et d'aller les remettre pour faire le handover, c'est tout.***[349]

for an interview, nor did they inquire whether there had been any discussion of substance immediately prior to the hand-over to the VWU.
[345] T-339 35:19-37:4.
[346] T-339 35:19-37:4.
[347] VWU Annex, p.7.
[348] TJ, para.726.
[349] TJ, para.725, referring to CAR-OTP-0074-0994:31-44.

193. This passage shows that Mangenda reportedly told Haynes, accurately, that D-29 had been met only at the handover.[350] There is no evidence or testimony from D-29 or any other source that he met Kilolo on any other occasion, or that they ever discussed the language spoken by soldiers at PK12. There is no evidence, testimony or finding that Mangenda was aware of any post-cut-off contact with the witness by Kilolo. Furthermore, assuming that Kilolo's denials in this respect are untrue, there is no basis to say that Mangenda knew they were false. The Chamber's finding that this passage reflects concealment by Mangenda of illicit – or even licit – coaching from other Defence team members mis-appreciates the evidence.

194. The Chamber's reliance[351] on Mangenda's salty description of the witness's poor performance on the second day of his testimony – "*Il a déconné à mort*"[352] and "*déconné d'une façon incroyable*"[353] – is misplaced. Adversarial lawyers often use similar language, such as whether a witness's testimony "came up to proof."[354] Nor is Kilolo's response "instructive"[355] of illicit coaching, as opposed to preparation:

> *[t]u vois maintenant, le problème que... que j'ai toujours dit au Client, de faire encore la couleur. Un ou deux jours avant que la personne passe, pourquoi? Parce que les gens oublient...tu vois? Les gens ne se souviennent pas de tout avec précision*.[356]

195. D-29's cut-off date, as with many other witnesses,[357] was just two days before the commencement of his testimony. Witness preparation was permissible up to that date. The closer in time to testimony that a witness's testimony has been reviewed, confirmed, clarified, streamlined, structured or focused – all in accordance with the Prosecution's own view of the scope of permissible witness preparation[358] – the greater the likelihood, indeed, that witnesses will recall and recount facts more precisely. These words would not have indicated to Mangenda, contrary to the Chamber's finding,[359] that Kilolo was using the word "*couleur*" to refer to a scheme of inducing witnesses to tell lies, instead of merely referring to witness preparation within the wide latitude permitted at the ICC.

---

[350] TJ, para.528.
[351] TJ, para.534.
[352] CAR-OTP-0074-0997:10-20.
[353] CAR-OTP-0074-0997:208.
[354] *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.354 ("[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").
[355] TJ, para.535.
[356] CAR-OTP-0074-0997:50.
[357] D-2,D-6,D-13,D-29,D-54,D-57.
[358] *Supra* para.156.
[359] TJ, para.535.

196. The Chamber interprets Mangenda as having said that "D-29 performed badly in court because Mr Kilolo had not illicitly coached him the night before."[360] The Chamber does not acknowledge the ambiguity as to whether Mangenda is saying that Kilolo should have spoken the *witness*, or to *Bemba*, the night before.[361] Even assuming that Mangenda is suggesting the need to speak to witnesses, such contacts were permitted up until shortly before witness testimony. The word "*la veille*" could have been intended to mean "shortly before" a witness's testimony, especially when viewed in light of Kilolo's own comment that such contacts should occur "*un ou deux jours*"[362] before the witness's appearance – which would have complied with the witness's cut-off.[363]

197. The Chamber also found that Mangenda's statement that this is "how witnesses perform if there hasn't been preparation"[364] "confirms the Chamber's conclusion that witnesses were meant to be 'prepared' on the substance of their testimony and that Mr Kilolo's intervention typically went beyond" permissible witness preparation.[365] A reasonably possible alternative interpretation of Mangenda's comment, however, is that he believed that D-29 could have been reminded during witness preparation not to speculate about facts, nor to casually repeat rumours that he could not verify based on his own knowledge. This is confirmed by Kilolo's response:

> *[e]t que maintenant avec le point de MONGUMBA ... je ne sais pas si lui il pense bien faire en disant que il a entendu,* ***que ça il ne peut pas nier mais que ... il n'a pas vu lui- même***.[366]

Kilolo's view, accordingly, is not that he could have told the witness to deny that rapes had taken place at Mongoumba ("*ça il ne peut pas nier*"), but that he could have emphasised more that he did not have direct knowledge of these events ("*il n'a pas vu lui-même*"). Accordingly, neither Mangenda's comment nor Kilolo's comment demonstrate their common understanding that Kilolo "typically went beyond" the scope of permissible witness preparation.

---

[360] TJ, para.536.
[361] CAR-OTP-0074-0997:115-123 ("*AK: Non ! Écoute je te dis... voilà j'insiste mais parfois lui, il s'énerve même, estimant que je suis en train de le déranger. Je dis j'ai besoin de l'argent de communication. Je vais appeler ces gens comment ? JJM: Euh il faut en parler. AK: Il faut ... c'est toujours important de s'entretenir longtemps la veille ... [Les 2 lignes suivantes sont prononcées simultanément] JJM : Euh s'il ne comprend pas ça, mais …qu'il comprenne, il faut le lui dire. Ou bien il comprend déjà que par exemple le témoin d'aujourd'hui parce que la veille vous n'avez pas fait ... vous ne vous êtes pas entretenus"*).
[362] CAR-OTP-0074-0994:50-52.
[363] VWU Annex, p.7; TJ, para.162.
[364] CAR-OTP-0074-0997:237.
[365] TJ, para.536.
[366] CAR-OTP-0074-0997:107-108.

198. The Chamber relied on a particular passage as "particularly revealing" that Mangenda "knew of, but also approved, the strategy of illicit coaching witnesses":

> *AK: … j'espère maintenant que Peter n'a pas encore mis ça à ma charge? JJM: Non, même pas, comment il va mettre cela à ta charge, parce que s'il fallait qu'il mette cela à ta charge, il fa … il condamne que les gens qui ... qui viennent témoigner nous détruisent. Là dans tel point il y a un témoin qui vient dire la vérité, bon qu'est-ce qu'il veut. AK: Voilà. JJM: Alors qu'est-ce qu'il veut, il y a un témoin qui dit la vérité qu'il soit content, voilà.*[367]

The Chamber's interpretation is conclusory and unreasoned. Assuming that the Chamber is implying that Mangenda is saying that D-29 was telling the truth about rapes having occurred at Mongoumba, this is not indicative of knowledge or approval of a strategy to induce witnesses to tell falsehoods. Kilolo and Mangenda, as discussed above, do not say that witness preparation could have induced a false answer, but an answer that was less damaging by avoiding speculation, or by at least underscoring the witness's insufficient knowledge of the event. Assuming that the Chamber is saying that the phrase "*qu'il soit content*" implies some counter-point between Haynes and the Congolese team members concerning truth, a more obvious explanation is that Mangenda is referring to his comment of the previous day that Haynes hoped that the testimony of any witness prepared by Kilolo would be "*réellement catastrophique*" in order to undermine his position on the team.[368] Mangenda's perception, in other words, is not that Haynes is "happy" because the truth has been told, but is "happy" because the testimony of a witness prepared by Kilolo has gone very badly. The opening lines of the passage – "*j'espère maintenant que Peter n'a pas encore mis ça à ma charge?*" – confirms that Mangenda's perception is not that Kilolo is concerned to conceal coaching but to avoid being blamed by Haynes for inadequate witness preparation.

199. The Chamber found that Kilolo contacted D-29 on the evening of his first day of testimony, before his second day of testimony, based on a reference by Kilolo to having spoken to "GOLF-FORCE" the night before, which is a potential reference to

[367] CAR-OTP-0074-0997:185-187.
[368] CAR-OTP-0074-0994:119-122 ("*JJM: Alors pour, pour lui il aurait souhaité vraiment que ce travail-là auquel il n'a pas été associe, que ce soit réellement catastrophique. Pour le de ... en tout cas il est en train de chercher par tous les voies et moyens cette occasion-là de pouvoir dire bon voilà vous avez effectué un travail a mon insu, et ... vous voyez le dommage que ce travail-là a causé dans le dossier*.")

the first letters of D-29's given names.[369] However, D-29 is never referred to in any other intercept as "GOLF-FORCE." Conversely, an intercept between Kilolo and Bemba makes reference to "GOLF-FORT" in a context that shows, as submitted by Bemba, that this code was used to refer to an acquaintance of the latter called François Guéant.[370] Further, there are no call records or testimonial evidence corroborating the Chamber's speculative finding that "GOLF-FORCE" was a reference to D-29. The Chamber failed to consider any of these considerations before coming to its conclusion that the reference to "GOLF-FORCE" must have been a reference to D-29. The Chamber committed a clear error, mis-appreciated the facts, and failed to take into account relevant facts in concluding that Kilolo had spoken to D-29 between his first and second day of testimony and – more importantly – that he informed Mangenda of such contact.

200. The Chamber also relies on Kilolo's purported remark on the second day of D-29's testimony that if his testimony was not completed that day that he would contact the witness to rectify two or three points. The passage is not as clear as the Chamber seems to have understood. Kilolo's comment reads:

> [i]f, 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.[371]

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, Mangenda does not assent or agree to this, stating instead: "But that's impossible. How's he going to catch up? They'll really take him for a liar."[372] 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, Mangenda saw the witness finish his testimony that day, and therefore knew that Kilolo could not contact the witness for the purpose of affecting this testimony, let alone telling lies.

201. The Chamber found that Kilolo told Mangenda that he was going to contact D-29's wife, D-30, to discuss her upcoming testimony, and that Kilolo instructed Mangenda

[369] TJ,para.725,fn.1672.
[370] CAR-OTP-0082-0842:480-481 ("*[REDACTED]?*") *See also* Bemba Response to OTP Confirmation Submission, para.8 ("[REDACTED].")
[371] CAR-OTP-0074-0997:204-206.
[372] CAR-OTP-0074-0997:207.

to describe to him certain aspects of D-29's testimony for that purpose.[373] The subjects on which Kilolo expresses interest in this regard are the number of previous contacts with the Defence and how D-29's wife had responded when she had been raped, and her treatment.[374] As Kilolo states, "*s'il y a des trucs qui concernent … qui sont communs aux deux, il faut me le dire*."[375] Even assuming that Kilolo's comments imply that he is about to engage in improper contact with D-30 this still does not indicate that Mangenda knew that Kilolo was going to induce her to tell any lies, or that Mangenda's acts of reporting on courtroom testimony were performed with any intent that Kilolo should induce her to tell any lies. Indeed, since D-30's cut-off was only one day before – on 28 August 2013[376] – it cannot be excluded that Mangenda did not realise that the cut-off had already taken place and that, accordingly, contacts with D-30 were no longer permitted. The Chamber, accordingly, misappreciated the evidence in determining that any discussions concerning D-30 reflected any knowledge or intent of Mangenda to corruptly influence her or any other witness.

202. In any event, relying on any causal impact on the coaching of D-30 was improper, since she formed no part of the confirmed charges, nor were any findings made that she had told any lies on any subject, or even that her testimony was, in fact, scripted. This was an error of law.

203. In summary, the Chamber failed to find that Mangenda performed any act with the intent to induce D-29 to lie. The only such finding concerns D-30.[377] However, the Chamber: (i) failed to find that D-30 had lied or been induced to lie (or even analyse her testimony at all); and (ii) improperly relied on D-30, who formed no part of the confirmed charges. Further, the Chamber's inference that Mangenda knew, based on conversations with Kilolo, that the latter was inducing witnesses to lie is based on a mis-appreciation of the facts and a failure to take into account facts. In particular, as discussed above, the Chamber's analysis fails to pay adequate or any regard to the possibility that Mangenda thought that Kilolo was engaging in licit witness preparation or in unauthorised witness contact falling short of inducing lies; and erroneously interprets a discussion about inadequate communication of the witness's prospective testimony as a reflection of a scheme to induce witnesses to lie. Finally, the Chamber made no finding that Mangenda knew that D-29 had made any false

[373] TJ, para.538; CAR-OTP-0074-0998:40-42.
[374] CAR-OTP-0074-0998:20-35.
[375] CAR-OTP-0074-0998:41-42.
[376] VWU Annex, p.7.
[377] TJ, para.542.

statements during his testimony and no finding that Mangenda knew that Kilolo had induced any of those statements. The Chamber's conclusion that Mangenda knew and intended the corrupt influencing of D-29 is clear error.

4. Factual Errors Concerning D-15

204. The basis for the Chamber's finding that Kilolo intended to induce D-15 to tell lies was the manner in which he "dictated the replies to be given before the Chamber";[378] "advised D-15 on how to conduct himself";[379] directly "instructed D-15 to incorrectly testify that his contact with Mr Kilolo were limited to one 2- to 3- hour meeting in late April 2012 and three telephone calls";[380] instructed him to deny that he knew Kilolo well;[381] and not only "rehearse[d] the anticipated questions" but also "provided the answers to be given in court" while D-15 himself "remained passive."[382] The Chamber noted that Kilolo had, according to call records, spoken to D-15 for more than 3.5 hours over the two days immediately before his testimony.[383]

205. Mangenda never participated in, or knew of, any of these facts. The first evidence of Mangenda knowing that Kilolo was talking to D-15 at all is a telephone intercept of 11 September 2013. This communication, apart from a lengthy description by Kilolo about a visit to a spa in Rotterdam,[384] consists of only the following exchange:

> [w]ell, apart from that, [I] have chatted to the person/[the person has been chatted to].[385] JJM: Mm. AK: Well, we've agreed on just three issues. JJM: Mm-mm. AK: The first issues are to go over… erm…the names of… the au…the military leaders in command of… the troops. JJM: Mm, mm. AK: The second thing…I'm going

[378] TJ, paras.553,556-563,590.
[379] TJ, para.553.
[380] TJ, paras.554-555,583,590.
[381] TJ, para.555.
[382] *Id.*
[383] TJ, para.551.
[384] CAR-OTP-0074-1004:1-61.
[385] The Prosecution's English translation erroneously translates "*on*" in the French transcript [CAR-OTP-0074-1004:61 ("*sinon on a causé avec la personne*")] 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".[386] CAR-OTP-0074-1004:61-75. The Prosecution has inserted punctuation, including quotation marks, that are not present in the French version and that provide an inappropriate interpretation of how the words were spoken and/or understood. *See* CAR-OTP-0074-1005:61-75 ("*AK: […] Bon sinon on a causé avec la personne. JJ: Mm. AK: Bon on s'est mis d'accord pour juste trois questions. (...) les premières questions c'est de reprendre...euh...les noms de... les au...les chefs militaires qui commandaient...les troupes (...) La deuxième chose... je vais lui demander...comment est-ce que...euh...je vais lui demander en disant bon...euh....le...euh...lorsque Mobutu a été déchu. Qu'est que vous, vous aviez fait […]. Vous êtes parti au est-ce que vous êtes reste au bien vous êtes ... ? Oh je suis parti me faire refugier. Bon tu étais parti seul, vous ETIEZ combien? C'était quel groupe? Bon à GBADOLITE ... euh ... à part KINSHASA, est-ce que MOBUTU avait aussi une autre résidence quelque part permanente? GBADO. Il y avait combien d'éléments ? 3 mille militaires. Ces 3 mille 75 militaires en 97 sont allés où?*")

> to ask him…how… erm…I'm going to ask him – I'm going to say, "Right…erm…the…erm [*telephone ringing*] when MOBUTU was deposed, what did you… you do? Did you leave, or did you stay, or did you…?" "Oh, I left and became a refugee." "Right. Did you leave alone? How many were you? What group was it? Right. In GBADOLITE…erm…apart from KINSHASA, did Mobutu also have another permanent residence somewhere?" "GBADO." "How many men were there?" "3,000 soldiers." "Where did those 3,000 soldiers go in '97?" [*End of transcript*][386]

206. The difference between the extent of Kilolo's actual preparation of the witness and the information provided to Mangenda is striking. Kilolo's description put Mangenda on notice only that Kilolo had informed the witness of three topics that he would ask about during his direct examination. The OTP has defended this practice as a legitimate witness preparation technique.[387] No indication is provided that the answers had not come from D-15 himself, the duration of Kilolo's discussion with the witness, or that Kilolo had discussed any other subjects with the witness whatsoever, including on the subject of how many contacts he had had with Kilolo himself.

207. The Chamber characterises this excerpt as an "update."[388] There is, however, no evidence of any other information about D-54 having been provided previously, nor the extent of any information that had been provided previously. The Chamber's use of the term "update," to the extent that it implies that some information had been previously provided – let alone previous information probative of Mangenda's knowledge of Kilolo's commission of any offence – is speculative and unfounded.

208. The Chamber also fails to address[389] that the topics mentioned are similar to the testimony of D-54,[390] whose testimony was also under discussion between Mangenda

[386] CAR-OTP-0074-1004:61-75. The Prosecution has inserted punctuation, including quotation marks, that are not present in the French version and that provide an inappropriate interpretation of how the words were spoken and/or understood. *See* CAR-OTP-0074-1005:61-75 ("*AK: […] Bon sinon on a causé avec la personne. JJ: Mm. AK: Bon on s'est mis d'accord pour juste trois questions. (...) les premières questions c'est de reprendre...euh...les noms de... les au...les chefs militaires qui commandaient...les troupes (...) La deuxième chose... je vais lui demander...comment est-ce que...euh...je vais lui demander en disant bon...euh....le...euh...lorsque Mobutu a été déchu. Qu'est que vous, vous aviez fait [...]. Vous êtes parti au est-ce que vous êtes reste au bien vous êtes ... ? Oh je suis parti me faire refugier. Bon tu étais parti seul, vous ETIEZ combien? C'était quel groupe? Bon à GBADOLITE ... euh ... à part KINSHASA, est-ce que MOBUTU avait aussi une autre résidence quelque part permanente? GBADO. Il y avait combien d'éléments ? 3 mille militaires. Ces 3 mille 75 militaires en 97 sont allés où?*")

[387] *Ruto* OTP Witness Preparation Motion, para.5 ("[r]eview[ing] the topics to be covered in examination.")

[388] TJ, para.566.

[389] As raised by the Defence in its Final Trial Brief, para.156.

[390] T-347 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).

and Kilolo during this period.[391] Mangenda says nothing demonstrating that he understands that Kilolo is talking about D-15 rather than D-54, or whether he is simply unsure. His responses of "Mm", "Mm-mm" and "Mm, mm"[392] do not dispel that ambiguity. The confusion is significant given that D-15's testimony had already started as of the date of this intercepted conversation, whereas D-54's had not. Hence, it is not clear that Mangenda even realised that Kilolo was referring to a conversation with a witness after the cut-off.

209. Even assuming, despite this ambiguity, that Mangenda knew that Kilolo was referring to an unauthorised and inappropriate conversation with D-15, there is no indication that Mangenda knows that Kilolo's recitation of questions and answer included any inducement to lie. Kilolo's contact would have, indeed, been an egregious violation of ICC procedure and protocols.[393] At this stage, however, the conversation does not show that Mangenda knows that Kilolo was – as the Chamber inferred based on its review of Kilolo's conversations with the witness – dictating replies, advising him on demeanour, instructing him to lie about contacts and their familiarity with one another. The Chamber committed a clear error in characterizing these words as a "brief[ing] by Mr Kilolo about his illicit coaching of D-15."[394]

210. At 9.49 pm on the second day of D-15's testimony, 13 September 2013, Mangenda received a phone call from Kilolo complaining that the LRV's questions had not *already* been forwarded to him. As the exchange makes clear, forwarding the LRV's questions – to which Kilolo was entitled and that must have already been in his ICC email inbox but inaccessible without Citrix – was a technical task and not a matter on which Mangenda was entitled to refuse:

> AK: You really have been overly distracted recently, Jean-Jacques. I don't know what the matter is with you there. JJ: What do you mean? AK: The questions… the questions…the questions of the people from the VILLAGE. JJ: Ah… erm … yes, yes, Actually, I've had a connection problem from home. AK: What? JJ: Mm. AK: Because the person wants to go to bed now. JJ: OK, I'm going to try to reconnect once more via the remote access system. AK: OK. OK. If you still can't manage to, have those girls got the remote access system or not? JJ: NO. I don't think they have

[391] Mangenda had called Kilolo to discuss the content of D-54's testimony just two days before: TJ, para.601 referring to CAR-OTP-0074-1001.
[392] CAR-OTP-0074-1004:62, 64, 67.
[393] Surprisingly, several legal systems permit a lawyer to contact a witness after they have taken the testimonial oath: 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.
[394] TJ, para.839.

> remote access. I don't think so. AK: That's right because 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. AK: You've go to send [them]. You just can't be careless like that. I really don't know what's going on. […] JJ: I'm going to give the remote access system another go. AK: Erm … you'd better let me know, because he wants to go to bed. He's still up: he stayed up specially – he's waiting for it before he goes to sleep.[395]

211. The Chamber notes that Mangenda sent the LRV questions to Kilolo at 22:58 that evening which, according to the Chamber, "demonstrates that Mr Mangenda planned to send the questions to D-15."[396] On the basis of this action by Mangenda, the Chamber found that "the Chamber is thus convinced that Mr Mangenda had broad and detailed knowledge concerning the purpose and the content of Mr Kilolo's contacts with D-15."[397]

212. The conclusion drawn by the Chamber is a clear error and mis-appreciates the facts. Kilolo's request suggests that he intends to prepare D-15 inappropriately by giving him advance notice of the LRV's questions, which would be another egregious violation of ICC procedure and protocols; it does not, however, give Mangenda "broad and detailed knowledge" of the intensive scripting described above.[398] Notably, Kilolo does not mention that he had a lengthy conversation with the witness earlier that evening, or the content thereof.[399] Furthermore, Kilolo's request for the LRV's questions came after the intensive scripting had already occurred.

213. On the third day of the witness's testimony, the last, 13 September 2013, D-15 testified truthfully, that his last "meeting" with Kilolo had been in January 2013;[400] however, in response to the question "when was the last time that you spoke with Mr Kilolo?" D-15 appeared to answer with reference to his previous response about meetings: "***I said*** that it was January of this year."[401] The Chamber did not accept D-15's testimony that when answering the question in the Main Case trial he misunderstood that the question was meant to include telephone contacts, whereas he thought the question was limited to face-to-face meetings.[402]

[395] CAR-OTP-0074-1010:16-18.
[396] TJ, para.575.
[397] TJ, para.576.
[398] *Supra* para.204.
[399] CAR-OTP-0074-1008 (lasting 31 minutes).
[400] T-345 5:11-12.
[401] T-345 10:2 (emphasis added).
[402] T-30-Red2-ENG 22:23-24; TJ, para.582.

214. Even if Kilolo had instructed D-15 to lie about their contacts, the issue for Mangenda, however, is whether *Mangenda* – not D-15 and not Kilolo – knew that D-15 was telling a lie and that this lie had been induced by Kilolo.

215. The Chamber itself made no findings of fact on this issue[403] nor did it analyse the information available to Mangenda at the time to come to a view as to whether Mangenda knew that D-15 lied, and that he had lied at Kilolo's behest, when he gave that answer denying any contacts with the Defence since "January of this year."[404]

216. Kilolo's indication to Mangenda that he intended to contact D-15 on the evening of 12 September 2013, combined with D-15's denial that he had had contact with Kilolo since the previous January, might have given Mangenda a basis to suspect that D-15 was lying at Kilolo's behest. No reasonable trier of fact, however, could have rejected as unreasonable the possibility that Mangenda did not draw this inference. Mangenda may, in particular, have perceived that the witness's statement that "***I said*** that it was in January of this year"[405] as referring back to his previous answer which was about meetings, not contacts.[406] Further, there is no evidence that Mangenda subsequently learned whether Kilolo had, or had not, followed through on his intention to contact D-15 that evening. The Defence presented these arguments to the Chamber, which were unaddressed in the Judgment.

217. Furthermore, Mangenda had reason to suspect that Kilolo had induced the lie only when he heard the witness's denial in court, which was after he had sent the LRVs questions to Kilolo. *Mens rea*, by definition, is the intention with which an act is carried out, and must exist at the at the moment of the alleged *actus reus*, not later.[407] Mangenda had no basis to know or intend that those questions would be used by Kilolo for any purpose other than improperly assisting the witness to be prepared for the questions, rather than inducing lies. Sharing such questions is, of course, a serious violation of ethical and procedural rules, but does not necessarily entail inducing the witness to lie. Indeed, the Chamber made no finding that D-15 lied in any of his

[403] The Chamber found that D-15 had testified "incorrectly" about his contacts with Kilolo and found that he had "evaded the question" on the issue in his testimony before the Article 70 Chamber. TJ, para.583. The Chamber also found that Kilolo had instructed him to "give false testimony with regard to the prior contacts he had with Mr Kilolo."
[404] T-345 10:2.
[405] *Id.* (emphasis added).
[406] The witness first said "the last time that I ***met*** the Defence was in January this year." (T-345 9:10).
[407] *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 constitué*").

answers to the LRV's questions or as a result of having the LRVs questions, or that Kilolo told him to lie in response to those questions.

218. The Chamber committed clear error and mis-appreciated the evidence, in summary, in finding that Mangenda was "firmly involved in and approved of Mr Kilolo's illicit coaching involving D-15."[408] The evidence does not show that Mangenda had "substantive and continuous"[409] knowledge of Kilolo's purportedly extensive[410] coaching sessions. On the contrary, no evidence shows that Mangenda even knew that Kilolo was in contact with D-15 until 11 September 2013, and even then learns only that Kilolo has discussed three topics of direct examination with the witness, without any indication of inducement to lie.[411] The next day, Mangenda provides the LRV's questions to which Kilolo was entitled as Lead Counsel. Only on 13 September 2013 does Mangenda hear the purported lie by D-15.

5. Factual Errors Concerning D-54

219. The Chamber found that Mangenda

> knew that Mr Kilolo intended to and did illicitly coach D-54. Indeed, Mr Mangenda conveyed Mr Bemba's instructions to Mr Kilolo to influence D-54 to testify to certain, specific matters. Mr Kilolo notified Mr Mangenda of D-54's agreement to testify. Together they discussed the best approach to ensure consistency with other evidence and avoid contradictions on D-54's part.[412]

220. This finding is clear error. Mangenda's last conversation with Kilolo about D-54 was on **9 September 2013** – **before** the events described above in respect of D-15's testimony, and more than seven weeks before the cut-off date for substantive witness preparation on 29 October 2013.[413] The elements of testimony suggested by Bemba, and conveyed through Mangenda, reflect no intent to induce the witness to lie, or even to engage in any form of improper witness preparation. It reflects, on the contrary, a permissible form of communication with a Defence team about testimony that could be given by a witness based on knowledge of his position. Discussing the "best approach to ensure consistency with other evidence and avoid contradictions on D-54's part" does not imply witness preparation going beyond the parameters suggested by the OTP itself, and does not entail encouraging a witness to lie. The Chamber's

[408] TJ, para.591.
[409] TJ, para.847.
[410] TJ, paras.551-565 (describing hours of telephone calls and intensive scripting).
[411] The Defence maintains that it cannot be said that the three topics in question.
[412] TJ, para.652.
[413] *Supra* para.208.

conclusion to the contrary is an error of fact or, as previously discussed, reflects the application of an improper legal standard.

221. The Chamber found that there were a total of four telephone calls between Kilolo and Mangenda referencing D-54, on 29 August 2013, 30 August, 1 September and on 9 September 2013. The Chamber correctly rejected the Prosecution allegation that Mangenda and Kilolo referred to D-54 in a phone call dated 19 October 2013 in respect of a "*monsieur qui doit venir*."[414]

222. The four telephone conversations all occur more than 51 days before the cut-off for substantive communications with the witness.[415] Witness preparation was, accordingly, permissible during that period.

223. In the first conversation, of 29 August 2013, Kilolo explains to Mangenda that he had not yet had the opportunity to interview D-54 thoroughly and that he had to "obtain additional details" from him: "*je ne l'ai pas encore interrogé en profondeur. Je vais l'interviewer sur base de quoi, je ne vais pas comme ça parler aux nuages […] il faut que j'obtienne de détails supplémentaires*." This expresses no impropriety, especially when expressed two full months before a witness's testimony. In fact, it would be negligent, under the adversarial regime applicable in the Main Case, for a counsel to call a witness without having interviewed them thoroughly enough to have a clear view of their anticipated testimony.

224. On 30 August 2013, a full two months before the witness testified, Mangenda communicated elements of testimony that Bemba believed could be adduced from D-54.[416] The Chamber's inference of Bemba's intention (which it presumably imputes to Mangenda as well) is that "D-54 be influenced" to testify to those elements.[417] The Chamber relied, in particular, on the form of words used by Mangenda during this internal Defence discussion as revealing an intent that Kilolo should induce the witness to lie: "evidenced by the language Mr Mangenda used throughout the conversation, when he specifies that the witness 'should clearly state', 'has to say', '[i]s going to say'"[418] or "that he doesn't forget" a particular item.[419] The Chamber

[414] TJ, paras.619-620.
[415] VWU Annex, p.8 ("[c]ut-off date as of the familiarisation: 29.10.2013").
[416] TJ, para.606.
[417] *Id.*
[418] TJ, para.605.
[419] TJ, para.606.

ignores[420] the occasions in the same conversation when Mangenda uses more conditional language such as "you'll have to let me know the reply he gives you so that I can pass it on to [Mr Bemba]"[421] and "the hope is that, erm…the ZOLO MOLAYI started crossing at that time."[422] The Chamber also ignores the private context of the conversation: asserting that a witness "should" say something, in the context of an internal discussion between subordinate and superior, cannot reasonably be taken to mean that the superior is meant to induce the witness to lie, and is certainly not the only reasonable interpretation in light of the entire conversation. The Chamber also ignores another purpose in using the imperative: the witness "has to" say *x*, *y* and *z*, or else he cannot appear as a witness.

225. The instruction as to "D-54's behaviour"[423] – to not testify "*du tic au tac*"[424] -- likewise does not demonstrate Mangenda's intent that Kilolo should exceed the bounds of proper witness preparation. This may be reasonably interpreted as meaning that the witness should be told to listen carefully to questions, answer only the questions posed, and not to speculate. Such instructions are neither illicit nor improper; on the contrary, these techniques and more have been advocated by the Prosecution.[425]

226. The Chamber also ignores, concerning the reference to "not forgetting" a particular item, that Kilolo's predecessor as Lead Counsel had interviewed D-54[426] and may reasonably be presumed to have conveyed the content of that interview to Bemba. Conveying a list of elements that a client wishes the Lead Counsel to adduce from a witness, especially in the context where the witness's position at the time is known and he has previously provided an indication of his knowledge, is not indicative of any impropriety. There is nothing wrong with a counsel taking instructions from his client – or a Case Manager conveying those instructions – even when those elements are described insistently, or as being essential and necessary.

[420] FTB, para.173.
[421] CAR-OTP-0074-0995:60-61.
[422] CAR-OTP-0074-0995:122-23.
[423] TJ, para.605.
[424] CAR-OTP-0074-0995:69-79.
[425] *Ntaganda* Witness Preparation Annex, p.4 ("20. Explain, in general terms, the topics that the calling party intends to cover in examination-in-chief. 21. Explain, in general and neutral terms, the topics on which, in the calling party's opinion, the witness may be questioned during cross-examination. […] 25. Inform the witness about appropriate witness behaviour, including the need to speak slowly and concisely.")
[426] T-29-CONF-ENG 7:6-12,9:3-9.

227. The Chamber asserts that Mangenda tells Kilolo that the witness has to "pretend that he went to visit family members at a certain location."[427] This is a clear misinterpretation of Mangenda's words. The context of the conversation shows that Mangenda and Kilolo are not discussing D-54, but rather General Bombayaké – "BRAVO" according to the OTP's own codes[428] – as is mentioned twice immediately prior to this passage. The discussion is not about testimony, but about how Bombayaké can meet with Kilolo without his superiors in the FARDC knowing. Accordingly, "*ce qu'il [Bombayaké] doit faire c'est de prétendre qu'il va aller voir les membres de famille dans les coins aux alentours*";[429] only later, when his "*histoire sera à un stade plus avancé*"[430] – *i.e.* when a final decision has been made as to whether he will be a witness – is Bombayaké to reveal his potential status as a witness. Third, the original Lingala does not even contain any word corresponding to "*prétendre*" – the Prosecution has inserted this word into the translation.[431] These matters were put before the Chamber in final submissions,[432] but ignored. The Chamber accepted the Prosecution's interpretation of this passage without any discernible consideration of the Defence's submissions.

228. The Chamber found that in the next conversation, on 1 September, Kilolo expressed his intention to "convince D-54 to testify on a proposition that he had supposedly and fervently rejected beforehand."[433] This same intention is imputed to Mangenda because of his responses to the information provided by Kilolo.[434] The Chamber fails to take account[435] that Kilolo expresses the view that D-54 may be denying the proposition that he had been part of the CCOP not because it is false, but because he was "afraid" of "being prosecuted".[436] Kilolo appears to be saying, accordingly, not that he will "convince" the witness to tell a lie, but that he will "convince" him to the

[427] TJ, paras.172,606.
[428] Annex A to OTP PTB, para.62.
[429] CAR-OTP-0074-0995:172-173.
[430] CAR-OTP-0074-0995:175.
[431] CAR-OTP-0074-0995:165-166 ("*[s]urtout makambo akosala eza que azokende kotala libota na bamboka oyo eza pembeni pembeni. Nde wana nde bakonzi naye bakoyeba*.")
[432] FTB, para.175.
[433] TJ, paras.609,686.
[434] TJ, para.839. The Chamber states, inaccurately, that Mangenda "advised Mr Kilolo on the witness's lack of knowledge about the 'CCOP' and how to ensure that D-54's testimony remained consistent with the rest of the defence evidence." Mangenda did not provide Kilolo with the information about the witness's response concerning the CCOP, but vice versa.
[435] TJ, para.609. The issue was raised by the Defence but not addressed by the Chamber. FTB, para.178.
[436] CAR-OTP-0074-0999:101-113 ("AK: But in any case, he doesn't really agree to be *[unintelligible]* in the CCOP. 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 commanded, 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 CCOP, even if only for a few days. JJM: That's it.")

tell the truth despite being afraid to do so because of a fear of self-incrimination. Challenging a witness who appears to be saying something that is believed to be untrue is not improper witness preparation, depending on the manner in which it is done.[437] Mangenda's responses reveal a concern that the witness's testimony, to the greatest extent possible, remain consistent with other Defence evidence, but gives no indication that this should be done by inducing the witness to lie or otherwise surpassing acceptable witness preparation. Indeed, the Chamber made no finding that D-54 lied in testifying that he was a CCOP member.[438]

229. The Chamber found that Mangenda's last conversation with Kilolo concerning D-54, on 9 September 2013, expresses an intention that Kilolo should "influence D-54 to testify to certain, specific matters,"[439] in particular, in order to "ensure consistency with other evidence and avoid contradictions on D-54's part."[440] During these exchanges, Mangenda and Kilolo do discuss how a particular aspect of D-54's prospective testimony fits into the evidence heard in the case so far ("*ça va être le premier cas qu'on a jamais eu"),*[441] and whether particular sequences of events are plausible *("la logique cela veut dire qu'il était renter d'abord … il risqué de se contredire*").[442] The Chamber places particular reliance on a reference to "*ce qui importe le plus est que … euh … toutes ces déclarations, correspondent à ce qui est écrit dans la lettre de la personne que tu connais.*"[443] The Chamber, departing evening the submissions of the Prosecution on this point,[444] considered the reference to "*la lettre de la personne que tu connais*" to be a reference to Bemba's instructions about the content of D-54's testimony.

[437] *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.")
[438] T-349 54:2-7 ("Q. In yesterday's transcript you said that you were not part of the CCOP, page 41, 3 lines 16 to 21. But, to your knowledge, was there a representative of the ALC with 4 the CCOP? A. CCOP? But I was in Bangui. CCOP, I was the first officer. I crossed over for the investigations as an observer, and when I got there too, we were together. But there were no ALC men that were members of the CCOP.")
[439] TJ, para.652.
[440] TJ, paras.611-612,652,717.
[441] CAR-OTP-0074-1001:65-66.
[442] CAR-OTP-0074-1001:72-74.
[443] CAR-OTP-0074-1001:109-110.
[444] OTP Response, 24 January 2014, para.25 ("[i]n another conversation on 9 September 2013, Mangenda discussed with Kilolo the preparation of witness D-54. In this conversation, Mangenda suggested how the witness should testify to be consistent with a letter authored by Bemba: *«Comme nous avions causé, pour que ça paraisse logique, il faut à tout prix que nous mettons qu'il est allé le 30 [en Centrafrique], parce que dans la lettre du client [l'Accusé] il a mis qu'il est allé le 30, comme officier de liai son…le témoin doit être en conformité avec le document du client [l'Accusé]»*").

230. The Chamber's analysis is clear error. The "*lettre*" is, as the context shows, a letter written by Bemba to the UN force commander at the time of the events that had already been admitted into evidence.[445] Mangenda's warning that discrepancies between this letter and the witness's testimony could be used by the Prosecution to damage D-54's credibility[446] was not only permissible, but necessary in accordance with his ethical obligation to zealously and competently defend Bemba. The Prosecution has said that showing "potential exhibits" to witnesses is permissible.[447] Putting to a witness contradictions between their anticipated testimony and documentary evidence is undoubtedly employed by the Prosecution and undoubtedly has the capacity to "influence" or even "contaminate" a witness's memory[448] but, for good or ill, these techniques are neither prohibited nor are they criminal. Mangenda's discussion with Kilolo concerning the need to ensure the greatest possible consistency between D-54's evidence and the letter already in evidence does not reveal an intent to go beyond the permissible techniques of witness preparation, let alone to induce the witness to lie.

231. The Chamber asserts in respect of this "letter" that Mangenda "implies" that the witness should "be instructed according to a pre-determined narrative" because he says that "this should occur '*[d]ans le cadre de la Couleur'*, followed by the comment '*juste comme on en a discuté*'".[449] The context shows, however, that Mangenda is referring to showing the letter to the witness as part of witness preparation to determine whether he will accept that chronology or, indeed, "narrative." The word "*couleur*"[450] appears alongside other words being used in the same way in the 9 September 2013 conversation, including "*logique*,"[451] "*compliquer*,"[452] "contradictions"[453] and "consistent."[454] The discussion is not about influencing D-54

[445] CAR-OTP-0017-0363-R01.
[446] CAR-OTP-0074-1001:128-131 ("*[p]arce que les ennemies vont déjà constater que ah ... les histoires qu'il raconte ne sont pas à leur avantage, un petit truc comme ça, ils vont vouloir le dramatiser pour démontrer que ban d'ailleurs ce monsieur c'est un menteur. Voilà, ici la lettre dit qu'il était à tel endroit à telle période donc la maintenant il est en train de vous mentir*.")
[447] *Ntaganda* Witness Preparation Annex, p.4 ("[s]how the witness potential exhibits and ask him or her to comment on them for the purpose of determining the utility of using the exhibits in court."); *Ruto* OTP Witness Preparation Motion, para.5.
[448] *Ntaganda*, T-88-ENG 7:25-8:8 ("you never know whether that is that witness's information or simply their willingness to confirm what the interviewer is telling them. It doesn't follow necessarily that that's going to lead to a false memory. It could. But still the manner in which the information has been obtained is contaminated and its value is dramatically reduced.")
[449] TJ, para.757.
[450] CAR-OTP-0074-1001:45.
[451] CAR-OTP-0074-1001:70,72.
[452] CAR-OTP-0074-1001:76.
[453] CAR-OTP-0074-1001:104.
[454] CAR-OTP-0074-1001:110.

to lie, but rather Mangenda and Kilolo coming to a common understanding between themselves of the evidence in the case so far. The gist of the conversation does not show that Mangenda's expression "*dans le cadre de la couleur*"[455] means anything different than trying to ensure that D-54's testimony fits into the "logic" of the Defence case. This does not require inducing a witness to tell lies given the techniques of witness preparation permitted at the ICC. The conversation does not show that the word "*couleur*" has any criminal meaning, nor *vice versa*.

232. The Chamber fails to note that Kilolo had not yet started his discussions with D-54 by the time of his last phone conversation with Mangenda about D-54 on 9 September 2013. Between 9 September 2013 and the start of the witness's testimony on 31 October 2013, Kilolo purportedly spoke to D-54 thirteen times for a total of 452 minutes.[456] There is no evidence and no finding that Mangenda was informed of any of these discussions. In particular, there is no evidence, and the Chamber was unable to find, that Mangenda was aware at all of the activities on which Kilolo's conviction was based in respect of D-54, namely that he "extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case."[457] This is inconsistent with the Chamber's inexplicable observation that "Mr Bemba, Mr Kilolo, Mr Mangenda and/or D-54 were in regular contact concerning the latter's testimony,"[458] and the overall conclusion for the Intercept Witnesses that Mangenda was informed on a "substantive and continuous basis of Mr Kilolo's activities."[459] These are clear errors, unsupported by evidence or the Chamber's own findings.

233. The Chamber also failed to consider that there was no evidence that Mangenda was even aware that D-54's one objective lie – that his last contact with the Defence had been "one-and-a-half-to-two-months ago"[460] – was incorrect, let alone a lie.

234. The Chamber, in summary, committed a clear error in finding that Mangenda intended that D-54 should be induced to lie, failed to take account of relevant facts showing that he was not privy to the "scripting" upon which the Chamber relied to find that Kilolo was inducing D-54 to lie, and mis-appreciated the facts, including by investing words

[455] CAR-OTP-0074-1001:45.
[456] TJ, para.622.
[457] TJ, para.651.
[458] TJ, para.597.
[459] TJ, para.847.
[460] T-349 44:1. The Judgment does not address this issue, despite it having been raised. FTB, para.184.

with unsubstantiated meanings or meanings that are not the only reasonably possible interpretation thereof.

6. Factual Errors Concerning D-13

235. The Chamber relies on a single passage of a single intercept to find that Kilolo "discussed his illicit coaching activities"[461] with Mangenda:

> [*m*]*oi, 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 [...]. Donc j'ai dû tout recommencer à zéro, donc ça m'a pris du temps...ça m'a fatigué à fond*.[462]

236. The Chamber's interpretation of "*couleur*" is based on the interpretation of that word in conversations discussed above in relation to D-25, D-29, and D-54.[463] As previously discussed, those discussions do not support the view that Mangenda interpreted the word "*couleur*" as entailing criminal witness preparation, as opposed to witness preparation within the broad limits permitted at the ICC. This passage likewise provides no basis to infer that Mangenda understood this word, to the exclusion of other reasonable possibilities, meant inducing the witness to lie. This conversation, moreover, occurs before the cut-off for permissible contacts with D-13[464] and, accordingly, does not even suggest to Mangenda that Kilolo was engaging in unauthorised contact with the witness.

237. The Chamber erred, moreover, in failing to contrast the extent of Kilolo's purportedly "extensive telephone contact"[465] between Kilolo and the witness, as compared to the evidence of Mangenda's limited knowledge thereof. The contacts consisted of 442 minutes of telephone contact between Kilolo and D-29 between 8 and 13 November 2013.[466] The only evidence of information provided by Kilolo to Mangenda about this extensive preparation is the passage quoted above, from a call on 10 November. No indication is provided by Kilolo to Mangenda of the techniques being used, the subject-matter of the discussion, nor by Mangenda to Kilolo of any information about

[461] TJ, para.667.
[462] CAR-OTP-0080-1419:10-14.
[463] *Supra* paras.170,195,231.
[464] VWU Annex, p.8.
[465] TJ, para.666.
[466] TJ, para.656.

D-13. The degree of contact, far from demonstrating Mangenda's knowledge of, and participation in, corruptly influencing the witness, suggests the opposite. Although the absence of evidence is not always evidence of absence, the pervasive nature of telephone surveillance ongoing at this time, as well as the occurrence of telephone calls throughout this period is, indeed, probative of the absence of Mangenda's knowledge of and involvement in such a common criminal plan.

238. The Chamber found that the witness testified untruthfully that his last contact with Kilolo had been "about three weeks ago"[467] – although the witness qualified his answer by saying "I don't remember very well."[468] Considering how recent had been the witness's last contact with the witness, no argument is made that this was an unreasonable finding. However, there is no evidence that Mangenda: (i) had advance notice that the witness would tell this lie; or (ii) that he knew for a fact when the witness had last spoken to Kilolo.

239. The Chamber, in summary, committed clear error that Mangenda had knowledge of, or intended, that Kilolo induce D-13 to lie.

7. Factual Errors Concerning Other References to "*Couleur*"

240. The Chamber erred in fact in finding that instances of the use of "*couleur*" other than those pertaining to the Intercept Witnesses reveal that word to mean corruptly influencing witnesses.

241. The Chamber asserts that a reference to "*couleur*" in respect of an unidentified witness on 7 November 2013 demonstrates that the expression "*faire la couleur*" was "also used by Mr Kilolo and Mr Mangenda when discussing whether potential defence witnesses would follow instructions."[469] The context of the conversation implies nothing more than 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*."[470] The word "accept," in the context of a lawyer-to-lawyer conversation, cannot reasonably be interpreted as implying forcing a story down the witness's throat in a manner that would imply corrupt influencing. Mangenda's use of the verb "*mettre*" in the same conversation – "*qu'on y mettre Un Peu De Couleur. C'est bon. S'il va... s'il accepte La Couleur c'est bon*" – likewise does not imply any advocacy of any

[467] PTB, para.211.
[468] T-352 35:19-20.
[469] TJ, para.758.
[470] CAR-OTP-0080-1376:119.

technique beyond those permitted within the context of witness preparation. Relying on the verbs "*accepter*" or "*mettre*" as implying corruptly influencing a witness is no less fallacious than would be imputing such meaning to the word "*amener*" – which Mangenda used to describe Associate Counsel Haynes' cross-examination technique.[471]

242. The Chamber interprets the following passage as "clearly impl[ying]" that "*faire les couleurs*" refers to something "illicit":

> ***[p]arce que tu vois comme moi je suis en train de faire Les Couleurs, c'est-à-dire, je me trouve dans un état tel que lorsque les choses se passent là-bas... ça doit être clair... parce que tu vois si ça bardait, nous tous....mais la première personne c'est bien moi.*** *Non seulement dans le cadre de mes fonctions, mais dans le cadre aussi qu'en réalité Les Couleurs c'est aussi... moi. Donc je suis conscient donc c'est-à-dire si quelqu'un déconnait, il citera le nom de quelqu'un.*[472]

The interpretation is mistaken. Kilolo's comment is made in the aftermath of D-29's incriminating testimony about Mongoumba.[473] Mangenda had previously expressed the view that Haynes was blaming Kilolo for that testimony.[474] The "*il*" in "*il citera*" in this context is most naturally interpreted as a reference to Associate Counsel Haynes telling Bemba that Kilolo is to blame when witnesses offer incriminating testimony. This understanding is confirmed by Mangenda's response: "no, but with the latter, it's going well. He genuinely … by the way, he did well, because at some point, our white guy came to discuss … for me to tell the client."[475] The implication of this response is that Kilolo need not be worried about this because Haynes, rather than blaming Kilolo for the poor performance of a witness, told the client that the witness's testimony had ultimately gone well. Once again, the Chamber adopted the Prosecution's interpretation[476] and ignored the Defence's submissions on the interpretation of this passage.[477] In the absence of articulated reasons, the Chamber's factual determination should be entitled to no deference.

243. Reliance is also placed for the interpretation of "*couleur*" on a conversation of 26 October 2013 in which Mangenda, when trying to figure out a way to explain to

[471] *Supra* para.173.
[472] TJ, paras.760-761.
[473] *Supra* paras.197-198.
[474] *Supra* paras.189-190.
[475] CAR-OTP-0074-0995:230-232.
[476] Annex A to OTP PTB, para.128; Opening 41:12-24.
[477] FTB, paras.204-205.

Bemba why there can be no record of payment in the context of the fictitious bribery scheme, says that "*c'est un cas que nous connaissons déjà dans le cadre de combat, dans le cadre de la COULEUR … on ne garde pas les éléments de preuve quoi*."[478] The Chamber ignores, however, that Mangenda immediately abandons this suggestion,[479] apparently realising that expenses for witness preparation meetings were, in fact, documented and traceable. The Chamber's reliance on this momentary suggestion – which is immediately withdrawn – does not demonstrate Mangenda's acknowledgement that pre-testimony witness meetings were for an illicit purpose.

8. Factual Errors Concerning Non-Witness "Bravo"

244. The Chamber committed clear error in finding that two conversations between Kilolo and Mangenda concerning a witness who was never called, known as "Bravo," are probative of their common understanding that witnesses in general should be illicitly coached.[480]

245. In the first conversation, long before any potential appearance of the witness,[481] Kilolo complains to Mangenda that the witness is somewhat aged[482] and that, "[s]ometimes there are things that come back to him naturally that he knows are true, they have to be re-framed each time."[483] The need to re-orient witnesses in time in relation to a sequence of events is a typical phenomenon of witnesses whose memory may be diminished by age or the lapse of time, and does not reasonably suggest to Mangenda that Kilolo is inducing the witness to lie. Kilolo then states that that "if I don't have the chance to conduct briefings with him night and day, that I have more briefings with him, that could be equally bad."[484] The sub-text of Kilolo's statement appears to be that he does not want the witness to testify, and this is his way of illustrating how harmful he might end up being as a witness. Mangenda does not respond by saying "yes, you're right, you really should spend day and night coaching the witness to make sure that we know exactly what he would say if called to testify." Mangenda does not even treat Kilolo's statement as a serious suggestion, responding instead, referring evidently to the client, that "you have to squarely tell him that" and that "you have to tell that to the Client, so that he can weigh the pros and cons for himself. You have to

[478] TJ, paras.767-768. CAR-OTP-0080-1362:56-57.
[479] CAR-OTP-0080-1362:59-60 ("*[o]u carrément je peux aussi lui dire, je l'ai fait par un système que je dispose … par Western par internet … pour le faire j'accède à ce système et je fais, je fais le mouvement, c'est tout*.")
[480] TJ, paras.714,719,812.
[481] TJ, para.714, referring to CAR-OTP-0074-0997 (conversation of 29 August 2013).
[482] CAR-OTP-0074-0997:161-162 ("*je constate lorsque je m'entretiens avec lui comme il est un peu âgé.")*
[483] CAR-OTP-0074-0997:161-162 ("*[p]arfois il y a des choses où il revient naturellement à des choses que lui il sait qui sont vraies, il faut chaque fois les recadrer*.")
[484] CAR-OTP-0074-0997:166-167.

tell him that side of things, because if he comes and screws up it's the Client who loses face, isn't it?"[485] Mangenda's response shows that he understands Kilolo's comment in jest, not as a serious option. This is at least as reasonable as the Chamber's interpretation that Kilolo is talking seriously about briefing the witness night and day—and one which no reasonable Chamber could have excluded.

246. The Chamber relies on Mangenda's suggestion in a telephone call almost two months later that Kilolo make contact with "Bravo" as making it "clear from the evidence that Mr Mangenda advised Mr Kilolo on approaching the potential witness and illicitly coaching him on the content of his testimony."[486] This finding ignores the context of the telephone call, which involved a report by the Registry indicating that it had contacted Bravo, who had said he was unwilling to testify. Mangenda, given this context, is only suggesting that Kilolo call "Bravo" to have him call the Registry and revise his statement about being unwilling to be a witness: "***AK:*** *Donc, que je parle avec BRAVO, pour lui expliquer seulement de contacter ces gens-là, leur dire qu'il est prêt, mais à condition qu'il le fasse par vidéoconférence ...* ***JJM:*** *C'est ça*."[487] The Chamber's finding that this passage shows Mangenda encouraging Kilolo to illicitly coach Bravo is clear error.

9. The Chamber Failed to Take Account of All Evidence and Misstated its Own Findings

247. The Chamber erred, and misstated its own findings, in concluding that Mangenda (i) discussed the objective lies about "payments and contacts, as well as association with other persons";[488] (ii) "was informed on a continuous and substantive basis of Mr Kilolo's activities" and had "continuous and substantive knowledge" of Kilolo's illicit coaching;[489] and (iii) "knew and intended" – implying advance knowledge – that witness would provide false testimony,[490] and that this advance knowledge of falsity was confirmed by an awareness that the testimony given in court was false.[491]

248. (i) The Chamber misstated its own findings in concluding, without any cross-reference to its prior findings,[492] that Mangenda discussed the objective lies with Kilolo. The

[485] CAR-OTP-0074-0997:168-173.
[486] TJ, para.720.
[487] CAR-OTP-0080-1361:52-54.
[488] TJ, para.849.
[489] TJ, para.847,848.
[490] TJ, para.849.
[491] *Id.*
[492] *Stanišić & Župljanin* AJ, para.377 ("the *Mens Rea* Section lacks cross-references to the Trial Chambers analysis or findings elsewhere in the Trial Judgement or reference to evidence in support of the factors listed

only objective lie that the Chamber found had been discussed by Mangenda in the intercepts was D-29's "responses to questions on prior contacts with the Main Case Defence and payments so that Mr Kilolo could prepare D-29's wife, D-30, accordingly."[493] Yet the Chamber found that D-29 had *not* lied about payments,[494] and made no findings that Mangenda knew that Kilolo had induced him to lie about payments or that he should under-state the number of contacts with the Defence. The Chamber also made no finding that D-29 was even incorrect, let alone lying, about the extent of his reimbursement or that he had under-stated the number of contacts with the Defence by referring to six instead of eight such contacts.[495] The Chamber's findings might be taken as implying that Mangenda could have surmised that D-15 lied about his contacts with Kilolo; however, the Chamber did not find, and the evidence does not show, that Mangenda ever discussed this statement with Kilolo or had any advance notice that this lie would be told or had been induced. After the date of this objective lie, Mangenda was not found, and the evidence does not show him, to have assisted Kilolo's preparation of the remaining two witnesses, D-54 and D-13.[496]

249. (ii) The Chamber's characterization that Mangenda was informed on a continuous and substantive basis of Kilolo's witness preparation is clear error. The Chamber failed to take into account the sharp contrast between the extensive and intensive witness preparation conducted by Kilolo as compared with Mangenda's limited knowledge thereof. Mangenda, according to the Chamber's own recitation of the evidence, was informed only of three questions to be posed during direct examination out of Kilolo's 6 hours and 41 minutes of conversation with D-15;[497] knew nothing about the anticipated testimony of D-13 or the nature or extent of Kilolo's contacts with him;[498] received no information about Kilolo's 8 hours and 47 minutes of witness preparation of D-54;[499] and was not informed of any of the 25 minutes of post-cut-off

---

therein […] This approach of the Trial Chamber is problematic, and has complicated the Appeals Chamber's review of the reasoning in the Trial Judgement.")

[493] TJ, para.538.

[494] TJ, para.530.

[495] *Supra* para.127.

[496] By the date of this lie, 13 September 2013, only two witnesses remained: D-54 and D-13. Mangenda's discussions with Kilolo regarding D-54 had already taken place, and Mangenda provided no instructions, advice or other assistance in the preparation of D-13's testimony. *See supra* paras.238-239.

[497] *Supra* para.217; TJ, para.551 ("9 September 2013, at 22:56, for 25 minutes and at 23:23, for 50 minutes; 10 September 2013, at 00:14, for 49 minutes, at 01:22, for approximately 36 minutes, at 22:54, for approximately 41 minutes, at 23:38, for almost 11 minutes, and at 23:55, for approximately 9 minutes; 11 September 2013, at 20:31, for approximately 34 minutes; 12 September 2013, at 21:00, for approximately 31 minutes, and at 23:06, for approximately 18½ minutes; and 13 September 2013, at 20:47, for approximately 17½ minutes.")

[498] *Supra* para.238; TJ, para.663.

[499] *Supra* para.232; TJ, para.622 ("22 August 2013, at 17:20, for almost 34 minutes; 9 September 2013, at 12:02, for almost 50 minutes; 24 September 2013, at 08:54, for approximately 13 minutes, at 09:22, for approximately 19 minutes and at 21:54 and 22:45, for 50 minutes, respectively; 25 September 2013, at 22:04, for 50 minutes

communications by Kilolo with Witness D-25.[500] The Chamber failed to consider the extent to which this raised the reasonable possibility that Mangenda was not informed of witness scripting in general, and the promulgation of the objective lies in particular.

250. (iii) No reasonable trier of fact could have found that the content of Mangenda's comments demonstrates "continuous and substantive" knowledge of Kilolo's purported "scripting."[501] Mangenda's comments about languages spoken by soldiers at PK-12 does not reveal knowledge of Kilolo's witness preparation, let alone that D-25 had told any lies or that Kilolo had induced him to lie. Mangenda's discussion with Kilolo of D-29's testimony concerning Mongoumba, which was a well-known element of the Defence case, does not indicate that Mangenda had been informed thoroughly or at all about the nature of Kilolo's preparation of the witness. Mangenda's comment that he believed that Kilolo would not have discussed Mongoumba with D-29[502] could reasonably reflect conjecture on Mangenda's part. Mangenda's general comment that the witness "*s'est bien défendu*"[503] when asked questions about contacts and assistance by the Defence does not demonstrate "continuous and substantive" knowledge of "scripting", but only that he knew about the substance of the case and could tell the difference between witnesses who performed well, and those who did not. The Chamber unreasonably rejected other reasonable interpretations of Mangenda's comments.

251. (iv) No evidence or finding substantiates the Chamber's uncross-referenced conclusion that Mangenda knew in advance that any testimony to be given by any witness would be a lie. The finding that Mangenda could have surmised that D-15 lied about his contacts with the Defence is an insufficient basis for the Chamber's broad conclusion, which also fails to take into account that Mangenda made no further contributions to witness preparation after the date of this lie. The Chamber's uncross-referenced statement that Mangenda expressed "approval" of any lie misstates its own factual findings and is clear error.

---

and at 22:55, for approximately 43½ minutes; 29 October 2013, at 21:31, for almost 64 minutes and at 22:41, for approximately 7 minutes; 30 October 2013, at 19:31, for approximately 17 minutes and at 21:12, for approximately 61 minutes; and 31 October 2013, at 06:46, for approximately 46 minutes, at 21:11, for approximately 62½ minutes and at 23:09, for approximately 10 minutes.")

[500] TJ, para.484.

[501] TJ, paras.835, 848.

[502] CAR-OTP-0074-0997:78-81,98-99 ("*[m]ême sur les histoires qu'on n'a pas évoquées, tout d'un coup il donne des explications. Maintenant, en parlant ainsi, il ne se rend pas compte qu'il est en train de tuer d'une manière incroyable. Parce que je ne pense pas que vous deux, vous vous êtes entretenus sur les histoires de MONGUMBA. […] ce sont des histoires qui étaient très bien connues. Vous le savez bien. Les histoires de MONGUMBA là c'est connu de tout le monde.*")

[503] CAR-OTP-0074-0998:14.

10. Conclusion Concerning Factual Errors Relating to the Intercept Witnesses

252. The Chamber's interpretation of Mangenda's conversations with Kilolo concerning the Intercept Witnesses is clear error. The Chamber failed to consider relevant facts, the context of the calls, or the extent to which they demonstrates lack of knowledge of the acts upon which the Chamber convicted Kilolo. Its interpretation of "*couleurs*" is unfounded and does not consider the extent to which it could refer to the product of licit, rather than illicit, witness preparation. The possibility of exaggeration or bravura given the private lawyer-to-lawyer conversations, as is reflected in the use of other words such as "*amener*," was disregarded. In fact, as described above, the Chamber disregarded almost all defence submissions concerning the reasonably possible interpretations of the intercepted conversations. The Chamber's interpretation, in these circumstances, is entitled to no deference.

253. The Chamber's clear error materially affected Mangenda's conviction. Mangenda never observed the purported illicit coaching. The inference of his knowledge of that illicit coaching depends on the second-hand evidence provided by the conversations between Kilolo and Mangenda. No reasonable Chamber could have found that the only reasonably possible interpretation of the intercepted conversations is that Mangenda intended and knew that Kilolo should and would corruptly influence witnesses. The Chamber's factual findings should be reviewed *de novo* and reversed.

D. *SUB-GROUND 2(D):* THE CHAMBER ERRED IN FACT AND LAW IN FINDING THAT MANGENDA MADE AN ESSENTIAL CONTRIBUTION TO THE COMMON CRIMINAL PLAN

254. The Chamber erred in finding that Mangenda played a "critical role"[504] in the common plan by, *inter alia*, (i) advising Kilolo "on points to be rehearsed with witnesses"[505] and liaising "on the content of the illicit coaching" between Bemba and Kilolo;[506] (ii) informing Kilolo about witnesses' in-court testimony, including their "false testimonies relating to among other things, contacts with the Main Case Defence";[507] and (iii) giving Kilolo the LRVs questions for D-15.[508]

[504] TJ, para.847.
[505] TJ, paras.839,847.
[506] TJ, para.843
[507] TJ, paras.844,849.
[508] TJ, paras.591,847.

255. The common criminal plan, as defined by the Chamber, was "to instruct or motivate defence witnesses to give a specific testimony, knowing the testimony to be false."[509] The essential contribution must, accordingly, be to this objective.[510] Accordingly, providing advice in respect of testimony not known to be false does not constitute a contribution to the common criminal plan.

256. First, Mangenda's involvement in witness preparation concerning elements that are not false does not constitute a contribution to the common criminal plan. The Chamber made no finding of the falsity of the non-objective lies.[511] The Chamber erred in law by relying on discussions of non-objective lies as a contribution to the common plan.

257. Second, Mangenda's description of witness testimony not found to have been false likewise cannot qualify as a contribution to the common plan to induce falsehoods. Almost all of Mangenda's description of witness testimony concerned the merits of the Main Case.[512] The Chamber, having not adjudicated any of this testimony as false, erred in law by relying on these discussions as basis for assessing Mangenda's contribution to the common plan.

258. Third, the Chamber erred in failing to assess whether Mangenda's reports concerning testimony were used by Kilolo to engage in subsequent acts of illicit coaching, or how they were used.[513] For example, there was no finding and no evidence to support a finding that Kilolo spoke to D-29 after Mangenda's report about his testimony on the second day of his testimony. The only witness who may have been improperly coached by Kilolo on the basis of, and subsequent to, information provided by Mangenda concerning testimony heard in court is D-30. The Chamber reliance on D-30, however, was improper.[514] The Chamber could make no finding, based only on retrospective indications, as to the nature of Mangenda's potential contribution to D-

[509] TJ, para.681.
[510] *Lubanga* TJ, paras.925 ("[t]urning to the second objective element (a 'co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime'), the Pre-Trial Chamber indicated that 'only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime'."); para.935 ("[a]s to (i) above, the central role will be made out 'where an accused has actually made an essential contribution to the implementation of the common plan' [i.e. an ex post facto essentiality analysis]"); para.1006 ("[t]he Majority therefore concludes that the commission of a crime jointly with another person involves two objective requirements: (i) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime. These two requirements must be assessed on the basis of all the evidence related to the alleged crime.")
[511] *Supra*, paras.128,133,167,168,201.
[512] The only exception, as discussed above, concerns D-25.
[513] TJ, para.844.
[514] *Supra*, paras.201-203.

25's witness preparation, let alone his contribution to illicit coaching. There is no finding that D-25, D-29, D-15, D-54 and D-13 were coached on the basis of any information provided by Mangenda concerning any in-court testimony. The provision of *post facto* information about the testimony of these previously illicitly coached witnesses is not a contribution to their coaching, let alone an essential contribution. Such information would have been, in any event, available to Kilolo from the daily transcripts, and providing information about the evidence heard in the case is a normal and unexceptional activity of a case manager.

259. Fourth, providing the LRV's questions had no causal impact on the execution of the common criminal plan. The Chamber made no finding that any answers given by D-15 to the LRV's questions were false or that Kilolo even induced D-15 to lie in response to those questions. The Chamber's reliance on Mangenda's act of forwarding questions that were already available to Kilolo, further, is not a contribution.

260. Fifth, the evidence of Mangenda's contribution to the preparation of D-15's testimony shows nothing but *de minimis* involvement having nothing to do with the lies ostensibly told by the witness. Mangenda's utterance of the sounds "Mm", "Mm-mm," or "Mm,mm" in response to Kilolo's description of the three questions he had improperly informed D-15 that he would ask the next day[515] is not a contribution, let alone an essential contribution to anything. Mangenda's act of forwarding the LRVs questions to Kilolo – questions that he must have already had in his email – is not a substantial contribution to anything.[516]

261. Sixth, the Chamber failed to find that any of Mangenda's acts were connected to the five "objective" lies, or the inducement of those lies, as determined by the Chamber. No evidence supports the view that Mangenda contributed to D-25's denial of having received a legitimate reimbursement of $132, D-29's denial of two out of eight contacts with the Defence, and D-54's statement that his last contact with the Defence was one-and-a-half to two months before.[517] Indeed, there is no evidence that Mangenda knew that these statements were incorrect, let alone false, let alone a lie, and still less a lie induced by Kilolo to which he was contributing or had contributed. In respect of D-15, as discussed above, Mangenda's acts did not contribute to his

[515] CAR-OTP-0074-1004:61-75.
[516] TJ, para.169.
[517] The three intercepts between Kilolo and Mangenda concerning Mondonga 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.

apparent lie about the date of his last contact with Kilolo, and Mangenda did nothing to contribute to D-13's apparent lie.

262. The Chamber's findings are clear errors of fact and built on errors of law that were material to the Chamber's conclusion that Mangenda made an essential contribution to the common criminal plan.

V. GROUND THREE: THE TRIAL CHAMBER ERRED IN FINDING THAT MANGENDA WAS INVOLVED IN CONTEMPORANEOUS OR POST FACTO MEASURES TO CONCEAL THE COMMON PLAN

A. CONTEMPORANEOUS CONCEALMENT

263. The Chamber found that Mangenda concealed the common plan by (1) being aware of the distribution of telephones to the Yaoundé witnesses; (2) conveying an instruction from Bemba to Kilolo that the latter should speak to D-54 before Mr Haynes,[518] (3) expressing concern about Mr Haynes' alleged suspicion of coaching, in particular, in respect of D-29;[519] (4) the "purpose[ful] exclu[sion]" of other members of the team from field missions;[520] (5) his use of coded language during telephone calls;[521] and (6) his "agreement to destruct physical evidence."[522]

264. (1) The finding that Mangenda knew that the distribution of telephones in Yaoundé were for an illicit purpose, for the reasons discussed in Ground 4, is clear error.

265. (2) The Chamber committed clear error in finding that Mangenda's role in conveying the following client instructions demonstrates his awareness and concealment of a criminal plan to corruptly influence witnesses:

> *[Bemba et Haynes] se sont entendus qu'avant qu'on affirme que réellement c'est lui, il faut qu'il parte là où tu connais, pour qu'il l'écoute, hein, que MIKE, MIKE aille à l'endroit que tu connais pour qu'il l'écoute ... AK : Oui, euh ... Oui, euh . Oui, . Oui, OK. JJM : ... il va falloir que notre blanc s'entretienne d'abord avec lui. Maintenant, le programme tel qu'il a été conçu, il faut que ce blanc s'entretienne avec lui le mardi. AK : Mm-mm. JJM : C'est pour cela que notre frère a dit qu'il faut que toi tu fasses tout, de façon que tu termines toutes tes affaires avant, parce que le mardi ... notre blanc ... AK : Mm-mm. JJM : ira là-bas pour s'entretenir avec lui par téléphone, il faudrait qu'il constate qu'il est vraiment*

[518] TJ, para.603-604,686.
[519] TJ, paras.536-537 (D-29), 724-726 (D-29), 759-760 ("*l'homme aux yeux*").
[520] TJ, paras.763-764,840.
[521] TJ, paras.748-761.
[522] TJ, paras.767-768.

> *pose. AK: Hein? JJM : Je crois que ...[00:02:00] AK: OK. JJM : ... d'ailleurs donc, je crois que c'est la première chose qu'il a évoquée ... AK: OK. Euh. JJM : Il a dit, bon pour que lui-même soit fin prêt, il lui faut au moins déjà 2 heures à l'avance, avant que notre blanc n'arrive, il faut déjà l'informer et puis il a dit en ce qui concerne la connaissance de MIKE lui-même, qu'il n'oublie surtout pas ... AK: Mm. JJM: ... les évènements qu'ils filmaient, lorsqu'ils travaillaient avec les gens ... AK: Mm. JJM : ... il insiste vraiment, qu'il ne faut pas qu'il oublie cela. AK: OK. JJM : Et puis qu'il n'oublie pas de mentionner les deux grands véhicules qu'ils avaient vus, comme ils étaient cites dans les cas de ces gens-là que tu connais. AK: Mm. JJM : Il a aussi dit qu'il faudrait que tu lui poses la question de savoir si ... AK : Exact. JJM : ... il était à PK12. Donc la réponse qu'il va te donner, il faut que tu me la communiques pour que je la lui transmette. Ou bien carrément quand tu l'auras au téléphone, tu la lui donnes directement.* [523]

266. The only purpose conveyed by Mangenda of Kilolo's purpose in meeting the witness before Haynes is to ensure that he makes a good impression on Haynes – "*il faudrait qu'il constate qu'il est vraiment posé*."[524] This is not untoward. Kilolo, unlike Haynes, spoke the witness's mother tongue. He was, accordingly, not only better placed to reassure the witness that he had nothing to fear by testifying (as is often the case with Defence witnesses) but also to review his potential testimony based on previous conversations with the late Lead Counsel Nkwebe Liriss. Significantly, no indication is made that Kilolo should keep his meetings secret from Haynes. These are reasonably possible reasons for Bemba's wish that were raised before the Chamber and not even addressed.[525]

267. Furthermore, the discussion of the anticipated content of the witness's testimony demonstrates no awareness by Mangenda that these instructions are part of the confection of false evidence. Mangenda recites instructions "*en ce qui concerne la connaissance de MIKE lui-même*"[526] – *i.e.* the witness's own knowledge. The witness's act of filming, seeing two vehicles, and whether he was at PK12 are not discussed in any way reflecting that Mangenda believes them to be false or manufactured. In fact, Mangenda underscores that Bemba is unsure about – and wants to hear back from Kilolo – about the content of the witness's answer concerning his presence at PK12. The way in which these instructions are conveyed does not reflect that Mangenda is aware that any corrupt influence is intended by Bemba or being

[523] CAR-OTP-0074-0995:29-52.
[524] CAR-OTP-0074-0995:38-39.
[525] These issues were raised in by the Defence and not addressed in the Judgment. FTB, para.176.
[526] CAR-OTP-0074-0995:47-48.

executed by Kilolo. Any inference to the contrary is, furthermore, contrary to the benefit of the doubt to which Mangenda was entitled following the Chamber's renunciation of any capacity to adjudicate any of these elements of testimony as false. The Chamber's assessment, viewed in conjunction with the errors discussed in Sub-Ground 2(c) concerning D-54, is clear error.

268. (3) The Chamber's inference is clear error for the reasons discussed in relation to D-29 in Ground 2(c).

269. (4) The Chamber found that members of the Defence were "purposefully excluded" from missions to conceal the common plan.[527] The Chamber's premise is wrong. Mangenda participated in the same number of missions as Associate Counsel Haynes (two)[528] and half as many as Legal Assistant Gibson (at least four).[529]

270. The Chamber pieces together three widely disparate excerpts from a lengthy conversation between Mangenda and Kilolo in which they discuss a variety of discontents within the Defence team, including disputes about salaries,[530] a poorly-written case analysis,[531] Haynes's disappointment at not having been taken along to, in particular, a mission to Brazzaville,[532] and Haynes's purported disappointment at not yet having been elevated to Lead Counsel based on "gaffes" that he hoped would be made by Kilolo.[533] This last topic – Haynes' supposed disappointed ambition – immediately precedes the last of the three excerpts of conversation relied on by the Chamber:

> *JJM: Mais c'est... c'est bien qu'il comprenne qu'il faut qu'il y ait dialogue. Parce que moi par exemple, s'il te dit qu'il tient à aller à BRAZZA. Moi d'ailleurs, les voyages en Afrique, en règle générale je ne suis pas vraiment très chaud. S'il en avait parlé très sincèrement, bon de toutes les façons c'est de ce côté-là qu'il y avait des ennuis... parce qu'il s'agissait d'aller faire les histoires des COULEURS, dans ces conditions-là peut-être il ne pouvait pas*

[527] TJ, paras.763-764,840.
[528] Mission of 12-24 April 2012 (CAR-D21-0001-0023, CAR-D21-0001-0077); Mission of 28-30 May 2012 (CAR-D21-0003-0219, CAR-D20-0001-0008).
[529] Mission of 20-28 February 2012 (CAR-D21-0001-0007; CAR-D21-0001-0049, CAR-D21-0001-0007, CAR-D21-0001-0065); Mission of 16 March-6 April 2012 (CAR-D21-0001-0020, CAR-D21-0001-0020, CAR-D21-0001-0105, CAR-D21-0001-0022); Mission of 24-27 May 2012 (CAR-D21-0003-0219); Mission of 17-22 July 2012 (CAR-D21-0001-0016).
[530] CAR-OTP-0074-1025:25-66.
[531] CAR-OTP-0074-1025:86-256
[532] CAR-OTP-0074-1025:267-290.
[533] CAR-OTP-0074-1026:68-71 ("*[m]oi, je suis convaincu qu'il. ..il se disait qu'il va te laisser travailler... il doit y avoir des gaffes, après gaffes... ou alors certains incidents vont pro... se produire assez régulièrement, et puis le Client va se fâcher. Comme ça lui-même va dire, Bon, OK., je change de dispositions. Désormais, PETER, vous, vous commencez à diriger l'équipe comme conseil principal, et Aimé vous devenez co-conseil.*")

> *venir... AK: Hm hm. JJM: C'est ça aussi ... le problèmes en question, s'il apprend les démarches sur les COULEURS après, lorsque ces gens viendront, s'il prend son verre et dans l'ivresse il va commencer à vous diffamer. Sans savoir qu'il est en train de livrer les secrets de t'équipe*.[534]

271. The Chamber considers the meaning of this passage to be so self-evident that, without any further explanation, it "concludes that the co-perpetrators purposefully excluded other members of the defence team from their mission plans so that they could engage in illicit coaching."[535]

272. If true, it would mean that Mangenda is saying that Haynes could be invited to participate in the witness coaching *but for* a perceived danger that he would reveal this illicit coaching while drunk. This interpretation would imply consideration of bringing Haynes into a criminal conspiracy, which is not a natural or likely interpretation. A more sensible interpretation is that Mangenda is saying that Haynes, in the course of denigrating Kilolo's abilities ("*commencer à vous diffamer*") will reveal the content of witness preparation sessions to others ("*sans savoir qu'il est en train de livrer les secrets de l'équipe*"). This interpretation accords with the sequence of the words as spoken and, in particular, explains why "starting to defame" Kilolo would lead to disclosure of "the secrets of the team without realizing it". The Chamber's interpretation, on the other hand, does not explain this sequence of words, nor does it account for the reference to being unaware of the disclosure of these secrets.

273. Mangenda's conditional observation that "*peut-être il ne pouvait pas venir*" ("maybe he cannot come") is not the language that would have been used if the activity in question was criminal. That conditional language makes sense, however, if the concern is the absence of a common language, particularly if time is pressing, and especially if previous witness interviews have been conducted in that language. Mangenda's words are consistent with the notion that under most circumstances it would not make sense to have someone conducting witness preparation who could speak neither French nor Lingala, especially if they had not been involved in previous interviews with the witness. This interpretation was presented to the Chamber in final submissions; instead of being accepted, or rejected with reasons, it was ignored.

[534] CAR-OTP-0074-1026:78-86.
[535] TJ, para.764.

274. The Chamber's interpretation of this passage is unsupported by reasoning, ignores Defence submissions, and is clear error insofar as it rejects reasonably possible interpretations other than the interpretation it adopted.

275. (5) The Chamber's erroneous interpretation of "*couleur*" has been addressed previously in Ground 2. To the extent that the Chamber relies on any other codes – such as "*le client*", "*le blanc*", "*colleague on haut*" or any other code[536] – this is clear error. The use of codes is so commonplace that it requires no explanation. The degree of surveillance of telephones is so widespread that using codes is indicative of nothing more than an attempt to keep confidential matters pertinent to the Defence. Any finding by the Chamber to the contrary – in particular based on its assessment that explanations by different accused differed[537] – is clear error.

276. (6) The Chamber's finding that Mangenda "agreed" to destroy evidence of payments to witnesses is clear error.[538] This error has already been addressed in Ground 2(c), and it does not constitute contemporaneous concealment of a common criminal plan.

B. *POST FACTO* CONCEALMENT

277. The Chamber relied on intercepted conversations to infer that Mangenda was involved in *post facto* efforts – primarily bribery of witnesses – to "counter the Article 70 investigation"[539] and that he had been involved in contemporaneous efforts of concealment of the common plan from other members of the Defence, such as participating in missions with Kilolo instead of other team members, or conveying Bemba's instructions that Kilolo should complete his witness interview before being interviewed by Haynes.[540]

278. The Chamber's finding that Mangenda participated in any *post facto* cover-up to counter-act the Article 70 investigation is clearly wrong. The Prosecution's own position at the beginning of trial was that this so-called cover-up was "entirely made up" in order to "get some money out of" Bemba:

> [w]ith complete confidence that they had been careful enough not to be caught, the evidence will show that Kilolo and Mangenda decided to take advantage of that situation in order to benefit themselves. Bemba's stay provided them with an opportunity **to**

[536] TJ, para.755.
[537] TJ, para.750.
[538] TJ, paras.767-768.
[539] TJ, para.848.
[540] TJ, paras.762-764.

> **get some money out of him** and they took it. They 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. They agreed to tell Bemba that the leak on the Defence side originated with the Cameroonian witnesses because they believed that Bemba could not effectively check that information. […] **Now although Kilolo's and Mangenda's stories about informers being among Defence witnesses in October 2013 was entirely made up, the reactions of Mr Bemba and Mr Babala were not**.[541]

279. The Prosecution's interpretation of the so-called cover-up is supported by the Independent Counsel's interpretation of the relevant telephone intercepts:

> *AK et JJM discutent de ce qu'ils vont faire croire à l'Accusé. Ils entendent prétendre que AK a identifié les témoins de la Défense qui ont parlé au Bureau du Procureur et qu'il doit partir en mission pour leur remettre de l'argent pour qu'ils reviennent sur leurs déclarations. En réalité, AK et JJM n'ont identifié aucun témoin et entendent garder l'argent pour eux-mêmes*.[542]

280. The Pre-Trial Chamber shared this view:

> [Mr Mangenda] also actively advised Mr Kilolo as to the best way **to deceive Mr Bemba into believing that they needed more money with a view to satisfying requests purportedly coming from "neglected" witnesses, a deception which had been devised by Mr Kilolo and Mr Mangenda as a strategy to enrich themselves**.[543]

281. The Chamber, however, rejected these submissions and findings. It found that that the intercepts instead reflect a genuine belief on the part of Mangenda and Kilolo that the Yaoundé witnesses were sources for the Article 70 investigation,[544] a genuine agreement that they should be bribed,[545] and a genuine effort to conceal any evidence of the payment of such bribes.[546]

282. No reasonable trial chamber could have reached this conclusion, particularly without expressly explaining why it was rejecting the reasons given by the Prosecution, the Independent Counsel, the Pre-Trial Chamber, and the Defence supporting the view that this was a deception.

---

[541] Opening, 67:4-68:11.
[542] Annex to Third IC Report, pp.6-7. *See* 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.
[543] Confirmation Decision, para.73.
[544] TJ, para.787.
[545] TJ, paras.792-793,801.
[546] TJ, para.768.

283. First, D-2 and D-3 both spoke to Kilolo immediately after Mangenda and Kilolo had discussed this purportedly genuine cover-up. If the cover-up scheme was genuine, and if the bribery scheme was meant to be executed, then one would have expected Kilolo to at least raise the issue during his conversations with D-2 and D-3. Yet he did not do so, based on the evidence. D-2 testified about the content of his conversation with Kilolo, which includes no offer of any bribe concerning the Article 70 investigation – or even any mention of the Article 70 investigation.[547] D-3, who also testified that he spoke to Kilolo by telephone during this time period, did not testify that Kilolo threatened, bribed or even told him to keep quiet about anything, let alone mention the existence of any investigation.[548] Both witnesses were more than willing to incriminate Kilolo, as other parts of their testimony demonstrate. If there had been any genuine cover-up, then it would have been mentioned by the alleged targets of the cover-up. They did not.

284. The Chamber, ignoring this evidence, relies instead on an intercept in which Kilolo tells Bemba that he had spoken to D-3, told him about the Article 70 investigation and warned him that he might himself end up in jail.[549] The Chamber says that this "clearly demonstrates that Kilolo intervened and attempted to discourage the witness from collaborating with the Prosecution."[550] The Chamber simply ignores the possibility that Kilolo was deceiving Bemba, and then ignores the direct evidence of deception – *i.e.* that contrary to what Kilolo had told Bemba, he had not spoken to either D-2 or D-3 about the Article 70 investigation. As unseemly as the objective of the fictitious scenario may have been, it is not probative of a consciousness of guilt in respect of past Article 70 offences.

285. Second, the Chamber itself found that the small sums paid by Kilolo to D-2 and D-3 when he contacted them – about 150 Euros – were meant to "complement the amount of money they had received before their testimonies,"[551] and not as bribes to discourage cooperation with the Article 70 investigation. Indeed, the amounts paid correspond roughly to the amount still outstanding from Kilolo's promise in May 2013 as to the amount the witnesses would receive for their testimony.[552] The amounts paid

[547] T-19-Red2-ENG 33:24; T-21-Red2-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.")
[548] T-23-CONF-ENG 18:12-22:17.
[549] TJ, para.792.
[550] TJ, para.792-793.
[551] TJ, para.146.
[552] The Prosecution alleges that they each received about 152 Euros. D-2 testified that he only received 550,000 CFA in Yaoundé, leaving a balance of 50,000 CFA (about 76 Euros) (T-19-Red2-ENG 34:5-8); and of which D-3 had not been paid 60,000 CFA (about 91 Euros) (T-27-Red-ENG 20:9-13).

bear no relation whatsoever to the large sums being discussed with Bemba, which provides a further indication that this was a deception to obtain money.[553] The Chamber did not find, nor is there any evidence suggesting, that these proposed amounts were ever paid to any witnesses.

286. Third, Mangenda's conversations with Kilolo reveal no consciousness of guilt that any offences had been committed in the preparation of the Yaoundé witnesses. Instead, Mangenda's first guess is that the investigation may centre on the written statements of two prospective Defence witnesses, General Bombayaké and another prospective witness.[554] As Mangenda is recorded as stating, "*moi, également je suis étonné*" that these statements, taken by Kilolo, were so favourable.[555] 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 ("*sûrement ils s'étaient dit que ce n'était pas gratuit*")[556] and wonders whether other members of the team, while "*sous l'effet d'alcool*", may have revealed these suspicions to individuals in the Office of the Prosecutor.[557] Mangenda then speculates in the alternative[558] whether the Prosecution "*trouvent que nos gens qui viennent pum, pum … ils déclarent tous la même chose. C'est ce qui leur fait mal […] Et c'est en train de mettre à mal les stratégies … qui étaient déjà établies*"[559] 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. 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

[553] The Prosecution alleged that the amounts contemplated under the fictitious scenario were 15,000 or 30,000 Euros. PTB, fn.154 ("30000" or "15000"); Annex A to OTP PTB, para.173 ("15,000").
[554] CAR-OTP-0074-1030:89-116 ("*toi-même tu sais qu'on a raconté des histoires sur ce monsieur-là et cette dame-là […] Le monsieur qu'on ne voulait pas, nous avions décidé qu'il ne vienne plus mais on avait un peu peur […] Mais nous leur avions remis la déclaration de ce monsieur-là n'est-ce pas, et ils avaient vu que le monsieur avait signé […] Le monsieur avait changé sa façon de voir les choses […] cette dame-là, elle a signé. Alors que les deux ne nous aimaient pas*.")
[555] CAR-OTP-0074-1030:123.
[556] CAR-OTP-0074-1030:112.
[557] CAR-OTP-0074-1030:121-128 ("*[e]t puis notre monsieur le blanc, tu vois, plusieurs fois il était en train de se … plaindre. Ah! Mais comment se fait-il que dans LE LIVRE que j'ai lu c'était ainsi. Mais en parlant avec les gens […] Maintenant, dans les conversations avec leurs gens. S'il est sous l'effet d'alcool et tout consort, il peut beaucoup parler … au sujet du LIVRE*"); CAR-OTP-0074-1030:340-344 ("*[p]arce que tu vois si c'est eux qui racontent ce genre d'histoires à leurs frères […] parce qu'après avoir pris de l'alcool, ce qui arrive c'est d'ailleurs telle personne, telle personne, telle personne avait dit ceci cela, ceci, ceci, cela, nous avons telles histoires et c'est d'ailleurs nous qui avions refusés que cela ne soit pas divulgué*"). Note that "*le livre*" in the former quotation is, as the context shows, not a reference to money but rather to "statement" or "summary".
[558] CAR-OTP-0074-1030:186-190 ("*soit ce sont nos frères-là* [colleagues] *qui sont en train de nous trahir […] ou si tel n'est pas le cas […] ça peut aussi être…*").
[559] CAR-OTP-0074-1030:186-194.

investigation might relate to the Yaoundé witnesses. These conversations reflect no consciousness of guilt in relation to the preparation of these witnesses and, in fact, the conversations directly reflect the fictitious scenario, as confirmed by the Independent Counsel.[560]

287. Fourth, discussions between Mangenda and Kilolo about the need to avoid a paper trail were related to this deception, not to any genuine concern about the need to conceal bribery that was never intended to – and never did – occur. The Chamber mistakes these discussions to reflect an actual intention to "destruct physical evidence"[561] and ensure that the illicit coaching take place "undetected and undisturbed."[562] These conversations, instead, reflect discussions about how to explain to Bemba that there would be no documentation of payments that, after all, had not been made.[563] Mangenda's comment that "*dans le cadre de La Couleur … on ne garde pas les éléments de preuve quoi*"[564] can reasonably be interpreted as meaning only that the payments should be explained to Bemba as being as related to witness preparation generally. Other payments that were found to have been improper or the object of lies by witnesses, such as the unacknowledged payment to D-25,[565] were documented. Hence, interpreting Mangenda's statement as meaning that payments made in the context of witness preparation were never documented is unreasonable.

288. Fifth, the Chamber fails to interpret Mangenda's and Kilolo's conversation in the context of the deception and the fictitious scenario. Mangenda's comment that "*[ç]a va maintenant détruire tous les témoins que nous avons*"[566] is not reasonably interpreted as a tacit acknowledgement that every Defence witness has been illicitly coached. An equally, if not more, reasonable interpretation is that any allegation of witness coaching could be fatal to the credibility of the entire case. Bemba is being encouraged, accordingly, to pay money to keep happy the three witnesses who are posited, incorrectly, to be the sources of this damaging information in order to preserve the integrity of the Defence case. The Chamber's failure to even consider the

[560] *See e.g.* CAR-OTP-0080-1362:40-41 ("*[c]omme ça va nous aider un peu, parce que franchement je passé les week-ends de côte-ci, je ne vois même pas ma famille*"); CAR-OTP-0074-1462:8-24.
[561] TJ, para.765.
[562] TJ, para.769.
[563] *See e.g.* TJ, para.777 (reflecting a discussion between Mangenda and Kilolo that the false payees of the bribes should be the Yaoundé witnesses because Bemba would be less likely to contact them than other witnesses: "*non, non, non, non. Pas les gens de notre côté. Il y a aussi la possibilité de vérifier discrètement*.")
[564] CAR-OTP-0080-1362:56-57; TJ, para.767.
[565] TJ, paras.483,500; CAR-OTP-0088-2924.
[566] CAR-OTP-0082-1326:336.

context of the deception is clear error, and a failure to take into account a manifestly relevant fact.

289. Sixth, the Chamber erred in finding that the "fictitious" scenario was "irrelevant, since the above-mentioned intercepts prove that the three co-perpetrators clearly intended to take measures to conceal their prior activities."[567] This analysis begs the question. The supposed meaning of the "above-mentioned intercepts" depends on whether or not there was, indeed, a fictitious scenario under discussion. Such a scenario is self-evidently relevant to understanding the purpose and nature of the discussions between Mangenda and Kilolo, and between the two of them and Bemba. The Chamber's failure to even address the fictitious scenario on the basis of "irrelevance" caused the Chamber to fail to consider a manifestly relevant fact.

VI. GROUND FOUR: THE TRIAL CHAMBER ERRED IN FACT AND IN LAW IN FINDING THAT MANGENDA "SURMISED" THAT KILOLO WAS CORRUPTLY INFLUENCING THE YAOUNDÉ WITNESSES BASED ON THE DISTRIBUTION OF MOBILE TELEPHONES

A. INTRODUCTION

290. The Chamber found that mobile telephones were distributed to the Yaoundé witnesses to "enable[] contact with the witnesses after the contact prohibition took effect."[568] Kilolo purportedly explained this to the four Yaoundé witnesses orally.[569] The Chamber did not find, based on the evidence, that Mangenda was present[570] or heard[571] that explanation, but did find that he could not have failed to "surmise" from the circumstances the illicit purpose for which the phones were provided.[572] The

[567] TJ, para.800.
[568] TJ, para.769.
[569] TJ, para.369.
[570] In respect of the distribution of the mobile telephone distributed to P-245 (D-3) on 25 May 2013, the Chamber found that "[t]he Chamber notes that, while P-245 (D-3) confirmed that Mr Kilolo provided the explanation concerning the purpose of his new telephone at the meeting on 25 May 2013, at which Mr Mangenda was present, he did not testify that Mr Mangenda was physically present for the explanation itself." This finding was made against the backdrop of P-245 (D-3)'s evidence, when asked whether Mangenda was present at the time, "I don't remember." *See* FTB, para.42; T-27-Red-ENG 83:4-22.
[571] The evidence showed, and the Chamber found, that although Mangenda was present in the same hotel waiting area where Mr Kilolo was meeting with the witnesses, he did not participate in, or observe the substance of, those discussions: "The Chamber also accepts the consistent evidence of P-260 (D-2) and P-245 (D-3) that Mr Mangenda, albeit present, was not involved in their discussions with Mr Kilolo regarding the substance of their upcoming testimony." P-260 (D-2) also confirmed that the witnesses subsequently talked with one another about their individual discussions with Mr Kilolo: "we shared information amongst each other, amongst ourselves." (T-19-Red2-ENG 11:19-20). Accordingly, P-260 (D-2)'s testimony that Kilolo had given the nefarious explanation about the purpose of the telephones to "us" (T-19-Red2-ENG 31:25) did not indicate that Mangenda had heard Kilolo's explanation. The Prosecution, notably, sought no explanation from P-260 (D-2) as to when or where Kilolo had offered this explanation and, in particular, whether it had been made during the individual meetings with the witnesses or at some other moment. *See* FTB, para.47.
[572] TJ, para.371. The Chamber found (TJ, paras.367,418,421) and it was not contested (FTB, paras.41-47) that Mangenda was aware of the distribution of the telephones to the Yaoundé witnesses.

Chamber inferred, particularly based on the date on which contacts with the witnesses would be prohibited, that Mangenda "could not have surmised any legitimate purpose for those telephones."[573]

291. The Chamber's inference is clear error. First, the Chamber on more than one occasion, misstated the evidence and asserted that the telephones had been distributed "after the VWU Cut-off Date."[574] Second, the Chamber unreasonably failed to address other reasonable possibilities, including that the telephones were meant for contacts up until the cut-off date.

B. DISCUSSION

292. **First**, the Chamber stated at least twice in the Judgment that "there was a distribution of new telephones after the VWU cut-off date."[575] This is incorrect. The cut-off dates for D-3 and D-2 were **19 days**[576] and **15 days**[577] after the distribution of telephones to D-3 and D-2, respectively. This was a serious – albeit not consistently repeated – error in respect of an important issue for Mangenda. If Mangenda knew of the distribution of telephones after the cut-off date, then this would have a major impact on the reasonableness of inferences that could be drawn by the Chamber as to his state of mind. The repetition, more than once, of this erroneous understanding of the evidence raises a substantial probability that the Chamber was influenced by this error in its deliberations. The error, in itself, warrants reversal of the Chamber's inference that Mangenda "could not have surmised any legitimate purpose for those telephones."[578] In the alternative, at the very least, the error should cause this Appeals Chamber to accord no deference to the Chamber's reasoning as a whole in respect of what Mangenda could or could not have reasonably possibly inferred in the circumstances.

293. **Second**, the court-imposed cut-off dates were not so imminent as to exclude the possibility that Mangenda genuinely believed that they had a non-illicit purpose. Contacts between the witnesses and the Main Case Defence were not prohibited during the 19-day and 15-day interval mentioned above. The Chamber does not

[573] TJ, para.371.
[574] TJ, paras.735,747.
[575] *Id.*
[576] TJ, para.390 ("[t]he VWU cut-off date for contacts between this witness [D-3] and the Main Case Defence was 13 June 2013"). D-3 testified that he received his telephone on 25 May 2013 (T-23-CONF-ENG 9:24-10:4) and the Chamber accepted this date (TJ, para.134).
[577] TJ, para.383 ("[t]he VWU cut-off date for contacts between this witness [D-2] and the Main Case Defence was 10 June 2013.") D-2 testified that he and the other two Yaoundé witnesses received their telephones on the day of the collective meeting at the hotel, which was 26 May 2013 (T-19-Red2-ENG 32:9-10) as was acknowledged by the Chamber (TJ, para.140).
[578] TJ, para.371.

explain why it would have been unreasonable for Mangenda to "surmise" that the telephones were meant to facilitate non-illicit contact up until the cut-off date. Indeed, D-2's own prior inconsistent statement – which was in this respect not mentioned by the Chamber – supports this possibility:

> *KILOLO, étant parti, il nous a laissé ce téléphone-là, avec qui, on communiquait avec lui.* ***Parce qu'il fallait absolument avoir ça pour communiquer avec lui. Puisque nous devions aller à la maison et revenir, afin qu'il puisse nous remettre à la disposition de ... de la Cour***.[579]

294. **Third**, the Chamber ignored salient considerations in assessing the reasonable possibility that Mangenda could have genuinely believed that the phones had a non-illicit purpose. The Chamber ignored: (i) that the Prosecution, presumably acting reasonably, has provided witnesses with new mobile telephones and calling credit within a similarly short period (less than 26 days) before its own witnesses' cut-off dates;[580] (ii) D-2's[581] and D-3's[582] testimony that they had lied to Mr Kilolo during his previous meeting with them about not possessing mobile telephones, and therefore needed telephones to remain in contact with him; and (iii) an African context in which mobile telephones are cheap and frequently the only means to get in touch with individuals – especially, for example, D-2 who had travelled to Yaoundé from Douala.[583]

295. The three reasons cited by the Chamber to support its inference that Mangenda "could not have surmised any legitimate purpose for the telephones" are internally contradictory, unsupported by any evidence, or based on a mis-appreciation of the evidence.

---

[579] CAR-OTP-0080-0100-R01:729-732 (italics added). Translation: ("Kilolo, having left, left us that telephone with which to communicate with him. Because we absolutely needed that to be in touch with him. Since we had to go to the house and come back, so that he could put us at the disposal of the Court.") *Cf.* T-19-Red2-ENG 18:5-11.

[580] *See* CAR-OTP-0065-0918 (referring to a purchase of a "Mobile Telephone" and "Credit Card" for Main Case Witness W-0178, for which the receipt was signed "le 03/08 2011" with a notation at the top indicating "Aug-11"). This witness commenced his testimony on 30 August 2011.

[581] T-19-Red2-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.")

[582] T-22-Red2-ENG 62:21-23 ("Q. Did you tell him that you didn't have a telephone? A. Yes, that is correct.")

[583] T-20-Red-ENG 10:3 ("[b]efore I could meet with Mr Kilolo in May, I was not in Cameroon. I was in Bangui.")

296. The Chamber stated:

> [f]irstly, according to witness P-260 (D-2) and P-245 (D-3)'s testimony, Mr Kilolo explained that these telephones were needed as the VWU would take away their personal telephones.[584]

Reliance on Mr Kilolo's explanation to substantiate Mangenda's knowledge was, however, inconsistent with the Chamber's own recognition that it could not find that he heard the illicit explanation.[585] The Chamber would have had no need to rely on "surmise" if the evidence had shown that Mangenda was aware of Kilolo's explanation. The Chamber's reliance on the content of Kilolo's explanation, having failed to find that Mangenda knew about it and that it must therefore resort to what he could have "surmised" from the circumstances, was inconsistent with reliance on Kilolo's explanation as a basis for Mangenda's state of mind.

297. The Chamber also asserts that:

> [s]econdly, the Main Case Defence kept these telephones secret from the VWU.[586]

The Chamber had no evidential basis for the assertion that the Main Case Defence as a whole, let alone Mangenda personally, did not disclose the provision of these phones to the VWU. Even assuming that there was no disclosure, the Chamber offers no substantiation for the view that phones distributed to witnesses **19 and 15 days prior to the cut-off date** should have been disclosed to VWU, let alone that there is any requirement that telephone provided to witnesses be "registered with the Court."[587] Finally, the Chamber had no evidential basis, even assuming that there was no disclosure, for assuming that Mangenda was aware that Kilolo had not disclosed this fact to the VWU.

298. Finally, the Chamber assumes any contacts with the witness after the "hand-over" had to be effected through the VWU:

> [t]hirdly, there was no need for such telephones after the VWU handover, since any contact until the cut-off date could have been facilitated by the VWU.[588]

---

[584] TJ, para.371.
[585] TJ, paras.369-371.
[586] TJ, para.371. *See also*, para.747.
[587] TJ, para.747.
[588] TJ, para.371.

This assertion is based on an ambiguity in the use of the expression "hand-over" – which is sometimes used to refer to the first introduction of a witness to the VWU and sometimes used to refer to the "cut-off" date. The distinction, and the ambiguity, has practical significance in respect of D-2 and D-3 because their "first meetings" with the VWU were on 27 and 28 May 2013, respectively,[589] whereas their "cut-off" dates were on 10 and 13 June 2013.[590] This, in turn, has a direct impact on the reasonableness of the Chamber's inference that Mangenda could not have believed that providing the phones had any non-illicit purpose.

299. The sources relied on by the Chamber for this finding do not support its conclusion. Paragraph 31 of the Main Case *Witness familiarization protocol* states that the "VWU will not facilitate any further contact between the witness and the entity calling the witness until the witness has finished his testimony."[591] As paragraph 30 of that protocol makes clear, however, this provision applies only "once the familiarisation process has commenced" – *i.e.* on the "cut-off" date.[592] The *Witness familiarization protocol*, accordingly, does not support the Chamber's.

300. Indeed, the VWU's submissions to the Chamber contradict its assertion. The VWU submissions provide two separate columns for each witness, one entitled "[i]ntroduced by phone and/or in person", and another "[c]ut-off dates to the VWU's knowledge."[593] The dates of in the former column for D-2 and D-3 are 27 May 2013 and 28 May 2013, respectively.[594] The VWU explains that "information in the column 'Introduction by phone and/or in person' indicates the dates of introduction where the Unit spoke or met with the witnesses for the first time."[595] The VWU also noted, however, that:

> [a]s explained individually in the Annex, most of the witnesses were handed over through phone introduction, by the Defence, to the VWU staff member who eventually would arrange for travel of the witnesses for their appearances at their respective location of testimony. In some instances, further meetings in person between the VWU and the witness took place either for the preparation purposes or for the travel of the witnesses. Therefore, in most cases

[589] VWU Annex, p.5.
[590] TJ, paras.383,390.
[591] TJ, fn.666.
[592] *Bemba* VWU Protocol, para.30.
[593] VWU Annex, p.2.
[594] *Id.* p.5 (D-2: "07.05.2013 by phone in HQ (joint phone call by the Defence and the VWU); 27.05.2013 at the location of testimony (first meeting in person between the witness and the VWU in the presence of the defence); D-3: "07.05.2013 by phone in HQ (joint phone call by the Defence and the VWU 8.05.2013 at the location of testimony (first meeting in person between the witness and the VWU in the presence of the defence).
[595] *Id.* para.5.

> it is not really possible to identify a formal handover date nor can the VWU provide the time of the handover as this is not an information that is normally recorded by the Unit.[596]

301. The cut-off dates for D-2 and D-3 are indicated by the VWU to have been 10 and 13 June 2013, respectively.[597] The VWU's explanation of "cut-off date" implies that direct contacts between witnesses and the calling party are not prohibited until that date:

> [t]he VWU understands that the meaning of "cut-off dates" for this purpose is the moment where the VWU informed the witnesses that they should not discuss their evidence with anyone and explain to the witnesses that that they will only be able to see the Defence briefly during the courtesy meetings. The VWU provides such information to the best of the VWU's knowledge and refers to the column "Cut-off dates" in the Annex.[598]

The Chamber's assumption that contacts after the "first meeting" with the VWU on 27 and 28 May 2013 had to be facilitated through the VWU is, accordingly, unsubstantiated.

302. The Chamber improperly relied on the Main Case testimony of Witness D-2 to support its finding that there was a prohibition on contact, except through the VWU, as of 27 or 28 May 2013.[599] The Chamber held during trial that the purpose of Main Case transcripts "would be limited to taking judicial notice of the dates and contents of the relevant witnesses' Main Case testimony, and not the truth or falsity of the testimony itself."[600] This was an appropriate limitation that was reaffirmed in the Judgment itself[601] – but that was ignored in relation to this finding. Even assuming that such reliance was not improper, D-2's testimony is a manifestly deficient basis for such a finding because: (i) D-2 only stated his view that he was not permitted to "meet" Defence counsel following his introduction to the VWU;[602] (ii) the Defence was not on notice that it should – and was in fact instructed that it should not[603] – cross-examine D-2 in respect of any and all aspects of Main Case testimony; (iii) D-2 had

[596] VWU, para.4.
[597] VWU Annex, p.5 (D-2: "Cut-off date as of the familiarisation: 10.06.2013"; D-3: "Cut-off date as of the familiarisation: 13.06.2013").
[598] VWU Provision of Information, para.11.
[599] TJ, fn.666.
[600] Rule 68(3) Decision, para.6.
[601] TJ, para.201 ("[t]he Chamber recalls that, pursuant to Article 69(6) of the Statute, it has taken judicial notice of trial transcripts in respect of the dates and content of the testimonies and not the truth or falsity of the testimony itself.")
[602] T-321 37:15-16.
[603] T-20-Red2-ENG 51:11-18; T-13-CONF-ENG 18:5-16; T-16-CONF-ENG 39:17-25.

limited or no knowledge of the Court's procedures and protocols[604] and is, accordingly, not a reliable basis for such a specific conclusion.

303. Even assuming that contacts between the Yaoundé witnesses were prohibited as of the date of the "first meeting" with the VWU, and even assuming that Mangenda knew or believed that contacts should cease as of that "first meeting," the Chamber failed to exclude – or even address – as unreasonable the possibility that Mangenda could have thought, based on the circumstances, that the purpose of the phones was to reach the witnesses during the intervening time period. In D-3's case, this interval was three days;[605] in D-2's case, the interval was four days.[606] The Chamber may be correct that "there was no need for such telephones after the VWU handover,"[607] but this is irrelevant. The issue is whether there was a reasonably possible non-illicit purpose *prior to* the handover. There was: being able to contact the witnesses before the introduction of the witnesses to the VWU, in particular, in order to arrange for that introduction. This issue was raised directly in Defence submissions before the Chamber, but never addressed.[608] This reasonable possibility – not certainty, probability or likelihood – is enhanced by D-2 and D-3's testimony that they had previously told Mr Kilolo that they had no telephones,[609] and D-2's testimony that he had told Mr Kilolo that he was not from Yaoundé.[610]

304. The Chamber, accordingly, erred in inferring "as the only conclusion, that Mr Mangenda was aware that the telephones were handed out to the witnesses in order to enable Mr Kilolo to illicitly contact them after the VWU cut-off date and approved thereof."[611] The Chamber failed to consider the reasonable possibility that the phones were for the purpose of contacting the witnesses until the cut-off; improperly imputed to Mangenda knowledge of Kilolo's explanation despite acknowledging that it could

[604] T-18-CONF-ENG 66:21-67:4; 74:18-22; T-19-Red2-ENG 25:22-26:1, 26:7-10, 29:7-14.
[605] D-3 testified that he received the telephone on 25 May and the VWU indicates that the first meeting occurred on 28 May 2013. T-23-Red2-ENG 26:8 ("A. I received my telephone on the 25th. The others got theirs on the 26th."); VWU Annex, p.5.
[606] T-19-Red2-ENG 32:9-10 ("A. When we met them at the (Redacted) hotel, the first thing that was done was for the phone to be given to us, each one of us received a phone"); VWU Annex, p.5.
[607] TJ, para.371.
[608] FTB, para.44 ("[h]aving a means of communicating with the witness at least until he 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 and calling credit to its own witnesses, sometimes on multiple occasions for the same witness, up to 26 days before the start of testimony.") The telephones were provided to D-2 and D-3 17 and 24 days before their testimony, respectively.
[609] T-19-Red2-ENG 17:25-18:3; T-22-Red2-ENG 62:21-23.
[610] T-20-CONF-ENG 41:18-19 ("[REDACTED]"); T-18-Red2-ENG 73:6-8 ("Q. The money that you received -- you received from Mr Kilolo, can you tell the Chamber how that came about? Under what circumstances did you receive it? A. I went there from (Redacted), and I went to his hotel.")
[611] TJ, para.371.

not find that he was privy to that explanation; making unsubstantiated findings as to when contacts were prohibited; and improperly imputing to Mangenda concealment of these telephones from the VWU.

C. CHARACTERIZATION AND IMPACT OF THE ERROR

305. The Chamber erred in fact by mis-appreciating the evidence (such as groundlessly assuming that the embargo on contact started as of the date of the first meeting with the VWU), taking into account irrelevant facts (such as the content of a promise by Kilolo that the Chamber could not find had been heard by Mangenda), and failing to take into account relevant facts (such as the reasonable possibility that Mangenda had perceived the purpose of the phones as being to engage in permissible contact before the cut-off date or before introduction to the VWU).

306. The Chamber also erred in law by failing to apply or even articulate the proper standard for making findings based on circumstantial evidence of what Mangenda must have been able to "surmise"; relying on non-evidence to substantiate its finding about the moment as of which contacts with the witnesses were no longer permitted; and relying on information that was not evidence.

D. CONCLUSION

307. In summary, the Chamber's conclusion that Mr Mangenda must have "surmised" the illicit purpose of the telephones based on the circumstances is unsound, unsafe and unsubstantiated. The Chamber erred in finding that the telephones were distributed after the cut-off, that direct contacts were prohibited as of "hand-over" rather than "cut-off" and that, given all the circumstances, Kilolo could not have had a non-illicit purpose for distributing the telephones. The only appropriate remedy, given that this was the only basis on which the Chamber relied to infer that Mangenda was involved in a common criminal plan in respect of the Yaoundé witnesses, is to quash his conviction for corruptly influencing witnesses D-2, D-3, D-4 and D-6.

VII. GROUND FIVE: THE TRIAL CHAMBER ERRED IN LAW AND IN FACT WHEN IT FOUND THAT THE EVIDENCE SHOWED THAT MANGENDA CONTRIBUTED, WITH THE NECESSARY *MENS REA*, TO THE ILLICIT COACHING OF: D-23, D-26, D-55, D-57 OR D-64; THE YAOUNDÉ WITNESSES; OR D-13

308. The Chamber erred in law and fact in finding that the evidence established that Mangenda was part of any common plan encompassing: (i) D-23, D-26, D-55, D-57 or D-64;[612] (ii) the Yaoundé witnesses (D-2, D-3, D-4 or D-6);[613] or (iii) D-13.[614]

309. The Chamber found that "there is no direct or indirect link between Mr Mangenda's activities and the false testimony given by D-23, D-26, D-55, D-57 or D-64."[615] The Chamber also made no finding, and cited no evidence in support of the view, that Mangenda even knew that Kilolo was coaching these witnesses. Furthermore, there is no evidence and no finding that the purported *post facto* cover-up efforts concerned anyone other than the Yaoundé witnesses, let alone these five witnesses.[616] The Chamber accordingly had no basis to conclude that the common plan in which Mangenda was found to have participated encompassed these five witnesses.

310. The Chamber erred in law or fact in projecting backwards in time, or outwards in scope, the common plan based on nothing more than an assumption that it must have extended to these other witnesses. D-55, D-57 and D-64 were all purportedly tampered with and testified before the first evidence of Mangenda having any knowledge of any common criminal scheme. The first evidence of such awareness arose during the Yaoundé mission when Mangenda purportedly witnessed and assisted in the distribution of telephones in circumstances that left no doubt that their purpose was to facilitate illicit coaching of the witnesses by Kilolo.[617] This occurred on 25 or 26 May

[612] TJ, para.681 ("the Chamber is satisfied that […] Mr Bemba, Mr Kilolo and Mr Mangenda jointly committed the offences of corruptly influencing the 14 witnesses and presenting false evidence as part of an agreement or common plan. The Chamber is convinced that Mr Bemba, Mr Kilolo and Mr Mangenda […] agreed to illicitly interfere with witnesses in order to ensure that those witnesses would provide evidence in Mr Bemba's favour"); para.910 ("[h]aving analysed the evidence […] the Chamber found that Mr Mangenda, jointly with Mr Bemba and Mr Kilolo, 2012 intentionally contributed to the planning and execution of the illicit coaching activities of Mr Kilolo involving D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64"); para.912 ("[i]n the light of the foregoing, the Chamber is satisfied beyond reasonable doubt that Mr Mangenda, jointly with Mr Bemba and Mr Kilolo, committed the offence of corruptly influencing D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64 within the meaning of Article 70(1)(c) of the Statute.")
[613] *Id.*
[614] *Id.*
[615] TJ, para.920.
[616] TJ, para.778 (noting that the purported bribery scheme concerned the "Yankee" witnesses which "the Chamber understands […] as used in the above intercept excerpt, stands for 'Yaoundé', where Mr Kilolo met witnesses D-2, D-3, D-4 and D-6.")
[617] TJ, paras.421,735,747.

2013.[618] D-57, D-64 and D-55, however, testified on 17-19 October 2012, 22-23 October 2012, and 29-31 October 2012 respectively.

311. Convictions for co-perpetration have been reversed at the ICTY where the temporal starting point of a common criminal plan is based only on conjecture and inference. 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.[619] Evidence of knowledge of a criminal purpose just *one day after* the criminal event has been deemed an insufficient basis on which to infer the existence of the *mens rea* the day before.[620] The *Krajišnik* Appeals Chamber quashed convictions for an expanded criminal plan whose starting point was defined in vague terms such as "soon", "very soon" or even referring to a "particular month"[621]:

> [t]he 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.[622]

312. Even though D-23 and D-26, unlike D-55, D-57 and D-64, testified after the Yaoundé witnesses, the Chamber still found that there was "no direct or indirect link between Mr Mangenda's activities" and their false testimony.[623] Despite this finding, the Chamber contradictorily held that Mangenda "presented evidence in the knowledge that the evidence of the witnesses (including D-23 and D-26) concerned was false."[624] Mangenda purportedly had this knowledge specifically in respect of "the witnesses' evidence on (i) prior contacts with the defence in the Main Case, (ii) the receipt of money, material benefits and non-monetary promises, and (iii) the witnesses' acquaintance with third persons."[625] The only lies falling within this category for D-23 was his denial of having received payments from Kilolo of $100 and 450,000 CFA,

[618] TJ, paras.367-371.
[619] *Šainović* AJ, 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.")
[620] *Blagojević* AJ, para.298.
[621] *Krajišnik* AJ, para.173.
[622] *Id.* para.203.
[623] TJ, para.920.
[624] TJ, para.914.
[625] *Id.*

and denial of knowing Kokate. D-26's lie within the categories above was denying contacts that he had after the VWU cut-off and during his testimony. The Chamber cites not one jot of evidence that Mangenda knew this testimony to be false, nor explain how its finding is reconcilable with its other finding that there was "no direct or indirect link between Mr Mangenda's activities" and their false testimony.[626]

313. These findings materially affected the Chamber's conviction of Mangenda for the presentation of the false testimony, and corrupt influencing, of D-23 and D-26. The only remedy commensurate with the error is to reverse Mangenda's convictions under Article 70(1)(b) and (c) in respect of these two witnesses.

314. Reversing the Chamber's findings in respect of these five witnesses would remove Mangenda from more than one-third of the common plan. It would also remove the five witnesses immediately surrounding the Yaoundé witnesses in time. The Chamber engaged in a "holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue."[627] The removal of one third of the basis for Mangenda's involvement in a common criminal plan materially affects its conclusions as a whole. Since the Chamber itself did not compartmentalise its findings, the Chamber's erroneous findings in respect of D-23, D-29, D-55, D-57 and D-64 also materially affects its findings in respect of the witnesses bracketed by these witnesses – the four Yaoundé witnesses. Even assuming that the Chamber did not commit clear error in its inferences regarding the distribution of the telephones, this finding is materially affected by the erroneous findings concerning these five witnesses. They surround in time the moment when Mangenda witnessed the distribution of telephones in Yaoundé. The Chamber, in accordance with its "holistic" approach, and given the sparse evidence of Mangenda's involvement in the purported illicit coaching in Yaoundé, may be presumed to have relied on its erroneous findings concerning those five witnesses to draw the inference it did about the telephones. The inference about Mangenda's apprehension of the purpose of the telephones, in other words, was likely fortified and corroborated by the Chamber's erroneous findings in respect of the five witnesses. The conviction concerning the four Yaoundé witnesses is, accordingly, materially affected by the clear error in respect of D-23, D-29, D-55, D-57 and D-64 and must be reversed.

315. Finally, the Chamber erred, both in law and in fact, when it found its factual findings

[626] TJ, para.920.
[627] TJ, para.188.

were a sufficient basis to infer that Mangenda was involved in a common plan to illicitly coach D-13.[628] The Chamber made no finding that Mangenda contributed in any way to Kilolo's coaching of this witness.[629] The full extent of Mangenda's involvement with this witness, according to the Chamber,[630] was listening to Kilolo complain – briefly – about having to remind the witness about what he had said during his interview.[631] Mangenda does not even respond to this complaint by offering advice or even encouragement. This does not constitute contribution or participation, nor does it even show illicit coaching, let alone illicit coaching concerning the objective lies within the confirmed charges. The Chamber's finding that the evidence showed that Mangenda contributed, or was part of a criminal plan, to coach D-13[632] is clear error.

316. The Chamber's erroneous conclusions regarding ten of the fourteen witnesses – even assuming the correctness of its findings regarding the remaining for – materially affects its finding that Mangenda was part of the common plan as defined by the Chamber.

VIII. GROUND SIX: THE TRIAL CHAMBER ERRED IN LAW AND IN FACT IN FINDING MANGENDA ABETTED D-2, D-3, D-4, D-6, D-13, D-25 AND D-29 TO GIVE FALSE TESTIMONY, OR THAT HE AIDED D-15 AND D-54, TO GIVE FALSE TESTIMONY

317. The Chamber found that Mangenda "committed the offence of aiding the giving of false testimony by D-15 and D-54," and that he "committed the offence of abetting the giving of false testimony by D-2, D-3, D-4, D-6, D-13, D-25 and D-29."[633]

318. Abetting, as the Chamber correctly defined it in its legal discussion, "describes the moral or psychological assistance of an accessory to the principal perpetrator,"[634] whereas aiding involves practical assistance. "Psychological assistance" is not defined,

---

[628] TJ, paras.910,912.
[629] TJ, paras.656-658,667.
[630] TJ, paras.658-660.
[631] CAR-OTP-0080-1419:10-25 ("*[m]oi, 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. JJM: Hum. AK: Donc j'ai du tout recommencer à zero, donc ça m'a pris du temps... ça m'a fatigué à fond. [Les 2 lignes suivantes sont prononcées simultanément] JJM: OK. AK: Et puis malgré cela, il m'appelle de nouveau, pour me dire qu'il veut encore qu'on parle encore ... d'autres histoires de VWU... donc j'étais vraiment contraint de ne pas répondre. [Les 2 lignes suivantes sont prononcées simultanément] JJM: Ah, OK. AK: Vraiment c'est ... c'est ... [Les 2 lignes suivantes sont prononcées simultanément] JJM: Hum.*")
[632] TJ, paras.910,912.
[633] TJ, para.922; p.456 ("GUILTY […] of having aided in the giving of false testimony by witnesses D-15 and D-54, and having abetted in the giving of false testimony by witnesses D-2, D-3, D-4, D-6, D-13, D-25 and D-29.")
[634] TJ, para.89.

but can only mean "encouragement". Abetting occurs only where the perpetrator is actually encouraged by the words of actions of the purported abettor. It follows, as held by the *Brđjanin* Appeals Chamber, that "encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators *are aware of it*."[635] Factual findings of abetting by trial chambers were overturned as unreasonable in *Brđjanin*, *Nyiramasuhuko* and *Ntagerura* in the absence of findings or evidence showing that the perpetrators were aware of the abettors' alleged encouraging conduct.[636]

319. The Chamber had no evidence, and made no findings, that any action by Mangenda had an encouraging psychological effect on D-2, D-3, D-4, D-6, D-13, D-25 or D-29 to give false testimony. The Chamber instead found that Mangenda "gave moral support and encouragement *to Mr Kilolo*."[637] In respect of D-13, Mangenda "listen[ed] to Mr Kilolo's updates and complaints about such activities and tacitly approv[ed] them."[638] These actions, however, are all irrelevant to abetting the offence under 70(1)(a) of giving false testimony, which can be committed only by a witness. The Chamber had no evidence to conclude – and did not find – that D-13, D-25 or D-29 were even aware of Mangenda's existence. D-2, D-3, D-4 and D-6 were aware of Mangenda's existence, but the Chamber made no finding that any of these witnesses were psychologically encouraged by his actions. Previous international jurisprudence is clear that presence alone, even during the perpetration of a crime, is in itself insufficient; what is required is that the presence be found, for one reason or another, to have had an "encouraging effect."[639] The Chamber made no such finding, and had no basis for any such finding.

320. The Chamber also erred in law in finding that aiding and abetting entails no substantiality requirement. The Chamber argued that since Article 25(3)(c), unlike the ILC's Draft Code, does not expressly incorporate a substantiality requirement, it must

[635] *Brđjanin* AJ, para.277.
[636] *Id.*; *Nyiramasuhuko* AJ, para.2088 (overturning as unreasonable a finding of abetting where the trial chamber had no evidence of an accused's prior criminal conduct and, accordingly, could not have been encouraged by his mere presence at a location); *Ntagerura* AJ, para.374 (overturning as unreasonable a finding of abetting by the trial chamber in the absence of evidence showing that the perpetrators were unaware of alleged "acquiescence" of the accused). *See* Peterson, pp.573-575.
[637] *See e.g.* TJ, para.867 ("the Chamber infers from Mr Mangenda's physical presence at these meetings, as well as from the consultation and exchanges between Mr Mangenda and Mr Kilolo on details of the illicit coaching, that Mr Mangenda *gave moral support and encouragement to Mr Kilolo* through his presence at these meetings") (italics added).
[638] TJ, para.868.
[639] *Tadić* TJ, para.579; *Čelebići* TJ, paras.324,327; *Aleksovski* TJ, paras.63,64; *Kunarac* TJ, para.393; *Bisengimana* TJ, para.34; *Orić* TJ, para.283; *Seromba* TJ, para.308; *Nzabirinda* TJ, para.17; *Mrksić* TJ, para.553; *Blaškić* TJ, para.402.

not be an element of this form of participation. The Chamber does not even address the uniform jurisprudence of the ICTY, ICTR and SCSL – whose statutory definitions likewise do not expressly include a substantiality requirement – that require the "substantial contribution" threshold.[640] This jurisprudence, which was based on World War II case-law and other international sources,[641] was established before the finalization of the Rome Statute. If the drafters had wished to lower this threshold, which the ICTY had already pronounced to a standard of customary international law,[642] then it could easily have done so. The Chamber likewise rejects the prevailing jurisprudence of the ICC without explanation.[643]

321. The Chamber also erred in finding that Mangenda aided D-15 and D-54 to give false testimony. The Chamber found that Mangenda aided the false testimony of D-15 by "advis[ing] Mr Kilolo on the content of the illicit coaching of D-15, and provid[ing] the confidential questions of the victims' legal representatives to Mr Kilolo for use during these illicit coaching activities."[644] The Chamber did not cross-reference to its own factual findings; had it done so, it would have discovered that it made no finding that Mangenda ever advised Kilolo on the content of D-15's testimony,[645] nor could it have made any such finding on the evidence.[646] Mangenda did forward the LRV questions, but the Chamber fails to explain how Kilolo's use of the LRV's question had any causal impact on the witness's objective lies – *i.e.* the date of his last contact with Kilolo.[647] The assistance did not meet the standard articulated by the Chamber itself of having "furthered, advanced or facilitated"[648] the giving of false testimony by D-15.

322. The Chamber committed the same error in respect of D-54. None of the elements of testimony discussed by Mangenda, far in advance of D-54's testimony, had anything

[640] Finnin, pp.143-146.
[641] *See e.g. Furundžija* TJ, paras.217-226, referring to *Einsatzgruppen*, *Zyklon B*, *Hechingen Deportation* and *Tadić*.
[642] *Furundžija* TJ, para.234 ("[t]he position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on he commission of the crime.")
[643] *Mbarushimana* Confirmation Decision, para.280; *Lubanga* TJ, para.997.
[644] TJ, paras.867,921.
[645] TJ, paras.566-576.
[646] There are only two telephone calls between Kilolo and Mangenda concerning D-15. In the first, on 11 September, Mangenda responds "Mm,mm" to the first of three questions that Kilolo says he is going to ask a witness, which cannot credibly be interpreted as "advice." CAR-OTP-0074-1005:67. He gives no further response. In the telephone call the next evening, Kilolo neither asks nor receives any advice from Mangenda concerning the witness's testimony. CAR-OTP-0074-1010.
[647] TJ, para.590 ("D-15, upon instructions of Mr Kilolo, untruthfully testified in the Main Case regarding his prior contacts with the Main Case Defence.")
[648] TJ, para.94.

to do with D-54's objective lie as found by the Chamber.[649] The Chamber does not explain how the provision of the information practically aided D-54's lie in this regard. In the absence of any finding, or evidence, in this regard, the Chamber erred in fact or law.

323. These errors materially affect all nine convictions for aiding and abetting. The findings of fact are clear errors, and even involve a misreading of the Chamber's own findings. The errors of law concerning essential standards; had the correct standards been applied, the Chamber would have undertaken a fundamentally different analysis of the evidence and of the facts as found. In these circumstances, all legal and factual findings should be reversed, and the convictions for aiding and abetting quashed.

IX. CONCLUSION

324. Mr Mangenda's convictions are based on numerous, often mutually reinforcing, errors of law and fact. The Chamber erred in finding that the intercepted conversations, which should never have been admitted as evidence, show that Mr Mangenda knew that Kilolo was engaging in illicit witness coaching, and erred in finding that he knew that Kilolo was engaging in illicit witness coaching in respect of the specific issues within the scope of the charges. The Chamber failed to address the key issue in this case: whether Mr Mangenda knew that Kilolo was resorting to illicit, rather than licit, techniques to achieve the results being discussed in their conversations. This failure arose from a failure to adequately define the Article 70 offences, the failure to address the permissible scope of witness preparation, and the improper reliance on discussion about the merits of the Main Case, even though Mr Mangenda was never present for the purported "scripting" of answers to these issues.

325. The appropriate remedy, for the foregoing reasons, is to reverse all findings against Mr Mangenda and to quash his convictions on all counts.

Christopher Gosnell
Counsel for Mr. Jean-Jacques Mangenda Kabongo

Respectfully submitted this 13 October 2017,

At The Hague, The Netherlands

[649] TJ, para.650 ("D-54 untruthfully testified in the Main Case regarding prior contacts with the Main Case Defence.")