

1 International Criminal Court

2 Trial Chamber VII - Courtroom 1

3 Situation: Central African Republic

4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,

5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido - ICC-01/05-01/13

6 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and

7 Judge Raul Pangalangan

8 Trial Hearing

9 Monday, 29 February 2016

10 (The hearing starts in open session at 9.34 a.m.)

11 THE COURT USHER: All rise.

12 The International Criminal Court is now in session.

13 PRESIDING JUDGE SCHMITT: I would like to welcome everyone back to the courtroom.

14 More specifically, I would like to welcome everyone in this new courtroom number 1. I

15 assume it is at least for most of us, I think at least for me, the first time to be here in official or

16 professional capacity, so to speak. We will all need some time, I would assume, and

17 indulgence with each other until we get accustomed to this huge courtroom and its technical

18 equipment. In comparison to the formal courtroom, the most striking difference to me seems

19 to be that the parties have switched sides, so to speak, which is of course meant actually and

20 not figurative.

21 But I'm confident the Chamber will adopt to the new local distribution of the parties.

22 Would the court officer please call the case.

23 THE COURT OFFICER: Good morning. Yes, Mr President. Situation in the Central

24 African Republic in the case of The Prosecutor versus Jean-Pierre Bemba Gombo, Aimé Kilolo

25 Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, in the

1 case reference ICC-01/05-01/13.

2 And for the record, we are in open session.

3 PRESIDING JUDGE SCHMITT: Counsel, would you please state your appearances for the
4 record.

5 MR VANDERPUYE: Good morning, Mr President, your Honours. Good morning
6 everyone.

7 Appearing on behalf of the Prosecution this morning is Olivia Struyven, trial lawyer
8 to my left; Silvia Vidinha, our case manager; behind me is Hesham Mourad, trial
9 lawyer; Ruth Frolich, trial lawyer; Nema Milaninia, trial lawyer; behind them to my
10 left is Silvia Wakchom, assistant trial lawyer; and Ester Kosova, who is our legal
11 assistant. Good morning, your Honours. I'm Kweku Vanderpuye.

12 PRESIDING JUDGE SCHMITT: Thank you very much. For the Defence, please, in an order
13 that you can decide.

14 MR DJUNGA: (Interpretation) Good morning, your Honours. Mr Kilolo's Defence has
15 been provided by Steven Powles, a member of the London Bar, co-counsel; myself,
16 Paul Djunga, a member of the Paris Bar, lead counsel. We are assisted by Ms Mbengue and
17 Ms Lueka Grogga, case manager.

18 MR TAKU: May it please your Honours, my name is Chief Charles Achaleke Taku. I
19 represent Mr Arido, who is here present today. With me, your Honours, is my distinguished
20 colleague Beth Lyons, a colleague of so many years on the same side in cases at ICTR. I also
21 have here today our colleague and case manager, the case manager Kiel Walker.

22 PRESIDING JUDGE SCHMITT: Thank you very much.
23 The Defence of Mr Mangenda, please.

24 MR GOSNELL: Good morning, Mr President. Christopher Gosnell, lead counsel for
25 Mr Mangenda, who is here to my left; joined by Nikki Sethi, legal assistant; and Jeanne Manga

1 Safi, legal consultant. Thank you, your Honours. Good morning.

2 PRESIDING JUDGE SCHMITT: Thank you.

3 Defence for Mr Babala.

4 MR KILENDA: (Interpretation) Good morning, your Honours. The Defence of Mr Babala

5 Wandu, who is right behind me, will be provided by legal assistant Bokolombe, who is

6 leading work and research at the University of Kinshasa. And we also have today Ms

7 Adriana-Marie Manolescu, our case manager who holds a doctorate from Leiden; Maître

8 Azama Shalie Rodoma, co-counsel; and myself, Jean-Pierre Kilenda Kakengi Basila, member

9 of the Brussels Bar and lead counsel representing Mr Babala.

10 PRESIDING JUDGE SCHMITT: Thank you very much. Defence for Mr Bemba please.

11 MS TAYLOR: Good morning, Mr President, your Honours. My name is Melinda Taylor,

12 and I'm appearing on behalf of Jean-Pierre Bemba, who is at the back of the courtroom. I'm

13 appearing today with Ms Natacha Lebaindre, Ms Yuqing Liu, Mr Joshua Bishay, and Ms Ines

14 Pierre de la Brière. Thank you.

15 PRESIDING JUDGE SCHMITT: Thank you very much. The Defence presentation of

16 evidence is set to commence this week in accordance with decisions 1209 and 1231. Before

17 this happens, the Defence teams will be given an opportunity to present their opening

18 statements in an order for them to decide amongst themselves.

19 The Kilolo Defence informed the Chamber that it only required one hour to present

20 its opening statement but was granted a half hour extension by way of an email on 23

21 February 2016. As such, all Defence teams will be allotted one and a half hours for

22 their opening statements.

23 For today we will sit from 9.30 till 11.30 and this has changed a little bit from 2.30 in

24 the afternoon until 4.30 in the afternoon. Tomorrow we will sit from 9.30 until 11.30

25 and 2 until 4 o'clock in the afternoon.

1 I assume, Mrs Taylor, you want to make a request in that respect, and I would like to
2 have it on the record, please.

3 MS TAYLOR: Yes, Mr President. My client, Mr Bemba, has requested to be excused from
4 this afternoon's session in order to avoid the possibility of being kept in the holding cell for
5 three hours. Thank you.

6 (Trial Chamber confers)

7 PRESIDING JUDGE SCHMITT: The Chamber decides that Mr Bemba is allowed to not be
8 present in the afternoon session. Does this extend also to tomorrow?

9 MS TAYLOR: Yes, Mr President. Should the opening statements continue tomorrow
10 afternoon, then he would also ask to be dismissed.

11 PRESIDING JUDGE SCHMITT: So this decision of the Chamber applies also to tomorrow
12 afternoon. Reason for it, the Chamber appreciates the concerns of the Bemba Defence. You
13 will recall that the Chamber has minimised in the past the duration of breaks whenever this
14 was possible. The Chamber will continue to do so. However, the two longer breaks today
15 and tomorrow are inevitable and exceptional, so this will only be a momentary not a lasting
16 problem, to make it clear.

17 MS TAYLOR: Thank you very much, Mr President, your Honours.

18 PRESIDING JUDGE SCHMITT: We expect to finish the opening statements sometime
19 tomorrow. After they are completed, the Chamber will hear any responses from the parties
20 to the Registry's submission of last Friday. The evidence presentation will commence on 2
21 March with D-213. The Chamber may sit extended hours in order to complete both D-213
22 and the D-231's testimony this week, but this is, as always, subject to the circumstances that
23 we will have, and we will have to discuss this tomorrow.
24 The Chamber also notes the Prosecution's response filing 1654 to the Defence's
25 opening statement materials as well as the further Defence submissions following this

1 response. These are filings 1660, 1661 and 1662.

2 The Chamber notes that no objection has been raised to the materials identified by the
3 Defence for purposes of their opening statements. The Chamber does not consider
4 that any directions on the scope of Defence opening statements are necessary at the
5 moment and will handle any objections in this regard on a case-by-case basis.

6 The Chamber also understands the Defence submissions to be that no accused intends
7 to present an unsworn statement during the openings. So unless this is incorrect,
8 there is no need to address this issue either.

9 I direct myself to the Defence teams. You have decided which Defence teams will be
10 the first, haven't you?

11 MS TAYLOR: Yes, Mr President, your Honours. It will be the Defence of Mr Bemba
12 followed by the Defence for Maître Kilolo.

13 PRESIDING JUDGE SCHMITT: Thank you very much. Then I give the floor to the Defence
14 of Mr Bemba, to Mrs Taylor especially.

15 MR DJUNGA: (Interpretation) With your leave, your Honour, I am having some trouble
16 with my headset. I'm not hearing the interpretation.

17 PRESIDING JUDGE SCHMITT: So we would have to solve this problem first until we can
18 start with Mrs Taylor. Just have a little bit of patience, please.

19 THE INTERPRETER: Message from the interpreters. Usually French interpretation is to be
20 found on channel 2.

21 PRESIDING JUDGE SCHMITT: Has the problem been solved, Mr Djunga? Then please,
22 Mrs Taylor.

23 MS TAYLOR: Good morning, Mr President, your Honours. During her opening statement,
24 the Prosecutor, Madam Bensouda, announced this is a case about shielding the integrity of the
25 Court's proceedings from offences against the administration of justice. It is about ensuring

1 that public confidence and the expectation of those who look to it to establish the truth and to
2 dispense justice are preserved and strengthened.

3 It is true that this case will set the parameters for how this Court defines the
4 administration of justice and the expectations that the Court has for those to whom it
5 looks to to establish the truth.

6 But to whom should we look to establish the truth? Should we look to Mr Bemba, an
7 accused protected by the right of silence? Or in light of its statutory duty to establish
8 the truth in an independent and impartial manner, should we turn first and
9 foremost to the Prosecutor?

10 And the record will show that the Prosecution has fallen short of this standard.

11 The Prosecution relied on witnesses who are strangers to the truth.

12 The Prosecution provided confidential information concerning protected Defence
13 witnesses to the same national authorities from which the witnesses sought protection.

14 The Prosecution relied on national police to harass and intimidate vulnerable refugees
15 and their families. And the Prosecutor repeatedly submitted incorrect and
16 misleading information to the Chamber and the Defence regarding key facts.

17 The Prosecution built its case on information which was covertly intercepted from
18 privileged Defence phone calls, emails and text messages. Of course, the

19 Prosecution claimed that everything was done pursuant to judicial authorisation in
20 accordance with national law and that there were numerous procedural safeguards in
21 place; but as we peel back these layers of rhetoric, we can see this simply wasn't the
22 case. National law was repeatedly ignored or trampled on.

23 Through a mate, Prosecution investigators obtained pages and pages of confidential
24 financial records without first obtaining a court order.

25 National authorities were falsely led to believe that the extremely intrusive measures

1 demanded by the Prosecution were required for genocide and war crimes rather than
2 a simple contempt investigation into the Defence.

3 The so-called procedural safeguards were also illusory.

4 Far from having Chinese walls, the same Prosecutors who were cross-examining
5 Defence witnesses day in and day out in the main case were having off-the-book
6 meetings with national authorities regarding the interception of the very same
7 Defence witnesses.

8 The Defence were also given no opportunity to assert privilege over intercepted
9 communications before it was transmitted to the Prosecution.

10 Mr Bemba's detention is supposed to be regulated by detention regulations; but in
11 order to further a simple contempt case, these protections were discarded, and the
12 Prosecution was given carte blanche to access all of Mr Bemba's non-privileged calls
13 dating back to 2008. That's almost six years' worth of surveillance.

14 The ICC regulations state that the detention recordings should first be vetted before
15 transmission to the Prosecution, but no one vetted these calls.

16 Of course, having obtained these recordings in somewhat controversial circumstances,
17 one might expect the Prosecution to adhere to the most rigorous standards of
18 impartiality in dealing with them. Again, sadly, they didn't. The Prosecution
19 mistranslated key phrases in the conversations in order to support their particular
20 Prosecution theory.

21 The Prosecution also subjectively reconstructed transcripts of the conversations and
22 tried to present them as objective records as to what was said by the speakers, except
23 they are not.

24 As Dr Harrison, an expert in forensic acoustics, will testify, the detention unit
25 recordings are plagued by technical errors.

1 A conversation should be a duet, not a solo; but for significant portions of the
2 recordings, we hear speakers conducting conversations with themselves. Other
3 portions suffer from post-facto speaker overlap, which renders it impossible to
4 ascertain who said what and when it was said.

5 Concretely, even if we can hear Mr Bemba say yes or no, we don't know what part of
6 the conversation he's agreeing or disagreeing with. And due to these technical
7 errors, it's not possible to construct an objective record as to what was said. We are
8 left with mere guesstimates and subjective interpretation.

9 As argued in a 2005 article in the Tulane Journal of International Law, the "use of
10 illegal evidence in the ICC carries the potential appearance of complicity in the
11 illegalities that produce the evidence. As a result, the integrity of the institution may
12 be substantially compromised."

13 These words, which were written by my learned prosecution colleague, Mr Kweku
14 Vanderpuye, are equally true now as they were then.

15 If the objective of this case is to uphold the integrity of the proceedings, to underscore
16 that the means do not justify the ends, then it is even more imperative that in this case,
17 this first Article 70 case before the ICC, that the conviction of these defendants is not
18 obtained through dubious means or tainted evidence.

19 It is equally imperative that in a case which was initiated and investigated by the
20 Prosecution against its main case litigation adversary, the Defence for Mr Bemba, that
21 the Court does not impose unrealistic standards of legal conduct on the Defence,
22 which have never and will never be applied to the Prosecution. The test as to what
23 contravenes Article 70 of the Statute cannot discriminate against the Defence.

24 If violations of national law or harassing and pressuring Defence witnesses doesn't
25 even trigger the exclusion of related evidence, can Defence conduct of a similar or

1 lesser gravity result in an Article 70 conviction?

2 The Statute makes a clear distinction between Article 70 offences and Article 71
3 misconduct.

4 The former requires an intent to act in a manner which is contrary to the
5 administration of justice, the latter does not. But the former can also result in jail
6 time; whereas, the latter does not.

7 The crucial difference between conduct which results in an Article 70 conviction as
8 compared to an Article 71 rap over the knuckles can't just depend on which side of
9 the courtroom the party is seated, even if we have now switched them around.

10 There can't be a Manichean presumption that the ends justifies the means when it
11 comes to prosecuting a case but the acts directed towards defending an accused are
12 ipso facto illegal.

13 The Defence are an integral part of this Court. The ICC Appeals Chamber has
14 underscored that a fair trial is the only means to do justice, but it's not possible to
15 have a fair trial without an independent and vigorous Defence. And it's not possible
16 to have an independent and vigorous Defence if the Defence risks being sanctioned
17 for exercising fundamental rights.

18 So when it comes to adjudicating an Article 70 case, there must be a clear demarcation
19 between legal and prohibited activity and conduct which was directed towards
20 defending an accused in accordance with his statutory rights.

21 But no such bright line exists in this case.

22 The Prosecutor has averred that this case is not intended to be an attack on the
23 Defence. But the Prosecution charges are directly predicated on the allegation that
24 there was a common plan to defend Bemba against charges of crimes against
25 humanity and war crimes in the main case by means which included the commission

1 of offences against the administration of justice in violation of Article 70 of the Statute.

2 This the Prosecution has termed the overall strategy.

3 How is it not an attack on the Defence to charge the Defence for a common plan to
4 defend Mr Bemba? And what does it mean to have a common plan which includes
5 the commission of offences? "Included" is a very vague word upon which to base a
6 conviction. The word "included" doesn't have a percentage. Something can also be
7 included without the knowledge and intent of those who partake in it.

8 Similarly, in this case, it's not clear which means were illegal, who decided on the
9 illegal means, and which members of the common plan knew, approved and
10 discharged the illegal means.

11 By advancing such a vague and nebulous common plan, the Prosecution is, in effect,
12 trying to take advantage of the unfair and prejudicial preconceptions which haunt
13 international justice and that is that all defendants who appear before these courts
14 must be guilty of something and that it is inherently immoral or unethical to do one's
15 best to defend them.

16 But if we examine the particular evidence and allegations levelled against Mr Bemba
17 himself, none of them reflect an intent to corrupt witnesses or rely on false testimony
18 or a knowing contribution to a joint plan to do so.

19 In its charges, the Prosecution outlined the flawed prongs of its case against
20 Mr Bemba. Mr Bemba contributed by providing instructions as concerns what
21 witnesses should testify about. Witnesses were thanked for testifying on
22 Mr Bemba's behalf. Mr Bemba allegedly circumvented the detention unit telephone
23 regime. Witnesses who were called on behalf of the Defence provided false
24 testimony, and Mr Bemba allegedly authorised payments to witnesses from third
25 parties in furtherance of the common plan.

1 As a first point, it is clear that these allegations are non-sequiturs. At no point has
2 the Prosecution led evidence which would establish that Mr Bemba's individual
3 actions contributed to or had any direct nexus with acts of false or corrupted witness
4 testimony.

5 As a second point, the Prosecution's case against Mr Bemba seems to be much ado
6 about nothing. All the smoke and mirrors in the world can't disguise the fact that
7 none of the alleged actions amounted to or were directed to conduct which is
8 prohibited under Article 70 of the Statute.

9 Let's take the first allegation, that Mr Bemba provided instructions to his Defence as
10 concerns the prospective testimony of witnesses. Well, of course he did. Article
11 67(1) of the Statute guarantees an accused both the right to participate in his Defence
12 and a privilege against self-incrimination.

13 Each time a witness is on the stand, Defence counsel must engage in a delicate
14 balancing act between putting all relevant issues to the witness and ensuring --

15 PRESIDING JUDGE SCHMITT: Mr Vanderpuye.

16 MR VANDERPUYE: Mr President, you indicated earlier that you would entertain objections
17 to the opening statement. I have an objection and the nature of the objection is that the
18 rhetoric that my colleague is engaging in does not comment on the evidence in the case or the
19 evidence that she intends to introduce on behalf of her client.

20 To the extent that she wants to comment on the various practices of the Defence, if she
21 has evidence that she intends to introduce in the case, there is no problem there. But
22 to the extent that there is no such evidence either in the record of the case or that she
23 intends to introduce in the case, we consider that that exceeds the proper scope of an
24 opening statement as distinguished from closing arguments, which is essentially what
25 she's making.

1 PRESIDING JUDGE SCHMITT: At the moment, I do not see any reason for interference, but
2 I think Mrs Taylor will then come to the evidence and will bear in mind what Mr Vanderpuye
3 has said. But at the moment, I think I don't have any complaints about what has been said in
4 that respect.

5 MS TAYLOR: Thank you, Mr President, your Honours.

6 PRESIDING JUDGE SCHMITT: You have the floor.

7 MR KILENDA: (Interpretation) Thank you very much, your Honour, for the floor. I'm
8 seriously shocked by the intervention of the Prosecutor. As a counsel in this Court, it's the
9 first time that I see the Prosecutor get up to interrupt a lawyer who is giving her opening
10 statement.

11 I think that the opening statement of lawyers, whatever it contains, these opening
12 statements must be religiously listened to by all. If there are objections, it is during
13 the final conclusions and written submissions that they can be made. In this regard I
14 think nobody in the Defence team will make their opening statements without being
15 interrupted without cease by the Prosecutor.

16 MR TAKU: May it please your Honours. In my --

17 PRESIDING JUDGE SCHMITT: Yes, please, Mr Taku.

18 MR TAKU: In my over 35 years of practice, including almost all at the International
19 Criminal Court, this is unprecedented. The prerogative is that of the judges to intervene and
20 direct on how the statements were made are not for the Prosecutor to interject and to try to
21 delay the course of the presentation of this brilliant opening statement of my colleague.

22 PRESIDING JUDGE SCHMITT: Thank you very much for these remarks. The Chamber
23 would very much appreciate if the opening statements could from now on go on
24 uninterrupted.

25 Please, Mrs Taylor.

1 MS TAYLOR: Thank you, Mr President, your Honours.

2 Each time a witness is on the stand, Defence counsel must engage in a delicate
3 balancing act between putting all relevant issues to the witness and ensuring that the
4 line of questions does not incriminate the accused. It is not possible to do this
5 without obtaining feedback from the client. This process isn't an essential
6 contribution to a criminal plan. It's an essential component of effective Defence
7 preparation.

8 The same holds true for the second allegation which runs through the charges, that
9 witnesses were thanked or that Mr Bemba appreciated their testimony. Again, this
10 discloses nothing inappropriate or illegal.

11 The witness protocol in the main case specifically stated that thanking a witness for
12 their testimony was "A valuable and direct tool to recognize and express appreciation
13 for the witness's cooperation with the Court in giving testimony."

14 The trial record in this case is also replete with examples where the Prosecution
15 thanked witnesses for providing certain answers on the stand. There was no
16 suggestion that such examples of common courtesy were a form of corruption. A
17 thank you is a thank you, and it cannot be transformed into corruption just because it
18 comes from the Defence.

19 Then we come to the third allegation regarding circumvention of the detention unit
20 telephone regime. The Prosecution led evidence from only one witness on this point
21 and failed to establish any nexus between the alleged misuse of the telephone regime
22 and the Article 70 charges. Far from being corrupted, the Prosecution's own witness
23 confirmed that there were no discussions concerning payments or the content of
24 witness testimony. Indeed, the witness was not even certain as to whom he was
25 speaking.

1 The Prosecution cannot discharge its burden of proof by simply making lots of
2 allegations regarding technical infractions and hoping that it amounts to a pastiche of
3 criminality.

4 After all, if intent to commit Article 70 offences could be inferred from technical
5 infractions, where does that leave the Prosecution as concerns their interaction
6 infractions?

7 D-57 testified as a Defence witness in the main case in 2012 and was also called as a
8 Prosecution witness in this case last year. During his stint as a Prosecution witness,
9 D-57 testified that after he arrived in The Hague as a Defence witness, the Prosecution
10 attempted to convince him to discuss his testimony with them. This testimony
11 suggests that there may have been an infraction of familiarisation protocol in the main
12 case.

13 But can we infer an intent to corrupt from such actions, or is it the case that Article 70,
14 whether it is applied to the Defence or the Prosecution, must be satisfied through
15 concrete evidence rather than assumptions?

16 That brings us to the bulk of the Prosecution case against Mr Bemba, allegations of
17 false testimony and payments to Defence witnesses.

18 One of the striking features of this case is that although the charges refer to 14
19 different witnesses who allegedly provided false testimony, not one of these
20 witnesses has been charged for lying to the Court. Indeed, the charges appear to put
21 the blame and responsibility on the Defence and Mr Bemba himself.

22 This approach is erroneous, both as a matter of law and of evidence. The Statute
23 does not support strict liability. Witnesses may have lied, but that does not, in itself,
24 invoke the personal responsibility of Mr Bemba.

25 Of course, Mr Bemba is currently standing trial for war crimes and crimes against

1 humanity, and it would be easy to make certain assumptions about what an accused
2 standing trial for such crimes might be capable of. It would be easy but completely
3 wrong to do so.

4 Mr Bemba is entitled to the full presumption of innocence in these legal proceedings.
5 The mere fact that he's an accused in one case does not mean that intent to corrupt
6 witnesses can be conjured up from thin air.

7 The Statute and rules do not permit the Court to assume from the fact that Defence
8 witnesses provided inaccurate or false testimony that they must have been corrupted
9 by Mr Bemba.

10 Indeed, if the Court were to accept such a flimsy premise, then where do we draw the
11 line?

12 There have been allegations of false testimony by Prosecution witnesses in almost
13 every case at the ICC. Does that mean that the Prosecutor herself must stand trial
14 each time such allegations arise? Of course not, which is why these charges against
15 Mr Bemba can't stand.

16 The Prosecution's attempt to drag Mr Bemba into the fulcrum of its common plan also
17 ignores the specific role and protections that apply to defendants in criminal
18 proceedings.

19 To put it in context, today I am addressing you in relation to these allegations, and I
20 am doing so as counsel for Mr Jean-Pierre Bemba. If I speak too quickly, it is to my
21 ears the interpreters will direct their pleas to slow down. If I go further and reveal
22 the names of protected witnesses, then I will be the one reprimanded or sanctioned by
23 the Chamber. It will be me and not Mr Bemba because I'm his counsel and I have
24 accepted responsibility for the presentation of his case.

25 Mr Bemba has no duty to make sure that I respect the five-second rule. Most

1 importantly, Mr Bemba has no capacity to enforce my compliance with the laws and
2 regulations of this Court. These duties fall on my shoulders to advise Mr Bemba to
3 receive instructions and to carry out those instructions in a manner which is
4 consistent with the law, and that is because Mr Bemba is not a lawyer. He did not
5 elect to represent himself in this case and he has, therefore, never accepted either the
6 rights or corresponding duties which attach to a counsel.

7 The same held true for the main case. When Mr Bemba was arrested in 2008 and
8 detained in the custody of the ICC, he explicitly opted to be defended through a
9 Defence team. This Defence team was vetted and appointed by the Registry.

10 Having made this choice, regulation 74(2) of the regulations of the Court is clear.

11 From that point onwards, Mr Bemba's Defence was conducted by his counsel, not by
12 him.

13 Mr President, your Honours, for defendants who are staring down the barrel of a
14 potential life sentence, the notion of effective representation must mean something.

15 But if this veil of legal representation is pierced for the first time in any international
16 criminal case, then it means that the notion of legal representation is no more than
17 empty words. It would be the equivalent of the emperor's new clothes.

18 From 2008 until 2013, the ICC Statute and rules guaranteed that Mr Bemba could and
19 should be clothed by the legal protection afforded by his Registry vetted Defence
20 team. But the Prosecution now want to make Mr Bemba, a detainee and accused,
21 liable for the acts of persons appointed by this Court to help him.

22 If you accept that it's possible to do this, then it means that between 2008 and 2013,
23 Mr Bemba was, in a legal sense, naked. The chair and table where I stand now were
24 empty and Mr Bemba was, to all intents and purposes, alone in the courtroom.

25 The Prosecution has also sought to present the Article 70 case in a vacuum, which

1 ignores the legal and factual realities which were at play in the main case. In so
2 doing, they have relied on a limited selection of filings from the main case. They
3 have presented snippets of false testimony without explaining the context in which
4 that testimony arose. And that context dispels the Prosecution's artificial construct
5 that Mr Bemba was at the pinnacle of a common plan to corrupt witnesses.
6 The reality is that the tail wagged the dog, not the other way around.
7 So let's look closer at that reality. Back in 2012 and 2013, the ICC had not yet
8 discovered that it had subpoena powers. The parties were instead required to find
9 witnesses who could consent to potentially placing their life at risk in order to testify.
10 This isn't exactly a simple task. In fact, the 12 labours of Hercules were probably
11 easier.
12 Of course, Mr Bemba had a hypothetical right to adequate time and resources to
13 prepare his Defence in the main case. But which resources should be used for this
14 purpose was, at best, murky.
15 On the one hand, the Registry found that Mr Bemba was not indigent and refused to
16 grant him legal aid; but at the same time the Pre-Trial Chamber ordered State Parties
17 to freeze Mr Bemba's assets. This contradiction triggered a long running battle
18 between the Defence and the Registry as to who was responsible for paying
19 Mr Bemba's Defence team and how much they should receive.
20 The effective preparation of Mr Bemba's Defence was a casualty of this battle.
21 Between March and October 2009, Mr Bemba's Defence received no funds, and the
22 Defence stopped working until the Trial Chamber intervened.
23 For the duration of 2010, the Defence received 26 percent less than a legally aided
24 funded team and so, once again, the Trial Chamber intervened.
25 Ten days before the start of the trial, the Defence had not appointed any investigators

1 and appeared to be completely in the dark as to how to investigate the case. This is
2 hardly surprising, given that the allegations in the main case concern the Central
3 African Republic, but neither Mr Bemba nor his counsel were from that country.
4 And this was not a simple case. In fact, due to the logistics involved in securing the
5 appearance of witnesses, many of whom were illegal refugees or deserters with no
6 passports, the Registry described it as the most complex case faced by the Court.
7 The Defence informed the Trial Chamber that it was ill-equipped to handle such
8 operations and requested the Victims and Witnesses Unit to accept full responsibility
9 for bringing witnesses to the Court. This request was rejected. Whereas the
10 Prosecution has an entire investigations division, the Defence had no investigations
11 budget. The Defence was, therefore, forced to make do with what they had, and this
12 included offers of help from persons from the Central African Republic.
13 Now, this isn't the first or the only case at the ICC where a party relied on local
14 intermediaries to help them to identify or locate potential witnesses.
15 In the Lubanga case, the Prosecution relied on several intermediaries, including a
16 Congolese intelligence officer. These intermediaries who were paid by the
17 Prosecution for their work notoriously convinced witnesses to lie about the fact that
18 they were child soldiers.
19 When the Defence first adduced evidence concerning such improprieties, the
20 Prosecution refused to either disavow themselves from the intermediaries or
21 renounce their reliance on the affected witness's testimony.
22 Now, if the same common plan theory from this case was applied to the Lubanga case,
23 it could be said that the Prosecution had a common plan to prosecute Mr Lubanga
24 through means which included false and corrupted testimony. But, of course, four
25 years later not a single witness, intermediary, or Prosecution staff member has been

1 sanctioned for that particular common plan.

2 The Prosecution phase of the Bemba main case was also afflicted by issues with

3 intermediaries. From an early point in the case, the Defence voiced concerns

4 regarding a strikingly similar language employed in several victim applications. The

5 financial damages claimed by some victims, which sometimes totalled thousands of

6 euros, also lacked credibility. But, notwithstanding these early warning signs, the

7 Prosecution still decided to call some of these victims as Prosecution witnesses.

8 One such victim, Witness P-73, testified that he had been assisted to complete his

9 victim application form by an intermediary. According to P-73, this intermediary

10 insisted that he should falsely declare that his daughter had been raped and increase

11 the sum of compensation he was requesting.

12 When P-73 initially declined, the intermediary told him, "But listen, people are

13 mentioning large sums of money and you, you are just mentioning just small

14 amounts of money. You don't want to eat of the cake?"

15 P-73 also testified that he convinced his neighbours, fellow Prosecution witnesses, to

16 agree on key dates which they should provide when testifying.

17 P-73 was a Prosecution witness, and his testimony was elicited in court in front of the

18 Prosecution, but the Prosecution still didn't renounce their reliance on P-73 or his

19 neighbours.

20 Instead, the Prosecution argued that any coordination of accounts between witnesses

21 was to be expected and was driven by a desire to provide accurate and truthful

22 information to the Court.

23 Again, if we were to apply the Prosecution's common plan theory from this case to

24 the main case, it could also be argued that the Prosecution had a common plan to

25 prosecute Mr Bemba through means which included false or corrupted testimony.

1 Turning to the current case, the Prosecution has alleged that witnesses who were
2 introduced to the Defence by intermediaries lied about who they were. The
3 Prosecution was apparently tipped off that this was the case back in 2012; but rather
4 than disclosing such evidence to the Defence so that Mr Bemba could make an
5 informed decision as to what to do, the Prosecution withheld it. Rather than acting
6 immediately to preserve the integrity of the trial proceedings, the Prosecution decided
7 to have their gotcha moment.

8 Only after every last Defence witness had been called, after Mr Bemba and members
9 of his former Defence had been arrested under covert warrants, it was only then that
10 the Prosecution revealed its suspicions to the Defence.

11 The Prosecution has, of course, attempted to establish that all this time Mr Bemba
12 knew these witnesses were lying, except they failed to do so, nor can any knowledge
13 be presumed.

14 After all, if the ICC Prosecution with its management committees, its manuals, it's
15 protocols, it's layers of supervision, were seemingly unaware of the legal activities of
16 its intermediaries, so how could it be presumed that Mr Bemba, who is detained in a
17 cell in Scheveningen, who was completely dependent on the information fed to him,
18 how could we presume that he would be in a better position to know what witnesses
19 and intermediaries were doing on the ground?

20 The record is clear on one thing though; whereas the Prosecution doggedly clung to
21 their tainted witnesses in Lubanga and Bemba main case, when Mr Bemba was
22 disclosed the allegations concerning tainted witnesses in the main case, his Defence
23 did not rely on them in its final submissions.

24 This begs the question: How can Mr Bemba be said to have participated in a
25 common plan, which included illegal means, when he expressly excluded such illegal

1 means from his Defence?

2 A further legal quandary is, of course, how can the Prosecutor prosecute Mr Bemba
3 for relying on false witnesses, which he did not rely on, whilst the Prosecutor relies on
4 the very same false witnesses to prosecute him?

5 If it was so obvious that D-2 and D-3 were liars and hustlers and Mr Bemba must
6 have known, why did the Prosecution choose to build their case on the same
7 witnesses? Their pseudonym might now start with a P rather than a D, but a rose by
8 any other name still smells the same.

9 Apart from adducing a flawed case as concerns Mr Bemba's responsibility for false
10 testimony, the Prosecution has made a big deal about money, as if this was the first
11 case in which that happened and there was something grotty and unprecedented
12 about paying money to witnesses; but, of course, there isn't. As the Assembly of
13 State Parties can attest, international justice isn't cheap, and every aspect has a price.
14 The stark realities of witness payments were addressed in a decision on Prosecution
15 witness expenses issued by the Special Tribunal for Lebanon on 9 May 2014. "In
16 national and international legal systems, witnesses incur expenses in providing
17 statements or information to parties, investigating judges or courts."

18 The Trial Chamber therefore concludes that paying witnesses their reasonable
19 expenses is considered a normal part of a functioning system of justice.

20 Of course, this raises the question as to what constitutes reasonable expenses. The
21 Trial Chamber, therefore, gives a hypothetical example. Paying a witness his or her
22 bus fare to attend an interview location is normal, non-disclosable. Giving the
23 witness the bus is not.

24 Well, at least one witness in the main case was bought a bus. The witness also
25 received several thousand euros from the Court, a little more than the costs of a few

1 bus tickets.

2 The witness wasn't happy with these benefits though. So after his testimony, he
3 called another witness and tried to convince other witnesses to demand money. He
4 also sent multiple emails and letters demanding the payment that he had been
5 promised.

6 At one point, unless his demands were met, he threatened to publicly reconsider his
7 testimony that he had provided to the Court, which he described as a marché de
8 dupes; that is, a fool's bargain.

9 The witness obtained these benefits by making allegations regarding intimidation and
10 threats, which turned out to be demonstrably false. And of course, when he testified,
11 the witness claimed that he had not received any financial assistance.

12 This was a Prosecution Witness. The Prosecution knew that he had received
13 financial assistance from them but took no steps to correct the record.

14 So has this person been investigated for providing false testimony to the Court? Did
15 the Prosecution investigate itself for repeatedly acquiescing to his demands? Or at
16 the very least did they renounce their reliance on him? No. This witness remains
17 one of the key witnesses for the Prosecution in the main case.

18 And this witness wasn't an isolated case. The Defence discovered at the end of the
19 case that the Prosecution had repeatedly provided cash directly to witnesses. Of
20 course, there was always a reason: Taxis, lunch money, lost earnings, mobile phones,
21 or for the support persons who suddenly started to tag along; but these expenses
22 tallied up.

23 So the Prosecution is entitled to pay witnesses from its Prosecution pockets, and it can
24 even rely on witnesses who have denied receiving such payments when under oath.

25 So what is the legal basis for imposing a different standard on the Defence? When

1 the Defence conducted their investigations, they also had the right to meet potential
2 witnesses. And for security or logistical reasons, these witnesses often had to travel
3 to meet the Defence. However, absent exceptional circumstances, the Registry does
4 not organise this, nor do they provide any funds to the Defence to do so.

5 The ICC Statute guarantees that the Defence must have the same right to investigate
6 and call witnesses as the Prosecution. If this right was to be effective and not
7 illusory, it was both necessary and reasonable for the Defence to try to find funds to
8 cover these costs.

9 Mr Bemba did not fall under the legal aid scheme, so nothing prohibited his Defence
10 from seeking such funds from third persons.

11 The amounts which were paid also fell within the yardstick of amounts paid by
12 international courts and tribunals for logistical expenses.

13 The code of conduct imposes the obligation of maintaining accurate accounts on
14 counsel, not the client. Mr Bemba should, therefore, have been entitled to rely on the
15 advice and estimates provided by his Court vetted counsel.

16 It is also unreasonable to expect that from his detention cell in The Hague, Mr Bemba
17 had either the time or means to verify the accuracy or purpose of such payments.

18 And this is particularly the case given that the Registry had not then or even today
19 established guidelines for payments from parties to witnesses.

20 So if, from the vantage point of Mr Bemba, the payments to witnesses were
21 objectively legal and there was no prohibition on the Defence receiving funds from
22 third parties, this leaves us with the unsolved question: How can Mr Bemba be said
23 to have participated in an Article 70 offence if his conduct and intent were directed
24 towards defending himself in accordance with rights guaranteed by the ICC Statute?

25 Mr President, your Honours, the answer is he can't. Mr Bemba had the right to

1 instruct his Defence team and to rely on their assistance. The Defence also had the
2 right to investigate and to have sufficient funds to do so.

3 If penal sanctions are now imposed on Mr Bemba because he wanted to exercise his
4 basic right to be defended by his court appointed Defence team, then I'm afraid that
5 it's game over for the Defence at this Court, and these chairs where I stand now might
6 as well be empty.

7 Thank you, Mr President, your Honours.

8 PRESIDING JUDGE SCHMITT: Thank you very much, Mrs Taylor.

9 Who will be the next with the opening statement? Mr Djunga, I assume? Then you
10 have the floor.

11 MR DJUNGA: (Interpretation) Your Honours, there are moments when addressing a
12 Court is like a kind of burden. In actual fact, in ancient times the Latin expression was
13 "honor est onus," that is to say, honour and onus or burden.

14 Today I have an honour. And in actual fact, this honour is also a kind of burden. It
15 is my difficult task to speak on behalf of a man who is in the habit of speaking for
16 others before Courts.

17 This is why addressing the Court today for me is such a special task and, indeed, this
18 is a new kind of trial before this August body. But this honourable and yet so
19 difficult task is even more difficult when one must defend, when one must speak and
20 advocate for a person who has devoted his entire life to the Defence of others.

21 Today I am not pleading before the Court. I am not presenting legal arguments.
22 The time has not come for that. In short, I will speak to the Defence's case, and this
23 case will be proven by way of testimony and written evidence. The evidence will
24 shed new light and will allow you to dismiss the wild and far-fetched allegations that
25 have been brought before you by the Prosecution, allegations that their own witnesses

1 have already given a lie to. Most of these witnesses have already contradicted the
2 Prosecution's theory.

3 We shall show that a number of very honourable counsel, all former presidents of bar
4 associations, both French speaking and Dutch speaking, including the former
5 president of the Lubumbashi Bar in the Democratic Republic of the Congo as well as
6 the former president of the International Criminal Bar have agreed to give testimony
7 in this case voluntarily. They will all tell this Court about Mr Kilolo, what an
8 honourable man he is, how devoted he has been to serving justice, his probity. An
9 official attestation has been issued by the Brussels Order of Lawyers and confirms
10 that our learned friend has been counsel for more than 20 years and has never been
11 found guilty of any offence, has never been issued a reprimand, has never been
12 criticised for any departure from his professional code of conduct throughout his
13 entire career, and that is why my words today will go far beyond a mere defence of
14 this person who finds himself about -- in the stand, no matter how illustrious it may
15 be because today I wish to speak also to the very foundation of democracy and the
16 foundations of legal institutions. I wish to speak to the guarantee of a fair, equitable
17 trial that allows the accused to choose a lawyer, a lawyer of his own choice, a lawyer
18 who will defend the accused in an entirely independent fashion.

19 Thus, I am addressing the Court today to defend the Defence and just for the Defence.
20 This important part of the trial did not go unnoticed by our entire profession. In
21 particular, the National Council of French Bar Associations has turned its attention to
22 the issue and at the outset issued a press release when our learned friends were
23 arrested.

24 Furthermore, the National Council has paid particular attention to developments in
25 this case.

1 Defending another lawyer is always seen as the opportunity for counsel to give a pro
2 domo speech. This opportunity has become an obligation when one can display a
3 number of flaws that have undermined the proceedings before this August body, and
4 this is particularly the case in this case. Among the flaws, first of all, we see a rather
5 uneven playing field. In this particular case, we see that the Office of the
6 Prosecution enjoys major resources and can even offer immunity to witnesses. And
7 sometimes, which is really a pity, the Prosecution even threatens witnesses with
8 proceedings under Article 70. This is the case for nearly all the witnesses who
9 testified in this case, for example, P-260, P-245, P-261.

10 We shall demonstrate that the Prosecution's practices are particularly regrettable.

11 The Prosecution did not hesitate a moment and brought major disproportionate
12 measures to bear beyond the scope of the Defence.

13 To gather evidence in a very arbitrary fashion, first of all, the Prosecution had former
14 Defence witnesses arrested, Defence witnesses from the main case, terrorised these
15 people, humiliated them before their wives and children. The Prosecution had them
16 forcibly taken to the police station to meet with members of the Prosecution office.

17 Your Honours, we shall demonstrate as no doubt you have seen and observed that
18 the use of such brutal, harsh procedures without any apparent reason have actually
19 traumatised and deeply shocked many of the Prosecution's own witnesses and their
20 family members, showing contempt for the fundamental rules that we find in the
21 Prosecution's code of conduct.

22 We shall establish that the statements made by P-20 bear witness to practices that the
23 Prosecution has used day in and day out in this particular case in a generalised
24 fashion. When giving testimony before this Chamber, Witness P-20 spoke truthfully
25 and in very blunt words about the brutal way in which the Prosecution interviewed

1 him as part of this particular case.

2 Here is what the witness said about his arrest so that he could be interviewed on 22
3 January 2015 by Prosecution investigators, and I quote, "They came in a military
4 fashion, I tell you, right in front of my children, and they worked in a very forcible
5 way to haul me to the police station," End of quote.

6 I make reference to transcript T-31, page 15, lines 10 to 12.

7 The wife of this witness, who herself was a witness, P-242, described that day, 22
8 January 2015, as a sad day for her family. Why a sad day? Because she said, and I
9 quote, "Such a thing should not happen to human beings." End of quote.

10 I refer you to transcript T-37, page 45, lines 8 and 9.

11 Witness P-243 was also deeply shocked by the methods used by Prosecution
12 investigators when that witness was interviewed. He said the following, and once
13 again I quote, "What truly shocked me in this operation is that the police came. They
14 called -- they rang the door as I was preparing my youngest daughter, who was five
15 and a half years old at the time." End of quote.

16 I refer to transcript T-32, page 74, lines 5 to 7.

17 What is more, the Prosecution used brutal and threatening procedures during the
18 interviews of a number of witnesses in this case. Defence Witness D21-0003, a
19 witness we will be calling, will give testimony before the Court to this effect. Faced
20 with this spectacle, which calls us to call in question the very credibility of this
21 prestigious court of law, the Defence has nothing, no resources, no means to
22 cross-check and verify the Prosecution's loyalty regarding management of their own
23 witnesses without you, without turning to you.

24 You represent the last rampart, the last line of Defence against illegal arbitrary actions
25 taken by the Prosecution that could bring this Court down and destroy the Court, an

1 edifice that has already been shaken by the voices of a number of international
2 organisations representing counsel who have decried the disproportionate measures
3 that were taken and initially led to Mr Kilolo being arrested in November 2013.
4 I think this would be a suitable point to remind the Court that Mr Kilolo was taken to
5 the detention centre, as if he were a perpetrator of genocide, by a dozen heavily
6 armed soldiers. I will spare you the rest.

7 I am also quite grateful to the international criminal bar, to the Paris Bar, to the
8 International Union of Counsel, Lawyers Without Borders who have spoken out
9 clearly against this attack upon the rights of the Defence, an attack unlike any other,
10 and these associations have called for the great principles of law to be respected,
11 principles that are threatened by the Prosecution's behaviour within this noble
12 institution, an institution that is supposed to protect the rights of the weakest.

13 We shall demonstrate that requiring the former lead counsel to defend himself in this
14 related case while he had to disclose and use information that he used -- correction,
15 that he obtained only for his official duties as a counsel, protected by client-solicitor
16 privilege, even before, even before the main case came before an appellate court, and
17 this is an extremely controversial matter.

18 We shall demonstrate that the fairness of proceedings in this case was also
19 compromised by the extremely long period of time that my client spent in detention.

20 Your Honours, no state, I reiterate, no state where the rule of law prevails allows one
21 year of detention for someone who is presumed to be innocent for an offence with a
22 maximum sentence of five years' imprisonment and the minimum sentence could be
23 merely a fine. This is particularly an important point given that we are talking about
24 here a person who is presumed to be innocent, who has never been convicted.

25 We shall show that throughout his entire detention Mr Kilolo, and I stress this point,

1 throughout his entire detention within the ICC detention centre, Mr Kilolo was
2 required, obliged to conduct interviews and consultations that were supposed to be
3 confidential and protected by client-solicitor privilege in rooms where there were at
4 least two cameras visible. They had been put there on a permanent basis. And it
5 would appear quite likely that there was also some kind of audio visual system to
6 record the sound and the images, utterly disregarding the very principle of
7 client-solicitor privilege and undermining the fairness of the proceedings.

8 Such practices that are prohibited in all states where the rule of law prevails but
9 which seem to be just fine at this Court means that some people will be drawing
10 comparisons between the detention centre and the Guantanamo prison, soon to be
11 closed.

12 I really wonder whether we need to look beyond the simple issue of unfair trial. I
13 believe we must look even further and ask ourselves, has the Prosecution seriously
14 broken, disregarded the fundamental rights of these people, their human rights?
15 This trial is not just about Mr Kilolo and his colleagues. It is also about the sacred
16 principles that must govern this august body, that must govern the dealings between
17 the Prosecution and all the Defence teams, Defence teams that I speak for at this
18 juncture. These sacred principles ensure that the rights of the Defence are indeed
19 effective. They include equality of arms, client-solicitor privilege, independence of
20 counsel. These principles must always prevail.

21 Indeed, counsel cannot be credible, counsel cannot be effective unless he enjoys these
22 rights. Society prosecuting men must provide a possibility, an opportunity to be
23 defended. This form of defence is of course the Defence counsel. To bring counsel
24 before the Court in such a manner is meaning the very depths of human conscience is
25 brought before your Honours. And this is doing irreparable harm to justice, and yet

1 this is what the Prosecution has chosen to do.

2 We shall demonstrate that the Prosecution has weakened the Defence. The
3 Prosecution is killing the Defence. The Prosecution is making the Defence pointless
4 by its thoughtless measures.

5 Your Honours, in the Lubanga case, and my learned friend made mention of that case
6 earlier, in the Lubanga case the judges concluded that witnesses had given false
7 testimony, and they asked the Prosecution to begin proceedings for contempt for the
8 administration of justice against their own witnesses for reasons that were never
9 explained.

10 When it came to their own witnesses, the Prosecution decided not to begin
11 proceedings, despite a ruling from the Bench saying that it had been inappropriate,
12 that to begin such proceedings while the main trial was still under way.

13 We shall show, your Honours, that the Prosecution, the very same Prosecution has
14 discriminated against Mr Kilolo while he was lead counsel in a case still under way.
15 The Prosecution likely targeted African members of the Defence team, even though
16 that team was made up of lawyers from the Congo, from Belgium, from Britain and
17 Australia. And all members of the team, all members were playing an active role in
18 setting strategy and visiting the field to investigate -- correction, to interview
19 witnesses, your Honours.

20 We shall demonstrate that in this particular proceedings a rather unconventional
21 personage has appeared. Some of my colleagues have described this new person,
22 this participant as a legal monster, I am speaking of the independent counsel.

23 We shall demonstrate that the most prudent legal doctrine is of the opinion that
24 having the Pre-Trial Chamber appoint independent counsel as part of this trial was
25 without any legal foundation and showed contempt for the Rome Statute.

1 Allow me to quote Professor Eric David from the Université Libre de Bruxelles,
2 CAR-D21-0004-0595, page 599 as of paragraph 16, and I quote, "The Single Judge
3 designated an independent counsel not to serve as an expert, but solely to assist the
4 Prosecution in their investigations. Such assistance is not part of a Judge's duty. In
5 this particular case, the Judge has gone beyond his role. We do not see what
6 provision of the Statute would allow the Judge to assist the Prosecution in their work
7 of conducting investigations."

8 Once again I again quote Professor David, page 600, paragraph 18, "It does not appear
9 that the Pre-Trial Chamber ruling through the Single Judge can appoint or give such a
10 status, the status of independent counsel, to a person who in actual fact will assist the
11 Prosecution in their investigations relating to the guilt of an accused. By so doing,
12 the Single Judge used an authority which is not founded in the Statute or in the rules
13 of evidence and proof. This is ultra vires, and we see here confusion between these
14 roles, the roles of Prosecution and the roles of coming to a decision. This
15 undermines the principle of equality of arms and the fairness of the proceedings."
16 End of quote.

17 Your Honour, your Honours, we will demonstrate that all that the Defence witnesses
18 in the main case have given as testimony before the Court corresponds with their own
19 truth. The most clear elements in this case shown by themselves that the attitude of
20 Mr Kilolo, whether it concerns his contacts and his interviews with Defence witnesses
21 in the main case do not fall under Article 70 of the Statute. We shall demonstrate
22 that Mr Kilolo never, never invited witnesses to alter their truth.
23 All the more, mentioned with them, their own prior statements which had previously
24 been recorded in audio supports, we challenge the Prosecutor to prove beyond all
25 reasonable doubt the contrary.

1 We shall demonstrate that Mr Kilolo clearly announced to the witnesses who
2 presented themselves to him as soldiers or militia, that he was looking for soldiers
3 who took part in military operations in the Central African Republic. At the same
4 time he recommended not to speak about what they had personally seen and
5 experienced in the events in Central African Republic. There was never any
6 question of changing their truth.

7 On this subject, remember, Mr President, your Honours, the document the Prosecutor
8 drafted on 21 September 2015, this was document 1276 in this case. In this document,
9 the Prosecutor wanted to prepare its own witnesses before their appearance at the
10 Court.

11 We will demonstrate that in the written submissions of the Prosecutor in this
12 document they are revealing, because they give a clear vision of the understanding of
13 the Prosecutor of what he himself understands by normal preparation of witnesses
14 which do not come under Article 70 of the Rome Statute.

15 We shall demonstrate that the Prosecutor recognized in the document that there is an
16 increasing tendency in the Court to accept the practice of witness preparation,
17 recognising in the first place the rights of the parties to prepare their case and,
18 secondly, the fact that witness preparation is one of the instruments that promotes
19 equality, effectiveness and the expeditiousness of the proceedings.

20 The Prosecutor herself wrote on this subject, and I quote, "In order to produce
21 targeted and structured testimony and with a view to ensuring that every probative
22 evidence is presented, it is important that counsel, and in particular the counsel of the
23 calling party, are well prepared and familiar with the evidence of each witness. A
24 pre-testimony interview is a last opportunity for the calling party to determine the
25 most efficient way to interview its witnesses as well as the subjects which will

1 produce the most relevant and probative evidence during the testimony before the
2 Court." End of quote.

3 The Prosecutor recognized that a pre-testimony interview with a witness made it
4 possible for the calling party to check whether there were important circumstances
5 that had changed and which could affect the evidence that the witness puts forward
6 in his testimony.

7 This gives the opportunity to the calling party to take fundamental decisions such as
8 to decide whether to call a witness or not.

9 The Prosecutor considers that allowing the calling party exercising its right to prepare
10 for the trial and to meet its witness, and here I quote, "To meet with them and speak
11 about the underlying facts of their testimony helps" -- and this is the Prosecutor that
12 says this -- "helps the memory of witnesses, improves the way in which the witnesses
13 speak about what they have experienced in a correct way to counsel, and that makes
14 it possible to ensure that the testimony is structured." End of quote.

15 We shall demonstrate, your Honour, that the Prosecution witness received a lot of
16 money without any similar measure, in terms of what Kilolo provided to certain
17 Defence witnesses. The Prosecution witnesses received money - and please pay
18 attention to this - pocket money, for medicine for themselves, medical care for
19 members of their family, to close their houses, to have business funds such that they
20 could start commercial activity, to buy a telephone as well as credits for the phone, to
21 pay the amount of the guarantee for their bail, to finance several months of payments
22 for their family housing and rent, to furnish their houses, to provide to their spouses
23 to pay transport on a private basis to members of their family with a view of going to
24 another town as subsistence expenses for themselves and the members of their family.
25 And here I'm referring to the document CAR-OTP-0072-0504_R01.

1 We will demonstrate that in the main case the witnesses of the Prosecutor received a
2 lot of money from the Registry and the Prosecutor. And here I am referring to
3 document ICC-01/05-01/08-3203-ANX9 communicated by the Registry on 4
4 February 2016.

5 The Prosecution Witness 169 received himself 22,908 euros.

6 Prosecution Witness P-22 received alone 15,858 euros covering transport, telephone,
7 meals, medical expenses.

8 The Witness for Prosecutor 178 received alone 11,165 euros.

9 Prosecution Witness P-87 received alone 7,295 euros.

10 Prosecution Witness P-209 -- received 5,525 euros.

11 So we shall demonstrate that a Prosecution witness also wrote to the Prosecutor to
12 threaten him and to threaten to denounce the subornation of Prosecution witnesses if
13 they did not give all the promised advantages in exchange for testimony against
14 Mr Bemba. But the Prosecutor didn't pay any attention to that. And I have the
15 reference to that, your Honour. This is document CAR-OTP-0072-0504_R01.

16 We shall demonstrate, by way of comparison, that the Prosecutor pursued Mr Kilolo
17 for having provided in all transparency by Western Union the sum of \$106 to P-0243
18 and Witness P-0020 or even \$130 to Witness P-0214.

19 And all the more, for having given, according to the Prosecutor, \$830 to Witness 261,
20 \$1,390 to Witness Gang, \$1,680 to P-245. That is, in total, \$4,212. \$4,212. Of course,
21 a sum which is much lower, really much lower than the sum of \$20,000 that a
22 Prosecution witness was offered individually.

23 Here I'm making reference to CAR-D21-0012-0001.

24 Your Honour, your Honours, I will not speak lengthily about the accusation relating
25 to payment to witnesses for false testimony. Here this is at the heart of another

1 question, namely how are the expenses made for witnesses managed. From what
2 precise moment are they unreasonable; can they be considered as buying somebody's
3 conscience?

4 We shall demonstrate that it's necessary to have clear judgment to take account of the
5 attitude of a man shaped by the great African culture of solidarity, totally
6 misunderstood and not known in western terms.

7 In African understanding, you can give without asking or expecting anything in
8 return. Prosecution Witness P-261 stated that in African culture with which he
9 identifies, and here I quote: "We, culture, we have to take it into account. Easily in
10 Africa you can ask your brother, he can give you 100, 200, \$300 freely. But it's very
11 difficult in Europe, and when you're given something, you can't immediately think
12 that it's a matter of corruption."

13 And the reference to that is ICC-01/05-01/13-T-14, page 20.

14 Your Honour, your Honours, by way of concluding, from everything that has been
15 said, the Defence shall show through testimonial and documentary proof that it is
16 clear that the means made available to obtain evidence of via wiretapping of
17 Mr Kilolo were illegal and, therefore, inadmissible; that all the investigative acts made
18 by the independent counsel were against the same fundamental text of the Court and
19 must be struck down; that Mr Kilolo never, never invited a witness to alter his own
20 truth.

21 All the more, he invited them not to forget the important aspects of their own prior
22 statements provided before the intercepts of certain communications.

23 We will prove that everything that he gave as money to certain witnesses corresponds
24 to the reimbursement of legitimate expenses, which were reasonable and justified.

25 They had a right to them, to the same -- in the same sense that the Prosecution

1 witnesses did. There was never any question of corrupting a witness.

2 So that gives you, in a few words, as in a thousand, the essential questions that put
3 into light the fundamental imbalance of procedures and means that can lead to the
4 discrediting of this prestigious institution without going further into the role of
5 counsel before -- in proceedings before a judge, whoever he is.

6 I have to think sincerely that this role is one of the most important roles that there are.

7 I would not wish that Defence counsel in this arena of international criminal justice be
8 easy prey of the Prosecutor subject to the mercy of the Prosecutor's fantasies, ready to
9 do everything, everything to obtain the conviction of his client and, according to need,
10 destroy his counsel.

11 If that is the case, I can only note with bitterness the decline of international justice in
12 which the whole world had placed its confidence.

13 And to paraphrase Aimé Césaire, to powerlessly witness the eulogy of all dawn
14 assassins. Thank you very much.

15 With your leave, my colleague Steven Powles which speak for approximately 20
16 minutes.

17 PRESIDING JUDGE SCHMITT: But I think I have said before that we will have the break
18 starting with 11.30. So I think this would be a good time now to defer your speech, to put it
19 this way, to the afternoon session. We will conclude the morning session now. We'll
20 resume at 2.30. As I have said before, Mr Bemba is excused for the afternoon session, and we
21 will see you then.

22 MR POWLES: Thank you very much, Mr President, your Honours.

23 THE COURT USHER: All rise.

24 (Recess taken at 11.28 a.m.)

25 (Upon resuming in open session at to 2.38 p.m.)

1 THE COURT USHER: All rise.

2 PRESIDING JUDGE SCHMITT: Mr Powles has the floor.

3 MR POWLES: Thank you very much, Mr President, Your Honours, learned colleagues on
4 this side, on the far side of this new courtroom.

5 We are now at the halfway point in this trial. The Prosecution's case has ended and
6 the Defence phase is about to commence. So it might be helpful at this stage to take
7 stock of where we're at and see what the Prosecution has and hasn't been able to
8 establish and what issues, therefore, remain going forward.

9 In their pre-trial brief, the Prosecution set out what they think this case is all about.

10 And now that we've heard the Prosecution evidence, it might be helpful to look
11 carefully at what they've presented and start the process of evaluation.

12 So with your respectful leave, what I propose to do for the next 20 minutes or so is
13 briefly consider in turn the four main and four minor means by which the Prosecution
14 in their pre-trial brief assert that Mr Kilolo and others have committed Article 70
15 offences. And I will limit my comments if I can to the evidence both in the case and
16 the evidence that we intend to call and present.

17 The first point and perhaps the main thing alleged in the Prosecution's pre-trial brief
18 relates to bribing witnesses, payment in exchange for false testimony. But when you
19 deconstruct that, and as we will show, there is simply no basis for that whatsoever.

20 In short, your Honours have heard from eight witnesses from the main case, and not
21 one of them said that Mr Kilolo bribed them or paid them money in exchange for false
22 testimony. And in due course the Defences of Mr Kilolo and the Arido Defence will
23 present three of the six witnesses who the Prosecution chose not to call and, similarly,
24 not one of them will say that Mr Kilolo either bribed or paid them money in exchange
25 for false testimony.

1 So let's consider them each in turn. On 5 October 2015, the Prosecution presented to
2 you P-261, D-23. He is a self-confessed perjurer, a man who says that he sat before
3 the Trial Chamber in the Bemba main case and who then lied and lied and lied about
4 being a soldier and he accepts as much. On the 6 and 7 October last year, when D-23
5 gave evidence to your Honours, he claimed unashamedly that he had lied to the Trial
6 Chamber in the Bemba case. But the crucial thing and what we say is perhaps the
7 most important part of D-23's evidence is that he does not say that Mr Kilolo knew
8 that he was not a soldier and certainly did not know that he was lying about being a
9 soldier in the main case, and that's really important because, of course, if Mr Kilolo
10 did not know that D-23's evidence about being a soldier was false, one thing is for
11 sure, any money or whatever that Mr Kilolo allegedly gave to D-23 was clearly not in
12 return for false testimony. How could it be if Mr Kilolo did not even know that his
13 evidence was false?

14 Let's now consider P-260, D-2, the mango man. And what a thoroughly
15 reprehensible character he was. Again, like D-23, a man who shamelessly admitted
16 that he had lied on oath to the Trial Chamber in the Bemba case about being a soldier.
17 In his own words, he said he was a fake and that he wanted to pass off to Mr Kilolo
18 that he took part in the events in the Central African Republic.

19 So, again, Mr Kilolo was not told by him that he may have been lying about his
20 military status. So, again, one thing is crystal clear, whatever the reason for giving
21 D-2 money, whether it was to pay for accommodation in the year while he was
22 waiting to give evidence, whether it was for food, whether it was for taxis, whether it
23 was for buses, you name it, one thing that is crystal clear is that the money that he
24 was given was not to procure false testimony in the way that he says he was.

25 It's very simple, if Mr Kilolo did not know that his evidence was false, he could not be

1 bribing him to give false testimony.

2 Moving on to the third witness, P-245, D-3. Again, a man who says he lied on oath

3 to the Trial Chamber in the Bemba case and a man who may also have lied on his

4 application to enter the country in which he now lives. And I'm reminded that I

5 don't think we ever really got to the bottom of that and maybe we will in due course.

6 But the important thing, leaving aside any visa issues, is that as with D-23, as with

7 D-2, he was a man who was trying to deceive Mr Kilolo about his military credentials

8 and his experiences. He wanted to give the impression to Mr Kilolo that he knew

9 about military affairs.

10 So, again, whatever money he was given, it was plainly neither a bribe nor a bid to

11 procure false testimony. In D-3's own words, I did not have a deal with Mr Kilolo.

12 And how could he have such a deal if Mr Kilolo did not even know that his evidence

13 was false?

14 Now, it may be that in due course the Arido team will adduce evidence that they,

15 these three individuals, were all double liars, in a sense, lying about lying about

16 being -- not being soldiers. Even if that's right, the crucial thing, we submit, is that

17 there is not one of them who says that Mr Kilolo knew they were lying in their

18 evidence about being soldiers; and if that's right, sure as night follows day, any

19 money that they received was plainly not to procure false testimony.

20 Consider now if we may P-20, that's D-57, and P-243, D-64, I'll consider them together.

21 Whatever sums they may have received and from whom, and for whatever it was for,

22 whether it was for hotels, travel, food or whatever, and, indeed, whatever they spent

23 it on because it may, as was their right, they decided to pocket the money instead of

24 spending it on hotels or travel or whatever, that would be their right. But two things

25 arise. First of all, the sums were small. In the words of P-242, who was

1 D-4 -- D-57's wife, who gave evidence before you, she said in terms, "The money that
2 was sent represents nothing to my family."

3 Secondly, and perhaps the crucial thing, is that both of them, both D-57 and D-64, said
4 that the evidence that they gave in the Bemba case was true and honest and that the
5 money that they got did not in any way impact upon the evidence that they gave.
6 Now, that was their testimony before you, witnesses who the Prosecution themselves
7 called.

8 And it's the same with P-214, D-55 from the main case. He told your Honours very
9 clearly that the hundred euros that he says he received was to reimburse him for
10 travel expenses, so clearly it was not in return for false testimony.

11 Your Honours, as with these witnesses, and as we will show, there is no evidence
12 from any other witness in this case who's a subject of a charge in the indictment that
13 will say that they received money from Mr Kilolo as a bribe to give false testimony.
14 Moving on then to the second major issue in the Prosecution's pre-trial brief. Non,
15 what they describe as non-monetary promises for false testimony. Well, what's the
16 evidence that we've heard of such non-monetary promises?

17 D-3 says he was promised a chance to go abroad if he testified for Bemba, the Bemba
18 Defence. Whether that's true or not, it's obviously entirely a matter for your
19 Honours. The fact is that he claimed he couldn't even remember the name of the
20 place that he wrote down on his little piece of paper as to where he wanted to go.
21 But whatever he wrote down, whether it was Paris, Rome or even Timbuktu, the fact
22 of the matter is that there is no evidence before this Court that it was Mr Kilolo who
23 made him that offer if, indeed, it was made at all.

24 And the same is true for D-2. He claimed he was promised a chance to live in
25 Europe if he testified. But he himself said to you, your Honours, that Mr Kilolo

1 never promised him a chance to live in Europe.

2 In their pre-trial brief, the Prosecution refer to a statement to D-55 to be in Bemba's
3 good graces, whatever that means. But D-55 was very clear in his evidence
4 regarding the letter and the author of the letter's hidden, potentially hidden agenda,
5 the evidence that he presented in the main case. He said that that was true and that's
6 the evidence that he gave you. He implied that he might even have further evidence
7 that undermined the position of the author of the letter that was the subject of his
8 evidence in the main case.

9 So, again, whatever promise was or wasn't made, one thing is absolutely clear: It
10 absolutely wasn't a promise for the purpose of procuring false testimony. It couldn't
11 be, because he said that the evidence he gave in the main case was true.

12 Now, we will hear from other witnesses, not called by the Prosecution, and not one of
13 them, again, will say that Mr Kilolo either paid the money or made any promises in
14 exchange for false testimony.

15 Moving on then to the third main issue in the Prosecution's pre-trial brief, instructing
16 witnesses on what to say and scripted evidence.

17 Now, generally speaking, with regards to investigations and how lawyers prepare
18 witnesses to give evidence at trial, lawyers from different jurisdictions and from
19 different backgrounds will have very different methods and very different practices.

20 Even within the common law jurisdictions, so one extreme, perhaps you have the
21 British barrister who very rarely meets with witnesses to discuss their testimony and
22 would not necessarily prepare them to give evidence before a court or tribunal at one
23 extreme, and on the other extreme you have the U.S. lawyer who would perhaps
24 consider it negligent of them not to fully prepare a witness for trial and to discuss
25 with them almost every aspect of their evidence in detail before giving evidence

1 before a court.

2 And then for those lawyers who do conduct investigations and have a role of
3 interacting with witnesses prior to testimony, there is a whole spectrum of legitimate
4 methods that they can use in preparing a witness and extracting information from
5 them prior to their testimony, and that can range from asking open, non-leading
6 questions, to putting a positive case to a witness for them to either accept or not, even
7 further to actively challenging a witness and confronting them with alternative
8 evidence and telling them that they're wrong. It is then always open to that witness
9 to either accept it or not.

10 Now, leaving to one side for now when discussions with the witnesses may or may
11 not have taken place and whether discussions at that time were permitted or not, the
12 important thing that we will submit is that witnesses were not instructed to say things
13 about the Bemba case that they themselves were not prepared to accept as true.

14 With that in mind, it's perhaps important to go through and look at the evidence the
15 Prosecution has presented in relation to witness instruction.

16 D-55 and the possible reasons for him collaborating in the writing of a letter and the
17 evidence that he gave, Mr Kilolo, it said, suggested to D-55 that the letter might be for
18 the asylum application of the author. D-55 rejected that proposition and that was the
19 end of the matter. It stopped there.

20 A lawyer, we submit, must be able to test a proposition with a potential witness.

21 There can surely, we submit, be no objection to that.

22 P-198, D-15, and P-201, D-54, and the alleged transcripts of the calls with them,
23 leaving aside the admissibility of those transcripts and leaving aside for now the issue
24 of when it was alleged to be happening, the issue, we submit, is whether these were
25 instructions to say something false or whether, especially bearing in mind the burden

1 and standard of proof in criminal proceedings, whether it was possibly acceptable
2 witness preparation, whether it was possibly repeating to them and presenting to
3 them what they themselves had previously said to Mr Kilolo.

4 Now, with regards D-2 and D-3, there can, we respectfully submit, be no complaint
5 about simply giving them their statements and going through with them aspects from
6 their statements prior to their testimony.

7 Now, of course, D-2 claims that Mr Kilolo instructed him regarding matters in his, I
8 think we called it his beautiful fresco, but he, we submit, is an inherently unreliable
9 witness, especially when it comes to falsifying and producing fake documents. He is,
10 after all, the man who says that he dunked a document in tea to give it the false
11 appearance of looking old and genuine.

12 The fourth matter in the Prosecution's pre-trial brief, presenting false, spurious
13 witnesses and thereafter failing to inform the Court when a witness has lied.

14 Well, the most spurious, the most thoroughly dishonest witnesses were, of course, the
15 self-confessed perjurers, D-2, D-3 and D-23. And I don't intend to belabour the point,
16 but plainly on their evidence they lied and did not tell Mr Kilolo that they were fake
17 military witnesses. So Mr Kilolo, of course, could not know that that aspect of their
18 evidence was false and he cannot be said to have knowingly presented it, nor could
19 he be said to have failed to inform the Court after having presented it.

20 Other witnesses may have lied, but the issue now is whether Mr Kilolo knew they
21 were lying and, if he knew about it, what he should or indeed could have done about
22 it.

23 In their pre-trial brief, the Prosecution assert, wrongly in our respectful submission,
24 that Mr Kilolo had an obligation to alert the Court whenever he knew a witness was
25 lying. Now, we respectfully submit that is plainly wrong, and in due course we will

1 show why.

2 There is absolutely no obligation on a Defence lawyer, and I stress Defence lawyer, to
3 alert a court or parties to any suspected false testimony on the part of a witness that
4 they have called. By way of example, if a defendant is in the witness box and gives
5 evidence diametrically opposed and opposite to what he has previously told his
6 lawyer, the lawyer taking him through his evidence in court is under no obligation to
7 stop and say, "I'm sorry, but what my client is saying is false. I wish to report him
8 for false testimony." Indeed, some would say that if a lawyer were to do that, that
9 would be a breach of their lawyer's lawyer-client responsibilities, their ethical duties
10 and lawyer-client privilege.

11 If there is any obligation on a lawyer in such a situation it is simply not to later
12 advance in final or closing submissions or indeed at any point something as a fact
13 which they know to be untrue.

14 The position is, of course, markedly different for a prosecuting lawyer, because a
15 Prosecution lawyer has a positive duty to disclose evidence that undermines the
16 evidence of his witnesses. Article 67(2) of the Rome statute provides that "The
17 Prosecutor shall as soon as practicable disclose to the Defence evidence in the
18 Prosecutor's possession or control which he or she believes shows or tends to show
19 the innocence of the accused or to mitigate the guilt of the accused or which" -- and
20 these are the crucial words -- "or which may affect the credibility of Prosecution
21 evidence."

22 There is rightly no corresponding such duty on the Defence or a Defence lawyer.

23 And that means that if a Prosecution witness gives evidence contrary to information
24 that is in the Prosecutor's possession, at the very least the Prosecutor has an obligation
25 to at least notify the other parties in the case. But that duty does not exist on a

1 Defence counsel.

2 In the remaining minutes I will, if I may, briefly deal with the four minor issues in the
3 Prosecution's pre-trial brief, and I can deal with them relatively briefly.

4 The first one, circumventing the detention unit's monitoring system. Yes, the
5 detention unit is permitted to monitor a prisoner's calls and, no, the detention unit
6 does not ordinarily monitor the privileged calls of a lawyer.

7 But there is nothing, we submit, inherently wrong with a lawyer letting someone use
8 a privileged line to speak to his client.

9 By way of analogy, if a defendant is at liberty, and provided there are no restrictions
10 on whom they may be in contact with pursuant to any provisional release decision,
11 but there is no reason why the lawyer couldn't facilitate a meeting between his client
12 and a potential witness. And if the lawyer was present at that meeting, that
13 lawyer -- that conversation, that meeting would be considered a privileged meeting.
14 And we submit that by way of analogy it's the same if a lawyer lets someone use a
15 phone to speak to their client on a privileged line. That conversation would be
16 privileged.

17 Secondly, third-party payments. There is simply no rule against third parties
18 making payments on someone's behalf. The only issue in this case is whether the
19 money was to procure false testimony. And as I've already explained and as we
20 shall show in due course, that was not the case in relation to any witness in this case.

21 Thirdly, the giving of phones to witnesses. There is no rule against giving witnesses
22 phones. Indeed, as the VWU in a filing dated 19 February 2013 where the VWU
23 provided information to the Court, as they fairly accepted in that filing, there was no
24 actual requirement that witnesses hand over their phones. As set out by the Registry
25 in that document, the VWU only invited the hand-over of private phones by

1 witnesses, and that's at paragraph 15 of that document, but there was no actual
2 obligation to give them.

3 And moreover, and as we shall show, the calling party is the focal point with
4 witnesses both before and after their testimony. So there can be nothing wrong with
5 giving a witness a phone for the purpose of being in contact with the Defence team,
6 the calling party, before and after their testimony.

7 Fourthly, coded language. Again, there is no rule against using coded language.

8 There are a whole range of reasons, we respectfully submit, as to why people might
9 speak in code or as it's more commonly put slang, and that is not indicative of guilt or
10 a cover-up.

11 The Prosecution's interpretation and the spin put on the alleged code in this case is,
12 with the greatest of respect, entirely speculative.

13 So by way of conclusion, there we have it, that's our preliminary half-time assessment
14 of the Prosecution's case. And as things stand, we submit that it's nowhere near as
15 serious and as wide ranging a case as the Prosecution has tried to make out. And for
16 that reason, we look forward to presenting to you our further evidence and in due
17 course our detailed assessment of all the evidence in this case at the end of this case,
18 which we are confident will establish that Mr Kilolo is not guilty of any offence.

19 Mr President, your Honours, your learned team and my learned colleagues, both this
20 side and the other side of the courtroom, thank you to very much for your attention.

21 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Powles.

22 I assume Mr Kilenda will have the floor now.

23 MR KILENDA: (Interpretation) Mr President, your Honours, it is with circumspection that
24 I address the Court today at this crucial point in our trial where the various Defence teams are
25 called to present their evidence and make opening statements. And I rise on behalf of the

1 team defending Mr Fidèle Babala Wandu.

2 By some dint of legal intricacies, I am again given the opportunity to appear before
3 you today before this august Court, and I would like on this occasion to once again
4 before anything else to discharge this pleasant duty of greeting you, Mr President,
5 and your Honours as well as all parties gathered here in this courtroom for what I
6 consider to be the purpose, the only purpose which brings us together, namely, the
7 quest for the truth, the factual and legal truth in the matter of the Prosecutor versus
8 the accused persons present in this courtroom. This objective or purpose sits at the
9 very heart of the fundamental texts governing the International Criminal Court,
10 which we all love and respect, and which will guide you in due time to draw the legal
11 consequences that flow accordingly.

12 Mr President, your Honours, representatives of the OTP, dear learned colleagues of
13 the Defence teams, it is in the name of this truth and mindful of your respective duties
14 and before the international community on whom -- on whose behalf you rendered
15 the truth and justice that we at the very start of our submissions want to state
16 unequivocally that Mr Fidèle Babala Wandu should not have been appearing before
17 you today.

18 In due time we shall make our final submissions, but allow us for now to simply
19 affirm, pursuant to the legal texts governing this Court and to the fundamental
20 principles of criminal justice, that the process leading up to the arrest, detention and
21 confirmation of charges against Mr Fidèle Babala was unfair and fraught with several
22 irregularities, which we will be addressing before this Chamber in the course of this
23 hearing and subsequently on behalf of justice.

24 Mr President, your Honours, it is not for Defence counsel to assess the decisions of the
25 organs of the Court, let alone the processes by which they were drafted. However, it

1 is our duty as counsel for Defence to respectfully challenge those which do not
2 comply with the laid down legal processes and which fail to uphold agreed standards
3 and above all when they are prejudicial to our clients in an unfair manner. That is
4 why we most respectfully challenge the procedure relating to the investigations,
5 arrest, as well as the preliminary trial phase of this case which most flagrantly was
6 fraught with abysmal discrepancies between the vast legal, human and financial
7 resources available to the Prosecution and to the meager and yet fading resources
8 given to the Defence, thereby violating the principle of equality of arms.

9 This principle of fairness, which must be understood to be -- which must not be
10 understood to be a mathematical equality of resources between the Prosecutor and
11 the Defence, however, requires according to the European Court on Human Rights in
12 the matter of Kress versus France, and I quote, that "Each party must be afforded
13 reasonable possibility to present its case under conditions that do not place that party
14 in a clearly disadvantaged position in relation to the opponent." End of quote.

15 The equality in point here, it must be stated, is not only about immaterial arms since
16 the Human Rights Committee of the United Nations uses this very principle to
17 determine whether beyond legal arms the accused or suspected persons were in a
18 position, practically and otherwise, to have adequate resources for a fair trial.

19 The Human Rights Chapter of the European Union further upholds this as follows
20 under article 47 of its text which provides as following: "Everybody has a right to be
21 heard fairly, publicly, and within a reasonable time by an independent and impartial
22 Court. Everybody has the possibility to be granted counsel, defence and
23 representation. Legal aid is also provided to those who do not have sufficient
24 resources for their effective access to justice." End of quote.

25 The principle of fairness was simply not respected during the pre-trial phase. We

1 shall not belabour the point, but we shall, however, provide a non-exhaustive list of
2 some highlights pointing to the breach of this principle before turning to the basis of
3 our arguments which we believe can help in the determination of the truth in a fair
4 trial in a congenial manner.

5 Your Honours, the esteemed colleagues opposite, let it be said that Mr Babala
6 discovered the investigation against him in November 2002 when the police came to
7 arrest him and unceremoniously woke up his family in the middle of the night. His
8 wife and his minor children were petrified by horror, by the horror of these brutal
9 people who did not even allow him to dress up before taking him out manu militari
10 to the premises of the l'Agence Nationale de Renseignements, which is a Congolese
11 authority whose links with the ICC are rather long lasting.

12 These representatives of the police acted at the behest of the Procureur Général of the
13 République and confiscated his mobile phone. During the search at his home in his
14 absence, they extorted a significant amount of money from his femme, without
15 mentioning it in the report of that search and seizure. To this day neither his mobile
16 phone nor the money taken has been restored to anyone.

17 No explanations have been provided as to why Mr Babala was arrested in violation of
18 the provisions of the Congolese criminal code, which provides that visits at home
19 cannot be conducted after 9 p.m. and before 5 o'clock a.m. in the morning. No one
20 has bothered to explain why the press was invited to the arrest to record and
21 broadcast the images with a view to tarnishing the image of Mr Babala and to land a
22 final blow to his political career.

23 Contrary to those of his co-accused who arrived here in The Hague after exhausting
24 all legal recourses in their countries of arrest, Mr Babala in his own very country, the
25 Democratic Republic of the Congo, which has been said to be a faithful student of the

1 ICC, Mr Babala's rights were violated. He could not even appear before a judge to
2 apply for provisional release. This explains why and how he was transferred to
3 Scheveningen on the very day he was arrested aboard a special flight chartered for
4 that purpose.

5 As a member of the international community, my client has the right to worry about
6 such use of the financial resources of States Parties for a case which did not deserve
7 all the media hype that was organised in that regard and all the logistics deployed for
8 the same purpose.

9 And I wish to quote President François Mitterand when he spoke on the occasion of
10 the suicide of his Prime Minister, Mr Beregovoy, when he said throwing to the dogs
11 his reputation, his personality and his honour.

12 This cavalier manner of arresting and seizing property was initiated by the arrest
13 warrant from the Single Judge of the Pre-Trial Chamber. The provisions on
14 cooperation with State's Parties of the Rome Statute, Chapter 9, provides that the
15 Court and the administration that are in charge of the arrest are jointly responsible for
16 the administration of justice, however, although the conditions under which
17 Mr Babala was unfortunately arrested tarnish the image of the Court, the Pre-Trial
18 Chamber failed to come to a determination on the conditions of the arrest of
19 Mr Babala and to request the DRC to make observations on the request made by the
20 Defence at the time of the initial hearing.

21 In addition to the irregularity in which Mr Babala was arrested as well as all other
22 legal aspects pertaining to his human rights, let us now turn to the more important
23 matter of legal procedure and the Prosecutor's irregular conduct which was further
24 endorsed by the Pre-Trial Chamber.

25 Now, regarding the Prosecutor, the first irregularity was the failure to ensure that

1 Mr Fidèle Babala was provided an initial hearing as well as the absence to conduct
2 inculpatory and exculpatory investigations pursuant to Article 54. Failure to hear
3 Mr Babala prior to his being detained, which is symptomatic of the Prosecutor's
4 practices, is a result of both linguistic and pragmatic difficulties relating to the
5 wording of Article 54(3) of the Statute, which provides that the Prosecutor may
6 initiate -- investigate persons who are to be investigated, including victims and
7 witnesses.

8 Going by this drafting difficulty, the Prosecutor did not bother to hear the suspect,
9 assuming almost that they were already guilty.

10 Operating, therefore, on the basis of an irrefutable assumption of guilt, the Prosecutor
11 actually violated the statutory rights of the suspects who, if they had been heard
12 before, could have provided factual and significant information pointing to the truth.

13 Such a preliminary investigation at the very onset is very important and, more
14 relevant, under Article 67(1)(i), which provides that the accused shall not bear or shall
15 not be imposed on him or her any reversal of the burden of proof or any onus of
16 rebuttal. By failing to do this, the Prosecutor forces the accused to de facto not only
17 subsequently produce evidence against the allegations about which there was no
18 prior opportunity to be heard, thereby reversing the onus of proof clearly, which is
19 prohibited under the article mentioned or cited before.

20 Failure to hear Mr Babala before he was detained is, in the meaning of Article 54(3) of
21 the Statute, contrary to the administration of justice, it is contrary to the proper
22 administration of justice and management of the resources of the Court. Such a
23 hearing would have made it possible to avoid implicating someone who has nothing
24 to do with the case before this Court. It would at least have made it possible for the
25 Prosecutor to verify and correct some assumptions or general assertions that it has

1 levelled against Mr Babala without any factual basis.

2 Mr Babala, in fact, is a victim of a factual or material void. In fact, contrary to the

3 Prosecution's statement on 29 September 2015 at the opening of the trial, Mr Babala is

4 not a lawyer. He has never been a lawyer. Where did the Prosecutor find this

5 information to tag him with that label, a prior hearing of the accused would have

6 enabled the Prosecutor to determine that before becoming a politician, Mr Babala was

7 a lawyer in an enterprise, a corporate lawyer. If he had carefully analyzed my

8 client's personality, the Prosecutor, being an objective and impartial organ of the

9 Court, would have been able to inform all and sundry that Mr Babala had never and

10 was never a member of Mr Bemba's Defence team.

11 If the Prosecutor had heard our client and Mr Bemba, he would have clearly

12 understood the nature of their relationship and the legality of the help provided to

13 Mr Babala -- to Mr Bemba by Mr Babala during his detention in the Hague, and this

14 would have not led them to ascribe intent to him simply based on their style of

15 conversation, which one must say essentially sought to provide and preserve

16 confidently for the political persons about whom the two had such conversations.

17 If the Prosecutor had organised a hearing of Mr Babala and Mr Bemba, they would

18 have been able to explain the context and the scope of their conversations, thereby

19 enabling the Prosecution to understand that this had no link whatsoever with the

20 matter before the Court. It was, rather, in relation to political matters.

21 Similarly, Mr Babala had relations with the lead counsel of Mr Bemba, and the same

22 principle applies in that relationship with Maître Kilolo. These must be said are

23 natural and healthy relations. Since Mr Kilolo was the lawyer defending Mr Bemba

24 and receiving no legal aid pursuant to a Court decision, therefore, it was only normal

25 for members of the family and friends to support through legal and good faith means

1 Mr Bemba. Nothing in the relations between Mr Babala and Mr Kilolo is of a
2 criminal character.

3 Mr Babala was never informed of any confidential and ex parte information in the
4 possession of Mr Bemba's Defence team, nor was he ever informed by Mr Bemba
5 himself. The Defence of Mr Babala challenges the Prosecutor to provide before this
6 Court any evidence that may demonstrate beyond a reasonable doubt that the
7 contrary is true.

8 Everything that Mr Babala is aware of in relation to that case is public information,
9 information that everybody is able to follow in the media. Maître Kilolo never
10 provided Mr Babala with the list of witnesses in the main case. He never informed
11 him of the subject of their testimony. Mr Babala was never informed of the strategy
12 of the Defence, let alone the type of testimony that would be in Mr Bemba's favour.
13 He never had any contact with any Defence witness who appeared before the
14 Pre-Trial Chamber in this matter.

15 The second irregularity of the Prosecutor relates to the absence of exculpatory
16 investigations, which is a corollary to the hearing of the witness -- of the accused as
17 stated above and is, again, a matter of the wording of the provisions. The duty to
18 conduct inculpatory and exculpatory investigations is inspired by the civil law
19 tradition and has been addressed by Fabrice Bousquet in an article titled "Judges
20 Walking on their Heads, the Right of the Prosecutor to a Fair Trial" in relation to a
21 minority opinion on the acquittal of Mathieu Ngudjolo and in which it is clear that the
22 origin of the idea came from a German proposer at the preparatory work of the
23 Statute before the preparatory committee on the creation of the ICC.

24 The author goes on to state that "The duty of the Prosecutor to conduct inculpatory
25 and exculpatory investigations to determine the truth is a duty on the Prosecutor

1 during the investigation as upheld as well in Article 54 relating to the duties and
2 powers of the Prosecutor during investigations, in particularly the cases of the
3 Defence and situational and institutional privileges of the Prosecutor within the ICC.
4 This duty, therefore, is one that seeks to strengthen the chances of the accused to have
5 a fair trial." End of quote.

6 The Prosecutor cannot, therefore, claim to be an independent organ of the
7 International Criminal Court with all the financial, legal and human privileges, yet
8 display prevarication when it comes to assuming those duties. In fact, it therefore
9 must be said that the Prosecutor can only play a role as a party in all fairness on the
10 same footing as the other parties.

11 At the level of the preliminary trial, all that can be said is that Mr Babala suffered
12 sprawling injustice. Several filings by ourselves and our learned colleagues at the
13 time decried this state of affairs. The first such significantly destabilising injustice in
14 the procedure as well as immeasurable prejudice to our client was, in fact, the
15 institution of an independent counsel, this ghostly figure, which to our mind was
16 created extra legem and even ex nihilo.

17 Our team, Mr President, your Honours, is very aware of your decision, the decision of
18 your august chamber confirming the legality of this institution that was set up by the
19 Pre-Trial Chamber and also of your order to stop any further discussions on the
20 illegality of this institution. Our team welcomes your decision to not rely on the
21 observations made by that institution.

22 The independent counsel is a figure that is even more complex, more complex than
23 minotaure of Greek mythology. In the discharge of his duties he acted illegally and
24 ultra vires of the rules governing his duties as well as the mission ascribed to him by
25 the Court and other -- and its institutions. He has become half prosecutor, half

1 expert, and half what have you.

2 As half prosecutor, the independent counsel acted as yeast on the poor flour of the
3 Prosecution's case with a view to building the theory of planning. He consciously
4 took out elements from the case and transformed them into relevant material without
5 which the Prosecutor's case would have been incoherent.

6 That is why the single Judge ruled as follows: "We are convinced that these objective
7 elements gathered by the Prosecutor and the independent counsel amount to tangible
8 evidence in support of our evaluation relating to the risk that may arise in the
9 procedure and in relation to any compromising of such procedure both in this case
10 and in the main case." End of quote.

11 He was more than the Prosecutor because he was not subjected to the duty to conduct
12 inculpatory and exculpatory evidence. This ghostly figure, omnipotent and
13 omniscient, indeed ushered in a day of mourning for the accused persons in this
14 courtroom. He joined with the Prosecutor to become a Prosecution tag team and he
15 actually built the case for the Prosecutor, leaving the Prosecutor therefore only to use
16 his leading interpretations in support of their charges before your Chamber.

17 Mr President, your Honours, the Defence knows that it can count on your vigilance
18 when it comes to matters of procedure so that you will administer at the proper time
19 the appropriate legal chemotherapy to the misleading deductions put forth by him in
20 support of his so-called plan to sabotage justice in the main case and in order to
21 gratuitously implicate Mr Babala, who is a penitus extranei third-party to the defence.

22 The second injustice was the denial of the presumption of innocence and
23 consequently assuming culpability or the culpability of Mr Babala and others.

24 Allow me for the benefit of your Chamber and ordinary persons listening to us today
25 or whom may read us someday, allow me to read for you the provisions of Article 66,

1 which is cast in this these words, quote: "Everyone shall be presumed innocent until
2 proved guilty before the Court in accordance with the applicable law." This
3 provision means that so long as the Appeals Chamber has not come to a final
4 determination on the guilt of an accused person, such an accused person must be
5 considered to be innocent.

6 Setting aside this provision, setting aside its own very reminders to the suspects at the
7 initial hearing or appearance, let me quote for your benefit: "First of all, you are
8 presumed to be innocent until the contrary is proven, until it has been established
9 beyond a reasonable doubt that you are guilty. And it is on the accused -- on the
10 Prosecution that the duty falls to prove and provide such evidence. You have the
11 right to not be the subject of a reversed burden. You are entitled to disclosure of
12 exhibits or material which tend to prove your innocence or which may mitigate your
13 responsibility or which may mitigate the credibility of the evidence provided by the
14 Prosecution or which are in the possession of the Prosecution." End of quote.

15 The Single Judge here reversed the principle that he himself recalled at that time
16 through several decisions whereby he fully supported the position of the Prosecution
17 and only took into account the Prosecution's evidence which was gathered regardless
18 of Article 54(1), which imposes on the Prosecutor a duty to investigate inculpatory
19 and exculpatory materials. The reason being as follows: The Chamber maybe
20 based its findings on the material under consideration and on the facts in the case.
21 This is a repetition of the argument that was repeatedly put forth in response to
22 various applications of provisional release from the Defence.

23 These decisions, therefore, clearly do not uphold the various submissions made by
24 Mr Babala's Defence, which were consistently disregarded by the Pre-Trial Chamber,
25 giving the impression that confirmation of charges was simply a formality whereby

1 suspects are automatically deferred to trial and left to fend for themselves in order to
2 seek acquittal at that level.

3 Mr Babala's Defence team does not share this view of the confirmation of charges
4 hearing, which breaches the very core text of the ICC in its letter and spirit. That is
5 the very reason why the Trial Chamber, Mr President, your Honours, your Chamber,
6 that is why your Chamber is not bound legally by the assessment of the evidence that
7 was conducted or was done by the Pre-Trial Chamber.

8 By qualifying that material furnished by the Prosecutor and the independent counsel
9 as objective and tangible evidence, the Pre-Trial Chamber simply took the view of not
10 having a critical overview of the Prosecutor and of not taking any precaution to
11 ensure fair trial for all parties. That is why the two organs worked hand in glove
12 from the beginning of this trial even in various ex parte filings. That is also why it
13 often happened that the Pre-Trial Chamber would reproduce the in extenso
14 arguments of the Prosecutor in its write-ups. That was, in fact, what happened in
15 the arrest warrant and various motions pertaining to the Prosecutor. Such disregard
16 for the principle of presumption of innocence was underscored in the case of *Alenet*
17 *de Ribemont and France* as follows: "The presumption of innocence is disregarded if
18 a legal decision on a suspect reflects the impression that such suspect is guilty
19 whereas such culpability has not been legally established. Even in the absence of
20 formal findings, it suffices for the Judge to be seen to consider the interested party as
21 guilty."

22 Now, when it came to opposing the provisional release of Mr Babala, the Prosecutor
23 argued that there were flight risks inherent in the person's case because, as a
24 Congolese parliamentarian, he had several contacts even at the international level and
25 that he would be able to freely travel even in member -- in countries that were

1 non-State Parties to the Rome Statute and further argued that there would be
2 significant risks to the administration of justice in that connection.

3 The Pre-Trial Chamber agreed with the Prosecution without any further critical
4 assessment. However, your Honours, Mr Babala was released and, yet, he is here
5 before you and has not committed any breach to the ongoing processes. He has not
6 brought any events to bear on the public order of his country. And this was
7 confirmed, confirmed by the decision of your August chamber, who found that the
8 Prosecutor had to provide elements showing that Mr Babala was a flight risk and, in
9 your decision, your honourable Judges, you noted the irreproachable conduct of my
10 client and, therefore, decided to grant him provisional release.

11 Mr President, your Honours, the space, the criminal space of the Court is not a forum
12 for settlement of scores between Congolese politicians. More than once the Single
13 Judge agreeing with the Prosecutor again adopted the in extenso observations of the
14 Congolese government whereby the arrest of Mr Babala was a serious disturbance of
15 the public order and went on to argue that releasing him to Congo was likely to
16 poison the political environment in a post-conflict country which needs peace in order
17 to reconstruct.

18 Clearly, the detention of Mr Babala at The Hague was, in fact, good news for his
19 political adversaries who found it an excellent means to proceed to his political
20 castration. No, Mr President, your Honours, politicizing justice is the hallmark of
21 totalitarian regimes.

22 The ICC has to bring morality into international standards and deny any such
23 practices. Fortunately, Mr President, your Honours, your Chamber is here to redress
24 the injury to our client and to uphold all legal principles in this case as well as in the
25 oral and final submissions of the parties. Thus, it was only on suspicion and guesses,

1 a practice denounced by Pre-Trial Chamber I in the Lubanga case, that Pre-Trial
2 Chamber II decided to have Mr Babala come before the Court. The Prosecution did
3 not have sufficient evidence to provide substantial grounds to believe that Mr Babala
4 had committed the offences that he has been charged with, thus this referral was
5 wrongful and was not in compliance with the norms relating to administration of
6 evidence.

7 Criminal justice is not a guessing game. It is no place for rash suppositions,
8 estimates or uncertainty, as was the case here. In actual fact, the Prosecution must
9 convince the Chamber beyond all reasonable doubt.

10 There have been a great many injustices committed against Mr Babala; for example,
11 violation of the principle of a ruling after due hearing of the parties, contempt for
12 application of the law, violation of the principle of holding procedures in open session
13 as much as possible for, in this case, the Single Judge refused the multiple requests
14 from multiple accused persons to have open hearings.

15 I do not want these remarks to become some kind of indictment in disguise. What I
16 want to stress is that all these profoundly unfair decisions merely bear witness to the
17 Pre-Trial Chamber's lack of effort to look beyond its own conclusions and to correct
18 the errors it made, your Honours.

19 Representatives of the Office of the Prosecution, my learned friends from my fellow
20 Defence teams, counsel is, by definition, someone who fights injustice, someone who
21 does not go unnoticed in the crowd.

22 The criticisms that we have made we have made in an objective way. We do not
23 wish to discredit anyone in particular, nor do we wish to focus on the negative side of
24 the International Criminal Court, which is still a very young court.

25 Our remarks are very much in line with the role that counsel must play within society.

1 It is merely a matter of shedding light on the violations of Mr Babala's rights. These
2 violations of his rights must be revealed here and now so that we can, as this is often
3 put on the day of a marriage, it is now time to speak now or forever hold our peace.
4 The time has come to turn now to my second point. I wish to say a few words about
5 possible directions that could be taken to come to a demonstration of the truth within
6 a fair and serene process.

7 Your Honours, the Prosecution began their case on 30 September 2015. From late
8 September until mid-November last year, the Prosecution called their witnesses one
9 by one. According to the Prosecution, these witnesses would demonstrate beyond
10 all reasonable doubt that Mr Babala had committed the alleged crimes, but also they
11 thought that their witnesses would show that he had knowledge of this so-called plan
12 to corruptly influence witnesses, and he intended to contribute to the plan.

13 I am sure that the Chamber realized during these hearings that Mr Babala was barely
14 ever mentioned during testimony. And when he was mentioned, it was only in a
15 very abstract context, and there was really no proof that Mr Babala had taken any
16 wrongful actions.

17 The Prosecution will certainly respond by saying that the incriminating evidence was
18 not brought before the Chamber during the hearing but, rather, were presented by
19 way of a bar table motion, indeed, violating the usual rules, the jurisprudence of the
20 Court and a number of ad hoc tribunals regarding the adduction of elements of
21 evidence. The Prosecution provided 91.21 percent of all items of evidence in this
22 unusual way, not relying on witnesses to bring these items of evidence before the
23 Court. This is a rather lacking process in several ways.

24 There were two kinds of evidence relating to Mr Babala directly. First of all, the
25 recordings of his conversations with his leader, Mr Bemba, recordings that were

1 obtained at the detention centre. Secondly, we have the records of the Western
2 Union transfers.

3 First of all, I need to point out that these recordings of the conversations are very
4 unreliable and do not meet the standard needed for them to be placed on the record
5 of the case.

6 Secondly, most of these items show that the discussions were political in nature and
7 really not relevant to this case. Secondly, allow me to say a few words about the
8 money transfers.

9 Mr Babala has never challenged the fact that he did make a number of money
10 transfers on behalf of his friend so that his normal needs within the detention centre
11 could be covered; food, telephone calls. And also, the money was transferred to
12 cover legitimate defence expenditures.

13 Mr Babala did not receive exact detailed explanations for all the expenditures made
14 by the Defence team. It was not his job to cross-check.

15 The Prosecution should have shown beyond all reasonable doubt that the money that
16 Mr Babala transferred was used to corruptly influence a particular witness, something
17 the Prosecution did not do.

18 Other than the lack of probative value of these transfers, the procedure that the
19 Prosecution followed to obtain the records raise a number of moral and legal issues.

20 Allow me to touch upon one of these problems in particular. The registers or, rather,
21 the records from Western Union were obtained wrongfully on an incorrect legal basis.

22 I wish to remind the Bench of information that was revealed in open session before
23 this very Chamber when P-267 appeared and gave testimony.

24 The records of the transfers made by or on behalf of Mr Babala and by dozens of other
25 people suspected of being related to the case were requested by the Prosecution as

1 part of an investigation of an alleged case of genocide. Yet, in this case, no one
2 before this Bench has been charged with genocide. Mr Babala is not a suspect, nor
3 has he ever been suspected of taking part in acts of genocide in no way, shape or
4 form.

5 As I argued before the Chamber on 3 November 2015, and I believe many of my
6 learned friends have made the same point, we have called upon the Prosecution to
7 apologize and to issue a public statement saying that they regretted this rather dodgy
8 procedure that they used to obtain the Western Union records. This issue really is
9 about the legality of the evidence. The Prosecution used misleading
10 characterisations to obtain evidence from a number of government authorities as part
11 of cooperation agreements between it and the Court. These items were allegedly
12 incriminating in relation to my client. The amounts transferred were not amounts or
13 money owned by my client. These are moneys from the family and friends of
14 Mr Bemba. The origin of the funds is not doubtful. All of this can be shown, can be
15 checked and cross-checked.

16 The evidence on the case record shows nothing other than the normal solidarity of
17 Mr Babala to his friend of many years standing. This is why, your Honours, the
18 Defence will be calling an expert to give testimony. This person is an expert in
19 African sociology and Congolese sociology. He will tell the Chamber and the parties
20 about the sociocultural context within which Mr Babala lives.

21 I am quite sure that the Bench will not allow an innocent person to be found guilty on
22 the basis of mere guesses, presumptions and possibilities.

23 Your Honours, representatives of the OTP, learned friends from the other Defence
24 teams, we said that -- well, we spoke of the objective of this trial, but we did not really
25 talk about the men or, rather, mankind. Within today's society when we talk about

1 objectives or aims, we speak of men because mankind must be at the very heart of all
2 concerns.

3 Mr Babala, who is here today, is a man with legal training. He studied law at the
4 University of Kinshasa and then at l'université libre du Bruxelles. He is a business
5 lawyer. Mr Babala is not truly a lawyer. He is not a lawyer. After his studies, he
6 began working as a consultant in the area of business law. He is a politician. That
7 is his advocacy.

8 In light of the many forms of suffering that his fellow citizens endure, he became
9 involved in politics. He became a Member of Parliament to fight alongside men and
10 women sharing his vision, men and women who want to improve the living
11 standards of the people of the Congo.

12 He works from the opposition benches despite the many offers of corruption, which
13 are so common in his country. He works within the Mouvement de Libération du
14 Congo, the MLC, led by Jean-Pierre Bemba.

15 Mr Babala's fine qualities are rarely found these days and must not be laughed at.

16 One cannot make a travesty of his efforts. One cannot draw incorrect and
17 out-of-place conclusions. That would be dishonest and unacceptable.

18 Mr Babala has no criminal record, and this is the case. He has lived in a country
19 where he has been trailed on a daily basis. His every word, his every gesture is
20 monitored closely. And now the Prosecution wishes to charge him for crimes even
21 though they are unable to prove such crimes beyond all reasonable doubt.

22 I think it's also important to specify that Mr Babala's actions, if we look at them
23 against the proper backdrop, were not offences in any way, shape or form, to
24 interpret facts outside of their context. This is just a pretext, a trick.

25 First of all, Mr Babala is not a member of Mr Bemba's Defence team. He never was a

1 member of Mr Bemba's Defence team during the main case. He is entirely foreign to
2 the Defence team in the main case and is utterly unaware of that team's defence
3 strategy.

4 Let us step back in time for a moment. Mr Babala met Mr Bemba in Belgium when
5 they were both studying at university. The two have been on good terms for many
6 years, have dealt with one another and now are both members of the Mouvement de
7 Libération du Congo. One is president, the other deputy secretary general of the
8 party.

9 Yesterday, Mr Babala took on the duties of -- correction.

10 In the past, Mr Babala took on the duties of deputy chief of staff and then became the
11 full-fledged chief of staff, and that is why Mr Babala was chosen by Mr Bemba to help
12 raise funds to meet the legitimate needs of Mr Bemba's Defence team as well as funds
13 to provide for Mr Bemba's basic needs within the detention centre.

14 Mr Babala's contacts with the members of the Defence team were limited. He merely
15 provided the necessary funding to cover the legitimate needs of the team and also for
16 the basic needs of Mr Bemba at the detention centre. A similar role was played by
17 other family members of Mr Bemba and friends. There is nothing wrong with
18 helping a friend, neither legally nor morally.

19 Mr Babala never received instructions from anyone to have any kind of a corrupt
20 influence on Pre-trial Chamber III. He cannot be charged with being a member of
21 some network trying to have a corrupt influence of witnesses.

22 We will hear evidence quite to the contrary throughout this case, and this evidence
23 should be sufficient to convince you beyond all reasonable doubt in accordance with
24 Article 66 of the statute which governs this Court.

25 It is never too late to do the right thing, as they say. The Prosecution could have

1 followed the attitude taken by the New York Prosecutor who decided in the case of
2 Diallo versus Dominique Strauss Khan to drop the case because those Prosecutors in
3 New York realized they could not convince the jury beyond all reasonable doubt that
4 the accused was guilty. And I think the time has come for the Prosecution to drop
5 the charges against Mr Babala. By doing this, the Prosecution would be
6 demonstrating legal honesty and rigour. There is no shame when a Prosecutor
7 decides to drop charges or to even ask that an accused person be acquitted.
8 The Rome Statute provides the Prosecution with all resources needed and at the same
9 time places a heavy burden upon the Prosecution. They must prosecute, but they
10 must -- well, their task is not necessarily to conduct proceedings and get a conviction
11 at any price. Their task is to shed light, to find the truth.
12 Furthermore, a number of years ago, I remember at a training session for counsel
13 before the ICC a Japanese lawyer used a very lovely turn of phrase. He referred to
14 the Court as the "Olympus of criminal law," definitely a sign of deference from a
15 lawyer. And in this case, we can say that the finest description of the course in legal
16 language came from a lawyer. This expression was so true and it really was the
17 right expression for us, and so we tried to really come to the very meaning of this
18 expression.
19 And let us imagine that the Japanese lawyer in question was referring to the height of
20 this Court, which far exceeds that of existing international criminal courts and
21 domestic courts, owing to the superiority of international law, like Mount Olympus,
22 which rises far above all other mountains in Greece.
23 Your Court is not limited in terms of individual jurisdiction as is set out in Article 27.
24 The Court is not limited in material jurisdiction, namely, prosecution and repression
25 of genocide, crimes against humanity. The Court is not limited in temporal and

1 territorial jurisdiction, other than considering the principle of complementarity.
2 Your Court is not subject to any other court.
3 I think that this lawyer was referring to the people who sit upon the bench at this
4 Court. Just as Mount Olympus was the place of the most important Greek gods, the
5 International Criminal Court is the headquarters of the gods of criminal procedure.
6 You, your Honours, are amongst the -- you are, figuratively speaking, the gods of
7 criminal proceedings. This is particularly true because your decisions are
8 irrevocable. There can be no recourse to another court. And as divine precepts
9 inspire men in their conduct, your decisions similarly must give shape to the
10 jurisprudence of other criminal courts, be they international or national and, thus,
11 these courts shall be distinguished by their fairness and their justice.
12 The law is an institution of men. At times the rules violate the ideal of justice.
13 Slavery, apartheid, discrimination, racial discrimination, discrimination against
14 women, all of these were instituted by law, by legislation. The term of "miscarriage
15 of justice" bears witness to this reality.
16 In some cases judges to render justice had to sacrifice law because the law itself was
17 unfair. Your Honours, you do not need to sacrifice the law because when it comes to
18 this august body, the law goes hand in hand with justice. Justice is a more complex
19 notion. It is an intuitive feeling, an ideal that allows us to look beyond law, to moral
20 duty, to equality, to individual liberties.
21 The jurisdictional function within the greatest criminal court has been entrusted to the
22 gods so that the gap between the ideal of justice and positive law, understood as the
23 sum of applicable law, procedural practices, can be -- so that this gap can be
24 narrowed.
25 The rules that govern this Court are fairer than one could ever imagine. They are

1 what we find in the core texts and are indeed veritable treasuries of justice. Article
2 21 of the Statute opens the path towards universal laws and principles upon which
3 you can base your decisions. It gives you the arsenal of measures, so to speak, to
4 reach justice by applying these rules, these principles.

5 There is no doubt that Mr Babala can not be found guilty and this is what Mr Babala,
6 his family, his friends, his Defence team and the international community call upon
7 you to do with all their hearts. I thank you, your Honours.

8 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Kilenda.

9 We have still 20 minutes for Mr Taku, I would assume. But I could also imagine that
10 you would perhaps prefer to make your opening statements uninterrupted, so if you
11 would request, I would suggest that we start with your opening statements tomorrow
12 at 9.30.

13 MR TAKU: Thank you very much, your Honour. I would prefer to start tomorrow at 9.30.
14 Thank you so much.

15 PRESIDING JUDGE SCHMITT: So then we will do that. This concludes the hearing for
16 today. We will resume at 9.30 tomorrow.

17 After the opening statements of the Defence of Mr Arido, we will discuss the report of
18 the Registry on the witnesses, so please be prepared to orally address that. And I
19 have been informed, I know now that the Defence of Mr Mangenda will not make
20 opening statements.

21 So this concludes the hearing for today.

22 THE COURT USHER: All rise.

23 (The hearing ends in open session at 4.07 p.m.)