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**International
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Date: **2 July 2018**

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Confidential Annex A

Prosecution Detailed Notice of Additional Sentencing Submissions

Source: Office of the Prosecutor

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

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I. Introduction

1. The Prosecution files this Detailed Notice of Additional Submissions pursuant to rule 145(1)(c) and (2)(vi) of the Rules of Procedure and Evidence (“Rules”) concerning the impact of the Bemba Main Case Appeals Judgment of 8 June 2018¹ overturning Trial Chamber III’s 21 March 2016 judgment of conviction.² Mr Bemba’s acquittal evidences the “damage caused” by the conduct of the convicted persons and an “aggravating circumstance” pursuant to rule 145. As a ‘new fact’ particularly one which comprises the realisation of the very objective of the common criminal plan in which Messrs Bemba, Kilolo and Mangenda participated, it is incumbent on the Prosecution to raise this matter before their re-sentencing. Similarly, the Trial Chamber is required to give the matter consideration in their determination.

2. This unprecedented case concerns the convicted persons’ execution of a sophisticated and concerted plan to obtain Mr Bemba’s acquittal through unlawful means—means which imperilled this Court’s ability fairly to adjudicate the serious crimes of international concern with which he was charged. In this context and as a part of the implementation of the plan, Messrs Bemba, Kilolo, Mangenda, Babala and Arido were convicted by this Trial Chamber for, *inter alia*, corruptly influencing 14 Defence witnesses in the Main Case (“Corrupted Witnesses”).³ They illicitly coached witnesses to testify in Mr Bemba’s favour concerning the merits of the Main Case, regardless of the truth or falsity of the information therein.⁴ However, as the evidence adduced at trial established, their convictions—and scripting—comprise a mere snapshot of the pervasive scheme, which encompassed many more witnesses than the 14.⁵

3. To obtain Mr Bemba’s acquittal, the convicted persons intentionally and irreversibly poisoned the evidentiary record of the Main Case with the testimony of false, scripted and tainted witnesses—whose evidence was never expunged and remains in the trial record to this

¹ ICC-01/05-01/08-3636 (“[Bemba AJ](#)”). The Judgment was rendered by a Majority of three judges.

² [Bemba TJ](#).

³ [Bemba et al. TJ](#), paras. 103, 681, 688. The witnesses are D-2 (P-260), D-3 (P-245), D-4 (P-256), D-6 (P-9), D-13 (P-431), D-15 (P-198), D-23 (P-261), D-25 (P-25), D-26 (P-432), D-29 (P-3), D-54 (P-201), D-55 (P-214), D-57 (P-20) and D-64 (P-243).

⁴ [Bemba et al. TJ](#), paras. 704-734.

⁵ *See e.g.* [Bemba et al. TJ](#), para. 331(referring to D-7’s and D-9’s, and prospective witnesses who did not testify, presence in the Douala meeting), paras. 715, 719, 787, 825 and 839 (referring to potential witness Bravo) and para. 856 (finding that Mr Bemba exercised direct influence on D-19 and urged or asked these witnesses about the specifics of their testimonies and thus follow Mr Kilolo’s instructions).

day. The offences of which they were convicted were extremely grave and seriously damaged the integrity of the proceedings before the Court, undermining public trust and confidence in its processes, regardless of, and independently from, their impact on the outcome of the Bemba Main Case.⁶

4. However, that an impact on the outcome of a case is not required as a matter of law to harm the administration of justice⁷ does not mean there was no impact in this instance. There was. As elaborated below, Mr Bemba's acquittal was, at least to a discernible extent, resulting from, and predicated on, evidence affected by a pervasive campaign of witness tampering, which eventually but not unforeseeably, infiltrated the Bemba AJ. Here, the toxic effects of the corrupt and tainted evidence adduced by Messrs Bemba, Kilolo and Mangenda at trial affected not only the immediate proceedings in which it was tendered, but inevitably, subsequent proceedings. In short, the convicted persons' concerted and unlawful efforts may have ultimately succeeded, not at trial as originally intended, but at the appellate stage.

5. Although the convicted persons could not have known that the Appeals Chamber would depart from the Court's established appellate standard of review for factual errors or that the Appeals Chamber's understanding of the scope of the charges would play a substantial role on quashing Mr Bemba's conviction, this is of no moment. They intended and foresaw Mr Bemba's acquittal by means of their illicit actions. Thus, in so far as the Bemba AJ disturbed the Bemba TJ to any extent⁸ on the basis of evidence adduced through, or the acts and conduct of, corrupted or tainted Defence witnesses,⁹ Mr Bemba's acquittal comprises "the damage caused" or an "aggravating circumstance[]" within the contemplation of rule 145.¹⁰

⁶ [Bemba et al. SAJ](#), paras. 42-45, 189.

⁷ [Bemba et al. SAJ](#), para. 189.

⁸ Although the reasons underpinning the acquittal cannot be solely attributed to the convicted persons, it is clear that the Appeals Chamber's approach to the assessment of factual findings and evidence on appeal informed the Chamber's ultimate decision.

⁹ [Bemba et al. SAJ](#), paras. 263 and 334 (finding that the consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence – when assessing gravity or as an aggravating factor – as long as these consequences were, at least, objectively foreseeable by the convicted person).

¹⁰ [Bemba et al. SAJ](#), paras. 263, 333 (finding that "whether the extent of the damage caused was considered as part of the gravity assessment of the offence rather than an aggravating circumstance is immaterial"). *See also* para. 157 (noting the non-exhaustive nature of aggravating circumstances).

II. Submissions

A. The corrupted and tainted evidence introduced by the convicted persons affected the Main Case appeal proceedings

6. In its 8 June 2018 Judgment, the Appeals Chamber (by majority) overturned Mr Bemba's convictions before Trial Chamber III, in part, because it found the Trial Chamber's assessment of the measures that Mr Bemba took to address crimes committed by MLC troops inadequate.¹¹ The Judgment—which only expressly references Witnesses P-36 and **D-48**'s testimonies¹²—rests on seven errors regarding the Trial Chamber's conclusion that Mr Bemba failed to take all necessary and reasonable measures.¹³ At least three of these errors follow the narrative and are related to the scripted evidence of Corrupted Witnesses and to unreliable evidence of other tainted witnesses, or their acts and conduct. In particular, the Majority of the Appeals Chamber found that Trial Chamber III:

- failed to pay sufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability, as a remote commander, to take necessary and reasonable measures (error 1);¹⁴
- failed to address Mr Bemba's statement that he wrote to the CAR Prime Minister requesting an international commission of inquiry to be set up, or the testimony of D-48 which attested to the existence and content of the letter (error 2);¹⁵
- erred in attributing any limitations it found in the mandate, execution and/or results of the measures to Mr Bemba (error 3).¹⁶

7. Mr Bemba's acquittal rests, in part, on the Majority's limited evaluation of an evidentiary record¹⁷ deliberately and criminally tainted and scripted by the convicted persons. Specifically, the Majority found that, in convicting Mr Bemba, Trial Chamber III had

¹¹ [Bemba AJ](#), para. 198. With respect to approximately half of the incidents, the Majority found that since “in the present case, the ‘facts and circumstances’ were described in relation to the crimes, at the level of individual criminal acts”, and the Prosecution added those incidents after the Confirmation Decision, they fell outside the “facts and circumstances” of the charges. As a result, the Majority *discontinued the proceedings* with respect to those crimes. See [Bemba AJ](#), paras. 196-197 (emphasis added).

¹² [Bemba AJ](#), paras. 172 (fn. 344 referring to Bemba Appeal Brief) and 174 (fn. 349 referring to Bemba Appeal and Closing Brief).

¹³ [Bemba AJ](#), paras. 171-194.

¹⁴ [Bemba AJ](#), paras. 171-173, 189.

¹⁵ [Bemba AJ](#), paras. 174-175, 189.

¹⁶ [Bemba AJ](#), paras. 180-181, 189.

¹⁷ [Minority Opinion](#), para. 8 (“[...] it appears that the Majority's review of evidence was, in fact, very limited”).

inappropriately dismissed certain arguments, and inadequately evaluated and weighed certain evidence presented by the Bemba Defence related to Mr Bemba's effective control over MLC troops and the scope of measures within his power to address alleged MLC crimes.¹⁸ The Majority faulted the Trial Chamber's assessment of the commissions and inquiries that Mr Bemba purportedly established,¹⁹ tacitly accepting the narrative advanced by scripted and tainted Defence witnesses. Their evidence, only some of which is cited in the Bemba AJ, necessarily informed the Majority's analysis of the trial record and played a discernible role in its decision to reverse Mr Bemba's conviction.

8. As demonstrated below, the narrative accepted by the Majority is traceable either to witnesses whose testimony was tainted or corruptly influenced by the convicted persons, or concerned the acts or conduct of such witnesses.

(i) D-54

9. **D-54** was called by the Defence to testify about a number of key issues in the Main Case, including Mr Bemba's effective control. He was crucial among the Corrupted Witnesses, testifying on the activities of a commission of inquiry which Mr Bemba purportedly established to investigate allegations of MLC crimes in CAR.²⁰ Trial Chamber III, noting that "particular caution is required in analysing D-54's evidence", observed:

"D-54 provided evasive and illogical testimony, particularly when he was questioned about the role of Mr Bemba and the MLC in the 2002-2003 CAR Operation. [...] Finally, the Chamber notes D-54's testimony that there were no victim complaints alleging MLC crimes made to certain commissions. When confronted with media reports of MLC crimes, he denied awareness, questioned their reliability, and/or attempted to shift blame to other forces involved in the conflict, in particular, General Bozizé's rebels."²¹

¹⁸ [Bemba AJ](#), paras. 171-172 (fns. 338 and 348); para. 174 (fn. 349).

¹⁹ [Bemba AJ](#), paras. 180-181 ("[...] However, without undertaking the necessary assessment set out in the preceding paragraph, this could not be made out without a finding that Mr Bemba purposively limited the mandates of the commissions and inquiries. Yet, the Trial Chamber made no such finding as to the sham nature of the measures").

²⁰ [Bemba TJ](#), para. 582.

²¹ [Bemba TJ](#), para. 370.

10. Thus, Trial Chamber III found **D-54**'s testimony unreliable as to Mr Bemba's lack of operational control,²² lack of disciplinary authority²³ over the MLC troops in CAR, and regarding the date of the MLC's arrival there.²⁴

11. **D-54** testified before this Chamber, which concluded beyond reasonable doubt that:

“Mr Kilolo extensively rehearsed, instructed, corrected and scripted the expected answers on **a series of issues pertaining to the Main Case**. [...] Mr Kilolo instructed D-54 to testify incorrectly about his prior contacts with the Main Case Defence. D-54 abided by these instructions. Mr Kilolo also instructed D-54 on how to conduct himself before the Court and to deny any payments from the Main Case Defence.”²⁵

12. The Chamber further found that Mr Bemba commissioned the corrupt influencing of **D-54**:²⁶ he instructed Mr Mangenda to communicate to Mr Kilolo the topics to be addressed and the manner in which **D-54** was expected to testify;²⁷ Mr Kilolo and Mr Mangenda extensively discussed **D-54**'s scripting²⁸ and sought to ensure that **D-54**'s testimony was consistent with the rest of the evidence introduced in the Main Case. Mr Mangenda is recorded on 9 September 2013 saying:

“Well, actually, the problem there was more that **it should be in line with the Client's letter, that there shouldn't be any inconsistencies**. So, as for the rest, he can say he went back ... (...) what matters most is that ... erm ... all his statements tally with what's written in the letter from the person you know, that's it”.²⁹

13. Mr Kilolo diligently implemented Mr Bemba's directives in scripting **D-54**'s testimony in multiple conversations with **D-54** from as early as 22 August 2013 until at least 2 November, including during his testimony before Trial Chamber III.³⁰ He ensured that **D-54** followed a particular narrative favourable to, and consistent with, the Main Case Defence

²² [Bemba TJ](#), paras. 427-446. *See in particular* paras. 428-429 and 440.

²³ [Bemba TJ](#), para. 448.

²⁴ [Bemba TJ](#), para. 457.

²⁵ [Bemba et al. TJ](#), para. 651. Trial Chamber VII also found that “[...] D-54 untruthfully testified in the Main Case regarding prior contacts with the Main Case Defence.” *See* [Bemba et al. TJ](#), para. 650.

²⁶ [Bemba et al. TJ](#), paras. 600-605, 653.

²⁷ *See* [Bemba et al. TJ](#), para. 606 (noting that in an intercepted conversation on 30 August 2013, Mr Mangenda is recorded conveying Mr Bemba's concrete instructions to Mr Kilolo with respect to D-54's expected testimony. This included instructions such as to: “(i) deny any knowledge of events in Mongoumba; (ii) deny having had any power, despite being a member of the ‘organe qui dirigeait la guerre’; (iii) testify that ‘on avait mélangé les troupes’; (iv) testify about when the troops arrived at PK12;[...]”). *See also* para. 652.

²⁸ [Bemba TJ](#), para. 406 (noting that CAR CO was responsible for gathering information, coordinating operations, logistics, communications, and intelligence). Mr Bemba's position was that the CAR authorities commanded the operations in CAR (including those involving the MLC) from this centre. *See* [Bemba Appeal Brief](#), paras. 148-150. This centre has also been referred to as CAR CO (CAR Centre of Operation).

²⁹ Audio recording, CAR-OTP-0074-1001; Translated transcript of audio recording, CAR-OTP-0079-1737 at 1741, lns. 103-104 and 109-110. *See* [Bemba et al. TJ](#), fn. 1365.

³⁰ [Bemba et al. TJ](#), paras. 622-624. D-54 testified before Trial Chamber III between 30 October and 1 November 2013. The VWU cut-off date was 29 October 2013.

position.³¹ During those conversations, Mr Kilolo went through the substance of **D-54**'s upcoming testimony on various matters relating to the merits of the Main Case including, but not limited to:³²

- Mr Bemba's command position and his military role.³³
- The commission of inquiry. **D-54** testified that the commission received *no complaints*, nor was any evidence found, to support the allegations about the MLC soldiers' criminal activity and that, therefore, Mr Bemba could not have known of the purported crimes.³⁴

"D-54: OK, erm ... and now, regarding my statement, as the investigation has been done, it is not always this kind of crime ...

Kilolo: Hm.

D-54:...and regarding what you say, then, what do you think?

Kilolo: No, no, you'll say that you did not find these crimes that the MLC people are being accused of, and you didn't see them being committed either, but civilians told you: we are happy since we've been liberated by the MLC and the FACA loyalists.

D-54: Hm.

Kilolo: ... but no complaints were received, either of rape, or, or of ... of erm ... concerning the MLC. (...)

Kilolo: So, and then ... this is also my question, and then the last question I'll ask you: if I said to you that Jean-Pierre Bemba should have known that ALC troops in Central Africa had committed acts of violence, murders, rapes, crimes, because you personally, you were there during the commission, you saw that crimes were being committed and you ... erm ... so Jean-Pierre Bemba must also have known. What is your response? This will be my very last question, then I'll sit down.

D-54: Hm.

Kilolo: Hm. Here, you'll only repeat, and you'll say: it is true that I went there, but I received no complaints, we saw no victims, whether of rape, murder or pillaging ... erm ... no complaints, no complaints were made, erm ... we asked questions, we questioned everybody: civilians, soldiers, we carried out searches, in any case, nothing was found. I'll stop there, and I'll sit down.

D-54: Hm"³⁵

"Kilolo: ... another thing, they'll ask you now, "Are you aware of the crimes committed by the ALC, in the various towns they captured?" You will say, no, no crime was committed because we checked. There was no complaint either. Say, you're the ones talking about crimes now. When we were in at the commission there was nothing. (...) you said when you moved around, you would ask civilians, in Damango ... in any case, you were told that the people were really very happy"³⁶.

³¹ [Bemba et al. TJ](#), para. 651.

³² [Bemba et al. TJ](#), para. 636.

³³ [Bemba et al. TJ](#), paras. 629, 631. *See fn.* 1429.

³⁴ [Bemba et al. TJ](#), para. 635.

³⁵ [Bemba et al. TJ](#), fn. 1445. Audio recording, CAR-OTP-0080-1366; Translated transcript of audio recording, CAR-OTP-0082-1087 at 1098-1099, lns. 380-391; at 1104, lns. 612-627; at 1101-1102, lns. 499-510.

³⁶ [Bemba et al. TJ](#), fn. 1445. Audio recording, CAR-OTP-0080-1368; Translated transcription of audio recording, CAR-OTP-0082-0659 at 0661, lns. 9-28.

14. Yet, in this case **D-54** admitted that *there were complaints* about crimes.³⁷

15. **D-54**'s testimony was also scripted on other substantive topics, such as the date of Mr Bemba's arrival in Bangui,³⁸ the deployment,³⁹ movements,⁴⁰ and withdrawal⁴¹ of MLC troops in the CAR; the motivations underlying the MLC's intervention in the CAR⁴² and the language spoken by the MLC soldiers⁴³ and the identity of the perpetrators of the crimes.⁴⁴

16. As this Trial Chamber found, these "excerpts are striking examples of Mr Kilolo's direct intervention, enabling the Chamber to determine the true extent of Mr Kilolo's illicit interference with **D-54**'s upcoming testimony."⁴⁵

17. **D-54** testified in the Main Case according to this scripted narrative. For example:

- He claimed Mr Bemba's effective control was limited as he was a civilian remotely located:

*A. Mr Jean-Pierre Bemba was a civilian. The one who was the technician and military man was the Chief of General Staff.*⁴⁶

[...]

*A. What do you mean by "giving orders," Counsel? Someone who was in Gbadolite, well, even from an organisational point of view, I have just demonstrated to you how orders were given. There was a whole array of circumstances. It wouldn't be someone 500 or 1,000 kilometres away who would be giving orders. This was the government of a different country.[...] So it would be practically impossible for someone hundreds of thousands of kilometres away to issue orders. I never even heard anywhere that Mr Bemba was giving orders. I was there.*⁴⁷

[...]

*And so when it came to operations, as I have just demonstrated, even taking into account the modern communication means, what you can see on the maps is very different from what those of us commanders see in the field.*⁴⁸

[...]

*A. Madam President, in my humble opinion and to my knowledge and with all the time I spent there in Bangui, these troops were made available to the Central African authorities.[...] So Mr Bemba had no authority on troops sent to Bangui.*⁴⁹

³⁷ [ICC-01/05-01/13-T-28-Red2](#), pp. 43-45.

³⁸ [Bemba et al. TJ](#), paras. 626-627.

³⁹ [Bemba et al. TJ](#), para. 631.

⁴⁰ [Bemba et al. TJ](#), para. 628.

⁴¹ [Bemba et al. TJ](#), paras. 629, 631.

⁴² [Bemba et al. TJ](#), paras. 629, 631.

⁴³ [Bemba et al. TJ](#), para. 632.

⁴⁴ [Bemba et al. TJ](#), para. 634.

⁴⁵ [Bemba et al. TJ](#), para. 625. *See also* para. 644.

⁴⁶ [T-347-Red](#), p. 20, lns. 22-23.

⁴⁷ [T-347-Red](#), p. 52, lns. 1-4.

⁴⁸ [T-347-Red](#), p. 55, lns. 15-17.

- He testified that Mr Bemba had no disciplinary authority:

“Mr Bemba did not have any disciplinary matters to deal with the ALC in Bangui. The disciplinary matters were solely under the authority of the Central African military authorities.”⁵⁰

- He testified that the commission of inquiry had received no complaints about crimes committed by MLC soldiers from the civilian population:

“(Q. (Redacted) (Redacted) any complaint from a citizen of the Central African Republic complaining about being a victim of rape by Congolese soldiers?”

A. None. The Court can cross-check with certain members of that commission. (Redacted) (Redacted) There was no complaint at all.

Q. (Redacted) complaints of a murder or murders perpetrated by ALC soldiers against a citizen of the CAR, or another country?

A. (Redacted) not have any such case in the commission.

Q. What was the outcome of the investigation? (Redacted)

A. (Redacted) (Redacted) No complaints were received. Otherwise, the president of the commission would have informed (Redacted) that such complaints had been received and then that further investigations would have to be carried out, ending with the arrest of the perpetrators. The rare cases that were identified were FACA soldiers, not even ALC soldiers, and this involved property abandoned by Bozizé's soldiers who were fleeing from attacks launched by FACA and supported by ALC soldiers.”⁵¹

18. After **D-54**'s testimony, Mr Kilolo complimented him for sticking to the script as agreed.⁵² **D-54**'s delivery of the narrative proved to be—eventually—successful since the Majority of the Appeals Chamber accepted it:

- Mr Bemba's limited authority as a remote commander located in another country. The Majority found that the Trial Chamber had paid insufficient attention to the fact that “the MLC troops were operating in a foreign country with attendant difficulties on Mr Bemba's ability, as a remote commander, to take measures”.⁵³
- The commissions and inquiries purportedly established by Mr Bemba. The Majority found that the Trial Chamber had not expressly found that these measures were

⁴⁹ [T-348-Red](#), p. 76, ln. 21 to p. 72, ln. 2.

⁵⁰ [T-349-Red](#), p. 5, lns. 17-19.

⁵¹ See [T-347-Red](#), p. 73 lns. 6- 22. See also [Bemba et al. TJ](#), para. 646, fn. 1472.

⁵² [Bemba et al. TJ](#), para. 644. See fn. 1468: Audio recording, CAR-OTP-0080-1367; Translated transcript of audio recording, CAR-OTP-0082-1109 at 1130, lns. 691-692 (“You answered well there. You know that, about that, when he started talking about that, I thought to myself “Oh-oh!” Because you and I hadn't prepared that”).

⁵³ [Bemba AJ](#), paras. 171-173. However, Gbadolite, MLC headquarters in DRC, is located at only 270 km from the scene of the crimes.

sham, and that Mr Bemba knew about the shortcomings (or was responsible for them) and had the material ability to address them.⁵⁴

(ii) **D-15**

19. **D-15**, also a Corrupted Witness, similarly testified that Mr Bemba lacked effective control over MLC forces because of his remote location. Trial Chamber III similarly found that particular caution was required in analysing this evidence since:

“**D-15**’s testimony was exaggerated, inconsistent, and evasive, particularly when questioned about Mr Bemba’s role in the 2002-2003 CAR Operation, including in relation to operational command over the MLC troops in the CAR. [...]”⁵⁵

“**D-15**’s testimony concerning operational control is also qualified and inconsistent. [...] His conclusions on the issue are also doubtful insofar as they were based on, *inter alia*, his belief that, as a matter of principle, Mr Bemba could not have ‘extraterritorial authority’ over MLC troops. [...]”⁵⁶

20. As this Chamber found beyond reasonable doubt, “Mr Kilolo extensively rehearsed, instructed, corrected and scripted the expected answers on a series of issues pertaining to the Main Case that were followed by [**D-15**] scrupulously”.⁵⁷

21. For example, in an intercepted conversation between Mr Kilolo and **D-15** which took place on the evening while **D-15** was testifying, Mr Kilolo is recorded scripting **D-15** on Mr Bemba’s effective control:

“Third question. To conclude, I’ll say to you (...) erm ... according (...) to one theory, Jean-Pierre Bemba (...) was the military leader in Central Africa, because he exercised command and control over the troops in Mustapha’s brigade in Bangui. What’s your reaction? So there, really, if you can string several military arguments together for me to explain that it was impossible”.⁵⁸

⁵⁴ [Bemba AJ](#), paras. 180-181.

⁵⁵ [Bemba TJ](#), paras. 357-358.

⁵⁶ [Bemba TJ](#), para. 432.

⁵⁷ [Bemba et al. TJ](#), para. 590. *See also* [Bemba et al. TJ](#), paras. 556-557 (finding that Mr Kilolo’s scripting extended to the subject-matter of the Main Case, including, Mr Bemba’s command and control over MLC troops in the CAR). *See also* para. 558 (finding that various parts of the script did not feature in D-15’s prior statement to the Main Case Defence and also featured in D23’s scripted testimony, and demonstrate Mr Kilolo’s efforts to harmonise the evidence). Trial Chamber VII also found that “D-15 upon Mr Kilolo’s instructions, untruthfully testified in the Main Case regarding his prior contacts with the Main Case Defence”. *See* [Bemba et al. TJ](#), para. 589.

⁵⁸ Audio recording, CAR-OTP-0074-1003; Translated transcript of audio recording, CAR-OTP-0079-0154 at 0157-0158, lns. 71-81, quoted in [Bemba et al. TJ](#), fn. 1190.

22. As this Chamber found, this intercepted conversation “records Mr Kilolo systematically going through the topics, several times, in a question-and-answer fashion, impressing upon **D-15** the answers to be given [in the Main Case].”⁵⁹ Mr Kilolo also sought to align **D-15**’s testimony with that of **D-19** and D-45.⁶⁰ He even explained to **D-15** the legal consequences of his testimony:⁶¹

“AK:... I simply wanted to explain the issue here to you. The issue is a legal one. It’s simply a question of...

[...]

AK: [...] But given that they were in a foreign territory, he had neither the authority nor the ability to call them and tell them ‘Right. Listen. You’re leaving now. You’re going back [...].”⁶²

23. **D-15**’s testimony before Trial Chamber III in the Main Case demonstrates that Mr Kilolo asked the exact questions as discussed, scripted and rehearsed with **D-15** in the telephone conversations during the evening before his testimony. In turn, **D-15**’s testimony strictly followed the narrative Mr Kilolo had dictated over the telephone.⁶³ For example, regarding Mr Bemba’s effective control:

Q. Now, Witness, this will no doubt be my last question. The Bench finds itself with one particular argument before them; namely, the argument that Mr Jean-Pierre Bemba had exercised command and control over the ALC during the operations in the Central African Republic between October 2002 and March 2003. To your knowledge, is this statement true?

A. Thank you very much, Counsel, for your question. The ALC troops, if I recall correctly, were in Bangui for operational reasons. And since they were in Bangui for operational reasons, they were, you see, located in another country on different territory,

[...]

In this particular case, was there a command within the Central African Republic? And answer is yes because there was a Chief of General Staff. And during that operation, was there a supreme commander? Indeed, there was a supreme commander: The chief of all the armies.

[...]

How can one--how can one keep a manoeuvring unit in the theatre of the operations from -and this manoeuvring unit, like any other unit with the same objective -how could--how could it receive an order from elsewhere? No, that is not how things are done, [...].

In this particular case, to say that Mr Bemba was giving a specific order to his people in the field as if he was being given day-to-day intelligence from the field about the enemy force, the weather, the terrain, each road at each time, no. This gentleman had

⁵⁹ [Bemba et al. TJ](#), para. 556.

⁶⁰ [Bemba et al. TJ](#), para. 709.

⁶¹ [Bemba et al. TJ](#), para. 573.

⁶² Audio recording, CAR-OTP-0074-1008; Transcript of audio recording, CAR-OTP-0077-1389 at 1401, Ins. 411-412 and 420-421. English Translation at CAR-OTP-0091-0186 at 0199, Ins. 406-407 and 414-416.

⁶³ [Bemba et al. TJ](#), para. 581.

*other things to do, and so from a technical point of view such a statement cannot be justified.*⁶⁴

24. As with **D-54**, **D-15**'s scripted testimony on Mr Bemba's limited effective control as a commander operating from a foreign country, also infiltrated the Bemba AJ. As noted above, the Majority found that the Trial Chamber had paid insufficient attention to the fact that "MLC troops were operating in a foreign country with attendant difficulties on Mr Bemba's ability, as a remote commander, to take measures",⁶⁵ thus accepting the contrived narrative.

(iii) D-13

25. Corrupted Witness **D-13** also testified about Mr Bemba's alleged limited effective control.⁶⁶ For example, he testified that he had never heard of any military order issued by Mr Bemba:

MR KILOLO: (Interpretation)

Q. Mr Witness, did you sometimes receive military orders from Gbadolite, that is, concerning operations in the CAR?

A. Orders from the general staff of the ALC in Gbadolite to the CAR, well, I did not receive any. The orders were issued by the authorities that we met on the spot.

Q. Based on what you were able to observe, did Mr Jean-Pierre Bemba give military orders to Colonel Mustapha or to the battalion commanders in the Central African Republic?

*A. (Redacted) I never heard that Mr Jean-Pierre Bemba sent any messages [...]*⁶⁷

26. Trial Chamber III considered his testimony on this topic unreliable.⁶⁸

27. The evidence before this Chamber established beyond reasonable doubt "that Mr Kilolo illicitly prepared and coached **D-13** with regard to the content of his testimony in the Main Case."⁶⁹

28. Mr Kilolo and **D-13** had several telephone contacts before **D-13**'s testimony in the Main Bemba Case from 12 to 14 November 2013. On 8 November, Mr Kilolo and **D-13** spoke four

⁶⁴ [T-344](#), p. 13, ln. 25 to p. 14, lns. 1-8, p. 15, lns. 6-9, p.16, lns. 1-5 and lns. 15-20. See also p. 17, ln. 17 to p. 19, ln. 4.

⁶⁵ [Bemba AJ](#), paras. 171-173.

⁶⁶ [Bemba TJ](#), para. 428.

⁶⁷ [T-350-Red](#), p. 65, lns. 4-14.

⁶⁸ [Bemba TJ](#), para. 431.

⁶⁹ [Bemba et al. TJ](#), paras. 663-664. Trial Chamber VII also found that "Mr Kilolo instructed D-13 to give an untruthful account of the number of contacts he had had with the Main Case Defence."

times, totalling almost two hours.⁷⁰ Shortly thereafter, on 10 November, Mr Kilolo and Mr Mangenda were caught on tape discussing **D-13**'s scripting:

“I, for example, am dealing with that person’s COLOURS because you see, the chap... as it had already been a long time, in his mind he knew that he was no longer coming, so he had...he no longer had those things in mind. So I just tried with him, like that ... even what he had said at our meeting with Kate, he can’t take it any more (...). So, I had to start again from the beginning, and that took me some time...it really tired me out”⁷¹.

29. As with **D-54** and **D-15**, the Majority largely accepted **D-13**'s narrative as to Mr Bemba's limited authority with respect to his troops operating in CAR. Any limitation to Mr Bemba's effective control over his troops in CAR—such as in issuing operational orders—was relevant to determine the extent of Mr Bemba's material ability to take necessary and reasonable measures to address the crimes committed by the MLC in the CAR. Consistent with **D-13**'s testimony, the Majority considered that Mr Bemba's *material abilities* were limited—due to his troops operating in a foreign territory—and, as a result, that the Trial Chamber failed to conduct a proper assessment as to the necessary and reasonable measures that Mr Bemba could have taken.⁷²

(iv) **D-25**

30. Corrupted Witness **D-25** testified that Mr Bemba lacked operational control. Trial Chamber III found him unreliable on this topic, and considered that “particular caution” was required in analysing his evidence:

“**D25**'s testimony was often incoherent and unclear. When confronted with evidence during Prosecution questioning contradicting his account, **D25** was evasive and qualified his testimony. In particular, in relation to Mr Bemba's role in the 2002-2003 CAR Operation, **D25 insisted that Mr Bemba had no operational command of the MLC troops in CAR, but also testified that he would not know whether Mr Bemba issued any orders, and that Mr Bemba could have directed the operations through the General Staff.** He also inconsistently testified both that the MLC troops never killed anyone and that he did not know anything about the crimes committed by the MLC.”⁷³

⁷⁰ [Bemba et al. TJ](#), para. 656.

⁷¹ Audio recording, CAR-OTP-0080-1419; Translated transcript of selected parts of the audio recording, CAR-OTP-0082-1140 at 1142, Ins. 10-16. See [Bemba et al. TJ](#), fn. 1526.

⁷² [Bemba AJ](#), para. 173 (finding that “the Trial Chamber did not conduct a proper assessment as to whether, in the particular circumstances that existed at the time, the range of measures taken by Mr Bemba could be regarded as the extent of the necessary and reasonable measures that he could have taken, given the limitations upon his material abilities”).

⁷³ [Bemba TJ](#), paras. 361-362. See also paras. 436, 445-446 (finding that **D-25**'s testimony with respect to Mr Bemba's operational control was not reliable).

31. Trial Chamber VII found that **D-25** had been illicitly coached by Mr Kilolo and that Mr Bemba knew about the illicit coaching, since he transmitted to Mr Kilolo his satisfaction regarding the precision of **D-25**'s testimony.⁷⁴ Mr Mangenda updated Mr Kilolo (who was not in the courtroom) about **D-25**'s testimony and surmised that the Trial Chamber III judges suspected that **D-25** had been illicitly coached.⁷⁵ In particular:

“Mangenda: ...but from our side, really, **I'd say that...in any event, he did at least, he really did 90%...**

Kilolo: Erm...for me, no, because normally it would need...he didn't manage, there's another veryimportant detail (...)

Mangenda: **That was going to weaken...if he were to say that that would affect his credibility, that would show that we...we...we...we...[...]**”⁷⁶

32. As with **D-54**, **D-15** and **D-13**, **D-25**'s testimony as to Mr Bemba's limited abilities must have informed the Majority's conclusion that Mr Bemba's ability to take necessary and reasonable measures was seemingly limited.⁷⁷

(v) **D-19**

33. **D-19** was a crucial Defence witness as to Mr Bemba's effective control, including regarding his disciplinary authority. Although he was not one of the 14 Corrupted Witnesses, this does not bar this Chamber from considering the impact of his testimony on the Majority's decision within its assessment under rule 145: (i) his evidence in the Main Case largely followed the same narrative as that of the Corrupted Witnesses; (ii) Trial Chamber III found him equally non-credible and, notably, (iii) there is a clear link between his unreliable testimony and the convicted persons' actions since Mr Bemba exercised influence on him and urged him to follow Mr Kilolo's instructions.⁷⁸

34. Trial Chamber III found **D-19**'s evidence in the Main Case largely unreliable, and his testimony as to Mr Bemba's involvement in the 2002-2003 CAR Operation, his operational

⁷⁴ [Bemba et al. TJ](#), paras. 504, 506. The Trial Chamber also found that D-25 had provided false testimony as to the payments he received. *See also* para. 501 (finding that Mr Kilolo's illicit coaching resulted in the scripting of the totality of the witnesses' testimony).

⁷⁵ [Bemba et al. TJ](#), paras. 489-490, 505.

⁷⁶ [Bemba et al. TJ](#), fn. 1008 referring to audio recording, CAR-OTP-0074-0991; Translated transcript of audio recording, CAR-OTP-0080-0228 at 0232, lns. 78-96.

⁷⁷ [Bemba AJ](#), para. 173.

⁷⁸ [Bemba et al. TJ](#), para. 856. *See* [Bemba et al. TJ](#), paras. 741, 861 (finding that Mr Kilolo enabled a multi-party call via his privileged line between Mr Bemba and D-19 on 4 October 2012).

control, and his (**D-19**'s) personal involvement, "not credible."⁷⁹ With respect to Mr Bemba's operational control Trial Chamber III found:

"[...] **D19**'s testimony on this issue is (i) inconsistent as to the timing of alleged negotiations concerning cooperation between FACA and MLC and any resulting decision; (ii) seemingly contradictory insofar as **D19** fails to provide a logical explanation for his testimony both that the CAR authorities had operational control, and that, at least as of January 2003, there was no longer contact between the MLC contingent and President Patassé, the FACA and General Mazi were not cooperating with the CAR hierarchy, and General Bombayake did not have the necessary logistics; (iii) contradictory with MLC logbook messages, [...] and (iv) evasive, particularly when the witness was confronted with his prior statements, in which he asserted that Colonel Moustapha received orders from and reported to the MLC Chief of General Staff and Mr Bemba"⁸⁰

35. Crucially, Trial Chamber III found **D-19**'s testimony that Mr Bemba and the MLC did not have primary disciplinary authority over the MLC contingent in CAR unreliable.⁸¹ With respect to the Mondonga commission of inquiry, the Trial Chamber specifically found:

"**D19** testified that Mr Bemba "set up Germain Mondonga's commission, along with the Central African team", i.e. the CAR authorities. However, the Chamber recalls its overall concerns as to **D19**'s credibility and the reliability of his testimony. The Chamber further notes that his evidence on issues related to the Mondonga Inquiry – including the circumstances surrounding the related arrests and the timing of Colonel Mondonga's arrival in the CAR – was evasive and contradictory. Accordingly, the Chamber considers that **D19**'s testimony on this issue is unreliable. In light of the above, the Chamber finds that the testimonies of **D19** and **D21** do not undermine the Chamber's findings that Mr Bemba established and had authority over the Mondonga Inquiry and related matters."⁸²

36. Notably, this Trial Chamber found in respect of **D-19** that:

"Mr Bemba also exerted direct influence on **D-19** and **D-55**" and "assessing the evidence as a whole, [...] the fact that he illicitly spoke to them on his privileged line in the ICC Detention Centre indicates that he urged them to cooperate and follow the instructions given by Mr Kilolo".⁸³

37. **D-19**'s tainted testimony also infiltrated the Appeals Judgment: the Majority inferred that Mr Bemba's material ability to take measures was limited because of the mixed composition of a commission of inquiry (set up by Bemba) composed by both MLC and CAR

⁷⁹ [Bemba TJ](#), paras. 359-360.

⁸⁰ [Bemba TJ](#), para. 433.

⁸¹ [Bemba TJ](#), para. 448.

⁸² [Bemba TJ](#), para. 585.

⁸³ [Bemba et al. TJ](#), para. 856. See [Bemba et al. TJ](#), paras. 741, 861 (finding that Mr Kilolo enabled a multi-party call via his privileged line between Mr Bemba and **D-19** on 4 October 2012).

personnel.⁸⁴ Although the Majority does not refer to **D-19**'s unreliable testimony (nor to **D-21**'s equally unreliable testimony mirroring **D-19**'s),⁸⁵ their conclusion is premised on these witnesses' narrative.⁸⁶

(vi) **D-48**

38. **D-48** was not one of the 14 Corrupted Witnesses regarding whom the convicted persons were found guilty in this case. Yet his unreliable testimony is also related to the convicted persons' actions. **D-48** testified about the Zongo Commission,⁸⁷ one purported measure taken by Mr Bemba in respect of the crimes committed by MLC forces in the CAR. His testimony followed the same narrative as those witnesses regarding whom this Chamber determined beyond a reasonable doubt the convicted persons had violated article 70.

39. Like **D-54** and **D-19**, **D-48** testified that CAR authorities had disciplinary authority over the MLC troops and that the MLC had no jurisdiction to investigate in the CAR.⁸⁸ He also testified that Mr Bemba had sent letters to the UN Secretary-General, the FIDH director and the CAR Prime Minister.⁸⁹ At trial, no evidence of a letter to the CAR Prime Minister was ever introduced and no witness corroborated **D-48**'s account. He had not even seen the letter.⁹⁰

40. Trial Chamber III concluded that this part of **D-48**'s testimony was unreliable given "the inconsistencies [...] and his apparent lack of knowledge of matters relating to the 2002-2003 operation and functioning of the MLC which a person in his position could be expected to know".⁹¹ However, as with **D-54** and **D-19**, in particular, **D-48**'s narrative as to Mr Bemba's and the MLC limited disciplinary ability in the CAR infiltrated the Bemba AJ and the Majority's finding that the Trial Chamber had not properly assessed Mr Bemba's limited material abilities,⁹² again in tacit acceptance of the corrupted narrative.

⁸⁴ [Bemba AJ](#), paras. 171-173.

⁸⁵ [Bemba TJ](#), para. 584.

⁸⁶ However, the Majority only referred to a limited extract of P-36's testimony. See [Bemba AJ](#), para. 172, fn. 344. The Prosecution does not consider that P-36's testimony, if considered in its entirety, supports the proposition that Mr Bemba's abilities were limited.

⁸⁷ [Bemba TJ](#), para. 602.

⁸⁸ [Bemba TJ](#), para. 448.

⁸⁹ [T-267-Red](#), p. 51, lns. 3-16. See [Bemba Appeal Brief](#), para. 357.

⁹⁰ [T-269-Red](#), p. 58, lns. 3-10.

⁹¹ [Bemba TJ](#), para. 448. The Trial Chamber also considered **D-48**'s testimony with respect to other subjects. See [Bemba TJ](#), paras. 384, 385, 402, 453, 555, 576, 578, 599, 601-604.

⁹² [Bemba AJ](#), para. 173.

41. During cross-examination, **D-48** withheld information about his prior conversations with the Defence:

*Q. I understand, sir. How many meetings did you have with the Defence? So a different question. How many meetings or **conversations** did you have with the Defence team, or anyone on the team?*

*A. I think I met with two lawyers. I was not in Kinshasa, because every now and then I work also in Lubumbashi. I was there. **I had a discussion with them over the phone.** They told me they were going come on a certain date and at that date I had returned from Lubumbashi and we met in Kinshasa. There were two of them. I do not remember their names. We had a discussion. [...]*

[...].

Q. And was that the only time that you ever meant -- met with any member of the 1 Defence team, sir?

A. I think so. That was the only time that they came to the Congo, I think, because they -- I don't know if they came another time, but I saw them that time.⁹³

42. Call Data Records (“CDRs”) formally submitted before this Trial Chamber show that **D-48** and Mr Kilolo were in contact several times between 27 September 2012 and 2 November 2012 (four days before his testimony on 6 November 2012, and thus before the VWU cut-off date). Their contact also included several SMSs and communications totalling more than 75 minutes shortly before his testimony.⁹⁴

Date	Start Time	Event	From	To	Duration (s)
			Person	Person	
27SEP2012	20:11	Telephone Call	KILOLO	D-48	138
	20:14	Telephone Call	KILOLO	D-48	265
23OCT2012	22:42	SMS	KILOLO	D-48	-
24OCT2012	01:10	SMS	D-48	KILOLO	-
26OCT2012	07:41	SMS	D-48	KILOLO	-
29OCT2012	16:26	Telephone Call	KILOLO	D-48	134
31OCT2012	17:22	Telephone Call	KILOLO	D-48	126
01NOV2012	14:46	Telephone Call	KILOLO	D-48	114
02NOV2012	09:27	Telephone Call	KILOLO	D-48	23
	09:34	Telephone Call	KILOLO	D-48	3662
	10:36	Telephone Call	KILOLO	D-48	360
	10:43	Telephone Call	KILOLO	D-48	53
	10:47	SMS	D-48	KILOLO	-
	10:48	SMS	KILOLO	D-48	-
	11:16	Telephone Call	KILOLO	D-48	32

⁹³ [T-268-Red](#), p. 77, ln. 9 to p. 78, ln. 21.

⁹⁴ See also Confidential Annex A. The CDRs also reveal additional contacts which did not lead to a conversation and accordingly are not included in the charts.

43. **D-48's** refusal to acknowledge his contacts with Mr Kilolo shortly before his testimony in the Main Case, in light of the totality of the evidence before this Chamber, supports the clear inference that Mr Kilolo improperly influenced this witness regarding his testimony. In turn, **D-48's** uncorroborated and unreliable evidence played an important role in the Majority's decision to overturn part of Mr Bemba's convictions: the Majority concluded that Trial Chamber III had erred on the basis of its lack of reference to portions of D-48's testimony pertaining to the purported letter in the Judgment.⁹⁵

B. Mr Bemba, Mr Kilolo and Mr Mangenda should be sentenced to the maximum custodial period under the Statute

44. As this Trial Chamber has found beyond reasonable doubt, the conduct of the convicted persons directly resulted in a scripted trial record encompassing at least the Corrupted Witnesses.⁹⁶ Moreover, the unreliable testimonies of other non-credible witnesses are also related and linked to the convicted persons' actions.⁹⁷ Once the record of a case is polluted with corrupt evidence and false testimony, there is no way of controlling the reach of their toxic effect. Here, that effect reached the appellate stage and affected at least a significant part of the Majority's assessment and conclusions. As demonstrated above, the factual narrative testified to by several Main Case tainted and Corrupted Witnesses permeated the Majority's analysis:

- consistent with **D-54's**, **D-15's**, **D-13's** and **D-25's** illicitly coached testimony, the Majority found that Mr Bemba, as a remote commander, had limited effective control;⁹⁸
- relying on **D-48's** tainted testimony and consistent with **D-19's** unreliable and **D-54's** coached narratives, the Majority found that the Trial Chamber had not properly assessed the measures that Mr Bemba took, or said he took, to address the crimes.⁹⁹

45. That the corroded evidentiary record in the Main Case permeated the Majority's limited review, analysis, and understanding of the facts at issue, even without the benefit of the very

⁹⁵ [Bemba AJ](#), paras. 174-175.

⁹⁶ See e.g. [Bemba et al. TJ](#), paras. 103 and 704-734.

⁹⁷ See above paras. 33-48.

⁹⁸ [Bemba AJ](#), paras. 171-173.

⁹⁹ [Bemba AJ](#), paras. 174-175, 180-181.

clear evidence of corruption that is before this Trial Chamber,¹⁰⁰ is no less a direct consequence of the convicted persons' criminal actions than were the numerous false, scripted and tainted witnesses who testified before Trial Chamber III at their behest.

46. Further, the fact that a factor outside the convicted persons' control also contributed to the current state of affairs does not attenuate the gravity of the offences or minimise the seriousness of their impact. On the contrary, even if the convicted persons would not have known precisely how a Chamber of this Court might assess the scripted and tainted narrative presented by the tainted and Corrupted Witnesses (absent the benefit of observing their testimony directly, or in its application of an unconventional standard of appellate review),¹⁰¹ the fact is that they deliberately manipulated such evidence in order to be relied on by a Chamber of this Court with the intention to affect the outcome of the Main Case. Having failed before Trial Chamber III, the result achieved before the Appeals Chamber was not only foreseeable,¹⁰² but necessarily comprised the very objective of the witness corruption scheme.

47. Mr Bemba's acquittal for part of the charges was thus a consequence of the convicted persons' offences. It is, at least in part, a plainly identifiable "damage" caused by the course and scope of the criminal acts of Messrs Bemba, Kilolo, and Mangenda within the terms of rule 145(1)(c) or an aggravating factor under rule 145(2)(b)(iv), and relevant to determining the gravity of the offences of which they were convicted and their appropriate sentences.¹⁰³

48. The preceding paragraphs show the corrosive effect that the corrupted and tainted evidence had on the proper administration of justice, and the need for effective deterrence flowing from adequate punishment. This further underscores that Mr Bemba, Mr Kilolo and

¹⁰⁰ Note however that the Defence sought to admit as additional evidence on appeal different intercepted communications submitted in the Bemba et al. case. Although the Majority did not rule on the application ([Bemba AJ](#), para. 72), the Minority considered the intercepts and found that those conversations were made to further criminal activities. *See e.g.* [Minority Opinion](#), paras. 477, 480, 482.

¹⁰¹ The Majority suddenly and inexplicably departed from the well-established appellate standard of review for factual errors, and required substantiation, which have been applied for the past 20 years by all the *ad hoc* courts and tribunals (ICTY, ICTR, SCSL, ECCC, STL). *See* [Bemba AJ](#), paras. 38-46, 66. The ICC Appeals Chamber has also endorsed and applied this standard, as recently as 8 March 2018 in the Bemba et al. case ([Bemba et al. AJ](#), paras. 91-94). The Majority provided no argument, let alone convincing reasons, to justify this departure (*see* [Gbagbo Victims Participation AD](#), para. 14).

¹⁰² [Bemba SAJ](#), para. 263.

¹⁰³ [Bemba SAJ](#), paras. 263 and 334 (finding that the consequences might be considered in aggravation either as an aggravating factor or to determine the gravity of the offence/ crime).

Mr Mangenda deserve the five-year imprisonment and effective substantial fine that the Prosecution has requested.¹⁰⁴

III. Conclusion

49. The Prosecution hereby provides detailed notice of the submissions that it will elaborate during the 4 July 2018 sentencing hearing. Given that the Bemba AJ was rendered after the sentencing submissions were filed, the Prosecution is entitled, as is the Defence,¹⁰⁵ to provide submissions on the impact that the Judgment has on the convicted persons' sentences.



Fatou Bensouda, Prosecutor

Dated 2nd day of July 2018
At The Hague, The Netherlands

¹⁰⁴ [Prosecution Second Sentencing Submissions](#), paras. 78-82, 84.

¹⁰⁵ [ICC-01/05-01/13-T-58](#), p. 5, lns. 14-23.