

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 June 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**

**Confidential, *EX PARTE*,
only available to the Prosecution and Kilolo's Defence**

**Prosecution's Request for Leave to Reply to Bemba's, Kilolo's and Mangenda's
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 seeks leave to reply to Jean-Pierre Bemba Gombo's ("Bemba"),¹ Jean-Jacques Mangenda Kabongo's ("Mangenda")² and Aimé Kilolo Musamba's ("Kilolo")³ second sentencing submissions on new and unforeseen issues. The Defence arguments do not accurately present the appeal proceedings,⁴ they disregard the Sentencing Appeal Judgment⁵ and misread the Prosecution Sentencing Submissions.⁶ Some of the issues raised go beyond the facts of this case, and its disposition might impact future sentencing and retrial proceedings. A focused Reply would assist the Trial Chamber's resolution of these issues and determination of the new sentences. Thus, the Prosecution seeks leave to address:

- Mangenda's request to delay the sentencing decision;
- Mangenda's and Bemba's arguments on "double jeopardy" and "unfair burden";
- Bemba's misinterpretation of the "harm" caused by the 14 witnesses' false testimony in this case, of the Appeals Chamber's related findings and of the notion of "damage" pursuant to rule 145(1)(c); and
- Defence arguments misrepresenting the appeal proceedings, the Sentencing Appeal Judgment and the Prosecution Sentencing Submissions.

2. Notwithstanding the Appeals Chamber's determination of three separate errors which, in the Prosecution's view, resulted in inadequate and low sentences, the three convicted persons request either the same sentence (Bemba) or substantially reduced sentences of 11-months' time served (Kilolo and Mangenda).⁷ The Defence requests are predicated on a disregard, if not distortion, of the Appeals Chamber's express findings which underscore the impact of the errors in the *quantum* of Bemba's, Mangenda's and Kilolo's sentences.⁸

¹ ICC-01/05-01/13-2281-Conf-Exp and ICC-01/05-01/13-2281-Red ("Bemba Sentencing Submissions").

² ICC-01/05-01/13-2280-Conf-Exp and ICC-01/05-01/13-2280-Red ("Mangenda Sentencing Submissions").

³ ICC-01/05-01/13-2282-Conf-Exp ("Kilolo Sentencing Submissions").

⁴ See in particular ICC-01/05-01/13-2168-Red ("[Prosecution Appeal Brief](#)").

⁵ ICC-01/05-01/13-2276-Red ("[Sentencing Appeal Judgment](#)").

⁶ ICC-01/05-01/13-2279 ("[Prosecution Sentencing Submissions](#)").

⁷ Kilolo also accepts a fine of 30,000 E despite his situation and his disagreement with ICC-01/05-01/13-2278 ("[Registry's Updated Solvency Report](#)") (see Kilolo Sentencing Submissions, paras. 47-48). However, he does not indicate the amounts required to satisfy his financial needs and those of his dependents in accordance with rule 166(3) and ICC-01/05-01/13-2277 ("[Sentencing Order](#)"), fn. 3.

⁸ [Sentencing Appeal Judgment](#), paras. 90 ("the Appeals Chamber found above that the Trial Chamber erred in relying on certain irrelevant circumstances for the determination of the *quantum* of the sentences for Mr Mangenda, Mr Kilolo and Mr Bemba. In addition, the Appeals Chamber found that the Trial Chamber acted *ultra vires* in pronouncing suspended sentences against Mr Mangenda and Mr Kilolo") and 359 ("[t]he Appeals Chamber considers that the sentences pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo are materially affected by each of these errors. In these circumstances, the Appeals Chamber considers it appropriate

Notwithstanding the quashing of the article 70(1)(b) convictions, the Defence requests are incongruous with the facts. They ignore the gravity of their offences and high level of culpability. The Prosecution's Reply is relevant and would assist the Chamber's deliberations.

II. Confidentiality

3. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), the Prosecution files a confidential *ex parte* version of this document only available to Kilolo since his Sentencing Submissions remain with that level of confidentiality. It also files a public version redacting the extracts related to Kilolo. Once Kilolo files a public redacted version of his submissions, the Prosecution will file a further public or public redacted version of this Request.

III. Submissions

(i) Procedural basis of the Prosecution's Request

4. The Trial Chamber set out staggered deadlines for the Parties to file their submissions: while the Prosecution was ordered to file its sentencing submissions by 30 April 2018, the Defence was ordered to file theirs by 30 May 2018.⁹ Since the Defence has addressed the substance of the Prosecution Sentencing Submissions, their filings are effectively "responses" for which the Prosecution may seek leave to reply pursuant to regulations 24(5) and 34(c) of the RoC.¹⁰ However, should the Chamber consider that the Prosecution has a direct right to respond to the three Defence Sentencing Submissions under regulation 24(1), the Prosecution is prepared to file its submissions by 11 June 2018.¹¹

to reverse their sentences. Therefore, it becomes necessary to impose a new sentence on Mr Bemba, Mr Mangenda and Mr Kilolo). *See also* para. 57 ("the Prosecutor's argument is that the Trial Chamber failed to properly consider the culpability of Mr Bemba (as well as Mr Kilolo) for the offence under article 70 (1) (a) of the Statute. If that is the case, it is evident that, contrary to Mr Bemba's suggestion, any such error might correspondingly affect the determination of the total culpability which must indeed be reflected in the ultimate sentence").

⁹ [Sentencing Order](#), p. 4.

¹⁰ [Prosecution Sentencing Submissions](#), para. 83 (noting that it might seek leave to reply to the Defence submissions, should new unforeseen issues arise).

¹¹ That is, within the 10-day time limit set out in regulation 34(b) of the RoC.

5. There is good cause to grant the Prosecution's Request.¹² The Request meets the requirements of regulation 24(5) and relates to new and unforeseen issues which the Prosecution could not have reasonably anticipated.¹³ The Prosecution's Reply would assist the Trial Chamber, particularly as some of the issues raised have implications for future sentencing and retrial proceedings. Moreover, the Trial Chamber would benefit from the Prosecution's intimate knowledge of the complex and intense appeal litigation which the Defence, in these sentencing submissions, either disregard or misunderstand.

(ii) *Bemba and Mangenda raised new issues which could not be reasonably anticipated*

6. Bemba's and Mangenda's Sentencing Submissions raised the following issues that the Prosecution could not reasonably have anticipated:

- *First*, Mangenda argues that re-incarceration would constitute an "unfair burden" due to the interval of more than one year between the original Sentencing Decision and the current sentencing proceedings.¹⁴ He relies on ICTY, ICC and domestic jurisprudence to support his position.¹⁵ Bemba submits that he would be "subjected to two separate proceedings, and thus 'jeopardised' twice",¹⁶ should the Trial Chamber alter its "method of calculating the joint sentence"¹⁷ or adopt "a new approach [...] to gravity or culpability".¹⁸ If granted leave, the Prosecution will explain:
 - That the gravity of the offences and the culpability of the convicted persons outweigh any "burden" caused by the second sentencing proceedings, which have been conducted efficiently and expeditiously.
 - That the jurisprudence Mangenda cites does not support his proposition since the facts are distinguishable from the instant case.

¹² Leave to reply will generally be granted only after a showing of good cause. *See e.g.* [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3.

¹³ [ICC-01/05-01/13-2197](#), para. 17 (noting that the question of whether leave to reply should be granted is discretionary and must be considered on a case-by-case basis).

¹⁴ Mangenda Sentencing Submissions, paras. 26 and 29.

¹⁵ Mangenda Sentencing Submissions, paras. 27-28.

¹⁶ Bemba Sentencing Submissions, para. 47.

¹⁷ Bemba Sentencing Submissions, para. 46.

¹⁸ Bemba Sentencing Submissions, para. 48. *See also below* para. 7, second bullet point. As noted below, Bemba also misrepresents the [Prosecution Appeal Brief](#), since the Prosecution appealed the joint sentence and the fine. *See* [Prosecution Appeal Brief](#), paras. 16-74.

- That the Statute foresees the Appeals Chamber's authority to remand matters to a Trial Chamber or order a retrial. In fact, Mangenda requested to remand the question of sentence to a new trial chamber for determination.¹⁹
- *Second*, as an alternative to his primary request for a sentence of time served,²⁰ Mangenda requests the Trial Chamber to defer a final decision on sentencing for a certain period for the Chamber to assess whether or not he re-offends.²¹ He argues that “[t]his would accomplish the same purpose as a suspended sentence and would be within the Chamber’s undoubted powers”.²² It is unclear whether Mangenda requests a deferred sentence of time served, or he takes no position on the *quantum*. If granted leave the Prosecution will explain whether:
 - Mangenda has failed to justify a postponement of the sentencing decision.
 - A deferred decision of time served conditioned on Mangenda’s conduct is tantamount to a suspended conditional sentence which, on the facts, would undermine the Appeals Chamber’s directives.
- *Third*, Bemba argues that the Prosecution has not shown how the 14 witnesses’ false testimony caused harm “in concreto”²³ because Trial Chamber III “not only properly found that the witnesses were lacking in credibility, but [...] found that the witnesses also lacked reliability on issues concerning the merits”,²⁴ and the Prosecution had an

¹⁹ ICC-01/05-01/13-2201-Red (“[Mangenda Response Prosecution Sentence Appeal](#)”), paras. 5 (“the appropriate remedy, assuming that either of the Prosecution’s grounds is granted, is to remand the question of sentence to the Trial Chamber for redetermination”) and 132 (“[t]he appropriate remedy, in the event that the Appeals Chamber finds any of the purported errors raised by the Prosecution to be well-founded, is to remand to the Trial Chamber the issue of sentence in accordance with any instructions as may be deemed by the Appeals Chamber necessary and appropriate. All of the judges of the Trial Chamber are still judges of the ICC and, accordingly, any decision following remand could be rendered efficiently and expeditiously [...]”).

²⁰ Mangenda Sentencing Submissions, paras. 2, 31, 57, 69.

²¹ Mangenda Sentencing Submissions, paras. 65, 69.

²² Mangenda Sentencing Submissions, para. 65.

²³ See e.g. Bemba Sentencing Submissions, paras. 8 (“[t]he notion of ‘harm’ thus encapsulates the concrete gravity of an offence, as compared to its abstract gravity, which was already assessed by the Trial Chamber, and factored into its initial sentence”), 9 (“[i]t follows that even if the Trial Chamber can take into account the harm caused to the merits of the Main case through lies on collateral issues, it should only do so where the Prosecution has established the existence of this harm to the standard of beyond reasonable doubt”), 10 (“the Prosecution does not take the necessary step of demonstrating *in concreto* that the lies negatively affected the Trial Chamber’s assessment of their testimony relating to the merits of the case, and the ultimate outcome of the trial, and, if it did, that this impact was not already subsumed by the Trial Chamber’s existing findings”), 11 (“the point is not what the level of damage caused by false testimony “may be” or “would have been”, but what it actually was in the specific circumstances of the Main case”).

²⁴ Bemba Sentencing Submissions, para. 18 (adding that “[t]his turn of events does not minimise the abstract gravity of the offences and the culpable conduct of the defendants but it does demonstrate that the hypothetical harm did not materialise in this particular case”).

opportunity to cross-examine the witnesses on the “non-merits” issues.²⁵ If granted leave, the Prosecution will explain:

- That Bemba’s interpretation of “damage” disregards the Sentencing Appeal Judgment which does not require a tangible impact on the final article 74 decision.²⁶ The notion of “damage caused” within rule 145(1)(c) for article 70(1)(a) offences (false testimony) does not require that a Trial Chamber—before which the false testimony is given—expressly takes into account these lies in its article 74 decision. The Reply would further demonstrate how Bemba’s interpretation leads to absurd results where the Prosecution would only be able to prove harm if the perpetrators’ unlawful plan succeeds, and the Chamber relies on the witnesses’ false testimony.
- The *actual harm* caused by the 14 witnesses’ false testimony. For instance, the witnesses testified before Trial Chamber III and their false evidence on the “non-merits” was introduced in the record of the Main Bemba Case. The Registry incurred on substantial costs to ensure the 14 witnesses’ false testimony.²⁷ Moreover, the proceedings were delayed as a result of the convicted persons’ criminal activity.

(iii) Bemba, Kilolo and Mangenda misread the Sentencing Appeal Judgment and the Prosecution Sentencing Submissions

7. The Prosecution further seeks leave to address and clarify some of Bemba’s, Kilolo’s and Mangenda’s submissions which are premised on a misreading of the Prosecution Sentencing Submissions and misrepresentation of the appeal proceedings, including the Sentencing Appeal Judgment. The Prosecution’s Reply on the below topics would facilitate the Chamber’s efficient and expeditious disposition of the issues raised and determination of the sentences. In particular, the Trial Chamber would benefit from the Prosecution’s intimate knowledge of the appeal proceedings which the Defence does not accurately portray. The Prosecution will thus clarify:

²⁵ Bemba Sentencing Submissions, para. 19.

²⁶ [Sentencing Appeal Judgment](#), para. 38 (“this relates to the evaluation of the damage that the commission of the offence caused, or *could have caused* on the truth-seeking function of the Court that is ultimately protected by the relevant incriminating provisions”) (emphasis added).

²⁷ ICC-01/05-01/13-2041 (“[Registry Costs Report](#)”), para. 23 and confidential annex.

- Bemba's distorted reading of the Prosecution Sentencing Submissions regarding his contributions as an accessory to the article 70(1)(a) offences.²⁸
- Bemba's erroneous submission that the Prosecution failed to appeal "the Trial Chamber's decision to impose a joint sentence or the manner in which the Trial Chamber calculated the sentence"²⁹ and the fine;³⁰ and that these matters are "fixed parameters" and *res judicata* that this Chamber cannot modify,³¹ including that "the joint sentence [...] be fixed by reference to the highest sentence",³² and that the fine is "the most appropriate form of punishment".³³
- Bemba's erroneous interpretation of the Prosecution's reference to rule 221.³⁴
- Kilolo's and Mangenda's erroneous understanding that the conditions underlying their suspended sentences (or probation period) were *not* suspended as a result of the appeal proceedings.³⁵
- Kilolo's and Mangenda's unfounded submission that, as a result of the Appeals Chamber's quashing their suspended sentences, the length of their imprisonment should be reduced.³⁶
- Mangenda's misplaced request to dismiss *in limine* paragraphs 55 through 82 of the Prosecution Sentencing Submissions (on the Trial Chamber's requirement to reassess the sentences as a result of the errors, including the

²⁸ Bemba Sentencing Submissions, paras. 23-25. *See also* para. 29.

²⁹ Bemba Sentencing Submissions, paras. 2, 36, 40.

³⁰ Bemba Sentencing Submissions, paras. 2, 55.

³¹ Bemba Sentencing Submissions, paras. 3, 36, 37, 41, 46-49 (on the joint sentence) and 53, 55 (on the fine).

³² Bemba Sentencing Submissions, para. 36. *But see* [Sentencing Appeal Judgment](#), para. 57.

³³ Bemba Sentencing Submissions, para. 53. *But see* [Sentencing Appeal Judgment](#), para. 200.

³⁴ Bemba Sentencing Submissions, para. 57 ("If the Prosecution's interpretation of Rule 221 were to be accepted (that is, that the Court should not fine a defendant if it were to result in less assets being available for reparations)").

³⁵ Kilolo Sentencing Submissions, para. 6 ("Mr. Kilolo has effectively served one third of the imposed suspended period. He has abided by all the conditions imposed by the Trial Chamber[...]"); Mangenda Sentence Submissions, paras. 11 ("Mr Mangenda has already complied with the conditions set by the Trial Chamber for almost one-third of the suspended term") and 25 ("Mr Mangenda's compliance with the conditions of his sentence prior to its invalidation. Indeed, almost one-third of the period of suspension was served before it was invalidated"). *But see* article 81(4): ("Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings") and ICC-01/05-01/13-2165 ("[Kilolo Presidency Fine Order](#)"), p. 3 ("The Presidency considers that in the circumstances of the case and in accordance with article 81(4) of the Statute, the sentence cannot be executed unless and until the conviction is confirmed on appeal").

³⁶ Kilolo Sentence Submissions, para. 44 ("The OTP's claims that the reversal of the suspended sentence mandates increase are meritless. The OTP had an opportunity on appeal to demonstrate an abuse of discretion and failed to do so"); Mangenda Sentencing Submissions, para. 14 ("the Appeals Chamber ordered remand in the awareness that the Trial Chamber might not have imposed the same term of imprisonment if it had known that it had no power to suspend").

quashing of the suspended sentences).³⁷

- Mangenda's unsubstantiated submissions regarding his personal circumstances³⁸ and alleged contributions to his community.³⁹
- Kilolo's erroneous submission that his original imprisonment sentence was of 11 months.⁴⁰
- Kilolo's belated, irrelevant and self-serving "updated circumstances".⁴¹

IV. Relief Sought

8. The Prosecution requests the Trial Chamber to grant the Prosecution's request for leave to reply to Bemba's, Kilolo's and Mangenda's Sentencing Submissions. Alternatively, should the Chamber consider that the Prosecution has a direct right to respond pursuant to regulation 24(1), the Prosecution stands ready to file its response within the required time limit of 10 days, that is, on 11 June 2018. Should the Chamber consider that regulation 24(1) is applicable, the Prosecution respectfully requests be informed by Wednesday 6 June 2018. Otherwise the Prosecution will file its Reply if and when the Trial Chamber so orders it.



Fatou Bensouda, Prosecutor

Dated 4th day of June 2018
At The Hague, The Netherlands

³⁷ Mangenda Sentencing Submissions, paras. 60-64. See [Prosecution Sentencing Submissions](#), para. 55 ("Moreover, the Trial Chamber must reconsider the appropriate sentences in light of the Appeals Chamber's findings on suspended sentences. As the Appeals Chamber found, ordering the conditional suspension of imprisonment terms—whether as an "intermediate" penalty or in the operation of a sentence—is *ultra vires*. But, beyond addressing these three individual errors, the Trial Chamber is obliged to re-assess the gravity of the offences and the conduct of the three convicted persons (in light of its existing and new findings) and to impose sentences that are proportionate to the crimes. In other words, having addressed the three specific errors found by the Appeals Chamber, and their impact, the Trial Chamber should then take a global view of the case in assessing the quantum of the sentences and in imposing new sentences that fit the offences and the culpability of the convicted persons").

³⁸ Mangenda Sentencing Submissions, para. 20 and, in particular, Annex A.

³⁹ Mangenda Sentencing Submissions, para. 58 (noting that he is an asset to his community).

⁴⁰ Kilolo Sentencing Submissions, paras. 6 and 40.

⁴¹ Kilolo Sentencing Submissions, para. 46 and Annex B.