



**Summary of the judgment on the appeals of The Prosecutor, Jean-
Pierre Bemba Gombo, Fidèle Babala Wandu and Narcisse Arido
(Sentence)**

**Delivered by Judge Silvia Fernández de Gurmendi,
Presiding Judge in this appeal,**

8 March 2018

This summary is not part of the written judgment. Please note that only the written judgment is authoritative.

1. the Appeals Chamber is delivering its judgment on the appeals of The Prosecutor, Jean-Pierre Bemba Gombo, Fidèle Babala Wandu and Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”. In today’s summary, I will refer to this decision as the Sentencing Decision.
2. In a moment, I shall summarise the Appeals Chamber’s judgment, which was taken unanimously. This summary is not part of the written judgment, which is the only authoritative account of the Appeals Chamber’s ruling and reasons. The written

judgment will be made available to the parties and participants at the conclusion of this hearing.

3. By way of background, following Mr Bemba's, Mr Kilolo's, Mr Mangenda's, Mr Arido's and Mr Babala's convictions for offences against the administration of justice pursuant to article 70 of the Statute, the Trial Chamber pronounced their respective sentences on 22 March 2017.

4. In relation to Mr Bemba, the Trial Chamber sentenced him to a joint sentence of 12 months of imprisonment, to be served consecutively to his existing sentence (imposed by Trial Chamber III in the Main Case) and ordered that the time Mr Bemba had spent in detention pending trial would not be deducted from the prison sentence. The Trial Chamber also imposed a fine of EUR 300,000, to be paid by Mr Bemba within three months of the Sentencing Decision.

5. In relation to Mr Kilolo, The Trial Chamber sentenced him to a joint sentence of 30 months of imprisonment and imposed a fine of EUR 30,000 to be paid within three months of the Sentencing Decision. The Trial Chamber ordered the suspension of the remaining term of imprisonment (after deduction of time spent in detention) for a period of three years so that the sentence shall not take effect (i) if Mr Kilolo pays the fine within three months; and (ii) unless during that period Mr Kilolo commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.

6. Likewise, with respect to Mr Mangenda, the Trial Chamber sentenced him to a joint sentence of 24 months of imprisonment. The Trial Chamber ordered the suspension of the remaining term of imprisonment (after deduction of time spent in detention) for a period of three (3) years so that the sentence shall not take effect unless during that period Mr Mangenda commits another offence anywhere that is punishable with imprisonment, including offences against the administration of justice.

7. In relation to Mr Babala, the Trial Chamber sentenced him to six months of imprisonment, which it considered served in light of the time he had already spent in detention pending trial. Mr Arido was sentenced to 11 months of imprisonment, which the Trial Chamber considered served in light of the time he had already spent in detention pending trial.

8. On 21 June 2017, Mr Babala, Mr Arido, Mr Bemba, and the Prosecutor filed their respective appeal briefs against the Sentencing Decision and on 21 August 2017 the parties filed their respective responses to the appeal briefs.

9. Turning to the merits of the present appeals, I wish to clarify that due to the number of issues raised on appeal and given that this is merely a summary of the judgment, I will endeavour to highlight only the key findings of the Appeals Chamber as they relate to the more significant issues raised across all four appeals.

10. Beginning with Mr Bemba's appeal, the Appeals Chamber notes that he raises 12 grounds of appeal against the Sentencing Decision. In relation to his second ground, Mr

Bemba argues that the Trial Chamber erred in relying on incidents and alleged offences that were never charged, including allegations concerning Mr Bemba's communications with witness D-19, and the so-called plan to engage in remedial measures, that is Mr Bemba's conduct that sought to frustrate the Prosecutor's investigation of the article 70 offences. The issue arising is therefore whether "uncharged offences" or "uncharged allegations" may be taken into account for the purpose of determining sentence. The Appeals Chamber recalls that the sentence imposed on a convicted person for crimes and offences under the jurisdiction of the Court must be proportionate to the crime or offence and reflect the culpability of the convicted person. The convicted person is sentenced for the crime or offence for which he or she was convicted, not for other crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This is not to say that the fact that a convicted person may have committed other offences is entirely irrelevant to sentencing. This is because conduct – including criminal conduct – that occurred after the offence for which the convicted person has been convicted may also be relevant for the sentencing phase to establish that offence's gravity or the convicted person's culpability in that regard or may amount to an aggravating circumstance. A natural limitation of the consideration of conduct, including criminal conduct that occurred after the offence for which the person was convicted is that there must be a sufficiently proximate link with them. In the absence of such a link, the conduct in question would be irrelevant to the sentence that is to be imposed. In addition, the Appeals Chamber finds that considerations of procedural

fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence.

11. Turning to the specific allegations of Mr Bemba under this ground of appeal, the Appeals Chamber finds that the Trial Chamber did not err. The Appeals Chamber considers that, for the reasons set out in the preceding paragraphs, there was no principled reason not to rely on the so-called “remedial measures” as an aggravating factor. Given that such measures were directly related to the offences for which Mr Bemba was convicted, it was *not* unreasonable to take the remedial measures into account as an aggravating circumstance. Nor is the Appeals Chamber convinced that Mr Bemba lacked sufficient notice of this as a potential aggravating circumstance. For reasons more fully explained in the judgment, the Appeals Chamber also does not consider that the Trial Chamber erred by relying on the phone call with witness D-19 in its discussion of the abuse of Mr Bemba’s communication privilege at the detention centre. Accordingly, the Appeals Chamber rejects Mr Bemba’s arguments under his second ground of appeal.

12. Under Mr Bemba’s tenth ground of appeal, he argues, *inter alia*, that the Trial Chamber erroneously relied on policy considerations in determining that Mr Bemba should not be granted credit for time spent in detention in relation to these proceedings. In this regard, the Appeals Chamber considers that article 78 (2) of the Statute mandates the Court to deduct time previously spent in detention in accordance with an order of the Court. However, in circumstances where an accused has spent time in detention as a

result of warrants of arrest issued in different cases by different chambers, **time spent in detention can only be taken into account once**. As noted by the Trial Chamber, in situations such as in the present case, the existence of article 70 proceedings would become inconsequential. The interpretation advanced by Mr Bemba would be difficult to reconcile with one of the purposes of article 70 of the Statute – namely to deter the commission of offences against the administration of justice. As a result, the Appeals Chamber finds that the Trial Chamber did not err in not deducting time previously spent in detention from the term of imprisonment imposed in these proceedings.

13. That being said, the Appeals Chamber notes that both the conviction and the sentence imposed in the **Main Case** have been appealed and a decision by the Appeals Chamber is pending. In these circumstances, the Appeals Chamber considers that the Trial Chamber's decision not to deduct the time Mr Bemba had spent in detention pending trial in the present case was conditioned on the sentence in the Main Case remaining intact. The Trial Chamber's decision not to deduct time can only be reasonably understood as meaning that, if the conviction or sentence in the Main Case were to be reversed on appeal, the time Mr Bemba has spent in detention pursuant to the warrant of arrest issued in the proceedings relating to offences under article 70 of the Statute would be automatically deducted from the sentence of imprisonment imposed by the Trial Chamber in the present case. The same would apply *mutatis mutandis* if Mr Bemba's sentence in the Main Case were to be reduced on appeal if the the time spent in detention from 23 November 2013 – the date on which he was served the warrant of arrest in the proceedings relating to offences under article 70 of the Statute – to the date

of the reduction of the sentence on appeal exceeds the term of the reduced sentence in that case. The Appeals Chamber notes that the **Presidency**, as the entity charged with issues relating to the enforcement of sentences, will be in a position to make the necessary adjustments as to when the sentence of Mr Bemba in the present case would be considered completed, should the conviction or sentence in the Main Case be reversed on appeal. Accordingly, the Appeals Chamber rejects Mr Bemba's tenth ground of appeal.

14. For reasons more fully elaborated in the judgment, Mr Bemba's remaining grounds of appeal are also rejected.

15. Turning to the appeals of Mr Babala and Mr Arido, the Appeals Chamber notes that they both predominantly raise arguments that seek to challenge their convictions under article 70 (1) (c) in conjunction with article 25 (3) (a) of the Statute. The Appeals Chamber dismisses their arguments *in limine* on the basis that it cannot be argued in an appeal against the sentence, that the convicted person should not have been convicted in the first place; rather, such arguments must be made in an appeal that is directed against the conviction decision.

16. With respect to other arguments raised by both Mr Babala and Mr Arido in their respective appeals, the Appeals Chamber notes that they both challenge the Trial Chamber's assessment of the gravity of the offence for which they were convicted. Both

argue, that the Trial Chamber erred in taking into account certain consequences of the offence for which they were convicted for its gravity assessment.

17. In this regard, the Appeals Chamber considers 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 in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person. Thus in Mr Babala's case, the Appeals Chamber notes that the Trial Chamber found, in the Conviction Decision, that Mr Babala had effected payments to witness D-57's wife and witness D-64's daughter "knowing that the payments were made for illegitimate purposes" and that he "knew [that these payments] were aimed at contaminating these witnesses' testimony and intentionally aided Mr Kilolo in corruptly influencing the two witnesses". In the Appeals Chamber's view, these findings which have not been reversed on appeal, provide a sufficient basis to establish, as a minimum, that it was objectively foreseeable that witnesses D-57 and D-64 would testify falsely before the Court as to the payments they had received as well as contacts with the Main Case Defence. Likewise, in Mr Arido's case, the Trial Chamber found that Mr Arido, by promising money and relocation to Europe "as encouragement to give certain evidence in the Main Case", recruited and briefed the four witnesses with the intent "to manipulate their testimonial evidence. These findings which have not been reversed on appeal, provide a sufficient basis to establish that it was objectively foreseeable by Mr Arido, as a result of his corrupt influence on the witnesses in relation to issues related to the "merits" of the

Main Case, that these witnesses would testify falsely about payments, acquaintances and the nature and number of prior contacts. The Appeals Chamber therefore rejects these arguments of Mr Babala and Mr Arido.

18. For reasons more fully explained in the judgment, the remaining arguments of Mr Babala and Mr Arido are rejected.

19. Turning to the Prosecutor's appeal, the Appeals Chamber notes that she raises two grounds of appeal against the Sentencing Decision. Under her first ground of appeal the Prosecutor submits that the Trial Chamber abused its discretion and erred in law by imposing manifestly inadequate and disproportionate sentences on Mr Kilolo, Mr Mangenda and Mr Bemba. The Prosecutor argues that the Appeals Chamber should amend the joint sentence of Mr Kilolo, Mr Mangenda and Mr Bemba by increasing each of them to five years, pursuant to article 83(2)(a) and (3) of the Statute.

20. The Prosecutor's first argument is that the Trial Chamber erred in relying on the fact that the false testimony of the witnesses did not pertain to the merits of the Main Case, as a relevant circumstance for its assessment of the gravity of the offences. In this regard the Appeals Chamber notes that in assessing the gravity of the offences the Trial Chamber distinguished lies on "merit" issues, on the one hand, and lies on "non-merit" issues, on the other hand, based on the assumption that the latter are inherently less grave than the former. The Appeals Chamber emphasises that the assessment by a trial chamber of the credibility of witnesses is an integral part of its ability to assess the

substance of the witnesses' testimony. Thus, the Court's truth-seeking functions are not necessarily less damaged by false testimony on matters informing the credibility of witnesses, than they are by false testimony on matters concerning the "merits" of a case. The Appeals Chamber considers that the fact that false testimony pertains to "merit" or "non-merit" issues of a case is not in and of itself reflective of the actual gravity of the offences. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in giving "some weight" to this extraneous consideration, which, in the words of the Trial Chamber "inform[ed] the assessment of the gravity of the offences" for which Mr Mangenda, Mr Kilolo and Mr Bemba were convicted.

21. The Prosecutor's second argument relates to the sentences imposed on Mr Kilolo and Mr Bemba for their conviction for having induced or solicited the commission of the offences under article 70 (1) (a) of the Statute. She argues that the Trial Chamber erred in giving a lower sentence for these convictions than those for the offences which they committed as co-perpetrators, *exclusively* on the basis of the different mode of liability.

22. The Appeals Chamber recognises that the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145 (1) (c) of the Rules. This however does not mean that the principal perpetrator of a crime/offence *necessarily* deserves a higher sentence than the accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case.

23. Indeed, the Court's legal framework does *not* indicate an automatic correlation between the convicted person's form of responsibility and the sentence; nor does it stipulate any form of mandatory mitigation in case of conviction as an accessory to a crime/offence. Rather, the sentencing factors in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case.

24. The Appeals Chamber observes that the Trial Chamber stated that it distinguished between the offences that Mr Kilolo and Mr Bemba committed as co-perpetrators and those in relation to which they were accessories". The Trial Chamber did not elaborate any further on this. However, this distinction appears to have been the basis for the imposition of a lower individual sentence for the offences under article 70 (1) (a) for which Mr Kilolo and Mr Bemba were convicted as accessories than the sentences for the offences which they committed as co-perpetrators. Indeed, the Appeals Chamber notes that the Trial Chamber's descriptions of the relevant facts for the assessment of Mr Kilolo's and Mr Bemba's respective culpability for their role as *co-perpetrators* of the offences under article 70 (1) (b) and (c) of the Statute and their role as *accessories* of the offence under article 70 (1) (a) of the Statute are essentially **almost identical**. Also the assessment of the gravity of the three concerned offences is essentially the same. It therefore appears that the Trial Chamber assumed that a reduction of the sentence for the offence under article 70 (1) (a) of the Statute was due *only* because of the concerned mode of liability. This amounted to an error.

25. Under her second ground of appeal, the Prosecutor submits that the Trial Chamber erred in law and/or abused its discretion in suspending the sentences of imprisonment of Mr Mangenda and Mr Kilolo. The Prosecutor requests that the Appeals Chamber reverse the suspension of the sentences and order Mr Kilolo and Mr Mangenda back into custody to serve the remainder of their sentences of imprisonment or any increased sentences as decided by the Appeals Chamber.

26. The Prosecutor argues that when the Statute is read in accordance with its ordinary meaning, in context and in light of its object and purpose, it is evident that there is no lacuna in the Statute and the Rules, which exhaustively regulate sentencing proceedings at the Court, the available penalties and their enforcement and execution. The Prosecutor submits that by finding that a lacuna exists in the legal instruments of the Court, the Trial Chamber “misunderstands – and effectively disregards – the basic criteria of treaty interpretation”.

27. The Appeals Chamber observes that on the basis of its assessment that a lacuna exists in the Court’s statutory framework, the Trial Chamber considered that its power to suspend a sentence of imprisonment derived from its inherent power to impose and determine the sentence. The Appeals Chamber emphasises that, in the legal framework of this Court, “inherent powers” should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure. The Appeals Chamber recalls that, in accordance with article 21 of the Statute, the Court shall apply in the first place the Statute and the Rules. The Appeals Chamber recalls further that it has previously found

that a lacuna does not exist when, for instance, a matter is exhaustively defined in the legal instruments of the Court. The Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported “inherent powers” to fill in non-existent gaps. The Appeals Chamber notes that the “inherent power” invoked by the Trial Chamber relates to the penalties and sentencing regime before the Court. The Appeals Chamber observes that this regime is directly and explicitly constrained by the principle of legality under article 23 of the Statute, which provides – encapsulating the principle of *nulla poena sine lege* – that “[a] person convicted by the Court may be punished only in accordance with th[e] Statute”. Accordingly, the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person and specify mandatory aggravating and mitigating circumstances as well as the parameters to be considered for the determination of the *quantum* of such penalties. The corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its *quantum*. No “inherent powers” may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court, as the Trial Chamber did in the present instance with respect to the suspension of sentences.

28. Thus the the Appeals Chamber considers that the Trial Chamber erred in law in finding that it had the inherent power to impose a suspended sentence, and therefore

acted *ultra vires* in ordering the conditional suspension of the remaining terms of imprisonment imposed on Mr Kilolo and Mr Mangenda.

29. Lastly, the Prosecutor submits that the Trial Chamber abused its discretion by imposing on Mr Mangenda, Mr Kilolo and Mr Bemba “disproportionate” and “manifestly inadequate” sentences which in her view do not reflect the gravity of the offences and the culpability of the convicted persons. Having found 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 **and** that the Trial Chamber acted *ultra vires* in pronouncing suspended sentences against Mr Mangenda and Mr Kilolo, the Appeals Chamber considers that these errors warrant reversal of the sentences and remand to the Trial Chamber for a new determination. The Appeals Chamber therefore considers it unnecessary to determine at this point whether the sentences pronounced against Mr Mangenda, Mr Kilolo and Mr Bemba **are so manifestly low and inadequate** *per se* as to constitute an abuse of discretion on the part of the Trial Chamber.

30. In sum, the Appeals Chamber recalls that it has rejected all grounds of appeal advanced by Mr Arido and Mr Babala against their respective sentences. The sentences imposed on them are therefore confirmed.

31. The Appeals Chamber has also rejected all grounds of appeal raised by Mr Bemba against his sentence.

32. In relation to the Prosecutor's appeal, the Appeals Chamber has found that the Trial Chamber committed a series of errors with respect to the sentences pronounced against Mr Bemba, Mr Mangenda and Mr Kilolo. In particular, the Trial Chamber determined the gravity of the offences in the present case with reference to an irrelevant consideration and improperly considered that the form of responsibility for the convictions under article 70 (1) (a) of the Statute warranted *per se* a reduction of the corresponding sentences. In addition, it acted *ultra vires* in suspending the remaining terms of imprisonment imposed on Mr Mangenda and Mr Kilolo. The 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, for the reasons advanced more fully in the judgment, to reverse their sentences and remand the matter to the original Trial Chamber for a new determination of their sentences.

33. This concludes the summary of the judgment.