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International Criminal Court

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No.**: ICC-01/05-01/13**
Date: **19/07/2018**

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 Public Annexes A and C and Confidential Annex B

Defence Response to the Prosecution Detailed Notice of Additional Sentencing Submission

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

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Xavier-Jean Keïta - We would like to take the opportunity to thank the entire OPCD for their excellent support and assistance during this phase of the proceedings.

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1.Introduction

1. The Prosecution's Application to have Trial Chamber VII characterise Mr. Bemba's Main Case acquittal as the "toxic effect" of a "criminal plan" is an unprecedented attack, by a Minister of Justice, on the very justice system that it is bound to uphold. This acquittal was a positive affirmation of the independence and impartiality of the Court: it signalled to the international community at large that justice matters, and that "a fair trial is the only means to do justice".[1] It was a result that might have surprised or disappointed the Prosecutor, but it was nonetheless one that the Prosecutor was bound to respect, as part of the Prosecution's commitment to the principles of fairness and impartiality that are the golden thread of the Rome Statute framework.

2. The Prosecution has, however, run roughshod over these principles through the submission of an Application that is procedurally improper, factually incorrect, and legally unfounded. The Application is a baseless attempt to controvert a final acquittal, and to pollute the public record of this case through misconceived, misconstructions of the Majority verdict in the Main case. Mr. Bemba was acquitted in the Main Case because he is innocent of the charges. The Main Case verdict was issued after a ten-year process, in which the Prosecution was afforded a full and fair opportunity to demonstrate otherwise. The door to do so has now been shut, and the Judges of this Chamber do not possess the keys to reopen that door. The Application should therefore be dismissed on the grounds that:

   - It is an *ultra vires* attempt to revise the scope of this case through new facts that can only be introduced by the Defence through Article 84 of the Statute; and
   - The Prosecution has failed to demonstrate that the 'new facts' have an evidentially established causal nexus to the offences, for which the defendants were convicted.

3. In addition to the dismissal of the Application, it would be appropriate for the Chamber to remedy the severe harm that has been generated through the intentional

[1] ICC-01/04-01/06-772, para. 37.

introduction of arguments that constitute an abuse of process, and which have generated unfair and unlawful stigmatisation and public condemnation of Mr. Bemba.[2]

2. Submissions

2.1 The Application is an ultra vires attempt to revise the scope of this case through new facts that can only be introduced by the Defence through Article 84 of the Statute.

4. The Prosecution has characterised the Majority verdict in the Main case as a 'new fact',[3] and further averred that the outcome impacts on conclusions of fact and law, which should be drawn in this case. The Defence for Mr. Bemba concurs.

5. Following the arguments of the Prosecution, the Appeals Chamber has ruled that the Chamber cannot take judicial notice of the contents of decisions; rather, their contents must be admitted as evidence in the record.[4] Accordingly, since this new evidence/fact was not before the Appeals Chamber when it issued its verdicts on conviction and sentence, the Main Case verdict falls outside the scope of the case record as concerns the specific errors remanded to the Trial Chamber for determination.[5]

6. The Statute affords the Trial Chamber no power to expand this record or to modify existing appellate findings in this case; the only mechanism for introducing evidence of new facts would be through a revision of the appeal judgments, pursuant to Article 84 of the Statute. The Application nonetheless fails to fulfil the necessary criteria. Crucially, although the 'new evidence/facts' engendered by the Main Case verdict appear to fall within the first category of review set out in Article 84(1)(a),[6] the revision procedure itself can only be triggered by the convicted person, or the "Prosecutor on the person's behalf". This restriction is intentional: during the drafting process, wording that allowed the Prosecution to seek review on its own behalf was strongly opposed on grounds of *ne bis in idem*, and eventually deleted.[7] The Application, which aims to aggravate Mr. Bemba's sentence not mitigate it, would be

[2] The Defence signalled its position that a remedy would be required for this harm, at the beginning of the sentencing hearing. ICC-01/05-01/13-T-59-ENG, p. 9, lns. 16-22. The Prosecution had the opportunity to address this point in its immediate response, in its substantive submissions, or in its oral reply to the substantive Defence submissions. The relevant legal authorities were also filed the day before the hearing.
[3] ICC-01/05-01/13-2296, para.1.
[4] ICC-01/05-01/13-2159, paras. 8-9.
[5] ICC-01/05-01/13-2277, para.3.
[6] Whereas the English version refers to 'evidence', the French version refers to 'facts' (*fait nouveau*'). Regulation 66 of the Regulations of the Court uses facts/evidence interchangeably.
[7] H. Brady, M. Jennings, 'Appeal and Revision' in R. Lee (ed.), The International Criminal Court: the Making of the Rome Statute – Issues, Negotiations, Results (Kluwer Law Int'l, 1999), p. 302; A. La Rosa 'Revision Procedure under the ICC Statute', in Cassese, Gaeta, Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary Vol. II (Oxford University Press, 2002) pp. 1563-1564.

dismissed outright, if filed before the Appeals Chamber. The Chamber's consideration of the merits of the Application, in the absence of prior appellate authorisation, would therefore circumnavigate the drafters' intent and the rights of the accused. The Application is therefore inadmissible on this basis alone.

7. This position also has implications for Defence arguments that were predicated on the findings of the Main Case Appeals Judgment, including:
    a. the impact of the acquittal on the quantum of harm;[8]
    b. appellate findings concerning the system for admission of evidence, and the impact that this system might have had on the amount of reasoning concerning the degree of Mr. Bemba's participation in the solicitation of false testimony;[9]
    c. detention credit, and the impact of the overall length of his detention on the sentence that should be issued at this point in time.

8. It is arguable that the Appeals Chamber specifically opened the door for the Trial Chamber to enter new findings on the last issue by virtue of its acknowledgment that a new assessment of the start and end date of Mr. Bemba's detention in this case would need to be made as and when the Main case sentence was finalised.[10] The ECHR *Vinter* case also stands for the principle that the Chamber has an ongoing duty to review the necessity of custodial measures, based on the circumstances that exist at that point in time.[11] The effective protection of Mr. Bemba's rights cannot, however, rest on an ambiguity. The Defence therefore notifies the Chamber that it intends to file an Article 84 application in the coming weeks. If these issues can be adjudicated by the Trial Chamber as part of the current sentencing proceedings, the Appeals Chamber will presumably rule to that effect. If a formal revision of the appellate record is required, then this is an issue that is best determined at the earliest juncture possible, in order to avoid unnecessary or parallel proceedings before different Chambers.

2.2 The Prosecution has failed to demonstrate that the 'new facts' have an evidentially established causal nexus to the offences, for which the defendants were convicted.

2.2.1 The allegations fall outside the scope of the case, and have no link to the issues before the Chamber

[8] ICC-01/05-01/13-T-59-ENG, p. 57.
[9] ICC-01/05-01/13-T-59-ENG, p. 44, lns. 14-18.
[10] ICC-01/05-01/13-2276-Conf-Exp, para. 231.
[11] *Vinter v. United Kingdom*, App. nos. 66069/09, 130/10 and 3896/10 (Grand Chamber) para. 111.

9. As affirmed by the Appeals Chamber:[12]

> 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 applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court's legal framework.

10. Although uncharged incidents can inform the gravity of the underlying offence or otherwise act as an aggravating factor, The word 'inform' means that the uncharged incidents can contextualise the Chamber's findings concerning the charged offences, but they cannot operate as the exclusive or prevailing foundation for such findings. There must also be a sufficiently proximate link between these incidents and the specific issue that is being aggravated or otherwise considered by the Chamber,[13] and the defendant must be afforded sufficient notice as to these factors so that it can challenge their veracity and relevance.[14]

11. The Application fails to comply with these requirements. Notwithstanding the fact that the charged incidents in this case concerned 14 Defence witnesses,[15] the Application is predicated on arguments concerning the entire "evidentiary record of the Main Case",[16] and witnesses whose names have never featured in the Prosecution pleadings in this case.[17] The Application's claim, that the '14 witnesses' were a "mere snapshot" that does not constrain or define the scope of this case,[18] has no traction: the Appeals Chamber has confirmed that vague pleadings cannot be employed to expand the scope of a case beyond the details that are set out expressly in the charges.[19] Put simply, vague and poorly framed pre-trial allegations do not amount to a blank cheque to introduce new allegations concerning entirely new witnesses throughout the case, particularly after the Appeals Chamber has already rendered verdicts on conviction and sentence.

[12] ICC-01/05-01/13-2276-Conf-Exp, para. 113.
[13] ICC-01/05-01/13-2276-Conf-Exp, para. 115.
[14] ICC-01/05-01/13-2276-Conf-Exp, para. 116.
[15] ICC-01/05-01/13-749, pp. 47-48.
[16] Application, para. 3, 44 inter alia.
[17] For example, P36 and D48.
[18] Application, para. 2.
[19] ICC-01/05-01/08-3636-Red, para. 104.

12. The Prosecution has also not used these incidents to 'inform' the gravity of existing findings; the Application seeks, rather, to turn the case on its head. The gravamen of the Application is that the 14 Defence witnesses lied on the merits, and that because other witnesses testified in a similar manner, any such testimony is *ipso facto* false. The common plan's execution therefore caused 'harm' because it resulted in Mr. Bemba being acquitted on the basis of testimony that was untrue.[20] This argument has no resonance as concerns the specific scope of the errors before the Trial Chamber as concerns Mr. Bemba's conviction under Article 70(1)(a). This conviction does not rest on common plan liability, and it was affirmed, on appeal, that "the Prosecutor acquiesced to the Trial Chamber's decision not to explore during the trial the issue on whether the concerned witnesses testified falsely on matters related to the "merits" of the Main Case".[21] There is no link between the Application, and the issues which the Chamber has been authorised to adjudicate.

13. The Trial Chamber also cannot adjudicate these claims without firstly, determining whether Mr. Bemba was wrongfully acquitted, secondly, whether that wrongful acquittal resulted from testimony that was false on the merits, and thirdly, whether Mr. Bemba knew and intended for these witnesses to testify falsely in relation to the issues relied upon by the Appeals Chamber and took steps to solicit their false testimony on these issues. It is impossible – in law and practice – for the Chamber to rule on these elements.

14. Trial Chamber VII has no legal competence to review the correctness of a final verdict issued in the Main case. Such an approach falls foul of Article 20(1) of the Statute, which prohibits the Prosecution from attempting to employ the Article 70 case as a mechanism for reviewing final Main Case findings concerning Mr. Bemba's conduct. Domestic courts, which follow a similar formulation of the *ne bis in idem* rule, have found that the threshold for an abuse of process is met in circumstances in which the Prosecution has sought, in a second case, to introduce allegations that are predicated on a version of the 'truth' that is contrary to findings reached in an earlier acquittal.[22] This rule also precludes the Prosecution from using 'contempt' cases as a

[20] Application, paras. 4, 5.
[21] ICC-01/05-01/13-2276-Conf-Exp, para. 40.
[22] United Kingdom: *R v. Beedie* [1997] 2 Cr. App. R. 167, CA.; Australia: *R v. CB*, [2010] NSWDC (21 June 2010); United States: *Ashe v. Swenson*, 397 U.S. 436 (1970); *Yeager v. United States*, 557 U.S. 110 (2009).

forum-shopping vehicle for re-litigating facts that resulted in a previous acquittal as concerns the same defendant before a different bench.[23]

15. Although some jurisdictions allow the Prosecution to initiate a subsequent prosecution if it has new and compelling evidence, these jurisdictions can be distinguished from the ICC legal framework, which explicitly prevents the Prosecution from reopening a final acquittal. In any case, the Application would fail any domestic new evidence test since:

- the Prosecution has acknowledged that the verdict and "harm" was not unforeseeable;[24] and

- the Prosecution was in possession of the evidence that supposedly demonstrates that the entire Defence evidential record in the Main case was corrupted, but chose not to introduce this evidence during the Main case trial, or, on appeal.

16. It would also be extremely imprudent, and prejudicial to the Defence, to attempt to adjudicate such complex issues on the basis of the small snapshot of information that has been placed before the Chamber. Disclosure is not a one-way street: the Prosecution cannot disclose only the materials that support its Application, and not those that would undermine or contextualise it. Nonetheless, apart from the extract of a CDR from Mr. Kilolo's number, the Prosecution disclosed no materials or transcripts concerning the new witnesses or the factual matters underpinning the Application.[25] As a result, even though the Prosecution relies on the Main Case testimony of D-48, the Article 70 Defence teams only have access to the redacted version of this testimony, and have no means to review its content in relation to other relevant witnesses (such as P-36). It is impossible for the Defence to respond, in a meaningful manner, to allegations that go to the very heart of the Main case charges,

[23] Australia*: R v El Zarw* [1994]12 Qd R 67; (1991) 58 A Crim R 200 at 76-77, 79-80, 84-85; *R v Carroll*, (2002) 213 CLR 635, at paragraphs 147-148. See also *Grdic v The Queen* [1985] 1 S.C.R. 810 (Canada), and *Wilkenson v. Gingrich*, US Court of Appeals, Ninth Circuit, No. 13–56952, 3 September 2015, (the United States). See also *Prosecutor v. Karemera et al.*, Case No. ICTR-9S-44-T, Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008, para. 4, in which the Trial Chamber found that the doctrine was applicable, under the rubric of double jeopardy, where the two parties and the fact in issue were the same.

[24] "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", ICC-01/05-01/13-2296, para. 4.

[25] The Defence raised the issue of disclosure at the hearing of 4 July 2018 (ICC-01/05-01/13-T-59-ENG, p.13), and sent a follow up request on 11 July 2018 (Annex B). The Prosecution did not deny that it possessed relevant materials beyond the discrete CDR upon which it was relying, but nonetheless declined to disclose anything further (Annex B).

within a framework that is tantamount to a boxing match, in which only one participant is forced to compete whilst blindfolded and handcuffed.

*2.2.*2 The Motion is based on rampant speculation and false syllogisms, and thus fails to meet the necessary evidential standard.

17. The Application's premise – that the Majority of the Appeals Chamber entered an acquittal on the basis of facts that were fatally undermined by the Article 70 case - cannot withstand any form of scrutiny. As pointed out by the Trial Chamber, the Main case verdict was issued after the Appeals Chamber confirmed that Trial Chamber VII's findings were final;[26] the Majority were not only aware of these findings, one of them sat on the Article 70 appellate bench, which upheld the Article 70 convictions. And yet, when questioned as to whether the Majority knowingly relied on tainted evidence when they acquitted Mr. Bemba, the Prosecution could only respond, "[t]hat's a very good question and a difficult one to answer, because at the end of the day, we're not privy to what the Appeals Chamber relied on".[27] It is therefore clear that the Prosecution does not have any evidentially supported grounds to support their hypothesis that acquittal was based on tainted evidence or findings.

18. In the absence of such evidence, the Application and related oral submissions rest on rampant speculation and insinuation. Allegations that witnesses 'might' have been corrupted are a blatantly insufficient foundation for such an inflammatory application. But if the Prosecution simply "does not know" which witnesses were corrupted and the extent of such corruption,[28] then the matter is clearly not established to the standard of beyond reasonable doubt. Article 67(1)(g) does not allow the Prosecution to point its finger at the Defence and claim that the defendants "know".[29] The burden falls to the Prosecution to prove its case and if it knows that it cannot do this, then there is simply no basis for its to be making such public allegations in the first place.

19. The Prosecution's hypothesis that the Majority acquitted Mr. Bemba because they were 'duped' by corrupted Defence evidence, also rests on a distorted version of their findings. Mr. Bemba was acquitted because he did what he was supposed to do as a

[26] ICC-01/05-01/13-T-59-ENG, p. 23, lns 11-15.
[27] ICC-01/05-01/13-T-59-ENG, p. 23, lns. 20-22.
[28] ICC-01/05-01/13-T-59-ENG, 14, ln 4.
[29] ICC-01/05-01/13-T-59-ENG, p. 25, lns. 13-14.

commander in relation to the charged crimes, and crucially, the fact that he took certain key steps was not contested or challenged by the Prosecution.

20. The key error of Trial Chamber III appears to be that because they disbelieved the testimony of certain defence witnesses, they readily accepted allegations to the contrary without conducting a thorough assessment as to whether such facts were established to the standard of beyond reasonable doubt, or considering whether the fact in question was actually disputed by the Prosecution. This was an error in law as concerns the correct application of the burden of proof. The fact that a Defence witness is disbelieved does not mean that Judges can infer that the opposite is true: rather, it means that Judges must look elsewhere to establish the facts.[30]

21. The Prosecution's claim that the acquittal rests on a 'corrupted evidential record' now invites this Chamber to replicate the same error: to conclude that if a witness who has lied about X, says Y, and another witness says Y and Z, then Y and Z must also be lies, and those witnesses must also be corrupted. This premise is logically unsound, and contrary to the experience of this Court that recognises that a lying witness can tell facts that are objectively true, an honest witness can testify in a manner that is objectively untrue, and an insider witness will often do both.[31] It is, therefore, an error

[30] *Nobilo* ICTY Appeal Judgement, 30 May 2001, para. 47, "A mere disbelief of a witness's denial of a particular fact does not by itself logically permit a tribunal of fact to accept beyond reasonable doubt the truth of fact which he denied."
Canada: *R v. Mungwarere*, Judgment Ontario, Superior Court of Justice, 5 July 2013, paras. 65-66 "The presumption of innocence applies to issues of credibility. It is not only about choosing the version of the story which appears more likely to have happened. If following the analysis of the totality of evidence, the trier of facts is not convinced beyond any reasonable doubt of the guilt of the accused, the accused must be acquitted. In the case at stake, the central question is to know whether the accused actively and with the required criminal intention took part in the deadly attacks against the Tutsi which took place in the area of Kibuye from April to July 1994. Mr. Mungwarere has testified and denied any implication in these attacks. If his testimony is believed, he must be acquitted. The presumption of innocence applies. Consequently, even if Mr. Mungwarere is not believed, if his testimony raises a reasonable doubt on his participation, he must be acquitted. Likewise, if the testimony of Mr. Mungwarere is rejected, he cannot be declared guilty unless if, in light of the totality of the other evidence, the court is convinced beyond reasonable doubt of his guilt".
United States: 'The mere disbelief of a witness' testimony cannot serve to fill an evidentiary gap in the case; it will not justify a conclusion that the opposite of the witness' testimony is true in the absence of any independent evidence affirmatively supporting that conclusion': see *People v. Matthews*, 17 Mich. App. 48 (1969), footnote 5; "when the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion", see *Evans-Reid v. District of Columbia*, 930 A.2d 930, 940 (D.C. 2007), *Dominique Bassil v. United States*, No. 13-CF-1133 (D.C 2016)

[31] According to the Prosecution, "[s]uch a position seeks to remove the Chamber's basic duty to freely assess witness credibility and reliability of evidence in favour of a fictitious standard that stipulates that once a person behaves in a disproving or controversial manner or admits to providing incorrect information, any information provided by that person should be automatically excluded. This rigid and artificial standard would automatically exclude certain categories of evidence, such as insider testimony where that witness seeks to minimise or conceal his role in spite of other evidence showing that other parts of his evidence are truthful." ICC-01/05-01/08-3182-Conf-Corr, para.25. See also ICC-01/05-01/08-1478-Conf, para. 15.

of law for a Chamber to assume that Y and Z are lies without satisfying itself, to the standard of beyond reasonable doubt, that this is the case.

22. The Prosecution Application falls a long way short of meeting this standard. In this case, the Trial Chamber found that the 14 Defence witnesses lied about contacts, payments and their military backgrounds, and provided scripted responses. Although the Chamber found that the first three elements were objectively false, the Chamber refrained from issuing findings as to whether the scripted answers were objectively false as concerns the merits. And, as set out below, the Application provides no basis for departing from this approach.

D-54

23. On the basis of intercepts with Mr. Kilolo, D-54 was found to have provided scripted testimony in relation to the answers he provided in the Main case in relation to a range of issues, including the existence of complaints. It is, nonetheless, beyond the scope of the Article 70 case,[32] and evidentially impossible to determine, on the basis of these answers alone, that:

- D-54's answers on all such issues were objectively false; and,
- from that, leap to the affirmative fact that the opposite to his testimony must have been true; and
- from that conclude that the Majority conclusions concerning the deficiencies in Trial Chamber III's findings regarding Mr. Bemba's limited authority as a remote commander, and whether Mr. Bemba intentionally took steps to restrict the effectiveness of commissions and inquiries, were wrong; and,
- from that, conclude that the Majority's error stemmed from its reliance on tainted evidence.

24. Indeed, the sole basis for the Prosecution's accusation that D-54's testimony was not only scripted, but also objectively untrue on all pertinent issues, is their claim that D-54 lied about the Commission receiving complaints of crimes committed by the MLC. This is, nonetheless, a red herring –that is, an accusation divorced from its proper context. In the Main Case, D-54 testified that:

[32] This is reflected by the Presiding Judge's contemporaneous interjection in relation to this line of questioning: "PRESIDING JUDGE SCHMITT: Mr Witness, Mr Witness, I think the question is answered, and I would urge the Prosecutor to move to another point now. **We are going now into details that we are not able to investigate in this case here**." ICC-01/05-01/13-T-28-CONF-ENG, p. 45, lns. 14-16.

- there were allegations of pillage in Bangui, which the Commission investigated;[33]
- the Chief of Staff had referred accusations of looting and rape to them;[34]
- the Commission did not personally receive complaints of rape and murder committed by Congolese soldiers, from civilians of CAR;[35] and
- the Commission did identify cases concerning FACA soldiers in relation to looted property.[36]

25. The Application then makes much ado about the fact that D-54 testified, in the Article 70 case, that there were 'complaints'.[37] But in so doing, the Prosecution has attempted to create an inconsistency (and in their view, falsehood) where there is no objective basis to do so. D-54's Article 70 testimony on this point did not differ substantively from his Main case testimony, that is, that the Commission received complaints concerning pillaging and looting, in particular as concerns FACA soldiers,[38] and that there were accusations of rape, but none which were reported by the individuals they questioned.[39] Moreover, during the Main case, D-54 testified in relation to the arrest of several soldiers for pillaging,[40] and during the Article 70 case, affirmed that these arrests occurred, and further stated that if there had been arrests, then there must have been complaints, albeit not in a written format.[41] D-54 further testified that he intended to convey the same factual meaning on both occasions.[42] The testimony on both occasions was also consistent with his report, which was prepared contemporaneously.[43] There is no therefore foundation for concluding that his Main Case testimony on this issue was objectively untrue.

D-15

26. Trial Chamber VII found that Mr. Kilolo rehearsed, instructed, and corrected D-15's answers on a range of topics. The scripted answers were rightfully found to be unreliable. Yet, once again, it is a bridge too far to conclude from this, that his entire testimony was objectively untrue. Accordingly, although Trial Chamber III correctly

[33] ICC-01/05-01/08-T-347-CONF-ENG, pp. 70-71.
[34] ICC-01/05-01/08-T-347-CONF-ENG, p. 72, lines 5-6.
[35] ICC-01/05-01/08-T-347-CONF-ENG, p. 73.
[36] ICC-01/05-01/08-T-347-CONF-ENG, pp.73-74.
[37] Application, para. 14.
[38] ICC-01/05-01/13-T-28-CONF-ENG, p.42, lines 1-4, 9-10; p. 43, ln. 21.
[39] ICC-01/05-01/13-T-28-CONF-ENG, p.45, lns. 8-13.
[40] ICC-01/05-01/13-T-29-CONF-ENG,, p.13, lns.1-25, p. 14, lns. 1-24.
[41] ICC-01/05-01/13-T-29-CONF-ENG, p.11, lns 2-14.
[42] ICC-01/05-01/13-T-29-CONF-ENG, p. 14, lns. 19-24.
[43] CAR-DEF-0002-0001

disregarded D-15's testimony as being unreliable, this did not absolve them from the duty of assessing whether the Prosecution had discharged its burden of demonstrating, beyond reasonable doubt, that Mr. Bemba – as a commander operating from a foreign country – possessed the capacity to exercise effective control in relation to the specific charged crimes. That is where the heart of the error lay: the Prosecution failed to prove its case on this issue, and the Trial Chamber convicted Mr. Bemba nonetheless. This outcome stems from the correct application of the burden of proof. **This is not corruption- it is justice.**

D-13, D-25 and D-19

27. The Prosecution never called these witnesses to testify in this case, it has disclosed no interviews with them, and there are no disclosed intercepts with D-25 and D-19. D-13 was an unreliable witness, and it fell well within Trial Chamber III's discretion to exclude his testimony that he never heard that Mr. Bemba sent messages. But again, this dismissal of his testimony did not create a foundation to either disbelieve outright any similar testimony, or to conclude the opposite, that is, that Mr. Bemba did send messages.

28. Contrary to the arguments of the Prosecution,[44] the Appeals Chamber also did not acquit Mr. Bemba because it believed the 'narrative' underpinning D-13's testimony. Rather, yet again, the Majority found that the Trial Chamber had failed to discharge its duty to assess whether the Prosecution had established – to the standard of beyond reasonable doubt - that Mr. Bemba possessed the capacity to implement the measures that had been identified (in an arbitrary manner) by the Trial Chamber. As underscored by the Majority, "it is for the trial chamber to identify in its reasoning that the commander did not take specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken. **It is not the responsibility of the accused to show that the measures he or she did take were sufficient**" (emphasis added).[45]

29. As regards D-25, the Prosecution acknowledges that the scope of Trial Chamber VII's findings were limited to the conclusion that D-25 lied about payments, and that his

[44] Application, para. 29.
[45] ICC-01/05-01/08-3636-Red, para. 170.

testimony was scripted.[46] Apart from this issue of payment, Trial Chamber VII did not find that the script itself was false. And, yet again, the Prosecution has also failed to establish any link between these findings and Mr. Bemba's Main Case acquittal; they merely contend, without more, that D-25's testimony "must have" informed the acquittal.[47]

30. Similarly, with respect to D-19, although Trial Chamber VII found that Mr. Bemba exercised influence on him and must have urged him to follow Mr. Kilolo's instructions, the Chamber made no findings concerning the content of these instructions, and whether they encompassed objectively false testimony on issues pertaining to the merits of the Main case. Nor, as is suggested by the Prosecution,[48] are Trial Chamber III's findings concerning D-19 a sufficient basis to conclude that the broader 'narrative', which overlapped with elements of his testimony, was objectively false. This Chamber cannot disregard a final appellate finding in favour of a vacated trial verdict simply because the Prosecution invites them to do so.

31. The Prosecution has also demonstrated no link between the content of D-19's testimony and Mr. Bemba's acquittal. The Prosecution acknowledges that the Majority's findings concerning the existence of mixed commissions stemmed, not from the testimony of D-19, but P-36 – a Prosecution witness.[49] The Majority also found that this aspect of P-36's testimony was corroborated by the Zongo Commission report.[50] It would appear from the Main Case Trial Judgment that this report was a Prosecution exhibit that was relied on by Trial Chamber III at various points in order to draw adverse findings concerning Mr. Bemba.[51] It is therefore impossible to see how the Appeals Chamber's reliance on the mixed nature of the commission stems was 'corrupted' by virtue of the fact that D-19's testimony also touched on this discrete point.

D-48

32. The Application's reliance on the Majority's reference to D-48 is another red herring. The Appeals Chamber did not acquit Mr. Bemba off the back of D-48's testimony: it used D-48 to illustrate the Trial Chamber's flawed approach to factual findings.

[46] Application, fn. 74.
[47] Application, para. 32.
[48] Application, para. 33-35.
[49] Application fn. 86.
[50] ICC-01/05-01/08-3636-Red, para. 172.
[51] EVD-T-OTP-00392 –see Trial Judgment, paras. 602, 603, 713, 717.

Concretely, Trial Chamber III relied on D-48 to make adverse findings concerning Mr. Bemba,[52] and yet, failed to address his testimony on a factual matter that was never disputed by the Prosecution at trial or on appeal, that is, the issue as to whether Mr. Bemba sent a letter to the CAR Prime Minister seeking assistance.[53] There was therefore no foundation for Trial Chamber III to make the affirmative finding of fact that 'Mr. Bemba "made no effort to refer the matter to the CAR authorities (…)"'.[54] Again, Mr. Bemba was acquitted not because of 'tainted' Defence evidence, but because the Prosecution failed to establish an issue of key importance to his alleged responsibility, and yet, the Trial Chamber convicted him anyway. Given this backdrop, the possibility that D-48 might have provided inaccurate information concerning his contacts with the Defence is neither here nor there.

33. It is also impossible, at the current juncture, and on the basis of the scraps of information contained in the Application, to make an informed evaluation as to the impact of these contacts on firstly, the overall reliability of D-48's testimony, and secondly, whether this unreliability is itself a reliable indicator of objective truth or falsity. Even the point as to whether D-48 lied about contacts with the Defence cannot be ascertained reliably on the basis of the limited information contained in the Application. The Prosecution has relied on the public version of his testimony, which contains redactions in relation to his answers regarding contacts with the Defence.[55] This impedes the ability of the Defence to analyse the train of questions and answers, in their proper context. In this regard, the Prosecution initially asked D-48 about meetings or conversations, with the defence team or anyone on the team, in an impermissibly convoluted question that the Chamber should have directed them to reformulate. Their follow-up questions then focussed on an in-person meeting and the modalities for organising that meeting, and then moved directly on to payments. D-48 was not asked, or afforded an opportunity to address the possibility of additional telephone contacts after the Prosecution moved from the number of in-person meetings to the issue of witness expenses. D-48 also offered to access his phone in order to give the Chamber more precise information concerning an issue related to contacts with the Defence,[56] which undercuts any inference that he intentionally

[52] See for example, Trial Judgment, fn. 983, 1053, 1702, 1776, para. 556,
[53] ICC-01/05-01/08-3636-Red, paras. 174-175.
[54] ICC-01/05-01/08-3636-Red, para. 175.
[55] ICC-01/05-01/08-T-268-Red2-Eng, p. 77, lns.19- 22.
[56] ICC-01/05-01/08-T-268-Red2-Eng, p. 77, lns. 3-7.

withheld information about telephone contacts, during this poorly structured cross-examination.

34. If the Prosecution believed that these transcript answers were sufficient to demonstrate that he had lied under oath, it also begs the question as to why:

- he was not included in the Article 70 case at any point – indeed, the RFA sent to the DRC authorities in December 2012 does not include his number,[57] which suggests that either the Prosecution did not consider it necessary to obtain his CDRs or information that would have been relevant to such contacts, or the Prosecution already had such information, and has simply not disclosed it in this case; and
- the Prosecution application to admit Article 70 materials in the Main case never referred to D-48: indeed, the application stated that the "additional evidence affects the testimony of **fourteen (14)** Defence witnesses"(emphasis added), and further underlined that the evidence would only have a "discrete impact on a limited aspect of the Defence evidence".[58]

2.3 The Prosecution's submission of this Application has caused irreparable harm to Mr. Bemba, which must be remedied.

35. As demonstrated above, the Application is ill-conceived and manifestly unfounded in law and fact. It is a naked attack on the authority of the ICC Appeals Chamber, and the legitimacy of Mr. Bemba's acquittal. The ICC Prosecutor is required to act as an impartial Minister of Justice: her 'job' is not to win cases,[59] but to assist the Court to establish the truth in a manner that fully respects the rights of the defendant. The Prosecutor also has a concordant duty to respect the finality of ICC verdicts, and to ensure that her actions do not call the legitimacy of these verdicts into question. The actions of the Prosecutor have fallen unacceptably short of these required standards, and in so doing, occasioned significant prejudice to Mr. Bemba. He has the right to an effective remedy for such violations.

[57] CAR-OTP-0091-0469 at 0471.
[58] ICC-01/05-01/08-2910, para. 8.
[59] *Barayagwiza* (ICTR-97-19-AR72), Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion, Judge Shahabuddeen, para. 68; "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." *People v. Roldan* (2005) 35 Cal.4th 646, 719.

36. Once an acquittal has become final, it is inacceptable for the Prosecution to voice suspicions concerning the culpability of the defendant,[60] or to conduct itself in a manner which undermines the effect of the acquittal.[61] But, notwithstanding these tenets of basic fairness, the Prosecution has not requested Trial Chamber VII to apply or admit the Main Case Majority's findings; rather, they have requested this Chamber to look behind those findings and reach a contrary conclusion, that is, to controvert the acquittal.[62] The Prosecution has issued very public statements – both inside and outside the courtroom – which go beyond merely questioning the correctness of the Majority verdict.[63] The Prosecution has stated in unequivocal terms that the verdict is wrong, that it has been secured through corruption, and that its mere existence constitutes 'damage' to the integrity of the proceedings.[64] During the release hearing, the Prosecution claimed that Mr. Bemba had not been acquitted of all the Main case charges,[65] and in most recent hearing, the Prosecutor also averred that Mr. Bemba's acquittal did not mean that he was actually innocent of the charges.[66] As set out above, their attempt to do so constitutes an abuse of process,[67] and further violates the presumption of innocence, which is an indispensable component of Mr. Bemba's right to fair trial.

37. The ICC Appeals Chamber has already had occasion to caution the Prosecution that ICC rulings are final, and must be treated as such, unless and until they are overturned or modified by a Chamber.[68] Although the Prosecutor has important statutory powers, these powers must be exercised in a manner that respects the rulings of the Court,

[60] ECHR: *Geerings v. the Netherlands*, App. No. 30810/03, para. 49; *Rushiti v. Austria*, App. No. 28389/95, para.31; *O. v. Norway*, App. No. 29327/95, para. 39.
[61] See *R. (on the application of R) v Chief Constable of Greater Manchester* [2016] 1 W.L.R. 4125, "article 6.2 of the Convention would be breached if the state undermined the effect of an acquittal or a public official treated an acquitted person as if he were guilty of the very criminal charge of which he had been acquitted".
[62] In the above-cited case of *Grdic v The Queen*, Lamer J, for the Majority, justified the application of estoppel to a perjury prosecution following the defendant's acquittal for substantive charges, noting: "There are not different kinds of acquittals and, on that point, I share the view that 'as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence' […]. To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of 'not proven', which is not, has never been, and should not be part of our law"(para. 35). See also ECHR, *Vleeland Boddy & Marcello Lanni v. Spain*, App. Nos. 53465/11, 9634/12, paras. 39-40.
[63] Cf *G.C.P. v. Romania*, App. No. 20899/03, paras 10, 57.
[64] See Application paras. 4, 44, 45, and 46 "*the result achieved before the Appeals Chamber was not only foreseeable, but necessarily comprised the very objective of the witness corruption scheme"*.
[65] ICC-01/05-01/13-T-58-ENG, p.18, lns. 21-23.
[66] ICC-01/05-01/13-T-59-ENG, p. 84, lns. 18-21.
[67] The possibility that the threshold for a permanent stay has not been reached does not exempt the Chamber from the duty to consider whether other remedies, such as a sentence reduction, are required if the defendant's rights have been violated: *Kajelijeli* Appeals Judgment, 23 May 2005, para. 255.
[68] ICC-01/04-01/06-2582, para. 1.

since "[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber".[69] And yet, despite these directions, the explicit premise of the Application is that the acquittal was wrongly entered – that it was obtained through corruption.[70] The Chamber cannot entertain this application without accepting that the Prosecutor has the right to query final appellate rulings. Similarly, the Chamber cannot accept that the conduct outlined in the application has caused 'damage' unless it first accepts the underlying premise that Mr. Bemba is guilty, and that the acquittal was therefore obtained through corrupt means. The Prosecution has therefore engineered a situation that threatens to undermine the authority of the Court, and the legitimacy of a final acquittal.

38. Although the acquittal was issued in the Main case, this Chamber has jurisdiction over conduct of the Prosecution, which arises from this case, or which prejudices Mr. Bemba's rights in this case.[71] Mr. Bemba is entitled to be viewed by the judges of this Chamber as someone who is innocent of the charges brought against him in the Main case. And yet, the Prosecution endeavoured, through its arguments, to pollute the acquittal verdict and thereby drain it of any positive value in this case. The Prosecution has also used the proceedings in this case to voice these positions, and to amplify the audience through their dissemination in both written and oral form. These statements have wrongfully generated public condemnation of Mr. Bemba,[72] and as a result, the Article 70 case has operated as a springboard for judicially unsanctioned punishment. The Prosecution's claim that Trial Chamber VII should severely sanction Mr. Bemba, in order to compensate "the victims of the crimes, more than 5,000 of them"[73] who were denied justice[74] as a result of his "toxic"[75] acquittal, has also fatally undermined the appearance of impartiality in this case.

[69] ICC-01/04-01/06-2582, para. 47 citing ICC-01/04-01/06-2517-Red, para. 47.
[70] Application, para. 46.
[71] ICC-01/05-01/08-3059, para. 18; ICC-01/05-01/08-3255, para. 18. See also *Ismoilov v Russia & others*, App. No. 2947/06, para 163; *Zollmann v United Kingdom*, App. No. 62902/00, "Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings".
[72] ABA's Model Rules of Professional Conduct provide at Rule 3.8 (f), with respect to the 'Special Responsibilities of A Prosecutor', that "The prosecutor in a criminal case shall: […] except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused (...)."
[73] ICC-01/05-01/13-T-59-ENG, p.17, ln. 11. See also p. 29, lns. 23-24.
[74] ICC-01/05-01/13-T-59-ENG, p. 33, lns 16-17: "There are victims of the crimes in that case, no question about that. They were before this Court as a court of last resort to seek justice. They didn't get it."
[75] Application, paras. 4, 44.

39. Apart from infringing the presumption of innocence, such statements have violated Mr. Bemba's right to private life by damaging his reputation. The protection of the right to private life under Article 17(1) of the ICCPR and Article 8 of the ECHR also encompasses the protection of a person's reputation.[76] This protection extends to statements or disclosures by prosecuting authorities, which are unlawful, in the sense that the alleged crimes have not been proved.[77] The fact that such statements have been uttered by a Prosecution in the course of court submissions therefore offers no defence, in circumstances where a fair balance between the pursuit of lawful objectives and the private interests of the individual has not been struck.[78] To the contrary, the inclusion of unfounded accusations in Prosecution filings create an authoritative appearance, that is "likely to carry great significance", which in turn, can stigmatise the individual and have "a major impact on his person situation as well as his honour and reputation".[79]

40. The Prosecutor's written and oral submissions served no lawful purpose: there was no legal basis for the Prosecution to use this case to achieve a *de facto* review of the Main Case verdict or to otherwise reopen the scope of this case. The language employed in the Prosecution's submissions also went well beyond the requirements of laying out its case on the issues that were properly before Trial Chamber VII. Given the timing and public nature of its submissions, the Prosecution would also have been aware that such submissions would generate severe harm to Mr. Bemba's reputation, and stigmatise him on the basis of accusations that had been dismissed by a final verdict of the Appeals Chamber. The impact of the Prosecution's actions can also be seen in the plethora of social media posts, which either cite to, or parrot the wording of the Prosecution.[80] This includes high profile NGO and medial organisations that are likely to have particular resonance amongst Mr. Bemba's community, and who were

[76] *Chauvy and others v. France*, App. No. 64915/01, 29 June 2004, par. 70; *Polanco Torres and Movilla Polanco v. Spain*, No. 34147/06, 21 September 2010, par 40, citing with approval *Arakó v. Hungary N*o. 39311/05, par. 23, 28 April 2009.
[77] *Mikolajová v. Slovakia*, App. No. 4479/03, 18 January 2011, par. 57.
[78] *Beyeler v. Italy*, app. No. 33202/96, para. 107.
[79] *Sanchez Cardenas v. Norway*, App. No. 12148/03, para. 38. See also *Y. B. v EULEX*, Case no. 2014-37, Judgment 19 October 2016, in which the Kosovo Human Rights Review Panel found that Article 8 of the ECHR was violated in circumstances where the EULEX Prosecutor exploited court proceedings in one case, to launch public, defamatory accusations that went beyond 'mere suspicion', against an uncharged individual: see paras. 44-54.
[80] Annex C.

emboldened to query the legitimacy of the verdict after the Prosecutor described the result as 'regrettable and troubling'.[81]

41. Of key importance, the Defence specifically apprised the Prosecutor, before the Application was filed, that the Prosecutor's public statements concerning the Majority verdict were contrary to Mr. Bemba's presumption of innocence, and gave rise to a concern as to whether the Prosecutor would address the Article 70 sentencing hearing in a manner that was consistent with Mr. Bemba's right to be treated as an acquitted person.[82] The Defence also invited the Prosecutor to mitigate the harm caused to Mr. Bemba by retracting her public statement concerning the Majority verdict.[83] The Prosecution not only declined to take steps to mitigate the harm, but further accused the Defence of 'misrepresenting' the relevance of Mr. Bemba's acquittal to the Article 70 sentencing hearing.[84]

42. Before the Prosecution commenced its oral submissions, the Defence attempted to avert further harm by requesting that the Application be dismissed *in limine*, and in so doing, outlined the reasons why the Prosecution's submission were contrary to the fundamental rights of Mr. Bemba, and likely to generate further harm.[85] Far from being dissuaded from pursuing such a stance, the Prosecution intimated that because Counsel represents a defendant who was convicted of Article 70 offences, the Chamber should view Counsel in the same light:[86] that is, the Prosecution responded to Defence concerns by broadening the scope of its defamatory statements to encompass the Defence.[87] The Prosecution's awareness of the impact that its Application and related submissions would have on the rights of Mr. Bemba operates as a significant aggravating factor, as does the ICC Prosecutor's heightened obligation to exercise circumspection in relation to her statements and submissions, which stems from the fact that the public are much more likely to believe, and attach significant weight to them.[88]

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[81] Annex C.
[82] Annex A.
[83] Annex A.
[84] Annex A.
[85] ICC-01/05-01/13-T-59-ENG, pp. 5-8.
[86] ICC-01/05-01/13-T-59-ENG, p. 10, lns. 20-25, p. 11, lns. 1-8.
87 The UN Basic Principles on the Role of Lawyers stipulates that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".
[88] *Fatullayev v Azerbaijan,* App. No., 40984/07, para. 159. See also ICC-01/11-01/11-175, paras. 27-28.

3. Conclusion

43. The Court has the duty to uphold the integrity of its proceedings and related findings, and to take steps to ensure that its 'truth-finding' functions are not impeded through the actions of a party. An effective response is required to address the present conduct of the Prosecutor, deter future such conduct, and remedy the harm caused to Mr. Bemba. In light of the highly emotive state of play engendered by the Application, it might be tempting to defuse these tensions and controversies by dismissing the Application in a quietly worded decision that focuses exclusively on the technical and procedural deficiencies of the Application, whilst avoiding any direct or indirect criticism of the Prosecution's conduct. To do so, would ignore the bigger picture that the moment the Application was publicly distributed, and the moment that the Prosecutor aired these views at the sentencing hearing, the Prosecution succeeded in its objective of delegitimising Mr. Bemba's Main Case acquittal. Moreover, given that the Application is legally and factually unfounded, its dismissal is warranted as a matter of course, and not as an additional remedy. This step would also not address the additional layers of prejudice and harm that were generated through the intentional, public dissemination of harmful accusations regarding Mr. Bemba and the Main Case verdict.[89]

44. The false trope that Mr. Bemba's acquittal is illegitimate or obtained through corruption has now gained a life of its own that is likely to haunt Mr. Bemba and his family for years to come. It will now be impossible to piece together the shattered perception of his innocence amongst key stakeholders that hold Mr. Bemba's future in their hands. This result calls for an effective antidote to these waves of public condemnation. It would therefore be consistent with the approach adopted in the *Lubanga* case, and at a domestic level, to remedy this harm through the Chamber's determination of the appropriate sentence to impose on Mr. Bemba.[90]

[89] A declaration by the State will not amount to an effective remedy if it does not acknowledge wrongfulness or otherwise apologise for the violation: *Prencipe v. Monaco*, App. No. 43376/06; *Tahsin Acar v. Turkey*, App. No. 26307/95 (Grand Chamber, Preliminary Issues), para. 76.

[90] ICC-01/04-01/06-2019, para. 91; Negative publicity has resulted in sentence reduction due to the stigma and related impact on integration and rehabilitation. See The Netherlands, *Rechtbank Den Bosch* (2010), ECLI:NL:RBSHE:2010:BM9713, 2 July 2010;, *Rechtbank Oost Brabant*, ECLI:NL:RBOBR:2013:4795, 28 August 2013.

45. Punishment should be proportionate but it should never be excessive, and it must always be tailored to the individual circumstances of the defendant. In addition to the fact that Mr. Bemba was deprived of his liberty for an excessively long period due to the absence of an effective mechanism for counting and regulating time in this case, the Chamber should now take into consideration the unlawful stigmatisation and significant public condemnation that have been generated by the actions of the Prosecution. The Defence maintains that the payment of a reasonable fine to the Trust Fund for Victims, and subsequent discharge, would be an appropriate sanction for Mr. Bemba's conduct. Anything beyond that would mean that the punishment meted out both in and through this case is excessive, and most importantly, that in a case concerning the need to protect the integrity of the Main Case proceedings, the Chamber declined to effectively and fully sanction and remedy conduct that undermined the ultimate outcome of those proceedings.

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Dated this 19th day of July 2018
The Hague, The Netherlands