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APPEALS CHAMBER

Before: Judge Howard Morrison, President
Judge Chile Eboe-Osuji,
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

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

Reply to the Article 81(2)(a) Appeal against the Resentencing Decision

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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1. Introduction

1. The gist of the Prosecution's Response is that the Defence appeal must be dismissed because the Defence is attempting to "re-litigate these settled findings" and that the Court's "statutory framework – when properly and reasonably interpreted" does not entitle the Defence to do so.¹ The Prosecution is correct that the Statute must be interpreted in a reasonable manner. When "properly and reasonably interpreted", the Statute's appellate provisions allow the Appeals Chamber to consider the full range of issues set out in the Defence Appeal. This power stems from the following considerations:

- *Firstly*, the issues set out in the Defence Appeal cannot be considered to be 'final and settled' in circumstances where the Defence has never had an effective right to be heard, and to participate, at first instance. The Appeals Chamber is empowered, through Article 81(2)(b) and Article 83(1) of the Statute, to exercise the form of appellate review and scrutiny that would best ensure a fair and effective adjudication of the appeal in these circumstances; and
- *Secondly*, the Appeals Chamber is entitled to rule on the scope of the remand to the Trial Chamber, and whether - in the circumstances of the case as a whole, and particular developments concerning Mr. Bemba - it was consistent with Mr. Bemba's fair trial rights. In line with the principle of legality, and the clear text of Article 83(2)(b) of the Statute, the remand should also be interpreted to encompass the trial as a whole, and to allow for factual findings to be made by a Chamber other than Trial Chamber VII.

2. Although the impugned rulings were issued within the context of an Article 70 case, the conviction and sanctions have had profound consequences for Mr. Bemba, and will continue to do so. Fair trial rights apply throughout "the judicial process in its entirety".² It would be manifestly unsatisfactory to allow a conviction and sentence to stand on the basis of proceedings, which failed to respect fundamental rights, such as the right to be heard.

¹ Response, [ICC-01/05-01/13-2320](#), para. 3.

² [ICC-01/04-01/06-772](#), para. 37.

2. Submissions

2.1 The issues set out in the Defence Appeal cannot be considered to be ‘final and settled’ in circumstances where the Defence has never had an effective right to be heard, and to participate, during the proceedings

3. Articles 81(2)(b) and Article 83(1) must be interpreted, and applied in a manner which takes into account the specific context of the case before the Chamber, including the evidential regime utilised by the Trial Chamber, and the sufficiency of reasoning available for the appellate proceedings in question. In circumstances where the record created by the Trial Chamber does not enable the defendant to exercise his appellate rights in an effective manner (including in connection with a sentencing appeal), the overarching right to a fair process will have been violated. Since Article 81(2) and Article 83(1) must be interpreted and applied in a manner that is consistent with internationally recognised human rights law, the Appeals Chamber is empowered to either reverse a conviction, within the context of a sentencing appeal, or to otherwise review the evidential foundation of the conviction, in order to ensure that the proceedings, as a whole, safeguard the defendant’s right to be heard, and to participate, in an effective manner.³
4. It is axiomatic that defendants appearing before the International Criminal Court are judged on the basis of evidence, and not abstract notions, or pure legal assumptions: factual findings require evidence of facts. This principle applies equally to the sentence imposed on a defendant. The Appeals Chamber recognised as much in its direction that a sentencing decision requires a “fact-specific assessment, *in concreto*, of the gravity of the particular offences for which the person was convicted”.⁴ No such clarity exists in this case. Quite uniquely, the Trial Judgement issued against Mr. Bemba did not refer to, or cite the Bemba Defence Final Trial Brief, or any items of Bemba Defence evidence, except the testimony of Dr. Harrison. The Trial Chamber also never issued a reasoned opinion, at any point of the proceedings, concerning:
 - The reliability and weight of individual items of evidence, as opposed to broad categories,⁵ and whether the weight differed *vis-à-vis* the different defendants, in

³ [ICC-01/05-01/08-3636-Red](#), para. 40.

⁴ [ICC-01/05-01/13-2276-Red](#), para.44.

⁵ Cf *ECHR: Moreira Ferreira v. Portugal* (no. 2) [GC], App. no. 19867/12, para. 84, concerning sufficiency of evidential reasons based on generic formulations.

order to address specific issues of prejudice arising from the use of statements and recordings concerning co-defendants (who did not testify) against Mr. Bemba;

- Why – given that the Trial Chamber admitted all of the Defence evidence - it not did not consider any item of Defence evidence to be relevant to its findings in the Trial Chamber; and
- Which excerpts from the detention unit recordings had been evaluated by the Trial Chamber as being a sufficiently reliable record of the communications between Mr. Bemba and Mr. Babala.⁶

5. This ambiguity and related prejudice was particularly acute for Mr. Bemba in light of the Trial Chamber’s recognition that there was a lack of direct evidence concerning his involvement,⁷ and its reliance on implicit form of knowledge and conduct: implicit ‘urging’,⁸ which Mr. Bemba ‘implicitly knew’⁹ involved the ‘implicit consequence’¹⁰ of false testimony. It was a case constructed almost entirely on abstract concepts (implied on the basis of Mr. Bemba’s role as the ‘defendant’), and inference. The Trial Chamber nonetheless never provided a reasoned opinion in relation to which evidential items were considered in relation to these inferences, in particular, whether the Chamber considered Defence arguments concerning the reliability and probative value of individual items of Prosecution evidence used to support the inference, or Defence evidence that might have supported a reasonable alternative inference.
6. These issues were not clarified or addressed in the first sentencing decision. Rather, the lack of any evidential findings within the Trial Judgment on Defence evidence precluded the Defence from being heard on issues of mitigation in the sentencing phase. Although the Trial Chamber invited the parties to submit additional items of evidence, the Sentencing Decision only referred to one item of evidence submitted by the Bemba Defence.¹¹ The Chamber nonetheless rejected all Defence evidence and arguments on mitigation on the basis that the Defence was attempting to ‘re-litigate’ the Trial Judgment,¹² notwithstanding the Trial Chamber’s failure to provide a reasoned opinion on these arguments in the Trial Judgment. The Trial Chamber further ruled that the only recourse available to the Defence was to raise these issues within the framework of an

⁶ Trial Judgment, para. 227.

⁷ Trial Judgment, para. 818

⁸ Trial Judgment, paras. 853, 734.

⁹ Trial Judgment, para. 818

¹⁰ Trial Judgment, para. 932.

¹¹ [ICC-01/05-01/13-2123-Corr](#), fn. 368.

¹² [ICC-01/05-01/13-2123-Corr](#), para. 228.

appeal against conviction,¹³ thereby affirming, from the outset, the nexus between the reasoning in the Trial Judgment, and the defendant's right to be heard at the sentencing phase. In contrast, the Trial Chamber relied on detailed factual extrapolations concerning aggravating factors, advanced by the Prosecution, on the basis of Prosecution evidence addressed in the Trial Judgment.¹⁴ The Trial Chamber's use of the factual findings in the Trial Judgment as the exclusive reference point for sentencing therefore gave rise to a manifest inequality of arms.¹⁵

7. These issues were not clarified or remedied by the subsequent appellate proceedings. In its Judgment on Conviction, the Appeals Chamber upheld the system for admission and appreciation of evidence employed by the Trial Chamber.¹⁶ The system employed by the Trial Chamber appears to mirror systems of evidence utilised in jurisdictions, which are more amenable to applying a *de novo* standard of appellate review.¹⁷ The Appeals Chamber nonetheless applied the margin of deference standard, which was first approved in the *Lubanga* case,¹⁸ where the Appeals Chamber had the benefit of a detailed trial record, containing written reasons concerning the admission of each item of evidence. In its explanation concerning the rationale for such deference, the *Lubanga* Appeals Chamber cited, with approval, the ICTY Appeals Chamber's finding in the *Kupreskic* case, which included the caveat that "[t]his discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion".¹⁹ Unlike the *Bemba* Main Case Appeals Chamber,²⁰ the *Bemba et al.*, Appeals Chamber never considered whether it was necessary to recalibrate its approach to the evaluation of evidence on appeal, in order to take into account the sufficiency of the trial evidential record.
8. The Appeal Chamber also did not clarify its understanding of the contours of the evidential record, and the weight and probative value of contested items of evidence. In

¹³ [ICC-01/05-01/13-2123-Corr](#), para. 228: "The Chamber adjudicated the Defence arguments in the Judgment. The appropriate forum in which to challenge the Judgment is the Appeals Chamber." See also para. 233: "At the outset, the arguments of the Bemba Defence mainly relate to the merits of the case. At the present stage of the proceedings, these arguments are properly raised before the Appeals Chamber. As a result, they cannot be taken into account for the purposes of this decision."

¹⁴ See for example, [ICC-01/05-01/13-2123-Corr](#), paras. 234-238.

¹⁵ See, by analogy, *ECHR: Coëme and Others v. Belgium*, App. nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 102: "the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules." See also: *Borisova v. Bulgaria*, App. No. 56891/00 paras. 48-49; *Topić v. Croatia*, App. No. 51355/10, paras. 47-49.

¹⁶ [ICC-01/05-01/13-2275-Conf](#), para. 628.

¹⁷ D. Djukic, 'The Right to a Fair Appeal in International Criminal Law', pp. 23-34, p. 60-61, 66.

¹⁸ [ICC-01/04-01/06-3121-Red](#), paras. 22-27.

¹⁹ [ICC-01/04-01/06-3121-Red](#), para. 24, citing *Kupreskić et al.* Appeal Judgment, para. 32.

²⁰ [ICC-01/05-01/08-3636-Red](#), para. 40.

particular, although the Appeals Chamber assessed the reasonableness of the Trial Chamber's findings by reference to the 'evidence' or the 'evidence as a whole',²¹ the Appeals Chamber never clarified what it included in this assessment, in particular, whether the assessment of 'the evidence' included Defence evidence that had not been referred to in the Trial Judgment.²² The Trial Chamber also never provided an exhaustive account of which detention unit recording excerpts were considered to be sufficiently reliable to rely upon. It is therefore unclear as to which excerpts were relied upon by the Appeals Chamber, in its assessment of the totality of the evidence. The importance of this body of evidence is reflected by the Trial Chamber's reliance on the recorded interactions between Mr. Bemba and Mr. Babala to reach radically different conclusions concerning the degree and nature of their contributions and knowledge.²³ These omissions undermined the ability of the Defence to make meaningful submissions, for the purpose of any future sentencing proceedings, as concerns the degree and nature of Mr. Bemba's contributions.

9. The Appeals Chamber also declined to take any steps to address or fulfil Mr. Bemba's right to be heard, in its Sentencing Judgment on Appeal. The Appeals Chamber once again, employed an extremely deferential level of appellate review, and entire grounds concerning the Trial Chamber's assessment of mitigating factors, and the degree and nature of Mr. Bemba's contribution were dismissed on the basis that the Defence was attempting to 'relitigate' the conviction.²⁴
10. As a result, when the Defence appeared before the Trial Chamber in 2018, the Defence faced the same difficulties that it experienced in 2016, as concerns its ability to make meaningful submissions on issues concerning the 'limited' and 'varying degrees' of Mr. Bemba's contributions²⁵ based on evidence and issues not specifically incorporated within the four corners of the 2016 Trial Judgment. The ultimate result – the sentence imposed by the Trial Chamber in 2018 – continues to be affected by the system for

²¹ ICC-01/05-01/13-2275-Conf, paras. 145, 151, 825, 837, 855, 875, 878, 997, 999, fn. 2448, 1195, 1211, 1229.

²² Cf [ICC-01/04-01/06-3121-Red](#), para. 26, citing Brđanin Appeal Judgment, para. 13: "In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal".

²³ Trial Judgment para. 883: "[c]ontrary to the Prosecution's position, the Chamber does not rely on the various telephone conversations in which Mr Babala merely asks for authorisation of payments to Mr Kilolo. The Chamber finds it cannot establish any link, without more, between those payments and subsequent illegitimate payments effected to the witnesses", compared to para. 693, "Mr Bemba was involved in this payment scheme extensively. This is demonstrated by a significant body of evidence which proves that Mr Babala, who was Mr Bemba's financier, would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons."

²⁴ [ICC-01/05-01/13-2276-Red](#), paras. 95, 118, 138-140.

²⁵ [ICC-01/05-01/13-2123-Corr](#), paras. 223, 248.

admission of evidence employed by the Trial Chamber. The issue at this juncture transcends the question as to whether the Appeals Chamber correctly determined this issue in 2018, and embraces the larger issue as to whether the record generated by this approach has respected Mr. Bemba's fundamental right to be heard, at all phases of the proceedings, including the current appeal. The Defence cannot participate in the proceedings in an effective manner if it is still entirely in the dark as to the particular evidential foundation of Mr. Bemba's conviction and sentence, including as concerns whether particular items of evidence were improperly included or excluded from judicial consideration, and given too little or too much weight. Ground 2 and 3 of the Defence Appeal concerned whether the Trial Chamber abused its discretion by basing its decision on irrelevant factors, and failing to take into consideration relevant factors.²⁶ This consideration is linked directly to the Chamber's appreciation and evaluation of the evidence concerning the nature and extent of Mr. Bemba's contribution to the offences in this case. The Defence nonetheless continues to have no clear reference point for making informed submissions concerning the nature and degree of Mr. Bemba's contributions, on the basis of the evidence as a whole. These are fundamental legal and procedural errors,²⁷ which vitiate both the 2018 sentence, and its underlying conviction. The scope of the present appeal therefore necessarily encompasses the sufficiency of the reasoning set out in the 2016 Trial Judgment.

11. These circumstances attract the ECHR's prescription that there is a positive duty to ensure that the factual record is sufficiently clear, to enable the defendant to exercise his or her rights on appeal; where this right has not been respected at first instance, the appellate process itself must remedy this error, and ensure that the defendant is afforded an effective right to be heard on factual issues, including as concerns: the perception of the defendant, the distinction between the different roles of the co-defendants, the factual basis for qualifying the conduct of co-defendants differently and imputing different degrees of knowledge and intent, and the evidential justification for imposing lesser sentences on some co-defendants, whilst aggravating that of others.²⁸
12. Accordingly, in line with the *Kupreskic* caveat that it might be necessary to temper its deference to first instance factual findings, in circumstances where they lack sufficient reasoning, the ICC Appeals Chamber should interpret and apply Article 81(2)(b) and Article 83(1) in a manner which safeguards Mr. Bemba's right to be heard in this

²⁶ [ICC-01/05-01/13-2315](#).

²⁷ [ICC-01/05-01/08-3636-Red](#), paras. 55, 66.

²⁸ ECHR, *Taxquet v. Belgium*, (GC) App. no. 926/05, paras 91-92, 97, 99.

process. Article 83(1) allows the Appeals Chamber to exercise any powers of the Trial Chamber that might be necessary to ensure a fair adjudication of the appeal. This includes the power to make *de novo* factual findings and to acquit Mr. Bemba. Article 81(2)(b) confirms that these powers apply to sentencing appeals. The use of these powers is now necessary to avoid miscarriage of justice, caused by the failure to ‘hear’ Mr. Bemba in an effective manner throughout these proceedings.²⁹

2.2 The Appeals Chamber’s right to rule on the scope of the remand to the Trial Chamber, and whether - in the circumstances of the case as a whole, and particular developments concerning Mr. Bemba - it was consistent with Mr. Bemba’s fair trial rights

13. The Appeals Chamber’s decision to remand the question of sentencing to Trial Chamber VII was not an automatic consequence of a particular outcome, but an exercise of discretion and law – a decision at first instance, and not a final adjudication of a point, or resolution of a proceeding. Within the scope of this appeal, the Appeals Chamber has the power to rule on the issue as to whether this exercise of discretion, and scope of remand, viewed in conjunction with the particular evidential record of this case, was consistent with Mr. Bemba’s right to fair proceedings.³⁰ And, in so doing, there are cogent reasons to find that the remand and its scope– as interpreted by Trial Chamber VII - was manifestly unsound, and legally and procedurally flawed, when considered in light of the particular evidential record in this case. These flaws vitiated the fairness of the proceedings in their entirety, as set out in Grounds 1 and 2 of the Defence Appeal.

14. **First**, the decision to remand the case to Trial Chamber VII was not conducted along adversarial lines. The Mangenda Defence proposed that sentencing issues should be referred back to Trial Chamber VII in its Response to the Prosecution Appeal on

²⁹ “A conviction ignoring key evidence constitutes a miscarriage of criminal justice, and that leaving such errors uncorrected may seriously affect the fairness, integrity and public reputation of judicial proceedings (...). Similarly, the Court has found that the upholding, after review proceedings, of a conviction which breached the right to a fair trial amounted to an error of assessment which perpetuated that breach (...)”: ECHR: [Moreira Ferreira v. Portugal \(no. 2\)](#) [GC], App. no. 19867/12, para. 63. See also [Tatishvili v. Russia](#), App no. 1509/02, para. 62; and [Yaremenko v. Ukraine \(no. 2\)](#), App. no. 66338/09, para. 67.

³⁰ See ICTY: [Prosecutor v. Dusko Tadic](#), Appeal Judgement On Allegations Of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, IT-94-1-A-AR77, pp. 3-4.

ICC: [Prosecutor v. Katanga](#), ‘Decision on ‘Defence Application for Reconsideration of the Presidency ‘Decision pursuant to article 108(1) of the Rome Statute’’, [ICC-01/04-01/07-3833](#), para. 25 where the Presidency held that the Presidency could reconsider its previous decisions, in order to address a decision that was manifestly unsound, and which had manifestly unsatisfactory consequences.

ICTR: [Prosecutor v. Kajelijeli](#), Appeals Judgment, 23 May 2005, ICTR-98-44A-A, concerning the right to reconsider interlocutory appellate rulings, within the context of a final appeal.

ECHR: [Moreira Ferreira v. Portugal \(no. 2\)](#) [GC], App. no. 19867/12, paras. 55-56, concerning the fact that a State party’s interpretation and application of an ECHR judgment constituted a ‘new issue’ impacting on the applicant’s fair trial rights.

Sentence.³¹ The Bemba Defence had no right to respond or reply to this proposal, which was filed on 20 August 2017, after all of the filings concerning the appeal against conviction had been submitted. The Defence has no opportunity to raise, within the context of its appeal against conviction, the issue as to whether the evidential system and record created by Trial Chamber VII was ‘fit for purpose’ as concerns a case that could be adjudicated by different judges, and a future Appeals Chamber, who would not be privy to the Trial Chamber’s underlying rationale for key evidential conclusions.

15. **Second**, the Mangenda proposal was motivated, in part, by Trial Chamber VII “intimate knowledge of the facts”.³² In its Judgment on Sentence, the Appeals Chamber recognised that “the sentencing factors enunciated 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”,³³ and further found that the 2017 sentencing decision lacked sufficient factual elaboration.³⁴ The Appeals Chamber’s decision to remand the issue to the same Trial Chamber appears to reflect the conclusion that the record was insufficiently clear to determine the appropriate sentence, as concerns the ‘limited’ and ‘varying degrees of Mr. Bemba’s participation’,³⁵ on appeal.

16. **Third**, in terms of the legal basis for the remand, Article 83(2) specifies that the Appeals Chamber can either reverse or amend the decision or sentence itself, or send the case to a different Trial Chamber for a new ‘trial’. Although the Appeals Chamber could have referred a specific factual issue to the same Trial Chamber, and ordered the Chamber to report back, this option was off the table due to the expiration of the mandate of two appellate judges in March 2018. The compromise, to send sentencing issues back to the same Trial Chamber, was inconsistent with the principle of legality, which the Appeals Chamber had underlined in the very same decision.³⁶ It was also a short-sighted solution, which failed to give due consideration to Mr. Bemba’s right to appeal the new sentence before different appellate judges, who would be unaware of the specific contours of the evidential record that the Appeals Chamber understood to apply to these proceedings. These errors would have been avoided if the Appeals Chamber had sent the case back to a different Trial Chamber for a new trial, as mandated by Article 83(2):

³¹ [ICC-01/05-01/13-2201-Red](#), paras. 131, 132.

³² [ICC-01/05-01/13-2201-Red](#), para. 131.

³³ [ICC-01/05-01/13-2276-Red](#), para. 60.

³⁴ [ICC-01/05-01/13-2276-Red](#), paras. 61, 62.

³⁵ [ICC-01/05-01/13-2123-Corr](#), paras. 223, 248.

³⁶ [ICC-01/05-01/13-2276-Red](#), paras. 77-80.

their correction now requires the Appeals Chamber to either exercise the fact finding powers of the Trial Chamber, or remit the case for a new trial before a different bench.

17. **Fourth**, although the Appeals Chamber clearly anticipated that the Trial Chamber would provide further elaboration concerning the concrete gravity of the false testimony of 14 witnesses, and the extent of Mr. Bemba's contribution, the Trial Chamber declined to do so. The Trial Chamber also continued to use its October 2016 findings as the reference point,³⁷ even though the Appeals Chamber had made important clarifications as concerns the foundation of Mr. Bemba's conviction and responsibility.³⁸ The ongoing lack of factual reasoning demonstrated the flawed nature of the remand to the same Trial Chamber, insofar as it failed to cure the original cause of the errors, which was the Trial Chamber's approach to evidence, and the related absence of detailed evidential reasoning manner in the October 2016 judgment.
18. **Fifth**, Mr. Bemba's acquittal in the Main case is a 'new fact',³⁹ and procedural development, which demonstrates that the evidential system in this case is not 'fit for purpose'. The absence of reasoned opinions concerning the relevance and weight of different items of evidence renders the system unable to handle changes being made to the factual matrix of the case in a legal forum other than Trial Chamber VII. The absence of a reasoned opinion also prevented, and continues to prevent the Defence from fully ascertaining the extent to which the Trial Chamber's factual findings concerning Mr. Bemba's nebulous role as the 'defendant' in the Main case were based on the perception that Mr. Bemba was guilty of the Main Case charges, and therefore must have known that any Defence witness testifying 'in favour' of Mr. Bemba was lying (Ground 2 of the Appeal).
19. **Sixth**, the Appeals Chamber's 2018 determination concerning the evidential system adopted by Trial Chamber VII was *backward-looking*, rather than *forward-looking*: the Appeals Chamber found that the system – up until that point – was not incompatible

³⁷ [ICC-01/05-01/13-2279](#), para. 31: "not only did he exercise influence over the witnesses through Kilolo, but Bemba also exerted direct influence over D-19 and D-55, with whom he illicitly spoke through the Registry's privileged line. The Appeals Chamber has confirmed these findings".

³⁸ [ICC-01/05-01/13-2275-Red](#), para. 155: the Trial Chamber's findings concerning Mr. Bemba's responsibility for the solicitation of false testimony "did not refer to witness D-19; rather, it found that Mr Bemba had asked and urged witnesses "through Mr Kilolo and Mr Mangenda".

³⁹ See ICTY, [Prosecutor v. Tadic](#), Decision in Motion for Review, 30 July 2002, IT-94-1, paras. 30-31; [ICC-01/04-01/07-3833](#), para. 2.

See also ICTR, [Prosecutor v. Barayagwiza](#), Decision on Review, 31 March 2000, Case No.:ICTR-97-19-AR72, para. 49, where the Appeals Chamber determined that a final judgment is "one which terminates the proceedings; only such a decision may be subject to review", and [Lubanga](#), [ICC-01/04-01/06-3121-Red](#), para. 61, where the ICC Appeals Chamber affirmed that any powers that apply to review proceedings, apply to appeals proceedings.

with Mr. Bemba's right to a fair trial,⁴⁰ but it did not mandate the continued use of this system for the remainder of this system and related record for any future proceedings, nor was it in a position to adjudicate issues of future prejudice. The 2018 determination does not, therefore, preclude the Appeals Chamber from ruling on the issue as to whether the evidential record, and related system of evidence was, for the period of 8 March 2018 onwards, consistent with Mr. Bemba's right to fair proceedings, and whether adequate safeguards were in place to ensure his overarching right to be heard, throughout the process.

3. Conclusion

20. Articles 81(2)(b), and Article 83(1) and (2) empower the Appeals Chamber to do justice in this case, and to confirm that the scope encompasses all issues set out in the Defence Appeal. If the Appeals Chamber accepts that the evidential record is manifestly deficient – that it is not fit for purpose within the context of the procedural developments in this case – the Appeals Chamber should overturn the record itself, and the related conviction and sentence, due to the fundamental violation of Mr. Bemba's right to be heard, and to participate effectively in the proceedings as a whole. The relief, in the alternative, would be to either tailor the appellate scrutiny of these factual findings to the degree of reasoning (that is, to conduct a *de novo* review on appeal, as allowed by Article 81(2)(b)), or, to subject the factual allegations to the first instance scrutiny of a Chamber other than Trial Chamber VII (as allowed by Article 83(2)(b)).



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Dated this 15th day of July 2019

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⁴⁰ [ICC-01/05-01/13-2275-Red](#), para. 628.