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Date: **19/01/2018**

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

Public Redacted Version of "Appellant's submissions further to the appeal hearing"

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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A. PROCEDURAL HISTORY

1. Between 9 and 11 January 2018, the Appeals Chamber conducted oral hearings in the present case.[1] At the conclusion of the hearing, the Presiding Judge invited the parties to make additional written submissions not exceeding 15 pages in length by Friday, 19 January 2018.[2] Pursuant to that invitation, Mr. Bemba files the following observations.

B. SUBMISSIONS

i. Group A - Preliminary issues

2. During questioning which followed the Group A submissions, Her Honour Judge Van den Wyngaert asked: "Mr Haynes, you have mentioned two *ex parte* meetings of P-178 with the presence of the Prosecution and the victims but not of your client. There was one meeting where Judge Steiner asked questions based on the Facebook page of P-178 and then there was this other meeting where you say that the answers that P-178 gave to the Chamber were wrong or false."[3]

3. Counsel responded that "[t]he examination upon a Facebook page, the reference is T-260-CONF English, and that's 23 October 2012."[4] To clarify, this refers to the examination by Her Honour Judge Steiner of D64 on his (purported) Facebook page. Judge Steiner did not examine any Prosecution witnesses on their social media pages, or indeed any information from documents not disclosed to the parties, or not forming part of the case file.

4. Her Honour did, however, seek to impugn the testimony of both D64 and D55 on the basis of information contained in confidential VWU reports which were not disclosed to the Defence,[5] including D64's purported Facebook page, dismissing a contemporaneous objection.[6]

5. Following this incident, the Defence seised the Trial Chamber with a request for disclosure of the materials used by the Presiding Judge to examine its witnesses.[7] The Trial Chamber confirmed that the materials, including the existence of the alleged Facebook page, had been provided to the Chamber in an internal VWU Security Assessment Report. The Defence was

[1] T-372-CONF-ENG.
[2] T-374-ENG, 88:18-25.
[3] T-372-CONF-ENG, 26:25-27:4.
[4] T-372-CONF-ENG, 27:15-16.
[5] T-260-CONF-ENG, 31:21-36:3, 37:5-38:8; T-265-CONF-ENG, 63:18-64:10.
[6] T-260-CONF-ENG, 33:24-36:2.
[7] ICC-01/05-01/08-2491-Conf.

informed that the reports had been provided in relation to D64 and D55, and also D51 and D57.[8]

6. The Trial Chamber said that the VWU Security Assessment Reports had been transmitted to the Chamber "in error".[9] This was contradicted by VWU, who said that they would have been transmitted after a request from the Chamber.[10] Regardless of which account is accurate, the Trial Chamber was given information provided by four Defence witnesses, in confidence, to VWU. Rather than returning this information to VWU and informing the parties of the error, the Presiding Judge used this material to attempt to impeach Defence witnesses.

7. When it was drawn to her attention that she was using material that had not been disclosed to the Defence, Her Honour responded that "we could just say that Facebook is a public site in which everyone could consult Facebook and find the information one wants to have […] the Judges of the Chamber […] are truth finders. We are allowed to put to the witness whatever questions we deem necessary in order to help the Chamber in finding the truth. So the Chamber is not bound by the documents of the case file…".[11]

8. For the Presiding Judge, it was legitimate to question Defence witnesses on confidential information unknown to the Defence, and on the basis that it existed on Facebook. The subsequent acknowledgement by the Trial Chamber that its possession of this information was an error (although laid at the feet of VWU staff) cannot circumvent what this incident reveals about the Presiding Judge's approach to trial procedure, rules of evidence in criminal proceedings, and the rights of an accused. It has a direct bearing on the deference to be accorded to the Trial Chamber's approach to evidence, and admissibility. The Trial Chamber relied on none of the witnesses for whom the VWU reports had been erroneously shared.

9. As regards the *ex parte* status conference, held during the testimony of P178, further clarification is also warranted. Firstly, the Appellant's position as to where "the line is crossed" in the conduct of *ex parte* proceedings does not exclude the possibility of one party engaging with the Chamber in discussion of administrative matters such as court scheduling and the practical aspects of witness attendance. However, discussions of the merits of the case, the credibility of evidence or the raising of matters prejudicial to the accused should

[8] ICC-01/05-01/08-2588, para. 2.
[9] ICC-01/05-01/08-2588, paras. 2, 7, 13, 23.
[10] ICC-01/05-01/08-2491-Red, para. 7.
[11] T-260-CONF-ENG, 34:7-9, 35:14-17.

never take place *ex parte*. Neither should a party take advantage of apparently administrative hearings to signpost such issues to the Chamber.

10. Turning then to P178,[12] as far as the Defence is aware, this witness has received [REDACTED] as a result of his testimony.[13] He was at the heart of a scheme to extort more money from the ICC, having (by his own admission) [REDACTED],[14] [REDACTED] in an attempt to secure payments allegedly promised to Prosecution witnesses.[15]

11. The Prosecution claims that the purpose of the *ex parte* status conference held during P178's testimony "was to hear P-178's concerns about his security and well-being. It was limited to that."[16] P178's testimony during the *ex parte* status conference was given under oath. He recounted a story, lasting for 20 uninterrupted pages of transcript, during which detailed [REDACTED]. He lays these threats [REDACTED].[17] On this point, the Appellant recalls the practice at the ICTY, referenced in his appeal brief, of drawing such allegations promptly to the attention of the Defence in order for them to be addressed.[18]

12. In addition to these purported security concerns, P178 also testified that [REDACTED];[19] that [REDACTED],[20] and that [REDACTED].[21] A further subtext is the suggestion that the matters he claimed had been distressing him[22] may in some way explain the manner and demeanor of his *inter partes* evidence up to that point.[23]

13. The testimony that P178 personally [REDACTED], given under oath, was not subject to cross-examination. The Trial Chamber went on to accept his (*inter partes*) testimony that he never saw crimes being committed.[24] The claim concerning [REDACTED] also went unchallenged. This allegation is, of course, factually impossible. After VWU examined

[12] *See* question posed by Judge Van den Wyngaert at T- T-372-CONF-ENG, 27:6-7: "[…] can you tell us what these problematic answers were that you are thinking of?"
[13] ICC-01/05-01/08-2912-Conf-AnxD, pp. 2-3.
[14] ICC-01/05-01/08-3190-Conf, para. 5.
[15] ICC-01/05-01/08-1660-Conf-Anx1-Red2. *See also* ICC-01/05-01/08-3138-Conf-AnxA. Details of P178's blackmail, threats, exaggerated financial claims and willingness to reveal protected information for financial gain form part of Mr. Bemba's submissions on appeal, *see* ICC-01/05-01/08-3434-Conf, paras. 494-520.
[16] T-372-CONF-ENG, 28:21-22.
[17] T-155-CONF-Red2-ENG, 21:24-25.
[18] ICC-01/05-01/08-3434-Conf, paras. 79-84.
[19] T-155-CONF-Red2-ENG, 20:4-5.
[20] T-155-CONF-Red2-ENG, 22:2.
[21] T-155-CONF-Red2-ENG, 20:11-12.
[22] T-155-CONF-Red2-ENG, 24:8, 24:14-25.
[23] ICC-01/05-01/08-Conf-3121, paras. 126-135.
[24] Judgement, para. 327.

P178's [REDACTED], it was revealed that his testimony at this status conference concerning [REDACTED] was also inaccurate.[25] By November 2014, P178 admitted to VWU that "[REDACTED]".[26]

14. Notably, in the 20 pages of transcript, P178 makes numerous references to [REDACTED].[27] He testified that he had been [REDACTED], but went on to insist that he didn't want [REDACTED].[28] It was later disclosed that the Prosecution [REDACTED],[29] [REDACTED]."[30] VWU had been concerned, however, that P178's claimed [REDACTED] was "unreaslistic".[31]

15. Following this *ex parte* testimony, the cross-examination of P178 by the Defence resumed. It concluded with the following exchange:[32]

> Q. … How much money, if applicable, did you get or do you expect to get in the context of your testimony?
>
> PRESIDING JUDGE STEINER: Maître Badibanga, you have the floor, **but I have already the answer to this question**.
>
> MR BADIBANGA: (Interpretation) Your Honour, yes. Of course we do object to these particularly insulting questions first of all in respect of the witness, whose integrity is being questioned on an imaginary basis and I really don't see any element that could possibly justify the position of the Defence. It is also very insulting towards the Office of the Prosecution […].
>
> PRESIDING JUDGE STEINER: Maître Badibanga, if there is any system to compensate the witness for the days the witness spent in The Hague, this is an issue that relates only to VWU and will be the same that will apply for the Defence witnesses when the Defence witnesses come. So the tone in which the question was posed to the witness is offensive and **the Chamber does not accept this kind of question.**

16. The Presiding Judge, having heard the sworn testimony in the *ex parte* status conference that the witness had indeed [REDACTED] two days prior, and was insisting on

[25] ICC-01/05-01/08-1816-Conf-Anx1-Red2, p. 12.
[26] ICC-01/05-01/08-3190-Conf, para. 8.
[27] T-155-CONF-Red2-ENG, 11:9-13, 13:19-20, 14:2-3, 16:23-24, 19:10-11, 21:12-20.
[28] T-155-CONF-Red2-ENG, 19:10-11, 20:23-24.
[29] ICC-01/05-01/08-2912-Conf-AnxD, p. 3.
[30] ICC-01/05-01/08-2912-Conf-AnxD, p. 3.
[31] ICC-01/05-01/08-2912-Conf-AnxD, p. 4.
[32] T-157-CONF-ENG, 53:11-54:5 (emphasis added).

[REDACTED], prevented this line of questioning. No opportunity was given to the Defence to provide an explanation or basis for the questions, she "already ha[d] the answer".[33] The testimony given *ex parte* the previous day would necessarily have provided this basis.

17. Had these questions been allowed, P178 would have either denied [REDACTED] (and thereby perjured himself), or confirmed that he had done so. Either answer would have had a bearing on his credibility, and thus was materially relevant for the Defence. The Trial Chamber allowed neither option to materialize.

18. Her Honour went on routinely to permit the Prosecution to examine Defence witnesses on whether they received benefits in exchange for their testimony.[34] The double-standard was pointed out, and dismissed.[35] The Trial Chamber also went on to rely on P178's testimony to make key findings adverse to Mr. Bemba. He was the sole witness relied upon concerning findings as to the MLC's alleged conduct in Mongoumba,[36] and matters deemed relevant to the MLC's organizational policy.[37] His testimony was relied upon to "authenticate" records of Thuraya numbers belonging to Mr. Bemba and Colonel Moustapha;[38] to determine that Mr. Bemba sometimes issued orders directly to the units in the field;[39] to establish that Colonel Moustapha transmitted an order to his troops for a punitive operation against Mongoumba;[40] and to show that Mr Bemba took the decision and issued the order for the MLC troops to withdraw from the CAR;[41] central elements of the conviction, all of which are challenged on appeal. In none of these findings did the Trial Chamber indicate that its reliance was subject to any level of caution. A request for P178's recall was denied.[42]

ii. Group B - Issues relating to the Second Ground of the appeal

19. Underlying criminal acts are indispensable to a conviction and must be proved beyond reasonable doubt. The Prosecution's assertion that "[t]he individual acts of murder, rape and pillaging were subsidiary facts or evidence - and the Trial Chamber did not need to enter

[33] T-157-CONF-ENG, 53:13-14.
[34] T-322-CONF-ENG, 26:6–27:9; T-323bis-CONF-ENG, 21:22-23; T-334-CONF-ENG, 17:23-25; T-335-CONF-ENG, 19:8-13; T-337-CONF-ENG, 40:3-6, 13-20; T-339-CONF-ENG, 41:18-19; T-342-CONF-ENG, 13:1-10; T-345-CONF-ENG, 12:4-15:6.
[35] T-277-CONF-ENG, 33:21-35:20, 37:3-38:4. *See also* ICC-01/05-01/08-3239-Conf-Exp, para. 40, ICC-01/05-01/08-3255, para. 110.
[36] Judgment, para. 543, fn. 1652, para. 568, fns. 1766-1767.
[37] Judgment, para. 564, fn. 1744. *See also*, para. 671, fn. 2095.
[38] Judgment, para. 420, fn. 1150.
[39] Judgment, para. 427, fn. 1185.
[40] Judgment, paras. 539-543, fns. 1637-1641, 1651-1653.
[41] Judgment, para. 555, fn. 1702.
[42] ICC-01/05-01/08-3186-Conf. *See also* ICC-01/05-01/08-3192-Conf; ICC-01/05-01/08-3204-Conf.

findings beyond reasonable doubt in relation to each of them" does not withstand scrutiny.[43] It also contradicts the Prosecution's approach in *Gbagbo*.

20. Underlying criminal acts are "facts which are indispensable for entering a conviction" and, thus, must be established beyond reasonable doubt.[44] This is a matter of common sense. If no individual act of murder, rape or pillage can be established, then an accused cannot be convicted of the relevant crime. It is also the position which was essentially advanced by the Prosecution in the pre-trial phase of the *Gbagbo* case.

21. In *Gbagbo*, the Prosecution recognised that it had to establish the existence of a widespread or systematic attack against the civilian population by reference to a number of specific incidents pleaded in the DCC, the dispute being the number of incidents which had to be established to the requisite standard. Given their indispensable nature to proving the "attack" element, the Prosecution acknowledged that the four incidents it sought to rely on were "material facts"[45] and argued that these incidents alone (rather than 41 others which were classed as "subsidiary facts") required to be established to the Article 61(7) standard.[46]

22. The *Gbagbo* "incidents" clearly equate to underlying acts in the present case. Therefore, underlying acts, as "material facts", would: (i) be indispensable to securing a conviction; (ii) require to be properly pleaded and confirmed to form part of the charges for trial; and (iii) require to be proved beyond reasonable doubt. The Prosecution's position to the contrary in the present case must be rejected.

23. Moreover, a Trial Chamber has no power to amend the factual allegations comprising the charges confirmed by the Pre-Trial Chamber.[47] To find otherwise would be to ignore the plain wording of the Statute, "confer upon [the Trial Chamber] a power not bestowed by the

[43] T-372-CONF-ENG, 55:4-6.
[44] ICC-01/04-02/12-3, para. 35.
[45] ICC-02/11-01/11-474, para. 18.
[46] ICC-02/11-01/11-474, para. 39.
[47] *See* questions posed by Judge Eboe-Osuji at T-372-CONF-ENG, 79:3-9: "By the time the case goes to court, to the Trial Chamber, the Pre-Trial Chamber would have confirmed the charges; and if the idea of confirmation is to ensure that people are not sent to trial on flimsy cases, what would be the point of then sending a case back to the Pre-Trial Chamber after the indictment had already been confirmed and the case is before the Trial Chamber? What value is added to the process of justice by sending the case back to the Pre-Trial Chamber to confirm a case that is already before the Trial Chamber?" and 81:1-3: "Now, is there not a process before the Trial Chamber, or is the process before the Trial Chamber necessarily less fair for purposes of amending an indictment?"

core legal texts"[48] and fatally undermine the role of the Pre-Trial Chamber during the pre-trial phase of proceedings.

24. In addition to ensuring "that people are not sent to trial on flimsy cases",[49] "one of the fundamental reasons for the existence of the Pre-Trial Chamber […] is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused."[50] To this end, changes to the confirmed charges can only be made in limited circumstances. Before the start of trial, amendments can be made with the permission of the Pre-Trial Chamber pursuant to Article 61(9). Once trial has commenced, the only changes which are permitted are to the legal characterisation of the charges under Regulation 55 of the Regulations of the Court[51] or a withdrawal of the charges by the Prosecutor under Article 61(9). No power is provided to the Trial Chamber at any point in the Court's legal texts to amend the factual parameters of the trial.

25. The fact that "defining the parameters of the trial lies solely in the hands of the PTC"[52] is underlined by the terms of Article 61(11). While the Trial Chamber constituted by the Presidency following the confirmation of charges "may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings", its powers are not unlimited and are expressly stated to be "subject to paragraph 9".[53] Thus, the power to amend the charges in the period prior to the start of the trial categorically remains with the Pre-Trial Chamber and is not transferred to the Trial Chamber. If this power does not transfer prior to trial, it cannot fairly and reasonably be said to transfer after the start of trial, else the requirement of certainty would be rendered nugatory. More fundamentally, if new "factual allegation[s] which [are to be used to] support[] […] the legal elements of the crime charged"[54] can be added after confirmation without the permission of the Pre-Trial Chamber, such a process "would […] render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to

[48] ICC-01/04-01/07-1547-tENG, para. 19.
[49] T-372-CONF-ENG, 79:5.
[50] ICC-01/04-01/07-1547-tENG, para. 22. This ensures the satisfaction of the accused's fair trial right "to be informed promptly and in detail of the nature, cause and content of the charge" (Rome Statute, Article 67(1)(a)).
[51] Regulation 55(1) expressly states that the factual parameters of the case cannot be changed through its operation ("[…] the Chamber may change the legal characterisation of facts […] without exceeding the facts and circumstances described in the charges and any amendments to the charges").
[52] Schabas, W., Chaitidou, E., El Zeidy, M., "Article 61", in Triffterer, O. and Ambos, K. (eds), *Commentary on the Rome Statute of the International Criminal Court* (2016), p. 1549.
[53] Rome Statute, Article 61(11).
[54] ICC-01/04-01/06-2205, fn. 163.

hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence."[55]

26. Crucially, the Court's legal framework means a power to amend the charges should not be required by a Trial Chamber. The Prosecution's "investigation should largely be completed at the stage of the confirmation of charges hearing",[56] with any subsequent amendment required during what is supposed to be the relatively short period between confirmation and trial being dealt with by the Pre-Trial Chamber *via* Article 61(9). Moreover, a "trial-ready" prosecution means that an accused should not face any realistic risk of subsequent trials.[57]

iii. Group D - Further issues relating to the Third Ground of appeal

27. Several references were made, during questioning from the bench, to the post-World War II High Command case, at Nuremberg.[58] The United Nations War Crimes Commission observed in relation to that case that just as a commanding officer has wide responsibility under international law, so also he is allowed considerable latitude in the ways in which he fulfills those responsibilities.[59]

28. In light of the facts at bar, the relevant rules of the ICRC Customary Law Study[60] recognise that the commander is permitted a broad range of discretion with regard to the timing and specific contents of measures taken in response to receipt of information related to alleged wrongdoing by forces under his or her effective control. In particular, there is no mention of any duty to withdraw in the ICRC Customary Law Study, nor does it provide affirmative authority from state practice for disregarding the actual steps taken by commanders based upon judicial inferences. The Trial Chamber's implicit finding that a commander's necessary and reasonable measures are entitled to evidentiary weight only when buttressed by evidence that he or she acted with meritorious or commendable motives is unwarranted by state practice and unsupportable in practice.

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[55] ICC-01/04-01/07-1547-tENG, para. 23.
[56] ICC-01/04-01/10-514 OA4, para. 44 citing to ICC-01/04-01/06-568 OA3, para. 54.
[57] T-372-CONF-ENG, 88:22-89:3: "JUDGE EBOE-OSUJI: […] There may be the possibility that the Prosecution can come back with trial on facts subsequently discovered which could have been added to an ongoing trial but weren't. So at the end of a trial, a second trial, or even more, are commenced against the same accused person, is it to the advantage of an accused, given that sort of scenario, to see a difficult regime for amendment of the indictment post-confirmation, or is it more advantageous for the accused to say, "Bring it on as early as possible. We can take out these charges and get on with it"?".
[58] T-373-ENG, 10:4-14, 52:23-53:3.
[59] The German High Command Trial, *Trial of Wilhelm Von Leeb and Thirteen Other*s, United States Military Tribunal, Nuremberg, Case No. 72, 30th December, 1947-28th October, 1948, p. 110, available at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf, last accessed 19 January 2018.
[60] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule153.

iv. Group E - Issues relating to the Fourth Ground of Mr Bemba's appeal

29. The debate concerning the propriety of the Trial Chamber's reliance on NGO reports, press articles, procès-verbaux, and anonymous hearsay, to find the contextual elements of crimes against humanity,[61] overlooked an important point.

30. Most of the documentary evidence relied upon in footnote 1736, was admitted by the Trial Chamber after the close of the Defence case. As such, it was effectively unchallenged at trial. The assertion, moreover, that deference is due to the Trial Chamber's reliance on this material because of its concurrent assessment of its correlation to oral evidence is unpersuasive.

31. The Defence was ordered to complete the presentation of its evidence by 15 November 2013.[62] The last Defence witness finished his testimony on 14 November 2013.[63] Over half of the documents relied upon in footnote 1736 were admitted between February and April 2014, up to five months later.[64]

32. The delayed admission of inculpatory evidence was a consequence of the Trial Chamber's mismanagement of the evidential record, dating back to 19 November 2010. Three days before the trial began, the Majority of the Trial Chamber ruled that all documents contained on the Prosecution's list of evidence were *prima facie* admissible, by virtue of their appearance on this list.[65] Both parties sought leave to appeal the Majority's decision.[66] On 3 May 2011, the Appeals Chamber held that the Majority had acted outside the legal framework of the court, and had put in place a system which was incompatible with the principle of orality established by article 69(2) of the Statute.[67]

33. The proceedings continued with no direction as to the procedure for the admission of evidence. Following a request from the Defence as to guidance, the Trial Chamber directed the parties "not to tender, or to request the tendering, of any document or materials into

[61] T-374, 56:10-67:25, 68 :25-72 :2.
[62] ICC-01/05/-01/08-2865-Red, paras. 12, 19.
[63] ICC-01/05-01/08-3343, para. 12.
[64] CAR-OTP-0013-0320, admitted on 17 February 2014 by Decision at ICC-01/05-01/08-2981-Red, at para. 65; CAR-ICC-0001-0102, CAR-OTP-0013-0052, CAR-OTP-0013-0113, CAR-OTP-0013-0090, admitted on 17 March 2014 by Decision ICC-01/05-01/08-3019-Red, at para. 89; CAR-OTP- 0013-0098 and CAR-OTP- 0036-0041, admitted on 07 April 2014 by Decision ICC-01/05-01/08-3034-Red, at para. 161.
[65] ICC-01/05-01/08-1022, para. 35.
[66] ICC-01/05-01/08-1059; ICC-01/05-01/08-1079.
[67] ICC-01/05-01/08-1386, paras. 1-3.

evidence until the moment the decision of the Chamber on the implementation of the Appeals Chamber judgment is issued."[68] The Defence suggested that that the proper procedure would be for the Trial Chamber to "review the items of evidence which each party seeks to tender at the conclusion of each witness′ evidence."[69] Thereby, as was the case at the *ad hoc*s, the record of the case would be settled at the end of each witness, with the parties having notice of which documents formed part of the case against the accused at any given time.

34. This approach was rejected. Instead, on 31 May 2011, the Trial Chamber put in place a wholly novel system for the admission of evidence, by which the parties were directed to "identify, on their respective lists of documents for each witness, which documents were intended to be submitted as evidence during the questioning of a witness".[70] The Trial Chamber undertook to rule on any objections that are raised to the admission of items as evidence "in due course."[71]

35. The number of objections to be ruled upon "in due course" quickly snowballed. It was not until nearly 12 months later, on 9 February 2012, that the Trial Chamber issued its first decision on the admission of evidence, and admitted 365 documents into the evidentiary record.[72] The second decision came 18 months later on 14 June 2013, nearly a year into the presentation of the Defence case.[73]

36. The Defence implored the Chamber to make timely decisions, highlighting on 22 April 2013 that the Accused was being "put in a difficult position in terms of presenting his defence" .[74] The Defence noted that:[75]

> Should the Chamber decide to admit a wealth of incriminating material on the Prosecution's request, fairness dictates that the accused be given notice of this admission in a manner which allows him to bring evidence to counter this material during the course of his defence case […] the Defence respectfully requests that the Chamber decides on all outstanding requests for the admission of documents as soon as possible.

[68] T-112-CONF-ENG, 14:22-24.
[69] T-112-CONF-ENG, 14:12-14.
[70] ICC-01/05-01/08-1470, paras. 7(a), (b).
[71] ICC-01/05-01/08-1470, para. 7(c).
[72] ICC-01/05-01/08-2012-Red.
[73] ICC-01/05-01/08-2688-Red.
[74] ICC-01/05-01/08-2590, paras. 14-16.
[75] ICC-01/05-01/08-2590, paras. 14-16.

37. No further decisions were forthcoming, and on 16 July 2013 the Trial Chamber ordered that the Defence would be required to complete the presentation of evidence by 25 October 2013.[76] As such, the Defence filed its *Defence Motion on outstanding decisions on the admission of evidence*,[77] noting that "the state and contents of the case file in the present proceedings is, to put it mildly, uncertain. Neither the parties nor the Accused have any way of knowing – for a significant proportion of the documents and materials presented during the case – which are in evidence, and which are not."[78] The fairness implications were highlighted:[79]

> Without a clear picture of the case against him (including which documentary materials ultimately form part of the evidence), the accused is put in an impossible position in terms of closing his defence, and preparing his Final Trial Brief submissions. It cannot be the case that the Chamber expects the accused to presume that his case includes all incriminating material for which admission has been sought, and present a defence against material not formally in the record, nor defend against these incriminating materials in a Final Trial Brief [...] The Defence submits that this issue has significant implications for the fairness of the proceedings […].

38. The third decision was not rendered until the eve of the close of the Defence case on 6 November 2013,[80] with the Trial Chamber deciding on the admission of an additional 124 documents. Further decisions were rendered in February, March and April 2014, in which the Chamber, *inter alia*, admitted the inculpatory extracts of "media reports" at the request of the Prosecution,[81] which were to form the backbone of footnote 1736.[82]

39. Any concern as to the probity of the materials relied upon in footnote 1736 should only be exacerbated by the means of their admission. The fact that the Defence had no opportunity

[76] ICC-01/05-01/08-2731, para. 38.
[77] ICC-01/05-01/08-2828.
[78] ICC-01/05-01/08-2828, para. 12.
[79] ICC-01/05-01/08-2828, para. 23.
[80] ICC-01/05-01/08-2864-Red.
[81] ICC-01/05-01/08-2981-Red, ICC-01/05-01/08-3019-Red, ICC-01/05-01/08-3034-Red.
[82] CAR-OTP-0013-0320, admitted on 17 February 2014 by Decision at ICC-01/05-01/08-2981-Conf, at para. 65; CAR-ICC-0001-0102, CAR-OTP-0013-0052, CAR-OTP-0013-0113, CAR-OTP-0013-0090, admitted on 17 March 2014 by Decision ICC-01/05-01/08-3019-Conf, at para. 89; CAR-OTP- 0013-0098 and CAR-OTP- 0036-0041, admitted on 07 April 2014 by Decision ICC-01/05-01/08-3034-Conf, at para. 161.

to challenge these "media reports" and NGO reports during the Defence case heightens their unreliability, and the Trial Chamber's error in relying on them.

v. Relevant issues arising in the appeals against sentence

40. During her submissions on sentence the Legal Representative of Victims asserted that "more than 10,000 victims" had applied to participate in the proceedings.[83] This was news to the Appellant. Like Defence Counsel, the LRV is "an officer of the Court"[84] and subject to the *Code of Conduct for Counsel*[85] which includes, *inter alia*, a duty not actively to deceive or mislead the Chamber.[86] Accordingly, the Appellant can only accept that the LRV's submissions were made on a good faith basis and upon proper "evidence".

41. The victims' participation forms provided to the Defence were heavily redacted.[87] The majority of them were notified to the Defence during the trial process[88] at a time when the focus of the Defence team was upon evidentiary and legal matters rather than any root and branch review of the applications. On that basis, the Defence was able to make brief observations about applications which were noticeably outside the temporal and geographical limits of the DCC, attributed culpability to perpetrators other than the Appellant's subordinates, or were obviously excessive in their requests for compensation.[89]

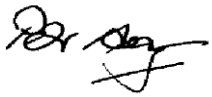
42. The *prima facie* test applied by the Pre-Trial Chamber and Trial Chamber for the acceptance of an application was simply that (i) the applicant was a natural or legal person; (ii) the applicant suffered harm; (iii) the events described by the applicant constituted a crime within the Court's jurisdiction with which the accused was charged; and (iv) there was a link between the harm suffered and the crimes charged in the case.[90] Proof of such matters required only basic information to be included in the form.[91] The LRV's most recent

[83] T-374-ENG, 104:16-17.
[84] T-374-ENG, 41:15-16.
[85] Code of Professional Conduct for counsel, Article 1.
[86] Code of Professional Conduct for counsel, Article 24, para. 3.
[87] Even the Prosecution observed that the extent of the redactions made it impossible sensibly to comment on many of them. *See e.g*. ICC-01/05-01/08-1017, para. 19.
[88] The redacted versions of applications to participate in the proceedings were filed between 10 December 2009 and 5 April 2012: ICC-01/05-01/08-707-Conf-Exp-Corr; ICC-01/05-01/08-824-Conf-Exp; ICC-01/05-01/08-903; ICC-01/05-01/08-914; ICC-01/05-01/08-933; ICC-01/05-01/08-937; ICC-01/05-01/08-955; ICC-01/05-01/08-982; ICC-01/05-01/08-1382; ICC-01/05-01/08-1560; ICC-01/05-01/08-1605; ICC-01/05-01/08-1724; ICC-01/05-01/08-1807; ICC-01/05-01/08-1855; ICC-01/05-01/08-1885; ICC-01/05-01/08-1923; ICC-01/05-01/08-1958; ICC-01/05-01-08-1979; ICC-01/05-01/08-2018; ICC-01/05-01/08-2042; ICC-01/05-01/08-2074; ICC-01/05-01/08-2131; ICC-01/05-01/08-2156; and ICC-01/05-01/08-2186.
[89] *See e.g* ICC-01/05-01/08-1017, paras. 24-35.
[90] ICC-01/05-01/08-1017, para. 38; *see also* ICC-01/05-01/08-3343, para. 20.
[91] ICC-01/05-01/08-1017, para. 39.

submissions reveal that something like 50% of those applications were either deemed incapable of submission (it has to be assumed that they were screened by OPCV/VPRS and the LRV) or did not survive a cursory examination **by the relevant Chamber**.

43. The Appellant respectfully reminds the Chamber of his submissions on the practices of NGOs and intermediaries in the solicitation of applications;[92] the practice of "intermediaries" completing false application forms;[93] and the testimony that "intermediaries" encouraged Central Africans to invent incidents of rape and exaggerate economic claims in order to "eat more of the cake".[94] This new "evidence" in the form of the LRV submissions only serves to underline his existing contention that the process was riven with fraud. The Chamber should have little or no regard to the existence of these forms in the determination of any issue.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 19 January 2018[95]

[92] *See*, *e.g* ICC-01/05-01/08-3121-Conf, paras. 220-227; ICC-01/05-01/08-3200-Conf, paras. 53, 70; ICC-01/05-01/08-3434-Conf, paras. 499, 504, 508 and fn. 969. [REDACTED] helped witnesses to fill in false application: T-76-Conf-ENG, 7:13-16:7; 23:14-24:17, and is known as "[REDACTED]" and had had multiple interactions with victim-applicants, including people who had been admitted to participate, ICC-01/05-01/08-1478-Conf.
[93] ICC-01/05-01/08-3434-Conf, paras. 504, 508, fn. 969. See also, ICC-01/05-01/08-3121-Conf, paras. 223-227,
[94] T-73-CONF-ENG, 19:24-25.
[95] This submission complies with Regulation 36 of the Regulations of the Court, and the direction of the Presiding Judge that it should not exceed 15 pages in length: T-374-ENG, 88:24-25.