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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

Aimé Kilolo Musamba's Response to "Prosecution Detailed Notice of Additional Sentencing Submissions" ICC-01/05-01/13-2296

Source: Counsel for Aimé Kilolo Musamba

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

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The Backdrop

1. On 8 March 2018, the Appeals Chamber confirmed most of the convictions,[1] reversed the sentences imposed on Messrs. Bemba, Kilolo, and Mangenda, and remanded the case to the Trial Chamber for resentencing.[2] The Parties were invited to make written submissions,[3] which they did,[4] with Mr. Kilolo further seeking oral arguments.[5] Subsequent to the filings, the Prosecution sought leave to reply.[6]

2. On 8 June 2018, the Appeals Chamber in the *Bemba* Main Case reversed Trial Chamber III's Conviction Decision and acquitted Mr. Bemba.[7] The Appeals Chamber split three to two: Judges Christine Van den Wyngaert, Chile Eboe-Osuji, and Howard Morrison (the Majority) issued separate opinions on some aspects of the appeal;[8] Judges Sanji Mmasenono Monageng and Piotr Hofmański (the Minority) issued a joint dissenting opinion.[9]

3. On 12 June 2018, prompted by Mr. Bemba's acquittal in the *Bemba* Main Case, the Trial Chamber convened an urgent status conference concerning Mr. Bemba's provisional release pending its resentencing decision.[10] During the status conference the Trial Chamber denied the Prosecution's leave to reply, decided that no further written submissions were necessary,[11] and granted Mr. Kilolo's request for oral arguments – scheduled for 4 July 2018.[12]

4. On 13 June 2018, Madam Prosecutor Fatou Bensouda issued a public statement, criticizing the Majority for departing "from the traditional model of appellate review of factual errors," replacing it "with new, uncertain and untested standards," and for departing "from the Appeals Chamber's previous jurisprudence, as well as

[1] ICC-01/05-01/13-2275-Red.
[2] ICC-01/05-01/13-2276, para. 362.
[3] ICC-01/05-01/13-2277.
[4] ICC-01/05-01/13-2279, ICC-01/05-01/13-2280-Red-Corr, ICC-01/05-01/13-2281-Red, ICC-01/05-01/13-2282-Corr-Red.
[5] ICC-01/05-01/13-2282-Corr-Red, para. 50.
[6] ICC-01/05-01/13-2283.
[7] ICC-01/05-01/08-3636-Red.
[8] Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2; Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-1/08-3636-Anx3.
[9] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, ICC-01/05-01/08-3636-Anx1-Red.
[10] ICC-01/05-01/13-2288.
[11] ICC-01/05-01/13-T-58-ENG, p. 5, ll. 14-17.
[12] ICC-01/05-01/13-T-58-ENG, p. 5, ll. 18-23.

international practice, in relation to the manner in which the Prosecution ought to charge cases involving mass criminality." She claimed that "[i]n the end, Mr. Bemba was acquitted because a majority of the Appeals Chamber found that the Trial Chamber's conclusion that Mr. Bemba had failed to take all necessary and reasonable measures to prevent or punish the crimes committed by his subordinates was materially affected by errors."[13] Madam Prosecutor neither claimed nor surmised that Mr. Bemba's acquittal was attributed to or influenced by the testimony or evidence presented by the 14 witnesses whom the Trial Chamber in this case had found to have been corruptly influenced ("14 Corrupted Witnesses").[14]

5. On 14 June 2018, ICC President Eboe-Osuji publicly responded to Madam Prosecutor. President Eboe-Osuji recalled and underscored what should have been obvious to Madam Prosecutor: "all judgments and decisions … are taken in accordance with the fundamental principle of judicial independence, consistently with the solemn undertaking of each judge to perform his or her duties 'honourably, faithfully, impartially and conscientiously,'" adding, "[w]hen judges acquit or convict, it is because those core principles direct them to do so."[15]

The Notice

6. On 2 July 2018, late afternoon, the Defence was noticed of the Prosecution Detailed Notice of Additional Sentencing Submissions ("Detailed Notice").[16] The Prosecution claimed the surfacing of a "new fact" warranting an increase in sentences: Mr. Bemba's acquittal – which "at least to a *discernible* extent, result[ed] from, and predicated on" tainted evidence.[17]

7. The Prosecution's "new fact" is founded on its new claim that the entire *Bemba* Main Case evidentiary record was contaminated by the convicted persons who illicitly coached not only the 14 Corrupted Witnesses which were the basis for this case, "but

[13] *See* Statement of ICC Prosecutor Fatou Bensouda on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo (13 June 2018), *available at* https://www.icc-cpi.int//Pages/item.aspx?name=180613-OTP-stat, (last visited 19 July 2018).
[14] ICC-01/05-01/13-1989-Red.
[15] *See* Statement of the President of the Court in relation to the case of Mr Jean-Pierre Bemba Gombo (14 June 2018), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=180614-pres-stat, (last visited 19 July 2018).
[16] ICC-01/05-01/13-2296.
[17] ICC-01/05-01/13-2296, para. 4 (emphasis added).

many more."[18] As examples, the Prosecution named D-19 and D-48, whom the Trial Chamber in the *Bemba* Main Case found to be unreliable and decided to treat their evidence with "particular caution."[19] The Prosecution claims that the testimony of these witnesses was consistent with the testimony of the 14 Corrupted Witnesses, and as such, it *must* follow that these witnesses played an important role in the Majority's decision to overturn Mr. Bemba's conviction.[20]

8. The Prosecution now claims that the "scripted" testimony of the two "tainted witnesses" (D-19 and D-48) and four other Corrupted Witnesses (D-13, D-15, D-25, and D-54) was in line with the Majority's finding of errors regarding the Trial Chamber's conclusion that Mr. Bemba failed to take all necessary and reasonable measures.[21] Despite the absence of any such indication in the judgment, the Prosecution claims that the Majority *must have* "tacitly accept[ed] the narrative advanced by scripted and tainted Defence witnesses," premised its conclusions on their false testimony, and made the findings of errors, leading to the reversal of Mr. Bemba's conviction and his acquittal.[22]

9. Though not claiming that the Majority relied on, referred to, or cited the testimony of witnesses D-13, D-15, D-19, D-25, D-54,[23] the Prosecution concedes, as it must (albeit grudgingly) that the Majority found a number of other errors in the Trial Chamber's analysis, ultimately resulting in Mr. Bemba's acquittal.[24] Remarkably, the Prosecution professed these other errors (which, incidentally were the basis for the reversal of Mr. Bemba's conviction) to be "of no moment"[25] – in a stark contrast to Madam Prosecutor's public pronouncements.

The Hearing

10. During the oral hearing of 4 July 2018, the Prosecution recited the substance of its Detailed Notice.[26] Mr. Kweku Vanderpuye, appearing for the Prosecution, argued that the convicted persons successfully accomplished their ultimate goal of having Mr.

[18] ICC-01/05-01/13-2296, para. 2.
[19] ICC-01/05-01/08-3343, paras. 360, 448.
[20] ICC-01/05-01/13-2296, para. 4.
[21] ICC-01/05-01/13-2296, paras. 6, 7.
[22] ICC-01/05-01/13-2296, para. 7.
[23] ICC-01/05-01/13-2296, paras. 18, 24, 29, 32, 37, 40.
[24] ICC-01/05-01/13-2296, paras. 5, 46; *see also* ICC-01/05-01/13-T-59-ENG, p. 18, ll. 5-13.
[25] ICC-01/05-01/13-2296, para. 5.
[26] ICC-01/05-01/13-T-59-ENG, p. 14, ll. 18-25.

Bemba acquitted by unlawful means,[27] though luckily for the Trial Chamber, he argued, it serendipitously is afforded a "reprieve … to set things right once and for all."[28]

11. With nothing more than hyperbole and speculation, Mr. Vanderpuye emotionally declared that "the extent of the corruption [of the trial record] is not known to this day, and it could not have been known to either the Appeals Chamber or any other Chamber,"[29] but there was no real question that "the acquittal … was to a *discernible* extent affected by" the convicted persons' conduct.[30]

12. This prompted the following exchange.

Presiding Judge Bertram Schmitt:

> [D]oes the OTP submit before this Chamber that the Appeals Chamber majority in the Main Case relied on evidence that they knew was tainted when they acquitted Mr Bemba?[31]

Mr. Vanderpuye:

> That'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. [E]ven if the Appeals Chamber had some inkling of which witnesses had been corruptly influenced … then I can assure you they would have been wrong, because even within the judgment of this Trial Chamber, findings were made which demonstrated the corrupt influence of witnesses that weren't charged…. So it is entirely possible that if the Appeals Chamber relied on the finality of the convictions and the basis of the convictions in your judgment and in the Appeals Chamber's affirmation of that judgment, that they would have been wrong in the Bemba Main Case to discard or disregard 14 witnesses.[32]

Presiding Judge Schmitt:

> This is of course very hypothetical, frankly speaking.[33]

13. Mr. Vanderpuye did not go beyond his answer in any detail, though he does seem to insinuate that the Majority could have *knowingly* relied on false or tainted evidence –

[27] ICC-01/05-01/13-T-59-ENG, pp. 15-22.
[28] ICC-01/05-01/13-T-59-ENG, p. 17, ll. 24-25, p. 18, l. 1.
[29] ICC-01/05-01/13-T-59-ENG, p. 19, ll. 4-6.
[30] ICC-01/05-01/13-T-59-ENG, p. 23, ll. 1-5 (emphasis added).
[31] ICC-01/05-01/13-T-59-ENG, p. 23, ll. 16-19.
[32] ICC-01/05-01/13-T-59-ENG, p. 23, ll. 20-25; p. 24, ll. 1-6, 13-16.
[33] ICC-01/05-01/13-T-59-ENG, p. 24, ll. 17-18.

which, unquestionably, would be a violation of the judicial oath and wholly inappropriate in complying with and adhering to the judicial obligation to determine the truth.[34] Perhaps in the heat of the moment Mr. Vanderpuye failed to appreciate the full thrust of Presiding Judge Schmitt's question. Or perhaps, Mr. Vanderpuye wanted to imply the plausibility of the Majority *knowingly* relying on false evidence. Suffice it to say, other than conjecture, Mr. Vanderpuye provided no evidence for his outrageous assertions. Nor did he claim that the plausibility could be founded on any part of the trial or appeal record where either the Parties or the Chambers expressly (and knowingly) relied on false or tainted evidence.

The Rub

14. The Prosecution, yet again, is embarrassed and infuriated by the final outcome of a case it brought to trial. After ten years of proceedings, hundreds of submissions (oral and written), roughly 48 months of trial, 77 witnesses, 733 admitted items of evidence, 1219 written trial decisions and orders,[35] the Office of the Prosecutor was found, in no small measure, to have been responsible for the reversal of Mr. Bemba's conviction and his acquittal. A stinging indictment that arguably calls into question the Prosecution's competence and judgment in charging individuals based on unsound and insufficient evidence, or worse yet, improperly arguing at the end of the trial for conviction on crimes that went beyond "the facts and circumstances described in the charges."[36] Is it any wonder that the Prosecution now seeks to scapegoat its own ineptitude by blaming the Majority and the convicted persons in the Article 70 Case for the reversal of Mr. Bemba's conviction and his acquittal in the *Bemba* Main Case?

[34] Rome Statute, Articles 64(6)(d) and 69(3); ICC Rules of Procedure and Evidence, Rule 140(2)(c); *see also* ICC-01/05-01/08-55, para. 11: "[T]he search for the truth is the principal goal of the Court as a whole."
[35] ICC-01/05-01/08-3343, para. 17: "Over the course of trial, the Chamber heard a total of 77 witnesses, including 40 witnesses called by the Prosecution, 34 witnesses called by the Defence, two witnesses called by the Legal Representatives of Victims ("Legal Representatives"), and one witness called by the Chamber. The Chamber also permitted three victims to present their views and concerns. The Chamber admitted a total of 733 items of evidence. Throughout the proceedings, the Chamber issued 1,219 written decisions, orders, notifications, and cooperation requests, and 277 oral decisions and orders."
[36] *See* ICC-01/05-01/08-3636-Red, paras. 104-10, 115, 116-19, where the Majority found that the Trial Chamber's convictions exceeded the "facts and circumstances" described in the charges. The Majority noted that "once the charges against Mr Bemba were confirmed and the Trial Chamber was seized of the case against him, the Prosecutor added, by means of disclosure and inclusion in auxiliary documents, criminal acts of murder, rape and pillage…. [A]dding any additional criminal acts of murder, rape and pillage would have required an amendment of charges, which, however, did not occur in the case at hand…. [G]iven the way in which the Prosecutor has pleaded the charges in the case at hand, [an amendment of the charges] was the only course of action that would have allowed additional criminal acts to enter the scope of the trial." *Id*., paras. 114-15.

15. The rub lies in the Majority's reasons for reversing Trial Chamber III's Conviction Decision. The inconvenient facts challenging the Prosecutor's new trial balloon, as found by the Majority, are that the Trial Chamber (a) erred by convicting Mr. Bemba of charges that fell outside the scope of the facts and circumstances described in the Prosecution's Document Containing the Charges, including the Amended version;[37] and (b) committed seven "serious errors"[38] in its assessment of the evidence as to whether Mr. Bemba took all necessary and reasonable measures to prevent and repress the crimes:

- by failing to appreciate Mr. Bemba's limitations in investigating and prosecuting crimes sending troops to a foreign country;[39]
- by ignoring Mr. Bemba's argument that he sent a letter to the CAR authorities before concluding that he had not referred the crimes to the CAR authorities for investigation;[40]
- by concluding that Mr. Bemba's motivations precluded him from taking the necessary and reasonable measures in good faith;[41]
- by faulting Mr. Bemba for any limitations and shortfalls in the mandate, execution, and/or results of the measures taken;[42]
- by finding that Mr. Bemba failed to empower other MLC officials to prosecute crimes in apparent contradiction to its own finding that other MLC officials exercised some disciplinary authority in the field;[43]
- by failing to give any indication of the approximate number of the crimes and their impact on what would encompass all necessary and reasonable measures;[44] and
- by considering the redeployment of MLC troops as a measure available to Mr. Bemba because such measure was never included in the charges to properly notify Mr. Bemba.[45]

[37] ICC-01/05-01/08-3636-Red, paras. 104-10, 115, 116-19.
[38] ICC-01/05-01/08-3636-Red, para. 166.
[39] ICC-01/05-01/08-3636-Red, paras. 171-73, 189.
[40] ICC-01/05-01/08-3636-Red, paras. 174-75, 189.
[41] ICC-01/05-01/08-3636-Red, paras. 176-79, 189.
[42] ICC-01/05-01/08-3636-Red, paras. 180-81, 189.
[43] ICC-01/05-01/08-3636-Red, paras. 182, 189.
[44] ICC-01/05-01/08-3636-Red, paras. 183-84, 189.
[45] ICC-01/05-01/08-3636-Red, paras. 185-88, 189.

16. None of these findings raise, implicate, or even suggest a whiff of the new theory the Prosecution now presses – that Mr. Bemba's acquittal in the Main Case was appreciably (and *discernibly*) caused by the Article 70 Case convicted persons' conduct.

17. The Prosecution claims "[t]he Majority suddenly and inexplicably departed from the well-established appellate standard of review for factual errors, and required substantiation, which have been applied for the past 20 years by all the *ad hoc* courts and tribunals."[46] Although the Prosecution did not elaborate any further, it obviously seeks solace in the Minority's opinion, relying on its (misguided) assertions that the Majority set aside the "conventional standard," replacing it with "a duty … to overturn findings which 'can reasonably be called into doubt.'"[47]

18. While the Prosecution may not be able to rest easy with the blame for the *Bemba* Main Case outcome laid upon it by the Majority, such umbrage does not allow for making up facts, disregarding the clear findings and reasoning of the Majority, or for asking *this* Chamber to do so. And, lest it go unsaid, the Prosecution's disquieting innuendo of foul play by the Majority evidenced by the characterization that it had "suddenly and inexplicably" departed from the ICC's standard of review, merits attention. There was no *sudden* or *inexplicable* departure – not if one were to carefully review the entire judgment, especially the concurring and separate opinions.

19. The Prosecution attempts to publicly acquit itself of any claims of incompetence, while germinating its thesis that the Majority, for untoward reasons, exonerated an obviously guilty Mr. Bemba and deprived the victims of their due justice in the Main Case. Word-choices and phrase-constructions matter, especially when the intended purpose (as one may conclude in this instance) is to allude to questionable motives, casting a dark and perverse shadow on the Majority. Difficult as it may be for the Prosecution to swallow the reversal of Mr. Bemba's conviction, and as hard as it obviously seems to be for the Prosecution to accept responsibility for its own

[46] ICC-01/05-01/13-2296, fn. 101.
[47] ICC-01/05-01/08-3636-Anx1-Red, paras. 9, 11; *see also* Madam Prosecutor's public statement endorsing the Minority's view, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo (13 June 2018), *available at* https://www.icc-cpi.int//Pages/item.aspx?name=180613-OTP-stat, (last visited 19 July 2018). For a brief response to Madam Prosecutor's (and others') critical assessment of the Standard of Review applied by the Majority *see* Michael G. Karnavas, *The Reversal of Bemba's Conviction: what went wrong or right?* 19 June 2018 *available at* http://michaelgkarnavas.net/blog/2018/06/19/bemba-reversal/, (last visited 19 July 2018).

shortcoming, it would be well served to be reminded, as President Eboe-Osuji did in his comprehensive Concurring Separate Opinion in quoting former ICC Judge, His Excellency Anthony T. A. Carmona SC:[48]

> *This perception that a conviction is an indication that the Court is doing its work, and that of an acquittal the reverse is true, must be disbanded. There is no such thing as an endemic right to a guilty verdict. The endemic right lies in a just verdict.*[49]

The "Reprieve"

20. The Prosecution claims that the Appeals Chamber's remand of this case for resentencing is a "reprieve for this Court,"[50] which gives the Trial Chamber a second chance to "set things right once and for all" by increasing the sentences of the convicted persons, thus, effectively, maligning the Majority's acquittal which they claim was "resulting from, and predicated on" the tainted evidence.[51]

21. The "reprieve" is a canard. It is nothing more than a desperate, transparent ploy by the Office of the Prosecutor to shift the blame for its own inadequacies, ineptitude, and prosecutorial overreach resulting in acquittal in the *Bemba* Main Case.

22. For all intents and purposes, the Prosecution, through its Detailed Notice and attendant oral submissions, provides the Trial Chamber with three untenable options that assuredly will result in violations of Mr. Kilolo's fair trial rights, were the Trial Chamber to indulge.

23. The first untenable option is for the Trial Chamber to do nothing more than to accept the Prosecution's claims of the supposed "new fact" that has come to light as a result of Mr. Bemba's acquittal.[52] This would entail accepting the Prosecution's claims as irrebuttable presumptions or proved facts, without any due process to Messrs. Bemba,

[48] President of the Republic of Trinidad and Tobago (2013-2018); former Judge of the International Criminal Court (2012-2013); former Judge of the High Court of Trinidad and Tobago (2004-2013); former Prosecution Appeals Counsel, International Criminal Tribunal for the former Yugoslavia (2001-2004).
[49] His Excellency Anthony T. A. Carmona SC, Address at the International Criminal Court's Inaugural Ceremony for the Opening of the Judicial Year 2018, 18 January 2018, Courtroom 1, International Criminal Court, The Hague, Netherlands, p. 12, as quoted by President Eboe-Osuji in Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-1/08-3636-Anx3, p. 3.
[50] ICC-01/05-01/13-T-59-ENG, p. 17, ll. 24-25.
[51] ICC-01/05-01/13-2296, para. 4.
[52] ICC-01/05-01/13-2296, para. 1.

Kilolo, and Mangenda, pronouncing them guilty for Mr. Bemba's acquittal in the *Bemba* Main Case and resentencing them accordingly.[53]

24. The second untenable option is for the Trial Chamber to conduct an independent assessment of the evidentiary record of the *Bemba* Main Case, review Trial Chamber III's Conviction Decision, assess the Appeals Chamber's analysis of Trial Chamber III's findings, revisit its final verdict, and replace it with its own. This would turn the Trial Chamber into a Third Instance Chamber – something that is not provided by the Rome Statute and any other legal texts of the Court.[54]

25. The third untenable option is to have a mini-trial, where the Trial Chamber takes evidence[55] relevant to the *Bemba* Main Case and the Article 70 Case. This would require the Trial Chamber to go outside the scope of the sentencing on remand and the scope of the charges in the Article 70 Case – impermissible under the legal framework of this Court and in violation of the convicted persons' fair trial rights, not least of which is their right to a trial without undue delay.[56]

26. Even if the Trial Chamber were in a position to act as a Third Instance Chamber or engage in a mini-trial, it still could not come to the conclusion the Prosecution urges. Here is why.

27. The Prosecution's claim is based on speculative and unsupported assertions, in flagrant disregard of all other inconvenient facts that do not fit in or simply undercut its line of arguments. Stripped to its essence (and taking into consideration the Prosecution's failure to appreciate the multiple errors found by the Majority), the Prosecution would have the Trial Chamber believe that – irrespective of any intervening causes – the false testimony of the 14 Corrupted Witnesses permeated the

[53] International Covenant on Civil and Political Rights, Article 14; Rome Statute, Article 67(1).
[54] There is no third instance of review at the International Criminal Court. The Rome Statute only provides for the revision of a conviction or sentence under Article 84 before the Appeals Chamber on the grounds that (a) new evidence has been discovered that was not available at the time of the trial and is sufficiently important to lead to a different verdict; (b) decisive evidence taken into account at trial was false, forged, or falsified; and (c) one or more judges committed an act of serious misconduct or breach of duty to justify his or her removal.
[55] For instance, under Article 64(6)(d) of the Rome Statute, the Trial Chamber "may, as necessary ... [o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties." Article 69(3) provides: "[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth." Rule 140(2)(c) gives the Trial Chamber the "right to question a witness before or after a witness is questioned by a participant." Article 64(6)(b) gives the Trial Chamber subpoena power to ensure the attendance and testimony of witnesses and the production of documents and other evidence.
[56] Rome Statute, Article 67(1)(c).

entire trial record, overwhelmed the other 63 witnesses and 733 admitted items of evidence and *caused* Mr. Bemba's acquittal.

28. Not only is this supposition unsupported by the evidence, it also defies the basic precepts of causation – cause and effect. Though applied in the context of command responsibility, Judge Eboe-Osuji's remarks on "causation" are instructive in exposing the vacuity of the Prosecution's claims about the "new fact" proving that Messrs. Bemba, Kilolo, and Mangenda were responsible for Mr. Bemba's acquittal:

> *Stripped down to its barest generalities, causation is a notion that describes the relationship between two events, in which the preceding event is said to have occasioned a subsequent one*. But, eminent philosophers ancient and modern—amongst them, Plato, Aristotle, St Thomas Aquinas, Thomas Hobbes, Spinoza, David Hume, Kant, John Stuart Mill, and Bertrand Russell—and their followers have struggled and quarrelled over the question of the degree of that relationship such as warrants its rational legitimacy in the chain of events. *The troubling questions include the following. Is the relationship deterministic (in the sense that the preceding event must have necessitated the subsequent event) or is it probabilistic? Is the relationship exclusive (in the sense that no other preceding event may also operate to stimulate the existence of the subsequent event) or merely conducive?*[57]

29. There is no "deterministic" or "exclusive" link or relationship between Mr. Bemba's acquittal and the conduct of the convicted persons in the Article 70 Case. The Majority did what the judicial oath obligates every appellate judge to do. Instead of conveniently ignoring serious flaws in the Trial Chamber's assessment of the evidence, rubber-stamping findings under the cover of giving "the margin of deference," the Majority went beyond the mere surface whenever it came across a factual finding lacking evidentiary basis and proper reasoning.[58]

30. The Majority assessed whether the Trial Chamber's factual findings were "clear and unassailable, both in terms of evidence and rationale."[59] The Majority saw it as its duty to intervene and overturn the findings that "can be reasonably called into doubt."[60] Judges Van den Wyngaert and Morrison poignantly explained: "[i]t is indeed incumbent upon a Trial Chamber to ensure that the evidentiary basis for its factual

[57] Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, para. 157 (internal citations omitted, emphasis added).
[58] ICC-01/05-01/08-3636-Red, paras. 2 and 3.
[59] ICC-01/05-01/08-3636-Red, para. 3.
[60] ICC-01/05-01/08-3636-Red, para. 3; *see also* Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, para. 5.

findings is set out 'fully,' which means that its reasons for making a particular finding must be clear, comprehensive and comprehensible."[61]

31. The Majority noted how "the Trial Chamber's preoccupation with Mr. Bemba's motivations appears to have colored its entire assessment of the measures that he took."[62] Echoing the Majority, Judge Eboe-Osuji elegantly observed:

> In short, in reviewing the evidential analysis in the Trial Judgment, I was struck by an uneasy, yet distinct, impression that literally every measure that the Appellant took was bound to provoke a riposte view as a shortcoming; even by way of adverse inference, with little or no effort made to eliminate reasonable inferences consistent with innocence. At times, limitations of the primary evidence in support of such adverse inferences were ignored. Many times, gaping holes were coped with logomachy.[63]

32. The Prosecution's claims that the false narrative of the "tainted" witnesses (D-19 and D-48) and the 14 Corrupted Witnesses was "tacitly accepted" by the Majority and "informed the decision to acquit"[64] are bogus. Neither the Majority, nor the dissents ever came close to suggesting such reliance and, as Mr. Vanderpuye reluctantly concedes, no one is "privy to what the Appeals Chamber relied on" in making the findings of errors.[65]

33. If the Prosecution had evidentiary grounds to believe that other witnesses such as D-19 and D-48 were corruptly influenced, the Prosecution would have included them in the Article 70 Case. Having failed to do so, it not only waives the claim, but reveals its recent concoction in the cauldron of the *Bemba* Main Case acquittal excuse-making.

34. Three Judges of the Appeals Chamber in the *Bemba* Main Case (Judges Monageng, Morrison, and Hofmański) were part of the very same Appeals Chamber in the Article 70 Case. These Judges not only upheld the convictions on most of the charges,[66] they were also deliberating in the *Bemba* Main Case – for some part at least – while also deliberating on the Article 70 Case. This further undermines the Prosecution's

[61] Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, para. 6.
[62] ICC-01/05-01/08-3636-Red, para. 178.
[63] Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, para. 18.
[64] ICC-01/05-01/13-T-59-ENG, p. 22, ll. 8-9; ICC-01/05-01/13-2296, para. 7.
[65] ICC-01/05-01/13-T-59-ENG, p. 23, ll. 16-22.
[66] ICC-01/05-01/13-2275-Red.

speculation that the Appeals Chamber might have been delusional about the Trial Chamber's finding that 14 Defence witnesses have been corruptly influenced.

35. The *Bemba* Main Case Defence in its appeal submissions did not rely upon the evidence of the 14 Corrupted Witnesses, which could have arguably exposed the Appeals Chamber to tainted evidence. The Majority does not refer or cite the evidence of the 14 Corrupted Witnesses. Needless to say, to knowingly rely on false evidence would be unethical for the lawyers,[67] as well as for the judges.[68] Remarkably, the Minority did not find, suggest, or imply that the Majority erroneously acquitted Mr. Bemba because of "tainted evidence" infiltrating its analysis.

36. The Prosecution attempts to divert the Trial Chamber's attention from the narrow purpose of the Appeals Chamber's remand for resentencing: to address the errors identified by the Appeals Chamber and to resentence the convicted persons accordingly. The Trial Chamber must ignore this clumsy sleight of hand.

The Solution

37. By remanding the case, the Appeals Chamber accorded the Trial Chamber an opportunity to provide further reasoning, substantiate the results it reached, and impose a sentence within the explicit contours of the Rome Statute. It did not call upon it to act as a Third Instance Chamber or to conduct a mini-trial – especially when, in part, it would entail relitigating matters related to the acquittal and final resolution in the *Bemba* Main Case. The Prosecution's claims in its Detailed Notice, as its claims during the resentencing hearing, merit no consideration and should be summarily dismissed.

Respectfully submitted, 19 July 2018,
In The Hague, the Netherlands.

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[67] ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, Article 24(3) (counsel shall not deceive or knowingly mislead the Court); Article 25(1) (counsel shall not introduce evidence known to be false or incorrect). *See also* UK Bar Standards Board Handbook, CD3, rC6 (containing the duty to act with honesty and integrity, which requires, among other things, not to mislead the court by making submissions, representations, or any other statements that the lawyer knows to be untrue or misleading).
[68] Rome Statute, Article 45; Rules of Procedure and Evidence, Rule 5(1)(a) (the solemn undertaking to exercise their functions impartially and conscientiously); *see also* ICC Code of Judicial Ethics, ICC-BD/02-01-05, Articles 3, 4, and 5 (on judicial independence, impartiality, and integrity).