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Date: **18/10/2018**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, President
Judge Howard Morrison
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
Notice of Appeal*

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. In accordance with Regulation 57 of the Regulations of the Court, the Defence for Mr. Jean-Pierre Bemba hereby files its Notice of Appeal against the 'Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo' (the 'Re-Sentencing Decision').¹
2. The Defence will advance three, separate grounds of appeal as concerns the imposition of an unfair and disproportionate penalty on Mr. Bemba. For reasons that will be provided in the Appeal Brief, the Defence will further request the Appeals Chamber to reverse the sentence, and, as concerns grounds one and two, terminate the case against Mr. Bemba.

Ground One: *The Trial Chamber erred in law insofar as it failed to comply with the Appeals Chamber's directive to issue a concrete determination of the degree of Mr. Bemba's participation and the harm caused by his conduct, which resulted in a disproportionate sentence. The Chamber's failure to issue such determinations is linked inextricably to a procedural error concerning its erroneous approach to evidence. Given the absence of first instance findings, it is not possible to rectify this error without revisiting and reversing Mr. Bemba's underlying convictions.*

3. In its Judgment on Sentence, the Appeals Chamber found that the Trial Chamber's decision on sentence lacked clarity and elaboration as to the basis for imposing a lower sentence for Mr. Bemba's conviction for the solicitation of false testimony, as compared to his conviction under Article 70(1)(c).²
4. The Appeals Chamber also found that the basis used by the Trial Chamber to assess the gravity of the offences was unsuitable,³ and based on an artificial hierarchy.⁴ The Appeals Chamber therefore directed the Trial Chamber to

¹ ICC-01/05-01/13-2312.

² ICC-01/05-01/13-2276-Red, para. 61.

³ ICC-01/05-01/13-2276-Red, para. 42.

⁴ ICC-01/05-01/13-2276-Red, para. 44.

issue a concrete, fact-specific determination of the harm caused by the false testimony.⁵

5. The tenor of both errors was the Trial Chamber's reliance on abstract and artificial distinctions, rather than concrete, fact-based determinations, as the basis for its ultimate conclusions.
6. The Chamber's Re-sentencing Decision repeats these errors, as reflected by:
 - the Chamber's omission to issue a fact-specific determination of the harm caused by the false testimony;
 - the Chamber's arbitrary decision to increase its determination of the gravity of Article 70(1)(a) offences, notwithstanding the absence of such a fact-specific determination;⁶
 - the Chamber's failure to correctly assess culpability on the basis of the defendant's degree of participation, as reflected by the Chamber's arbitrary and un-elaborated decision to increase the degree of Mr. Bemba's culpability for Article 70(1)(a) offences,⁷ even though it affirmed its initial finding that the degree of his participation in this offence was of a more reduced nature;⁸
 - the Chamber's failure to assess the amount of Mr. Bemba's fine on the basis of his culpability, rather than his means;⁹

⁵ ICC-01/05-01/13-2276-Red, para. 45.

⁶ ICC-01/05-01/13-2312, paras. 35, 114.

⁷ Compare ICC-01/05-01/13-2312, para. 45 with para. 117.

⁸ ICC-01/05-01/13-2312, para. 117.

⁹ ICC-01/05-01/13-2312, para. 134. Cf. para. 245: "The Appeals Chamber considers that culpability, rather than solvency, should be the primary consideration for a determination of the appropriate type of punishment. Indeed, this constitutes a guarantee of equal treatment of convicted persons as the determination on whether or not it is appropriate to impose a custodial sentence (and, if so, its quantum) as part of a sentence for offences under article 70 of the Statute cannot be determined on the basis of the convicted person's financial means and his or her ability to pay a fine of high monetary value."

- the Chamber's dismissal, without elaboration, of the relevance of Mr. Bemba's acquittal and the Majority's findings, as concerns its assessment of the harm caused, and the nature and degree of Mr. Bemba's contribution;¹⁰
- the Chamber's unclear, and inconsistent approach as concerns the process for admitting evidence during the Re-sentencing phase,¹¹ which impacted on its assessment of evidence;¹² and
- the Chamber's failure to articulate its approach as concerns the burden of proof at this stage, and to apply the correct standard to the issues before it.

7. The flawed nature of the Chamber's approach vitiates Mr. Bemba's penalty.

8. This approach is also symptomatic of, and linked inextricably to two issues, which underscore the impossibility of imposing a fair, and proportionate penalty in connection with the existing trial record concerning Mr. Bemba:

¹⁰ ICC-01/05-01/13-2312, para. 23, "The Chamber recalls that this case has been clearly understood as independent from the Main Case. This means that none of the Chamber's evidentiary findings in this case were affected by the Main Case AJ in any way." See also para. 34. Compare with, for example, Trial Judgment, para. 805: ". With a view to properly assessing Mr Bemba's contribution and mens rea, it is necessary to refer to his situation as an accused in the Main case. He is the ultimate and main beneficiary of the implementation of the common plan, as the offences were committed in the context of his defence against the charges of crimes against humanity and war crimes in the Main Case."

¹¹ The Chamber's guidelines never articulated the Chamber's approach or relevant deadlines as concerns the submission and admission of evidence at this stage: ICC-01/05-01/13-2277. A later decision suggested that the rules of admissibility both did, and did not apply: ICC-01/05-01/13-2311, paras. 14-15. The Re-Sentencing decision did not articulate the final approach adopted by the Chamber as concerns the admissibility, probative value, and weight of 'evidence', as compared to 'non-evidentiary submissions' at this phase.

¹² For example, the Chamber considered Prosecution evidence that was disclosed after the July sentencing hearing (ICC-01/05-01/13-2312, para. 103), and a second Registry report filed after the deadline for both the Registry observations and the Defence sentencing submissions (ICC-01/05-01/13-2312, fn. 216, citing ICC-01/05-01/13-2295-Conf-Exp-AnxII), but conversely, made no reference to Registry observations concerning Mr. Bemba's conduct in detention (ICC-01/05-01/13-2299), as a factor that was as evidentially relevant as its findings concerning the conduct of Mr. Kilolo and Mr. Mangenda on release.

- **Firstly**, although the Appeals Chamber upheld Mr. Bemba's conviction, it also issued findings that undermined the evidential infrastructure of this conviction. Specifically, both the Trial Judgment and the Appeals Judgment on Verdict anchored Mr. Bemba's culpability by repeated reference to 'the evidence' or 'the evidence as a whole',¹³ that is, an evidential record generated through an holistic approach, which did not differentiate between the relevance of individual items of evidence, or, as concerns the weight such items should have vis-à-vis different defendants. But, at the same time, in order to minimise the impact of Defence challenges to factual findings or individual items of evidence, the Appeals Chamber also re-characterised these factual findings, or qualified the extent to which specific items of evidence could be relied upon in support of Mr. Bemba's knowledge and intent,¹⁴ and the degree of his participation in the offences.¹⁵ This necessarily altered the internal matrix of the 'evidence as a whole'.

- **Secondly**, sentences must be tailored to the individual circumstances and culpability of the defendant: this assessment is "fact-specific and ultimately depend[s] on a case-by-case assessment of the individual circumstances of each case."¹⁶ But, as a result of the Trial Chamber's approach to the admission of evidence (that is, the Chamber never issued a reasoned determination of the weight and relevance of individual items of evidence to the specific case against Mr. Bemba), there was no foundation upon which the Chamber could fall back, in order to make concrete and specific factual findings concerning the degree of Mr.

¹³ See for example, Trial Judgment, paras. 681, 683, 700, 806, 808, 818, 853, 856; Sentencing Decision, paras. 212 (referring to its 'considerations' on Article 70(1)(c)), 222 (relying on Trial Judgment, para. 856); Appeals Judgment on Verdict, paras. 145, 151, 825, 837, 855, 875, 878, 997, 999, fn. 2448, 1195, 1211, 1229.

¹⁴ See for example, ICC-01/05-01/13-2275-Red, paras. 800, 922, 927, 974, 978, 156 & 981, 1028.

¹⁵ See for example, ICC-01/05-01/13-2275-Red, paras. 154, 155, 888, 953, 1434.

¹⁶ ICC-01/05-01/13-2276-Red, para. 60.

Bemba's contribution to the Article 70(1)(a) offences, and the harm caused by this contribution. The Appeals Chamber's directive that the Trial Chamber determine a new sentence, based on concrete determinations concerning Mr. Bemba's individual participation in the offences, exposed significant cracks in this holistic approach to evidence and fact-finding. And, like Humpty Dumpty, once these cracks appeared, in the absence of a rational and reasoned approach to evidence, it became impossible to piece together the case against Mr. Bemba. This approach resulted in an arbitrary sentence for Mr. Bemba because it was preceded by abstract, arbitrary, and evidentially unsupported findings concerning Mr. Bemba's culpability.

9. Consequentially, it would be impossible and highly prejudicial for the Appeals Chamber to attempt to remedy the Trial Chamber's omissions and errors on appeal.
10. **From a procedural standpoint**, the deficiencies in the Chamber's approach to evidential reasoning amounts to a procedural error, which had a material effect on the ability of the Defence to contest the Chamber's reliance on abstract concepts of culpability.¹⁷ This approach further hinders appellate review. The Trial Chamber never issued a reasoned determination as to the relevance and weight of individual items of evidence, and the Appeals Judgment on Conviction produced less, rather than greater clarity on this point. The Appeals Chamber has no record that it can utilise to assess the

¹⁷ ICC-01/05-01/08-3636-Red, para. 44 and 55: "If a trial chamber's reasoning in relation to a given factual finding does not conform with the principles set out in the preceding paragraphs, this may amount to a procedural error, as the trial chamber's conviction would, in respect of that particular finding, not comply with the requirement in article 74 (5) of the Statute. Such an error has a material effect in terms of article 83 (2) of the Statute because it inhibits the parties from properly mounting an appeal in relation to the factual finding in question and prevents the Appeals Chamber from exercising its appellate review."

specific degree of Mr. Bemba's contributions to the false testimony of the fourteen witnesses,¹⁸ and the harm occasioned by these contributions.

11. **From a legal standpoint**, although the Trial Chamber was afforded an opportunity, through this Resentencing phase, to correct its approach, or, at the very least, provide greater specificity and clarity concerning weight and relevance of the evidence that it relied upon to assess the nature and degree of Mr. Bemba's participation and intended aims, the Chamber declined to do so. Instead, the Chamber further deepened the degree of prejudice by maintaining an opaque, and contradictory approach as concerns its approach to evidence and information submitted during the Resentencing phase, thus committing a legal error. It is, as a result, impossible to determine the manner in which the Trial Chamber resolved the issues before it, by reference to the evidence.¹⁹

12. An appellate majority has found that this evidential approach constituted a prejudicial departure from the principles established by the Appeals Chamber in 2011,²⁰ and that this approach is, moreover, inconsistent with the legal principles set out in the Rome Statute.²¹ Although some of these findings were issued in the Main Case, Article 69 applies equally to Article

¹⁸ ICC-01/05-01/13-2275-Red, 1029: "The Trial Chamber considered the "concerted actions" of Mr Bemba, Mr Kilolo, and Mr Mangenda to infer the existence of a common plan pursuant to which they "jointly committed the offences of corruptly influencing the 14 witnesses". It did not carry out an individual assessment of whether each of the co-perpetrators played a role in the illicit coaching of each individual witness."

¹⁹ "In any number of ways, the failure of the Trial Chamber to give 'a full and reasoned statement of its findings on the evidence and conclusion' in support of its decision on the guilt or innocence of the accused, as required in article 74(5), does bear on concerns indicated in article 83(2). For instance, the Trial Chamber may have used evidence in a manner that was 'unfair in a way that affected the reliability of the decision or sentence' and undermined the fairness of the trial, but failed to make that apparent to the accused by refusing fully to explain how it resolved issues raised (pursuant to rule 64) against the evidence." ICC-01/05-01/08-3636-Anx3, para. 306.

²⁰ ICC-01/05-01/08-3636-Anx3, para. 296, ICC-01/05-01/08-3636-Anx2, para. 17; ICC-01/05-01/13-2275-Anx, para. 53.

²¹ ICC-01/05-01/08-3636-Anx3, paras. 296, 300-304, ICC-01/05-01/08-3636-Anx2, para. 18; ICC-01/05-01/13-2275-Anx, paras. 41, 44, 53-54.

70 cases,²² and Article 70 defendants have an equal expectation of adversarial justice.²³ The Appeals Chamber also has an overriding duty to do justice, in accordance with the correct law. Put simply, the Appeals Chamber cannot draw conclusions from an opaque factual record that was generated through an *ultra vires* evidential system.

13. Article 83(2) specifies that if the proceedings appealed from were unfair in a manner that materially impacts on the sentence, the Chamber may order a re-trial before a different Trial Chamber. In its March 2018 decision, the Appeals Chamber determined that the sentence imposed on Mr. Bemba was materially affected by errors, which derived from the Trial Chamber's failure to justify its conclusions by reference to a fact-specific analysis concerning the individual contributions of Mr. Bemba.²⁴ The subsequent approach, which was to remit specific factual issues to the same Trial Chamber for a new determination, failed to address and cure the underlying cause of the errors, which was the Trial Chamber's approach to evidence. And, having recognised the existence of this error (that is, the absence of fact-specific elaboration concerning Mr. Bemba's participation), this error must now be remedied to the benefit of the Defence.²⁵

14. Although the errors identified explicitly by the Appeals Chamber related to Article 70(1)(a), the Appeals Chamber directed the Trial Chamber to issue a new joint sentence in relation to both Article 70(1)(a) and (c). That sentence

²² Rule 163(1), Rules of Procedure and Evidence.

²³ "it is important to bear in mind that this particular trial was conducted along adversarial lines", Judge Henderson, ICC-01/05-01/13-2275-Anx para. 45.

²⁴ ICC-01/05-01/13-2276-Red, paras. 61, 362.

²⁵ "If the trial chamber fails to accompany its finding with reasoning of sufficient clarity, which unambiguously demonstrates both the evidentiary basis upon which the finding is based as well as the trial chamber's analysis of it, the Appeals Chamber has no choice but to set aside the affected finding, since the lack of adequate reasoning renders the finding unreviewable, thereby constituting a serious procedural error": ICC-01/05-01/08-3636-Red, para. 66.

was then based on common findings underpinning both the Article 70(1)(a) and (c) convictions.²⁶ The errors in the former thus tainted the latter.

15. Given that the Chamber's errors in sentence are linked inextricably to the Chamber's approach to evidence throughout the proceedings as a whole, the Defence will demonstrate that the remedy needs to address not just the symptoms of these errors, but the root cause – which is the underlying evidential record itself. A retrial at this juncture of the proceedings would, however, be inconsistent with Mr. Bemba's right to expeditious proceedings. Rather, the fairest and most expeditious solution is presented by Article 81(2)(b), which provides that,

If on an appeal against sentence, the Court considers that there are grounds on which the conviction may be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1(a) or (b), and may render a decision on conviction in accordance with article 83.

16. The Appeals Chamber has underlined that “[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it”.²⁷ The Defence will therefore move the Appeals Chamber to exercise its power under Article 81(2)(b) to set aside Mr. Bemba's convictions, which rest on a flawed evidential record.

Ground Two: *The Trial Chamber unreasonably abused its discretion, and erred in law, by failing to stay the proceedings/discharge Mr. Bemba, or otherwise provide a remedy for the cumulative impact of egregious violations of Mr. Bemba's rights. These violations undermined the fairness of the proceedings, and resulted in a disproportionate sentence. The appropriate remedy would be to grant Mr. Bemba an*

²⁶ ICC-01/05-01/13-2312, paras. 41, 117.

²⁷ ICC-01/04-01/07-476, para. 17, citing Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168. OA3, paragraph 20.

unconditional release, in the sense that the proceedings against Mr. Bemba are terminated and the conviction is revoked.

17. The right to a fair sentence is part of the right to a fair trial. For this reason, the Chamber remains obligated to ensure that the rights of the defendant are respected fully, and continues to possess the power to issue an unconditional stay of the proceedings, post-conviction, if the constituent elements of fair proceedings are not present.
18. The Defence requested the Chamber to exercise this power, as a remedy for:
 - a. Mr. Bemba's unreasonable and arbitrary length of detention; and
 - b. Highly prejudicial and inflammatory statements and submissions from the Prosecution, which severely undermined Mr. Bemba's rights, and the impartiality of the proceedings.
19. The Chamber nonetheless failed to provide a reasoned determination on these requests, or any remedy as concerns these violations of Mr. Bemba's rights.
20. As concerns Mr. Bemba's right to be protected against an unreasonable length of detention, the Chamber claimed that it had disposed of this issue in its decision releasing Mr. Bemba from custody,²⁸ even though it had indicated in a hearing, convened on the same day, that the remit of the hearing was limited to the question as to whether the criteria under article 58(1) were met, and not matters concerning Mr. Bemba's penalty, which it reserved for a subsequent hearing.²⁹

²⁸ ICC-01/05-01/13-2312, para. 124.

²⁹ ICC-01/05-01/13-T-58-ENG, p.4, 6 lns. 2-8.

21. The Chamber also erred in law by conflating the formal lawfulness of a defendant's detention, with substantive lawfulness and arbitrariness.³⁰ An arrest or detention, which is lawful *ab initia*, might be transformed into arbitrary detention if it is unnecessary or disproportionate, or if there are inadequate safeguards to protect the defendant against unnecessary or disproportionate detention. The fact that the Main Case Appeals Chamber did not order Mr. Bemba's immediate release from both cases did not, therefore, answer the questions as to whether the total length of Mr. Bemba's detention was unreasonable and disproportionate, and whether it had been rendered arbitrary as a result of the absence of appropriate legal safeguards.³¹ Indeed, the very fact that in the space of a few hours, the formal length of Mr. Bemba's detention in the Article 70 case went from zero to almost the maximum,³² highlighted the absence of an effective mechanism for protecting him against unduly lengthy detention in the Article 70 case.

22. As a result of this legal error, the Chamber excluded relevant factors from its decision, and incorrectly denied Mr. Bemba the right to an effective remedy. The right to release, as set out in the various limbs of Article 60 of the Statute, must be interpreted in accordance with human rights law.³³ This corpus of law sets out the right to release, as a remedy for unreasonably lengthy detention, even if the cause is not attributable to the Prosecution.³⁴ As will be set out in the Appeals Brief, international criminal practice and domestic case law have also interpreted 'release' to encompass the right to be released from

³⁰ "The drafting history of article 9 of the International Covenant on Civil and Political Rights "confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law" Report of the Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/22/44, para. 61, citing Human Rights Committee in *Mukong v. Cameroon*, communication No. 458/1991, Views adopted on 21 July 1994, para. 9.8.

³¹ Cf ICC-01/05-01/13-2291, para. 6.

³² The Trial Chamber also committed a legal error as concerns its calculation of Mr. Bemba's Article 70 detention (that is, by not including the periods in 2015, where he remained detained pursuant to an Article 70 detention order): ICC-01/05-01/13-2312, para. 126.

³³ ICC-01/05-01/13-969, para. 2.

³⁴ ICC-01/05-01/13-969, para. 43.

the charges (or to a stay of the proceedings), where release *simpliciter* is an insufficient remedy. That is the case with Mr. Bemba: his release, on 12 June 2018, failed to remedy the full extent of the harm caused by the fact that the total length of his detention was at least **4 ½ times greater** than the amount judged appropriate for his culpability, and **over 3 ½ years** after the Single Judge first determined that the length had ceased to be reasonable and proportionate. Whilst these time periods might seem minimal within the framework of an Article 5 case, they are extremely significant in respect to contempt proceedings, which are generally sanctioned through “fines of a few thousand euros or light prison sentences not exceeding a few months”.³⁵

23. Article 81(3)(b) of the Statute also sets the appropriate reference point for release as the sentence first imposed by the Trial Chamber (which was **12 months**), and not the maximum sentence that could be imposed. Any detention beyond this point must be judicially authorised, and confined to exceptional circumstances.³⁶ The fact that Mr. Bemba was denied the protection of this form of *habeaus corpus*, constitutes a further violation, which increases the overall harm incurred by Mr. Bemba, and the damage to the fairness and integrity of the proceedings.

24. The Defence will therefore seek Mr. Bemba’s unconditional release from the charges/a stay of the proceedings, as the remedy for this ground of appeal.

25. This remedy is further supported by the second aspect of this ground of appeal, that is, the Chamber’s failure to condemn, or otherwise remedy, inflammatory statements and submissions which attempted to controvert Mr. Bemba’s Main Case acquittal, and the consequential impact on the fairness and impartiality of the proceedings.

³⁵ *Prosecutor v. Petkovic*, Judgment on Contempt, 9 December 2008, IT-03-67-R77.1, para. 77.

³⁶ Article 81(3)(c)(i) of the Statute.

26. The Chamber committed a procedural error, and manifestly abused its discretion, by firstly, allowing the Prosecution to voice such arguments in a public hearing, which amplified the damage to Mr. Bemba and the integrity of the proceedings, and secondly, failing to provide any remedy as concerns the damage caused by such arguments. This error had a material impact on the reliability of the decision. Specifically, there is an appearance that the Prosecutions' submissions effectively contaminated the appearance of the impartiality and objectivity of the Chamber vis-à-vis Mr. Bemba, and caused the Chamber to disregard relevant factors, which militated in favour of a stay of the proceedings/unconditional discharge from the conviction.
27. This is reflected by the manner in which the Trial Chamber addressed the legal and factual ramifications of the Main Case acquittal. The Statute and Rules bar the review of a final acquittal, and, at a domestic level, it would be considered to be an abuse of process to use contempt proceedings to controvert a final acquittal. But, although the Chamber ultimately dismissed the Prosecution's attempt to controvert Mr. Bemba's acquittal, the Chamber accepted the written submissions, allowed further oral submissions, accepted that it had the competence to evaluate their merits,³⁷ and declined to correct public averrals that Mr. Bemba had not been acquitted of all the charges, and that he should not be considered as 'innocent' following his acquittal. The Chamber also appears to have accepted the premise underpinning the Prosecution's reliance on a media statement by Mr. Bemba's former lawyer, that is, that the lawyer's description of the acquittal as "the feeling of a duty accomplished", should be construed to mean that the acquittal was the product of Article 70 conduct.³⁸

³⁷ The Chamber found that it should not review Main Case record because of the Chamber's own directions concerning the separation of the two cases (ICC-01/05-01/13-2312, para. 23) and not because a final acquittal is final.

³⁸ ICC-01/05-01/13-2312, para. 103.

28. The Chamber's willingness to review, at the behest of the Prosecutor, the factual underpinnings of the Main Case Appeals Judgment, stands in stark contrast to the Chamber's refusal to apply the appellate finding of Mr. Bemba's innocence to the assessment of an appropriate sentence, on the grounds that "the outcome of the Main case" was irrelevant to its sentencing considerations.³⁹ The Chamber's description of the acquittal as irrelevant is also inconsistent with the positions that it adopted before the Prosecution initiated its attacks on the Main Case acquittal. Specifically, in its 2017 sentencing decision, the Trial Chamber accepted that the absence of a prior conviction was a relevant factor as concerns the sentence imposed on Mr. Bemba's co-defendants.⁴⁰ And yet, for Mr. Bemba, the Chamber appears to have considered the absence of a prior record as a matter which heightened, rather than diminished the need for further sanctions.⁴¹

29. The Chamber's failure to provide a remedy in relation to the length of Mr. Bemba's detention is also emblematic of an appearance of partiality, fanned by the Prosecutions' submissions. In its 12 June 2018 decision on release, the Trial Chamber affirmed that Mr. Bemba's acquittal, after 10 years of detention, was relevant to its calculation of the reasonableness and proportionality of his detention.⁴² These considerations were equally applicable to the Chamber's later decision on sentence, in particular, as concerns the necessity and reasonableness of any detention served after March 2016 (which is when Trial Chamber III should have acquitted Mr. Bemba, if they had applied the correct law). And yet, although the Trial Chamber convened a hearing to enable the Defence to make such submissions concerning the full implications of the acquittal for sentence, the

³⁹ ICC-01/05-01/13-2312, para., 34, 121.

⁴⁰ ICC-01/05-01/13-2123, para. 61.

⁴¹ ICC-01/05-01/13-2312, para. 138.

⁴² ICC-01/05-01/13-2291, paras. 18-20, 22.

Chamber subsequently, and inexplicably, disavowed its position concerning the relevance of the acquittal. The only intervening factor was the Prosecution's attempt to controvert the acquittal.

30. Of further import, lengthy detention is illegal and arbitrary because, *inter alia*, it creates a perception of guilt that might exceed the actual culpability of the defendant. The Trial Chamber's description of Mr. Bemba's sentence as 'time served',⁴³ and failure to remedy the surplus detention, reinforces this false perception of the sum total of Mr. Bemba's culpability, a perception which is further bolstered by the Trial Chamber's recognition that there was no practical difference between its 2018 sentence, and Judge Pangalangan's 2017 opinion that Mr. Bemba should have received a sentence of four years.⁴⁴ Judge Pangalangan's 2017 opinion was, in turn, predicated on the assumption that Mr. Bemba had engaged in Article 70 conduct "in order to subvert a conviction."⁴⁵

31. The fact that the ultimate penalty mirrors the sanction judged appropriate for a defendant, who was guilty of the Main case charges, demonstrates that the Prosecution's attempt to subvert the Main case acquittal, was ultimately successful. Mr. Bemba was sentenced in the Article 70 case in accordance with the underlying assumption that his conduct was directed towards securing an illegal acquittal. This, in itself, constitutes an abuse of process, which further speaks to the impossibility of remedying Mr. Bemba's rights through any mechanism other than a permanent stay of the proceedings.

32. Both the un-remedied length of Mr. Bemba's detention and the Prosecution's submissions, ineliminably tainted the fairness and impartiality of the proceedings, and resulted in a manifestly unfair and disproportionate

⁴³ ICC-01/05-01/13-2312, fn. 214.

⁴⁴ ICC-01/05-01/13-2312, fn. 214.

⁴⁵ ICC-01/05-01/13-2123-Anx, para. 18.

sentence. The proceedings are therefore vitiated as per Article 83(2) of the Statute.

33. The appropriate remedy for this ground of appeal would, therefore, be for the Appeals Chamber to invoke Article 81(2)(b) for the purpose of revoking Mr. Bemba's convictions.

Ground three: *The Trial Chamber failed to apply the principle of totality, and identify all relevant circumstances, and therefore imposed a sentence, which when viewed in light of the total punishment endured by Mr. Bemba, exceeds the level of his culpability, and is therefore disproportionate, as per Article 81(2)(a).*

34. The totality principle prescribes that punishment should be proportionate to culpability, but it should never be excessive. The Trial Chamber determined that although Mr. Bemba's culpability for Article 70 offences had increased as a result of the errors identified by the Appeals Chamber, it had also decreased in light of his Article 70(1)(b) acquittal. The net level of culpability was therefore the same as the level underpinning its March 2017 decision. The Chamber also imposed an identical sentence – that is, a 12-month custodial sentence and a 300,000 euro fine. This result ignored the significant degree of punishment that had been imposed on Mr. Bemba since 2017, including the transfer of detention credit to the Article 70 case, the overall length of his detention at the ICC, and sanctions imposed on him by domestic authorities. The Chamber's sentence failed to comport to the totality principle set out in Rule 145(1)(a), and excluded relevant considerations. The Chamber's construction of the interplay between Article 23 of the Statute and Rules 162 and 166 of the Rules of Procedure and Evidence, and failure to consider a mandatory factor, constitute legal errors,⁴⁶ which resulted in a disproportionate sentence.

⁴⁶ ICC-01/04-01/06-3122, para. 1.

35. Without prejudice to the remedies requested under Grounds One and Two, the appropriate remedy for Ground Three would be to direct that Mr. Bemba should be sanctioned exclusively through a reasonable fine, assessed in accordance with the correct legal principles (that is, one that is calculated on the basis of culpability rather than resources).



Melinda Taylor
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Dated this 18th day of October 2018

The Hague, The Netherlands