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Date: **04/03/2019**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public
Request for Leave to Reply to Prosecution's response to Bemba's Request to Admit Additional Evidence

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

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

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1.Introduction

1. The Prosecution response to the Defence request to admit additional evidence ("the Response"),[1] is filled with contradictions, concessions, and unsubstantiated disagreement. It provides no cogent rebuttal of the factual issues at play and seeks to avoid any proper inquiry of serious matters by trivialising the fundamental right to a fair and impartial trial.

2. These are not matters that can or should be swept under the carpet.

3. The Defence therefore seeks leave to reply to the following new and rather surprising issues, which the Prosecution has chosen to advance in its Response:

    i. *The Prosecution's full endorsement, and reliance upon the 'admission' rather than the 'submission' system for evidence, for the purpose of arguing that the Request should be rejected;*
    ii. *The Prosecution's claim that Judge Brichambaut's former position in the French Ministry of Defence has no relevance to the Article 70 case;*
    iii. *The Prosecution's claim that the Request is part of a "dilatory strategy to unnecessarily prolong these limited re-sentencing proceedings", and should be dismissed on this basis;*
    iv. *The Prosecution's complaint that Judge Brichambaut was not afforded a right to be heard on issues concerning his former role;*
    v. *The Prosecution's claim that the Defence has misstated the record of Judge Brichambaut's comments and quoted them out of context; and*
    vi. *The Prosecution's position that the approach adopted by Trial Chamber VII (that is, to adopt a predetermined stance on key procedural issues) was consistent with adversarial proceedings.*

[1] ICC-01/05-01/13-2322.

4. This request is filed pursuant to Regulation 34(c) of the Regulations of the Court, which applies to appellate filings other than substantive briefs.[2]

2. Submissions

i. The Prosecution's full endorsement, and reliance upon the 'admission' rather than the 'submission' system for evidence

5. On 18 February 2019, the Prosecution defended the notion that the rules for the submission and admission of evidence do not apply to the sentencing/re-sentencing phase,[3] and, in line with this free-for-all approach to the introduction of evidence, further relied on a document that had never been submitted before the Trial Chamber or otherwise disclosed and submitted in these proceedings.[4]

6. But a mere eight days later, the Prosecution has claimed that:

- firstly, the Appeals Chamber should employ a rigorous approach to the admission of evidence on appeal;[5] and
- secondly, re-sentencing appeals should be governed by a stricter approach to the admission of evidence because the subject matter concerns the defendant's sentence.[6]

[2] See ICC-01/05-01/13-2196, para 9, which confirms that Regulation 60 is the *lex specialis* regarding request to reply filed in connection with substantive appeal briefs (such that the deadline is set by the Appeals Chamber), whereas Regulation 34(c) applies to requests to reply to appellate applications.

[3] "*Second*, the procedure adopted by the Chamber for the re-sentencing proceedings was consistent with the Rome Statute. Following its existing practice in the trial and first sentencing proceedings, the Chamber did not make formal rulings to 'admit' material but rather authorised its submission. Additionally, as it did in the first sentencing proceeding, the Chamber considered the limited purpose of the sentencing phase in light of the relevant statutory provisions. The provisions make clear that while a Chamber must consider "only […] evidence submitted and discussed before it at the trial" *to determine the guilt or innocence of the accused person*, a Chamber is required to consider "evidence presented and submissions made during the trial that are relevant to the sentence" *in determining the appropriate sentence of a convicted person*. Accordingly, the Chamber held that, consistent with its broad discretion at sentencing, a "Chamber may take into account non-evidentiary submissions for sentencing purposes". In addition, a Chamber may also consider in determining a sentence facts and circumstances going beyond the Confirmation Decision, provided that the convicted person had a reasonable opportunity to address them." ICC-01/05-01/13-2320, para. 35. See also para. 36:"Further, the Chamber's approach is consistent with that of other Chambers. They do not strictly apply the evidentiary rules as they did at trial; *relevance* appears to be the touchstone for considering proffered items. Significantly, the Appeals Chamber in its Sentencing Appeal Judgment has endorsed the identical approach and procedure adopted by the Chamber during its first sentencing proceedings."

[4] ICC-01/05-01/13-2320, fn 452, citing to a media interview with Mr. Peter Haynes QC.

[5] Response, para.5: "Admitting additional evidence on appeal is exceptional and highly circumscribed. Regulation 62 of the Regulations of the Court, articles 69(4) and 83 of the Statute, and rule 149 of the Rules of Procedure and Evidence govern the admission of additional evidence on appeal. None contemplate re-opening the evidentiary phase of trial or allowing the liberal admission of evidence on appeal—let alone in a *re-sentencing appeal* where the issues are confined to addressing the discrete errors that the Appeals Chamber had remanded back to the Trial Chamber and any new considerations affecting the new sentences to be imposed. In this context, the restrictive approach towards additional evidence is only further underscored."

7. For the sake of clarity, the Defence agrees that the Statute, Rules and Regulations proscribe a specific system for the admission of evidence at all phases of a trial and appeal, and that transparent judicial control as concerns whether the criteria are met is of paramount importance to the effective application of the Statute, Rules and Regulations, in an adversarial system. The Prosecutions claim nonetheless touches on the key point as to whether it would be consistent with equality of arms for the Appeals Chamber to endorse the application of a submission/no rules approach to the proceedings at first instance, where the burden fell on the Prosecution. And then apply a stricter, 'admission' approach at the appellate level *vis-à-vis* the Defence.

8. This disparity also speaks to a broader issue concerning the system for evidence as a whole. The Response accepts that Regulation 62 requires the Appeals Chamber to make and issue a reasoned determination, at some point of the proceedings, as to whether the documents tendered by the Defence fulfil the criteria for admission into the record. Although drafted initially by the Judges, Regulation 62 was also endorsed by the Assembly of State Parties. Its content therefore impacts on the interpretation of similar or related provisions in the Court's texts.

9. The Defence could not have anticipated that the Prosecution would propose that Regulation 62 should be interpreted in such an isolated and inconsistent manner. It is therefore a new and unforeseen issue. A reply to the Prosecution's reliance on the admission system in Regulation 62 would also facilitate the Appeals Chamber's adjudication of the significant matters before it.

ii. The Prosecution's claim that Judge Brichambaut's former position in the French Ministry of Defence has no relevance to the Article 70 case

10. Ground Two of the Defence Appeal centred on the Prosecution's attempt to controvert the Main Case acquittal through the Article 70 case, and the extent to which this undermined the impartiality of the Article 70 proceedings. But for the purposes of its Response to the Defence Request, the Prosecution has adopted a

[6] Response, para 1: "[a]dmitting additional evidence on appeal is the exception, not the rule. While this principle is central to all appeals,2 it assumes special significance within the context of a *re-sentencing appeal* (which is confined in its scope) in a case where the Appeals Chamber has already confirmed the convictions for offences against the administration of justice (articles 70(1)(a) and (c))."; para. 5: "let alone in a *re-sentencing appeal"*.

different tack, arguing that issues concerning the Main Case charges have no relevance to this case.[7]

11. In making the above claim, the Prosecution has sought to draw a bright line between the events in the CAR in 2002 and 2003, and the charges in this case. This position contradicts the Appeals Chamber's finding that the facts and circumstances of this case were not restricted to non-merits issues, and that issues concerning the merits of the Main case were potentially relevant to the Trial Chamber's assessment of evidence in this case.[8] This line is also an artificial distinction given that the Trial Chamber's conviction rests heavily on its perception of the defendant (Mr. Bemba), and a series of inferences concerning his motives, and knowledge as concerns the veracity of witness testimony.[9]

12. The Prosecution also not attempted to situate its 'bright line' within the text of Rule 34(c), which is drafted broadly to encompass any involvement in matters that might give rise to a predetermination of the case at hand, which would be incompatible with the duty of judicial impartiality. The focus is on the nature of the prior involvement (the "functions" of the individual) rather than the extent to which there is a strict factual overlap with the charges. Within the context of requests to

[7] Response, para. 27.

[8] "The facts and circumstances described in the charges contained the allegation that the co-perpetrators' common plan, and their contribution thereto, concerned "presenting false evidence" under article 70 (1) (b) and "corruptly Main Case. Illicit coaching was understood as instructing witnesses to "testify according to a particular script concerning the merits of the Main Case, *regardless of the truth or falsity of the information therein*". This practice encompassed the rehearsing, instructing, correcting and scripting of expected answers on issues pertaining to the Main Case.1533 Accordingly, Bemba was not convicted for uncharged conduct, but rather for the offences resulting from the Common Plan, to which he contributed, which included influencing witnesses' testimonies in a manner that, without it, "they would not have testified on a number of issues in the same way". Before trial, the Chamber noted that "statements pertaining to the merits of the Main Case could […] have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony."1536 The Chamber was free to rely on all evidence before it, including conversations in which the co-accused were discussing the merits of the Main Case, to establish whether Bemba and his co-perpetrators engaged in the practice of illicit coaching. This does not mean that the Chamber made findings on the truth or falsity of the merits of the Main Case. Indeed, the Chamber made no such findings." ICC-01/05-01/13-2275-Red, para. 168.

[9] See for example, ICC-01/05-01/13-2275-Red, para. 972: "In order to properly address Mr Bemba's argument, the Appeals Chamber finds it necessary to recall the main steps of the Trial Chamber's reasoning. **In paragraph 818 of the Conviction Decision, the Trial Chamber inferred from Mr Bemba's specific directions and instructions concerning testimony relating to the merits of the Main Case that his intent was to motivate the witnesses to testify to certain information, regardless of its truth or falsity or whether it accorded with the witness's personal knowledge**. The Trial Chamber then noted that no direct evidence existed that Mr Bemba also directed or instructed false testimony regarding (a) the nature and number of prior contacts of the witnesses with members of his defence team in the Main Case; (b) the payments and material or non-monetary benefits that members of the defence team made, or promised to the witnesses; and/or (c) acquaintances with other individuals. The Trial Chamber concluded, nevertheless, on the basis of an overall assessment of the evidence, that it could infer that Mr Bemba at least "implicitly knew" about such instructions to the witnesses and expected Mr Kilolo to give them."

disqualify Defence Counsel, the Appeals Chamber has also considered whether the lawyer in question received information "related to the case" rather than deriving from the case itself.[10]

13. Once again, the Defence could not have anticipated the Prosecution's change in approach as concerns the relevance of the Main case to these proceedings, nor could it foresee that the Prosecution would request the Appeals Chamber to interpret Rule 34(c) in a manner that is more restrictive than the equivalent standard applied to Defence Counsel. The Defence therefore seeks leave to reply to this new and important issue.

iii. The Prosecution's claim that the Request is part of a "dilatory strategy to unnecessarily prolong these limited re-sentencing proceedings", and should be dismissed on this basis

14. This claim is unsubstantiated and inappropriate, and merits a reply, for the reasons set out below.

15. In terms of procedural history, the Prosecution conceded that, "in isolation, the Defence may not have had reason to closely examine the Judge's interventions in the CILRAP material before the 17 May 2017 transcript (CILRAP 1) was sent to Defence counsel in February 2019."[11] The application was filed 9 working days after Counsel received the article, which triggered this inquiry. This 'dilatory' approach can be contrasted to the conduct of the Prosecution, who received the full thrust of the issues that formed the basis of the Defence appeal in October 2018, but waited a further 4 months to raise issues concerning whether Judge Eboe-Osuji should be part of the bench for this appeal.[12] Issues of delay are therefore inapposite as concerns Defence arguments regarding Judge Perrin de Brichambaut's statements concerning the case, and the Chamber's predeterminations on issues of law and procedure.

16. In order to substantiate its claim that the Defence should have been aware, at an earlier juncture, of any potential grounds to request Judge Brichambaut's disqualification as a result of his former position, the Prosecution has cited a link,[13]

[10] ICC-01/09-02/11-365, para. 67.
[11] Response, para. 8.
[12] ICC-01/05-01/13-2320, para. 66.
[13] Response, fn. 23.

which in turn, leads to various documents. This includes a statement of qualifications in English, in which Judge Brichambaut describes his former role as the 'Under Secretary for Policy' (rather than Director), and his field of competence as advice in relation to 'geographic, sectoral and technical fields'. The French version provides the rather anodyne description that:[14]

> *En tant que de Délégué aux Affaires Stratégiques du Ministère de la Défense (1998-2005), il a assuré le suivi des questions internationales et s'est impliqué dans la gestion d'un nombre important de crises mettant en jeu des questions importantes de droit international humanitaire, telles que le Kosovo, l'Afghanistan ou encore l'Irak.*

17. Of key importance, although certain countries are named, none of these descriptions refer to military operations in the DRC or CAR, or the role of DAS in receiving military intelligence from the *Direction du renseignement militaire*,[15] and providing strategic advice on the basis of this intelligence, in connection with French military operations and military assistance, including those that involved Mr. Bemba.

18. The Prosecution has not formally disclosed or tendered the information in these links as rebuttal evidence (as required by Regulation 62), and it is therefore unclear as to whether the Prosecution wishes for the Appeals Chamber to consider this information in resolving the Application.

19. In the event that the Appeals Chamber considers this information to be tendered for 'admission' for the purposes of Regulation 62, then in line with prior practice, the Defence should be afforded a right to respond to its content.[16] It would, moreover, facilitate the fair and efficient determination of the Application to grant the Defence leave to reply, due to the following, important issues arising from the link relied upon by the Prosecution.

[14] https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/ICC-ASP-EJ2014-FRA-ST-FRA.pdf
[15] Article 2, Décret n°92-524 du 16 juin 1992 portant création de la délégation aux affaires stratégiques du ministère de la défense, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000357776 The '*Direction du renseignement militaire*' appears to be the French equivalent of the DIA(United States)/DI(United Kingdom/GRU(Russia). The details of the budget and staff are also covered by military secrecy.
[16] ICC-01/05-01/13-2198, para. 10.

20. First, President Fernández de Gurmendi appointed Judge Perrin de Brichambaut to this case, approximately one month before the trial commenced.[17] The decision did not refer to any potential conflicts of interest, nor did it reference any prior proceedings through which Judge Brichambaut had raised these issues with the Presidency. Notwithstanding the absence of any disclosure from either President Fernández or Judge Brichambaut of the latter's specific involvement in matters that related to Mr. Bemba, the Response advances the premise that the burden fell on the Defence to conduct a full investigation of Judge Brichambaut as soon as he was appointed.[18]

21. It would be in the interests of justice to allow the Defence to address whether this premise is legally correct, appropriate or tenable, by reference to the link relied upon by the Prosecution. The parties are generally cautioned to exercise restraint in submitting requests for judicial disqualification, but this restraint is subject to the understanding that firstly, Judges should raise any issues that might give rise to their disqualification in a pro-active manner, and secondly, that the Court will ensure an effective remedy if the 'line has been crossed' as concerns the appearance of impartial proceedings.[19] As reflected by Rule 35 of the ICC Rules of Procedure and

[17] ICC-01/05-01/13-1173
[18] Response, para. 6.
[19] See the High Court of Australia decision of *Antoun v R [2006] HCA 2*, in which Justice Kirby observed as follows (internal footnotes omitted):

> *It is true that, in the oft-repeated and oft-applied words of Mason J in Re JRL; Ex parte CJL, this Court has "loudly and clearly" expressed a corrective against any view that a judge should too readily accept recusal because a party has demanded it. In the administration of justice in Australia, the parties do not (at least normally) have an entitlement to choose amongst the judicial officers who will conduct the trial. This principle has been reasserted and applied in many cases. It was not questioned in this appeal. The duty to discharge judicial functions is necessarily subject to any disqualifying conduct on the part of the judge subject to a recusal submission. The observations in Re JRL are a corrective to over-ready disqualification. But they are not a blanket that smothers the effect of disqualification where it has already arisen.*
>
> *That is the case here. Once the line was crossed, as I have held it to have been, it was not repositioned by the act that the trial judge, seemingly acting under sufferance because he was obliged to, submitted to the procedure of hearing the no case arguments and then (as he had predicted and repeated) rejected them immediately.*
>
> *A consideration that shows why this must be so is the increasing recognition of the fact that the entitlement to an impartial tribunal is one of the most important human rights and fundamental freedoms recognised by international law. It is stated in Art 14.1 of the International Covenant on Civil and Political Rights. Australia is a party to that Covenant and also to the First Optional Protocol that renders Australia accountable to the Human Rights Committee of the United Nations, upon communications alleging infractions. Although the Covenant is not, as such, part of Australia's municipal law, the ratification of the First Optional Protocol, and national accountability to the treaty body, inevitably produce an impact on the content and understanding of the Australian common law. The common law principle was already strong. Now it is reinforced by a rule of international law which expresses the entitlement to an impartial tribunal as a fundamental right of the individual concerned. It is not simply an aspiration or guideline of good judicial practice. It is a basic right which the appellants in this case have asserted.*

Evidence,[20] the burden falls on the judiciary to disclose any potential conflicts; it does not fall on the Defence to investigate them, particularly in the absence of concrete grounds to do so.[21]

22. The Defence Request also focusses primarily on Judge Perrin de Brichambaut's CILRAP statements, which generated an appearance that Judge Brichambaut possessed a predetermined view point on several key points of law, procedure and

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In the course of disposing of communications to it, the Human Rights Committee has upheld alleged violations of the right to a fair trial where a national supreme court, referred to the issue, has failed to afford relief. One such instance involved the failure of the municipal court specifically to address complaints about the hostile atmosphere and pressure imposed by the conduct of the trial which effectively made it impossible for defence counsel to present the accused's defence
It is not every complaint that engages the attention of the Human Rights Committee. That body has recognised the different standards that will be required in different cases having regard to the importance of their respective outcomes to the life and liberty of the accused. Nevertheless, the Committee has strongly emphasised the centrality of the manifest impartiality of court proceedings which "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties". If the judge is disqualified on such grounds by domestic law, the trial is flawed and "cannot normally be considered to be fair or impartial within the meaning of article 14".
The jurisprudence of the European Court of Human Rights, giving effect to Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, expressed in similar terms, is to like effect. The right to an impartial tribunal has been held to denote an absence of prejudice or bias on the part of the person constituting the tribunal. Whilst the perception of an accused that the court or tribunal is not impartial is relevant and is taken into account, it is not decisive. The question is always whether any doubt as to impartiality can be justified objectively. The accused is entitled to the benefit of any legitimate doubt as to impartiality.

http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2006/2.html

[20] Rule 35 provides that "[w]here a judge, the Prosecutor or a Deputy Prosecutor has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused and shall not wait for a request for disqualification to be made in accordance with article 41, paragraph 2, or article 42, paragraph 7, and rule 34. The request shall be made and the Presidency shall deal with it in accordance with rule 33." In the context of requests to disqualify Defence Counsel, the Appeals Chamber has averred that, "Given both the nature of the obligation and those potential consequences, the Appeals Chamber would expect counsel to err on the side of caution and either not agree to represent a client at all or, certainly, immediately bring the matter before the relevant Chamber pursuant to article 12 (1) (b) of the Code prior to agreeing to represent a client if in any doubt at all about the application of the provisions to him or her." ICC-01/09-02/11-365, para. 55.

[21] In the Pinochet 2 case, the House of Lords accepted that the relevant date on which the applicant could be deemed to be aware of Lord Hoffman's involvement with Amnesty was the date on which this connection was explicitly brought to the attention of the applicant. In further finding that the House of Lords had the competence to reopen an appeal where "through no fault of a party, he or she has been subjected to an unfair procedure", it appears that the House of Lords accepted that the applicant was not at 'fault' for having not investigated the issue at an earlier point (see separate opinion of Lord Browne-Wilkinson).
See also separate opinion of Lord Hope of Craighead: "As my noble and learned friend Lord Goff of Chieveley said in *Reg. v. Gough* [1993] AC 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case **or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand**. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. **But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable"**.

A. *Pinochet, In re* [1999] UKHL 1; [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272 (15th January, 1999)

fact. This included statements concerning Mr. Bemba's culpability and influence, which arose independently of the evidence in this case.[22] His position and functions in the Division of Strategic Affairs are relevant insofar as they provide further context for a reasonable apprehension of bias, but it is the CILRAP statements themselves that constitute the focal point of the Request and a clear indication that the line was crossed, as concerns Mr. Bemba's right to be tried by an impartial tribunal.[23] These statements effectively controverted the assumption, that is vested in the oath of judicial office, that Judge Brichambaut approached this case having disabused his "mind[] of any irrelevant personal beliefs of predispositions".[24]

23. If granted leave to reply, the Defence demonstrate why the information relied upon by the Prosecution was not sufficiently detailed to exempt Judge Brichambaut from any further forms of disclosure or action under Rule 35 when appointed to the Bemba case, or to otherwise trigger a duty on the part of Defence (as opposed to Judge Brichambaut or the Presidency) to seek the disqualification of Judge Brichambaut from this case, before the Defence received the CILRAP materials.

24. Second, in addition to the claim that the Defence was tardy in submitting its Request, the Prosecution has further argued that the Appeals Chamber should adopt a more restrictive approach to the merits because it has been filed in the context of a re-sentencing appeal.[25]

25. Article 84(1)(c) allows the Defence to seek the reversal of the defendant's conviction on the grounds that one of the judges, who participated in the conviction,

[22] For example, Judge Brichambaut's description of Mr. Bemba as the richest man in the DRC (CAR-D20-0011-0001 at 0021), even though the 2016 Registry report fell far short of such a description: ICC-01/05-01/13-2081-Conf-Exp-AnxI-A-Red

[23] See *Antoun v R [2006] HCA 2* (cited at footnote 19 above).

[24] The full quote of the Constitutional Court of South Africa is as follows: "It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." *President of the Republic of South Africa v South African Rugby Football Union (1999)* 4 S.A. 147, para. 48, http://www.saflii.org/za/cases/ZACC/1999/9.html

[25] Response, para. xx

committed a serious breach of duty. Rule 24 (2)(a) defines a serious breach of duty as "[f]ailing to comply with the duty to request to be excused, knowing that there are grounds for doing so". In contrast to Article 84(1)(a) and (b), this specific ground for revision is not dependent on the existence of newly discovered evidence. The Prosecution's position, if accepted, would therefore result in the anomaly whereby the defendant's ability to raise an issue of fundamental importance concerning the legitimacy of his conviction would be inexistent in practice, or more curtailed than the equivalent Article 84(1)(c) process, simply because the proceedings against him have not yet terminated.[26] This approach appears to be at loggerheads with the Appeals Chamber's previous determination that the "rules governing the admissibility of additional evidence on appeal cannot, as a matter of principle, be more stringent than the standard of admitting additional evidence in revision proceedings under Article 84 of the Statute".[27] It would also penalise the defendant for having exercised his right to appeal Trial Chamber VII's sentence: in order to avail himself of Article 84, Mr. Bemba would either be compelled to first abandon his sentencing appeal, so that he could then reopen the terminated proceedings *via* Article 84, or wait until the sentencing appeal has run its course, and then, after the proceedings are terminated, file his Article 84 application.

26. The Defence therefore seeks leave to reply to the issue as to whether the Appeals Chamber should apply a 'stricter' standard, or otherwise fetter its power to hear this application, on the grounds that it has been filed in the context of the current sentencing Appeal.

iv. The Prosecution's complaint that Judge Brichambaut should have been afforded a right to be heard on issues concerning his former role

[26] The ICTR Appeals Chamber has held that for the purposes of review proceedings, a final judgment is "one which terminates the proceedings; only such a decision may be subject to review"; *Barayagwiza,* Decision on Review, 31 March 2000, Case No.:ICTR-97-19-AR72, para. 49.

[27] ICC-01/04-01/06-3121-Red, para. 61: "With respect to the interaction between the rules governing the admissibility of additional evidence on appeal and revision proceedings, the Appeals Chamber considers that additional evidence brought by a convicted person on appeal that would be considered in revision proceedings should, as a general matter, be admissible on appeal. In this respect, it would be contrary to the interests of justice and the proper and expeditious administration of judicial proceedings to establish a more stringent standard for the admission of evidence on appeal than that which can be considered in revision proceedings. This is because to do so could lead to a person's conviction first being confirmed on appeal because the evidence could not be considered, only then to be overturned in revision proceedings."

27. The Prosecution appears to suggest that the Request should be dismissed as "speculative" because Judge Brichambaut was not provided an opportunity to be heard in relation to his former role in the Ministry of Defence.[28]

28. The Prosecution has cited no legal or factual justification for this proposition.

29. The Prosecution has not disputed the authenticity or accuracy of the evidence tendered by the Defence, nor has it contested the relevant facts concerning the former position occupied by Judge Brichambaut. The question before the Appeals Chamber is therefore whether these facts generate an appearance that Judge Brichambaut failed to adjudicate this case in an impartial manner. This is an objective test that can be satisfied even if Judge Brichambaut were to avow that he did not possess any actual bias.[29] Given that the Defence Request centres on an appearance of possible bias, it would also not assist the Appeals Chamber for Judge Brichambaut to outline the factors he relied upon to convict Mr. Bemba;[30] to the contrary, there is a risk that the impartiality of *these proceedings* could be tainted by Judge Brichambaut's active participation in their resolution.

30. Given that other Courts and Tribunals have adjudicated such matters on the basis of the record and the submissions of the parties, this is a new issue that could not have been foreseen by the Defence. The Defence therefore seeks leave to reply to the question as to whether Judge Brichambaut's active involvement in the resolution of the Request would have been consistent with the role of the Appeals Chamber to adjudicate this issue in an independent and impartial manner.

v. The Prosecution's claim that the Defence has misstated the record of Judge Perrin de Brichambaut's comments and quoted them out of context[31]

[28] Response, para. 21.
[29] "It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality" (Lord Hope of Craighead, Pinochet 2, see supra fn. XXX).
[30] "Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror." *Ebner v Official Trustee in Bankruptcy*, [2000] HCA 63; (2000) 205 CLR 337 at 345, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2000/63.html
[31] Response, paras.10, 19.

31. According to the Prosecution, "[e]very single extract that Bemba relies on in his Request is taken out of context".[32] In terms of concrete examples of this alleged de-contextualisation,
    - The Prosecution has claimed that Judge Brichambaut's statements should be viewed as informal, colloquial anecdotes, directed to the students before him;[33] and
    - The Prosecution has accused the Defence of misstating the record in paraphrasing Judge Brichambaut's observation that witnesses effectively bartered with the Prosecution in connection with their decision to testify (""Well, c'mon now, maybe yes, maybe not, but what do you offer me?") as a '*quid pro quo*'. According to the Prose

32. Since the Prosecution has made a positive accusation that the Defence has mis-stated the record or quoted Judge Brichambaut out of context, the Defence should be afforded an opportunity to place the full context before the Appeals Chamber, so that the Appeals Chamber can reach an informed decision as to the import of Judge Brichambaut's remarks. This 'missing' context includes the context of Judge Brichambaut's CILRAP presentations, and the specific nature of payments and witness assistance given in this case.

33. As concerns this first aspect, since the Prosecution has averred that the contents of the CILRAP website are generally known to court-users,[34] the Prosecution is also presumably aware that the stated purpose of Lexitus, as set out in a video introduction from Judge Brichambaut, is to provide an online library of expert commentary on the content and application of the ICC Statute.[35] If granted leave to reply, the Defence can adduce further information and context concerning the formal and deliberate nature of the presentations uploaded on the site.

34. With respect to the second issue, in order to make the claim that the Defence mis-stated the record in relation to the *quid pro quo* quote, the Prosecution has in fact mis-stated and mis-characterised Defence arguments. The Response states that:[36]

[32] Response, para. 10.
[33] Response, paras. 17, 19.
[34] Response, para. 8.
[35] https://www.cilrap.org/cilrap-film/lexsitus-brichambaut-english/
[36] Response, para. 19.

> The remarks cannot be reasonably construed to mean anything other than that the Prosecution witnesses in the article 70 proceedings were protected and paid for through *routine* expenses. In implying that the Judge meant that witnesses (such as D-2 and D-3) benefitted from some "extraordinary" payments so as to "alter their testimony in exchange for something offered to them", Bemba disregards the detailed credibility assessments that the Trial Chamber undertook of these witnesses, before relying on them

35. Although the Prosecution has put the word "extraordinary" in quotation marks, the Defence Request never used this phrase or turned on the issue of extraordinary versus routine expenses. The issue before the Appeals Chamber is not the specific amount of assistance that was given to the witnesses, but rather whether Judge Brichambaut was aware that the witnesses in this case decided to testify first, in favour of the Defence, and then, in favour of the Prosecution, because of an <u>independent</u> desire to obtain benefits associated with being a witness, and failed to give any weight to this, in the judgment.

36. Rather than addressing the actual content of the Defence Request, the Prosecution has constructed a straw case concerning the irrelevant distinction between routine and extraordinary expenses, and then defended the validity of the Chamber's conclusions on issue of witness credibility by relying exclusively on the conclusion itself (i.e. X is correct because X says it is correct).

37. The full context of Judge Brichambaut's statements concerning witness payments, as set out below, serves to clarify the issues before the Appeals Chamber:[37]

> Then, you may have noticed I described VPRS, I described OPCV. There is a third unit within the court which is called VWU, Victims and Witnesses Unit. Victims and Witnesses Unit are the people who actually helps the victims and witnesses when they are in The Hague. They take them at the airport, they make sure that that they had food which they can handle, that that they have a coat when it's cold, very simple things. Now, of course some of the victims are very clever. Never underestimate human nature. They comment, I have a terrible toothache could you please take me to the dentist. What do you do? They take you to the dentist. So, the victims exchange notes and some of them come and say, "I have this ailment could you please take me to the doctor?" So, of course you have to take care of them. So, you can make some profit in being a victim. On top of it, you have a per diem and you travel around. And then some of the victims also have also understood, "I reach the airport. I ask for asylum. I don't want to go home. I want to stay in the Netherlands. It's a much better place." So, Dutch authorities say, "You guys that's your responsibility. We don't want them." "They're at the airport now.

[37] CAR-D20-0011-0001 at 0020, 0021.

> It's your responsibility." There have already been a number of cases like that, which are very difficult to handle, because you have to determine when the responsibility of the Court bringing in a witness or victim starts and finishes. So, you have to protect the victims. All this process of redactions I mentioned to you. And also to a certain extent, protect souls locally who have come out as victims. Witness protections, it's a nightmare, because bringing over in The Hague, witnesses which can really say nasty things about the accused. Some of them never come back to their country. They have to be relocated because the risk would be too great for them. But those witnesses also understand, "Ah, if I am witness in The Hague, I can exfiltrate my whole family to a much nicer environment. That's a good deal.

38. Although Judge Brichambaut refers to 'victims', he appears to mean persons who testified before the Court as witnesses. The only trial that Judge Brichambaut has sat on, is the Bemba Article 70 case. Since the Appeals Chamber might be less familiar with the trial record than the parties, it would also be in the interest of clarity and context to allow the Defence to cross-reference Judge Brichambaut's statements to the trial record in this case. This would include the sequence of testimony between D-2 and D-3 (who "were in regular contact and attested to similar factual allegations",[38] and testified directly after each other), and the lengthy adjournment that occurred during D-3 testimony, because he was unwell and seems to have needed assistance.[39]

39. This full context would further facilitate the Appeals Chamber's assessment of the impact of Judge Brichambaut's view, on the appearance of impartiality of Mr,. Bemba's conviction. The full context of Judge Brichamaut's intervention is not only relevant to the credibility of D-2 and D-3 (whose testimony formed the core basis of the similar fact pattern utilised by the Trial Chamber to infer that other witnesses were corrupted to lie about contacts and payments), but also the appearance of bias as concerns Mr. Bemba.

40. In the full extract quoted above, Judge Brichambaut observes that 'victims' (which appears to refer to Prosecution witnesses) are aware of the considerable advantages that accrue as a result of testifying before the Court (as concerns asylum, *per diem*

[38] Trial Judgment, para. 318.

[39] D-3 commenced testifying on Monday 19 October 2015, and continued on the 20th with cross-examination. Whereas cross-examination was supposed to continue in the afternoon, D-3 was suddenly unable to testify. On 21st October, the Presiding Judge informed the parties during the morning session that the Chamber still did not know whether D-3 would be available to testify (T-24-Conf, p. 4, lns. 18-20). His testimony was in fact adjourned until Thursday, 22nd October – at which point, the Presiding Judge noted that "We are glad to see that you are feeling better." T-26-Conf, p. 3, lns. 24-25.

allowances *et cetera*), and take advantage of this system ("*Now, of course some of the victims are very clever. Never underestimate human nature"*). Judge Brichambaut also appears to appreciate the ambiguity as concerns the point at which Court should meet the demands of witnesses for such forms of assistance ("There have already been a number of cases like that, **which are very difficult to handle**, because you have to determine when the responsibility of the Court bringing in a witness or victim starts and finishes").

41. The full context only serves to demonstrate the arbitrariness of Judge Brichambaut's description of Mr. Bemba. Whereas Judge Brichambaut appears to accept that such victims (i.e. Prosecution witnesses) makes such demands for their own individual reasons ("*some of the victims are very clever")*, Judge Brichambaut's concluded that the initiative that witnesses should falsely pretend to be soldiers originated from Mr. Bemba ("*they had been invented by Mr. Bemba*"), because he was accused of crimes committed by his troops in CAR[40] – the implication being that he did so because he must have been guilty, and would not have been able to find potential witnesses otherwise.

42. The stark difference in approach in Judge Brichambaut's intervention underlines the appearance of a lack of objectivity as concerns Mr. Bemba. This appearance is further bolstered by the fact that none of the judgments on conviction or sentence/resentencing issued by Trial Chamber VII refer to, or address Defence evidence and case law on the very points Judge Brichambaut canvassed in his CILRAP intervention, that is, that the tail wagged the dog - witnesses, such as D-2 and D-3, presented themselves to the Defence as prospective Defence witnesses so that they could exploit the system for witness payments and assistance at the Court. Their decision to testify falsely pre-dated and preceded any forms of influence, or assistance provided by the Defence or the Court. These judgments also disregarded plethora of Defence evidence concerning how difficult it would have been for Mr. Bemba to determine, from his detention cell in The Hague, the particular point at which the "*responsibility of the Court bringing in a witness or victim starts and finishes*".

[40] CAR-D20-0011-0001 at 0021.

43. The objective appearance of a lack of impartiality on such issues strikes at the heart of Mr. Bemba's conviction and sentence. The Trial Chamber inferred the existence of a common plan, from the concerted contributions of the co-perpetrators.[41] Mr. Bemba's intentional contribution was comprised, *inter alia*, of inferred preparatory activity, which the Trial Chamber inferred, on the basis of the inferred common plan, to be taken in connection with the inferred common plan.[42] Given the convoluted scaffolding for Mr. Bemba's conviction, Judge Brichambaut's dogmatic views concerning Mr. Bemba,[43] when contrasted to the nuances displayed elsewhere vis-à-vis victims/Prosecution witnesses, would lead a reasonable observer to conclude that the aforementioned chain of inferences were not drawn from a judicial mind, free from the taint of preconceptions.

44. There is therefore good cause to grant the Defence leave to reply to the Prosecution's claim that the Defence has cited Judge Brichambaut out of context, so that the Defence can supply relevant, missing context.

vi. The Prosecution's position that the approach adopted by Trial Chamber VII (that is, to adopt a predetermined stance on key procedural issues) was consistent with adversarial proceedings

45. The Prosecution has confirmed that the Trial Chamber conveyed the impression that the Article 70 trial would be run as an 'adversarial' trial.[44] Nonetheless, by claiming that it was "misplaced" for the Defence to argue that the trial was not, in fact run along adversarial lines,[45] the Prosecution appears to be relying on an overly narrow and artificial definition of adversarial proceedings.

[41] ICC-01/05-01/13-2275-Red, para. 764: "The Appeals Chamber observes that the Trial Chamber focused on whether there existed a common plan between the three co-perpetrators, Mr Bemba, Mr Mangenda and Mr Kilolo. The Conviction Decision made clear that the common plan was **inferred** from their concerted actions. Nevertheless, the Trial Chamber also took into account actions of third persons, including of the other two co-accused, Mr Babala and Mr Arido, who were nevertheless not found to have been coperpetrators." (emphasis added)
[42] ICC-01/05-01/13-2275-Red, paras. 823, 828, 839 ("the Trial Chamber **inferred** Mr Bemba's knowledge of Mr Kilolo's conduct implementing an essential aspect of the common plan from the fact that the three coperpetrators, including Mr Bemba, had agreed to illicitly interfere with witnesses and had formed a common plan.")(emphasis added);
[43] "Mr. Bemba was **not a small war lord**. He was a major political figure in DRC. Richest man in DRC. He got caught in special circumstances, we don't have time to discuss it. Mr. Bemba had a whole legal and political machinery and large resources. So, when **he** was accused of having his militia misbehave heavily in Central African Republic, **he** invented witnesses. **He** created a group of people (…)" (emphasis added): CAR-D20-0011-0001 at 0021.
[44] Response, para. 14.
[45] Response, para. 14.

46. For example, after advancing the irrelevant claim that the Bemba Defence should have augmented the Babala and Arido requests to appeal the bar table decision with its own, independent request (which does make sense within the context of a joint trial), the Response claims that the right to adversarial proceedings was in fact respected because the Trial Chamber issued rulings on various requests for leave to appeal, and these rulings were correct.[46] Nonetheless, contrary to what is claimed in the Response,[47] the Defence never framed the right to impartial and adversarial proceedings as the right to a certain outcome. It is, rather, a right to be heard by a Chamber that had not already made up its mind.[48] Accordingly, even if the Chamber went through the motions of 'appreciating' multiple Defence requests for leave to appeal, Judge Brichambaut's statements concerning prior determinations (i.e. "*we won't accept any interlocutory appeal*") would lead an objective bystander to conclude that the bench had already decided, before it had actually reviewed the applications, to reject them.[49] In such circumstances, the harm is not merely that specific appeals were not granted, but also that the multiple rejections may have served to quell legitimate and necessary applications, and dis-incentivise full argumentation. It is, therefore, impossible to cure the harm by reviewing – in hind-sight – the correctness of the Chamber's decision to dismiss individual applications.

47. The right to adversarial proceedings also denotes the right to know the applicable procedure that is being applied to the case at hand.[50] Without such knowledge, the

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[46] Response, para. 14.

[47] Response, para. 14: "Bemba certainly had a "right" to seek leave to appeal; he did not have a right to have such relief granted."

[48] "Both the common law and the Convention for the Protection of Human Rights and Fundamental Freedoms recognise the fundamentality of every litigant's right to a tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind", *Steadman-Byrne v. Amjad*, [2007] 1 W.L.R. 2484

[49] See *Antoun v R [2006] HCA 2,* para. 87: "The trial judge was bound to follow the proper process of considering submissions and applications without apparently prejudging them. This clearly he did not do, even though, after stating that they would fail, he said that he would hear them. In view of the dogmatism and asperity of the trial judge's expressions, the latter was hardly likely to instil any confidence in either an innocent bystander, or the appellants. Indeed, it had the ring, more of a protestation, than an assurance of impartiality, of the kind referred to by Aickin J in *Re Lusink; Ex parte Shaw* and was likely therefore to have reinforced, rather than dispelled, the apprehension of bias which must by then have arisen."

[50] *Antoun v R [2006] HCA 2, p*aras. 31-32:

I certainly agree with Smart AJ that it is preferable (at least in a trial by judge alone without a jury) that the judge should express tentative or preliminary views to the parties so that they might address the judge on such matters. This Court had said as much. In *Vakauta v Kelly*, Brennan, Deane and Gaudron JJ observed:

> "[A] trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated."

right to be heard is ineffective – unless the parties know the rules of the game (particularly if they have been changed), the parties cannot play it effectively or fairly. The Prosecution has nonetheless averred that the Trial Chamber did provide sufficient advance notice of the 'radical changes' referred to by Judge Brichambaut. This assertion is not reflected by the record, or indeed content of key filings cited by the Prosecution.[51] In citing the Trial Judgment itself,[52] the Prosecution also implies that it is sufficient for the parties to be informed of the applicable trial procedure, after the proceedings have concluded.

48. The Defence therefore seeks leave to reply to the issue as to whether the Trial Chamber's approach, as set out in the filings relied upon by the Prosecution, was consistent with the right to be heard in an effective manner.

3. Relief sought

49. For the reasons set out above, the Defence respectfully requests the Appeals Chamber to grant the Defence leave to reply to the above issues set out in the Response, and the new evidence cited therein.

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 4th day of March, 2019
The Hague, The Netherlands

In this, the approach of this Court has now travelled beyond the apparent approbation of judicial silence expressed in *R v Watson; Ex parte Armstrong*. In the United States of America, such silence has been held, on occasion, to constitute a denial of due process. It deprives the party who will ultimately be affected by judicial conclusions of the "opportunity, before judgment, to be heard to correct and to persuade". Just as the judge should, to a proper extent, listen, so the judge should, to a proper extent, express any tentative views.

[51] For example, in the 'Evidence Submission Decision', the Trial Chamber decided at para. 16 that: "it will not make any ruling on the relevance and/or admissibility of the 1,028 submitted items **at this time** beyond its previous decisions taken under Article 69(7) of the Statute"; it would be reasonable to interpret this as meaning that the Trial Chamber would make such rulings on relevance and admissibility at another time (i.e. in the judgment)."

[52] Response, para. 13, fn. 42.