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No.**: ICC-01/05-01/13**
Date: **07/03/2019**

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 to Reply, pursuant to Regulation 60 of the Regulations of the Court

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 Defence for Jean-Pierre Bemba respectfully requests the Appeals Chamber to exercise its power, under Regulation 60 of the Regulations of the Court, to authorise the Defence to reply to the Prosecution Response to the Defence Appeal ("the Response").[1]

2. Regulation 60(1) empowers the Appeals Chamber to order the appellant to file a reply, "[w]henever the Appeals Chamber considers it necessary in the interests of justice". The Appeals Chamber has resolved previous Regulation 60(1) requests by considering whether the issues set out in the requests would assist the Appeals Chamber to determine the appeals before it;[2] this suggests that the requesting party must elaborate the issues with sufficient detail in order to allow the Appeals Chamber to make an informed assessment on this point.

3. As concerns the necessity and utility of authorising a reply in connection with this Appeal, at this point in time, it is uncertain as to whether the Appeals Chamber will schedule a hearing, under Rule 156(3) of the Rules of Procedure and Evidence. In a judicial system, which has neither an *appeal de novo* or additional layers of appellate review, it is imperative that the party bringing the appeal has a sufficient opportunity to address, and be heard on all relevant issues, particularly if these issues fall for consideration for the first time, or impact on key procedures at the Court (such as the system for the admission of evidence at trial, including the sentence).

4. This general principle has particular resonance in light of the contents of the Response, which includes:
    i. An implicit request to disqualify Judge Eboe-Osuji;
    ii. Incorrect statements of fact and procedure, and mischaracterisations of the Defence position;
    iii. Submissions of fact, which either fall outside the scope of the Trial Chamber's findings or contradict them;
    iv. New legal arguments concerning the definition of 'gravity' for Article 70 offences;

[1] ICC-01/05-01/13-2320
[2] See for example, ICC-01/05-01/13-2259.

v. New legal arguments concerning Article 81(2)(b); and
vi. The Prosecution's arguments concerning the definition of unlawful detention.

5. These issues are central to the Appeals Chamber's adjudication of the Appeal; a reply is therefore necessary, in the interests of justice.

6. The Appeals Chamber might also have noted that the ninety-eight page Response does not cite to a single item of evidence (apart from a media article that the Prosecution has failed to disclose or otherwise tender).[3] This level of abstraction is itself a key concession concerning the impossibility of making meaningful evidential submissions concerning Mr. Bemba on the basis of the sparse evidentiary record in this case. To paraphrase the Nuremberg judgment, crimes are committed by individuals, not by abstract entities or abstract notions. If the Trial Chamber and the Prosecutor were unable to identify the evidence underpinning Mr. Bemba's individual contributions to crimes, then there is no sentence that would be fair or proportionate to impose in these circumstances. His conviction and sentence are, quite simply, void for vagueness, and should be reversed.

2. Submissions

i. The Prosecution's request to disqualify Judge Eboe-Osuji

7. The Prosecution has employed curiously oblique phrasing to imply that if the Appeals Chamber were to consider the merits of particular Defence arguments, Judge Eboe-Osuji might be required to recuse himself.[4] This conditional phraseology is inherently problematic, and, as a matter of procedure, it is inappropriate to include a request in a response.[5] The Appeals Chamber might wish to dismiss this 'request' on the latter ground alone. In the event that the Appeals Chamber decides to consider

[3] Response, fn. 452.
[4] "Moreover, if this Appeals Chamber were to decide to re-visit the previous findings in the Appeal Judgment on the 'submission' evidentiary regime, the Prosecution respectfully notes that this could give rise to an appearance of bias for Judge Eboe-Osuji": Response, para. 66.
[5] "The Chamber further notes that, in making the Additional Requests, the Arido Defence Response and Babala Defence Response seek relief beyond the scope of the Kilolo Defence Request. The Chamber disapproves of this practice. A response serves a distinct purpose in the filing regime established by the Regulations. The Chamber cautions the parties that it may disregard any request made in a response which exceeds the scope of the original filing." ICC-01/05-01/13-1154, para. 8.

the request, then the Defence should clearly be afforded an opportunity to respond, in full, to the admissibility and merits of this 'request'.

ii. Incorrect statements of fact and procedure, and mischaracterisations of the Defence position

8. The Prosecution has relied on the following incorrect statements of fact and procedure, and mischaracterisations.

9. *First,* the Prosecution has claimed that the Defence did not raise several arguments, including the issue of Joachim Kokaté's responsibility, until after Mr. Bemba was convicted, or during this appeal itself.[6] This statement is patently incorrect.

10. As concerns Kokaté, the Defence pleaded its case that the evidence supported the existence of a separate and independent common plan- led by Joachim Kokaté - in its Final Trial Brief and closing arguments.[7] The fact that these pleadings are completely absent from the Trial Judgment and respective Sentences demonstrates the very prejudice that led to this appeal - key Defence arguments were never 'heard' and 'considered'.

11. Similarly, the Defence case concerning Mr. Bemba's reaction to the *faux scenario* (including the suggestion that the Defence contact witnesses due to a belief that the Prosecution might be tampering with them) was pleaded clearly at trial in oral submissions and written pleadings.[8] Once again, the Trial Chamber failed to address the arguments or related evidence.

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[6] Response, para. 68.

[7] Final Trial Brief (ICC-01/05-01/13-1902-Conf-Corr2), paras. 90-93.
Closing Arguments: ICC-01/05-01/13-T-48-CONF-ENG, pp. 70-72 (Bob =Kokaté)
See in particular, p. 71,lns. 23- p. 72, ln.22: "We couldn't have said it better ourselves. Bob was acting in his own interest. He had his own interest to bring false testimony before the ICC. General Bozizé was his rival, procuring testimony that Bozizé's forces committed crimes in the CAR directly 1 advanced his political agenda. Bob's own interest was underscored by the fact that he approached his friends members of political or military movement to help him with this endeavour. Bob sabotaged the Defence for Mr Bemba. He introduced false witness to them and instructed them to lie to the Defence. He made promises to these witnesses and encouraged them to take advantage of the ICC to improve their personal situation. Of course, when the political winds changed, Bob joined forces with Bozizé and conveniently decided not to testify for the Defence. Bob was never charged. Instead, the Prosecutor has sought to make Mr Bemba responsible for the havoc and mayhem which was wrought by a bad intermediary."

[8] Defence Bar table motion: ICC-01/05-01/13-1794-Conf-AnxA, p. 59, ICC-01/05-01/13-1794-Conf-Corr, para. 48.
Final Trial Brief (ICC-01/05-01/13-1902-Conf-Corr2): paras. 89, 216-229.
Closing submission, T-48-CONF-ENG, p.73,lns. 15 – p. 75 line 23
"Mr Bemba's response to the false scenario is also completely inconsistent with the intent and actions of a

12. The issue of multiple interpretations of 'colour' in different contexts and by different speakers was also raised in the Defence bar table motion,[9] the closing brief,[10] and the sentencing brief.[11] But again, the Trial Chamber did not refer to these arguments and related evidence in its Trial Judgment or Sentencing Decision.

13. It would be improper for the Prosecution to take advantage of the fact that the Trial Judgment failed to refer to the Defence closing arguments or Final Trial Brief. Regulation 59 of the Regulations of the Court also obliges the parties to present an accurate version of the trial record to the Appeals Chamber. Given the clear references set out above, the Defence would expect the Prosecution to correct this

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person engaged in bribery or a cover-up plan. As set out in the confirmation decision and as mentioned, one of the components of the Prosecution's case is that the precarious living situation of D2, D3 were exploited to induce them to provide false testimony. Well, because of the false information that was fed to him by his Defence, that's exactly what Mr Bemba believed the Prosecution were doing with D2 and D3. His Defence told him that the Prosecution were exploiting the witnesses' discontent and dissatisfaction with the Defence and it was the Prosecution that was inducing them to provide false testimony. Mr Bemba suggested in response that Maître Kilolo should contact Defence witnesses by phone one or two minutes to check in on them. This is something that is completely consistent with the role of the Defence in monitoring the well-being of its witnesses after the completion of their testimony. If Mr Bemba had wanted his Defence to induce the witnesses to become part of a cover-up, it beggars belief that he would expect his counsel to do this over the telephone in just one or two minutes. The Defence witnesses who were actually contacted by Maître Kilolo during this time period also confirmed that they were not asked to participate in a cover-up. Indeed, rather than suggesting a cover-up, Mr Bemba asked his Defence to do the opposite, to expose what he believed to be improper conduct by the Prosecution, to collect documents from the witnesses which the Defence could use to demonstrate this improper conduct. In the same manner that the Prosecution eventually deployed to the country in question in order to obtain evidence that D2 or D3 had been exploited, Mr Bemba wanted his Defence to do the same. He wanted to catch the OTP in the act. There is nothing wrong, illicit or improper about this. Other Defence teams had done the same. In the Kenya cases, evidence of such impropriety had even triggered the Prosecution withdrawing charges against the defendant. Contacting witnesses to check their well-being, collecting statements or documents concerning improper pressure, that's standard, permissible conduct. When the Prosecution set out to explore issues of possible impropriety, they did so by hauling D2 and D3 into police stations, waiving the equivalent of immunity agreements under their noses and arranging for them to have furnished houses and to receive significant sums of money. In contrast, when Mr Bemba was informed about this, his approach was to direct his Defence teams to inform D2 and D3 that due to the ethical obligations of the Defence, the Defence would not be able to accede to their demands. How is it that the Prosecution can ignore or transform clear evidence that Mr Bemba did not instruct or authorise his Defence to bribe witnesses as part of a cover up scheme into the opposite? Again, rather than focusing on what Mr Bemba actually said, the Prosecution has put their guilt tinted glasses back on. For example, when Mr Bemba and Maître Kilolo first discussed the possibility of collecting evidence on the Prosecutor's impropriety, and this was 17 October 2013, Maître Kilolo states that going down this route should be the last resort, the strategy would also affect the credibility of the witnesses who had been suborned to provide false testimony to the Prosecution. Effectively, even if the Defence witnesses admitted to lying to the OTP for money, this admission would necessarily affect the witness's credibility in the main case. This is CAR-OTP-0082-1309 at 1318. The Prosecution has ignored this exchange. Instead they have claimed that Defence concerns regarding witness credibility show that the Defence knew that witnesses were false witnesses. Once again, they have invited the Chamber to go down the rabbit hole into a topsy-turvy world."

[9] ICC-01/05-01/13-1794-Conf-Corr, paras. 44-46; See also ICC-01/05-01/13-1794-Conf-AnxA, pp. 54-57, and explanations provided in connection with the use of colour phrases in defence communications.

[10] ICC-01/05-01/13-1902-Conf-Corr2, para. 227.

[11] ICC-01/05-01/13-2089-Red, paras. 58-59.

error from its Response. If the Prosecution does not do so, the Defence should be afforded an opportunity to reply, in order to correct the appellate record.

14. *Second,* the Response refers to the Appeal, repeatedly, as a request for 'reconsideration',[12] and argues that it is impermissible to 'reconsider' Mr. Bemba's conviction on the basis of the legal findings set out in the separate opinions issued by the Main Case Appeals Chamber. These arguments are inconsistent with concessions advanced elsewhere in the Response. They also mischaracterise the nature of the Defence Appeal. A reply on these points would assist the Appeals Chamber's determination of the appeal.

15. As concerns the first point, in its Response, the Prosecution has recognised that the Trial Chamber considered new factors,[13] and relied on new evidence (to the detriment of Mr. Bemba),[14] and a new approach to certain factors (such as the content of the testimony).[15] The Appeals Chamber is therefore not seized of the same record that was before it, in 2018. There has been a change in the factual fabric of this case.

16. The Defence Appeal also did not request the Appeals Chamber to apply new law that was issued after the March 2018 judgment, and to reverse Mr. Bemba's conviction on that basis alone.[16] Rather, the Defence requested the Appeals Chamber to adjudicate the issues that are before it, on the basis of the evidential record that is now before it. If the Trial Chamber's factual findings, and the evidential record do not allow the Appeals Chamber to ascertain the degree of Mr. Bemba's contribution to the Article 70(1)(a) offences and the extent of his culpability, then the Appeals Chamber has a duty to consider the legal and procedural consequences that stem from this. Either the Appeals Chamber can conclude that it is not possible to enter a sentence, or it can attempt to reconstruct the evidential record itself. If it proceeds to the latter course of action, then clearly, the Appeals Chamber would not be 'reconsidering' previous findings, but entering <u>new</u> findings. And it would be required to do so, in accordance with what the Appeals Chamber considers to be the correct legal approach to the assessment and evaluation of evidence.

[12] See for example, Response, Section II.B.3.
[13] Response, para. 12.
[14] Response, para. 37
[15] Response, para. 29, citing Re-Sentencing decision, para. 33.
[16] Cf Response, paras. 52-56.

17. As made clear in the Defence Appeal, if the Appeals Chamber reaches such a point, then it is not because the 'law has changed', but because it has been handed an incomplete trial record – one that is not fit for the current purpose.[17] The Trial Chamber's system for the evaluation of evidence is not compatible with the fact that, unlike Germany, the ICC does not (at present) employ a *de novo* standard of appellate review; the Appeals Chamber generally defers to the Trial Chamber's appreciation of the facts, subject to the proviso that the Appeals Chamber has reviewed the record, and concluded that this appreciation was not unreasonable or cannot be impugned for other reasons. This system of appellate review does not work if the Trial Chamber has not generated a record that can be scrutinised by the Appeals Chamber, in a fully independent manner.

18. Given this backdrop, the issue as to whether the Appeals Chamber should endorse the 2011 Bemba approach to admissibility, or the 2018 submission approach, only comes into play if the Appeals Chamber decides to reconstruct the evidential record itself, in order to determine the issues before it (such as the specific degree of Mr. Bemba's influence over the false testimony of the fourteen witnesses). This legal question would therefore follow a decision by the Appeals Chamber to issue its own evaluation of the evidential record of the case, not trigger it.[18]

19. The Prosecution's attempt to frame the Appeal as a request for reconsideration is also predicated on the assumption that the Appeals Chamber has been requested to apply a new change in the law, based on Judge Eboe-Osuji's separate opinion.[19] These arguments, once again, mischaracterise the Defence Appeal, and miss the point. The Defence Appeal states clearly that it was not asking the Appeals Chamber to reverse its previous findings on the basis of 'new law';[20] the admission regime is not 'new law', but existing law, which was supported by appellate precedent at all material times during the *Bemba et al.* trial, and also during the re-sentencing phase. The opinions issued in the 2018 Main Case Appeals Judgment are relevant to this point, not because they are binding, but because they recognise that the Bemba Article 70 submission regime constituted a departure from prior, appellate precedent,

[17] Defence Appeal, paras. 39-41.
[18] This is clearly reflected by the title of Section 2C of the Defence Appeal: "It is not possible for the Appeals Chamber to cure these errors on appeal, by reconstructing the evidential record".
[19] Response, para. 53.
[20] Defence Appeals, paras. 58-59.

namely the 2011 Bemba Appeals Decision.[21] The 2017 Gbagbo Appeals Decision also referred to the admissibility of evidence,[22] and further interpreted the Bemba precedent as requiring the Chamber to make a ruling at some point of the proceedings.[23]

20. When viewed through the actual focus of the Defence Appeal, the case law cited by the Prosecution validates the Defence argument concerning the importance of adhering to the admissibility regime. For ten years, the ICC applied the 'admissibility' regime of evidence. Trial chambers consistently issued reasoned rulings on evidential objections, and built transparent evidential records. The Appeals Chamber had, in turn, developed its standard of appellate review on the assumption that it would have recourse to such a record, when assessing the Trial Chamber's findings of fact. Judge Shahabuddeen's critical observations concerning the principles of judicial security and predictability apply in full force to this case,[24] but they are best served by applying the appellate law that existed during the trial proceedings in this case.

21. *Third,* the Prosecution's account of Mr. Bemba's detention history is procedurally and factually incorrect, and misleading. When the Defence withdrew its release request in 2015, it had a legitimate expectation that firstly, Mr. Bemba would be entitled to receive credit for any time spent in detention in the Article 70 case,[25] and secondly, time would continue to run, for the purposes of triggering the Trial Chamber's residual duty to release the defendant, under Article 60(4).[26] The Trial Chamber did not determine that this time would not count for credit purposes until March 2017. This determination (that time had not yet started to run in the Article 70 case) also had the effect of preventing the Defence from activating Article 81(3)(b) or otherwise motivating a release request;[27] this ruling froze the capacity of the Defence to seek release, and eliminated the duty of the Chamber to independently

[21] ICC-01/05-01/08- 1386.
[22] ICC-02/11-01/15-995, para. 2: "Rule 64 (1) of the Rules requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber".
[23] ICC-02/11-01/15-995, paras. 45-47.
[24] Response, para. 55.
[25] As noted by Judge Pangalangan, this expectation was also generated by statements issued by the Trial Chamber concerning the separation of the Main case and the Article 70 case: ICC-01/05-01/13-2123-Anx, para. 17.
[26] ICC-01/05-01/13-1016, paras. 4, 16.
[27] Cf Response, para. 107: "he could have requested release once the Trial Chamber provided its article 78(2) determination in its Sentencing Decision on 22 March 2017 (dismissing his argument)".

trigger Article 81(3)(b). Given this context, it is disingenuous for the Prosecution to claim that any prejudice faced by Mr Bemba is due to his own strategy,[28] rather than the shifting terrain created by the Trial Chamber's approach to credit.

22. Moreover, whereas the Prosecution has averred that Mr. Bemba's Article 70 detention was subject to continuous judicial oversight,[29] it ignores the dead zone created by the Trial Chamber's ruling on credit, which lasted from March 2017 until June 2018. As recognised by the Appeals Chamber, the regime set out in Article 81(3) is *lex specialis* as concerns continued detention or release, on appeal.[30] Article 81(3)(a) sets out a presumption of continued detention, which is mitigated by the presumption of release, set out in Article 81(3)(b), at the point at which the length of this detention exceeds the initial sentence imposed by the Trial Chamber. Contrary to the position advanced by the Prosecution, the reference point is the initial sentence imposed by the Trial Chamber, irrespective as to whether it is varied or vacated at a later stage; otherwise, Article 81(3)(b) would be unnecessary and redundant. It should therefore have come into play from March 2017 onwards, and not September 2018 (as claimed by the Prosecutor).[31] Article 81(3)(b) also obliges the Chamber to release the defendant as soon as the length of the initial sentence has been served, even if the defendant has not submitted a request to that effect. The 2015 Defence filing, which withdrew Mr. Bemba's Article 60(2) application, was therefore irrelevant to the operation of Article 81(3)(b). The effective operation of the Article 81(3)(b) regime also presupposes that the 'real' (as in servable) length of the defendant's initial sentence is fixed, and not dependent on indeterminate factors (such as a conviction and sentence in another case, which were pending appeal). The Trial Chamber's decision to peg Mr. Bemba's right to credit to indeterminate factors (the completion of his Main Case sentence) meant that the status of Mr. Bemba's Article 70 sentence was placed on hiatus for the duration of the Main Case. As a result, the protective force of Article 81(3)(b) was also hamstrung for the duration of the Main Case Appeal. The Response fails to acknowledge this gap in protection, which is attributable squarely to the approach of the Trial Chamber, and not to any strategy on the part of Mr. Bemba.

[28] Response, para. 81.
[29] Response, para. 81.
[30] ICC-02/11-01/15-1243, para. 17.
[31] Response, para. 114.

iii. Submissions of fact, which either fall outside the scope of the Trial Chamber's findings or contradict them

23. The Prosecution did not appeal the Trial Judgment or the Re-Sentencing Decision. There is therefore no basis for the Prosecution to advance arguments that expand the scope of factual findings in this case, or contradict those entered by the Trial Chamber. Given the prejudice that accrues from such an attempt, the Defence should be granted leave to the discrete instances where the Prosecution seeks to do so. This includes the following.

24. *First,* the Prosecution's Response to the Chamber's assessment of Mr. Bemba's contribution turns on the following point: "in view of the confined scope of the re-sentencing proceedings, the Trial Chamber need not have repeated in full its factual assessment of Bemba's participation and intent which it had already elaborated on in its Sentencing Decision, **as long as it remained valid**."[32] This argument is based on the premise that the Trial Chamber's assessment as concerns Mr. Bemba's contribution to Article 70(1)(a) offences, remained valid in all key respects.

25. The Defence Appeal nonetheless established that the Appeals Chamber's findings invalidated key aspects of the Trial Chamber's conclusions concerning Mr. Bemba's involvement in the solicitation of Defence witnesses. The Prosecution's Response attempted to address these changes in the factual fabric of this case, but its attempt to do so cannot be reconciled with the Trial Chamber's own interpretation of its findings (as set out in the Re-Sentencing Decision). The Prosecution's claim is as follows:[33]

> Bemba misstates the Appeal Judgment, which did not modify the Trial Chamber's findings. To the contrary, the Appeals Chamber dismissed Bemba's arguments when affirming the Chamber's reliance on Bemba's interactions with non-charged witnesses (such as D-19 and Bravo) as *evidence* establishing, together with other evidence, Bemba's liability for offences involving the 14 charged witnesses. Bemba's conflation of the Chamber's conclusion that Bemba, through Kilolo and Mangenda, solicited the false testimony of the 14 witnesses, with the evidence it considered in reaching such a conclusion reflects his clear misunderstanding of the Appeal Judgment.

[32] Response, para. 19.
[33] Response, para.21.

26. Although phrased in a confusing manner, it appears that the Prosecution agrees that the Appeals Chamber found that interactions with D-19 did not form part of the charges or conviction as free-standing incidents, and that Mr. Bemba was convicted for soliciting false testimony through Mr. Kilolo and Mr. Mangenda, and not directly (that is, indirect solicitation). This appellate finding therefore invalidated any prior findings of the Trial Chamber that Mr. Bemba solicited false testimony, directly.

27. And yet, in the Re-Sentencing Decision,[34] the Trial Chamber once again relied on the following 2017 findings concerning Mr. Bemba's direct solicitation of false testimony:[35]

> Through Mr Kilolo and Mr Mangenda **or personally**, Mr Bemba asked for or urged conduct with the explicit and/or implicit consequence of prompting each of the 14 Main Case Defence Witnesses to provide false testimony regarding (i) prior contacts with the Main Case Defence; (ii) the receipt of money, material benefits and non-monetary promises; and (iii) the witnesses' acquaintance with third persons. Mr Bemba was updated on, and expressly authorised and directed, the illicit coaching of witnesses and gave directions, through Mr Kilolo **or personally** (in the case of D-19 and D-55), on how and to what the witnesses were expected to testify. Having directed and approved the illicit coaching of witnesses and having organised the payments and other assistance to witnesses prior to their testimonies, Mr Bemba knew that Mr Kilolo would instruct the witnesses accordingly and that the witnesses would, in turn, testify untruthfully in court as a consequence of his conduct. Mr Bemba's conduct had an effect on the commission of the offence by the 14 Main Case Defence Witnesses. Without Mr Bemba's authoritative influence, **personally** or through Mr Kilolo and/or Mr Mangenda, the witnesses would not have testified untruthfully before Trial Chamber III.

28. The Trial Chamber was not relying on D-19 as evidence of indirect solicitation; rather, it relied on D-19 and D-55 to support a free-standing finding that Mr. Bemba directly influenced witnesses. The question is not, therefore, whether the Trial Chamber was entitled to rely on D-19 as evidence, but whether it should have maintained the conclusion that Mr. Bemba personally, or directly solicited false testimony. There is good cause to allow the Defence to clarify the misunderstanding generated by the Prosecution on this matter.

[34] ICC-01/05-01/13-2312, para. 116 – reciting its previous findings concerning Mr. Bemba's culpable conduct, including at footnote 191, ICC-01/05-01/13-2123-Corr, paras 219-23.
[35] ICC-01/05-01/13-2123-Corr, para. 222. NB: footnote 13 of the Defence Appeal should refer to ICC-01/05-01/13-2123-Corr, para. 222, rather than ICC-01/05-01/13-2275-Red, para. 222. The accompanying text clarifies that the reference was to the Trial Chamber's sentencing decision (Appeal, para. 10).

29. *Second,* in order to refute the description of the case against Mr. Bemba as being an 'inferential case', the Prosecution claims that Mr. Bemba was convicted on the basis of direct evidence.[36] The Prosecution does not explain what it means by 'direct evidence',[37] or cite this 'direct evidence'; the Prosecution merely references paragraphs 806 to 816 of the Trial Judgment in their totality. The vagueness of this response fails to satisfy the standards of precision required by Regulation 59 of the Regulations of the Court. This defect alone justifies ignoring the claim. Nonetheless, should the Appeals Chamber decide to consider the various items of evidence scattered through these paragraphs, then the Defence seeks leave to reply in relation to the Prosecution's characterisation of these items as 'direct evidence' of Mr. Bemba's intentional contributions to the charges.

30. *Third*, in a belated attempt to fill the lacuna in the Trial Chamber's reasoning concerning the content of false testimony in this case, the Prosecution has advanced the bald assertion that "[t]he falsehoods in this case related to crucial credibility matters."[38] Although the Trial Chamber made abstract pronouncements concerning the impact that false testimony on issues of credibility could have on the integrity of justice, it never issued a factual determination that the falsehoods of the fourteen witnesses related to crucial credibility matters in the Bemba Main Case. If the Trial Chamber had made such a finding, the Prosecution would have cited it. These are issues that should have been litigated and established at first instance.

31. *Fourth*, the Prosecution has claimed that co-perpetration liability does not require the Trial Chamber to make an assessment of Mr. Bemba's individual contribution to the offences.[39] Mr. Bemba was not, however, convicted for the co-perpetration of Article 70(1)(a) offences - he was charged and convicted for solicitation, which is a different mode of liability. The Trial Chamber decided to apply the modes of liability regime in Article 25(3) to Article 70 offences, at the request of the Prosecution, and

[36] Response, para. 68.
[37] Certain ICC Pre-Trial Chambers have used the phrases direct or indirect evidence to refer to the distinction between 'first-hand evidence', such as eye-witness testimony on the one hand, and indirect evidence, which comprises hearsay and NGO reports et cetera. They have further held that indirect evidence should, in general, be corroborated in order to satisfy even the lower threshold of substantial grounds to believe: see for example, ICC-01/09-02/11-396, para. 45; ICC-01/09-02/11-382-Red, para. 83. The distinction has not always been employed consistently or coherently, in part, because of the different evidentiary regimes that apply to the confirmation *versus* the trial stage.
[38] Response, para. 29.
[39] Response, para. 71.

over the objection of the Defence.[40] Having applied this framework in order to convict Mr. Bemba for Article 70(1)(a) offences, it would be unfair to jettison it for the purposes of sentencing him for these offences. Even if the factors underpinning the different modes are not always 'neatly distinguishable', the focus of solicitation is on the effect of the defendant's conduct on the principal: the "causal relationship between the act of instigation and the commission of the crime, in the sense that the accused person's actions prompted the principal perpetrator to commit the crime or offence".[41] This analysis requires an assessment of Mr. Bemba's contribution to the acts of the principals (the fourteen witnesses); the Trial Chamber was therefore obliged to assess the degree and gravity of Mr. Bemba's contribution to the Article 70(1)(a) offences by reference to the extent to which Mr. Bemba's intentional conduct prompted the fourteen witnesses to provide false testimony.

iv. New legal arguments concerning the definition of 'gravity' for Article 70 offences

32. In its appeal against sentence, the Prosecution argued that the Trial Chamber erred by employing an artificial distinction between merits and non-merits, which was not necessarily consistent with the material nature of the lies in question.[42] The Prosecution further averred that this distinction failed to give sufficient importance to the purpose of the common plan, particularly as "[p]erjured evidence given to secure the acquittal of a **guilty person** is very serious".[43]

33. These arguments succeeded, in part. The Appeals Chamber found, that while the Trial Chamber had exercised its discretion reasonably in determining that the content of false testimony was relevant to the sentence, the Trial Chamber had erred in connection with its evaluation of the content.[44] In terms of the latter aspect, the Appeals Chamber agreed that it was wrong to assess the gravity of the false testimony on the basis of abstract assumptions concerning a distinction between non-merits and merits issues.[45] According to the Appeals Chamber, what was required

[40] ICC-01/05-01/13-977, paras. 14-40.
[41] ICC-01/05-01/13-2275-Red, para. 848.
[42] ICC-01/05-01/13-2168-Conf, para. 92
[43] ICC-01/05-01/13-2168-Conf, para. 97.
[44] ICC-01/05-01/13-2276-Red, para. 40.
[45] ICC-01/05-01/13-2276-Red, para. 42.

was a "fact-specific assessment, *in concreto*, of the gravity of the particular offences for which the person was convicted".[46]

34. During the re-sentencing proceedings, the Prosecution never advanced coherent arguments as to the specific gravity of the false testimony of this case or, the extent to which the 'lies' of the fourteen witnesses were material to the issues before Trial Chamber III. Instead, the Prosecution advanced either abstract notions concerning the potential impact of false testimony on credibility issues,[47] or repeated factual considerations that had been relied upon by the Trial Chamber in connection with other sentencing factors.[48] The Prosecution also, again, agitated for Mr. Bemba's penalty to be aggravated on the grounds that:[49]

> it is axiomatic that perjured evidence given to secure the acquittal of a **guilty person** is very serious. This was the reality of this case, where the witnesses were told to improperly testify so as to conceal the criminal scheme **and to acquit Bemba of his serious crimes.**

35. Now, in response to appellate arguments that the Trial Chamber failed to make findings concerning the concrete gravity of the false testimony in this case (i.e the extent to which the lies in question were material to Trial Chamber III's adjudication of the issues before it), the Prosecution has pulled a bait and switch, and proposed a new test for assessing the gravity of Article 70(1)(a) offences. The Prosecution has argued that Article 70(1)(a) is a 'conduct' offence',[50] and that as such, the 'damage' in question results from the introduction of false testimony into the record.[51] At the same time, the Prosecution has also resiled from its earlier position that the purpose of this conduct is relevant – it has now claimed that Mr. Bemba's acquittal, and the distinction between securing testimony for an innocent as opposed to guilty defendant, are irrelevant.[52]

36. Although the Prosecution arguments are framed obtusely, it seems that the Prosecution is arguing that, because Article 70(1)(a) is a conduct offence, the

[46]ICC-01/05-01/13-2276-Red, para.44.
[47] ICC-01/05-01/13-2279, para. 13.
[48] This included the statements of Mr. Bemba's co-defendants in the context of the 'remedial measures' (ICC-01/05-01/13-2279, para. 19). The Trial Chamber had cited this conduct (the remedial measures) as an aggravating factor at paragraph 238 of the 2017 Sentencing Decision, and further took it into consideration when assessing the the "degree of intent" of the defendants (paras. 218, 226, 237, 238, 248).
[49] ICC-01/05-01/13-2168-Conf, para. 97.
[50] Response, para. 28.
[51] Response, para. 27.
[52] Response, paras. 43, 77.

integrity of the proceedings is automatically damaged when a witness testifies falsely, and that as such, it is not necessary or appropriate to then evaluate the extent of this damage or to differentiate between different types of false testimony, and their impact on the issues before Trial Chamber III (the Chamber's 'truth-finding functions'). Abstract conclusions concerning the abstract impact on the 'integrity of justice' at large, are sufficient.[53] Indeed it is telling, that in order to substantiate the gravity of the false testimony in this case, the Prosecution relies on the Appeals Chamber's statement concerning the hypothetical gravity of false testimony.[54]

37. This position seeks to re-write the Appeals Chamber's findings, and re-redirect the scope of the issues that were sent back to the Trial Chamber. The Appeals Chamber rejected the Prosecution's contention, on appeal, that the particular content of false testimony could not be considered in connection with the gravity of the offence,[55] and further affirmed that "in principle, the importance of the issues on which false testimony is given (within the meaning of Article 70 (1) (a) of the Statute) or false or forged documentary evidence is presented (within the meaning of Article 70 (1) (b) of the Statute) may be a relevant consideration in the assessment of the gravity of these offences." [56]

38. As a result, the legal definition of the gravity of Article 70(1)(a) is not at play in the current proceedings; the Defence Appeal concerns the Trial Chamber's failure to render a "fact-specific assessment, *in concreto,* of the gravity of the particular offences for which the person was convicted".[57] Moreover, having decided, at first instance, that content was a relevant factor, it would have been an abuse of discretion for the Trial Chamber to refuse to make a determination on this point, because it was either unwilling or unable to evaluate content in the manner set out by the Appeals Chamber. In the scheduling order, which was issued after the case was remanded back to trial, the Trial Chamber underscored that it would not allow the parties to re-litigate any issues that fell outside of the specific errors identified by the Appeals Chamber: any aspects of the initial sentencing decision that were confirmed on appeal should be treated as final.[58] As noted above, the Appeals Chamber approved

[53] Response, paras. 27-28.
[54] Response, para. 28.
[55] ICC-01/05-01/13-2276-Red, para. 40.
[56] ICC-01/05-01/13-2276-Red, para.38.
[57] ICC-01/05-01/13-2276-Red, para.44.
[58] ICC-01/05-01/13-2277, para. 3.

the Trial Chamber's reliance on the content of the testimony to assess gravity.[59] The Trial Chamber nonetheless ruled, in its 2018 decision (which followed Mr. Bemba's acquittal), that "[t]he independence between this case and the *Bemba* Main Case also warrants not giving weight to the fact that the false testimony went only to 'non-merits' issues."[60] Although framed as a matter of 'weight', by giving the actual content of the testimony 'no weight', the Trial Chamber effectively excluded the content of the testimony from its determination of gravity. The Trial Chamber changed the rules of the game without giving the Defence advance notice that this factor was no longer in play. To the extent that the Trial Chamber attributes this new approach to the 'independence' of the two cases (thus implying that this independence prevented the Chamber from making an assessment of the content of the false testimony) the Trial Chamber also implicitly overruled the Appeals Chamber's determination that this independence did not prevent the Chamber from evaluating the gravity of the content of the false testimony in this case.

39. These were the issues placed before the Appeals Chamber in the Defence Appeal. To the extent that the Response seeks to broaden the scope of appellate inquiry, the Prosecution's arguments should either be dismissed, or the Defence should be afforded a full opportunity to reply.

v. New legal arguments concerning the scope of Article 81(2)(b)[61]

40. In its Response, the Prosecution argues that, as a categorical rule, Article 81(2)(b) cannot be invoked if the Appeals Chamber has already issued a judgment on conviction.[62] This stance ignores the very specific circumstances of this case (created, through the Appeals Chamber's decision to vacate the sentence due to the deficiencies in the Trial Chamber's factual reasoning), and the interplay between Article 81(2)(b) and Article 83(2)(b). It would also result in an unnecessary and illogical gap as concerns the power of the Court to overturn an unfair or unsubstantiated conviction. The fact that this is a contempt case should not detract from the importance of ensuring that these issues are decided after a full ventilation of the relevant legal and procedural issues, and the potential implications at play.

[59] ICC-01/05-01/13-2276-Red, para. 40.
[60] Response, para. 29, citing Re-Sentencing decision, para. 33.
[61] The references to Article 82(1)(b) in the Appeals Brief were typos, and clearly understandable as such. The Defence will file a corrigendum in the coming days.
[62] Response, para. 51.

This includes situating Article 81(2)(b) in its proper context in the Statute, and in this case.

41. In particular, although the Prosecution has framed the Appeal as an attempt by the Defence to have two bites from the same cherry,[63] this line ignores the fact that the first 'bite' was invalidated by the Appeals Chamber, at the behest of the Prosecution. After the Appeals Chamber vacated the sentence imposed by the Trial Chamber, it decided to remand the case to Trial Chamber VII to impose a new sentence. Article 83(2) regulates the options that are available to the Appeals Chamber if it decides that a sentence is materially affected by errors. The Appeals Chamber confirmed, in this regard, at an earlier point of the same decision, that where a "matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported 'inherent powers' to fill in non-existent gaps".[64] It follows, therefore that the Appeals Chamber must have applied Article 83(2) in order to send the case back to the Trial Chamber. And, since the Appeals Chamber did not amend the sentence itself or request the Trial Chamber to report back to it, the Appeals Chamber must have relied on Article 83(2)(b).

42. Article 83(2)(b) allows the Appeals Chamber to order "a new trial" before a different Trial Chamber. Apart from the caveat that the case would be sent back to Trial Chamber VII rather than a new Chamber, the Appeals Chamber imposed no further restrictions on the operation of Article 83(2)(b). The Appeals Chamber further directed the Trial Chamber to base the new sentence on concrete factual determinations concerning the gravity of the false testimony, and the nature of Mr. Bemba's contributions to Article 70(1)(a) offences. The remand was therefore not confined to issues of law; the Appeals Chamber clearly presumed that it would encompass new and/or more fully elaborated evaluations of fact. The Appeals Chamber's decision to reopen the trial proceedings through Article 83(2)(b) is therefore fundamentally at odds with the Prosecution's claim that it was definitively closed.

43. The wording of Part VI ('The Trial' – which encompasses sentencing proceedings), Article 81(2)(b), and Article 83(2)(b) all speak to the indivisible nature of trial and

[63] See for example, Response, para. 42.
[64] ICC-01/05-01/13-2276-Red, para. 2.

sentencing procedures at the ICC. Under Part VI, the trial phase is not completed until the sentence is imposed. Similarly, Article 81(2)(b) recognises that *res judicata* does not attach vis-à-vis the conviction, until the Appeals Chamber has also concluded the sentencing proceedings. Article 83(2)(b) affirms that if a sentence is vacated, unless the Appeals Chamber issues its own sentence, the case can be sent to the trial stage once more. The absence of any limitations concerning the scope of such a new trial also affirms the absence of any further restrictions concerning the potential operation of Article 81(2)(b) in this appeal.

44. The adoption of a rigid rule would also unnecessarily and unfairly fetter the power of the Appeals Chamber to protect the rights of the accused, and ensure justice, in unique cases. This is one such case. The Appeals Chamber's 2018 decision recognised that the sentence imposed on Mr. Bemba was materially impacted by errors. These errors have not been cured, and the Appeals Chamber cannot ignore these errors (unless, of course, it reconsiders its 2018 approach).

45. The Defence fully subscribes to the need to adopt an expeditious conclusion to this case, but these considerations do not override the Appeals Chamber's duty to apply the Statute. And when faced with a flawed sentence, Article 83 proscribes the following options: the Appeals Chamber can reverse the sentence (which would effectively amount to an acquittal), attempt to cure the flaws by amending the sentence itself, or remand the case or issues to a Trial Chamber.

46. The Appeals Chamber's previous reliance on the latter approach failed to cure the errors in Mr. Bemba's sentence. The Appeals Chamber's determination that, given the nature of the offences and the errors identified by the Appeals Chamber, Trial Chamber VII would be the most 'appropriate' Chamber to hear the case,[65] also appears to recognise the difficulties that another Chamber would face in attempting to do so.

47. It is also impossible for the Appeals Chamber to cure these errors itself, based on the existing record. For example, the Trial Chamber relied on Mr. Bemba's interactions with Mr. Babala, in order to conclude that Mr. Bemba made an essential contribution

[65] ICC-01/05-01/13-2276-Red, para. 362. The Bemba Defence did not argue that the case should be sent back to Trial Chamber VII (cf. para. 362).

to the common plan.[66] These interactions were based on the detention unit recordings. The Trial Chamber accepted that these recordings were technically flawed, and that before relying on certain recordings, it would need to ascertain, on a case by case basis, that the extract in question was not affected, but could be read in isolation, and that there were no plausible discrepancies.[67] Nonetheless, although the Trial Chamber provided a limited number of examples in the Trial Judgment, it never issued a detailed ruling concerning which extracts (incriminating or exculpatory) were considered to be reliable, and therefore included as part of its 'holistic' assessment of the evidence. Accordingly, if the Appeals Chamber were to consider the Trial Chamber's finding, in paragraph 700 of the Trial Judgment, that "on the basis of an overall assessment of the evidence, the Chamber is convinced that Mr Bemba knew that at least some of the payments he discussed and authorised over the phone served also illegitimate purposes," the Appeals Chamber would have no way of knowing which (incriminating **and** exculpatory) recordings were considered, and relied upon, in order to reach this conclusion.

48. The Appeals Chamber has also changed in composition; three of the five judges are not privy to the manner in which the Appeals Chamber made its assessment of Mr. Bemba's contributions "on the basis of an overall assessment of the evidence", and, because of the Trial Chamber's approach to evidence, five of the five Appeals judges are also not privy to the manner in which the Trial Chamber evaluated and weighed the evidence.

49. The Appeals Chamber can of course, reverse the sentence - and this was the primary relief requested by the Defence in its Appeal. But if the Appeals Chamber does attempt to construct its own evidential record, then the Defence should be heard, in relation to this record. And if this record does not substantiate Mr. Bemba's conviction, then it is impossible to determine how and why issues of expedition or certainty override the fundamental principle, set out in Article 66(3), that "[i]n order to convict the accused, **the Court must be convinced** of the guilt of the accused beyond reasonable doubt". The converse of Article 66(3) is that if the Court is not

[66] ICC-01/05-01/13-1989-Red, paras. 813,816.
[67] "the Chamber must review each and every excerpt within a telephone conversation to be relied upon. Furthermore, the difficulties identified by the Defence cause the Chamber to treat with circumspection any probative value to be attributed to the information emanating from the evidence concerned. Hence, where discrepancies appear plausible, the Chamber refrained from relying on the recordings. Otherwise, the Chamber did not rely solely on the audio recordings and transcription/translation concerned; it relied on such items only if corroborated by other evidence", ICC-01/05-01/13-1989-Conf, para. 227.

convinced that the evidence establishes the guilt of Mr. Bemba, to the standard of beyond reasonable doubt, then it must acquit him. Article 83(2) and Article 81(2)(b) must be interpreted and applied in this light.

vi. The Prosecution's arguments concerning the definition of unlawful detention

50. The Prosecution's claim, at paragraph 76 of its Response, that the Court's legal framework does not distinguish between formal and substantive lawfulness is legally incorrect. If accepted, it would also have profound ramifications as concerns the ability of the Court to prosecute and adjudicate crimes against humanity and war crimes arising from situations of arbitrary detention.

51. The Appeals Chamber has affirmed that the Court's legal framework concerning detention must be interpreted and applied in a manner that is consistent with internationally recognised human rights, as per Article 21(3) of the Statute.[68] Human rights law recognises in turn, that,[69]

> any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (…)It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context.

52. The ICC Presidency has also incorporated this distinction between formal and substantive lawfulness into its decisions on the lawfulness of restrictions of the defendant's liberty:[70] the Presidency's consideration as to whether the measures were 'in accordance with the law' considered not only the formal compliance with the text of the regulations, but whether the regulations themselves possessed sufficient safeguards to protect the detainee against arbitrary or unfair results. After deciding whether such measures were 'in accordance with the law', the Presidency also considered whether they were necessary and proportionate.

[68] ICC-01/05-01/13-969, para. 2.
[69] ECHR: *Kurt v. Turkey, App.No.*15/1997/799/1002, paras. 122, 123.
[70] See for example, ICC-01/05-01/08-310, paras. 37-41.

53. In line with these approaches, the Chamber's assessment of the lawfulness of Mr. Bemba's detention should not have terminated with the conclusion that it was 'lawful' simply because Mr. Bemba was detained pursuant to an Article 70 arrest warrant. Rather, the Trial Chamber's assessment of 'lawfulness' should have encompassed a further inquiry into whether Mr. Bemba's detention under this warrant was, at all times, necessary and reasonable, and subject to effective judicial oversight. This further inquiry is not only essential to the Appeals Chamber's adjudication of the Defence Appeal, but also the effective protection of victims of unlawful detention, who may fall under the jurisdiction of the Court.[71]

3.Relief sought

54. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Appeals Chamber to invoke Regulation 60 of the Regulations of the Court, and authorise the Defence to file a reply to the Prosecution Response to the Defence Appeal.

Melinda Taylor
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Dated this 7th day of March, 2019
The Hague, The Netherlands

[71] Through Article 7(1)(e), or Article 8(2)(a)(vii), for example.