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International Criminal Court

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No.: **ICC-01/05-01/13**
Date: **18/02/2019**

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, with Confidential Annex A and Public Annex B
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 Defence for Mr. Jean-Pierre Bemba respectfully seeks leave to admit additional evidence on appeal, which is related to Grounds 1 and 2 of the Defence Appeal against the Resentencing Decision (the Defence Appeal). The evidence in question (set out in Annex A) consists primarily of public interventions from Judge Perrin de Brichambaut, which indicate that:

    i. Trial Chamber VII conducted a *coup d'état* as concerns the Court's applicable law. Without informing the parties, the Chamber decided to conduct the Article 70 proceedings as a civil law trial. The decision to import German procedural law was contrary to the Statute, and resulted in an arbitrary and unfair conviction and sentence; and

    ii. There is an objective appearance that Judge Perrin de Brichambaut possessed specific preconceptions as concerns Mr. Bemba's role and responsibility, and on fundamental points of law and procedure. The objective appearance of such preconceptions fundamentally undermined the fairness and impartiality of the proceedings.

2. The evidence fulfils the standard for admission on appeal:

    i. The Defence was not aware of this evidence during previous phases of the proceedings, and there are, otherwise, compelling grounds to consider these issues;

    ii. The evidential items are authentic and reliable representations of Judge Brichambaut's interventions, or otherwise, open source materials from reliable sources; and

    iii. The evidence is directly relevant to the issues set out in the Defence appeal (Grounds 1 and 2).

3. To the extent that the evidence might be considered to supplement the factual basis for Ground 2 by incorporating an additional basis for impugning the fairness and impartiality of the proceedings, the Defence also seeks leave to expand the scope of the appellate grounds, if such expansion is required.[1]

2. Submissions

[1] Regulation 61(1), Regulations of the Court.

4. Regulation 62(1) of the Regulations of the Court provides that "A participant seeking to present additional evidence shall file an application setting out: (a) The evidence to be presented; (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber."

2. 1 The evidence was not available to the Defence at trial

5. The 'evidence' which is the subject of this application is set out in Annex A, and will be disclosed forthwith. The evidence was not adduced before the Trial Chamber because the Defence was not aware of it. The first item, a transcript of an intervention by Judge Perrin de Brichambaut titled 'Article 68', was sent to Counsel on 6 February 2019 by a colleague, in the context of a discussion concerning interlocutory appeals. The transcript post-dates the trial, but was published by CILRAP/Lexitus whilst the appeal proceedings in this case were ongoing. Since this transcript ostensibly concerned victim participation (Article 68), it did not fall with the scope of articles that would fall within diligent preparation for Article 70 proceedings. The contents of the transcript also do not appear pursuant to open source searches in relation to any of issues that arose in the case.

6. After this transcript was sent to the Defence and in light of the sentiments set out therein, the Defence conducted a systematic review of other interventions from Judge Perrin de Brichambaut that touched directly or indirectly on the *Bemba et al.,* case. Given ICC case law that specifies that public statements concerning the defendant must be considered in their context,[2] the Defence further reviewed open source materials in order to identify the context of these statements, including whether these views might have been influenced by former positions or information received in such positions. This review unearthed:

- Further CILRAP interventions from Judge Perrin de Brichambaut concerning the 'civil law' procedures and system for admission of evidence that the Trial Chamber had decided to apply in the *Bemba et al.,* case, and the Chamber's position towards former appellate rulings; and
- Documentation concerning Judge Perrin de Brichambaut's former role as Director of DAS, and the role of France and the Ministry of Defence in the 2002-2003 CAR conflict.

[2] ICC-01/05-01/08-3311, paras. 8-9.

7. The relevance of this information only became apparent as a result of the 'Article 68' intervention sent to the Defence on 6 February 2019. Given that Judge Perrin de Brichambaut issued no separate opinions or statements during the trial itself concerning Mr. Bemba or the system for admission of evidence, the Defence had no cause to explore these matters at a previous juncture. It is entirely possible that the Prosecution might claim that the contents of Judge Perrin de Brichambaut's interventions were readily available, and indeed known to participants in the Court. But if that *were* the case, then – in light of the relevance to issues in this case (including former appellate proceedings) – the Prosecutor would have been required to formally disclose them to the Defence, as required by the Court's disclosure principles.[3] The very fact that these materials were not disclosed by the Prosecutor therefore presupposes that these interventions were not 'available' to the parties, in the ordinary sense of the word.

8. Regulation 62 must also be interpreted in a manner that is consistent with Article 64(6)(d), which empowers the Trial Chamber (and thus, the Appeals Chamber, pursuant to Article 83(1)) to order the production of evidence, including in circumstances where the party originally seeking to tender the evidence has failed to comply with applicable deadlines or procedural requirements.[4] The Appeals Chamber has further confirmed that, even when the criteria regarding such admission are not fulfilled, the Chamber possesses the discretion to admit additional evidence on appeal, if there are "compelling reasons" for doing so.[5] The present application raises issues concerning the appearance of impartiality of a member of the Trial Chamber. The UN Human Rights Committee has underlined the importance of addressing such issues, including on an *ex officio* basis, since a "trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."[6] There is therefore a compelling justification for considering this evidence, notwithstanding the advanced stage of the proceedings.

2.2 The additional evidence fulfils the criteria for admission

9. Judge Perrin de Brichambaut's interventions were either video or audio-recorded, which allows for an independent verification of the accuracy of the contents, or submitted by him to CILRAP. The information concerning the role of DAS is sourced primarily

[3] ICC-02/05-03/09-501, para. 34.
[4] ICC-01/04-02/06-2191, para. 12; ICC-01/04-0l/07-T-222-Red-ENG, page 77, lines 11 – 14; ICC-01/04-01/06-2727-Red, paras. 61-2; ICC-01/05-01/08-3029, paras. 23-28.
[5] ICC-01/04-01/06-3121-Red, para. 62.
[6] *Karttunen v. Finland,* HRC Communication No. 387/1989, UN Doc. CCPR/C/46/D/387/1989, para. 7.2.

from either French legislation or French Ministry of Defence sites, and must therefore be presumed to be an accurate reflection of the official French position on such matters. Other open source materials are relied upon for specific contextual purposes, for example, to illustrate the type of high-level access that Judge Perrin de Brichambaut would have had, in his former role.

2.3 The additional evidence is relevant to Ground One

10. Ground One concerned the Trial Chamber's failure to apply the Appeals Chamber's directives concerning the correct approach to sentencing, which stemmed in turn, from the Chamber's erroneous approach to evidence, specifically, the Chamber's failure to apply the Statutory regime concerning the admission of evidence and prior appellate case law.[7] Ground One further addressed the prejudice and appearance of arbitrariness, which stemmed from the absence of reasoning concerning the admission and weight of evidence. The additional evidence goes to the heart of these issues. As noted by Judge Henderson, "it is important to bear in mind that this particular trial was conducted along adversarial lines."[8] That was also the understanding of the Defence. This assumption informed Defence strategy, investigations and argument, including at the Re-Sentencing phase. And yet, Judge Perrin de Brichambaut's interventions reveal that, unbeknownst to the parties, the *Bemba et al.* case was in fact conducted as a civil law trial, and evidence was admitted pursuant to the system employed in Germany, rather than in accordance with the criteria set out in the Statute, as interpreted by appellate case law.

11. In an intervention dated 17 May 2017,[9] Judge Perrin de Brichambaut recounted the procedures adopted in this case:[10]

> Third elements that the chamber has to has to rule on, because this is the common law tradition, there is a constant exchange of documents between the Prosecutor, the Defense and one of them is—and I hate it because we don't have it in our system and in the civil law system— interlocutory appeal. If either party, either the Prosecutor or the Defense is not happy with a decision which has been taken by the chamber, he asks for leave to appeal to the Chamber of Appeal. So, there are different approaches to this. I sat in the Bemba and others Chamber. This is the picture you saw, presided by Judge Smith. Judge Smith, serious German judge, no nonsense:
>
> > "Interlocutory appeals—I don't have. None. Full-stop".
>
> I agreed, actually, and the Filipino judge also agreed. We all said, "We won't accept

[7] Ground One, pp. 7-24.
[8] ICC-01/05-01/13-2275-Anx, para. 45.
[9] CAR-D20-011-0001 at 0010-0011 (Video, CAR-D20-0011-0314)0
[10] CAR-D20-011-0001 at 0010-0011.

> any interlocutory appeal. If they have any questions to make they will make it in the full appeal." (…) So, we were civil lawyers in Bemba and others. We said interlocutory appeals shouldn't even exist, we will ignore it.

12. In a subsequent written intervention, Judge Perrin de Brichambaut elaborated that,[11]

> La Chambre de première instance présidée par le Juge Schmitt et composée de juge issus du droit civil a pris quatorze mois pour juger les poursuites pour entrave à l'administration judiciaire en vertu de l'article 70 du Statut. A cette occasion, la Chambre de première instance a adopté un certain nombre de décisions qui sont désormais soumises à l'examen de la Chambre d'appel. […] Des directives strictes furent fournies pour la présentation des preuves, pour toute demande des parties et, à cinq reprises, des requêtes déposées à la barre contenant un grand de documents écrits furent acceptés. Plus important, la Chambre a décidé qu'en règle générale, elle supprimerait l'évaluation de la recevabilité de la preuve jusqu'au délibéré du jugement. Aucune décision concernant la recevabilité de la preuve ne fut désormais adoptée (à l'exception des cas mandatés par le Règlement) et la Chambre considéra que les éléments proposés par les parties pouvaient être soumis sans aucun autre traitement supplémentaire. Ceci a permis au bureau du procureur de présenter des documents issus de Western Union ainsi que des relevés d'écoutes téléphoniques. Toutes les demandes des parties d'interjeter appel furent rejetées sans exception. En agissant ainsi, la Chambre se rapprocha de la pratique d'une cour d'appel allemande avec laquelle le président Schmitt était très familier, ce qui remit sérieusement en question les anciennes pratiques de la CPI, en particulier celles relatives à l'acceptation des éléments de preuve soumis. Il s'agit là d'un point central dans la tradition de la Common law où la pertinence, la fiabilité et la probité de la preuve doivent normalement être considérées avant que la preuve soit elle-même admise au dossier. Des pratiques similaires sont désormais suivies par deux autres chambres de la CPI, les autres chambres restant attachées des pratiques différentes dans ce domaine. […]

13. In the verbal presentation that coincided with this intervention,[12] Judge Perrin underscores that civil law is the 'proper law',[13] and confirms once again that Trial Chamber VII decided to conduct the *Bemba et al.* case as a 'civil law', 'radically anti-common law' trial:[14]

> So what I am going to read is a sort of marching order of everything the Chamber decided which was radically anti-common law, and which has changed the way that the trials have been run at the ICC. (…) The Presiding Judge was a very experienced German judge – I pay tribute to him and I supported him fully – took a decision on proceedings that laid down strict rules for the organisation of the trial giving a maximum of 200 hours to the prosecutors and double that time to the five defence teams He accepted pre-recorded testimonies and provided very strict directives for the presentation of evidence and for all submission by **parties he accepted something that had never been done in the same way in the ICC – bar table**

[11] CAR-D20-0011-0023 at 0028-0029.
[12] CAR-D20-0011-0032 (see also Annex B for transcribed extracts)
[13] CAR-D20-0011-0032 "When I was discussing this week with the Justice Ministers of Francophone Africa they were all steeped in the proper law, the civil romantic law, which has inquisitorial systems' (16.09 mark - 16.20)
[14] CAR-D20-0011-0032 (approx. 30 -34 minute mark) ; see also Annex B.

> **motions where hundreds of written documents were taken on board but the five different bar table inputs But the most radical change that was done in the Bemba and others the decision was that as a general rule the chamber determined that it would defer its assessment on the admissibility of evidence until deliberating its judgment**. So the Chamber made no ruling on the admissibility of the evidence. except in a few cases where it was mandated by the rules themselves. **The Chamber considered that items proposed by the parties to have been submitted and without any further elaborations it allowed for the submission of documents emanating from a number of outside sources like Western Union as well as telephone intercepts**. And the even more radical decision taken by the Chamber was that all requests by the parties for interlocutory appeals were rejected, without exception. No interlocutory appeals in the whole trial. Now if you look at what made the other trials last for 6 or 7 years you see that a key source was the problem of the assessment of the admissibility of evidence and various forms of interlocutory appeals which were accepted by the Chamber **so if you do such a radical changes of the rules**, **which in all respect is the practice of the German appeals section which was implemented by Judge Schmitt** and I supported him 100% on all this, you can change rules. (34 minute)

14. Although Article 64(8)(b) gives the Presiding Judge some degree of flexibility to adopt specific procedures concerning the conduct of the trial, this flexibility is subject to the overarching duty to conduct the trial fairly and impartially, and in a manner that is consistent with the Statute. Nonetheless, whereas Article 64(3)(a) underscores the duty to "[c]onfer with the parties" in relation to the procedures that will be adopted in the case at hand, at no point were the parties afforded an opportunity to weigh in on the propriety of adopting specific 'radical' civil law features. Article 21(1) also does not permit the Chamber to conduct a trial based on the procedures of one country;[15] if "one swallow does not make a rule of international law",[16] then certainly one country's practice is not a sufficient foundation to controvert the tide of international criminal procedure as applied by the ICC itself (in all prior decisions), and other international and internationalised courts.[17]

15. The German law on the submission and evaluation of evidence also bears no similarity to the practice employed in former ICC trials or the pre-trial phase of this case, nor can it be readily reconciled with the text of the Statute and Rules. International

[15] ICC-01/04-168, paras. 23-32 , including para. 27, where the Appeals Chamber already rejected the appellate procedures of Germany as being inapposite to ICC procedure.
[16] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26, per Lord Bingham, para. 22.
[17] "Consistency requires that any extreme shift in position in the jurisprudence be fully reasoned and considered", *Prosecutor v. Lukic*, Appeals Judgment, 4 December 2012, dissenting opinion, Judge Morrison, para. 9.

criminal trials at the ICC are largely party driven,[18] and the burden rests exclusively with the Prosecution.[19] In contrast,[20]

> the German law operates on an independent duty of the court to establish the truth and not on the partisan presentation of the evidence by the parties; it is thus not really helpful to speak of the 'prosecution proving its case' or of the prosecution having a 'burden of proof' in a German trial context. Once the case is admitted to trial and the hearings have begun, control is taken out of the hands of the prosecution and given to the court.

16. And, as a further point of fairness, irrespective as to whether the trial is conducted along lines which are influenced by the common law, the civil law, or *sui generis* concepts, the Defence has a right to know which law and procedural standards will be applied in the case at hand, and, at an appellate level, which law and procedural standards were applied to the case at hand. By virtue of his description of this approach as a 'radical change', Judge Perrin was clearly aware that the approach adopted by the Chamber represented a 'radical' departure from the established jurisprudence at the Court, including prior appellate rulings concerning the admission of evidence. The principle of open justice and legal certainty therefore required, at the very least, the Trial Chamber to notify the parties of the legal and philosophical underpinnings of this approach so that they could modify their preparation and strategy accordingly.

17. Of particular importance, although Trial Chamber informed the parties that it had decided to defer its assessment of the relevance, probative value and prejudicial impact of each item of evidence,[21] the Defence assumed that in accordance with Article 66(2) and Article 67(1)(i), the burden to establish that each item of Prosecution evidence was relevant, and the probative value was not outweighed by the prejudicial impact on the proceedings, rested with the Prosecution. The Defence relied heavily on the Statutory burden of proof throughout the proceedings, including during the Re-sentencing phase.[22] In contrast, if the Chamber had enlightened the Defence as to the rules of the game, the Defence could have anticipated that, in line with the specific approach in Germany, the burden would fall to the Defence to demonstrate why evidence should be excluded.[23] Whereas the Chamber ultimately decided to admit entire categories of evidence because

[18] ICC-01/04-01/06-1432, para. 3.
[19] Article 66 (2) of the Statute.
[20] M. Bohlander, Principles of German Procedure (Hart Publisher, 2012), pp. 143-144.
[21] ICC-01/05-01/13-1285, para. 9.
[22] ICC-01/05-01/13-2281-Conf-Exp, paras. 6-25; for Trial, see for example, ICC-01/05-01/13-1074-Conf, paras. 20-107; ICC-01/05-01/13-1199-Conf, paras. 3-16; ICC-01/05-01/13-1245-Conf; para. 10; ICC-01/05-01/13-1402-Conf, paras. 3, 44-45, ICC-01/05-01/13-1517-Conf, paras. 2-3.
[23] Bohlander, p. 172.

the Defence had failed to establish that specific items lacked authenticity or reliability,[24] the Defence was never aware that it had a duty to do so. Having focused on whether the specific arguments adduced by the Prosecution were sufficient to satisfy the burden of proof, the Defence could not have anticipated that the Chamber would don an inquisitorial mantle by conducting its own, *in camera*, authentication and attribution of Prosecution evidence.[25]

18. The Chamber also did not clarify or otherwise put the Defence on notice of its decision to accept reams of evidence tabled *via* extremely sparsely worded bar table motions without requiring 'further elaborations'. If the Chamber had expressed the formal position that it was conducting the trial along civil law lines, based on the system for evidence employed in Germany, the Defence could have adjusted its strategy accordingly, and advocated for the corresponding introduction of specific Defence protections that apply in that system. This includes the stricter exclusionary rules for evidence obtained in violation of privacy protection;[26] the general rule that documents must be introduced through an individual (which is of particular importance as concerns audio-visual materials);[27] and the requirement that written statements may not be relied upon in relation to issues concerning a witness's impression of factual events.[28] Instead, the lack of precision on this point allowed the trial to morph into a procedural Frankenstein, in which the Chamber could cherry pick domestic elements which afforded the Chamber and Prosecution more leniency, whilst disregarding the attendant safeguards that exist for the Defence.[29]

19. The invisible nature of these determinations deprived the Defence of the opportunity to fully explore and contest the Chamber's approach to the admission of evidence, or other 'radical changes of the rules', such as the elimination of the right to seek interlocutory appeal,[30] in its former appeal against conviction. The covert nature of this

[24] ICC-01/05-01/13-1989-Conf, para. 224.
[25] ICC-01/05-01/13-1989-Conf, paras. 216,
[26] S. Gless, 'Germany: Balancing Truth Against Protected Constitutional Interests' in Thannen (ed.) Exclusionary Rules in Comparative Law (Springer, 2013), pp. 115-117
[27] Bohlander, pp. 157, 162.
[28] Bohlander, p. 158. Cf with the Chamber reliance on the summary notes of a police interview with D-55, ICC-01/05-01/13-1989-Conf, para. 295, which was contradicted by D-55's testimony under oath (ICC-01/05-01/13-T-36-CONF-ENG, p.36, lns 17-21, p.37, lns 10-15, p.65, lns 8-25, p.66 lns 1-12),
[29] "The idea of fairness and equality of arms is somewhat different from that of the adversarial model underlying many common law systems. It is not so much about balancing the positions of the defence and the prosecution; rather, based on the realisation that the prosecution is always in a stronger position, the emphasis is on protecting the rights of the defence versus the prosecution *and* the court", Bohlander, p. 144.
[30] See, for example, ICC-01/05-01/13-1361, para. 4, which makes no reference to this restrictive approach.

tectonic shift in approach also meant that during the trial, the Defence needlessly expended time and resources filing requests for leave to appeal that had no prospect of success.[31] And, as acknowledged by Judge Perrin, the absence of any form of interlocutory review in the Court's first contempt case meant that a significant number of complicated legal, procedural and factual issues were deferred to the Appeals Chamber, which was then compelled to address them within a very circumscribed deadline of 9 May 2018.[32]

20. Moreover, whereas the Appeals Chamber assumed, in its judgment of 8 March 2018, that the Trial Chamber's verdict reflects an impartial and objective assessment of the entire evidence based on the criteria set out in Article 69(4), this assumption is undercut by Judge de Brichambaut's revelation that the Chamber decided to apply an exclusively civil law approach, based on German inquisitorial principles, to its assessment of evidence in this case. The hidden nature of this approach, when coupled with the absence of any detailed reasoning concerning the Chamber's assessment of specific items of evidence, rebuts any presumption that merely because the Chamber cited correct standards of evidence in the introductory sections of the judgment, it actually applied these standards to the admission and assessment of evidence.[33] The disjunct between the reasoning formally communicated to the parties, as compared to the Chamber's own internal assessment of the evidence is, in fact, highlighted by the following exchange from Judge de Brichambaut:[34]

> We were going after Bemba and the legal team who had tried to disrupt justice by false testimony. But the witnesses we had, they were also quite clever. So, they had been invented by Mr. Bemba, but while they were witnesses, they were protected and paid for. [When the Prosecutor] went to them and said, "You have been lying." They say, "Well, c'mon now, maybe yes, maybe not, but what do you offer me?" So, we had, I won't tell you how many, but a number of witnesses which had been defense witnesses of Mr. Bemba, which—who, when it came to the second round—were turn coats. They were defense witnesses of the Prosecution, and in between they had lived a fairly comfortable life at the expense of the taxpayers of the ICC. Ironic, but inevitable.

21. But whereas Judge de Brichambaut acknowledges that key Prosecution witnesses in the Article 70 trial had agreed to testify in a certain manner for the Prosecution, as a *quid*

[31] The Chamber denied all requests for leave to appeal, including requests concerning the system for admission of evidence, and the approach to bar table evidence: ICC-01/05-01/13-1489, ICC-01/05-01/13-1361.
[32] CAR-D20-0011-0032, 34:28 - 36 minute mark.
[33] *Lukic*, Appeals Judgment (ibid).,dissenting opinion, Judge Morrison, para. 18.
[34] CAR-D20-0011-0001 at 0021.

pro quo (*You have been lying." They say, "Well, c'mon now, maybe yes, maybe not, but what do you offer me?")*, the Trial Chamber stated that,[35]

> The Chamber is alive to the fact that the Court invested significant amounts of money in order to facilitate P-260 (D-2)'s testimony. Nevertheless, **the Chamber finds no indication** that those payments prompted the witness to strategically direct his evidence in the Prosecution's favour. Accordingly, they do not impact on P-260 (D-2)'s credibility or the overall reliability of his evidence.(emphasis added)

22. If Judge de Brichambaut was of the view that these witnesses had decided to alter their testimony in exchange for something offered to them, then there clearly **was an indication** that payments had prompted the witnesses to alter their testimony in favour of the Prosecution, and this indication should have been reflected in the weight attributed to this testimony (and the purpose for which it was used).

23. These issues goes to the heart of Ground One: the Trial Chamber's failure to issue transparent, reasoned determinations concerning the evidential foundation of Mr. Bemba's conviction and sentence utterly vitiates the fairness and reliability of Mr. Bemba's conviction. In its judgment, the Trial Chamber acknowledged the dearth of direct evidence concerning Mr. Bemba;[36] Mr. Bemba's conviction and current sentence rest, as a result, on the Chamber's interpretations and extrapolations of circumstantial evidence, based on its appreciation of the 'evidence as a whole'. A highly circumstantial case was thus used to establish extremely nebulous concepts, such as the nature and extent of Mr. Bemba's indirect 'influence' on witnesses. Given the specific nature of the case against Mr. Bemba, there is an obvious the risk that the Chamber's conclusions might have been influenced by implicit assumptions and pre-conceptions, or arbitrary and irrelevant factors. This risk is further manifested by Judge Perrin de Brichambaut's intervention of May 2017, which describes Mr. Bemba's role in this case in a manner that does not correlate to the charges, or the evidence submitted by the Prosecution. Specifically, Judge de Brichambaut informed the students that,[37]

> 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 who are well aware,

[35] ICC-01/05-01/13-1989-Red, para. 311. The Chamber employs almost identical language in connection with D3, at para. 316.
[36] ICC-01/05-01/13-1989-Conf, para. 818.
[37] CAR-D20-0011-0001 at 0021

who were central Africans and his legal team told them what to do.

24. Judge de Brichambaut's views concerning Mr. Bemba are consonant with the Chamber's decision to impose the highest penalty on Mr. Bemba. But these views are not consistent with the charges or the evidence tendered in the case. At the time of the events set out in the charges, Mr. Bemba was a detained, defendant in Scheveningen; the Prosecution never addressed or tendered evidence to substantiate the degree of political influence exercised by Mr. Bemba (as a detained defendant) during the time period of the Article 70 charges. The sum total of any evidence concerning Mr. Bemba's potential influence was a highly unreliable, truncated police summary of an unrecorded interview with an unrepresented suspect-witness,[38] which does not reference any attempt by Mr. Bemba to actually exercise influence.

25. The case also concerned five different defendants, who were charged with contributing to the different offences (including Article 70(1)(a)). It was never pleaded or evidentially substantiated that Mr. Bemba "invented witnesses" or that Mr. Bemba "created a group of people"; indeed the evidence (which the Chamber ignored in both its judgment and sentencing decisions) reflected that witnesses invented their testimonies independently of Mr. Bemba, and for reasons that were unrelated to Mr. Bemba.[39] Yet, Judge de Brichambaut's description of the Chamber's findings obliterates any distinction between the roles of the different defendants; Mr. Bemba is deemed culpable for the actions of all (including persons, such as Joachim Kokaté, whom he never met or interacted with), seemingly because of his former role in the DRC.

26. In terms of the impact of such views and approaches on the outcome of these proceedings, after commencing the anecdote with a clear confirmation as to his inquisitorial bent ("*We were going after Bemba and the legal team who had tried to disrupt justice by false testimony),* Judge Perrin de Brichambaut freely concedes that the Chamber's approach to evidence "allowed for the submission of documents emanating from a number of outside sources like Western Union as well as telephone intercepts".[40] Judge de Brichambaut further acknowledges that as a result of the 'radical' changes to the rules adopted in this case, "*you have to be honest what has happened – of course we reached a decision, Bemba was convicted, he was sentenced, we even innovated a little in*

[38] The witness denied that his lack of representation was an informed choice: T -36-Conf-Eng, p.45, lines 11-22.
[39] The Chamber's failure to address this evidence is set out in para. 26, Ground One, Defence Appeal.
[40] CAR-D20-0011-0032 (between 30-34 minutes mark); Annex B.

the sentencing because we inflicted a 300, 000 euros fine on him in order to do something for the victims." [41] Neither the sentencing decision of March 2017 nor its successor of October 2018 revealed that the Chamber had 'innovated' by "inflict[ing] a 300 000 fine on [Mr. Bemba] in order to do something for the victims". Indeed, had the Chamber done so, the Defence would have had a clear basis to contest the Chamber's decision to impose a sanction that was based on extraneous considerations.

27. A fully reasoned judgment and decision on sentence would have safeguarded the impartiality of the process, and acted as a bulwark against an arbitrary verdict in this case. It would have allowed the parties (and any appellate bench) to conduct an independent review of the means by which the Chamber assessed the evidence, and reached its ultimate conclusions concerning the responsibility and culpability of each individual defendant.[42] This is of particular importance given the Chamber's reliance on the same, vague body of evidence, to reach diametrically different conclusions regarding different defendants.[43] In the absence of such a record, Judge Perrin de Brichambaut's interventions only serve to bolster the arguments – set out in Ground One – that the Chamber reversed the burden of proof throughout these proceedings ("We were going after Bemba"),[44] the Chamber failed to conduct an evidential assessment of Mr. Bemba's culpability,[45] the Chamber imposed arbitrary sanctions that were not linked to Mr. Bemba's culpability,[46] and the Chamber assessed the evidence in a manner that was never accurately, and transparently reflected in the judgment and decisions on sentence.[47] Given the extent of these errors, the only feasible and fair remedy is to reverse Mr. Bemba's conviction.

2.3 The additional evidence is relevant to Ground 2

28. In Ground 2 of the Defence Appeal, the Defence argued that the sentence imposed on Mr. Bemba, and underlying conviction itself, were vitiated by the Trial Chamber's

[41] CAR-D20-0011-0032 34 minutes -34.30 minute mark.
[42] Main Case Appeals Judgment, Majority, para. 43.
[43] See for example, Trial Judgment para. 883, "[c]ontrary to the Prosecution's position, the Chamber does not rely on the various telephone conversations in which Mr Babala merely asks for authorisation of payments to Mr Kilolo. The Chamber finds it cannot establish any link, without more, between those payments and subsequent illegitimate payments effected to the witnesses", as compared to para. 693, "Mr Bemba was involved in this payment scheme extensively. This is demonstrated by a significant body of evidence which proves that Mr Babala, who was Mr Bemba's financier, would seek authorisation from or inform Mr Bemba before making any payment to Mr Kilolo or other persons."
[44] Ground One, para. 61.
[45] Ground One, paras. 5-10, 14-16,
[46] Ground One, paras. 9, 10, 38
[47] Ground One, paras. 17-37.

failure to provide an effective remedy as concerns specific violations of Mr. Bemba's fundamental rights. This included the Trial Chamber's failure to take necessary steps to protect the fairness and impartiality of the proceedings, which led to an appearance that Mr. Bemba was sentenced and sanctioned in accordance with the underlying assumption that he had committed war crimes and crimes against humanity in the CAR.[48] The additional evidence relates directly to these issues,[49] insofar as:

- Judge Perrin de Brichambaut's interventions are inflected with an appearance of partiality; when read in conjunction with his background in the French Ministry of Defence, and its involvement in the CAR conflict, there is an objective appearance that he lacked sufficient impartiality to adjudicate issues that were intrinsically tied to Mr. Bemba's involvement in the CAR; and
- Judge Perrin de Brichambaut's predetermination of key legal issues was incompatible with the duty to adjudicate requests (including Defence applications for abuse of process remedies vis-à-vis Prosecution misconduct) in an impartial manner. This in turn, deprived Mr. Bemba of the right to an effective remedy.

There is an objective appearance that the Trial Chamber lacked impartiality vis-à-vis Mr. Bemba

29. Judge Perrin de Brichambaut's pronounced views concerning Mr. Bemba ("not a small warlord"), Mr. Bemba's role in the case (such that he is portrayed as the exclusive instigator and proponent), his own role as a Judge ("*We were going after Bemba*"), and what he perceived as Mr. Bemba's liability to victims ("*we inflicted a 300, 000 euros fine on him in order to do something for the victims")* raise an objective appearance of partiality.

30. Although these statements post-date Mr. Bemba's conviction, Judge de Brichambaut's conception of Mr. Bemba's culpability is problematic because it appears to be directly linked to Mr. Bemba's political and military position in the CAR and DRC, rather than the evidential findings concerning Mr. Bemba's role in the charged offences. As was the case with Judge Harhoff in the *Seselj* case, [50] Judge de Brichambaut's interventions offend the duty of judicial impartiality because they are based on preconceived notions concerning the position of the defendant, rather than the evidence

[48] Ground Two, paras. 121-138.
[49] Requests to admit additional evidence on appeal can also relate to the fairness of the proceedings: ICC-01/04-01/06-3121-Red, para.60.
[50] *Prosecutor v. Vojislav Šešelj*, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, IT-03-6 -T D 60924 –D60915, 28 august 2013, paras. 12-13.

of the defendant's culpability. Judge de Brichambaut's revelation that a substantial fine was initially imposed 'to do something for the victims' also speaks to the ongoing partiality of the Chamber, given that the Chamber decided to maintain the fine in its 2018 decision, even though Mr. Bemba was acquitted, and bears no responsibility for the crimes committed against the victims in the Main Case.[51] And, as set out above and in Ground One, the absence of a transparent record concerning evidential determinations heightens the appearance of arbitrariness as concerns judicial conclusions, which are not clearly rooted in direct evidence, or which are contradicted by the Chamber's approach to other defendants.

31. The objective appearance that the Chamber convicted and sentenced Mr. Bemba in accordance with the assumption that he was, in fact, guilty of Main Case charges,[52] is now reinforced by further contextual background provided by Judge Perrin de Brichambaut. Specifically, in his May 2017 intervention, Judge Perrin de Brichambaut recounted the close oversight exercised by the French Ministry of Defence over ICC developments impacting on French peacekeeping operations, such that when he was acting as head of the French delegation at the Rome Conference, he "had observers in my delegation from my Ministry of Defense also, making sure that I wouldn't adopt anything which would make the work of French soldiers serving in peacekeeping missions, which were quite active at that time particularly in Yugoslavia, former Yugoslavia."[53] This statement has particular resonance for this case in light of firstly, Judge Perrin de Brichambaut's active involvement in the Ministry of Defence, as Director of the Delegation of Strategic Affairs (DAS), from 1998 until 2005;[54] and secondly, the French Ministry of Defence's direct involvement in the CAR conflict, during his tenure, and during the time period of the Main Case charges.

32. Article 41(2)(a) of the Statute provides that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.[…]." Rule 34(2) of the Rules of Procedure and evidence delineates further grounds for disqualification, including,

> (c)Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their

[51] Cf Ground 2, para. 119.
[52] Ground 2, paras. 134,136.
[53] CAR-D20-0011-0001 at 0003.
[54] CAR-D20-0011-0033 at 0033-0034.

> legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;
> (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

33. The ICTY Appeals Chamber has elaborated that "[a]s to the "circumstances" that may lead to a disqualification, (…) "a Judge should not only be subjectively free from bias, but there should also be nothing in the surrounding circumstances which objectively gives rise to an appearance or a reasonable apprehension of bias" (emphasis added).[55] Accordingly, whereas the presumption of impartiality must be rebutted by concrete evidence in order to demonstrate subjective bias, given the importance placed on the need to ensure the *appearance* of justice, the presumption does not apply to the assessment as to whether there is an objective appearance of bias.[56]

34. Although not determinative, the view-point of the defendant is important, since what "[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."[57] As set out in the Prosecution Main Case Final Trial Brief, throughout the 2002-2003 conflict in CAR, Mr. Bemba and members of the MLC expressed their suspicions and concerns regarding French involvement in the conflict and the allegations against the MLC.[58] Given these concerns, the appearance of justice required the Court to ensure that Mr. Bemba's adjudication was untainted by any suspicion of influence from French authorities, or judges who might have a predetermined view of the issues before them. But, although Judge Perrin de Brichambaut was no longer part of the Ministry of Defence at the time of the *Bemba et al*. trial, his former position and functions generates an appearance of partiality/interest in the proceedings. According to the decree setting up the Delegation of Strategic Affairs,[59] the Division reported directly to the Minister of Defence, and was tasked with collecting information, conducting research, and preparing strategic advice for the Minister in order to facilitate the exercise of his responsibilities.[60]

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[55] *Prosecutor v. Furundžija* Appeal Judgement, para. 189; *Prosecutor v. Delalić et al*. Case No. IT-96-21-A, Judgement, 20 February 2001, para. 682.
[56] *Kyprianou v. Cyprus* [GC], 73797/01, para. 119: "Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 793, § 32)." See also *Morice v. France* [GC], 29369/10, para. 75
[57] *Padovani v. Italy*, 13396/87, para. 27; See also *Ferrantelli and Santangelo v. Italy*, 19874/92, para. 58;
[58] ICC-01/05-01/08-3079-Conf, paras. 617(n), 626, 737.
[59] Article 1, 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
[60] Article 1.

The Division also assisted the Minister of Armed Forces in formulating the French position in international negotiations or cooperation efforts that engaged France.[61] The legislation further specifies that as Director, Judge Perrin de Brichambaut would have received information and intelligence relevant to his mandate from "the Directorate-General for Armaments, the General Secretariat for Administration, the Directorate-General for External Security and the Directorate of Military Intelligence".[62] Contemporaneous reports indicate that Judge Perrin de Brichambaut was involved in high level defence discussions concerning the military interests of France.[63] Under Articles 413-9 and 413-10 of the French Penal Code, Judge Perrin de Brichambaut is under a continuing obligation to maintain the secrecy of any confidential information that was received in this capacity.

35. During the relevant time period, the French Ministry of Defence deployed French peacekeepers to the DRC (Operation Artemis),[64] and was actively involved in supporting military operations in CAR. Regarding the latter, in December 2002, the French Ministry of Defence transported, funded and provided military equipment to CEMAC peacekeeping troops sent to Bangui. This operation was termed 'Operation Boali', and fell under the reporting obligations of the Ministry of Defence (including DAS).[65] French troops were then sent to Bangui, initially to secure the airport in order to protect French interests and allow for the repatriation of French citizens, and then to provide ongoing support and assistance to General Bozizé's regime.**[66]** In terms of the latter aspect, after General Bozizé assumed power, a French general, Jean-Pierre Perez, was assigned to provide strategic advice and support to General Bozizé and the CAR army.**[67]** During his first meeting with President Chirac after the 2002-2003 coup, General Bozizé emphasised that "«*La France est un partenaire privilégié de toujours. Elle est à nos côtés depuis toujours. Et depuis la transition consensuelle, elle ne nous abandonnera pas*».[68]

36. Bearing in mind the specific concerns expressed by Mr. Bemba and the MLC during the conflict as concerns potential French involvement, a reasonable bystander would have

[61] Article 1.
[62] Article 2.
[63] CAR-D20-0011-0035
[64] CAR-D20-0011-0067 at 0076, 0078, 0082.
[65] See CAR-D20-0011-0158, which was prepared with the assistance of DAS (at , 0184, 0258) and which addresses Operation Boali (at 0307).
[66] CAR-D20-0011-0036
[67] CAR-D20-0011-0038
[68] CAR-D20-0011-0315

cause to doubt the impartiality of a trial process adjudicated by a person, who would have received or had access to sensitive military intelligence, and provided key strategic advice to the Minister of Defence on issues concerning the provision of military assistance to CEMAC, and Operation Boali. Subordination to the military hierarchy has consistently been held to constitute a basis for impugning the objective impartiality of a judge, particularly in circumstances where the defendant has been charged with offences that are against military or national security interests.[69] In such circumstances, it is not necessary to demonstrate bias as the composition of the Chamber will, in itself, give rise to an objective appearance of partiality.[70] Although Judge de Brichambaut is no longer formally subject to military hierarchy, his former involvement creates an appearance that he has a particular interest in the conflict. Judge de Brichambaut's very ardent endorsement of the French interest in preserving the 'civil law' at the ICC, also underlines the appearance of loyalty to French interests *vis-à-vis* ICC proceedings.[71]

37. The fact that Judge de Brichambaut has access to various sources of military intelligence concerning both the CAR and DRC conflicts, coupled with Judge Perrin de Brichambaut's continuing duty of confidentiality, also creates an objective appearance that Judge Perrin de Brichambaut's perception of Mr. Bemba may have derived from information received independently of the case, in violation of the principle of open, adversarial justice.[72] This appearance is heighted by the emphasis that Judge Perrin de Brichambaut placed, in his public interventions, on Mr. Bemba's influence and power as a political-military figure. This goes to a key concern raised in the Defence appeal that the Chamber's findings concerning Mr. Bemba's influence over the commission of the crimes (in both the conviction and the sentence) lacked an objective, evidential foundation.[73]

[69] *Öcalan v. Turkey* (application no. 46221/99)(Grand Chamber), paras. 112-116.
[70] The Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 87/93 (1995), paras. 13-14. See also Suit No: Ecw/Ccj/App/03/18 Judgment No: Ecw/Ccj/Jud/20/18 Between 1. Gabriel Inyang Applicants 2. Linus Iyeme And The Federal Republic Of Nigeria
http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2018/ECW_CCJ_JUD_20_18.pdf
[71] See for example, CAR-D20-0011-0032 13 minute mark, 34-36 minute mark, and 40.00-40.55 minutes mark (see also Annex B).
[72] The US Military Commission disqualified certain members for prior involvement in matters linked to the case, including one Commissioner, who had provided logistical assistance to US forces in Afghanistan, and who could not exclude that by virtue of his former position, he may have read intelligence reports on one of the defendants. http://www.nbcnews.com/id/6302570/ns/us_news-security/t/three-guantanamo-panelists-dismissed/#.XGa1DuJKhsM
[73] Ground Two, Defence Appeal, paras. 134-138.

38. In terms of the impact on the judgment and most recent sentence, as the sole French speaking judge on the bench, Judge Perrin de Brichambaut played a particularly active role in reviewing the French intercepts and detention unit recordings concerning Mr. Bemba.[74] The ECHR has affirmed, in any case, that due to secrecy of deliberations, the taint of partiality applies to the bench as a whole,[75] and will continue to exist even if the composition is changed at a later juncture.[76] Given the broad degree of deference afforded by the Appeals Chamber to the Trial Chamber's findings,[77] the Appeals Judgment of 8 March 2018 also did not cure, or otherwise remedy the taint.

Judge Perrin de Brichambaut's predetermination of key legal issues was inconsistent with the duty of judicial impartiality, and deprived Mr. Bemba of the right to an effective remedy

39. During the Re-Sentencing hearing and in subsequent written submissions, the Defence sought to rely on case law emanating from the *Lubanga* case concerning the right to a remedy (including mitigation in sentencing) in connection with Prosecutorial statements that violated the impartiality of the proceedings.[78] The Defence did so on the understanding that since the Appeals Chamber had accepted the abuse of process doctrine in 2006,[79] and further upheld a specific application of this doctrine in that case,[80] this notion was part of the applicable law at the ICC. The idea that the Chamber should exercise some degree of oversight over extra-curial statements of the Prosecutor was also affirmed by the Appeals Chamber.[81]

40. Nonetheless, as noted in the Defence appeal, the Chamber failed to either take steps to regulate the conduct of the Prosecutor in a preventatives manner, or to otherwise address these arguments its eventual decision.[82] Although the Chamber never disavowed the abuse of process doctrine or related remedies in its written decisions, it is clear from

[74] For example, during a hearing, Judge Schmitt insisted on the audio of the detention unit recordings being played so that Judge Perrin de Brichambaut could listen to them: ICC-01/05-01/13-T-48-CONF-ENG p. 56, lns. 12-15.
[75] *Morice v. France* [GC], 29369/10, para. 89; *Otegi Mondragon v. Spain*, 4184/15 & others, para. 67.
[76] *Öcalan* para. 115;. See also UNHRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 21.
[77] *Findlay v. the United Kingdom*, 22107/93, para. 79: "[n]or could the defects referred to above (in paragraphs 75 and 77) be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first-instance tribunal which fully met the requirements of Article 6 para. 1".
[78] ICC-01/05-01/13-2304, paras. 44, 79, 141; ICC-01/05-01/13-T-59-ENG,pp.6 -7; p. 9, lns. 20-21.
[79] ICC-01/04-01/06-772, para. 24.
[80] ICC-01/04-01/06-1486, para. 4
[81] ICC-01/11-01/11-175, para. 35.
[82] Ground 2, paras. 114-120.

Judge de Brichambaut's interventions that he, at least, considers such approaches to fall exclusively within the common law domain,[83] and to be antithetical to the 'civil law' manner.[84] And, once again, the absence of a reasoned determination on this issue deprives the Defence and the Appeals Chamber of an independent and objective record as concerns the factors relied upon by the Chamber to dismiss the arguments out of hand.

41. As determined by the Human Rights Committee, the right to a fair trial "implies that judges must not harbour preconceptions about the matter put before them".[85] This duty is not restricted to factual issues, but extends to questions of law that are *sub judice*. For this reason, the Scottish High Court of Justiciary found in the *Hoekstra* case that the necessary guarantees of impartiality were not met in circumstances where one of the sitting Judges, in a case concerning the potential application of the right to privacy under article 8 of the Convention, had publicly expressed significant concerns regarding the implications of the introduction of the ECHR into domestic law;[86] in so doing, the Court underscored that "what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially".[87]

42. In terms of the application of these principles to the case at hand, the Rome Statute vests the Chamber with the duty to exercise oversight over the fairness and impartiality of proceedings.[88]And, in circumstances where the conduct of a Prosecutor imperils the right to fair and impartial proceedings, the Chamber has an active duty to step in, in order to address this conduct and ensure its non-repetition.[89] Judge Perrin de Brichambaut's views that such oversight is somehow overly confrontational (and thus improper) raises profound concerns regarding the absence of effective judicial safeguards concerning Mr. Bemba's right to fair and impartial proceedings throughout this case. It is untenable (and an abuse of discretion) for an ICC judge to fetter his or her duty to hear and consider

[83] CAR-D20-0011-0032 (between 24.43 -25.26).
[84]CAR-D20-0011-0001 at 0013 [When] the Court was still finding its way and Judge Fulford was presiding in the Lubanga case, he had a head-on clash with the Prosecutor on intermediaries (…) But this is, by the way, a typical common law dialogue. In a civil law court, I don't know what would happen in other countries, but we would never accept such a thing, which is to tell the Prosecutor, "go home and tomorrow morning, this is what we want"—but, okay".
[85]*Karttunen v. Finland, ibid.*, para. 7.2
[86] *Hoekstra & Ors v Her Majesty's Advocate (No. 2)* [2000] ScotHC 32 paras. 18-24.
[87] Para. 23.
[88] Article 64(2) of the Statute.
[89] ICC-01/04-01/06-2582, para. 58.

applications, which aim to safeguard the rights of the accused, due to personal preferences for, or antipathy towards a particular system of law. The additional evidence therefore supports the conclusion, in Ground 2 of the Appeal, that the cumulative impact of the different violations of Mr. Bemba's right to fair and impartial proceedings were such that the constituent elements of fair proceedings can no longer be pieced together.

3. Conclusion

43. Although it may seem trite to recall, the principle that "justice must not only be done, but should manifestly and undoubtedly be seen to be done",[90] forms part of the bedrock of the legitimacy and integrity of judicial institutions. Mr. Bemba had the right to be judged by a Tribunal that possessed the necessary guarantees of fairness and impartiality, but when the additional evidence is read in light of firstly, the Chamber's illogical and evidentially unfounded conclusions concerning Mr. Bemba, as set out in the Re-Sentencing Decision, and secondly, Judge Perrin de Brichambaut's former role in the French Ministry of Defence, there is an ineluctable appearance that Mr. Bemba's right to be tried by a fair and impartial tribunal was violated. The only appropriate remedy for such a violation is to reverse the conviction, and acquit Mr. Bemba, pursuant to Article 81(2)(b) of the Statute.

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 18th day of February 2019

The Hague, The Netherlands

[90] *R vSussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259, per Lord Hewart CJ.