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No.: **ICC-01/05-01/13**

Date: **13/09/2018**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

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

Public

Request for Leave to Reply

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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Other

1. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr. Jean-Pierre Bemba respectfully requests leave to reply to two discrete new issues arising from the Prosecution Response to the Urgent Request (the Response):¹

Firstly, the Prosecution has suggested that articles and rules relied upon by the Defence apply exclusively to the actions of the ICC, and not State parties; and

Secondly, the Prosecution has claimed that since the Defence did not challenge admissibility or invoke Article 23 and rule 168 at an earlier juncture, it has waived the right to do so now.

2. These issues are new, and could not reasonably have been anticipated by the Defence.
3. In particular, as concerns the first issue, the Prosecution has asserted that Article 23 has not been violated “since the Chamber has yet to impose a sentence”.² If Article 23 required a final conviction, the Defence would agree with this stance, but it does not – it is framed broadly to enjoin the Court to take steps to prevent the defendant from being subjected to penalties that are not explicitly permitted by the Statute.³ The Prosecution’s emphasis on the pending sentence therefore presupposes that Article 23 only applies to punishments imposed by the Court.
4. The Defence could not have anticipated that the Prosecution would have adopted this position since no such limitation is found in the wording of

¹ ICC-01/05-01/13-2309

² Response, para. 3.

³ ICC-01/05-01/13-2276-Red, paras. 77-78.

Article 23.⁴ In its Appeal on Sentence, the Prosecution also advanced arguments,⁵ and cited commentary,⁶ which indicates that the scope of Article 23 extends to penalties and measures imposed by State parties, including disqualification and suspension from political office.⁷

⁴ Whereas the drafters explicitly added “by the court” to qualify the type of person to whom article 23 applies, no such wording or limitation was inserted in relation to the source of the punishment.

⁵ “In contrast to the Rome Statute, domestic legislation regulates such a possibility. However, an accused person before the ICC can foresee at the outset that in the event of a conviction, he or she could be sentenced to a term of imprisonment, and/or a fine and/or an order of forfeiture. Such a person does not expect to be compelled to undergo, for example, community service or to report on a weekly basis to a monitoring body in a domestic jurisdiction.” ICC-01/05-01/13-2168-Red, para. 125.

“the drafters deleted all references to domestic laws²⁸⁰ since the sharp differences on penalties in the different domestic systems (as shown by the conflicting views expressed during the debates) would have introduced uneven treatment for detainees. Moreover, since the suspension of Mangenda’s and Kilolo’s sentences will depend on domestic laws—namely the operation of the term of imprisonment is suspended unless they commit “another offence anywhere that is punishable with imprisonment”—the Chamber has introduced an uneven treatment for convicted persons, something the drafters had precisely sought to avoid.” ICC-01/05-01/13-2168-Red, paras. 128-129.

⁶ ICC-01/05-01/13-2168-Red, fn. 267 cites “Schabas, Ambos p. 970, mn. 9”, which states as follows:

“Article 23 serves as a limit to the discretionary powers of the Court, which cannot impose punishment that is not set out in the Statute, or provided for in accordance with its delegated legislation, and specifically the Rules of Procedure and Evidence. It also prevents State Parties from imposing additional punishment upon those who have already been convicted by the Court. The ramifications of this remain to be determined, but offenders may argue that civil sanctions such as deprivation of the right to vote or prohibition of holding office, constitute additional punishment and are therefore prohibited by article 23.”

Schabas/ Ambos, ‘Article 23: Nulla poena sine lege’ in Triffterer and Ambos (eds.), The Rome Statute of the International Criminal Court: a Commentary, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016)

The Prosecution also relied extensively on the Article 23 Chapter by D. Scalia (ICC-01/05-01/13-2168-Red, fns. 266, 271, 375), who wrote at p. 801 of this Chapter that “L’article 23 limite ainsi le pouvoir discrétionnaire des juges en vertu des dispositions du Statute et des règles du Règlement de procédure et de preuve ; **il empêche par là même les Etats d’ajouter une peine à la suite d’une condamnation prononcée par la Cour.** » Scalia in Fernandez, Pacreau, Maze (eds.), Statut de Rome de la Cour Pénale Internationale Commentaire Article par Article (Editions Pedone, 2012)

⁷ Regarding the punitive nature of such measures, see ICC-01/05-01/13-2168-Red, fn. 268 (emphasis added): “Fife (2016), p. 1878, mn. 1; Fife (1999), p. 339 (“[i]n accordance with the principle of nulla poena sine lege reflected in Article 23, the list of applicable penalties is exhaustive”). See p. 329 (noting that “[o]ther proposed penalties included the loss of suspension of rights, disqualification and disfranchisement, i.e. loss of voting rights or the right to seek public office. However, opinions were divided as to whether such penalties should be left to be dealt with within the context of national law by national courts.”) In this context, a commentator has noted that “[a] non-custodial

5. If leave to reply is granted, the Defence will file submissions concerning whether the objective, content, and context of Article 23, including its complementary relationship to other provisions, including Article 70(4)(b) (which forecloses the scope for unilateral action by a State in connection with Article 70 offences), support the Prosecution's interpretation.
6. Regarding the second issue, the Defence could not have anticipated the Prosecution's attempt to apply a doctrine of 'waiver' to article 23 and rule 168, particularly since the Prosecution itself invoked article 23 for the first time on appeal in connection with an issue (suspended sentences) that had been litigated at first instance during the sentencing hearing.
7. The Prosecution also argued in its appeal against sentence that the very nub of article 23 is the right to be protected against unforeseen consequences – including the unforeseen curtailment of rights in a domestic jurisdiction.⁸ Mr. Bemba's disqualification was not an automatic or 'natural' consequence: the DRC Constitutional Court applied, on the basis of analogy, legal provisions, which were not in force at the time that the conduct occurred or during the trial itself.⁹ Yet, the Prosecution faults the defendant for having failed to initiate an 'admissibility challenge' (which does not exist for Article 70 offences) or otherwise seek relief in relation to the unforeseen consequences, before they actually occurred.

sentence appears to be impossible under the penalties regime of the International Criminal Court". See also Schabas, p. 1159".

⁸ "an accused person before the ICC can foresee at the outset that in the event of a conviction, he or she could be sentenced to a term of imprisonment, and/or a fine and/or an order of forfeiture. Such a person does not expect to be compelled to undergo, for example, community service or to report on a weekly basis to a monitoring body in a domestic jurisdiction": ICC-01/05-01/13-2168-Red, para. 125.

⁹ Request, para. 9.

8. If leave to reply is granted, the Defence will therefore address the Prosecution's claim in light of, firstly, the status of article 23 as an absolute legal bar to the competence of courts to impose unanticipated legal consequences for Article 70 conduct,¹⁰ and secondly, appellate case-law that the ability and related deadline to raises issues concerning conflicts in jurisdictions only arises once the conflict manifests itself through concrete proceedings.¹¹

9. Finally, as concerns the Prosecution's reliance on specific Defence submissions concerning the possibility of filing a request for review,¹² it will be clear from the record that the Defence did not in fact file such a request. Upon further research and review, it was apparent that Article 81(2)(b) and Article 24 (2) provide legal avenues for the Court to address the ramifications of the Main Case judgment and findings, in a manner, which avoids unnecessary duplication of procedures and delays in a multi-accused case. Defence submissions concerning the extent to which the Prosecution might be bound by *res judicata* do not speak to the overarching question – which can only be answered by the Appeals Chamber – as to whether all remedies against the condemnation have been exhausted.

¹⁰ ICC-01/05-01/13-2276-Red, paras. 77-78.

¹¹ ICC-01/09-02/11-274, para. 45.

¹² ICC-01/05-01/13-2309, para. 6.

Relief sought

10. For the reasons set out above, the Defence seeks leave to reply in relation to the two issues identified above.



Melinda Taylor
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Dated this 13th day of September, 2018

The Hague, The Netherlands