



Original: **English**

No.: ICC-01/05-01/13
Date: **14 September 2018**

TRIAL CHAMBER VII

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

Decision on Bemba Defence Request Following DRC Election Decision

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Michael Karnavas

Counsel for Jean-Jacques Mangenda Kabongo

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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REGISTRY

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Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 1, 23 and 76(1) of the Rome Statute ('Statute'), Rule 168 of the Rules of Procedure and Evidence ('Rules') and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Bemba Defence Request Following DRC Election Decision'.

I. Procedural background

1. On 29 August 2018, the Chamber announced 17 September 2018 as the date for delivery of its decision re-sentencing, amongst others, Mr Jean-Pierre Bemba Gombo ('Mr Bemba').¹
2. On 10 September 2018, the defence for Mr Bemba filed a request for relief ('Request')² concerning a decision of the Constitutional Court of the Democratic Republic of the Congo ('DRC') dated 3 September 2018 ('DRC Decision'). As summarised by the Bemba Defence, the DRC Decision 'determined that Mr Bemba was ineligible to hold office in the [DRC], as a result of its finding that his conduct in [the present case] equated to the crime of corruption'.³ The Bemba Defence requested: (i) the Chamber to admit the material annexed to the Request for the purposes of establishing the existence of the DRC Decision and issue a declaration that the DRC authorities do not have the competence to unilaterally exercise jurisdiction over conduct for which Mr Bemba has been convicted; or, (ii) in the alternative, for the Chamber to take into account the DRC Decision for the purpose of re-sentencing Mr Bemba.⁴

¹ Order Scheduling the Delivery of the Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, ICC-01/05-01/13-2306.

² Urgent request, ICC-01/05-01/13-2307 (with two annexes).

³ Request, ICC-01/05-01/13-2307, para. 2.

⁴ Request, ICC-01/05-01/13-2307, paras 46-47.

3. On 12 September 2018,⁵ the Office of the Prosecutor ('Prosecution') responded to the Request ('Response'), submitting that it be rejected in full.⁶
4. On 13 September 2018, the Bemba Defence sought leave to reply to the Response.⁷

II. Analysis and conclusions

5. Preliminarily, the Chamber does not consider that it requires any further submissions in order to rule on the Request. The Chamber rejects the Bemba Defence request for leave to reply.
6. Turning to the Request itself, the Chamber considers that the first part of the Bemba Defence's main request (to admit materials establishing the existence of the DRC Decision) and its alternative request (to have the DRC Decision taken into account in the re-sentencing decision) seek functionally identical relief. The Chamber will first address the Bemba Defence request for a declaration from the Chamber before turning to the remainder of the relief sought.

A. Declaration from the Chamber

7. The Chamber considers that the Bemba Defence fails to make any persuasive argument as to why the Chamber could or should issue the requested declaration. In particular, the Chamber considers that the statutory provisions relied upon by the Bemba Defence are inapposite to the case at hand.
8. The Bemba Defence alleges that Article 23 of the Statute is violated by virtue of the DRC Decision, mainly because: (i) the domestic court took into account Mr Bemba's conviction at the ICC before the Article 70 proceedings have been concluded; and (ii) the DRC Decision 'subjects Mr Bemba to measures and legal consequences that were not in force at the time that the Article 70 conduct

⁵ The response deadline was shortened to this date. Email from the Chamber, 10 September 2018 at 22:28.

⁶ Prosecution Response to Mr Bemba's Urgent Request (ICC-01/05-01/13-2307), ICC-01/05-01/13-2309.

⁷ Request for leave to reply, ICC-01/05-01/13-2310.

occurred’.⁸ However, the Chamber considers that Article 23 of the Statute is principally concerned with punishments that *this* Court imposes on convicted persons.⁹ A loss of the right to seek office by a domestic court is beyond its ambit.

9. The Bemba Defence also argues that the DRC Decision is taken in contravention of the *ne bis in idem* principle specified in Rule 168 of the Rules.¹⁰ However, the Chamber considers that this provision only regulates the powers of this Court to launch subsequent prosecutions against persons convicted by the Court. It is unrelated to subsequent domestic proceedings. As a result, whether Mr Bemba can be tried and punished for the same Article 70 conduct before domestic courts is a matter to be resolved with reference to domestic law.
10. It is not for this Chamber to consider how Mr Bemba’s convictions in this case should be treated under DRC electoral law.¹¹ Should Mr Bemba be dissatisfied with the DRC Decision, it is for him to pursue this before an appropriate venue in the DRC. The Chamber does not consider that a DRC court attaching electoral consequences to Mr Bemba’s convictions in this case amounts to some sort of jurisdictional conflict of the kind the Bemba Defence asserts.¹² As the Prosecution argues, it is for the competent domestic authorities to regulate their own electoral proceedings.¹³ The Chamber will not intervene in such proceedings, nor will it tolerate being instrumentalised in an attempt to influence them.
11. In conclusion, this part of the Request is rejected.

⁸ Request, ICC-01/05-01/13-2307, paras 2, 7-8, 19-31. Article 23 of the Statute provides: ‘A person convicted by the Court may be punished only in accordance with this Statute.’

⁹ *Consistent with Judgment* on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/05-01/13-2276-Red, A6-A9 (with annex), paras 77-78 (discussing Article 23 of the Statute solely in relation to the corresponding powers of the trial chambers of this Court).

¹⁰ Request, ICC-01/05-01/13-2307, paras 2, 6, 8, 33. Rule 168 provides: ‘In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court.’

¹¹ Request, ICC-01/05-01/13-2307, paras 9-16 (especially paragraph 16).

¹² See Request, ICC-01/05-01/13-2307, paras 16-18, 33-39.

¹³ Response, ICC-01/05-01/13-2309, para. 5.

B. Remainder of relief sought

12. The Bemba Defence requests for the Chamber to admit certain media materials establishing the existence of the DRC Decision¹⁴ and, as its alternative request, have them considered in the re-sentencing decision.
13. The Chamber recalls its previous finding that the Chamber may take into account non-evidentiary submissions for sentencing purposes.¹⁵ This means that it is unnecessary for the Chamber to 'admit' the identified media materials as a pre-requisite to considering them in the re-sentencing decision.
14. As raised by the Prosecution, the only procedural bar potentially affecting the Chamber's consideration of the DRC Decision in re-sentencing is the lateness of the Request.¹⁶ The Chamber has previously determined that it would receive no further re-sentencing submissions¹⁷ and emphasised that sentencing proceedings cannot last for an indefinite duration.¹⁸ But the Chamber also notes that the DRC Decision was rendered only on 3 September 2018, preventing the Bemba Defence from raising this matter sooner. Noting also that the Prosecution was permitted to file an additional submission outside the scope of the Chamber's pre-determined briefing schedule,¹⁹ the Chamber considers that it would be fair to consider the materials submitted by the Bemba Defence in its re-sentencing decision.
15. As regards the Bemba Defence's alternative request, the Chamber informs the parties that the determination of what weight, if any,²⁰ the Chamber will give to

¹⁴ Annex A of the Request, ICC-01/05-01/13-2307-AnxA.

¹⁵ Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, ICC-01/05-01/13-2025, paras 6-7.

¹⁶ Response, ICC-01/05-01/13-2309, paras 2-3.

¹⁷ Transcript of hearing, ICC-01/05-01/13-T-59-ENG, page 4, line 11.

¹⁸ Decision on Final Submission of Further Items for Sentencing, 16 December 2016, ICC-01/05-01/13-2099, para. 10.

¹⁹ ICC-01/05-01/13-T-59-ENG, page 3, line 11, to page 4 line 10.

²⁰ In this regard, the Chamber notes and defers consideration of the relevance arguments advanced by the Prosecution in paragraph 4 of the Response.

the DRC Decision's impact on Mr Bemba will be made in the upcoming re-sentencing decision.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Bemba Defence request for leave to reply;

REJECTS the Request with respect to the request for a declaration from the Chamber;

PERMITS the submission of the materials in Annex A of the Request; and

DEFERS the Request with respect to whether, if at all, the Chamber will take into account the DRC Decision in the context of re-sentencing Mr Bemba.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 14 September 2018

At The Hague, The Netherlands