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Date: **10/09/2018**

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 with Public Annex A and Annex B

Urgent Request

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 requests the Honourable Trial Chamber to firstly, admit into evidence media reportage concerning the existence of a decision of the Constitutional Court of the Democratic Republic of Congo (DRC), dated 3 September 2018 ('the Decision'),[1] and secondly, take steps to protect the right of Mr. Bemba not to be pursued and punished twice for the same conduct, by different jurisdictions.

2. In the Decision, the Constitutional Court determined that Mr. Bemba was ineligible to hold public office in the Democratic Republic of Congo, as a result of its finding that his conduct in the Article 70 case equated to the crime of corruption. The Constitutional Court has put the cart before the horse by imposing a sanction on Mr. Bemba in relation to Article 70 conduct, before the ICC Article 70 proceedings have concluded, an approach which triggers the application of *ne bis in idem* under Rule 168(3) of the ICC Rules of Procedure and Evidence. The Decision to deny Mr. Bemba the right to participate in elections and hold public office also constitutes a severe sanction, which falls outside the legal framework of the Statute, and the law in force at the time of the conduct. The Decision to impose sanctions independently of the ICC therefore violates Article 23 of the Statute (n*ulla poena sine lege)*.

3. In the alternative, in line with the totality principle, this sanction should be considered as part of the continuum of punishment that has already been meted out to Mr. Bemba, as a result of the Article 70 case.

4. The DRC lawyers for Mr. Bemba have requested a copy of the Decision but not yet obtained it, and it is unclear as to when they will be in a position to

[1] Annex A. The Defence will disclose this document forthwith.

do so. Bearing in mind the prejudice which ensues from multiplication of proceedings and punishments, the Defence has seised the Chamber at the earliest juncture possible, with the materials that are presently available (Annex A).

5. The materials establishing the existence of the Decision fulfil the following criteria for admission into the proceedings:

   a. The Decision is directly relevant to the matters before the Trial Chamber, including the ICC's jurisdiction over Mr. Bemba's conduct, the totality principle, and the full extent of the sanctions that have been imposed on Mr. Bemba in connection with the Article 70 proceedings; and
   b. The Decision constitutes 'new evidence' in the sense that it was issued after the deadline for Defence submissions, and could not have been introduced at an earlier point. The probative value of this information also outweighs any prejudice occasioned by the admission of the information at this point.

2. Submissions

2.1 <u>The Decision is relevant to matters before the Trial Chamber</u>

2.1.1 The Decision raises issues of Ne Bis in Idem and Nulla Poena Sine Lege

6. Rule 168 of the ICC Rules of Procedure and Evidence specifies that "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."

7. Article 23 of the Statute further provides that "a person convicted by the Court may be punished only in accordance with this Statute". The punitive consequences that attach to Article 70 offences are therefore governed exclusively by the terms of the Statute.

8. The Decision has offended both Rule 168 and Article 23 as a result of the fact that:
   - Firstly, the DRC Constitutional Court asserted its jurisdiction over conduct covered by the Article 70 case; and
   - Secondly, the DRC Constitutional Court issued its own determination concerning corruption, and attached a sanction, of a criminal nature, to that determination.

   a) The DRC Constitutional Court asserted its jurisdiction over conduct covered by the Article 70 case

9. In terms of the legal foundation of the Decision, pursuant to a 2017 amendment to the DRC electoral law, a candidate will be ineligible to hold office in the DRC, if they have been condemned, through an irrevocable judgment, of corruption.[2]

10. According to the media reportage set out in Annex A, the Constitutional Court reached its determination on the basis of advice, from the DRC Prosecutor-General, that in light of ICC findings concerning Mr. Bemba's conduct in the Article 70 case, Mr. Bemba should be considered to have been convicted, irrevocably, of corruption. As far as the Defence is aware, neither the DRC Prosecutor-General nor the Constitutional Court requested the ICC Appeals Chamber to clarify the scope of the Article 70 case concerning Mr.

[2]http://www.ceni.cd/assets/bundles/documents/La%20loi%20%C3%A9lectorale%20du%2024%20d%C3%A9cembre%2020170002.pdf

Bemba, and its potential concurrence with the crime of 'corruption' under DRC law. Nor did they request the Appeals Chamber to issue a formal confirmation that Mr. Bemba's condemnation is irrevocable, and enforceable.

11. The latter is not an issue that can simply be assumed.

12. The question as to whether a condemnation is 'irrevocable' is a term of legal art, which must be defined within the context of the specific jurisdiction in question. In jurisdictions in which there is a bifurcated verdict and sentence, Courts have found that the conviction cannot be considered as 'final' (or *res judicata*) until the sanction has been imposed, and there are no further avenues of appeal. For example, the Privy Council found in the case of *Richards v The Queen* that although the defendant had been found guilty, the conviction was not 'final', and subject to *res judicata*, because the sentence had yet to be finalized.[3] In the United States, the Supreme Court has confirmed that a plea of *autrefois convict (*that a defendant has been finally convicted for the same conduct in another case) cannot be entertained unless the defendant has been sentenced in that case.[4] In the Canadian case of *R v Keen*, the Court recognised its competence to reverse convictions during a sentencing appeal, if the convictions had been invalidated through a subsequent change of law.[5] In India, the Courts have confirmed that "there are two stages in a criminal trial before a Sessions Court, the stage up to the recording of a conviction and the stage post-conviction up to the imposition

[3] Lloydell Richards v. The Queen Co (Jamaica) [1992] UKPC 28 (19 October 1992), http://www.bailii.org/uk/cases/UKPC/1992/1992_28.html See also Archbold: Criminal Pleading, Evidence and Practice 2003 (Sweet & Maxwell, London, 2003), p. 382, para. 4-141

[4] Roscoe, Cr. Evid. (8th ed.) 199, cited in *Coleman v Tennessee* 97 U.S. 509 (, 24 L.Ed. 1118) *https://www.law.cornell.edu/supremecourt/text/97/509*

[5] *R v Keen*, Decision Ontario Court of Appeal, 13 May 1996, p. 4. "However, he would seek to appeal the conviction as part of his sentence appeal and have the court consider this development in the context of the totality of the sentence imposed upon him. For the purpose of this argument, I am prepared to assume that if the sentences were reviewed, consideration would be given to the fact that on the basis of the law as it stands today, the four counts involving anal intercourse would not form part of his convictions" (Annex B).

of sentence. A judgment becomes complete after both these stages are covered…. trial as provided under Section 311 of the Code will not be terminated by closing the evidence of prosecution and defence or posting the case for judgment. Trial would stand terminated only on pronouncing the judgment either acquitting the accused or awarding the sentence after conviction."[6] Of particular significance, when the ICTY still had a bifurcated sentencing procedure, the Appeals Chamber found that the second phase of appellate proceedings on sentence appeared to be part of a "single continuing lawsuit" (emphasis added).[7]

13. In civil law countries, the issue of 'finality' is impacted by the scope of the appellate process. For example, in France, there is no strict delimitation between appeals on sentence and conviction: the judgment is not, therefore, irrevocable until the appellate process is finalized.[8] Courts have referred to the principle of 'indivisibility' between the sentence and the verdict,[9] and, in the context of appeals against sentence, reversed the conviction as well.[10] In

[6] Venkatadeswara Enterprises vs Rajasekharan Nair on 3 August, 2006, 2007 CriLJ 1626, 2006 (3) KLT 930, https://indiankanoon.org/doc/1250496/
See also legal opinion by Justice Ramaswami, 'No disqualification when an appeal is pending', Hindu Times 10 April 2001, confirming that a 'conviction' is not final, until sentencing proceedings are completed: https://www.thehindu.com/2001/04/10/stories/13100641.htm

[7] *Prosecutor v. Delalic et al.,* Judgment on Sentence Appeal, IT-96-21-Abis, 8 April 2003, para. 48.

[8] J. Pradel, '*Criminal Procedure'*, in Bell et al. (eds) Principles of French Law (Oxford 2008) p. 144.

[9] Cour de Cassation, criminelle, Chambre criminelle, 9 mars 2016, 15-83.927, Publié au bulletin https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032193868

[10] Cour de Cassation, Chambre criminelle, du 10 juillet 1996, 95-83.450, Publié au bulletin https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007068182

The Accused was found guilty of *violences aggravées* by the *cour d'assises* and sentenced to, *inter alia*, a term of imprisonment, partly suspended. There was an appeal against the lawfulness of the suspended sentence, which led the *Cour de Cassation* to find an error in the sentence. It held "[q]u'en raison de l'indivisibilité entre la déclaration de culpabilité et la décision sur la peine, la cassation doit être totale", and therefore annulled the whole judgment ("en toutes ses dispositions") and referred the case back to the *cour d'assises*, so that it may be tried again in accordance with the law. In the *"[a]nalyse"*, it is repeated that "[e]n raison du principe de l'indivisibilité des décisions sur la culpabilité et sur la peine prononcées par la cour d'assises, la cassation est totale et doit être prononcée avec renvoi devant une autre cour d'assises".

See also Cour de Cassation, Chambre criminelle, du 4 mai 1979, 78-93.408, Publié au bulletin

Italy, the Court of Cassation has determined that any decision concerning the imposition of disciplinary measures must be suspended until criminal proceedings are final.[11]

14. The ICC appeal judgments issued on 8 March did not address this specific issue. It is, nonetheless, illuminating that Article 81(2)(b) allows the Appeals Chamber to set aside a conviction, in whole or in part, when seised of an appeal against sentence. As concerns the genesis of this provision, the commentary to the 'Proceedings on Appeal' in the 1994 draft ILC statute noted that the envisaged appeals chamber "combines some of the functions of appeal in civil law systems with some of the functions of cassation. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial".[12] The 1994 appellate procedure did not envisage a bifurcated conviction and sentence process. After that step was introduced in 1996, and following the May 2017 ICTY scheduling order in the *Erdemovic* case, which invited the parties to file submissions concerning the validity of a verdict within the context of a sentencing appeal,[13] the August 1997 draft proposal then introduced a proposed Article 48 1 ter, that "[i]n case of an appeal of sentence, the Appeals Chamber may also render a

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https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007060826

The Accused was found guilty of *delit d'homicide par imprudence* and *d'infraction aux regles de securite sur un chantier de construction* and punished with a suspended sentence as well as various fines. There was an appeal challenging the validity of the sentence imposed. The Court of Cassation found that there was an error, and "qu'en raison de l'indivisibilité existant entre la declaration de culpabilité et la peine, l'annulation doit s'etendre a toutes les dispositions penales de l'arret", and therefore annulled the whole judgment. The case was referred back to the *cour d'appel*, in order to be judged again in accordance with the law. In the "*[a]nalyse*" it is repeated that "la méconnsaisance de cette règle doit entraîner l'annulation totale des dispositions pénales de la décision en raison de l'indivisibilité existant entre la déclaration de culpabilité et la peine".

[11] Italian Court of Cassation, Joined Civil Chambers, decision n. 11987/2017 and n. 16694/2017
According to Article 324 of the Code of Civil Procedure, a decision becomes final, *inter alia*, when it is no longer subject to an appeal, to the Court of Appeal or Cassation, unless otherwise provided for by law: *Oliari v. Italy*, *Applications nos. 18766/11 and 36030/11*, para. 52.

[12] ILC Draft Statute, 1994, Commentary to Article 49, p. 61,
http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf

[13] *Prosecutor v. Erdemovic,* Scheduling Order, Appeals Chamber, 5 May 1997.

decision on conviction".[14] This provision, or variations thereof, was maintained in all subsequent proposals.

15. The ICC Rules also stipulate that a conviction cannot be considered as 'enforceable' until the sentence has been finalised.[15]

16. For the purpose of this application, it is not necessary for the Trial Chamber to determine this matter, particularly since any such ruling would enter into the territory of the Appeals Chamber to determine the scope of its powers. The point is, rather, that it falls to the ICC, and not DRC courts, to determine this issue.

17. ICC Chambers have consistently declared that if a case is before the ICC, it falls to the ICC, rather than domestic courts, to determine the parameters of the case before it.[16] Article 119 also specifies that "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". Pre-Trial Chamber I observed, in a recent decision, that this article encapsulates the ICC's *compétence de la compétence*.[17] Although Judge Perrin de Brichambaut disputed the applicability of Article 119 in that particular decision, he recognised that the principle of *compétence de la competence* could be called into play to "serve as a mechanism to resolve conflicts of law".[18] In an earlier 2017 decision, Judge Perrin de Brichambaut further affirmed that Article 119, and the principle of *compétence de la competence*, invested the ICC

[14] Prepcom report, 4 August 1997, p. 52 https://www.legal-tools.org/doc/30409e/pdf/
[15] Rule 164(3) specifies that the statute of limitations for the enforcement of Article 70 offences only commences on "the date on which the sanction has become final".
[16] ICC-02/04-01/05-377, paras. 14, 45, 46: "it is also for the judicial body whose jurisdiction is being debated to have the last say as to the way in which its statutory instruments should be construed"; ICC-01/09-01/11-307, para.62.
[17] ICC-RoC46(3)-01/18-37, para. 28.
[18] ICC-RoC46(3)-01/18-37-Anx, para. 26.

with the power to determine the scope of any immunities that might apply to Heads of State, under the Rome Statute.[19]

18. But, notwithstanding these principles, the Constitutional Court did not seek the views of the ICC or otherwise defer to its competence to determine these issues. The Decision therefore amounts to a unilateral exercise of jurisdiction over the conduct of Mr. Bemba.

b) The DRC Constitutional Court issued its own determination that Mr. Bemba is convicted of the crime of corruption, and attached a sanction – of a criminal nature – to that determination

19. The Decision and related sanction amount to a criminal conviction and sanction, for the purpose of triggering the ICC's *ne bis in idem* protection, and the prohibition of retrospective or ultra vires punishments (*nulla peona sine lege).*

20. In terms of the criminal nature of the proceedings in the DRC , the ECHR has delineated the following, alternative criteria for determining whether proceedings, or a particular penalty, should be characterised as criminal in nature (the *Engel* criteria):[20]
    - the classification of the offence;
    - the nature of the offence; or
    - the nature and degree of severity of the penalty that the person concerned risked incurring.

[19] ICC-02/05-01/09-302-Anx, para. 63.
[20] *Engel & others* v. *Netherlands, App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72,* paras.82-83.

21. The first criterion is not dispositive, since otherwise States could categorise offences or sanctions as 'regulatory' in order to avoid applying the safeguards, which attach to a criminal offence/penalty.[21]

22. If the ECHR *Engel* criteria are applied to the findings of the Constitutional Court, the Decision can be equated to a criminal sanction by virtue of firstly, the Constitutional Court's declaration that Mr. Bemba has been convicted of corruption, and secondly, and in the alternative, as a result of the nature and intensity of the consequences of the finding.

23. As concerns the first aspect, the fact that the finding concerning Mr. Bemba's guilt for corruption was made by the Constitutional Court, and not a criminal court, does not alter the nature of the finding itself.[22] Rather, the key factor is that the Constitution Court made its own finding that the conduct fulfils the legal description of the crime of corruption. The situation is thus directly analogous to the case of *Matyjek v. Poland*,[23] in which the ECHR concluded that a decision to disqualify the applicant from political office was 'criminal' in nature, because the domestic decision found that the parliamentarian had engaged in conduct, which was analogous to criminal conduct, and which could have subjected the applicant to criminal consequences.[24]

24. In terms of the alternative *Engel* criterion, that is, the punitive nature of the sanctions, the ability to stand for, and hold public office is not a privilege, but

[21] *Öztürk v. Germany,* App. no. 8544/79, para. 49.
[22] "With regard to Article 6 § 1 of the Convention, the Court reiterates that the fact that proceedings have taken place before a constitutional court does not suffice to remove them from the ambit of that provision. It must therefore be ascertained whether the proceedings before the Constitutional Court in the instant case did or did not relate to the "determination" of the applicant's "civil rights and obligations" or of a "criminal charge" against him (see Pierre-Bloch v. France, 21 October 1997, § 48, Reports of Judgments and Decisions 1997-VI)." *Paksas v. Lithuania* 34932/04 (Grand Chamber), para. 65.
[23] Application no. 38184/03, Decision on admissibility, 30 May 2006.
[24] Para. 52.

a fundamental right, which is protected by article 25 of the ICCPR (of which, the DRC is a State party). For this reason, the ECHR further held in the *Matyjek* case that although the decision did not expose the applicant to the prospect of imprisonment or a fine,[25]

> *The prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. (…) This sanction should thus be regarded as having at least partly punitive and deterrent character.*

25. Moreover, unlike *Paksas v. Lithuania,* the decision of the Constitutional Court concerning Mr. Bemba's conduct did not stem from the existence of an administrative impeachment process. The Constitutional Court requested and relied on the advice of the DRC Prosecutor-General in order to reach its conclusion. The active involvement of the DRC Prosecutor-General, and the Court's ultimate deference to views confirms that the Court's determination fell within the sphere of criminal law, and thus amounted to a criminal condemnation for corruption.

26. The punitive nature of the Decision is further exemplified by the fact that the Decision subjects Mr. Bemba to measures and legal consequences that were not in force at the time that the Article 70 conduct occurred,[26] and which are not otherwise envisaged by the Rome Statute. The Rome Statute framework specifically limits the punishment of Article 70 offences to the imposition of a fine or a sentence. At the time that the conduct in question took place, that is, between 2012 and 2013, no further penalties or sanctions were presaged by either the Rome Statute framework or DRC law. The situation thus falls squarely within the four corners of the ECHR's conclusion, in *Welch v United*

[25] Para. 55.

[26] The modification to article 10 (the conditions of eligibility) was introduced in 2017: http://www.presidentrdc.cd/IMG/pdf/-27.pdf

Kingdom, that a confiscation order could be characterised as a penalty, because:[27]

> *Looking behind appearances at the realities of the situation, whatever the characterization of the measure of confiscation, the fact remains that the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted.*

27. Finally, the fact that the effects of the Decision are tantamount to a second Article 70 punishment is underscored by proposals for the ICC Statute to include the option of ordering a convicted person to be disqualified from office, as part of the sentence imposed by the Court.[28] Although this possibility was removed in light of objections from States,[29] the drafters clearly understood that the imposition of such a measure would amount to a criminal sanction.

28. This understanding is further confirmed by the practice of the ICTY Appals Chamber in the *Vujin* case. Whereas the ICTY Appeals Chamber acknowledged that the Registrar had an independent power to strike the defendant from the list of counsel because of the misconduct established by the Appeals Chamber's findings, the Chamber nonetheless deemed it appropriate to firstly, direct the Registrar to consider taking such measures as part of its judgment, and secondly, include such measures in its determination of the punishment imposed on the defendant.[30]

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[27] *Welch v United Kingdom*, *App. No. 17440/90,* para. 34.

[28] "Countries did not feel strongly about the penalty of disqualification from public office (Draft Article 75(c)(i)) and decided not to insist on it when a few states objected to its inclusion." B. Von Schaak, International Service for Human Rights Dossier on the International Criminal Court, Santa Clara University School of Law, Legal Studies Research Papers Series Working Paper No. 10-07, June 2010, at p. 34, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1173&context=facpubs

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[30] 'Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin', 31 January 2000, para. 172.

29. In contrast, the DRC has essentially jumped the queue by imposing a significant, unheralded and indefinite sanction on Mr. Bemba, which prejudges and predetermines the ongoing proceedings at the ICC.

c) The appropriate remedy is to confirm that the since the case is before the ICC, the DRC does not have the competence to unilaterally impose sanctions on Mr. Bemba in relation to conduct that falls within the ICC case

30. Although the ICC is a court of last resort, once cases are properly before the Court (and there is no extant legal challenge to the ICC's competence), they should be tried and prosecuted exclusively before the ICC. Article 23 further confirms that they should be punished within the explicit parameters of the Rome Statute. The Appeals Chamber has confirmed that principle of legality precludes the imposition of any form of punishment that is not set out explicitly in Rule 166.[31]

31. Parallel proceedings and punishments - for the same person and the same conduct – are thus contrary to the Rome Statute and highly prejudicial to the rights of the defendant.

32. Whereas articles 17 to 19 of the Statute set out detailed procedures as concerns challenges to the admissibility of an Article 5 case, Rule 162 establishes a more streamlined process for establishing the proper forum of Article 70 cases, and the resolution of competing competences. Rule 162(1) requires the Court to engage in a consultation process to determine which States may exercise jurisdiction, and then render a decision on whether the ICC should do so. The Rule thus vests the ICC with the ultimate competence for determining which forum has jurisdiction over the offence in question.

[31] ICC-01/05-01/13-2276-Red, para.77: "The Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person"

33. The Statute and Rules do not specify the procedural avenue for raising issues of *ne bis in idem* or *lis pendens* within the context of an Article 70 case, but since the State parties chose to give expression to this fundamental right of the defendant, the Judges have a corollary obligation to craft a procedure that ensures that the right is effective, and not illusory.[32] As observed by Judge Hunt, the role of procedural rules is to be the servant and not the master of the law.[33] Article 23 and Rule 168 are also drafted in mandatory terms that apply independently of any request from the Defence or a State. It follows, therefore, that the Chamber is required to apply the Statute and Rules in a manner which gives effect to Mr. Bemba's right to be protected from concurrent proceedings and punishments for the same conduct.

34. Indeed, the fact there is no procedural rule for addressing the current situation speaks to the fact that this situation simply should not have occurred. As a State party, the DRC was bound by the Pre-Trial Chamber's determination that the Article 70 case would be prosecuted before the ICC. If the DRC wished to attach sanctions to Mr. Bemba's contempt, it should have requested from the outset to prosecute the Article 70 case in the DRC. Far from doing so, in response to Mr. Babala's request to be released on the territory of the DRC, the DRC Prosecutor-General underlined that:[34]

> *notre pays n'est partie ni à l'affaire qui oppose Monsieur Fidèle BABALA WANDU au Procureur de la Cour Pénale Internationale, ni à celle concernant Monsieur Jean-Pierre BEMBA GOMBO, relative a la situation en République Centrafricaine.*

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[32] "This belated inclusion of the *ne bis in idem* principle in article 17(1)(c) as a basis for challenging admissibility is therefore explained essentially by the need to protect the rights of the accused, in contrast to sub-paragraphs (a), (b) and (d) of the same article, the purpose of which is to safeguard the sovereign rights of States and to ensure that cases brought before the Court are of sufficient gravity. Moreover, it should be recalled that the *ne bis in idem* principle is defined in article 20 to which article 17(1) only makes reference." ICC-01/04-01/07-1213-tENG, para. 48.

[33] *Prosecutor v. Kordic & Cerkez*, Decision Authorising Appellant's Briefs To Exceed The Limit Imposed By The Practice Direction On The Length Of Briefs And Motions, 29 August 2001, para.6.

[34] ICC-01/05-01/13-78-Anx6, p. 3.

35. The possibility of overlapping competencies is also an issue that should have been made clear, in the context of Rule 162 consultations, or, at the very latest, before the commencement of the Defence case.

36. Recent ICC case law and practice has affirmed the importance of timely notice concerning the legal characterisation of the charges,[35] but throughout the Article 70 trial, Mr. Bemba was afforded no notice that this could and would occur. States are required to implement ICC requests for assistance (RFAs) in accordance with domestic law, but to the knowledge of the Defence (based on the documents disclosed to the Bemba Defence), none of the requests for assistance executed by the DRC authorities in this case referenced Article 147 of the DRC penal code, [36] or 'corruption', as the legal basis for executing requests in DRC territory. The coercive measures implemented in the DRC appear to only reference 'Article 70' as the legal basis for the measure in question.[37] Mr. Bemba therefore participated, and defended himself in relation to the conduct in question on the understanding that the legal elements were exhaustively set out in Articles 70(1)(a), (b), and (c), and the legal consequences and sanctions were those set out in the ICC Statute and Rules.

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[35] See for example, ICC-02/11-01/15-185, para. 11. See also *Mattocia v. Italy*, app. no. 23969/94, para. 59.

[36] Article 147 of the DRC penal code defines corruption as follows :

> *Article 147 : Tout fonctionnaire ou officier public, toute personne chargée d'un service public ou parastatal, toute personne représentant les intérêts de l'Etat ou d'une société privée, parastatale ou d'économie mixte en qualité d'administrateur, de gérant, de commissaire aux comptes ou à tout autre titre, tout mandataire ou préposé des personnes énumérées cidessus, tout arbitre ou tout expert commis en justice qui aura agréé des offres, des promesses, qui aura reçu des dons ou présents pour faire un acte de sa fonction, de son emploi ou de sa mission, même juste mais non sujet à salaire, sera puni de six mois à deux ans de servitude pénale et d'une amende de cinq à vingt zaïres. La peine prévue à l'alinéa précédent pourra être portée au double du maximum, s'il a agréé des offres ou promesses ou s'il a reçu des dons ou présents, soit pour faire, dans l'exercice de sa fonction, de son emploi ou de sa mission, un acte injuste, soit pour s'abstenir de faire un acte qui rentre dans l'ordre de ses devoirs.*

http://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd004fr.pdf

[37] See for example, ICC-01/05-01/13-24-Anx6-Red, p.2; CAR-OTP-0072-0145.

37. In terms of the appropriate remedy for this situation, it would be perverse, and contrary to Rule 162, to simply cede jurisdiction to the DRC at this point in time. As a matter of precedent, it would also be troubling for the ICC to acquiesce to the possibility that States can exercise jurisdiction over conduct that is the subject of proceedings before the ICC, without any prior and formal consultations with the ICC itself.

38. Such outcomes are incompatible with the observation by Pre-Trial Chamber I that:[38]

> *If a perpetrator is charged and found guilty before this Court in accordance with the relevant jurisdictional parameters, his or her conviction may be duly taken into account before any national jurisdiction in order to avoid double jeopardy (ne bis in idem re), including by a State not Party to the Statute that chooses to do so, given the customary law character of this principle (or, according to certain doctrines, its status as a general principle of law).*

39. The purpose of taking the conviction into account is thus to avoid double jeopardy, and not to commit it. The inclusion of Article 23 in the Statute would also be meaningless unless the Court is prepared to take steps to protect defendants from being subjected to a separate and additional punishment regime, particularly one which is based on domestic law that came into force several years after the commission of the conduct in question.

40. The most effective and coherent remedy would be to affirm that since the ICC continues to exercise jurisdiction over the conduct of Mr. Bemba in Article 70 proceedings, the DRC authorities do not have the competence to unilaterally exercise jurisdiction over the same conduct.[39] The Defence

[38] ICC-RoC46(3)-01/18-37, para. 46.

[39] This remedy would be consistent with the decision of Pre-Trial Chamber I to issue a decision for the purpose of "dispelling uncertainty" concerning conflicting competencies: ICC-02/04-01/05-408, para. 86.

further requests the Chamber to issue such declaratory relief on an urgent basis in order to eliminate the ongoing harm caused by the conflict in jurisdictions, and to that end, to shorten the deadline for the Prosecution respond to this aspect of the request.

d) In the alternative, the sanction must be taken into consideration by the Trial Chamber in its sentencing decision

41. The totality principle set out in Rule 145(1) requires the Chamber to ensure that the punishment endured by Mr. Bemba does not exceed the limits of his culpability.[40] The sanction imposed by the Constitutional Court underscores the need to limit the imposition of further punishment.

2.2 The Decision constitutes 'new evidence', which was not previously available to the Defence, and the probative value outweighs any prejudicial impact

42. The Decision was issued in the evening of 3 September 2018. The Defence has introduced this application at the earliest possible juncture.

43. Previously, this Chamber has allowed the admission of court decisions that were issued after the close of pleadings. Specifically, although the Trial Chamber VII rejected defence challenges to the admissibility of Western Union document, the Chamber subsequently determined that it was in the interests of justice to reconsider that decision, in light of 'new facts' arising from two Austrian decisions that were not previously known to the parties (and which could not have been 'discovered' through appropriate diligence).[41]

[40] ICC-01/05-01/13-T-59-ENG, pp. 43, 70-71, 75.

[41] ICC-01/05-01/13-1948, para. 25.

44. The Chamber has yet to render its sentencing determination. Although the decision is scheduled to be issued on 17 September 2018, the matters set out in this application do not require any further suspension of the sentencing calendar. The Defence arguments concerning Article 23 and Rule 168 concern the competing competences between the ICC and the DRC, and not the prospective contents of the sentencing judgment. Since the Defence is also not requesting the ICC to divest itself of its jurisdiction of this case, the ICC Prosecutor also cannot claim to have a specific interest in the outcome of an application that relates to the impact of domestic proceedings on the rights of Mr. Bemba.

45. The alternative relief based on the totality principle is limited to one brief paragraph, which has the sole purpose of establishing the nexus between the existence of the Decision and the issues placed previously before the Chamber. The admission of materials concerning the existence of the Decision only serves to demonstrate the existence of a penalty/sanction that has been imposed on Mr. Bemba. The fact that the Constitutional Court has issued a decision disqualifying Mr. Bemba from public office, as a result of the Article 70 conduct, is also not a 'fact' that the Prosecution can reasonably contest.

3. Relief sought

46. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to:
    - Admit the material in Annex A for the purpose of establishing the existence of the Decision; and
    - Issue, on an urgent basis, a declaration that since the ICC exercises jurisdiction over the conduct of Mr. Bemba in Article 70 proceedings, the

DRC authorities do not have the competence to unilaterally exercise jurisdiction and attach sanctions to the same conduct.

47. In the alternative, the Defence requests the Chamber to take account of the Decision for the purpose of assessing the total level of punishment and adverse consequences that have been meted out in connection with Mr. Bemba's Article 70 conduct.

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 10th day of September, 2018
The Hague, The Netherlands