



Original: **English**

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

Date: **22/11/2016**

**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 confidential annexes A, B and C*

**Request for Trial Chamber to Review and Vary Decision of the Registry**

**Source:** Defence for Mr. Jean-Pierre Bemba Gombo

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
Kweku Vanderpuye

**Counsel for the Defence of Mr Jean-Pierre Bemba Gombo**

Melinda Taylor

**Counsel for the Defence of Mr Aimé Kilolo Musamba**

Paul Djunga Mudimbi  
Steve Powles

**Counsel for the Defence of Jean-Jacques Mangenda Kabongo**

Christopher Gosnell

**Counsel for the Defence of Fidèle Babala Wandu**

Jean-Pierre Kilenda Kakengi Basila  
Roland Azama Shalie Rodoma

**Counsel for the Defence of Mr Narcisse Arido**

Charles Achaleke Taku  
Beth Lyons

---

---

**REGISTRY**

**Registrar**

Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Other**

## Introduction

1. On 7 November 2016, the Registry notified the Bemba Defence of its position that the designation of funding for remunerating persons assisting Counsel for work carried out for the preparation of sentencing submissions is "not automatic", but rather requires the "action" of filing a Notice of Appeal.<sup>1</sup> ('Decision of the Registry')
2. Further to its Notice of Appeal,<sup>2</sup> the Bemba Defence contests the Decision of the Registry, and submits that its interpretation of the ICC Legal Aid Policy<sup>3</sup> is incorrect and prejudicial to the preparations of the Defence.
3. Pursuant to Regulation 83(4) of the ICC Regulations of the Court<sup>4</sup> and Regulation 135(2) of the ICC Regulations of the Registry,<sup>5</sup> the Bemba Defence hereby requests the Chamber to review and vary the Decision of the Registry; and to direct the Registry to allocate funds to the Defence teams in the manner envisaged in the ICC Legal Aid Policy;<sup>6</sup> that is, in a manner equivalent to the funding allocated during the trial.
4. In the alternative, the Defence requests the Trial Chamber to direct the Registry to provide the current level of monthly funds, dating back from the commencement of the sentencing phase.

## Background

5. Following the Judgment on 19 October 2016,<sup>7</sup> persons assisting Counsel were reinstated in order to facilitate the consequent tasks, including those related to preparing sentencing submissions. These appointments were made by Counsel in accordance with the ICC Legal Aid Policy<sup>8</sup> and with the reasonable expectation that persons assisting Counsel would be remunerated for their work. Further, the Registry communicated orally to the Defence that funding was applicable in these circumstances.<sup>9</sup> Formal notice of these reinstatements was communicated to the

---

<sup>1</sup> Confidential Annex A

<sup>2</sup> ICC-01/05-01/13-2012, paras. 3-5.

<sup>3</sup> ICC-ASP/12/3, 'ICC Legal Aid Policy.'

<sup>4</sup> ICC-BD/01-01-04

<sup>5</sup> ICC-BD/03-01-06-Rev.1

<sup>6</sup> ICC Legal Aid Policy, para.43.

<sup>7</sup> ICC-01/05-01/13-1989-Red. ('Judgment')

<sup>8</sup> ICC Legal Aid Policy, para.43.

<sup>9</sup> ICC-01/05-01/13-2012, *See* Confidential Annex.

Registry by the Kilolo and Bemba Defence Teams on 21 October 2016<sup>10</sup> and 31 October 2016,<sup>11</sup> respectively.

6. It was not until 3 November 2016 that any indication was given to either Defence team that funding arrangements would depart from the usual course of the ICC Legal Aid Policy.<sup>12</sup> On 7 November 2016 the Registry informed the Bemba Defence that funding for persons assisting Counsel would only be "triggered" by the Defence teams filing a Notice of Appeal, and would not be paid retroactively.<sup>13</sup> Further, the Registry informed the Bemba Defence of its view that as the ICC Legal Aid Policy makes no "reference to a specific and independent 'sentencing phase'" consequently, no funding will be designated to a defence team for this purpose.
7. In order to protect against the loss of further resources, on 7 November 2016 (which was soon as was practicable) the Bemba Defence filed its Notice of Appeal, well in advance of the time limit prescribed by Rule 150(1) of the ICC Rules of Procedure and Evidence.
8. The impact of the Registry's Decision is that from the issuance of the Trial Judgment until the filing of the Notice of Appeal, the Bemba Defence was only allocated funds for one Counsel.<sup>14</sup> Apart from the fact that this has reduced the amount of funds available to the Defence, it also impacted adversely on Defence preparation. For example, the appointment of support staff was delayed by several weeks, pending the Registry's assessment as to whether the Defence possessed sufficient residual funds to remunerate them at the standard rate. As matters stand, two support staff have yet to be provided with full access to relevant Defence databases (such as ringtail).
9. Further, the Bemba Defence understands that the Registry communicated its position to other Defence teams prior to its notice to the Bemba Defence on 7 November 2016. It is for this reason that Defence Counsel for Mr Arido filed its Notice of Appeal on 31 October 2016.<sup>15</sup>

---

<sup>10</sup> Confidential Annex B

<sup>11</sup> Confidential Annex C

<sup>12</sup> Confidential Annex A

<sup>13</sup> Ibid.

<sup>14</sup> 19 October 2016 – 7 November 2016

<sup>15</sup> ICC-01/05-01/13-1995

## Submissions

### Issues of Procedural Fairness

10. The Regulations of the Court provide that "legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel [and] his or her assistants..."<sup>16</sup> The principle of affording an *equality of arms* to indigent defendants governs both the application of the Court's legal aid system and the related decisions of the Registrar.<sup>17</sup> It is therefore apparent that any decision made by the Registrar in relation to, *inter alia*, the funding arrangements of the Defence teams must "contribute to maintaining a balance between the resources and means of the accused and those of the prosecution."<sup>18</sup> The Registry's position that there is no express provision in the ICC Legal Aid Policy for a "sentencing phase" is therefore inadequate. Further, it is completely illogical to insist that the Defence teams will only receive funds for its sentencing preparations if it files a Notice of Appeal, when these are two entirely independent phases of trial. It is arbitrary, unreasonable and goes against the very principles of procedural fairness underpinning the ICC Legal Aid Policy to require the Defence teams to prepare for sentencing with significantly reduced resources.

11. As is the case during the Trial Phase, preparations for sentencing are similarly resource intensive. This is indeed reflected in the ICC Legal Aid Policy, which clearly states that from the date of Judgment until the date of a Decision on Appeal (if applicable), Defence teams are to be composed of Counsel, a Legal Assistant and a Case Manager.<sup>19</sup> The Registry's refusal to allocate funding from the date of Judgment is therefore illogical, prejudicial to the fair trial rights of the Defence and in blatant disregard of the ICC Legal Aid Policy.

### Notice Requirements

12. The Registry gave the clear impression to the Bemba Defence that in accordance with the ICC Legal Aid Policy;<sup>20</sup> additional resources would be allocated from the

---

<sup>16</sup> ICC-BD/01-01-04, Reg. 83(4).

<sup>17</sup> ICC Legal Aid Policy, para.9.

<sup>18</sup> ICC Legal Aid Policy, para.9.

<sup>19</sup> ICC Legal Aid Policy, para.43.

<sup>20</sup> ICC Legal Aid Policy, para.43.

date of the Judgment.<sup>21</sup> Any departure from this position ought to have been notified to the Bemba Defence "at the earliest possible juncture."<sup>22</sup> There is no justification for the Registry's failure to inform Defence teams of its position in a timely manner.

13. Further still, there is no justification for the Registry having informed different Defence teams of its decision, at different points in time. The Defence teams have a right to be treated equally. It is manifestly unfair to inform Defence teams in a different manner, the impact of which is that some teams were not made aware that a delay in filing the Notices of Appeal would result in a loss of allocated funding. In this regard the Bemba Defence is at an even further disadvantage due to the fact that it is difficult to obtain immediate instructions from a client in detention.

#### Misidentification of resources

14. It is a wholly unsatisfactory response from the Registry to suggest that, in conjunction with the flexibility principle of the ICC Legal Aid Policy,<sup>23</sup> the Bemba Defence apply "un-used team funds"<sup>24</sup> in order to remunerate assistants for their work preparing arguments towards sentencing. The use of reserved funds for this purpose curtails the ability of the Defence to use such funds for specific appellate activities that might require additional or external expertise. It also fails to promote equality between Defence teams; as a result of entirely irrelevant and arbitrary factor (the filing date of the Notice of Appeal) the Bemba Defence has been provided less funds than other Defence teams. Finally, the Registrar's duty to interpret and apply the legal aid policy in a rational and equitable manner is an issue that impacts on the rights of all of the Defence teams, and therefore the application of funding credit (if any) of one Defence team is irrelevant.

#### **Relief sought**

15. For the foregoing reasons, the Bemba Defence requests the Honourable Trial Chamber to:

- a. review and vary the Decision of the Registry; and
- b. to direct the Registry to allocate funds to the Defence from the date of judgment until the conclusion of the sentencing phase in a manner equivalent

---

<sup>21</sup> Confidential Annex A

<sup>22</sup> Regulations of the Registry, Reg. 135(1).

<sup>23</sup> ICC Legal Aid Policy, para.9.

<sup>24</sup> Confidential Annex A

to the funding allocated during the trial, or at the very least, equivalent to the current monthly level of funding.



Melinda Taylor  
Counsel of Mr. Jean-Pierre Bemba

Dated this 22<sup>nd</sup> day of November 2016

The Hague, The Netherlands