

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/05-01/13**
Date: **25 November 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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 Defence Request to Review and Vary the Registry's Scope of Legal
Assistance Decision**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), issues the following 'Decision on Defence Request to Review and Vary the Registry's Scope of Legal Assistance Decision', 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 64(2) and 67 of the Rome Statute ('Statute') and Regulations 83 and 85 of the Regulations of the Court ('Regulations').

I. Procedural history and background

1. On 19 October 2016, the Chamber, pursuant to Article 74 of the Statute, convicted Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido of offences against the administration of justice ('Judgment').¹
2. On 22 November 2016, the defence for Mr Bemba ('Bemba Defence') requested the Chamber to review and vary a decision of the Registry in regard to the scope of legal assistance ('Request').²
3. On 23 November 2016, the defence for Mr Kilolo ('Kilolo Defence') joined the Request.³
4. On 24 November 2016, the defence for Mr Babala joined the Request.⁴
5. On 25 November 2016,⁵ the Registry responded to the Request and argued that its decision should be upheld ('Registry Observations').⁶

¹ Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (confidential version registered on the same day).

² Request for Trial Chamber to Review and Vary Decision of the Registry, ICC-01/05-01/13-2043 (with three confidential annexes).

³ Kilolo Defence's joinder to "Request For Trial Chamber to Review and Vary Decision of the Registry" (ICC-01/05-01/13-2043), ICC-01/05-01/13-2051.

⁴ Adjunction de la Défense de M. Fidèle BABALA Wandu à « Request for Trial Chamber to Review and Vary Decision of the Registry » ICC-01/05-01/13-2043, ICC-01/05-01/13-2056.

⁵ The deadline for submissions responding to the Request was shortened to this date. Email from Trial Chamber VII Communications to the parties, 22 November 2016 at 16:09. The Office of the Prosecutor indicated by email that it

6. The most relevant facts underlying the Request do not appear to be contested and are as follows:

- (i) According to the Registry's single policy document on the Court's legal aid system ('Legal Aid Policy'),⁷ a defence team operating under this policy is provided resources for a 'core team' – consisting of one counsel, one legal assistant and one case manager – which operates throughout the proceedings.⁸ This is with the exception of two periods when defence counsel must act alone. The second of these two exceptional periods requires counsel to act alone during the period between the conclusion of the closing statements and the judgment ('deliberations phase').⁹ The core defence team is then 'immediately reinstated when the case progresses to the Appeals phase'.¹⁰ It is also noted that, during the earlier 'trial phase', this core defence team benefits from an additional resource in the form of funds to remunerate an associate counsel.¹¹ The Legal Aid Policy makes no explicit reference to sentencing or any 'sentencing phase'.
- (ii) All five convicted persons were receiving some form of legal assistance from the Registry during the deliberations phase.¹²
- (iii) On 3 November 2016, following correspondence from the Bemba and Kilolo Defence,¹³ the Registry indicated that the start of the appeals phase for purposes of the Legal Aid Policy 'would produce its effects from the date of the submission of the respective notice of Appeal, if any'.¹⁴
- (iv) On 4 November 2016 at 14:48, the Registry confirmed, in response to a follow-up inquiry from the Bemba Defence which specifically mentioned concerns about sentencing preparation, that filing a notice of appeal would have no retroactive effect for legal aid purposes. As explained by the Registry: '[i]f you submit, for example, your respective notice of appeal on

did not intend to file any formal response. Email from the Prosecution to the Chamber and parties, 23 November 2016 at 09:47.

⁶ Registry's Observations on the "Request for Trial Chamber to Review and Vary Decision of the Registry", ICC-01/05-01/13-2061 (with one confidential annex).

⁷ Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3.

⁸ Legal Aid Policy, ICC-ASP/12/3, paras 39-40.

⁹ Legal Aid Policy, ICC-ASP/12/3, para. 39.

¹⁰ Legal Aid Policy, ICC-ASP/12/3, paras 40, 42.

¹¹ Legal Aid Policy, ICC-ASP/12/3, para. 41.

¹² As regards the Bemba Defence specifically, *see* Decision on Bemba Defence Request for Provisional Legal Assistance, 30 August 2016, ICC-01/05-01/13-1977.

¹³ Annexes B and C of the Request, ICC-01/05-01/13-2043-Conf-AnxB, ICC-01/05-01/13-2043-Conf-AnxC.

¹⁴ Annex A of the Request, ICC-01/05-01/13-2043-Conf-AnxA, page 4.

19 November, the payment scheme and principles of the [Legal Aid Policy] for the appeals phase will produce its effects from 19/11 onwards.¹⁵

- (v) Later that day at 15:12, the Bemba Defence asked the Registry for clarification as to what funds would then be available for the preparation of sentencing.¹⁶
 - (vi) On 7 November 2016, the Registry responded to this clarification request, specifying that the Legal Aid Policy makes no reference to a sentencing phase or to resources explicitly designated for sentencing.¹⁷
 - (vii) Between 31 October 2016 and 7 November 2016, each defence team filed its notice of appeal against the Judgment.¹⁸
 - (viii) The consequence of the above sequence of events is that the Registry has decided not to provide the additional funds to reinstate the core defence teams between 19 October 2016 (when the judgment was delivered) and the date of each defence team's respective notice of appeal.
7. The Chamber is requested to review and vary the Registry's decision and direct the Registry to allocate funds from the date of judgment until the conclusion of the sentencing phase, in a manner equivalent to: (i) the funding allocated during the trial or, in the alternative, (ii) the current monthly level of funding.¹⁹

II. Analysis

8. Although only three defence teams are formally part of this Request, the Single Judge's ruling below applies equally to all five defence teams.

¹⁵ Annex A of the Request, ICC-01/05-01/13-2043-Conf-AnxA, page 3.

¹⁶ Annex A of the Request, ICC-01/05-01/13-2043-Conf-AnxA, page 2.

¹⁷ Annex A of the Request, ICC-01/05-01/13-2043-Conf-AnxA, page 2.

¹⁸ Notice of Appeal, ICC-01/05-01/13-2012 (with confidential annex); Addendum to Notice of Appeal, 7 November 2016, ICC-01/05-01/13-2014; Acte d'appel de la Défense de Maître Aimé Kilolo Musamba à l'encontre du «Judgment pursuant to Article 74 of the Statute» (ICC-01/05-01/13-1989-Conf) rendu par la Chambre de première instance VII, le 19 octobre 2016, 7 November 2016, ICC-01/05-01/13-2015; Notice of Appeal, 4 November 2016, ICC-01/05-01/13-2006; Notification d'appel de la Défense de M. Fidèle Babala Wandu à l'encontre du jugement rendu en application de l'article 74 du Statut par la Chambre de première instance VII le 19 octobre 2016, 2 November 2016, ICC-01/05-01/13-1999; Narcisse Arido's Notice of Appeal Against Trial Chamber VII's 'Judgment pursuant to Article 74 of the Statute' (ICC-01/05-01/13-1989-Conf), 31 October 2016, ICC-01/05-01/13-1995.

¹⁹ Request, ICC-01/05-01/13-2043, paras 3-4, 15.

9. The Single Judge recalls from previous decisions the applicable law for reviewing Registry decisions on the scope of legal assistance.²⁰
10. The Single Judge considers that the Registry abused its discretion by interpreting the Legal Aid Policy in a manner which left an unjustified legal assistance gap between the delivery of the Judgment and the filing of a notice of appeal. By interpreting the Legal Aid Policy in this manner, it unduly extended the applicability of one of the two exceptional scenarios beyond the plain wording of the Legal Aid Policy. It is emphasised that the Legal Aid Policy states, as a principle, that the core team 'operates throughout the proceedings'.
11. The Legal Aid Policy does reduce resources during the deliberations phase, but only specifies this as the period 'between the closing statements and the judgment'.²¹ A plain reading of this time frame requires that the core defence team is to be reinstated from the Article 74 decision's issuance, not from the notice of appeal. The Registry's decision is taken in contradiction to this specified timeframe, depriving the defence teams of resources necessary for the sentencing stage. It also disregards the fact that, despite the delivery of the judgment pursuant to Article 74 of the Statute, litigation before the Trial Chamber is still ongoing. Article 76 of the Statute forms an integral part of Part 6 – which governs 'The Trial' - and requires the Chamber, in the event of conviction, to consider the appropriate sentence to be imposed.
12. The Single Judge considers that the Registry set an illogical triggering point for reinstating the legal assistance level for the core defence team. The filing of a notice of appeal is an arbitrary deadline against which the core team is to be reinstated, and does not reflect the reality of the workload expected of the defence upon receipt of an Article 74 decision. The defence teams were required to prepare for

²⁰ ICC-01/05-01/13-1977, paras 5-8; Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, ICC-01/05-01/13-955, para. 33.

²¹ Legal Aid Policy, ICC-ASP/12/3, para. 39.

sentencing and the prospect of any appeal from the moment the Judgment was rendered.²² Indeed, the Single Judge set all relevant sentencing deadlines the day after the Judgment was rendered,²³ and expected the parties to immediately set about complying with them.

13. The Single Judge considers it unduly formalistic to delay the reformation of the core defence team on grounds that there is only an ‘appeals phase’ - and no ‘sentencing phase’ – stated in the Legal Aid Policy.²⁴ This interpretation does not reflect the fact that sentencing is an integral part of the trial, as evidenced by Part 6 of the Statute itself. Although the notice of appeal against the judgment does signify the moment when the trial record is formally transferred to the Appeals Chamber,²⁵ the Legal Aid Policy itself confirms that the core team operates ‘throughout the proceedings’ and that deliberations end when the judgment is rendered. It is noted that the Registry argues that any sentencing phase preparations could be financed through un-used team funds,²⁶ but the defence teams should not have to use accrued funds as a substitute for financial assistance which they are entitled to under the Legal Aid Policy.
14. The Single Judge notes that a sentencing determination is a more limited inquiry than the determination on the innocence or guilt of the accused,²⁷ and for this reason does not consider that the defence teams require for sentencing the further resources allocated between the definite decision relating to the confirmation of charges and the conclusion of the closing statements.²⁸ But there is clearly a difference in the defence’s workload between the deliberations phase and the immediate aftermath of the Judgment, and the Registry’s decision entirely fails to

²² In this regard, it is noted that the defence are statutorily entitled to 30 days to file any notice of appeal. Rule 150(1) of the Rules.

²³ Sentencing Calendar, 20 October 2016, ICC-01/05-01/13-1990.

²⁴ *Contrary to Registry Observations*, ICC-01/05-01/13-2061, paras 12-15.

²⁵ Rule 151(1) of the Rules.

²⁶ Registry Observations, ICC-01/05-01/13-2061, paras 11, 14, 28-30.

²⁷ *See Decision on Requests for Variation of Deadlines in the Sentencing Calendar*, 2 November 2016, ICC-01/05-01/13-2001, paras 10, 13.

²⁸ *See Legal Aid Policy*, ICC-ASP/12/3, para. 41.

account for this difference. The Single Judge therefore varies the Registry's decision and grants the alternative relief sought in the Request. The Registry is ordered to provide all five defence teams with additional funds commensurate with what they would have received had their *current* monthly level of funding run from the issuance of the Judgment.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request to the extent specified in paragraph 14 above.

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



Judge Bertram Schmitt, Presiding Judge

Dated 25 November 2016

At The Hague, The Netherlands