



Original: English

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

Date: 29/06/2016

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

Public Redacted Version of “Defence Request for variation of P-361’s testimony”

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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Introduction

1. Mr. Bemba has been detained for over eight years, and would appear to be the only defendant appearing before an international court or tribunal, who is required to participate in simultaneous trial proceedings.
2. These special circumstances underscore his right to expeditious proceedings, and his right to adequate time and facilities as concerns both trial proceedings.
3. The Defence for Mr. Jean-Pierre Bemba Gombo has done its utmost over the last eight months to ensure Mr. Bemba's rights under the Statute, including both his right to expeditious proceedings, and his right to adequate time and facilities.
4. A variety of factors, which fall outside the control of the Defence, have impeded its ability to do so. As a result, the Defence has been able to conduct no investigative missions, is severely under-resourced, and has been unable to conduct key preparatory activities.
5. At the same time that the Defence has faced these issues, it has also faced a constant stream of filings, and the need to review further disclosure, which was received after the commencement of the trial.
6. It has now reached a juncture where it is apparent that the Defence is concerned that it will be unable to ensure Mr. Bemba's effective representation, in the manner required by both Article 67(1) of the Statute, or Article 13(2) of the Code of Conduct.

7. For the reasons set out below, and pursuant to Regulation 35 of the Regulations of the Court, the Defence for Mr. Bemba requests the Trial Chamber for additional time as concerns the scheduling of the testimony of P-361.

Reasons justifying additional time

8. During the pre-confirmation phase of this case, Mr. Bemba was represented by Mr. Kaufman on *apro bono* basis.^[1]

9. The Pre-Trial Chamber initially refused to provide up-front funds to the Article 70 Defence (as is the case in the Main Case) and found that Counsel was required to recover the funds directly from Mr. Bemba.^[2]

10. Although the Presidency eventually allocated the Defence three (four) months' funding for one counsel^[3], this was recovered from the money released from seized assets of Mr. Bemba. These assets were then exhausted by Mr. Bemba's prior debt to the Court.^[4]

11. The Presidency subsequently confirmed that no further up-front funds would be allocated to the Defence.^[5]

12. Mr. Kaufman therefore withdrew as Counsel in December 2014.^[6]

13. In January 2015, Ms. Taylor was appointed.^[7]

^[1] ICC-01/05-01/13-36-anxI

^[2] ICC-01/05-01/13-57.

^[3] ICC-01/05-01/13-21.

^[4] ICC-roc85-01/13-31-Conf-Exp

^[5] ICC-roc85-01/13-31-Conf-Exp

^[6] ICC-01/05-01/13-783.

^[7] ICC-01/05-01/13-789-anxI.

14. Although Ms. Taylor had been engaged in the Main Case since January 2014, it was on a part-time basis, and her familiarity with the Article 70 case was of an incidental nature, as that was not the primary focus of her prior engagement.

15. Two case managers from the Main Case were also appointed on a *pro bono* basis, although due to ongoing litigation in the Main Case, one has been exclusively assigned to Main Case litigation since June 2015.

16. The Defence is currently composed of *pro bono* Counsel, *pro bono* case manager, and one full time intern (*pro bono* assistant, as they are termed under the legal aid scheme), and one part-time intern (*pro bono* assistant).

17. At the time of her appointment, she met with the representatives from the Registry to address the issue of funding for investigations, and was informed that a solution would be found for issues where *pro bono* assistance would not be possible.

18. According to Registry documentation regarding the application of the legal aid scheme, the Registry is committed to reassessing the indigence status of defendants when their case progresses to the trial phase.^[8]

19. When it became apparent that no such reassessment would be forthcoming, the Defence filed its own request for a review of the financial status of Mr. Bemba. This review was warranted by the fact that the Registry had erred by failing to taking into consideration the fact that the Article 70 indigency decision failed to take into consideration Mr. Bemba's Main Case debts, and the fact that assets attributed to Mr. Bemba would be exhausted by such debts.

^[8] "The calculation of the financial means of a person claiming indigence before the Court is assessed at each stage of the proceedings: pre-trial, trial and appeal. Thus, once a determination of indigence has been made, for example at the pre-trial phase, the Court will reassess that determination once the case proceeds to the trial phase and later to the appeal phase"; ICC-ASP/8/24, para. 7.

20. This request was filed on 29 June 2015. According to Regulation 85 of the Regulations of the Court, decisions on indigence should be issued within one month of the submission of an application. ^[9]

21. Nonetheless, when the Defence inquired on 5 August 2015 as to when it could expect a response, it was informed that a decision would not be issued until 14 August 2015.

22. The decision was in fact issued on 21 August 2015. The decision denied the Request in full.

23. Given that any review process before the Presidency was unlikely to be completed before the start of the trial, the Defence met with representatives of the Registry in order to address the fact that the decision included assumptions and valuations, which were inconsistent with previous Registry determinations.

24. The Registry therefore reviewed its decision, and issued on a new determination on 1 September 2015 in which it assessed Mr. Bemba as partially indigent. The Defence would like to note that it is extremely appreciative of the Registry's actions in this regard.

25. Upon receipt of these funds, the Defence determined that such funds would be usefully employed in conducting investigations (which had hitherto been precluded), and, given that fact that the Prosecution was calling both an analyst on 'contacts' and a telecommunications expert, engaging expertise in the area of telecommunications evidence.

26. The Defence had in fact indicated to Counsel Support Section that it wished to appoint an expert on these issues on 19 July 2015, and had been informed in

^[9] The same deadline is set out in Regulation 132(3) of the Regulations of the Registry.

response that any fees for such an expert would need to be allocated from legal aid. Thus, since there were no legal aid funds assigned to Mr. Bemba prior to 1 September 2015, the Defence had not been able to engage an expert prior to that time.

27. On 4 September 2015, the Defence requested CSS to appoint Mr. Duncan Brown as expert. His appointment was, however, protracted through further inquiries on a range of issues, including whether the other teams would contribute to his funding, and his fees,^[10] and was then confirmed on 16 September 2015.

28. The Defence immediately started working with Mr. Brown with a view to the scheduled testimony of Mr. Pluijmers in the second half of October. In this regard, throughout this case, the Defence has underscored the need for it to have sufficient time to analyse Mr. Pluijmers' report and to have sufficient time to seek counter-expertise in relation to the issues raised therein.^[12] This right is particularly important in relation to the interpretation of CDRs, which on their face, could involve potential issues of self-incrimination. As recognised by Trial Chamber I, the possibility of join-instruction would not be appropriate in circumstances where the instructions could reveal issues of confidential Defence strategy.^[13]

29. Since Mr. Brown is appointed as an expert consultant to the team, the Defence intended to seek the approval for Mr. Brown to be present during the testimony of Mr. Pluijmers to advise the Defence on potential aspects for its cross-examination. This is consistent with the practice of the *ad hoc* Tribunals,^[14] and

^[10] The defence had requested that he be paid at the rate referred to on the ICC homepage for experts (P4 rate), which CSS assessed at [REDACTED] euros an hour. It should be noted that Mr. Pluijmers was paid at [REDACTED] euros an hour excluding VAT and expenses.

^[12] ICC-01/05-01/13-T-8-Red-ENG, 24-04-2015, p.41, lines 2-14

^[13] Trial Chamber, *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-58-ENG, 30 October 2007, p. 29, lines 22-25, p. 30, lines 1-19.

^[14] *Prosecutor v. Galic*, DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS; 3 July 2002; page 3; *Prosecutor v. Karadzic*, ORDER TO THE REGISTRY IN RELATION TO ACCUSED'S REQUEST FOR ASSISTANCE OF DEFENCE EXPERT IN THE

would be of immense benefit given that the Defence does not have a co-counsel or a legal assistant, and is operating with significantly reduced resources with a *pro bono* team, with entry level qualifications.

30. It would also ensure that all relevant issues are addressed during Mr. Pluijmer's testimony, and avoid the need for the Defence to call a separate expert witness during the Defence case, or request Mr. Pluijmer's to be recalled during the Defence case.

31. Given the volume of material, Mr. Brown is still at a very preliminary stage of his analysis. Mr. Brown is not able to travel to The Hague to meet with the Defence in advance of P361's testimony on 7 October, and, due to the *pro bono* status of Counsel, Counsel cannot at this point travel on missions. Thus, even if it were possible for him to attend the hearing on 7 October, in the absence of full review of the materials and prior consultation, his assistance would be very limited.

32. The scheduling of Mr. Pluijmer's testimony on the 7 October 2015 would therefore deprive the Defence of the ability to enjoy Mr. Brown's effective assistance.

33. This in turn, imposes a greater burden on the Defence to conduct its own analysis, at a time when it is preparing for the testimony of P-261, and attempting to undertake investigative acts, which were not possible previously.

COURTROOM; 2 July 2010, page 2 and 3; prosecutor v. Karadzic, DECISION ON ACCUSED'S REQUEST FOR ASSISTANCE OF DEFENCE EXPERTS IN THE COURTROOM DURING TESTIMONY OF SEVEN PROSECUTION EXPERT WITNESSES; 27 October 2011; courtroom during the testimony of Thomas Parsons.

Prosecutor v. Karadzic, DECISION ON ACCUSED'S REQUEST FOR ASSISTANCE OF DEFENCE EXPERT IN THE COURTROOM DURING TESTIMONY

OF EXPERT WITNESS THEUNENS; 14 June 2011; Prosecutor v. Popovic et al; defence notice: notifying the trial chamber of the presence of the defence expert witness during the testimony of the prosecution's expert witness helge brunborg; 25 april 2007

34. The Defence further notes in this regard that the Appeals Chamber has underscored that,^[15]

'As a rule, counsel is best placed to appreciate the needs of a case, especially the time needed for going into matters at issue in the way expected of counsel.'

35. Throughout these proceedings, the Defence has done its utmost to comply with the deadlines imposed by the Chamber in order to ensure Mr. Bemba's right to a speedy trial, and has never requested an extension of time unless it was absolutely necessary to do so.

36. The Defence has made a good faith determination that it is not in a position to effectively represent Mr. Bemba's interests during the testimony of P-361, if scheduled for next week. Any delay that this would cause is extremely minimal when viewed against the length of the pre-trial phase and investigations, and the fact that Mr. Pluijmer's testimony can be scheduled relatively easily at other times due to his residence in The Netherlands.,

37. For these reasons, the Defence for Mr. Bemba respectfully submits that there is good cause to vary the timing for Mr. Pluijmer's testimony.

38. Due to the urgency of any preparations that would need to be made if the Trial Chamber rules to the contrary, the Defence requests an urgent determination of this request.

^[15] ICC-01/01-01/06-903, Para 3.



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Done this 29nd day of June 2016