



Original: **English**

No.: ICC-01/05-01/08 A

Date: 18/07/2016

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public document

Reasons for the Request for Leave to Withdraw

Source: Associate Counsel 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. On 13 July 2016, the Appeals Chamber ordered Associate Counsel to file reasons for the request for withdrawal.
2. Mr. Bemba has consented to waive privilege in order to allow for the submission of the reasons below. Associate Counsel has also obtained advice from an elected member of the ICCBA Professional Standards Advisory Committee as to the scope of information which can be placed, properly, before the Chamber.

Submissions

3. The request to withdraw was engendered primarily by potential conflicts, relating to the funding of the Defence in ICC-01/05-01/08 and ICC-01/05-01/13.
4. Whereas the Registry agreed to advance funds to the Defence in ICC-01/05-01/08, the Registry and the Presidency rejected the Defence request for a similar arrangement to be implemented in ICC-01/05-01/13. This precipitated the withdrawal of former Counsel, Nick Kaufman, in December 2014.
5. The undersigned was appointed on a *pro bono basis* as Counsel in ICC-01/05-01/13 in January 2015, whilst continuing as Associate Counsel in ICC-01/05-01/08.
6. After careful consideration, and having obtained independent legal advice, the undersigned determined that in order to fulfil her obligations in ICC-

01/05-01/13 in an effective and independent manner and avoid potential conflicts, it was necessary to obtain some degree of resources in ICC-01/05-01/13, which fell under the authority of Counsel in ICC-01/5-01/13, and not Lead Counsel in ICC-01/05-01/08.

7. Some of the reasons underpinning this determination were as follows.
8. Concurrent representation of accused in different cases triggers inevitable conflicts in time commitments, which are generally resolvable. One of the ways through which they can be resolved is by redistributing resources in one case, in order to compensate for Counsel's increased participation in another case. The Registry legal aid policy attempts to ensure this by stipulating that if Counsel is assigned in two cases, they will receive reduced fees in one of the cases, which can then be allocated to other members on that team.
9. This type of redistribution is not available, however, in circumstances in which the second case receives no funding. Concretely, if the workload in the Main Case diverts the time of the undersigned from the Article 70 case, the undersigned cannot redistribute her funds to other members of the Article 70 team if there are no funds to redistribute.
10. A further complicating factor is that the charges in the Main Case are far graver, and of more importance than the Article 70 case. This dictates a necessary prioritisation of resources on the Main case. Whereas the Lead Counsel in the Main case has an obligation to ensure that all resources under his authority are focussed on pursuing the best interests of Mr. Bemba in the Main case, he has no corresponding professional obligation as concerns the interests of Mr. Bemba in the Article 70 case. This obligation falls on the undersigned alone. For this reason, it is incumbent on the undersigned to ensure - at all times - that there are sufficient resources available in ICC-

01/05-01/13 in order to ensure Mr. Bemba's effective representation in that case, notwithstanding the particular demands and requirements of ICC-01/05-01/08.

11. Given the particularities of representing one client in two different cases with vastly disparate outcomes, it was the considered opinion of the undersigned that the potential conflict could only be avoided by not having to make a choice between allocating time and sufficient funds to both cases. Indeed, as a matter of law and principle, Mr. Bemba should not have to choose between the right to be represented effectively in the Main case, and the right to be represented effectively in the Article 70 case. Mr. Bemba has a right that his Defence be afforded necessary and reasonable resources in both cases.
12. The need for independent resources in ICC-01/05-01/13 was further underscored by the fact that the undersigned was informed after her appointment that firstly, *pro bono* appointments have a limited duration of six months, and secondly, the Registry considers that *pro bono* members of the Defence are not covered by privileges and immunities, and for this reason, cannot participate in missions conducted on behalf of the Defence.
13. For these reasons, in May 2015, the Article 70 Defence challenged the legal funding situation of the Defence in ICC-01/05-01/13. On 1 September 2015, the Registry determined that Mr. Bemba was partially indigent, and allocated 8,334 euros *per* month.
14. This level of funding, even when combined with the shared resources of Associate Counsel and a case manager who was appointed in both cases, was significantly lower than the funds allocated to the other Article 70 teams.¹ It

¹ The total amount available to the Article 70 Bemba Defence was approximately 21 000 euros. This is also not a completely accurate representation of the amount of resources available on a full time basis as the Associate Counsel and Case Manager had ongoing commitments to the Main Case. In

nonetheless facilitated the ability of the Defence in ICC-01/05-01/13 to make independent decisions concerning the effective representation of Mr. Bemba in that case, including the appointment of expert witnesses (who were remunerated from the allotted legal aid funds).

15. Given the timing of the decision (mere weeks before the commencement of the trial), the Article 70 Defence did not have the time and resources to mount a more substantive challenge to the funding situation in ICC-01/05-01/13.
16. In March 2016, as the Article 70 case drew to a close, the undersigned corresponded with the Registry to inquire as to the future funding situation of the Bemba Article 70 case. In verbal meetings, the undersigned also stressed the need to maintain at least a minimum level of funding in the Article 70 case.
17. Subsequently, on 12 May 2016, all Article 70 Defence teams were informed by the Counsel Support Section (CSS) that after the closing submissions (i.e. from 2 June 2016 onwards), they would receive the funds corresponding to Lead Counsel (which was roughly the amount allocated to the Bemba Article 70 Defence thus far).
18. After the conclusion of closing submissions, the Defence attempted to meet the Registry in order to confirm its entitlement to receive funding, which was the equivalent of one Lead Counsel.
19. On 2 June 2016, the Registry informed the Defence that due to the fact that the allotment for the Defence teams had decreased, Mr. Bemba was no longer

contrast, other Article 70 Defence teams were allocated approximately 35 000 euros per month (including funds for investigations).

considered partially indigent, and that as such, no funds would be provided from this point onwards.

20. In response to Defence concerns regarding the lack of notice, and the impact that this would have on support staff, the Registry agreed to extend funding until the end of June, but confirmed that from that point onwards (including for any potential appellate phase), there would be no additional funds for the Bemba Defence in ICC-01/05-01/13.

21. Although the Defence in ICC-01/05-01/13 requested CSS to review its determination in light of a range of factors,² it cannot be assumed that this position will be reversed. In the absence of a decision on this request for review, the Article 70 Defence cannot seize the Presidency or Article 70 Trial Chamber with a request for relief.

² These were that:

- a) The Registry failed to credit the Defence with funding for pre-trial and trial periods, during which the Mr. Bemba was partially indigent and entitled to legal aid, according to the Registry's own calculations;
- b) The Registry took into consideration assets, which do not fall under the control of Mr. Bemba; and
- c) The Registry employed an erroneous and prejudicial base line for calculating whether Mr. Bemba could contribute to the costs of his Defence.

In terms of the latter aspect, in assessing whether Mr. Bemba could contribute to the costs of his Defence, the Registry took into consideration whether he was able pay the minimum skeleton amount which applies at this phase. Nonetheless, according to the official ICC legal aid policy, the Registry has committed itself to adopting the opposite position, namely:

The starting point for the determination of indigence is that, where the MDM is higher than the monthly cost of defence for the most onerous phase of the proceedings i.e. that of the trial, when the maximum extent of the legal team is in place, the person will be deemed not indigent and his or her request will be refused. On the other hand, where the MDM is <0, indigence will be recognized to the full extent, i.e. the Court will pay all costs in conformity with regulation 83 of the RoC. ICC-ASP/12/3 (para. 30)

If the Registry had adopted this standard in its 2 June 2016 assessment, it would have continued to provide at least the same level of funding at the current phase of the proceedings, and in any appellate phase.

22. The decision of the Registry not to allocate any further resources to the Article 70 case served to underline the fact that the payment of Associate Counsel in the Main Case, but not the Article 70 case, had created the semblance of a solution, which was in fact, illusory. The continuation of this arrangement was therefore likely to be deleterious to Mr. Bemba's interests in the Article 70 case.
23. In particular, the unfair nature of this situation has been obscured by the fact that the undersigned receives funding for work conducted in the Main Case. In contrast, the majority of the Article 70 Bemba Defence team did not, and, as a result of the Registry decision, would have no expectation of funding for the appeal.
24. There has been no other case at international courts and tribunals, in which a defendant, who has elected to be represented through Counsel, has been compelled to defend himself with no means to fund his Defence. It is also completely untenable to assume that Counsel and support staff should represent an accused, for more than *de minimis* periods, on a completely *pro bono* basis.
25. Although the current phase of the Article 70 case is less active than previous phases, there has been ongoing litigation on important issues concerning the admission of documents, and it cannot be excluded that other issues of importance could arise. The *chapeau* to Article 67(1) also provides that defendants appearing before the ICC should be entitled to enjoy the minimum guarantees set out therein in full equality. If the Registry has deemed that it is necessary and reasonable to allocate a certain amount of legal aid in order to ensure the effective representation of Me. Kilolo, Mr. Mangenda, Mr. Babala and Mr. Arido during this phase, then there is no

conceivable justification for compelling Mr. Bemba to be defended in the Article 70 case at this juncture with no resources.

26. In this regard, the case law of the ICC has consistently recognised that the right to a fair trial and the right to equality of arms demand that sufficient funding be allocated to the Defence during all phases of the trial proceedings.³

27. The right to effective legal representation at trial, continues up until the issuance of the trial judgment itself, and can persist through any subsequent sentencing or appeal proceedings.⁴ It is, moreover, artificial and unfair to eliminate the right to legal representation for any discrete ‘phases’ of the trial itself.⁵

28. It is uncertain at this point in time as to when the Article 70 Trial Judgment will be issued, what the outcome will be, and whether any parties will appeal. It would, however, be irresponsible not to factor into consideration the need to advise Mr. Bemba as to the impact of such a judgment on his rights, and to be available to pursue any steps which might be warranted in light of the outcome.

29. For this reason, when faced with the scenario that the Defence could be reduced to skeleton staff pending the issuance of the judgment, Trial Chamber 1 concluded that it:⁶

³ ICC-01/04-01/07-T-341-ENG

⁴ ICC-01/05-01/06-2800, pp. 23-24.

⁵ ICC-01/05-01/06-2800, paras. 45-47, 48 “Without prejudice to the rights of the accused during any appellate stage, at least until the end of the trial (as defined above), he is protected by Article 67 of the Statute, and his rights thereunder should not be undermined simply because a particular stage of the trial proceedings”.

⁶ ICC-01/05-01/06-2800, para. 57.

would in all likelihood be wholly unfair to the accused to dissolve his defence team following the closing submissions, leaving one lead counsel, a legal assistant and a case manager, who would -depending on the outcome of the Article 74 Decision - have to recruit a new team and file the accused's appeal in 30 days. It is of note that the prosecution will inevitably be in a far more advantageous position in this regard, since the Prosecutor is not under any obligation to lay off staff following the concluding submissions.

30. These conclusions have even greater force in connection with a scenario in which the Article 70 Defence has been reduced to absolutely no resources, and has no possibility to reconstitute the team either before or after the issuance of the trial judgment.

31. Mr. Bemba has been detained for over eight years. In both cases, he asserts his innocence. His right to expeditious proceedings in both cases is therefore of paramount importance. As such, it is not only necessary to ensure that the Defence in ICC-01/05-01/08 is able to represent Mr. Bemba in an expeditious manner, but that the same applies to ICC-01/05-01/13.

32. In this regard, although the absence of funding in the Article 70 case could be a basis for withdrawal in that case,⁷ the impact of withdrawal in that case would be far more prejudicial for Mr. Bemba, since there is no Associate Counsel, who can continue in the stead of the undersigned. Given the withdrawal of his former Counsel at the end of the pre-confirmation phase, it would also be desirable to avoid any further disruptions to his representation in ICC-01/05-01/13.

⁷ As per Article 18(1)(b) of the Code of Conduct.

33. The best interests of Mr. Bemba in the Article 70 case therefore dictate that the undersigned should undertake all necessary measures to review or challenge the decision of the Registry through the appropriate legal mechanisms, before resorting to a measure, which could be significantly prejudicial to Mr. Bemba's right to expeditious proceedings in that case.
34. In determining the best interests of Mr. Bemba, the undersigned further took into consideration the fact that, as acknowledged by the Appeals Chamber, the Main Case appeal raises important issues of superior responsibility.
35. Upon the request of Mr. Bemba and Lead Counsel, the undersigned had liaised with a legal expert in this area, who had indicated his willingness and availability to provide legal advice and assistance to this area of the appeal. A further legal expert had also been contacted, and had consented to assist, if sufficient funds were provided. The withdrawal of the undersigned, with immediate effect, thus enabled the funds, which would otherwise have been allocated to her from 1 July onwards, to be allocated to such international legal specialists.
36. It is, moreover, the understanding of the undersigned that Mr. Bemba and his Lead Counsel are in the process of appointing a Legal Assistant, and an Associate Counsel, who is familiar with factual issues that are relevant to the appeal.⁸ The withdrawal of the undersigned also does not preclude bilateral cooperation and assistance between the two teams, and the transmission of information that might be relevant to the errors identified in the 20 June 2016 document filed by the Defence.

⁸ The undersigned notes that the decision as to whether the appointment of a particular replacement Associate Counsel would engender potential conflicts of interests does not fall within her legal responsibility. Within the framework of her responsibility as Counsel in ICC-01/05-01/13, she has advised Mr. Bemba as to any issues that might arise.

37. Finally, although the decision as to whether to authorise withdrawal rests with the Appeals Chamber, it may be of relevance that the undersigned has received advice from an elected member of the ICCBA Professional Standards Advisory Committee as concerns the compatibility of her request to withdraw with her obligations under the Code of Professional Conduct. The withdrawal of Associate Counsel in ICC-01/05-01/08 would allow for the advancement of a full array of defences in the current appeal.

Relief Sought

38. For the reasons set out above, the undersigned respectfully requests the Honourable Appeals Chamber to authorise her withdrawal as Associate Counsel in ICC-01/05-01/08.



Melinda Taylor
Associate Counsel for Mr. Jean-Pierre Bemba Gombo

Dated this 18th day of July, 2016

The Hague, The Netherlands

It is hereby certified that this document contains a total of 2933 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.