

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

And one confidential annex

**Registry's Observations on the "Request for Trial Chamber to Review and Vary
Decision of the Registry"**

Source: Registry

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

The Office of the Prosecutor

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Mr Charles Achaleke Taku

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Mr Esteban Peralta-Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I - Introduction

1. The Registry provides its observations to Trial Chamber VII (“Chamber”) following its request¹ for submissions on the “Request for Trial Chamber to Review and Vary Decision of the Registry” (“Request”) submitted by the Defence for Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) on 22 November 2016.²

II – Classification

2. The annex to the present decision is classified as confidential, pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), because it contains the private contact details of Counsel for Jean-Pierre Bemba

III - Applicable law

3. For the purpose of the present submission, the Registry has considered regulation 83 of the Regulations of the Court (“RoC”) and regulations 130 to 135(1) of the Regulation of the Registry (“RoR”), the Registry’s single policy document on the Court’s legal aid system (“LAP”).³

¹ Email from the Trial Coordinator Trial Chamber VII to the Registry on 22 November 2016 at 16:09.

² ICC-01/05-01/13-2043.

³ Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3.

IV - Submissions

Procedural History

4. On 12 May 2016, counsel for the Defence of Mr Bemba (“Bemba Defence”) was informed, via email and by way of a formal letter that they would benefit of funds for “counsel only” from 4 June 2016 in line with the LAP. The funds mentioned above amount to €8,221 per month for fees and €3,000 for expenses⁴.
5. On 31 October 2016, 3 and 4 November 2016, the Bemba Defence and the Registry exchanged emails on the specific date on which the remuneration package for the Appeals phase as foreseen in the LAP (fees for Counsel, Legal Assistant and Case Manager) would become “available”.
6. On 7 November 2016, the Defence for Mr Bemba filed its notice of Appeal.
7. On 15 November 2016, all Defence teams in the case of the *Prosecutor v. Jean-Pierre Bemba et al.* were equally informed, via email and informative letter, about the commencement date of the new remuneration regime following their respective submission of Notice of appeal.
8. Should the commencement date of the Appeals remuneration scheme be set from the date of the Article 74 judgement (i.e. 19 October), the amount of +/- €6,000 could be claimed (from 19/10 until 07/11), taking into consideration the new remuneration scheme.
9. After the Article 74 judgment of 19 October 2016, Counsel for Mr Bemba requested, via email on 03 November, the appointment of a new team member from 14 November 2016 onwards. Other administrative changes were requested on 31 October 2016 and have been equally implemented or are being implemented.
10. The Registry did not encounter any problems in relation to the commencement date of the change in the remuneration scheme.

⁴ LAP, table 3 and paragraphs 139 – 145.

11. The Defence for Mr Bemba has accrued, to date, the amount of €16,545 in expenses, pending on-going assessments for reimbursements, if any.

A. The LAP does not foresee a sentencing phase

12. The wording of Article 76 of the Statute does not foresee a sentencing phase after the Article 74 decision has been rendered; its paragraph 2 suggests that the “hearing to hear any additional evidence or submissions relevant to the sentence” takes place “before the completion of the trial”.

13. This suggestion led the authors of the LAP to not envisage a specific sentencing phase in the LAP. The sentencing phase is part of the trial phase. This is also supported by the wording of the LAP at paragraph 42 when it indicates that “the core composition is reinstated when the case progresses to the Appeals phase”.

14. The Registry agrees with the Bemba Defence that preparing for the sentencing phase and for the submission of an appeals brief may require additional funds. Therefore, despite the lack of any timely request for such additional funds, the Registry, following a pragmatic approach, proactively pointed out to the Bemba Defence the possibility of using of accrued funds. These funds can be used on the basis of the principle of flexibility in the management of the legal aid system enshrined in the LAP as this would help “to preclude any paralysis prejudicial to the interests of the due administration of justice”.⁵

15. As to the interpretation of the LAP with regard to the start of the Appeals phase, the Registry submits that the Appeals phase cannot reasonably be independent of the existence of an appeal. The Registry thus considers that this Appeals phase is triggered by the submission of a notice of appeal under Rule 150(1) of the Rules of Procedure and Evidence. In addition, the Registry cannot decide on the composition of a team during the Appeals phase based on a presumption that an appeal will be filed.

B. The Bemba Defence is seeking a remedy that was never requested

16. The Registry understands that the Bemba Defence’s request before the Chamber is twofold:

- a. On the one hand, it requests the Chamber to direct the Registry to allocate funds to the Defence [...] in a manner equivalent to the funding allocated

⁵ Page 4 of the LAP.

during the trial, or at the very least, equivalent to the current monthly level of funding.”⁶

- b. On the other hand, it requests that such allocation be effective “from the date of judgment until the conclusion of the sentencing phase”.⁷

17. Counsel for Mr Bemba now wishes to receive additional funds “equivalent to funds allocated during trial”, in order to adequately prepare for the sentencing hearing, for the period between the Judgement pursuant to article 74 of the Rome Statute (19 October 2016) and the submission of its Notice of Appeal on 7 November 2016.
18. Until the latter date and since 4 June 2016,⁸ the defence team was allocated the funds necessary for counsel to perform her work full-time. However, she now appears to request the funds corresponding to a defence team at trial namely, a counsel, an associate counsel, a legal assistant and a case manager.
19. For a counsel to receive additional funds, a request in writing should be made to the Registry in advance of the anticipated needs. No such request was ever made by the counsel for Mr Bemba. In the same vein, the Registry does not have before it any formal request for retro-active payment of the two team members the Bemba Defence decided to appoint at a time where, under the LAP, the defence team could only be composed of one counsel. As a result, no Registry’s decision was ever made and the Bemba Defence is seeking the review of a non-existing decision.
20. The email of 7 November 2016, interpreted by the Bemba Defence as a Registry’s Decision, is no more than a response to a previous email asking for clarification on the delineation of the judicial phases under the LAP.
21. As Trial Chamber II declared in its decision of 23 April 2012, the Chamber’s “role under Regulation 83(4) of the Regulations is limited to reviewing decisions by the Registrar on the scope of legal aid. The Chamber cannot substitute its own decision for one still to be made by the Registrar, as this would usurp the latter’s discretion.”⁹
22. Furthermore, the Bemba Defence seems to have changed its claim when seizing the Chamber.
23. The only request, which was a request for clarification, made to the Registry was to implement the appeals phase – one counsel, one legal assistant and one case manager

⁶ Paragraph 15(b) of the Request.

⁷ *Ibidem*.

⁸ Letter from the Counsel Support Section dated 12 May 2016.

⁹ ICC-01/04-01/07-3277, par. 23.

namely, a “core defence team” under the LAP – from the day of the Article 74 decision.¹⁰ However, the remedy now requested to the Chamber is to receive the same funding as during the trial, that is a core defence team detailed above plus one associate counsel.

24. By presenting to the Chamber a different claim than previously made to the Registry, counsel is therefore requesting the Chamber to usurp the Registrar’s discretion as noted by the Trial Chamber in the decision referred above.

C. Counsel had funds available for the required work

25. Between 4 June and 7 November 2016, the defence team was allocated the funds necessary for counsel to perform her work full-time.

26. Regulation 57 of the Regulations of the Court sets the scope of the notice of appeal that needs to be filed for the purposes of rule 150. This *numerus clausus* comprises:

- a. The name and number of the case;
- b. The date of the decision of conviction or acquittal, sentence or reparation order appealed against;
- c. Whether the appeal is directed against the whole decision or part thereof;
- d. The relief sought.

27. In the practice of the Court, all notices of appeal filed are rather short submissions of four to five pages. The determination of the content of a notice of appeal may therefore be reasonably prepared by a qualified counsel working full-time during one month.

28. In addition to the fees of counsel accrued during this period, she could have disposed of the funds previously allocated and not used to date, as explained above.¹¹

29. Counsel submits that she had to refuse the invitation to use those accrued funds because she needs them “for specific appellate activities that might require additional or external expertise”. However, it is the Registry’s view that this argument is ill-founded for the three following reasons:

- a. At the present moment, those acts are hypothetical;

¹⁰ See the electronic e-mail exchange between counsel and the Head of the Legal Aid Unit of 31 October, 3 and 4 November 2016, in Annexes C and A to the Request respectively.

¹¹ See paragraph 14.

- b. It is up to the Registry to determine if costs covered by legal assistance paid by the Court are reasonably necessary for an effective and efficient defence.¹²
- c. The legal aid scheme of the Court being governed, among others, by the principles of continuity and flexibility, counsel can present at any point a request for additional resources that will be granted wherever the proposed activities meet the test mentioned in (b) above.

30. Since 7 November 2016, counsel has the resources for a team composed of one counsel, one legal assistant and one case manager during the appeals phase. Should these resources not be sufficient for the sentencing phase, she might have access to the unused funds discussed above.

31. The Registry thus concludes that the Bemba Defence was in no way prevented to prepare for her submissions on appeal due to the lack of passage to the appeals phase as of the filing of the notice of appeal in respect of the legal aid scheme.

I. The Registry treats equally all equal situations

32. Counsel submits that “[t]he 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”¹³ and that the Registry “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.”¹⁴

33. By way of an email on 3 November 2016,¹⁵ all defence counsel in the same case were simultaneously informed in one general communication that “*the payment scheme in relation to the appeals phase as specified in the Registry’s single policy document on the Court’s legal aid system (the “LAP”) will produce its effects from the date of the submission of the respective notice of Appeal, if any*”. Counsel for Mr Bemba replied to this communication within eleven minutes. Therefore, her submission that “the Registry communicated its position to other Defence teams prior to its notice to the

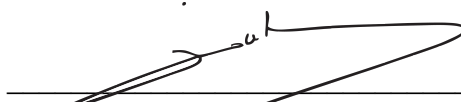
¹² Regulation 83(1) of the Regulations of the Court.

¹³ Paragraph 13 of the Request.

¹⁴ Paragraph 14 of the Request.

¹⁵ Page 2 of Annex A of the Request

Bemba Defence on 7 November 2016”¹⁶ is contradicted by the very evidence she submitted.



Marc Dubuisson, Director, Division of Judicial Services
per delegation of
Herman von Hebel, Registrar

Dated this 25 November 2016
At The Hague, The Netherlands

¹⁶ Paragraph 9 of the Request.