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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, C, D, E, F, G, H, J and Public Annex I

**Request to Review the Registry's Decision to Neither Apply or Comply With
Legal Service Agreements with Defence Support Staff**

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

Mylène Dimitri

Counsel for the Defence of Mr Aimé Kilolo Musamba

Michael G. Karnavas

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Peter Robinson

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

States' Representatives

Amicus Curia

Registrar

Peter Lewis

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

1. Introduction

1. In accordance with Articles 21(3), and 67(1) of the Statute, Rules 20(1) and 22(3) of the Rules of Procedure and Evidence, and Regulations 83(1) and (3) of the Regulations of the Court, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Trial Chamber to order the Registry to apply the 'Legal Aid Policy' ('LAP') in a manner which is consistent with:
 - Equality of arms; and
 - Internationally recognised human rights of support staff as concerns basic employment protections and safeguards, including the right to minimum salaries/hourly rates, certain forms of paid leave, and protection from unfair/wrongful dismissal or retaliation.

2. The Defence is not seeking additional funds: it is requesting the right to apply existing funds in a manner which ensures the efficiency and professional independence of the Defence, and the fundamental rights of Defence support staff members. It is a privilege and an honour to work for the Defence, to participate in international criminal proceedings, and to contribute to fair and impartial justice at the ICC. Nothing in this motion should be construed otherwise. The fact, though, that positions on Defence teams are sought after, should not mean that the individuals who accept such positions, renounce their right to fundamental employment protections.

3. Support staff are the backbone of the Defence, contributing technical expertise and legal skills, and institutional and factual knowledge built up over the course of the case. The ability of the Defence to retain qualified and motivated support staff is of essential importance to the expeditiously and efficient preparation of the Defence case. Nonetheless, although support staff are often appointed on cases for several years, the LAP, as currently interpreted, affords them:
 - No right to any form of paid annual leave, sick leave or maternity leave, and no right to enjoy ICC holidays as non-working days;
 - No right to minimum pay/minimum hourly rates, or average number of working hours; and

- No employment protections against wrongful termination of their appointment (including, if support staff are fired for filing complaints or otherwise raising issues concerning harassment or improper conduct).
4. Apart from the fact that the lack of such protections is unfair and unjust, the fact that support staff are completely dependent on Counsel also creates an environment of vulnerability. This environment is contrary to the ICC's stated objective to "[p]rovide and maintain a healthy, motivating, sustainable and caring environment for staff and others participating in the Court's work".¹
 5. When Counsel raised these issues with the Registry, the Defence were informed that these issues were 'internal Defence team' matters; if the Defence wishes to address such issues, then it fell to the Defence to devise and apply a contract with support staff. Apart from the fact that this approach leaves issues concerning fundamental rights to the discretion of individual teams, it is also apparent that since the Defence do not control issues of payment, it is not possible for the Defence to apply such contracts, even if they choose to do so.
 6. Specifically, even though Counsel appointed support staff members pursuant to contracts, which aimed to ensure such rights, the Registry amended the terms of a support staff's terms of engagement (such that they were then compelled to work less than minimum rates on this case) without any prior notice to Counsel. Since the Defence is also entering a reduced activity phase, it is also impossible for Counsel to apply such contracts because the LAP for this phase is based on the assumption that the Defence must work every working day in the month in order to receive the standard monthly salary, even if there are ICC holidays, and even if the support staff member is too ill to work.
 7. This system creates a fundamental disequilibrium between Defence and Prosecution support staff. This impacts adversely on the efficiency and quality of Defence preparation and, in turn, places the Defence in a disadvantaged position vis-à-vis the Prosecution.² The Chamber therefore has the power to request the Registry to correct

¹ Goal 2.4, Strategic plan 2013-2017, https://www.icc-cpi.int/iccdocs/registry/Strategic_Plan_2013-2017__update_Jul_2015.pdf

² *Delcourt v. Belgium*, App. No. 2689/65, para. 34.

this system in order to ensure that the Defence can finish this case under conditions that fully respect the right to an effective defence.

2. Submissions

2.1 The Court has a duty to ensure that all persons participating in its processes are protected from the risk of harm, including employment-related abuses, and that their appointment is consistent with fundamental human rights concerning employment protections, and equality of arms

8. As underscored by Trial Chamber I in the *Lubanga* case,³

The Chamber accepts that the Registrar has a mandate to ensure that the Court's limited resources, to the extent that they are her responsibility, are managed carefully. In this regard, it is of importance that the sections of the Registry that have authority in this area should ensure that the Court's funds are not squandered. However, the overarching consideration in this context is the accused's right to a fair trial under Article 67 of the Statute. Furthermore, it is necessary to observe that the guarantee of a fair trial is, in essence, an indispensable element of international justice. This fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties (the Adjustments). If the accused's right to an effective defence is infringed, a fair trial for the accused is no longer possible.

9. This Trial Chamber has also recognised that “the Chamber has overarching obligations to ensure that the trial is fair and that the rights of the accused are respected. This overarching obligation has led past chambers to intervene when legal assistance decisions not normally falling under their competence risked undermining the fairness of the proceedings”.⁴

10. Article 21(3) of the Statute further provides that the application and interpretation of the Rome Statute’s legal framework must be consistent with internationally recognised human rights, and be without adverse distinction based on grounds concerning a person’s status. Such international rights include the right to “just and favourable conditions of work”,⁵ the right, without discrimination, to “equal pay for equal work”,⁶ “the right to rest and leisure, including reasonable limitation of

³ ICC-01/04-01/06-2800, paras. 53-54.

⁴ ICC-01/05-01/13-1977, para. 7.

⁵ Article 23(1), UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (hereinafter ‘UDHR’); Article 2, Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163 (hereinafter ‘European Social Charter’).

⁶ Article 23(2), UDHR. See also Article 7(a) (i) of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3

working hours and periodic holidays with pay”,⁷ “safe and healthy working conditions”,⁸ and paid maternity leave/leave with social security benefits”.⁹

11. As concerns termination of employment rights, the employee should have “the right to security in the event of event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”,¹⁰ and should be afforded ‘a reasonable period of notice for termination of employment’¹¹ as well as ‘protection against termination for the fact of pregnancy’.¹²

12. Within the framework of European Union law, a worker is defined as a person who for a certain period of time ‘performs services for and under the direction of another person in return for which he receives remuneration’.¹³ Workers have the right to enjoy certain minimum rights, included paid leave (encompassing maternity and paternity leave), equal pay for work of equal value, and a safe working environment.¹⁴ The ECJ has ruled that ‘workers’ should be able to take paid annual leave, and to do so, in the knowledge that it will be paid.¹⁵ If the workload is such

(thereinafter ‘ICESCR’), concerning the obligation to “Pay wages and equal remuneration for work of equal value without distinction of any kind”. *See also*, Article 4 (3) of the European Social Charter.

⁷ Article 24, UDHR; Article 7(d), ICESCR, which sets out the right to “Rest, leisure and reasonable limitation of working hours and periodic (a) holidays with pay, as well as remuneration for public holidays”; Article 2 (1) and (3), European Social Charter. *See also*, Article 3 of the Convention concerning Annual Holidays with Pay (Revised), 1970 (Entry into force: 30 Jun 1973) available at

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C132 >

⁸ Article 7(b) ICESCR. *See also*, Article 3 of the European Social Charter.

⁹ Article 10(2) ICESCR. *See also*, Article 8 (1) of the European Social Charter.

¹⁰ Article 25, UDHR. *See also*, Articles 13, 19, 25, 31, 51 of the Convention concerning Minimum Standards of Social Security (Entry into force: 27 Apr 1955), available at

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C102:NO >

¹¹ Article 4 (4), European Social Charter; *see also* Article 11 of the 1982 International Labour Organization’s Convention concerning Termination of Employment at the Initiative of the Employer (No. 158), available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 >

¹² Article 10(2) ICESCR. *See also*, Article 8 (2) of the European Social Charter, which sets out the following prohibition ‘[...] to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;’

¹³ *Lawrie-Blum v. Land Baden-Württemberg (Germany) Case 66/85*, [1986] ECR 2121, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0066> >

¹⁴ Articles 8, 17, 19 of the Community Charter of the Fundamental Social Rights of Workers (European File 6/90, May 1990); Articles 31 and 33 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). *See also*, Article 8 of the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085> >; and Clause 2 of the Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0018> > .

¹⁵ Case C-214/16, Judgment, 29 November 2017, para. 47.

that they cannot take it when it falls due, and their contract is then terminated, the worker should be allocated an additional allowance in compensation.¹⁶

13. Within the United Nations, such rights are protected within the Staff Rules. Although it is possible to appoint persons on non-Staff contracts, for examples, as consultants or external contractors, this is subject to the proviso that such appointments can only be temporary, and the persons so appointed cannot be utilised to perform functions that are equivalent to regular, and continuous staff members.¹⁷ In terms of what constitutes a ‘temporary’ contract, for consultants, the maximum duration is 24 months within a 36 month period, and for contractors, 9 months within a 12 month period.¹⁸ The equivalent ICC administrative instruction also has the same temporal limitations.¹⁹ In terms of the specific status of Defence teams, when the first Registrar of the first international Court, the ICTY, decided that it was appropriate to appoint Defence Counsel and their support staff as external contractors, it was because he was operating under the mistaken belief that trials would only last 6 weeks.²⁰ This prediction was clearly wrong, with trials, and the related appointment of support staff, lasting several years.

14. Apart from the fact that human rights law sets out the principle of equal pay for equal work, the case law, policies, and practices of international courts and tribunals also reflects the principle that equality of arms does require there to be equivalent remuneration for equivalent services. Upon advice from international bar associations, the ICTY Registrar pegged the rates of Defence Counsel to a pro rata-ed salary of a Prosecution Senior Trial Attorney.²¹ The ECCC and STL have also committed to respecting equality of arms by basing Defence rates on their Prosecution counterparts.²²

¹⁶ *Ibid.* para. 52.

¹⁷ Rules 3.3, 3.5, ST/AI/2013/4, Administrative Instruction on Appointment of Consultants and Independent Contractors.

¹⁸ Rules 5.8, 5.9, ST/AI/2013/4

¹⁹ Sections 6.12, 6.13 of ICC Administrative Instruction on Consultants and Individual Contractors, [https://www.icc-cpi.int/resource-library/Vademecum/CONSULTANTS%20AND%20INDIVIDUAL%20CONTRACTORS%20\(2016\).PDF](https://www.icc-cpi.int/resource-library/Vademecum/CONSULTANTS%20AND%20INDIVIDUAL%20CONTRACTORS%20(2016).PDF)

²⁰ D. Garrido-Nijgh, Speech of the Registrar, ICDA Conference on Defence Independence, 1-2 November 1999.

²¹ D. Garrido-Nijgh, Speech of the Registrar, ICDA Conference on Defence Independence, 1-2 November 1999.

²² Article 9.5, STL Legal Aid Policy for the Defence (as amended 2015); Regulation 12.1 and 12.2 ECCC DCS Administrative Regulations, https://www.eccc.gov.kh/sites/default/files/DSS_Admin_Regulations_English.pdf

15. The ICC also recognised from the outset that, “[t]he payment system must contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution.”²³ In line with this principle of equilibrium, the Single Judge, in the *Lubanga* case, ordered the Registry to provide legal aid funding for a GTA legal assistant, based on the equivalent payment of a Prosecution P2.²⁴

16. As noted by the International Bar Association, this principle of equivalence is necessary “to ensure fairness and an effective defence ... inequality is not only unfair, but will over time materially impact the quality of representation and proceedings, if the ICC is unable to attract and retain highly-skilled counsel for Defence and victims”.²⁵

17. Although most analysis of equality of arms focusses on the payment of Counsel, the conditions of employment of support staff are also of crucial importance. Whereas Counsel are likely to have additional cases or sources of employment (or at least, the means and experience to obtain such employment), support staff are expected to work on a full-time basis over a prolonged period, and to perform tasks that are directly comparable to their Prosecution counterparts. Yet, notwithstanding the fact that support staff are appointed to a case, on a full time basis, for a period of time that exceeds the maximum length of time that is permissible for consultants or external contractors, the ICC has simply maintained support staff as a *sui generis* type of appointment, which falls outside the protections of either the staff rules, or procedures and safeguards governing external contractors and consultants.²⁶ This has created a lacuna as concerns fundamental employment protections and rights.

18. Concretely, under the current Legal Aid Policy (‘LAP’),

- a. Support staff have no contract of employment or services, which in turn, means that they can be hired and fired at will, and without any need to demonstrate good cause or grounds for termination, and without any form of

²³ Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons ICC- ASP/3/16, 17 August 2004, para. 16.

²⁴ ICC-01/04-01/06-460

²⁵ IBA Report 2017, p. 6 https://docs.wixstatic.com/ugd/ff5a5e_f227ef9afd0d4e20b6326f10eba38958.pdf

²⁶ Section 1.4 of the ICC AI on external contractors provides that “1.4 This administrative instruction, including the terms and conditions set out under annex I, does not apply to a contract issued for engaging a defence counsel or a legal representative of victims, and to any other member of his or her team, except as otherwise ordered by a judicial decision of the Court”.

protection against retaliation should support staff file a complaint or raise concerns through the appropriate channels concerning conduct in the workplace;

- b. Support staff have no right to any form of leave, paid or otherwise - during regular LAP phases, it falls entirely to the discretion of Counsel as to whether support staff can take leave, and during ‘periods of reduced activity’ (that is, when the activity based payment scheme kicks in), support staff are simply not paid for any day they do not work (including if they are sick, or if it is an ICC holiday when it is not feasible to work in an efficient manner); and
- c. There are no minimum payment rates: Counsel has the complete discretion to decide how much a support staff is paid and how much they work, provided that the support staff in question communicates his or her agreement to CSS.

19. In terms of the last aspect, ICC financial rules prevent the Prosecution or Registry from reducing the salary of staff members during periods of reduced activity, or from requiring their staff to perform tasks for free or for a salary that would otherwise apply to a much lower post.²⁷ Nonetheless, in 2013, the Registry adopted a ‘flexibility principle’ whereby Defence Counsel are actively encouraged to do more, with less funds: that is, rather than applying for, and obtaining additional funding that is commensurate with the workload, Counsel are advised that they can pay staff less than the individual rates set out in the LAP.²⁸

20. As noted by both the OPCD, and the ECCC Defence Office, the absence of fixed, minimum rates for support staff also renders them vulnerable to “market forces”; that is, the closure of other international tribunals has meant that supply outweighs demand, which in turn, renders it impossible for support staff, without the benefit of

²⁷ “The OPCD has verified with Human Resources that neither the UN system or the ICC rules and regulations permit the Court to reduce the salary of a staff member (apart from small fluctuations in post adjustment related to living costs in The Hague and exchange rates). It is also contrary to ICC rules and regulations to require a staff member to perform tasks, which are above their pay grade.” OPCD 2012 commentary, p. , http://iccnw.org/documents/2012_01_31-_Legal_aid_proposal-OPCD_FV__4_.pdf

²⁸ “The ICCBA observes that neither the assistants hired, nor the hiring Counsel, have an interest in splitting the fees allowed for one person – which are already lower than before other international courts and tribunals – between several persons, as this has a direct impact on the quality of legal assistance. Is the practice happening because the ICC Registry is not providing the necessary assets? The practice could be the direct consequence of a failure of the current system to provide adequate support, forcing a team with a need for such support to take the only available route left open to them”; ICCBA ‘Response on the Legal Aid Issue’, 24 April 2017, p.31, https://docs.wixstatic.com/ugd/ff5a5e_91839eee83344f6b979f146268a0fad1.pdf

institutional support, to insist that they be paid an appropriate salary for the work performed or to insist that they be afforded basic employment protections.²⁹

21. Without entering into concrete details, past precedents have demonstrated that this regulation free environment increases the risk of exploitation and harassment. For this reason, 46 support staff, who have appeared before the ICC, have voiced their concern regarding the absence of any institutional protection against harassment and exploitation in the workplace.³⁰
22. The ICCBA's decision to issue an instruction concerning the Code of Conduct implications for harassment is a welcome development, but as long as support staff can be hired and fired at will, the theoretical right to submit a Code of Conduct complaint will not afford support staff effective protection against abuse and exploitation. The absence of any form of paid leave, in particular, maternity leave, also creates a clear basis for gender discrimination.
23. The ECCC and STL have recognized that the most appropriate and efficient mechanism for mitigating these risks is to appoint support staff on contracts, the conditions of which are negotiated and overseen by the Court, rather than Counsel.³¹ An expert appointed by the ICC Registry to evaluate the Court's legal aid policy also recommended that support staff should be appointed pursuant to legal service agreements, which would include certain employment protections.³² This recommendation was endorsed by the ICCBA.³³

²⁹ "Defence support staff are also in an extremely vulnerable position. They are not protected by the ICC Staff Rules or any employment contract, and it is ambiguous as to whether they are covered by any employment law of domestic systems. Given the current economic conditions, and the availability of support staff due to the imminent closure of the ICTY and ICTR, potential support staff are in a weak bargaining position and therefore do not have the ability to negotiate a proper salary. As noted above, the ICC's Strategic Plan aims to "Attract, care for, and offer career development and advancement opportunities to a diverse staff of the highest quality." It would be entirely discriminatory to apply this objective to Prosecution support staff, whilst denying any protection or regulation to Defence", OPCD 2012 commentary, p. 4, http://iccnow.org/documents/2012_01_31-_Legal_aid_proposal-OPCD_FV__4_.pdf

See also Guide to the ECCC Legal Assistance Scheme, 21 January, at B.1 (quoted in Gut, Kirsch, Mundis, and Taylor, 'Defence Issues', in Sluiter *et al.* ed. International Criminal Procedure: Principles and Rules Oxford University Press, 2013) p. 1242).

³⁰ Annex I

³¹ Gut, Kirsch, Mundis, and Taylor, 'Defence Issues', in Sluiter *et al.* ed. International Criminal Procedure: Principles and Rules Oxford University Press, 2013), pp. 1231-1232.

³² 'Assessment of the ICC Legal Aid System', 5 January 2017, pp. 11, 72-73, <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>

³³ ICCBA 'Response on the Legal Aid Issue' *ibid.*, p. 34.

2.2 The LAP, as currently interpreted and applied in this case, fails to comply with basic human rights and equality of arms

24. Following such recommendations, Counsel inquired with CSS as to whether as to whether a model legal services agreement had been prepared in the interim. Counsel also observed that since the Registry is responsible for approving and disbursing funds, any such agreements would need to be ratified, or signed off by the Registry in order to be enforceable.³⁴ The Defence received the following response:³⁵

With regards to your query, we can inform you as follows:

In the Legal Aid Policy (LAP) currently in force, the Court is not included as such in the relationship between counsel and persons assisting counsel.

The Court's only role is to make sure that the criteria for counsel and assistants to counsel are met and that the legal aid is paid, in accordance with the LAP.

Consequently, all the conditions of the appointment of a team member are negotiated between the Counsel and the team member, with the approval of the client. Legal team members of a non-indigent client are engaged in the same manner.

In sum, the legal services agreement is exclusively between the Counsel and the team member, without the involvement of the Court, regardless of the indigence of the client.

Accordingly, the current LAP does not foresee any legal services agreements identifying rights, duties and entitlements of persons appointed in the defence teams or victims teams. Reason why we are, currently only providing appointment letters with reference to the LAP.

Moreover, the CSS has previously suggested to the ICCBA, shortly after its inception - to prepare model contracts or a set of good practices for such purposes. To date, we have not received any feedback.

As to the future, we hope that the new LAP will encompass the rights, duties and entitlements, as listed in your email.

25. In line with the stated position that “all the conditions of the appointment of a team member are negotiated between the Counsel and the team member (...) In sum, the legal services agreement is exclusively between the Counsel and the team member, without the involvement of the Court”, Counsel drafted and concluded legal

³⁴ Annex E

³⁵ Annex E

service agreements with each member of the team.³⁶ The agreements included employment protections such as the right to paid annual leave and official holidays, the prohibition of harassment and related conduct, and protection against unfair or arbitrary dismissal.

26. Since two members were appointed on a part-time basis, the LAP stipulates that they must agree to the terms of their appointment. Both team members submitted their signed legal services agreement to the Registry, and they were duly appointed.³⁷

27. However, notwithstanding these stated positions, one week before the sentencing submissions were due, Counsel discovered that the Registry had, a month earlier, entered into a separate agreement with one of the Bemba support staff members. As a condition of his appointment to another case, this agreement stipulated that the support staff member in question had to renounce 50% of his part-time salary in the Bemba case. Although the LAP specifically requires the Registry to notify both teams so that any conflicts of interest or time can be assessed and approved,³⁸ the Registry averred that it had not duty to notify the Bemba Defence that 30% of the legal assistant's salary would not be allocated to this individual.³⁹

28. The Registry further informed the Bemba Defence that the reduction in funds could not be redistributed to the other part-time member on a retrospective or prospective basis, but averred that the Bemba Defence's right to adequate time and facilities was not adversely affected because the support staff member in question should still perform the same amount of hours, albeit at an hourly rate that was half the rate established by the Court for such services.⁴⁰

29. This chain of events demonstrates:

- firstly, that it is futile to vest Counsel with the exclusive responsibility for regulating the terms and conditions of the appointment of support staff since the Registry can unilaterally override any such agreements; and

³⁶ Annex A.

³⁷ Annex J.

³⁸ LAP, ICC-ASP/12/3, para. 107.

³⁹ Annex D.

⁴⁰ Annex D.

- secondly, that under the LAP, the Registry has the power to impose specific terms and conditions concerning the appointment of support staff, but has declined to exercise this power for the purpose of protecting support staff rights, which are essential to equality of arms.

30. As concerns the first point, the Registry's position that it falls to Counsel to ensure that support staff are appointed under conditions that respects their basic rights places Counsel in an impossible dilemma: Counsel cannot meet this obligation if they do not have the means to ensure its performance. Under the legal aid scheme, it is the Registry, which is responsible for approving the appointment of support staff, and it is the Registry, which is responsible for determining how much the team receives *in toto*, and whether payments to individual members fall within the specific provisions of the LAP. An agreement by Counsel to respect fixed salary rates, the right to paid leave, and protection against unfair termination will be meaningfulness in practice unless the Registry endorses such an agreement, and agrees to apply the LAP in a manner that is consistent with the endorsed agreement.

31. As concerns the second aspect, if the Registry has the power to regulate the terms and conditions of individual Defence team members, then it follows that this power can and should be exercised in a manner that promotes, rather than undermines, the rights and protection of support staff.

32. According to the LAP, the logic underpinning the 50% rule is that because the Registry has the "primary responsibility for managing the legal assistance scheme of the Court", the Registry should step in and actively regulate the specific fees of Defence team members in circumstances where the conditions of appointment might otherwise adversely affect the interests of the defendant.⁴¹ The Registry has in turn, concluded that multiple mandates can adversely affect the interests of the defendant because of the following assumption:⁴²

It should be noted that the Registry, having learned from the experience and challenges faced by the ad hoc tribunals, has attempted to integrate the remuneration of external counsel and their team members with that applicable within the Court, and to treat them on a par basis with staff of the Court, as far as feasible within the limits of managing a publicly funded legal aid system. Thus salary amounts for external team members under the Court's legal aid system are set so as to correspond to the net salaries received by Court staff

⁴¹ LAP, ICC-ASP/12/3, para. 105.

⁴² LAP, ICC-ASP/12/3, para. 109.

performing equivalent duties, and are automatically fixed at Step V within the relevant grade from the commencement of the mandate of the team. It should be noted in this regard that the individual composition of each team — and hence the salary entitlements of its members — is comparable to that of teams in the Office of the Prosecutor, who simultaneously work on several cases in proceedings before the Court.

33. The Registry's self-declared duty to step in to regulate the specific salaries of Defence team members thus stems from the underlying presumption that such team members are paid, and treated "on a par basis with staff of the Court", and that the legal aid system should therefore be administered in such a way as to adhere to this principle of equivalent treatment.

34. If that was the case, then it follows the Registry would also 'step in' to ensure that the terms and conditions of all legal aid appointments ensure parity with Prosecution staff members performing equivalent duties. And yet, the manner in which the 50% rule was applied in this case demonstrates that the opposite holds true. Specifically, if the aim of this rule was to ensure equivalence with the Prosecution, then the application of this rule should have meant firstly, that the team member in question should either have received 50% of a full time standard salary (50% of 100% of a standard legal assistant position), or the reduction in salary should have been accompanied by a reduction in hours (so that the salary of 30% corresponded to hours that are the equivalent of 30% of a full-time working month). But when this point was made, the position of the Registry in response was that the even though the staff member was appointed by Counsel on a part-time contract and, even though the sum total of the monthly salary was therefore less than his equivalent full-time Prosecution counterpart, they considered that appointment to be full-time. As a result, the application of the 50% rule meant that a 60% contract had to be reduced to 30% pay, whilst requiring 60% work. Rather than applying a presumption of equivalence, the LAP is therefore interpreted in accordance with an assumption of dis-equivalence that runs roughshod over any attempt by Counsel to apply terms and conditions that ensure that individual team members are paid - either on a monthly or hourly basis – the same as their Prosecution counterparts.

35. By the same token, if the point of the 50% rule is that since Prosecution staff are not necessarily paid more for working on multiple cases, then the Defence should also not be paid more, then the converse should also apply: that is, in the same

manner that Prosecution teams receive a full salary pending the issuance of a judgment or in times of reduced activity, so should core Defence support staff.

36. And yet again, the opposite holds true: namely, as soon as the case enters a period of ‘reduced activity’, the funding is reduced to a total amount which is the equivalent of one counsel’s monthly fees – the logic, apparently being that although the point of the LAP 50% rule is to discourage Defence team members from accepting multiple mandates, as soon as the case enters a ‘fallow’ period, the Defence (including case managers and legal assistants) should suddenly be able to find new cases and clients to ensure their basic remuneration for periods of unknown duration.
37. It is also impossible to predict when the case might move in and out of a reduced activity phase. In this case, the Defence were paid under the regular scheme until the filing of the sentencing submissions. The Defence requested this funding to be extended until end of June in order to take into consideration i) the likelihood that the Prosecution would seek leave to reply, ii) a review of the Main Case judgment and its implications for the Article 70 case, and iii) a possible hearing.⁴³ The Registry nonetheless rejected the request, and indicated that the Defence would only receive additional funding (i.e. beyond the fees of one Counsel) if and when the predicted event occurred, and under the reduced activity terms and conditions.⁴⁴
38. In practical terms, although the Registry clearly expects support staff to remain on ‘standby’ to provide assistance as and when needed, the legal aid scheme does not provide even a basic level of funding to meet their subsistence needs during this period of uncertainty.⁴⁵ The question as to whether such support staff receive any funding during this ‘standby’ period rests purely with the discretion of Counsel.
39. The manner in which the ‘reduced activity’ phase is interpreted and applied also fails to ensure equivalence, equality of arms or flexibility. Specifically, whereas Prosecution teams can take advantage of these ‘reduced activity periods’ to take their annual leave or schedule necessary trainings (i.e for Ringtail), the ‘reduced activity’

⁴³ Annex B

⁴⁴ Annex B, Annex C.

⁴⁵ In contrast, Regulation 3.6 of the ICC AI provides firstly, that the Court cannot appoint a staff member as a consultant/contractor unless there has been at least a one month break of service, and secondly, that staff members cannot be appointed as consultants/contractors for the purpose of performing the same tasks that were performed as a staff member.

legal aid policy applies an hourly rate that is based on the assumption that the Defence must work 21.5 days that month (even if there are less working days available in that month because of ICC holidays or because it is a month with less days).

40. Accordingly, if a Defence team member takes 2.5 days of leave during this period (which is the standard monthly allotment for staff), they will only be paid 88% of the net salary for the equivalent position. Similarly, even if a Defence team member works every available working day in February, they will not receive a full salary for that month.
41. There is also no right to bank or defer leave: if a support staff has been unable to take annual leave due to multiple deadlines, they cannot, in general, defer the paid leave to the period of reduced activity, even though it would be efficient to do so.⁴⁶ The result is that support staff either have to forego paid leave, or, rely on the discretion of Counsel to allow them to take it at times when the case is busiest.
42. The manner in which the reduced activity scheme is interpreted and applies also fails to promote efficiency. The monthly and hourly rate is based on the assumption of a 7.5 hour working day, but rather than applying this as an average throughout the month, the Registry applies a strict daily cap: that is, although the Defence are paid on an hourly and not daily rate, they are not remunerated for any hours worked over the 7.5 hour cap on any particular day.⁴⁷ This means that if the Defence have a deadline or a hearing, they cannot distribute more hours in advance of the hearing, and less afterwards: if they work more than 7.5 hours a day before the hearing, they are not paid for the excess hours, and if they work less afterwards, then they are only paid for the hours actually worked. The system thus affords the Defence none of the advantages enjoyed by staff members, and none of the flexibility enjoyed by external consultants/contractors. This rigidity also undermines equality of arms by compelling the Defence to prepare its case under conditions of extreme uncertainty and consistent under-payment, which renders it difficult to retain skilled and motivated team members.

⁴⁶ See Annex F, Annex G: CSS declined to allow the case manager to take deferred leave in December under the lump sum scheme. Bearing in mind the significant number of ICC holidays in December/January, CSS exceptionally allowed the case manager to exceed the 7.5 hour cap in advance of Christmas, so that she would not be required to work on Christmas day in order to receive the standard monthly salary.

⁴⁷ Annex F, Annex G.

43. The table illustrates the stark difference between Prosecution case managers and Defence case managers, who have assisted a case for two years, as per the terms of the current interpretation of the LAP:

	Prosecution Case managers	Defence case managers
Maximum salary	P1 Step 13 at gross rate – i.e tax-free and includes education grant, dependency allowance, rental allowance, insurance and pension contributions.	P1 step 5 at the net rate ⁴⁸ excludes any allowances or entitlements & the team member must pay domestic taxes (approx. 30%) but can claim 15% ‘professional charges’ upon submission of receipts. This 15% is insufficient to cover insurance or pension contributions.
Minimum Salary	P1 Step 1 Gross (with entitlements)	0 euros
Types of paid leave	2.5 days’ annual leave per month (30 per year) ICC holidays (10 per year) Sick leave (65 days fully paid certified leave, and 65 days ½ paid certified leave) Emergency leave (7 days) Maternity leave (16 weeks) Other parent leave (4 weeks) Special leave with pay (exceptional circumstances – approval of Prosecutor)	None as of right. During the lump sum phase, Counsel have sole discretion to determine if and when support staff can take ‘leave’. During the reduced activity phase, this discretion cannot be exercised – any leave is unpaid.
Notice periods	30 days	None – which can be particularly difficult for support staff who depend on their appointment for residency in The Netherlands
Grounds for termination	Specific grounds set out in Staff Rules & right of appeal –staff also have a right to a termination indemnity	Falls to discretion of Counsel – no right of appeal & no termination indemnity
Average working hours	Staff can only be required to work outside regular hours to the extent that is necessary – may also receive compensatory time off when required to do so (Rule 103.15)	Falls to discretion of Counsel but no right to compensatory time off under the LAP

⁴⁸ It should be noted that the fees of UN and ICC consultants/contractors are also determined by reference to the gross salary that would be allocated to a staff member performing such functions: Section 6.23 of ICC AI, [https://www.icc-cpi.int/resource-library/Vademecum/CONSULTANTS%20AND%20INDIVIDUAL%20CONTRACTORS%20\(2016\).PDF](https://www.icc-cpi.int/resource-library/Vademecum/CONSULTANTS%20AND%20INDIVIDUAL%20CONTRACTORS%20(2016).PDF)

44. Although the salary rates that apply to Defence team members might need to be endorsed by the ASP, there is nothing in the LAP which prevents the Registry from interpreting the LAP in such a manner that Defence support staff can enjoy the same basic employment rights and protections and their prosecution counterparts. Rather than simply appointing staff members by a cursory letter,⁴⁹ and exercising no oversight over the terms and conditions of their appointment, “CSS should introduce a written contract with provisions clarifying the roles of responsibilities of both parties. The terms of the contract can, to a large extent, be borrowed from the other tribunals.”⁵⁰

3. Relief sought

45. Although this case is at an advanced stage of the proceedings, this does not eliminate the need for basic employment protections. To the contrary, given the advanced stage of this case, it is absolutely crucial that Counsel has the ability to retain motivated and qualified support staff. The absence of basic protections acts as a clear disincentive for support staff to continue on the case, which in turn, renders it difficult for the Defence to prepare its submissions under conditions that are in any way comparable to those that apply to the Prosecution. The optimum and fairest solution would be for the Registry to administer the legal aid system in a manner that respects the Court’s commitment to providing a healthy, non-discriminatory, and fair work environment. But, failing that, Counsel should, as a last resort, have the means and ability to ensure that persons appointed to the Defence are appointed under conditions that adhere to fundamental employment protections.

46. Accordingly, in order to remedy this structural imbalance between Prosecution and Defence support staff, and ensure the right of the Defence to adequate time and facilities, the Defence respectfully requests the Trial Chamber to order the Registry to:

- a. Issue legal service agreements to the support staff in this case, which include basic protections and rights (as set out in Section 2.1 above); or
- b. Apply the LAP in a manner that is consistent with the legal service agreement that is concluded between Counsel and support staff.

⁴⁹ Annex H.

⁵⁰ ‘Assessment of the ICC Legal Aid System’, 5 January 2017, p. 73, *ibid.*, <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>



Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 20th day of June 2018

The Hague, The Netherlands