

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29/06/2018

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, FIDELE BABALA
WANDU AND NARCISSE ARIDO

Public Document

**Registry's Observations on the "Request to Review the Registry's Decision to
Neither Apply or Comply With Legal Service Agreements with Defence Support
Staff"(ICC-01/05-01/13-2292)**

Source: Registry

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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The Office of Public Counsel for the Defence

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Registrar

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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Registry hereby submits its observations on the “Request to Review the Registry’s Decision to Neither Apply or Comply With Legal Service Agreements with Defence Support Staff” (“the Request”), as invited by Trial Chamber VII (“Chamber”) in its email of 21 June 2018 at 11:56.

II. APPLICABLE LAW

2. These submissions are made on the basis of article 67(1)(d) of the Rome Statute (“Statute”), rules 20(2) and 21(2) of the Rules of Procedure and Evidence (“Rules”), regulation 83(3) of the Regulations of the Court (“RoC”) and the Registry’s single policy document on the Court’s legal aid system (“Legal Aid Policy”).

III. SUBMISSIONS

A. The request has no legal basis

1. *It is not a request for additional resources*

3. The Request invokes regulation 83(3) of the RoC, which stipulates that persons receiving legal assistance paid by the Court may apply to the Registrar for additional means.
4. However, the Request explicitly states that “The Defence is not seeking additional funds [...]”.¹
5. The legal basis that the Request invokes is thus inapplicable.

¹ ICC-01/05-01/13-2292, para 2.

2. *It is not a request for review*

6. The Request does not refer to the review of any decision. There is no decision by the Registry whose legality can be assessed by the Chamber.
7. The Request cites the response of the Counsel Support Section (“CSS”) informing the team that in accordance with the LAP in force, legal services agreements are exclusively between Counsel and team member. However, the Request does not claim that CSS applied the LAP incorrectly; rather, it acknowledges that the issues it contests are the product of a sound application of the LAP.²
8. The Request argues that the terms of the LAP should be changed. It thus requests the review of the Legal Aid Policy (“LAP”) of the Court.
9. In support of this interpretation of the purpose of the Request, its paragraph 23 refers to proposals *de lege ferenda* made by a consultant and endorsed by the International Criminal Court Bar Association (ICCBA). This recommendation is still under study as is the entire legal aid policy, and cannot be implemented *de lege lata*.
10. The Request lacks therefore any legal basis and should be rejected *in limine*.

B. Should it be a request for review, the Request lacks merit

11. The considerations below are proposed to the Chamber in case it decides to address the merits of the case, without prejudice of the Registrar’s opinion that the Request is irreceivable due to its lack of a legal basis.
12. Pursuant to the standard established by the Presidency,³ the review of administrative decisions involves whether the Registrar acted without jurisdiction, has committed an error of law, has failed to act with procedural

² Request, para. 18.

³ ICC-RoC72-02/05, para 16.

fairness, has taken into account irrelevant factors or failed to take into account relevant factors, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.⁴

13. The Request seems to allege that the Registrar has committed an error of law and that the Registrar failed to act with procedural fairness.⁵

1. There is no error of law

14. The Request states that “the LAP specifically requires the Registry to notify both teams so that any conflicts of interest or time can be assessed and approved [...]”.⁶

15. The reference to paragraph 107 of the LAP invoked in the Request to justify this claim applies only to counsel.⁷ Support staff is considered in paragraph 112 of the LAP, where it is clearly stated that the only consequence of the appointment of a team member to two simultaneous mandates is the same proportionate reduction of fees as applied for counsel.

16. Apart from this unjustified instance, the LAP has been well applied; the Request acknowledges this fact in its paragraph 18.

17. It is thus submitted that the Registry applied the LAP correctly to counsel and support staff.

⁵ ICC-01/05-01/03-2292, para 1.

⁶ ICC-01/05-01/03-2292, para 27.

⁷ LAP para 107.

2. *Procedural fairness has been respected*

a. The LAP is based on the obligation to respect the independence of lawyers

18. Pursuant to rule 20(2) of the Rules, the Registrar is obliged to carry out his duties, including the financial administration of the Registry, in a manner that ensures the professional independence of counsel. The LAP was drafted based on this fundamental principle, and the Registry scrupulously respects this independence.

19. It is the practice of the Registry to inform counsel of the flexibility principle, but never to actively encourage counsel “to do more, [sic] with less funds” or to advise counsel “that they can pay staff less than the individual rates set out in the LAP”, as stated in the Request.⁸

b. The LAP is based on the principle of flexibility

20. The LAP explicitly stipulates the applicable principles that govern the application of the legal aid system of the Court. The principle of flexibility is one of these governing principles,⁹ guaranteeing that there is a payment system in place which provides for “mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice”.¹⁰ Based on this, counsel has the right to utilise the resources provided to structure the team in a

⁸ Para. 19. According to the Oxford English Dictionary, *advise* followed by a that-clause indicates a recommended action (see <http://www.oed.com/view/Entry/3001>, last consulted on 26 June 2018). The Registry never recommends such practice.

⁹ The flexibility is present since the first version of the LAP as a principle as well as an option offered to counsel; see *Report to the Assembly of States Parties on options to ensure adequate defence counsel for accused persons*, ICC-ASP/3/16 (17 August 2004), paras. 16 and 18; *Report on the operation of the Court’s legal aid system and proposals for its amendment*, ICC-ASP/6/4 (31 May 2007), para. 33.

¹⁰ LAP para 9.

manner that both best serves the interests of the indigent client and is compatible with the judicious financial use of legal aid funds.¹¹

c. Counsel and support staff are not personnel of the Court

21. Pursuant to article 67(1)(d) of the Statute and rule 21(2) of the Rules, a suspect or an accused has the freedom to choose his legal representation. Consequently, counsel is appointed by the suspect or accused, and support staff is appointed by counsel. Neither counsel nor support staff participate in the recruitment processes of the Court.
22. All the references to the rights of employees must therefore be read and assessed in the framework of the relations between employer (counsel) and employees. The employer, in this regard, is bound by his or her legal and ethical obligations vis-à-vis the applicable national legal order and code or codes of conduct.
23. The contractual link of counsel and support staff with the Court is based purely on their acceptance of their appointment, thus it is limited to the application of the LAP. All other aspects of their intervention that fall outside the scope of the LAP cannot be considered relevant for the Court.
24. Concerning the intervention of counsel and their support staff in other international or internationalised criminal jurisdictions, every organisation creates different regulations, depending on specific characteristics attributed to that organisation. Therefore, it is irrelevant to compare other dissimilar institutions with the Court.
25. It is also inappropriate to compare the members of a defence team to their counterparts in the Office of the Prosecutor for the purpose of claiming identical working conditions. Neither are defence team members staff of the

¹¹ LAP para 44.

Court, nor can the equality of arms principle be misconstrued as requiring exactly the same treatment in this context. Nothing in the Request suggests that the current situation puts the defence “at a disadvantage when presenting its case”, which is the standard for equality of arms set by the international criminal tribunals.¹²

d. The LAP does not regulate the working conditions of counsel and support staff

26. The LAP does not enter into the working conditions since these must be agreed between counsel and personnel.

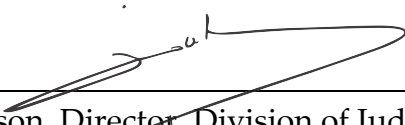
27. Pursuant to regulation 83(1) of the RoC, legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence. Therefore, the sole focus of the LAP is the remuneration of counsel and support staff. As to the working conditions of support staff, the Court respects the freedom of counsel and support staff to agree on the conditions themselves. The Registry only requires that such agreements be formalised in writing.

IV. CONCLUSION

28. Based on all the arguments presented, the Request is manifestly *ultra vires*. Counsel herself acknowledges that the LAP as is today is being correctly applied by the Registry and thus it can be safely said that it is extravagant and has a frivolous character.

¹² See, in particular, ICTR, Appeals Chamber, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment (Reasons)”, 1 June 2001, para. 69.

29. The Request has no basis in fact or in law and therefore it should be rejected.



Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Peter Lewis, Registrar

Dated this 29 June 2018

At The Hague, The Netherlands