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

Date: **30 August 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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

Decision on Bemba Defence Request for Provisional Legal Assistance

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 James Stewart

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Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

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REGISTRY

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Mr Herman von Hebel

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), issues the following 'Decision on Bemba Defence Request for Provisional Legal Assistance', in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(2) and 67 of the Rome Statute ('Statute') and Regulations 83 and 85 of the Regulations of the Court ('Regulations').

I. Procedural history and background

1. On 12 August 2016, the defence for Mr Bemba ('Bemba Defence') requested the Chamber to order the Registry to provide provisional legal assistance ('Request').¹
2. By 19 August 2016,² neither the Registry nor any of the other parties filed submissions in response to the Request.
3. As set out by the Bemba Defence, the basic facts underlying the Request are as follows:
 - (i) The Bemba Defence was receiving some legal aid during the trial, based on a 1 September 2015 Registry determination that Mr Bemba was partially indigent.³
 - (ii) On 12 May 2016 (just after the Chamber closed the evidence), the Registry's Counsel Support Section ('CSS') told all the defence teams that after their closing statements they would only receive reduced legal aid funds as during the judges' deliberations 'only the services of [Lead] Counsel are envisaged'.⁴
 - (iii) According to the Registry, this reduction in legal aid changed Mr Bemba's partial indigence determination.⁵ In other words, Mr Bemba was found to

¹ Urgent Defence Request for an Order to Grant the Defence Provisional Legal Assistance, ICC-01/05-01/13-1967 (with three annexes).

² The response deadline was set for this date. Email from Trial Chamber VII Communications to the Registry and parties, 12 August 2016 at 15:53.

³ Request, ICC-01/05-01/13-1967, para. 9.

⁴ Annex 3 of the Request, ICC-01/05-01/13-1967-Anx3.

⁵ Annex 1 of the Request, ICC-01/05-01/13-1967-Conf-Exp-Anx1.

be able to pay for his defence at the reduced legal aid rates and, therefore, the Registry decided to stop providing the Bemba Defence any legal aid from the end of June 2016 onwards.

- (iv) In June 2016, the Bemba Defence requested the Registry to review its calculation as to Mr Bemba's indigence, continue legal aid payments in the interim and give the Bemba Defence some retrospective payment for the work done in 2015 prior to the partial indigence determination. As of the date of the Request, the Registry had not taken a position on these requests.⁶
 - (v) The Bemba Defence claims that 'as a result of this inaction, the Defence has reached a point where it has absolutely no funding'.⁷
4. The Bemba Defence requests the Chamber to order the Registry 'to provide provisional legal aid, from 1 July 2016 onwards, until such time that a final determination on the financial status of Mr. Bemba is issued by the Court'.⁸

II. Applicable law

5. Chambers have competence to review disputes as to the scope of legal assistance paid by virtue of Regulation 83(4) of the Regulations.
6. Regulation 85 of the Regulations governs payments on legal assistance. Regulation 85(1) indicates that a decision on whether legal assistance should be paid by the Court is a matter for the Registry to decide. The Registry 'may, in appropriate circumstances, make a provisional decision to grant payment of legal assistance'.⁹ Decisions on legal assistance are to be reconsidered if 'the financial situation of the person receiving such legal assistance is found to be different than indicated in the application, or if the financial situation of the person has changed since the application was submitted'.¹⁰ In contrast to Regulation 83(4), decisions on whether to pay or reconsider paying legal

⁶ Request, ICC-01/05-01/13-1967, para. 3.

⁷ Request, ICC-01/05-01/13-1967, para. 4.

⁸ Request, ICC-01/05-01/13-1967, para. 57.

⁹ Regulation 85(1) of the Regulations.

¹⁰ Regulation 85(2) of the Regulations.

assistance are specified in Regulation 85(3) as being reviewable by the Presidency.¹¹

7. Regardless of whether Regulation 83(4) or 85(1) applies, the Chamber has overarching obligations to ensure that the trial is fair and that the rights of the accused are respected.¹² 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.¹³
8. As this Chamber has held previously, the standard for reviewing Registry decisions in the legal assistance context is as follows:

[...] [T]he Chamber should only interfere with the exercise of the Registrar's discretion in the area of legal assistance where there are compelling reasons for doing so, taking into consideration the rights of the defence as enshrined in the Statute. In reviewing the Registrar's decisions, the Chamber must not consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess, inter alia: whether the decision of the Registrar was materially affected by an error of law or fact; whether the Registrar abused his discretion; the propriety of the procedure by which the Registrar reached a particular decision; or whether the Registrar could not rationally have reached a given conclusion. Furthermore, 'when...review[ing] crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation'.¹⁴

III. Analysis

9. The Single Judge notes the particular circumstances behind the Request, namely:
 - (i) the Bemba Defence was receiving legal assistance on the basis of a partial indigence finding and (ii) the level of legal assistance was cut to zero solely because the case moved on to its deliberations phase. The consequence of the Registry's decision is that the Bemba Defence no longer receives legal assistance

¹¹ Regulation 85(3) of the Regulations.

¹² Articles 64(2) and 67(1) of the Statute, particularly Article 67(1)(b) and (d) of the Statute.

¹³ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 20 October 2009, ICC-01/05-01/08-568 (ordering that funding be provided to the accused after they had not been paid since March 2009); Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the "Defence Request for the Review of the Scope of Legal Assistance", 15 May 2011, ICC-01/04-01/10-142, para. 16 (granting defence request for retroactive legal assistance to a time before an application for legal assistance was made).

¹⁴ Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, ICC-01/05-01/13-955, para. 33 (citations removed).

to conduct its work during the deliberations phase. Though the workload of the Bemba Defence is understandably reduced during the Chamber's deliberations, the parties' work does not stop altogether. Since the closing statements were heard in this case on 31 May and 1 June 2016, the Chamber has issued seven decisions in response to further requests from the parties. The parties were also required to review their filings by 22 July 2016 and certify that they were as public as possible.¹⁵ This work has been done independently of the work done by the parties in preparation for potential sentencing submissions or appeals following the upcoming judgment.

10. Noting the applicable law above and the facts underlying the Request, the Single Judge understands the Registry's decision as judicially reviewable pursuant to Regulation 83(4) of the Regulations. The Single Judge fails to see why a decision reducing a defence team's legal assistance to a mere pittance (which would clearly be a decision on the 'scope of legal assistance paid' and reviewable under Regulation 83(4)) would fall within his competence while a decision reducing said assistance to zero would not. This is especially the case given that, at one point in the present proceedings, it was undisputed that Mr Bemba was entitled to at least some legal assistance.
11. Even if the Request were understood as addressing matters falling solely under Regulation 85 of the Regulations, the Request raises issues directly implicating Mr Bemba's rights to conduct his defence through his counsel and to have adequate time and facilities to prepare his defence. The Single Judge also recalls the following language from the *Lubanga* case, whereby Trial Chamber I reversed a Registry decision which reduced the defence's legal assistance during the deliberations phase to a point where the defence team would need to be dissolved:

¹⁵ See Decision Closing the Submission of Evidence and Further Directions, 29 April 2016, ICC-01/05-01/13-1859, para. 8.

[...] It 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.¹⁶

12. Though this decision fell more clearly under the Chamber's competence as it concerned only a substantial reduction to legal assistance,¹⁷ the fairness concerns noted by Trial Chamber I are even more pronounced where – as here – legal assistance is reduced to zero. In the particular circumstances, the Single Judge considers that judicial intervention is warranted in order to preserve the integrity of the proceedings.

13. When cutting the Bemba Defence's legal assistance during the deliberations phase, the Registry neither: (i) inquired with the Chamber as to how long it projected its deliberations phase to last nor (ii) reassessed Mr Bemba's indigence status prior to taking its decision. The Single Judge considers that both of these amounted to procedural errors materially affecting the Registry's decision.

14. First, the period of reduced workload of the Bemba Defence depends entirely on the length of time the Chamber requires for its deliberations. The Registry has been told in the past that it should consult with the Chamber prior to taking measures which may result in dissolving a defence team during the deliberations phase.¹⁸ This is because, if the deliberation period is anticipated to be relatively short, it may cause less overall disruption to maintain a relatively higher level of legal assistance and avoid having to reconstitute the defence team during an appeals phase. The Registry made no such efforts to consult with the Chamber in the present case.

¹⁶ Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, 31 August 2011, ICC-01/04-01/06-2800, para. 57.

¹⁷ As indicated above, decisions on the scope of legal assistance are explicitly reviewable by the Chamber by the terms of Regulation 83(4) of the Regulations.

¹⁸ ICC-01/04-01/06-2800, paras 57-58.

15. Second, in cases of partial indigence the Registry is supposed to conduct new appraisals for each distinct phase in the proceedings. As indicated in the Court's legal aid policy (emphasis added):

The issue of partial indigence is approached cautiously: the practical impossibility of forecasting the length of the proceedings makes calculation of their total cost a very risky proposition. The fair and effective solution *is the appraisal for each phase in respect of which the allocation of funds by the Registry changes*, i.e.: pre-trial, trial and appeals phase. [...] ¹⁹

16. The Registry clearly undertook no such re-appraisal in the present case, despite expressly indicating to the defence teams that the period between the end of the closing statements and the judgment is considered a new phase in the proceedings.²⁰ The Bemba Defence was instead forced to seek such an appraisal after being informed its legal assistance would be cut to zero.

17. The Single Judge considers that these procedural errors warrant the remedy sought by the Bemba Defence in its Request. The Single Judge accordingly orders the Registry to provide provisional legal aid to the Bemba Defence from 1 July 2016 until a final determination on Mr Bemba's financial status is issued by the Court. The Single Judge's ruling is dependent on the Bemba Defence's continued diligence in resolving the pending assessment of Mr Bemba's indigence.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request, subject to paragraph 17 above.

¹⁹ Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3, para. 31.

²⁰ Annex 3 of the Request, ICC-01/05-01/13-1967-Anx3, page 2.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'BS', is written over a horizontal line.

Judge Bertram Schmitt, Presiding Judge

Dated 30 August 2016

At The Hague, The Netherlands