

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 7 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential, EX PARTE, Only available to Prosecution and Bemba Defence

**Prosecution's Response to the Bemba Defence's Request for Leave to Appeal the
"Decision on the 'Defence request for financial assistance or, in the alternative,
suspension of the proceedings against Jean-Pierre Bemba Gombo and withdrawal
of Counsel' and on the 'Second Defence request for a loan in lieu of legal
assistance'"**

Source: The Office of the Prosecutor

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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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Bemba Defence's application for leave to appeal ("Application")¹ the Single Judge's 3 March Decision on the Defence's request for financial assistance ("Decision").² The Application fails because it does not establish a properly appealable issue arising from the Decision. Alternatively, the issues identified do not meet the criteria for leave to appeal under Article 82(1)(d) of the Rome Statute ("Statute").

II. Confidentiality

2. Pursuant to Regulation 23*bis*(2) of the Regulation of the Court, the Prosecution files this response confidentially, *ex parte*, only available to Prosecution and Bemba Defence, because the Application is subject to the same classification. The Prosecution does not object to reclassifying this response as "public".

III. Submissions

3. The Defence seeks leave to appeal the Decision on the following issues:³

- (i) Whether the Single Judge violated Article 67 of the Statute by holding that the Suspect has been properly represented in the on-going proceedings despite the fact that the Suspect has had no access whatsoever to funds to prepare his defence while awaiting a decision on legal assistance by the Registrar, thereby precluding completion of administrative and investigative tasks essential (according to the assessment of his Counsel) for the conduct of his defence ("First Issue");

¹ ICC-01/05-01/13-231-Conf-Exp.

² ICC-01/05-01/13-147.

³ Application, para. 38.

- (ii) Whether the Single Judge's holding that the Chamber has no power to order the Registrar to provide legal assistance until the Registrar has rendered a decision thereon violates Article 67 and ignores the Chamber's inherent powers emanating therefrom ("Second Issue");
- (iii) Whether the Single Judge's holding that the Suspect is "properly represented...whether by current Counsel **or by a new Counsel**" [emphasis added] violates the right to be represented by a counsel of one's choosing under Article 67 ("Third Issue"); and
- (iv) Whether the Single Judge erred by denying the Suspect a decision on *quantum debeat* in the absence of a decision *an debeat* ("Fourth Issue").

4. The Appeals Chamber has held that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."⁴

5. The First and Third Issues are predicated on the Single Judge's finding that Mr. Bemba is "properly represented in the on-going proceedings, whether by current Counsel or by a new Counsel".⁵ This finding was made in response to the Defence's request that the proceedings be terminated because Mr. Bemba's Article 67 rights cannot be protected until the issue of legal assistance is resolved. However, this finding was not determinative for the resolution of the question before him. Rather, the Single Judge rejected the Defence's request that he order the Registrar to provide legal assistance first and foremost because the remedy was "not contemplated by the

⁴ ICC-01/04-168 OA3, para. 9. ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

⁵ Decision, p. 5.

Court's legal instruments".⁶ Although the Single Judge addressed the Defence's request to terminate proceedings due to an alleged inability to protect the Suspect's Article 67 rights, his decision was not based on this ground. As a result, the First and Third Issues do not constitute appealable issues within the meaning of Article 82(1)(d) as they fail to raise a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.

6. The Second and the Fourth Issues relate to the Registrar's decision on legal assistance and are based on the assumption that the Registrar will conclude that the Suspect is so entitled.⁷ An appealable issue cannot be grounded on an assumption. As a result, the Second and Fourth Issue "merely represent[...] an abstract question or a hypothetical concern."⁸

7. Moreover, by allowing Counsel to withdraw from the present case under certain conditions,⁹ the Single Judge in fact granted one of the Defence's alternative requested remedies. Even if the Defence may have preferred that the Single Judge grant the first remedy, the Issues put forward in the Application are "merely a question over which there is disagreement or conflicting opinion."¹⁰ As such, they do not amount to an appealable issue within the terms of Article 82(1)(d).

8. An immediate resolution by the Appeals Chamber of the Issues is not warranted: since the Decision grants a remedy requested by the Defence, an

⁶ Decision, p. 5.

⁷ In particular, any argument regarding violations of Article 67 of the Statute would have no merit whatsoever, unless the Suspect was wrongfully found ineligible for legal assistance.

⁸ ICC-01/05-01/08-532, para. 17; ICC-01/05-01/08-75 para. 11; ICC-02/04-01/05-367, para. 22; ICC-01/09-01/11-301 para. 34; ICC-01/09-02/11-406, paras. 50, 61.

⁹ Decision, p. 6.

¹⁰ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

interlocutory appeal on these Issues would not “move forward” the proceedings in the sense of “ensuring that the proceedings follow the right course”.¹¹

IV. Conclusion

9. The two Applications should be rejected.



Fatou Bensouda, Prosecutor

Dated this 7th Day of March 2014

At The Hague, The Netherlands

¹¹ ICC-01/04-168 OA3, para. 15.