

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **04/03/2014**

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,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Confidential Document

***ex parte* Prosecution and Defence for Jean-Pierre Bemba Gombo only**

Third Defence request for a loan *in lieu* of legal assistance

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 Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Counsel for Jean-Jacques Mangenda Kabongo

Counsel for Fidèle Babala Wandu

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Jean-Pierre Bemba Gombo ("the Suspect") is currently without access to the means necessary to finance his defence. This situation presents a manifest inequality of arms and, to date, has prevented any proper defence investigation. Given the Suspect's proven inability to access his assets, the Defence repeats, yet again, its request that the Single Judge order the Registrar to forward, as a loan, the monthly sum of 32,922 Euros – a sum which the latter formerly deemed appropriate for financing the defence case at the pre-trial stage of proceedings.

Classification

Counsel submits this application confidential *ex parte* because it refers to a confidential *ex parte* ruling of the Single Judge. In the spirit of the Presidency's rulings ICC-RoC85-01/13-7-Red and ICC-RoC85-01/11, Counsel requests that this petition, the previous requests for a loan and the Single Judge's decision thereupon be reclassified as public documents.

Submission

1. Counsel repeats and incorporates herein all submissions made in his *Defence request for financial assistance or, in the alternative, suspension of the proceedings against Jean-Pierre Bemba Gombo and withdrawal of Counsel* dated 10 January 2014.¹
2. Likewise, Counsel repeats and incorporates herein all submissions made in the *Second request for a loan in lieu of legal assistance* dated 24 February 2014.²
3. On 11 February 2014, the Single Judge issued his *Decision on the 'Defence request for an order requiring the translation of evidence'* in response to the Suspect's request that all Lingala intercepts be translated into one of the working languages of the International Criminal Court.³ In this decision, the Single Judge ruled as follows:
"Whilst the Prosecutor is under a strict obligation to provide the Defence with

¹ ICC-01/05-01/13-79-Conf.

² ICC-01/05-01/13-219-Conf.

³ ICC-01/05-01/13-177.

the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute". In the same decision, the Single Judge also stipulated that: "[s]ince those [Lingala] communications are perfectly intelligible to the suspects, their disclosure will enable the Defence not only to challenge the portions included in the Prosecutor's list of evidence, but also to otherwise rely on other portions of the same conversations which it might identify as relevant and decide to bring to the attention of the Chamber".

4. On 21 February 2014, the Single Judge rendered his *Decision on Mr Kilolo's Defence 'Requête aux fins d'accès aux enregistrements soumis par les autorités néerlandaises au Conseil indépendant nommé par décision ICC-01/05-52-Red2' dated 20 February 2014*⁴. This decision was prompted by a Defence request to listen to the original recordings of the intercepts performed by the Dutch authorities on the telecommunications of Aimé Kilolo and Jean-Jacques Mangenda. In this decision, the Single Judge ordered that "the parties should be given the opportunity, if they so wish, to access and inspect the First DVD, which has since been stored in the Registry's vault" and, further, that "such access occur by accessing the DVD on the premises of the Court". The Single Judge also ordered that Counsel should "address directly the Dutch judicial authorities if he wishes to obtain materials other than those filed in the record of the case".

5. The Defence has previously submitted that it is not capable of implementing the duties imposed on it by virtue of the Single Judge's rulings mentioned in paragraphs 3 and 4 above without funding.

⁴ ICC-01/05-01/13-214-Conf.

6. On 27 February 2014, the Single Judge rendered his consolidated *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"* (the "Single Judge's Decision of 27 February 2014").⁵ The Single Judge rejected the Defence request for a loan noting, in the operative part of his decision, as follows:

CONSIDERING (i) that to date no final decision has been taken as to the "*an debeatur*" by the Court of any legal aid for Mr Jean-Pierre Bemba, (ii) that only once the still on-going administrative procedures as to the "*an debeatur*" have been exhausted, the Registrar can decide on the "*quantum debeatur*", decision which can, if impugned, be reviewed by the relevant Chamber (regulation 83(4) of the Regulations of the Court); and (iii) that, according to regulation 85(1) of the Regulations of the Court, it falls within the authority of the Registrar to "make a provisional decision to grant payment of legal assistance" recurring "appropriate circumstances";

CONSIDERING therefore that at this stage the Chamber has no authority to impose on the Registrar or to rule on the request for financial assistance or for a loan;

7. In the same decision, while ordering the delivery of a disc comprising recordings of intercepts reviewed by the "Independent" Counsel to the Suspect in his cell, the Single Judge neglected to rule on how the Defence is expected, without funding, to provide alternative translations of Lingala intercepts in order "to challenge the portions included in the Prosecutor's list of evidence" and to bring to the attention of the Single Judge "other portions of the same conversations which it might identify as relevant". The Single Judge also neglected to rule on how the Defence, without funding, is expected to carry out various investigative procedures

⁵ ICC-01/05-01/13-227-Conf-Exp.

such as interviewing potential defence witnesses or obtaining documentation from the judicial authorities of Belgium and The Netherlands.

8. On 27 February 2014, less than two hours after the aforementioned decision, the Registrar rejected the Suspect's second request for legal assistance ("The Registrar's Decision of 27 February 2014").

9. On 3 March 2014, the Defence filed its request for leave to appeal the Single Judge's Decision of 27 February 2014 raising four grounds of appeal which, in their totality, allege a breach of the Suspects' fundamental rights under article 67 of the Rome Statute.

10. On 3 March 2014, the Defence also filed an application for judicial review before the Presidency requesting that the Registrar's Decision of 27 February 2014 be quashed.

11. The Defence submits that, according to the reasoning contained in the Single Judge's Decision of 27 February 2014, the time is now ripe for the Single Judge to order the Registrar to advance the monthly sum of 32,922 Euros which was the sum the Registrar himself deemed appropriate for the purpose of handling the Suspect's defence at the pre-trial stage.

12. It will be recalled that Trial Chamber III has previously found that the Suspect's inability to access his alleged resources denies him the opportunity to be tried without undue delay and to be afforded adequate facilities for the preparation of his defence. Trial Chamber III was not "prepared to condone the possibility of a further period (of more than de minimis length) during which defence funding is unavailable or uncertain". Trial Chamber III further stated that "[t]his right is not dependent on assessment of whether or not an accused may at some stage in the future have access to significant funds...it is, instead, focussed solely on whether or not the accused has sufficient means to pay for his legal assistance". This

interpretation clearly applies to the interim period between when an accused applies for legal assistance and when such legal assistance is finally decided upon – even if administrative procedures have not been exhausted.

13. The Prosecutor, herself, would appear to agree with Counsel's approach to this issue, stating that "it is axiomatic that adequate Defence funding is important to achieving procedural parity and trial fairness". The Prosecutor even concurred with the Defence's request "insofar as it seeks via auspices of the Chamber the Registrar's temporary assistance whether by loan or full provision of funds to enable [the Suspect] to fund his Defence".

14. The Registrar, despite having filed a detailed response to the request for judicial review of his first decision refusing legal assistance, refrained from filing a response to both the first and second request for a loan. The Single Judge is requested to view the absence of a response to both these applications as tacit approval.

15. It is stressed that the Suspect's applications to review the two decisions delivered on 27 February 2014 should not be viewed as the re-initiation of an "administrative procedure" which is yet to be "exhausted". Were Counsel to have postponed filing his second petition to the Presidency until after a decision on the present application, the Suspect could very well have been left without any remedy whatsoever. The Single Judge, after all, could have delayed his decision on the present application until after expiry of the statutory time-limits for seeking such appellate review.

16. To leave the Suspect, however, in an endless cycle of petitions, requests for leave to appeal and judicial review in a matter which will not be exhausted in the near future is manifestly unfair. It is abundantly clear that the Registrar will never agree to forward monies to the Suspect – whether by way of legal assistance or by way of a loan until ordered to do so.

17. In any event, continuation of the present situation in which the Suspect is denied the means to defend himself will inevitably lead to yet another application for a "stay of proceedings on the ground that a fair trial cannot be guaranteed" – which while possibly not contemplated by the statutory instruments of the Court is most definitely contemplated by precedent.

18. The Defence recalls that Presidency, inclusive of the Single Judge himself, has ruled in the case of the Suspect, *inter alia*, "that the 'means' referred to in Article 67(1)(d) of the Statute must be available to the applicant immediately or in the near future, thereby concurring with the 2009 Trial Chamber III Decision in this particular respect".⁶

19. The Single Judge is also reminded that the Presidency, of which he is a part, endorsed the principle that "[i]t is not in the interests of justice to deprive a person of legal assistance paid for by the Court if that person lacks the means to fund his or her defence where his or her assets are confirmed as unavailable".⁷ Indeed, the Suspect has no assets of which he may dispose.

20. On a final note, the Defence feels it important to reiterate that it is not requesting a gift from the Registry but rather the advance of a monthly loan the future return of which may be guaranteed in the same way that the loan forwarded to the Suspect in case ICC-01/05-01/08 is guaranteed.

Urgency

21. The Single Judge did not seek a Prosecution response to the second request for a loan in lieu of legal assistance nor did he ask for the Registrar's observations. In the circumstances, therefore, and given the short time remaining until the commencement of the confirmation proceedings, the Single Judge is respectfully requested to deliver a decision on this request forthwith.

⁶ ICC-RoC85-01/13-7-Red at paragraph 54.

⁷ *ibid.*

Relief Sought

22. In light of all the aforementioned, the Single Judge is requested to order the Registrar to forward to the Suspect, retrospectively to 20 December 2013, the monthly sum of 32,922 Euros in order to finance all investigative measures necessary for properly defending the Suspect and Counsel's fees and expenses.



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel

Tuesday, March 04, 2014