

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 25 April 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**

**Decision on the request for disqualification of Independent Counsel filed by  
the Defence of Jean-Pierre Bemba Gombo**

Decision 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**

Ghislain Mabanga

**Counsel for Jean-Jacques Mangenda Kabongo**

Jean Flamme

**Counsel for Fidèle Babala Wandu**

Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

Göran Sluiter

**Legal Representatives of  
Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**States Representatives**

**REGISTRY**

**Registrar**

Herman von Hebel

**Detention Section**

**Victims and Witnesses Unit**

**Others**

**I, Judge Cuno Tarfusser**, Single Judge of Pre-Trial Chamber II of the International Criminal Court responsible for the present case;

**NOTING** the “Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings”, whereby the Single Judge, *inter alia*, appointed Fidel Nsita Luvengika as Independent Counsel tasked with (i) being present at the unsealing and the forensic acquisition of documentary and electronic material seized during the searches of the person and cell of Jean-Pierre Bemba, the residence of Narcisse Arido and the residence of Fidèle Babala; (ii) reviewing this material with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings; (iii) promptly submitting a report to the Single Judge as to the results of such review;<sup>1</sup>

**NOTING** that, on 7 April 2014, the Defence of Mr Bemba requested the immediate disqualification of Mr Luvengika as Independent Counsel in a filing classified as confidential *ex parte*, only available to the Prosecutor and Mr Bemba’s Defence (the “Request”);<sup>2</sup>

**NOTING** the Prosecutor’s response to the Request, which was filed on 22 April 2014 and which is equally classified as confidential *ex parte*, only available to the Prosecutor and Mr Bemba’s Defence;<sup>3</sup>

**NOTING** that, on 22 April 2014, the Defence of Mr Bemba filed, as a confidential document (as such also available to the other Defence teams in the case), a further request for the disqualification of Mr Luvengika, renewing his previous Request and reiterating the same arguments already relied upon in the Request;<sup>4</sup>

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<sup>1</sup> ICC-01/05-01/13-41.

<sup>2</sup> ICC-01/05-01/13-317-Conf-Exp.

<sup>3</sup> ICC-01/05-01/13-352-Conf-Exp.

<sup>4</sup> ICC-01/05-01/13-353-Conf.

**NOTING** that in the Request the Defence seeks that the activities of Mr Luvengika as Independent Counsel in the present case be suspended immediately on the ground of Mr Luvengika's perceived lack of impartiality due to the existence of a previous working relationship between him and Jean-Jacques Badibanga, who is the Senior Trial Lawyer in the case ICC-01/05-01/08 against Mr Bemba;

**CONSIDERING** that the determination of whether the independence of Mr Luvengika as Independent Counsel may be reasonably doubted to the point that his immediate disqualification appears necessary cannot but be informed by proper consideration of the tasks assigned to him and of his relationship with the Single Judge who has entrusted him with his mandate, including in terms of the actual impact that Mr Luvengika's activities (allegedly tainted by a lack of impartiality) may have on the Single Judge's exercise of his judicial functions;

**CONSIDERING** that the activity which at the moment is being performed by Mr Luvengika as Independent Counsel (the suspension of which would be the effect of the disqualification sought by the Defence) is to provide to the Defence of Mr Bemba (as the individual in principle vested with the right to privileged communications with his counsel) all items, among those seized upon the searches of the person and cell of Mr Bemba, the residence of Narcisse Arido and the residence of Fidèle Babala, that have been identified by the Independent Counsel as non-privileged and relevant to the present case, in order for Mr Bemba to provide observations, if he so wishes, on the selection made by Independent Counsel prior to any item being made available to the Prosecutor and the other Defence teams;<sup>5</sup>

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<sup>5</sup> ICC-01/05-01/13-347-Conf.



**CONSIDERING** that the tasks more generally carried out by the Independent Counsel (*i.e.* to be present at the unsealing and forensic acquisition of the concerned material, review such material with a view to identifying any item which is privileged or obviously irrelevant to the present proceedings and submit a report to the Single Judge as to results of this review<sup>6</sup>) are for the assistance of, but without prejudice to, the proper exercise of the Single Judge's responsibility to ensure respect for the privileged communications of Mr Bemba (for which purpose Mr Bemba may present his observations), and are equally without prejudice to the Chamber's power to assess the admissibility, relevance and probative value of any item of evidence that had originally been identified by the Independent Counsel as non-privileged and relevant to the present case and is relied upon by any party for the purposes of the confirmation of charges proceedings;

**CONSIDERING**, in other words, that the Independent Counsel does not replace either the Single Judge not the Chamber in the exercise of their judicial responsibility, and that his mandate can in no way be equated to the performance of functions of a judicial nature;

**CONSIDERING**, therefore, that, given (i) the limited tasks assigned to Mr Luvengika, (ii) the fact that the Defence may challenge the results of Mr Luvengika's review of the concerned material and (iii) that the ultimate determination thereupon is left with the Single Judge and the Chamber as part of their judicial functions, the request for Mr Luvengika's disqualification as Independent Counsel due to his alleged lack of impartiality in the performance of his mandate could be already rejected without further consideration;

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<sup>6</sup> See ICC-01/05-01/13-41.

**CONSIDERING** that it is nonetheless appropriate to address the arguments advanced in the Request;

**CONSIDERING** in this regard that the Defence fails to show any concrete fact (as opposed to mere speculation) suitable to undermine Mr Luvengika's independence as Independent Counsel, or even appearance thereof;

**CONSIDERING**, indeed, that the mere existence of a past working relationship between Mr Luvengika and Mr Badibanga in 1999 (which is the only fact relied upon by the Defence in support of its Request) does not cast reasonable doubts upon Mr Luvengika's ability to properly carry out the tasks assigned to him, in that it does not suggest any lack of independence on the part of Mr Luvengika;

**CONSIDERING** that, given the irrelevance of this information in itself in light of the system as explained above, the fact that the Prosecutor did not mention the existence of such past working experience cannot be considered an indication of bad faith on the part of the Prosecutor, contrary to the Defence contention that this fact alone, in and of itself, demonstrates that Mr Luvengika lacks the necessary independence to perform the role of Independent Counsel;

**CONSIDERING** that the Defence assertion that to allow Mr Luvengika to continue with his activities as Independent Counsel "is tantamount to endorsing the communication of the complete defence strategy in case ICC-01/05-01/08 to the Prosecution on a silver plate" is either inaccurate (as Mr Bemba is given the opportunity to assert the existence of a privilege attached to any material that the Independent Counsel will select for transmission to the parties) or particularly disturbing as such, insofar as it appears to assume the carrying out of improper actions "behind the scene" on the part of Mr Luvengika in the performance of the tasks assigned to him, which is an extremely grave allegation that, in the absence of any substantiation of any kind, does not deserve serious consideration, let

alone to be deemed sufficient to warrant Mr Luvengika's disqualification as Independent Counsel;

**CONSIDERING**, therefore, that the Defence provides no reason warranting Mr Luvengika's disqualification as Independent Counsel and the consequent suspension of all his activities in the present case;

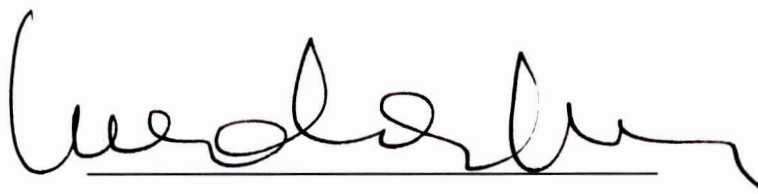
**CONSIDERING**, finally, that in light of the fact that the anonymity of Independent Counsel has been lifted *vis-à-vis* the parties in the present case, the basis for the classification of the Request and of the Prosecutor's response thereto as confidential *ex parte*, only available to the Prosecutor and Mr Bemba's Defence no longer exists, and that these filings should accordingly be reclassified as confidential and made available to the other Defence teams;

**FOR THESE REASONS**

**REJECT** the Request; and

**ORDER** the Registrar to reclassify as "confidential" filings ICC-01/05-01/13-317-Conf-Exp and ICC-01/05-01/13-352-Conf-Exp.

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

A handwritten signature in black ink, appearing to be 'Cuno Tarfusser', written over a horizontal line.

**Judge Cuno Tarfusser**  
**Single Judge**

Dated this Friday, 25 April 2014

The Hague, The Netherlands