

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date of the public redacted
version : 19 May 2014

Date of original:
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*

Public redacted version

**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 [REDACTED] 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;¹

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

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;³

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 [REDACTED], renewing his previous Request and reiterating the same arguments already relied upon in the Request;⁴

¹ ICC-01/05-01/13-41.

² ICC-01/05-01/13-317-Conf-Exp.

³ ICC-01/05-01/13-352-Conf-Exp.

⁴ ICC-01/05-01/13-353-Conf.

NOTING that in the Request the Defence seeks that the activities of [REDACTED] as Independent Counsel in the present case be suspended immediately on the ground of [REDACTED]'s perceived lack of impartiality due to the existence of a previous working relationship between [REDACTED] and [REDACTED];

CONSIDERING that the determination of whether the independence of [REDACTED] as Independent Counsel may be reasonably doubted to the point that [REDACTED] immediate disqualification appears necessary cannot but be informed by proper consideration of the tasks assigned to [REDACTED] and of [REDACTED] relationship with the Single Judge who has entrusted [REDACTED] with [REDACTED] mandate, including in terms of the actual impact that [REDACTED]'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 [REDACTED] 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;⁵

⁵ 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 review⁶) 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 [REDACTED] 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 [REDACTED], (ii) the fact that the Defence may challenge the results of [REDACTED]'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 [REDACTED]'s disqualification as Independent Counsel due to [REDACTED] alleged lack of impartiality in the performance of [REDACTED] mandate could be already rejected without further consideration;

⁶ See ICC-01/05-01/13-41.

CONSIDERING that 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 [REDACTED]'s independence as Independent Counsel, or even appearance thereof;

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

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 [REDACTED] lacks the necessary independence to perform the role of Independent Counsel;

CONSIDERING that the Defence assertion that to allow [REDACTED] to continue with [REDACTED] 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 [REDACTED] in the performance of the tasks assigned to [REDACTED], 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 [REDACTED]'s disqualification as Independent Counsel;

CONSIDERING, therefore, that the Defence provides no reason warranting [REDACTED]'s disqualification as Independent Counsel and the consequent suspension of all [REDACTED] activities in the present case;

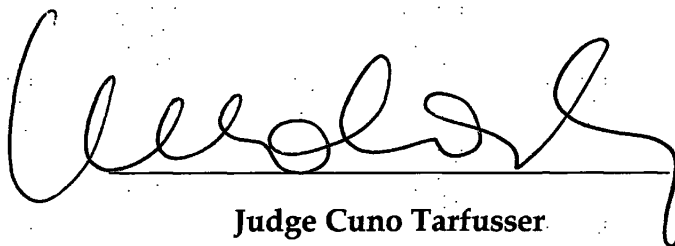
CONSIDERING, finally, that in light of the fact that the anonymity of Independent Counsel has been lifted *vis-à-vis* the parties in the present case, the basis for the classification of the Request and of the Prosecutor's response thereto as confidential *ex parte*, only available to the Prosecutor 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.



Judge Cuno Tarfusser
Single Judge

Dated this Monday, 19 May 2014

The Hague, The Netherlands