

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 20 May 2014

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**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***

**Public**

**Prosecution's Response to Defence Request for the Exercise of Judicial Functions  
by the Full Pre-Trial Chamber II**

**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 Kilolo Defence’s 7 May 2014 “Request for the Exercise of Judicial Functions by the full Pre-Trial Chamber II” (“Request”).<sup>1</sup> The Request will be rendered moot on 27 May 2014, when the plenary of judges decides<sup>2</sup> the Defence’s request to disqualify the Single Judge.<sup>3</sup> As such, the Pre-Trial Chamber II (“Chamber”) should dismiss the Request.

2. In the alternative, the Request fails on its merits. It is not supported by the law or the facts, relies on a flawed premise, and requires two judges of the Chamber to pre-judge matters they will have to decide as members of the plenary.

## **II. Submissions**

### **A. The Request will be rendered moot on 27 May 2014**

3. However the plenary of judges decides the Defence’s disqualification request on 27 May 2014, the Request will be rendered moot.

4. If the Single Judge is not disqualified he will continue to sit as such on this case. This renders the Request moot because it relies on the same arguments advanced in the Defence’s disqualification request. For example, the Defence argues that “the gravamen of the problem and the impetus for the present Request” is “the continuation of proceedings in front of the Single Judge . . . during the consideration of the Defence’s disqualification request”.<sup>4</sup>

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<sup>1</sup> ICC-01/05-01/13-381.

<sup>2</sup> ICC-01/05-01/13-385.

<sup>3</sup> ICC-01/05-01/13-372.

<sup>4</sup> ICC-01/05-01/13-381, para. 10.

5. Should the plenary of judges determine that the Defence's disqualification request is unfounded, the basis of and reason for the Request fall away. There is no need for the full bench to sit if the Single Judge is found to be independent.

6. Conversely, the Request will become moot if the plenary of judges grants the Defence's disqualification request. In this scenario, the Single Judge's removal will resolve the reasons underlying the Request. Without a Single Judge whose independence is impugned, there is no reason for the full bench Chamber to sit.

7. Further, contrary to the Mangenda Defence's interpretation,<sup>5</sup> the Request is aimed at Single Judge Cuno Tarfusser. Because it does not contest more broadly the Chamber's ability under Article 39(2)(b)(iii) of the Rome Statute ("Statute") to assign a Single Judge to deal with matters on its behalf, the Chamber does not need to consider sitting as a full bench if the disqualification request is resolved.

## **B. In the alternative, the Request fails on its merits**

### **i. The law does not support the Request**

8. Under Rule 7(3) of the Rules of Procedure and Evidence ("Rules"), the Chamber has broad discretion to dispose of the Request. But, its discretion is not unlimited: a Chamber may decide that the functions of the Single Judge be exercised by the full bench only "if appropriate".<sup>6</sup> Here, for the reasons outlined below, the circumstances do not warrant granting the Request.

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<sup>5</sup> ICC-01/05-01/13-406, para. 4.

<sup>6</sup> Rule 7(3) of the Rules.

9. The Defence's argument that it has a right to make a Rule 7(3) request, which is considered "*ipso facto* valid",<sup>7</sup> does not extend to a right to have the Request granted. The Defence conflates the Chamber's duty to *receive* a request to sit as a full-bench with an obligation to *grant* it.

ii. The facts do not support the Request

10. The Prosecution incorporates by reference the arguments made in its 16 May 2014 "Observations on the Kilolo, Mangenda, and Babala Defences' Requests to Disqualify the Single Judge Cuno Tarfusser"<sup>8</sup> to rebut the Request's allegations against the Single Judge's independence.

11. In addition, the Request fails to establish that the Single Judge acted outside his mandate.<sup>9</sup> The Chamber designated the Single Judge in this case to "ensure the expeditiousness and efficiency of the proceedings", and to "address[] and determin[e] the issues arising in connection with the Prosecutor's Request".<sup>10</sup> Contrary to the Request, the Single Judge continues to act within this mandate, as all subsequent pre-confirmation litigation – including the arrest warrant and provisional release – has necessarily "aris[en]"<sup>11</sup> from the Prosecution's 3 May 2013 request for judicial assistance to obtain evidence for an Article 70 investigation.

12. The Statute confirms this interpretation. Article 57(2)(b) permits the Single Judge to rule on *any* matter not covered in Article 57(2)(a), "unless otherwise provided for in the Rules . . . or by a majority of the Pre-Trial Chamber". The Single Judge acted within his statutory authority in issuing all pre-confirmation decisions, given that the Chamber did not exercise its power to rule as a full bench, and the

<sup>7</sup> ICC-01/05-01/13-381, para. 3.

<sup>8</sup> ICC-01/05-01/13-404-Red.

<sup>9</sup> See ICC-01/05-01/13-381, paras. 20-21.

<sup>10</sup> ICC-01/05-45, para. 5.

<sup>11</sup> ICC-01/05-45, para. 5.

Request fails to identify any violation of the Rules.<sup>12</sup>

iii. The Request relies on a flawed premise

13. Contrary to the Request,<sup>13</sup> the Single Judge's ability to adjudicate this case is not affected until the plenary of judges adjudicates the disqualification request. Under Article 41(2) of the Statute, the burden rests on the Defence to substantiate its allegations of partiality. A party may request disqualification, but that request in itself is not enough to precipitate a judge's interim suspension from the case. Otherwise, a party's mere filing of a frivolous request could delay proceedings or even change the composition of the Chamber at will.

14. The Presidency's 19 May 2014 decision denying the Defence's request to immediately provisionally suspend the Single Judge<sup>14</sup> supports such an interpretation. Specifically, the Presidency found that a disqualification request was not in and of itself sufficient to warrant a judge's automatic and concomitant provisional suspension.<sup>15</sup>

iv. The Request requires two judges of the Chamber to pre-judge matters they will have to decide as members of the plenary

15. The Request is predicated on the same allegations underpinning the Defence's

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<sup>12</sup> See, e.g., ICC-02/11-01/11-530, paras. 43-44 ("it is evident from the wording of the Statute that a decision on the question of interim release of the suspect . . . or a request for leave to appeal . . . *must* not be made by the full Chamber") (emphasis added); ICC-02/11-01/11-595, para. 15 ("As the present decision is not of a type which under article 57(2)(a) of the Statute or under the Rules must be issued by the full Chamber and given that the full Chamber, after consultation, has decided not to make use of its prerogative under Rule 7(3) of the Rules to decide on this Request, the Single Judge remains competent to exercise the functions of the Chamber in relation to this Request").

<sup>13</sup> See, e.g., ICC-01/05-01/13-381, para. 9 ("where the impartiality of the Single Judge is *in question*, as it is now, it is critical that the Court not only do justice, but be seen as doing justice, and convene the Pre-Trial Chamber II in full") (citation omitted, emphasis added).

<sup>14</sup> ICC-01/05-01/13-407.

<sup>15</sup> ICC-01/05-01/13-407, para. 22.

disqualification request before the Presidency. The Chamber is thus in an impossible situation: to decide the Request on its merits two judges of the Chamber would need to pre-judge matters they will have to decide as members of the plenary on 27 May 2014 in different litigation. For this reason, the Chamber should not rule on the Request until after the plenary – at which time the Request will become moot, in any case.

### III. Requested Relief

16. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Request.



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**Fatou Bensouda, Prosecutor**

Dated this 20<sup>th</sup> day of May 2014  
At The Hague, The Netherlands