

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 05 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***

Public Redacted document

Public Redacted version of "Prosecution's response to the Bemba Defence request for the disclosure of information pertaining to the Independent Counsel", 5 March 2014, ICC-01/05-01/13-237-Conf

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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Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby responds to the Bemba Defence’s request for the disclosure of information pertaining to the identity of the Independent Counsel appointed by the Single Judge to review recorded telephone communications for relevance and to exclude privileged information (“Request”).¹ The Request fails for two reasons and should be dismissed: (a) the law does not support the relief sought; and (b) the facts cited are speculative and unfounded.

II. Confidentiality

2. This filing is classified as “Confidential” as it refers to material that is so designated. A “Public” redacted version will be filed.

III. Submissions

A. The Request fails on the law

3. The basis for the Defence’s request that the Single Judge clarify information pertaining to the Independent Counsel² is legally unsound. The Request relies on Rule 34(1)(a) and (c) of the Rules of Procedure and Evidence (“Rules”)³, which are inapposite. These provisions do not apply to the disqualification of an Independent Counsel, but pertain solely to judges, the Prosecutor or Deputy Prosecutor.⁴ The Request is thus predicated upon a claim that Independent Counsel “may be broadly

¹ ICC-01/05-01/13-209, Defence request for the disclosure of information pertaining to the Independent Counsel, 20 February 2014 (“Request”).

² Request, paras. 10 and 11.

³ See Rule 34(1)(a) and (c) of the Rules.

⁴ Request, para. 7.

equated to that of the Prosecutor.”⁵ However, this contention is not only forced, but also unsubstantiated.

4. The Single Judge’s express direction regarding the appointment of the Independent Counsel contradicts the Request. Specifically, the Single Judge noted that “counsel should be a really independent one, as opposed *to one to be appointed by or acting in cooperation with the prosecution*.”⁶ The Single Judge further clarified that the Independent Counsel does not report to the Prosecutor, but to the Chamber.⁷

5. The fact that the Defence does not accept the Single Judge’s appropriate exercise of his discretion in appointing the Independent Counsel does not transform the matter into a cognizable issue. This is even more so, as the Request fails to advance any legal ground calling into question the Single Judge’s assessment of the Independent Counsel’s suitability to perform his/her specific tasks in this case.

B. The Request fails on the facts

6. The Request also fails on the facts.

7. *First*, the Request erroneously asserts that the Independent Counsel has not examined exculpatory information.⁸ To the contrary, the Single Judge ordered the Independent Counsel “to review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant to the limited purpose of the Prosecutor’s investigation”.⁹ Article 54(1)(a) of the Rome Statute is implicit to that investigation and the Single Judge’s order, which thus connotes the

⁵ Request, para. 5.

⁶ ICC-01/05-52-Red2, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014, para. 7 (“Judicial Order Decision”) (emphasis added).

⁷ ICC-01/05-01/13-T-2-Red-ENG, page 15, line 25.

⁸ Request, para. 3.

⁹ Judicial Order Decision, para. 7.

identification of exonerating evidence. Further, the Independent Counsel's reports confirm that he/she has followed the order of the Single Judge.¹⁰ There is nothing in the Independent Counsel's reports or the Single Judge's order remotely suggesting any failure to review exculpatory evidence.

8. *Second*, the Request asserts no substantive basis upon which the Independent Counsel's impartiality and/or independence are legitimately contestable. In this respect, the Judicial Order Decision and Single Judge's further clarification¹¹ are clear-cut, and borne out by the facts: (1) the Independent Counsel is in fact independent of the Prosecution; (2) his/her reports consider all relevant evidence (i.e., the entirety of the available recordings); and (3) the Independent Counsel has taken account of the confidentiality, privacy and privilege interests of the suspects.¹²

9. *Third*, the anonymity of the Independent Counsel is legitimate and justified. There is no allegation to the contrary in the Request. Further, the Defence fails to advance any argument demonstrating any change in circumstances negating the continued necessity of the Independent Counsel's anonymity, or otherwise establishing actual prejudice to the Defence at this early stage of the proceedings.

¹⁰ [REDACTED]; see also [REDACTED].

¹¹ ICC-01/05-01/13-T-2-Red-ENG, page 15, line 25.

¹² [REDACTED].

IV. Requested Relief

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



Fatou Bensouda, Prosecutor

Dated this 5th Day of March 2014

At The Hague, The Netherlands