

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 10 February 2015

TRIAL CHAMBER VII

Before: Judge Olga Herrera Carbuccion
Judge Robert Fremr
Judge Chile Eboe-Osuji

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's
"Additional Defence Response to Prosecution filing ICC-01/05-01/13/310-Conf and
request for the immediate disqualification of Independent Counsel"", 22 April
2014, ICC-01/05-01/13-352-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
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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s so-called ‘additional response’¹ to the Prosecution’s 2 April 2014 request to refer potentially privileged materials to an independent counsel (“Request”).² The ‘additional response’ is not responsive to the salient issues raised in the Request and seeks relief not sought in the original Defence Response.³ It is, in fact, a motion (“Motion”), which, in addition, fails on its merits and should be dismissed.

II. Confidentiality

2. This filing is classified as “Confidential” and “Ex Parte”, as it refers to a filing of the same designation.

III. Submissions

A. Article 42(7) does not apply to the Independent Counsel

3. Contrary to the Motion, the legal status of an independent counsel and the rules and standards regarding his/her qualification or disqualification are not matters determined by what is expedient. At its core however, the Motion is predicated on nothing more than this.

4. The Defence’s contention that the Independent Counsel should be disqualified is based upon an erroneous conflation of the standards applicable to the Prosecutor and Deputy Prosecutor and those concerning an independent counsel. The Defence provides no legal basis for why Article 42(7), which expressly concerns the

¹ ICC-01/05-01/13-317-Conf-Exp

² ICC-01/05-01/13-310-Conf.

³ ICC-01/05-01/13-311-Conf.

disqualification of the Prosecutor or Deputy Prosecutor, “should apply, *mutatis mutandis*, to the Independent Counsel”.⁴ Presumably, the Defence rehashes its previous assertion that the Independent Counsel “may be broadly equated to that of the Prosecutor.”⁵ Not only do the facts contradict this claim, but when explaining why it has not directly petitioned the Appeals Chamber regarding the Independent Counsel’s disqualification, the Defence concedes that “[t]he Independent Counsel is not a prosecutor”⁶. As concerns the application of Article 42(7) to the Independent Counsel in this case, the Motion is as forced as it is vacuous.

B. The independent counsel’s disqualification is unwarranted

5. On 17 April 2014, the Chamber lifted the anonymity of the Independent Counsel vis-à-vis the parties in the proceedings.⁷ As such, the Prosecution acknowledges the existence of a prior professional relationship between the Independent Counsel and [REDACTED]. However, this fact alone does not in any way create a risk of partiality, much less comprise its “flagrant” appearance⁸, as asserted by the Defence.

6. [REDACTED] previous professional relationship with the Independent Counsel dates back [REDACTED] years⁹ and precedes [REDACTED] employment with the OTP. The Motion is built on a series of unsubstantiated related assumptions. It thus fails to establish any concrete fact creating an impediment to the Independent Counsel’s engagement in this case. Although the Motion asserts that “[REDACTED] relationship is not a casual acquaintance but a long-standing affiliation of an

⁴ ICC-01/05-01/13-317-Conf-Exp, para. 12.

⁵ ICC-01/05-01/13-209, para. 5.

⁶ ICC-01/05-01/13-317-Conf-Exp, para. 11.

⁷ ICC-01/05-01/13-347-Red.

⁸ ICC-01/05-01/13-317-Conf-Exp, para. 14.

⁹ ICC-01/05-01/13-317-Conf-Exp, para. 9, footnote 15.

extremely close professional nature”¹⁰, the facts alleged are speculative, inconsequential or non-existent.

7. Indeed, the prior professional association between [REDACTED] and the Independent Counsel no more potentially impedes the latter’s independence than Defence Counsel’s prior employment with the OTP affects his independent judgement.¹¹ In the same way that Counsel’s continuing personal relationship with members of the OTP, including his having sought and continued to share an office with a Trial Lawyer assigned to the prosecution of his client¹² does not *per se* undermine his independence, [REDACTED] previous professional association with the Independent Counsel in [REDACTED] raises no legally cognisable issue. Nor does the Motion’s claim that the two worked “possibly contemporaneously” as [REDACTED].¹³

8. While it is not settled what standard applies to an independent counsel in terms of disqualification, the ICC Code of Conduct seems to apply more aptly than Article 42(7).¹⁴ In either case however, the Independent Counsel’s professional association with [REDACTED] does not hint at any lack of independence justifying [REDACTED] disqualification. In reality, [REDACTED] has never been in a position, professionally or personally to interfere with the independent judgement of the Independent Counsel at any point. Further, as members of [REDACTED] as a cornerstone of their professional obligations.

9. Prior associations among members of the parties and even the Chambers of the Court are not infrequent. However, alone, this establishes neither any evidence of interference with, nor the compromising of professional independence. Were that so,

¹⁰ ICC-01/05-01/13-317-Conf-Exp, para. 9.

¹¹ See ICC-ASP/4/Res.1, Code of Professional Conduct for counsel, Article 6 (“ICC Code of Conduct”).

¹² See ICC-01/05-01/08-670-Red, paras. 13 and 14.

¹³ ICC-01/05-01/13-317-Conf-Exp, para. 9.

¹⁴ See ICC Code of Conduct, Article 1.

Counsel, as a former prosecuting Trial Lawyer in the OTP, could never have ethically accepted an assignment to represent Accused Bemba in either the Main Case or the Article 70 proceedings. The Motion presents no substantiated reason to distinguish the independent counsel's capacity to do the same.

10. To the contrary, the Motion presents facts and circumstances far less compelling in terms of the Independent Counsel's professional independence than those facts pertinent to Defence Counsel's independent representation of the suspect in this case.

C. Counsel's use of confidential, *ex parte*, information in TRIM concerning the alleged identity of the independent counsel was not appropriate

11. The Motion makes clear that the Defence set about ascertaining the identity of the independent counsel, despite the Single Judge's specific withholding of this information. Counsel characterises this conduct as merely "doing his job".¹⁵ Nevertheless, it has resulted in undermining the Single Judge's intention to keep the Independent Counsel's identity secret.¹⁶

12. Having uncovered information in TRIM concededly likely resulting from an IT security lapse, and which was made available to the Defence "mistakenly and negligently"¹⁷, Counsel rightly brought the matter to the immediate attention of the Single Judge. However, the Prosecution takes issue with the Defence's further appropriation and substantive use of this highly sensitive and confidential information in the Motion to which it was plainly not entitled.

¹⁵ ICC-01/05-01/13-317-Conf-Exp, para. 6.

¹⁶ ICC-01/05-01/13-317-Conf-Exp, p. 3.

¹⁷ ICC-01/05-01/13-317-Conf-Exp, para. 6.

13. Standard warnings to recipients of inadvertently disclosed electronic information through TRIM are not attached to filings or other uploaded material. Nevertheless, certain conventions apply when access to information is obtained inadvertently, for example: refraining from reading, printing, retaining copies, disseminating, distributing, or using the document or its content, as well as deleting any copies obtained or sent to third parties.

14. Counsel's notice regarding his email communications provides, in relevant part:

NOTICE: . . . If you are not the e-mail's intended recipient, you are hereby notified that any dissemination, distribution or copy of this e-mail, and/or any attachments thereto, is strictly prohibited. Please immediately notify the sender replying to the above mentioned e-mail address, and permanently delete and/or destroy the original and any copy of this e-mail and/or its attachments, as well as any printout thereof.¹⁸

15. Such warnings are commonplace. Their objective is to prevent the unsanctioned *use* of such material. The result here should have been no different, particularly given the Court's direct protection of the material involved, as contrasted with, for example, a merely asserted claim of privilege or confidentiality.

16. The Chamber's recent lifting of the Independent Counsel's anonymity has rendered moot the propriety of the Defence's exploitation of identifying information inadvertently disseminated. However, the Chamber should not countenance the appropriation and use of protected information obtained in this way.

¹⁸ ICC-01/05-01/13-317-Conf-Exp, Anxs. A and B.

IV. Requested Relief

17. For the foregoing reasons, the Prosecution respectfully requests that the Chamber deny the Motion in its entirety.



Fatou Bensouda, Prosecutor

Dated this 10th Day of February 2015
At The Hague, The Netherlands