

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 7 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
& NARCISSE ARIDO**

**Confidential Document
with Confidential Annexes A-D**

ex parte (document and annexes) Prosecution and Bemba Defence only

**Additional Defence response to Prosecution filing ICC-01/05-01/13-310-Conf
and request for the immediate disqualification of Independent Counsel**

Source: Defence for Jean-Pierre Bemba Gombo

Document 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

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for
the Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Esteban Peralta-Losilla

Victims and Witnesses Unit

Other

The Defence for Jean-Pierre Bemba Gombo ("the Suspect") hereby provides additional information in response to the *Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel*.¹ The Defence, furthermore, requests that the Single Judge immediately suspend the activities of the Independent Counsel.

Confidential, ex parte, Classification

Counsel has filed this submission confidentially and *ex parte* out of respect for the Single Judge's clearly evinced intention that the identity of the Independent Counsel should remain a secret. Counsel believes that this document should be made available to the other defence teams in this case and to Counsel for the Suspect in case ICC-01/05-01/08 yet leaves the question of future reclassification to the discretion of the Single Judge. Given the sensitive nature of the information communicated in this submission, however, Counsel has filed it as a separate document - purposefully not including it in his previously filed *Defence Response to Prosecution Filing ICC-01/05-01/13-310-Conf*.²

Submission

1. The Suspect has been driven to the inevitable conclusion that the Independent Counsel appointed by the Single Judge for the purpose of filtering out materials pertaining to the Suspect's case and subject to client-attorney privilege is [REDACTED] of the [REDACTED]. The reason for this is patently obvious and a matter of simple deductive logic. It is a known fact from previous confidential court documents available to the participants in ICC-01/05-01/13 that the Independent Counsel is a member of the [REDACTED] [REDACTED]³ lives in [REDACTED]⁴ speaks [REDACTED]⁵ was most likely

¹ ICC-01/05-01/13-310-Conf.

² ICC-01/05-01/13-311-Conf.

³ ICC-01/05-59-Conf-Anx-Red at page 4/5 (4th paragraph).

⁴ [REDACTED]

⁵ [REDACTED]

appointed from the list of Counsel⁶ [REDACTED]

[REDACTED]⁷

[REDACTED]

3. In light of the aforementioned, Counsel wrote to [REDACTED] in order to verify the truth of these allegations and to ask him whether he was in a position to contradict information provided to the Suspect by potential defence witnesses. Counsel also asked [REDACTED] to clarify whether he had any form of connection with the Senior Trial Lawyer on case ICC-01/05-01/08 – Jean-Jacques Badibanga ("Badibanga"). [REDACTED]'s Email address was supplied to Counsel by a colleague of [REDACTED]. [REDACTED] did not reply to Counsel's communications on the matter. Counsel can only presume that his communications were forwarded to the Single Judge - as they should have been. Indeed, if these communications were not forwarded to the Single Judge, to whom [REDACTED] as obliged to report, then it would suggest that [REDACTED] had a reason to hide the fact of Counsel's queries.⁸

4. In light of the information communicated to the Suspect concerning the alleged activities of [REDACTED] at ASP12, Counsel also wrote to the Secretariat of the ASP asking to receive a list of participants from the [REDACTED]. Counsel received no response to this query.

[REDACTED]

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⁸

5. Thereafter, Counsel wrote to Counsel Support Services ("CSS") asking to know whether [REDACTED], as one of the few [REDACTED] speaking advocates on the ICC list of counsel, had ever been instructed to advise witnesses in case ICC-01/05-01/08. CSS replied to Counsel that it was not at liberty to divulge such information and referred Counsel to the Single Judge.⁹

6. Finally, on 6 April 2014, while researching the case, Counsel came across a document in TRIM which confirms the Suspect's aforementioned suspicions.¹⁰ The document in question is entitled "*Hearing Information Form: Status Conference*"; it was created on 29 August 2013 and sets out the list of participants at the Status Conference to be held on the following day between 14:00 and 15:30. The participants at that status conference were to include, *inter alia*, the Single Judge, his assistant [REDACTED] Jean-Jacques Badibanga and [REDACTED]. The document bears no confidential classification yet was most likely, mistakenly and negligently, made available to Counsel in TRIM. The document's record number is NF2013/04226. Counsel believes that this IT security lapse should be investigated by the appropriate authorities and wishes to be afforded due credit both for bringing this matter immediately and confidentially to the attention of the Single Judge and not to be criticized for doing his job as thoroughly as possible despite the lack of resources afforded him.

7. The Suspect respectfully repeats his previous submission that [REDACTED] is not a "really"¹¹ independent counsel. Counsel, furthermore, suggests, tentatively and respectfully, that the Single Judge has been regrettably misinformed, by omission, as to [REDACTED]'s supposed independence.

8. Counsel refers to his previous filing entitled: *Defence request for the disclosure of information pertaining to the Independent Counsel* whereby he requested that the Single Judge order the Prosecutor to clarify "*whether the "Independent" Counsel has ever had*

⁹ Confidential ex parte Annex B.

¹⁰ Confidential ex parte Annex C.

¹¹ ICC-01/05-52-Red2 at paragraph 7.

any previous working relationship with any member of the Office of the Prosecutor and, if this be the case, whether such a previous working relationship was disclosed by the member of the Office of the Prosecutor in question".¹² The Prosecutor responded by way of obfuscation and stated as follows: *"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 clarification are clear cut, and borne out by the facts..."*.¹³

9. [REDACTED] and Badibanga do, indeed, share a previous working relationship and Counsel suggests that it was not appropriate for the Prosecutor to exploit Counsel's lack of access to confidential information to insinuate that the latter had provided no substantive basis upon which the Independent Counsel's impartiality could be deemed contestable. It was, furthermore, misleading for the Prosecutor to state that the facts cited by Counsel were "speculative and unfounded".¹⁴ [REDACTED] and Badibanga's relationship is not a casual acquaintance but a long-standing affiliation of an extremely close professional nature. Not only did [REDACTED] and Badibanga act as

[REDACTED]
[REDACTED]
[REDACTED]¹⁵ This professional relationship should have been declared to the Single Judge and the Defence should have been given an opportunity to raise arguments as to the propriety of the appointment of [REDACTED] to the position of Independent Counsel.¹⁶

10. Counsel cannot discount the possibility that the Prosecutor did, in fact, inform the Single Judge of the aforementioned information by way of an *ex parte* filing. If the

¹² ICC-01/05-01/13-209 at paragraph 10.

¹³ ICC_01/05-01/13-237-Conf at paragraph 8.

¹⁴ ICC-01/05-01/13-237-Conf at paragraph 1.

¹⁵ *c.f.*; Judgment, 5 April 1999; Conf exp Annex D: [REDACTED]

¹⁶ *c.f.* ICC-01/05-T-2 at page 16 line 16 *infra* where Badibanga stated: *"We are very aware of the magnitude of what's going on and we would like to make sure that we are also free from any accusation of lack of independence"*. Notwithstanding, Badibanga failed to disclose his prior working relationship with [REDACTED]

information was not disclosed, however, then questions should be asked as to why the Prosecutor deemed it appropriate not to divulge it.

11. The Independent Counsel should be immediately disqualified for a perceived lack of impartiality. The Independent Counsel is not a prosecutor and thus his disqualification may not be sought by way of petition to the Appeals Chamber. His role, nevertheless, was established by decision of the Single Judge and it is the Single Judge who should now intervene to prevent the potential for any further prejudice arising out of the Independent Counsel's continuing activities.

12. The Single Judge is referred to article 42(7) of the Rome Statute which stipulates that "*[n]either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground*". This principle should apply, *mutatis mutandis*, to the Independent Counsel.

13. In interpreting the phrase "might reasonably be doubted", the Appeals Chamber of the ICC has held as follows: "*... it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather the question [...] is whether it reasonable appears that the Prosecutor lacks impartiality. In determining whether there is such an appearance of partiality, the Appeals Chamber considers that this determination should be based on the perspective of a reasonable observer, properly informed*".¹⁷

14. In the circumstances, to allow the Independent Counsel access to the Email accounts of Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo ("the Email Accounts") would be unconscionable. There is a flagrant appearance of partiality. A reasonable observer appraised of the true nature of the relationship between Badibanga and [REDACTED] and the subsequent failure to disclose such a relationship would conclude that the latter lacks the necessary independence to perform the role of Independent Counsel.

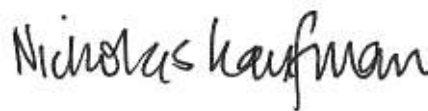
¹⁷ ICC-01/11-01/11-175 at paragraph 20.

15. The Email Accounts contain the entire defence work-product in case ICC-01/05-01/08 including a full draft copy of the final brief which will be submitted in due course to Trial Chamber III. It is not, therefore, hard to appreciate why the Suspect fears that to allow the so-called "independent" counsel who has failed to disclose his prior relations with Badibanga access to the Email Accounts would be tantamount to serving up the complete defence strategy in case ICC-01/05-01/08 to the Prosecution on a silver platter.

Relief Sought

16. In the light of all the aforementioned, the Single Judge is respectfully requested to order as follows:

- i) to suspend the activities of the Independent Counsel immediately;
- ii) to release the contents of this submission to Defence Counsel in ICC-01/05-01/08;
- iii) to permit the Email Accounts to be reviewed by Counsel for the Defence in both case ICC-01/05-01/13 and ICC-01/05-01/08 for the purpose of filtering out potentially privileged documents which will be submitted to the Single Judge for subsequent review and approval.



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Monday, April 07, 2014