

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 09/05/2014

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***

Confidential Document

**Defence request to compel the attendance of the Independent Counsel for
examination during the confirmation proceedings**

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

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**Legal Representatives of the
Victims**

**Legal Representatives of the
Applicants**

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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the Defence**

States' Representatives

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REGISTRY

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Jean-Pierre Bemba Gombo ("the Suspect") hereby requests the learned Single Judge to compel the attendance of the "Independent" Counsel for examination on the witness stand during the confirmation proceedings.

I. THE LEGAL BASIS FOR THE REQUEST

1. Article 61(6) of the Rome Statute provides a suspect with the discretionary right to present evidence during confirmation proceedings. Past practice at the International Criminal Court has shown that oral testimony has, indeed, been proffered by defence teams at confirmation.

2. This Single Judge himself – Cuno Tarfusser, in an earlier decision, has set down the rules governing the presentation of oral testimony at confirmation rejecting, as he did, a Prosecution demand to "strike" a request made by a defence team to summons an investigator from the Office of the Prosecutor. On that matter, the Single Judge had the following to say: *"...nothing in the statutory instruments prohibits a member of the OTP from being called as a witness, in particular if the party calling such a witness has presented reasonable grounds to justify the need for the witness'[s] testimony to be presented viva voce during a hearing".¹*

3. So what are these "reasonable grounds" required "to justify the need for the witness's testimony to be presented viva voce during a hearing"? Once again, Judge Cuno Tarfusser supplies the answer. The presentation of such *viva voce* testimony, as opposed to documentary evidence, ought to be permitted where it will provide provide "the proper elucidation of the facts for the purpose of the Chamber's final decision under article 61(7)" of the Rome Statute.²

¹ ICC-02/05-02/09-186 at page 4.

² ICC-01/05-01/13-363. See also ICC-02/05-02/09: "the questioning of the ... witness, provided it is appropriately conducted, might prove instrumental in the Chamber meaningfully exercising its powers in accordance with article 61(7) of the Statute".

4. Nothing in the Court's legal texts or precedent, therefore, prevents a Suspect from calling whatever witnesses he wishes so long as the proposed contents of those witnesses' testimony meet the requirements of reasonableness, relevance and admissibility.³

5. Moreover, despite the transparency which the Suspect will demonstrate below, there is absolutely no obligation upon him to disclose the lines of enquiry which he wishes to pursue by way of examination on the witness stand. Judge Cuno Tarfusser said it himself: *"apart from the ruling envisaged in article 69(4) of the Statute relating to the admissibility or relevance of any piece of evidence, the statutory instruments provide no basis either for the preliminary authorisation of a proposed witness by the Chamber or for a party's right to be notified in advance of the other party's intended line of questioning of a given witness"*.

6. Judge Cuno Tarfusser has even ruled that there is no hierarchy in witnesses and no special rules the application of which form a necessary precondition to testimony. All are equal before the bench in Judge Cuno Tarfusser's court whether the witness be a victim, an OTP investigator or, presumably, the creature of his own design - the "Independent" Counsel. The Suspect refers the learned Single Judge to his own ruling in the Abu Garda case: *"...subjecting a particular witness to a regime consisting of such authorisation and/or notification on the sole grounds of his or her being a member of the OTP would be tantamount to establishing a special regime which is not provided for in the statutory instruments of the Court"*.

7. By virtue of customary international law⁴ and the "doctrine of implied powers" as codified in article 4(1) of the Rome Statute,⁵ the Suspect relies on recent precedent established in the Ruto case and submits that the Single Judge now has the "legal capacity" to "order"⁶ the attendance of a witness.

³ see, also, article 69(4) of the Rome Statute.

⁴ ICC-01/09-01/11-1274-Corr2 at paragraph 88.

⁵ ICC-01/09-01/11-1274-Corr2 at paragraphs 83 and 84.

⁶ ICC-01/09-01/11-1274-Corr2 at paragraph 100.

II. THE FACTUAL BASIS FOR THE REQUEST

8. The "Independent" Counsel is a not-so-*really* independent counsel. Nor is his assistant, whoever he may be, independent. These two individuals are anything but independent. The Suspect wishes to prove this, through his lawyer, by questioning the Independent Counsel on the witness stand.

9. Firstly, the Suspect wishes to explore how the "Independent" Counsel executed his mandate and more particularly, how he would determine "relevance" with respect to the article 70 investigation against the Suspect. This is not "elucidated" in the reports which he has supplied to date. Nor is it elucidated whether the "Independent" Counsel was even acute to the need to search for exculpatory evidence or whether he served merely as the long arm of the Prosecutor with complete disregard for article 54(1)(a) of the Rome Statute.

10. Secondly, Counsel wishes to put to the "Independent" Counsel the contents of potentially exonerating communications which could contradict the allegedly incriminating import of intercepted communications which the "Independent" Counsel has deemed relevant to the Prosecutor's investigation. The Suspect has been denied an investigative budget to date and the only objective way of performing this task is to utilize the services of the "Independent" Counsel whose disputed motto – after all – is "independence".

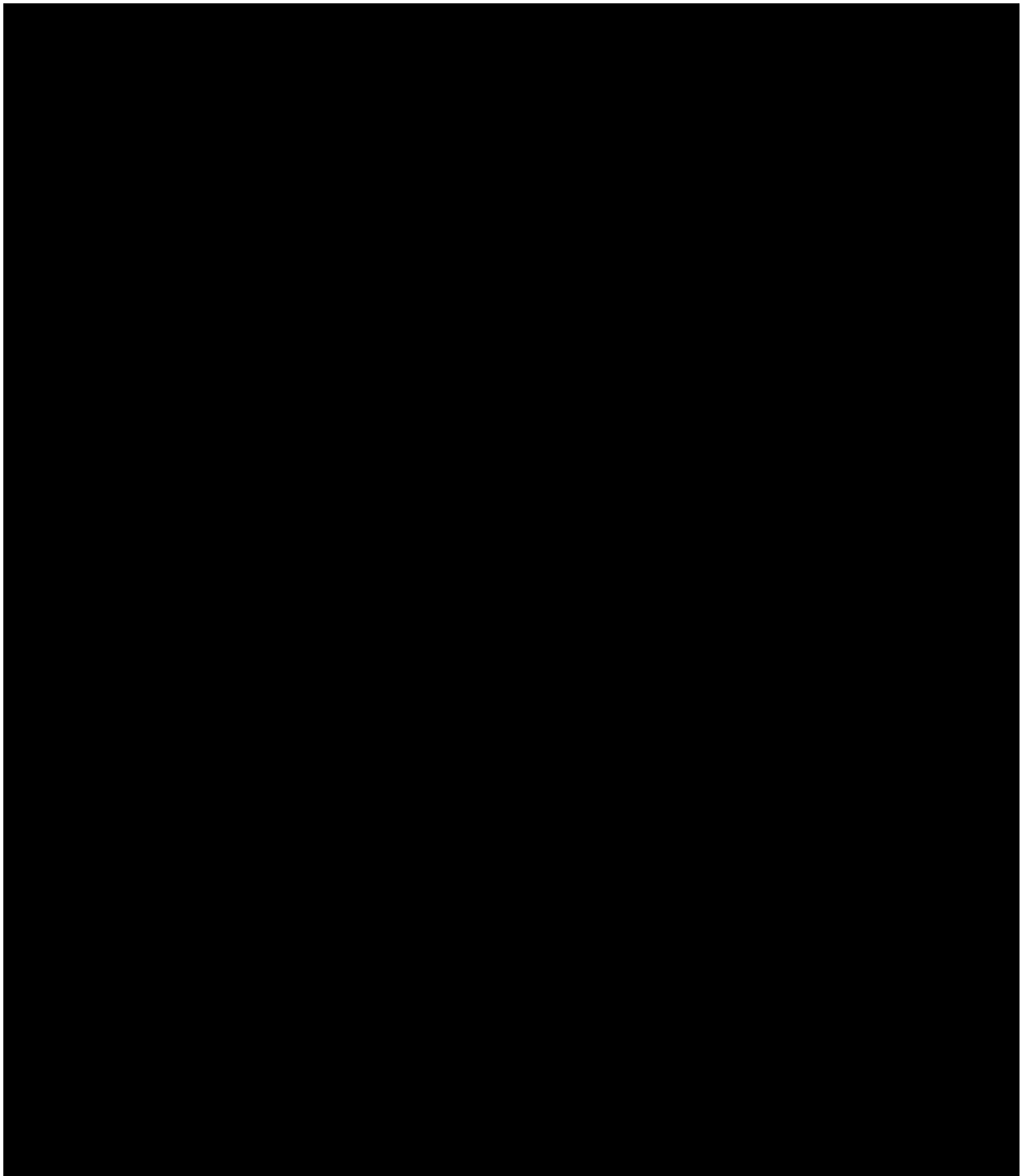
11. Thirdly, the Suspect wishes, further, to examine whether the "Independent" Counsel was motivated by irrelevant considerations in the execution of his mandate. This request is substantiated on two separate grounds: i) that it is now known, when it was previously concealed, that the "Independent" Counsel enjoyed a previous working relationship with a member of the Office of the Prosecutor and ii) that the Suspect has reason to believe that the "Independent" Counsel had, on an occasion, professed inside knowledge of his case to unauthorised third parties in total breach of his mandate.

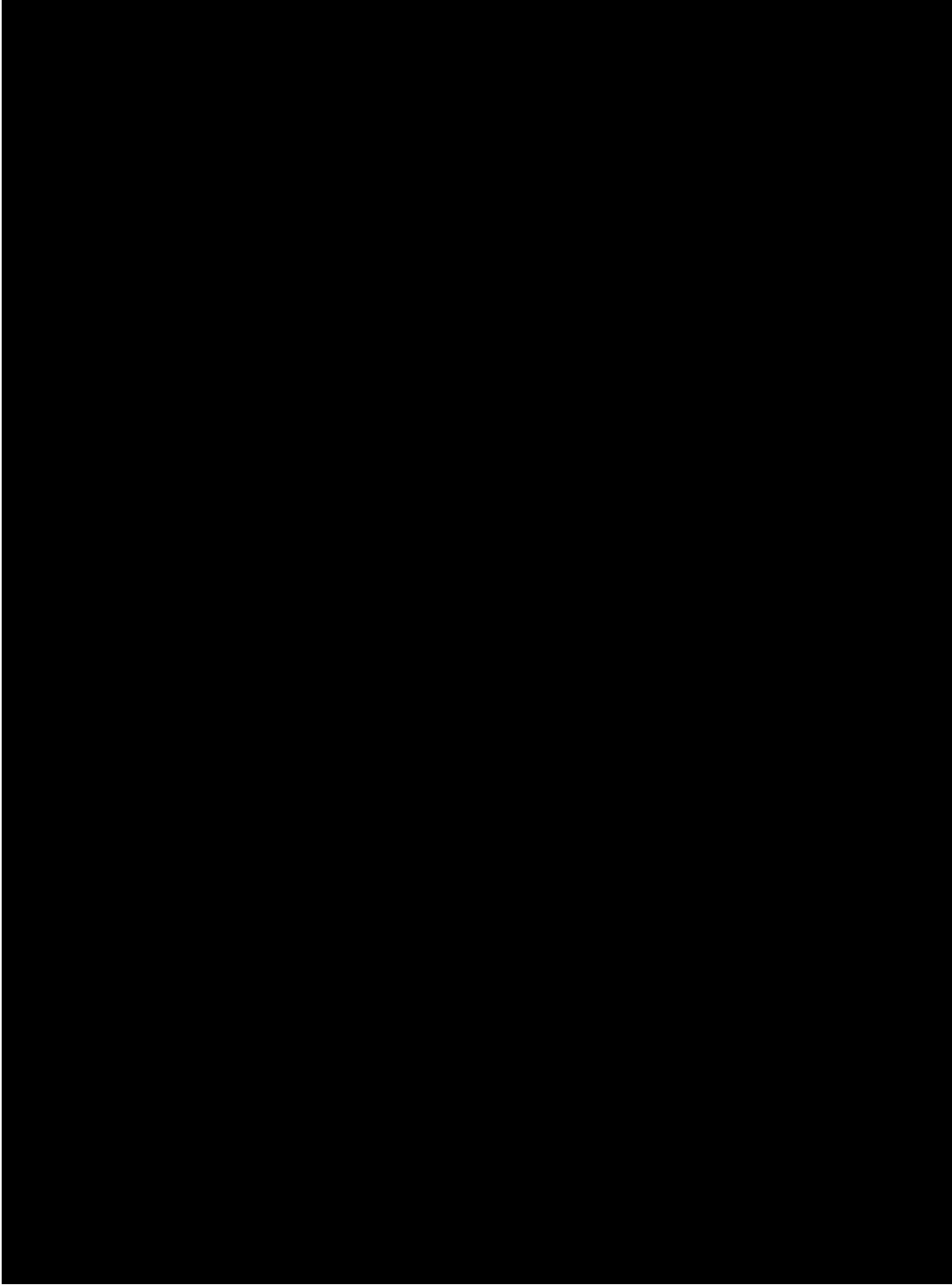
12. Counsel should not have to accept the Prosecutor's clarifications concerning the integrity of her staff or the "Independent" Counsel when the Prosecutor herself, so it is submitted, has been shown to have obfuscated the fact that there was a previous working relationship between a member of her office and the "Independent" Counsel. With the utmost respect, the Suspect suggests that the presumption of good faith which he would normally, without hesitation, attribute to the Prosecutor has now, in this discrete respect, been rebutted. The Suspect should be entitled to explore the nature of the previous working relationship further in order that the Court be satisfied that the "Independent" Counsel has, indeed, exhibited no bias.

13. On 22 January 2014, way before the Single Judge decided that his identity should be disclosed to the parties *"in light of the advanced stage of the proceedings"*,⁷ Counsel for the Suspect wrote to the "Independent" Counsel and asked him whether he would agree to be interviewed with a view to testifying for the Suspect. In retrospect, The Suspect suggests that "Independent" Counsel had blown his own cover by virtue of his alleged conduct at the 12th Assembly of States Parties conference held in The Hague in November 2013. At the time, however, Counsel for the Suspect did not know, for certain, that the individual to whom he wrote was the "Independent" Counsel. Counsel for the Suspect was merely informed that a certain [REDACTED] had, allegedly, been heard to proclaim to a couple of individuals inside knowledge that he had acquired concerning the Suspect's *"dossier"* and the fact that it was *"foutu"*. As grave as this allegation may seem – it was, of course, an allegation that the Defence was duty-bound to investigate and has investigated, to the best of its ability given the total absence of a budget to conduct an investigation. The Suspect wishes to explore this issue with the "Independent" Counsel on the witness-stand.

⁷ ICC-01/05-01/13-347-Red at page 3.

14. Finally, the Suspect wishes to explore whether the "Independent" Counsel acted in accordance with the ethics of his own bar association and the law of his own country. This is relevant to the legality of the evidence emanating from his reports and which will be put before the Pre-Trial Chamber. It will be remembered that "Independent" Counsel revealed his professional affiliation in his second report. On 26 February 2014, therefore, Counsel for the Suspect wrote to the Chairman of the Bar Association to which he believed that "Independent" Counsel belonged. Counsel for the Suspect wrote as follows:





15. On the same day, 26 February 2014, the Chairman of the [REDACTED] Bar Association replied to Counsel for the Suspect stating, inter alia, that he did not fully understand the import of herein undersigned Counsel's questions because they were formulated in [REDACTED] and, in any event, concerned matters in which he had no intention to intervene.

III. RELIEF SOUGHT

16. In light of all the aforementioned, the Suspect requests that the Single Judge "compel" the attendance of "Independent" Counsel who has received an invitation from the Suspect to be interviewed and has refused such. This is in keeping with precedent established in the *Ruto & Sang* case. The Single Judge is requested to permit the Defence to examine the "Independent" Counsel on the issues mentioned in this application while respecting the guidelines set out in the *Abu-Garda* case.⁸ Despite not being required to do so by virtue of the Single Judge's own precedent, the Suspect has clearly set out the issues and lines of enquiry which he wishes to pursue with the "Independent" Counsel on the witness-stand. The Suspect has also shown that these lines of enquiry cannot be achieved through reliance on the "Independent" Counsel's reports alone.

17. The Defence presumes or, rather, wishfully anticipates that the Prosecutor will support this application. After all, the Prosecutor has a duty to ensure that the Counsel on who she relies is indeed "*really*" independent and that his reports manifest her duty to examine exonerating circumstances as set out in article 54(1)(a) of the Rome Statute. Given the proximity of the confirmation proceedings, good cause is shown for shortening the time-limit for the Prosecutor's response.



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Friday, May 09, 2014

⁸ ICC-02/05-02/09-186; Questions aimed at eliciting from the Defence's Proposed Witness judgements or evaluations of a discretionary nature (including without limitation matters of prosecutorial discretion) will be prohibited.