

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22/04/2014**

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 for disqualification of the Independent Counsel

Source: Defence for Mr. 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

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Goran Sluiter

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

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Jean-Pierre Bemba ("the Suspect") hereby renews his request that the Independent Counsel be immediately disqualified and, respectfully, requests that the Single Judge render an urgent decision on the matter **before** any further transfer of materials to the Prosecutor pursuant to decisions ICC-01/05-01/13-347-Conf and ICC-01/05-01/13-319-Conf ("the Decisions").

1. The Suspect respectfully repeats his previous submission that Independent Counsel is not a "really"¹ independent counsel. Counsel, furthermore, suggests, tentatively and most respectfully, that the Single Judge has been regrettably misinformed, by omission, as to the Independent Counsel's supposed independence.

2. 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 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".² 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...".³

3. Despite the aforementioned, the Independent Counsel and the Senior Trial Lawyer on case ICC-01/05-01/08 – Jean-Jacques Badibanga ("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

¹ICC-01/05-52-Red2 at paragraph 7.

² ICC-01/05-01/13-209 at paragraph 10.

³ ICC-01/05-01/13-237-Conf at paragraph 8.

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".⁴ The Independent Counsel and Badibanga's

[REDACTED]
[REDACTED] Not only did the Independent Counsel and
Badibanga [REDACTED]

[REDACTED]
[REDACTED]⁵ 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 the
Independent Counsel.⁶

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

5. 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.

6. 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

⁴ ICC-01/05-01/13-237-Conf at paragraph 1.

⁵ c

⁶ 6 c.f. ICC-01/05-T-2 at page

f 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 the Independent Counsel.

matter in which their impartiality might reasonably be doubted on any ground". This principle should apply, mutatis mutandis, to the Independent Counsel.

7. 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 reasonably 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*".⁷

8. In the circumstances, to allow the Independent Counsel to continue his activities for one moment longer would, it is respectfully submitted, be unconscionable. There is a flagrant appearance of partiality. A reasonable observer appraised of the true nature of the relationship between Badibanga and the Independent Counsel and a subsequent failure to disclose such a relationship would conclude that the latter lacks the necessary independence to perform the role of Independent Counsel.

9. Both the disclosure to the Prosecutor contemplated by the Decisions⁸ and the contents of 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 to continue with his activities is tantamount to endorsing the communication of the complete defence strategy in case ICC-01/05-01/08 to the Prosecution on a silver platter.

⁷ ICC-01/11-01/11-175 at paragraph 20.

⁸ Transfer of the

Relief Sought

10. The Single Judge is respectfully requested immediately to disqualify and thereby terminate the activities of the Independent Counsel.

A handwritten signature in black ink that reads "Nicholas Kaufman". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Tuesday, April 22, 2014