

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 9 May 2014

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Akua Kuenyehia, Acting Second Vice-President

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*

Public Document

**Defence Request for the Automatic Temporary Suspension of the Single Judge
Pending Decision on Defence Submission ICC-01/05-01/13-372**

Source: Defence for Mr Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

**The Office of Public Counsel for the
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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. *Purpose:* This Request (“Request” or “Defence Request”) is submitted by the Defence of Mr Aimé Kilolo Musamba (“Mr Kilolo”) to the Presidency of this Court pursuant to 41(2)(a) of the Rome Statute (“Statute”), Rule 38 of the Rules of Procedure and Evidence (“Rules”), and Regulation 15 of the Regulations of the Court (“Regulations”), respectfully requesting that the Single Judge be automatically and temporarily suspended from further exercising his judicial functions in case ICC-01/05-01/13, and that the Single Judge be replaced by another Judge of this Court, during such time as the Presidency’s decision on Defence submission ICC-01/05-01/13-372 on the disqualification of the Single Judge is pending.
2. *Structure:* This Request will dispense with the overall procedural posture of this case, except to the extent necessary to properly contextualize the arguments herein. It will instead focus on the immediate background to the present Request (**II**) and the legal grounds on which this Request is predicated (**III & IV**). Hereinafter, all references to ‘Articles’ shall be assumed to refer to Articles of the Statute, all references to ‘Rules’ shall be to the ICC Rules of Procedure and Evidence, all references to ‘Regulations’ shall be to the ICC Regulations of the Court, and all references to ‘the Suspects’ shall refer collectively to Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido.

II. THE DEFENCE REQUEST FOR DISQUALIFICATION OF THE SINGLE JUDGE IS SUPPORTED BY THIS COURT’S LEGAL FRAMEWORK

3. On 1 May 2014, the Kilolo Defence made a request to the Presidency of this Court for the disqualification of Single Judge Cuno Tarfusser from the present proceedings

(“Disqualification Request”).¹ The Disqualification Request was predicated on this Court’s legal framework – requiring that the Honourable Judges of this Court be impartial in the discharge of their functions²– as well as on this Court’s jurisprudence requiring that Judges not only *be* impartial, but *appear* impartial to the reasonable observer, properly informed.³ The Defence contends that the Single Judge’s actions and language manifesting a pre-determination of guilt in the proceedings thus far could, to the reasonable observer properly informed, in fact be considered to give rise to the apprehension of bias, jeopardizing the due process rights of the Suspects and justifying the disqualification of the Single Judge from the present proceedings.

4. Pending the Presidency’s decision on the Disqualification Request, the Defence submits that the practice and jurisprudence of this Court necessitate the automatic and immediate provisional suspension of the Single Judge from any further adjudication in these proceedings, whether singly or collectively with the full Pre-Trial Chamber. Furthermore, a strict textual and teleological reading of Rule 38 supports the replacement of the Single Judge during such time as the decision on the Disqualification Request is pending.

III. THE IMMEDIATE PROVISIONAL SUSPENSION OF THE SINGLE JUDGE PENDING DECISION ON THE DISQUALIFICATION REQUEST IS CONSISTENT WITH THE PRACTICE OF THIS COURT

5. The provisional suspension of the Single Judge is consistent with the practice adopted by the various Chambers of this Court in response to requests by the parties

¹ ICC-01/05-01/13-372.

² Rome Statute, Art. 40(1) and Art. 41(2)(a).

³ ICC-02/05-03/09-344, paras. 11-14; ICC-02/05-03/09-317, para. 5; ICC-02/05-01/09-76-Anx2, p. 6.

to disqualify judicial officers due to a perceived lack of impartiality.⁴ Such suspension is not only harmonious with Court practice, but is also *necessary* in order (i) to ensure that the rights of the Suspects are not further prejudiced in the interim, and (ii) to protect the both the *appearance* as well as the *actual* integrity of the present proceedings. Indeed, where there is any doubt or uncertainty as to possible grounds for excusal or disqualification, the Presidency of this Court has made clear that a cautious approach should be followed.⁵

6. In *Lubanga*, repeated applications by the Prosecutor – which were supported by the Defence – to separate the senior legal advisor to the Pre-Trial Division from rendering legal advice in the case⁶ was considered by the Judges to be “*tantamount to a request for disqualification of the judges or [that] might, at the very least, raise an issue regarding the disqualification of the judges*”⁷. Upon discussion with the Judges of the Pre-Trial Chambers, the President of the Pre-Trial Division decided to – as a provisional measure pending determination of said applications – separate and temporarily relieve the Senior Legal Adviser from any functions relating to the case.⁸
7. It should be noted that this measure was essentially *proprio motu* in that the provisional suspension was an *ex abundanti cautela* measure deliberated by the Judges of the two Pre-Trial Chambers⁹ and acted upon by the President of the Pre-Trial Division, who had themselves discussed and determined the need for – as well

⁴ ICC-01/04-01/07-T-48-ENG pp. 1-2; ICC-01/04-01/06-623.

⁵ ICC-01/04-01/06-2138-AnxIII.

⁶ ICC-01/04-01/06-373; ICC-02/04-01/05-108.

⁷ ICC-01/04-01/06-623; ICC-02/04-01/05-124-Anx1.

⁸ ICC-01/04-01/06-623-Annex, pp. 8 and 9, consisting of an internal memorandum by the President of the Pre-Trial Division, Judge Hans-Peter Kaul, to the President of the Court, Judge Philippe Kirsch, indicating that the Judges of Pre-Trial Chambers I and II had agreed to, *ex abundanti cautela*, temporarily relieve the Senior Legal Adviser from any functions relating to the *Lubanga* case pending the disqualification request (paras. 17 and 18); ICC-02/04-01/05-124-Anx1, paras. 17 and 18.

⁹ ICC-01/04-01/06-623-Annex, p. 11, consisting of a letter dated 20 October 2006 from Judge Claude Jorda to Judge Hans-Peter Kaul indicating that “the Judges of Pre-Trial Chamber I are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the [c]ase...”

as the appropriateness of – such action in the circumstances. Indeed, the parties requesting disqualification *were not required to meet any additional standards to justify the provisional suspension* in connection with the disqualification request. Rather, the decision stemmed from the Judges’ own initiatives and concern as to the public opinion on and perception of judicial impartiality.¹⁰

8. This is in line with the Appeals Chamber’s reasoning in *Gaddafi and Al-Senussi* that, to the extent necessary to take any measures necessary to preserve the impartiality of proceedings, the Pre-Trial Chamber dealing with the case “could adopt any appropriate and necessary measures”.¹¹ Indeed, the *Lubanga* provisional suspension is particularly instructive in that the Pre-Trial Chambers saw fit to temporarily suspend the Senior Legal Advisor simply on the premise that it *might* invoke a question as to judicial impartiality. Specifically, the Judges felt that the:

*...references made by the Prosecutor to the issue of impartiality of the Judges of the Pre-Trial Chambers I and II, linking the issue pertaining to the Senior Legal Adviser to an alleged appearance of bias of the Judges of Pre-Trial Chamber I and II...can be interpreted as amounting to a request by the Prosecutor...for the disqualification of the Judges of Pre-Trial Chambers I and II, or at least to a “question as to the disqualification” of the Judges of Pre-Trial Chambers I and II under Article 41(2) of the Statute.*¹²

In the present case, however, the concern as to the lack of judicial impartiality relates not simply to someone – however tenuously – *connected* to the judiciary, but rather, *directly and specifically* to the Single Judge himself.

¹⁰ *Ibid.*, p. 9, para. 21; ICC-02/04-01/05-124-Anx1, para. 21.

¹¹ ICC-01/11-01/11-175, para. 5.

¹² ICC-01/04-01/06-623-Annex, p. 9, para. 20; ICC-02/04-01/05-124-Anx1, para. 20 (original emphasis).

9. Pursuant to the established practice of this Court, then, *a disqualification request by either party is in and of itself sufficient to warrant the automatic and concomitant invocation of provisional suspension absent any further requests or showings of proof by either party.* Indeed, as articulated by Judge Kaul, questions as to the appearance of impartiality of the Judges may raise doubts in public opinion, and are “relevant not only for the current proceedings before the Pre-Trial Chambers but may also have an impact on the future work of the Court.”¹³
10. Similarly, then, and in line with the above, the disqualification requests submitted by the Mangenda¹⁴ and Kilolo¹⁵ Defence teams should *immediately* invoke the *automatic* provisional suspension of the Single Judge’s exercise of judicial functions, insofar as decision on the disqualification requests are pending. After all, the impartiality of the Single Judge is directly in question and this Court has advocated a practice of acting cautiously in all matters pertaining to judicial ethics.¹⁶
11. In the absence of the Single Judge, there is no better authority than the Pre-Trial Chamber – pursuant to Rule 7(3) – to continue the proper adjudication of these proceedings. However, it should be noted that the Defence believes that the provisional suspension of the Single Judge should apply as a temporary blanket ban on further exercise of *any* judicial functions in these proceedings, whether singly *or* collectively as part of the Pre-Trial Chamber. As such, even if the Pre-Trial Chamber II is convened as per the Kilolo Defence request of 7 May 2014¹⁷, the Single Judge should be precluded from exercising judicial functions in his capacity as a member of such Pre-Trial Chamber, at least for as such time as the Disqualification Request remains unresolved.

¹³ ICC-01/04-01/06-623-Annex, paras. 20 and 21.

¹⁴ ICC-01/05-01/13-367.

¹⁵ ICC-01/05-01/13-372.

¹⁶ 2009/PRES/450, p. 3, with Judge Anita Ušacka noting that “in all matters pertaining to judicial ethics, a Judge should proceed cautiously”, cited in ICC-01/04-01/06-2138-AnxIII, p. 3.

¹⁷ ICC-01/05-01/13-381.

12. This extends also to the upcoming confirmation of charges, for which the Pre-Trial Chamber II is required to convene in full, as per the requirements espoused in Article 57(2)(a). As currently constituted, the full Chamber would include the Single Judge. Considering especially that the confirmation of charges requires substantive legal assessments on questions of law and fact as well as determinations of guilt or innocence, it is wholly problematic that the Single Judge would, in light of the current contentions as to his impartiality, be allowed to continue to adjudicate. As such, the Defence wishes to reiterate its assertion that the Single Judge should be excused from his judicial functions in these proceedings in his capacities as *either* the Single Judge or a member of the Pre-Trial Chamber II.

IV. IT IS THE DUTY OF THE PRESIDENCY TO APPOINT A REPLACEMENT JUDGE

13. The Defence submits that it is the duty of the Presidency to appoint a Judge to replace the single Judge during such time as the Disqualification Request is pending, or, should the Disqualification Request be successful, for the remainder of the proceedings. Such contention is grounded in Rule 38 – allowing for replacement of Judges – and Regulation 15, which vests the authority and responsibility for such replacements with the Presidency. The grounds included in Rule 38 allowing for the replacement of judges being non-exhaustive, such replacement may be contemplated for *any* “objective and justified” reason.¹⁸ The Defence contends that lingering questions as to impartiality and fairness of proceedings would certainly fall within this standard, particularly as they invoke concerns as to the proper – and fair – administration of justice. This would, in and of itself, justify replacement of the Single Judge and be consistent with the object and purpose of the Statute and the Rules. Furthermore, that the Presidency may replace a Judge is and has been the


¹⁸ ICC Rules of Procedure and Evidence, Rule 38(1).

accepted practice of the Court.¹⁹ To that end, the Defence asks the Presidency to act without haste in its immediate appointment of a replacement Judge, such that the grave breaches of the Suspects' rights to due process and a fair trial do not continue to be compounded.

V. RELIEF REQUESTED

14. The Defence for Mr Kilolo respectfully requests that the Presidency:

- Grant this present Request for the provisional suspension of the Single Judge in case ICC-01/05-01/13 in his capacities as both the Single Judge in these proceedings as well as in his capacity as a Judge of the Pre-Trial Chamber II, during such time as the Presidency is considering the numerous requests on the permanent disqualification of the Single Judge from these proceedings; and
- Appoint a Judge to replace the Single Judge in the exercise of any and all judicial functions in the present proceedings.



Ghislain M. Mabanga

Lead Counsel for Mr Aimé Kilolo Musamba

Dated this 9 May 2014,

at The Hague, The Netherlands

¹⁹ ICC-01/04-01/06-2138-AnxII; ICC-01/04-01/06-2138-AnxIII; ICC-01/09-02/11-890.