

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 June 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

Decision on the "Defence request for leave to appeal decisions ICC-01/05-01/13-362-Conf and ICC-01/05-01/13-366-Conf" submitted by the Defence for Mr Bemba

Decision 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

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Additional Defence response to Prosecution filing ICC-01/05-01/13-310-Conf and request for the immediate disqualification of Independent Counsel” dated 7 April 2014¹ and the “Defence request for disqualification of the Independent Counsel” dated 22 April 2014² (“Requests for the Disqualification of Independent Counsel”);

NOTING the “Decision on the request for disqualification of Independent Counsel filed by the Defence of Jean-Pierre Bemba Gombo” dated 25 April 2014 (“First Decision”) ³, *inter alia* rejecting Mr Bemba’s request dated 7 April 2014⁴;

NOTING the “Decision on the ‘Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel’” dated 25 April 2014 (“Second Decision”) ⁵, whereby the Single Judge, *inter alia*, decided to appoint Independent Counsel (“IC”) tasked with “(i) being present at the unsealing and the forensic acquisition of the DVDs; (ii) reviewing the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings; (iii) promptly submitting a report to the Single Judge as to the results of such review”;

NOTING the “Defence request for leave to appeal decisions ICC-01/05-01/13-362-Conf and ICC-01/05-01/13-366-Conf” submitted on 4 May 2014 by the Defence for Jean-Pierre Bemba Gombo (“Mr Bemba’s Defence Application”) ⁶, requesting to be granted leave to appeal (I) the First Decision in respect of the following issues:

¹ ICC-01/05-01/13-317-Conf.

² ICC-01/05-01/13-353-Conf.

³ ICC-01/05-01/13-362-Conf.

⁴ ICC-01/05-01/13-317-Conf.

⁵ ICC-01/05-01/13-366-Conf.

⁶ ICC-01/05-01/13-376-Conf.

Issue 1: Whether the Single Judge erred by holding that his relationship with [IC] was, inter alia, a relevant factor in determining [IC]'s "independence" ("First Issue");

Issue 2: Whether the Single Judge erred by holding that the need to disqualify [IC] was only necessitated by virtue of the tasks mentioned in the First Impugned Decision which were assigned to [IC] "at the moment" ("Second Issue");

Issue 3: Whether the Single Judge erred by failing to appreciate correctly the facts giving rise to the appearance of bias ("Third Issue");

Issue 4: Whether the Single Judge erred by factoring into his decision making process an irrelevant consideration; namely, a purported Defence suggestion that [IC] was carrying out improper actions "behind the scene (sic)" ("Fourth Issue");

and (II) the Second Decision in respect of the following issue

Issue 5: Whether the Single Judge erred by referring potentially privileged materials to [IC] in light of Issue One to Four inclusive herein above ("Fifth Issue");

NOTING the "Prosecution's response to the Bemba Defence's request for leave to appeal decisions ICC-01/05-01/13-362-Conf and ICC-01/05-01/13-366-Conf" dated 9 May 2014⁷, submitting that Mr Bemba's Defence Application should be rejected;

NOTING article 82(1)(d) of the Statute, as well as the established jurisprudence of the Court on the requirements for granting leave to appeal;

CONSIDERING, as regards the First Issue, that it is premised on Counsel for Mr Bemba's view that he had "not been afforded a full picture of this relationship" (ie, the relationship between the Single Judge and Independent Counsel) and that, following the submission of Mr Bemba's Defence Application, documents relating to the circumstances surrounding the appointment of Independent Counsel as well as the terms of the mandate conferred to him have been disclosed to the Defence teams⁸;

⁷ ICC-01/05-01/13-386-Conf.

⁸ ICC-01/05-01/13-399-Conf.

CONSIDERING that, accordingly, the First Issue is no longer a live issue arising from the First Decision;

CONSIDERING, as regards the Second Issue, that reference by the relevant portion of the First Decision to activity being performed “at the moment” by Independent Counsel was never meant, as apparent upon reading the decision as a whole⁹ and as noted by the Prosecutor, to limit, whether from a temporal standpoint or otherwise, the Single Judge’s consideration of the tasks and mandate performed by Independent Counsel;

CONSIDERING that, accordingly, the Second Issue is premised on a portion of the First Decision which, imprecise as it may be, does not have any significant impact on the determinations taken therein and as such is not suitable to constitute an issue within the meaning and for the purposes of article 82(1)(d) of the Statute;

CONSIDERING, as regards the Third Issue, that, contrary to what stated by the Defence for Mr Bemba, it does consist of “a difference of opinion” between the Single Judge and Counsel as regards the relevance of a past relationship between Independent Counsel and a member of the Office of the Prosecutor for the purposes of the disqualification of the former, which difference of opinion underlies the decision not to rule on the alleged “failure of the Prosecutor to disclose” information on such relationship;

CONSIDERING, as regards the Fourth Issue, that not only is it based on a statement that was not determinative in deciding on the disqualification of the Independent Counsel, but also that its very formulation belies the fact that it consists of a another disagreement between Counsel for Mr Bemba and the

⁹ ICC-01/05-01/13-362-Conf, p. 5, where reference to “the tasks more generally carried out” by Independent Counsel is made.

Single Judge as to the relevance of the possible suggestion on improper actions by Independent Counsel for the purposes of the decision on the disqualification; **CONSIDERING** that, accordingly, neither the Third Issue nor the Fourth Issue constitute an issue within the meaning and for the purposes of article 82(1)(d) of the Statute;

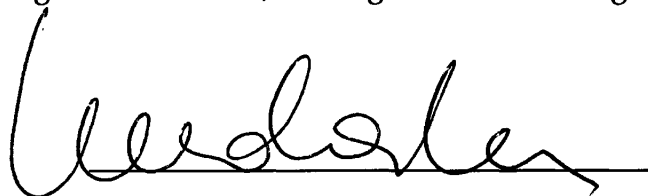
CONSIDERING, as regards the Fifth Issue, that its very formulation makes it obvious that it is based on and flows from the First, Second, Third and Fourth Issues raised in respect of the First Decision and, as such, cannot be regarded as arising from the Second Decision for the purposes of article 82(1)(d);

CONSIDERING further that, as already stated, the average time required by the Appeals Chamber to determine interlocutory appeals would make it unlikely that these proceedings could be “materially advanced” by submitting to the Appeals Chamber any of the issues raised in Mr Bemba’s Defence Application, particularly in light of the imminence of the date set for the confirmation of the charges;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS Mr Bemba ’s Defence Application.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Single Judge

Dated this Tuesday, 17 June 2014

The Hague, The Netherlands