

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/06

Date: 23 August 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Confidential
with confidential annexes 1-7**

**Observations on the urgent request presented by counsel for Mr Mathieu
Ngudjolo Chui on 12 August 2013 (ICC-01/04-02/06-82-Conf)**

Source: The Registrar

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Marc Desalliers

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
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Other

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**Victims Participation and Reparations
Section**

Other

THE REGISTRAR of the International Criminal Court (the "Court") in conformity with the invitation of the Pre-Trial Chamber II dated 15 August 2013¹ is pleased to provide the following observations on the "Requête urgente de la défense de Mathieu Ngudjolo Chui tendant à obtenir de la Chambre préliminaire II la suspension, à titre de mesure de précaution, de l'entéreninement [*sic*] par le Greffe via la Section d'appui aux conseils de la décision de désignation de Maître Andrea Valdivia en qualité d'assistante juridique au sein de l'équipe de défense de Bosco Ntaganda jusqu'à élucidation complète de la question de conflit d'intérêts »² ("the Request"), in which counsel for Mr. Ngudjolo requests the Chamber, *inter alia*, "d'enjoindre à la Section d'appui aux conseils de suspendre immédiatement, à titre de mesure de protection, les effets de la désignation de Maître Andrea Valdivia en qualité d'Assistante juridique au sein de l'équipe de défense de Bosco Ntaganda."

1. The Registrar stresses at the outset that, as will be explained below, the applicable legal framework at the Court do not provide him a basis to refuse or indefinitely suspend the acknowledgement of an appointment of a legal team member solely on the grounds of an alleged conflict of interest. Only the Chamber has the power to adjudicate a controversy between the parties on the potential existence of a conflict of interest arising from the appointment. The Registry implements any measure ultimately adopted by the Chamber in this regard.
2. It is respectfully submitted that the Registrar, in all cases where conflicts of interest are at issue as an impediment to legal representation, applies the same consistent policy in the assessment of the specific facts and circumstances present in each case, draws the attention of the concerned parties to the issue as deemed appropriate and facilitates communication between them; this has been the approach followed in the different cases referred in the Request.

¹ Decision requesting observations from the defence of Bosco Ntaganda and the Counsel Support Section, ICC-01/04-02/06-84-Conf.

² ICC-01/04-02/06-82-Conf.

3. Rule 20 (2) of the Rules of Procedure and Evidence ("RPE") mandates the Registrar to carry out his functions "in such a manner as to ensure the professional independence of defence counsel."
4. It is submitted that where a person is appointed either by the client or by the counsel or legal representative,³ the Registry carries out a series of checks which can lead to the confirmation or refusal of the appointment where the legal basis is granted to the Registrar, namely where the person to be appointed does not meet the mandatory legal requirements set by the applicable texts (e.g. to be admitted to the list of counsel, list of assistants or list of professional investigators as the case may be), where a core team acting in the framework of the legal aid system does not have enough available resources for the new appointment or, potentially, where a person is appointed to represent several persons simultaneously.⁴
5. In all other cases, in particular where the circumstances of the appointment make apparent the risk of an impediment to representation (Articles 12 and 16 of the Code of Professional Conduct for counsel ["the Code"]), the ICC Registry does not have the power to *proprio motu* refuse or indefinitely suspend an appointment once the appointing counsel has unequivocally expressed his or her determination to proceed with it.⁵ In short, once the Registry discharges its obligations to highlight the issue of a conflict of interest and facilitates communication on the matter between the interested parties – in this case, defence counsels for Ngudjolo and Ntaganda – and a reasonable time has been afforded to counsel to settle the matter, as was the case here, the Registry cannot indefinitely suspend the appointment and must formalize it when appointing counsel sees no conflict and insists on the appointment in the interests of the legal representation of his or her client. It is then up to the

³ The Registrar does not appoints members to a team, but acknowledges and formalises the appointment facilitating their intervention in the team, and only appoints counsel in the case of Regulation 73 of the Regulations of the Court or as ordered by the Chamber as appropriate

⁴ See the *Registry's single policy document on the Court's legal aid system*, ICC-ASP/12/3, para. 107.

⁵ See ICC-01/05-01/08-674, para. 3.

counsel involved to settle the matter between them and inform the Registry, or in the absence of an accord, to bring the issue before the Chamber seized of the case for final determination.

6. The Registrar's role in this respect is one of mainly assisting and facilitating communication. A Chamber, based on its inherent powers as the ultimate arbiter of the proceedings before it, be it under Article 64 (2) of the Statute in the case of a Trial Chamber or under its "authority and duty to ensure that the proceedings are dealt with in a fair and expeditious manner, including the responsibility to ensure that the proceedings during the confirmation hearing are not disrupted",⁶ is vested with the power to decide on any controversy related to conflicts of interest arising from the appointment of team members. This fact is acknowledged by counsel for Mr Ngudjolo⁷ himself, as shown in the previous cases dealt with by the Court.⁸
7. The role of the Registrar in such specific cases is apparent from the language the Registry uses when addressing such issues with counsel. In the case of Ms Véronique Pandanzyla mentioned in the Request (para. 21), the Registry simply served as a channel of communication between the counsel and the Office of the Prosecutor, which opposed her appointment, the final decision not to appoint her having been taken by counsel for Mr Ngudjolo.⁹
8. In a similar case, Trial Chamber IV simply took "note of the fact that although the Registry facilitates the appointment of 'persons who assist Counsel', for

⁶ ICC-01/04-01/07-660, p. 8.

⁷ Counsel for Mr Ngudjolo raised directly before Pre-Trial Chamber I the potential conflict of interest in which the late Mr Jean-Christophe Mulamba would have incurred.

⁸ The opposing party addressed directly the Chamber, mentioning the acknowledgment of the challenged appointment by the Registry but without questioning this course of action, in the cases of Mr Nicholas Stuart Kaufman (ICC-01/05-01/08-670-Conf) and Mr Ibrahim Yillah (ICC-02/05-03/09-160). In the case of Mr Essa Faal, the proceedings were triggered by the Chamber *proprio motu* (ICC-01/09-02/11-185).

⁹ Annex 1.

example associate counsel, they lack the authority to bar or act as an impediment to the appointment of these persons.”¹⁰

9. The Registry stresses that, by two letters sent on 7 August 2013¹¹ and 12 August 2013,¹² it explained this role clearly to counsel for Mr Ngudjolo, inviting him to contact counsel for Mr Ntaganda directly in case he wanted to raise any issues related to the appointment, as had been proposed since the first letter dated 29 July 2013; such role was further evoked in the e-mail message sent to counsel for Mr Ngudjolo by the Chief of CSS on 9 August 2013 at 12:09.¹³

10. In the aforementioned letters, the Registry also informed counsel for Mr Ngudjolo that the authority to settle any dispute arising from the appointment of a team member in cases where a controversy exists over the issue of conflict of interests ultimately resides with the Chamber seized of the case, as has been the practice of the Chambers of the Court to date in the cases of Messrs Bemba,¹⁴ Banda and Jerbo¹⁵ and Muthaura, Kenyatta and Ali.¹⁶ The same letter recalled that an issue regarding potential conflict of interest had also been dealt with by the Chamber in the case of Messrs Katanga and Ngudjolo Chui.¹⁷ It bears mentioning that, in all those cases, the opposing party or the party raising the conflict of interest expressed its position directly before the Chamber and, rightly, without asking the Registry to implement any injunctive action or relief by itself.

11. In the present case, following the reception of the appointment of Ms Andrea Valdivia to the Ntaganda defence team, the Registry had telephone

¹⁰ ICC-02/05-03/09-168, para. 9.

¹¹ Annex 2.

¹² Annex 3.

¹³ Annex 4.

¹⁴ ICC-01/05-01/08-769.

¹⁵ ICC-02/05-03/09-168 and ICC-02/05-03/09-252.

¹⁶ ICC-01/09-02-11/365. It bears mentioning that, in this case, the procedure was triggered by the Chamber itself.

¹⁷ ICC-01/04-01/07-683.

conversations with counsel for Mr Ntaganda on the potential existence of an impediment to the requested appointment,¹⁸ inviting the latter to contact counsel for Mr Ngudjolo directly to discuss this matter. Counsel for Mr. Ntaganda informed CSS during these telephone conversations that such contact had already taken place and that the counsel for Mr Ngudjolo had opposed the appointment without providing him sufficient reasons or justifications for his objection, in view of which he had decided to proceed with the appointment. As mentioned above, CSS informed counsel for Mr Ngudjolo of the envisaged appointment by letter on 29 July 2013,¹⁹ copying counsel for Mr Ntaganda in the email communication to facilitate their inter-parties communication on this matter. The section did not receive counsel for Mr Ngudjolo's reaction until 6 August 2013.

12. The Registry notes in this regard the statement that counsel never received the letter dated 29 July 2013 "par courriel ICC".²⁰ It must be stated that counsel expressly acknowledged by his e-mail message dated 6 August 2013²¹ that he neither had access to his official EPN account nor remote access to the case records. This is the first instance during the course of the time frame at issue in which counsel brought to the attention of CSS any access difficulties related to his official EPN email address.²² In this context, Annex 9 demonstrates that the letter was indeed sent to counsel's official e-mail address where all official communications from the Court on the case, including documents filed, are sent for the purposes of notification.

¹⁸ As advanced by the counsel for Mr Ngudjolo in an e-mail message to the CSS prior to the receipt of any request of appointment from the Ntaganda defence team: see the message of 19 July 2013 reproduced as Annex 5.

¹⁹ Annex 6.

²⁰ Para. 6 of the Request.

²¹ Annex 7, sent from a private e-mail address.

²² Counsel and all external team members are fully informed of their obligations to use and ensure full functioning of the secure and official EPN address at all times as this is the only secure means of e-mail communication to the Court, and of the applicable administrative procedures in place to enable the Registry's IT section take appropriate measures for its resolution, namely, opening service tickets and reporting any remote access matters to the CSS.

13. The Registrar rejects the accusations of discriminatory treatment tabled by counsel for Mr Ngudjolo,²³ of having exerted any pressure whatsoever to prevent the appointment of Ms Véronique Pandanzyla,²⁴ of having hidden motives to refuse the confirmation of the impugned appointment, having put in place a system to prevent counsel from appointing a team member who might violate the professional secret or that in the Registry's views there are first-class and second-class lawyers at the Court.²⁵ These unfortunate accusations result from the misinterpretation by counsel of the role of the Registry as has been explained above, and which contrary to counsel's belief is limited to assisting counsel and facilitating the communication between concerned parties in the case of a dispute over conflict of interest, in conformity with the Registrar's mandate of providing support and assistance to all defence counsel pursuant to Rule 20(1)(b) of the RPE. The power to decide on such issues is vested in the competent Chamber should the parties fail to reach an agreement on the appointment of a team member in question.

14. The Registrar submits the present observations as confidential pursuant to Regulation 23 *bis* (2) of the Regulations of the Court. It nevertheless requests from the Chamber, under Regulation 23 *bis* (4) that it re-classifies them as public, except for the Annexes attached thereto, which include personal data, such as e-mail addresses and telephone numbers, of the participants as well as members of the Registry.

²³ Paras 9 and 11 of the Request.

²⁴ Para. 21 of the Request.

²⁵ Para. 33 of the Request.

15. The Registrar remains at the disposal of Pre Trial Chamber II should further elaborations be required.



Herman von Hebel
Registrar

Dated this 23 August 2013

At The Hague, The Netherlands