

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 September 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Confidential

**Decision on the Request of the Defence of Mathieu Ngudjolo Chui in Relation to
the Appointment of Andrea Valdivia as Member of the Defence Team of Bosco
Ntaganda**

Decision 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 for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Other
Jean-Pierre Kilenda Kakengi Basila
Jean-Pierre Fofé Djofia Malewa

REGISTRY

Registrar & Deputy Registrar
Herman von Hebel, Registrar
Didier Preira, Deputy Registrar

Defence Support Section
Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court"),¹ hereby renders this decision 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'entérinement] par le Greffe via la section d'appui aux conseils de la décision de désignation de maitre Andrea Valvida 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" (the "Request") submitted by the Defence of Mathieu Ngudjolo Chui ("Mr. Ngudjolo").²

I. PROCEDURAL HISTORY

1. On 12 August 2013, the Defence of Mr. Ngudjolo submitted the Request objecting to the appointment of Andrea Valdivia (Ms. Valdivia") as legal assistant to the Defence team of Bosco Ntaganda ("Mr. Ntaganda")³ and requesting that the Chamber

D'INTERDIRE l'Assistante Juridique Andrea Valdivia, à titre conservatoire et par précaution, de toutes prestations au sein de l'équipe de défense de Bosco Ntaganda jusqu'à élucidation complète par voie judiciaire de la question du conflit d'intérêts;

D'ENJOINDRE à la Section d'appui aux conseils de suspendre immédiatement, à titre de mesure de précaution, les effets de la désignation de Maître Andrea Valdivia en qualité d'Assistante juridique au sein de l'équipe de défense de Bosco Ntaganda;

DE FIXER un calendrier d'échanges de mémoires permettant aux parties, à savoir le Procureur, le Greffe, la Section d'appui aux conseils, la Défense de Bosco Ntaganda, M^e Andrea Valdivia et la Défense de Mathieu Ngudjolo de débattre de la problématique de l'existence ou non du conflit d'intérêts entre les deux affaires Ntaganda et Ngudjolo dans la situation en République Démocratique du Congo.

D'INVITER les Barreaux de Bruxelles et du Québec auxquels appartiennent Maître Kilenda (Ordre français des avocats de Bruxelles), Mes Marc Desalliers et Andrea Valdivia (Québec) à éclairer éventuellement la Chambre sur les règles déontologiques applicables en l'espèce et de faire toutes propositions utiles susceptibles de favoriser et d'améliorer l'exercice normal du métier d'avocat au sein de la Cour pénale internationale.

¹ Pre-Trial Chamber II, "Decision Designating a Single Judge", 21 March 2013, ICC-01/04-02/06-40.

² ICC-01/04-02/06-82-Conf and its public annexes A-E. The Request was notified to the Chamber on 14 August 2013.

³ ICC-01/04-02/06-82-Conf, para. 1 and p. 15.

DE LIMITER le nombre de pages desdits mémoires à cent (100) étant donné l'importance de cette question pour le bon fonctionnement de la Cour pénale internationale.

DE TENIR COMPTE, dans la fixation du calendrier d'échanges de mémoires, du fait que tant le Procureur que la Défense sont actuellement occupés à échanger leurs écritures finales relativement à l'appel pendant devant la Chambre d'appel contre le jugement d'acquiescement de Mathieu Ngudjolo rendu par la Chambre de première instance II en date du 18 décembre 2012, les dernières écritures devant être déposées le 29 août 2013.

DE FIXER, après échange de mémoires, une date pour les plaidoiries en vue de permettre aux parties de développer oralement leurs conclusions écrites.⁴

2. On 15 August 2013, the Defence of Mr. Ntaganda filed its "Réponse de la Défense de M. Ntaganda à la Requête urgente de la Défense de Mathieu Ngudjolo déposée le 14 août 2013 relative à la désignation de Me Andrea Valdivia en qualité légale au sein de l'équipe de la Défense de M. Ntaganda" (the Response of Mr. Ntaganda").⁵

3. On the same day, the Single Judge issued the "Decision Requesting Observations from the Defence of Bosco Ntaganda and the Counsel Support Section".⁶

4. On 16 August 2013, Defence counsel of Mr. Ngudjolo submitted the "Demande de réplique à la 'Réponse de la Défense de M. Ntaganda à la Requête urgente de la Défense de Mathieu Ngudjolo déposée le 14 août 2013 relative à la désignation de Maître Andrea Valdivia en qualité d'assistante légale au sein de l'équipe de la Défense de M. Ntaganda'" to which it submitted an addendum on 19 August 2013 entitled "ADDENDUM à la Demande de réplique à la 'Réponse de la Défense de M. Ntaganda à la Requête urgente de la Défense de Mathieu Ngudjolo déposée le 14 août 2013 relative à la désignation de Maître Andrea Valdivia en qualité d'assistante légale au sein de l'équipe de la Défense de M. Ntaganda'" (collectively, the "Defence Request for Leave to Reply to the Response of Mr. Ntaganda").⁸ The Defence of Mr. Ngudjolo requested leave from the Chamber to reply to the Response of Mr. Ntaganda but presented its reply at the same time.

⁴ ICC-01/04-02/06-82-Conf, pp. 15 and 16.

⁵ ICC-01/04-02/06-83-Conf.

⁶ Pre-Trial Chamber II, 15 August 2013, ICC-01/04-02/06-84-Conf.

⁷ ICC-01/04-02/06-85-Conf.

⁸ ICC-01/04-02/06-86-Conf.

5. On 23 August 2013, the Defence of Mr. Ntaganda submitted the "Réponse de la Défense de M. Bosco Ntaganda conformément à la 'Decision Requesting Observations from the Defence of Bosco Ntaganda and the Counsel Support Section'".⁹

6. On the same day, the Registrar submitted his "Observations on the urgent request presented by counsel for Mr Mathieu Ngudjolo Chui on 12 August 2013 (ICC-01/04-02/06-82-Conf)" (the "Registrar's Observations" or the "Observations").¹⁰ He also requested that his Observations be re-classified as public, except for the annexes.

7. On 26 August 2013, the Defence of Mr. Ngudjolo filed the "Demande de réplique aux 'Observations on the urgent request presented by counsel for Mr Mathieu Ngudjolo Chui on 12 August 2013 (ICC-01/04-02/06-82-Conf)'" (the "Defence Request for Leave to Reply to the Registrar's Observations") requesting leave from the Chamber to reply to the Registrar's Observations in which, while requesting such leave, it presented the reply at the same time.¹¹

II. THE SUBMISSIONS

The Request

8. Defence counsel of Mr. Ngudjolo, Jean-Pierre Kilenda Kakengi Basila ("Mr. Kilenda") maintains that the Registry's confirmation of the appointment of Ms. Valdivia as member of the Defence team of Mr. Ntaganda violated the Code of Professional Conduct for counsel and infringed the rights of Mr. Ngudjolo.¹² The essence of the Defence submission is reflected below in what follows.

9. Mr. Kilenda provides first some factual background and informs the Chamber that Ms. Valdivia previously formed part of the Defence team of Mr. Ngudjolo since

⁹ ICC-01/04-02/06-89-Conf.

¹⁰ ICC-01/04-02/06-90-Conf and its confidential annexes 1-7.

¹¹ ICC-01/04-02/06-91-Conf.

¹² ICC-01/04-02/06-82-Conf, para. 42.

19 November 2009 as legal assistant.¹³ On 18 July 2013 she allegedly presented her resignation without any further reasons to Mr. Kilenda.¹⁴ A copy thereof was purportedly also provided to the Counsel Support Section (the "CSS")¹⁵ which took note of the resignation and invited Ms. Valdivia to proceed with the check-out procedure.¹⁶

10. It is further maintained that on 6 August 2013 the CSS informed Mr. Kilenda that Ms. Valdivia had been designated legal assistant to the Defence team of Mr. Ntaganda and that the CSS would finalize this appointment.¹⁷ Mr. Kilenda submits that on the same day, he requested in writing that the CSS does not proceed with such acknowledgment of or suspend the appointment of Ms. Valdivia, in light of a "manifest" conflict of interest; in case Ms. Valdivia is appointed, to send him a copy of the document acknowledging such appointment.¹⁸ He also maintains that already in July 2013, he had objected to the recruitment of Ms. Valdivia on grounds of "evident" conflict of interest between the present case and the case of *The Prosecutor v Mathieu Ngudjolo Chui* (the "Ngudjolo Case").¹⁹

11. Mr. Kilenda further contends that by letter dated 7 August 2013, the CSS informed him of the appointment of Ms. Valdivia thus rejecting the Defence requests set forth in the abovementioned letter dated 6 August 2013. The CSS explained that it was not within its mandate to resolve issues of potential conflict of interests between counsel or to object to any appointment of counsel.²⁰

12. Mr. Kilenda also avers that the CSS treated him in a discriminatory manner. He recalls and elaborates on two instances in 2008 and 2009 when conflict of interest considerations were addressed with regard to two professionals who wished to join

¹³ ICC-01/04-02/06-82-Conf, para. 3.

¹⁴ ICC-01/04-02/06-82-Conf, para. 3.

¹⁵ ICC-01/04-02/06-82-Conf, para. 3.

¹⁶ ICC-01/04-02/06-82-Conf, para. 4.

¹⁷ ICC-01/04-02/06-82-Conf, para. 5.

¹⁸ ICC-01/04-02/06-82-Conf, para. 6.

¹⁹ *Ibid.*

²⁰ ICC-01/04-02/06-82-Conf, paras 7 and 8.

his team.²¹ It is purported that Marc Dessalier, lead counsel in the present case, is allowed to proceed with the appointment of Ms. Valdivia in breach of articles 16(1) and 8(1) of the Code of Professional Conduct for counsel (the "Code of Conduct").²² Mr. Kilenda is of the view that this reveals a discriminatory treatment.²³

13. Finally, on 12 August 2013, Mr. Kilenda submits that the head of the CSS invited him to present his request to the Chamber seized of the present case.²⁴

14. In support of his legal arguments, Mr. Kilenda refers, *inter alia*, to articles 8, 12, and 16 of the Code of Conduct. He purports that the interests of Mr. Ngudjolo and those of Mr. Ntaganda are divergent as they allegedly belong to different military organisations.²⁵ At the same time, Mr. Ngudjolo and Mr. Ntaganda (a co-perpetrator with Thomas Lubanga Dyilo)²⁶, who also belong to different ethnicities, are prosecuted for the same crimes falling within the same time period in the situation of the Democratic Republic of the Congo.²⁷ If appointed, Ms. Valdivia would defend opposing interests in one and the same situation.²⁸

15. In case an "*acteur judiciaire*" is in a conflict situation, it is alleged that according to the Court's jurisprudence that person may temporarily refrain from exercising his/her functions until such time that the relevant chamber resolve the matter.²⁹ Reference is made to a precedent set by Pre-Trial Chamber in the course of the pre-trial proceedings in the *Ngudjolo* Case.³⁰

16. Mr. Kilenda purports that Ms. Valdivia is prevented from representation pursuant to article 12(1)(b) of the Code of Conduct as she was privy to confidential

²¹ ICC-01/04-02/06-82-Conf, paras 9 and 10.

²² ICC-01/04-02/06-82-Conf, para. 11.

²³ *Ibid.*

²⁴ ICC-01/04-02/06-82-Conf, para. 13.

²⁵ ICC-01/04-02/06-82-Conf, para. 16.

²⁶ ICC-01/04-02/06-82-Conf, para. 19.

²⁷ ICC-01/04-02/06-82-Conf, paras 17, 18 and 22.

²⁸ ICC-01/04-02/06-82-Conf, para. 22.

²⁹ ICC-01/04-02/06-92-Conf, para. 24.

³⁰ ICC-01/04-02/06-92-Conf, para. 24.

information in the *Ngudjolo* Case.³¹ The fact that she contacted, without informing Mr. Kilenda, her former supervisor, the Defence counsel of Mr. Ntaganda and concluded unilaterally that there was no conflict of interest indicates that there is a violation of "*secrets professionnels*" (professional secrets).³² Rather, Mr. Kilenda suggests, Ms. Valdivia, should have declined the appointment which is prejudicial to Mr. Ngudjolo.³³ The Defence questions her loyalty and alleges that her motivation is based on personal financial considerations which, as such, cannot do away a counsel's obligation to respect his/her duties "until the end".³⁴ Even though at the appellate stage, the *Ngudjolo* Case is not yet terminated.³⁵ To leave a client for the reason that the case draws to a close signifies lack of loyalty; if all members of a Defence team would act in the same manner, the clients would be left alone.³⁶

17. By mail dated 9 August 2013, the CSS allegedly requested Defence counsel of Mr. Ntaganda to limit Ms. Valdivia's access to public information only.³⁷ All efforts by Mr. Kilenda to move the Registry to cancel the acknowledgment of appointment of Ms. Valdivia were in vain.³⁸ Mr. Kilenda complains about an alleged unequal treatment of counsel before the Court and recalls the two instances where professionals wishing to join Mr. Kilenda's team were pre-empted from doing so.³⁹

18. According to Mr. Kilenda, in case there is an issue of conflict of interest between one or more counsel, the Registry, as a neutral organ of the Court,⁴⁰ should refrain from acknowledging any appointment so as to allow counsel to resolve their differences either judicially or extra-judicially.⁴¹ Moreover, the Registry cannot absolve itself from entertaining the issue of the existence of a potential conflict of

³¹ ICC-01/04-02/06-82-Conf, para. 26.

³² ICC-01/04-02/06-82-Conf, para. 26.

³³ ICC-01/04-02/06-82-Conf, para. 28.

³⁴ ICC-01/04-02/06-82-Conf, para. 31.

³⁵ ICC-01/04-02/06-82-Conf, para. 32.

³⁶ ICC-01/04-02/06-82-Conf, para. 32.

³⁷ ICC-01/04-02/06-82-Conf, para. 27.

³⁸ ICC-01/04-02/06-82-Conf, para. 33.

³⁹ ICC-01/04-02/06-82-Conf, para. 33.

⁴⁰ See also ICC-01/04-02/06-82-Conf, paras 38 and 39.

⁴¹ ICC-01/04-02/06-82-Conf, para. 34.

interest as it replaces, to some extent, the bar association which typically ensures discipline of lawyers.⁴² In this context it is alleged that the Registry refrained from requesting a written consent from Mr. Ngudjolo and his Defence counsel, as was previously requested from Mr. Kilenda in the context of recruiting a professional of his team.⁴³ In the view of Mr. Kilenda, this reveals discriminatory treatment *vis-à-vis* Mr. Ngudjolo and his counsel.

Response of Mr. Ntaganda

19. The Defence of Mr. Ntaganda contends that the Request is inadmissible and unfounded⁴⁴ and requests that it be rejected.⁴⁵

20. It contends that on 12 July 2013, Ms. Valdivia informed Mr. Kilenda that she wished to join the Defence team of Mr. Ntaganda.⁴⁶ However, when proposing to leave on 20 August 2013, after the written submissions in the appeal proceedings in the *Ngudjolo* Case, Mr. Kilenda objected.⁴⁷ On 16 and 17 July 2013, Defence counsel of Mr. Ntaganda unsuccessfully tried to reach Mr. Kilenda with a view to understanding the motives for such objection.⁴⁸ A written invitation to discuss the matter was rejected by Mr. Kilenda.⁴⁹

21. On 18 July 2013, Defence counsel of Mr. Ntaganda clarified in writing that, according to him, there was no conflict of interest and that confidentiality of information acquired within the context of the *Ngudjolo* Case would be respected.⁵⁰ An offer to discuss the matter was made again which was rejected by Mr. Kilenda the same day.⁵¹

⁴² ICC-01/04-02/06-82-Conf, para. 35.

⁴³ ICC-01/04-02/06-82-Conf, para. 40.

⁴⁴ ICC-01/04-02/06-83-Conf, para. 4.

⁴⁵ ICC-01/04-02/06-83-Conf, p. 13.

⁴⁶ ICC-01/04-02/06-83-Conf, para. 7.

⁴⁷ ICC-01/04-02/06-83-Conf, para. 7.

⁴⁸ ICC-01/04-02/06-83-Conf, para. 8.

⁴⁹ ICC-01/04-02/06-83-Conf, para. 9.

⁵⁰ ICC-01/04-02/06-83-Conf, para. 10.

⁵¹ *Ibid.*

22. With regard to the purported communications between Ms. Valdivia and Mr. Kilenda, the Defence of Mr. Ntaganda alleges the following: on 17 July 2013, Mr. Kilenda requested Ms. Valdivia to state within 24 hours the reason for which Defence counsel of Mr. Ntaganda wished to speak to him. Failing that, she should consider herself no longer part of the Defence team of Mr. Ngudjolo.⁵² With email dated 18 July 2013, Mr. Kilenda purportedly accused Ms. Valdivia for having disclosed confidential information to the Defence counsel of Mr. Ntaganda thus infringing her professional duties.⁵³ Ms. Valdivia allegedly rejected such claim⁵⁴ and submitted her resignation the same day⁵⁵.

23. On 24 July 2013, Defence counsel for Mr. Ntaganda requested the CSS to proceed with the appointment of Ms. Valdivia as legal assistant to the Defence team of Mr. Ntaganda.⁵⁶ The Registry, in turn, allegedly informed Mr. Kilenda on 29 July 2013 about the forthcoming appointment of Ms. Valdivia inviting him to raise any question with Defence counsel of Mr. Ntaganda.⁵⁷ No such consultation took place and the Registry acknowledged the new appointment of Ms. Valdivia on 1 August 2013.⁵⁸ On 6 August 2013, Mr. Kilenda requested the Registry to suspend the appointment on the grounds that there was a conflict of interest.⁵⁹ The following day, the Registry requested Mr. Kilenda either to resolve the matter amicable with Defence counsel of Mr. Ntaganda or to seize the Chamber of this matter.⁶⁰ By letter dated 9 August 2013, Mr. Kilenda, *inter alia*, renewed his request to cancel ("*retrait*") the appointment of Ms. Valdivia and requested that the Chamber be seized by the Registry.⁶¹ On the same day, the Registry invited yet again Mr. Kilenda to share his concerns with Defence counsel of Mr. Ntaganda to which Mr. Kilenda allegedly

⁵² ICC-01/04-02/06-83-Conf, para. 11.

⁵³ ICC-01/04-02/06-83-Conf, para. 11.

⁵⁴ ICC-01/04-02/06-83-Conf, para. 11.

⁵⁵ ICC-01/04-02/06-83-Conf, para. 12.

⁵⁶ ICC-01/04-02/06-83-Conf, para. 13.

⁵⁷ ICC-01/04-02/06-83-Conf, para. 14.

⁵⁸ ICC-01/04-02/06-83-Conf, para. 15.

⁵⁹ ICC-01/04-02/06-83-Conf, para. 16.

⁶⁰ ICC-01/04-02/06-83-Conf, para. 17.

⁶¹ ICC-01/04-02/06-83-Conf, para. 18.

responded, he would never ("*jamais*") communicate with him.⁶² By letter dated 20 August 2013, it is purported that the Registry dismissed any claim of discrimination against Defence counsel of Mr. Ngudjolo.⁶³

24. The Defence of Mr. Ntaganda stresses that at no point in time was confidential information, to which Ms. Valdivia may have been privy to, discussed or revealed, a point which was purportedly confirmed by Ms. Valdivia by email dated 18 July 2013.⁶⁴ It is also maintained that the first discussion between Ms. Valdivia and Defence counsel of Mr. Ntaganda was held on 14 August 2013.⁶⁵

25. The Defence of Mr. Ntaganda also responds to the specific requests advanced by Mr. Kilenda. With regard to the request to suspend the appointment of Ms. Valdivia, the Defence of Mr. Ntaganda responds that such suspension was not ordered by the Court and that the example, according to which Pre-Trial Chamber I ordered the suspension of the participation of a legal representative of victims, is not applicable here.⁶⁶ The Defence of Mr. Ntaganda is of the view that in any event, Mr. Kilenda did not raise any serious argument supporting the existence of a conflict of interest situation.⁶⁷ It is further highlighted that no confidential information was shared and that Mr. Kilenda refused to discuss the matter with his colleague.⁶⁸

26. As regards the request to set a calendar for exchanging submissions which takes into consideration the lodging of the last written submissions in the appeals proceedings in the *Ngudjolo* Case by 29 August 2013, the Defence of Mr. Ntaganda expresses its objection.⁶⁹ Defence counsel recalls the time-schedule established by the Chamber for this case and points out that he requires all resources as of now.⁷⁰

⁶² ICC-01/04-02/06-83-Conf, para. 18.

⁶³ ICC-01/04-02/06-83-Conf, para. 19.

⁶⁴ ICC-01/04-02/06-83-Conf, paras 23, 24 and 30.

⁶⁵ ICC-01/04-02/06-83-Conf, para. 25.

⁶⁶ ICC-01/04-02/06-83-Conf, paras 27 and 28.

⁶⁷ ICC-01/04-02/06-83-Conf, para. 29.

⁶⁸ ICC-01/04-02/06-83-Conf, paras 30 and 31.

⁶⁹ ICC-01/04-02/06-83-Conf, para. 32.

⁷⁰ ICC-01/04-02/06-83-Conf, paras 33 and 34.

27. In relation to the request that the Chamber consult the bar associations of Brussels and Québec in relation to the regulations applicable in this case, Defence counsel of Mr. Ntaganda recalls that the Court has its own Code of Conduct and that those bar associations are not familiar with the applicable regulations of the Court.⁷¹

28. With regard to the request to grant counsel to submit further written submissions comprising up to 100 pages each in preparation of a hearing, the Defence of Mr. Ntaganda responds that such extension is not necessary and that no "exceptional circumstances" have been invoked within the meaning of regulation 37(2) of the Regulations of the Court.⁷²

29. The Defence of Mr. Ntaganda reserved its right to present its arguments to the allegation that there exists a conflict of interest in relation to Ms. Valdivia's appointment at a later stage, should the Chamber consider it appropriate.⁷³

Registrar's Observations

30. The Registrar maintains that "in all cases where conflicts of interest are at issue as an impediment to legal representation", he has applied a "consistent policy" as regards the assessment of the facts and circumstances of a particular case, drawing counsel's attention to the issue and facilitating communication between counsel.⁷⁴ He also adds that he does not appoint members to a team but "acknowledges and formalises appointment (...) and only appoints counsel in the case of Regulation 73 of the Regulations of the Court or as ordered by the Chamber".⁷⁵

31. He submits that in case a client appoints counsel or legal representative, the Registrar's duty is to conduct a series of checks "which can lead to the confirmation or refusal of the appointment where the legal basis is granted to the Registrar".⁷⁶ To

⁷¹ ICC-01/04-02/06-83-Conf, paras 35-38.

⁷² ICC-01/04-02/06-83-Conf, paras 39-43.

⁷³ ICC-01/04-02/06-89-Conf, para. 2.

⁷⁴ ICC-01/04-02/06-90-Conf, para. 2.

⁷⁵ ICC-01/04-02/06-90-Conf, footnote 3.

⁷⁶ ICC-01/04-02/06-90-Conf, para. 4.

this end, reference is made, for example to the question whether counsel fulfils mandatory legal requirements to be admitted to the list of counsel.⁷⁷

32. However, the Registrar suggests that his duty is discharged if he has highlighted the issue of a potential conflict of interest to and facilitated communication on the matter between counsel allowing them to settle the matter within a reasonable time. He cannot then “indefinitely suspend the appointment” but “must formalize it when appointing counsel sees no conflict of and insists on the appointment”.⁷⁸ The Registrar submits that the Court’s applicable legal framework does not allow him to “to refuse or indefinitely suspend” the acknowledgment of appointment of a member of a Defence team “solely on the grounds of an alleged conflict of interest”.⁷⁹ The Registrar’s role is seen to be one of “mainly assisting and facilitating communication”.⁸⁰

33. Rather, it is for counsel to settle the matter between them and inform the Registry accordingly or seize the Chamber “for final determination”⁸¹ as the Chamber “has the power to adjudicate a controversy” involving the existence of a potential conflict of interest.⁸² The Registry “implements any measure ultimately adopted by the Chamber in this regard”.⁸³

34. With regard to the present case, the Registrar recalls that he explained clearly his role to Mr. Kilenda on several occasions and invited him to contact the counsel of Mr. Ntaganda.⁸⁴ Mr. Kilenda was also advised to address the Chamber, “as has been the practice of the [c]hambers of the Court to date in the cases of Messrs Bemba,

⁷⁷ ICC-01/04-02/06-90-Conf, para. 4.

⁷⁸ ICC-01/04-02/06-90-Conf, para. 5.

⁷⁹ ICC-01/04-02/06-90-Conf, para. 1.

⁸⁰ ICC-01/04-02/06-90-Conf, para. 6. Reference is made to a decision by Trial Chamber IV, “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011, ICC-02/05-03/09-168.

⁸¹ ICC-01/04-02/06-90-Conf, para. 5.

⁸² This argument has been repeatedly made in the Registrar’s Observations, see ICC-01/04-02/06-90-Conf, paras 1, 5, 6, 10 and 13.

⁸³ ICC-01/04-02/06-90-Conf, para. 1.

⁸⁴ ICC-01/04-02/06-90-Conf, paras 9 and 11.

Banda and Jerbo and Muthaura, Kenyatta and Ali".⁸⁵ In all those cases, counsel raising the existence of a potential conflict of interest presented their arguments before the Chamber "without asking the Registry to implement any injunctive action or relief".⁸⁶

35. Finally, the Registrar rejects any claims of discriminatory treatment raised by Mr. Kilenda. It is alleged that these claims stem from Defence counsel's misinterpretation of the Registry's role.⁸⁷

II. APPLICABLE LAW

36. The Single Judge notes articles 21(1)(a) and (3) of the Statute, rule 20 of the Rules of Procedure and Evidence (the Rules"), regulations 23 *bis* (3) and 24 of the Regulations of the Court (the "Regulations") and article 12 of the Code of Conduct.

37. The Single Judge recalls, in particular, article 12 of the Code of Conduct which reads, in relevant part:

1. Counsel shall not represent a client in a case:

(a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation; or

(b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

2. In the case of paragraph 1(a) of this article, where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained. Such notice shall be provided in a manner consistent with counsel's duties of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence.

⁸⁵ ICC-01/04-02/06-90-Conf, para. 10.

⁸⁶ ICC-01/04-02/06-90-Conf, para. 10.

⁸⁷ ICC-01/04-02/06-90-Conf, para. 13.

III. DETERMINATION BY THE SINGLE JUDGE

Preliminary Matter

38. The Single Judge observes that in the Defence Request for Leave to Reply to the Response of Mr. Ntaganda and the Defence Request for Leave to Reply to the Registrar's Observations, Mr. Kilenda develops already his arguments on the substance in reply to some arguments put forth in the Response of Mr. Ntaganda and the Registrar's Observations. The Single Judge observes that according to regulation 24(5) of the Regulations, participants may only reply to responses with *prior* leave of the Chamber. This includes observations which have been submitted in response to a request, as ordered by the Chamber. Thus, submissions on the substance may only be made *after* the Chamber has authorized the participant concerned to do so. In the absence of the Chamber's authorization to grant leave, the submissions in those requests must be dismissed.

Merits

39. In essence, the Chamber is seized of a request to suspend the appointment of Ms. Valdivia as a precautionary measure and, ultimately, to resolve the dispute between counsel over the existence of a purported conflict of interest. Defence counsel raising the issue of conflict of interest was advised by the Registry to approach the Chamber on this issue.

40. Regardless of Mr. Kilenda's claim that there exists such a conflict of interest, the Single Judge is of the view that there is no legal basis available under the Court's statutory documents to intervene in the present case. Yet, before delving into the question related to the legal basis, the Single Judge considers it important to outline the following.

41. The Registry is the organ "responsible for the non-judicial aspects of the administration of the Court".⁸⁸ Rule 20 of the Rules encapsulates the responsibilities

⁸⁸ Article 43(1) of the Statute.

of the Registrar, the “principal administrative officer of the Court”,⁸⁹ relating to the rights of the defence and enumerates some of the functions in a non-exhaustive manner. This includes, for example, to “[p]rovide support, assistance and information to all defence counsel appearing before the Court”⁹⁰ and to “[p]rovide the defence with such facilities as may be necessary for the direct performance of the duty of the defence”⁹¹. Thus, issues relating to the administration of defence-related matters, for example, the qualifications of counsel,⁹² appointment of counsel,⁹³ availability of resources and legal aid⁹⁴ fall squarely under the authority of the Registrar who has created to this purpose a specialized section within the Registry, the CSS.

42. It is only in specific instances and under limited circumstances set out in the Court’s statutory documents that the Chamber may interfere in the Registrar’s daily administration of defence-related matters.

43. Mr. Kilenda as well as the Registrar make express reference to article 12(1)(b) of the Code of Conduct and its related jurisprudence arguing that it served as a legal basis for other chambers to intervene on this matter. For clarification purposes, the Single Judge deems it important to explain the realm of article 12(1)(b) of the Code of Conduct and its relevance to the present case. As the clear wording of the provision suggests, this avenue may only be invoked in case a *former staff member of the Court*,⁹⁵ who is privy to confidential information to a particular case, appears as counsel *in that same case*. Only in this instance, the Chamber, at the request of counsel, is authorized to lift the impediment to representation “if deemed justified in the interests of justice”.

⁸⁹ Article 43(2), first sentence, of the Statute.

⁹⁰ Rule 20(1)(b) of the Rules.

⁹¹ Rule 20(1)(e) of the Rules.

⁹² Rule 22 of the Rules.

⁹³ Rules 21(2) and 22(2) of the Rules.

⁹⁴ Regulations 83 to 85 of the Regulations.

⁹⁵ Article 44 of the Statute; Rule 101.1 of the Staff Rules (Annex to ICC/AI/2005/003).

44. Obviously, the Single Judge cannot resort to this provision as Ms. Valdivia was never a staff member of the Court in accordance with article 12(1)(b) of the Code of Conduct. It is therefore flawed to assert 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 [c]hambers of the Court to date in the cases of Messrs Bemba, Banda and Jerbo and Muthaura, Kenyatta and Ali".⁹⁶ Those cases referred to by the Registrar involved different facts since they addressed the impediment to representation of counsel who had been previously members of the Office of the Prosecutor.⁹⁷ These precedents are obviously irrelevant to the consideration of the present case.

45. The Single Judge, in an effort to exhaust other possible avenues, examines in addition article 12(1)(a) in conjunction with article 12(2) of the Code of Conduct, which embrace a second scenario suggesting the Chamber's involvement. Article 12(1)(a) of the Code of Conduct foresees that there may be an impediment for counsel to represent a client "if the case is the same as or substantially related to another case" in which counsel represents or represented another client and where "the interests of the client are incompatible with the interests of the former client", unless both clients consent. Pursuant to article 12(2) of the Code of Conduct, "*counsel shall inform the Chamber (...) of the conflict and the consent obtained*". It is evident that the provision imposes an obligation *on counsel* to inform the Chamber. However, said provision does not envisage an active role for the Chamber which goes beyond receiving this information. Had the drafters of this provision intended a broader judicial involvement, they would have explicitly spelled it out in the text of article 12(2) of the Code of Conduct. This is actually the case with the text of article

⁹⁶ Registrar's Observations, para. 10 (emphasis added).

⁹⁷ Trial Chamber III, "Decision on the 'Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team'", 7 May 2010, ICC-01/05-01/08-769; Trial Chamber IV, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence'", 13 July 2011, ICC-02/05-03/09-179; Pre-Trial Chamber II, "Second Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 9 March 2012, ICC-01/09-02/11-405.

12(1)(b) of the Code of Conduct which clearly mandates the Chamber to intervene in a well-defined situation, namely to lift the impediment to representation upon a request lodged by a counsel. It follows that article 12(1)(a) and (2) of the Code of Conduct also cannot serve as a legal basis for acceding to the Request.

46. In this context, the Single Judge wishes to highlight that it is first and foremost incumbent upon the Registrar, and by extension the CSS, to address all defence-related issues which are brought to his attention. It is questionable, in that regard, whether "the Registrar's role in this respect is one of mainly assisting and facilitating communication"⁹⁸. A specialized section within the Registry, such as the CSS, should instead direct the interested party as to the appropriate legal avenues. In the case at hand, the CSS could have directed the interested party towards the disciplinary regime set out under Chapter 4 of the Code of Conduct.

47. As article 12 of the Code of Conduct does not provide a legal basis for the Single Judge to entertain the questions discussed above, the Single Judge does not deem it necessary to address the subsequent requests to (1) instruct the CSS; (2) receive further written submissions⁹⁹ on the issue within specified time limits; (3) request the bar associations of Brussels and Québec to submit observations; and (4) eventually hold a hearing.

⁹⁸ ICC-01/04-02/06-90-Conf, para. 2

⁹⁹ This includes the request to allow the Defence of Mr. Ngudjolo to submit a document of up to 100 pages.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) REJECTS** the Request;
- b) DISMISSES** the Defence Request for Leave to Reply to the Response of Mr. Ntaganda and the Defence Request for Leave to Reply to the Registrar's Observations;
- c) REJECTS** the Registrar's request to re-classify his Observations as public;
- d) ORDERS** the Registrar to re-classify annexes A to E to ICC-01/04-02/06-82 as confidential.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 20 September 2013

At The Hague, The Netherlands