

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

No.: ICC-01/05-01/13  
Date: 7 February 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, AIME KILOLO  
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU  
AND NARCISSE ARIDO***

**Confidential**

**Prosecution Submission on the Appointment of Defence Counsel**

**Source: The Office of the Prosecutor**

**Document to be notified in accordance with Regulation 31 of the *Regulations of the***

***Court to:***

**The Office of the Prosecutor**

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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Others**

## I. Introduction

1. The Office of the Prosecutor ("Prosecution") objects to the appointment of Jean-Pierre Kilenda Kakengi Basila, Counsel for Suspect Fidèle Babala Wandu. As set out below, the propriety of Mr. Kilenda's representation should be determined by the Single Judge of Pre-Trial Chamber II ("Chamber").

2. Contrary to Article 12 of the Code of Professional Conduct for Counsel ("Code"), Counsel has formerly represented a client in this case, whose interests are incompatible with those of his current client.<sup>1</sup> Further, the record of these proceedings provides no clear indication that Counsel has obtained the full and informed consent of both, Mr. Babala and Mr. Kilolo,<sup>2</sup> and notified duly the Chamber.<sup>3</sup> These are impediments to representation.

3. The Chamber's review of Mr. Kilenda's appointment is necessary to ensure the absence of present or latent conflicts of interest,<sup>4</sup> and to preserve the integrity and fairness of the proceedings.

## II. Procedural History

4. On 29 November 2013, Mr. Kilolo appointed Mr. Kilenda as his Defence Counsel.<sup>5</sup> Mr. Kilenda also represented Mr. Kilolo before the Belgian authorities

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<sup>1</sup> Article 12(1)(a) of the Code; see also ICC-01/09-02/11-365 OA3, Prosecutor v. Muthaura, Kenyatta and Ali, Judgment on the Appointment of Defence Counsel, 10 November 2011, paras. 48 and 54 ("[t]he Code is a part of the Court's applicable law under article 21(1)(a) of the Statute, which requires the Court to apply, in the first place, its Statute, Elements of Crimes and Rules of Procedure and Evidence. Rule 8 of the Rules of Procedure and Evidence mandates the drawing up of a Code of Professional Conduct for counsel.").

<sup>2</sup> Article 12(1)(a) of the Code.

<sup>3</sup> See Article 12(4) of the Code.

<sup>4</sup> See Article 16(1) and (3) of the Code.

<sup>5</sup> ICC-01/05-01/13-26-Anxs I and II, *Enregistrement de la désignation de Maître Jean-Pierre Kilenda Kakengi Basila par M. Aimé Kilolo comme son conseil et de l'acceptation de la désignation*, 29 November 2014.

following his arrest and prior to his surrender to the Court.<sup>6</sup>

5. On 3 December 2013, Mr. Babala appointed Mr. Jean-Pierre Fofé Djofia Malewa as his Defence Counsel.<sup>7</sup>

6. On 17 January 2014, Mr. Babala discharged his Counsel and appointed Mr. Kilenda to represent him.<sup>8</sup>

### III. Confidentiality

7. This filing is classified as “Confidential” as it refers to material with the same designation.

### IV. Submissions

8. The Code is “part of the Court's applicable law under article 21(1)(a) of the Statute.”<sup>9</sup> Article 12 of the Code regulates impediments to representation.<sup>10</sup> Subsection (1)(a) thereof prohibits counsel from appearing in a case which “... is the same as or substantially related to another case in which counsel ... 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.”

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<sup>6</sup> CAR-OTP-0072-0150, *Interrogatoire d’inculpé*, 25 November 2013.

<sup>7</sup> ICC-01/05-01/13-28- Anxs I and II, *Enregistrement de la désignation de Maître Jean-Pierre Fofé Djofia Malewa par M. Fidèle Babala Wandu comme son conseil et de l’acceptation de la désignation, accompagnée de la prestation de serment du conseil*, 4 December 2013.

<sup>8</sup> ICC-01/05-01/13-107, *Enregistrement de deux lettres de M. Fidèle Babala Wandu et de M. Aimé Kilolo Musamba relatives à la désignation de conseil, reçues le 15 janvier 2014 par le Greffe*, 17 January 2014, paras. 1 and 2.

<sup>9</sup> ICC-01/09-02/11-365 OA3, para. 49.

<sup>10</sup> Article 12(1)(a) of the Code.

9. Mr. Kilenda's appointment requires the Chamber's review because he formerly represented a client in this case.<sup>11</sup> As the record stands, there is at least an impediment to representation, if not a present or latent conflict of interest.

**A. Mr. Kilenda formerly represented a client in this case**

10. Messrs. Kilolo and Babala are co-suspects in this case since its inception.<sup>12</sup> Prior to Mr. Kilenda's appointment as Defence Counsel for Mr. Babala, he represented Mr. Kilolo for over two months. Even before Mr. Kilolo's transfer to the seat of the Court on 25 November 2013, Mr. Kilenda represented him before the Belgian authorities, shortly after his arrest.<sup>13</sup>

**B. Suspects Babala and Kilolo have incompatible interests**

11. Suspects Babala and Kilolo have incompatible interests in this case. Both are alleged participants in a criminal scheme to corrupt Defence witnesses and to present false evidence to the Trial Chamber in the *Bemba* case.<sup>14</sup> Significantly, Mr. Babala allegedly provided some of the money paid by Mr. Kilolo to Defence witnesses in exchange for their false testimony.<sup>15</sup> This creates an obvious and serious tension among the two Suspects' potential defences, rising to the level of a conflict of interest.

12. Given his previous representation, Mr. Kilenda cannot use information obtained from Mr. Kilolo when acting as his Counsel either to Mr. Kilolo's detriment or to Mr. Babala's advantage. If, for example, Mr. Kilolo provided Mr. Kilenda with

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<sup>11</sup> ICC-01/05/01/13.

<sup>12</sup> ICC-01/05-67-Conf, Prosecution's Application for Warrant of Arrest, 19 November 2013, paras. 4, 44 and 69.

<sup>13</sup> CAR-OTP-0072-0150, *Interrogatoire d'inculpé*, dated 25 November 2013.

<sup>14</sup> See ICC-01/05-67 Conf, paras. 4, 44 and 69; see also ICC-01/05-01/13-1-Red2-tENG, Public redacted version of the Warrant of Arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 5 December 2013, paras. 14, 16 and 18.

<sup>15</sup> ICC-01/05-67 Conf, paras. 5, 46 and 70.

information exonerating Mr. Babala, Mr. Kilenda would be precluded from using this information either directly or derivatively in the interests of his present client. Similarly, should Mr. Kilolo testify, Mr. Kilenda could not cross-examine him on information that he might have acquired as Mr. Kilolo's Counsel.

13. Mr. Kilenda's responsibilities to his former client thus materially limit his duty to his current one, and his appointment is *per se* inconsistent with his adversarial position in these proceedings. Particularly, the appointment presents a significant risk to Mr. Babala's right to adequate representation and conversely, risks Mr. Kilolo's right to maintain the confidence of communications with his former Counsel, pursuant to Article 67(b) of the Rome Statute ("Statute").<sup>16</sup>

14. Although Messrs. Kilolo and Babala have understandably not announced their respective defences, each could potentially blame the other for the crimes charged. Such directly adverse positions are hardly uncommon among co-accused. The critical issue is the likelihood that these incompatible interests will materialise. Should this occur mid-trial, it could be too late to cure the latent conflict of interest. Further, given that this is a multiple suspect case, this could imperil the proceedings beyond the individual Suspect.

### **C. Consent is required but may not be sufficient**

#### **i. Consent is required under the Code**

15. Articles 12(1)(a) and 16(3)(b) of the Code prohibit Mr. Kilenda's representation of Mr. Babala in this case, unless both Suspects have been fully informed of the nature and extent of any possible conflicts of interest, and consented to the representation. Until this is clear in the record of this case, an impediment to

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<sup>16</sup> See also, Article 15(3) of the Code.

representation exists.

16. Given the apparent conflict of interest, Counsel should have declined his appointment under Article 13(2)(a) of the Code.

17. Nonetheless, Article 12(2) of the Code provides that “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.”

18. To date, the Prosecution is unaware that the required written notification has been filed with the Chamber.<sup>17</sup>

19. If written consent *has* been obtained, it is still incumbent on the Chamber to assess the sufficiency of the information upon which it is based. In this regard, it is significant whether the current and former clients were informed of the actual and reasonably foreseeable adverse consequences of representation. Further, directly adverse positions between clients may require independent legal advice concerning their consent to the conflicted representation.

ii. Even with consent the Chamber should review the appointment

20. Even if sufficient, the informed consent of Mr. Kilenda's present client may not be sufficient to discharge the Chamber's overarching duty to protect the rights and interests of the parties and persons appearing before it.<sup>18</sup>

21. The rights of suspects are necessarily components of a fair trial and, as such,

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<sup>17</sup> Article 12(2) and (4), and Article 16(3)(b) of the Code (requiring that full and informed consent of all potentially affected clients be sought in writing).

<sup>18</sup> Article 67 of the Statute.

failing to secure them will adversely affect a trial's fairness.<sup>19</sup> A conflict of interest does not necessarily entail the withdrawal or removal of counsel where the consent of all potentially affected clients is obtained.<sup>20</sup> However, where the representation involves the assertion of a claim by one client against another, a waiver may be unavailing.

22. It is first and foremost "counsel's responsibility to ensure that an impediment to representation and/or a conflict of interest does not arise, in accordance with his or her professional obligations under the Code."<sup>21</sup> However, where, as here, the interests of Counsel's current and former clients may be so directly aligned against one another, the Chamber's intervention is necessary to avert the potential adverse impact on the fairness of this case, as well as the safety of an eventual trial.

## V. Conclusion

23. For the reasons set out above, the Prosecution objects to the appointment of Mr. Kilenda as Counsel for Suspect Babala, and requests that the Single Judge determine the propriety of his continued representation.



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Fatou Bensouda, Prosecutor

Dated this 7<sup>th</sup> Day of February 2014  
At The Hague, The Netherlands

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<sup>19</sup> ICC-01/09-02/11-365 OA3, para. 51.

<sup>20</sup> See, Article 16(3) of the Code.

<sup>21</sup> ICC-01/09-02/11-365 OA3, paras. 54 and 69.