

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 April 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 "Prosecution Submission on the Appointment of Defence Counsel" for Mr Fidèle Babala Wandu

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

Catherine Mabilie

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Kimo Sluiter

States Representatives

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Esteban Peralta Losilla

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

NOTING the “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” dated 17 January 2014¹, whereby the Registrar inter alia filed in the record of the case “[l]a lettre de M. Fidèle Babala par laquelle il décharge Maître Jean-Pierre Fofé Djofia Malewa de son mandat et désigne Maître Jean-Pierre Kilenda Kakengi Basila en qualité de conseil”²;

NOTING the “Enregistrement de la ‘Déclaration d’acceptation de désignation’ exécutée par Maître Jean-Pierre Kilenda Kakengi Basila en qualité de conseil de M. Fidèle Babala, et des engagements du conseil prévus aux articles 5 et 22-3 du Code de conduite professionnelle des conseils” dated 21 January 2014³;

NOTING the “Prosecution submission on the Appointment of Defence Counsel” (“Prosecutor’s Request”) dated 7 February 2014⁴, whereby the Prosecutor objects to the appointment of Jean-Pierre Kilenda Kakengi Basila (“Jean-Pierre Kilenda”) as Counsel for Mr Babala in light of his former representation of Aimé Kilolo Musamba in this case and requests the Single Judge to “determine the propriety of his continued representation”⁵;

NOTING the “Réponse de la Défense à la ‘Prosecution’s Submission on the Appointment of Defence Counsel’ (ICC-01/05-01/13-159-Conf)” (“Defence’s

¹ ICC-01/05-01/13-107.

² ICC-01/05-01/13-107-AnxI.

³ ICC-01/05-01/13-118, with public annexes I and IV and confidential annexes II and III.

⁴ ICC-01/05-01/13-159-Conf.

⁵ ICC-01/05-01/13-159-Conf, para. 23.

Response”), dated 14 February 2014⁶, whereby the Defence for Fidèle Babala submits that the Prosecutor’s Request “manque de base en fait et en droit” on the grounds that, inter alia, (i) Mr Kilenda only made “une brève déclaration” on behalf of Aimé Kilolo before the Belgian judicial authorities prior to his request for immediate transfer to The Hague; (ii) prior to accepting Aimé Kilolo’s mandate, he had the opportunity to “écouter attentivement” both Mr Kilolo and Mr Babala, with a view to adequately discharging his responsibilities under the Code, including for the purposes of determining the existence of a conflict of interest; while the Prosecutor’s Submission “n’avance aucun fait précis et concret prouvant l’incompatibilité des interest entre MM. Babala et Kilolo” and (ii) “aucun texte applicable devant la Cour pénale international n’autorise le Procureur à solliciter la récusation d’un Conseil”;

NOTING the “Decision requesting observations from the Counsel Support Section on the ‘Prosecution submission on the appointment of Defence Counsel’ for Mr Fidèle Babala Wandu” dated 18 February 2014⁷;

NOTING the “Prosecution Request for Leave to Reply to the Babala Defence’s Response to the Prosecution’s Submission on the Appointment of the Defence Counsel” (“Request for Leave to Reply”) dated 21 February 2014⁸;

NOTING the “Registry’s observations pursuant to the ‘Decision requesting observations from the Counsel Support Section on the ‘Prosecution submission on the appointment of Defence Counsel’ for Mr Fidèle Babala Wandu dated 18 February 2014’” dated 25 February 2014⁹, submitting that, “[a]t the moment of

⁶ ICC-01/05-01/13-188-Conf.

⁷ ICC-01/05-01/13-201-Conf.

⁸ ICC-01/05-01/13-215-Conf

⁹ ICC-01/05-01/13-225-Conf.

the appointment of Mr Jean-Pierre Kilenda Basila as defence counsel for Mr Babala, the Registry was not aware of any potential conflict of interest which might result in an impediment to representation pursuant to article 12 of the Code”;

NOTING articles 67(1)(d) of the Rome Statute (“Statute”); rules 20(1)(c) and 21(2) of the Rules of Procedure and Evidence (“Rules”); regulation 74 of the Regulations of the Court; articles 12(1)(a), 12(2), 16(1) and 16(3) of the Code of Conduct for Counsel (“Code of Conduct”);

hereby issues this decision.

Determinations by the Single Judge

1. For the purposes of the determinations required by the Prosecutor Submission, the critical provisions are articles 12(1)(a) and 16 of the Code of Professional Conduct for Counsel appearing before the Court. Article 12(1)(a) provides, in relevant part, as follows:

Counsel shall not represent a client in a case (a) if the case is the same or is 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”.

2. Article 16(1) of the Code provides that “counsel shall exercise all care to ensure that no conflict of interest arise”. Whenever a conflict of interest does arise, article 16(3) mandates counsel to “at once inform all potentially affected clients of the existence of the conflict and either (a) withdraw from the representation of one or more clients with the prior consent of the Chamber; or (b) seek the full and informed consent in writing of all potentially affected clients to continue representation”.

3. The principle emerging from these provisions is twofold: the Code of Professional Conduct for Counsel appearing before the Court chose to treat (i) conflict of interest as an issue falling to a large extent within the scope of the duties and responsibilities of counsel and (ii) its settlement by and large as a matter between counsel and his or her client. The existence of a conflict of interest entails counsel's duty to decline representation only in the event that no "full and informed" consent from the affected client(s) can be obtained. Fully informed consent by the client, the existence and genuineness of which is a matter for the Registrar to consider on a prima facie basis, has been considered as an appropriate mechanism for addressing the risk of conflicts of interest.

4. More specifically, article 16 is quite clear in contemplating the scenario whereby one and the same counsel might be called to subsequently represent two different clients in the same case and in subjecting this particular scenario to the same rules. On the one hand, counsel's responsibility to prevent conflicts of interest forbids him or her to enter a representation agreement when a conflict of interest may be imminent and subjects him or her to a duty to inform when such conflict arises at a later stage. On the other, client has to express his or her informed consent in writing.

5. Against this background, it appears hardly debatable that the choice of counsel by the accused is an expression of one of his or her fundamental statutory rights. As such, this choice is to be considered as the rule and the Chamber's interference in the exercise of this right as the exception. Such interference, albeit theoretically possible, is not to be exercised easily or lightly, the more so in the absence of specific elements pointing to an actual or a concrete risk for a conflict. A suspect's right to counsel of choice should prevail over the desire to address out of mere precaution scenarios which might never materialise. The inconveniences which replacement of counsel by its nature inevitably entails

should not be brought about if not warranted, on the basis of pure speculation and in the absence of compelling circumstances.

6. The Single Judge finds that the Prosecutor Submission establishes no such compelling circumstances as regards the existence of, or the risk for, a conflict of interest arising from the fact that Mr Kilenda, prior to representing Mr Babala, had served as counsel for Aimé Kilolo in the context of these proceedings.

7. The Prosecutor submits inter alia the following elements as purportedly substantiating the existence of “incompatible interests” between Fidèle Babala and Aimé Kilolo:

- a. “[g]iven 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 information exonerating Mr Babala, Mr Kilenda would be precluded from using this information either directly or derivately in the interests of his present client;
- b. “should Mr Kilolo testify, Mr Kilenda could not cross-examine him on information that he might have acquired as Mr Kilolo’s Counsel”;
- c. each of them “could potentially blame the other for the crimes charged”.

8. The Single Judge observes that all of these scenarios constitute, at this stage, no more than hypothesis. Their speculative nature is belied by the fact that all the scenarios envisaged by the Prosecutor as possible instances of conflict of interest are expressed as a matter of hypothesis (“if”), or in the conditional tense (“could”). As of today, no elements have been brought before the Single Judge showing that exonerating information has been provided to Mr Kilenda, that the

defence strategy includes the testimony of Mr Kilolo, or that one or more of the suspects wishes to "blame the other for the crimes charged". Accordingly, the Single Judge takes the view that the Prosecutor's submission to the effect that "incompatible interests" would exist between Fidèle Babala and Aimé Kilolo has not been substantiated.

9. The Prosecutor's statement to the effect that "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, and notified duly the Chamber" is likewise unsubstantiated. First, a handwritten letter whereby Fidèle Babala appoints Kilenda as his Counsel in these proceedings has been filed in the record¹⁰. Second, counsel's duty to inform and act accordingly only arises in the presence of an actual risk for a conflict of interest, which actual risk the Single Judge is not satisfied has been established at this stage. Third, Mr Kilenda states that his acceptance of the mandate followed "*une série d'entretiens préalables tant avec M. Kilolo qu'avec Babala lui-même*". The Single Judge has no reason, at this stage, to entertain the doubt that these meetings failed to address all the aspects which would be required with a view to allowing Mr Kilenda to duly comply under his obligations under the Code, including for the purposes of the rules governing the issue of conflict of interest.

10. Finally, and critically, it has to be held that, by now, this full and informed consent has been given and exists: not only both Fidèle Babala and Aimé Kilolo have obviously always been aware of the role played by Mr Kilenda as counsel for Aimé Kilolo in the early stage of these proceedings, but full awareness now exists and is to be presumed following the Prosecutor's Submission. In light of this, the Single Judge finds that the opposition to the Prosecutor's Submission by

¹⁰ ICC-01/05-01/13-107-AnxI.

the Defence for Fidèle Babala, as well as the failure by the current defence for Mr Kilolo to respond to it, amount to their “full and informed” consent to the continued representation of Fidèle Babala by Mr. Kilenda for the purposes of article 12(1)(a), as well as to its notification to the Chamber pursuant to article 12(2) of the Code.

11. In light of the above, the Single Judge is satisfied that no current obstacle exists to the propriety of the continued representation of Fidèle Babala by Mr. Kilenda in these proceedings. As of this day, the incompatibility of the interests between Fidèle Babala and Aimé Kilolo remains a pure hypothetical scenario, as such unsuitable to warrant an intervention by the Chamber of such an intrinsically disruptive nature as the replacement of counsel of choice.

12. Notwithstanding this conclusion, and as an additional measure of a merely precautionary nature, the Single Judge instructs the Registrar and the Counsel Support Section to remain at the disposal of both Fidèle Babala and Aimé Kilolo to provide them with further information and neutral assistance in connections with the issues related to the Prosecutor’s Submission, should they so wish.

13. The Single Judge is persuaded that the information available to him is fully adequate for the purposes of his determinations on the Prosecutor’s Submission at this stage and that, accordingly, no need for a Prosecutor’s reply arises.

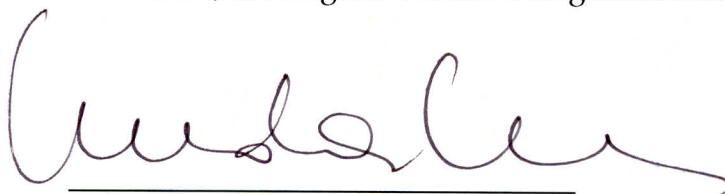
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Prosecutor’s Request for Leave to Reply;

DECIDES that no current obstacle exists to the propriety of the continued representation of Fidèle Babala by Jean-Pierre Kilenda in these proceedings;

ORDERS the Registrar and the Counsel Support Section to remain at the disposal of both Fidèle Babala and Aimé Kilolo with a view to providing them with information and neutral assistance in connection with the issues related to the Prosecutor's Submission, should they so wish.

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

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

Judge Cuno Tarfusser
Single Judge

Dated this Tuesday, 1 April 2014

The Hague, The Netherlands