

**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, ex parte Prosecutor, Registry and Defence for Aimé Kilolo

Decision on the "Prosecution Submission on the Appointment of Defence Counsel" for Mr Aimé Kilolo Musamba

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

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Catherine Mabille

Counsel for Jean-Jacques Mangenda Kabongo

Counsel for Fidèle Babala Wandu

Legal Representatives of Victims

Legal Representatives of Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

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. Aimé Kilolo Musamba par laquelle il décharge Maître Jean- Pierre Kilenda Kakengi Basila de son mandat et désigne Maître Ghislain Mabanga en qualité de conseil”²;

NOTING the “Enregistrement de la déclaration d’acceptation de désignation signée par Maître Ghislain Mabanga Monga Mabanga en qualité de conseil de M. Aimé Kilolo Musamba, et des engagements du conseil prévus aux article 5 du Code de conduite professionnelle des conseils” dated 21 January 2014³;

NOTING the “Prosecution submission on the appointment of Defence Counsel” dated 7 February 2014⁴, whereby the Prosecutor objects to the appointment of Ghislain Mabanga as Counsel for Aimé Kilolo Musamba (i) since he, as duty counsel to advise defence witnesses in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”), “formerly represented several clients in a substantially related case, whose interests are incompatible with those of his current client” and (ii) since “the record of these proceedings provides no clear indication that Counsel has obtained the full and informed consent not only of Mr. Kilolo and his former clients but also duly notified the Chamber”⁵ (“Prosecutor’s Submission”);

¹ ICC-01/05-01/13-107.

² ICC-01/05-01/13-107-AnxII.

³ ICC-01/05-01/13-119, with public annexes I and III and confidential Annex II.

⁴ ICC-01/05-01/13-157-Conf-Exp.

⁵ ICC-01/05-01/13-157-Conf-Exp, para. 2.

NOTING the “Réponse de la Défense à la ‘Prosecution submission on the Appointment of Defence Counsel’ (ICC-01/05-01/13-157-Conf-Exp)” dated 14 February 2014⁶, whereby the Defence requests the Single Judge “de rejeter l’Objection du Procureur a titre principal, comme irrecevable pour cause de prématurité” and “a titre subsidiaire, comme non fondée”⁷; on the grounds that, inter alia, (i) the conflicts of interest alleged by the Prosecutor are “purement hypothétiques”⁸ and that since the Duty Counsel appointed to assist Defence witnesses “n’a pas accès au dossier de l’affaire ... il n’est pas, par nature, dépositaire d’informations susceptibles de nuire aux Anciens Clients ou de profiter à l’Actuel Client”⁹;

NOTING the “Decision requesting observations from the Counsel Support Section on the ‘Prosecution submission on the appointment of Defence Counsel’ for Aimé Kilolo Musamba” dated 18 February 2014¹⁰;

NOTING the “Prosecution Request for Leave to Reply to the Kilolo’s Defence “Réponse de la Défense à la ‘Prosecution submission on the Appointment of Defence Counsel’ (ICC-01/05-01/13-193-Conf-Exp)”” dated 21 February 2014 (“Prosecutor’s Request for Leave to Reply”)¹¹;

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 Aimé Kilolo Musamba dated 18 February 2014”” dated 25 February 2014¹²;

⁶ ICC-01/05-01/13-193-Conf-Exp with confidential ex parte Annexes 1 and 2.

⁷ ICC-01/05-01/13-193-Conf-Exp, para. 39.

⁸ ICC-01/05-01/13-193-Conf-Exp, para. 21.

⁹ ICC-01/05-01/13-193-Conf-Exp, para. 29.

¹⁰ ICC-01/05-01/13-200-Conf-Exp.

¹¹ ICC-01/05-01/13-216-Conf-Exp.

¹² ICC-01/05-01/13-224-Conf-Exp.

NOTING articles 67(1)(d) of the Statute, rules 20(1)(c) and 21(2) of the Rules of Procedure and Evidence ("Rules"), regulation 73 of the Regulations of the Court and articles 12(1)(a), 12(2), 16(1) and 16(3) of the Code of Conduct for Counsel ("Code");

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. 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.

5. 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, neither between Ghislain Mabanga and the witnesses in the Main Case, nor between Ghislain Mabanga and Aimé Kilolo.

6. As regards the alleged conflict of interest between Ghislain Mabanga and relevant witnesses in the Main Case, the Prosecutor submits that "[a]s a duty counsel in the Bemba case, Mr. Mabanga was appointed to advise 13 Defence witnesses on self-incrimination and related matters concerning their trial testimony". Since "[s]everal of his former clients are implicated in this case, their false testimony being the alleged product of Mr. Kilolo's corruption, bribery and/or coaching ... not only are the cases related, the particular circumstances

underscore a profound conflict arising as a result of Mr. Mabanga's continued representation".

7. The Single Judge notes that the role played by Ghislain Mabanga in the context of the Main Case had a purely technical, objective (and hence neutral) nature. As stated by the Registrar (and acknowledged by the Prosecutor), he was appointed "solely to provide legal advice to the witnesses in the framework of rule 74 of the Rules of Procedure and Evidence"¹³ (i.e., for the purposes of the scenario of self-incrimination by a witness) and no evidence is available showing that he might have "at any moment acted beyond the scope of his appointment as duty counsel"¹⁴. It is therefore to be held that he had no reason to take position about the merits of their testimony, except to the extent that this might become relevant for the purposes of the witnesses' self-incrimination, and that, accordingly, his role did not amount to legal representation of any of those witnesses.

8. Since the role played by Ghislain Mabanga *vis-à-vis* and to the benefit of a number of witnesses in the Main Case does not amount to their "legal representation", those witnesses cannot be considered as "former clients" of his within the meaning and for the purposes of article 12(1)(a) of the Code. As stated by the Defence for Aimé Kilolo, since "il ne s'agit pas d'un mandat émanant du client, mais plutôt de la Cour, conformément à l'article 11 du Code de conduite ... notifié au Conseil par le Greffe et ... modifiable par la Chambre", it ensues that "[l]e Conseil du témoin intervient donc comme un expert par délégation de pouvoir de la Chambre, puisque la mission confiée à ce Conseil est, en vérité, dévolue à la Chambre en vertu de la règle 74-1". The objective nature of the task, as such completely neutral *vis-à-vis* the content of the testimony or the

¹³ ICC-01/05-01/13-224-Conf-Exp, para. 3.

¹⁴ ICC-01/05-01/13-224-Conf-Exp, para. 5.

merits of the case, is also made apparent by the applicable protocol governing the preparation and familiarisation of witnesses, stating in relevant part that “la discussion portera uniquement sur les questions relatives à la non-incrimination et ... aucun autre aspect de la déposition ne doit être évoqué”¹⁵.

9. Accordingly, it cannot be said that “Mr Mabanga has formerly represented several clients in a substantially related case”. Furthermore, even assuming that an analogy could be drawn between the role played by Ghislain Mabanga in the Main Case and the one of counsel, it appears significant that the Prosecutor does not identify any concrete, specific line of arguing or defence which would be precluded to Ghislain Mabanga by virtue of his previous involvement in the Main Case. She only states that each of the witnesses advised by Ghislain Mabanga in the Main Case “is a potential witness against Mr. Kilolo with interests that are, *prima facie*, adverse to his” and that “if one of Mr Mabanga’s former clients implicates Mr Kilolo, a conflict of interest arises”, a matter – in the Prosecutor’s submission – “potentially further complicated by the very real possibility that Mr Mabanga could have rendered advice to that former client regarding the subject matter of their testimony”¹⁶. The speculative nature of the Prosecutor’s submission is belied by the fact that the scenarios “conceptualised” by the Prosecutor are expressed as a matter of hypothesis (“if”), or in the conditional tense (“could”).

10. As regards the alleged conflict of interest between Aimé Kilolo and Ghislain Mabanga, the Prosecutor submits that “[g]iven his previous representation, Mr. Mabanga cannot use information obtained from his former

¹⁵ ICC-01/05-01/13-193-Conf-Exp, paras 15-16.

¹⁶ ICC-01/05-01/13-157-Conf-Exp, paras 11-12.

clients either to their detriment or to Mr. Kilolo's advantage", including information of an exonerating nature.

11. The Single Judge notes that this submission suffers from the same weaknesses detected above in respect of the submissions as to what the relevant witnesses might or might not say in the context and for the purposes of these proceedings: it is based on speculation, elaborated on the basis of the flawed assumption that those witnesses should be regarded as "clients" of Ghislain Mabanga's.

12. The Prosecutor further submits that, were any of those witnesses to be found having provided false testimony, whether on their own initiative or upon somebody's instructions, "it is conceivable" that they would be able to "minimise responsibility for providing alleged false evidence by arguing ... that the advice they were given regarding self-incrimination was unclear or inadequate".

13. Contrary to what stated by the Prosecutor, it seems hardly conceivable to see this scenario materialise. First, as also acknowledged by the Prosecutor, as of today, "(i)t is not known what, if anything, these witnesses may say". Far from being "a live conflict of interest", this scenario offers at the most "the potential" for a conflict of interest which, as of today, is far from being substantiated. Furthermore, the Prosecutor's statement seems to unduly conflate the merits of the Main Case with the merits of this case: the self-incrimination, on which Ghislain Mabanga was called to "advise" witnesses in the Main Case, would refer to events relevant within the context of that case, rather than to the events underlying the charges in these proceedings.

14. In the view of the Single Judge, the only scenario theoretically suitable to give rise to a conflict of interest might be the one whereby, in the context of these proceedings, either Aimé Kilolo, or the relevant witnesses, would submit that Ghislain Mabanga advised the witness(es) to provide false testimony. This

scenario is, as of today, as inexistent and unsubstantiated as any of the ones evoked by the Prosecutor in her Submission. As said, no definite elements were brought to the attention of the Single Judge showing that Ghislain Mabanga assisted the relevant witnesses in the Main Case by any other manner than by providing general legal advice in respect of their forthcoming testimony, with specific reference to their awareness of the rules governing the issue of self-incrimination before the Court.

15. The Prosecutor's statement to the effect that there is "no clear indication that Counsel has obtained the full and informed consent not only of Mr Kilolo and his former clients" is likewise unsubstantiated. First, a handwritten letter whereby Aimé Kilolo appoints Ghislain Mabanga as his Counsel in these proceedings has been filed in the record¹⁷. Second, as stated by the Defence for Aimé Kilolo, 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, and critically, it has to be held that, by now, this full and informed consent has been given: even assuming that Aimé Kilolo had not been previously aware of Ghislain Mabanga's role in the Main Case (a *per se* hardly sustainable assumption, given Aimé Kilolo's role as lead counsel for the Accused in that case) and of what the Prosecutor calls "the reasonably foreseeable adverse consequences of representation", this awareness now exists and is to be presumed following the Prosecutor's Submission, the more so in light of the fact that Aimé Kilolo, an admitted lawyer, is certainly in a position to fully appreciate the contents and the implications of that Submission. In light of this, the Single Judge finds that the opposition to the Prosecutor's Submission by the Defence for Aimé Kilolo

¹⁷ ICC-01/05-01/13-107-AnxII.

amounts to his "full and informed" consent to his continued representation by Ghislain Mabanga 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.

16. In light of the above, the Single Judge is satisfied that no current obstacle exists to the propriety of the continued representation of Aimé Kilolo by Ghislain Mabanga in these proceedings. As of this day, the incompatibility of the interests between Ghislain Mabanga on the one hand, and either the witnesses assisted by him in the Main Case or Aimé Kilolo, on the other, 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.

17. 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 Aimé Kilolo to provide him with further information and neutral assistance in connections with the issues related to the Prosecutor's Submission, should he so wish.

18. 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

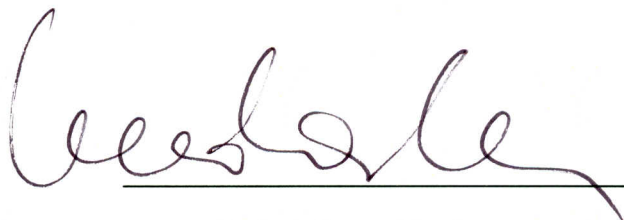
REJECTS the Prosecutor's Request for Leave to Reply;

DECIDES that no current obstacle exists to the propriety of the continued representation of Aimé Kilolo Musamba by Ghislain Mabanga in these proceedings;

ORDERS the Registrar and the Counsel Support Section to remain at the disposal of Aimé Kilolo Musamba with a view to providing him with

information and neutral assistance in connection with the issues related to the Prosecutor's Submission, should he 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