

**Cour
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**International
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Court**



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No.: **ICC-01/14-01/21**

Date: **10 December 2021**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**Public Redacted Version of
“Prosecution’s Submission on the Appointment of Defence Counsel”, ICC-01/14-
01/21-7-Conf-Red, dated 1 February 2021**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) submits that Mr Jean-Pierre Madoukou should not be appointed as permanent Counsel for Mr Mahamat Said Abdel Kani (“SAID”) and requests that another Counsel be appointed (“Request”). Contrary to article 12(1)(a) of the Code of Professional Conduct for counsel (“Code”), Mr. Madoukou represents [REDACTED] witnesses and at least one [REDACTED] witness on which the Prosecution will rely to establish its case against SAID. In addition, Mr. Madoukou represents several [REDACTED] witnesses in the Anti-Balaka investigation, [REDACTED]. The Prosecution asserts that the extent and cumulative effect of the different conflicts of interests and/or potential conflicts of Mr Madoukou are such that even their waiver, pursuant to articles 12 and 16 of the Code, would be insufficient to preserve the right to counsel of SAID and the fairness and integrity of the proceedings.

II. CONFIDENTIALITY

2. The Request is filed *Under Seal* and *Ex Parte*, pursuant to regulation 23bis(1) of the Regulations of the Court, as it relates to decisions and filings of the same designation. A confidential redacted version of the Request is filed concurrently.

III. SUBMISSIONS

3. On 27 January 2021, the Registry notified the Single Judge of the appointment of Mr. Madoukou as Counsel to represent SAID during his initial appearance before the Court.¹ Having received this notice, the Prosecution informed the Single Judge that

¹ ICC-01/14-01/21-5.

there may be a potential conflict of interest due to his representation of a Prosecution witness.² The Single Judge requested formal submissions on the matter.

4. The Code is “part of the Court's applicable law under article 21(1)(a) of the Statute.”³ Article 12 of the Code regulates impediments to representation. 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.”

A. Mr. Madoukou represents insider witnesses in this specific case and other witnesses in the CAR cases

1. Representation of witness P-2563

5. There is a conflict of interest in the sense of articles 12(1)(a) and 16(3)(b) of the Code as Mr. Madoukou is representing [REDACTED] witness [REDACTED] (P-2563) in the Seleka Investigation. Mr. Madoukou has represented P-2563 who was interviewed by the Prosecution [REDACTED] with the safeguards provided under article 55(2).⁴ Mr. Madoukou continued to represent the interests of witness P-2563 during interactions with the Prosecution related to witness management and protection issues, thus establishing a counsel-client relationship going beyond the mere representation at interview.⁵

² E-mail to Legal Officers of the Chamber dated 27 January 2021, 12:49hrs.

³ ICC-01/09-02/11-365, para. 49.

⁴ CAR-OTP-2127-7738 (Investigation Report).

⁵ Ibid.

6. [REDACTED].⁶

7. SAID and P-2563 have incompatible interests. [REDACTED]. Mr. Madoukou would not be in a position to cross-examine witness P-2563 at trial. At the same time, Mr Madoukou could not represent witness P-2563 as his lawyer pursuant to rule 74 of the Rules of Evidence and Procedure in this case. Further, given his previous representation, Mr. Madoukou cannot use information obtained from P-2563 when acting as SAID's counsel either to P-2563's detriment or to SAID's *advantage*. If for example, his former client had provided him with information tending to exonerate SAID, Mr. Madoukou would be precluded from using this information in the present case.

8. Thus, any future appointment is *per se* inconsistent with his clients' potentially adversarial or incompatible positions in these proceedings. The responsibilities vis-à-vis P-2563 materially limit his prospective duty to SAID. Particularly, the appointment presents a significant risk to SAID's right to adequate representation and conversely, risks the former clients' right to maintain the confidentiality of communications with their former counsel.

9. [REDACTED]. The Prosecution considers that it is highly likely that such incompatible interests will materialise, especially after Counsel and SAID have had an opportunity to review the underlying evidence which is set to be disclosed in the near future. It will then be too late to cure a latent conflict of interest.

10. Additionally, witness P-2563 cooperated with the investigation of the Prosecution when Mr Madoukou was his counsel. He developed a relationship of trust with Mr Madoukou. [REDACTED].

⁶ [REDACTED].

2. Representation of P-0759

11. Mr. Madoukou also represents [REDACTED] Witness [REDACTED] (P-0759) who was interviewed by the Prosecution [REDACTED]. [REDACTED].⁷ [REDACTED].⁸

12. Thus, the representation of P-0759 poses an additional impediment to the prospective representation of SAID. As with P-2563, Mr. Madoukou would be precluded from using any information received from P-0759 in these proceedings and from a possible cross-examination should the witness be called to testify by the Prosecution. His responsibilities towards P-0759 materially limit his prospective duties towards SAID. As with P-2563, P-0759 has developed a client-counsel relationship with Mr. Madoukou. Mr Madoukou's representation also goes beyond his representation of the Witness during his interview with the Prosecution since he is also consulted in relation to witness management issues.

3. Representation of Flyers-Victims

13. According to Prosecution Witness P-2263, Mr. Madoukou was defence counsel before the *Tribunal de Grande Instance* in Bangui for [REDACTED].⁹ [REDACTED].

14. [REDACTED].

15. [REDACTED].

⁷ [REDACTED].

⁸ The transcripts are not yet available as the interview was conducted in November 2020.

⁹ [REDACTED].

2. Anti-Balaka [REDACTED] witnesses

16. The same conflict of interests apply in respect to suspects interviewed in the Anti-Balaka Investigation (CARIIB). Mr. Madoukou represents several [REDACTED] witnesses in the Anti-Balaka Investigation, namely:

- [REDACTED] (P-0458)
- [REDACTED] (P-0306)
- [REDACTED] (P-2233)
- [REDACTED] Severin (P-2282)
- [REDACTED] (P-0446)

17. There are also indications that he represented other witnesses interviewed in the CARIIB Investigation with alleged ties to the Anti-Balaka, such as [REDACTED] (P-0525) and [REDACTED] (P-2167).

18. [REDACTED]. Therefore, Mr Madoukou's responsibility to these insider witnesses materially limits his ability to efficiently represent the interest of SAID. Mr Madoukou's appointment is *per se* inconsistent with SAID's potentially adversarial or incompatible positions in these proceedings. Mr Madoukou's appointment, therefore, significantly compromises SAID's right to adequate representation pursuant to article 67 and conversely, undermines these insider witnesses right to maintain the confidentiality of their communications with their counsel.

B. Consent is required but would not be sufficient

19. Articles 12(1)(a) and 16(3)(b) of the Code prohibit Mr Madoukou's representation of SAID in this case, unless both SAID and Counsel's former clients have been fully informed of the nature and extent of any possible conflicts of interest,

and consented to the representation. Until such consents are filed in the record of this case, impediments to representation exist.

20. Given the extent of the apparent conflict of interests, Mr Madoukou should have disclosed and declined his appointment under article 13(2)(a) of the Code. 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.” To date, the Prosecution is unaware that the required written notification has been filed with the Chamber.¹⁰

21. If written consent was obtained, it is 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 Mr Madoukou’s representation. Further, directly adverse positions between clients may require independent legal advice concerning their consent to the conflicted representation. If Mr Madoukou were to now seek such consents, the Chamber may wish to appoint an independent Counsel or person to make sure that such consents are obtained freely and voluntarily without undue pressure or promises of an advantage.

22. Even so, the informed consent of SAID and the other clients may not be sufficient to discharge the Chamber’s overarching duty to ensure that the trial is fair to the parties and persons appearing before Court, and conducted with the full respect for the rights of the Suspect and of the Prosecution.¹¹ These rights are necessarily components of a fair trial and, as such, failing to secure them will adversely affect a trial’s fairness.¹² A conflict of interest does not necessarily entail the withdrawal or removal of counsel where the consent of all potentially affected clients (current and

¹⁰ 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).

¹¹ Articles 64(2) and (4), and 67.

¹² ICC-01/09-02/11-365, para. 51.

former) is obtained.¹³ However, where the representation involves the assertion of a claim by one client against another for instance, a waiver may be unavailing.

23. 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.”¹⁴ However, where, as here, the interests of Counsel’s current and former clients may be directly aligned against one another, the Chamber’s intervention is necessary to avert the potential adverse impact on the fairness and integrity of the trial.

24. Even if, *arguendo*, obtaining the informed consent of the former clients and current client could eliminate the existing impediments to Mr. Madoukou’s representation of SAID, doing so would require his disclosure of highly confidential and sensitive information from his past and current representation to his clients. This would be the only way to ensure that SAID and his other clients are fully aware of the extent of this Counsel’s representation and that his own interests are not thereby prejudiced. Permitting resolution of these conflicts would therefore run counter to the rules of confidentiality. Moreover, it would also defeat the concerns the Prosecution has raised in its Request for Additional Redactions to the Arrest Warrant¹⁵ as well as the compelling arguments set out in several requests relating to redactions under 81(2) of the Rules of Evidence and Procedure to protect the Seleka Investigation, which have been recognised by this Chamber and by Trial Chamber V.¹⁶

25. In respect of the Anti-Balaka [REDACTED], the [REDACTED], Witnesses P-0759 and P-2563 so far, neither their cooperation with the ICC nor the content of their accounts is known to SAID. However, as mentioned above, to comply with his

¹³ Article 16(3) of the Code.

¹⁴ ICC-01/09-02/11-365, paras. 54 and 69.

¹⁵ ICC-01/14-135-US-Exp.

¹⁶ ICC-01/14-01/18-232-Conf-Exp; ICC-01/14-01/18-329-Conf-Exp+Anxs; ICC-01/14-01/18-332-Conf-Exp; ICC-01/14-01/18-335-Conf-Exp; ICC-01/14-01/18-670-Conf-Exp.

obligations, Mr Madoukou would have to fully inform theses witnesses *and* SAID of the nature and extent of any possible conflicts of interest, which in turn would require him to breach his confidentiality obligations.

26. The overall extent of Mr. Madoukou's conflicts of interests is so extensive that any attempt to obtain informed consents has the potential to significantly impact the integrity of the proceedings. The Prosecution seeks to begin the disclosure of evidence as soon as possible following the adoption of the required modalities of disclosure. Due to the extent of the prior representations of Mr. Madoukou, the process of obtaining informed consents will necessarily delay this process. Other necessary procedural steps will also be affected to the detriment of the Suspect and efficiency of the proceedings, namely witness management and protection of the witnesses noted above, redactions of documents related to witnesses and necessary investigative enquiries [REDACTED].

27. Consequently, the Prosecution submits that the extent and far reaching effect of the conflict of interests and the practicalities to lift their impediments are such, that Mr Madoukou should not be appointed as permanent counsel to represent SAID before the ICC.

IV. RELIEF SOUGHT

28. For the above reasons, the Prosecution objects to the appointment of Mr. Madoukou and requests the Single Judge to appoint another Counsel to represent SAID.



Karim A.A. Khan QC, Prosecutor

Dated this 10th day of December 2021
At The Hague, The Netherlands