

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 27 February 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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

Public Redacted Document

Public redacted version of "Prosecution Submission on the Appointment of Defence Counsel", 7 February 2014, ICC-01/05-01/13-157-Conf-Exp

Source: The Office of the Prosecutor

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

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Detention Section

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) objects to the appointment of Ghislain Mabanga, counsel for Suspect Aimé Kilolo Musamba. As set out below, the propriety of Mr. Mabanga’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”), Mr. Mabanga has formerly represented [REDACTED] clients in a substantially related case, whose interests are incompatible with those of his current client.¹ Further, 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 clients² but also duly notified the Chamber.³ These are impediments to representation.

3. The Chamber’s review of Mr. Mabanga’s appointment is necessary to ensure the absence of present or latent conflicts of interest,⁴ and to preserve the integrity and fairness of the proceedings.

II. Procedural History

4. On 11 October 2012, Trial Chamber III appointed Mr. Mabanga as Duty Counsel to advise Defence witnesses in *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba

¹ Article 12(1)(a) of the Code; see also ICC-01/09-02/11-365 OA3, paras. 48 and 54. *Prosecutor v. Muthaura, Kenyatta and Ali*, Judgment on the Appointment of Defence Counsel, 10 November 2011 (“Muthaura Appeal”) (“The 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.”).

² Article 12(1)(a) of the Code.

³ See Article 12(4) of the Code.

⁴ See Article 16(1) and (3) of the Code.

case”)⁵ on self-incrimination and the possibility of subsequent prosecution as a result of their trial testimony.⁶ Mr. Mabanga advised [REDACTED] Defence witnesses, some of whom are implicated in these proceedings.⁷

5. On 29 November 2013, Mr. Kilolo appointed Mr. Kilenda as his Defence Counsel.⁸ Mr. Kilenda also represented Mr. Kilolo before the Belgian authorities following his arrest and prior to his surrender to the Court.⁹

6. On 17 January 2014, Mr. Kilolo discharged Mr. Kilenda as his Defence counsel and appointed Mr. Mabanga.¹⁰

III. Confidentiality

7. This filing is classified as “Confidential, *Ex parte*, only available to Prosecution, Registry and Kilolo Defence”, as it contains references to facts and material classified as such in the Bemba case, to which other parties to this proceeding have no right of access.

IV. Submissions

8. The Code is “part of the Court's applicable law under article 21(1)(a) of the

⁵ ICC-01/05/01/08.

⁶ ICC-01/05-01/08-2338-Conf, *Enregistrement de la désignation de Maître Ghislain Mabanga en qualité de conseil de permanence*, 11 October 2012.

⁷ [REDACTED].

⁸ 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 2013.

⁹ CAR-OTP-0072-0150, *Interrogatoire d'inculpé*, 25 November 2013.

¹⁰ 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.

Statute.”¹¹ Article 12 of the Code regulates impediments to representation.¹² Subsection (1)(a) thereof prohibits counsel from appearing in a case which, *inter alia*, “... 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.”

9. The appointment of Mr. Mabanga requires the Chamber’s review because he formerly represented clients in a substantially related case.¹³ As the record stands, there is at least this impediment to representation, if not a present or latent conflict of interest.

A. Mr. Mabanga formerly represented clients in a substantially related case

10. This case arises directly from the conduct of the Defence in the Bemba case. The two are substantially related. As a duty counsel in the Bemba case, Mr. Mabanga was appointed to advise [REDACTED] Defence witnesses on self-incrimination and related matters concerning their trial testimony.¹⁴ [REDACTED] his former clients are implicated in this case, their false testimony being the alleged product of Mr. Kilolo’s corruption, bribery and/or coaching.¹⁵ Thus, not only are the cases related, the particular circumstances underscore a profound conflict arising as a result of Mr. Mabanga’s continued representation, not only among his current and former clients, but between himself and Mr. Kilolo.¹⁶

¹¹ ICC-01/09-02/11-365 OA3, para. 49.

¹² Article 12(1)(a) of the Code.

¹³ ICC-01/05/01/08.

¹⁴ See above, fn. 7.

¹⁵ ICC-01/05-67-Conf, Prosecution’s Application for Warrant of Arrest, 19 November 2013, para. 45.

¹⁶ See Article 13(2)(a) of the Code (requiring that counsel refuses an agreement where there is a conflict of interest).

B. Suspect Kilolo's interests are incompatible with those of his counsel's former clients

11. At least [REDACTED] of Mr. Mabanga's former clients are alleged to have been corruptly influenced in this case.¹⁷ [REDACTED] a potential witness against Mr. Kilolo with interests that are, *prima facie*, adverse to his. Mr. Mabanga's representation in these circumstances is not consistent with his adversarial position in this case. The appointment presents a significant risk to Mr. Kilolo's right to adequate representation. Relatedly, it places his counsel in an untenable position where his responsibilities to his former clients materially limit his duties to his current one.¹⁸

12. A scenario that puts Mr. Kilolo's interests in direct conflict with those of Mr. Mabanga's former clients in the Bemba case is not difficult to conceptualise. For example, if one of Mr. Mabanga's former clients implicates Mr. Kilolo, a conflict of interest arises. The matter is 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, which the Prosecution alleges in this case Mr. Kilolo unlawfully influenced. In this instance, the witness's evidence would bring Mr. Mabanga into direct and actual conflict with his client.

13. Given his previous representation, Mr. Mabanga cannot use information obtained from his former clients either to their detriment or to Mr. Kilolo's advantage. Thus, if Mr. Mabanga were aware of information exonerating Mr. Kilolo, obtained either directly or derivatively from his former client his use of that information would be precluded. Similarly, he could not cross-examine a former client on information that he might have acquired as their Counsel.

¹⁷ [REDACTED].

¹⁸ See also, Article 15(3) of the Code.

14. While the Kilolo Defence has understandably not announced its prospective defence, the critical issue for the Court is the likelihood that incompatible interests will materialise. Should this occur mid-trial, it may well be too late to cure the latent conflict of interest.

C. Suspect Kilolo's interests may conflict with his counsel's

15. As noted above, because the nature of the advice provided by Mr. Mabanga to Defence witnesses in the Bemba case concerned their testimony, and as that testimony is at issue here, there is a live conflict of interest.

16. It is conceivable that Mr. Mabanga's former clients may seek to minimise responsibility for providing alleged false evidence by arguing, for instance, that the advice they were given regarding self-incrimination was unclear or inadequate. They may claim that, as their counsel, Mr. Mabanga did not fully explain their obligation to tell the truth to the Trial Chamber. In such a case, the resultant conflict of interest would be direct, and Mr. Kilolo's right to adequate and fair representation under the Rome Statute¹⁹ compromised, given the incompatibility of his interests with those of his Counsel.

17. It is not known what, if anything, these witnesses may say. However, the potential for a serious conflict of interest is clearly present. As noted, a latent conflict may materialise too late to effectively remedy. Further, given that this is a multiple suspect case, this could imperil the proceedings beyond the individual Suspect.

¹⁹ See Article 67 of the Rome Statute ("Statute") and Article 16(1) of the Code.

D. Consent is required but may not be sufficient

i. Consent is required under the Code

18. Pursuant to Articles 12(1)(a) and 16(3)(b) of the Code, Mr. Mabanga cannot represent Mr. Kilolo unless and until Mr. Kilolo and Mr. Mabanga's former clients have been fully informed and consented to the proposed representation. Until this is clear in the record of this case, an impediment to representation exists.

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

20. 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."

21. To date, the Prosecution is unaware that the required written notification has been filed with the Chamber.²⁰

22. 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, where such conflicts entail directly adverse positions between clients or between counsel and client, independent legal advice concerning consent to continued representation may be required.

²⁰ 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).

ii. Even with consent the Chamber should review the appointment

23. However, even if sufficient, the informed consent of Mr. Mabanga's former and present clients may not be enough to discharge the Chamber's overarching and independent duty to protect the rights and interests of the parties and persons appearing before it.²¹

24. The rights of suspects are necessarily components of a fair trial and, as such, failing to secure them will adversely affect a trial's fairness.²² A conflict of interest does not necessarily entail the withdrawal or removal of counsel where the consent of all potentially affected clients is obtained.²³ However, where the representation involves the assertion of a claim by one client against another, a waiver may be unavailing.

25. It is firstly "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."²⁴ However, where, as here, the interests of Counsel's current and former clients may be so directly aligned against one another, or Counsel's interests similarly clash with his client's, 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.

²¹ Article 67 of the Statute.

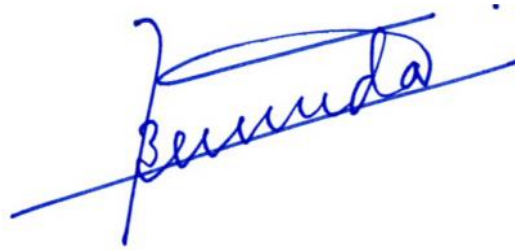
²² ICC-01/09-02/11-365 OA3, Muthaura Appeal, para. 51.

²³ See, Article 16(3) of the Code.

²⁴ ICC-01/09-02/11-365 OA3, Muthaura Appeal, paras. 54 and 69.

V. Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 27th Day of February 2015

At The Hague, The Netherlands