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

Date: 20 November 2024

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez
Alternate Judge: Judge Keebong Paek

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

Public

Public Redacted Version of “Prosecution’s Response to Defence “Observations de la Défense sur la « Notification of Appointment of Ms Dignité Bwiza as Legal Adviser to Witness P-2563 » (ICC-01/14-01/21-836) et la « Notification of Appointment of Mr Fabián Raimondo as Legal Adviser to Witness P-2161 » (ICC-01/14-01/21-837) et demande de tirer les conséquences procédurals de ces observations”, ICC-01-14-01-21-845-Conf, dated 2 September 2024

Source: 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

Mr Karim A.A. Khan KC

Mr Mame Mandiaye Niang

Ms Holo Makwaia

Counsel for Defence

Ms Jennifer Naouri

Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet

Mr Tars Van Litsenborgh

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation
and Reparations Section**

Other

I. INTRODUCTION

1. On 28 August 2024, the Defence filed its “Observations de la Défense sur la « Notification of Appointment of Ms Dignité Bwiza as Legal Adviser to Witness P-2563 » (ICC-01/14-01/21-836) et la « Notification of Appointment of Mr Fabiàn Raimondo as Legal Adviser to Witness P-2161 » (ICC-01/14-01/21-837) et demande de tirer les conséquences procédurales de ces observations” challenging the appointment of Ms Dignité Bwiza as rule 74 Counsel for Witness P-2563, and the appointment of Mr Fabiàn Raimondo as rule 74 counsel for Witness P-2161.¹

2. Ms Dignité Bwiza previously represented Witness P-0487 as rule 74 counsel in the case of *The Prosecutor v. Yekatom and Ngaïssona*, and Mr Fabiàn Raimondo represented Witness P-2105 in the case against Mahamat Said Abdel Kani (“Mr Said”).²

3. The Defence requests Trial Chamber VI (“the Chamber”) to review the appointment of Ms Dignité Bwiza on grounds that: (i) there appears to be an impediment to Ms Dignité Bwiza’s representation of P-2563 in this case under article 12(1) of the Code of Professional Conduct for Counsel (“Code of Conduct”) (...); (ii) such representation can give rise to actual and potential conflicts under Article 12(1) of the Code of Conduct (...).

4. The Defence similarly requests the review of Mr Fabiàn Raimondo’s appointment alleging that he is precluded by article 12 of the Code of Conduct from representing Witness P-2161, having previously represented another witness in the same case whose evidence contradicts that of P-2161, and thereby potentially affects the credibility of both Witnesses P-2105 and P-2161.

¹ ICC-01/14-01/21-840-Conf.

² ICC-01/14-01/18-1746.

II. CONFIDENTIALITY

5. The Prosecution's response is filed as "Confidential" since it responds to the Defence filing which is confidential. The Prosecution will file a public redacted version of this filing at the earliest opportunity.

III. RELEVANT LEGAL PROVISION

6. Article 12 of the Code of Conduct provides:

1. Counsel shall not represent a client in a case:

(a) If the case is the same or 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.

IV. SUBMISSIONS

A. Ms Bwiza's representation of Witness P-2161 is not impeded under article 12(1) (a) of the Code of Conduct.

7. The Defence argues *inter alia* that Ms Dignité Bwiza's representation of Witness P-2563 in this case gives rise to a conflict of interest because the interests of w=Witness P-0487 in the *Yekatom and Ngaïssona* case are incompatible with the interests of Witness P-2563 in this case. This is mere speculation as preservation of P-0487's interests in the *Yekatom and Ngaïssona* case has not been shown to be in conflict with the interests of

P-2563 in the present case. P-0487 and P-2563 are two different individuals with totally distinct and different interests in two different cases.³

8. The Prosecution submits that there is no ‘impediment to representation’ of Witness P-2563 by Ms Dignité Bwiza under article 12(1) (a) of the Code of Conduct, merely because of a potential that the interests of P-0487 and P-2563 may be incompatible. The scenario envisaged by the plain wording of article 12(1) (a) of the Code of Conduct - in relation to the interests of P-2563 being incompatible with the interests of P-0487, - appears not to be engaged by the Defence in the present case.⁴

9. The Defence seeks to extend the applicability of article 12(1) of the Code of Conduct, beyond its wording, and irrespective of whether the interests of the former client are incompatible with the interests of the current client of Ms Dignité Bwiza. The Chamber should not endorse such an extended meaning to the provision.

10. The potential for a conflict of interest justifying counsel’s disqualification, must be substantial – to ensure the client’s right to choose counsel is not lightly denied.⁵

11. In this case, the ‘substantial probability’ test has not been met. It is an enhanced test, in terms that the mischief that is contemplated must be seen as probable - and substantially so. The evident aim is to ensure that counsel of choice are not easily denied to clients on the mere possibility that the interest of the current client may be incompatible with the interests of a former client in another case. The Defence has not shown the substantial probability that the interests of P-0487 and P-2563 are incompatible to warrant disqualification of Ms Dignité Bwiza as rule 74 counsel. As a

³ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Prosecution submission on the appointment of defence counsel, ICC-01/05- 01/13-909, 15 April 2015, paras. 22, 24.

⁴ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Prosecution submission on the appointment of defence counsel, ICC-01/05- 01/13-909, 15 April 2015, paras. 1-2, 14-15.

⁵ Article 12(1) of the Code of Conduct for Counsel.

result, the Defence's application to remove Ms Dignité Bwiza as P-2563's counsel on the basis of article 12(1) of the Code of Conduct must be rejected.⁶

12. Even if article 16 of the Code of Conduct were to be invoked, it requires to be demonstrated (beyond mere speculation) that a rule 74 counsel, who previously represented P-0487 is conflicted because she might not advance defences on behalf of her client in this case. Even if conflict might arise in this situation, in reaching a decision, a Chamber may also consider the client's full and informed consent under article 16(3)(b) of the Code to retain the counsel in question. Arguably, depending on the facts of a case, where there is no full and informed consent by the client, the Chamber may disqualify counsel to avoid irreversible prejudice to the administration of justice.

B. There is no similarity between case of the *Prosecutor v. Yekatom and Ngaïssona* and this case.

13. Article 12(1)(a) of the Code of Professional Conduct (the 'Code'), provides, *inter alia*, that counsel shall not represent a client if the case is 'the same as or substantially related to another case' in which counsel formerly represented another client, and the interests of both clients are incompatible, unless their consent is obtained after consultation.

14. There is no similarity between the case of the *Prosecutor v. Yekatom and Ngaïssona* and this case. While the crimes with which Mr Said is charged with in these proceedings relate to his own conduct and that of the Seleka, the crimes with which Yekatom and Ngaïssona are charged relate to their own conducts and that of the Anti-Balaka. The fact that the Accused in the two cases belong to two opposing sides in the conflict does not automatically render the two cases similar.

⁶ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Prosecution submission on the appointment of defence counsel, ICC-01/05- 01/13-909, 15 April 2015, para. 20.

15. The Prosecution submits that, the fact a few individuals are witnesses in both cases does not automatically mean that the two cases are similar.⁷

16. In addition, there is no similarity in the evidence of P-0487 and P-2563. P-2563 is expected to testify about the Seleka's advance on BANGUI, the composition of the Seleka coalition, as well as [REDACTED] the OCRB. He will also testify to acts and conduct of Mr Said and other Seleka leaders regarding the crimes allegedly committed at the OCRB. His evidence extends to the Seleka at the *Camp de Roux*, [REDACTED] 2013. The Defence does not demonstrate how this evidence is similar to P-0487 evidence in *Yekatom and Ngaïssona* case.⁸

C. Mr Raimondo's representation of Witness P-2161 is not impeded under article 12(1) (a) of the Code of Conduct.

17. The Defence argues that the representation of Witnesses P-2105 and P-2161 concerns the same case and facts, which places Mr Raimondo in a situation of conflict of interest when the client's interests are diverging. That the two witnesses have adverse interests given the differences and contradictions in their individual accounts which consequently create a situation in which their interests would be incompatible.⁹ The Defence further avers that because Mr Raimondo represented Witness P-2105, he had access to confidential information regarding Witness P-2161 which both incriminates and contradicts the latter's anticipated testimony.¹⁰

18. The Prosecution maintains that there is no impediment to representation of Witness P-2161 by Mr Raimondo under article 12(1) (a) of the Code of Conduct. While there may be some overlap in the topics generally discussed by Witnesses P-2105 and

⁷ See ICC-01/14-01/21-840-Conf, para. 14.

⁸ See ICC-01/14-01/21-840-Conf, para 16 – 18.

⁹ ICC-01/14-01/21-840-Conf, para 33-35.

¹⁰ ICC-01/14-01/21-840-Conf, para 36.

P-2161 in their individual testimonies, an allegation that these similarities amount to adverse interests is speculative and unsubstantiated.

V. RELIEF SOUGHT

19. For the above reasons, the Prosecution requests that the Chamber upholds the appointments of Ms Dignité Bwiza and Mr. Fabiàn Raimondo as rule 74 counsels for P-2563 and P-2161 respectively.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 20th day of November 2024
At The Hague, The Netherland