

**Cour
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**International
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Court**



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No.: ICC-01/14-01/21
Date: 28 February 2025

TRIAL CHAMBER VI

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

**Prosecution Request to order the Defence to exclude Defence Counsel Dov Jacobs
from its List of Witnesses and Evidence**

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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☒ Legal Representatives of the Victims

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☐ Unrepresented Victims

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I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") requests Trial Chamber VI ("the Chamber") to order the Defence to exclude Witness CAR-D33-P-0032, Mr. Dov Jacobs ("Mr. Jacobs") from its list of witnesses and evidence in the case of the Prosecutor v. Mahamat Said Abdel Kani (the "SAID case"), due to the conflict that will arise as he is co-Counsel in the case.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Request is filed as public.

III. THE BACKGROUND

3. On 8 October 2024, the Chamber issued the 'Third Directions on the Conduct of Proceedings'.¹ Therein, the Chamber ordered, *inter alia*, the Defence to file its final list of witnesses, final list of evidence and complete the final disclosure of items it intends to use during its case no later than 21 February 2025.²
4. On 17 January 2025, the Defence provided a preliminary list of seven witnesses.³
5. On 24 January 2025, the Chamber issued the 'Order in relation to the Defence Notification of its Preliminary List of Witnesses',⁴ wherein the Chamber ordered the Defence to provide further information.

¹ Third Directions on the Conduct of Proceedings, 8 October 2024, ICC-01/14-01/21-873.

² Third Directions on the Conduct of Proceedings, ICC-01/14-01/21-873, paras 14-15.

³ *Version publique expurgée de la « Notification de la Défense conformément à la « Third Directions on the Conduct of Proceedings » (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024. »* ICC-01/14-01/21-908-Conf-Exp. 3 February 2025, ICC-01/14-01/21-908-Red. A confidential ex parte version and a confidential redacted version were filed on 17 January 2025 respectively (ICC-01/14-01/21-908-Conf-Exp; ICC-01/14-01/21-908-Conf-Red).

⁴ Order in relation to the Defence Notification of its Preliminary List of Witnesses, 24 January 2025, ICC-01/14-01/21-909.

6. On 30 January 2025, the Defence filed its observations,⁵ providing further information and indicating, *inter alia*, that it may have to ask for an extension of time in relation to four witnesses.
7. On 17 February 2025, the Defence filed a request for an extension of time.⁶
8. On 21 February 2025, the Chamber granted the Defence Request for an extension of time⁷ in part, and ordered the Defence to file its List of Witnesses and List of Evidence on 21 February 2025, and to update the said lists and complete disclosure no later than 21 March 2025.⁸
9. On 21 February 2025, the Defence filed its List of Witnesses, List of Evidence and anticipated summaries of witnesses testimonies⁹ (the "Notification") which include witness CAR-D33-P-0032 and his associated material.
10. Mr. Dov Jacobs, is a Defence co-Counsel in the SAID case, who has participated fully in the Defence of case, receiving instructions from Mr. SAID, filing and responding to applications and associated material before the Chamber, reviewing evidence in the case from the pre-trial stage through confirmation of the charges and now at Trial. Mr. Jacobs has cross-examined prosecution witnesses, represented the interests of the Accused during the proceedings and advised him

⁵ Version publique expurgée des « Observations de la Défense conformément à l'ordonnance rendue par la Chambre le 24 janvier 2025 (ICC-01/14-01/21-909) ». ICC-01/14-01/21-912-Conf-Exp., 3 February 2025, ICC-01/14-01/21-912-Red. A confidential ex parte version was filed on 30 January 2025 (ICC-01/14-01/21-912-Conf-Exp) and a confidential redacted version was filed on 3 February 2025 (ICC-01/14-01/21-912-Conf-Red).

⁶ Version confidentielle expurgée de la « Demande d'extension de délais ciblée pour terminer des actes d'enquêtes en cours conformément à la Norme 35 du Règlement de la Cour ». ICC-01/14-01/21-917-Conf-Exp., 18 February 2025, ICC-01/14-01/21-917-Conf-Red. A confidential ex parte version was filed on 17 February 2025 (ICC-01/14-01/21-917-Conf-Exp) with one confidential ex parte annex (ICC-01/14-01/21-917-Conf-Exp-AnxA).

⁷ Version confidentielle expurgée de la « Demande d'extension de délais ciblée pour terminer des actes d'enquêtes en cours conformément à la Norme 35 du Règlement de la Cour ». ICC-01/14-01/21-917-Conf-Exp., 18 February 2025, ICC-01/14-01/21-917-Conf-Red. A confidential ex parte version was filed on 17 February 2025 (ICC-01/14-01/21-917-Conf-Exp) with one confidential ex parte annex (ICC-01/14-01/21-917-Conf-Exp-AnxA).

⁸ Decision on the Defence's Request for an Extension of Time to File its Final List of Witnesses, List of Evidence and Complete Disclosure, 21 February 2025, ICC-01/14-01/21-920.

⁹ Notification de la liste de témoins et de la liste des éléments de preuve de la Défense conformément à la « Third Directions on the Conduct of Proceedings » (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024, ICC-01/14-01/21-921.

on various legal and strategic issues with respect to his case. As demonstrated by material disclosed by the Defence, Mr. Jacobs has and continues to play an important role in the preparation of the Defence case.

IV. SUBMISSIONS

A. Article 12(3) of the ICC Code of Professional Conduct for Counsel impedes Mr Jacobs from appearing as a witness in this case.

11. The Prosecution submits that article 12 (3) of the ICC Code of Professional Conduct for Counsel (the "Code of Conduct")¹⁰ impedes Mr. Jacobs from appearing as a witness in this case since he is contemporaneously acting as Defence co-Counsel.
12. Article 12(3) of the Code of Conduct provides that, unless exceptions not applicable to the present case apply, counsel '*shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness*'.¹¹ These exceptions are:
 - "(a) The testimony relates to an uncontested issue; or*
 - (b) The testimony relates to the nature and value of legal services rendered in the case."*
13. This provision precludes a Counsel from representing a client in proceedings in which there is substantial probability that Counsel may be called to appear as a witness. It also excludes a Counsel from appearing as a witness in proceedings in which he is representing a client as a Counsel.
14. In this case, it is a reality and not a probability, given that Mr. Jacobs has been and continues to act as Mr SAID's co-Counsel. In any event by May 2024, Mr. Jacobs

¹⁰ ICC-ASP/4/Res.1.

¹¹ 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. 11

knew that he may appear as a Defence witness in this case.¹² Irrespective of this, he continued to act as Counsel. The Prosecution submits that he cannot therefore appear as a witness in the same case in which he is co-Counsel for the Accused. Doing so would be contravening article 12(3) of the Code of Conduct. Consequently, Mr. Jacobs is impeded from appearing as the Accused's witness in this case.

B. Mr. Jacobs testimony does not fall into the two exceptions in article 12(3) of the Code of Conduct.

15. Mr. Jacobs' anticipated testimony does not fall into the two exceptions as set out in article 12(3) of the Code of Conduct since it relates to contested issues in the case and does not, in any way, relate to the nature and value of legal services rendered in this case. As per the summaries of anticipated testimonies of Defence witnesses,¹³ Mr. Jacobs (CAR-D33-P-0032) is expected to provide evidence *viva voce* on his mission to Bangui in May 2024, most specifically, on the information gathered by him at the OCRB and at the *Tribunal de Grande Instance* (TGI). He is further presumed to testify on criminal procedures adopted by the judicial authorities in Bangui during the charged period. The findings of the anticipated witness were disclosed to the Prosecution through two reports¹⁴ and photographs.¹⁵

16. The Prosecution observes that in view of the charges preferred against the Accused, as well as the lines of cross-examination adopted by the Defence, the matters on which Mr. Jacobs proposes to testify have been firmly contested in this case.

17. Moreover, Mr. Jacobs testimony does not, in any way, relate to the nature and value of legal services rendered in this case. To the contrary, Mr. Jacobs' testimony goes

¹² Annex 3 of the Notification.

¹³ Annex 3 of the Notification.

¹⁴ CAR-D33-0015-0711 and CAR-D33-0015-0716.

¹⁵ Material disclosed by Defence in Rule 78, Pacakge 071.

to the substance of the case in which he is acting as co-Counsel for the Accused. His anticipated testimony will therefore be in breach of article 12(3) of the Code of Conduct.

C. Mr. Jacobs impediment to appear as a witness cannot be cured by Article 16 of the Code of Conduct.

18. Mr. Jacobs' impediment to appear as a witness in this case cannot be cured by either withdrawing from appearing as Counsel in this case, or by obtaining a full and informed consent in writing from the Accused, and doing so will result in irreversible prejudice to the administration of justice.¹⁶ It must be recalled that todate, Mr. Jacobs has neither withdrawn from the case nor obtained the Accused's informed consent on the issue.

19. The Chamber has previously ruled that: *"[W]here a conflict does arise, counsel must inform all potentially affected clients 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 (...). However, informed consent from a potentially affected client given in an effort to cure a conflict is not necessarily conclusive of the matter (...). In particular, the Chamber considers that a conflict of interest waiver may not be accepted if to do so is likely to result in irreversible prejudice to the administration of justice."*¹⁷

¹⁶ 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. 12. See also para. 21.

¹⁷ 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. 12. See also para. 21.

20. But more importantly, Article 16 of the Code of Conduct¹⁸ requires that Counsel must exercise all care to ensure that no conflict of interest arises.¹⁹ By accepting to appear as a witness in a case in which he is contemporaneously acting as the Accused's co-Counsel, Mr. Jacobs failed to exercise all care to ensure that no conflict of interest arises as required by Article 16(1) of the Code of Conduct. His anticipated appearance as a witness in this case will therefore be in breach of the aforesaid duty of care as set out in Article 16(1) of the Code of Conduct.

D. Mr. Jacobs appearance as a witness will result in irreversible prejudice to the administration of justice.

21. Allowing Mr. Jacobs to appear as a witness in this case is likely to result in irreversible prejudice to the administration of justice.²⁰ Mr Jacobs had a duty to promptly inform the Chamber and the Parties about the possibility of appearing as a witness in this case, yet he did not. By May 2024, Mr. Jacobs knew that there was substantial probability that he may appear as witness in this case.²¹ His failure to promptly inform the Chamber and the Parties that there is a substantial probability that he may testify as a witness in this case is a serious and grave violation of the statute and Code of Conduct which affects the appearance of the integrity of the proceedings.²²

22. In revoking a Counsel's appointment, the Chamber in the *Gbagbo* case stated that "[T]he Chamber believes that the very existence of a previous assignment of this counsel on

¹⁸ This provision provides, in relevant part: ' 1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code. [...] 3. Where a conflict of interest arises, counsel shall 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.'

¹⁹ Article 16(3) of the Code of Conduct.

²⁰ 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. 12. See also para. 21.

²¹ Material disclosed by Defence in Rule 78, Package 071.

²² Prosecutor v. *Gbagbo & Blé Goudé*, Transcripts 6 March 2017, p. 17, lines 23- 25 to p. 18, line 1-24.

*behalf of the Prosecutor, compounded by the belated disclosure of its existence might indeed raise concerns in terms of appearance of the integrity of the proceedings.[...]. The strictness of the rules governing issues of conflict of interest is precisely aimed at preventing the concerns as to the integrity of the proceedings might arise even if only as a matter of appearance. [...] The Chamber also regrets that Mr Raimondo failed to promptly inform the Registry and the Chamber about his previous involvement and to alert them to the possibility that an issue of this kind might arise. In doing so he may be responsible of violation of duties incumbent to counsel pursuant to the code of professional conduct for counsel before the Court. For all these reasons, the Chamber decides that the appointment of Mr Fabián Raimondo as Rule 74 counsel for Witness P-10 and P-11 is revoked with immediate effect, orders the Registry to immediately appoint a new French speaking counsel to Witness P-11 for the purpose of Rule 74 [...]."*²³

23. In the *Mokom* case, the Chamber stated that "Where there is a conflict of interest, the Defence Counsel has a duty to bring the matter to the Chamber's attention, rather than waiting for the Chamber to raise it; withdrawing with prior consent of the Chamber, or seeking full consent in writing of all potentially affected client. Moreover, the Appeals Chamber observes that Mr Kaufman himself should have brought the matter to light even before it was raised by the Pre-Trial Chamber. In the *Mokom* case, the Appeals Chambers stated that "The Appeals Chamber considers that such a course of action would have aligned with counsel's ethical obligations under articles 12 and 16 of the Code."²⁴

24. Moreover, Mr. Jacobs' anticipated testimony is likely to result in irreversible prejudice to the administration of justice since it is influenced by him listening to the evidence of other witnesses. Mr. Jacobs was not only present in court when other witnesses testified in this case, but also cross examined a good number of them. In addition, as a Defence Counsel, he has full and unfettered access to the

²³ Prosecutor v. *Gbagbo & Blé Goudé*, Transcripts 6 March 2017, p. 17, lines 23- 25 to p. 18, line 1-24.

²⁴ Prosecutor v. *Mokom*, Judgement on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 25 March 2022 entitled "Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-70-Conf, 19 July 2022, para. 65.

transcripts of all the witnesses who have testified in this case. Consequently, his anticipated testimony is influenced by the testimonies of other witnesses.

25. In *Lubanga*, the Chamber stated that “[A]rticle 54 (3) (f) foresees a role for, *inter alia*, a Chamber at the Prosecutor’s request “to ensure the confidentiality of information, the protection of any person or the preservation of evidence.” Rule 140 (3) of the Rules of Procedure and Evidence permits the exclusion of witnesses who have not testified from the courtroom during the evidence of other witnesses in the same proceedings: a witness other than an expert [...] shall not be present when the testimony of another witness is given. [...] “The Chamber notes that this provision is clearly aimed at protecting against the possibility that a witness may be influenced by listening to the evidence of others. The prosecution in its written submissions argues that by logical extension discussions between witnesses about their testimony before each of them has given evidence should be prevented.”²⁵ It must be recalled that Mr. Jacobs does not intend to testify as an expert in this case.

26. Moreover, if Mr. Jacobs is allowed to testify, the Prosecution will be faced with the legal impediment of not being able to cross-examine him fully as many issues will be protected under the Counsel-client’s privilege. This will result in irreversible prejudice to the administration of justice.

27. In view of the foregoing, Mr. Jacobs’ role in this case and the substance of his anticipated testimony militate against calling him as witness and doing so is likely to result in irreversible prejudice to the administration of justice.

²⁵ Prosecutor v. *Lubanga*, Decision on “Prosecution’s Request for the Preservation of Evidence”, ICC-01/04-01/06-1040-Conf, 21 November 2007, para. 17.

E. Anticipated testimony is not unique to warrant Mr. Jacobs appearing as a witness.

28. The anticipated testimony of Mr. Jacobs can be equated to a site visit of the OCRB and the TGI. The Prosecution notes that to prepare their case, both the Defence and the Prosecution are entitled to carry out site visits at the locus, and give necessary instructions to carry out independent and objective investigations. The Prosecution observes that Defence could have instructed individuals not covered under article 12(3) of the Code of Conduct to gather evidence at the OCRB and the TGI, if they intended to rely on such evidence, so as to preserve the independence and integrity of the investigation and evidence. The Prosecution also observes that Defence Counsel who has been influenced by listening to the testimonies of other witnesses testifying on his assessment of the site visits in Bangui for the preparation of his case, in no way amounts to an objective assessment of evidence that can assist the Court.

29. Mr. Jacobs is not an expert witness whose testimony would assist the Chamber to adjudicate in this case. Consequently, the Defence has not demonstrated extreme and rare circumstances that would make it necessary for Mr. Jacobs to testify in these proceedings.

F. The impediment of Counsel appearing as a witness is supported by State practice.

30. The importance of ensuring that Defence Counsels refrain from being witnesses in the same case they are defending, is such a sacrosanct principle that it is embedded in the Codes of conduct of Counsel in various jurisdictions. For instance, in the case of *SRCL Ltd v The National Health Service Commissioning Board (NHS)*,²⁶ the United Kingdom High Court held that *"I therefore consider it is necessary to state some*

²⁶ [2018] EWHC 1985 (TCC) (27 July 2018).

basic principles about the calling of evidence in such cases to avoid this situation occurring in future cases.[...] These principles are as follows: No solicitor should be called by its own client to give evidence if that is likely to give rise to a conflict of interest, or the appearance of a conflict of interest. This is enshrined in the Solicitors' Code of Conduct in any event."²⁷

31. Furthermore, article 3.14 of the Code of Conduct for the Bar of Ireland states that²⁸:

"Barristers shall not appear in any case in which they are likely to be witnesses. If, being engaged in a case, it becomes apparent that they are likely to be witnesses on a question of fact, they should not continue to appear if they can retire without jeopardising their client's interests."

G. RELIEF SOUGHT

32. For the above reasons, the Prosecution respectfully requests the Chamber to order the Defence to exclude Mr. Dov Jacobs from its list of witnesses and evidence.



Karim A. A. Khan KC, Prosecutor

Dated this 28th day of February 2025

At The Hague, The Netherlands

²⁷ URL: <http://www.bailii.org/ew/cases/EWHC/TCC/2018/1985.html> Cite as: [2018] EWHC 1985 (TCC), [2019] PTSR 383, [2018] WLR(D) 540 at paras 78 – 80.: see also **Re Gray (1900) 2 QB 675**: Established the principle that a solicitor should avoid acting as both advocate and witness, as it could compromise the integrity of the legal process: see also **Jaffray v The Society of Lloyd's [2007] EWCA Civ 586**: Highlighted concerns about credibility and impartiality when a lawyer acts as both an advocate and a witness.: see also **R v Secretary of State for the Home Department, ex p. Doody [1994] 1 AC 531**: Reinforced the importance of a fair hearing, emphasizing that legal representatives should avoid conflicts that could undermine procedural fairness. "

²⁸ Adopted by a General meeting of the Bar of Ireland on 22 July 2024, <https://www.lawlibrary.ie/app/uploads/2024/10/9.-Code-of-Conduct-Amended-by-AGM-22.7.24-Updated.pdf>. Also, Rule 3.7 (a) of the American Bar Association Model Rules of Professional Conduct states that: "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. "