

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/05-01/08**

Date: **17 May 2010**

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio-Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Public

**Public Redacted Version of “Prosecution’s Request to Invalidate the Appointment of
Legal Consultant to the Defence Team” (ICC-01/05-01/08-670-Conf)**

Source: The 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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

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REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Mr. Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. On 18 November 2009, the Defence Support Section (“DSS”) informed the Office of the Prosecutor (“the Prosecution” or “OTP”) that the Defence team of Mr. Jean-Pierre BEMBA designated Mr. Nicholas Stuart Kaufman (“Mr. Kaufman”) to work as Legal Consultant in the Defence team and that such designation is under the examination of the Registrar for the purpose of its finalization. The DSS further requested that the Prosecution express to the Defence team its views due to the fact that Mr. Kaufman had previously been employed as a trial attorney in the OTP.¹

2. The Prosecution on three occasions informed the Defence and the DSS that it objects to the proposed appointment because it will raise a conflict of interest within the meaning of Article 16 of the Code of Professional Conduct for Counsel (“Code of Conduct”),² and that the conflict forms an impediment to representation pursuant to Article 12 thereof.³ Mr. Kaufman and the Defence provided responsive Observations.⁴

3. On 12 January 2010, the Defence informed the Prosecution that it instructed the Registry to finalize the appointment of Mr. Kaufman to the Defence team.⁵ On the same day, the Registry also informed the Prosecution that the appointment has taken effect.⁶

4. The Prosecution continues to oppose the appointment. Mr. Kaufman was privy to confidential discussions about this case, including discussions about trial strategy, strengths and weaknesses of the case, and other matters while a senior member of the OTP.

5. It is, accordingly, unfair to the Prosecution that counsel will be in a position to use inside information in the representation of the Accused. Nor can Mr. Kaufman reasonably be expected to put aside the information that he gained while a member of the OTP in the diligent representation of his client. Finally, it is not necessary that the Defence retain the

¹ Annex A appended to this filing.

² Resolution ICC-ASP/4/Res.1 adopted on 2 December 2005.

³ Annexes B, D, and I appended to this filing.

⁴ Annexes C, E, F, and J appended to this filing

⁵ Annex J appended to this filing.

⁶ Annex K appended to this filing

services of a conflicted attorney instead of one of other lawyers expressly identified as qualified to practice in this Court.

Request for confidentiality

6. The Prosecution requests that this filing be received as “Confidential” since it relates to material that is currently confidential.

Prosecution’s submissions

7. In this instance, Mr. Kaufman was privy to confidential information involving the *Bemba* case and additionally had tangential involvement in that matter when he was a staff member of the OTP. In the view of the Prosecution, it would be impossible for Mr. Kaufman to work for the *Bemba* Defence team while respecting and remaining bound by “the duties of confidentiality stemming from his [...] former position” (Article 12(1)(b), Code of Conduct) in the OTP.

8. Article 12 of the Code of Conduct provides that:

“Counsel shall not represent a client in a case:

(a) ...

(b) In which counsel was involved or was privy to confidential information as a staff member of the court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel’s request, be ordered by the Court if deemed justified in the interests of justice. ...” (emphasis added)

9. This article sets out two causes for attorney disqualification for former staff members:

(i) prior involvement or (ii) knowledge of confidential information, in the case in which counsel seeks to appear. Either ground is sufficient to constitute impediment to representation.

10. The Code of Conduct deliberately does not require that the prior involvement be substantial.⁷ The drafters of Article 12 of the Code of Conduct elsewhere impose a standard of

⁷ In this respect, it is significantly different than Article 14 (c) of the ICTY Code of Professional Conduct. The, Code of Professional Conduct for Counsel appearing before the ICTY expressly states: “Counsel shall not represent a client in connection with a matter in which counsel participated personally and substantially as an

substantiality in two occasions when stipulating the impediments to representation. The first addresses a conflict of interest between the case of the Accused for whom counsel seeks to appear and cases of other clients represented by the same counsel (see Article 12(1)(a)). The second addresses the probability of a counsel appearing as a witness in the proceedings in which he seeks to appear (see Article 12(3)). Accordingly, the exclusion of the substantiality standard in subparagraph Article 12(1)(b) of the Code of Conduct is not a result of oversight but an expression of determined intent by the drafters to *not* require that the prior involvement be “substantial” when considering potential disqualification of a former staff member of the Court.⁸

11. Nor does the Code of Conduct define “confidential information” to mean only documents, evidence, confidential filings, or the like. In fact, confidential information is more than tangible material; it includes, for example, information regarding internal assessments of the OTP of the strengths and weaknesses of its case and the reasons underlying its prosecutorial strategy.

12. Though Mr. Kaufman states that his “only knowledge of written submissions and evidence in the *Bemba* case is derived from publicly available information”⁹ and that he does not know the names of witnesses, the reality is that he has substantial knowledge of other confidential information as defined above.

official or staff member of the Tribunal [...]” (emphasis added). This provision is the basis for a “*substantial involvement test*” set out in some ICTY jurisprudence. In contrast, Article 12(1)(b) of the ICC Code of Conduct does not require prior “substantial” and “personal” involvement, but only involvement or knowledge of confidential information.

⁸ This is in line with the drafting history of this code of conduct. See Chapter III (13) of the proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, prepared by the International Criminal Bar, Ethics Committee, available at http://217.148.84.127/bpi-icb/files/Code_of_Conduct_en2.pdf, it states:

“13. Former members of the Office of the Prosecutor and former Judges and staff of the Chambers and of the Registry. 1). Former Prosecutors or members of the office of the Prosecutor and former Judges and former staff of the Chambers and of the Registry may accept mandates to act as counsel on behalf of accused persons, victims and witnesses in matters that are prosecuted before the International Criminal Court under the following conditions. a) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge was not involved in any matter related to the mandate they are called to accomplish. b) The former Prosecutor, member of the office of the Prosecutor, former staff of the Chambers or of the Registry, or former Judge is not in a conflict of interests and has not been privy to any information that is likely to result in a conflict of interests.” (emphasis added)

⁹ Mr. Kaufman’s first observations at para 4, Annex C appended to this filing.

13. Mr. Kaufman worked for the Prosecution from 5 May 2008 to 4 May 2009 as a senior staff member (P4) in the Prosecution Division (“PD”). He was first assigned to the *Lubanga* case and later assigned to the *Katanga and Ngudjolo* case. From early October 2008 until he left PD, he shared an office with Massimo Scaliotti, then one of two P4 lawyers assigned to the *Bemba* case. Mr. Scaliotti was occasionally acting leader of the trial team, in the absence of the P5 Senior Trial Lawyer. In addition, he supervised the pre-confirmation and pre-trial preparation on modes of liability and was in charge, overall, of issues dealing with the *Mouvement de Libération du Congo* insiders.¹⁰ As a senior member of the trial team and a member of the joint team,¹¹ Mr. Scaliotti would have strategy and legal discussions in his office in Mr. Kaufman’s presence.

14. Mr. Kaufman anticipated exposure to *Bemba* matters when proposing to share an office with Mr. Scaliotti. In an email dated 3 September 2009,¹² Mr. Kaufman stated (emphasis added):

[REDACTED]

Thanks for this.

As I explained, I am very happy where I am with Manoj - but Eric rather expressed a desire that I be more accessible to him on Floor 10. Furthermore, Massimo is a friend from days of yore and also at P4 level. *I also think it advantageous to be in a room with someone on a different case. That way one can be more in tune with what is going on elsewhere in the OTP - sharing knowledge etc....*

Nick

15. Apart from his physical presence in the office he shared with Mr. Scaliotti, in his capacity as a senior staff member Mr. Kaufman directly participated in formal and informal

¹⁰ When Mr. Kaufman states that he wishes to join the Defence team because he genuinely believes that Mr. Bemba “is not guilty of the [...] breach of command responsibility and of the charges against him” (Mr. Kaufman’s first observations para 1, Annex C appended to this filing), such a statement must be considered against the backdrop of his exposure to modes of liability discussions within OTP.

¹¹ Regulation 2 of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, defines “joint team” as the interdivisional team formed to carry out investigations. It also defines “trial team” as the interdivisional team formed upon confirmation of the charges to carry out prosecutions. Regulation 32(2) states that “each joint team shall be composed of staff from the three Divisions in order to ensure a coordinated approach throughout the investigation”. Regulation 32(5) states that “Upon confirmation of the charges, an interdivisional trial team is formed to carry out prosecutions. [...]”

¹² Annex L appended to this filing.

office discussions that inherently included confidential discussions of the strengths and weaknesses of the *Bemba* case.¹³ The reality is that within the ranks of senior staff in the OTP the lawyers and investigators frequently confer among themselves and seek advice on strategies for investigating, charging, and preparing cases for confirmation hearings or trials. Since the Court has not yet resolved many issues or potential issues, members of the staff frequently consult to benefit from their colleagues' various experiences. Mr. Kaufman, as a senior lawyer with experience in criminal law (including practice before an international tribunal) and as the office mate of a P4 lawyer in the *Bemba* team, directly and indirectly participated in or was exposed to these informal confidential discussions.

16. OTP also has confidential discussions on issues, strategies, and case evaluation in senior staff meetings in PD and in meetings involving the heads of the various divisions and the Prosecutor. Mr. Kaufman attended senior staff meetings in which the lawyers in PD would address and analyze core issues in the various cases within the Office. These included discussions regarding the *Bemba* case,¹⁴ including the litigated mode of liability, the guidelines for disclosure review, the Prosecution's position on witness protection, and the elements of the Prosecution's case.¹⁵

17. Additionally, Mr. Kaufman, upon his request and for the purpose of preparing a task in relation to the *Lubanga* case, obtained an under seal document, namely the Prosecutor's application for warrant of arrest in the *Bemba* case, which is currently not available to the Defence in an unredacted form.¹⁶

¹³ Though Mr. Kaufman suggests that it would have been a "breach of protocol" to divulge confidential information to a person not working on the particular case team, (Mr. Kaufman's first observations at para. 6, Annex C appended to this filing) there is no protocol restricting deliberative internal discussions, even when the subject matter is confidential. Courts instead presume that lawyers will appropriately recognize that they are bound by their duties of confidentiality.

¹⁴ Mr. Kaufman admitted the attendance of a meeting discussing the mode of liability in the *Bemba* case. See para. 10 of Mr. Kaufman's first observations, Annex C appended to this filing.

¹⁵ To ensure effective participation in the discussion, participants often receive internal OTP documents that revealed confidential information pertaining to the prosecutorial and investigative strategies of the office., See Annex G appended to this filing [Email inviting Mr. Kaufman to a meeting on 15 August 2008 with ExCom and the Joint team to discuss disclosure in the *Bemba* case, which includes among its attachments, guidelines for disclosure review, ExCom's position on Witness protection, and CAR issue list which contains internal elements of the Prosecution case]. See Annex H appended to this filing [exchange of emails between Mr. Kaufman and a senior staff member in the *Bemba* case setting a date for discussion of the Mode of Liability in the *Bemba* Case]

¹⁶ Mr. Kaufman admitted in his second observations that he requested this document (Mr. Kaufman's second observations at para. 3, Annex E appended to this filing) in contradiction with his assertion in his first observations that "[his] only knowledge of written submissions and evidence in the *Bemba* case is derived from publicly available information" (Mr. Kaufman's first observations at para. 4, Annex C appended to this filing).

18. Mr. Kaufman's proximity to, and involvement in, case-specific confidential discussions about prosecutorial strategy disqualifies him from representing the Accused. Mr. Kaufman states, "If the OTP's objection were to be upheld, the upshot would be that all former employees of the OTP would be denied the opportunity of working as Defence Counsel at the ICC".¹⁷ That is neither the Prosecution's position nor the inevitable consequence of the Prosecution's objection here. Rather, the Prosecution's position is only that a person of senior status, exposed to confidential information, including as a participant in confidential internal deliberations and discussions in an ongoing case or investigation, cannot thereafter align himself with the suspect or Accused in that case.¹⁸

19. Nothing in the Code of Conduct or professional ethics generally would disqualify a junior attorney who had no exposure to or participation in confidential deliberations and discussions from thereafter working as a Defence counsel in the Court. Nor would a senior attorney be disqualified from working as a Defence counsel in a case that was investigated after the attorney leaves the OTP. The Code of Conduct, however, bars Mr. Kaufman from undertaking a role with the Defence team after having been exposed to confidential Prosecution information, since it is not reasonable that he will ignore the confidential information he has received as a member of the OTP regarding strengths and witnesses and strategic decisions in this case. If he were to use that information to the benefit of his client, as he would be obligated to do, that would adversely affect the fairness of the trial and unduly disadvantage the Prosecution.

20. As much as the views of Mr. Kaufman will unavoidably affect the joint representation by the other members of the Defence team - indeed, he must share his assessment of the Prosecution strengths and weaknesses, based on his knowledge of the case, if he is to represent the interests of their shared client - their representation of Mr. Bemba will similarly

¹⁷ Mr. Kaufman's first observations at para. 12, Annex C appended to this filing.

¹⁸ Nor would the disqualification of Mr. Kaufman violate a protected right of Mr. Bemba to counsel of choice, regardless of the Code of Conduct or conflict of interest. It is noted that the right to choose Counsel is not an absolute one, it is subject to limitations. In this context, it was held that: "one of the limits to the accused's choice of counsel is a conflict of interest affecting his counsel". See *Prosecutor v. Gotovina, Čermak and Markač*, Case No. IT-06-90-AR 73.2, *Decision on Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorney's Prodanović and Sloković*, 29th June 2007, para 55 citing *Prosecutor v. Ante Gotovina and Prosecutor v. Ivan Čermak and Mladen Markac*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, *Decision on Interlocutory Appeals against the Trial Chambers Decision to Amend the Indictment and for Joinder*, 25 October 2006, para 30, citing *Prosecutor v. Željko Mejakić et al.*, Case No IT-02-65-AR73.1, *Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić*, 6 October 2004 ("*Mejakić Decision*"), para. 8

be affected. The Prosecution reminds the Court that it is the *knowledge* of the counsel, rather than the *passing of this knowledge* to the opposing party that is envisaged as impediment to representation pursuant to Article 12(1)(b) of the Code of Conduct. This knowledge alone will affect the functions of Mr. Kaufman in the Defence team and necessarily will extend to the members of the Defence team, since his knowledge cannot be isolated from the legal opinions or views he will present and share with them.

21. The Prosecution further submits that this appointment should be invalidated since it is based on the following violations of the Code of Conduct¹⁹;

i) Violation of Article 12(1)(b) “second sentence” of the Code of Conduct by not seeking the authorization of the Court to lift the impediment of representation stipulated in the “first sentence” of the said provision. In so doing, the Defence chose to circumvent an essential procedure designed to safeguard the integrity of proceedings by allowing the Court to draw an assessment based on the interests of justice.

ii) Failure to resolve the concerns raised by the Prosecution and notified to the Defence team,²⁰ constitutes a violation to Articles 13 and 16 of the Code of Conduct which respectively necessitate the exercise of all care to ensure that no conflict of interest arises,²¹ and the refusal of an agreement of representation where there is a conflict of interest.²² It also violates Article 24(1) of the Code of the Conduct that requires Counsel to take all necessary steps to ensure that his actions or those of other members of the team are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.

22. Nor is it necessary that the Defence team take on the services of a person with even a potential conflict of interest. The Registry maintains a list of qualified counsels to appear before the Court, which, as of 1 September 2009, exceeded 300 names.²³ In addition, the Accused may choose counsel not on the list.²⁴

¹⁹ These violations are attributed to Mr. Kaufman and equally to the Defence team since the latter was sufficiently notified of Mr. Kaufman’s involvement and knowledge of confidential information in the Bemba Case by consecutive memoranda on 19 November 2009, 2 December 2009, and 5 January 2010 (see annex B, D and I).

²⁰ See Annexes B, D and I

²¹ Article 16(1) of the Code of Conduct.

²² Article 13 (2)(a) of the Code of Conduct.

²³ <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/List+of+Counsel/List+of+>

23. The Prosecution's request is further supported by the principle that "safeguarding the interests of justice requires the prevention of potential conflicts of interest before they arise".²⁵

Relief sought

24. For the reasons set out above, the Prosecution respectfully requests that the Chamber:

- i) invalidate the contested appointment, or alternatively refer the request to a judge of the Pre-Trial Division pursuant to Article 64(4) of the Statute and allow the Prosecution to further substantiate its request; and
- ii) suspend the contested appointment pending a final decision on the matter.



Luis Moreno-Ocampo, Prosecutor

Dated this 17th Day of May 2010

At The Hague, The Netherlands

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²⁴ Regulation 75(2) of the Regulations of the Court.

²⁵ *Prosecutor v. Ante Gotovina et al*, Case No. IT-06-90-AR73.2, *Decision on Cermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Prodanovic and Slokovic*, 29 June 2007, para 16. *Decision on Appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel*, 24 November 2004 ("Prlić Appeal Decision"), para 25.