

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 30 June 2011

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS**

Public

**Decision on the Prosecution's Request to Invalidate the Appointment of
Counsel to the Defence**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan

Legal Representatives of Victims

Mr Brahim Koné
Ms Hélène Cissé
Mr Akin Akinbote
Mr Frank Adaka
Sir Geoffrey Nice & Mr Rodney Dixon

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***Amicus Curiae***REGISTRY****Registrar**

Ms Silvana Arbia

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations
Section****Others**

Trial Chamber IV ("Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("*Banda and Jerbo case*"), issues its Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence:

I. Background and Submissions

1. On 26 May 2011, the Registry's Counsel Support Section ("CSS") confirmed the appointment of Mr Ibrahim Yillah ("Mr Yillah") as associate defence counsel to the defence team in the *Banda and Jerbo case*.¹
2. On 9 June 2011, the Office of the Prosecutor ("prosecution") filed a motion requesting the Chamber to invalidate the appointment of counsel to the defence team ("prosecution Request").² The prosecution submits that the assignment of very recently departed lawyers of the prosecution to defence teams creates a conflict of interest.³ The prosecution contends that regardless of whether he was assigned to the *Banda and Jerbo case* itself, as a trial lawyer in the prosecution, he was exposed to and could have participated in or just overheard formal and informal office discussions concerning confidential information relating the *Banda and Jerbo case*. This, according to the prosecution, presents a real risk that he could inadvertently use such confidential information in his proposed new role.⁴

¹ *Enregistrement au dossier ICC-02/05-03/09 de la désignation de M. Ibrahim Yillah en qualité de Conseil Associé dans les équipes de Défense de M. Abdallah Banda Abakaer Nourain et M. Saleh Mohammed Jerbo Jamus*, 26 May 2011, ICC-02/05-03/09-152 and annex thereto.

² Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team, 9 June 2011, ICC-02/05-03/09-160.

³ ICC-02/05-03/09-160, paragraph 2.

⁴ ICC-02/05-03/09-160, paragraph 3.

3. The prosecution submits that in the “particular circumstances of the OTP”, lawyers who work within the Office of the Prosecutor have a conflict of interest and should be barred for a period of time, which should be no shorter than one year, from working for the defence in any case before the ICC. As a consequence, the prosecution requests that the Chamber invalidates his appointment.⁵

4. The prosecution submits that the Code of Professional Conduct for Counsel (“Code of Conduct”) bars Mr Yillah from undertaking a role within a defence team because he has until recently been exposed to confidential prosecution information. The prosecution contends that “[i]t is inconceivable that as Defence counsel he will be able to exclude in his exercise of judgment any information or knowledge regarding strengths and witnesses and strategic decisions received whilst part of the [prosecution], and exercise that professional judgment based solely on public information or information provided by his client or the defence team”.⁶ In support of its submission that a conflict of interest exists in the present case, the prosecution relies extensively on national legal texts.⁷

5. The prosecution asks the Chamber to prevent the appointment of Mr Yillah because of the suggested conflict of interests under Articles 12 and 16 of the Code of Conduct, or, alternatively, to remit the matter to a pre-trial judge pursuant to Article 64(4) of the Rome Statute (“Statute”), and to suspend the contested appointment pending a final decision.⁸

⁵ ICC-02/05-03/09-160, paragraph 4.

⁶ ICC-02/05-03/09-160, paragraph 30.

⁷ ICC-02/05-03/09-160, paragraphs 15 and 22.

⁸ ICC-02/05-03/09-160, paragraph 34.

6. On 15 June 2011, the defence filed a response to the prosecution Request.⁹ The defence request that the Trial Chamber dismiss the objections contained in the prosecution Request as unfounded and without merit. The defence also request that the issue be considered as a matter of priority by the Trial Chamber in order to minimise any impact on defence preparations for trial.¹⁰

II. Relevant provisions

7. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. [...] the Trial Chamber assigned to deal with the case shall:
 - (a) [...] adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

[...]

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

⁹ Defence Response to the "Prosecution's Request to Invalidate the Appointment Counsel to the Defence Team, 15 June 2011, ICC-02/05-03/09-163.

¹⁰ ICC-02/05-03/09-163, paragraphs 60-61.

- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

[...]

Rule 22 of the Rules of Procedure and Evidence ("Rules")

Appointment and qualifications of Counsel for the defence

[...]

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

3. In the performance of their duties. Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

[...]

Regulation 68 of the Regulations of the Court

Assistants to Counsel

Persons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber. The criteria to be met by these persons shall be determined in the Regulations of the Registry.

Regulation 127 of the Regulations of the Registry

Appointment of assistants to counsel

Persons who assist counsel in the presentation of the case before a Chamber shall be appointed by counsel and selected from the list maintained by the Registrar.

Article 2 of the Code of Conduct**Use of terms**

[...]

2. In this Code:
 - “defence team” refers to counsel and all persons working under his or her oversight;

[...]

Article 7 of the Code of Conduct**Professional conduct of counsel**

[...]

4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

[...]

Article 12 of the Code of Conduct**Impediments to representation**

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

[...]

- (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. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

[...]

4. This article is without prejudice to article 16 of this Code.

Article 13 of the Code of Conduct**Refusal by counsel of a representation agreement**

[...]

2. Counsel has a duty to refuse an agreement where:
 - (a) There is a conflict of interest under article 16 of this Code;

[...]

Article 16 of the Code of Conduct**Conflict of interest**

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the clients 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.
2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.
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.

Article 24 of the Code of Conduct**Duties towards the Court**

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.

III. Analysis and Conclusions

8. The Chamber first notes that the prosecution relies extensively on national legal texts to support its argument that a conflict of interest exists in the present case.¹¹ As to the applicable law on the issue of conflict of interest, the Chamber finds the prosecution argument inapposite because, as underlined by the defence¹² and the international jurisprudence, “national practices differ so much from each other on even the principal issues behind the question with which the Chamber is confronted, that it can derive no guidance from national practices”.¹³ Therefore, to resolve this issue, the Chamber will rely, pursuant to Article 21 of the Statute, primarily on the Rome Statute legal framework and the related existing previous decisions before the Court¹⁴ as well as the Code of Conduct.

9. The Chamber further notes that pursuant to Rule 22(1) of the Rules, counsel for the defence may be assisted by other persons with relevant experience. In accordance with Regulation 127 of the Regulations of the Registry, “persons who assist Counsel” are appointed by counsel and selected from the list maintained by the Registrar. In this context, the Chamber takes note of the fact that although the Registry facilitates the appointment of “persons who assist Counsel”, for example associate counsel, they lack the authority to bar or act as an impediment to the appointment of these persons.¹⁵

¹¹ ICC-02/05-03/09-160, paragraphs 15 and 22.

¹² ICC-02/05-03/09-163, paragraphs 9 and 10.

¹³ The Prosecutor v. Hadžihasanović et al., IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, Case No. IT-01-47-PT, 26 March 2002 (“Hadžihasanović Decision”), paragraph 42.

¹⁴ Article 21(1)(a) and Article 21(2) of the Statute.

¹⁵ The Registry stated that they cannot *proprio motu* bar or act as an impediment to the appointment of counsel or a team member if counsel with carriage over the matter, and who has the sole authority to make such appointments, insists on the appointment (ICC-02/05-03/09-160-Conf-Exp-AnxC).

10. Mr Yillah has been appointed as associate counsel for the defence team in the *Banda and Jerbo* case. In that position, Mr Yillah is expected to represent, under the supervision of the lead counsel, the accused persons in court and make submissions before the Chamber on their behalf. Mr Yillah may therefore be considered a "defence counsel [...] practising at the [...] Court" within the meaning of Article 1 of the Code of Conduct. The Code of Conduct, and in particular Articles 12(1)(b) and 16, are thus applicable in the present situation.

11. Pursuant to Article 16(1) of the Code of Conduct, it is defence counsel's responsibility to ensure that a conflict of interest does not arise, including a conflict that concerns a member of the "defence team" as defined by Article 2(2) of the Code of Conduct. Under Article 7(4) of the Code of Conduct, counsel shall supervise the work of the defence team, to ensure, *inter alia*, they comply with the code. Therefore, the principal responsibility for addressing and resolving a suggested conflict of interest rests with counsel, in accordance with his or her professional obligations as prescribed in Articles 12, 13(2)(b) and 16 of the Code of Conduct.¹⁶

12. In the event of a dispute that may cause unfairness in the proceedings, however, it is the responsibility of the Chamber to resolve the matter pursuant to Article 64(2) of the Statute. Under Article 64(3)(a) of the Statute, the Chamber has statutory responsibilities for ensuring that the trial is fair and for adopting such procedures as are necessary to facilitate the fair conduct of the proceedings.¹⁷

13. Article 12 of the Code of Conduct regulates impediments to representation. Pursuant to Article 12(1)(b) of the Code of Conduct, appointment of counsel is

¹⁶ See also Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, ICC-01/05-01/08-769, paragraph 39.

¹⁷ *Ibid.*, paragraph 41; See also Hadžihasanović Decision, paragraphs 17 and 30.

barred if counsel was (i) involved or (ii) was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The Chamber notes that “[t]he lifting of this impediment may, however, at counsel’s request be ordered by the Court if deemed justified in the interests of justice.”

14. The prosecution does not contend that Mr Yillah was involved in the present case during his employment with the Office of the Prosecutor. Therefore, the first alternative in Article 12(1) of the Code of Conduct is not applicable in this case.

15. As regards the second alternative in Article 12(1)(b) of the Code of Conduct, namely, that counsel was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear, the prosecution submits that, unlike at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), this alternative does not require prior “substantial and personal” involvement but only involvement or knowledge of confidential information.¹⁸ In support of its submission, the prosecution refers to earlier drafts of the Code of Conduct. The prosecution submits that the drafters of Article 12 had initially required the “substantiality standard” in two occasions when stipulating the impediments to representation in Article 12 but later on excluded this standard in the final subparagraph Article 12(1)(b) of the Code of Conduct. The prosecution contends that the exclusion of the said standard is not a result of oversight but an expression of determined intent by the drafters not to require that the prior involvement be “substantial” when considering potential disqualification of a former staff member of the Court.¹⁹ The current provision of Article 12 of the Code of Conduct, according to the prosecution, is in marked contrast to Article 14(c) of

¹⁸ ICC-02/05-03/09-160, paragraph 28, footnote 18.

¹⁹ ICC-02/05-03/09-160, paragraph 28.

the ICTY Code of Professional Conduct, which imposes the “substantial or personal” involvement test.²⁰

16. The Chamber agrees with the prosecution that the test under Article 12(1)(b), second alternative, of the Code of Conduct, does not require that the prior involvement was “substantial.” Therefore, the determinative issue for the Chamber is whether Mr Yillah became aware of more than “*de minimis* confidential information”²¹ relevant to the case which a member of the defence team should not possess.

17. The prosecution contends that as a trial lawyer in the Office of Prosecutor, Mr Yillah directly participated in formal and informal office discussions that inherently included confidential discussions of the strengths and weaknesses of the various cases which are at pre-trial or trial stages.²² The prosecution submits that within the ranks of junior and senior staff in the Office of the Prosecutor, the lawyers and investigators frequently confer amongst themselves and seek advice on investigative and prosecutorial tactics and policies. The prosecution further submits that over the course of Mr Yillah’s former employment, such formal and informal discussions have occurred and have included confidential investigative strategies, charging strategies for potential suspects and strategies for the preparation of cases for confirmation hearings or cases.²³

²⁰ ICC-02/05-03/09-160, paragraph 28. Article 14(c) of the ICTY Code of Professional Conduct states that: “Counsel shall not represent a client in connection with a matter in which counsel participated **personally and substantially** as an official or staff member of the Tribunal” (emphasis added).

²¹ ICC-01/05-01/08-769, paragraph 42.

²² ICC-02/05-03/09-160, paragraph 11. The Prosecution refers to Article 12(b) of the Code of Conduct. The Prosecution contends that Mr Yillah’s knowledge of such confidential information confronts him with a dilemma. He will be ethically obligated to use that information and judgment to the benefit of his clients while at the same time, he will be ethically prohibited from using it. See ICC-02/05-03/09-160, paragraph 30.

²³ ICC-02/05-03/09-160, paragraph 11.

18. The defence submits that Mr Yillah has never shared an office with any lawyer from the *Banda and Jerbo* case. It further submits that it is not accurate to assert that all members of the prosecution, including P-3 trial lawyers have access to confidential information across all situations and cases. In addition, the defence submits that the only prosecution strategies that Mr Yillah was privy to were those conveyed to him by the senior trial lawyers or the P-4 trial lawyers in the cases he actually worked on.²⁴
19. Finally, Mr Yillah contends that he is not in possession of any confidential information, either directly or indirectly, "be it officially or picked up along the corridors of the OTPs offices" pertaining to any other case or situation outside of the Central African Republic, the Democratic Republic of the Congo and Uganda cases, which have thus far been filed.²⁵ He further asserts that he has not participated in any meetings and/or discussions dealing with any "highly confidential" prosecution investigation strategy or policy, or in relation to any confidential matters arising out of any of these cases during his tenure.²⁶
20. The Chamber notes that although the prosecution states that Mr Yillah became aware of confidential information relevant to the present case during his employment with the prosecution, this has been advanced essentially in general terms, without any particulars or any supporting material.
21. Although, Mr Yillah's prior employment with the prosecution might have provided him insight into the functioning of the Office of the Prosecutor and provided him with knowledge pertaining to ongoing investigations, the Prosecution has not

²⁴ ICC-02/05-03/09-163, paragraph 48.

²⁵ ICC-02/05-03/09-163-AnxB, page 3.

²⁶ ICC-02/05-03/09-163-AnxB, page 3; ICC-02/05-03/09-163-AnxD.

demonstrated that Mr Yillah indeed has confidential information and knowledge pertaining to this specific case. Instead, the prosecution only suggests the possibility.²⁷

22. As a result, the combination of lack of any proof that Mr Yillah is effectively in possession of confidential material and his unequivocal assertions that he is unaware of any relevant confidential material settles this matter. Absent any reasons for doubting Mr Yillah's integrity, the Chamber is entitled to rely on his clear undertakings. Therefore, the Chamber finds that there are no persuasive indications that a conflict of interests exists or that his appointment is prejudicial to the present proceedings.

²⁷ See also ICC-01/05-01/08-769, paragraph 43.

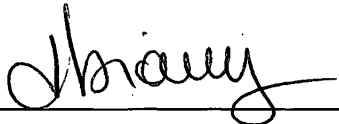
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the prosecution's Request.

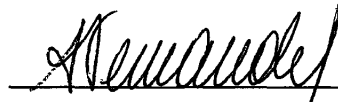
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembele Diarra



Judge Fernández de Gurmendi

Dated this 30 June 2011

At The Hague, The Netherlands