

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 15 April 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO***

Public

Decision on Prosecution submission on the appointment of defence counsel

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(2) and 67(1)(d) of the Rome Statute (the ‘Statute’), Regulations 23 *bis* and 24(5) of the Regulations of the Court and Articles 12(3) and 16 of the Code of Professional Conduct for counsel (the ‘Code of Conduct’), issues the following ‘Decision on Prosecution submission on the appointment of defence counsel’.

I. Procedural history and relief sought

1. On 16 February 2015, the Prosecution filed a submission related to Ms Melinda Taylor, Mr Bemba’s defence counsel in this case (the ‘Request’).¹ Ms Taylor has represented Mr Bemba as associate counsel in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (the ‘Main Case’) since 3 April 2014² and as lead counsel in this case since 21 January 2015.³
2. The Prosecution requests the Chamber to review the appointment of Ms Taylor on grounds that: (i) there appears to be an impediment to Ms Taylor’s simultaneous representation of Mr Bemba in this case and the Main Case under Article 12(3) of the Code of Conduct;⁴ (ii) such representation can give rise to actual and potential conflicts under Article 16(1) of the Code of Conduct⁵ and

¹ Prosecution’s Submission on the Appointment of Defence Counsel, 16 February 2015, ICC-01/05-01/13-819-Conf (notified on 17 February 2015, reclassified from confidential *ex parte* Prosecution and Bemba Defence only on 24 February 2015).

² Registry, *The Prosecutor v. Jean Pierre-Bemba Gombo*, Notification of the appointment of associate counsel and registration of the solemn undertakings, 3 April 2014, ICC-01/05-01/08-3031 (with annexes). Ms Taylor was named as a consultant on the Main Case as early as 6 January 2014. Registry, *The Prosecutor v. Jean Pierre-Bemba Gombo*, Enregistrement d’une lettre de M. Jean-Pierre Bemba Gombo désignant librement son conseil et précisant la composition de l’équipe assurant sa défense, 6 January 2014, ICC-01/05-01/08-2927.

³ Registration in the record of the case of the appointment of Ms. Melinda A. Taylor as Lead Counsel for Mr. Jean-Pierre Bemba Gombo, 21 January 2015, ICC-01/05-01/13-796 (with annex; notified on 22 January 2015). This appointment was foreshadowed as early as 16 December 2014. Annex I of Transmission to the Chamber of letters from Mr. Jean-Pierre Bemba Gombo, 6 January 2015, ICC-01/05-01/13-789-AnxI (filing contains two other annexes).

⁴ Request, ICC-01/05-01/13-819-Conf, paras 2, 17-24.

⁵ Request, ICC-01/05-01/13-819-Conf, paras 2, 25-33, 36-38.

(iii) this assignment must be examined with a view towards avoiding future disruptions in the continuity of Mr Bemba's representation in this case.⁶

3. Alternatively, should the Chamber determine that there is no impediment to Ms Taylor's continued representation, the Prosecution requests that the Chamber require Mr Bemba's 'proper waiver of any actual or latent conflicts under Article 16 of the Code of Conduct, pursuant to independent legal advice.'⁷
4. On 17 March 2015, the defence team for Mr Arido responded to the Request, requesting that the relief sought be rejected.⁸
5. That same day, the Bemba Defence, in view of the Prosecution's alternative relief sought, requested that an independent counsel selected by Mr Bemba be given access to the Request.⁹ This request, which the Prosecution did not oppose,¹⁰ was granted by the Chamber on 18 March 2015.¹¹
6. On 24 March 2015, the Bemba Defence responded to the Request (the 'Bemba Defence Response'),¹² requesting that the relief sought be rejected and annexing certain relevant correspondence.¹³

⁶ Request, ICC-01/05-01/13-819-Conf, paras 2, 34-35.

⁷ Request, ICC-01/05-01/13-819-Conf, paras 38-39.

⁸ Narcisse Arido's Observations on the "Prosecution's Submissions on the Appointment of Defence Counsel" (ICC-01/05-01/13-819-Conf), 17 March 2015, ICC-01/05-01/13-849-Conf.

⁹ Urgent request for reclassification, 17 March 2015, ICC-01/05-01/13-851-Conf. This filing followed certain questions raised by Ms Taylor about obtaining a waiver from an independent counsel. Email from Ms Taylor to the Chamber, 18 February 2015 at 14:44; Email from a Legal Officer of the Chamber to Ms Taylor, 23 February 2015, at 16:22 (The Chamber's entire response was as follows: 'If you wish to pursue this course, it makes sense to select someone off the ICC List of Counsel. If you would like to share any document with the selected person, you must make a formal application to the Chamber to reclassify that document. Beyond this step, the Chamber takes no position as to which modalities and safeguards should be adopted for any discussion between Mr Bemba and the selected counsel.').

¹⁰ Email from Prosecution to the Defence, Registry and Chamber, 17 March 2015 at 18:18.

¹¹ Email from Legal Officer of the Chamber to the parties and Registry, 18 March 2015, at 10:01.

¹² The Bemba Defence had previously requested to be granted an extension of time to respond to the Request in its Request for extension of time to respond to the 'Prosecution's Submission on the Appointment of Defence Counsel', 5 March 2015, ICC-01/05-01/13-833-Conf. This request was not opposed by the Prosecution, *see* The Prosecution's Response to the Bemba Defence's Request for an Extension of Time, 6 March 2015, ICC-01/05-01/13-834-Conf. The Bemba Defence request was granted by Email from Legal Officer of the Chamber to the parties, 9 March 2015 at 15:29.

¹³ Defence Response to the Prosecution's Submission on the Appointment of Defence Counsel, 23 March 2015, ICC-01/05-01/13-864-Conf (with annex).

7. On 30 March 2015, the Prosecution sought leave to reply to the Bemba Defence Response (the 'Leave to Reply Request').¹⁴
8. On 2 April 2015, the Bemba Defence filed three documents purporting to demonstrate Mr Bemba's written election for Ms Taylor to continue representing him.¹⁵ These documents are: (i) a letter signed by Mr Bemba indicating that he is satisfied that it is in his best interests for Ms Taylor to continue representing him in both his cases;¹⁶ (ii) a signed statement from the selected independent counsel, who submits he gave 'independent, impartial and sufficient' advice to Mr Bemba on issues related to a potential conflict of interest between Mr Bemba and Ms Taylor arising out of Ms Taylor's concurrent representation¹⁷ and (iii) a further signed letter from Mr Bemba confirming that he received advice from this independent counsel and asking for Ms Taylor to continue representing him in both his cases.¹⁸

II. Applicable Law

9. Article 67(1)(d) of the Statute¹⁹ confers an accused at this Court the right, *inter alia*, to conduct the defence through legal assistance of the accused's choosing.
10. However, this right is not absolute²⁰ for purposes of a fair trial and the proper administration of justice.²¹ Amongst its limitations are the need to ensure that a

¹⁴ Prosecution Request for Leave to Reply to ICC-01/05-01/13-864-Conf, 30 March 2015, ICC-01/05-01/13-879-Conf.

¹⁵ Defence Filing of Documents in the Record with Confidential Annex A, Confidential Annex B and Confidential Annex C, 2 April 2015, ICC-01/05-01/13-889-Conf (with three annexes). This was filed following an email indication from the Chamber. Email from Legal Officer of the Chamber to the Bemba Defence, 30 March 2015 at 15:25.

¹⁶ ICC-01/05-01/13-889-Conf-AnxA.

¹⁷ ICC-01/05-01/13-889-Conf-AnxB.

¹⁸ ICC-01/05-01/13-889-Conf-AnxC.

¹⁹ This provision provides: 'In the determination of any charge, the accused shall be entitled to [...] the following minimum guarantees, in full equality: [...] (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'.

²⁰ Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, ICC-01/09-02/11-365 (OA 3) (the '*Muthaura et al.* OA 3 Judgment'), para. 53.

person is suitable to act as counsel, a consideration that includes, in turn, the need to prevent conflicts of interest.

11. Article 12(3) of the Code of Conduct²² 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'. The Code of Conduct refers, *inter alia*, to defence counsel as 'counsel'²³ and makes otherwise clear that the terms as defined in the Statute and the Rules are used in the same manner in the Code of Conduct.²⁴ An 'associate' in the Code of Conduct refers to 'lawyers who practise in the same law firm as counsel'.²⁵

12. Article 16 of the Code of Conduct²⁶ requires that counsel must exercise all care to ensure that no conflict of interest arises. Where 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.²⁷ However, informed consent from a potentially affected client given in an effort to cure a conflict is not necessarily conclusive of the matter.²⁸ In particular, the Chamber considers that a conflict of interest

²¹ *Muthaura et al.* OA 3 Judgment, ICC-01/09-02/11-365, para. 51.

²² This provision provides: '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 unless: (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.'

²³ Article 1 of the Code of Conduct.

²⁴ Article 2(1) of the Code of Conduct.

²⁵ Article 2(2) of the Code of Conduct.

²⁶ 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.'

²⁷ Article 16(3) of the Code of Conduct.

²⁸ See, similarly, ICTY, *The Prosecutor v. Ante Gotovina et al.*, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, IT-06-90-AR73.1, para. 32.

waiver may not be accepted if to do so is likely to result in irreversible prejudice to the administration of justice.²⁹

III. Analysis

13. As a preliminary matter, the Chamber considers that it does not require any further submissions in order to resolve the relief sought in the Request. The Chamber therefore rejects the Prosecution's request for leave to reply. The Chamber will analyse the Request under the two provisions of the Code of Conduct which are central to the Request.

A. Impediment to representation under Article 12(3) of the Code of Conduct

14. For the reasons that follow, and particularly on the facts of the present matter, the Chamber finds that there is no 'impediment to representation' under Article 12(3) of the Code of Conduct, merely because of a potential that the impugned counsel may examine other members of a defence team in the Main Case.

15. At the outset, the Chamber considers that the scenario envisaged by the plain wording of Article 12(3) of the Code of Conduct – in relation to the specific term 'counsel' - appears not to be engaged in the present case. Ms Taylor, as 'counsel' in the present case, is not called to testify as a witness nor is information available to support a 'substantial probability' that she will be called to testify as a witness in the present case.

16. The Prosecution does not argue that there is a substantial probability of Ms Taylor being called as a witness. Rather, the Prosecution argues that there is a substantial probability that Mr Peter Haynes and/or Ms Kate Gibson (Lead Counsel and Co-Counsel, respectively, in the Main Case) will be called as

²⁹ The ICTY has codified this standard when evaluating conflict of interest. *See* Article 14(E) of the ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal, 2009, IT/125 Rev. 3 ('ICTY Code of Conduct').

witnesses on contested issues in this case.³⁰ According to the Prosecution's hypothesis, Mr Haynes or Ms Gibson would come within the meaning of the term 'an associate of counsel'. In that regard, the Prosecution submits as follows:

Article 2(2) of Code defines the term 'associate' as "lawyers who practise in the same law firm as counsel". However, the fact that Ms Taylor's association with Mr Haynes and Ms Gibson does not comprise a formally constituted 'law firm' is irrelevant. Lawyers comprising a singular 'defence team' (i.e., working under the oversight of a lead counsel) fall within the type of professional relationship toward which article 12(3) of the Code is addressed.³¹

17. From the foregoing, it appears that the Prosecution seeks to extend the applicability of Article 12(3) of the Code of Conduct, beyond its wording, to any member of the 'defence team', thus creating an impediment to counsel to represent a client in any case in which there is substantial probability that any member of counsel's defence team will testify. But, the Chamber is unwilling to endorse such an extended meaning to the provision at this time, especially given the related applicable language of the Code of Conduct.
18. Specifically, Article 2(2) of the Code of Conduct clearly recognises the distinction between an 'associate' and a 'defence team'.³² The prohibition made in Article 12(3) of the Code of Conduct relates only to 'counsel' or an 'associate of counsel.' No mention is made of other members of a counsel's 'defence team'. Hence, Mr Haynes and Ms Gibson in the Main Case are not 'associate[s] of counsel' within the ambit of Article 12(3) of the Code of Conduct.
19. None of this is to say that conflicts of interest are not possible, such that make it necessary to disqualify counsel on the basis of professional relationships within a defence team. That must remain a possibility on a case by case basis and on the particular facts of a given case, in cases of such severity that engage the need to avoid irreversible prejudice to the administration of justice. However, the

³⁰ Request, ICC-01/05-01/13-819-Conf, para. 14.

³¹ Request, ICC-01/05-01/13-819-Conf, para. 13 n. 11.

³² The latter refers to 'counsel and all persons working under his or her oversight'.

Chamber considers that Article 16 of the Code of Conduct governs these matters, not Article 12(3) of the Code of Conduct.

20. In any event, the Chamber is not persuaded that the ‘substantial probability’ test has been demonstrated. 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 accused persons on the mere possibility that counsel or her associates in the practice of law may be called as witnesses in the case. In that connection, the Chamber notes that the Prosecution had not shown the substantial probability that Ms Taylor is likely to call either Mr Haynes or Ms Gibson as a witness for the Defence.³³ Nor has the Prosecution demonstrated a ‘substantial probability’ that Mr Haynes or Ms Gibson is likely to be called as a witness for the Prosecution. As a result, the Prosecution’s application to remove Ms Taylor as Mr Bemba’s counsel on the basis of Article 12(3) of the Code of Conduct must be rejected.

B. Conflict of interest under Article 16 of the Code of Conduct

21. For the reasons that follow, the Chamber finds that there is no conflict of interest to Ms Taylor’s representation of Mr Bemba which, despite Mr Bemba’s waiver, would nevertheless irreversibly prejudice the administration of justice.

22. The Prosecution argues that Ms Taylor’s concurrent representation seems to give rise to an actual conflict of interest because her association with counsel in the Main Case restricts her ability to pursue potentially viable defences, such as mounting a defence strategy which discredits Mr Bemba’s overall representation in the Main Case.³⁴ The Prosecution further submits that Ms Taylor’s concurrent appointment may conditionally give rise to a latent conflict of interest because, if Mr Haynes and/or Ms Gibson appeared as witnesses, Ms Taylor would have her

³³ See Bemba Defence Response, ICC-01/05-01/13-864-Conf, para. 39.

³⁴ Request, ICC-01/05-01/13-819-Conf, para. 26.

loyalties divided by 'pitting her client's interests against the professional interests of her teammates in the [M]ain [C]ase'.³⁵

23. The Bemba Defence responds that it is not intending to advance any defence strategy which would discredit Mr Bemba's counsel in the Main Case, submitting that doing so would be a 'completely schizophrenic strategy in two, related cases.'³⁶ The Bemba Defence emphasises the importance that Mr Bemba's counsel in this case provide legal advice which takes into consideration his rights and interests in both cases, and that Ms Taylor's concurrent representation actually eliminates the possibility of a conflict arising between the strategies employed in both cases.³⁷

24. The Chamber is not convinced that the Prosecution has taken their theory of conflict of interest beyond mere speculation. For one thing, the conflict is not readily apparent at the primary level of ownership of the interests contemplated as potentially in conflict. For the interest of Mr Bemba in the successful outcome in the Main Case has not been shown to be in conflict with his interest in a successful outcome in the present case. They are both the interests of Mr Bemba himself, not interests belonging to different persons. Nor has a latent potential conflict of interest been demonstrated at the collateral level involving the interests of Mr Haynes and Ms Gibson. In this sense, there needs to be more than mere speculation that a robust defence strategy by counsel other than Ms Taylor in the present case has a real potential to expose as against Mr Haynes and Ms Gibson a salutary claim of what would amount to ineffective assistance of counsel in the Main Case.

25. The Prosecution's argument ultimately comes to this: a different counsel may do better for Mr Bemba in the present case simply by being a stranger to the Main Case. But, that is a speculative argument that inevitably provokes the opposing

³⁵ Request, ICC-01/05-01/13-819-Conf, paras 27-33.

³⁶ Bemba Defence Response, ICC-01/05-01/13-864-Conf, paras 14-16.

³⁷ Bemba Defence Response, ICC-01/05-01/13-864-Conf, paras 20-29.

one alluded to in the responding submission: that the different counsel may do worse for Mr Bemba (in either case or both) simply because he or she is a stranger to the Main Case. The Chamber finds it undesirable to grant a positive relief on the basis of such competing speculations.

26. Even assuming that a conflict of interest may arise with regard to Ms Taylor's concurrent representation, the Chamber particularly notes that Mr Bemba, on the basis of independent legal advice, has settled the choice of Ms Taylor to continue as his counsel in the present case. The Chamber is satisfied that the unredacted information³⁸ provided by the Bemba Defence to the Chamber, taken together, constitute 'full and informed consent' from Mr Bemba within the meaning of Article 16(3)(b) of the Code of Conduct. Given Mr Bemba's right to counsel of his choice and his understandable interest in having a coordinated approach across his two defence teams in the two related cases,³⁹ the Chamber sees no reason why, despite the waiver, it would irreversibly prejudice the administration of justice for Ms Taylor to continue representing Mr Bemba in this case and the Main Case. As a result, the Prosecution's application to remove Ms Taylor as Mr Bemba's counsel on the basis of Article 16 of the Code of Conduct must be rejected.

C. Classification of filings

27. As a final matter, the Chamber notes that the Bemba Defence does not object to reclassifying the Bemba Defence Response as public.⁴⁰ The Chamber considers

³⁸ ICC-01/05-01/13-889-Conf-AnxA, page 3; ICC-01/05-01/13-889-Conf-AnxB; ICC-01/05-01/13-889-Conf-AnxC. *But see* ICC-01/05-01/13-889-Conf, para. 1(a) (explaining that 'privileged information' has been redacted from Annex A).

³⁹ *See* ICC-01/05-01/13-889-Conf-AnxA, page 3; ICC-01/05-01/13-889-Conf-AnxC, page 2 (signed letters of Mr Bemba asking for Ms Taylor to continue to represent him in this case and the Main Case).

⁴⁰ Bemba Defence Response, ICC-01/05-01/13-864-Conf, para. 9.

that the basis for the confidential classification of this litigation's underlying filings no longer exists, and directs the Registry to reclassify them as public.⁴¹

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

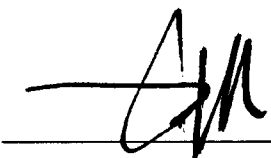
REJECTS the relief sought in the Leave to Reply Request;

REJECTS the relief sought in the Request to remove Ms Taylor as Mr Bemba's counsel;

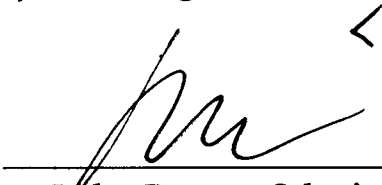
DISMISSES the relief sought in the Request to receive Mr Bemba's waiver as moot; and

ORDERS the Registry to reclassify the following documents as public: (i) the Request (ICC-01/05-01/13-819-Conf); (ii) ICC-01/05-01/13-823-Conf; (iii) ICC-01/05-01/13-833-Conf; (iv) ICC-01/05-01/13-834-Conf; (v) ICC-01/05-01/13-849-Conf; (vi) ICC-01/05-01/13-851-Conf; (vii) the Bemba Defence Response (ICC-01/05-01/13-864-Conf); (viii) ICC-01/05-01/13-889-Conf; (ix) ICC-01/05-01/13-889-Conf-AnxA and (x) ICC-01/05-01/13-889-Conf-AnxC.

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


 Judge Chile Eboe Osuji, Presiding


 Judge Olga Herrera Carbuccion


 Judge Bertram Schmitt

Dated 15 April 2015

At The Hague, The Netherlands

⁴¹ Although the Bemba Defence Response and ICC-01/05-01/13-889-Conf are to be reclassified, the Bemba Defence may apply redactions, to the extent necessary, to ICC-01/05-01/13-864-Conf-AnxA and ICC-01/05-01/13-889-Conf-AnxB before filing public redacted versions of them in the case record.