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No.: **ICC-01/14-01/18**
Date: **10 December 2020**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-*
EDOUARD NGAÏSSONA

Public

**Public Redacted Version of “Prosecution’s Submission on the Appointment of
Defence Counsel” 10 December 2020**

Source: Office of the Prosecutor

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Mr Richard Omissé-Namkeamaï

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) hereby provides its submissions on the appointment of Richard Omissé-Namkeamaï as Associate Counsel for the Accused NGAISSONA.¹ As set out below, the propriety of Mr Omissé-Namkeamaï’s representation should be determined by Trial Chamber V (“Chamber”), and the Chamber should direct that an informed waiver be filed in the record of the proceedings, should it consider that a waivable impediment or conflict arises.

2. Contrary to Article 12(1)(a) of the Code of Professional Conduct for Counsel (“Code”), Counsel has formerly represented [REDACTED]. Given the circumstances of the related proceeding, NGAISSONA’s interests appear incompatible with those of Counsel’s former clients. Further, the record of these proceedings provides no indication that Counsel has obtained the full and informed consent of both NGAISSONA and of his former clients, [REDACTED].

3. The Chamber’s review of Mr Omissé-Namkeamaï’s appointment is necessary to ensure the absence of present or latent conflicts of interest,² and to preserve the integrity and fairness of the proceedings.

II. CONFIDENTIALITY

4. This filing is classified as Confidential as it provides details of Prosecution evidence not yet made public [REDACTED]. The Prosecution concurrently files a public redacted version of this filing.

¹ See ICC-01/14-01/18-758.

² See Article 16(1) and (3) of the Code.

III. SUBMISSIONS

5. The Code is “part of the Court's applicable law under article 21(1)(a) of the Statute.”³ Article 12 of the Code regulates impediments to representation. Subsection (1)(a) thereof prohibits counsel from appearing in a case which “... is the same as or substantially related to another case in which counsel ... formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation.”

A. Mr Omissé-Namkeamaï formerly represented [REDACTED]

6. [REDACTED].⁴ [REDACTED].⁵ [REDACTED].⁶

7. [REDACTED].⁷ [REDACTED].⁸ [REDACTED].⁹ [REDACTED].¹⁰

B. NGAISSONA and the former clients may have incompatible interests

8. NGAISSONA interests, on the one hand, and Counsel's former clients' on the other, appear to be incompatible. [REDACTED].¹¹ [REDACTED].¹² [REDACTED].

9. [REDACTED].¹³ [REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶

³ ICC-01/09-02/11-365, para. 49.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

10. Given his previous representation, Mr Omissé-Namkemaï cannot use information obtained from his former clients when acting as Counsel to NGAISSONA, whether to his former clients' detriment or to NGAISSONA's *advantage*. If, for example, one of his former clients had provided him with information tending to exonerate NGAISSONA, Mr Omissé-Namkemaï would be precluded from using this information in the present case. [REDACTED].

11. Mr Omissé-Namkemaï's responsibilities to his former clients thus materially limit his duty to his current one, and his appointment is *per se* inconsistent with his adversarial position in these proceedings. Particularly, the appointment presents a significant risk to NGAISSONA's right to adequate representation and conversely, risks the former clients' right to maintain the confidence of communications with their former counsel.

12. Although NGAISSONA has understandably not announced the contours of his defence in this case, it is conceivable that [REDACTED]. For instance, [REDACTED] may comprise evidence of prior *intent* in relation to the charged crimes in this case (as the Chamber has recognised).¹⁷ The critical issue is the likelihood that such incompatible interests will materialise. The Prosecution considers this is substantial, and should this occur mid-trial, it could be too late to cure the latent conflict of interest.

C. Consent is required but may not be sufficient

13. Articles 12(1)(a) and 16(3)(b) of the Code prohibit Mr Omissé-Namkemaï's representation of NGAISSONA in this case, unless both NGAISSONA and Counsel's former clients have been fully informed of the nature and extent of any possible conflicts of interest, and consented to the representation. Until this is clear in the record of this case, an impediment to representation exists.

¹⁷ ICC-01/14-01/18-703, para. 51.

14. Given the apparent conflict of interest, Counsel should have disclosed and declined his appointment under Article 13(2)(a) of the Code. Nonetheless, Article 12(2) of the Code provides that “where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained.” To date, the Prosecution is unaware that the required written notification has been filed with the Chamber.¹⁸

15. If written consent *has* been obtained, it is still incumbent on the Chamber to assess the sufficiency of the information upon which it is based. In this regard, it is significant whether the current and former clients were informed of the actual and reasonably foreseeable adverse consequences of representation. Further, directly adverse positions between clients may require independent legal advice concerning their consent to the conflicted representation.

16. Even so, the informed consent of NGAISSONA and Counsel’s former clients may not be sufficient to discharge the Chamber’s overarching duty to ensure that the trial is fair to the parties and persons appearing before it, and conducted with full respect for the rights of the accused.¹⁹ These rights are necessarily components of a fair trial and, as such, failing to secure them will adversely affect a trial’s fairness.²⁰ A conflict of interest does not necessarily entail the withdrawal or removal of counsel where the consent of all potentially affected clients (current and former) is obtained.²¹ However, where the representation involves the assertion of a claim by one client against another for instance, a waiver may be unavailing.

17. It is first and foremost “counsel’s responsibility to ensure that an impediment to representation and/or a conflict of interest does not arise, in accordance with his or her

¹⁸ Article 12(2) and (4), and Article 16(3)(b) of the Code (requiring that full and informed consent of all potentially affected clients be sought in writing).

¹⁹ Articles 64(2) and (4), and 67.

²⁰ ICC-01/09-02/11-365, para. 51.

²¹ See Article 16(3) of the Code.

professional obligations under the Code.”²² However, where, as here, the interests of Counsel’s current and former clients may be directly aligned against one another, the Chamber’s intervention is necessary to avert the potential adverse impact on the fairness and integrity of the trial.

IV. CONCLUSION

18. For the reasons set out above, the Prosecution requests that the Chamber determine the propriety of Mr Omissé-Namkeamaï’s appointment as Associate Counsel for NGAISSONA, and direct that a waiver be filed in the record of the proceedings, should it consider that a waivable impediment or conflict arises.



James Stewart, Deputy Prosecutor

Dated this 10th day of December 2020
At The Hague, The Netherlands

²² ICC-01/09-02/11-365, paras. 54 and 69.