

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/14-01/18
Date: 19 January 2021**

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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

Decision on the Prosecution Submission on the Appointment of Defence Counsel

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and 67(1)(d) of the Rome Statute (the ‘Statute’), and Articles 12, 13 and 16 of the Code of Professional Conduct for counsel (the ‘Code’), issues this ‘Decision on the Prosecution Submission on the Appointment of Defence Counsel’.

I. Procedural history and submissions

1. On 8 December 2020, the Registry informed the Chamber that, on 2 December 2020, Mr Richard Omissé-Namkeamaï, a lawyer on the List of Counsel of the Court, had been formally appointed as Associate Counsel for Mr Ngaïssona (the ‘Counsel’).¹
2. On 11 December 2020, the Chamber received the ‘Prosecution’s Submission on the Appointment of Defence Counsel’ (the ‘Request’).² The Office of the Prosecutor (the ‘Prosecution’) submits that Counsel has, contrary to Article 12(1)(a) of the Code, formerly represented trial witness [REDACTED] (the ‘Witness’ and collectively the ‘Former Clients’) in related proceedings in the Central African Republic (the ‘CAR’).³ According to the Prosecution, Mr Ngaïssona’s interests appear incompatible with those of Counsel’s Former Clients.⁴ In order to avoid ‘present or latent’ conflicts of interest, the Prosecution requests that the Chamber: (i) determine the ‘propriety’ of Counsel’s appointment; and (ii) direct that a waiver be filed in the record of these proceedings, should it consider that a ‘waivable impediment or conflict arises’.⁵
3. On 21 December 2020, the Ngaïssona Defence (the ‘Defence’) responded to the Request (the ‘Response’).⁶ According to the Defence, Counsel was appointed as

¹ Registration of the appointment of Mr Richard Omissé-Namkeamaï as Associate Counsel for Mr Patrice-Edouard Ngaïssona, ICC-01/14-01/18-758 (with confidential Annex I and public Annex II) (corrigendum of Annex II notified on 12 January 2021, ICC-01/14-01/18-758-AnxII-Corr).

² Request, ICC-01/14-01/18-764-Conf (public redacted version notified the same day, ICC-01/14-01/18-764-Red).

³ Request, ICC-01/14-01/18-764-Conf, paras 2, 6-7.

⁴ Request, ICC-01/14-01/18-764-Red, paras 2, 8-12.

⁵ Request, ICC-01/14-01/18-764-Red, paras 1, 18.

⁶ Defence Response to the “Prosecution’s Submission on the Appointment of Defence Counsel”, ICC-01/14-01/18-791-Conf (including an affidavit by Mr Omissé-Namkeamaï contained in confidential

pro bono legal representative of his Former Clients by the [REDACTED].⁷ Whereas his appointment was formalised on [REDACTED] by way of a letter sent to [REDACTED] (the ‘Tribunal’),⁸ it was abruptly withdrawn shortly thereafter upon recommendation of the [REDACTED], due to [REDACTED].⁹

4. With regard to this ‘abrupt’ withdrawal of representation, the Defence specifies that Counsel was, as a consequence of [REDACTED].¹⁰ According to the Defence, Counsel: (i) never received the case file from the Tribunal, or any privileged information, (ii) did not perform any legal work on behalf of his Former Clients,¹¹ and (iii) his interaction with these individuals was ‘extremely limited’ and amounted to a single visit [REDACTED] that lasted less than thirty minutes.¹²
5. Accordingly, the Defence submits that there is no conflict of interest and no impediment to Counsel’s representation of Mr Ngaïssona,¹³ as there was no ‘effective representation’ of Counsel’s Former Clients within the meaning of Article 12(1)(a) of the Code.¹⁴ The Defence further submits that: (i) the facts of the present case and the case against the Former Clients are not ‘substantially related’; and (ii) ‘the criterion that the interests of the former clients must not be incompatible with those of the client in these proceedings is not met’.¹⁵

II. Analysis

A. Applicable law

Annex A, ICC-01/14-01/18-791-Conf-AnxA) (public redacted version notified the same day, ICC-01/14-01/18-791-Red).

⁷ Response, ICC-01/14-01/18-791-Conf, para. 8; Annex A to the Response, ICC-01/14-01/18-791-Conf-AnxA, paras 1-2.

⁸ Response, ICC-01/14-01/18-791-Conf, para. 8.

⁹ Response, ICC-01/14-01/18-791-Conf, para. 9; Annex A to the Response, ICC-01/14-01/18-791-Conf-AnxA, para. 8.

¹⁰ Annex A to the Response, ICC-01/14-01/18-791-Conf-AnxA, paras 8-9; Response, ICC-01/14-01/18-791-Conf, para. 9, n. 10.

¹¹ Response, ICC-01/14-01/18-791-Conf, para. 9; Annex A to the Response, ICC-01/14-01/18-791-Conf-AnxA, paras 5, 8.

¹² Annex A to the Response, ICC-01/14-01/18-791-Conf-AnxA, para. 6; Response, ICC-01/14-01/18-791-Conf, para. 10.

¹³ Response, ICC-01/14-01/18-791-Red, para. 3.

¹⁴ Response, ICC-01/14-01/18-791-Red, para. 13.

¹⁵ Response, ICC-01/14-01/18-791-Red, para. 13.

6. At the outset, the Chamber recalls the accused's right to receive legal assistance of their choosing pursuant to Article 67(1)(d) of the Statute and that the Chamber should only interfere with the exercise of this right on an exceptional basis.¹⁶
7. The Chamber notes Articles 12, 13 and 16 of the Code concerning impediments to the representation of clients, the right and/or duty of counsel to refuse a representation agreement, and conflicts of interests. Article 12(1)(a) of the Code establishes that an impediment to representation exists, *inter alia*, if (i) the case is 'the same as or substantially related to another case in which counsel [...] formerly represented another client', and (ii) 'the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation'. In accordance with Article 12(2) of the Code, when consent has been obtained after consultation, counsel shall inform the Chamber of the conflict and the consent obtained.
8. Article 16(1) of the Code provides that counsel shall 'exercise all care to ensure that no conflict of interest arises' and that counsel shall 'put the client's interests before counsel's own interests or those of any other person'. Article 16(3) of the Code further establishes that, when a conflict of interest arises, counsel has a duty to inform all potentially affected clients and either (i) withdraw from representation of one or more clients with the prior consent of the Chamber; or (ii) seek the full and informed consent in writing of all potentially affected clients to continue representation.
9. Pursuant to Article 13(2)(a) of the Code, counsel is under an obligation to refuse representation when there is a conflict of interest under Article 16 of the Code.

B. The Chamber's determination

10. The Chamber will first assess whether there is an impediment to representation within the meaning of Article 12 of the Code and then determine whether a conflict of interest exists, pursuant to Article 16 of the Code.

¹⁶ See also Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the "Prosecution Submission on the Appointment of Defence Counsel" for Mr Aimé Kilolo Musamba, 1 April 2014, ICC-01/05-01/13-307, para. 4.

11. On the basis of the information available, the Chamber finds that no impediment to representation exists, as there was no ‘former representation’ within the meaning of Article 12 of the Code. First, Counsel’s formal appointment as legal representative led to a single interaction with the Former Clients that was limited to less than thirty minutes. Second, Counsel neither received any privileged information nor performed legal work on their behalf.¹⁷ Accordingly, the Chamber finds the Prosecution’s concerns in this regard unsubstantiated.¹⁸
12. With regard to the alleged conflict of interest pursuant to Article 16 of the Code, the Chamber finds that, on the basis of the information available at this stage, there is also no indication that a conflict of interest exists.
13. Specifically, the Chamber finds the Prosecution’s submissions as to potential conflicts of interests that may arise mid-trial and the possibility of Mr Ngaïssona blaming lower-ranking members of the Anti-Balaka, including the Former Clients, for the crimes with which he is charged,¹⁹ to be speculative and unsubstantiated.
14. In light of the above, the Chamber considers Counsel’s appointment appropriate and sees no need for the filing of any waivers. Nonetheless, the Chamber reminds Counsel of his ongoing obligations under Article 16(3) of the Code.
15. Finally, out of an abundance of caution, and noting that the Witness will be called to testify pursuant to Rule 68(3) of the Rules,²⁰ the Chamber orders the Defence to ensure that Counsel does not cross-examine the Witness. In this context, the Chamber also recalls the Victims and Witnesses Unit’s (the ‘VWU’) obligations under the Witness Familiarisation Protocol.²¹ The Chamber directs that, as part of the Witness’s familiarisation, the VWU should inform him of Counsel’s presence in the courtroom.

¹⁷ See paragraph 4 above.

¹⁸ Request, ICC-01/14-01/18-764-Red, paras 10-11.

¹⁹ Request, ICC-01/14-01/18-764-Conf, para. 12.

²⁰ Final Witness List, Annex A to the Prosecution’s List of Witnesses and Evidence, 9 November 2020, ICC-01/14-01/18-724-AnxA.

²¹ Witness Familiarisation Protocol, Annex 1 to the Decision on Protocols at Trial, 8 October 2020, ICC-01/14-01/18-677-Anx1, in particular para. 76.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

DIRECTS the Defence to ensure that Counsel does not cross-examine the Witness;
and

DIRECTS the VWU to inform the Witness of Counsel's presence, as set out in paragraph 15 of the present decision.

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

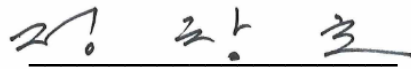


Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 19 January 2021

At The Hague, The Netherlands