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No.: **ICC-01/14-01/18**

Date: **22 March 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Submission on the Appointment of
Defence Counsel”, (ICC-01/14-01/18-898-Conf), 4 March 2021**

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

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Ms Marie-Hélène Proulx

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) hereby provides its submissions on the appointment of Marie-Hélène Proulx as Associate Counsel for the Accused NGAISSONA.¹ Trial Chamber V (“Chamber”) should determine the propriety of Ms Proulx’s representation in view of her prior assignment as Counsel to represent the interests of the Defence [REDACTED], and her prior association with Defence Counsel for YEKATOM in an unrelated proceeding. Should the Chamber determine that a waivable impediment or conflict exists currently or may reasonably arise latently, a fully informed written waiver should be required and filed in the record of the proceedings.

2. The Chamber’s review of Ms Proulx’s appointment is necessary to ensure the absence of any present or latent conflicts of interest,² and to preserve the integrity and fairness of the proceedings.

II. CONFIDENTIALITY

3. This filing is classified as *Confidential* as it concerns, in part, proceedings [REDACTED] that are not public.³ The Prosecution will file a public redacted version of this filing as soon as practicable.

III. SUBMISSIONS

4. An arguable conflict of interest arises in the present circumstances under article 16 of the Code of Professional Conduct for Counsel (“Code”).

¹ See ICC-01/14-01/18-891.

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

³ The Prosecution has obtained the express permission [REDACTED], for the purposes of this filing.

A. Assignment as Duty Counsel [REDACTED]

5. Ms Proulx was previously assigned through the Office of Public Counsel for the Defence (“OPCD”) to represent Defence interests [REDACTED]. Pursuant to this appointment, OPCD was provided with confidential materials [REDACTED].

6. Ms Proulx is professionally bound to maintain the confidentiality of any information acquired in the course of her [REDACTED] representation of Defence interests, whether in her actual possession or knowledge. This includes any material or information which, in her judgement, may be of assistance to her prospective client in any way. As such, her current appointment may present an ethical dilemma, pitting her professional obligations to the Court against those owed to her client. Effectively, Counsel may be forced to choose between her own professional interests in sequestering information from her client which might otherwise be advantageous to him.⁴ Such a position is in direct tension with Article 16(1) of the Code, which provides *inter alia* that, “Counsel shall put the client’s interests before counsel’s own interests”. In that circumstance, there would be an actual conflict.

7. In addition, it would appear that Article 12(1)(b) of the Code may present an impediment to representation insofar as Ms Proulx, through her OPCD assignment, [REDACTED]⁵ The Prosecution is not aware that any application has been made or ordered by the Court in the interests of justice. Even if the Chamber were to determine that Ms Proulx cannot be said to have been [REDACTED] at the time of her assignment by or through OPCD, this would not extinguish a potential Article 16(1) conflict

⁴ See e.g., ICC-01/09-02/11-365, paras. 54 and 69 (noting, “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 professional obligations under the Code”).

⁵ [REDACTED].

arising from her possession of confidential information [REDACTED], to the exclusion of her client.⁶

B. Prior Association with Defence Counsel for Yekatom

8. The Prosecution further understands that Ms Proulx was previously a member of the Defence team in the *Al Hassan* case,⁷ together with the current Associate Counsel for the Yekatom Defence Thomas Hannis.⁸ Although this may not itself create a conflict of interest, it potentially could. The Chamber should thus appropriately determine the issue. Here, the representation implicates Article 12(1) of the Code, namely “[i]f the case is the same ... in which counsel or his or her associates represents ... another client”.⁹ Again, if the Chamber does not consider that Counsel’s prior professional relationship amounts to an ‘association’ under Article 12(1), it may nevertheless independently give rise to a conflict under Article 16(1).

9. NGAISSONA and YEKATOM are commonly charged with some 21 counts. Pre-Trial Chamber II determined that NGAISSONA’s responsibility for crimes committed by YEKATOM and his Anti-Balaka elements rests, in part, “Yekatom and his group [having] been operating under the Coordination, including Ngaïssona”.¹⁰ In these circumstances, antithetical or incompatible defences are reasonably likely to occur, if they do not exist already. Thus, a failure to at least inquire and determine whether there is a current conflict of interest or if there is a serious risk of one arising during the course of the proceedings, would be improvident. Should a latent conflict emerge mid-trial, it may be too late to cure.

⁶ See Article 12(4) of the Code.

⁷ ICC-01/12-01/18-354; *see also* ICC-01/12-01/18-920.

⁸ ICC-01/12-01/18-675; *see also* ICC-01/12-01/18-856.

⁹ Article 12(1) of the Code. Also, note that Article 2 of the Code provides that the term “‘associate” refers to lawyers who practise in the same law firm as counsel”.

¹⁰ ICC-01/14-01/18-403-Conf-Corr, para. 142.

C. Consent is required but may not be sufficient

10. If the Chamber determines that a conflict of interest or impediment exists regarding the prospective representation, it is unclear that it may be waived. To the extent that it might be, the Accused must clearly be informed of the nature and extent of any potential conflicts of interest and expressly consent to the continued representation.¹¹ To date, the Prosecution is unaware that any such process has been undertaken or written notification filed.

11. Notwithstanding the above, it remains incumbent on the Chamber to assess the sufficiency of the information on which an accused's consent may be based; for instance, whether they were informed of any actual and reasonably foreseeable adverse consequences of the prospective representation. Further, where there are directly adverse positions or antithetical Defence's, independent legal advice concerning the issue of consent may be required. That said, if the representation sought goes beyond an issue resulting from a prior relationship with another client or 'associate', and extends to competing interests among counsel and client, a waiver may be altogether unavailing.

12. The Chamber has an overarching duty to ensure that the trial proceedings are fair to the parties and persons appearing before it, and conducted with full respect for the rights of the accused.¹² These rights are necessarily components of a fair trial and, as such, failing to secure them prudently may adversely affect a trial's fairness.¹³ This Submission thus will afford Counsel an opportunity to present or clarify the position, including in respect of any steps that have been taken (if necessary) in respect of the

¹¹ See Article 16(3)(b) of the Code (requiring the "full and informed consent in writing of all potentially affected clients").

¹² Articles 64(2) and (4), and 67.

¹³ ICC-01/09-02/11-365, para. 51.

concerns raised, and permit the Chamber to make a careful determination of the issues as appears necessary and appropriate in these circumstances.

IV. CONCLUSION

13. For the reasons above, the Prosecution requests that the Chamber determine the propriety of Ms Proulx's appointment as Associate Counsel for NGAISSONA. Should the Chamber determine that a waivable impediment or conflict exists currently or may reasonably arise latently, a fully informed written waiver should be required, to be filed in the record of the proceedings.



James Stewart, Deputy Prosecutor

Dated this 22nd day of March 2021
At The Hague, The Netherlands