

Pursuant to Trial Chamber V's instruction dated 14 July 2025, this document is reclassified as Public

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No. ICC-01/14-01/18

Date: 17 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Decision on the Second Prosecution Submission on the Appointment of Defence
Counsel**

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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 Second Prosecution Submission on the Appointment of Defence Counsel’.

I. Procedural history and submissions

1. On 24 February 2021, the Registry informed the Chamber that, on that same day, Ms Marie-Hélène Proulx had been formally appointed as Associate Counsel for Mr Ngaïssona (the ‘Counsel’).¹
2. On 4 March 2021, the Office of the Prosecutor (the ‘Prosecution’) filed its ‘Prosecution’s Submission on the Appointment of Defence Counsel’ (the ‘Request’).² The Prosecution requests that the Chamber ‘determine the propriety’ of Ms Proulx’s appointment in view of (i) her prior assignment through the Office of Public Counsel for the Defence (the ‘OPCD’) to represent defence interests in proceedings under Article 56 of the Statute in the context of the Seleka investigation (the ‘Article 56 Proceedings’);³ and (ii) her prior association with current defence counsel for Mr Yekatom, Mr Thomas Hannis, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (the ‘Al Hassan case’).⁴ Further, ‘[s]hould the Chamber determine that a waivable impediment or conflict exists currently or may reasonably arise

¹ Registration of the appointment of Ms Marie-Hélène Proulx as Associate Counsel for Mr Patrice-Edouard Ngaïssona, ICC-01/14-01/18-891 (notified on 25 February 2021) (with one confidential annex).

² Request, ICC-01/14-01/18-898-Conf.

³ Article 56(1)(b) and (2)(d) of the Statute provide that the Pre-Trial Chamber, in the context of a ‘unique investigative opportunity’ may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence’, including by ‘[a]uthorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence’.

⁴ Request, ICC-01/14-01/18-898-Conf, paras 1, 5, 8, 13.

latently', it requests the Chamber to require that a 'fully informed written waiver' be filed in the record of the proceedings.⁵

3. As regards Counsel's assignment in the Article 56 Proceedings, the Prosecution submits that her current appointment 'may present an ethical dilemma, pitting her professional obligations to the Court against those owed to her own client'. Such 'dilemma' may arise, according to the Prosecution, on the basis that Counsel is professionally bound to maintain the confidentiality of information acquired in the course of the Article 56 Proceedings, which 'in her judgment, may be of assistance' to her client. In these circumstances, the Prosecution submits that Counsel 'may be forced to choose between her own professional interests in sequestering information from her client which might otherwise be advantageous to him'. This position would, in the Prosecution's submission, give rise to an 'actual conflict' as it is 'in direct tension' with Article 16(1) of the Code, which provides that 'Counsel shall put the client's interests before counsel's own interests'.⁶ In addition, the Prosecution submits that Article 12(1)(b) of the Code may represent an impediment to representation insofar as Counsel, through the Article 56 Proceedings, became privy to confidential information as a staff member of the Court relating to the case in which she seeks to appear.⁷
4. Concerning Counsel's prior association with defence counsel for Mr Yekatom in the *Al Hassan* case, the Prosecution argues that this situation could 'potentially' create a conflict of interest by implicating Article 12(1) of the Code, which provides that counsel 'shall not represent a client in a case' '[if] the case is the same [...] in which counsel or his or her associates represents [...] another client'. The Prosecution further submits that if the Chamber does not consider Ms Proulx's and Mr Hannis' prior professional relationship to amount to an 'association' under Article 12(1) of the Code, 'it may nevertheless independently give rise to a conflict' under Article 16(1) of the Code. In this regard, the Prosecution notes that Mr Ngaïssona and Mr Yekatom are

⁵ Request, ICC-01/14-01/18-898-Conf, para. 13.

⁶ Request, ICC-01/14-01/18-898-Conf, para. 6.

⁷ Request, ICC-01/14-01/18-898-Conf, para. 7.

‘commonly charged with some 21 counts’, and that, consequently, ‘antithetical or incompatible defences are reasonably likely to occur, if they do not exist already’.⁸

5. On 8 March 2021, the Ngaïssona Defence (the ‘Defence’) responded to the Request (the ‘Response’).⁹ The Defence submits that the Request should be dismissed, as there are ‘no indicia of the existence of an actual or potential conflict of interest or any impediment to representation concerning Ms Proulx pursuant to Articles 12 and 16 of the Code’.¹⁰
6. First, the Defence argues that Counsel’s involvement in the Article 56 Proceedings does not constitute an impediment to representation, noting that (i) she was employed by the OPCD from 24 August to 2 October 2020 as an external contractor whose role was limited to ‘protecting the interests of the defence’ in general through the conduct of one cross-examination; (ii) she was granted access to a limited number of documents, some of which were heavily redacted; (iii) the Article 56 Proceedings and the present case do not constitute the ‘same case’ per the terms of Article 12(1)(b) of the Code, as the Article 56 Proceedings only related to one alleged incident which, as acknowledged by the Prosecution itself, is irrelevant to the present case; and (iv) any confidential information which may have been communicated to Counsel in the context of the Article 56 Proceedings has no relevance to the present case, meaning that Counsel’s duty of loyalty towards Mr Ngaïssona is not jeopardized in any way and that access to confidential information does not procure her an unfair advantage in the current proceedings.¹¹
7. Second, the Defence avers that the Prosecution’s allegation that the fact that Counsel and Mr Hannis were both associate counsel for Mr Al Hassan may create a conflict of interests is ‘baseless’ and ‘without merit’. In this regard, the Defence notes that (i) the *Al Hassan* case is ‘completely separate’ from the

⁸ Request, ICC-01/14-01/18-898-Conf, paras 8-9.

⁹ Defence Response to the “Prosecution’s Submission on the Appointment of Defence Counsel”, ICC-01/14-01/18-902-Conf.

¹⁰ Response, ICC-01/14-01/18-902-Conf, para. 25.

¹¹ Response, ICC-01/14-01/18-902-Conf, paras 8-18.

current proceedings and counsel's duties of confidentiality and loyalty to Mr Al Hassan are in no way incompatible with their duties towards their current clients; (ii) Ms Proulx and Mr Hannis have never been 'associated' as per the terms of Article 12(1)(a) of the Code; and (iii) Ms Proulx and Mr Hannis are independent and professional counsel and the mere fact that they both represented Mr Al Hassan would not give rise to a conflict in terms of potential adverse defence strategies.¹²

8. On 11 March 2021, the Yekatom Defence informed the Chamber that it did not intend to respond to the Request and defers to the Chamber's discretion.¹³

II. Analysis

9. The Chamber recalls the applicable law concerning impediments to the representation of clients, the right and/or duty of counsel to refuse a representation agreement, and conflicts of interests as set out in its previous decision.¹⁴
10. The Chamber also 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.¹⁵
11. The Chamber notes, at the outset, the largely speculative nature of the Prosecution's submissions.¹⁶ In this regard, the Chamber agrees with the finding of Pre-Trial Chamber II in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* that an accused's right to counsel of choice 'should prevail over

¹² Response, ICC-01/14-01/18-902-Conf, paras 19-23.

¹³ Email from the Yekatom Defence, 11 March 2021, at 11:07.

¹⁴ Decision on the Prosecution Submission on the Appointment of Defence Counsel, 19 January 2021, ICC-01/14-01/18-837-Conf (public redacted version notified on the same day, ICC-01/14-01/18-837-Red) (the '19 January 2021 Decision'), paras 7-9.

¹⁵ 19 January 2021 Decision, ICC-01/14-01/18-837-Red, para. 6 *referring to* 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 (the '*Bemba et al.* 1 April 2014 Decision'), para. 4.

¹⁶ See e.g. Request, ICC-01/14-01/18-898-Conf, paras 6 ('may present an ethical dilemma', 'may be forced to choose', '[i]n that circumstance, there would be an actual conflict'), 7 ('it would appear that Article 12(1)(b) of the Code may present an impediment to representation'), 8 ('[a]lthough this may not itself create a conflict of interest, it potentially could', 'it may nevertheless independently give rise to a conflict', and 9 ('antithetical or incompatible defences are reasonably likely to occur', 'should a latent conflict emerge').

the desire to address out of mere speculation scenarios which might never materialise', and that '[t]he inconveniences which replacement of counsel by its nature inevitably entails should not be brought about if not warranted, on the basis of pure speculation and in the absence of compelling circumstances'.¹⁷

12. On the basis of the information available, the Chamber finds that no impediment to representation or conflict of interest exists.
13. First, as regards Counsel's previous role in the Article 56 Proceedings, the Chamber notes that these proceedings were related to the Prosecution's investigation into crimes allegedly committed by the Seleka¹⁸ and the Defence's submission that 'the Article 56 [P]roceedings in which Ms Proulx took part only related to one alleged incident, which is absent from, and therefore irrelevant to', the present case.¹⁹ Consequently, the Chamber finds that these proceedings are not 'substantially the same' as or 'substantially related to' the present case, and there is no impediment to representation pursuant to Article 12(1)(a) or (b) of the Code. Further, noting the Defence's submissions that any confidential information which may have been communicated to Counsel in the context of the Article 56 Proceedings has no relevance to the present case,²⁰ the Chamber considers that the Prosecution's submissions on a conflict of interest within the meaning of Article 16 of the Code due to Counsel's obligation to put her 'client's interests before [her] own interests'²¹ are without merit.
14. Second, concerning Counsel's prior role as associate counsel for Mr Al Hassan together with Mr Hannis, the Chamber finds that the Prosecution's submissions are equally unsubstantiated. The Chamber finds that Article 12(1) of the Code is not applicable to the matter at hand, noting that (i) the present case and the *Al Hassan* case are separate cases; and (ii) in light of the definition of the term 'associate' in Article 2(2) of the Code, the previous professional relationship

¹⁷ *Bemba et al.* 1 April 2014 Decision, ICC-01/05-01/13-307, para. 4.

¹⁸ See, e.g., Request, ICC-01/14-01/18-898-Conf, para. 5, Response, ICC-01/14-01/18-902-Conf, para. 2.

¹⁹ Response, ICC-01/14-01/18-902-Conf, para. 10.

²⁰ Response, ICC-01/14-01/18-902-Conf, para. 17.

²¹ See Article 16(1) of the Code.

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between Counsel and Mr Hannis does not amount to an 'association' within the meaning of Article 12(1) of the Code.²²

15. Moreover, the Chamber notes the Prosecution's submission that this relationship may nevertheless independently give rise to a conflict' under Article 16(1) of the Code on the basis that 'antithetical or incompatible defences are reasonably likely to occur'. However, absent any convincing explanation as to why their prior professional relationship would give rise to a conflict in the present case, the Chamber considers that this argument is purely speculative and does not warrant any further examination.
16. Lastly, the Chamber notes the Defence's submission that Mr Ngaïssona has been informed of Counsel's former role in the Article 56 Proceedings and in the *Al Hassan* case, and has 'issued no objection to her appointment'.²³
17. In light of the above, the Chamber does not consider it necessary to address the Prosecution's request for the filing of a 'fully informed written waiver'.²⁴

²² Article 2(2) of the Code defines the term 'associate' as 'lawyers who practise in the same law firm as counsel'. For a similar approach, see Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution submission on the appointment of defence counsel, 15 April 2015, ICC-01/05-01/13-909, paras 16-19, finding that members of a defence team are not associates of counsel within the ambit of Article 12(3) of the Code.

²³ See Response, ICC-01/14-01/18-902-Conf, para. 24.

²⁴ See Request, ICC-01/14-01/18-898-Conf, para. 13.

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FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the participants to file public redacted versions of their underlying submissions within seven days of notification 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 17 March 2021

At The Hague, The Netherlands