

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08

Date: 7 May 2010

**TRIAL CHAMBER III**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
*v. JEAN-PIERRE BEMBA GOMBO***

**Confidential**

**Decision on the "Prosecution's Request to Invalidate the Appointment of Legal  
Consultant to the Defence Team"**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

**Legal Representatives of the Victims**

**Legal Representatives of the 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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

Mr Esteban Peralta Losilla

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Mr Didier Preira

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case"), issues the following Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team"<sup>1</sup> of Mr Jean-Pierre Bemba Gombo ("Mr Bemba").

## I. Procedural history and submissions

1. On 11 November 2009, Mr Nkwebe Liriss (lead counsel for the accused) informed the registry's Defence Support Section ("DSS") of the appointment of Mr Nicholas Stuart Kaufman as a legal consultant.<sup>2</sup>
2. On 18 November 2009, the DSS took the necessary steps to finalize this appointment and informed the Office of the Prosecutor ("prosecution") of the impending appointment, since Mr Kaufman had previously worked as trial lawyer (P-4 level) within the prosecution team, when he had particularly focussed on the Democratic Republic of the Congo ("DRC") and the Uganda situations.<sup>3</sup>
3. On 19 November 2009, the prosecution set out its opposition to this proposed appointment, suggesting it violated Articles 12 and 16 of the Code of Professional Conduct for counsel ("Code of Conduct")<sup>4</sup> due to the fact that whilst working for the prosecution, Mr Kaufman had been afforded "full access to confidential and under seal information in *all*

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<sup>1</sup> Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 18 January 2010, ICC-01/05-01/08-670-Conf and confidential Annexes A-L.

<sup>2</sup> ICC-01/05-01/08-670-Conf-AnxA.

<sup>3</sup> ICC-01/05-01/08-670-Conf-AnxA.

<sup>4</sup> Pursuant to Articles 8 and 20(3) of the Rules of Procedure and Evidence, the Code of Conduct was adopted by resolution ICC-ASP/4/Res.1 at the 4<sup>th</sup> session of the Assembly of State Parties on 2 December 2005.

cases and situations" (emphasis added), including some information that is not available to Mr Bemba or his counsel.<sup>5</sup>

4. On 24 November 2009, the DSS transmitted to the prosecution the observations of Mr Kaufman, dated 21 November 2009, which had been received by defence counsel. Mr Kaufman indicated he had not had access to the under seal and confidential information in all of the cases and situations.<sup>6</sup>
5. On 2 December 2009, the prosecution repeated its opposition to this proposed appointment.<sup>7</sup>
6. On 19 December 2009, Mr Nkwebe Liriss wrote to the prosecution, indicating that on the information he had received from Mr Kaufman, he did not consider a conflict of interest existed.<sup>8</sup>
7. Additionally, on 24 December 2009, in a detailed letter to Mr Nkwebe Liriss, Mr Kaufman addressed the arguments raised by the prosecution.<sup>9</sup>
8. On 5 January 2010, in a letter to Mr Nkwebe Liriss, the prosecution indicated its objections to the appointment as: (1) Mr Kaufman's discourtesy and lack of respect to the prosecution, in breach of Article 7 of the Code of Conduct and (2) his knowledge of some confidential information.<sup>10</sup>

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<sup>5</sup> ICC-01/05-01/08-670-Conf-AnxB.

<sup>6</sup> ICC-01/05-01/08-670-Conf-AnxC.

<sup>7</sup> ICC-01/05-01/08-670-Conf-AnxD.

<sup>8</sup> ICC-01/05-01/08-670-Conf-AnxE.

<sup>9</sup> ICC-01/05-01/08-670-Conf-AnxF.

<sup>10</sup> ICC-01/05-01/08-670-Conf-AnxI.

9. On 12 January 2010, Mr Nkwebe Liriss suggested that the Chamber should resolve this issue if the prosecution so agreed to that course.<sup>11</sup>
10. On 12 January 2010, the DSS confirmed the appointment of Mr Kaufman as legal consultant to Mr Bemba's defence team, although reference to the prosecution's opposition was included in the appointment letter.<sup>12</sup>
11. On 18 January 2010, the prosecution filed the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team" ("prosecution's Request"), with 12 confidential annexes of the exchanges between the prosecution and the defence.<sup>13</sup> Pursuant to Regulation 34 of the Regulations of the Court, the Chamber shortened the time-limit for responses to 27 January 2010.<sup>14</sup>
12. On 27 January 2010, the defence filed the "Réponse de la Défense à la Requête du Bureau du Procureur en vue d'invalidation de la désignation d'un des Consultants Juridiques de la Défense" ("Response").<sup>15</sup> The defence annexed a confidential exchange between Mr Kaufman and Mr Nkwebe Liriss for consideration by the Chamber.<sup>16</sup>
13. On the same day, the Registrar filed her observations ("Registrar's Observations").<sup>17</sup> The Registrar annexed 5 confidential emails between the DSS and the defence.<sup>18</sup>

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<sup>11</sup> ICC-01/05-01/08-670-Conf-AnxJ.

<sup>12</sup> ICC-01/05-01/08-670-Conf-AnxK.

<sup>13</sup> ICC-01/05-01/08-670-Conf and Annexes A-L.

<sup>14</sup> Email communication from the Legal Adviser to the Trial Division to the parties and Registry on 19 January 2010.

<sup>15</sup> Réponse de la Défense à la Requête du Bureau du Procureur en vue d'invalidation de la désignation d'un des Consultants Juridiques de la Défense, 27 January 2010, ICC-01/05-01/08-672-Conf.

<sup>16</sup> ICC-01/05-01/08-672-Conf-AnxA.

<sup>17</sup> Observations of the Registrar on invitation by the Chamber dated 19 January 2010, concerning the request of the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team" dated 18 January 2010, 19 January 2010, ICC-01/05-01/05-674-Conf.

<sup>18</sup> ICC-01/05-01/05-674-Conf and confidential Annexes 1 – 5.

14. On 12 February 2010, the Chamber, on a provisional basis only, pending the substantive resolution of the issue and given the defence did not oppose this proposed course of action, ordered that Mr Kaufman was to be denied access to confidential documents in the case record.<sup>19</sup>

*The prosecution submissions*

15. The prosecution asks the Chamber to prevent the appointment of Mr Kaufman because of the suggested conflict of interest under Articles 12 and 16 of the Code of Conduct, or, alternatively, to remit the matter to a pre-trial judge pursuant to Article 64(4) of the Rome Statute ("Statute") and to suspend the contested appointment pending a final decision.<sup>20</sup>
16. Pursuant to Article 12(1)(b) of the Code of Conduct, the prosecution's argument is twofold: (1) Mr Kaufman had access to confidential information and (2) he had "tangential involvement" in the *Bemba* case.<sup>21</sup> To support its argument, the prosecution refers to the drafting history of Article 12(1)(b) and it relies on a draft proposal of this Article as prepared by the Ethics Committee of the International Criminal Bar.<sup>22</sup> In addition, the prosecution submits that the test to be applied when determining a potential conflict of interest for a former staff member of the prosecution seeking appointment as legal consultant within a defence team differs between the ICC and the International Criminal Tribunal for the former Yugoslavia ("ICTY").<sup>23</sup> The prosecution asserts that the "substantial involvement test" or "real possibility of conflict test" does not apply at the ICC, and that the threshold for recognizing a conflict of interest is lower at the ICC than at the ICTY.<sup>24</sup>

<sup>19</sup> E-mail Communications from the Legal Adviser to the Trial Division to the defence on 12 February 2010.

<sup>20</sup> ICC-01/05-01/08-670-Conf, paragraph 24.

<sup>21</sup> ICC-01/05-01/08-670-Conf, paragraphs 7 to 9.

<sup>22</sup> ICC-01/05-01/08-670-Conf, paragraph 10 and footnote 8.

<sup>23</sup> ICC-01/05-01/08-670-Conf, paragraph 10, footnote 7.

<sup>24</sup> ICC-01/05-01/08-670-Conf, paragraph 10, footnote 7.

17. As regards confidential information, the prosecution argues that Mr Kaufman is aware of the strengths and weaknesses of the *Bemba* case as well as the reasons underlying the prosecutorial strategy.<sup>25</sup> The prosecution submits he may have gained this knowledge through formal meetings or informal discussions with former prosecution colleagues, especially Mr Scaliotti, a trial lawyer in the *Bemba* case, and with whom Mr Kaufman shared an office and spoke about matters of mutual interest. In addition, it is submitted that Mr Kaufman participated in Division meetings, and he was involved in discussions on prosecutorial policies, including on the mode of liability and the disclosure system in the *Bemba* case.<sup>26</sup>

18. The prosecution asserts that Mr Kaufman was aware of the under seal, non-redacted application for warrant of arrest in the *Bemba* case, which has not been disclosed to the defence.<sup>27</sup>

19. Finally, the prosecution argues on the basis of this suggested conflict of interest that Mr Kaufman's appointment violates Article 24(1) of the Code of Conduct which requires counsel to "take all necessary steps to ensure that his actions or those of other members of the team are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute".<sup>28</sup> The prosecution suggests that another legal consultant can be selected, including from the list of counsel maintained by the Registry.<sup>29</sup>

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<sup>25</sup> ICC-01/05-01/08-670-Conf, paragraphs 11 – 16.

<sup>26</sup> ICC-01/05-01/08-670-Conf; ICC-01/05-01/08-670-Conf-AnxB; ICC-01/05-01/08-670-Conf-AnxG; ICC-01/05-01/08-670-Conf-AnxH.

<sup>27</sup> ICC-01/05-01/08-670-Conf, paragraph 17.

<sup>28</sup> ICC-01/05-01/08-670-Conf, paragraph 21.

<sup>29</sup> ICC-01/05-01/08-670-Conf, paragraph 22.

*The defence submissions*

20. Essentially, counsel for the defence maintain their submissions, set out, for instance, in letters or emails and annexed to the prosecution's Request. On the basis of Mr Kaufman's observations on these matters, (which are annexed to the defence Response and considered below)<sup>30</sup> the Chamber is asked to reject the prosecution's Request as being unfounded.<sup>31</sup>

21. Mr Kaufman suggests there is no potential conflict of interest. Further, he submits that Mr Bemba is entitled to choose his defence team and the onus is on counsel or his assistants to avoid a potential conflict of interest.<sup>32</sup>

22. He asserts that his alleged participation in discussing the strengths and weaknesses of a case (something that he denies occurred), without more, fails to provide a foundation for a sustainable challenge.<sup>33</sup>

23. He further asserts that the prosecution does not have the statutory right to apply to disqualify counsel or their assistants. It is observed that the prosecution has not referred to any relevant article of the Code of Conduct, nor does it identify any other legal basis.<sup>34</sup>

24. Mr Kaufman submits that the Registrar at the ICC does not exercise a similar range of discretion as the Registrar at the ICTY with appointments of this kind.<sup>35</sup>

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<sup>30</sup> ICC-01/05-01/08-672-Conf-AnxA.

<sup>31</sup> ICC-01/05-01/08-672-Conf, paragraphs 5 and 6.

<sup>32</sup> ICC-01/05-01/08-672-Conf-AnxA, page 2.

<sup>33</sup> ICC-01/05-01/08-672-Conf-AnxA, page 4.

<sup>34</sup> ICC-01/05-01/08-672-Conf-AnxA, page 2.

<sup>35</sup> ICC-01/05-01/08-672-Conf-AnxA, page 2.



25. Referring to jurisprudence from the ICTY, Mr Kaufman suggests that his position as a former staff member within the prosecution does not automatically place him in a position of conflict of interest;<sup>36</sup> he argues that ample precedent exists where "former prosecution counsel have left the institution only to be subsequently re-engaged by the Defence".<sup>37</sup>

26. Mr Kaufman, in a letter to Mr Nkwebe Liriss and Mr Kilolo Musamba on 11 November 2009, set out that he did not have access rights to the *Bemba* case or full access to all cases and situations,<sup>38</sup> as submitted by the prosecution.<sup>39</sup> He states that his knowledge of the court records from the *Bemba* case is limited to public filings, and that he was not one of those listed in the Court Management Services as a recipient of confidential, under seal or *ex parte* filings in the *Bemba* case. He refers to a protocol within the prosecution that prevents staff members sharing confidential information with others within the prosecution who are involved in different cases.<sup>40</sup> He stresses that he was not able to peruse the evidence collection relating to the Central African Republic.<sup>41</sup> As a result, he argues that he has no knowledge of any of the confidential material in the *Bemba* case, and he suggests that the prosecution's Request does not reveal any specifically identified confidential information of which he is said to have been aware.<sup>42</sup>

27. Mr Kaufman explains that he asked for the non-redacted version of the prosecution's application for Mr Bemba's arrest warrant to ensure consistency with the co-perpetration modes of liability relied on in the

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<sup>36</sup> ICC-01/05-01/08-670-Conf-AnxF, page 3.

<sup>37</sup> ICC-01/05-01/08-670-Conf-AnxC, page 5.

<sup>38</sup> ICC-01/05-01/08-670-Conf-AnxC, page 4, paragraph 1.

<sup>39</sup> ICC-01/05-01/08-670-Conf-AnxB, paragraph 3.

<sup>40</sup> ICC-01/05-01/08-670-Conf-AnxC.

<sup>41</sup> ICC-01/05-01/08-672-Conf-AnxA, page 5.

<sup>42</sup> ICC-01/05-01/08-672-Conf-AnxA, page 4.

*Lubanga* case (the trial he was working on).<sup>43</sup> This mode of liability is, he suggests, no longer relied on in the *Bemba* case. He asserts that his conversations with members of the prosecution team on this topic were purely academic in nature, and the relevant part of the prosecution application containing the modes of liability is no longer redacted or under seal. As regards the names of the witnesses set out in the arrest warrant, he suggests this information was disclosed to the defence before his appointment. As a result, he does not apprehend prejudice arising from any memory he may have of this document.<sup>44</sup>

28. He suggests that he did not participate in discussions concerning witness protection in the *Bemba* case. He recalls Ms Tai, a prosecution colleague, informing "the whole of the Prosecution Division, in a general meeting", that there were no issues of witness relocation in the *Bemba* trial and therefore, he suggests, this information cannot be classified as confidential.<sup>45</sup>

29. Mr Kaufman submits that the prosecution's argument under Article 24(1) of the Code of Conduct is misconceived because the prosecution cannot dictate the composition of the defence team. He stresses that Mr Nkwebe Liriss has specifically requested his assistance due to his position as an English-speaking ICC lawyer whose background is in the common law tradition, with experience of the adversarial system and an understanding of the rules governing disclosure.<sup>46</sup>

30. Mr Kaufman submits that even if the Trial Chamber concludes that he became aware of confidential information during his time in the

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<sup>43</sup> ICC-01/05-01/08-672-Conf-AnxA, page 5.

<sup>44</sup> ICC-01/05-01/08-672-Conf-AnxA, pages 5 and 6.

<sup>45</sup> ICC-01/05-01/08-672-Conf-AnxA, page 6.

<sup>46</sup> ICC-01/05-01/08-672-Conf-AnxA, pages 6 and 7.

prosecution, in the interests of justice it should conclude that he may nonetheless join the defence team since no conflict of interest exists.<sup>47</sup>

#### *The Registrar's Observations*

31. The DSS focuses its observations on the policy and legal framework relevant to an alleged conflict of interest. It submits that there are differences in the Registrar's role between the ICTY and the ICC when an alleged a conflict of interest arises in circumstances such as these. Whilst at the ICTY the Registrar has a broad discretion, the approach at the ICC "has been to place that onus squarely on counsel in conformity with his or her professional ethical obligations and to allow for the judicial branch of the Court – its Chambers – to act as ultimate arbitrator over the issue".<sup>48</sup>

32. In support of this argument, the DSS refers to several provisions under the Code of Conduct, which tend to suggest that it is an obligation of counsel to avoid a conflict of interest, under Articles 12, 13(2)(a) and 16 of the Code of Conduct, whilst alleged breaches come within Chapter 4 of the Code of Conduct.<sup>49</sup>

33. The Registry submits that it has a neutral role, with the DSS acting as a channel of communication. As a result, the Registry merely facilitates communication between the parties in the event of a dispute over the appointment of a member of the defence team.<sup>50</sup> This facilitation role, set out in the Rome Statute framework, does not permit the Registry "to *proprio motu* bar or act as an impediment to the appointment of counsel or a team member".<sup>51</sup>

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<sup>47</sup> ICC-01/05-01/08-672-Conf-AnxA, page 7.

<sup>48</sup> ICC-01/05-01/08-674-Conf, paragraphs 1 and 6.

<sup>49</sup> ICC-01/05-01/08-674-Conf, paragraphs 3 – 4.

<sup>50</sup> ICC-01/05-01/08-674-Conf, paragraph 5.

<sup>51</sup> ICC-01/05-01/08-674-Conf, paragraph 6.

## II. Relevant provisions

34. The Chamber has taken into consideration the following provisions:

### **Article 64 of the Statute**

#### **Functions and powers of the Trial Chamber**

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

### **Article 67 of the Statute**

#### **Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and 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;

[...]

### **Rule 22 of the Rules of Procedure and Evidence ("Rules")**

#### **Appointment and qualifications of Counsel for the defence**

[...]

3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

[...]

### **Article 11 of the Code of Conduct**

#### **Establishment of the representation agreement**

The agreement is established when counsel accepts a request from a client seeking representation or from the Chamber.

**Article 12 of the Code of Conduct**  
**Impediments to representation**

1. Counsel shall not represent a client in a case:

[...]

(b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

[...]

4. This article is without prejudice to article 16 of this Code.

**Article 13 of the Code of Conduct**  
**Refusal by counsel of a representation agreement**

[...]

2. Counsel has a duty to refuse an agreement where:

(a) There is a conflict of interest under article 16 of this Code;

[...]

**Article 16 of the Code of Conduct**  
**Conflict of interest**

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.

2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group.

Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.

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.

**Article 24 of the Code of Conduct**  
**Duties towards the Court**

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.

[...]

### III. Analysis and conclusions

35. Mr Kaufman has been appointed as a “legal consultant”, and it is of importance that the Code of Conduct applies only to “defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court” (Article 1 of the Code of Conduct, emphasis added). Indeed, the appointment of a “legal consultant” is not separately regulated in the Rome Statute framework, and including in the Code of Conduct, although counsel for the defence may be assisted by other persons with relevant experience (Rule 22(1) of the Rules). Therefore, it is to be noted that although Mr Kaufman is registered as counsel for the defence on the list of counsel maintained by the Registry, in this case he has been engaged as a legal consultant and is not the subject of a representation agreement (Article 11 of the Code of Conduct). Ordinarily, a consultant will not represent the accused in court and make oral submissions before the Chamber on his behalf, unless expressly authorized to do so. He may therefore not be considered as “practising at the [...] Court” within the meaning of Article 1 of the Code of Conduct.

36. The prosecution relies on the provisions of Article 12(1)(b) of the Code of Conduct, whereby it submits there are “two causes for attorney disqualification for former staff members: (i) prior involvement or (ii) knowledge of confidential information in the case in which counsel seeks to appear.”<sup>52</sup> It further argues that under Article 12(1)(b) of the Code of Conduct the alleged prior involvement need not be substantial because although words “substantially” or “substantial” are found in

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<sup>52</sup>ICC-01/05-01/08-670-Conf, paragraph 9.

Article 12(1)(a) and 12(3) of the Code of Conduct they are absent from Article 12(1)(b).<sup>53</sup>

37. These contentions by the prosecution do not arise in this case – that Mr Kaufman should be disqualified because he was involved as a staff member of the Court relating to the case in which (as counsel) he seeks to appear (Article 12(1)(b) of the Code of Conduct) – because, as set out above, he does not represent the accused as counsel, and accordingly this provision within the Code does not apply.

38. However, given that Article 12(4) is “without prejudice to article 16” of the Code of Conduct, it is necessary to focus on defence counsel’s responsibility to ensure that a conflict of interest does not arise pursuant to Article 16(1), and this will include a conflict that concerns a member of the “defence team” as defined by Article 2(2) of the Code of Conduct. Under Article 7(4) of the Code of Conduct, counsel shall supervise the work of the defence team, to ensure, *inter alia*, they comply with the code.

39. Therefore, the principal responsibility for addressing and resolving a suggested conflict of interest rests with counsel, in accordance with his or her professional obligations as prescribed in the Code of Conduct, Articles 12, 13(2)(b) and 16. In the event of a dispute that may cause unfairness in the proceedings, it is the responsibility of the Chamber to resolve the matter pursuant to Article 64(2) of the Statute. Under Article 64(3)(a) of the Statute the Chamber has statutory responsibilities for ensuring that the trial is fair and for adopting such procedures as are necessary to facilitate the fair conduct of the proceedings.

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<sup>53</sup> ICC-01/05-01/08-670-Conf, paragraph 10.

40. In this case, the prosecution submits the appointment of Mr Kaufman as legal consultant to the defence team would constitute a potential conflict of interest and create "an inequality of arms" in favour of the defence.<sup>54</sup> In those circumstances, the Chamber, appropriately, has been asked to intervene.

41. This is similar to the position at the ICTY, in that whilst primary responsibility at that tribunal in this area rests with the Registrar, the judges have jurisdiction to scrutinise the Registrar's decision to assign a counsel when it is "raised as a matter of procedural fairness and proper administration of justice".<sup>55</sup>

42. The decision for the Chamber, therefore, on this application is whether defence counsel have appointed a member of the defence team in circumstances that either creates a conflict of interest (Articles 7(4) and 16(1) of the Code of Conduct) or which is prejudicial to the ongoing proceedings (Article 24(1) of the Code of Conduct). In essence, the operative test, certainly in these circumstances, is similar to the applicable test under Article 12(1)(b). The determinative issue is whether Mr Kaufman, whilst working for the prosecution, became aware of more than *de minimis* confidential information relevant to the case, which a member of the defence team should not possess (since as a lawyer formerly employed by the prosecution he is bound by the duties of confidentiality stemming from his former position pursuant to Article 12(1)(b) of the Code of Conduct). Mr Kaufman would then be faced with

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<sup>54</sup> ICC-01/05-01/08-670-Conf-AnxD, page 3; ICC-01/05-01/08-670-Conf-AnxI, page 4, paragraph 4.

<sup>55</sup> ICTY, *The Prosecutor v. Hadžihasanović, Case No IT-01-47-PT*, "Decision on the Prosecution's Motion for review of the decision of the Registrar to assign Mr Rodney Dixon as co-counsel to the accused Kubura", 26 March 2002, paragraph 21; see also paragraphs 22 to 24 and paragraph 55; ICTY, *The Prosecutor v. Gotovina, Case No IT-06-90-PT*, "Decision on Ivan Čermak's and Mladen Markač's joint motion to resolve conflict of interest regarding attorney Gregory Kehoe", 29 November 2007, page 8, which refers to the "broad powers" of the Trial Chamber to ensure a fair trial and to safeguard the integrity of the proceedings.



an irresolvable conflict: on the one hand he remains bound by his obligations to the prosecution not to disclose confidential information, whilst simultaneously his knowledge of the protected material is likely to inform his contribution to the preparation and presentation of the accused's defence. His position in the result would be untenable.

43. Although the prosecution has made an assertion that Mr Kaufman became aware of confidential information relevant to the case during his employment with the prosecution, this has been advanced essentially in general terms, without detailed particulars or any convincing supporting evidence. In contradistinction, Mr Kaufman wholly rejects these assertions. As rehearsed above, it is said that Mr Kaufman "is aware of the strengths and weaknesses of the *Bemba* case as well as the reasons underlying the prosecutorial strategy", knowledge which he may have gained through formal meetings or informal discussions with his former colleagues; further it is contended that he was involved in discussions on prosecutorial policies, including on the mode of liability and the disclosure system in the *Bemba* case. None of those suggestions demonstrates that a conflict of interest necessarily exists: given the general nature of the prosecution's assertions, therefore, it is impossible to conclude that Mr Kaufman is, as a result, in possession of information that leads to a conflict of interest. Instead, the prosecution simply suggests the possibility.

44. It is accepted that Mr Kaufman was shown the under seal, non-redacted application for warrant of arrest, which has not been disclosed to the defence.<sup>56</sup> However, as set out above, Mr Kaufman maintains that he saw this document simply to ensure consistency with the modes of liability relied on in the *Lubanga* case. He asserts that this mode of

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<sup>56</sup> ICC-01/05-01/08-670-Conf, paragraph 17.

liability is no longer relied on in the *Bemba* case, and the relevant conversations with members of the prosecution team were purely academic. Moreover, it is suggested that the relevant parts of the prosecution application are no longer under seal. As regards the names of the witnesses in the arrest warrant, he avers this information was disclosed to the defence before his appointment. Accordingly, the Chamber is asked to accept that no conflict of interest arises by virtue of his exposure to this document.

45. In the result, the combination of lack of any proof that Mr Kaufman is in possession of material that creates a conflict of interest and his unequivocal assertions that he is unaware of any relevant confidential information together resolve this application. Absent any reasons for doubting Mr Kaufman's integrity, the Chamber is entitled to rely on his clear undertakings, particularly given his position as one of the lawyers on the list of counsel. In summary, there are no persuasive indications that a conflict of interest exists or that his appointment is prejudicial to the ongoing proceedings.

46. Finally, even if the Chamber had decided that the appointment of Mr Kaufman is directly covered by the Code of Conduct (*e.g.* because his name is on the Registrar's list of counsel), considering Article 12(1)(b) of the Code of Conduct, it would have concluded that there are no persuasive indications that he was involved in or privy to confidential information as a staff member of the Court relating to this case, for the reasons set out above.

47. The prosecution's Request is refused and Mr Kaufman is authorised full access to the case record.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge Joyce Aluoch**

Dated this 7 May 2010

At The Hague, The Netherlands