



Original: English

No.: ICC-01/14-01/22

Date: 30/09/2022

THE APPEALS CHAMBER

Before: Judge Solomy Balungi Bossa, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Gocha Lordkipanidze

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka

PUBLIC

with public annex I and confidential annex II

Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80

Source: Gregory Townsend, Duty Counsel

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

The Office of the Prosecutor

Mr Karim A. A. Khan

Mr Mame Mandiaye Niang

Ms Helen Brady

Mr Kweku Vanderpuye

Counsel for the Defence

Mr Gregory Townsend, Duty Counsel

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Introduction

1. On 19 July 2022, the Appeals Chamber rendered its *‘Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 25 March 2022 entitled “Order to the Registry concerning the appointment of Mr. Nicholas Kaufman as counsel for Maxime Jeoffroy Eli Mokom Gawaka” (ICC-01/14-01/22-70-Conf)’*¹ (‘Impugned Order’ and ‘Appeals Judgment’, respectively).

2. A majority of the Appeals Chamber found, at para. 68, that it was *‘unable to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr. Kaufman as counsel.’* For this reason, inter alia, the Appeals Chamber, by a majority, **reversed** the Impugned Order² revoking Mr. Kaufman’s mandate and remanded the issue to the Pre-Trial Chamber to provide further reasons for its decision.

3. On 19 August 2022, almost five months after issuing the Impugned Order, Pre-Trial Chamber II rendered its *‘Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022’* furnishing further reasons for finding a conflict of interest between Mr. Mokom and two other individuals represented by Mr. Kaufman that cannot be remedied (‘Impugned Decision’).³

4. In its Decision of 19 August 2022, the Pre-Trial Chamber also *proprio motu* granted leave to appeal the Impugned Decision on one issue.⁴ Duty Counsel for Mr. Mokom and the Prosecution filed their submissions before the Appeals Chamber on 24 and 25 August 2022, respectively.⁵

5. On 27 September 2022, the Appeals Chamber decided that the appeal was inadmissible and therefore dismissed it due to the manner in which the

¹ See ICC-01/14-01/22-70-Red.

² See ICC-01/14-01/22-26-Red.

³ See ICC-01/14-01/22-80.

⁴ ICC-01/14-01/22-80, para. 30.

⁵ See ICC-01/14-01/22-81; ICC-01/14-01/22-84.

Appeals Chamber has been seized *proprio motu* by the Pre-Trial Chamber.⁶ The Appeals Chamber also held that the parties could still request leave to appeal the Impugned Decision.⁷

6. On 29 September 2022, Duty Counsel for Mr. Mokom requested leave to appeal the Impugned Decision, and formulated the following issue for appeal:

[w]hether the [Pre-Trial] Chamber, on the basis of the further reasons exposed in the ‘Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022’, erred in finding that there is an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the Code of Professional Conduct for Counsel to Mr Kaufman’s representation of Mr Mokom that cannot be remedied.⁸

7. On the same day, 29 September 2022, the Prosecution responded to Mr. Mokom’s request for leave to appeal⁹ and the Pre-Trial Chamber granted Mr. Mokom’s request for leave to appeal for the above-formulated issue.¹⁰

8. As set out below, Duty Counsel lodges this appeal on behalf of Mr. Mokom respectfully submitting that the Appeals Chamber should address the issue certified for appeal by reference to four errors of law and fact; namely that the Pre-Trial Chamber erred by:

- i) confusing the differing remedial requirements for the purpose of an impediment to representation as opposed to a conflict of interest,
- ii) erroneously concluding that the pertinent interests were so intertwined by virtue of their substantial similarity and fundamental incompatibility that remedial measures should be precluded,
- iii) erroneously concluding that Mr. Kaufman’s conduct should preclude any remedial measures, and
- iv) failing to consider the waiver and letter of termination filed, which remedied the possible conflict of interest.

⁶ ICC-01/14-01/22-91, paras. 12-23.

⁷ ICC-01/14-01/22-91, paras. 12-23 (including, at para. 23, on the ‘calculation of time limits’).

⁸ ICC-01/14-01/22-92, para. 4.

⁹ ICC-01/14-01/22-93.

¹⁰ ICC-01/14-01/22-94, para. 4.

The Appeals Chamber, therefore, should REVERSE the Impugned Decision.

9. Further, Duty Counsel submits that it is telling that the Pre-Trial Chamber in its Impugned Decision: (1) nowhere mentions that the Appeals Chamber judgement ‘reverse[d]’¹¹ its Impugned Order, and (2) ‘CONFIRMS’ (at page 14) its own Impugned Order, going beyond ‘provid[ing] further reasons’ as ordered in the relief issued by the Appeals Judgement of 19 July 2022. Duty Counsel respectfully submits that a Pre-Trial Chamber under Article 61 *et seq.* may ‘confirm’ charges, or ‘confirm’ under Rule 110 a decision of the Prosecutor, but that it is the realm of the Appeals Chamber to ‘confirm’ a decision of a Pre-Trial Chamber, including under Rule 158(1) of the Rules.

Grounds of Appeal

Error 1: The Pre-Trial Chamber confused the remedial requirements of an impediment to representation and a conflict of interest

10. In the Impugned Decision, at paras. 17-19, and as mandated by the Appeals Chamber, the Pre-Trial Chamber fleshed out its holding that the other proceedings during which ‘Mr. Kaufman represented other clients’ are ‘*substantially related*’. The Pre-Trial Chamber, at paras 20-23, *reiterated* its conclusion ‘that the interests of P-1019 and Mr. Adam diverge from those of Mr. Mokom to such a degree that it prevents Mr. Kaufman from effectively representing Mr. Mokom since those interests are *fundamentally incompatible*’.

11. But as the Appeals Chamber rightly held ‘even if, as the Defence argues, the proceedings in which Clients 1 and 2 were involved are not substantially related to the present proceedings, this does not necessarily preclude the existence of a conflict of interest’.¹² By focusing, however, on the ‘substantially related’ and ‘fundamentally incompatible’ nature of the various client-based

¹¹ ICC-01/14-01/22-70-Red, at para. 69; ICC-01/14-01/22-80, at paras 6, 30.

¹² ICC-01/14-01/22-70-Red at para. 66.

interests, the Pre-Trial Chamber's new and 'further reasons' address only the existence of an impediment to representation and not a conflict of interest.

12. The above-mentioned distinction is of legal consequence. Article 12(1) of the Code of Professional Conduct for counsel places a duty on counsel to consult with all clients affected by an impediment to representation and to obtain their consent. Nowhere does the Code mention that a written waiver of consent to the impediment must be presented to a Chamber. Counsel is merely obliged to 'inform the Chamber of the Court' of the consent obtained, under Article 12(2). This is distinct from Article 16(3)(b) of the Code that requires the remedial waiver of a conflict of interest to be produced 'in writing'. In this case, the Pre-Trial Chamber's Legal Officer was acute to this distinction when he wrote, in his e-mail to Mr. Kaufman of 17 March 2022: 'You are hereby ordered to provide, by way of email [...], your observations on the matter, including on any steps taken as provided for in paragraph 16 of the Code of Conduct'.¹³ Correctly, the Legal Officer did not and, in fact, could not mandate Mr. Kaufman to submit written evidence of his consultations for the purpose of lifting a perceived impediment to representation.

13. Nonetheless, and in his subsequent observations to the Pre-Trial Chamber of 17 March 2022, Mr. Kaufman stated as follows:

Regarding Mr. Nouredine Adam, I was introduced to him by [P-1019] before the latter's interviews with the OTP. Mr. Nouredine Adam is not currently being 'represented' before the Court in any matter nor has an arrest warrant for him been made public. I have not been made aware of any interests that he has before the Court which may be compromised by my representation of Mr. Maxime Mokom. Intuitively, I have always assumed that the OTP would attempt to target Mr. Nouredine Adam given my knowledge of the CAR2 Situation

¹³ See confidential Annex II, p. 4; see also ICC-01/14-01/22-32-Conf-Exp-AnxI-Red, p. 3.

and the allegations made against him. Accordingly, I agreed to accept a power of attorney from him. I can state quite firmly, however, that I have never discussed the so-called anti-balaka groups with Mr. Nouredine Adam. Our discussions were in the hypothetical and concerned what he should do if he was required, one day, to present himself before the Court. [...] Nothing more than that. The OTP expressed an interest in interviewing him and there were some negotiations in the hypothetical, once again, regarding terms for him to agree to such an interview. Nothing came of those discussions. Notwithstanding, no discussion was ever conducted between me and Mr. Nouredine Adam concerning the so-called anti-balaka or any alleged member thereof; certainly no discussions concerning Mr. Maxime Mokom (who later became his political ally in the CPC). I have presently lost contact with Mr. Nouredine Adam. He has recently changed his cellphone number and the last number that I had for him no longer functions. As I am aware of no conflict between Mr Nouredine Adam and Mr. Maxime Mokom, I do not believe that there should be a need for me to obtain anything in writing from Mr. Nouredine Adam - even if I could obtain it now at such short notice. Should it ever transpire that Mr. Nouredine Adam will ask for my substantive representation before the Court, I will make my decision at that time whether I can indeed represent him appropriately in light of my current and future representation of Mr. Mokom and in light of other ethical considerations.¹⁴

¹⁴ See confidential Annex II (email of 17 March 2022), p. 2-3; ICC-01/14-01/22-32-Conf-Exp-AnxI-Red, p. 10-11).

14. Furthermore, in an affidavit submitted by Duty Counsel to the Pre-Trial Chamber on 28 July 2022, Mr. Kaufman solemnly affirmed, under pain of prosecution pursuant to Article 70 of the Rome Statute, as follows:

I was introduced to [Noureddine Adam] by P-1019. We spoke in English and exchanged greetings [...]. At some stage between 2020 and 2021, [Noureddine Adam] [...] offered to reconnect the two of us when, at one point I had temporarily lost contact with Maxime Mokom. This offer was made in the context of [Noureddine Adam]'s full knowledge and approval of my proposed representation of Maxime Mokom at the International Criminal Court. Apart from my clarifying the meaning of a conflict of interest and or impediment, and us both agreeing that there existed no grounds for such a concern, [Noureddine Adam] and I had no other conversation whatsoever which concerned Maxime Mokom.¹⁵

15. Within the framework of the Code, from the above, one may note that Mr. Kaufman both 'consulted' Noureddine Adam and obtained his consent to the representation of Mr. Mokom. The fact that the letter terminating representation was provided to only 'two individuals with whom Mr. Adam is normally in contact and not Mr. Adam himself'¹⁶ is legally irrelevant for the purpose of remedying an impediment to representation. It is more than sufficient, however, for terminating representation when such representation is rendered impossible because a client cuts off all contact with his counsel.

¹⁵ See public Annex I, para. 7.

¹⁶ Impugned Decision, at para. 26.

Error 2: The Pre-Trial Chamber failed to characterize appropriately the nature of the impediment or conflict of interest that precludes remedial measures

16. Duty Counsel submits that the Pre-Trial Chamber failed to provide further ‘*precise and detailed reasons*’¹⁷ which would clarify why the various stakeholders’ interests are so substantially similar and fundamentally incompatible that they render remedial measures impossible. However, before addressing the Pre-Trial Chamber’s reasoning on these issues, as set out in paragraphs 17-22 of the Impugned Decision, Duty Counsel wishes to make two general observations.

17. Firstly, it is noted that the Appeals Chamber ruled (with Judge Ibáñez and Judge Bossa dissenting) that ‘due to the Pre-Trial Chamber’s intimate familiarity with the underlying circumstances, that Chamber is best-placed to assess the consequences of Mr Kaufman’s continued representation of Mr Mokom and the likelihood that one or more of Mr Kaufman’s other clients may become materially involved in this or a substantially related case.’¹⁸ Nowhere in the Impugned Decision, however, does the Pre-Trial Chamber address the possibility that either Nouredine Adam or P-1019 could testify in Mr. Mokom’s case. As it would appear, even the Prosecution does not currently contemplate this eventuality. Indeed, such a prospect has become even less likely given the details disclosed in the arrest warrant for Nouredine Adam. The unsealing of that warrant also appears to have taken place as a function of the matter at issue in this case.

18. Secondly, the general scope of the armed conflict in the Situation in the Central African Republic cannot, *per se*, produce an irremediable conflict of interest. If this were so, no alleged member of the anti-balaka could ever be represented by counsel who has represented an alleged member of the ex-

¹⁷ Appeals Judgment, at para. 68 (italics added).

¹⁸ ICC-01/14-01/22-70-Red at para 65.

Séléka and vice-versa. The experience of Trial Chamber V,¹⁹ however, has shown such a contention to be completely unfounded. As submitted previously, the scope of the conflict, the high-level nature of clients in their respective and allegedly opposing factions may conceivably comprise threshold considerations when querying the existence of a handicap to representation. Such considerations are not, however, dispositive when determining the existence of an impediment to representation in a specific case, and they are most certainly not grounds for preventing remedial measures.

Substantial Similarity²⁰

19. In considering ‘substantial similarity’, the Pre-Trial Chamber distinguished the present situation from a scenario addressed in a confidential decision issued by Trial Chamber V.²¹ Particularly, the Pre-Trial Chamber appeared to reason that counsel who had formerly represented ex-Séléka interests would not face an impediment on the basis of ‘substantial similarity’ when subsequently representing an anti-Balaka suspect. The distinguishing factor, according to the Pre-Trial Chamber, was the fact that counsel acting before Trial Chamber V had been protecting general ex-Séléka interests and not the interests of a specific ex- Séléka suspect.²²

20. Duty Counsel respectfully submits that such logic is both legally flawed and shows the Pre-Trial Chamber’s inconsistent reasoning. Firstly, Article 12(1)(a) of the Code of Professional Conduct was designed to restrict dual representation in substantially similar *cases* and not in substantially similar situational scenarios. Mr. Kaufman never represented Nouredine Adam before the Court in a *case* but rather, if at all, in the CAR2 Situation. As such, Mr. Kaufman has not appeared in substantially similar cases *per* Article 12(1)(a)

¹⁹ ICC-01/14-01/18-916-Conf.

²⁰ See Impugned Decision, at paras 17-19.

²¹ ICC-01/14-01/18-916-Conf.

²² See Impugned Decision, para. 19.

of the Code.²³ Secondly, the lawyer in question in ICC-01/14-01/18-916-Conf would also appear to have been exposed to ‘diverging’ situational interests thereby falling foul of the Pre-Trial Chamber’s ‘fundamentally incompatible’ test. What the Pre-Trial Chamber identified as a distinguishing feature was the *role* performed by counsel and not the substantially dissimilar nature of the two *cases* in which counsel was engaged. Indeed, that there exists Trial Chamber V precedent allowing ‘flipside’ representation in the same CAR2 situation, demonstrates Pre-Trial Chamber II’s inconsistent and insufficient reasoning.

21. Further, had the warrant for the arrest of Nouredine Adam been made available to the Appeals Chamber at the time that it rendered its judgment (ICC-01/14-01/22-70), one or more judges of the majority thereof might even have been empowered to *properly* assess themselves the two cases, and concurred that the cases implicating Nouredine Adam and Mr. Mokom are not substantially similar.²⁴ Specifically, the arrest warrant for Nouredine Adam reveals charges that relate to a completely different time-period and geographical location than those cited in the charges leveled at Mr. Mokom.²⁵ The Impugned Decision, at para. 12, while citing Duty Counsel’s submissions of 1 August 2022 that the cases of Mr. Mokom and Adam ‘relate to a totally different time period and geographical location’, fails to address this point. This shows the insufficiency of the Impugned Decision’s further reasons and warrants its reversal.

Fundamental Incompatibility²⁶

22. The Appeals Chamber ordered the Pre-Trial Chamber to be more precise in explaining how Mr. Kaufman’s now-terminated, prior representation of Nouredine Adam and his representation of P-1019 would be ‘fundamentally

²³ ICC-01/14-01/22-70-Anx-Red, Appeals Judgment, Dissenting Opinion, at para. 18.

²⁴ ICC-01/14-01/22-70-Red at para 65.

²⁵ Public Redacted Version of ‘Warrant of Arrest for Mahamat Nouradine Adam’, 28 July 2022, ICC-01/14-41-Red2, at para. 19.

²⁶ Impugned Decision, at paras. 20-22 inclusive.

incompatible’ with his present representation of Mr. Mokom, given the uncertainty of whether the former individuals will testify in Mr. Mokom’s case.²⁷ The Pre-Trial Chamber, however, failed to provide any such precision. Further, and considering the arrest warrant rendered public, it is now abundantly clear that neither Nouredine Adam nor P-1019 would have anything to contribute by way of testimony in Mr. Mokom’s case.

23. Duty Counsel further notes that the Pre-Trial Chamber’s enhanced reasons in the Impugned Decision for finding a ‘fundamental incompatibility’ hardly differ from those previously set out in paragraph 13 of its own previous Impugned Order where it stated: ‘the information before the Chamber shows that the interest(s) of Mr Mokom are fundamentally incompatible with those of Mr Kaufman’s other clients, given the nature and scope of the conflict in the Central African Republic during the relevant period, the parties involved in the conflict and the alleged role and status of the other clients’. The only new element states (at para. 21) that ‘having been close to senior members of opposing sides, or being perceived as such, **objectively** affects a counsel’s ability to effectively and impartially represent a client, irrespective of the counsel’s good faith and professionalism’²⁸ [emphasis added].

24. As found by a minority of the Appeals Chamber, impediments to representation and conflicts of interest may not be determined on the basis of *speculation*.²⁹ Such speculation would include an ‘objective’ appreciation of Mr. Kaufman’s so-called ‘closeness’ to senior members of purportedly opposing sides to an armed conflict. This finding is equally valid for disposing of the Pre-Trial Chamber’s *assumption* that ‘as part of his representation of Mr. Adam, Mr. Kaufman *must have obtained* information from Mr. Adam in connection with

²⁷ ICC-01/14-01/22-70-Red, para 67.

²⁸ Impugned Decision, at para. 21.

²⁹ ICC-01/14-01/22-70-Anx-Red (Partially Dissenting Opinion), at para. 14; see also paras 4, 8.

events relevant to these proceedings'.³⁰ The very language adopted by the Pre-Trial Chamber; namely 'must have obtained' indicates utter speculation.³¹

25. Further, the Pre-Trial Chamber, at para. 26, opined that 'the information that [Mr. Kaufman] learned during his contacts with Mr. Adam cannot be mechanically set aside and could be detrimental to Mr. Mokom at some stage of the proceedings.' The Pre-Trial Chamber, however, failed to state the nature of the potentially detrimental information that it speculatively found to be indelibly imprinted in Mr. Kaufman's mind. Moreover, the Pre-Trial Chamber, disregarded, without reason, the observations which it commissioned from Mr. Kaufman on 17 March 2022, and his sworn affidavit filed before the Pre-Trial Chamber, both of which fully address the extremely limited nature of the now-terminated engagement between Mr. Kaufman and Nouredine Adam.³²

Error 3: The Pre-Trial Chamber erred by finding that Mr. Kaufman is precluded from adopting any remedial measures because of his *untimely* conduct and a perceived lack of transparency

26. The Pre-Trial Chamber, at para. 24 of the Impugned Decision, concluded that '*it would have been incumbent on Mr Kaufman to raise a potential conflict of interest with the Registry and have been forthcoming about his representation of these other persons. The Chamber, by coincidence, was aware of Mr Kaufman's representation of P-1019 and Mr Adam, and raised the issue proprio motu. However, it should not have been for the Chamber to have brought the matter to light, but for Mr Kaufman*' (emphasis added).

³⁰ Impugned Decision, at para. 22 (italics added).

³¹ Cf ICC-01/14-01/18-837-Red at para. 13 (finding 'Specifically, the Chamber finds the Prosecution's submissions as to potential conflicts of interests that may arise mid-trial and the possibility of Mr Ngaissona blaming lower-ranking members of the Anti-Balaka, including the Former Clients, for the crimes with which he is charged, [...] to be speculative and unsubstantiated').

³² The Appeals Chamber (see particularly para. 17 of the partially dissenting opinion) did not question the veracity of Mr. Kaufman's assertions as to his limited representation of Nouredine Adam.

27. In stark contradiction to the Pre-Trial Chamber's reasoning (and demonstrating its error), however, it is submitted that Mr. Kaufman was, indeed, 'forthcoming about his representation of the [...] other persons'. Further, it appears that the Pre-Trial Chamber, despite its holding, did not become aware of that representation 'by coincidence'. Per representations of Mr. Kaufman to Duty Counsel in August 2022, he indicated that he submitted power of attorney forms from both P-1019 and Nouredine Adam to Pre-Trial Chamber II, by way of Registry transmission, as early as 18 July 2017.³³ The Pre-Trial Chamber failed to consider or mention the existence of these two filings and found, erroneously, that Mr. Kaufman only informed the Court of his representation of P-1019 and Nouredine *after* assuming representation of Mr. Mokom. Because these two filings were filed in the *confidential* case record of the CAR2 Situation, Duty Counsel was not even aware of their existence, and had to request access thereto from the Registry for the purposes of this appeal. Such access was granted on 23 August 2022. In these filings of five years ago, which included powers of attorney, the lack of a conflict of interest between Nouredine Adam and P-1019 was addressed, which supports Mr. Kaufman's awareness of his ethical obligations under the Code. Upon closer inspection of this issue, the Impugned Decision's reasoning falls short.

28. Additionally, and at para. 25 of the Impugned Decision, the Pre-Trial Chamber as part of its reasoning, found that the waiver provided by P-1019 and the termination letter sent to Nouredine Adam were of questionable value because their late submission '*raises questions about Mr. Kaufman's transparency and ability to fully engage in Mr. Mokom's defence*'.

29. Duty Counsel agrees that all counsel have an ethical duty to raise the potential for any impediment to representation *proprio motu*. Although the Pre-

³³ See ICC-01/14-10-Conf (with 5 confidential annexes) dated 18 July 2017 and ICC-01/14-11-Conf (with 2 confidential annexes) dated 20 July 2017.

Trial Chamber's recently furnished reasons purport to preclude remedial measures because of an impediment to representation, Duty Counsel now addresses the Pre-Trial Chamber's reasoning concerning Mr. Kaufman's allegedly questionable transparency and allegedly tardy conduct as it underlies the Pre-Trial Chamber's holding that there exists no possible remedy to the purported conflict of interest.

30. Mr. Kaufman has indicated repeatedly that he had no reason to suspect the potential for either an impediment or a conflict of interest based on all information at his disposal at the time *and* after fully consulting all his clients. Mr. Kaufman's assertions in this respect have been already set out in his observations to the Pre-Trial Chamber and in his affidavit, to which the Pre-Trial Chamber gave little or no weight.

31. Counsel's ethical obligations, under Articles 12 and 16 of the Code of Professional Conduct, can only be triggered as a result of information known to him at the time. Here, the 'further reasons in support of its findings' now claimed to handicap Mr. Kaufman, arise as a result of reasoning which 'the [Pre-Trial] Chamber [formerly] had set out [...] in a more general manner in order to prevent exposing information that was confidential or under seal' and on the basis 'of documents at the time classified as confidential or under seal which now have been made public'.³⁴ Accordingly, and therefore, logically, it is hard to fault Mr. Kaufman for failing to identify and raise a potential conflict of interest where:

- i) the Pre-Trial Chamber frankly concedes that its *further* reasoning is based on confidential information of which almost nothing was available to Mr. Kaufman, and, further, when;
- ii) the majority of the Appeals Chamber, at para. 67, itself found that the Pre-Trial Chamber 'could have been more precise' in explaining why Mr Kaufman's prior representation of P-1019 and Nouredine Adam 'would

³⁴ Impugned Decision, at para. 16.

necessarily be “fundamentally incompatible” with his present representation of Mr Mokom’.

32. While these considerations do not preclude the Pre-Trial Chamber from surmising the existence of an impediment to representation or conflict of interest from information available to it, and not available to Mr. Kaufman, the same considerations, nevertheless, refute the conclusion that Mr. Kaufman acted in an untimely fashion and with a lack of transparency thereby rendering him unable to remedy the alleged impediment and conflict of interest. This again shows that the Impugned Decision’s reasoning falls short.

Error 4: The Pre-Trial Chamber failed to consider the documentation filed and which remedied the possible conflict of interest

33. Finally, the Pre-Trial Chamber’s failed to consider: (1) the waiver, and (2) the letter terminating representation, both filed and designed to remedy any possible conflict of interest. This constitutes an error. The Pre-Trial Chamber further neglected to mention and factor into its reasoning the fact that Mr. Kaufman had declared his then representation of Nouredine Adam and P-1019 to the Pre-Trial Chamber in 2017 – more than four years before the arrest of Mr. Mokom.

Conclusion

34. In conclusion, Duty Counsel summarizes as follows:

- a. An impediment or handicap to representation is distinct from a conflict of interest;
- b. An impediment to representation can only arise when counsel is contemplating appearing in a plurality of cases before the Court;
- c. To remedy an impediment to representation under Article 12(1)(a) of the Code, there is no requirement to submit a written document; counsel’s affirmation, full explanation and mutual consent should suffice;

- d. A conflict of interest can arise even if an impediment to representation is cured;
- e. A conflict of interest can arise as a result of counsel's conflicting loyalties or duties, which do not necessarily arise out of multiple cases before the court;
- f. To substantiate an evidence-based conflict of interest *proprio motu*, especially where the Prosecution has not done so, the Court should find more than the existence of substantial similarity and diverging or fundamentally incompatible interests. The Court would have to be satisfied that counsel possesses knowledge, the sharing or denial of which from one of his jointly-represented clients, would prejudice the interests and/or expectations of the other.

35. In the present case, the Pre-Trial Chamber has focused, primarily, on a supposed impediment to representation. The Pre-Trial Chamber's holdings in the Impugned Decision relating to 'substantial similarity' and 'fundamental incompatibility' do not arise out of a plurality of cases before the Court and are no further or better reasoned than they were in the original Impugned Order. Even if an impediment to representation exists, its cure could be achieved without a written document.

36. In so far as any conflict of interest might exist, the Pre-Trial Chamber has not indicated what knowledge Mr. Kaufman purportedly possesses from either of his other clients, the sharing or denial of which could be beneficial or detrimental to the other. While disregarding Mr. Kaufman's solemn affirmations and sworn affidavit, the Pre-Trial Chamber speculated or assumed 'objectively' that such knowledge exists and assumed that it was so grave that could not be 'mechanically' set aside by waiver. Mr. Kaufman could not have acted in a timelier fashion on the basis of information not known to him.

37. For the above reasons, Mr. Mokom, in seeking to exercise his right to counsel of his choice, respectfully requests the Appeals Chamber to allow his appeal, **REVERSE** the Impugned Decision, and immediately restore Mr. Kaufman as the freely chosen counsel of Mr. Mokom.

Urgency

38. Consistent with paragraph 30 of the Impugned Decision (holding that an 'immediate resolution by the Appeals Chamber would ensure that any doubts in connection with the scope of Mr. Mokom's right to be assisted by counsel of his own choice are promptly and authoritatively dispelled'), Duty Counsel files this appeal on an urgent basis (and on the understanding that the composition of the Appeals Chamber since 27 September 2022 remains the same in this matter having been remanded and certified on appeal), given the passage of almost six months since the Pre-Trial Chamber first denied Mr. Mokom's sincere wish to be represented by Mr. Kaufman. In light of this and consistent with Rule 156(4), the Appeals Chamber is respectfully requested to render the dispositive part of its judgment, as expeditiously as possible, with any written motivation to be provided at a later date, so that Mr. Mokom's case is not further delayed.

Respectfully submitted,

A handwritten signature in blue ink, reading "Gregory Townsend". The signature is fluid and cursive, with the first name "Gregory" being more prominent than the last name "Townsend".

Gregory Townsend,
Duty Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, September 30, 2022