

Pursuant to Pre-Trial Chamber II's instruction dated 02-05-2024, this document is reclassified as Public

**Cour
Pénale
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**International
Criminal
Court**

Annex I

Confidential *EX PARTE* Registry only

Registry transmission of a document received from Mr Nicholas Kaufman

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**International
Criminal
Court**



Original: English

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

Date: 28/03/2022

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka

CONFIDENTIAL

Ex parte Prosecution, Nicholas Kaufman, Maxime Mokom and Registry

Request for Reconsideration of Order ICC-01/14-01/22-26-Conf-Exp

Source: Nicholas Kaufman

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for the Defence

Nicholas Kaufman

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
Peter Lewis

Counsel Support Section
Pieter Vanaverbeke

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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In the interests of justice and with a view to finding a constructive solution to an unprecedented situation, undersigned counsel ("the Applicant") requests that the Pre-Trial Chamber reconsider its *Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka* ("the Order").¹

1. The Order is unprecedented because it involves the forcible dismissal of counsel who has been found, allegedly, to face an irremediable impediment or conflict of interest arising out of his representation of "other clients". In other words, the Pre-Trial Chamber preemptively ordered the revocation of the Applicant's mandate without even permitting him to remedy the situation as expressly foreseen by the ICC Code of Professional Conduct.² Indeed, the Chamber cited no precedent, national or international, for adopting such an extreme course of action. All ICC precedent to date has concerned former employees of the Office of the Prosecutor "switching sides". These cases discussed the existence of an impediment yet required proof of exploitation thereof and, specifically, stated that the impediment may be remedied. *Meftah & Others v. France*³ is not precedent for invalidating the mandate of counsel in the way it was done in the present case.

2. Although the Appeals Chamber has recognized⁴ that Article 64(2) of the Rome Statute forms a statutory basis for reviewing the ethical appropriateness of representation, the implied allegation that Mr. Mokom's rights might not be respected overlooks the absence of evidence as to the Applicant's access to confidential information⁵ from his "other clients" and his solemn affirmed denial as to the possession thereof. The Order also fails to show how Mr. Mokom's rights could possibly be impacted by an impediment manifested by a questionably potential witness - who is yet to be announced - and a "potential suspect" who is not currently a party to any proceedings before the Court. The Order, additionally,

¹ ICC-01/14-01/22-26-Conf-Exp.

² Order at para. 18. Articles 16(3)(a) and 16(3)(b) of the ICC Code of Professional Conduct.

³ Order at para. 17 fn. 17 and ECtHR 32911/96 at para. 45.

⁴ *Muthaura*; ICC-01/09-02/11-365 at paras 45-46.

⁵ That is confidential information the use of which may impact on the effective representation of any of his clients.

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markedly dissents from the finding of Trial Chamber V that the situation implicating the "other clients" was not "substantially related" to situation in which Mr. Mokom is implicated.⁶

3. The exceptional nature of the Order is compounded because the Chamber overrode the Applicant's own assessment of the non-existence of possible impediments to representation and conflicts of interest⁷ and rejected even the Prosecutor's view that any such impediments or potential conflicts may be remedied.

4. The Applicant believes it to be in the best interests of the Court to avoid unnecessary contentious and public litigation of this important yet sensitive matter. Accordingly, should the solution(s) proposed hereinafter be approved, he will withdraw any request for leave to appeal subsequently filed.

5. This Pre-Trial Chamber has already formulated the test for reconsideration as follows:

*"reconsideration may be allowed; however only under strict and limited conditions and subject to the fulfilment of a twofold requirement: reconsideration should only be undertaken when (i) 'the conditions upon which the decision was grounded have changed', and (ii) 'it is necessary to prevent an injustice'."*⁸

6. The rationale for the Order was framed to "ensure the fairness of the proceedings".⁹ The concept of fairness is inextricably linked to the interests of justice which incorporate the rights of Mr. Mokom and the need "to prevent an injustice". The Applicant suggests that it would be an injustice to impose on Mr. Mokom undesired counsel who lacks the intimate knowledge that the Applicant has of Mr. Mokom's personal and familial situation, of the pertinent court documentation and of the events relevant to the Central African conflict. It would be an injustice to impose

⁶ Prosecutor's Email of 18 March 2022 citing ICC-01/14-01/18-916-Conf.

⁷ There is a presumption of professional integrity.

⁸ ICC-01/14-01/18-447 at para. 16.

⁹ Order at para. 16.

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undesired counsel where Mr. Mokom has placed his trust in the Applicant since 2019 at the latest and discussed and agreed mutual representation with the "other clients". It would also be an injustice to ignore a constructive solution to the perceived impediments and conflicts of interest. These injustices far outweigh the possible adverse effects of the disputed impediment/conflict of interest.

7. The conditions and concerns on which the Order was grounded have changed and they may now be resolved by the constructive solution(s) alluded to above and presented hereinafter. Firstly, the Chamber found that the possibility of conflict was exacerbated by the fact that *"it is unclear whether [the Applicant] has actually ended his representation of the other persons"*.¹⁰ The Applicant will terminate his representation of the "potential suspect".¹¹ This is notwithstanding the fact that Mr. Mokom has told the Applicant that he and this potential suspect agreed to mutual representation and, furthermore, clarified to the Applicant that he had engaged in written telecommunication of the matter with the potential suspect prior to his arrest and surrender. As mentioned previously, the representation of the potential suspect, at the time, was non-substantive and confined to negotiating terms for an interview requested by the Prosecution, not his representation as a suspect in court proceedings. Regarding Witness P-1019, the representation was, as stated, limited to overseeing the taking of his evidence in 2018 in the course which no confidential information was obtained.¹² This representation has also terminated and no further contact will be initiated. Indeed, the Applicant has no basis for any future representation because no ICC charges in the second Central African Situation will be presented against Witness P-1019 nor will he, probably, be called to give evidence. Secondly, the Order was grounded on the assumption that the Applicant would be prevented from *"pursuing all available and permissible means in representing Mr. Mokom"*¹³ and would, purportedly, be hindered in cross-examination should *"any of*

¹⁰ Order at para. 15.

¹¹ Article 16(3)(a); Termination, incidentally, requires the consent of the Chamber implying that the potential suspect must be subject to proceedings before the Court such that the Court may give consent.

¹² Regardless oral consent has been delivered and this may be entered into the case record in writing.

¹³ Order at para. 12.

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his clients be called to testify in the proceedings against Mr. Mokom".¹⁴ The Applicant will limit his representation, if so ordained, to the confirmation stage of the proceedings in the course of which no witnesses are, as a rule, called to testify. This suggested solution will be conditioned on the Prosecutor notifying, within a reasonable period, that neither of the "other clients", formerly represented by the Applicant, will be called to testify at confirmation. There is no written or documentary information emanating directly from these "other clients" which can be presented at confirmation other than the evidence, already in the possession of the Office of the Prosecutor, known to the Applicant and subject to disclosure. In this way, even the appearance of exploiting a "*fundamental incompatibility*"¹⁵ (strenuously disputed) is avoided.

8. Finally, the Applicant will agree, if the Chamber should deem it necessary, that his ethical decisions taken to date be subjected to review by the Professional Standards Committee of his own bar association or, failing that, by the Commissioner to the Disciplinary Board of the International Criminal Court – for an advisory opinion which will be submitted to the Chamber. This would require changing the classification of the litigation.

9. The balancing test which the Chamber performed to conclude that the interests of justice implicating effective representation outweigh the right to counsel of choice involved a subjective assessment of the nature of the proceedings and the professional tools required to carry out such effective representation. The Applicant's suggested solutions directly address those concerns, and it is well within the "interests of justice" discretion of the Chamber to accept them should it not be predisposed to prevent the Applicant's continuing representation.

10. The Applicant is aware of situations at the international criminal tribunals where the bench has imposed representation on an indigent suspect not of his own free choosing. In the Applicant's experience, the result has, on occasion, unnecessarily derailed the smooth running of the judicial process. Accordingly,

¹⁴ Order at para. 12.

¹⁵ Order at para. 13.

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pending the conclusion of the confirmation process, the Chamber is respectfully asked to rescind the Order so that the pre-trial process may continue without inconvenience either to the Prosecution, to Mr. Mokom or to the staff that the Applicant has provisionally hired. Failure to suspend the operation of the Order will cause harm to Mr. Mokom, who has expressed his firm desire for the Applicant to continue to represent him, and to the disclosure process which will now stagnate.

Classification

11. This document is filed confidentially and *ex parte* pursuant to the classification of the Order. Given the importance of the issues at stake and the fact that the matter should be available to the international community at large and national bar associations, including that of proposed replacement counsel, the Chamber is requested to change the classification of this document to public.

Conclusion

12. The Applicant makes this request for reconsideration in good faith and in the hope that it will be supported by the Prosecutor – especially given the latter's *prima facie* opinion that any impediment or conflict may be remedied. The Pre-Trial Chamber is, thus, requested to:

RESCIND, forthwith, the revocation of the Applicant's mandate to represent Mr. Mokom, and;

PERMIT the Applicant's representation of Mr Mokom, presently, for the duration of the pre-trial stage.



Counsel for Maxime Mokom

The Hague, The Netherlands
Monday, March 28, 2022