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No. ICC-01/14-01/22

Date: 25 March 2022

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PRE-TRIAL CHAMBER II

Before:

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Public Redacted Version of 'Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka', 25 March 2022, ICC-01/14-01/22-26-Conf-Exp

Order 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
Mr Kweku Vanderpuye

Counsel for Mr Mokom

Mr Townsend (Duty Counsel)

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this order on the appointment of Mr Nicholas Kaufman (‘Mr Kaufman’) as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka (‘Mr Mokom’).

I. Procedural History

1. On 10 December 2018, the Chamber issued a warrant of arrest for Mr Mokom (the ‘Warrant of Arrest’).¹ Following his arrest in the Republic of Chad, Mr Mokom was surrendered to the Court on 14 March 2022, and arrived at the Detention Centre that same day.

2. On 15 March 2022, Mr Mokom expressed to the Registry his wish that Mr Kaufman be appointed as his counsel.² Following the acceptance by Mr Kaufman to act as such,³ the Registry formally appointed Mr Kaufman as counsel for Mr Mokom, for an (initial) period of 30 days, on 16 March 2022.⁴ That same day, the Registry notified the Chamber of Mr Kaufman’s appointment as counsel for Mr Mokom, annexing information about the aforementioned steps.⁵

3. On 17 March 2022, the Chamber ordered Mr Kaufman, the Prosecution, and the Registry to submit observations, by way of email, on any potential conflict of interest regarding the appointment of Mr Kaufman as counsel for Mr Mokom.⁶ These observations were provided on 17 and 18 March 2022.⁷

4. On 18 March 2022, in light of the imminence of the first appearance for which Mr Mokom required representation, and without prejudice to the Chamber’s

¹ ICC-01/14-01/22-2-Red2.

² Annex I to the ‘Notification of the Appointment of Mr Nicholas Kaufman as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka’, ICC-01/14-01/22-22-AnxI.

³ ICC-01/14-01/22-22-Conf-AnxII.

⁴ ICC-01/14-01/22-22-Conf-AnxIII.

⁵ Notification of the Appointment of Mr Nicholas Kaufman as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-22, and four public annexes.

⁶ Email from the Chamber to the Prosecution and to the Registry, at 14:19. Email from the Chamber to Mr Kaufman, at 14:24.

⁷ Email from Mr Kaufman to the Chamber, 17 March 2022, at 23:24; Email from the Prosecution to the Chamber, 18 March 2022, at 09:41; and Email from the Registry to the Chamber, 18 March 2022, at 10:02.

determination of the matter, the Chamber permitted Mr Kaufman to represent Mr Mokom at the first appearance.⁸

5. On 22 March 2022,⁹ Mr Mokom made his first appearance before the Chamber, represented by Mr Kaufman.

6. On 23 March 2022, the Chamber provided Mr Kaufman with redacted versions of the Prosecution's and Registry's observations of 18 March 2022.¹⁰ On 25 March 2022, Mr Kaufman responded to the Prosecution's observations of 18 March 2022.¹¹ Although he was not granted leave to respond to these observations, and his email, if it were to be seen as an amendment to his own earlier observations, was sent out of time,¹² given the issue at stake, and the potential consequences for Mr Kaufman and Mr Mokom, the Chamber has considered the information contained in the 25 March 2022 email.

II. Determination by the Chamber

7. At the outset, the Chamber notes that the proceedings concerning Mr Kaufman's representation of Mr Mokom, in particular with regard to the potential existence of a conflict of interest, were triggered by the Chamber in light of information and documents before it concerning the role played by Mr Kaufman in other proceedings before the Court.

8. The Chamber notes article 12(1)(a) of the Code of Professional Conduct (the 'Code'), which provides, *inter alia*, that counsel shall not represent a client if the case is 'the same as or substantially related to another case' in which counsel formerly represented another client, and the interests of both clients are incompatible, unless their consent is obtained after consultation. Article 16(1) of the Code further provides that

⁸ Email from the Chamber to Mr Kaufman, at 17:45.

⁹ See Order convening a hearing for the first appearance of Mr Mokom, 16 March 2022, ICC-01/14-01/22-21.

¹⁰ Email from the Chamber to Mr Kaufman, at 12:13.

¹¹ Email from Mr Kaufman to the Chamber, at 8:08.

¹² On 21 March 2022, the Chamber had indicated to Mr Kaufman that should he 'wish to provide the Chamber with any amendment to [his own] observations on an *ex parte* basis', he was permitted to do so 'by coming Wednesday, 23 March 2022, at noon' (see Email from the Chamber to Mr Kaufman, at 12:50). No amendment was received by the aforementioned deadline.

counsel shall ‘exercise all care to ensure that no conflict of interest arises’ and ‘put the client’s interests before counsel’s own interests or those of any other person’.

9. Having carefully considered the information before it, as well as the observations provided by Mr Kaufman, the Registry and the Prosecution, the Chamber considers, for the reasons set out below, that the role played by Mr Kaufman in other proceedings before the Court constitutes a conflict of interest within the meaning of articles 12 and 16 of the Code, and as such forms an impediment to his representing of Mr Mokom in the present proceedings.

10. The Chamber notes that Mr Kaufman represented other clients, [REDACTED], in the context of investigative proceedings conducted by the Prosecution related to the situation in the Central African Republic II (the ‘CAR II Situation’) and the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*. The Chamber considers that these proceedings are ‘substantially related’ to the present case, and notes that the charges in the aforementioned case largely overlap with the allegations brought against Mr Mokom.

11. The Chamber recalls in this regard that in 2019, following a request by the Prosecution not to appoint Mr Kaufman as counsel under article 56 of the Rome Statute (the ‘Statute’) for the purposes of obtaining evidence of certain persons, due to his representation of [REDACTED], it instructed the Registrar to appoint counsel other than Mr Kaufman in view of the nature of the latter’s previous involvement in the CAR II Situation.¹³ Since that time, Mr Kaufman has indicated to the Court that he is representing at least one other person who may be of interest to the proceedings, [REDACTED].¹⁴

12. The Chamber considers that the interests of these other clients diverge from those of Mr Mokom to such a degree that it prevents Mr Kaufman from pursuing all available

¹³ [REDACTED]. The Chamber notes that the existence of this filing and instruction to the Registry contained therein, was not available to Mr Kaufman. The relevant decision was not notified to Mr Kaufman and remains under seal *ex parte*. The Chamber hereby clarifies, for Mr Kaufman’s purposes that the decision does not contain any other information related to him, and by way of the above, he is now made aware of any and all information that the Chamber considers appropriate for him to be informed of.

¹⁴ See [REDACTED]; and [REDACTED].

and permissible means in representing Mr Mokom and providing all explanations that are reasonably needed regarding his representation. Indeed, should any of his clients, be called to testify in the proceedings against Mr Mokom, Mr Kaufman, as counsel for Mr Mokom, will be precluded from using the information relating to his representation of the other clients to their detriment and to the benefit of Mr Mokom,¹⁵ on the basis of his obligations under the Code.¹⁶

13. Furthermore, the information before the Chamber shows that the interest 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. Whether any of the other clients currently bears 'any ill-will' towards Mr Mokom is irrelevant for the purpose of assessing the appropriateness of Mr Kaufman representing Mr Mokom. Therefore, in the view of the Chamber, in these circumstances, Mr Kaufman is not be in a position to effectively represent Mr Mokom.

14. The Code provides for avenues to cure an impediment to representation or a conflict of interest under articles 12(1)(a) and 16(3), respectively. With regard to article 12(1)(a), the Chamber notes that Mr Kaufman has not been able to consult and obtain consent from one of the other clients. Concerning article 16(3), the Chamber notes Mr Mokom's signed note in which he acknowledges having been informed by Mr Kaufman of the latter's representation of the other clients, and re-confirms his wish to appoint Mr Kaufman as his counsel. However, this note followed the Chamber's order to provide observations. Notwithstanding the fact that the Registry ought to have been alert to any potential conflict of interest, especially when it is aware that a counsel represents multiple persons related to a situation before the Court, Mr Kaufman did not himself indicate any conflict of interest, or steps taken in this regard prior to his appointment.

¹⁵ The Chamber notes that Mr Kaufman states that he has 'not acquired any specific confidential information from [REDACTED]' (Email from Mr Kaufman to the Chamber of 25 March 2022, at 8:08). However, as discussed in the next paragraph with this client, as with another person represented by Mr Kaufman, the matter is not merely that of having or not having obtained confidential information.

¹⁶ E.g., professional secrecy and confidentiality, and the performance in good faith of a representation agreement under articles 8 and 14 of the Code.

15. Moreover, it is unclear whether Mr Kaufman has actually ended his representation of the other persons. In his observations to the Chamber, Mr Kaufman simply indicates that he will assess whether he can represent the other clients appropriately in light of his current and future representation of Mr Mokom, should the circumstances arise, while in later submissions he continues to refer to these other persons as his clients. This does not suffice to overcome the above mentioned conflict of interest.

16. The Chamber must ensure the fairness of the proceedings, which, in this context, especially implicates Mr Mokom's right to be effectively represented through legal assistance under article 67(1)(d) of the Statute. In discharging this duty, the Chamber also takes into consideration the importance of the confirmation of charges process and the seriousness of the allegations contained in the Warrant of Arrest, which could attract a significant sentence if the charges were to be confirmed and subsequently established at trial.

17. Whilst article 67(1)(d) of the Statute affords Mr Mokom the right to be represented by counsel of his own choosing, this right is not without limitations. Indeed, as held by the European Court of Human Rights, 'the right for everyone charged with a criminal offence to be defended by counsel of his own choosing [...] cannot be considered to be absolute and, consequently the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.¹⁷ In the Chamber's view, Mr Mokom's right to effective legal representation outweighs his choice to be represented by Mr Kaufman.

18. Accordingly, the Chamber finds that, the above mentioned impediment and conflict of interest cannot be remedied by Mr Kaufman obtaining consent in writing of all potentially affected clients or withdrawing from their representation. Therefore, the Chamber instructs the Registry to revoke or cancel¹⁸ its appointment of Mr Kaufman forthwith and relieve him from further representing Mr Mokom in this case.

¹⁷ ECtHR, *Meftah and Others v. France*, Judgment, 26 July 2002, Application Nos. 32911/96, 35237/97 and 34595/97, para. 45.

¹⁸ The Chamber notes that the Registry appointed Mr Kaufman, by way of an administrative decision of the Registry, for a period of 30 days. As such, the manner in which the Registry ends the appointment is within the Registry's purview, so long as the effect is that Mr Kaufman's representation of Mr Mokom before the Court ceases forthwith, and a new counsel is appointed promptly to ensure that Mr Mokom is not left without representation.

19. The Chamber further orders the Registry pursuant to rules 20 to 22 of the Rules of Procedure and Evidence to make the necessary arrangements, including by consulting with Mr Mokom, to appoint counsel within the shortest possible delay and to submit a report to the Chamber immediately after appointing new counsel.

FOR THESE REASONS, THE CHAMBER HEREBY

INSTRUCTS the Registry to revoke its appointment of Mr Kaufman as counsel for Mr Mokom; and

ORDERS the Registry to make the necessary arrangements, including by consulting with Mr Mokom, to appoint counsel within the shortest possible timeframe, and to submit a report to the Chamber immediately following the appointment of new counsel.

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



Judge Rosario Salvatore Aitala

Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 13 June 2022

At The Hague, The Netherlands