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**No: ICC-01/14-01/22 OA**

**Date: 29 June 2022**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF  
*THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

**Public with Public Annex A**

**Public redacted version of “Prosecution’s Response to Mr Mokom’s Appeal against Pre-Trial Chamber II’s Order concerning the appointment of Counsel”, 16 May 2022, ICC-01/14-01/22-48-Conf-Exp**

**Source: Office of the Prosecutor**

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

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

Mr Pieter Vanaverbeke

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## INTRODUCTION

1. On 25 March 2022, Pre-Trial Chamber II ordered the Registry to revoke its appointment of Mr Nicholas Kaufman as Mr Mokom’s counsel.<sup>1</sup> The Chamber found that Mr Kaufman’s representation of other clients [REDACTED] in the ‘substantially related’ investigative proceedings in the *CAR II* situation and the *Yekatom & Ngaïssona* case constituted a conflict of interest under articles 12 and 16 of the Code of Conduct and impeded his representation of Mr Mokom.<sup>2</sup> Therefore, the Chamber found that Mr Kaufman was not in a position to effectively represent Mr Mokom.<sup>3</sup> Moreover, the Chamber considered whether the impediments to representation could be cured or overcome under articles 12(1)(a) and 16(3) of the Code—but found that they could not.<sup>4</sup> The Chamber found that while article 67(1)(d) of the Statute gives Mr Mokom the right to be represented by counsel of his choice, this right could be limited.<sup>5</sup> The Chamber found that, in this case, Mr Mokom’s right to effective legal representation outweighed his choice to be represented by Mr Kaufman.<sup>6</sup>

2. The Chamber granted leave to appeal on two issues relating to the Revocation Order on 14 April 2022.<sup>7</sup> Mr Mokom filed his appeal against the Revocation Order on 4 May 2022,<sup>8</sup> followed by the submission of a further annex (a one page consent document) on 9 May 2022.<sup>9</sup> Duty Counsel explained why the Appeal was filed past the deadline.<sup>10</sup> The Prosecution defers to the Appeals Chamber on this matter.

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<sup>1</sup> [Revocation Order](#), p. 9.

<sup>2</sup> [Revocation Order](#), paras. 10 (“[T]he charges in [*Yekatom & Ngaïssona*] largely overlap with the allegations brought against Mr Mokom”); 11 [REDACTED]; 12 (“[...] interests of these other clients diverge from Mr Mokom to such a degree that it prevents Mr Kaufman from pursuing all available and permissible means in representing Mr Mokom and providing all explanations that are reasonably needed regarding his representation.”); 13 (“[...] interest[s] of Mr Mokom are fundamentally incompatible with those of Mr Kaufman’s other clients, [REDACTED]”; *see* articles 12 and 16, [Code of Conduct](#) or [Code](#).

<sup>3</sup> [Revocation Order](#), para. 13.

<sup>4</sup> [Revocation Order](#), paras. 14 (for article 12(1)(a), Mr Kaufman has not been able to consult and obtain consent from one of his other clients; for article 16(3), Mr Mokom’s signed note reaffirming his wish to be represented by Mr Kaufman followed the Chamber’s order for observations, Mr Kaufman did not indicate any conflict of interest, or steps taken in this regard prior to his appointment); 15(unclear if Mr Kaufman has actually ended his representation of the other persons).

<sup>5</sup> [Revocation Order](#), para. 17.

<sup>6</sup> [Revocation Order](#), para. 17.

<sup>7</sup> [Mokom ALA Decision](#), paras. 28-29.

<sup>8</sup> [Appeal](#), filed on 2 May 2022 (23.37.54), notified on 4 May 2022 (09.54).

<sup>9</sup> [Annex](#).

<sup>10</sup> [Appeal](#), para. 17.

3. Since the Appeal was notified on 4 May 2022, the Prosecution files its response within the revised time limit under regulation 31(2) of the RoC.<sup>11</sup>

4. To assist the Appeals Chamber, the Prosecution sets out the relevant legal framework and principles that apply. Moreover, to the extent that the Appeal relies on the Prosecution's submissions before the Pre-Trial Chamber, the Prosecution respectfully disagrees with Mr Mokom's interpretations of its submissions, and takes this opportunity to place them in their proper context. Nonetheless, the Prosecution does not take a position on the factual issues raised by this Appeal. It defers to the Appeals Chamber's resolution of the Appeal according to the applicable standard of appellate review for discretionary decisions.<sup>12</sup>

## SUBMISSIONS

### A. Relevant Legal Principles

5. In his Appeal, Mr Mokom raises several interrelated legal issues relating to the interpretation of the Statute (articles 64 and 67) and the Code of Conduct (articles 12 and 16).<sup>13</sup> Since they are of general significance to the Court's practice, the Prosecution sets out its understanding of these issues, based on the Court's law, below.

6. *First*, while litigating counsel are presumed to act ethically,<sup>14</sup> any presumption of ethical regularity—if it applies—is rebuttable and not necessarily determinative. The Code of Conduct places the responsibility on counsel to exercise all care to ensure that no conflict of interest arises, and to avoid impediments to representation.<sup>15</sup> Given the nature of counsel's obligations under the Code and the consequences of not following them, the Appeals Chamber has held previously that it expects counsel to err on the side of caution.<sup>16</sup> In case of any doubt on the

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<sup>11</sup> Regulation 31(2), [RoC](#): Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, a participant is deemed notified, informed of or to have had communicated to him or her, a document, decision or order on the day it is effectively sent from the Court by the Registry. Such date shall be written on the notification form to be appended to all copies of the document, decision or order, as relevant; regulation 34(b), [RoC](#).

The appeal brief was notified on 4 May 2022, and accordingly, the Prosecution's response is due on 16 May 2022.

<sup>12</sup> [Bemba et al. AJ](#), paras. 100-101; [Kony Admissibility AD](#), paras. 79-81; [Bemba AJ](#), para. 48; [Ntaganda AJ](#), paras. 45-46; [Al-Bashir AD](#), paras. 34-35; [Al-Bashir Joint Dis Op. Judge Ibáñez and Judge Bossa](#), paras. 18-23.

<sup>13</sup> [Appeal](#), paras. 4, 8-9, 12, 15.

<sup>14</sup> [Appeal](#), para. 4.

<sup>15</sup> Articles 12, 13 and 16(1), [Code of Conduct](#).

<sup>16</sup> [Muthaura et al. AD](#), para. 55 (noting that the consequences of not applying the Code properly include (i) being disqualified from the case; (ii) institution of disciplinary proceedings, with the ultimate sanction of a permanent ban from practising before the Court and being struck off the list of counsel; and (iii) an enduring tarnish on

Code's application, counsel should either not agree to the representation or bring the matter immediately before a Chamber.<sup>17</sup> Equally, if such conflict should arise later, counsel has a duty to inform the Chamber at that stage.<sup>18</sup>

7. *Second*, Mr Mokom accepts that a Chamber has a role in regulating whether a suspect or an accused is appropriately represented by counsel.<sup>19</sup> The question before the Appeals Chamber is the legal basis of a Chamber's power and the scope of its role in regulating matters of conflicts of interest. Notwithstanding counsel's own duty of care under the Code, a Chamber has an overarching role, under article 64 of the Statute, to ensure the integrity of the proceedings.<sup>20</sup> Specifically regarding matters of counsel appointments, the Appeals Chamber has held that article 64(2) of the Statute is the correct legal basis for a Chamber to act.<sup>21</sup> As it held, "protecting the integrity of proceedings—in particular, their fairness and expedition in the specific context [of whether counsel representation in a case is appropriate]—is a matter that is necessarily within a Chamber's jurisdiction."<sup>22</sup> In exercising this jurisdiction, Chambers of this Court necessarily interpret the Code of Conduct as part of the Court's applicable law under article 21(1)(a) of the Statute, and rule on the existence (or not) of conflicts of interests or impediments to representation, and whether they have been waived or cured.<sup>23</sup>

8. Further, consistent with its power and duty to ensure the integrity of the proceedings, a Chamber is not bound to accept remedial measures provided to waive or cure conflicts of interest.<sup>24</sup> In cases where full and informed consent of clients is argued to waive any conflict of interest or impediment to representation, a Chamber may still assess if such consent is sufficient and proper. Chambers have held that the waiver or curing of a conflict of interest may not be accepted, if to do so is likely to result in irreversible prejudice to the administration

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counsel's reputation (honesty and/or judgment)); *see also* article 24(1), [Code of Conduct](#): 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; [15 April 2015 Bemba et al. Decision](#), para. 12 ("Article 16 of the Code of Conduct requires that counsel must exercise all care to ensure that no conflict of interest arises.")

<sup>17</sup> [Muthaura et al. AD](#), para. 55.

<sup>18</sup> [1 April 2014 Babala Decision](#), para. 4.

<sup>19</sup> [Appeal](#), paras. 4, 12.

<sup>20</sup> Articles 64(2), 64(3)(a), [Statute](#). While article 64 of the Statute does not mention the PTC, it is equally bound by the essence of its principles ([Muthaura et al. AD](#), para. 46); [7 May 2010 Bemba Decision](#), para. 39.

<sup>21</sup> [Banda AD](#), para. 30; [Muthaura et al. AD](#), para. 46.

<sup>22</sup> [Muthaura et al. AD](#), para. 46.

<sup>23</sup> [Muthaura et al. AD](#), para. 48, referring to rule 8, [RPE](#), mandating the drawing up of the Code of Conduct. Pursuant to rule 8, the Assembly of States Parties adopted the Code by consensus on 2 December 2005.

<sup>24</sup> *Contra* [Appeal](#), paras. 4, 9; [15 April 2015 Bemba et al. Decision](#), paras. 12, 19.

of justice.<sup>25</sup> Claims that counsel have “a right to cure” impediments must be seen in this context.<sup>26</sup> Such a “right to cure”—if recognised—will always be subject to a Chamber’s statutory powers and discretion, no matter which provision of the Code is at issue.<sup>27</sup> Likewise, even if all litigating parties agree that a conflict or impediment may be cured, a Chamber may still make the final assessment.<sup>28</sup>

9. *Third*, in adjudicating impediments to representation at the Court, tests and practices on conflict of interest deriving from domestic and other international jurisdictions are of limited value.<sup>29</sup> Chambers of this Court have expressly held that in matters of conflict of interest, the Court is guided by its own legal framework and does not resort to the practice of other courts and tribunals (national and international).<sup>30</sup> For this reason, the suggestion that a Chamber intervene only in case of “substantial or significant risk that counsel’s representation of a current client would be *materially and adversely* affected by his duties to a former client” is unsupported by the Court’s legal framework.<sup>31</sup> The plain text of the Code<sup>32</sup> and its drafting history<sup>33</sup> confirm this understanding.

10. *Fourth*, as the Appeals Chamber has recognised, while article 67(1)(d) of the Statute recognises the right to legal assistance of an accused’s (or suspect’s) choosing, this is not an

<sup>25</sup> [15 April 2015 Bemba et al. Decision](#), para. 12 (para. 19: “[Disqualifying counsel] must remain a possibility on a case by case basis and on the particular facts of a given case, in cases of such severity that engage the need to avoid irreversible prejudice to the administration of justice.”)

<sup>26</sup> [Appeal](#), para. 9.

<sup>27</sup> *Contra* [Appeal](#), para. 9 (arguing that a Chamber has no statutory discretionary power to effectively refuse to allow counsel to remedy an impediment or conflict under article 12(1)(a) or article 16(3)(b), as opposed to articles 12(1)(b) and 16(3)(a)).

<sup>28</sup> *Contra* [Appeal](#), para. 13.

<sup>29</sup> *Contra* [Appeal](#), paras. 4 (relying on conflict of interest rules from the Law Society of Ontario (Canada) and the American Bar Association, United States), 15 (citing a case from the United States).

<sup>30</sup> [Muthaura et al. AD](#), paras. 61-62 (“This Court has its own legal framework governing the issues that arise in this appeal... This cannot be replaced by the practice of other courts and tribunals in the present circumstances.”); [30 June 2011 Banda Decision](#), para. 8 (“national practices differ so much from each other on even the principal issues behind the question with which the Chamber is confronted, that it can derive no guidance from national practices”).

<sup>31</sup> *Contra* [Appeal](#), para. 4.

<sup>32</sup> See e.g., article 12(1)(a), the [Code](#) (using the phrase “the interests of the client are incompatible with the interests of the former client”).

<sup>33</sup> Compare article 11, [ICC Presidency Proposal](#), 27 August 2004, using the phrase “interests of the client are materially adverse to the interests of the former client” with article 12(1)(a), [Bureau Report](#), 10 October 2005 using the phrase “interests of the client are incompatible with the interests of the former client”. See article 12(1)(a), Working Group Report, 2 December 2005.

absolute right.<sup>34</sup> Human rights law<sup>35</sup> and commentaries<sup>36</sup> underscore the same interpretation. Therefore, the provisions on conflict of interest in the Code of Conduct are subject to the Statute and reflect a fair balance, in the context of impediments to representation and a fair trial, of several competing interests, including the accused's right.<sup>37</sup> In particular, the accused's right can be limited to ensure that a person is suitable to act as counsel, which, in turn, includes the need to prevent conflicts of interest.<sup>38</sup> At the same time, a suspect's right to counsel of choice should prevail over the mere speculation of a conflict of interest.<sup>39</sup>

<sup>34</sup> [Muthaura et al. AD](#), para. 53; [Abd-Al-Rahman Interpretation AD](#), para. 34 (“[ While choice of counsel has been respected], it is for [a Chamber] to ensure that [a] situation does not impact on the delivery of an effective and efficient defence...Although the wording of article 67(1)(d) shows that there is no absolute right to free choice of counsel when legal assistance is paid by the Court, the Rules and Regulations of the Court suggest that a person's choice of counsel must generally be respected. Nonetheless, consistent with human rights jurisprudence, regulation 76(1) of the [RoC] allows a chamber to appoint counsel when the interests of justice so require.”); [Abd-Al-Rahman Partly Dis Op. Judge Ibáñez](#)”), paras. 4, 16 (right to freely choose counsel under article 67(1)(d) is not subject to limitation on the basis of linguistic ability); [Lubanga Presidency Decision](#), para. 25. See [15 April 2015 Bemba et al. Decision](#), paras. 9-10 (“the right under article 67(1)(d) is not absolute for the purposes of a fair trial and the proper administration of justice.”); [19 January 2021 Yekatom & Ngaïssona Decision](#), para. 6 (noting the accused's right to receive legal assistance of their choosing under article 67(1)(d) of the Statute and that the Chamber should only interfere with the exercise of this right on an exceptional basis); [1 April 2014 Kilolo Decision](#), para. 4 (“[The] choice of counsel by the accused is an expression of one of his or her fundamental statutory rights. [The Chamber's interference with this right], albeit theoretically possible, is not to be exercised easily or lightly, the more so in the absence of specific elements pointing to an actual or a concrete risk for a conflict”); [1 April 2014 Babala Decision](#), para. 5.

<sup>35</sup> See article 6(3)(c), [ECHR](#); article 14(3)(d), [ICCP](#); article 8(2)(d) [ACHR](#); article 7(1), [ACHPR](#). ECtHR: [Croissant v. Germany](#), para. 29; [Meftah and others v. France](#), para. 45; [Dvorski v. Croatia](#), paras. 76-82 (“[...] national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice [...] the first step should be to assess whether it had been demonstrated in the light of the particular circumstances... that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings.”); [Mayzit v. Russia](#), paras. 65-66 (“[The] right to choose one's own counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them.”); [Vitan v. Romania](#), para. 59; HRC: [Osbourne Wright and Eric Harvey v. Jamaica](#), para. 10.5 (“[...] The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice.”); ICTR: [Kambanda AJ](#), para. 33; [Akayesu AJ](#), paras. 61-62; [Nahimana et al. AJ](#), para. 265; ICTY: [Blagojević AJ](#), para. 17.

<sup>36</sup> See Schabas/McDermott, ‘Article 67’, 4<sup>th</sup> Ed., p. 1986 (mn. 30); 3<sup>rd</sup> Ed, p. 1667 (mn. 30) (“Although the accused is entitled to choice of counsel, this right cannot be unlimited. The Court may impose ethical, linguistic and other professional requirements...”); Schabas, pp. 1038-1040; Keita et al., ‘Article 67’, pp. 1840 (“Toutefois, ce droit n'est pas absolu et est nécessairement soumis à certaines limitations.”); 1841 (“Aussi, ce droit est-il limité dans l'hypothèse où le conseil désigné est frappé d'une mesure de suspension ou encore lorsqu'il ne remplit pas les conditions pour intervenir comme conseil devant le tribunal ou lorsqu'il y a conflit d'intérêt.”)

<sup>37</sup> [Muthaura et al. AD](#), para. 53 (also noting the OTP's interests and restrictions on future professional practice).

<sup>38</sup> [15 April 2015 Bemba et al. Decision](#), para. 10.

<sup>39</sup> [1 April 2014 Kilolo Decision](#), para. 4 (“A suspect's right to counsel of choice should prevail over the desire to address out of mere precaution scenarios which might never materialise. The 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.”); [1 April 2014 Babala Decision](#), para. 5.



## B. Mr Mokom's reliance on the Prosecution's submissions

11. Mr Mokom misinterprets the Prosecution submissions before the Pre-Trial Chamber in arguing that the Chamber had erred.<sup>40</sup>

12. *First*, as a matter of law and principle, the Prosecution's submissions before a Chamber on matters of conflict of interest are not necessarily dispositive.<sup>41</sup> Notwithstanding the parties' views, a Chamber is entitled—and indeed, obliged—under article 64 of the Statute to assess and determine submissions before it.

13. *Second*, in the specific circumstances, the Prosecution's position cannot be dispositive, since it did not take a position on the merits.<sup>42</sup> Rather, it deferred to the Pre-Trial Chamber's discretion on whether a conflict of interest or other impediment to representation existed, and if so, on whether any waiver given was applicable or sufficient.<sup>43</sup> Thus, Mr Mokom incorrectly suggests that the Prosecution had agreed that any impediment or conflict, *in the particular facts of this case*, could be remedied.<sup>44</sup> Similarly, any inferences that Mr Mokom seeks to draw from the Prosecution's submissions—based on the use or absence of certain words—are unsustainable.<sup>45</sup>

### LEVEL OF CONFIDENTIALITY

14. This response is filed confidential *ex parte* pursuant to regulation 23*bis* of the RoC, since it refers to the Revocation Order with the same classification. The Prosecution notes that the Appeal and the Annex also bear confidential status. Once the relevant documents are

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<sup>40</sup> [Appeal](#), paras. 6-8.

<sup>41</sup> *Contra* [Appeal](#), para. 6.

<sup>42</sup> See [Prosecution ALA Response](#), paras. 5 (deferring to the Chamber's discretion on the underlying issues, whether and to what extent a conflict or other impediment may exist, and on the applicability/sufficiency of any waiver), 6 (taking no position on the request seeking leave to appeal). See also Prosecution Submissions on Counsel Appointment (deferring to the Chamber in determining whether a conflict of interest or other impediment arises concerning Mr Kaufman's representation, and deferring to the Chamber regarding its assessment of the sufficiency of any such waiver).

<sup>43</sup> [Prosecution ALA Response](#), para. 5; Prosecution Submissions on Counsel Appointment.

<sup>44</sup> [Appeal](#), para. 13.

<sup>45</sup> See e.g., [Appeal](#), paras. 6 (that the Prosecution had not argued that [REDACTED] interests were fundamentally incompatible with those of Mr Mokom, that it refrained from arguing that there was an actual impediment to representation); 7 (that the Prosecution's use of the qualified verbs "might" and "may" suggested that the envisaged conflict of interest would be conditional).



reclassified as public, the Prosecution will file a public redacted version of its response, or seek reclassification thereof.

### **CONCLUSION**

15. As set out above, the Prosecution respectfully submits its response on this appeal and defers to the Appeals Chamber's resolution of the Appeal according to the applicable standard of appellate review for discretionary decisions.



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**Karim A. A. Khan QC, Prosecutor**

Dated this 29<sup>th</sup> day of June 2022  
At The Hague, The Netherlands