



Original: English

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

Date: 29/06/2022

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka

PUBLIC

Public Redacted Version of “Appeal brief of Maxime Mokom against
Order ICC-01/14-01/22-26-Conf-Exp” (ICC-01/14-01/22-46-Conf, filed 2 May 2022)

Source: Gregory Townsend, Duty Counsel for Maxime Mokom

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

Helen Brady

Kweku Vanderpuye

Counsel for the Defence

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 the 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 Other
Section**

Introduction

1. Duty Counsel for Mr. Maxime Jeoffroy Eli Mokom Gawaka (Mr. Mokom) hereby submits an appeal brief on the two certified issues¹ arising out of Pre-Trial Chamber II's Order - ICC-01/14-01/22-26-Conf-Exp (the Impugned Order) revoking the mandate of Mr. Mokom's freely chosen counsel, namely Mr. Nicholas Kaufman (Mr. Kaufman).

2. Mr. Mokom is grateful to Pre-Trial Chamber II for certifying the two issues, set out below:

- 1) Whether the [Pre-Trial] Chamber erred by finding that a conflict of interest within the meaning of Article 16 of the Code [of Professional Conduct for Counsel] and an impediment within the meaning of Article 12(1)(a) exist as a result of Mr. Kaufman's representation of other individuals in the alleged armed conflict between the Seleka and Anti-Balaka, and that those could not be overcome by obtaining a waiver from Mr. Mokom or Mr. Kaufman's other clients or by ending Mr. Kaufman's representation of his other clients [**"The First Issue"**] [and];
- 2) Whether the [Pre-Trial] Chamber erred by finding that, in those circumstances, Mr. Mokom's right to effective legal representation pursuant to article 67(1)(d) of the Statute outweighed his choice to be represented by Mr. Kaufman [**"The Second Issue"**].

Relevant Statutory Provisions

3. For the purpose of this appeal, Mr. Mokom feels it appropriate to set out two relevant articles of the Code of Professional Conduct for Counsel at the International Criminal Court (the Code), namely Articles 12 and 16.

¹ See ICC-01/14-01/22-43.

Article 12

Impediments to representation

1. Counsel shall not represent a client in a case:
 - (a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation; [...]

Article 16

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 [...]
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. [emphasis added]

The First Issue

4. While Mr. Mokom accepts that a Pre-Trial Chamber's duty to ensure the fairness of proceedings encompasses a power to review the appropriateness of legal representation, there should, nevertheless, exist a presumption of ethical regularity on the part of litigating counsel. In so far as this presumption can be deemed rebuttable, a chamber should, nonetheless, intervene only in such circumstances where there exists a substantial² or significant³ risk that counsel's representation of a

² See Law Society of Ontario, "Steps for Dealing with Conflicts of Interest Rules" (suggesting the legal test is one of "substantial" risk), *see*

<https://lso.ca/lawyers/practice-supports-resources/practice-management-topics/the-lawyer-client-relationship/conflicts-of-interest/steps-for-dealing-with-conflicts-of-interest-rules>

³ See American Bar Association, "Rule 1.7 Conflict of Interest: Current Clients – Comment", para. 24 (suggesting the legal test is one of "significant" risk), *see*

current client would be *materially and adversely* affected by his duties to a former client. Even then, a Pre-Trial Chamber should allow counsel to cure such ethical hurdles where the Code specifically provides for such remedial measures, namely by waiver (attesting to “full and informed consent in writing”).

5. In the Impugned Order, the learned Pre-Trial Chamber reached its factual conclusions in light of “*information and documents before it*”⁴ and on account of Mr. Kaufman’s representation of “*both [redacted] and [redacted]*”.⁵ The learned Pre-Trial Chamber further found that the interests of the aforementioned individuals “*diverge*”⁶ from and are “*fundamentally incompatible*”⁷ with the interests of Mr. Mokom “*given the nature and scope of the conflict in the Central African Republic during the relevant period*”.⁸ The Pre-Trial Chamber thus concluded that Mr. Kaufman would be prevented from “*pursuing all possible means*” in representing Mr. Mokom and, particularly, would be precluded from using or withholding knowledge acquired from those individuals.

6. It is not disputed that Mr. Kaufman’s two other clients, namely [redacted] and an individual [redacted] and a “*person who may [redacted]*”,⁹ were indeed [redacted]. Notwithstanding, the only reasons given by the Pre-Trial Chamber, for finding an impediment to representation and a conflict of interest, namely; diverging interests, the nature of the conflict in the Central African Republic, and the actors involved therein, are insufficient as a matter of fact and law. Even the Prosecution, in its submissions of 18 March 2022, did not argue that [redacted] interests are “*fundamentally incompatible*” with those of Mr. Mokom.¹⁰ Indeed, as the

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/

⁴ Impugned Order at para. 7.

⁵ Ibid. at para. 10.

⁶ Ibid. at para. 12.

⁷ Ibid. at para. 13.

⁸ Ibid. at para. 13.

⁹ Ibid. at para. 11.

¹⁰ [Redacted].

Prosecution, at this stage of the pre-trial proceedings, constitutes the master of the evidence and of information, including that *not necessarily disclosed to the Pre-Trial Chamber*, the views of the Prosecution should have carried dispositive weight. The Prosecution's concern, rather, was that Mr. Kaufman could have acquired confidential information from [redacted] that Mr. Kaufman would be prevented from using. For this very reason, so it is suggested, the Prosecution appears to have refrained from arguing that there was an actual impediment to representation but stated, quite fairly and cautiously, that Mr. Kaufman's former representation of [redacted] "*raises considerations under Article 12(1)(a) of the Code*", thereafter deferring to the Pre-Trial Chamber. Mr. Kaufman addressed this concern and proffered a solemn affirmation that he had no such confidential information. Out of deference to the learned Pre-Trial Chamber and with [redacted] approval, Mr. Kaufman, explained his role during [redacted] interviews with the Office of the Prosecutor.¹¹ The Pre-Trial Chamber, in the Impugned Decision, did not appear to accord sufficient weight to this affirmation (that should not have been required in the first place, given the presumption of ethical regularity that should have been afforded Mr. Kaufman).

7. As for Mr. Kaufman's other client "*who may* [redacted]", the Prosecution's email message of 18 March 2022 reveals that the Pre-Trial Chamber appears to have contradicted the finding of Trial Chamber V which found that the proceedings concerning [redacted] are not "substantially the same as" or "substantially related to" those proceedings concerning [redacted].¹² Article 12(1) of the Code cannot, thus, be engaged, and the Pre-Trial Chamber erred in finding it did. In fairness, the Prosecution did argue that Article 16 of the Code "might" be relevant because Mr.

¹¹ Mr. Kaufman strongly affirmed that he had acquired no confidential information from any of his former clients other than information which was recorded by and/or transmitted to the Prosecution. Everything known to Mr. Kaufman and relevant to the Central African Situation will be disclosed by the Prosecution prior to the confirmation process. Accordingly, there is absolutely nothing that Mr. Kaufman could hide from or use to promote the defence of Mr. Mokom. In other words, there is no "substantial" or "significant" risk of conflict.

¹² ICC-01/14-01/18-916-Conf. Indeed, the time-period relevant to the crimes imputed to Mr. Mokom postdates the time-period relevant to the crimes imputed to the [redacted].

Mokom's interests and those of the other client "may" prove incompatible.¹³ The Prosecution's use of the qualified verbs "might" and "may", however, suggests that the envisaged conflict of interest would be conditional [redacted] by the [redacted]. Indeed, by virtue of being a "*person who* [redacted]", the individual concerned is, quite clearly, [redacted]. The Pre-Trial Chamber erred when it went beyond the Prosecution's determination, for reasons not sufficiently specified or clarified, and concluded that there was an actual¹⁴ conflict of interest. Further, it did so while ignoring Mr. Kaufman's solemn declaration as to the nature of the service that he had performed [redacted].¹⁵ In any event, the Prosecution's concerns may be assuaged by [redacted].

8. To conclude, the Appeals Chamber is respectfully requested to rule that the learned Pre-Trial Chamber erred when finding that an impediment and/or an actual conflict existed (which effectively displaced the conclusions and actual knowledge of the Prosecution and Mr. Kaufman, both parties to the litigation at that time).

9. Even if the Appeals Chamber should find that an impediment or conflict exists, Mr. Mokom submits, nonetheless, that it is necessary to consider whether such ethical issues may be cured (and if the learned Pre-Trial Chamber erred, including in not allowing sufficient time to permit such remedy). The Pre-Trial Chamber ruled that the aforementioned impediments were of such a nature that they (without any qualification) "*cannot be remedied by ... obtaining consent in writing of all potentially affected clients or withdrawing from their representation*".¹⁶ In other words, the Pre-Trial Chamber was of the view that it possessed the power, on occasion, to deny allegedly conflicted counsel access to the explicit remedial measures provided in the Code. The

¹³ Mr. Mokom and the person who may [redacted] did indeed discuss and agree to the joint representation between themselves. Mr. Kaufman, himself, affirms that he confirmed this both with the person who may [redacted] and with Mr. Mokom.

¹⁴ Impugned Order at para. 9.

¹⁵ Mr. Kaufman facilitated and negotiated terms for that person to be interviewed, at the Prosecution's request.

¹⁶ Impugned Order at para. 18.

Pre-Trial Chamber gave no clear reasoning for such a precipitous and draconian decision in the present instance. The purported diverging interests of Mr. Kaufman's clientele,¹⁷ the scope of the conflict, and Counsel's "previous involvement" were the disputed threshold grounds for finding an impediment to representation and a conflict of interest. These considerations themselves, however, do not constitute substantive reasons for precluding the right to cure such impediments. It is respectfully submitted that a Pre-Trial Chamber does not have a 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). This is distinct from the situation under Article 12(1)(b) and Article 16(3)(a). Ironically, Article 16(3)(a) gives the Pre-Trial Chamber the power to refuse withdrawal as a remedial measure reinforcing the contention that Article 16 conflicts of interest can only arise with respect to persons whose interests are actively engaged before the Court – something which is not the case with respect to [redacted] and [redacted].

10. Since the issuance of the Impugned Order, Mr. Kaufman has provided a specific and detailed written consent to joint representation emanating from [redacted].¹⁸ This is despite the fact that [redacted] will not be called as a Prosecution witness in the Yekatom and Ngaissona case nor, with a high degree of certitude, at confirmation in Mr. Mokom's case. The fact that this written consent was provided at a late stage is amply explained: Firstly, Mr. Kaufman did not believe that any impediment existed. Secondly, Mr. Kaufman obtained the consent out of deference to the Pre-Trial Chamber and as soon as [redacted] was able to access a computer scanner ([redacted]).

11. Regarding [redacted], Mr. Kaufman has indicated that he will terminate his representation of this individual pursuant to Article 16(3)(a) of the Code if the

¹⁷ Ibid. at para. 12.

¹⁸ Mr. Mokom co-signed this "waiver" (under Article 16(3)(b) of the Code) and Duty Counsel will be in a position (and in the Netherlands) on 9 May 2022 to file this 1-page document before the Appeals Chamber.

situation envisaged by the Prosecution should materialize or if the Pre-Trial Chamber's finding of an impediment should be confirmed on appeal. It should be noted, however, that the Pre-Trial Chamber specifically referred to Article 12(1)(a) of the Code when finding that Mr. Kaufman had failed to remedy what it found to be an impediment to representing [redacted]. If the Appeals Chamber accepts the Parties' previous joint claim and the finding of Trial Chamber V that "*proceedings related to the Prosecution's investigation of [redacted] are not 'substantially the same' as or 'substantially related' to [redacted]*",¹⁹ then only concerns arising under Article 16 of the Code can be relevant. Such concerns are, at present, wholly in the abstract and may easily be remedied by Mr. Kaufman's withdrawal from the representation of [redacted].

The Second Issue

12. Where an impediment or conflict arises and such hurdles are not cured, Mr. Mokom agrees that his right to effective legal representation would, indeed, oblige the Pre-Trial Chamber to intervene. Putting aside his argument that no such impediment or conflict exists in the present instance, Mr. Mokom suggests that such intervention could, possibly, have been achieved in a fashion more subtle than abruptly terminating contact between him and Mr. Kaufman, his counsel of choice. Regardless, Mr. Mokom is conscious of the Pre-Trial Chamber's overarching duty to ensure the quality of his representation and is grateful for this expression of concern.

13. Nonetheless, and as noted above, a Chamber must allow counsel the opportunity, including sufficient time, to remedy any impediment or conflict – especially when the Code does not explicitly provide a Chamber with the discretion to refuse the lifting of an impediment or to permit or deny a withdrawal as is clearly the case under Articles 12(1)(b) and 16(3)(a) of the Code, respectively. The right to cure an impediment or a conflict of interest is even more pronounced when all

¹⁹ Email from Prosecutor dated 18 March 2022 at 09:41.

parties to the litigation agree that any impediment or conflict may be remedied, as it was here.

14. Here, the Pre-Trial Chamber, in its expedition of the matter of representation, erred in not allowing sufficient time to cure (particularly, as procuring a waiver, including from far-flung former clients, is not necessarily procured within days).

15. Mr. Mokom is not aware of any national precedent supporting proactive intervention of a Court which overrode the views of counsel as to the existence of an impediment/conflict and the views of all parties as to the viability of remedial measures.²⁰ The case of *Meftah*²¹ is not precedent for limiting the right to counsel of choice in the case of a suspected conflict of interest. It is, rather, precedent for maintaining a professional monopoly over a complex form of legal representation before the higher courts of France.

16. In light of all the aforementioned, it is respectfully submitted that the learned Pre-Trial Chamber erred when it found, in the present circumstances, that the right to effective legal representation could not be assured by Mr. Mokom's clear counsel of choice, namely Mr. Kaufman.

Filing after deadline

17. Duty Counsel sincerely apologizes for what he only today understands as his filing that may be one working day after the deadline. Duty Counsel thanks Mr. Vanderpuye for his professionalism and having personally contacted him by phone today. Duty Counsel takes full responsibility for his own flagrant error and his mistaken understanding that the deadline for filing this appeal would run from a

²⁰ In *Wheat v. United States*, 486 US 153 (1988), for example, the Respondent **objected** to the waiver produced by counsel for the petitioner.

²¹ ECtHR, *Meftah and Others v. France*, Judgment, 26 July 2002, Application Nos. 32911/96, 35237/97 and 34595/97 at para 45.

scheduling order. Due this misunderstanding, Duty Counsel's move out of his house, and a pre-booked leave with family, he prays that the Appeals Chamber will grant an extension, accept this filing, and not punish his client for his own shortcoming.

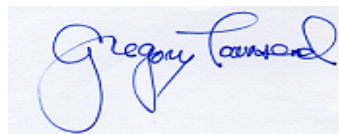
Classification

18. Given the sensitive nature of these proceedings and the reference to other filings, Duty Counsel has erred on the side of caution and submits the current filing confidentially. Duty Counsel will endeavor to file a public redacted version in due course. Further, there is nothing in this filing, however, which may not be disclosed publicly at a later date should the Appeals Chamber order such.

Conclusion

19. The Appeals Chamber is respectfully requested to **GRANT** this appeal, accept the representations contained herein and the waiver to be filed on 9 May 2022, and permit Mr. Mokom, as a matter of ensuring his right to counsel, to be represented his clear counsel of choice, namely Mr. Kaufman.

Respectfully submitted,



Gregory Townsend,

Duty Counsel for Maxime Jeoffroy Eli Mokom Gawaka

Date: 29 June 2022

At The Hague, Netherlands.