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

Date: 19 July 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

**IN THE CASE OF THE PROSECUTOR v. MAXIME JEOFFROY ELI
MOKOM GAWAKA**

Public redacted

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 Mr Maxime
Jeoffroy Eli Mokom Gawaka”**

Judgment 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, Prosecutor
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for the Defence

Mr Gregory Townsend, Duty Counsel

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Mr Pieter Vanaverbeke

Other

Mr Nicholas Kaufman

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II entitled “Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka” of 25 March 2022 (ICC-01/14-01/22-26-Conf-Exp),

After deliberation,

By majority, Judge Ibáñez and Judge Bossa partially dissenting,

Delivers the following

JUDGMENT

- 1) 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 Mr Maxime Jeoffroy Eli Mokom Gawaka” is reversed. Pre-Trial Chamber II is directed to provide further reasons as explained in the present judgment.
- 2) The Registry is ordered to reclassify as “public” documents ICC-01/14-01/22-48-Conf-Exp-AnxA and ICC-01/14-01/22-65-Conf-Exp.

REASONS

I. INTRODUCTION

1. The proceedings that give rise to the present appeal concern Pre-Trial Chamber II’s (hereinafter: “Pre-Trial Chamber”) order to the Registry to remove Mr Nicholas Kaufman (hereinafter: “Mr Kaufman”) as legal counsel to Mr Maxime Jeoffroy Eli Mokom Gawaka Mokom (hereinafter: “Mr Mokom”). The Pre-Trial Chamber, acting *proprio motu*, determined that Mr Kaufman’s representation of persons of interest in the *Situation in the Central African Republic II* constituted a conflict of interest that could not be remedied through obtaining written consent of potentially affected clients

or withdrawing from representation.¹ The Defence challenges the aforementioned order.

2. The Pre-Trial Chamber granted the Defence's request for leave to appeal in respect of two reformulated issues. The first issue concerns whether the Pre-Trial Chamber erred by finding that a conflict of interest or impediment exists as a result of Mr Kaufman's representation of other individuals, and that these could not be overcome through a waiver or termination of representation. The second issue concerns whether the Pre-Trial Chamber erred in finding that 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.²

II. KEY FINDING

3. A chamber is required to carefully balance a person's right to appoint counsel of his or her choosing with its duty to ensure the fairness of the proceedings and the attendant discretion to intervene with the appointment or removal of counsel. In particular, if a chamber intervenes with a person's choice of counsel, it must clearly set out its reasons for doing so and explain why it is in the interests of justice to remove counsel. This is especially so given that, in addition to curtailing an accused's right to choose counsel, removing counsel of choice may constitute a significant interruption to the proceedings.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

4. On 10 December 2018, the Pre-Trial Chamber issued an arrest warrant for Mr Mokom.³

¹ 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 (public redacted version filed on 13 June 2022 (ICC-01/14-01/22-26-Red)).

² Pre-Trial Chamber II, [Decision on Mr Mokom's requests for reconsideration and leave to appeal the 'Order on appointment of Mr Kaufman as Counsel for Mr Mokom'](#), 14 April 2022, ICC-01/14-01/22-43, para. 28.

³ Pre-Trial Chamber II, [Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka](#), 20 December 2018, ICC-01/14-01/22-2-US-Exp (a public redacted version was notified on 22 March 2022 (ICC-01/14-01/22-2-Red2)).

5. On 14 March 2022, Mr Mokom was surrendered to the Court, following his arrest in the Republic of Chad, and arrived at the Detention Centre the same day.⁴
6. On 16 March 2022, pursuant to Mr Mokom's request,⁵ the Registry formally appointed Mr Kaufman as counsel for Mr Mokom.⁶
7. On 17 March 2022, the Pre-Trial Chamber ordered Mr Kaufman, the Prosecution, and the Registry to submit observations by way of email regarding any potential conflict of interest regarding the appointment of Mr Kaufman as counsel for Mr Mokom.⁷
8. On 17 March 2022, Mr Kaufman provided his observations to the Chamber by way of email.⁸
9. On 18 March 2022, the Prosecution and the Registry provided their respective responses by way of email.⁹
10. On 22 March 2022, Mr Mokom made his first appearance before the Pre-Trial Chamber, represented by Mr Kaufman.¹⁰
11. On 25 March 2022, the Pre-Trial Chamber ordered the Registry to revoke its appointment of Mr Kaufman as Mr Mokom's counsel, finding that Mr Kaufman's representation of other clients in the "substantially related" investigative proceedings in the *Situation in the Central African Republic II* and *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* constituted a conflict of interest under articles 12 and

⁴ See Pre-Trial Chamber II, [Order convening a hearing for the first appearance of Mr Mokom](#), 16 March 2022, ICC-01/14-01/22-21, para. 4.

⁵ [Annex I to the Notification of the Appointment of Mr Nicholas Kaufman as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 16 March 2022, ICC-01/14-01/22-22-AnxI.

⁶ Pre-Trial Chamber II, [Notification of the Appointment of Mr Nicholas Kaufman as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 16 March 2022, ICC-01/14-01/22-22. See also Annex III to the filing ICC-01/14-01/22-22-Conf-AnxIII.

⁷ The order of Pre-Trial Chamber II from 17 March 2022 was sent by email and was not immediately filed in the record of the proceedings. The order, the submissions of Mr Kaufman and the Prosecution, and other relevant email correspondence were later filed in Annex I to the Order convening a status conference and instructing the Registry to appoint duty counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, 1 April 2022, ICC-01/14-01/22-32-Conf-Exp-AnxI-Red (hereinafter: "Annex to PTC's 1 April 2022 Order").

⁸ Annex to PTC's 1 April 2022 Order, pp. 10-11.

⁹ Annex to PTC's 1 April 2022 Order, pp. 4-6.

¹⁰ See Pre-Trial Chamber II, [Order convening a hearing for the first appearance of Mr Mokom](#), 16 March 2022, ICC-01/14-01/22-21.

16 of the Code of Professional Conduct for Counsel (hereinafter: the “25 March 2022 Order” and “Impugned Decision”).¹¹

12. On the same day, pursuant to the order of the Pre-Trial Chamber, the Registry revoked its appointment of Mr Kaufman as counsel for Mr Mokom.¹²

13. On 28 March 2022, the Registry transmitted submissions from Mr Kaufman to the Pre-Trial Chamber, requesting that the Chamber reconsider the 25 March 2022 Order (hereinafter: “Mr Kaufman’s 28 March 2022 Request”).¹³

14. On 30 March 2022, the Registry transmitted to the Pre-Trial Chamber submissions from Mr Kaufman requesting leave to appeal the Impugned Decision (hereinafter: “Mr Kaufman’s 30 March 2022 Request”).¹⁴

15. On 4 April 2022, the Registry issued a notification that Mr Gregory Townsend had been appointed as duty counsel to Mr Mokom.¹⁵ That day, the Pre-Trial Chamber held a status conference with Mr Mokom, assisted by duty counsel.¹⁶ At the status conference, Mr Mokom confirmed that he had been adequately informed by Mr Kaufman, saw no conflict of interest, and reiterated that Mr Kaufman was his counsel of choice.¹⁷

16. On 8 April 2022, Mr Mokom, assisted by duty counsel (hereinafter: “Defence”), submitted filings incorporating by reference Mr Kaufman’s 28 and 30 March 2022

¹¹ [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 (public redacted version filed on 13 June 2022 (ICC-01/14-01/22-26-Red)).

¹² See Annex to PTC’s 1 April 2022 Order, p. 16.

¹³ Registry transmission of a document received from Mr Nicholas Kaufman, 28 March 2022, ICC-01/14-01/22-27-Conf-Exp. Mr Kaufman’s submissions are contained in the associated annex, ICC-01/14-01/22-27-Conf-Exp-AnxI.

¹⁴ Registry second transmission of a document received from Mr Nicholas Kaufman, ICC-01/14-01/22-30-Conf-Exp. Mr Kaufman’s submissions are contained in the associated annex, ICC-01/14-01/22-30-Conf-Exp-AnxI.

¹⁵ Notification of the Appointment of Mr Gregory Townsend as Duty Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-33-Conf-Exp, with a confidential, *ex parte* annex, ICC-01/14-01/22-33-Conf-Exp-Anx1.

¹⁶ Order convening a status conference and instructing the Registry to appoint duty counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-32-Conf-Exp.

¹⁷ The status conference took place in closed session, see ICC-01/14-01/22-T-002-CONF-EXP-ENG. See also Pre-Trial Chamber II, [Decision on Mr Mokom’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom’](#), 14 April 2022, ICC-01/14-01/22-43, para. 13.

Requests and seeking a period of three weeks for Mr Kaufman to produce the written consent of the other affected clients.¹⁸

17. On 14 April 2022, the Pre-Trial Chamber issued a decision dismissing *in limine* Mr Kaufman’s 28 March 2022 Request and 30 March 2022 Request, on the basis that Mr Kaufman did not have legal standing.¹⁹ However, the Pre-Trial Chamber granted the 8 April 2022 request for leave to appeal from Mr Mokom in respect of two issues:

- i. 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 (hereinafter: “Code”) and an impediment within the meaning of article 12(1)(a) of the Code exist as a result of Mr Kaufman’s representation of other individuals in the alleged armed conflict between the Séléka 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; and
- ii. 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.²⁰

B. Proceedings before the Appeals Chamber

18. On 4 May 2022, the Defence’s appeal brief was notified (hereinafter: “Appeal Brief”).²¹

¹⁸ Request for Reconsideration of Order ICC-01/14-01/22-26-Conf-Exp, 8 April 2022, ICC-01/14-01/22-36-Conf-Exp; Request Seeking Leave to Appeal Order ICC-01/14-01/22-26-Conf-Exp, 8 April 2022, ICC-01/14-01/22-37-Conf-Exp.

¹⁹ Pre-Trial Chamber II, [Decision on Mr Kaufman’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom’](#), 14 April 2022, ICC-01/14-01/22-42, paras 12-13.

²⁰ Pre-Trial Chamber II, [Decision on Mr Mokom’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom’](#), 14 April 2022, ICC-01/14-01/22-43, para. 28.

²¹ [Appeal brief of Maxime Mokom against Order ICC-01/14-01/22-26-Conf-Exp](#), 4 May 2022, ICC-01/14-01/22-46-Conf (public redacted version registered on 30 June 2022 and notified on 15 July 2022 (ICC-01/14-01/22-46-Red2)).

19. On 9 May 2022, the Defence submitted an “annex to the appeal brief” containing a waiver letter, signed by both [REDACTED] (hereinafter: “Client 1”) and Mr Mokom, in order to provide the written consent of both parties to be represented by Mr Kaufman.²²

20. On 16 May 2022, the Prosecution filed its response to the Appeal Brief (hereinafter: “Prosecution’s Response”).²³

21. On 20 May 2022, the Defence submitted a filing with annexes, indicating that Mr Kaufman terminated his representation of another client (hereinafter: “Client 2”) effective 18 May 2022.²⁴

IV. STANDARD OF REVIEW

22. Regarding errors of law, the Appeals Chamber has previously held that it

will not defer to the relevant Chamber’s legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁵

²² Annex to the appeal brief of Mr Maxime Mokom against Order ICC-01/14-01/22-26-Conf-Exp, 9 May 2022, ICC-01/14-01/22-47-Conf.

²³ [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 (public redacted version filed on 29 June 2022 (ICC-01/14-01/22-48-Red)).

²⁴ Confidential Submission of Second Annex to the Appeal brief of Maxim Mokom against Order ICC-01/14-01/22-26-Conf-Exp with Confidential and Ex Parte Annex (Appeals Chamber) and Confidential (Redacted) Annex, 20 May 2022, ICC-01/14-01/22-51-Conf. See associated annex, ICC-01/14-01/22-51-Conf-Exp-Anx (redacted version ICC-01/14-01/22-51-Conf-Anx-Red).

²⁵ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5) (hereinafter: “Kenyatta OA5 Judgment”), para. 23. See also Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (confidential version notified on the same day, ICC-01/12-01/18-601-Conf (OA)) (hereinafter: “Al Hassan OA Judgment”), para. 38.

If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.²⁶ A decision is “materially affected by an error of law” if the chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.²⁷

23. Regarding discretionary decisions, the Appeals Chamber will interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question. In its review, the Appeals Chamber will not interfere with a chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. Moreover, even if an error has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the relevant chamber failed to exercise its discretion judiciously.²⁸

²⁶ [Al Hassan OA Judgment](#), para. 38; Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: “*Simone Gbagbo* OA Judgment”), para. 40.

²⁷ [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41.

²⁸ Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules”](#), 13 May 2022, ICC-01/12-01/18-2222 (OA4), para. 20, referring to Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 46; [Kenyatta OA5 Judgment](#), paras 22-25, referring to, inter alia, Appeals Chamber, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19\(1\) of the Statute” of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3), paras 79-81; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”](#), 1 December 2014, ICC-01/04-01/06-3122 (A4 A6), paras 41 43; ICTY, Appeals Chamber, *Slobodan Milošević v. The Prosecutor*, [Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel](#), 1 November 2004, IT-02-54-AR73.7, para. 10. See also ICTY, Appeals Chamber, *The Prosecutor v. Vojislav Šešelj*, Decision on appeal against decision on continuation of proceedings, 6 June 2014, IT-03-67-AR15bis, para. 35: “[...] even if a trial court has not otherwise erred, the appellate ‘court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the [Judges’] ruling may have resulted in injustice to the [appellant]’”.

V. PRELIMINARY ISSUES

24. In accordance with the classification of the Impugned Decision, the parties initially filed their appeal submissions on a “confidential” and “*ex parte*” basis. The Impugned Decision was then made public on 13 June 2022, and the parties filed public redacted versions of their appeal submissions. Under regulation 23*bis*(3) of the Regulations of the Court (hereinafter: “Regulations”), a party may apply to the chamber to re-classify a document where the basis for the classification no longer exists. The Prosecution has seized the Appeals Chamber of a request to reclassify the annex to its submissions.²⁹ As the Prosecution has already filed a public version of the Prosecution’s Response, the Appeals Chamber instructs the Registry to reclassify as “public” i) the annex to those submissions, which contains a list of references, and ii) the request for reclassification itself.

25. The Appeals Chamber observes that there are several other matters to address before reaching the merits of this appeal: two concerning the Appeal Brief, and another concerning the maintenance of the pre-trial record.

26. First, the Appeals Chamber notes that the Appeal Brief was notified on 4 May 2022, after the prescribed time limit.³⁰ Subsequent to the Appeal Brief, the Defence submitted two separate filings which he referred to as annexes to the Appeal Brief, on 9 and 20 May 2022, respectively.³¹

27. The Appeals Chamber notes that Duty Counsel apologises for the late filing and explains that he missed the filing deadline because he miscalculated the time limit, and due to other intervening personal matters. The Appeals Chamber emphasises the importance of complying with the time limits. Notwithstanding the non-compliance of counsel, in light of the significance of the matter under appeal, the Appeals Chamber considers that it is in the interests of justice, pursuant to regulation 29(1) of the Regulations, to accept the Appeal Brief and the 9 and 20 May 2022 filings.

²⁹ Prosecution’s request to reclassify ICC-01/14-01/22-48-Conf-Exp-AnxA, 29 June 2022, ICC-01/14-01/22-65-Conf-Exp.

³⁰ The time limit for filing the Appeal Brief fell on 29 April 2022 (*see* regulation 65(4) of the Regulations). Duty Counsel submitted the Appeal Brief to the Court on 2 May 2022 at 23:37. The Appeal Brief was notified on 4 May 2022, following the 3 May 2022 Court holiday.

³¹ The 9 May 2022 filing contained a joint waiver signed by Mr Mokom and Client 1. The 20 May 2022 filing contained a letter of termination from Mr Kaufman to Client 2, dated 18 May 2022.

28. Second, the Appeals Chamber notes that instead of setting out the grounds of appeal in the Appeal Brief, Duty Counsel has organised the arguments under two sub-headings, “First Issue” and “Second Issue”, in reference to the first and second issues certified for appeal.

29. The Appeals Chamber recalls that pursuant to regulation 64(2) of the Regulations,³² the Appeal Brief must “set out the grounds of appeal [containing] the legal and/or factual reasons in support of each ground of appeal”. The Appeals Chamber considers that this is not simply a formal requirement. Rather, compliance with this requirement is necessary to provide guidance to the reader as to the specific findings in the decision appealed from that the arguments presented seek to address, as well as the concrete errors alleged and the nature of those errors. In this context, the Appeals Chamber recalls that the appellant must provide submissions in as comprehensible a manner as possible in order for the Appeals Chamber to determine the validity of the arguments.³³ The Appeals Chamber cautions counsel to exercise greater diligence in future filings before the Court.

30. Finally, the Appeals Chamber notes that the submissions of the parties and the Registry preceding the Impugned Decision were sought and received by way of email. While the Pre-Trial Chamber subsequently filed the email submissions of the parties as an annex to an order scheduling a status conference,³⁴ the Appeals Chamber considers that the submissions were not filed in the record of the case in a clear manner. Additionally, the Pre-Trial Chamber did not include a summary of the submissions in the Impugned Decision.

31. The Appeals Chamber recalls the principle of publicity of hearings and the importance of ensuring that the case record is as complete as possible, particularly in view of potential appeals. The Appeals Chamber encourages the Pre-Trial Chamber to remain vigilant in its maintenance of the case record.

³² See regulation 65(4) of the Regulations, applicable to interlocutory appeals filed under article 82(1)(d) of the Statute, stating that “the appellant shall file [...] an appeal brief in accordance with regulation 64, sub-regulation 2”.

³³ See Appeals Chamber, *Situation in the Republic of Kenya*, [Decision on the request for reconsideration of the decision on the request for the disqualification of the Prosecutor in the investigation against Mr David Nyekorach-Matsanga](#), 22 April 2013, ICC-01/09-111, para. 4.

³⁴ See Annex to PTC’s 1 April 2022 Order.

VI. MERITS

A. Background and relevant part of the Impugned Decision

32. The Pre-Trial Chamber sought observations in relation to Mr Kaufman's representation of Mr Mokom on a *proprio motu* basis, "in light of information and documents before [the Chamber] concerning the role played by Mr Kaufman in other proceedings before the Court".³⁵

33. In his email submissions, Mr Kaufman indicated that he represented Client 1 during his interviews with the Prosecution in 2018, and that he received a power of attorney from Client 2 in 2020. Mr Kaufman was not aware of any conflict of interest between Mr Mokom and Client 1. Following the Chamber's request for observations, Mr Kaufman procured a signed note from Mr Mokom and a voicemail from Client 1 to serve as waivers. If Client 1 were ever called to testify in the proceedings against Mr Mokom, Mr Kaufman submitted that this could be resolved through a waiver or by appointing independent counsel for the cross-examination. Mr Kaufman indicated that he had lost touch with Client 2, and that in any case, his discussions with Client 2 had been purely hypothetical.³⁶

34. The Prosecution deferred to the Pre-Trial Chamber in determining whether a conflict of interest may arise, and whether any such conflict could be cured through obtaining a waiver. The Prosecution stated that Client 1 will not be called as a Prosecution witness in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiisona*. As a result of Mr Kaufman's representation of Client 1, the Prosecution submitted that Mr Kaufman would not be able to use information obtained from Client 1 when acting as counsel to Mr Mokom, and that if Client 1 were to testify in the case against Mr Mokom, Mr Kaufman would not be able to cross-examine the witness.³⁷

35. Regarding Mr Kaufman's representation of Client 2, the Prosecution referred to a decision from Trial Chamber V,³⁸ which found that [REDACTED].³⁹

³⁵ [Impugned Decision](#), para. 7.

³⁶ Annex to PTC's 1 April 2022 Order, pp. 7-8, 10-11.

³⁷ Annex to PTC's 1 April 2022 Order, p. 4.

³⁸ [REDACTED].

³⁹ Annex to PTC's 1 April 2022 Order, p. 4.

36. In the Impugned Decision, the Pre-Trial Chamber found that Mr Kaufman’s representation of persons of interest in *The Situation in the Central African Republic II* constituted a conflict of interest that could not be remedied through obtaining written consent of potentially affected clients or withdrawing from representation. The Pre-Trial Chamber instructed the Registry to revoke or cancel its appointment of Mr Kaufman.⁴⁰

37. In reaching its finding, the Pre-Trial Chamber indicated that the interests of the other clients diverged from those of Mr Mokom to such a degree that it prevented Mr Mokom from pursuing all available means in representing Mr Mokom.⁴¹ If these clients were ever called to testify in the proceedings against Mr Mokom, the Pre-Trial Chamber noted that Mr Kaufman would be “precluded from using the information relating to his representation of the other clients to their detriment and to the benefit of Mr Mokom”.⁴²

38. In considering avenues to cure an impediment to representation or a conflict of interest pursuant to articles 12(1)(a) and 16(3) of the Code, the Pre-Trial Chamber noted that (i) Mr Kaufman had not been able to consult with, and obtain consent from, one of his clients; (ii) it was unclear whether Mr Kaufman had ended his representation of the other persons; (iii) the signed note from Mr Mokom was provided after the Chamber’s order to provide observations; and (iv) the 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”.⁴³ The Pre-Trial Chamber also highlighted that Mr Kaufman had not himself indicated any conflict of interest, or taken any steps in this regard, prior to his appointment as counsel to Mr Mokom.⁴⁴

39. The Pre-Trial Chamber stated that it 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”.⁴⁵ In the view of the Pre-Trial Chamber, “Mr Mokom’s right to effective legal representation

⁴⁰ [Impugned Decision](#), para. 18.

⁴¹ [Impugned Decision](#), para. 12.

⁴² [Impugned Decision](#), para. 12.

⁴³ [Impugned Decision](#), paras 14 and 18.

⁴⁴ [Impugned Decision](#), para. 14.

⁴⁵ [Impugned Decision](#), para. 16.

outweighs his choice to be represented by Mr Kaufman”.⁴⁶ The Pre-Trial Chamber ordered the Registry to revoke or cancel its appointment of Mr Kaufman as counsel to Mr Mokom.⁴⁷

B. Submissions of the parties

1. Submissions of the Defence

40. While the Defence has not set out grounds of appeal in the Appeal Brief, it has presented arguments generally following the issues as framed in the decision granting leave to appeal. In particular, the Defence first argues that the Pre-Trial Chamber “erred when finding that an impediment and/or an actual conflict existed”.⁴⁸ Second, the Defence submits that the Pre-Trial Chamber erred “in not allowing sufficient time to cure [the conflict]”.⁴⁹

41. The Defence states that Mr Kaufman’s representation of the other two individuals in question does not present an impediment or conflict to his representation of Mr Mokom. Regarding Client 1, the Defence highlights that Mr Kaufman provided the Chamber with a solemn affirmation and a detailed written consent to joint representation from Client 1. In the solemn affirmation, Mr Kaufman explained his role in Client 1’s interviews with the Prosecution, and stated that he was not in possession of confidential information from this client that would pose an impediment to the representation of Mr Mokom.⁵⁰ In any event, the Defence highlights that Client 1 will not be called as a witness in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, “nor, with a high degree of certitude, at confirmation in Mr. Mokom’s case”.⁵¹ The written consent from Client 1 was not secured at an earlier stage as Mr Kaufman did not believe that there was an impediment.⁵²

42. As to Client 2, the Defence submits that the Chamber overlooked Mr Kaufman’s solemn declaration as to the nature of the service he performed for this individual, and that in any event, any concerns “may be assuaged by Mr Kaufman’s termination of the

⁴⁶ [Impugned Decision](#), para. 17.

⁴⁷ [Impugned Decision](#), para. 18.

⁴⁸ [Appeal Brief](#), para. 8.

⁴⁹ [Appeal Brief](#), para. 14.

⁵⁰ [Appeal Brief](#), para. 6.

⁵¹ [Appeal Brief](#), para. 10.

⁵² [Appeal Brief](#), para. 10.

representation of said person [...] (which is the present state of affairs)”.⁵³ The Defence refers to a decision of Trial Chamber V in submitting that [REDACTED].⁵⁴

43. The Defence submits that there should exist a presumption of ethical regularity on the part of litigating counsel. Insofar as this presumption may be deemed rebuttable, the Defence maintains that a chamber should only intervene in those circumstances where there is a 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.⁵⁵

44. Finally, the Defence argues that a chamber must allow counsel the opportunity, including sufficient time, to remedy any impediment or conflict to representation.⁵⁶ In this respect, the Defence states that the Code does not explicitly provide a chamber with the discretion to refuse to allow for an impediment to be lifted or to deny counsel the opportunity to withdraw from representation. In finding that any impediment could not be cured, the Defence submits that 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”, and that the “Pre-Trial Chamber gave no clear reasoning for such a precipitous and draconian decision”.⁵⁷

2. *Response of the Prosecution*

45. The Prosecution does not take a position on the factual issues of the appeal, but has set out the relevant legal framework and principles to assist the Appeals Chamber.⁵⁸

46. The Prosecution submits that while counsel are presumed to act ethically, any presumption of ethical regularity, if it applies, is rebuttable.⁵⁹ The rules of the profession place the responsibility on counsel to exercise care to ensure that no conflict of interest arises, and the Prosecution states that the Appeals Chamber had held that counsel is expected to err on the side of caution. In case of doubt, the Prosecution

⁵³ [Appeal Brief](#), para. 7.

⁵⁴ [Appeal Brief](#), para. 7, referring to [REDACTED].

⁵⁵ [Appeal Brief](#), para. 4.

⁵⁶ [Appeal Brief](#), para. 12.

⁵⁷ [Appeal Brief](#), para. 9.

⁵⁸ [Prosecution Response](#), para. 4.

⁵⁹ [Prosecution Response](#), para. 6.

submits that counsel should either not agree to representation or bring the matter immediately before a chamber.⁶⁰

47. The Prosecution submits that 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. In the view of the Prosecution, a chamber has an overarching role under article 64 of the Statute to ensure the integrity of the proceedings.⁶¹ Furthermore, the Prosecution states that a chamber is not bound to accept remedial measures provided to waive or cure conflicts of interest.⁶² In cases where full and informed consent is argued to waive any conflict of interest or impediment to representation, the Prosecution submits that a chamber may still assess if such consent is sufficient. Even where all parties agree that a conflict or impediment may be cured, the Prosecution submits that a chamber may still make the final assessment.⁶³

48. The Prosecution further maintains that the tests and practices from domestic and other international jurisdictions regarding conflicts of interest are of limited value, as the Court has held that it is guided by its own legal framework in matters of conflict of interest.⁶⁴

49. The Prosecution submits that while article 67(1)(d) of the Statute recognises the right of a suspect to counsel of his or her choosing, this is not an absolute right, and can be limited to ensure that a person is suitable to act as counsel. At the same time, the Prosecution takes the view that a suspect's right to counsel of choice "should prevail over the mere speculation of a conflict of interest".⁶⁵

50. The Prosecution states that in its email submissions on this matter, it did not take a position on the merits, and deferred to the Pre-Trial Chamber's discretion as to whether a conflict of interest or other impediment existed, or whether any waiver would be sufficient.⁶⁶

⁶⁰ [Prosecution Response](#), para. 6.

⁶¹ [Prosecution Response](#), para. 7.

⁶² [Prosecution Response](#), para. 8.

⁶³ [Prosecution Response](#), para. 8.

⁶⁴ [Prosecution Response](#), para. 9.

⁶⁵ [Prosecution Response](#), para. 10.

⁶⁶ [Prosecution Response](#), para. 13.

C. Determination by the Appeals Chamber

51. The Defence brings this appeal to challenge the Pre-Trial Chamber’s conclusion that grounds existed for removing Mr Kaufman as counsel in these proceedings due to his representation of two clients other than Mr Mokom in relation to *The Situation in the Central African Republic II*. In support of this challenge, the Defence raises arguments directed at i) the Pre-Trial Chamber’s determination that the interests of Mr Mokom necessarily diverged from those of Mr Kaufman’s two other clients to such a degree that Mr Kaufman was unable to provide effective representation,⁶⁷ and ii) the Pre-Trial Chamber’s decision to deny Mr Kaufman the opportunity to take sufficient steps to cure the purported conflict of interests.⁶⁸

52. The Appeals Chamber will address these arguments in turn below. But the Appeals Chamber must first set out the general legal framework applicable in appeals concerning the selection of counsel for the Defence and the due diligence that counsel must exercise when faced with a potential conflict of interest. In this regard, article 67(1)(d) of the Statute contains an accused’s right to choose his or her legal representation at this Court:⁶⁹

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] (d) [...] to conduct the defence in person or through legal assistance of the accused’s choosing [...]

53. Rule 21(2) of the Rules of Procedure and Evidence (hereinafter: “Rules”) elaborates upon the right contained in article 67(1)(d) of the Statute:

The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.

54. Regulation 74 of the Regulations of the Court, entitled “Defence through counsel”, provides as follows: “Defence shall act in proceedings before the Court when

⁶⁷ [Appeal Brief](#), paras 7-8, 16.

⁶⁸ [Appeal Brief](#), paras 9, 14.

⁶⁹ This provision is also applicable in pre-trial proceedings.

chosen by the person entitled to legal assistance in accordance with rule 21, sub-rule 2 [...]”. And finally,⁷⁰ regulation 75(1) of the Regulations states:

If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.

55. Regarding the duty of counsel to exercise due diligence, article 12(1)(a) of the Code, entitled “Impediments to representation”, states:

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 [...]

Furthermore, article 12(2) of the Code states:

In the case of paragraph 1(a) of this article, where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained. Such notice shall be provided in a manner consistent with counsel’s duties of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence.

56. Finally, article 16 of the Code, “Conflict of interest”, in relevant part states:

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.

[...]

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.

57. The Appeals Chamber has previously held that “[u]nder the Statute, the Rules of Procedure and Evidence and the Regulations of the Court the choice of counsel lies

⁷⁰ See also regulation 76(1) of the Regulations: “A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and Rules”.

with the person” and that a person under charge must have “a reasonable opportunity to appoint counsel of [his or her] choice”.⁷¹ Indeed, in addition to article 67(1)(d) of the Statute, the right of a criminal defendant to choose his or her legal representation is enshrined in article 14(3)(b) of the International Covenant on Civil and Political Rights, which provides that everyone charged with a criminal offence is entitled “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”.⁷²

58. Nevertheless, as a matter of human rights law, the right to choose legal counsel is not absolute.⁷³ Although national courts “must certainly have regard to the defendant’s wishes” when appointing defence counsel, the court may “override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice”.⁷⁴

59. To this end, the Appeals Chamber notes that one of the justifications that may compel a chamber to intervene in the appointment of counsel is if that counsel has a conflict of interest.⁷⁵ When faced with a potential conflict, the Appeals Chamber has held that counsel should err on the side of caution and either not agree to represent a client at all or immediately bring the matter before the relevant chamber prior to agreeing to represent a client if counsel is “in any doubt at all about the application of

⁷¹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Reasons for Decision of the Appeals Chamber on the Defence application, “Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense” filed on 20 February 2007](#), 9 March 2007, ICC-01/04-01/06-844 (OA8), paras 12-13.

⁷² United Nations, General Assembly, article 14 (3)(b) of the International Covenant on Civil and Political Rights, 19 December 1966, vol 999 p.171. *See also* Organization of American States, article 8 (2)(d) of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955; Organization of African Unity, article 7 (1)(c) of the African Charter on Human and People’s Rights, 27 June 1981, United Nations Treaty Series 1520, p. 217; Council of Europe, article 6(3)(c) of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, 4 November 1950, [ETS No. 005](#).

⁷³ A Clooney and P Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021) (hereinafter: “Clooney and Webb”), p. 351.

⁷⁴ ECtHR, Grand Chamber, *Croissant v. Germany*, 25 September 1992, Application number. 13611/88 para. 29. *See also* ICTY, Appeals Chamber, *The Prosecutor v. Jadranko Prlić et al.*, [Decision on Appeal by Bruno Stojić against Trial Chamber’s Decision on Request for Appointment of Counsel](#), 24 November 2004, IT-04-74 (hereinafter: “*Prlić et al.* Appeals Judgment”), para. 19; Clooney and Webb, p. 351, referring to ECtHR, Grand Chamber, *Dvorski v. Croatia*, , 20 October 2015, Application No. 25703/11, paras 81, 94-99.

⁷⁵ *See* ECtHR, *Mihai Moldoveanu v. Romania*, 19 June 2012, Application. no. 4238/03 para. 74–76; [Prlić et al. Appeals Judgment](#), para. 19.

the provisions [of the Code] to him or her”.⁷⁶ Furthermore, the Appeals Chamber has found that, in overseeing the fairness and expeditiousness of proceedings, a pre-trial chamber may find it appropriate to *proprio motu* address the issue of whether counsel is fit to represent the suspect or accused person.⁷⁷ Generally speaking, decisions concerning the appointment or removal of counsel traditionally fall within the discretion of a chamber.⁷⁸

60. However, the UN Human Rights Committee has emphasised the duty to justify why “the interests of justice” require the defendant’s choice of counsel to be overridden.⁷⁹ Similarly, chambers of this Court have held that they will not intervene with a person’s choice of counsel “in the absence of compelling circumstances”.⁸⁰

61. In sum, a chamber is required to carefully balance a person’s right to appoint counsel of his or her choosing with its duty to ensure the fairness of the proceedings and the attendant discretion to intervene with the appointment or removal of counsel. In particular, if a chamber intervenes with a person’s choice of counsel, it must clearly set out its reasons for doing so and explain why it is in the interests of justice to remove counsel. This is especially so given that, in addition to curtailing an accused’s right to

⁷⁶ Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”](#), 10 November 2011, ICC-01/09-02/11-365 (OA3) (hereinafter: “*Muthaura et al.* OA3 Judgment”), para. 55.

⁷⁷ [Muthaura et al. OA3 Judgment](#), para. 46 (applying the underlying principles in article 64(2) of the Statute to the pre-trial stage); *see also* para. 69.

⁷⁸ *E.g.* ICTY, Appeals Chamber, *The Prosecutor v. Slobodan Milosevic*, [Decision on interlocutory appeal of the Trial Chamber’s decision on the assignment of Defense counsel](#), 1 November 2004, IT-02-54-AR73.7, para. 9: “[...] a Trial Chamber exercises its discretion in many different situations such as when imposing a sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure. A Trial Chamber’s assignment of counsel fits squarely within this last category of decisions. It draws on the Trial chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings”.

⁷⁹ Human Rights Committee, *Esergepov v. Kazakhstan* 29 March 2016, communication No. 2129/2012, para. 11.5.

⁸⁰ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the “Prosecution Submission on the Appointment of Defence Counsel” for Mr Fidèle Babala Wandu](#), 1 April 2014, ICC-01/05-01/13-306, para. 5. *See also* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Prosecution submission on the appointment of defence counsel](#), 15 April 2015, ICC-01/05-01/13-909, para. 24; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, [Decision on the Prosecution Submission on the Appointment of Defence Counsel](#), 19 January 2021, ICC-01/14-01/18-837-Red, para. 13.

choose counsel, removing counsel of choice may constitute a significant interruption to the proceedings.

62. Turning to the case at hand, the Appeals Chamber observes that in the Impugned Decision, the Pre-Trial Chamber noted that Mr Kaufman had represented “other clients” in the investigation that preceded *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, and found that those proceedings are “substantially related” to the present proceedings within the meaning of article 12(1)(a) of the Code.⁸¹ Upon thoroughly reviewing the reasons in the Impugned Decision and the submissions leading to it, the Appeals Chamber can discern only two such “other clients”: i) [REDACTED] (Client 1, as designated above), and ii) another person “who may be of interest to the proceedings”, [REDACTED] (Client 2, as designated above).⁸²

63. After noting the existence of these other individuals, the Pre-Trial Chamber concluded that the interests of Mr Kaufman’s other clients diverge from those of Mr Mokom to such a degree that it prevented Mr Kaufman from pursuing all available means in representing Mr Mokom.⁸³ The Pre-Trial Chamber presented what the Appeals Chambers considers to be two hypothetical scenarios justifying this conclusion. Under one scenario, the Pre-Trial Chamber explained that Mr Kaufman would be precluded from using information from his representation of the other clients to the benefit of Mr Mokom “should any of his clients [...] be called to testify in the proceedings against Mr Mokom”.⁸⁴ Under the other, the Pre-Trial Chamber explained that Mr Kaufman’s representation of Client 1 and Client 2 during the investigation in the *Situation in the Central African Republic II* prevents him from representing effectively Mr Mokom, as the latter’s interests are “fundamentally incompatible” with the former.⁸⁵

64. At the outset, the Appeals Chamber notes that the Impugned Decision came after several days of correspondence involving the Registry and the parties regarding the

⁸¹ [Impugned Decision](#), para. 10.

⁸² [Impugned Decision](#), para. 11.

⁸³ [Impugned Decision](#), para. 12. *See also* para. 13: “[...] the information before the chamber shows that the interest [*sic*] 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”.

⁸⁴ [Impugned Decision](#), para. 12.

⁸⁵ [Impugned Decision](#), para. 13.

potential conflict of interest in question. Following this correspondence, the Pre-Trial Chamber determined that the conflict was one that could not be cured by the written consent of the clients involved, nor by the withdrawal of Mr Kaufman from his representation of any or all of those clients.

65. The majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting, finds 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. Moreover, the Appeals Chamber observes that Mr Kaufman himself should have brought the matter to light even before it was raised by the Pre-Trial Chamber. The Appeals Chamber considers that such a course of action would have aligned with counsel's ethical obligations under articles 12 and 16 of the Code.⁸⁶

66. Thus, the majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting, rejects the Defence's arguments that the Pre-Trial Chamber erred in finding that Mr Kaufman was unable to provide effective representation and that it erred in failing to allow reasonable time to cure the conflict of interest. Moreover, the Appeals Chamber notes that 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.

67. Nevertheless, the Appeals Chamber observes that the Defence also submits, albeit obliquely, that the Pre-Trial Chamber erred in failing to provide a sufficiently reasoned decision.⁸⁷ The majority of the Appeals Chamber agrees, Judge Ibáñez and Judge Bossa dissenting, that the Pre-Trial Chamber could have been more precise in explaining why Mr Kaufman's prior representation of Clients 1 and 2 would necessarily be "fundamentally incompatible" with his present representation of Mr Mokom, given the uncertainty of whether Clients 1 and 2 will testify in these proceedings. The Pre-Trial Chamber also could have made clearer its reasons for concluding that Mr Kaufman's

⁸⁶ See, in respect of article 12 of the Code, [Muthaura et al. OA3 Judgment](#), para. 55.

⁸⁷ [Appeal Brief](#), paras 6-7: "[...] the only reasons given by the Pre-Trial Chamber, for finding an impediment to representation and a conflict of interest [...] are insufficient as a matter of law"; "the Pre-Trial Chamber erred when it went beyond the Prosecution's determination, for reasons not sufficiently specified or clarified [...]".

withdrawal from representation of those clients and the procurement of the consent of those clients would have no effect on its conclusion that the only plausible remedy is his removal as counsel for Mr Mokom.

68. Indeed, the Appeals Chamber finds that the reasons underlying the determination of the Pre-Trial Chamber are not fully set out in the Impugned Decision. Under the circumstances, given that the Appeals Chamber is tasked with reviewing the findings in the Impugned Decision,⁸⁸ the Appeals Chamber is unable to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr Kaufman as counsel. Accordingly, the majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting, considers that remanding the matter to the Pre-Trial Chamber is the appropriate remedy in the present circumstances. The Pre-Trial Chamber is directed to issue a new decision on the matter based upon all available information,⁸⁹ setting out precise and detailed reasons as to whether there is an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the Code to Mr Kaufman's representation of Mr Mokom that cannot be remedied.

VII. APPROPRIATE RELIEF

69. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision or order appealed.⁹⁰ In the present case, it is

⁸⁸ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81](#), 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20, referring to ICTY, Appeals Chamber, *The Prosecutor v. Momir Nikolic*, [Judgement on Sentencing Appeal](#), 8 March 2006, Case No. IT-02-60/1-A, para. 96; *The Prosecutor v. Dragoljub Kunarac et al.*, [Judgement](#), 12 June 2002, Case No. IT-96-23 & 23/1-A, para. 4. See also Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"](#), 26 October 2012, ICC-02/11-01/11-278-Red, dissenting opinion of Judge Anita Ušacka, paras 8-11; ICTR, Appeals Chamber, *The Prosecutor v. Augustin Bizimungu*, [Judgement](#), 30 June 2014, ICTR-00-56B-A, paras 18-20, 23-24.

⁸⁹ The Appeals Chamber notes that, following the Impugned Decision, Mr Kaufman provided new information in his 28 March 2022 submissions (ICC-01/14-01/22-27-Conf-Exp-AnxI) and Mr Mokom himself provided information orally during the 4 April 2022 status conference. Moreover, Duty Counsel transmitted additional client documentation as part of this appeal (ICC-01/14-01/22-47-Conf and ICC-01/14-01/22-51-Conf).

⁹⁰ See rule 158(1) of the Rules.

appropriate to reverse the Impugned Decision and remand the issue to the Pre-Trial Chamber to provide further reasons for its decision as directed in this judgment.

Judge Ibáñez and Judge Bossa append a partially dissenting opinion to this judgment.

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



Judge Solomy Balungi Bossa
Presiding



Judge Piotr Hofmański



Judge Luz del Carmen Ibáñez
Carranza



Judge Marc Perrin de Brichambaut



Judge Gocha Lordkipanidze

Dated this 19th day of July 2022

At The Hague, The Netherlands