



Original: **English**

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

Date: **28/07/2022**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

PUBLIC

With Confidential Annex I, II and III

Submissions pursuant to Order ICC-01/14-01/22-73

Source: Gregory Townsend, Duty Counsel for Mr. Mokom

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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REGISTRY

Registrar
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Counsel Support Section
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Procedural background

1. On 19 July 2022, the Appeals Chamber rendered its *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 Maxime Jeoffroy Eli Mokom Gawaka"* (ICC-01/14-01/22-70-Conf)¹ (Judgment).¹

2. At paragraph 68 of its Judgment, the Appeals Chamber found that it was *"unable to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr. Kaufman as Counsel"*. For this reason, inter alia, the Appeals Chamber reversed the *'Impugned Order'*² that had revoked Counsel Kaufman's mandate and, by a majority, remanded the matter to the Pre-Trial Chamber directing it to render a new decision *'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'*.³

3. On 20 July 2022, the Pre-Trial Chamber issued its *Decision designating a Single Judge* for the duration of the Court's summer recess.⁴

4. On 21 July 2022, in light of the Appeal Chamber's reversal of the Impugned Order, Mr. Kaufman filed a *Request for Immediate Access to Mr Mokom and to the Confidential Record of the Case*, arguing that the Judgment had, effectively, rendered the Impugned Order void and that his standing as Counsel of record should be restored immediately absent any further decision to the contrary.⁵

¹ ICC-01/14-01/22-70-Red.

² ICC-01/14-01/22-26-Red.

³ ICC-01/14-01/22-70-Red, para. 68.

⁴ ICC-01/14-01/22-71.

⁵ ICC-01/14-01/22-72-AnxI.

5. On 22 July 2022, the Pre-Trial Chamber issued its *Order to the Registry to Maintain the Mandate of Duty Counsel and to the Prosecution and Duty Counsel for Submissions*, ruling that the Appeals Chamber had instructed it ‘to issue a new decision based upon all available information, including information that came to light after the Appeals Chamber Judgment’.⁶

Submissions

6. Duty Counsel hereby presents three annexes containing information that was not before the Pre-Trial Chamber at the time that it issued its Impugned Order. This new information provides a sufficient factual basis to satisfy the Pre-Trial Chamber that any discernable and latent impediment or conflict, if any should exist, already has been cured or can be cured.

i) First, a document signed during the month of April 2022 by both Mr. Mokom and Client 1 entitled *Renonciation à soulever un conflit des intérêts* (and previously submitted before the Appeals Chamber as an annex to ICC-01/14-01/22-46-Conf).⁷ The content of this document is *pro forma* and designed to waive the existence of an impediment to representation or a conflict of interest, pursuant to Articles 12(1)(a) and 16(3)(b) of Code of Professional Conduct. As will be recalled, Mr. Kaufman was of the view that no impediment to his representation or conflict existed. Notwithstanding, even if Mr. Mokom's interests should be deemed ‘fundamentally incompatible’⁸ with those of Client 1 (which, it is submitted, they are not), then both individuals have now signed and provided their full and informed consent to mutual representation as envisaged by the Code of Professional Conduct. In any event, Client 1 will, almost certainly, not be called as a Prosecution witness and, as such, Mr. Kaufman's services for Client 1 have, effectively, terminated. Mr. Mokom and Client 1, furthermore, agreed to the mutual sharing of information that could

⁶ ICC-01/14-01/22-73, para. 9.

⁷ ICC-01/14-01/22-47-Conf.

⁸ Impugned Order (ICC-01/14-01/22-26-Red), para. 13.

impact the defence of one another. They so agreed, even though Mr. Kaufman has solemnly affirmed that he has, to date, obtained no particular knowledge from either party that might impact the interests of the other.⁹

ii) Second, a letter addressed by Mr. Kaufman to Client 2, the person mentioned in the last sentence of paragraph 11 of the Impugned Order, dated 18 May 2022 (was also submitted to the Appeals Chamber as an annex to ICC-01/14-01/22-46-Conf).¹⁰ In this letter, Mr. Kaufman stated that he terminated his representation of Client 2 in order to address the concerns of the Pre-Trial Chamber and because Client 2 had cut off contact with him for more than a year, thereby making it impossible to take proper instructions.¹¹ This letter constitutes a withdrawal of future representation for the purposes of Article 16(3)(a) of the Code of Professional Conduct. This letter was also provided to two individuals with whom Client 2 is, normally, in regular contact. It will be recalled that Mr. Kaufman had expressed his view that there was no conflict of interest between Client 2 and Mr Mokom because of the extremely discrete nature of the services provided to the former, and because there was no actual service provided before the Court (which would have engaged the Pre-Trial Chamber's power to withhold its consent to the withdrawal).¹²

iii) Third, an affidavit signed by Mr. Kaufman on 24 July 2022 before a notary public whereby he was warned as to the penalties for deliberately providing false testimony to the International Criminal Court and, thereafter, reiterated the nature of the services provided to Client 1 and Client 2. It also gives the reasons why Mr. Kaufman concluded that there existed no impediment to him representing Mr. Mokom and no conflict of interest.¹³

⁹ Confidential Annex I.

¹⁰ ICC-01/14-01/22-51-Conf-Exp-Anx.

¹¹ Confidential Annex II.

¹² Article 16(3)(a) Code of Professional Conduct for Counsel.

¹³ Confidential Annex III.

7. In addition to the aforementioned documentation, Duty Counsel cites the transcript of the status conference held on 4 April 2022¹⁴ at which the Pre-Trial Chamber put questions to Mr. Mokom, who was then represented by Duty Counsel. Revealing voluntarily, what, otherwise, would have been subject to client-attorney privilege, Mr. Mokom confirmed that Mr. Kaufman had explained to him the nature of a conflict of interest and had hidden nothing from him.¹⁵ The accuracy of Mr. Kaufman's previous representations were also tested by the Presiding Judge who queried whether the former had, indeed, told Mr. Mokom that he sensed that his mandate would be revoked.¹⁶ Mr. Mokom confirmed this and, moreover, reiterated his keen desire to have Mr. Kaufman act as his counsel.¹⁷

8. Duty Counsel submits again that the Prosecution is the master of the evidence in this case. Every item of evidence known to the Pre-Trial Chamber should be known to the Prosecution. During the litigation of this issue, the Prosecution has not, at any stage, argued that there is any specific confidential information submitted to the Pre-Trial Chamber, and not disclosable to the Defence, which could impact Mr. Kaufman's capacity to represent Mr. Mokom to the best of his ability. The Prosecution, equally charged with clarifying the truth by means of a fair trial process, has 'no further submissions to provide, and reiterates that it does not take any position on the merits, deferring to the Chamber's discretion as to whether a conflict of interest or other impediment exist, or whether any waiver would be sufficient'.¹⁸

¹⁴ ICC-01/14-01/22-T-002-Red-ENG.

¹⁵ Ibid., page 10, line 20.

¹⁶ Ibid., page 12, line 4.

¹⁷ Ibid., page 12, lines 13-14.

¹⁸ ICC-01/14-01/22-75.

9. In the Impugned Order, the Pre-Trial Chamber found that the interests of Client 1 and Client 2, on the one hand, and those of Mr. Mokom, on the other, 'diverge'¹⁹ and are 'fundamentally incompatible'²⁰ given the 'nature and scope of the conflict in the Central African Republic'.²¹ The Appeals Chamber deferred to the Pre-Trial Chamber's intimate knowledge of the facts²² and directed the Pre-Trial Chamber to give further 'precise and detailed' reasons for such a finding.²³ Should the Pre-Trial Chamber have formulated its reasoning in the interim, the fairness of the proceedings would dictate that Mr. Mokom be afforded the opportunity to address such reasoning in advance of any further decision. Notwithstanding, Mr. Mokom respectfully suggests that such an exercise is unnecessary given the provision of the additional documentation detailed in paragraph 6 above.

10. Finally, Duty Counsel notes that Mr. Kaufman has already expressed his keen desire for a constructive and respectful solution to the present situation.²⁴ In light of the Judgment, Mr. Kaufman has accepted that his timelier submission of the additional documentation could have assuaged the Pre-Trial Chamber's concerns regarding the potential for a conflict.

Conclusion

11. In light of the above, Duty Counsel submits, based on the factual basis now before the Pre-Trial Chamber, that there should be no further impediment to the Pre-Trial Chamber revising the Impugned Order and allowing Mr Mokom to have his choice of counsel and be represented by Mr. Kaufman.

¹⁹ Impugned Order (ICC-01/14-01/22-26-Red), para. 12.

²⁰ Ibid., para. 13.

²¹ Ibid.

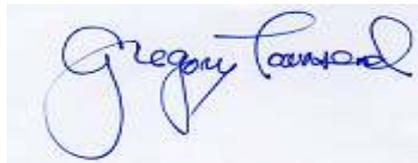
²² ICC-01/14-01/22-70-Red, para. 65.

²³ Ibid, para. 68.

²⁴ ICC-01/14-01/22-27-Conf-Exp-AnxI, paras 7-8.

12. Allowing Mr Mokom to have his choice of counsel as permanent counsel also will facilitate the most efficient start of the process of disclosure by the Prosecution, as ordered by the Pre-Trial Chamber.²⁵

13. Mr. Mokom expresses, once more, his gratitude to the Pre-Trial Chamber for its concerns about the quality of his legal representation and assures the Pre-Trial Chamber that if Mr. Kaufman's standing is restored forthwith, he will instruct Mr. Kaufman to avoid any postponement of the confirmation hearing.

A handwritten signature in blue ink that reads "Gregory Townsend". The signature is written in a cursive style with a large initial 'G'.

Gregory Townsend,
Duty Counsel for Maxime Mokom

Los Angeles, United States of America

Thursday, July 28, 2022

²⁵ ICC-01/14-01/22-62, para. 27.