

**Original: English****No. ICC-01/14-01/22 OA3****Date: 19 December 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 19 August 2022 entitled “Decision on legal  
representation further to the Appeals Chamber’s judgment of 19 July 2022”**

**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  
Ms Helen Brady

**Counsel for the Defence**

Mr Gregory Townsend, Duty Counsel

**REGISTRY**

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**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 “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022” of 19 August 2022 (ICC-01/14-01/22-80),

After deliberation,

By majority, Judge Ibáñez Carranza and Judge Bossa dissenting,

*Delivers* the following

## JUDGMENT

- 1) The decision of Pre-Trial Chamber II of 19 August 2022 entitled “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022” is confirmed.
- 2) The Registry is directed to liaise with Mr Mokom regarding his selection of counsel in the proceedings.

## REASONS

### I. INTRODUCTION

1. The proceedings that give rise to the present appeal concern the decision of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) setting out further reasons in support of its decision ordering the removal of Mr Nicholas Kaufman (hereinafter: “Mr Kaufman”) as legal counsel to Mr Maxime Jeoffroy Eli Mokom Gawaka Mokom (hereinafter: “Mr Mokom” and “Impugned Decision”, respectively).<sup>1</sup> The Pre-Trial Chamber issued this decision pursuant to the direction of the Appeals Chamber in the *Mokom* OA Judgment.<sup>2</sup> In setting out its further reasons, the Pre-Trial Chamber

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<sup>1</sup> Pre-Trial Chamber II, [Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022](#), 19 August 2022, ICC-01/14-01/22-80 (hereinafter: “Impugned Decision”).

<sup>2</sup> [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”](#), 19 July 2022, ICC-01/14-01/22-70-Red (confidential version notified same day) (hereinafter: “*Mokom* OA Judgment”).

maintained its earlier finding 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 the written consent of potentially affected clients or withdrawing from representation.<sup>3</sup> The Defence challenges this decision.

## II. KEY FINDINGS

2. 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.

3. The Appeals Chamber considers that a suspect's or an accused person's choice of counsel should be respected unless there are sufficient grounds to override this preference in order to ensure the fairness of the proceedings. Any limitation of a person's right to choose counsel must be proportional to the need to protect the fairness of the proceedings and the interests of justice. However, where there exist exceptional circumstances in which the actions of counsel could jeopardise a person's right to a fair trial or affect the proper administration of justice, a chamber may take appropriate measures to ensure the fairness of the trial and the integrity of the proceedings, including ordering the withdrawal of counsel.

## 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.<sup>4</sup>

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<sup>3</sup> [Impugned Decision](#). See also Pre-Trial Chamber II, [Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 13 June 2022, ICC-01/14-01/22-26-Red (confidential version filed on 25 March 2022).

<sup>4</sup> Pre-Trial Chamber II, [Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka](#), 22 March 2022, ICC-01/14-01/22-2-Red2 (a confidential, *ex parte* version was notified on 10 December 2018) (hereinafter: "Warrant of Arrest for Mr Mokom").

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.<sup>5</sup>
6. On 16 March 2022, pursuant to Mr Mokom's request,<sup>6</sup> the Registry formally appointed Mr Kaufman as counsel for Mr Mokom.<sup>7</sup>
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.<sup>8</sup>
8. On 22 March 2022, Mr Mokom made his first appearance before the Pre-Trial Chamber, represented by Mr Kaufman.<sup>9</sup>
9. On 25 March 2022, after receiving the submissions of the parties and the Registry,<sup>10</sup> 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 Ngaiïsona* constituted a conflict of interest under articles 12 and 16 of the Code of Professional Conduct for Counsel (hereinafter: the "Code" and the "25 March 2022 Order", respectively).<sup>11</sup>

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<sup>5</sup> 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.

<sup>6</sup> [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.

<sup>7</sup> 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.

<sup>8</sup> See Pre-Trial Chamber II, [Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 13 June 2022, ICC-01/14-01/22-26-Red (confidential version filed on 25 March 2022), para. 6.

<sup>9</sup> 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.

<sup>10</sup> See Pre-Trial Chamber II, [Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 13 June 2022, ICC-01/14-01/22-26-Red (confidential version filed on 25 March 2022), para. 6.

<sup>11</sup> Pre-Trial Chamber II, [Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 13 June 2022, ICC-01/14-01/22-26-Red (confidential version filed on 25 March 2022).

10. On 4 April 2022, Mr Gregory Townsend was appointed as duty counsel to Mr Mokom.<sup>12</sup> On the same day, the Pre-Trial Chamber held a status conference with Mr Mokom, assisted by duty counsel.<sup>13</sup>

11. On 14 April 2022, the Pre-Trial Chamber granted a request from Mr Mokom seeking leave to appeal the 25 March 2022 Order.<sup>14</sup>

12. On 19 July 2022, the Appeals Chamber issued the *Mokom* OA Judgment whereby the Appeals Chamber, Judge Ibáñez Carranza and Judge Bossa partially dissenting, reversed the decision and remanded the matter to the Pre-Trial Chamber to provide a new decision based upon all available information, 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.<sup>15</sup>

13. On 28 July 2022, the Pre-Trial Chamber issued a public redacted version of the warrant of arrest for Mr Mahamat Nouradine Adam (hereinafter: "Mr Adam").<sup>16</sup>

14. On 19 August 2022, the Pre-Trial Chamber issued the Impugned Decision setting out further reasons for its finding that Mr Kaufman's representation of Mr Mokom poses a conflict of interest or impediment.<sup>17</sup> Within the same decision, the Pre-Trial Chamber *proprio motu* granted leave to appeal to the Defence on one issue.<sup>18</sup>

15. On 27 September 2022, the Appeals Chamber issued a decision dismissing the appeal as inadmissible on the basis that leave was improperly granted by the Pre-Trial Chamber (hereinafter: "*Mokom* OA2 Decision").<sup>19</sup> The Appeals Chamber determined

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<sup>12</sup> See [Impugned Decision](#), para. 3.

<sup>13</sup> See [Impugned Decision](#), para. 4.

<sup>14</sup> 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.

<sup>15</sup> [Mokom OA Judgment](#).

<sup>16</sup> Pre-Trial Chamber II, *Situation in the Central African Republic II*, [Warrant of Arrest for Mahamat Nouradine Adam](#), 28 July 2022, ICC-01/14-41-Red (an under seal, *ex parte* version was notified on 7 January 2019) (hereinafter: "Warrant of Arrest for Mr Adam").

<sup>17</sup> [Impugned Decision](#).

<sup>18</sup> [Impugned Decision](#), para. 30.

<sup>19</sup> [Mokom OA2 Decision](#), ICC-01/14-01/22-91.

that the parties would still be entitled to request leave to appeal the Impugned Decision.<sup>20</sup>

16. On 29 September 2022, the Pre-Trial Chamber granted Mr Mokom’s request for leave to appeal the Impugned Decision with respect to one issue.<sup>21</sup>

## **B. Proceedings before the Appeals Chamber**

17. On 30 September 2022, the Defence filed its appeal brief (hereinafter: “Appeal Brief”).<sup>22</sup>

18. On 3 October 2022, the Prosecution submitted its response, in which it indicated that it does not take a position on the factual issues raised.<sup>23</sup>

## **IV. STANDARD OF REVIEW**

19. 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.<sup>24</sup>

20. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.<sup>25</sup> A decision

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<sup>20</sup> [Mokom OA2 Decision](#), ICC-01/14-01/22-91, para. 23.

<sup>21</sup> Pre-Trial Chamber II, [Decision granting Mr Mokom’s request for leave to appeal the 19 August 2022 Decision on legal representation](#), ICC-01/14-01/22-94.

<sup>22</sup> [Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80](#), ICC-01/14-01/22-95 (hereinafter: “Appeal Brief”).

<sup>23</sup> [Prosecution’s Response to Mr Mokom’s Appeal against Pre-Trial Chamber II’s Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022](#), ICC-01/14-01/22-96.

<sup>24</sup> *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; *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; *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 *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 ‘D cision relative   l’exception d’irrecevabilit  pour insuffisance de gravit  de l’affaire soulev e par la d fense’](#), 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.

<sup>25</sup> [Al Hassan OA Judgment](#), para. 38; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of C te d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on C te](#)

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”.<sup>26</sup>

21. As to errors of fact, the Appeals Chamber will determine whether a chamber’s factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will not disturb a trial chamber’s factual finding only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber’s conclusion could have reasonably been reached from the evidence on the record.<sup>27</sup>

22. 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.<sup>28</sup>

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[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.

<sup>26</sup> [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41.

<sup>27</sup> [The Prosecutor v. Bosco Ntaganda, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’](#), 30 March 2021, ICC-01/04-02/06-2667-Red (A3), paras 27-29; [The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled ‘Decision on Mr Gbagbo’s Detention’](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10), (hereinafter: “*Gbagbo* OA10 Judgment”), para. 16.

<sup>28</sup> [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 [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), (hereinafter: “*Ntaganda* A A2 Judgment”), para. 46; [Kenyatta OA5 Judgment](#), paras 22-25, referring to, inter alia, [The Prosecutor v.](#)



## V. PRELIMINARY ISSUE

23. As a preliminary issue, the Appeals Chamber notes the submission of the Defence that the Pre-Trial Chamber, in the Impugned Decision, failed to mention the Appeals Chamber’s reversal of the 25 March 2022 Order,<sup>29</sup> and instead confirmed the reversed Order.<sup>30</sup>

24. The Appeals Chamber recalls that it reversed the 25 March 2022 Order, and remanded the matter to the Pre-Trial Chamber to provide further reasons supporting its decision ordering the removal of Mr Kaufman as counsel to Mr Mokom. Thus, the 25 March 2022 Order is not the subject of the present appeal.

25. In regard to the Appeals Chamber’s instruction to the Pre-Trial Chamber to provide a new decision setting out further reasoning, the Appeals Chamber will review the Impugned Decision to determine whether the Pre-Trial Chamber, “based upon all available information”, provided “precise and detailed reasons” in support of its determination to order the removal of Mr Kaufman as counsel to Mr Mokom, as instructed by the Appeals Chamber, and whether the reasons given are correct.

## VI. MERITS

### A. Relevant part of the Impugned Decision

26. In the Impugned Decision, the Pre-Trial Chamber noted that the two other individuals in question who were represented by Mr Kaufman, P-1019 and Mr Adam, are alleged to have been high-ranking members of the Seleka, the armed movement that

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*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), (hereinafter: “*Kony* OA3 Judgment”), paras 79-81; *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), (hereinafter: *Lubanga* Appeal Judgment”), 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]’”.

<sup>29</sup> [Appeal Brief](#), para. 9.

<sup>30</sup> [Appeal Brief](#), para. 9.

opposed the group to which Mr Mokom allegedly belonged.<sup>31</sup> In addition, the Pre-Trial Chamber considered the fact that Mr Adam is alleged to have held a senior role in the Seleka, while Mr Mokom is alleged to have held a senior role in the Anti-Balaka. The Pre-Trial Chamber found that “[t]he interests of persons who would have occupied high level functions/roles within the Seleka at the time of the relevant events, radically diverge from and are necessarily incompatible with those of Mr Mokom, who is alleged to have been a high-ranking member of the opposing movement, the Anti-Balaka”.<sup>32</sup> The Pre-Trial Chamber further found that having been “close to senior members of opposing sides, or being perceived as such, objectively affects a counsel’s ability to effectively and impartially represent a client, irrespective of the counsel’s good faith and professionalism”.<sup>33</sup>

27. The Pre-Trial Chamber noted that after being given power of attorney by Mr Adam, Mr Kaufman enquired with the Prosecution as to the existence of a warrant of arrest for Mr Adam on several occasions, and that in the course of such exchanges and as part of his representation, Mr Kaufman must have obtained information from Mr Adam in connection with events relevant to the present proceedings.<sup>34</sup> In this respect, the Pre-Trial Chamber noted that Mr Kaufman would be precluded from using any information obtained in connection with his representation of Mr Adam to his detriment, or to the benefit of Mr Mokom.<sup>35</sup>

28. Considering that Mr Kaufman secured waivers and terminated his representation of Mr Adam only after the Pre-Trial Chamber sought observations regarding a potential conflict or impediment, the Pre-Trial Chamber found that this raised questions about Mr Kaufman’s transparency and ability to fully engage in Mr Mokom’s defence, and impacts the value of the documents secured.<sup>36</sup> In particular, the Pre-Trial Chamber found that Mr Kaufman’s engagement with Mr Adam “objectively impairs his ability to fully and unreservedly pursue the interests of Mr Mokom” and that “[t]he information he learned during his contacts with Mr Adam cannot be mechanically set

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<sup>31</sup> [Impugned Decision](#), para. 18.

<sup>32</sup> [Impugned Decision](#), para. 21.

<sup>33</sup> [Impugned Decision](#), para. 21.

<sup>34</sup> [Impugned Decision](#), para. 22.

<sup>35</sup> [Impugned Decision](#), para. 22.

<sup>36</sup> [Impugned Decision](#), para. 25.

aside, and could be detrimental to Mr Mokom at some stage of the proceedings”.<sup>37</sup> In regard to the waiver secured in relation to P-1019, the Pre-Trial Chamber found that it does not remedy the impediment or conflict of interest, and considers that Mr Kaufman should have raised a potential conflict of interest with the Registry.<sup>38</sup>

29. The Pre-Trial Chamber stated that the present case may be distinguished from the Trial Chamber V determination that proceedings related to the investigation of Seleka crimes are not substantially related to alleged crimes of the Anti-Balaka,<sup>39</sup> given that in this instance, Mr Kaufman has represented two persons for whom warrants of arrest have been issued.<sup>40</sup>

30. On 29 September 2022, the Pre-Trial Chamber granted leave to appeal on the following issue:

Whether the Chamber, on the basis of the further reasons exposed in the ‘Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022’, erred in finding that there is an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the code of Professional Conduct for Counsel to Mr Kaufman’s representation of Mr Mokom that cannot be remedied.<sup>41</sup>

## **B. Submissions of the parties**

### *1. Submissions of the Defence*

31. The Defence submits that the certified issue, as set out in the preceding paragraph, should be addressed in reference to four errors of law and fact. Specifically, the Defence submits that the Pre-Trial Chamber erred by (i) confusing the differing remedial requirements for an impediment with those of a conflict of interest; (ii) concluding that the interests of the relevant individuals are substantially similar and fundamentally incompatible, such that remedial measures should be precluded; (iii) finding that Mr Kaufman’s conduct should preclude any remedial measures; and (iv) failing to

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<sup>37</sup> [Impugned Decision](#), para. 26.

<sup>38</sup> [Impugned Decision](#), para. 24.

<sup>39</sup> [Impugned Decision](#), para. 19, referring to Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Second Prosecution Submission on the Appointment of Defence Counsel, 17 March 2021, ICC-01/14-01/18-916-Conf (hereinafter: “*Yekatom and Ngaïssona* Decision”).

<sup>40</sup> [Impugned Decision](#), para. 19.

<sup>41</sup> Pre-Trial Chamber II, [Decision granting Mr Mokom’s request for leave to appeal the 19 August 2022 Decision on legal representation](#), 29 September 2022, ICC-01/14-01/22-94, para. 4.

consider the waiver and letter of termination filed, which remedied the possible conflict of interest.<sup>42</sup>

32. Regarding the first error, the Defence avers that the Pre-Trial Chamber has focused its arguments around an impediment to representation (article 12 of the Code), which does not require counsel to provide a chamber with a written waiver of consent.<sup>43</sup>

33. As to the second error, the Defence argues that the Pre-Trial Chamber “failed to provide further ‘precise and detailed reasons’ which would clarify why the various stakeholders’ interests are so substantially similar and fundamentally incompatible that they render remedial measures impossible”.<sup>44</sup> Turning to the third error, the Defence submits that the Pre-Trial Chamber erred by finding that Mr Kaufman is precluded from adopting any remedial measures due to his untimely conduct and a perceived lack of transparency.<sup>45</sup>

34. Regarding the fourth error, the Defence argues that the Pre-Trial Chamber failed to consider a waiver and a letter from Mr Kaufman terminating his representation of Mr Adam.<sup>46</sup> The Defence also contends that the Pre-Trial Chamber further ignored the fact that Mr Kaufman had already declared the existence of his representation with Mr Adam and P-1019 more than four years ago.<sup>47</sup>

35. The Defence states that Mr Kaufman has repeatedly indicated that he has no reason to suspect the potential for either an impediment or conflict of interest, based on the information at his disposal and after fully consulting all his clients.<sup>48</sup> In the view of the Defence, the Pre-Trial Chamber has failed to explain how Mr Kaufman’s now-terminated, prior representation of Mr Adam and P-1019 would be fundamentally incompatible with his representation of Mr Mokom.<sup>49</sup> While the Appeals Chamber ordered the Pre-Trial Chamber to set out precise reasoning to support its finding of a conflict of impediment, the Defence states that the reasons set forth in the Impugned

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<sup>42</sup> [Appeal Brief](#), para. 8.

<sup>43</sup> [Appeal Brief](#), paras 10-12.

<sup>44</sup> [Appeal Brief](#), para. 16.

<sup>45</sup> [Appeal Brief](#), paras 26-32.

<sup>46</sup> [Appeal Brief](#), para. 33.

<sup>47</sup> [Appeal Brief](#), para. 33.

<sup>48</sup> [Appeal Brief](#), para. 30.

<sup>49</sup> [Appeal Brief](#), para. 22.

Decision “hardly differ” from those provided in paragraph 13 of the Pre-Trial Chamber’s first order to revoke Mr Kaufman’s appointment.<sup>50</sup> Furthermore, the Defence notes that the arrest warrant for Mr Adam relates to charges from a different time period and geographical location than those cited in the charges against Mr Mokom.<sup>51</sup>

## 2. *Response of the Prosecution*

36. In its response, the Prosecution has not taken a position on the factual issues raised.<sup>52</sup>

## C. **Determination by the Appeals Chamber**

### 1. *Introduction*

37. At the outset, the Appeals Chamber recalls that in the *Mokom* OA Judgment, the Appeals Chamber reversed and remanded the decision, directing the Pre-Trial Chamber to “issue a new decision on the matter based upon all available information, 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”.<sup>53</sup> Having examined the additional reasons set out by the Pre-Trial Chamber in the Impugned Decision, the Appeals Chamber considers that by issuing this further decision and providing additional reasons supporting its order to revoke Mr Kaufman’s appointment as counsel to Mr Mokom, the Pre-Trial Chamber has met the requirements set forth by the Appeals Chamber in the *Mokom* OA Judgment.

38. The Appeals Chamber recalls that pursuant to article 74(5) of the Statute, a decision shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.<sup>54</sup> In the Impugned Decision, the Pre-Trial Chamber,

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<sup>50</sup> [Appeal Brief](#), para. 23 (emphasis removed).

<sup>51</sup> [Appeal Brief](#), para. 21.

<sup>52</sup> [Prosecution’s Response to Mr Mokom’s Appeal against Pre-Trial Chamber II’s Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022](#), 3 October 2022, ICC-01/14-01/22-96.

<sup>53</sup> [Mokom OA Judgment](#), para. 68.

<sup>54</sup> See *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’](#), 17 May 2022, ICC-01/14-01/21-111-Red2 (OA) (confidential version notified on 26 June 2021), para. 41 *et seq*; *The Prosecutor v. Jean-Pierre Bemba Gombo*,

starting at paragraph 21, sets out additional reasons for its finding that Mr Kaufman’s representation of Mr Mokom presents a conflict of interest or impediment that cannot be remedied. While the Defence has not raised this issue in the Appeal Brief, the Appeals Chamber nevertheless notes that the Pre-Trial Chamber did not provide any definition of the relevant terms or expressly set out the standard that it applied to the facts. The Appeals Chamber considers that the Pre-Trial Chamber erred in this respect. However, as set out in further detail below, the Appeals Chamber does not consider that, but for this error, the Pre-Trial Chamber’s decision would have been substantially different.<sup>55</sup> Accordingly, the Appeals Chamber considers that this error has no material impact on the Impugned Decision.

39. The Defence brings this appeal to challenge the Pre-Trial Chamber’s decision to remove Mr Kaufman as counsel in these proceedings due to his representation of two other individuals, P-1019 and Mr Adam. The Appeals Chamber will address the arguments of the Defence below.

## 2. *First ground of appeal*

40. Under the first ground of appeal, the Defence submits that the Pre-Trial Chamber confused the requirements of an impediment to representation with that of a conflict of interest.<sup>56</sup> The Defence argues that by focusing on the “substantially related” and “fundamentally incompatible” nature of the client-based interests, the Pre-Trial Chamber’s additional reasons only address the existence of an impediment to

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[Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”](#), 8 June 2018, ICC-01/05-01/08-3636-Red (A), para. 51, referring to *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. See also Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [Separate opinion of Marc Perrin de Brichambaut](#), 19 May 2016, ICC-02/04-01/15-422-Anx-tENG.

<sup>55</sup> *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 7 April 2015, ICC-01/04-02/12-271-Corr (A) (hereinafter: “[Ngudjolo Appeal Judgment](#)”), para. 285 (emphasis in original). See also [Lubanga Appeal Judgment](#), paras 19-20; *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidele Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), 8 March 2018, ICC-01/05-01/13-2275-Red, (hereinafter: “*Bemba et al. Appeal Judgment*”), para. 90.

<sup>56</sup> [Appeal Brief](#), p. 5.

representation and not a conflict of interest.<sup>57</sup> In this regard, the Defence contends that counsel is only obliged to inform the chamber of the consent obtained with respect to an impediment to representation as article 12(1) of the Code does not require that counsel provide a chamber with a written waiver of consent,<sup>58</sup> while article 16(3)(b) of the Code, which relates to conflicts of interest, requires the waiver of a conflict of interest to be produced in writing.<sup>59</sup>

### **i. Applicable Standard**

41. The Appeals Chamber considers that the first ground of appeal concerns the issue of remedial measures, which must only be addressed if there is a conflict of interest. Thus, in order to examine this issue, the Appeals Chamber must first address the applicable standard relating to a conflict of interest. In this regard, the Appeals Chamber recalls that the right of a suspect or an accused person to counsel is enshrined in article 67(1)(d) of the Statute, as well as article 14(3)(b) of the International Covenant on Civil and Political Rights.<sup>60</sup> However, as noted in the *Mokom* OA Judgment, this right is not absolute.<sup>61</sup> Although 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”.<sup>62</sup> In other words, the right to select particular counsel may be limited in order to protect the integrity of the proceedings and in the interest of the proper administration of justice.<sup>63</sup> Noting that the right to a fair trial is also a fundamental right of the

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<sup>57</sup> [Appeal Brief](#), paras 10-11.

<sup>58</sup> [Appeal Brief](#), para. 12.

<sup>59</sup> [Appeal Brief](#), para. 12.

<sup>60</sup> [Mokom OA Judgment](#), para. 57.

<sup>61</sup> [Mokom OA Judgment](#), para. 58.

<sup>62</sup> [Mokom OA Judgment](#), para. 58, referring to 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-AR73.1 (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.

<sup>63</sup> Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Appointment of Duty Counsel for a Witness](#), 12 January 2015, ICC-01/09-01/11-1775-Red2, para. 20.

accused,<sup>64</sup> a chamber may thus intervene in the appointment or removal of counsel where the fairness of the trial is at stake.<sup>65</sup>

42. As stated by the Appeals Chamber in the *Mokom* OA Judgment:

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.<sup>66</sup>

43. One circumstance that may compel a chamber to intervene in the appointment of counsel is a conflict of interest.<sup>67</sup> A conflict of interest between counsel and a client arises in a situation where representation by counsel prejudices, or could prejudice, the interests of the client and the wider interests of justice.<sup>68</sup> The Appeals Chamber has found that, in overseeing the fairness and expeditiousness of proceedings, a chamber may find it appropriate to *proprio motu* address the issue of whether counsel is fit to represent the suspect or accused.<sup>69</sup> Decisions concerning the appointment or removal of counsel traditionally fall within the discretion of a chamber.<sup>70</sup> The Appeals Chamber notes, however, that chambers of this Court will not intervene with a person's choice of counsel "in the absence of compelling circumstances".<sup>71</sup> Accordingly, a chamber must exercise caution when intervening in the selection of counsel. As stated above, a chamber is required to carefully balance a person's right to appoint counsel of their

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<sup>64</sup> Article 67 of the Statute.

<sup>65</sup> ICTY, Appeals Chamber, *Prosecutor v. Gotovina et al.*, [Decision on Miroslav Šeparaović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct](#), 4 May 2007, IT-06-90-AR73.1, para. 37.

<sup>66</sup> [Mokom OA Judgment](#), paras 3 and 61.

<sup>67</sup> [Mokom OA Judgment](#), para. 59.

<sup>68</sup> See ICTY, Appeals Chamber, *Prosecutor v. Gotovina et al.*, [Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorney Čedo Prodanović and Jadranka Sloković](#), 29 June 2007, IT-06-90-AR73.2 (hereinafter: "ICTY *Gotovina et al.* Appeals Judgment"); ICTY, [Prlić et al. Appeals Judgment](#), para. 22.

<sup>69</sup> [Mokom OA Judgment](#), para. 59.

<sup>70</sup> [Mokom OA Judgment](#), para. 59.

<sup>71</sup> [Mokom OA Judgment](#), para. 60.



choosing with its duty to ensure the fairness of the proceedings, and the discretion to intervene with the appointment or removal of counsel.<sup>72</sup>

44. The Appeals Chamber notes that a chamber's duty pursuant to article 64(2) of the Statute to ensure a fair trial throughout the entirety of the proceedings is in keeping with its obligation under article 21 of the Statute to ensure that the application and interpretation of the law is consistent with internationally recognized human rights. Indeed, the right to a fair trial is a fundamental right under international human rights law.<sup>73</sup> A chamber must take a multifaceted approach to ensure the fairness of the proceedings. The Appeals Chamber considers that, as stated in the *Muthaura* OA3 Judgment, "ensuring that a person is suitable to act as counsel, preventing conflicts of interest, protecting the confidentiality of information and ensuring that one party does not have an unfair advantage arising therefrom and respecting the rights of the accused are features of a fair trial and also reflect the purposes underpinning article 12 (1) (b) of the Code".<sup>74</sup> Importantly, in doing so, the chamber in turn protects the rights of the accused, as well as those of the parties and participants to the proceedings.

45. The Appeals Chamber considers that a suspect's or an accused person's choice of counsel should be respected unless there are sufficient grounds to override this preference in order to ensure the fairness of the proceedings.<sup>75</sup> Any limitation of a person's right to choose counsel must be proportional to the need to protect the fairness of the proceedings and the interests of justice. However, where there exist exceptional circumstances in which the actions of counsel could jeopardise a person's right to a fair trial or affect the proper administration of justice, a chamber may take appropriate measures to ensure the fairness of the trial and the integrity of the proceedings, including ordering the withdrawal of counsel.<sup>76</sup>

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<sup>72</sup> [Mokom OA Judgment](#), para. 61.

<sup>73</sup> See International Covenant on Civil and Political Rights, article 14; European Convention on Human Rights, article 6; African Charter on Human and Peoples' Rights, article 7; American Convention on Human Rights, article 8.

<sup>74</sup> [The Prosecutor v. 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. 51.

<sup>75</sup> [Mokom OA Judgment](#), para. 58. See also ICTY, [Prlić et al. Appeals Judgment](#), para. 19.

<sup>76</sup> See ICTY, [Gotovina et al. Appeals Judgment](#), para. 16.

46. The Appeals Chamber recalls that articles 12 and 16 of the Code address impediments to representation and conflicts of interest. Regarding the duty of counsel to exercise due diligence, article 12(1)(a), “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 [...]

47. Furthermore, article 12(2) of the Code provides:

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.

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

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.

49. Regarding the Defence’s argument that the Pre-Trial Chamber confused the two provisions, the Appeals Chamber recalls that as indicated in the *Muthaura et al.* OA3 Judgment, the purposes underpinning article 12 of the Code are, *inter alia*, “ensuring that a person is suitable to act as counsel [and] preventing conflicts of interest”.<sup>77</sup> In the

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<sup>77</sup> [Muthaura et al. OA3 Judgment](#), para. 51 (emphasis added).

Appeals Chamber’s view, article 12 of the Code functions as the first layer of a safeguard protecting the fairness and integrity of the proceedings. It does so by prohibiting counsel from representing a client when the criteria of this provision have been met. This provision addresses instances where the case is “the same as or substantially related to another case”, where counsel was privy to confidential information as a staff member of the Court, or where there is a “substantial probability” that counsel or an associate will be called to appear as a witness. The safeguard provided by article 12 of the Code is in line with a chamber’s duty to ensure the fairness and expeditiousness of the trial, as set out in article 64(2) of the Statute.

50. This safeguard pertains to the stage at which counsel seeks to appear before the Court. In the event that counsel has any doubt about the application of the Code to his or her representation, he or she has a professional obligation to err on the side of caution and either decline to represent a client, or immediately bring the matter before the relevant chamber prior to agreeing to represent the client.<sup>78</sup>

51. Article 16 of the Code, on the other hand, has a broader scope. A conflict of interest within the meaning of this provision involves “counsel’s own interests or those of any other person, organisation or State”, that encompasses the conflict of interest between a client and a former client of counsel under article 12(1)(a) of the Code.

52. As indicated in article 12(4) of the Code, an overlap exists between articles 12 and 16 of the Code with respect to the incompatible interests of the clients. This understanding of the framework set out in the Code is reflected in the Appeals Chamber’s finding in the *Muthaura et al.* OA3 Judgment which provided that

[i]t is, in the first instance, counsel’s responsibility to ensure that an impediment to representation *and/or* conflict of interest does not arise, in accordance with his or her professional obligations under [articles 12 and 16 of] the Code.<sup>79</sup>

53. Accordingly, counsel must examine whether an impediment to representation and/or conflict of interest exists *before* seeking to appear before the Court to represent a client.

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<sup>78</sup> [Muthaura et al. OA3 Judgment](#), para. 55.

<sup>79</sup> [Muthaura et al. OA3 Judgment](#), para. 54 (emphasis added).

54. The Appeals Chamber considers that while the Code specifically governs counsel's professional obligations in respect of the accused's rights to, *inter alia*, counsel of his or her own choosing and an effective defence, a chamber's duty to ensure the fairness of the proceedings and the interests of justice, which encompass duties to fully respect the rights of the accused as well as to duly regard the protection of victims and witnesses, concern all stages and aspects of the proceedings before the chamber. Indeed, under articles 56(1)(b), 57(3)(c) and 61(1) of the Statute, the pre-trial chamber has the responsibility to protect a detained person, and to make sure that the suspect is aware of his or her rights, thereby giving effect to the rights of the suspect under articles 55 and 67 of the Statute. A chamber shall ensure the expeditiousness and fairness of the proceedings in respect of the rights of the suspect.<sup>80</sup>

**ii. The remedial measures in article 12(2) and article 16(3)(b) of the Code**

55. The Defence submits that article 12(2) and article 16(3)(b) of the Code contain different remedial measures.<sup>81</sup> This contention appears to be based on the premise that pursuant to article 12(2) of the Code, any consent obtained does not need to be provided in writing. In this respect, the Appeals Chamber recalls rule 73(1) of the Rules of Procedure and Evidence (hereinafter: the "Rules"), which provides that

communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(a) The person consents *in writing* to such disclosure; or

(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure [emphasis added].

56. The Appeals Chamber considers that in keeping with this provision, remedial measures in respect of conflicts of interest must be provided in writing. Furthermore, article 12(2) of the Code states that

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*

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<sup>80</sup> Article 64(2) of the Statute.

<sup>81</sup> [Appeal Brief](#), para. 12.

*of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence [emphasis added].*

57. The Appeals Chamber considers that in line with this provision, remedial measures in respect of conflicts of interest must be provided in writing. The Appeals Chamber therefore rejects the Defence's argument.

### **iii. Applying the standard to the Impugned Decision**

58. The Appeals Chamber will now address the core issue of whether the Pre-Trial Chamber erred in finding that Mr Kaufman's representation of P-1019 and Mr Adam presents a conflict of interest or impediment, and subsequently, whether the Pre-Trial Chamber erred in finding that this conflict or impediment cannot be remedied. Thus, the Appeals Chamber will apply the standard set out above to the reasoning in the Impugned Decision.

59. The Appeals Chamber recalls that, as noted above, the Pre-Trial Chamber was required to carefully balance the relevant interests at stake, that is, the right of the suspect or accused to choose counsel with the need to ensure the integrity of the proceedings and the discretion to intervene with the appointment or removal of counsel. The Appeals Chamber finds no error in the Pre-Trial Chamber's approach. In this regard, the Appeals Chamber notes that the Pre-Trial Chamber carefully considered relevant factors, including that (i) Mr Kaufman's represented high-ranking individuals on opposing sides of the same conflict, and how this may affect his ability to effectively and impartially represent Mr Mokom;<sup>82</sup> (ii) Mr Kaufman must have obtained information from Mr Adam during his representation of this client, and that such information could not be mechanically set aside;<sup>83</sup> and (iii) in relation to P-1019, Mr Mokom and P-1019 have agreed to the mutual sharing of information.<sup>84</sup> The Appeals Chamber agrees with the Pre-Trial Chamber's conclusion that such information could be detrimental to Mr Mokom at some stage in the proceedings. In this respect, and as set out in further detail below, the Appeals Chamber notes that a chamber must consider harm that may arise later in the proceedings that could ultimately affect the fairness of the trial.

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<sup>82</sup> [Impugned Decision](#), para. 21.

<sup>83</sup> [Impugned Decision](#), paras 21 and 26.

<sup>84</sup> [Impugned Decision](#), para. 24.

60. Furthermore, as highlighted by the Pre-Trial Chamber, Mr Kaufman should have brought the potential conflict of interest or impediment to the attention of the Registry. The Appeals Chamber notes that, as set out above, in the event that counsel has any doubt about a potential conflict of interest or impediment, he or she has a professional obligation to err on the side of caution and either decline to represent a client, or immediately bring the matter before the relevant chamber prior to agreeing to represent the client.<sup>85</sup> While Mr Kaufman was of the view that his representation of P-1019 and Mr Adam did not pose a conflict of interest or impediment, counsel should properly have raised the matter before the Pre-Trial Chamber, rather than substituting his own assessment regarding a conflict of interest, and potential remedies thereto. The Appeals Chamber notes the Pre-Trial Chamber's finding that Mr Kaufman's delayed action of securing waivers and terminating representation of a client only after the Pre-Trial Chamber sought submissions on the matter raises questions regarding Mr Kaufman's transparency and his ability to fully engage in Mr Mokom's defence.<sup>86</sup>

61. The Appeals Chamber concurs with the ICTY that "safeguarding the interests of justice requires not only the existence of a mechanism for removing conflicts of interest after they have arisen but also the *prevention* of such conflict before they arise".<sup>87</sup> Once a chamber is alert to the potential detrimental effect that may result from a conflict or impediment, it must consider whether intervention is necessary in order to ensure the fairness of the proceedings and the interests of justice. Where intervention is warranted, deferring such action to a later stage may result in a delay to the proceedings, which would in turn affect the right of the accused to be tried in an expeditious manner.

62. The Appeals Chamber considers that, in the particular circumstances of this case, it was not unreasonable for the Pre-Trial Chamber to determine that Mr Kaufman's representation of Mr Mokom presents a conflict of interest that impedes his appointment as counsel. Furthermore, the Appeals Chamber considers that the Defence has not demonstrated that the Pre-Trial Chamber erred in balancing Mr Mokom's right to appoint counsel of his choosing with its duty to ensure the fairness of the proceedings, and the discretion to intervene with the appointment or removal of

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<sup>85</sup> [Muthaura et al. OA3 Judgment](#), para. 55.

<sup>86</sup> [Impugned Decision](#), paras 24-25.

<sup>87</sup> ICTY, [Prlić et al. Appeals Judgment](#), para. 25 (emphasis added).

counsel. As noted above, in ensuring the fairness of the proceedings, a chamber must consider the detrimental effect that may arise at a later stage. While the Appeals Chamber stresses that a chamber must exercise caution when intervening in a person's choice of counsel, in certain rare circumstances, doing so may be necessary to ensure the fairness of the proceedings and the interests of justice.

63. In determining that no remedial measures were available, the Pre-Trial Chamber found that in the course of Mr Kaufman's exchanges with Mr Adam, Mr Kaufman must have obtained information in connection with events relevant to the proceedings, and that the information he learned could not be mechanically set aside and could ultimately be detrimental to Mr Mokom at some stage of the proceedings.<sup>88</sup> The Pre-Trial Chamber further considered that the waiver secured does not remedy the impediment or conflict of interest in respect to P-1019, and that it would have been incumbent on Mr Kaufman to raise a potential conflict of interest with the Registry and to have been forthcoming about his representation of other persons.<sup>89</sup>

64. As noted above, a chamber's obligation extends beyond simply determining whether a conflict of interest or impediment exists within the meaning of articles 12 and 16 of the Code. Rather, it has a broader duty to ensure the fairness of the proceedings and the interests of justice. In those instances, the conduct of counsel may rise to such a level that no remedial measures would suffice. While a chamber must take a limited approach in exercising its discretion to intervene with the selection of counsel, such intervention is possible when necessary to ensure the fairness of the proceedings. The Appeals Chamber considers that in the particular circumstances of the case, the fairness of the proceedings have been impacted such that no remedial measures are possible.

### 3. *Second ground of appeal*

65. Under the second ground of appeal, the Defence firstly submits that the Pre-Trial Chamber "failed to provide further 'precise and detailed reasons', which would clarify why the various stakeholders' interests are substantially similar and fundamentally incompatible, such that they render remedial measures impossible. In support, the

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<sup>88</sup> [Impugned Decision](#), paras 22, 26.

<sup>89</sup> [Impugned Decision](#), para. 24.

Defence argues that the Pre-Trial Chamber did not assess the possibility that either Mr Adam or P-1019 may testify in this case,<sup>90</sup> and that the scope of the armed conflict in the Central African Republic cannot be, in and of itself, a cause for an “irremediable conflict of interest”.<sup>91</sup> The Defence further presents its arguments under the two prongs of article 12(1)(a) of the Code: substantial similarity and fundamental incompatibility.<sup>92</sup> The Appeals Chamber will address, in turn, these submissions below.<sup>93</sup>

**i. Whether the Pre-Trial Chamber provided further precise and detailed reasons in support of its decision**

66. The Appeals Chamber observes that in its 25 March 2022 Order, 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, because 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. 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;<sup>94</sup> (ii) it was unclear whether Mr Kaufman had ended his representation of the other persons;<sup>95</sup> (iii) the signed note from Mr Mokom was provided after the Chamber’s order to provide observations;<sup>96</sup> 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”.<sup>97</sup> 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.<sup>98</sup>

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<sup>90</sup> [Appeal Brief](#), para. 17.

<sup>91</sup> [Appeal Brief](#), para. 18.

<sup>92</sup> [Appeal Brief](#), paras 19-25.

<sup>93</sup> [Appeal Brief](#).

<sup>94</sup> [25 March 2022 Order](#), para. 14

<sup>95</sup> [25 March 2022 Order](#), para. 15.

<sup>96</sup> [25 March 2022 Order](#), para. 14.

<sup>97</sup> [25 March 2022 Order](#), para. 18.

<sup>98</sup> [25 March 2022 Order](#), para. 14.



67. In light of the instructions of the Appeals Chamber as set forth in the *Mokom* OA Judgment, the Pre-Trial Chamber provided the following reasons for its determination:

(i) the two other individuals in question who were represented by Mr Kaufman, P-1019 and Mr Adam, are alleged to have been high-ranking members of the Seleka, the armed movement that opposed the group to which Mr Mokom allegedly belonged;<sup>99</sup>

(ii) Mr Adam is alleged to have held a senior role in the Seleka, while Mr Mokom is alleged to have held a senior role in the Anti-Balaka; “[t]he interests of persons who would have occupied high level functions/roles within the Seleka at the time of the relevant events, radically diverge from and are necessarily incompatible with those of Mr Mokom, who is alleged to have been a high-ranking member of the opposing movement, the Anti-Balaka”,<sup>100</sup>

(iii) having been “close to senior members of opposing sides, or being perceived as such, objectively affects a counsel’s ability to effectively and impartially represent a client, irrespective of the counsel’s good faith and professionalism”,<sup>101</sup>

(iv) after being given power of attorney by Mr Adam, Mr Kaufman enquired with the Prosecution as to the existence of a warrant of arrest for Mr Adam on several occasions, and that in the course of such exchanges and as part of his representation, Mr Kaufman must have obtained information from Mr Adam in connection with events relevant to the present proceedings;<sup>102</sup>

(v) Mr Kaufman secured waivers and terminated his representation of Mr Adam only after the Pre-Trial Chamber sought observations regarding a potential conflict or impediment, which raises questions about Mr Kaufman’s transparency and ability to fully engage in Mr Mokom’s defence, and impacts the value of the documents secured;<sup>103</sup>

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<sup>99</sup> [Impugned Decision](#), para. 18.

<sup>100</sup> [Impugned Decision](#), para. 21.

<sup>101</sup> [Impugned Decision](#), para. 21.

<sup>102</sup> [Impugned Decision](#), para. 22.

<sup>103</sup> [Impugned Decision](#), para. 25.

(vi) Mr Kaufman’s engagement with Mr Adam “objectively impairs his ability to fully and unreservedly pursue the interests of Mr Mokom” and that “[t]he information he learned during his contacts with Mr Adam cannot be mechanically set aside, and could be detrimental to Mr Mokom at some stage of the proceedings”;<sup>104</sup>

(vii) the waiver secured in relation to P-1019 does not remedy the impediment or conflict of interest, as Mr Kaufman should have raised a potential conflict of interest with the Registry;<sup>105</sup> and

(viii) the present case may be distinguished from the Trial Chamber V determination that proceedings related to the investigation of Seleka crimes are not substantially related to alleged crimes of the Anti-Balaka,<sup>106</sup> given that in this instance, Mr Kaufman has represented two persons for whom warrants of arrest have been issued.<sup>107</sup>

68. As noted above, the Appeals Chamber considers that in setting out further reasons in the Impugned Decision, the Pre-Trial Chamber has satisfied the conditions set forth by the Appeals Chamber in the *Mokom* OA Judgment. Therefore, the Appeals Chamber rejects the Defence’s general assertion that no further reasoning was provided.

## ii. Substantial Similarity

69. The Appeals Chamber firstly recalls that article 12(1)(a), “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 of 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 [...]

70. As noted above, article 12 of the Code prohibits counsel from representing a client when the criteria of this provision have been met. Article 12 of the Code addresses

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<sup>104</sup> [Impugned Decision](#), para. 26.

<sup>105</sup> [Impugned Decision](#), para. 24.

<sup>106</sup> [Impugned Decision](#), para. 19, referring to *Yekatom and Ngaïssona* Decision.

<sup>107</sup> [Impugned Decision](#), para. 19.

instances where the case is “the same as or substantially related to another case”, where counsel was privy to confidential information as a staff member of the Court, or where there is a “substantial probability” that counsel or an associate will be called to appear as a witness. The safeguard provided by article 12 of the Code is in line with a chamber’s duty to ensure the fairness and expeditiousness of the trial, as set out in article 64(2) of the Statute.

71. This safeguard pertains to the stage at which counsel seeks to appear before the Court. In the event that counsel has any doubt as to the application of the Code to his or her representation, counsel has a professional obligation to err on the side of caution and either decline to represent a client, or immediately bring the matter before the relevant chamber prior to agreeing to represent the client.<sup>108</sup>

72. In this context, the Appeals Chamber turns to examine whether, based upon all available information, the cases involving Mr Mokom and other clients are the same or substantially related. It firstly observes that Mr Mokom is alleged to have committed crimes in the Court’s jurisdiction pursuant to article 25(3)(a) and (c) of the Statute in “various locations in the [western CAR], including Bangui, Bossangoa, the Lobaye Prefecture, Yaloké, Gaga, Bossempaté, Boda, Carnot and Berberati”, “between at least 5 December 2013 and at least December 2014”.<sup>109</sup>

73. As noted above, Mr Kaufman represented P-1019 in an interview under article 55(2) of the Statute. Mr Kaufman represented Mr Adam during article 55 of the Statute interviews with the Prosecution at the investigation stage that preceded *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*.<sup>110</sup>

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<sup>108</sup> [Muthaura et al. OA3 Judgment](#), para. 55.

<sup>109</sup> [Warrant of Arrest for Mr Mokom](#), pp. 36-37.

<sup>110</sup> [Impugned Decision](#), para. 18.

74. In relation to P-1019, the Appeals Chamber notes that P-1019 (i) [REDACTED];<sup>111</sup> (ii) [REDACTED];<sup>112</sup> (iii) [REDACTED];<sup>113</sup> (iv) [REDACTED];<sup>114</sup> and (v) [REDACTED].<sup>115</sup>

75. The case against Mr Adam concerns his alleged criminal responsibility, pursuant to articles 25(3)(a), (b), (c) and (d) as well as 28(a) of the Statute, for crimes within the Court’s jurisdiction committed “at the OCRB and CEDAD detention centres in Bangui”, “between at least 12 April 2013 and at least 27 November 2013”.<sup>116</sup> At the time of the takeover of Bangui, Mr Adam was the leader of the CPJP-F faction and was considered to be the person with the most power in the Seleka, [REDACTED].<sup>117</sup>

76. The Appeals Chamber further recalls the Pre-Trial Chamber’s finding that P-1019 and Mr Adam were high-ranking members of the Seleka, an armed movement opposing the Anti-Balaka, the group of which Mr Mokom allegedly was a member; that both arrest warrants against Mr Adam and Mr Mokom state that there was a non-international armed conflict between the groups; and that each group made widespread and systematic attacks against the civilian population and those perceived to be associated with the other side.<sup>118</sup> Furthermore, following a *coup d’etat* by the Seleka, a pro-Bozizé counter-movement which would later become the Anti-Balaka was organised. The fighting between these groups culminated in an attack on 5 December 2013 in Bangui.<sup>119</sup> The Pre-Trial Chamber noted that Mr Mokom and Mr Adam held senior roles in the opposing groups, and that similar findings about the mentioned contextual elements led to the confirmation of the charges in the *Yekatom and Ngaiissona* case.<sup>120</sup>

77. The Appeals Chamber observes that the Pre-Trial Chamber addressed the arguments of the Defence regarding a decision in the *Yekatom and Ngaiissona* case in

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<sup>111</sup>[REDACTED]

<sup>112</sup>[REDACTED]

<sup>113</sup>[REDACTED]

<sup>114</sup>[REDACTED]

<sup>115</sup>[REDACTED]

<sup>116</sup> [Warrant of Arrest for Mr Adam](#), para. 2, p. 24.

<sup>117</sup>[REDACTED]

<sup>118</sup> [Impugned Decision](#), para. 18.

<sup>119</sup> [Impugned Decision](#), para. 18.

<sup>120</sup> [Impugned Decision](#), para. 18.

which counsel, who had previously represented the interests of the defence in the investigation of the Seleka crimes, was not prevented from representing an accused person who belonged to the Anti-Balaka.<sup>121</sup> In that case, Trial Chamber V found that proceedings in the investigation of the Seleka crimes are not “substantially the same as” or “substantially related to” a case against Anti-Balaka members.<sup>122</sup> The Pre-Trial Chamber noted that this finding “arose out of the specific facts before Trial Chamber V, and was made in relation to a counsel representing the interests of the defence pursuant to a measure adopted under article 56 of the Statute and subsequently representing one of the accused in the *Yekatom and Ngaïssona* case”.<sup>123</sup> The Pre-Trial Chamber found that the present situation is “distinguishable in that Mr Kaufman represented two persons for whom warrants of arrest have been issued (i.e. Mr Adam and Mr Mokom)”.<sup>124</sup> The Pre-Trial Chamber, therefore, concluded that “[d]ifferently to Trial Chamber V’s determination, [...] the proceedings involving Mr Kaufman’s other clients, and in particular with regard to Mr Adam, are substantially related to the proceedings against Mr Mokom, insofar as both arose from the conflict between the armed movements of which Mr Adam and Mr Mokom are respectively believed to have been high ranking members.”<sup>125</sup>

78. The Defence submits that given the abovementioned finding of Trial Chamber V in the *Yekatom and Ngaïssona* case, the Pre-Trial Chamber’s reasoning that the general scope of the armed conflict in the Situation in the Central African Republic produces an irremediable conflict of interest is “completely unfounded” and “legally flawed”.<sup>126</sup> In support, the Defence firstly argues that Mr Kaufman has not appeared in “substantially similar cases”, because article 12(1)(a) of the Code restricts “dual representation in substantially similar cases and not in substantially similar situational scenarios”,<sup>127</sup> and Mr Kaufman never represented Mr Adam “in a case but rather, if at all, in the CAR2 Situation”.<sup>128</sup> Secondly, according to the Defence, counsel in the *Yekatom and Ngaïssona* case would also appear to have been exposed to “‘diverging’

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<sup>121</sup> [Impugned Decision](#), para. 18.

<sup>122</sup> [Impugned Decision](#), para. 19.

<sup>123</sup> [Impugned Decision](#), para. 19.

<sup>124</sup> [Impugned Decision](#), para. 19.

<sup>125</sup> [Impugned Decision](#), para. 19.

<sup>126</sup> [Appeal Brief](#), paras 18, 20.

<sup>127</sup> [Appeal Brief](#), para. 20.

<sup>128</sup> [Appeal Brief](#), para. 20.

situational interests thereby falling afoul of the Pre-Trial Chamber’s ‘fundamentally incompatible’ test”.<sup>129</sup> In avers that the “precedent allowing ‘flipside’ representation in the same CAR2 situation” demonstrates the Pre-Trial Chamber’s “inconsistent and insufficient reasoning”.<sup>130</sup> Lastly, the Defence adds that the Appeals Chamber might have found that the cases implicating Mr Adam and Mr Mokom are not substantially similar, if the warrant for the arrest of Mr Adam had been available at the time the Appeals Chamber rendered its *Mokom* OA Judgment. For the reasons that follow, the Appeals Chamber rejects these arguments.

79. The Appeals Chamber finds no merit in the Defence’s first argument concerning article 12(1)(a) of the Code, as the Defence fails to provide any support for its restrictive interpretation of the provision, excluding representation of a client under investigation against whom a case could be brought. In this respect, the Appeals Chamber notes that the drafting history of the Code does not indicate that the drafters had the intention to limit the scope of article 12(1)(a) of the Code to only a “case” and exclude the representation of a client in the context of a “situation”.<sup>131</sup> Furthermore, the Appeals Chamber observes that while different standards of burden of proof apply for an investigation at the situational stage and a case at pre-trial or trial, this does not affect the scope of information that a client shares with his or her attorney, and thus does not render any difference between “situation” and “stage” in respect of the attorney-client relationship. In the view of the Appeals Chamber, under the first prong of the criteria set forth in article 12(1)(a) of the Code, it is sufficient that a case that could eventually be brought against a client under investigation is substantially related to that of another client under investigation or against whom there are charges. Therefore, the Appeals Chamber finds the Defence’s argument in this regard unconvincing.

80. Regarding the second argument with respect to the finding of Trial Chamber V in the *Yekatom and Ngaïssona* case, the Appeals Chamber notes that the correctness of the decision of Trial Chamber V is not under appeal, and that, in any event, according

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<sup>129</sup> [Appeal Brief](#), para. 20.

<sup>130</sup> [Appeal Brief](#), para. 20.

<sup>131</sup> The Presidency’s “Proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court” shows that the word “case” was used from the early version of the provision as presented to the Assembly of State Parties. *See* Proposal for a draft Code of Professional Conduct for counsel before the International Criminal Court, 6-10 September 2004, article 11.

to article 21(2), which provides that chambers of the Court “*may* apply principles and rules of law as interpreted in its previous decisions”,<sup>132</sup> the Pre-Trial Chamber was not bound to follow the decision. That notwithstanding, the Pre-Trial Chamber provided reasons that distinguish the circumstances of this case from that of the *Yekatom and Ngaïssona* case.<sup>133</sup> Moreover, the Appeals Chamber observes that contrary to the Defence’s assertion, it does not appear that Trial Chamber V has allowed “‘flipside’ representation”.<sup>134</sup> [REDACTED].<sup>135</sup> [REDACTED].<sup>136</sup> [REDACTED]. For this reason, the Appeals Chamber finds the Defence’s argument in this respect to be misleading.

81. Lastly, the Appeals Chamber finds the Defence’s argument relating to the availability of the warrant of arrest for Mr Adam speculative and unsubstantiated.<sup>137</sup> It recalls that in regard to factual allegations, the Appeals Chamber’s “review is corrective and not *de novo*”, and that it “will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”.<sup>138</sup> It further recalls that for an error to have material effect on the impugned decision, “it must be demonstrated that, had the Trial Chamber not erred [...], the decision under article 74 of the Statute *would* (as opposed to ‘could’ or ‘might’) have been *substantially* different”.<sup>139</sup> This standard has also been applied in the context of interlocutory appeals against decisions of a pre-trial chamber.<sup>140</sup> The Defence’s argument, nevertheless, fails to clearly identify an error in the Impugned Decision or the 25 March 2022 Order. Instead, it submits that, had the warrants of arrests been available earlier, the Appeals Chamber “might” have found that the cases implicating Mr Adam and Mr Mokom are not substantially similar.<sup>141</sup> Not only does the Defence

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<sup>132</sup> Emphasis added.

<sup>133</sup> [Impugned Decision](#), para. 19.

<sup>134</sup> [Appeal Brief](#), para. 20.

<sup>135</sup> [REDACTED]

<sup>136</sup> [REDACTED]

<sup>137</sup> [Appeal Brief](#), para. 21.

<sup>138</sup> [Gbagbo OA10 Judgment](#), para. 16 (footnotes omitted).

<sup>139</sup> [Ngudjolo Appeal Judgment](#), para. 285 (emphasis in original). *See also* paras 20-21; [Lubanga Appeal Judgment](#), paras 19-20; [Bemba et al. Appeal Judgment](#), para. 90.

<sup>140</sup> *Situation in The Democratic Republic of The Congo*, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”](#), 13 July 2006, ICC-01/04-169, para. 84 (emphasis added).

<sup>141</sup> [Appeal Brief](#), para. 21.

misunderstand the corrective nature of the Appeals Chamber's review, but it further fails to demonstrate that the Impugned Decision, or the 25 March 2022 Order for that matter, would have been different. The Appeals Chamber therefore dismisses this argument.

82. That notwithstanding, the Appeals Chamber notes the Defence's contention that the arrest warrant against Mr Adam "reveals charges that relate to a completely different time-period and geographical location than those cited in the charges [levelled] at Mr. Mokom".<sup>142</sup> To the extent that the Defence argues that the Pre-Trial Chamber failed to address this point, thereby showing the lack of reasoning of the Impugned Decision,<sup>143</sup> the Appeals Chamber will address this argument below under the third ground of appeal.

### **iii. Fundamental incompatibility**

83. The Defence argues that (i) the Pre-Trial Chamber failed to provide reasons as to how Mr Kaufman's representation of Mr Adam and P-1019 would be "fundamentally incompatible",<sup>144</sup> and that (ii) the Pre-Trial Chamber erred in finding that having been close to senior members of opposing sides, or being perceived as such, objectively affects counsel's ability to effectively and impartially represent a client.<sup>145</sup> It adds that (iii) the Pre-Trial Chamber failed to indicate the nature of the potentially detrimental information and to consider Mr Kaufman's observations and affidavit, "both of which fully address the extremely limited nature of the now-terminated engagement" between Mr Kaufman and Mr Adam.<sup>146</sup>

84. The Appeals Chamber notes that the Pre-Trial Chamber provided further reasoning in relation to its previous finding in the 25 March 2022 Order that the interests of P-1019 and Mr Adam are fundamentally incompatible with those of Mr Mokom.<sup>147</sup> The Pre-Trial Chamber observed that it took into account the abovementioned nature and scope of the conflict, and that both P-1019 and Mr Adam are alleged to have been "prominent figures" of the Seleka at the relevant time. In particular, the Pre-Trial

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<sup>142</sup> [Appeal Brief](#), para. 21.

<sup>143</sup> [Appeal Brief](#), para. 21.

<sup>144</sup> [Appeal Brief](#), para. 22.

<sup>145</sup> [Appeal Brief](#), para. 23.

<sup>146</sup> [Appeal Brief](#), para. 25.

<sup>147</sup> [Impugned Decision](#), para. 20.



Chamber noted that “Mr Adam would have been the leader of a faction of the Seleka, the Minister for Security in charge and *de facto* in control of a detention facility, and the director general of another detention facility after stepping down as Minister for Security”.<sup>148</sup> The Pre-Trial Chamber considered that the interests of high-level officials of the Seleka at the time of the relevant events “radically diverge from and are necessary incompatible with those of Mr Mokom”, and stated that

the representation of clients belonging to opposing sides in which they occupy senior roles, especially in the context of a conflict between two groups with relatively small leaderships, whose factions and alliances changed several times, is incompatible. Being, or having been, close to senior members of opposing sides, or being perceived as such, objectively affects a counsel’s ability to effectively and impartially represent a client, irrespective of the counsel’s good faith and professionalism.<sup>149</sup>

85. Specifically, in the context of this case, the Pre-Trial Chamber, on the basis of the information before it, recalled that Mr Kaufman received a power of attorney from Mr Adam in 2020, and that he enquired with the Prosecution as to whether there were any arrest warrants against Mr Adam, and if the Prosecution “contemplated discussing the possibility of Mr Adam’s surrender with Mr Kaufman”.<sup>150</sup> In this context, the Pre-Trial Chamber observed that “Mr Kaufman must have obtained information from Mr Adam in connection with events relevant to these proceedings”.<sup>151</sup> In support, the Pre-Trial Chamber referred to a letter of Mr Kaufman, dated 18 May 2022, where he indicates that he terminated his representation of Mr Adam, acknowledging that “no information he had acquired from him ‘can be used to Mr Mokom’s advantage, and that there was no expectation that he, Mr Kaufman, ‘should withhold information from [Mr Adam]’ relevant to Mr Mokom defence”.<sup>152</sup> The Pre-Trial Chamber found that “Mr Kaufman would be precluded from using any information obtained in connection with his representation of Mr Adam to his detriment, also if it would benefit Mr Mokom”.<sup>153</sup>

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<sup>148</sup> [Impugned Decision](#), para. 21.

<sup>149</sup> [Impugned Decision](#), para. 21.

<sup>150</sup> [Impugned Decision](#), para. 22.

<sup>151</sup> [Impugned Decision](#), para. 22.

<sup>152</sup> [Impugned Decision](#), para. 22.

<sup>153</sup> [Impugned Decision](#), para. 22.

86. At the outset, the Appeals Chamber notes that while Mr Kaufman sent a letter to terminate his representation of Mr Adam, dated 18 May 2022, and submitted to the Pre-Trial Chamber on 22 July 2022, Mr Kaufman failed to seek the prior consent of the Chamber to withdraw from representation, pursuant to article 16(3)(a) of the Code.

87. Furthermore, and contrary to the Defence's argument that the Pre-Trial Chamber failed to provide reasons as to how Mr Kaufman's representation of Mr Adam and P-1019 would be "fundamentally incompatible",<sup>154</sup> the Appeals Chamber observes that having referred to its previous finding in the 25 March 2022 Order that the interests of P-1019 and Mr Adam are fundamentally incompatible with those of Mr Mokom,<sup>155</sup> the Pre-Trial Chamber indeed issued a new decision with additional reasons.<sup>156</sup> While the Appeals Chamber will examine below whether these reasons were correct and, as the Defence puts it, "hardly differ" from those of the 25 March 2022 Order,<sup>157</sup> the Appeals Chamber does not find that the Pre-Trial Chamber failed to provide any reasoning on remand on this point. Therefore, the Appeals Chamber rejects the Defence's general assertion that no further reasoning was provided.

88. Turning to the Defence's contention that the Pre-Trial Chamber erred in finding that having been close to senior members of opposing sides, or being perceived as such, objectively affects counsel's ability to effectively and impartially represent a client,<sup>158</sup> the Appeals Chamber considers that the Defence merely disagrees with the standard set by the Pre-Trial Chamber without providing any reasons as to why this would be incorrect as a matter of law. In particular, the Pre-Trial Chamber found that "[b]eing, or having been, close to senior members of opposing sides, or being perceived as such, objectively affects a counsel's ability to effectively and impartially represent a client, irrespective of the counsel's good faith and professionalism".<sup>159</sup> Without arguments from the Defence challenging this standard regarding the prong of "fundamental incompatibility", the Appeals Chamber is unable to find an error of law thereon.

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<sup>154</sup> [Appeal Brief](#), para. 22.

<sup>155</sup> [Impugned Decision](#), para. 20.

<sup>156</sup> [Impugned Decision](#), paras 20-22.

<sup>157</sup> [Appeal Brief](#), para. 23.

<sup>158</sup> [Appeal Brief](#), para. 23.

<sup>159</sup> [Impugned Decision](#), para. 21.

89. The Appeals Chamber notes that the Defence does not challenge the legal basis of the standard set by the Pre-Trial Chamber. Rather, the Defence argues that the Pre-Trial Chamber’s finding that Mr Kaufman “must have” obtained information from Mr Adam that cannot be set aside, and that such information could ultimately be detrimental to Mr Mokom is speculative.<sup>160</sup> The Appeals Chamber recalls that with regard to factual allegations, the review of the Appeals Chamber “is corrective and not *de novo*”, and that it “will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.<sup>161</sup> For the reasons that follow, the Appeals Chamber is unable to find that the Pre-Trial Chamber’s conclusion was unreasonable.

90. The Appeals Chamber observes that the Pre-Trial Chamber examined the information before it, and recalled that Mr Kaufman received a power of attorney from Mr Adam in 2020, and that on that basis, he enquired with the Prosecution as to whether there was an arrest warrant against Mr Adam and if the Prosecution had “contemplated discussing the possibility of Mr Adam’s surrender with Mr Kaufman”.<sup>162</sup> In this context, the Pre-Trial Chamber noted that “Mr Kaufman must have obtained information from Mr Adam in connection with events relevant to these proceedings”.<sup>163</sup> In support, the Pre-Trial Chamber referred to a letter of Mr Kaufman, dated 18 May 2022, where he indicates that he terminated his representation of Mr Adam, acknowledging that “no information he had acquired from him ‘can be used to Mr Mokom’s advantage, and that there was no expectation that he, Mr Kaufman, ‘should withhold information from [Mr Adam]’ relevant to Mr Mokom[’s] defence”.<sup>164</sup> The Pre-Trial Chamber found that “Mr Kaufman would be precluded from using any information obtained in connection with his representation of Mr Adam to his detriment, also if it would benefit Mr Mokom”.<sup>165</sup>

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<sup>160</sup> [Appeal Brief](#), paras 24-25.

<sup>161</sup> [Gbagbo OA10 Judgment](#), para. 16 (footnotes omitted).

<sup>162</sup> [Impugned Decision](#), para. 22.

<sup>163</sup> [Impugned Decision](#), para. 22.

<sup>164</sup> [Impugned Decision](#), para. 22.

<sup>165</sup> [Impugned Decision](#), para. 22.

91. The Appeals Chamber finds that this assessment was substantiated and within the Pre-Trial Chamber’s purview, and the Appeals Chamber is not called to make a *de novo* assessment in these circumstances.

92. In this regard, the Appeals Chamber firstly recalls that a chamber may determine whether there is an impediment to representation under the Code on the basis of articles 64(2) and (3)(a) of the Statute, in order to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner.<sup>166</sup> It further recalls that “protecting the integrity of the proceedings - in particular their fairness and expedition in the specific context under consideration - is a matter that is necessarily within the jurisdiction of the Pre-Trial Chamber”.<sup>167</sup>

93. Moreover, as set out in the jurisprudence of the ICTY, and as noted above, an accused’s right to defence counsel of his or her own choosing is not without limits, and “the choice of any accused regarding his Defence counsel in proceedings before the International Tribunals should be respected unless there are sufficient grounds to override the accused’s preference in the interests of justice”.<sup>168</sup> The Appeals Chamber recalls that “the accused’s choice [of counsel] might be overridden”,<sup>169</sup> and that “one of the limits to the accused’s choice is the existence of a conflict of interests affecting his counsel”.<sup>170</sup> Ultimately, the issue of qualification, appointment, and assignment of counsel is “open to judicial scrutiny”.<sup>171</sup>

94. In this context, the Appeals Chamber notes the finding of the ICTY Appeals Chamber that states:

[A] conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interest of the client and the wider interests of justice. Safeguarding the interests of justice requires the prevention of potential conflicts of interest before they arise. If a Chamber determines that the risks and damage that could be caused are such as to jeopardise the right of the accused to a fair and expeditious trial or proper administration of justice, it takes the appropriate measure

<sup>166</sup> [Muthaura et al. OA3 Judgment](#), para. 46.

<sup>167</sup> [Muthaura et al. OA3 Judgment](#), para. 46.

<sup>168</sup> ICTY, [Prlić et al. Appeals Judgment](#), para. 19.

<sup>169</sup> ICTY, [Prlić et al. Appeals Judgment](#), para. 19.

<sup>170</sup> ICTY, [Prlić et al. Appeals Judgment](#), para. 19.

<sup>171</sup> ICTY, [Prlić et al. Appeals Judgment](#), para. 21.

to restore and protect the fairness of trial and integrity of proceedings. It has been held that such measures can include ordering withdrawal of counsel.<sup>172</sup>

95. In the view of the Appeals Chamber, this is consistent with internationally recognised human rights. The ECtHR and other international human rights bodies suggest that the authorities may be required to intervene and ensure effective representation when a defence counsel's incompetence is either "manifest"<sup>173</sup> or "sufficiently brought to the authorities' attention".<sup>174</sup> Human rights jurisprudence is clear that a defendant in a criminal trial should not be represented by counsel who has a conflict of interest.<sup>175</sup>

96. As set out above, a chamber must 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. A chamber's obligation to protect the fairness of the proceedings and the interests of justice encompasses a broader scope than that of articles 12 and 16 of the Code. On this basis, a chamber must also take into account the potential harm that may arise later in the proceedings. In the particular facts of this case, the Appeals Chamber considers that the actions of counsel, taken as a whole, affect the fairness of the proceedings such that no remedial measures are available. On this basis, the Appeals Chamber does not find that the Pre-Trial Chamber was unreasonable in its determination. The Appeals Chamber therefore rejects the second ground of appeal.

#### 4. *Third ground of appeal*

97. The Appeals Chamber observes that in its third ground of appeal, the Defence submits that the Pre-Trial Chamber erred by finding that "it would have been incumbent on Mr Kaufman to raise a potential conflict of interest with the Registry and have been forthcoming about his representation of these other persons",<sup>176</sup> and that the waiver

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<sup>172</sup> ICTY, [Gotovina et al. Appeals Judgment](#), para. 16.

<sup>173</sup> HRC, [General Comment No. 32 \(2007\)](#), para. 38; ECtHR, [Güveç v. Turkey](#) (App. no. 70337/01), 20 January 2009, para. 130.

<sup>174</sup> ECtHR, [Kamasinski v. Austria](#) (App. no. 9783/82), 19 December 1989, para. 65; *see also* IACtHR, [DaCosta Cadogan v. Barbados](#) (Series C, no. 204), 24 September 2009, para. 93; ICTY, [Prosecutor v. Tadić \(IT-94-1-A\) Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence](#), 15 October 1998, para. 65.

<sup>175</sup> ECtHR, [Moldoveanu v. Romania](#) (App. no. 4238/03), 19 June 2012, paras 74–76.

<sup>176</sup> [Appeal Brief](#), para. 26.

provided by P-1019 and the termination of representation letter sent to Mr Adam were of questionable value, as their late submission “raises questions about Mr. Kaufman’s transparency and ability to fully engage in Mr. Mokom’s defence”.<sup>177</sup> As noted above, the Appeals Chamber will examine, under this ground of appeal, the Defence’s arguments in relation to Mr Kaufman’s 17 March 2022 observations and 24 July 2022 affidavit which are presented under the second ground of appeal,<sup>178</sup> along with the Defence’s contention as regards the 13 April 2022 waiver obtained from P-1019.<sup>179</sup>

98. At the outset, the Appeals Chamber recalls that the Code provides avenues to cure both an impediment to representation and a conflict of interest. Article 12(1)(a) and 12(2) of the Code state that counsel may represent a client in cases where the criteria set forth in the provision is met, if “the client and the former client consent after consultation” and counsel then “[informs] the chamber of the Court seized with the situation or case of the conflict and the consent obtained”. Article 16(3)(b) of the Code stipulates that where a conflict of interest arises, “counsel shall at once inform all potentially affected clients of the existence of the conflict and either” “[w]ithdraw from the representation of one or more clients with the prior consent of the Chamber” or “[s]eek the full and informed consent in writing of all potentially affected clients to continue representation”.

99. The Appeals Chamber further recalls that the Pre-Trial Chamber, in a different composition, previously found that the existence of a conflict of interest entails counsel’s duty to decline representation “only in the event that no ‘full and informed’ consent from the affect client(s) can be obtained”, and that “fully informed consent by the client has been considered as an appropriate mechanism for addressing the risk of conflicts of interest”.<sup>180</sup>

100. In this regard, the Appeals Chamber notes that consent provided by a potentially affected client or former client to remove a conflict of interest upon consultation with counsel should generally be regarded as fully informed in the absence of an indication

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<sup>177</sup> [Appeal Brief](#), para. 28.

<sup>178</sup> [Appeal Brief](#), para. 25.

<sup>179</sup> [Appeal Brief](#), para. 27.

<sup>180</sup> Pre-Trial Chamber II, [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. 3.

to the contrary.<sup>181</sup> However, in the view of the Appeals Chamber, such presumption could be made in this case only if the potentially affected clients of Mr Kaufman had been fully aware of all possible implications and possible limitations that Mr Kaufman’s representation could impose upon their defence.<sup>182</sup> Moreover, the Appeals Chamber recalls that such consent, even if found to be fully informed, is not conclusive of there being no conflict of interest. Even if clients have agreed to mutual representation, this does not relieve the chamber of its responsibility to protect the fairness of the proceedings, and ensure that the interests of justice are met.<sup>183</sup>

101. In this context, the Appeals Chamber notes that the Pre-Trial Chamber referred to its previous finding that Mr Kaufman’s impediment to representation or conflict of interest cannot be remedied as provided under articles 12(1)(a) and 16(3) of the Code, and provided further reasons.<sup>184</sup> In this regard, the Pre-Trial Chamber noted the Defence’s reference to a document of April 2022 containing a waiver of the existence of an impediment to representation or a conflict of interest in relation to P-1019, and its submission that Mr Mokom and P-1019 agreed to the mutual sharing of information that could impact the defence of one another.<sup>185</sup> The Pre-Trial Chamber considered that this document did not “remedy the impediment or conflict of interests with regard to P-1019”, because given Mr Kaufman’s representation of multiple persons within the same situation, “it would have been incumbent on Mr Kaufman to raise a potential conflict of interest with the Registry and have been forthcoming about his

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<sup>181</sup> See, for example, ICTY, [Gotovina et al. Appeals Judgment](#), para. 33; [Prlić et al. Appeals Judgment](#), para. 27.

<sup>182</sup> See ICTY, [Gotovina et al. Appeals Judgment](#), para. 33.

<sup>183</sup> See ICTY, [Prlić et al. Appeals Judgment](#), para. 27; ICTY, [Gotovina et al. Appeals Judgment](#), para. 35; ICTY, Trial Chamber II, *Prosecutor v. Zdravko Tolimir, Radivoje Miletic, Milan Gvero*, [Decision on appointment of co-counsel for Radivoje Miletic](#), 28 September 2005, IT-05-88-PT, para. 32. See also *United States v. Vasquez*, 995 F.2d 40, 45 (5<sup>th</sup> Circuit 19930); *Wheat v. United States*, 486 US 153,162-163, 108 S. Ct.1692,1698-99; *United States v. Medina*, 161 F.3d 867, 870 (5<sup>th</sup> Circuit 1998), *United States v. Rico*, 51 F.3d495, 511 (5<sup>th</sup> Circuit 1995); Argentina. Poder Judicial de la Nación –Camara nacional de apelaciones en lo criminal y correccional – sala 7 CCC 30579/2012/CA2 - CA1 – “[B., E. J.?](#)”, [Designación defensor. Estafa](#). I. 9 (case 30579/2012), March 2, 2016; Cour de cassation, 1<sup>ère</sup> Ch.civ., 20 January 1993, Bull. n. 91-15.548; *Law Society of Upper Canada v. Carlesso*, 2014 ONLSTH 129, LCN62/13, 7 July 2014: “[e]ven with proper consent a lawyer may not act or continue to act where a conflicting interest actually impairs the client representation. To be clear, while clients can ‘waive conflicts’ in proper circumstances, client consent does not permit a lawyer to act without fidelity to law. A client is not entitled to authorize a lawyer to act unlawfully”; Supreme Court of Canada, *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), 3 SCR 1235, 4-10 May 1990; *R v. Neil*, 2002 3 SCR 631, 2002, SCC 70, 25 January 2002.

<sup>184</sup> [Impugned Decision](#), para. 24.

<sup>185</sup> [Impugned Decision](#), para. 24.

representation of these other persons”.<sup>186</sup> The Pre-Trial Chamber considered that it should not have been for it, but for Mr Kaufman, to bring this matter to light.<sup>187</sup> The Pre-Trial Chamber observed that it was “[o]nly in response to the Chamber’s query” that “Mr Kaufman sought waivers and ended his representation of other clients involved in the CAR II situation”, which “raises questions about Mr Kaufman’s transparency and ability to fully engage in Mr Mokom’s defence”, and further “impacts the value of the subsequent documents provided to the Chamber”.<sup>188</sup>

102. Turning to the submission of the Defence concerning Mr Kaufman’s 17 March 2022 observations and 24 July 2022 affidavit, the Appeals Chamber finds no error in the Pre-Trial Chamber’s finding that “Mr Kaufman’s 24 July 2022 Affidavit is not sufficient to remedy the said impediment or conflict of interest”.<sup>189</sup> Regarding the Defence’s argument that the Pre-Trial Chamber “disregarded, without reason,” these documents,<sup>190</sup> the Appeals Chamber recalls that it is not necessary for a chamber to refer in its reasons to every piece of evidence on the record.<sup>191</sup> In any event, the Appeals Chamber notes that the Pre-Trial Chamber addressed these documents in paragraphs 26 and 27 of the Impugned Decision to conclude that “Mr Kaufman’s 24 July 2022 Affidavit is not sufficient to remedy the said impediment or conflict of interest”.<sup>192</sup>

103. Furthermore, in the view of the Appeals Chamber, the Defence’s contention that the 24 July 2022 affidavit, in the absence of written consent from Mr Adam, was sufficient is based on its incorrect assumption that article 12(2) of the Code does not require a written waiver of consent. As found above under the first ground of appeal, pursuant to article 12(2) of the Code, read together with rule 73(1)(a) of the Rules, it is required that the consent provided be in writing. Therefore, the Appeals Chamber considers that it is not unreasonable that the Pre-Trial Chamber found the 24 July 2022 affidavit to be insufficient as a remedial measure.

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<sup>186</sup> [Impugned Decision](#), para. 24.

<sup>187</sup> [Impugned Decision](#), para. 24.

<sup>188</sup> [Impugned Decision](#), para. 25.

<sup>189</sup> [Impugned Decision](#), para. 27.

<sup>190</sup> [Appeal Brief](#), para. 25.

<sup>191</sup> [Bemba et al. Judgment](#), para. 105.

<sup>192</sup> [Impugned Decision](#), para. 27.



104. As regards the Defence’s argument that Mr Kaufman informed the Pre-Trial Chamber about his representation of Mr Adam and P-1019 as early as 18 July 2017,<sup>193</sup> the Appeals Chamber notes that these power of attorney forms were submitted in the situation stage of the proceedings, before a different composition of the Pre-Trial Chamber, and prior to Mr Kaufman’s representation of Mr Mokom. The Appeals Chamber will consider below whether this action was sufficient to satisfy Mr Kaufman’s professional obligations in respect to his representation of Mr Mokom.

105. The Appeals Chamber notes that article 16(1) of the Code, in its relevant part, requires that “[c]ounsel *shall* exercise all care to ensure that no conflict of interest arises”. It recalls that when considering the ordinary meaning of a provision, it is possible to rely on grammatical forms such as the tense of a sentence.<sup>194</sup> In this context, the Appeals Chamber observes that the obligation imposed on counsel is prospective, requiring him or her to continuously ensure that no conflict of interest arises between his or her clients and him or herself, or any other client that counsel may eventually represent. Similarly, the ICTY Appeals Chamber has found that “a conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or *could* prejudice, the interest of the client and the wider interests of justice”.<sup>195</sup> The ICTY Appeals Chamber has further determined that whether or not a client has provided counsel with confidential information is not the deciding factor, “since this factor is not the only basis on which a conflict of interest can be reasonably anticipated”. The ICTY Appeals Chamber further stated that:

Indeed, where a Chamber can reasonably expect that, due to a conflict of interest, a counsel “may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage, in order to avoid prejudicing another client”, it cannot longer presume that counsel has fulfilled his or her professional obligations under the Code of Conduct and has the power and the duty to intervene in order to guarantee or restore the integrity of the proceedings without delay.<sup>196</sup>

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<sup>193</sup> [Appeal Brief](#), para. 27.

<sup>194</sup> For treaties, see *mutatis mutandi* article 31 of the Vienna Convention on the Law of Treaties; see also O. Dörr, “Article 31. General rule of interpretation”, in O. Dörr, et al. (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521, at para. 42.

<sup>195</sup> See ICTY, [Gotovina et al. Appeals Judgment](#), para. 16 (emphasis added).

<sup>196</sup> See ICTY, [Gotovina et al. Appeals Judgment](#), para. 23.

106. In the present case, Mr Kaufman’s professional obligations under the Code did not cease to exist at the time of his submission of said power of attorney forms in 2017. Rather, Mr Kaufman was still duty-bound, pursuant to the Code, at the moment when he was retained to represent Mr Mokom. It is, therefore, not unreasonable for the Pre-Trial Chamber to have found that “it would have been incumbent on Mr Kaufman to raise a potential conflict of interest with the Registry and have been forthcoming about his representation of these other persons”.<sup>197</sup> In these circumstances, the Appeals Chamber finds no error in the Pre-Trial Chamber’s assessment in this regard.

107. In light of the foregoing, the Appeals Chamber rejects this ground of appeal.

#### 5. *Fourth ground of appeal*

108. Under the fourth ground of appeal, the Defence submits that the Pre-Trial Chamber failed to consider the following documents: (i) the 13 April 2022 waiver obtained from P-1019, and (ii) Mr Kaufman’s 18 May 2022 letter, terminating his representation of Mr Adam.<sup>198</sup>

109. The Appeals Chamber recalls that regulation 58(2) of the Regulations requires the appellant to refer to “the relevant part of the record or any other document or source of information as regards any factual issue” and “to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof” as regards any legal issue. The provision also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number. It further recalls that an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred.<sup>199</sup>

110. The Appeals Chamber notes that the submissions under the fourth ground of appeal are presented in one paragraph without any footnotes or specific references as to the precise part of the Impugned Decision that the Defence is challenging nor the

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<sup>197</sup> [Impugned Decision](#), para. 24.

<sup>198</sup> [Appeal Brief](#), para. 33.

<sup>199</sup> *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), paras 47-48; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A 5), para. 30; [Kony OA3 Judgment](#), para. 48.

applicable law upon which the Defence is relying. The Appeals Chamber, therefore, finds that this ground is insufficiently substantiated.

111. In any event, the fact that the Pre-Trial Chamber does not explicitly mention a piece of evidence in the record does not mean that it did not review it. In this regard, the Appeals Chamber recalls that it is not necessary for a chamber to refer in its reasons to every piece of evidence on the record.<sup>200</sup> A chamber's reasoning may be defective "if it completely disregarded evidence which is clearly relevant to its findings".<sup>201</sup> It is not possible to conclude, neither from the Impugned Decision nor the scarce submissions presented by the Defence, that the Pre-Trial Chamber necessarily ignored the documents to which this ground of appeal refers.

112. In view of the foregoing, the fourth ground of appeal is dismissed.

113. In light of the above, the majority of the Appeals Chamber, Judge Ibáñez Carranza and Judge Bossa dissenting, considers it appropriate to confirm the Impugned Decision issued in support of the 25 March 2022 Order, removing Mr Kaufman as counsel to Mr Mokom. The Appeals Chamber notes that Mr Mokom is free to select alternate counsel of his choosing, and that pursuant to article 18(5) of the Code, Mr Kaufman and duty counsel shall convey to replacement counsel the entire case file, including any material or document relating to it.

## VII. APPROPRIATE RELIEF

114. 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.<sup>202</sup> In the present case, it is appropriate to confirm the Impugned Decision in support of the 25 March 2022 Order, removing Mr Kaufman as counsel to Mr Mokom.

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<sup>200</sup> [Bemba et al. Judgment](#), para. 105.

<sup>201</sup> [Bemba et al. Judgment](#), para. 1540. See also [Ntaganda A A2 Judgment](#), para. 38, *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled 'Decision on the "Prosecution's Request for Extension of Contact Restrictions"'](#), 17 May 2022, ICC-01/14-01/21-111-Red2 (OA) (confidential version notified on 26 June 2021), para. 38.

<sup>202</sup> See rule 158(1) of the Rules.

115. In light of this decision and considering that Mr Mokom is currently represented by duty counsel on a temporary basis, the Registry is directed to liaise with Mr Mokom regarding his alternate selection of counsel.

116. Judge Ibáñez Carranza and Judge Bossa append a 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 December 2022

At The Hague, The Netherlands