



**DISSENTING OPINION OF JUDGE SOLOMY BALUNGI BOSSA
AND JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA**

I. INTRODUCTION

1. This appeal arises from the 25 March 2022 order of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”), removing Mr Nicholas Kaufman (hereinafter: “Mr Kaufman”) as legal counsel to Mr Maxime Jeoffroy Eli Mokom Gawaka Mokom (hereinafter: “Mr Mokom”). The Pre-Trial Chamber, acting *proprio motu*, determined that Mr Kaufman’s representation of persons of interest in the *Situation in the Central African Republic II* constituted a conflict of interest that could not be remedied through obtaining the written consent of potentially affected clients or withdrawing from representation.¹

2. In the *Mokom* OA Judgment, the Majority of the Appeals Chamber reversed the 25 March 2022 Order and remanded the matter to the Pre-Trial Chamber, and directed it to “issue a new decision on the matter based upon all available information, setting out precise and detailed reasons” in support of its decision ordering the removal of Mr Kaufman as counsel to Mr Mokom.² The Appeals Chamber found that “the reasons underlying the determination of the Pre-Trial Chamber are not fully set out” in the 25 March 2022 Order, and as such, the Appeals Chamber was unable to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr Kaufman as counsel.³

¹ [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 notified on 25 March 2022).

² [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 (OA) (confidential version notified same day) (hereinafter: “*Mokom* OA Judgment”), para. 68.

³ [Mokom OA Judgment](#), para. 68.

3. In our partially dissenting opinion to the *Mokom* OA Judgment, we agreed with the Majority's affirmation of the law governing the appointment and removal of counsel. However, we disagreed with the Majority as to the appropriate relief. We put forward that we would have granted the appeal and reversed the 25 March 2022 Order, finding that the Pre-Trial Chamber improperly exercised its discretion by *proprio motu* ordering the Registry to revoke Mr Kaufman's appointment.⁴

4. After receiving further submissions from the parties in relation to a potential conflict of interest regarding Mr Kaufman's representation of Mr Mokom, the Pre-Trial Chamber, on 19 August 2022, issued the "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022" (hereinafter: "Impugned Decision"), affirming its original finding that Mr Kaufman's representation of Mr Mokom would pose a conflict of interest or impediment pursuant to articles 12 and 16 of the Code of Professional Conduct for counsel (hereinafter: "Code").⁵ The Defence challenges the aforementioned decision.

5. The Pre-Trial Chamber granted the Defence's request for leave to appeal on the following issue:

Whether the Chamber, on the basis of the further reasons exposed in its "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", erred in finding that there is an impediment or 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.⁶

6. In today's judgment, the Majority of the Appeals Chamber confirms the Pre-Trial Chamber's decision. In their view, the Pre-Trial Chamber met the requirements set out by the Appeals Chamber in the *Mokom* OA Judgment, and properly balanced the accused's right to counsel of his choosing pursuant to article 67(1)(d) of the Statute with its duty to ensure the fairness of the proceedings under article 64(2) of the Statute, and its attendant discretion to intervene with the appointment or removal of counsel. Consequently, the Majority concludes that, in light of the particular circumstances of

⁴ [Partially Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa](#), 19 July 2022, ICC-01/14-01/22-70-Anx-Red.

⁵ 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").

⁶ 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.

the case, the Pre-Trial Chamber's intervention in the exercise of Mr Mokom's right to counsel of his choosing was not unreasonable.

7. We agree with the Majority's recollection of the applicable standard of review for the Appeals Chamber's appellate review in this appeal. We also concur with the Majority's finding as regards the fourth ground of appeal, and its preliminary remarks relating to the Pre-Trial Chamber's confirmation of its own 25 March 2022 Order, disregarding the Appeals Chamber's reversal of the Order.

8. However, we dissent from the Majority's conclusion that the Impugned Decision should be confirmed. We further disagree with the Majority's findings regarding the interpretation of the applicable law and appreciation of the facts before the Appeals Chamber.

9. At the outset, we are not persuaded by the premise of the Majority's reasoning that the interests of justice and the issue of conflict of interest should be delineated. We emphasise that the issue of an impediment to representation or a conflict of interest arises in the realm of the interests of justice as well as the integrity and fairness of the proceedings. This is especially so, where a chamber *proprio motu* intervenes in a suspect's or an accused's exercise of fair trial rights, ostensibly on the basis of an impediment or conflict of interest, and disregards the fully informed consent obtained, for the reasons of mere speculation and assumption. In our view, the statutory framework of the Court provides a staunch safeguard and mechanism that requires a balance between the fundamental rights of a suspect or an accused to a fair trial and due process with the interests of justice. In particular, pursuant to article 64(2) of the Statute, a chamber is obliged to ensure that the proceedings before it are conducted with full respect for the rights of the accused, enshrined in article 67(1) of the Statute which reproduces internationally recognised human rights, and to guarantee the interests of justice and the fairness of the proceedings.

10. It follows that this equipoise is required when addressing the issue of an impediment to representation or a conflict of interest that arises in the proceedings before it. Therefore, in balancing the interests of justice and the right of a suspect or an accused to select counsel of his or her own choosing, a chamber must interpret and

apply the Code in a manner that does not contravene the Statute, the primary instrument of the Court.

11. The right of a suspect or an accused to counsel of his or her choosing is of such a fundamental nature so as to constitute part of the minimum guarantees to a fair trial and due process. Any court is under an obligation to observe this right, throughout any judicial proceeding. In this regard, we note that article 67(1)(d) of the Statute merely reflects what has long been recognised in international law, including in article 14(3)(b) of the International Covenant on Civil and Political Rights (hereinafter: “ICCPR”) and other international instruments. The right to counsel of choice cannot be infringed upon without compelling reasons, let alone *proprio motu*. Non-compliance with the observation of this right constitutes a fundamental violation of the due process guarantees. In this regard, we reaffirm that Mr Mokom’s selection of Mr Kaufman as his counsel constitutes an exercise of a fundamental right, enshrined in the Statute of this Court and internationally recognised human rights law, which should not be interfered with in the absence of compelling reasons overriding the choice of counsel.

12. Furthermore, contrary to the view of the Majority, we consider that the Pre-Trial Chamber erred in law in its interpretation of articles 12 and 16 of the Code, and thereafter in its application of the standard for establishing an impediment to representation and a conflict of interest pursuant to articles 12 and 16 of the Code. This error of law not only materially impacted the Impugned Decision as the Pre-Trial Chamber, if not for the error, would have rendered a substantially different decision, but also inevitably led to an error of fact. This is so, because the Pre-Trial Chamber misappreciated the facts of the case and failed to take into account relevant facts relating to the proceedings involving Mr Mokom and other clients in question, as well as in regard to the nature and scope of Mr Kaufman’s representation of other clients. In particular, we note, as mentioned above, the largely speculative manner in which the Pre-Trial Chamber disregarded the waivers and the letter of termination of service obtained from Mr Kaufman’s clients. As a result, the Pre-Trial Chamber, in essence, merely repeated their findings in its 25 March 2022 Order, which the Appeals Chamber previously found to be neither “fully set out” nor sufficient for the Appeals Chamber “to discern how the Pre-Trial Chamber arrived at the ultimate determination that it

would be necessary to remove Mr Kaufman as counsel”.⁷ Therefore, we consider that the Pre-Trial Chamber failed to provide further “precise and detailed reasons” in support of its determination, as directed by the Appeals Chamber.⁸

13. Accordingly, we find that on the basis of the reasons given in the Impugned Decision and with the application of a correct standard for finding an impediment to representation and a conflict of interest pursuant to articles 12 and 16 of the Code, the facts of this case are not sufficient to establish that Mr Kaufman’s representation would pose an impediment to representation or conflict of interest that cannot be remedied by the waivers and the letter of termination obtained. Consequently, we find that there was no compelling reason that warranted the Pre-Trial Chamber’s interference with Mr Mokom’s exercise of his right to counsel of his choice.

II. GENERAL LEGAL FRAMEWORK RELATING TO THE APPOINTMENT AND REMOVAL OF DEFENCE COUNSEL

14. At the outset, we recall that article 64(2) obliges a chamber to ensure that the proceedings before it are “*fair and expeditious*” and are “conducted with *full respect for the rights of the accused*”.⁹

15. As regards the rights of the accused, article 67(1) of the Statute, in relevant parts, further provides that

[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;

(c) To be tried without undue delay;

⁷ See [Mokom OA Judgment](#), para. 68.

⁸ See [Mokom OA Judgment](#), para. 68.

⁹ Emphasis added.

(d) [...] to conduct the defence in person or through legal assistance *of the accused's choosing* [...]¹⁰

16. Concerning the accused's right to counsel of his or her own choosing, rule 21(2) of the Rules of Procedure and Evidence (hereinafter: "Rules") states that

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

17. The Regulations of the Court (hereinafter: "Regulations") further provide guidance on the procedure for the appointment of counsel as follows:

Defence shall act in proceedings before the Court when chosen by the person entitled to legal assistance in accordance with rule 21, sub-rule 2 [...].¹¹

If the person entitled to legal assistance chooses a counsel included in the list of counsel, the registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.¹²

A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and Rules.¹³

18. We recall that "[t]his Court has its own legal framework governing the issues" relating to an impediment to representation or a conflict of interest pursuant to articles 12 and 16 of the Code.¹⁴ This cannot be replaced by the practice of other courts and tribunals in the present circumstances.¹⁵ In the same vein, we observe that article 4 of the Code provides that

[w]here there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honour, *the terms of this Code shall prevail* in respect of the practice and professional ethics of counsel when practising before the Court.¹⁶

¹⁰ Emphasis added.

¹¹ Regulation 74(1) of the Regulations.

¹² Regulation 75(1) of the Regulations.

¹³ Regulation 76(1) of the Regulations.

¹⁴ *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. 62.

¹⁵ See [Muthaura et al. OA3 Judgment](#), para. 62.

¹⁶ Emphasis added.

19. Therefore, we do not find the jurisprudence of domestic courts or that of other international courts and tribunals in this regard to be of assistance in resolving the issues before the Appeals Chamber in the appeal at hand. Accordingly, we will examine the statutory framework and the jurisprudence of this Court with respect to an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the Code.

20. Article 12 of the Code, “Impediments to representation”, in relevant part states:

1. Counsel shall not represent a client in a case:

(a) If the case is the *same as or substantially related* to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are *incompatible* with the interests of the former client, unless the client and the former client consent after consultation [...]¹⁷

[...]

2. 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.

[...]

4. This article is without prejudice to article 16 of this Code.

21. 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:

¹⁷ Emphasis added.

- (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.

22. The Appeals Chamber has previously found that “[w]hat cannot be denied to the accused or a person under charge is a reasonable opportunity to appoint counsel of their choice and affording them adequate time and facilities to prepare their defence.”¹⁸

23. The Pre-Trial Chamber, in a different composition, noted in *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* case that “it appears hardly debatable that the choice of counsel by the accused is an expression of one of his or her fundamental statutory rights”.¹⁹ In that case, the Pre-Trial Chamber further found that a person’s choice of counsel should receive primary importance, and that a chamber’s interference in the exercise of this right requires “an actual or a concrete risk for a conflict”:

[T]his choice is to be considered as the rule and the Chamber's interference in the exercise of this right as the exception. Such interference, albeit theoretically possible, is not to be exercised easily or lightly, the more so in the absence of specific elements pointing to *an actual or a concrete risk for a conflict*. A suspect's right to counsel of choice should prevail over the desire to address out of mere precaution scenarios which might never materialise. The inconveniences which replacement of counsel by its nature inevitably entails should not be brought about if not warranted, on the basis of pure speculation and in the absence of compelling circumstances.²⁰

24. Trial Chamber V, in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* case, recalled that a chamber “should only interfere with” the exercise of the accused’s right to receive legal assistance of their choosing pursuant to article 67(1)(d) of the Statute “on an exceptional basis”,²¹ and agreed with the finding of the Pre-Trial

¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, [Reasons for ‘Decision of the Appeals Chamber on the Defence application, “Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense” filed on 20 February 2007’](#), issued on 23 February 2007, 9 March 2007, ICC-01/04-01/06-844 (OA8), para. 13.

¹⁹ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the “Prosecution Submission on the Appointment of Defence Counsel” for Mr Fidèle Babala Wandu](#), 1 April 2014, ICC-01/05-01/13-306 (hereinafter: “Pre-Trial Chamber Decision on Appointment of Counsel in *Bemba et al.*”), para. 5.

²⁰ [Pre-Trial Chamber Decision on Appointment of Counsel in *Bemba et al.*](#), para. 5.

²¹ 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, para. 10.

Chamber that any accused’s right to counsel of choice “should prevail over the desire to address out of mere speculation scenarios which might never materialise”, and that “[t]he inconveniences which replacement of counsel by its nature inevitably entails should not be brought about if not warranted, on the basis of pure speculation and in the absence of compelling circumstances”.²²

25. Additionally, we note that the right of a defendant to be represented by a lawyer of his choice is enshrined in international human rights treaties. In particular, article 14(3)(b) of the ICCPR provides that everyone charged with a criminal offence is entitled “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”.²³ While this right is not absolute,²⁴ courts should not inhibit a defendant’s ability to choose counsel freely nor reject a defendant’s choice of counsel without “relevant and sufficient reasons”.²⁵ As noted in the *Mokom* OA Judgment, one of the justifications that may compel a chamber to intervene in the appointment of counsel is a conflict of interest.²⁶ However, as the UN Human Rights Committee has emphasised, courts must justify why “the interests of justice” require the defendant’s choice of counsel to be overridden.²⁷

²² 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, para. 11, referring to Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the “Prosecution Submission on the Appointment of Defence Counsel” for Mr Aimé Kilolo Musamba](#), 1 April 2014, ICC-01/05-01/13-307, para. 4.

²³ See also article 6(3)(c) of the European Convention on Human Rights: Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

²⁴ A. Clooney and P. Webb, *The Right to a Fair Trial in International Law* (OUP 2021), p. 350. See HRC, [Collins v. Jamaica](#) (Comm. No. 356/1989), 25 March 1993, para. 8.2; ECtHR, [Croissant v. Germany](#) (App. no. 13611/88), 25 September 1992, paras 28-29. See also HRC, General Comment No. 32 (2007), para. 37.

²⁵ A. Clooney and P. Webb, *The Right to a Fair Trial in International Law* (OUP 2021), fn 232, referring to ECtHR, Grand Chamber, [Dvorski v. Croatia](#) (App. no. 25703/11), 20 October 2015, paras 81, 94–99, 112–113. See also HRC, [Mukhtar v. Kazakhstan](#) (Comm. no. 2304/2013), 6 November 2015, paras 2.3, 2.15, 7.5; HRC, [Zeynalov v. Estonia](#) (Comm. no. 2040/2011), 4 November 2015, paras 9.5–9.6; ACmHPR, [Amnesty International v. Sudan](#) (Comm. nos 48/90 & others), 1–15 November 1999, paras 64, 66.

²⁶ [Mokom OA Judgment](#), para. 59, citing ECtHR, [Moldoveanu v. Romania](#) (App. no. 4238/03), 19 June 2012, para. 74–76.

²⁷ HRC, [Eserepov v. Kazakhstan](#) (Comm. No. 2129/2012), 29 March 2016, para. 11.5.

III. MERITS

A. Submissions of the parties

1. Submissions of the Defence

26. The Defence submits that the issue certified for appeal by the Pre-Trial Chamber 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 consider the waiver and letter of termination filed, which remedied the possible conflict of interest.²⁸ In addition, the Defence notes that the Pre-Trial Chamber ignored the Appeals Chamber's reversal of the 25 March 2022 Order and confirmed the reversed order in its Impugned Decision.²⁹

27. Regarding the first error, the Defence avers that the Pre-Trial Chamber has focused its arguments around an impediment to representation under article 12 of the Code, which does not require counsel to provide a chamber with a written waiver of consent.³⁰ 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".³¹ Concerning the third error, the Defence claims 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.³² As regards the fourth error, the Defence contends that the Pre-Trial Chamber failed to consider a waiver and a letter from Mr Kaufman terminating his representation of Mr Adam.³³

²⁸ [Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80](#), 30 September 2022, ICC-01/14-01/22-95 (hereinafter: "Appeal Brief"), para. 8.

²⁹ [Appeal Brief](#), para. 9.

³⁰ [Appeal Brief](#), paras 10-12.

³¹ [Appeal Brief](#), para. 16.

³² [Appeal Brief](#), paras 26-32.

³³ [Appeal Brief](#), para. 33.

28. 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 involved clients.³⁴ 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.³⁵ Recalling the Appeals Chamber's instructions in respect of precise and detailed reasoning to support its finding of an impediment or conflict, the Defence argues that the reasons set out in the 19 August 2022 Decision "hardly differ" from those provided in paragraph 13 of the Pre-Trial Chamber's 25 March 2022 Order.³⁶ Furthermore, the Defence notes that the arrest warrant for Mr Adam relates to charges concerning a different time period and geographical location from those cited in the charges against Mr Mokom.³⁷

2. Response of the Prosecution

29. In its response, the Prosecution has not taken a position on the factual issues raised.³⁸

B. Preliminary Issues

30. We acknowledge that protecting the integrity of the proceedings – in particular their fairness and expeditiousness in the specific context under consideration – is a matter that is necessarily within the jurisdiction of the Pre-Trial Chamber.³⁹

31. However, as noted above, we emphasise that the chambers of this Court have a concomitant obligation to ensure that the proceedings before them are conducted with full respect for the rights of the accused, pursuant to article 64(2) of the Statute. In this regard, we note Mr Mokom's desire, clearly expressed orally and in writing, to be represented by Mr Kaufman, and reiterate that Mr Mokom's exercise of his right to choose counsel is a fundamental right enshrined in the Statute, as well as internationally

³⁴ [Appeal Brief](#), para. 30.

³⁵ [Appeal Brief](#), para. 22.

³⁶ [Appeal Brief](#), para. 23 (emphasis removed).

³⁷ [Appeal Brief](#), para. 21.

³⁸ [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 (hereinafter: "Prosecution Response").

³⁹ See [Muthaura et al. OA3 Judgment](#), para. 46.

recognised human rights law. We lament that the proceedings in this case are now at a standstill, and that Mr Mokom has been deprived of his counsel of choice since May 2022.

32. Moreover, as recently held by the Appeals Chamber in the *Mokom* OA2 Decision, a chamber's duty to ensure the fairness and expeditiousness of the proceedings must be balanced against the need to safeguard the proper administration of justice.⁴⁰ In our view, the manner in which this appeal was brought before the Appeals Chamber raises the question as to whether the Pre-Trial Chamber appropriately exercised its discretion to intervene with the appointment or removal of counsel. While potential conflicts of interest are typically raised by the parties, in the instant appeal, the Pre-Trial Chamber *proprio motu* sought submissions regarding a potential conflict of interest in the proceedings before it on the basis of mere speculation, and ordered the Registry to remove Mr Kaufman as counsel. We further note the submission of the Prosecution that it does not take a position opposing Mr Kaufman's suitability to act as counsel.⁴¹

33. We recall that in the *Mokom* OA Judgment, the Appeals Chamber directed the Pre-Trial Chamber to "issue a new decision on the matter *based upon all available information, setting out precise and detailed reasons*" in support of its decision ordering the removal of Mr Kaufman as counsel to Mr Mokom.⁴² Consequently, we consider that the Pre-Trial Chamber was instructed to examine all the facts available before it, determine and clearly state the standard for establishing an impediment to representation and conflict of interest within the meaning of articles 12 and 16 of the Code, and provide precise and detailed reasons in support of its determination. In this regard, we observe the Defence's submission that the Pre-Trial Chamber "failed to provide further 'precise and detailed reasons' which would clarify why the various

⁴⁰ See [Decision on the admissibility of the appeal](#), 27 September 2022, ICC-01/14-01/22-91, para. 21. See also Pre-Trial Chamber A, *The Prosecutor v. Paul Gicheru*, [Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings](#), 26 February 2021, ICC-01/09-01/20-103, para. 29; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, [Decision on the 'Prosecution's Requests under Articles 64\(6\)\(b\) and 93 of the Rome Statute to Summon Witnesses'](#), 3 December 2015, ICC-01/05-01/13-1343-Red, (confidential version notified on 6 October 2015), para. 27; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Second Order on the further conduct of the proceedings](#), 4 June 2018, ICC-02/11-01/15-1174, para. 9.

⁴¹ See [Prosecution Response](#), para. 3.

⁴² [Mokom OA Judgment](#), para. 68.

stakeholders' interests are so substantially similar and fundamentally incompatible that they render remedial measures impossible".⁴³

34. Therefore, we consider it appropriate and proper to review and determine whether the Pre-Trial Chamber examined all relevant facts and arrived at a reasonable conclusion, and whether the Pre-Trial Chamber provided a full and reasoned statement of its findings and determination.

C. Impediment to representation and conflict of interest

1. Principal responsibility to prevent and resolve an impediment to representation and/or conflict of interest

35. We note that the procedure for addressing conflicts of interest exists primarily under the Code, which places the responsibility for curing such conflicts on counsel. In particular, article 16 requires counsel to "exercise all care to ensure that no conflict of interest arises",⁴⁴ and if one does rise, to "at once inform all potentially affected clients".⁴⁵

36. According to the jurisprudence of the Appeals Chamber, while a chamber, indeed, has a duty to ensure the fairness of the proceedings, it 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.⁴⁶ With respect to a potential conflict of interest, we note the finding of Trial Chamber III that the principal responsibility rests with counsel to address and resolve it, by properly consulting and informing his or her client about a potential impediment to the full and zealous representation of the client's interests.⁴⁷

⁴³ [Appeal Brief](#), para. 16.

⁴⁴ Article 16(1) of the Code.

⁴⁵ Article 16(3) of the Code.

⁴⁶ [Muthaura et al. OA3 Judgment](#), para. 54.

⁴⁷ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team"](#), 7 May 2010, ICC-01/05-01/08-769, para. 39.

37. We further observe that the Pre-Trial Chamber, in a different composition, previously found that the principle emerging from articles 12(1)(a) and 16 of the Code is twofold:

the [Code] chose to treat (i) conflict of interest as an issue falling to a large extent within the scope of the duties and responsibilities of counsel and (ii) its settlement by and large as a matter between counsel and his or her client. 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 affected client(s) can be obtained. Fully informed consent by the client [...] has been considered as an appropriate mechanism for addressing the risk of conflicts of interest”.⁴⁸

2. The Criteria under Articles 12 and 16 of the Code

38. In placing the impediment to representation and the conflict of interest as issues that fall primarily within the scope of the duties and responsibilities of counsel, the legal framework of the Court provides multiple layers of safeguard that protect the rights of the accused enshrined in article 67(1) of the Statute, as well as the fairness and integrity of the proceedings before the Court, pursuant to article 64(2) of the Statute. In this regard, we recall that as indicated in the *Muthaura et al.* OA3 Judgment, the purposes underpinning article 12 of the Code, in relation to article 16 of the Code as well as articles 64(2) and 67(1) of the Statute, are “ensuring that a person is suitable to act as counsel, *preventing conflicts of interest*, [...] and *respecting the rights of the accused*”, which are also “features of a *fair trial*”.⁴⁹

39. We agree with the Majority that article 12 of the Code functions as the first layer of the safeguard by prohibiting counsel from representing a client when the criteria of this provision have been met: 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. As the duties and responsibilities of counsel under this provision are triggered at the stage where counsel seeks to appear before the Court, article 12 of the Code prevents a conflict of interest under article 16 of the Code in proceedings before the Court. We further concur with the Majority that article 16 of the Code, on the other hand, has a broader scope. A conflict of interest within the meaning

⁴⁸ [Pre-Trial Chamber Decision on Appointment of Counsel in Bemba et al.](#), para. 3.

⁴⁹ [Muthaura et al. OA3 Judgment](#), para. 51 (emphasis added).

of this provision involves the “counsel’s own interests or those of any other person, organisation or State”, that encompass conflicts of interest between a client and a former client of counsel under article 12(1)(a) of the Code. As indicated in article 12(4) of the Code, an overlap exists between articles 12 and 16 of the Code in regard to the incompatible interests of the clients.

40. However, we diverge from the Majority in that in light of the above, it is counsel that has the principal responsibility to ensure that neither an impediment to representation nor a conflict of interest arises, in accordance with his or her professional obligations under articles 12 and 16 of the Code.⁵⁰

41. More specifically, pursuant to article 12(1)(a) of the Code, it is required that counsel, *before* seeking to appear before the Court to represent a client, determine (i) if “the case is the same as or substantially related to another case in which the counsel or his or her associates represents or formerly represented another client”; and (ii) whether “the interests of the client are incompatible with the interests of the former client”. A plain reading of the text of the provision indicates that these two requirements are cumulative. We further recall that as noted in the *Mokom* OA Judgment, the Appeals Chamber has held that if counsel has any doubt as to whether these criteria are met, counsel has a professional obligation to err on the side of caution and either decline to represent a client, or seek fully informed consent from the client and the former client after consultation, and immediately inform the relevant chamber of the conflict and the consent obtained.⁵¹

42. Where a conflict of interest arises, counsel is required, pursuant to article 16 of the Code, to (i) “at once inform all potentially affected clients of the existence of the conflict” and (ii) 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”.

⁵⁰ See [Muthaura et al. OA3 Judgment](#), para. 54 (emphasis added).

⁵¹ [Mokom OA Judgment](#), para. 59.

3. Standard for establishing an impediment or conflict of interest that warrants a chamber's intervention

(i) A chamber's intervention on the basis of the Code within the statutory framework of the Court

43. The Appeals Chamber has previously stated that the Code is part of the Court's applicable law under article 21(1)(a) of the Statute, which requires the Court to apply, in the first place, its Statute, Elements of Crimes and its Rules.⁵² The Code was adopted pursuant to rule 8 of the Rules, which mandates the drawing up of a Code of Professional Conduct for counsel. This was done by the Court's legislative body, the Assembly of States Parties, by consensus on 2 December 2005.⁵³ We further observe article 51 of the Statute, which instructs that "[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail".

44. In our view, a chamber's discretion in intervening on the basis of an impediment or conflict of interest pursuant to articles 12 and 16 of the Code is necessarily limited: a chamber must exercise its discretion in a manner that allows it to uphold both the accused's fundamental right to counsel of his or her choosing enshrined in article 67(1)(d) of the Statute, as well as its obligation under article 64(2) of the Statute to ensure that the proceedings before it are fair and conducted with full respect for the rights of the accused.

45. More broadly, we further recall that a chamber must exercise caution in intervening in the selection of counsel under article 67(1)(d) of the Statute,⁵⁴ and that a chamber will not intervene where the alleged conflict is only "speculative" or in the absence of "compelling reasons" to do so.⁵⁵

⁵² [Muthaura et al. OA3 Judgment](#), para. 48 (emphasis added).

⁵³ See [Muthaura et al. OA3 Judgment](#), para. 48.

⁵⁴ See [Pre-Trial Chamber Decision on Appointment of Counsel in Bemba et al.](#), paras 3-5; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Prosecution submission on the appointment of defence counsel](#), 15 April 2015, ICC-01/05-01/13-909, para. 26; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Prosecution Submission on the Appointment of Defence Counsel](#), 19 January 2021, ICC-01/14-01/18-837-Red, para. 6; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Ngaïssona Defence Submissions regarding the Appointment of a Legal Adviser to P-0458 and P-0446](#), 2 February 2022, ICC-01/14-01/18-1269-Red, para. 13.

⁵⁵ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Prosecution Submission on the Appointment of Defence Counsel](#), 19 January 2021, ICC-01/14-01/18-837-Red, para. 13; [Pre-Trial Chamber Decision on Appointment of Counsel in Bemba et al.](#), para. 5;

46. In light of the above, where there remains a concern as to whether the representation can be conducted effectively, a chamber's intervention should first aim to determine whether the client has made an informed choice in favour of a counsel in spite of the disclosed conflict of interest. Disqualification of counsel should be a measure of last resort, and the risk that a conflict will materialise must rise to such a level that immediate intervention is necessary to ensure the proper administration of justice.

47. We consider that on the basis of the legal framework of the Court, an impediment or conflict of interest within the meaning of the Code entails a significant risk that the representation of a client will be materially limited by counsel's responsibilities to another client.⁵⁶ Conversely, if there is an equal likelihood that a conflict may or may not materialise, and it remains but one possibility among many, then the risk is not "significant". By the same token, if a chamber is aware that the conflict could be avoided by adopting a relatively low-impact procedural measure, then the representation will not be "materially limited".

Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Prosecution submission on the appointment of defence counsel](#), 15 April 2015, ICC-01/05-01/13-909, para. 24.

⁵⁶ See IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011, para. 3.2: "A conflict of interest exists if [...] there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client" (emphasis added); Council of Bars and Law Societies of Europe, Model Code of Conduct for European Lawyers, Model Article on Conflict of Interests (2021), p. 8: "[...] a lawyer is not only excluded to assist a client if there actually is an existing conflict of interests but also if there is a significant risk that a conflict of interest may arise in the future" (emphasis added); Chile, Chilean Ethical Regulation (2010), article 3.2: original text in Spanish as follows: "*Existe un conflicto de intereses toda vez que la asesoría, defensa o representación de un cliente resulta directamente adversa a la de otro cliente o existe un riesgo sustancial de que el cumplimiento del deber de lealtad o la independencia del abogado se vea afectada por su interés personal o sus deberes hacia otro cliente actual o anterior, o hacia terceros*" (emphasis added); Canada, Model Code of Professional Conduct (2019), para. 3.4-1, commentary [2]: "[...] the lawyer or law firm will [...] be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer" (emphasis added); Singapore, Legal Profession (Professional Conduct) Rules (2015), "Conflict, or potential conflict, between two or more clients", art. 20(2): "Paragraphs (3), (4) and (7) [concerning conflicts of interest] apply where – (a) a legal practitioner or law practice intends to act for 2 or more different parties (each called in those paragraphs a relevant party) to a matter or transaction; and (b) a diversity of interests exists, or may reasonably be expected to exist, between those parties" (emphasis added).

(ii) *Standard for establishing an impediment or conflict of interest within the meaning of articles 12 and 16 of the Code*

48. Recalling the jurisprudence of the Court as illustrated above, we find that a suspect's or an accused's choice of counsel is to be considered as the rule, and a chamber's intervention in the exercise of this right as the exception. Such interference with a fundamental statutory right shall not be exercised easily or lightly, in the absence of specific elements pointing to an actual or concrete risk of an impediment and/or conflict of interest. The rights of a suspect or an accused to counsel of his or her own choosing should prevail over the desire of a chamber to address, out of mere precaution or on the basis of pure speculation, scenarios that might never materialise, in the absence of compelling reasons.

49. Additionally, we note that a common theme is observed across jurisdictions that a conflict exists where there is an actual conflict with the interests of two or more clients being directly adverse or where there is a high probability that one may arise.⁵⁷

50. In the appeal at hand, we, however, note that the Pre-Trial Chamber failed to clearly state the standard it applied. On the basis of the finding at paragraph 21 of the Impugned Decision,⁵⁸ it would appear that the Pre-Trial Chamber considered that a perception or appearance of an impediment or a conflict of interest is sufficient for a chamber to intervene. We further note that the Pre-Trial Chamber did not provide reasons for adopting such a standard.

51. As to the Majority's reliance on the jurisprudence of the ICTY, we reiterate that this Court has its own legal framework governing the issues relating to an impediment to representation or a conflict of interest pursuant to articles 12 and 16 of the Code, as

⁵⁷ IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011, para. 3.2: "A conflict of interest exists if the representation of one client will be directly adverse to another client"; Canada, Model Code of Professional Conduct (2019), para. 3.4-1, commentary [1]: "The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent"; Chile, Chilean Ethical Regulation (2010), article 3.2; Peru, Código de ética del abogado concordado, approved by Resolution of the Presidency of the Board of Deans No. 001-2012-JDCAP-P, dated 14 April 2012 and compiled by the Ministry of Justice and Human Rights in alliance with the Faculty of Law of the Pontifical Catholic University of Peru, p. 227, original text in Spanish as follows: "*Conflicto de Intereses: Situación actual o potencial en la que se encuentra un Abogado cuando el interés que patrocina, o pretende patrocinar, es adverso a su interés personal o al interés de otro cliente.*"

⁵⁸ [Impugned Decision](#), para. 21: "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" (emphasis added).

noted above. This cannot be replaced by the practice of other courts and tribunals in the present circumstances.

52. In this context, we further note that article 14 of the ICTY Code of Conduct on which the jurisprudence concerned is based is more stringent in its requirements than articles 12 and 16 of the Code:

[...]

(C) Counsel shall not represent a client in connection with a matter in which counsel participated *personally and substantially* as an official or staff member of the Tribunal or in any other capacity, unless the Registrar determines, after consultation with the parties and taking account the views of the Chamber, that there is no real possibility shown that a conflict between the former and present assignment exists;

(D) Counsel or his firm shall not represent a client with respect to a matter if:

(i) such representation *will be, or may reasonably be expected to be, adversely affected* by representation of another client;

(ii) representation of another client *will be, or may reasonably be expected to be, adversely affected* by such representation;

(iii) the matter is the *same or substantially related* to another matter in which counsel or his firm had formerly represented another client (“former client”), and the *interests of the client are materially adverse to the interests of the former client*; or

(iv) counsel’s professional judgement on behalf of the client *will be, or may reasonably be expected to be, adversely affected* by:
(1) counsel’s responsibilities to, or interests in, a third party; or (2) to counsel’s own financial, business, property or personal interests;

(E) Where a conflict of interest does arise, counsel shall:

(i) promptly and fully inform each potentially affected present and former client of *the nature and extent of the conflict*; and

(ii) either: (1) *take all steps necessary to remove the conflict*; or (2) obtain the full and informed consent of all potentially affected present and former clients to continue the representation *unless* such consent is likely to *irreversibly prejudice the administration of justice*.⁵⁹

⁵⁹ Code of Professional Conduct for Counsel Appearing Before the International Tribunal (as amended on 22 July 2009), IT/125 Rev. 3, article 14 (emphasis added).

53. Moreover, we observe a distinction in the facts of the appeal in that in the instant appeal, Mr Kaufman has affirmed that he no longer represents the individuals whose interests may diverge from Mr Mokom's interests, and that Mr Mokom was not in a superior-subordinate relationship with either of the individuals. Indeed, this would not have been possible, given that Mr Mokom and the two individuals in question were on opposing sides of the conflict.

54. In light of the above, we find that the Pre-Trial Chamber exercised its discretion improperly and erred in law by adopting an incorrect standard for establishing an impediment or conflict of interest within the meaning of articles 12 and 16 of the Code, failing to balance Mr Mokom's right to 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 counsel.⁶⁰

4. Remedial measures

55. We observe that the Code explicitly 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 are 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".

56. As noted above, 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 affected client(s) can be obtained", and affirmed that "[f]ully informed consent by the client [...] has been considered as an appropriate mechanism for addressing the risk of conflicts of interest".⁶¹

⁶⁰ See [Mokom OA Judgment](#), para. 61.

⁶¹ [Pre-Trial Chamber Decision on Appointment of Counsel in Bemba et al.](#), para. 3.

57. We further recall 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 to the contrary.⁶² Furthermore, counsel is duty-bound, pursuant to the Code, to perform his or her duties with integrity and diligence, honourably and conscientiously.⁶³ In our view, it follows that unless gross negligence is shown in the conduct of counsel, he or she is presumed to have fulfilled his or her professional obligations under the Code.⁶⁴

58. In the appeal at hand, the Pre-Trial Chamber, however, found that Mr Kaufman's representation of high-ranking individuals on opposing sides of the same conflict "objectively impairs" his ability to fully and unreservedly pursue the interests of Mr Mokom,⁶⁵ and that information Mr Kaufman "must have" obtained from these other clients during his representation "cannot be mechanically set aside".⁶⁶ Consequently, the Pre-Trial Chamber concluded that the conflict at hand is one that could not be remedied by the written consent of the clients involved, nor by the withdrawal of Mr Kaufman from his representation of these clients.

59. In this context, we note that there is nothing in the language of articles 12 and 16 of the Code, nor indeed in any other provision of the Court's governing texts, that indicate a general bar or an objective standard as regards an impediment to representation and/or a conflict of interest, which would preclude the application of the remedial measures explicitly provided in articles 12(1) and (2), as well as article 16(3) of the Code. We agree with the Defence that "the general scope of the armed conflict in the Situation in the Central African Republic cannot, *per se*, produce an irreparable conflict of interest".⁶⁷ In the same vein, we further concur with the submission of the

⁶² See, for example, 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 Attorneys Čedo Prodanović and Jadranka Sloković](#), 29 June 2007, IT-06-90-AR73.2 (hereinafter: "ICTY *Gotovina et al.* Appeals Judgment"), para. 33; ICTY, Appeals Chamber, *Prosecutor v. Prlić et al.*, [Decision on Appeal by Bruno Stojic against Trial Chamber's Decision on Request for Appointment of Counsel](#), 24 November 2004, IT-04-74-AR73.1 (hereinafter: "ICTY *Prlić et al.* Appeal Judgment"), para. 27.

⁶³ See, for example, article 5 of the Code.

⁶⁴ See [ICTY *Gotovina et al.* Appeals Judgment](#), para. 23.

⁶⁵ [Impugned Decision](#), para. 21.

⁶⁶ [Impugned Decision](#), paras 21 and 26.

⁶⁷ See [Appeal Brief](#), para. 18.

Defence that the Pre-Trial Chamber's finding in this regard relies solely on its speculation and assumption.⁶⁸

60. Accordingly, we find that the Pre-Trial Chamber's findings in this regard are without basis, and that the Pre-Trial Chamber erred in law by adopting an incorrect standard with respect to the remedial mechanism for addressing an impediment to representation and a conflict of interest within the meaning of articles 12 and 16 of the Code.

D. Application of the relevant standard to the facts before the Appeals Chamber

1. Relevant findings in the Impugned Decision

61. Notwithstanding the Appeals Chamber's reversal of the 25 March 2022 Order and specific instruction 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",⁶⁹ the Pre-Trial Chamber, in its Impugned Decision, failed to provide further reasons as directed, and in essence, repeated its findings made in the 25 March 2022 Order.

62. The Pre-Trial Chamber merely stated that "taking into consideration the nature and scope of the conflict", as well as "the alleged roles and status [as prominent figures] of P-1019 and Mr Adam within the Seleka",⁷⁰ (i) the proceedings involving Mr Adam and P-1019 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";⁷¹ and (ii) the interests of Mr Adam and P-1019 "who would have occupied high level functions/roles within the Seleka at the time of the relevant events, radically diverge

⁶⁸ See [Appeal Brief](#), para. 24.

⁶⁹ [Mokom OA Judgment](#), para. 68 (emphasis added).

⁷⁰ [Impugned Decision](#), para. 21.

⁷¹ [Impugned Decision](#), para. 19.

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”.⁷²

63. Without providing further reasoning with respect to the facts relating to the proceedings involving Mr Adam, P-1019 and Mr Mokom or to Mr Kaufman’s representation, the Pre-Trial Chamber found 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”.⁷³ The Pre-Trial Chamber further proclaimed, without clearly setting out the standard it applied in this regard, 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”.⁷⁴

64. As to avenues to cure an impediment to representation or a conflict of interest pursuant to articles 12(1)(a) and 16(3) of the Code, we note the largely speculative nature of the Pre-Trial Chamber’s finding that Mr Kaufman’s representation of high-ranking individuals on opposing sides of the same conflict “objectively impairs” his ability to fully and unreservedly pursue the interests of Mr Mokom,⁷⁵ and that information Mr Kaufman “must have” obtained from these other clients during his representation “cannot be mechanically set aside”.⁷⁶ The Pre-Trial Chamber concluded that the conflict at hand is one that could not be remedied by the written consent of the clients involved, nor by Mr Kaufman’s withdrawal from his representation of those clients. Thus, it would appear that the Pre-Trial Chamber considered Mr Kaufman’s failure to bring the potential impediment or conflict of interest to the attention of the Registry prior to its *proprio motu* intervention to be a deciding factor,⁷⁷ so much so that it disregarded any information relating to Mr Kaufman’s now-terminated and limited prior representation of P-1019 and Mr Adam, provided in the 13 April 2022 waiver obtained from P-1019 and the 18 May 2022 letter of termination of services for

⁷² [Impugned Decision](#), para. 21.

⁷³ [Impugned Decision](#), para. 21.

⁷⁴ [Impugned Decision](#), para. 21 (emphasis added).

⁷⁵ [Impugned Decision](#), para. 21.

⁷⁶ [Impugned Decision](#), paras 22, 26-27.

⁷⁷ [Impugned Decision](#), para. 14.

Mr Adam, as well as Mr Kaufman’s 24 July 2022 affidavit. In the Pre-Trial Chamber’s view, the fact that Mr Kaufman sought and submitted these documents “only in response to [its] query” “raises questions about Mr Kaufman’s transparency and ability to fully engage in Mr Mokom’s defence”, and “impacts the value of the documents”.⁷⁸

65. In our view, the essential issue is whether, on the basis of all relevant facts presented before the Appeals Chamber, there exists an actual or a concrete risk of an impediment and/or conflict of interest in this case that warranted the Pre-Trial Chamber’s intervention. In this regard, we will examine, in turn, the scope of the facts alleged relating to the proceedings involving Mr Mokom and other clients in question, and that of Mr Kaufman’s representation of Mr Adam and P-1019.

2. Mr Mokom and Mr Adam

(i) *Cases against Mr Mokom and Mr Adam*

66. The warrants of arrest for Mr Mokom and Mr Adam demonstrate that while the geographical scope relating to the alleged criminal responsibility of these two clients of Mr Kaufman overlaps in regard to Bangui, there is no overlap in the temporal scope of the facts in relation to the cases against Mr Mokom and Mr Adam whose imputed crimes concern the time-period that predates Mr Mokom’s alleged crimes.

67. Mr Mokom’s criminal responsibility, pursuant to article 25(3)(a) and (c) of the Statute, is alleged for crimes within the Court’s jurisdiction committed 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”.⁷⁹ In contrast, 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

⁷⁸ [Impugned Decision](#), paras 25-27.

⁷⁹ Pre-Trial Chamber II, [Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka](#), 22 March 2022, ICC-01/14-01/22-2-Red2 (an under seal, *ex parte* version was notified on 20 December 2018) (hereinafter: “Warrant of Arrest for Mr Mokom”), pp. 36-37.

2013 and at least 27 November 2013”.⁸⁰ At the time of the takeover of Bangui, Mr Adam was the leader of the CPJP-F fraction and considered as the person with the most power in the Seleka, [REDACTED].⁸¹

68. We further observe that as the Defence correctly noted,⁸² Mr Adam is not scheduled to testify in the case against Mr Mokom.

69. Noting the Pre-Trial Chamber’s finding that Mr Kaufman’s representation of Mr Mokom and Mr Adam who “[belonged] 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”,⁸³ we observe that the Pre-Trial Chamber provides no information regarding any alleged shifting of alliances between Mr Mokom, P-1019, or Mr Adam during the relevant timeframe. In this regard, Mr Kaufman provides in his 18 May 2022 letter terminating his representation that [REDACTED].⁸⁴

70. In light of the foregoing, we agree with the Defence,⁸⁵ and find that the case against Mr Adam is not “the same as or substantially related to” the case against Mr Mokom within the meaning of article 12(1)(a) of the Code. Recalling that the criteria set forth in article 12(1)(a) are cumulative, we consider that there was no impediment to Mr Kaufman’s representation of Mr Mokom that required remedial measures.

(ii) Incompatibility or a conflict of interest within the meaning of articles 12 and 16 of the Code

71. We consider that a question may arise as to whether Mr Kaufman acquired any information that may adversely impact the defence of Mr Mokom due to his former representation of Mr Adam. This is particularly so, considering that there is a gap of only seven days in the timeframe relating to the two cases, as well as Mr Kaufman’s

⁸⁰ 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”), para. 2, p. 24.

⁸¹ [REDACTED].

⁸² See [Appeal Brief](#), para. 17.

⁸³ [Impugned Decision](#), para. 21.

⁸⁴ See [REDACTED].

⁸⁵ See [Appeal Brief](#), para. 21.

statement in his 18 May 2022 letter of termination of services that Mr Adam [REDACTED], in support of his claim that Mr Adam and P-1019 [REDACTED].⁸⁶

72. In this regard, the email correspondence between the Pre-Trial Chamber and the Prosecution, as well as the documents submitted by Mr Kaufman, demonstrate that Mr Kaufman provided limited representation to 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*, and that he is not in possession of such information.

- (a) Before receiving a signed power of attorney on 7 July 2017, Mr Kaufman [REDACTED].⁸⁷
- (b) In 2017, Mr Kaufman acted as Mr Adam's lawyer for the discrete issue of [REDACTED],⁸⁸ and their discussions were in the hypothetical as to [REDACTED].⁸⁹ According to Mr Kaufman, they did not discuss or agree on [REDACTED].⁹⁰
- (c) In [REDACTED], Mr Kaufman represented Mr Adam in negotiations in the hypothetical regarding [REDACTED].⁹¹ Mr Kaufman emphasises that he has never discussed [REDACTED].⁹²
- (d) In addition, Mr Kaufman states, in both his 18 May 2022 letter of termination of services and 17 March 2022 email addressed to the Pre-Trial Chamber, that since [REDACTED].⁹³

73. As regards the Pre-Trial Chamber's findings in relation to the 18 May 2022 letter of termination of services for Mr Adam, we firstly recall our view that the Pre-Trial Chamber erred in law by adopting an incorrect standard with respect to the remedial mechanism for addressing an impediment to representation and a conflict of interest

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

within the meaning of articles 12 and 16 of the Code. Furthermore, we are not persuaded by the Pre-Trial Chamber's rigid stance that the value of this document is impacted by the fact that Mr Kaufman's submission was made "only in response to the Chamber's query".⁹⁴

74. In this regard, we note the limited scope of Mr Kaufman's representation to Mr Adam and the absence of any information that may adversely impact the defence of Mr Mokom acquired from that limited representation. We further recall Mr Kaufman's professional obligations pursuant to the Code to perform his duties with integrity and diligence, honourably and conscientiously. Therefore, we find that it was unreasonable for the Pre-Trial Chamber to disregard the fact that Mr Kaufman "was not aware of any actual conflict of interest or impediment which could have impacted on [his] [...] representation of [Mr Mokom]", and that, therefore, in his view, there was no "need for [him] to obtain anything in writing from [Mr Adam]" prior to the Pre-Trial Chamber's *proprio motu* intervention in this regard.⁹⁵ In addition, we reiterate that the failure of counsel to act cannot prejudice the defendant's rights.⁹⁶

3. Mr Mokom and P-1019

(i) Case against Mr Mokom and proceedings involving P-1019

75. At the outset, we observe that P-1019 is neither a suspect currently before the Court nor a proposed witness in the case against Mr Mokom.

76. The warrants of arrest for Mr Mokom and Mr Adam, as well as the decisions on the confirmation of charges against Mahamat Said Abdel Kani and Alfred Yekatom and Patrice-Edouard Ngaïssona, indicate that P1019 (i) [REDACTED];⁹⁷

⁹⁴ See [Impugned Decision](#), paras 25-27.

⁹⁵ See [Appeal Brief](#), para. 30 ("Mr Kaufman has indicated repeatedly [in his observations to the Pre-Trial Chamber and his affidavit] that he had no reason to suspect the potential for either an impediment or conflict of interest based on all information at his disposal at the time and after fully consulting all his clients"); Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI; [REDACTED].

⁹⁶ [Partially Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa](#), 19 July 2022, ICC-01/14-01/22-70-Anx-Red, para. 20.

⁹⁷ [REDACTED]; [REDACTED].

(ii) [REDACTED];⁹⁸ (iii) [REDACTED];⁹⁹ (iv) [REDACTED];¹⁰⁰ and (v) [REDACTED].¹⁰¹

77. We note that there is an overlap of [REDACTED] days in temporal scope of the facts relating to Mr Mokom and P-1019 between 5 December 2013 and [REDACTED].

78. The Pre-Trial Chamber found reasonable grounds to believe that during this period, an armed conflict not of an international character was ongoing in the territory of the CAR between the Seleka and the Anti-Balaka, and that a widespread and systematic attack was conducted by members of the Seleka against the civilian population and those perceived to be collectively responsible for, complicit with or supportive of the Anti-Balaka.¹⁰²

79. In relation to P-1019, the crimes committed in [REDACTED] fall within this timeframe, while the attacks in [REDACTED] took place *after* P-1019's resignation on [REDACTED].¹⁰³ In particular, the members of the Anti-Balaka group led by [REDACTED].¹⁰⁴

80. Regarding Mr Mokom's role and participation in the crimes committed in [REDACTED] during this time period, the Pre-Trial Chamber found that there were reasonable grounds to believe that Mr Mokom, who relocated to Zongo in the Democratic Republic of the Congo soon after the 24 March 2013 coup while liaising with persons in Bozizé's inner circle in Cameroon, acted as the *de facto* operations coordinator of the Anti-Balaka, and was formally designated as the Anti-Balaka National Coordinator of Operations in January 2014.¹⁰⁵ More specifically, Mr Mokom enabled the Anti-Balaka to commit crimes by improving the group's organisation,

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [Warrant of Arrest for Mr Mokom](#), para. 7; [Warrant of Arrest for Mr Adam](#), para. 15; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona](#), 14 May 2020, ICC-01/14-01/18-403-Corr-Red, para. 61. *See* Pre-Trial Chamber II, *The Prosecutor v. Mahamat Said Abdel Kani*, [Decision on Confirmation of Charges against Mahamat Said Abdel Kani](#), 9 December 2021, ICC-01/14-01/21-218-Red, para. 52.

¹⁰² [Impugned Decision](#), para. 18.

¹⁰³ *See* [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [Warrant of Arrest for Mr Mokom](#), para. 16.

providing logistical support such as weapons, steering and controlling operations in the course of which crimes were committed, and validating the conduct of subordinates involved in crimes by, *inter alia*, (i) coordinating the 5 December 2013 attack on Bangui and providing weapons and communicating with Anti-Balaka members involved in the crimes in [REDACTED]; (ii) following the 5 December 2013 attack, communicating with Anti-Balaka members directly implicated in the crimes allegedly committed in [REDACTED]; and (iii) visiting the Anti-Balaka troops in [REDACTED].¹⁰⁶

81. In addition, we note that the Pre-Trial Chamber has not provided any further explanation, other than the fact that Mr Kaufman has represented two individuals subject to a warrant of arrest,¹⁰⁷ as to why the present case is different from *The Prosecutor v. Yekatom and Ngaïssona* case in which Trial Chamber V found that proceedings involving the Seleka and the Anti-Balaka are not substantially related. Furthermore, in our view, the fact that the concerned individuals are each subject to a warrant of arrest is not a distinguishing factor, and does not affect whether the cases at hand are “the same as or substantially related to” one another.

82. On the basis of the facts above, the proceedings involving P-1019 fall short of qualifying as a “case”, or *arguendo*, if they do qualify as such, they are, in any event, not “the same as or substantially related to” the case against Mr Mokom within the meaning of article 12 of the Code. Recalling that the criteria set forth in article 12(1)(a) of the Code are cumulative, we consider that there was no impediment to Mr Kaufman’s representation of Mr Mokom that required remedial measures.

(ii) Incompatibility or a conflict of interest within the meaning of articles 12 and 16 of the Code

83. We now turn to examine whether P-1019, [REDACTED], may have shared with Mr Kaufman information that would adversely impact the defence of Mr Mokom. This is particularly so, in light of the Defence’s statement, in its 28 July 2022 submission

¹⁰⁶ [REDACTED].

¹⁰⁷ See [Impugned Decision](#), para. 19.

pursuant to the 25 March 2022 Order , that both Mr Mokom and P-1019 “agreed to the mutual sharing of information that could impact the defence of one another”.¹⁰⁸

84. In this regard, the email correspondence between the Pre-Trial Chamber and the Prosecution, as well as the documents submitted by Mr Kaufman, demonstrate that Mr Kaufman provided limited representation to P-1019, and that he is not in possession of such information.

- (a) Mr Kaufman states in in his affidavit of 24 July 2022 that “since Pre-Trial Chamber II revoked [his] mandate, P-1019 has signed a waiver agreeing to the mutual transfer of information (of which [he has] none) and mutual representation even though [his] representation of [P-1019] has, effectively, terminated”.¹⁰⁹ In our view, this affirmation should have been given more weight in the Pre-Trial Chamber’s considerations since it explains that the agreement concerned took place after the termination of his representation of P-1019, and that Mr Kaufman is not in possession of any information.
- (b) Mr Kaufman solemnly declares and affirms in his 24 July 2022 affidavit that he has acquired no information emanating from P-1019 under conditions of professional secrecy which may be used to the detriment or to the benefit of Mr Mokom.¹¹⁰
- (c) In both his 17 March 2022 email addressed to the Pre-Trial Chamber, as well as the 24 July 2022 affidavit, Mr Kaufman provides that during his representation of P-1019, P-1019 had not divulged to him any information concerning Mr Mokom or the Anti-Balaka which might be pertinent to Mr Mokom’s defence, nor had he disclosed any information which he requested Mr Kaufman to withhold from Mr Mokom or any particular confidential knowledge which Mr Kaufman might be able to use for the benefit of Mr Mokom.¹¹¹

¹⁰⁸ [Submissions pursuant to Order ICC-01/14-01/22-73](#), 28 July 2022, ICC-01/14-01/22-78, para. 6.

¹⁰⁹ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI, para. 6.

¹¹⁰ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI, para. 5.

¹¹¹ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI, para. 5; [REDACTED].

- (d) Mr Kaufman indicates that during his interviews with the Prosecution in 2018, it was apparent that P-1019’s knowledge of the alleged functioning of the Anti-Balaka was very limited as P-1019 stated that he has “next to no knowledge” of the workings of the Anti-Balaka.¹¹²
- (e) According to Mr Kaufman, P-1019 does not [REDACTED],¹¹³ and it was P-1019 who “offered to reconnect [him and Mr Mokom] when, at one point [between 2020 and 2021], [he] had temporarily lost contact with [Mr] Mokom.”¹¹⁴
- (f) In addition, according to Mr Kaufman, “at some stage in the last two years”, Mr Kaufman had temporarily lost contact with P-1019 as the telephone number that he had for P-1019 was disconnected, shortly after his last conversation with P-1019 in which P-1019 informed that [REDACTED],¹¹⁵ and that Mr Kaufman left “a notice terminating any future representation” of P-1019 “with his close advisers who had also temporarily lost contact with him”.¹¹⁶

85. As regards Mr Kaufman’s submission of the 13 April 2022 waiver obtained from P-1019, we firstly recall our view that the Pre-Trial Chamber erred in law by adopting an incorrect standard with respect to the remedial mechanism for addressing an impediment to representation and a conflict of interest within the meaning of articles 12 and 16 of the Code. Furthermore, we are not persuaded by the Pre-Trial Chamber’s rigid stance that the value of this document is impacted by the fact that Mr Kaufman’s submission was made “only in response to the Chamber’s query”.¹¹⁷

86. In this regard, we note the limited scope of Mr Kaufman’s representation to P-1019, as well as the absence of any information that may adversely impact the defence of Mr Mokom acquired from that limited representation. We further recall

¹¹² Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI, para. 5; [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI.

¹¹⁵ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI.

¹¹⁶ Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-AnxI.

¹¹⁷ See [Impugned Decision](#), paras 25-27.

Mr Kaufman's professional obligations pursuant to the Code to perform his duties with integrity and diligence, honourably and conscientiously. Therefore, we find that it was unreasonable for the Pre-Trial Chamber to disregard the fact that Mr Kaufman "firmly [believed] that no conflict exists" and that, therefore, in his view, there was no "need for [him] to provide any waiver in writing" from P-1019 prior to the Pre-Trial Chamber's *proprio motu* intervention in this regard.¹¹⁸ In addition, we reiterate that the failure of counsel to act cannot prejudice the defendant's rights.¹¹⁹

4. Conclusion

87. In light of all information available before the Appeals Chamber, we find that the cases against Mr Mokom and Mr Adam are not the same nor are they substantially related. The two cases call for separate conclusions as to guilt or innocence on temporally and geographically distinct facts. There is no common basis between the two cases. Moreover, we find that the proceedings involving P-1019 do not qualify as a "case", or *arguendo*, if they do qualify as such, they are, in any event, not substantially related to the case against Mr Mokom within the meaning of article 12 of the Code. The two proceedings involving Mr Mokom and P-1019 concern significantly distinct facts, both temporally and geographically. We further note that Mr Kaufman provided limited representation to Mr Adam and P-1019, and he is not in possession of any information that would adversely impact his representation of Mr Mokom. In our view, the mere fact that the cases against Mr Adam and Mr Mokom and the proceedings involving P-1019 concern one conflict falls short of constituting an actual or a concrete risk of an impediment and/or conflict that warrant a chamber's intervention.

88. The Pre-Trial Chamber erred in law by failing to clearly state the standard for establishing an impediment and/or conflict of interest within the meaning of articles 12 and 16 of the Code that it applied in making its determination. On the basis of the

¹¹⁸ See [Appeal Brief](#), para. 30 ("Mr Kaufman has indicated repeatedly [in his observations to the Pre-Trial Chamber and his affidavit] that he had no reason to suspect the potential for either an impediment or conflict of interest based on all information at his disposal at the time and after fully consulting all his clients"); Annex I to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-Conf-AnxI; Annex II to the Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80, ICC-01/14-01/22-95-Conf-AnxII.

¹¹⁹ [Partially Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa](#), 19 July 2022, ICC-01/14-01/22-70-Anx-Red, para. 20.

finding at paragraph 21 of the Impugned Decision,¹²⁰ it would appear that the Pre-Trial Chamber considered that a perception or appearance of an impediment or a conflict of interest is sufficient for a chamber to intervene. We further note that the Pre-Trial Chamber failed to provide precise and detailed reasons for adopting such a standard.

89. The Pre-Trial Chamber further erred in law in its interpretation of articles 12 and 16 of the Code. The Pre-Trial Chamber adopted and applied an incorrect standard of an appearance or perception for establishing an impediment or conflict of interest within the meaning of articles 12 and 16 of the Code, failing to properly balance the accused's right to counsel of his or her choosing with its duty to ensure the fairness of the proceedings.¹²¹ As noted above, we find that a suspect's or an accused's choice of counsel is to be considered as the rule, and a chamber's intervention in the exercise of this right as the exception. Such interference with a fundamental statutory right shall not be exercised easily or lightly, in the absence of specific elements pointing to an actual or a concrete risk for an impediment and/or conflict of interest. Accordingly, we find that the facts relating to the proceedings involving Mr Mokom. Mr Adam and P-1019, as well as all the available information regarding Mr Kaufman's representation of Mr Adam and P-1019, do not establish an actual or a concrete risk of a conflict. As such, we find that there was no compelling reason that warranted the Pre-Trial Chamber's interference with Mr Mokom's exercise of his right to counsel of his choice. Therefore, this error of law materially impacted the Impugned Decision since the Pre-Trial Chamber, if not for the error, would have rendered a substantially different decision.

90. As noted above, the Pre-Trial Chamber further erred in law by adopting an incorrect standard with respect to the remedial mechanism for addressing an impediment to representation and a conflict of interest within the meaning of articles 12 and 16 of the Code. In our view, this error of law materially impacted the Impugned Decision since the Pre-Trial Chamber, if not for the error, would have rendered a substantially different decision.

¹²⁰ [Impugned Decision](#), para. 21: "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" (emphasis added).

¹²¹ See [Mokom OA Judgment](#), para. 61.

91. Moreover, the Pre-Trial Chamber erred in fact by misappreciating the facts and failing to take into account relevant facts in relation to proceedings involving Mr Mokom, Mr Adam and P-1019, as well as Mr Kaufman's representation of Mr Adam and P-1019.

92. In this regard, we recall that the Appeals Chamber does not interfere unless it is shown that the first instance chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. As regards the "misappreciation of facts", the Appeals Chamber intervenes only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

93. In the instant appeal, we find that the Pre-Trial Chamber misappreciated the facts. Specifically, we cannot discern how the Pre-Trial Chamber's conclusion that there exists an impediment and/or conflict of interest with respect to Mr Kaufman's representation of Mr Mokom, Mr Adam and P-1019 could have reasonably been reached from the evidence before it.

94. We further find that the Pre-Trial Chamber failed to take into account relevant facts in relation to the proceedings involving Mr Mokom, Mr Adam and P-1019, as well as Mr Kaufman's representation of Mr Adam and P-1019. Even if, *arguendo*, there were an impediment or conflict of interest pursuant to articles 12 and 16 of the Code by virtue of the mere fact that the proceedings involving Mr Mokom, Mr Adam and P-1019 concern one conflict, that is not an uncommon situation in which counsel either seeks the consent of his client to the continuation of representation in writing or withdraws from the representation. Such consent was obtained from Mr Adam and P-1019, clearly indicating that Mr Kaufman would not face a conflict of interest in his representation of Mr Mokom. In this regard, we recall that in the absence of an indication to the contrary, 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,¹²² and that unless gross negligence is shown in the conduct of counsel, he or she is presumed to have fulfilled his or her professional

¹²² See, for example, [ICTY Gotovina et al. Appeals Judgment](#), para. 33; [ICTY Prlić et al. Appeals Judgment](#), para. 27.

obligations under the Code.¹²³ Therefore, we are not persuaded by the Pre-Trial Chamber's analysis which seeks to disregard the waiver and the letter of termination of services provided by Mr Kaufman, solely due to its late submission.

IV. CONCLUSION

95. For the foregoing reasons, we find that the Pre-Trial Chamber erred in law and fact, and exercised its discretion improperly. In our view, the appropriate relief in this appeal would be to reverse the Impugned Decision and order the Registry to allow Mr Mokom the opportunity to appoint counsel of his choice, whether it be Mr Kaufman or another individual from the list of counsel.

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



Judge Solomy Balungi Bossa



**Judge Luz del Carmen Ibáñez
Carranza**

Dated this 19th day of December 2022

At The Hague, The Netherlands

¹²³ See [ICTY Gotovina et al. Appeals Judgment](#), para. 23.