

Pursuant to Pre-Trial Chamber II's instruction dated 02-05-2024, this document is reclassified as Public

**Cour
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**International
Criminal
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Annex I

Confidential *EX PARTE* Registry only

Registry second transmission of a document received from Mr Nicholas Kaufman

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**Cour
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**International
Criminal
Court**

Original: English

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

Date: 30/03/2022

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka

CONFIDENTIAL

***Ex parte* Prosecution, Nicholas Kaufman, Maxime Mokom and Registry**

Request for Leave to Appeal Order ICC-01/14-01/22-26-Conf-Exp

Source: Nicholas Kaufman

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section
Pieter Vanaverbeke

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other
Nicholas Kaufman

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Pursuant to Article 82(1)(d) of the Rome Statute, undersigned Counsel ("Counsel") hereby seeks leave to appeal the *Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka* ("the Order").¹ This request is filed subsequent to an earlier request for reconsideration which was sent to CMS and the Pre-Trial Chamber on 28 March 2022. This request is also filed on behalf of Mr. Mokom who, pursuant to information received and advice delivered before the revocation of Counsel's mandate, will act *pro se* if necessary.

Relevant Statutory Provision

1. Regulation 82(1)(d) of the Rome Statute permits appellate review of an interlocutory decision that:

"involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

The Issues

2. The four issues for which leave to appeal is sought satisfy the consistent jurisprudence of the Court in so far as they relate to *"an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion"*.²

(i) *Whether the Order revoking Counsel's mandate is sufficiently motivated in order to afford appellate review;*

3. In this regard, Counsel submits that the Order is defective in that it lacks detail as to the earlier proceedings in which Counsel represented "other clients" and how such representation was performed.³ The Order, also, lacks detail as to the nature of the "diverging interests" which, purportedly, create an impediment to

¹ ICC-01/14-01/22-26-Conf-Exp.

² Appeals Chamber, 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal', 13 July 2006, ICC-01/04, para. 9.

³ The client deemed "of interest to the proceedings either as witness or a potential suspect" is, by this very definition, not subject to any current proceedings before the Court.

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representation or a conflict of interest. The Appeals Chamber, thus, has no means of reviewing the factual and legal assessment performed by the Pre-Trial Chamber which led it to override Counsel's conclusion that no impediment or conflict of interest existed and the Prosecutor's conclusion that any impediment or conflict of interest, if such should arise, may be cured.

- (ii) *When, and in what circumstances, is the ICC Pre-Trial Chamber ("the Chamber") entitled, if at all, to substitute its assessment as to the existence of an impediment to representation or a conflict of interest for that of both Counsel and the Prosecutor?*

4. Considering the ruling of the Appeals Chamber in *Muthaura*,⁴ Counsel accepts, for the purpose of this request, that the Pre-Trial Chamber does, indeed, possess the *proprio motu* power to review the ethical appropriateness of representation to ensure the fairness of proceedings. Notwithstanding, it is submitted that there must be a rebuttable presumption in favour of Counsel's assessment as to the lack of any impediment or conflict and that the Pre-Trial Chamber should defer to that assessment unless there is clear evidence to the contrary. No evidentiary standard is stipulated under Articles 12 or 16 of the ICC Code of Professional Conduct ("the Code") or in the impugned Order, but, based on certain national practice, Counsel submits that the onus is on the Pre-Trial Chamber to satisfy itself that a substantial⁵ or significant⁶ risk exists that his representation of a current client would be materially and adversely affected by his duties to a former client.

5. The Pre-Trial Chamber, albeit, concluded that Mr. Mokom's interests were "fundamentally incompatible" with those of Counsel's former clients but did not give any cogent reasons for such a conclusion other than to cite, nebulously, "the

⁴ ICC-01/09-02/11-365 at paras. 45-46.

⁵ Law Society of Ontario:

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

⁶American

Bar

Association:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/ Rule 1.7 at para. 24.

Pursuant to Pre-Trial Chamber II's instruction dated 02-05-2024, this document is reclassified as Public

nature and scope of the conflict" and the actors involved therein.⁷ This is insufficient. Indeed, it is insufficient given that the Prosecutor is the master of the evidence which has been presented to the Pre-Trial Chamber in the Central African Situation and, in his submissions of 18 March 2022, did not argue that P-1019's interests are "fundamentally incompatible" with those of Mr. Mokom. The Prosecutor's concern, rather, was that Counsel could have acquired confidential information from P-1019 which he would be prevented from using. For this very reason, it is suggested, the Prosecutor refrained from arguing that there was an actual impediment to representation but rather stated, fairly, that Counsel's former representation during interview "*raises considerations under Article 12(1)(a) of the Code*", thereafter deferring to the Pre-Trial Chamber. Counsel addressed this concern and proffered a solemn affirmation that he had no such confidential information and explained his role during P-1019's interviews with the Office of the Prosecutor.⁸ The Pre-Trial Chamber ignored this affirmation and failed even to reference the audio recording submitted to it from P-1019 himself consenting to the representation. The Pre-Trial Chamber's finding as to a "fundamental incompatibility" between the interests of P-1019 and Mr. Mokom lacks foundation, does not meet the required evidentiary standard, and is not supported by the Prosecutor in his Email of 18 March 2022.⁹

6. As for the other client, termed "a person of interest to the proceedings", the Prosecutor's Email of 18 March 2022 reveals that the Pre-Trial Chamber appears to have contradicted the finding of Trial Chamber V which found that the proceedings concerning ex-Séléka crimes are **not** "substantially the same as" or "substantially related to" those proceedings concerning Anti-Balaka crimes. Article 12(1) of the Code is, thus, not engaged. In fairness, the Prosecutor did argue that Article 16 of the

⁷ Order at para.13.

⁸ Counsel strongly reaffirms, that he has acquired no confidential information from any of his former clients other than information which was recorded by and/or transmitted to the Prosecutor. Everything known to the Counsel and relevant to the Situation will be disclosed by the Prosecutor prior to the confirmation process. Accordingly, there is absolutely nothing which Counsel can hide from or use to promote the defence of Mr. Mokom.

⁹ Indeed, P-1019 is not a Prosecution witness in the Ngaissona/Yekatom trial and lacks sufficient information on the structure of the so-called Anti-Balaka.

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Code "might" be relevant because Mr. Mokom's interests and those of the other client "may" prove incompatible. The Prosecutor's use of the subjunctive verbs "might" and "may", however, suggests that the envisaged conflict of interest would be conditional on the future line of defence adopted by the "person of interest". Indeed, by virtue of being of "interest" to the proceedings, the individual concerned cannot be said to be involved or represented in Court proceedings. The Pre-Trial Chamber went beyond the Prosecutor's determination and concluded that there was an actual¹⁰ conflict of interest while ignoring Counsel's clarification of the nature of the service that he had performed for that "person of interest".¹¹

7. To conclude, the Appeals Chamber will be asked to rule on whether the Pre-Trial Chamber instructed itself appropriately when finding that an actual impediment and an actual conflict existed, thereby displacing the conclusions of both parties to the litigation.

(iii) *When, if at all, can the ICC Pre Trial Chamber preclude remedial measures under Articles 12(1)(a) and 16(3) of the ICC Code of Professional Conduct?*

8. The Pre-Trial Chamber ruled that the impediments were of such a nature that they "*cannot be remedied by obtaining consent in writing of all potentially affected clients or withdrawing from their representation*".¹² In other words, the Pre-Trial Chamber was of the view that Counsel may, on occasion, be denied access to the explicit remedial measures provided in the Code. The Prosecutor was entirely of the opposite view. The Pre-Trial Chamber gave no clear reasoning for such a draconian and extreme policy in the present instance. The purported "diverging interests" of Counsel's clientele,¹³ "the scope of the conflict" and Counsel's "previous involvement" are, arguable yet presently denied, threshold grounds for finding an

¹⁰ Order at para. 9.

¹¹ facilitating and negotiating terms for the other client to be interviewed at the Prosecution request. Counsel was **not** engaged to defend the person of interest before the ICC because there are no current proceedings against him at the ICC. Nor did Counsel acquire any information which could assist in the defence of the other client before the ICC.

¹² Order at para. 18.

¹³ Order at para. 12.

Pursuant to Pre-Trial Chamber II's instruction dated 02-05-2024, this document is reclassified as Public

impediment to representation and a conflict of interest. These considerations, however, are not a reason for denying Counsel the right to cure such impediments. Furthermore, the Pre-Trial Chamber does not have a statutory discretionary power to refuse to allow Counsel to remedy an impediment or conflict under Article 12(1)(a) or Article 16(3)(b). This is distinct from the situation under Article 12(1)(b) and Article 16(3)(a). Ironically, Article 16(3)(a) gives the Pre-Trial Chamber the power to refuse withdrawal as a remedial measure – something which reinforces the fact that Article 16 conflicts of interest only arise with respect to persons engaged in an active role before the Court – something which is not the case with respect to P-1019 and the “person of interest to the proceedings”.

- (iv) *Whether the ICC Pre-Trial Chamber is entitled to consider ex-parte submissions and ex-parte court filings, even non-dispositive in nature, when assessing the appropriateness of representation?*

9. The Order cited and considered court litigation conducted without Counsel's knowledge.¹⁴ Moreover, Counsel was only provided with redacted versions of his co-litigants' submissions because he asked for them¹⁵ and **not** because the Pre-Trial Chamber volunteered them. Counsel suggests that assessing the fairness of proceedings liable to be impacted by an impediment or a conflict of interest requires a corresponding fairness and transparency in the conduct of the assessment envisaged by the *Muthaura* judgment. Counsel cannot know to what extent the redacted submissions impacted on the Pre-Trial Chamber's decision making process.

Fairness, the Expeditious Conduct of Proceedings and Material Advancement

10. The very rationale for the immediate revocation of Counsel's mandate was, purportedly, to preserve the fairness of the legal process and the effectiveness of legal representation. According to the very reasoning of the Pre-Trial Chamber,

¹⁴ ICC-01/14-103-US-Exp / ICC-01/14-01/18-916-Conf. and redacted observations presented by the Prosecution & Division of Judicial Services.

¹⁵ Email from Counsel to the Pre-Trial Chamber dated 18 March 2022 at 18:55.

Pursuant to Pre-Trial Chamber II's instruction dated 02-05-2024, this document is reclassified as Public

therefore, resolution of all the above identified issues is required to ensure “*the fair and expeditious conduct of the proceedings*”. Immediately reinstating Counsel to represent Mr. Mokom, as Mr. Mokom wishes, will materially advance the proceedings which are currently at a halt.

Classification

11. This request is filed confidentially and *ex parte* because of the classification of the Order. Counsel requests that this document and all associated litigation be reclassified public – redacted if necessary - so that the important issues discussed therein may be reviewed by the international community at large and national bar associations.

Conclusion

12. The Pre-Trial Chamber is hereby requested to:

GRANT leave to appeal all four of the identified issues;

SUSPEND the process for appointing replacement Counsel until the resolution of this request and the earlier filed request for reconsideration, and;

SUSPEND the Order directing the immediate revocation of Counsel's mandate pending resolution of this request and the request for reconsideration so that Mr. Mokom may be represented appropriately in the interim.



Counsel

Wednesday, March 30, 2022