



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

I. INTRODUCTION

1. This appeal arises from the 25 March 2022 order (hereinafter: “Impugned Decision”) of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) removing Mr Nicholas Kaufman (hereinafter: “Mr Kaufman”) as counsel for the suspect, Mr Maxime Jeoffroy Eli Mokom Gawaka (hereinafter: “Mr Mokom”). As Mr Kaufman had previously represented two individuals – designated “Client 1” and “Client 2” in the Majority judgment – as an incident to the investigation in the *Situation in the Central African Republic II*, the Pre-Trial Chamber found a present conflict of interest warranting his removal as counsel in the instant proceedings. The appeal of the Defence directly challenges the Pre-Trial Chamber’s determination that an impediment existed to Mr Kaufman’s ability to effectively represent Mr Mokom.

2. In today’s judgment, the Majority of the Appeals Chamber reverses the Impugned Decision and remands the matter for a new decision with fuller reasons. We agree with the Majority’s recollection of the law governing the appointment and removal of counsel. In this regard, the Majority affirms, and we re-affirm, that the primary consideration in this appeal is that the suspect has selected Mr Kaufman as his counsel, and that this constitutes an exercise of a fundamental right enshrined in the Statute of this Court and in internationally recognised human rights law.

3. We further agree with the Majority that the exercise of this right must only be interfered with where there exist compelling reasons overriding the choice of counsel, for instance where counsel of choice is patently unable to provide effective

representation. If a chamber makes such an intervention, it must issue a reasoned opinion detailing why its intervention is strictly necessary under the circumstances.

4. But although we agree with the Majority that the Impugned Decision should be reversed, we disagree as to the appropriate relief. In our view, the reasons given in the Impugned Decision – though sparse – still disclose an error in the weighing exercise conducted by the Pre-Trial Chamber. In our view, the potential conflict of interest described in the Impugned Decision is merely speculative. We would find that the Pre-Trial Chamber erred in concluding that the risk of such a conflict of interest was so great that immediate removal of Mr Mokom’s counsel was justified.

II. MERITS

5. At the outset, we acknowledge the Majority’s discussion about discretionary decisions, but we take the firm view that the deference usually assigned to decisions of a chamber appointing or removing counsel is not determinative here. The Impugned Decision represents a decision taken *proprio motu* by the Pre-Trial Chamber, and the Prosecution makes clear that it does not take a position opposing Mr Kaufman’s suitability to act as counsel. In this regard, we note that the proceedings below are now at a standstill and Mr Mokom has been deprived of his counsel of choice. Thus, we find that a thorough and unfettered appellate review of the considerations in the Impugned Decision is appropriate. Mr Mokom’s exercise of his right to choose counsel is procedural in nature and it is also protected as an international human right, which must be taken into account in the interpretation of article 67(1)(d) of the Statute.¹

6. Moreover, while we agree with the Majority that a chamber has a duty to ensure the fairness of the proceedings, we would add that it is the primary responsibility of counsel to properly consult and inform his or her client about a potential impediment to the full and zealous representation of the client’s interests.² This is evident in the fact

¹ See United Nations, General Assembly, article 14 (3)(b) of the International Covenant on Civil and Political Rights, 19 December 1966, vol 999 p.171; Organization of American States, article 8 (2)(d) of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955; Organization of African Unity, article 7 (1)(c) of the African Charter on Human and People’s Rights, 27 June 1981, United Nations Treaty Series 1520, p.217; Council of Europe, article 6 (3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

² 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-

that the procedure for addressing conflicts of interest exists primarily under the Code of Professional Conduct for Counsel (hereinafter: “Code”), and the responsibility for curing such conflicts rests on counsel. Indeed, counsel “shall exercise all care to ensure that no conflict of interest arises”,³ and if it does arise, “counsel shall at once inform all potentially affected clients”.⁴ Counsel has a professional obligation to err on the side of caution and either decline to represent a client or immediately bring the matter before the relevant chamber prior to agreeing to represent a client if in any doubt at all about the application of the Code to him or her.⁵

7. Where there remains a concern about 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 lawyer 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. Although the precise definition varies across jurisdictions, we observe that a conflict of interest in criminal proceedings entails a significant risk that the representation of a client will be materially limited by the lawyer’s responsibilities to another client.⁶ Thus, in our view,

01/05-01/08-769, para. 39: “[...] the principal responsibility for addressing and resolving a suggested conflict of interest rests with counsel [...]”.

³ Article 16(1) of the Code.

⁴ Article 16(3) of the Code.

⁵ See Appeals Chamber, [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), para. 55.

⁶ See IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011, § 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”; 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”; 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), § 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

if there is an equal likelihood that a conflict may materialise as there is that it may not, and it remains but one possibility among many, then the risk is not “significant”. Similarly, 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”.

8. Regarding the nature of the conflict itself, we observe a common theme across jurisdictions that a “conflict” exists where the interests of two or more clients are directly adverse.⁷ In practice, it is difficult to derive any general principles as each case is decided on the nature of the alleged conflict and the resulting prejudice in that particular case, and the particular steps taken by counsel to resolve the conflict in that case. However, we observe that the chambers of this Court have exercised caution in intervening in a person’s election under article 67(1)(d) of the Statute.⁸ In particular, a chamber will not intervene where the alleged conflict is only “speculative” or there is an absence of “compelling reasons” to do so.⁹

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).

⁷ IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011, § 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), § 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.

⁸ See 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, 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.

⁹ 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 II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the “Prosecution Submission on the Appointment of Defence Counsel” for Mr Fidèle Babala Wandu](#), 1 April 2014, ICC-01/05-01/13-306, para. 5; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba*

9. In the ICTY, the Appeals Chamber has found that intervention is necessary in the event that there is a potential conflict relating to counsel's ongoing representation of two clients accused of crimes in related cases before the Tribunal.¹⁰ In those cases, the clients in question were in a superior-subordinate relationship during the incidents alleged in the charging documents. This can be contrasted with the instant appeal, wherein 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.

10. In sum, given the superseding principle that a person must have the opportunity to choose one's counsel and that counsel must actively and routinely monitor his or her capacity to effectively represent that person, a chamber must not displace the choice of counsel – protected internationally in human rights law – absent compelling reasons. In particular, a chamber must be satisfied that it is substantially likely that a conflict will adversely affect the fairness of the proceedings. In discharging its duty to ensure that a person is adequately represented by counsel, a chamber must exercise its discretion with these principles in mind.

11. In the application of the foregoing principles to this appeal, we would have found an error in the Pre-Trial Chamber's assessment of the potential conflict of interest. In this regard, we refer to the two hypothetical scenarios elucidated in today's judgment: the first relating to the possibility that Clients 1 or 2 may testify against Mr Mokom, and the second relating to the incompatibility of Mr Kaufman's representation of Mr Mokom with his former representation of Clients 1 and 2. We find for the following reasons that neither of these scenarios is substantiated in the reasons given in the Impugned Decision.

12. Regarding the first scenario, we are unable to discern from the reasons provided that, at the time of the Impugned Decision, there existed any impediment that was likely to present itself in the proceedings and that necessitated the immediate removal of Mr

Gombo et al., [Decision on Prosecution submission on the appointment of defence counsel](#), 15 April 2015, ICC-01/05-01/13-909, para. 24.

¹⁰ ICTY, Appeals Chamber, *The Prosecutor v. Jadranko Prlić et al.*, [Decision on Appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel](#), 24 November 2004, IT-04-74; ICTY, Appeals Chamber, *The Prosecutor v. Međaković et al.*, [Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić](#), 6 October 2004, IT-02-65-AR73.1.

Kaufman as counsel. Regarding Client 1, we note that, prior to the Impugned Decision, Mr Kaufman affirmed that he represented Client 1 at investigative interviews with the Prosecution for a brief period in 2018, as the Prosecution was gathering evidence against Mr Yekatom and Mr Ngaiissona. The Prosecution now confirms that it will not call Client 1 to testify in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*. Moreover, at the time of the Impugned Decision, the Prosecution did not provide any information to the Pre-Trial Chamber indicating that it would call Client 1 to testify in the proceedings against Mr Mokom.¹¹

13. As for Client 2, we note that Mr Kaufman affirmed that he accepted a power of attorney from this person in the event that Client 2 may be interviewed [REDACTED], but the person was not, in the end, interviewed by the Prosecution and Mr Kaufman has since lost contact with the person.¹² Like Client 1, there was no concrete information before the Pre-Trial Chamber that this other individual would participate in either the present proceedings as a witness, [REDACTED], in the near future. Therefore, we are unable to discern from the reasons given how this individual “may be of interest to the proceedings”.¹³

14. For the foregoing reasons, we find no basis for the Pre-Trial Chamber’s concern that a conflict would arise “should any of [Mr Kaufman’s] clients [...] be called to testify”. Rather, we find that such a scenario was only speculative and the Pre-Trial Chamber failed to give due consideration to the lack of information before it that either of Mr Kaufman’s clients would be of interest to the proceedings against Mr Mokom.

15. Moving to the other scenario set out in the Impugned Decision, the Pre-Trial Chamber explained that Mr Kaufman’s representation of Clients 1 and 2 during the investigation in the *Situation in the Central African Republic II* creates a present conflict that prevents him from “pursuing all available and permissible means in

¹¹ In any event, we note that, in his submissions before the Pre-Trial Chamber, Mr Kaufman proposed that, should Client 1 in fact testify in these proceedings, the Chamber could appoint independent counsel for the purpose of cross-examination (Annex to PTC’s 1 April 2022 Order, p. 7). This submission was not addressed in the Impugned Decision. *See e.g.* Trial Chamber III (Article 70), *The Prosecutor v. Paul Gicheru*, [Waiver](#), 22 March 2022, ICC-01/09-01/20-309 (with confidential annex (ICC-01/09-01/20-309-Conf-AnxA)).

¹² Annex to PTC’s 1 April 2022 Order, p. 10.

¹³ [Impugned Decision](#), para. 11.

representing Mr Mokom”.¹⁴ The Pre-Trial Chamber determined that the interests of Mr Mokom and those of the two other clients were “fundamentally incompatible”.¹⁵ It found that, even if Mr Kaufman obtained the consent in writing of the two other clients or if he withdrew from their representation altogether, the impediment and conflict of interest would remain.¹⁶

16. We understand this to mean that, according to the Pre-Trial Chamber, an impediment to representation existed irrespective of whether Clients 1 and 2 testify in the present proceedings, and regardless of whether Mr Kaufman continues to represent them concurrently with Mr Mokom as he proceeds to a confirmation hearing.

17. However, we can find no reason why Mr Kaufman’s prior representation of Clients 1 and 2 would, under the circumstances, create an impediment in the present proceedings. We acknowledge that, [REDACTED]. However, we note that Mr Kaufman provided only limited representation to those clients and he has affirmed that he does not possess any relevant information as a result of the lawyer-client relationship that would impede his representation of Mr Mokom.¹⁷ Moreover, Mr Kaufman affirms that he informed Mr Mokom of his prior representation of Clients 1 and 2 and the nature

¹⁴ [Impugned Decision](#), para. 12.

¹⁵ [Impugned Decision](#), para. 13.

¹⁶ [Impugned Decision](#), para. 18. *See also* Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Decision on Mr Mokom’s requests for reconsideration and leave to appeal to “Order on appointment of Mr Kaufman as Counsel for Mr Mokom”](#), 14 April 2022, ICC-01/14-01/22-43, para. 20, in which the Pre-Trial Chamber stated: “[...] the fact that Mr Kaufman will or has ended his representation of the other clients does not, in and of itself, warrant reconsideration. This is because Mr Kaufman’s ongoing representation of the other clients is not the only factor forming the basis of the Chamber’s [Impugned Decision]. Rather, the [Impugned Decision] is based on other circumstances, which remain unchanged. These include that [*sic*] fact that, as a result of his representation of the other clients, and irrespective of whether such representation has now ended, Mr Kaufman will be prevented from pursuing all available and permissible means in representing Mr Mokom”.

¹⁷ Regarding Client 1, Mr Kaufman affirms as follows: “[Client 1] did not provide evidence which, in my opinion, can compromise Mr Maxime Mokom’s interests. [Client 1]’s knowledge of the alleged functioning of the so-called anti-balaka was very limited – something which was apparent during his interviews with the OTP” (Annex to PTC’s 1 April 2022 Order, p. 11). “I have not acquired any specific confidential information from [Client 1]” (Annex to PTC’s 1 April 2022 Order, p. 7). Regarding Client 2, Mr Kaufman affirms as follows: “I have never discussed the so-called anti-balaka groups with [Client 2]. Our discussions were in the hypothetical and concerned [REDACTED]. [REDACTED]. Nothing more than that. The OTP expressed an interest in interviewing him and there were some negotiations in the hypothetical, once again, regarding terms for him to agree to such an interview. Nothing came of those discussions. Notwithstanding, no discussion was ever conducted between me and [Client 2] concerning the so-called anti-balaka or any alleged member thereof; certainly no discussions concerning Mr. Maxime Mokom [...]” (Annex to PTC’s 1 April 2022 Order, p. 10).

of that representation,¹⁸ and Mr Mokom re-confirmed his wish to appoint Mr Kaufman as his counsel.¹⁹

18. We also note, as the Pre-Trial Chamber correctly pointed out in the Impugned Decision, that some of the charges in *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* overlap in geographic and temporal scope with those in the present proceedings.²⁰ Nevertheless, as noted above, the Code contemplates an impediment to representation only where the present case is related to “another case in which counsel or his or her associates represents or formerly represented another client”.²¹ We note that neither Client 1 nor Client 2 has given evidence against Mr Yekatom or Mr Ngaïssona. Indeed, Client 1’s investigative interview pre-dates the arrest warrants in that case and Client 2 has been involved neither in the investigation nor in the trial in that case to date. Thus, the conclusion that *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* is “substantially related” to the present proceedings is of no consequence.

19. For the foregoing reasons, we find that the Pre-Trial Chamber erred in concluding, under either scenario discussed above, that there was an impediment or conflict of interest to representation justifying Mr Kaufman’s immediate removal as counsel and the ensuing interruption to the proceedings. Given Mr Mokom’s desire, clearly expressed orally and in writing, to be represented by Mr Kaufman and his fundamental right to counsel of his own choosing under article 67(1)(d) of the Statute, we find that the Pre-Trial Chamber exercised its discretion inappropriately in intervening *proprio motu* in Mr Kaufman’s appointment in the absence of compelling reasons to do so. Ultimately, we agree with the Defence’s argument that the Pre-Trial Chamber’s concern about Mr Kaufman’s ability to effectively represent Mr Mokom was unwarranted, and it erred in finding that Mr Mokom’s exercise of his internationally recognised right to choose counsel²² was outweighed by his interest in receiving effective representation.

¹⁸ Annex to PTC’s 1 April 2022 Order, p. 11.

¹⁹ See [Impugned Decision](#), para. 14.

²⁰ [Impugned Decision](#), para. 10.

²¹ Article 12(1)(a) of the Code (emphasis added).

²² See United Nations, General Assembly, article 14 (3)(b) of the International Covenant on Civil and Political Rights, 19 December 1966, vol 999 p.171; Organization of American States, article 8 (2)(d) of

20. Finally, the Defence argues on appeal that the Pre-Trial Chamber erred in failing to give Mr Kaufman sufficient time to “cure” the potential for conflict that might occur if there was concurrent representation of an accused and a testifying witness.²³ On the one hand, we note that the Pre-Trial Chamber could have dealt with this issue more effectively by allowing Mr Kaufman the opportunity to formally withdraw from his representation of Clients 1 and 2 prior to the Impugned Decision, thus removing any possibility that there would be a concurrent representation of an accused and testifying witness.²⁴ On the other hand, we agree with the Majority that Mr Kaufman himself should have brought the matter to light even before it was raised by the Pre-Trial Chamber. Although the failure of counsel to act cannot prejudice the defendant’s rights here, we consider that such a course of action would have aligned with counsel’s ethical obligations under articles 12 and 16 of the Code.²⁵

21. Nevertheless, while both the Pre-Trial Chamber and Mr Kaufman could have done more to address the issue, we have concluded above that there was no basis for finding that the potential for a conflict of interest would crystallise in the present proceedings to such a degree that would warrant the removal of counsel. Therefore, it is not necessary to address the Defence’s argument that the Pre-Trial Chamber erred in not allowing adequate time to cure the potential conflict.

III. CONCLUSION

22. In light of the foregoing, we would have granted the appeal and reversed the Impugned Decision. Upon review of that order and the submissions filed immediately before it, we would have found sufficient information for the limited purpose of the present review to determine that the Pre-Trial Chamber improperly exercised its discretion in *proprio motu* ordering the Registry to revoke Mr Kaufman’s appointment. In our view, the relief appropriate in this appeal is to order the Registry to allow

the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955; Organization of African Unity, article 7 (1)(c) of the African Charter on Human and People’s Rights, 27 June 1981, United Nations Treaty Series 1520, p.217; Council of Europe, article 6 (3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

²³ [Appeal Brief](#), paras 9, 14.

²⁴ Indeed, we note that eight calendar days elapsed from the day that the Pre-Trial Chamber brought this issue to counsel’s attention to the day that it issued the Impugned Decision requiring his withdrawal. During this time, counsel was able to procure Client 1’s consent to his representation of Mr Mokom only by telephone. Mr Kaufman terminated his representation of Client 2 pursuant to a letter dated 18 May 2022 (ICC-01/14-01/22-51-Conf-Exp-Anx, pp. 2-3).

²⁵ See in respect of article 12 of the Code, [Muthaura et al. OA3 Judgment](#), para. 55.

Mr Mokom the opportunity to re-appoint counsel of his choice, whether it be Mr Kaufman or someone else from the list of counsel.

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



Judge Luz del Carmen Ibáñez Carranza



Judge Solomy Balungi Bossa

Dated this 19th day of July 2022

At The Hague, The Netherlands