

Original: **English**No.: **ICC-01/14-01/22**Date: **16/11/2022****PRE-TRIAL CHAMBER II**

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II*The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*

Public

Public Redacted Version of "Mr. Mokom's Application for Interim Release pursuant to Order ICC-01/14-01/22-105", 14 November 2022, ICC-01/14-01/22-110-Conf

Source: Gregory Townsend, Duty Counsel

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**Other
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Introduction

1. On 7 November 2022, Pre-Trial Chamber II (the ‘Chamber’) issued an Order instructing Mr. Mokom to submit a substantiated application in case he wishes to apply for interim release under article 60(2) of the Statute (the ‘Order’).¹

2. The Order ruled that Mr. Mokom’s application for interim must include: (i) a proposal as to the State(s) Mr. Mokom would seek to be released to; (ii) submissions as to whether or not any conditions restricting liberty should be imposed under rule 119 of the Rules of Procedure and Evidence (the ‘Rules’), and; (iii) any other relevant considerations.²

3. Because, to date, Mr. Mokom is still not yet represented by permanent counsel, I file these observations on his behalf, as Duty Counsel for Mr. Mokom, and submit that Mr. Mokom wishes to apply for interim release pursuant to article 60(2) of the Statute.

Classification

4. Pursuant to Regulation 23 *bis* of the Regulations of the Court, this Application is filed as ‘confidential’ as it includes private information about Mr. Mokom and his family. A public redacted version will be filed soon thereafter.

Relevant Procedural Background

5. On 10 December 2018, Pre-Trial Chamber II issued a warrant for the arrest of Mr. Mokom.³

6. On 14 March 2022, after his arrest in Chad, Mr. Mokom was surrendered to the International Criminal Court.⁴

¹ Pre-Trial Chamber II, ‘Order to Mr Mokom to provide submissions on interim release’, 7 November 2022, ICC-01/14-01/22-105, para. 12.

² *ibid.*

³ ICC-01/14-01/22-2-US-Exp. *See* ICC-01/14-01/22-105, para. 1.

7. On 22 March 2022, Mr. Mokom appeared before Pre-Trial Chamber II for an initial appearance at which he was represented by his freely chosen counsel - Mr. Nicholas Kaufman ('Mr. Kaufman').⁵

8. On 25 March 2022, Pre-Trial Chamber II, *proprio motu*, revoked Mr. Kaufman's mandate to represent Mr. Mokom citing what it then believed was the existence of an irremediable impediment to representation and a conflict of interest.⁶

9. On 19 July 2022, the Appeals Chamber 'reversed' the Pre-Trial Chamber's order and found that that '*the reasons underlying the determination of the Pre-Trial Chamber [we]re not fully set out*' and that it was not possible '*to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr Kaufman as counsel*'.⁷

10. On 19 August 2022, Pre-Trial Chamber II, as mandated by the Appeals Chamber, provided what it deemed to be further and better reasons for revoking Mr. Kaufman's mandate.⁸ The Pre-Trial Chamber granted leave to appeal this decision.⁹

11. On 30 September 2022, Mr. Mokom filed his appeal against the Pre-Trial Chamber's decision to reconfirm its removal.¹⁰ To date, no judgment on this appeal has been delivered.

⁴ Pre-Trial Chamber II, 'Order convening a hearing for the first appearance of Mr Mokom', 16 March 2022, para. 4.

⁵ ICC Transcript, [ICC-01/14-01/22-T-001-Red-ENG](#), 22 March 2022.

⁶ Pre-Trial Chamber II, 'Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka', 25 March 2022, ICC-01/14-01/22-26-Conf-Exp.

⁷ Appeals Chamber, '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"', ICC-01/14-01/22-70-Conf, para 68.

⁸ Pre-Trial Chamber II, 'Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022', ICC-01/14-01/22-80.

⁹ Pre-Trial Chamber II, 'Decision granting Mr Mokom's request for leave to appeal the 19 August 2022 Decision on legal representation', ICC-01/14-01/22-94, 29 September 2022.

¹⁰ 'Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80', ICC-01/14-01/22-95, 30 September 2022.

Relevant Statutory Background

12. Article 60(2) of the Rome Statute empowers a Pre-Trial Chamber to periodically review the detention of a suspect, and reads:

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

13. Article 58(1) of the Rome Statute sets out so-called risk factors which must be satisfied for a Pre-Trial Chamber to order the detention of a suspect, and reads:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and*
- (b) The arrest of the person appears necessary:*
 - (i) To ensure the person's appearance at trial;*
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or*
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.*

Submissions

I. Proposal as to the possible States to which Mr. Mokom could be released

14. Mr. Mokom is grateful for the opportunity provided by the Chamber to consider the possibility of his interim release and to allow him to propose States to which he could be released, conditions permitting. In this context, Mr. Mokom seeks to indicate at the outset his willingness that his interim release takes place in a European State, in order to ensure and facilitate his presence at the Court when ordered by the Chamber.

15. Eager to display a solid defence against the allegations against him, Mr. Mokom intrinsically wishes to remain at the Chamber's disposal and to be present at the Court during the entirety of the proceedings, when ordered by the Chamber.

16. Following the Order¹¹ and at an initial stage, as Duty Counsel, I have liaised with the Registry and discussed the process to seek to identify European States onto whose territory Mr. Mokom could be released, conditions permitting. Mr. Mokom stresses that given their proximity with the Court, the proposed States would be well placed to facilitate Mr. Mokom's attendance at the Court's premises when required and to ensure his immediate arrest should he fail to abide by the terms of his release.

17. In this context, Mr. Mokom has identified and proposes European States in which he could be released, conditions permitting, in order of priority, in function of: (i) [REDACTED]; (ii) [REDACTED], and; (iii) [REDACTED]. All proposed European States are party to the Rome Statute.

18. Mr. Mokom wishes to indicate that, whilst he remains open and reserves his right to be released to any State willing and able to accept him, he prefers to either be released in [REDACTED]. In addition to allowing him to travel back expeditiously and within a reasonable time to the premises of the Court in The Hague when ordered by the Chamber, Mr. Mokom's willingness to be released in a State located in the proximity of the Court will allow him to work on the preparation of his case efficiently and meet and communicate regularly with his Counsel and Defence team members.

¹¹ ICC-01/14-01/22-105, para. 14.

- i. [REDACTED] proposed European States
 - [REDACTED]
19. Mr. Mokom [REDACTED].¹² [REDACTED].
20. [REDACTED].
- ii. European States [REDACTED]
21. [REDACTED].
22. [REDACTED]. These States also can enforce any conditions.
23. [REDACTED].¹³ [REDACTED].¹⁴
24. [REDACTED].¹⁵ [REDACTED].¹⁶ [REDACTED].¹⁷

¹² Annex I.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ The Registry has confirmed this information in an email to Mr. Mokom's Duty Counsel.

¹⁷ [REDACTED].

iii. European States [REDACTED]

25. If interim release is not possible in a State in the first two categories, Mr. Mokom proposes that he could be released in a European State [REDACTED].

26. [REDACTED].

27. [REDACTED].

28. [REDACTED] criteria would still allow Mr. Mokom to travel back within a reasonable time to the premises of the Court in The Hague when ordered by the Chamber and would also permit his Counsel and Defence team to travel to meet him regularly within a reasonable amount of time. Video-call arrangements could also be considered. These States also can enforce any conditions imposed.

II. Submissions as to whether or not any conditions restricting liberty should be imposed under Rule 119 during Mr. Mokom's interim release

29. As Duty Counsel, I can attest that Mr. Mokom would agree to comply fully with any and all conditions placed on him, including those restricting his liberty during an interim release, by the Chamber under Rule 119.

30. Indeed, Mr. Mokom has expressed his willingness to subject himself to the jurisdiction of the Court in relation to the allegations against him. In this vein, Mr. Mokom wishes to make clear his willingness to remain under the close supervision of national authorities and remain available for the Chamber for the entirety of the proceedings. In this context, Mr. Mokom wishes to display to the Chamber the highest level of good faith regarding his willingness to make himself available for the Chamber and accepts that conditions restricting his liberty should be imposed under Rule 119 during an interim release granted by the Chamber.

31. Pursuant to Rule 119 and mindful of the conditions of interim release recently imposed by Pre-Trial Chamber A in the *Gicheru* case,¹⁸ such conditions may include: (a) the prohibition to travel beyond territorial limits set by the Pre-Trial Chamber without the explicit authorization of the Court; (b) the prohibition to go to certain places or associate with certain persons specified by the Pre-Trial Chamber; (c) to reside at a particular address as specified by the Pre-Trial Chamber for the duration of the proceedings in the Netherlands and when not present in the Netherlands for the purposes of court proceedings, unless otherwise authorised in advance by the Chamber; (d) to not engage in certain professional activities; (e) full compliance with all orders issued in the case including an order to surrender himself immediately to the relevant authorities if required by the Chamber; (f) appearing before the Chamber at the date, time, place, and in the manner ordered by the Chamber and remaining in attendance until excused; (g) the surrender to the Registrar of all passports, visas, identity documents, and any other travel documents issued to him; (h) reporting once a week to the law enforcement authorities of the Receiving State or the Registry, which may include the use of video conferencing technology; (i) to provide the Registrar with all mobile and other telephone numbers and ensure that at least one of his mobile telephone numbers remains active and with sufficient credit to be reachable at any time; and (j) to not contact directly or indirectly victims or witnesses.

32. In relation to the last above-mentioned condition, Mr. Mokom wishes to clearly stipulate that he would not contact any victims or Prosecution witness in the case during his interim release, except through Counsel authorised to represent him before the Court and in accordance with any conditions and applicable protocols.¹⁹

¹⁸ *Prosecutor v. Paul Gicheru*, Pre-Trial Chamber A, 'Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release', 29 January 2021, ICC-01/09-01/20-90-Conf', 29 January 2021, ICC-01/09-01/20-90-Red2, para. 47.

¹⁹ See also ICC-01/09-01/20-90-Red2, para. 47.

33. Moreover, Mr. Mokom undertakes that:

- He would not engage in any political activities during his interim release;
- He would not make any public statements or social media post, directly or through a person, about the case;
- He would not talk to the public or the press concerning the case;
- The only contact he will seek to have will be with his family; Counsel; defence team members; the Registry; medical personnel; the Red Cross.

34. [REDACTED].

35. Mr. Mokom would comply with any reasonable conditions imposed by the Receiving State during the interim release, including [REDACTED], the imposition of curfews or home confinement. Moreover, Mr. Mokom undertakes that he will abide by the laws of the Receiving State during his stay on interim release and that he accepts that any violations of the laws of the Receiving State or of the conditions imposed for the release must be reported to the Court.

36. Mr. Mokom is also cognizant that any violation of conditions imposed can result in the immediate revocation of his interim release and transfer into the custody of the Court.

37. Should the Chamber grant him interim release, Mr. Mokom will sign an undertaking that he will abide by all conditions imposed upon him by the Court, including to be present at the Court when ordered.

III. Other Relevant Considerations

i. Legal Considerations

38. At paragraph 10 of the Order, the Pre-Trial Chamber reiterated the ruling of the Appeals Chamber in the *Bemba et al.* case where it found that Article 60(2) empowered it to release a detainee if he has been in detention for an unreasonable

period – even in the absence of inexcusable delay by the Prosecutor.²⁰ In relying on that precedent, the Pre-Trial Chamber was aware that the Appeals Chamber had also found that release, pursuant to Article 60(2) of the Rome Statute, would still oblige it to assess the risk factors enumerated in Article 58(1)(b).

39. Without prejudice to any future submissions, especially by permanent counsel, Duty Counsel is not able, at this stage, absent full disclosure, to address the risk factors in a discrete fashion other than to raise the observations set out below.

40. Firstly, the Order, issued *proprio motu* and eventually inviting State Parties to submit observations on the enforcement of conditions of release, was delivered with due consideration of Mr. Mokom's circumstances. Accordingly, the Pre-Trial Chamber already must have performed the obligatory balancing exercise between the competing interests and have concluded that the factors in favour of release outweigh the risk of flight, the risk of continuing criminal activity and, most importantly, the risk of any possible harm to witnesses and victims.

41. Secondly, the Pre-Trial Chamber has a sound grasp of the Central African Situation, the various stakeholders operating therein and the evidence arising out of the investigation acquired from having supervised disclosure and redactions and having delivered confirmation decisions in the *Ngaïssona & Yekatom* and *Saïd* cases.²¹ Consequently, the Pre-Trial Chamber will have fully anticipated the arguments which will be presented by the Prosecution and the participating victims objecting to interim release and, notwithstanding, believed that the prejudice caused to Mr. Mokom as a result of the unreasonable period of detention outweighs the factors which require detention behind bars as opposed to conditional release.

²⁰ ICC-01/14-01/22-105, para. 12 (citing ICC-01/05-01/13-970 at para. 23).

²¹ 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', 11 December 2019; Pre-Trial Chamber II, *The Prosecutor v. Mahamat Saïd Abdel Kani*, Public redacted version of Decision on the confirmation of charges against Mahamat Saïd Abdel Kani, 9 December 2021.

42. Thirdly, the Pre-Trial Chamber is also familiar with the evidence relevant to security situation on the ground, Mr. Mokom's alleged role in the conflict, and his alleged conduct subsequent thereto. Notwithstanding all the aforementioned, the Pre-Trial Chamber would not have sought observations on interim release had it believed that Mr. Mokom's conditional release would exacerbate tensions in the region or that Mr. Mokom's past alleged conduct was of such a nature to infer an ongoing danger to protected interests or a propensity to abuse the trust which the Pre-Trial Chamber would place in him when ordering conditions of release.

43. Fourthly, Mr. Mokom is at a significant disadvantage in that he has not yet been afforded full disclosure permitting him to make an evidence-based response to any arguments which the Prosecution and Victims' representatives might proffer. If the Pre-Trial Chamber should not order his release, Mr. Mokom will address both the Article 58(1)(b) risk factors *and* the Article 58(1)(a) evidentiary burden in a subsequent application for interim release. Here, ironically, the lack of disclosure must, at this stage, militate in favour of release given that the Prosecution cannot present the usual argument that exposure to the identities of potential witnesses and alleged victims increases the threat to them.

44. Fifthly, the litigation about Mr. Mokom's legal representation is not resolved, and as found by the Pre-Trial Chamber, it is not possible to predict when it will be the case.²² As a result of the amount of time that this litigation has taken, the Pre-Trial Chamber has held that the confirmation of charges hearing, scheduled to commence on 31 January 2023, will have to be postponed, and such postponement is indefinite.²³

45. Such lengthy pre-trial detention due to litigation of legal representation of a suspect is a matter of first impression before the ICC. The consistent jurisprudence of the ICC and the European Court of Human Rights (ECtHR) has held that freedom

²² Pre-Trial Chamber II, 'Order to Mr Mokom to provide submissions on interim release', 7 November 2022, ICC-01/14-01/22-105, para. 12.

²³ *ibid.*, para. 11.

must be the rule and detention the exception.²⁴ Moreover, Article 9(3) of the International Covenant on Civil and Political Rights specifically provides that ‘anyone arrested or detained on a criminal charge [...] ‘shall be entitled to trial within a reasonable time or to release’ and that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody’.²⁵

46. On the day of submission of this application for interim release, Mr. Mokom has been in pre-trial detention for exactly eight months without any significant developments in his case. This unacceptable situation threatens Mr. Mokom’s rights.

47. In this vein, the United Nations Human Rights Committee has found that ‘Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.’²⁶

48. The ICC Statute and human rights law provide that Mr. Mokom is presumed innocent,²⁷ and to date he remains a suspect without any charges confirmed. Here, based on the exceptional amount of time spent by Mr. Mokom in pre-trial detention pending the resolution of the issue of legal representation, it is a human rights duty of any ICC State Party listed in this Application to consider affording Mr. Mokom

²⁴ Pre-Trial Chamber I, *Prosecutor v. Katanga*, ‘Decision on the Conditions of Pre-Trial Detention of Germain Katanga’, ICC-01/04-01/07-426, 21 April 2008, p. 6; Pre-Trial Chamber III, *Prosecutor v. Bemba*, ‘Decision on Application for Interim Release’, ICC01/05-01/08-321, 16 December 2008, para. 31; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, ‘Decision on the Defence’s Application for Interim Release’, 18 November 2013, ICC-01/04-02/06-147, para. 33; Trial Chamber X, *Prosecutor v. Al Hassan*, ‘Public Redacted Version of Decision on the Defence Request for Interim Release’, 29 May 2020, ICC-01/12-01/18-786-Red, para. 16; ECtHR, *Quinn v. France*, no. 18580/91, Judgment of 22 March 1995, § 42; *Kurt v Turkey*, no. 24276/94, Judgment of 25 May 1998, para. 122; *Shamayev and others v Georgia and Russia*, no. 36378/02, Judgment of 12 April 2005, para. 396.

²⁵ International Covenant on Civil and Political Rights, Art. 9 (3).

²⁶ UN Human Rights Committee, [General Comment No. 35](#), CCPR/C/GC/35, Art. 9 (providing for liberty and security of person), 16 December 2014, para. 38.

²⁷ ICC Statute, Art. 66 (1); European Convention on Human Rights, Art. 6 (2); International Covenant on Civil and Political Rights, Art. 14 (2).

interim release on its territory. The length of time taken to adjudicate the issue of his legal representation has kept Mr. Mokom in a state of uncertainty for the past eight months, with the consequential hardships on him and his family.

49. Moreover, if the Court is to respect the presumption of innocence under the Statute and avoid lengthy pre-trial detention, in particular in situations in which a suspect is kept in detention for other reasons than the ones related to the charges against him, the Court should establish, like domestic justice systems, a precedent for interim release when justification for further, lengthy pre-confirmation detention cannot be convincingly demonstrated for a suspect, as is the case for Mr. Mokom.

50. Mr. Mokom's proceedings have been almost at a standstill for the past eight months, which entails that nearly the entirety of *the time he has spent in detention has had nothing to do with the criminal charges* for which he has been arrested.

51. Even if a permanent Counsel is appointed to represent Mr. Mokom before the end of this year 2022, the present delay of eight months will likely entail a further postponement (of perhaps the same duration) of the holding of the confirmation of charges hearing, which was scheduled to start on 31 January 2023.²⁸ By that estimation, Mr. Mokom is likely to have a confirmation of charges hearing only around September 2023, which would amount to a year and a half after his arrest. This is a factor weighing heavily in favour of granting interim release to Mr. Mokom.

52. If Mr. Mokom is granted interim release, he could reside in one of the proposed States, under the conditions imposed, until the new date of confirmation of charges hearing or as otherwise ordered by the Chamber.

ii. Two Factual Considerations

53. Firstly, the interim release of Mr. Mokom in one of the proposed States [REDACTED]. Thus, there is an additional important consideration weighing in

²⁸ ICC-01/14-01/22-T-001-Red-ENG, 22 March 2022, p. 11.

favour of Mr. Mokom's interim release taking place in one of the proposed States as such release could facilitate [REDACTED] also may make him a better candidate for interim release.

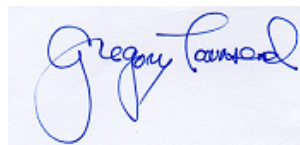
54. Secondly, since being detained, Mr. Mokom [REDACTED].

55. In this context, an interim release would allow [REDACTED].

Conclusion

56. In conclusion, on behalf of Mr. Mokom, for all the above reasons, the Pre-Trial Chamber is respectfully requested to order the interim release of Mr. Mokom to one of the proposed State Parties consulted by the Registry on the conditions stipulated in this Application and any further, more stringent conditions deemed appropriate by the Pre-Trial Chamber, where such conditions of release may adequately be supervised by the receiving State Party.

Respectfully submitted,



Gregory Townsend,
Duty Counsel

The Hague, The Netherlands
Wednesday, November 16, 2022