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Pénale  
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**International  
Criminal  
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**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**

**IN THE CASE OF  
*THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

**Public Document**

**Public redacted version of the “Victims’ Observations on  
‘Mr. Mokom’s Application for Interim Release  
pursuant to Order ICC-01/14-01/22-105’”**

**Source:** Office of Public Counsel for Victims

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

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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the “OPCV”), appointed to represent the collective interests of potential victims,<sup>1</sup> hereby file their observations on “Mr. Mokom’s Application for Interim Release pursuant to Order ICC-01/14-01/22-105” (the “Application”).<sup>2</sup>

2. Preliminarily, Counsel note that the Application does not address the conditions set forth under article 58(1) of the Rome Statute (the “Statute”). The Defence speculates on the intention of the Pre-Trial Chamber (the “Chamber”) without substantiating any of the legal criteria which have to be met to amend or modify Mr Mokom’s detention and which are crucial to decide on a request for interim release.

3. Moreover, the Defence does not provide sufficient details on the State(s) in which the Suspect would seek to be released, merely proposing some vague options without concretely identifying such State(s). Said approach limits the other participants in submitting observations *in concreto*.

4. Counsel share the Prosecution’s submissions<sup>3</sup> and posit that the Application should be rejected and Mr Mokom should continue to be detained as the conditions set forth in article 58(1) of the Statute continue to be met. In this regard, the Defence has advanced no grounds justifying the release of the Suspect and failed to make concrete proposals for his conditional release pursuant to rule 119 of the Rules of Procedure and Evidence (the “Rules”).

5. Counsel further note that the release of Mr Mokom with conditions would not adequately mitigate the risks that he may abscond, obstruct or endanger the Court’s

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<sup>1</sup> See the “Order on the conduct of the confirmation of charges proceedings” (Pre-Trial Chamber II), [No. ICC-01/14-01/22-62](#), 27 June 2022, paras. 45-46.

<sup>2</sup> See “Mr. Mokom’s Application for Interim Release pursuant to Order ICC-01/14-01/22-105”, No. ICC-01/14-01/22-110-Conf, 14 November 2022; public redacted version notified on 16 November 2022, [No. ICC-01/14-01/22-110-Red](#) (the “Application”).

<sup>3</sup> See the “Réponse de l’Accusation à “Mr. Mokom’s Application for Interim Release pursuant to Order ICC-01/14-01/22-105””, No. ICC-01/14-01/22-112-Conf, 18 November 2022 (the “Prosecution Response”).

proceedings and/or pose a threat to the safety and well-being of the victims. In this regard, a chamber must strike a fair balance between different competing interests, with due regard to the safety and well-being of the victims.

6. Finally, Counsel argue that the delay in the proceedings and the duration of pre-trial detention are not factors which supersede the legal requirements of article 58(1) of the Statute. Moreover, in the present circumstances, said factors do not amount to an undue delay.

## II. PROCEDURAL BACKGROUND

7. On 10 December 2018, the Chamber issued the warrant of arrest against Mr Mokom (the “Warrant of Arrest”).<sup>4</sup>

8. On 14 March 2022, Mr Mokom was surrendered to the Court. Following his first appearance,<sup>5</sup> the Chamber scheduled the confirmation of charges hearing to commence on 31 January 2023.<sup>6</sup>

9. On 7 November 2022, the Chamber rendered the “Order to Mr Mokom to provide submissions on interim release” (the “Order”).<sup>7</sup>

10. On 9 November 2022, Counsel filed a request to submit observations on behalf of victims on the issue of interim release (the “Request”).<sup>8</sup>

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<sup>4</sup> See the “Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka” (Pre-Trial Chamber II), ICC-01/14-01/22-2-US-Exp; public redacted version notified on 22 March 2022, [No. ICC-01/14-01/22-2-Red2](#) (the “Warrant of Arrest”).

<sup>5</sup> See the Transcript of hearing, No. ICC-01/14-01/22-T-001-CONF-ENG, 22 March 2022; public redacted version notified on the same day, [No. ICC-01/14-01/22-T-001-Red-ENG](#).

<sup>6</sup> See the “Order convening a hearing for the first appearance of Mr Mokom” (Pre-Trial Chamber II), [No. ICC-01/14-01/22-21](#), 16 March 2022.

<sup>7</sup> See the “Order to Mr Mokom to provide submissions on interim release” (Pre-Trial Chamber II), [No. ICC-01/14-01/22-105](#), 7 November 2022 (the “Order”).

<sup>8</sup> See the “OPCV Request to submit observations on behalf of victims on the issue of interim release”, [No. ICC-01/14-01/22-107](#), 9 November 2022.

11. On 14 November 2022, Mr Mokom filed the Application.<sup>9</sup>
12. On 17 November 2022, the Chamber, by e-mail, granted the Request, instructing Counsel to file observations by 22 November 2022.<sup>10</sup>
13. On 18 November 2022, the Prosecution filed its response to the Application (the “Prosecution Response”).<sup>11</sup>

### III. CLASSIFICATION

14. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. A public redacted version will be filed in due course.

### IV. SUBMISSIONS

#### 1. Applicable law

15. Article 60(2) of the Statute provides that:

*“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”.*

16. In turn, article 58(1) of the Statute provides the following conditions:<sup>12</sup>

*“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*

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<sup>9</sup> See the Application, *supra* note 2.

<sup>10</sup> See the Email correspondence from the Chamber on 17 November 2022 at 9:42.

<sup>11</sup> See the Prosecution Response, *supra* note 3.

<sup>12</sup> See, *inter alia*, ECtHR, *Buzadji v. the Republic of Moldova* [GC], [Application No. 23755/07](#), 5 July 2016, para. 88.

(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”.*

17. The Appeals Chamber has held in this regard that *“the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released”*.<sup>13</sup>

18. Whilst the Chamber’s power is not conditioned by its previous decision on the issuance of the Warrant of Arrest, the factors supporting said decision may be the same as those required for a decision under article 60(2) of the Statute.<sup>14</sup> In particular, *“in a decision under article 60(2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the de novo character of [its] decision”*.<sup>15</sup> The Chamber may therefore *“base its decision on evidence that was already before it when it issued the warrant of arrest, as long as it is persuaded that the evidence, at the time of the decision under article 60(2) of the Statute, justifies the finding in question”*.<sup>16</sup>

19. Moreover, the Appeals Chamber has confirmed that continued detention *“must ‘appear’ to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence”*,<sup>17</sup> and *“[t]he apparent necessity of continued detention in order to ensure*

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<sup>13</sup> See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), [No. ICC-01/04-01/06-824 OA7](#), 13 February 2007, para. 134.

<sup>14</sup> See the “Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’” (Appeals Chamber), [No. ICC-01/05-01/13-558 OA2](#), 11 July 2014, para. 104.

<sup>15</sup> See the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’” (Appeals Chamber), [No. ICC-02/11-01/11-278-Red OA](#), 26 October 2012, paras. 23 and 27.

<sup>16</sup> *Idem*, para. 69.

<sup>17</sup> See the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” (Appeals Chamber), [No. ICC-01/04-01/07-572 OA4](#), 9 June 2008, para. 21. See also the “Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’” (Appeals Chamber), [No. ICC-02/05-01/20-177](#)

*the detainee's appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together".*<sup>18</sup>

20. The reasons for detention pursuant to article 58(1)(b)(i) to (iii) of the Statute are alternative.<sup>19</sup> Accordingly, if at least one of the three conditions is fulfilled, the person shall continue to be detained.<sup>20</sup>

21. In the same vein, international human rights case law, as developed by the European Court of Human Rights (the "ECtHR"), has established that the following grounds may be considered "relevant" and "sufficient" to justify the continued detention of the person concerned:<sup>21</sup> (i) the existence and persistence of serious indications of guilt;<sup>22</sup> (ii) the existence of a risk of pressure on witnesses and collusion

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[OA2](#), 8 October 2020, para. 33; and the "Decision on the Defence's Application for Interim Release" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-147](#), 18 November 2013, para. 47.

<sup>18</sup> See the "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for Interim release'" (Appeals Chamber), [No. ICC-01/05-01/08-323 OA](#), 16 December 2008, para. 55; the "Decision on the 'Defence Request for Interim Release'" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-163](#), 19 May 2011, para. 39.

<sup>19</sup> See the "Public Redacted Version of Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa'" (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 89; the "Decision on the Defence Request for Interim Release" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-115](#), 14 August 2020, para. 30.

<sup>20</sup> See the "Public redacted version of 'Decision on the Defence request for interim release'" (Trial Chamber X), [No. ICC-01/12-01/18-786-Red](#), 29 May 2020, para. 18.

<sup>21</sup> See ECtHR, *Prncipe v. Monaco*, [Application No. 43376/06](#), 16 July 2009, para. 74; *Tum v. Turkey*, [Application No. 11855/04](#), 17 June 2008, para. 41; *Lelieore v. Belgium*, [Application No. 11287/03](#), 8 November 2007, para. 92.

<sup>22</sup> See ECtHR, *Tum v. Turkey*, [Application No. 11855/04](#), 17 June 2008, para. 41; *Mansur v. Turkey*, [Application No. 16026/90](#), 8 June 1995, para. 56; *Tomasi v. France*, [Application No. 12850/87](#), 27 August 1992, para. 89.

between the co-accused;<sup>23</sup> (iii) the risk of flight;<sup>24</sup> (iv) the existence of a risk of the commission of a new offence;<sup>25</sup> and (v) the requirements of the investigation.<sup>26</sup>

22. Finally, pursuant to rule 119 of the Rules, the Chamber may grant conditional release, even if the article 58(1) conditions are satisfied, on the basis of specific and enforceable conditions, *provided that such conditions are available and negate or sufficiently mitigate any identified risks.*<sup>27</sup>

## 2. The Application fails to meet the relevant legal criteria

23. At the outset, Counsel note that the Application does not address the conditions set forth under article 58(1) of the Statute. In fact, while the Defence sets up the “*Relevant Statutory Background*”<sup>28</sup> of the Application, it does not argue on any of the legal criteria which have to be met to amend or modify Mr Mokom’s detention and which are crucial to decide on a request for interim release.

24. Instead, the Defence merely speculates on the reasons behind the *proprio motu* issuance of the Order. In particular, the Defence seems to assume that there is no need to articulate on the requirements of article 58(1) of the Statute as “*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*

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<sup>23</sup> See ECtHR, *Contrada v. Italy*, [Application No. 27143/95](#), 24 August 1998, para. 61; *Tomasi v. France*, [Application No. 12850/87](#), 27 August 1992, paras. 92-95.

<sup>24</sup> See ECtHR, *Cetin Agdas v. Turkey*, [Application No. 77331/01](#), 19 September 2006, paras. 27-28. See also *Mansur v. Turkey*, [Application No. 16026/90](#), 8 June 1995, para. 55; *Tomasi v. France*, [Application No. 12850/87](#), 27 August 1992, para. 98; *Letellier v. France*, [Application No. 12369/86](#), 26 June 1991, para. 43.

<sup>25</sup> See ECtHR, *Paradysz v. France*, [Application No. 17020/05](#), 29 October 2009, para. 70; *Muller v. France*, [Application No. 21802/93](#), 17 March 1997, para. 44; *Clooth v. Belgium*, [Application No. 12718/87](#), 12 December 1991, para. 40.

<sup>26</sup> See ECtHR, *Lelievre v. Belgium*, [Application No. 11287/03](#), 8 November 2007, para. 92; *Bouchet v. France*, [Application No. 33591/96](#), 20 March 2001, para. 41.

<sup>27</sup> See, *mutatis mutandis*, the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), [No. ICC-02/11-01/15-846](#), 10 March 2017, para. 21. See also, the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), [No. ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 105.

<sup>28</sup> See the Application, *supra* note 2, paras. 12-13.



*continuing criminal activity and, most importantly, the risk of any possible harm to witnesses and victims”.*<sup>29</sup>

25. On the contrary, Counsel submit that the Defence still has to substantiate a request for interim release showing that none of article 58(1) criteria are met and the reasons justifying a change in the conditions of detention of the Suspect. The Defence admittedly fails to do so.

26. In addition, the Defence does not provide sufficient details on the State(s) in which the Suspect would seek to be released. In fact, the Defence proposes some vague options without concretely identifying such State(s).<sup>30</sup> This approach limits the other participants in submitting observations *in concreto*.

**a) *The conditions set out in article 58(1) of the Statute continue to be met***

27. Counsel submit that the detention of Mr Mokom should be maintained as the conditions set out in article 58(1) of the Statute continue to be met and there has been no significant development since the issuance of the Arrest Warrant which would justify his release.<sup>31</sup>

28. In particular, the following findings of the Chamber remain valid: 1) the overall supporting evidence is sufficient to establish reasonable grounds to believe that Mr Mokom bears individual criminal responsibility (article 58(1)(a) of the Statute);<sup>32</sup> 2) the detention of Mr Mokom appears necessary to ensure that he (i) appears before the Chamber; (ii) does not obstruct or endanger the Prosecutor’s ongoing investigation; and (iii) is prevented from committing related crimes within the jurisdiction of the Court arising from the same circumstances described in his warrant of arrest (article 58(1)(b) of the Statute).<sup>33</sup> In this regard, the Chamber noted, *inter alia*,

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<sup>29</sup> *Idem*, para. 40.

<sup>30</sup> See the Application, *supra* note 2, paras. 14-28.

<sup>31</sup> See the Prosecution Response, *supra* note 3, paras. 7-15.

<sup>32</sup> See the Warrant of Arrest, *supra* note 4, para. 19.

<sup>33</sup> *Idem*, para. 20.

that in 2017 Mr Mokom “*publicly threatened with a resumption of violence in the CAR*” and was reported to “*lead his own Anti-Balaka wing*”.<sup>34</sup> There is no information which would suggest that these circumstances changed.

29. The fact that Mr Mokom will soon have access to the material from the *Yekatom and Ngaiissona* case<sup>35</sup> – together with the already available material in this case – is an additional factor which make his continued detention necessary<sup>36</sup> to ensure his presence at the confirmation hearing and to avoid any obstruction of the Court’s proceedings. In this regard, the Chamber has previously considered the issue of risk of interference with witnesses as a justifiable factor for continued detention concluding that the Suspect “*could be in a position to reach, intimidate, or harm (potential) witnesses, their families or other individuals cooperating with the Court*”.<sup>37</sup> As a result, Counsel submit that the preservation of the evidence and the integrity of the proceedings would be put at risk should Mr Mokom be released.

30. Counsel further note that the scheduling of the confirmation of charges hearing is a further element that makes Mr Mokom more likely to abscond. It would thus be incongruous to grant interim release close to the commencement of the hearing – even if a postponement is envisaged.<sup>38</sup>

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<sup>34</sup> *Ibid.*

<sup>35</sup> See the “Prosecution’s Submissions pursuant to the Chamber’s Order on Disclosure and Related Matters (ICC-01/14-01/22-104)”, [No. ICC-01/14-01/22-109](#), 11 November 2022.

<sup>36</sup> See *contra* the Application, *supra* note 2, para. 43.

<sup>37</sup> See the “Decision on the Defence Request for Interim Release” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-115](#), 14 August 2020, para. 29. See also the Warrant of Arrest, *supra* note 4, para. 20. See also the “Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’”, *supra* note 17, para. 27 (“[...] *in considering this information for the purpose of its determination, the Pre-Trial Chamber acted in line with its obligation under article 68 of the Statute to ensure the protection of victims and witnesses. [...] Indeed, when determining whether the condition for continued detention under article 58(1)(b)(ii) of the Statute is met, the safety of witnesses must be considered regardless of whether they are currently reachable by the Prosecutor*”).

<sup>38</sup> See the Order, *supra* note 7, para. 11.

31. In the Application, the Defence submits that the fact that the confirmation hearing will be delayed warrants Mr Mokom's interim release.<sup>39</sup> Such an argument is unsubstantiated.

32. In fact, according to the relevant jurisprudence and practice before this Court :

*"12. [...] Efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.*

*13. However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. [...] Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial".<sup>40</sup>*

33. Thus, delays in the pre-trial proceedings may be justified depending on the circumstances of a specific case and with the view to best solve any pre-trial issues before the commencement of a trial. Continuity of a pre-trial detention may be justified within this framework.<sup>41</sup>

34. The ECtHR has dealt with the issue of pre-trial detention and what is to be considered as an alleged unreasonable period.<sup>42</sup> In this regard:

*"The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the*

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<sup>39</sup> See the Application, *supra* note 2, para. 51.

<sup>40</sup> See the [Chambers Practice Manual](#), Fifth edition, available at [20220323-chambers-practice-manual-fifth-edition-eng\\_2.pdf \(icc-cpi.int\)](#).

<sup>41</sup> See also, *mutatis mutandis*, the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled 'Decision on Mr Gbagbo's Detention'" (Appeals Chamber), [No. ICC-02/11-01/15-992-Red OA10](#), 19 July 2017, para. 77.

<sup>42</sup> See also the Prosecution Response in the part dealing with the period of Mr Mokom's detention, *supra* note 3, paras. 17-20.

*presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”*.<sup>43</sup>

35. The above considerations shall also apply in the present case and circumstances.<sup>44</sup> In addition, procedural steps have already been taken by the Chamber in order to expedite the proceedings and mitigate any further delay.<sup>45</sup> The matter of the Defence legal representation is currently before the Appeals Chamber,<sup>46</sup> once resolved any pending issue that pose a delay in the proceedings would be settled.<sup>47</sup>

36. Thus, the overall discussion on the possible release of Mr Mokom is premature. The Appeals Chamber is still to adjudicate on Mr Mokom’s legal representation. Therefore, the argument that an eight-month pre-trial detention would be tantamount to an infringement of Mr Mokom’s rights cannot be upheld.<sup>48</sup>

37. Counsel also contend that the Statute provides safeguards against the undue extension of detention. Indeed, pursuant to article 60(3) of the Statute, the Pre-Trial Chamber shall review periodically any previous ruling on the release or detention of a suspect in order to ascertain whether the circumstances have changed, and if so,

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<sup>43</sup> See e.g. ECtHR, *Buzadji v. the Republic of Moldova* [GC], [Application No. 23755/07](#), 5 July 2016, para. 90. See also IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, “Judgment”, [Series C, no. 170](#), 21 November 2007, para. 93.

<sup>44</sup> See the “Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”, *supra* note 14, para. 68 (“[...] *The exceptionality of detention and the presumption of innocence, as “internationally recognised human rights” under article 21 (3) of the Statute, are therefore relevant to the interpretation of articles 58 (1) and 60 (2) of the Statute. However, the thrust of decisions on interim release is the concrete assessment of whether “reasonable grounds to believe” the suspect committed the alleged crimes continues to exist and that the conditions under article 58 (1) (b) are met. Therefore, if the conditions underpinning article 58 (1) are satisfied, detention of a suspect will be justifiable and consonant with internationally recognised human rights principles [...]*”).

<sup>45</sup> See the “Order on disclosure and related matters” (Pre-Trial Chamber II), [No. ICC-01/14-01/22-104](#), 7 November 2022. See also the “Prosecution’s Submissions pursuant to the Chamber’s Order on Disclosure and Related Matters (ICC-01/14-01/22-104)”, [No. ICC-01/14-01/18-1662](#), 11 November 2022.

<sup>46</sup> See the “Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II entitled ‘Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022’” (Appeals Chamber), [No. ICC-01/14-01/22-97 OA3](#), 3 October 2022.

<sup>47</sup> See *contra* the Application, *supra* note 2, para. 44.

<sup>48</sup> *Idem*, para. 46.

whether the termination of detention is warranted.<sup>49</sup> In fact, “[t]he object of the law is to ensure that detention is not extended beyond what is necessary to secure the ends of justice”.<sup>50</sup> Lastly, article 60(4) of the Statute ensures that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor, which has not been the case in these proceedings.

38. Concerning Mr Mokom’s [REDACTED],<sup>51</sup> Counsel note that the Defence itself confirms that [REDACTED].<sup>52</sup> In this regard, Counsel recall that interim release based on [REDACTED] may not trump the requirements underpinning article 58 of the Statute,<sup>53</sup> even more so if [REDACTED].<sup>54</sup>

**b) *The interim release would endanger victims***

39. In accordance with article 68(1) of the Statute, the Court shall “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.<sup>55</sup> When ruling on the Application, the Chamber must strike a fair balance between different competing interests, with due regard to the safety and well-being of the victims. Mr Mokom’s continued detention pending the confirmation hearing makes it possible to meet all of these requirements, also in light of the fact that the relevant criteria under articles 58(1) and 60(2) of the Statute continue to be met.

40. Counsel posit that the security and well-being of the victims would be endangered if the Suspect is released. Said release would destabilise the already volatile security situation in the Central African Republic (the “CAR”).<sup>56</sup> It would in

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<sup>49</sup> See the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre Trial Chamber I on the Application of the Appellant for Interim Release”, *supra* note 17, para. 14.

<sup>50</sup> *Idem*. See also the “Decision on the Defence’s Application for Interim Release” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-147](#), 18 November 2013, para. 34.

<sup>51</sup> See the Application, *supra* note 2, paras. 54-55.

<sup>52</sup> *Idem*, para. 54.

<sup>53</sup> See the [REDACTED].

<sup>54</sup> See the [REDACTED].

<sup>55</sup> See also article 57(3)(c) of the Statute.

<sup>56</sup> See e.g. ECtHR, *Milanković and Bošnjak v. Croatia*, [Applications Nos. 37762/12 and 23530/13](#), 26 April 2016, para. 154 (“The Court also notes that the prevention of a threat to public order is commonly seen as a legitimate ground for detention [...], and as such is accepted in the Court’s case-law (see, for example, *Peša*, cited above, § 101; and *J.M.*, cited above, § 62), and in international criminal-law practice (see, for instance,

fact further expose victims - who bravely decided to apply for participation in the present proceedings to contribute to the search for the truth, despite risks of being threatened or otherwise stigmatised.

41. While the Defence does not propose a concrete State in which Mr Mokom would be released, it indicates [REDACTED] as possible countries. In this regard, objective risks exist for the victims who reside in said countries or who have family members residing in said countries.

42. Counsel also underline that Mr Mokom's release would be hard to fathom for the victims who fear retaliation and had clearly advocated for his continued detention pending the pre-trial proceedings. For the victims, this is in fact the only way of ensuring that they and their families are safe and the Suspect will face the proceedings. Victims oppose Mr Mokom's release regardless of the conditions proposed by the Defence. They indeed believe that no condition exists that can mitigate the risks they would be exposed to.

*c) Rule 119 conditions do not adequately mitigate the risks under article 58(1) of the Statute*

43. Counsel submit that the release of Mr Mokom – even with conditions – entails a high risk that he may abscond, obstruct or endanger the Court's proceedings and pose a threat to the safety and well-being of the victims.

44. In this regard, the Defence requests to follow the *Gicheru* case and the conditions imposed therein.<sup>57</sup> Counsel note that said case differs considerably from the present in both scope and substance. The *Gicheru* case concerned an article 70 proceeding whilst

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*paragraph 100 above). Indeed, given the specific nature of the charges of war crimes against civilian population, this ground for detention appears particularly pertinent to the cases involving charges of such grave breaches of fundamental human rights, which in the general public commonly provoke particular moral condemnation").*

<sup>57</sup> See the Application *supra* note 2, para. 31, referring to the "Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release', 29 January 2021, ICC-01/09-01/20-90-Conf" (Pre-Trial Chamber A), [No. ICC-01/09-01/20-90-Red2](#), 29 January 2021, para. 47.

the present relates to core crimes of the Statute;<sup>58</sup> Mr Gicheru demonstrated a concrete intention to cooperate with the Court through his voluntary surrender – contrary to Mr Mokom, who was at large until his arrest in Chad;<sup>59</sup> the Prosecution did not oppose Mr Gicheru conditional release; and the confirmation proceedings were to be in writing in the *Gicheru* case, making his appearance before the Pre-Trial Chamber not necessary.

45. In any case, absent any information on the willingness of any proposed State to have Mr Mokom on its territory, as well on the particulars of the conditions on his release,<sup>60</sup> Counsel are unable to seek the victims' views and concerns and thus cannot make substantiated submissions on this aspect of the Application.<sup>61</sup>

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<sup>58</sup> See the "Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", *supra* note 14, paras. 1, 64 ("[...] offences under article 70 of the Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under article 5 of the Statute [...]"); the "Decision on Mr Gicheru's Request for Interim Release", *supra* note 57, para. 44.

<sup>59</sup> See the "Order convening a hearing for the first appearance of Mr Mokom" (Pre-Trial Chamber II), [No. ICC-01/14-01/22-21](#), 16 March 2022, para. 4.

<sup>60</sup> See the "Decision on the Second Yekatom Defence Motion for Interim Release" (Trial Chamber V), [No. ICC-01/14-01/18-643-Red](#), 7 September 2020, para. 34; the "Decision on the first review of Aimé Kilolo Musamba's detention pursuant to article 60(3) of the Statute" (Pre-Trial Chamber II), [No. ICC-01/05-01/13-611](#), 6 August 2014, paras. 12-13.

<sup>61</sup> See also the Prosecution Response, *supra* note 3, para. 25.

## V. CONCLUSION

46. For the foregoing reasons, Counsel respectfully request the Chamber to reject the Application.



Dmytro Suprun



Paolina Massidda

Dated this 24<sup>th</sup> day of November 2022

At The Hague, The Netherlands