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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

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

PUBLIC

**Mokom Defence Observations on the Interim Release Application Submitted by
Duty Counsel on behalf of Mr. Mokom**

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

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**Victims Participation and Reparations Other
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Introduction and Procedural History

1. On 10 December 2018, Pre-Trial Chamber II ('Chamber') issued a Warrant of Arrest for Mr. Mokom.¹
2. On 14 March 2022, Mr. Mokom was surrendered to the Court.²
3. On 22 March 2022, during the first appearance of Mr. Mokom, the Chamber set the date of the confirmation of charges hearing for 31 January 2023.³
4. On 7 November 2022, following delays in the proceedings on account of the litigation in relation to Mr Mokom's legal representation, Pre-Trial Chamber II ('Chamber') issued an Order instructing Mr. Mokom to provide submissions on interim release.⁴
5. On 14 November 2022, Duty Counsel for Mr. Mokom submitted an application for interim release on behalf of Mr. Mokom.⁵
6. On 18 November 2022, the Prosecution filed its Response to the Application.⁶
7. On 22 November 2022, the Office of Public Counsel for Victims (OPCV) filed its Observations on the Application.⁷

¹ Pre-Trial Chamber II, 'Public Redacted Version of 'Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka' (ICC-01/14-01/22-2-US-Exp)', 22 March 2022, ICC-01/14-01/22-2-Red2.

² Pre-Trial Chamber II, 'Order convening a hearing for the first appearance of Mr Mokom', 16 March 2022, ICC-01/14-01/22-21, para. 4.

³ ICC Transcript, 22 March 2022, ICC-01/14-01/22-T-001-Red-ENG, p. 11, l. 19-21.

⁴ 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 ('Order').

⁵ '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. A public redacted version was submitted on 16 November 2022, ICC-01/14-01/22-110-Red ('Application').

⁶ Réponse de l'Accusation à "Mr MOKOM's Application for Interim Release pursuant to Order ICC-01/14-01/22-105", 18 November 2022, ICC-01/14-01/22-112-Conf; a public redacted version was submitted on 26 January 2023, ICC-01/14-01/22-112-Red ('Prosecution's Response').

⁷ Victims' Observations on "Mr. Mokom's Application for Interim Release pursuant to Order ICC-01/14-01/22-105", 22 November 2022, ICC-01/14-01/22-115-Conf; a public redacted version was submitted on 24 November 2022, ICC-01/14-01/22-115-Red, (OPCV Observations).

8. On 23 January 2023, permanent Counsel for Mr. Mokom was appointed.⁸
9. On 24 January 2023, the Chamber instructed permanent Counsel for Mr. Mokom, if considered necessary for Mr. Mokom's defence, to provide observations on the Prosecution's Response and the OPCV Observations.⁹
10. On 3 February 2023, the Chamber ordered that the Confirmation of Charges Hearing will commence on 22 August 2023.¹⁰

Legal Framework

11. Article 60(2) of the Statute places the burden of satisfying the Pre-Trial Chamber that the conditions justifying the continued detention of Mr. Mokom exist on those who seek his continued detention. This burden is consistent with the recognised presumption in favour of pre-trial release¹¹ which flows from the presumption of innocence;¹² a fundamental right which underpins proceedings at this Court.
12. Specifically, it must be demonstrated that ongoing detention is necessary (i) to ensure Mr. Mokom's appearance at trial, (ii) to ensure that Mr. Mokom does not obstruct or endanger the investigation or Court proceedings or (iii) to prevent Mr. Mokom from committing a crime within the jurisdiction of the Court and arising out of the same circumstances. These conditions are listed at Article 58(1) of the Statute.

⁸ Registry, "Notification of the Appointment of Mr Philippe Larochelle as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka", 23 January 2023, ICC-01/14-01/22-136.

⁹ Pre-Trial Chamber II, 'Order for observations and decision on the Prosecution's request for a status conference', 24 January 2023, ICC-01/14-01/22-138, para. 11.

¹⁰ Pre-Trial Chamber II, 'Decision setting the date for the confirmation of charges hearing', 3 February 2023, ICC-01/14-01/22-151, para. 11.

¹¹ See, e.g., ECtHR, *Bykov v. Russia*, Application no. 4378/02, Grand Chamber, Judgment, 10 March 2009, para. 61; ECtHR, *Neumeister v. Austria*, Application no 1936/63, Court (Chamber), Judgment, 27 June 1968, Series A no. 8, p. 37.

¹² ECtHR, *Buzadji v. the Republic of Moldova*, Application no. 23755/07, Grand Chamber, Judgment, 5 July 2016, para. 89; William A. Schabas, *The European Convention on Human Rights* (Oxford University Press, 2015), p. 250.

13. Neither the Statute nor the Rules of Procedure and Evidence prescribe the existence and selection of a suitable country to host Mr. Mokom as a pre-condition of his provisional release. In other words, Mr. Mokom's eligibility for provisional release cannot hinge on the willingness of a State to receive him, even if practically speaking, such provisional release cannot occur without a State declaring itself willing to do so.

14. In those circumstances, the Defence respectfully submits that should the Pre-Trial Chamber agree that neither the Prosecution nor the OPCV have demonstrated that the conditions justifying continued detention exist, it should issue a decision to that effect, stating that Mr. Mokom's is eligible to be provisionally released as soon as a State declares its willingness to host him.

Observations

A. The Prosecution's Response and the OPCV Observations do not demonstrate that Mr. Mokom's detention is necessary:

(i) Mr. Mokom does not pose a flight risk

15. The Prosecution's Response alleges that Mr. Mokom is a flight risk because he may receive a significant sentence.¹³ There are two levels of speculation in this Prosecution submission: first that Mr. Mokom will receive a significant sentence and second that Mr. Mokom may decide to flee that risk.

16. Neither the Prosecution nor the OPCV Observations offer any evidence that Mr. Mokom has a tendency or intent to flee from justice and spend the rest of his life as a fugitive, on the run. On the contrary, his conduct to date supports the existence of his desire to engage with the Court, by fighting to retain the lawyer of his choice and then selecting a permanent counsel who will assist him in facing the allegations of the Prosecution. The charges against him have yet to be confirmed, and the

¹³ ICC-01/14-01/22-112-Red, para. 7 (emphasis added).

Defence may very well oppose the Prosecution speculation with one of its own, that Mr. Mokom may very well be acquitted after proceedings during which he is presumed innocent, so that any additional day in jail is a violation not only of that presumption of but actual innocence.

17. The only evidence offered by the Prosecution to justify Mr. Mokom's continued detention is an article from "*Corbeaunews*" welcoming the arrest of Mr. Mokom. This article does not support the Prosecution contention. It states that Mr. Mokom fled to Tchad after a rebel coalition unsuccessfully tried to seize power in CAR in 2020, years after the allegations against him before this Court are supposed to have taken place. In fact, the article itself makes that distinction, stating that "*[l]es crimes pour lesquels il sera traduit en justice, et qui sont à l'origine du mandat d'arrêt émis contre lui en 2018, sont bien antérieurs toutefois*".¹⁴ On the contrary, the facts demonstrate that Mr. Mokom remained in the Central African Republic after the period of the commission of the crimes alleged in the Warrant of Arrest issued by the ICC. The proposition that Mr. Mokom is a flight risk is therefore completely speculative, and does not resist even a cursory analysis.

(ii) The detention is not necessary to ensure that Mr. Mokom does not obstruct or endanger the investigation of the court proceedings

18. The Prosecution allegation that Mr. Mokom's detention is necessary to protect Prosecution witnesses and ongoing investigations rests on arguments identical to those offered in previous submissions on contact restrictions, where it was argued that Mr. Mokom could threaten witnesses or has influence over a 'wide range' of associates who could assist him, or otherwise interfere with investigations.¹⁵

¹⁴ Ibidem, footnote 6.

¹⁵ Ibid., paras. 9 and 11.

19. The Chamber has already held that the Prosecution could not rely on such arguments to justify the imposition of contact restrictions on Mr. Mokom, and instead required the Prosecution to provide concrete and up-to-date information to seek to justify their imposition.¹⁶ In the same way, the Prosecution's attempt to justify Mr. Mokom's ongoing detention with arguments deemed too speculative by the Chamber to justify the level of contact restrictions, should also be dismissed.

20. Nor can the Prosecution credibly argue that Mr. Mokom's risk of interference with Prosecution witnesses or investigations has increased since the beginning of the disclosure process, due to Mr. Mokom's knowledge of the identity of witnesses in the case,¹⁷ or based on witness testimonies in the *Yekatom and Ngaïssona* case.¹⁸ This information has been in possession of Mr. Mokom for almost a year, and the Prosecution is not in a position to demonstrate a single incident of intimidation or interference with the investigation.

21. In any case, the Chamber has already stated that the mere fact that Mr. Mokom may be aware of the evidence underlying the warrant of arrest issued against him and potentially of the evidence adduced in the *Yekatom and Ngaïssona* case, is not sufficient to justify the imposition of a measure which restricts Mr. Mokom's rights without any other concrete and up-to-date information concerning potential risks.¹⁹

¹⁶ Pre-Trial Chamber II, 'Sixth Decision on Contact Restrictions', 2 February 2023, ICC-01/14-01/22-148-Conf-Exp, para. 9; 'Fifth Decision on Contact Restrictions', 7 November 2022, ICC-01/14-01/22-106-Conf-Exp, para. 9.

¹⁷ ICC-01/14-01/22-112-Red, para. 10.

¹⁸ Ibid., para. 11, footnote 12.

¹⁹ ICC-01/14-01/22-106-Conf-Exp, para. 9.

- (iii) The detention is not necessary to prevent of the commission of crimes arising out of the same circumstances by Mr. Mokom.

22. The Prosecution does not offer evidence that would justify the need to maintain Mr. Mokom's detention to prevent his involvement in the commission of crimes within the Court's jurisdiction arising out of the same circumstances. The considerations listed by the Chamber in the Warrant of Arrest to justify such necessity do not offer concrete evidence concerning Mr. Mokom's involvement or even acquiescence to the crimes allegedly committed by a group in the Central African Republic.²⁰ However, the Warrant of Arrest, which was issued in December 2018, is more than four years old. The three sources relied upon therein by the Chamber to justify Mr. Mokom's detention at the time are even older, being dated March 2018 at the latest.²¹

23. The Prosecution Request lists more recent security incidents which it attributes to the CPC, to try to demonstrate a risk of Mr. Mokom's involvement in the commission of crimes within the Court's jurisdiction.²² The Prosecution relies only upon poorly referenced press articles to attempt to demonstrate that the CPC is linked to recent security incidents in the Central African Republic, which is manifestly insufficient. Importantly, none of the sources provided by the Prosecution reference any of the active armed groups of the CPC as forming part of Mr. Mokom's network of supporters and associates, or as having any affiliation to Mr. Mokom. The Prosecution's reference to these more recent events to justify Mr. Mokom's detention is therefore also entirely speculative and does not establish a sufficient basis to justify Mr. Mokom's detention.

²⁰ ICC-01/14-01/22-112-Red, para. 12.

²¹ See ICC-01/14-01/22-2-Red2, para. 20, footnotes 201-203, with respective reference to CAR-OTP-2084-1825, dated August 2017; CAR-OTP-2084-1827, dated March 2018; and CAR-OTP-2072-1440, dated January 2018.

²² ICC-01/14-01/22-112-Red, para. 14.

- (iv) The provisional release conditions and the undertaking offered by Mr. Mokom

24. The Prosecutor cursorily dismissed as insufficient the proposed conditions restricting Mr. Mokom's liberty during interim release, claiming that these conditions would not prevent him from seeking to flee or would not guarantee control over his communications.²³ The Application however clearly states that Mr. Mokom is willing 'to comply fully with any and all conditions placed on him' and that he would comply with any reasonable conditions imposed by the Receiving State during the interim release.²⁴ The Prosecution Response fails to take into account Mr. Mokom's willingness to be released in physical proximity of the Court to allow him to travel back to the premises when ordered by the Chamber and to ensure the efficient preparation of his case with his Defence team.²⁵

25. Mr. Mokom fails to see how being provisionally released in the Netherlands, with no passport, an electronic bracelet and a degree of control over his communications would allow any of the risks mentioned in Article 58(1)(b) to materialise to any degree. Again, the fact that Mr. Mokom has fought for so many months over the issue of his legal representation is a clear demonstration of his willingness to prepare a strong Defence and remain at disposal of the Chamber and subsequent Trial Chamber during the entirety of the pre-trial and trial proceedings.²⁶

26. Nor do the OPCV Observations provide any concrete information justifying the necessity of Mr. Mokom's continued detention. Like the Prosecution, the OPCV

²³ ICC-01/14-01/22-112-Red, para. 24.

²⁴ ICC-01/14-01/22-110-Red, paras. 29 and 35.

²⁵ Ibid., para. 18.

²⁶ See Ibid., paras. 15 and 18.

Observations rely upon considerations set out in the Warrant of Arrest to seek to justify the maintenance of Mr. Mokom's detention,²⁷ which are insufficient.²⁸

27. The OPCV Observations' reliance on the Mokom Defence access to material from the *Yekatom and Ngaïssona* case does not constitute an additional factor justifying the detention 'to avoid any obstruction of the Court's proceedings'.²⁹ This argument is purely speculative, particularly given that the Prosecution has now admitted that much of the material from *Yekatom and Ngaïssona* case will not be of relevance to the Mr Mokom's Defence.³⁰

28. The OPCV Observations also state that Mr. Mokom's release 'would destabilise the already volatile security situation in the Central African Republic'.³¹ However, no specific explanations are offered to substantiate this allegation, in particular in relation to the fact that Mr. Mokom has not sought for his interim release to take place in CAR.

B. The length of the pre-trial proceedings justifies the interim release:

29. The Appeals Chamber rendered its final Judgment on the matter of Mr. Mokom's legal representation on 19 December 2022.³² The matter therefore took eight months and 24 days to be resolved.³³

²⁷ ICC-01/14-01/22-115-Red, para. 28.

²⁸ See *Supra*, para. 22.

²⁹ ICC-01/14-01/22-115-Red, para. 29.

³⁰ See Pre-Trial Chamber II, 'Second order on the conduct of the confirmation of charges proceedings', 13 February 2022, ICC-01/14-01/22-157, paras. 32-33.

³¹ ICC-01/14-01/22-115-Red, para. 40.

³² Public redacted Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", 19 December 2022, ICC-01/14-01/22-124-Red.

³³ See Public Redacted Version of '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, 13 June 2022.

30. On 3 February 2023, the Chamber decided that the Confirmation of Charges Hearing will take place on 22 August 2023, after Mr. Mokom offered the date of 17 July for this hearing.³⁴ As such, Mr. Mokom's pre-trial proceedings will span almost one and a half years prior to the beginning of the Confirmation of Charges Hearing.

31. Moreover, the Prosecution's Response and OPCV Observations were filed prior to the Chamber's decision setting a new date for the Confirmation of Charges Hearing. They could not therefore take into account the fact that Mr. Mokom's Pre-Trial proceedings is likely to last until October 2023;³⁵ being one year and seven months after Mr. Mokom's surrender to the Court.

32. Whereas the initial delay between appearance and the Confirmation of Charges Hearing was ten months (March 2022-January 2023) it will now be a period of six months (February 2023-August 2023). In the status conference of 7 February 2023, the Prosecutor attempted to provide the parties with guidance on the importance of the material that will be made accessible to the Defence ahead of that confirmation hearing. Irrespective of the Prosecutor's ability to properly meet its statutory disclosure obligations, it will be of crucial importance that Mr. Mokom can access that material, and that his Defence team has the necessary time and facilities to review and analyse that material relevance to the Confirmation of Charges Hearing. Mr. Mokom's provisional release will accelerate this exercise, by facilitating Defence working visits with Mr. Mokom, and therefore expediting Defence preparation before the Confirmation of Charges Hearing.

33. Mr. Mokom's detention is therefore still occurring in exceptional circumstances, despite the resolution of the litigation on his legal representation. The Chamber is respectfully requested to draw on the unique circumstances of this case

³⁴ ICC-01/14-01/22-151, paras. 8 and 11.

³⁵ In accordance with Regulation 53 of the Regulations of the Court, the Pre-Trial Chamber shall deliver its written decision within 60 days of the date on which the confirmation hearing ends.

and the lack of justification for the maintenance of Mr Mokom's detention to grant interim release under reasonable conditions restricting his liberty.

Respectfully submitted,



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