

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **01/03/2023**

**PRE-TRIAL CHAMBER II**

**Before: Judge Rosario Salvatore Aitala, Presiding  
Judge Tomoko Akane  
Judge Sergio Gerardo Ugalde Godínez**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

***THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA***

**PUBLIC**

**Public Redacted Version of “Defence Observations on the Registry’s Consultations with States on the Interim Release of Mr. Mokom”, 27 February 2023, ICC-01/14-01/22-169-Conf**

**Source: Philippe Larochelle, Counsel for Mr. Mokom**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***  
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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## I. INTRODUCTION

1. Pursuant to Pre-Trial Chamber II's ('Chamber') 24 January 2023 Order,<sup>1</sup> the Defence for Mr. Mokom provides its observations concerning the States' responses in the context of the Registry's consultations on Mr. Mokom's interim release.

2. Mr. Mokom submits as a preliminary matter that waiting for all States Parties to provide observations on their willingness and ability to enforce potential conditions of release will only delay the matter and serves no purpose. Three months have now passed since Mr. Mokom's application for interim release. Given the length of the pre-trial period affected by delays related to Mr. Mokom's legal representation, and that the conditions for his ongoing incarceration are no longer met, the Defence respectfully asks the Chamber to immediately order Mr. Mokom's interim release. If at the time of his release a State Party has not yet agreed to host Mr Mokom, he should be temporarily transferred to The Netherlands pending the acceptance of a facilitating State.

## II. LEVEL OF CONFIDENTIALITY

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files these observations as confidential, since they refer to confidential documents and information. A public redacted version will be filed as soon as practicable.

## III. PROCEDURAL HISTORY

4. On 10 December 2018, the Chamber issued a Warrant of Arrest against Mr. Mokom.<sup>2</sup>

5. On 14 March 2022, Mr. Mokom was surrendered to the Court.<sup>3</sup>

6. 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,<sup>4</sup> later rescheduled for 22 August 2023.<sup>5</sup>

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<sup>1</sup> ICC-01/14-01/22-138, para. 11. The time limit for the Defence to provide any observations on the States was later extended by email dated 15 February 2023 at 17:09.

<sup>2</sup> ICC-01/14-01/22-2-US-Exp.

<sup>3</sup> ICC-01/14-01/22-21, para. 4.

<sup>4</sup> ICC-01/14-01/22-T-001-Red-ENG, p. 11, lines 19-21.

<sup>5</sup> ICC-01/14-01/22-151, para. 11.

7. On 7 November 2022, following delays in the proceedings on account of the litigation in relation to Mr Mokom's legal representation, the Chamber ordered Mr. Mokom to provide submissions on interim release.<sup>6</sup>
8. On 14 November 2022, Duty Counsel for Mr. Mokom submitted an application for interim release on behalf of Mr. Mokom.<sup>7</sup>
9. On 18 November 2022, the Prosecution filed its Response to the Application.<sup>8</sup>
10. On 22 November 2022, the Office of Public Counsel for Victims ('OPCV') filed its Observations on the Application.<sup>9</sup>
11. On 21 December 2022, the Registry submitted a report on its consultations with States on Mr Mokom's interim release,<sup>10</sup> followed by an addendum.<sup>11</sup>
12. On 23 January 2023, permanent Counsel for Mr. Mokom was appointed.<sup>12</sup>
13. On 1 February 2023, the Registry submitted a second report on its consultations with States on Mr Mokom's interim release,<sup>13</sup> followed by a third report on 13 February 2023.<sup>14</sup>
14. On 15 February 2023, permanent Counsel for Mr. Mokom provided observations on the Prosecution's Response and the OPCV Observations on Mr Mokom's application for interim release.<sup>15</sup>
15. On 15 February 2023, the Prosecution<sup>16</sup> and the OPCV<sup>17</sup> filed their observations on the states' responses regarding Mr Mokom's interim release.
16. On 22 February 2023, the Registry submitted a fourth report on its consultations with States.<sup>18</sup>

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<sup>6</sup> ICC-01/14-01/22-105, para. 12.

<sup>7</sup> ICC-01/14-01/22-110-Conf ('Application').

<sup>8</sup> ICC-01/14-01/22-112-Conf ('Prosecution's Response').

<sup>9</sup> ICC-01/14-01/22-115-Conf ('OPCV Observations').

<sup>10</sup> ICC-01/14-01/22-120-Conf-Red.

<sup>11</sup> ICC-01/14-01/22-127-Conf.

<sup>12</sup> ICC-01/14-01/22-136.

<sup>13</sup> ICC-01/14-01/22-146-Conf.

<sup>14</sup> ICC-01/14-01/22-159-Conf.

<sup>15</sup> ICC-01/14-01/22-162, para. 11.

<sup>16</sup> ICC-01/14-01/22-161-Conf.

<sup>17</sup> ICC-01/14-01/22-160-Conf.

#### IV. Applicable law

17. The Defence incorporates by reference the applicable legal framework and submissions as set out in its Observations on the Interim Release Application Submitted by Duty Counsel on behalf of Mr. Mokom.<sup>19</sup>

18. States Parties to the Rome Statute have a duty to cooperate with the Court under Article 86 of the Statute. Article 87 also lays the framework for cooperation, giving the Court the authority to make request to States Parties. Article 57(3)(b) gives a suspect the right to ask the Pre-Trial Chamber to issue an order for cooperation as may be necessary to assist in the preparation of their Defence.

19. The Appeals Chamber has previously found “that the examination of conditions of release is discretionary and that conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under article 58(1)(b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58(1)(b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release”.<sup>20</sup>

20. In the *Bemba et al.* case, the Single Judge ordered Fidèle Babala Wandu’s provisional release despite the Democratic Republic of Congo’s professed inability to enforce conditions of provisional release.<sup>21</sup> Similarly, the Single Judge in the *Gicheru* case ordered the provisional release of Paul Gicheru before Kenya’s indication of its ability to enforce the conditions set forth in Rule 119 of the Rules.<sup>22</sup> Should a state consider that it is prevented from enforcing a specific condition restricting liberty, it may consult with the Court pursuant to Article 97 of the Statute.

21. As regards the obligations of the Host State itself, Article 47 of the Headquarters Agreement<sup>23</sup> addresses Interim Release, and provides as follows:

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<sup>18</sup> ICC-01/14-01/22-165-Conf.

<sup>19</sup> ICC-01/14-01/22-162.

<sup>20</sup> ICC-01/05-01/08-1626-Red, para. 55.

<sup>21</sup> See ICC-01/05-01/13-703 and ICC-01/05-01/13-694-Anx3.

<sup>22</sup> ICC-01/09-01/20-90-Red2, para. 50.

<sup>23</sup> ICC-BD/04-01-08, Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008 (‘Headquarters Agreement’).

1. The host State shall facilitate the transfer of persons granted interim release into a State other than the host State.
2. The host State shall facilitate the re-entry into the host State of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court.
3. The Court and the host State shall make practical arrangements as to the implementation of this article.

22. Moreover, the *Basic principles governing a headquarters agreement to be negotiated between the Court and the host country*,<sup>24</sup> provides that “[t]he headquarters agreement should be without prejudice to relevant rules of international law, including international humanitarian law.”<sup>25</sup>

## V. Observations

### (a) Responses from States Parties

23. [REDACTED] European States Parties have been contacted as the potential facilitators of Mr Mokom’s interim release. [REDACTED] have communicated that they would not accept Mr Mokom on their territory, whilst [REDACTED] have not yet provided a response.<sup>26</sup> The remaining State Party, [REDACTED], has indicated that it will provide a response by 13 March 2023.<sup>27</sup>

24. [REDACTED],<sup>28</sup> [REDACTED],<sup>29</sup> [REDACTED],<sup>30</sup> [REDACTED],<sup>31</sup> [REDACTED],<sup>32</sup> [REDACTED]<sup>33</sup> and [REDACTED]<sup>34</sup> provided no reasons or explanations for their refusal to accept Mr Mokom on their territory. While [REDACTED],<sup>35</sup>

<sup>24</sup> ICC-ASP/1/3, Basic principles governing a headquarters agreement to be negotiated between the Court and the host country, September 2002 (‘Basic Principles’).

<sup>25</sup> Basic Principles, para. 41.

<sup>26</sup> ICC-01/14-01/22-120-Conf-Red; ICC-01/14-01/22-127; ICC-01/14-01/22-146-Conf; ICC-01/14-01/22-159-Conf; ICC-01/14-01/22-165-Conf.

<sup>27</sup> ICC-01/14-01/22-165-Conf, para. 14.

<sup>28</sup> ICC-01/14-01/22-120-Conf-AnxVI.

<sup>29</sup> ICC-01/14-01/22-159-Conf-AnxIII.

<sup>30</sup> ICC-01/14-01/22-146-Conf-AnxIII.

<sup>31</sup> ICC-01/14-01/22-146-Conf-AnxXII.

<sup>32</sup> ICC-01/14-01/22-127-Conf-AnxIII.

<sup>33</sup> ICC-01/14-01/22-159-Conf, fn. 12.

<sup>34</sup> ICC-01/14-01/22-127-Conf-AnxVII.

<sup>35</sup> ICC-01/14-01/22-120-Conf-AnxV.

[REDACTED],<sup>36</sup> [REDACTED]<sup>37</sup> and [REDACTED]<sup>38</sup> cited a lack of preparation or the impossibility of imposing the necessary conditions to host Mr Mokom; [REDACTED],<sup>39</sup> [REDACTED],<sup>40</sup> [REDACTED],<sup>41</sup> [REDACTED],<sup>42</sup> [REDACTED],<sup>43</sup> and [REDACTED]<sup>44</sup> cited a purported lack of national legislation to allow them to do so.

25. [REDACTED]<sup>45</sup> and [REDACTED]<sup>46</sup> argued specifically that in the absence of memorandum of understanding for interim release with the ICC, they were unable to grant interim release to Mr Mokom on their territory. [REDACTED],<sup>47</sup> [REDACTED],<sup>48</sup> and [REDACTED]<sup>49</sup> invoked [REDACTED]. [REDACTED] argued that [REDACTED].<sup>50</sup>

26. Finally, The Netherlands alleged that neither the Rome Statute, nor the Headquarters Agreement impose on the Host State an obligation to facilitate interim release.<sup>51</sup> [REDACTED] provided its response to the Registry on an *ex parte* basis, therefore the Defence has no knowledge of its content.<sup>52</sup>

27. Facilitating interim release falls squarely within the cooperation obligations of a State Party. The work of the Court, and the responsibility resting on the international community towards the individuals suspected or accused, is not limited to facilitating their arrest and surrender, or cooperating in helping build the Prosecution case. Mr Mokom's rights to liberty and freedom of movement, as a defendant who still benefits from the presumption of innocence, and for whom the conditions of detention are no longer met, cannot be curtailed on the basis that State Parties are "not in a position" or "not prepared" to accept the suspect on their territory without further justification. Not only does an obligation rest on the Court to

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<sup>36</sup> ICC-01/14-01/22-159-Conf-AnxI.

<sup>37</sup> ICC-01/14-01/22-146-Conf-AnxVIII.

<sup>38</sup> ICC-01/14-01/22-146-Conf-AnxIV.

<sup>39</sup> ICC-01/14-01/22-146-Conf-AnxVII.

<sup>40</sup> ICC-01/14-01/22-146-Conf-AnxIX.

<sup>41</sup> ICC-01/14-01/22-146-Conf-AnxX.

<sup>42</sup> ICC-01/14-01/22-146-Conf-AnxXI.

<sup>43</sup> ICC-01/14-01/22-127-Conf-AnxIV.

<sup>44</sup> ICC-01/14-01/22-127-Conf-AnxI.

<sup>45</sup> ICC-01/14-01/22-159-Conf-AnxII.

<sup>46</sup> ICC-01/14-01/22-146-Conf-AnxV.

<sup>47</sup> ICC-01/14-01/22-159-Conf-AnxIV.

<sup>48</sup> ICC-01/14-01/22-127-Conf-AnxII.

<sup>49</sup> ICC-01/14-01/22-127-Conf-AnxVI.

<sup>50</sup> ICC-01/14-01/22-127-Conf-AnxV.

<sup>51</sup> ICC-01/14-01/22-146-AnxII.

<sup>52</sup> ICC-01/14-01/22-146-Conf, para. 7.

apply the relevant provisions regarding interim release in a manner consistent with ‘internationally recognised human rights’, as required by Article 21(3) of the Rome Statute, but also on States Parties to cooperate under Article 86, and consult with the Court under Article 97 of the Statute if they consider themselves unable to implement interim release conditions.

28. The Chamber is not required to wait for detailed observations from States Parties as to their ability to enforce the specific conditions restricting liberty to order the interim release of Mr. Mokom. Rather, the Chamber’s decision should turn only on whether conditions for ongoing detention continue to be met. The Defence has demonstrated that they are not.<sup>53</sup>

29. Concerning States Parties that have not provided reasons for their refusal to accept Mr. Mokom on their territory, the Defence submits that the Registry should be ordered to ask the States to provide reasons. Indeed, the Single Judge had requested the provision of more information from The Netherlands after it first refused to host Mr. Mokom, having considered that the Dutch authorities were required to provide reasons for their refusal.<sup>54</sup> The same request should be made of other States, in order to determine if a solution can be found.

30. As regards States Parties that have invoked the absence of legislation, or the impossibility of imposing the required conditions, they should be encouraged to discuss the matter with the Registry pursuant to Article 97 of the Statute, in order to also determine if a solution could be put in place.

*(b) Temporary transfer to The Netherlands*

31. Until a State agrees to facilitate Mr Mokom’s release, the Defence asks that the Chamber order the temporary transfer of Mr. Mokom into the territory of The Netherlands. This temporary transfer would be consistent with Article 47(1) and (2) of the Headquarters Agreement, which requires The Netherlands to “facilitate the transfer of persons granted interim release into a State other than the host State”, and “facilitate the re-entry into the host State of persons granted interim release and their **short-term stay in the host State** for any purpose related to proceedings before the Court.” Facilitating Mr Mokom’s temporary

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<sup>53</sup> ICC-01/14-01/22-110-Conf.

<sup>54</sup> ICC-01/14-01/22-146-Conf-AnxI. *See also*, first response of the Netherlands providing no explanation, ICC-01/14-01/22-120-Conf-AnxI.



transfer to The Netherlands would therefore fall squarely within its obligations as a Host State.

32. Moreover, the Basic principles provides that “[t]he headquarters agreement should be without prejudice to relevant rules of international law, including international humanitarian law.”<sup>55</sup> Should the Chamber order Mr Mokom’s provisional release, any refusal by The Netherlands to facilitate this release through his temporary transfer to its territory would amount to a violation of Mr Mokom’s fundamental human rights to liberty and freedom of movement, in a manner inconsistent with its obligations as a Host State.

## VI. CONCLUSION

33. Where the conditions for detention are no longer met, the ongoing pre-trial incarceration of an accused before the Court cannot be justified by the unwillingness of States Parties to extend their cooperation beyond matters aimed towards securing convictions. The Court’s historical approach to pre-trial incarceration is at odds with its exceptional nature. As was recently observed, “the worldwide practice of prolonged pre-trial detention, including the practice of international criminal tribunals, is deplorable”.<sup>56</sup> The recognised presumption in favour of pre-trial release<sup>57</sup> flows from the presumption of innocence;<sup>58</sup> a fundamental right which underpins proceedings at this Court. In 19 years of judicial activity, each of the ICC’s detained suspects, 12 in total,<sup>59</sup> have spent the entire pre-trial proceedings stage in detention,<sup>60</sup> making the blanket application of prolonged pre-trial incarceration of accused one of the Court’s emblematic features. This tide should be turned, and States Parties should move to normalise interim release as part of their cooperation obligations. The Chamber in the present case has all the elements in its possession and all reasons to grant Mr Mokom interim release pending trial, and should now do so.

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<sup>55</sup> Basic Principles, para. 41.

<sup>56</sup> KSC-BC-2020-06/IA004/F00005, Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, 30 April 2021, para. 17.

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> Detained under Article 5 of the Rome Statute.

<sup>60</sup> Lubanga, Katanga, Ntaganda, Bemba, Gbagbo, Blé Goudé, Ongwen, Al Mahdi, Al Hassan, Ngaïssona, Yekatom and Abd-Al-Rahman (the average period of pre-trial detention spanning from the arrival to the Detention centre to the beginning of the trial being **2 years and 4 months**).

Respectfully submitted,



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The Hague, The Netherlands  
Wednesday, March 01, 2023