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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

IN THE CASE OF

THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Public redacted version of 'Decision on interim release'

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr Mokom

Mr Philippe Larochelle

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on interim release.

I. PROCEDURAL HISTORY

1. On 10 December 2018, the Chamber issued a warrant of arrest for Maxime Jeoffroy Eli Mokom Gawaka ('Mr Mokom' and 'Warrant of Arrest').¹
2. On 14 March 2022, Mr Mokom was surrendered to the Court and arrived at the Detention Centre.²
3. On 25 March 2022, the Chamber revoked the appointment of Mr Nicholas Kaufman ('Mr Kaufman') as counsel for Mr Mokom due to an impediment to representation or a conflict of interest.³ Mr Gregory Townsend was appointed as Duty Counsel to Mr Mokom on 4 April 2022.⁴
4. On 14 November 2022, Duty Counsel, further to an order issued by the Chamber on 7 November 2022 (the '7 November 2022 Order'),⁵ applied for Mr Mokom's interim release to a number of States in Europe (the 'Application').⁶
5. On 18 November 2022, the Prosecution responded to the Application (the 'Prosecution Response').⁷

¹ ICC-01/14-01/22-2-US-Exp, confidential and *ex parte*, available only to the Prosecution (a redacted under seal, *ex parte*, only available to the Prosecutor and the Victims and Witnesses Unit, version was issued on 31 January 2019, ICC-01/14-01/22-2-US-Exp-Red; a public redacted version was issued on 22 March 2022, [ICC-01/14-01/22-2-Red2](#)).

² Transcript of Hearing, 22 March 2022, ICC-01/14-01/22-T-001-CONF-ENG, confidential, p. 1 (a public redacted version was issued on 29 March 2022, [ICC-01/14-01/22-T-001-Red-ENG](#)).

³ 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, confidential and *ex parte*, available only to the Prosecution, Mr Kaufman, Mr Mokom, and the Registry (a public redacted version was issued on 13 June 2022, [ICC-01/14-01/22-26-Red](#)).

⁴ Registry, Notification of the Appointment of Mr Gregory Townsend as Duty Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-33-Conf-Exp, confidential and *ex parte*, only available to Mr Mokom and the Registry, with Annex I, confidential and *ex parte*, only available to Mr Mokom and the Registry.

⁵ [Order to Mr Mokom to provide submissions on interim release](#), ICC-01/14-01/22-105, public.

⁶ Mr. Mokom's Application for Interim Release pursuant to Order ICC-01/14-01/22-105, ICC-01/14-01/22-110-Conf, confidential, together with an annex, confidential and *ex parte*, only available to Mr Mokom and the Registry (a public redacted version of the Application was submitted on 16 November 2022, [ICC-01/14-01/22-110-Red](#)).

⁷ Réponse de l'Accusation à "Mr MOKOM's Application for Interim Release pursuant to Order ICC-01/14-01/22-105", ICC-01/14-01/22-112-Conf, confidential. Pursuant to the [Order for observations and](#)

6. On 22 November 2022, the Office of Public Counsel for Victims (the ‘OPCV’) submitted its observations on the Application (the ‘OPCV Observations’).⁸
7. On 14 December 2022, the Registry submitted a report on its consultations with the States identified in the Application (the ‘First Registry Report’).⁹
8. On 23 December 2022, the Registry submitted an addendum to the First Registry Report (the ‘Addendum’).¹⁰
9. On 23 December 2022, the Single Judge ordered the Registry to: (i) request the States that have not done so hitherto to provide their observations by no later than 31 January 2023; (ii) request the Netherlands to provide reasons for its refusal to accept Mr Mokom if he would be granted interim release, and to further indicate whether it agrees to designate a location in The Hague as the premises of the Court for these purposes; and (iii) [REDACTED].¹¹

[decision on the Prosecution’s request for a status conference](#), 24 January 2023, ICC-01/14-01/22-138, public, para. 11 (the ‘24 January 2023 Order’), a public redacted version of the Prosecution Response was submitted on 26 January 2023, [ICC-01/14-01/22-112-Red](#)).

⁸ Victims’ Observations on “Mr. Mokom’s Application for Interim Release pursuant to Order ICC-01/14-01/22-105”, ICC-01/14-01/22-115-Conf, confidential (a public redacted version was submitted on 24 November 2022, [ICC-01/14-01/22-115-Red](#)). See also [OPCV Request to submit observations on behalf of victims on the issue of interim release](#), 9 November 2022, ICC-01/14-01/22-107, public, which the Chamber granted by way of email on 17 November 2022, at 09:42.

⁹ Report on the Registry’s consultations with States on the Interim Release of Mr Mokom and Request for Guidance, ICC-01/14-01/22-120-Conf-Exp, confidential and *ex parte*, only available to the Registry and Defence for Mr Mokom, with Annexes I-VII, confidential and *ex parte*, only available to the Registry and the Defence for Mr Mokom (see [7 November 2022 Order](#), para. 14, and email from the Chamber to the Registry, 6 December 2022, at 16:13). Following an order issued by the Chamber by way of email on 16 December 2022, at 17:09, the Registry submitted a confidential redacted version of the First Registry Report on 20 December 2022, ICC-01/14-01/22-120-Conf-Red. The Chamber, by way of email on 12 January 2023, at 17:45, granted a request submitted by the Registry to reclassify the annexes to the Registry Report as confidential. Pursuant to the [24 January 2023 Order](#), a public redacted version of the First Registry Report was submitted on 15 February 2023, [ICC-01/14-01/22-120-Red](#).

¹⁰ ADDENDUM To the confidential redacted version of “Report on the Registry’s consultations with States on the Interim Release of Mr Mokom and Request for Guidance”, 21 December 2022, ICC-01/14-01/22-120-Conf-Red, ICC-01/14-01/22-127-Conf, confidential, with Annexes I-VII, confidential. Pursuant to the [24 January 2023 Order](#), a public redacted version of the Addendum was submitted on 15 February 2023, [ICC-01/14-01/22-127-Red](#).

¹¹ Email from the Single Judge to the Registry, 23 December 2022, at 15:06. See [First Registry Report](#), paras 25-29.

10. On 23 January 2023, following the Appeals Chamber's confirmation of the Chamber's decisions regarding the removal of Mr Kaufman,¹² Mr Philippe Larochelle was appointed as Permanent Counsel for Mr Mokom.¹³

11. On 27 January 2023, the Registry submitted [REDACTED].¹⁴

12. On 1 February 2023, the Registry submitted a further report on its consultations with States (the 'Second Registry Report').¹⁵

13. On 3 February 2023, the Chamber formally postponed the confirmation of charges hearing, which had been initially scheduled to commence on 31 January 2023, until 22 August 2023.¹⁶ On the same day, the Chamber ordered the Registry to: (i) inform the [REDACTED] authorities that they may provide their observations by 6 February 2023; (ii) inform the [REDACTED] authorities that they may provide their observations by 10 February 2023, as well as that [REDACTED]; and (iii) request the authorities of the States that had not done so previously to provide their observations by 10 February 2023.¹⁷

14. On 13 February 2023, the Registry submitted a further report on its consultations with States (the 'Third Registry Report').¹⁸

¹² 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", ICC-01/14-01/22-124-Conf, confidential, together with an annex containing the dissenting opinion of Judges Bossa and Ibáñez Carranza (public redacted versions of the decision and the annex were issued on the same day, [ICC-01/14-01/22-124-Red](#) and [ICC-01/14-01/22-124-Anx-Red](#)).

¹³ Registry, Notification of the Appointment of Mr Philippe Larochelle as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, [ICC-01/14-01/22-136](#), public, with Annexes I, II and IV, public and Annex III, confidential.

¹⁴ [REDACTED].

¹⁵ Second Report on the Registry's Consultations with States on the Interim Release of Mr Mokom, ICC-01/14-01/22-146-Conf, confidential, with Annexes I-V and VII-XII, confidential, and Annex VI, confidential and *ex parte*, only available to the Registry. Pursuant to the [24 January 2023 Order](#), a public redacted version of the Second Registry Report was submitted on 15 February 2023, [ICC-01/14-01/22-146-Red](#).

¹⁶ [Decision setting the date for the confirmation of charges hearing](#), ICC-01/14-01/22-151, public. See also [Order postponing the confirmation of charges hearing](#), 23 January 2023, ICC-01/14-01/22-137, public.

¹⁷ Email from the Chamber to the Registry, 3 February 2023, at 16:17.

¹⁸ Third Report on the Registry's Consultations with States on the Interim Release of Mr Mokom, ICC-01/14-01/22-159-Conf, confidential, with Annexes I-IV, confidential (a public redacted version of the Third Registry Report was submitted on 15 February 2023, [ICC-01/14-01/22-159-Red](#)).

15. On 15 February 2023, the OPCV and the Prosecution submitted their observations on the States' responses (the 'OPCV Observations States Responses' and 'Prosecution Observations States Responses').¹⁹ On the same day, Permanent Counsel for Mr Mokom submitted observations on the Application (the 'Permanent Counsel Observations').²⁰ Also on that day, the Chamber granted the Registry's request to communicate the 21 February 2023 deadline to the [REDACTED] authorities to submit their response, as well as to the remaining States that are yet to provide a response.²¹

16. On 21 February 2023, the Chamber ordered the Registry to inform the [REDACTED] authorities that the Chamber grants a final extension of the time limit to submit their response by no later than 13 March 2023.²²

17. On 21 February 2023, Judge Sergio Gerardo Ugalde Godínez was assigned to the Chamber to replace Judge Antoine Kesia-Mbe Mindua.²³

18. On 22 February 2023, the Registry submitted a further report on its consultations with States (the 'Fourth Registry Report').²⁴

19. On 27 February 2023, Permanent Counsel submitted observations on the States' responses (the 'Permanent Counsel Observations States Responses').²⁵

20. On 6 March 2023, the [REDACTED] authorities requested a further extension of the time limit to submit their response by no later than 13 April 2023.²⁶

¹⁹ Victims' observations on the States' responses regarding Mr Mokom's interim release, ICC-01/14-01/22-160-Conf, confidential (a public redacted version was submitted on 8 March 2023, ICC-01/14-01/22-160-Red); Prosecution's Observations on the Registry's Consultations with States on the Interim Release of Mr Mokom, ICC-01/14-01/22-161-Conf, confidential. See [24 January 2023 Order](#), para. 11.

²⁰ Mokom Defence Observations on the Interim Release Application Submitted by Duty Counsel on behalf of Mr. Mokom, ICC-01/14-01/22-162, public. See [24 January 2023 Order](#), para. 11.

²¹ Email from the Chamber to the Registry, 15 February 2023, at 17:09.

²² Email from the Chamber to the Registry, 21 February 2023, at 16:08.

²³ Presidency, [Decision replacing a judge in Pre-Trial Chamber II](#), ICC-01/14-01/22-164, public. The Judges subsequently elected Judge Aitala as the Presiding Judge, see Notification of the election of the Presiding Judge, 23 February 2023, ICC-01/14-01/22-168, public.

²⁴ Fourth Report on the Registry's Consultations with States on the Interim Release of Mr Mokom, ICC-01/14-01/22-165-Conf, confidential (a public redacted version of the Fourth Registry Report was submitted on the same day, [ICC-01/14-01/22-165-Red](#)).

²⁵ Defence Observations on the Registry's Consultations with States on the Interim Release of Mr. Mokom, ICC-01/14-01/22-169-Conf, confidential (a public redacted version was submitted on 1 March 2023, [ICC-01/14-01/22-169-Red](#)). See email from the Chamber to the Registry and Counsel, 15 February 2023, at 17:09; the Prosecution and OPCV have not supplemented their observations on the States' responses pursuant to the Chamber's order.

²⁶ Email from the Registry to the Chamber, 7 March 2023, at 12:33.

II. SUBMISSIONS

A. Submissions related to the Application

1. Application

21. Duty Counsel submits that Mr Mokom proposes to be released to any of the following European States in order of priority: (i) [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED].

22. Furthermore, it is asserted that Mr Mokom agrees to comply fully with any and all conditions placed on him, including those restricting his liberty, by the Chamber under rule 119 of the Rules of Procedure and Evidence (the ‘Rules’). However, according to Duty Counsel, [REDACTED].

23. In addition, Duty Counsel avers that, considering that the 7 November 2022 Order was delivered with due consideration of Mr Mokom’s circumstances, the 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. Duty Counsel adds that the Chamber has a sound grasp of the Situation in the Central African Republic II, 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 Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘Yekatom & Ngaïssona case’) and *The Prosecutor v. Mahamat Said Abdel Kani*. Furthermore, in the view of Duty Counsel, the Chamber is also familiar with the evidence relevant to the security situation on the ground, Mr Mokom’s alleged role in the conflict, and his alleged subsequent conduct. Duty Counsel also contends that the lack of disclosure must, at this stage, militate in favour of release given that the Prosecution cannot argue that exposure to the identities of potential witnesses and alleged victims increases the threat to them. Moreover, according to Duty Counsel, it is a human rights duty of any State Party listed in the Application to consider affording Mr Mokom interim release on its territory given that the length of time taken to adjudicate the issue of his legal representation has kept Mr Mokom in a state of uncertainty for eight months in the period preceding the Application, and that the confirmation of charges hearing is likely to be postponed significantly.

24. Lastly, Duty Counsel submits that the interim release of Mr Mokom in one of the proposed States could [REDACTED], and it would [REDACTED].

2. *Prosecution Response*

25. The Prosecution requests the Chamber to reject the Application. In the view of the Prosecution, the criteria under article 58(1)(b) of the Rome Statute (the ‘Statute’) continue to be met and, therefore, Mr Mokom’s detention is required as a matter of principle. First, the Prosecution asserts that a risk of flight exists as Mr Mokom may face a significant prison sentence if convicted, and he was arrested after having fled from the Central African Republic to Chad. Second, the Prosecution avers that Mr Mokom’s detention is necessary to avoid any risk of interference on his part with witnesses or investigations seeing as: (i) the Prosecution has informed the Chamber of concrete threats issued by Mr Mokom [REDACTED], which has led the Chamber to order the close monitoring of Mr Mokom’s contacts and communications; (ii) Mr Mokom has been made aware of the identity of key witnesses by way of the disclosure of the supporting material underlying the Warrant of Arrest; and (iii) Mr Mokom and some of his family members have occupied important positions in the Central African Republic and he, therefore, has a network at his disposal that could lend its assistance with a view to intimidating witnesses. Lastly, the Prosecution submits that there remains a risk that Mr Mokom will commit related crimes within the jurisdiction of the Court considering that he was one of the principal coordinators of the *Coalition des Patriotes pour le Changement* and, according to recent information, this group controls a significant part of the Central African Republic, commits crimes, and plans to carry out a coup d’état.

26. The Prosecution additionally contends that the delays resulting from the litigation related to the Chamber’s decision to revoke the mandate of Mr Mokom’s counsel are not such so as to render his detention unreasonable as: (i) the questions of law at stake are complex; (ii) the assessment of Mr Mokom’s interim release is premature as the Chamber, when setting the date for the confirmation of charges hearing for 31 January 2023, anticipated that his detention for at least this period would be reasonable; and (iii) Mr Mokom initiated the procedure before the Appeals Chamber and, while this is his right, it remains the case that this matter takes time.

27. Lastly, the Prosecution asserts that, even if the Chamber would consider that the duration of Mr Mokom's detention has become unreasonable, his detention remains justified in view of the risks under article 58(1)(b) of the Statute on the basis that: (i) the aforementioned delays do not amount to an unreasonable period in law; (ii) the aforementioned risks are concrete, established and particularly distressing; (iii) the conditions and undertakings set out in the Application are inadequate to exclude these risks, in particular because his contacts and communications could no longer be monitored; and (iv) a decision granting interim release cannot be adopted in the absence of concrete modalities of judicial control in the State(s) willing to accept Mr Mokom.

3. *OPCV Observations*

28. The OPCV requests the Chamber to reject the Application. At the outset, the OPCV notes that the Application neither addresses the conditions set forth under article 58(1) of the Statute, but rather assumes that there is no need to do so, nor provides sufficient details on the State(s) in which Mr Mokom would seek to be released.

29. The OPCV submits 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 Warrant of Arrest which would justify his release. It adds that the fact that Mr Mokom will soon have access to the material from the *Yekatom & Ngaiissona* case – together with the already available material in this case – is an additional factor which makes his continued detention necessary. Furthermore, the OPCV asserts that it would be incongruous to grant interim release close to the commencement of the hearing – even if a postponement is envisaged. It is of the view that delays in the pre-trial proceedings may be justified depending on the circumstances of a specific case with the view to best solve any pre-trial issues before the commencement of a trial, and continuity of pre-trial detention may be justified within this framework. Moreover, according to the OPCV, the overall discussion on the possible release of Mr Mokom is premature as procedural steps have already been taken by the Chamber in order to expedite the proceedings. The OPCV further recalls that interim release based on [REDACTED] may not trump the requirements underpinning article 58 of the Statute, even more so if [REDACTED].

30. In addition, the OPCV posits that the security and well-being of the victims would be endangered if the suspect is released as it would destabilise the already volatile security situation in the Central African Republic, and it would in fact further expose victims. The OPCV also asserts that objective risks exist for the victims residing in [REDACTED] and [REDACTED] or who have family members residing in those countries.

31. Lastly, in the submission of the OPCV, 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. As to the Defence’s reference to the conditions in *The Prosecutor v. Paul Gicheru* (the ‘Gicheru case’), the OPCV asserts that that case concerned article 70 proceedings, Mr Gicheru demonstrated a concrete intention to cooperate with the Court through his voluntary surrender, and the confirmation proceedings were to be in writing. The OPCV is, in any event, of the view that, 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, Counsel are unable to seek the victims’ views.

4. *Permanent Counsel Observations*

32. According to Permanent Counsel, the Prosecution speculates when submitting that Mr Mokom is a flight risk on the basis that he may receive a significant sentence, and it may also be speculated that Mr Mokom may be acquitted. It is submitted that Mr Mokom’s conduct to date supports the existence of his desire to engage with the Court. Permanent Counsel adds that the article cited by the Prosecution does not support its contention as it indicates that Mr Mokom fled to Chad after a rebel coalition unsuccessfully tried to seize power in the Central African Republic in 2020, years after the allegations against him before this Court are supposed to have taken place.

33. As to the Prosecution’s assertion that Mr Mokom may obstruct or endanger the investigation or proceedings, Permanent Counsel asserts that the Chamber has already held that the Prosecution could not rely on such arguments to justify the imposition of contact restrictions on Mr Mokom. Furthermore, Permanent Counsel avers that Mr Mokom has known the identity of witnesses for almost a year, and the Prosecution is not in a position to demonstrate a single incident of intimidation or interference with

the investigation. It is further argued that the Chamber has already stated that the mere fact that Mr Mokom may be aware of the evidence underlying the Warrant of Arrest 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.

34. In relation to the Prosecution's argument that Mr Mokom may commit other crimes within the Court's jurisdiction, Permanent Counsel submits that the sources relied upon in the Warrant of Arrest are dated March 2018 at the latest. In addition, in the view of Permanent Counsel, the press articles relied upon in the Prosecution Response do not reference any of the active armed groups of the *Coalition des Patriotes pour le Changement* as forming part of Mr Mokom's network of supporters and associates, or as having any affiliation to Mr Mokom.

35. Permanent Counsel also avers that the Prosecution fails to consider that Mr Mokom is willing to comply fully with any and all conditions placed on him, and his 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.

36. Moreover, Permanent Counsel takes the view that the OPCV Observations do not provide any concrete information justifying his continued detention.

37. Lastly, Permanent Counsel considers that the length of Mr Mokom's pre-trial detention justifies interim release as, following the postponement of the confirmation of charges hearing, the pre-trial proceedings will span almost one and a half years.

B. Submissions related to the Registry Reports

1. Registry Reports

38. In the First Registry Report, the Registry indicates that the Netherlands, [REDACTED], and [REDACTED] have responded that they cannot accept Mr Mokom on their territory for the purposes of interim release. Furthermore, according to the Registry, no response had been received from [REDACTED]. Lastly, the Registry specifies that [REDACTED] requested an extension of time for providing their responses.

39. In the Addendum, the Registry adds that [REDACTED] indicated that they are not able to accept Mr Mokom on their territory for the purposes of interim release.

40. In the Second Registry Report, the Registry specifies that the Dutch authorities provided reasons for refusing to accept Mr Mokom for the purposes of interim release (namely that this would place a disproportionate burden on the host State and it wishes to prevent such an undesired precedent), and that [REDACTED] responded that they were not in a position to accept Mr Mokom on their territory. According to the Registry, no response had been received from [REDACTED]. The Registry also indicates that it had provided responses to questions raised by the authorities of [REDACTED], namely that, if Mr Mokom's application for interim release is granted, such a decision would only concern the pre-trial phase of the proceedings and, in the event that the charges are confirmed, it would be for the Trial Chamber to take a further decision regarding interim release, [REDACTED].

41. In the Third Registry Report, the Registry pointed out that [REDACTED] responded that they were not in a position to accept Mr Mokom on their territory should he be granted interim release. The Registry added that it had not received a response from [REDACTED].

42. In the Fourth Registry Report, the Registry specified that [REDACTED] had not provided any observations regarding the potential interim release of Mr Mokom.

2. *Submissions by the Parties and OPCV*

43. In the OPCV Observations States Responses, it is asserted that, pending responses from all concerned States and in the absence of the particulars of the conditions of Mr Mokom's interim release, the OPCV is not in a position to present meaningful observations on the matter. It further requests the Chamber to postpone its determination of the Application until the positions of all concerned States are known and clear conditions for an eventual interim release are identified.

44. In the Prosecution Observations States Responses, it is contended that, as the case proceeds towards the confirmation of charges hearing, Mr Mokom's incentive to flee and to obstruct the proceedings is clearly heightened. The Prosecution adds that, even assuming *arguendo* that the risk of Mr Mokom's flight could be mitigated by imposing one or more conditions, the unavailability of any State willing to accept his presence

on their territory, let alone to enforce any prospective condition thereof, renders the exercise pointless since the Appeals Chamber has underscored that, ‘for conditional release to be granted, “a State willing to accept the person concerned as well as enforce related conditions is *necessary*”’ (emphasis in original).

45. In the Permanent Counsel Observations States Responses, it is submitted 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 it is requested to immediately order Mr Mokom’s interim release. Permanent Counsel adds that provisional release was ordered in *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, despite the professed inability of a State to enforce conditions (the ‘Bemba et al. Decision’), as well as in the *Gicheru* case, prior to a State having indicated its ability to enforce conditions (the ‘Gicheru Decision’). According to Permanent Counsel, not only does an obligation rest on the Court to apply the relevant provisions regarding interim release in a manner consistent with internationally recognised human rights, but also on States Parties to cooperate under article 86 of the Statute, and consult with the Court under article 97 of the Statute if they consider themselves unable to implement interim release conditions. Permanent Counsel adds that States Parties that have not provided reasons for their refusal to accept Mr Mokom should be ordered to do so, while States Parties that have invoked the absence of legislation or the impossibility of imposing the required conditions should be encouraged to discuss the matter with the Registry pursuant to article 97 of the Statute. In addition, Permanent Counsel requests that, until a State agrees to facilitate Mr Mokom’s release, the Chamber order his temporary transfer into the territory of The Netherlands consistent with article 47(1) and (2) of the Headquarters Agreement, as well as Mr Mokom’s fundamental human rights to liberty and freedom of movement.

C. [REDACTED]

46. [REDACTED].

47. [REDACTED].

III. DETERMINATION

48. At the outset, the Chamber observes that Duty Counsel contends that the Chamber must have already concluded that the factors in favour of release outweigh the risks under article 58(1)(b) of the Statute. However, the Chamber has not pre-determined any aspect in connection with the Application. In the 7 November 2022 Order, the Chamber, as the ultimate guarantor of Mr Mokom's rights, found it appropriate to consider the question of interim release in the specific circumstances of the present proceedings. As a result, the Chamber ordered Mr Mokom to submit a *substantiated application* for interim release should he so wish (emphasis added). It follows that the 7 November 2022 Order specifically conveys that the Chamber sought to address the possibility of the interim release on the basis of the submissions to be provided by Mr Mokom, if any. Accordingly, the Chamber will, in what follows, consider the Application in accordance with the established criteria relating to interim release under the legal texts of the Court in conjunction with the applicable jurisprudence.

49. Article 60(2) of the Statute stipulates, in the relevant part, that, '[i]f 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'. According to the Appeals Chamber, a decision adopted pursuant to this provision is a decision *ex novo*, in the course of which it has to be determined whether the conditions of article 58(1) of the Statute have been met, although reference to the decision on the warrant of arrest may be had, without this affecting the *ex novo* character of such a decision.²⁷ The Chamber further recalls that deprivation of liberty is the exception and not the rule.²⁸

50. The first condition arising from article 58(1)(a) of the Statute is that '[t]here are reasonable grounds to believe that the person has committed a crime within the

²⁷ Appeals Chamber, *Prosecutor v. Laurent Koudou Gbagbo*, [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"'](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 23, 27 (the 'Gbagbo Appeal Judgment').

²⁸ Pre-Trial Chamber II, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Decision on the Defence Request for Interim Release](#), 14 August 2020, ICC-02/05-01/20-115, para. 23.

jurisdiction of the Court'. The Appeals Chamber has determined that this condition 'applies in proceedings for interim release under article 60 (2) of the Statute'.²⁹

51. The Chamber observes that this point has not been contested either in the Application or the Permanent Counsel Observations. In light of the findings contained in the Warrant of Arrest, the Chamber is satisfied that there continue to be reasonable grounds to believe that Mr Mokom is responsible for war crimes and crimes against humanity allegedly committed in the Central African Republic. Therefore, the requirement under article 58(1)(a) of the Statute has been met for the purposes of the Chamber's assessment under article 60(2) of the Statute.

52. Article 58(1)(b) of the Statute further requires that '[t]he arrest of the person appears necessary: (i) [t]o ensure the person's appearance at trial; (ii) [t]o ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) [w]here 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'. The Appeals Chamber has specified that the reasons for detention are formulated in the alternative.³⁰

53. With regard to the need to ensure Mr Mokom's presence at trial, the Chamber recalls that Mr Mokom was arrested outside the Central African Republic. Irrespective of the question whether Mr Mokom's presence in Chad was related to the allegations contained in the Warrant of Arrest, this signifies his willingness and capability to move between States as a result of developments affecting him. In addition, Mr Mokom may receive a sentence of a number of years in the event that (part of) the charges would be confirmed and he would be subsequently convicted at trial.³¹ In the view of the Chamber, the possibility of such a sentence is a secondary factor in light of the fact that the crimes within the Court's jurisdiction are inherently grave and the States nonetheless included the possibility of provisional release in the Statute. The Defence's submission that these considerations are speculative fails considering that the

²⁹ Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [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](#), 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 18 (the 'Ngudjolo Appeal Judgment').

³⁰ [Ngudjolo Appeal Judgment](#), para. 20.

³¹ [Gbagbo Appeal Judgment](#), para. 54.

Appeals Chamber has clarified that the assessment under article 58(1)(b) of the Statute ‘revolves around the possibility, not the inevitability, of a future occurrence’ and that ‘any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction’.³² Therefore, the Chamber is of the view that a risk of flight exists in relation to Mr Mokom.

54. As to the risks of Mr Mokom obstructing or endangering the investigation or the court proceedings and/or committing related crimes within the jurisdiction of the Court, the Chamber notes that the relevant factors invoked in the Warrant of Arrest date back to 2017 and 2018.³³ As such, these factors no longer suffice, without more, to establish the aforementioned risks. In addition, as to the Prosecution’s assertions that it has previously detailed threats issued by Mr Mokom [REDACTED] against potential witnesses and that the identity of key witnesses has been disclosed to Mr Mokom, it is recalled that the Chamber has found these arguments insufficient in another context.³⁴ That conclusion necessarily extends to the matter under consideration. This is even more so the case at present considering that the Prosecution has decided [REDACTED].³⁵ In this regard, the Chamber further finds that the OPCV’s contention that objective risks exist for the victims residing in [REDACTED] and [REDACTED] or who have family members in those States is unsubstantiated. The Chamber is also not persuaded that Mr Mokom’s connections to the Central African Republic and certain developments involving the *Coalition des Patriotes pour le Changement* establish the risks under consideration given the generic nature of the Prosecution’s assertions, and that Mr Mokom is seeking interim release to a State in Europe. Accordingly, it has not been established that there is a risk that Mr Mokom, should he be granted interim release, would obstruct or endanger the investigation or the court proceedings and/or commit related crimes within the jurisdiction of the Court.

55. In conclusion, the Chamber finds that, at present, the detention of Mr Mokom is required so as to ensure his appearance in these proceedings. Having said that, the

³² [Ngudjolo Appeal Judgment](#), para. 21; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo, 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 liberte provisoire de Thomas Lubanga Dyilo”*, 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 137.

³³ [Warrant of Arrest](#), para. 20.

³⁴ [REDACTED].

³⁵ See [REDACTED].

Chamber notes that the Appeals Chamber has found that a chamber may ‘examine appropriate conditions with a view to mitigating or negating the risk’.³⁶ In this regard, the Chamber has considered, on the one hand, the serious nature of the allegations against Mr Mokom included in the Warrant of Arrest, as well as the possible sentence that he could receive if the charges would be confirmed and he would be convicted at trial. On the other hand, the Chamber has taken into account that: (i) the risks under article 58(1)(b)(ii)-(iii) of the Statute have not been established; (ii) Mr Mokom is seeking to be released to a State in close proximity to the Court so as to facilitate the preparation of his defence; and (iii) Mr Mokom agrees to abide by any and all conditions the Chamber may impose. Having balanced these factors, the Chamber is of the view that, whilst a risk of flight in relation to Mr Mokom exists, this risk could be sufficiently mitigated by adopting and enforcing a number of conditions.

56. As a result, the Chamber, without identifying an exhaustive list of conditions at present, is of the view that the following conditions would have to be enforced pursuant to rule 119 of the Rules: (i) remaining within certain territorial limits; (ii) residing at a particular address; (iii) handing in travel documents to the local authorities except when travelling to and from the Court; (iv) reporting physically to a local police station and by telephone to the Registry every day; (v) wearing a device to electronically monitor movements; (vi) communicating exclusively with a specified number of persons; (vii) not discussing any aspect of the present proceedings with anyone other than counsel; (viii) not using any methods of communication other than a designated mobile telephone to be provided by the Registry (without internet access) to communicate with specified persons; (ix) consenting to have the designated mobile telephone verified for any disallowed communications; (x) remaining reachable at a designated mobile telephone number at all times; (xi) responding immediately when summoned by the Chamber and complying with any other instructions issued by the Chamber in connection with interim release; and (xii) undertaking to have interim release revoked if the aforementioned conditions were to be breached.

³⁶ Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, [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"](#), 2 December 2009, ICC-01/05-01/08-631-Red, para. 105 (the ‘Bemba Appeal Judgment’).

57. The Chamber further notes that ‘a Chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, pursuant to article 60 (3) of the Statute’ and that ‘the issue of the reasonableness of the period of detention [is] fact intensive and case specific’.³⁷ In the view of the Chamber, nothing precludes such an assessment from being made in respect of an application under article 60(2) of the Statute.³⁸

58. In this regard, the Chamber recalls that the litigation regarding Mr Mokom’s initially appointed counsel lasted from March 2022 until December 2022. Contrary to the Prosecution’s assertion, this delay did not entirely result from the complexity of the question under consideration seeing as it was, in large part, occasioned by procedural issues. As a result of this litigation, only limited progress could be made in completing the necessary procedural steps in preparation for the confirmation of charges hearing, which ultimately compelled the Chamber to postpone the confirmation of charges hearing until August 2023. This means that Mr Mokom would be detained for approximately 17 months prior to the start of the confirmation of charges hearing. The time required for issuing the decision on the confirmation of charges would also have to be added to this period. Therefore, the overall period of Mr Mokom’s pre-trial detention would significantly exceed the initially envisaged period of approximately 10 months between his arrest and the original date for the confirmation of charges hearing. It is crucial that this delay cannot be attributed to Mr Mokom. Whereas the Prosecution refers to the time required to adjudicate a matter initiated by Mr Mokom himself, the Chamber notes that the exercise of Mr Mokom’s statutory right cannot be held against him and, in any event, the conclusion of this litigation exceeded any reasonable expectation of the duration thereof. Accordingly, having regard to the preceding finding that the risk of flight can, in principle, be mitigated, the Chamber finds that, in the specific circumstances of the present proceedings, the length of

³⁷ Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification](#), 29 May 2015, ICC-01/05-01/13-969 (OA 5, OA 6, OA 7, OA 8, OA 9), paras 43, 45 (the ‘Bemba et al. Appeal Judgment’).

³⁸ See [Bemba et al. Appeal Judgment](#), footnote 78 (‘This statement and what follows are not intended to preclude the application of the principles expounded upon herein in other relevant contexts, *including in relation to article 60 (2) of the Statute*’ (emphasis added)).

Mr Mokom's detention additionally militates in favour of his interim release. In view of these findings, the Chamber finds that it is not necessary to further address Duty Counsel's arguments that the interim release of Mr Mokom could [REDACTED].

59. At the same time, the Chamber notes that, according to the Appeals Chamber, 'in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary', and such a State 'ought to be identified prior to a decision on conditional release'.³⁹ However, in the present case, the States identified by Mr Mokom have either explicitly rejected to accept him (even though certain States have not provided any reasons while certain other States provided reasons not pertaining specifically to the possible interim release of Mr Mokom) or not responded to the Chamber's repeated invitations to provide observations. While the Chamber has had due regard to the need to apply and interpret the law under article 21 of the Statute consistently with internationally recognised human rights, as well as States Parties' obligation to cooperate under the Statute, the Chamber understands the Appeals Chamber's jurisprudence to signify that, in the absence of a State willing to accept a person and enforce related conditions, interim release is not possible.⁴⁰ In view of the Netherlands' refusal, this finding also necessarily precludes the temporary transfer of Mr Mokom into its territory until another State willing to accept Mr Mokom is identified. The Chamber is additionally of the view that the Bemba et al. Decision and the Gicheru Decision are distinguishable. In the former, it was determined that it was not necessary to impose conditions that required to be enforced by a State,⁴¹ whereas the Chamber has found that such conditions are required in relation to Mr Mokom. In the latter, the relevant State had expressed its willingness to, in principle, accept the person concerned,⁴² while no such State has been identified in the present proceedings. Lastly, since the relevant States

³⁹ [Bemba Appeal Judgment](#), para. 106.

⁴⁰ Indeed, the Appeals Chamber has determined that a 'Pre-Trial Chamber [had] erred in granting conditional release without specifying the appropriate conditions that make conditional release feasible, identifying the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court', [Bemba Appeal Judgment](#), paras 108-109.

⁴¹ Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido](#), 21 October 2014, ICC-01/05-01/13-703, public, p. 5, 6.

⁴² Pre-Trial Chamber A (Article 70), *Prosecutor v. Paul Gicheru*, [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. 50.

have had several opportunities to express their positions and/or consult with the Court, the Chamber considers that there is no basis for further engagement at present, without prejudice to receiving any outstanding responses by some of the States concerned.

60. For the foregoing reasons, the Chamber regrets that, notwithstanding its conclusion that the risk of flight in relation to Mr Mokom could be sufficiently mitigated through the aforementioned conditions, it is not in a position to order Mr Mokom's interim release. It follows that the Application must be rejected. The present decision is without prejudice to any future determination that may be made under article 60(3) of the Statute, in particular if a State identified in the Application that has not responded hitherto nonetheless indicates its willingness to receive Mr Mokom for the purposes of interim release.⁴³ [REDACTED].

⁴³ In this regard, the Chamber finds it appropriate to grant the request of the [REDACTED] authorities to submit their response by no later than 13 April 2023.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Application without prejudice to any future determination that may be made under article 60(3) of the Statute;

INSTRUCTS the Registry to inform the [REDACTED] authorities that their response may be provided by no later than 13 April 2023; and

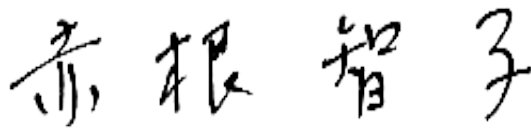
ORDERS the Prosecution to submit a public redacted version of ICC-01/14-01/22-161-Conf by no later than 17 March 2023.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala

Presiding



Judge Tomoko Akane



Judge Sergio Gerardo

Ugalde Godínez

Dated this Wednesday, 8 March 2023.

At The Hague, The Netherlands.