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**Cour  
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**International  
Criminal  
Court**

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

Date: 26 May 2023

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM  
GAWAKA***

**Confidential**

**Prosecution's Response to Request for Reconsideration of Decisions on Interim  
Release**

**Source:** Office of the Prosecutor

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

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**Detention Section**

**Victims Participation and Reparations  
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**Other**

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## I. INTRODUCTION

1. The Defence Request for Reconsideration<sup>1</sup> of the Decisions on interim release<sup>2</sup> of Pre-Trial Chamber II (“Chamber”) misrepresents the Chamber’s legal and factual findings and in any event it fails to meet the standard for reconsideration. For these reasons it should be dismissed.

## II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” because it responds to a filing of the same classification. A public redacted version will be filed as soon as possible.

## III. SUBMISSIONS

### a. The Request misrepresents the Decisions

3. The Request is premised on a wrong understanding of the Chamber’s factual and legal reasoning and conclusions. Since it misrepresents the Decisions, the Request should be dismissed *in limine*.

### i. The Request misrepresents the Chamber’s factual findings

4. Contrary to the Defence’s submission, it is the risk that Mr Mokom flees and escapes justice that *stands between* him and his release. The Defence oversimplifies the

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<sup>1</sup> ICC-01/14-01/22-203-Conf, Defence Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf, 22 May 2023 (“Request for Reconsideration”).

<sup>2</sup> ICC-01/14-01/22-173-Conf, Decision on interim release, 8 March 2023 (“Decision on Interim Release”); ICC-01/14-01/22-195-Conf, Decision on the Defence Request for Interim Measures, 19 April 2023 (“Decision on Interim Measures”), collectively “Decisions”.

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Chamber's findings when they submit that "the only thing standing between" Mr Mokom and his release is the State Parties' lack of cooperation.<sup>3</sup>

5. In its Decision on Interim Release, the Chamber found that there is a risk of flight in relation to Mr Mokom, based on his proven "willingness and capability to move between States" and the possibility that he "may receive a sentence of a number of years".<sup>4</sup> Based on these findings, the Chamber concluded that Mr Mokom could be released from prison only if the following conditions are enforced:

- (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

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<sup>3</sup> Request for Reconsideration, para. 1.

<sup>4</sup> Decision on Interim Release, para. 53.

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(xii) undertaking to have interim release revoked if the aforementioned conditions were to be breached.<sup>5</sup>

6. Currently, none of these conditions can be enforced. As a result Mr Mokom's detention remains necessary under article 58(1)(b)(i) to ensure that he does not evade justice. For this reason the Chamber denied Mr Mokom's release.

7. As the Chamber rightly noted when addressing similar arguments in the Request for Interim Measures,<sup>6</sup> "the Defence relies on the incorrect assertion that the Chamber found that all requirements for the interim release of Mr Mokom have been satisfied and that he, therefore, is eligible for interim release".<sup>7</sup> The Defence's factual premise that Mr Mokom's "detention is no longer necessary"<sup>8</sup> and that he became a "political prisoner"<sup>9</sup> is thus misplaced and at odds with the Chamber's factual findings.

## ii. The Request misrepresents the Chamber's legal findings

8. Based on the wrong factual premise that Mr Mokom should be released, the Defence further misrepresents the Chamber's legal reasoning by arguing that it unlawfully *delegated* to the Registrar its exclusive judicial authority to determine whether Mr Mokom should be detained.<sup>10</sup> To the contrary, the Chamber properly applied the law and fully exercised its authority by rejecting Mr Mokom's applications absent a State willing to enforce the measures it considered necessary under article 60.<sup>11</sup>

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<sup>5</sup> Decision on Interim Release, para. 56.

<sup>6</sup> ICC-01/14-01/22-181-Red, Public Redacted Version of "Defence Request for Interim Measures", 28 March 2023 ("Request for Interim Measures").

<sup>7</sup> Decision on Interim Measures, para. 8.

<sup>8</sup> Request for Reconsideration, para. 25.

<sup>9</sup> Request for Reconsideration, para. 27.

<sup>10</sup> Request for Reconsideration, paras. 4, 25, 27-28, 32, 41.

<sup>11</sup> Decision on Interim Release, paras. 55-56, 59-60; Decision on Interim Measures, para. 8.

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9. Contrary to the Defence's understanding, the Appeals Chamber in *Bemba* did not "introduce"<sup>12</sup> an unlawful requirement that results in the ICC Judges being forced to *delegate* their judicial authority<sup>13</sup> under article 60 to the Registrar and his ability to find a host State.<sup>14</sup> Rather, the Appeals Chamber properly and consistently *interpreted* the existing ICC legal framework.

10. The Appeals Chamber reasoned that if a Chamber finds that "the release would lead to any of the risks described in article 58(1)(b) [...] the Chamber may, pursuant to rule 119 [...] examine appropriate conditions with a view to mitigating or negating the risk. [...] The result of this two-tiered examination is a single unseverable decision that grants conditional release on the basis of specific and *enforceable* conditions".<sup>15</sup>

11. The corollary of the need for *enforceable* conditions is that "to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary".<sup>16</sup> As reflected in rule 119(3) (and regulation 51) "a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release".<sup>17</sup>

12. In *Abd-Al-Rahman* the Appeals Chamber, called to decide on the scope of regulation 51, noted that the *Bemba* Interim Release Appeal Judgment "does not indicate that any decisions on requests for interim release need to be preceded by observations of the relevant State or States. Rather, read in its proper context, the

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<sup>12</sup> See Request for Reconsideration, para. 24.

<sup>13</sup> The Appeals Chamber has repeatedly found that a decision on interim release is not discretionary in nature. See ICC-01/05-01/08-631-Red, "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 ("*Bemba* Interim Release Appeal Judgment"), para. 59; *contra* Request for Reconsideration, paras. 25, 27-28, 32.

<sup>14</sup> Request for Reconsideration, paras. 4, 24.

<sup>15</sup> *Bemba* Interim Release Appeal Judgment, para. 105 (emphasis added).

<sup>16</sup> *Bemba* Interim Release Appeal Judgment, para. 106.

<sup>17</sup> *Bemba* Interim Release Appeal Judgment, para. 106. See also ICC-02/05-01/20-177, 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', 8 October 2020 ("*Abd-Al-Rahman* Appeal Judgment"), para. 59.

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holding in that judgment concerned [and reversed] a decision *granting* interim release in the absence of having identified a State willing to accept the person concerned".<sup>18</sup> The Appeals Chamber reasoning in *Abd-Al-Rahman* confirms that the *Bemba* Interim Release Appeal Judgment does not "requir[e] ICC Judges to delegate their authority in Article 60"<sup>19</sup> but merely reiterates the need for the Chamber to ensure that the conditions deemed necessary under article 60 are in fact *enforceable*.

13. As the Appeals Chamber noted, the ICC "exercises its functions and powers on the territories of States Parties and as such is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective."<sup>20</sup>

14. This is the Court's legal framework, and it is not a prerogative of the Chamber to change it,<sup>21</sup> nor is the Chamber "on strong legal footing" to depart from the Appeals Chamber jurisprudence.<sup>22</sup> To suggest, as the Defence appears to do, that when no State

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<sup>18</sup> *Abd-Al-Rahman* Appeal Judgment, para. 59. In her separate concurring opinion, Judge Luz del Carmen Ibáñez Carranza expressed the view that "a Chamber [has] a general obligation to seek observations of the host State and/or the State on whose territory release is sought" irrespective of "whether a chamber is minded or not to grant" release (see Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza to 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', para. 26).

<sup>19</sup> Request for Reconsideration, paras. 32.

<sup>20</sup> *Bemba* Interim Release Appeal Judgment, para. 107. The ICC legal system based on State cooperation is, in this regard, fundamentally different from the *ad hoc* Tribunals and the Kosovo Specialist Chambers ("KSC") that the Defence unsuccessfully relies upon (See Request for Reconsideration, paras. 30-31). In addition, in relation to the cited International Criminal Tribunal for the former Yugoslavia ("ICTY") cases, the Defence appears to conflate States' guarantees that the accused will appear for trial and will not pose a danger to victims, witnesses and other persons in the context of consultations under rule 65(B) of the ICTY Rules of Procedure and Evidence, and the conditions that a Chamber may impose upon the release of the accused under rule 65(C). While rule 65 places no obligation upon an accused to provide State's guarantees under rule 65(B), conditions imposed under rule 65(C) should be enforced as a condition to grant release. Further, reference to the KSC Constitutional Court findings (See Request for Reconsideration, para. 31) is also misplaced since the judgment deals with a situation where "a person should continue to be deprived of his or her liberty despite the existence of a court order for his or her release" (See KSC-CC-PR-2017-01/F00004, 26 April 2017, "KSC Constitutional Court Decision", para. 120, emphasis added). As discussed above, in this case there is simply no Chamber's order to release Mr Mokom. Further, the KSC Constitutional Court Decision endorsed article 41(11) of the Law No.05/L-053 (mirrored in rule 57(4) of the KSC Rules) according to which a person can be released in a third State only if such State agrees to accept them (See KSC Constitutional Court Decision, para. 121).

<sup>21</sup> *Contra* Request for Reconsideration, para. 7.

<sup>22</sup> *Contra* Request for Reconsideration, para. 38.

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is able to *enforce* the required conditions a detained person should be released even if they may escape, obstruct justice or persist in their criminal activity would be untenable.

15. The Request is based on factual and legal misrepresentations of the Decisions. For this sole reason it should be dismissed *in limine*.<sup>23</sup>

**b. The Request fails to meet the standard for reconsideration**

16. In any event, the Request should be dismissed as it fails to meet the standard for reconsideration. As the Chamber rightly found, “reconsideration is an exceptional remedy which may be allowed only under strict and limited conditions and subject to the fulfilment of a twofold requirement: (i) ‘the conditions upon which the decision was grounded have changed’, and (ii) ‘it is necessary to prevent an injustice.’”<sup>24</sup>

17. First, the conditions upon which the Decisions were grounded have remained unchanged. In its Request, the Defence does not show any change. Further, as discussed above, by misrepresenting the Chamber’s factual and legal findings, the Defence has failed to show any clear error of reasoning that may justify reconsideration.<sup>25</sup> For this reason alone, the Request should be dismissed.

18. Second, the Defence has failed to show that a reconsideration is necessary to prevent an injustice. As discussed above, Mr Mokom did not become a *political*

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<sup>23</sup> ICC-01/04-01/10-505 OA4, Decision on the Defence Request for Reconsideration, 23 March 2012, para. 10.

<sup>24</sup> ICC-01/14-01/22-43, Decision on Mr Mokom’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom,’ 14 April 2022, para. 19. *See also* Pre-Trial Chamber II, ICC-01/14-01/18-447, Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 11 March 2021, para. 16; ICC-01/14-01/18-206, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, 24 May 2019, para. 20.

<sup>25</sup> ICC-01/12-01/18-1330, Decision on Defence request for reconsideration, or leave to appeal the ‘Fourth decision on matters related to the conduct of proceedings’, 2 March 2021, para. 4; ICC-01/14-01/21-275, Decision on Defence Request for Reconsideration or Leave to Appeal the “Directions on the Conduct of Proceedings”(ICC-01/14-01/21-251), 8 April 2022, para. 8



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prisoner<sup>26</sup> and he is not subjected to indefinite pre-trial detention.<sup>27</sup> In particular, the allegation that Mr Mokom is “at risk” of *indefinite* detention is not only misplaced — since the Chamber has repeatedly recalled that its Decisions are with no prejudice to any future determination under article 60(3)<sup>28</sup> — but also purely speculative.

#### IV. CONCLUSION

19. For the above reasons, the Chamber should dismiss the Request.



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**Karim A. A. Khan KC, Prosecutor**

Dated this 26<sup>th</sup> day of May 2023  
At The Hague, The Netherlands

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<sup>26</sup> Request for Reconsideration, para. 27.

<sup>27</sup> Request for Reconsideration, paras. 5, 27, 35.

<sup>28</sup> Decision on Interim Release, para. 60; Decision on Interim Measures, para. 10.