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Date: **09/06/2023**

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 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, ICC-01/14-01/22-203-Conf

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

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I. INTRODUCTION

1. The only thing standing between Mr Maxime Mokom and provisional release from detention, is that **not one** of the International Criminal Court's 123 States Parties will facilitate it. Put another way, the only reason Mr Mokom is detained, is a lack of cooperation and support by the ICC States Parties, towards an important aspect of the Court's operation.

2. In its last decision on interim release, the Pre-Trial Chamber was explicit that it had "rejected Mr Mokom's application for interim release in the absence of a State willing to accept him". More specifically, Mr Mokom's application was rejected because the Court's jurisprudence provides that "absent such a State, interim release cannot be ordered" (the "Prior State Requirement").[1] It is against this Prior State Requirement that the Defence for Mr Mokom ("the Defence") directs the present request.

3. Importantly, having found itself constrained by this Prior State Requirement, the Pre-Trial Chamber held as follows:[2]

> The Chamber considers that continued consultations with certain States, on the basis of these findings, may facilitate the identification of a State willing to accept Mr Mokom for the purposes of interim release. **The Registry** is, in view of its responsibilities under the Statute, uniquely placed to assist the Defence in this regard.

4. As such, in effect, the Prior State Requirement requires ICC Judges to delegate their discretion to release suspects and accused to the Registrar, and his ability to find a host state. This delegation of the Pre-Trial Chamber's authority on detention and release, falls foul of the principle of *delegatus non potest delegare,* whereby the delegation of discretionary powers or duties will be unlawful unless the provision conferring these powers or imposing these duties provides expressly or impliedly for their delegation. Importantly, domestic legislation which removed the discretion over provisional release from the judiciary has consistently been found by the European Court of Human Rights ("ECtHR") to be unlawful,

[1] Decision on the 'Defence Request for Interim Measures, ICC-01/14-01/22-195-Conf, 19 April 2023 ("19 April Decision"), para. 8, citing "Appeals Chamber, *The 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, he Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red, public, paras. 105-107 ("*Bemba* Appeal Decision").
[2] 19 April Decision, para. 11.

on the basis that judicial control over an individual's right to liberty is an essential feature of the guarantee of the right to liberty.[3]

5. Of course, the practical effect of this delegation of power, is that accused like Mr Mokom are at risk of indefinite detention, through no fault their own, or the ICC Judges, and despite the good faith efforts of the Registry, but rather because of a historical lack of cooperation on issues that are not viewed by States as directly contributing to the fight against impunity. This situation is untenable, procedurally unlawful, and has prompted the present request.

6. His Honour Judge Ambos recently observed that "the world wide practice of prolonged pre-trial detention, including the practice of international criminal tribunals, is deplorable".[4] In relation to suspects like Mr Mokom, the language of regional human rights courts and bodies highlights the incongruity of imposing "the severe penalty of the deprivation of liberty which is legally reserved for those who have been convicted," upon those who are presumed innocent.[5] Human rights law therefore requires that pre-trial detention be limited only to situations in which it is strictly necessary, given that to allow otherwise would be the equivalent of conferring upon an accused a sentence in advance of conviction,[6] which equates to anticipatory punishment.[7] It cannot reasonably be understood that detention is 'necessary' simply because States are unwilling to cooperate with the ICC on detention issues.

7. It is not an exaggeration to claim that the moral authority of the Court cannot be maintained while it has a regime in place which offers no alternative than indefinite pre-trial detention for suspects presumed to be innocent. With no ability to release suspects and accused, the ICC is not fit for purpose as an international criminal court. This is an extraordinary situation. It must be changed, and the legal framework exists for the Pre-Trial Chamber to do so.

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[3] ECtHR, *S.B.C. v. United Kingdom*, Third Section: Judgment, 39360/98, 19 June 2001 ("*SBC* Judgment"), paras. 22-23; ECtHR, *Pantea v. Romania*, Second Section: Judgment, 33343/96, 3 June 2003 ("*Pantea* Judgment"), para. 236; ECtHR, *Assenov and Others v. Bulgaria*, Chamber: Judgment, 24760/94, 28 October 1998 ("*Assenovc* Judgment"), para. 146.
[4] KSC, *Prosecutor v. Thaçi et al.,* Court of Appeals Panel: Separate Concurring Opinion of Judge Kai Ambos, KSC-BC-2020-06/IA004/F00005, 30 April 2021, para. 3.
[5] IACHR, *Giménez v. Argentina*, Report No. 12/96, Case 11.245, EA/Ser.L/V/II.91, 1 March 1996, para. 80.
[6] *Ibid;* IACHR, *Suárez-Rosero v. Ecuador*, Judgment, 12 November 1997, para.
[7] ECtHR, *Letellier v. France,* Chamber: Judgment, 12369/86, 26 June 1991.

II. LEVEL OF CONFIDENTIALITY

8. 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 in due course.

III. PROCEDURAL HISTORY

9. The procedural history in question is set out in the Pre-Trial Chamber's prior decisions on provisional release.[8]

10. For present purposes, the Defence notes that the first application for Mr Mokom's provisional release was filed on 14 November 2022.[9] Subsequent applications and observations followed on 15 February 2023[10] and 27 March 2023,[11] seeking and proposing concrete solutions to the situation of Mr Mokom's ongoing detention.

11. In the 8 March Decision, the Chamber expressed its regret that, in the absence of a State willing to accept and enforce the conditions of Mr Mokom's interim release, it was not in a position to order Mr Mokom's interim release.[12] In the 19 April Decision, the Chamber was explicit it had "rejected Mr Mokom's application for interim release in the absence of a State willing to accept him", on the basis that it was bound by the Prior State Requirement.[13]

IV. APPLICABLE LAW

12. The statutory framework of the ICC vests discretion over detention with the judiciary. Article 60 of the ICC Statute, which governs "Initial proceedings before the Court", vests the

[8] *See*, Pre-Trial Chamber II: Decision on interim release, ICC-01/14-01/22-173-Red, 8 March 2023 ("8 March Decision"), paras. 1-20; 19 April Decision, paras. 1-4.
[9] Mr. Mokom's Application for Interim Release pursuant to Order ICC-01/14-01/22-105, ICC-01/14-01/22-110-Conf, 14 November 2011, 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).
[10] Mokom Defence Observations on the Interim Release Application Submitted by Duty Counsel on behalf of Mr. Mokom, ICC-01/14-01/22-162, 15 February 2023.
[11] Defence Request for Interim Measures, ICC-01/14-01/22-181-Conf, 27 March 2023, with confidential Annexes I and II.
[12] 8 March Decision, para. 60.
[13] 19 April Decision, para. 8, citing *Bemba* Appeal Decision, paras. 105-107.

sole authority for the detention and release of suspects and accused with the Pre-Trial Chamber, with no provision for delegating this discretion to any other organs of the Court:

> **Article 60**
> **Initial proceedings before the Court**
>
> 1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
>
> 2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
>
> 3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
>
> 4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

V. SUBMISSIONS

(a) The Lack of State Cooperation

(i) Where are the States?

13. Following the 8 March Decision, Lead Counsel contacted the Office of the ICC President and the Division of Judicial Services of the Registry ("Division of Judicial Services"), seeking any assistance or advice that these Organs of the Court could provide in finding ways to implement Mr. Mokom's interim release.

14. On 13 March 2023, the Director of the Division of Judicial Services informed the Defence that he had forwarded the matter to the section of the Registry in charge of external relations and judicial cooperation, and that he hoped a meeting would take place with the Defence when additional information was received. On the same day, Lead Counsel

responded that he was looking forward to a meeting with the Registry as soon as practicable, based on the urgency of the situation.

15. On 16 March 2023, Lead Counsel contacted the Division of Judicial Services, indicating that the Defence had received no additional information about the support that the Registry could provide to facilitate Mr Mokom's interim release, in particular through its Division of External Relations. Whilst still welcoming a meeting with the Registry, Lead Counsel indicated that the urgency of the situation required the Defence to ensure that States Parties were contacted urgently to ask about their willingness to implement interim release. Lead Counsel asked the Division of Judicial Services to provide a list of focal points for thirteen (13) States Parties which the Defence sought to contact, as a priority.

16. On 20 March 2023, the Division of Judicial Services responded that it had referred the Defence request to the External Operations and Support Section of the Registry ("EOSS"). Apparently, [REDACTED].

17. On 22 March 2023, a meeting was held between the Defence and the Division of Judicial Services, [REDACTED].

18. The Defence has been, independently, expending its own resources contacting States attempting to secure an agreement to facilitate Mr Mokom's provisional release. To date, the Defence have had no success. A typical response received on 2 May 2023, for example, urges the Defence to use the channels and framework put in place for cooperation through the Registry. In short, the States are nowhere.

(ii) Where is the Assembly of States Parties?

19. On 10 March 2023, Lead Counsel for Mr Mokom sent a letter to the President of the ASP, asking her to issue an urgent call to States Parties to comply with their commitment to cooperate with the Court by facilitating the provisional release of Mr Mokom.

20. On 15 March 2023, the Director of the Secretariat of the ASP acknowledged receipt. On 16 March 2023, Lead Counsel responded that the Defence would be grateful for any

support that the ASP could provide in relation to Mr Mokom's interim release and would welcome a meeting with ASP Representatives as soon as practicable.

21. On 13 April 2023, the ASP President responded, [REDACTED].

22. On 19 April 2023, the Defence thanked the ASP President for her response, and the proposed discussions in the context of the June and July 2023 events. The Defence wrote that "with a confirmation of charges hearing in the Mokom case scheduled for 22 August 2023, I'm sure you can appreciate that the need to reach out to States Parties remains urgent. Nevertheless, I would be very grateful to stay connected on this issue, and would very much appreciate any news you can share on the results of the efforts carried out in the letter."

23. In short, there is no reasonable expectation that the ASP will secure or facilitate State cooperation for the provisional release of Mr Mokom, beyond encouraging States to enter into voluntary cooperation agreements, and referring in a public setting to the need for States to cooperate on interim release.

(b) The Unlawful Result of the Prior State Requirement

24. The Prior State Requirement was introduced by the Appeals Chamber following a decision by Pre-Trial Chamber II in August 2009 to provisionally release Mr Jean-Pierre Bemba, who was then arguably the most high profile of the Court's accused. The decision by the Pre-Trial Chamber to provisionally release Mr Bemba has been described as one which "turned heads around the world, as [Mr] Bemba was then poised to become the first accused in ICC custody to be awarded pre-trial release".[14] Through the introduction of the Prior State Requirement, among other reasons, this Pre-Trial Chamber decision was reversed,[15] and Mr Bemba remained in detention.

25. The first consequence of the Prior State Requirement is that, in situations where detention is no longer necessary, ICC Judges are obliged to keep the suspect or accused person detained, until the Registry has been able to conclude an agreement with a State. In this way, the Prior State Requirement forces ICC Judges to delegate their power and

[14] Megan A. Fairlie, 'The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled', (2010) 33 Fordham Int'l L.J. 1101.
[15] *Bemba* Appeal Judgment, paras. 105-107.

discretion to release suspects and accused to the Registrar, and his ability to find and secure an agreement with a State.

26. Looking at how this plays out in concrete terms, the Pre-Trial Chamber has been clear that while it considers that a risk of flight exists in relation to Mr Mokom,[16] "this risk could be sufficiently mitigated by adopting and enforcing a number of conditions",[17] and that "the length of Mr Mokom's detention additionally militates in favour of his interim release."[18] However, "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,"[19] because "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'".[20]

27. The Pre-Trial Chamber was therefore clear. Without the Prior State Requirement, Mr Mokom would be released. With the Prior State Requirement in place, the Pre-Trial Chamber was required to delegate its discretion in this matter to the Registrar and his ability to secure the prior agreement of a State. This is the case, despite the reality that the Registrar's failure to do so would result in indefinite pre-trial incarceration of Mr Mokom, who would then be detained for reasons entirely outside his own control, and the control of the Judges and the Registrar himself. The net result is that Mr Mokom becomes an effective political prisoner. His release does not depend on meeting the Rome Statute criteria, but rather on the political goodwill of the States Parties.

28. A condition that removes discretion from Judges to order provisional release, in circumstance where detention is no longer necessary, has been found to be incompatible with the right to liberty, and a violation of protections against arbitrary detention. The ECtHR has held that legislation that removes judicial discretion in release fails to meet established standards of a fair trial. This was the case with, for example, the *Criminal Justice and Public Order Act* (United Kingdom) (1994) which precluded the possibility of pre-trial release for

[16] 8 March Decision, para. 53.
[17] 8 March Decision, para. 55.
[18] 8 March Decision, para. 59.
[19] 8 March Decision, para. 60.
[20] 8 March Decision, para. 59.

those charged with specific crimes, if previously convicted of one of those crimes. In referring to a prior decision of the European Commission, the ECtHR held:[21]

> …judicial control of interference by the executive with an individual's right to liberty [is] an essential feature of the guarantees embodied in Article 5(3), the purpose being to minimise the risk of arbitrariness in the pre-trial detention of accused persons. Certain procedural and substantive guarantees ensure that judicial control: the judge (or other officer) before whom the accused is "brought promptly" must be seen to be independent of the executive and of the parties to the proceedings; that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty, and that judge must have the power to order an accused's release… **[A] removal of the judicial control of pre-trial detention required by Article 5(3) of the Convention was found by the Commission to amount to a violation of that Article…** The Court sees no reason to disagree with the conclusions reached by the Commission…

29. As such, the absolute ban on the grant of release for a particular class of accused violates Article 5(3) of the Convention,[22] and Article 9(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which govern the right to liberty and security, and necessitate judicial supervision of deprivations of liberty.[23] In addition, detention absent a showing of reasonable necessity gives rise to the possibility of arbitrary detention,[24] in violation of Article 9(1) of the ICCPR.

30. It is for this reason that, while the *ad hoc* Tribunals certainly gave weight to the provision of prior state guarantees when adjudicating requests for provisional release (which were regularly granted), the Appeals Chamber "has made it clear that, although the

[21] *SBC* Judgment, paras. 22-23.
[22] See also ECtHR, *Ilijkov v. Bulgaria*, Fourth Section: Judgment, 33977/96, 26 July 2001, para. 84: "any system of mandatory detention on remand is per se incompatible with Article 5(3) of the Convention."
[23] Article 5(3) ECHR: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." Article 9(3) ICCPR provides: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."
[24] *See* UNHRC, Communication No. 1128/2002: Views of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights (*Marques de Morais v. Angola*), 1 6.1, U.N. Doc. CCPR/C/83/D/1128/2002, 29 March 2005, para. 6.1: "the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime."

production of a guarantee from the relevant governmental body is advisable, **it is <u>not</u> a prerequisite** for provisional release."[25]

31. Similarly, the requirement that "[a] detained person shall not be released without the consent of that State" was previously incorporated into Rule 54(4) of the KSC Rules of Procedure and Evidence ("KSC Rules"). A Specialised Chamber of the Kosovo Constitutional Court struck down this effective Prior State Requirement in the KSC Rules as being unconstitutional, [26] on the basis that it "would make the release of a detained person entirely dependent upon the consent of a State even in circumstances where a Panel has found sufficient grounds requiring his or her release."[27] The Constitutional Court considered that "any detention in those circumstances would lack the necessary legal basis and would not be a lawful detention".[28] Relevantly, this meant that the plain meaning of the phrase "a detained person shall not be released without the consent of that State" in Rule 154, if left unqualified "would result in the continued detention of a person in the absence of any justifiable grounds authorised under Article 29 of the Constitution in flagrant violation of the right of the detained person to liberty".[29] Therefore, "mindful of the obligation on the Specialist Chambers to adjudicate and function in accordance with the Constitution and international human rights law",[30] the Prior State Requirement in the KSC Rules was held to be unconstitutional.

32. As such, by requiring ICC Judges to delegate their authority in Article 60 of the Statute to decide on matters of provisional detention and release, the Prior State Requirement amounts to an unlawful delegation of discretionary powers in violation of the principle of *delegatus non potest delegare,* rendering subsequent detention without a legal basis. Judicial

[25] ICTY, *Prosecutor v Sainović & Ojdanić*, Decision on Provisional Release, IT-99-37-AR65, 30 October 2002, Dissenting Opinion of Judge David Hunt on Provisional Release, para. 57, citing *Prosecutor v. Blagojević*, Decision on Application by Dragan Jokić for Provisional Release, IT-02-60-AR65 & IT-02-60-AR65.2, 28 March 2002. *See also Prosecutor v. Tolimir*, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, IT-04-80-AR65.1, 19 October 2005, para. 9: "Rule 15 places no obligation upon an accused applying for provisional release to provide guarantees from a State as a prerequisite to obtaining provisional release".
[26] KSC, *Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law,* Specialist Chamber of the Constitutional Court: Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-01/F00004, 26 April 2017 ("Kosovo Constitutional Court Decision"), paras. 120-122.
[27] Kosovo Constitutional Court Decision, para. 120.
[28] *Ibid*.
[29] *Ibid*, para. 122.
[30] *Ibid*, para. 123.

control over individual's right to liberty is an essential feature of the guarantee of the right to liberty.[31] As repeatedly stated by the ECtHR, and reinforced in this context by the Kosovo Constitutional Court, this cannot be left to the whim and will of the States. The responsibility must rest with the Judges, and the Judges alone.

(c) The Request for Reconsideration

33. Consistent with the need to preserve legal certainty, there is no statutory basis in the Court's instruments allowing for reconsideration of a Chamber's past decisions.[32] Reconsideration has, however, been found to be available as an exceptional measure, in limited circumstances.

34. In *Lubanga*, the Trial Chamber held that in accordance with the approach adopted by the *ad hoc* Tribunals, which reflects the position in many common law national legal systems, it is well established that "a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory".[33] Perhaps the highest threshold was set in *Ntaganda*, where the Single Judge held that "[o]nly in extreme circumstances, pursuant to its powers under articles 64(2) and 67, a Chamber may reconsider its own decisions, as an exceptional measure which should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."[34]

35. The Prior State Requirement, which mandates an unlawful delegation of power, and results in indefinite pre-trial detention in a manner incompatible with the internationally recognised human right to liberty and protections against arbitrary detention, is precisely the kind of "manifestly unsatisfactory consequence"[35] which should justify reconsideration. As such, the Defence invites the Pre-Trial Chamber to reconsider its previous decisions of 8

[31] *SBC* Judgment, paras. 22-23; *Pantea* Judgment, para. 236; *Assenov* Judgment, para. 146.
[32] ICTR, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber II: Decision on "Second Defence request for interim release", ICC-01/04-01/10-319, 28 July 2011, p. 6.
[33] *Prosecutor v. Lubanga*, Trial Chamber: Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011 ("*Lubanga* Decision on Request for Reconsideration"), para. 18.
[34] *Prosecutor v. Ntaganda*, Trial Chamber: Decision on the Defence request seeking clarifications and/or further guidance following the 'First Decision on Reparations Process' and Request seeking an extension of time to submit observations on the Registry 30 September Report, ICC-01/04-02/06-2601, 29 September 2020 ("*Ntaganda* Decision"), para. 6.
[35] *Lubanga* Decision on Request for Reconsideration para. 18.

March and 19 April in so far as they incorporate an apparent obligation to follow the Prior State Requirement, given that "it is necessary to do so to prevent an injustice."[36] The injustice being the illegal delegation of its power to the Registrar, and/or the unnecessary indefinite pre-trial detention of the suspect in this case.

36. This request for reconsideration is rendered even more reasonable by the non-binding nature of the ICC's jurisprudence, and hence the Prior State Requirement in question. Article 21(2) of the Statute provides that "[t]he Court **may** apply principles and rules of law as interpreted in its previous decisions." The use of the permissive "may" contrasts with, for example, the use of the word "must" in Article 21(3), where the Statute mandates that the application of law "**must** be consistent with internationally recognised human rights".

37. On this basis, commentators have recognised that ICC jurisprudence "is a non-binding source of law in accordance with Article 21(2)."[37] A review of the ICC's jurisprudence demonstrates that "Chambers do not feel bound by the jurisprudence of other Chambers. Even more interesting to note, Chambers have deviated from previous jurisprudence either explicitly or implicitly, simply ignoring the jurisprudence of other Chambers."[38] This is because, "as a developing body of law, without the benefits of legislative guidance, international criminal law requires a certain amount of judicial discretion".[39]

38. And while the Prior State Requirement was first enumerated by the Appeals Chamber, it is significant that Article 21(2) of the Statute "does not make any difference between the jurisprudence of the Pre-Trial, Trial or Appeals Chambers of the Court".[40] In practice, therefore, "the case law of the Appeals Chamber does not seem to be placed on a higher level than the case law of other Chambers of the Court, which is in line with the wording of Article

[36] *Ntaganda* Decision, para. 6.
[37] G. Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC', in C. Stahn (ed.) The Law and Practice of the International Criminal Court (OUP, 2015) ("Bitti"), p. 417. *See also* M.M. de Guzman, 'Article 21' in O. Triffterer & K. Ambos (eds), *The Rome Statute of the International Criminal Court* (CH Beck, 2016) ("De Guzman"), p. 945: "[t]his paragraph provides for the discretionary use of precedent by the Court. The Court is not obligated to adhere to its prior decisions through a binding rule of stare decisis. Rather, paragraph 2 permits the judges, in their discretion, to accord precedential value to principles and rules of law identified in prior decisions. This provision represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties before the court."
[38] Bitti, p. 423.
[39] De Guzman, p. 945.
[40] Bitti, p. 417. *See also* W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute (2nd Edition)* (OUP, 2016), p. 526: "[a]rticle 21(2) rejects a rule of *stare decisis*, because it is worded as a permissive and not a mandatory provision. Nor does the provision explicitly establish any hierarchy in terms of the decisions of the various Chambers of the Court".

21(2) which refers to the Court and does not give a particular weight to the jurisprudence of the Appeals Chamber."[41]

39. As such, in practice, ICC Chambers have regularly declined to follow prior decisions of their fellow Judges, including decisions of the Appeals Chamber,[42] and including on questions of provisional release.[43] The Pre-Trial Chamber in this case is therefore on strong legal footing to do the same.

VI. CONCLUSION AND REMEDY

40. If the ICC operated in an ideal world, States Parties would take their obligation to cooperate with the Court to protect the rights of the accused, as seriously as the obligation to cooperate with those aspects of the Court's mandate which are geared towards securing convictions.

41. The fact that they do not is the reality now facing the ICC Judges who are seized with requests for provisional release in situations like Mr Mokom's. However, this reality in combination with the Prior State Requirement leads to a system of *de facto* pre-trial detention at the ICC which cannot be reconciled with international standards governing pre-trial detention, or internationally recognised human rights. Provisional release at the ICC cannot be rendered illusory, nor can the judicial authority to decide on release be unlawfully delegated.

[41] Bitti, p. 423.
[42] *See, e.g.,* ICC, *Prosecutor v. Ruto et al.,* Pre-Trial Chamber II: Decision on the "Prosecution's Application to File Additional Authority", ICC-01/09-01/11-365, 4 November 2011, para. 7; *Prosecutor v. Lubanga,* Trial Chamber I: Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras. 1007-1011; *Prosecutor v. Katanga,* Single Judge: Decision on Article 54(3)(e) Documents identified as potentially exculpatory or otherwise material to the Defence's preparation for the Confirmation hearing, ICC-01/04-01/07-621, 20 June 2008, paras. 59, 64; *Prosecutor v. Muthaura and Kenyatta,* Trial Chamber V: Decision on witness preparation, ICC-01/09-02/11-588, 2 January 2013, para. 30 & fn. 57.
[43] *See, e.g.,* ICC, *Prosecutor v. Ongwen,* Single Judge: Decision on the "Defence Request for the Interim Release of Dominic Ongwen", ICC-02/04-01/15-349-Red, 27 October 2015, para. 7: "The Single Judge acknowledges the position expressed by the Appeals Chamber, which may be applied in the present case as a subsidiary source of law under article 21(2) of the Statute, but is of the view that the reference by article 60(2) of the Statute to article 58(1) cannot be understood to require, for the disposal of an application for interim release, an examination of the merits of the case with a view to determining whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."

42. While acknowledging both the extraordinary nature of reconsideration, and the significance of circumventing the Prior State Requirement, there is a sound legal basis for doing both. For the above reasons, the Defence respectfully requests that the Chamber:

RECONSIDER the 8 March and 19 April Decisions, insofar as they apply the Prior State Requirement; and

ORDER the release of Mr Mokom, with conditions as deemed appropriate by Pre-Trial Chamber; and

ORDER the Registrar to facilitate urgent interim measures to allow for Mr Mokom's immediate release.

Respectfully submitted,

Philippe Larochelle,

Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, June 09, 2023