

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **22/11/2023**

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
with Confidential Annexes A – G***

**Public Redacted Version of “Defence Motion for a Request for Cooperation to the
Central African Republic”**

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

Karim A. A. Khan KC
 Mame Mandiaye Niang
 Leonie von Braun

Counsel for the Defence

Philippe Larochelle

Legal Representatives of the Victims

Abdou Dangabo Moussa
 Marie-Edith Douzima-Lawson
 Yaré Fall
 Elisabeth Rabesandratana

Legal Representatives of the Applicant**Unrepresented Victims****Unrepresented
(Participation/Reparation)****Applicants****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Oswaldo Zavala Giler

Counsel Support Section**Deputy Registrar****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Central African Republic is a State Party to the ICC. Having ratified the Rome Statute on 3 October 2001, the Central African Government assumed the obligations of a State Party. The Office of the Prosecutor considers the Central African authorities to be valued partners in justice,¹ and is said to enjoy “fruitful cooperation of relevant national authorities” in the Central African Republic.²

2. As the Pre-Trial Chamber is aware,³ following the close of the ICC confirmation hearing in August 2023, a rushed trial *in absentia* appears to have suddenly taken place against Mr Mokom in Bangui. This ‘trial’ resulted in the issuance of a two-page Judgment, published on 5 October 2023,⁴ sentencing Mr Mokom to life imprisonment with hard labour, and the confiscation of his goods for the benefit of the Central African state.

3. Having been notified of this Judgment, and following the Pre-Trial Chamber’s order that the Registry make arrangements for Mr Mokom’s transfer by liaising “in particular” with the Central African Republic and the Host State,⁵ the Defence prepared a Request for Assistance to the Central African Republic authorities, seeking information about the *in absentia* proceedings, and information that would inform Defence submissions on Mr Mokom’s transfer under Rule 185 of the ICC Rules of Procedure and Evidence (‘Rules’).⁶ The Registry transmitted the request to the Central African authorities on 20 October 2023.

¹ ICC Office of the Prosecutor Statement, ‘ICC Office of the Prosecutor partners with national authorities and international experts in the forensic identification and restitution of remains of victims in the Central African Republic’, 29 September 2023, available at: <https://www.icc-cpi.int/news/icc-office-prosecutor-partners-national-authorities-and-international-experts-forensic>: “The Office expresses its gratitude to these partners, as well as the national and local CAR authorities, the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), and other partners who facilitated this work.”

² ICC Office of the Prosecutor Statement, ‘The Prosecutor of the International Criminal Court, Karim A.A. Khan KC, announces conclusion of the investigation phase in the Situation in the Central African Republic’, 16 December 2022, available at: <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-karim-aa-khan-kc-announces-conclusion-investigation-0>. See also ICC Office of the Prosecutor Statement, ‘ICC Prosecutor underlines commitment to support the Special Criminal Court of the Central African Republic following address by Deputy Prosecutor, Mr Mame Mandiaye Niang at opening of first trial in Bangui’, 11 May 2022, available at: <https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic>.

³ Defence Urgent Request, [ICC-01/14-01/22-278](https://www.icc-cpi.int/cases/01/14-01/22-278), 23 October 2023, paras. 5, 6.

⁴ See: [ICC-01/14-01/22-278-AnxA](https://www.icc-cpi.int/cases/01/14-01/22-278-AnxA).

⁵ Order for Release, [ICC-01/14-01/22-276-Conf](https://www.icc-cpi.int/cases/01/14-01/22-276-Conf), 16 October 2023, para. 10.

⁶ Annex A: Request for Assistance to the Central African Republic, 20 October 2023.

4. This was not the first Request for Assistance sent by the Registry to the Central African authorities on behalf of the Defence. In July 2023, the Registry transmitted a Request for Assistance seeking information concerning the seizure of Mr Mokom's property and materials from his house in Bangui.⁷ No response was ever received. Importantly, there was no indication from the Central African authorities that the Defence was not entitled to rely on the Registry to transmit requests, or that the procedure followed by the Defence and Registry was not appropriate or complete.

5. On 1 November 2023, having learnt about the arrest and [REDACTED] of a Defence witness, the Defence sent a further Request for Assistance to the Central African authorities, asking for information about the arrest of the witness, and his current status.⁸ This Request for Assistance was transmitted by the Registry to the Central African authorities on 2 November. On 7 November 2023, the Defence received the following information from the Counsel Support Section ('CSS'):⁹

Further to your request for transmission to the CAR MoJ, our colleagues in the Office of the Director, Division of External Relations, have informed us that, on 2 November 2023, a representative of the Country Office CAR ("CO CAR") met with the CAR authorities, to follow up on the Defence request (MM-2023-CAR/RFA-10-2 – request to the CAR MoJ (see annex) and in order to transmit the Defence request MM-2023-CAR/RFA-11-8 to the CAR authorities.

The Registry understands the position of the CAR authorities as communicated during the said meeting, as follows: The CAR authorities recommend that the Mokom Defence hire a local lawyer in the CAR who could send the requests in question to the CAR authorities; and that **the CAR authorities will not consider the Mokom Defence's requests unless the request is made by a local lawyer in the CAR.**

6. Against the backdrop of the purge currently being carried out in the Central African Republic of perceived opponents of the current regime, discussed further below, the Defence cannot in good conscience designate a local lawyer, whose identity would be known by the Central African authorities as someone who is cooperating with Mr Mokom's Defence team. Nor is there any logical or legal basis for a State Party conditioning cooperation with the Defence on their hiring local and in-country team member(s), particularly when other parties and participants have not been subjected to the same conditions. As such, the Defence seizes

⁷ Annex B: Request for Assistance to the Central African Republic, 18 July 2023.

⁸ Annex C: Request for Assistance to the Central African Republic, 1 November 2023.

⁹ Annex D: Email CSS to Defence, 1 November 2023 (emphasis added).

the Pre-Trial Chamber with a request to order the Registry to transmit a request for cooperation to the Central African Republic authorities pursuant to Article 87(1)(a) of the Rome Statute, to facilitate the provision of the information sought by the Defence without the need for the engagement and endangerment of local lawyers.

II. APPLICABLE LAW

7. Part 9 of the Rome Statute contains provisions regarding international cooperation and judicial assistance. Article 86 of the Rome Statute encapsulates the general obligation to cooperate, stipulating that States Parties shall cooperate **fully** with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

8. Article 87 of the Rome Statute contains general rules regarding requests for cooperation, which are necessary to make the general obligation in Article 86 operative, and which apply to all forms of cooperation. Notably, Article 87(1) provides the Court with the authority to submit requests to States Parties for cooperation. A request by the Court to cooperate is binding for the State Party addressed,¹⁰ and there are consequences for failure to cooperate which are set out in Article 87(7).

9. These general provisions are supplemented by additional provisions in Part 9 of the Rome Statute which provide for specific forms of cooperation. Most relevantly, Article 93 addresses forms of cooperation other than surrender of persons. Pursuant to Article 93(1) of the Statute, the following categories of cooperation can be the subject of a request: ‘(a) The identification and whereabouts of persons or the location of items; [...] (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; [...] (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.’ Article 93 must be read in conjunction with Article 96(2), which details the required contents for requests for assistance.

10. The moving party must meet three essential prerequisites for obtaining a cooperation request. That is, the cooperation request must be sufficiently: (i) relevant, (ii) specific and (iii)

¹⁰ *Prosecutor v. Al-Rahman*, Single Judge: Decision on the Defence Request pursuant to Article 87(5)(b) of the Statute, [ICC-02/05-01/20-295](#), 9 March 2021, paras. 11-12.

necessary.¹¹ Once these three criteria are satisfied, a request is not invalidated by issues such as practical difficulties.¹²

11. Article 96(2) details the contents of requests for assistance submitted under Article 93. Requests for cooperation must be sufficiently precise to enable the requested State to execute the requests.¹³

Concerning the stipulations of article 96(2) of the Statute, the Chamber considers that they require requests for cooperation to be sufficiently precise to enable the requested State to implement the request, implying that, where a request is made for the provision of documents, as in the instant case, it must target specific and identifiable items or categories of item. This requirement of precision is also intended to ensure that the request for cooperation demonstrate precisely what it has become necessary to ask the State to provide assistance with: thus, the Court cannot merely request a government's assistance in obtaining all types of unidentified or unidentifiable documents that might be in the government's possession.

12. Commentators have recognised that the ICC and the requested State have a joint responsibility for the rights of the individual or individuals concerned, which “implies the need to avoid loopholes in the protection of individual rights as a result of the international division of labor in the conduct of the criminal proceedings”.¹⁴

13. Various chambers of the ICC have previously granted requests by Defence teams for requests for orders for cooperation pursuant to Article 93(1), including for requests for documents and records,¹⁵ as well as to ensure protection of victims and witnesses.¹⁶

¹¹ *Prosecutor v. Ongwen*, Trial Chamber: Decision on Defence Request for Deadline Extension and Cooperation from Uganda, [ICC-02/04-01/15-1254](#), 4 May 2018, para. 7 and fn. 21.

¹² *Prosecutor v. Kenyatta*, Trial Chamber V(B): Decision on the Prosecution's Revised Cooperation Request, [ICC-01/09-02/11-937](#), 29 July 2014, para. 34.

¹³ *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II: Decision on the second motion of the Defence for Germain Katanga seeking the cooperation of the Democratic Republic of the Congo, [ICC-01/04-01/07-2619-Red-tENG](#), 6 December 2010, para. 13.

¹⁴ Claus Kreß & Kimberly Prost, ‘Article 86’, in Kai Ambos & Otto Triffterer (eds.) *The Rome Statute of the International Criminal Court* (3rd ed., 2016), p. 2011.

¹⁵ See, for example: *Prosecutor v. Abd-Al-Rahman*, Trial Chamber I: Decision on the Defence request for cooperation pursuant to Article 57(3)(b) of the Statute, [ICC-02/05-01/20-590-Red](#), 11 February 2022; *Prosecutor v. Yekatom & Ngaïssona*, Trial Chamber V: Decision on the Ngaïssona Defence Request pursuant to Article 57(3)(b) of the Statute, [ICC-01/14-01/18-1159-Red](#), 1 November 2021; *Prosecutor v. Ruto & Sang*, Trial Chamber V(A): Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses, [ICC-01/09-01/11-1655-Red2](#), 17 November 2014; *Prosecutor v. Bemba et al.*, Trial Chamber VII: Decision on Second Mangenda Request for Cooperation, [ICC-01/05-01/13-1768](#), 5 April 2016.

¹⁶ See, for example: *Prosecutor v. Katanga & Ngudjolo Chui*, Trial Chamber II: Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute, [ICC-01/04-01/07-3033](#), 22 June 2011, paras. 41-42.

III.SUBMISSIONS

14. This is, first and foremost, a security issue. According to consistent information relayed in the Central African press, a series of arrests have been carried out over the past weeks by the Central African authorities against perceived opponents of the government. The Pre-Trial Chamber is aware that Defence witness P-0405 was arrested in Bangui on [REDACTED] 2023.¹⁷ [REDACTED].¹⁸ The Defence has a reasonable basis to believe that his arrest is linked to his engagement with the Mokom Defence team.

15. Since bringing P-0405's arrest to the attention of the Pre-Trial Chamber by way of an urgent motion on 4 November 2023, the Defence has since learnt that [REDACTED]. This appears to be the same alleged attempt which formed the basis of the *in absentia* judgment issued against Mr. Mokom in Bangui last month. Against this backdrop, the Defence team cannot, in good conscience, engage the services of a local lawyer who would then be identified to the Central African authorities as being associated with Mr Mokom's Defence team. Particularly in the context of the 2-page judgment, convicting Mr Mokom of what appear essentially to be political offences.¹⁹ Nor is there any logical or legal basis put forward for the imposition of this additional level of distance between the Defence and the Central African authorities from whom they are seeking urgent answers and information.

16. This is also an equality of arms issue. Put simply, the Prosecution is not required to engage local lawyers just to transmit information to the Central African authorities. Article 67(1) of the Rome Statute encompasses the principle of equality of arms, meaning that minimum guarantees "must be generously interpreted, so as to ensure the defence is placed insofar as possible on an equal footing with the prosecution, in order to protect fully the right of the accused to a fair trial".²⁰ The right to a fair trial, of which the principle of equality of arms forms a cornerstone, mandates that a party cannot be put at a disadvantage *vis-à-vis* its adversary.²¹

¹⁷ Defence Urgent Request for an Order Concerning the Arrest of P-0405, [ICC-01/14-01/22-287-Conf](#), 4 November 2023.

¹⁸ [REDACTED].

¹⁹ See: [ICC-01/14-01/22-278-AnxA](#).

²⁰ *Prosecutor v. Lubanga*, Trial Chamber, Decision on Defence's Request to Obtain Simultaneous French Transcripts, [ICC-01/04-01/06-1091](#), 14 December 2007, para. 18.

²¹ *Prosecutor v Katanga*, Trial Chamber: Judgment, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014, para. 1572.

17. The Prosecution's dealings with the Central African authorities are governed by a Judicial Cooperation Agreement. The Defence was first alerted to the existence of this Judicial Cooperation Agreement in June 2023 when on mission in the Central African Republic. The Defence was informed by potential witnesses, who felt that they could not speak with the Defence because the terms of this Judicial Cooperation Agreement stipulate that interaction with ICC officials requires notification to their hierarchy. Should this interaction be with the Defence, this would lead to repercussions for themselves and their families.

18. Given the obvious and significant impact of this Judicial Cooperation Agreement on the ability of the Defence to effectively represent Mr Mokom, the Defence asked for a copy from VWU,²² CSS²³ and the Prosecution. CSS and VWU told the Defence they could not provide it and directed the Defence back to the Prosecution. An exchange with the Prosecution ended on 17 July 2023, after several follow up emails, with the Prosecution undertaking to get back to the Defence "as soon as possible".²⁴ The Judicial Cooperation Agreement still has not been provided.

19. Relevantly, the Defence has located a 2007 agreement between the ICC and the Government of the Central African Republic, which was filed publicly in the *Bemba* case.²⁵ On the basis of this former agreement, the Defence presumes that the current agreement was designed to facilitate cooperation and assistance between the Prosecution and Central African authorities, and did not require the Prosecution to hire local lawyers to transmit requests for cooperation. The Defence accordingly seeks an order for disclosure, in order to determine whether this understanding is correct, and whether the Agreement could facilitate the provision of the information being sought by the Defence, or whether it poses any additional risks for interaction of Central Africans with members of Mr Mokom's Defence team, such as a requirement that all contact be notified to the state authorities.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ *Prosecutor v. Bemba*, Annex A: Prosecution's Filing of the Judicial Cooperation Agreement with the Government of the Central African Republic into the Record of the Case, [ICC-01/05-01/08-738-AnxA](#), 26 March 2010.

20. The requirement of hiring local Central African lawyer(s) to transmit Defence Requests for Assistance also places an additional financial burden on the Defence team, at a time where the Defence is still waiting for information from the Registry about the resources which will be available to it, following the withdrawal of the charges. On 26 October 2023, the Defence filed a request for resources to be able continue to assist Mr Mokom with resolving the current situation in which he has been placed. This request did not include a budget for hiring local lawyers in the Central African Republic to submit its requests to the Central African authorities, a cost which will undoubtedly be considered by the CSS as falling outside the Legal Aid Scheme at this phase of the proceedings.

21. As such, for reasons of security, equality of arms, and resources, the Defence is not in a position to engage local lawyer(s) to transmit its Requests for Assistance to the Central African Republic. The Defence Requests for Assistance transmitted by the Registry are relevant, specific, and seek information that is essential for the current work of the Defence; facilitating Mr Mokom's transfer from the Host State to a safe third State, and to ensure the ongoing security and wellbeing of witnesses associated with this case. They fall within the scope of requests for cooperation as set out in Article 87(1)(a), and Articles 93(1)(a), (i), (j) and (l) of the Rome Statute.

22. There is no legal or logical basis for the Central African authorities to condition their response on the hiring of additional Central African personnel. As such, the Central African authorities should be requested to remove this pre-condition, and provide the information sought by the Defence in line with the obligations of cooperation incumbent on States Parties.

IV. CONCLUSION AND RELIEF SOUGHT

23. Since being first notified of the Prosecutor's intention to withdraw the charges against Mr Mokom on 16 October 2023, the Defence has been scrambling to address the urgent and frankly horrifying series of events that have subsequently unfolded. In order to implement a solution that is compatible with Mr Mokom's fundamental human rights, within the constraints of the limited resources and assistance being offered to it, the Defence needs information. The majority of this information is in the possession of the Central African authorities. The imposition of an arbitrary condition requiring the identification (and exposure) of local lawyers

is an unprecedented and unnecessary barrier to the Defence's ongoing efforts to bring Mr Mokom's engagement with the Court to an end.

24. For these reasons, the Defence asks the Pre-Trial Chamber to:

ORDER the Prosecution to disclose the current Judicial Cooperation Agreement between the Office of the Prosecutor and the Central African Republic to the Defence; and

ORDER the Registrar to prepare and transmit a cooperation request pursuant to Article 87(1)(a) and Article 93(1) of the Rome Statute asking for the assistance of the Central African Republic in responding to the pending Defence requests for assistance, without requiring the Defence to engage local lawyers to transmit these requests.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, November 22, 2023