



Original: English

No. ICC-01/14-01/22

Date: 18 January 2024

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 pursuant to Rule 185 of the Rules of Procedure and Evidence'

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
Ms Leonie von Braun

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

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

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 pursuant to Rule 185 of the Rules of Procedure and Evidence’.

I. PROCEDURAL HISTORY

1. On 17 October 2023, following the withdrawal of the charges against Maxime Jeoffroy Eli Mokom Gawaka (‘Mr Mokom’) by the Prosecution,¹ the Chamber terminated the proceedings against Mr Mokom, and further, *inter alia*, instructed the Registry to ‘make all necessary arrangements for [the transfer of Mr Mokom]’ (the ‘17 October 2023 Order’).²
2. On 23 November 2023, the Registry transmitted a letter from the authorities of the Central African Republic (the ‘CAR’ and ‘CAR Letter’).³
3. On 8 December 2023, Mr Mokom submitted his views pursuant to rule 185(1) of the Rules of Procedure and Evidence (the ‘Rules’ and ‘Rule 185 Views’).⁴

II. SUBMISSIONS

A. CAR Letter

4. The CAR authorities indicate that [REDACTED].
5. Furthermore, the CAR authorities specify [REDACTED]. The CAR authorities add that [REDACTED]. According to the CAR authorities, [REDACTED]. The CAR authorities further explain that [REDACTED].

¹ Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’, 16 October 2023, [ICC-01/14-01/22-275-Conf](#), confidential (reclassified as public pursuant to the Chamber’s order dated 19 October 2023).

² Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’, [ICC-01/14-01/22-276-Conf](#), confidential (reclassified as public pursuant to the Chamber’s order dated 19 October 2023).

³ Registry’s Transmission of the letter of the authorities of the Central African Republic, ICC-01/14-01/22-296-Conf-Exp, confidential, together with annex I, confidential.

⁴ Mokom Defence Submissions pursuant to Rule 185(1), ICC-01/14-01/22-307-Conf-Exp, confidential and *ex parte*, only available to the Registry and the Defence, together with annexes A, B, C, D, E, F, G, H, I, J, K, L, N, O, P, confidential and *ex parte*, only available to the Registry and the Defence, and annexes M and Q, public (public redacted versions of the submissions ([ICC-01/14-01/22-307-Red](#)) and annexes I and N (ICC-01/14-01/22-307-AnxI-Red and ICC-01/14-01/22-307-AnxN-Red) were made available on the same day).

6. The judicial authorities of the CAR seek the cooperation of the ICC Prosecutor in executing the warrant for the arrest of Mr Mokom in order to secure his extradition to the CAR to serve his sentence. The CAR authorities specify that [REDACTED]. The CAR authorities add that [REDACTED].

B. Rule 185 Views

7. Mr Mokom submits that he cannot be returned to the CAR. According to Mr Mokom, the extradition request from the CAR is invalid as he was arrested in and surrendered by Chad and, as such, rule 185(1) of the Rules requires the CAR to obtain the consent of Chad. Mr Mokom adds that a transfer to the CAR is prohibited under the Angola *feuille de route*, pursuant to which Mr Mokom is entitled to remain in Chad. Mr Mokom is further of the view that a return to the CAR would mean being subjected to an unfair trial, cruel treatment, torture, and the likelihood of death in view of: (i) materials casting doubt on the independence and impartiality of the CAR judicial system, and pointing to its weaponization against political opponents; (ii) the absence of attempts to contact Mr Mokom or his counsel regarding the proceedings against Mr Mokom in the CAR, as well as the lack of reasoning in the judgment issued by the Bangui Criminal Court; (iii) accounts of the torture and cruel treatment of a Defence witness and other persons, who would have been compelled to make false confessions, including in relation to Mr Mokom's alleged involvement in certain events; (iv) materials describing the widespread use of torture in the CAR, as well as statements expressing that Mr Mokom is at risk of being killed upon his return to the CAR; (v) materials on sub-standard conditions of detention in the CAR; and (vi) statements indicating Mr Mokom risks persecution on the basis of his Gbaya race, as well as Mr Mokom's belief that his conviction in the CAR evidences persecution on the basis of political opinion. Mr Mokom requests that, should the Chamber be inclined to order his forced rendition to the CAR, it first invites the CAR authorities to appear before the Chamber in an oral hearing to respond to his submissions.

8. Mr Mokom adds that he has family residing in both [REDACTED] and [REDACTED], and that he would be willing to be re-settled in either of these two countries, as well as in [REDACTED]. Mr Mokom requests the Chamber to declare that he is a protected person under the Convention and Protocol Relating to the Status

of Refugees so as to facilitate the identification of a State(s) which are obliged or agree to receive him. In addition, Mr Mokom asks the Chamber to [REDACTED] so as to allow for sufficient time to assess the risks involved in sending Mr Mokom to the CAR. Furthermore, Mr Mokom asserts that, in the event that the Chamber is minded to send him to the CAR and [REDACTED], he [REDACTED]. Lastly, Mr Mokom requests the Chamber to return him to Chad should it be minded to send him to the CAR, [REDACTED], and if he is prevented from [REDACTED].

III. DETERMINATION

9. At the outset, the Chamber observes that the CAR explicitly requests the cooperation of the Prosecution in executing the warrant of arrest issued against Mr Mokom in the CAR following a conviction pronounced by the Bangui Criminal Court in order to secure his extradition to the CAR. However, this request ought to have been made to the Court as such, and in the circumstances of this case, within the Court, the Chamber is the appropriate body to address the request. On the other hand, Mr Mokom raises concerns regarding his well-being should he be returned to the CAR.

10. The Chamber recalls that, pursuant to article 21(3) of the Rome Statute (the ‘Statute’), the Court is bound by internationally recognised human rights and recognises the principle of non-refoulement.⁵ Be that as it may, the Chamber, in the specific circumstances of the matter under consideration, does not need to consider Mr Mokom’s submissions in relation to the alleged risks to his well-being should he be returned to the CAR. The reason is that the Chamber, which is responsible for conducting the procedure pursuant to rule 185 of the Rules, is not in a position to order Mr Mokom to return to the CAR pursuant to the extradition request submitted by the CAR authorities.

11. The Court is not vested with the power to extradite a free person, as is the case in respect of Mr Mokom, to a State. Article 102 of the Statute stipulates that “‘surrender’ means the delivering up of a person by a State to the Court pursuant to this Statute’,

⁵ See also Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on an Amicus Curiae application and on the ‘Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile’ (Arts. 68 and 93(7) of the Statute)”, 9 June 2011, [ICC-01/04-01/07-3003-t-ENG](#) (the ‘9 June 2011 Decision’), para. 64.

whereas “‘extradition” means the delivering up of a person *by one State to another* as provided by treaty, convention or national legislation’ (emphasis added). In view of this distinction, any request for the extradition of Mr Mokom is not to be addressed to the Court, but to a relevant State.

12. It further follows that the reference to ‘extradition’ in rule 185 of the Rules must be understood in light of the distinction enshrined in article 102 of the Statute. The relevant part of rule 185 of the Rules highlights that a State may request extradition with the consent of the original surrendering State. Viewed in the context of article 102 of the Statute, this entails that an extradition procedure may take place between a State requesting extradition and the original surrendering State, whereas the Court may only ‘transfer’ the person concerned to the requesting State. This is further confirmed by the fact that the reference to ‘transfer’ in rule 185 of the Rules applies to all three scenarios envisaged by this provision without distinction (namely a State obliged to receive a person, a State agreeing to receive a person, and a State having requested the extradition of a person with the consent of the original surrendering State). A different situation, not relevant to the present case, may occur if the surrendering State is the same seeking the extradition of the person concerned. In relation to the matter under consideration, there is no information before the Chamber that the CAR has requested the original surrendering State to extradite Mr Mokom.

13. In addition to the foregoing, the Chamber recalls that, as previously set out in the 17 October 2023 Order, Mr Mokom is a free person after the Prosecution withdrew the charges against him and the ICC warrant of arrest issued against him was rendered without effect. Since the Court’s legal title to restrict Mr Mokom’s liberty fell away, the Chamber further instructed the Registry to release Mr Mokom from the ICC Detention Centre on that same day. The absence of a legal title to restrict Mr Mokom’s liberty necessarily means that the Chamber can only order the transfer of Mr Mokom under rule 185 of the Rules with his consent. It would run contrary to basic principles of law to restrict Mr Mokom’s liberties without a legal title to this effect. Indeed, the Court can only grant a request for the (temporary) surrender of a person if he or she is detained at the relevant time pursuant to a decision of the Court.

14. Having found that Mr Mokom cannot be transferred to the CAR pursuant to the extradition request submitted by the CAR authorities, the Chamber also considers that

it is not necessary to further address the remaining requests set out in the Rule 185 Views in so far as they concern the transfer of Mr Mokom to the CAR.⁶

15. It additionally follows from the above that, in the case of a person having been released from custody as a free person, the arrangements to be made by the Court under rule 185 of the Rules are limited to entering into consultations with States that may be willing to receive the person in question and to which this person agrees to be transferred. This is further confirmed by the lack of enforcement powers on the part of the Court vis-à-vis States Parties. As held by another chamber, ‘the Court cannot employ the cooperation mechanisms provided for by the Statute in order to compel a State Party to receive onto its territory an individual’ that a State Party does not wish to receive.⁷ In the event that a suitable State would be identified, the arrangements to be made under rule 185 of the Rules additionally include all practical matters arising from the transfer of the person concerned, such as travel and transfer of belongings.

16. Accordingly, the Chamber orders the Registry, which bears responsibility for entering into consultations and making the necessary arrangements under rule 185 of the Rules, to immediately commence liaising with each of the States to which Mr Mokom agrees to be transferred. In specific terms, the Registry, while consulting with Mr Mokom and his Counsel where necessary, shall itself actively interact with all the relevant States regarding all pertinent aspects associated with a potential transfer of Mr Mokom under rule 185 of the Rules with a view to obtaining a definitive response as to their willingness to accept Mr Mokom, irrespective of the question whether such States are Parties to the Statute or not, by no later than 7 February 2024 (12:00 hours). The Chamber recalls that the 17 October 2023 Order already contains an instruction to this effect.

17. In this regard, the Chamber further observes that Mr Mokom refers to a potential transfer to Chad. As Mr Mokom was residing in Chad prior to his surrender to the Court, a transfer to Chad under rule 185 of the Rules would, as far as possible in the present circumstances, reinstate the situation in which Mr Mokom found himself prior to his surrender to the Court. Thus, the Registry shall prioritise its consultations with Chad, without such consultations detracting from the need to also actively consult with

⁶ [Rule 185 Views](#), p. 19.

⁷ [9 June 2011 Decision](#), para. 64.

the other States to which Mr Mokom agrees to be transferred. The Registry shall report to the Chamber on its consultations with Chad and the other States to which Mr Mokom agrees to be transferred by no later than 7 February 2024 (16:00 hours).

18. Should no State be identified that is willing to accept Mr Mokom and to which he agrees to be transferred by the aforementioned date, the Chamber's residual jurisdiction in the present case will come to an end. In the view of the Chamber, any other determination would contravene basic tenets of fairness vis-à-vis Mr Mokom. As set out above, the Court lacks a legal title to enforce any measures in relation to Mr Mokom considering that the proceedings against him have been terminated. Furthermore, the procedure foreseen under rule 185 of the Rules must, as with any other legal procedure, be brought to a close within a reasonable time frame. This procedure cannot be protracted further unless there are compelling circumstances exceptionally requiring an extension of the Chamber's residual jurisdiction.

19. In the event that the Chamber's residual jurisdiction would conclude without a State having been identified that is willing to accept Mr Mokom and to which he agrees to be transferred, Mr Mokom will fall under the exclusive jurisdiction of the Host State (the territory of which he entered upon his transfer from Chad, where he remained during his detention in the ICC Detention Centre,⁸ and where he is currently located following his release). As found previously, whereas the Court retains limited residual jurisdiction with regard to a person against whom the charges have not been confirmed for the purposes of rule 185 of the Rules, this does not exclude such a person from simultaneously falling within the jurisdiction of the Host State.⁹ Hence, at present, Mr Mokom falls under the Court's jurisdiction in as far as the procedure under rule 185 of the Rules is concerned, but he is otherwise under the jurisdiction of the Host State by virtue of the objective fact that he is present on its territory, thus enjoying certain rights under the legal system of the Host State.¹⁰ It follows that, should the Chamber's residual jurisdiction conclude without Mr Mokom having been transferred pursuant to rule 185 of the Rules, only the jurisdiction of the Host State will apply vis-à-vis Mr Mokom.

⁸ See also Rechtbank 's-Gravenhage, 28 December 2011, ECLI:NL:RBSGR:2011:BU9492; Raad van State, 27 June 2014, ECLI:NL:RVS:2014:2426.

⁹ Order regarding arrangements pending Mr Mokom's transfer, 21 November 2023, ICC-01/14-01/22-294-Conf-Exp, confidential and *ex parte*, only available to the Registry and the Defence.

¹⁰ Raad van State, 27 June 2014, ECLI:NL:RVS:2014:2426.

20. For the avoidance of doubt, the Chamber clarifies that this entails that the arrangements for Mr Mokom's stay in the territory of the Host State that are currently in place shall remain applicable until and including 7 February 2024,¹¹ without prejudice to the Chamber's power to amend the arrangements or the present decision. Should no positive response have been received from a State to which Mr Mokom agrees to be transferred and the process of organising a transfer not have commenced by 7 February 2024, the arrangements, in so far as they implicate the legal framework of the Court, shall conclude. The termination of the arrangements also means that the designation of the location where Mr Mokom is staying shall no longer be regarded as 'premises of the Court'. It will be for the Host State to determine the appropriate course of action pursuant to its own legal framework as of 8 February 2024. Therefore, the Chamber orders the Registry to immediately inform the Host State accordingly. The Registry shall report to the Chamber by no later than 31 January 2024 (16:00 hours).

21. In the event that the residual jurisdiction and the Rule 185 process come to an end on 7 February 2024, Mr Mokom will no longer be involved in any procedures pending before the Court and need no longer be represented before it. Subject to any transitional period as foreseen by the legal aid policy and/or any specific directions the Chamber may issue regarding the conclusion of the present procedure, Mr Mokom's entitlement to legal aid funded by the Court will cease as of 8 February 2024.

22. Lastly, in light of the foregoing determinations, the Chamber further considers that the following matters have been rendered moot, namely: (i) the 'Defence Urgent Request for an Extension of Pre-Trial Chamber's II Order of 17 October 2023';¹² (ii) the 'Corrected version of the "Registry's Report pursuant to Pre-Trial Chamber II's Instruction of 30 October 2023 and Request for Guidance", 2 November 2023, ICC-01/14-01/22-285-US-Exp', in so far as it relates to the Registry's request for guidance;¹³ and (iii) the 'Defence Motion for a Request for Cooperation to the Central African

¹¹ Order regarding arrangements pending Mr Mokom's transfer, 21 November 2023, ICC-01/14-01/22-294-Conf-Exp, confidential and *ex parte*, only available to the Registry and the Defence, as modified by way of the Chamber's email to the Registry of 15 December 2023, at 15:43.

¹² 25 October 2023, ICC-01/14-01/22-279-Conf-Exp, confidential and *ex parte*, only available to the Defence and Registry, together with annexes I to VI, confidential and *ex parte*, only available to the Defence and Registry (a public redacted version was submitted on 18 December 2023, [ICC-01/14-01/22-279-Red](#)).

¹³ 3 November 2023, ICC-01/14-01/22-285-Conf-Exp-Corr, together with annexes I and II, confidential and *ex parte*, only available to the Registry (a confidential redacted version was submitted on 30 November 2023, ICC-01/14-01/22-285-Conf-Corr-Red).

Republic’¹⁴ and the ‘Prosecution’s Response to Defence Request for Disclosure’.¹⁵ However, these determinations shall not affect the continued jurisdiction of the Chamber in respect of the Situation in the Central African Republic II.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the request by the CAR, as a result of which Mr Mokom shall not be transferred to the CAR;

ORDERS the Registry to actively interact with the States to which Mr Mokom agrees to be transferred regarding all pertinent aspects associated with a potential transfer of Mr Mokom under rule 185 of the Rules with a view to obtaining a definitive response as to their willingness to accept Mr Mokom by no later than 7 February 2024 (12:00 hours), and to report to the Chamber on these consultations by no later than 7 February 2024 (16:00 hours);

DECIDES that, as of 8 February 2024, without any further order by the Chamber to the contrary, as set out in the present decision, the residual jurisdiction of the Chamber will conclude and the designation of Mr Mokom’s place of stay as ‘premises of the Court’ will end, thus entailing that Mr Mokom will fall under the exclusive jurisdiction of the Host State;

ORDERS the Registry to immediately inform the Host State, and to report to the Chamber by no later than 31 January 2024 (16:00 hours);

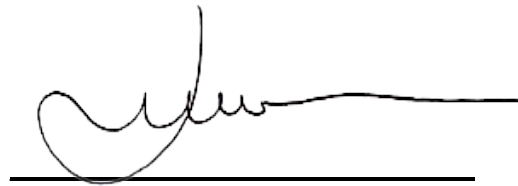
ORDERS the Registry to urgently translate the public redacted version of the present decision into French and to provide it to the competent authorities of the CAR as soon as possible, together with the French translation of the 17 October 2023 Order (ICC-01/14-01/22-276-tFRA); and

ORDERS the Registry to request the CAR authorities to either consent to reclassifying the CAR Letter as public or to provide a public redacted version of the CAR Letter as soon as possible.

¹⁴ 10 November 2023, ICC-01/14-01/22-291-Conf, confidential, with annexes A to G, confidential (a public redacted version was provided on 22 November 2023, [ICC-01/14-01/22-291-Red2](#)).

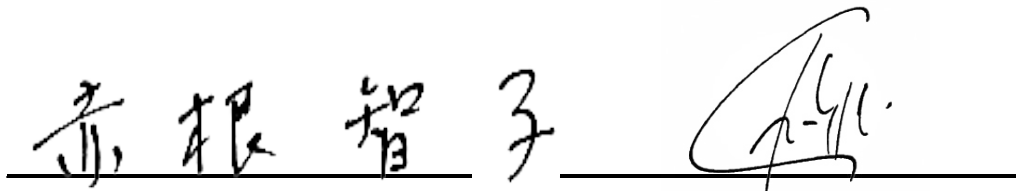
¹⁵ 16 November 2023, ICC-01/14-01/22-292-Conf.

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 Thursday, 18 January 2024.

At The Hague, The Netherlands.