

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **26/01/2024**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Public Redacted Version of “Notice of Appeal against “Decision pursuant to Rule 185 of the Rules of Procedure and Evidence”, ICC-01/14-01/22-309-Conf-Exp and Request for Suspensive Effect”, ICC-01/14-01/22-312-Conf-Exp, 24 January 2024

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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. Maxime Jeoffroy Eli Mokom Gawaka was arrested on the basis of an ICC arrest warrant and transferred to The Hague on 14 March 2022. He was detained as a suspect, without provisional release, for 19 months. He was released from the ICC Detention Centre on 17 October 2023, after the ICC Prosecutor submitted to the Pre-Trial Chamber that there was no reasonable prospect of a conviction.¹ The Pre-Trial Chamber terminated the proceedings against him, but retained jurisdiction for residual matters.² In efforts detailed below, immediately upon his release, the Defence for Mr Mokom (‘the Defence’) began urgently trying to find a path for Mr Mokom’s relocation to a safe third State, where he can live in peace together with his family.

2. Rule 185 of the Rules of Procedure and Evidence (‘Rules’) requires that where charges are not confirmed, “**the Court shall**, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State.” Importantly, Article 48 of the Headquarters Agreement between the ICC and The Netherlands mirrors this language, recognising the Court’s obligation to arrange for the transfer of those released from its custody, and imposing no obligation on the Host State to allow those released from ICC custody to enter or stay on its territory. [REDACTED].³

3. Efforts to find a safe third State for Mr Mokom’s transfer are ongoing. The process is a diplomatic one, which necessarily takes time.⁴ States remain reluctant to liaise directly with Defence teams, or respond to RFAs originating with the Defence. Within a State, different branches of government may need to be consulted, and confer. There may be legislative challenges to consider, and information may need to be exchanged several times between the State, and the Court. As previously submitted, “Mr Mokom is fully aware of the challenges

¹ Office of the Prosecutor, “Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka”, 16 October 2023, ICC-01/14-01/22-275.

² Pre-Trial Chamber II, “Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka”, 17 October 2023, ICC-01/14-01/22-276.

³ [REDACTED].

⁴ See further submissions in Defence Request for Variation of Time Limit, 24 November 2023, ICC-01/14-01/22-297-Conf-Exp, para. 4 & fn. 2 (including sources cited therein).

and difficulties faced by the Court in organising his transfer to a safe third State”,⁵ and is cooperating at every step, despite finding the uncertainty about his future and that of his family, extremely stressful and taxing. [REDACTED].⁶

4. On 18 January 2024, however, the Pre-Trial Chamber indicated, for the first time, that it had had enough. In its *Decision pursuant to Rule 185 of the Rules of Procedure and Evidence* (‘the Decision’),⁷ the Pre-Trial Chamber set a deadline of 7 February 2024 (12:00 hours) for the Registry to obtain “definitive responses” from States as to their willingness to accept Mr Mokom. The Pre-Trial Chamber then concluded that should no State be ready to do so by 7 February 2024 at noon, “the Chamber’s residual jurisdiction in the present case will come to an end”.⁸

5. In dropping a guillotine on this process, the Pre-Trial Chamber made a series of legal errors, abused its discretion, and reached a decision that is not only materially impacted by these errors, but places Mr Mokom in an impossible position. With the Court washing its hands on 7 February 2024, [REDACTED], Mr Mokom faces a situation of complete uncertainty, anxiety, stress, and a likely period of further detention in immigration prison in a country where he does not speak the language, and in which he has no desire to resettle. The Decision also spells the end of Mr Mokom’s chance [REDACTED]. Rather than making arrangements to facilitate Mr Mokom’s transfer as explicitly required under the Court’s statutory framework, the Pre-Trial Chamber has imposed on itself an arbitrary and entirely counter-productive timeline, to erroneously extricate itself from a situation the Court has a statutory and moral obligation to work to solve.

6. As such, pursuant to Article 82(1)(a) of the Rome Statute (‘Statute’), Rule 154 of the Rules, and Regulation 64(1) of the Regulations of the Court (‘Regulations’), the Defence submits its notice of appeal against those aspects of the Decision which relate to the Pre-Trial Chamber’s conclusion that its residual jurisdiction will cease to exist as of 8 February 2024,

⁵ Mokom Defence Submissions pursuant to Rule 185(1), 8 December 2023, ICC-01/14-01/22-307-Conf-Exp, para. 50.

⁶ [REDACTED].

⁷ Pre-Trial Chamber II, “Decision pursuant to Rule 185 of the Rules of Procedure and Evidence”, 18 January 2024, ICC-01/14-01/22-309-Conf-Exp.

⁸ ICC-01/14-01/22-309-Conf-Exp, paras. 16-18.

after which time Mr Mokom's life will be placed in the hands of the Host State.⁹ As this is a jurisdictional question, the Defence appeals as of right.

II. LEVEL OF CONFIDENTIALITY

7. Pursuant to Regulation 23bis(1) of the Regulations, the Defence files this request as confidential *ex parte*. It refers to confidential documents and information that is *ex parte* the Registry and Defence. A public redacted version will be filed.

III. PROCEDURAL HISTORY

8. On 16 October 2023, the Office of the Prosecutor filed a 'Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka', pursuant to Article 61(4) of the Statute.¹⁰

9. On 17 October 2023, the Pre-Trial Chamber terminated the proceedings against Mr Mokom, and instructed the Registry to "make all necessary arrangements for the transfer of Mr Mokom to a State which is obliged to receive him or to another State". The Pre-Trial Chamber also found that it retained jurisdiction for residual matters.¹¹

10. On 18 October 2023, [REDACTED].¹²

11. On 25 October 2023, the Defence asked the Registry to exercise its good offices and transmit Defence Requests for Assistance ('RFAs') related to Mr. Mokom's resettlement. The Defence wrote RFAs to:

- [REDACTED].¹³
- [REDACTED].¹⁴
- [REDACTED].¹⁵

⁹ *Ibid.*, paras. 16-20.

¹⁰ Office of the Prosecutor, "Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka", 16 October 2023, ICC-01/14-01/22-275.

¹¹ Pre-Trial Chamber II, "Order in relation to the Prosecution's 'Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka'", 17 October 2023, ICC-01/14-01/22-276.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

- [REDACTED].¹⁶
- [REDACTED].¹⁷

12. On 27 October 2023, the Defence sent RFAs to [REDACTED].¹⁸

13. On 30 October 2023, the Registry informed the Defence that [REDACTED].¹⁹ On the same day, the Defence sent an RFA to [REDACTED].²⁰

14. On 2 November 2023, the Defence asked that the Registry to exercise its good offices and facilitate the transmission of Defence RFAs [REDACTED].²¹

15. On 3 November 2023, the Defence filed an ‘Urgent Request for an Order’ concerning the arbitrary arrest by the Central African authorities of a Defence witness, Mr Olivier Feissona (P-0405).²² In this submission, the Defence identified reasons to believe that P-0405 “is in grave danger and might be subject to [REDACTED] by the Central African authorities”, and asked the Pre-Trial Chamber to order the Victim and Witness’ Unit (‘VWU’) of the Registry to take active steps to find out information about the circumstances of P-0405’s arrest, his health and conditions, and to report back to the Pre-Trial Chamber.²³

16. On 7 November 2023, the Defence asked the Registry to exercise its good offices and facilitate the transmission of a Defence RFA to [REDACTED] in relation to Mr. Mokom’s resettlement in [REDACTED].²⁴

17. On 8 November 2023, the Prosecution submitted that it had no additional information as to the reasons for P-0405’s arrest beyond the information provided by the Defence, but given the absence of a specific time limitation on the Court’s protection obligations, VWU

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² Defence Urgent Request for an Order Concerning the Arrest of P-0405, 3 November 2023, ICC-01/14-01/22-287-Conf; P-0405 is both a Defence and Prosecution witness.

²³ *Ibid.*, para. 13.

²⁴ [REDACTED].

should assess the matter submitted by the Defence.²⁵ On 10 November 2023, the Pre-Trial Chamber ordered the VWU to take measures to acquire information on P-0405 and report by 17 November 2023.²⁶

18. On the same day, the Defence filed a Motion for a Request for Cooperation to the Central African Republic ('CAR'), requesting the Pre-Trial Chamber to order the Registry to prepare and transmit a cooperation request pursuant to Article 87(1)(a) and Article 93(1) of the Statute. This request sought the assistance of the Registry in obtaining a response from the CAR to the pending Defence requests for assistance, [REDACTED].²⁷

19. On 17 November 2023, [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰

20. On 22 November 2023, the Pre-Trial Chamber ordered Mr Mokom to provide his views under Rule 185(1) of the Rules regarding any matters in connection with his transfer to a State referred to in that provision by 30 November 2023.³¹

21. On the same day, [REDACTED].³²

22. On 23 November 2023, the Registry transmitted a letter from the CAR authorities, requesting the Prosecution's cooperation to facilitate the extradition of Mr Mokom based on an arrest warrant and an *in absentia* judgement issued against Mr Mokom by the CAR authorities in September 2023.³³

23. On 27 November 2023, the Registry submitted a report on [REDACTED].³⁴ [REDACTED].³⁵ [REDACTED].³⁶

²⁵ Prosecution's Response to Defence Urgent Request for an Order regarding P-0405, 8 November 2023, ICC-01/14-01/22-288-Conf, paras. 3-5.

²⁶ Decision on 'Defence Urgent Request for an Order Concerning the Arrest of P-0405', 10 November 2023, ICC-01/14-01/22-290-Conf, para. 5.

²⁷ Defence Motion for a Request for Cooperation to the Central African Republic, 10 November 2023, ICC-01/14-01/22-291-Conf.

²⁸ [REDACTED].

²⁹ *Ibid.*, para. 4.

³⁰ *Ibid.*, para. 5.

³¹ Pre-Trial Chamber II, "Order to provide views under rule 185(1) of the Rules of Procedure and Evidence", 22 November 2023, ICC-01/14-01/22-295.

³² [REDACTED].

³³ Registry's Transmission of the letter of the authorities of the Central African Republic, 23 November 2023, ICC-01/14-01/22-296-Conf-Exp; Annex I to Registry's Transmission of the letter of the authorities of the Central African Republic, ICC-01/14-01/22-296-Conf-AnxI.

³⁴ [REDACTED].

³⁵ [REDACTED].

24. On 28 November 2023, [REDACTED].³⁷

25. On the same day, the Pre-Trial Chamber extended the deadline for the Defence to file submissions pursuant to Rule 185 from 30 November 2023 to 8 December 2023.³⁸ This followed a Defence request for an extension of time, to allow Mr Mokom sufficient time to substantiate his views pursuant to Rule 185(1) of the Rules with expert evidence and responses to pending RFAs.³⁹

26. On 29 November 2023, the Defence filed submissions further to the Registry Report on P-0405.⁴⁰ The submissions explained that the Defence had made contact with P-0405 via its Bangui-based Legal Assistant, who confirmed that P-0405 has been tortured, was in an extremely frail state of health, and that his arrest and torture were directly related to his interactions with the Defence.⁴¹

27. On 1 December 2023, [REDACTED].⁴²

28. On 8 December 2023, the Defence submitted Mr Mokom's views pursuant to Rule 185(1) of the Rules,⁴³ substantiated its submissions that Mr Mokom's life and fundamental rights would be severely threatened in the event of his possible return to the CAR, and asking the Pre-Trial Chamber to deny the CAR's extradition request. The Defence also provided up-to-date information to the Pre-Trial Chamber about the Defence's efforts to contact States for Mr Mokom's resettlement outside of the Netherlands.⁴⁴ The Defence also annexed to its submissions further reports from its Bangui-based Legal Assistant, confirming again that P-0405's arrest and torture were directly related to his status as a witness for the Defence.⁴⁵

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ Decision on 'Defence Request for Variation of Time Limit', 28 November 2023, ICC-01/14-01/22-302-Conf-Exp.

³⁹ Defence Request for Variation of Time Limit, 24 November 2023, ICC-01/14-01/22-297-Conf-Exp.

⁴⁰ Defence Submissions Further to the "Registry's Report pursuant to the 'Decision on 'Defence Urgent Request for an Order Concerning the Arrest of P-0405'", 29 November 2023, ICC-01/14-01/22-304-Conf.

⁴¹ Annex A to the Defence Submissions Further to the "Registry's Report pursuant to the 'Decision on 'Defence Urgent Request for an Order Concerning the Arrest of P-0405'", ICC-01/14-01/22-304-Conf-AnxA.

⁴² [REDACTED].

⁴³ Mokom Defence Submissions pursuant to Rule 185(1), 8 December 2023, 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).

⁴⁴ ICC-01/14-01/22-307-Conf-Exp, paras. 46-50.

⁴⁵ Annex I to the Mokom Defence Submissions pursuant to Rule 185(1), ICC-01/14-01/22-307-Conf-Exp-AnxI.

29. On 20 December 2023, [REDACTED].⁴⁶

30. On 18 January 2024, the Chamber rendered the Decision.⁴⁷ The Pre-Trial Chamber found that it could not order Mr Mokom to return to the CAR pursuant to the extradition request submitted by the CAR authorities, as the Court is not vested with the power to extradite a free person.⁴⁸ The Pre-Trial Chamber instructed the Registry to liaise with each of the States to which Mr Mokom agreed to be transferred, and report by 7 February 2024.⁴⁹ Should no State be identified by this date, the Pre-Trial Chamber found that its residual jurisdiction in the proceedings involving Mr Mokom will come to an end, stating that any other determination “would contravene basic tenets of fairness vis-à-vis Mr. Mokom and that “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”.⁵⁰ The Chamber also indicated that, following the conclusion of its residual jurisdiction, Mr Mokom would fall under the exclusive jurisdiction of the Host State.⁵¹ The termination of the Pre-Trial Chamber’s residual jurisdiction was also found to mean that the designation of the location where Mr Mokom is staying will no longer be regarded as “premises of the Court” and that he no longer needs legal representation before the Court as of 8 February 2024.⁵² The Pre-Trial Chamber also requested the Registry to inform the Host State of the Decision, and to report to the Chamber by no later than 31 January 2024.⁵³

31. On the same day, [REDACTED].⁵⁴ [REDACTED].

32. On 22 January 2024, the Mokom Defence requested by email that the Registry exercises its good offices and facilitate the transmission of a Defence Request for Assistance [REDACTED].⁵⁵ [REDACTED].⁵⁶

⁴⁶ [REDACTED].

⁴⁷ See ICC-01/14-01/22-309-Conf-Exp.

⁴⁸ *Ibid.*, para. 11.

⁴⁹ *Ibid.*, para. 17.

⁵⁰ *Ibid.*, para. 18.

⁵¹ *Ibid.*, para. 19.

⁵² *Ibid.*, paras. 20-21.

⁵³ *Ibid.*, para. 20.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

IV. NOTICE OF APPEAL

33. Pursuant to Regulation 64(1) of the Regulations, the Defence submits as follows:

(a) **The name and number of the case or situation:** *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, ICC-01/14-01/22.

(b) **The title and date of the decision being appealed:** Pre-Trial Chamber II, “Decision pursuant to Rule 185 of the Rules of Procedure and Evidence”, 18 January 2024, ICC-01/14-01/22-309-Conf-Exp.

(c) **Whether the appeal is directed against the whole decision or part thereof:** Only part of the Decision is being appealed, namely the Pre-Trial Chamber’s finding that its residual jurisdiction ends as of 8 February 2024.⁵⁷

(d) **The specific provision of the Statute pursuant to which the appeal is filed:** Article 82(1)(a) of the Statute.

(e) **The relief sought:** The quashing of the Pre-Trial Chamber’s finding that the residual jurisdiction ends as of 8 February 2024, and an order that the Pre-Trial Chamber continue to work with Mr Mokom, the Defence, the Registry, and States, to fulfil its obligations under Rule 185 of the Rules, and other outstanding matters including but not limited to the transmission of RFAs to the CAR regarding the judgment issued against Mr Mokom, and adjudicating outstanding Defence requests concerning the safety of Mr Olivier Feissona.

34. Without prejudice to the ultimate filing, the Defence anticipates raising the following grounds of appeal:

Ground 1: Whether the Pre-Trial Chamber erred in setting a period of 21 days for the Registry to obtain “definitive” responses as to States’ willingness to accept Mr

⁵⁷ Decision, paras. 18-22, p.11.

Mokom onto their territory;⁵⁸ a period which is so manifestly unworkable and unreasonable as to constitute an abuse of discretion;

Ground 2: Whether the Pre-Trial Chamber erred in law in finding that its residual jurisdiction would conclude on 8 February 2024 in the absence of arrangements for transfer being in place, despite the operation of Article 48 of the Headquarters Agreement and the language of Rule 185 of the Rules, particularly where the use of the obligatory “shall” in Rule 185 indicates an obligation of result, not an obligation of means.

Ground 3: Whether [REDACTED] through the ending of its residual jurisdiction, the Pre-Trial Chamber abused its discretion.

Ground 4: Whether the Pre-Trial Chamber erred by unilaterally and without prior notice, transferring the jurisdiction over Mr Mokom to the Host State, without consulting with either the Host State or Mr Mokom, or receiving submissions thereon.

V. REQUEST FOR SUSPENSIVE EFFECT

35. The Defence also requests an order from the Appeals Chamber that the present appeal will have suspensive effect on the Decision. In deciding whether to order suspensive affect, factors to be considered include whether the implementation of the Decision (i) would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant, (ii) would lead to consequences that would be very difficult to correct and may be irreversible, or (iii) could potentially defeat the purpose of the appeal.⁵⁹

36. All three factors are present in this case. Should the residual jurisdiction of the Pre-Trial Chamber be found to end before arrangements are in place for Mr Mokom’s transfer, he will lose any ability to seek or receive assistance in this regard from the Court, will be

⁵⁸ Decision, para. 16 & p. 11.

⁵⁹ *Prosecutor v Abd-Al-Rahman*, Decision on Request for Suspensive Effect, 25 August 2020, ICC-02/05-01/20-134, para. 6, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”’, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

erroneously characterised as being under the exclusive jurisdiction of the Host State authorities, who may place him in immigration detention, expel him from the territory, or take other steps which will make it immeasurably harder for him to be ultimately transferred to a safe third State. Even if the Appeals Chamber were to find in favour of Mr Mokom, the situation in which he will be placed from 8 February 2024, and its consequences (including being removed from his present and only accommodation) will be irreversible.

37. The implementation of the Decision will also undoubtedly defeat the purpose of the appeal, which is aimed at preventing the passing of responsibility for Mr Mokom's welfare between the Court and the Host State in a manner which is deeply undignified and traumatic for him, and to prompt a humane, reasonable, and final resolution to the question of where he will spend the rest of his life. While this may not be definitively resolved by 5pm on 7 February 2024, there are solutions available, and all relevant stakeholders should be afforded the time and opportunity needed to put them in place.

Respectfully submitted,



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The Hague, The Netherlands
Friday, January 26, 2024