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**International
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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 Annex A & Annex B Confidential and Ex Parte Registry and Defence Only

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

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**

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I. INTRODUCTION

1. On 17 October 2023, the Pre-Trial Chamber ordered the Registry to “immediately make all necessary arrangements” for Mr Mokom’s transfer to a State “including by liaising with Mr Mokom and the Defence, as well as the relevant States, in particular the Central African Republic and the Host State”, citing Rule 185(1) of the ICC Rules of Procedure and Evidence (“Rules”).¹

2. Upon learning that the potential of transfer Mr Mokom back to the Central African Republic (“CAR”) was being considered by the Pre-Trial Chamber, the Defence for Mr Mokom (“the Defence”) started preparing to file potential Rule 185(1) submissions. These submissions will be grounded in corroborated, informed, widespread, and expert opinion, and will address the question of whether Rule 185(1) can provide for the transfer of Mr Mokom to the CAR against his will, taking into account the constraints of Article 21(3) of the Rome Statute (“Statute”).

3. In preparing for potential Rule 185(1) submissions, the Defence has worked closely with the Counsel Support Section (“CSS”) of the Registry to secure funding to engage leading experts, whose reports are in the process of being prepared. Witnesses with evidence that is highly relevant to a determination under Rule 185(1) have also been interviewed, and their statements are in the process of being finalised.

4. The Defence also immediately began [REDACTED]. Defence teams are prohibited from directly contacting the Division of External Operations of the Registry (“DEO”). As such, Requests for Assistance (“RFAs”) from Defence teams must first be submitted through CSS, then sent on to the DEO, and then transmitted to States Parties. Following this process, significant delays are regularly encountered before responses are received from States to RFAs sent on behalf of Defence teams.²

5. As set out in the procedural history below, Defence efforts to prepare for potential Rule 185(1) submissions have been timely, and comprehensive, with the aim of ensuring that the

¹ ICC-01/14-01/22-276, Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’, 17 October 2023, (reclassified as public pursuant to the Chamber’s order dated 19 October 2023) (“Order for Release”), para. 10.

² *See, for example*, ICC ASP, ‘Report of the Court on Cooperation’, [ICC-ASP/22/24](#), 26 October 2023, p. 4, recording the average time for reply to an RFA sent by a Defence team is 46 days. *See also* para. 19, where it is noted that “[i]t has been the Registry’s experience that cooperation with Defence teams is not easily forthcoming for a number of reasons.”

Pre-Trial Chamber is provided with the most probative and relevant information for its decision. This decision will, unquestionably, affect the remainder of the lives of Mr Mokom and his wife and children. Despite the Defence's best efforts, the volume of outstanding information, including expert reports, witness statements, and information requested from relevant States, has prompted the present request for variation of the applicable deadline. The Defence respectfully submits that (i) the volume of expected outstanding material, (ii) the novelty of the present procedure, and (iii) the importance of the question at issue, demonstrates good cause for a variation of the time limit, which is in the interests of justice to grant.

II. LEVEL OF CONFIDENTIALITY

6. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), the Defence files these submissions as confidential and *ex parte*, since they refer to confidential and *ex parte* documents and information. A confidential redacted version and/or a public redacted version will be filed as soon as practicable.

III. PROCEDURAL HISTORY

7. On 17 October 2023, the Pre-Trial Chamber terminated the proceedings against Mr Mokom following the Prosecution's withdrawal of charges.³ The Pre-Trial Chamber ordered the Registry to make all necessary arrangements for the transfer of Mr Mokom, including by liaising with Mr Mokom and the Defence, as well as relevant States, in particular the CAR and the Host State.

8. On 23 October 2023, the Defence requested the Chamber to "declare that it will afford Mr Mokom the opportunity to be heard through written submissions and/or an oral hearing, pursuant to Rule 185(1) before any transfer is ordered, and allow Mr Mokom time to consult with lawyers in The Netherlands to have a full understanding of his options and rights".⁴ On 25 October 2023, the Defence filed an urgent request asking the Chamber to instruct the Registry to extend the arrangements which have been made between the Court and the Netherlands until Mr Mokom can be safely relocated to a receiving State.⁵

³ Order for Release, para. 10.

⁴ ICC-01/14-01/22-278, Defence Urgent Request, 23 October 2023.

⁵ ICC-01/14-01/22-279-Conf-Exp, Defence Urgent Request for an Extension of Pre-Trial Chamber's II Order of 17 October 2023, 25 October 2023.

9. The Chamber replied by way of email on 27 October 2023, confirming that Mr Mokom will be afforded the opportunity to express his views in due course.⁶
10. On 20 October 2023, the Defence prepared an RFA [REDACTED].⁷ The Registry confirmed the transmission of the RFA [REDACTED] on 23 October 2023.⁸
11. On 23 October 2023, [REDACTED].
12. On 25 October 2023, the Defence drew up an [REDACTED].⁹ On the same day, the Defence also prepared an RFA to [REDACTED].¹⁰ The Registry confirmed the transmission of the RFAs to [REDACTED] on 30 October 2023.¹¹
13. On 25 October 2023, the Defence sent to the Registry three (3) RFAs, to the [REDACTED],¹² to the [REDACTED],¹³ and to the [REDACTED],¹⁴ requesting the transmission of the [REDACTED].
14. On 30 October 2023, the Registry informed the Defence that, [REDACTED] had been established. The Registry advised the Defence to send its requests directly, while they would remain on standby to transmit the said requests, [REDACTED] wish to receive the requests from the Court.¹⁵
15. On 27 and 30 October 2023, the Defence sent RFAs requesting the transmission of the [REDACTED].¹⁶
16. On 1 November 2023, the Defence prepared a further RFA to the [REDACTED].¹⁷
17. On 2 November, the Registry informed the Defence that a [REDACTED].¹⁸

⁶ RE: Courtesy Copy of the Mokom Defence Urgent Request for an Extension of Pre-Trial Chamber's II Order of 17 October 2023, 27 October 2023, at 17:47.

⁷ [REDACTED], Annex A, p.2.

⁸ Annex A, p. 32.

⁹ [REDACTED], Annex A, p.14.

¹⁰ [REDACTED], Annex A, p.12.

¹¹ Annex A, p.31.

¹² [REDACTED], Annex A, p.9.

¹³ [REDACTED], Annex A, p.5.

¹⁴ [REDACTED], Annex A, p.7.

¹⁵ Annex A, p.30.

¹⁶ Annex A, p.31.

¹⁷ [REDACTED], Annex A, p.17.

¹⁸ Annex A, p.40

18. On 2 November 2023, the Defence sent two (2) RFAs to the Registry, to be transmitted to [REDACTED]¹⁹ and [REDACTED],²⁰ [REDACTED]. On 6 November 2023, the Registry confirmed that the RFAs had been transmitted to the two countries on 3 November 2023.²¹

19. On 7 November 2023, the Defence prepared an RFA to [REDACTED].²² The Registry confirmed transmission to the relevant section on the same day.²³

20. On 10 November 2023, the Defence filed its Motion for a Request for Cooperation to the CAR, requesting the Pre-Trial Chamber to order the Prosecution to disclose the current Judicial Cooperation Agreement between the OTP and the CAR to the Defence. The Defence also requested that the Registrar be ordered to prepare and transmit a cooperation request pursuant to Articles 87(1)(a) and 93(1) of the Statute, requesting the assistance of the CAR in responding to the pending Defence requests for assistance, without requiring the Defence to engage local lawyers to transmit these requests.²⁴ A decision on this motion is pending.

21. On 14 November 2023, the Defence wrote to the Registry to inform them that, following their recommendation, it had sent RFAs directly to [REDACTED], but had not received a reply or acknowledgement of receipt. The Defence therefore asked if the Registry could exercise its good offices and facilitate the transmission of these requests.²⁵

22. On 15 November 2023, the Registry advised the Defence to try to contact [REDACTED] again directly.²⁶ The Defence followed up on the phone with the [REDACTED] on 15 November 2023, who indicated that they had received the request and would follow up.²⁷

23. On 15 November 2023, the Registry informed the Defence of a meeting that took place on 13 November 2023 between [REDACTED], requesting the transfer of Mr Mokom to the CAR. The Registry further informed the Defence that it would transmit the letter in question when received.²⁸

¹⁹ [REDACTED], Annex A, p.23.

²⁰ [REDACTED], Annex A, p.19.

²¹ Annex A, p.36.

²² [REDACTED], Annex A, p.25.

²³ Annex A, p. 52.

²⁴ ICC-01/14-01/22-291-Conf (“Defence Request for Cooperation”).

²⁵ Annex A, p.30-31.

²⁶ Annex A, p. 30-31.

²⁷ Annex A, p. 38.

²⁸ Annex A, p.29.

24. The Defence has engaged three experts to produce expert reports relevant to the Pre-Trial Chamber's application of Rule 185(1), and the question of whether Mr Mokom can be lawfully transferred to the CAR. On 10 November 2023, the Defence submitted a request for the appointment of [REDACTED] to CSS. As is evident from her CV,²⁹ [REDACTED] focusing on the Central African region, and a former [REDACTED] on the CAR. She is preparing an expert report addressing a wealth of directly relevant matters, including whether any transfer of Mr Mokom would be compatible with the requirements of Article 21(3) of the Statute.

25. On 15 November 2023, the Defence submitted a similar request to CSS to appoint [REDACTED] as an expert. As is evident from his CV,³⁰ [REDACTED] the CAR. He is preparing an expert report [REDACTED], to produce a report on issues that are directly relevant to the question of whether Mr Mokom can be transferred back to the CAR.

26. On 22 November 2023, the Defence submitted a request to CSS to appoint [REDACTED] as an expert. As is evident from his CV,³¹ [REDACTED] specialised in the CAR. [REDACTED]. He is preparing an expert report that will provide information about why Mr Mokom is at particular risk of harm and death should he be returned to the CAR, either as a free man or detained.

27. On 23 November 2023, the Registry approved the appointment of [REDACTED]. The appointment of [REDACTED] is pending.

28. 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, together with a confidential and/or public redacted version if necessary, by no later than 30 November 2023."³² At this stage, the Defence had not been notified of any request from the Central African authorities for Mr Mokom's return.

29. The next day, on 23 November 2023, the Registry circulated a letter communicated by the authorities of the CAR to the Registry on 23 November 2023 to seek the cooperation of the ICC Prosecutor "*pour l'exécution du mandat d'arrêt contre Maxime Jeoffroy Eli Mokom*

²⁹ Annex B.

³⁰ Annex B.

³¹ Annex B.

³² ICC-01/14-01/22-295, Order to provide views under rule 185(1) of the Rules of Procedure and Evidence, 22 November 2023.

Gawaka, afin d'obtenir son extradition vers la République Centrafricaine, pour qu'il exécute la peine prononcée contre lui".³³ Despite the letter explicitly calling for the assistance of the ICC Prosecutor, the letter was designated "ex parte Defence and Registry". The letter was sent by the Central African authorities several days after the ICC Deputy Prosecutor arrived on an official mission in Bangui.³⁴

IV. APPLICABLE LAW

30. The purpose of this application is to request a variation of the time limit pursuant to Regulation 35(2) of the Regulations, for Mr Mokom to provide his views under Rule 185(1) of the Rules regarding any matters in connection with his transfer to a State following his release. Regulation 35(2) provides that the Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard.

31. According to the well-established jurisprudence of the Court, the 'good cause' criterion is satisfied when there are 'sound reasons' which 'would objectively provide justification for the inability of a party to comply with his/her obligation'; as regards the reasons outside one party's control, they must amount to 'exceptional circumstances'.³⁵

32. As a matter of good practice, requests for extension of time should be filed sufficiently in advance of the deadline.³⁶

V. SUBMISSIONS

33. As demonstrated by the above procedural history, the Defence has acted diligently and quickly to be in a position to respond to any potential invitation to file submissions pursuant to

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

³⁴ See, e.g. [ICC Deputy Prosecutor Niang met w/ diplomatic community in Bangui, updating them on activities, MoUs w/ CAR Government & Special Criminal Court & plans to deepen engagement](#), 23 November 2023.; [The Deputy Prosecutor of the ICC, Mame Mandiaye Niang, concludes his visit to the Central African Republic on the occasion of the signing of two memoranda of understanding, deepening cooperation and complementarity with the national justice system](#), 24 November 2023.

³⁵ *Prosecutor v. Yekatom & Ngaißona*, Pre-Trial Chamber II: Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaißona', [ICC-01/14-01/18-403-Red-Corr](#), 14 May 2020, para. 23 citing "Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Variation of the 30 September Deadline, 10 September 2019, [ICC-02/04-01/15-1591](#); see also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007, 21 February 2007, [ICC-01/04-01/06-834](#), paras 7, 9."

³⁶ *Prosecutor v. Yekatom & Ngaißona*, Pre-Trial Chamber II: Decision on the Prosecutor's Request for an Extension of Time to Apply for the Non-Disclosure of Witness Identities, [ICC-01/14-01/18-168](#), 10 April 2019, para. 18.

Rule 185(1). These Defence preparations were carried out despite not having any indication of whether it would be required to file submissions immediately, or after several months. Despite acting diligently and making best efforts to gather the information relevant to a Rule 185(1) assessment from directly relevant States, experts, and witnesses, the Defence is still facing delays outside of its control.

34. Ultimately, under Rule 185(1), this Pre-Trial Chamber, on behalf of the Court, will have to make the arrangements it considers appropriate for the transfer of Mr Mokom after taking his views into account, either to a State which is obliged to receive him, which agrees to receive him, or which has requested his extradition with the consent of the original surrendering State. Publicly available material, evidence from witnesses, and expert opinions will be necessary to support any view on the part of Mr Mokom that return to the CAR would expose him to, for example, credible and unacceptable risks of torture, ill-treatment, unfair trial, harsh detention conditions and persecution.

35. However, the Defence is still waiting for responses to RFAs sent on its behalf by the ICC Registry to the [REDACTED]. The Defence is also waiting for responses to the requests it has sent to [REDACTED]. As regards the CAR, the Defence is also waiting for a decision on its Request for Cooperation, filed on 10 November 2023.

36. The Defence has also received approval from CSS on 23 November 2023³⁷ to engage and fund two experts, who are preparing reports that are directly relevant to the questions of Mr Mokom's transfer from the Host State. The Defence asked these two experts about the earliest date they could urgently complete their report. [REDACTED]. The Defence is also seeking the appointment of a third expert, [REDACTED].

37. The Defence has also been interviewing witnesses who have experiences and backgrounds which render their evidence directly relevant to the question of the legality of Mr Mokom's transfer under Rule 185(1). This information is not already contained in the record of the case, meaning additional investigations and collection of evidence were required. While the Defence has made extraordinary progress in its investigations, and has completed its interviews of the most relevant witnesses, the process of finalising their statements is ongoing.

38. For these reasons, and given the volume of outstanding and directly relevant information which the Defence is seeking to gather and compile, the Defence submits that good

³⁷ Email from CSS to the Defence Case Manager, from 23 November 2023 at 15:13.

cause exists for a variation of the 30 November 2023 time limit. There are sound reasons that provide objective justification for the inability of the Defence to comply with the deadline in place. Importantly, this is a deadline that is not prescribed by the ICC's statutory framework, and could not have reasonably been anticipated, either in start date or length. It is in the interests of justice that the Defence is given the opportunity to collect, analyse and present directly relevant material that has been sought in a diligent and timely manner.

39. Given the historic reluctance of States to respond to RFAs originating from the Defence, a delay for filing cannot reasonably be contingent on the receipt of responses from States. A 2023 Registry report on cooperation notes that the average time for a State Party to reply to an RFA sent on behalf of the Defence, is 46 days.³⁸ With this timeframe in mind, and given that the experts have undertaken to finalise their reports by 15 January 2024, the Defence undertakes to finalise its submissions within the same working week, and file by 19 January 2024.

40. Even putting aside the need to gather outstanding information, the novelty of these submissions provide further justification for the variation sought. To the knowledge of the Defence, no publicly available filings address the procedure for a Rule 185(1) submission by an affected person. As such, the Defence is in entirely uncharted territory in terms of: (i) the level of scrutiny to be applied by the Pre-Trial Chamber to the risks faced by Mr Mokom should he be returned to Bangui; (ii) the evidentiary standard the Pre-Trial Chamber intends to apply as regards its assessment of these risks; (iii) the weight to be afforded to Mr Mokom's view in making its determination; and (iv) the weight to be afforded to any guarantees provided by States, including the CAR, as to the conditions of Mr Mokom's transfer, residency, or detention. Not only does the lack of precedent warrant additional time for the framing of Defence submissions, it also mitigates in favour of a full briefing by the Defence on these threshold and evidentiary issues, given that the eventual decision will be breaking important ground in terms of the operation of Rule 185(1), its interaction with Article 21(3), and its application to released former suspects.

41. Lastly, it is not controversial for the Defence to submit that the question of where Mr Mokom is transferred has monumental consequences in terms of his personal safety and

³⁸ See, for example, ICC ASP, 'Report of the Court on Cooperation', [ICC-ASP/22/24](#), 26 October 2023, p. 4, recording the average time for reply to an RFA sent by a Defence team is 46 days. See also para. 19, where it is noted that "[i]t has been the Registry's experience that cooperation with Defence teams is not easily forthcoming for a number of reasons."

security, and whether he has any chance of spending his life with his wife and children. Since the withdrawal of the charges on 17 October 2023, the Defence has been operating in the dark. The Defence team is not composed of experts in asylum law and European immigration procedure, and lacks detailed expertise on the central and pressing question at issue: where and when should Mr Mokom be transferred? It is entirely reasonable for the Defence to have worked with CSS to engage and instruct relevant experts, and to seek to obtain as much relevant information as possible from States and witnesses. The requirement under Rule 185(1) that the views of the person should be considered, must be interpreted as *meaningful* consideration. The Defence submits that a variation of the deadline set by the Pre-Trial Chamber will ensure that the submissions on Mr Mokom's behalf are informed, relevant, and capable of providing meaningful assistance to the Pre-Trial Chamber on this question.

VI. RELIEF SOUGHT

42. On the basis of the above, the Defence respectfully requests that the Pre-Trial Chamber:

FIND that good cause exists for a variation of the 30 November 2023 deadline within which Mr Mokom is to provide his views under Rule 185(1); and

ORDER that Mr Mokom provide these views by no later than 19 January 2024.

Respectfully submitted,



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The Hague, The Netherlands
Wednesday, January 31, 2024