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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

**Public Redacted Version of Mokom Defence Response to the 'Prosecution's
Request to extend the contact restrictions imposed in the "Fifth Decision on
Contact Restrictions"
(ICC-01/14-01/22-106-Conf-Exp)'**

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
 Kweku Vanderpuye

Counsel for the Defence

Philippe Larochelle,
 Gregory Townsend, Duty Counsel

Legal Representatives of the Victims**Legal Representatives of the Applicant****Unrepresented Victims**

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims**The Office of Public Counsel for the
 Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Peter Lewis

Counsel Support Section**Deputy Registrar****Victims and Witnesses Unit****Detention Section**

**Victims Participation and Reparations
 Section Other**

Introduction

1. Pursuant to Regulation 24(1) of the Regulations of the Court (“RoC”) as well as the Pre-Trial Chamber’s instructions,¹ the Defence of Maxime Mokom (‘Defence’) files this response to the ‘*Prosecution’s Request to extend the contact restrictions imposed in the “Fifth Decision on Contact Restrictions” (ICC-01/14-01/22-106-Conf-Exp)*’.² The Defence opposes the Prosecution’s Request, which mainly requests, again, that the Pre-Trial Chamber reinstate active monitoring of Mr. Mokom’s non-privileged calls with persons other than [Redacted].

2. Mr. Mokom’s communications have been without incident since his transfer to ICC custody more than ten months ago, including since the Pre-Trial Chamber lifted the active monitoring of Mr. Mokom’s non-privileged communications with persons other than [Redacted] in November 2022. Moreover, Mr. Mokom is currently awaiting the outcome of his request for his interim release, initiated by the Pre-Trial Chamber itself. In such context, the Pre-Trial Chamber should deny the Prosecution’s Request, which mainly seeks again the reinstatement of the active monitoring of Mr. Mokom’s non-privileged communications with persons other than [Redacted].

3. Should the Pre-Trial Chamber consider reinstating the active monitoring of Mr. Mokom’s non-privileged communications, the Defence has three alternative requests aimed at mitigating the reinstatement of active monitoring.

Relevant Procedural Background

¹ Pre-Trial Chamber II, ‘Fifth Decision on Contact Restrictions’, 7 November 2022, ICC-01/14-01/22-106-Conf-Exp, para. 13 (‘Fifth Decision on contact restrictions’); Pre-Trial Chamber II communications email to Parties and Registry, 23 January 2023 at 17:27.

² Office of the Prosecutor, ‘Prosecution’s Request to extend the contact restrictions imposed in the “Fifth Decision on Contact Restrictions” (ICC-01/14-01/22-106-Conf-Exp)’, 19 January 2023, ICC-01/14-01/22-131-Conf-Exp (‘Prosecution’s Request’).

4. On 19 and 23 January 2023, the Registry respectively filed its fourth report on the implementation of the restrictions on contact³ and its Addendum to the fourth Registry Report.⁴ The Defence concurs with the procedural history contained therein.⁵

Confidentiality

5. Pursuant to Regulation 23bis(1) of the Regulations of the Court ('RoC'), the Defence files this Response under the classification of 'confidential *Ex Parte*, only available to the Registry, the Prosecution, and the Defence' to accord with the classification of the Pre-Trial Chamber's decisions on Contact Restrictions and filings of the same classification, including the Fourth Registry Report, the Addendum to the Registry Report, and the Prosecution's Request.

Applicable Legal Provisions

6. Under Regulations 99(1)(i) and 100(1) of the RoC, every detained person shall be entitled to respectively 'communicate by letter or telephone with his or her family and other persons' and 'receive visits'.

Submissions

A. The Prosecution reiterates previous arguments without concrete and up-to-date additional information

7. The Prosecution's Request seeks the re-introduction of contact restrictions based on certain arguments it has made in previous submissions, in relation to Mr. Mokom's so-called involvement, alongside family members' or associates' in

³ Registry, 'Fourth Registry Report on the Implementation of the Restrictions on Contact Ordered by Pre-Trial Chamber II', 19 January 2023, ICC-01/14-01/22-132-Conf-Exp ('Fourth Registry Report').

⁴ Registry, 'Addendum to the "Fourth Registry Report on the Implementation of the Restrictions on Contact Ordered by Pre-Trial Chamber II" issued on 19 January 2023, ICC-01/14-01/22-132-Conf-Exp', 23 January 2023, ICC-01/14-01/22-135-Conf-Exp ('Addendum to the Fourth Registry Report').

⁵ ICC-01/14-01/22-132-Conf-Exp, paras. 2-3; ICC-01/14-01/22-135-Conf-Exp, paras. 3-5.

alleged incidents with Prosecution witnesses or other persons.⁶ As such, it procedurally amounts to an appeal or motion for reconsideration.

8. The Defence hereby refers to and incorporates by reference the arguments it developed in its last Response in relation to the above-mentioned Prosecution's arguments on the matter of contact restrictions,⁷ and which were respectively related to the misplaced implication of Mr. Mokom, his direct family members and other associates in threats to individuals;⁸ the fact that the Prosecution's Request does not establish that Mr. Mokom has influence over a 'wide range' of supporters and associates;⁹ and the fact that the security situation in Central African Republic remains fragile does not constitute an additional ground justifying this Chamber's imposition of contact restrictions.¹⁰

9. In addition, the Prosecution's Request reiterates the same above-mentioned arguments even though the Pre-Trial Chamber ruled in the Fifth Decision on contact restrictions that, since its initial request for contact restrictions, 'the Prosecution has not provided further substantiation for its contention that Mr Mokom's communication ought to be restricted' and that the Prosecution merely *reiterates* previous arguments.¹¹

10. The Prosecution's Request also suggests that even though there have not been any known incidents reported by any of its witnesses since 2019, 'the objectively justifiable risk associated with the Suspect's contacts has not diminished significantly at this stage of the proceedings', arguing, based on the wording of Regulation 101(2)(b) and (c) of the RoC that the Pre-Trial Chamber

⁶ ICC-01/14-01/22-131-Conf-Exp, para. 4.

⁷ Mr. Mokom's Response to the 'Prosecution's Request to extend the contact restrictions imposed in the "Fourth Decision on Contact Restrictions" (ICC-01/14-01/22-63-Conf-Exp)', 20 September 2022, ICC-01/14-01/22-90-Conf-Exp.

⁸ *Ibid*, paras. 10-15.

⁹ *Ibid*, paras. 18-23.

¹⁰ *Ibid*, para. 15.

¹¹ ICC-01/14-01/22-106-Conf-Exp, para. 8.

must assess whether the absence of contact restrictions ‘could be harmful’ or ‘*could* prejudice or otherwise affect’ the outcome of the proceedings.¹²

11. However, whilst aware of Regulation 101(2) of the ROC, the Pre-Trial Chamber already held in the Fifth Decision on Contact Restrictions that ‘the longer restrictions last, the more the necessity and proportionality for such restrictions must be scrutinised’. This entails that Pre-Trial Chamber expects the Prosecution ‘to provide concrete and up-to-date information in support of its request’, which the Prosecution already failed to do in its last Request, as found by the Pre-Trial Chamber in its Fifth Decision on Contact Restrictions.¹³

12. The Prosecution’s referring to previous arguments based on the literal wording of Regulation 101(2)(b) and (c) of the ROC does not amount to providing concrete and up-to-date information in order to fully reinstate the necessity of contact restrictions to be imposed over a long period of time, as requested by the Pre-Trial Chamber.

13. In particular, even though the Prosecution requests the reinstatement of the active monitoring of Mr. Mokom’s non-privileged communications, it cannot cite any incidents since the active monitoring of Mr. Mokom’s non-privileged communications was lifted by the Pre-Trial Chamber last November.

14. The Prosecution only speculates that reducing the contact restrictions on Mr. Mokom *may* have an impact on the effect of the contact restrictions imposed on Mr. Yekatom and Mr. Ngaïssona.¹⁴

15. This Chamber should not impose contact restrictions on Mr. Mokom based on *speculation* about their effect in another case. Such line of argument does

¹² ICC-01/14-01/22-131-Conf-Exp, para. 5.

¹³ ICC-01/14-01/22-106-Conf-Exp, para. 9.

¹⁴ ICC-01/14-01/22-131-Conf-Exp, para. 6.

not constitute a reasonable ground for the imposition of any contact restrictions, in particular as the Prosecution does not provide any concrete information demonstrating that Mr. Mokom's behaviour has had any negative impact on the conduct of the Yekatom and Ngaïssona trial.

16. Finally, the Prosecution also repeats that Mr. Mokom would have a motive to interfere with the Prosecution's investigations because the charges carry serious consequences for Mr. Mokom's 'freedom, reputation, and political and economic ambitions'.¹⁵ Whilst this contention is almost identical to the one already made in the previous Prosecution's Request on contact restrictions,¹⁶ the Prosecution adds that Mr. Mokom now possesses 'economic ambitions', which is a new assertion, without any reference or apparent support.

17. The Defence can hereby confirm that Mr. Mokom does not have any specific economic or business-related ambitions and that such a contention from the Prosecution is purely speculative.

B. The delay in the pre-trial Proceedings and Mr. Mokom's compliance with the Chamber's Orders must be taken into account in the adjudication of contact restrictions, alongside other factors

18. The Prosecution's Request argues that the delay in these pre-trial proceedings does not constitute a decisive factor to assess the lifting of contact restrictions.¹⁷

19. Even though the Appeals Chamber recently settled Mr. Mokom's legal representation and that no further delay is expected in the pre-trial proceedings,

¹⁵ ICC-01/14-01/22-131-Conf-Exp, p. 4-5, para. 4.

¹⁶ Office of the Prosecutor, 'Prosecution's Request to extend the contact restrictions imposed in the "Fourth Decision on Contact Restrictions" (ICC-01/14-01/22-63-Conf-Exp)', 16 September 2022, ICC-01/14-01/22-89-Conf-Exp, p. 5, para. 6.

¹⁷ ICC-01/14-01/22-131-Conf-Exp, paras. 9-12.

the Pre-Trial Chamber already held that ‘careful consideration must be given to the passage of time and severity of the measures imposed.’¹⁸

20. In this context, the Fourth Registry Report and the Addendum to the Fourth Registry Reports state that there have been no incidents to report since implementing the contact restrictions on Mr. Mokom’s non-privileged telephone calls, non-privileged visits and written correspondence.¹⁹ The Prosecution has not alleged either that any incidents occurred arising from Mr. Mokom’s behaviour, in particular since the lifting of the active monitoring of Mr. Mokom’s non-privileged communications on 7 November 2022.²⁰ Mr. Mokom has therefore demonstrated once again his exemplary behaviour, even after the lifting of the active monitoring of his non-privileged communications.

21. Moreover, even if the rest of the disclosure is supposed to be provided to the Defence after the appointment of Mr. Mokom’s permanent Counsel, disclosure in this case was already initiated last July with the provision of the evidence underlying the Application for a Warrant of Arrest.²¹ However, since then, more than six (6) months ago, no incidents have been reported.

22. The Prosecution also argues that Mr. Mokom’s compliance with the contact restrictions should be the norm and does not bear much weight, citing an Appeals Chamber Judgment in the *Ntaganda* case.²² It has to be highlighted that the contact restrictions imposed at the time on Bosco Ntaganda consisted of active monitoring of non-privileged communications.²³ However, the

¹⁸ Pre-Trial Chamber II, ‘Public Redacted Version of Decision Pursuant to Regulation 101 of the Regulations of the Court’, 16 February 2021, ICC-01/14-01/18-413-Red2, para. 78.

¹⁹ ICC-01/14-01/22-132-Conf-Exp, para. 7; ICC-01/14-01/22-135-Conf-Exp, para. 16.

²⁰ ICC-01/14-01/22-131-Conf-Exp, para. 5.

²¹ Pre-Trial Chamber II, ‘Order on the conduct of the confirmation of charges proceedings’, 27 June 2022, ICC-01/14-01/22-62, para. 26.

²² ICC-01/14-01/22-131-Conf-Exp, para. 7, footnote 19.

²³ See Appeals Chamber, ‘Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016’, 8 March 2017, ICC-01/04-02/06-1817-Red, para. 14 (the ‘Appeals Chamber Judgment’); see also Trial Chamber VI, ‘Second public redacted version of Decision reviewing the restrictions placed on Mr Ntaganda’s contacts, 7 September

Prosecution relies on the Appeals Chamber's Judgment to justify that Mr. Mokom's compliance is the norm 'given the fact that the restrictions themselves removed in large measure the *possibility* for MOKOM's misconduct',²⁴ citing the exact same words used by the Appeals Chamber in relation to Mr. Ntaganda's compliance with his contact restrictions, even though Mr. Ntaganda had not been granted the passive monitoring of his non-privileged communications at the time, as has been the case for Mr. Mokom since last November. The Prosecution has therefore stated that Mr. Mokom's compliance with the Pre-Trial Chamber's Orders does not bear much weight by relying upon an Appeals Chamber's Judgment which concerned the opposite situation of a detainee subject to a very different set of contact restrictions. As indicated in the same Appeals Chamber's Judgment, matters of contact restrictions must be assessed on a case-by-case basis,²⁵ which entails that no comparison should be made between the contact restrictions applicable to different detainees to reach conclusion about the weight that should be given to their respective compliance with orders on contact restrictions (or the absence thereof).

23. In addition to Mr. Mokom's compliance with the Pre-Trial Chamber's Orders and the delay in the proceedings, the Pre-Trial Chamber also took into account in its Fifth Decision on contact restrictions other factors, namely the facts that Mr. Mokom previously said that he will refrain from contacting certain individuals and the lack of concrete and up-to-date information from the Prosecution justifying the extension of the contact restrictions.²⁶

24. Moreover, the Pre-Trial Chamber now can take into account two additional factors, namely:

2016, ICC-01/04-02/06-1494-Conf-Exp', 21 November 2016, ICC-01/04-02/06-1494-Red4, paras. 19-20.

²⁴ ICC-01/14-01/22-131-Conf-Exp, para. 7.

²⁵ ICC-01/04-02/06-1817-Red, para. 74.

²⁶ ICC-01/14-01/22-106-Conf-Exp, paras. 9-10.

- the fact that Mr. Mokom has also continued to demonstrate his exemplary behaviour since last November, when active monitoring of his non-privileged communications was lifted;
- the fact that since 7 November 2022, the Pre-Trial Chamber itself has initiated a procedure for Mr. Mokom's potential interim release.²⁷ As this procedure is still ongoing, it would be contradictory for the Pre-Trial Chamber to revert and increase the level of Mr. Mokom's contact restrictions when nothing justifies it whilst still having to adjudicate the matter of interim release which it launched.

25. The Pre-Trial Chamber has held that contact restrictions must be necessary, proportionate to the legitimate aim pursued, and balanced against a suspect's right to private and family life.²⁸

26. As Mr. Mokom's behaviour has been irreproachable for the past 10 months, the cessation of all restrictions is timely, proportionate, and reasonable.

C. Defence's Alternative Requests:

27. In the alternative, should the Pre-Trial Chamber consider that the Prosecution's Request be granted, in particular the reinstatement of the active monitoring of Mr. Mokom's non-privileged communications, the Defence first requests that the Pre-Trial Chamber orders the Prosecution to provide a specific list of individuals with whom active monitoring should be reinstated, based on up-to-date and concrete information. The Defence respectfully submits that,

²⁷ Pre-Trial Chamber II, 'Order to Mr Mokom to provide submissions on interim release', 7 November 2022, ICC-01/14-01/22-105.

²⁸ Pre-Trial Chamber II, 'Public Redacted Version of Decision Pursuant to Regulation 101 of the Regulations of the Court', 16 February 2021, ICC-01/14-01/18-413-Red2, para. 78; ICC-01/14-01/22-106-Conf-Exp; para. 10.

absent any specific considerations, no active monitoring of Mr. Mokom's non-privileged communications should be considered.

28. Second, the Defence requests that the vetting process put in place by the Pre-Trial Chamber for the addition of individuals to Mr. Mokom's non-privileged contact list²⁹ be modified. As stated in the Addendum to the Registry Report, one individual was not added to Mr. Mokom's non-privileged contact list as both the Registry and the Prosecution had concerns about the addition of this individual to the contact list.³⁰

29. However, even though Mr. Mokom was notified via a CCO Memorandum that the individual was not added to his non-privileged contact list,³¹ Mr. Mokom has not received an explanation in the CCO Memorandum or subsequently from the Registry about the specific reasons for denying this non-privileged contact. Whilst the Defence has contacted the Registry seeking more information, none has been provided.

30. As Mr. Mokom has no means to understand the reasons underlying the discretionary refusal to add an individual to his contacts list, the Defence thereby requests the Pre-Trial Chamber to amend the vetting process by:

- either ordering the Registry to provide Mr. Mokom its reasons for refusing to add an individual to his non-privileged contact list, or;
- requesting that the Registry consult with Mr. Mokom before refusing to add an individual to his non-privileged contact list. Per the Fourth Pre-Trial Chamber's Decision on Contact Restrictions, the Registry *may* seek relevant information from Mr. Mokom in relation to the addition of a

²⁹ ICC-01/14-01/22-106-Conf-Exp, para. 12.

³⁰ ICC-01/14-01/22-135-Conf-Exp, paras. 14-15.

³¹ See ICC-01/14-01/22-135-Conf-Exp, para. 15.

person to his non-privileged contact list.³² The Defence requests that the discretion to consult Mr. Mokom be amended to an obligation.

31. Third, in case the Pre-Trial Chamber decides that active monitoring should be reinstated for certain individuals, the Defence requests that the time allocated for Mr. Mokom's non-privileged calls consist of at least 8 hours per week. Under the previous regime of active monitoring, the Pre-Trial Chamber had imposed that non-privileged telephone calls be limited to four hours per week.³³

32. As previously stated, no incidents have been identified by the Registry or the Prosecution since the beginning of Mr. Mokom's detention and there are no reasons that justify that Mr. Mokom should be submitted again to an as restrictive active monitoring regime as the one previously in place. Based on this, the Defence therefore requests that Mr. Mokom's allotment of time for non-privileged calls be raised to at least 8 hours per week.

33. Finally, the Defence requests that [Redacted], remains subject to passive monitoring for the reasons stated in the Defence last submissions on the matter of contact restrictions, namely that:

- The Prosecution has not made any allegations on contact restrictions with respect to [Redacted];³⁴
- There are logistical difficulties at stake regarding the organisation of phone calls between [Redacted] when active monitoring is put in place, as [Redacted];³⁵

³² Pre-Trial Chamber II, "Fourth Decision on Contact Restrictions", 28 June 2022, ICC-01/14-01/22-63-Conf-Exp, para. 10.

³³ Pre-Trial Chamber II, "Decision temporarily imposing contact restrictions on Mr Mokom", 29 March 2022, ICC-01/14-01/22-28-Conf-Exp, para. 16.

³⁴ ICC-01/14-01/22-90-Conf-Exp, para. 34.

³⁵ Ibid., para. 30-33.

- The fact that [Redacted] following Mr. Mokom's arrest last March.³⁶

Conclusion

34. In conclusion, the Defence requests that the Pre-Trial Chamber:
- (a) **DENY** the Prosecution's Request;
or in the alternative:
 - (b) **ORDER** the Prosecution to provide a specific list of individuals with whom active monitoring should be reinstated, based on up-to-date and concrete information;
 - (c) **VARIES** the vetting process currently in place as described in paragraph 30;
 - (d) **ORDER** the Registry to allow Mr. Mokom at least 8 hours of non-privileged calls with the individuals subject to active monitoring;
 - (e) **REFRAIN** from varying the passive monitoring of Mr. Mokom's calls, visits and written communications with [Redacted], subject to the Pre-Trial Chamber's periodic review based on reports from the Registry.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Wednesday, January 31, 2024

³⁶ Ibid., para. 36.