

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **28/04/2023**

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

**Public Redacted Version of “Defence Request for Interim Measures”, 27 March 2023,
ICC-01/14-01/22-181-Conf**

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

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States' Representatives

Amicus Curiae

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Registrar
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Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. On 8 March 2023, Pre-Trial Chamber II (“Chamber”) determined that Mr. Mokom was eligible for interim release, since “whilst a risk of flight in relation to Mr Mokom exists, this risk could be sufficiently mitigated by adopting and enforcing a number of conditions”.¹ The Chamber also determined that it was not in a position to order Mr. Mokom’s interim release because no State had agreed to accommodate him.² The result of the Chamber’s decision is that Mr. Mokom should no longer be incarcerated, and his continued detention violates his rights.

2. This request is premised on finding a solution to this issue. Efforts to locate a state to facilitate Mr. Mokom’s interim release remain ongoing and have been augmented by the weight of recent judicial findings of the Chamber which support his interim release. In the meantime, however, the Defence requests the Chamber use its broad powers to implement interim measures, including the release of Mr. Mokom onto premises within the jurisdiction of the Court in the Netherlands.

II. LEVEL OF CONFIDENTIALITY

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files these observations as confidential since they refer to confidential documents and information. A public redacted version will be filed as soon as practicable.

III. PROCEDURAL HISTORY

4. On 8 March 2023, the Chamber issued its Decision on Mr. Mokom’s interim release. The Chamber expressed its regret that, in the absence of a State willing to accept and enforce the conditions of Mr. Mokom’s interim release, it was not in a position to order Mr Mokom’s interim release.³

¹ Pre-Trial Chamber II, ‘Public Redacted Version of ‘Decision on Interim Release’, 8 March 2023, ICC-01/14-01/22-173-Red (‘Decision of 8 March 2023’), para. 55.

² Decision of 8 March 2023, para. 60.

³ Decision of 8 March 2023, para. 60.

5. On 10 March 2023, Lead Counsel for Mr. Mokom sent a letter to the President of the Assembly of States Parties (“ASP”) asking her to issue an urgent call to States Parties to comply with their commitment to cooperate with the Court by facilitating the provisional release of Mr Mokom.⁴

6. On the same day, Lead Counsel contacted the Office of the ICC President⁵ and the Division of Judicial Services of the Registry,⁶ seeking any assistance or advice that these Organs of the Court could provide in finding ways to implement Mr. Mokom's right to interim release, following the decision of 8 March 2023.

7. On 13 March 2023, the Director of the Division of Judicial Services of the Registry (“Division of Judicial Services”) informed the Defence that he had forwarded the matter to the section of the Registry in charge of external relations and judicial cooperation, and that he hoped that a meeting would take place with the Defence when additional information was received.⁷ On the same day, Lead Counsel responded that he was looking forward to a meeting with the Registry as soon as practicable, based on the urgency of the situation.⁸

8. On 15 March 2023, the Director of the Secretariat of the ASP acknowledged receipt of the 10 March 2023 letter addressed to the President of the ASP, and indicated that the letter had been conveyed to the President.⁹ On 16 March 2023, Lead Counsel responded that the Defence would be grateful for any support that the ASP could provide in relation to Mr. Mokom’s interim release and would welcome a meeting with ASP Representatives as soon as practicable.¹⁰ No further information has come from the ASP since 16 March 2023.

9. On 16 March 2023, Lead Counsel contacted the Division of Judicial Services, indicating that the Defence had not received additional information about the support that the Registry could provide to facilitate Mr. Mokom's interim release, in particular through its Division of External Relations. Whilst still welcoming a meeting with the Registry, Lead

⁴ Annex I, Email, “Correspondence for the President of the ASP”, 10 March 2023, 18:55; Annex II: Letter sent by Lead Counsel for Mr Mokom to States Parties to the Rome Statute of the International Criminal Court, 10 March 2023.

⁵ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 10 March 2023, 19:06.

⁶ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 10 March 2023, 19:13.

⁷ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 13 March 2023, 12:55.

⁸ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 13 March 2023, 13:54.

⁹ Annex I, Email, “Correspondence for the President of the ASP”, 15 March 2023, 16:42.

¹⁰ Annex I, Email, “Correspondence for the President of the ASP”, 16 March 2023, 09:03.

Counsel indicated that the urgency of the situation required the Defence to ensure that States Parties were contacted urgently to ask about their willingness to implement interim release. Lead Counsel asked the Division of Judicial Services to provide a list of focal points for [REDACTED] States Parties, which the Defence sought to contact, as a priority.¹¹

10. Four days later, on 20 March 2023, the Division of Judicial Services responded that it had referred the Defence request to the External Operations and Support Section of the Registry (“EOSS”). Apparently, [REDACTED].¹²

11. On 21 March 2023, Lead Counsel replied that providing the Defence with the contact details of the focal points of the identified States Parties would only require the Division of Judicial Services to provide information already in its possession, which did not require the involvement of either the EOSS or the ASP. Lead Counsel reiterated the request to meet with Registry staff as soon as possible.¹³

12. The Division of Judicial Services replied that the relevant focal points, and their contact details, were not known to the Division of Judicial Services, but that it was available to meet with the Defence on 22 March 2023.¹⁴

13. On 22 March 2023, a meeting was held between the Mokom Defence and the Division of Judicial Services, [REDACTED].

IV. APPLICABLE LAW

14. Article 57 of the Rome Statute of the ICC (“Statute”) details the broad functions and powers of the Chamber. This includes the power to take action to protect persons who have been arrested or appeared in response to a summons,¹⁵ as well as the power to “[u]pon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”.¹⁶

¹¹ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 16 March 2023, 21:01.

¹² Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 20 March 2023, 17:18.

¹³ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 21 March 2023, 09:07.

¹⁴ Annex I, Email, “Interim Release of Mr Maxime Mokom - ICC-01/14-01/22”, 21 March 2023, 11:34.

¹⁵ Statute, Article 57(3)(b).

¹⁶ Statute, Article 57(3)(c).

15. Similarly, Article 43(1) of the Statute sets the functions of the Registry, including “[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court”. Further, Rule 20(1) of the ICC Rules of Procedure and Evidence (“Rules”) relevantly provides that “the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute.”. This includes providing support, assistance, and information to all defence counsel appearing before the Court.¹⁷ The Registry is also responsible for transmitting and receiving requests for cooperation made by the Court to States.¹⁸

16. Article 21(3) of the Statute requires that the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights. This includes the right to liberty and security of a person.¹⁹

V. OBSERVATIONS

17. Deprivation of the liberty of a suspect, who benefits from the presumption of innocence, must be the exception and not the rule.²⁰

18. This starting point is reflected in the Chamber’s previous determination that Mr. Mokom is eligible for interim release, in accordance with specified conditions.²¹ The Chamber also found that a factor militating in favour of interim release was the length of Mr. Mokom’s pre-trial detention, given the significant delays experienced with prior procedural litigation.²² These findings mean Mr. Mokom should no longer be in detention. The consequent unfairness of Mr. Mokom’s continued detention is exacerbated with each additional day that he remains in prison. In these circumstances, all available action must be taken to ensure Mr. Mokom’s rights as a suspect are respected, and he is released as soon as possible.

¹⁷ Rules, Rule 20(1)(b).

¹⁸ Rules, Rule 176(1).

¹⁹ *See, e.g.*, International Covenant on Civil and Political Rights, Article 9(1); European Convention on Human Rights, Article 5(1).

²⁰ Decision of 8 March 2023, para. 49, citing *Prosecutor v. Al-Rahman*, ICC-02/05-01/20-115, Decision on the Defence Request for Interim Release, 14 August 2020, para. 23.

²¹ Decision of 8 March 2023, para. 60.

²² Decision of 8 March 2023, para. 58.

19. On this basis, the Defence seizes the Chamber with an interim, temporary measure to facilitate Mr. Mokom's interim release; namely, allowing Mr. Mokom to be temporarily released onto premises of the Court within the Netherlands, and at the cost of the Court. The Defence appreciates the position elucidated by the Netherlands, in which it refused the transfer of Mr. Mokom onto its territory, even temporarily. However, the Court has previously facilitated the creation of temporary premises in the Netherlands, designated as being under the responsibility, and within the jurisdiction, of the Court. For example, Mr. Paul Gicheru was granted interim release in Kenya, but the Netherlands was required to facilitate his presence in the territory for the purpose of proceedings. In so doing, it was noted:²³

Since Mr Gicheru will travel from Kenya where he is staying during his interim-release, he will be granted, upon request, **a single-entry visa, territorially limited to the Municipality of The Hague, for the duration of a block of hearings.** It is the understanding of the host State that during his short-term stay, **Mr Gicheru remains at all times under the jurisdiction of the Court** and will not leave the Municipality of The Hague for reasons other than his departure from the Netherlands.

20. Similarly, during the appeal phase of the *Ngudjolo* case, Mr. Mathieu Ngudjolo Chui was released onto the territory of the Netherlands to facilitate his attendance at hearings and cooperation with his defence team, "under the responsibility of the Registry of the International criminal Court".²⁴ The Registry monitored Mr. Ngudjolo on a regular basis, while Mr. Ngudjolo's defence team maintained constant contact and assured his attendance at the hearings.²⁵ This was explicitly recognised as being an interim measure while an appropriate place of relocation was identified.²⁶ Other examples beyond those cited are also available²⁷ and, taken together, make clear that the Court does have authority to order the interim measures proposed herein.

21. The Defence submits that an interim release in these circumstances could be conducted in accordance with the conditions previously ordered by the Chamber, enforced by

²³ *Prosecutor v. Gicheru*, ICC-01/09-01/20-181-Anx, Annex - Transmission of further Observations Submitted by the Host State with respect to the stay of Mr Gicheru in the Netherlands, 23 September 2021 (emphasis added).

²⁴ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-69-Red, Public redacted version of ICC-01/04-02/12-69-Conf-Exp Registry's update on the situation in relation to Mathieu Ngudjolo Chui, 3 June 2013, para. 8.

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 5.

²⁷ See, e.g., *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-1427, Decision on Mr Blé Goudé's request for compensation, 10 February 2022, para. 53: "In the meantime, the Registrar should explore with the Host State whether all, or part of, the measures the Applicant is presently subjected to during his ongoing stay on the territory of the Host State can be lifted."; *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-T-242-Red-ENG, 13 December 2021, p. 30, lns 3-21.

both the Registry and the Defence. The Defence further stresses that the proposed interim measure would only be a temporary arrangement to allow the Registry and the Defence additional time to consult with States Parties since efforts to identify a State to facilitate Mr. Mokom's provisional release remain ongoing.

22. Specifically, responses from a number of states remain outstanding, following the first round of Registry consultations. For example, the authorities [REDACTED] are only required to submit their response on 13 April 2023.²⁸ Similarly, as discussed above, the Defence is pursuing alternative avenues for identifying possible States that will accommodate Mr. Mokom's interim release. This includes seeking the assistance of the President of the ASP, and requesting the issue of an urgent call for States Parties to facilitate Mr. Mokom's interim release.²⁹ The Defence have also taken steps to contact [REDACTED] specific States Parties directly; namely, [REDACTED],³⁰ which the Defence has identified as being potential realistic and credible candidates to cooperate with the Court on this question.

23. Moreover, following initial Registry consultations with States, the Chamber has made a number of findings which constitute a change of circumstances. The relevant findings of the Chamber include:

- (i) The determination that Mr. Mokom is eligible for interim release, and the length of his detention to date is unreasonable;³¹
- (ii) The conditions under which such interim release could be affected, in clear and precise terms capable of enforcement by States;³² and
- (iii) The determination that [REDACTED].³³

24. The logical corollary of these changed circumstances is that the Registry should renew its engagements with each of the States Parties previously contacted, to communicate these new findings, particularly the [REDACTED] priority states identified above. The weight of this judicial authority may assist the decision-making of States, moving the needle in favour of their facilitation of Mr. Mokom's release. In these circumstances, locating a State that will accommodate Mr. Mokom's interim release remains a clear and realistic possibility.

²⁸ Decision of 8 March 2023, fn. 43.

²⁹ Annex I, Email, "Interim Release of Mr Maxime Mokom - ICC-01/14-01/22", 10 March 2023, 19:13.

³⁰ Annex I, Email, "Interim Release of Mr Maxime Mokom - ICC-01/14-01/22", 16 March 2023, 21:01.

³¹ Decision of 8 March 2023, para. 55.

³² Decision of 8 March 2023, para. 56.

³³ Decision of 8 March 2023, para. 13, [REDACTED].

VI. CONCLUSION

25. For the above reasons, the Defence respectfully requests that the Chamber:

ORDER the Registry to contact all previously-contacted States to advise of the new developments in these proceedings, including the Chamber's findings in the Decision of 8 March 2023 detailed in paragraph 23 above;

ORDER the interim release of Mr. Mokom onto temporary premises of the Court, as an interim measure pending the outcome of ongoing negotiations with States; and

ORDER the Registrar to consult with the Netherlands as a matter of priority, in order to facilitate Mr. Mokom's immediate release under the conditions set by the Chamber, and report back within seven days as to the progress of these discussions.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, April 28, 2023