

Pursuant to Pre-Trial Chamber II's instruction dated 12 June 2023, this document is reclassified as Public.

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

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

Date: **30/05/2023**

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

Confidential

Defence Request for Leave to Reply to the “Prosecution’s Response to Request for Reconsideration of Decisions on Interim Release”

Source: Philippe Larochelle, Counsel for Mr. Mokom

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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. At the time of filing the present request, Maxime Mokom has now been detained for 14 months. On 8 March 2023, the Pre-Trial Chamber determined that the risk of Mr Mokom's flight "could be sufficiently mitigated" through his provisional release into a third State, pursuant to conditions.¹ 123 countries are States Parties to the Rome Statute of the International Criminal Court. None are willing to facilitate Mr Mokom's provisional release. As such, he remains detained at the UN Detention Facility in The Hague.

2. The present litigation is aimed at finding a solution for this deeply unacceptable *status quo*. On 22 May 2023, the Defence for Mr Mokom ("Defence") filed a 'Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf'.² The Prosecution responded to the Defence Request on 26 May 2023, alleging that the Defence had misrepresented the Chamber's factual and legal findings, and failed to meet the standard for reconsideration.³

3. The Defence's practice has been **not** to seek leave to reply to Prosecution responses, on the basis that the Pre-Trial Chamber has all the information it needs to adjudicate the issues. In the present case, however, the Prosecution Response has revealed the parties' fundamentally divergent views on the necessity of detention, with the Prosecution also raising novel legal issues of statutory interpretation, the ongoing relevance of the *Bemba* Appeal Decision, and the relevance of the ICC's legal framework to the availability of provisional release to those appearing before it.⁴

4. As such, a limited reply is warranted to address the new issues raised by the Prosecution, and the allegations that the Defence misrepresented the Chamber's factual and

¹ See, Pre-Trial Chamber II: Decision on interim release, ICC-01/14-01/22-173-Red, 8 March 2023 ("8 March Decision"), para. 55.

² Defence Request for Reconsideration of Decision on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf, ICC-01/14-01/22-203-Conf, 22 May 2023 ("Defence Request").

³ Prosecution's Response to Request for Reconsideration of Decisions on Interim Release, ICC-01/14-01/22-210-Conf, 26 May 2023 ("Prosecution Response"), para. 1.

⁴ Prosecution Response, paras. 4-15, citing "Appeals Chamber, The *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red, public, paras. 105-107" ("*Bemba* Appeal Decision").

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legal findings. Such a reply will ensure that all submissions necessary for the fair and complete adjudication of this matter are before the Pre-Trial Chamber.

II. LEVEL OF CONFIDENTIALITY

5. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this request as confidential since it refers to confidential filings, documents and information. A public redacted version will be filed in due course.

III. APPLICABLE LAW

6. Regulation 24(5) of the Regulations of the Court (“Regulations”) prescribes that:
Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

7. Jurisprudence indicates that a request for leave to reply may be granted if the conditions set out in Regulation 24(5) are met, or if the Chamber considers a reply would otherwise be necessary for the adjudication of the matter.⁵

8. A request for leave to reply must explain the intended subject-matter of the reply to some extent. As held by the Appeals Chamber, a party seeking leave to reply must: (i) do more than “point [...] to issues” to which it wishes to reply, but must rather “demonstrate [...] why they are new and could not reasonably have been anticipated”⁶ and (ii) “explain why a reply to the aforementioned issues is otherwise warranted.”⁷

9. Requests for leave to reply must be filed within three days of the response sought to be addressed in the reply.⁸

⁵ See, e.g., *Situation in the Republic of the Philippines*, Appeals Chamber: Decision on the Republic of the Philippines’ request for leave to reply to the “Prosecution’s response to the Philippine Government’s Appeal Brief against ‘Authorisation pursuant to article 18(2) of the Statute to resume the investigation’ (ICC-01/21-65 OA)”, ICC-01/21-72 02-05-2023, 2 May 2023, para. 7.

⁶ *Prosecutor v. Ntaganda*, Appeals Chamber: Decision on Mr. Ntaganda’s request for leave to reply, ICC-01/04-02/06-1994, 17 July 2017, para. 13.

⁷ *Ibid.*, para. 14.

⁸ Regulation 34(c) of the Regulations.

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IV. SUBMISSIONS

10. Should leave to reply be granted, the Defence will make limited submissions on the two central Prosecution allegations: that the Defence Request misrepresented the Pre-Trial Chamber's factual findings, and misrepresented its legal findings.

(i) The Request does not misrepresent the Chamber's factual findings

11. According to the Prosecution, the Defence position that "detention is no longer necessary", is misplaced.⁹ This appears to result from a fundamental divergence in the way the two parties view the necessity of ongoing detention, and the primacy of the right to liberty and security. The Defence's position is that the obstacle to Mr Mokom's provisional release is the absence of a State willing to facilitate it. The Prosecution comes at the question from a different angle, submitting that the problem is Mr Mokom's risk of flight, and the fact that "none" of the conditions assessed as necessary by the Chamber can currently be enforced.¹⁰ As such, it accuses the Defence of "misrepresenting" the Pre-Trial Chamber's factual findings, citing to language from an earlier decision which addressed previous Defence submissions.¹¹

12. In addition to responding to this allegation of misrepresentation, which the Defence takes seriously, a reply would seek to address the fundamental divergence between the parties, which was unanticipated. On this basis, a limited reply is warranted.

(ii) The Request does not misrepresent the Chamber's legal findings

13. Rather than misinterpreting the Chamber's legal findings, the Defence Request invited the Pre-Trial Chamber to depart from them. The Prosecution argues in response that the Prior State Requirement is "reflected in rule 119(3) (and regulation 51)", and that a recent decision in the *Abd-Al-Rahman* case – which addressed the discrete issue of whether the *Bemba* Appeal Judgment can be read as requiring State observations prior to an interim release decision – undermines the Defence Request and supports maintenance of the *status*

⁹ Prosecution Response, para. 7.

¹⁰ Prosecution Response, para. 6.

¹¹ Prosecution Response, para. 7.

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quo.¹² As well as being erroneous, these arguments are new, could not have been anticipated, and warrant a reply.

14. The Prosecution then seeks to distinguish the KSC and ICTY precedent relied on by the Defence, on the basis that “the ICC legal system based on State cooperation is, in this regard, fundamentally different from the *ad hoc* Tribunals and the Kosovo Specialist Chambers (“KSC”) that the Defence unsuccessfully relies upon”.¹³ While this distinction is not further explained, this unanticipated argument should also be addressed, particularly whether the differences in the legal frameworks of international tribunals can justify reduced access of defendants to provisional release.

15. Importantly, the Prosecution’s presentation of the relevant jurisprudence from the Kosovo Constitutional Court, and KSC Rules and Law, is erroneously selective. As such, it gives an inaccurate impression of the current provisional release regime at the Specialised Chambers by isolating the last phrase in Article 41(11), which refers to “another State that agrees to accept them”, and ignoring the preceding language which governs defendants being released into the country where they were originally detained, or where they are ordinarily or lawfully resident. The approach of the KSC and the Kosovo Constitutional Court supports the Defence submissions, and the Prosecution’s position is one which could not reasonably have been anticipated.

16. A reply would also be directed at the failure of the Prosecution to engage in any way with the practical obstacles raised, the fair trial issues they impact, the ECtHR jurisprudence prohibiting delegation of detention decisions,¹⁴ and the significance of these omissions. A reply on the legal issues outlined above is accordingly warranted.

V. CONCLUSION AND REMEDY

17. Mr Mokom’s ongoing detention is fast becoming the emblematic aspect of these proceedings. The Defence is seeking to find constructive and meaningful solutions to a situation that is deeply unsatisfactory, and should be considered as such by everyone involved,

¹² Prosecution Response, paras. 11-13.

¹³ Prosecution Response, fn. 20.

¹⁴ Defence Request, paras. 28-29.

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including the Prosecution. The issue is an important one which warrants a full briefing. As such, the Defence respectfully requests that the Chamber:

GRANT the Defence request for leave to reply; and

AUTHORISE the Defence to file a reply to the Prosecution Response, limited to the issues set out above.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Tuesday, May 30, 2023