

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

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 31 May 2023

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM
GAWAKA***

Confidential

**Prosecution's Response to Defence Request for Leave to Reply,
ICC-01/14-01/22-211-Conf**

Source: Office of the Prosecutor

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

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Ms Leonie von Braun

Counsel for the Defence

Mr Philippe Larochelle

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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

I. INTRODUCTION

1. The Defence Request for Leave to Reply¹ to the Prosecution Response² fails to identify any issue raised in response which could not have reasonably been anticipated. Further, the Defence reiteration or elaboration of the position already taken will not materially assist the Chamber in the exercise of its judicial function. The Request for Leave to Reply should be dismissed as it fails to meet regulation 24(5) of the Regulations of the Court ("RoC") requirements or to show that a reply is otherwise necessary for the adjudication of the matter.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the RoC, this document is filed as "Confidential" because it responds to a filing of the same classification. A public redacted version will be filed as soon as possible.

III. SUBMISSIONS

3. The Prosecution's Response addresses factual and legal arguments raised by the Defence in their Request for Reconsideration.³ As such they could have been reasonably anticipated.

¹ ICC-01/14-01/22-211-Conf, Defence Request for Leave to Reply to the "Prosecution's Response to Request for Reconsideration of Decisions on Interim Release", 30 May 2023 ("Request for Leave to Reply").

² ICC-01/14-01/22-210-Conf, Prosecution's Response to Request for Reconsideration of Decisions on Interim Release, 26 May 2023 ("Response").

³ ICC-01/14-01/22-203-Conf, Defence Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf, 22 May 2023 ("Request for Reconsideration").

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

i. The Defence could have reasonably anticipated the Prosecution's factual submissions in response

4. The divergence in the way the two Parties view the necessity of Mr Mokom's ongoing detention could have been reasonably anticipated.⁴ In particular, the Defence could have anticipated that in response to their arguments, the Prosecution would have recalled the findings of Pre-Trial Chamber II ("Chamber") regarding Mr Mokom's risk of flight, the consequent need for conditions and the difficulties to identify a State willing and able to enforce such conditions.⁵ The Prosecution maintains that the Defence's factual premise to their legal arguments that Mr Mokom's "detention is no longer necessary"⁶ and that he became a "political prisoner"⁷ are misplaced and at odds with the Chamber's factual findings.⁸ The Defence could have reasonably anticipated this divergent line of argument.

ii. The Defence could have reasonably anticipated the Prosecution's legal submissions

5. Similarly, the Defence could have reasonably anticipated the divergence in the way the two Parties view the Chamber's legal findings based on the Appeals Chamber's determinations in *Bemba*.⁹ In particular, the Defence could have reasonably anticipated that in response to their submission that the Appeals Chamber in *Bemba* "introduced" an unlawful requirement that results in the ICC Judges being forced to *delegate* their judicial authority under article 60,¹⁰ the Prosecution would have argued that this interpretation mischaracterises the Appeals Chamber's legal conclusions as adopted by the Chamber.¹¹ The Defence could have also reasonably anticipated that

⁴ *Contra* Request for Leave to Reply, paras. 11-12.

⁵ Response, paras. 4-7.

⁶ Request for Reconsideration, para. 25.

⁷ Request for Reconsideration, para. 27.

⁸ Response, para. 7.

⁹ *Contra* Request for Leave to Reply, paras. 13-16.

¹⁰ *See* Request for Reconsideration, para. 24.

¹¹ Response, paras. 8-15.

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

the Prosecution would have relied on the subsequent Appeals Chamber decision in *Abd-Al-Rahman*¹² and responded to their representation of other tribunals' caselaw.¹³

iii. A reply is not necessary for the adjudication of the matter

6. The issue before the Chamber is whether it should reconsider its Decisions denying Mr Mokom's release because the conditions deemed necessary to prevent his flight are not, at present time, enforceable. The Parties fully briefed the Chamber on their divergent views on the Court's legal framework and Appeals Chamber's jurisprudence in this regard. The Chamber, who touched upon the issue twice in its prior Decisions,¹⁴ would not be materially assisted by the Defence's reiteration or elaboration of their positions: a reply is not necessary for the adjudication of this matter.¹⁵

IV. CONCLUSION

7. For the above reasons, the Chamber should dismiss the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 31st day of May 2023
At The Hague, The Netherlands

¹² Response, para. 12.

¹³ Response, para. 13, fn. 20.

¹⁴ See for instance ICC-01/14-01/22-173-Conf, Decision on interim release, 8 March 2023, para. 59; ICC-01/14-01/22-195-Conf, Decision on the Defence Request for Interim Measures, 19 April 2023, para. 8, collectively "Decisions".

¹⁵ ICC-01/04-02/06-1813 (OA5), Decision on Mr Ntaganda's request for leave to reply, 3 March 2017, para. 8; ICC-01/04-02/06-1994 (OA6), Decision on Mr Ntaganda's request for leave to reply, 17 July 2017, paras. 13-14.