

Annex

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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/22
Date: 30 October 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

Request for leave to file submissions under Rule 103

Source:

ICC Bar Association

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. This request for leave is submitted pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”) by the International Criminal Court Bar Association (“ICCBA”). It requests leave for the ICCBA to file submissions concerning the matters raised by the Defence Urgent Request.¹

II. the iccba

2. The ICCBA was established in 2016 and is registered as a non-profit foundation in the Netherlands. It is independent of the Court and states parties. It is primarily funded by member subscriptions. In 2019 the ICCBA was officially recognised by the Assembly of States Parties as an independent representative body in accordance with Rule 20(3) of the RPE.²
3. The ICCBA serves as a collective voice for the independent lawyers who represent defendants, victims and others before the ICC. Its membership is drawn from the ICC’s List of Counsel, as well as the more junior jurists who serve as support staff on counsel teams. The ICC is the only organisation which brings together the expertise and experience of private lawyers who are qualified to practice before the ICC. In this role it engages with the Organs of the Court, the Assembly of States Parties and others to represent external counsel and their teams.
4. In addition to its role addressing questions of legal representation, the ICCBA has an important role to play on substantive questions of defence and victims’ rights before the Court. In this respect it is the ICC equivalent of the Association of Defence Counsel practising before the International Courts and Tribunals (“ADC-ICT”). That body was initially established at the instigation of ICTY judges in recognition of the need for a body which could make collective representations for defence counsel involved in all cases at the ICTY.³ This reflects the fact that while the Prosecution is carried out by one unified entity and therefore able to speak to matters in a Court-wide way; that is not the case for defence (or, at the ICC, for victims).
5. This role of the ICCBA means that it is uniquely placed to assist the Court on certain matters. These include both (a) questions concerning legal representation and (b) questions concerning core defence and victims’ rights.
6. In this regard the ICCBA is similar to the ADC-ICT. The provision of *amicus curiae* submissions has been an important function of the ADC-ICT since its founding, with such submissions frequently welcomed by the judges of the *ad hoc* tribunals.
7. The ICCBA emphasizes that any submissions made by it under Rule 103 would be entirely independent of counsel and support staff acting in the case in question. In the present case, both defence and victims counsel and some support staff are members of the ICCBA. However, they have not been involved in

¹ Defence Urgent Request, ICC-01/14-01/22-278, 23 October 2023.

² [ASP Resolution ICC-ASP/18/Res.6](#), 6 December 2019, paras 78-81.

³ See ICTY Press Release, ‘Judges’ Plenary Session adopt reforms concerning Defense Counsel Teams’, 19 July 2002, available at: <https://www.icty.org/en/press/judges-plenary-session-adopt-reforms-concerning-defense-counsel-teams>.

the preparation of these submissions and would play no role in any submissions, should leave be granted.

III. summary of proposed submissions

8. In the event that leave is granted, the ICCBA would make submissions concerning the following matters.

III.1 Submissions concerning the right to counsel

9. The Defence Urgent Request raises important questions regarding the right to legal representation. These have potential impacts well beyond the present case.
10. At its most fundamental, the Defence Urgent Request is a request for the possibility to be heard and to obtain legal advice. It is a request for the Pre-Trial Chamber (“Chamber”) to enforce the right to legal representation. The facts raise an important question about detained persons’ rights to legal representation in the event that they face a risk of persecution or torture upon return or deportation following detention by the ICC. The ICCBA submissions would address why the Court’s texts must be interpreted so as to permit access to legal advice and representation in these circumstances.
11. Further, the facts set out in the Defence Urgent Request raise the possibility that national criminal proceedings have taken place within a state party in total violation of the right to counsel, and despite the fact that the state party must be aware of (a) the whereabouts of Mr Mokom, who was detained in The Hague the in very public proceedings before the ICC; and (b) the identity of his ICC counsel and how to contact that counsel through the ICC. The ICCBA submissions would address the legal consequences of such a violation, and particularly their impact on Rule 185 of the RPE regarding the release of a person from the custody of the Court other than upon completion of a sentence.

III.2 Submissions concerning other defence rights

12. In addition to rights to legal representation, the matters raised in the Defence Urgent Request raise serious concerns about other core defence rights. Articles 55, 63 and 67 establish core defence rights which are applicable during ICC proceedings. The ICCBA submission would address the relevance of these rights where national proceedings have failed to comply with them, and the ICC’s proposed return of a person will result in the serving of a sentence as a result of such proceedings. Considering the centrality of complementarity in the Court’s legal framework, this is a question of enormous significance for the Court. Any perception of the Court’s endorsement of national proceedings which fall well below the most basic human rights standards required at the ICC (or by international human rights courts) risks damaging the Court’s credibility. Returning persons who have been acquitted or where charges have been withdrawn or not confirmed before the ICC, to face sentences imposed through such national proceedings may make suspects less willing to surrender to the ICC. Such a practice would also risk placing counsel in an ethically impossible position, whereby a successful defence before the ICC can lead to persecution and torture for counsel’s client.
13. Should leave be granted, the ICCBA submission would explain how these matters should be taken into account by the Pre-Trial Chamber in determining the Urgent Defence Request.

IV. request for leave

14. In light of the foregoing, the ICCBA respectfully requests that the Chamber

GRANT LEAVE to the ICCBA to file submissions on the above identified matters pursuant to Rule 103 of the RPE in respect of the Urgent Defence Request.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'M. H. Proulx', is written over a faint, light blue circular stamp.

Marie-Hélène Proulx
President of the ICCBA

Dated this 30th day of October 2023
At The Hague