

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

**Cour  
Pénale  
Internationale**  

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**International  
Criminal  
Court**



**Original: English**

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

**Date: 1 June 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**  
**IN THE CASE OF**  
***THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

**Confidential**

Decision on the ‘Defence Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf’ and the ‘Defence Request for Leave to Reply to the “Prosecution’s Response to Request for Reconsideration of Decisions on Interim Release”’

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**Decision 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  
Mr Mame Mandiaye Niang  
Ms Leonie von Braun

**Counsel for Mr Mokom**

Mr Philippe Larochelle

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel  
for the Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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**PRE-TRIAL CHAMBER II** of the International Criminal Court issues this Decision on the ‘Defence Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf’ and the ‘Defence Request for Leave to Reply to the “Prosecution’s Response to Request for Reconsideration of Decisions on Interim Release”’.

## **I. PROCEDURAL HISTORY**

1. On 8 March 2023, the Chamber rejected an application submitted by the Defence for Maxime Jeoffroy Eli Mokom Gawaka (the ‘Defence’ and ‘Mr Mokom’) for interim release to a number of States in Europe in the absence of a State willing to accept Mr Mokom and enforce related conditions (the ‘Interim Release Decision’).<sup>1</sup>
2. On 19 April 2023, the Chamber, *inter alia*, rejected Mr Mokom’s request for interim measures regarding his temporary release onto premises of the Court within the Netherlands (the ‘Interim Measures Decision’).<sup>2</sup>
3. On 22 May 2023, the Defence submitted a request for reconsideration of the Interim Release Decision and the Interim Measures Decision (the ‘Request’).<sup>3</sup>
4. On 26 May 2023, the Prosecution responded to the Request (the ‘Response’).<sup>4</sup>
5. On 30 May 2023, the Defence filed a request for leave to reply to the Response (the ‘Leave to Reply Request’).<sup>5</sup>
6. On 31 May 2023, the Prosecution responded to the Leave to Reply Request (the ‘Response to the Leave to Reply Request’).<sup>6</sup>

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<sup>1</sup> Decision on interim release, ICC-01/14-01/22-173-Conf (a public redacted version was filed on the same day, [ICC-01/14-01/22-173-Red](#)).

<sup>2</sup> Decision on the ‘Defence Request for Interim Measures’, ICC-01/14-01/22-195-Conf, confidential (a public redacted version was filed on 4 May 2023, [ICC-01/14-01/22-195-Red](#)).

<sup>3</sup> Defence Request for Reconsideration of Decisions 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, confidential.

<sup>4</sup> Prosecution’s Response to Request for Reconsideration of Decisions on Interim Release, ICC-01/14-01/22-210-Conf, confidential.

<sup>5</sup> Defence Request for Leave to Reply to the “Prosecution’s Response to Request for Reconsideration of Decisions on Interim Release”, ICC-01/14-01/22-211-Conf, confidential.

<sup>6</sup> Prosecution’s Response to Defence Request for Leave to Reply, ICC-01/14-01/22-211-Conf, ICC-01/14-01/22-213-Conf, confidential.

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## II. SUBMISSIONS

7. The Defence denounces the lack of cooperation of States and the Assembly of States Parties in relation to the possibility of the interim release of Mr Mokom, despite its efforts to engage with them. It further submits that the Chamber in the Interim Release Decision and Interim Measures Decision rejected the Defence requests in the absence of a State willing to accept Mr Mokom, applying as such a prior State requirement introduced by the Appeals Chamber in the *The Prosecutor v. Jean-Pierre Bemba Gombo* case (the 'Prior State Requirement'), in the absence of which Mr Mokom would have been released. The Defence contends that this requirement created a delegation of the Chamber's discretion to release suspects and accused under article 60 of the Rome Statute (the 'Statute') to the Registrar and his ability to secure and agreement with a State, rendering subsequent detention without legal basis. In this regard, the Defence contends that: (i) the removal of the Judges' discretion has been found to be incompatible with the right to liberty, and a violation of the protection against arbitrary detention by the European Court of Human Rights; (ii) the *ad hoc* Tribunals have found that the production of a guarantee from the relevant governmental body is not a prerequisite for provisional release; and (iii) a Constitutional Court Panel of the Kosovo Specialist Chambers (the 'KSC') has found the Prior State Requirement in the KSC Rules of Procedure and Evidence unconstitutional.

8. The Defence asserts that the Prior State Requirement, therefore, led to a manifestly unsatisfactory consequence in the form of indefinite pre-trial detention in a manner incompatible with the internationally recognised human right to liberty and the protection against arbitrary detention, thus justifying reconsideration of the Chamber's previous decisions in order to prevent an injustice. The Defence adds that the Request is reasonable as the Court's jurisprudence is non-binding under article 21(2) of the Statute.

9. The Prosecution submits that the Request should be dismissed *in limine* as it misrepresents the Chamber's factual and legal findings. Regarding the factual findings, the Prosecution argues that it is not the lack of cooperation of States which prevents the release of Mr Mokom but the risk of flight which has to be mitigated by conditions that currently cannot be enforced. As to the Chamber's legal findings, the Prosecution asserts that the Appeals Chamber did not introduce an unlawful requirement entailing the delegation of judicial authority under article 60 of the Statute but only reiterated the

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need for the Chamber to ensure that the conditions deemed necessary under the same provision are in fact enforceable. The Prosecution adds that this is the Court's legal framework and that the Chamber cannot change or depart from the Appeals Chamber's jurisprudence. Furthermore, the Prosecution asserts that, in any event, the Requests fails to meet the standard of reconsideration as the Defence fails to show that: (i) the conditions upon which the Decisions were grounded have changed; (ii) the Chamber committed any clear error of reasoning; and (iii) a reconsideration is necessary to prevent an injustice.

10. In the Leave to Reply Request, the Defence submits that a reply is necessary to address the allegations of the Prosecution that the Request misrepresents the Chamber's factual and legal findings. It alleges that it could not have anticipated: (i) the fundamental divergence between the parties with regard to the Chamber's factual findings; and (ii) the Prosecution's references to decisions of the Court and other international(ised) courts as well as its failure to engage with some of the issues raised by the Defence in relation to the Chamber's legal findings.

11. In the Response to the Leave to Reply Request, the Prosecution alleges that its Response addresses factual and legal arguments raised by the Defence in its Request and, as such, could have been reasonably anticipated. The Prosecution further contends that a reply is not necessary for the adjudication of the matter.

### **III. DETERMINATION**

#### **A. The Leave to Reply Request**

12. According to Regulation 24(5) of the Regulations of the Court (the 'Regulations'), a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

13. The Chamber notes that the Defence either does not allege that the Response raises new issues<sup>7</sup> or does not elaborate to what extent the Prosecution's arguments are new,<sup>8</sup> but rather wishes to reply to the Prosecution's counter arguments to the Defence's initial submissions. The Defence fails to show that it could not have anticipated the

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<sup>7</sup> See Leave to Reply Request, paras 11-12, 14-16.

<sup>8</sup> See Leave to Reply Request, para. 13.

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arguments raised in the Response, especially as: (i) the divergences between the Defence and the Prosecution with regard to the Chamber's factual findings have been evident since the Defence's request for interim measures; and (ii) the arguments raised by the Prosecution in relation to the jurisprudence of the Court and other international(ised) tribunals are in direct response to the Defence's references to such jurisprudence in the Request. Furthermore, the Chamber observes that the Defence has made substantive submissions in its Leave to Reply Request. The Chamber recalls that requests pursuant to regulation 24(5) of the Regulations must be limited to demonstrating the requirements for providing a reply, and that any substantive arguments may only be submitted upon receiving the Chamber's authorisation.

14. Therefore, the Chamber finds that the requirements arising from regulation 24(5) of the Regulations have not been fulfilled. Moreover, further submissions by the Defence would not otherwise assist the Chamber. Accordingly, the Chamber rejects the Leave to Reply Request.

## **B. The Request for Reconsideration**

15. The Chamber recalls that the mechanism of reconsideration has no statutory basis, but that it exists as an exceptional remedy<sup>9</sup> which may be allowed only under strict and limited conditions and subject to the fulfilment of a twofold requirement: (i) the conditions upon which the decision was grounded have changed, and (ii) it is necessary to prevent an injustice.<sup>10</sup>

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<sup>9</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Kilolo Defence Request for Reconsideration](#), 15 July 2015, ICC-01/05-01/13-1085, para. 4; Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits](#), 10 February 2015, ICC-01/09-01/11-1813, para. 19. See also, generally, Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for reconsideration of the decision on time and page extensions](#), 1 October 2019, ICC-01/04-02/06-2426.

<sup>10</sup> Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Decision on Mr Mokom's requests for reconsideration and leave to appeal the 'Order on appointment of Mr Kaufman as Counsel for Mr Mokom'](#), 14 April 2022, ICC-01/14-01/22-43, public, para. 19; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'](#), 11 March 2021, ICC-01/14-01/18-447, para. 16; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters'](#), 24 May 2019, ICC-01/14-01/18-206, para. 20.

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16. The Chamber considers that the basis for the Interim Release Decision and the Interim Measures Decision has remained unchanged. The Defence does not bring forward any argument to the contrary. The Request denounces the lack of cooperation by States and the Assembly of States Parties, while inviting the Chamber to depart from a so-called Prior State Requirement. As such, the Request amounts to a mere disagreement with the application of the law by the Chamber.

17. Since the above-mentioned requirements are cumulative, it is not necessary to address whether reconsideration is necessary to prevent an injustice. It follows that reconsideration of the Interim Release Decision and of the Interim Measures Decision is not warranted. In any event, the Chamber deems it important to reiterate that Mr Mokom's pre-trial detention is justified because he constitutes a risk of flight and, at present, no State is willing to accept him and to enforce the requisite conditions to mitigate this risk. Therefore, the detention of Mr Mokom is justified in light of articles 58(1)(b) and 60 of the Statute, and rule 119 of the Rules of Procedure and Evidence. Accordingly, the Chamber rejects the Request.

18. Finally, the Chamber notes that the Request, the Response, the Leave to Reply Request and the Response to the Leave to Reply Request were filed confidentially and that no public redacted versions have been filed to date. Therefore, the Chamber orders the Defence and Prosecution to file public redacted versions of these filings (as applicable) by 9 June 2023.

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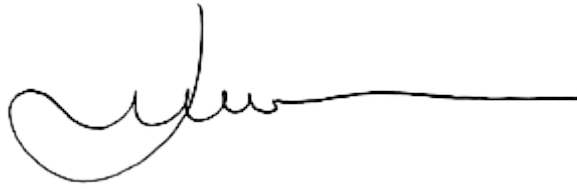
**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Leave to Reply Request;

**REJECTS** the Request; and

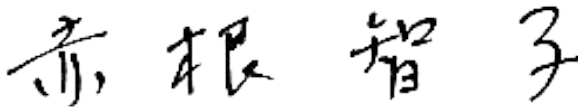
**ORDERS** the Defence and Prosecution to file public redacted versions of ICC-01/14-01/22-203-Conf, ICC-01/14-01/22-210-Conf, ICC-01/14-01/22-211-Conf and ICC-01/14-01/22-213-Conf (as applicable) by no later than 9 June 2023.

Done in English. A French translation will follow. The English version remains authoritative.



**Judge Rosario Salvatore Aitala**

**Presiding**



**Judge Tomoko Akane**



**Judge Sergio Gerardo**

**Ugalde Godínez**

Dated this Thursday, 1 June 2023.

At The Hague, The Netherlands.