

# Cooperation Cherry-Picking at the ICC

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On the 8<sup>th</sup> of March 2023, the Pre-Trial Chamber II of the International Criminal Court (ICC) issued a decision on the [interim release of Maxime Mokom](#). While it held that the set-out criteria for granting such a release were officially met, it ultimately had to deny the request because no State Party offered to host Mr. Mokom for the duration of the trial. This decision is just the latest amongst many that relate to the issues encountered by defendants awaiting their release. It sheds light on State Parties' understanding of necessary engagement and cooperation with international criminal justice procedures, particularly with regard to European State Parties. This post reflects on States' willingness to engage with defendants released from ICC custody, specifically their interim release, in view of the findings of the Pre-Trial Chamber in [The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka](#).

Maxime Mokom is [suspected](#) of having committed war crimes and crimes against humanity in various locations in the Central African Republic and was surrendered to the ICC by the authorities of the Republic of Chad on 14 March 2022. Mr. Mokom is [said to have participated](#), as leader of the Anti-Balaka armed group, in murders, exterminations, and tortures as well as in the facilitating of the use of child soldiers. He is currently awaiting trial with the confirmation of charges hearing set to take place on the 22<sup>nd</sup> of August 2023.

## The Findings of the ICC

To determine whether Mr. Mokom is entitled to interim release, the Chamber assessed, as per Article 60(2) of the [Rome Statute](#), whether the conditions set out in Article 58(1) of the Rome Statute were still met. 'Interim release' refers to the release of an individual detained by the ICC who is awaiting their trial. Particularly, the Chamber assessed whether detention is necessary "(i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) where applicable, to prevent the person from continuing with the commission of that crime or related crime which is within the jurisdiction of the Court and which arises out of the same circumstances." This means that for an interim release to be granted, the Pre-Trial Chamber must find that none of the three conditions set out in Article 58(1) are met.

The three judges, Judge Aitala, Judge Akane, and Judge Godínez, found Mr. Mokom theoretically eligible for interim release based on (i) the geographical distance from the locations of the crimes in questions, (ii) the time passed between crimes in question, arrest warrant, and potential release, and (iii) the mitigation of any risks through specific measures mandated by the Court. Specifically, the Pre-Trial Chamber argued that although Mr. Mokom was detained in the Republic of Chad, as opposed to the Central African Republic, and therefore posed a potential flight risk, with a non-exhaustive list of measures including conditions such as reporting

physically to a local police station and by telephone to the Registry every day, wearing a device to electronically monitor movements, as well as not to use any methods of communication other than a designated mobile telephone to be provided by the Registry, the risk could be effectively mitigated. Furthermore, and essential with regard to the assessment of State Parties' cooperation, Mr. Mokom sought to be released to a State within Europe, with close proximity to the Court and, consequently, significant distance to the locations of the crimes in question. This geographical request was essential to the Court's decision on whether he posed a danger to the investigation or proceedings itself and whether the release would enable him to commit further crimes. The Chamber found that such geographical distance was sufficient to mitigate the considered risks. And, most importantly, pursuant to Article 60(3) of the Rome Statute, it was the Chamber's view that, due to preceding procedural issues, the detention of 17 months prior to the confirmation of charges hearing would exceed the reasonable period Mr. Mokom could be held – since initially a period of 10 months was anticipated.

However, despite the above, they ultimately rejected his request because no State Party could be identified that would host Mr. Mokom. As Bemba [established](#), a suitable State to host the defendant must be identified prior to the granting of his release. Important to note here is that the Pre-Trial Chamber only held that the requirements of Article 58(1) were not met if Mr. Mokom were to remain within Europe, as stated in paragraph 54 of the Decision. This means that only European State Parties could have offered to host him, and therefore, only European State Parties failed to do so. The Chamber clarified in its decision that the States indicated by Mr. Mokom as possible host States, either 'explicitly rejected to accept him (...) or [did] not [respond] to the Chamber's repeated invitations to provide observations'. The [four reports](#) on Registry Consultations (see here for [first](#), [second](#), [third](#)) provide little insight into the reasoning of selected State Parties. However, previous observations, as well as observations submitted by the [defence](#), the [prosecution](#) and the [victims](#) in this case, reveal general arguments put forward by potential host States as to why they are unable to receive the accused: not only are States unwilling to take on the responsibility of receiving a defendant, but the conditions attached and therefore the requirements for enforcing such conditions are in most cases perceived as too burdensome. At the heart of such rejections, however, is the belief that States do not feel obliged to accept a defendant into their territory and know that such acceptance cannot be imposed on the State.

### **Circumventing Responsibility?**

The decision echoes the [well-known challenges](#) with regard to the release of defendants from ICC custody. While State Parties officially recognise the importance of due process and safeguarding of the rights of the defendant as integral to the overall functioning of the international criminal justice system, the Mokom decision shows, once again, their failure to take individual responsibility through effective cooperation with the Court when necessary. The release of a defendant, and this includes the interim release, is an essential right of the accused, and in order to effectively exercise such right, it requires States' willingness to cooperate. The right to be released, as per Rule 185(1) of the [Rules of Procedure and Evidence](#), should

be exercisable for any defendant. This rests on the ‘right to liberty’ as recognised in international human rights law, and while this post will not go into great lengths outlining the Court’s interpretation of such right (or the lack thereof) over the years, it is apparent that for the Court to ensure that such right is not breached, State Parties are required to take on a proactive role. Article 93(1)(l) of the Rome Statute specifically stipulates that:

“State Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(l) any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”.

If read in conjunction with generally recognised international human rights principles, the referenced article ultimately requires the cooperation of States even *sans* an express obligation to accept individuals for interim release.

### **Final Thoughts on Temporary Issues**

Cooperation should not be cherry-picked to suit a state’s agenda. While it is understandable that granting an individual accused of war crimes and crimes against humanity the right to stay within one’s territory for the duration of the trial may pose (limited) legal, practical, and political challenges, non-responsiveness or outright denial of such hosting is not an appropriate response. States cannot pride themselves on the successes of international criminal justice when unwilling to commit to ensuring that all rights of all participating parties are upheld. However, even after years of harsh criticism of the treatment of released defendants, there is no coherent scheme that the Court can rely on with regard to cooperation. And while this decision on interim release is, unfortunately, only a small piece within a larger ‘lack-of-cooperation’ saga. State Parties cannot demand a functioning system of international criminal justice without accepting the burden of maintaining and upholding such system. The refusal to cooperate undermines the effectiveness of the Court and prevents it from operating at its highest standards, both with regard to procedural justness as well as safeguarding the legal standards of international criminal justice.

States cannot claim to participate in the effort to end impunity, but fail to take the necessary, and sometimes politically uncomfortable, steps to make such a reality.

