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**International
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Court**

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No: **ICC-01/14-01/18**

Date: **30 August 2022**

TRIAL CHAMBER V

Before:

**Judge Bertrand Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

**Public redacted Version of “Defence response to the ‘Prosecution’s Request to grant
Maxime Jeoffroy Eli Mokom Gawaka access to the record of the Yekatom and
Ngaïssona case” (ICC-01/14-01/18-1353), 23 May 2022 (ICC-01/14-01/18-1427-Conf)**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence for Mr Ngaïssona (“Defence”) requests Trial Chamber V (“Chamber”) to reject the “Prosecution’s Request to grant Maxime Jeoffroy Eli Mokom Gawaka access to the record of the *Yekatom and Ngaïssona* case” (“Request”) filed on 8 April 2022.¹
2. The Defence opposes the Request given its overly broad scope, which infringes Mr Ngaïssona’s fair trial rights as protected in article 67(1) of the Rome Statute (“Statute”). The Request is also partly premature. The Prosecution may file a new targeted request identifying the documents it wishes to disclose in the *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka* case (“Mokom case”).² In the alternative, the Defence objects to the disclosure of several documents, which are either irrelevant, pertain to Mr Ngaïssona’s private life, or contain information relating to confidential Defence strategy, and may thus not be shared with third parties.
3. In addition, to protect the integrity of Defence investigations and witnesses, the Defence requests the Chamber to direct the Prosecution to seek an amendment to its request ICC-01/14-01/22-24 before Pre-Trial Chamber II, such that the protocol on handling of confidential information and contacts with witnesses applies across the Mokom and the present cases.

II. Relevant Procedural History

4. On 29 September 2021, the Prosecution filed an urgent request to disclose the transcripts of the testimony of eight witnesses into the *Prosecutor v. Mahamat Said Abdel Kani* case (“Saïd case”), listed in a confidential annex.³ On 5 October, the

¹ ICC-01/14-01/18-1353 (“Request”).

² ICC-01/14-01/22.

³ ICC-01/14-01/18-1122 and ICC-01/14-01/18-1122-Conf-AnxA.

Prosecution filed a request for the disclosure of additional transcripts to the Saïd Defence.⁴ On the same day, the Chamber granted the requests.⁵

5. On 8 April 2022, the Prosecution filed the Request, wherein it seeks the disclosure of the entire case file into the *Mokom* case. It seeks the disclosure of: (i) all confidential submissions of the parties and participants excluding *ex parte* ones; (ii) all transcripts of testimonies, including private sessions; (iii) all confidential decisions issued by this Chamber, excluding *ex parte* ones; (iv) all confidential exhibits deemed formally submitted into evidence; and (v) all witness statements, with the existing redactions applied.⁶
6. On 11 April 2022, the Prosecution filed a second request for disclosure of the transcripts of testimonies of 14 witnesses from the present case into the Saïd case, with a confidential annex listing the transcripts.⁷
7. On 19 April 2022, the Chamber granted the Defence's request for an extension of time until 23 May 2022 to file its response to the Request.⁸
8. On 9 May 2022, the Defence filed its response to the Prosecution's request ICC-01/14-01/18-1358-Corr into the Saïd case. The Defence deferred to the Chamber for disclosure of transcripts of witnesses who had already testified, but opposed the request insofar as the Prosecution requested disclosure of prospective confidential transcripts.⁹
9. On 19 May 2022, the Chamber held that 'associated exhibits' linked to witnesses subject to Decision ICC-01/14-01/18-1129 and subject to the pending request ICC-

⁴ Email from the Prosecution to the Chamber and parties, 5 October 2021, at 13:34.

⁵ ICC-01/14-01/18-1129.

⁶ Request, para. 1.

⁷ ICC-01/14-01/18-1358-Corr and ICC-01/14-01/18-1358-AnxA.

⁸ Email from the Chamber to the parties and participants, 19 April 2022, at 15:46. See Defence's request for an extension of time: Email from the Defence to the Chamber, 13 April 2022 16:54.

⁹ ICC-01/14-01/18-1399.

01/14-01/18-1358-Corr were not automatically included in the disclosure of transcripts requested by the Prosecution. The Chamber instructed the Prosecution to file a request on the record should it wish to include 'associated exhibits' to its inter-case disclosure requests.¹⁰

III. Applicable Law

10. Article 67(1) of the Rome Statute enshrines the fundamental fair trial rights of accused persons, including the principle of equality of arms and the right to be heard.
11. Article 64(2) provides that the "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses".
12. Article 21(3) Statute provides that the application and interpretation of the Statute "must be consistent with internationally recognized human rights", which includes the right to privacy.
13. Article 68(1) provides that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".
14. Regulation 42 of the Regulations of the Court ("Regulations") governs the application and variation of protective measures. Regulation 42(2) provides that when "the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures". Regulation 42(3) provides that any application to vary protective measures shall first be made to

¹⁰ Email from the Chamber to the parties, 19 May 2022, at 10:35,

the Chamber which issued the order to the extent possible. Before making such a determination, “the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made”.¹¹

IV. Confidentiality

15. The present request is filed on a confidential basis pursuant to regulation 23*bis*(1) of the Regulations as it contains references to confidential information and evidence. A public redacted version will be filed as soon as practicable.

V. Submissions

A. The Prosecution’s sweeping Request to disclose the entire case file into the *Mokom* case should be rejected

a) Mr Ngaïssona’s fair trial rights warrant the rejection of the Request

16. The Prosecution’s Request is impermissibly broad. It amounts to a blanket request for disclosure of the near entirety of the case file to third parties.¹² The Prosecution’s approach is prejudicial to the Defence and incompatible with Mr Ngaïssona’s fair trial rights guaranteed under article 67(1) of the Statute.

17. *First*, the Request breaches the principle of equality enshrined in article 67(1) of the Statute. By adopting an indiscriminate approach to disclosure of confidential information to third parties, the Prosecution shifts the burden onto the Defence of reviewing more than [REDACTED] filings and decisions and over [REDACTED] items of evidence – amounting to [REDACTED] pages – with a view of identifying confidentiality-related concerns arising from disclosure into

¹¹ Regulation 42(4), Regulations of the Court.

¹² The only documents which the Prosecution excludes from the scope of the Request are victim participation and reparations forms which are not formally submitted into evidence by the Chamber, “ex parte” documents, and exhibits which have not been formally submitted, see Request, para. 1.

the *Mokom* case. These include privacy¹³ and witness protection issues. Given its limited resources, it is fundamentally unfair to shift this burden – arising solely from the Prosecution’s disclosure duty in the *Mokom* case – onto the Defence. Although disclosure is a necessary component of fair trials, it must be stressed that the Defence has no disclosure obligations towards the *Mokom* Defence. It is the Prosecution’s obligation to clearly identify disclosable material, for instance by way of an annex,¹⁴ and to identify potential confidentiality-related issues. The Chamber recently required specificity in the Prosecution’s disclosure requests.¹⁵ This is consistent with the practice of Trial Chamber III in the *Bemba* case. The Prosecution had requested to disclose material into the *Bemba et al* case. Trial Chamber III ordered that the Prosecution apply redactions to information in a Defence List of Evidence that was not included in the Prosecution disclosure request.¹⁶ In the ICTY *Kordić and Čerkez* case, the Trial Chamber rejected a request for disclosure because “the Defence has failed to describe the documents for which access was sought even in the broadest terms, thereby engaging in a fishing expedition”.¹⁷

18. The core of the Request, which is three paragraphs long, is also severely lacking in substantiation. It is the Prosecution’s obligation to substantiate its Request.¹⁸ The Defence is placed in the unattainable and unfair position of having to fill the gaps in the Prosecution’s reasoning.

19. Although the Chamber granted the Defence additional time to respond, the Defence does not have the resources to review the entire case file with a view of identifying every confidentiality-issue that may arise. By failing to identify

¹³ See Section B, below.

¹⁴ As the Prosecution has done in its previous inter-case disclosure requests. See CC-01/14-01/18-1358-Corr and its annex ICC-01/14-01/18-1358-Conf-AnxA.

¹⁵ Email from the Chamber to the parties and participants, 19 May 2022, at 10:35.

¹⁶ ICC-01/05-01/08-3074, para. 21.

¹⁷ *Prosecutor v. Kordić and Čerkez*, Order on Pasko Ljubčić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, Case No. IT-95-14/2-A, 19 July 2002, p. 4.

¹⁸ See regulation 23(1)(d), Regulations of the Court.

disclosable portions of the case file, and overlooking potential concerns relating to witness protection and consent, Mr Ngaïssona's right to privacy, the need to protect the integrity of investigations, and other issues arising from disclosure into the *Mokom* case, the Prosecution Request does not comply with its duty of fairness.

20. *Second*, the Prosecution's suggested approach, albeit unclear, seems to request disclosure of both past and future items.¹⁹ This is contrary to procedural fairness guaranteed by article 67(1) of the Statute, including Mr Ngaïssona's right to be heard.²⁰

21. In discussing the right to be heard, the Appeals Chamber has noted "the right to be heard can be classified as an absolute guarantee"²¹ and the right "can only be seen to be effective if the observations are actually 'heard', that is duly considered by the trial court".²² Regulation 24(1) of the Regulations of the Registry provides that the Defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, said Regulations and any order of the Chamber. The Prosecution's apparent Request for a prospective ruling on future disclosures would effectively prevent the Defence from responding, contrary to regulation 24(1), because the Defence cannot make observations now upon issues that do not yet exist.

22. *Third*, the Prosecution's Request is incompatible with rule 68(1) of the Statute. Allowing advance authorisation to disclose future evidence would prevent the parties from scrutinising the material, consulting with the Victims and Witnesses Unit ("VWU") if necessary, proposing potential redactions, and raising security-

¹⁹ The Prosecution has recently sought the disclosure of future material in its request, which the Defence opposed.

²⁰ On the right to be heard comprised in the general right to a fair trial under Article 67(1) and 64(2) see *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2297, 28 July 2010, para. 56.

²¹ *Ibid.*

²² *Ibid.*

related concerns pursuant to regulation 42(3), based on circumstances existing at the time the evidence materialises.

23. *Fourth*, the Prosecution's proposed approach is inconsistent with judicial economy and the right to an expeditious trial, since the Chamber may be forced to review its decision on disclosure between cases based on future circumstances that will only be known once future evidence is made available.²³ Issues relating to confidentiality and witness protection may arise later on. In the ICTY *Krajišnik* case, the Trial Chamber rejected the portion of the request which related to future confidential material. The Trial Chamber held that "extending the reach of the order beyond the date of this Decision, as has been requested by the Applicant, would be inappropriate as it would impose a constraint upon the Trial Chamber's flexibility in responding appropriately to protection issues which may arise in respect of future material in this case."²⁴

24. *Fifth*, the seeking of an advance ruling on future material is premature and procedurally unsound given prospective evidence cannot be said to be within the Prosecution's "possession or control".²⁵ The Defence incorporates by reference its recent submissions opposing the disclosure of future material.²⁶

25. The Request is also premature because the scope of the Prosecution *Mokom* case is not yet defined: the *Mokom* case is at its earliest stages; Mr Mokom does not appear to have a permanent Counsel at present; and the Prosecution has not filed its Document Containing the Charges. There is thus only a marginal definition of the scope of charges against Mr Mokom. Given this, beyond the generalities advanced by the Prosecution, the Chamber may not be in a position, at this stage,

²³ See ICC-01/14-01/18-1399.

²⁴ *Prosecutor v. Krajišnik*, Decision on Jankovic's Defence Motion for Access to Confidential and Under Seal material in the Krajišnik Case relating to the Municipality of Foca, No. IT-00-39-T, 14 July 2005, p. 4.

²⁵ See rule 77, Rules of Procedure and Evidence.

²⁶ ICC-01/14-01/18-1399.

to assess and balance the rights of Mr Ngaïssona raised elsewhere in this response against the purported relevance to the *Mokom* case.

26. In light of the above, the Trial Chamber should reject the Request. The Prosecution may file a new and targeted request comprising a list of disclosable materials.²⁷

B. In the alternative, to preserve confidentiality and Mr Ngaïssona's fundamental right to privacy, certain items should not be disclosed into the *Mokom* case

27. In the alternative, should the Chamber reject the Defence's primary relief, the Chamber should exclude irrelevant documents and documents affecting Mr Ngaïssona's right to privacy from disclosure into the *Mokom* case.

28. The Prosecution argues that the near entirety²⁸ of the case file is relevant to the Defence of Mr Mokom due to the alleged "geographical, temporal, and material substantive overlap" between the two cases.²⁹ This sweeping statement is factually incorrect. Among the colossal body of items on the case record, there are many which are not relevant to the Defence of Mr Mokom. Although the Defence does not have the resources to conduct a full review of all the material in the file in the time since the Request was filed, a task which falls within the Prosecution's remit, it has identified some documents which should be excluded from disclosure to third parties.

a) Documents relating to Mr Ngaïssona's detention

29. Documents relating to Mr Ngaïssona's detention, including those pertaining to [REDACTED], should be excluded from disclosure.

²⁷ See ICC-01/14-01/18-1358 and ICC-01/14-01/18-1358-Conf-AnxA.

²⁸ See footnote 12, above.

²⁹ Request, para. 2.

30. *First*, these documents are irrelevant to the *Mokom* case; they bear no link to the alleged charges against Mr Ngaïssona and Mr Mokom. They should therefore have been excluded from the Prosecution's Request. Upon ruling on a Defence request for disclosure of material from the *Lubanga* case, Trial Chamber VI in the *Ntaganda* case held that "anything which relates purely to procedural matters specific to the *Lubanga* case or is otherwise irrelevant to the Defence" should be excluded from the disclosure to the Defence for Mr Ntaganda.³⁰ The same reasoning should apply here.

31. *Second*, the disclosure of confidential detention-related filings is incompatible with Mr Ngaïssona's fundamental right to privacy as guaranteed by international human rights law. Detention-related documents contain sensitive and private information for which Mr Ngaïssona has a reasonable expectation of privacy. They include information relating, among others, to [REDACTED].

32. A suspect or accused person's right to privacy is protected by the legal framework of the Court. Article 21(3) of the Statute provides that the application and interpretation of the Statute "must be consistent with internationally recognized human rights". The right to privacy is protected under numerous internationally recognized human rights instruments including article 12 of the Universal Declaration of Human Rights, Article 17 of the ICCPR and article 8 of the ECHR, and has been asserted by this Court.³¹ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has defined privacy as:

the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others,

³⁰ *Prosecutor v. Ntaganda*, Order on Defence access to confidential material in the *Lubanga* case, , ICC-01/04-02/06-806, 1 September 2015, paras 8-12.

³¹ *See Prosecutor v. Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015, para. 18.

free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how is that information used.³²

33. Any unavoidable interference with the right to privacy should be limited as far as possible to that which is rendered strictly necessary by the specific features of the proceedings.³³ The disclosure of information relating to Mr Ngaïssona's private and family life is clearly avoidable and unnecessary in the present case. Although some private information in detention-related documents is classified *ex parte*, – a category of documents which the Prosecution excludes from its Request – or as 'confidential-redacted', further redactions were applied to public redacted versions of those filings to protect Mr Ngaïssona's right to privacy. The *ex parte* classification of those documents and the additional redactions applied towards the public are indicative of Mr Ngaïssona's privacy interests, which are at stake.

34. The parties and participants in the *Mokom* case are sufficiently informed of Mr Ngaïssona's detention-related filings and decisions through the public record.³⁴ There is thus no basis for their disclosure.

b) Mr Ngaïssona's personal communications should be excluded from disclosure into the *Mokom* case

35. The Prosecution has collected and disclosed a significant body of Mr Ngaïssona's alleged private email and call data records ("CDR") to the parties and

³² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN A/HRC/23/40, 17 April 2013, para. 22.

³³ See for instance, ECHR, L.L. c. France, No 7508/02, 10 October 2006, para 45.

³⁴ For instance see: ICC-01/14-01/18-138-Red; ICC-01/14-01/18-171-Red; ICC-01/14-01/18-234-Red2; ICC-01/14-01/18-300-Red3; ICC-01/14-01/18-355-Red2; ICC-01/14-01/18-373-Red2; ICC-01/14-01/18-391-Red; ICC-01/14-01/18-397-Red3; ICC-01/14-01/18-401-Red2; ICC-01/14-01/18-408-Red3; ICC-01/14-01/18-420-Red3; ICC-01/14-01/18-426-Corr-Red2; ICC-01/14-01/18-440-Red; ICC-01/14-01/18-460-Red; ICC-01/14-01/18-496-Red2; ICC-01/14-01/18-561-Red; ICC-01/14-01/18-541-Red; ICC-01/14-01/18-556-Conf-Exp; ICC-01/14-01/18-559-Red; ICC-01/14-01/18-657-Red; ICC-01/14-01/18-924-Red.

participants in this case. Mr Ngaïssona has a reasonable expectation of privacy with regard to those communications. According to the Request, emails which are formally submitted into the case record are included within the scope of the requested disclosure.

36. *First*, several emails were collected and disclosed which contain private communications between Mr Ngaïssona and third parties. These emails should be excluded from disclosure into the *Mokom* case. In particular, emails containing information of a strictly personal nature should be excluded, or in the alternative, disclosed in redacted form.

37. By way of example, items CAR-OTP-2124-0982, CAR-OTP-2124-0848, CAR-OTP-2124-0759, CAR-OTP-2124-0708 are private email exchanges allegedly between Mr Ngaïssona and third parties, of a personal nature. Given Mr Ngaïssona's reasonable expectation of privacy with respect to those items, in which he is an alleged interlocutor, they should not be disclosed to third parties. The same logic should apply to parties' submissions and decisions containing information about Mr Ngaïssona's alleged emails with third parties.³⁵

38. The Prosecution may argue that some of the private emails attributed to Mr Ngaïssona are relevant in that they may be used to attribute certain alleged telephone numbers to Mr Ngaïssona. However, this potential argument should fail. The Prosecution has not argued that Mr Ngaïssona's alleged telephone attributions are relevant to the *Mokom* case and it is the Defence's position that they are not. Even if the Chamber were to find some relevance in emails attributed to Mr Ngaïssona, the Prosecution relies on other documents, which are less private in nature, for alleged attribution to Mr Ngaïssona. For instance, for the telephone numbers [REDACTED] and [REDACTED], mentioned in the

³⁵ For instance: ICC-01/14-01/18-973-Conf ; ICC-01/14-01/18-958-Conf.

private email in which Mr Ngaïssona is an alleged interlocutor, CAR-OTP-2124-0759, the Prosecution relies on several other items of evidence to attribute the same numbers to Mr Ngaïssona. Among these are documents to which Mr Ngaïssona does not have a reasonable expectation of privacy.³⁶ Should the Chamber deem Mr Ngaïssona's alleged private emails to be disclosable into the *Mokom* case, they should at a minimum be redacted in order to preserve Mr Ngaïssona's right to privacy. Matters of redactions can be resolved *inter partes*, should the Prosecution file a new and more targeted inter-case disclosure request. Upon ruling on a request from the Defence of Mr Ntaganda for access to the case record in the *Lubanga* case, Trial Chamber VI directed the parties to identify:

any specific material for which it considers that additional protective measures, including redactions, is required prior to disclosure of the Requested Material to the Defence. The other parties and participants to the *Lubanga* case are similarly directed to submit any specific proposals for additional protective measures that are required with respect of the Requested Material, including redactions, providing all relevant information to enable the Chamber to subsequently rule on the matter.³⁷

39. *Second*, several CDR including SMS messages were [REDACTED] by the [REDACTED]. A reasonable expectation of privacy exists in relation to [REDACTED], which is evidenced, *inter alia*, by the Prosecution first disclosing

³⁶ For instance : CAR-OTP-2050-0273-R03 at 0277; CAR-OTP-2001-5365, at tab Bangui, row 10; CAR-OTP-2020-0156, at row 21; CAR-OTP-2025-0408 at 0409-0427; CAR-OTP-2084-0164; CAR-OTP-2039-0020; CAR-OTP-2084-0153, at 0153. See also Annex C to the Prosecution's submission of call data records and related evidence via the "bar table " (ICC-01/14-01/18-1296-Conf-AnxC), "supporting evidence" for the numbers [REDACTED] and [REDACTED].

³⁷ Emphasis added. *Prosecutor v. Bosco Ntaganda*, Order on Defence access to confidential material in the Lubanga case, ICC-01/04-02/06-806, 1 September 2015, paras 5-12.

the beginning of its investigations, the Defence has collected documents and met with potential witnesses, while considering its disclosure obligations with respect to the parties and participants in the present case. The possibility that the fruit of its investigations would potentially be disclosed, without the consent of potential witnesses, to third parties, was not envisaged. The Prosecution's open-ended request, which is tantamount to seeking an expansion of the Defence disclosure obligations into the *Mokom* case, is fundamentally unfair. The Defence should not be placed in a position whereby it may become reluctant to collect documentary or witness evidence, for fear of having to disclose the information or the identity of its Defence witnesses to third parties. Such are not the parameters of Defence disclosure obligations in this trial, pursuant to rule 78 of the Rules of Procedure and Evidence.

44. Moreover, the Defence requests the exclusion of cooperation-related filings and decisions from the scope of any disclosure into the *Mokom* case, as they refer to confidential Defence strategy, including ICC-01/14-01/18-1133-Conf, ICC-01/14-01/18-1133-Conf-AnxA-Red; ICC-01/14-01/18-1133-Conf-AnxB; ICC-01/14-01/18-1133-Conf-AnxC, ICC-01/14-01/18-1141-Conf; ICC-01/14-01/18-1159-Conf and ICC-01/14-01/18-1133-Conf-tFRA.

45. The Request disregards considerations, which the Prosecution and Trial Chambers have previously considered important in circumstances where the Prosecution requested inter-case disclosure. In the *Bemba* case, for instance, the Prosecution included as part of its request for disclosure in the *Bemba et al* case that the VWU had been consulted and saw no security concerns.⁴⁰ Presently, there are no protective measures for potential Defence witnesses upon which the VWU could offer an opinion. Similarly, the Request also does not address Trial

⁴⁰ *Prosecutor v. Bemba*, Redacted Version of "Decision on 'Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding'", ICC-01/05-01/08-3098-Red, 26 June 2014, para. 5(iii).

Chamber III's view that "the defence, which as the calling party is best placed to know the security situation faced by its witnesses".⁴¹ It does not even address the precedent whereby Trial Chamber III offered the Bemba Defence an opportunity to review transcripts for redactions before they were transmitted to another case.⁴²

d) Ex parte documents

46. The Prosecution requests that *ex parte* documents be excluded from disclosure into the *Mokom* case. However, the Prosecution does not clarify whether this includes the confidential redacted versions of those filings. The Defence understands the Prosecution's Request to only include disclosure of confidential redacted versions where all parties have access.⁴³ If the Trial Chamber does not share this understanding, then the Defence requests the Chamber to seek Defence views on the suitability of disclosure of these partially *ex parte* filings.

e) Other irrelevant documents of a purely procedural nature

47. The Defence further requests the Chamber to reject the disclosure of all documents which are related "purely to procedural matters" specific to the present case.⁴⁴ Examples of such documents are filings and decisions which relate to the appointment of Defence counsel;⁴⁵ Defence requests to visit Mr Ngaïssona in detention during the COVID-19 pandemic;⁴⁶ responses pursuant to

⁴¹ *Prosecutor v. Bemba*, Decision on "Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding", ICC-01/05-01/08-3014, 12 March 2014, para. 14.

⁴² *Ibid.*

⁴³ I.e. in some circumstances, a confidential redacted version may continue to be *ex parte* to another party or participant(s).

⁴⁴ *Prosecutor v. Bosco Ntaganda*, Order on Defence access to confidential material in the Lubanga case, Trial Chamber VI, 1st September 2015, ICC-01/04-02/06-806, paras 8-12.

⁴⁵ See for instance: ICC-01/14-01/18-902-Conf; ICC-01/14-01/18-791-Conf; ICC-01/14-01/18-791-Conf-AnxA; ICC-01/14-01/18-898-Conf ; ICC-01/14-01/18-916-Conf ; ICC-01/14-01/18-764-Conf ; ICC-01/14-01/18-837-Conf.

⁴⁶ For instance: ICC-01/14-01/18-564-Conf; ICC-01/14-01/18-575-Conf ; ICC-01/14-01/18-568-Conf-Red ; ICC-01/14-01/18-833-Conf-Red and ICC-01/14-01/18-833-Conf-Anx;. See also, relating to [REDACTED]: ICC-

regulation 35 of the Regulations;⁴⁷ Defence submissions relating to [REDACTED];⁴⁸ and Registry reports and annexes on decisions issued by way of email.⁴⁹

C. The Protocol on handling confidential information and contacts with witnesses should apply across the *Mokom* and the present cases

48. To protect the integrity of the proceedings, the Protocol on the Handling of Confidential Information and Contacts should apply across the *Mokom* and the present cases.⁵⁰

49. The interests and considerations that the protocol seeks to protect within a given case and also between the co-Accused are equally applicable between trials if, as the Prosecution alleges, there is “substantive overlap between the Yekatom and Ngaïssona case and the Mokom case”.⁵¹ For instance, if [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

VI. Conclusion

50. For the purposes of the *Mokom* case, Mr Ngaïssona is an individual who benefits from the same assurances of safety, physical and psychological well-being, and dignity pursuant to article 68(1) of the Statute, as any other individual with a nexus to a case at the Court. This is also true of Mr Ngaïssona’s family and acquaintances. To preserve Mr Ngaïssona’s right to a fair trial, his right to private and family life, and the integrity of Defence investigations and the proceedings,

01/14-01/18-544-Conf; ICC-01/14-01/18-557-Conf and ICC-01/14-01/18-557-Conf-Anx; ICC-01/14-01/18-558-Conf.

⁴⁷ For example: ICC-01/14-01/18-725-Conf ; ICC-01/14-01/18-596-Conf; ICC-01/14-01/18-388-Conf.

⁴⁸ ICC-01/14-01/18-1014-Conf and ICC-01/14-01/18-1014-Anx.

⁴⁹ For example, ICC-01/14-01/18-1315, with annexes 1 to 11.

⁵⁰ *Prosecutor v. Mokom*, Prosecution’s Request for an E-Court Protocol, a Redaction Protocol, and a Protocol on the Handling of Confidential Information and Contacts with Witnesses, ICC-01/14-01/22-24, 21 March 2022.

⁵¹ Request, para. 2.

the Chamber should reject the Prosecution's Request for unrestricted disclosure of all material into the Mokom case.

VII. Relief sought

51. The Defence respectfully requests the Chamber to

- a. REJECT the Prosecution's Request.
 - i. In the alternative, REJECT disclosure of all irrelevant documents, documents for which Mr Ngaïssona has a reasonable expectation of privacy including Mr Ngaïssona's alleged private emails and CDR, defence documents, and documents relating to cooperation and Defence strategy;
 - ii. Or, in the alternative, ALLOW the Defence to propose redactions to private information before disclosure into the *Mokom* case;
- b. DIRECT the Prosecution to amend its request ICC-01/14-01/22-24 before Pre-Trial Chamber II for the Protocol on Handling Confidential Information and Contacts with Witnesses to apply across the *Mokom* and present cases.

Respectfully submitted,



Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 30 August 2022,

At The Hague, the Netherlands