



Original: English

No. ICC-01/14-01/22

Date: 7 November 2022

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane**

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

Public

Order on disclosure and related matters

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
Mr Kweku Vanderpuye

Counsel for Mr Mokom

Mr Gregory Townsend, Duty Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court, further to its ‘Order on the conduct of the confirmation of charges proceedings’ dated 27 June 2022 (the ‘Order on the Conduct of Proceedings’),¹ issues the present order on several disclosure and related matters.

I. Procedural history

1. Following his arrest and surrender to the Court on 14 March 2022, Mr Maxime Jeoffroy Eli Mokom Gawaka (‘Mr Mokom’) made his first appearance before the Chamber on 22 March 2022,² at which time the confirmation of charges hearing was scheduled to commence on 31 January 2023.

2. On 27 June 2022, the Chamber issued the Order on the Conduct of Proceedings,³ thereby *inter alia* adopting the principles and procedure governing disclosure, as well as the disclosure calendar.

3. A status conference to discuss matters related to the disclosure process took place on 23 September 2022 (the ‘Status Conference’).⁴

II. Determination

4. Pursuant to article 61(3) of the Rome Statute (the ‘Statute’) and rule 121(2) of the Rules of Procedure and Evidence (the ‘Rules’), the Chamber has a duty to ensure that disclosure takes place under satisfactory conditions, i.e. in a transparent, efficient and expeditious manner, allowing the suspect to prepare adequately for the confirmation hearing. For the Chamber to adequately discharge this duty, it is essential that it receives all relevant information in a complete and timely manner, so as to be able to rule on all relevant issues. This order addresses a number of matters raised at the Status Conference that, in the Chamber’s view, require further clarification. It also contains additional instructions regarding the disclosure process.

¹ ICC-01/14-01/22-62.

² ICC-01/14-01/22-T-001-CONF-ENG (public redacted version notified on the same day, ICC-01/14-01/22-T-001-Red-ENG). See also Order convening a hearing for the first appearance of Mr Mokom, 16 March 2022, ICC-01/14-01/22-21.

³ For the relevant submissions of the parties and the Registry, and other relevant information, see the procedural history of the Order on the Conduct of Proceedings at paras 1-13.

⁴ ICC-01/14-01/22-T-004-CONF-ENG (public redacted version notified on the same day, ICC-01/14-01/22-T-004-Red-ENG). See Order convening a status conference and decision designating a Single Judge, 15 September 2022, ICC-01/14-01/22-88-Conf-Exp.

5. At the outset, the Chamber notes the Prosecution's intention to 'migrate' material which is currently part of the *Yekatom and Ngaïssona* case record to the *Mokom* case record.⁵ The submissions of the Prosecution at the Status Conference were however unclear in this regard. Therefore, the Prosecution must explain what such a 'migration' process would exactly entail and how it would affect the disclosure process in the present case through written submissions to be filed by no later than 11 November 2022. The Prosecution shall clarify, in particular, (i) what kind of material (evidence, transcripts, filings, etc.) it intends to 'migrate'; (ii) how the 'migration' would take place from a technical perspective; and (iii) how the 'migration' is consistent with its disclosure obligations. The Chamber recalls that the Prosecution and Mr Mokom's Duty Counsel indicated during the Status Conference that they would liaise about the 'migration' process.⁶ The Prosecution may also inform the Chamber as to any such exchanges having taken place on the matter. Duty Counsel may respond by no later than 17 November 2022.

6. Furthermore, the Chamber stresses that any 'migration' of material from a case record to another shall only be conducted in strict adherence to the Prosecution's statutory disclosure obligations. Merely 'migrating' material from the *Yekatom and Ngaïssona* case record to the *Mokom* case record and providing the *Mokom* Defence with access to it, as suggested by the Prosecution,⁷ does not appear to suffice for this purpose.

7. As 'the scope of the confirmation of charges phase is limited' and 'only evidence of true relevance to the charges in this specific case is to be disclosed',⁸ the Prosecution shall filter and limit the amount of items that would be 'migrated' to the *Mokom* case record. Noting, in particular, that the Prosecution has identified 'about 29,000 items' that would be 'migrated' for the purposes of rule 77 of the Rules,⁹ the Chamber urges

⁵ ICC-01/14-01/22-T-004-CONF-ENG, p. 8, lines 7-12.

⁶ ICC-01/14-01/22-T-004-CONF-ENG, p. 33, lines 10-25 and p. 34, lines 1-10.

⁷ ICC-01/14-01/22-T-004-CONF-ENG, p. 9, lines 16, 20-21.

⁸ Order on the Conduct of Proceedings, para. 28. See also *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, para. 21 ('it is not the amount of evidence presented but its probative value and relevance to the case that is essential for the Chamber's confirmation decision. Therefore, the Prosecutor should not disclose "the greatest volume of evidence", but only that of true relevance to the case').

⁹ ICC-01/14-01/22-T-004-CONF-ENG, p. 9, lines 17-21; p. 10, lines 6-10 and p. 11, lines 10-11.

the Prosecution to take into account the current stage of the proceedings and avoid duplication and redundancy of information when disclosing items pursuant to rule 77 of the Rules. As stated by the Chamber, and consistently with the criteria of rule 77 of the Rules, the Prosecution's responsibility with regard to material disclosed under this provision 'cannot be discharged by making everything that is in its possession or control available to Mr Mokom'.¹⁰

8. The Prosecution 'is expected to organise the evidence it intends to rely upon for the confirmation hearing in such a manner so as to ensure that the disclosure process is focused and carried out efficiently and expeditiously'.¹¹ Therefore, the Prosecution is instructed to differentiate the evidentiary items disclosed in this case, including those 'migrated' from the *Yekatom and Ngaïssona* to the *Mokom* case record, by indicating, for each disclosed item, which sections are deemed to contain incriminating, exonerating and/or other information. Specifically, the Prosecution shall provide the relevant information by using the codes PEXO, INCRIM, R-77, or other, and by indicating the corresponding page and paragraph numbers of the relevant sections of documents, statements and transcripts in a dedicated metadata field. For audio material, the Prosecution is expected to indicate the relevant time intervals and provide the page and/or line numbers of the transcript in the metadata field. For visual evidence, the Prosecution shall include a brief note in the metadata field explaining what is depicted and how it is relevant to the case. Should the Prosecution not be able to implement these instructions with regard to material to be 'migrated' from the *Yekatom and Ngaïssona* to the *Mokom* case record, it shall not proceed with its 'migration', without first explaining to the Chamber how it intends to address the above instructions, or proceed to disclose items according to the regular disclosure practices.

9. In light of the latest estimates as to the number of witnesses the Prosecution expects to rely upon for the purposes of the confirmation hearing,¹² the Chamber also considers it necessary to supplement its instructions at paragraphs 32 and 33 of the Order on the Conduct of Proceedings by ordering that the detailed table listing the Prosecution's witnesses (the 'Witnesses Table') shall also include a column indicating, with reference to the relevant paragraphs and/or pages of a witness' statement and/or

¹⁰ Order on the Conduct of Proceedings, para. 29.

¹¹ Order on the Conduct of Proceedings, para. 28.

¹² ICC-01/14-01/22-T-004-CONF-ENG, p. 10, lines 15-19.

transcript of interview, what the Prosecution intends to prove by relying on that witness, detailing the relevant crime or element(s) thereof, location and conduct. In addition, since the Prosecution intends to rely on a large number of witnesses for the purposes of confirmation, the need to clearly indicate the aforementioned information is vital to allow the Defence to prepare, and the Chamber to consider the information in a timely fashion.

10. The Chamber further seizes this opportunity to remind the Prosecution that the annex to the Document Containing the Charges (the ‘DCC’) shall not consist of a narrative in the form of a ‘pre-trial’ or ‘pre-confirmation’ brief. This annex shall rather ‘mirror the structure of the DCC’ and provide a clear and concise explanation of the evidence supporting each allegation presented in the DCC.¹³ Furthermore, recalling that in other recent cases the Prosecution has relied on a fraction of the totality of the items disclosed,¹⁴ the Chamber orders the Prosecution to ensure that the evidence that will be referenced in the annex to the DCC corresponds exactly to the evidentiary items listed in the List of Evidence and the Witnesses Table.

11. Noting that the Prosecution is carrying out ‘follow-up investigations’ in relation to the present proceedings,¹⁵ the Chamber also recalls that, while the Prosecution is entitled to continue investigating at this stage of the proceedings, the start of the disclosure process and of the confirmation hearing cannot be made conditional upon the completion of additional investigations.¹⁶ The Prosecution is instructed to submit monthly reports indicating whether it is undertaking or intends to undertake further investigative activities in relation to the present proceedings prior to the confirmation of charges hearing, and, if so, a detailed schedule of and the estimated time line for completing any investigative step the Prosecution may plan to conduct, highlighting any obstacles that may arise. Such reports shall be submitted on the first working day of each month, commencing on 1 December 2022.

¹³ See Order on the Conduct of Proceedings, para. 36.

¹⁴ See Order on the Conduct of Proceedings, footnote 36.

¹⁵ ICC-01/14-01/22-T-004-CONF-ENG, p. 14, lines 1-13.

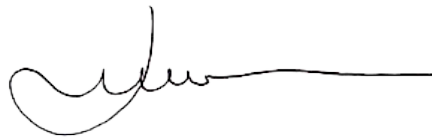
¹⁶ See *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, para. 19 and footnote 52.

12. Finally, although the Chamber initially indicated that any disclosure would only commence following the appointment of permanent counsel, given the current uncertainty as to when this appointment may take place, and in order to expedite the disclosure process and take into consideration Mr Mokom's legitimate interest in receiving potentially exculpatory material as soon as feasible,¹⁷ the Chamber orders the Prosecution to disclose all such evidence in its possession by no later than 11 November 2022.¹⁸

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution and Duty Counsel to comply with the instructions set out at paragraphs 5 to 12.

Done in English. A French translation will follow, but the English version remains authoritative.



Judge Rosario Salvatore Aitala
Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 7 November 2022

At The Hague, The Netherlands

¹⁷ ICC-01/14-01/22-T-004-CONF-ENG, p. 29, lines 5-8.

¹⁸ See also Order on the Conduct of Proceedings, para. 30.