



Original: English

No. ICC-01/14-01/22

Date: 30 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

Second order on disclosure and related matters

Order 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

Ms Paolina Massidda
Mr Dmytro Suprun

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this ‘Second order on disclosure and related matters’.

I. PROCEDURAL HISTORY

1. On 27 June 2022, the Chamber issued the ‘Order on the conduct of the confirmation of charges proceedings’ (the ‘27 June 2022 Order’),¹ thereby *inter alia* adopting the principles and procedure governing disclosure, as well as the disclosure calendar.

2. On 23 September 2022, the Chamber held a status conference to discuss matters related to the disclosure process.² During the hearing, the Prosecution indicated *inter alia* that it intended to ‘migrate’ material which is currently part of the *Yekatom and Ngaïssona* case record to the *Mokom* case record.³

3. On 7 November 2022, the Chamber issued the ‘Order on disclosure and related matters’ (the ‘7 November 2022 Order’),⁴ thereby *inter alia* instructing the Prosecution to: (i) provide clarifications in relation to the ‘migration’ process; (ii) ‘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’, as well as ‘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’; and (iii) disclose potentially exculpatory evidence to Mr Mokom.

4. On 11 November 2022, the Prosecution provided its submissions on the disclosure process and related matters pursuant to the 7 November 2022 Order

¹ [ICC-01/14-01/22-62](#). For the relevant submissions of the parties and the Registry, and other relevant information, see paras 1-13.

² ICC-01/14-01/22-T-004-CONF-ENG (a public redacted version was 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 (a public redacted version was notified on the same day, [ICC-01/14-01/22-88-Red](#)).

³ [ICC-01/14-01/22-T-004-Red-ENG](#), p. 8, lines 7-12.

⁴ [ICC-01/14-01/22-104](#).

(the ‘Prosecution’s Submissions’),⁵ to which Mr Mokom’s Duty Counsel responded on 17 November 2022 (‘Duty Counsel’s Response’).⁶

II. SUBMISSIONS

5. The Prosecution requests the Chamber’s authorisation to proceed with the ‘migration’ of material currently part of the *Yekatom and Ngaïssona* case record to the *Mokom* case record. It indicates, *inter alia*, that it: (i) intends to ‘migrate’ through NUIX 33,000 evidentiary items with specified metadata fields, excluding court filings, trial transcripts, or other material; and (ii) will comply with its disclosure obligations by subsequently releasing disclosure related metadata.

6. The Prosecution estimates that it will not disclose more than 1,000 incriminatory items, and it further states that it will identify, for each such item, the relevant sections as incriminatory or potentially exculpatory (‘PEXO’). It also indicates that ‘the items that may be considered material to the preparation of the Defence, but that will not be relied upon by the Prosecution to substantiate the charges at the confirmation stage’ will ‘likely amount to approximately 29,000 items out of the 33,000 migrated items’ (the ‘Rule 77 Material’) and that ‘it understands that it is not required to identify the relevant sections through a separate meta-data field’ (i.e. disclosure notes). The Prosecution additionally avers that it has already disclosed PEXO items, with reference to the relevant sections, and that it ‘will continue reviewing its collection, and disclose any additional PEXO items as soon as possible’.

7. Duty Counsel does not oppose the ‘migration’ process. In his view, however, the Prosecution’s Submissions suggest that it will ‘populate only certain migrated items with the disclosure-related metadata’. Duty Counsel submits in this regard that the Prosecution must provide *all* ‘migrated’ items with disclosure-related metadata, including their legal classification. Moreover, he argues that, on the basis of the 7 November 2022 Order, the Prosecution is under an obligation to identify the relevant sections in disclosure notes in relation to the Rule 77 Material.

⁵ Prosecution’s Submissions pursuant to the Chamber’s Order on Disclosure and Related Matters (ICC-01/14-01/22-104), [ICC-01/14-01/22-109](#).

⁶ Mr. Mokom’s Response to the ‘Prosecution’s Submissions on Disclosure and Related Matters’, ICC-01/14-01/22-111.

III. DETERMINATION BY THE CHAMBER

8. The Chamber recalls that, pursuant to article 61(3) of the Rome 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.

9. In relation to the ‘migration’ process, the Chamber notes that, in order to fulfil its disclosure obligations, the Prosecution intends, for all ‘migrated’ items containing incriminatory material, to release related disclosure metadata, including by indicating their legal classification. Duty Counsel does not oppose the Prosecution’s request in this regard. Therefore, the Chamber authorises the Prosecution to immediately commence the ‘migration’ process as proposed in the Prosecution’s Submissions, and proceed with the formal disclosure of items of evidence (i.e. the release of related disclosure metadata for migrated items) once Mr Mokom’s permanent counsel is appointed in accordance with the time limits specified in the 27 June 2022 Order, subject to the Chamber’s findings related to the Rule 77 Material set out below.⁷

10. In this regard, the Chamber also recalls that, pursuant to rule 121(2)(c) of the Rules, all evidence disclosed between the parties shall be communicated to the Chamber. Accordingly, the Chamber expects that, in relation to the disclosure of material ‘migrated’ from the *Yekatom and Ngaïssona* case to the Defence in the present proceedings, the Prosecution continues to follow the established practice. More specifically, the Prosecution shall notify the Chamber and provide an accompanying annex listing the relevant items each time that it formally discloses items ‘migrated’ from the *Yekatom and Ngaïssona* case to the Defence in the present proceedings.⁸ Such communication is critical to allow the Chamber to ensure that disclosure takes place under satisfactory conditions.⁹

⁷ See [27 June 2022 Order](#), paras 27 and 31.

⁸ See for instance Prosecution’s Communication of the Disclosure of Evidence on 11 November 2022, 11 November 2022, [ICC-01/14-01/22-108](#) and Annex (ICC-01/14-01/22-108-Conf-Anx).

⁹ 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 (the ‘[Abd-Al-Rahman Second Disclosure Order](#)’), para. 24.

11. The Chamber turns next to the Prosecution's submissions that the 'migration' does not concern court filings, transcripts and other material from the *Yekatom and Ngaïssona* case, and that, if Trial Chamber V grants its request for Mr Mokom to have access to such material, 'the Mokom Defence will have access to nearly the entire record of the Yekatom and Ngaïssona proceedings'.¹⁰

12. In the view of the Chamber, the Prosecution's approach to this material for the purposes of the present case is unclear. Therefore, the Prosecution shall provide further submissions to clarify this matter by no later than 9 December 2022, including as to: (i) whether the Prosecution intends to use any of this material for the purposes of the confirmation of charges hearing and, if so, in what manner; (ii) how the Prosecution would discharge its formal disclosure obligations regarding this material in connection with the present proceedings; and (iii) how the Prosecution will approach additional court filings, trial transcripts, or other material that will be included in the *Yekatom and Ngaïssona* case record *after* any authorisation by Trial Chamber V to grant Mr Mokom access to any court filings, transcripts and other material.

13. Lastly, the Prosecution and Duty Counsel express diverging views on the 7 November 2022 Order in relation to the Rule 77 Material and disclosure notes. The Chamber emphasises that the Prosecution shall also provide the relevant information for the Rule 77 Material by using the appropriate code and by indicating the corresponding page and paragraph numbers of the relevant sections of documents, statements and transcripts in a dedicated metadata field. In this regard, the Chamber recalls that, in order to fully realise the right of the suspect to have adequate time to prepare his defence and to facilitate the Chamber's own preparation of the confirmation hearing, the relevance of the evidence disclosed should be clear. The disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness/relevance for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings.¹¹

14. In addition, whereas the Prosecution refers exclusively to the 27 June 2022 Order,¹² it omits to take the clear language of the 7 November 2022 Order into account, which supplemented the Chamber's instructions with regard to the disclosure process

¹⁰ [Prosecution's Submissions](#), footnote 5.

¹¹ [Abd-Al-Rahman Second Disclosure Order](#), para. 23.

¹² [Prosecution's Submissions](#), para. 13, footnote 18.

as set out in the 27 June 2022 Order. The 7 November 2022 Order unambiguously and specifically instructed the Prosecution ‘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’ (emphasis added). Therefore, the Prosecution has been clearly put on notice of this instruction.¹³

15. The Chamber further underlines that the Prosecution has had ample time to organise the evidence relevant to the confirmation hearing, so as to ensure that the disclosure process is conducted in a meaningful and efficient manner. The Prosecution has been collecting evidence since, at least, the date of the referral of the Central African Republic II situation, and it has been prosecuting other persons in related cases arising from the same situation before the Court. In addition, the present proceedings have been delayed on account of the ongoing litigation before the Appeals Chamber in relation to Mr Mokom’s legal representation. The Chamber, thus, expects the Prosecution to carry out its disclosure obligations in line with its instructions.

16. At the same time, the Chamber notes the significant volume of the Rule 77 Material. The Chamber reiterates that ‘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’.¹⁴ Bearing this in mind, and given that the Prosecution’s responsibility with regard to Rule 77 Material ‘cannot be discharged by making everything that is in its possession or control available to Mr Mokom’,¹⁵ the Chamber emphasises that the Prosecution remains at liberty to re-evaluate its approach to the Rule 77 Material in accordance with the preceding considerations.

¹³ The Chamber has also required the Prosecution to provide disclosure notes regarding material falling under rule 77 of the Rules in other proceedings. See for instance [Abd-Al-Rahman Second Disclosure Order](#), paras 23-24.

¹⁴ [27 June 2022 Order](#), para. 28. See also [Abd-Al-Rahman Second Disclosure Order](#), para. 21.

¹⁵ [27 June 2022 Order](#), para. 29.

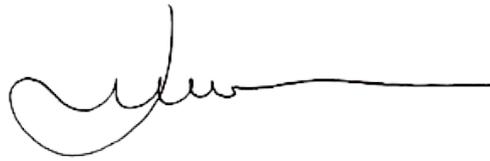
FOR THESE REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to immediately commence the ‘migration’ process as proposed in the Prosecution’s Submissions, and proceed with the formal disclosure of items of evidence once Mr Mokom’s permanent counsel is appointed in accordance with the time limits specified in the 27 June 2022 Order;

ORDERS the Prosecution to comply with the instructions concerning the disclosure process set out at paragraphs 10 and 13-15 of the present order; and

INSTRUCTS the Prosecution to provide the clarifications set out at paragraph 12 of the present order by no later than 9 December 2022.

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala
Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Wednesday, 30 November 2022

At The Hague, The Netherlands