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**International
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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
*PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

Public

Prosecution's Submission on its Approach to Material in the *Yekatom* and *Ngaissona* Case to which Access may be authorised

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pursuant to Pre-Trial Chamber II's ("Chamber") 30 November 2022 Second order on disclosure and related matters,¹ the Prosecution provides the following submissions on its approach regarding material in the *Yekatom* and *Ngaissona* case to which Trial Chamber V may authorise access, as set out below.

II. SUBMISSIONS

2. As a preliminary point, the Prosecution underscores that it views the question of disclosure on the one hand, and access to material in another case on the other, as procedurally distinct. The former concerns material in the official Court record, including filings, transcripts, and exhibits.² The Defence may thus obtain material considered as "form[ing] part of the Court archive"³ through a request to the Chamber seized of the other case to direct the Registry to provide *access*,⁴ on a showing that the materials are of relevance to the case.⁵

3. The Prosecution filed an access request regarding material on the record of the *Yekatom* and *Ngaissona* case for MOKOM's benefit, anticipating such a request given the nature of the two proceedings, and setting out its position concerning the records and items for which it considered access appropriate.⁶ The Prosecution's 8 April 2022 Access Request was filed promptly after MOKOM's transfer to the Court, notwithstanding that it is normally incumbent on the *defendant* to seek access to

¹ See ICC-01/14-01/22-116, p. 8.

² These may include documents generated by a witness in Court for instance, or otherwise 'associated' with the witness's testimony.

³ ICC-01/04-02/06-806, para. 8 (noting that materials in trial proceedings formed part of the Court archive).

⁴ See ICC-01/04-02/06-879, p. 10 ("[d]irect[ing] the *Registry* to provide the Defence with access to all Requested Material except for the items on the List, as promptly as possible after the List is filed" (emphasis added)).

⁵ See ICC-01/04-02/06-806, para. 8. See also e.g., *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Decision on Defence Request for Access to Confidential Materials From Krstić Case, 21 March 2012, para.5 ("[a] party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown"), citing, *inter alia*, *Prosecutor v. Jokić*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005, p.4; see also, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, paras.10, 12, 16, 18; see e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Access, 16 May 2002, para. 14.

⁶ See ICC-01/14-01/18-1353 ("8 April 2022 Access Request").

confidential material in another case.⁷ The Prosecution did so specifically to advance MOKOM's preparation for the proceedings on the confirmation of charges, and to ensure that the issue would be immediately under consideration by Trial Chamber V to avoid delay. However, 'access' is procedurally distinct from 'disclosure' which, under the statutory framework, applies in respect of items and evidence deemed within the "possession or control"⁸ of the Prosecution.

4. Thus, regarding the three specific inquiries posed by the Chamber⁹ and set out below, the Prosecution clarifies its approach as follows:

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"*¹⁰

5. The Prosecution intends to use some of the material for which access is may be granted to MOKOM for the purposes of the confirmation of charges hearing. This principally comprises transcripts of the testimony of several witnesses, which the Prosecution intends to use as evidence to substantiate the prospective charges.

ii) *"How the Prosecution would discharge its formal disclosure obligations regarding this material in connection with the present proceedings"*¹¹

6. The Prosecution considers that, where a Chamber authorises a defendant's access to material that forms part of the record in another case, the Prosecution's formal disclosure obligations with respect to that *same* material are not implicated – unless such material is deemed to be within the Prosecution's 'possession and control'.¹²

⁷ See e.g., ICC-01/04-02/06-721 (Request on behalf of Mr Ntaganda seeking access to all *inter partes confidential* material in the *Lubanga* case).

⁸ See rule 77 of the Rules (providing for inspection of "tangible items in the possession or control of the Prosecutor"); see also article 67(2) (providing for disclosure of "evidence in the Prosecutor's possession or control").

⁹ ICC-01/14-01/22-116, p. 8, para. 12.

¹⁰ ICC-01/14-01/22-116, para. 12.

¹¹ ICC-01/14-01/22-116, para. 12.

¹² See *supra*, note 9.

7. In either case, as regards rule 77, authorised access to material effectively *extinguishes* any requirement for its further ‘disclosure’. Once such an item is accessible to the Defence, the materiality of its further disclosure is dissipated. This is consistent with the language and spirit of rule 77, which primarily allows for the “inspection” of material in the Prosecution’s possession or control. Thus, as noted in the *Lubanga* case, where a duplicative document would have no ‘material effect’ on the preparation of the Defence, rule 77 does not require its provision.¹³ In any case, no prejudice arises where access to the document is otherwise authorised.¹⁴

8. As regards rule 76, to the extent that a witness’s prior testimony need only be provided in one form,¹⁵ this subsumes that doing so both through access and then separately, through formal disclosure (in the *same form* no less), is not statutorily mandated. Further, insofar rule 76(3) requires that the prior testimony be “made available in *original*,”¹⁶ this singularly comprises the transcripts within the Court’s archive. It thus, properly falls within the scope ‘access’.

9. In respect of the identification of items for which Trial Chamber V may authorise access and on which the Prosecution will rely in the confirmation proceedings (*i.e.*, INCRIM), the Prosecution considers that article 61(3)(b) regarding *those items* is fully discharged by the timely provision of a rule 121(3) “list of evidence.”

10. To be clear however, the Prosecution intends fully to discharge its formal disclosure obligations concerning any material within its possession and control in accordance with the Court’s established jurisprudence. Depending on the

¹³ See ICC-01/04-01/06-2147, 23-24 (holding that, where the Defence has been supplied with sufficient information, information “above and beyond that already disclosed, is *unnecessary* for the preparation of the defence (*viz.* it would have no *material effect*). *It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules*”) (emphasis added). This effectively removes the provision of *duplicative* items from the scope of rule 77.

¹⁴ See *e.g.*, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 21 March 2012, para.38 (observing that the Prosecution’s in respect of the rule requiring disclosure of potentially exculpatory “the Appeals Chamber considers that the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is *accessible* to the appellant”).

¹⁵ See ICC-02/05-03/09-295, para. 27; *see also* ICC-01/14-01/18-535, para. 11.

¹⁶ See rule 76(3) of the Rules (emphasis added).

circumstances, this may include some of the prospectively authorised access material.¹⁷

*iii) "How the Prosecution will approach additional court filings, trial transcripts, or other material that will be included in the Yekatom and Ngaissona case record after any authorisation by Trial Chamber V to grant Mr Mokom access to any court filings, transcripts and other material"*¹⁸

11. The Prosecution's approach to additional Court filings, transcripts, or other material added to the *Yekatom* and *Ngaissona* case record after any authorisation by Trial Chamber V granting MOKOM access, will depend on the terms of the relevant decision.

12. The Prosecution will continue to identify relevant material for the purposes of further access on a rolling basis. However, insofar as access to the *Yekatom* and *Ngaissona* case record concerns the Parties and Participants, the Prosecution considers that it is also incumbent on the MOKOM Defence to make any necessary and further application as it may require and can justify.

13. Insofar as such material may involve the rule 76(1) prior statements of witnesses on whom the Prosecution will rely, other INCRIM, or article 67(2) evidence, the Prosecution undertakes to seize Trial Chamber V promptly to make such material available, such that it can be timely provided to the MOKOM Defence.

14. The Prosecution does not consider that the Defence need be alerted to additional Court filings, given that public versions thereof will: (a) normally be

¹⁷ See ICC-01/05-01/13-1188, para. 13; and ICC-01/05-01/13-1278, paras. 9 (dismissing a Defence Request for disclosure before Trial Chamber VII, while an access request was pending before Trial Chamber III — noting, that where an access request is pending in relation to the same material which may potentially implicate disclosure obligations before another Chamber, the Chamber seized of the access request "has primary authority" in deciding whether access to that material can be provided, thus rendering disclosure in the case before the other Chamber premature); see *underlying* Prosecution Response, ICC-01/05-01/13-1162, para. 8 (noting, that "the Prosecution is not the custodian of court records, nor is the record of a case, at least in principle, 'evidence in the Prosecution's possession or control', within the terms of article 67 (2), or material in possession or control of the Prosecution, within the terms of rule 77").

¹⁸ ICC-01/14-01/22-116, para. 12.

sufficient to alert the Defence of their existence;¹⁹ and (b) provide enough information to enable the Defence to determine for itself whether they are of any forensic value to its preparation. Where it is clear that such information will not be made public, the Prosecution intends to advise the Defence that a relevant issue exists, so that the latter can determine whether a further application seeking an access order may be appropriate.

III. CONCLUSION

15. The Prosecution remains at the Chamber's disposal for any further clarification or elaboration as to its approach concerning the prospective access material, as set out above.



Karim A. A. Khan KC, Prosecutor

Dated this 9th day of December 2022

At The Hague, The Netherlands

¹⁹ See e.g., ICC-01/04-02/06-1826, para. 9 (noting, in different circumstances, the effectiveness of publicly available information in filings as sufficiently informative for the Defence).