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PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

PUBLIC

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

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

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Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

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Introduction and Procedural History

1. On 8 April 2022, the Prosecution submitted a request to Trial Chamber V, currently seized with the *Yekatom* and *Ngaïssona* proceedings, seeking an order directing the Registry to grant the Mokom Defence access to *Yekatom* and *Ngaïssona* case materials, including: (i) all confidential, excluding *ex parte*, submissions of the Parties and Participants; (ii) all transcripts of testimonies, including private sessions; (iii) all confidential, excluding *ex parte*, decisions issued by Trial Chamber V; (iv) all confidential exhibits submitted into evidence; and (v) all witness statements.¹

2. The Prosecution argued that this material is relevant to the Mokom Defence based on the ‘geographical, temporal and substantive overlap between the *Yekatom* and *Ngaïssona* case and the Mokom case’.²

3. On 23 August 2022, Trial Chamber V rendered its ‘Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the *Yekatom* and *Ngaïssona* Case’, finding it ‘necessary that the Prosecution specifies the material sought to be provided to the Mokom Defence’. Trial Chamber V instructed that consultations first take place between the Prosecution and the *Yekatom* and *Ngaïssona* Defence teams in order to seek to reach *inter partes* agreements about the material which the Mokom Defence could access (‘the consultations’).³ In case of disagreement regarding ‘specific items or categories thereof, and/or the application of redactions’, the parties are entitled to seize the Trial Chamber.⁴

¹ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Office of the Prosecutor, ‘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, para. 1 (‘Prosecution Request for Defence Access’).

² *Ibid.*, para. 2.

³ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Trial Chamber V, ‘Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the *Yekatom* and *Ngaïssona* Case’, 23 August 2022, ICC-01/14-01/18-1552, paras. 9-11 (‘Trial Chamber V Decision’).

⁴ *Ibid.*, para. 11.

4. On 11 November 2022, the Prosecution requested 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, indicating that the migration would not concern transcripts, filings or other material.⁵

5. On 30 November 2022, Pre-Trial Chamber II ('Chamber') issued its 'Second order on disclosure and related matters' in which it authorized the 'migration' and instructed inter alia the Prosecution to provide submissions on its approach regarding material in the *Yekatom and Ngaïssona* case to which Trial Chamber V may authorise access.⁶

6. On 9 December 2022, pursuant to the Chamber's instructions, the Prosecution filed its 'Submission on its Approach to Material in the *Yekatom and Ngaïssona* Case to which Access may be authorised'.⁷

7. On 21 December 2022, Duty Counsel for Mr. Mokom responded to the Prosecution's Submission.⁸

8. On 23 January 2023, permanent Counsel for Mr. Mokom was appointed.⁹

9. On 24 January 2023, the Chamber issued an Order in which it instructed permanent Counsel for Mr. Mokom, if considered necessary for Mr Mokom's

⁵ Office of the Prosecutor, '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, paras. 1 and 4.

⁶ Pre-Trial Chamber II, 'Second order on disclosure and related matters', 30 November 2022, ICC-01/14-01/22-116, paras. 9 and 12.

⁷ Office of the Prosecutor, 'Prosecution's Submission on its Approach to Material in the *Yekatom and Ngaïssona* Case to which Access may be authorised', 9 December 2022, ICC-01/14-01/22-118 ('Prosecution's Submission').

⁸ Mr. Mokom's Response to the Prosecution's Submission on its Approach to Material in the *Yekatom and Ngaïssona* Case to which Access may be authorised, 21 December 2022, ICC-01/14-01/22-125 ('Duty Counsel's Response').

⁹ Registry, "Notification of the Appointment of Mr Philippe Larochelle as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka", 23 January 2023, ICC-01/14-01/22-136.

defence, to provide observations on the Prosecution's Submission by 30 January 2023.¹⁰

Observations

a. The *Mokom* Defence access to materials from the *Yekatom* and *Ngaïssona* case record is still uncertain

10. The resolution of the question of access by the *Mokom* Defence to materials placed on the *Yekatom* and *Ngaïssona* case record ('the access') is still pending. Further to the Trial Chamber V Decision, there is no other publicly available submission or decision in the *Yekatom* and *Ngaïssona* case record providing additional information about the state of the consultations between the Parties about the question of access.

11. Moreover, the Trial Chamber V Decision stated that 'in the absence of objections or in case of unopposed redactions, the Prosecution may proceed as soon as possible with the provision of the items to the *Mokom* Defence'.¹¹ However, no items have been provided by the Prosecution to the *Mokom* Defence so far, which suggests that consultations may still be ongoing. Trial Chamber V may also still be seized by the Parties in case of disagreement about the access to be granted to the *Mokom* Defence to certain items.¹²

12. The *Mokom* Defence has also not received any updates from the Prosecution on the state of the consultations. As the Prosecution team assigned to the *Mokom*

¹⁰ Pre-Trial Chamber II, 'Order for observations and decision on the Prosecution's request for a status conference', 24 January 2023, ICC-01/14-01/22-138, para. 11.

¹¹ ICC-01/14-01/18-1552, para. 11.

¹² *Ibidem*.

case is the same team presenting its case in the *Yekatom and Ngaiissona* trial,¹³ the Prosecution team is the only side in the *Mokom* case involved in the consultations.

13. Based on the absence of information about the state of the consultations, the Mokom Defence suggests that the Prosecution could be invited to provide an update about the state of the consultations during the Status Conference scheduled for 7 February 2023.¹⁴

b. The Prosecution must inform the Mokom Defence about the specific accessed material upon which it will rely at the confirmation of charges hearing as soon as access to the material is granted to the Mokom Defence

14. The Prosecution's Submission says that the identification of items in *Yekatom* and *Ngaiissona* to which the Mokom Defence may be granted access ('the accessed material') and upon which the Prosecution intends to rely during the confirmation proceedings, may be provided to the Mokom Defence according to the 'timely provision of a rule 121(3) "list of evidence"',¹⁵ i.e. no later than 30 days before the date of the confirmation hearing.

15. The Mokom Defence supports the Duty Counsel's Response according to which the identification of the accessed material upon which the Prosecution intends to rely during the confirmation proceedings should be provided to the Mokom Defence more than 30 days before the confirmation hearing.¹⁶

¹³ Office of the Prosecutor, 'Prosecution's Observations on a Proposed Date for the Commencement of the Confirmation of Charges Hearing', 26 January 2023, ICC-01/14-01/22-140, para. 3.

¹⁴ ICC-01/14-01/22-138, para. 13.

¹⁵ ICC-01/14-01/22-118, para. 9.

¹⁶ ICC-01/14-01/22-125, para. 4.

16. The Pre-Trial Chamber has already noted that the Prosecution has had more time to prepare this case than in regular circumstances.¹⁷ Moreover, the original reason for which the Prosecution requested Trial Chamber V to grant access to the *Yekatom and Ngaiissona* case record to the Mokom Defence is because of the so-called overlap between the two cases.¹⁸

17. Based on the time that the Prosecution already has had to prepare the Mokom case which, the Prosecution says, largely overlaps with the *Yekatom and Ngaiissona* case, the Prosecution must already be in a position to assess with precision which items from among the accessed material it will seek to rely upon during the confirmation hearing.

18. The Prosecution recently indicated that it will be in a position to present its case at the confirmation of charges hearing as early as 5 June 2023, only four months' away.¹⁹ It must therefore already have formed a view about the accessed material that it will seek to rely on during this hearing. The provision of such list would not either delay its own preparation for the confirmation of charges hearing.

19. In addition, this Pre-Trial Chamber has already held that 'rule 121(3) of the Rules sets a minimum period and that the parties are expected to discharge their disclosure obligations as soon as practicable'.²⁰ In this vein, the Prosecution, as the 'triggering force of the proceedings', must ensure the early initiation of the disclosure process and 'be guided by the overarching principle of fairness'.²¹

¹⁷ ICC Transcript, 23 September 2022, ICC-01/14-01/22-T-004-Red-ENG, p. 22, l. 23-24.

¹⁸ ICC-01/14-01/18-1353, para. 2.

¹⁹ ICC-01/14-01/22-140, para. 3.

²⁰ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*, Pre-Trial Chamber II, 'Second Decision on Disclosure and Related Matters', 4 April 2019, ICC-01/14-01/18-163, para. 26; See also *The Prosecutor v. Alfred Yekatom*, Pre-Trial Chamber II, 'Public Redacted Version of "Decision on Disclosure and Related Matters"', 23 January 2019, ICC-01/14-01/18-64-Red, paras. 13-14; *The Prosecutor v. Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, Pre-Trial Chamber II, 'Second Order on Disclosure and Related Matters', 2 October 2020, ICC-02/05-01/20-169, para. 13.

²¹ *The Prosecutor v. Alfred Yekatom*, Pre-Trial Chamber II, 'Public Redacted Version of "Decision on Disclosure and Related Matters"', 23 January 2019, ICC-01/14-01/18-64-Red, para. 14.

20. There are compelling reasons for the Prosecution to identify the specific parts of the accessed material that it will rely upon at the confirmation of charges hearing much earlier than 30 days before the date of the hearing itself.

21. There is currently no indication when access to the *Yekatom* and *Ngaiissona* materials will be granted to the Mokom Defence (if any access is granted). As such, the identification of the accessed material upon which the Prosecution will be relying upon during the confirmation proceedings as early as possible after access is granted to the Mokom Defence is essential to expedite pre-trial preparation.

22. It is unrealistic and contrary to the ‘overarching principle of fairness’ for the Defence to analyse *years* of proceedings in the *Yekatom* and *Ngaiissona* case *within 30 days* prior to the confirmation hearing, bearing in mind the limited human resources allocated to Defence teams in the pre-trial phase. Moreover, lack of indication by the Prosecution about the relevant parts of the accessed material that it will rely upon at the confirmation hearing also would have a substantial impact on Defence preparation.

23. As submitted by Duty Counsel for Mr. Mokom, provision by the Prosecution of the relevant sections of the accessed material that it will rely upon for the confirmation of charges hearing on a rolling basis, based on specific deadlines set by the Pre-Trial Chamber,²² would help facilitate efficient confirmation hearing preparation.

²² ICC-01/14-01/22-125, para. 6.

Respectfully submitted,



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The Hague, The Netherlands
Monday, January 30, 2023