



Original: English

No. ICC-01/14-01/22

Date: 2 February 2023

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

Decision regarding the Prosecution's submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised

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 Philippe Larochelle
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 Massida

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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 ‘Decision regarding the Prosecution’s submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised’.

I. PROCEDURAL HISTORY

1. On 8 April 2022, the Prosecution requested Trial Chamber V to grant Mr Maxime Jeoffroy Eli Mokom Gawaka (‘Mr Mokom’) access to certain material placed on the trial record of the case of *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona* (the ‘*Yekatom and Ngaïssona* case’), ‘namely: (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 this Chamber; (iv) all confidential exhibits deemed formally submitted into evidence; and (v) all witness statements, with the existing redactions applied’ (the ‘Access Request’).¹

2. On 23 August 2022, Trial Chamber V, finding that, ‘[t]o the extent that there appears to exist an overlap between the two proceedings [...] at least some of the [m]aterial may indeed be relevant to Mr Mokom’, rejected the Access Request and directed the Prosecution to further specify what material was sought to be provided to Mr Mokom by conducting *inter partes* consultations and providing ‘the Yekatom and Ngaïssona Defence with a list of the material to be provided to the Mokom Defence as soon as feasible’ (the ‘23 August 2022 Decision’).²

3. Pursuant to the Chamber’s order,³ a status conference was held on 23 September 2022, during which the Prosecution *inter alia* provided an update on its implementation of Trial Chamber V’s 23 August 2022 Decision.⁴

¹ 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.

² Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the *Yekatom and Ngaïssona* Case, ICC-01/14-01/18-1552.

³ Order convening a status conference and decision designating a Single Judge, ICC-01/14-01/22-88-Conf-Exp (public redacted version notified on same day, ICC-01/14-01/22-88-Red).

⁴ Transcript of hearing, ICC-01/14-01/22-T-004-CONF-ENG (public redacted version notified on same day, ICC-01/14-01/22-T-004-Red-ENG), p. 19 line 17 to p. 22 line 14.

4. On 9 December 2022, the Prosecution, further to the 30 November 2022 ‘Second order on disclosure and related matters’,⁵ submitted the ‘Prosecution’s Submission on its Approach to Material in the *Yekatom* and *Ngaissona* Case to which Access may be authorised’ (the ‘Prosecution’s Submission’).⁶ Recalling that it ‘filed an access request regarding material on the record of the *Yekatom* and *Ngaissona* case for [Mr Mokom]’s benefit, anticipating such a request given the nature of the two proceedings’, the Prosecution added that it also intended ‘to use some of the material [...] for the purposes of the confirmation of charges hearing’ and that ‘formal disclosure obligations with respect to that [...] material are not implicated’. In particular, the Prosecution submitted that: (i) ‘as regards rule 77, authorised access to material effectively *extinguishes* any requirement for its further “disclosure”’; (ii) [a]s regards rule 76, to the extent that a witness’s prior testimony need only be provided in one form, this subsumes that doing so both through access and then separately, through formal disclosure [...], is not statutorily mandated’; and (iii) ‘[i]n respect of [...] items [...] on which the Prosecution will rely in the confirmation proceedings (*i.e.*, INCRIM), [...] article 61(3)(b) regarding *those items* is fully discharged by the timely provision of a rule 121(3) “list of evidence”’.

5. On 21 December 2022, Duty Counsel for Mr Mokom responded to the Prosecution’s Submission, requesting the Chamber to instruct the Prosecution ‘to provide on a rolling basis a list of the relevant sections of the accessed material that it will rely upon for the confirmation of charges hearing, based on specific deadlines set by the Pre-Trial Chamber’ (‘Duty Counsel’s Request’).⁷

6. On 24 January 2023, following the appointment of Mr Philippe Larochelle as permanent counsel to Mr Mokom (the ‘Defence’),⁸ the Chamber *inter alia* ordered the Defence to provide observations, if any, on the Prosecution’s Submission, by no later than 30 January 2023 (the ‘24 January 2023 Order’).⁹

⁵ ICC-01/14-01/22-116.

⁶ ICC-01/14-01/22-118.

⁷ Mr. Mokom’s Response to the Prosecution’s Submission on its Approach to Material in the *Yekatom* and *Ngaissona* Case to which Access may be authorised, ICC-01/14-01/22-125.

⁸ 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, with public Annexes I, II and IV, and confidential Annex III.

⁹ Order for observations and decision on the Prosecution’s request for a status conference, ICC-01/14-01/22-138.

7. On 30 January 2023, the Defence submitted its observations pursuant to the 24 January 2023 Order, indicating *inter alia* that: (i) ‘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’; and (ii) ‘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, would help facilitate efficient confirmation hearing preparation’.¹⁰

III. DETERMINATION

8. At the outset, the Chamber notes that, at the 23 September 2022 Status Conference, the Prosecution indicated with regard to Trial Chamber V’s 23 August 2022 Decision that, while ‘[t]here hasn’t been progress in the sense that there has been any form of a resolution of the matter, or specification as to what exactly Mr Mokom will have access to’, the matter would ‘probably be resolved within the next 30 days’.¹¹ However, to date, the Chamber has not been made aware of a decision issued by Trial Chamber V granting or denying access to Mr Mokom to any material from the trial record in the *Yekatom and Ngaïssona* case pursuant to the Access Request and the 23 August 2022 Decision. In the absence of a formal decision issued by Trial Chamber V following the consultations ordered pursuant to the 23 August 2022 Decision, the Chamber is not in a position to address the specific legal consequences of any access that may be granted to Mr Mokom by Trial Chamber V for the different types of material highlighted in the Prosecution’s Submission.

9. Nonetheless, the Chamber notes that the Prosecution’s Submission is premised on the viewpoint that ‘the question of disclosure on the one hand, and access to material in another case on the other, [are] procedurally distinct’. In the Prosecution’s view, while disclosure relates to ‘items and evidence deemed within the “possession or control” of the Prosecution’, access to material in another case ‘concerns material in the official Court record, including filings, transcripts and exhibits’ and can be obtained

¹⁰ 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’, ICC-01/14-01/22-144.

¹¹ Transcript of hearing, ICC-01/14-01/22-T-004-CONF-ENG (public redacted version notified on same day, ICC-01/14-01/22-T-004-Red-ENG), p. 21 lines 6-7 and p. 22 lines 3-7.

‘through a request to the Chamber seized of the other case to direct the Registry to provide *access*, on a showing that the materials are of relevance to the case’. The Prosecution further ‘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’.

10. However, contrary to previously adjudicated requests for access to information and material in another case before the Court and other international criminal tribunals, the Access Request was submitted by the Prosecution, rather than the Defence. In addition, while indicating that the Access Request was submitted ‘for [Mr Mokom]’s benefit’ and ‘to advance [Mr Mokom]’s preparation for the proceedings on the confirmation of charges’, the Prosecution also avers that it ‘intends to use some of the material for which access [...] may be granted to [Mr Mokom] for the purposes of the confirmation of charges hearing’, namely ‘as evidence to substantiate the prospective charges’.

11. In these unique circumstances, the Chamber considers that any access to material forming part of the *Yekatom and Ngaïssona* case record that may be granted by Trial Chamber V does not automatically displace the Prosecution’s formal disclosure obligations in the present proceedings. The Chamber therefore recalls that the Prosecution must fulfil its disclosure obligations in the present proceedings in accordance with the Chamber’s previous orders, including within prescribed time limits, i.e. 23 February 2023.¹² Any material from the *Yekatom and Ngaïssona* case record for which formal disclosure to Mr Mokom is required will thus have to be disclosed before the prescribed time limits. After the expiry of that time limit, other material from the *Yekatom and Ngaïssona* case record for which disclosure would be required, will not be taken into account for the purposes of the confirmation hearing,¹³ without prejudice to the Prosecution’s ongoing duty to provide the Defence with

¹² Order for observations and decision on the Prosecution’s request for a status conference, 24 January 2023, ICC-01/14-01/22-138, para. 12. See also Order on the conduct of the confirmation of charges proceedings, 27 June 2022, ICC-01/14-01/22-62, paras 20-37; Order on disclosure and related matters, 7 November 2022, ICC-01/14-01/22-104, paras 8-10; Second order on disclosure and related matters, 30 November 2022, ICC-01/14-01/22-116, paras 13-16. In particular, the Prosecution obviously cannot ‘use some of the material for which access [...] may be granted to [Mr Mokom] for the purposes of the confirmation of charges hearing’ (Prosecution’s Submission, para. 5) without having formally disclosed such material and having abided by all requirements attached to disclosure.

¹³ Order on the conduct of the confirmation of charges proceedings, 27 June 2022, ICC-01/14-01/22-62, para. 31.

potentially exonerating evidence in accordance with article 67(2) of the Rome Statute, and the possibility to present new evidence pursuant to rule 121(5) of the Rules of Procedure and Evidence.

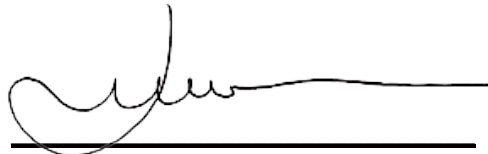
12. Finally, the Chamber considers that, in view of the preceding findings together with the fact that the Access Request remains pending, it is not necessary to adjudicate Duty Counsel's Request for the present purposes.

FOR THESE REASONS, THE CHAMBER HEREBY

INSTRUCTS the Prosecution to comply with its disclosure obligations as set out at paragraph 11 above, including the disclosure deadline of 23 February 2023; and

FINDS that the Prosecution must discharge the established disclosure obligations regarding any material from the *Yekatom and Ngaiissona* case record to which access may be granted.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala

Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Thursday, 2 February 2023.

At The Hague, The Netherlands.