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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 Response to 'Request for Clarification concerning the "Decision regarding the Prosecution's submission on material in the Yekatom and Ngaïssona case to which access may be authorised" (ICC-01/14-01/22-147)'**

**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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## Introduction

1. Pursuant to Regulation 24(1) of the Regulations of the Court and the Pre-Trial Chamber's instruction,<sup>1</sup> the Defence of Maxime Mokom ('Defence') files this response to the Prosecution's 'Request for Clarification concerning the "Decision regarding the Prosecution's submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised" (ICC-01/14-01/22-147)'.<sup>2</sup>

## Submissions

2. Pre-Trial Chamber II ('Chamber')'s 'Decision regarding the Prosecution's submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised'<sup>3</sup> unequivocally states that the Prosecution's disclosure obligations apply to the material to which the Mokom Defence may be granted access in the *Yekatom and Ngaïssona* case record.

3. The Prosecution's Request states that clarification is warranted in relation to the second limb of the disposition in the Chamber's Decision, which finds that '[...] the Prosecution must discharge the established disclosure obligations regarding *any* material from the *Yekatom and Ngaïssona* case record to which access may be granted'.<sup>4</sup>

4. The Prosecution's Request posits that the use of the word '*any*' in this part of the disposition creates ambiguity. This ambiguity is purportedly based on the Prosecution's understanding that its disclosure obligations do not apply to the material from the *Yekatom and Ngaïssona* case record to which the Mokom Defence

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<sup>1</sup> ICC Transcript, 7 February 2023, ICC-01/14-01/22-T-005-ENG, p. 15, l. 21-24.

<sup>2</sup> Office of the Prosecutor, 'Request for Clarification concerning the "Decision regarding the Prosecution's submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised" (ICC-01/14-01/22-147)', 6 February 2023, ICC-01/14-01/22-153 ('Prosecution's Request').

<sup>3</sup> Pre-Trial Chamber II, 'Decision regarding the Prosecution's submission on material in the *Yekatom and Ngaïssona* case to which access may be authorised', 2 February 2023, ICC-01/14-01/22-147 ('Chamber's Decision').

<sup>4</sup> ICC-01/14-01/22-153, para. 2.

may be granted access ('accessed material').<sup>5</sup> This proposition is in plain contradiction with the Chamber's Decision.

5. The Defence submits that this second limb of the disposition must be read together with the first limb, which makes reference to paragraph 11 of the Chamber's Decision, where the Chamber lays out the Prosecution's disclosure obligations as regards the accessed material.

6. In addition to being privy to the accessed material, the Prosecution has had years to prepare both the *Mokom* and the *Yekatom and Ngaïssona* cases, meaning that it should be in a position to meet the disclosure obligations prescribed by the Chamber in relation to the accessed material. The Prosecution is indeed in an advantageous position, whereby it can seek to rely on the accessed material while the Defence is deprived of a meaningful ability to assess the relevance of each item given the timeframes now in place.

7. The Prosecution must have already been in a position to determine the relevance of the accessed material when it made the request for access before Trial Chamber V in April 2022,<sup>6</sup> which entails that it must already know which parts of the accessed material should be subject to disclosure in the present case. Moreover, the Prosecution cannot hide behind the fact that the accessed material is in possession of both the Registry and the Prosecution.

8. In these circumstances, the Defence's understanding of the Chamber's Decision is that unless the Prosecution complies with its disclosure obligations with regards to the accessed material, the Prosecution is necessarily precluded from

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<sup>5</sup> ICC-01/14-01/22-153, para. 5.

<sup>6</sup> *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', 8 April 2022, ICC-01/14-01/18-1353.

relying on any of this material for the purposes of the confirmation of charges hearing.

9. With this advantage in mind, it would be prejudicial to the Defence should the Prosecution be allowed to pick and choose the material relevant to its case, without giving the Defence a meaningful opportunity to review, assess and potentially exploit the material, having sought instructions from the client thereon.

10. As such, the fact that the Chamber specifically inserted a reference to the 23 February deadline related to the completion of the disclosure process both in paragraph 11 and in the disposition of the Chamber's Decision, indicates that the established disclosure obligations apply to *any* material from the *Yekatom and Ngaïssona* case which the Prosecution will seek to rely upon for the purposes of the confirmation of charges hearing.

#### Conclusion

11. In conclusion, the Defence requests that the Pre-Trial Chamber
- (a) **DENY** the Prosecution's Request; and
  - (b) **REITERATE** that the Prosecution must comply with its disclosure obligations in relation to any material from the *Yekatom and Ngaïssona* case record to which the Defence is granted access.

Respectfully submitted,



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The Hague, The Netherlands  
Friday, February 10, 2023