



Original: English

No. ICC-01/14-01/18

Date: 13 July 2023

TRIAL CHAMBER V

**Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on the Mokom Defence's Request for Access to Materials

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamai
Marie-Hélène Proulx

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II
Philippe Larochelle

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), (6)(c), (e), 67 and 68(1) of the Rome Statute, Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 42(2) of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Mokom Defence’s Request for Access to Materials’.

I. Procedural history

1. On 23 August 2022, the Chamber decided on a request by the Office of the Prosecutor (the ‘Prosecution’) allowing it to provide certain materials to Maxime Mokom’s defence team in the case of *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka Mokom* before Pre-Trial Chamber II (the ‘Decision on Disclosure to the Mokom case’, the ‘Mokom Defence’, the ‘Mokom Case’, and the ‘Pre-Trial Chamber’, respectively).¹
2. On 5 June 2023, the Pre-Trial Chamber issued a decision on a disclosure request by the Mokom Defence in the *Mokom Case* (the ‘Pre-Trial Decision’).² Therein, the Pre-Trial Chamber rejected a request by the Mokom Defence for disclosure of certain confidential materials from the present case, holding that such requests should be directed to this Chamber instead.
3. On 19 June 2023, the Mokom Defence requested access to further materials concerning 33 witnesses that have testified in the present case (the ‘Request’).³ In particular, the Mokom Defence requested access to (i) all exhibits shown to, or otherwise used with, these witnesses during their testimony (the ‘First Sub-Request’); (ii) all other documents identified by the Yekatom Defence and Ngaïssona Defence (collectively, the ‘Defence’) as ‘documents they intended to use during their cross-examination of the relevant witnesses’ as well as lists

¹ 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.

² Decision on the Defence’s requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf (public redacted version notified on 3 July 2023, ICC-01/14-01/22-219-Red).

³ Mokom Defence Request for Access to Materials in the *Prosecutor v. Yekatom & Ngaïssona* Case, ICC-01/14-01/18-1932-Conf (with two confidential annexes, ICC-01/14-01/18-1932-Conf-AnxA and ICC-01/14-01/18-1932-Conf-AnxB).

thereof (the ‘Second Sub-Request’ and ‘Lists of Defence Items’, respectively); and (iii) all confidential transcripts of testimony concerning these witnesses, comprising unredacted or lesser redacted versions thereof (the ‘Third Sub-Request’).⁴ Additionally, the Mokom Defence seeks advance authorisation for access to the aforementioned categories of materials for any of the 37 remaining witnesses identified as to be relied on in the *Mokom* Case and who may testify in the instant case prior to the confirmation hearings in the *Mokom* Case, on a rolling basis (the ‘Fourth Sub-Request’).⁵

4. On 21 June 2023, the Prosecution indicated that it does not oppose the Request and defers to the broad discretion of the Chamber. It submits that the *Mokom* Case is sufficiently related to the present case and may justify access to the limited material sought by the Mokom Defence (the ‘Prosecution Response’).⁶
5. On 30 June 2023, the Yekatom Defence responded to the Request indicating that it does not oppose the Request (the ‘Yekatom Defence Response’).⁷ However, it submits that the Request is premised on the Pre-Trial Decision, to which it does not have access. For this reason, its lack of opposition is conditional on there being no additional and relevant information contained in that decision which could change its position.⁸
6. On the same day, the Ngaïssona Defence responded to the Request (the ‘Ngaïssona Defence Response’).⁹ It requests the Chamber to (i) reject the Second Sub-Request, ‘without prejudice should they choose to re-file a request providing a list of [m]aterials sought’, including their ERNs, to the Defence; (ii) reject the Fourth Sub-Request; and (iii) in the alternative, reject access to ‘all documents that are not relevant to the *Mokom* Case, documents for which Mr Ngaïssona has

⁴ Request, ICC-01/14-01/18-1932-Conf, para. 4.

⁵ Request, ICC-01/14-01/18-1932-Conf, para. 5.

⁶ Prosecution’s Response to “Mokom Defence Request for Access to Materials in the Prosecutor v. Yekatom & Ngaïssona Case” (ICC-01/14-01/18-1932-Conf), ICC-01/14-01/18-1939-Conf, para. 1.

⁷ Yekatom Defence Response to ‘Mokom Defence Request for Access to Materials in the Prosecutor v. Yekatom & Ngaïssona Case’, 19 June 2023, ICC-01/14-01/18-1932-Conf, ICC-01/14-01/18-1951-Conf, paras 2, 6, 8.

⁸ Yekatom Defence Response, ICC-01/14-01/18-1951-Conf, paras 5, 8.

⁹ Defence response to the “Mokom Defence Request for Access to Materials in the *Prosecutor v. Yekatom & Ngaïssona* Case - With Confidential Annexes A & B” (ICC-01/14-01/18-1932-Conf), ICC-01/14-01/18-1953-Conf.

a reasonable expectation of privacy, documents of purely of [*sic*] procedural nature, and documents relating to potential Defence strategy and investigations’.¹⁰

II. Analysis

7. At the outset, the Chamber notes that the Yekatom Defence’s non-opposition is linked to there being no additional and relevant information in the Pre-Trial Chamber Decision.¹¹ A public redacted version of this decision was notified on 3 July 2023. Having considered the content of the decision as well as where redactions were applied, which in any event appear to be limited and included in parts of the decision which do not seem to have a bearing on the Request, the Chamber is of the view that the information contained in the Pre-Trial Chamber Decision would not impact the Yekatom Defence’s position. In light of this, the Chamber considers the Yekatom Defence’s position to be that it does not oppose the Request.
8. Before turning to the Request, the Chamber recalls that the disclosure of items to participants in different proceedings before the Court would not vary the protective measures in this case, since they will remain in place towards the public. The Chamber therefore considers that Regulation 42(2) of the Regulations is applicable.¹²
9. The Chamber also recalls its findings in its earlier decision. In particular, the Chamber recalls that it allowed the Prosecution to provide the Mokom Defence access in respect of the following materials, subject to certain conditions, *inter alia*: (i) all transcripts of testimonies, including private sessions; (ii) all confidential exhibits deemed formally submitted into evidence; and (iii) all witness statements, with the existing redactions applied.¹³ The Prosecution was

¹⁰ Ngaïssona Defence Response, ICC-01/14-01/18-1953-Conf, pp. 12-13.

¹¹ Yekatom Defence Response, ICC-01/14-01/18-1951-Conf, paras 5, 8.

¹² *See for example* Decision on the Third Prosecution Request for Authorisation to Disclose Certain Materials in the Case of *The Prosecutor v. Mahamat Said Abdel Kani* concerning Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328, 17 June 2022, ICC-01/14-01/18-1465 (the ‘Third *Said* Decision’), para. 7; Decision on the Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, 5 October 2021, ICC-01/14-01/18-1129, para. 7, *with further references to the jurisprudence of the Court*.

¹³ Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, paras 1, 9-10.

directed to prepare a list of items for prior consultation with the Defence, detailing all items that were to be disclosed to the Mokom Defence.

10. The Chamber also held that certain items in the case record did not appear, on their face, of any relevance to the Mokom Defence. The Prosecution was therefore directed to exclude such items from disclosure to the Mokom Defence unless exceptional circumstances required it. These items included (i) confidential items related to the accused's detention; (ii) *ex parte* items, in particular when concerning personal matters such as medical information; (iii) items collected during the Ngaïssona Defence's investigations; and (iv) other irrelevant documents of a purely procedural nature.¹⁴
11. The Chamber held that the Defence could review this list and present their objections to disclosure to the Mokom Defence within a specified time and/or indicate which redactions they deem necessary. In the absence of objections or in case of unopposed redactions, the Prosecution could proceed as soon as possible with the provision of the items to the Mokom Defence. In case of disagreement regarding the provision of specific items or categories thereof, and/or the application of redactions, the parties could seize the Chamber.¹⁵
12. The Chamber notes that, till date, the parties have not seized the Chamber of any applications concerning disagreement on specific items and/or application of redactions on material disclosed to the Mokom Defence.

A. First Sub-Request

13. Having regard to the above, the Chamber turns to the First Sub-Request that concerns all exhibits shown to, or otherwise used with, the 33 witnesses during their testimony.
14. The Mokom Defence submits that all items used during the testimony of the 33 witnesses are material to the defence preparation for the confirmation proceedings.¹⁶ It further submits that what is material for the preparation of the

¹⁴ Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, para. 10.

¹⁵ Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, para. 11.

¹⁶ Request, ICC-01/14-01/18-1932-Conf, para. 20.

defence must be interpreted broadly.¹⁷ It adds that it is seeking material that is directly relevant to witnesses that are being ‘used against Mr Mokom’ and such material would assist the Mokom Defence in its investigations and analysis.¹⁸ It argues that the only consideration for the purpose of the Request is ‘the relevance of the materials to the [Mokom] Defence’.¹⁹

15. The Chamber recalls that it permitted the Prosecution to provide to the Mokom Defence all public and confidential exhibits deemed formally submitted into evidence, in the absence of objections or unopposed redactions from the Defence, and excluding specific categories of items as outlined above.²⁰ The Chamber notes that, in principle, these items deemed formally submitted into evidence would include items shown to and/or discussed with the concerned witnesses respectively. The Chamber trusts that the Prosecution has complied with the Decision on Disclosure to the Mokom case and provided these items within the framework of that decision.
16. The Chamber sees no need to grant the Mokom Defence access to items that have not been recognised as formally submitted before the Chamber even if they may have been used in court with a particular witness. The Chamber notes the Mokom Defence’s submission that, access to *all* items used with a witness is necessary to understand the line of questioning surrounding them.²¹ However, the Mokom Defence does not point to any specific item(s), not disclosed to them, that would have been necessary to understand a particular line of questioning.
17. In the event that the Mokom Defence identifies specific item(s) in the possession of the Prosecution that, in its submission, should have been disclosed to it and are not recognised as formally submitted before the Chamber, it is directed to approach the Prosecution to request their provision *inter partes*, including in consultation with the Defence, if necessary.

¹⁷ Request, ICC-01/14-01/18-1932-Conf, para. 17.

¹⁸ Request, ICC-01/14-01/18-1932-Conf, para. 24.

¹⁹ Request, ICC-01/14-01/18-1932-Conf, para. 24.

²⁰ Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, paras 1, 9-11.

²¹ Request, ICC-01/14-01/18-1932-Conf, para. 22 (emphasis added).

18. In case of disagreement on whether a particular item must be disclosed, the Mokom Defence is directed to approach the Pre-Trial Chamber.
19. Accordingly, the Chamber rejects the First Sub-Request.

B. Second Sub-Request

20. The Second Sub-Request concerns ‘all other documents’ identified by the Defence as ‘documents they intended to use during their cross-examination of the relevant witnesses’ as well as the Lists of Defence Items.
21. In addition to the arguments advanced in relation to the First Sub-Request that also apply to the Second Sub-Request, the Mokom Defence submits, *inter alia*, that all items in the Lists of Defence Items are material to its preparation as these are documents that the Defence deem to be relevant to challenging the credibility, reliability and authenticity of a witness’s account.²² It further submits that, without access to this material, it would be impossible to ‘fully understand the transcripts’ of the 33 witnesses, as the transcript is ‘devoid of context’ and ‘incomprehensible’.²³
22. The Chamber considers that the Decision on Disclosure to the Mokom case covers all items that the Chamber is authorised to direct the parties to provide to the Mokom Defence.
23. In respect of items that are on the Lists of Defence Items and in the possession of the Prosecution but not recognised as formally submitted before the Chamber, the Mokom Defence is invited to proceed in accordance with paragraphs 17-18 of the present decision.
24. As regards the provision of the Lists of Defence Items themselves, the Chamber notes that such lists are an aid for the participants in preparation of an upcoming witness’s testimony. In and of themselves, they do not constitute evidence. In practice, they are also not conclusive or comprehensive as regards the items that are eventually used in court by the parties, as not all items appearing therein are

²² Request, ICC-01/14-01/18-1932-Conf, para. 23.

²³ Request, ICC-01/14-01/18-1932-Conf, para. 22.

necessarily used by a participant. In view of the Chamber, such lists are not needed to understand the testimony of a particular witness in all circumstances. For these reasons, the Chamber does not see fit to direct the Defence to provide these lists to the Mokom Defence.

25. However, the Mokom Defence is at liberty to request the Lists of Defence Items from the respective Defence teams, in consultation with the Prosecution on the necessary redactions, if any. In this regard, the Chamber notes that the Request does not indicate whether the Mokom Defence had previously approached the Defence with specific requests for any Lists of Defence Items. The Chamber invites the Mokom Defence to consult with the Defence, respectively, as the case may be, on whether these may be provided by them in good faith. The Chamber emphasises that, for the reasons mentioned above, it may not approach the Chamber in case of failure of consultations with the Defence on these lists.
26. Accordingly, the Chamber rejects the Second Sub-Request.

C. Third Sub-Request

27. The Third Sub-Request concerns all confidential transcripts of testimony concerning the 33 witnesses, comprising unredacted or lesser redacted versions thereof.
28. The Mokom Defence submits that some of these transcripts contain additional redactions and it has no information as to why these redactions have been implemented and what material is sought to be protected.²⁴ It points to specific transcripts and the redactions that it contests.²⁵ It submits that these redactions are ‘significant’ and impede its preparations; it seeks the ‘disclosure of the unredacted, or lesser redacted’ version of this material in the interest of ‘fairness and the exercise of the accused’s rights’.²⁶

²⁴ Request, ICC-01/14-01/18-1932-Conf, paras 25-26.

²⁵ Request, ICC-01/14-01/18-1932-Conf, para. 26, n. 31.

²⁶ Request, ICC-01/14-01/18-1932-Conf, para. 27.

29. The Chamber has reviewed the redactions disputed by the Mokom Defence. In view of the Chamber, some of these redactions may be lifted *vis-à-vis* the Mokom Defence, as detailed below.
- i. P-0992, Transcript of Hearing, T-092, p. 7, lines 3-14: The Chamber finds that lines 3-5 need not be redacted. The Chamber further notes that lines 11-14 have not been redacted from the public redacted version of this transcript. Accordingly, redactions from lines 3-5, 11-14 may be lifted from the confidential redacted version.
 - ii. P-0889, Transcript of Hearing, T-108, p. 12, lines 12-17: The Chamber notes that these redactions concern information contained in item CAR-OTP-2127-3304 that is recognised as formally submitted and as such should already have been provided to the Mokom Defence. The Chamber further notes that lines 12-17 have not been redacted from the public redacted version of this transcript. For this reason, the Chamber finds that lines 12-17 need not be redacted and these redactions may be lifted from the confidential redacted version.
 - iii. P-0889, Transcript of Hearing T-108, p. 22, lines 7-10: The Chamber notes that these redactions concern information contained in item CAR-OTP-2133-2735 that is recognised as formally submitted and as such should already have been provided to the Mokom Defence. The answers from the witness will assist the Mokom Defence in fully understanding the testimony concerning this document. For this reason, the Chamber finds that lines 7-10 need not be redacted and these redactions may be lifted from the confidential redacted version.
 - iv. P-0889, Transcript of Hearing, T-108, p. 42, line 25 to p. 43: lines 1, 4, 8: The Chamber notes that these redactions concern information that will assist the Mokom Defence in fully understanding the witness's testimony. Despite the fact that this information may touch on Mr Ngaïssona's private life to a limited extent, the Chamber finds that provision of this information to the Mokom Defence is appropriate when balancing the respective interests. For this reason, the Chamber finds

that p. 42, line 25 – p. 43: lines 1, 4, 8 need not be redacted and these redactions may be lifted from the confidential redacted version.

- v. Transcript of Hearing, T-184, p. 18, line 25 to p. 19, line 2: The Chamber notes that certain phrases in these sentences have not been redacted from the public redacted version of this transcript. Accordingly, the redactions from the following phrases may be lifted from the confidential redacted version ‘Mr Ngaïssona deteriorated the last two weeks. Unforeseeable.’ and ‘and, of course, he can follow some parts of the hearing but he is not well. Unforeseen.’
30. Accordingly, the Chamber partly grants the Third Sub-Request. It directs the Registry to file a lesser redacted confidential version of the aforementioned transcripts, lifting the redactions specified, and grant the Mokom Defence access to these transcripts. The Chamber emphasises that the Mokom Defence is bound by confidentiality obligations pursuant to Article 8 of the Code of Professional Conduct for Counsel and the protocol on handling of confidential information in the *Mokom* Case.
 31. The Chamber finds that the remaining redactions appear necessary in the present case on grounds, *inter alia*, that they concern Mr Ngaïssona’s health and private life, ongoing investigations by the parties, and detention related matters unrelated to the *Mokom* case.²⁷ In any event, the Prosecution is directed to review the necessity of any redactions on an ongoing basis.

D. Fourth Sub-Request

32. The Fourth Sub-Request concerns the disclosure of future material arising from witnesses yet to testify.
33. The Mokom Defence requests that the categories of items underlying the First, Second and Third Sub-Requests should also be made available in respect of any

²⁷ See Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, para. 10 for categories of items that the Chamber excluded from those that the Prosecution needed to provide to the Mokom Defence.

of ‘the remaining 37 witnesses’ that may testify in the present case prior to the confirmation proceedings in the *Mokom* case.²⁸

34. The Chamber recalls its previous ruling concerning ‘advance authorisation’.²⁹ The Chamber reiterates that such an advance authorisation would prevent the Defence from providing its views on the disclosure of the material to the Mokom Defence as outlined above, and also prevent the Chamber from examining it, if necessary.
35. Accordingly, the Chamber rejects the Fourth Sub-Request. This is without prejudice to a new request being filed pursuant to Regulation 42(2) of the Regulations if and when any of the witnesses subject to the Fourth Sub-Request may testify.
36. Finally, the Chamber notes that the Yekatom Defence does not oppose the reclassification to public of its response.³⁰ However, noting the reference to a decision of a certain classification in paragraph 3 and footnote 4 of the Yekatom Defence Response, the Chamber instructs the Yekatom Defence to file a public redacted version of its response.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the First Sub-Request;

REJECTS the Second Sub-Request;

PARTLY GRANTS the Third Sub-Request;

²⁸ Request, ICC-01/14-01/18-1932-Conf, para. 28.

²⁹ Decision on Disclosure to the Mokom case, ICC-01/14-01/18-1552, para. 12; Third *Said* Decision, ICC-01/14-01/18-1465, para. 13 *referring to* Decision on the Second Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of *The Prosecutor v. Mahamat Said Abdel Kani* concerning witnesses P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-0975, P-1339, P-1521, P-1719, P-2232, P-2269, and P-2843, 7 June 2022, ICC-01/14-01/18-1448, para. 8.

³⁰ Yekatom Defence Response, ICC-01/14-01/18-1951-Conf, para. 9.

DIRECTS the Registry to file a lesser redacted confidential version of the transcripts in accordance with paragraphs 29-30 above and grant the Mokom Defence access to these transcripts;

REJECTS the Fourth Sub-Request;




ORDERS the Registry to reclassify as public the Prosecution Response, ICC-01/14-01/18-1939-Conf;

INSTRUCTS the Mokom Defence to file a public redacted version of its Request, ICC-01/14-01/18-1932-Conf, within two weeks of notification of the present decision;

INTRUCTS the Yekatom Defence to file a public redacted version of the Yekatom Defence Response, ICC-01/14-01/18-1951-Conf, in accordance with paragraph 36 above, within two weeks of notification of the present decision; and

INSTRUCTS the Ngaïssona Defence to file a public redacted version of the Ngaïssona Defence Response, ICC-01/14-01/18-1953-Conf, within two weeks of notification of the present decision.

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

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Judge Péter Kovács	Judge Bertram Schmitt Presiding Judge	Judge Chang-ho Chung

Dated 13 July 2023

At The Hague, The Netherlands