

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/14-01/22**

Date: 5 April 2024

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala
Judge Sergio Gerardo Ugalde Godínez
Judge Haykel Ben-Mahfoudh

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM
GAWAKA***

Public

**Public Redacted Version of "Prosecution's Response to Ngaissona Defence
Motion for Disclosure" (ICC-01/14-01/22-326-Conf)**

Source: Office of the Prosecutor

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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I. INTRODUCTION

1. The Ngaissona Defence Motion for Disclosure (“Motion”)¹ should be rejected because Pre-Trial Chamber II (“Chamber”) is not the appropriate forum to litigate this particular disclosure request, which pertains to issues in the *Yekatom & Ngaissona* trial before Trial Chamber V. In addition, the Motion is overly broad and speculative.

II. CONFIDENTIALITY

2. The present request is filed on a confidential basis pursuant to regulation 23bis(1) of the Regulations of the Court as it contains references to confidential *inter partes* communications and relates to a Motion of the same designation. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

3. The Motion should be submitted before Trial Chamber V and not this Chamber. By attempting to litigate these issues before the Chamber, the Defence of Mr Ngaissona is circumventing the appropriate forum for disclosure related issues in the *Yekatom & Ngaissona* case, which is Trial Chamber V. The Defence seeks to obtain information of alleged relevance to many Prosecution witnesses, who have already testified in the case of *Yekatom & Ngaissona*, and links its Motion to a dispute regarding the application of the Contact Protocol applicable in that case.²

4. The Chamber’s residual jurisdiction over the Mokom case also does not extend to the resolution of conflicts on disclosure of evidence in the *Yekatom & Ngaissona* case. Contrary to the Defence argument³, the situation is not the same as previously raised before this Chamber. Then, the Defence of Mr Mokom sought access to confidential filings and submissions, which this Chamber did not have access to. By contrast, Trial Chamber V should adjudicate whether information in the possession of the

¹ ICC-01/14-01/22-322-Conf, hereinafter “Motion”.

² [REDACTED].

³ Defence e-mail of 8 February 2024, with reference to ICC-01/14-01/22-219-Red, para. 50.

Prosecution is material to the preparation of the Defence of Mr Ngaissona or triggers obligations pursuant to article 67(2). It follows that Trial Chamber V is the sole competent forum to resolve a conflict related to the applicable protocols as well as disclosure disagreements between the Parties *to that case*. The Defence strategy would otherwise undermine the competency of Trial Chamber V and open the door to regular forum shopping.

5. For completeness sake, the Prosecution respectfully submits that the “Sought Information” as set out in the Motion fails to meet the requirements under article 67(2) of the Statute and rule 77 of the Rules in the *Yekatom & Ngaissona* case. It is unclear what the Defence seeks to obtain at this point. Furthermore, the Motion is based on pure speculation.

6. [REDACTED]⁴ However, all these witnesses had already testified in the *Yekatom & Ngaissona* case and the Prosecution had rested its case. It is purely speculative on part of the Defence of Mr Ngaissona that unavailability for the *Mokom* case means a witness has decided not to cooperate or refuses to testify.

7. Furthermore, the Prosecution responded already that [REDACTED]⁵ The Prosecution also observed that the fact that a witness may be ‘unavailable’ alone does not make that fact or information regarding the surrounding circumstances disclosable. In assessing the materiality of a witness’s unavailability, the Prosecution must properly consider whether their present status has any bearing on their past participation in the case; put otherwise, to determine if and how the requested information “has a direct connection to the charges or a live issue in the case”.⁶ Where there is no such connection disclosure is not warranted. Nor, is it required regarding any internal assessments, opinions, or conclusions.⁷

⁴ [REDACTED].

⁵ [REDACTED].

⁶ *see Al Hassan* ICC-01/12-01/18-768, para. 13, citing *Ongwen* - ICC-02/04-01/15-1734, para. 22.

⁷ [REDACTED].

8. [REDACTED]⁸ However, instead of bringing this specific matter before the Trial Chamber V for resolution the Defence has sought to circumvent the normal procedure by applying to this Chamber for relief. In sum, whatever the motive for an interview may be, the Contact Protocol is binding on the Parties of the *Yekatom & Ngaissona* case and the resolution of any dispute regarding its application or touching upon the conduct of proceedings, lies solely with the corresponding Trial Chamber V.

9. The Notice of Withdrawal of the Charges (“Withdrawal Notice”) is specific to the case against Mr Mokom. Any information regarding “overlapping” witnesses, which triggers disclosure obligations, has been disclosed in the *Yekatom & Ngaissona* case. Should additional information arise, which bears on the credibility of witnesses who testified in the *Yekatom & Ngaissona* case, and therefore may trigger disclosure obligations in that case, this too will be disclosed. This conflict as well as any future conflicts are to be resolved before Trial Chamber V unless they concern access to legal submissions and decisions Trial Chamber V does not have access to.

IV. CONCLUSION

10. For the above reasons, the Prosecution respectfully requests that the Motion is dismissed.



Karim A. A. Khan KC, Prosecutor

Dated this 5th day of April 2024
At The Hague, The Netherlands

⁸ [REDACTED].