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**International
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Date: **4 January 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
*PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

Public

Public redacted version of "Corrected version of 'Prosecution's Request for a Status Conference, 21 December 2022, ICC-01/14-01/22-126-Conf'"

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to schedule a status conference pursuant to rule 121(2)(b) of the Rules of Procedure and Evidence¹ on 16 January 2023, or as soon as practicable thereafter.

2. Given the Appeals Chamber’s 19 December 2022 Judgement affirming the Chamber’s 25 March 2022 order revoking the appointment of Mokom’s choice of legal representation,² it is likely that a permanent Counsel will be selected and assigned shortly. As such, a status conference promptly following the judicial recess would afford the Parties and Participants a meaningful opportunity to apprise and update the Chamber regarding any outstanding issues or developments potentially affecting the confirmation of charges proceedings. It would also allow for the debate and expeditious resolution of matters which might otherwise result in time-consuming litigation and delay, as well as facilitate the Parties’ and Participants’ better allocation of limited resources, toward their respective preparation.

3. As concerns the Prosecution, a status conference would, among other things, touch on the state of disclosure, the posture of the pending litigation before Trial Chamber V regarding Mokom’s access to the *Yekatom and Ngaissona* case file, and on its ongoing investigations. For the Mokom Defence, it may reasonably afford permanent Counsel with an opportunity to provide clarity on, *inter alia*, procedural and substantive Defence positions, which have been deferred during the lengthy pendency of the appellate litigation.

¹ Hereinafter, “Rules”.

² See ICC-01/14-01/22-124-Red; and ICC-01/14-01/22-26-Red (“25 March 2022 Order”).

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files this submission confidentially because it references filings of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

5. Rule 121(2)(b) provides that “[t]he Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions.” Although framed in the context of the Pre-Trial Chamber’s duty to organise ‘disclosure’ as such, the provision is interpreted within the broader context of ensuring the timely and efficient disposition of the confirmation process. Thus, the Chambers Practice Manual clarifies:

“Pre-Trial Chambers should *make full use* of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. *Parties’ procedural requests can also be received, debated and decided at status conferences.*”³

The manual reflects not only the Court’s “best practices”⁴ regarding systems common to various stages of the proceedings, but the ‘agreements’ of the Court’s judges in addressing past and extant inconsistencies in the practice of the different Pre-Trial Chambers.

6. Although an *inter partes* status conference has been held,⁵ Mokom’s temporary representation and its inherent limitations have impacted its effectiveness, including

³ Chambers Practice Manual (6th ed.), para. 19 (emphasis added).

⁴ See Pre-Trial Practice Manual, September 2015 (noting that the creation of a practice manual “was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings”); see Chambers Practice Manual, February 2016 (noting, the “crystallisation of the best practices identified with respect to systems common to various stages of the proceedings”).

⁵ See ICC-01/14-01/22-88-Conf-Exp; see also ICC-01/14-01/22-T-004-CONF-ENG.

having precipitated the contingent nature of relevant decisions issued by the Chamber.⁶ As the assignment of permanent Counsel advances the certainty of the proceedings, holding a status conference at the earliest opportunity would be advantageous.

i) Disclosure

7. The Prosecution has raised concerns regarding the metadata requirements for disclosure directed by the Chamber.⁷ A number of factors affect the relative burdens on the Parties and further, potentially implicate the celerity of the confirmation process. The Prosecution considers that a status conference would allow it more fully to apprise the Chamber of these concerns, as well as the state of the Prosecution's progress or any related impediments.

8. As noted, the requirement to identify for each 'disclosed' item which sections contain incriminating, exonerating and/or material information, and to indicate the page and paragraph numbers of the relevant sections of documents, statements, and transcripts, was initially understood to relate limitedly to material disclosed as PEXO,⁸ as opposed to items disclosed pursuant to rule 77.⁹ The latter comprises by far the bulk of potentially disclosable material in this case. The Chamber later clarified the scope of its instruction in its 7 November 2022 Order on disclosure and related matters,¹⁰ and further so in its 30 November 2022 Second Order on disclosure and related matters, which noted the previous application of its approach,¹¹ and referenced the *Abd-Al Rahman* case as an example.¹²

⁶ ICC-01/14-01/22-62, paras. 27, 31 (predicating disclosure on the assignment of permanent Counsel).

⁷ See ICC-01/14-01/22-109; see ICC-01/14-01/22-116, para. 14.

⁸ The Prosecution was later made to understand that this requirement extended to material disclosed INCRIM as well.

⁹ See ICC-01/14-01/22-62, para. 30.

¹⁰ ICC-01/14-01/22-104.

¹¹ ICC-01/14-01/22-116, para. 14.

¹² See ICC-02/05-01/20-169, paras. 23-24. However, see *contra* ICC-02/04-01/15-251, para. 43.

9. Nevertheless, the Chamber's evolving approach to disclosure places an onerous burden on the Prosecution's resources in this specific case.¹³ Both the *Abd-Al Rahman* and *Said* pre-trial proceedings in which the Chamber's approach to disclosure was adopted relate to narrower cases and substantially less disclosable material.¹⁴ In addition, neither case is the product of a larger related trial in which statutory disclosure has already been discharged. These factors mean that the Chamber's approach renders disclosure in the *Mokom* case significantly more resource intensive and burdensome than in the interrelated case of *Yekatom and Ngaissona*. Generally, in *sequential* proceedings in related cases, the disclosure process becomes more efficient. However, the Chamber's shift in the disclosure paradigm requires the Prosecution to reorganise its disclosable material, including by adding, modifying, and populating metadata fields, which were not considered necessary or otherwise required by the Chamber in the *Yekatom and Ngaissona* proceedings. Further, the variance between the two may give rise to unconsidered litigation. These factors warrant further consideration in line with the Court's jurisprudence.¹⁵

10. While mindful of the Chamber's concerns about the volume of information potentially to be disclosed at this stage, the Prosecution considers that it is bound by the statutory disclosure framework and the Court's jurisprudence. As such, given the interrelatedness of the *Mokom* and *Yekatom and Ngaissona* cases, it bears underscoring that the approximately 32,000 items disclosed in the latter case and *potentially* disclosable¹⁶ in the *Mokom* case emerge from an evaluation and assessment of some

¹³ The assigned Prosecution team is simultaneously engaged in the ongoing *Yekatom and Ngaissona* trial.

¹⁴ Comprising approximately 16,000 and 12,000 items, respectively.

¹⁵ See e.g., ICC-02/04-01/15-251, paras. 41-43 (noting the importance of rule 121(2)(b) status conferences to the Chamber's consideration of "the full circumstances of *each individual case* in making orders and decisions regarding disclosure", and particularly, the Chamber's receipt of the Parties' submissions on the disclosure process, particularly on the "utility and practical implications of [an] additional disclosure requirement prior to imposing it", especially when doing so "may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings").

¹⁶ Note that the Prosecution is re-reviewing this material toward assessing items 'truly relevant' to the limited confirmation proceedings.

149,000 items in the Prosecution's collection comprising nearly one half-million pages and over 11,000 audio and visual items.

11. The Prosecution considers that a status conference would provide it with a meaningful opportunity to apprise and update the Chamber, Parties, and Participants regarding the implementation of the Chamber's disclosure order, as well as to ventilate its concerns and to timely present any perceived difficulties or obstacles.

12. A status conference would further allow the Prosecution to address such issues as may affect its continuing investigation,¹⁷ and as concerns the status of the Mokom Defence's prospective access to the record of the *Yekatom and Ngaissona* case¹⁸ — also significant to the expeditious conduct of the confirmation proceedings. It bears noting that the Prosecution's 8 April 2022 request to grant access to the confidential record of the *Yekatom and Ngaissona* case for Mokom's benefit was filed precisely to facilitate the efficient conduct of the pre-confirmation proceedings. To this extent, a status conference where any related issues can be fully debated and determined, would also mitigate delay — for which there can be no reasonable suggestion that the Prosecution has in any way contributed.¹⁹

ii) Victim Participation

13. Victims' participation is another area in which the appointment of permanent Counsel has an impact, given that the Chamber's adjudication of the Office of Public Counsel for Victim's application was deferred until such time to allow for the Defence's definitive response.²⁰

¹⁷ See article 63(4).

¹⁸ See ICC-01/14-01/22-125 (requesting the Prosecution's provision of a list of access material on which it intends to rely for instance for the purposes of confirmation, notwithstanding the Court's practice and the express provisions of rule 121(3)).

¹⁹ *Contra*, ICC-01/14-01/22-125, para. 6 (citing ICC-01/14-01/22-T-004-Red-ENG, p. 22, l. 23-24).

²⁰ ICC-01/14-01/22-62, para. 39.

14. Here too, a status conference, as prescribed in the Chambers Practice Manual, would be of benefit to the expeditious disposition of the pending application.

iii) Substantive Defence Positions

15. Duty Counsel has previously noted limitations in advancing substantive positions on Mokom's behalf, deferring to permanent Counsel as best placed to address such matters. Accordingly, permanent Counsel may avail themselves of the status conference to address for instance, "the defence approach and strategy at the confirmation hearing"²¹ and, as regards Defence investigations, "the[ir] scope and priorities."²² Permanent Counsel may also consider addressing significant matters not addressed by Duty Counsel regarding the Chamber's Order seeking observations on the conduct of the confirmation proceedings.²³ These could include, whether the Defence (a) anticipates advancing any ground for excluding criminal responsibility or alibi; (b) will call witnesses to testify, or (c) intends to rely on written testimony.²⁴

16. A status conference would afford permanent Counsel with an opportunity promptly and meaningfully to provide the Chamber, the Parties, and the Participants with an indication of these and other issues (such as may concern staffing or resources – a Registry responsibility) which may affect the Defence's preparation for the confirmation proceedings. In this way, these issues can be addressed and resolved efficiently.

iv) Interim Release

17. In view of the Registry's 21 December 2022 report on its consultations concerning the Suspect's potential interim release [REDACTED],²⁵ the requested status conference

²¹ ICC-01/14-01/22-58, para. 3.

²² ICC-01/14-01/22-58, para. 4.

²³ ICC-01/14-01/22-50.

²⁴ See ICC-01/14-01/22-58, para. 3.

²⁵ [REDACTED].

may also provide a convenient forum for the Chamber, along with the Parties and Participants to be updated, and to provide other information pertinent to the issue.

IV. CONCLUSION

18. For the foregoing reasons, the Prosecution requests that the Chamber schedule a status conference pursuant to rule 121(2)(b) for 16 January 2023, or as soon thereafter as practicable.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 4th day of January 2023

At The Hague, The Netherlands