



Original: English

**No. ICC-01/14-01/22
Date: 13 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 in relation to 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)'

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

Legal Representatives of Victims

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

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 in relation to 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)’’.

I. PROCEDURAL HISTORY

1. On 2 February 2023, the Chamber issued the ‘Decision regarding the Prosecution’s submission on material in the Yekatom and Ngaïssona case to which access may be authorised’ (the ‘2 February 2023 Decision’),¹ finding that any access to material forming part of the record of *The Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona* (the ‘Yekatom and Ngaïssona case’) that may be granted by Trial Chamber V (the ‘Access Material’) does not automatically displace the Prosecution’s formal disclosure obligations in the present proceedings, which entails that any material from the *Yekatom and Ngaïssona* case record for which formal disclosure to Mr Mokom is required will have to be disclosed in accordance with the Chamber’s instructions in the present case.

2. On 6 February 2023, the Prosecution submitted the ‘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)’ (the ‘Prosecution’s Request’)², requesting the Chamber to confirm that ‘its disclosure obligations are limited to material that is duly disclosable, and do not extend to other, non-disclosable material from the Yekatom and Ngaïssona case record to which access may nevertheless be granted’. It asserts that the 2 February 2023 Decision could be read as imposing ‘a standard inconsistent with the Court’s statutory framework and practice, to the extent that it could impose a duty on the Prosecution to perform its disclosure obligations in relation to material that is non-disclosable or otherwise not in its possession, to which the [Defence] has been granted access by the Registry’.

¹ [ICC-01/14-01/22-147](#).

² [ICC-01/14-01/22-153](#).

3. On 7 February 2023, a status conference was held (the ‘7 February 2023 Status Conference’),³ at which time the Prosecution stated *inter alia* that ‘access to material may have a bearing on the disclosability of the same material’,⁴ and ‘[a]ccess [sic] material is not disclosed within the paradigm of the Court’s procedural framework’.⁵

4. On 10 February 2023, the Defence for Mr Mokom (the ‘Defence’), pursuant to the Chamber’s oral order issued during the 7 February 2023 Status Conference,⁶ submitted its response to the Prosecution’s Request.⁷ It argues *inter alia* that the 2 February 2023 Decision ‘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’, and that the second limb of the disposition of the 2 February 2023 Decision must be read together with the first limb, which refers to paragraph 11 of that decision. The Defence further contends that ‘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’.

II. DETERMINATION

5. In the 2 February 2023 Decision, the Chamber: (i) instructed the Prosecution to comply with its disclosure obligations as set out at paragraph 11 of the decision, including the disclosure deadline of 23 February 2023; and (ii) found 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.

6. The Chamber emphasises that, considering that the 2 February 2023 Decision specifically pertains to the Prosecution’s submission regarding its approach to the Access Material, and reading the 2 February 2023 Decision as a whole, it necessarily

³ Transcript of hearing, 7 February 2023, [ICC-01/14-01/22-T-005-ENG](#); see also Order for observations and decision on the Prosecution’s request for a status conference, 24 January 2023, [ICC-01/14-01/22-138](#).

⁴ [ICC-01/14-01/22-T-005-ENG](#), p. 12, lines 15-16.

⁵ [ICC-01/14-01/22-T-005-ENG](#), p. 24, lines 18-19.

⁶ [ICC-01/14-01/22-T-005-ENG](#), p. 15, line 21 - p. 16, line 2.

⁷ 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)’, ICC-01/14-01/22-156.

follows that the reference to ‘any’ in the second limb of the operative paragraph of the decision refers to any material from the *Yekatom and Ngaïssona* case to which access may be granted by Trial Chamber V that triggers the Prosecution’s formal disclosure obligations in the present proceedings.⁸

7. Accordingly, the Prosecution shall formally disclose any of the Access Material insofar as its disclosure obligations are engaged pursuant to articles 61(3)(b) and 67(2) of the Rome Statute, and/or rules 76 and 77 of the Rules of Procedure and Evidence, in accordance with the Chamber’s instructions.⁹ This means that the Prosecution is required to discharge its disclosure obligations in relation to Access Material which it considers to be incriminating, potentially exonerating, or material to the preparation of the Defence. Therefore, the Chamber expects the Prosecution to thoroughly review the Access Material with a view to determining whether its disclosure obligations in the present case are triggered and, if so, it shall proceed with the formal disclosure of such material in conformity with the statutory framework and the Chamber’s instructions.

8. Furthermore, following the Prosecution’s clarifications provided at the 7 February 2023 Status Conference, the Chamber understands that the Defence may be given access to other materials from the *Yekatom and Ngaïssona* case that, in the view of the Prosecution, do not fall in the aforementioned categories (i.e. incriminating, potentially exonerating or rule 77 material) (the ‘Other Access Material’).¹⁰ To the extent that this is the case, the Chamber emphasises that the Prosecution’s approach with regard to the Other Access Material creates a degree of confusion in respect of the disclosure process and its related obligations in this case. Whilst the Chamber appreciates the Prosecution’s intention to make information from a related case available to the Defence, the Chamber emphasises that the provision of materials to the Defence must proceed in conformity with the applicable statutory framework governing disclosure and the Chamber’s additional instructions, in order to ensure the orderly

⁸ See also [2 February 2023 Decision](#), footnote 12 (‘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”’ [emphasis added]).

⁹ 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; 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; [2 February 2023 Decision](#), para. 11.

¹⁰ See for instance [Prosecution’s Request](#), para. 3.

conduct of the disclosure process. It is not appropriate for the Prosecution to seek to place at the disposal of the Defence material falling outside the scope of the above-mentioned provisions and the Chamber's instructions. Such an approach may result in the Defence receiving access to a potentially large amount of materials which does not have any formal status in this case, and for which the Prosecution's formal disclosure obligations may not be engaged. In this regard, the Chamber also notes the Prosecution's approach regarding the material 'migrated' from the *Yekatom and Ngaïssona* case, which has similarly led to a voluminous amount of materials to which the Defence has access outside the formal disclosure process.¹¹

9. Whilst inappropriate, the Chamber considers that the Prosecution's approach with regard to the Other Access Material does not materially prejudice the Defence at present. This is because the disclosure process remains ongoing, the Chamber has instructed the Prosecution to thoroughly review the Access Material so as to determine whether formal disclosure is required, and there remains sufficient time for the Defence to prepare for the confirmation of charges hearing. Nonetheless, given the potentially large amount of information concerned and to facilitate the Defence's examination of these materials, the Chamber considers it appropriate to instruct the Prosecution, in accordance with its obligation to act in good faith and impartially, to provide the necessary assistance that the Defence may require in reviewing the Other Access Material in *inter partes* consultations, in particular with regard to its relevance to the present proceedings.¹² This is all the more necessary given the Prosecution's previous indication that the Defence will have access to 'nearly the entire record of the Yekatom and Ngaïssona proceedings'.¹³

¹¹ At the Status Conference, the Prosecution indicated that it had 'migrated' approximately 30,000 items from the *Yekatom and Ngaïssona* case to the *Mokom* case to be placed at the disposal of the Defence, whereas, in its view, a large amount of such items are not pertinent to this case (see [ICC-01/14-01/22-T-005-ENG](#), p. 21 line 7 – p. 22 line 18; p. 24 line 11 - p. 26 line 15; p. 29 line 3 – p. 30 line 20).

¹² The parties may seize the Chamber only if they are not able to resolve a matter through their *inter partes* consultations.

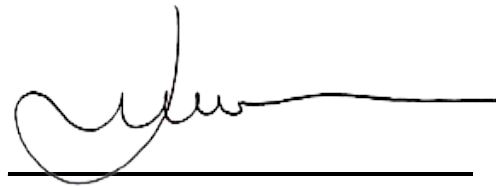
¹³ Prosecution's Submissions pursuant to the Chamber's Order on Disclosure and Related Matters (ICC-01/14-01/22-104), [ICC-01/14-01/22-109](#), footnote 5.

FOR THESE REASONS, THE CHAMBER HEREBY

PROVIDES the clarification set out in the present decision; and

ORDERS the Prosecution, in accordance with its obligation to act in good faith and impartially, to provide the necessary assistance that the Defence may require in reviewing the Other Access Material in *inter partes* consultations.

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

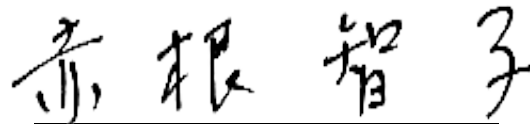


Judge Rosario Salvatore Aitala

Presiding



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 13 February 2023

At The Hague, The Netherlands