

**Cour
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**International
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Court**



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Date: **15/03/2023**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

PUBLIC

Mokom Defence Response to ‘Prosecution’s Submission of the Document Containing the Charges’

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

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Applicants

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**Victims Participation and Reparations Other
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I. INTRODUCTION

1. Pursuant to Regulation 24(1) of the Regulations of the Court and the Pre-Trial Chamber's instructions on time limits,¹ the Defence for Mr. Mokom provides its response to the Prosecution's Submission of the Document Containing the Charges.²

II. PROCEDURAL HISTORY

2. On 10 December 2018, Pre-Trial Chamber II ('Chamber') issued a Warrant of Arrest for Mr. Mokom.³

3. On 14 March 2022, Mr. Mokom was surrendered to the Court.⁴

4. On 22 March 2022, during the first appearance of Mr. Mokom, the Chamber set the date of the confirmation of charges hearing for 31 January 2023,⁵ later rescheduled for 22 August 2023.⁶

5. On 27 June 2022, the Chamber issued its 'Order on the conduct of the confirmation of charges proceedings', in which it ordered the Prosecution to commence the disclosure of all evidence it intends to rely upon at the confirmation hearing, immediately after the notification of appointment of permanent counsel for Mr. Mokom, and to complete this disclosure within a month.⁷ The same Order also instructed the Prosecution to submit a complete and detailed table of its witnesses in relation to whom material(s) has/have been disclosed on the date of the completion of the disclosure process.⁸

6. On 7 November 2022, the Chamber issued its 'Order on disclosure and related matters', in which it instructed the Prosecution to differentiate the evidentiary items disclosed

¹ Pre-Trial Chamber II, 'Second order on the conduct of the confirmation of charges proceedings'. 13 February 2023, ICC-01/14-01/22-157, para. 18.

² Office of the Prosecutor, 'Prosecution's Submission of the Document Containing the Charges', 9 March 2023, ICC-01/14-01/22-174 ('Prosecution Submission').

³ See Pre-Trial Chamber II, 'Public Redacted Version of 'Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka' (ICC-01/14-01/22-2-US-Exp)', 22 March 2022, ICC-01/14-01/22-2-Red2.

⁴ Pre-Trial Chamber II, 'Order convening a hearing for the first appearance of Mr Mokom', 16 March 2022, ICC-01/14-01/22-21, para. 4.

⁵ ICC Transcript, 22 March 2022, ICC-01/14-01/22-T-001-Red-ENG, p. 11, lines 19-21.

⁶ Pre-Trial Chamber II, 'Decision setting the date for the confirmation of charges hearing', 3 February 2023, ICC-01/14-01/22-151, para. 11.

⁷ Pre-Trial Chamber II, 'Order on the conduct of the confirmation of charges proceedings', 27 June 2022, ICC-01/14-01/22-62, paras. 27 and 31.

⁸ Ibid. para. 32.

in the case by indicating the page and paragraph numbers of the relevant sections of each disclosed item.⁹

7. On 11 November 2022, the Prosecution requested the Chamber's authorisation to proceed with the migration of approximately 33,000 items disclosed in the *Yekatom and Ngaïssona* case to the *Mokom* case record ('migration').¹⁰

8. On 30 November 2022, the Chamber issued its 'Second order on disclosure and related matters' in which it authorized the 'migration'.¹¹

9. On 23 January 2023, permanent Counsel for Mr. Mokom was appointed.¹²

10. On 24 January 2023, the Chamber ordered the Prosecution to fulfil its disclosure obligations regarding material it intends to rely upon for the confirmation of charges hearing by no later than 23 February 2023, and submit its Document Containing the Charges (the 'DCC') by 9 March 2023.¹³

III. SUBMISSIONS

(a) The disclosure deadline has expired and no further request for disclosure is admissible

11. The Prosecution requests the Chamber's authorisation to:

- Amend the disclosure metadata of 21 Rule 77 documents to INCRIM;
- Amend the disclosure notes relating to the identification of the relevant passage(s) for 39 INCRIM items; and
- Formally disclose nine (9) trial transcripts from the *Yekatom and Ngaïssona* case (the 'disclosure request').¹⁴

⁹ Pre-Trial Chamber II, 'Order on disclosure and related matters', 7 November 2022, ICC-01/14-01/22-104, para. 8.

¹⁰ Office of the Prosecutor, 'Prosecution's Submissions pursuant to the Chamber's Order on Disclosure and Related Matters (ICC-01/14-01/22-104)', 11 November 2022, ICC-01/14-01/22-109, paras. 3-4.

¹¹ Pre-Trial Chamber II, 'Second order on disclosure and related matters', 30 November 2022, ICC-01/14-01/22-116, para. 9.

¹² Registry, "Notification of the Appointment of Mr Philippe Larochelle as Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka", 23 January 2023, ICC-01/14-01/22-136.

¹³ Pre-Trial Chamber II, '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.

¹⁴ ICC-01/14-01/22-174, para. 9.

12. The disclosure request has been submitted after the expiry of the disclosure deadline of 23 February 2023.¹⁵

13. Article 67(1)(a) and (b) of the Statute protect the right of the accused to prompt and detailed notice of the case against him, and adequate time and resources for the preparation of his Defence. The deadlines set by the Chamber for the Prosecution disclosure in advance of the confirmation of charges hearing are directed towards the preservation of these rights, and to prevent the Prosecution from presenting a case of shifting scope and size.

14. Compliance with the disclosure deadlines set by the Chamber is not optional. Where a party becomes aware that it will not be in a position to comply with a deadline, it is required to seek leave in advance for its variation, upon a showing of good cause. The Prosecution has offered no explanation for its failure to comply with the Chamber's order, and has offered no basis for a finding of good cause that the disclosure deadline should be varied in relation to the additional material it now seeks to disclose, and the amendments it seeks to make.

15. Presumably, the Prosecution has been aware of the existence of the items in question long before the filing of the DCC. Nevertheless, instead of complying with the deadlines set by the Pre-Trial Chamber, the Prosecution is now placing the parties before a *fait accompli* by simply including these items in the DCC. Further, the failure to abide by the Pre-Trial Chamber's orders is compounded by the fact that the items referred to in the Prosecution submissions have neither been identified in the DCC nor singularized in the ocean of disclosure for the benefit of the Pre-Trial Chamber and the Defence.

16. The Chamber has already recognised that the Prosecution has had 'ample time' to organise the evidence relevant to the confirmation hearing, in particular during the protracted period of litigation related to Mr. Mokom's legal representation.¹⁶ The Prosecution stated more than one month ago that the DCC was 'written' and that the preparation and organisation of the evidence on which it intends to rely was well advanced.¹⁷ The Prosecution should have therefore been in a position to disclose the entirety of the documents it intends to rely upon at the confirmation hearing by 23 February 2023.

¹⁵ ICC-01/14-01/22-138, para. 12.

¹⁶ ICC-01/14-01/22-116, para. 15.

¹⁷ ICC Transcript, 7 February 2023, ICC-01/14-01/22-T-005-ENG, p. 13-14, l. 24-4.

17. With regard to the nine transcripts of *Yekatom and Ngaïssona* case record that the Prosecution seeks to formally disclose, the Prosecution was required to fulfil its disclosure obligations in relation to transcripts of the *Yekatom and Ngaïssona* case in accordance with the Chamber's previous orders, including within time limit of 23 February 2023.¹⁸ The Chamber has therefore been explicit that other material from the *Yekatom and Ngaïssona* case record for which disclosure would be required after the expiry of the disclosure deadline, 'will not be taken into account for the purposes of the confirmation hearing'.¹⁹ The fact the Defence already has access to these transcripts does not mitigate the prejudice resulting from the Prosecution's failure to abide by the Chamber's instructions.²⁰

18. The confirmation of charges hearing is five months away. The disclosure deadlines were put in place precisely to avoid untimely applications of this kind. The Prosecution claim that the disclosure request is submitted at an 'early stage' is therefore unfounded. As is the claim that this late disclosure will not result in any 'appreciable prejudice'.²¹ At this point in the pre-trial phase, the Defence is entitled to have a full picture of the material which it must be prepared to respond, given that a constantly shifting Prosecution case disrupts Defence investigations and preparations.

19. As such, and in the absence of any justification or showing of good cause, the Prosecution request should be denied, and items relied upon by the Prosecution in its DCC and which were not disclosed by 23 February 2023 should not be taken into account for the purposes of the confirmation of charges hearing.

(b) The Prosecution must provide a list of the witness statements not included in its Witness Table

20. The Prosecution concedes that references to witnesses' statements in the Annex to the DCC are not contained in the Witness Table. As such, the Prosecution recognizes that it failed to abide by the Chamber's instructions requiring it to ensure that the evidence referenced in the Annex to the DCC corresponds exactly to the evidentiary items listed in the List of Evidence and the Witnesses Table.²²

¹⁸ 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, para. 11.

¹⁹ Ibidem.

²⁰ See ICC-01/14-01/22-174, para. 9, footnote 8.

²¹ ICC-01/14-01/22-174, para. 9.

²² ICC-01/14-01/22-174, para. 7; see also ICC-01/14-01/22-104, para. 10.

21. Contrary of the Prosecution's assertion, the Annex to the DCC does not provide sufficient notice of the Statement references on which it relies if the witness statements listed in the Annex do not mirror the ones listed in the Witness Table. The Defence must have a complete picture of the witnesses associated with each statement relied upon by the Prosecution for the purposes of the confirmation of charges hearing, which can only be obtained through the inclusion in the Witness Table of all statements relied upon by the Prosecution. The Prosecution has been aware since June 2022 of the Chamber's instructions in relation to the submission of its Witness Table²³ and has also had ample time to prepare in this regard.

22. The Prosecution offers to provide a list of the references not included in the Witness Table, should the Chamber require it to do so. The Defence submits that the Chamber should require the Prosecution to submit such list of statements as soon as practicable, in order to ensure an efficient and meaningful Defence preparation prior to the confirmation of charges hearing. Alternatively, the Pre-Trial Chamber should request the Prosecution to provide a new version of the Witness Table including the additional statements references.

IV. CONCLUSION

23. On the basis of the above submissions, the Defence requests that the Pre-Trial Chamber:

ORDER the Prosecution to identify the newly disclosed items in the DCC;

DENY the disclosure request; and

ORDER the Prosecution to provide a list of the witnesses' Statements relied upon in the Annex to the DCC which are not contained in the Witness Table, or in the alternative, submit a new version of its Witness Table including the additional statements references;

Respectfully submitted,

²³ ICC-01/14-01/22-62, para. 32.



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The Hague, The Netherlands
Wednesday, March 15, 2023