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**Cour
Pénale
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**International
Criminal
Court**



Original: **English**

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

Date: **24/03/2023**

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

*Confidential Ex Parte available only to Defence and Registry
With Confidential Ex Parte Annex I available only to Defence and Registry*

**Defence Request for Review of the Registrar's Decision on Legal Assistance and for a
Stay of Proceedings**

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

The Office of the Prosecutor

Counsel for the Defence
Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section
Pieter Vanaverbeke

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other
Section

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I. INTRODUCTION

1. The present application is a simple one. The Legal Aid Policy of the Court¹ includes a set formula for calculating the amount of legal assistance to be provided to indigent accused appearing before it. The Registrar has declined to provide the Defence with the resources to which it is entitled under the Legal Aid Policy,² and in doing so, has committed errors which warrant the intervention of the Pre-Trial Chamber ("Chamber").

2. The Defence and Mr. Mokom have given the Chamber every reason to accept that they intend to defend against the charges in this case in good faith, and cooperate with the Court and its organs. This is only possible if the Defence team is comprised of enough people to review and analyse the evidence that the Prosecution has been collecting since 2007, and has now provided and disclosed to the Defence.

3. At the heart of the present application is the Registrar's mistaken and unilateral conclusion that the Defence is not entitled to the resources needed to review the materials migrated from the *Yekatom and Ngaïssona* case. Essentially, therefore, the Registrar's position is that the Chamber authorised the migration of materials into Mr. Mokom's casefile that the Defence was never entitled to read. This conclusion is at odds with both the Prosecution and the Chamber's own language, and with common sense.

4. Importantly, against the backdrop of a six-month period for preparation for the confirmation of charges hearing, and despite the best efforts of the Defence, the Registrar took over three weeks to issue a decision on the Defence Request,³ and another three weeks to decide not to reconsider it. As such, the Defence seeks the intervention of the Chamber, including the issuance of a stay of proceedings until the issue of funding is resolved, for the reasons set out below.

¹ Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP-12/3 ("Legal Aid Policy").

² Annex I, Email, "Mokom Defence Request for Additional Resources", 20 March 2023, 17:30 ("Registrar's Decision").

³ Request for additional resources to the Counsel Support Section pursuant to Regulation 83(3) of the Regulations of the Court and Article 67(1)(b) of the Rome Statute, 6 February 2023 ("Defence Request").

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II. LEVEL OF CONFIDENTIALITY

5. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files these observations as confidential *ex parte*, as they refer to confidential documents and information, and concern questions of internal Defence organisation and funding. A public redacted version will be filed.

III. PROCEDURAL HISTORY

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

7. 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, 10 months later.⁵

8. On 17 May 2022, Mr. Mokom submitted his application form for legal aid to the Registry. His indigent status was recognized for the purpose of legal assistance paid by the Court.

9. On 30 November 2022, following a request from the Prosecution, the Chamber authorised the Prosecution to migrate approximately 33,000 items disclosed in the *Yekatom and Ngaïssona* case to the Mokom case record ("migration").⁶

10. On 23 January 2023, the Chamber postponed the date of the confirmation of charges hearing, as a result of delays caused by the litigation regarding Mr. Mokom's legal representation.⁷

11. During the week of 30 January 2023, 31,751 disclosed items were migrated from the *Yekatom and Ngaïssona* case to the Mokom case record.

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, l. 19-21.

⁶ Pre-Trial Chamber II, 'Second order on disclosure and related matters', 30 November 2022, ICC-01/14-01/22-116, para. 9; see also 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.

⁷ Pre-Trial Chamber II, 'Order postponing the confirmation of charges hearing', 23 January 2023, ICC-01/14-01/22-137, para. 8.

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12. On 3 February 2023, the Chamber ordered the confirmation of charges hearing in the Mokom case would commence on 22 August 2023.⁸ For Mr. Mokom's new legal team, this meant a 6 month period for preparation for the confirmation hearing, as opposed to the original 10 months set by the Chamber.

13. On 6 February 2023, the Mokom Defence submitted the Defence Request, seeking the allocation of additional resources under the Full Time Equivalent ("FTE") system provided in the Registry Legal Aid Policy, where one FTE warrants the recruitment of one additional Legal Assistant.⁹ In accordance with the FTE system and based on a survey of the case workload, the Mokom Defence requested the addition of 9 FTE under the Legal Aid Policy.

14. On 10 February 2023, Counsel for Mr. Mokom wrote to the Head of the Counsel Support Section ("CSS") to discuss the Defence Request.¹⁰ On the same day, the Head of CSS responded that they were still assessing the Defence request and would be in a position to liaise with the Defence at the latest in the following week.¹¹ This did not happen.

15. On 17¹² and 21 February 2023¹³, Counsel for Mr. Mokom again wrote to the Head of CSS, asking for a decision as soon as possible on the Defence Request. On the same day, the Head of CSS responded that a decision would be provided the following day.¹⁴ This did not happen.

16. On 24 February 2023, the Head of the Counsel Support Section informed the Mokom Defence that the Registrar had assessed that "3 additional FTE are considered, at this stage, reasonably necessary in light of the current situation and pending further clarification (i.e. Document containing the Charges as well as any other indication as to the relevancy of the migrated documents to the Mokom case)."¹⁵

⁸ Pre-Trial Chamber II, 'Decision setting the date for the confirmation of charges hearing', 3 February 2023, ICC-01/14-01/22-151.

⁹ Legal Aid Policy, para. 69.

¹⁰ Annex I, Email, "Your appointment as Counsel for Mr Mokom", 10 February 2023, 16:39.

¹¹ Annex I, Email, "Your appointment as Counsel for Mr Mokom", 10 February 2023, 16:43.

¹² Annex I, Email, "Mokom Defence Request for Additional Resources", 17 February 2023, 16:56.

¹³ Annex I, Email, "Additional Resources", 21 February 2023, 13:44.

¹⁴ Annex I, Email, "Additional Resources", 21 February 2023, 07:52.

¹⁵ Annex I, Email, "Mokom Defence Request for Additional Resources", 24 February 2023, 14:42

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17. On 27 February 2023, Counsel for Mr. Mokom requested reconsideration of the Registrar's Decision and maintained his original request for resources, explaining that the migrated documents from the *Yekatom and Ngaïssona* case to the Mokom case are either truly relevant to the preparation of the Defence, or relevant to the case more generally, requiring their review. Given the three weeks that had already passed since the Defence Request, Counsel for Mr. Mokom asked CSS for a decision by close of business on 28 February 2023.¹⁶

18. On 27 February 2023, the Registry acknowledged receipt of the Defence request for reconsideration, and indicated that it could not guarantee that a decision would be rendered by 28 February 2023.¹⁷

19. Having received no response after almost two weeks, on 13 March 2023, the Defence requested CSS to provide an update.¹⁸ On the same day, the Head of CSS responded that CSS "will get back" to the Defence by the end of the same week. This did not happen.¹⁹

20. On 16 March 2023, Counsel for Mr. Mokom requested a meeting with the Head of CSS to discuss the status of the decision on the request on reconsideration.²⁰ On 17 March 2023, a meeting was held between Counsel for Mr. Mokom and the Head of the CSS, during which the latter indicated that a decision would be issued by 20 March 2023.

21. On 20 March 2023, the Head of CSS informed the Mokom Defence that the Registrar "cannot entertain the Mokom Defence's request for reconsideration" and is of the view that "Mr Mokom is, at this stage, provided with sufficient resources to prepare for the confirmation of charges proceedings and that the disclosure process (i.e. migration) does not warrant any additional resource".²¹ The Registrar therefore maintained the Decision of 24 February 2023, according to which the Mokom Defence was granted 3 FTE, instead of the 9 FTE justified by the Legal Aid Policy.

¹⁶ Annex I, Email, "Mokom Defence Request for Additional Resources", 27 February 2023, 01:55.

¹⁷ Annex I, Email, "Mokom Defence Request for Additional Resources", 27 February 2023, 11:11.

¹⁸ Annex I, Email, "Payments / Additional Resources", 13 March 2023, 14:21.

¹⁹ Annex I, Email, "Payments / Additional Resources", 13 March 2023, 16:15.

²⁰ Annex I, Email, "Meeting", 16 March 2023, 11:47.

²¹ Annex I, Email, "Mokom Defence Request for Additional Resources", 20 March 2023, 17:30.

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IV. APPLICABLE LAW

22. Article 67(1) of the Rome Statute of the ICC (“Statute”) provides that an accused, as a minimum guarantee, is entitled to have adequate time and facilities for the preparation of his defence,²² and if the accused does not have legal assistance, to have it assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.²³

23. Regulation 83(1) of the ICC Regulations of the Court (‘Regulations’) provides that “[l]egal assistance paid by the Court is ‘determined by the Registrar’”. Where this assistance is paid by the Court, the Defence “may apply to the Registrar for additional means which may be granted depending on the nature of the case”.²⁴

24. The Registrar’s discretion in respect of legal assistance, according to previous case law, must be exercised “in conformity with the provisions of the Statute, the Rules and the framework of the legal aid scheme, as endorsed by the Assembly of States Parties and established by the legal and policy texts of the Court.”²⁵ The legal aid scheme can be found in the Registry’s Legal Aid Policy, which requires that the Registrar’s decision to be governed by five principles, the first of which - significantly - provides for equality of arms. The Legal Aid Policy provides that “the payment system must contribute to maintaining a balance between the resources and means of the accused and those of the prosecution.”²⁶ The other principles relate to objectivity, transparency, continuity and flexibility, and economy. The latter provides that the assistance paid by the Court must cover all costs “reasonably necessary for an effective and efficient legal representation”.²⁷

25. **In terms of review**, Regulation 83(4) of the Regulations makes the Registrar’s decisions about the scope of legal assistance subject to review by the relevant Chamber. As for the standard of review, any decision within the framework of legal assistance may be invalidated according to three grounds: “(a) whether the Registrar has abused [his] discretion;

²² Article 67(1)(b) of the Statute

²³ Article 67(1)(d) of the Statute.

²⁴ Regulation 83(3) of the Regulations.

²⁵ *Prosecutor v. Saif Al-Islam Gaddafi*, ICC- 01/11-01/11-390-Red, Decision on ‘Request for Review of Registrar’s Decision’ by the Defence of Saif Al-Islam Gaddafi, 30 July 2013 (“*Gaddafi Funding Decision*”), para. 28.

²⁶ Legal Aid Policy, para. 9.

²⁷ *Ibid.*

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(b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable."²⁸

26. There is no doubt that the Registrar enjoys a degree of discretion in the determination of the costs that are reasonably necessary for an effective and efficient defence.²⁹ Importantly, however, decisions that have a substantial and long-term impact on the composition of Defence teams, should be scrutinised "more thoroughly" than more minor decisions. When Chambers "are asked to review crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation."³⁰

V. SUBMISSIONS

(a) *The Registrar's decision was based on an error of fact, resulting from a failure to take into account relevant considerations*

27. As noted above, the Legal Aid Policy sets out a system for the allocation of additional resources. This system is governed by the FTE procedure, where Defence teams can calculate how many additional FTE positions are warranted. Each FTE allows for the recruitment of one additional Legal Assistant.³¹

28. The Defence Request was based on the application of this system, as set out in the Legal Aid Policy. The justification for the 9 requested FTEs was presented as follows:

- 18 counts in the arrest warrant; = 0.45 FTE
- 181,434 pages of the Prosecution casefile; = 6.0478 FTE
- Approximately 153 hours of audio-video material; and = 0.51 FTE³²

²⁸ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-3277, Decision on the Urgent Requests by the Legal Representatives of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, 23 April 2012 ("Katanga Review Decision"), para. 9.

²⁹ *Gaddafi Funding Decision*, para. 25.

³⁰ *Katanga Review Decision*, para. 9.

³¹ ICC-ASP/12/3, 4 June 2013, para 69.

³² The Defence has received the equivalent of 9.2 Gigabytes of audio-video material, i.e. around 9200 Megabytes. The rule of thumb is that one minute of audio material corresponds to around 1 Megabyte (See <https://web.stanford.edu/class/cs101/bits->

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- 423 persons applying to be a victim = 2.115 FTE
participating in the proceedings.

29. Therefore, the scope of the casefile as at 6 February 2023, amounted to a **9.1228 FTE** of additional resources.³³ On this basis, 9 FTEs were requested.

30. At the heart of its decision denying the Defence Request, is the Registrar's position that "the disclosure process (i.e. migration), does not warrant any additional resources".³⁴ In essence, the Registrar has unilaterally decided that the Defence is not required to read documents migrated into the case file, and as such should not be allocated resources to allow it do so.

31. This idea first appeared in the Registrar's Decision of 24 February 2023, denying the Defence Request. The Registrar found that 3 FTEs were reasonably necessary, pending further clarification of "the **relevancy** of the migrated documents to the *Mokom* case". As such, the Registrar revealed that he was unconvinced that the migrated documents were relevant to the *Mokom* case, despite this migration having been authorised by the Chamber. As such, according to the Registrar, the Defence was not entitled to have the resources required to read them.

32. The Defence responded, stating that:

The 30,000 documents are relevant to the case. At a Status Conference on [13] February 2023, the Prosecution indicated clearly that "*in the group of the 30,000 other documents, we're basically trying to see which ones we are believing are truly relevant to the preparation of the defence and which are documents that are just relevant to the case generally speaking*" (Transcript, p. 27). Clearly, therefore, the 30,000 documents are comprised of material that is either truly relevant to the preparation of the Defence, or relevant to the case more generally. All of them must therefore be reviewed. Indeed, it would be negligent of Mr Mokom's team not to review these documents.

[gigabytes.html#:~:text=Megabyte%20or%20MB&text=One%20megabyte%20is%20about%201,takes%20up%20about%201%20megabyte](#)). Based on that, 9.2 Gigabytes of audio-video correspond to around 9200 minutes, i.e. 153,3 hours.

The Defence also considers that every hour of Audio-video material generates the workload equivalent to 100 pages of material in print - therefore 15 300 pages in this instance.

³³ The Legal Aid Policy states that one FTE is the equivalent of one Legal Assistant: ICC-ASP/12/3, 4 June 2013, para 70.

³⁴ Registrar's Decision.

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This of course makes sense. The Prosecution would never have been in a position to migrate 30,000 documents into Mr Mokom's casefile had these documents had no relevance to the present proceedings, nor would a Pre-Trial Chamber properly supervising the pre-trial phase have allowed this migration to occur.

This is reflected throughout the relevant filings. In its submissions on 11 November 2022 (ICC-01/14-01/22-109), the Prosecution stated that migrating the items disclosed in the *Yekatom and Ngaissona* case to the *Mokom* case "*would place those items at the immediate disposal of the Defence, allowing the Defence to start its preparations.*" The Prosecution said that "*upon migration, the Defence will immediately be in a position to search the migrated material effectively in E-Court, both on their content (through content searches), and through the meta-data listed above. As conceived, the migration through NUIX will thus be an efficient means of providing the Defence timely with information which can be immediately used in preparation for the proceedings.*" On 30 November 2022, the Pre-Trial Chamber then ordered "*the Prosecution to immediately commence the migration process as proposed in the Prosecution's submissions*" (ICC-01/14-01/22-116).

In addition, since 6 February 2023, the Prosecution has disclosed an additional unanticipated 18,000 pages, which were not included in our original request, bringing the total of pages to review to 199,465.

We therefore maintain our current request for increase resources. Given the nearly 3 weeks that have passed between our original request and today's decision, we would be grateful for a response by close of business on Tuesday, 28 February 2023.³⁵

33. After three weeks of repeated attempts to secure a decision, the Registrar came back with the same decision, reasoning as follows:

...we refer to the Pre-Trial Chamber II's "Second order on the conduct of the confirmation of charges proceedings", dated 13 February 2023 and referenced ICC-01/14-01/22-157, where *[sic]* further guidance is provided on the scope of the documents disclosed to the Defence team for Mr Mokom.

Pre-Trial Chamber II held that "[...] Accordingly, the 'migrated' materials that will not be formally disclosed in the present proceedings in accordance with the Chamber's instructions will not be taken into account in any manner. [...]" (page 12, paragraph 33, document ICC-01/14-01/22-157).

In addition, the Document containing the Charges further specifies and (greatly) limits the number of documents to be taken into consideration (i.e. "formally disclosed") for said confirmation proceedings (i.e. not the 30,000+ documents as initially "migrated").³⁶

³⁵ Annex I, Email, "Mokom Defence Request for Additional Resources", 27 February 2023, 01:55.

³⁶ Annex I, Email, "Mokom Defence Request for Additional Resources", 20 March 2023, 17:30.

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34. In doing so, the Registrar based his decision on an error of fact, having failed to take into account relevant considerations.³⁷ Firstly, the Registrar's Decision makes express reference to paragraph 33 of the Second Order,³⁸ where the Chamber held that the migrated materials will not be formally disclosed in the present proceedings. On this basis, he found that their review was unnecessary. Importantly, the Registrar did not make reference to paragraph 34 of the Second Order, in which the Chamber instructed the Prosecutor to provide, following *inter partes* consultations, **"any guidance and assistance the Defence may require if it decides to review these materials** in accordance with the preceding instruction."³⁹ As such, the Chamber recognised the *prima facie* relevance of these documents, linked review to the Defence's own assessment, and ordered the Prosecution to assist the Defence in its review. There is no indication whatsoever from the Chamber that the lack of formal disclosure of these documents meant the Defence will not, should not, or cannot review them.

35. Through this selective interpretation and application of the Second Order, the Registrar failed to take into account what is clear to everyone in these proceedings; the Defence cannot simply ignore a body of evidence made available to it, whether through formal disclosure or migration. Particularly when, in the Prosecution's own submission, this body of evidence is comprised of documents which are either "truly relevant to the Defence" or "relevant to the case generally speaking".⁴⁰ The professional and competent representation of Mr. Mokom requires his Defence team to review and analyse this material, rely on those parts which are exculpatory of the charges, and prepare to challenge, rebut or explain those aspects which are not. This cannot be done if the Defence is not given the resources, as set out under the Legal Aid Policy, to allow the Defence to read them.

36. The migrated documents comprise amongst others 154 statements, 359 transcribed interviews, 1882 audio files which include 309 items in Sango, 860 media articles, 2197 Facebook items, and 616 reports. Overall, the migrated documents (which have not been

³⁷ The failure to take account of relevant considerations is a well-recognised ground for quashing administrative decisions; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, para. 9: Accordingly, an administrative decision may be quashed if the Registrar [...] failed to take into account relevant material." The ICC Presidency has similarly found that judicial review is appropriate where "[i]t involves a consideration of whether the Registrar has: ... failed to take into account relevant factors". See e.g. ICCPresRoC72-02-5, para. 16; ICC-01/04-01/06-731-Conf, para. 24; ICC-Pres-RoC72-01-8-10, para. 20.

³⁸ ICC-01/14-01/22-157, Second order on the conduct of the confirmation of charges proceedings, 13 February 2023, para. 33 ("Second Order").

³⁹ Second Order, para. 34.

⁴⁰ Transcript, 7 February 2023, p. 29, l. 9-10.

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subsequently disclosed) amount to 28 873 documents, which equate to at least 141 187 pages. By failing to take into account that the Defence would need to review the migrated documents, the Registrar based his decision on an error of fact, warranting the intervention of the Trial Panel.

37. Secondly, the Registrar has failed to take into consideration the reality of the workload associated with the review of Call Data Records (“CDRs”) in the present case. In his decision of 24 February 2023, the Registrar said he had taken into account “the specific additional workload related to analysis of Call Data Records”. No further information is given. The inclusion of CDRs in the Prosecution’s case against Mr. Mokom introduces an entirely new aspect of these proceedings that has a momentous impact on Defence preparedness. By way of an overview, the Prosecution has disclosed 748 items of CDRs in relation to which:

- all calls appearing in 707 CDRs have been listed as relevant by the Prosecution for the purposes of the confirmation hearing, without any indication of how they are relevant;
- 651 CDRs have been disclosed under Rule 77 as material to the preparation of the Defence;
- 30 CDRs have been disclosed without any specification about their relevance;
- the vast majority of CDRs contain thousands of items of raw call data information which must now be formatted and analysed by the Defence;
- the information related to the chain of custody of CDRs lacks precision and requires the Defence to conduct a thorough analysis of its reliability. Similarly, observations on the Prosecution’s failure to follow best forensic practice related to the chain of custody of phone-related material has recently been put on public record by the *Yekatom* Defence,⁴¹ thereby reinforcing the need for Mr. Mokom’s Defence team to reassess the chain of custody of all CDRs made available to it;
- a preliminary analysis of CDRs by the Defence reveals lack of precision about the specific numbers and individuals targeted by the Prosecution, when requesting the material from the relevant providers.

⁴¹ *The Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaïssona*, Public Redacted Version of the “Yekatom Defence Observations further to the “Registry’s Observations on the Prosecution’s “Request for leave to add one item to the List of Evidence (ICC-01/14-01/18-1702-Conf)””, ICC-01/14-01/18-1794-Conf, 13 March 2023”, 22 March 2023, ICC-01/14-01/18-1809-Red, para. 11.

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38. In the diligent exercise of their duties, the Defence team is required to conduct a complex analysis of the entirety of the CDRs made available to the Defence, which will require the resources requested in the Defence Request. More generally, the Defence will have to review the entirety of the disclosed material, including those referred to in the Document Containing the Charges (“DCC”),⁴² amounting to 4,761 documents and 65,947 pages of material. In particular, 140 statements and 431 transcribed interviews are part of this disclosed material, as are 244 audio files which include 60 items in Sango, 305 media articles, 126 Facebook items, and 191 reports. By failing to take into account these manifestly relevant considerations, the Registrar’s decision is based on an error of fact, warranting its reversal by the Chamber, in order to ensure Mr. Mokom’s rights to adequate resources is respected.

(b) The Registrar’s Decision is manifestly unreasonable

39. The Defence Request was grounded entirely in the FTE system as set out in the Legal Aid Policy. It was justified on the basis of the Court’s own approach to legal assistance.

40. As recognised by the Chamber, the decision whether to review the migrated materials rests with the Defence.⁴³ Through the Defence Request of 6 February 2023, the Defence indicated that it intended to review the migrated documents, in the diligent exercise of its duties, in preparation for the confirmation hearing. By questioning the “relevance” of this material, and unilaterally circumscribing the Defence preparation by dictating what the Defence is - and is not - entitled to review, the Registrar reached a manifestly unreasonable decision.

41. The decision also stands in direct conflict with the approach taken by the Chamber and the Prosecution in relation to the migrated materials and the necessity of providing them to the Defence. In its supervision and direction of the pre-trial phase, the Chamber has been guided and acted in accordance with its statutory obligations to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.⁴⁴ The Registrar’s position, that the migrated materials need not be reviewed, cannot be reconciled with the Chamber’s considered position that they be provided to the Defence.

⁴² Prosecution’s Submission of the Document Containing the Charges, 9 March 2023, ICC-01/14-01/22-174-Conf.

⁴³ Second Order, para. 34.

⁴⁴ Article 64(2) of the Statute.

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42. The manifest unreasonableness of the Registrar's Decision is compounded by consideration of its future application. Should another Central African defendant be arrested by the ICC, the Registrar's Decision exists as a clear signal to the Prosecution the Defence will never be given the resources to review the materials migrated from other relevant cases, and that any exculpatory or relevant material contained therein will remain buried. Such an approach undermines, in full, the purpose of any such migration.

43. Significant time has elapsed since the filing of the Defence Request of 6 February 2023. Perhaps most notably, the Defence has received the DCC and its Annexes, also available to the Chamber, which includes the 59-page Prosecution Table of Evidence setting out the material on which it intends to rely on each of the elements of the crimes and modes charged;⁴⁵ and the CDR analysis.⁴⁶ As a result, the case workload has now increased, as compared with the situation on 6 February 2023. The scope of preparation for the confirmation of charges hearing now stands at:

- | | |
|--|--------------|
| • 20 counts in the DCC; | = 0.5 FTE |
| • 199,466 pages of the Prosecution casefile; | = 6.6488 FTE |
| • Approximately 233 hours of audio-video material; ⁴⁷ and | = 0.77 FTE |
| • 423 persons applying to be a victim participating in the proceedings | = 2.115 FTE |

This equates to **10.0338 FTE** of additional resources under the Legal Aid Policy.

44. In reviewing the Registrar's decision to deny the Defence Request, the Defence appreciates that the Chamber is restricted to considering whether the Registrar erred based on the material and information available to him at the time of his decision. Should the Defence

⁴⁵ ICC-01/14-01/22-174-Conf-AnxC1

⁴⁶ ICC-01/14-01/22-174-Conf-AnxC2.

⁴⁷ The Defence has received the equivalent of 14 Gigabytes of audio-video material, i.e. around 14000 Megabytes. The rule of thumb is that one minute of audio material corresponds to around 1 Megabyte (See <https://web.stanford.edu/class/cs101/bits-gigabytes.html#:~:text=Megabyte%20or%20MB&text=One%20megabyte%20is%20about%201,takes%20up%20about%201%20megabyte>). As such, 14 Gigabytes of audio-video correspond to around 14000 minutes, i.e. 233,3 hours. Every hour of Audio-video material therefore generates the workload equivalent to 100 pages of material in print, being 23 300 pages in this instance. This corresponds to 0.77 FTE.

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now wish to argue for an additional 10 FTE, it would be required to make a new application to the Registry, and reasonably expect to wait an additional three weeks before receiving any response. Now, at the end of March, this kind of time is no longer available. On this basis, the Defence maintains its original request of 6 February 2023, and asks for the Chamber's review in the context of that request. However, insofar as it is relevant to the Chamber's deliberations and adjudication of this issue, the Defence notes that the 9 FTE requested is profoundly reasonable in light of the expanding Prosecution case, further underlining the reasonableness of the Defence Request.

45. The Registrar's Decision was manifestly unreasonable, and should be reversed.

(c) Request for a Stay of Proceedings

46. The Defence Request in question was made on 6 February 2023. The initial decision of the Registrar was sent on 24 February 2023, nearly three weeks later. The Defence sought reconsideration of this decision on 27 February 2023. It took another three weeks before the Registrar's Decision was issued.

47. This six-week period, in the context of the six months allocated to the Defence for preparation for the confirmation hearing, is objectively excessive, and has jeopardised the Defence preparations for the confirmation of charges hearing.

48. The Court has previously recognised that while the Statute does not provide for a stay of proceedings, Article 21(3)'s requirement that the application of the Statute must be consistent with internationally recognised human rights means that where a fair trial cannot be held, the object of the judicial process is frustrated, and the process must be stopped.⁴⁸ Both the content of the Registrar's Decision, and the protracted period of its issuance, has precluded the Defence from using the 6 months allocated to it – already an objectively limited period given the scope of the case – to prepare effectively for the confirmation of charges hearing in full enjoyment of the right of Mr. Mokom to adequate time and resources to prepare.

⁴⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Appeals Chamber: Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court, 14 December 2006, para. 37: "Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."

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49. In practical terms, the delays in rendering the Registrar's Decision, and the time elapsed since 6 February 2023, mean that an inordinate amount of time has been lost in trying to secure a decision and reconsideration from CSS, in providing explanations and seeking instructions from Mr. Mokom as regards the question of resources, and in managing the "recruitment" of Defence team members who are then required to "wait in the wings" pending the Registrar's decision, but who must be available to start work on a moment's notice, if and when the resources sought are allocated. The Defence has been unable to finalise work plans, prioritise tasks and preparatory steps, or organise division of work among team members, without any clarity about what the eventual Defence team will look like, and what resources will be in place for a confirmation of charges hearing that will be held in under five months.

50. Until this situation is resolved, the Defence feels compelled to seek to stop the clock from running to the detriment of the suspect. Accordingly, the Defence asks that the Chamber stay the proceedings until confirmation from the Registry that the necessary resources have been made available to the Defence. These resources should be allocated retroactively from the date of the Defence Request, being 6 February 2023, to allow them to be harnessed to recover the time that has been lost. The stay of proceedings being sought is not permanent, but rather a necessary corollary of the time before the confirmation hearing continuing to reduce, while the Defence remains deprived of the resources needed to properly prepare, in violation of Mr. Mokom's right to adequate time and facilities.

VI. CONCLUSION AND RELIEF SOUGHT

51. The Defence has every intention of assisting the Chamber by providing a full and vigorous defence of Mr. Mokom at the confirmation of charges hearing. The present request is brought in good faith, and on the basis of the Legal Aid Policy itself, and the casefile as presented to Mr. Mokom by the Prosecution.

52. The Defence Request of 6 February 2023 was quantifiable, justified and reasonable. In denying this Request, the Registrar erred in taking into account irrelevant circumstances, and by reaching a manifestly unreasonable conclusion. For the above reasons, the Defence respectfully requests that the Chamber:

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FIND that submissions from the Registry are unnecessary in light of the details as set out herein;

REVERSE the Registrar's Decision;

ORDER that the Defence be provided with the 9 FTE as sought in the Defence Request, and that such provision be retroactive from 6 February 2023; and

STAY the proceedings until confirmation from the Registry that the necessary resources have been made available to the Defence.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Friday, March 24, 2023