

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15/05/2023**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Confidential with Confidential Annex A

Mokom Defence Request to Rectify Deficiencies in Disclosure Metadata

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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A. INTRODUCTION

1. The Chamber has previously recognised that the Prosecution has had “ample time to organise the evidence relevant to the confirmation hearing, so as to ensure that the disclosure process is conducted in a meaningful and efficient manner.”¹ The Chamber has also expressed concern that “[t]he disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness/relevance for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings.”² And yet, this is exactly the situation in which the Defence for Mr. Maxime Mokom (“Defence”) now finds itself: namely, deficiencies in the presentation of the material disclosed by the Prosecution are impacting the Defence’s ability to prepare for the confirmation hearing in an efficient and expeditious manner.

2. In particular, the Prosecution has not included all the metadata necessary for the Defence to adequately link the disclosed materials to specific witnesses. The result is that the Defence has not been able to identify the materials that may be relevant to each witness that the Prosecution seeks to rely on, and therefore has been hampered in its knowledge and understanding of the materials specifically, and the Prosecution’s case more generally.

3. The Chamber is empowered to take “necessary decisions regarding disclosure”, and ensure “disclosure takes place under satisfactory conditions”.³ The Defence submits that the current state of the disclosure completed by the Prosecution is far from satisfactory, and therefore invites the Chamber to remedy the defects identified herein. Specifically, the Defence seeks an order for the Prosecution to complete a metadata update of the disclosed materials and ensure all documents are linked to relevant witnesses.

4. For the sake of clarity, the Defence confirms that this is not a request for additional disclosure. Instead, the Defence is seeking to fix deficiencies in how the materials were disclosed by the Prosecution, and the metadata provided to the Defence as part of this disclosure.

¹ Pre-Trial Chamber II: Second order on disclosure and related matters, ICC-01/14-01/22-116, 30 November 2022 (“Second Disclosure Order”), para. 15.

² Second Disclosure Order, para. 14.

³ Rules 121(2) and (2)(b) of the ICC Rules of Procedure and Evidence.

B. PROCEDURAL HISTORY

5. On 3 April 2023, the Defence requested a metadata update from the Prosecution, noting that some metadata on Nuix was missing or incorrect.⁴ The Defence gave three specific examples, one of which was that:

Some witnesses are missing from the classification "Related to witness" as their documents are not related to them. P-0342 and P-1263 are examples. Could you relate the documents to these witnesses and make sure that it does not concern other witnesses.

6. Having received no response, the Defence sent a follow-up email on 5 April 2023.⁵ Once again, the Defence received no response.

7. On 17 April 2023, the Defence sent a further email to the Prosecution, following up on its request of 3 April 2023, and made two additional requests relating to disclosure issues.⁶ The Prosecution responded later the same day, stating they would look into the matters raised by the Defence and revert "shortly".⁷

8. On 19 April 2023 at 12:26, a metadata update was conducted, which resolved one of the Defence's pending requests from 3 April 2023. This related to the fact that transcripts from the *Yekatom and Ngaïssona* proceedings had not previously been linked to the relevant witnesses.

9. On 24 April 2023, the Defence sent a further follow-up email to the Prosecution, reminding them of the outstanding requests and noting that the Defence was still waiting for assistance.⁸ The Defence also requested to be provided with a list of all persons – with their names and witness numbers - interviewed by the Prosecution which had been disclosed on Nuix, noting "*the information available on Nuix is neither accurate nor complete, and make the Defence's task extremely and unnecessarily difficult*". Again, no response was received by the Defence.

⁴ Annex A: Email Defence to Prosecution of 3 April 2023, 13:51, p. 1.

⁵ Annex A: Email Defence to Prosecution of 5 April 2023, 15:07, p. 1.

⁶ Annex A: Email Defence to Prosecution of 17 April 2023, 14:52, pp. 2-3.

⁷ Annex A: Email Prosecution to Defence of 17 April 2023, 19:02, p. 2.

⁸ Annex A: Email Defence to Prosecution of 24 April 2023, 11:56, p. 6.

10. On 2 May 2023 at 17:45, the Prosecution resolved another pending request, by providing the document sought in the 17 April 2023 additional request.

11. On 10 May 2023, the Defence sent a further follow-up email, confirming that matters raised in its request from 3 April 2023 remained outstanding.⁹ As at the time of filing, the Defence has not received a response and four Defence requests are still pending.

C. SUBMISSIONS

12. The overarching issue is that the Prosecution has failed to effectively organise and complete its disclosure process. Specifically, the Defence has identified there are documents in Nuix which are missing relevant metadata, including the link between the document and a relevant witness through the inclusion of a 'P-X' number in the 'Related to Witness' field. So far, the Defence has identified 252 documents on Nuix which are not currently linked to any witness in their metadata. This includes the following documents: (i) 117 transcribed statements;¹⁰ (ii) 87 screening notes;¹¹ and (iii) 48 statements.¹² On the basis of the Defence's review, these documents are the result of the Prosecution's "direct interaction with the witness/emanating from the witness";¹³ it appears simply that the Prosecution has not input the correct metadata necessary to make this link.

13. These 252 documents were generated by an unknown number of individuals for whom the Defence did not receive a 'P-X' number associated with them. This means that the 'Related to Witness' field of the Metadata of these 252 documents is empty. It is impossible to know what portion of the iceberg these documents represent, as it does not seem possible to know how many more documents need to be associated to these individuals. This is also information which the Prosecutor does not seem willing to share thus far.

⁹ Annex A: Email Defence to Prosecution of 10 May 2023, 14:44, p. 5.

¹⁰ See, e.g.: CAR-OTP-0084-0412-R01; CAR-OTP-0087-2392-R01.

¹¹ See, e.g.: CAR-OTP-2070-0314-R01; CAR-OTP-2078-0132-R01.

¹² See, e.g.: CAR-OTP-2099-0336-R01 ; CAR-OTP-2008-0499.

¹³ Unified Technical protocol ("E-court Protocol") for the provision of evidence, witness and victims information in electronic form (ICC-01/14-01/18-64-Anx), p. 13, Section D.

14. While it may be a simple exercise, as suggested by the Prosecutor during the status conference of 7 February 2023, to search for the name of “Maxime Mokom” in the disclosed evidence, this exercise is far less efficient if the documents found are not classified by witness.

15. The above documents were identified in the course of regular Defence reviews of disclosed materials. There is no way for the Defence to adequately estimate the volume of material that may be impacted, given the size of the current case record. However, the nature of this issue means that there could be hundreds, or even thousands, of documents which suffer from the same deficiencies. By extension, this means that there are hundreds of documents that the Defence have not been able to identify as being relevant to a particular witness, and therefore that the Defence have not been able to fully understand the utility and relevance thereof. Further, if a document is not linked to a relevant witness, there are two related consequences. First, the Defence’s review of the specific witness is necessarily incomplete, affecting its knowledge and understanding of the witness’ evidence and their relevance to the proceedings. Second, and more generally, the Defence is also hampered in its ability to know and understand the case being advanced by the Prosecution.

16. The extent of this issue therefore impacts on the rights of the Defence to meaningfully and efficiently prepare for the confirmation proceedings. In particular, requiring the Defence to undertake the exercise of linking the items to the relevant witnesses would have a significant impact on the allocation of its already limited resources. For each document, the Defence would be required to manually check a number of different data points in order to confidently establish any link with a witness. For example, there is a document titled ‘Meeting with CAR-OTP-P-1558’.¹⁴ From its title, it is self-evidently related to Prosecution witness P-1558. However, none of the relevant metadata for this document indicates a link with this (or any) witness: it is classified in the category ‘ICC Investigation notes/ report/ correspondence’, and the witness code is not identified in either the ‘Related to Witness’ or ‘Source Identity’ fields. Thus, to identify the relevant witness for any unlinked documents, the Defence is required to check all possible fields, including title, content and source. Such searches are resource and labour intensive, and are not an effective use of Defence time and resources.

¹⁴ CAR-OTP-2130-0131-R01.

17. Notably, the Defence understands the Prosecution will complete all of the same metadata fields regardless of whether the item was formally disclosed or part of the migration from the *Yekatom and Ngaïssona* proceedings. This understanding is based on the fact that the Prosecution appears to have completed the required metadata for some such documents, but not all. For example, CAR-OTP-2045-1169-R01 is an item that was migrated from the *Yekatom and Ngaïssona* proceedings, and is the transcribed statement of P-0568, who is not currently on the Prosecution's witness list. However, the 'Related to Witness' field for this document was filled with 'CAR-OTP-P-0568', indicating the relevant link. This example also demonstrates that the 'Related to Witness' field has not been interpreted as being limited to only witnesses that the Prosecution has included in their witness list. The Defence submits such an interpretation is clearly correct, and in the interests of the efficiency and fairness of the proceedings, and must therefore be applied by the Prosecution to all documents. The Defence stresses the need for consistency, and for the Prosecution to have completed the metadata for all items regardless of whether they were migrated or disclosed, and regardless of whether the item is linked to a witness on the Prosecution's witness list.

18. Inputting correct and complete metadata was part of the Prosecution's responsibility to complete disclosure in a transparent, efficient and expeditious manner, with the relevance of the evidence made clear to the Defence.¹⁵ Such measures are required to ensure the disclosure was 'satisfactory' and the Defence can adequately prepare for the confirmation hearing. Since the metadata ascribed to documents by the Prosecution is incomplete and otherwise deficient, the Prosecution should be ordered to undertake the necessary updates now.

19. The Defence notes this issue must be resolved as a matter of urgency, in light of the rapidly approaching confirmation proceedings. The Defence proposes seven days as a reasonable period in which the Prosecution could implement the changes. In addition, the Prosecution should be ordered, as requested by the Defence on 24 April 2023, to provide a complete list of all persons interviewed, including their name and 'P-X' number, where documents such as screening notes, statements and transcribed statements have been disclosed on Nuix. The purpose of providing this list would be to prevent further impediments to the preparation of the Defence, by allowing the Defence to at least start the process of linking documents to relevant people and witnesses.

¹⁵ Second Disclosure Order, paras. 8, 13.

20. Finally, this request pertains only to one issue regarding the metadata associated with the Prosecution's disclosure. This request has been made to the Chamber now, in light of the Defence's previous *inter partes* attempts at resolution, and the importance of resolving this issue quickly. However, the Defence have encountered other issues related to the metadata of the disclosure which it also intends to raise *inter partes* with the Prosecution at first instance, in the hopes such issues can be resolved efficiently.

D. CONCLUSION & RELIEF REQUESTED

21. For the reasons outlined above, deficiencies in the metadata of the material disclosed by the Prosecution are hampering the Defence's identification and comprehension of relevant items. This is impacting the rights of Mr Mokom to have adequate time and facilities to prepare for the confirmation hearing, and to know and understand the case against him. In these circumstances, the Defence seeks a remedy for these deficiencies, and asks that the Chamber:

ORDER the Prosecution to complete a metadata update within seven (7) days of the Chamber's order, such that all documents are linked to a relevant witness in the 'Related to Witness' field; and

ORDER, as an interim measure, the Prosecution to provide a list of all persons (including names and 'P-X' numbers) screened, interviewed or otherwise met by the Prosecution, for whom documents have been disclosed/migrated on Nuix.



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The Hague, The Netherlands
Monday, May 15, 2023