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TRIAL CHAMBER V

Before:

**Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

***THE PROSECUTOR V. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Mokom Defence Request for Access to Materials in the *Prosecutor v. Yekatom &
Ngaïssona* Case
With Confidential Annexes A & B**

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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**

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Pre-Trial Chamber II

A. INTRODUCTION

1. The Prosecution in the case against Mr Maxime Mokom ("*Mokom* case") has indicated its intention to rely upon the evidence of 70 witnesses in the confirmation proceedings, scheduled for August 2023.

2. Of these 70 witnesses, the Defence for Mr Maxime Mokom ("Defence") has identified 33 who have previously testified as witnesses in the *Yekatom and Ngaïssona* proceedings ("Overlapping Witnesses").¹ Given the strong links between the two proceedings, it is also probable that some of the remaining 37 witnesses will testify in the *Yekatom and Ngaïssona* proceedings, including some prior to the *Mokom* confirmation hearing ("Future Witnesses").

3. The Defence has not received all information material to its preparation in relation to the Overlapping Witnesses. In particular, the Defence has been disclosed redacted versions of the transcripts of testimony of these witnesses in the *Yekatom and Ngaïssona* proceedings, and has not received disclosure of all items shown to witnesses during their testimony. These gaps are impeding the Defence's ability to understand the evidence given by the Overlapping Witnesses, and its ability to review and analyse the material disclosed by the Prosecution, conduct investigations and otherwise prepare for the confirmation hearing.

4. For the reasons elaborated further below, and in accordance with Regulation 42 of the Regulations of the Court ("Regulations"), the Defence therefore requests to be granted access to the following materials from the *Yekatom and Ngaïssona* proceedings, in relation to the Overlapping Witnesses (collectively, "Requested Material"):

- (a) All exhibits shown to, or otherwise used with Overlapping Witnesses during their testimony;

¹ See Annex A – List of Overlapping Witnesses.

- (b) All other documents that were identified by the *Yekatom and Ngaïssona* defence teams as documents they intended to use during their cross-examination of the relevant witnesses ("Defence Lists"); and
- (c) All confidential transcripts of testimony, comprising unredacted, or lesser redacted, versions of the transcripts of the Overlapping Witness' testimony.

5. The Defence also seeks advance authorisation to be granted access to these same categories of materials for any Future Witnesses who testify prior to the *Mokom* confirmation hearing, on a rolling basis.

6. The Prosecution indicated in *inter partes* correspondence that they support a request for "access and authorisation to disclose the full transcripts and the items shown to or otherwise used with *overlapping* INCRIM witnesses".² The Prosecution subsequently indicated that they also do not oppose the remaining requests made by the Defence, instead simply deferring to the discretion of the Trial Chamber.³

B. PROCEDURAL HISTORY

7. On 3 February 2023, Pre-Trial Chamber II in the *Mokom* proceedings issued its *Second order on the conduct of the confirmation of charges proceedings*,⁴ in which it set time limits to facilitate the parties' preparations for the confirmation of charges hearing and the orderly conduct of the proceedings. One of the time limits set by the Chamber was that: "any and all motions on matters relating to the disclosure process shall be submitted by no later than 4 May 2023".⁵

8. In accordance with the above timeframe, on 4 May 2023, the Defence filed a formal request for disclosure of three clearly identified categories of material.⁶ Most relevantly, the third category of material sought disclosure of related materials from the *Yekatom and Ngaïssona* proceedings, including unredacted transcripts, materials used with witnesses

² See Annex B: Email from Prosecution to Defence, 9 June 2023, 15:19.

³ See Annex B: Email from Prosecution to Defence, 14 June 2023, 13:49.

⁴ *Prosecutor v. Mokom*, Pre-Trial Chamber II: Second order on disclosure and related matters, ICC-01/14-01/22-116, 30 November 2022 ("Second Disclosure Order").

⁵ Second Conduct Order, para. 16(i).

⁶ See *Prosecutor v. Mokom*, Mokom Defence Request for Disclosure, ICC-01/14-01/22-198, 4 May 2023 ("Mokom Disclosure Request").

during their testimony and materials identified by the defence teams to be used during cross-examination.⁷

9. The Prosecution responded to the Mokom Disclosure Request on 11 May 2023, submitting that they were under no obligation to disclose the additional documents requested relating to the *Yekatom and Ngaïssona* proceedings.⁸ They also noted the requests should be directed to the Trial Panel in the *Yekatom and Ngaïssona* proceedings.⁹

10. On 5 June 2023, Pre-Trial Chamber II issued its decision on the Mokom Disclosure Request.¹⁰ Pre-Trial Chamber II rejected the request for disclosure of materials from the *Yekatom and Ngaïssona* proceedings, noting that “Trial Chamber V is the appropriate forum to adjudicate these requests”.¹¹

C. APPLICABLE LAW

11. Regulation 42 provides for the application and variation of protective measures. Regulation 42(2) provides that, “when the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.” Further, Regulation 42(3) provides that “[a]ny application to vary a protective measure shall first be made to the Chamber which issued the order”.

12. There is no uniform approach for dealing with requests for access to materials from other proceedings.¹² It is nonetheless accepted that the Defence may access confidential material, including transcripts and exhibits, from other cases provided that such documents

⁷ Mokom Disclosure Request, paras. 31-40.

⁸ *Prosecutor v. Mokom*, Prosecution’s Response to “Mokom Defence Request for Disclosure, (ICC-01/14-01/22-198-Conf)”, 4 May 2023, 11 May 2023 (“Prosecution Response to Mokom Request”), paras. 23-30.

⁹ Prosecution Response to Mokom Request, para. 30.

¹⁰ *Prosecutor v. Mokom*, Pre-Trial Chamber II: Decision on the Defence’s request for disclosure and rectification of disclosure metadata, ICC-01/14-01/22-219-Conf, 5 June 2023 (“PTC Decision”).

¹¹ PTC Decision, para. 50.

¹² *Prosecutor v. Ntaganda*, Trial Chamber IV: Order on Defence access to confidential material in the Lubanga case, ICC-01/04-02/06-806, 1 September 2015 (“*Ntaganda* Order”), para. 8.

are “material to the preparation of the defence in that trial (e.g. they may have a direct impact on the defence strategy)”.¹³

13. Prior requests for access to confidential information in another case have been authorised by chambers on the condition of continuation of existing protective measures in the second proceedings, pursuant to Regulation 42(2). Regulation 42(3) is only required where there is a request for a variation of the pre-existing protective measures.¹⁴

D. LEVEL OF CONFIDENTIALITY

14. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this request as confidential since it refers to confidential documents and information. A public redacted version will be filed as soon as practicable.

E. SUBMISSIONS

(i) Preliminary Remarks

15. This request is submitted to the Trial Panel as the most appropriate forum for its adjudication, in accordance with the directions of the Pre-Trial Chamber in the *Mokom* case. The Requested Material comprises materials disclosed, used and relied upon by all parties to the *Yekatom and Ngaïssona* proceedings. Since some of the material requested is not only within the exclusive competence of the disclosing party, but has been disclosed and communicated to the Trial Panel, it therefore comes within its authority to grant access.¹⁵

16. The Defence accepts, and agrees, that any protective measures applied for the purposes of the *Yekatom and Ngaïssona* proceedings should be maintained, and the Defence may be provided access to these materials with the same confidentiality level and protective measures that were ordered previously.¹⁶ The Defence is bound by confidentiality obligations

¹³ *Prosecutor v. Lubanga*, Trial Chamber I: Decision on the request from the defence in the Katanga and Ngudjolo case for disclosure of transcripts in the Lubanga case, ICC-01/04-01/06-2471, 11 June 2010 (“*Lubanga* 2010 Decision”), paras. 27, 34, 39.

¹⁴ *Ntaganda* Order, paras. 6-7.

¹⁵ *Prosecutor v. Gbagbo*, Pre-Trial Chamber I: Decision on the “Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2)”, ICC-02/11-01/11-659, 19 June 2014 (“*Gbagbo* Decision”), para. 8.

¹⁶ *Ntaganda* Order, para. 6.

pursuant to Article 8 of the *Code of Professional Conduct for Counsel* and a protocol on the handling of confidential information.¹⁷ Further, the material relates to witnesses that are already part of the *Mokom* proceedings and for whom confidential material has already been provided. Therefore, disclosure of confidential materials relating to these witnesses from the *Yekatom and Ngaïssona* proceedings would not give rise to increased risks for the witnesses concerned, and would not endanger the purpose of any confidentiality restrictions originally applied.¹⁸

(ii) Materiality and relevance of the Requested Materials: nexus between the proceedings

17. The Defence seeks access to the Requested Material on the basis that it is material for its preparation for the confirmation hearing, pursuant to Rule 77 of the Rules of Procedure and Evidence ("Rules"). What is material for the preparation of the defence must be interpreted broadly, and "should be understood as referring to all objects that are relevant for the preparation of the defence".¹⁹ Information and witness testimony that tends to incriminate a suspect or accused have been found to be material to the preparation of the defence in the relevant case, including by having a direct impact on defence strategy.²⁰

18. The materiality and relevance of items from the *Yekatom and Ngaïssona* proceedings should not be in question, in light of the strong links with the *Mokom* case. As a starting point, the cases stem from the same alleged armed conflict between the Anti-Balaka and the Seleka forces in 2013 and 2014. The incidents and locations charged in the *Mokom* DCC, namely in relation to crimes committed in Bangui and Bossangoa from December 2013 to April 2014, also form part of the *Yekatom and Ngaïssona* confirmed charges.²¹ Finally, both Mr Mokom and Mr Ngaïssona are alleged to be criminally responsible by contributing to the commission of crimes through a shared common purpose; namely, the violent targeting of the

¹⁷ *Prosecutor v. Yekatom & Ngaïssona*, Trial Chamber V: Decision on the Second Prosecution Request for Authorisation to Disclose Certain Transcripts in the case of The Prosecutor v. Mahamat Said Abdel Kani concerning witnesses P-0287, P-0801, P-0808, P-0876, P-0889, P-0992, P-0966, P-0975, P-1339, P-1521, P-1719, P-2232, P-2269, and P-2843, ICC-01/14-01/18-1448, 7 June 2022, para. 7.

¹⁸ *Gbagbo* Decision, para. 6.

¹⁹ *Prosecutor v. Lubanga*, Appeals Chamber: Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 OA11, 11 July 2008, paras. 77-80.

²⁰ *Lubanga* 2010 Decision, para. 27.

²¹ *Prosecutor v. Mokom*, Document Containing the Charges, ICC-01/14-01/22-174-Conf-AnxA, 9 March 2023 ("Mokom DCC"); *Prosecutor v. Yekatom and Ngaïssona*, Pre-Trial Chamber II, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Red, 20 December 2019 ("Yekatom and Ngaïssona Confirmation Decision"), pp. 100-107.

Muslim population in western CAR, who were seen as collectively responsible for crimes committed by the Seleka, or complicit with or supportive of the Seleka.²²

19. Consequently, the significant geographical, temporal and material overlap with the charges, crime sites and witnesses in the *Yekatom and Ngaïssona* proceedings indicates the relevance of the material to the Defence.²³ It is also evident from the Prosecution's prior request to disclose items from these proceedings,²⁴ and its decision to migrate thousands of items from the *Yekatom and Ngaïssona* proceedings into the *Mokom* case record.²⁵ Most importantly, the relevance of the material is self-evident from the Prosecution's stated intention to rely upon the evidence of the Overlapping Witnesses for the purpose of the *Mokom* proceedings.

(iii) Materials used during, or relevant to, Overlapping Witness testimony

20. All items used during the testimony of Overlapping Witnesses, are material to the Defence preparation for the confirmation proceedings. The Prosecution has previously recognised these items are an integral part of the testimony of a witness, such that: "[a]ssociated [i]tems of these witnesses may be material to the preparation of the [...] Defence pursuant to rule 77 of the Rules as they were referenced during the testimony of witnesses the Prosecution [...] intends to rely on at trial".²⁶

21. The Defence endorses the approach previously advocated by the *Yekatom* defence, and submits the material referred to in these transcripts is analogous to material referenced in a statement that is routinely admitted as an associated exhibit pursuant to Rule 68 of the Rules: "[i]f such material is admissible as an integral part of the witness' statement or testimony, it follows that it must also be disclosable as such".²⁷ The Pre-Trial Chamber in

²² *Mokom* DCC, paras. 4-5, 46, 47(a), 48; *Yekatom and Ngaïssona* Confirmation Decision, pp. 31, 106.

²³ *Ntaganda* Order, paras. 10-11.

²⁴ *Prosecutor v. Yekatom & Ngaïssona*, Trial Chamber V: Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, ICC-01/14-01/18-1552, 23 August 2022 ("*Mokom* Access Decision").

²⁵ See, e.g., *Prosecutor v. Mokom*, Pre-Trial Chamber II: Order on disclosure and related matters, ICC-01/14-01/22-104, 7 November 2022 ("First Disclosure Order"), para. 5; Second Disclosure Order, p. 8.

²⁶ *Prosecutor v. Yekatom & Ngaïssona*, Prosecution's Request for Authorisation to Disclose Materials from Transcripts of the Testimony of Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328 to the Defence in the case of Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/18-1435, 25 May 2022, para. 17.

²⁷ *Prosecutor v. Yekatom & Ngaïssona*, *Yekatom*: Public Redacted Version of Second Motion for Disclosure of Rule 76 Material, ICC-01/14-01/18-331-Red, 11 September 2019, para. 21.

Yekatom and Ngaïssona ultimately determined that materials which were shown to, or provided by witnesses, and for which they provided additional information, were disclosable prior to the confirmation hearing. In fact, such materials were “necessary in order for the Defence to understand the line of questioning surrounding them”.²⁸

22. Similarly, without access to the material of the Defence Lists, it becomes impossible for the Defence to fully understand the transcripts of the Overlapping Witnesses. The Defence is missing key elements of the witness’ evidence, so the transcripts are devoid of context and incomprehensible in the relevant portions. This prevents the Defence from conducting meaningful review and analysis, and inhibits its ability to conduct fulsome investigations into the allegations made by the witnesses.

23. As such, all items in the Defence Lists for the Overlapping Witnesses are material to the Defence’s preparation. These are documents that the *Yekatom* and *Ngaïssona* defence teams deemed to be relevant to challenging the credibility, reliability and authenticity of a witness’ account – for witnesses that the Prosecution now also seeks to rely on for the purposes of these proceedings against Mr Mokom. Even where the documents in question are not specifically referred to within the transcript, the Defence remains unable to understand the propositions being put to the witnesses, which are based on evidentiary foundations being drawn through documents which are not available to the Defence.

24. The Defence is seeking materials that are directly relevant to witnesses that are being used against Mr Mokom, and are therefore material to its preparation. In particular, such materials are necessary for the purpose of Defence investigations, and for assisting the Defence in its analysis of the material received from the Prosecution to date.²⁹ Further, the Defence submits that the only consideration for the purpose of this application is the relevance of the materials to the Defence; the admissibility or otherwise of the materials used with the witnesses is a separate issue that is beyond the scope of this request. Finally, this

²⁸ *Prosecutor v. Yekatom & Ngaïssona*, Pre-Trial Chamber II: Decision on the Yekatom Defence Second Motion for Disclosure of Rule 76 Material, ICC-01/14-01/18-341-Red, 13 September 2019, para. 24.

²⁹ *Ntaganda* Order, para. 11.

request is discrete and specific, limited to clearly defined categories of materials, and relating to only 33 witnesses.³⁰ Thus, the Defence should be granted access to these materials.

(iv) Unredacted, or lesser redacted, transcripts of testimony

25. The transcripts disclosed by the Prosecution from the *Yekatom and Ngaïssona* proceedings are partially redacted.³¹ It is the Defence's understanding that these redactions were made following Trial Chamber V's invitation to the Defence teams to suggest redactions they deemed necessary.³² However, the Defence has no information as to why the redactions have been implemented and what material is sought to be protected.

26. In principle, the Defence is entitled to be provided with the unredacted statements of witnesses that the Prosecution intends to rely on at the confirmation hearing.³³ As noted above, the Defence accepts, and agrees, that any pre-existing protective measures should be maintained. Where the Defence diverges is that **additional** redactions are required, particularly in the absence of any justification for these additional redactions. The Defence therefore seeks a variation of the protective measures ordered by Trial Panel V.

27. As is evident from the list of redactions cited, the number and extent of the affected transcripts is significant. These redactions impede the Defence's preparation, particularly where they have been applied to evidence given by Overlapping Witnesses. The Defence therefore seeks disclosure of the unredacted, or lesser redacted, materials, in the interests of fairness and the exercise of the accused's rights.

(v) Requested Materials for Future Witnesses

³⁰ Cf. *Prosecutor v. Bemba*, Trial Chamber III: Decision on "Registry Transmission of a Joint Request received from the Defence teams in the Bemba et al. case (ICC-01/05-01/13)", ICC-01/05-01/08-3298, 18 September 2015, paras. 23-24.

³¹ T-037-CONF-Red-ENG: page 3, lines 3-23; T-039-CONF-Red-ENG: page 58, lines 10-11; T-046-CONF-Red-ENG: page 3, lines 15-25; page 4, fully redacted; page 5, lines 1-7; T-058-CONF-Red-ENG: page 42, lines 15-22; page 82, lines 4-9; page 83, lines 9-16; T-065-CONF-Red-ENG: page 19, lines 12-25; T-076-CONF-Red-ENG: page 70, lines 22-25; page 71, fully redacted; page 72, fully redacted; page 73, line 1; T-092-CONF-Red-ENG: page 7, lines 3-14; T-108-CONF-Red-ENG: page 12, lines 12-17; page 22, lines 7-10; page 42, line 25; page 43, lines 1, 4 and 8; T-111-CONF-Red-ENG: page 55, lines 10, 19-25; page 56 lines 1, 6, 7, 14, 17; page 57, lines 7, 13-25; page 58, lines 3-15; T-141-CONF-Red-ENG: page 50, lines 14-16; T-169-CONF-Red-ENG: page 79, lines 21-25; page 80, fully redacted; page 81, lines 1-23; page 83, lines 3-19; and T-184-CONF-Red-ENG: page 18, line 25; page 19, lines 1-2.

³² *Mokom* Access Decision, p. 7.

³³ *Prosecutor v. Lubanga*, Single Judge: Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, Annex I para. 98.

28. The Defence has no way of knowing if there are other witnesses among the 70 that the Prosecution intends to rely upon for the confirmation proceedings in the *Mokom* case, that will also testify in the future in the *Yekatom and Ngaïssona* proceedings. However, should any of the remaining 37 witnesses testify in the *Yekatom and Ngaïssona* proceedings prior to the *Mokom* confirmation hearing, the Defence also seeks access to the Requested Materials for these witnesses, for the same reasons elucidated above. The Defence proposes that the most efficient procedure would be for such materials to be provided on a rolling basis, within two (2) days of the conclusion of the relevant witness' testimony.

F. CONCLUSION & RELIEF REQUESTED

29. The Requested Material is relevant, and necessary for the Defence to be able to prepare effectively for the *Mokom* confirmation proceedings. On this basis, the Defence asks that the Trial Chamber provide access to the following materials from the *Yekatom & Ngaïssona* case:

- (a) In relation to the Overlapping Witnesses:
 - (i) All materials shown to, or otherwise used with, the witnesses during their testimony in the *Yekatom and Ngaïssona* trial proceedings;
 - (ii) All materials in the Defence Lists, as well as the lists themselves; and
 - (iii) Unredacted, or lesser redacted, versions of the transcripts of testimony for which the Defence has only been disclosed redacted versions;
- (b) In relation to Future Witnesses, disclosure of each of the above categories of material on a rolling basis.



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Friday, June 16, 2023