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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

Public

**Public Redacted Version of “Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing”,
ICC-01/14-01/22-192-Conf, 17 April 2023**

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. PROCEDURAL HISTORY

1. On 17 May 2022, Pre-Trial Chamber II ('the Chamber') issued its 'Order seeking observations on matters related to the conduct of the confirmation proceedings', in which it instructed Duty Counsel for Mr. Mokom to provide submissions on six questions related to the confirmation proceedings:¹

- (i) Does Mr. Mokom anticipate invoking any ground for excluding criminal responsibility and/or alibi?
- (ii) Does Mr. Mokom anticipate the need to conduct investigations before the confirmation hearing?
- (iii) Does Mr. Mokom anticipate presenting evidence at the confirmation hearing? In the affirmative, what is the prospective overall amount and types of evidence that Mr Mokom intends to rely upon?
- (iv) Does Mr. Mokom anticipate calling witnesses to testify at the confirmation hearing?
- (v) Does Mr. Mokom intend to rely on written testimonial evidence at the confirmation hearing? In the affirmative, in what format does Mr Mokom intend to provide such evidence?
- (vi) Does Mr. Mokom possess or control any books, documents, photographs or other tangible objects that the Prosecution shall be permitted to inspect as material intended for use by Mr. Mokom as evidence under rule 78 of the Rules?²

2. On 6 June 2022, Duty Counsel for Mr. Mokom filed his Response to the 17 May Order,³ in which he submitted that it was premature for him to respond to

¹ Pre-Trial Chamber II, 'Order seeking observations on matters related to the conduct of the confirmation proceedings', 17 May 2022, ICC-01/14-01/22-50, paras. 10 and 11 ('17 May Order').

² International Criminal Court Rules of Procedure and Evidence ('Rules').

³ Mr. Mokom's Response to the 'Order seeking observations on matters related to the conduct of the confirmation proceedings' (ICC-01/14-01/22-50)', 6 June 2022, ICC-01/14-01/22-58 ('Duty Counsel's Response').

questions (i), (iii), (iv) and (v). As to questions (ii) and (vi), Duty Counsel submitted that Mr. Mokom would indeed need to conduct investigations as a matter of due diligence, and that Mr. Mokom did not, at that time, possess or control any items falling under Rule 78.⁴

3. On 23 January 2023, permanent Counsel for Mr. Mokom was appointed.⁵

4. On 24 January 2023, the Chamber issued an Order instructing permanent Counsel for Mr. Mokom, if considered necessary for Mr. Mokom's defence, to provide observations on the conduct of the proceedings related to the confirmation of charges, as addressed in, *inter alia*, the 17 May Order.⁶

5. On 3 February 2023, the Defence filed its 'Observations on the Conduct of the Proceedings Relating to the Confirmation of Charges Hearing'. The Defence submitted that it remained premature for it to respond to a number of issues, undertook to provide further information as soon as practicable, and anticipated being able to do so in April 2023.⁷

6. On 13 February 2023, in its 'Second order on the conduct of the confirmation of charges proceedings', the Chamber took note of the Defence observations and "instruct[ed] the Defence to provide such observations by no later than 17 April 2023".⁸

⁴ Duty Counsel's Response, paras. 3, 4.

⁵ 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.

⁶ 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. 11.

⁷ Mokom Defence Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing, 3 February 2023, ICC-01/14-01/22-150, para. 17 ('3 February Observations').

⁸ 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. 19 ('13 February order').

7. On 6 February 2023, the Defence asked the Registry for additional resources which it had assessed it was entitled to under the Legal Aid Policy.⁹ On 24 February 2023, the Registrar informed the Defence that it was not entitled to more than three additional FTEs, a decision which was maintained by the Registrar on 20 March 2023, and upheld by the Chamber on 3 April 2023.¹⁰

B. LEVEL OF CONFIDENTIALITY

8. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files these observations as confidential since they refer to confidential documents and information. A public redacted version will be filed as soon as practicable.

C. OBSERVATIONS

9. Since the 3 February Observations, the Defence has taken significant preparatory steps in advance of the confirmation hearing. These steps have included recruiting and appointing Defence team members; putting in place a case management system; attempting to classify and organise the disclosed and migrated materials; commencing the review and analysis of these materials; seeking instructions from Mr. Mokom on the Document Containing the Charges and supporting materials; recruiting and appointing investigators; preparing and seeking approval for investigative mission plans; and recruiting and seeking the appointment of interns.

10. The Chamber and parties are already aware of the Defence position that investigations are a critical part of its own due diligence and preparation,¹¹ and will

⁹ Defence Request for Review of the Registrar's Decision on Legal Assistance and for a Stay of Proceedings, 24 March 2023, ICC-01/14-01/22-178-Conf, para. 13.

¹⁰ Pre-Trial Chamber II, Decision on the 'Defence Request for Review of the Registrar's Decision on Legal Assistance and for a Stay of Proceedings', 3 April 2023, ICC-01/14-01/22-186-Conf.

¹¹ 3 February Observations, para. 13; Duty Counsel's Response, para. 14.

necessarily inform whether Mr. Mokom intends to call evidence at confirmation, and in what form.

11. Immediately after Lead Counsel's appointment on 23 January 2023, the Defence started the process of locating Central African investigators in Bangui with relevant experience to assist in Defence investigations. Interviews were conducted in early February. Proposed investigators were then asked to assemble the necessary documents and materials required for admission to the ICC List of Professional Investigators, created and maintained pursuant to Regulation 137 of the Regulations of the Registry. Admission to this list requires potential investigators to provide the Counsel Support Section ("CSS") in The Hague with copies of, *inter alia*, a passport, birth certificate, and a **hard copy** of a "certificate issued by the relevant authority of the State(s) in which you are domiciled, stating the existence, if any, of criminal convictions". These are not documents which are regularly in the possession of potential investigators in the Central African Republic. Delays in obtaining official documents in Bangui are not considered by CSS as exceptional enough to warrant provisional admission to the List of Professional Investigators. Accordingly, this process resulted in delays of several weeks before Defence investigators could be appointed.

12. Once appointed, the next step was to prepare and submit mission plans to allow the Defence investigators to travel to The Hague, meet the client and the Defence team and begin their work. There was a lack of clear information as to whether this would first require the investigators to travel to a designated third state to secure a visa for entry to Europe, as had apparently been done in the past, or whether a visa could be obtained in Bangui. The process of obtaining the correct information through regular discussions with CSS, and the ICC Field Office in Bangui on this question, and the application process itself, are ongoing. As such, the time needed to investigate, complicated by the issues explained above, is longer than

the Defence anticipated, and the obstacles identified continue to inhibit its ability to definitively answer the Chamber's questions.

13. Defence investigations have been further complicated by the manner of Prosecution disclosure in the present case. The volume of disclosed or migrated material is objectively significant and has been cited in previous filings:¹² 748 items of Call Data Records; 4,761 documents and 65,947 pages of disclosed material, which includes 140 statements and 431 transcribed interviews.

14. In its 'Order on disclosure and related matters' of 7 November 2022, the Chamber issued a directive to the Prosecution, in the following terms:¹³

...the Prosecution is instructed to differentiate the evidentiary items disclosed in this case, including those 'migrated' from the Yekatom and Ngaïssona to the Mokom case record, **by indicating, for each disclosed item, which sections are deemed to contain incriminating, exonerating and/or other information.**

15. This instruction, which reflects prior practice at the ICC,¹⁴ was repeated by the Chamber in a second order on disclosure-related issues on 30 November 2022, in which it recalled:¹⁵

the Chamber recalls that, in order to fully realise the right of the suspect to have adequate time to prepare his defence and to facilitate the Chamber's own preparation of the confirmation hearing, the relevance of the evidence disclosed should be clear. The 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

¹² See, e.g., Defence Request for Review of the Registrar's Decision on Legal Assistance and for a Stay of Proceedings, 24 March 2023, ICC-01/14-01/22-178-Conf, paras. 37-38.

¹³ Pre-Trial Chamber II, Order on disclosure and related matters, 7 November 2022, ICC-01/14-01/22-104 ('Chamber Order on Disclosure'), para. 8 (emphasis added).

¹⁴ See, e.g., Pre-Trial Chamber II, *Prosecutor v. Abd-Al-Rahman*, Second Order on disclosure and related matters, 2 October 2020, ICC-02/05-01/20-169, para. 24.

¹⁵ Pre-Trial Chamber II, Second order on disclosure and related matters, 30 November 2022, ICC-01/14-01/22-116, paras. 13-14 (emphasis added).

it cannot genuinely exercise its rights, and serves to hold back the proceedings.

[...] The 7 November 2022 Order unambiguously and specifically instructed the Prosecution ‘to differentiate the evidentiary items disclosed in this case, including those “migrated” from the Yekatom and Ngaïssona to the Mokom case record, by indicating, for each disclosed item, which sections are deemed to contain incriminating, exonerating and/or other information’ (emphasis added). Therefore, the Prosecution has been clearly put on notice of this instruction.

16. Exculpatory or exonerating material is that which “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”.¹⁶ The prior testimony of witnesses on which the Prosecution seeks to rely for the confirmation hearing contain unequivocally exculpatory material, which has not been indicated by the Prosecution as being exonerating.

17. By way of example, the Prosecution alleges in the Document Containing the Charges that “by at least around mid-November 2013, **under Mokom’s coordination**, the Anti-Balaka began their advance toward Bangui in preparation to attack the city. In the early hours of 5 December 2013, over 1,500 of the Anti-Balaka launched the attack”.¹⁷ In the underlying “Facts and Evidence” table, the Prosecution again alleges that [REDACTED]”.¹⁸

18. For the confirmation hearing, the Prosecution has indicated that it intends to rely on the evidence of P-1521.¹⁹ It has accordingly disclosed the transcripts of P-1521’s evidence in the *Yekatom and Ngaïssona* proceedings. There is no indication

¹⁶ ICC Statute, Article 67(2).

¹⁷ Annex A to Prosecution’s Submission of the Document Containing the Charges, 9 March 2023, ICC-01/14-01/22-174-Conf-AnxA (‘DCC’).

¹⁸ Annex C1 to Prosecution’s Submission of the Document Containing the Charges, 9 March 2023, ICC-01/14-01/22-174-Conf-AnxC1, paras. 65-69.

¹⁹ Annex B to Prosecution’s Submission of its Witness Table, 23 February 2023, ICC-01/14-01/22-167-Conf-AnxB (‘Prosecution Witness Table’), pp. 31-33.

from the Prosecution in these transcripts that any of the material contained therein is exculpatory.

19. P-1521 [REDACTED].²⁰ The following day, P-1521 again confirmed that Andjilo had not acted under the authority of anyone.²¹ Given the Prosecution's case is that Mr. Mokom was coordinating the 5 December attack, direct evidence that a commander on the ground leading the attack was neither coordinated by, nor receiving orders from Mr. Mokom, is exculpatory. It was not marked as such in P-1521's transcript. The existence of both exculpatory and incriminatory information in a document is not a reason to disregard potentially exculpatory factor(s) contained therein;²² the exculpatory sections were required to be indicated.

20. The Prosecution is also seeking to rely on the evidence of P-2232, [REDACTED]. From the sheer number of Prosecution allegations for which the evidence of P-2232 is cited, it appears that he is a witness central to the Prosecution case.²³ Again, the Prosecution disclosed the transcripts of P-2232's testimony in the *Yekatom and Ngaïssona* proceedings and, again, no sections were indicated as being exculpatory.

21. P-2232 testified that Mr. Mokom said it would be necessary for Anti-Balaka leaders to "make sure elements did everything that no exactions took place",²⁴ and that when Mr. Mokom [REDACTED]".²⁵

²⁰ ICC-01/14-01/18-T-081-CONF-ENG ET, 30 November 2021, p. 53: "[REDACTED]."

²¹ ICC-01/14-01/18-T-082-CONF-ENG CT2, 12 December 2021, p. 70: "Mr Witness, a witness appearing here before you told the Court that at the time Andjilo always acted under the authority of someone. So would that be false, according to you? [...] Mr President, I understood the question and I said that Andjilo did not act under anybody's authority. I was with him. He was in charge of our company and of our section. In the same way as all the others were under the authority of their leaders. So he wasn't under anybody's command".

²² *Prosecutor v. Yekatom & Ngaïssona*, Trial Chamber V, Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595, para. 21.

²³ Prosecution Witness Table, pp. 50-59.

²⁴ ICC-01/14-01/18-T-076-CONF-ENG ET, 12 November 2021, p. 67.

22. Importantly, P-2232 paints a very different picture in respect of the central Prosecution allegation that Mr. Mokom was the coordinator responsible for the Anti-Balaka's military operations.²⁶ P-2232 explained that, the Anti-Balaka attacks were generally **not** coordinated,²⁷ that the leaders on the ground would call after the attacks to report and inform about what had happened,²⁸ and that all Mr. Mokom could say was "Be careful. Do not upset the population. Protect the population."²⁹ Importantly, P-2232 drew a distinction between Anti-Balaka elements, and those within the Anti-Balaka "with bad intentions who could take your phone, your motorcycle", but specified that "**it was not the coordination** that asked them to do that".³⁰ P-2232 then describes an incident [REDACTED].³¹ This evidence is exculpatory.

23. The Defence takes no position as to the truth or otherwise of these statements, the credibility of these witnesses, or the reliability of their testimony. What is clear, however, is that exculpatory material is not being drawn by the Prosecution to the attention of the Defence or the Chamber. This is despite the Chamber's instruction that for "each disclosed item", the Prosecution was required to indicate which sections contained exonerating information. This was deemed necessary to ensure that the disclosure process was focused, and carried out as efficiently and

²⁵ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 9: "[REDACTED]."

²⁶ DCC, para. 5.

²⁷ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 24: "So the attacks that were coordinated were the ones of 5 December. Most of the attacks in Bangui were not coordinated. The attacks in Bangui really weren't coordinated, but it's only afterwards that the leaders reported back to the chief of staff in order to explain what had happened."

²⁸ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 24: "The attacks in the provinces, when they occurred, the leaders called the bureau of coordination to give a report. Sometimes they phoned the ComZones or those responsible of coordination in order -- or directly to the top to tell them about what was going on. So it was after the attack that they phoned their leaders to give a report."

²⁹ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 25.

³⁰ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 25 (emphasis added).

³¹ ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 62.

expeditiously as possible.³² This order reflects the years that have been spent by the Prosecution team in putting this case together, and its undoubtedly superior knowledge of the material underpinning its case. The corollary of the Prosecution's failure to comply with this aspect of the Chamber's order is that the exercise instead passes to the Defence. While the Defence reserves its right to seize the Chamber with a future request for a remedy, for the purposes of the present filing, the Defence simply notes that this failure exists as a further barrier to effective Defence investigations, and a final determination of whether the Defence will need to present evidence at the confirmation hearing, and in what form.

24. Lastly, Mr. Mokom remains in detention. On 8 March 2023, Chamber expressed its regret that, despite its findings as regards the necessity of his detention, in the absence of a State willing to accept and enforce the conditions of his release, he must remain detained.³³ The Prosecution continues to oppose Mr. Mokom's provisional release.³⁴ However, Mr. Mokom's detention also has a bearing on the efficacy of Defence preparations. As a new team coming to this case, Mr. Mokom's instructions are at the centre of the Defence's work. While he remains detained, the Defence's access to Mr. Mokom is far more limited than it would be otherwise, which itself constrains Defence preparations.

25. With these barriers in mind, and despite the best efforts and diligent endeavours of the newly assembled team, the Defence is limited to providing the following information below:

(i) Does Mr. Mokom anticipate invoking any ground for excluding criminal responsibility and/or alibi?

³² Chamber Order on Disclosure, para. 8.

³³ Pre-Trial Chamber II, Public Redacted Version of 'Decision on Interim Release', 8 March 2023, ICC-01/14-01/22-173-Red.

³⁴ Réponse de l'Accusation à la "Defence Request for Interim Measures" (ICC-01/14-01/22-181-Conf), 6 April 2023, ICC-01/14-01/22-189-Conf.

No decision has been taken at this time.

(ii) Does Mr. Mokom anticipate the need to conduct investigations before the confirmation hearing?

As previously indicated, the Defence intends to investigate the Prosecution allegations as part of its preparation for the confirmation hearing, and has taken numerous steps towards being able to commence this process in the near future, as outlined above.

(iii) Does Mr. Mokom anticipate presenting evidence at the confirmation hearing? In the affirmative, what is the prospective overall amount and types of evidence that Mr. Mokom intends to rely upon?

Yes, Mr. Mokom anticipates presenting evidence at the confirmation hearing. It remains premature for the Defence to indicate the prospective overall amount and types of evidence, but the Defence already anticipates that it will rely, at least, on documentary evidence, which will likely be drawn in large part from the Prosecution's own disclosure and migrated material.

(iv) Does Mr. Mokom anticipate calling witnesses to testify at the confirmation hearing?

Not at this stage, but a final decision will depend on the outcome of the investigations when completed.

(v) Does Mr. Mokom intend to rely on written testimonial evidence at the confirmation hearing? In the affirmative, in what format does Mr. Mokom intend to provide such evidence?

The decision as regards written testimonial evidence will depend on the outcome of the investigations when completed.

(vi) Does Mr. Mokom possess or control any books, documents, photographs or other tangible objects that the Prosecution shall be permitted to inspect as material intended for use by Mr. Mokom as evidence under rule 78 of the Rules?

Not at this stage.

Respectfully submitted,



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The Hague, The Netherlands
Tuesday, June 27, 2023