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Pénale  
Internationale**

**International  
Criminal  
Court**



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No: **ICC-01/14-01/18**

Date: **30 June 2023**

**TRIAL CHAMBER V**

**Before:**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD  
NGAÏSSONA***

**Confidential**

**Defence response to the “Mokom Defence Request for Access to Materials in the  
*Prosecutor v. Yekatom & Ngaïssona* Case - With Confidential Annexes A & B” (ICC-  
01/14-01/18-1932-Conf)**

**Source: Defence of Patrice-Edouard Ngaïssona**

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

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| <b>Unrepresented Victims</b> | <b>Unrepresented Applicants<br/>(Participation/Reparation)</b> |
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| <b>The Office of Public Counsel for Victims</b> | <b>The Office of Public Counsel for the<br/>Defence</b> |
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## I. Introduction

1. The Defence for Mr Ngaïssona ("Defence") requests the Trial Chamber V ("Trial Chamber" or "Chamber") to reject the "Mokom Defence Request for Access to Materials in the *Prosecutor v. Yekatom & Ngaïssona Case*" ("Request") filed on 16 June 2023, in relation to the disclosure of Mr Ngaïssona's List of material used in the course of its examinations of Prosecution's witnesses (the 'Requested Material').<sup>1</sup>
2. The Defence opposes the Request, specifically regarding the materials listed in Mr Ngaïssona's List of material, and considers it should be rejected on the basis that the scope of the Request is too broad and prospective and does not meet the requirement previously set out by the Chamber, where it considered it necessary that a party's request to disclose material in another case needs to be **specific**.<sup>2</sup> In addition, the Request does not establish how the material sought is relevant for the Defence team of Mr Mokom, as previously established in other cases at this Court.<sup>3</sup>
3. Moreover, granting such a general Request would result in a violation of Mr Ngaïssona's fair trial rights protected in article 67(1) of the Rome Statute

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<sup>1</sup> ICC-01/14-01/18-1932-Conf ("Request").

<sup>2</sup> Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, 23 August 2022, ICC-01/14-01/18-1552, para. 9; See Email from the Chamber to the parties and participants, 19 May 2022, at 10:35; See criterion set out by the ICTY Appeals Chamber as follows: "(i) it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail; and (ii) if it can show that such access is likely to materially assist its case or if a legitimate forensic purpose exists for such access" *in* Request on behalf of Mr Ntaganda seeking access to all inter partes confidential material in the Lubanga case, 15 July 2015, ICC-01/04-02/06-721, para. 9; *referring to* Prosecutor v. Blaškić, Case No IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškić, 16 May 2002 ("Blaškić Decision"), para.14; Prosecutor v. Enver Hadžihasanović et al., Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 10.

<sup>3</sup> Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, ICC-01/04-02/06-806, para. 12.

("Statute"). Indeed, the Request infringes on Mr Ngaïssona's right to privacy, as some material might only pertain to personal information, and the confidentiality of the Defence strategy as well as (current and future) investigations. The Defence's obligation of disclosure differs greatly from the Prosecution's disclosure obligations, especially towards another Defence team from another case, regardless of the fact that the cases might be related. The Mokom Request for disclosure implicitly seeks to obtain work product from the Defence team of Mr Ngaïssona, and could not be without prejudice to the Accused in the present case, considering that the proceedings are still ongoing.

4. As for the disclosure of future material,<sup>4</sup> the Defence refers to the Chamber's previous ruling denying 'advance authorisation' of inexistent material.<sup>5</sup>
5. In the alternative, should the Trial Chamber consider some of the Requested Material **relevant** to the *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka* case ("*Mokom* case")<sup>6</sup>, the Defence objects to the disclosure of several documents, which are either irrelevant, pertain to Mr Ngaïssona's private life, documents of purely procedural nature,<sup>7</sup> or contain information relating to confidential Defence strategy, and may therefore not be shared with third parties. The Mokom Defence may file a new targeted request identifying the specific documents it wishes to obtain from the transcripts of the 33 witnesses who have previously testified in the *Yekatom & Ngaïssona* proceedings ('Overlapping Witnesses') and seek the observations of the Defence on such material.

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<sup>4</sup> Request, ICC-01/14-01/18-1932-Conf, paras 28-29.

<sup>5</sup> 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, 7 June 2022, ICC-01/14-01/18-1448, para. 8.

<sup>6</sup> ICC-01/14-01/22.

<sup>7</sup> Order on Defence access to confidential material in the Lubanga case, 1 September 2015, ICC-01/04-02/06-806, paras 11-12.

## II. Relevant Procedural History

4. On 8 April 2022, the Prosecution filed a request<sup>8</sup> seeking the disclosure of the entire *Yekatom & Ngaïssona* case file into the *Mokom* case.<sup>9</sup> On 23 May 2022, the Defence responded to the said request, requesting that Trial Chamber V reject it, for its overly broad nature and violation of the Accused rights.<sup>10</sup>
5. The Chamber, on 23 August 2022, held that the aforementioned request must be rejected and ordered that the Prosecution provide the *Yekatom* and *Ngaïssona* Defence with a precise list of material.<sup>11</sup>
6. On 11 May 2023, the Prosecution filed its response to the *Mokom* Defence request ICC-01/14-01/22-200-Conf for the disclosure of additional documents relating to the *Yekatom and Ngaïssona* proceedings.<sup>12</sup> The Prosecution argued that the Chamber should reject the said disclosure request, submitting that they were under no obligation to disclose the additional material sought and they had already duly disclosed the items accessed as potentially exonerating material.<sup>13</sup>
7. On 5 June 2023, Pre-Trial Chamber II rejected the *Mokom* Defence request disclosure and rectification of disclosure metadata.<sup>14</sup>

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<sup>8</sup> Prosecution's Request to grant Maxime Jeoffroy Eli Mokom Gawaka access to the record of the *Yekatom and Ngaïssona* case, 8 April 2022, ICC-01/14-01/18-1353.

<sup>9</sup> ICC-01/14-01/18-1353, para. 1.

<sup>10</sup> Defence response to the "Prosecution's Request to grant Maxime Jeoffroy Eli Mokom Gawaka access to the record of the *Yekatom and Ngaïssona* case" (ICC-01/14-01/18-1353), 23 May 2022, ICC-01/14-01/18-1427-Conf.

<sup>11</sup> Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the *Yekatom and Ngaïssona* Case, 23 August 2022, ICC-01/14-01/18-1552.

<sup>12</sup> Public Redacted Version of "Prosecution's Response to "Mokom Defence Request for Disclosure, (ICC-01/14-01/22-198-Conf)", 4 May 2023", ICC-01/14-01/22-200-Conf, 11 May 2023, ICC-01/14-01/22-200-Red ("Prosecution's Response").

<sup>13</sup> Prosecution's Response, para. 1.

<sup>14</sup> *Prosecutor v. Mokom*, Pre-Trial Chamber II: Decision on the Defence's request for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf.

### III. Applicable Law

10. Article 67(1) of the Rome Statute preserves the fundamental fair trial rights of accused persons, including the principle of equality of arms and the right to be heard.
11. Article 64(2) provides that the "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses".
12. Article 21(3) of the Statute provides that the application and interpretation of the Statute "must be consistent with internationally recognized human rights", which includes the right to privacy.
13. Article 68(1) provides that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".
14. Regulation 42 of the Regulations of the Court ("Regulations") frames 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".

### IV. Confidentiality

15. The present request is filed on a confidential basis pursuant to regulation 23*bis*(1) of the Regulations as it refers to the Request, filed with this level of confidentiality, and as it contains references to confidential information and evidence. A public redacted version will be filed as soon as practicable.

## V. Submissions

### A. The open-ended nature of the Mokom Defence's Request justifies its rejections *prima facie*

#### a) Mr Ngaïssona's fair trial rights warrant the rejection of the Request

16. The Mokom Defence's Request refers to all the Materials used during or relevant to Overlapping Witnesses, all items in the Defence List of Material, as well as the lists themselves, all unredacted, or lesser redacted, versions of the transcripts of testimony, along with the Requested Materials for future witnesses.<sup>15</sup> The Request is prejudicial to the Defence and it infringes on Mr Ngaïssona's fair trial rights guaranteed under article 67(1) of the Statute, for the reasons elaborated further below.

17. *First*, the scope of the Request is too broad. Indeed, as ruled by the Trial Chamber itself, that request from a party to gain access to confidential material from another case should be granted if the party is able to describe the documents sought specifically.<sup>16</sup> The Request has neither clearly described the documents requested, nor demonstrated that all of the Requested Materials will likely assist the *Mokom* case or will be necessary for forensic purposes. Simply stating that the access to the material will assist them in understanding the content of the transcripts is not sufficient. Not all the documents on the Defence List of Material were in fact used with the Prosecution's witnesses, and are thus irrelevant to the Mokom defence understanding of the transcripts. It is equally the case for documents of purely procedural nature,<sup>17</sup> documents containing Mr Ngaïssona's

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<sup>15</sup> Request, paras 25-26.

<sup>16</sup> Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, 23 August 2022, ICC-01/14-01/18-1552, para. 9.

<sup>17</sup> Order on Defence access to confidential material in the Lubanga case, 1 September 2015, ICC-01/04-02/06-806, paras 11-12.

personal communications, *ex parte* documents or those relating to Mr Ngaïssona's detention. The Request's indiscriminatory approach constitutes a way of accessing a wide range of documents, regardless of their real added value to the *Mokom* case,<sup>18</sup> without undergoing the exercise of assessing which precise items are actually **relevant** to the Mokom Defence.

18. Furthermore, the Request implies that the Defence will have the burden of reviewing the evidence that was used during the examination of 33 Overlapping Witnesses, which is, given its limited resources, fundamentally unreasonable. It is not the Defence's responsibility to verify all the transcripts and to identify the documents that are to be disclosed. This is a task that should be incumbent on the party requesting the disclosure. The Requested Materials should be primarily listed and thereafter reviewed by the Defence.

19. *Second*, the Request breaches Mr Ngaïssona's right to privacy, therefore violating international human rights law,<sup>19</sup> to which the Statute's application and interpretation must be consistent with, pursuant to Article 21(3). Indeed, a reasonable expectation of privacy exists in relation to Mr Ngaïssona's personal documents,<sup>20</sup> or those of his family members. In addition, the rejection of this Request is necessary to ensure the fairness and integrity of Defence investigations. Within the Requested Material can be found the result of Defence

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<sup>18</sup> See Public redacted version of Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities, 05 January 2021, ICC-01/12-01/18-768-Red, para. 13.

<sup>19</sup> Article 12 of the Universal Declaration of Human Rights; Article 17 of the International Covenant on Civil and Political Rights; Article 8 of the European Convention on Human Rights; See *Prosecutor v. Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015, para. 18.

<sup>20</sup> Decision on the Third Prosecution Request for Authorisation to Disclose Certain Materials in the Case of The Prosecutor v. Mahamat Said Abdel Kani concerning Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328, 17 June 2022, ICC-01/14-01/18-1465, para. 11; See Decision on the Fifth Prosecution Request for Authorisation to Disclose Certain Transcripts, Filings and Materials in the case of The Prosecutor v. Mahamat Said Abdel Kani concerning witness P-2625, 17 April 2023, ICC-01/14-01/18-1840, paras 7-8.

investigations, hence a collection of confidential documents specific to the Defence case, as well as potential defence witnesses, which are intrinsically linked to the Defence strategy. Mr Ngaïssona's Lists of material used in the course of its examinations of Prosecution's witnesses were made considering the Defence's disclosure obligations with respect to the parties and participants of the *Yekatom and Ngaïssona* case. However, the Defence had never envisioned that the product of Defence investigations would be provided to third parties, much less to the *Mokom* case, whose core issues are closely linked to the Defence case. Needless to say, potential Defence witnesses have not consented, nor were they forewarned of this eventuality. Moreover, the Request seeks to unduly expand the Defence disclosure obligations, as provided by rule 78 of the Rules of Procedure and Evidence, into another defence case, which is fundamentally unfair and unjustifiable. Should the Chamber provide access to the Requested Material to the Mokom Defence, it would create a precedent, placing the Defence in a vulnerable position of having to potentially withhold documentary or witness evidence, in fear of having to disclose the information or the identity of its potential Defence witnesses to third parties. Consequently, this would deprive the Defence of the independence of its investigations and strategy and the right to make a full answer and defence.

20. *Third*, the Mokom Defence suggests that the Request is comparable to that of the Ntaganda Defence's request for access to confidential material in the *Lubanga* case.<sup>21</sup> On the contrary, in the case of the Ntaganda case, the Defence had requested the disclosure of confidential materials in trial proceedings that were **complete** and were part of the Court archives,<sup>22</sup> contrary to Mr Ngaïssona's case.

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<sup>21</sup> Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, ICC-01/04-02/06-806.

<sup>22</sup> Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, ICC-01/04-02/06-806, para. 8.

In fact, the *Lubanga* case was completely terminated with the issuance of the Appeals Judgment in 2014,<sup>23</sup> and therefore the disclosure of materials could not have had any impact on the case outcome, whereas Mr Ngaïssona's case is still ongoing and the Request could have a direct incidence on the proceedings.

21. *Fourth*, the Mokom Defence is impermissibly seeking to obtain material that does not exist yet, i.e., material that will potentially be used with future Prosecution or Defence witnesses testifying in the present case and that of which will overlap with the *Mokom* case. In fact, it has been previously ruled that the authorisation of the disclosure of "transcripts to an accused in another case pursuant to Regulation 42(2) of the Regulations necessarily requires that such transcript already exists."<sup>24</sup> This rationale also finds application in the litigation of this Request, for it concerns Materials that may eventually be found in the transcripts of witnesses that have yet to testify. Therefore, it is impossible to anticipate what the witnesses will testify about and if the said Materials will be relevant to the Mokom Defence. For this reason, the Chamber should reject this part of the Request as advance authorisation cannot be granted, although without prejudice to a new request in accordance with Regulation 42(2) of the Regulations<sup>25</sup>, should the remaining 37 witnesses that the Prosecution intends to rely upon for the Mokom confirmation hearing testify in the *Yekatom & Ngaïssona* prior to the said hearing.

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<sup>23</sup> Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red.

<sup>24</sup> 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, 7 June 2022, ICC-01/14-01/18-1448, para. 8.

<sup>25</sup> 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, 7 June 2022, ICC-01/14-01/18-1448, para. 8.

22. In light of the above, the Trial Chamber should reject the Request. The Request does not identify the general nature of the Material sought, in addition of having failed to demonstrate how the aforementioned documents are likely to assist in the preparation of the defence. The Mokom Defence may file a new and targeted request comprising a precise list of the Requested Materials with their respective ERN numbers.<sup>26</sup>

**B. In the alternative, to preserve confidentiality and Mr Ngaïssona's fundamental right to privacy, the Mokom Defence should not have access to certain items**

27. In the alternative, should the Chamber reject the Defence's primary relief, the Chamber should not grant access to documents that are irrelevant to the *Mokom* case and documents pertaining to Mr Ngaïssona's personal information.

28. As set forth by the Chamber, items concerning Mr Ngaïssona's personal matters are of no relevance to the Mokom Defence and should therefore be excluded from disclosure, unless exceptional circumstances require otherwise.<sup>27</sup> The Chamber equally held that the disclosure of personal information regarding Mr Ngaïssona had no obvious link to another defence case and the disclosure of these items would "infringe disproportionately on Mr Ngaïssona's right to privacy."<sup>28</sup>

29. In regards to the confidentiality of certain documents, the Defence also notes that the Mokom Defence seeks a variation of the protective measures ordered by Trial

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<sup>26</sup> See ICC-01/14-01/18-1358 and ICC-01/14-01/18-1358-Conf-AnxA.

<sup>27</sup> Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, 23 August 2022, ICC-01/14-01/18-1552, para. 10.

<sup>28</sup> Decision on the Third Prosecution Request for Authorisation to Disclose Certain Materials in the Case of The Prosecutor v. Mahamat Said Abdel Kani concerning Witnesses P-0291, P-0884, P-0966, P-0975, P-1339, P-2232, P-2251, P-2269, and P-2328, 17 June 2022, ICC-01/14-01/18-1465, para. 11; See Decision on the Fifth Prosecution Request for Authorisation to Disclose Certain Transcripts, Filings and Materials in the case of The Prosecutor v. Mahamat Said Abdel Kani concerning witness P-2625, 17 April 2023, ICC-01/14-01/18-1840, para. 7.

Chamber V.<sup>29</sup> The Defence however contends that the authorisation to grant access to confidential material from one case to another should be done on the condition of the *continuation* of the protective measures, rather than their *variation*, as set forth by the Trial Chamber VI in the *Ntaganda* case.<sup>30</sup> The confidentiality requirements and the protective measures already in place must be guaranteed.

## VI. Conclusion

50. The Request, on the face it, necessitates the Chamber's rejection, as the material requested is not sufficiently described and the Mokom Defence has not demonstrated how the sought material would assist them in their defence or how there exist a legitimate forensic purpose, nor how the said material is relevant to the Mokom Defence. To preserve Mr Ngaïssona's right to a fair trial, his right to private life, and the integrity of Defence investigations and the proceedings, the Chamber should reject the Mokom's Defence Request, or on the alternative the Defence should be provided with a list of the ERN that are sought and be allowed to make observations on the disclosure of those documents.

## VII. Relief sought

51. The Defence respectfully requests the Trial Chamber to

- a. REJECT the Mokom Defence's Request *prima facie* with regard to Mr Ngaïssona's List of material used during the testimony of the Overlapping Witnesses, without prejudice should they choose to re-file a request providing a list of the Materials sought to the Yekatom and

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<sup>29</sup> Request, para. 26.

<sup>30</sup> Order on Defence access to confidential material in the Lubanga case, 1 September 2015, ICC-01/04-02/06-806, para. 6.

Ngaïssona Defence, including their ERN numbers, in relation to the 33  
Overlapping Witnesses

b. REJECT access to prospective materials;

In the alternative,

c. REJECT access to all documents that are not relevant to the *Mokom* case,  
documents for which Mr Ngaïssona has a reasonable expectation of privacy,  
documents of purely of procedural nature, and documents relating to  
potential Defence strategy and investigations.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 30 June 2023,

At The Hague, the Netherlands