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**International
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Court**

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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

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA***

Public

Public Redacted Version of ‘Defence Response to “Version confidentielle expurgée de la « Requête de l’Accusation aux fins de citation de Maxime MOKOM comme témoin de la Chambre et de délivrance d’une citation à comparaître à cet effet »” (ICC-01/14-01/18-2198), filed on 9 November 2023

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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I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('Defence') requests that Trial Chamber V ('Chamber') reject the 2 November 2023 request ('Request').¹ The Chamber should reject the Request because it:
 - a. Is an attempt to circumvent the Prosecution's closure of case and is an abuse of process;
 - b. Proceeds on the incorrect premise that Mr Mokom testifying would advance the interests of truth;
 - c. Seeks a relief that cannot be granted without violating Mr Ngaïssona's fair trial rights under Article 67 of the Statute; and
 - d. Makes an argument by an inapposite analogy to the Chamber's decision to call P-0952 as a Chamber witness.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23*bis* of the Regulations of the Court, this Response is filed as "Confidential", as it responds to a filing of the same classification. A public redacted version of this request will be filed when practicable.

¹ Version confidentielle expurgée de la « Requête de l'Accusation aux fins de citation de Maxime MOKOM comme témoin de la Chambre et de délivrance d'une citation à comparaître à cet effet », ICC-01/14-01/18-2186-Conf-Red.

III. SUBMISSIONS

3. The Prosecution should not be permitted a second bite of the apple. The Prosecution has had over two and a half years to substantiate its allegations over the course of numerous live and Rule 68 witnesses and the submission of several thousands of pages of evidence. If it does not believe it has secured a conviction to date, then the correct action is for it to seek the withdrawal of charges against Mr Ngaïssona as it did in the *Mokom case* rather than asking the Chamber to re-open the Prosecution case in an attempt to fill gaps while inviting the various forms of prejudice that this entails.
4. The mere existence of the Request suggests that the Prosecution is desperate to find last minute evidence on key aspects of the charges that are lacking at the close of its case. Paragraph 11 should give anyone with knowledge of the allegations against Mr Ngaïssona pause for thought as to the Prosecution's confidence in its case. The Request seeks Mr Mokom's testimony as it claims he could provide 'important information' on:²
 - a. The emergence of the Anti-Balaka;
 - b. Its structure and leaders;
 - c. The coordination of the Anti-Balaka and the *role* of the Cameroon Bozizé supporters including Mr Ngaïssona;

² Request, para. 11 ("Il pourra fournir des informations importantes sur les circonstances de l'émergence des Anti-Balaka, leur structuration et leurs chefs, sur la coordination des Anti-Balaka à cette époque, et le rôle qu'ont joué les partisans de BOZIZE présents au Cameroun, parmi lesquels NGAISSONA, entre autres s'agissant de leur financement et de leur armement. Il pourra être interrogé sur la connexion entre le groupe de YEKATOM et le mouvement Anti-Balaka à cette époque, les contacts qu'il a eu avec YEKATOM à ZONGO puis après le départ de ce dernier de cette localité jusqu'à l'attaque de BANGUI du 5 décembre 2013. Il pourra déposer sur la connaissance qu'il avait dans cette période de la commission de crimes visant la population musulmane par les Anti-Balaka, et sur les informations dont disposaient – s'il a des connaissances à ce sujet – les proches de BOZIZE présents au Cameroun, dont son père Bernard MOKOM et NGAISSONA.").

- d. The role Mr Ngaïssona played in *financing* and *arming* of the Anti-Balaka and by implication his *intent*;
 - e. The connection between Mr Yekatom and the Anti-Balaka;
 - f. Mr Yekatom's role in the 5 December attack; and
 - g. Potentially, as the Prosecution is not sure,³ the *knowledge* of Mr Ngaïssona concerning the attacks against Muslims.
5. Broadly speaking, the above list contains core elements that the Prosecution *had* to prove over the course of *its* presentation of evidence as necessary conditions for a conviction. Upon reading the Request, it would not be unreasonable to speculate whether abandoning the charges against Mr Mokom was aimed at an attempt to rescue an otherwise failed case against Mr Ngaïssona.
6. At the outset, the Defence notes that redactions in the Request mean that Defence is not able to have all the information available so that it can fully respond to an unprecedented request.⁴ It is unclear whether this information would be relevant to Defence arguments, but the Chamber should consider any prejudice that might arise from the Defence not being able to evaluate the full Prosecution argument.
7. Additionally, the conditions for a summons are not met. The Request confirms how the [REDACTED].⁵ Therefore [REDACTED].

³ Request, para. 11 ("s'il a des connaissances à ce sujet").

⁴ Request, paras 3 and 18.

⁵ Request, para. 8.

A. The Request qualifies as an abuse of process

8. The Request seeks to circumvent the close of the Prosecution case on 11 September 2023⁶ by seeking to use the Chamber's powers as a vehicle to bring material into the trial at a moment when the Defence is trying to prepare its case and conclude its investigations. The Prosecution seeks to have Mr Mokom as an incriminating witness, but rather than accepting that its case is closed, it now tries to use the Chamber to compensate its *lacunae* in its case theory.
9. The Chamber is encouraged to consider how abusive the Request is when placed in its historical context. *Firstly*, Mr Mokom's testimony should not be necessary at this stage of proceedings. If it is, then the Prosecution has been deceiving the Chamber for potentially years. The Prosecution began investigating in 2014 and it had **years for investigations** following the arrest of Mr Ngaïssona in 2018 to further develop its case.
10. *Secondly*, Mr Ngaïssona should not carry the cost of prior Prosecution choices, whether they were ill-conceived or not. For several years prior to **December 2020** when he fled into the bush to join the Coalition of Patriots for Change,⁷ Mr Mokom had been a Minister in Bangui. During that time, the Prosecution carried an obligation to establish the truth pursuant to Article 54(1)(a) of the Rome Statute. The Defence will not speculate what did or did not occur, but the Request avoids any discussion of that period and why now after many years all the prejudice of the search for the truth⁸ should accrue to the trial against Mr Ngaïssona.

⁶ ICC-01/14-01/18-2089.

⁷ <https://theconversation.com/maxime-mokom-le-centrafricain-juge-a-la-cour-penale-internationale-183103>, accessed 9 November 2023.

⁸ Heading prior to para. 9 of the Request

11. *Thirdly*, the Chamber should reject the Request arguments that the summons could not have been anticipated until now, that the absence of proceedings against Mr Mokom is a new fact on 2 November 2023,⁹ and that the Prosecution has acted with diligence.¹⁰
12. It is reasonable for the Chamber to assume that the *Mokom* and *Ngaïssona & Yekatom* Prosecution teams work hand in hand. Knowledge of witness testimony in the *Ngaïssona & Yekatom* case would be necessary to prepare for the *Mokom* confirmation hearings.¹¹ It would also be necessary to introduce witnesses who might testify again to the *Mokom* Prosecution team. Moreover, regular interaction would be necessary to avoid disclosure violations and ensure care with respect to the parallel trials.¹² On **24 August 2023**, the Prosecution in the *Mokom* case was ordered at the end of the confirmation of charges hearing to make submissions no later than **14 September 2023** on Mr Mokom's alleged contribution to the charged crimes, and Mr Mokom's alleged *mens rea* in relation to the charged crimes.¹³ The *Ngaïssona & Yekatom* Prosecution closed its case on **11 September 2023**. Even if discussions about withdrawing the charges were not ongoing much earlier, there was a period of **at least 18 days** when this should have been discussed. It would be remarkable if such a decision was taken over night.
13. A further indication of actual knowledge of the pending decision to withdraw charges was the legally tenuous request for judicial notice of the *Mokom* transcript that was

⁹ Request, para. 5.

¹⁰ Request, para. 16.

¹¹ See related: ICC-01/14-01/18-1552; ICC-01/14-01/18-1976.

¹² See, for example, ICC-01/14-01/18-1681, para. 11 ("it notes that the Prosecution submitted its Final Witness List on 10 November 2020 and expects that this list is, indeed, *final*. In view of that, and noting that no allegations to the contrary have been made by the defence, the Chamber trusts that the Prosecution is not contacting further individuals with the purpose of testifying *in the present case*."); ICC-01/14-01/18-1707, para. 10 ("It must however be acknowledged that the Prosecution, as an organ, is also engaged in other cases – contrary to the Defence, whose mandate is limited to the present case. In order to fulfil its statutory obligations in all these cases, the Prosecution may thus need to contact individuals as potential witnesses, irrespective of whether they are already witnesses in another case, be it for the Prosecution or for a defence team.")

¹³ ICC-01/14-01/22-T-008-Red-ENG, p. 9, lines 14-24.

filed on **9 October 2023** out of nowhere¹⁴ and recently rejected.¹⁵ The Prosecution requested the withdrawal of charges against Mr Mokom on **16 October 2023**.¹⁶

14. In any case, the jurisprudence of the ICC deems that the Office of the Prosecutor is a unitary office which negates this argument.¹⁷ The implication of this jurisprudence is that the *Ngaïssona & Yekatom* Prosecution had *at least* constructive knowledge of discussions concerning the potential withdrawal of charges in the *Mokom* case before 2 November. The *Ngaïssona & Yekatom* Prosecution was not obliged to close its case on **11 September 2023** and it should be deemed to have had knowledge that could have enabled the Prosecution to raise the issues in the Request earlier.
15. Therefore, there was an opportunity prior to the 2 November Request to raise the issues and to explain the implications for the trial schedule. There were also several prompts to raise matters that could impact upon the schedule. On 29 May 2023, the Chamber indicated in the Further Directions that it may reconsider the time limits defined for the presentation of the evidence by the Defence if there were significant changes to the expected conclusion of the Prosecution's presentation of evidence, or other unforeseen developments.¹⁸ Moreover, on 29 July 2023 the Defence sought reconsideration of the schedule in the Further Directions.¹⁹ The Chamber gave its decision on this on 29 August 2023.²⁰ These were all prompts where it would have been appropriate to provide notice that changed circumstances were on the horizon if it was in the awareness of the Prosecution.

¹⁴ ICC-01/14-01-18-2134.

¹⁵ ICC-01/14-01-18-2193.

¹⁶ ICC-01/14-01/22-275-Conf.

¹⁷ *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Admissibility of the Appeal, ICC-01/14-01/21-514, 25 October 2022, para. 14; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence Request for Reconsideration and, in the Alternative, Leave to Appeal the "Decision on Witness Preparation and Familiarisation", ICC-01/12-01/18-734, 9 April 2020, para. 13.

¹⁸ ICC-01/14-01/18-1892, para. 8.

¹⁹ ICC-01/14-01/18-1997.

²⁰ ICC-01/14-01/18-2068.

16. Though the Request would still be extremely problematic if made earlier, the omission to file it before 2 Novembers means that the Prosecution's actions have increased the prejudice to Defence preparation by making this last-minute request which diverts Defence time and resources and have increased the cost to a fair trial of granting the Request itself.

B. The reasoning in the Request undermines its stated purpose of unveiling the truth

17. The Request seeks the exceptional remedy of obtaining the testimony of Mr Mokom on the basis that it is highly relevant and will contribute to the manifestation of the truth. Yet, the Request immediately qualifies this with:

s'il honore ses obligations en tant que témoin comme prescrit par les articles 69(1) et 70 du Statut et par la Règle 66 du Règlement de procédure et de preuve, et s'il dépose en toute sincérité²¹

18. In contrast to how the Request drifts over this critical qualification, the Chamber, should *inter alia* dwell on the premise of whether there is actually a prospect for truthful testimony. With the greatest of respect to Mr Mokom, the Request itself refers to three reasons why this is doubtful:

- a. Mr Mokom [REDACTED];²²
- b. Despite Rule 74 assurances, the prospect of a multi-year trial in pre-trial detention dissipated mere weeks ago and was concluded with no finding of acquittal and the threat of further charges;²³ and
- c. The Prosecution argues that the risk of collusion would have been too high had Mr Mokom testified while still in the Detention Centre,²⁴ but to the extent that memories are altered through conversation it may well be that

²¹ Request, para. 10.

²² Request, para. 8 ("[REDACTED]").

²³ ICC-01/14-01/22-275, para. 9.

²⁴ Request, para. 7.

the detainees have already contaminated the evidence of Mr Mokom simply through their mutual chatting about their prior lives during the monotony of detention.

19. For all the above reasons, while relevant in theory, there are *indicia* that Mr Mokom's testimony is already fundamentally flawed and it is therefore doubtful whether it can contribute to the truth. Therefore, the prejudice caused to Mr Ngaïssona in terms of fairness and expeditiousness described elsewhere in this response, in the present circumstances, largely outweighs any relevant information Mr Mokom might provide.

C. Granting the Request will violate Mr Ngaïssona's fair trial rights as the Defence cannot feasibly prepare a case under the circumstances proposed by the Prosecution

20. It is absurd for the Prosecution to claim that: "le préjudice occasionné à la Défense sera inexistant ou limité étant considérée la phase actuelle de la procédure."²⁵ However, this argument ignores the considerable workload linked to the presentation of the Defence case and the numerous ways in which surprise testimony of Mr Mokom following the Prosecution case is prejudicial.
21. It is not tenable for the Prosecution to suggest that an individual who is mentioned around 100 times in the Prosecution Trial Brief can testify after the closure of the Prosecution case and that this would have no impact upon the Defence strategy during the preceding two and half years of trial.
22. The Request also fails to address or take a position on numerous issues that will have dramatic impacts upon the fairness and prejudice of the requested remedy. These are many things Chamber would presumably need to know before granting the Request. For example, the Defence would need to interview Mr Mokom prior his testimony as it would not be possible to question him without some understanding of his

²⁵ Request, para. 13.

prospective testimony. Absent this, it would not be possible to review the case file to build a list of items that would confirm or disconfirm his version of events.

23. A second issue which the Request does not satisfactorily address is whether the Prosecution would oppose recalling its prior witnesses as Chamber witnesses. This would be at the Defence request should Mr Mokom provide testimony on a point that prior witnesses would be able to comment upon had Mr Mokom testified at the beginning or during its case or if the Defence had a statement. In *inter partes* communications relating to a yet unresolved disclosure request, the *Mokom* Prosecution has suggested [REDACTED].²⁶ Thus, absent more specificity as to which individuals this concerns, it appears that a recall of witnesses may not be possible and this would increase the prejudice of granting the Request. As the Request does not begin to grapple with the implications of the remedy it seeks, the suggestion of no prejudice resulting from granting the Request should be ignored by the Chamber.
24. The Defence must be able to focus on the preparation of its case, rather than having to divert its limited resources to respond to frivolous motions and prepare lengthy and unexpected examinations at the eleventh hour.
25. The suggestion in the Request for the Chamber to call Mr Mokom during the Defence case²⁷ is also untenable and lacks deference to the important trial principle that the Defence gets the last word.²⁸ The only way to respect the principle would be to defer the Defence trial schedule until after the testimony of Mr Mokom.
26. Putting aside the irreparable prejudice to a fair trial, the impact of granting the Request would also lead to a lack of expeditiousness. For the Ngaïssona Defence to prepare for the testimony of Mr Mokom would take much of the team resources and

²⁶ [REDACTED].

²⁷ Request, para. 14.

²⁸ ICC-01/14-01/18-1892.

conservatively could involve months of preparation – particularly as the Defence has no statement or interview transcript for Mr Mokom. Under such circumstances, the Trial Chamber would need to suspend the 17 November and related deadlines for a significant amount of time.²⁹ However, further buffer time would need to be included in the schedule for the start of a potential Defence case following Mr Mokom’s testimony. Testimony by Mr Mokom is likely to have deep consequences on the Defence strategy and investigations, that would inevitably lead to the need for a considerable extension of time to finalise the Defence witness and evidence lists. For example, the Defence would need to try to locate individuals whom Mr Mokom might mention. The Defence being obliged to dramatically shift priorities has associated time and resource costs that the Chamber should take into consideration even if not mentioned by the Prosecution.

27. Moreover, whatever hypothetical information Mr Mokom might provide, granting the Request would necessarily imply major adjustments to the schedule to ensure trial fairness. On 3 August 2023, the Chamber noted that “two years and a half will have passed since the appearance of the first witness called by the Prosecution” and “the Chamber highlights that expeditiousness is an independent and important value in the Statute to ensure the proper administration of justice”.³⁰ Yet, while the extent to which granting this Request would extend the proceedings cannot be discerned at this point, it would be significant and given that Mr Ngaïssona has now been in pre-judgment detention for five years, granting the Request and the necessary extension of the trial would risk becoming a human rights violation itself.

D. The Chamber’s decision to call P-0952 as a Chamber witness is inapposite to the present Request

²⁹ ICC-01/14-01/18-1997.

³⁰ ICC-01/14-01/18-2016-Red, para. 50.

28. *Finally*, The Request argument that the 31 January 2023 decision calling P-0952 to advance the truth is transposable³¹ to the present situation is also ill-founded. The situation of P-0952 is not factually comparable and the Chamber can distinguish it from the Request through a cursory consideration of facts. Firstly, P-0952 was on the Prosecution witness list as of [REDACTED].³² The Defence had disclosed transcripts and other material four years prior to her eventual testimony.³³ This enabled the Defence to investigate, prepare, and take certain strategic decisions for others witnesses over the course of the trial. Secondly, in contrast to the Request, P-0952 was not compelled, she was called by the Chamber³⁴ eight and half months³⁵ prior to her actual appearance, and after having previously appeared as a Prosecution witness. Finally, P-0952 was not arrested pursuant to a Prosecution warrant and then subject to one and a half years³⁶ of pre-trial detention only to have the charges dropped under the circumstances that it is:

without prejudice to a potential submission of a new application for a warrant of arrest against Mr Mokom in the event that additional collection of evidence provides a reasonable prospect of conviction³⁷

29. Also, in the case of P-0952, the Chamber's balancing of truth against expeditiousness involved different considerations. The interests involved were less grave than the present Request. The Chamber specifically noted that having P-0952 appear within two weeks after the conclusion of the Prosecution case would enable Defence preparation and avoid an unnecessary delay.³⁸ As discussed above, granting the

³¹ Request, para. 9.

³² ICC-01/14-01/18-553-Conf-AnxA, p. 2, line 59.

³³ For example CAR-OTP-2107-0784-R01 was disclosed in Pre-Confirmation INCRIM package 18 09 August 2019.

³⁴ ICC-01/14-01/18-1739, para.17.

³⁵ The decision calling her was 31 January 2023 (ICC-01/14-01/18-1739) and she appeared on 24 October 2023 (ICC-01/14-01/18-T-249-ENG).

³⁶ Mr Mokom was surrendered to the court's custody on 14 March 2022 (ICC-01/14-01/22-276, para. 2).

³⁷ ICC-01/14-01/22-275, para. 9.

³⁸ ICC-01/14-01/18-1739, para. 12.

Request would lead to a delay that is much greater than two weeks and dramatically impact upon Defence preparations.

IV. RELIEF SOUGHT

For the reasons above, the Defence respectfully requests the Chamber to **REJECT** request ICC-01/14-01/18-2186-Conf-Red.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 28 November 2023

At The Hague, the Netherlands.