

**Cour
Pénale
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**International
Criminal
Court**

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Date: **31/01/2024**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

With Confidential Annexes A & B

Public Redacted Version of Mokom Defence Submission of Evidence Designated by the Prosecution as Exonerating, in advance of the Confirmation of Charges Hearing, ICC-01/14-01/22-260-Conf, 18 August 2023

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

The Office of the Prosecutor

Karim A. A. Khan KC
Mame Mandiaye Niang
Leonie von Braun

Counsel for the Defence

Philippe Larochelle

Legal Representatives of the Victims

Paolina Massidda

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ozvaldo Zavala Giler

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The volume of exculpatory evidence which exists in relation to the Prosecution's case against Mr Mokom, may indeed be unprecedented before this Court. Certainly, the emblematic feature of the pre-trial proceedings in this case, has been the shifting Prosecution approach to the identification of this exonerating evidence.

2. The Prosecution has a statutory obligation to “disclose to the defence evidence in the Prosecutor's possession or control which he or she believes 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”.¹

3. By the time of submission of the Document containing the Charges (“DCC”),² the Prosecution had identified 116 documents as being or containing exculpatory (PEXO) material. Repeated written requests from the Defence produced no additional documents. After an eventual order from the Pre-Trial Chamber, the Prosecution then identified a total of 425 documents as containing exculpatory excerpts, including 375 new documents marked as exculpatory. Of the 116 documents originally identified by the Prosecutor as having PEXO extracts, only 50 remained in the PEXO category following further review. This new identification was, evidently, completed months after the expiry of the Prosecution's disclosure deadline.

4. In advance of the confirmation of charges hearing, the Defence submits the present filing to set out, exhaustively, the material designated by the Prosecution itself in relation to the statements, transcribed statements and transcripts of Prosecution witnesses, as tending to show the innocence of Mr Mokom, or mitigate his guilt, or which may affect the credibility of the Prosecution's own evidence. All of this evidence was already included in the Defence list of evidence, filed on 11 August 2023.³ The Defence intends to refer to this material during its submissions on the merits, and also submits that it should form part of the Pre-Trial Chamber's deliberations at the confirmation stage.

¹ Article 67(2) of the Rome Statute of the International Criminal Court.

² Prosecution: Document Containing the Charges, [ICC-01/14-01/22-174-Conf-AnxA](#), 9 March 2023. A public redacted version was filed on 13 March 2023: [ICC-01/14-01/22-174-AnxA-Red](#).

³ See Defence Submission of its List of Evidence, [ICC-01/14-01/22-258](#), 11 August 2023, including Annex A: Mokom Defence List of Evidence, [ICC-01/14-01/22-258-Conf-AnxA](#), 11 August 2023.

II. PROCEDURAL HISTORY

5. On 10 December 2018, the Pre-Trial Chamber issued a warrant of arrest for Maxime Jeoffroy Eli Mokom Gawaka.⁴ Mr Mokom was surrendered to the Court on 14 March 2022.⁵

6. Throughout the subsequent disclosure process in these proceedings, the Prosecution identified 116 documents as being or containing exculpatory (PEXO) material.

7. On 9 March 2023, the Prosecution filed its DCC, and associated materials.⁶

8. On 24 March 2023, the Prosecution filed its Submission Related to the Chamber's Decision on issues arising from the submission of the DCC, including a revised List of Evidence, revised Witness Tables and a list of items for which amendments to the disclosure metadata or disclosure notes were sought.⁷

9. On 17 April 2023, the Defence filed observations on the conduct of the proceedings, and noted that its investigations had been complicated by the manner of the Prosecution's disclosure.⁸ The Defence identified that "prior testimony of witnesses on which the Prosecution seeks to rely for the confirmation hearing contain[s] unequivocally exculpatory material, which has not been indicated by the Prosecution as being exonerating." To illustrate this point, the Defence provided specific examples from the transcripts of testimony of witnesses P-1521 and P-2232 in *Yekatom & Ngaïssona*, which the Prosecution had not identified as being exculpatory.⁹

⁴ A public redacted version was issued on 22 March 2022, see: Pre-Trial Chamber II: Public Redacted Version of 'Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka' (ICC-01/14-01/22-2-US-Exp), [ICC-01/14-01/22-2-Red2](#).

⁵ Transcript of Hearing, 22 March 2022, ICC-01/14-01/22-T-001-RED-ENG, p. 1, l. 16-17.

⁶ See, Prosecution's Submission of the Document Containing the Charges, [ICC-01/14-01/22-174](#), 9 March 2023, and its associated Annexes A, B, C1, C2 and D.

⁷ Prosecution's Submission Related to the Chamber's Decision on issues arising from the submission of the Document Containing the Charges, [ICC-01/14-01/22-179](#), 24 March 2023, para. 1.

⁸ 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 ("Mokom Defence Observations"), para. 13. A public redacted version was issued on 27 June 2023: [ICC-01/14-01/22-192-Red](#)

⁹ Mokom Defence Observations, paras. 18–22.

10. On 19 April 2023, recalling the Pre-Trial Chamber's order of 7 November 2022 which ordered the Prosecution to differentiate the disclosed and migrated evidentiary material by indicating which sections are deemed to contain exonerating information,¹⁰ the Defence contacted the Prosecution *inter partes*, and advised that it was "coming across material which in our view is manifestly exculpatory, cannot be reasonably viewed in any other way, and which has not been marked as such".¹¹

11. On 23 April 2023, the Prosecution replied¹² that the Defence was confused as to the difference between disclosed and migrated material, and that, to the extent that the Chamber's Orders exceed the requirements of the E-Court Protocol, they apply only to disclosed material. The Prosecution stated that the key INCRIM witnesses – like P-1521 and P-2232 - identified by the Prosecution remained as such, and that the evidence identified by the Defence as exculpatory was taken out of context and remained incriminating.

12. This position was reiterated in the Prosecution's response to the Mokom Defence Observations, filed on 24 April 2023. The Prosecution repeated that P-1521 and P-2232 were key INCRIM witnesses, "as a whole", and their testimonies "do not comprise anything which would fall under article 67(2)".¹³ They also addressed the specific examples raised by the Defence, stating that the allegation that these testimonies contained exculpatory material was 'contrived' and 'wrong', or incorrectly characterised the evidence.¹⁴

13. On 26 April 2023, the Defence sent a letter to the Prosecution,¹⁵ regarding the 116 documents identified as exculpatory by the Prosecution. The Defence noted that 96 documents had been marked as PEXO without any indication as to which parts of the documents were considered to be exculpatory, and that it was impossible to determine the criteria which had been used for this assessment. The Defence also identified additional exculpatory evidence which had not been included in the list of 116 documents.

¹⁰ Pre-Trial Chamber II: Order on disclosure and related matters, [ICC-01/14-01/22-104](#), 7 November 2022, para.8.

¹¹ See correspondence contained in Annex A to Mokom Defence Request for Disclosure: "Correspondence between the Mokom Defence and the Prosecution regarding disclosure of exculpatory materials", [ICC-01/14-01/22-198-Conf-AnxA](#), 4 May 2023 ("Mokom Disclosure Request Annex A"), p. 1.

¹² *Ibid*, pp. 3-4.

¹³ Prosecution's response to "Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing", 17 April 2023, ICC-01/14-01/22-192-Conf, ICC-01/14-01/22-196-Conf, 24 April 2023 ("Prosecution Response to Observations"), para. 6.

¹⁴ *Ibid*, paras. 7, 10.

¹⁵ Mokom Disclosure Request Annex A, pp. 9 – 10 ("26 April Letter").

14. On 3 May 2023, the Prosecution asserted that it had properly discharged its disclosure obligations and that it was not necessary to review all disclosed materials to search for any excerpts of evidence that the Defence would consider exculpatory.¹⁶ More specifically, the Prosecution stated that it “has identified 116 items of PEXO in November 2022, i.e., several months before the filing of the Witness List and the Document Containing the Charges (“DCC”)” and that “the Defence thus has ample time to review the rather limited pool of documents”. In addition, the Prosecution considered that the criteria it used to mark some evidence as exculpatory did not precipitate a disclosure requirement under Article 67(2) or Rule 77, and that Rule 81(1) explicitly exempts internal work product and/or analysis from disclosure. The Prosecution suggested that the Defence should read and analyse witness related materials “**as a whole, holistically**”, to understand why the Prosecution had marked entire documents as exculpatory.

15. On 4 May 2023, the Defence filed its Request for Disclosure, asking the Pre-Trial Chamber to order the Prosecution to differentiate the evidentiary items disclosed in this case, including those “migrated” from the *Yekatom and Ngaïssona* case record to the Mokom case record, by indicating, for each disclosed item, which sections are deemed to contain incriminating, exonerating and/or other information, and to indicate the criteria used in designating evidential items as exculpatory.¹⁷

16. On 11 May 2023, the Prosecution responded that it had properly disclosed the PEXO material in its possession or control, and that the Chamber need not intervene in the parties’ dispute as to the legal classification of disclosed material.¹⁸

17. On 5 June 2023, the Chamber instructed the Prosecution to complete its further review of its material and formally disclose any additional potentially exonerating information for Mr Mokom specifically as soon as possible, and no later than 21 June 2023. The Prosecution was also ordered to further review the statements and testimonies of ‘Key INCRIM witnesses’ without unduly narrowing its approach to potentially exculpatory

¹⁶ Mokom Disclosure Request Annex A, pp. 13-15.

¹⁷ Mokom Defence Request for Disclosure, [ICC-01/14-01/22-198-Conf](#), 4 May 2023, para. 42(i). A public redacted version was issued on 28 June 2023, [ICC-01/14-01/22-198-Red](#).

¹⁸ 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, para. 1 & section III(a)(ii). A public redacted version was issued on 11 May 2023, [ICC-01/14-01/22-200-Red](#).

information, and identify to the Defence information falling under Article 67(2) of the Statute by no later than 21 June 2023. The Chamber also ordered the Prosecution to review the material disclosed as ‘entirely PEXO’, with a view to identifying specifically which sections it considers exculpatory for Mr Mokom in the disclosure notes by no later than 21 June 2023.¹⁹

18. The Defence has now been provided with a total of 425 documents containing exculpatory excerpts. This includes 375 new documents marked as exculpatory since 21 June 2023. Of the 116 documents identified by the Prosecutor as having PEXO extracts before the Defence Request on 4 May 2023, only 50 remain identified as having PEXO extracts, following this additional review by the Prosecutor.

19. As part of this review, the Prosecution has marked as exculpatory many sections of P-1961, P-1521 and P-2232’s evidence that the Defence had previously identified in submissions or *inter partes* correspondence. The Prosecution has therefore departed from its previous position, in which it suggested that the Defence was wrong, confused, or otherwise unaware of the correct interpretation and application of Rule 67(2). To assist the Chamber, the Defence has identified the following examples:

- (i) P-1961: In the 26 April Letter, the Defence identified paragraph 91 of P-1961’s statement²⁰ as being exculpatory, where he said “[REDACTED]”.²¹ The Prosecution had responded “[w]e disagree”, stating the relevant extract actually supported an incriminating perspective.²² However, as part of the update completed on 21 June 2023, this paragraph was marked as PEXO.²³
- (ii) P-1521: The Mokom Defence Observations noted that P-1521 stated on two occasions in his *Yekatom & Ngaïssona* testimony that Andjilo, an Anti-Balaka commander, had not received orders or acted under the authority of anyone in relation to the 5 December attack. In circumstances where the Prosecution alleges Mr Mokom was coordinating the 5 December attack, such evidence is

¹⁹ Pre-Trial Chamber II: Decision on the Defence’s requests for disclosure and rectification of disclosure metadata, [ICC-01/14-01/22-219-Conf](#), 5 June 2023, paras. 34, 38-39. A public redacted version was issued on 3 July 2023, [ICC-01/14-01/22-219-Red](#).

²⁰ CAR-OTP-2090-0067-R01.

²¹ Mokom Disclosure Request Annex A, p. 11.

²² Mokom Disclosure Request Annex A, p. 14.

²³ See disclosure notes for CAR-OTP-2090-0067-R01, stating “PEXO: p. 0083, paras 91-93”.

exculpatory, even though it was not marked as such originally.²⁴ In fact, no exculpatory extracts had previously been identified in P-1521's testimony. In response, the Prosecution stated the fact Andjilo had not received orders from anyone was "not only consistent with the Prosecution's theory underpinning MOKOM's responsibility, but fully supports it."²⁵ However, both of the cited extracts of P-1521's testimony were subsequently marked as PEXO by the Prosecution as part of its 21 June update.²⁶

- (iii) P-2232: The Mokom Defence Observations identified that P-2232 described an [REDACTED].²⁷ Again, this is exculpatory, although the Prosecution had not previously designated any sections of P-2232's testimony as exculpatory. The Prosecution responded that this excerpt was "purely incriminating".²⁸ However, this excerpt was then marked as PEXO by the Prosecution as part of its 21 June update.²⁹

III. SUBMISSIONS

20. As part of its review of the evidentiary material disclosed or migrated in this case, the Defence has isolated the materials and excerpts designated by the Prosecution as exculpatory in relation to Prosecution witnesses, and compiled them in the annexes to the present filing.

21. The Annexes are comprised of

- (i) Annex A: Exculpatory Material identified by the Prosecution in statements, transcribed statements and transcripts related to the 70 Prosecution witnesses relied on to support the DCC; and
- (ii) Annex B: Exculpatory Material identified by the Prosecution in statements, transcribed statements and transcripts related to witnesses not relied on to support the DCC.

²⁴ Mokom Defence Observations, para. 19, and fns. 20-21, referring to ICC-01/14-01/18-T-081-CONF-ENG ET, 30 November 2021, p. 53 and ICC-01/14-01/18-T-082-CONF-ENG CT2, 12 December 2021, p. 70.

²⁵ Prosecution Response to Observations, para. 8.

²⁶ See disclosure notes for: (1) CAR-OTP-00000909 [ICC-01/14-01/18-T-081-CONF-ENG ET], referring to "PEXO: pp. [...] 51-56 [...]"; (2) CAR-OTP-00000911 [ICC-01 14-01 18-T-082-CONF-ENG CT], referring to "PEXO: [...] p. 00070, lns. 20-24".

²⁷ Mokom Defence Observations, para. 22, and fn. 31, referring to ICC-01/14-01/18-T-077-CONF-ENG ET, 16 November 2021, p. 62.

²⁸ Prosecution Response to Observations, para. 14.

²⁹ See disclosure notes for CAR-OTP-00000901 [ICC-01 14-01 18-T-077-CONF-ENG ET], referring to: "PEXO: p. [...] 62 (lns. 6-25)".

22. For clarity, the annexes only contain material **designated by the Prosecution itself** as exculpatory in statements, transcribed statements and transcripts related to Prosecution witnesses. It is not the Defence position that this is the only exculpatory material contained in the disclosed and migrated material.

23. The materials in Annex A are categorised into themes, based on their content, to facilitate the review of the parties and the Chamber. The Prosecution has not indicated the basis on which materials have been marked as exculpatory. As such, the categorisation of the materials listed in Annex A has been done by the Defence, independently from the Prosecution.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
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