

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 May 2024

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-ÉDOUARD
NGAISSONA***

Public Document

**Public Redacted Version of the “Victims’ Joint Response to the ‘Ngaïssona
Defence Motion for Disclosure’ (ICC-01/14-01/18-2448-Conf)”
(No. ICC-01/14-01/18-2464-Conf, dated 25 April 2024)**

Source: Common Legal Representatives of Victims

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Patrice-Édouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Ms Anta Guissé
Mr Thomas Hannis
Ms Sarah Bafadhel

Legal Representatives of the Victims

Mr Abdou Dangabo Moussa
Ms Marie Édith Douzima Lawson
Mr Yaré Fall
Ms Paolina Massidda
Ms Elisabeth Rabesandratana
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Dmytro Suprun
Mr Enrique Carnero Rojo

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers (jointly the “CLR”) herewith file their joint response to the motion by the Defence of Mr Ngaïssona (the “Motion”) to order the Prosecution to disclose items and information relating to the unavailability of witnesses who were due to testify in the case *Prosecutor v. Maxime Mokom* and are also witnesses in the present case (the “Sought Material”).¹

2. The CLR oppose in full the Motion and contend that the Defence fails to show that the Sought Material may contain exculpatory material and may affect the credibility of Prosecution witnesses pursuant to article 67(2) of the Rome Statute (the “Statute”), or that is material to the preparation of the defence pursuant to rule 77 of the Rules of Procedure and Evidence (the “Rules”).

3. Moreover, the CLR submit that granting the Motion would have a deleterious impact both on the interests of the victims and on the expeditiousness of the proceedings, which are meant *inter alia* to assure that victims receive justice and are able to go through the healing process quickly.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is classified as confidential, following the classification chosen by the Defence. A public redacted version will be filed in due course.

¹ See the “Ngaïssona Defence Motion for Disclosure”, No. [ICC-01/14-01/18-2448-Conf](#), 15 April 2024 (the “Motion”).

III. PROCEDURAL BACKGROUND

5. On 16 October 2023, the Prosecution withdrew the charges against Mr Mokom before Pre-Trial Chamber II.²

6. On 2 November 2023, upon an *inter partes* request for disclosure by the Defence of Mr Ngaïssona (the “Defence”), the Prosecution indicated to the Defence that there were no disclosable tangible items or evidence either in terms of rule 77 ‘materiality’ or article 67(2) ‘PEXO’ considerations in respect of the decision to withdraw the charges against Mr Mokom.³

7. On 9 January 2024, the Prosecution reiterated its position upon a renewed Defence *inter partes* request for disclosure of information relating to the “unavailability” of witnesses common to the *Mokom* and *Yekatom & Ngaïssona* cases.⁴

8. [REDACTED].⁵

9. On 15 April 2024, the Defence filed the Motion before the Chamber.⁶

10. On 19 April 2024, the Defence of Mr Yekatom joined and supported the arguments raised in the Motion.⁷

² See the “Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka”, No. [ICC-01/14-01/22-275](#), 16 October 2023.

³ See the Motion, *supra* note 1, para. 5.

⁴ *Ibid.*, para. 7.

⁵ *Ibid.*, para. 11.

⁶ See the Motion, *supra* note 1.

⁷ See email from the Defence of Mr Yekatom, 19 April 2024, at 12:56.

IV. SUBMISSIONS

1. The Defence fails to show that the Sought Material is relevant for its preparation

11. Although the Chamber has not exhaustively defined the scope of evidence encapsulated under article 67(2) of the Statute⁸ and the *inter partes* character of the Defence requests for disclosure prevents the CLRV from determining if their content is specific enough and relates to information that has a direct connection to the charges or a live issue in this case,⁹ the CLRV submit that the Motion does not demonstrate the “materiality” of the Sought Material.¹⁰

12. As clarified by other Chambers, the obligations under article 67(2) of the Statute and rule 77 of the Rules “do not extend to providing irrelevant information that does not come within either of those provisions”,¹¹ and “[it] is not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection”.¹² In turn, the Appeals Chamber has explained that “the right to disclosure is not unlimited and which objects are ‘material to the preparation of the defence’ will depend upon the specific circumstances of the case”.¹³

⁸ See the “Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-[REDACTED]” (Trial Chamber V), No. [ICC-01/14-01/18-551-Red](#), 15 June 2020, para. 29.

⁹ See *supra* paras. 6-8. See also the Motion, *supra* note 1, para. 26.

¹⁰ See for instance the “Public redacted version of ‘Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali’” (Trial Chamber X), No. [ICC-01/12-01/18-859-Red](#), 5 January 2021, para. 10.

¹¹ See the “Reasons for Oral Decision lifting the stay of proceedings” (Trial Chamber I), No. [ICC-01/04-01/06-1644](#), 24 January 2009, para. 53.

¹² See the “Decision on the defence application for additional disclosure relating to a challenge on admissibility” (Trial Chamber III), No. [ICC-01/05-01/08-632](#), 2 December 2009, para. 20.

¹³ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 55.

13. In this regard, the Defence fails to demonstrate that the Sought Material may contain exculpatory material and affect the credibility of Prosecution witnesses pursuant to article 67(2) of the Statute or that it is material to the preparation of the defence pursuant to rule 77 of the Rules. The Defence merely notes that there is a “*factual and evidentiary overlap*” between the cases against Mr Mokom and against Mr Yekatom and Mr Ngaïssona, and advances the hypothesis that “*the collapse of the Prosecution’s case [against Mr Mokom] appears to transpire fundamental failures in securing the testimony of critical witnesses, who are also witnesses in the case against Mr Ngaïssona*”.¹⁴ The Defence also challenges the credibility of some “overlapping witnesses” in the current case.¹⁵

14. The CLRV contend that the Defence does not meet its “*low burden*”¹⁶ to show that the Sought Material is “*relevant for the preparation of the defence*”¹⁷ on the basis of “*a prima facie assessment*”.¹⁸ In particular, the Defence does not show how the Sought Material could undermine the Prosecution case, support a line of argument of the Defence, or significantly assist Mr Ngaïssona in understanding the incriminating and exculpatory evidence, and the issues, in this case.¹⁹

¹⁴ See the Motion, *supra* note 1, para. 20.

¹⁵ *Ibid.*, para. 22.

¹⁶ *Ibid.*, para. 17, referring to “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’” (Appeals Chamber), No. [ICC-02/05-03/09-501 OA4](#), 28 August 2013, para. 42.

¹⁷ See the Motion, *supra* note 1, paras. 17-18, referring *inter alia* to the “Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’” (Appeals Chamber), No. [ICC-01/04-02/06-1330 OA3](#), 20 May 2016, para. 23; the “Decision on Mr Thomas Lubanga’s Request for Disclosure” (Appeals Chamber), No. [ICC-01/04-01/06-3017 A5 A6](#), 11 April 2013, para. 10; and the “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008” (Appeals Chamber), No. [ICC-01/04-01/06-1433 OA11](#), 11 July 2008, para. 77.

¹⁸ See the “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, *supra* note 16, para. 42.

¹⁹ Cf. the “Decision on ‘Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications’ and Addendum” (Trial Chamber III), No. [ICC-01/05-01/08-3101](#), 3 July 2014, para. 32; the “Decision on defence requests for disclosure” (Trial Chamber III), No. [ICC-01/05-01/08-3100](#), 2 July 2014, para. 11; the “Decision on the ‘Defence Motion on Prosecution contact

15. Although the Defence avers that “[t]he Sought Material may directly affect the credibility of the overlapping witnesses”,²⁰ it only refers to *hypothetical* information regarding witnesses in this case that could fall within article 67(2) of the Statute or rule 77 of the Rules.²¹ The Defence merely challenges the Prosecution’s stance that there is *actually* no disclosable information relating to the alleged non-cooperation of the overlapping witnesses in the case against Mr Mokom, but does not provide a reasonable basis to doubt the Prosecution’s position.²²

16. Moreover, contrary to the Defence’s contention,²³ [REDACTED].²⁴

17. Finally, in these circumstances, the disclosure of the Sought Material would not provide further assistance to the Chamber in its truth-seeking function.²⁵

with its witnesses” (Trial Chamber III), No. [ICC-01/05-01/08-3070](#), 2 July 2014, para. 23; and the “Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses” (Trial Chamber III), No. [ICC-01/04-01/06-2624](#), 12 November 2010, para. 16.

²⁰ See the Motion, *supra* note 1, para. 23.

²¹ *Idem*.

²² *Ibid.*, para. 25.

²³ *Ibid.*, para. 24.

²⁴ [REDACTED].

²⁵ *Contra* the Motion, *supra* note 1, para. 27.

2. Granting the Motion would have a negative impact on the expeditiousness of the proceedings and the interests of the victims

18. The CLRV note that the Motion is broad as it refers to [REDACTED] “overlapping witnesses”.²⁶ The Defence impugns the credibility of “*several of those witnesses*”²⁷ and seems interested in “*disclosable statements, investigative reports, or information relating to the non-cooperation of [these] overlapping witness*” in the case against Mr Mokom.²⁸ The CLRV submit that granting the Motion would have a deleterious impact on the expeditiousness of the proceedings and, thereby, on the interests of the victims.

19. Given its vast scope, the eventual disclosure of the Sought Material by the Prosecution and its analysis and subsequent action by the Defence (for instance, by either submitting evidence through the bar table or calling witnesses to testify) would undoubtedly prolong the proceedings in a substantial way.

20. The trial in this case has already surpassed three years, during which over 4,000 documents have been tendered and over 85 witnesses have testified upon being called by the Prosecution, the Defence, the CLRV and the Chamber. In these circumstances and for the reasons above,²⁹ the CLRV submit that considering now additional evidence on almost a [REDACTED] of the total number of witnesses heard so far would not be cost-effective.

21. Moreover, the CRLV note with concern that, among the [REDACTED] “overlapping witnesses” whose credibility the Defence challenges in the Motion, there are two dual-status individuals who were already called to testify in this case, namely

²⁶ See the Motion, *supra* note 1, para. 22.

²⁷ *Ibid.*, paras. 22-23.

²⁸ *Ibid.*, para. 25.

²⁹ See *supra* paras. 13-16.

P-2049 (victim a/70287/22) and P-2657 (victim a/70288/22).³⁰ [REDACTED].³¹ The CLRV [REDACTED],³² [REDACTED] stress in particular that the Chamber will evaluate these witnesses' credibility in conjunction with all the evidence in the case as a whole,³³ considering also the Defence arguments in this regard.³⁴

22. Finally, although *"considerations of expeditiousness are not explicitly found in rule 77 as a basis for restricting disclosure"*,³⁵ the CLRV submit that the Chamber must always ensure that proceedings are fair and expeditious under articles 64(2) and 67(1)(c) of the Statute. In particular, as held by the Appeals Chamber, the expeditiousness of the proceedings is *"more than just a component of the fair trial rights of the accused"*³⁶ and *"an expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly"*.³⁷ In this regard, the participating victims respectfully plead the Chamber to abide by its consideration that *"the expeditiousness of the case is of the utmost importance"*.³⁸

³⁰ See the Motion, *supra* note 1, footnote 37. P-2049 and P-2657 testified in block 10, between 25 February and 4 March 2022. See the transcripts of the hearings [T-100 \[ENG\]](#), [T-101 \[ENG\]](#), [T-102 \[ENG\]](#), [T-103 \[ENG\]](#), [T-104 \[ENG\]](#) and [T-105 \[ENG\]](#).

³¹ [REDACTED].

³² [REDACTED].

³³ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber V), No. [ICC-01/14-01/18-631](#), 26 August 2020, para. 53.

³⁴ For the same approach, see the "Decision on Defence application to exclude the evidence of or recall P-0547" (Trial Chamber X), No. [ICC-01/12-01/18-2344-Red](#), 21 September 2022, paras. 39-40.

³⁵ See the "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'", *supra* note 16, para. 37.

³⁶ See the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'" (Appeals Chamber), No. [ICC-01/04-01/07-2259 OA10](#), 12 July 2010, para. 47.

³⁷ *Ibid.*, para. 46.

³⁸ See the transcript of the hearing held on 8 April 2024, No. [ICC-01/14-01/18-T-275-CONF-ENG ET](#), at p. 3, lines 3-4 (open session).

V. CONCLUSION

23. For the foregoing reasons, the CLRV request the Chamber to reject the Motion in its entirety.

Respectfully submitted.



Dmytro Suprun

Common Legal Representative
Victims Former Child Soldiers



Paolina Massidda

For the team of the Common Legal
Representatives of Victims of the Other
Crimes

Dated this 10th day of May 2024

At The Hague, The Netherlands