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**International
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Court**

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Date: **20 September 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-EDOUARD
NGAISSONA***

PUBLIC

Public Redacted Version of “Ngaïssona Defence Motion for Disclosure”, ICC-01/14-01/18-2448-Conf, 15 April 2024

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 Trial Chamber V (“Chamber”) to order the Prosecution to disclose items and information relating to the Prosecution’s withdrawal of charges in the case *Prosecutor v. Maxime Mokom* (“Mokom case”), pursuant to article 67(2) of the Rome Statute (“Statute”) and rule 77 of the Rules of Procedure and Evidence (“Rules”). Specifically, the Defence seeks the disclosure of all items and information relating to the sudden “unavailability” of witnesses who were due to testify in the Mokom case, who are also witnesses in the present case, including several insider witnesses (“overlapping witnesses”).¹ These items and information (“Sought Material”) are disclosable as they are material, may contain exculpatory material, and may affect the credibility of those witnesses, within the meaning of article 67(2) of the Statute.
2. Given *inter partes* discussions have not been fruitful in relation to obtaining the Sought Material, the Defence turns to the Chamber for relief.

II. Relevant Procedural History

3. On 16 October 2023, the Prosecution filed its “Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka” (“Withdrawal of Charges”) before Pre-Trial Chamber II, indicating that it did “not consider that there is a reasonable prospect of conviction at trial even if the charges were confirmed” in “light of changed circumstances regarding the state of the evidence”.² The changed circumstances relate to the “unavailability” of “several critical witnesses”, including insider witnesses in the present case.³

¹ See fn. 38, below.

² *Prosecutor v. Mokom*, Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-275, 16 October 2023, paras 1-5 (“Mokom Notice of Withdrawal”).

³ Mokom Notice of Withdrawal, para. 3.

4. Following the Withdrawal of Charges, the Defence promptly sent an *inter partes* request, on 20 October 2023, for disclosure of all documents and information relevant to the “changed circumstances regarding the state of the evidence” in the Mokom case.⁴ The Defence limited its request for disclosure to :
- a. “the identity of all witnesses who have become unavailable to testify in the Mokom case. This list of witnesses should include but not be limited to the identity of all “insider witnesses who provide critical information regarding the charges against Mr Mokom” (Notice, para. 3);
 - b. any notes, transcripts, statements, reports in the possession of your Office in relation to the “changed circumstances”, including any investigation notes pertaining to the efforts made to locate the witnesses in question and secure their cooperation;
 - c. any statement and/or material provided by the witnesses in question which might be relevant to the changed circumstances (ie relevant contact logs);
 - d. any correspondence involving the witnesses in question which might be relevant to the changed circumstances;
 - e. more generally, any information in the possession of your Office as to the changed circumstances, including the reasons (i) why each of these witnesses has become unavailable and/or unwilling to testify in the Mokom case and (ii) why it led the Prosecution to the decision to file the Notice.”⁵
5. On 2 November 2023, the Prosecution refused to disclose any of the above material to the Defence, indicating *inter alia* that there was no disclosable tangible items or evidence falling under the “materiality” criterion of article 67(2), nor

⁴ Email from the Defence to the Prosecution, 20 October 2023, at 9:27 and re-sent at 12:55.

⁵ Ibid.

any “PEXO” considerations in respect of the decision to withdraw the charges against MOKOM.⁶

6. On 9 January 2024, the Defence sent a renewed and narrowed request for disclosure to the Prosecution for information relating to the “unavailability” of witnesses common to the Mokom and Yekatom & Ngaïssona cases, with reference to the Prosecution’s Notice of Withdrawal.⁷ The Defence specifically listed the pseudonyms of several witnesses for whom it sought disclosure of information and items.⁸
7. On the same day, the Prosecution reiterated its position that “there are 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 MOKOM”.⁹
8. On 30 January 2024, the Defence sought to interview several Prosecution insider witnesses pursuant to the “Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses”.¹⁰ On 2 February, the Prosecution rejected the request, arguing, without providing a legal basis, that the Protocol does not apply to [REDACTED].¹¹ The matter is pending before the Chamber.¹²

⁶ Email from the Prosecution to the Defence, 2 November 2023, at 16:22.

⁷ Mokom Notice of Withdrawal, para. 1.

⁸ Email from the Defence to the Prosecution, 9 January 2024, at 12:02.

⁹ Email from the Prosecution to the Defence, 9 January 2024, at 17:08.

¹⁰ Email from the Defence to the Prosecution, 30 January 2024, at 14:53, with reference to ICC-01/14-01/18-156-AnxA, para. 31.

¹¹ Email from the Prosecution to the Defence, 2 February 2024, at 19:20.

¹² ICC-01/14-01/18-2400-Conf.

9. On 9 February 2024, after obtaining authorisation from Pre-Trial Chamber II,¹³ the Defence filed a request for disclosure of the Sought Material to the Pre-Trial Chamber II ("First Disclosure Request").¹⁴
10. The Prosecution responded to the Defence request on 15 February 2024.¹⁵
11. On 2 April 2024, the Pre-Trial Chamber II dismissed the Defence's First Disclosure Request on the basis that it was not the appropriate forum, without prejudice to Trial Chamber V adjudicating the matter.¹⁶

III. Applicable Law

12. Article 67(1) of the Statute enshrines, among other fair trial guarantees, the principle of equality of arms.
13. Article 67(2) governs the Prosecution's 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." Such disclosure must be done "as soon as practicable",¹⁷ which means, without undue delay.¹⁸ It also provides that "[i]n case of doubt as to the application of this paragraph, the Court shall decide."¹⁹
14. Rule 77 of the Rules provides that the Prosecution shall permit the defence to inspect any item in its "possession or control", "which are material to the

¹³ Email from Pre-Trial Chamber II to Ngaiissona Defence, 9 February 2024, at 11:58.

¹⁴ ICC-01/14-01/22-322-Conf.

¹⁵ ICC-01/14-01/22-326-Conf.

¹⁶ ICC-01/14-01/22-328-Conf, paras 7, 10.

¹⁷ Article 67(2), Rome Statute.

¹⁸ *Prosecutor v. Muthaura et al.*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-02/11-48, 6 April 2011, para. 25.

¹⁹ *See Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06-1486 OA 13, 21 October 2008, para. 46.

preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.”

IV. Confidentiality

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

V. Submissions

16. The Defence filed its First Disclosure Request before the Pre-Trial Chamber II given the Chamber’s and the Pre-Trial Chamber II’s recent rulings on a similar request filed by the defence team of Mr Mokom.²⁰ Contrary to the Prosecution’s claim, the Defence pursued this procedural route based on this precedent and not to “circumvent” in any way the “normal procedure”.²¹ However, the Pre-Trial Chamber II held that the Chamber is the appropriate forum – a position held by the Prosecution – hence the present renewed request.²²

17. The Appeals Chamber has held that the Prosecution’s disclosure obligations towards the Defence are broad.²³ They encompass “all objects relevant for the

²⁰ See ICC-01/14-01/18-1976; *Prosecutor v. Mokom*, Public Redacted Version of ‘Decision on the Defence’s requests for disclosure and rectification of disclosure metadata’, ICC-01/14-01/22-219-Red, 3 July 2023, paras 50-52.

²¹ ICC-01/14-01/22-326-Conf, paras 3, 8.

²² ICC-01/14-01/22-328-Conf, paras 7, 10; ICC-01/14-01/22-326-Conf, paras 3, 4, 9: the Prosecution stated that the motion “should be submitted before Trial Chamber V and not this Chamber” and that “Trial Chamber V is the sole competent forum to resolve a conflict related to the applicable protocols as well as disclosure disagreements between the Parties to that case”; “conflicts are to be resolved before Trial Chamber V unless they concern access to legal submissions and decisions Trial Chamber V does not have access to”.

²³ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 OA11, 11 July 2008, paras 76-82; *Prosecutor v. Lubanga*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, ICC-01/04-01/06-2624, 12 November 2010, para. 16 (“[T]he prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, *inter alia*, any item that is relevant to the preparation of the defence, and including not

preparation of the defence.”²⁴ In addition, “the Prosecutor shall, as soon as practicable, 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.”²⁵ The Appeals Chamber ruled that any assessment of whether information is material to the preparation of the defence pursuant to rule 77 should be made on a *prima facie* basis, which “places a low burden on the defence”.²⁶ It further emphasised that it “may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet the defence is still entitled to this information on the basis of a *prima facie* assessment.”²⁷ Moreover, the Prosecution is obliged to effect disclosure pursuant to article 67(2) and rule 77 of the Rules “in a diligent and timely manner”.²⁸

18. The terms “material to the preparation of the defence” should “be understood as referring to *all objects that are relevant* for the preparation of the defence”.²⁹ The

only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation.”); *Prosecutor v. Katanga and Ngudjolo*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, ICC-01/04-01/07-621, 20 June 2008, para. 28.

²⁴ ICC-01/14-01/18-1578-Red, para. 24; ICC-01/14-01/22-219-Red, para. 41; *Prosecutor v. Lubanga*, Decision on Mr Thomas Lubanga’s request for disclosure, ICC-01/04-01/06-3017 A5 6, para. 10; *Prosecutor v. Lubanga*, “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, ICC-01/04-01/06-1433 OA 11, 11 July 2008, paras 77-78; *Prosecutor v. Gaddafi*, Decision on the “Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya”, ICC-01/11-01/11-578, 4 February 2015, para. 4; *Prosecutor v. Banda & Jerbo*, 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’, 28 August 2013, ICC-02/05-03/09-501, paras 38-39; *Prosecutor v. Ntaganda*, 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”, ICC-01/04-02/06-1330 OA3, 20 May 2016, para. 23.

²⁵ Article 67(2), Rome Statute.

²⁶ *Prosecutor v. Banda and Jerbo*, 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”, ICC-02/05-03/09-501 OA4, 28 August 2013, para. 42

²⁷ *Ibid.*

²⁸ ICC-01/14-01/18-1627-Conf, para. 9.

²⁹ ICC-01/14-01/18-1578-Red, para. 24 (emphasis added); ICC-01/14-01/22-219-Red, para. 41; *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18

assessment of whether an object is material to the preparation of the defence will depend upon the specific circumstances of the case.³⁰ Article 67(2) requires the Prosecution to disclose materials to the Defence “which *may* affect the credibility of prosecution evidence”.³¹ It is therefore not required that the Sought Material *will* affect the credibility of Prosecution witnesses.

19. Preliminarily, the Sought Material clearly falls within the category of “evidence in the Prosecutor’s possession or control (...)”. The Office of the Prosecutor is a unitary entity.³² Evidence obtained in the course of its investigations in the Mokom case is within the Prosecution’s “possession or control” in the Yekatom & Ngaïssona case.

20. The collapse of the Prosecution’s case, leading to the sudden withdrawal of all the charges against Mr Mokom, is unprecedented at the Court. The Prosecution provided virtually no reasons or supporting evidence to justify its request, other than it “has become clear that several critical witnesses are unavailable to testify”.³³ Despite the Prosecution’s lack of concrete justification for the Withdrawal of Charges, including the identity of “unavailable” witnesses, even in redacted form, the collapse of the Prosecution’s case appears to transpire fundamental failures in securing the testimony of critical witnesses, who are also witnesses in the case against Mr Ngaïssona. Given the significant factual and

January 2008, ICC-01/04-01/06-1433 OA 11, 11 July 2008, para. 77; *Prosecutor v. Gaddafi*, Decision on the “Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya”, ICC-01/11-01/11-578 OA 11, 4 February 2015, para. 4.

³⁰ ICC-01/14-01/18-2306-Conf, para. 4; ICC-01/14-01/18-1694-Conf, para. 7; ICC-01/14-01/18- 1438-Red, para. 9; *Prosecutor v. Banda & Jerbo*, 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”, 28 August 2013, ICC-02/05-03/09-501 OA 4, para. 39.

³¹ Emphasis added.

³² The Pre-Trial Chamber II held: “the material sought by the Ngaïssona Defence is in the possession or control of the Prosecution as a single entity, regardless of the case it originates from”, ICC-01/14-01/22-328-Conf, para. 10.

³³ Mokom Notice of Withdrawal, para. 3; the sparsity of reasons provided by the Prosecution underlining its request was noted by Pre-Trial Chamber II: *Prosecutor v. Mokom*, Order in relation to the Prosecution’s ‘Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka’, ICC-01/14-01/22-276, 17 October 2023, para. 8 (“[T]hese reasons are limited and lack additional information in support.”).

evidentiary overlap between the cases against Mr Mokom and against Mr Yekatom and Mr Ngaïssona, the Sought Material is clearly material to the preparation of the Defence.³⁴

21. The Prosecution argues that the Defence's request is "overly broad and speculative";³⁵ however, the Prosecution appears to be hiding behind a veil of opacity by refusing to provide even the slightest information relating to the Sought Material. For example, the Prosecution refuses to indicate to the Defence the pseudonyms of "unavailable" insider overlapping witnesses. The Prosecution moreover applies a narrow interpretation of its disclosure obligations, placing the burden on the Defence to perform the impracticable task of identifying specific items in the Prosecution's possession or control and justifying how each item "has a direct connection to the charges or a live issue in the case", without first being provided with the most basic information.³⁶ Despite these hurdles, the Defence has gathered sufficient information through accessible transcripts and filings in order to substantiate its disclosure request.
22. Among 33 Prosecution witnesses cited during the confirmation of charges hearing in the Mokom case, 29 witnesses are overlapping witnesses.³⁷ The credibility of several of those witnesses is severely impugned. As argued elsewhere, the credibility of witnesses such as [REDACTED],³⁸ [REDACTED],³⁹

³⁴ The substantial overlap is consistently recognised by the Prosecution. For instance, during the confirmation of charges hearings in the Mokom case, the Prosecution indicated: "Mr Mokom should actually have been tried at the same time with Ngaïssona and Yekatom. There was a single Document Containing the Charges against the three, but because of the gaps in the arrests it was necessary for us to separate the cases", ICC-01/14-01/22-T-006-CONF-ENG ET, page 22; *see also Prosecutor v. Mokom*, Prosecution's Response to "Mokom Defence Request for Access to Materials in the Prosecutor v. Yekatom & Ngaïssona Case" (ICC-01/14-01/18-1932-Conf), ICC-01/14-01/18-1939-Conf, para. 1.

³⁵ ICC-01/14-01/22-326-Conf, paras 1, 6.

³⁶ ICC-01/14-01/22-326-Conf, para. 7; *see* Email from the Prosecution to the Defence, 9 January 2024, at 17:08.

³⁷ [REDACTED]. The Defence does not have access to a definitive witness list in the *Mokom* case; however, it appears there may be several additional overlapping witnesses, such as [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

[REDACTED],⁴⁰ and [REDACTED],⁴¹ among several others, is highly contested given the overwhelming evidence on record impugning their credibility.

23. The Sought Material may directly affect the credibility of the overlapping witnesses. For instance, should those witnesses have withdrawn their cooperation with the Prosecution because they recanted their prior statements and testimonies in the case against Mr Ngaïssona and Mr Yekatom, or should the Prosecution have withdrawn the witnesses based on information casting doubt on their credibility, this should be disclosed immediately to the Defence. The fact that overlapping witnesses appear available to testify in the *Saïd* case, but not in the Mokom case, also raises *prima facie* credibility issues for those witnesses in the present case. For example, should overlapping witnesses have withdrawn their cooperation with respect to accused who are alleged members of the Anti-Balaka leadership only, for reasons which may impact the credibility of their testimony against Mr Ngaïssona, this information should be made available to the Defence. Such scenarios are well within the realm of plausible facts, given the extent and abruptness of the collapse of the Prosecution case against Mr Mokom, and the inconsistency arising from the fact that some overlapping witnesses appear available to testify in the *Saïd* case, but not in the Mokom case.⁴² The Prosecution asserts a broad definition of “unavailability” which in its view encompasses situations where a witness is no longer willing to cooperate with the Prosecution.⁴³ Therefore, it cannot be excluded that the above scenarios fall, according to the Prosecution, under the umbrella of “unavailability”.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² ICC-01/14-01/18-2400-Conf, para. 18.

⁴³ ICC-01/14-01/18-1519-Conf, paras 25, 39-40; ICC-01/14-01/18-2285-Conf and Defence responses ICC-01/14-01/18-2311-Conf, paras 26-28 and ICC-01/14-01/18-2312-Conf, paras 13-16; ICC-01/12-01/18-2445-Red, paras 22-23.

24. On at least two occasions, Trial Chamber V recognised the materiality of items and information surrounding an insider witness' refusal to cooperate with the Prosecution pursuant to article 67(2) of the Statute and rule 77 of the Rules.⁴⁴ As recently held by the Pre-Trial Chamber in adjudicating a disclosure request by the Mokom Defence team, "inconsistencies or contradiction in the statements of Prosecution's witnesses, such as the example identified by the Defence in relation to P-2232, are relevant to the issue of the witness' credibility".⁴⁵ The Pre-Trial Chamber concluded that the Prosecution had not fulfilled its article 67(2) disclosure obligations, in particular as it concerned key incriminating witnesses.⁴⁶
25. In these circumstances, the Prosecution's stance that there is not a single disclosable statement, investigative report, or information relating to the non-cooperation of overlapping witnesses appears implausible. Despite the Defence's repeated disclosure requests and narrowing of the materials sought, it is unclear whether the Prosecution has seriously effectuated a review of evidence relating to the "unavailability" of overlapping witnesses.
26. Moreover, the centrality to the Prosecution's case of the testimonies of overlapping witnesses to the charges against Mr Ngaïssona only reinforces the materiality and relevance of the Sought Material.⁴⁷
27. Finally, disclosure by the Prosecution of the Sought Material would also assist the Chamber in its holistic assessment of the evidence, and in particular, in its

⁴⁴ ICC-01/14-01/18-804-Conf, para. 25; ICC-01/14-01/18-1694-Conf, paras 16-18.

⁴⁵ *Prosecutor v. Mokom*, Public Redacted Version of 'Decision on the Defence's requests for disclosure and rectification of disclosure metadata', ICC-01/14-01/22-219-Red, 3 July 2023, paras 33-34, referring to contradictions in the testimonies of Witnesses P-1521 and P-2232, ICC-01/14-01/22-198-Red, para. 14.

⁴⁶ *Ibid*, para. 34.

⁴⁷ ICC-01/14-01/18-282-Conf-AnxB1; ICC-01/14-01/18-403-Conf-Corr; *see also* ICC-01/14-01/22-219-Red, para. 42.

assessment of the credibility of several insider witnesses. This would further the Court's truth-seeking function.

VI. Conclusion

28. The Withdrawal of Charges in the Mokom case, based on the "unavailability" of overlapping witnesses, has a direct bearing on the present case against Mr Ngaïssona. By refusing to provide the Defence with the Sought Material, which may affect the credibility of overlapping witnesses and contain potentially exculpatory material, the Prosecution dismisses its broad disclosure obligations towards the Defence, requiring the intervention of the Chamber.

VII. Relief sought

29. The Defence respectfully requests the Chamber to ORDER the Prosecution to disclose the Sought Material to the Defence.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 20 September 2024,

At The Hague, the Netherlands