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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
NGAISSONA***

Public redacted version of

**Decision on the Ngaïssona Defence Request for Disclosure of Reports
related to Seizure of Digital Materials from P-0889**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), 3(c), and 67(2) of the Rome Statute (the ‘Statute’), and Rules 77, 81(1) and 84 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889’.

I. Procedural history

1. On 9, 14 and from 16 to 17 March 2022, P-0889 testified before the Chamber.¹
2. On 11 March 2022, the Ngaïssona Defence enquired *inter partes* with the Office of the Prosecutor (the ‘Prosecution’) whether ‘all the material [...] seized from P-0889 by the [...] authorities, or that was produced because of such seizure’ had been disclosed pursuant to Rule 77 of the Rules.² On 15 March 2022, the Prosecution responded that it had disclosed all the items ‘assessed as material’ and that it ‘do[es] not share [the] position that all extraction reports in the case need to be disclosed’.³
3. On 8 April 2022, the Ngaïssona Defence requested that the Chamber (i) order the Prosecution to disclose ‘the digital extraction reports of [REDACTED] seized from P-0889’ (the ‘Extraction Reports’); (ii) order the Prosecution to ‘provide an investigative report that documents what was found on items seized from P-0889 and why an investigator(s) did or did not select certain objects for forensic examination’ (the ‘Investigative Report’); and (iii) find that the Prosecution violated its disclosure obligations by failing to disclose the Extraction Reports and Investigative Report (jointly, the ‘Request’).⁴

¹ See transcripts of hearing, 9 March 2022, ICC-01/14-01/18-T-108-Red-ENG; 14 March 2022, ICC-01/14-01/18-T-109-Red-ENG; 16 March 2022, ICC-01/14-01/18-T-110-Red-ENG; 17 March 2022, ICC-01/14-01/18-T-111-CONF-ENG.

² Annex A to the Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889, ICC-01/14-01/18-1354-Conf-AnxA, p. 2.

³ Annex A to the Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889, ICC-01/14-01/18-1354-Conf-AnxA, p. 1.

⁴ Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889, ICC-01/14-01/18-1354-Conf (with confidential Annex A, ICC-01/14-01/18-1354-Conf-AnxA), paras 1-2, 50.

4. On 19 April 2022, the Prosecution responded to the Request, asking the Chamber to dismiss it.⁵
5. On 21 April 2022, the Yekatom Defence responded to the Request, expressing its support, in particular as regards the Ngaïssona Defence's argument that 'the Prosecution misinterprets its obligation of disclosure'.⁶

II. Analysis

6. The Chamber recalls that, pursuant to Rule 77 of the Rules, the Prosecution 'shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are [*inter alia*] material to the preparation of the defence'.
7. It further recalls that, according to the Court's jurisprudence, the Prosecution's obligation pursuant to Rule 77 of the Rules is subject to a 'two-fold test'. First, it must be determined whether the 'books, documents, photographs and other tangible objects' in question are 'material to the preparation of the defence'. Second, if they are, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and Rules 81 and 82 of the Rules.⁷
8. With regard to the term 'material to the preparation of the defence' in Rule 77 of the Rules, the Chamber recalls the Appeals Chamber's jurisprudence according to which this term must be interpreted broadly, without excluding 'objects which,

⁵ Prosecution's response to Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889 (ICC-01/14-01/18-1354-Conf), ICC-01/14-01/18-1368-Conf (the 'Prosecution Response'), para. 39.

⁶ Yekatom Defence Response to the Ngaïssona 'Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889' (ICC-01/14-01/18-1354-Conf), 8 April 2022, ICC-01/14-01/18-1373-Conf, paras 1-2.

⁷ See Appeals Chamber, *The Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 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 OA04 (the '*Banda and Jerbo* OA04 Judgment'), paras 1, 35; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, 24 August 2015, ICC-01/05-01/13-1172, para. 17; Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, Decision on the prosecution's request for an order on the disclosure of *tu quoque* material pursuant to Rule 77, 2 October 2009, ICC-01/04-01/06-2147, para. 20.

while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence’, referring to ‘all objects that are relevant for the preparation of the defence’.⁸ According to the Appeals Chamber, a broader interpretation of the term ‘material to the preparation of the defence’ could include evidence that is ‘significantly helpful to an understanding of important inculpatory or exculpatory evidence’.⁹

9. The Chamber further notes that the right to disclosure is not unlimited. The determination of which objects are ‘material to the preparation of the defence’ depends upon the specific circumstances of the case, and such an assessment must be made on a *prima facie* basis, placing a low burden on the accused.¹⁰
10. Turning to the merits of the Request, and for the reasons that follow, the Chamber considers that the Ngaiissona Defence has failed to show that the Extraction and

⁸ Appeals Chamber, *The Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA11 (the ‘Lubanga OA11 Judgment’), paras 77-78. See also Decision on Mr Thomas Lubanga’s request for disclosure, 11 April 2013, ICC-01/04-01/06-3017 A05 A06, para. 10; *Banda and Jerbo* OA04 Judgment, ICC-02/05-03/09-501 OA04, para. 38; *The Prosecutor vs. Bosco 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”, 20 May 2016, ICC-01/04-02/06-1330 OA03, para. 23.

⁹ See *Lubanga* OA11 Judgment, ICC-01/04-01/06-1433 OA11, paras 78, 81, where the Appeals Chamber found that ‘[g]iven that the wording of rule 77 [...] is based on the wording of rule 66 (B) of the Rules of Procedure and Evidence of the ICTY, it is useful to consider the relevant jurisprudence of the ICTY and the ICTR on the corresponding provisions in the ICTY and ICTR Rules of Procedure and Evidence’, and further found that ‘[a] broader interpretation of the disclosure obligations is also supported by the decision of 26 September 1996 of a Trial Chamber of the ICTY in the case of *Delalić et al.* At paragraph 7 of that decision, the ICTY Trial Chamber cited case law of U.S. federal jurisdictions that the “requested evidence must be ‘significantly helpful to an understanding of important inculpatory or exculpatory evidence’” (emphasis added)’ (footnotes omitted). See also e.g. Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, 12 November 2010, ICC-01/04-01/06-2624, para. 16; Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 12 July 2011, ICC-01/05-01/08-1594-Conf (public redacted version notified on 29 July 2011, ICC-01/05-01/08-1594-Red), para. 21.

¹⁰ *Banda and Jerbo* OA04 Judgment, ICC-02/05-03/09-501 OA04, paras 39, 42; Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf A01, A02, A03, A04, A05 (public redacted version notified on the same day, ICC-01/05-01/13-2275-Red), para. 55. See also para. 10, where the Appeals Chamber found that the assessment whether a request for assistance falls under Rule 77 of the Rules ‘necessarily depends on the content, context and purpose of any individual request for assistance in the specific circumstances of each case, and no general and abstract definition can be given as to the type of requests for assistance which may fall within rule 77 of the Rules’.

Investigative Reports are ‘material to the preparation of the Defence’ within the meaning of Rule 77 of the Rules.

11. First, the Chamber notes that, in its Request, the Ngaiissona Defence argues that ‘[t]he extraction reports’ and ‘[t]he investigative report’, respectively, are necessary to (i) ‘[u]nderstand evidence which has been disclosed or discussed in testimony’, ‘[i]nstruct experts or engage consultants’ and/or ‘[s]crutinise material that the Prosecution may submit through further witnesses’; and (ii) ‘ensure a fair trial process that does not deny the Defence material that could be relevant for its preparation or investigations’.¹¹ It further argues that ‘[f]orensic extraction reports’ are necessary to, *inter alia*, (i) ‘ensure the integrity and reliability of material generated through digital extraction processes’, (ii) ‘understand the timeline in which events may have occurred’, (iii) ‘provide information about files that is relevant to the Defence’, and (iv) ‘enabl[e] the Defence to engage fully with certain materials used within a trial as the chain of custody is necessary to understand other items the Prosecution collected’.¹²
12. At the outset, the Chamber notes that the Ngaiissona Defence’s suggestion that *all* extraction and investigative reports, regardless of their context or content, should be disclosed under Rule 77 of the Rules contradicts the Court’s jurisprudence, pursuant to which the determination of whether an object falls under this provision ‘will depend upon the specific circumstances of the case’.¹³ The Chamber therefore considers that the arguments put forward by the Ngaiissona Defence concerning the usefulness of extraction and investigative reports in general, as set out above, are too vague and general in nature.
13. The Request overall appears to be a ‘fishing expedition’, despite the two specific examples provided, namely P-0889’s list [REDACTED] (the ‘List [REDACTED]’)¹⁴ and WhatsApp recordings [REDACTED] (the ‘WhatsApp

¹¹ Request, ICC-01/14-01/18-1354-Conf, paras 5-6.

¹² Request, ICC-01/14-01/18-1354-Conf, paras 32-34.

¹³ *See above* paragraph 9.

¹⁴ CAR-OTP-2127-3304.

Recordings’),¹⁵ which, according to the Ngaiissona Defence, ‘demonstrate the materiality of the extraction reports to Defence preparation’.¹⁶

14. Regarding the List [REDACTED], the Ngaiissona Defence specifically submits that, while this item has ‘many of the features of a technical examination or forensic expert report’,¹⁷ the Prosecution provided ‘little information to understand the item’, specifically pointing to ‘[s]everal elements of the [List [REDACTED]] hint[ing] at the need for more information’ (including ‘a peculiar record that hints at data corruption’).¹⁸ It further argues that the Prosecution asserted during P-0889’s testimony that the List [REDACTED], information which the Defence is unable to confirm ‘without more disclosure’, and raises a number of issues related to the date and provenance of this list.¹⁹
15. As for the WhatsApp Recordings, the Chamber likewise notes the Ngaiissona Defence’s submissions, *inter alia*, that it was in fact provided with ‘a form of extraction report’, but that it would need more details to (i) have ‘an exhaustive picture of what was recorded and when’ so that it can ‘put forward well founded arguments’, (ii) ‘understan[d] the context of the recordings’, and (iii) ‘resolv[e] questions about the chain of custody’.²⁰
16. The Chamber observes that, as the Ngaiissona Defence itself acknowledges, the Prosecution already provided relevant information about the extraction process of both the List [REDACTED] and the WhatsApp Recordings.²¹ It further observes that this information, as well as several WhatsApp Recordings, were disclosed on 3 November 2020.²² The Defence was therefore provided with

¹⁵ See a list of the WhatsApp Recordings in CAR-OTP-2127-3042.

¹⁶ Request, ICC-01/14-01/18-1354-Conf, para. 37.

¹⁷ Request, ICC-01/14-01/18-1354-Conf, para. 38.

¹⁸ See these elements listed in the Request, ICC-01/14-01/18-1354-Conf, para. 38.a-c.

¹⁹ Request, ICC-01/14-01/18-1354-Conf, para. 39.

²⁰ Request, ICC-01/14-01/18-1354-Conf, paras 41-43.

²¹ For the List [REDACTED], see CAR-OTP-2127-3304. For the WhatsApp Recordings, see CAR-OTP-2127-3042. See also Prosecution Response, ICC-01/14-01/18-1354-Conf, para. 33.

²² For the List [REDACTED], see Prosecution’s Communication of the Disclosure of Evidence on 3 November 2020, 4 November 2020, ICC-01/14-01/18-711 (with one confidential annex, ICC-01/14-01/18-711-Conf-Anx). See, in particular, the annex, listing the items disclosed as part of ‘INCRIM package 59’, including CAR-OTP-2127-3304. For the WhatsApp Recordings, see Prosecution’s Communication of the Disclosure of Evidence on 3 November 2020, 4 November 2020, ICC-01/14-01/18-711 (with one confidential annex, ICC-01/14-01/18-711-Conf-Anx). See, in particular, the annex,

relevant information about the extraction process of the material in question sixteen months before P-0889's testimony, albeit perhaps not in the desired form of a standard extraction report.²³ Additionally, with regard to the Ngaiissona Defence's queries related to the date, the completeness and the provenance of the List [REDACTED], the Chamber notes that the Ngaiissona Defence could have directly addressed these aspects with P-0889 himself during its examination of the witness.

17. Nonetheless, noting that the Ngaiissona Defence submits that additional information is required to clarify certain limited aspects of the List [REDACTED] and the WhatsApp Recordings,²⁴ and to the extent that the Prosecution has not yet sufficiently clarified these aspects, the Prosecution is instructed to answer the Ngaiissona Defence's specific queries in this regard.
18. In relation to the Investigative Report, the Ngaiissona Defence submits that the Prosecution should 'provide or produce' such a report indicating, *inter alia*, 'why [it] did not disclose the contents of certain items seized from P-0889 to the Defence', arguing that the Prosecution 'has not been explicit about [...] [the] basis of non-disclosure'.²⁵ Further, it submits that the Prosecution 'already disclosed an investigative report of precisely this nature pursuant to Rule 77' concerning material seized from another witness (the 'Other Investigative Report'),²⁶ which provides 'an outline of [...] what [REDACTED] seized and how the Prosecution inspected the material' and 'some rationale for why the investigators did not retain certain material'. According to the Ngaiissona Defence, this would demonstrate, *inter alia*, that 'it is of assistance to the Defence to understand what material was seized and not retained as well as how material

listing the items disclosed as part of 'INCRIM package 59', including CAR-OTP-2127-3042; CAR-OTP-2127-1311; CAR-OTP-2127-1312; CAR-OTP-2127-1313; CAR-OTP-2127-1331; CAR-OTP-2127-1332; CAR-OTP-2127-1333; CAR-OTP-2127-1334; CAR-OTP-2127-1335; CAR-OTP-2127-1349; CAR-OTP-2127-1350.

²³ See in this regard *Banda and Jerbo* OA04 Judgment, ICC-02/05-03/09-501 OA04, para. 40, where the Appeals Chamber found that, while 'caution should be exercised in taking such an approach', 'in deciding whether the information sought continues to be material to the preparation of the defence, the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor'.

²⁴ See e.g. Request, ICC-01/14-01/18-1354-Conf, paras 38.a-c, 43.

²⁵ Request, ICC-01/14-01/18-1354-Conf, paras 44-45.

²⁶ CAR-OTP-2134-0401.

came to enter the proceedings'.²⁷ In addition, it argues that '[w]ithout basic information concerning the seized items, the Defence cannot substantiate further disclosure requests and the Prosecution may improperly deny information from the Defence'.²⁸

19. In this regard, the Chamber recalls that 'the obligation of the prosecution is to permit inspection of any documents, and other items as listed in Rule 77 of the Rules, which are material to the preparation of the defence [...] [and] *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*'.²⁹ Rule 77 of the Rules therefore *requires* the Prosecution to decide which material in its possession is relevant to the Defence, and provide the latter with such material. The Ngaiissona Defence's suggestion that it should be allowed to inspect all the items seized from P-0889 in order to 'substantiate' potential 'further disclosure requests' clearly conflicts with the purpose of the provision and is based on speculation.
20. Further, the Chamber notes that the Prosecution already disclosed 'basic information' concerning the search and seizure operation of P-0889's devices,³⁰ including information about 'what the [...] authorities actually seized'.³¹ In this regard, it also notes the Prosecution's submission that 'the forensic images of the Electronic Devices have been and remain available to the Defence for *inspection pursuant to rule 77*'.³²
21. Moreover, the Chamber observes that, contrary to the Ngaiissona Defence's submission, the Other Investigative Report appears to only contain information about '*the identified material deemed pertinent* to the situation under

²⁷ Request, ICC-01/14-01/18-1354-Conf, para. 46.

²⁸ Request, ICC-01/14-01/18-1354-Conf, para. 47.

²⁹ Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, ICC-01/05-01/08-632, para. 20 (emphasis added).

³⁰ See e.g. CAR-OTP-2122-9748; CAR-OTP-2129-0100; CAR-OTP-2129-0103; CAR-OTP-2127-0708; CAR-OTP-2127-0710; CAR-OTP-2127-0712; CAR-OTP-2127-0652.

³¹ Request, ICC-01/14-01/18-1354-Conf, para. 48.

³² Prosecution Response, ICC-01/14-01/18-1368-Conf, para. 27. See also paras 3, 33, 37.

investigation'³³ (and therefore does not include information about material which was not retained by the Prosecution).

22. In this context, the Chamber recalls that the Prosecution has not only disclosed information regarding the extraction process of material obtained from P-0889's seized devices, but has also previously disclosed extraction and investigative reports in this case in relation to other individuals, as acknowledged by the Ngaiissona Defence.³⁴ Therefore, and noting the Prosecution's reiteration that it has fully discharged its disclosure obligations with regard to P-0889's seized devices,³⁵ the Chamber sees no reason to doubt that the Prosecution has properly fulfilled its disclosure duties in this specific instance, and trusts that it will continue exercising these duties with utmost diligence.
23. In light of the above, there is no need for the Chamber to determine whether any restrictions on disclosure apply under the Statute and Rules 81 and 82 of the Rules.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

ORDERS the Prosecution to answer specific queries by the Ngaiissona Defence regarding the aspects of the List [REDACTED] and the WhatsApp Recordings emphasised in its Request, as set out in paragraph 17 above; and

ORDERS the Ngaiissona Defence and the Prosecution to file public redacted versions of the Request and its response thereto, respectively, within one week of notification of this decision.

Done in both English and French, the English version being authoritative.


³³ See CAR-OTP-2134-0401, at 0401, where it is indicated that '[t]he amount of the seized and provided data was vast and impossible to present in its totality' and '[b]elow the investigators present exclusively *the identified material deemed pertinent* to the situation under investigation' (emphasis added).

³⁴ Request, ICC-01/14-01/18-1354-Conf, para. 15, n. 14; para. 46, n. 75.

³⁵ See Prosecution Response, ICC-01/14-01/18-1368-Conf, paras 4, 8, 17-30; Annex to the Request, ICC-01/14-01/18-1354-Conf-AnxA, p. 1.

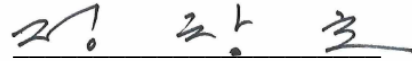


Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 30 September 2022

At The Hague, The Netherlands