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TRIAL CHAMBER V

Before: Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

PUBLIC

With Confidential Annex A

Public Redacted Version of “Ngaïssona Defence Motion for Disclosure”, ICC-01/14-01/18-1658-Conf, 9 November 2022

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 Ngaissona (“Defence”) requests Trial Chamber V (“Chamber”) to order the Prosecution to disclose to the Defence any information or item which is material to the Defence, pursuant to article 67(2) of the Rome Statute (“Statute”) and rule 77 of the Rules of Procedure and Evidence (“Rules”) relating to the circumstances of P-2625’s refusal to cooperate with the Prosecution, including information relating to the search and seizure operation at P-2625’s residence.
2. This information is material and vital to the Defence preparations for P-2625’s upcoming testimony, as it concerns the circumstances of P-2625’s refusal to testify and thereby, his credibility, as illustrated below. It falls squarely within the Prosecution’s legally required disclosure obligations. Given *inter partes* discussions have not been fruitful in relation to obtaining this material, the Defence now turns to the Chamber for relief.

II. Relevant Procedural History

3. Since the beginning of trial in February 2021, P-2625’s anticipated in-court testimony has been replete with hindrances, including postponements, ambiguity regarding his whereabouts, and uncertainties surrounding his willingness to testify.¹ The procedural history relating to P-2625’s scheduled appearance before the Court, which is incorporated by reference,² reveals significant credibility concerns which are directly material to the Defence preparations.³

¹ [REDACTED]; See also ICC-01/14-01/18-804-Conf and related filings and ICC-01/14-01/18-1627-Conf and related filings.

² See ICC-01/14-01/18-804-Conf and ICC-01/14-01/18-1627-Conf.

³ See ICC-01/14-01/18-1640-Conf-Exp, paras 19-32.

4. The latest update was provided on 25 October 2022 by the Victims and Witnesses Section (“VWS”), which informed the Chamber, parties and participants that P-2625 “refused any interaction with the OTP since they raided his home in France after he had given them his statement and according to him left his wife shocked and is (sic) son traumatised.”⁴ The Prosecution never previously disclosed this information to the Defence.
5. In light of this new information, the Defence immediately sent an *inter partes* request to the Prosecution requesting disclosure, *inter alia* and primarily, of any information and potential material seized during the search and seizure operation of P-2625’s residence, including any investigative report, requests for assistance, any *procès-verbal de perquisition*, or any document or information resulting from the operation. The Defence argued that such information is clearly material to Defence preparations, particularly given the circumstances surrounding P-2625’s refusal to cooperate with the Prosecution and issues involving his credibility.⁵
6. The Prosecution refused to disclose information or material relating to the Prosecution’s search and seizure operation. On 27 October 2022, the Prosecution indicated that it deemed that the “information material to the preparation of the Defence, which was communicated, is that P-2625 refused any interaction with the OTP following this search and seizure operation” and that it considered “that the *procès-verbal de perquisition* does not contain information disclosable per article 67(2) or Rule 77”.⁶ On 31 October 2022, the Prosecution also indicated that the “*procès-verbal de perquisition* in itself does not contain any information as to the reasons behind P-2625’s refusal to testify” as a justification for non-

⁴ Email from VWS to the parties and participants, 25 October 2022, at 15:16.

⁵ Annex A, Email from the Defence to the Prosecution, 26 October 2022 at 12:56.

⁶ Annex A, Email from the Prosecution to the Defence, 27 October 2022, at 18:52.

disclosure. It deemed the general information provided by VWS as sufficient disclosure.⁷

7. It is notable that the Prosecution's responses of 27 and 31 October 2022 focus solely on the *procès-verbal de perquisition*, whereas the Defence's request was broader and encompassed the disclosure of any requests for assistance, any *procès-verbal de perquisition*, any investigative report, potential material seized during the search and seizure operation and "any information or document in relation to a raid of P-2625's home in France".⁸ To date, to the Defence's knowledge, the Prosecution has not disclosed any such information including the date of the operation.⁹ Moreover, the Prosecution has not argued that disclosure would have a "sufficient and objectively justifiable risk of prejudicing (...) ongoing and further investigations".¹⁰

III. Applicable Law

8. Article 67(1) of the Statute enshrines fundamental fair trial guarantees of suspects and accused persons, including the principle of equality of arms.
9. 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."¹¹ Such

⁷ Annex A, Email from the Prosecution to the Defence, 31 October 2022, at 11:05.

⁸ Annex A, Email from the Prosecution to the Defence, 27 October 2022, at 18:52.

⁹ The Prosecution indicated that "P-2625 had already withdrawn his cooperation long before the French authorities carried out the search operation, as is clear from other information disclosed pursuant to the Order", without however, providing the date of the operation or referring to a specific document to support its assertion, Annex A, Email from the Prosecution to the Defence 31 October 2022, at 11:05.

¹⁰ *Prosecutor v. Lubanga*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", ICC-01/04-01/06-3031, 27 May 2013, para. 12.

¹¹ In *Lubanga*, the Trial Chamber held "The Trial Chamber reminds the prosecution that the test laid out in Article 67(2) (see paragraph 16 below) for disclosure is not, in fact, whether the information is accurate. Rather, the test required in Article 67(2) carries two main elements. The first element requires the prosecution to have evidence in its possession or control. Secondly, the Prosecutor must assess whether that evidence may affect the credibility

disclosure must be done “as soon as practicable”,¹² which means, without undue delay.¹³ It also provides that “[i]n case of doubt as to the application of this paragraph, the Court shall decide.”¹⁴

10. Article 64(2) provides that the “Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

11. 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 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.”

12. As held by the Appeals Chamber, 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”.¹⁵ The Appeals Chamber 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.”¹⁶

of the prosecution evidence. If these two elements are met, it is the duty of the Prosecutor to disclose as soon as is practicable the information to the defence”, *Prosecutor v. Lubanga*, Redacted version of “Decision on the prosecution's filing entitled “Prosecution's provision of information to the Trial Chamber” filed on 3 September 2007”, ICC-01/04-01/06-963-Anx1, 26 September 2007, para. 12.

¹² Article 67(2), Rome Statute.

¹³ *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.

¹⁴ 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, 21 October 2008, para. 46.

¹⁵ *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, 28 August 2013, para. 42

¹⁶ *Ibid.*

IV. Confidentiality

13. The present request and its Annex are filed on a confidential basis pursuant to regulation 23*bis*(1) of the Regulations of the Court as they contain references to confidential information and evidence. A public redacted version will be filed as soon as practicable.

V. Submissions

a) *Information and items relating to the search and seizure of P-2625's residence "may affect the credibility of prosecution evidence" and are "material to the preparation of the defence" and must therefore be disclosed*

14. Information and items relating to the Prosecution's search and seizure operation of P-2625's residence clearly fall within the category of "evidence in the Prosecutor's possession or control (...) which may affect the credibility of prosecution evidence" and amount to documents "which are material to the preparation of the defence", pursuant to article 67(2) of the Statute and rule 77 of the Rules.

15. As held by the Appeals Chamber of this Court, the Prosecution's disclosure obligations under rule 77 are broad.¹⁷ 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*".¹⁸

¹⁷ *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, 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; *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.

¹⁸ ICC-01/14-01/18-1578-Red, para. 24 (emphasis added); *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, 11 July 2008, para. 77; *Prosecutor v. Gaddafi*, Decision on the "Request for Disclosure of Memorandum on Burden

16. Such items include, *inter alia*, Prosecution investigative reports, related communications, requests for assistance, judicial orders, any *procès-verbal de perquisition*, items seized from the operation, if any, and any other relevant information including the aim, scope and timing of operation.¹⁹
17. The Defence is currently in the dark about the circumstances of the search and seizure operation, including whether or not the operation resulted in the collection of any item from P-2625's residence. Such information and documents are clearly material to Defence preparation as they relate to the circumstances of P-2625's refusal to cooperate and to P-2625's credibility. For instance, information provided by VWS according to which the search and seizure operation prompted P-2625's refusal to cooperate with the Prosecution is contradicted with other evidence according to which P-2625's refusal was linked to the "current political situation in his country".²⁰
18. The scope of the operation, and whether it resulted in any seizure is directly linked to P-2625's credibility as it could provide insight as to whether P-2625's "archives" could have been fabricated. It could also provide crucial insight into the Prosecution's reasons and objectives in requesting the search and seizure operation of the residence of one of its own witnesses, for instance whether the Prosecution itself may be doubting P-2625's credibility or has changed its stance towards P-2625. Any Prosecution request for assistance, any French judicial

Sharing between the ICC Office of the Prosecutor and the Government of Libya", ICC-01/11-01/11-578, 4 February 2015, para. 4.

¹⁹ As held by Trial Chamber IX, "it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them". Trial Chamber IX also held that it is "incorrect to say that RFAs are internal work product – they are Prosecution requests for information to States and other third parties, and external correspondence does not qualify under Rule 81(1) of the Rules", *Prosecutor v. Ongwen*, Decision on Disclosure Issues Arising Out of First Status Conference, ICC-02/04-01/15-457, 7 June 2016; *Prosecutor v. Bemba et al.*, Decision on Arido Defence Request for Disclosure of Documents Related to the Cooperation between the Prosecution and the Cameroonian Authorities, ICC-01/05-01/13-1658, 25 February 2016, para. 6; *Prosecutor v. Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, ICC-01/05-01/13-1632, 17 February 2016, para. 19.

²⁰ CAR-OTP-2127-6432-R03, page 6433.

decision allowing the search and seizure operation,²¹ or *procès-verbal de perquisition* could provide further relevant insight, including information regarding the legal basis and regularity of the operation, whether P-2625 or anyone in his household consented to the search, and the presence of witnesses to the operation, for instance. Moreover, the timing of the operation could be relevant to assessing P-2625's changing motivations and behaviour.

19. Another example illustrating the materiality of the sought information and items is that in his prior recorded statement, P-2625 indicated that he kept precise documentation in a "safe location" in France about the events which unfolded in CAR, including alleged recordings of Mr Ngaïssona, minutes of meetings held in Paris and recordings of those meetings, names of actors, summaries, decrees, *ordres de missions*, copies of extracts of Western Union documents, including transfers allegedly used to buy weapons, a diary of contemporary events, and telephone numbers, covering the period April 2013 to February 2014.²² The seizure of this documentation – or similar items – was conceivably the object of the Prosecution's search and seizure operation of P-2625's residence. However, such documentation was never disclosed by the Prosecution, suggesting that they were never produced by the witness or obtained through seizure, thereby affecting P-2625's credibility. Investigative notes show that P-2625 [REDACTED].²³ The link between the [REDACTED] and the search and seizure

²¹ Article 706-92 of the French Code of Criminal Procedure on search and seizure operations : "*A peine de nullité, les autorisations prévues par les articles 706-89 à 706-91 sont données pour des perquisitions déterminées et font l'objet d'une ordonnance écrite, précisant la qualification de l'infraction dont la preuve est recherchée ainsi que l'adresse des lieux dans lesquels les visites, perquisitions et saisies peuvent être faites; cette ordonnance, qui n'est pas susceptible d'appel, est motivée par référence aux éléments de fait et de droit justifiant que ces opérations sont nécessaires [...]*".

²² CAR-OTP-2123-0377-R01, paras 19-21, 81. P-2625 seems to indicate that these "archives" are located at a friend's house in France; however, to the Defence's knowledge no search and seizure operation was ever carried out at this location. No information was disclosed in this respect by the Prosecution, CAR-OTP-2122-7139-R01.

²³ CAR-OTP-2127-4444-R03.

operation, including the sequence and timing of events, are clearly relevant to the Defence's understanding of the events, as well as P-2625's credibility.

20. As argued extensively elsewhere, P-2625's credibility is highly contested by the Defence given the overwhelming evidence on record impugning his credibility.²⁴ To provide but one example, in the communications between P-2625 and the Prosecution, it appears that P-2625 may have been using his testimony and his alleged [REDACTED], casting doubt as to his motives to testify against Mr Ngaïssona.²⁵ Therefore, circumstances, including the timing and scope of the operation, requests for assistance, any *procès-verbal de perquisition*, and any collected materials from the operation are "material" to the Defence preparation.
21. Furthermore, although the scope of the Prosecution's disclosure obligation is very broad and encompasses "all objects that are relevant for the preparation of the defence",²⁶ the centrality to the charges against Mr Ngaïssona of P-2625's evidence – as advanced by the Prosecution – only reinforces the materiality and relevance of the sought material.²⁷ The Prosecution itself argued the materiality of P-2625's "archives" to the charges.²⁸ For instance, the Prosecution has emphasised that without P-2625's testimony, the Prosecution "would be deprived of important evidence going to the heart of the charged crimes" and that his evidence was highly probative of Mr Ngaïssona's alleged criminal responsibility.²⁹ The Prosecution pointed out that not only was P-2625's testimony material for its case theory but certain aspects of P-2625's evidence were supposedly "unique" and critical to the determination of the truth.³⁰

²⁴ ICC-01/14-01/18-1640-Conf-Exp, paras 19-32.

²⁵ See for instance CAR-OTP-2122-7139-R01. The Prosecution investigators appear to have implied that P-2625's cooperation in assisting the Prosecution [REDACTED], see CAR-OTP-2122-7139-R01, at 7143.

²⁶ See above, paras 8-12.

²⁷ See for example ICC-01/14-01/18-739-Conf-Red, paras 2, 17-18, 20.

²⁸ ICC-01/14-01/18-739-Conf-Red, para. 2.

²⁹ ICC-01/14-01/18-1519-Conf-Red, para. 2.

³⁰ ICC-01/14-01/18-1519-Conf-Red, paras 28-29. See also ICC-01/14-01/18-739-Conf-Red, paras 8-24 and ICC-01/14-01/18-804-Conf, para. 19.

22. The Chamber has also recognised the materiality of information relating to P-2625's reasons to not cooperate with the Prosecution in previous decisions. For instance, in its 8 January 2021 decision, the Chamber partially granted a Defence request for disclosure and held:

25. (...) In this regard, the Chamber notes that the redactions in documents CAR-OTP-2127-4444 and CAR-OTP-2127-6432 mostly concern information of a logistical nature, or other information falling under the standard redaction categories, and are neither material to the preparation of the Defence nor of an exculpatory nature. However, one discrete redaction in document CAR-OTP-2127-6432, at page 6433, first paragraph, relates to the reasons provided by P-2625 for his decision not to cooperate with the Prosecution. The Chamber finds that this information is material to the preparation of the Defence and, as such, disclosable under Rule 77 of the Rules.³¹

23. More recently, ruling on another Defence disclosure request, the Chamber held:

9. Turning to the Defence Disclosure Request, the Chamber reminds the Prosecution of its obligation to effect disclosure in a diligent and timely manner, as required by Article 67(2) of the Statute and Rule 77 of the Rules. In addition, and to the extent that the Prosecution considers the reasons behind P-2625's refusal to testify in this case material to the preparation of the defence, any material containing information thereon, including any correspondence, investigative report, or [REDACTED], should be disclosed to the defence immediately.³²

As cited above, the Chamber's direction was not exhaustive as regards the kinds of material which must be disclosed and included "any material containing information" "behind P-2625's refusal to testify in this case". The disclosure of the information and documents relating to the search and seizure operation

³¹ ICC-01/14-01/18-804-Conf, para. 25.

³² ICC-01/14-01/18-1627-Conf, para. 9.

would also assist the Chamber in its holistic assessment of the evidence, and in particular, in its assessment of P-2625's credibility.

24. The materiality of evidence relating to the circumstances of P-2625's refusal to cooperate with the Prosecution was tacitly recognised by the Prosecution as well. It has disclosed to the Defence several investigative reports and communications it had with P-2625 and with [REDACTED]) relating to the circumstances of P-2625's testimony and his willingness and subsequent unwillingness to cooperate with the Prosecution, such as CAR-OTP-2127-6432-R03, CAR-OTP-00000452, CAR-OTP-2127-4444-R03, CAR-OTP-00000422-R01, and CAR-OTP-2122-7139-R01. It is therefore puzzling that the Prosecution refuses to disclose to the Defence information and items relating to its search and seizure operation of P-2625's residence, which directly relate to P-2625's sudden refusal to cooperate with the Prosecution and therefore, to his credibility.

25. Thus, the Defence requests the Chamber to order the Prosecution to disclose all information and items relating to the search and seizure operation at P-2625's residence, or at any third-parties' residence in relation to P-2625,³³ including any cooperation-related documents, *procès-verbal de perquisition*, information relating to whether the operation resulted in seizure, and items seized, if any, and any other item, document, or information which is material to the Defence preparations.

b) The Prosecution violated its statutory disclosure obligations

26. The Defence became apprised of the existence of a Prosecution search and seizure operation of P-2625's residence incidentally, through a VWS email communicated to the Defence pursuant to a Chamber's order. This information

³³ See for instance CAR-OTP-2122-7139-R01 where P-2625's explain that his "secret archives" are located at his friend's house in the Paris region.

had not previously been disclosed by the Prosecution to the Defence and came as a surprise.

27. Despite its multiple *inter partes* disclosure requests relating to P-2625, to this day, the Defence still does not have information concerning the circumstances of this operation, such as the precise timing of the operation, whether any items were seized as a result of the operation, or whether any search and seizure operation was effectuated at P-2625's deceased friend's residence, where he allegedly held his "secret archives".³⁴

28. The Prosecution's failure to disclose such information amounts to a breach of the Prosecution's disclosure obligations. This disclosure violation causes prejudice to Mr Ngaïssona's rights at trial given that the Defence was not even apprised until VWS's email of 25 October 2022 of the existence of a Prosecution search and seizure operation in P-2625's residence, and that this had been one of the reasons behind P-2625's sudden refusal to cooperate with the Prosecution. Had VWS not disclosed this information, as a result of a Defence request, the Defence and the Chamber may have never been apprised of this information, which opens up potential new investigative avenues and lines of questioning of P-2625, at a late stage. The Defence recalls that P-2625 was initially set to testify as early as March 2021.

29. The above disclosure violation is also in violation of the Chamber's 20 October 2022 order for the Prosecution to disclose to the Defence "to the extent that the Prosecution considers the reasons behind P-2625's refusal to testify in this case material to the preparation of the defence, any material containing information thereon, including any correspondence, investigative report, or [REDACTED]" [...] "immediately".³⁵ As held by Judge Pikis in a separate opinion in *Lubanga*,

³⁴ See CAR-OTP-2122-7139-R01.

³⁵ ICC-01/14-01/18-1627-Conf, para. 9.

the “right to disclosure, more so to disclosure of exonerating evidence, is a fundamental right of the accused, denial of which makes trial according to law unattainable”.³⁶

30. Therefore, should such evidence be in the Prosecution’s possession, the Prosecution should be barred from relying on it at trial.

VI. Relief sought

31. The Defence respectfully requests the Chamber to ORDER the Prosecution to disclose all information and items relating to the search and seizure operation at P-2625’s residence, or at any third-parties’ residence in relation to P-2625, including any cooperation-related documents, judicial orders, *procès-verbal de perquisition*, information relating to the scope, objective, timing and whether the operation resulted in seizure, and items seized, if any, and any other item, document, or information which is material to the Defence preparations.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 31 January 2023,

³⁶ Separate Opinion of Judge Georghios M. Pikis, *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, 21 October 2008, para.16.

At The Hague, the Netherlands