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

Date: **14 February 2023**

**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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public**

**Public redacted version of “Prosecution’s Response to the Ngaissona Defence  
Motion for Disclosure”, ICC-01/14-01/18-1671-Conf, 21 November 2022**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Ngaissona Defence’s 9 November 2022 Motion for Disclosure.<sup>1</sup> The Motion — which seeks all information and items relating to a search and seizure operation concerning P-2625 (“Sought Items”) — fails to demonstrate the requisite materiality, and more specifically regarding the reasons behind P-2625’s refusal to testify.<sup>2</sup>

2. Nevertheless, having carefully considered the Defence’s prior e-mail requests, as well as re-reviewed information in its possession in view of the Chamber’s 20 October 2022 Order, the Prosecution maintains that it has correctly assessed and appropriately effected disclosure as regards P-2625, pursuant to article 67(2) and Rule 77 of the Rules and Procedure and Evidence (“Rules”).

3. The Motion is principally predicated on conjecture and speculation, and should be dismissed in all respects.

## II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” as it responds to a document bearing this classification. A public redacted version will be filed as soon as practicable.

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<sup>1</sup> ICC-01/14-01/18-1658-Conf (“Motion”).

<sup>2</sup> ICC-01/14-01/18-1627-Conf, para. 9 (“20 October 2022 Order”).

### III. SUBMISSIONS

#### A. The Sought Items are not Material

5. The Motion is based on incorrect *assumptions* and inferences, lacking any substantiation. Indeed, the few factual assertions advanced underscore exactly why the Sought Items are *not material* to the preparation of the Defence.

6. *First*, there is no objective causal relationship between the search operation and P-2625's refusal to testify in this case. As the Defence is aware and is discernible from material already disclosed related to the search,<sup>3</sup> the operation was carried out long after the witness withdrew his cooperation. In fact, the search was carried out nearly six months *after* the Chamber issued its Decision to compel P-2625's appearance.<sup>4</sup>

7. As the Chamber observed in its Summons Decision,<sup>5</sup> the Prosecution averred that it had 'exhausted all avenues to secure P-2625's voluntary attendance', and it was 'apparent that he [P-2625] will not testify in this trial unless compelled.'<sup>6</sup> Thus, as is clear in the record of the proceedings, and contrary to the Motion, P-2625's "sudden refusal to cooperate with the Prosecution"<sup>7</sup> did not occur *after* the search. Rather, his withdrawal of cooperation triggered the need for the operation. To assert that the search is at all causally related or material to the witness's refusal to testify is spurious, at best. It is unclear why VWU did not indicate the date on which P-2625 *first* complained to them regarding the search operation [REDACTED],<sup>8</sup> which may have

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<sup>3</sup> See CAR-OTP-2134-0385 and attached metadata indicating [REDACTED]. *Contra* ICC-01/14-01/18-1658-Conf, para. 26.

<sup>4</sup> See ICC-01/14-01/18-804-Conf ("Summons Decision").

<sup>5</sup> ICC-01/14-01/18-804-Conf, para. 6.

<sup>6</sup> ICC-01/14-01/18-804-Conf, para. 6.

<sup>7</sup> ICC-01/14-01/18-1658-Conf, para. 28.

<sup>8</sup> [REDACTED].

averted this unnecessary litigation. Still, the fact remains that it only underscores why the Sought Items are not material to the issue of the witness's refusal to cooperate.

8. *Second*, the circumstances, information, and documents related to the search operation neither have any bearing on the witness's credibility, nor are they otherwise material to the Defence's preparation. The contention that such documents "are *clearly material* to the Defence preparation as they relate to the circumstances of P-2625's refusal to cooperate and to P-2625's credibility",<sup>9</sup> is conclusory. Moreover, it is circular – that is, it inappropriately *presumes* the Sought Items are material in arguing that they are disclosable for that same reason.

9. The relevant [REDACTED], attached as *ex parte* Annex, demonstrates the lack of materiality of the Sought Items. It confirms that: (a) in [REDACTED], a search operation was conducted by the [REDACTED] regarding P-2625; (b) it was carried out under the auspices of a domestic investigation involving [REDACTED]; and (c) it contains *no information* as to the reasons P-2625 refused to testify in this case. None of the search-related material does.

10. Contrary to the Defence's contention that it is "puzzling that the Prosecution refuses to disclose ... information and items relating to its search and seizure operation of [REDACTED]"<sup>10</sup> – the clear explanation is that the Prosecution does not disclose information that it has assessed and *re-assessed* as not disclosable.

## **B. Disclosure concerning P-2625 has been fully discharged**

*i. The Prosecution has reasonably assessed and disclosed all material information*

11. The Appeals Chamber's settled jurisprudence makes clear that:

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<sup>9</sup> See ICC-01/14-01/18-1658-Conf, para. 17 (emphasis added).

<sup>10</sup> ICC-01/14-01/18-1658-Conf, para. 24.

“Article 67 (2) of the Statute requires disclosure of evidence which *the Prosecutor believes* meets the criteria set out therein. Similarly, rule 77 of the Rules *leaves to the Prosecutor* the assessment of whether objects are “material to the preparation of the defence” and their inspection should thus be permitted.”<sup>11</sup>

12. The Court’s jurisprudence further provides 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.”<sup>12</sup>

13. This Chamber (and others) has also acknowledged that pursuant to rule 77, it devolves on the Prosecution “*to decide which material in its possession is relevant to the Defence*”,<sup>13</sup> underscoring that the Prosecution is not required “to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection’.”<sup>14</sup>

14. As such, it is well-recognised that the onus remains on the Defence to demonstrate materiality with specificity<sup>15</sup> in respect of a request for disclosure — not merely come forward with speculative or general allegations.<sup>16</sup> Merely claiming the *potential* or *possible* relevance of information without more does not suffice to discharge this minimal showing. Yet, the Motion fails to do so.

15. In defining ‘materiality’, Trial Chamber III observed in the *Bemba* case that:

“An item will be considered material to the preparation of the defence if it would “undermine the prosecution case or support a line of argument of the

<sup>11</sup> ICC-01/04-02/06-1330 OA3, para. 23 (emphasis added).

<sup>12</sup> See ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42; *see also* ICC-01/14-01/18-1438-Conf, para. 9.

<sup>13</sup> ICC-01/14-01/18-1438-Conf, para.19.

<sup>14</sup> ICC-01/14-01/18-1438-Conf, para.19.

<sup>15</sup> ICC-01/12-01/18-768-Conf, para. 13.

<sup>16</sup> ICC-01/12-01/18-768-Red, para. 13.

defence" or "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."<sup>17</sup>

16. In expounding this principle, Trial Chambers IX<sup>18</sup> and X<sup>19</sup> have further defined 'materiality' within the meaning of rule 77; specifically that:

"[ ...] it is not sufficient to indicate that the [item] 'may potentially' include information ... without anything further such as a direct connection to the charges or a live issue in the case, this would not in and of itself amount to information 'material to the preparation of the Defence' within the meaning and for the purposes of Rule 77 of the Rules. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the [item] would have been 'material to the preparation of the Defence' *in the sense of undermining the Prosecution case or supporting a line of argument of the Defence.*"<sup>20</sup>

ii. *The Sought Items are reasonably assessed as not material to the preparation of the Defence*

17. As noted, having re-assessed and re-reviewed the information in its possession in accordance with the settled jurisprudence, the Prosecution has determined that the Sought Material, including the [REDACTED], does not bear on P-2625's refusal to testify. It is not material for the Defence's preparation. In this respect, the Prosecution recalls the relevant language of the Chamber's 20 October 2022 Order, which required disclosure *"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."*<sup>21</sup>

18. The Prosecution disclosed one item seized during the [REDACTED] search insofar as it was at least arguably material.<sup>22</sup> Importantly, as indicated above, the metadata attached to the document also provided the Defence with an indication as

<sup>17</sup> ICC-01/05-01/08-3070, para. 23.

<sup>18</sup> ICC-02/04-01/15-1734.

<sup>19</sup> See ICC-01/12-01/18-859-Red, paras. 9-10;

<sup>20</sup> ICC-02/04-01/15-1734, para. 22 (emphasis added); see ICC-02/05-03/09-501 OA4, paras. 38-39, 42.

<sup>21</sup> CC-01/14-01/18-1627-Conf, para. 9.

<sup>22</sup> CAR-OTP-2134-0385.

to when the search took place [REDACTED]. It thus undermines a basic tenet of the Motion's assertion of a potential impact of the search on P-2625's disposition towards his cooperation or testimony in the case.

19. Beyond the one item, none of the other items related to the search operation in the Prosecution's possession is reasonably *material*. In particular, no line of argument of the Defence can find support in the Sought Items, even less so, as regards the discrete question of the witness's motivation for refusing to testify. Of course, the Prosecution has indeed disclosed *other* documents which *do reflect* the possible reasons for P-2625's refusal to *testify* in this case, which the Motion properly acknowledges.<sup>23</sup> These include investigative reports and communications.

20. The assumption that there remain undisclosed material information in the Prosecution's possession or control regarding P-2625's refusal to cooperate and/or bearing generally on the latter's credibility, is incorrect. The Defence's insistent refusal to accept the Prosecution's assessment in accordance with its statutory duties, does not render the Sought Items disclosable.

21. As Trial Chamber III, among others, has observed, "the Prosecution is required to make fact-specific decisions for each such item to determine whether it is disclosable pursuant to Rule 77 or Article 67(2)."<sup>24</sup> This has been done. The Defence's dissatisfaction with the result alone and without sufficient substantiation, cannot reasonably occasion the Prosecution's continual review and reassessment of the information at issue.

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<sup>23</sup> See ICC-01/14-01/18-1658-Conf, para. 24 ("[The Prosecution] has disclosed to the Defence several investigative reports and communications it had with P-2625 and with P-2642 [REDACTED] relating to the circumstances of P-2625's testimony and his willingness and subsequent unwillingness to cooperate with the Prosecution.

<sup>24</sup> See ICC-01/05-01/08-3336, para. 12.



22. As Chambers of the Court have consistently held, including in the *Ongwen*,<sup>25</sup> *Al Hassan*,<sup>26</sup> and *Lubanga* cases,<sup>27</sup> where information is not otherwise assessed as ‘material’ by the Prosecution in good faith, the Defence bears the burden of demonstrating its materiality. Although the threshold is low, it requires substantiation nevertheless. This is even more stringent when the requested information concerns matters of international cooperation.

*iii. Disclosure concerning information bearing on international cooperation require special scrutiny*

23. The Court’s jurisprudence provides for particular scrutiny in respect of broad and unsubstantiated requests for information that implicate matters of international cooperation. Such is the case here, where the Motion extends to information and items involving cooperation between the Prosecution and national authorities — and especially, may bear on the conduct of a domestic investigation [REDACTED].

24. Chambers of the Court have thus acknowledged certain limitations on the disclosure of documents concerning matters of international cooperation. In the *Bemba et al* case, the Single Judge of Pre-Trial Chamber II recognised this boundary as concerns the disclosure of Requests for Assistance.<sup>28</sup> More recently, in the *Al Hassan* case, the Chamber articulated the Court’s policy stance underlying this principle, noting:

“[t]he cooperation regime under the Statute is integral to the effective functioning of the Court and central to that regime is the relationship of trust between the State Parties and the organs of the Court...”<sup>29</sup>

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<sup>25</sup> See ICC-02/04-01/15-1734.

<sup>26</sup> See ICC-01/12-01/18-859-Red.

<sup>27</sup> See ICC-01/04-01/06-2147.

<sup>28</sup> ICC-01/05-01/13-453, p. 4 (noting that, “... as a matter of principle and as noted by the Prosecutor, requests for cooperation are *per se* irrelevant for the purposes of determining the admissibility of evidence which might be retrieved as a result of their implementation and are not intended as evidence themselves”).

<sup>29</sup> ICC-01/12-01/18-768-Red, para. 6 (internal citations omitted).

25. For this reason, among others, the Statute provides that exceptions to full disclosure may be warranted in certain circumstances, including “for operational purposes related to Prosecution investigations.”<sup>30</sup> Thus, the Single Judge in the *Al Hassan* case acknowledged that, in principle, documents related to such cooperation are not disclosable *per se*, “... as confidential correspondence with States is expected and necessary under Part 9 of the Statute.” Confidentiality may be lifted, but only in particular circumstances, “... if the specific need for disclosure is demonstrated in accordance with the disclosure regime.”<sup>31</sup> However, this may be entertained only where the request for such information is substantiated in the first place. Here, for the reasons stated above, the Motion fails to do so. Moreover, as observed in the *Al Hassan* case, a request for ‘all relevant records’ of formal or informal correspondence with national authorities “is too broad and cannot be considered ‘in bulk’ as falling under Article 67(2) of the Statute or Rule 77 of the Rules...”<sup>32</sup> The same applies here.

### **C. There are no grounds to support the request to find a disclosure violation**

26. The Defence’s request for the Chamber to find that the Prosecution has violated its disclosure obligations is gratuitous. It is neither founded on the record before the Chamber, nor the facts advanced in the Motion. No prejudice arises here, even assuming *arguendo*, that the Sought Items (to the extent identified) are disclosable — which they are not.

27. That P-2625 has refused to testify in these proceedings is an established fact. It has been known to the Parties and Participants since at least December 2020.<sup>33</sup> The suggestion that the Defence is “in the dark”<sup>34</sup> about the circumstances of the witness’s

<sup>30</sup> ICC-01/12-01/18-768-Red, para. 7.

<sup>31</sup> See ICC-01/12-01/18-768-Red, para. 6.

<sup>32</sup> ICC-01/12-01/18-768-Red, para. 8. Cf. ICC-01/14-01/18-1658-Conf, para. 16, 18, 25 (regarding the *scope* of the information sought and non-specificity).

<sup>33</sup> See ICC-01/14-01/18-739-Conf-Red (dated 4 December 2020).

<sup>34</sup> ICC-01/14-01/18-1658-Conf, para. 17.

withdrawal of cooperation, or as to when he adopted his adverse posture relative to the timing of the search of the premises [REDACTED] for prospectively significant evidence which the witness claimed to possess or control, is specious. Moreover, the basis on which the Defence seems to assert that it has a right to be kept abreast of the Prosecution's legitimate ongoing investigative activities is not substantiated.<sup>35</sup>

28. As to P-2625's credibility, the Defence's assertion that there is *already* "overwhelming evidence on record impugning his credibility"<sup>36</sup> belies the claim that the Sought Items are material for that purpose. Indeed, the *Lubanga* case contradicts the Defence's position. It holds that where the disclosure of requested items would have no 'material effect' on the Defence's preparation (such as where there is already sufficient information disclosed) providing them is neither *necessary*, nor falls within the Prosecution's disclosure obligations.<sup>37</sup> Thus again, no prejudice arises.

29. Separately, nothing precludes the Defence from examining the witness on this matter – should it consider his prior motivation not to testify significant enough to question him on when he appears.

30. Likewise, no prejudice arises in respect of the information (or lack thereof) at the disposal of the Defence regarding the results of the [REDACTED] search. As detailed in previous filings and noted in the Motion itself, the nature of the items that P-2625 [REDACTED] are such that it is clear that had the search [REDACTED] disclosed as generally material, indeed far more likely as incriminating evidence in this case.<sup>38</sup>

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<sup>35</sup> See ICC-01/14-01/18-1658-Conf, paras. 26-28.

<sup>36</sup> ICC-01/14-01/18-1658-Conf, para. 20.

<sup>37</sup> See ICC-01/04-01/06-2147, 23-24 (noting, "where the defence has been supplied with a more than sufficient body of information" and "further material will not provide additional assistance to the defence under Rule 77" ... providing material "above and beyond that already disclosed, is *unnecessary* for the preparation of the defence (viz. it would have no material effect). It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules") (emphasis added).

<sup>38</sup> See ICC-01/14-01/18-739-Conf-Red (referencing CAR-OTP-2123-0377, at 0380, paras. 19-21; and paras. 81, 84, which indicate, *inter alia*, [REDACTED]; see ICC-01/14-01/18-1658-Conf, para. 19, 21.

#### IV. CONCLUSION

31. For the reasons above, the Prosecution respectfully requests that the Chamber dismiss the Motion in all respects.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

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Karim A. A. Khan KC, Prosecutor

Dated this 14<sup>th</sup> day of February 2023  
At The Hague, The Netherlands