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PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Presiding Judge**
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA*

Public

Public Redacted Version of "Prosecution's Response to "Mokom Defence Request for Disclosure, (ICC-01/14-01/22-198-Conf)", 4 May 2023"
ICC-01/14-01/22-200-Conf, 11 May 2023

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. Pre-Trial Chamber II ("Chamber") should reject the 4 May 2023 "Mokom Defence Request for Disclosure" ("Request").[1] The Defence's suggestion that the Prosecution considers that it does not need to comply with the Chamber's orders[2] is gratuitous and unfounded. *First*, the Prosecution has duly disclosed items that it has assessed as potentially exonerating material ("PEXO") in accordance with article 67(2).[3] *Second*, there is no procedural requirement for the disclosure of *additional* call data records ("CDR"), call sequence tables ("CST"), or requests for assistance ("RFAs").[4] Nor, is there any founded basis for the disclosure of *additional* documents in the record of the *Yekatom* and *Ngaissona* trial proceedings.[5]

II. CONFIDENTIALITY

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

III. SUBMISSIONS

a. The Prosecution has properly disclosed PEXO

3. The Defence's contentions that "the Prosecution appears to exempt itself from identifying exculpatory evidence in the migrated […] material",[6] or has failed to disclose *enough* PEXO,[7] merely disagrees with the Prosecution's assessment of the article 67(2) material. However, the Defence is in error, and the resulting disagreement

[1] ICC-01/14-01/22-198-Conf.
[2] ICC-01/14-01/22-198-Conf , para. 5.
[3] *See* Section A.
[4] *See* Section B.
[5] *See* Section C.
[6] ICC-01/14-01/22-198-Conf , para. 13.
[7] ICC-01/14-01/22-198-Conf , paras. 10-12.

does not require the Chamber's intervention in the disclosure process, as shown below.[8]

(i) The Prosecution has disclosed PEXO in its possession or control

4. *First*, as noted, the Prosecution has disclosed evidence in its possession or control which it believes falls under article 67(2) in the context of the case. It has not applied a limited approach. The fact that such material is not necessarily directed specifically at the Suspect's acts or conduct, neither confuses nor undermines the Prosecution's assessment. The Defence's characterisation that such disclosure bears a degree of "randomness and arbitrariness to what has been marked as exculpatory evidence"[9] is ill informed and unavailing. The Defence cannot on the one hand argue that the Prosecution has unreasonably limited its approach to PEXO, while protesting that the evidence disclosed as such is too broad.

5. The determination that certain evidence is PEXO involves several factors, including (most obviously) its assessment in view of other evidence or the contours of the case at the time the material is disclosed. For instance, the transcribed interview of [REDACTED][10] was disclosed as PEXO in whole. This determination took into consideration Pre-Trial Chamber II's and Trial Chamber V's evaluation of such declarations in the *Yekatom* and *Ngaissona* case, in relation to the *[REDACTED].* proceedings.[11] Considering that the Chambers had previously evaluated [REDACTED} interview as potentially affecting the credibility of his evidence under article 67(2), the evidence was disclosed as such in this case. Significantly, this was done in November 2022, well before a final determination had been made on whether to rely on [REDACTED] for the purposes of confirmation.

[8] ICC-01/14-01/22-198-Conf , para. 14.
[9] Letter of Philippe Larochelle to Kweku Vanderpuye, 26 April 2023, ICC-01/14-01/22-198-Conf-AnxA, p. 10.
[10] CAR-OTP-0094-0035, CAR-OTP-0094-0156, CAR-OTP-0094-0180.
[11] *See* ICC-01/14-01/18-315-Red; *see also* ICC-01/14-01/18-551-Red.

6. A second example involves two photographs of limbs disclosed as PEXO.[12] In respect of these items, the Defence's assertion that an aleatory approach was adopted in their assessment is vacuous.[13] The metadata of both photographs clearly shows that their source is [REDCTED]. P-0953's declarations were disclosed as PEXO. Thus, as sourced by the witness, these documents were disclosed as PEXO for the sake of completeness. Again, this is apparent in the corresponding metadata.

7. The Defence's arguments regarding CAR-OTP-2061-1426, notes from an interview with [REDACTED], similarly fail. P-0884 is an INCRIM witness whose interview notes were disclosed as PEXO. In the circumstances, the Defence considers that the Prosecution should indicate *which sections* of the document comprise PEXO, without regard to the fact it is but a single page in length. What might be considered PEXO is manifest even on the most cursory examination, for instance, P-0884's claim that "[m]y group has never killed anyone. Our wish is to have no difference between Muslims and Christians in CAR." Under such circumstances, the Defence cannot reasonably suggest that the Prosecution's implementation of its disclosure obligations is in anyway deficient. Rather, the Request suggests a Defence strategy to pursue an artificial and pedantic approach to disclosure.[14]

8. Further, most of the evidence disclosed as PEXO in the *Yekatom* and *Ngaissona* case was also disclosed as PEXO in the present case. As the Prosecution reasonably anticipated that the Defence would request disclosure of evidence assessed as PEXO

[12] CAR-OTP-2063-0491, CAR-OTP-2063-0492.
[13] Letter of Philippe Larochelle to Kweku Vanderpuye, 26 April 2023, ICC-01/14-01/22-198-Conf-AnxA, p. 10.
[14] *See e.g.*, ICC-01/05-01/13-177, para. 10 (noting, in relevant part that "[w]hilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, the *Defence cannot abdicate its duty and responsibility to examine such materials*, *which examination is necessary for it to be in a position to decide* whether to challenge the evidence or its reading by the Prosecutor, *as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute*") (emphasis added).

in the *Yekatom* and *Ngaissona* case, this material was specifically reviewed, following which 61 items were determined not to be relevant to this case in any way.

9. Finally, as explained in the *inter partes* correspondence concerning the Defence's disclosure demand, the *reasons why* the Prosecution has identified certain items as PEXO are not disclosable. They amount to internal work product, and their disclosure is not compellable under the Court's regulatory framework. The Prosecution considers that the Request presents no substantiated basis for the demand, which moreover exceeds the plain wording of the Statute and the directions of the Chamber on its face.

10. For the remainder, the Prosecution refers to the determinations sent to the Defence,[15] and to its 24 April response to the Defence's further observations on the conduct of the proceedings ("Observations").[16]

(ii) The Chamber need not intervene in the parties' dispute as to the legal classification of disclosed material

11. In relation to article 67(2), the Court's established jurisprudence provides that, "[i]n principle, it is for the Prosecutor to determine whether any given item is subject to disclosure [...]. [Unless] there are […] credible indications that the Prosecutor has violated her disclosure obligations, there is no reason for the Chamber to intervene. [...]".[17] The conclusory and erroneous allegations in the Request make out no such case.

12. The Request essentially reargues the Defence's previous Observations to which the Prosecution has provided its 24 April Response. The Prosecution had also replied directly to the MOKOM Defence on 23 April 2023 in the context of *inter partes*

[15] ICC-01/14-01/22-198-Conf-AnxA, pp. 5-6, 13-16l.
[16] *See* ICC-01/14/01/22-192-Conf and ICC-01/14-01/22-196-Conf ("24 April Response").
[17] ICC-02/05-01/20-433-Corr, para. 16.

exchanges.[18] In both cases, the Prosecution specified why the passages in the declarations of P-2232 [REDACTED] and P-1521 [REDACTED] characterised by the Defence as PEXO were, in fact, *incriminating* ("INCRIM").[19] The Prosecution did not merely point to other sections of such declarations, as the Defence incorrectly represents.[20] Instead, it explained in quite some detail the context of the referenced passages and the Defence's patent misconstruction of them.

13. As previously communicated to the Defence, the dictates of article 67(2) are clear — a determination that evidence is disclosable as PEXO is predicated on the Prosecution's reasonable "belief" as to what it shows, or its effect on other evidence.[21] This entails consideration of that evidence, not only in the context of the case, charges, and the material issues involved, but also a reasonable and fair evaluation of it and *other* evidence available to the Prosecution. In short, such a determination does not rest just on what is said in a particular line or passage in a given declaration or statement, but whether in addition to satisfying the conditions for disclosure set out in article 67(2), that evidence is at least objectively plausible. For this reason, the Prosecution's determination of what comprises PEXO may change depending on the nature and contours of the Defence case or position as it becomes known. Here, the Suspect has neither communicated the nature and scope of his Defence, nor do the referenced examples provided by the Defence objectively meet the criteria under article 67(2).

14. In its 26 April 2023 letter entitled "Queries related to exculpatory evidence",[22] the Defence reiterated its position regarding P-2232 and P-1521, arguing additionally that

[18] Email of Kweku Vanderpuye to Philippe Larochelle on 23 April 2023 at 21:38, ICC-01/14-01/22-198-Conf-AnxA, pp. 3-4.
[19] ICC-01/14-01/22-196-Conf, *see* paras. 5-14.
[20] ICC-01/14-01/22-198-Conf , para. 14.
[21] *See* article 67(2); *See also* ICC-01/14-01/22-198-Conf-AnxA, pp. 13-16, in particular pp. 14-15 starting with "First Issue".
[22] ICC-01/14-01/22-198-Conf-AnxA, pp. 7-12, in particular the alleged "third issue" on p. 11, 3rd paragraph.

certain referenced parts of P-1961's statement [REDACTED] also comprise PEXO. Again, the Prosecution provided a detailed response on 3 May 2023 explaining why the referenced parts were in fact INCRIM.[23]

15. Although it is the Defence's prerogative to contest the Prosecution's characterisation of any disclosed evidence, the Request should advance a substantiated basis. It does not. As in the previous *inter partes* exchanges, the Request identifies no credible argument that the Prosecution has violated its statutory disclosure obligations, withheld PEXO, there has been any prejudice incurred, or that the fairness of the proceedings more generally are in anyway in peril. In addition, the Defence's effort to use the disclosure process to argue, at length, its reading of the evidence to be considered at confirmation — out of context — is transparent and unavailing.

b. The Prosecution is under no obligation to disclose the *additional* CDR, CST and RFAs sought

16. The Defence's Request for disclosure of a number of additional documents in relation to telephone contacts between various individuals, in particular CDR, CST and RFAs,[24] is unsubstantiated.

17. The Defence's contention that there is some abstract "entitle[ment] to see what the Prosecution chose not to include in its Analysis",[25] *i.e.* in Annex C.2 to the Document Containing the Charges ("DCC"),[26] fundamentally misunderstands the ICC's disclosure paradigm. Broadly stated, material is not disclosable to satisfy a Party's idle curiosity. Rather, the materiality of the information sought must be

[23] ICC-01/14-01/22-198-Conf-AnxA, pp. 13-16, in particular pp. 14-15 starting with "Third Issue".
[24] ICC-01/14-01/22-198-Conf, paras. 26, 29, 30.
[25] ICC-01/14-01/22-198-Conf, para. 25.
[26] ICC-01/14-01/22-174-Conf-AnxC2, which is referred to in ICC-01/14-01/22-174-Conf-AnxC1.

demonstrated, particularly where it is not otherwise apparent. In this respect the Request makes virtually no pretence of its obvious insufficiency.

18. *First*, apart from stating generally that the Defence has a right to contest the Prosecution's view of the case, the Request fails to link such a contest to the information demanded — specifically, that the **CDR** sought is material to the Defence's preparation. Contacts between Prosecution witnesses before, during, or after the charges (without more) in no way puts into question the contacts the Suspect had with such individuals or others, as pled in the DCC or its Annex.[27] The absence of any substantiation establishing the materiality of such information requires the rejection of the Request on this basis alone.[28] In addition, the Prosecution has already provided all of the CDR (more than 700) disclosed in the *Yekatom* and *Ngaissona* case to the Defence, mostly as Rule 77. Only 62 have been disclosed as INCRIM. The Prosecution has thus met its disclosure obligations as regards the CDR, in particular by limiting the INCRIM pool amongst such items of evidence.

19. *Second*, the disclosed **CST** indeed include numbers attributed to the Suspect.[29] As previously indicated to the Defence, CST are *internal* analytical products that are "prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case".[30] Rule 81(1) is express and unambiguous in that such materials "are not subject to disclosure." [31] Nothing prevents the Defence from proceeding with its own analysis of the truly relevant CDR that has been duly disclosed.[32]

[27] *See* ICC-01/14-01/22-198-Conf, paras. 25, 27; *see also* ICC-01/14-01/22-174-Conf-AnxC1, e.g. rows 23, 70, 90, 91, 92, 97, 120, 122, 123, 132, 139, 143, 144, 147, 151, including references to ICC-01/14-01/22-174-Conf-AnxC2.
[28] *See ICC*-01/05-01/08-1594-Red, 29 July 2011, para. 21 (holding that "*the prosecution's disclosure obligations under Rule 77's materiality prong are broad. Those obligations are not, however, unlimited*") (emphasis added); *see* ICC-01/05-01/08-3070, para. 23; *see* also ICC-01/09-01/11-1465, para. 12.
[29] ICC-01/14-01/22-198-Conf, para. 28.
[30] Rule 81(1) of the Rules.
[31] Rule 81(1) of the Rules.
[32] *See* Status conference, 7 February 2023, ICC-01/14-01/22-T-005-ENG ET, p. 33, l. 2-13.

20. In this respect, the Defence's reliance on the *Turinabo* case brings no clarity on this issue: specifically, it does not draw the purported "distinction between CSTs which were considered disclosable, and the Prosecution's internal notes and mission reports".[33]

21. *Third*, RFAs involve matters of cooperation and are not disclosable unless substantiated reasons are put forward. The Defence merely asserts that since *some* RFAs were disclosed, all must be disclosed.[34] Again, this misunderstands the Court's established disclosure paradigm, which requires that the Defence set out the materiality of the information sought.[35] Indeed, in the *Turinabo* decision on which the Defence relies, despite the defence having significantly detailed the basis for its request for the disclosure of RFAs,[36] the Single Judge found that it had not established their materiality to its preparation and thus denied the disclosure request, "with the exception of the Clearance Letter and the Expenses Material",[37] which were *not* the RFAs. In a previous decision in the *Turinabo* case, certain RFAs were found to be disclosable based on a *substantiated* defence request demonstrating their materiality.[38]

[33] ICC-01/14-01/22-198-Conf, para. 29, referring to *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk, 7 May 2020, p. 6.
[34] ICC-01/14-01/22-198-Conf, para. 30.
[35] ICC-01/12-01/18-768-Red, paras. 6-8, 13 (denying a defence request for disclosure, noting that "*in some aspects the Request is general and could constitute a 'fishing expedition'. In particular, the Single Judge notes that materiality is not shown by making general allegations referring to the Defence's interests in having a general picture of the cooperation and assistance between the national authorities and the Prosecution*") (emphasis added); *see also* ICC-01/12-01/18-859-Red, paras. 9, 17; *see* ICC-01/05-01/13-453, p. 4 (where the Single Judge noted 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*") (emphasis added).
[36] *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk, 7 May 2020, pp. 2-3, where the defence details how the requested documents are related to steps taken by a Prosecution investigator which the Single Judge had agreed that the defence interview and how the materials sought could be relevant to a motion for a stay of proceedings.
[37] *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk, 7 May 2020, 7 May 2020, p. 8.
[38] *See The Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on motion for access to Prosecution's Requests for assistance and responses thereto, 18 April 2019, pp. 1-2 (where the Defence expressly indicated the reasons for disclosure of certain RFAs, in particular the possibility to challenge aspects related to the suspect's warrant of arrest and order for search and seizure, and thus to the legality of procedures and reliability of the evidence. The Defence however did not sufficiently substantiate the remainder of its request).

In neither of the two above-mentioned decisions did the Single Judge *generally* grant a request for disclosure of RFAs, as the Defence asserts.[39] By contrast, the Single Judge even considered that the defence's request for disclosure of "all RFAs sent to Rwanda and 'any other authorities' 'irrespective of the case involved'" was "overly broad and framed in language too vague to trigger any […] disclosure obligation".[40]

22. Here, the Request not only fails to demonstrate concretely *how* the RFAs sought are material to the Defence's preparation, but the demand for them as formulated — i.e., "all"[41] RFAs related to CDR — is overly broad and vague. It cannot suffice to require disclosure,[42] especially considering the limited scope of the confirmation proceedings.

c. The Prosecution is under no obligation to disclose the *additional* documents from the *Yekatom* and *Ngaissona* trial proceedings sought

23. The Defence's Request for disclosure of *unredacted* transcripts of the *Yekatom* and *Ngaissona* trial proceedings; *all* exhibits shown or used with trial witnesses on whom the Prosecution relies; and *all* documents the defence teams in *Yekatom* and *Ngaissona* used or *intended* to use during their cross-examination of those witnesses,[43] is misguided.

(iii) The Prosecution has disclosed exhibits used during testimony under Rule 77

24. As stated on 14 March 2023 in *inter partes* correspondence, the Prosecution has disclosed:

[39] ICC-01/14-01/22-198-Conf, para. 30 *in fine*.
[40] *The Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on motion for access to Prosecution's Requests for assistance and responses thereto, 18 April 2019, p. 3-4.
[41] ICC-01/14-01/22-198-Conf, para. 30.
[42] ICC-01/12-01/18-859-Red, para. 20.
[43] ICC-01/14-01/22-198-Conf, para. 31.

> "[t]he exhibits used during the testimony of the witnesses […] to the extent assessed as material to the preparation of the Defence and 'truly relevant', given the limited scope and purpose of the confirmation proceedings in accordance with the Pre-Trial Chamber's direction".[44]

25. Moreover, as previously indicated to the Defence,[45] should a specific non-disclosed exhibit used by the defence teams in *Yekatom* and *Ngaissona* be shown to be material to the Defence's preparation in this case, the Prosecution will reassess its position. To date, the Defence has not provided any substantiated examples of how a given exhibit used by the defence teams in *Yekatom* and *Ngaissona* in a disclosed trial transcript is material to the Defence in this case.

26. For instance, contents of CAR-D29-0006-0227, requested by the Defence by way of an email dated 11 April 2023[46] because it is cited in P-0884's [REDACTED]'s disclosed trial transcript,[47] actually appear in the transcript itself. Even assuming *arguendo* the significance of the subject matter – which is far from clear – the disclosure of the underlying document is unwarranted since it would have no material effect on the Defence's preparation, given that it is already possessed of the salient information as reflected in the transcript.[48]

27. The Defence further fails to show in what way the lists of items that the defence teams in *Yekatom* and *Ngaissona* used or intended to use during the cross-examination of witnesses relied on by the Prosecution for confirmation are material. The Request merely contends that they are "relevant to challenging the credibility, reliability and authenticity of a witness' account".[49] The explanation fails.

[44] ICC-01/14-01/22-198-Conf-AnxC, p. 9.
[45] *See* ICC-01/14-01/22-198-Conf-AnxC, p. 9.
[46] *See* ICC-01/14-01/22-198-Conf-AnxC, p. 3.
[47] *See* CAR-OTP-00001101-000007, l. 16.
[48] *See* ICC-01/04-01/06-2147, para. 24 (holding that where disclosure of information "would have no material effect … [i]t does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules").
[49] ICC-01/14-01/22-198-Conf, para. 37.

28. *First*, the strategies of the defence teams in another case are not evidential. They do not fall within the ambit of the Prosecution's disclosure obligations, and particularly absent any showing of materiality. *Second*, it has been ruled that the assessment of the credibility of witnesses at the confirmation stage of proceedings is "necessarily presumptive", since it "can only be properly addressed at trial".[50] Thus, the conclusory, if not boilerplate, reasons put forward by the Defence to support its demand for such material does not satisfy the required substantiated showing of materiality.

(iv) The Prosecution is not obliged to lift redactions in disclosed transcripts sanctioned by the Trial Chamber

29. As the Request concedes, Trial Chamber V required that the Prosecution apply redactions requested by the *Yekatom* or *Ngaissona* defence teams to certain trial transcripts, before providing them to the MOKOM Defence. Thus, the Prosecution is bound by the order of Trial Chamber V with respect to the status of the corresponding transcripts. Moreover, such order was issued in contemplation of the purpose to provide the Defence access to the transcripts.[51]

30. Notably, the Request provides no specific example of any redaction to be lifted in order for the Defence to understand the testimony of any given witness. Nor has the Defence concretely shown *whether* and *how* any redaction has impedes its ability to prepare for the confirmation hearing. In any event, nothing precludes the Defence from requesting that Trial Chamber V vary the measures in place pursuant to Regulation 42(3) of the RoC, which is the appropriate mechanism to invoke upon a properly substantiated application.

[50] *See* ICC-02/04-01/15-422-Red, 23 March 2016, para. 18.
[51] *See* ICC-01/14-01/18-1353; *see also* ICC-01/14-01/18-1552.

IV. CONCLUSION

31. For the above reasons, the Chamber should reject the Request.

Karim A. A. Khan KC, Prosecutor

Dated this 11th day of May 2023
At The Hague, The Netherlands