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PRE-TRIAL CHAMBER II

Before:

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF**

THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Public Redacted Version of 'Decision on the Defence's requests for disclosure and rectification of disclosure metadata'

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

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**Victims Participation and Reparations
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Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this ‘Decision on the Defence’s requests for disclosure and rectification of disclosure metadata’.

I. PROCEDURAL HISTORY

1. On 7 November 2022, the Chamber issued the ‘Order on disclosure and related matters’ (the ‘7 November 2022 Order’),¹ in which it *inter alia* instructed the Prosecution to: (i) ‘differentiate the evidentiary items disclosed in this case, including those “migrated” from the *Yekatom and Ngaïssona* to the *Mokom* case record, by indicating, for each disclosed item, which sections are deemed to contain incriminating, exonerating and/or other information’, as well as ‘provide the relevant information by using the codes PEXO, INCRIM, R-77, or other, and by indicating the corresponding page and paragraph numbers of the relevant sections of documents, statements and transcripts in a dedicated metadata field’; and (ii) disclose potentially exculpatory evidence to Mr Mokom.

2. On 30 November 2022, the Chamber issued the ‘Second order on disclosure and related matters’ (the ‘30 November 2022 Order’), in which it *inter alia* reiterated the first above mentioned instruction.²

3. On 13 February 2023, the Chamber issued the ‘Second order on the conduct of the confirmation of charges proceedings’ (the ‘13 February 2023 Order’), in which it *inter alia* set the time limit for ‘any and all motions on matters relating to the disclosure process’ to 4 May 2023.³

4. On 17 April 2023, pursuant to the 13 February 2023 Order, the Defence for Mr Mokom (the ‘Defence’) submitted the ‘Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing’,⁴ in which it *inter alia* raised disclosure related issues (the ‘17 April 2023 Observations’).

¹ [ICC-01/14-01/22-104](#).

² [ICC-01/14-01/22-116](#).

³ [ICC-01/14-01/22-157](#).

⁴ ICC-01/14-01/22-192-Conf.

5. On 24 April 2023, the Prosecution submitted a response to the disclosure related submissions made in the 17 April 2023 Observations (the ‘Prosecution’s 24 April 2023 Response’).⁵
6. On 4 May 2023, the Defence submitted the ‘Mokom Defence Request for Disclosure’ (the ‘Defence’s Disclosure Request’),⁶ raising issues in relation to the disclosure of: (i) potentially exonerating material (the ‘First Disclosure Request’); (ii) call data records (‘CDRs’), call sequence tables (‘CSTs’) and requests for assistance (‘RFAs’) (the ‘Second Disclosure Request’); and (iii) unredacted transcripts and exhibits from the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘Yekatom and Ngaïssona case’) (the ‘Third Disclosure Request’).
7. On 5 May 2023, the Prosecution requested an extension of the time limit to respond to the Defence’s Disclosure Request pursuant to regulation 35 of the Regulations of the Court (the ‘Regulations’),⁷ which the Chamber partially granted on the same day by way of an email decision, and ordered the Prosecution to file its response by no later than 11 May 2023.⁸
8. On 11 May 2023, the Prosecution submitted its response to the Defence’s Disclosure Request, arguing that it should be rejected (the ‘Prosecution’s Response’).⁹
9. On 15 May 2023, the Defence submitted the ‘Mokom Defence Request to Rectify Deficiencies in Disclosure Metadata’ (the ‘Defence’s Metadata Request’).¹⁰
10. On 22 May 2023, the Prosecution submitted a response to the Defence’s Metadata Request (the ‘Metadata Response’).¹¹ On the same day, the Prosecution filed a

⁵ Prosecution’s response to “Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing”, 17 April 2023, ICC-01/14-01/22-192-Conf, ICC-01/14-01/22-196-Conf.

⁶ ICC-01/14-01/22-198-Conf, with confidential annexes A, B and C.

⁷ Prosecution’s Request pursuant to regulation 35 for an extension of the time limit to respond to the 4 May 2023 ‘Mokom Defence Request for Disclosure’ (ICC-01/14-01/22-198-Conf), ICC-01/14-01/22-199-Conf.

⁸ See Email from Chamber to the Prosecution and Defence, 5 May 2023 at 14:40 entitled ‘Decision on Prosecution’s request ICC-01/14-01/22-199-Conf’.

⁹ 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, with public redacted version filed on the same day ([ICC-01/14-01/22-200-Red](#)).

¹⁰ ICC-01/14-01/22-201-Conf.

¹¹ Prosecution’s Response to the Mokom Defence Request to Rectify Deficiencies in Disclosure Metadata, ICC-01/14-01/22-204-Conf.

communication of amendments to certain disclosure metadata which occurred on 19 May 2023 (the ‘22 May 2023 Communication’).¹²

11. On 26 May 2023, by way of email, the Chamber instructed the Prosecution ‘to clarify whether it has conducted a full review of all material within its possession or control, including migrated or accessed material to determine whether they contain PEXO information for Mr Mokom *specifically*, by no later than 31 May 2023, by way of email’.¹³

12. On 31 May 2023, the Prosecution submitted the requested submissions (the ‘31 May 2023 Submissions’).¹⁴ On that date, the Prosecution also provided further submissions in a second email in respect of the Third Disclosure Request (the ‘31 May 2023 Further Submissions’).¹⁵

II. SUBMISSIONS

A. Defence’s Disclosure Request

1. *First Disclosure Request*

13. The Defence submits that the number of exculpatory material disclosed suggests that the Prosecution has adopted a narrow approach to such material. In this regard, it avers that the Prosecution has not identified exculpatory sections in the material ‘migrated’ and ‘accessed material’ or in the statements of ‘Key INCRIM witnesses’, and that this is incompatible with the Chamber’s 7 November 2022 Order. Furthermore, the Defence submits that, for material identified entirely as potentially exculpatory, the Prosecution provides no indication as to the reason for such categorization and does not indicate which specific sections are potentially exculpatory. It argues that this makes its preparation ‘immeasurably and unnecessary harder’ and is ‘incompatible with the full exercise of its rights’.

14. In the Prosecution’s Response, the Prosecution argues that the Defence merely disagrees with its assessment of material falling under article 67(2) of the Rome Statute

¹² Prosecution’s Communication of the amendments to disclosure metadata on 19 May 2023, 22 May 2023, [ICC-01/14-01/22-202](#).

¹³ Email from the Chamber to the Prosecution and Defence, 26 May 2023 at 10:08.

¹⁴ Email from the Prosecution to the Chamber, 31 May 2023 at 13:15.

¹⁵ Email from the Prosecution to the Chamber, 31 May 2023 at 17:51.

(the ‘Statute’), and that it has disclosed material which it believes falls under that provision. It posits that, in doing so, it has not adopted a limited approach and its assessment involves several factors. The Prosecution provides explanations as to why it assessed certain material as potentially exculpatory or not identified specific sections as potentially exculpatory for items identified by the Defence. Furthermore, the Prosecution indicates that most of the evidence disclosed as potentially exculpatory in the *Yekatom and Ngaïssona* case was disclosed under the same category in the present case. It also argues that ‘the *reasons why* the Prosecution has identified certain items as PEXO are not disclosable’ as they amount to internal work product. Moreover, the Prosecution submits that the Chamber need not intervene as there are no credible indications that it has violated its disclosure obligations.

15. Furthermore, in its 31 May 2023 Submissions, the Prosecution submits that it has thus far fulfilled its ongoing obligations under article 67(2) of the Statute by primarily focusing its review on items assessed as potentially exculpatory in the *Yekatom and Ngaïssona* case to determine whether they also contain potentially exculpatory information for Mr Mokom specifically. It further states that this approach was chosen since the *Mokom* case—in terms of geographical and temporal scope relating to both crime base and evidence regarding modes of liability—is a subset of the *Yekatom and Ngaïssona* case. Lastly, the Prosecution indicates that it is conducting an additional and systematic review of all material within the Prosecution’s possession or control, including migrated or accessed material to determine whether they contain potentially exculpatory information for Mr Mokom specifically, which it plans to finalise by 14 July 2023.

2. *Second Disclosure Request*

16. The Defence submits that the Prosecution has only disclosed the CDRs included in annex C2 to the ‘Document Containing the Charges’ (‘Annex C2’),¹⁶ but that all the CDRs obtained are material for its preparation as they will place communication with Mr Mokom in their relevant context. Therefore, it requests that the Prosecution disclose an inventory of the entirety of the CDRs it has obtained. The Defence also seeks disclosure of an inventory of CDRs relating to Prosecution witnesses on the basis that

¹⁶ ICC-01/14-01/22-174-Conf-AnxC2.

this information will enable it to confirm (or otherwise) the disclosed statements made by the Prosecution witnesses about their contact, and to have an accurate picture of [REDACTED]. In addition, the Defence requests disclosure of all CSTs produced by the Prosecution arguing that they are material for its preparation. Referring to relevant jurisprudence of the Court, it submits that the Prosecution's assertion that CSTs are internal work product falling under rule 81(1) of the Rules of Procedure and Evidence (the 'Rules'), is incorrect. The Defence also requests disclosure of all RFAs sent to obtain the CDRs and argues that they are material for its preparation.

17. The Prosecution submits that it is not under an obligation to disclose the requested additional material, arguing that the Defence's submissions are unsubstantiated and fail to demonstrate the materiality of the information sought. Regarding the CDRs, the Prosecution indicates that it has already provided all of the CDRs (more than 700) disclosed in the *Yekatom* and *Ngaïssona* case to the Defence and has therefore met its obligations in this respect. As to the CSTs, it submits that CSTs are internal work product and are not disclosable pursuant to rule 81(1) of the Rules and that nothing prevents the Defence from proceeding with its own analysis of the truly relevant CDRs that have been duly disclosed. Moreover, the Prosecution argues that RFAs involve matters of cooperation and are not disclosable unless substantiated reasons are put forward, which it argues the Defence has failed to provide.

3. *Third Disclosure Request*

18. The Defence seeks disclosure of the following material from the *Yekatom and Ngaïssona* case: (i) all exhibits shown to, or otherwise used with, the relevant witnesses during their testimony (the 'Exhibits Request'); (ii) all other documents that were identified by the *Yekatom and Ngaïssona* defence teams as documents they intended to use during their cross-examination of the relevant witnesses (the '*Yekatom and Ngaïssona* Defence Lists Request'); and (iii) unredacted versions of the transcripts of testimony for which it has been disclosed redacted versions (the 'Unredacted Transcripts Request'). Regarding the Exhibits Request, the Defence submits that this information is material to its preparation, arguing *inter alia* that it is necessary to fully understand the transcripts of the relevant Prosecution witnesses. As concerns the *Yekatom and Ngaïssona* Defence Lists Request, it argues that the information sought is

also material to its preparation as it will assist it in understanding propositions put to witnesses, even if not specifically referred to in the testimony of the relevant witnesses. With regard to the Unredacted Transcripts Request, the Defence submits that the number and extent of the redactions applied in the relevant transcripts is such that it impedes its ability to prepare and that no explanation has been provided justifying these redactions. It therefore requests that the relevant material be disclosed unredacted.

19. In the Prosecution's Response, the Prosecution indicates that it has disclosed the exhibits used during the testimony of Prosecution witnesses assessed as falling under rule 77 of the Rules and truly relevant, and it will reassess its position should a specific exhibit is shown to be material to preparation of the Defence. In relation to the *Yekatom and Ngaïssona* Defence Lists Request, it submits that the strategies of the defence teams in another case are not evidential, do not fall within the scope of the Prosecution's disclosure obligations and the assessment of the credibility of witnesses at the confirmation stage is necessarily presumptive and can only be properly addressed at trial. Regarding the Unredacted Transcripts Request, the Prosecution avers that it is bound by the order of Trial Chamber V, the Defence does not provide specific examples of redactions to be lifted or show an impediment to its ability to prepare, and nothing precludes the Defence to seize Trial Chamber V. In the 31 May 2023 Further Submissions, the Prosecution adds that it will strive to make available all exhibits shown or used with trial witnesses in the *Yekatom and Ngaïssona* case on whom the Prosecution relies for the purposes of confirmation, in time for the confirmation hearing, and that this may involve requesting permission from Trial Chamber V.

B. Defence's Metadata Request

20. The Defence requests the Chamber to order the Prosecution to complete a metadata update of the disclosed material and ensure all documents are linked to relevant witnesses. It indicates that it has identified 252 documents in Nuix missing the relevant metadata. According to the Defence, this affects its right to meaningfully and efficiently prepare. Moreover, the Defence indicates that it understands from the manner in which the Prosecution has proceeded that the same metadata will be completed for migrated, accessed or formally disclosed items. In addition, the Defence requests that the Prosecution provide a complete list of all persons interviewed for

whom documents such as screening notes, statements and transcribed statements have been disclosed.

21. In the Metadata Response, the Prosecution indicates that the Defence's request for a rectification of the 'related to witness' metadata is moot since it has already completed the additional metadata update on 19 May 2023, referring to the 22 May 2023 Communication. In addition, it submits that it is not obliged to provide the same type of metadata for 'accessed' and 'migrated' material, or to provide the requested list of persons interviewed.

III. DETERMINATION

A. Preliminary matters

22. First, the Chamber notes that, in the Defence's Disclosure Request, the Defence indicates that it understands the term 'disclosure process' as not encompassing all possible disclosure issues that will continue to arise throughout the pre-trial and trial proceedings, and that its request is filed without prejudice to the Defence's ability to raise future disclosure issues with the Chamber.

23. The Chamber recalls that, as clearly instructed in the 13 February 2023 Order, the time limit for the parties to submit any and *all* motions on matters relating to the disclosure process expired on 4 May 2023. In setting this time limit, the Chamber took into consideration the time needed for the parties to identify any issues after the end of the disclosure process, as well as the date of the confirmation of charges hearing.¹⁷ Therefore, requests submitted after the above-mentioned time limit will not be considered unless exceptional circumstances and good cause are demonstrated.

24. In this regard, it is noted that the Defence's Metadata Request was filed after the time limit. Nonetheless, the Chamber will consider this request on an exceptional basis, seeing as the Prosecution has already taken action to remedy some of the deficiencies identified by the Defence, thereby rendering submissions on this aspect moot, and provided a response regarding the remaining issues. In these circumstances, the

¹⁷ The disclosure process ended on 23 February 2023 (see Order for observations and decision on the Prosecution's request for a status conference, 24 January 2023, [ICC-01/14-01/22-138](#), para. 12).

Chamber finds it appropriate to consider the remaining issues so as to ensure clarity of the case record.

25. Second, the Chamber notes that the Defence's Disclosure Request refers to disclosure issues raised in the 17 April 2023 Observations, in which no relief was requested in this regard.¹⁸ This approach creates confusion as to the relief requested and could lead to a circumvention of the word limit applicable to the parties' submissions.¹⁹ The Chamber will nonetheless exceptionally consider the relevant previous submissions for the purpose of adjudicating the Defence's Disclosure Request.

B. Defence's Disclosure Request

1. First Disclosure Request

26. At the outset, the Chamber considers that the fact that the Prosecution has disclosed, in the Defence's view, a limited number of potentially exculpatory materials does not, as such, reveal a narrow understanding regarding such material on the part of the Prosecution. The Chamber will instead consider the specific arguments raised by the Defence.

27. First, the Defence's avers that the Prosecution has failed to identify potentially exculpatory sections in the material 'migrated' and 'accessed' from the *Yekatom and Ngaïssona* case. The Chamber is of the view that, for this material, the issue is not whether the Prosecution should have identified any potentially exculpatory sections, as separately instructed by the Chamber in its 7 November 2022 Order and 30 November 2022 Order, but rather whether the Prosecution should have *formally* disclosed this material to the Defence with the relevant information specifically identified pursuant to its obligations under article 67(2) of the Statute and the above mentioned orders. The Chamber recalls that an individual's right to fair proceedings includes an entitlement to disclosure of exculpatory material.²⁰ The Prosecution's duty

¹⁸ See for instance Defence's Disclosure Request, para. 14, referring to the 17 April 2023 Observations.

¹⁹ Regulation 37 of the Regulations.

²⁰ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 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, 13 June 2008, [ICC-01/04-01/06-1401](#), para. 77; See also Pre-Trial Chamber I, *The Prosecutor*

to disclose article 67(2) material is intimately intertwined with the Defence's right to receive such material, and is a core component of a suspect's right to a fair trial.²¹ Therefore, the Prosecution has an obligation to *formally* disclose information which it believes falls under article 67(2) of the Statute.

28. The Chamber notes with serious concern the Prosecution's indication that it has so far only reviewed material assessed as potentially exculpatory in the *Yekatom and Ngaïssona* case for the purpose of the *Mokom* case. As clearly stated by article 67(2) of the Statute, the Prosecution is to make its assessment of potentially exonerating information in respect of material in its 'possession or control'. This unequivocally means that the Prosecution's assessment should not be unduly limited to a particular source, including material which it has considered potentially exonerating in another 'connected' case based on the assumption that 'the *Mokom* case [...] is a subset of the *Yekatom and Ngaïssona* case'. This practice, which is inappropriate and unprecedented, is irreconcilable with the wording of article 67(2) of the Statute and, more importantly, could undermine Mr Mokom's right to receive potentially exonerating information. Whilst the *Yekatom and Ngaïssona* case and *Mokom* case are connected to some extent, the Prosecution's disclosure obligations under article 67(2) of the Statute in the *Mokom* case are distinct and must be scrupulously fulfilled irrespective of this factor. Therefore, Chamber considers that the Prosecution has unduly limited its approach in respect of potentially exonerating material in this case.

29. Further, the Chamber notes the Prosecution's undertaking to conduct a further review of material in its possession or control, including migrated and accessed material, by 14 July 2023. In this regard, it is noted that the Prosecution has had ample time to organise and review the evidence relevant to the confirmation hearing, including potentially exonerating material. The Prosecution has been in possession or control of the migrated and accessed material for a long period of time. In addition, the present proceedings have been delayed on account of the litigation before the Appeals Chamber in relation to Mr Mokom's legal representation. The Prosecution's decision to unduly limit its approach in relation to potentially exonerating material in this case should not

v. Germain Katanga and Mathieu Ngudjolo Chui, 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 (the '*Katanga and Ngudjolo* Decision'), para. 3.

²¹ [Katanga and Ngudjolo Decision](#), para. 3.

negatively impact the Defence's preparation for the confirmation hearing and its right to receive any such material.

30. Therefore, given the current date of the confirmation hearing and the time necessary for the Defence to be able to review any additional potentially exculpatory information disclosed, the Chamber instructs the Prosecution to complete its further review of the material in its possession or control, including migrated or accessed material, and formally disclose any additional potentially exonerating information for Mr Mokom specifically as soon as possible and in any case by no later than 21 June 2023.

31. Second, the Defence alleges that the Prosecution has not complied with its obligations under article 67(2) of the Statute because it has failed to identify potentially exculpatory sections in the statements of 'Key INCRIM witnesses'. The Chamber notes that the prosecutorial obligation to disclose exculpatory material under article 67(2) of the Statute is one of the most fundamental features of the procedural system of the Court, which mandates that the Prosecutor must act as an impartial organ of justice. This obligation is intimately intertwined with the Prosecutor's duty under article 54 of the Statute to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'. Article 67(2) of the Statute implicates the Prosecution's disclosure obligation in respect of material it 'believes' is potentially exculpatory. It is therefore for the Prosecution to make this assessment and determine whether material in its possession or control falls under this provision.²² The Chamber may not necessarily be in the position to oversee or review the decisions taken by the Prosecution in the fulfilment of its duty of disclosure under article 67(2) of the Statute.²³ These are important and essential prosecutorial obligations, which must be discharged scrupulously and fairly.²⁴ In view of these considerations, the Chamber retains the power to intervene if there are good reasons for

²² See for instance Pre-Trial Chamber II, *The Prosecution v. Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb'), Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')', 9 July 2021, [ICC-02/05-01/20-433-Corr](#) (the '*Abd-Al-Rahman* Confirmation Decision'), para. 16.

²³ See Trial Chamber III, *The Prosecutor v. 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](#) (the '*Bemba* Decision'), para. 22. See also, [Abd-Al-Rahman Confirmation Decision](#), para. 16.

²⁴ See [Bemba Decision](#), para. 22. See also [Abd-Al-Rahman Confirmation Decision](#), para. 16.

doubting that this duty has been properly fulfilled by the Prosecution.²⁵ Moreover, the Chamber notes that article 67(2) of the Statute is formulated broadly as it refers to evidence that ‘tends to show the innocence of the accused’ or ‘may affect the credibility of the Prosecution’s evidence’.

32. In the present case, the Defence has identified specific examples of information it considers as potentially exculpatory in the statements of ‘Key INCRIM witnesses’.²⁶ The Chamber notes the Prosecution’s submissions as to why it does not consider these examples to be potentially exculpatory.²⁷ It essentially argues that the Defence misinterprets the relevant passages in light of, *inter alia*, the role and status of the relevant witnesses in the alleged events,²⁸ other statements these witnesses have made,²⁹ and the Prosecution’s own interpretation of the evidence.

33. The Chamber considers that the fact that the examples identified by the Defence may be undermined by other evidence or that the witness may also provide incriminating evidence are factors which are irrelevant to the assessment under article 67(2) of the Statute.³⁰ Whereas such considerations go to the weight to be attached to such evidence, what is relevant for the purpose of this provision is whether there is a real possibility that the information at issue may contribute to a resolution of material issues in the case in favour of the individual concerned. If so, the Prosecution has an obligation to provide it.³¹ P-1521’s statement that [REDACTED] is, irrespective of the Prosecution’s own theory, the type of information envisaged by the terms ‘tends to show innocence’ for which the Prosecution’s duty of disclosure under article 67(2) of the Statute is implicated. Similarly, inconsistencies or contradictions in the statements of Prosecution’s witnesses, such as the example identified by the Defence in relation to P-2232, are relevant to the issue of the witness’ credibility. Given this, the Chamber considers that there exists a real possibility that the specific examples identified by the Defence may contribute to the resolution of a material issue in this case in favour of Mr

²⁵ See [Bemba Decision](#), para. 22. See also [Abd-Al-Rahman Confirmation Decision](#), para. 16.

²⁶ Defence’s Disclosure Request, para. 14; 17 April 2023 Observations, paras 18-23.

²⁷ Prosecution’s Response, paras 12-15; Prosecution’s 24 April 2023 Response, paras 5-14.

²⁸ See for instance for P-1521, Prosecution’s 24 April 2023 Response, para. 8.

²⁹ See for instance for P-1521, Prosecution’s 24 April 2023 Response, para. 9; for P-2232, Prosecution’s 24 April 2023 Response, paras 11-12.

³⁰ Trial Chamber I, *Prosecutor v. Lubanga*, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, [ICC-01/04-01/06-1311-Anx2](#), 24 April 2008 (the ‘*Lubanga Decision*’), para. 94.

³¹ [Lubanga Decision](#), para. 94.

Mokom. Therefore, the Prosecution should have specifically identified such information as potentially exculpatory, irrespective of the fact that it considered the relevant witnesses as ‘Key INCRIM witnesses’.

34. In light of the foregoing, the Chamber considers that there are good reasons to consider that the Prosecution’s duty under article 67(2) of the Statute has not been properly fulfilled in the present case, and therefore its intervention is warranted. The Chamber orders the Prosecution to further review the statements and testimonies of ‘Key INCRIM witnesses’ without unduly narrowing its approach to potentially exculpatory information, and identify to the Defence information falling under article 67(2) of the Statute by no later than 21 June 2023.

35. The Chamber emphasises that the preceding finding is limited to the scope of the Prosecution’s obligation under article 67(2) of the Statute and is without prejudice to any further determination of the Chamber on any factual issues related to the case, including the weight to be attached to any evidentiary items for the purposes of the confirmation of charges decision.

36. Lastly, the Chamber recalls that, pursuant to the 7 November 2022 Order and the 30 November 2022 Order, the Prosecution is also required to specifically indicate, for each disclosed item, which sections are deemed to contain, *inter alia*, exonerating information. In this respect, it is recalled that ‘in order to fully realise the right of the suspect to have adequate time to prepare his defence and to facilitate the Chamber’s own preparation of the confirmation hearing, the relevance of the evidence disclosed should be clear’. This means that ‘the disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness/relevance for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings’.³²

37. The Prosecution has disclosed a number of items as ‘entirely PEXO’ without identifying specific sections within those items, some of which are lengthy.³³ The Chamber notes the Prosecution’s explanations in this regard. Whilst the explanation in relation to the two photographs and the one page document provide appropriate

³² [30 November 2022 Order](#), para. 13

³³ For example, this is the case for the transcribed interview of [REDACTED]: CAR-OTP-0094-0035, CAR-OTP-0094-0156, CAR-OTP-0094-0180 which are 119, 24 and 179 pages respectively.

justifications as to why no potentially exculpatory sections have been identified, those in relation to the transcribed interview of [REDACTED] are insufficient to enable the Defence to efficiently understand the relevance of such lengthy material.

38. In view of the above, the Chamber orders the Prosecution to review the material disclosed as ‘entirely PEXO’, with a view to identifying specifically which sections it considers exculpatory for Mr Mokom in the disclosure notes. Should the Prosecution consider that an item is entirely exculpatory and the basis for this classification is not readily apparent from the document, especially in the case of lengthy documents, it should provide, in the disclosure notes, a concise summary of the content of such item and an explanation of its relevance as potentially exculpatory.³⁴ In this regard, the Chamber notes the Prosecution’s assertion that ‘the reasons why the Prosecution has identified certain items as PEXO are not disclosable’ as they amount to internal work product pursuant to rule 81(1) of the Rules. The Chamber considers that requiring the Prosecution to provide a concise summary does not violate rule 81(1) of the Rules. This is because, *inter alia*, such a summary may be descriptive in nature, without revealing any internal strategies. In addition, such a summary is required to ensure a meaningful application of the Defence’s right to be provided with potentially exculpatory information.

39. The Prosecution is expected to conduct this review without any further guidance and provide the necessary information to the Defence in accordance with the instructions set out above, by no later than 21 June 2023.

40. For the above reasons, the Chamber grants the First Disclosure Request.

2. *Second Disclosure Request*

41. In relation to the standard applicable to requests for disclosure under rule 77 of the Rules, the Chamber recalls that, in order to demonstrate that disclosure is required, the Defence must make a request which is specific³⁵ and shows that such evidence has

³⁴ See *The Prosecutor v. Laurent Gbagbo*, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, [ICC-02/11-01/11-30](#), para. 24.

³⁵ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities, 23 April 2020, [ICC-01/12-01/18-768-Red](#), (the ‘*Al Hassan Disclosure Decision*’), para. 13.

a direct connection to the charges or a live issue in the case.³⁶ Further, in relation to rule 77 of the Rules, ‘the term “material to the preparation of the defence” should be understood as referring to all objects that are relevant for the preparation of the defence’.³⁷

42. In relation to the Defence’s request for disclosure of inventories of the entirety of the CDRs postdating 2012 and 2013, as well as CDRs relating to Prosecution witnesses, the Chamber considers that this request meets the above mentioned requirements, especially in light of the fact that it concerns the provision of inventories. In particular, in relation to the inventory of the CDRs postdating 2012 and 2013, the Chamber notes that the Prosecution has made communications between Mr Mokom and other persons a central part of its case. It is therefore appropriate for the Defence to request and receive disclosure of an inventory of all CDRs obtained by the Prosecution so as to enable it to put the communications relied on by the Prosecution in context and ascertain whether it wishes to receive disclosure of specific CDRs. Thus, this aspect of the Defence’s request has a direct link to the charges and a live issue of in this case. Similarly, in relation to the inventory of CDRs relating to Prosecution’s witnesses, the Chamber considers that Defence’s submissions are sufficiently specific and that the information requested is material for its preparation as it is relevant to the credibility of Prosecution witnesses. The Chamber notes in this regard the Defence’s submissions that ‘its review of the case record has revealed the extent to [REDACTED].

43. In light of the above, the Chamber orders the Prosecution to provide the Defence with the two inventories by no later than 16 June 2023 so as to enable to the Defence to determine whether it wishes to receive any specific CDRs. It is emphasized in this regard that the parties are expected to prioritize *inter partes* discussions in relation to any further disclosure of CDRs and only seize the Chamber in case of a disagreement that cannot be otherwise resolved. In this context, in relation to CDRs more generally, the Chamber recalls its previous finding in the *Yekatom* and *Ngaiissona* case that ‘CDR

³⁶ *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, [ICC-02/04-01/15-1734](#), para. 22.

³⁷ 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](#), para. 2.

alone, in the absence of indicia as to the content and purpose of the conversation, are inadequate to support a conclusive finding'.³⁸

44. Turning to the request for disclosure of all RFAs obtained by the Prosecution, the Chamber recalls that, 'in principle, documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*' and that '[a]lthough confidentiality is not absolute, it is often required in the communication of cooperation requests and responses, and may be lifted only in particular circumstances, if the specific need for disclosure is demonstrated in accordance with the disclosure regime'.³⁹ In the present case, what must be assessed is whether the correspondence sought is material for the preparation of the Defence pursuant to rule 77 of the Rules.

45. The Chamber notes that the Prosecution has disclosed the RFAs relating to the CDRs cited in Annex C2, and opposes the Defence's request for disclosure of all RFAs. The Chamber considers that the RFAs sent to national authorities in relation to the CDRs obtained by the Prosecution in the context of its investigations, are material to the preparation of the Defence as they will allow it to examine the manner in which CDRs were identified and provided to the Prosecution. As stated above, communications between Mr Mokom and other persons are a central part of the Prosecution's case. These particular circumstances warrant lifting the confidentiality of this material. Therefore, the Chamber orders the Prosecution to disclose all RFAs sent as well as responses relating the CDRs obtained by the Prosecution. Prior to disclosing this material to the Defence, the Prosecution may examine whether specific redactions are necessary, and if so, apply them. The Prosecution is expected to complete disclosure by no later than 16 June 2023.

46. With regard to the Defence's request for disclosure of all CSTs, the Chamber notes that the Prosecution has already disclosed CSTs relating to numbers attributed to Mr Mokom. It now argues that it has no obligation to do so because CSTs are internal work product and fall under rule 81(1) of the Rules. This assertion is however incorrect. The Chamber is of the view that CSTs are not *per se* exempt from disclosure. CSTs are not reports, memoranda or internal documents susceptible of revealing the

³⁸ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Public redacted version of the decision on the confirmation of charges against Yekatom and Ngaïssona, 20 December 2019, [ICC-01/14-01/18-403-Red](#), paras 159, 179-180.

³⁹ See [Al Hassan Disclosure Decision](#), para. 6.

Prosecution's internal strategies as they merely organise CDRs in a manner which is easily readable. In addition, the Prosecution has itself chosen to disclose several CSTs to the Defence, and it is now contradictory for it to generally argue that this material is non-disclosable in the absence of specific arguments demonstrating why the CSTs not disclosed hitherto fall under rule 81(1) of the Rules.

47. The Chamber considers that all CSTs produced by the Prosecution are material for the preparation of the Defence, and should therefore be disclosed. Indeed, the Defence must be in a position to place communication between Mr Mokom and other persons on which the Prosecution relies in their proper context, so as to enable it to prepare for the confirmation of charges hearing in a meaningful manner. The Chamber therefore instructs the Prosecution to disclose to the Defence all CSTs it has produced in the context of the *Mokom* case by no later than 16 June 2023.

48. For these reasons, the Chamber grants the Second Disclosure Request. Whereas the Chamber considers that the Defence's specific request for additional material meets the requisite threshold, this does not detract from the limited scope of the confirmation of charges hearing and it shall not have any bearing on the date of its commencement. The Defence's preparation should therefore be focused and take this into consideration.⁴⁰

3. *Third Disclosure Request*

49. Whilst noting the Prosecution's undertaking that it will strive to make available all exhibits shown or used with Prosecution witnesses during their testimonies in the *Yekatom and Ngaïssona* case, the Chamber otherwise sets aside the 31 May 2023 Further Submissions as they have been provided after the expiry of the time limit to respond to the Defence's Disclosure Request.⁴¹

50. In relation to the Exhibits Request and the *Yekatom and Ngaïssona* Defence Lists, the Chamber notes that the information for which the Defence seeks disclosure is

⁴⁰ Pre-Trial Chamber II, *The Prosecutor v. Mahamat Said Abdel Kani*, Order setting the schedule for the confirmation of charges hearing, 14 September 2022, [ICC-01/14-01/21-172](#), para. 20.

⁴¹ See Email from the Chamber to the Prosecution and Defence, 5 May 2023 at 14:40, thereby partially granting the Prosecution's request for an extension of the deadline to response to the Defence's Disclosure Request (ICC-01/14-01/22-199-Conf) and instructing the Prosecution to file a response by no later than 11 May 2023.

information from another case which is confidential in nature. The Chamber does not have access to the relevant material and therefore cannot make a determination on whether the relevant information is material for the preparation of the Defence. Moreover, it is noted that some of the information sought is not ‘in the possession or control’ of the Prosecution within the meaning of rule 77 of the Rules as it is evidence led or controlled and possessed by the Defence teams in the *Yekatom and Ngaïssona* case.⁴² Therefore, Trial Chamber V is the appropriate forum to adjudicate these requests.

51. With regard to the Unredacted Transcripts Request, the Chamber recalls that regulation 42 of the Regulations provides that ‘[a]ny application to vary a protective measure shall first be made to the Chamber which issued the order’. This means that this aspect of the Third Disclosure Request also cannot be entertained by the Chamber and should be directed at Trial Chamber V.

52. For these reasons, the Chamber rejects the Defence’s Third Disclosure Request.

C. Defence’s Metadata Request

53. As stated above, in respect of the material formally disclosed, the Chamber notes that the Prosecution has completed a metadata update on 19 May 2023 in order to link formally disclosed items to witnesses.⁴³ Therefore, the Chamber need not address this aspect of the Defence’s Metadata Request as the Prosecution has already taken action to remedy the deficiencies identified by the Defence.

54. In respect of ‘migrated’ and ‘accessed’ material, the Chamber recalls that, pursuant to the 13 February 2023 Order, the Prosecution’s obligation in respect of this material is to ‘provide, in *inter partes* consultations, any guidance and assistance the Defence may require if it decides to review these materials’.⁴⁴ The Prosecution is therefore not required to link ‘migrated’ or ‘accessed’ material to Prosecution witnesses or other persons for whom statements, transcripts of interviews or testimonies have been formally disclosed, but rather assist the Defence in its review of this material. Such

⁴² Pre-Trial Chamber II, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Defence’s request for disclosure of material from *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* case, 27 September 2021, [ICC-01/14-01/21-182](#), para. 15.

⁴³ See Metadata Response, para. 5; 22 May 2023 Communication.

⁴⁴ 22 May 2023 Communication, para. 3.

assistance may evidently include providing the Defence with the relevant information. It follows that the Defence's request that the Prosecution should provide a list of all persons, screened, interviewed or otherwise met, for whom documents have been disclosed or migrated on Nuix, as an interim measure is rejected.

55. Lastly, the Chamber notes the Prosecution's undertaking to consult with the Defence and the Registry with a view to better separating, on Nuix, documents which have been formally disclosed to the Defence from those 'migrated' from and 'accessed' in the *Yekatom and Ngaiissona* case. The Chamber is of the view that it is indeed beneficial for the Prosecution to consider such re-organisation as the difference between items formally disclosed and all other items placed at the disposal of the Defence on Nuix, is currently not entirely clear. The Prosecution is therefore instructed to report back on its consultations with the Defence and the Registry on this matter, with proposals to the Chamber, by no later than 28 June 2023, by way of email.

56. For these reasons, the Chamber rejects the Defence's Metadata Request to the extent that it has not been addressed by way of the 22 May 2023 Communication.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the First Disclosure Request and Second Disclosure Request;

REJECTS the Third Disclosure Request;

REJECTS the Defence's Metadata Request to the extent that it has not been addressed by way of the 22 May 2023 Communication;

ORDERS the Prosecution to comply with the instructions set out in the present decision; and

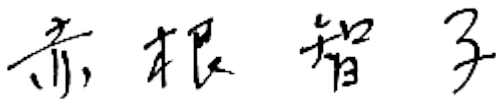
ORDERS the Defence and the Prosecution to file public redacted versions of the following filings as applicable: ICC-01/14-01/22-192-Conf, ICC-01/14-01/22-196-Conf, ICC-01/14-01/22-198-Conf, ICC-01/14-01/22-199-Conf, ICC-01/14-01/22-201-Conf, and ICC-01/14-01/22-204-Conf as soon as possible.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala

Presiding



Judge Tomoko Akane



Judge Sergio Gerardo

Ugalde Godínez

Dated this Monday, 3 July 2023.

At The Hague, The Netherlands.