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TRIAL CHAMBER V

**Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Ngaïssona Defence Motion to Obtain a Lesser Redacted Version
of CAR-OTP-2110-0915**

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

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Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 57(3)(b), 61(11), 64(2), 64(6)(a) and 87(6) of the Rome Statute (the ‘Statute’), and Rule 116(1) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Ngaïssona Defence Motion to Obtain a Lesser Redacted Version of CAR-OTP-2110-0915’.

I. Procedural history and submissions

1. On 26 April 2022, the Ngaïssona Defence (the ‘Defence’) filed a motion to obtain a lesser redacted version of document CAR-OTP-2110-0915 (the ‘Report’ and the ‘Motion’, respectively). In its Motion, it requests that the Chamber either (i) uses its discretionary power under Article 69(3) of the Statute to directly request a lesser redacted version of the Report from the United Nations Office of Legal Affairs (the ‘UNOLA’), in which the redactions to paragraphs 31 and 42 of the Report are lifted (the ‘First Request to Obtain the Report’); or, alternatively (ii) orders the Office of the Prosecutor (the ‘Prosecution’) to promptly request a lesser redacted version of the Report from UNOLA and inform the Chamber of any progress on the matter (the ‘Second Request to Obtain the Report’). In addition, the Defence requests that the Chamber (i) confirm that the information included in paragraphs 31 and 42 of the Report is relevant to the Defence’s preparation (the ‘Request to Confirm’); and (ii) reduce the deadline for any responses to the Motion (the ‘Request to Reduce the Deadline’).¹
2. The Defence seeks to obtain a lesser redacted version of the Report, which is a ‘RCA daily mission report’ prepared by UNOLA, arguing that since it relates to the alleged Bossangoa crimes, with which Mr Ngaïssona is charged, it is ‘in and of itself, material to the Defence for the preparation of the Bossangoa witnesses’, of whom three have already testified and three others are expected to appear before the Chamber.²

¹ Ngaïssona Defence Motion to obtain a lesser-redacted version of document CAR-OTP-2110-0915, ICC-01/14-01/18-1381-Conf (with confidential Annex A, ICC-01/14-01/18-1381-Conf-AnxA) (public redacted version notified on 29 April 2022, ICC-01/14-01/18-1381-Red), paras 1-2, 27.

² Motion, ICC-01/14-01/18-1381-Red, paras 1, 13.

3. In particular, the Defence submits that paragraph 31 of the Report contains the description of a video reportedly taken during an alleged Anti-Balaka attack in Zeré on 6 September 2013 (the ‘Zéré Attack’ and the ‘Video’, respectively), which shows a man being burned alive and whose identity is redacted. The Defence argues that the Video has a striking similarity with another video, which was discussed by witness P-2049 during his testimony before the Chamber,³ and which it submits was allegedly taken two years before the Zeré Attack.⁴ While not being a charged incident, the Defence contends, *inter alia*, that the Prosecution ‘has actively elicited information regarding [the Zeré Attack] from several witnesses’, and that all relevant material should be disclosed to confront witnesses and rebut these ‘highly prejudicial’ allegations.⁵ In relation to paragraph 42, the Defence submits that the redacted information appears to relate to an individual who is a witness in this case,⁶ and that other information contained in said paragraph is material to the extent that it questions ‘the apparent inflation of the number of Muslim victims in the Bossangoa region’, which goes to the core of the charges and impeaches the credibility of witnesses.⁷
4. On 2 May 2022, the Yekatom Defence responded to the Motion, indicating that it fully supports the Defence’s argument that the Prosecution misinterprets its disclosure obligations.⁸
5. On 9 May 2022, the Prosecution responded to the Motion.⁹ In relation to the First Request to Obtain the Report, while it defers to the Chamber’s discretion with regard to the latter directly addressing UNOLA, it submits that the proper basis of the Defence’s request is Article 57(3)(b) and Part 9 of the Statute, rather than Article 69(3) of the Statute and that, as such, it must meet the cumulative

³ CAR-OTP-2088-2205.

⁴ Motion, ICC-01/14-01/18-1381-Red, paras 15-16. *See also* transcript of hearing, 1 March 2022, ICC-01/14-01/18-T-108-CONF-ENG, p. 38, line 4 to p. 42, line 3.

⁵ Motion, ICC-01/14-01/18-1381-Red, paras 17-18.

⁶ Motion, ICC-01/14-01/18-1381-Conf, para. 20. *See also* **P-2200**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 32, entry 51.

⁷ Motion, ICC-01/14-01/18-1381-Conf, para. 21.

⁸ Yekatom Defence Response to ‘Ngaïssona Defence Motion to obtain a lesser-redacted version of document CAR-OTP-2110-0915’ (ICC-01/14-01/18-1381-Conf), ICC-01/14-01/18-1387-Conf, paras 1-2.

⁹ Réponse de l’Accusation à la “Ngaïssona Defence Motion to obtain a lesser-redacted version of document CAR-OTP-2110-0915” (ICC-01/14-01/18-1381-Conf), ICC-01/14-01/18-1397-Conf.

requirements of relevance, specificity, and necessity.¹⁰ In this regard, the Prosecution argues that the redacted information contained in paragraphs 31 and 42 of the Report is not necessary for the Defence's preparation, and that the arguments in the Motion are speculative.¹¹ As to the Second Request to Obtain the Report, the Prosecution opposes it arguing, *inter alia*, that the information sought does not have an exculpatory nature under Article 51(1)(a) of the Statute.¹²

II. Analysis

6. At the outset, the Chamber notes that the redactions in paragraphs 31 and 42 of the Report were applied by the UNOLA. The Prosecution is therefore not in possession of the redacted information and accordingly not in a position to lift the redactions or disclose a lesser redacted version. Second, the Chamber notes that the Motion contains a cooperation request and that Article 57(3)(b) of the Statute is therefore the appropriate legal basis.¹³
7. As previously stated, the Chamber may, pursuant to Article 57(3)(b) of the Statute and Rule 116(1) of the Rules, 'seek such cooperation pursuant to Part 9 as may be necessary to assist [a] person [who has been arrested] in the preparation of his or her defence', where it is satisfied that (i) this would 'facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence',¹⁴ and (ii) 'sufficient information to comply with article 96, paragraph 2, has been provided'.¹⁵

¹⁰ Prosecution Response, ICC-01/14-01/18-1397-Conf, paras 2, 7, 16-18.

¹¹ Prosecution Response, ICC-01/14-01/18-1397-Conf, paras 7-15.

¹² Prosecution Response, ICC-01/14-01/18-1397-Conf, paras 19-25.

¹³ *See also* Prosecution Response, ICC-01/14-01/18-1397-Conf, paras 16-18.

¹⁴ *See* Decision on the Yekatom Defence Request for Cooperation from the African Union, 17 September 2020, ICC-01/14-01/18-658 (the 'African Union Cooperation Request Decision'), para. 7.

¹⁵ Decision on the Ngaïssona Defence Request pursuant to Article 57(3)(b) of the Statute, 1 November 2021, ICC-01/14-01/18-1159-Conf (public redacted version notified the same day, ICC-01/14-01/18-1159-Red) (the 'CAR Cooperation Request Decision'), para. 5.

8. It further recalls that any cooperation request under Article 57(3)(b) and Part 9 of the Statute must satisfy three requirements, namely (i) relevance, (ii) specificity, and (iii) necessity.¹⁶
9. The Chamber notes that the Defence has not provided the Chamber with any information regarding unsuccessful attempts to obtain a lesser redacted version of the Report by contacting UNOLA itself. In this respect, it further notes that the Defence was reportedly aware of the fact that the Prosecution was not in possession of a lesser redacted version of the Report since at least November 2020,¹⁷ and that nothing prevented it from attempting to obtain it directly from UNOLA. In these circumstances, the Chamber finds that the Defence has not exhausted all available avenues before approaching the Chamber and that the Motion thus does not satisfy the element of ‘necessity’.¹⁸
10. Further noting that the requirements are cumulative, the Chamber does not consider it necessary to address the arguments raised in relation to relevance and specificity.
11. In light of the above, the Chamber sees no reason to address the Request to Confirm. With regard to the Second Request to Obtain the Report, the Chamber notes that the Defence did not allege any violations under Article 54(1)(a) of the Statute. Accordingly, the Second Request to Obtain the Report is rejected. Lastly, with regard to the Request to Reduce the Deadline, the Chamber notes that it did not consider a shortened deadline necessary in the circumstances at hand at the time and thus rejects this request.

¹⁶ See CAR Cooperation Request Decision, ICC-01/14-01/18-1159-Red, para. 6; Decision on the Prosecution Request to Summon a Witness, 8 January 2021, ICC-01/14-01/18-804-Conf, para. 15. See also Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Decision on Second Mangenda Request for Cooperation, 5 April 2016, ICC-01/05-01/13-1768, para. 8; Trial Chamber IV, *The Prosecutor v. Abdalah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union”, 1 July 2011, ICC-02/05-03/09-170 (the ‘*Banda and Jerbo Decision*’), paras 12-14.

¹⁷ See Prosecution Response, ICC-01/14-01/18-1397-Conf, para. 5, referring to the disclosure of the Report and a letter from UNOLA (CAR-OTP-2110-0737) in ‘INCRIM package 54’ and ‘INCRIM package 59’, respectively. See also Annex A to the Motion, ICC-01/14-01/18-1381-Conf-AnxA.

¹⁸ See similarly African Union Cooperation Request Decision, ICC-01/14-01/18-658, paras 2-3; CAR Cooperation Request Decision, ICC-01/14-01/18-1159-Conf, paras 3-4, 10. See also *Banda and Jerbo Decision*, ICC-02/05-03/09-170, paras 25-26.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Motion;

ORDERS the Registry to reclassify the Yekatom Defence's response to the Motion, ICC-01/14-01/18-1387-Conf, to public; and

ORDERS the Prosecution to file a public redacted version of the Prosecution Response within one week of notification of this decision.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 22 June 2022

At The Hague, The Netherlands